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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM14-11-000]

Open Access and Priority Rights on Interconnection Customer's Interconnection Facilities

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: In this Notice of Proposed Rulemaking, the Federal Energy Regulatory Commission proposes to amend its regulations to waive the Open Access Transmission Tariff requirements, the Open Access Same-Time Information System requirements its regulations, and the Standards of Conduct requirements its regulations for

any public utility that is subject to such requirements solely because it owns, controls, or operates Interconnection Customer's Interconnection Facilities, in whole or in part, and sells electric energy from its Generating Facility, as those terms are defined in the *pro forma* Large Generator Interconnection Procedures and the *pro forma* Large Generator Interconnection Agreement and adopted in Order No. 2003. The Commission proposes to find that requiring the filing of an Open Access Transmission Tariff is not necessary to prevent unjust or unreasonable rates or unduly discriminatory behavior with respect to Interconnection Customer's Interconnection Facilities over which interconnection and transmission services can be ordered pursuant to the Federal Power Act.

DATES: Comments are due July 29, 2014.

ADDRESSES: You may submit comments, identified by docket number and in accordance with the requirements posted on the Commission's Web site, <http://www.ferc.gov>. Comments may be submitted by any of the following methods:

- Agency Web site: Documents created electronically using word processing software should be filed in native applications or print-to-PDF format, and not in a scanned format, at

<http://www.ferc.gov/docs-filing/efiling.asp>.

• Mail/Hand Delivery: Commenters unable to file comments electronically must mail or hand deliver an original copy of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426. These requirements can be found on the Commission's Web site, see, e.g., the "Quick Reference Guide for Paper Submissions," available at <http://www.ferc.gov/docs-filing/efiling.asp>, or via phone from FERC Online Support at (202) 502-6652 or toll-free at 1-866-208-3676.

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147 FERC ¶ 61,123.

Notice of Proposed Rulemaking

May 15, 2014.

I. Introduction

1. In this Notice of Proposed Rulemaking (Proposed Rule), the Federal Energy Regulatory Commission (FERC or Commission) proposes to

amend its regulations to waive the Open Access Transmission Tariff (OATT) requirements of 18 CFR 35.28 (2013), the Open Access Same-Time Information System (OASIS) requirements of Part 37 of its regulations, 18 CFR 37 (2013), and the Standards of Conduct requirements of Part 358 of its regulations, 18 CFR 358 (2013), for any public utility that is

subject to such requirements solely because it owns, controls, or operates Interconnection Customer's Interconnection Facilities (ICIF),¹ in whole or in part, and sells electric

¹ The term "generator tie line" has often been used in the past to refer to the facilities defined as ICIF. The Commission uses the term ICIF in this Proposed Rule.

energy from its Generating Facility, as those terms are defined in the *pro forma* Large Generator Interconnection Procedures (LGIP) and the *pro forma* Large Generator Interconnection Agreement (LGIA)² and adopted in Order No. 2003.³ The Commission proposes to find that requiring the filing of an OATT is not necessary to prevent unjust or unreasonable rates or unduly discriminatory behavior with respect to ICIF over which interconnection and transmission services can be ordered pursuant to sections 210, 211, and 212 of the Federal Power Act (FPA).⁴

2. Accordingly, with the goal of reducing regulatory burdens and promoting development of generating facilities while continuing to ensure open access to transmission facilities, the Commission proposes to find that those seeking transmission service over ICIF that are subject to the proposed blanket waiver discussed below must follow procedures applicable to requests for interconnection and/or transmission service under sections 210, 211, and 212 of the FPA. This Proposed Rule also proposes a five-year safe harbor period during which an ICIF owner subject to the blanket waiver discussed herein, who initially has excess capacity on its ICIF because it intends to serve its own or its affiliates' future phased generator additions or expansions, may establish a rebuttable presumption for priority right over third parties to use that excess capacity.

3. Based on input received following a technical conference and a Notice of Inquiry (NOI) related to the treatment of ICIF, the Commission preliminarily concludes that its policies that require the ICIF owner to make excess capacity available to third parties unless it can

justify its planned use of the line impose risks and burdens on ICIF owners and create regulatory inefficiencies that are not necessary given the goals that the Commission seeks to achieve through such policies. Specifically, the Commission's current policy has led ICIF owners to file petitions for declaratory orders demonstrating plans and milestones for future generation development to reserve for itself currently excess ICIF capacity that it built with the intention of using it for such purposes. In the vast majority of cases, the Commission has granted the petition, based on confidential documentation filed by the ICIF owner, with a limited description of the plans and milestones the Commission deemed dispositive. Further, the Commission's policy of treating ICIF the same as other transmission facilities for OATT purposes, including the requirement to file an OATT following a third-party request, creates undue burden for ICIF owners without a corresponding enhancement of access given the ICIF owner's typical ability to establish priority rights. We propose the aforementioned reforms to re-balance the burden on ICIF owners, while maintaining access to available capacity for third parties where appropriate.

II. Background

A. Development of ICIF Policies

4. Under section 201(b) of the FPA, the Commission has jurisdiction over all facilities used for the transmission of electric energy in interstate commerce.⁵ Under section 201(e) of the FPA, any person who owns or operates facilities subject to the jurisdiction of the Commission is a public utility.⁶ The Commission is charged with the responsibility under sections 205 and 206 of the FPA to ensure that a public utility's rates, charges, and classifications are just and reasonable and not unduly discriminatory or preferential.⁷

5. In Order No. 888, the Commission, relying upon its authority under sections 205 and 206 of the FPA, established nondiscriminatory open access to electric transmission service as the foundation necessary to develop competitive bulk power markets in the United States.⁸ Order No. 888 requires

that all public utilities that own, control, or operate transmission facilities must offer transmission service to all eligible customers under standard terms and conditions.

6. Order No. 888, codified in section 35.28 of the Commission's regulations, requires that any public utility that owns, controls, or operates facilities used for the transmission of electric energy in interstate commerce must file an OATT and comply with other related requirements. The Commission in Order No. 888 did not specifically address transmission facilities associated with the interconnection of electric generating units to the transmission grid.

7. In Order No. 2003, the Commission found that interconnection service plays a crucial role in bringing much-needed generation into the market to meet the growing needs of electricity customers and competitive electricity markets.⁹ The Commission reiterated that "[i]nterconnection is a critical component of open access transmission service," and that "the Commission may order generic interconnection terms and procedures pursuant to its authority to remedy undue discrimination and preferences under Sections 205 and 206 of the Federal Power Act."¹⁰ The Commission concluded that there was a pressing need for a uniformly applicable set of procedures and a *pro forma* agreement to form the basis of interconnection service for large generators, and thus promulgated the LGIP and the LGIA to be included in every public utility's OATT.¹¹

8. The LGIA defines an Interconnection Customer as "any entity, including the Transmission Provider, Transmission Owner or any of

² Throughout this Proposed Rule, the terms LGIP and LGIA refer to the *pro forma* versions of those documents. The LGIA defines ICIF as "all facilities and equipment, as identified in Appendix A of the Standard Large Generator Interconnection Agreement, that are located between the Generating Facility and the Point of Change of Ownership, including any modification, addition, or upgrades to such facilities and equipment necessary to physically and electrically interconnect the Generating Facility to the Transmission Provider's Transmission System. Interconnection Customer's Interconnection Facilities are sole use facilities." LGIA Article 1. The LGIP, in Section 1, contains identical definitions to those in Article 1 of the LGIA.

³ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 FR 49845 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, 69 FR 15932 (Mar. 26, 2004), FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, 70 FR 265 (Jan. 4, 2005), FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, 70 FR 37661 (Jun. 30, 2005), FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

⁴ 16 U.S.C. 824i, 824j, and 824k (2012).

⁵ 16 U.S.C. 824(b).

⁶ Section 201(f) of the FPA exempts certain governmental entities and electric cooperatives from being a public utility.

⁷ 16 U.S.C. 824d and 824e.

⁸ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded*

Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 FR 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, 62 FR 12274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

⁹ Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 11.

¹⁰ *Id.* PP 12, 20.

¹¹ Order No. 2003 established rules for a Large Generating Facility, defined as a generating facility with a capacity of more than 20 MW. In Order No. 2006, the Commission established procedures and a *pro forma* Small Generator Interconnection Agreement for the interconnection of generation resources no larger than 20 MW. *Standardization of Small Generator Interconnection Agreements and Procedures*, Order No. 2006, 70 FR 34100 (Jun. 13, 2005), FERC Stats. & Regs. ¶ 31,180, *order on reh'g*, Order No. 2006-A, 70 FR 71760 (Nov. 30, 2005), FERC Stats. & Regs. ¶ 31,196 (2005), *order on clarification*, Order No. 2006-B, 71 FR 42587 (Jul. 27, 2006), FERC Stats. & Regs. ¶ 31,221 (2006).

the Affiliates or subsidiaries of either, that proposes to interconnect its Generating Facility with the Transmission Provider's Transmission System." Article 11.1 of the LGIA provides that the "Interconnection Customer shall design, procure, construct, install, own and/or control Interconnection Customer Interconnection Facilities . . . at its sole expense." The LGIA defines "Interconnection Facilities" ¹² as the:

Transmission Provider's Interconnection Facilities and the Interconnection Customer's Interconnection Facilities. Collectively, Interconnection Facilities include all facilities and equipment between the Generating Facility and the Point of Interconnection, including any modification, additions or upgrades that are necessary to physically and electrically interconnect the Generating Facility to the Transmission Provider's Transmission System. Interconnection Facilities are sole use facilities and shall not include Distribution Upgrades, Stand Alone Network Upgrades or Network Upgrades.¹³

9. In general, Interconnection Facilities are constructed to enable a generation facility or multiple generation facilities to transmit power to the integrated transmission grid. Interconnection Facilities are typically radial in nature, with a single point of interconnection with the network grid, and over which power flows in one direction toward the transmission grid.¹⁴ Depending on the circumstances, Interconnection Facilities can be relatively short,¹⁵ or can span considerable distances and represent significant transmission capacity.¹⁶

10. Pursuant to the definitions in the LGIA and LGIP, those Interconnection Facilities that are located between the Point of Interconnection ¹⁷ with the grid and the Point of Change of Ownership,¹⁸

and which are owned, controlled, or operated by the Transmission Provider, are the Transmission Provider's Interconnection Facilities. Article 11.2 of the LGIA specifies that the "Transmission Provider or Transmission Owner shall design, procure, construct, install, own and/or control the Transmission Provider's Interconnection Facilities . . . at the sole expense of the Interconnection Customer." Third-party use of the Transmission Provider's Interconnection Facilities is governed by Article 9.9.2 of the LGIA.¹⁹ This provision permits the parties to negotiate for a third party to use the Transmission Provider's Interconnection Facilities and entitles the Interconnection Customer to compensation, based on *pro rata* usage, for capital costs it incurred to construct those facilities and for the associated ongoing costs, including operation and maintenance costs. Neither the LGIP nor the LGIA contains provisions for third-party requests for use of ICIF.

11. In a series of cases since Order No. 2003 became effective, issues have been raised regarding the extent to which, if at all, third parties should be able to have open access for transmission on the facilities located between the Generating Facility and the point at which the Transmission Provider's Interconnection Facilities begin, i.e., ICIF. In these cases, the Commission has required the ICIF owner to provide open access transmission service over its facilities. In *Aero Energy, LLC*,²⁰ in response to an application under sections 210 and 211 of the FPA, the Commission ordered the Sagebrush Partnership (Sagebrush) to interconnect with and provide transmission service to a third party (Aero Energy, LLC) over Sagebrush's 46-mile, 230-kV ICIF that connects its partners' generation resources to the grid. The Commission ordered the parties to file an executed

interconnection agreement and transmission service agreement setting forth the terms and conditions of service.²¹

12. In *Milford Wind Corridor, LLC*, the Commission noted that the fact that facilities only interconnect a generator to the grid does not eliminate the requirement to file an OATT and to provide open access transmission service.²² However, the Commission recognized that, in such cases, it has granted waivers of the OATT requirements on a case-by-case basis for ICIF owners who demonstrate that their ICIF are limited and discrete and there is no outstanding request by a third party to access the ICIF. The Commission granted these waivers to Milford Wind Corridor, LLC with respect to its 88-mile 345-kV "generator lead line."²³

13. In *Sky River, LLC*, the Commission rejected the filing of an executed Common Facilities Agreement providing a third party the right to access and utilize Sky River, LLC's interest in a nine-mile 230-kV "generator tie-line." Instead, the Commission required that any service by non-owners over the line must be made pursuant to an OATT.²⁴ The Commission viewed the Common Facilities Agreement as an attempt to govern transmission service for an unaffiliated third party outside the context of an OATT.

14. At issue in these cases was whether the entity that owns and/or controls ICIF to serve its or its affiliates' generation project or projects has any priority right over third-party requesters to use the capacity on its ICIF. Where an owner of ICIF has specific, pre-existing generator expansion plans with milestones for construction of

¹² Unless otherwise indicated, capitalized terms herein have the same definition as in the Commission's LGIA or in the OATT, as applicable.

¹³ LGIA Article 1.

¹⁴ In limited circumstances, power may flow from the grid to supply station power in the event no power is being produced at the generating facility.

¹⁵ See, e.g., *Southern Company Serv., Inc.*, Docket No. ER12-554-000 (Jan. 6, 2012) (delegated letter order) (involving an approximately 2000 foot interconnection facility).

¹⁶ See, e.g., *Bayonne Energy Center*, 136 FERC ¶ 61,019 (2011) (involving a 345-kV interconnection facility); *Terra-Gen Dixie Valley, LLC*, 132 FERC ¶ 61,215 (2010) (*Terra-Gen II*) (involving a 212-mile interconnection facility).

¹⁷ The Point of Interconnection is defined in Article 1 of the LGIA as the point where the Interconnection Facilities connect to the Transmission Provider's Transmission System.

¹⁸ The Point of Change of Ownership is defined in Article 1 of the LGIA as the point, as set forth in Appendix A to the LGIA, where the Interconnection Customer's Interconnection Facilities connect to the Transmission Provider's Interconnection Facilities. LGIP section 11.2 states

that the Transmission Provider and Interconnection Customer shall negotiate the provisions of the appendices to the LGIA.

¹⁹ Article 9.9.2 provides that:

[I]f the Parties mutually agree, such agreement not to be unreasonably withheld, to allow one or more third parties to use Transmission Provider's Interconnection Facilities, or any part thereof, Interconnection Customer will be entitled to compensation for the capital expenses it incurred in connection with the Interconnection Facilities based upon the *pro rata* use of the Interconnection Facilities by the Transmission Provider, all third-party users and the Interconnection Customer.

²⁰ 115 FERC ¶ 61,128 (2006) (*Aero Proposed Order*), *order granting modification*, 116 FERC ¶ 61,149 (2006) (*Aero Modification Order*), *final order directing interconnection and transmission service*, 118 FERC ¶ 61,204 (2007), *order denying reh'g*, 120 FERC ¶ 61,188 (2007) (*Aero Rehearing Order*) (collectively, *Aero*).

²¹ Subsequently, the Commission granted market-based rates to several Sagebrush affiliates on the condition that Sagebrush file an OATT for its line if any third party filed a request for service on the line. *EDFD Handsome-Lake*, 127 FERC ¶ 61,243, at P 15 (2009). Such a request was made, and Sagebrush filed an OATT for its interconnection facility. *Sagebrush, a California Partnership*, 130 FERC ¶ 61,093, *order on reh'g*, 132 FERC ¶ 61,234 (2010). Similarly, in *Peetz Logan*, the generation owner filed an OATT in response to a request for third-party interconnection and transmission services over its existing 78.2-mile, 230-kV ICIF that had been used to connect three affiliated wind generation projects to the grid. *Peetz Logan Interconnect, LLC*, 136 FERC ¶ 61,075 (2011) (*Peetz Logan*). Also, in *Terra-Gen*, the generator owner of a 214-mile, 230-kV radial interconnection facility was ordered by the Commission to file an OATT in response to a request for third-party transmission service. *Terra-Gen Dixie Valley, LLC*, 134 FERC ¶ 61,027, *order on reh'g* 135 FERC ¶ 61,134 (2011) (*Terra Gen II*).

²² 129 FERC ¶ 61,149, at P 24 (2009) (*Milford*).

²³ *Id.* PP 1, 27.

²⁴ 134 FERC ¶ 61,064 (2011) (*Sky River*).

generation facilities and can demonstrate that it has made material progress toward meeting those milestones, the Commission may grant priority rights for excess capacity on the ICIF for those future generation projects.²⁵ In *Aero*, before ordering service over the Sagebrush line, the Commission provided the opportunity for the ICIF owner to demonstrate that it had pre-existing contractual obligations or other specific plans that would prevent it from providing the requested firm transmission service to the third party.²⁶ As a result, the Commission found that one of the Sagebrush partners had shown that it had pre-existing expansion plans that, at some future date, would require firm transmission capacity, and that two other Sagebrush partners had not shown that they had pre-existing expansion plans that will require additional transmission capacity.²⁷ Subsequently, the Commission has considered, on a case-by-case basis, petitions for declaratory order requesting that an ICIF owner be granted priority over third-parties to use capacity on its ICIF.²⁸ In *Milford*, the Commission granted such priority, finding that Milford had shown that it had specific plans for phased development of its generation. The Commission in *Milford* summarized the *Aero* precedent as providing that:

A transmission owner that filed specific expansion plans with definite dates and milestones for construction, and had made material progress toward meeting its milestones, had priority over later transmission requests.²⁹

This required demonstration necessary to claim priority rights has

²⁵ *Alta Wind*, 134 FERC ¶ 61,109, at PP 16–17 (2011); *Milford*, 129 FERC ¶ 61,149 at P 22; *Aero* Modification Order, 116 FERC ¶ 61,149 at P 28. Such plans and initial progress also must pre-date a valid request for service. *Terra-Gen I*, 132 FERC ¶ 61,215 at P 53.

²⁶ *Aero* Modification Order, 116 FERC ¶ 61,149 at P 28.

²⁷ Specifically, one partner relied on a power purchase agreement for 10 MW more than the nameplate capacity of its existing project, but the Commission did not grant priority rights, ruling that a power purchase agreement was not evidence of an expansion obligation and that the partner had not presented evidence of milestones having been met. Another partner argued that it had expansion plans for one of its projects and had been working to transfer transmission capacity from one of its affiliated projects to another to accommodate its currently unused wind turbines; however, the Commission ruled that because this was a transfer of transmission capacity between partners, the required transmission capacity was accounted for and included in the original allocation of transmission capacity amongst the Sagebrush partners, and that this possible expansion would not need additional transmission.

²⁸ See *Milford*, 129 FERC ¶ 61,149 at P 24; *Terra-Gen I*, 132 FERC ¶ 61,215 at P 49.

²⁹ *Milford*, 129 FERC ¶ 61,149 at P 22.

sometimes been referred to as the “specific plans and milestones” showing. In the past, some combination of the following types of criteria has proven acceptable to demonstrate that an ICIF owner has specific expansion plans with definite dates and milestones for construction, and has made material progress toward meeting its milestones: requesting interconnection and progressing with studies to interconnect to the integrated transmission grid, demonstrating site control, signing a power purchase agreement, pursuing financing options, and researching and/or purchasing equipment.³⁰

15. The Commission has also found that an affiliate of the ICIF owner that is developing its own generator projects also may obtain priority rights to the capacity on the ICIF by meeting the “specific plans and milestones” standard with respect to future use.³¹ This granting of priority rights preserves the ability of the generation developer to deliver its future output to the point of interconnection with the integrated transmission grid, so long as it can make the relevant showing to the Commission sufficient to justify priority.

B. Notice of Inquiry

16. On April 19, 2012, the Commission issued a NOI seeking comment on whether and, if so, how it should revise its current policy concerning open access and priority rights for capacity on ICIF.³² Specifically, the Commission sought comments on two alternative approaches to govern third-party requests for service and priority rights: (1) Continued use of an OATT framework with potential modification and clarification, including the creation of a *pro forma* tailored OATT and a case-by-case determination on the generation developer's priority rights; and (2) use of an LGIA/LGIP framework in which the existing LGIA provisions that govern third-party use of a Transmission Provider's Interconnection Facilities would be extended to ICIF (i.e., allowing parties to mutually agree to the use of and

³⁰ The *Aero* precedent cited above is the only instance where the Commission has not granted priority rights upon an attempted plans and milestones demonstration.

³¹ See *NextEra Energy Resources, LLC*, 142 FERC ¶ 61,043, at P 26 (2013).

³² *Open Access and Priority Rights on Interconnection Facilities*, 139 FERC ¶ 61,051 (2012). The Commission also held a technical conference in March 2011 to explore, among other things, the application of the Commission's open access policies to “generator lead lines” in the instance when affiliated or unaffiliated third-party generators seek to use these facilities. *Priority Rights to New Participant-Funded Transmission*, March 15, 2011 Technical Conference, AD11–11–000.

compensation for the facilities, with disagreements coming to the Commission for resolution).

17. These two options were intended to capture the policy debate of whether, given the changes in industry (e.g., the development of variable energy resources), and concerns over land-use, the Commission should require ICIF owners to provide comparable service under known rates, terms, and condition (i.e., an OATT) in response to a request of a third party, or whether such third-party access should be obtained by negotiation with the owner of the ICIF subject to the processes and requirements of Order No. 2003, including Commission resolution of disputes.

C. Comments on the Notice of Inquiry

18. Twenty-five entities submitted comments in response to the NOI.³³ Most commenters raised concerns regarding the Commission's current policy and agreed that the Commission should change it. For example, commenters expressed concerns that: (1) The Commission's current policy creates regulatory disincentives for the development of more efficient, high voltage ICIF to access new generation by dramatically expanding the potential costs and responsibilities of generation owners and increasing uncertainty regarding planned future generation phases;³⁴ (2) subjecting ICIF to open access requirements places overly burdensome transmission owner-type requirements on generators who are not in the business of providing transmission service to third parties;³⁵ (3) the Commission's *pro forma* OATT is not well-suited to addressing a third-party request for access to ICIF because ICIF do not serve the same purpose, and cannot provide many of the same services, as network transmission facilities;³⁶ (4) treating these facilities under the OATT framework blurs the historical distinction between integrated networked transmission facilities and radial ICIF;³⁷ and (5) having third-party access governed under separate OATTs would complicate the third party's development because prospective interconnecting generators would need to make separate requests to seek

³³ Appendix A provides a list of commenters and name abbreviations used herein.

³⁴ BP Wind at 6; E.ON at 20; EEI at 2, 8–9; EPSA at 3, 16; LADWP at 3; NextEra at 10; NRG at 1–3; Tenaska at 4–7.

³⁵ BP Wind at 14; Duke at 3–5; EPSA at 7; First Wind at 2; Invenery at 20–21; NextEra at 10; NJBPU at 4–5, 8; NRG at 1–3.

³⁶ APPA at 7; AWEA at 5; Duke at 5, 13; EEI at 7–8; Invenery at 7–8; NextEra at 9–10; Puget at 6; SEIA at 2; TGP at 28.

³⁷ LADWP at 3, 10.

interconnection and transmission service from the ICIF owner and then further transmission service from the Transmission Provider to transmit energy on the transmission system.³⁸

19. Commenters differed, however, in their recommendations for specific changes to Commission policy. Some commenters supported the option of creating a *pro forma* tailored OATT suited to the use of ICIF for the provision of open access transmission service, noting that it: (1) Would reduce the bureaucratic and financial burdens associated with filing a *pro forma* OATT, while preserving the spirit of the Commission's open access requirements;³⁹ and (2) would ensure that third-party requests for service on ICIF provide for adequate transmission planning and study and appropriate contractual relationships between Transmission Providers and interconnection customers.⁴⁰

20. Other commenters argued against requiring any OATT for ICIF. They argued, among other things, that: (1) Mandating generator owners to assume the role of Transmission Providers when faced with third-party interconnection requests creates regulatory disincentives for the development of more efficient, high voltage lead lines to access new generation;⁴¹ and (2) the current policy of requiring an OATT is not legally necessary⁴² or it is beyond the Commission's statutory authority to impose a blanket OATT approach on independent generators that do not voluntarily submit to the Commission's transmission service jurisdiction under section 205.⁴³

21. Other commenters supported an LGIA/LGIP approach for ICIF access, in which the existing LGIA provisions that govern third-party use of a Transmission Provider's Interconnection Facilities would be extended to ICIF. They argued that: (1) A third party's access to the grid cannot be evaluated solely by evaluating its use of the ICIF but must also evaluate the third party's ability to interconnect with the networked transmission system; (2) the networked Transmission Provider has a more holistic view of the transmission system; (3) the Transmission Provider has the necessary information and tools to evaluate ICIF uses that are tied to the networked Transmission Provider's administration of its interconnection

queue and its preparation of required system studies;⁴⁴ (4) applying an LGIA/LGIP framework to ICIF is administratively easy to implement and removes the current uncertainty surrounding the Commission's OATT waiver process;⁴⁵ (5) using the LGIA/LGIP approach will avoid placing the overly burdensome requirements of an OATT or tailored OATT framework on ICIF owners;⁴⁶ (6) this approach will not require the substantial staffing and monetary resources that would be necessary to establish an OATT, and ensures that balancing authority and Transmission Provider functions remain with the most appropriate entity;⁴⁷ and (7) the LGIA/LGIP framework provides a more efficient method because it will integrate any expanded use of the ICIF with the existing Transmission Provider's planning process.⁴⁸

22. Other commenters, however, opposed the use of an LGIA/LGIP framework for ICIF, arguing that: (1) It would place the network Transmission Provider in control of determining access to the generator lead line, when that utility may be a competitor, and leave to the ICIF owner only a determination of the rates it could charge;⁴⁹ (2) the network Transmission Provider is in no position to grant or facilitate access to or over facilities that it does not control or operate;⁵⁰ (3) the Commission would have to address cost recovery (for the increased burden of managing interconnection requests), cost allocation (between the ICIF owner and third party), and the Transmission Provider's level of operational control and the scope of responsibilities;⁵¹ and (4) the LGIA/LGIP approach would inappropriately favor the ICIF owner's generation vis-à-vis a third-party generator because it would expand the ICIF owner's priority rights to the full amount of the original interconnection request.⁵²

III. The Need for Reform

23. The Commission preliminarily finds that the Commission's current OATT requirements as applied to ICIF may impose risks and burdens on generators and create regulatory inefficiencies that are not necessary to achieve the Commission's open access goals. As such, the Commission preliminarily finds that the Commission

requirements for achieving nondiscriminatory access over ICIF should be reformed to not discourage competitive generation development with unnecessary burdens, while ensuring nondiscriminatory access by eligible transmission customers. Through this Proposed Rule, the Commission seeks to reduce regulatory burdens and promote development of generation facilities while continuing to ensure open access to transmission facilities.

24. Through the technical conference and NOI comments, as well as other outreach efforts, the Commission has identified concerns with respect to the Commission's current policy of applying OATT requirements to ICIF. The Commission recognizes that filing and maintaining an OATT can be seen as burdensome by ICIF owners who do not see themselves, and do not want to be, in the business of providing transmission service. Adding an OATT obligation to a generation project can introduce an additional element of risk for the developer and its lenders that they would not have if the project were not subject to the potential obligation to file and maintain a transmission tariff.

25. The Commission also recognizes that the *pro forma* OATT is not a very good fit for the limited services that could be provided over ICIF. A number of sections of the *pro forma* OATT, such as the provisions regarding network service, ancillary services, and planning requirements, are arguably inapplicable to most or all ICIF owners. Although ICIF owners may propose deviations from the *pro forma* OATT, the Commission's existing process of handling these proposed deviations on a case-by-case basis could result in a time-consuming proceeding with an uncertain outcome.

26. An ICIF owner that has obtained a waiver of the OATT is still required to file an OATT within 60 days of a request for service by a third party and must begin interconnection studies. That obligation can be triggered with a minimal effort by a requester, which may not sufficiently distinguish customers who have a specific and substantiated request for service from those whose request is not as well supported. The Commission is aware of situations where the ICIF owner received a request for service triggering the requirement that the owner file an OATT, but the requester then failed to pursue any further development. This is an additional risk for the ICIF owner.

27. Interconnecting with ICIF often involves unique circumstances that would benefit from negotiation of individual access agreements. However,

³⁸ AWEA at 25; MISO at 5–6; Puget at 2–3.

³⁹ APPA at 2–4; TAPS at 2.

⁴⁰ ITC at 7–9.

⁴¹ LADWP at 3.

⁴² EPSA at 2–4; First Wind at 2, 11; NRG at 5–6; Tenaska at 2–3.

⁴³ TGP at 1–2.

⁴⁴ First Wind at 6–7.

⁴⁵ BPA at 4; NRG at 14–17; Puget at 14–15.

⁴⁶ EPSA at 9.

⁴⁷ Puget at 14–15; E.ON at 2–3.

⁴⁸ BPA at 1–5; MISO at 6.

⁴⁹ Invenery 9–12; TGP at 5.

⁵⁰ ITC at 6–7.

⁵¹ CAISO at 2–3.

⁵² TAPS at 11.

the current policy limits an ICIF owner's contractual flexibility if it chooses to provide third-party access by mutual agreement. Specifically, the Commission's current policy requires non-affiliated parties to enter into a transmission service agreement, rather than a common facilities agreement, which can limit the form of rates, terms, and conditions in important ways. For instance, the third party would pay average losses rather than incremental losses. In addition, an ICIF owner is required to openly offer third-party service if it grants third-party use by mutual agreement. This inflexibility may limit the willingness of an ICIF owner to enter into third-party use agreements.

28. With respect to market-based rate filings (initial filings, triennial updates, and change of status filings), there is often a lack of clarity under existing policies as to whether applicants that own ICIF or have affiliates that own ICIF must file an OATT or seek a waiver from OATT requirements in order to show a lack of vertical market power before the market-based rate order can be processed.⁵³

29. In addition, the Commission has identified concerns with the *pro forma* OATT's requirement, in the absence of native load, to award priority to use available capacity on transmission facilities based on the timing (i.e., first-come-first-served) of the transmission request. It is common for an ICIF owner to initially have excess capacity on its ICIF because it plans to bring generation into commercial service in stages or because transmission losses increase dramatically when a transmission line becomes fully loaded. Under the Commission's current policy, such ICIF owners face the risk of losing that capacity to a competing developer who makes a request for service before the ICIF owner is ready to use that capacity for its own future phases.

30. The Commission has developed a process for granting priority rights to the ICIF owner for such excess capacity on a case-by-case basis when the ICIF owner files a petition for declaratory order to establish such priority rights. However, filing a petition for declaratory order to establish priority rights can be a significant burden for the ICIF owner. The Commission's current policy of requiring a demonstration of "specific plans and milestones" to establish priority rights can require substantial effort and resources on the

part of the ICIF owner to make the necessary showings. In addition, the criteria the Commission uses to establish priority rights may appear as vague to the public due to the reliance on documentation filed as confidential.

31. Even with priority established through a request for declaratory order, under current policy, the ICIF owner must still file an OATT if a transmission request is filed. In other words, the priority rights do not diminish the risk that the ICIF owner may have to file an OATT within 60 days of a request for service.

32. The burdens and risks described above fall on all ICIF owners, despite the fact that it is unlikely that any third party would request OATT service on most ICIF. The Commission has issued numerous individual orders granting waivers of OATT, OASIS, and Standards of Conduct to ICIF owners, but in only four instances did a third party request access on ICIF necessitating the filing of an OATT.⁵⁴ Although only a small percentage of ICIF owners have actually had to file an OATT, all ICIF owners are subject to the additional risks and regulatory burdens discussed above, including possibly having to file an OATT on 60 days' notice in response to a request for service, and possibly losing some of the ICIF capacity planned for future use to a requesting third party. The Commission preliminarily finds that reforming its open access transmission requirements in this narrow set of circumstances is appropriate due to the infrequency of third-party requests to use ICIF. The Commission seeks comments on whether and how the burden for eligible ICIF owners of potential OATT compliance bears on the need to reform existing Commission policies with respect to ICIF access.

IV. Proposed Reform

A. Proposed New Processes for ICIF Access

33. The Commission proposes the following approach for non-discriminatory open access to ICIF to replace the current case-by-case approach for granting waivers of the OATT and priority rights declarations. The Commission believes this approach will reduce regulatory burdens and promote development of generation facilities while continuing to ensure open access to transmission facilities. The elements of this proposal are as described below.

1. Grant Blanket Waivers to Eligible ICIF Owners

34. The Commission's current policy is that, because ICIF are facilities used for the transmission of electric energy in interstate commerce, those who own, control, or operate ICIF must either have an OATT on file or receive a waiver of the OATT requirement.⁵⁵ Section 35.28(d) provides that any public utility subject to OATT, OASIS, and Standards of Conduct requirements may file a request for a waiver for good cause shown.⁵⁶ The Commission has granted such requests for waiver where the public utility owns only limited and discrete facilities or is a small utility.⁵⁷ Even if a waiver of the OATT is granted for ICIF, it is subject to the requirement that, if a request for transmission service over the facilities is made, the ICIF owner would have to file an OATT within 60 days of the request⁵⁸ and comply with any additional requirements then in effect for compliance with Order Nos. 888 and 890.⁵⁹ The ICIF owner would thus become subject to all of the relevant *pro forma* OATT requirements, unless it successfully seeks and receives approval for deviations from the *pro forma* OATT.

35. The Commission proposes to add sub-paragraph (d)(2) to 18 CFR 35.28 to grant a blanket ICIF waiver of all OATT, OASIS, and Standards of Conduct

⁵⁵ See *Milford*, 129 FERC ¶ 61,149 at P 24 (noting that the fact that the facilities merely tie a generator to the grid does not render a line exempt from the Commission's regulation of transmission facilities). See also *Evergreen Wind Power III, LLC*, 135 FERC ¶ 61,030, at P 15 n.18 (2011) (granting request for waiver of the OATT requirement in the context of a request for market-based rate authority).

⁵⁶ The Commission has the general statutory authority to waive its regulations as it may find necessary or appropriate. *UtiliCorp United, Inc.*, 99 FERC ¶ 61,280, at P 12 (2002); see also *Pacific Gas and Electric Co.*, 99 FERC ¶ 61,045, at P 5 (2002) ("It is however well established that, with or without an explicit provision to that effect, an agency may waive its regulations in appropriate cases.").

⁵⁷ See, e.g., *Prairie Breeze Wind Energy LLC*, 145 FERC ¶ 61,290, at P 26 (2013); *Ebensburg Power Company*, 145 FERC ¶ 61,265, at P 27 (2013); *CSOLAR IV South, LLC*, 143 FERC ¶ 61,275, at P 16 (2013).

⁵⁸ *Milford*, 129 FERC ¶ 61,149 at P 27. See *Termoelectrica U.S., LLC*, 105 FERC ¶ 61,087, at P 11 (2003); *Black Creek Hydro, Inc.*, 77 FERC ¶ 61,232, at 61,941 (1996).

⁵⁹ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 FR 12266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241, order on reh'g, Order No. 890-A, 73 FR 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), order on reh'g and clarification, Order No. 890-B, 73 FR 39092 (July 8, 2008), 123 FERC ¶ 61,299 (2008), order on reh'g, Order No. 890-C, 74 FR 12540 (Mar. 25, 2009), 126 FERC ¶ 61,228 (2009), order on clarification, Order No. 890-D, 74 FR 61511 (Nov. 25, 2009), 129 FERC ¶ 61,126 (2009).

⁵³ To demonstrate the absence of vertical market power in a market power analysis, a seller or its affiliate that owns, operates, or controls transmission facilities must have an OATT on file unless waived. See 18 CFR 35.37(d) (2013).

⁵⁴ Between January 1, 2009, and January 1, 2014, the Commission issued approximately 80 orders granting waiver of OATT, OASIS, and Standards of Conduct requirements to ICIF owners.

requirements to any public utility that is subject to such requirements solely because it owns, controls, or operates ICIF, in whole or in part, and sells electric energy from its Generating Facility, as those terms are defined in the LGIP and LGIA.⁶⁰ The waiver would apply to all eligible existing and future ICIF owners. The Commission's proposal to limit the waiver to ICIF owners who sell electric energy is intended to ensure that any public utility with an OATT blanket waiver would be subject to both an interconnection order under FPA section 210 and a transmission order under FPA section 211, as discussed further below.

36. The Commission preliminarily finds that a blanket ICIF waiver in these circumstances is justified because the usually limited and discrete nature of ICIF and ICIF's dedicated interconnection purpose mean that such facilities do not typically present all of the concerns about discriminatory conduct that the Commission's OATT, OASIS and Standards of Conduct requirements were intended to address. Because third-party requests to use ICIF have been relatively rare, it is more efficient to address such situations as they arise on an individual basis.

37. Further, the ICIF waiver would remove regulatory burdens on competitive generation resources without sacrificing the Commission's ability to require open access in appropriate circumstances. Specifically, we take this step to address concerns that our current policy creates an undue burden on ICIF owners to file an OATT upon energizing the ICIF or seek a waiver that would be revoked upon a third-party request for service. As discussed above, ICIF owners are focused on developing new generation resources. The time, effort and cost of complying with the requirements of a public utility transmission provider unduly hinder generation development efforts to the detriment of competition. In addition, we agree with commenters to the NOI and the technical conference that the current policy creates too low a bar for third-party requests for service. Specifically, an existing waiver of the OATT is revoked as soon as the ICIF owner receives a third-party request for service, even if that request meets few of the information and other requirements for transmission service under the *pro forma* OATT. Finally, we believe that providing an up-front

waiver of the OATT for ICIF will clarify the manner by which owners of these facilities can address concerns about vertical market power when they seek market-based rate authority.

38. Unlike the current waivers for "limited and discrete" facilities, this blanket waiver of the OATT would not be automatically revoked if transmission service is requested by a third party, but could be revoked in a Commission order if the Commission determines that it is in the public interest to do so. The waiver would also be deemed to be revoked as of the date the public utility ceases to satisfy the qualifications for such waiver, e.g., it owns, controls, or operates transmission facilities that are not ICIF, or the corporate structure changes such that the ICIF owner is no longer the entity that sells electric energy from its Generating Facility. Thus, if material circumstances change so that the ICIF owner no longer satisfies the waiver qualifications, it may no longer rely on this waiver. For example, providing transmission service not related to interconnecting a generator to the grid, or the acquisition of transmission facilities that are not ICIF, would be indicators that there has been a change in circumstances that would make reliance on an ICIF waiver of the OATT inappropriate.⁶¹ Determining whether the function of an ICIF has evolved, and thus whether an ICIF owner may continue to rely on its ICIF waiver, may require case-by-case assessment. We seek comment on the circumstances under which and the mechanism by which the Commission should revoke the proposed waiver.

39. If the OATT waiver is revoked because of such a change in circumstances, the waivers of OASIS and Standards of Conduct will also be revoked, without prejudice to the ICIF owner filing a request to continue its waivers of OASIS and Standards of Conduct pursuant to the waiver criteria

then in place.⁶² In the instance where the Commission revokes the ICIF waiver by order, it may determine whether the OASIS and Standards of Conduct waivers should be continued based on the criteria then in place.

40. The grant of a blanket ICIF waiver under the Proposed Rule would have no automatic impact on an OATT already on file or on service already being taken under it, but the Commission might on a case-by-case basis consider requests to withdraw an OATT on file for ICIF if no third party is taking service under it. With regard to entities that already have received a waiver of the OATT, the blanket ICIF waiver would supersede an existing waiver.

2. Provide Open Access and Establish Priority Rights to ICIF Through Sections 210 and 211

41. Under this Proposed Rule and subject to the safe harbor presumption proposed below, if a third party seeks to use the ICIF that are subject to the blanket ICIF waiver, an eligible entity seeking interconnection and transmission service on ICIF would need to follow the rules and regulations applicable to requests for service under sections 210 and 211.

a. Procedures Under Sections 210 and 211

42. Sections 210 and 211 of the FPA describe the process for granting interconnection and transmission service in the absence of an OATT governing these services. Section 210 of the FPA provides, in relevant part, "Upon application of any electric utility . . . the Commission may issue an order requiring (A) the physical connection of . . . the transmission facilities of any electric utility, with the facilities of such applicant."⁶³ An "electric utility" is defined as "a person or Federal or State agency . . . that sells electric energy."⁶⁴ Section 211 provides that "any electric utility, Federal power marketing agency, or any other person generating electric energy for sale or resale" may apply to the Commission for an order requiring a "transmitting utility" to provide transmission services, including enlargement of facilities if necessary.⁶⁵ The term "transmitting utility" is defined as an entity that "owns, operates, or controls facilities used for the transmission of electric energy . . . in interstate commerce . . . for the sale of electric

⁶⁰ The Commission also proposes to make non-substantive revisions to what is currently 18 CFR 35.28(d) in order to update certain cross-references in that paragraph.

⁶¹ Cf. *Golden Spread Electric Cooperative, Inc.*, 139 FERC ¶ 61,067, at PP 3–5 (2012) (explaining that the Commission several times granted continued waiver of Order Nos. 888 and 889 to Golden Spread Electric Cooperative, Inc. in response to system changes). Specifically, in 2004, Golden Spread acquired approximately 110 miles of radial transmission facilities; in 2008, Golden Spread acquired approximately 54.5 miles of radial transmission facilities and constructed an approximately 18.4 mile radial line; and in 2011, Golden Spread acquired Golden Panhandle Wind Ranch, LLC. Each time, the Commission granted Golden Spread's waiver requests based on the representation that the transmission facilities were limited and discrete and did not constitute an integrated transmission system. In doing so, the Commission noted its reliance on Golden Spread's representation that the transmission lines were only used to provide bundled wholesale service to the affected Golden Spread members and that the power flowed in only one direction. *Id.* P 6.

⁶² Waivers of the standards of conduct may be granted for good cause pursuant to 18 CFR 358.1(d).

⁶³ 16 U.S.C. 824i(a)(1)(A).

⁶⁴ 16 U.S.C. 796(22).

⁶⁵ 16 U.S.C. 824j.

energy at wholesale.”⁶⁶ For a third party to obtain interconnection services and transmission services, an application must be made under both sections 210 and 211.⁶⁷ An applicant may consolidate the applications for the Commission’s consideration.⁶⁸

43. As discussed above, under the various provisions of the LGIA, ICIF connect the Interconnection Customer’s Generating Facility to the Point of Interconnection. Consistent with these definitions, to be eligible for the ICIF waiver, the Interconnection Customer that owns a Generating Facility must also sell electric energy, and thus be subject to section 210 of the FPA. Further, that Interconnection Customer must also own, control, or operate ICIF, in whole or in part, used for transmission for the sale of electric energy at wholesale, and thus be subject to section 211 of the FPA. To be eligible for the blanket waiver discussed herein, the ICIF owner must be subject to the Commission’s authority under both sections 210 and section 211.

44. An application under section 210 must: (1) Show that the interconnection is in the public interest; (2) would either encourage conservation of energy or capital, optimize efficient use of facilities and resources, or improve reliability; and (3) meet the requirements of section 212.⁶⁹ The requirements of section 212 are discussed further below.

45. An application under section 211 requires that the third party seeking transmission first make a good faith request for service, complying with 18 CFR 2.20, specifying details as to how much capacity is requested and for what period, at least 60 days before making an application to the Commission for an order requiring transmission service.⁷⁰ The Commission may grant an

application under section 211 if the application is in the public interest and otherwise meets the requirements under section 212.

46. Section 212 further requires that, before issuing a final order under either section 210 or 211, the Commission must issue a proposed order setting a reasonable time for the parties to agree to terms and conditions for carrying out the order, including allocation of costs. If parties can agree to terms within that time, the Commission may issue a final order approving those terms. If parties do not agree, the Commission will weigh the positions of the parties and issue a final order establishing the terms of costs, compensation, and other terms of interconnection and transmission and directing service.⁷¹

b. Application of Sections 210 and 211 to Requests for Service on ICIF

47. As discussed above, the Commission’s current practice of addressing third-party requests for service is to allow the ICIF owner to demonstrate “specific plans and milestones” for any planned future generation development of the ICIF owner or its affiliates. Consistent with that practice, the Commission proposes to find that, with respect to ICIF eligible for the blanket waiver discussed above, it is generally in the public interest under sections 210 and 211 to allow an ICIF owner to retain priority rights to the use of excess capacity on ICIF that it plans to use to interconnect its own or its affiliates’ future generation projects to the extent the ICIF owner can demonstrate specific plans and milestones for its and/or its affiliates’ future use of the ICIF. Thus, the Commission will be making priority determinations in the section 210 and 211 process. The Commission seeks comment on whether an ICIF owner’s or affiliate’s planned future use of the ICIF is an appropriate consideration to factor into a section 210 or 211 proceeding.

48. Any disputes as to the extent of excess capacity on ICIF or the ICIF owner’s future plans to use such excess capacity would be resolved, subject to the safe harbor presumption discussed below, during the proceedings under sections 210 and 211, using an excess capacity analysis similar to that used in *Aero* and *Milford*, in which the ICIF owner must demonstrate specific plans and milestones for the future use of its ICIF. However, unlike *Aero* and *Milford*, the ICIF waiver proposed here would

not carry the automatic obligation to file an OATT if transmission is requested; rather, use of the framework under sections 210 and 211 will allow third parties to access the transmission facilities after following the process set forth under those provisions. The Commission acknowledges that entities have expressed concern with the plans and milestones standard of *Aero*/*Milford* for demonstrating priority rights, but believes that use of the framework under sections 210 and 211 and the safe harbor presumption discussed below will reduce the need for ICIF owners to file petitions for declaratory order to pre-emptively seek priority rights.

49. Further, using sections 210 and 211 will protect the ICIF owner from non-serious requests for transmission service by requiring the entity requesting service to pursue processes under sections 210 and 211, rather than requiring an ICIF owner to file an OATT upon a request for service. This framework will assure eligible ICIF owners that they will have specified procedural rights as set forth in sections 210, 211, and 212 of the FPA. This framework will also provide the contractual flexibility that some commenters suggest is not available under our current policy so that contractual arrangements (e.g., transmission service agreements, interconnection agreements, and/or shared facilities agreements) can be tailored to the special situations for ICIF. In addition, this framework will provide for some flexibility in determining the appropriate terms and conditions of service, as many of the *pro forma* OATT provisions are not applicable to service over ICIF.

50. Under this proposal, the Commission could order the eligible ICIF owner to expand its facilities to provide interconnection and transmission service under sections 210 and 211 if no excess capacity is available.⁷² Section 212 requires that the eligible ICIF owners would be fully compensated for any required expansion.⁷³ This is similar to the rights

⁶⁶ 16 U.S.C. 796(23).

⁶⁷ *Tres Amigas LLC*, 130 FERC ¶ 61,205, at P 43, *reh’g denied*, 132 FERC ¶ 61,232 (2010). In *Laguna Irrigation District*, the Commission explained that “[n]othing in our [section 210] interconnection order requires transmission service. Rather, transmission service will be obtained by Laguna pursuant to other transmission tariffs or agreements.” 95 FERC ¶ 61,305, at 62,038 (2001), *aff’d sub. nom.*, *Pacific Gas & Electric Co. v. FERC*, 44 Fed. Appx. 170 (9th Cir. 2002) (unpublished); *see also City of Corona, California v. Southern California Edison Co.*, 104 FERC ¶ 61,085, at PP 7–10 (2003) (Corona’s application under section 210 did not constitute a request for transmission under section 211).

⁶⁸ *See Aero* Proposed Order, 115 FERC ¶ 61,128.

⁶⁹ 16 U.S.C. 824i(c); *Aero* Proposed Order, 115 FERC ¶ 61,128 at PP 15–16.

⁷⁰ *See* 16 U.S.C. 824j(a) (“No order may be issued under this subsection unless the applicant has made a request for transmission services to the transmitting utility that would be the subject of such order at least 60 days prior to its filing of an application for such order.”); 18 CFR 2.20.

⁷¹ 16 U.S.C. 824k(c)(2); *Aero* Proposed Order, 115 FERC ¶ 61,128 at PP 17–18 (providing parties 28 days to negotiate and provide briefing on issues of disagreement).

⁷² 16 U.S.C. 824i(a)(1)(D) (“The Commission may issue an order requiring . . . such increase in transmission capacity as may be necessary”); 16 U.S.C. 824j(a) (“Any electric utility . . . may apply to the Commission for an order under this subsection requiring a transmitting utility to provide transmission services (including any enlargement of transmission capacity necessary to provide such services) to the applicant.”).

⁷³ Section 212(a) provides that:

An order under section 211 shall require the transmitting utility subject to the order to provide wholesale transmission services at rates, charges, terms, and conditions which permit the recovery by such utility of all the costs incurred in connection with the transmission services and necessary associated services, including, but not limited to, an

and obligations under the *pro forma* OATT,⁷⁴ so under the Proposed Rule third parties will have substantively similar rights, compared to the Commission's current policy, with regard to situations where providing interconnection and transmission service entails expanding ICIF.

51. The Commission believes that the section 210/211 process for requesting service over ICIF protects the rights of potential third-party requesters. The proposed blanket waiver only applies in situations where sections 210 and 211 would provide interconnection and transmission access to a customer that seeks service over the ICIF. To the extent that either the third-party requester or ICIF owner does not meet applicable requirements for purposes of sections 210 and 211, but where the third-party requester would be eligible for OATT service, the ICIF waiver would not apply. The Commission believes that there would be a relatively small number of ICIF owners who could not be subject to section 210 and 211 orders. The Commission seeks comment on whether this limitation on which public utilities can take advantage of the blanket ICIF waiver is appropriate.

52. The Commission notes that an ICIF owner that is not an electric utility continues to have the option to seek waiver of the OATT, OASIS, and Standards of Conduct requirements on a case-by-case basis. The Commission seeks comment on what would be the appropriate criteria and procedures for granting such entities a waiver, and whether and under what procedures the safe harbor provision discussed below could be extended to such entities. The Commission also seeks comment on whether a case-by-case process is effective for addressing waivers to such entities, or whether there are alternative, more general structures by which the Commission could appropriately apply the blanket waiver to entities with a broader set of ownership structures.

53. We note that a section 210 and/or 211 proceeding would not necessarily revoke the blanket ICIF waiver, and that

appropriate share, if any, of legitimate, verifiable and economic costs, including taking into account any benefits to the transmission system of providing the transmission service, and the costs of any enlargement of transmission facilities.

⁷⁴ Section 15.4 of the *pro forma* OATT states:

If the Transmission Provider determines that it cannot accommodate a Completed Application for Firm Point-To-Point Transmission Service because of insufficient capability on its Transmission System, the Transmission Provider will use due diligence to expand or modify its Transmission System to provide the requested Firm Transmission Service, consistent with its planning obligations in Attachment K, provided the Transmission Customer agrees to compensate the Transmission Provider for such costs pursuant to the terms of Section 27.

the Commission might direct service to be provided under an interconnection and/or transmission service agreement without directing that the ICIF owner file an OATT. However, the Commission reserves the right to revoke the blanket ICIF waiver and require the filing of an OATT to ensure open access in appropriate circumstances.

3. Safe Harbor for Early Years After ICIF Energization

54. To reduce risks to ICIF owners eligible for the blanket waiver discussed above during the critical early years of their projects, the Commission proposes a safe harbor period of five years during which there would be a rebuttable presumption that: (1) The eligible ICIF owner has definitive plans to use its capacity without having to make a demonstration through a specific plans and milestones showing; and (2) the eligible ICIF owner should not be required to expand its facilities. A third-party requester⁷⁵ for service on ICIF during the safe harbor period could attempt to rebut these presumptions, but it would have the burden of proof to show that the owner and/or operator does not have definitive plans to use its capacity and the public interest under sections 210 and 211 is better served by granting access to the third party than by allowing the eligible ICIF owner to reserve its ICIF capacity for its own future use.

55. We believe a safe harbor period will address several concerns with our current policy. Creating a safe harbor period will reduce the risks of developing phased generation projects, as it will preserve the eligible ICIF owner's priority use of its ICIF capacity during the safe harbor period when the third-party requester fails to meet its burden of proof and will allow the eligible ICIF owner to demonstrate its plans and milestones in the proceedings under section 210 and 211. Creating the safe harbor period will require greater specificity for third-party requests for service, so the eligible ICIF owner would only be required to respond to requests for service that are fully developed and appropriate to the circumstances. Doing so will allow an eligible ICIF owner to focus on building generation and achieving commercial operation during the safe harbor period.

56. The Commission proposes that the safe harbor period begin on the ICIF energization date. Because the energization date is not always publicly available, we propose that any eligible

⁷⁵ Such third-party requests for service could include requests for firm, nonfirm, conditional, or interim service. See, e.g., 18 CFR 2.20(b)(9).

ICIF owner seeking to take advantage of the safe harbor must file an informational filing with the Commission (requiring no Commission action) documenting: (1) The ICIF energization date; (2) details sufficient to identify the ICIF at issue, such as location and Point of Interconnection; and (3) identification of the ICIF owner. For generators that are already operating as of the effective date of the Final Rule adopted in this proceeding, we propose to allow them to seek safe harbor status by filing at the Commission to document the information listed above, and that the safe harbor would expire five years after the initial energization of their ICIF. The Commission proposes that eligible ICIF owners making such an informational filing will be assigned an "AD" docket prefix for these filings, so that any interested third party will be able to easily identify the relevant filing and determine when a safe harbor is applicable.

57. Where an application under sections 210 and 211 is filed during a safe harbor period and the Commission determines that the applicant has not successfully rebutted the presumption, the Commission could dismiss the application without prejudice to it being refiled if circumstances change or after the safe harbor period expires.

58. The Commission seeks comments on whether a safe harbor period is appropriate, and about the structure and length of the safe harbor policy, including how the ICIF energization date should be reported. The Commission also seeks comment on whether ICIF owners that are not eligible for the blanket waiver, but that seek waiver on an individual basis of the OATT, OASIS, and Standards of Conduct, should be eligible for the safe harbor.

B. Affiliate Concerns

59. The Commission seeks comment as to the set of entities to which it is appropriate to extend these reforms. As mentioned above, the target of these reforms is intended to be those generators whose ownership/operation of transmission facilities is limited to ICIF. Should entities that meet this description, but who are affiliated with a public utility transmission provider, be eligible for the blanket ICIF waiver within or adjacent to a public utility's footprint? A potential concern is that the availability of the blanket ICIF waiver to affiliated generation could incent vertically-integrated utilities to structure their generation and Interconnection Facilities developments in such a way that inappropriately limits access to certain facilities. If such

concerns warrant limiting the blanket ICIF waiver only to nonaffiliates of public utility transmission providers (within or adjacent to a public utility's footprint), the Commission is also interested as to what would be the appropriate mechanics of third-party interest on affiliates' ICIF (e.g., treatment of the facilities under the vertically-integrated utility's OATT or a separate OATT).⁷⁶

V. Information Collection Statement

60. The following collections of information contained in this Proposed Rule are subject to review by the Office of Management and Budget (OMB) under section 3507(d) of the Paperwork Reduction Act of 1995.⁷⁷ OMB's regulations require approval of certain information collection requirements

imposed by agency rules.⁷⁸ The Commission solicits comments on the Commission's need for this information, whether the information will have practical utility, the accuracy of the burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected or retained, and any suggested methods for minimizing respondents' burden, including the use of automated information techniques.

61. The proposed regulations give a blanket waiver of OATT, OASIS, and Standards of Conduct filing requirements, and thus avoid both individual filings to request waiver as well as OATT filings. The Commission also believes that the proposed regulations will reduce the need for

eligible ICIF owners to file petitions for declaratory order to pre-emptively seek priority rights. Based upon a review of the filings made over the past five years, the Commission estimates a reduction of eighteen filings per year, as shown in the table below.

62. The Commission also recognizes that, in order to avail themselves of the safe harbor period described in the Proposed Rule, most ICIF owners will likely file a brief notification filing documenting: (1) The energization date; (2) details sufficient to identify the ICIF at issue, such as location and Point of Interconnection; and (3) identification of the ICIF owner. The estimated public reporting burdens for this proposed reporting requirement are also in the table below.

RM14-11 (OPEN ACCESS AND PRIORITY RIGHTS ON INTERCONNECTION CUSTOMER'S INTERCONNECTION FACILITIES)

	Number of respondents	Annual number of responses per respondent	Total number of responses	Average burden and cost per response ⁷⁹	Total annual burden hours and total annual cost	Average cost per respondent (\$)
	(1)	(2)	(1) * (2) = (3)	(4)	(3) * (4) = (5)	(5) ÷ (1)
Individual Requests for Waiver (FERC-917)	16	– 1	– 16	10 \$910	– 160 – \$14,560	– \$910
OATT Filings (FERC-917)	1	– 1	– 1	100 \$9,100	– 100 – \$9,100	– \$9,100
Petitions for Declaratory Order requesting priority rights (FERC-582)	1	– 1	– 1	30 \$2,730	– 30 – \$2,730	– \$2,730
Safe Harbor Energize Date Filing (average of first three years) ⁸⁰ (FERC-917)	39	1	39	1 \$91	39 \$3,549	\$91
Total			21		– 251 – \$22,841	– \$12,649

Cost to Comply: The Commission has projected the cost of compliance with the safe harbor energization date filing to be \$7,280 in the initial year and \$1,638 in subsequent years, as new ICIF owners make safe harbor filings for their newly energized projects. This is offset by the reduction in burden associated with the waiver of filing requirements of \$26,390 per year. As an average for the first three years, this amounts to a net reduction in burden of \$22,841.

Total Annual Hours for Collection in initial year (80 hours) @ \$91 an hour = \$7,280

Total Annual Hours for Collection in subsequent years (18 hours) @ \$91 an hour = \$1,638.

Total Annual Hours for Reduced Collection per year (290 hours) @ \$91 an hour = \$26,390.

Title: FERC-917, Non-Discriminatory Open Access Transmission Tariff

Action: Proposed Collection.

OMB Control No. 1902-0233

Respondents for this Rulemaking: Businesses or other for profit and/or not-for-profit institutions.

Frequency of Information: As indicated in the table.

Necessity of Information: The Federal Energy Regulatory Commission is proposing changes to its regulations related to which entities must file the *pro forma* OATT, establish and maintain an OASIS, and abide by its

⁷⁶ See *Termoelectrica U.S., LLC*, 102 FERC ¶ 61,024, at P 28 (finding that Termoelectrica's line should be covered under the OATT of its adjacent, affiliated public utility), *order granting reh'g on other grounds*, 105 FERC ¶ 61,087 (2003) (granting rehearing to waive OATT filing requirements for Termoelectrica).

⁷⁷ 44 U.S.C. 3507(d).

⁷⁸ 5 CFR 1320.11 (2013).

⁷⁹ The estimates for cost per response are derived using the following formula: Average Burden Hours per Response * \$91 per Hour = Average Cost per Response. The hourly cost figure represents a

combined hourly rate of an attorney (\$128.39), economist (\$70.96), engineer (\$59.87), and administrative staff (\$29.93), with a 50 percent weighting on the attorney's rate. The estimated hourly costs (salary) are based on Bureau of Labor and Statistics information (available at http://www.bls.gov/oes/current/naics2_22.htm), and are adjusted to include benefits by assuming that salary accounts for 70.1 percent of total compensation. See <http://www.bls.gov/news.release/cecec.nr0.htm>.

⁸⁰ The average number of filings for the first three years is computed as follows. The Commission expects approximately 80 safe harbor filings in the first year, which represents the number of waiver

filings over a historical five year period and thus the approximate number of existing entities which will be able to take advantage of the five year safe harbor period as of the effective date of the Final Rule in this proceeding. In the subsequent two years, the Commission expects approximately 18 safe harbor filings per year, which represents the historical number of OATT waiver filings (16), OATT filings (1), and petitions for declaratory order (1) per year. Going forward, we would expect the Proposed Rule would avoid these filings and that the relevant entities would instead avail themselves of the proposed safe harbor period. The average of the three year period then is (80 + 18 + 18)/3 = 39.

Standards of Conduct in order to eliminate unnecessary filings and increase certainty for entities that develop generation. The purpose of this Proposed Rule is to reduce regulatory burdens and promote development while continuing to ensure open access to transmission facilities. The safe harbor energization date filing is necessary to ensure transparency as to the applicability of the safe harbor period.

Internal Review: The Commission has reviewed the proposed changes and has determined that the changes are necessary. These requirements conform to the Commission's need for efficient information collection, communication, and management within the energy industry. The Commission has assured itself, by means of internal review, that there is specific, objective support for the burden estimates associated with the information collection requirements.

63. Interested persons may obtain information on the reporting requirements by contacting the following: Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426 [Attention: Ellen Brown, Office of the Executive Director], email: DataClearance@ferc.gov, Phone: (202) 502-8663, fax: (202) 273-0873.

64. Comments on the collections of information and the associated burden estimates in the proposed rule should be sent to the Commission in this docket and may also be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission], at the following email address: oira_submission@omb.eop.gov. Please reference OMB Control No. 1902-0096 and the docket number of this proposed rulemaking in your submission.

VI. Environmental Analysis

65. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.⁸¹ The Commission concludes that neither an Environmental Assessment nor an Environmental Impact Statement is required for this Proposed Rule under section 380.4(a)(15) of the Commission's regulations, which provides a categorical exemption for approval of actions under sections 205 and 206 of

the FPA relating to the filing of schedules containing all rates and charges for the transmission or sale of electric energy subject to the Commission's jurisdiction, plus the classification, practices, contracts, and regulations that affect rates, charges, classifications, and services.⁸²

VII. Regulatory Flexibility Act Analysis

66. The Regulatory Flexibility Act of 1980 (RFA) generally requires a description and analysis of final rules that will have a significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a proposed rule and that minimize any significant economic impact on a substantial number of small entities. The Small Business Administration's (SBA's) Office of Size Standards develops the numerical definition of a small business.⁸³ The SBA recently revised its size standard for electric utilities (effective January 22, 2014) to a standard based on the number of employees, including affiliates (from a standard based on megawatt hours).⁸⁴ Under SBA's new size standards, ICIF owners likely come under one of the following categories and associated size thresholds:⁸⁵

- Hydroelectric power generation, at 500 employees
- Fossil fuel electric power generation, at 750 employees
- Other electric power generation (e.g. solar, wind, geothermal, and others), at 250 employees

67. According to US economic census data,⁸⁶ over half of the firms in the categories above are small. However, currently FERC does not have information on how the economic census data compares with entities registered with NERC and is unable to estimate the number of small ICIF owners using the new SBA definitions. Regardless, FERC recognizes that the rule will likely impact small ICIF owners and estimates the economic impact on each entity below.

68. This Proposed Rule applies to public utilities whose ownership, control, or operation of transmission facilities is limited to ICIF, as defined in the standard generator interconnection procedures and agreements referenced in 18 CFR 35.28(f). Of these public

utilities, we conservatively estimate that all will qualify as small. The Commission estimates that each of the small entities to whom the Proposed Rule applies will incur one-time costs of \$91⁸⁷ to document its energization date and thus avail itself of the safe harbor provision. This is true for those existing entities that have already received waiver of the OATT prior to the issuance of a Final Rule, as well as for new entities. This cost will be offset for new entities by a cost reduction, on average, of \$1,269.⁸⁸ As the Commission has previously explained, in determining whether a regulatory flexibility analysis is required, the Commission is required to examine only direct compliance costs that a rulemaking imposes on small business.⁸⁹ It is not required to examine indirect economic consequences, nor is it required to consider costs that an entity incurs voluntarily. The Commission does not consider the estimated costs per small entity to have a significant economic impact on a substantial number of small entities. Accordingly, the Commission certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities.

VIII. Comment Procedures

69. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due July 29, 2014. Comments must refer to Docket No. RM14-11-000, and must include the commenter's name, the organization represented, if applicable, and its address in its comments.

70. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's Web site at <http://www.ferc.gov>. The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

71. Commenters that are not able to file comments electronically must send

⁸⁷ \$91 is calculated here as one hour of work at an hourly rate of \$91.

⁸⁸ This reduced burden amount is calculated by taking the total estimated burden reduction per year, \$22,841, and dividing by 18, the estimated number of filings avoided because of the proposed regulations.

⁸⁹ *Credit Reforms in Organized Wholesale Electric Markets*, 133 FERC ¶ 61,060, at P 184 (2010).

⁸¹ *Regulations Implementing the National Environmental Policy Act of 1969*, Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. Regulations Preambles 1986-1990 ¶ 30,783 (1987).

⁸² 18 CFR 380.4(a)(15) (2013).

⁸³ 13 CFR 121.101 (2013).

⁸⁴ SBA Final Rule on "Small Business Size Standards: Utilities," 78 FR 77343 (12/23/2013).

⁸⁵ 13 CFR 121.201, Sector 22, Utilities.

⁸⁶ Data and further information is available from SBA at <http://www.sba.gov/advocacy/849/12162>.

an original copy of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

72. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

IX. Document Availability

73. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (<http://www.ferc.gov>) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street NE., Room 2A, Washington, DC 20426.

74. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

75. User assistance is available for eLibrary and the FERC's Web site during normal business hours from FERC Online Support at (202) 502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. Email the Public Reference Room at public.referenceroom@ferc.gov.

List of Subjects in 18 CFR Part 35

Electric power rates; Electric utilities; Reporting and recordkeeping requirements.

By direction of the Commission.

Kimberly D. Bose,
Secretary.

In consideration of the foregoing, the Commission proposes to amend Part 35, Chapter I, Title 18, *Code of Federal Regulations*, as follows:

PART 35—FILING OF RATE SCHEDULES AND TARIFFS

■ 1. The authority citation for part 35 continues to read as follows:

Authority: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

■ 2. Amend § 35.28 by revising paragraph (d) to read as follows:

§ 35.28 Non-discriminatory open access transmission tariff.

* * * * *

(d) *Waivers.* (1) A public utility subject to the requirements of this section and 18 CFR parts 37 (Open Access Same-Time Information System) and 358 (Standards of Conduct for Transmission Providers) for good cause shown. Except as provided in paragraph (f) of this section, an application for waiver must be filed no later than 60 days prior to the time the public utility would have to comply with the requirement.

(2) The requirements of this section, 18 CFR parts 37 (Open Access Same-Time Information System) and 358 (Standards of Conduct for Transmission Providers) are waived for any public utility that is or becomes subject to such requirements solely because it owns, controls, or operates Interconnection Customer's Interconnection Facilities, in whole or in part, and sells electric energy from its Generating Facility, as those terms are defined in the standard generator interconnection procedures and agreements referenced in paragraph (f) of this section.

(i) The waivers referenced in this paragraph (d)(2) shall be deemed to be revoked as of the date the public utility ceases to satisfy the qualifications of this paragraph (d)(2), and may be revoked by the Commission if the Commission determines that it is in the public interest to do so. After revocation of its waivers, the public utility must comply with the requirements that had been waived within 60 days of revocation.

(ii) Any eligible entity that seeks interconnection or transmission services with respect to Interconnection Customer's Interconnection Facilities for which a waiver is in effect pursuant to this paragraph (d)(2) shall follow the procedures in sections 210, 211, and 212 of the Federal Power Act and 18 CFR 2.20 and 18 CFR part 36. In any proceeding pursuant to this paragraph (d)(2)(ii):

(A) The Commission will consider it to be in the public interest to grant priority rights to the owner and/or operator of Interconnection Customer's Interconnection Facilities to use capacity thereon when such owner and/or operator can demonstrate that it has specific plans with milestones to use such capacity to interconnect its or its affiliate's future generation projects.

(B) For the first five years after the Interconnection Customer's Interconnection Facilities are energized, the Commission will apply rebuttable presumptions that:

(1) The owner and/or operator of such facilities has definitive plans to use the capacity thereon, and it is thus in the public interest to grant priority rights to the owner and/or operator of such facilities to use capacity thereon; and

(2) The owner and/or operator of such facilities should not be required to expand its facilities.

Note: The following appendices will not appear in the *Code of Federal Regulations*.

Appendix A: List of Short Names of Commenters on the Federal Energy Regulatory Commission's Notice of Inquiry on Open Access and Priority Rights on Interconnection Facilities—Docket No. AD12-14-000, April 2012

Commenter (Short Name or Acronym)

American Public Power Association (APPA)
American Wind Energy Association (AWEA)
Bonneville Power Administration (BPA)
BP Wind Energy North America Inc. (BP Wind)
California Independent System Operator Corporation (CAISO)
Duke Energy Corporation (Duke)
Edison Electric Institute (EEI)
E.ON Climate & Renewables North America (E.ON)
Electric Power Supply Association (EPSA)
First Wind Holdings, LLC (First Wind)
Invenergy Wind Development LLC and Invenergy Thermal Development LLC (Invenergy)
ITC Holdings Corp. (ITC)
Los Angeles Department of Water and Power (LADWP)
Midwest Independent Transmission System Operator, Inc. (MISO)
NextEra Energy Resources, LLC (NextEra)
New Jersey Board of Public Utilities (NJBPU)
The NRG Companies (NRG)
Puget Sound Energy, Inc. (Puget)
Recurrent Energy
San Diego Gas & Electric Company
Solar Energy Industries Association (SEIA)
Southwest Power Pool, Inc.
Tenaska Energy, Inc. (Tenaska)
TGP Development Company, LLC (TGP)
Transmission Access Policy Study Group (TAPS)

[FR Doc. 2014-11946 Filed 5-29-14; 8:45 am]

BILLING CODE 6717-01-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 745

[EPA-HQ-OPPT-2010-0173; FRL-9910-44]

RIN 2070-AJ56

Lead; Framework for Identifying and Evaluating Lead-Based Paint Hazards From Renovation, Repair, and Painting Activities in Public and Commercial Buildings

AGENCY: Environmental Protection Agency (EPA).