

Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9V, Airspace Designations and Reporting Points, dated August 9, 2011, and effective September 15, 2011 is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ANM MT E5 Wolf Point, MT [Modified]

Wolf Point, L M Clayton Airport, MT
(Lat. 48°05'40" N., long. 105°34'30" W.)

That airspace extending upward from 700 feet above the surface within an 8-mile radius of L M Clayton Airport; that airspace extending upward from 1,200 feet above the surface bounded by a line beginning at lat. 48°02'00" N., long. 104°13'00" W.; to lat. 47°48'00" N., long. 104°33'00" W.; to lat. 47°48'00" N., long. 106°00'02" W.; to lat. 48°20'00" N., long. 106°00'02" W.; to lat. 48°20'00" N., long. 104°17'00" W.; thence to the point of beginning.

Issued in Seattle, Washington, on July 16, 2012.

Robert Henry,

*Acting Manager, Operations Support Group,
Western Service Center.*

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DEPARTMENT OF ENERGY

**Federal Energy Regulatory
Commission**

18 CFR Parts 2 and 35

[Docket Nos. AD12–9–000 and AD11–11–000]

Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Projects; Priority Rights to New Participant-Funded Transmission

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Proposed Policy Statement.

SUMMARY: The Commission seeks comment on this proposed policy statement, which clarifies and refines current policies governing the allocation of capacity for new merchant transmission projects and new nonincumbent, cost-based, participant-funded transmission projects. The Commission proposes to allow developers of such projects to select a subset of customers, based on not unduly discriminatory or preferential criteria, and negotiate directly with those customers to reach agreement on the key terms and conditions for procuring capacity, when the developers (1) broadly solicit interest in the project from potential customers, and (2) file a report with the Commission describing the solicitation, selection and negotiation process. The Commission proposes these policy reforms to ensure transparency in the capacity allocation process while providing developers the ability to bilaterally negotiate rates, terms, and conditions for the full amount of transmission capacity with potential customers.

DATES: Comments on the proposed policy statement are due on or before September 24, 2012.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

140 FERC ¶ 61,061

Before Commissioners: Jon Wellenhoff, Chairman; Philip D. Moeller, John R. Norris, Cheryl A. LaFleur, and Tony T. Clark.

Proposed Policy Statement

Issued July 19, 2012.

I. Introduction

1. The Commission seeks comment on this proposed policy statement, which clarifies and refines current policies governing the allocation of capacity for new merchant transmission projects and new nonincumbent, cost-based, participant-funded transmission projects. In recent years, a number of merchant and nontraditional transmission developers have sought guidance from the Commission

regarding application of open access principles to new transmission facilities through petitions for declaratory orders. As the Commission addressed these requests, its policies have evolved over time to provide potential customers adequate opportunities to obtain service while also providing transmission developers adequate certainty to assist with financing transmission projects. As a result of these evolving policies, different rules have been adopted regarding capacity allocation for merchant transmission projects and nonincumbent, cost-based, participant-funded transmission projects.

2. With the benefit of experience regarding the unique characteristics of merchant and other nontraditional transmission project proposals, and in consideration of industry input on Commission policies regarding the allocation of capacity on such projects, the Commission proposes to streamline its capacity allocation policies by establishing consistent policies regarding capacity allocation for both merchant transmission projects and nonincumbent, cost-based, participant-funded transmission projects. Specifically, the Commission proposes to allow developers of such projects to select a subset of customers, based on not unduly discriminatory or preferential criteria, and negotiate directly with those customers to reach agreement on the key terms and conditions for procuring capacity, when they (1) broadly solicit interest in the project from potential customers, and (2) submit a report to the Commission describing the solicitation, selection and negotiation process. The Commission proposes these policy reforms to ensure transparency in the capacity allocation process while providing developers the ability to negotiate bilaterally with potential customers the rates, terms, and conditions for the full amount of transmission capacity. These policy reforms would be implemented within the existing four factor analysis used to evaluate requests for negotiated rate authority.¹ The Commission seeks comment regarding this proposed change in policy, as discussed below.

II. Background

3. The Commission first granted negotiated rate authority to a merchant transmission project developer over a decade ago, finding that merchant transmission can play a useful role in expanding competitive generation alternatives for customers.² Unlike

¹ See *infra* note 29.

² *TransEnergie U.S., Ltd.* 91 FERC ¶ 61,230, at 61,838 (2000) (*TransEnergie*).

traditional utilities recovering their costs-of-service from captive and wholesale customers, investors in merchant transmission projects assume the full market risk of development.³ Over the course of a number of early proceedings, the Commission developed ten criteria to guide its analysis in making a determination as to whether negotiated rate authority would be just and reasonable for a given merchant transmission project.⁴ Two of these criteria were that (1) an open season process should be employed to initially allocate all transmission capacity and (2) the results of the open season should be posted on an Open Access Same-Time Information System (OASIS) and filed in a report with the Commission.⁵

4. In *Chinook*, the Commission refined its approach to evaluating merchant transmission by adopting a four-factor analysis.⁶ Under this analysis, the Commission continues to rely upon an open season and a post-open season report as a means to provide transparency in the allocation of initial transmission capacity and ensure against undue discrimination among potential customers in the award of transmission capacity. Specifically, the Commission evaluates the terms and conditions of the open season as part of ensuring no undue discrimination

(second factor),⁷ and uses the open season as an added protection in overseeing any affiliate participation, to ensure no undue preference or affiliate concerns (third factor).

5. The *Chinook* order also marked a change in Commission policy on capacity allocation, as in that order the Commission for the first time authorized developers to allocate some portion of capacity through anchor customer presubscriptions, while requiring that the remaining portion be allocated in a subsequent open season. The Commission implemented this policy to achieve the dual goals of requiring an open season process that ensures capacity on a merchant transmission project is allocated transparently in an open, fair, and not unduly discriminatory manner, while permitting an anchor customer model that enables developers of merchant transmission projects to meet the financial challenges unique to merchant transmission development.⁸ Since the *Chinook* order, the Commission has issued orders on several new merchant and other nontraditional transmission development proposals, including granting requests to allocate up to 75 percent of a transmission project's capacity to anchor customers.⁹

6. The Commission also has received proposals from transmission developers regarding the allocation of capacity on cost-based, participant-funded transmission projects. These proceedings involved incumbent transmission developers,¹⁰ while one involved a nonincumbent transmission developer.¹¹ In *NU/NSTAR*, the Commission approved the structure of a transaction whereby a customer was granted usage rights to transmission capacity in exchange for funding the transmission expansion, under the reasoning that any potential transmission customer has the right to

request transmission service expansion from a transmission owning utility, and that utility is obligated to make any necessary system expansions and offer service at the higher of an incremental cost or an embedded cost rate to the transmission customer. More recently, in *National Grid*, the Commission found again that participant funding of transmission projects by incumbent transmission providers is not inconsistent with the Commission's open access requirements.¹² Cost-based participant-funded projects are similar to merchant projects in that both involve willing customers assuming part of the risk of a transmission project in return for defined capacity rights; i.e., there is no direct assignment of costs to captive customers. Cost-based participant-funded projects differ between incumbents and nonincumbents, in that incumbent transmission providers have a clearly defined set of existing obligations under their tariffs for the expansion of their existing transmission facilities, whereas nonincumbents have no existing obligation to build any transmission facilities.

7. To gain feedback regarding the Commission's capacity allocation policies, the Commission held a technical conference in March 2011 to discuss the extent to which nonincumbent developers of transmission should be provided flexibility in the allocation of rights to use transmission facilities developed on a cost-of-service or negotiated rate basis.¹³ Participants at that conference and subsequent commenters acknowledged the value in widely soliciting new customers, but they also expressed the desire to be able to allocate 100 percent of their projects' capacity through bilateral negotiations with identified customers.¹⁴ Based on these comments, the Commission held a follow up workshop in February 2012 to obtain input on potential reforms to the Commission's capacity allocation policies.¹⁵ Many participants at the

³ *Id.* at 61,836.

⁴ *Id.*; *Neptune Regional Transmission System*, LLC, 96 FERC ¶ 61,147, at 61,633 (2001) (*Neptune*); *Northeast Utilities Service Co.*, 97 FERC ¶ 61,026, at 61,075 (2001) (*Northeast Utilities I*); *Northeast Utilities Service Co.*, 98 FERC ¶ 61,310, at 62,327 (2002) (*Northeast Utilities II*).

⁵ The ten criteria are: (1) The merchant transmission facility must assume full market risk; (2) the service should be provided under the open access transmission tariff (OATT) of the Independent System Operator (ISO) or Regional Transmission Organization (RTO) that operates the merchant transmission facility and that operational control be given to that ISO or RTO; (3) the merchant transmission facility should create tradable firm secondary transmission rights; (4) an open season process should be employed to initially allocate transmission rights; (5) the results of the open season should be posted on the OASIS and filed in a report to the Commission; (6) affiliate concerns should be adequately addressed; (7) the merchant transmission facility not preclude access to essential facilities by competitors; (8) the merchant transmission facilities should be subject to market monitoring for market power abuse; (9) physical energy flows on merchant transmission facilities should be coordinated with, and subject to, reliability requirements of the relevant ISO or RTO; and (10) merchant transmission facilities should not impair pre-existing property rights to use the transmission grids of inter-connected RTOs or utilities. *E.g.*, *Northeast Utilities I*, 97 FERC at 61,075.

⁶ The four factors are: (1) the justness and reasonableness of rates; (2) the potential for undue discrimination; (3) the potential for undue preference, including affiliate preference; and (4) regional reliability and operational efficiency requirements. *E.g.*, *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134, at P 37 (2009) (*Chinook*).

⁷ Also, the Commission looks to a developer's own OATT commitments or its commitment to turn operational control over to an RTO or ISO. *See id.* P 40. Guidance given in this policy statement with regards to satisfying the second factor is directed at the open season requirement; the Commission will continue to require merchant and other transmission developers either to file an OATT or to turn over control to an RTO or ISO.

⁸ *See id.* P 46.

⁹ *See, e.g.*, *Champlain Hudson Power Express, Inc.*, 132 FERC ¶ 61,006 (2010); *Rock Island Clean Line LLC*, 139 FERC ¶ 61,142 (2012); *Southern Cross Transmission LLC*, 137 FERC ¶ 61,207 (2011).

¹⁰ *See, e.g.*, *Northeast Utilities Service Company, NSTAR Electric Company*, 127 FERC ¶ 61,179 (2009) (*NU/NStar*), *order denying reh'g, and clarification*, 129 FERC ¶ 61,279 (2009); *National Grid Transmission Services Corporation and Bangor Hydro Electric Company*, 139 FERC ¶ 61,129 (2012) (*National Grid*).

¹¹ *See Grasslands Renewable Energy, LLC*, 133 FERC ¶ 61,225 (2010).

¹² *National Grid*, 139 FERC ¶ 61,129 at P 29.

¹³ "Priority Rights to New Participant-Funded Transmission," AD11-11-000, March 15, 2011. This technical conference also addressed generator lead lines, but those facilities are not the subject of this proposed policy statement.

¹⁴ *See, e.g.*, Clean Line Energy Partners May 5, 2011 Comments at 7 (Clean Line); LS Power Transmission, LLC May 5, 2011 Comments at 3-4 (LSPT); Transmission Developers, Inc., May 5, 2011 Comments at 4-5 (TDI); Western Independent Transmission Group May 5, 2011 Comments at 6 (WITG); and Tonbridge Power Inc. April 19, 2011 Comments at 2 (Tonbridge).

¹⁵ "Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based,

2012 workshop suggested that the need for flexibility required something less structured than the traditional open season process. Specifically, some commenters, including transmission developers, emphasized the inherent incentive transmission developers have to solicit interest widely and attract potential customers to their project, so that they can identify customers that are most likely to be successful in their own generation projects and therefore provide the greatest certainty that they will be successful in becoming transmission customers.¹⁶ In this respect, these commenters argued that their incentives harmonize with the Commission's goals of open access. Further, they argue that their class of transmission developers does not raise the same concerns that motivated the Commission in Order No. 888,¹⁷ where vertically-integrated utilities had an economic incentive to favor their own generation and discriminate against competitors when providing transmission service.¹⁸

8. However, commenters also focused on the need for negotiation flexibility during the capacity allocation process,¹⁹ pointing out that the transmission developer and customer need to address a variety of issues, including points of delivery and receipt, project timing and what happens if schedules change, termination rights of parties at various development stages, development cost-sharing, length and payments of the initial term of service, extensions of the term and associated payments.²⁰ These commenters argued that a rigid open season process that requires developers to offer all customers the same terms and conditions does not allow for the bilateral exchange of information to

address the unique needs of developers and their potential customers. Moreover, these commenters pointed out that there have been no claims of undue discrimination resulting from any of the anchor customer proposals the Commission has approved, to date,²¹ and that parties who feel they were unduly discriminated against have had, as an added protection, the right to file a section 206 complaint.²²

9. However, other commenters at the 2012 workshop voiced concerns with the merchant transmission model in general, and the opportunity for potentially unduly discriminatory deals.²³ They argued that allowing more flexibility for merchant transmission developers is tantamount to reverting to the pre-open access Order No. 888 days of transmission regulation, and discouraged the Commission from pursuing policies that enable anchor customers to exclude or burden generation competitors or engage in other abusive practices the Commission sought to eradicate in Order No. 888. Such commenters favor requiring merchant transmission developer participation in the regional planning process.²⁴ The staff of the Federal Trade Commission similarly questions how the Commission will restrain merchant transmission developers from exercising market power.²⁵

10. The Commission believes that there is a role within its transmission development policies for both bilateral negotiations for transmission service and uniform rules and processes through the *pro forma* OATT for all customers at all times. The policy of open access and comparable treatment is the underpinning of the Commission's approach to ensuring against undue discrimination and permeates many, if not all, of the Commission's programs. However, this does not mean that the Commission cannot be flexible in how it accomplishes open access and comparable treatment. As Order No.

1000²⁶ is implemented around the country, the Commission expects that more transmission needs will be identified and addressed through the open and transparent regional transmission planning process. Nonetheless, bilateral negotiation between transmission developers and potential customers may be another appropriate vehicle for new merchant transmission projects and new nonincumbent, cost-based, participant-funded transmission projects to move forward. In fact, Order No. 1000 allowed for such a vehicle, noting that some projects may not seek to pursue regional or interregional cost allocation.²⁷ In addition, there may be projects that are considered in the regional planning process that, although not ultimately selected in a regional plan for purposes of cost allocation, have sufficient value for individual potential customers such that they wish to pursue them through bilateral negotiations with a potential developer. This proposed policy statement is intended to provide a "roadmap" for entities to pursue those projects, while also serving to ensure transparency in the allocations of capacity resulting from such bilateral negotiation and, in turn, to ensure that transmission service is provided at rates, terms and conditions that are just and reasonable and not unduly discriminatory.

11. Accordingly, the Commission proposes to clarify and refine its policies governing the allocation capacity for new merchant transmission projects and new nonincumbent, cost-based, participant-funded transmission projects to ensure that it is done in an open and transparent manner, giving all interested parties a chance to participate. The Commission believes that the proposed capacity allocation process outlined here satisfies our statutory responsibilities, provides sufficient transparency and protections to market participants, and is responsive to the industry concerns.

Participant-Funded Transmission Projects," Docket No. AD12-9-000 (February 28, 2012).

¹⁶ See, e.g., MATL LLP and Montana Alberta Tie, Ltd. March 29, 2012 Comments at 3 (MATL).

¹⁷ *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 (DC Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

¹⁸ SunZia Transmission, LLC March 29, 2012 Comments at 7 (SunZia).

¹⁹ See, e.g., WITG March 28, 2012 Comments at 5; Clean Line March 28, 2012 Comments at 5-7; SunZia March 29, 2012 Comments at 3-6, 9; LSPT March 29, 2012 Comments at 2-4; and Pattern Transmission March 28, 2012 Comments at 6-7 (Pattern).

²⁰ LSPT March 29, 2012 Comments at 2-3.

²¹ TransWest Express LLC March 28, 2012 Comments at 7.

²² Duke Energy Corporation March 29, 2012 Comments at 7-8; 16 U.S.C. 824e (2006).

²³ See, e.g., Transmission Access Policy Study Group March 29, 2012 Comments at 6-9 (TAPS); Transmission Dependent Utility Systems March 29, 2012 Comments at 2-4; New Jersey Division of Rate Counsel March 29, 2012 Comments at 2-4; and the Federal Trade Commission staff June 14, 2012 Comments at 6-9 (FTC staff).

²⁴ This latter argument is outside the scope of this proceeding and was addressed in Order No. 1000-A. Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, at P 297 (2012).

²⁵ FTC staff June 14, 2012 Comments at 9.

²⁶ Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132 (2012).

²⁷ See Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 725; Order No. 1000-A, 139 FERC ¶ 61,132 at PP 728-729 ("[N]othing in Order No. 1000 forecloses the opportunity for a transmission developer, a group of transmission developers, or one or more individual transmission customers to voluntarily assume the costs of a new transmission facility * * *. Transmission developers who see particular advantages in participant funding remain free to use it on their own or jointly with others. This simply means they would not be pursuing regional or interregional cost allocation.").

III. Discussion

A. Merchant Transmission Projects

12. The Commission proposes to revise its merchant transmission policy to streamline the process by which capacity may be allocated on new merchant transmission projects and to expect more detail and transparency in the report describing the developer's capacity allocation approach. While the Commission's fundamental concerns continue to be that new transmission capacity be allocated in a not unduly discriminatory or preferential manner, the Commission's experience with new merchant transmission projects and comments received during the technical conference and workshop suggest that we can provide more flexibility while addressing these concerns. The Commission proposes to allow merchant transmission developers to allocate up to 100 percent of their projects' capacity through bilateral negotiations.²⁸ With the transparency protections discussed below, the Commission also proposes to allow capacity allocation to affiliates, when done in a transparent manner, so that other interested parties can voice concern if they believe the affiliate was treated preferentially at the expense of another party.²⁹

13. The flexibility we propose to afford under the policy outlined below is complemented by the emphasis on additional detail in reports describing the developer's capacity allocation approach. The Commission agrees with commenters that each merchant transmission project has unique characteristics that require the ability to negotiate risk-sharing and other details. The Commission also acknowledges that merchant transmission developers have inherent incentives to solicit interest widely in a potential project. However, other commenters point out that counter-incentives may exist that motivate a developer to unduly prefer one or more customers. To protect against undue discrimination, the Commission proposes to allow

merchant transmission developers to engage in an open solicitation to identify potential transmission customers, but with the expectation that they will submit to the Commission reports regarding the processes that led to the identification of customers and execution of relevant capacity arrangements. The Commission believes that this approach, when coupled with the existing opportunity to file complaints under FPA section 206, serves the interest of customers and developers alike.³⁰

1. Open Solicitation Process

14. In the past, the Commission has required an open season for the allocation of capacity on new merchant transmission projects. The open season requirement was to ensure open access to transmission capacity and prevent the withholding of transmission capacity from interested transmission customers, and also to enable the developer to assess the size of the market. However, beginning with the *Chinook* order, the Commission also began to allow the allocation of a portion of transmission capacity through bilateral negotiations prior to an open season. Thus, current Commission policy allows a merchant transmission developer to solicit interest through bilateral negotiations for a portion of its capacity so long as it makes the remainder available through an open season.

15. Based on the Commission's experience with prior cases and information received from the technical conference and workshop, the Commission believes that bilateral negotiations, if conducted in a transparent manner, may serve the same purpose as an open season process by ensuring against undue discrimination or preference in the provision of transmission service. Hence, the Commission proposes that, in seeking negotiated rate authority, merchant transmission developers should also engage in an open solicitation of interest in their projects from potential transmission customers (without the previous requirement of an open season). Such open solicitation should include a broad notice issued in a manner that ensures that all potential and interested customers are informed of the proposed project. For example, such notice may be placed in trade magazines, regional energy publications, communications with regional transmission planning groups, and email distribution lists addressing transmission-related matters. Such notice should include transmission

developer points of contact and pertinent project dates, as well as sufficient technical specifications and contract information to inform interested customers of the nature of the project, including:

Technical specifications

- Project size/Capacity: MW and/or kV rating (specific value or range of values)
- End points of line (as specific as possible such as points of interconnection to existing lines and substations, although it may be potentially broad, such as Montana to Nevada, if the project is very early in development)
- Projected construction and/or in-service dates
- Type of line—for example, AC, DC, bi-directional

Contract information

- Precedent agreement (if developed)
- Other capacity allocation arrangements (including how it will address potential oversubscription of capacity)

16. The developer should also specify in the notice the criteria it plans to use to select transmission customers, such as credit rating; "first mover" status, i.e., customers who respond early and take on greater project risk; and customers' willingness to incorporate project risk-sharing into their contracts. This will contribute to the transparency of the process, and help interested entities know at the outset the features of the project and how the bids to the merchant transmission developer will be considered.

17. Finally, the merchant transmission developer would be expected to update its posting if there are any material changes to the nature of the project or the status of capacity allocation.

18. Under this proposed process, once a subset of customers has been identified by the developer through the open solicitation process, the Commission would allow developers to engage in bilateral negotiations with each potential customer on the specific terms and conditions for procuring transmission capacity, as the Commission recognizes that developers and potential customers may need to negotiate individualized terms that meet their unique needs.³¹ In these

²⁸ Commenters in the technical conference and in the workshop specifically requested that the Commission clarify circumstances under which merchant transmission developers would be allowed to allocate up to 100 percent of their project's capacity through bilateral negotiations.

²⁹ By proposing to adopt the policies herein, the Commission seeks to encourage merchant transmission developers intending to seek negotiated rate authority to utilize the guidelines discussed below. To the extent that a merchant transmission developer substantially complies with any such policies ultimately adopted by the Commission, the developer would be deemed to have satisfied the second (undue discrimination) and third (undue preference) factors of the four-factor analysis.

³⁰ See *Chinook*, 126 FERC ¶ 61,134 at P 41.

³¹ While negotiations for the allocation of initial transmission rights may address terms and conditions of the transmission service to be ultimately taken once the facilities are in service, the Commission will adhere to its policy, regardless of any negotiated agreement, that any deviations from the Commission's *pro forma* OATT must be justified as consistent with or superior to the *pro forma* OATT when the transmission developer files its OATT with the Commission and any deviations will be evaluated on that basis by the Commission when they are submitted. See *Chinook*, 126 FERC ¶ 61,134 at PP 47, 63.

negotiations, the Commission proposes to allow for distinctions among prospective customers based on transparent and not unduly discriminatory or preferential criteria—so long as the differences in negotiated terms recognize material differences and do not result in undue discrimination or preference—with the potential result that a single customer may be awarded up to 100 percent of capacity. For instance, developers might offer “first mover” customers more favorable terms and conditions than later customers.

2. Reporting

19. In the past, the Commission required that developers file a report, shortly after the close of the open season, on the results of the open season and any anchor customer presubscription, including information on the notice of the open season, the method used for evaluating bids, the identity of the parties that purchased capacity, and the amount, term, and price of that capacity.³² The Commission required this report to provide transparency to the allocation of initial transmission rights, and to enable unsuccessful bidders to determine if they were treated in an unduly discriminatory manner so that they may file a complaint if they believe they were.³³

20. The Commission now proposes to place more emphasis on reporting, as the success of the capacity allocation approach proposed here and its ability to prevent undue discrimination relies, to a noticeable degree, on the transparency this report provides. Open access requires not only that everyone is given an opportunity to seek access, but also that entities know how their bids were evaluated and, if they were not selected in the initial allocation of transmission rights, on what basis that decision was made. If a party feels it was treated in an unduly discriminatory way, it may file a complaint under section 206 of the FPA; however, parties must have access to the relevant information on the outcomes of the capacity allocation process to evaluate whether or not they were treated fairly.

21. To prevent against undue discrimination by merchant transmission developers, a report should be submitted shortly after the completion of the open solicitation process and the resulting negotiations describing the processes that led to the identification of transmission customers

and the execution of the relevant contractual arrangements. The merchant transmission developer should describe the criteria used to select customers, any price terms, and any risk-sharing terms and conditions that served as the basis for identifying transmission customers selected versus those that were not. The Commission proposes that the developer should include, at a minimum, the following information in the report to provide sufficient transparency to the Commission and interested parties:

- (1) Steps the developer took to provide broad notice;
- (2) Identity of the parties that purchased capacity, and the amount, term, and price of that capacity;
- (3) Basis for the developer's decision to prorate, or not to prorate, capacity, if a proposed project is oversubscribed;
- (4) Basis for the developer's decision not to increase capacity for a proposed project if it is oversubscribed (including the details of any relevant technical or financial bases for declining to increase capacity);
- (5) Justification for offering more favorable terms to certain customers, such as “first movers” or those willing to take on greater project risk-sharing;

(6) Criteria used for distinguishing customers and the method used for evaluating bids. This should include specific details on how each potential transmission customer (including both those who were and those who were not allocated capacity) was evaluated and compared to other potential transmission customers, both at the early stage when the developer chooses with whom to enter into bilateral negotiations and subsequently when the developer chooses in the negotiation phase to whom to award transmission capacity;

(7) Explanation of decisions used to select and reject specific customers. In particular, the report should identify the facts, including any terms and conditions of agreements unique to individual customers that led to their selection, and relevant information about others that led to their rejection. If a selected customer is an affiliate, the Commission will look more carefully at the basis for reaching that determination.

22. The Commission anticipates that, under this proposed policy, those developers requesting negotiated rate authority will file this report either in conjunction with their request for negotiated rate authority or as a compliance filing to a Commission order approving a request for negotiated

rate authority.³⁴ This will allow interested entities to submit comments on the report, or otherwise protest the contents or insufficiency of the report, to ensure that there is sufficient transparency, as well as to provide Commission oversight in the capacity allocation process.³⁵

23. Beyond the reporting process described above, the Commission does not propose to change its existing requirement that developers seek Commission approval, either when the developer requests negotiated rate authority or files its report describing its capacity allocation approach, if an affiliate is expected to participate as a customer on the proposed merchant transmission project. Further, consistent with Commission precedent, in order to allow affiliate participation, the Commission will expect an affirmative showing that the affiliate is not afforded an undue preference.³⁶

B. Nonincumbent, Cost-Based, Participant-Funded Projects

24. The Commission proposes to apply the policy reforms above to nonincumbent, cost-based, participant-funded transmission developers. The Commission has similar concerns regarding the capacity allocation process regardless of whether the project is a nonincumbent, cost-based, participant-funded transmission project or a merchant transmission project. That is, the Commission is concerned that access is not unduly discriminatory or preferential. We believe that the process outlined herein will address our concerns regardless of the manner by which transmission rates are determined. Commenters and workshop participants support the Commission's

³⁴ This flexibility in timing acknowledges that parties have filed and may continue to file requests for negotiated rate authority at various stages of their project development process.

³⁵ Commenters opposing the Commission's merchant transmission policy generally express concern regarding the use and allocation of scarce rights-of-way. The Commission appreciates the significance of this issue, but has limited authority to address it directly. Through Order Nos. 890 and 1000, the Commission has increased transparency in local and regional transmission planning processes, and through this proposed policy statement seeks to increase transparency in the negotiation of capacity allocation with merchant transmission and nonincumbent, cost-based, participant-funded developers. For example, as noted above, the pre-open solicitation notice requirement and post-open solicitation reporting requirement proposed here require developers to provide information on any oversubscription of a proposed project. The Commission anticipates that this kind of information may be useful for relevant entities (such as siting authorities) as they evaluate whether a proposed transmission facility satisfies applicable requirements for use and allocation of rights-of-way.

³⁶ See *Chinook*, 126 FERC ¶ 61,134 at PP 49–50.

³² *Chinook*, 126 FERC ¶ 61,134 at PP 41, 43.

³³ See *Chinook*, 126 FERC ¶ 61,134 at P 41; *Montana Alberta Tie, Ltd.*, 116 FERC ¶ 61,071, at P 37 (2006).

application of these policy reforms to both merchant transmission developers and nonincumbent, cost-based, participant-funded transmission developers.³⁷

25. However, use of this common process does not eliminate the distinction between these types of projects. In particular, although the negotiations between developers and potential customers could address a transmission rate, among other issues, the Commission's approach to reviewing such a rate would be different for a new merchant transmission project than for a new nonincumbent, cost-based, participant-funded transmission project. For a merchant transmission project, the Commission relies on the processes it sets forth to ensure against undue discrimination in the award of capacity and the willingness of the transmission developer and customers to negotiate a transmission rate and terms and conditions, understanding that the customers are not captive customers.³⁸ For a nonincumbent, cost-based, participant-funded transmission project, the Commission would review the transmission rate, including any agreed upon return on equity, in greater detail to ensure that it satisfies Commission precedent regarding cost-based transmission service.

26. While we are proposing that this capacity allocation process apply equally to nonincumbent, cost-based, participant-funded projects, we are not proposing to evaluate such projects based on the other aspects of the four factor analysis set forth in *Chinook*.³⁹ To the extent nonincumbent, cost-based, participant-funded transmission projects wish to use an anchor customer-type model, the effect of the proposed policy would be that the Commission will deem any capacity allocation process that follows the guidelines of this proposed policy statement to satisfy its concerns regarding undue discrimination and undue preference.

C. Incumbent, Cost-Based, Participant-Funded Projects

27. The Commission does not propose to change its case-by-case evaluation of requests for cost-based participant-funded transmission projects by

incumbent transmission providers.⁴⁰ As noted above, incumbents differ from nonincumbents in that the former have a clearly defined set of existing obligations under their OATTs with regard to new transmission development, including participation in regional planning processes and the processing of transmission service request queues. Nonincumbent transmission developers do not yet own or operate transmission facilities in the region that they propose to develop transmission and, therefore, are not yet subject to an OATT in that region. The proposed policy laid out above identifies the Commission's policies regarding the allocation of capacity for merchant transmission developers and nonincumbent, cost-based, participant-funded projects during the development of a new transmission facility. In most instances, we would expect that an incumbent transmission provider will be able to use existing processes set forth in its OATT to allocate capacity on a new transmission facility. These existing OATT processes do not prohibit incumbent transmission owners from identifying projects that could be constructed on a participant-funded basis in conjunction with processing of transmission service requests or in addition to meeting transmission needs through participation in a regional transmission planning process.⁴¹ Furthermore, the Commission will continue to entertain on a case-by-case basis requests for waiver of any OATT requirements that may be needed for the incumbent transmission owner to pursue innovative transmission development that is just, reasonable, and not unduly discriminatory. For example, an incumbent may seek waiver of serial queue processing requirements so that they may cluster transmission service requests,⁴² or they may seek to "ring fence" a transmission project in order to ensure that new transmission facilities developed for a particular customer or set of customers do not adversely impact existing customers, including native load.⁴³ Incumbent

developers should address the capacity allocation issues in a manner that does not constitute undue discrimination or preference and is consistent with the applicable Commission-accepted tariffs.⁴⁴

IV. Comment Procedures

28. The Commission invites comments on this proposed policy statement September 24, 2012.

V. Document Availability

29. 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.

30. 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.

31. 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.

By the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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⁴⁰ See, e.g., *NU/NSTAR; National Grid*.

⁴¹ See, e.g., *Subscription Process for Proposed PacifiCorp Transmission Expansion Projects*, available at http://www.oasis.pacificorp.com/oasis/ppw/SUBSCRIPTION_PROCESS.PDF (noting incumbent's solicitation of interest from third parties in the development of a cost-based transmission project in advance of receipt of transmission service requests from third parties under the incumbent's OATT).

⁴² See, e.g., *Portland General Electric Co.*, 139 FERC ¶ 61,133 (2012) (granting waiver of serial queue processing requirements, allowing a general facilities study for a cluster of transmission and interconnection service requests).

⁴³ See, e.g., *Mountain States Transmission Intertie, LLC and NorthWestern Corp.*, 127 FERC ¶

61,270, at PP 2, 5 (2009) (incumbent developing an export-only transmission project through a separate stand-alone company so that their existing transmission customers will not be required to subsidize the cost of a new transmission facility to serve off-system markets; the Commission presented the option of this project proceeding on a cost-of-service basis).

⁴⁴ See *National Grid*, 139 FERC ¶ 61,129 at P 33.

³⁷ TAPS March 29, 2012 Comments at 24; Pathfinder Renewable Wind Energy, LLC March 28, 2012 Comments at 3-4.

³⁸ *TransEnergie*, 91 FERC ¶ 61,230 at 61,836.

³⁹ We note, however, that petitions regarding capacity allocation on nonincumbent, cost-based, participant-funded transmission projects must continue to be evaluated by the Commission in accordance with the Commissions' responsibilities under the FPA.