

# Client Alert

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## FERC Adopts New Regulations and Policies on Open Access and Priority Rights on Interconnection Customer Interconnection Facilities

By Zori G. Ferkin and Robert S. Fleishman

On March 19, 2015, the Federal Energy Regulatory Commission (FERC or “Commission”) issued Order No. 807 (the “Final Rule”) that will provide owners and operators of Interconnection Customer Interconnection Facilities (ICIF) a blanket waiver of the Open Access Transmission Tariff requirements, the Open Access Same-Time Information System requirements, and the Standards of Conduct requirements (collectively, the “OATT Requirements”), subject to certain conditions.

The Final Rule and related changes in FERC’s regulations are significant for many market participants, including developers planning new generation and interconnection facilities, prospective wholesale power sellers seeking market-based rate authorization to sell power from new facilities, and owners and operators of existing electric generation and interconnection facilities (including parties to negotiated agreements for shared use of generator tie-lines and other interconnection facilities that provide access to the transmission grid). This alert describes the Final Rule and identifies some important implications for market participants.

### A NEW OPEN ACCESS REGIME ON CERTAIN INTERCONNECTION FACILITIES

In the Final Rule, FERC states that it is adopting reforms to its regulations to “re-balance the burden on ICIF owners and encourage efficient generation and interconnection facility development, while maintaining access to available capacity for third parties where appropriate.” FERC recognizes that “[a]dding a potential 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.” The Commission cautions, however, that it is only waiving the OATT Requirements in a “narrow set of circumstances” and then only “in circumstances where there is an alternative for third parties to seek not unduly discriminatory access.”

Highlights of the Final Rule include:

**A Regulatory Blanket Waiver of the Open Access Requirements for ICIF.** Amended 18 C.F.R. § 35.28(d)(2) grants a blanket waiver to public utilities of all OATT Requirements, including the requirements in 18 C.F.R. Part 37 (to establish and maintain an Open Access Same Time Information System and Part 358 (to abide by the Standards of Conduct for Transmission Providers), under certain conditions. Non-public utilities with a reciprocity obligation are also eligible for the blanket waiver. If an entity previously received a specific waiver of the OATT Requirements, the blanket waiver will supersede the existing waiver and the entity will be deemed to be operating under the blanket waiver without further filings. If an entity has a specific request for a waiver of the OATT Requirements pending as of the date that the entity becomes eligible for the blanket waiver, the blanket waiver

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will apply as of that date and the entity should file with FERC to withdraw the waiver request to the extent it has been rendered moot by the blanket waiver. A market-based rate seller can use its (and its affiliates) eligibility for the blanket waiver as a basis to demonstrate to the Commission that it lacks vertical market power.

**FERC Will Not Limit the Blanket Waiver to Entities That Sell Electric Energy.** A public utility that owns, operates or controls ICIF qualifies for the blanket waiver either by being a seller of electric energy or by filing a Section 210 statement with FERC. The latter case would include, for example, an entity that only owns, operates or controls ICIF and does not also generate and sell electric energy. A “Section 210 statement” is an affirmative declaration that “[i]n order to satisfy the requirements for a blanket waiver as described in section 35.28(d)(2), [entity] commits to comply with and be bound by the obligations and procedures applicable to electric utilities under section 210 of the FPA.” The Commission will not issue a public notice, accept comments or issue an order on the filing of a Section 210 statement. A Section 210 statement will remain operative if the public utility that filed it had a change in ownership. However, if the filing public utility sold its ICIF facilities to a different entity, the new entity must meet the qualifications for the blanket waiver, or the new owner will be subject to the OATT Requirements.

**FERC Intends All Facilities and Equipment Between a Generating Facility and the Transmission Provider System to Qualify for the Blanket Waiver.** FERC had proposed to define ICIF using only the definition in its *pro forma* Large Generator Interconnection Agreement (LGIA). In the Final Rule, however, FERC recognizes that this could exclude certain interconnection facilities from the blanket waiver, such as interconnection facilities under Small Generator Interconnection Agreements and other interconnection contracts. Accordingly, for interconnection customers that have entered into an interconnection agreement other than an LGIA, the blanket waiver will apply to “comparable jurisdictional interconnection facilities” that generally will include all facilities and equipment located between the interconnection customer’s generation facility and the point where such facilities connect to the transmission provider’s interconnection facilities (called the “point of change of ownership” in the LGIA) that are necessary to physically and electrically interconnect the generating facility to the transmission provider’s facilities that are used to provide transmission service (called the “point of interconnection” in the LGIA).

**FERC Provides Alternatives For Third Parties To Access ICIF That are Covered by a Blanket Waiver.** ICIF owners will no longer be required to respond to a third party request to use the facilities by filing an OATT. In the Final Rule, FERC makes clear that the ICIF owner may negotiate a mutually agreeable and voluntary contract, such as a shared use or common facilities agreement, to provide a third party with access to the ICIF. The terms of such agreements must not be unduly discriminatory as required by Sections 205 and 206 of the Federal Power Act (FPA).

Alternatively, a party may apply to FERC for an order under Sections 210 and 211 of the FPA directing the ICIF owner to connect the applicant’s facilities with the ICIF (Section 210) and provide the applicant with transmission services (Section 211).

In a Section 210/211 proceeding, FERC will presume that the ICIF owner has definitive plans to use the capacity for the first five years after the date of “commercial operation” of the ICIF. However, this “safe harbor” presumption is rebuttable and the petitioner in the Section 210/211 proceeding will have the opportunity to demonstrate to FERC that the presumption should not apply.

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In addition, FERC is requiring that an entity that owns, operates or controls ICIF and wants to preserve the opportunity to use this five-year “safe harbor” file an informational statement. The informational statement must state the “commercial operation date” of the ICIF and provide details sufficient to identify the ICIF (such as the location and point of interconnection) and the ICIF owner. The “commercial operation date” for purposes of claiming the five-year “safe harbor” will be the “date [the ICIF] facilities are first used to transmit energy for sale, excluding use for on-site testing and commissioning of the generating facility.”

**Revocation of the Blanket Waiver.** The blanket waiver will be deemed to be revoked as of the date the public utility ceases to satisfy the qualifications for the waiver. As an example, the blanket waiver of an ICIF owner that based its qualification on a Section 210 statement, but subsequently objects or fails to comply with the Section 210 obligations and procedures, will be deemed to have been revoked. If the ICIF become integrated into a transmission system such that they can no longer be considered to be ICIF, the blanket waiver will be deemed to have been revoked. In addition, FERC may revoke a blanket waiver if it determines that it is in the public interest to do so pursuant to a proceeding under Sections 210 and 211 of the FPA. In such a proceeding, the ICIF owner would have notice and full due process rights to respond.

### IMPLICATIONS FOR MARKET PARTICIPANTS

The Final Rule responds to many of the concerns addressed by the commenters to the proposed rule. The Final Rule makes the blanket waiver available to entities that do not own both the ICIF and the generating facility. The five-year “safe harbor” granted to the owner and/or operator of the ICIF begins when the facilities enter “commercial operation” and not the (often much earlier) date that the facilities are first energized.

The Final Rule also establishes a clear path for ICIF owners to negotiate with affiliates and non-affiliated third parties mutually acceptable agreements for priority use of the facilities by multiple parties. Notably, FERC cautions that such agreements must satisfy the requirements in Sections 205 and 206 of the FPA that they not be unduly discriminatory. Whereas some parties have questioned whether FERC has jurisdiction with respect to shared use agreements and similar contracts, the inference from Order No. 807 is that FERC intends for these agreements to be subject to scrutiny under Sections 205 and 206 as an adjunct to granting ICIF owners the benefits of the blanket waiver, the “safe harbor” period and authorization to allocate the capacity of the ICIF pursuant to negotiated contracts.

Parties to whom FERC has previously granted waivers of the OATT Requirements should pay close attention to the effective date of the blanket waiver, as FERC intends for the blanket waiver to supersede such prior waivers. Representations and covenants in financing documents may need to be updated to reflect the new regulatory regime.

Parties who have applications pending before FERC that are requesting waivers of the OATT Requirements will also need to be aware of the effective date, and make plans to withdraw their pending requests if necessary to comply with the Final Rule.

The effective date of the Final Rule is 90 days after Order No. 807 is published in the Federal Register.

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**Contact:**

**Zori G. Ferkin**

(202) 887-1532

[zferkin@mofo.com](mailto:zferkin@mofo.com)

**Robert S. Fleishman**

(202) 887-8768

[rfleishman@mofo.com](mailto:rfleishman@mofo.com)

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