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DEPARTMENT OF ENERGY
Federal Energy Regulatory Commission

18 CFR Part 35

[RM14-11-000; Order No. 807]

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

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule.

SUMMARY: In this Final Rule, the Federal Energy Regulatory Commission is amending its regulations to waive the Open Access Transmission Tariff requirements, the Open Access Same-Time Information System requirements, and the Standards of Conduct requirements, under certain conditions, for the ownership, control, or operation of Interconnection Customer's Interconnection Facilities (ICIF). This Final Rule finds that those seeking interconnection and transmission service over ICIF that are subject to the blanket waiver adopted herein may follow procedures applicable to requests for interconnection and transmission service under sections 210, 211, and 212 of the FPA, which also allows the contractual flexibility for entities to reach mutually agreeable access solutions. This Final Rule establishes a modified rebuttable presumption for a

five-year safe harbor period to reduce risks to ICIF owners eligible for the blanket waiver during the critical early years of their projects. Finally, this Final Rule modifies, as described in detail below, several elements of the Notice of Proposed Rulemaking, including the entities eligible for the OATT waiver, the date on which the safe harbor begins, the rebuttable presumption that the ICIF owner should not be required to expand its facilities during the safe harbor, and the facilities covered by the Final Rule.

DATES: This rule will become effective [**Insert_Date 90 days after publication in the FEDERAL REGISTER**].

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SUPPLEMENTARY INFORMATION:

ORDER NO. 807

FINAL RULE

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Appendix A: List of Short Names of Commenters on the Notice of Proposed Rulemaking

I. Introduction

1. In this Final Rule, the Federal Energy Regulatory Commission (FERC or Commission) is amending its regulations to waive the Open Access Transmission Tariff (OATT) requirements of 18 CFR 35.28, the Open Access Same-Time Information System (OASIS) requirements of 18 CFR 37, and the Standards of Conduct requirements 18 CFR 358, under certain conditions, for the ownership, control, or operation of Interconnection Customer's Interconnection Facilities (ICIF).¹ This Final Rule finds that those seeking interconnection and transmission service over ICIF that are subject to the blanket waiver adopted herein may follow procedures applicable to requests for interconnection and transmission service under sections 210, 211, and 212 of the Federal Power Act (FPA), which also allows the contractual flexibility for entities to reach mutually agreeable access solutions.² This Final Rule establishes a modified rebuttable

¹ The jurisdictional interconnection facilities for which this Final Rule grants a waiver have sometimes in the past been referred to informally as “generator tie lines,” but, in the Notice of Proposed Rulemaking, the Commission used the term ICIF as defined in the *pro forma* documents issued with Order No. 2003. As discussed below, *infra* section IV.A Eligible ICIF, we continue to use the term “ICIF” throughout this Final Rule but clarify there that we intend the term to encompass a broader scope. *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 FR 49845 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146, at Appendix C, Appendix 6, Article 1 (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), cert denied, 552 U.S. 1230 (2008).

² 16 U.S.C. 824i, 824j, and 824k.

presumption for a five-year safe harbor period to reduce risks to ICIF owners³ eligible for the blanket waiver during the critical early years of their projects. Finally, this Final Rule modifies, as described in detail below, several elements of the Notice of Proposed Rulemaking (NOPR), including the entities eligible for the OATT waiver, the date on which the safe harbor begins, the rebuttable presumption that the ICIF owner should not be required to expand its facilities during the safe harbor, and the facilities covered by the Final Rule.⁴

2. We 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 FPA.⁵ Further, we conclude that the Commission's policies requiring 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. Based on comments received as part of our consideration of the

³ In this Final Rule, the term "ICIF owners" includes those who operate or control ICIF.

⁴ *Open Access and Priority Rights on Interconnection Customer's Interconnection Facilities*, Notice of Proposed Rulemaking, 79 FR 31061 (May 30, 2014), FERC Stats. & Regs. ¶ 32,701 (2014), *corrected*, 79 FR 35501 (June 23, 2014).

⁵ As discussed *infra*, the blanket waiver will apply only to entities that are either directly subject to section 210 or have voluntarily committed to comply with section 210.

treatment of ICIF, we understand that generation developers may develop new projects in phases and build interconnection facilities large enough to accommodate the development of all planned phases. The Commission's existing policy has led ICIF owners to file petitions for declaratory orders demonstrating plans and milestones for future generation development to reserve for themselves currently excess ICIF capacity that they built 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 existing 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.

3. Granting an OATT waiver to ICIF owners and providing that third-party access be governed by sections 210, 211, and 212 will enable ICIF owners and third parties, where possible, to reach mutually agreeable and voluntary arrangements that provide ICIF access to third parties, while protecting a third party's right to request that the Commission order interconnection and transmission service over ICIF. We find that providing this contractual flexibility may remove barriers to an ICIF owner's willingness to enter into such an agreement with a third party.

4. We recognize that ICIF owners often construct ICIF to accommodate multiple generation project phases and intend for their subsequent generation projects to use what is initially excess capacity on the ICIF. We believe that the safe harbor period

established by this Final Rule will enable these ICIF owners to focus in the early stages of development on building generation.

5. We find that the reforms adopted herein 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.

II. Background

A. Development of ICIF Policies

6. Under section 201(b) of the FPA, the Commission has jurisdiction over all facilities used for the transmission of electric energy in interstate commerce.⁶ 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.⁷ 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 of service are just and reasonable and not unduly discriminatory or preferential.⁸

7. In Order No. 888, the Commission, relying upon its authority under sections 205 and 206 of the FPA, established non-discriminatory open access to electric transmission service as the foundation necessary to develop competitive bulk power markets in the

⁶ 16 U.S.C. 824(b).

⁷ 16 U.S.C. 824(e). Section 201(f) of the FPA exempts certain governmental entities and electric cooperatives from being a public utility.

⁸ 16 U.S.C. 824d and 824e.

United States.⁹ 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.

8. At the same time, the Commission issued Order No. 889,¹⁰ which promulgated the Open Access Same-Time Information System (OASIS) and Standards of Conduct requirements in Part 37 of the Commission's regulations to ensure the contemporaneous disclosure of certain information and prevent transmission providers from engaging in non-discriminatory behavior in favor of their marketing affiliates.¹¹

⁹ *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).

¹⁰ *Open Access Same-Time Information System and Standards of Conduct*, Order No. 889, 61 FR 21737 (May 10, 1996), FERC Stats. & Regs. ¶ 31,035 (1996), *order on reh'g*, Order No. 889-A, FERC Stats. & Regs. ¶ 31,049 (1997), *reh'g denied*, Order No. 889-B, 81 FERC ¶ 61,253 (1997).

¹¹ Although originally promulgated by Order No. 889, the Commission has since relocated the Standards of Conduct to Part 358 and adopted a number of changes, most recently revised by Order No. 717. *Standards of Conduct for Transmission Providers*, Order No. 717, FERC Stats. & Regs. ¶ 31,280 (2008).

9. In Order No. 2003, the Commission found that interconnection service plays a crucial role in bringing generation into the market to meet the growing needs of electricity customers and competitive electricity markets.¹² 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.”¹³ 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 *pro forma* Large Generator Interconnection Procedures (LGIP) and the *pro forma* Large Generator Interconnection Agreement (LGIA)¹⁴ to be included in every public utility’s OATT.¹⁵

10. Article 11.1 of the LGIA provides that the “Interconnection Customer shall design, procure, construct, install, own and/or control Interconnection Customer

¹² Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 11.

¹³ *Id.* PP 12, 20.

¹⁴ As discussed above, throughout this Final Rule, the terms LGIP and LGIA refer to the *pro forma* versions of those documents.

¹⁵ Order No. 2003 established rules for a Large Generating Facility, defined as a generating facility with a capacity of more than 20 MW. Similarly, in Order No. 2006, the Commission established the *pro forma* Small Generator Interconnection Procedures and the *pro forma* Small Generator Interconnection Agreement for interconnecting small generators (no larger than 20 MW). *Standardization of Small Generator Interconnection Agreements and Procedures*, Order No. 2006, FERC Stats. & Regs. ¶ 31,180, *order on reh’g*, Order No. 2006-A, FERC Stats. & Regs. ¶ 31,196 (2005), *order granting clarification*, Order No. 2006-B, FERC Stats. & Regs. ¶ 31,221 (2006).

Interconnection Facilities . . . at its sole expense.” 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.”¹⁶ The LGIA defines “Interconnection Facilities”¹⁷ 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.¹⁸

¹⁶ LGIA Article 1. Section 1 of the LGIP includes identical definitions to those in Article 1 of the LGIA.

¹⁷ Unless otherwise indicated, capitalized terms herein have the same definition as in the Commission’s LGIA or in the OATT, as applicable.

¹⁸ LGIA Article 1. *See supra* n.1.

Finally, the LGIA defines Transmission Provider’s Interconnection Facilities as “those Interconnection Facilities that are located between the Point of Interconnection¹⁹ with the grid and the Point of Change of Ownership,²⁰ and which are owned, controlled, or operated by the transmission provider.”²¹

11. 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.²² Depending on the circumstances, Interconnection Facilities may range in length, but can span considerable distances and represent significant transmission capacity.²³

¹⁹ 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.

²⁰ 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.

²¹ LGIA Article 1.

²² 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.

²³ See, e.g., *Bayonne Energy Center, LLC*, 136 FERC ¶ 61,019 (2011) (involving a 6.75-mile, 345-kV interconnection facility); *Terra-Gen Dixie Valley, LLC*, 132 FERC ¶ 61,215 (2010) (*Terra-Gen I*), *reh’g denied*, 134 FERC ¶ 61,021 (2011), *order on*

(continued...)

12. 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 access rights for transmission on the facilities located between the generating facility and the Point of Change of Ownership at which the Transmission Provider's Interconnection Facilities begin, i.e., ICIF. Applications have come before the Commission as petitions for declaratory order and requests for service under sections 210 and 211. In each of these, the Commission has put the onus on the developer, if it would like to preempt a third party's use, to demonstrate that it has plans to use the currently excess capacity.

13. In *Milford Wind Corridor, LLC*, the Commission recognized that 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.²⁴

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 ICIF owner has specific, pre-existing generator expansion plans with milestones for construction of generation facilities and can demonstrate that it has made material progress toward meeting those

request for priority rights, 137 FERC ¶ 61,179 (2011), *order on reh'g*, 147 FERC ¶ 61,122 (2014) (involving a 214-mile, 230-kV interconnection facility). *See also, e.g., Southern Company Serv., Inc.*, Docket No. ER12-554-000 (Jan. 6, 2012) (delegated letter order) (involving an approximately 2000 foot interconnection facility).

²⁴ *Milford Wind Corridor, LLC*, 129 FERC ¶ 61,149, at P 24 (2009) (*Milford*).

milestones, the Commission granted priority rights for excess capacity on the ICIF for those future generation projects.²⁵ For example in *Aero Energy, LLC*,²⁶ before ordering service over the Sagebrush line pursuant to FPA sections 210 and 211, 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.²⁷ 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 would require additional transmission capacity.

15. The Commission has also 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

²⁵ *Alta Wind I, LLC*, 134 FERC ¶ 61,109, at PP 16-17 (2011); *Milford*, 129 FERC ¶ 61,149 at P 22; *Aero Energy LLC*, 116 FERC ¶ 61,149, at P 28 (2006) *Aero Modification Order*. 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 Energy LLC*, 115 FERC ¶ 61,128 (2006) (*Aero Proposed Order*), *order granting modification*, 116 FERC ¶ 61,149 (2006) (*Aero Modification Order*), *final order*, 118 FERC ¶ 61,204 (2007), *reh'g denied*, 120 FERC ¶ 61,188 (2007) (*Aero Rehearing Order*) (collectively, *Aero*).

²⁷ *Aero Modification Order*, 116 FERC ¶ 61,149 at P 28.

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

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 been referred to as the “specific plans and milestones” showing. 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.³⁰ 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

16. Notwithstanding the ability of an ICIF owner to request priority rights, where an ICIF owner has received a third-party request for service, the Commission has required that the ICIF owner file an OATT.³²

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

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 Subsequent to ordering transmission under FPA sections 210 and 211 in *Aero*, 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

(continued...)

17. In summary, the Commission’s existing policy since 2009 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.³³ 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.³⁴ The Commission grants such requests for waiver where the public utility

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). 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*). In *Sky River*, 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. *Sky River, LLC*, 134 FERC ¶ 61,064 (2011) (*Sky River*). 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 (2011), *order on reh’g*, 135 FERC ¶ 61,134 (2011), *order granting extension of time*, 136 FERC ¶ 61,026 (2011), *order on reh’g*, 147 FERC ¶ 61,122 (2014).

³³ 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).

³⁴ 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

(continued...)

owns only limited and discrete facilities or is a small utility.³⁵ Even if a waiver of the OATT is granted for ICIF, the ICIF owner is subject to the requirement that, if a request for transmission service over the facilities is made, it would have to file an OATT within 60 days of the request³⁶ and comply with any additional requirements then in effect for public utility transmission providers. 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.

III. Need for Reform

A. Commission Proposal

18. The Commission issued a NOPR in this proceeding on May 15, 2014. In the NOPR, the Commission proposed to grant a blanket waiver for ICIF of all OATT, OASIS, and Standards of Conduct requirements in circumstances where a public utility is subject to such requirements solely because it owns, controls, or operates ICIF and sells electric energy from its generating facility. The Commission also proposed a safe harbor period of five years during which there would be a rebuttable presumption that: (1) the

agency may waive its regulations in appropriate cases.”). Similarly, section 358.1(d) of the Commission’s regulations provides that a transmission provider may seek a waiver from all or some of the requirements of Part 358.

³⁵ 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).

³⁶ *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).

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.³⁷ The Commission found, on a preliminary basis, that there was a need for reform because 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. The Commission also preliminarily found that there was a need to reform its requirements for achieving non-discriminatory access over ICIF so as not to discourage competitive generation development with unnecessary burdens, while ensuring non-discriminatory access by eligible transmission customers.

B. Comments

19. The Commission received 24 comments and one reply comment on the NOPR.³⁸ Of those, 21 commenters³⁹ generally support the need for reform and the NOPR proposals. Commenters state that the Commission's existing policy is unduly burdensome and unnecessary⁴⁰ and that it does not meet the goal of promoting

³⁷ NOPR, FERC Stats. & Regs. ¶ 32,701 at P 54.

³⁸ See Appendix A for a list of NOPR commenters.

³⁹ These include AWEA, BHE, BP Wind, Linden, DTE, E.ON, EEI, ELCON, EPSA, First Wind, Invenergy, ITC, MISO, MISO TOs, NextEra, NRG, Recurrent, SEIA, Sempra, Southern, and Terra-Gen. SWP also commented on the NOPR, but did not express support or opposition to the proposed changes overall.

⁴⁰ AWEA at 1; E.ON at 2; and NextEra at 3.

development of generation facilities while ensuring not unduly discriminatory open access to transmission facilities.⁴¹ Commenters argue that ICIF owners are focused on developing new generation resources and the time, effort and cost of complying with the OATT requirements under the Commission's existing policy hinders generation development.⁴² Commenters support the Commission's goal of reducing regulatory burdens and promoting development of generation facilities while ensuring open access to transmission facilities and support the Commission's proposal to revise its current ICIF policies.⁴³

20. Terra-Gen states that the NOPR proposals are essential to minimize the business and regulatory risks faced by generation owners and developers.⁴⁴ Further, Terra-Gen argues that the Commission's existing ICIF policy allows third parties to impose substantial and potentially unrecoverable regulatory compliance and other costs on generation owners by requesting access to ICIF without making a showing that the third party is "ready, willing, and able to pay the reasonable costs of transmission services plus a reasonable rate of return on such costs."⁴⁵

⁴¹ EEI at 2.

⁴² AWEA at 2; Linden at 3; and E.ON at 2.

⁴³ BHE at 1; EEI at 2; and ELCON at 2.

⁴⁴ Terra-Gen at 1.

⁴⁵ Terra-Gen at 1 (citing *New York State Electric & Gas Corp. v. FERC*, 638 F.2d 388, 402 (2d. Cir. 1980), *cert. denied*, 454 U.S. 821 (1981)).

21. Linden states that ICIF owners generally plan to use the excess capacity on their ICIF for their own purposes and that the Commission's existing policy imposes a risk of losing that capacity if another party makes a request for service.⁴⁶ ELCON argues that an ICIF owner should retain the rights over its ICIF for its own future projected use.⁴⁷

22. MISO supports revising the Commission's ICIF policy because it argues that the existing policy: (1) creates disincentives to develop more efficient, high-voltage ICIF by expanding the costs and responsibilities of generation owners; (2) imposes transmission owner requirements on entities that are not in the business of providing transmission service to third parties; and (3) creates concerns over the interaction of ICIF with the transmission system, and the reliable interconnection of projects to the transmission system.⁴⁸

23. Commenters argue that ICIF are unique and the Commission's open access requirements and *pro forma* OATT were not designed for and are not appropriate for these facilities.⁴⁹ MISO asserts that use of an OATT by an ICIF owner raises complicated issues regarding seams agreements between the transmission provider and the ICIF owner and issues related to Order No. 1000-compliance regional transmission

⁴⁶ Linden at 4.

⁴⁷ ELCON at 2.

⁴⁸ MISO at 4-5.

⁴⁹ BP Wind at 4; Linden at 3; ELCON at 2; and E.ON at 2.

planning and cost allocation.⁵⁰ MISO also notes that using OATTs for access to ICIF could create different interconnection processes for different ICIF within the MISO footprint, thus complicating the interconnection process.⁵¹

24. On the other hand, APPA, TAPS, and NCPA state that they support the Commission's goal of promoting generation development, but assert that the NOPR proposals would erode the Commission's open access transmission policies.⁵² APPA and TAPS argue that the Commission should instead address the concerns identified in the NOPR in a manner that preserves the open access underpinnings of competitive markets and its reliance on market-based rates to ensure just and reasonable wholesale sales, and meets its statutory obligation to eliminate undue discrimination in transmission service. APPA and TAPS contend that the NOPR, as proposed, fundamentally erodes open access by making it effectively impossible for subsequent competitive generation developers to interconnect with the ICIF owner's facilities for long periods of time, if ever.⁵³ NCPA states that while it supports the Commission's desire to promote generation development, it shares the concerns expressed by APPA and TAPS that the NOPR imperils the open access underpinnings for competitive markets by cutting back on the significant procedural reforms initiated by this Commission in Order Nos. 888 and 889, and supports

⁵⁰ MISO at 5.

⁵¹ MISO at 5.

⁵² APPA and TAPS at 2 and NCPA at 3.

⁵³ APPA and TAPS at 2.

the alternatives proposed by APPA and TAPS, as described below, by which the Commission could achieve the NOPR's objectives without unnecessarily reducing the protection from discrimination that those orders provided.⁵⁴ Similarly, NRECA states that it appreciates the Commission's concerns about imposing the entire open access regime on entities that only own ICIF, but contends that reducing this burden must not come at the expense of ensuring that load-serving entities have access to facilities to serve their loads.⁵⁵

25. APPA and TAPS⁵⁶ argue that the NOPR fails to demonstrate the need to change the requirement that an ICIF owner file an OATT upon receipt of a third-party request for service, noting that the NOPR itself recognizes that third-party requests to ICIF owners for service are "infrequen[t]" and "relatively rare."⁵⁷ They also contend that the NOPR has not demonstrated that the proposed procedures would cost less than existing requirements, arguing that the lengthy and costly procedures of sections 210 and 211 could not possibly be less expensive for ICIF owners on an industry-wide basis. They

⁵⁴ NCPA at 3.

⁵⁵ NRECA at 2.

⁵⁶ NCPA states that it supports the comments submitted by APPA and TAPS. NCPA at 1 and 3.

⁵⁷ APPA and TAPS at 20 (citing NOPR, FERC Stats. & Regs. ¶ 32,701 at PP 32, 36).

argue that the NOPR proposals will therefore be ineffective at reducing the regulatory costs of ICIF owners and may function as a bar to open access.⁵⁸

26. APPA and TAPS contend that the NOPR would invite ICIF owners to close off access to what could well be significant highways to areas ripe for renewable resource development.⁵⁹ APPA and TAPS argue that the NOPR would allow an ICIF owner to hold that transmission corridor hostage, block efficient expansion, and deny access to competitors. They add that the ICIF owner is likely to be the competitor of the third party seeking interconnection and transmission service over the ICIF, giving the ICIF owner strong incentive to use its control over ICIF to the advantage of its own generation resources.⁶⁰

27. APPA and TAPS also state that the Commission cannot assume that open access principles need not apply to ICIF because competitors can build their own, arguing that such lines require extensive permitting, and that it is often more difficult to obtain siting approvals for a second line once a first line has been permitted.⁶¹ They contend that, even where it is possible to obtain necessary siting approvals for duplicative lines, inefficient build-out of the grid would make it more costly than necessary to access new

⁵⁸ APPA and TAPS at 21.

⁵⁹ APPA and TAPS at 8 (citing NOPR, FERC Stats. & Regs. ¶ 32,701 at P 9, n.16).

⁶⁰ APPA and TAPS at 8-9.

⁶¹ APPA and TAPS at 9-10.

generation resources, burdening those resources and consumers, as well as undermining competitive wholesale markets.

28. APPA and TAPS contend that departure from the Commission's non-discriminatory access requirements cannot be excused by the fact that usage of ICIF has been requested infrequently thus far, arguing that ICIF access may well become more common in the future given the increasing dependence on renewable resources.

29. APPA, TAPS, and NRECA suggest alternatives to the NOPR proposals. APPA and TAPS state that the Commission could grant a blanket waiver of OATT, OASIS, and Standards of Conduct requirements, but require ICIF owners to submit a standardized, more limited OATT within 60 days of a third-party service request. APPA and TAPS argue that the modified OATT should not remove core elements of open access, including the obligation to expand and the development of rates for point-to-point service, but could eliminate provisions for network transmission service and ancillary services.⁶² They state that this will reduce the regulatory burden on ICIF owners and eliminate the need to apply for special waivers on a case-by-case basis, while preserving key limitations on the ICIF owner's ability to discriminate and create barriers to entry to competitive markets.

30. APPA and TAPS state that the Commission could address the concern that the existing policy creates too low a bar for third-party requests to trigger the requirement for

⁶² APPA and TAPS at 21-22.

an ICIF owner to file an OATT by specifying clarified and heightened thresholds for a service request to trigger the requirement to file. They add that the Commission could approve fee structures that enable an ICIF owner to insist upon reasonable deposits before the obligation to file a notice of receipt of a service request and, subsequently, an OATT is triggered.⁶³ They argue that such additional deposits would discourage speculative service requests that trigger a first-time OATT filing and fully address the specific ICIF owner regulatory burden that the NOPR identifies. They contend that while the extra deposit would increase costs for the first entity that seeks service from the ICIF owner's corporate family, the amount of the deposit would be much lower than the costs of requesting, negotiating, and litigating service under sections 210 and 211.⁶⁴

31. NRECA suggests that the Commission could implement a procedure under which a prospective customer seeking service on ICIF must submit a request that is fully supported by specified information, followed by the necessary studies and the parties cooperating to reach an agreement for service within a specified period of time, such as 90 days.⁶⁵ NRECA adds that if the parties are not able to reach an agreement, the ICIF owner would file an unexecuted service proposal with the Commission.⁶⁶

⁶³ APPA and TAPS at 23.

⁶⁴ APPA and TAPS at 23-24.

⁶⁵ NRECA at 5-6.

⁶⁶ NRECA at 6-7.

32. NRECA argues that its proposed procedures would address the Commission’s concern that the existing policy “creates too low a bar for third-party requests for service” because those seeking service would be required to provide adequate information to support their requests. NRECA also argues that its proposal would alleviate the concern that an ICIF owner may be required to file an OATT due to a service request by a requester that subsequently fails to pursue any further development, because a mere service request would no longer trigger that requirement. In addition, NRECA contends that its proposal would promote flexibility by requiring the parties to work together to attempt to reach an agreement.⁶⁷

C. Commission Determination

33. We believe this Final Rule will relieve regulatory burdens and unnecessary risks from generation developers to encourage the development of new generation and efficient interconnection facilities and promote competition while ensuring access to transmission on a not unduly discriminatory basis.

34. Our action is supported by comments on the NOPR, the technical conference,⁶⁸ and Notice of Inquiry.⁶⁹ Specifically, we appreciate that filing and maintaining an OATT can be burdensome to ICIF owners who do not seek to provide transmission service.

⁶⁷ NRECA at 7.

⁶⁸ *Priority Rights to New Participant-Funded Transmission*, March 15, 2011 Technical Conference, AD11-11-000.

⁶⁹ *Open Access and Priority Rights on Interconnection Facilities*, Notice of Inquiry, FERC Stats. & Regs. ¶ 35,574 (cross-referenced at 139 FERC ¶ 61,051 (2012)).

Adding 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 risk stems from the policy to require an ICIF owner to file an OATT within 60 days of a request for service by a third party and must begin interconnection studies. The ICIF owner's obligation can be triggered with minimal effort by a third party requester, thus a request for service may not sufficiently distinguish third party requesters who have a well-supported request for service from those that do not. We are 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.⁷⁰ This is an additional risk for the ICIF owner.

35. We also agree that 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

⁷⁰ See NextEra at 5 (“Two of the three NextEra subsidiaries that received inquiries triggering OATT filings with respect to their ICIF – Sagebrush and Peetz Logan – never had customers actually pursue transmission or interconnection service following the initial inquiries”) and Terra-Gen at 2 (“Dixie Valley ... incurred substantial costs in attempting to comply with the Commission's OATT requirements over several years, only to find that it would have no way to recover those costs because the customer that requested transmission service ultimately did not become a transmission customer”).

these proposed deviations on a case-by-case basis can impose the risk of a time-consuming proceeding with an uncertain outcome.

36. Moreover, interconnecting with ICIF often involves unique circumstances that would benefit from negotiations to tailor individual access agreements. However, the existing policy limits an ICIF owner's contractual flexibility and does not allow parties to use common facility agreements or have service governed outside of an OATT.⁷¹

37. In addition, it is common for an ICIF owner to initially have excess capacity on its ICIF when it plans to bring generation into commercial service in stages. The Commission has a process for granting priority rights to the ICIF owner for such excess capacity on a case-by-case basis. However, filing a petition for declaratory order to establish priority rights can be a significant burden for the ICIF owner because the Commission's existing policy of requiring a demonstration of "specific plans and milestones" can require substantial effort and resources on the part of the ICIF owner to make the necessary showings. Further, these priority rights do not diminish the risk and potential burden that the ICIF owner may have to file an OATT within 60 days of a request for service.

38. Contrary to APPA and TAPS' argument that the proposed revisions will likely cost more to implement than the Commission's existing OATT requirements,⁷² other

⁷¹ *Sky River*, 134 FERC ¶ 61,064 at P 13.

⁷² APPA and TAPS at 20.

commenters assert that the risks described above fall on all ICIF owners and therefore that the Commission's existing policy imposes costs,⁷³ 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 such that the filing of an OATT was required.⁷⁴ 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 potential 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. In response to commenters concerns that the process under sections 210 and 211 is more expensive for potential transmission customers than the existing process, we note that the cost of any process has many variables. This Final Rule specifically allows for voluntary interconnection agreements, which may be a more efficient process than currently exists. Under our existing policy, while a potential transmission customer may trigger an ICIF owner's OATT obligation by making a simple request for service, the potential customer often bears the expense to be a party to what are sometimes

⁷³ AWEA at 2 and E.ON at 2.

⁷⁴ 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.

controversial proceedings. We find that the proposed reforms will avoid the expense of requests that are unlikely to be successful. Accordingly, we find that reforming the open access transmission requirements in this narrow set of circumstances is appropriate.

39. We find that APPA and TAPS' concerns that the NOPR would allow an ICIF owner to close off access to significant highways to areas ripe for renewable resource development overlook practical considerations of infrastructure development. The approach taken in this Final Rule recognizes that, often, an ICIF owner anticipates that it will use its excess ICIF capacity, and seeks to reduce unnecessary regulatory burdens. The Commission precedent with respect to priority use has given ICIF owners the opportunity to demonstrate that they had pre-existing contractual obligations or other specific plans that would prevent them from providing the requested transmission service at a future date.⁷⁵ In balancing the considerations, we are persuaded that the process under sections 210 and 211 allows an ICIF owner to be reasonably assured of being able to use that extra capacity, while also providing a mechanism for expansion. Without such reasonable assurance, there is no incentive for a developer to shoulder the extra expense of ICIF sized larger than their initial project.

40. Moreover, we agree with NRECA that it is important to promote flexibility by encouraging the ICIF owner and the third party to work together to attempt to reach an agreement. As discussed further below, this Final Rule adopts a framework that includes

⁷⁵ See, e.g., *Aero Modification Order*, 116 FERC ¶ 61,149 at P 28.

opportunities for the ICIF owner and third party to reach mutually agreeable solutions, either as part of a proceeding under sections 210 and 211, or in such a way that obviates the need to bring a proceeding under sections 210 and 211 to the Commission.

IV. Proposed Reforms

A. Eligible ICIF

1. Commission Proposal

41. In the NOPR, the Commission defined the facilities that were subject to the rule as ICIF because that term already had a specific definition in the *pro forma* LGIA and LGIP.⁷⁶ The Commission proposed to apply the NOPR reforms to any public utility that is subject to OATT, OASIS, and Standards of Conduct 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 *pro forma* LGIP and the *pro forma* LGIA adopted in Order No. 2003. The LGIA and LGIP define ICIF as “all facilities and equipment, as identified in Appendix A of the LGIA, 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.”⁷⁷

⁷⁶ NOPR, FERC Stats. & Regs. ¶ 32,701 at PP 1 and 35.

⁷⁷ LGIA Article 1.

2. Comments

42. First Wind and Invenergy recommend that the Commission not define the interconnection facilities subject to the waiver with reference to the LGIA and LGIP, but simply as those facilities located between the generating facility and the point of interconnection to the transmission provider's transmission system. This is because some interconnection agreements predate Order No. 2003 which first defined ICIF; some may be implemented under the small generator interconnection procedures under Order No. 2006; and some agreements were entered into with non-Commission jurisdictional transmission providers. They argue that the definition of ICIF and generating facility should be revised to encompass facilities that may not be installed under the Commission's LGIA/LGIP arrangements.⁷⁸ Similarly, AWEA seeks clarification that ICIF owners who do not have interconnection agreements under *pro forma* arrangements or those that have shared facilities agreements (or similar understandings) also qualify for the blanket waiver.⁷⁹

3. Commission Determination

43. We expand our definition of what interconnection facilities are subject to the Final Rule to include ICIF as well as comparable jurisdictional interconnection facilities that are the subject of interconnection agreements other than an LGIA. For those interconnection customers that have entered into an LGIA, these facilities will be those

⁷⁸ First Wind at 11-12 and Invenergy at 4-6.

⁷⁹ AWEA at 7-8.

defined as ICIF in the LGIA and LGIP. For those interconnection customers that have entered into interconnection agreements other than an LGIA, these facilities will be the comparable set of interconnection facilities as those described as ICIF in the LGIA. Therefore, the term ICIF should be read in this Final Rule to encompass this broader scope. We use the term “comparable” set of interconnection facilities because the definition of ICIF in the LGIA is made with reference to specific facilities listed in an appendix to the LGIA and to terms defined elsewhere in the LGIA. Therefore, we cannot apply literally the definition of ICIF in the LGIA to describe facilities in interconnection agreements other than the LGIA. Generally, this comparable set of facilities would include all facilities and equipment that are located between an interconnection customer's generating 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 interconnection customer's generating facility to the transmission provider’s facilities that are used to provide transmission service (called the “point of interconnection” in the LGIA).

B. Grant Blanket Waivers to Eligible ICIF Owners

1. Blanket Waivers

a. Commission Proposal

44. The Commission proposed to add sub-paragraph (d)(2) to 18 CFR 35.28 to grant a blanket waiver of all OATT, OASIS, and Standards of Conduct 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.⁸⁰ The Commission proposed that the blanket waiver would apply to all eligible existing and future ICIF owners, and explained that the limitation to ICIF owners that sell electric energy was meant to ensure that the proposed blanket waiver would only apply in situations where sections 210 and 211 would provide interconnection and transmission access to a customer that seeks service over the ICIF.⁸¹

b. Comments

45. The majority of commenters support the Commission's proposal to grant a blanket waiver of all OATT, OASIS, and Standards of Conduct requirements to public utility ICIF owners. Commenters agree with the Commission's preliminary findings in the NOPR that a blanket waiver is justified because such facilities do not typically present the concerns about discriminatory conduct that the Commission's OATT, OASIS, and Standards of Conduct requirements were intended to address.⁸² Commenters agree that the Commission's existing practice of requiring an OATT for ICIF discourages generation development and results in a disincentive to be the first developer in an area to build ICIF, while creating a relative advantage for subsequent competing generation

⁸⁰ The Commission also proposed to make non-substantive revisions to what is currently 18 CFR 35.28(d) in order to update certain cross-references in that paragraph.

⁸¹ NOPR, FERC Stats. & Regs. ¶ 32,701 at P 35.

⁸² EEI at 3 and BHE at 6-7.

developers in that area.⁸³ Additionally, they argue that the Commission's existing practice unreasonably causes developers of ICIF to incur significant costs in response to mere written third-party requests unaccompanied by any deposit. Commenters agree that the requirement to file an OATT following any third-party request creates a regulatory burden without a corresponding enhancement of access.⁸⁴

46. Commenters state that the OATT is not a good fit for the services that can be provided over ICIF, and argue that such limited service is not comparable to the integrated network, point-to-point, and ancillary services provided under the *pro forma* OATT.⁸⁵ E.ON agrees that the current OATT requirement can be seen as burdensome by ICIF owners who do not seek to be in the business of providing transmission service, 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, and limits an ICIF owner's contractual flexibility if it chooses to provide third-party access by mutual agreement.⁸⁶

47. Commenters state that the Commission's existing policy of requiring an ICIF owner to file an OATT or seek a waiver that would be revoked only upon a third-party

⁸³ EEI at 8-9; BHE at 6-7; and E.ON at 2.

⁸⁴ EEI at 8-9; BHE at 6-7; and E.ON at 2.

⁸⁵ NextEra at 4-5 and E.ON at 2.

⁸⁶ E.ON at 2.

request for service creates too low a bar for third-party requests for service and could lead to competitive mischief.⁸⁷ BHE argues that ICIF owners are focused on developing new generation resources and that, given the infrequency of third-party requests and the absence of disputes before the Commission, it is more reasonable and efficient to address third-party requests to access available ICIF capacity as they arise on an individual basis.⁸⁸

48. Some commenters argue that adjudicating such OATT waiver requests and OATT tariff filings on a case-by-case basis has led to confusion and uncertainty in the industry with respect to compliance with the Commission's open access requirements as applied to ICIF.⁸⁹ DTE argues that there is a filing burden associated with making a waiver request, as well as some uncertainty about the actions that would need to be taken in the unlikely event that these requests for waiver were not granted. DTE states that the proposed blanket waiver would remove any uncertainty regarding the current status of existing eligible ICIF owners that may have been awaiting the Commission's direction on this matter before making the determination of whether or not to seek a "limited and discrete" waiver from the OATT, OASIS and Standards of Conduct regulations.⁹⁰

Similarly, NextEra argues that the implication of the description of existing policy in the

⁸⁷ BHE at 6-7 and E.ON at 2.

⁸⁸ BHE at 6-7.

⁸⁹ NextEra at 3-4.

⁹⁰ DTE at 2.

NOPR is that a significant number of generation owners should be taking actions to address existing open access requirements. NextEra points out that, in the NOPR, the Commission notes that this lack of clarity extends to whether market-based rate 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. NextEra argues that the proposed waiver will provide much needed certainty for ICIF owners by clearly identifying those entities that are not subject to OATT, OASIS, or Standards of Conduct requirements.⁹¹

49. Southern agrees that the blanket waiver approach appears to be appropriate given that very few generator tie lines have the characteristics (e.g., long length, excess capacity) that would make them more feasible for interconnection by another generator than the transmission system.⁹²

50. In contrast, APPA and TAPS state that creating and maintaining two different standards for access to transmission facilities is problematic in a dynamic grid, adding that ICIF that look like radial lines at the fringe of the system today may be a more central part of the network in a decade or two.⁹³

⁹¹ NextEra at 7.

⁹² Southern at 4.

⁹³ APPA and TAPS at 10.

51. APPA and TAPS argue that the Commission has long required market-based rate sellers that own transmission to demonstrate mitigation of vertical market power by showing that they and their affiliates either have filed an OATT or received a waiver for every transmission facility that they own, operate, or control, and to offer third parties service comparable to the service the market-based rate sellers and their affiliates provide themselves. APPA and TAPS contend that the proposed blanket waiver does not clarify the manner by which ICIF owners can address concerns about vertical market power when they seek market-based rate authority, but rather that it magnifies those concerns by discarding an essential foundation for allowing the ICIF owner and its affiliates to enjoy market-based rates.⁹⁴

52. APPA and TAPS state that they would not oppose an initial grant of a blanket waiver of the requirement that each ICIF owner must file an individual request for waiver of OATT, OASIS, and Standards of Conduct, provided that such waivers would be revoked upon receipt of a third-party request for service on the ICIF.⁹⁵

53. APPA and TAPS argue that the NOPR places no limit on the proposed blanket waiver, extending it to periods when there is no reasonable expectation that the ICIF owner is still in the project development mode.

⁹⁴ APPA and TAPS at 14.

⁹⁵ APPA and TAPS at 20.

54. NRECA states that it does not object to exempting certain ICIF owners from the mandate to file an OATT and related requirements for limited and discrete facilities, but that any such waiver should be revoked if the entity no longer meets those criteria.⁹⁶

c. Commission Determination

55. We adopt the proposed blanket waiver with modifications as discussed below.⁹⁷

We believe the proposal as modified addresses the concerns of commenters while meeting our purpose of reducing unnecessary burden and providing clarity and certainty to developers. Such a waiver is justified because the usually limited and discrete nature of ICIF and ICIF's dedicated interconnection purpose means that such facilities do not typically present 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.

56. Further, the ICIF waiver would remove regulatory burdens on competitive generation developers without sacrificing the Commission's ability to require open access in appropriate circumstances. Specifically, we find that a blanket waiver will remedy the undue burden on ICIF owners under our existing policy to file an OATT or seek a waiver

⁹⁶ NRECA at 4.

⁹⁷ Certain aspects of the blanket ICIF waiver adopted herein differ from the NOPR proposal. *E.g.*, see *infra* PP 73-75 for the Commission determination on the public utilities eligible for the blanket waiver and *supra* P 43 for the Commission determination on the ICIF eligible for the blanket waiver.

that would be revoked upon a third-party request for service from ICIF owners. We find that the time, effort, and cost of complying with the requirements of a public utility transmission provider in these circumstances unduly burden generation development efforts. In addition, we agree with commenters that the existing 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.

57. Finally, we agree with DTE and NextEra that providing a blanket waiver of the OATT for ICIF owners will clarify how they meet the OATT filing or OATT waiver requirements involved when seeking market-based rate authority.⁹⁸ APPA and TAPS argue that the blanket waiver does not explain how sellers would address vertical market power for purposes of market-based rate authority. However, this Final Rule simply provides an additional method for obtaining waiver of the OATT requirements. Therefore, to the extent that a market-based rate seller or any of its affiliates owns, operates, or controls transmission facilities, the Commission will require that, in order to satisfy the Commission's market-based rate vertical market power requirements in 18 CFR 35.37(d), it either must have a Commission-approved OATT on file, receive

⁹⁸ 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).

waiver of the OATT requirement under 18 CFR 35.28(d)(1), or satisfy the requirements for blanket waiver under 18 CFR 35.28(d)(2). Market-based rate filings cannot be used as the vehicle by which applicants may obtain determinations on whether they qualify for an ICIF blanket waiver.

58. As discussed further below, the blanket waiver adopted herein only applies in situations where sections 210, 211, and 212 would provide interconnection and transmission access to a customer that seeks service over the ICIF. This ensures that we are only waiving the OATT requirements in circumstances where there is an alternative for third parties to seek not unduly discriminatory access.

2. Requirement That ICIF Owners Must Sell Electricity to Qualify for the Waiver

a. Commission Proposal

59. The Commission proposed to grant the blanket waiver to any public utility that is subject to the Commission's OATT, OASIS, and Standards of Conduct requirements solely because it owns, controls, or operates ICIF, in whole or in part, and sells electric energy from its generating facility. The Commission's proposal to limit the waiver to ICIF owners who sell electric energy was intended to ensure that any public utility with an OATT blanket waiver would be subject to an interconnection order under section 210. This requirement was seen as necessary so as not to create a gap and leave a potential

customer without a means of obtaining an interconnection with ICIF once the OATT interconnection procedures were waived.⁹⁹

60. 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.”¹⁰⁰ An “electric utility” is defined as “a person or Federal or State agency ... that sells electric energy.”¹⁰¹ Thus, the NOPR granted the waiver only to those that qualified as an electric utility to ensure that section 210 would be applicable. The Commission stated that it believes that there would be a relatively small number of ICIF owners who could not be subject to orders under sections 210 and 211, and sought comments on whether this limitation on which public utilities can take advantage of the blanket waiver is appropriate. The Commission noted that ICIF owners who were not electric utilities had the option to seek waiver on a case-by-case basis.¹⁰²

b. Comments

61. Some commenters argue that it is common for separate ICIF-only companies to be created and owned by a generation company or an affiliate, so that an entity separate

⁹⁹ NOPR, FERC Stats. & Regs. ¶ 32,701 at PP 35, 43.

¹⁰⁰ 16 U.S.C. 824i(a)(1)(A).

¹⁰¹ 16 U.S.C. 796(22).

¹⁰² NOPR, FERC Stats. & Regs. ¶ 32,701 at PP 51-52.

from the generation company is used to own, operate, and manage the ICIF.¹⁰³ Further, these commenters argue that it is unnecessary to exclude from the waiver and safe harbor those entities that do not sell electric energy, and that the Commission can and should modify the proposal to make the waiver applicable to entities that only own the ICIF but do not sell electric energy. They also argue that the Commission routinely grants OATT waivers for such companies under the limited and discrete facilities factor.¹⁰⁴

62. Recurrent, SEIA, and Sempra argue that ICIF-only companies often are employed when the generation project is developed in phases, and separate companies own the discrete portions of the generating facility that is the subject of a LGIA.¹⁰⁵ SEIA states that establishing a separate entity can facilitate management of the jointly-owned ICIF, assist in establishing a single point of contact with the interconnected transmission owner and operator, and can facilitate the addition of other ICIF users.¹⁰⁶ Sempra states that the ICIF-only entity structure has also been utilized because of tax regulations and other

¹⁰³ Recurrent at 4; First Wind at 4-8; Invenergy at 7-11; BP Wind at 4-5; E.ON at 6; ITC at 8; NextEra at 7-9; SEIA at 4-5; Sempra at 3-6; and MISO TOs at 5-6.

¹⁰⁴ First Wind at 4-8 and Invenergy at 7-11.

¹⁰⁵ Sempra at 3 (citing, *e.g.*, *Wolverine Creek Goshen Interconnection LLC*, Docket Nos. ER06-267-000 (Letter Order dated Jan. 13 2006), *Wolverine Creek Energy LLC, et al.*, Docket Nos. ER12-1280-000 and ER12-1281-000 (May 9, 2012) (unpublished letter order accepting amended common facilities agreement for filing), and *Maine GenLead, LLC*, 146 FERC ¶ 61,223 (2014)).

¹⁰⁶ SEIA at 4.

permitting considerations.¹⁰⁷ BP Wind notes that sometimes a separate stand-alone entity is formed to own the ICIF because an RTO requests to have a single point of contact for multiple generators interconnecting at the same point on the grid.¹⁰⁸

63. E.ON argues that an ICIF-only entity should be afforded the same opportunity to obtain a blanket waiver as entities that sell electricity because this type of entity only exists to accommodate a generator company's phased access to the grid.¹⁰⁹ Recurrent states that when an interconnection company structure is used, the physical arrangement is identical to where the same entity owns the generation and the ICIF – the only difference is that a separate entity, the interconnection company, owns all or a portion of the ICIF and no generation.¹¹⁰ SEIA asserts that the Commission should not impose

¹⁰⁷ Sempra at 3 (citing, *e.g.*, Docket No. ER03-175-000, “Request of Termoelectrica U.S., LLC for Rehearing, and Expedited Consideration and/or Stay” at n.6 (filed Feb. 10, 2003) (TDM Rehearing Request), and *Termoelectrica U.S., LLC*, 105 FERC ¶ 61,087 (2003) (order granting rehearing relating to OATT waivers), Docket No. EC14-80-000, “Application for Authorization to Transfer Jurisdictional Facilities Pursuant to section 203 of the Federal Power Act and Request for Expedited Action” at pp. 5-6 (describing the planned ownership structure of future cross-border interconnection facilities), and *Energia Sierra Juarez U.S., LLC*, Docket No. EC14-80-000 (May 29, 2014) (letter order approving transfer)).

¹⁰⁸ BP Wind at 4-5. MISO's comments seem to support this point, stating, “from an operational and reliability perspective, MISO needs to have a single Interconnection Customer entity at each distinct Point of Interconnection to the Transmission System with whom MISO can coordinate. That entity must have the authority to control any other generators that interconnect to its ICIF on its side of the Point of Interconnection.” MISO at 8.

¹⁰⁹ E.ON at 6-7.

¹¹⁰ Recurrent at 5-6.

unnecessary burdens on developers based on their use of this ownership structure.¹¹¹ ITC argues that the ICIF owned by an ICIF-only entity will be functionally identical to situations where generators own ICIF, and the service is likely to be the same.¹¹² BP Wind agrees that the Commission should ensure that ICIF-only entities are not precluded from being eligible for the proposed blanket waiver on a technicality, so long as the facilities are utilized to interconnect generating facilities to the transmission grid.¹¹³ BP Wind argues that these interconnection-only entities, like generators that directly own interconnection facilities, do not seek to be in the transmission business.

64. First Wind and Invenergy argue that, if the Commission does not extend the blanket waiver to ICIF-only entities, the rule would be discriminatory because there is no basis to distinguish the two types of ICIF entities other than corporate structure, and ICIF-only entities would face the undue burdens identified in the NOPR.¹¹⁴ ITC and MISO TOs argue that to provide a blanket waiver to ICIF owners that sell electric energy, but to require ICIF owners that do not sell electric energy to file an OATT or seek waiver thereof, serves no clear purpose and imposes precisely the same burdens and regulatory

¹¹¹ SEIA at 4-5.

¹¹² ITC at 12-13.

¹¹³ BP Wind at 6.

¹¹⁴ First Wind at 4-8 and Invenergy at 7-11.

inefficiencies identified as the basis for the Commission's NOPR, in a manner which discriminates against non-sellers of electric energy.¹¹⁵

65. ITC also is concerned that the Commission's proposal to limit eligibility for the waiver may have unintended consequences. For example, given the practical burdens associated with the operation and maintenance of ICIF, ICIF owners may wish to divest such facilities to transmission owners with more experience operating these types of facilities, and more resources for meeting the reliability requirements of such operation. ITC argues that failure to extend the blanket waiver in such scenarios may discourage such transactions, thereby imposing reliability and operational burdens on generator owners who may not be willing or able to carry them out.¹¹⁶ MISO TOs quote the NOPR as stating that the *pro forma* OATT is not a good fit for ICIF and that these facilities do not typically present all the concerns the OATT is intended to address; MISO TOs assert that the same is true whether the ICIF owner happens to sell electric energy from its generating facility or not.¹¹⁷

66. Recurrent and Sempra further argue that the Commission has addressed these types of ownership arrangements in the context of "exempt wholesale generator" (EWG) status pursuant to section 32 of the Public Utility Holding Company Act of 2005

¹¹⁵ ITC at 12-13 and MISO TOs at 5-6.

¹¹⁶ ITC at 13.

¹¹⁷ MISO TOs at 5-6.

(PUHCA).¹¹⁸ Recurrent states that the Commission has held that an entity that does not own generation facilities but does own a radial interconnection line used solely to connect wholesale-only generating facilities to the transmission grid qualifies as an EWG. Recurrent argues that section 32(a)(2) of PUHCA states that the term “eligible facility” includes interconnecting transmission facilities necessary to effect a sale of electric energy at wholesale, and that an entity may be an EWG if it owns “all or part of one or more eligible facilities.” Recurrent states that with respect to the statutory requirement that an EWG “sell electric energy at wholesale,” the Commission has imputed the generation owner’s sales of wholesale power to the interconnection company, in order to satisfy the statutory requirement, in all of the proceedings that have addressed this issue.¹¹⁹ Recurrent argues that in decisions involving requests for waivers of OATT and related requirements, and in those involving EWG status, the Commission appropriately has not elevated form over substance and has not differentiated its

¹¹⁸ Sempra at 4-5 (citing, e.g., *Wolverine Creek Goshen Interconnection LLC*, 111 FERC ¶ 62,209 (2005) (*Wolverine Creek Goshen*); *Sagebrush*, 103 FERC ¶ 61,332 (2003) (*Sagebrush*); *Termoelectrica U.S., LLC*, 102 FERC ¶ 61,019 (2003) (*Termoelectrica*); *Peetz Logan Interconnect, LLC*, Docket No. EG06-84-000, “Notice of Exempt Wholesale Generator Status” (Sept. 27, 2006); *Bishop Hill Interconnection LLC*, Docket No. EG12-24-000, “Notice of Self-Certification of Exempt Wholesale Generator Status” (Jan. 20, 2012); *Maine GenLead LLC*, Docket No. EG14-23-000, “Notice of Self-Certification of Exempt Wholesale Generator Status” (Jan. 24, 2014)).

¹¹⁹ Recurrent at 6.

regulatory treatment of interconnection companies from its treatment of a “single entity” that owns both generation and ICIF.¹²⁰

67. Several commenters suggest potential ways to fix the section 210 applicability issue with respect to ICIF-only entities, such that the blanket waiver and safe harbor would apply to ICIF-only companies, and section 210 would preserve the “backstop” ability of third parties to obtain a Commission order requiring the ICIF-only company to interconnect with and provide transmission services to the third party. Recurrent proposes that the Commission grant the blanket waiver to an ICIF owner that does not sell electric energy if the interconnection company files a request for waiver that includes a commitment that if the Commission issues an order requiring the interconnection company to provide transmission services to a third party pursuant to section 211 of the FPA – to which the interconnection company is subject – the interconnection company agrees to voluntarily provide interconnection to the third party.¹²¹ SEIA states that it supports Recurrent’s proposal.¹²² Similarly E.ON states that the section 210 applicability concern could be alleviated by having the ICIF-only entity affirmatively submit to the

¹²⁰ Recurrent at 6-7.

¹²¹ Recurrent at 9-10.

¹²² SEIA at 5 (citing Recurrent at 9-10).

Commission's section 210 jurisdiction as a condition to being afforded the blanket waiver.¹²³

68. Sempra states that, although ICIF-only entities may not sell the power produced by their affiliates, they are an indispensable part of the sales transaction, and are typically party to the interconnection agreement along with or as agent for the affiliated generator.¹²⁴ Therefore, Sempra argues, for the purpose of section 210 applicability, it would be appropriate to impute the electricity sales of an affiliated generator, as the Commission does in the EWG context, as discussed above, and extend that blanket waiver and safe harbor to the ICIF-only entity.¹²⁵

69. First Wind and Invenenergy argue that the Commission's concern about entities not being able to use section 210 to request interconnection service can be addressed by the Commission creating an equivalent obligation by regulation for requesting interconnection from an ICIF entity, and then review requests under section 210 standards.¹²⁶ Similarly, BP Wind argues that the Commission should revise its regulations so that ICIF-only entities that receive a request for interconnection service

¹²³ E.ON at 7. E.ON also offers a redline of the proposed regulations to effect this change.

¹²⁴ Sempra at 4.

¹²⁵ Sempra at 4-6.

¹²⁶ First Wind at 4-8 and Invenenergy at 7-11. Invenenergy also offers a redline of the proposed regulations to effect this change.

would process the request in accordance with requirements similar to those set forth in section 210 of the FPA.¹²⁷

70. NextEra requests that the Commission clarify that ICIF owners that have authorization from the Commission to sell electric energy at market-based rates or that are EWGs are engaged in the sale of electric energy for purposes of determining application of the proposed waiver and application of section 210. NextEra argues that this would ensure consistency between the Commission's use of similar terms and with Commission precedent with respect to EWGs.¹²⁸ NextEra states that there may be instances in which an ICIF owner is not currently engaged in sales of electricity yet is authorized by the Commission to engage in such sales under a market-based rates tariff, so it should qualify as an electric utility.

71. ITC argues that section 210(d) provides that the Commission may, on its own motion, issue an order requiring any action described in subsection (a)(1) if the Commission determines that such order meets the requirements of subsection (c). ITC interprets this to mean that the Commission may issue an interconnection order on its own motion, regardless of whether the ICIF owner qualifies as an electric utility by selling energy.

¹²⁷ BP Wind at 5-6.

¹²⁸ NextEra at 7-9.

72. BP Wind argues that, if the Commission does not allow ICIF-only entities to forego filing an OATT, it should at a minimum not require such companies to file an OATT with the Commission until after completion of interconnection studies by the interconnecting utility and the requesting party has committed to move forward with its project.¹²⁹ ITC argues that if the Commission does not extend the blanket waiver to ICIF-only entities, the Commission should provide the option for ineligible entities to file a less burdensome and more narrowly tailored OATT that governs the terms of interconnections via the LGIP and LGIA.¹³⁰

c. Commission Determination

73. The proposal to limit the waiver to ICIF owners that also sell electricity was intended to prevent the creation of a regulatory gap and ensure that potential customers are not deprived of the ability to seek interconnection with ICIF as a result of the waiver of ICIF owners' OATT obligation. We believe that the initial assessment in the NOPR that relatively few entities that own and/or operate ICIF would be excluded from the blanket waiver by the requirement that they sell electricity may be incorrect. We also believe that the value of reducing regulatory burdens, which is a goal of this Final Rule, applies equally to ICIF owners who sell electricity and to those that do not. Therefore, we conclude that we should extend the blanket waiver to ICIF owners who do not sell

¹²⁹ BP Wind at 7.

¹³⁰ ITC at 8.

electricity, but, in doing so, we must ensure that no potential customers are deprived of their ability to seek interconnection with ICIF by the waiver of the ICIF owner's OATT obligation. To expand the entities eligible for the blanket OATT waiver, we adopt the following procedure to allow ICIF-only entities to be eligible for the blanket OATT waiver. Any public utility to which the blanket waiver stated in section 35.28(d)(2) of the regulations adopted herein applies, but which does not sell electric energy, will receive the blanket waiver upon filing an informational statement with the Commission, as provided for in those regulations adopted herein.¹³¹ In the statement, the entity must declare that, "In order to satisfy the requirements for a blanket waiver as described in section 35.28(d)(2) of the Commission's regulations, [entity] commits to comply with and be bound by the obligations and procedures applicable to electric utilities under section 210 of the FPA." This informational statement may be brief, requiring only the name and contact information for the entity making the statement, and the affirmative declaration described in the previous sentence. These section 210 statements are to be filed in the following docket, Docket No. AD15-9-000. The Commission will take no action in response to these statements, but the blanket waiver will be applicable upon filing this informational statement.

74. The purpose of this section 210 statement is to create a publically available record of ICIF-only entities that are taking advantage of the blanket OATT waiver, and of the

¹³¹ We will not issue a public notice, accept comments, or issue an order on the informational filings.

fact that, even though these entities are not electric utilities, they are subject to an application to the Commission under section 210 for an interconnection order. Through this process, our intent is to extend the benefits of the blanket OATT waiver to ICIF-only entities, protect the rights of potential interconnection customers, and minimize the regulatory burden to accomplish these goals. If an entity submits such a statement and later objects to or fails to comply with section 210 obligations and procedures, its blanket waiver will be deemed to have been revoked.¹³²

75. Accordingly, we are revising section 35.28(d)(2) of the regulations to incorporate this extension of the blanket waiver to entities that are not electric utilities, upon the filing of the section 210 statement described above. The safe harbor protections at section 35.28(d)(2)(ii)(B) will also be available to those entities eligible for the blanket waiver, as discussed below.

3. Status of the Third-Party Requester

a. Commission Proposal

76. In the NOPR, the Commission stated, “To the extent that either the third-party requester or ICIF owner does not meet applicable requirements for purposes of sections

¹³² A section 210 informational statement would remain operative if the public utility that filed it had a change in ownership. However, if the original public utility with an informational statement sold the facilities to a different entity, the new entity would have to satisfy the criteria for a waiver (including, for instance, not owning network transmission facilities), and if it does not, it would be subject to OATT requirements. It is the party’s responsibility to ensure that its regulatory filings are up to date.

210 and 211, but where the third-party requester would be eligible for OATT service, the ICIF waiver would not apply.”¹³³

b. Comments

77. AWEA, First Wind, and Invenergy argue that a public utility’s eligibility for the blanket waivers should not depend on the status of any such potential third party that might seek access to ICIF. They argue that the waiver would not provide the expected benefits of reducing risks if it would not apply in the circumstance of an ineligible third-party requester. They argue that the Commission does not explain how an ICIF owner would be expected to deal with requests from such a third-party requester. These parties argue that, if the Commission is concerned about this, it should by regulation require such entities to follow procedures under sections 210 and 211.¹³⁴

c. Commission Determination

78. We agree with commenters that making the applicability of the blanket waiver to the ICIF owner dependent on the status of a potential third-party requester would create unnecessary uncertainty for ICIF owners. Accordingly, we clarify that applicability of the blanket waiver will not depend on the status of the third-party requester. The applicability of the blanket waiver does, however, depend on the status of the ICIF owner or the ICIF owner’s willingness to file a section 210 statement, as described above.

¹³³ NOPR, FERC Stats. & Regs. ¶ 32,701 at P 51.

¹³⁴ AWEA at 14; First Wind 8-9; and Invenergy at 11-12.

4. Non-Public Utilities

a. Commission Proposal

79. The Commission proposed to grant a blanket waiver of all OATT, OASIS, and Standards of Conduct 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.¹³⁵ The NOPR did not specify how the blanket waiver would apply to non-public utilities.

b. Comments

80. APPA and TAPS state that, in the event the Commission modifies its regulations to create blanket waivers for public utility ICIF owners, the same blanket waiver and safe harbor should also apply to non-jurisdictional utilities for purposes of satisfying reciprocity obligations.¹³⁶ APPA, TAPS, and SWP explain that non-public utilities are not directly subject to OATT, OASIS, and Standards of Conduct requirements, but are obligated to provide reciprocal service over transmission they own, operate, or control as a condition of taking service under a public utility's OATT. APPA and TAPS state that, to the extent a non-public utility is subject to reciprocity solely because it owns, controls, or operates ICIF and sells energy from its generation facility, it should be able to point to any blanket waiver adopted by the Final Rule for public utilities as eliminating its obligation to individually file for "limited and discrete" waivers to satisfy reciprocity

¹³⁵ NOPR, FERC Stats. & Regs. ¶ 32,701 at P 35.

¹³⁶ APPA and TAPS at 27-29.

obligations, thereby avoiding the burden on it and the Commission associated with such waivers. They state that any restrictions or safe harbors adopted with respect to section 210 or 211 proceedings regarding public utility ICIF should also be available to such a non-public utility.

81. NCPA and SWP contend that the Final Rule should make clear that any blanket waiver adopted in this proceeding applies to eligible public utilities and non-public utilities alike, arguing that treating similarly situated utilities differently in this respect would be unduly discriminatory.¹³⁷ SWP states that non-public utilities may request waivers from these obligations according to the same criteria as public utilities. SWP also argues that there is no justification for conferring an advantage on public utilities that non-public utilities do not share.¹³⁸

c. Commission Determination

82. The blanket waiver made available to public utilities under this Final Rule is also available, as commenters suggest, to non-public utilities with a reciprocity obligation.

5. Applicability to Industrial Power Systems' Tie Lines

a. Comments

83. ELCON comments that many industrials own and operate combined heat and power systems or other types of generation that are primarily dedicated to their own consumption needs, and that ambiguity with the scope of the NOPR may arise because of

¹³⁷ NCPA at 4 and SWP at 4.

¹³⁸ SWP at 5.

commonly used nomenclature, because dedicated lines operated by industrials are often referred to as one type of “generator tie line.” ELCON argues that the NOPR should be revised to clarify that the regulations respecting third-party rights to interconnection facilities, even as newly constrained, do not apply to the generator tie lines operated by industrials and dedicated to their own internal consumption.¹³⁹

b. Commission Determination

84. We decline to revise the proposed regulation as ELCON suggests. ELCON’s argument that the NOPR’s discussion of third-party rights to request interconnection and transmission on ICIF should not apply to electric lines from industrial-owned combined heat and power systems raises an issue that is not the subject of this rulemaking. This Final Rule does not make any determination with respect to the applicability of the Commission’s OATT requirements to any particular lines or types of lines. Rather, it applies to any transmission providers who are subject to the requirements of section 35.28 of our regulations, i.e., any public utility that owns, controls, or operates facilities used for the transmission of electric energy in interstate commerce.¹⁴⁰

6. Applicability of the Blanket Waiver to Additional Regulations

a. Commission Proposal

85. In the NOPR, the Commission proposed that the blanket waiver would apply to section 35.28 of the Commission’s regulation, which relates to OATT requirements,

¹³⁹ ELCON at 2-3.

¹⁴⁰ 18 CFR 35.28(a).

Part 37, which relates to OASIS requirements, and Part 358, which relates to Standards of Conduct for Transmission Providers.¹⁴¹

b. Comments

86. Linden argues that the blanket waiver should be expanded to also apply to all of Parts 34, 35, 41, 50, 101, and 141 (except sections 141.14 and 141.15) of the Commission's regulations with respect to any provision of transmission service or interconnection service or other sharing with respect to ICIF.¹⁴² Linden contends that this is consistent with the Commission's findings in an order on a proposed shared facilities agreement between Linden and its affiliate, in which the Commission found that such regulations are waived with respect to Linden.¹⁴³

c. Commission Determination

87. While we recognize that waiver of the provisions mentioned by Linden have, under certain circumstances, been granted by the Commission, we decline to expand the scope of this Final Rule. The blanket waivers granted in this Final Rule are the same as those that could be requested on a case-by-case basis for good cause shown in the Commission's pre-existing regulations at 18 CFR 35.28(d). Whether to grant additional

¹⁴¹ NOPR, FERC Stats. & Regs. ¶ 32,701 at P 1.

¹⁴² Linden at 8.

¹⁴³ Linden at 8 (citing *Cogen Technologies Linden Venture, L.L.P.*, 127 FERC ¶ 61,181, at P 20 (2009)).

waivers on a generic basis was not something proposed to be addressed in this proceeding.

7. Existing Agreements and Waivers

a. Comments

88. Linden contends that the Commission should clarify that the blanket waiver will apply regardless of whether a public utility has already granted access to its ICIF pursuant to a Commission-accepted agreement. Linden argues that the fact that an owner and/or operator of ICIF has allowed a third-party to use its ICIF pursuant to a Commission-accepted agreement does not change the nature of such ICIF, and the blanket waiver should accordingly continue to apply.¹⁴⁴ Linden states that, at the very least, the Commission should clarify that all existing waivers that have been granted to public utilities like Linden will continue to apply.¹⁴⁵

b. Commission Determination

89. We affirm granting access over ICIF via an existing agreement, such as a common facilities agreement or shared use agreement, does not affect an ICIF owner's eligibility for the blanket waiver granted by this Final Rule. Further, we affirm that, if an entity has previously received a specific waiver of the OATT and related obligations pursuant to the Commission's "limited and discrete" or "small entity" standards, the blanket waiver will

¹⁴⁴ Linden at 7.

¹⁴⁵ Linden at 7-8.

supersede the existing waiver.¹⁴⁶ If, as Linden postulates, an entity has received a case-specific waiver that waives requirements in addition to those waived by the blanket waiver, the blanket waiver would not rescind the broader waiver.

8. Existing OATTs

a. Commission Proposal

90. The Commission proposed that the grant of a blanket waiver 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.¹⁴⁷

b. Comments

91. AWEA, Terra-Gen, and NextEra assert that an ICIF owner with an OATT on file should be able to withdraw its OATT if there are no third parties taking, or currently pursuing a request for, interconnection or transmission service.¹⁴⁸ AWEA and Terra-Gen ask that the Commission: (1) clarify that this cancellation policy will apply when the ICIF owner has no existing customers and that any new service requests submitted after such a filing has been made must proceed under sections 210, 211, and 212; and (2) provide an expedited process to grant such requests to withdraw such OATTs.¹⁴⁹

¹⁴⁶ NOPR, FERC Stats. & Regs. ¶ 32,701 at P 40.

¹⁴⁷ NOPR, FERC Stats. & Regs. ¶ 32,701 at P 40.

¹⁴⁸ AWEA at 17; NextEra at 10; and Terra-Gen at 2.

¹⁴⁹ AWEA at 17 and Terra-Gen at 4.

Terra-Gen states that it incurred substantial costs in attempting to comply with the Commission's OATT requirements over several years, only to find that it could not recover those costs because the customer that requested transmission service ultimately did not become a transmission customer. Terra-Gen argues that this experience underscores the importance of the Commission's proposal to provide a case-by-case mechanism to accept cancellation of OATTs filed by ICIF owners that have proven to be unnecessary because no third parties are taking service under them.¹⁵⁰ NextEra requests that the Commission clarify its statement in the NOPR that withdrawal of an OATT "if no party is taking service under it" was not intended to preclude the ability of an ICIF owner with an OATT on file from exercising its rights under section 205 of the FPA to propose alternative tariff structures in the future, as appropriate to the facts and circumstances of service available on the ICIF.¹⁵¹

92. AWEA further contends that the blanket waivers should also automatically apply to those that already have OATTs on file. AWEA states that ICIF owners that currently have an OATT on file are in need of the proposed reforms just as much as future ICIF owners, and argues that providing blanket waivers to this group as well would provide consistency and certainty to these entities.¹⁵²

¹⁵⁰ Terra-Gen at 2.

¹⁵¹ NextEra at 10-11.

¹⁵² AWEA at 11.

c. Commission Determination

93. In the instance where an ICIF owner has an OATT on file and no third parties are taking service, the Commission will consider a request to withdraw an OATT on a case-by-case basis. Thus, we decline to automatically apply blanket waivers to those that already have OATTs on file. We believe this is appropriate in order to give any potential customer actively pursuing service sufficient notice before allowing a filed OATT to be withdrawn. As such, we decline to establish a separate process for cancelling existing OATTs because the Commission will consider the specific circumstances of each request to withdraw an OATT already on file.

9. Revoking the Blanket Waiver

a. Commission Proposal

94. In the NOPR, the Commission proposed that the blanket waiver would not be automatically revoked by a service request, but could be revoked in a Commission order if the Commission determines that it is in the public interest to do so pursuant to a proceeding under sections 210 and 211. The Commission also proposed that the waiver would 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). The Commission sought

comment on the circumstances under which and the mechanism by which the Commission should revoke the proposed waiver.¹⁵³

95. The Commission also proposed that, if an OATT waiver were revoked because of such a change in circumstances, the waivers of OASIS and Standards of Conduct would 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 effect.¹⁵⁴ In the instance where the Commission revokes the ICIF waiver by order, the Commission noted that it may determine whether the OASIS and Standards of Conduct waivers should be continued based on the criteria that are in effect.¹⁵⁵

b. Comments

96. NextEra, BHE, and AWEA agree that revocation of the blanket waiver should be considered on a case-by-case basis and believe that the processes set forth in sections 210 and 211 of the FPA and section 2.20 of the Commission's regulations are sufficient to evaluate potential revocation of waivers granted to ICIF owners.¹⁵⁶ If, for example, the Commission were to determine that an ICIF owner employed market power against the third party requesting service over the ICIF, it would be reasonable for the Commission

¹⁵³ NOPR, FERC Stats. & Regs. ¶ 32,701 at P 38.

¹⁵⁴ Waivers of the Standards of Conduct may be granted for good cause pursuant to 18 CFR 358.1(d).

¹⁵⁵ NOPR, FERC Stats. & Regs. ¶ 32,701 at P 39.

¹⁵⁶ NextEra at 9-10; BHE at 7-8; and AWEA at 8.

to consider the revocation of waiver or other enforcement remedies.¹⁵⁷ Similarly, AWEA asserts that the only plausible basis for revocation of the waiver, besides losing eligibility, is if an ICIF owner refuses to provide transmission access following proceedings under sections 210, 211, and 212. AWEA seeks clarification on what, if any, other criteria might be used by the Commission to determine that it is in the public interest to revoke such a waiver and requests the Commission to provide clear criteria for what would constitute a waiver revocation.¹⁵⁸ BHE states that the waiver should only be revoked in limited circumstances, such as when a third party is granted access under sections 210 and 211 of the FPA or when material circumstances change such that the ICIF owner no longer satisfies the waiver qualification.¹⁵⁹

97. AWEA states that acquisition of transmission facilities should not automatically trigger revocation of the blanket waiver. AWEA argues that service over such transmission facilities will be subject to applicable open access regulations but that ICIFs are distinct facilities that exist for the limited purpose of connecting generation to the grid.¹⁶⁰

98. With respect to the revocation process, AWEA recommends that the Commission provide an ICIF owner with reasonable advanced notice detailing the reasons for

¹⁵⁷ NextEra at 10.

¹⁵⁸ AWEA at 9.

¹⁵⁹ BHE at 7.

¹⁶⁰ AWEA at 9.

potential revocation, and give the ICIF owner an opportunity to dispute and to cure the reasons for such a potential revocation.¹⁶¹ AWEA suggests that the Commission first issue a show cause order to the waiver holder to address why the waiver should not be revoked and provide an opportunity for the waiver holder to make that demonstration.¹⁶²

99. AWEA recommends that the Commission outline the process to reinstitute an ICIF owner's waiver if, after revocation of a waiver, it is discovered that the waiver revocation was unnecessary, such as, for example, if the requirement to file an OATT proves to be unnecessary because of the failure of the requesting third party to take transmission service.¹⁶³

100. AWEA supports the Commission proposals that (1) if the OATT waiver is revoked, the Commission may determine whether the OASIS and Standards of Conduct waivers should continue to be based on the criteria in effect;¹⁶⁴ and (2) if the OATT waiver is revoked due to loss of eligibility, the OASIS and Standards of Conduct waivers will also be revoked without prejudice to the entity filing a request to continue the OASIS and Standards of Conduct waivers.¹⁶⁵

¹⁶¹ AWEA at 9-10.

¹⁶² AWEA at 10.

¹⁶³ AWEA at 10.

¹⁶⁴ AWEA at 10-11.

¹⁶⁵ AWEA at 10-11.

c. Commission Determination

101. We adopt the NOPR proposal that the blanket waiver would not be automatically revoked by a service request, but could be revoked in a Commission order if the Commission determines that it is in the public interest to do so pursuant to a proceeding under sections 210 and 211 of the FPA. We also adopt the NOPR proposal that the waiver would be deemed to be revoked as of the date the public utility ceases to satisfy the qualifications for such waiver. Additionally, if the ICIF that are covered by a blanket waiver become integrated into a transmission system such that they can no longer be considered ICIF, the blanket waiver would be deemed to have been revoked. To the extent that a dispute arises regarding whether a facility is eligible for the waiver, the Commission will address such a dispute at that time.

102. If the OATT waiver is automatically revoked because of a change in circumstances, we affirm that the waivers of OASIS and Standards of Conduct would 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 effect.

103. We decline to elaborate on the specific circumstances that would lead to the revocation of the blanket waiver other than ceasing to satisfy the qualifications for such waiver, because it is not possible to anticipate every circumstance that would result in a revocation. Revocation of the blanket waiver in circumstances other than ceasing to satisfy the qualifications for such waiver will be determined by the Commission under applicable statutory and regulatory provisions. Any instance of revocation, however, would be the result of a Commission proceeding, so the ICIF owner would have notice of

the revocation and full due process rights to respond. Moreover, under sections 210 and 211 the Commission may direct service to be provided under an interconnection and transmission service agreement without directing that the ICIF owner file an OATT. However, the Commission reserves the right to revoke the blanket waiver and require the filing of an OATT to ensure open access in appropriate circumstances.

C. Interconnection and Transmission Under Sections 210 and 211 of the Federal Power Act

1. Sections 210 and 211

104. Sections 210 and 211 of the FPA describe the process for seeking Commission-ordered interconnection and transmission 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.”¹⁶⁶ An “electric utility” is defined as “a person or Federal or State agency ... that sells electric energy.”¹⁶⁷ 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.¹⁶⁸ The term “transmitting utility” is defined as an entity that

¹⁶⁶ 16 U.S.C. 824i(a)(1)(A).

¹⁶⁷ 16 U.S.C. 796(22).

¹⁶⁸ 16 U.S.C. 824j.

“owns, operates, or controls facilities used for the transmission of electric energy . . . in interstate commerce . . . for the sale of electric energy at wholesale.”¹⁶⁹ For a third party to obtain interconnection services and transmission services, an application must be made under both sections 210 and 211.¹⁷⁰ An applicant may consolidate the applications for the Commission’s consideration.¹⁷¹

105. An application under section 210 must show that the interconnection: (1) 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) meets the requirements of section 212.¹⁷² The requirements of section 212 are discussed further below.

106. An application under section 211 requires that the third party seeking transmission service first make a good faith request for service, complying with 18 CFR section 2.20, specifying details as to how much capacity is requested and for what period, at least

¹⁶⁹ 16 U.S.C. 796(23).

¹⁷⁰ *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).

¹⁷¹ *See Aero Proposed Order*, 115 FERC ¶ 61,128.

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

60 days before making an application to the Commission for an order requiring transmission service.¹⁷³ 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.

107. 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.¹⁷⁴

a. Commission Proposal

108. The Commission proposed in the NOPR that, if a third party seeks to use ICIF that qualify for the blanket waiver discussed above, an eligible entity seeking interconnection and transmission service on ICIF would need to follow the rules and regulations

¹⁷³ 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.

¹⁷⁴ 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).

applicable to requests for service under sections 210 and 211 (subject to the safe harbor presumption proposed in the NOPR).¹⁷⁵

109. As discussed above, the Commission's current practice with respect to allowing an ICIF owner to have priority use of excess transmission capacity it has built is to allow the ICIF owner to demonstrate specific plans and milestones for any planned future generation development by the ICIF owner or its affiliates. Consistent with that practice, the Commission proposed in the NOPR to find that, outside of the safe harbor period and to the extent the ICIF owner can demonstrate specific plans and milestones for its and/or its affiliates' future use of the ICIF, with respect to ICIF that are 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.¹⁷⁶ Thus, the Commission proposed to make priority determinations for use of ICIF, in the event of a third party request, in the process under sections 210 and 211. The Commission sought comment on whether an ICIF owner's or affiliate's planned future use of the ICIF is an appropriate consideration to factor into a proceeding under sections 210 and 211.

110. 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

¹⁷⁵ NOPR, FERC Stats. & Regs. ¶ 32,701 at P 41.

¹⁷⁶ NOPR, FERC Stats. & Regs. ¶ 32,701 at P 47.

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. Even if an ICIF owner were able to demonstrate in such a proceeding that no excess capacity exists, if supported by the record in the case, the Commission could order the eligible ICIF owner to expand its facilities to provide interconnection and transmission service under sections 210 and 211.¹⁷⁷ Section 212 requires that the eligible ICIF owners would be fully compensated for any required expansion.¹⁷⁸ This is similar to the rights and obligations under the *pro forma* OATT.¹⁷⁹

¹⁷⁷ 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.”).

¹⁷⁸ 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 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.

¹⁷⁹ Section 15.4 of the *pro forma* OATT states that 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.

b. Comments

111. Most commenters support the NOPR proposal that third parties seeking to use ICIF subject to the blanket waiver should do so pursuant to sections 210 and 211. AWEA, BHE, EEI, NextEra, Recurrent, and Southern argue that this approach will protect the ICIF owner from speculative requests for transmission service.¹⁸⁰ NextEra and BHE further argue that the requirements of sections 210 and 211 also protect the interests of third parties seeking to use ICIF.¹⁸¹ NextEra and Southern also support the NOPR's proposal to evaluate, in the course of a proceeding under sections 210 and 211, whether an ICIF owner's "specific plans and milestones" justify priority rights to use excess capacity on the ICIF, to the extent the safe harbor is not applicable.¹⁸² Finally, NextEra and AWEA contend that the framework under sections 210 and 211 provides the flexibility necessary for ICIF owners and third parties to reach mutually agreeable arrangements tailored to their respective needs.¹⁸³

112. APPA and TAPS argue that the NOPR, as proposed, would erect an impassable barrier to accessing ICIF. APPA, TAPS, and NRECA argue that a proceeding under

¹⁸⁰ Recurrent at 4; Southern at 7; NextEra at 11-14; AWEA at 12-13; BHE at 8; and EEI at 16.

¹⁸¹ NextEra at 11-14 and BHE at 8.

¹⁸² NextEra at 11-14.

¹⁸³ NextEra at 11-14 and AWEA at 12-13.

sections 210 and 211 is time-consuming, burdensome, and expensive.¹⁸⁴ They state that Order No. 888 expressly found those statutory processes to be too cumbersome and time-consuming to provide non-discriminatory access and placed customers “at a severe disadvantage compared to the transmission owner.”¹⁸⁵ They contend that by limiting requesters to access only through sections 210 and 211, even if the request is received many years after the ICIF is energized and there is ample unused capacity, the NOPR creates a potent and permanent obstacle to open access that enhances the ICIF owner’s vertical market power without any justification.¹⁸⁶ NRECA argues that prospective customers should not have to initiate such a proceeding with the Commission in order to demonstrate entitlement to service on these Commission-jurisdictional lines.¹⁸⁷ APPA and TAPS also contend that the NOPR has not demonstrated that the proposed procedures will cost less than existing requirements, arguing that the lengthy and costly procedures of sections 210 and 211 could not possibly be less expensive for ICIF owners on an industry-wide basis.¹⁸⁸

¹⁸⁴ APPA and TAPS at 11-12.

¹⁸⁵ APPA and TAPS at 12 (citing to Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,646).

¹⁸⁶ APPA and TAPS at 24-25.

¹⁸⁷ NRECA at 5.

¹⁸⁸ APPA and TAPS at 20-21.

c. **Commission Determination**

113. We find that with respect to ICIF eligible for the blanket waiver discussed above, it is appropriate for entities seeking interconnection and transmission service on ICIF to follow the rules and regulations applicable to requests for service under sections 210 and 211 (subject to the safe harbor discussed below).¹⁸⁹ Given the risk of investment in generation and ICIF, it is appropriate to provide an ICIF owner with priority rights over the use of the 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. In addition, we find that given the relatively small percentage of ICIF owners that have actually had to file an OATT,¹⁹⁰ requiring the entity requesting service over ICIF to pursue such service under sections 210 and 211 will not overly burden potential customers of service on ICIF. The process under sections 210 and 211 assures third-party entities requesting service on ICIF and eligible ICIF owners alike that they will have specified procedural rights as set forth in sections 210, 211, and 212 of the FPA and appropriately balances ICIF owners' and third parties' rights to service on ICIF. Further, this framework provides the contractual flexibility that some commenters suggest is not available under our existing policy so that contractual arrangements (e.g., transmission

¹⁸⁹ 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).

¹⁹⁰ *See supra* P 38.

service agreements, interconnection agreements, and/or shared facilities agreements) can be tailored to the special situations for ICIF in determining the appropriate terms and conditions of service, as many of the *pro forma* OATT provisions are not applicable to service over ICIF. Finally, we recognize that our existing policy to allow an ICIF owner to retain priority rights if it has plans to use the ICIF capacity and is making progress to achieve those plans can involve a potential transmission or interconnection customer in complex proceedings associated with a request for service. Thus, we believe the reforms adopted herein will not meaningfully change the expense potential customers incur to obtain service.

114. APPA and TAPS are correct that the Commission in Order No. 888 found section 211 to provide insufficient relief as a general method of enabling more competitive generation to obtain open access transmission service. As a result, Order No. 888 required that public utilities file an OATT to provide readily available, comparable service at known rates, terms, and conditions. In this Final Rule, the Commission finds that the filing of an OATT and compliance with certain regulations are not necessary to prevent unjust and unreasonable rates or unduly discriminatory behavior with respect to ICIF. ICIF are sole-use, limited and discrete, radial in nature, and not part of an integrated transmission network, and third-party requests to use ICIF are infrequent. Case-by-case determinations under sections 210 and 211 are not appropriate for the large number of transmission service requests on the integrated grid, but are appropriate for the few expected requests for service on ICIF, each of which would likely have different

circumstances. We find that, for this set of circumstances, the framework of sections 210 and 211 provide a sufficient means for third-party access to ICIF.

2. Voluntary Arrangements

a. Comments

115. First Wind and Invenergy ask the Commission to confirm that ICIF owners may continue to enter into shared use agreements with affiliates without requiring the affiliated party to utilize sections 210, 211 and 212 to obtain access.¹⁹¹

Similarly, Linden requests that the Commission clarify that the Commission’s proposed process does not preclude an ICIF owner and a non-affiliated entity seeking service to mutually agree upon an appropriate arrangement outside of the context of a proceeding under sections 210 or 211, if the parties file any resulting mutually agreed upon arrangement pursuant to section 205 of the FPA.¹⁹² Linden contends that the new proposed section 35.28(d)(2)(ii) suggests that the parties must use the process before the Commission that is outlined in sections 210, 211, and 212 of the FPA and the Commission’s corresponding regulations. Linden asserts that even where sections 210 and 211 apply, section 212(c)(1) of the FPA requires that the Commission “set a reasonable time for parties . . . to agree to terms and conditions under which such order is to be carried out” and that the Commission generally directs the parties to negotiate

¹⁹¹ First Wind at 15 and Invenergy at 14-15.

¹⁹² Linden at 4-5.

appropriate agreements.¹⁹³ Accordingly, Linden recommends that the Commission should consider revising section 35.28(d)(2)(ii) to explicitly allow for the possibility that parties may arrive at mutually agreeable arrangements without undergoing a proceeding under sections 210 and 211 at the Commission.¹⁹⁴ Linden further states that parties to the relevant arrangements should be allowed flexibility to negotiate appropriate terms and conditions without restriction as to the form or nature of the agreement for greater regulatory efficiency, and recommends that the Commission add an additional section 35.28(iii) explicitly acknowledging that parties may mutually agree on rates, terms and conditions, subject to Commission review and acceptance.¹⁹⁵

116. E.ON asks the Commission to clarify that the blanket waiver should not be jeopardized if a planned phase of a generation project is owned by a non-affiliate.¹⁹⁶ Similarly, NRG and E.ON ask for clarification that voluntarily negotiating a bilateral agreement with a third party that is seeking access to the ICIF during the safe harbor period, discussed below, would not jeopardize the continuation of the safe harbor period.¹⁹⁷

¹⁹³ Linden at 5.

¹⁹⁴ Linden at 5-6.

¹⁹⁵ Linden at 6-7.

¹⁹⁶ E.ON at 13.

¹⁹⁷ NRG at 3-4 and E.ON at 13.

b. Commission Determination

117. We clarify that the availability of the process under sections 210 and 211 does not preclude the opportunity for an ICIF owner and an entity seeking service, including an affiliate, to mutually agree, outside of the process under sections 210 and 211, to an arrangement for service over the ICIF. In fact, this flexibility benefits both the ICIF owner and an entity seeking service, as it allows the parties the opportunity to craft an agreement appropriate for the circumstances and potentially expedite access to ICIF. In that case, availability of the process under sections 210 and 211 provides protection to entities seeking service by allowing them to seek service under the process under sections 210 and 211 if an agreement cannot be reached. Furthermore, we likewise clarify that this flexibility applies both to affiliates and non-affiliates of the ICIF owner, such that ICIF owners may enter into shared use agreements with affiliates or non-affiliates, without requiring a proceeding under sections 210 and 211 to obtain access. Finally, we clarify that a shared-use agreement or bilateral agreement with either an affiliate or non-affiliate will not in itself jeopardize the applicability of the blanket waiver or the continuation of the safe harbor period, discussed below. We find that this will allow flexibility and promote mutually agreeable arrangements for sharing facilities. In any case, ICIF owners that are public utilities would still be subject to the statutory requirement of sections 205 and 206 forbidding unduly discriminatory practices.

118. We agree that our use of the term “shall” in new section 35.28(d)(2)(ii) may have inadvertently given the impression that voluntary agreements without resort to sections 210 and 211 were not allowed. We did not intend that, and therefore change the

word “shall” to “may” in section 35.28(d)(2)(ii). Indeed, the flexibility to enter into voluntary agreements is inherent in the process under sections 210 and 211. As Linden points out, section 212 recognizes that parties should have a reasonable time to agree to terms and conditions,¹⁹⁸ and section 211 requires that a third party must have submitted a good faith request for service at least 60 days before it may submit a section 211 application before the Commission. Nothing in sections 210 or 211 precludes entities from arriving at mutual agreements prior to or instead of seeking to establish a process under sections 210 and 211. Accordingly, we confirm that an ICIF owner and an entity seeking service may mutually agree to an arrangement for interconnection and transmission service over the ICIF, without initiating a process under sections 210 and 211.

3. Interaction with the Transmission System

a. Comments

119. AWEA states that a third party requesting service on an ICIF should be required to submit an appropriate interconnection or transmission service request to the transmission provider with whom the ICIF are interconnected within 30 days of the good faith request to the owner of the ICIF and/or within a reasonable time before an application under sections 210 and 211 is made. NextEra argues for a similar requirement, stating that the third party should make a request to the transmission provider within 60 days following

¹⁹⁸ See 16 U.S.C. 824k(c)(1).

the completion of a feasibility study by the ICIF owner in order for a subsequent petition under sections 210 or 211 of the FPA to be considered in good faith.¹⁹⁹ AWEA explains that, even if the proposed reforms were put into place, failing to require such a submittal could lead to gaming opportunities by unaffiliated generators who may wish to establish a queue position on an ICIF, while avoiding upfront costs associated with actually injecting power into a transmission provider's network grid.²⁰⁰ AWEA argues that it is reasonable to make such a requirement because it is critical for system reliability that all three of the relevant parties are involved in any interconnection of new generation to the grid.²⁰¹

120. MISO and the MISO TOs suggest that the Commission should require the new interconnection customer who requests to interconnect to the existing ICIF to enter into an agreement with the existing interconnection customer before allowing the new interconnection customer to enter the binding portion of the governing interconnection procedures.²⁰² They argue this is reasonable because adding generating facilities to existing ICIF will complicate the existing interconnection process and require coordination with the relevant RTO or the use of existing RTO interconnection

¹⁹⁹ NextEra at 14-15.

²⁰⁰ AWEA at 16-17.

²⁰¹ AWEA at 17.

²⁰² MISO at 7 and MISO TOs at 5.

procedures to ensure that new interconnections to ICIFs will not adversely impact the reliable operation of the transmission system.²⁰³

121. While ITC does not oppose the reforms proposed in the NOPR, ITC is concerned that the Commission's proposal to rely exclusively on sections 210 and 211 of the FPA to govern third-party interconnections on ICIF fails to provide sufficient clarity on the precise contractual relationship that will exist between the ICIF owner, a third party proposing to interconnect with ICIF, the transmission provider, and the impacted transmission owner (provided these are separate entities). ITC recommends that the Commission provide additional guidance in the Final Rule on the process for establishing contractual relationships between these four types of parties, the nature of these contractual relationships, and how successful applications will fit into the relevant transmission provider study processes necessary to ensure that such connections occur safely and reliably. Specifically, ITC recommends that the Commission include in the Final Rule requirements that: (1) interconnection requests approved under sections 210 and 211 must proceed under the LGIP of the transmission provider to which the ICIF owner is interconnected; and (2) the third party must enter into a separate LGIA with the impacted transmission owner and facilities agreement with the ICIF owner.²⁰⁴ Given that the transmission owner owns and operates facilities to which the shared ICIF are

²⁰³ MISO at 5-6 and MISO TOs at 4-5.

²⁰⁴ ITC at 7-8.

interconnected, the third party should be required to enter into an LGIA with the impacted transmission owner. This will clearly establish the rights and obligations of all parties and, more importantly, ensure that the appropriate reliability studies are conducted prior to allowing an interconnection.²⁰⁵ The MISO TOs agree with ITC that the Commission should modify its NOPR proposal to require greater coordination with the transmission provider and transmission owner because this will lessen the likelihood of operational and reliability problems while lessening the OATT, OASIS, and Standards of Conduct burdens on ICIF owners that the Commission seeks to alleviate.²⁰⁶

122. Similarly, EPSA recommends that the Commission should encourage parties to utilize appropriate existing LGIA and LGIP provisions regarding terms, conditions and procedures in the Final Rule because the provisions of the LGIA and LGIP (e.g., section 9.9.2 of the LGIA) work well for the interconnection process and that augmenting the process under sections 210, 211 and 212 with these procedures will offer clarity to industry stakeholders.

123. EEI requests that the Commission not be prescriptive with respect to a mechanism for interconnection or transmission under this rule, and states that under the framework under sections 210 and 211, the ICIF owner, the eligible entity seeking interconnection to the ICIF and the transmission provider will have flexibility on how to develop the terms

²⁰⁵ ITC at 11.

²⁰⁶ MISO TOs at 5.

and conditions of the interconnection to the ICIF and any associated transmission delivery service over the ICIF.²⁰⁷

124. Southern asserts that the ICIF owner, the party seeking interconnection to the ICIF, and the transmission provider should have the flexibility to develop appropriate arrangements for both interconnection and transmission service that meet all parties' needs so long as the new interconnection customer is able to interconnect its generating facility and acquire transmission service on terms and conditions that are similar to other customers. Therefore, Southern contends, the Commission should not be prescriptive with respect to the mechanism to be used for interconnection or transmission service under this rule as long as all affected parties agree to jointly study and provide interconnection and transmission service for the new generator requesting interconnection, with the new generator's commitment to bear the expense of such work. Moreover, Southern notes that the Commission would retain oversight over the third-party requests for service over the ICIF because it would have an opportunity to review such arrangements under FPA sections 210, 211 and 212 and amendments to existing interconnection agreements under section 205.²⁰⁸

²⁰⁷ EEI at 16-17.

²⁰⁸ Southern at 7-8.

b. Commission Determination

125. Commenters appear to be conflating the scope of this Final Rule – access to ICIF – with requirements for access to the network/integrated grid. As such, we decline to prescribe additional requirements for access to the network/integrated transmission system by entities seeking to interconnect with ICIF or a process for how requests to interconnect with ICIF must fit into the transmission provider’s study processes. We reaffirm the existing policy that third-party requesters are obligated to obtain service on the transmission facilities at or beyond the Point of Change of Ownership as well as those facilities beyond the Point of Interconnection with ICIF pursuant to the relevant existing OATT and interconnection procedures.²⁰⁹ The existing policy, under which third-party requesters are obligated to obtain service on the transmission facilities beyond the ICIF pursuant to the relevant existing OATT and interconnection procedures, will maintain the reliability of the network transmission system by ensuring that the appropriate studies are conducted. At the same time, the Commission’s existing policy provides the flexibility for the entity seeking interconnection to the ICIF, the ICIF owner, and the public utility

²⁰⁹ In addition, an application under section 211 requires that the third party seeking transmission first make a good faith request for service, complying with 18 CFR section 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. 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. As part of the evaluation of whether the third party seeking transmission service made a good faith request for service, the Commission may look to see what measures, if any, the third party has taken to acquire service on the network transmission system beyond the ICIF.

transmission provider to develop arrangements for the interconnection to the ICIF and any associated transmission delivery service over the ICIF.

126. In response to AWEA's assertion that failing to require a third party seeking service on ICIF to submit an interconnection or transmission service request to the transmission provider with whom the ICIF are interconnected could lead to gaming opportunities by unaffiliated generators, we find that the process under sections 210 and 211 will limit speculative requests for transmission service from the ICIF owner and deter attempts to game the interconnection process. We are not persuaded that additional protection is needed at this time. The framework under sections 210 and 211 assures that ICIF owners have specified procedural rights as set forth in sections 210 and 211 of the FPA.

127. We conclude that the existing policy, that third-party requesters are obligated to obtain service on the transmission facilities at or beyond the Point of Change of Ownership as well as those facilities beyond the Point of Interconnection pursuant to the relevant OATT and interconnection procedures, strikes the right balance between ensuring reliability, providing flexibility, and protecting the rights of the ICIF owner. Accordingly, we decline to further prescribe how a third-party seeking service over ICIF pursuant to sections 210 and 211 also gains access to the networked transmission provider's transmission system.

4. Scope of Regulations to be Modified

a. Commission Proposal

128. In the NOPR, the Commission proposed to add subsection 35.28(d)(2) to the Commission's regulations for the purpose of setting forth the terms of the blanket OATT waiver, and did not propose to revise other regulations.²¹⁰

b. Comments

129. E.ON argues that section 2.20 of the Commission's regulations, which implements the section 211 process with respect to making and responding to "good faith" requests for transmission services, should be amended as to its applicability to ICIF because an ICIF owner cannot fulfill all of the requirements of a traditional transmission provider in that regulation. For example, section 2.20 requires the transmitting utility to respond to the requester with a date by which a response will be sent to the requester and a statement of any fees associated with responding to its request (e.g., initial studies), and if the transmitting utility determines it cannot provide the requested service with existing capacity, then it must provide studies and data regarding constraints and offer an executable agreement wherein the requester agrees to reimburse the transmitting utility for all costs of performing any studies.²¹¹ E.ON argues that the Commission should clarify that the section 2.20 process requires the third-party requester to arrange and pay for all required studies with the ICIF's transmission provider, and that the ICIF owner has

²¹⁰ NOPR, FERC Stats. & Regs. ¶ 32,701 at P 35.

²¹¹ E.ON at 13-14.

no obligation to arrange and pay for all such studies. E.ON argues that this would encompass impacts on the ICIF, interconnecting transmission owner's interconnection facilities and transmission facilities, the transmission provider's grid and any other affected entities' facilities.²¹²

c. Commission Determination

130. We see no reason to revise section 2.20 of our regulations. We do not expect the ICIF owner to study the networked transmission system, but only to study the capacity available on its ICIF. Further, we believe that section 2.20 is clear that the requesting party pays for any studies associated with a request for service over ICIF.²¹³ Given the nature of the study to determine available capacity on the ICIF (typically by comparing the thermal rating of the facilities to the existing commitments on the line) and that the ICIF owner should have the information necessary to perform such studies, this is likely to be a fairly straightforward process that is best performed by the ICIF owner.

Accordingly, the transparency and timing requirements of section 2.20 should not prove overly burdensome for ICIF owners and do not require revision.

5. Reliability Standards

a. Comments

131. ITC requests that the Commission clarify how the proposed interconnection process interacts with the requirements of NERC Reliability Standard FAC-001-1

²¹² E.ON at 14.

²¹³ See 18 CFR 2.20(c)(1) and 18 CFR 2.20(c)(4)(iii).

(Facility Connection Requirements).²¹⁴ This standard applies to all transmission owners and those generator owners that have an executed agreement to evaluate the reliability impact of interconnecting a third party facility to the generator owner's existing facility that is used to interconnect to the interconnected transmission systems.

b. Commission Determination

132. We clarify that nothing in this Final Rule changes the requirement to comply with all Commission-approved mandatory Reliability Standards, including FAC-001-1.

D. Safe Harbor

1. Whether and To What Extent There Should be a Safe Harbor Period

a. Commission Proposal

133. To reduce risks to ICIF owners eligible for the blanket waiver discussed above during the critical early years of their projects, the Commission proposed 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 requester 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

²¹⁴ ITC at 11-12.

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.

b. Comments

134. Many commenters²¹⁵ support the proposed safe harbor period, during which a developer of a generator tie line would be presumed to have priority rights to the capacity on the generator tie lines it funded for five years from the date the line is energized.

However, a few commenters oppose the safe harbor, and a few others argue it should be strengthened.

135. APPA and TAPS argue that the NOPR's proposed safe harbor cuts back on the relief otherwise available under sections 210, 211, and 212, and all but ensures absolute foreclosure of competitors from access to ICIF.²¹⁶ They explain that in order to rebut the presumptions, a requester would have the burden of proof to show that the ICIF owner lacks definitive plans to use its capacity, and that the public interest under sections 210 and 211 is better served by granting access to the third party than by allowing the ICIF owner to reserve its ICIF capacity for its own future use. They contend that the proposed presumption is effectively irrebuttable because the Commission's determinations as to whether the ICIF owner and its affiliates have definitive plans have been based on

²¹⁵ AWEA at 5; BHE at 3; BP Wind at 4; E.ON at 10; EEI at 4; EPSA at 6; ELCON at 2-3; First Wind at 2; Invenegy at 2; NextEra at 6; NRG at 3; Recurrent at 3; Sempra at 2; SEIA at 3; Southern at 6; and Terra-Gen at 4.

²¹⁶ APPA and TAPS at 14-15.

confidential demonstrations available only to the ICIF owner and its affiliates. They note that the bar on any “expansion” during the safe harbor period may also foreclose all interconnections, even if the definitive plans presumption were somehow surmounted, because while the NOPR does not define the term “expansion,” modifications to the ICIF owner’s facilities will be necessary in any interconnection of a competitor’s generator.

136. NRECA argues that the Commission should not implement its proposed safe harbor creating a rebuttable presumption against transmission access for five years in cases where the customer requesting service on the ICIF needs it to serve load efficiently.²¹⁷ NRECA states that load has little or minimal impact on the available capacity of ICIF, and, in many cases may actually increase the capability of ICIF with counterflow. NRECA states that the burden of proof should be on the ICIF owner to demonstrate that it has specific plans to use the transmission capacity in such a way that would prevent it from providing access to a load-serving transmission customer, adding that the Commission cannot reasonably require a prospective customer to prove a negative – that the owner has no such plans – when all of the relevant information is in the hands of the owner.²¹⁸ NRECA also argues that the Commission has not provided any justification for granting a five-year presumption against requiring an ICIF owner to

²¹⁷ NRECA at 7.

²¹⁸ NRECA at 8.

expand its facilities to accommodate a service request when sections 210 and 211 of the FPA provide for potential increases in transmission capacity as necessary.²¹⁹

137. On the other hand, AWEA and E.ON support the safe harbor concept but urge the Commission to consider removing the rebuttable presumption standard. E.ON expresses concern that the safe harbor the Commission proposes would not relieve the interconnection customer of the regulatory compliance burden, because a third party could still initiate the process under sections 210 and 211 during the safe harbor period and thus force the ICIF owner to demonstrate specific plans and milestones in order to sustain the rebuttable presumption.²²⁰ Further, while the NOPR proposed to rebuttably presume that an ICIF owner should not be required to expand the ICIF during the five-year safe harbor period, E.ON argues that it is unclear how a rebuttable presumption would apply in that context and what might be rebutted. E.ON argues that what is clear is that the ICIF owner needs to be unencumbered during the safe harbor period, so that it may focus on developing and bringing online successive phases of new generation.²²¹

²¹⁹ NRECA at 8 (citing 16 U.S.C. 824i(a)(1) (“Upon application...the Commission may issue an order requiring...such increase in transmission capacity as may be necessary to carry out the purposes of any order under subparagraph (A) or (B)”); 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.”)).

²²⁰ E.ON at 10.

²²¹ E.ON at 11-12.

More generally, AWEA contends that if the generation developer dedicates the extra capital and builds ICIF that accommodate more capacity than needed for initial generation, it is because the generation developer plans to develop more generation in future phases. Accordingly, AWEA believes that removing the rebuttable presumption is appropriate because it will clarify that the generation developer and owner of the ICIF have sole use of the excess capacity, without the need to defend the right to that capacity.²²²

c. Commission Determination

138. We will adopt the safe harbor period, but we will modify it to remove the rebuttable presumption that the ICIF owner should not be required to expand its facilities. During the safe harbor period, there will be a rebuttable presumption that the eligible ICIF owner has definitive plans to use its capacity without having to make a demonstration through a specific plans and milestones showing. We believe this Final Rule will relieve regulatory burdens and unnecessary risks from generation developers to encourage the development of new generation and efficient interconnection facilities and promote competition while ensuring access to transmission on a not unduly discriminatory basis. Under this Final Rule, the ICIF owner gains a degree of protection through the reduced likelihood that a third-party requester could rebut the presumption that an ICIF owner has plans to use all of its capacity. However, by making the

²²² AWEA at 13.

presumption rebuttable rather than absolute, a third-party requester with strong evidence has the opportunity to gain access to the ICIF, even during the safe harbor.

139. The proposal in the NOPR that the safe harbor period would also contain a rebuttable presumption that the ICIF owner should not have to expand its facilities was intended to provide generation developers an initial opportunity to establish their generation projects while limiting the burden and distraction of studying requests to expand its ICIF and potentially expanding those facilities to accommodate third party use. However, upon consideration of the comments, we believe such a rebuttable presumption could prevent third-party access without providing a substantial ease of burden for the ICIF owner.²²³ We conclude that eliminating this presumption strikes an appropriate balance by providing certainty to an ICIF owner over its planned capacity without hindering expansion of the facility in question when a potential customer requesting that expansion is willing to carry the burden associated with that possible expansion.

140. With regard to NRECA's argument that load-serving entities' use of ICIF has minimal or positive impact on available ICIF capacity, we find that such arguments are based on an unlikely scenario that assumes away the intended function of the interconnection facilities at issue in this Final Rule. By definition, the facilities at issue

²²³ We would expect that, in any order under sections 210 and 211, we would require the potential customer requesting expansion to pay all costs to study the request to expand and to take full responsibility for the costs to expand and operate the ICIF.

are not part of the integrated transmission system, so it is a slim possibility that a load-serving entity would be in a position to make use of ICIF to serve load by counterflowing power relative to the generation associated with the ICIF. However, a load-serving entity may make arguments to support such a scenario in a proceeding under sections 210 and 211.

2. Starting Point for the Safe Harbor Period

a. Commission Proposal

141. In the NOPR, the Commission proposed that the safe harbor period begin on the ICIF energization date. Because the energization date is not always publicly available, the Commission proposed that any eligible 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;²²⁴ and (3) identification of the ICIF owner. For generators that are already operating as of the effective date of the Final Rule, the Commission proposed 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.²²⁵

²²⁴ See *supra* n. 19.

²²⁵ NOPR, FERC Stats. & Regs. ¶ 32,701 at P 56.

b. Comments

142. E.ON, AWEA, First Wind, and NRG argue that ICIF energization is not the proper starting date for the safe harbor period and that the safe harbor period should instead begin when the first generating facility using the ICIF achieves commercial operation, the commercial operation date.²²⁶ E.ON argues that the point in the interconnection process where access to the grid begins is the appropriate starting point for the safe harbor period.²²⁷ E.ON states that, prior to this, the interconnecting transmission owner's interconnection facilities and network upgrades may not be complete and available for use and that all necessary interconnecting transmission owner's network upgrades may not be scheduled for completion for years after the ICIF are energized.²²⁸ E.ON adds that, if the safe harbor begins on the ICIF energization date, it may only encourage energization to be delayed as long as possible in order to have as long a safe harbor period as is needed to support future phase's priority use of the ICIF.²²⁹

143. AWEA and First Wind explain that for many wind projects the ICIF may be energized well before commercial operation of the wind project begins in order to

²²⁶ The Commercial Operation Date is defined in the LGIP and LGIA as the date on which the Generating Facility commences generating electricity for sale, excluding electricity generated during on-site test operations and commissioning of the Generating Facility, as agreed to by the Parties pursuant to Appendix E to the Standard Large Generator Interconnection Agreement.

²²⁷ E.ON at 8.

²²⁸ E.ON at 9.

²²⁹ E.ON at 9.

provide backfeed power to the construction site.²³⁰ Accordingly, AWEA contends that the “energization date” would significantly limit the safe harbor period for phased development projects.²³¹ First Wind and NRG argues that the commercial operation date not only provides a more appropriate starting date, but it also is a date that is routinely documented for other purposes (e.g., under Appendix E of the LGIA, the customer is required to provide written documentation of the commercial operation date, and power purchase agreements will have the commercial operation date.²³² NRG also argues that the commercial operation date is universally understandable.²³³

144. NRG and Linden argue that the Commission should decline to adopt the requirement that owners of existing and new ICIFs submit an informational filing to get the benefit of the safe harbor provision. NRG argues that the Commission is already generally aware of the commercial operation date for interconnection facilities through market-based rate, exempt wholesale generator, and interconnection agreement filings. NRG further argues that the commercial operation date is an established and verifiable date, and interconnection facility owners are often required to provide notice of the commercial operation date to various parties under different project agreements.

Additionally, third-parties that seek to interconnect can contact the ICIF owner directly

²³⁰ First Wind at 16.

²³¹ AWEA at 15-16.

²³² First Wind at 16 and NRG at 4.

²³³ NRG at 4.

and ask for the same information detailed in the informational filing, and ICIF owners can be required to provide the commercial operation date upon request. NRG argues that if there is any dispute regarding the commercial operation date, the third party can go to the Commission and seek clarification of the commercial operation date.²³⁴ Linden argues that the informational filing proposal would simply require numerous public utilities to make filings that will never be needed until and unless an entity seeks service over the ICIF.²³⁵ It argues that no policy would be served by requiring public utilities to preserve rights through an otherwise unnecessary informational filing.²³⁶

145. MISO supports the Commission's proposal to require interconnection customers to submit their ICIF energization date to the Commission. Currently, MISO interconnection customers submit their test dates, which are very close to the energization date, to MISO's resource integration group as part of the Generator Interconnection Agreement milestones.²³⁷

c. Commission Determination

146. We will modify the proposal and will use the commercial operation date instead of the energization date. We find commenters' argument convincing that the commercial operation date is the preferable starting point for the safe harbor period. The ICIF may be

²³⁴ NRG at 5.

²³⁵ Linden at 9-10.

²³⁶ Linden at 9-10.

²³⁷ MISO at 6.

energized to provide needed backfeed power for construction equipment well before the first generator is ready to produce test power, thus shortening the safe harbor period and undermining the goal to give the generation project sufficient time to develop. Using the energization date would likely disadvantage certain developers who must energize their ICIF early in the construction process because of their particular circumstances, while other developers are not required to do so. Although commenters argue that the commercial operation date is frequently documented in other contexts, we are not aware of a publicly available source that would consistently provide the commercial operation date for ICIF. Commenters' suggestion that potential customers request information from the ICIF owner or seek relief from the Commission creates an unnecessary barrier to potential customers and is inconsistent with the transparency we require for other elements of transmission and interconnection service. Accordingly, we will require, consistent with the NOPR proposal, that any eligible ICIF owner seeking to take advantage of the safe harbor must file an informational filing with the Commission (requiring no Commission action) stating: (1) the ICIF commercial operation date, as we define it below; (2) details sufficient to identify the ICIF at issue, such as location and Point of Interconnection; and (3) identification of the ICIF owner seeking to take advantage of the safe harbor.²³⁸ For ICIF that are already in commercial operation as of the effective date of the Final Rule, the ICIF owner may seek safe harbor status by filing

²³⁸ We do not intend to issue a public notice, accept comments, or issue an order on the informational filings.

at the Commission to provide the information listed above, and the safe harbor would expire five years after the commercial operation date of its ICIF. ICIF owners making such an informational filing should file under the following docket, Docket No.AD15-9-000, so that any interested third party will be able to easily identify the relevant filing and determine when a safe harbor is applicable. We consider the commercial operation date of ICIF to be the date those facilities are first used to transmit energy for sale, excluding use for on-site testing and commissioning of the generating facility.

3. Length of the Safe Harbor Period

a. Commission Proposal

147. In the NOPR, the Commission proposed 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.²³⁹

b. Comments

148. Several commenters argue for a seven-year safe harbor period.²⁴⁰ EEI argues that a presumption of five years from the date the line is energized is only minimally sufficient and providing an additional two years of safe harbor protection would allow the eligible ICIF owner to focus on building generation and achieving commercial operation

²³⁹ NOPR, FERC Stats. & Regs. ¶ 32,701 at P 54.

²⁴⁰ EEI at 14; NextEra at 17; EPSA at 6-7; NRG at 3-4; and SEIA at 4.

during the safe harbor period.²⁴¹ NextEra argues that a safe harbor of five years effectively presumes that the second phase will be completed without any delays and that the developer will not pursue development in additional phases. NextEra argues that a seven-year safe harbor would more fully achieve the Commission's stated goals.²⁴² EPSA and NRG agree that a seven-year period would better support ICIF project development, and argue that a seven-year time period is supported by section 3.3.1 of the *pro forma* LGIP under which the expected in-service date of a new generating facility or increase in capacity of an existing facility should not be more than seven years from the date the interconnection request is received by the transmission provider.²⁴³ SEIA states that a seven-year safe harbor period would ensure adequate time for financing and construction of additional generation capacity. SEIA asserts that analysis of the dozen largest solar projects expected to be online by 2016 reveals the median time from development to commercial operation is nearly six years. A seven-year safe harbor will ensure that most, if not all, future phases of a solar power plant can be constructed within the safe harbor timeframe.²⁴⁴

149. Some commenters argue for a ten-year safe harbor period. BHE also agrees that the proposed five-year duration is impractically short given the commercial and

²⁴¹ EEI at 14.

²⁴² NextEra at 17.

²⁴³ EPSA at 6-7 and NRG at 3-4.

²⁴⁴ SEIA at 4.

permitting realities generation developers face and, argues the safe harbor should be for ten years from the date that the ICIF is energized.²⁴⁵ AWEA argues that the proposed five-year period should be extended to ten years in order to reduce the risks encountered by generation developers developing phased generation projects. AWEA explains that often times a wind generation project may be planned in three or four phases, which could not reasonably be expected to reach completion in a five-year period. According to AWEA, a ten-year safe harbor period would provide developers the appropriate amount of time and reasonable incentive needed to develop the ICIF necessary for the development of new, cost-effective wind energy resources.²⁴⁶

150. As discussed above, APPA, TAPS, and NRECA argue that the Commission should not implement a safe harbor period of any duration.²⁴⁷ Additionally, APPA and TAPS argue that the monopoly on ICIF will extend for longer than the five years of the safe harbor period.²⁴⁸ They argue that in order to avoid the safe harbor barrier, a requester must not file its application under sections 210 and 211 until after the five-year period. They point out that it will take some time for the Commission to issue a final order requiring interconnection and transmission service, and additional studies or modifications may be required even after a final order. Therefore, they contend, the

²⁴⁵ BHE at 12-13.

²⁴⁶ AWEA at 15.

²⁴⁷ *See supra* PP 135-136.

²⁴⁸ APPA and TAPS at 15-16.

proposed safe harbor effectively grants to the ICIF owner and its affiliates a monopoly over use of its ICIF for six years at a minimum. They argue that such a result cannot be harmonized with the Commission's obligations to remedy undue discrimination in transmission service and its reliance on competitive markets to ensure just and reasonable wholesale prices.

c. Commission Determination

151. We adopt in this Final Rule the five-year safe harbor period. It represents a balancing of interests. On the one hand, we want to relieve regulatory burdens and unnecessary risks from generation developers to encourage the development of new generation and promote competition. On the other hand, we want to ensure not unduly discriminatory access to transmission which also promotes competition. We find that using the commercial operation date as the starting point for the safe harbor period eliminates some of the concerns regarding sufficient time for safe harbor protection. As such, we decline to increase the safe harbor period from five years to either seven or ten years.

152. We disagree with APPA and TAPS that the safe harbor protection is effectively a minimum of six years instead of five. That is, the rebuttable presumption that the ICIF owner has definitive plans to use its capacity, without having to make a demonstration through a specific plans and milestones showing, ends five years after the commercial operation date. The fact that it takes time to get service under sections 210 and 211 does not change the fact that, at the end of the five year safe harbor period, if there were to be an application under sections 210 and 211, the ICIF owner would need to show it has

plans to use any remaining capacity on the ICIF and is making progress to completing those plans. In any event, we note that any request for interconnection or transmission service takes time to prepare and process, whether it is addressed to an ICIF owner pursuant to sections 210 and 211 or a public utility under its OATT.

E. Affiliate Concerns

1. Commission Proposal

153. In the NOPR,²⁴⁹ the Commission sought comments on whether to extend the proposed reforms to generators whose ownership or operation of transmission facilities is limited to ICIF, but who are affiliated with a public utility transmission provider and are within or adjacent to the public utility transmission provider's footprint (ICIF-Owning Affiliates).²⁵⁰

2. Comments

154. Several commenters argue that ICIF-Owning Affiliates should be eligible for the blanket waiver.²⁵¹ Commenters assert that excluding ICIF-Owning Affiliates from the proposed waivers would bestow an unfair advantage on their competitors without

²⁴⁹ NOPR, FERC Stats. & Regs. ¶ 32,701 at P 59.

²⁵⁰ For generators owned by a public utility transmission provider within its footprint, transmission service on the generator's interconnection facilities has generally been governed by the public utility transmission provider's OATT. *See Puget Sound Energy, Inc.*, 133 FERC ¶ 61,160 (2010), *reh'g denied* 139 FERC ¶ 61,241 (2012).

²⁵¹ Southern at 4-5; EEI at 11-13; BHE at 8-11; Sempra at 6-9; BP Wind 7-10; First Wind at 10; AWEA at 16; and NextEra 18-20.

providing any regulatory benefits.²⁵² Southern emphasizes that ICIF-Owning Affiliates function separately from the public utility transmission provider and are independent generators.²⁵³ BHE argues that the same reasons that warrant the Commission replacing its current case-by-case approach to granting waivers apply irrespective of corporate structure.²⁵⁴

155. BP Wind, Sempra, and First Wind take issue with the Commission's stated concern in the NOPR that the generator's vertically-integrated utility affiliate, if granted the blanket waiver, may take steps to structure its development projects to limit or deny access to transmission facilities. BP Wind emphasizes that there are various reasons why a company would place ownership of generation and associated generation interconnection facilities into a separate legal entity that are not in any way for the purpose of limiting access to generator interconnection facilities.²⁵⁵ First Wind argues that, as a practical matter, a transmission owner will not attempt to push facilities that are not properly defined as ICIF into the ICIF classification in order to remove them from availability under their OATTs or to secure priority rights, because it would violate the OATT and shift costs to the generation affiliate that would otherwise be recovered from

²⁵² EEI at 9; BHE at 8-10; and Southern at 4-5.

²⁵³ Southern at 4-5.

²⁵⁴ BHE at 8-10.

²⁵⁵ BP Wind at 8-9.

OATT customers.²⁵⁶ Further, Sempra argues that the Commission has for years granted OATT waivers to ICIF-owning generators interconnected to their affiliated utility systems because the facilities in question are sole-use, limited and discrete, radial in nature, and not part of an integrated transmission network.²⁵⁷

156. Several commenters argue that there are sufficient protections already in place to deter such behavior. Sempra notes that the Commission-jurisdictional interconnection process and the Commission's Standards of Conduct provide additional protections to affiliated and unaffiliated generators alike, and that further protection is provided when the interconnection process is administered by an RTO or ISO.²⁵⁸ Sempra also states that if the Commission is made aware that a vertically-integrated utility has structured its generation and interconnection facilities development in such a way that inappropriately limits access to those facilities, the Commission could, among other things, revoke the blanket waiver and safe harbor treatment for those facilities.²⁵⁹ Further, BHE asserts that affiliate restrictions and enforcement tools all function to achieve non-discriminatory access over ICIF for third parties and that the procedures under sections 210 and 211 of

²⁵⁶ First Wind at 10.

²⁵⁷ Sempra at 8 (citing the TDM Rehearing Request at n. 20, pointing to the then-significant number of OATT waivers granted to such affiliated entities as of 2003).

²⁵⁸ Sempra at 8.

²⁵⁹ Sempra at 8-9.

the FPA provide an extra level of protection.²⁶⁰ Southern agrees that the Commission's concerns with respect to anti-competitive behavior by a transmission provider should be addressed by the Commission's open access requirements, the Standards of Conduct, and the code of conduct.²⁶¹ BHE contends that the Commission should extend eligibility for the proposed blanket waiver not only to affiliates of the transmission provider, but also to the wholesale generation function of a vertically-integrated utility, irrespective of whether the ICIF is physically located within or adjacent to the affiliated public utility transmission provider's footprint.²⁶²

157. BP Wind and AWEA argue that the Commission should at least extend eligibility of the blanket waiver to ICIF-owning Affiliates where they are geographically separate from the public utility transmission provider's footprint.²⁶³ Southern, BP Wind, and NextEra question how ICIF-owning Affiliates will be treated if they do not receive the blanket waiver. Southern argues that a wholesale generator affiliate that is not a part of a vertically-integrated utility's OATT, and whose ownership/operation of transmission facilities is limited to ICIF, should not be required to be added to the public utility's OATT because this could shift the costs of the ICIF to native load customers of the

²⁶⁰ BHE at 10.

²⁶¹ Southern at 5.

²⁶² BHE at 2, 10-11.

²⁶³ BP Wind at 7-8 and AWEA at 16.

transmission provider and create other complexities for the transmission provider (e.g., compliance with Standards of Conduct).²⁶⁴

158. BP Wind points out that excluding ICIF-owning Affiliates from the blanket waiver could disadvantage jointly owned projects, as unaffiliated generator owners would effectively lose the value associated with their blanket waiver if they share ownership in a common set of ICIF with a generator that is affiliated with a public utility transmission provider.²⁶⁵ Similarly, if the Commission declines to extend the blanket waiver to ICIF-owning Affiliates, NextEra questions: (1) how ICIF-owning Affiliates could request the waiver on a case-by-case basis; (2) whether, without a waiver, each ICIF-owning Affiliate is required to file its own OATT, resulting in holding companies with numerous OATTs on file, even for facilities located in the affiliated public utility transmission provider's footprint; and (3) whether the ICIF-owning Affiliates have to transfer ownership or control of their facilities to the affiliated public utility transmission provider.²⁶⁶ In the event the Commission does extend the blanket waiver to ICIF-owning Affiliates, BHE asks the Commission to confirm that, in instances where a third party is granted a request for service under sections 210 and 211 over an incumbent utility generator's ICIF, that incumbent utility generator can fulfill its access responsibility by

²⁶⁴ Southern at 5.

²⁶⁵ BP Wind at 8-9.

²⁶⁶ NextEra at 18-20.

transferring operational control and responsibility for the relevant ICIF to its transmission provider to ensure non-discriminatory access over the ICIF.²⁶⁷ Additionally, BHE asks the Commission to clarify its expectations, in this scenario, as to whether the ICIF should be treated by the transmission provider as Transmission Provider's Interconnection Facilities and managed under Article 9.9.2 of the Commission's *pro forma* LGIA.²⁶⁸

159. Linden states that in the event that the Commission limits the applicability of the blanket waiver to non-affiliates, it requests that the Commission clarify that any such limitation would not apply to an affiliate of a merchant transmission provider.²⁶⁹

160. Southern and BHE also argue that the Commission should extend the safe harbor protection to ICIF-owning Affiliates because such generators are similarly situated to and operate the same as other wholesale generators. Southern believes that all wholesale generators and ICIF owners would benefit from the proposed safe harbor period.²⁷⁰ BHE requests that the Commission also extend eligibility for the safe harbor presumption to incumbent utility generators.²⁷¹ BHE asserts that wholesale generator ICIF owners share the same commercial risks of having their specific generation expansion plans preempted by a competing unaffiliated generation developer and burden of pursuing a

²⁶⁷ BHE at 17-18.

²⁶⁸ BHE at 17-18.

²⁶⁹ Linden at 8-9.

²⁷⁰ Southern at 6.

²⁷¹ BHE at 13.

declaratory order from the Commission in order to reserve capacity for their future plans.²⁷² According to BHE, any concerns with extending the safe harbor presumption beyond non-affiliates are reasonably mitigated without limiting the presumption to non-affiliated ICIF owners. BHE explains that under Commission rules, all generators seeking transmission interconnection and/or transmission service are to be treated comparably. BHE further notes that employees of a public utility with captive customers and its affiliates with market-based rate authority are to operate separately to the maximum extent practical.²⁷³ BHE also contends that it would be unduly discriminatory to deny incumbent utility generator and ICIF-owning Affiliates identical access to the safe harbor presumption, given that existing policy is equally burdensome, and creates the same regulatory uncertainty with respect to priority rights for all ICIF owners.²⁷⁴

161. BHE argues that, at a minimum, eligibility for the proposed safe harbor presumption should be extended to ICIF-owning Affiliates.²⁷⁵ BHE also argues that the safe harbor presumption should be applied to ICIF-owning Affiliates irrespective of whether the ICIF is physically located within or adjacent to the affiliated public utility transmission provider's footprint.²⁷⁶

²⁷² BHE at 14.

²⁷³ BHE at 15.

²⁷⁴ BHE at 16.

²⁷⁵ BHE at 3-4.

²⁷⁶ BHE at 3-4.

162. In contrast, some commenters argue that the Commission should not extend the proposed reforms to entities that are affiliated with a public utility transmission provider.²⁷⁷ APPA and TAPS contend that the NOPR’s treatment of affiliates is inconsistent and contrary to the Commission’s market-based rate policies which have been crafted over decades to protect customers from the use of control over transmission facilities to erect barriers to competition in favor of the owner’s corporate family.²⁷⁸ They state that, while the NOPR does not consider the ICIF owner’s affiliates in defining eligibility for the blanket waiver or safe harbor, potentially even if the ICIF owner’s affiliate is a transmission provider, the Commission proposes to continue its policy of allowing the ICIF owner to point to its affiliate’s planned usage to demonstrate definitive plans to use any remaining ICIF capacity after the safe harbor period.²⁷⁹ APPA and TAPS argue that by ignoring affiliates in determining eligibility for waiver or safe harbor while allowing ICIF owners to use those same affiliates to fend off third-party access, the NOPR would incent utilities to organize their corporate structures to maximize their opportunities to block third-party competitive generation.

163. APPA and TAPS also contend that transmission providers are already “in the business of providing transmission service” and are subject to Standards of Conduct, and

²⁷⁷ APPA and TAPS at 16-17 and NRECA at 9-10.

²⁷⁸ APPA and TAPS at 16-17.

²⁷⁹ APPA and TAPS at 17 (citing to NOPR, FERC Stats. & Regs. ¶ 32,701 proposed section 35.28(d)(2)(ii)(A)).

thus face no significant additional burden from the requirements the Commission proposes to waive. NRECA adds that such entities should not be granted privileges that are intended for generators that are completely independent of transmission providers. They argue that if extended to affiliates of transmission providers, the proposed reforms would incent transmission providers to structure generation and ICIF development to avoid open access and transmission planning obligations.²⁸⁰

164. APPA and TAPS contend that any ICIF policy changes should exclude affiliates of transmission providers from eligibility for the blanket waiver or safe harbor status at least within the transmission provider's planning region.²⁸¹ They argue that requiring transmission provider-affiliated ICIF owners within the transmission provider's planning region to utilize the transmission provider's existing OATT processes, rather than artificially walling-off such ICIF from access and transmission planning and expansion obligations, is necessary to prevent the transmission provider from evading its affirmative obligation to work within its transmission planning region to create a regional transmission plan. They assert that, at an absolute minimum, ICIF owners affiliated with transmission providers should be excluded from the blanket waiver and safe harbor as to any ICIF within the transmission provider's footprint or an adjacent system.²⁸²

²⁸⁰ APPA and TAPS at 18 and NRECA at 9-10.

²⁸¹ APPA and TAPS at 25-27.

²⁸² APPA and TAPS at 26-27.

3. Commission Determination

165. We conclude that the blanket waiver and safe harbor should apply to a public utility transmission provider's affiliates whose ownership/operation of transmission facilities is limited to ICIF, regardless of geographic location. An ICIF-Owning Affiliate, as we use the term here, is a corporate entity that is separate from, and functions independently from, an affiliated public utility transmission provider that owns, controls, or operates non-ICIF transmission facilities. As such, the ICIF-Owning Affiliate is comparable to other independent generation companies that own ICIF within the public utility transmission provider's footprint. Like other independent generation companies, an ICIF-Owning Affiliate faces the risk and potential burden of having to file an OATT if it receives a third-party request for service. The undue discrimination provisions of section 205 and section 206 and the Commission's existing Standards of Conduct rules should prevent undue discrimination and ensure that the transmission provider's open access and transmission planning obligations are not circumvented. However, we decline to extend the blanket waiver to ICIF that are controlled or operated by the generation units of vertically-integrated public utilities (Generation Functions), as requested by BHE.

166. We disagree with APPA and TAPS that extending the reforms adopted herein to ICIF-Owning Affiliates would constitute a departure from the Commission's requirements that transmission service be not unduly discriminatory. Sections 205 and 206 of the FPA continue to govern the behavior of the ICIF-Owning Affiliates and public utility transmission providers after the reforms adopted herein become effective.

Therefore, ICIF-Owning Affiliates and public utility transmission providers are prohibited from engaging in unduly preferential or unduly discriminatory behavior. In addition, the independent functioning and transparency requirements of the Standards of Conduct under Part 358 of the Commission's regulations impose specific requirements governing the relationship between the ICIF-Owning Affiliates and the transmission provider.²⁸³ While a waiver of the Standards of Conduct for the ICIF-Owning Affiliate would relieve it of the obligation to comply with the Standards of Conduct that require separation of transmission and marketing functions, that waiver has no effect on the transmission provider's obligation to comply with the Standards of Conduct consistent with Part 358 of the Commission's regulations.²⁸⁴ The Standards of Conduct also require, among other things, a transmission provider to treat all transmission customers, affiliated and non-affiliated, on a not unduly discriminatory basis, and prohibits the transmission provider from making or granting any undue preference or advantage to any person with respect to the transmission or sale of electric energy.²⁸⁵

167. We disagree with APPA and TAPS' claim that granting the waiver to ICIF-Owning Affiliates would be inconsistent and contrary to the Commission's market-based

²⁸³ 18 CFR pt. 358.

²⁸⁴ ICIF Generator Affiliates are typically making sales for resale in interstate commerce and meet the Commission's definition of marketing affiliates. *See* 18 CFR 358.3(a) and (c).

²⁸⁵ 18 CFR 358.4.

rate policies by failing to consider the ICIF-Owning Affiliates in defining eligibility for market-based rates. The Commission considers the ICIF-Owning Affiliates when granting market-based rate authority. The market-based rate requirement under section 35.37(d) requires a seller that owns, operates, or controls transmission facilities, or whose affiliates own, operate, or control transmission facilities, to have on file with the Commission an OATT as described in section 35.28. However, the Commission allows sellers to rely on Commission-granted OATT waivers to satisfy the vertical market power part of the requirement.²⁸⁶ As noted above,²⁸⁷ the waiver in section 35.28(d)(2) is an additional way in which to satisfy the vertical market power requirements for transmission. Market-based rate authority is conditioned on compliance with the Affiliate Restrictions in section 35.39 of the Commission's regulations. Like the Standards of Conduct, the Affiliate Restrictions include independent functioning requirements as well as information sharing prohibitions.²⁸⁸ Thus, with the statutory

²⁸⁶ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 FR 39904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252 at P 408, *clarified*, 121 FERC ¶ 61,260 (2007), *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-A, 73 FR 25832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268, *order on reh'g*, Order No. 697-B, 73 FR 79610 (Dec. 30, 2008), FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, 74 FR 30924 (June 29, 2009), FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, 75 FR 14342 (Mar. 25, 2010), FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012).

²⁸⁷ *See supra* P 57.

²⁸⁸ *See* 18 CFR 35.39(c) and § 35.39(d).

prohibitions and implementing regulations, public utility transmission providers are not permitted to organize their corporate structures in a way that would block third-party competitive generation.

168. Moreover, we note that entities may file a complaint under section 206 with the Commission if they believe discrimination is occurring. Also, in determining whether a third party has rebutted the presumption under this Final Rule that an ICIF owner has definitive plans to use excess capacity on the ICIF during the safe harbor period, the affiliate relationship between the ICIF owner and a public utility transmission provider may be a factor in that determination. Finally, as a backstop, we note that the Commission possesses ample statutory remedies to address violations of the applicable regulations and statutes. As noted by Sempra, if the Commission became aware that a public utility transmission provider and an ICIF-Owning Affiliate structured their transmission, generation, and interconnection facilities development in such a way that inappropriately limits access to those facilities, the Commission could, among other things, revoke the blanket waiver and safe harbor treatment for the ICIF-Owning Affiliate. Accordingly, the Commission's existing rules, in concert with other tools available to hold entities accountable, are sufficient to ensure comparable treatment of affiliates and non-affiliates, and enforce the Commission's requirements prohibiting undue discrimination without the provisions waived through this Final Rule.

169. We find that it is not appropriate to grant the blanket waiver to Generation Functions. The public utility transmission provider has certain rights and obligations, one of which is to administer the transmission grid pursuant to its existing OATT. Where a

Generation Function of the public utility transmission provider is an ICIF owner, we find it appropriate, in the event of a third-party request, for the request to be processed pursuant to its affiliated public utility transmission provider's OATT.

F. Miscellaneous

1. Treatment of Line Losses on ICIF

a. Comments

170. NRG requests that the Commission explicitly state that all transmission line losses associated with a third party gaining access to an incumbent owner's interconnection facility be borne solely by the third party. NRG argues that as more capacity is transmitted on these interconnection facilities and the excess capacity on these facilities diminishes, line losses will continue to increase to the detriment of the incumbent interconnection facility owner.²⁸⁹

b. Commission Determination

171. We find the NRG's argument to be beyond the scope of the proceeding. Treatment of line losses on ICIF should be negotiated between the parties using the ICIF.

2. Applicability of the Commission's "Prior Notice" Policy

a. Comments

172. First Wind and Invenergy ask the Commission to confirm that its *Prior Notice* policy²⁹⁰ also applies to requests for ICIF access. In *Prior Notice*, the Commission,

²⁸⁹ NRG at 6.

²⁹⁰ *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*

(continued...)

among other things, found that transmission study contracts and charges, while jurisdictional, do not have to be filed unless they are the subject of a complaint filed by the transmission requester under section 206 of the Federal Power Act alleging that the rates charged for a transmission feasibility study are unjust, unreasonable or unduly discriminatory, or preferential. First Wind and Invenergy contend that the Commission should confirm that this *Prior Notice* policy applies not only to transmission requests under section 211, but also to interconnection requests under section 210 and to any requests for ICIF access.²⁹¹

b. Commission Determination

173. We decline to address the Commission's filing requirements as they are beyond the scope of the proceeding.

3. Technical Aspects of Interconnection

a. Comments

174. BHE states that third-party access to an ICIF should only be allowed at a point past the high side (transmission side) of a collector bus, and not on the low side (generator side) of the collector bus. It argues that such access to the generator side of the collector introduces technical system protection and control complexities that would be impractical to accommodate, requiring an inordinate amount of coordination between

64 FERC ¶ 61,139, *clarified*, 65 FERC ¶ 61,081, at 61,508 (1993) (*Prior Notice*).

²⁹¹ First Wind at 12-14 and Invenergy at 12-13.

interconnecting generation projects and may even compromise the reliability of the interconnecting facilities.²⁹²

b. Commission Determination

175. We find BHE's argument to be beyond the scope of the proceeding. Disputes regarding technical requirements of the reliable interconnection of third-party generators should be addressed in particular proceedings under sections 210 and 211.

4. Implementation

176. For those entities that satisfy the eligibility requirements set forth in this Final Rule, the blanket waiver will be effective as of the effective date of this Final Rule. For those entities that must file a statement of compliance with section 210 of the FPA in order to achieve eligibility, the blanket waiver will be effective as of the latter of the effective date of this Final Rule or the date the statement of compliance is filed. If an entity has a case-specific request for waiver of OATT requirements pending as of the date that the entity becomes eligible for the blanket waiver, the blanket waiver will apply as of that date, and the entity should file to withdraw the waiver request to the extent it has been rendered moot by the blanket waiver. As discussed in section IV.B.7 above, an entity that has already been issued a waiver of the same requirements waived by the blanket waiver and is eligible for the blanket waiver will be deemed to be operating under the blanket waiver without further filings necessary with respect to the issued waiver.

²⁹² BHE at 19.

However, as discussed in section IV.B.8 above, the blanket waiver will have no automatic impact on existing OATTs that govern service requests over ICIF, although the Commission will consider a request to withdraw an OATT on a case-by-case basis if no third parties are taking service under it. With respect to the informational statement regarding the commercial operation date of the ICIF discussed in section IV.D.2 above, we note that such statement need only be filed if the ICIF owner seeks to take advantage of the five-year safe harbor period.

V. Information Collection Statement

177. The Office of Management and Budget (OMB) regulations require approval of certain information collection and data retention requirements imposed by agency rules.²⁹³ Upon approval of a collection(s) of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of a rule will not be penalized for failing to respond to these collections of information unless the collections of information display a valid OMB control number.

178. The Commission is submitting the proposed modifications to its information collections to OMB for review and approval in accordance with section 3507(d) of the Paperwork Reduction Act of 1995.²⁹⁴ In the NOPR, the Commission solicited comments on the Commission's need for this information, whether the information will have

²⁹³ 5 CFR 1320.11(b) (2013).

²⁹⁴ 44 U.S.C. 3507(d) (2012).

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. The Commission included a table that listed the estimated public reporting burdens for the proposed reporting requirements, as well as a projection of the costs of compliance for the reporting requirements.

179. The Commission did not receive any comments specifically addressing the burden estimates provided in the NOPR. However, the Commission has made changes to its proposal that are adopted in this Final Rule.

180. First, the regulations adopted in the Final Rule give a blanket waiver of OATT, OASIS, and Standards of Conduct filing requirements, to all ICIF owners, including those that do not sell electric energy. Under the Final Rule, an ICIF owner that does not sell electric energy is required to make an informational filing stating that it commits to comply with and be bound by the obligations and procedures applicable to electric utilities under section 210 of the FPA in order to receive the blanket waiver. We have increased the burden estimate in the table below to reflect this filing.

181. Second, the Commission revised the beginning of the safe harbor period from the ICIF energization date to the ICIF commercial operation date. The Commission recognizes that most ICIF owners will likely make a brief notification filing documenting: (1) the ICIF commercial operation date; (2) details sufficient to identify the ICIF at issue, such as location and Point of Interconnection; and (3) identification of the ICIF owner. However, because the filing is similar to that proposed in the NOPR, we

are not modifying the estimated public reporting burdens for this proposed reporting requirement in the table below. The Commission believes that the revised burden estimates below are representatives of the average burden on respondents.

RM14-11 (Open Access and Priority Rights on Interconnection Customer's Interconnection Facilities)						
	Number of Respondents (1)	Annual Number of Responses per Respondent (2)	Total Number of Responses (1)*(2)=(3)	Average Burden & Cost Per Response²⁹⁵ (4)	Total Annual Burden Hours & Total Annual Cost (3)*(4)=(5)	Average Cost per Respondent (\$) (5)÷(1)
Individual Requests for Waiver (FERC-917)	16	-1	-16	10 \$947	-160 -\$15,146	-\$947
OATT Filings (FERC-917)	1	-1	-1	100 \$9,466	-100 -\$9,466	-\$9,466
Petitions for Declaratory Order requesting priority rights (FERC-582)	1	-1	-1	30 \$2,840	-30 -\$2,840	-\$2,840
Safe Harbor Commercial Operation Date Filing (average of first three years) ²⁹⁶ (FERC-917)	39	1	39	1 \$95	39 \$3,692	\$95

²⁹⁵ The estimates for cost per response are derived using the following formula: Average Burden Hours per Response * \$94.66 per Hour = Average Cost per Response. The hourly cost figure represents a combined hourly rate of an attorney (\$131.00), economist (\$71.00), engineer (\$65.34), and administrative staff (\$38.63), with a 50 percent weighting on the attorney's rate (i.e. [$\$131(1/2) + \$71.00(1/6) + \$65.34(1/6) + \$38.63(1/6)$]/4 = \$94.66. 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 68.7 percent of total compensation). See <http://www.bls.gov/news.release/ecec.nr0.htm>.

²⁹⁶ 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

(continued...)

ICIF Owner that Does Not Sell Electric Energy Filing to Receive Blanket Waiver (average of first three years) ²⁹⁷ (FERC-917)	19	1	19	1 \$95	19 \$1,799	\$95
TOTAL			40		-232 -\$21,961	-\$13,063

Cost to Comply: The Commission has projected the cost of compliance with the safe harbor commercial operation date filing to be \$7,573 in the initial year and \$1,704 in subsequent years, as new ICIF owners make safe harbor filings for their new projects. In addition, the Commission has projected the cost of compliance for ICIF owners that do

would expect the entities complying with the Final Rule would avoid these filings and that the relevant entities would instead avail themselves of the safe harbor period. The average of the three-year period then is $(80 + 18 + 18) / 3 = 39$.

²⁹⁷ The average number of filings for the first three years is computed as follows. The Commission expects approximately 40 section 210 applicability filings in the first year, which represents half the number of waiver filings over a historical five-year period. The Commission does not know the precise number of existing ICIF owners that do not sell electric energy. Of the 80 ICIF owner that have requested waiver in the past five years, the Commission reasons that some share of them do not sell electric energy, and we use 50 percent as an estimate. While there is no five year limitation that applies to entities that may make this filing, we reason that this issue, while not new, has become more relevant in recent years because of an increase in generation owners retaining control of their ICIF; hence, we are not including in our estimate any estimate of the number of ICIF owners that do not sell electric energy that would have requested waiver prior to 2010. In the subsequent two years, the Commission expects approximately nine section 210 applicability filings per year, which represents half 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 entities complying with the Final Rule would avoid these filings and that the relevant entities would instead avail themselves of the blanket ICIF waiver. The average of the three-year period then is $(40 + 9 + 9) / 3 = 19$.

not sell electric energy to make an informational filing stating that it commits to comply with and be bound by the obligations and procedures applicable to electric utilities under section 210 of the FPA in order to receive the blanket waiver to be \$3,786 in the initial year and \$852 in subsequent years, as new ICIF owners make such filings. This is offset by the reduction in burden associated with the waiver of filing requirements of \$27,452 per year. As an average for the first three years, this amounts to a net reduction in burden of \$21,961.

Total Annual Hours for Collection in initial year (120 hours) @ \$94.66 an hour =
\$11,359

Total Annual Hours for Collection in subsequent years (27 hours) @ \$94.66 an hour =
\$2,556.

Total Annual Hours for Reduced Collection per year (290 hours) @ \$94.66 an hour =
\$27,452.

Title: FERC-582, Electric Fees and Annual Charges; FERC-917, Non-Discriminatory Open Access Transmission Tariff.

Action: Revision of Currently Approved Collection of Information.

OMB Control No. 1902-0132; 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 Commission is adopting these changes to its regulations related to which entities must file the *pro forma* OATT, establish and maintain an

OASIS, and abide by its Standards of Conduct in order to eliminate unnecessary filings and increase certainty for entities that develop generation. The purpose of this Final Rule is to reduce regulatory burdens and promote development while continuing to ensure open access to transmission facilities. The safe harbor commercial operation 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.

182. 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], e-mail: DataClearance@ferc.gov, Phone: (202) 502-8663, fax: (202) 273-0873.

183. Comments on the requirements of this Final Rule can 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]. For security reasons, comments to OMB should be submitted by e-mail to: oir_submission@omb.eop.gov. Comments submitted to OMB should include Docket No. RM14-11-000 and OMB Control No. 1902-0132 and/or 1902-0233.

VI. Regulatory Flexibility Act Analysis

184. The Regulatory Flexibility Act of 1980 (RFA)²⁹⁸ generally requires a description and analysis of final rules that will have a significant economic impact on a substantial number of small entities. The Small Business Administration (SBA) revised its size standard (effective January 22, 2014) for electric utilities from a standard based on megawatt hours to a standard based on the number of employees including affiliates.²⁹⁹ Under SBA's new size standards, ICIF owners likely come under the following category and associated size threshold: Electric bulk power transmission and control, at 500 employees.³⁰⁰ The Final Rule states that approximately 80 entities will be affected by the changes imposed. Of these, the Commission estimates that approximately 93.1 percent³⁰¹ or 75 of these are small entities. In the Final Rule, the Commission estimates that, on average, each of the small entities to whom the Final Rule applies will incur one-time costs of \$142 in order to: (1) document its commercial operation date and

²⁹⁸ 5 U.S.C. 601-612 (2014).

²⁹⁹ SBA Final Rule on "Small Business Size Standards: Utilities," 78 FR 77,343 (Dec. 23, 2013).

³⁰⁰ 13 CFR 121.201, Sector 22, Utilities.

³⁰¹ The Small Business Administration sets the threshold for what constitutes a small business. Public utilities may fall under one of several different categories, each with a size threshold based on the company's number of employees, including affiliates, the parent company, and subsidiaries. The possible categories for the applicable entities have a size threshold ranging from 250 employees to 1,000 employees. For the analysis in this final rule, we are using the 500 employee threshold for each applicable entity type.

thus avail itself of the safe harbor provision; and, (2) if the entity does not sell electricity, commit to comply with section 210 of the FPA.³⁰² This is true for those existing entities that have already received waiver of the OATT prior to the issuance of the Final Rule, as well as for new entities. This cost will be offset for new entities by, on average, \$1,525.³⁰³ 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.³⁰⁴ 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 Final Rule will not have a significant economic impact on a substantial number of small entities.

VII. Document Availability

185. 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

³⁰² See *supra* n. 298. We estimate that all affected entities will make the safe harbor filing, but that only half do not sell electric energy and thus need to make the commitment to comply with section 210 of the FPA. Thus, $\$142 = (1) \times (\$94.66) + (1/2) \times (\$94.66)$.

³⁰³ This reduced burden amount is calculated by taking the total estimated burden reduction per year, \$27,452, and dividing by 18, the estimated number of filings avoided because of the new regulations.

³⁰⁴ *Credit Reforms in Organized Wholesale Electric Markets*, 133 FERC ¶ 61,060, at P 184 (2010).

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.

186. 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.

187. User assistance is available for eLibrary and the FERC's website 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. E-mail the Public Reference Room at public.referenceroom@ferc.gov.

VIII. Effective Date and Congressional Notification

These regulations are effective [**INSERT DATE 90 days after publication in the FEDERAL REGISTER**]. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a "major rule" as defined in section 351 of the Small Business Regulatory

Enforcement Act of 1996. The Commission will submit this Final Rule to both houses of Congress and the Government Accountability Office.

List of Subjects in 18 CFR Part 35

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

By the Commission.

Issued: March 19, 2015

Nathaniel J. Davis, Sr.,
Deputy Secretary.

In consideration of the foregoing, the Commission amends 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) may file a request for waiver of all or part of such requirements for good cause shown.

(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, as that term is defined in the standard generator interconnection procedures and agreements referenced in paragraph (f) of this section, or comparable jurisdictional interconnection facilities that are the subject of interconnection agreements other than the standard

generator interconnection procedures and agreements referenced in paragraph (f) of this section, if the entity that owns, operates, or controls such facilities either sells electric energy, or files a statement with the Commission that it commits to comply with and be bound by the obligations and procedures applicable to electric utilities under section 210 of the Federal Power Act.

(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 the interconnection facilities for which a waiver is in effect pursuant to this paragraph (d)(2) may follow the procedures in sections 210, 211, and 212 of the Federal Power Act, 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 facilities specified in this paragraph (d)(2) 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 commercial operation date of the interconnection facilities specified in this paragraph (d)(2), the Commission will apply the rebuttable presumption that 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.

Note: Appendix A will not be published in the Code of Federal Regulations.

Appendix A: List of Short Names of Commenters on the Notice of Proposed Rulemaking

Commenter (Short Name or Acronym)

American Public Power Association and Transmission Access Policy Study Group (APPA and TAPS)

American Wind Energy Association (AWEA)

Berkshire Hathaway Energy Company (BHE)

BP Wind Energy North America Inc. (BP Wind)

California Department of Water Resources State Water Project (SWP)

Cogen Technologies Linden Venture, L.P. (Linden)

DTE Energy Company (DTE)

Edison Electric Institute (EEI)

Electric Power Supply Association (EPSA)

Electricity Consumers Resource Council (ELCON)

E.ON Climate & Renewables North America (E.ON)

First Wind Energy, LLC (First Wind)

Invenergy Wind LLC, Invenergy Wind Development LLC, and Invenergy Thermal Development LLC (Invenergy)

ITC Transmission, Michigan Electric Transmission Company, LLC, ITC Midwest, LLC, and ITC Great Plains, LLC (ITC)

Midcontinent Independent System Operator, Inc. (MISO)

MISO Transmission Owners (MISO TOs)

National Rural Electric Cooperative Association (NRECA)

NextEra Energy, Inc. (NextEra)

Northern California Power Agency (NCPA)

The NRG Companies (NRG)

Recurrent Energy (Recurrent)

Sempra U.S. Gas & Power, LLC (Sempra)

Solar Energy Industries Association (SEIA)

Southern Company Services, Inc. (Southern)

Terra-Gen Dixie Valley, LLC (Terra-Gen)

[FR Doc. 2015-06953 Filed: 3/31/2015 08:45 am; Publication Date: 4/1/2015]