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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### 18 CFR Parts 2 and 35

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

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

**AGENCY:** Federal Energy Regulatory Commission, Energy.

**ACTION:** Final Policy Statement.

**SUMMARY:** The Commission issues this final policy statement to clarify and refine its policies governing the allocation of capacity for new merchant transmission projects and new nonincumbent, cost-based, participant-funded transmission projects. Under this policy statement, the Commission will allow developers of such projects to select a subset of customers, based on not unduly discriminatory or preferential criteria, and negotiate directly with those customers to reach agreement on the key rates, terms, and conditions for procuring up to the full amount of transmission capacity, when the developers broadly solicit interest in the project from potential customers, and demonstrate to the Commission that the developer has satisfied the solicitation, selection and negotiation process criteria set forth herein. The Commission is making these clarifications and refinements to fulfill its statutory responsibility of preventing undue discrimination and undue preference while providing developers the ability to bilaterally negotiate rates, terms, and conditions for the full amount of transmission capacity with potential customers. These clarifications and refinements will be implemented within the Commission's existing four-factor analysis used to evaluate requests for negotiated rate authority for transmission service. The Commission will apply this policy statement on a prospective basis to filings received after this issuance.

**DATES:** These policies became effective January 17, 2013.

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#### SUPPLEMENTARY INFORMATION:

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

#### Final Policy Statement

(Issued January 17, 2013)

#### I. Introduction

1. The Commission issues this final policy statement to clarify and refine its policies governing the allocation of capacity for new merchant transmission projects and new nonincumbent, cost-based, participant-funded transmission projects. Under this policy statement, the Commission will allow developers of such projects to select a subset of customers, based on not unduly discriminatory or preferential criteria, and negotiate directly with those customers to reach agreement on the key rates, terms, and conditions for procuring up to the full amount of transmission capacity, when the developers (1) broadly solicit interest in the project from potential customers, and (2) demonstrate to the Commission that the developer has satisfied the solicitation, selection and negotiation process criteria set forth herein. The Commission is making these clarifications and refinements to fulfill its statutory responsibility of preventing undue discrimination and undue preference while providing developers the ability to bilaterally negotiate rates, terms, and conditions for the full amount of transmission capacity with potential customers. These clarifications and refinements will be implemented within the Commission's existing four-factor analysis used to evaluate requests for negotiated rate authority for transmission service.<sup>1</sup> The Commission will apply this policy statement on a prospective basis to filings received after this issuance.

#### II. Background

2. The Commission first granted negotiated rate authority to a merchant transmission project developer over a

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

3. In recent years, a number of merchant and nontraditional transmission developers have sought guidance from the Commission regarding application of open access principles to new transmission facilities through petitions for declaratory orders. As the Commission addressed these requests, its policies evolved over time to provide potential customers adequate opportunities to obtain service while also providing transmission developers adequate certainty to assist with financing transmission projects. As a result of these evolving policies,

<sup>2</sup> *TransEnergy U.S., Ltd.*, 91 FERC ¶ 61,230, at 61,838 (2000) (*TransEnergy*).

<sup>3</sup> *Id.* at 61,836.

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

<sup>5</sup> The ten criteria were: (1) The merchant transmission facility must assume full market risk; (2) the service should be provided under the open access transmission tariff (OATT) of the Independent System Operator (ISO) or Regional Transmission Organization (RTO) that operates the merchant transmission facility and that operational control be given to that ISO or RTO; (3) the merchant transmission facility should create tradable firm secondary transmission rights; (4) an open season process should be employed to initially allocate transmission rights; (5) the results of the open season should be posted on the OASIS and filed in a report to the Commission; (6) affiliate concerns should be adequately addressed; (7) the merchant transmission facility not preclude access to essential facilities by competitors; (8) the merchant transmission facilities should be subject to market monitoring for market power abuse; (9) physical energy flows on merchant transmission facilities should be coordinated with, and subject to, reliability requirements of the relevant ISO or RTO; and (10) merchant transmission facilities should not impair pre-existing property rights to use the transmission grids of inter-connected RTOs or utilities. *E.g.*, *Northeast Utilities I*, 97 FERC ¶ 61,026 at 61,075.

<sup>1</sup> See *infra* note 6 and P 15.

different rules have been adopted regarding capacity allocation for merchant transmission projects and nonincumbent, cost-based, participant-funded transmission projects.

4. In *Chinook*, the Commission refined its approach to evaluating merchant transmission by adopting a four-factor analysis.<sup>6</sup> Under this analysis, the Commission continues to rely upon an open season and a post-open season report as a means to provide transparency in the allocation of initial transmission capacity and ensure against undue discrimination among potential customers in the award of transmission capacity. Specifically, the Commission evaluates the terms and conditions of the open season as part of ensuring no undue discrimination (second factor),<sup>7</sup> and uses the open season as an added protection in overseeing any affiliate participation, to ensure no undue preference or affiliate concerns (third factor).

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

percent of a transmission project's capacity to anchor customers.<sup>9</sup>

6. The Commission also has received proposals from transmission developers regarding the allocation of capacity on cost-based, participant-funded transmission projects. These proceedings involved incumbent transmission developers,<sup>10</sup> while one involved a nonincumbent transmission developer.<sup>11</sup> In *NU/NSTAR*, the Commission approved the structure of a transaction whereby a customer was granted usage rights to transmission capacity in exchange for funding the transmission expansion, under the reasoning that any potential transmission customer has the right to request transmission service expansion from a transmission owning utility, and that utility is obligated to make any necessary system expansions and offer service at the higher of an incremental cost or an embedded cost rate to the transmission customer. More recently, in *National Grid*, the Commission found again that participant funding of transmission projects by incumbent transmission providers is not inconsistent with the Commission's open access requirements.<sup>12</sup> Cost-based participant-funded projects are similar to merchant projects in that both involve willing customers assuming part of the risk of a transmission project in return for defined capacity rights; i.e., there is no direct assignment of costs to captive customers. Cost-based participant-funded projects differ between incumbents and nonincumbents, in that incumbent transmission providers have a clearly defined set of existing obligations under their tariffs for the expansion of their existing transmission facilities, whereas nonincumbents have no existing obligation to build any transmission facilities.

#### A. Technical Conference and Workshop

7. To gain feedback regarding the Commission's capacity allocation policies, the Commission held a technical conference in March 2011 to discuss the extent to which nonincumbent developers of

transmission should be provided flexibility in the allocation of rights to use transmission facilities developed on a cost-of-service or negotiated rate basis.<sup>13</sup> Participants at that conference and subsequent commenters acknowledged the value in widely soliciting new customers, but they also expressed the desire to be able to allocate 100 percent of their projects' capacity through bilateral negotiations with identified customers.<sup>14</sup> Based on these comments, the Commission held a follow up workshop in February 2012 to obtain input on potential reforms to the Commission's capacity allocation policies.<sup>15</sup> Many participants at the 2012 workshop emphasized that a bilateral exchange of information is necessary to address the unique needs of developers and their potential customers, and that a rigid open season process does not allow for bilateral exchanges. However, other commenters at the 2012 workshop voiced concerns with the merchant transmission model in general, and discouraged the Commission from pursuing policies that enable anchor customers to exclude or burden generation competitors or engage in other abusive practices the Commission sought to eradicate in Order No. 888.

#### B. Proposed Policy Statement

8. Informed by the discussion at the workshop and technical conference and by comments filed afterwards, the Commission in July 2012 issued a proposed policy statement on the allocation of capacity on new merchant transmission projects and new cost-based, participant-funded transmission projects. The Commission proposed to allow developers of new merchant transmission projects and new nonincumbent cost-based, participant-funded transmission projects to select a subset of customers, based on not unduly discriminatory or preferential criteria, and negotiate directly with those customers to reach agreement on the rates, terms, and conditions for procuring capacity. The proposed policy would allow such direct negotiations

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

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

<sup>8</sup> See *id.* P 46.

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

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

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

<sup>12</sup> *National Grid*, 139 FERC ¶ 61,129 at P 29.

<sup>13</sup> "Priority Rights to New Participant-Funded Transmission," Docket No. AD11-11-000, March 15, 2011. This technical conference also addressed generator lead lines, but those facilities are not the subject of this proposed policy statement.

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

<sup>15</sup> "Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Projects," Docket No. AD12-9-000 (February 28, 2012).

when the developers (1) broadly solicit interest in the project from potential customers, and (2) demonstrate to the Commission that the developer has satisfied the solicitation, selection, and negotiation process criteria set forth in the proposed policy statement. Such proposed policy would also allow the developer to allocate up to 100 percent of the capacity on a transmission project to a single customer, including an affiliate, if the developer has satisfied the obligations set forth in the proposed policy statement.

9. The Commission received comments on the proposed policy statement from 18 entities.<sup>16</sup> As a general matter, the proposed policy statement received broad support in the comments received, albeit there were some comments in opposition. In addition, the Commission received requests to clarify the policies articulated in the proposed policy statement. We summarize here the general comments in support and in opposition to the proposed policy statement, with comments requesting clarification noted in the discussion of specific elements of this final policy statement.

10. Many commenters broadly support the proposed policy statement.<sup>17</sup> WITG asserts that the proposed policy statement will give new transmission development momentum by allowing transmission developers to discuss contractual arrangements, technical specifications and project timing with prospective customers.<sup>18</sup> WITG asserts that, under the proposed policy statement, a transmission developer will be more able to “right-size” its project based on market interest for the project.<sup>19</sup> AWEA and NYTO similarly suggest that the proposed policy statement will allow merchant transmission developments to be

tailored to the needs of the market.<sup>20</sup> EEI asserts that the proposed policy statement will allow transmission developers to identify viable transmission customers early in the process, and suggests that the flexibility allowed for in the proposed policy statement will aid funding and enable construction on a timely basis.<sup>21</sup> Duke Energy also asserts that the bilateral negotiation process allowed for in the proposed policy statement will provide the most efficient and effective way of ensuring that commercial transmission projects are successfully completed.<sup>22</sup>

11. AWEA emphasizes the importance of merchant transmission development in removing barriers to the development of renewable energy.<sup>23</sup> AWEA notes that the proposed policy statement will allow transmission developers to provide incentives to first-movers, which should encourage potential transmission customers to negotiate with developers early in the development process. In contrast, AWEA asserts that, under current Commission policy, “a prospective transmission customer has no economic incentive to commit to a capacity allocation early during the development process because that customer can obtain the same terms, and conditions during the open season auction without taking any development risk.”<sup>24</sup>

12. However, APPA, NRECA, NJ Rate Counsel and TAPS argue that changes to our capacity allocation policies are unnecessary, run counter to our open access principles, and are inconsistent with our obligations under the Federal Power Act (FPA). These commenters argue that the Commission’s proposal to allow allocation of 100 percent of a merchant’s capacity through bilateral negotiations is counter to the Commission’s core obligation under sections 205, 206, and 217(b)(4) <sup>25</sup> of the FPA, compromises the open access principles at the core of Order Nos.

888,<sup>26</sup> 890<sup>27</sup> and 1000,<sup>28</sup> and will result in an unjust, unreasonable, and unduly discriminatory paradigm.<sup>29</sup> For example, TAPS argues that the Commission should not relax its merchant policies but should instead continue to require a substantial portion of the capacity to be made available to other customers, through an open season, on the same rates and terms as are applied to the anchor customer(s).<sup>30</sup>

13. APPA and NRECA assert that our existing policies already provide substantial flexibility and have not prevented the development of merchant transmission projects.<sup>31</sup> They argue that the incentives inherent in the Commission’s proposed policy statement are poorly aligned with the Commission’s goals. TAPS similarly refutes the claim that developers have an inherent incentive to widely solicit interest in merchant transmission projects, arguing that once a developer takes on an anchor customer, its opportunity and incentives align with that customer.<sup>32</sup>

14. Further, NJ Rate Counsel argues that the proposed policy statement may have the unintended consequence of reducing competition in the long run and thus ultimately increasing the delivered cost of electricity.<sup>33</sup> NJ Rate Counsel and TAPS both argue that the Commission has long recognized that

<sup>26</sup> *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, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh’g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (DC Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).

<sup>27</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh’g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh’g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh’g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

<sup>28</sup> *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh’g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh’g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012).

<sup>29</sup> APPA at 3; NJ Rate Counsel at 4–9; NRECA at 4–9, 12; and TAPS at 10. TAPS argues that the Commission’s proposed policy statement will (1) result in undersized, single-purpose merchant transmission facilities with restricted access, (2) undermine regional transmission planning processes, (3) balkanize the grid and impair competitive wholesale markets, and (4) hamstring access to competitive generation and transmission development. TAPS at 1–5.

<sup>30</sup> TAPS at 10.

<sup>31</sup> APPA at 4; NRECA at 5.

<sup>32</sup> TAPS at 6–7, 9.

<sup>33</sup> NJ Rate Counsel at 4.

<sup>16</sup> American Antitrust Institute (AAI); American Electric Power Services Corporation (AEP); American Public Power Association (APPA); American Wind Energy Association (AWEA); Clean Line Energy Partners, LLC (Clean Line); Duke Energy Corporation (Duke); Edison Electric Institute (EEI); LSP Transmission Holdings, LLC (LSP Transmission); National Grid USA; National Rural Electric Cooperative Association (NRECA); New Jersey Division of Rate Counsel (NJ Rate Counsel); New York Transmission Owners (NYTO); Northeast Utilities Service Company (Northeast Utilities); Pattern Transmission, LP; Transmission Access Policy Study Group (TAPS); Transmission Developers, Inc. (TDI); TransWest Express, LLC; and Western Independent Transmission Group (WITG).

<sup>17</sup> AEP; AWEA; Clean Line; Duke; EEI; LSP Transmission; NYTO; National Grid USA; Northeast Utilities; Pattern Transmission, LP; TDI; TransWest Express, LLC; and WITG.

<sup>18</sup> WITG at 3.

<sup>19</sup> WITG at 4.

<sup>20</sup> AWEA at 3; NYTO at 2.

<sup>21</sup> EEI at 5.

<sup>22</sup> Duke at 3.

<sup>23</sup> AWEA at 6.

<sup>24</sup> AWEA at 6.

<sup>25</sup> APPA and NRECA argue the Commission has ignored its statutory obligation under FPA section 217(b)(4) that directs the Commission to facilitate the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy their service obligations. APPA at 12; NRECA at 11–12.

transmission is a natural monopoly and that “the most likely route to market power in today’s electric utility industry lies through ownership or control of transmission facilities.”<sup>34</sup> TAPS and NRECA underscore concerns over transmission siting fatigue<sup>35</sup> and right-of-way limitations, arguing that a small wind developer excluded from a merchant project is unlikely to be able to reach the market.<sup>36</sup>

### III. Final Policy Statement

#### A. Need for Refined Policies Regarding Allocation of Capacity on Transmission Projects

15. The fundamental concern underlying the second and third factor of the Commission’s four-factor analysis for negotiated rate authority is that new transmission capacity should be allocated in a not unduly discriminatory or preferential manner. Based on the Commission’s experience with new merchant transmission projects and on the comments received in this proceeding, the Commission believes that it can provide more flexibility in the capacity allocation process for customers and transmission developers, while still ensuring that the resulting allocation of new transmission capacity is not unduly discriminatory or preferential. By adopting the policies herein, the Commission seeks to encourage merchant transmission developers intending to seek negotiated rate authority to utilize the guidelines discussed herein. To the extent the Commission determines that a merchant transmission developer complies with such policies, the Commission will find that the developer has satisfied the second (undue discrimination) and third (undue preference) factors of the four-factor analysis.<sup>37</sup>

16. The Commission therefore refines its capacity allocation policies to allow

the developer of a new merchant transmission project to select a subset of customers, based on not unduly discriminatory or preferential criteria, and negotiate directly with those customers to reach agreement on the key rates, terms, and conditions for procuring up to the full amount of transmission capacity, when the developer (1) broadly solicits interest in the project from potential customers and (2) demonstrates to the Commission that the developer has satisfied the solicitation, selection and negotiation process criteria set forth herein. This capacity allocation process also will apply to the developer of a new nonincumbent, cost-based, participant-funded project.

17. With regard to concerns raised by commenters that the policies described in the proposed policy statement may compromise open access, balkanize the grid, or otherwise impair competition, these comments were taken into account in our development of the capacity allocation policies set forth herein. We believe that the allocation process outlined herein will provide the same protections as a formal open season process, i.e., that a broad notice at the early stages of project development and rigorous demonstration after the selection of transmission customers will mirror our earlier requirements. Therefore, the Commission disagrees that the refinements to our capacity allocation policies reflected herein are a departure from the Commission’s fundamental policies governing open access and encouraging competition. Retaining and refining the process by which capacity is allocated on such projects will increase, rather than impair, opportunities for customers in need of new transmission service.

18. Specifically, under this final policy statement the Commission will allow merchant transmission developers to allocate up to 100 percent of their projects’ capacity through bilateral negotiations. The Commission will also allow capacity allocation to affiliates, when done in a transparent manner with the transparency protections adopted in this final policy statement, so that other interested parties can voice concern if they believe the affiliate was treated preferentially at the expense of another party.

19. The flexibility we afford under the policy outlined below is complemented by the emphasis on additional detail the Commission will expect from transmission project developers concerning the process they utilize to allocate project capacity. The Commission agrees with commenters that each merchant transmission project

has unique project-specific characteristics that warrant providing such developers flexibility in negotiating risk-sharing and other details. The Commission likewise acknowledges that merchant transmission developers have inherent incentives to solicit interest widely in a potential project. However, the Commission also appreciates commenter concerns that counter-incentives may exist that could motivate a developer to unduly prefer one or more customers. To protect against undue discrimination and undue preference, the Commission will expect merchant transmission developers to engage in an open solicitation to identify potential transmission customers, and to demonstrate to the Commission that the processes leading to the identification of customers and execution of relevant capacity arrangements are consistent with our policies herein and our open access principles. The Commission believes that this approach, when coupled with the existing section 206 protections against undue discrimination and undue preference, serves the interest of customers and developers alike.<sup>38</sup>

20. We recognize that a developer’s incentives may change once it has contracted with a customer for a substantial portion of the transmission developer’s capacity. Indeed, several participants at the February 2012 workshop noted that part of the reason developers need to be able to negotiate more freely with potential customers is that there are a number of details to coordinate between the generation and transmission projects, recognizing that once a transmission developer has secured customers, its business success depends on its customers’ success. In this way, the relationship between transmission developer and transmission customer will inherently resemble that of a joint venture. We believe the policies described herein ensure that there is an open, transparent, and fair process to become a transmission customer, and in particular we believe that the Commission’s review of the post-selection demonstration will help discipline the process. We further believe the flexibility allowed through bilateral negotiations is appropriate in light of the risk-sharing inherent in the relationship between the transmission developer and its customers.

21. The Commission similarly appreciates concerns with respect to transmission siting fatigue and right-of-way limitations. Under the policies

<sup>34</sup> TAPS at 6 (citing *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, FERC Stats. & Regs. ¶ 31,036 at 31,643). NJ Rate Counsel additionally posits that, in private negotiations, an anchor tenant that expects to gain market power by excluding other generators from access to the new transmission project could seek an allocation of 100 percent of project capacity in return for an offer to split the anticompetitive gains with the merchant developer. NJ Rate Counsel at 7.

<sup>35</sup> Transmission siting fatigue is the idea that, after a transmission line is sited and permitted in an area, it will be significantly more difficult to get an additional transmission line sited and permitted in that same area.

<sup>36</sup> TAPS at 6; NRECA at 10–11.

<sup>37</sup> The remaining two Chinook factors, the justness and reasonableness of rates and regional reliability and operational efficiency requirements, remain elements of the Commission’s analysis of merchant applications for negotiated rate authority.

<sup>38</sup> See *Chinook*, 126 FERC ¶ 61,134 at P 41.

adopted herein, the Commission will evaluate a developer's reasoning for the sizing of new transmission facilities to ensure that the sizing of such facilities was based on objective criteria, rather than the result of undue preference or undue discrimination. In doing so, the Commission will be cognizant of the potential for undersized transmission facilities that show an undue preference for one customer over another, involve undue discrimination against a potential customer, and/or that, as a result of the anticompetitive nature of the sizing, result in rates for transmission service that are not just and reasonable. If the Commission finds that a transmission project is undersized as the result of undue preference, undue discrimination or other anticompetitive behavior, the Commission has the authority to reject the proposed allocation of capacity on such project. Moreover, entities that believe that such biases resulted in a discriminatory allocation of capacity will have the opportunity to protest the transmission developer's post-selection demonstration.<sup>39</sup> The Commission can, and has demonstrated that it will, reject unacceptable proposals for transmission capacity allocation when appropriate.<sup>40</sup>

22. We reaffirm here that all merchant transmission developers and nonincumbent cost-based, participant-funded transmission projects become public utilities at the time their projects are energized (and, depending on the circumstances, may become public utilities even earlier). Public utility transmission providers are subject to the Commission's OATT requirements, including the obligation to expand their transmission systems, if necessary, to provide transmission service.<sup>41</sup> This should help to allay concerns about the potential for undue discrimination and preference with respect to the sizing of these types of projects.

#### B. Merchant Projects

##### 1. Open Solicitation Process

23. Based on the Commission's experience with prior cases and information received from the technical conference, the workshop, and in responses to the proposed policy statement, the Commission believes that

bilateral negotiations, if conducted in a transparent manner, may serve the same purpose as an open season process to ensure against undue discrimination or preference in the provision of transmission service. Hence, under this final policy statement, merchant transmission developers seeking negotiated rate authority may instead engage in an open solicitation of interest in their projects from potential transmission customers in lieu of the previous requirement of a formal open season. Such open solicitation should include a broad notice issued in a manner that ensures that all potential and interested customers are informed of the proposed project. For example, such notice may be placed in trade magazines or regional energy publications, may include communications with regional transmission planning groups such as through the Order No. 1000 regional planning process,<sup>42</sup> and may use email distribution lists addressing transmission-related matters. In response to commenters that asked that we clarify what constitutes broad notice,<sup>43</sup> we note that these examples of broad notice are not intended to be exhaustive or prescriptive. A developer should make reasonable efforts to ensure that all potential transmission customers would be made aware of the intention to develop the project.

24. Such notice should include transmission developer points of contact and pertinent project dates, as well as sufficient technical specifications and contract information to inform interested customers of the nature of the project, including:

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

25. The developer should also specify in the notice the criteria it plans to use to select transmission customers, such as credit rating; "first mover" status (i.e., customers who respond early and take on greater project risk); and customers' willingness to incorporate project risk-sharing into their contracts. This will contribute to the transparency of the process and will help interested entities know at the outset the features of the project and how the merchant transmission developer will consider bids. This list of criteria is not prescriptive or exhaustive.

26. Developers may also adopt a specific set of objective criteria that they will use to rank prospective customers, provided they can justify why such criteria are appropriate. Clean Line suggests the Commission should consider incorporating additional criteria as part of the capacity allocation process, including: Willingness to pay, length of term for transmission service, acceptance of proposed business terms, and the state of advancement in generation project development.<sup>44</sup> The Commission believes that, while the additional criteria suggested by Clean Line appear reasonable on their face, we would need additional information to ensure the criteria proposed are indeed uniformly appropriate and are not discriminatory. Thus, we decline to incorporate at this time the additional criteria proposed by Clean Line, though we could consider these types of criteria in a specific case before the Commission.

27. Finally, the Commission expects the merchant transmission developer to update its posting if there are any material changes to the nature of the project or the status of the capacity allocation process, in particular to ensure that interested entities are informed of remaining available capacity. As proposed by WITG,<sup>45</sup> time-stamped updates on a developer's Web site is one reasonable approach for alerting interested parties to periodic changes in project information, provided that the developer's initial broad notice had alerted entities to the developer's Web site, and to the possibility that changes might occur and would be posted there.

28. Under the final policy statement, once a subset of customers has been identified by the developer through the open solicitation process, the Commission will allow developers to engage in bilateral negotiations with each potential customer on the specific rates, terms, and conditions for

<sup>39</sup> Such entities remain entitled to exercise their statutory right to challenge such capacity allocations under section 206 of the FPA.

<sup>40</sup> See, e.g., *Mountain States Transmission Intertie, LLC and NorthWestern Corp.*, 127 FERC ¶ 61,270 (2009).

<sup>41</sup> See *Pro Forma Open Access Transmission Tariff* § 15.4(a). See also *Tres Amigas LLC*, 130 FERC ¶ 61,207, at PP 18, 76, 80 (2010); *SunZia Transmission LLC*, 131 FERC ¶ 61,162, at P 43 (2010); *SunZia Transmission LLC*, 135 FERC ¶ 61,169, at PP 10–11, 22 (2011); *Montana Alberta Tie, Ltd.*, 119 FERC ¶ 61,216, at P 7 (2007).

<sup>42</sup> We note that NJ Rate Counsel suggested that a group's participation in the Order No. 1000 process could bear on the open solicitation requirements. NJ Rate Counsel at 12–13.

<sup>43</sup> See, e.g., *Pattern Transmission, LP* at 10; WITG at 4.

<sup>44</sup> Clean Line at 6.

<sup>45</sup> WITG at 2, 5.

procuring transmission capacity, as the Commission recognizes that developers and potential customers may need to negotiate individualized terms that meet their unique project-specific needs.<sup>46</sup> In these negotiations, the Commission will allow for distinctions among prospective customers based on transparent and not unduly discriminatory or preferential criteria—so long as the differences in negotiated terms recognize material differences and do not result in undue discrimination or preference—with the potential result that a single customer, including an affiliate, may be awarded up to 100 percent of capacity. For instance, developers might offer “first mover” customers more favorable rates, terms, and conditions than later customers. This represents a change from prior policy, under which the Commission required that a developer offer their “anchor customer deal” in the open season to any other customer willing to make the same commitment as the anchor customer, such that all customers had access to the same rates, terms, and conditions.<sup>47</sup> For reasons discussed above, including the need to negotiate individualized terms and incent early movers, we conclude that this policy change is appropriate.

## 2. Post-Selection Demonstration

29. In the past, the Commission required that developers file a report, shortly after the close of the open season, on the results of the open season and any anchor customer presubscription, including information on the notice of the open season, the method used for evaluating bids, the identity of the parties that purchased capacity, and the amount, term, and price of that capacity.<sup>48</sup> The Commission required this report to provide transparency to the allocation of initial transmission rights, and to enable unsuccessful bidders to determine if they were treated in an unduly discriminatory manner so that they may file a complaint if they believe they

were.<sup>49</sup> These reports were not noticed, and did not receive Commission action.

30. The Commission will continue to require merchant transmission developers to disclose the results of their capacity allocation process, though this disclosure will be part of the Commission’s approval of such capacity allocation process, and thus noticed and acted upon under section 205 of the FPA. Specifically, to provide transparency, and to prevent against undue discrimination and undue preference by merchant transmission developers, this final policy statement expects developers to demonstrate that the processes that led to the identification of transmission customers and the execution of the relevant contractual arrangements are consistent with the policies described herein, and consistent with our open access principles. The merchant transmission developer should describe the criteria used to select customers, any price terms, and any risk-sharing terms and conditions that served as the basis for identifying transmission customers selected versus those that were not. To this end, and in response to comments suggesting additional transparency measures,<sup>50</sup> the Commission will expect that the developer include, at a minimum, the following information in the demonstration to provide sufficient transparency to the Commission and interested parties:

(1) Steps the developer took to provide broad notice, including the project information and customer evaluation criteria that were relayed in the broad notice;

(2) Identity of the parties that expressed interest in the project, placed bids for project capacity, and/or purchased capacity; and the capacity amounts, terms, and prices involved in that interest, bid, or purchase;

(3) Basis for the developer’s decision to prorate, or not to prorate, capacity, if a proposed project is oversubscribed;

(4) Basis for the developer’s decision not to increase capacity for a proposed project if it is oversubscribed (including the details of the economic, technical, or financial infeasibility that is the basis for declining to increase capacity);

(5) Justification for offering more favorable rates, terms, and conditions to certain customers, such as “first movers” or those willing to take on greater project risk-sharing;

(6) Criteria used for distinguishing customers and the method used for

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

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

31. In response to requests that the Commission clarify when a transmission developer needs to request approval of its capacity allocation process,<sup>51</sup> we will allow a developer discretion in timing its request that the Commission approve a capacity allocation process. For example, developers can seek approval of their capacity allocation approach after having completed the process of selecting customers in accordance with our policies. Alternatively, a developer can first seek approval of its capacity allocation approach, and then demonstrate in a compliance filing to the Commission order approving that approach that the developer’s selection of customers was consistent with the approved selection process. Under either procedural framework, the Commission will notice the demonstration, allow protests, and reach a determination regarding whether the developer’s selection of customers was consistent with our policies herein and our open access principles.<sup>52</sup> However, we agree with some commenters that protests filed in response to the post-selection demonstration should be focused on the

<sup>46</sup> While negotiations for the allocation of initial transmission rights may address terms and conditions of the transmission service to be ultimately taken once the facilities are in service, the Commission will adhere to its policy, regardless of any negotiated agreement, that any deviations from the Commission’s *pro forma* OATT must be justified as consistent with or superior to the *pro forma* OATT when the transmission developer files its OATT with the Commission. The Commission will evaluate any deviations on that basis when they are submitted. See *Chinook*, 126 FERC ¶ 61,134 at PP 47, 63.

<sup>47</sup> See *Chinook*, 126 FERC ¶ 61,134 at P 61.

<sup>48</sup> *Chinook*, 126 FERC ¶ 61,134 at PP 41, 43.

<sup>49</sup> See *Chinook*, 126 FERC ¶ 61,134 at P 41; *Montana Alberta Tie, Ltd.*, 116 FERC ¶ 61,071, at P 37 (2006).

<sup>50</sup> AAI at 6–7; TAPS at 13–14.

<sup>51</sup> See, e.g., *Pattern Transmission*, LP at 13.

<sup>52</sup> Under this policy statement, the Commission’s policies for reviewing capacity allocation processes will apply equally to both new merchant transmission developers and new nonincumbent cost-based participant-funded transmission developers. With respect to new merchant transmission developers, the Commission’s consideration of this capacity allocation process will be a part of the Commission’s evaluation of the applicant’s request for negotiated rate authority.

matters at issue in the Commission's review.<sup>53</sup>

32. We emphasize that the information in the post-selection demonstration is an essential part of a merchant developer's request for approval of a capacity allocation process, and that the developer will have the burden to demonstrate that its process was in fact not unduly discriminatory or preferential, and resulted in rates, terms, and conditions that are just and reasonable. Thus, interested parties will have the opportunity to submit protests on the demonstration to ensure there is sufficient transparency. The Commission expects that interested parties who believe that the process used to select customers and allocate capacity on merchant transmission projects was unjust or preferential would file comments or protests on the demonstration. Interested parties also remain entitled to exercise their statutory right to challenge the process under section 206 of the FPA.

33. In response to commenters that request that we recognize the commercially sensitive nature of the business arrangements associated with capacity allocation, we clarify that we will address whether to allow for protection of such information on a case-by-case basis.<sup>54</sup> We believe transparency is essential to our allowing capacity to be allocated through bilateral negotiations rather than a more formally structured open season process. Thus, we do not agree that certain types of commercial information should be generically protected. To the extent developers believe they cannot file certain information publicly, they may make their case for confidential treatment to the Commission when they file their post-selection demonstrations.

34. With respect to potential affiliate participation in the capacity allocation process, the Commission will continue to expect an affirmative showing that the affiliate is not afforded an undue preference.<sup>55</sup> The developer will bear a high burden to demonstrate that the assignment of capacity to its affiliate and the corresponding treatment of non-affiliated potential customers is just, reasonable, and not unduly preferential or discriminatory. While the Commission will not require non-affiliates to receive the same rates, terms and conditions as affiliates as suggested by some commenters,<sup>56</sup> the Commission

will carefully scrutinize any differences in rates, terms and conditions for affiliates versus non-affiliates to ensure those differences are appropriately based on objective criteria.

35. Commenters are concerned that the reporting obligations described in the proposed policy statement provide inadequate protections for potential transmission customers. NRECA argues that discrimination can take place not only in the solicitation of a project, but also in the design of a project, and that the proposed reporting requirement would not remedy this flaw.<sup>57</sup> APPA asserts that this "after-the-fact" reporting requirement is of particular concern, because the Commission will be under substantial pressure to rubberstamp an after-the-fact filing because the applicants will have already completed their contract negotiations and selected successful customers.<sup>58</sup> APPA cautions that, if the Commission adopts this proposed policy despite commenters' concerns, it is critical that the associated reporting requirements not be eroded over time.<sup>59</sup>

36. The Commission believes that the reporting obligations set forth in this final policy statement offer sufficient protections to ensure that a capacity allocation process protects against undue preference or discrimination. In response to commenters that questioned if any consequences attach to the report or if it is just informational,<sup>60</sup> we reiterate that we will notice the demonstration and consider any protests submitted in reaching our determination on such demonstration.

37. Certain commenters argue that the section 206 complaint process is an insufficient deterrent to undue preference or discrimination in the capacity allocation process, and that few section 206 complaints are likely to be filed particularly due to inadequate resources or time to mount effective section 206 challenges.<sup>61</sup> In particular, NJ Rate Counsel is concerned that the filing of section 206 challenges will depend on the willingness of

participants to assume a heavy burden without attendant discovery rights, and on the need for an expedited process with no assurance that the process will move quickly.<sup>62</sup> Similarly, NRECA argues that complainants are unlikely to have access to some or all of the required information, and NRECA notes that the Commission has at times dismissed complaints alleging wrongdoing for lack of specificity.<sup>63</sup> The NJ Rate Counsel asserts that reliance on the section 206 complaint process shifts the Commission's independent regulatory responsibility to third-party complainants, and argues that the Commission must exercise its independent responsibility to ensure that rates remain just and reasonable and not unduly discriminatory.<sup>64</sup>

38. In response to these comments, we clarify that, under the processes adopted in this final policy statement, entities will be able to protest a developer's proposed capacity allocation process (which we expect to be described in detail as part of the developer's post-selection demonstration pursuant to section 205 of the FPA). Under this final policy statement, the Commission will evaluate the capacity allocation process to ensure that the process was not unduly discriminatory or preferential, and resulted in rates, terms, and conditions that are just and reasonable. Entities also remain entitled to challenge such capacity allocation processes by filing a complaint under section 206 of the FPA.

#### *C. Nonincumbent, Cost-Based, Participant-Funded Projects*

39. The Commission will apply the policy clarifications and refinements in this final policy statement not only to new merchant transmission projects, but also to nonincumbent, cost-based, participant-funded transmission projects. The Commission has similar concerns regarding the capacity allocation process regardless of whether the project is a new merchant transmission project, or a nonincumbent, cost-based, participant-funded transmission project. That is, the Commission is concerned that access not be unduly discriminatory or preferential. We believe that the process outlined herein will address such concerns, however. Commenters and workshop participants, moreover, support the Commission's application of these policy clarifications and refinements to both new merchant transmission developers and

<sup>53</sup> NRECA at 14.

<sup>54</sup> APPA at 9.

<sup>55</sup> APPA at 7.

<sup>56</sup> See, e.g., TAPS at 17–20.

<sup>57</sup> APPA at 8; AAI at 6; NJ Rate Counsel at 3; NRECA at 14–15. NRECA adds that the proposed Policy Statement is inconsistent with the Commission's statement in Order No. 1000–A that, "individual complaints under section 206 of the FPA would not suffice to overcome the free rider problem because litigating complaints burdens and unduly delays the transmission planning process" (or in this case, unduly delay open access to transmission service). NRECA at 15 (citing *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities* Order No. 1000–A, 139 FERC ¶ 61,132, at P 577 (2012)).

<sup>62</sup> NJ Rate Counsel at 3.

<sup>63</sup> NRECA at 14–15.

<sup>64</sup> NJ Rate Counsel at 10.

<sup>53</sup> See Pattern Transmission, LP at 14; WITG at 6.

<sup>54</sup> See AEP at 4; AAI at 10–11; Duke at 4; EEI at 5; Pattern Transmission, LP at 13; and WITG at 6.

<sup>55</sup> See *Chinook*, 126 FERC ¶ 61,134 at PP 49–50.

<sup>56</sup> See, e.g., TAPS at 26.



nonincumbent, cost-based, participant-funded transmission developers.<sup>65</sup> Petitions regarding capacity allocation on nonincumbent, cost-based, participant-funded transmission projects will be evaluated by the Commission in accordance with the Commission's responsibilities under the FPA.

40. However, use of this common process does not eliminate the distinction between these types of projects. In particular, although the negotiations between developers and potential customers could address a transmission rate, among other issues, the Commission's approach to reviewing such a rate would be different for a new merchant transmission project than for a new nonincumbent, cost-based, participant-funded transmission project. For a nonincumbent, cost-based, participant-funded transmission project, the Commission will review the transmission rate, terms and conditions, including any agreed upon return on equity, more closely to ensure that they satisfy Commission precedent regarding cost-based transmission service.

#### *D. Incumbent, Cost-Based, Participant-Funded Projects*

41. The Commission is not changing its case-by-case evaluation of requests for cost-based participant-funded transmission projects by incumbent transmission providers.<sup>66</sup> This final policy statement thus does not affect incumbent transmission development for the purpose of serving native load. Incumbents differ from nonincumbents in that the former have a clearly defined set of existing obligations under their OATTs with regard to new transmission development, including participation in regional planning processes and the processing of transmission service request queues. Nonincumbent transmission developers do not yet own or operate transmission facilities in the region that they propose to develop transmission; thus, they are not yet subject to an OATT in that region.<sup>67</sup> Thus, the Commission's final policy statement establishes the Commission's process for evaluating, going forward,

the allocation of capacity only for merchant transmission developers and nonincumbent, cost-based, participant-funded projects for new transmission facilities.

42. In contrast, in most instances, we would expect that an incumbent transmission provider will be able to use existing processes set forth in its OATT to allocate capacity on a new transmission facility. These existing OATT processes do not prohibit incumbent transmission owners from identifying projects that could be constructed on a participant-funded basis in conjunction with processing of transmission service requests or in addition to meeting transmission needs through participation in a regional transmission planning process.<sup>68</sup> Furthermore, the Commission will continue to entertain on a case-by-case basis requests for waiver of any OATT requirements that may be needed for the incumbent transmission owner to pursue innovative transmission development that is just, reasonable, and not unduly discriminatory. For example, an incumbent may seek waiver of serial queue processing requirements so that it may cluster transmission service requests,<sup>69</sup> or it may seek to "ring fence" a transmission project in order to ensure that new transmission facilities developed for a particular customer or set of customers do not adversely affect existing customers, including native load.<sup>70</sup> Incumbent developers should address capacity allocation issues in a manner that does not constitute undue discrimination or preference and is consistent with applicable Commission-accepted tariffs.<sup>71</sup>

#### *E. Miscellaneous*

43. WITG requests that the Commission allow developers that have

<sup>68</sup> See, e.g., Subscription Process for Proposed PacifiCorp Transmission Expansion Projects, available at [http://www.oasis.pacifiCorp.com/oasis/ppw/SUBSCRIPTION\\_PROCESS.PDF](http://www.oasis.pacifiCorp.com/oasis/ppw/SUBSCRIPTION_PROCESS.PDF) (noting incumbent's solicitation of interest from third parties in the development of a cost-based transmission project in advance of receipt of transmission service requests from third parties under the incumbent's OATT).

<sup>69</sup> See, e.g., *Portland General Electric Co.*, 139 FERC ¶ 61,133 (2012) (granting waiver of serial queue processing requirements, allowing a general facilities study for a cluster of transmission and interconnection service requests).

<sup>70</sup> See, e.g., *Mountain States Transmission Intertie, LLC and NorthWestern Corp.*, 127 FERC ¶ 61,270, at PP 2, 5 (2009) (incumbent developing an export-only transmission project through a separate stand-alone company so that their existing transmission customers will not be required to subsidize the cost of a new transmission facility to serve off-system markets; the Commission presented the option of this project proceeding on a cost-of-service basis).

<sup>71</sup> See *National Grid*, 139 FERC ¶ 61,129 at P 33.

already been granted negotiated rate authority the ability to allocate any unsubscribed capacity according to the processes in this policy statement. We clarify here that such developers, if they want to utilize the capacity allocation process described in this final policy statement for any unsubscribed capacity, must seek Commission approval to deviate from their current capacity allocation process authority set forth in the Commission order granting them negotiated rate authority. This will ensure that all interested parties are fully aware of and have an opportunity to comment on the proposed capacity allocation.

44. Several commenters raise concerns regarding the role of the merchant transmission developer in the Order No. 1000 regional planning processes. The policies set forth herein are intended only to be a roadmap for the capacity allocation process for new merchant and nonincumbent, cost-based, participant-funded transmission facilities. Thus, we believe that comments addressing the Order No. 1000 regional planning processes are outside the scope of this final policy statement. However, we note that Order No. 1000 requires a merchant transmission developer to provide adequate information and data to allow public utility transmission providers in the transmission planning region to assess the potential reliability and operational impacts of the merchant transmission developer's proposed transmission facilities on other systems in the region.<sup>72</sup>

45. Clean Line requests that the Commission ensure that all RTOs/ISOs and transmission providers create interconnection queue processes that do not hinder high voltage direct current (HVDC) transmission development, and suggests that a standard interconnection procedure specifically for HVDC lines would solve this issue.<sup>73</sup> The Commission believes that the matter of HVDC-specific interconnection procedures is similarly outside the scope of this final policy statement.

#### **IV. Document Availability**

46. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (<http://www.ferc.gov>) and in the Commission's

<sup>72</sup> See Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 163–164; Order No. 1000–A, 139 FERC ¶ 61,132 at P 297.

<sup>73</sup> Clean Line at 8.

<sup>65</sup> TAPS March 29, 2012 Comments at 24; Pathfinder Renewable Wind Energy, LLC March 28, 2012 Comments at 3–4.

<sup>66</sup> See, e.g., *NU/NSTAR*, 127 FERC ¶ 61,179 (2009), order denying reh'g and clarification, 129 FERC ¶ 61,279 (2009); *National Grid*, 139 FERC ¶ 61,129 (2012).

<sup>67</sup> We clarify, in response to Clean Line, that, for purposes of this final policy statement, a nonincumbent transmission developer will not become an incumbent within a transmission planning region until such time as it energizes a transmission facility within that region. See Order No. 1000–A, 139 FERC ¶ 61,132 at P 421.



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.

47. From Commission'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.

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

By the Commission.

**Nathaniel J. Davis, Sr.,**  
Deputy Secretary.

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## DEPARTMENT OF THE INTERIOR

### National Indian Gaming Commission

#### 25 CFR Parts 556 and 558

RIN 3141-AA15

#### Tribal Background Investigations and Licensing

**AGENCY:** National Indian Gaming Commission, Interior.

**ACTION:** Final rule.

**SUMMARY:** The National Indian Gaming Commission (NIGC or Commission) is amending certain NIGC regulations concerning background investigations and licenses to streamline the submission of documents to the Commission; to ensure that two notifications are submitted to the Commission in compliance with the Indian Gaming Regulatory Act (IGRA); and to clarify the regulations regarding the issuance of temporary and permanent gaming licenses.

**DATES:** *Effective Date:* February 25, 2013.

**FOR FURTHER INFORMATION CONTACT:** John Hay, National Indian Gaming Commission, 1441 L Street NW., Suite 9100, Washington, DC 20005. Telephone: 202-632-7009.

**SUPPLEMENTARY INFORMATION:**

### I. Background

The Indian Gaming Regulatory Act (IGRA or Act), Public Law 100-497, 25 U.S.C. 2701 *et seq.*, was signed into law on October 17, 1988. The Act establishes the NIGC and sets out a comprehensive framework for the regulation of gaming on Indian lands. On November 18, 2010, the Commission issued a Notice of Inquiry and Notice of Consultation (NOI) advising the public that the NIGC was conducting a comprehensive review of its regulations and requesting public comment on which of its regulations were most in need of revision, in what order the Commission should review its regulations, and the process NIGC should utilize to make revisions. 75 FR 70680 (Nov. 18, 2010). On April 4, 2011, after holding eight consultations and reviewing all comments, NIGC published a Notice of Regulatory Review Schedule (NRR) setting out a consultation schedule and process for review. 76 FR 18457. The Commission's regulatory review process established a tribal consultation schedule with a description of the regulation groups to be covered at each consultation. These parts 556 and 558 were included in this regulatory review.

### II. Previous Rulemaking Activity

The Commission consulted with tribes as part of its review of parts 556 and 558. Tribal consultations were held in every region of the country and were attended by numerous tribes, tribal leaders or their representatives. After considering the comments received from the public and through tribal consultations, the Commission published a Notice of Proposed Rulemaking regarding background and investigation licensing procedures on December 22, 2011.

### III. Review of Public Comments

In response to our Notice of Proposed Rulemaking, published December 22, 2011, 76 FR 79567, we received the following comments.

#### General Comments

*Comment:* Many commenters supported the formalization of the "pilot program" because it reduces the quantity of documents a tribe must submit to the NIGC, formalizes a streamlined process, and is a cost effective measure.

*Response:* The Commission agrees and has decided to amend parts 556 and 558 to implement the pilot program.

*Comment:* Many commenters generally support the changes to part 558.

*Response:* The Commission has decided to go forward with many of the amendments set forth in the proposed rule.

*Comment:* One commenter supported the agency's efforts to improve tribal access to background investigation materials but was puzzled by the suggestion that the Commission presently lacks "sufficient resources and technology" to make this information available in a secure format. The commenter believes that the necessary technology is available and the Commission resources would be minimal. Further, the commenter urges the Commission to develop a plan and a timeline for implementing such a system.

*Response:* The Commission will continue to review this issue closely to determine whether it is feasible to make background investigation information available in a secure format.

*Comment:* One commenter stated that there is potential for confusion and/or possible non-compliance when attempting to reconcile the requirements in 556.1, 556.6(b)(2), 558.1, and 558.3(b), because the perimeters of temporary versus permanent licenses are unclear in these sections. The commenter suggested that a revision to the regulations may not be necessary; however, additional guidance may be beneficial for applying the regulatory sections.

*Response:* The Commission reviewed this provision and believes it is sufficiently clear. The Commission will examine whether it is appropriate to issue additional guidance for those sections.

*Comment:* One commenter inquired whether a tribe would be out of compliance with 556.2(b)(2) and/or 558.3(b) if it allows for temporary employees to be used and/or issues temporary licenses for a period of 90 days or less and it hires such temporary employee or individual with a temporary license as a key employee or primary management official during that time period.

*Response:* Temporary licenses are used by tribes that choose to have individuals working in their gaming facilities while the individuals are undergoing the background investigation and licensing process. No key employee or primary management official can work at a gaming facility for longer than 90 days without a gaming license issued pursuant to parts 556 and 558. The tribe should implement the regulatory licensing process for a key employee or primary management official simultaneously with issuing a temporary license to ensure that a