

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Standardization of Generator)	
Interconnection Agreements and)	Docket No. RM02-1-000
Procedures)	
)	

**REQUEST FOR CLARIFICATION AND REHEARING
OF THE LARGE PUBLIC POWER COUNCIL**

Pursuant to Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission"), 18 C.F.R. § 385.713 (2003), the Large Public Power Council ("LPPC") respectfully submits this Request for Clarification and Rehearing of the Commission's Final Rule in the above-captioned docket.¹ LPPC supports the Commission's retention of the Order No. 888 approach to reciprocity, but submits that some statements in the Final Rule are inconsistent with that approach. Accordingly, LPPC seeks further explicit clarification that the Commission's intent is not to change its current reciprocity policy. Alternatively, should the Commission determine that it is modifying the application of Order No. 888's reciprocity requirement, LPPC seeks rehearing on this issue for the reasons stated below. LPPC also seeks rehearing regarding the Commission's policy for dual-use facilities.

I. BACKGROUND

LPPC is an association of 24 of the largest public power systems in the United States. LPPC member companies are not-for-profit entities that are service-focused, committed to the local residents and communities we serve, bound by state constitutional and statutory mandates and fiduciary responsibilities as well as local

¹ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61,103 (2003) ("Final Rule").

regulations, and mandated to use our tax-exempt funded assets first and foremost to serve our core customers.

On June 17, 2002, LPPC filed comments² on the NOPR issued by the Commission in this proceeding on April 24, 2002.³ In those comments, LPPC stated its support for the Commission's goals of encouraging investment in infrastructure, limiting opportunities for transmission owners to favor their own generation, and easing entry into the market while ensuring efficient siting decisions. LPPC offered comments on several aspects of the NOPR to assist the Commission in realizing these goals, including the allocation of upgrade costs, indemnification against the loss of tax-exempt status due to an interconnection, liquidated damages, reliability and business standards and reciprocity.

On July 24, 2003, the Commission issued the Final Rule in this proceeding. The LPPC here seeks clarification on the issues of greatest importance that affect our ability to continue to provide low-cost, reliable power to our core customers.

II. REQUEST FOR CLARIFICATION

A. Reciprocity

With regard to the applicability of the Generator Interconnection Final Rule to non-public utilities, the Commission declares that as part of the *pro forma* Open Access Transmission Tariff ("OATT"), the Final Rule Large Generator Interconnection Procedures ("LGIP") and Large Generator Interconnection Agreement ("LGIA") will be

² Comments of the Large Public Power Council, FERC Docket No. RM02-1-000 (filed June 17, 2002).

³ *Standardizing Generator Interconnection Agreements and Procedures*, FERC Stats. & Regs. ¶ 32,560 (2002).

subject to the reciprocity provision of Order No. 888.⁴ The Commission goes on to emphasize, “[w]e wish to make it clear that this Final Rule in no way alters the applicability of the reciprocity provision in the OATT and the reciprocity policy articulated in Order No. 888 and its progeny.”⁵ The Commission expands upon this determination by specifying three ways a non-public utility may satisfy the reciprocity provision: (1) by providing service under a safe harbor OATT on file with the Commission to any public utility whose transmission service the non-public utility seeks to use; (2) by providing service to a public utility under a bilateral agreement which satisfies the reciprocity obligation; and (3) by seeking waiver of the reciprocity condition.⁶ The LPPC fully supports the Commission’s retention of this approach.

However, the Commission makes certain other statements in the Final Rule which are seemingly inconsistent with the application of the reciprocity requirement as described above. First, in P 843 of the Final Rule, the Commission states that it will not require non-public utilities to provide transmission credits for Network Upgrade costs in order to satisfy the reciprocity condition, but that it will only require that the rates for interconnection be comparable to the rates the non-public utility charges itself. By way of contrast, in the section of the Final Rule discussing the requirement that the Interconnection Customer be reimbursed for the costs of Network Upgrades, the Commission specifically denies the request of the Los Angeles Department of Water and Power (“LADWP”) to provide such refunds over the same period that it would use to amortize such facilities if constructed for the benefit of its own customers. Instead, the

⁴ Final Rule at P 832.

⁵ Final Rule at P 840.

⁶ Final Rule at P 841.

Commission holds that all non-independent transmission providers must refund the cost of Network Upgrades to the Interconnection Customer over a five-year repayment period.⁷

The Commission's determinations regarding credits are difficult to reconcile. On the one hand, the Commission appears to be saying that non-public utilities will not have to provide credits to Interconnection Customers for Network Upgrades; on the other hand, the Commission determines that non-public utilities will have to provide such credits over a five-year repayment period. The Commission should clarify that non-public utilities, regardless of whether they are non-independent transmission providers, need not refund Interconnection Customers for the cost of Network Upgrades over a five-year period, but rather must charge them rates for interconnection comparable to what the non-public utility charges itself in order to satisfy the reciprocity provision. This formulation is consistent with the Commission's stated intent not to expand the application of the reciprocity requirement of Order No. 888, which requires that non-public utilities charge rates comparable to what they charge themselves.

A second area where additional clarity is needed is the holding that non-public utilities will not be required to provide transmission credits for Network Upgrades, which arises in the discussion of Affected Systems, at PP 738-739. There, the Commission holds that an Affected System Operator may require an Interconnection Customer to pay for all Interconnection Facilities and Network Upgrades constructed to accommodate the Interconnection request, but must refund such payments back to the Interconnection Customer over a five-year period, regardless of whether the

⁷ Final Rule P 722.

Interconnection Customer takes transmission service from the Affected System. LPPC requests clarification that Affected Systems that are non-public utilities need not provide such refunds to Interconnection Customers in order to satisfy the reciprocity provisions of the Final Rule. Such clarification is consistent with the Commission's statement that non-public utilities will not be required to provide refunds for Network Upgrades in order to satisfy the reciprocity provision.

Third, there are inconsistent statements in the Final Rule as to the terms and conditions of service that a non-public utility must provide in order to satisfy the reciprocity requirement. In P 832, the Commission states, "With the addition of the Final Rule LGIP and Final Rule LGIA to the OATT, in order to meet its reciprocity obligation, a non-public utility would have to provide Interconnection Service to the Transmission Provider and the Transmission Provider's Affiliates under the same terms and conditions under which it receives service" (emphasis added). However, the Commission later determines in P 844, that "we shall limit reciprocity compliance to those services a nonjurisdictional entity is capable of providing on its system." In some cases, service non-public utilities are capable of providing may be quite different than the terms and conditions under which non-public utilities receive service from a public utility. The Commission should clarify that it will require that non-public utilities will provide transmission service in a manner comparable to the way they offer service to themselves in order to obtain transmission service from a jurisdictional utility under its OATT. Such a clarification would be consistent with the Order No. 888 reciprocity requirement.

Fourth, contrary to the assurance in P 840 that the Commission is not changing the current reciprocity policy, the Commission states at P 832 that a non-public utility would have to provide reciprocal service not only to the utility from which it takes transmission service, but also to all of that utility's affiliates. This constitutes an expansion of the Order No. 888 reciprocity requirement. The Commission has stated very clearly that in order to satisfy the reciprocity provisions of Order No. 888, a non-public utility need offer reciprocal service "to only those transmission providers from whom the non-public utility obtains open-access service."⁸ Order No. 888 does not require that reciprocal access be offered to all affiliates of a transmission provider from whom a non-public utility seeks service. Further, such an unwieldy requirement could serve to inhibit the voluntary participation of public power in restructured markets. Consistent with Order No. 888, LPPC requests that the Commission clarify that a non-public utility need offer reciprocal access only to the transmitting provider from whom it receives service and not to all of its affiliates as well.

Finally, LPPC asks the Commission to clarify that the provisions of PP 840 - 845 shall be deemed to represent the Commission's intent with regard to non-public utility interconnection matters.

B. Interconnections to "Distribution" Facilities

LPPC also seeks clarification regarding the application of the Generator Interconnection LGIP and LGIA to facilities used for distribution service. LPPC supports the Commission's stated position that the Final Rule applies only where the Commission already has jurisdiction over a particular facility at the time an

⁸ *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities,*

interconnection request is made.⁹ However, the Final Rule offers no indication of how the Commission will determine whether particular facilities are under its jurisdiction. The Commission should clarify that it will continue to use the test laid out in Order No. 888 to determine whether facilities are jurisdictional or are deemed “local distribution” under the Federal Power Act.¹⁰ Under Order No. 888, as upheld by the United States Court of Appeals for the D.C. Circuit¹¹ and the U.S. Supreme Court,¹² the Commission asserts Section 205 and 206 jurisdiction over any facility used to deliver energy in interstate commerce to a wholesale purchaser, even if such facilities are labeled “distribution.” However, for facilities used to deliver electric energy directly to an end-user, the Commission applies the functional test known as the “seven-factor test.”¹³

LPPC supports the Commission’s position that the cost of Network Upgrades for “distribution” facilities that are nonetheless jurisdictional under the Order No. 888 standard should not be refunded to the Interconnection Customer.¹⁴ However, LPPC seeks clarification as to how the Commission intends to differentiate between such “jurisdictional distribution” facilities and “transmission” facilities. LPPC respectfully suggests that if the Commission does not put forth a test for determining when jurisdictional facilities should be classified as “distribution” facilities even though they are

Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at p. 30,289 (1997) (“Order No. 888-A”).

⁹ Final Rule P 809.

¹⁰ *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, Appendix G, at pp. 31,980-981 (1996) (“Order No. 888”).

¹¹ *Transmission Access Policy Study Group v. Federal Energy Regulatory Commission*, 225 F.3d 667, 694-696 (D.C. Cir. 2000).

¹² *New York v. Federal Energy Regulatory Commission*, 535 U.S. 1, 20-21 (2002).

¹³ Order No. 888, Appendix G, at p. 31,980-981.

¹⁴ Final Rule P 697.

not “local distribution” facilities under Order No. 888, public utilities will seek to classify facilities as “jurisdictional distribution” whenever possible in order to avoid paying refunds for Network Upgrades. Interconnection Customers will seek to classify as many facilities as possible as “transmission” facilities in order to obtain refunds. Clarification will eliminate such counterproductive incentives.

Finally, LPPC seeks clarification that an interconnection request for the purposes of making sales in interstate commerce will not invoke the LGIP and LGIA for facilities which are not otherwise under the Commission’s jurisdiction at the time that the request is made.

III. REQUEST FOR REHEARING

A. Reciprocity

To the extent that the Commission denies the clarifications requested above with regard to reciprocity and the application of the Final Rule to non-public utilities, thereby expanding the reach of the Commission’s jurisdiction over non-public utilities, LPPC seeks rehearing. Section 201(f) of the FPA expressly prohibits FERC from regulating “a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing as such in the course of his official duty.”¹⁵ The law further makes clear that the Commission is prohibited from extending its authority indirectly into areas it is prohibited from regulating directly.¹⁶ Therefore, such an expansion of Commission

¹⁵ 16 U.S.C. § 824(f) (2000).

¹⁶ See *Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 152 (1960); *National Fuel Gas Supply Corp. v. FERC*, 909 F.2d 1519 (D.C. Cir. 1990).

jurisdiction over non-public entities would constitute error and should be reversed on rehearing. Moreover, such an expansion would be an unexplained and unjustified departure from the Commission's prior policy under Order No. 888.

B. Interconnections to "Distribution" Facilities

To the extent that the Commission denies LPPC's requests for clarification regarding the Commission's jurisdiction over interconnections to distribution facilities, LPPC believes that the Commission is impermissably expanding its jurisdiction beyond the limits prescribed in Section 201(b)(1) of the FPA, which prohibits the Commission from exercising jurisdiction over any local distribution facilities. Therefore, if the Commission denies LPPC's requests for clarification, LPPC seeks rehearing.

Finally, LPPC seeks rehearing regarding the Commission's policy for "dual use" facilities.¹⁷ The Commission states that it will exercise jurisdiction over Generator Interconnections to facilities that are used for both local distribution and jurisdictional purposes where the purpose of a proposed interconnection is to make sales of electric energy for resale in interstate commerce.¹⁸ LPPC believes that this assertion of jurisdiction is inconsistent with the holding of the United States Circuit Court for the D.C. Circuit in *Detroit Edison Co. v. FERC*.¹⁹ In that case, the Court held that the plain language of FPA Section 201(b)(1) denies FERC jurisdiction over facilities used in local distribution.²⁰ The court went on to indicate that the Commission should have employed the seven-factor test, which examines the totality of the circumstances regarding the

¹⁷ Final Rule at P 804.

¹⁸ *Id.*

¹⁹ 334 F.3d 48 (2003).

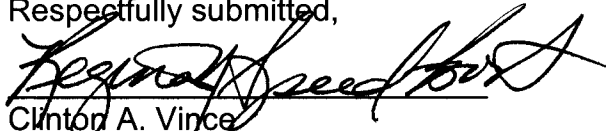
²⁰ *Id.* at 54.

facilities to determine whether or not the facilities were local distribution facilities. It did not allow for the Commission to determine that it may exercise jurisdiction over local distribution facilities because part of those facilities were used for an otherwise FERC-jurisdictional use.²¹ Therefore, under the holding in the *Detroit Edison* case, the Commission should apply the Final Rule only to facilities deemed to be FERC-jurisdictional under the tests put forth in Appendix G to Order No. 888.

IV. CONCLUSION

WHEREFORE, LPPC respectfully requests that the Commission grant the clarification requested herein, or in the alternative grant rehearing of the Final Rule.

Respectfully submitted,



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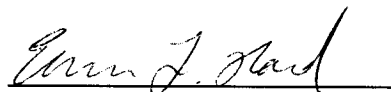
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Dated: August 25, 2003

²¹ *Id.*

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding by first-class mail. Dated at Washington, D.C. this 25th day of August, 2003.



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