

INSIGHTS

FERC Confirms the Long Reach of Open Access Requirements

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This week the Federal Energy Regulatory Commission (FERC) put to rest any doubt that transmission rights pursuant to a pre-Order No. 888 transmission service agreement are subject to the FERC's open access regime when the agreement is modified or becomes obsolete. In the same order, FERC found that a so-called "resale tariff" is only permissible where a jurisdictional transmission provider seeks to resell transmission rights on a non-jurisdictional transmission provider's facilities where the resale could not be facilitated under a FERC-approved Open Access Transmission Tariff (OATT). [FERC's February 27, 2014 order](#) rejected a December 30, 2013 filing by SoCal Edison Company (SCE). SCE's filing attempted to modify transmission rights it has held since 1966 under a transmission services agreement with Arizona Public Service Company (APS). The 1966 agreement arose in connection with SCE and APS's joint ownership interests in two generating units at Four Corners in New Mexico. Pursuant to the agreement, APS constructed and operated a 500 kV transmission line from Four Corners to the Arizona-Nevada border, and SCE paid APS cost-based transmission service charges for rights to all of that line's transmission capacity, for purposes of transmitting SCE's portion of the units' output to California. In 2013, SCE transferred to APS its ownership interests in the Four Corners units, so SCE no longer needed the transmission capacity it had held for more than four decades for purposes of transmitting its Four Corners capacity. In the wake of that transfer, APS submitted a filing at FERC to terminate the transmission services agreement and recover in wholesale transmission rates a \$40 million termination fee it proposed to pay to SCE. APS explained that it intended to offer newly available transmission capacity to third parties through its Open Access Same Time Information System (OASIS). But in September 2013, FERC denied APS's rate-recovery request as not adequately supported. Instead of terminating the transmission services agreement, SCE on December 30, 2013 filed an assignment agreement and a proposed "Resale Tariff." SCE's proposal would have allowed it to recover the \$40 million fee by assigning to APS's marketing function a portion of the rights it held under the obsolete transmission services agreement, and reselling the remainder of those rights pursuant to the Resale Tariff (with APS's transmission function acting as SCE's agent). Several parties protested SCE's filing as, among other things, contrary to FERC's open access policies. SCE and APS took the position that FERC's open access policies did not hamper SCE's ability to offer the grandfathered rights to third parties as it saw fit. SCE's filing placed squarely before FERC the question of whether FERC's open access policies restrict the transfer of grandfathered

transmission rights where ""as was the case here"" the grandfathered transmission services agreement becomes obsolete or is modified. FERC's definitive answer to that question is "yes."² FERC explained that where "a pre-Order No. 888 transmission agreement is modified, or otherwise expires by its own terms, Commission policy requires that the modified service be taken pursuant to the rates, terms, and conditions of an open access transmission tariff."³ FERC characterized the SCE-APS assignment agreement as a "rider"⁴ that would effectively modify the agreement, "requiring related transmission service to be provided pursuant to APS's OATT."⁵ FERC thus rejected the assignment agreement SCE filed, but instructed that SCE and APS could "effectuat[e] the assignment pursuant to the terms and conditions of APS's OATT, including as relevant the conversion of transmission service under the [agreement] to a reservation for transmission service under APS's OATT."⁶ FERC also rejected SCE's proposed Resale Tariff. FERC explained: "The Commission has only allowed resale tariffs in the context of jurisdictional transmission providers reselling transmission rights on a non-jurisdictional transmission provider's facilities, where there is not a Commission-approved OATT under which the resale can be facilitated."⁷ FERC's order confirms the breadth of its open access transmission policies. As more pre-Order No. 888 transmission service agreements expire or their terms become obsolete in the modern era of transmission usage, the long arm of transmission providers' OATTs will continue to sweep up additional transmission service, particularly in the Western United States.