

ALERT



January 2008

FERC's Order No. 890-A: Preventing Undue Discrimination and Preference in Transmission Service – Clarifying and Revising Certain Provisions of Order No. 890

The Federal Energy Regulatory Commission (“FERC” or the “Commission”) issued Order No. 890-A¹ on December 28, 2007, in Docket Nos. RM05-17-001, -002, and RM05-25-001, -002. Order No. 890-A largely affirms FERC's Order No. 890,² which, as explained in our March 2007 Client Alert “[FERC's Order No. 890: Preventing Undue Discrimination and Preference in Transmission Service – Overhauling Certain Provisions of Order Nos. 888 and 889](#),” focuses on incremental improvements to the *pro forma* Open Access Transmission Tariff (the “OATT”) adopted in Order No. 888,³ rather than more sweeping reforms advocated by a number of commenters. In Order No. 890-A, the Commission grants limited rehearing, issues numerous clarifications of Order No. 890, and revises several provisions of the OATT. The changes adopted in Order No. 890-A will become effective March 17, 2008.

Significant changes adopted in Order No. 890-A include: (1) reinstatement of the price cap on reassignments of transmission capacity as of October 1, 2010; (2) clarification of (a) transmission providers' obligations to offer generator imbalance services, (b) the calculation of imbalance charges, and (c) the exemption from penalties; (3) reversal of the requirement that regional transmission organizations (“RTOs”) and independent system operators (“ISOs”) modify any existing planning dispatch provisions in their tariffs; (4) clarification of contract rollover rights for existing firm transmission customers; (5) allowing equitable extension of transmission customers' service agreements; and (6) simplification of Section 4 posting requirements.

1. Price Cap on Reassignments of Transmission Capacity

In Order No. 890, FERC removed the price cap for transmission customers reassigning point-to-point transmission capacity. Order No. 890-A affirms the decision to remove the price cap but provides for reinstatement of the price cap as of October 1, 2010. Noting that Order No. 890 required FERC Staff to submit a report within six months of the receipt of two years' worth of data on lifting the price cap (*i.e.*, by May 1, 2010), the Commission explains that, after reviewing the Staff report and considering feedback from the industry, it will determine whether it is appropriate to continue to allow capacity reassignments above the price cap after October 1, 2010. Order No. 890-A at P 390.

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Unless otherwise ordered by FERC, on and after October 1, 2010, the price paid to resellers shall not exceed the higher of: (i) the original rate paid by the reseller; (ii) the transmission provider's maximum rate on file at the time of the assignment; or (iii) the reseller's opportunity cost capped at the transmission provider's cost of expansion. OATT § 23.1.

Order No. 890-A clarifies that, consistent with the statement in Order No. 890 that resellers of transmission capacity need not have a rate schedule governing capacity reassignment on file, and similar provisions of Order No. 697⁴ (discussed in our July 2007 client alert "[FERC's Order No. 697: Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities](#)"), capacity reassignment shall be governed by the terms of the relevant transmission provider's OATT, not the assignor's market-based rate tariff or other rate schedule purporting to govern transmission capacity reassignment. Thus, even if the assignor has a rate schedule on file that retains the cap, capacity reassignments occurring prior to October 1, 2010 will not be subject to that cap.

2. Energy and Generation Imbalances

In Order No. 890, the Commission modified the energy imbalance provisions of Schedule 4 to the OATT and adopted standardized generator imbalance provisions in new Schedule 9 to the OATT, establishing three general principles governing charges for both. Order No. 890 requires that generator imbalance services be offered for any transmission service used to deliver energy from a generator located within the transmission provider's control area. In addition to revising OATT Section 3 to provide internal consistency with these standards, FERC revised OATT Schedule 9 to require that a transmission provider offer generator imbalance services to any generator in its control area.

Order No. 890-A clarifies a number of issues relating to energy and generation imbalances. Recognizing that certain language referring to the "same imbalance" in Schedule 4 and 9 could lead to confusion, FERC modifies the language to make clear that a transmission provider may charge a customer a penalty for either hourly generator imbalances under Schedule 9 or hourly energy imbalances under Schedule 4 for imbalances occurring during a given hour, but not both unless the imbalances aggravate, rather than offset, each other. Order 890-A at P 273. In addition, Order No. 890-A clarifies that a transmission provider is required to provide generator imbalance service from its own resources only to the extent that it is physically feasible to do so

without compromising reliability. If it cannot provide generator imbalance service from its own resources, the transmission provider must take steps to offer an alternative that customers can use to satisfy their obligation to acquire generator imbalance service as a condition of taking transmission service. Also, any transmission customer scheduling from a generator that has executed a service agreement for generator imbalance services will be deemed to have satisfied its obligation to purchase generator imbalance service. Order No. 890-A at PP 287-89.

Order No. 890-A also modifies the definition of "incremental cost" so that imbalance charges are based on the actual cost to correct the imbalance. Order No. 890-A also requires transmission providers to include language in their OATTs specifying the method by which they calculate incremental cost. Order No. 890-A at P 310.

FERC revised OATT Schedule 9 to exempt generators responding to directives by balancing authorities, transmission operators, and reliability coordinators from generator imbalance penalties resulting from such directives. Order No. 890-A at P 309.

3. Planning Redispatch

In Order No. 890, the Commission required transmission providers, other than most RTOs and ISOs, to offer a modified form of planning redispatch to long-term firm point-to-point customers. It required those RTOs and ISOs that already offered planning redispatch to modify their tariffs to include the obligation to post monthly redispatch costs for each transmission facility over which planning and reliability redispatch are provided. In Order No. 890-A, the Commission reversed the requirement for RTOs and ISOs to modify this aspect of their tariffs, concluding that it was better not to disturb tariffs developed to "layer energy markets and financial transmission rights on top of the existing pro forma OATT physical rights systems." Order No. 890-A at P 534.

4. Rollover Rights

In Order No. 890, the Commission extended the minimum term necessary for firm transmission customers to qualify to rollover or renew their service agreements from one year to five years and extended the notice deadline from 60 days to one year. In Order No. 890-A, the Commission amended OATT Section 2.2 to clarify the timing of the transmission provider's compliance filing. Because rollover reform is closely related to transmission planning, a transmission provider is not required to file its rollover reform language

until after the Commission accepts its Attachment K compliance filing. Order No. 890-A at P 684.

Order No. 890-A addresses transition issues by allowing the previous one-year commitment requirement to apply to service agreements entered into before July 13, 2007, Order No. 890's effective date. Going forward, to retain rollover rights, the customer must enter into a minimum five-year term. The previous 60-day notice rule applies to existing customers with less than five years remaining on their contract terms. Order No. 890-A at PP 692-95.

5. Extension of the Service Commencement Date

Under Order No. 890, a transmission customer may obtain, subject to availability, up to five one-year extensions for the commencement of service, but the transmission providers may terminate a request for transmission service if a customer seeking extension fails to pay an annual reservation fee within 15 days of giving notice to extend. In Order No. 890-A, FERC concludes that it would be inequitable to

terminate the underlying transmission service agreement for failure to make a timely deposit. Under the revised OATT Section 17.7, such customers will lose only their right to extend the transmission service start date, but not their rights under the underlying service agreement. A transmission customer failing to make the appropriate payment to extend service will remain obligated to take service under the terms and conditions of the existing agreement. Order No. 890-A at PP 773-74.

6. Posting Requirements

In Order No. 890, FERC required transmission providers to make available on their websites and OASIS rules, standards and practices relating to transmission service, including credit guides and manuals. FERC simplified this rule by allowing transmission providers to post the information on their websites, OASIS or other suitable platform as long as they provide a link to the information on their websites and OASIS. Order No. 890-A at P 991.

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- ¹ *Preventing Undue Discrimination and Preference in Transmission Service* ("Order No. 890-A"), 121 FERC ¶ 61,297 (2007).
 - ² *Preventing Undue Discrimination and Preference in Transmission Service* ("Order No. 890"), FERC Stats. & Regs. ¶ 31,241 (2007).
 - ³ *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. [Regs. Preambles 1991-1996] ¶ 31,036 (1996), *on reh'g*, Order No. 888-A, FERC Stats. & Regs. [Regs. Preambles 1996-2000] ¶ 31,048 (1997), *on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part and remanded in part, sub nom., Transmission Access Policy Study Group, et al., v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).
 - ⁴ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 (2007), *clarified*, 121 FERC ¶ 61,260 (2007).
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