

designed for Large Generators would unduly hinder the development of Small Generators. They sought streamlined procedures and requirements that would allow an Interconnection Customer with a Small Generator to avoid delays caused by studying sequentially the effects of interconnecting its generator with the Transmission Provider's electric system.

17. Persuaded by this request, the Commission decided to propose separate Small Generator interconnection procedures and an agreement (SGIP and SGIA) to provide the right incentives for both Transmission Providers and Interconnection Customers with Small Generators.¹⁴ To that end, the Commission severed the issues related to interconnecting generators no larger than 20 MW from this proceeding and initiated another rulemaking docket, RM02-12-000, for the former.¹⁵

B. Legal Authority

1. The Federal Power Act and Order No. 888

18. In fulfilling its responsibilities under Sections 205 and 206 of the Federal Power Act,¹⁶ the Commission is required to address, and has the authority to remedy, undue discrimination. The Commission must ensure that the rates, contracts, and practices affecting jurisdictional transmission do not reflect an undue preference or advantage for non-independent Transmission Providers and are just and reasonable. Additionally, as discussed in Order No. 888, the Commission's regulatory authority under the Federal Power Act "clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to [FPA] Sections 202 and 203, and under like directives contained in Sections 205, 206, and 207."¹⁷

19. The record underlying Order No. 888 showed that public utilities owning

or controlling jurisdictional transmission facilities had the incentive to engage in, and had engaged in, unduly discriminatory transmission practices.¹⁸ The Commission in Order No. 888 also thoroughly discussed the legislative history and case law involving Sections 205 and 206, concluded that it had the authority and responsibility to remedy the undue discrimination it had found by requiring open access, and decided to do so through a rulemaking on a generic, industrywide basis.¹⁹ The Supreme Court affirmed the Commission's decision to exercise this authority by requiring non-discriminatory (comparable) open access as a remedy for undue discrimination.²⁰

20. The Commission has identified interconnection as an element of transmission service that is required to be provided under the OATT.²¹ Thus, the Commission may order generic interconnection terms and procedures pursuant to its authority to remedy undue discrimination and preferences under Sections 205 and 206 of the Federal Power Act.

2. Commission Interconnection Case Law

21. Unless expressly changed in this Final Rule, the holdings in the Commission's existing interconnection precedents will remain a useful guide during the implementation of this Final Rule. The Commission's interconnection cases have drawn the distinction between Interconnection Facilities and Network Upgrades. Interconnection Facilities are found between the Interconnection Customer's Generating Facility and the Transmission Provider's Transmission System. The Commission has developed a simple test for distinguishing Interconnection Facilities from Network Upgrades: Network Upgrades include only facilities at or beyond the point where the Interconnection Customer's Generating Facility interconnects to the Transmission Provider's Transmission System.²² The Commission has made clear that Interconnection Agreements

are evaluated by the Commission according to the just and reasonable standard.²³ Most improvements to the Transmission System, including Network Upgrades, benefit all transmission customers, but the determination of who benefits from such Network Upgrades is often made by a non-independent transmission provider, who is an interested party. In such cases, the Commission has found that it is just and reasonable for the Interconnection Customer to pay for Interconnection Facilities but not for Network Upgrades. Agreements between the Parties to classify Interconnection Facilities as Network Upgrades, or to otherwise directly assign the costs of Network Upgrades to the Interconnection Customer, have not been found to be just and reasonable and have been rejected by the Commission.²⁴

22. Regarding pricing for a non-independent Transmission Provider, the distinction between Interconnection Facilities and Network Upgrades is important because Interconnection Facilities will be paid for solely by the Interconnection Customer, and while Network Upgrades will be funded initially by the Interconnection Customer (unless the Transmission Provider elects to fund them), the Interconnection Customer would then be entitled to a cash equivalent refund (*i.e.*, credit) equal to the total amount paid for the Network Upgrades, including any tax gross-up or other tax-related payments. The refund would be paid to the Interconnection Customer on a dollar-for-dollar basis, as credits against the Interconnection Customer's payments for transmission services, with the full amount to be refunded, with interest within five years of the Commercial Operation Date. The Commission has clarified that transmission credits may be used whether or not a Generating Facility is being dispatched and that credits must be accepted for all network transmissions by the Interconnection Customer, regardless of whether the plant from which the credits originated is dispatched.²⁵ Credits are not tied to any particular Generating Facility.²⁶ The Commission has stated that peaking facilities, for instance, must be allowed to use credits even when the Generating

¹⁴ The Small Generator Interconnection ANOPR proposed adopting two Small Generator Interconnection Procedures documents and two Small Generator Interconnection Agreements, with the distinction between the two sets of documents being the size of the Small Generator.

¹⁵ See Standardization of Small Generator Interconnection Agreements and Procedures, Advance Notice of Proposed Rulemaking, 67 FR 54749 (Aug. 26, 2002), FERC Stats. & Regs. ¶ 35,544 (2002).

¹⁶ 16 U.S.C. 824d, 824e (2000).

¹⁷ *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 758-59 (1973); see *City of Huntingburg v. FPC*, 498 F.2d 778, 783-84 (D.C. Cir. 1974) (noting the Commission's duty to consider the potential anticompetitive effects of a proposed interconnection agreement).

¹⁸ Order No. 888, FERC Stats. Regs. ¶ 31,036 at 31,679-84; Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,209-10.

¹⁹ Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,668-73, 31,676-79; Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,201-12; *TAPS v. FERC*, 225 F.3d 667, 687-88 (DC Cir. 2000).

²⁰ *New York v. FERC*, 535 U.S. 1 (2002).

²¹ See *Tennessee Power Co.*, 90 FERC ¶ 61,238 at 61,761, *reh'g dismissed*, 91 FERC ¶ 61,271 (2000).

²² *Entergy Gulf States, Inc.*, 98 FERC ¶ 61,014 at 61,023, *reh'g denied*, 99 FERC ¶ 61,095 (2002); see *Public Service Co. of Colorado*, 59 FERC ¶ 61,311 (1992), *reh'g denied*, 62 FERC ¶ 61,013 at 61,061 (1993).

²³ *Pacific Gas & Electric Company, et al.*, 102 FERC ¶ 61,070 (2003).

²⁴ See, e.g., *Illinois Power Co.*, 103 FERC ¶ 61,032 (2003); *American Electric Power Service Corp.*, 101 FERC ¶ 61,194 (2002).

²⁵ *Entergy Services, Inc.*, 101 FERC ¶ 61,289 (2002).

²⁶ *Id.*