

Client Alert: FERC Order No. 2023: Implications and Unanswered Questions

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On July 28, 2023, the Federal Energy Regulatory Commission (FERC) issued its long awaited final rule, Order No. 2023, directing all public utility transmission providers to revise their pro forma generator interconnection queue rules. All four FERC Commissioners supported the final rule. According to Chairman Willie Phillips, this rule represents the most significant set of interconnection reforms in two decades and will ensure that generation resources are able to connect to the grid in a timely and efficient manner.

BACKGROUND:

In the final rule, the Commission described significant changes in the electricity sector since the issuance of Order Nos. 2003 and 2006, including a rapidly changing resource mix and an explosion of new resources with differing characteristics seeking to interconnect with the transmission system. Existing rules have created incentives for interconnection customers to submit speculative interconnection requests to secure a favorable position in the queue, even if they are not prepared to move forward with their projects—with the prospect of cascading withdrawals of projects from the queue leading to further delays and costs for lower queued interconnection requests. All of this has led to unprecedented levels of generation resources stuck in interconnection queue backlogs and commercial uncertainty regarding the cost and timing to interconnect to the transmission system.

According to some commenters, that interconnection cost and timing uncertainty led to over 70% of generation projects being withdrawn over the past decade. A report by the Lawrence Berkeley National Laboratory found that interconnection costs in MISO doubled for projects completed between 2019-2021 compared to projects completed prior to 2018, while cost estimates tripled for projects still active in the queue between the same time periods.

The Commission found that these factors have created the largest interconnection queue size in history. As of the end of 2022, there were over 10,000 active interconnection requests in interconnection queues throughout the United States, representing over 2,000 gigawatts (GW) of potential generation and storage capacity, a 40% increase in queue size over 2021.

FINAL RULE:

The final rule attempts to eliminate or ameliorate the problems with interconnections by adopting reforms across three areas.

First, the rule implements a first-ready, first-served cluster study process. A cluster study process allows for the study of a group of interconnection requests by multiple generating facilities at the same time, rather than sequentially. This approach, which assigns all requests received before the close of the “cluster window” the same queue priority, is intended to increase efficiency and enhance transparency for developers before they enter the interconnection queue. The rule also implements enhanced financial commitments and withdrawal penalties to discourage withdrawals.

Second, the rule aims to increase the speed of interconnection queue processing by eliminating the “reasonable efforts” standard governing the transmission provider’s duty to timely complete cluster studies, cluster restudies, facilities studies, and affected system studies. The Commission found that removing the “reasonable efforts” standard and imposing in its place firm study deadlines and penalties for missing study deadlines would incentivize transmission providers to ensure the timely processing of interconnection requests. As a result of this final rule, transmission providers will face the prospect of significant financial penalties for failure to meet study deadlines. The final rule also adopts a broad and prescriptive approach to the affected system study process.

Third, the rule incorporates technological advancements into the interconnection process to provide greater flexibility, including by permitting multiple generating facilities to co-locate and share a single point of interconnection and requiring the incorporation of operating assumptions for energy storage resources.

Potential reforms that were proposed but not adopted include (1) requiring transmission providers to offer an optional informational interconnection study to serve as additional information for prospective customers in deciding whether to submit an interconnection request; (2) requiring transmission providers to allocate the costs of network upgrades between interconnection customers in an earlier cluster and interconnection customers in a subsequent cluster that benefit from the same network upgrade; (3) establishing an optional resource solicitation study for any entity (like a state entity or load serving entity) required to develop a resource plan or conduct a resource solicitation process; (4) requiring 100% site control at the time a customer submits an interconnection request; and establishing provisions to demonstrate non-financial commercial readiness.

LIKELY IMPACTS AND LINGERING QUESTIONS

There are both significant changes and unanswered questions in the final rule that will merit close review by interested stakeholders.

How much impact can generator interconnection queue reform have without addressing the root issue: lack of sufficient transmission capacity across the country? As Commissioner Clements noted in her concurring statement, “*interconnection processes are overloaded in part*

because they are being relied on to build out core transmission system infrastructure that should be considered in regional planning processes. We know interconnection processes were not intended for, and are ill suited to perform, this task.” She also highlighted ongoing efforts among RTOs like SPP, CAISO, and MISO to better link transmission planning and interconnection processes.

Americans For A Clean Energy Grid similarly expressed support for the final rule along with hope for more progress on transmission planning: “[T]he best way to address interconnection delays is still to improve the planning and development of new transmission lines.” Notwithstanding any region specific efforts to improve planning processes, Commission action to reform transmission planning on a nationwide basis likely will be critical to ensuring that national decarbonization goals inherent in the Inflation Reduction Act are satisfied.

The final rule’s reforms will result in higher costs for both transmission providers and interconnection customers, in the form of enhanced penalties (unrecoverable in transmission rates) on providers for study delays and increased deposits and withdrawal penalties on customers. But it remains to be seen whether these increased costs result in greater certainty and fewer delays.

- Transmission providers that do not complete studies by the deadline specified in the pro forma Large Generator Interconnection Agreement (LGIP) must pay (subject to certain limits or safeguards) \$1,000 per business day for delayed cluster studies, \$2,000 per business day for delayed restudies or affected system studies, and \$2,500 per business day for delayed affected system studies. Rather than imposing these penalties immediately, the final rule adopts a “transition” mechanism whereby no study delay penalties will be assessed until the third cluster study cycle after the Commission approved effective date of the transmission provider’s filing in compliance with this final rule. The rule also adopts a 10 business day grace period, such that no study delay penalties will be assessed for delays of 10 business days or fewer. Regional Transmission Organization’s (RTO) and Independent System Operator’s (ISO) can propose tariff provisions that would require them to submit requests to recover or allocate the costs of specific interconnection study penalties under Federal Power Act (FPA) section 205.
- Evidence from the rulemaking suggests that impacts on transmission providers from these reforms may be punitive and ineffective in reducing queue processing time, considering the numerous comments pointing out that delays are largely outside the providers’ control and include factors like high volumes of speculative interconnection requests, a shortage of qualified engineers, delayed data from interconnection customers, affected system coordination, cascading restudies caused by withdrawals, and the increasing complexity of studies due to new types of generating facilities. MISO, for instance, noted evidence indicating that most delays are caused by the need to wait for affected systems studies. Parties including MISO also pointed out the dearth of due process and fact finding of the study delay penalty structure as compared to the process for RTOs and ISOs recovering penalties for North American Electric Reliability Corporation (NERC) reliability violations.

- The final rule creates an appeals process for transmission providers to seek Commission relief for study penalties. In the interest of strengthening arguments for “good cause” for the grant of such relief, it is critical that transmission providers carefully document any extenuating circumstances outside their control (like delayed affected system study results), any efforts to mitigate delays, and any proposed process enhancements to prevent future delays.
- As for interconnection customers, they would be required to submit a single study deposit instead of multiple deposits, payable at the time of submitting an interconnection request. The size of the deposit depends on the megawatt size of the facility seeking interconnection. Withdrawal penalties would increase as an interconnection customer proceeds through the interconnection process.

The final rule dropped the proposal to mandate a demonstration of non-financial commercial readiness. Clean energy groups hailed the rule dropping this proposal, which they had argued would have erected an impossible hurdle in the form of requiring developers to have offtake contracts in place before entering the queue.

When it comes to technological advancements like “grid enhancing technology,” the final rule requires a process to evaluate such advancements but does not mandate the usage of such advancements in specific cases.

While the final rule takes significant steps and is the first major change to FERC’s interconnection rules in two decades, many of the final rule’s key provisions have already been implemented by many or most RTOs. MISO, PJM, and SPP have all moved to a first-ready, first-served cluster study approach. At times in the final rule, the Commission appears to acknowledge that much of Order No. 2023 adopts incremental process improvements.

Will Order No. 2023 help or impede work already underway at RTOs across the country? Many commenters, including RTOs, had expressed concern about the need to avoid overly prescriptive solutions to problems the regions are already addressing or have already addressed.

It will likely take significant time for the regional entities to thoroughly assess how the plus 1,400 page final rule interacts with reforms already underway in the RTOs and thus the 90 day compliance directive may not be realistic. It is also unclear how stringently the Commission may apply the “independent entity variation” standard when assessing any variations RTOs may request.

Will the final rule pose particular barriers to tribal nations’ efforts to develop generation projects? The final rule provides exceptions on site control to ensure that unique regulatory requirements associated with projects on tribal land do not pose a barrier to development. However, as Commissioner Clements cautioned in her concurrence and one commenter noted, the requirements related to commercial readiness deposits and withdrawal penalties may serve as barriers to projects serving or developed by Tribes due to unique ownership and financing structures.

Jenner & Block's Energy Team stands ready to assist with any questions related to Order No. 2023 and similar reforms already happening around the country.

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