

## FERC Allows Merchant Transmission Projects to Employ “Anchor Customer” Model for Early Subscription

On February 19, 2009, the Federal Energy Regulatory Commission issued an order authorizing two merchant transmission developers, Chinook Power Transmission, LLC and Zephyr Power Transmission, LLC, to sell transmission rights at negotiated rates without allocating 100% of the initial transmission capacity through an open season. This order marks an evolution in the Commission’s policy because it allows merchant transmission developers, for the first time, to presubscribe transmission capacity to an “anchor” customer prior to the open season process. Also of note, in evaluating the requests of Chinook and Zephyr for negotiated rate authority, the Commission adopted a new stream lined four-factor analysis.

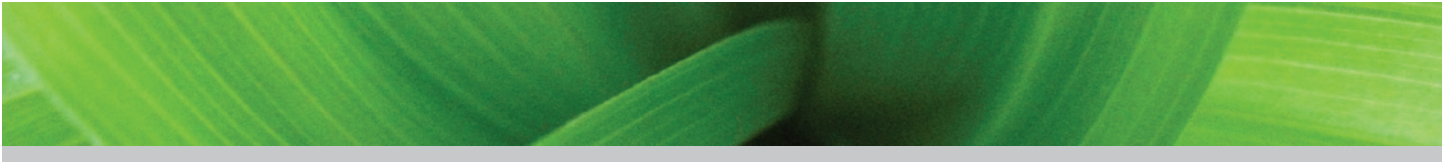
### ALLOCATING TRANSMISSION RIGHTS TO “ANCHOR” CUSTOMERS

In the past, the Commission, citing fairness and transparency concerns, has required that merchant transmission owners allocate 100% of initial capacity through a pre-construction open season. Now, in light of commercial realities and recognizing that the financial commitments made by anchor customers prior to an open season provide crucial and early support and certainty to merchant transmission developers, the Commission will entertain proposals to allocate all or a portion of initial capacity outside an open season on a case-by-case basis, and will allow anchor customer allocations, provided the Commission is satisfied that the transmission developer has not acted in an unduly discriminatory manner in allocating capacity.

### NEW NEGOTIATED RATE ANALYSIS

Previously, the Commission evaluated requests by merchant transmission developers for negotiated rate authority under a 10-factor analysis. Going forward, the Commission will employ a more adaptable four factor analysis for reviewing requests for negotiated rate authority:

- 1) **Just and Reasonable Rates:** The Commission will consider whether the transmission developer has assumed the full market risk of the development or whether it is developing the project in an area where it has captive customers.
- 2) **Undue Discrimination:** The Commission will continue to rely on the post-open season report and complaint process to ensure fairness in initial capacity allocations. As discussed, the Commission will no longer require that all initial capacity be allocated through an open season. Transmission developers will be required to create firm, tradable secondary transmission rights, and create and maintain an OASIS for customers to purchase and sell these rights.
- 3) **Undue Preference and Affiliate Concerns:** The Commission will apply a higher level of scrutiny where a transmission developer allocates initial capacity, either through a presubscription or through the open season process, to customers that are affiliated with the transmission developer.



- 4) **Regional Reliability and Operating Efficiency:** The Commission encourages merchant transmission developers to turn over operational control of their facilities to RTOs or ISOs where available, and in all cases will require compliance with all applicable NERC standards and those of any regional reliability council.

Statements by Commissioners suggest that the Commission may also have viewed the use of these projects to connect renewable resources to markets as a key consideration.

#### FOR ADDITIONAL INFORMATION

Van Ness Feldman represents merchant transmission developers, regularly providing a full range of services including representation before FERC. For additional information, assistance, or a copy of the Commission's Order, please contact Peg Moore or Jessica Friedman, in our Washington, D.C. office at (202) 298-1800, or any other member of the Van Ness Feldman Electricity practice.

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