147 FERC ¶ 61,122
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

Terra-Gen Dixie Valley, LLC	Docket Nos.	ER11-2127-003 ER11-2127-004 EL11-37-001
Terra-Gen Dixie Valley, LLC TGP Dixie Development Company, LLC and New York Canyon, LLC		EL10-29-003
Green Borders Geothermal, LLC v. Terra-Gen Dixie Valley, LLC		EL10-36-003

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued May 15, 2014)

1. In this order, the Commission grants in part and denies in part a request for clarification and rehearing of the Commission's May 13, 2011 order in this proceeding,[1] filed by Terra-Gen Dixie Valley, LLC (Terra-Gen) and two of its affiliates, New York Canyon, LLC (New York Canyon) and TGP Dixie Development Company, LLC (collectively, Petitioners). Additionally, we find that Terra-Gen's proposed tariff sheets, filed in compliance with the requirements of the May 13 Order, partially comply with the Commission's directives, and order a further compliance filing. Finally, we modify our requirement in the Commission's December 2, 2011 order in this proceeding that, in order to obtain priority rights to the Dixie Valley Line, New York Canyon must acquire ownership rights to the line.[2]

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[1] *Terra-Gen Dixie Valley, LLC*, 135 FERC ¶ 61,134 (2011) (May 13 Order).

[2] *Terra-Gen Dixie Valley, LLC*, 137 FERC ¶ 61,179, at PP 31, 33 and n.52 (2011) (December 2 Order).

I. **Background**

2. On December 24, 2009, Petitioners filed a petition for declaratory order seeking Commission confirmation that they have priority firm transmission rights to 360 MW of existing transmission capacity on the Dixie Valley Line. Specifically, Petitioners sought priority rights to 60 MW of capacity for transmission service already being provided for Terra-Gen's 60 MW geothermal generation unit, and for an additional 300 MW of available capacity for new geothermal generation units planned by Terra-Gen and its affiliates. Petitioners also sought waiver of the obligation to file an Open Access Transmission Tariff (OATT),[3] to comply with the Commission's Standards of Conduct,[4] and to establish and maintain an Open Access Same-Time Information System (OASIS).[5] On January 25, 2010, Green Borders Geothermal, LLC (Green Borders) filed a complaint requesting that the Commission find that Terra-Gen violated the *Oxbow Orders*[6] and the requirement that transmission providers have an OATT on file with the Commission and provide non-discriminatory transmission service to all eligible customers.

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[3] *See 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. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

[4] *See* 18 C.F.R. pt. 358 (2013).

[5] *See Open Access Same-Time Information System and Standards of Conduct*, Order No. 889, FERC Stats. & Regs. ¶ 31,035 (1996), *order on reh'g*, Order No. 889-A, FERC Stats. & Regs. ¶ 31,049, *reh'g denied*, Order No. 889-B, 81 FERC ¶ 61,253 (1997).

[6] *Oxbow Power Marketing, Inc.*, 76 FERC ¶ 61,031 (1996); 79 FERC ¶ 61,193 (1997) (collectively, *Oxbow Orders*). The Commission granted Oxbow Geothermal Corporation certification of the three facilities as a single QF, *Oxbow Geothermal Corp.*, 36 FERC ¶ 62,152 (1986), and granted recertification of the Dixie Valley QF, confirming inclusion of the Dixie Valley Line as a component of the QF in 1988. *Oxbow Geothermal Corp.*, 43 FERC ¶ 61,286 (1988), *recertification*, 67 FERC ¶ 61,193 (1994).

3. The Commission addressed the petition and complaint in its September 16 Order,[7] and found that: (1) Green Borders' May 8, 2007 request for interconnection and transmission service satisfied the criteria of section 17.2 of the *pro forma* OATT; (2) Terra-Gen must file an OATT as a result of Green Borders' valid transmission service request; (3) Terra-Gen established priority for its current use of 60 MW of existing transmission capacity; and (4) Terra-Gen had not provided sufficient evidence of specific pre-existing generation development plans to justify priority rights to transmission capacity beyond its current use of 60 MW. The Commission therefore denied Terra-Gen's request that the Commission confirm priority rights for planned capacity expansions, without prejudice to Terra-Gen submitting additional evidence to establish such priority along with the submission of its OATT.[8] In this regard, the Commission recognized that Terra-Gen may have invested in the Dixie Valley Line with the expectation that it would have priority rights to existing and planned capacity for itself and its affiliates, and that Terra-Gen believed that it was taking steps to establish those priority rights. The Commission therefore allowed Terra-Gen the opportunity "to submit further evidence of pre-existing development plans that satisfy the criteria in *Aero Energy* and *Milford*."[9] The Commission explained that Terra-Gen "must demonstrate the existence of specific pre-existing generation development plans, consistent material progress towards achieving such plans, and that such plans and initial progress pre-date Green Border's valid request for transmission service."[10] The Commission also granted Terra-Gen waiver of the requirements of Order No. 889 and the Standards of Conduct until such time as another interconnection on the Dixie Valley Line becomes operational or the Commission finds revocation appropriate in response to a complaint made to the Commission.[11]

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[7] *Terra-Gen Dixie Valley, LLC*, 132 FERC ¶ 61,215 (2010) (September 16 Order).

[8] *Id*. P 4.

[9] September 16, Order, 132 FERC ¶ 61,215 at P 53. *See Aero Energy, LLC*, 115 FERC ¶ 61,128 (2006), *order granting modification*, 116 FERC ¶ 61,149 (2006), *final order directing interconnection and transmission service*, 118 FERC ¶ 61,204 (2007), *order denying reh'g*, 120 FERC ¶ 61,188 (2007) (*Aero Energy*); *Milford Wind Corridor, LLC*, 129 FERC ¶ 61,149 (2009) (*Milford*).

[10] September 16 Order, 132 FERC ¶ 61,215 at P 53.

[11] *Id*. P 55.

4. Petitioners submitted additional evidence on November 15, 2010 (November 15 Filing)[12] to support their request that the Commission grant priority transmission rights for: (1) 100 MW of priority firm transmission rights for Terra-Gen's Coyote Canyon project; and (2) 100 MW of priority rights for the New York Canyon project owned by Terra-Gen's affiliate, New York Canyon.[13] In the same filing, Terra-Gen also submitted its OATT, as required by the Commission in the September 16 Order.[14]

5. On January 13, 2011, the Commission denied Green Borders' request for rehearing of the September 16 Order.[15] The Commission found that, because Green Borders did not dispute Terra-Gen's request for waiver of the OASIS requirements in either the petition for declaratory order or complaint proceedings, Green Borders' challenge on rehearing regarding the OASIS requirement amounted to Green Borders impermissibly raising a new issue for the first time on rehearing.[16] The Commission also found that allowing Petitioners to provide additional information demonstrating pre-existing generation development plans for the Dixie Valley Line was reasonable.

6. On January 14, 2011, the Commission rejected Terra-Gen's proposed OATT, finding that Terra-Gen had not demonstrated that its OATT was consistent with or superior to the *pro forma* OATT. However, because Terra-Gen demonstrated that it qualifies as a small public utility, the Commission granted Terra-Gen's request for waiver of the OASIS and Standards of Conduct requirements beyond the operational date of an additional interconnection.[17] On March 16, 2011, Terra-Gen submitted a revised OATT (Revised OATT) in compliance with the January 14 Order.

7. In the May 13 Order, the Commission accepted Terra-Gen's Revised OATT, subject to modification and a further compliance filing, and set Terra-Gen's proposed

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[12] On October 8, 2010, the Commission granted Petitioners an extension of time to November 15, 2010 to comply with the September 16 Order.

[13] Although Petitioners also submitted evidence to support their request for 100 MW of priority firm transmission rights for the Dixie Meadows project, they subsequently withdrew that request.

[14] Terra-Gen's OATT was submitted in Docket No. ER11-2127-000.

[15] *Terra-Gen Dixie Valley, LLC*, 134 FERC ¶ 61,021 (2011) (January 13 Order).

[16] January 13 Order, 134 FERC ¶ 61,021 at P 12.

[17] *See Terra-Gen Dixie Valley, LLC*, 134 FERC ¶ 61,027 (2011) (January 14 Order).

transmission service rates for hearing and settlement judge procedures. The Commission also found that Terra-Gen may exclude the 60 MW of existing service that is the subject of a pre-existing power purchase agreement between Terra-Gen and Southern California Edison from its OATT. However, the Commission found that any future use of the Dixie Valley Line must be taken pursuant to the rates, terms, and conditions of Terra-Gen's OATT,[18] and that all future users of planned transmission capacity for which priority may be granted must take service subject to the OATT.[19]

8. In the December 2 Order, the Commission addressed Petitioners' November 15 Filing of additional information to support their request for priority. The Commission granted Petitioners' request for priority rights for 100 MW of transmission capacity on the Dixie Valley Line for the Coyote Canyon project and for 100 MW of transmission capacity on the Dixie Valley Line for the New York Canyon project, conditioned on New York Canyon obtaining a *pro rata* ownership interest in the line commensurate with the amount of capacity for which service is taken and priority rights have been conditionally granted.[20]

9. By order dated January 23, 2012, the Commission approved a settlement of Terra-Gen's transmission rates set for hearing in the May 13 Order.[21]

A. <u>Request for Clarification and Rehearing of the May 13 Order</u>

10. On June 13, 2011,[22] Petitioners filed a request for clarification and rehearing of the May 13 Order.[23] Petitioners also request that the Commission waive or stay until after

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[18] May 13, Order, 135 FERC ¶ 61,134 at P 23.

[19] *Id*. P 25.

[20] December 2 Order, 137 FERC ¶ 61,179 at PP 32-33 and n.52.

[21] *Terra-Gen Dixie Valley, LLC*, 138 FERC ¶ 61,047 (2012).

[22] On June 14, 2011, Petitioners filed revisions to correct minor typographical errors.

[23] Although, on June 13, 2011, Green Borders also submitted a request for clarification or, in the alternative, rehearing of the May 13 Order, on September 20, 2011, Green Borders filed a notice of withdrawal (Green Borders September 20 Withdrawal) of several pleadings in this proceeding, including the rehearing request. Accordingly, we will not address this pleading, Petitioners' June 28, 2011 Answer, or Green Border's July 1, 2011 Response to that answer.

the Commission acts on Petitioners' rehearing request the requirement in section 2.1 of Terra-Gen's OATT that applications for new firm transmission service received during the initial 60-day period, commencing with the effective date of the OATT, will be deemed to have been filed simultaneously, and that a lottery system shall be used to assign priorities for such completed applications. Petitioners argue that, in the alternative, the Commission should stay Terra-Gen's obligation to award capacity under the OATT, because allocating capacity in the absence of guidance by the Commission on how to treat priority use capacity may be expensive to unwind or result in missed commercial opportunities that cannot be regained.

11. On July 12, 2011, the Commission granted an extension of time to comply with section 2.1 of Terra-Gen's OATT accepted by the Commission in the May 13 Order, until 60 days after the Commission issues an order on the requests for clarification and rehearing of the May 13 Order.

B. Compliance Filing

12. On June 14, 2011, Terra-Gen submitted revisions to its OATT in compliance with the May 13 Order (Compliance Filing), subject to the outcome of its request for clarification and rehearing of the May 13 Order.

II. Notice of Filing and Responsive Pleadings

13. Notice of Terra-Gen's Compliance Filing was published in the *Federal Register*, 76 Fed. Reg. 36103 (2011), with interventions and comments due on or before July 5, 2011.

14. On July 5, 2011, Green Borders submitted a protest. The Green Borders September 20 Withdrawal also withdrew this protest.

III. Discussion

15. As a result of Green Borders' notice of withdrawal of all of its pleadings made in these pleadings, the Commission will not address Green Border's issues as initially raised or responses made by Terra-Gen to Green Border's positions in this order.

A. Request for Rehearing and Clarification of the May 13 Order

1. Commission Jurisdiction

16. Petitioners contend that the Commission lacks jurisdiction under sections 205 and 206 of the Federal Power Act (FPA)[24] to require Terra-Gen to provide wheeling service under an OATT. Rather, they argue that Terra-Gen is a qualifying facility (QF) and the Commission only has authority to compel a QF to provide wheeling service to third parties under sections 211 and 212 of the FPA,[25] and that any Commission order must comply with the substantive and procedural requirements of those statutes.[26]

17. Petitioners point out that an order pursuant to sections 210[27]-212 of the FPA would have given Terra-Gen the opportunity to negotiate service and payment terms with individual customers on a case-by-case basis, that would have allowed Terra-Gen to protect its and its owners' financial interests. Petitioners assert that Terra-Gen cannot make capital expenditures to fund transmission expansions beyond those contractually authorized by its investors without their consent, and that Terra-Gen could be forced to default on its credit as a result of the Commission's determinations.[28]

Commission Determination

18. We will deny Petitioners' request for rehearing on this issue. In the September 16 Order, we explained that, in Order No. 671,[29] the Commission amended its regulations to

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[24] 16 U.S.C. §§ 824d and 824e (2012).

[25] Request for Rehearing at 25 (citing 16 U.S.C. §§ 824j and 824k (2012) and *Florida Power & Light Co. v. FERC*, 660 F.2d 668, 676 (5th Cir. 1981), *cert. denied*, 459 U.S. 1156 (1983); *New York State Elec. & Gas Corp. v. FERC*, 638 F.2d 388, 402 (2d Cir. 1980); *Richmond Power & Light v. FERC*, 574 F.2d 610, 620 (D.C. Cir. 1978)).

[26] *Id*. at 24-25 (citing *Florida Power & Light Co. v. FERC*, 660 F.2d 668, 676 (5th Cir. 1981), *cert. denied*, 459 U.S. 1156 (1983); *New York State Elec. & Gas Corp. v. FERC*, 638 F.2d 388, 402 (2d Cir. 1980); *Richmond Power & Light v. FERC*, 574 F.2d 610, 620 (D.C. Cir. 1978)).

[27] 16 U.S.C. § 824i (2012).

[28] Request for Rehearing at 40-41.

[29] *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, FERC Stats. & Regs. ¶ 31,203, *order on reh'g*, Order No. 671-A, FERC Stats. & Regs. ¶ 31,219 (2006).

specifically include QFs within the broad category of public utilities subject to regulation under sections 205 and 206 of the FPA, with limited exceptions.[30] As we explained in the September 16 Order, a transmission line owned by a QF/exempt wholesale generator partnership is also subject to section 205 of the FPA.[31] The Commission has also made clear that owners of transmission lines interconnecting generation facilities to the integrated transmission grid, even those characterized as "generator lead lines," are subject to the requirement to file an OATT and to provide open access transmission service.[32] Thus, as we explained in the September 16 Order, whether a transmission line is utilized by a QF to provide service to itself (or co-owners), affiliates, or unaffiliated third parties does not alter the obligation of the QF to file an OATT with the Commission unless it qualifies for a waiver of the OATT filing obligation.[33] Petitioners' argument is really an impermissible collateral attack on the September 16 Order,[34] as well as on Order No. 671.

2. Priority Service Under the OATT

19. In the May 13 Order, we explained:

> Contrary to Terra-Gen's assertions, its OATT proposal with respect to priority and grandfathering of future planned service is inconsistent with Commission policy, as well as

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[30] The Commission regulations governing the exemptions enjoyed by QFs are codified at 18 C.F.R. Part 292, Subpart F (18 C.F.R. §§ 292.601-.602 (2013)). The limited QF exemptions from sections 205 and 206 of the FPA, which apply to QFs making certain sales of energy and capacity, are not applicable to this proceeding, which involves Terra-Gen's provision of transmission services over the Dixie Valley Line.

[31] *Sagebrush, a California Partnership*, 130 FERC ¶ 61,093, at P 25 (2010) (*Sagebrush*).

[32] *See, e.g.*, *Milford*, 129 FERC ¶ 61,149 at P 24; *Evergreen Wind Power III, LLC*, 135 FERC ¶ 61,030, at n.18 (2011). We note that the Commission has sought comment in Docket No. RM14-11-000 regarding open access and priority rights for capacity on interconnection facilities.

[33] We also note that the fact that Green Borders *could* have requested interconnection and transmission pursuant to sections 210 and 211 of the FPA does not mean that it was required to do so.

[34] Petitioners did not seek rehearing of the September 16 Order.

> Order No. 888, which requires that all new transmission be provided pursuant to an OATT. Terra-Gen is correct that, in *Sagebrush*, we excluded from the OATT planned expansion for which the Sagebrush partners had previously been granted priority. However, our determination in *Sagebrush* to exempt the 33 MW which had been granted priority was made almost three years after priority had been granted in *Aero Energy, LLC*, and the parties had expected, during that intervening time, that the 33 MW would be exempt from the OATT, as we did not impose an obligation to file an OATT. In contrast, here, the obligation to file an OATT was triggered by Green Border's valid transmission service request made on May 8, 2007, prior to Terra-Gen's attempt to establish priority for future service let alone a Commission order granting such priority. In addition, here there was never any question that there would be an obligation to file an OATT, as was the case in *Aero Energy;* there was thus no assumption that service could be taken pursuant to an existing agreement as in *Sagebrush*. Thus, in considering any future use of the Dixie Valley Line, whether it be priority service to Terra-Gen itself, or to a third-party such as Green Borders, the Commission will apply its usual open access princip[les], which require that future service be taken subject to the OATT.
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> In the instant case, Terra-Gen proposes tariff language that would allow Terra-Gen to continue its existing service and initiate new transmission service to itself, for any Commission approved priority rights associated with its generation, outside of the rates, terms, and conditions of the OATT. Such a provision is not consistent with or superior to the *pro forma* OATT. Accordingly, Terra-Gen must revise its proposed grandfathering provision (Section 2.1a) in order to reflect that all future users of planned transmission capacity, for which priority may be granted, must take service subject to the terms of the OATT.[[35]]

20. On rehearing, Petitioners challenge the Commission's determination that all service other than the 60 MW of existing service must be taken under the rates, terms,

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[35] May 13 Order, 135 FERC ¶ 61,134 at PP 24-25 (citations omitted).

and conditions of the OATT. They assert that, with this ruling, the Commission required them to share rate and non-rate terms and conditions with third parties, and substantially diminished the benefit of priority use rights.[36] They also assert that this determination undercuts their business model and greatly increases their costs, without any assurance of reimbursement.[37]

21. Petitioners also contend that the Commission departed from its precedent without a reasoned explanation, by failing to give effect to its prior policy to permit entities that establish priority use of their transmission assets to make such use outside of an OATT.[38] They maintain that the Commission improperly applied its new policy on priority use rights retroactively to the Petitioners, notwithstanding that it recognized in the September 16 Order the Petitioners' expectations that they would have priority use rights in the Dixie Valley Line, and their substantial expenditure of time and money based on those expectations. Moreover, they argue that, even if the Commission had the power to make new policy requiring non-public utilities to become common carriers and file an OATT, applying such a policy retroactively here violates well-settled equitable principles.[39] Petitioners contend that the purpose of priority use in a transmission line that a generation developer builds or acquires for its own use is to ensure that the developer can deliver the power it produces to meet power sales commitments to its customers, at costs that it can reasonably estimate under the terms and conditions that it can establish by private agreement to meet its commercial needs, and to identify the cost responsibility of third parties who request transmission service.[40]

22. Petitioners assert that a generation developer such as Dixie Valley "does not invest in generation development with the goal of becoming a regulated transmission provider serving third parties" and that "[a] Commission order compelling it to do so undercuts its business model and the expectations of its lenders and investors, and imposes substantially greater regulatory compliance costs and burdens than would have been the

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[36] Request for Rehearing at 25, 42, 47.

[37] *Id.* at 47-48.

[38] *Id*. at 25, 43-46 (citing *Alta Wind I, LLC*, 134 FERC ¶ 61,109, at P 19 (2011); *Aero Energy*, 115 FERC ¶ 61,128 (2006); *Milford*, 129 FERC ¶ 61,149 (2009); *Michigan Pub. Power Agency v. FERC*, 405 F.3d 8, 12 (D.C. Cir. 2005); *Hatch v. FERC*, 654 F.2d 825, 834 (D.C. Cir. 1981)).

[39] *Id*. at 44.

[40] *Id.* at 14-15.

case if it continued to use its private generation tie-line for private use."[41] Petitioners also point out that a generation developer cannot simply pass on the costs of third-party use because it has no captive rate base customers. Petitioners further explain that, because Terra-Gen is a project financed entity, it can neither front the cost of expansion or bear third party credit risks without the consent of its investors, nor simply hire new staff to implement and administer an OATT or engage in general transmission planning, because it has no surplus cash flow to pay for it.

23. In this regard, Petitioners argue that the degree to which the May 13 Order imposes new and unreasonable costs and burdens on Terra-Gen depends on what the Commission meant when it said that the Petitioners must take their future priority use under the OATT.[42] Petitioners argue that, if the Commission intended to say that future priority use is subject to the non-rate terms and conditions of the OATT, akin to the treatment of traditional utilities taking service under the OATT to serve retail load, then the magnitude of the harm caused by the May 13 Order is more limited. This, they argue, would be more in tune with the approach taken in *Aero Energy*, where the Commission required the customer to pay all of the costs attributable to its request for service, including the obligation to pay for further studies and upgrade costs to preserve priority use service.[43]

24. In contrast, Petitioners argue that, if the Commission meant to say in the May 13 Order that priority use rights are subject to the Commission's average cost pricing policy as it applies to the treatment of line losses and other matters, then the May 13 Order conflicts with the statutory underpinning of the priority use policy, thereby both substantially diminishing the benefits of priority use and potentially causing Petitioners substantial harm. According to Petitioners, the priority use policy announced in *Aero Energy* derives directly from sections 211 and 212 of the FPA, and the Commission's average cost pricing policy conflicts with the section 212 directive that the Commission allocate all costs "properly allocable" to requests for transmission service directly to the party that made that request.[44]

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[41] *Id*. at 15.

[42] *Id.*

[43] *Id*. at 16 (citing *Aero Energy*, 120 FERC ¶ 61,188 at PP 46-47).

[44] *Id*. (citing *Aero Energy*, 120 FERC ¶ 61,188 at P 18; *Aero Energy*, 116 FERC ¶ 61,149 at PP 26-28; 16 U.S.C. § 824k(a) (2012)).

25. As an example, Petitioners assert that, if the losses attributable to priority users must be averaged with the losses attributable to non-priority users, then the priority users do not have the benefits of ownership of the line associated with priority use rights. Petitioners also argue that, if the priority users must share in the costs of establishing the OATT, administering it, complying with the Commission's various regulatory requirements applicable to transmission providers, and potentially complying with North American Electric Reliability Corporation (NERC) reliability rules, then the benefits of priority use rights are substantially reduced "and Terra-Gen and the priority users are not kept whole from the consequences of the Commission's regulations."[45]

26. In addition, Petitioners argue that, if the Commission meant to say that priority use rights are subject to the OATT's rates, terms, and conditions, then Petitioners are also potentially aggrieved if the third parties do not pay for the costs they cause Terra-Gen to incur. Petitioners assert that, if all priority users of the line pay an embedded cost rate calculated based on the costs of the line as configured to meet their service needs, and third party users pay the higher of that embedded cost rate or the incremental cost of service, then Petitioners would be kept whole. However, Petitioners argue that, if the Commission intended that priority users must pay an embedded cost rate calculated after taking into account upgrades and billing determinants associated with third parties, then Petitioners are not kept whole and are instead required to subsidize service to third parties.[46]

Commission Determination

27. We will deny rehearing on this issue. The Commission has required Terra-Gen to submit an OATT because it received a request for service from a non-affiliated third party. It would be unduly discriminatory to require that only service to a non-affiliated third party be taken pursuant to that OATT.[47] Accordingly, we reiterate that the priority we granted for the Coyote Canyon and New York Canyon projects means queue priority; their requests for transmission service are preeminent to all other transmission customers and, to the extent not already in priority position, have priority, to the extent necessary, to align transmission service and interconnection service needs, particularly necessary upgrades or additions to the Dixie Valley Line.

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[45] *Id*. at 17.

[46] *Id*.

[47] As noted above, the Commission is seeking comment in Docket No. RM14-11-000 in a Notice of Proposed Rulemaking regarding open access and priority rights for capacity on interconnection facilities.

28. However, priority under the Terra-Gen OATT does not mean priority to any rate, term, or condition of the OATT beyond transmission queue priority. As a result, the Coyote Canyon and New York Canyon projects must abide by loss calculation and transmission service rate policies in the same way as other, non-affiliated transmission service customers must do. Thus, while Terra-Gen may, for example, charge a transmission customer the greater of the average system rate or an incremental rate, it may not charge both. Accordingly, Terra-Gen will need to ensure that its OATT does not result in unduly discriminatory rates, terms, or conditions of service for its affiliated generation compared to how third parties are treated.

3. Computation of Incremental Transmission Rates Under the OATT

29. Petitioners argue that the Commission should clarify that, if incremental costs, incremental transmission losses, OATT administration, and compliance costs incurred as a result of a transmission request, as well as verifiable out-of-pocket costs, are greater than Terra-Gen's current embedded cost, it may charge an incremental rate for transmission service under the OATT.[48] Petitioners argue that there are presently no OATT customers on the Dixie Valley Line, and the only entity using it is Terra-Gen itself. Petitioners also point out that the Commission has confirmed that Terra-Gen's use is outside of the OATT.[49] As a result, Petitioners contend that the OATT administration and compliance costs are "incremental" to Terra-Gen because it would not have incurred them but for Green Borders' service request and the Commission's order directing Terra-Gen to file an OATT.

30. Petitioners also argue that any new transmission service may trigger the need for upgrades to the line, and that such upgrades will also be incremental to the extent the revenue requirement exceeds the embedded cost of Terra-Gen's current use. Petitioners state that, if the Commission declines to grant this clarification, they request rehearing of the May 13 Order, arguing that it is an unexplained departure from Commission precedent.[50]

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[48] Terra-Gen Rehearing Request at 18-19.

[49] *Id*. (citing May 13 Order, 135 FERC ¶ 61,134 at P 23).

[50] *Id*. at 18-19 (citing *Preventing Under Discrimination and Preference in Transmission Services*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 870, n.533 (2007)).

Commission Determination

31. We will grant Petitioners' request for clarification. Petitioners may seek to recover in transmission rates the costs of compliance with the Commission's open access requirements along with the costs of any upgrades to the Dixie Valley Line. While we will not now, in the abstract, specify the substance of each cost category for which recovery would be found to be just and reasonable, Terra-Gen may seek recovery of these costs. We reiterate the Commission's policy on transmission service pricing. Pursuant to the Commission's long-standing Transmission Pricing Policy[51] and Commission precedent, a transmission provider may charge transmission-only customers the higher of embedded costs or legitimate and verifiable opportunity costs ("or" pricing), but not the sum of the two ("and" pricing).[52] The opportunity costs that may be proposed by a transmission provider are capped by incremental expansion costs. We emphasize that, if Terra-Gen elects to assess a transmission service customer an incremental rate for transmission service, Terra-Gen must submit a filing to the Commission supporting that incremental rate, while recognizing that the proposed opportunity cost rate must be capped at the incremental cost of expansion, which could include costs that Terra-Gen has described that may be incurred as a result of a transmission request, and are shown to be just and reasonable.

B. Compliance Filing

32. In the May 13 Order, the Commission addressed Terra-Gen's proposed OATT submitted in compliance with the January 14 Order. Among other things, the Commission accepted Terra-Gen's OATT, subject to modification and further compliance filing. Specifically, the Commission required Terra-Gen to: (1) modify the proposed grandfathering provisions in section 2.1; (2) address the loss calculations to be assessed to transmission service customers; (3) provide further explanation supporting Terra-Gen's proposed creditworthiness provisions; (4) resubmit an Attachment C – Methodology for Calculating Available Transfer Capability (ATC) consistent with the determination in the May 13 Order; and (5) address certain deficiencies in its proposed planning process (Attachment K). The Commission also required that Terra-Gen make

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[51] *Inquiry Concerning the Commission's Pricing Policy for Transmission Services Provided by Public Utilities Under the Federal Power Act*; *Policy Statement*, FERC Stats. and Regs. ¶ 31,005 (1994), *order on reconsideration*, 71 FERC ¶ 61,195 (1995).

[52] *Id.* at 31,138, 31,146. *See also* 71 FERC at 61,190-91.

ministerial changes to remove certain terms that were not applicable within Terra-Gen's OATT.[53]

33. Subject to our further discussion below, we find that many of Terra-Gen's modifications to its OATT satisfactorily comply with the Commission's directives of the May 13 Order. We find that Terra-Gen has satisfactorily modified section 2.1 of its OATT to reflect that all future transmission service customers that are granted priority rights, as clarified in this order, are subject to the rates, terms, and conditions of the Terra-Gen OATT. Additionally, Terra-Gen has satisfactorily explained its proposed creditworthiness standards, based on its structure as a single-asset, project-financed entity with limited ability to undertake capital expenditures necessary for third-party service. Terra-Gen has also included the term Transmission Provider in its OATT, rather than the disallowed term "Transmitting Utility."

34. We also find that Terra-Gen's proposed transmission planning process, included in Attachment K to its OATT, satisfactorily complies with the comparability principle established in Order No. 890.[54] Terra-Gen's planning process identifies that competing solutions will be evaluated against each other based on, among other considerations, cost, economics, and/or impact on reliability. Similarly, Terra-Gen has explained that the cost of new transmission facilities will be directly assigned to those that request them, if not otherwise included in Terra-Gen's existing rates.

35. However, we find that Terra-Gen has not complied with the Commission's directives with regard to: (1) its calculation of total transfer capability (TTC) pursuant to Attachment C of Terra-Gen's OATT; and (2) the development of Terra-Gen's charge for transmission losses under Schedule 10 of its OATT.

1. <u>Attachment C – TTC and ATC</u>

36. In the May 13 Order, the Commission rejected Terra-Gen's Attachment C, explaining that the methodology by which Terra-Gen proposed to calculate TTC was

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[53] May 13 Order, 135 FERC ¶ 61,134 at P 85 (requiring Terra-Gen to remove the term "Transmitting Utility" and replace it with the pro forma term "Transmission Provider," as Terra-Gen had previously committed to change).

[54] *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

illogical, as Terra-Gen asserted that TTC of the Dixie Valley Line was always zero.[55] The Commission directed Terra-Gen to re-file an Attachment C establishing the TTC value for the line based on the most limiting component of the line, electrical characteristics, or other factors, that impact reliable operation.[56]

37. In its Compliance Filing, Terra-Gen explains that it has revised Attachment C to incorporate an ATC methodology that does not take into account N-1 criteria, and which is consistent with the type of transmission service that Terra-Gen is capable of providing on the Dixie Valley Line. Terra-Gen explains that the proposed Attachment C specifies that the firm and non-firm transmission services provided under the Terra-Gen OATT are conditional transmission service and will be made available up to the facility rating of the most limiting element of the Dixie Valley Line.

38. Terra-Gen also states that that it is submitting its proposed Attachment C subject to the Commission granting it a waiver from the relevant NERC reliability standards. Terra-Gen asserts that the methodology used in its proposed Attachment C departs from the method described in NERC rules. Specifically, Terra-Gen requests waiver of or exemption from NERC Reliability Standard MOD-001-1a. Terra-Gen asserts that good cause exists to grant the waiver or exemption because it claims the Commission rejected Terra-Gen's previous methodology which, it claims, was consistent with NERC standards.[57]

39. Terra-Gen also requests a limited waiver from including a link to its ATC methodology on its website. Terra-Gen asserts that it does not yet have a website, but commits to amending its ATC provisions to provide such a link when its website becomes available.

40. In their request for rehearing, Petitioners argue that the Commission must clarify that the calculation of TTC under Attachment C does not compel Terra-Gen to provide firm service. Petitioners state that Terra-Gen is attempting to implement the Commission's suggestions that it file an Attachment C methodology that calculates the TTC of the line based on the most limiting component, the electric characteristics or other factors such as ground clearance,[58] but they seek clarification that the Commission

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[55] May 13 Order, 135 FERC ¶ 61,134 at P 51.

[56] *Id*. P 52.

[57] Compliance Filing at 4.

[58] Request for Rehearing at 19 (citing May 13 Order, 135 FERC ¶ 61,134 at P 52).

does not intend Terra-Gen to be contractually committed to providing a service that does not exist on its line, and that, by complying with the Commission's directive, Terra-Gen will not be deemed to be in violation of the NERC reliability rules if NERC seeks to apply them to the Dixie Valley Line.

41. Petitioners assert that the traditional notion of firm point-to-point service implies that the transmission provider continues to have the ability to provide service to its customers, even if the transmission provider has suffered an N-1 contingency on its system, as NERC defines that concept. Petitioners argue that Terra-Gen's system consists of a single radial line, so any contingency means the line is either de-rated or unavailable. Petitioners therefore request clarification that service interruption on the Dixie Valley Line due to an N-1 contingency will not result in Terra-Gen being in default under the OATT to the extent a customer has requested firm service. In the alternative, Petitioners request clarification that Terra-Gen's service obligation is limited to conditional firm service. In addition, they request clarification that basing Terra-Gen's calculations of ATC and TTC in Attachment C on something other than the mandatory N-1 criteria as directed by the Commission will not cause Terra-Gen to be in violation of the applicable reliability rules. If the Commission does not grant this request for clarification, Petitioners request rehearing.

Commission Determination

42. We find that Terra-Gen's proposed Attachment C generally complies with the directives of the May 13 Order, subject to certain modifications. The Commission directed Terra-Gen to revise its Attachment C to calculate TTC based upon the most limiting thermal characteristics of the line, electrical characteristics, or other factors such as ground clearance. The Commission further directed that Terra-Gen's methodology must be consistent with the fact that allocation of capacity to existing users implies that TTC on the Dixie Valley Line must be greater than zero. On compliance, Terra-Gen only needs to address these directives by filing appropriately revised tariff sheets. Therefore, we will conditionally accept in part, and reject in part, Terra-Gen's proposed Attachment C.

43. We find that Terra-Gen has complied with the May 13 Order inasmuch as it has updated its Attachment C to indicate that the TTC of the Dixie Valley Line will be determined based upon the most limiting thermal characteristics of the line or other characteristics such as voltage or stability limits. However, we will direct Terra-Gen to submit a revised Attachment C that retains these provisions, but removes language asserting that their methodology diverges from NERC reliability standards. Specifically, we will direct Terra-Gen to remove language indicating that the methodology "departs from the method described in the North American Electric Reliability Corporation's

("NERC") report on *Available Transfer Capability Definitions and Determination* and the methodologies for calculating ATC as described in NERC MOD-001-1a…."[59] We note the Commission has approved methods for assessing ATC for similarly-situated transmission providers, and that waivers from mandatory NERC reliability requirements have not been requested from the Commission for those systems.[60] Terra-Gen has not convinced us that it needs a waiver when similarly-situated systems do not. Moreover, MOD-001-1a establishes three alternative methods for the calculation of ATC or available flow capacity on a transmission provider's system, and Terra-Gen has not shown that it is incapable of complying with any of the three alternatives. Accordingly, we will not grant Terra-Gen's requested waiver of NERC Reliability Standard MOD-001-1a.

44. We also note that Terra-Gen has included in Attachment C, for the first time, an affirmative statement that transmission service on the Dixie Valley Line will be conditional firm or non-firm transmission service. In Order No. 890, the Commission stated that conditional firm service is subject to *pro-rata* curtailment, consistent with curtailment of other long-term firm service during the non-conditional periods.[61] In *Sky River*, the Commission explained that, because the system condition of the line not being in service applies to all uses of the line, existing as well as new conditional firm customers, curtailment for all users should be on a *pro-rata* basis.[62] Since Terra-Gen has now taken the same approach in its OATT, we will require Terra-Gen to clarify within its OATT that conditional firm and non-firm transmission service is conditional transmission service and to further address that curtailment of users of the Dixie Valley Line must be *pro-rata*.

45. Finally, we will deny as moot Terra-Gen's request for limited waiver of posting ATC values on its website because Terra-Gen has yet to develop a website. We note that, in fact, Terra-Gen currently does have a website available for information regarding the

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[59] June 13 compliance filing at Attachment C.

[60] *See Sagebrush, a California partnership*, Docket No. ER11-2526-000, delegated letter order issued February 28, 2011, accepting Sagebrush's Attachment C calculating ATC on the rated system path methodology.

[61] Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 1074.

[62] *Sky River, LLC*, 136 FERC ¶ 61,162 (2011).

Dixie Valley Line.[63] While we recognize that Terra-Gen continues to develop the necessary communication and information sharing platforms now required of it as a result of providing open access transmission service, granting the requested waiver is unnecessary.

2. Transmission Service Losses

46. In the May 13 Order, the Commission found that Terra-Gen had proposed a formula to calculate the incremental line losses that are directly attributable to a specific customer when that customer takes service on the Dixie Valley Line.[64] The Commission further found that Terra-Gen's proposed incremental treatment of line losses is not consistent with Commission policy insofar as Terra-Gen proposed to charge an average system transmission charge, but charge for losses on an incremental basis.[65] The Commission therefore required that Terra-Gen submit a compliance filing that proposes a loss compensation methodology that is consistent with Commission precedent and policy.

47. In its compliance filing, Terra-Gen proposes to revise the language in Schedule 10 of its OATT by adding the clause stating that it will "assign losses on an incremental basis to the extent that it charges customers incremental rates for transmission service."[66] Terra-Gen has made no other changes to the transmission loss formula as it was originally submitted.

Commission Determination

48. In the May 13 Order, the Commission recognized that Terra-Gen's loss calculation methodology in its proposed Schedule 10 reflected an incremental loss calculation; a conclusion that was not refuted by Terra-Gen.[67] Insofar as Terra-Gen has simply proposed a clause that the incremental loss calculation will only be applicable to

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[63] *See* http://www.terra-gendixievalley.com. We note that the Terra-Gen website contains no links to its OATT or other information regarding the provision of transmission service on the Dixie Valley Line. However the currently-effective Terra-Gen OATT is posted at http://www.terra-gendixievalley.com/DixieValleyOATTasof5-14-2011_2.pdf.

[64] May 13 Order, 135 FERC ¶ 61,134 at P 37.

[65] *Id*.

[66] Compliance Filing at Schedule 10.

[67] May 13 Order, 135 FERC ¶ 61,134 at P 37.

transmission customers that are charged incremental transmission rates, Terra-Gen has not satisfactorily complied with the Commission's directives. Specifically, Terra-Gen has not proposed an average loss rate that would be charged to transmission customers that are not assessed an incremental transmission service rate.

49. In the May 13 Order, the Commission found that Terra-Gen may include a provision in its OATT that allows Terra-Gen to charge the higher of the average embedded transmission rates included in schedule 7 or schedule 8 of Terra-Gen's OATT, or incremental costs, capped at the cost of expansion.[68] In the Compliance Filing, Terra-Gen has not proposed an average loss calculation that will be assessed to transmission customers. As a result, transmission service customers could be charged the average system rate, and assessed charges for losses calculated on an incremental basis. This continues to be inconsistent with Commission precedent.[69] Accordingly, we find that Terra-Gen has not satisfactorily complied with the May 13 Order. We will therefore require Terra-Gen to address how transmission service customers that are not assessed incremental transmission service rates will compensate Terra-Gen for losses. This should be addressed as an average system loss compensation rate or methodology and reflected in Terra-Gen's OATT.[70]

C. Rehearing of the December 2 Order

50. As noted above, in the December 2 Order, we conditioned a grant of priority to New York Canyon on New York Canyon's obtaining a *pro rata* ownership interest in the Dixie Valley Line.[71] However, in *NextEra Energy Resources, LLC*, the Commission reconsidered the requirement that an affiliate obtain a direct ownership interest and concluded that "it is no longer appropriate to require a transfer of ownership as a condition for granting priority rights to the generation-developing affiliate of a

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[68] *Id.* P 80.

[69] *Sithe/Independence Power Partners LP v. FERC*, 165 F.3d 944, 334 U.S. App. D.C. 157 (D.C. Cir. 1999); *Northern States Power Co.*, 59 FERC ¶ 61,100, at 61,369, *reh'g denied*, 60 FERC ¶ 61,076, at 61,252-53 & n.25 (1992), *clarification denied*, 64 FERC ¶ 61,111, at 61,920 (1993), *aff'd sub nom. Northern States Power Co. v. FERC*, 30 F.3d 177, 308 U.S. App. D.C. 115 (D.C. Cir. 1994). *See also Southern California Edison Company*, Opinion No. 145, 20 FERC ¶ 61,301, at 61,589, *reh'g denied*, Opinion No. 145-A, 21 FERC ¶ 61,211 (1982).

[70] *See, e.g., pro forma* section 15.7 and Schedule 10.

[71] December 2 Order, 137 FERC ¶ 61,179 at PP 32-33 and n.52.

transmission owner."[72] Accordingly, we will no longer require New York Canyon to obtain a *pro rata* ownership interest in the Dixie Valley Line to obtain 100 MW of priority use.

The Commission orders:

(A) Petitioners' requests for rehearing, clarification, and waivers or exemption are hereby granted in part and denied in part, as discussed in the body of this order.

(B) Terra-Gen's compliance filing is hereby accepted in part and rejected in part, as discussed in the body of this order.

(C) Terra-Gen is hereby directed to file revisions to its OATT, within 60 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[72] 142 FERC ¶ 61,043, at P 26 (2013).