

Discussion Paper: Preservation of Rights to Protest PEC/LSO Conversions and NCR Instructions

Submitted by Carl Imparato on Behalf of the Non-Incumbent Coalition
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The purpose of this Discussion Paper is to lay out the rationale for allowing all Eligible Customers and other interested parties to exercise the right to protest proposed conversions of pre-existing rights (PECs and LSOs) to RTO service and proposed translations of non-converted pre-existing rights into Non-Converted Rights (NCR) Instructions (through which the non-converted pre-existing rights are implemented by the RTO).

Background

When a pre-existing right is converted to RTO service or a pre-existing right is translated into NCR Instructions, it will typically be the result of discussions between the parties to the contract that establishes the right (although in some cases, it may be the result of a unilateral action on the part of the transmission provider).

The parties to the PEC or LSO may, in some cases, reach agreements which may be mutually beneficial to those parties, but would be harmful to other users of the RTO Grid. In fact, the incentives may often exist to make this a very likely outcome. This is the case because it may cost the PTO and the transmission customer very little to increase the rights of the transmission customer (for example, by liberally granting unused transmission capacity - ATC - to the customer or by increasing the firmness of rights which may in fact only be conditionally firm). The two parties to the contract make peace with one another or create other mutual benefits; and the losers are the Eligible Customers who come later, seeking transmission access that can no longer be granted because the FTRs associated with that access have been pre-allocated to the parties to the pre-existing contract.¹

It is therefore essential that other parties be able to see the terms of the proposed agreements which are forwarded to the RTO for implementation and to protest those terms when they believe that their own potential rights would be compromised by implementation of the proposed agreements.

The proposal advocated in this Discussion Paper is that the RTO or any other party may see the proposed implementation terms and may submit written protests to the RTO and seek redress through the RTO's dispute resolution processes and whatever other legal rights might be available to the party. The protests would be required to follow the RTO Tariff's strict due process requirements in order to prevent the intervening parties from simply creating delay.²

Note also that the proposal advocated in this Discussion Paper does not invite third parties to participate in the negotiations between the parties to the pre-existing contract. It would simply

¹ This is not a hypothetical concern: it has materialized several times in one or more ISOs.

² The proposal advocates that - at least as a starting point for discussions - the CMWG consider the processes that were created in Mountain West ISA Appendix E (as submitted to and approved by the FERC). Those processes were the result of multi-day negotiations between transmission providers, transmission customers and other parties. The result was deemed satisfactory to all parties. In particular, the transmission customers supported the processes as not creating harm to their rights.

allow the third parties to protest the results of those negotiations, as those results might affect the rights of the third parties.

The alternative proposal, which this Discussion Paper rejects, would limit the ability of parties to protest. Only “a party whose rights might be materially impacted by the proposed conversion or modification”³ would be permitted to protest, and the grounds for the protest would be severely limited to “questions of fact.” Other parties would be limited to requesting that the RTO carry forward their objections.

Discussion

1. There is no rationale for limiting the ability of parties to participate in the RTO’s processes. If parties are locked out of the RTO’s process for approval of conversions or translation of rights, they will be forced to seek redress in other forums. This will ultimately contribute to greater delays. It is also inconsistent with one of the rationales for creating the RTO: to, in the first instance, address disputes over transmission access locally rather than in the courts or in Washington, D.C.
2. There is no rationale for limiting the ability of parties to dispute “questions of fact” when indeed, many of the more controversial aspects of rights conversion or translation will be the result of how policies are interpreted. Limiting parties’ rights to dispute proposed translations or conversions in the RTO forum will simply lead to more disputes elsewhere.
3. The alternative proposal would limit the rights which third parties have today. Today, an entity does not need to be the holder of a pre-existing right in order to protest terms of conditions of access that are proposed by a transmission provider to a transmission customer. Any Eligible Customer that might want transmission access in the future has a legitimate interest in the terms and conditions of proposed transmission agreements, and the FERC has liberally interpreted the grounds upon which parties may become intervenors in FERC proceedings. The alternative proposal would strip away the rights of non-incumbents, preventing them from pursuing their legitimate interests in the hope that the RTO might make the case for them.
4. As a matter of public policy, there is no rationale for limiting the participation by any interested party in the affairs of the RTO; and the mechanisms through which transmission access can be parceled out to incumbents are certainly of legitimate interest to a broad community that includes transmission owners, marketers, generators, aggregators, end-use customers, etc. - all of whom would bear the consequences of “sweetheart” deals for rights conversions or rights translations.
5. Finally, no harm would come about through allowing broad participation. Rather, the knowledge that proposed deals would be subject to scrutiny by all parties will bring a greater integrity to proposals for rights conversions and rights translations.

For all of the above reasons, any interested party should be permitted to participate in protesting proposed rights conversions or proposed rights translations pursuant to the due process procedures that would be specified in the RTO Tariff, and grounds for protest should not be limited to “questions of fact.”

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³ The proponents of this position have stated that the intent of this language is to limit protests to only parties who also have pre-existing entitlements on the affected portions of the RTO Grid.