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How To Fix Discrimination Issues In SE Power Market Plan

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The Southeast Energy Exchange Market went into effect on Oct. 12,[1] and the corresponding revisions to the jurisdictional transmission tariffs were approved by the Federal Energy Regulatory Commission in a majority vote on Nov. 8.[2] All regulatory approvals required to implement SEEM are now complete.

But even though SEEM members have a green light to proceed, the SEEM construct remains vulnerable to legal challenges related to discriminatory transmission access.

Potential discrimination is a real concern, because SEEM lacks mechanisms such as representative governance, stakeholder processes and an independent market monitor that could detect and correct discrimination should it arise.

Background

SEEM is a trading platform founded by 14 load-serving entities whose service territories cover a large swath of the southeast U.S. in Oklahoma, Missouri, Iowa, Kentucky, Tennessee, Mississippi, Alabama, Georgia and the Carolinas.

The purpose of the trading platform is to centralize and automate bilateral trading of a 15-minute nonfirm energy product called an energy exchange.[3] The market is bid-based. For each 15-minute period in each hour, participants submit bids and offers to buy and sell energy. Optimization software matches buyers and sellers, and determines a transaction price and quantity.

Once finalized, SEEM schedules the energy transaction on the transmission system.

SEEM transmission owner-operators provide the service needed to transmit energy exchanges — called Non-Firm Energy Exchange Transmission Service, or NFEETS — free of charge.

Once scheduled, the individual seller and buyer are responsible for executing the energy transaction and for arranging payment.

Numerous Discrimination Concerns Arising Within SEEM Construct

The SEEM trading platform uses transmission under FERC's jurisdiction and is thus subject to FERC Order No. 888, which requires nondiscriminatory and nonpreferential access, or open access, to the electric transmission grid.

SEEM members assert that open access will be achieved under the individual tariffs of each SEEM transmission provider — either the open access tariffs filed at FERC or the comparable tariffs of SEEM transmission providers not under FERC's jurisdiction.

Although FERC has approved the jurisdictional tariffs that incorporate NFEETS, the design of SEEM could or does exclude certain market participants. Some key concerns are outlined below.

NFEETS transmission service is not available without the execution of a SEEM participation agreement — a set of contractual provisions and market rules. SEEM members, all of which are load-serving entities, established the participation agreement. However, load-serving entities do not represent the interests of all participants.

A prospective trader must sign the participation agreement without input into its provisions, or be denied NFEETS. And even if the prospective trader signs, SEEM members must approve the agreement.

It is hard to square this arrangement with FERC requirements for nondiscriminatory and nonpreferential transmission access.

Additionally, to participate in the market and obtain NFEETS, a prospective trader must sign at least three bilateral enabling agreements with SEEM energy trading partners. This is a departure from the bilateral market, where trade with one counterparty does not depend on trade with other counterparties.

Further, in addition to the enabling agreement requirement, a trader that does not have at least three bids/offers in each 15-minute interval cannot transact.

The failure of one trading partner to make a bid/offer can thus, under certain circumstances, thwart a deal with someone else. These requirements can prevent trade, resulting in discriminatory transmission access.

Another concern is that to get NFEETS transmission service, a prospective participant must execute a service agreement under every SEEM transmission provider's tariff — whether its within FERC's jurisdiction or not.

This requirement could allow a single transmission provider to block the entry of a prospective participant by refusing to execute a transmission service agreement. This is especially concerning if the transmission provider is not FERC-jurisdictional because it is not clear what process, if any, would be available to seek redress.

In addition, to participate, a SEEM trader must own or control a generation source, or be contractually obligated to serve a load, within the SEEM footprint.[4] This requirement will exclude traders that currently transact in the SEEM footprint or that may wish to do so in the future, but that do not have resources located there.

FERC has approved the source/sink requirement in the context of multistate energy imbalance markets but not for bilateral trading markets, where this requirement diminishes trade.

Governance and Market Monitoring Challenges

The SEEM construct lacks an independent board, stakeholder processes and an independent market monitor that could identify and correct discrimination or preferential access should it arise.

SEEM members do not include these features because they view SEEM as "nothing more than an enhancement to the existing bilateral market,"[5] and existing bilateral markets are protected from undue discrimination under FERC's open access tariffs and bilateral market-based pricing regime.

Clearly, SEEM is more than a simple enhancement to the bilateral market. FERC Commissioner Allison Clements provides a more accurate characterization in her dissent, describing SEEM as

> a complex multi-lateral optimization engine that replaces the bilateral negotiation of key terms, including price and quantity ... [and] is responsible for ... allocating the NFEETS, which is an exclusive transmission service reserved for participants in the Southeast EEM ... [and] it also has its own set of rules, a governance structure, and participation requirements, each of which further distinguish it from traditional bilateral markets.[6]

The SEEM decision-making bodies, the operating committee and membership board, are composed exclusively of members — vested load-serving entities — whose interests do not always align with those of other participants, such as independent power producers, public interest groups, or state and local regulators.

Without fair and balanced representation and an independent oversight function, there is nothing set up to adequately address potential sources of discrimination.

Possible Remedies

There are ways to improve nondiscriminatory and nonpreferential transmission access, as described in the following examples.

Participation Agreement

Instead of limiting the authorship of the participation agreement to SEEM members, a process that allows for stakeholder input into the review and revision of the participation agreement could be adopted by SEEM members.

Bilateral Enabling Agreements

Instead of a three-counterparty rule, SEEM could offer a single enabling agreement that by default enables energy trading with all SEEM participants. Then, from the default position, a participant could explicitly remove certain trading partners.

This could dramatically open up trading possibilities and prevent trading interdependencies, while allowing traders to exclude counterparties for legitimate reasons, such as credit concerns.

NFEETS Transmission Service Agreements

To mitigate the possibility of exclusion by a single or small number of transmission providers, the requirement that a participant execute service agreements with every transmission provider could be modified to require execution with FERC-jurisdictional transmission providers only, or some other subset of transmission providers.

Also, nonjurisdictional transmission providers should be required to file their comparable tariffs at FERC.

Source/Sink Requirement

In her dissent, Clements offered a possible pathway that could make the source/sink requirement unnecessary, namely "requiring external resources to secure firm service to the border of the Southeast EEM territory."[7]

SEEM members could overcome discrimination concerns by committing to explore and implement provisions to include external resources.

The Road Ahead

Potential discriminatory and preferential transmission access is a real concern in the SEEM construct because SEEM lacks representative governance, stakeholder processes and an independent market monitor that could identify and correct these issues should they arise.

Rehearing requests of the SEEM agreement and the SEEM open access transmission tariffs have been, or will be, filed at FERC. FERC may require changes to the agreement or tariffs to ensure nondiscriminatory and nonpreferential transmission access, or changes could be required in the appellate review process.

SEEM has the potential to expand trading opportunities and significantly benefit market participants, but it must ensure that these benefits are available to all.

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[1] The SEEM agreement went into effect without a vote by FERC because, as prescribed by law, this type of application is automatically approved when the Commission vote is split 2–2.

[2] Order Accepting Tariff Revisions, FERC Docket Nos. ER21-1115, etc., November 8, 2021.

[3] "Energy exchange" is a misnomer, as the electricity is not exchanged but rather bought and paid for.

[4] Transmittal Letter, Revisions to Joint Open Access Transmission Tariff to Implement Non-Firm Energy Exchange Transmission Service, Duke Energy Carolinas, LLC and Duke Energy Progress, LLC, FERC Docket No. ER21-1115, February 12, 2021, p. 4.

[5] Southeast Energy Exchange Market Agreement, FERC Docket No. ER21-1111, February 12, 2021, Attachment B, ¶ 6.

[6] Statement of Commissioner Clements, FERC Docket No. ER21-111-002 et al., October 20, 2021, ¶ 12.

[7] Clements Dissenting Opinion, FERC Docket No. ER21-1115, November 8, 2021, ¶ 14.