UNITED STATES OF AMERICA
BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

Petition for Expedited Rulemaking to Adopt Commercial Readiness and Withdrawal Penalty Rules for Tribal Energy Development Organizations	**)** **)** **)** **)**	**Docket No. RM24-9-000**

COMMENTS OF PUBLIC INTEREST ORGANIZATIONS

The Environmental Defense Fund, National Wildlife Federation, Earthjustice, Natural Resources Defense Council, Sustainable FERC Project, and Center for Biological Diversity (collectively, "Public Interest Organizations" or "PIOs") respectfully submit these comments to the Federal Energy Regulatory Commission ("FERC" or "the Commission") in support of the Alliance for Tribal Clean Energy's ("ATCE") Petition for Expedited Rulemaking to Adopt Commercial Readiness and Withdrawal Penalty Rules for Tribal Energy Development Organizations ("Petition").[1]

The Petition seeks a revision to requirements under FERC's current Large Generator Interconnection Procedures ("LGIP"), as established in Order No. 2023.[2] Order No. 2023 sought to tackle substantial delays in the interconnection process by updating the LGIP for connecting generators to the bulk transmission system. The previous LGIP framework was ill-equipped to manage the surge in applications from clean energy projects, particularly wind, solar, and storage, leading to prolonged wait times and significant backlogs in interconnection queues.

[1] Petition for Expedited Rulemaking to Adopt Commercial Readiness and Withdrawal Penalty Rules for Tribal Energy Development Organizations, Docket No. RM24-9 (Filed Aug 9, 2024) (hereinafter "Petition").

[2] Order No. 2023, Improvements to Generator Interconnection Procedures and Agreements, 184 FERC ¶ 61,054 (2023) (hereinafter "Order No. 2023").

A significant factor contributing to these delays is the presence of a number of speculative applications, where developers submit multiple interconnection requests without intending to pursue them all, but instead, to pick and choose the projects that require the least upgrade costs. These speculative submissions exacerbate grid congestion and extend delays for all projects by introducing uncertainty and triggering restudies. Order No. 2023 reasonably sought to address this issue by modifying certain requirements on interconnection applicants. Tribal energy developers, however, generally approach project development differently due to structural, cultural, and historical constraints, including limited geographic and financial flexibility. These differences mean that Tribal energy developers do not and generally cannot submit speculative requests, and make it significantly more difficult for Tribal energy developers to meet some of the new requirements imposed on interconnection applicants.

As ATCE explains in its petition, the commercial readiness deposit requirements and the withdrawal penalty structure introduced in Order 2023 unfairly burden Tribal energy developers. Moreover, these provisions are unduly discriminatory as applied to Tribal energy developers since Tribes do not contribute to the speculative request problem. Given its trust responsibility to Tribes, FERC must ensure its rules do not disadvantage Tribal projects. PIOs urge FERC to initiate a rulemaking to correct these inequitable impacts.

I. Summary

FERC's trust responsibility to Tribes requires that its regulations do not impose undue burdens on Tribal energy development.[3] Order No. 2023, however, creates these burdens through its commercial readiness and withdrawal penalty requirements, which impose severe financial

[3] *See* Order No. 635, Policy Statement on Consultation with Indian Tribes in Commission Proceedings, 104 FERC ¶ 61,108 (2003); Order No. 863, Revision to Policy Statement on Consultation with Indian Tribes in Commission Proceedings, 169 FERC ¶ 61,036 (2019).

obstacles that disproportionately impact Tribes and effectively inhibit their participation in energy markets. In response, the Alliance for Tribal Clean Energy (ATCE) proposes practical, fair adjustments to the process, allowing Tribes to demonstrate commercial readiness through non-financial means aligned with their resources and rigorous community approval standards. Given the unique financial constraints faced by Tribal governments, including limited access to capital and barriers to speculative projects, ATCE's recommendations provide a necessary exemption from Order No. 2023's deposit and penalty requirements. Without this rulemaking, FERC risks further limiting Tribes' energy development opportunities and jeopardizing vital federal investments meant to empower Tribal energy independence. To fulfill its commitment to fair, just, and reasonable regulation, FERC should initiate a rulemaking to prevent further inequities and support the growth of Tribal energy projects.

II. FERC Has a Trust Responsibility to Tribes that Obligates It to Actively Consult and Engage with Tribes on Matters Impacting Tribal Lands and Resources

The United States government holds a trust responsibility toward Tribes, rooted in Article I, Section 8 of the Constitution, shaped and defined by 375 treaties, hundreds of laws, and countless executive orders. This fiduciary duty requires the government to honor treaty obligations, manage resources for Tribes' benefit, and act in their best interests. Federal agencies are mandated to actively consult and engage with Tribes on matters impacting Tribal lands, resources, and cultural heritage, ensuring respect for Tribal sovereignty and upholding commitments to promote Tribal self-determination and well-being.

Over the past several decades, Congress has strengthened its commitments to Tribes by eliminating regulatory barriers and granting Tribes greater autonomy over activities on their lands. Recent legislative initiatives, including the Infrastructure Investment and Jobs Act (2021) and the Inflation Reduction Act (2022), have sought to address the long-standing

underinvestment in Tribal communities. These laws provide substantial funding to support Tribes in meeting critical infrastructure needs and developing both community-scale and utility-scale energy projects, fostering economic development and energy independence.[4]

The Commission has consistently acknowledged Tribes' sovereign status[5] and affirmed its trust responsibility as an independent federal agency,[6] which obligates FERC to evaluate the impact of its rules on Tribes and engage in meaningful government-to-government consultation. Despite this commitment, FERC fell short of fulfilling these obligations during the development of Order No. 2023. Insufficient consultation with Tribes at critical stages resulted in a rule that lacks robust Tribal input and fails to adequately address Tribal interests and priorities.

Order No. 2023 traces its origins to a 2015 petition by the American Wind Energy Association seeking revisions to interconnection procedures.[7] While numerous stakeholders submitted comments during the process, none were received from Tribes, and the rule's potential impact on Tribal energy development was not addressed. In 2016, FERC convened a technical conference to discuss interconnection procedures, yet the 268-page transcript contains no mention of Tribes or Tribal Energy Development Organizations (TEDOs), nor any input from

[4] *See* White House, Bipartisan Infrastructure Law Tribal Playbook (May 2022), https://www.whitehouse.gov/wp-content/uploads/2022/05/Bipartisan-Infrastructure-Law-Tribal-Playbook-053122-.pdf ("The law provides more than $13 billion in funding to directly support Tribal communities and makes Tribes eligible to apply for or request billions in discretionary, formula, and other funding."); and White House, Guidebook to the Inflation Reduction Act's Clean Energy And Climate Investments in Indian Country (Apr. 2023), https://www.whitehouse.gov/wp-content/uploads/2023/04/Inflation-Reduction-Act-Tribal-Guidebook.pdf ("[T]he Inflation Reduction Act provides more than $720 million for programs dedicated to Tribal lands and Native communities").

[5] *See* Order No. 635 at P 11.

[6] *Id*. at P 13.

[7] Petition For Rulemaking of The American Wind Energy Association to Revise Generator Interconnection Rules and Procedures, Docket No. RM15-21-000 (Filed June 19, 2015).

them.[8] Furthermore, no Tribes submitted comments. There is no evidence that FERC engaged in consultation with Tribes as required by its trust obligations in advance of any of the above proceedings.

In July 2021, FERC issued an advanced notice of proposed rulemaking ("ANOPR") covering regional transmission planning, cost allocation, and generator interconnection but again did not explicitly seek Tribal input. As with previous efforts, no Tribes submitted comments on the ANOPR, and no commenter represented or reflected Tribal perspectives. At the November 2021 technical conference on regional transmission planning, cost allocation and generator interconnection, John B. Lewis was the lone panelist to provide a Tribal perspective, although he was not officially representing a Tribe or TEDO.[9]

In June 2022, FERC released its generator interconnection notice of proposed rulemaking ("NOPR") without reference to Tribal energy development.[10] For the first time, Tribes responded, with entities like the Oceti Sakowin Power Authority ("OSPA") expressing concerns about the potential impacts of high commercial readiness deposits, including forcing Tribal utilities out of the queue.[11] OSPA sought an exemption for Tribes from commercial readiness deposits due to the unique obstacles they face.[12]

[8] Technical Conference Transcript, Review of Generator Interconnection Agreements and Procedures American Wind Energy Association, Docket No. RM16-12-000 (May 13, 2016).

[9] Technical Video Conference Transcript, Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection, Docket No. RM21-17-000 at p. 167 (Nov. 15, 2021) (noting that although Lewis did not speak directly to the challenges that Tribes face in the interconnection process, he emphasized the need for FERC's engagement with Tribes to be "consistent and ongoing," with consultation starting "from the very beginning of the process to the end.").

[10] Notice of Proposed Rulemaking, Improvements to Generator Interconnection Procedures and Agreements, Docket No. RM22-14-000 (June 16, 2022) ("NOPR").

[11] Reply Comments of The Oceti Sakowin Power Authority, Improvements Generator Interconnection Procedures and Agreements, Docket No. RM22-14-000 at p. 16 (Dec. 14, 2022).

[12] *Id.*

On March 29, 2023, FERC hosted its inaugural Environmental Justice Roundtable, where Amy Cordalis, Co-Principal of the Ridges to Riffles Indigenous Conservation Group, emphasized the Commission's trust responsibility.[13] She highlighted the pressing need for FERC to incorporate Tribal consent into its decision-making processes, particularly in advancing infrastructure permitting and fostering fair and inclusive approaches.

Despite this feedback, FERC's final rule did not address these concerns.[14] Barriers facing Tribal projects were only recognized in Commissioner Allison Clements' concurrence, which acknowledged that the adopted processes "may act as a barrier to projects serving or developed by Tribes."[15] Clements called for further inquiry into alternative methods for Tribes to demonstrate commercial readiness, given the unique challenges they face.

Insufficient Tribal input in the consultation process leading up to Order No. 2023 has resulted in a rule that fails to adequately address Tribal energy development. This oversight raises serious concerns about a potential violation of FERC's trust responsibility to Tribes. In response to the ATCE's petition, FERC has taken meaningful steps to re-engage with its trust obligations, including creating a public website on the petition and hosting listening sessions.[16] PIOs encourage FERC to build on these efforts by promptly evaluating the impact of its regulations on Tribes, ensuring it fulfills its trust responsibilities and promotes equitable access to energy markets for Tribal communities.

[13] Transcript, Roundtable on Environmental Justice and Equity in Infrastructure Permitting, Docket No. AD23-5-000 at p. 97 (Mar. 29, 2023).

[14] Order No. 2023, Improvements to Generator Interconnection Procedures and Agreements, 184 FERC ¶ 61,054 (2023) (hereinafter Order No. 2023).

[15] Comm'r. Clements Concurrence to Order No. 2023 at P 38-40. (citing a waiver issued to the SAGE Development Authority, a Standing Rock Sioux Tribe TEDO, which was exempted from a security deposit deadline due to difficulties in securing credit.)

[16] This website is available at https://www.ferc.gov/ATCE-petition.

III. Order No. 2023's Primary Purpose is to Limit Speculative Interconnection Requests

In Order No. 2023, the Commission recognized an urgent need to reform its pro forma LGIP. Under the previous framework established in Order No. 2003, the absence of robust financial commitment requirements inadvertently encouraged developers to submit speculative,[17] or exploratory applications across multiple interconnection points.[18] This surge in speculative requests overwhelmed interconnection queues, contributing, along with other factors, to significant backlogs and leaving some applicants waiting more than five years to connect to the grid and access the market.

To tackle these challenges, the Commission implemented several important reforms. First, to discourage speculative applications at multiple interconnection points, the Commission mandated the public availability of transmission capacity data for each point of interconnection. These "heatmaps" provide prospective interconnection customers with valuable information about congestion levels, helping them assess whether a specific point can accommodate their project and estimate the scope of network upgrades that may be necessary.[19]

Second, to ensure that only serious projects advance through the interconnection queue, the Commission now requires applicants to demonstrate both site control,[20] and financial

[17] Order No. 2023 at PP 46-48. *See, e.g.*, Fervo Energy Initial Comments, Improvements to Generator Interconnection Procedures and Agreements, 179 FERC ¶ 61,194, Docket No. RM22-14-000 at pp. 2-3 (2022) (stating that there are many applications in the queue "simply intended to solicit information discovery from the transmission provider"); Dominion Initial Comments, Improvements to Generator Interconnection Procedures and Agreements, 179 FERC ¶ 61,194, Docket No. RM22-14-000 at p. 4 (stating that "owners of speculative projects remain in the queue process for as long as they possibly can in the hopes that their project somehow becomes viable.").

[18] Order No. 2023 at PP 46-48. *See, e.g.*, Clean Energy Buyers Initial Comments at 3 (stating that inefficiencies in the serial study queue are "compounded by exploratory interconnection requests that are based on developers' attempts to obtain locations with available transmission capacity").

[19] Order No. 2023 at PP 121-24.

[20] *Id*. at PP 584-61.

capability to complete their projects.[21] This financial demonstration, referred to as "Commercial Readiness Deposit," includes a series of escalating financial deposits throughout the interconnection process. Applicants must begin by providing a Commercial Readiness Deposit which is defined as twice the amount of the initial study deposit, with subsequent deposits increasing to 10% of the estimated network upgrade costs identified in later studies.[22] A final deposit, amounting to 20% of the estimated network upgrade costs, is required upon executing the LGIA or when requesting to file the LGIA unexecuted [23]

Third, the Commission established a penalty structure for applicants who withdraw from the interconnection queue. These penalties are tied to the commercial readiness deposit amounts, starting at twice the cost of completed studies and increasing to 10% of the estimated network upgrade costs. Applicants who withdraw after executing the LGIA or requesting filing of an unexecuted LGIA filing face a withdrawal penalty of 20% of the network upgrade costs.[24] This structure is designed to discourage speculative or non-viable projects from clogging the queue while ensuring that projects with a high likelihood of completion advance to later stages.

As many of the signatories to these comments have previously conveyed to the Commission, reforms to the interconnection process are critical to reducing excessive wait times. For most energy projects, the measures in Order 2023 strike a reasonable balance by discouraging speculative applications while not overly deterring legitimate new energy generation. However, this balance fails for Tribal energy developers. As explained in the next section, Tribal energy developers' processes vary significantly from non-Tribal developers, and

[21] *Id*. at PP 690-708.

[22] *Id*. at P 692.

[23] *Id.* at P 714.

[24] *Id.* at 791.

as a result, Tribal energy developers do not submit speculative interconnection requests. Yet the financial readiness deposit requirements and withdrawal penalty structure impose substantial burdens on Tribal developers, who often face limited access to capital and fewer affordable financing options. These requirements significantly hinder Tribes' ability to engage in energy development and, when applied to Tribes, are unjust, unreasonable, and unduly discriminatory.

IV. Tribal Energy Projects are Well Founded and Not Speculative

While many projects in the interconnection queue are speculative, there is no evidence to suggest that any of these speculative projects have been proposed by Tribes or Tribal energy developers. On the contrary, given the unique challenges and constraints faced by Tribal energy development, it is highly improbable that any Tribal project would be speculative for several reasons.

First, Tribes have direct control over nearly all the land on which they plan to develop projects, in contrast to private developers who may submit applications for projects on land they have yet to secure. Additionally, Tribes typically have a limited number of points of interconnection within or near their lands, which significantly restricts their ability to "shop" the same project across multiple interconnection points. Indeed, after controlling for windiness, solar irradiance and the other variables, rural areas comprised of all reservation area land have 70 percent fewer kilometers of transmission lines and 43 percent fewer kilometers of high voltage lines when compared with non-reservation rural townships.[25]

Second, unlike private developers, who are incentivized to submit multiple interconnection applications to maximize project positions and shareholder returns, Tribal

[25] Parker *et al*., *Economic potential of wind and solar in American Indian communities*, Nature Energy at 5 (Aug. 2024).

governments operate under different priorities. For Tribes, each interconnection application represents a significant financial commitment, with the non-refundable $5,000 fee serving as a substantial investment rather than a speculative or exploratory step. This fee reflects a clear intent to move forward with a project, as Tribal governments must carefully manage their limited resources and prioritize funding for critical initiatives.

Third, before submitting an interconnection application and paying any associated fees, Tribes must secure formal approval from their governing bodies. This process typically includes comprehensive studies, assessments, and public meetings to ensure the project aligns with Tribal policies and financial constraints. The rigorous nature of this approval process—often involving multiple council deliberations and community consultations—requires substantial time and governmental resources, making speculative applications by Tribes highly improbable.

Moreover, Tribal governments face distinct financial challenges as sovereign entities. Unlike state and local governments, which can generate revenue through broad taxing authority and tax-free municipal bonds, Tribes have limited taxing power and face significant restrictions on bond financing. Despite having comparable responsibilities to states—such as providing education, healthcare, public safety, and infrastructure[26]—Tribal governments operate with far fewer financial resources.[27] Their ability to raise revenue is further constrained by competition with states for business development, jobs, and investment. Moreover, Tribes often face the issue

[26] *See* BIA, *The Importance of Tribal Infrastructure*, https://www.bia.gov/service/infrastructure/importance-tribal-infrastructure (Last accessed Nov. 14, 2024, at 9:02pm EDT); Jessica L Liddell et al., *Healthcare needs and Infrastructure Obstacles for a State-Recognized Indigenous Tribe in the United States*, Health Soc Care Community, Sep. 22, 2022, https://pmc.ncbi.nlm.nih.gov/articles/PMC11104768/. *See also,* Daniel Raimi et al., *Securing Energy Sovereignty: A Review of Key Barriers and Opportunities For Energy-Producing Native Nations in the United States*, Energy Research & Social Science, Vol. 107 (Jan. 2024), https://www.sciencedirect.com/science/article/pii/S2214629623003845.

[27] *See generally*, GAO, Report to Congressional Committees: Tribal Economic Development, GAO-22-105215 (Aug. 2022) https://www.gao.gov/assets/gao-22-105215.pdf.

of "double taxation," where non-Tribal buyers are subject to both state and Tribal taxes on purchases, which discourages investment and economic activity on Tribal lands.

Tribal governments face significant disadvantages in financing public projects because they seldom issue tax-exempt bonds. Under Section 7871 of the Internal Revenue Code, Tribal bonds are restricted to funding "essential government functions," such as schools and roads, and cannot be used for commercial or industrial ventures like energy generation.[28] As a result, Tribes are unable to access the tax-free bond market to finance energy development projects, putting them at a distinct disadvantage compared to their state counterparts.[29]

These limitations also extend to private financing, as lenders often avoid Tribal economic projects due to infrastructure gaps, unfamiliarity with Tribal legal systems, and difficulties in securing collateral. Much of Tribal land is held in trust by the federal government, restricting lenders' ability to claim an interest in land as collateral if a borrower defaults.[30] For example, Hopi Utilities faced challenges in acquiring a letter of credit for a 400 MW solar facility, delaying the project until philanthropic funds could secure the necessary collateral.[31] Given these constraints, Tribal interconnection applications are fundamentally non-speculative. The interplay of limited financial resources, stringent internal approval processes, and structural economic

[28] 26 U.S.C § 7871(b).

[29] *See* Serena Loftus et. al., *Native American Governments' Borrowing Costs: Evidence from Municipal Bond Markets*, Brookings (2022) *https://www.brookings.edu/wp-content/uploads/2022/06/Loftus-et-al_2022-7-10-LMZ.pdf*. *See also*, Matthew Gregg and John Morseau, *Tax Code Constraints Limit Tribal Tax-Exempt Bonding*, Fed. Res. Bank of Minneapolis, Apr. 25, 2024, https://www.minneapolisfed.org/article/2024/tax-code-constraints-limit-tribal-tax-exempt-bonding.

[30] GAO-22-105215 Tribal Economic Development at 6. *See also*, GAO, *Agricultural Lending: Information on Credit and Outreach to Socially Disadvantaged Farmers and Ranchers Is Limited*, GAO-19-539 (July 11, 2019); GAO, *Indian Issues: Agriculture Credit Needs and Barriers to Lending on Tribal Lands*, GAO-19-464 (May 9, 2019); and Miriam Jorgensen, *Access to Capital and Credit in Native Communities* (2016).

[31] *Hopi Utils. Corp.*, 185 FERC ¶ 61,149 at 7-9 (2023).

disadvantages ensures that Tribes focus solely on pursuing well-founded and viable energy projects.

V. Order No. 2023's Commercial Readiness Deposit Requirements Disproportionately Harm Tribes and Are a Poor Proxy for Likelihood of Tribal Project Completeness

To reduce speculative or non-viable interconnection requests and ultimately shorten queue times,[32] Order No. 2023 requires applicants in an interconnection queue to pay a deposit—either in cash or via an irrevocable letter of credit—before entering each stage of the transmission provider's interconnection studies, including the cluster study, cluster restudy, and facilities study. The initial deposit amount is based on the size of the generator: for facilities between 20 MW and 80 MW, applicants must pay $35,000 plus $1,000 per MW; for facilities between 80 MW and 200 MW, $150,000 is required; and for facilities over 200 MW, $250,000.[33] If applicants proceed to the cluster restudy, they must pay an additional five percent of the estimated network upgrade costs from the initial cluster study. Those entering the facilities study must pay ten percent of the updated network upgrade costs. Finally, before executing a LGIA, customers are required to provide a deposit equal to twenty percent of the network upgrade costs identified in the LGIA.

Order No. 2023 does not allow for any non-financial demonstrations of commercial readiness. This is a departure from the June 2022 Notice of Proposed Rulemaking on generator interconnection procedures ("Interconnection NOPR"), which proposed that applicants could satisfy commercial readiness requirements through non-financial means.[34] These alternatives included (1) an executed term sheet or memorandum of understanding related to a contract for

[32] Order No. 2023 at P 691.

[33] *Id*. at P 491.

[34] Improvements to Generator Interconnection Procedures and Agreements, 179 FERC ¶ 61,194 (2022) ("NOPR").

the sale of the facility or its energy, capacity, or ancillary services; or (2) "reasonable evidence" of project selection in a resource plan, selection in a utility or RTO/ISO solicitation process, development by a utility or RTO/ISO, or development for sale to a large end-use customer.[35]

The Commission decided not to incorporate these non-financial options in the final rule, citing concerns that these alternatives would not reliably indicate "viability on a national basis."[36] The Commission noted a "misalignment" between state procurement and interconnection processes, where some states require that a project be in an interconnection queue before it is eligible for solicitation.[37] Additionally, the Commission expressed concern that non-viable projects might still enter into power purchase agreements, potentially leading customers to either restart the procurement process or over-procure as a safeguard against terminated contracts.[38]

While the Commission's emphasis on financial demonstrations of readiness aims to enhance reliability and cost-effectiveness for customers, the majority does not acknowledge that some developers may encounter structural barriers to making substantial upfront deposits. Tribal developers are a clear example of such developers. In her concurrence to Order No. 2023, Commissioner Clements recognized that while the commercial readiness deposit framework could improve interconnection efficiency, it might also pose significant obstacles for projects developed by or serving Tribes, given their unique ownership and financing structures.[39] She

[35] NOPR at P 129. *Cf*, NOPR at P 130 (requiring an "[e]xecuted contract (as opposed to term sheet), binding upon the parties to the contract, for sale of (1) the constructed generating facility, (2) the generating facility's energy or capacity").

[36] Order No. 2023 at P 695.

[37] *Id*. at 696.

[38] *Id*. at 698.

[39] Order No. 2023, Clements Concurrence at 23.

recommended exploring alternative approaches for Tribal projects, but this inquiry was never undertaken.[40]

The Commission's reliance on solely financial methods of demonstrating readiness is not just an obstacle to Tribal participation, it is also an inaccurate metric of the viability of Tribal energy projects. As the ATCE petition explains, the issue is not that Tribal energy projects do not have funding lined up, but rather, that these funds cannot be used in the pre-construction phases. Although the Commission may have valid concerns about the "viability on a national basis" of certain non-financial commercial readiness metrics, the difference in Tribal financing structures also calls into question the universal viability of *only* allowing financial commercial readiness demonstrations.

ATCE, representing several Tribes, filed a petition for rulemaking to address this issue. ATCE's petition highlights that commercial readiness deposits are a poor metric for Tribal project readiness and impose an undue burden on Tribes, which typically face limited access to capital and fewer revenue-generating opportunities compared to private developers. Unlike private developers with more adaptable funding mechanisms, Tribal governments operate under strict financial constraints, making large deposits prohibitively expensive. As a result, the commercial readiness requirements in Order No. 2023 disproportionately disadvantage Tribal energy development, restricting Tribal participation in energy markets and needlessly hindering their ability to pursue energy projects that would otherwise be viable.

[40] *Id.*

VI. Tribes Should Be Allowed to Submit Non-Financial Demonstrations of Commercial Readiness Prior to Each Study Phase

PIOs support ATCE's proposal to allow Tribal energy developers to demonstrate commercial readiness through non-financial means prior to each study phase, as an alternative to large financial deposits. This proposal thoughtfully addresses the unique circumstances of Tribal development while upholding the primary objective of Order No. 2023's commercial readiness rule: reducing speculative interconnection requests. ATCE's approach recognizes the significant commitment required for Tribal government approval, as well as the extensive effort Tribal energy development staff invest in securing these approvals before applying for interconnection. The allocation of government funds and resources to a project serves as a clear and credible indicator of its seriousness, offering robust evidence of the project's viability.

Although Order No. 2023 allows transmission providers to submit revised LGIPs enabling developers to use non-financial commercial readiness demonstrations, there is no assurance that any provider will implement this option. Similarly, while Order No. 2023 permits waivers from LGIP requirements, including commercial readiness deposits, the waiver process is neither practical nor equitable for Tribes, as highlighted by ATCE.[41] FERC itself has acknowledged this limitation, stating that relying on waiver requests is an "inadequate and inefficient means to address interconnection issues."[42]

ATCE proposes that, in place of a financial deposit for the initial cluster study, Tribal developers be allowed to submit either (1) a resolution from the Tribal Council or governing body approving the development of a utility-scale generation project, or (2) evidence that the

[41] Petition at 24 ("[S]ecuring a waiver from FERC's rules further strain the finances of cash-strapped Tribes. FERC waivers generally require hiring specialized attorneys at a time when Tribal funds could and should be spent completing pre-development activities, not seeking waivers from FERC.").

[42] Order No. 2003 at P 10.

Tribal government or Tribal Energy Development Organization has allocated resources, such as funding and staff, to a specific utility-scale project. While ATCE does not specify exact resource thresholds, PIOs recommend that FERC adopt a reasonableness standard to assess whether the allocated resources are proportionate to the scope and scale of the proposed project.

For the second study phase, whether a cluster restudy or facilities study, ATCE suggests additional non-financial indicators to demonstrate Tribal commitment to a project. Instead of a financial deposit, Tribes could provide (1) evidence of a government grant or loan application or other federal or state funding request; (2) documentation of ongoing studies, such as cultural, environmental, or feasibility studies; or (3) records of Tribal community engagement meetings, workshops, or forums discussing the proposed project.

Non-financial activities like applying for state or federal funding or conducting feasibility studies serve as compelling evidence of a Tribe's intent to move forward, given the significant effort and resources these activities require. Similarly, community engagement meetings and public forums reflect serious commitment, as Tribes generally only initiate such dialogues for major projects they genuinely intend to pursue. Demonstrations of commercial readiness at the restudy phase should reflect sustained intent following the release of initial cluster study results. To ensure this, these activities should begin or be completed during the initial cluster study and continue through its conclusion.

For the third study, if a restudy is required, ATCE suggests that Tribes demonstrate continued intent by submitting one or more of the following: (1) evidence of an application to the Bureau of Indian Affairs (BIA) for necessary land, water, or air permits; (2) a completed project feasibility study or technical assessment; or (3) a letter of intent to purchase power, or a similar commitment from a potential offtaker. These indicators provide clear evidence of a Tribe's

ongoing commitment to advancing the project. PIOs agree that a completed BIA application demonstrates significant Tribal commitment to the project, given the time and resources required to evaluate potential impacts on air, water, land, and cultural resources. A letter of intent or power purchase agreement with an offtaker also reflects continued intent, as tribal government approval is necessary for such agreements. However, a feasibility or technical study alone may not indicate renewed commitment to the same extent. While it demonstrates that the project is viable, it does not by itself provide as strong an assurance of continued intent at this advanced stage.

Finally, PIOs encourage FERC to allow Tribes the flexibility to provide alternative forms of non-financial demonstrations, acknowledging that varying circumstances may necessitate different approaches. FERC should permit Tribes to submit other evidence that effectively demonstrates their ongoing commitment to the project, provided it appropriately reflects the Tribe's sustained dedication and progress.

VII. Order No. 2023's Withdrawal Penalty Regime Disproportionately Harms Tribes

Order No. 2023 establishes a penalty structure for interconnection applicants who withdraw from the queue after the study process has commenced. Similar to the commercial readiness deposit requirements, these penalties are designed to deter speculative applications by imposing escalating financial costs as projects advance through the study phases. Under this framework, applicants withdrawing after the start of the cluster study must pay a penalty equal to twice the initial study deposit. Penalties increase for withdrawals during later phases, rising to five percent of estimated network upgrade costs after the restudy phase and ten percent after the facilities study phase. For large-scale projects, these penalties can reach hundreds of thousands or even millions of dollars

While this penalty structure may deter speculative withdrawals among typical applicants, it places an undue burden on Tribal projects, which are overwhelmingly well-founded and non-speculative. For Tribes, queue withdrawals are rarely speculative; instead, they are almost always driven by unforeseen challenges beyond their control, such as financing difficulties, unexpected regulatory obstacles, or the need to reallocate limited resources to address urgent community priorities. These external constraints make Tribal projects fundamentally different from private development initiatives, which often have the capital and flexibility to absorb penalty costs as part of calculated investment strategies.

The financial impact of withdrawal penalties on Tribal governments is particularly severe and distinct. Unlike private developers, who typically distribute financial risk among investors and stakeholders participating in high-risk, high-reward ventures, Tribal governments must absorb these penalties directly. Funds used to pay penalties are diverted from essential community services, infrastructure development, and economic growth initiatives. For Tribal governments, every dollar allocated to energy development must be carefully balanced against other critical priorities, such as healthcare, education, and infrastructure improvements for their communities. These penalties drain resources from vital services, undermining the well-being of Tribal members who depend on their government to provide for both immediate needs and long-term economic stability.

Withdrawal penalties can also have a chilling effect on Tribal participation in energy development, dissuading Tribes from pursuing projects that could otherwise benefit their communities and diversify their economies. The potential for significant penalties may deter Tribal governments from engaging in the interconnection process altogether, particularly when they must weigh the risk of financial loss against the need to allocate scarce resources carefully.

For Tribes already operating within a complex web of economic and legal constraints, the imposition of punitive withdrawal fees adds yet another hurdle to an already challenging process, further limiting their ability to advance critical energy initiatives.

Penalizing Tribal governments for circumstances largely beyond their control undermines FERC's trust responsibility to Tribes, which obligates the Commission to account for the unique position and needs of Tribal governments within the regulatory framework. FERC's mission to ensure fair and reasonable access to energy markets should not create inequitable barriers that disproportionately burden Tribes or restrict their sovereign authority to make energy-related decisions. Imposing withdrawal penalties without considering the structural disadvantages Tribes face risks stifling the economic development and energy sovereignty that FERC should be fostering and that Congress sought to promote through the Inflation Reduction Act.

The penalty framework under Order No. 2023 is not only financially onerous but also risks discouraging Tribes from participating in the energy market entirely. Tribal projects offer distinct public interest benefits, advancing clean energy goals while enabling Tribal governments to manage and benefit from their energy resources. Considering the minimal risk of speculative applications from Tribal developers and the significant challenges they face, adopting a more tailored approach—such as waivers or reduced penalty thresholds for Tribal projects—would better reflect FERC's trust obligations. Such measures would ensure that Tribes can equitably engage in energy development, fostering their economic and energy sovereignty.

VIII. FERC's Trust Responsibility to Tribes and the Need to Support Tribal Energy Development Require a Rulemaking in this Case

As outlined above, FERC has a trust responsibility to evaluate the effects of its actions on Tribes.[43] This obligation requires FERC to carefully review Order No. 2023 to ensure that, while addressing the needs of the broader stakeholder community, it does not unintentionally inflict undue harm on Tribes—communities FERC has a specific duty to safeguard.

FERC's trust responsibility is particularly vital given the growing interest and capacity of Tribes to develop utility-scale energy projects. The U.S. Department of Energy's Office of Indian Energy, in its 2023 Tribal Electricity Access and Reliability Report, recognized the increasing number of Tribally owned or affiliated utility-scale energy projects, totaling over 2,250 MW in combined nameplate capacity at that time.[44] While comprehensive data on all Tribal projects in interconnection queues is still emerging, the introduction of new funding and tax incentives has likely spurred additional project development in the past year.

With this growing momentum, Tribes have a unique opportunity to play a central role in their energy decision-making, driving economic development and advancing energy sovereignty. However, a failure to revise the punitive financial requirements and penalties under Order No. 2023 would risk stalling these promising projects and jeopardizing their success. This outcome would not only burden Tribes further but could also lead to unspent funds specifically allocated by Congress to support Tribal energy development. To align with Congress's intent in passing the IRA and IIJA, FERC should implement rulemaking that facilitates, rather than obstructs, Tribal energy advancement.

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[43] Order No. 635 at P 13.

[44] *See* Dept. of Energy, Office of Indian Energy, Report to Congress: Tribal Electricity Access and Reliability (Aug. 2023), https://www.energy.gov/indianenergy/articles/tribal-electricity-access-and-reliability-report-congress-august-2023.

IX. Conclusion

For the reasons discussed, PIOs strongly support the Alliance for Tribal Clean Energy's (ATCE) petition for rulemaking. FERC's trust responsibility to Tribes necessitates a thoughtful approach to addressing the unique challenges Tribal energy developers face under the current Order No. 2023 framework. Exempting Tribal energy projects from burdensome commercial readiness deposit requirements and withdrawal penalties would ensure equitable access to the interconnection process and facilitate greater Tribal participation in clean energy development. Such rulemaking would reaffirm FERC's commitment to fair, just, and reasonable regulation, advance energy sovereignty for Tribal nations, and align with Congress's vision to empower Tribal communities through the Infrastructure Investment and Jobs Act and Inflation Reduction Act. We respectfully urge FERC to act promptly on ATCE's petition and create a regulatory framework that supports, rather than hinders, Tribal energy progress.

Respectfully submitted this 18th day of November 2024

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