FERC REVISES FEDERAL ELECTRIC TRANSMISSION REGULATIONS TO ENCOURAGE U.S. GRID DEVELOPMENT AND INVESTMENT – BUT, WILL ORDER NO. 1000 DELIVER?

Executive Summary and Analysis

On July 21, 2011, the Federal Energy Regulatory Commission (FERC) issued Order No. 1000, a long anticipated final rule addressing electric transmission planning and cost allocation.1 As explained by FERC, the rule is intended to address “inadequacies” in existing transmission policy that discourage transmission investment by requiring reforms in three key areas:

• **planning**: creating regional and interregional processes;

• **cost allocation**: establishing allocation principles; and

• **investment**: eliminating obstacles for nonincumbent transmission providers.2

The requirements of the rule apply to transmission facilities that are evaluated in planning processes that occur after the effective date of public


2 As explained by FERC:

...”nonincumbent transmission developer” refers to two categories of transmission developer: (1) a transmission developer that does not have a retail distribution service territory or footprint; and (2) a public utility transmission provider that proposes a transmission project outside of its existing retail distribution service territory or footprint, where it is not the incumbent for purposes of that project. By contrast, ... an “incumbent transmission developer/provider” is an entity that develops a transmission project within its own retail distribution service territory or footprint.

*Id.* at P 225.
utility transmission providers’ compliance filings adopting the transmission planning and cost allocation reforms.

According to FERC Chairman Jon Wellinghoff, the rule “will facilitate identification of transmission needs driven by a region’s public policy requirements and consideration of efficient and cost-effective transmission solutions to meet those needs.” Commissioner Cheryl A. LeFleur observed that “it is imperative that we invest in the right transmission for customers. Allowing both incumbents and nonincumbents the ability to propose transmission projects will help make that happen.” Commissioners Spitzer and Norris likewise supported the order. Commissioner Moeller supported most of the order, but issued a dissent in part.

Order No. 1000 becomes effective on October 10, 2011, 60 days after it was published in the Federal Register. Compliance with most of the rule is not required until 12 months from the effective date; compliance with the interregional procedures is not due until 18 months after the effective date. As a result, the benefits of the changes made in Order No. 1000 will not be realized until sometime in the fourth quarter of 2012, at the earliest.

Because of the long lead time to implement the rule, the potential for modification or remand or reversal on appeal, and an uncertain and potentially contentious compliance process, it may take several years for the impact of Order No. 1000 to be fully evaluated. In the meantime, however, it signals the importance FERC places on encouraging transmission investment, particularly investment that can help bring energy from renewable resources to the nation’s electric consumers. The rule complements past efforts by the Commission to encourage investment in electric transmission through, for example, rate incentives for qualifying projects.

The scope, complexity and potential cost impacts of the rule will provoke requests for clarification or rehearing that will result in one or more

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5 This partial dissent is addressed in more detail below.
6 The rule was published in the Federal Register on August 11, 2011. 76 Fed. Reg. 49,842 (Aug. 11, 2011). The effective date will thus be October 10, 2011.
7 See Promoting Transmission Investment Through Pricing Reform, Notice of Inquiry, 135 FERC ¶ 61,146 (2011) (seeking comments on FERC’s policy on transmission incentives under Order No. 679).
additional orders refining the rule. Petitions for court review may follow FERC action on any rehearing requests. Unless otherwise stayed by the Commission or court, the rule will remain effective pending rehearing and appeal.

While it is a beneficial step toward encouraging rational electric transmission investment, Order No. 1000 does not address a key issue that can still slow or stop interstate transmission projects: the lack of meaningful, centralized federal siting authority for such projects. Thus, even as it approves planning and cost allocation changes designed to encourage regional and interregional transmission projects, FERC recognizes that “nothing in this [rule] involves an exercise of siting, permitting, and construction authority,” or “specific substantive matters traditionally reserved to the states…” For investors or potential investors in transmission projects, the uncertainty that can result from these federal, state, or local siting issues can be considerable and should be evaluated in considering new investment opportunities that may arise from Order No. 1000.

**Detailed Summary and Analysis**

Order No. 1000 builds on FERC’s efforts in Order Nos. 888 and 890 to create a more competitive and robust electric transmission system. Order No. 888, issued in 1996, required all FERC-jurisdictional public utilities operating transmission facilities to adopt open access transmission tariffs (OATTs). Order No. 890, issued in 2007, focused on the need to improve the planning process and required adoption of planning principles applicable to all public utility transmission providers, including Commission-approved regional transmission organizations (RTOs) and independent system operators

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8 Although FERC has “backstop” siting authority in specified circumstances, FERC’s effort to employ that authority has been judicially constrained. See Piedmont Envtl. Council v. FERC, 558 F.3d 304 (4th Cir. 2009).
9 Order No. 1000 at P 108.
(ISOs). Non-public utilities with transmission assets were encouraged to implement equivalent tariffs to obtain reciprocal access to the systems of public utilities.

Echoing DOE’s observation that “[s]ignificant expansion of the transmission grid will be required under any future electric industry scenario” and based on a finding that additional planning and cost allocation reforms are needed to ensure that “the transmission grid can better support wholesale power markets and thereby ensure that Commission-jurisdictional services are provided at rates, terms and conditions that are just and reasonable and not unduly discriminatory or preferential,” FERC concludes that it has the authority under section 206 of the Federal Power Act (FPA) to adopt the Order No. 1000 planning reforms.

Planning Reforms

The rule establishes three basic requirements for transmission planning:

- **Regional Transmission Planning:** each public utility transmission provider *must* participate in a regional transmission planning process that produces a regional transmission plan.

- **Interregional Transmission Planning:** neighboring transmission planning regions *must* coordinate to determine if there are more efficient or cost-effective solutions to their mutual transmission needs.

- **Public Policy Requirements:** local and regional transmission planning processes *must* consider transmission needs driven by Public Policy Requirements and evaluate proposed solutions to those transmission needs.

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12 Order No. 1000 at P 29, quoting Department of Energy, 20% Wind Energy by 2030, at 93 (July 2008).

13 Id. at P 99.
For most utilities that currently own transmission that is part of an RTO or ISO, there are already regional and in many cases interregional planning and cost allocation methods that will serve as a starting point for the FERC-mandated changes. RTOs and ISOs also have well developed stakeholder processes that can be used for developing compliance filings. For utilities outside of RTOs and ISOs, while there may already be some level of regional planning, the stakeholder and cost allocation processes may be less developed, thus requiring additional effort to implement FERC’s required regional and interregional changes.

The requirement to include Public Policy Requirements in the planning process will further complicate the process of meeting FERC’s compliance schedule. “Public Policy Requirements” are defined as policies established by “enacted statutes (i.e., passed by the legislature and signed by the executive) and regulations promulgated by a relevant jurisdiction, whether within a state or at the federal level.”14 Most renewable portfolio standards (RPS) would thus qualify for inclusion as Public Policy Requirements that would need to be factored into regional and interregional plans. Although over 30 states now have some form of RPS, RPSs vary considerably by state, with differences in the level of renewables required, the target date(s), and the consequences if a RPS is not met. Determining how to include these requirements in regional and interregional transmission plans may lead to new disputes that will ultimately require FERC action to resolve.

**Cost Allocation Reforms**

A “central underpinning” of Order No. 1000 is an effort to more closely align transmission planning and cost allocation. Thus, each public utility transmission provider must participate in a regional transmission planning process that has a regional cost allocation method for new transmission facilities. Similarly, public utility transmission providers in neighboring transmission planning regions must have a common interregional cost allocation method for new interregional transmission facilities that the regions determine to be efficient or cost-effective. Both regional and interregional plans must satisfy six cost allocation principles.

The six cost allocation principles, which apply with some minor differences to both regional and interregional cost allocation methodologies, are:

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14 *Id.* at P 3.
1) costs must be allocated in a way that is roughly commensurate with benefits;

2) no involuntary allocation of costs to non-beneficiaries;

3) if adopted, a benefit to cost threshold ratio may not exceed 1.25, unless a higher threshold is justified by the region or pair of regions, and the Commission approves the higher ratio;

4) allocation to transmission planning region(s) in which the project is located, unless those outside voluntarily assume costs;

5) transparent method of determining benefits and identifying beneficiaries; and

6) different cost allocation methods may be used for different types of facilities.\textsuperscript{15}

The cost allocation principles apply to new regional or interregional transmission facilities included for purposes of cost allocation in a regional plan or interregional transmission coordination procedures. The Commission explains that the principles do not apply to other transmission facilities and thus do not foreclose the opportunity for participant funding of projects where the cost allocation principles do not apply.\textsuperscript{16}

The rule permits different regions to develop different allocation methods, as long as the methods are consistent with the cost allocation principles. Within a region allocations may differ by the type of transmission project as long as the selected method applies to all transmission facilities of the same type within a region.\textsuperscript{17}

As part of their compliance filings, all RTOs, ISOs, and individual public utilities in non-RTO/ISO regions must include in their OATTs the cost allocation method or methods that will be used in their respective transmission planning regions.\textsuperscript{18}

\textsuperscript{15} The complete set of cost allocation principles is detailed at P 586 of the rule for regional projects and at P 587 of the rule for interregional projects.

\textsuperscript{16} \textit{Id.} at P 603; \textit{also see} PP 723-29 (explaining why participant funding may not create positive incentives for new transmission, but should nonetheless not be foreclosed).

\textsuperscript{17} \textit{Id.} at P 560.

\textsuperscript{18} \textit{Id.} at P 558.
For a project in multiple regions, the project must be selected in both of the neighboring regional transmission plans for cost allocation in order to be eligible for interregional cost allocation. The Commission explains that this is intended “to allow for adequate stakeholder review of the interregional transmission facility before the relevant portion of the facility is in a regional transmission plan.”\(^{19}\)

**Investment Reforms**

Finding that nonincumbent transmission developers seeking to invest in transmission can be discouraged from doing so as a result of federal rights of first refusal (ROFRs) in tariffs and agreements subject to the Commission’s jurisdiction,\(^{20}\) Order No. 1000 requires public utility transmission providers to remove from Commission-approved tariffs and agreements a federal ROFR for transmission facilities selected in a regional transmission plan for purposes of cost allocation. There are, however, three exceptions where the incumbent utility retains its ROFR: (1) local projects where the incumbent does not seek to share the costs of the projects; (2) upgrades to existing assets; and (3) projects on existing rights of way.\(^{21}\)

Public utility transmission providers in a transmission planning region are allowed (but not required by this rule) to use competitive bidding to solicit transmission projects or project developers.

The rule recognizes that incumbent transmission providers may rely on regional transmission facilities to satisfy their reliability needs or service obligations. The rule requires each public utility transmission provider to amend its tariff to require reevaluation of the regional transmission plan to determine if delays in the development of a transmission facility may require mitigation or alternative solutions, including those proposed by the incumbent, to ensure incumbent transmission providers can meet reliability needs or service obligations.

Given that the projects that fall within the exceptions to the no-ROFR rule could be a significant proportion of the projects in some regions, and without a time limit for exercising the ROFR as suggested by Commissioner Moeller, the actual impact of the no-ROFR rule may not lead to a host of new

\(^{19}\) Id. at P 582.
\(^{20}\) Id. at P 3.
\(^{21}\) Id. at PP 318-19.
investment opportunities, but instead may focus such investment on large-scale projects or those associated with new generation that may also carry greater risk.

**Compliance Filings**

Seeking to strike a balance between “implementing needed reforms . . . in a timely fashion and providing time for those involved in these processes to work with stakeholders,” FERC requires each jurisdictional public utility transmission provider to make a compliance filing with the Commission within 12 months of the effective date of the rule. This compliance filing is to include a revised Attachment K to the utilities OATT that complies with the *regional* planning and cost allocation aspects of the rule.23

Compliance filings to amend Attachment K to address *interregional* transmission coordination and *interregional* cost allocation are required within 18 months of the effective date.24

The rule does not include an explicit compliance requirement for non-public utility transmission providers, but notes an expectation that non-public transmission providers will participate voluntarily.25 The rule declined to use section 211A of the FPA to mandate non-public utility participation, relying instead on the existing reciprocity conditions embodied in Order Nos. 888 and 890.26 A non-public utility may submit a transmission tariff and a request for declaratory order that its voluntary transmission tariff meets the reciprocity requirements of Order Nos. 888, 890 and 1000 at any time.27

The compliance process will be contentious in many regions, with protests likely to many of the compliance filings. This will require additional FERC rulings on issues arising in the compliance filings and protests. Thus, for example, FERC has indicated that if parties in a region can not agree to cost allocation, it will use the record in the compliance filing proceeding to develop a cost allocation that meets the Order No. 1000 requirements.28

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22 *Id.* at P 794.
23 *See id.* at Appendix C.
24 *Id.*
25 *Id.* at P 822.
26 *Id.* at PP 815-821.
27 *See id.* Regulatory Text at 18 C.F.R. § 35.28(e)(1).
28 *Id.* at P 482.
Commissioner Moeller’s Partial Dissent

While largely supporting the rule, Commissioner Philip D. Moeller would have: (a) provided greater flexibility for transmission owners to build reliability projects in their service territories by expanding the list of ROFR exceptions to include such projects regardless of whether they were part of a regional plan; and (b) required that the time in which a ROFR could be exercised be limited to 90 days, or similar period adopted as part of a regional process.

This summary and analysis is provided for informative purposes only and is not intended as legal advice.

For additional information about Order No. 1000, or other aspects of FERC regulation, please contact Paul B. Mohler at 571.344.5097 or pmohler@paulmohlerlaw.com.

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