

Client Alert.

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FERC Order No. 1000, Final Rule on Transmission Planning and Cost Allocation: Major Changes Ahead

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On July 21, 2011, the Federal Energy Regulatory Commission (“FERC”) unanimously adopted Order No. 1000, its Final Rule on transmission planning and cost planning. Order No. 1000 seeks to reform the transmission planning process to (1) require a regional transmission planning process; (2) include procedures for the consideration of public policy requirements (e.g., renewable portfolio standards and other state clean energy requirements); (3) modify the right of first refusal for certain new transmission facilities; and (4) provide for additional coordination for planning and cost allocation both within and among regions. A copy of Order No. 1000 is found at <http://www.ferc.gov/whats-new/comm-meet/2011/072111/E-6.pdf>.

FERC Order No. 1000 is a major development but also very complex. The most critical details will arise out of the compliance process, tariff changes, and challenges to those changes. This client alert summarizes important preliminary impressions and questions concerning the potential impact of Order No. 1000, particularly with respect to enhanced support for renewable project development and other state clean energy policies, and opportunities for non-incumbent transmission developers to construct transmission facilities.

BACKGROUND

On June 17, 2010, FERC issued a Notice of Proposed Rulemaking (“NOPR”) seeking comment on potential changes to its transmission planning and cost allocation requirements.

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On July 21, 2011, by a unanimous vote (with one partial dissent), FERC approved significant changes in the transmission planning and cost allocation process, focusing primarily on regional transmission planning entities and a “bottom up” process.

At the open meeting adopting the Order, Chairman Jon Wellinghoff stated that actions in Order No. 1000 are necessary because (1) the nation’s generation mix has shifted to greater use of renewable resources due to state-mandated public policy directives and (2) there is now a well-developed sector of transmission developers/owners that are independent from the incumbent public utility transmission owners. It has been, therefore, increasingly necessary for FERC to address transmission planning and cost allocation issues, and promote more transmission development in a manner that deals with these two facts.

Commissioner Cheryl LaFleur followed in kind, noting that there has been a historic under-investment in transmission, and that new transmission is needed to: (1) strengthen reliability; (2) make wholesale markets work better; and (3) connect new resources mandated by public policy requirements such as state Renewable Portfolio Standards.

SUMMARY OF COMPLIANCE REQUIREMENTS

Order No. 1000 requires each public utility transmission provider to make compliance filings with the Commission. The

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providers must submit a revised Attachment K of their pro forma Open Access Transmission Tariff (OATT) and any other Commission jurisdictional documents within 12 months for regional planning processes and cost allocation and within 18 months for interregional planning processes and cost allocation methodologies. These filings must include:

- local and regional transmission planning processes that are consistent with the requirements of the Final Rule, which includes:
 - participating in a regional transmission planning process that satisfies the planning principles of Order No. 890 and produces a regional transmission plan;
 - considering in the local and regional transmission process transmission needs driven by public policy requirements (e.g., renewable portfolio standards) and evaluating proposed solutions to those transmission needs;
 - coordinating with each neighboring transmission planning region to determine if there are more efficient or cost-effective solutions to mutual transmission needs;
- a regional cost allocation method consistent with the principles established in the Final Rule, which includes:
 - participating in a regional transmission planning process that has a regional cost allocation method for new transmission facilities selected that complies with six specified regional cost allocation principles¹:
 - costs allocated roughly commensurate with benefits
 - no involuntary allocation of costs to non-beneficiaries
 - benefit-to-cost threshold ratio
 - allocation to be solely within transmission planning region(s) unless those outside voluntarily assume costs
 - transparent method for determining benefits and identifying beneficiaries
 - different cost allocation methods may be used for different types of transmission facilities;
 - establishing a common interregional cost allocation method with each neighboring public utility transmission provider that complies with six similar interregional cost allocation principles;
 - not allowing participant-funding of transmission facilities as the regional or interregional cost allocation method (but permitting participant-funding of new transmission facilities).

Removal of Right of First Refusal

The Final Rule further requires public transmission providers to remove from Commission-approved tariffs and agreements a federal right of first refusal for a transmission facility selected in a regional transmission plan for purposes of cost allocation, subject to four limitations:

- It does not apply to a transmission facility that is not selected in a regional transmission plan for purposes of cost allocation.

¹ Some regional transmission entities, such as the California Independent System Operator (“CAISO”), already have cost allocation methods in place (e.g., the CAISO’s Transmission Access Charge), though these entities may need to make additional modifications to comply with Order No. 1000.

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- It does not apply to upgrades to transmission facilities, such as tower change outs or reconductoring.
- It allows, but does not require, public utility transmission providers in a transmission planning region to use competitive bidding to solicit transmission projects or project developers.
- Nothing in this requirement affects state or local laws or regulations regarding the construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities.

The ultimate scope of the limitations regarding the removal of the right of first refusal from Commission-approved tariffs is one of the most significant questions that faces non-incumbent transmission developers. The scope of transmission projects that are not covered by a remaining first refusal may be relatively small, such as certain regional reliability projects and large generator interconnection projects. During the July 21, 2011, FERC meeting adopting Order No. 1000, Commissioner Philip Moeller asked staff whether it would be fair to say that, given the limitations regarding the removal of the right of first refusal, “an overwhelming majority of transmission projects in any regional plan will continue to retain their existing right of first refusal” notwithstanding Order No. 1000. The staff answered that it is possible in any given region, but that it will depend on how each region implements the requirements of the Final Rule.

The Effects of the Removal of Right of First Refusal

It will be crucial to follow closely how public transmission providers and regional transmission planning entities implement the Final Rule, as there are a number of avenues through which regional transmission planning entities and incumbent transmission providers seek to minimize change and protect incumbent providers from competition. For example, a regional transmission planning entity may exclude an independent transmission project from its regional transmission plan, or claim that a project constitutes an upgrade for which the incumbent has the right of first refusal.

Other risks that Order No. 1000 will not have its intended effect with respect to the right of first refusal include:

- As Commissioner Moeller noted in his dissent, a right of first refusal may be a right of “forever” refusal that would preclude the lowest-cost power/project from being built; and
- Non-incumbent transmission developers may still receive disparate treatment with respect to right of first refusal based on how a transmission project is treated by the regional transmission planning entity.

Competition in transmission development, construction, and ownership remains possible, and is strengthened by Order No. 1000. However, the extent to which non-incumbent transmission developers will be provided new opportunities will depend on how regional transmission entities address the right of first refusal provisions of Order No. 1000. It will take time and effort to work out the details of the change in right of first refusal before the regional transmission entities and before FERC.

Consideration of State Renewable and Other Clean Energy Policies and Laws

Another key area of focus in Order No. 1000 that raises additional questions is how public policy determinations, such as state clean energy laws and particularly renewable portfolio standards, will be incorporated into regional transmission planning and how FERC will oversee the incorporation of such public policy determinations. Order No. 1000 promises to significantly strengthen development of renewables—as well as demand-side resources—but here again, the actual compliance filings and implementation activities will be key.

Order No. 1000 requires that “generation, demand resources, and transmission be treated comparably in the regional transmission planning process.” (Order No. 1000 at ¶ 779.) While this directive is consistent with FERC’s Order No. 890,

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Order No. 1000 specifically highlights the role that demand resources are to play in the regional transmission planning process, to ensure reliability for transmission and in keeping rates just and reasonable. FERC's inclusion of this provision also supports the many states, including California, that increasingly focus upon energy efficiency, demand response, and smart grid. However, Order No. 1000 also concludes that the issue of cost recovery for non-transmission alternatives (such as demand response) is beyond the scope of the transmission cost allocation reforms adopted in Order No. 1000, which are limited to allocating the costs of new transmission facilities.

Order No. 1000 represents a clear departure from past FERC precedent with respect to public policy considerations. Under Order No. 890, there was no affirmative obligation that public utility transmission providers consider the effect that state and federal laws and regulations (Public Policy Requirements) have on local and regional transmission needs in the transmission planning process. Order No. 1000 breaks significant new ground by requiring the public utility transmission owners to amend their OATTs to include procedures that provide for the consideration of transmission needs driven by Public Policy Requirements in the local and regional transmission planning processes. Order No. 1000 does not mandate what process must be used to do so, but requires very specifically that the transmission providers consider such requirements and establish a process open to all stakeholders to ensure the requirements of Order No. 1000 are addressed. This process has already begun under the interconnection-wide transmission expansion planning processes funded by federal stimulus monies, but Order No. 1000 will now mandate the process and consideration of these state policies and thus, will have far-ranging impacts going forward. Order No. 1000 specifies that proposals to address these public policy requirements need justification to be included in regional transmission planning, and here again, the impact of these critical provisions for renewable and other clean energy developers will depend upon the processes adopted and how they are then implemented, as well as likely challenges at FERC.

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