

Client Alert

Global Transactions Practice Group

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FERC Amends its Transmission Planning and Cost Allocation Requirements in Order No. 1000

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On July 21, 2011, the Federal Energy Regulatory Commission (FERC) issued Order No. 1000,ⁱ amending the transmission planning and cost allocation requirements established in Order No. 890ⁱⁱ to ensure just and reasonable, and non-discriminatory transmission rates and access. Order No. 1000 finds that although transmission planning processes have seen “substantial improvements, particularly at the regional level, in the relatively short time since the issuance of Order No. 890,” existing regulations “provide an inadequate foundation for public utility transmission providers to address the challenges they are currently facing or will face in the near future.”ⁱⁱⁱ In particular, FERC explains that regulations ensuring efficient and cost-effective investment decisions are necessary at this time because changes in generation mix are driving the demand for additional investment in transmission.

Order No. 1000 mandates a number of reforms, including the establishment of a regional transmission planning process, interregional transmission coordination requirements, elimination of the federal right of first refusal, and the issuance of cost allocation guidelines, each of which is intended to address a current deficiency in FERC’s existing requirements.

Transmission Planning

Order No. 1000 makes several changes to FERC’s existing transmission planning requirements. First, Order No. 1000 updates Attachment K to the *pro forma* Open Access Transmission Tariff (OATT) to require that each public utility transmission provider, in consultation with stakeholders, participate in a regional transmission planning process to evaluate alternative transmission solutions, including non-transmission alternatives. At the end of this process, transmission providers must produce a regional transmission plan with solutions that meet the region’s need more efficiently and cost-effectively than in the past. In order to ensure that stakeholders have an adequate opportunity to participate in the process, FERC extends Order No. 890’s transmission planning principles of (i) coordination, (ii) openness, (iii) transparency, (iv) information exchange, (v) comparability, (vi) dispute resolution, and (vii) economic planning to the regional transmission planning process. In addition, Order No. 1000 updates Attachment K to specify further requirements that a public utility’s proposed regional transmission process must meet, including that any process must include a cost-allocation method consistent with Order No. 1000.

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Merchant transmission developers are not required to participate in a regional transmission planning process for purposes of identifying the beneficiaries of their transmission projects under Order No. 1000 because they assume all financial risk for developing their projects. Merchant transmission developers are required to provide sufficient information for public utility transmission providers in each relevant region to assess the reliability and operational impacts of any merchant transmission projects. FERC is permitting public utility transmission providers to propose what information will be required from merchant transmission developers in their Order No. 1000 compliance filings.

Second, Order No. 1000 requires that public utility transmission providers amend their OATTs to include procedures for the identification of transmission needs driven by public policy requirements established under state or federal law, and the evaluation of solutions to meet those needs. Although FERC mandates that public utility transmission providers evaluate public policy requirements, Order No. 1000 does not establish an obligation for the transmission provider to satisfy each public policy requirement under its OATT.

Third, Order No. 1000 requires that neighboring regions develop and implement procedures for the joint evaluation and sharing of information to facilitate interregional planning. Order No. 1000 does not impose a requirement to produce an interregional transmission plan, or require that transmission providers engage in interconnection-wide planning. Order No. 1000 revises Attachment K of the *pro forma* OATT to include language on interregional transmission coordination.

Elimination of the Right of First Refusal

Out of concern that incumbent transmission providers can use the right of first refusal to discourage new transmission development, Order No. 1000 requires the removal of provisions that grant a federal right of first refusal to construct transmission facilities selected in a regional transmission plan for purposes of cost-allocation from FERC-jurisdictional tariffs and agreements. The right of first refusal does not have to be eliminated as to a transmission facility that is not selected in a regional transmission plan, or as to upgrades of an incumbent transmission provider on its own transmission facilities.

To implement the elimination of right of first refusal provisions, FERC adopts a new framework for evaluating transmission proposals. Under Order No. 1000 transmission providers are required to revise their OATTs to (i) demonstrate that the regional planning process has appropriate, non-discriminatory qualification criteria; (ii) identify the information that must be submitted by prospective transmission developers, and the date by which such information must be submitted; and (iii) include a description of a transparent and non-discriminatory evaluation process for the selection of proposed transmission facilities for purposes of cost allocation.

Order No. 1000 also stipulates that a non-incumbent transmission developer has the same eligibility as an incumbent transmission developer to use a regional cost allocation method for any transmission facilities selected in the regional transmission plan.

Cost Allocation

Addressing cost-allocation, FERC requires that each public utility transmission provider in a region have in place a common method for allocating the costs of new transmission facilities selected in a regional transmission plan for purposes of cost allocation. Similarly, two neighboring transmission planning regions must have a common interregional cost allocation method for new interregional transmission facilities. A particular region may have different regional and interregional cost allocation methods.

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Although FERC is allowing each region to develop its own cost allocation method, it specifies six regional cost allocation principles that must be met:

1. Costs must be allocated in a way that is roughly commensurate with benefits,
2. No involuntary allocation of costs to non-beneficiaries is permitted,
3. Any “benefit to cost threshold ratio” used cannot be so high that transmission facilities with significant positive net benefits are excluded from cost allocation,
4. Allocations must be solely within transmission planning region(s) unless those outside voluntarily assume costs,
5. There must be a transparent method for determining benefit and identifying beneficiaries, and
6. There may be different methods for different types of facilities, and transmission planning regions are to determine whether, and how, to distinguish between types of transmission facilities for cost allocation purposes.

In the event a region cannot agree on a cost allocation method, FERC will make a determination based on the record in the relevant compliance proceedings.

Although FERC requires the consideration of non-transmission alternatives in the regional transmission plan, cost allocation for non-transmission alternatives is beyond the scope of Order No. 1000.

Reciprocity Tariffs

Order No. 888^{iv} permits non-public utility transmission providers to provide transmission service under “safe harbor” or “reciprocity” tariffs on file with FERC. Although FERC is not requiring that every entity with a safe harbor tariff file to modify its tariff in accordance with Order No. 1000, a non-public utility transmission provider must revise its tariff in order to maintain safe-harbor status.

Implementation

Order No. 1000 becomes effective sixty days after publication of the order in the *Federal Register*, and applies only to new transmission facilities. New transmission facilities are those subject to evaluation or reevaluation within a local or regional transmission planning process after the effective date of the relevant public utility transmission provider’s filing adopting the relevant requirements of Order No. 1000.

In order to implement its changes, FERC revises Attachment K to the *pro forma* OATT, and specifies a number of additional revisions to the tariffs and agreements of transmission providers. Changes to the OATT and other relevant FERC-jurisdictional documents regarding the regional planning process, and a regional cost allocation method must be made within 12 months of the effective date of Order No. 1000. Changes to the OATT and other relevant FERC-jurisdictional documents regarding interregional coordination procedures, and an interregional cost allocation method must be made within 18 months of the effective date of Order No. 1000.

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Public utility transmission owners that are part of FERC-jurisdictional Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs) may demonstrate compliance with Order No. 1000 through the relevant RTO's/ISO's compliance filing and are not required to make separate compliance filings.

Order No. 1000 is available [here](#).

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This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice.

ⁱ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 136 FERC ¶ 61,051 (2011) (Order No. 1000).

ⁱⁱ *Preventing Undue Discrimination and Preference in Transmission Serv.*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 (2007), *on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *reh'g denied*, Order No. 890-C, 126 FERC ¶ 61,228 (2009).

ⁱⁱⁱ Order No. 1000 at PP 42-43.

^{iv} *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part and remanded in part, sub nom. Transmission Access Policy Study Group, et al., v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).