LEGAL UPDATES

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Another Major Step in the Restructuring of the Power Industry

Professional

JAMES J. HOECKER
WASHINGTON:
202.378.2316
JAMES.HOECKER@
HUSCHBLACKWELL.COM

FERC introduces new framework for regional transmission planning and cost allocation.

On July 21, 2011, the Federal Energy Regulatory Commission (FERC or Commission) issued Order No. 1000 (the Order), which amended the transmission planning and cost allocation requirements established in Order No. 890 that ensures that Commission-jurisdictional services are provided at just and reasonable rates and not on an unduly discriminatory or preferential basis. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011).

The Order is the fourth in a series of generic changes to federal policy designed to restructure how the nation's wholesale electric power system works, the others being Order No. 888 (1996), Order No. 2000 (1999), and Order No. 890 (2006).

The Order focuses on the need to expand and upgrade the high-voltage network, which forms the platform for competitive electricity markets. The amendments provide a framework to address transmission planning and cost allocation issues, and remove the barrier to entry created by the right of first refusal (ROFR) contained in most public utilities' tariffs and agreements, which favored transmission investment by incumbent utilities only. The Order does not address the siting of transmission facilities because federal authority in this area is marginal and secondary to state authority.

Husch Blackwell offers these preliminary observations about Order No. 1000:

The Order is a natural extension of a two-decade-old federal policy favoring competitive power markets and the second major Commission rulemaking order that addresses how the grid is planned and paid for.

Although the Order mandates regional transmission planning, including in bilateral markets, it does not dictate how regions and stakeholders institute such planning or how transmission costs are to be allocated. Rather, it provides a framework within which companies can arrive at regional solutions before filing corresponding tariff changes for evaluation.

The Commission's decisions on ROFR and cost allocation issues are likely to become controversial. In fact, a Senate committee has already introduced a bill to curb FERC's cost allocation authority.

The Order positions federal transmission policy midway between those who favor a preemptive federal approach that would bring transmission regulation in line with regulation of interstate natural gas pipelines, and those who favor a policy more deferential to the state and local interests that have historically influenced most electricity policy. FERC's pursuit of a regional approach to planning and cost allocation reflects trends in how the grid is operated as well as their belief that more effective coordination between multiple private and government interests is necessary to meet challenges to the grid.

The Order was approved by a 5-0 bipartisan vote of the commissioners with only one partial dissent advocating for a more aggressive approach. This, in addition to the over 600 page reasoning that accompanied the Order, indicates a strong decision designed to withstand court scrutiny wholly or in large part.

The guidance accompanying the Order falls into three subject areas: (1) Transmission Planning; (2) Cost Allocation; and (3) Nonincumbent Developer Reforms.

Transmission Planning

The Commission determined that it was "necessary to act under section 206 of the Federal Power Act to adopt the regional transmission planning reforms of [Order No. 1000] . . . to ensure just and reasonable rates and to prevent undue discrimination by public utility transmission providers." (Order No. 1000, P 78.) The Commission explained that because the existing requirements of Order No. 890 were "inadequate to ensure that public utility transmission providers in each transmission planning region, in consultation with stakeholders, identify and evaluate transmission alternatives at the regional level that may resolve the region's needs more efficiently or cost-effectively than solutions identified in the local transmission plans of individual public utility transmission providers." *Id*. As a result, Order No. 1000 establishes the following three general requirements for transmission planning:

1. Each public utility transmission provider must participate in a regional transmission planning process, which satisfies the transmission planning principles of Order No. 890 and produces a regional transmission plan.
2. Local and regional transmission planning processes must consider transmission needs driven by public policy requirements established by state or federal laws or regulations. Further, each public utility transmission provider must establish procedures to identify transmission needs driven by public policy requirements and evaluate proposed solutions to those transmission needs.
3. Public utility transmission providers in each pair of neighboring transmission planning regions must coordinate to determine if there are more efficient or cost-effective solutions to their mutual transmission needs.

Cost Allocation

Order No. 1000 does not impose a uniform cost allocation method for all transmission regions. Instead, the Commission attempted to "retain regional flexibility and allow the public utility transmission providers in each transmission planning region, as well as pairs of transmission planning regions, to develop transmission cost allocation methods that best suit the needs of each transmission planning region or pair of transmission planning regions, so long as those approaches comply with the regional and interregional cost allocation principles" of the Order. As a result,

1. Each public utility transmission provider must participate in a regional transmission planning process that has a regional cost allocation method for new transmission facilities selected in the regional transmission plan for purposes of cost allocation. The method must satisfy six regional cost allocation principles:
    a. The cost of transmission facilities must be allocated to those within the transmission planning region that benefit from those facilities in a manner that is at least roughly commensurate with estimated benefits;
    b. Customers that receive no benefit from transmission facilities, either at present or in a likely future scenario, must not be involuntarily allocated any of the costs of those transmission facilities;
    c. If a benefit to cost threshold is used to determine which transmission facilities have sufficient net benefits to be selected in a regional transmission plan for the purpose of cost allocation, it must not be so high that transmission facilities with significant positive net benefits are excluded from cost allocation;

   d. The allocation method for the cost of a transmission facility selected in a regional transmission plan must allocate costs solely within that transmission planning region unless another entity outside the region or another transmission planning region voluntarily agrees to assume a portion of those costs;

   e. The cost allocation method and data requirements for determining benefits and identifying beneficiaries for a transmission facility must be transparent with adequate documentation to allow a stakeholder to determine how they were applied to a proposed transmission facility; and

   f. A transmission planning region may choose to use a different cost allocation method for different types of transmission facilities in the regional transmission plan, such as transmission facilities needed for reliability, congestion relief, or to achieve public policy requirements.

2. 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. The method must satisfy six similar interregional cost allocation principles.

3. Participant-funding of new transmission facilities is permitted, but is not allowed as a regional or interregional cost allocation method.

Non Incumbent Developer Reforms

Order No. 1000 requires public utility transmission providers to remove from Commission-approved tariffs and agreements any ROFR for a transmission facility selected in a regional transmission plan for purposes of cost allocation, in both Regional Transmission Organization (RTO) and non-RTO regions. Such rights to develop transmission, if reserved to incumbents, constitute an unlawful barrier to entry and their elimination is intended to give sponsors of transmission projects the right to build and own facilities included in the regional transmission plan. There are four exceptions to this rule:

1. A transmission facility that is not selected in a regional transmission plan for purposes of cost allocation;

2. Upgrades to transmission facilities, such as tower change-outs or reconductoring;

3. Solicitations for transmission projects or project developers by public utility providers in a transmission planning region; and

4. State or local laws or regulations regarding the construction, siting or permitting of transmission facilities.

Further, the Order mandates that each public utility transmission provider amend its tariff to require reevaluation of the regional transmission plan to determine if delays in the development of a transmission facility require evaluation of alternative solutions, including those proposed by the incumbent, to ensure incumbent transmission providers can meet reliability needs or service obligations.

Procedures and Timelines

Order No. 1000 becomes effective 60 days from the date of publication in the *Federal Register*. We anticipate that several entities will file requests for rehearing, which are due by August 22, 2011. Although the Commission will evaluate rehearing requests for several months, the Order requires that each public utility transmission provider make its compliance filing within 12 months of the effective date. Further, compliance filings for interregional transmission coordination and interregional cost allocation are required within 18 months of the effective date.

What This Means to You

Public utility transmission providers and sponsors of transmission projects should familiarize themselves with the new planning and cost allocation requirements, and begin planning for compliance filings as well as amendments to existing tariffs.

Contact Info

If you have any questions concerning these amendments or any other energy issues, please contact your Husch Blackwell attorney, Jim Hoecker or any of the attorneys in the Husch Blackwell Energy Group at 202.378.2300.

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