

ClientAlert

Energy, Infrastructure, Project and Asset Finance

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FERC Order No. 1000

On July 21, 2011, over a year after a Notice of Proposed Rulemaking was released, the Federal Energy Regulatory Commission (Commission) issued Order No. 1000, its Final Rule on Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities. Order No. 1000 adopted major changes for all public utility transmission providers, as described below, by establishing new transmission planning requirements, among other things, to ensure a process for identifying when regional needs can be met more efficiently and cost-effectively with a regional solution rather than through an individual public utility's transmission plan and to enhance interregional coordination, as well as related cost allocation requirements. These changes build on requirements that the Commission established in Order No. 890 (Preventing Undue Discrimination and Preference in Transmission Service). However, Order No. 1000 is distinguished from Order No. 890, which required regional coordination, because it requires affirmative consideration of whether a regional solution would be preferable to solutions by individual utilities.

In addition to requiring regional planning and interregional coordination, Order No. 1000 eliminates the federal right of first refusal (ROFR) for incumbent transmission providers to build facilities selected in a regional transmission plan for purposes of cost allocations, and requires that each public utility transmission provider amend its Open Access Transmission Tariff (OATT) to describe procedures for consideration of transmission needs driven by public policy requirements (that is, federal and state laws and regulations).

Implementation of Order No. 1000

Each public utility transmission provider will be required to make a compliance filing no later than twelve months after the date Order No. 1000 goes into effect (which is 60 days from publication in the *Federal Register*) amending its OATT to reflect the new requirements, except that changes related to interregional coordination and interregional cost allocation are not due until eighteen months after Order No. 1000 goes into effect. A public utility transmission provider that is a member of an RTO or ISO will satisfy this compliance filing requirement through its RTO or ISO, which must file.

The obligations imposed by Order No. 1000 are largely process-oriented in terms of requiring consideration by public utility transmission providers of various issues, but the Commission has included guidelines that provide clarification on the range of options that public utility transmission providers should consider during the implementation process. The Commission has established acceptable bounds for the implementation of its transmission planning and cost allocation amendments, and public utility transmission providers may propose their solutions within that acceptable range. While the Commission has now promulgated new



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rules for its transmission planning and cost allocation process, the substantive changes to transmission planning and cost allocation will not begin to take effect until after the public utility transmission providers submit their required compliance filings (which is over a year from now). Further, the new requirements will apply prospectively, with the Commission recognizing that these rules could take effect in the middle of a transmission planning cycle. The Commission left it up to the public utility transmission providers to decide (and explain in their compliance filings) when transmission facilities evaluated in their local and regional planning processes will be subject to the requirements of Order No. 1000.

As the Commission has only defined the boundaries of acceptable outcomes and has left much of the implementation of Order No. 1000 to the discretion of public utility transmission providers (including RTOs and ISOs), there is substantial uncertainty that will not be fully resolved until the Commission accepts the compliance filings. For example, questions like the precise impact on the rights and responsibilities of incumbent transmission developers, with the elimination of the federal ROFR (as described below), will not be fully answered until the new procedures are adopted and fully in force in the new regional transmission planning regions.

Overview of Order No. 1000's Substantive Requirements

With respect to transmission planning, the Commission, in Order No. 1000: (1) ruled that each public utility transmission provider must participate in a regional transmission planning process (which has to include multiple public utility transmission providers) that produces a regional transmission plan, (2) mandated that each public utility transmission provider amend its OATT to incorporate procedures for the consideration of transmission needs driven by public policy requirements established by state or federal laws or regulations in its local and regional transmission planning processes (described more fully below), (3) ordered the removal from Commission-approved tariffs and agreements of a federal ROFR to construct new transmission facilities selected in a regional transmission plan for purposes of cost allocation (described more fully below), and (4) required improved coordination between neighboring transmission planning regions in regards to new interregional transmission facilities.¹

The Commission's reference to "transmission facilities selected in a regional transmission plan for purposes of cost allocation" points

to the significant relationship between the newly mandated planning process and the new cost allocation principles. Facilities selected for cost allocation, which may be a subset of those in the regional plan, will be only those, as identified by this new Commission-mandated process, that are more efficient or cost-effective solutions to regional needs than those identified by public utilities in their local planning processes, acting independently.² The Commission is using cost allocation for transmission facilities as an indicator of regional benefits (that is, if a proposed regional solution is more cost-effective or efficient, it must necessarily provide regional benefits). Regional plans must also consider non-transmission solutions on a comparable basis to transmission solutions (although cost allocation for non-transmission alternatives is not addressed by Order No. 1000) and otherwise comply with the requirements set forth in Order No. 890, except for the requirements related to regional coordination and cost allocation, which are addressed in Order No. 1000.³

While technically the requirements of Order No. 1000 only apply to public utility transmission providers, the Commission noted that "a non-public utility transmission provider seeking to maintain a safe harbor tariff must ensure that the provisions of that tariff substantially conform, or are superior to, the *pro forma* OATT as it has been revised by this Final Rule" (even though "it remains up to each non-public utility transmission provider whether it wants to maintain its safe harbor status by meeting the transmission planning and cost allocation requirements of this Final Rule"). A number of non-public utility transmission providers raised concerns with their ability to commit to a cost allocation program, and thus it remains to be seen how they will balance those concerns with the benefits of maintaining reciprocity with other open access providers pursuant to the Commission's safe harbor rules (thereby extending the reach of the Commission's new transmission planning and cost allocation procedures). But, transmitting utilities in ERCOT, which are non-jurisdictional, will not be subject to the requirements in Order No. 1000.

Cost Allocation

The newly mandated regional transmission planning processes must incorporate a regional cost allocation method for the cost of new transmission facilities selected in a regional transmission plan for purposes of cost allocation, as well as an interregional cost allocation method to cover the cost of certain new transmission facilities located in two or more neighboring transmission planning regions that are jointly evaluated by the regions in the interregional

¹ The Commission made clear that it is not mandating interconnection-wide planning.

² As such, the elimination of the federal ROFR only applies to a limited set of projects, as described more fully below.

³ The seven requirements (other than regional participation and cost allocation) are coordination, openness, transparency, information exchange, comparability, dispute resolution and economic planning.

transmission coordination procedures. The Commission established a principles-based approach to guide regional and interregional cost allocation. Separate sets of principles apply to regional and interregional processes, but they are nearly identical. Those principles, as described in Order No. 1000, specify that: (a) costs must be allocated in a way that is roughly commensurate with benefits, (b) no involuntary allocation of costs in the regional transmission planning region to non-beneficiaries is permitted, (c) to the extent a cost/benefit analysis is part of the evaluation, the benefit to cost threshold ratio may not be so high as to exclude a project with significant positive net benefits,⁴ (d) allocations are to be made solely within transmission planning region(s) unless those outside voluntarily assume costs (such that even a purported beneficiary outside the region(s) would not be allocated costs without its consent), (e) a transparent method for determining benefits and identifying beneficiaries must be used, and (f) different allocation methods may be adopted for different types of facilities (differentiating, for example, among facilities needed for reliability, economic and public policy purposes, although the Commission acknowledged that further breakdowns, such as by voltage level, might also be proposed). The Commission determined that an entity participating in the regional planning process and identified as a beneficiary may be allocated costs, even if it is not a public utility under the Federal Power Act.

The Commission's cost allocation procedures do not prohibit the use of participant funding among consenting parties (including for facilities that are included in a regional plan but not selected for cost allocation), but it specified that participant funding does not satisfy the newly established cost allocation principals and will not be accepted as a regional or interregional cost allocation method. Existing *pro forma* OATT mechanisms for the recovery of costs associated with individual transmission service requests or interconnection are not changed by Order No. 1000.

Consideration of Public Policy Requirements

The Commission also ordered public utility transmission providers to revise their OATTs to include procedures in their local and regional transmission planning processes for "the identification of transmission needs driven by Public Policy Requirements [established by state or federal laws or regulations]" and "the evaluation of potential solutions to meet those needs." The consideration of Public Policy Requirements is intended to be in addition to the existing transmission planning obligations that

the Commission has established under Order No. 890. The Commission acknowledged that the effect of Public Policy Requirements on transmission needs will be highly varied across the regions and that it was granting public utility transmission providers flexibility, in their local and regional transmission planning processes, to design the needed procedures. As part of that flexibility, the Commission did not mandate a particular set of transmission needs driven by any particular Public Policy Requirements, but left that determination to be made by procedures developed by the public utility transmissions providers. But, these procedures for identifying transmission needs driven by Public Policy Requirements must provide an opportunity for stakeholder input, in order to ensure that it is not just the public utility transmission provider planning for its own needs or the needs of its native load customers. The Commission did leave open the possibility that these procedures will not identify any transmission needs that are driven by Public Policy Requirements. The Commission did not require public utility transmission providers to evaluate transmission needs beyond those established by state or federal laws or regulations or to incorporate any additional public policy principles or objectives as part of the transmission planning process. But, a public utility transmission provider is not precluded from evaluating transmission needs in its transmission planning process that are driven by public policy objectives that are not mandated by state or federal laws or regulations.

Right of First Refusal

One of the most controversial changes that the Commission adopted in Order No. 1000 involves its treatment of the federal ROFR. In response to its proposal in the Notice of Proposed Rulemaking to eliminate the ROFR in Commission-approved tariffs or agreements that provided an incumbent transmission provider with an undue advantage over a non-incumbent transmission developer, the Commission received a large volume of comments, both favorable and opposed. Commenters in support of the proposal argued that it would encourage transmission development, by promoting competition between incumbent and non-incumbent transmission providers by providing a level playing field for project selection, and that this competition would result in lower transmission costs to meet system needs.⁵ Commenters opposed to the proposal countered that there was not sufficient evidence showing that the ROFR impeded transmission development and, instead, that the ROFR is the best method to achieve the Commission's transmission goals (as the incumbent

⁴ The cost/benefit principle further explains that the cost/benefit threshold may not exceed 1.25 unless the Commission approves a higher ratio after evaluating the proposed justification.

⁵ An incumbent transmission developer or provider is defined by the Commission as "an entity that develops a transmission project within its own retail distribution service territory or footprint." A non-incumbent transmission developer is defined as "a transmission developer that does not have a retail distribution service territory or footprint" or "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."

transmission providers best know the needs of their systems) and eliminating the ROFR could make the transmission planning process inefficient and the system less reliable. Some commenters also argued that eliminating the ROFR would result in undue discrimination for the incumbent transmission providers since the incumbent transmission providers would still possess an obligation to build certain transmission facilities, but the elimination of the ROFR would allow non-incumbent transmission developers to “cherry pick” the most advantageous transmission projects for development.

In Order No. 1000, the Commission ordered the elimination of a federal ROFR from all Commission-approved tariffs and agreements (including the OATT) for projects chosen in the regional transmission plan for purposes of cost allocation. The Commission found that these changes were “necessary in order to eliminate practices that have the potential to undermine the identification and evaluation of more efficient or cost-effective alternatives to regional transmission needs, which in turn can result in rates for Commission-jurisdictional services that are unjust and unreasonable, or otherwise result in undue discrimination by public utility transmission providers.” In addition, the Commission noted that public utility transmission providers have already developed mechanisms, under Order No. 890, to evaluate competing transmission projects as part of their transmission planning process and that those existing procedures would serve as foundation for the changes adopted in Order No. 1000.

However, the extent of these new rights is circumscribed. The Commission’s amendments to the federal ROFR only apply to those transmission facilities that are evaluated at the regional level through the regional transmission planning process and chosen in the regional transmission plan for purposes of cost allocation. The transmission facilities impacted by the elimination of the federal ROFR are most likely to be those that involve major upgrades to the electric transmission grid that impact multiple utilities. Numerous transmission facilities that are built do not go (and will not) through the regional transmission planning process. For example, the elimination of the federal ROFR does not apply to a local transmission facility, which is defined as “a transmission facility located solely within a public utility transmission provider’s retail distribution service territory or footprint that is not selected in the regional transmission plan for purposes of cost allocation.” The amendments to the federal ROFR also do not affect transmission facilities, which, while listed in the regional transmission plan, are only “rolled up” from local transmission plans and do not go through a needs analysis at the regional level. In addition, the rights of an incumbent transmission provider to build, own and recover costs for upgrades to its transmission facilities will not be impacted by the changes to the federal ROFR. The excluded scenarios encompass a large number of transmission facilities that are actually built. Order No. 1000 also

does not grant (or deny) any transmission developer, including non-incumbent transmission developers, the ability to use rights-of-way possessed by other entities. Furthermore, the changes to the ROFR in Order No. 1000 only apply to the federal ROFR, as contained in Commission-approved tariffs and agreements, and do not affect any state or local laws or regulations regarding the construction of transmission facilities, such as laws or regulations for the siting and permitting of transmission facilities. Thus, to the extent that an incumbent transmission provider benefits from state law preferences, such as a right of eminent domain, or other benefits of incumbency, such as possession of rights-of-way, those rights are undisturbed by Order No. 1000.

In those situations where the federal ROFR will no longer apply, the Commission ordered each public utility transmission provider to amend its OATT “to demonstrate that the regional transmission planning process in which it participates has established appropriate qualification criteria for determining an entity’s eligibility to propose a transmission project for selection in the regional transmission plan for purposes of cost allocation, whether that entity is an incumbent transmission provider or a nonincumbent transmission developer.” The Commission ruled that this qualification criteria must provide, on a non-preferential or unduly discriminatory basis, each potential transmission developer, including non-incumbent transmission developers, with the opportunity to show that it possesses the required financial and technical resources to develop, construct, own, operate and maintain the relevant transmission facilities.

Regional Planning Requirements

In order to implement the regional requirement, public utility transmission providers must amend their OATTs using the same language as all of the other public utility transmission providers in their regional transmission planning region. Since many elements are not prescribed by the Commission, substantial coordination will be needed among the utilities in each planning region over the coming months to reach agreement. In order to comply with Order No. 1000, the OATT must specify the information that a prospective transmission developer must submit and the due date for submitting that information in order for a proposed project to be evaluated for a given transmission planning cycle. Each public utility transmission provider must describe in its OATT a transparent and not unduly discriminatory process with which it will evaluate which of the proposed transmission facilities are to be included in the regional transmission plan for purposes of cost allocation. According to the Commission, “[t]his process must comply with the Order No. 890 transmission planning principles, ensuring transparency, and the opportunity for stakeholder coordination. The evaluation process must culminate in a determination that is sufficiently detailed for stakeholders

to understand why a particular transmission project was selected or not selected in the regional transmission plan for purposes of cost allocation.” If a non-incumbent transmission developer’s project is selected by the regional transmission planning process to be part of the regional transmission plan for purposes of cost allocation, that non-incumbent transmission developer must have a comparable opportunity to that of an incumbent transmission developer to allocate the cost of that transmission facility according to the relevant cost allocation method(s).

After the Order No. 1000 amendments have been enacted, incumbent transmission providers will still be able to propose transmission projects to be evaluated as part of the regional transmission planning process for purposes of cost allocation. These projects are in addition to any local transmission facilities the incumbent transmission provider chooses to build. Even if projects are located entirely within the incumbent transmission provider’s retail distribution service territory or footprint, the incumbent transmission provider will still receive regional cost allocation for those projects if they are selected as part of the regional transmission plan for purposes of cost allocation.

Reliability

The Order No. 1000 proceeding also contained vigorous debate about the ability of incumbent transmission providers to continue to satisfy their reliability needs and service obligations once the Order No. 1000 amendments take effect. To address concerns that the failure of non-incumbent transmission developers to timely complete a transmission project will have an adverse impact, the Commission ordered public utility transmission providers to revise their OATTs to “describe the circumstances and procedures under which public utility transmission providers in the regional transmission planning process will reevaluate the regional transmission plan to determine if delays in the development of a transmission facility selected in a regional transmission plan for purposes of cost allocation require evaluation of alternative solutions, including those the incumbent transmission provider proposes, to ensure the incumbent can meet its reliability needs or service obligations.” Furthermore, the Commission affirmed that both incumbent and non-incumbent transmission developers are subject to the NERC Reliability Standards and noted that special consideration would be taken if the abandonment of a transmission project by a non-incumbent transmission developer would result in a Reliability Standard violation for the incumbent transmission provider.⁶

Next Steps

Overall, the Commission provides the transmission planning regions with flexibility in implementing Order No. 1000’s mandates—especially as some regions will have to make fewer modifications to their Commission-approved tariffs and agreements than other regions. The Commission left it to the public utility transmission providers within each transmission planning region, in consultation with the region’s stakeholders, to determine the appropriate mechanisms, in compliance with Order No. 1000 for establishing its regional planning process and cost allocation. Therefore, the full scope of Order No. 1000’s impact will only start to become clear when the compliance filings are made. To facilitate the preparation of these compliance filings, the Commission directed its staff to conduct informational conferences to discuss the implementation of Order No. 1000, as well as encouraged dialogue between Commission staff and public utility transmission providers.

⁶ For example, if a non-incumbent transmission developer abandons a transmission facility that is meant to address a violation of a NERC Reliability Standard and a violation of that Reliability Standard would result from the abandonment, the Commission found that the incumbent transmission provider does not have an obligation to construct the non-incumbent transmission provider’s project. Instead, the incumbent transmission provider must submit a mitigation plan to NERC to address the Reliability Standard violation and, as long as the incumbent transmission provider follows the mitigation plan, it will not be subject to an enforcement action for that Reliability Standard violation.

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