

7th Circ. Ruling Fortifies FERC's Transmission Rule

By **Keith Goldberg**

Law360, New York (June 12, 2013, 9:50 PM ET) -- In blessing Federal Energy Regulatory Commission orders allowing a regional transmission organization to charge members to finance new power lines to remote wind farms, experts say the Seventh Circuit last week effectively endorsed the agency's efforts to spread out the costs of expanding the nation's electricity grid and handed it some new ammunition to protect a controversial utility transmission planning rule.

On Friday, a three-judge panel affirmed all but one of FERC's 2010 orders allowing Midwest Independent Transmission System Operator Inc. to impose a tariff on its 130 provider members to fund the construction of the new high-voltage power lines.

A group of challengers including the Illinois Commerce Commission had accused MISO of failing to show that the project would confer benefits greater than its costs. But the panel rejected that argument, saying the challengers couldn't counter FERC without presenting evidence of an imbalance between costs and benefits.

"It's not enough for Illinois to point out that MISO's and FERC's attempt to match the costs and the benefits of the [project] is crude; if crude is all that is possible, it will have to suffice," U.S. Circuit Judge Richard A. Posner wrote for the panel.

By upholding the orders, the Seventh Circuit has validated FERC's theory that developers of regional projects could spread the costs regionally without having to show exact benefits, experts say.

"I was really struck with the ease in which the court seemed to accept the premise that these facilities provide benefits on a regionwide basis," Akin Gump Strauss Hauer & Feld LLP energy regulatory partner Chip Cannon told Law360. "I think the court's decision is reflecting the reality of what today's grid is like, how it's built out and what's needed [to improve it]."

The decision also backs up FERC's transmission planning rule, known as Order No. 1,000. Adopted by the regulator in 2011 and affirmed the next year over widespread industry objections, the order is meant to spark transmission investment by requiring utilities to create regional plans and a framework for cost allocation, their way of recouping project expenses.

It also introduced competitive bidding into the construction process for transmission facilities and heaped compliance requirements on public utilities.

Utility groups have challenged the rule in the District of Columbia Circuit, taking issue with many of its provisions, including cost allocation. While there's no guarantee other appeals courts will see the cost allocation issue the same way the Seventh Circuit did, Friday's ruling has given FERC more of a legal leg to stand on, experts say.

"The court rejected the idea that in regional planning, you have to show exact or specific benefits — the gist of what the court says is that you can't quantify this exactly, and that's OK, you don't need to," Hunton & Williams LLP partner Linda Walsh, a former FERC trial attorney, told Law360. "In the Order No. 1,000 challenge, similar arguments were made against regional cost allocation."

However, experts warn that the Seventh Circuit's ruling doesn't apply to other provisions of the transmission planning rule that are being challenged. Most notably, the rule by and large eliminates incumbent utilities' right of first refusal for transmission projects, with few exceptions. An incumbent utility is an existing utility that is already under a state's regulatory umbrella.

"It is still an open question whether that aspect of Order No. 1,000 is going to survive," Venable LLP energy partner Brian Zimmet said.

The Seventh Circuit also made waves in turning back the cost-benefit challenge of a second group of petitioners that included Michigan utilities and the state's utility regulator.

The petitioners pointed to a Michigan standard that required utilities to draw at least 10 percent of their power from renewable sources by 2015, but prohibited them from using power generated outside the state to meet the standard.

Judge Posner rejected their arguments, writing that "Michigan cannot, without violating the commerce clause of Article I of the Constitution, discriminate against out-of-state renewable energy."

Although the Michigan program wasn't a main issue in the case, the judge's statement shines a light on constitutional concerns over requirements in some states' renewable energy standards — and experts say it's shown renewable developers a path for challenging them.

"If a state was truly imposing significant burdens on out-of-state power, I wouldn't be surprised if some power developers would want to bring suit against that on this basis," Zimmet said.

The judge's words could also indirectly boost FERC's mission to eliminate rights of first refusal, or ROFRs, according to Walsh — especially considering that states such as New Mexico are contemplating legislation to establish ROFRs for incumbent utilities.

Not only are state ROFR laws themselves vulnerable, but parties trying to argue that Order No. 1,000 conflicts with the laws could face the same commerce clause argument that confronted the Michigan petitioners, Walsh said.

All in all, experts say the Seventh Circuit ruling has provided legal cover for two major FERC priorities: improvements to electric infrastructure and increased use of renewable energy.

"This will help FERC along in its efforts to ... justify broader cost-sharing, as well as potentially in its efforts to get more transmission built — especially transmission that is needed for bringing renewable energy to major market areas," Zimmet said.

Judges Richard A. Posner, Diane P. Wood and Ann Claire Williams sat on the panel for the Seventh Circuit.

The Illinois petitioners are represented by Barry Cohen of Miller Balis & O'Neil PC.

MISO is represented by Stephen L. Teichler of Duane Morris LLP.

The case is Illinois Commerce Commission et al. v. Federal Energy Regulatory Commission, case numbers 11-3421, 11-3430, 11-3584, 11-3585, 11-3586, 11-3620, 11-3787, 11-3795, 11-3806 and 12-1027, in the U.S. Court of Appeals for the Seventh Circuit.

--Additional reporting by David McAfee. Editing by Kat Laskowski and Chris Yates.