

## FERC Gains Upper Hand In Regional Power Planning Fights

By **Keith Goldberg**

*Law360, New York (August 22, 2014, 6:23 PM ET)* -- With the D.C. Circuit backing the Federal Energy Regulatory Commission's controversial regional transmission planning rule, the legal battlefield shifts to its implementation, but experts say the appeals court's sweeping ruling will make it tougher for incumbent utilities and state regulators to fight an emboldened commission's decisions on whether plans pass muster.

Many observers expected the appeals court to uphold FERC Order No. 1,000, which is meant to spark new transmission investment by requiring utilities to create regional plans and a framework for cost allocation, which is how they recoup project expenses. Still, a D.C. Circuit panel on Aug. 15 soundly rejected challenges by utility industry groups and state regulators to FERC's authority under the Federal Power Act to enact virtually every key aspect of the order.

"It's a clean win for FERC," said Chip Cannon, an Akin Gump Strauss Hauer & Feld LLP energy regulatory partner.

The court's decision puts "the industry on notice that it feels FERC's jurisdiction with respect to regional planning and cost allocation is pretty deep," he said. "They didn't even suggest that FERC came close to the borders of its jurisdiction."

The commission has taken a hard line on whether plans submitted by utilities and regional transmission operators fully comply with Order No. 1,000 and has rejected several plans. Experts say the D.C. Circuit's decision will encourage FERC to maintain, or even stiffen, that critical stance.

"The court has clearly affirmed broad authority, so I don't think it's going to be reluctant to exercise that authority," Day Pitney LLP senior counsel Eric Runge said.

Which means that future challenges to Order No. 1,000 will center around how far FERC's authority can stretch.

That will manifest itself in battles over two of the most controversial aspects of the rule: removal of federal rights of first refusal for new transmission development by incumbent utilities from FERC-jurisdictional tariffs and other agreements, and allocating a project's costs based on who benefits from it.

The D.C. Circuit upheld FERC's authority to strip federal ROFR provisions. While the commission said in

Order No. 1,000 that ROFRs are generally anti-competitive, it also said it would analyze them on a case-by-case basis using the so-called Mobile-Sierra doctrine, which holds that a FERC-jurisdictional contract that has a public interest clause can't be overturned except in extraordinary circumstances.

Still, the commission has rejected several regional transmission plans because they didn't go far enough in removing ROFR provisions.

FERC has been pretty consistent: Whenever there was an inappropriate ROFR, the commission found that the Mobile-Sierra doctrine did not apply, according to Linda Walsh, a Hunton & Williams LLP partner.

"It will be a question of whether the appellate courts would be as consistent," Walsh said. "In my view, the Mobile-Sierra issues are a key component of Order No. 1,000, and the order will be weakened if those issues aren't upheld."

There have been several rehearing requests of FERC rejections of regional transmission plans, many on Mobile-Sierra grounds. The D.C. Circuit didn't address the Mobile-Sierra issue, but looking at the court's reasoning, which relied on generic findings of potential harm created by ROFRs, one can draw the conclusion that FERC will deny most of those rehearing requests, Runge said.

"Based on other court precedent, the commission does not [need] to make empirical findings; it's entitled to rely on the threat of implied economic harm," Runge said. "All of that could be relied on, justifiably, by the commission in making the decisions on these compliance filings. I don't see that being overturned by the courts, and I don't see FERC changing its approach."

There will also be appeals of FERC rulings on the cost allocation portions of transmission plans, experts say.

"The dollars are too big and a lot of parties feel that the roughly commensurate policy of cost allocation is at odds with the commission's historic practice of allocating costs to the people who use the transmission lines," Cannon said.

This is especially true as FERC moves into the next big stage of Order No. 1,000 implementation: reviewing inter-regional transmission plans, Hunton partner Ted Murphy said.

"The big issue will be what FERC does with compliance when it comes to inter-regional cost allocations for planned transmission projects," Murphy said.

But having given FERC broad authority over regional transmission planning and cost allocation, the D.C. Circuit has set a high bar for would-be challengers to clear.

"The premise of the decision seems to be ... the court is going to defer to the commission's reasoned decision-making in that area," Cannon said.

The question is: How far is the commission willing to push that decision-making?

"There's a boundary somewhere," Cannon said. "It'll be interesting to see how far FERC pushes things before a court pushes back."

Circuit Judges Judith W. Rogers, Thomas B. Griffith and Nina Pillard sat on the panel for the D.C. Circuit.

The petitioners and intervenors are represented variously by Harvey L. Reiter and Jonathan D. Schneider of Stinson Leonard Street LLP, Andrew W. Tunnell of Balch & Bingham LLP, Randolph Lee Elliott and Luther D. Bentley IV of the Alabama Public Service Commission, John L. Shepherd Jr. of Skadden Arps Slate Meagher & Flom LLP, and Michael R. Engleman of Squire Patton Boggs, among others.

FERC is represented by its attorneys Beth G. Pacella, Lona T. Perry, Robert M. Kennedy, David L. Morenoff, Robert H. Solomon and Jennifer S. Amerkhail.

The case is South Carolina Public Service Authority v. Federal Energy Regulatory Commission, case number 12-1232, in the U.S. Court of Appeals for the District of Columbia Circuit.

--Editing by Jeremy Barker and Emily Kokoll.

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