

## Energy Regulation, Markets and Enforcement Alert

August 19, 2014

### **D.C. Circuit Upholds Order No. 1000, FERC's Landmark Transmission Planning and Cost Allocation Rulemaking Order**

On August 15, 2014, the United States Court of Appeals for the District of Columbia Circuit unanimously [affirmed](#) Order No. 1000, a landmark set of rules approved by the Federal Energy Regulatory Commission (FERC) in 2011 to reform the transmission planning and cost allocation requirements for the nation's public utility transmission providers.<sup>1</sup> Among other things, Order No. 1000 required transmission providers to participate in regional planning processes with neighboring utilities. FERC reasoned that evaluating transmission alternatives at the regional level could resolve a region's transmission needs more cost-effectively than through local planning without mandated coordination. Multiple parties, including state regulatory agencies, transmission providers, regional transmission organizations and industry trade associations (collectively, "Petitioners") appealed Order No. 1000 to the D.C. Circuit, challenging FERC's authority to adopt the new rules and arguing that they were arbitrary and capricious.

The Federal Power Act (FPA) does not expressly give FERC the authority to regulate transmission planning by public utilities. Nevertheless, the D.C. Circuit held that FERC has the authority under FPA Section 206 – which provides for FERC to remedy "any . . . practice" that "affect[s]" a rate for interstate electricity transmission services "demanded" or "charged" by "any public utility" if such practice "is unjust, unreasonable, unduly discriminatory or preferential"<sup>2</sup> – to require transmission providers to participate in a regional transmission planning process.

FERC determined in Order No. 1000 that "the narrow focus of [the pre-Order No. 1000] planning requirements and shortcomings of [the pre-Order No. 1000] cost allocation practices create an environment that fails to promote the more efficient and cost-effective development of new transmission facilities, and that addressing these issues is necessary to ensure just and reasonable rates."<sup>3</sup> The D.C. Circuit agreed, concluding that there was "substantive evidence of a theoretical threat" to justify FERC's adoption of the Order No. 1000 pursuant to an FPA Section 206 rulemaking proceeding.

In Order No. 1000, FERC mandated that a regional transmission planning process consider and evaluate transmission projects proposed by "non-incumbent" developers. FERC therefore required that public utility transmission providers remove certain rights of first refusal (ROFR) from their federal tariffs and contracts, thereby eliminating the public utilities' automatic right to construct transmission facilities within

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<sup>1</sup> *Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011) ("Order No. 1000"), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012) (collectively, "Order No. 1000").

<sup>2</sup> 16 U.S.C. § 824e.

<sup>3</sup> Order No. 1000 at P 52.

their service territories, including proposals submitted by third parties.<sup>4</sup> In the wake of Order No. 1000, regional transmission planning groups across the country have adopted a variety of competitive processes for selecting transmission proposals and assigning construction rights. The court held that FERC has the authority under FPA Section 206 to require removal of the federal ROFR and rejected Petitioners' argument that the relationship between the federal ROFR and FERC-jurisdictional rates is too attenuated to trigger FERC's Section 206 authority.

The court also rejected Petitioners' argument that the removal of the federal ROFR violated the so-called *Mobile-Sierra* doctrine,<sup>5</sup> "which presumes that freely-negotiated wholesale-energy contracts are just and reasonable unless found to seriously harm the public interest." The court found that Petitioners' *Mobile-Sierra* objection to the ROFR removal was not ripe because FERC had committed to consider the *Mobile-Sierra* arguments when it reviewed the public utility transmission providers' tariffs that would be submitted in compliance with Order No. 1000.

Order No. 1000 also required public utility transmission providers to develop methods for allocating the costs of new transmission facilities to the entities that benefit from such facilities. FERC did not impose a one-size-fits-all requirement dictating how such costs should be allocated; rather, FERC announced general cost allocation principles for the various regions to implement. The court dismissed Petitioners' argument that FERC does not have the authority to adopt cost allocation reforms. In particular, the court rejected the argument that Section 206 does not authorize FERC to require utilities "to pay for the costs of transmission facilities developed by entities with whom they have no prior contractual or customer relationship and from whom they do not take transmission service."

Order No. 1000 further required that the transmission planning regions establish procedures to account for the impact that federal, state and local laws and regulations, including state renewable portfolio standards, have on the transmission system. The court rejected Petitioners' argument that FERC cannot require regions to take into account such public policy requirements because FERC does not have the statutory authority to generally promote the "public welfare." The court concluded that Order No. 1000 "does not promote any particular public policy or even the public welfare generally. The mandate simply recognizes that state and federal policies might affect the transmission market and directs transmission providers to consider that impact in their planning decisions." The court also rejected Petitioners' argument that the public policy mandate is too vague, finding that Order No. 1000 only required regions to establish the processes for evaluating public policies that may impact the transmission grid.

Finally, the D.C. Circuit rejected jurisdictional challenges to Order No. 1000 from non-public utilities such as municipal utilities. Prior to Order No. 1000, in Order Nos. 888<sup>6</sup> and 890,<sup>7</sup> FERC required non-public

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<sup>4</sup> The elimination of the federal ROFR was one of the most controversial aspects of Order No. 1000.

<sup>5</sup> *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

<sup>6</sup> *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. by Pub. Utils.; Recovery of Stranded Costs by Pub. Utils. & Transmitting Utils.*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996)

utility transmission providers that seek access to a public utility's transmission system on an open-access basis to provide reciprocal transmission service over their own systems on comparable terms. Order No. 1000 included as part of this "reciprocity condition" that, in exchange for open access, such non-public utilities must also participate in regional transmission planning and cost allocation processes. The court affirmed FERC here as well, finding that the Order No. 1000 reciprocity condition was "fundamentally the same" as that contained in earlier FERC orders and that FERC reasonably relied on the reciprocity condition to encourage non-public utility transmission providers to participate in regional transmission planning processes.

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<sup>7</sup> *Preventing Undue Discrimination & Preference in Transmission Serv.*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 (2007).

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