

May 22, 2012

FERC Denies Rehearing of Order No. 1000

Pre-Order No. 1000 transmission planning and cost-allocation requirements are inadequate and a possible threat to the development of efficient or cost-effective transmission.

On May 17, the Federal Energy Regulatory Commission (FERC or Commission) issued Order No. 1000-A, upholding its Order No. 1000 reforms to transmission planning and cost allocation.¹ In Order No. 1000-A, the Commission (1) upheld the minimum criteria that a regional and interregional transmission planning process must satisfy, and reiterated general principles for cost allocation; (2) upheld its decision to remove from Commission-approved tariffs and agreements any federal right of first refusal for transmission facilities selected in a regional or interregional transmission plan for purposes of cost allocation; and (3) did **not** alter or otherwise extend the deadlines for Transmission Providers to submit compliance filings implementing Order No. 1000. Accordingly, each public utility Transmission Provider must submit a regional Order No. 1000 compliance filing by October 11, 2012. Compliance filings for interregional transmission coordination and interregional cost allocation are due on April 11, 2013.

Background

In July 2011, the Commission issued Order No. 1000 for the purpose of reforming its electric transmission planning and cost-allocation requirements applicable to Transmission Providers. The Commission stated that Order No. 1000 was necessary in order to address deficiencies in transmission planning and cost allocation that it identified following its issuance of Order No. 890.²

The directives set forth in Order No. 1000 are designed to achieve two goals: (1) ensure that transmission planning processes at the regional and interregional levels consider and evaluate, on a nondiscriminatory basis, possible transmission alternatives that can meet transmission needs more efficiently and cost-effectively, and (2) ensure that the costs of transmission solutions chosen to meet regional and interregional transmission needs are allocated fairly to those who receive benefits from them.

Decision

The Commission denied the requests for rehearing of Order No. 1000 in all respects. Further, the Commission declined to make any changes to the regulatory text promulgated in Order No. 1000. Nevertheless, in Order No. 1000-A the Commission does address its jurisdiction to impose the requirements in Order No. 1000 and clarifies several notable issues raised in the parties' requests for rehearing.

First, the Commission responded at length to arguments that in Order No. 1000 it exceeded its authority. The Commission maintained that, pursuant to the U.S. Court of Appeals for the District of Columbia's opinion in *National Fuel Gas Supply Corp. v. FERC*,³ the reforms required under Order No. 1000 are properly supported

1. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132 (2012).

2. *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 at P 290 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241 (2007) (Order No. 890), *order on reh'g*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007) (Order No. 890-A); *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008) (Order No. 890-B), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009) (Order No. 890-C).

3. 468 F.3d 831 (D.C. Cir. 2006).

because a theoretical threat exists that, absent the reforms, rates would otherwise become unjust, unreasonable, or unduly discriminatory. The Commission also explained that it does not view Section 202(a) of the Federal Power Act as precluding the Commission from requiring reforms with respect to regional and interregional transmission planning. The Commission noted that even though Section 202(a) specifies that “interconnection and coordination” of facilities should be voluntary, Section 202(a) was inapplicable because it referred to the coordination of facilities already in operation. As such, the Commission found that Section 202(a) does not encompass facilities that are not interconnected or operating and, therefore, does not prevent the Commission from issuing mandatory regulations in connection with planning transmission facilities that may or may not be developed, interconnected, and operational at a future point in time.

Second, the Commission clarified that nonpublic utility Transmission Providers are not required to join a transmission planning region and be subject to the allocation of costs associated with transmission development. To that end, Transmission Providers in each region are required to have a clear enrollment process that defines how entities make the choice to become part of a transmission region. If a nonpublic utility Transmission Provider does not elect to join a transmission planning region, the regional planning process is not required to plan for the needs of that nonpublic utility Transmission Provider any differently than it otherwise would plan for the needs of the customers of the Transmission Providers in that region.

Third, the Commission determined that, when establishing qualification criteria that must be satisfied by potential non-incumbent transmission developers in order to propose a project, a transmission planning region cannot require the potential non-incumbent developer to demonstrate that it either has, or can obtain, the state approvals necessary to operate in that state. The Commission determined that such a requirement would amount to an unreasonable barrier to entry, which the Commission is seeking to eliminate by mandating the removal of rights of first refusal from Transmission Providers’ open access transmission tariffs (OATTs). However, if a transmission project is selected for inclusion in a regional transmission plan, the transmission developer is required to submit a development schedule that indicates the required steps necessary to develop and construct the facility. As part of the ongoing monitoring of the progress of the transmission project once it is selected, Transmission Providers in a transmission planning region must establish a date by which state approvals to construct must be achieved; that date must be tied to the date by which construction must begin in order to timely meet the need that the project is selected to address. If such steps have not been achieved by that date, then the Transmission Providers in a transmission planning region may remove the transmission project from the selected category and proceed with reevaluating the regional transmission plan to seek an alternative solution.

Fourth, the Commission stated that compliance filings submitted to implement Order No. 1000 must clearly explain how “benefits” and “beneficiaries” are defined for the purpose of determining how transmission development costs are to be allocated. The Commission stated that if a compliance filing is unclear on that matter, the Commission will address the issue in its review of the respective compliance filing.

Implications

In addition to the four issues mentioned above, Order No. 1000-A reiterates the majority of the Commission’s determinations set forth in Order No. 1000. As noted above, the Commission did not alter the dates on which compliance with Order No. 1000 is required. As such, public utility Transmission Providers should note that compliance filings are still due on October 11, 2012, and April 11, 2013.

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