

## energy lawflash

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## FERC Grants Rehearing on State Law Issues in Order No. 1000 Filings

*In a trio of orders, FERC softened its approach to considering the effects of state law rights of first refusal in Order No. 1000 regional transmission planning, suggesting a move toward deference to state legal limitations on planning and greater deference to Order No. 1000 compliance proposal alternatives more generally.*

At its May open meeting, the Federal Energy Regulatory Commission (FERC) softened its approach to considering state law rights of first refusal in Order No. 1000 regional transmission planning. This change suggests a new openness to the implications of the legal limitations unique to various states when considering Order No. 1000 compliance proposals, and more closely matches the FERC-directed federal planning structure to the restrictions on transmission development that also exist throughout the United States. More broadly, it may also represent a move by FERC to provide greater deference to the proposals developed by each region. However, given the thorny legal issues presented in the compliance filings still awaiting a ruling, whether this represents a decisive shift remains to be seen.

Order No. 1000 had directed public utility transmission providers to remove any federal rights of first refusal that give incumbent transmission providers the right to build new transmission facilities in their service territories. FERC's concern was that these rights of first refusal were a barrier to entry by nonincumbent transmission developers that might otherwise propose and construct needed transmission projects. This, in turn, could lead to less efficient and less cost-effective transmission planning. In addition, as FERC later explained, Order No. 1000 prevents planning regions from considering state laws or regulations in their planning process if doing so would effectively reintroduce such a right of first refusal by limiting transmission development to those utilities that have an exclusive right to construct new transmission projects under state law. Several planning regions, including the Midcontinent Independent Transmission System Operator, Inc. (MISO), PJM Interconnection, L.L.C., and South Carolina Electric & Gas Co. (SCE&G) regions, had proposed to consider state laws in that manner.

In three orders issued after last week's open meeting in Docket Nos. ER13-187-002 et al., ER13-198-001 et al., and ER13-107-003 et al., FERC changed course in its response to requests for rehearing in these regions, permitting MISO, PJM, and SCE&G to consider state laws and regulations in their regional planning efforts. For example, MISO will be permitted to consider the operation of these state requirements when holding competitive solicitations for identified transmission projects' development. According to FERC, this will avoid the inefficiency of a regional planning process that ignores state legal requirements that would restrict which utilities may construct a transmission project. As FERC explained, it is "counterproductive and inefficient" to consider a potential developer as part of Order No. 1000 regional planning if that developer would be barred under state law from developing the project. It could also delay the construction of needed transmission facilities, undermining the very purpose of Order No. 1000.

A key benefit of this change is that it will help regions avoid federal planning results that are inconsistent with state laws on transmission siting and construction. Under FERC's previous approach, it was conceivable that a nonincumbent transmission developer could be approved under the relevant regional planning process to develop a specific project and use the FERC-approved cost allocation process to allocate the costs of that project to beneficiaries, but be unable to construct that project because the incumbent utility would have a state right of first refusal. Combined with FERC's lack of meaningful authority over transmission siting, this would have created a

more difficult federalism conflict further down the road.

For the planning regions that still await their orders on rehearing, FERC's new orders raise the possibility that the agency may seek to avoid possible legal conflicts surrounding the implementation of Order No. 1000 regional planning by offering greater deference to the implications of state laws. Read more broadly, these orders could suggest FERC's willingness to defer to regional proposals that diverge in some ways from the initial Order No. 1000 directives.

Each region includes its own unique mix of state legal structures, public and non-public utilities, and public policy needs. Each region's Order No. 1000 compliance filing has, as a result, reflected the unique nature of transmission development in that region, which in some cases has pushed the boundaries of Order No. 1000. Until last week, FERC had offered relatively little flexibility on major Order No. 1000 principles in assessing those compliance filings, pushing concerns about legal conflicts related to the outcomes of Order No. 1000 regional planning, such as transmission construction, into the future. With these new orders, FERC may be expressing a willingness to avoid those conflicts from the beginning by offering greater deference to regional proposals, thereby creating a more productive, lower-conflict regional planning process more conducive to the construction of significant transmission facilities.

These orders will, however, not be without their detractors. The prime beneficiaries of removing rights of first refusal are nonincumbent transmission developers that could more easily compete with incumbent transmission providers when no utility has a right of first refusal. By permitting planning regions to consider state rights of first refusal, nonincumbent transmission developers will likely have greater difficulty sponsoring projects in planning regions with those limitations.

## Contacts

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