

FERC Permanently Lifts Price Cap for Electric Transmission Capacity Reassignments

September 22, 2010

On September 20, the Federal Energy Regulatory Commission (FERC) issued Order No. 739, *Promoting a Competitive Market for Capacity Reassignment*. Order No. 739 permanently lifts the price cap for transmission customers reassigning electric transmission capacity. FERC explained that lifting the price cap is intended to facilitate the development of a market for electric transmission capacity reassignments as a competitive alternative to primary transmission capacity.

In Order No. 890, *Preventing Undue Discrimination and Preference in Transmission Service*, FERC had determined that it would be appropriate to lift the price cap for all transmission customers reassigning point-to-point transmission capacity, believing that the cap had served to reduce transmission options for customers and had impaired the development of a secondary market for transmission capacity.

However, in response to concerns expressed on rehearing, FERC in Order No. 890-A concluded that it would lift the price cap temporarily (with the cap reinstated as of October 1, 2010), in order to accommodate a study by FERC staff. After conducting a two-year study on capacity reassignment, FERC staff issued a report in April 2010 concluding that the lifting of the price cap assisted in the further development of the secondary market, but that lifting the price cap was not the primary vehicle for the observed growth in the secondary market. The Staff Report also concluded that there did not appear to be any evidence of abuse by resellers.

Following a Notice of Proposed Rulemaking (NOPR) issued in Docket No. RM10-22-000 and comments submitted thereon, FERC issued Order No. 739, to become effective October 1, 2010. FERC stated that removal of the price cap will help foster the development of a more robust secondary market for transmission capacity because point-to-point transmission service customers will have increased incentives to resell their service whenever others place a higher value on it. However, FERC declined to adopt nonrate reforms proposed by commenters in response to the NOPR.

Because the price cap—including language in section 23 of the pro forma open access transmission tariff (OATT)—had been scheduled to be reinstated as of October 1, 2010, FERC invoked the “Good Cause” exception to Section 553 of the Administrative Procedure Act’s requirement that rules become effective not less than 30 days after publication in the *Federal Register*. FERC directed transmission providers to file the required revisions to their OATTs within 30 days from publication of Order No. 739 in the *Federal Register* (forthcoming as of September 22, 2010).

If you have any questions or would like more information on any of the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

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