

UTILITIES AND TELECOMMUNICATIONS ALERT

FERC ISSUES NOPR ON TRANSMISSION PLANNING AND COST ALLOCATION BY TRANSMISSION OWNING AND OPERATING PUBLIC UTILITIES

Today, June 17, 2010, FERC took long-anticipated action on the planning and cost-allocation of the nation's transmission infrastructure. The Commissioners unanimously approved (with Commissioner Moeller noting his separate concurrence) a Notice of Proposed Rulemaking on Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (the "Transmission NOPR"), Docket Number RM10-23-000.

FERC staff introduced the Transmission NOPR with the far-reaching statement that it "promises to reform transmission planning and cost allocation." The Transmission NOPR seeks to build on FERC's Order 890 by "establishing a closer link between regional electric transmission planning and cost allocation to help ensure that needed transmission facilities actually are built." (FERC News Release, June 17, 2010) Chairman Jon Wellinohoff noted that he was "very, very proud" of FERC's staff and stated: "Our nation needs a transmission grid that can accommodate rising consumer demand for a more diverse mix of power generators and the sophisticated technology of the smart grid. To do that, we must make sure FERC transmission policies are open to all." (Id.)

The rules established by the Transmission NOPR will apply to all public utility transmission providers, including RTOs and ISOs and require other transmission providers to adopt the requirements of the rules in order to maintain their safe harbor status or otherwise comply with order 888. Comments are due 60 days after publication of the NOPR in the Federal Register. The NOPR is not yet publicly available. However, a summary of the proposed rules and our thoughts on them, in italics, follows.

Transmission Planning

1. The proposed rule would require each public utility transmission provider to participate in a regional transmission planning process that produces a regional transmission plan and that meets certain transmission planning principles established in Order No. 890. *For public utilities that do not currently participate in an RTO or are otherwise required to plan transmission with stakeholders, this will be a new era. Other stakeholders, including alternative energy generation companies, may be interested in having a voice in transmission planning.*
2. The proposed rule would require that local or regional transmission planning processes account for public policy requirements established by state or federal laws or regulations that may drive transmission needs. *This rule, of course, is designed to ensure that state requirements regarding issues such as renewable energy portfolio standards play a role in transmission planning.*
3. The proposed rule would remove from FERC-approved tariffs or agreements any right of first refusal that provides an incumbent public utility with an undue advantage over a non-incumbent transmission project developer, while preserving state authority. *With this rule, FERC seeks to spur cost and development competition for both transmission developers and generation developers that require new transmission.*

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4. The proposed rule would require each public utility transmission provider through its regional transmission planning process to enter into a transmission planning agreement with the public utility transmission providers in each neighboring transmission planning region.

Transmission Cost Allocation

1. The proposed rule would establish principles for allocating the costs of new transmission facilities in a manner that is at least roughly commensurate with the distribution of benefits. *Chairman Wellinghoff referred to this proposal as the “cost causation principle,” stating that “only those benefitted will pay.” This provision of the proposed rule will be contentious and hotly debated, on all bases, including policy, legal and business principles.*
2. The proposed rule would require each public utility transmission provider to have a cost allocation method for new transmission facilities in the regional transmission plan that satisfies certain proposed cost allocation principles. *The devil is in the details here; the proposed cost allocation principles will be critical. At the least, the planning agreement requirements and corollary cost allocation implementation will add yet another level of complexity to transmission issues.*
3. The proposed rule would require each public utility transmission provider to have a cost allocation method for new transmission facilities resulting from the planning agreements implemented by neighboring regions that satisfies certain proposed cost allocation principles. *Again, the telling details will be the proposed cost allocation principles.*

Commissioner Marc Spitzer noted that for years the nation has grappled with two constant transmission construction issues: “Who should plan for new transmission [and] who should pay for new transmission?” FERC’s Transmission NOPR has the ambitious goal of conclusively answering both questions.

The Utilities and Telecommunications Alert is intended to keep readers current on matters affecting utilities and telecommunications issues and is not intended to be legal advice. If you have questions, please contact Daniel Clearfield at 717.237.7173 or dclearfield@eckertseamans.com or Charles Zdebski at 202.659.6605 or czdebski@eckertseamans.com, or any other attorney with whom you have been working.