



# A Changing Landscape for Transmission Providers

An historic rule brings increased competition to the electric transmission industry

BY BETH MINEAR, ESQ.

**Whether you are a seasoned veteran in the electric transmission industry or new to the field, there are few areas of comprehension more critical than that of the Federal Energy Regulatory Commission's (FERC) Order No. 1000.**

At its heart, Order 1000 deals with the simple issue of whether states can be forced to coordinate on transmission planning while meeting cost obligations for new electricity transmission capacity. Affirmed in 2012 in a final rule, it sought to fundamentally change the electric transmission industry's planning and cost allocation

requirements. It also removes the right of first refusal from regional tariffs, where historically, incumbent transmission providers had been given a preference on transmission projects in their existing territories. The order, which is now at the mercy of pending and still nascent court filings, says that states can be compelled to comply.

## **Territorial Planning**

Few Americans fully understand the revolution in electricity delivery that FERC has led over the past 15 years. Yet, the strain on the transmission system continues, despite a decade-long standoff over how transmission projects should be planned and paid for. Historically, once a transmission utility had regulatory authority for a particular geographic area, it could simply build what it wanted within that territory, with few limitations. Regardless of whether the service was needed or the construction was efficient and cost-effective, the utility held that right to construct it and propose cost recovery mechanisms to FERC.

What became obvious to the regulators was that the electric transmission companies had little incentive to work together to avoid

service redundancies in a region, and other than budgeting considerations, little incentive to examine project efficiencies in detail. In recognition of these perceived inadequacies, FERC began an historic rulemaking endeavor with the goal of increased competition among companies in mind.

Two previous orders should have been regarded as sending up flares to indicate the direction that FERC was heading. Beginning in 1996, FERC's Order 888 required "all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce to have on file open access non-discriminatory transmission tariffs that contain minimum terms and conditions of non-discriminatory service." It required companies engaged in interstate commerce to amend their Open Access Transmission Tariff (OATT) to include minimum terms and conditions to provide non-discriminatory open access to their facilities. It also allowed companies to recoup "legitimate, prudent and verifiable stranded costs" (existing investments in infrastructure for the incumbent utility that may become redundant in a competitive environment) associated with providing the mandated open access with a goal of providing more efficient, lower-cost energy service to U.S. consumers.

The second major FERC ruling was issued in 2007. Order 890 intended to amend "the regulations and the pro forma open access transmission tariff adopted in Orders 888 and 889 to ensure that transmission services are provided on a basis that is just, reasonable and not unduly discriminatory or preferential." Order 890 attempted to address many questions, particularly surrounding the lack of specific criteria required in an OATT. The issuance required a "coordinated, open and transparent regional transmission planning process" on a regional level to further prevent undue discrimination in

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open access. FERC also required that "each transmission provider's planning process meet its nine planning principles, which are coordination, openness, transparency, information exchange, comparability, dispute resolution, regional coordination, economic planning studies and cost allocation."

## Planning and Cost Allocations

After other orders attempted clarification, FERC issued Order 1000, which combined and streamlined previous rulings and formalized the Commission's goal to increase competition in the electric transmission industry. It sets forth three main areas of reform, including transmission planning, cost allocation and non-incumbent development.

### 1) Transmission Planning

In the area of planning, FERC established three requirements. First, each public utility transmission provider must participate in a regional transmission planning process that satisfies the transmission planning principles of Order No. 890 and produces a regional transmission plan. Second, local and regional transmission planning processes must consider transmission needs driven by

public policy requirements established by state or federal laws or regulations. Each public utility transmission provider must establish procedures to identify transmission needs driven by public policy requirements and evaluate proposed solutions to those transmission needs. And third, public utility transmission providers in each pair of neighboring transmission planning regions must coordinate to determine if there are more efficient or cost-effective solutions to their mutual transmission needs.

Thus, Order 1000 not only requires planning for a single region, but also to develop formal procedures with neighboring regions to evaluate interregional facilities to be located in neighboring regions. Transmission providers were again required to update their OATTs to set forth the coordination procedures with a particular set of regions and with the option of filing a coordination agreement with FERC.

### 2) Cost Allocation

In terms of cost allocation, FERC established three requirements. First, each public utility transmission provider must participate in a regional transmission planning process that has a regional cost allocation method

for new transmission facilities selected in the regional transmission plan for purposes of cost allocation. The method must satisfy six regional cost allocation principles. Secondly, public utility transmission providers in neighboring transmission planning regions must have a common interregional cost allocation method for new interregional transmission facilities that the regions determine to be efficient or cost-effective. The method must satisfy six similar interregional cost allocation principles.

Thirdly, participant funding of new transmission facilities is permitted, but is not allowed as the regional or interregional cost allocation method.

Order 1000 amended the cost allocation requirements from Order No. 890 to “ensure that Commission-jurisdictional services are provided at just and reasonable rates and on a basis that is just and reasonable and not unduly discriminatory or preferential.” A transmission provider must have a cost allocation method in place to demonstrate compliance with that stated directive within the regional scheme.

### 3) Non-Incumbent Developer Reforms

Prior to Order 1000, electric transmission providers enjoyed a right of first refusal (ROFR) where an incumbent provider (one who already owns a facility in a given territory) had the right to construct and propose cost recovery for a new project in its service territory and was approved for inclusion under the Order 890 planning process.

After issuance, Order 1000 required transmission providers to “remove from Commission-approved tariffs and agreements a federal right of first refusal for a transmission facility selected in a regional transmission

plan for purposes of cost allocation, subject to four limitations as follows:

- 1) This does not apply to a transmission facility that is not selected in a regional transmission plan for purposes of cost allocation.
- 2) This does not apply to upgrades to transmission facilities, such as tower change outs or reconductoring.
- 3) This allows, but does not require, public utility transmission providers in a transmission planning region to use competitive bidding to solicit transmission projects or project developers.
- 4) Nothing in this requirement affects state or local laws or regulations regarding the construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities.”

The removal of the ROFR advantage appears to have generated more complaints and legal wrangling than the new planning and cost allocation requirements. Indeed, the arguments in FERC Commissioner Philip D. Moeller’s dissent are often cited by opponents to the new scheme. Although Order 1000 purportedly maintained a federal ROFR for local projects—where the incumbent does not seek to share the costs of those projects, seeks to upgrade existing assets, and projects executed on existing rights—Commissioner Moeller argued that it should have allowed companies to maintain their ROFRs to ensure reliability of the existing network. He opined that the loss of ROFR might discourage transmission companies from cooperating in the regional process.

Despite the elimination of ROFR, the incumbent transmission provider will likely maintain an edge when bidding for transmission projects on its home turf.

They have the advantages that come from long-held relationships with regulators, already existing rights of way, proven operational track records and knowledge of the network in the service territory.

### Post-Order Considerations

In determining whether to develop new electric transmission projects, many transmission companies are still working through the nuances to determine the impact of Order 1000 in the long term. For these companies, acquisition cost estimates, feasibility studies and “fatal flaw” analyses have always been critical for determining whether to pursue any project, and used as an aid in project planning and route selection.

This has never been more critical for the companies that must incorporate project execution costs into their “just and reasonable rates.”

With the efficiency goals set forth in Order 1000, electric transmission companies are required to justify the costs associated with new projects and regional cost allocation determinations, or risk getting left behind in the planning and development of regional infrastructure opportunities. The advantage for incumbents comes from reduced costs and finding the most effective resolution to regional transmission needs. However, incumbent utilities with a record of poor performance or a particularly contentious relationship with regulators or regional coordinators could be at a disadvantage. 🗳️



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