



June 29, 2010

## FERC Issues Proposed Rule and Two Orders Addressing Transmission Planning and Cost Allocation

On June 17, 2010, the Federal Energy Regulatory Commission (FERC) issued a Notice of Proposed Rulemaking (NOPR) proposing reforms to FERC's transmission planning and cost allocation policy,<sup>1</sup> which would be set forth in a revised Section 35.28 of FERC's regulations.<sup>2</sup> Comments are due 60 days after publication in the *Federal Register*, which is expected to occur shortly.

On the same day, FERC issued two orders clarifying its current transmission planning and cost allocation policies: (1) an order accepting the Southwest Power Pool, Inc.'s (SPP) proposed "Highway/Byway" transmission cost allocation proposal;<sup>3</sup> and (2) an order on the complaint filed by Central Transmission, LLC (Central Transmission) clarifying that non-incumbent utilities may be designated to construct and own transmission projects approved through the PJM Interconnection, L.L.C. (PJM) Regional Transmission Expansion Plan (RTEP) and to recover costs under the PJM tariff.<sup>4</sup>

### I. Background

In 1996, FERC issued Order No. 888,<sup>5</sup> which implemented a number of reforms designed to remedy various anti-competitive and unduly discriminatory practices by public utility transmission providers. Order No. 888 required each transmission provider to adopt a *pro forma* open access transmission tariff (OATT), which set forth minimum transmission planning standards, including the requirement that the transmission provider provide comparable treatment of network customers and its own native load in its transmission planning activities and that it construct new facilities to accommodate requests for firm point-to-point customers.

In 2007, FERC issued Order No. 890,<sup>6</sup> which found, among other things, that the Order No. 888 transmission planning obligations were insufficient to eliminate certain forms of undue discrimination and therefore adopted further reforms regarding regional transmission planning and cost allocation. Order No. 890 required

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each transmission provider to develop a transmission planning process that satisfies the following principles: (1) coordination; (2) openness; (3) transparency; (4) information exchange; (5) comparability; (6) dispute resolution; (7) regional participation; (8) economic planning studies; and (9) cost allocation.

**II. The Transmission Planning and Cost Allocation NOPR**

After the issuance of Order No. 890, FERC identified a number of additional deficiencies in the transmission planning and cost allocation processes through the Order No. 890 compliance filings, technical conferences on regional transmission planning, the FERC Notice of Request for Comments on these issues, and in a number of proceedings addressing applications and rate filings by merchant and other independent transmission developers. These deficiencies, and the NOPR's proposed solutions, are described below. FERC proposes to require each transmission provider to submit a compliance filing within six months of the effective date of the final rule in this proceeding revising its OATT and other FERC-jurisdictional document as necessary to satisfy the NOPR's requirements, with the exception of the proposed requirements regarding interregional transmission planning agreements and interregional cost allocation. For these requirements, the compliance filing would be due within one year of the effective date of the final rule.

**A. Transmission Planning**

**1. Participation in the Regional Transmission Planning Process**

In Order No. 890, FERC required transmission providers to coordinate transmission planning on a regional basis, but stopped short of requiring transmission providers in a transmission planning region to develop a comprehensive regional transmission plan. In the NOPR, FERC proposes to require each transmission provider to participate in a regional transmission planning process to develop a regional transmission plan that would identify what transmission facilities and non-transmission solutions are needed to meet the needs of transmission providers, their customers, and other stakeholders in the region. To ensure that stakeholders have an opportunity for meaningful participation, the planning process would have to satisfy the following principles established in Order No. 890: (1) coordination; (2) openness; (3) transparency; (4) information exchange; (5) comparability; (6) dispute resolution; and (7) economic planning studies.

**2. Public Policy Driven Projects**

The economic planning studies principle in Order No. 890 requires transmission providers to give stakeholders the right to request a defined number of high priority studies each year to identify projects that could relieve transmission congestion or integrate new resources or loads. Order No. 890 did not, however, impose any specific obligation on transmission providers to evaluate a project based on its potential to facilitate the achievement of public policy requirements established by state or federal laws or regulations, *e.g.*, requirements regarding the use of renewable energy such as renewable portfolio standards or goals for energy efficiency or demand response. In the NOPR, FERC would require each transmission provider to specify in its OATT the procedures for evaluating transmission projects proposed to satisfy public policy requirements, although FERC does not propose to identify the specific types of public policy requirements



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that must be considered. FERC clarified that this requirement would not preempt state planning requirements and that it would not treat failure to satisfy such requirements as an OATT violation.

### **3. Remediating Undue Discrimination Against Non-Incumbent Transmission Developers.**

FERC noted that incumbent transmission providers (*i.e.*, a traditional public utility with a franchised service territory) have a right of first refusal (ROFR) to construct and own transmission facilities within their service territories and expressed concern that this ROFR may present opportunities for undue discrimination against non-incumbent transmission developers. In the NOPR, FERC proposes the following OATT reforms to place incumbent and non-incumbent transmission providers on the same footing:

- The OATT must demonstrate that the regional transmission planning process in which the transmission provider participates has established appropriate financial and technical eligibility criteria for participation that do not discriminate between incumbent transmission owners and non-incumbent transmission developers.
- The OATT must include a form by which a prospective project sponsor would provide information in sufficient detail to allow the proposed project to be evaluated in the regional transmission planning process.
- The OATT must set forth a transparent and not unduly discriminatory or preferential regional planning process for evaluating proposed projects.
- Transmission providers must remove from their OATTs or other FERC-jurisdictional agreements any provision granting the transmission provider a ROFR to construct transmission facilities.
- If a proposed project is rejected in one planning cycle, the project sponsor must retain its priority to develop the project if one or more substantially similar projects are proposed by other developers in future planning cycles within some defined period of time (*e.g.*, five years).
- Non-incumbent transmission developers must be eligible for cost recovery under a regional cost allocation method under the same terms as the incumbent transmission owner.

### **4. Interregional Coordination**

Neither Order No. 888 nor Order No. 890 imposed any interregional coordination requirements. Instead, these issues have primarily been addressed through bilateral agreements between individual transmission providers. In the NOPR, FERC proposes to require the transmission providers within a given transmission planning region to coordinate with transmission providers in each neighboring transmission planning region within its interconnection. The terms of the interregional planning process would be set forth in an agreement (filed with FERC) that would provide a detailed description of the process with respect to: (1) proposed facilities located in both regions; (2) interregional facilities that could address transmission needs more efficiently than separate intraregional facilities; and (3) sharing information regarding the respective regional transmission plans and planning data. With respect to projects to be located in two transmission



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planning regions, FERC would require that the two regions coordinate their reviews of the project in the same general timeframe and that projects would have to be included in each of the respective regional transmission plans to qualify for interregional cost allocation.

### B. Cost Allocation

FERC has previously addressed cost allocation issues primarily by applying the “cost causation” principle, *i.e.*, that costs should be allocated to the projects’ beneficiaries in an amount roughly commensurate with the benefits received, on a case-by-case basis. In the NOPR, FERC notes that cost allocation challenges have become more acute recently, particularly with respect to interstate projects outside of regions with an independent system operator (ISO) or regional transmission organization (RTO) and interregional projects. FERC proposes to require each transmission provider to propose a cost allocation methodology for interregional and intraregional cost allocation that complies with each of the following principles:

- The costs of a new interregional facility must be allocated to each transmission planning region in which that facility is located in a manner that is roughly commensurate with the estimated benefits of that facility in each of the transmission planning regions, while the costs of an intraregional facility must be allocated to those within the transmission planning region that benefit from those facilities in a manner that is roughly commensurate with estimated benefits.
- Those that receive no benefit from transmission facilities, either at present or in a likely future scenario, must not be involuntarily allocated the costs of those facilities.
- If a “benefit to cost” threshold is used, it should not be so high as to exclude facilities with significant positive net benefit and cannot be higher than 1.25, unless FERC approves a greater ratio.
- Costs must be allocated solely within the transmission planning region(s) in which the facility is located, unless another entity outside of the region(s) agrees to assume a portion of those costs.
- The cost allocation method and data requirements for determining benefits and identifying beneficiaries must be transparent and with sufficient documentation to allow for stakeholder review.
- Different cost allocation methods may be applied for different types of transmission facilities (*e.g.*, facilities needed for reliability, congestion relief, or to achieve public policy requirements).

### III. SPP Transmission Cost Allocation Order

In *SPP*, FERC accepted SPP’s proposed Highway/Byway cost allocation methodology. Under this proposal, costs for reliability upgrades, “high priority” economic upgrades, and upgrades associated with wind generation projects located within the same zone as the transmission customer’s point of delivery<sup>7</sup> are to be allocated based on the voltage of the upgrade, as follows: (1) the costs of facilities operating at 300 kV and above will be allocated 100 percent across the SPP region on a postage stamp basis; (2) the costs of facilities operating above 100 kV and below 300 kV will be allocated one-third on a regional postage stamp basis and two-thirds to the zone in which the facilities are located; and (3) the costs of facilities operating at or below 100 kV will be allocated 100 percent to the zone in which the facilities are located.



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In accepting SPP's proposal, FERC explained that this cost allocation methodology is part of SPP's ongoing effort to move from a traditional transmission planning approach that focuses on local reliability issues to one that takes a more holistic approach to meeting the needs of the region as a whole. FERC found that the methodology would facilitate investment in new transmission facilities to integrate the western and eastern portions of the SPP grid to enable renewable resources, predominately in the western areas of the SPP region, to serve load centers in the east.

**IV. Order on Central Transmission Complaint**

In *Central Transmission*, FERC addressed a complaint filed by Central Transmission, which had proposed to build a 160-mile, 345 kV transmission line in the PJM footprint, but sought clarification as to whether non-incumbent transmission developers that, like Central Transmission, did not currently own or operate transmission facilities in the PJM footprint, could be designated to construct and own transmission facilities and whether they were eligible for cost recovery under the PJM OATT. FERC affirmed that the existing PJM OATT permits PJM to designate non-incumbent utilities to construct and own economic expansion projects approved through the PJM RTEP process and that, once approved, such non-incumbent transmission developers are eligible to seek cost-of-service rate treatment under the PJM OATT as would any other transmission owner.

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*This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice.*

<sup>1</sup> Notice of Proposed Rulemaking, *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 131 FERC ¶ 61,253 (2010) (NOPR).

<sup>2</sup> 18 C.F.R. § 35.28.

<sup>3</sup> *Southwest Power Pool, Inc.*, 131 FERC ¶ 61,252 (2010) (*SPP*).

<sup>4</sup> *Central Transmission, LLC v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,243 (2010) (*Central Transmission*).

<sup>5</sup> *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002) (Order No. 888).

<sup>6</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009) (Order No. 890).

<sup>7</sup> For upgrades associated with wind generation resources where the upgrade is located in a different zone than the point of delivery, the Highway/Byway Methodology will only apply if the facility operates at 300 kV and above. For lower voltages, two-thirds of the costs will be allocated regionally, with the remaining one-third allocated to the transmission customer.