

FERC Proposes New Transmission Planning and Cost Allocation Rules Designed to Remove Obstacles to New Investment in Electric Transmission

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On June 17, 2010, the Federal Energy Regulatory Commission (“FERC”) proposed to amend the transmission planning and cost allocation requirements for electric transmission providers. The proposed rule would apply to all public utility transmission providers, including regional transmission organizations (“RTOs”) and independent system operators (“ISOs”). Transmission providers that are not public utilities would have to adopt the requirements of this proposed rule as a condition of maintaining the status of their safe harbor tariff or otherwise satisfying the FERC reciprocity requirement. Comments are due within sixty days of the publication of the proposed rule in the Federal Register.

Among other things, the proposed rule would open the door for independent transmission owners to be treated on an equal footing with incumbent transmission utilities in proposing new transmission projects in a regional planning process by removing 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. Also, the rule would greatly expand the scope of transmission projects that must be included in regional transmission plans to incorporate projects intended to address public policy mandates established by federal and state laws such as projects that would help states satisfy their renewable portfolio standard objectives. This is significant because there is a substantial need for new transmission investment to meet these public policy goals. The proposed rule also seeks to resolve cost recovery uncertainty by requiring regional planning tariffs to include cost allocation methodologies based on an analysis of the beneficiaries of a proposed project.

Current planning process rules in organized electricity markets have not proven adequate to accommodate transmission projects that do not neatly fit the “reliability” or “market/economic” categories that are currently addressed in planning tariffs. For example, many planning processes do not currently address transmission needed to meet state or federal public policy imperatives. Developers of such projects including those designed to integrate location constrained renewable resources, have struggled with a lack of clear rules on planning and cost allocation.

Some recent FERC decisions have contributed to the resolution of these issues in certain regions. For example, on the same day the proposed rule was issued, FERC also approved a regional cost allocation proposal submitted by the Southwest Power Pool in a separate proceeding. FERC also has been considering cost allocation rules for high voltage transmission facilities in PJM after a court of appeals remanded its original decision to FERC. Congress also has been discussing transmission cost allocation issues in the context of various pending legislative initiatives.

The proposed rule, which includes a requirement that transmission providers (both in organized electricity markets and outside of such markets) expand their transmission planning processes to broaden the scope of projects that can be considered for inclusion in the regional plan and, therefore, qualify for cost recovery through the regional transmission tariff is a significant step forward in addressing these concerns. The proposed rule could be finalized this year and implemented in the first half of next year.

Significantly, the Commission did not propose a uniform, nationwide methodology for determining the beneficiaries that will be required to pay for new transmission projects. Rather each region will be permitted to file a proposed methodology for identifying beneficiaries and the methodology can vary depending on the type of project at issue (*e.g.*, reliability, economic, or public policy based project). However, the methodology must be based on the cost causation principle which provides that costs should be allocated to those who cause them to be incurred and those that otherwise benefit from them. The cost causation principle also requires the Commission to ensure that the costs allocated to a beneficiary under a cost allocation method are at least roughly commensurate with the benefits that are expected to accrue to that entity. Although cost causation is a long-standing principle of energy law and FERC regulation, identifying cost causers and beneficiaries is often a complicated matter. FERC provided additional guidance in this area by proposing that, in determining the beneficiaries of transmission facilities, a regional transmission planning process may consider the extent to which transmission facilities, individually or in the aggregate, provide for maintaining reliability and sharing reserves, production cost savings and congestion relief, and/or meeting public policy requirements established by state or federal laws or regulations that may drive transmission needs.

Several approaches to cost allocation may satisfy the principles under the proposed rule. For example, a postage stamp cost allocation method may be appropriate where all customers within a specified transmission planning region are found to benefit from the use or availability of a facility

This memorandum is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship partner.

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or class or group of facilities (e.g., all transmission facilities at 345 kV or higher), especially if the distribution of benefits associated with a class or group of facilities is likely to vary considerably over the long depreciation life of the facilities amid changing power flows, fuel prices, population patterns, and local economic developments. Similarly, other methods that propose cost allocation to a narrower class of beneficiaries may be appropriate, provided that the method reflects an evaluation of beneficiaries and is adequately defined and supported by the transmission planning region. The proposed rule does not foreclose the opportunity for a transmission developer or individual customer to voluntarily assume the costs of a new transmission facility, but a cost allocation method that relies exclusively on a participant funding approach, without respect to other beneficiaries of a transmission facility, would not satisfy the proposed principles.

Given how contentious transmission cost allocation issues have been in each region, it is not surprising that the Commission decided to allow different regional methodologies to exist. However, this approach does not completely resolve the problems faced by entities with projects that cross more than one region, despite the fact that adjoining regions would be required to achieve some level of coordination. Specifically, the Commission proposes to require that the public utility transmission providers located in each pair of neighboring transmission planning regions develop a mutually agreeable method for allocating between the two transmission planning regions the costs of a new transmission facility that is located within both regions and that is eligible for interregional cost recovery under the region's interregional transmission planning agreement. These agreements also must be based on the cost causation principle.

If the stakeholders in a particular region cannot agree on a cost allocation methodology, the Commission would make a decision based on the information provided in the regional compliance filing. By mandating interregional transmission planning, facilitating development of transmission projects by independent transmission owners on a regulated basis and expanding the type of projects to be built under transmission planning processes, FERC seeks to remove remaining obstacles to substantial new investments in electric transmission.

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