



JONES DAY  
**COMMENTARY**

## FERC REJECTS CHALLENGES TO LANDMARK RULEMAKING ORDER ON NEW ELECTRIC TRANSMISSION INFRASTRUCTURE

On May 17, 2012, the Federal Energy Regulatory Commission (“FERC” or “Commission”) issued an “Order on Rehearing and Clarification” reaffirming its Order No. 1000,<sup>1</sup> which the Commission issued in August 2011 as a major reform of FERC policies governing the planning for, and cost treatment of, new electric transmission projects. The May 17 Order, Order No. 1000-A,<sup>2</sup> denied requests for rehearing that had challenged Order No. 1000’s central directives. FERC also clarified certain elements of Order No. 1000’s requirements.

### OVERVIEW OF FERC ORDER NO. 1000

Order No. 1000 requires each Public Utility Transmission Provider (“Transmission Provider”):

1. To participate in a regional planning process that evaluates transmission alternatives based on the principles of FERC’s Order No. 890<sup>3</sup> and to produce a regional transmission plan that evaluates, *inter alia*, transmission needs driven by public policy requirements that are established by state or federal laws or regulations (“Public Policy Requirements”);
2. To remove from the Transmission Provider’s Open Access Transmission Tariff (“OATT”) or other FERC-jurisdictional tariffs and agreements any federal “rights of first refusal” with respect to transmission facilities that are selected in a regional transmission plan for purposes of cost allocation;
3. To coordinate across neighboring transmission planning regions on the development of procedures for joint evaluation of transmission projects and sharing of transmission planning information and solutions, to determine whether interregional transmission projects will provide more cost-effective solutions to transmission needs; and
4. To develop methods to allocate, to the beneficiaries of new transmission projects selected through regional or interregional transmission

planning processes, the costs of those facilities, in accordance with certain regional and interregional cost allocation principles.

## TOPICS CLARIFIED IN ORDER NO. 1000-A

**Regional Transmission Planning.** Order No. 1000 requires all Transmission Providers to participate in a regional transmission planning process that complies with Order No. 890 and produces a regional transmission plan. Through this process, Transmission Providers must, *inter alia*, consider transmission needs driven by Public Policy Requirements, evaluate alternative transmission solutions that might meet the transmission needs more efficiently than the projects proposed by individual Transmission Providers, and consider proposed non-transmission alternatives on a comparable basis. In Order No. 1000-A, the Commission denied requests for rehearing—including those requests that had challenged the Commission’s legal authority to mandate Transmission Providers’ participation in a regional transmission process—and clarified various aspects of Order No. 1000’s terms and conditions to govern regional transmission planning:

- In Order No. 1000-A, FERC once again declined to define the specific size or other characteristics of a planning “region” other than to state that an individual utility, acting by itself, cannot satisfy this requirement. FERC explained that Order No. 1000 defined a “transmission planning region” as a region in which Transmission Providers, in consultation with stakeholders and affected states, have joined for purposes of satisfying the requirements of Order No. 1000, including, among other purposes, the development of a regional transmission plan.<sup>4</sup> The Commission stated that the scope of a transmission planning region should be determined by the integrated nature of the regional power grid and the reliability and resource issues in a specific region.<sup>5</sup> Regional Transmission Organization (“RTO”) regions already may satisfy many aspects of Order No. 1000’s regional planning requirements.<sup>6</sup>
- FERC emphasized that Transmission Providers must have a clear enrollment process for regional transmission planning that defines how entities, including entities other than

Transmission Providers, may elect to become part of the transmission planning region. OATTs for Transmission Providers must include a list of all Transmission Providers and other entities that have enrolled in transmission planning in a region.<sup>7</sup>

- FERC clarified in Order No. 1000-A that participation by an entity other than a FERC-jurisdictional Transmission Provider in Order No. 1000 compliance processes—e.g., in the development of a Transmission Provider’s proposed regional transmission planning process and regional cost allocation method—does not obligate that entity to join the transmission planning region and thus to become potentially subject to the allocation of costs under the regional cost allocation method. Such an entity will not be deemed to have joined a transmission planning region, and thus to have become eligible for cost allocation, until it has actually *enrolled* in the transmission planning region.<sup>8</sup>
- FERC clarified that nothing in Order No. 1000 is intended to preempt or otherwise conflict with state authority over siting, permitting, and construction of transmission facilities; integrated resource planning; or similar processes. Order No. 1000’s reforms were not intended to dictate substantive outcomes, such as what transmission facilities will be built and where. These decisions are normally made at the state level. Rather, Order No. 1000’s transmission planning reforms are intended to ensure that there is an open and transparent regional transmission planning process that produces a regional transmission plan.<sup>9</sup>
- FERC clarified that Order No. 1000 does not require that transmission facilities included in a Transmission Provider’s *local* transmission plan be subject to approval at the regional or interregional level, unless that Transmission Provider seeks to have any of those facilities selected in the regional transmission plan for purposes of cost allocation.<sup>10</sup>
- FERC explained that Order No. 1000 does not require that any federal or state laws (including municipal or county laws) or regulations be evaluated as part of the transmission planning process.<sup>11</sup> In Order No. 1000-A, the Commission explained that Order No. 1000 simply requires that public utility transmission providers amend their OATTs to provide for the consideration of transmission needs driven by Public Policy Requirements, but does not require that Public Policy Requirements themselves be considered.<sup>12</sup> Moreover, FERC explained that it

is not the function of the transmission planning process to reconcile differing state policies.<sup>13</sup> Order No. 1000 requires only that there be a process for Transmission Providers, in consultation with stakeholders, to consider transmission needs driven by Public Policy Requirements, in the same way that Transmission Providers consider reliability-based or economic-based transmission needs.

- FERC clarified that to comply with these provisions, Transmission Providers are obligated only to (i) post an explanation of those transmission needs driven by Public Policy Requirements that have been identified for evaluation and (ii) post an explanation of how other transmission needs driven by Public Policy Requirements introduced by stakeholders were considered during the identification stage and why they were not selected for further evaluation.<sup>14</sup>
- FERC explained that Order No. 1000 does not require Transmission Providers to file regional transmission plans with the Commission, noting that its concern is that there be an open and transparent planning process.<sup>15</sup>
- FERC clarified that entities other than FERC-jurisdictional Transmission Providers are not required to enroll or otherwise participate in a regional planning process.<sup>16</sup>
- In Order No. 1000-A, FERC declined to define what constitutes a “new” transmission facility, deferring instead to the transmission planning regions themselves.<sup>17</sup>

**Nonincumbent Transmission Providers.** Order No. 1000’s reforms include eliminating tariff-based mechanisms that designate incumbent utilities (the entities that in most cases built the transmission grid that serves a particular area) to construct new transmission facilities, so-called federal “rights of first refusal.” Thus, Order No. 1000 requires each Transmission Provider to eliminate from its FERC-jurisdictional tariffs and agreements any provision that grants the incumbent presumptive developer status with respect to determining which entity is to serve as the developer of new transmission facilities that are selected in a regional transmission plan for purposes of cost allocation.<sup>18</sup> A number of parties sought rehearing of Order No. 1000’s provisions regarding federal rights of first refusal. FERC denied these requests for rehearing, including those that challenged its legal authority to implement this aspect of Order No. 1000. Nevertheless, FERC made

several clarifications regarding nonincumbent Transmission Providers and federal rights of first refusal:

- FERC clarified that the term “incumbent transmission developer/provider” means an entity that develops a transmission project within its own retail distribution service territory or footprint. As such, the term “nonincumbent transmission developer” means any entity that is not an incumbent transmission developer/provider.<sup>19</sup> Further, Order No. 1000-A explained that the term “retail distribution” as used in the definition above does not modify “footprint.” Footprint was intended to include, but not be limited to, the location of the transmission facilities of a transmission-only company that owns and/or controls the transmission facilities of formerly vertically integrated utilities, as well as the location of the transmission facilities of any other transmission-only company.<sup>20</sup> In other words, an entity can be an incumbent Transmission Provider without having a retail distribution service territory.
- FERC explained that Order No. 1000 does not require elimination of a federal right of first refusal for a new transmission facility where the costs of the new facility are to be borne entirely by the Transmission Provider in whose retail distribution service territory or footprint the new facility is to be located.<sup>21</sup>
- In Order No. 1000-A, FERC clarified that the requirement to eliminate a federal right of first refusal does not apply to any upgrade to a preexisting facility, even where the upgrade requires the expansion of an existing right-of-way.<sup>22</sup> The term “upgrade” means an improvement to, addition to, or replacement of a part of, an existing transmission facility. The Commission “is not eliminating the right of an owner ... to improve its own existing transmission facility by allowing a third-party transmission developer to, for example, propose to replace the towers or the conductors of a transmission line owned by another entity.”<sup>23</sup>
- FERC explained that where a Transmission Provider regards a federal right of first refusal as protected by contract under a “*Mobile-Sierra* provision” (a provision that prevents FERC from altering a contract absent a finding that such action is required by the public interest),<sup>24</sup> associated questions of Order No. 1000 compliance will be addressed on a case-by-case basis. Such a Transmission Provider should include, in its Order No. 1000 compliance

filing, its argument as to how its contract protects a right of first refusal. Order No. 1000-A states that any such compliance filing also must include revisions to Commission-jurisdictional tariffs and agreements as necessary for full Order No. 1000 compliance. The Commission will determine whether the contract at issue is protected by a *Mobile-Sierra* provision and, if so, whether the referenced “public interest” standard of review is satisfied such that FERC can require that the contract be modified to remove the right of first refusal. If the Commission determines that the contract is protected by a *Mobile-Sierra* provision and that the public interest standard of review cannot be satisfied (such as would be necessary to permit a contract modification directive), then the Commission need not consider whether the revisions submitted to the Commission jurisdictional tariffs and agreements comply with Order No. 1000; the contract provision at issue may simply be retained. However, if the Commission determines that the agreement is not protected by a *Mobile-Sierra* provision or that the Commission has met the applicable standard of review, then the Commission will assess the proposed revisions to Commission-jurisdictional tariffs and agreements, to determine whether they comply with Order No. 1000.<sup>25</sup>

- With regard to the criteria to be applied to determine an entity’s eligibility to propose a transmission project for selection in a regional plan, FERC clarified that it would be an impermissible barrier to entry to require, as part of the qualification criteria, that a transmission developer demonstrate that it either has, or can obtain, state approvals necessary to operate in a state, including state public utility status and the right to eminent domain, to be eligible to propose a transmission facility.<sup>26</sup>
- With regard to the process used to select a proposed transmission facility in a regional transmission plan, FERC explained that Transmission Providers in a transmission planning region must use the same process to evaluate a facility proposed by a nonincumbent transmission developer as they do for a facility proposed by an incumbent transmission developer.<sup>27</sup>
- FERC clarified that it will not subject a Registered Entity—an owner or user of the North American Electric Reliability Corporation (“NERC”) Bulk Power System—to a penalty for a violation of a NERC reliability standard caused by a non-incumbent transmission developer’s decision to abandon

a transmission project (any type of transmission facility selected in the regional transmission plan for purposes of cost allocation) if, on a timely basis, that Registered Entity identifies the violation and complies with all of its obligations under the NERC reliability standards to address it.<sup>28</sup>

- There may be instances where an incumbent Transmission Provider steps in to complete a transmission project it did not sponsor. In Order No. 1000-A, FERC explained that Order No. 1000 does not *require* an incumbent Transmission Provider to construct a transmission project abandoned by a nonincumbent transmission developer.<sup>29</sup> The Commission does not require that an incumbent transmission developer purchase the facilities, materials, or any other assets related to an abandoned project that the incumbent transmission provider determines it must complete. However, Order No. 1000 also does not *preclude* an incumbent transmission developer from purchasing such facilities, materials, or other assets if it believes it is prudent to do so.<sup>30</sup> FERC noted that it will consider requests for abandoned plant recovery on a case-by-case basis.<sup>31</sup>

**Interregional Coordination.** Under Order No. 1000, each Transmission Provider must establish procedures with each neighboring transmission planning region to coordinate and share the results of regional transmission plans (sharing information about both transmission needs and potential solutions to those needs) to identify possible interregional transmission facilities that could address transmission needs more efficiently or cost-effectively than separate regional transmission facilities.<sup>32</sup> These procedures can be adopted through an agreement between regions or through the adoption of common tariff language describing the process in the OATTs of the relevant Transmission Providers.<sup>33</sup> In Order No. 1000-A, the Commission denied requests for rehearing pertaining to interregional coordination, while offering clarification of Order No. 1000’s requirements:

- FERC explained that Order No. 1000 does not require or prohibit consideration of longer term transmission needs driven by Public Policy Requirements as part of interregional transmission coordination; however, such needs must be considered as part of regional coordination.<sup>34</sup> Order No. 1000 in this regard requires only the development of a formal procedure to identify and jointly

evaluate interregional transmission facilities that are proposed to be located in neighboring transmission planning regions.<sup>35</sup>

- In Order No. 1000, FERC explained that it does not require interregional transmission coordination procedures to meet the same standards as regional planning. In Order No. 1000-A, FERC clarified that a Transmission Provider must provide stakeholders with a meaningful opportunity to provide input into the development of its interregional transmission coordination procedures before those procedures are submitted to the Commission in its compliance filing, whether those procedures are included in its OATT or reflected in an interregional transmission coordination agreement. Stakeholders must be afforded sufficient time to meaningfully comment on a public utility transmission provider's proposed interregional transmission coordination procedures as they are being developed.<sup>36</sup>
- FERC further clarified that each Transmission Provider must describe in its OATT how its regional transmission planning process will enable stakeholders to provide meaningful and timely input with respect to the consideration of interregional transmission facilities. Moreover, each Transmission Provider must explain in its OATT how stakeholders and transmission developers can propose interregional transmission facilities for the public utility transmission providers in neighboring transmission planning regions to evaluate jointly.<sup>37</sup>

**Cost Allocation.** Order No. 1000 posited that each Transmission Provider must participate in a regional transmission planning process that has: (i) a regional cost allocation method for the cost of new transmission facilities selected in a regional transmission plan for purposes of cost allocation and (ii) an interregional cost allocation method for the cost of new transmission facilities that are located in two neighboring transmission planning regions and are jointly evaluated by the two regions in the interregional transmission coordination process. Instead of providing a uniform method of cost allocation, Order No. 1000 allowed Transmission Providers the opportunity to determine for themselves the optimal cost allocation methods based on their own regional needs; however, the Transmission Provider's methods of cost allocation must satisfy six cost allocation principles.<sup>38</sup> In Order No. 1000-A, the Commission

reaffirmed these cost allocation policies. In doing so, the Commission denied requests for rehearing and made the following clarifications:

- With regard to regional transmission facilities, FERC confirmed that each Transmission Provider must have in place a method (or methods) to allocate the costs of new transmission facilities selected in the regional plan.<sup>39</sup> FERC further clarified that cost recovery is a separate issue that is not addressed by Order No. 1000.<sup>40</sup>
- With regard to cost recovery for interregional transmission facilities, FERC clarified that all interested parties, including transmission customer load-serving entities, must have the opportunity to participate in the process of developing the interregional cost allocation method or methods.<sup>41</sup>
- FERC further clarified that one region cannot impose costs on another region for an interregional transmission facility without that region's consent. For an interregional facility to receive interregional cost allocation, each of the neighboring regions must select the facility in its regional transmission plan.<sup>42</sup>
- With regard to Cost Allocation Principle 2—that there must be no involuntary allocation of costs to nonbeneficiaries—FERC explained that Transmission Providers may rely on scenario analyses used by a Transmission Provider in preparing a regional transmission plan and the selection of new transmission facilities through such a plan. If a project or group of projects is shown to have benefits in one or more of the transmission planning scenarios by Transmission Providers in their Commission-approved Order No. 1000-compliant cost allocation methods, Principle 2 would be satisfied.<sup>43</sup>
- In connection with Cost Allocation Principle 4—that costs must be allocated solely within the transmission planning region—FERC clarified that this principle does not preclude an RTO from allocating to a withdrawing RTO member the cost of eligible transmission upgrades located solely in the RTO and approved before the member withdraws pursuant to a Commission-approved RTO agreement.<sup>44</sup>
- FERC explained that a “participant funding” model of cost allocation (which generally relies on the direct users of the facilities in question to finance the full costs of their construction) cannot be the regional or interregional

cost allocation method under Order No. 1000.<sup>45</sup> The Commission stated that where a project's costs are allocated under a participant funding method, that project, by definition, was not selected in the regional transmission planning process for purposes of cost allocation.<sup>46</sup>

- FERC restated that Order No. 1000 did not address or change the Commission's prohibition on "and" pricing—i.e., pricing models that would permit a Transmission Provider to recover both the incremental cost of an upgrade to its transmission system and the aggregate ("rolled-in") cost of its system including the upgrade.<sup>47</sup>

**Compliance.** Order No. 1000 was issued on July 11, 2001 and became effective on October 11, 2011. It expanded on the transmission planning and cost-allocation directives contained in FERC's Order No. 890, issued in 2007. FERC did not prescribe a "one-size-fits-all" approach and left it to each Transmission Provider to devise an appropriate method for compliance. As a result, Transmission Providers will have substantial discretion in implementing Order No. 1000, and approaches to compliance are expected to vary from region to region.

Transmission Providers that are part of FERC-jurisdictional RTOs and Independent System Operators ("ISOs") may demonstrate compliance through that RTO's or ISO's compliance filing and are not required to make a separate compliance filing. Transmission Providers that are not members of RTOs or ISOs must each submit compliance filings incorporating Order No. 1000's requirements in the Transmission Providers' individual OATTs.

Order No. 1000 requires Transmission Providers to submit compliance filings to implement Order No. 1000 in two steps. First, no later than October 11, 2012 (12 months after Order No. 1000's effective date), each Transmission Provider must submit a compliance filing to implement or otherwise demonstrate compliance with the regional components of Order No. 1000. Second, no later than April 11, 2013 (18 months after Order No. 1000's effective date), the Transmission Provider must amend its OATT as necessary to comply with those transmission planning and cost allocation requirements at the interregional level.<sup>48</sup>

In addition to reaffirming the methods of compliance for Order No. 1000, Order No. 1000-A made the following clarifications:

- A Transmission Provider will not be deemed out of compliance with Order No. 1000 for failure to reach agreement with neighboring non-public-utility transmission providers (i.e., municipal utility systems or other such entities that are beyond the jurisdiction of FERC) on a regional transmission planning process, interregional transmission coordination procedures, or a regional or interregional cost allocation method, provided that the Transmission Provider is able to demonstrate that it made a good faith effort to reach such agreement.<sup>49</sup>
- Transmission Providers that have received waiver of the obligation to comply with Order Nos. 888, 889, and 890 will not also have to seek waiver of Order No. 1000; such waiver is deemed granted.<sup>50</sup>
- The reciprocity requirement under Orders No. 888 and 890 remains unchanged; a non-public-utility transmission provider may continue to satisfy the reciprocity condition in any of three ways: First, it may provide service under a tariff that has been approved by the Commission under the voluntary "safe harbor" provision of the *pro forma* OATT, in which case it must offer service under its reciprocity tariff to any Transmission Provider whose transmission service the non-public-utility transmission provider seeks to use. Second, the non-public-utility transmission provider may provide comparable service to a Transmission Provider under a bilateral agreement. Finally, the non-public-utility transmission provider may seek a waiver of the reciprocity condition from the Transmission Provider.<sup>51</sup>
- In the absence of a safe harbor tariff, a non-public-utility transmission provider's obligation to a Transmission Provider to provide a comparable transmission service that it is capable of providing on its own system begins when that Transmission Provider requests comparable reciprocal service from the non-public-utility transmission provider. The Commission did not intend that it would enforce reciprocity tariff provisions *sua sponte*, except insofar as the Commission permits a Transmission Provider to refuse to offer open access transmission service to that non-public-utility transmission provider, in accordance with Order No. 888.<sup>52</sup>

In sum, although FERC made a number of clarifications in Order No. 1000-A, the absence of any significant change of direction demonstrates, from the standpoint of the Transmission Provider, the importance of continued diligent preparations for full compliance with Order No. 1000. The finer contours of FERC policy on new transmission infrastructure, particularly as to planning and cost treatment, will emerge as the Commission and market participants begin to grapple with issues raised by efforts to comply with this landmark order.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at [www.jonesday.com](http://www.jonesday.com).

### **James C. Beh**

Washington  
+1.202.879.3430  
[jcbeh@jonesday.com](mailto:jcbeh@jonesday.com)

### **Kenneth B. Driver**

Washington  
+1.202.879.7629  
[kbdriver@jonesday.com](mailto:kbdriver@jonesday.com)

### **Kevin J. McIntyre**

Washington  
+1.202.879.3917  
[kjmcintyre@jonesday.com](mailto:kjmcintyre@jonesday.com)

### **Carolyn Y. Thompson**

Washington  
+1.202.879.5426  
[carolynthompson@jonesday.com](mailto:carolynthompson@jonesday.com)

### **William Weaver**

Washington  
+1.202.879.7697  
[wweaver@jonesday.com](mailto:wweaver@jonesday.com)

## ENDNOTES

- 1 Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 136 FERC ¶ 61,051 (2011), 155 Fed. Reg. 49,842 (Aug. 11, 2011) (“Order No. 1000”).
- 2 Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 139 FERC ¶ 61,132 (May 17, 2012) (“Order No. 1000-A”).
- 3 Preventing Undue Discrimination and Preference in Transmission Service, 118 FERC ¶ 61,119 (March 15, 2007) (“Order No. 890”).
- 4 Order No. 1000-A P 233.
- 5 *Id.*
- 6 Order No. 1000 PP 68, 148, 153-54.
- 7 Order No. 1000-A P 275.
- 8 Order No. 1000-A P 276.
- 9 Order No. 1000-A P 176, 188.
- 10 Order No. 1000-A P 190.
- 11 Order No. 1000-A PP 204, 319.
- 12 Order No. 1000-A P 237.
- 13 Order No. 1000-A P 327-328.
- 14 Order No. 1000-A P 325.
- 15 Order No. 1000-A P 285.
- 16 Order No. 1000-A P 279.
- 17 Order No. 1000-A P 301.
- 18 Order No. 1000 P 225.

- 19 Order No. 1000-A P 416.
- 20 Order No. 1000-A P 420.
- 21 Order No. 1000-A PP 366, 423.
- 22 Order No. 1000-A P 427.
- 23 Order No. 1000-A P 426.
- 24 See *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (Mobile); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (Sierra); see also *NRG Power Marketing v. Maine Public Utilities Commission*, 130 S. Ct. 693 (2010) (reaffirming *Mobile-Sierra*).
- 25 Order No. 1000-A P 389.
- 26 Order No. 1000-A P 441.
- 27 Order No. 1000-A P 454.
- 28 Order No. 1000-A P 481.
- 29 Order No. 1000-A P 490.
- 30 Order No. 1000-A P 492.
- 31 Order No. 1000-A P 489.
- 32 Order No. 1000 P 396.
- 33 Order No. 1000 P 475.
- 34 Order No. 1000-A P 500.
- 35 Order No. 1000-A P 501.
- 36 Order No. 1000-A P 518.
- 37 Order No. 1000-A P 522.
- 38 Order No. 1000 P 603.
- 39 Order No. 1000-A P 613.
- 40 Order No. 1000-A P 616.
- 41 Order No. 1000-A P 637.
- 42 Order No. 1000-A P 635.
- 43 Order No. 1000-A P 690.
- 44 Order No. 1000-A P 714.
- 45 Order No. 1000-A P 727.
- 46 Order No. 1000-A P 736.
- 47 *Id.*
- 48 Order No. 1000 P 792.
- 49 Order No. 1000-A P 752.
- 50 Order No. 1000-A P 753.
- 51 Order No. 1000-A PP 771-773.
- 52 Order No. 1000-A P 774.

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