BRACEWELL

INSIGHTS

FERC Endeavors to Encourage Transmission Development in Coordination With States

June 28, 2021

*By: **Catherine P. McCarthy** and **Boris Shkuta***

At the June 17, 2021 Open Meeting, the Federal Energy Regulatory Commission ("FERC" or "Commission") issued a policy statement and an order reflecting its continued support for transmission project development and transmission investment to achieve federal and state renewable resource policy goals.

I. FERC Policy Statement on Voluntary Agreements

FERC's ***policy statement*** seeks to eliminate potential barriers to voluntary agreements providing for the construction of transmission facilities, including voluntary agreements involving one or more states ("Voluntary Agreement") ("Policy Statement").*[1]* The Policy Statement also identifies voluntary agreements between two or more transmission owners as being "within scope" although it largely focuses on transmission investment to support state initiatives. The Policy Statement emphasized that "Voluntary Agreements are not categorically precluded" by either the Federal Power Act ("FPA") or the Commission's implementation of the FPA.*[2]* Recognizing that FERC Order No. 1000 has not yet accelerated transmission development as many anticipated, the Commission explained its view that Voluntary Agreements may provide states "with a way to prioritize, plan, and pay for transmission facilities that, for whatever reason, are not being developed pursuant to the regional transmission planning processes required by Order No. 1000."*[3]* In the Policy Statement, the Commission also invited parties that consider existing FERC-jurisdictional tariffs to pose barriers to Voluntary Agreements to make a filing with FERC seeking to remove or otherwise address such tariff provisions.

The Policy Statement builds upon FERC precedent exhibiting support for voluntary arrangements related to the construction and allocation of costs of transmission facilities. For instance, the Policy Statement noted that Order No. 1000 permits "market participants, including states, to negotiate voluntary alternative cost sharing arrangements" other than the regional cost allocation methods implemented to comply with Order No. 1000.*[4]* The Commission also highlighted PJM Interconnection, L.L.C.'s ("PJM") State Agreement Approach to transmission planning, which provides a mechanism for states to require PJM to take steps to develop transmission solutions to help the state achieve its public policy goals and to assume the costs of such solutions.[5] FERC noted that it had recently accepted a study agreement between PJM and the New Jersey Board of Public Utilities that initiated a competitive solicitation process to solicit proposals for transmission facilities to interconnect and deliver 7,500 MW of offshore wind generation to New Jersey by 2035.[6] The study process is intended to identify more efficient or cost-effective transmission investment to satisfy the state's offshore wind goals.[7]

Commissioners James P. Danly and Mark C. Christie wrote separate concurrences to the Policy Statement. Commissioner Christie sought to clarify that Voluntary Agreements need not be limited to states within a Regional Transmission Organization ("RTO") or Independent System Operator ("ISO") footprint.[8] He noted that states that "wish to cooperate with other states which share similar public-policy goals – whether environmental, reliability or economic – have options for achieving regional benefits outside the context of RTO/ISO participation."[9]

Commissioner Danly reminded "everyone" that "each Voluntary Agreement must still individually pass muster under our statute [FPA] and regulations."[10] In other words, although the Policy Statement is intended to remove perceived barriers to the use of voluntary agreements to encourage transmission development, Commissioner Danly's view appears to be that the decision of a state to enter into an agreement to plan and pay for the costs of transmission facilities would not replace FERC review of the resulting transmission rates and allocation of costs.

The application of the FPA and FERC's requirements to a transmission project resulting from a Voluntary Agreement should not be overlooked. For instance, if a state entered into an agreement that appeared to establish the rates for transmission service over the facility at issue, it is possible that the agreement could attract opposition from third parties on the basis that the agreement represented an attempt by the state to exercise control over transmission rates that is preempted by FERC's exclusive jurisdiction under the FPA. While recent court decisions addressing the intersection between state and federal jurisdiction have given states significant flexibility to implement policies and programs in pursuit of state objectives even when they affect FERC-jurisdictional rates,[11] any Voluntary Agreements will need to be tailored to account for the relative jurisdiction of the states and FERC.

II. Joint Federal-State Task Force on Electric Transmission

At the same meeting, FERC also voted on an order issued pursuant to the seldom-used FPA Section 209(b),[12] establishing a first-of-its-kind Joint Federal-State Task Force on Electric Transmission ("Joint Federal-State Task Force").[13] The Joint Federal-State Task Force—a group comprised of every FERC Commissioner and 10 state public service commission commissioners to be nominated by the National Association of Regulatory Utility Commissioners ("NARUC") and confirmed by FERC— is tasked with identifying ways to increase federal-state coordination to improve the electric transmission development process. The 10 state commissioners will sit in an advisory capacity. FERC considers transmission development to be "ripe for greater federal-state coordination and cooperation" because federal and state regulators each exercise authority over transmission-related issues.[14] Over the next three years, after which the Joint Federal-State Task Force will expire unless its term is extended pursuant to an agreement between FERC and NARUC, the Joint Federal-State Task force will convene multiple formal public meetings, as well as possible regional meetings, to examine issues “related to efficiently and fairly planning and paying for transmission.”[15]

FERC delineated six specific topic areas that may be examined by the Task Force, all related to “efficiently and fairly planning and paying for transmission”:

- Identifying barriers that inhibit planning and development of optimal transmission necessary to achieve federal and state policy goals, as well as potential solutions to those barriers;
- Exploring potential bases for one or more states to use FERC-jurisdictional transmission planning processes to advance their policy goals, including multi-state goals;
- Exploring opportunities for states to voluntarily coordinate in order to identify, plan, and develop regional transmission solutions;
- Reviewing FERC rules and regulations regarding planning and cost allocation of transmission projects and potentially identifying recommendations for reforms;
- Examining barriers to the efficient and expeditious interconnection of new resources through the FERC-jurisdictional interconnection processes, as well as potential solutions to those barriers; and
- Discussing mechanisms to ensure that transmission investment is cost effective, including approaches to enhance transparency and improve oversight of transmission investment including, potentially, through enhanced federal-state coordination.[16]

The agenda for the first public task force meeting will be issued at least two weeks before the meeting, a not yet announced date. Although only 10 state commissioners will participate as Joint Federal-State Task Force members, FERC invited all state commissions to suggest agenda topics and submit comments before and after the meetings.[17] Also, FERC anticipates that staff from FERC, NARUC and the state commission representatives will support the work of the Joint Federal-State Task Force. The Press Release accompanying the order includes quotes from FERC Chairman Rich Glick thanking NARUC and this year’s NARUC President, Paul Kjellander (President of the Idaho Public Utilities Commission).

Interestingly, other federal administrative agencies have successfully relied on Federal-State Joint Boards. The Communications Act of 1934, enacted the year before the FPA, includes a parallel position to FPA Section 209(b) found at 47 U.S.C. § 410. The Federal Communications Commission has successfully relied on Federal-State Joint Boards such as the Federal-State Joint Board on Universal Service that has existed and promoted universal service since 1996, in part by assessing the impact of various universal service support mechanisms and the methods used to finance them.

---

[1] *State Voluntary Agreements to Plan and Pay for Transmission Facilities*, 175 FERC ¶ 61,225, at P 3 (2021).

[2] *Id.*

[3] *Id.* at P 2 (footnote omitted).

[4] *Id.* at P 3.

[5] *Id.*

[6] *Id.* at P 5.

[7] *Id.*

[8] *Id.* at P 2 (Christie, Comm'r, concurring).

[9] *Id.* at P 5 (Christie, Comm'r concurring).

[10] *Id.* at P 3 (Danly, Comm'r, concurring).

[11] ***FERC v. Electric Power Supply Assn., 136 S. Ct. 760 (2016)***; *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41 (2d. Cir. 2018); *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518 (7th Cir. 2018).

[12] 16 U.S.C. § 824h(b).

[13] *Joint Federal-State Task Force on Electric Transmission*, 175 FERC ¶ 61,224 (2021).

[14] *Id.* at P 2.

[15] *Id*. at P 3.

[16] *Id.* at P 6.

[17] *Id.* at P 3.