May 2, 2022

FERC Issues Notice of Proposed Rulemaking on Regional Transmission Planning, Cost Allocation and Related Matters

On April 21, the Federal Energy Regulatory Commission (FERC or the Commission) issued a major Notice of Proposed Rulemaking (NOPR) on electric regional transmission planning, cost allocation and related matters.[1] In this voluminous NOPR, the Commission proposes reforms to the *pro forma* Open Access Transmission Tariff (OATT) and *pro forma* Large Generator Interconnection Agreement to account for new regional transmission planning and cost allocation requirements. The NOPR is driven by the Commission's intent to facilitate electric transmission expansion/replacement, in part to address the anticipated change in the nation's resource mix to accommodate the clean energy future and in part by its concerns that current transmission planning processes and related rules may be unjust and unreasonable or unduly discriminatory or preferential. The NOPR follows last year's Advance Notice of Proposed Rulemaking (ANOPR) and the multitude of industry comments on the ANOPR.[2] While the ANOPR also sought comment on reforms related to cost allocation for interconnection-related network upgrades, the interconnection queue process, interregional transmission coordination and planning, and oversight of transmission planning and costs, the NOPR does not propose reforms related to those topics. The Commission notes that it plans to continue to review the record and address potential reforms related to those topics at a later date. Comments on the NOPR are due 75 days from its publication in the *Federal Register*, which as of the date of this advisory has not occurred, and reply comments are due 30 days later. Given the number of substantive reforms proposed in the NOPR, it is likely that some industry participants will seek an extension of time to comment. A final rule in this rulemaking proceeding could be issued by early 2023.[3] The NOPR addresses six main topics: (1) long-term regional transmission planning; (2) regional transmission cost allocation; (3) the construction-work-in-progress (CWIP) incentive; (4) the federal right of first refusal (ROFR) to construct new transmission facilities; (5) enhanced transparency for local transmission planning; and (6) interregional transmission coordination and cost allocation. The stated purpose of the NOPR is to remedy deficiencies in the existing regional transmission planning and cost allocation requirements to ensure that the more efficient or cost-effective transmission facilities are identified, planned and built, particularly to account for the increasingly diverse resource mix and demand. **1. Long-Term Regional Transmission Planning** The Commission devotes a significant portion of the NOPR to proposed reforms to the Long-Term Regional Transmission Planning process. The Commission states that the reforms "would require that public utility transmission providers conduct regional transmission planning on a sufficiently long-term, forward-looking basis to identify and plan for transmission needs driven by changes in the resource mix and demand."[4] The Commission specifically states that it is not proposing any change to the current near-term reliability and economic planning processes, but clarifies that the Order No. 1000 requirement to consider transmission needs driven by Public Policy Requirements will be met through the Long-Term Regional Transmission Planning requirement proposed in the NOPR. The Commission proposes several reforms within the theme of long-term regional transmission planning.

- **Long-Term Scenario-Based Planning:** The Commission proposes to require public utility transmission providers to develop and use long-term scenarios, based on multiple factors and assumptions, to forecast transmission needs, as part of Long-Term Regional Transmission Planning.
    - More specifically, the Commission proposes to require that public utility transmission providers:

      (1) use a transmission planning horizon no less than 20 years into the future to develop the long-term scenarios and review/revise the scenarios at least once every three years;

      (2) incorporate a set of Commission-identified categories of factors that may affect transmission needs driven by changes in the resource mix and demand into the long-term scenarios;

(3) develop a plausible and diverse set of at least four long-term scenarios;

(4) use the "best available data" to develop the scenarios; and

(5) consider whether to identify geographic zones with the potential for development of large amounts of new generation.[5]

- **Coordination Among Regional Transmission Planning and Generator Interconnection Procedures:** The Commission avers that the transmission needs driven by changes in the resource mix and demand are currently largely addressed through the interconnection processes, but the facilities often do not get built because of the significant cost and ultimate interconnection customer withdrawal. The Commission proposes to require "that public utility transmission providers consider in their Long-Term Regional Transmission Planning regional transmission facilities that address certain interconnection-related needs that the public utility transmission provider has identified multiple times in the generator interconnection process but that have never been constructed due to the withdrawal of the underlying interconnection request(s)."[6] Among other criteria, the regional transmission facilities must be identified in at least two interconnection queue cycles during the previous five years and have a voltage level of at least 200 kilovolts and/or an estimated cost of $30 million.
- **Evaluation of the Benefits of Regional Transmission Facilities:** In order to fully realize the goal of improving regional transmission facilities to meet the changes in the resource mix and demand, the Commission also proposes to reform the benefits determination that is undertaken during the process of selecting a transmission facility.
    - Specifically, the Commission proposes that as part of the public utility transmission providers' determination of the more efficient or cost-effective regional transmission facilities, they must:

      (1) evaluate the benefits of Long-Term Regional Transmission Facilities to meet identified transmission needs driven by changes in the resource mix and demand, identify which benefits they will use in Long-Term Regional Transmission Planning, explain how they will calculate those benefits, and explain how the benefits will reasonably reflect the benefits of regional transmission facilities to meet identified transmission needs driven by changes in the resource mix and demand; and

      (2) evaluate the benefits of Long-Term Regional Transmission Facilities over a time horizon that covers, at a minimum, 20 years starting from the estimated in-service dates of the transmission facilities.[7]
    - The Commission also proposes to allow (but not require) evaluation of the benefits of a portfolio of Long-Term Regional Transmission Facilities, rather than evaluation on only a facility-by-facility basis.
    - While the Commission declines to prescribe what benefits to use in the benefits evaluation, and will allow for regional flexibility, it does provide a list of types of benefits to consider, including: (1) avoided or deferred reliability transmission projects and aging infrastructure replacement; (2) either reduced loss of load probability or reduced planning reserve margin; (3) production cost savings; (4) reduced transmission energy losses; (5) reduced congestion due to transmission outages; (6) mitigation of extreme events and system contingencies; (7) mitigation of weather and load uncertainty; (8) capacity cost benefits from reduced peak energy losses; (9) deferred generation capacity investments; (10) access to lower-cost generation; (11) increased competition; and (12) increased market liquidity.[8]
- **Criteria for Selection of Long-Term Regional Transmission Facilities:** The Commission proposes to allow significant flexibility for public utility transmission providers to develop (through collaboration with stakeholders) selection criteria that they believe will best suit their region's needs as long as the selection criteria are just and reasonable and not unduly discriminatory.[9] Despite flexibility, the selection criteria would need to be transparent and not unduly discriminatory and seek to maximize benefits to consumers over time without overbuilding transmission facilities, and there would need to be a process to coordinate with the relevant state entities in the planning region to develop such criteria.[10]

- **Grid-Enhancing Technology:** The Commission proposes to require that public utility transmission providers more fully consider two specific technologies in their regional transmission planning and cost allocation processes: dynamic line ratings and advanced power flow control devices.[11]

2. Regional Transmission Cost Allocation For Long-Term Regional Transmission Facility cost allocation, the Commission proposes a collaborative method with the states, requiring public utility transmission providers in each planning region to seek the agreement of relevant state entities within the transmission planning region regarding the cost allocation method(s) that will apply to transmission facilities selected in the regional transmission plan for the purposes of cost allocation and revise OATTs to include the method(s).[12] The Commission's proposed reform specifically requires that public utility transmission providers in each transmission planning region revise their OATTs to include either (1) a Long-Term Regional Transmission Cost Allocation Method[13] to allocate the costs of Long-Term Regional Transmission Facilities, or (2) a State Agreement Process[14] by which one or more relevant state entities may voluntarily agree to a cost allocation method or (3) a combination of both. **3. CWIP** In Order No. 679, in response to the long lead time to construct new transmission facilities and associated cash flow problems, the Commission established an incentive whereby it allows for the recovery of 100 percent of CWIP costs in the rate base in certain circumstances. The Commission finds that the NOPR proposals may require additional protection for ratepayers, particularly given the incremental uncertainty and risk that the Long-Term Regional Transmission Facilities may not actually become "used and useful. " Given this risk, the CWIP incentive, if available, may "shift too much risk to consumers to the benefit of public utility transmission providers" in an unjust and unreasonable manner.[15] The Commission therefore proposes not to permit public utility transmission providers to take advantage of the CWIP incentive for Long-Term Regional Transmission Facilities.[16] Elimination of the CWIP incentive would apply only to facilities identified in the Long-Term Regional Transmission Planning process allowing developers of other types of transmission facilities to seek recovery of 100 percent of CWIP for those projects. Further, the Commission's regulations that permit recovery of 50 percent of CWIP are not impacted and would apply to projects identified in the Long-Term Regional Transmission Planning process. **4. Federal ROFR** In Order No. 1000, the Commission eliminated the federal ROFR for incumbent transmission providers with respect to entirely new transmission facilities selected in a regional transmission plan, with some exceptions. However, in the NOPR, the Commission notes that in the decade since Order No. 1000, its understanding of competitive transmission development and the exercise of the federal ROFR has evolved, and it now proposes to permit, but not require, the exercise of a federal ROFR for any transmission facility selected in a regional transmission plan for purposes of cost allocation, conditioned on the incumbent transmission provider with the federal ROFR for such regional transmission facilities establishing joint ownership of the transmission facilities.[17] Importantly, and significantly reducing the opportunities for competitive solicitations, the Commission proposal includes the following items:

- An incumbent transmission provider may establish qualifying joint ownership criteria with only *unaffiliated* nonincumbent transmission developers or another *unaffiliated* entity, including another incumbent transmission provider.
- Incumbent transmission providers will be given an opportunity to exercise their ROFR and submit a jointly owned regional transmission facility proposal *before* the initiation of the competitive transmission development process.
- If an incumbent transmission provider submits a conforming, jointly owned regional transmission facility proposal, the proposal will be evaluated without going through the competitive transmission development process.

5. Enhanced Transparency and Right-Sizing Facilities The Commission aims to address its concerns regarding transparency between regional and local transmission planning processes and the efficiency of replacing aging transmission infrastructure.

- **Transparency:** The Commission proposes to require that public utility transmission providers in each transmission planning region revise the regional transmission planning process in their OATTs with additional provisions to enhance transparency of:

  (1) the criteria, models and assumptions that they use in their local transmission planning process;
  (2) the local transmission needs that they identify through that process; and
  (3) the potential local or regional transmission facilities that they will evaluate to address those local transmission needs.[18]
- **Right-Sizing:**[19] The Commission proposes to require that "as part of each Long-Term Regional Transmission Planning cycle, public utility transmission providers in each transmission planning region evaluate whether transmission facilities

operating at or above 230 kV that an individual public utility transmission provider that owns the transmission facility anticipates replacing in-kind with a new transmission facility during the next 10 years can be 'right-sized' to more efficiently or cost-effectively address regional transmission needs identified in Long-Term Regional Transmission Planning."[20]

6. Inter-Regional Transmission Coordination Finally, the Commission proposes to require that public utility transmission providers revise their existing interregional transmission coordination procedures adopted in compliance with Order No. 1000 to apply them to the proposed Long-Term Regional Transmission Planning reforms.

- Specifically, the Commission proposes to require that public utility transmission providers in neighboring transmission planning regions revise their existing interregional coordination procedures (and regional transmission planning processes as needed) to provide for:

  (1) the sharing of information regarding the respective transmission needs identified in the Long-Term Regional Transmission Planning that it proposes to require in that section above, as well as potential transmission facilities to meet those needs; and
  (2) the identification and joint evaluation of interregional transmission facilities that may be more efficient or cost-effective transmission facilities to address transmission needs identified through the Long-Term Regional Transmission Planning.[21]

Compliance The Commission proposes to require compliance filings to be due eight months after the final rule becomes effective.[22] **Observations**

- Issuance of the NOPR was based on a 4-1 decision by the Commission, with the Chair and three Commissioners supporting the NOPR and one Commissioner dissenting.
- Commissioner Danly's dissent views this rulemaking as designed to encourage the massive transmission build-out required to transition to a renewable, clean energy future, and that is what it appears to be, but it is also combined with legitimate concerns about the inefficient piecemeal development of transmission infrastructure and failure to plan on a long-term basis to meet reasonably anticipated needs.
- This rulemaking proceeding now has sufficient support among the Commissioners, and momentum and focus, to result in a final rule by early 2023, with compliance due before the end of 2023.
- Compliance will entail significant discussions and interaction among transmission providers (including regional transmission organizations/independent system operators), stakeholders and the states within the regions.
- As with other landmark final rules, there will likely be challenges to the Commission's authority to make the kinds of changes it is proposing in the NOPR, but the NOPR, together with the precedent of past planning and cost allocation orders, provides a defensible position to withstand challenges.
- The ROFR proposal will likely significantly reduce the number of competitive solicitation processes that are tailored to identify the more efficient and cost-effective transmission projects or solutions.
- The role of the states in regional transmission planning will be substantially increased in the development of scenarios, the identification of need, the evaluation and selection of solutions, and cost allocation, which aligns with the fact that state public policy requirements are a major driver of the need for Long-Term Regional Transmission Planning to meet anticipated demand.
- The final rule that is likely to come out of this proceeding will almost certainly launch major new investments in transmission infrastructure.

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[1] *Building the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, 179 FERC ¶ 61,028 at P 56 (2022) (NOPR) https://ferc.gov/media/rm21-17-000.

[2] *Building the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, 176 FERC ¶ 61,024 (2021) https://www.ferc.gov/media/e-1-rm21-17-000.

[3] Concurrent with the issuance of the NOPR, the Commission also issued a Notice of Technical Conference on Transmission Planning and Cost Management in Docket No. AD22-8-000 to "explore measures to ensure sufficient transparency into and cost effectiveness of local and regional transmission planning decisions, including: (1) the role of cost management measures in ensuring the cost[-]effective identification of local transmission needs (e.g., planning criteria) and solutions to address identified local transmission and regional reliability-related transmission needs; and (2) cost considerations and the processes through which transmission developers recover their costs to ensure just and reasonable transmission rates." The technical conference will be held on October 6.

[4] *Building the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, 179 FERC ¶ 61,028 at P 56 (2022) (NOPR).

[5] NOPR at P 78.

[6] *Id*. at P 107.

[7] *Id*. at P 175.

[8] *Id*. at P 183. However, the Commission acknowledges commenters' support for the adoption of a common set of *minimum* benefits and proposes a list of Long-Term Regional Transmission Benefits.

[9] *Id.* at P 243.

[10] *Id*. at P 241.

[11] *Id.* at P 272.

[12] *Id.* at P 279.

[13] The Commission proposes to define "Long-Term Regional Transmission Cost Allocation Method" as an e*x ante* regional cost allocation method that would be included in each public utility transmission provider's OATT as part of Long-Term Regional Transmission Planning. The developer of a Long-Term Regional Transmission Facility would be entitled to use the Long-Term Regional Transmission Cost Allocation Method if it is the applicable method. *Id.* at n. 508.

[14] The Commission proposes to define "State Agreement Process" as an *ex post* cost allocation process that would be included in each public utility transmission provider's OATT as part of Long-Term Regional Transmission Planning, which may apply to an individual Long-Term Regional Transmission Facility or a portfolio of such Facilities grouped together for the purposes of cost allocation. After a Long-Term Regional Transmission Facility is selected in the regional transmission plan for the purposes of cost allocation, the State Agreement Process would be followed to establish a cost allocation method for that facility (if an agreement can be reached). If the Commission subsequently approves the cost allocation method that results from the State Agreement Process, the developer of the Long-Term Regional Transmission Facility would be entitled to use that cost allocation method if it is the applicable method. *Id.* at n. 509.

[15] *Id.* at P 332.

[16] The Commission does note that "public utility transmission providers may still book costs incurred during the preconstruction or construction phase as Allowance for Funds Used During Construction." *Id.* at P 333.

[17] *Id.* at P 336.

[18] *Id.* at P 400.

[19] The Commission states: "By 'right-sizing' we mean the process of modifying a public utility transmission provider's in-kind replacement of an existing transmission facility to increase that facility's transfer capability." *Id.* at P 403.

[20] *Id.* at P 403.

[21] *Id.* at P 427.

[22] *Id.* at P 430.

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