**It's Not Easy Transmitting Green**

**FERC will face challenges in balancing a push for renewable energy with statutory duties on rates.**

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The Obama administration aims to double the electric power produced from renewable resources (such as hydro, solar, wind, geothermal, and biomass) by 2012. At the same time, the administration is focusing on how to spur expansion and refurbishment of the electric transmission grid.

Why the focus on transmission in the context of renewable energy? Many desirable renewable resource sites are located far from the existing transmission grid, meaning that significant transmission investment will be needed to connect these sources to the grid.

The Federal Energy Regulatory Commission has exclusive jurisdiction under the Federal Power Act over the rates and terms for transmission service in interstate commerce by public utilities. With the administration's strong emphasis on renewable energy and electric transmission now on the front burner, what are the legal and regulatory issues that the commission will face? What authority does the commission have or need for these challenges?

**SITING BATTLES**

With all the costs of building transmission infrastructure come significant risks. Developers confront siting, regulatory, and financial hurdles. Transmission siting can be a lengthy process even for relatively short transmission lines and upgrades, but the risk is greatly compounded in construction of new 1,000-mile lines. Uncertainties in the permitting and citing process affect the ability to obtain financing for these projects.

Although FERC has exclusive authority for siting interstate natural gas pipelines, it does not enjoy the same level of jurisdiction with electric transmission siting. The Energy Policy Act of 2005 (EPAct 2005) and FERC's implementing regulations enable FERC to issue permits for the construction or modification of transmission facilities that are located in "national interest electric transmission corridors" designated by the Department of Energy. The DOE has to follow a process for the designation of these corridors, allowing for public comment and objection. Currently, the DOE has designated two such corridors, one in the mid-Atlantic and the other in the Southwest.

FERC's ability to issue such permits for siting and constructing transmission projects is limited to those within these corridors. It is further limited to situations where a state does not have the authority to grant such a permit for construction, the state has withheld approval for over one year, or the state has conditioned approval in such a way that would not significantly reduce interstate transmission congestion and is not otherwise economically feasible. In light of these limitations, FERC's authority is referred to as "backstop" authority.

FERC adopted regulations that would allow it to consider a siting application under EPAct 2005 where a state denied an application within one year of its filing.

However, in February the U.S. Court of Appeals for the 4th Circuit concluded in *Piedmont Environmental Counsel v. FERC* that FERC incorrectly construed the statutory phrase "withheld approval for more than one year after the filing of an application" to allow the commission to assert authority where a state has outright denied the application within one year of filing. Under the 4th Circuit's decision, if a state commission denies permits for lines within one year of filing, FERC's backstop authority is not triggered and it cannot trump the state decision.

Regardless of whether one agrees with the 4th Circuit's analysis, unless overturned by the Supreme Court, FERC's already limited jurisdiction was further circumscribed by the court. Congress may take up proposed legislation to further expand FERC jurisdiction in this area this year, spurred in part by this court decision. Recently, Senate Majority Leader Harry Reid (D-Nev.) introduced legislation that would give backstop authority for site transmission lines in which at least 75 percent of the capacity is reserved for renewable resources within designated "renewable energy zones."

**TRANSMISSION RATE INCENTIVES**

Whereas FERC's siting authority is limited, its rate-making authority enjoys wider latitude. EPAct 2005 also required FERC to establish incentive-based rate methodologies for transmission facilities for which it seeks incentives either to ensure reliability or reduce the cost of delivered power by reducing congestion. The commission subsequently issued Order No. 679, which established the process to seek rate incentives and how the statutory standard for the incentives would be met.

FERC has issued several orders granting incentive rates for certain transmission facilities. The orders grant incentives such as return on equity adders, as well as recovery of 100 percent construction work in progress costs, prudently incurred abandoned plant costs if the project is abandoned through no fault of the applicant, and pre-commercial costs not included in construction work in progress costs.

In these cases, the applicant must demonstrate that its project is not routine, so it deserves special rate incentives. This rewards developers who use advanced technologies and undertake projects of significant scope and risk, and the incentives go hand-in-hand with the push for renewable resources. For example, the Tallgrass Transmission and Prairie Grass Transmission companies successfully argued that their proposed wind generation facilities were not routine because they were designed to provide access to "remote, locationally-constrained renewable resources."

Applications for rate incentives are not without objection. Who will pay for these projects? How will the incentive transmission rates be recovered from ratepayers who do not wish to be subject to excessive or unreasonable costs? How should costs be allocated where the expensive interconnection and transmission facilities are built in one region, but the power is transmitted to another region? FERC itself has to establish a reasonable basis not only for the incentive rates, but for how the related costs will be reflected in rates paid by customers, including determining which region or regions should bear these costs.

Other than sheer costs, protesting parties have also called the Tallgrass and Prairie Grass proposals speculative because they are predicated on the completion of many wind generators that may or may not come to fruition.

Industry participants and their counsel will square off on these issues, and FERC will have to reconcile its approach in balancing its statutory duty of ensuring that jurisdictional transmission rates are just and reasonable with the administration's goal of greatly expanding access to renewable resources.

In a February 2009 order, FERC considered another type of incentive rate when it approved an application for a 1,000-mile line to transmit energy from wind facilities in Montana to the southwest. Specifically, in an order involving the Chinook and Zephyr Power Transmission projects, the commission permitted the transmission developers to reserve 50 percent of the proposed capacity for renewable resource "anchor shippers" to generate early stable funding.

This innovative solution expands the options beyond the previous approach of using a competitive "open season" auction to sell capacity. In other words, transmission owners can now fill a portion of the capacity on their lines early and on a long-term basis by agreements with renewable energy generators instead of facing these enormous risks with no guaranteed customers. Only the remaining capacity would be made available through an "open season" auction.

Although the Chinook and Zephyr order approved anchor shipper sales that would lock up 50 percent of the proposed line's capacity, indicating that FERC will consider similar limits on a case-by-case basis, some transmission owners have sought to push the anchor shipper concept even further. Northeast Utilities filed a rate plan with the commission on Dec. 12, seeking to dedicate all of its initial 1,200 megawatts of capacity to renewable power generator Hydro-Quebec. The line could be expanded by 300 megawatts if there was sufficient interest from customers. The proposal is still pending, but the industry eagerly awaits the commission's decision.

In sum, an emphasis on significantly increasing reliance on renewable energy resources necessarily entails a focus on building and paying for new transmission grids and expanding existing ones. Because many of the desired renewable energy resource sites are so far from the existing grid, expensive transmission upgrades and lines will be needed.

Although industry participants may debate whether renewable resources should receive even more or significantly less attention and financing and other resources, the administration has unquestionably inaugurated its renewable energy goals.

Affected parties thus will need to respond by evaluating their positions and developing a sound legal and regulatory strategy regarding the rates and allocation of costs of the new transmission projects.

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