

## 5 Takeaways From FERC's Grid Planning Policy Overhaul

By **Keith Goldberg**

*Law360 (May 14, 2024, 10:16 PM EDT)* -- The Federal Energy Regulatory Commission's sweeping revision of its regional transmission planning policies will completely transform how U.S. grid projects are planned and paid for.

In finalizing Order No. 1920 on Monday, FERC put into place the linchpin of its multiyear effort to encourage the new transmission development that's needed to accommodate both increased electricity demand and clean energy looking to get onto the grid.

By directing utilities and regional grid operators to create longer-term regional plans and a framework for allocating project costs, FERC watchers say the agency is embracing a top-down approach to building and expanding interstate transmission, rather than the bottom-up, project-by-project approach that's been the norm for decades.

"The reason it's historic is because it looks at the bottom-up transmission process and recognizes that it's more participatory but less efficient than a top-down transmission process," said Suedeen Kelly, a former FERC commissioner who co-chairs the energy practice at Jenner & Block LLP.

Compliance with Order 1920 for utilities and grid operators will be daunting — the order clocks in at a whopping 1,364 pages — and puts states on the spot to meaningfully engage in long-term transmission planning and cost allocation, or risk being shut out of the process.

And legal challenges to the rule are likely, fueled by Commissioner Mark Christie's fiery dissent claiming FERC has overstepped its authority by pushing a clean energy agenda at the expense of state authority and consumer protection.

But between past failures by FERC to move the needle on regional transmission planning — including 2011's Order No. 1000 — and Congress failing to provide a legislative fix, the agency should be applauded for the sizable push it's making to ensure the future buildout of the grid, said Neil Chatterjee, a former FERC chairman who is now a senior adviser at Hogan Lovells.

"Somebody needed to step up and rip the Band-Aid off," Chatterjee said, citing his **own frustration** with advancing revisions of regional transmission policies while at FERC. "[FERC commissioners] stepped in and made a bold decision. Is it going to be perfect? No, but somebody had to do something."

Here are five key takeaways from FERC's final rule:

## FERC Is Firmly in the Driver's Seat

Between requiring transmission owners and regional transmission organizations, or RTOs, to look at least 20 years into the future when crafting regional transmission plans and updating those forecasts every five years, as well as coming up with at least one cost allocation plan for long-term projects that doesn't require unanimous buy-in from states, FERC has crafted a muscular rule that goes further than what some observers expected.

"There were ways the majority could have compromised that would have made it a big waste of time," said Rob Gramlich, president of transmission consulting and advocacy firm Grid Strategies LLC. "It's a meaningful rule that will have a major impact."

For example, many of the final rule's requirements that transmission companies consider several factors when making regional plans and use several economic and reliability cost benefits when evaluating potential long-term transmission projects were optional when the rule was initially proposed in 2022, Gramlich said.

And while the finalized rule gives states a place at the cost allocation discussion table, including the option for companies to accept state-negotiated plans, it also makes clear that FERC and transmission owners can move ahead without state input if necessary, attorneys say.

"It would hopefully incentivize states to get together," said Kelly of Jenner & Block.

In his dissent, Christie said that by mandating consideration of factors such as state and corporate clean energy policies without considering policies from states that might not align and not allowing such states to opt out of paying for projects it hasn't agreed to, FERC is rendering states mere spectators and undermining their authority over whether and where projects should be built.

The National Association of Regulatory Utility Commissioners, the umbrella advocacy group for state utility regulators, said in a Tuesday statement that it is "generally disappointed by the significantly diminished state role envisioned by the FERC order with respect to transmission planning and cost allocation."

But there has to be some sort of federal backstop for any regional planning and cost allocation to ensure projects actually get built, attorneys say.

"If states were to have a de facto veto over cost allocation rules, that would stymie transmission development, especially within multistate RTOs," said Mintz Levin Cohn Ferris Glovsky and Popeo PC member Steven Shparber, who previously worked at both FERC and PJM Interconnection, the nation's largest regional grid operator.

And attorneys say the possibility of cost allocation plans without state input won't necessarily doom any existing state-level efforts on that issue. Kelly noted that New England states have recently collaborated with regional grid operator ISO New England Inc. to produce a long-term transmission planning process that includes the states agreeing on cost allocation.

"If a state approach is working in an RTO, I'm not sure it will go out the window," said Jenner & Block special counsel Anand Viswanathan, a former FERC official.

Chatterjee of Hogan Lovells said that while he was at FERC, several state utility regulators told him privately that they'd prefer the agency to be the lead dog on transmission planning, but that they would face heat back home if they said so publicly.

"This is FERC doing the difficult, boring good," Chatterjee said of the final rule.

### **Compliance Will Be a Bear**

Attorneys say making 20-year projections of future grid needs while considering a broad scope of factors will be challenging for transmission owners and regulators used to making shorter-term electric generation and transmission plans.

"Implementing it is more than just changing the transmission planning rules; they have to translate those rules into a culture," Kelly said. "That will be done planning region by planning region, or not."

Morgan Lewis & Bockius LLP energy regulatory partner Dan Skees said the reevaluation provisions of Order 1920 will be especially critical, since transmission developers could be assigned projects that are eventually determined to be unneeded.

Developers will have to think about how much reliance they can place on building certain projects, while grid operators and utility regulators will have to determine how much protection ratepayers need from paying for projects based on grid needs that could ultimately change, Skees said.

"To the extent the final rule is not prescriptive, this will be an essential, if underappreciated, focus of the compliance filings," Skees said.

Gramlich of Grid Strategies said that level of proactiveness could be a rude awakening for utilities and transmission owners in regions of the U.S. not covered by regional transmission organizations, which includes most of the West and Southeast.

However, Mintz's Shparber said the heaviest lift will likely be borne by the multistate grid operators.

"The RTOs are going to have more challenges compared to single utilities, especially utilities in a single state, just because if you take a PJM or [Midcontinent Independent System Operator] or Southwest Power Pool, those have multiple states with diverse energy policies," Shparber said. "If you're a single utility in a state and you maybe for the first time look at what neighboring utilities or states are doing, especially from a policy standpoint, that may be a challenge you've not had to deal with."

But attorneys also say that FERC has given utilities and grid operators a fairly long runway to submit compliance plans: 10 months from when the rule goes into effect, which is 60 days after it's published in the Federal Register. And FERC has historically been pretty generous about granting extensions, attorneys noted — the agency handed out several extensions to submit compliance plans for **last year's Order 2023**, which revised FERC's policies for connecting electric generation projects to the grid.

### **FERC Punts on Right of First Refusal**

FERC had originally proposed the restoration of a federal right of first refusal for incumbent transmission companies before new companies can build regionally planned projects, as long as the incumbent

companies establish joint ownership of those projects. The agency removed that in the final rule, but didn't slam the door on the idea either, saying it could be revisited in a future proceeding.

FERC also said a right of first refusal could be used in other instances, such as transmission owners who are replacing their own aging facilities as part of a long-term plan.

The partial restoration of a federal right of first refusal, which had been yanked by Order 1000, was one of the more controversial pieces of the original 2022 proposal. Utilities had pushed for it, but transmissions developers, consumer advocates and federal antitrust officials were opposed to it.

FERC watchers say the agency likely figured that since they're going to have their hands full with challenges to the rule's core provisions covering planning and cost allocation, it made sense to put the right of first refusal issue on the back burner.

"I think they wanted to really focus on those issues and didn't want to also have to defend adding a conditional right of first refusal, which a lot of transmission developers were going to fight tooth and nail," Shparber said.

### **Legal Fights Await**

Christie's dissent telegraphed several potential legal challenges to the rule. Attorneys say the legal argument to watch might be that FERC's interpretation of its Federal Power Act authority isn't entitled to deference, especially given that the U.S. Supreme Court appears poised to alter or overturn so-called Chevron deference in *Loper Bright Enterprises et al. v. Gina Raimondo*.

In voting to approve Order 1920, FERC Chairman Willie Phillips and Commissioner Allison Clements, both Democrats, said the agency took a similar approach as it did with Order 1000, which was upheld by the D.C. Circuit. But attorneys note that the appellate court's rationale was partly based on Chevron deference, which requires judicial deference to regulators in disputes over ambiguous statutes.

"If the Supreme Court modifies Chevron deference by the time this gets up on appeal, it'll be interesting to see how a court deals with it," Shparber said.

Viswanathan of Jenner & Block, who spent time in FERC solicitor's office, said agency attorneys would likely avoid making any arguments that the FPA is ambiguous and that FERC is entitled to deference. Instead, they'd likely argue that the FPA clearly gives FERC exclusive authority over regional transmission issues, he said.

Republican Commissioner Christie contends that FERC is violating the so-called major questions doctrine, which says large-scale regulatory initiatives that have wide impacts can't be grounded in vague, minor and obscure provisions of law without clear congressional authorization.

But attorneys say what exactly triggers the major questions doctrine remains murky; that FERC has been using the relevant provisions of the FPA for years; and that the rule is within FERC's exclusive jurisdiction.

"It's been understood for a long time that regional transmission planning directly affects wholesale electricity rates," Viswanathan said.

Beyond challenges to the rule itself, attorneys expect there will be plenty of challenges to individual pieces of the rule, as well as its implementation.

"For example, when the transmission planning entities come up with cost allocation plans, you're going to see a lot of litigation," Jenner & Block's Kelly said.

### **A Holistic Approach to Transmission**

Order 1920 is the single biggest policy change in a series of transmission policy overhauls FERC has pursued in recent years, and it isn't hard to see what its influence will be on both rules already enacted and future rules.

For instance, FERC issued Order 1920 almost a year after finalizing Order 2023, a rewrite of the agency's standard generator interconnection procedures and agreements that aims to break the growing logjam of clean energy projects looking to get on the grid. But FERC watchers say Order 1920 is what's going to help maximize the effectiveness of Order 2023.

"You're not going to solve interconnection without robust regional planning," Gramlich of Grid Strategies said.

Gramlich added that Order 1920 will also figure prominently in future FERC transmission rules.

"You could see them acting on inter-regional transmission in the next year or so, but I expect a lot of the heavy lifting and hard work has been done in this rule, and they can do a fair amount of cutting and pasting in the inter-regional context," he said.

Between Orders 1920 and 2023 — plus the implementation of FERC's backstop siting authority for transmission projects within national corridors designated by the U.S. Department of Energy, which the agency also finalized on Monday — experts say FERC is clearly eager to smash the fits-and-starts status quo of U.S. grid development.

"The combination of orders shows that FERC is very serious about trying to get transmission built and updating the grid," Shparber said.

--Editing by Alanna Weissman and Michael Watanabe.