A Sequential Assessment of Order 1000, a Mysteriously Disappearing Dissent, and Prospects on Appeal

FERC Order No. 1000 has generated many comments on its substantive requirements. But its substance won't matter if the landmark rule doesn't survive judicial review. Here are predictions from an appellate practitioner on how the D.C. Circuit may view Order No. 1000.

by Carolyn Elefant

Editor's Note: The Federal Energy Regulatory Commission's Order No. 1000 is evolutionary rather than revolutionary, in that it continues a line of FERC rulemakings including Order 888, requiring open access to transmission, and Order 890, which sets forth requirements for a regional transmission planning process. The perceptive analysis and comments that follow were posted by FERC practitioner Carolyn Elefant on her law firm's website. We present them here in edited form.

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After Order No. 1000 issued, my first thought was "Which circuit is going to hear it?" Under Section 313 of the Federal Power Act, a petition for review of Order No. 1000 may be filed in the D.C. Circuit or in any of the other federal circuits where a licensee or utility impacted by the order is located. Since Order No. 1000 applies to over 160 utilities, any circuit could have been a contender to review the Commission's landmark rule. Initially, it

appeared that there might be some split, with the Sacramento Public Utility District (SMUD) filing the first petition for review in the Seventh Circuit, followed by several other petitions. Filings by the Coalition for Fair Transmission Policy, PSEG, and South Carolina Public Service Authority were all docketed in the D.C. Circuit. Now, of course, the suspense is over: The D.C. Circuit was chosen as the court where Order No. 1000 petitions for review will be consolidated. Here's how the petitions wound up in the D.C. Circuit, as well as some thoughts on whether the D.C. Circuit was a better choice than the Seventh Circuit.

By way of background, after SMUD filed its petition for review in the Seventh Circuit, the FERC filed an unopposed motion to transfer SMUD's petition to the D.C. Circuit for the convenience of all parties. But notwithstanding that the Commission's motion was uncontested, rules are rules, asserted Judge Easterbrook in his rather prickly denial of the Commission's request.

Because the multi-district jurisdiction statute[1] kicks in when appeals are filed in competing circuits within ten days of a final order, the ability to transfer the case was out of the Seventh Circuit's hands, according to Judge Easterbrook. By statute, the Judicial Panel must select the appropriate forum by lot, at which point the circuit chosen may entertain transfer requests for reasons of convenience.

Events followed as Judge Easterbrook described. The Commission filed a Notice of the Multi-circuit Petition with the Judicial Panel on Multidistrict Litigation. And on June 13, 2012, that panel randomly chose the D.C. Circuit for consolidation of the petitions.

But is the D.C. Circuit the right place from the perspective of petitioners? On the surface, the Seventh Circuit seemed like a strong bet for petitioners, given that circuit's 2009 decision in Illinois Commerce Commission v. FERC. There, the Seventh Circuit vacated and remanded FERC's approval of a region-wide (or "postage stamp") cost allocation mechanism for new high-voltage transmission projects in the PJM region because the Commission had failed to offer "even the roughest of ballpark estimates" of the benefits that contributing ratepayers would receive from the project. (The Commission has since essentially reaffirmed its position in its Order on Remand, issued March 30, 2012, with Commissioner La Fleur dissenting.) Meanwhile, in Order 1000, the Commission couldn't resist highlighting that its requirement that any cost allocation methodology developed under the rule must reflect principles of cost causation compliant with the Seventh Circuit's *ICC* decision. Therefore, it's only natural that challengers would want to go to the Seventh Circuit for a ruling on whether Order 1000's cost allocation principles are indeed consistent with the *ICC* precedent.

[1] 28 U.S.C. §2112.

Still, with the exception of the cost allocation issue in the *ICC* ruling, there really isn't any compelling reason for petitioners to seek review at the Seventh Circuit. Order 1000 is rooted in the Federal Power Act and in Order No. 888, which issued 20 years ago. While the Seventh Circuit has its energy experts (notably, Judge Richard Cudahy), overall that circuit isn't as up to speed on energy regulatory minutiae as the D.C. Circuit. Had the case been heard in the Seventh Circuit, petitioners likely would have needed to devote more time and, critically, more verbiage in their word-limit constrained briefs to educate the court, limiting their arguments on the merits.

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Also, while the Seventh Circuit did indeed vacate the Commission's order in *ICC v. FERC*, that case centered on cost-allocation, which in turn involves lots of economic analysis – one of the Seventh Circuit's strengths. Because of its law and economics background, the Seventh Circuit could confidently take the Commission to task for a loosey-goosey cost-causation analysis. But the Order 1000 appeal focuses on traditional administrative law issues of statutory construction and *Chevron* analysis – issues that the D.C. Circuit has more experience resolving than any other circuit. The D.C. Circuit has not hesitated to vacate not just case-specific rulings (like *ICC*) but also agency rules. *See, e.g.*, National Fuel v. FERC (vacating Commission gas pipeline affiliate codes of conduct).

So, even though Order 1000 landed in the D.C. Circuit by random selection, sometimes fate gets things right.

Postscript: Following resolution of the forum selection questions, several other entities decided to join the Order 1000 party at the court. In addition to the early round of petitioners mentioned earlier, Edison Electric Institute, APPA, NRECA, Southern Companies, Alabama Public Service Commission, the Large Public Power Council, First Energy, MISO and MISO Transmission Owners all filed timely petitions to review. In addition, twenty entities also moved to intervene. It should be interesting to see how these odd bedfellows cooperate – and cooperate, they must, because the D.C. Circuit does not take kindly to duplicative briefings by multiple parties.

The Mysteriously Disappearing Dissent of Commissioner Moeller and What It Might Mean

Back in July 2011 when Order 1000 issued, Commissioner Moeller expressed substantial praise for the final rule, but dissented in part, criticizing the Commission's decision to require elimination from open access tariffs (OATT) rights of first refusal (ROFR) – *i.e.*, the priority held by incumbent transmission providers to own, construct and operate new

transmission within their local service territory.

First, Commissioner Moeller expressed concern that reliability might suffer as a result of ROFR elimination, since, if a non-incumbent provider is chosen to build a transmission project and later abandons it, the final rule grants it a blanket waiver of penalties from NERC reliability standards. By contrast, if FERC permitted incumbent providers to retain ROFR for their service territory, they would remain responsible for reliability and a broad waiver would not have been necessary.

Second, Commissioner Moeller argued that to the extent that the Commission harbored concerns about the anti-competitive impacts of ROFR, it could have adopted a more narrowly tailored remedy than eliminating ROFR entirely. In Moeller's view, the Commission should have allowed incumbent utilities ninety days to decide whether to exercise the ROFR to construct the transmission project, after which a non-incumbent utility would have an opportunity. In this way, he argued, incumbents could not endlessly block competitors from building needed transmission.

On rehearing, several commenters asked the Commission to adopt Commissioner Moeller's alternative approach to elimination of ROFR. (Download the bundled packet and search "Moeller" in the Rehearing PDF file). Yet, the Order on Rehearing doesn't mention the support for Commissioner Moeller's dissenting position. The rehearing order also summarily rejects the 90-day "use it or lose it" option for ROFR (Order at 327), asserting that even a limited exercise period would still discourage new transmission and result in unjust rates. But this time Commissioner Moeller joined the majority, while his previously dissenting view supporting a 90 day election (and expressing other concerns about the Commission's approach to ROFRs) disappeared without a trace of explanation.

In the past, Commission orders have been most vulnerable on judicial review when there's a strong dissent. In *National Fuel*, where the D.C. Circuit vacated FERC's affiliate code of conduct for pipelines, two Commissioners strongly dissented, arguing that there was no evidence of abuse that would justify regulation of all affiliates. The Commission also lost in *Kamargo*. (Does anyone recall those scathing dissents by Commissioner Trabandt –- the FERC equivalent of Justice Scalia?) And in *Piedmont Environmental Council* (with Commissioner Kelly insisting that no, to withhold approval doesn't mean the same thing as rejecting it), to name a few. And just two years ago, the D.C. Circuit remanded a case in which the FERC majority failed to respond to reasonable concerns raised in a dissent by then-Commissioner Wellinghoff.

As I discussed above, in my view the Commission's treatment of the ROFR issue is already on weak footing, and I have no doubt that had Commissioner Moeller reaffirmed his dissent on rehearing, that would have clinched a reversal of the ROFR ruling (at least at the D.C. Circuit). Now that the Moeller dissent

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has disappeared, I'm not sure what will happen, since, in all of the cases discussed above, the dissenting commissioners reaffirmed their position and even bolstered it on rehearing. (I haven't done much research, but offhand can't think of any cases where a previously dissenting commissioner retreated from a prior position without any explanation.) Commissioners surely have the prerogative to change their views, but at the same time, reasoned decision-making requires some explanation – particularly when, as here, several parties urged adoption of Commissioner Moeller's dissenting position on rehearing. Yet Commissioner Moeller's dissent isn't referenced or mentioned in the Commission's rehearing order.

Granted, the disappearing dissent is a bit of a sideline issue. But given the D.C. Circuit's propensity for vacating Commission decisions where there's a strong dissent, and the mysterious and unremarked-on disappearance of the Moeller dissent from the record, I would at least flag the issue on appeal if I were challenging the ROFR ruling.

My Predictions for Order 1000's Treatment on Appeal

On May 17, 2012, FERC issued an order on Rehearing on Order No. 1000, the Commission's landmark rule on transmission planning and cost allocation. (You can read my summary of the rehearing decision here.) With more than 60 petitions for review filed, many challenging not only discrete components of the final rule, but the Commission's authority to issue it at all, it's unlikely that the appeals will disappear through voluntary dismissal. But what's the likely outcome?

Here are my brief and very preliminary predictions about some of the issues. Quick caveat: I've made these predictions from the perspective of a FERC appellate practitioner with many years of experience observing trends and briefing and arguing FERC appeals. My predictions don't necessarily align with my own personal views or those of my clients on how the court *should* rule, but rather, how I think it *may* rule.

1. The court will uphold the Commission's authority to require utilities to engage in transmission planning and cost allocation as the rule prescribes.

The Commission's statutory authority over interstate transmission is broad. Even though some aspects of the proposed rule may trickle down to impact state planning and siting processes, because the effects on states are incidental the Commission's lawful exercise of its broad power over transmission will prevail. State-encroachment arguments won't win the day.

2. Order No. 1000 is a rule and not an adjudicatory proceeding, so the Commission is justified in relying on generic rather than specific factual findings so long as they are reasonable.

Overall, the Commission's generic findings support the overall rule – although not necessarily specific features (e.g., state public policy requirements or elimination of ROFR).

3. I don't believe that Section 202(a) of the FPA bars the Commission from

anything other than voluntary planning and transmission.

Several parties argue that Order No. 1000's mandatory transmission planning requirement violates Section 202(a) of the Federal Power Act, which permits the Commission to recommend only voluntary coordination and interconnection by utilities. They also cite[2] Central Iowa Power v. FERC, 606 F.2d 1156 (D.C. Cir. 1979), a lead case involving Section 202(a) where the D.C. Circuit agreed that FERC lacked the power to require a power pool to offer additional services because Section 202(a) is voluntary in scope. The Commission rejected the Section 202(a) arguments on rehearing, saying that the statute doesn't apply at all since transmission planning is different from interconnection and coordination.

I may be going out on a limb, but I don't think that the Section 202(a) argument gets out of the gate. (I'm not even sure that I would pursue the claim as a petitioner.) Not only does the argument lose from a strict constructionist perspective (since Section 202(a) doesn't use the word "planning" anywhere), but to the extent that there's some ambiguity, the court will defer to the Commission's interpretation of the statute under *Chevron* >. *Central Iowa* doesn't help either, because the court leaves open the possibility for FERC to require a power pool to offer additional services, not under Section 202(a) but under Section 206, if it determines that the agreement is unjust and unreasonable in the absence of expanded service. Since the Commission relied on Section 206 as authority for Order No. 1000, *Central Iowa* actually supports the Commission's position.

The court won't reach the issue of the legality of the state public policy arguments if it finds that the requirement is non-binding. That seems the most likely outcome.

4. The requirement that transmission utilities consider state and federal public policy in regional transmission planning will be upheld, but expect close scrutiny on cost allocation in subsequent proceedings.

Frankly, I've gone back and forth on how the court will rule on Order 1000's requirement to consider state public policy. Much of the debate over the legality of the state public policy considerations revolves around whether the Commission exceeded its authority by encroaching on states' rights or lacked sufficient evidence to justify consideration of state public policy in transmission planning. Interesting as these issues are, for me the resolution of the state public policy issue depends upon whether the court views Order 1000's public policy

[2] http://scholar.google.com/scholar_case?case=7248981606990787937&q=central+iowa+and+%22section+202(a)%22&hl=en&as_sdt=2,9

directive as advisory in nature, or potentially binding on, or dispositive of, cost allocation.

If the court agrees with my colleague Scott Hempling's perspective[3] – that Order No. 1000 requires transmission providers to consider state policies planning but doesn't commit them to any particular course of action – then Order 1000 survives, if only by default. That's because it's difficult for opponents to argue that they're aggrieved by an order that doesn't mandate anything more than consideration of a factor – state public policy – that impacts interstate transmission rates, a matter within the Commission's jurisdiction. Because the D.C. Circuit loves nothing more than to dispose of cases on procedural or jurisdictional grounds (and aggrievement is a statutory prerequisite to review under Section 313l(b) of the Federal Power Act), the court won't reach the issue of the legality of the state public policy arguments if it finds that the requirement is non-binding. That seems the most likely outcome.

On the other hand, the court could find that state public policy considerations are determinative of cost allocation – that once a transmission provider decides that a state's RPS policy justifies a transmission project, the project is deemed a benefit the cost of which may be allocated regionally. In this scenario, the court might be troubled by the prospect of ratepayers in one state absorbing the costs of a project that benefits another, and might either conclude that the Commission's policy encroaches on state policy or is arbitrary and capricious.

5. I think that the Commission's ROFR position fails.

The court's analysis of the right of first refusal (ROFR) issue will differ from state public policy because elimination of the ROFR aggrieves utilities that hold this right (and may adversely impact states that confer this right on local providers). For that reason, the court will pay close to attention to whether there's substantial evidence showing that ROFRs give

rise to unjust and unreasonable rates so as to ustify the Commission's remedy of eliminating them. A court may also be sympathetic to Commissioner Moeller's point in his dissent (though it may be gone, it won't be forgotten) that elimination of ROFRs could degrade reliability, which in itself adversely impacts rates. (Unreliable service means that consumers get less for what they pay, which is tantamount to paying more.) In my view, the record on the impact of eliminating ROFRs is scant and the

[3] S. Hempling, *How Order 1000's Regional Transmission Planning Can Accommodate State Policies and Planning*, ElectricityPolicy.com, Sept. 2012, at 10. *See* http://bit.ly/PqNKkw.

Commission's justification for eliminating ROFRs entirely, instead of simply limiting the ability to exercise the right, isn't convincing. So I don't think Order 1000's elimination of ROFRs survives.

6. The court might find that some parties' *Mobile-Sierra*[4] objections are not yet ripe for review.

I can't make a call on this one, except to predict that petitioners should expect the Commission to ask for dismissal of *Mobile-Sierra* objections on ripeness grounds.

7. I believe the Commission's decision to draw the line at inter-regional cost allocation has a reasonable chance of being sustained.

Some commenters argued that the Commission's decision not to allocate costs outside a region without a voluntary agreement violates cost-causation principles. After all, if there are beneficiaries outside a region, cost-causation principles require that they share in the costs. This line of argument essentially posits that the Commission didn't go far enough. While that's a reasonable position, generally speaking courts are less likely to overrule an agency when it fails to exercise the full scope of its authority. That was the result in the Order No. 888 decision, where the court found that notwithstanding that the Commission *could* have regulated both bundled and unbundled retail transactions, its decision to refrain from regulating bundled retail transactions was reasonable.

Complications and Timing of Review

Since Order No. 1000A issued on May 17, 2012, the 30-day time frame for filing a request for rehearing and/or reconsideration didn't expire until June 18, 2012 (since the 30th day, was a Saturday). On June 15, 2012, the Organization of MISO States filed a request for clarification and/or rehearing, followed by rehearing/reconsideration requests by the Transmission Access Policy Study Group, AEP, OG&E and Midwest ISO Transmission Owners on June 18, 2012. As is typical, the rehearing/reconsideration requests seek clarification on narrow points such as the scope of facilities covered by the new ROFR policy or whether certain provisions of Order 1000 may limit long term transmission rights for load serving entities as conferred by Order 681.

On July 16, 2012, the Commission issued what is known as a "tolling order," which grants rehearing to allow the Commission more time to consider the arguments raised. A tolling order "suspends" the 30 day time period in Section 313(b) of the FPA for the Commission to rule on a rehearing petition. In the absence of a tolling order, the rehearing petition would be denied by operation of law if the Commission

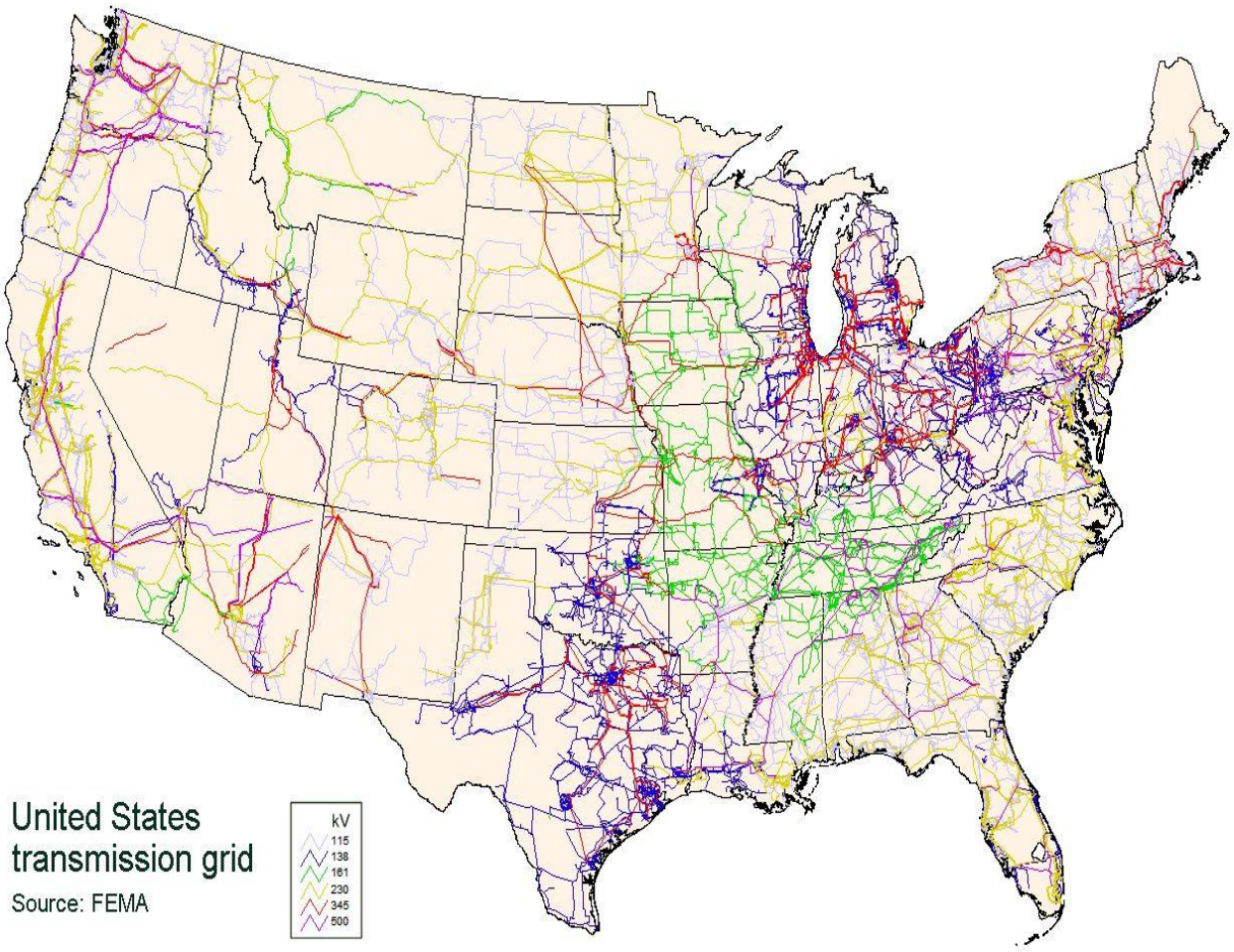
[4] The doctrine is named after a pair of 1956 Supreme Court decisions [*United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956)] addressing challenges to rates under jurisdiction of the then Federal Power Commission. It stands for the proposition that rates negotiated between parties must stand, unless they are found to violate the public interest.

failed to act within the 30 days, and would proceed straight to court for review. Thus, as of this writing, the rehearing and reconsideration petitions are pending before the Commission awaiting resolution.

So what happens to the petitions for review while FERC processes the new rehearing requests? That's not yet clear. On August 3, 2012, the Commission asked the court to hold the proceeding in abeyance pending resolution of the reconsideration and rehearing requests before the Commission. By awaiting a Commission decision on the pending requests, the court would avoid piecemeal review of one set of appeals followed by another. Several petitioners[5] opposed the Commission's request, arguing that they would be harmed by a delay in resolving the appeal since they must expend substantial resources on compliance, which would be wasted if the court vacates Order 1000.

Ordinarily, I'd put my money on the court holding any case in abeyance. After all, Commission cases aren't exactly the D.C. Circuit's (or any federal court's) idea of a good time, so consolidating the cases means that the court (or more accurately, the court clerks) need to resolve just one case rather than two. Moreover, as the Commission points out, the court waited to move forward with the Order 888 and 890 petitions (which likewise imposed compliance obligations) until pending rehearing requests were resolved. (In fact, with regard to Order 890, all challenges were dismissed or withdrawn after the Commission resolved the petitioners' concerns on rehearing).

[5] Coalition for Fair Transmission Policy ("CFTP"), the Alabama Public Service Commission ("APSC"), Edison Electric Institute ("EEI"), Large Public Power Council ("LPPC"), New York Independent System Operator, Inc. ("NYISO"), Sacramento Municipal Utility District ("SMUD"), South Carolina Public Service Authority ("SCPSA") and Southern Company Services, Inc.



But this case is a little different. In contrast to Order No. 888, where the Commission elaborated on its initial decision on rehearing and thus invited another round, here the Commission shut down most of the challenges, simply referencing its initial decision without elaborating. As a result, only five rehearing petitions were filed, and most don't challenge the "big picture" issues like the Commission's statutory authority to issue Order 1000, but instead seek clarification on smaller points, such as whether elimination of the ROFR apply in a given case. Thus, the court may determine that it's not fair to hold up the appeal until these last few matters are tied up.

Ultimately, though, the abeyance decision may resolve itself. Because only a handful of rehearing petitions remains – and they were filed back in June – there's a chance that the Commission will rule on them by its September meeting. If that's the case, the court would certainly put the case on the back burner for 60 days to give the holdouts time to petition for review and hop on board the Order 1000 express at the D.C. Circuit station. ■