

Presentation of Sue D. Sheridan
Transmission Planning and Cost Allocation
Sheridan Energy & Environmental Consulting, LLC

Harvard Electricity Policy Group
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Legislative Background - Transmission Issues in 111th Congress

- S. 1462, American Clean Energy Leadership Act, reported from Senate Energy and Natural Resources Committee July 2009
- Original “markup vehicle” by Sen. Bingaman addressed several electricity transmission issues:
- (1) *Transmission planning*: FERC would establish national grid planning principles, coordinate regional plans to ensure they are integrated into a single interconnection wide plan, and authorize FERC to reconcile inconsistencies

- (2) *Transmission siting*: amends FERC “backstop” transmission line siting authority to cover situations where a state fails to approve a line included in an approved plan within one year of application (a response to the 4th Cir. Court of Appeals’ 2009 decision in *Piedmont Environmental Council v. FERC*)

- (3) *Cost allocation for new transmission lines*: original *Bingaman bill language* provided that “costs shall not be allocated to a region...that are disproportionate to reasonably anticipated benefits”
- *Corker amendment* provided “costs can only be allocated to a region...if they are reasonably proportionate to measurable economic and reliability benefits”

Judicial Context

- In 2009, THE 7TH Cir. US Court of Appeals remanded a FERC decision on rates for transmission over PJM facilities (Illinois Commerce Commission v. FERC.)
- This was a procedural decision (court said FERC did not provide sufficient rationale for its decision); the case is still under consideration at FERC.
- But the court suggested some “tea leaves” for future consideration:
- (1) “FERC is not authorized to approve a pricing scheme that requires a group of utilities to pay for facilities from which its members derive no benefits, or benefits that are trivial in relation to the costs sought to be shifted ...”
- (2) “No doubt there will be some benefit to the midwestern utilities just because the network is the network, and there have outages in the Midwest”
- (3) “We do not suggest that the Commission has to calculate benefits to the last penny...” but it must state an “articulable and plausible reason that the benefits are at least roughly commensurate” to costs

Aspects of FERC's June 2010 Notice of Proposed Rulemaking on Transmission Planning, Cost Allocation Principles

- (1) Require transmission providers to participate in regional transmission planning process that produces a regional transmission plan
- (2) Require that a local or regional transmission planning process account for public policy requirements established by state or federal laws or regulations that may drive transmission needs
- (3) Establish principles for allocating the costs of new transmission facilities in a manner that is at least roughly commensurate with the distribution of benefits (echoing the 7th Cir. decision language.)

Excerpts from Commissioner Norris' Comments on Notice of Proposed Rulemaking (June 17, 2010)

- “...we are asking our present electric transmission grid to do more than it was ever planned or constructed to do...by anyone’s measure the improvement and expansion to date has been inadequate. We are now asking our transmission infrastructure to...facilitate the achievement of public policy goals such as the expanded use of renewable energy and demand-side resources...”.
- “For example, this proposed rule would require that transmission planning processes consider transmission projects intended to help facilitate the achievement of public policy requirements established by state or federal laws or regulations.”

(Norris' comments, continued)

- “...there are significant uncertainties in national policy that are beyond our control, and that will greatly impact efforts to build the transmission system of the future. Without guidance and decisions from Congress on a national carbon and clean energy policy, it is exceedingly difficult – if not impossible – to know what future scenario the transmission system must be planned to support.”

Excerpts from Commissioner Moeller's Comments on Notice of Proposed Rulemaking (June 17, 2010)

- "... I am not certain that every policy in this proposed rule will ultimately be adopted...".
- "Given that the U.S. Congress is examining cost allocation at this time, our issuance of this proposed rule comes at a potentially sensitive time. While Congress is now considering several measures that deal directly with issues addressed in this proposed rule, I expect that this Commission will defer to the legislative branch as we move forward in our deliberations. "
- "This proposed rule, and the comments to follow, will provide the Congress with the framework of the issues that we consider relevant and the opportunity for Congress to provide further guidance to us. Thus our action today is not intended to interfere with that process, but rather to add helpful information and evidence that will be useful in the formation of federal legislation."

Some Policy Issues in Congressional debate and FERC NOPR

- Overarching question: how should the cost of new transmission capacity be allocated by FERC?
- What does the Federal Power Act's historic "just and reasonable" standard mean in a world where states adopt varying policies (e.g. renewable portfolio standards) with differing strategies – some of which may necessitate new transmission, some of which will not?
- How specific a burden of proof should be required of FERC be in determining who benefits from new transmission?

- What “benefits” should FERC recognize when it allocates costs for transmission – reliability, economic, environmental?
- What “public policy requirements” emanating from the states is FERC authorized by statute to recognize? At what point might FERC deference to state policy requirements amount to handing over the federal “pen” on interstate electricity service to the states?
- Do these questions take the Commission beyond its traditional authority? (Compare for example the Clean Air Act, PURPA, the Fuel Use Act, PUHCA, each of which arose from statutes other than the Federal Power Act.)

- On the other hand, will state regulators object to a new FERC allocation policy as an objectionable “top-down methodology...that could result in construction of unneeded lines and not necessarily reduce carbon emission”? (NARUC March 16, 2010 letter to Senate leadership)
- State consumer advocates have argued that “any allocation of costs by FERC must reflect the distribution of costs and benefits associated with particular projects, including benefits to resource developers, and must be supported by strong evidence of commensurate benefits to the parties receiving the allocations...” (NASUCA Resolution 2010-01, June 2010.)

- Is new Congressional authority required to deal with any “gap” in FERC’s authority under the Federal Power Act ?
- Is there a possibility of Congressional backlash to FERC’s final rule?