

FERC Order 1000:

Whither the State Transmission Cost Recovery/Siting Role?

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Preemption Themes

- Do FERC's new cost allocation principles preempt state cost recovery decisions, requiring pass through of transmission costs in bundled rates?
- Is there any FERC preemption of state or local transmission siting?
- Is there a federalism concern with “back dooring” some state “public policy” requirements into regional and federal cost allocation decisions and potentially imposing them on customers in other states, especially where other states may have rejected these same goals?

FERC's intent regarding preemption?

- Over and over again in Order 1000 FERC claims nothing it is doing is intended to preempt states.
- Curiously, each time FERC says this, it speaks only to construction, siting and permitting or transmission and notably **not** to cost allocation:
 - p. 127, n. 155 (obligations to build under state or local law)
 - p. 176 (construction, siting and permitting under state law)
 - p. 200, n. 231 (construction, siting and permitting under state law)
 - p. 227 (construction, siting and permitting under state law)
 - p. 268 (obligations or requirements for nonincumbent transmission developers under state law or RTO/ISO agreements)

Cost Allocation

- FERC claims to be addressing cost allocation and *not cost recovery* (p. 408). No single default, but FERC advances 6 principles to guide cost allocation.
- Any proposal for a new transmission facility will “**identify the beneficiaries who will pay for the costs** of the new transmission facility selected in a regional plan for purposes of cost allocation” and those beneficiaries can be allocated costs *even in the absence of a contract* (p 539).
- As to the definition of “benefits,” these can arise where facilities (separately or in the aggregate) “maintain reliability,” “share reserves,” provide “production cost savings and congestion relief” and/or “**meet Public Policy Requirements**” (p 622)

Bundled Retail Rates

- Southern Company claims it recovers only 15% of transmission revenues through OATT, leaving 85% to bundled retail rates. Florida, Alabama regulators echo this concern.
- Additional problem is allowing a non incumbent transmission provider “comparable” cost recovery would force state ratepayers to pay for facilities that they do not benefit from (at least under state law), because of blended nature of transmission assets (inability to separate the bundled/unbundled components of transmission costs).

The FPA's Reach Over Bundled Retail Transmission?

- 201(b)(1) gives FERC jurisdiction over “the transmission of electric energy in interstate commerce.” Also speaks to “all facilities”. This jurisdictional grant is distinct from provisions related to the sale of energy, which extend only to sales for resale.
- “Free rider” issues along with cost causation principles (emphasized most recently by 7th Circuit, ***Illinois Commerce Commission***, 576 F.3d 470) reinforce the need for broad federal jurisdiction over cost allocation and the need to assess “an extension of the chain of causation.” (D.C. Circuit, ***MISO Transmission Owners***, 373 F.3d 1361)

Can State Consumer Advocates Challenge Cost Allocations?

- Filed rate doctrine gives *cost allocation* a potentially preemptive effect under **Nantahala**, 476 U.S. 953 (1986): “a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable.”
- States retain authority to decide intra-class cost allocation issues among retail customers.
- State consumer advocates and PSCs still may claim one modest safety valve to preserve their role: under the **Pike County** exception: In *cost recovery* decisions states still may attempt to find a purchasing utility acted imprudently in buying power rather than choosing less expensive alternatives.

The Problems with *Pike*

- Does it even apply to transmission anymore?
- Even if it does, geographic areas where all power purchase options share the same transmission lines do not seem to have many options.
- However, there are “non-transmission alternatives” (which FERC refused to include in Order 1000), including DG but also conservation.

Connection to Siting

It does not seem that Order 1000 has any direct preemptive effect over transmission siting at the state (or local) level.

- States can still control who applies for siting and the right to eminent domain, and limit non-incumbent utilities from these.
- States can still refuse to site because of environmental concerns, and FERC and RTO findings regarding environmental impacts do not preempt state or local governments under environmental statutes.
- As to need, states can arguably still define benefits in need assessment for siting purposes.

Indirect Impacts on Siting?

- Still, FERC and RTO endorsement of transmission lines in the planning or cost allocation process will undeniably give some projects additional political leverage in the state and local siting process.
- Cost allocation pass through in bundled rates may reduce any opposition in siting that comes from consumer advocates – if customers are going to have pay for lines anyway there is less at stake for them in a siting proceeding.

Big Picture of Federalism

- State (and APPA has urged on rehearing, local) public policy requirements are incorporated into FERC/RTO decisions.
- E.g., in the Southeast only N.C. has an RPS.
- Is Order 1000 an example of “**reverse cooperative federalism**” – inviting individual states to set requirements for implementation by regional bodies and endorsement by FERC?

Is “reverse cooperative federalism” legally permissible?

- Like PURPA, can the FPA be understood to be a cooperative federalism statute?
- Where is FERC’s statutory authority to “back door” state policy requirements into plans/cost allocations for individual utilities or regions?

Arguments favoring FERC’s approach relate to reliability, along with addressing the interstate “free rider” gaps Part II of the FPA was designed to close when first adopted (*Attleboro*).

The End

6 Cost Allocation Principles

- Costs allocated “roughly commensurate” with estimated benefits
- Those who do not benefit from transmission do not have to pay for it
- Benefit-to-cost thresholds must not exclude projects with significant net benefits
- No allocation of costs outside a region unless other region agrees
- Cost allocation methods and identification of beneficiaries must be transparent
- Different allocation methods could apply to different types of transmission facilities