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Appeals Court Validates FERC Regional Planning Mandate as Reasoned Evolution of the Open-Access Electricity Transmission System.

The Federal Energy Regulatory Commission's (FERC) Order No. 1000 mandate that going forward the high-voltage electric transmission grid be planned and fairly financed regionally by all of its operators and beneficiaries, survived myriad challenges from 45 petitioners in the unanimous August 15 decision of a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit in *South Carolina Public Service Authority v. FERC*. The rigorous 97-page opinion rejected challenges coming from all directions to the 2011 rulemaking entitled "Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities."

According to the panel, nearly all of the challenges misapprehended Order No. 1000's regional planning mandate. The court repeatedly emphasized that Order No. 1000's mandate is nothing new, but rather the next step in evolving efforts under section 206 of the Federal Power Act to combat undue discrimination. That evolution, the panel explained, began in 1996 when Orders No. 888 and No. 889 required that electricity transmission be "unbundled" from sales and offered via the internet pursuant to open-access tariffs, and 11 years later continued in Order No. 890's directive that a transmission provider standardize how it measures available transmission capacity and open to its customers the process for planning transmission upgrades and expansions.

The panel's decision affirmed FERC's authority to require each of the key elements that FERC prescribed for regional transmission planning. Those elements include:

All public utility transmission providers are required to participate in a regional planning process, and non-public utilities such as cooperative or municipal utilities effectively must also participate pursuant to a reciprocity requirement carried forward from Order No. 888.

The planning process must include procedures for taking into account federal, state and local laws and regulations affecting transmission, such as federal air quality rules and state or local renewable portfolio standards.

Transmission tariffs must be amended to remove provisions that confer on the incumbent transmission provider a right of first refusal to construct, own, and operate new regional transmission, thereby opening the regional process to input, innovation, and investment from non-incumbents and new entrants, subject to state and local restrictions on siting and eminent domain.

A methodology must be added to transmission tariffs for allocating up-front the cost of new regional transmission facilities, consistent with six principles, including a causation principle directing that the allocation be roughly commensurate with the benefits received by those consumers required to pay, and a prohibition on one region allocating costs to its neighbors without their advance consent.

FERC Chairman Cheryl LaFleur promptly praised the panel's decision upholding Order No. 1000 in its entirety as critical for inducing the "substantial investment in transmission infrastructure

[needed] to adapt to changes in its resource mix and environmental policies.” In its decision the panel noted that the electric industry in 2008 estimated the infrastructure investment needed at \$298 billion between 2010 and 2030.

Following FERC’s lead, the panel chose not rule at this time on challenges that elements of the regional planning mandate violate the Mobile-Sierra doctrine —eponymously named for two 1956 Supreme Court decisions —which limits FERC’s authority unilaterally to alter the terms of bilateral contractual relationships. FERC explained that it would not rule on these challenges in the context of Order No. 1000, but would instead address them in connection with a transmission provider’s filing of tariff amendments in compliance with the Order. Mobile-Sierra challenges prosecuted at that time are unlikely to succeed since precedents interpreting the doctrine give the Commission much greater leeway when implementing industry-wide changes to tariffs than when seeking to alter individual contracts.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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