Published on *The National Law Review* https://natlawreview.com

Seventh Circuit Remands FERC for the Second Time on Cost Allocation for High-Voltage Transmission Lines in PJM

Article By:

Energy and Public Utilities Group

In a split decision issued on June 25, 2014, the U.S. Court of Appeals for the Seventh Circuit remanded a **Federal Energy Regulatory Commission** ("FERC") order allocating costs for certain new **high-voltage network transmission lines** within **PJM Interconnection, L.L.C.** ("PJM"). In 2009, the Court previously remanded a FERC order in the same case in ***Illinois Commerce Commission v. FERC*,** 576 F.3d 470 (7th Cir. 2009). In its June 25 decision, the Court held that FERC failed to comply with the Court's 2009 decision remanding the case to it and must try again.

The question presented to the Court was the extent to which the members of PJM in its western region can be required to contribute to the costs of newly built or to-be-built 500 kV lines even though the lines are primarily in the eastern part of PJM. The Court found that PJM's western utilities are unlikely to obtain a significant additional supply of electricity from the new transmission lines. However, the western utilities may benefit from the new high-voltage transmission lines in PJM's eastern region, and to the extent they do, they can be required to contribute to the cost of building the new lines.

In its order on remand, FERC described four types of benefits associated with 500 kV facilities: reduced congestion, reduced outages, reduced operating reserve requirements, and reduced losses. FERC explained that these benefits radiate from the upgraded facility and are thus spread throughout the PJM region. However, in its June 25 decision, the Court found that, of the four types of benefit listed by FERC, at least two – reduced electrical outages and reduced electricity losses – will definitely not be equally distributed between the utilities in the eastern region and those in the western region. The Court found that some of the benefits of the new high-voltage transmission facilities will indeed radiate to the western utilities, but "some" is not a number and does not enable even a ballpark estimate of the benefits of the new transmission lines to the western utilities. The Court concluded that FERC's treatment of all benefits as equivalent resulted from its failure to conduct a cost-benefit analysis.

The Court explained that its concern is with the absence from FERC's orders of even an attempt at empirical justification for the postage-stamp pricing it approved for high-voltage transmission facilities in PJM. FERC assumed, but did not demonstrate, that the benefits of the eastern 500 kV lines are proportionate to the total electric power output of each utility, no matter how remote the utility is from the eastern projects that it must help pay for. The Court found that this is a method guaranteed to overcharge the western utilities, as they will benefit much less than the eastern utilities from eastern projects that are designed to improve the electricity supply in the east. The Court found that FERC had not met even the modest goal of showing that benefits are at least roughly commensurate with costs, because it did not make an effort to quantify the benefits. Instead, FERC made only general statements regarding use and benefits of the 500 kV lines and unspecific assertions regarding the potential for changes over the 40-year life of the facilities.

The Court found that the basic fallacy of FERC's analysis is to assume that the 500 kV lines that have been or will be built in PJM's eastern region are basically for the benefit of the entire regional grid. According to the Court, this is not true – their purpose is to address specific reliability violations in the eastern part of PJM. While there are bound to be benefits to the entire grid and therefore to the utilities connected to it, they are incidental.

The Court held that FERC failed to comply with its order remanding the case to it and must try again. If FERC continues to argue that a cost-benefit analysis of the new transmission facilities is infeasible, it must explain why that is so and what the alternatives are. The Court found that the lines at issue in the case are part of a regional grid that includes the western utilities. However, all the lines at issue are located in PJM's eastern region, primarily benefit that region, and should not be allowed to shift a grossly disproportionate share of their costs to western utilities on which the eastern projects will confer only future, speculative and limited benefits. Accordingly, the Court granted the petitions for review and remanded the matter once again to FERC for new proceedings.

The Court's decision is available here.

National Law Review, Volume IV, Number 191