

FERC Prevails Again in Order No. 1000 Appellate Proceedings

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On April 19, 2017, the U.S. Court of Appeals for the D.C. Circuit unanimously upheld the ***Federal Energy Regulatory Commission's (FERC)*** implementation of Order No. 1000 with respect to ISO-New England (ISO-NE). The D.C. Circuit had previously upheld the legality of the order itself in 2014, and the Seventh Circuit upheld FERC's implementation of Midcontinent Independent System Operator Inc.'s Order No. 1000 compliance plan in 2016. This week's decision represents another success for FERC and its Order No. 1000 policy objectives.

Order No. 1000 required public utilities to alter their transmission planning and cost allocation methods. The order aimed to improve collaboration among market participants and to improve competition in the electricity market. For example, it requires public utility transmission providers to participate in regional transmission planning efforts. It also requires providers to remove all federal rights of first refusal (ROFR) from their FERC tariffs, which had given incumbent utilities the first choice for building new projects.

In the most recent challenge to Order No. 1000, state regulators and transmission owners challenged FERC's approval of regional ISO-NE's compliance filings. Two issues arose in the case: the transmission owners were concerned about the elimination of the ROFR, and the state regulators were concerned about protecting state authority over their rights to approve the construction of transmission facilities.

The transmission owners claimed that FERC improperly approved ISO-NE's proposal to remove the ROFR provisions from its tariff, because FERC had previously approved the Transmission Operating Agreement (TOA) between ISO-NE and the transmission owners. The transmission owners claimed that the *Mobile-Sierra* doctrine requires FERC to find that the TOA is no longer in the public interest before modifying it, and that FERC's orders approving ISO-NE's Order No. 1000 compliance plans had failed to do so. The D.C. Circuit disagreed. It held that FERC adequately supported its decision to change policy and had made the findings necessary under *Mobile-Sierra* to modify the operating agreement.

The state regulators argued that FERC's approval of a plan that allows ISO-NE to have the final say in selecting transmission projects for regional planning is harmful to state authority. The D.C. Circuit held that FERC's decision was consistent with Order No. 1000, and the court's previous

determination that Order No. 1000 did not inappropriately invade state authority.

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