



# FERC Order 1000 Compliance: Themes and Concerns

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# Outline of Presentation

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- I. Summary of Order 1000 Rulings
- II. Recap of Legal Concerns/Responses
- III. Overview of Nine Compliance Processes
- IV. Analysis of ROFR Statutes Under the Dormant Commerce Clause



# Background

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- Order 1000 issued July 21, 2011
- Pursuant to §206(e) of the F.P.A., 16 USC 824:  
“Whenever the Commission...shall find that any rate, charge or classification...rule practice or regulation...is unjust, unreasonable, unduly discriminatory or preferential...the Commission...shall fix the same by order.”
- Order 1000 Builds Upon Order 890 (2007) Planning Principles: (1) Coordination; (2) Openness; (3) Transparency; (4) Information Exchange; (5) Comparability; (6) Dispute Resolution; (7) Regional Participation; (8) Economic Planning Studies; and (9) Cost Allocation for New Projects
- “In light of changing conditions in the industry”  
“The shifting generation fleet will require billions of dollars of investment in new transmission facilities to ensure that transmission services are provided reliably, cost-effectively and in a manner that meets public policy objectives.” See FERC Order 1000, ¶¶s 44-46.



## Summary of Order 1000 Rulings

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- 1) Participation in a regional planning process
- 2) Consideration of transmission needs driven by public policy requirements
- 3) Removal of federal right of first refusal from Commission-approved tariffs
- 4) Interregional Coordination
- 5) Regional cost allocation and adherence to six cost allocation principles, and
- 6) Inter-regional cost allocation and adherence to six cost allocation principles for jointly-evaluated projects
- 7) Non-jurisdictional public utilities who seek to retain safe harbor tariff to demonstrate compliance with the Order 1000 Rulings (Safe Harbor v. FPA §211A)



# Participation in Regional Planning Process

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## 1) Evaluation of Alternatives

- “an affirmative obligation in transmission planning regions to evaluate alternatives that may meet the needs of the region more efficiently or cost effectively” ¶80
- “it should be clear from the tariff language how one type of investment would be considered against another and how the TP would choose one resource over another” FN 149
- “consider NTAs on a comparable basis.” ¶148

## 2) Application of Order 890 Planning Principles

## 3) Data-sharing requirement for non-jurisdictional TPs

## 4) Identification of Planning Region for purposes of producing a regional plan



## Consideration of PPRs

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- Consideration means:
  - (1) identification of transmission needs driven by PPRs; and
  - (2) the evaluation of potential solutions to meet those needs Para. 205
- “a prudent transmission provider will.... consider how to plan for transmission needs driven by Public Policy Requirements” ¶ 83.
- FERC is neither pursuing nor enforcing any specific policy goals. ¶ ¶ 111, 213
- Consideration of state of federal laws and regulations and county or municipal laws. ¶ 209



## Removal of ROFR from Federal Tariffs

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- 1) Qualification, Protocols, Framework:
  - a) Qualification criteria
  - b) Specification of the date by which such information must be submitted to be considered;
  - (c) Description of process for evaluation; and
  - (d) Removal of incumbent ROFR provision.
  
- 2) Comparability
  
- 3) Maintenance of ROFR
  - a) local
  - b) upgrades
  - c) alter existing rights-of-way
  - d) 100% of cost allocated to TP service territory (§ 423).



# Interregional Coordination

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- 1) Develop/implement procedures: sharing of information; identification of needs; and joint evaluation of potential interregional transmission facilities that address those needs;
- 2) Development and implementation of procedures to identify and jointly evaluate transmission facilities that are proposed to be located in both regions;
- 3) Exchange of planning data and information between neighboring transmission planning regions at least annually; and
- 4) Maintenance of a website or e-mail list for the communication of information related to interregional transmission coordination.

(¶ 345).





## Regional Cost Allocation

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- Order 1000 applies to new projects selected in regional transmission plan for purposes of cost allocation
- Foundation of Order 1000 is to establish a closer link between regional transmission planning and cost allocation. ¶556
- Prevent Free-ridership ¶ 534
- Comparability – all TPs in region must use same cost allocation methods for same projects ¶ 482
- Participant Funding – cannot be sole regional methodology ¶ 497



## Six Cost Allocation Principles

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- 1) Cost allocation roughly commensurate with estimated benefits;
- 2) If no benefit, no involuntary allocation
- 3) If threshold used to select projects, cannot exceed 1.25 benefits : costs
- 4) Allocation of costs solely within the region unless outside entity voluntarily agrees to assume costs.
- 5) Allocation method and data requirements must be transparent
- 6) Region may use different methods for different types of facilities.



## Safe Harbor

- Under the *pro forma* OATT established in Order 888, a non-public utility TP may receive reciprocity treatment by providing service under a tariff that has been approved by FERC under the voluntary “safe harbor” provision of the *pro forma* OATT.
- However, FERC may choose to exercise its authority under FPA section 211A(b) if it finds that that non-public-utility TPs were not participating in the transmission planning and transmission cost-allocation procedures required by the final rule.

FPA 211 (A): “the Commission may, by rule or order, require an unregulated transmitting utility to provide transmission services – (1) at rates that are comparable to those that the unregulated transmitting utility charges itself; and (2) on terms and conditions (not relating to rates) that are comparable to those under which the unregulated transmitting utility provides transmission services to itself and that are not unduly discriminatory or preferential.” 16 U.S.C. 824j.



# Legal Concerns and Responses

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The Commission determined that:

- (1) the problem it seeks to resolve represents a significant “theoretical threat” and
- (2) is not one that FERC can address adequately through individual adjudications
- (3) it did not need to make specific factual findings of discrimination in order to promulgate a generic rule to ensure just and reasonable rates or eliminate undue discrimination  
(Order 1000-A, ¶¶ 96,97)

Stakeholder FPA-based Objections:

- (1) Commission Overreach (FPA Section 206)
- (2) F.P.A. requires voluntary planning (FPA Section 202(a))
- (3) Order 1000 not in interest of load serving entities (FPA Section 217(b)(4))

To objections, the Commission offered responses which reference:

- (1) Policy considerations (shift in resource fleet/retirements)
- (2) Case Law (*National Fuel and Associated Gas*)
- (3) Statement of *Effective* Transmission Planning (Order 1000-A, ¶52)



## Legal Concerns & Responses

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**Opposing Viewpoint:** Commission could not impose planning reforms because §202(a) of the FPA says that coordination of transmission facilities, is to be voluntary.

**FPA 202(a):** FERC “is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy”

**FERC Response:** by “interconnection and coordination,” the FPA means that the “coordinated operation” of facilities be voluntary and Section 202(a) is silent on and established no implicit limits on transmission “planning.” Order 1000-A, ¶ 123



## Legal Concerns & Responses

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**Opposing Viewpoint:** Order 1000 was inconsistent with the FPA by failing to meet the reasonable needs of load-serving entities (“LSEs”).

**FPA 217(b)(4):** FERC “shall exercise...authority...in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities”

**FERC Response:** Order 1000 will enhance the transmission planning process for all interested entities, including LSEs by supporting the development of needed transmission facilities that benefit LSEs. Order 1000-A, ¶ ¶ 168-170



## Overview of 9 Compliance Processes

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- NTTG
- WestConnect
- Columbia Grid
- Florida
- North Carolina
- South Carolina
- Maine
- MAPP
- SERTP



## Overview of 9 Compliance Dockets

### Northern Tier Transmission Group

PacifiCorp	ER13-64	May 17, 2013	143FERC ¶61,151
Deseret G&T Coop	ER13-65	May 17, 2013	143FERC ¶61,151
Northweste rn Corp. (MT)	ER13-67	May 17, 2013	143FERC ¶61,151
Portland General Electric	ER13-68	May 17, 2013	143FERC ¶61,151
Idaho Power Co.	ER13- 127	May 17, 2013	142FERC ¶61,206





## Overview of 10 Compliance Dockets

### WestConnect

PSC CO	ER13-75	March 22, 2013	142FERC ¶61,206
Terra-Gen Dixie Valley	ER13-76	March 22, 2013	142FERC ¶61,206
Tucson EPC	ER13-77	March 22, 2013	142FERC ¶61,206
UNS Electric	ER13-78	March 22, 2013	142FERC ¶61,206
PSC NM	ER13-79	March 22, 2013	142FERC ¶61,206
PSC AZ	ER13-82	March 22, 2013	142FERC ¶61,206
El Paso Electric Co	ER13-91	March 22, 2013	142FERC ¶61,206
Black Hills Power	ER13-96	March 22, 2013	142FERC ¶61,206
Black Hills CO Elec. Util	ER13-97	March 22, 2013	142FERC ¶61,206
NV Energy	ER13-105	March 22, 2013	142FERC ¶61,206
Cheyenne LF&P	ER13-120	March 22, 2013	142FERC ¶61,206



## Overview of 9 Compliance Dockets

### Columbia Grid

Avista Corp (PEFA)	ER13-93	No Order
Avista Corp	ER13-94	No order
Puget Sound (PEFA)	ER13-98	No Order
Puget Sound	ER13-99	No Order
Bonneville	NJ13-1	No Order



## Overview of 9 Compliance Dockets

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### Florida

Tampa Elec. Co.	ER13-80	No Order
FL Power Corp.	ER13-86	No Order
FL P&L Co.	ER13-104	No Order
Orlando Util. Comm.	NJ13-2	No Order



## Overview of 9 Compliance Dockets

### North Carolina

Duke Energy Carolinas LLC & Carolina P&L Co.	ER13-83	February 21, 2013	142 FERC ¶61,130
Alcoa Power Generating (Yadkin Div.)	ER13-88	February 21, 2013	142 FERC ¶61,130

### South Carolina

SC Elec. & Gas Co.	ER13-107-001	April 18, 2013	143 FERC ¶61,058
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## Overview of 9 Compliance Dockets

### Maine

Maine Public Service Co.	ER13-85	February 21, 2013	142FERC ¶61,129
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### MAPP

Northwestern Corp. S.D.	ER13-62	April 18, 2013	143FERC ¶61,056
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## Overview of 9 Compliance Dockets

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# Southeast Regional Transmission Planning (SERTP)

Southern Companies	ER13-908	No Order
Louisville Gas & Elec. And KY Utilities Co.	ER13-897	No Order
Ohio Valley Electric. Corp.	ER13-913	No Order



# Compliance Orders & Responses

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## NTTG Compliance Order

May 17, 2013

NTTG Utilities must revise OATTs to:

- provide adequate detail in their respective OATTs regarding how they will implement Order No. 1000's requirement that they plan on a regional basis to identify more efficient or cost-effective solutions to regional transmission needs. ¶82
- Include additional detail regarding how the public utilities will address Order No. 1000's requirement to consider transmission needs driven by public policy requirements in their local and regional transmission planning processes. ¶121



## Compliance Orders & Responses

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### MAPP Compliance Order

April 18, 2013

Northwestern Co. S.D must revise OATT to:

- Comply with information exchange principle by identifying the information that stakeholders submit, when stakeholders submit such information, what planning horizon to use, or what format the submission should take; and in addition, include a process for stakeholders to provide proposed demand response resources. ¶44
- Include more detail as to how the MAPP regional transmission planning process will perform analysis to determine more efficient or cost-effective transmission solutions to regional transmission needs rather than relying exclusively on transmission proposals from individual transmission owners and stakeholders. ¶123





## Compliance Orders & Responses

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### WestConnect Compliance Order

March 22, 2013

The FERC held: WestConnect Planning Management Committee (“PMC”) cost allocation determinations for transmission projects identified in the WestConnect regional plan are binding when identified by the PMC.

Requests for Clarific./Rehearing: (Xcel, PSCo N.M, NV Energy, etc)  
Order No. 1000 contemplated that the results of regional evaluations would identify “potential beneficiaries” of a transmission project.



## Compliance Orders & Responses

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North Carolina – Duke Carolina’s Compliance Order

February 21, 2013

FERC held:

Duke Energy and Progress Energy constitute a single “transmission provider” for purposes of Order 1000 and therefore cannot constitute a “region” without additional unaffiliated participants.

Requests for  
Clarific./Rehearing:

LSP Trans. Holdings, Duke/Progress, NCEMC:  
North Carolina Transmission Planning Collaborative (NCTPC), rejected in compliance order as local rather than regional, should be defined as a region for purposes of Order 1000, as Duke and Progress are separate legal entities, or should still allow certain projects to be characterized as regional.



## Compliance Orders & Responses

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### South Carolina Compliance Order

April 18, 2013

FERC held:

SCEG must remove from its OATT the following language:

(1) the transmission developer must secure its own rights-of-way and “the Transmission Providers’ use or control of existing [rights-of-way] may not be altered unless agreed to by Transmission Providers”

Requests for  
Clarific./Rehearing:

South Carolina Office of Regulatory Staff

NARUC: Directive at odds with FERC’s assurance that Order 1000 did “not remove, alter or limit an incumbent transmission provider’s use and control of existing rights-of-way under State law.” A reference in a tariff that State law shall apply when otherwise applicable does not create a federal right of first refusal.



## Compliance Orders & Responses

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### Maine Public Service Co.

February 21, 2013

FERC accepted : “[t]here is a first presumption that the party that requires or requests the Public Policy Project is the beneficiary of the project and will pay all costs associated with the Public Policy Project...if production cost benefits ....exceed the costs of the Public Policy Project, then the presumption is that Transmission Customers will be beneficiaries and the costs shall be allocated to all Transmission Customers on a load ratio share basis

Motion for  
Clarif./Rehear.

Northern Maine Independent System Administrator: “it is incumbent upon the transmission provider to determine the extent of the transmission customer’s benefits relative to those of the project developer and other beneficiaries and to allocate costs accordingly.”

Production cost benefits exceeding the PPR is not the correct standard, etc.



## ROFR & dormant Commerce Clause

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- FERC Order 1000 included a requirement that incumbent Transmission Providers remove from federally-approved tariffs a right of first refusal (ROFR) in order to foster more competition.
- Certain states have responded by enacting or proposing to enact state statutes conferring ROFR to local incumbents.



## ROFR & dormant Commerce Clause

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- ROFR is potential buyer's contractual right to meet the terms of a third party's highest offer.
- Order 888 and 888-A conferred a ROFR to transmission *customers* which included a “matching requirement” on incumbent to match duration and rate of competing customer
- **Distinction:** The ROFRs at issue in Order 1000 seem to not contain a matching requirement - one basis of FERC's Order 1000 rule.



## ROFR & dormant Commerce Clause

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- “the Congress shall have Power...to regulate Commerce...among the several states” Art. I, §8
- Negative aspect denying states power unjustifiably to discriminate against or burden interstate flow of articles of commerce
- Facially-discriminatory laws – Strict Scrutiny Standard
- Neutral laws with discriminatory effects – Pike Test
- Under strict scrutiny, challenging party must identify in-state commercial interest that is favored at the expense of out-of-state competitors.
- Under Pike, incidental effects on interstate commerce are okay, unless the burden imposed is clearly excessive in relation to the benefits



## ROFR & dormant Commerce Clause

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- Five statutes examined are facially discriminatory – may be subject to strict scrutiny
- Held per se invalid, **unless**:
  - Justified by factor other than economic protectionism
    - ✦ unique knowledge of their own transmission systems;
    - ✦ familiarity with the communities they serve;
    - ✦ economies of scale;
    - ✦ experience in building and maintaining transmission facilities; and,
    - ✦ access to funds needed to maintain reliability
  - No other means to advance legitimate state interest





## ROFR & dormant Commerce Clause

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Main Recommendation: States should determine, through an analysis, whether

- 1) competitive solicitation model (envisioned in FERC Order 1000) or
- 2) incumbent preference model  
is best for its state and ratepayers

The analysis, if it considers reliability, economic and public policy goals, could help statute withstand court challenge, regardless of standard applied.



## Questions/Comments

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