

ELECTRIC ALPHABET SOUP: FERC, NERC, EPA, CFTC....

Susan N. Kelly
Senior VP, Policy Analysis
and General Counsel
APPA

2012 Annual National Conference
May 21, 2012
Indianapolis, Indiana

The Current FERC Line Up

- Chairman Jon Wellinghoff (D): His “Big Three” issues are: Demand Response, Renewable Generation, and Transmission
- Other Commissioners: Phil Moeller (R), John Norris (D), Cheryl LaFleur (D)
- On deck for the open R seat: Tony Clark of the ND PSC

Some Current FERC Issues

- Transmission Planning/Cost Allocation/Open Access Policies
- Transmission Rate Incentives
- Locational Capacity Markets
- Reliability Issues (intersection with NERC)
- Impact of environmental regulations on reliability (intersection with EPA)
- Jurisdictional issues posed by Dodd-Frank Act (intersection with CFTC)

Transmission Planning and Cost Allocation

- FERC long interested in transmission (TX) planning—but now with a renewables slant
- Issued Order No. 1000 in July 2011 to:
 - Ensure that regional (and interregional) TX planning processes consider and evaluate on a non-discriminatory basis possible transmission alternatives to produce “efficient and cost-effective” plans
 - Ensure that cost of TX solutions chosen to meet regional (and interregional) needs “are allocated fairly to those who receive benefits from them”

Basic Requirements of Order No. 1000

- Public utility transmission providers (TPs) must participate in a regional TX planning process, evaluating TX alternatives at the regional level
- The process must provide the opportunity to consider “Public Policy Requirements”
- The process must result in a TX plan (but there is no requirement actually to build facilities set out in a regional plan)

Basic Requirements-2

- Public utility TPs must develop and implement *interregional* procedures for sharing of planning data and information (at least annually), and must work with neighboring regions to identify and evaluate potential TX solutions

Basic Requirements-3

- Public utility TPs must have in place a method (or methods) to allocate costs of new transmission facilities “selected in a regional plan for purposes of cost allocation”
- Public utility TPs must work with neighboring regions to allocate costs of TX projects they “jointly evaluate”

FERC's Legal Authority to Order Cost Allocation

- FERC makes a big legal leap in Order No. 1000, finding (at P 532) that:
 - “...the Commission has jurisdiction over the use of [all] transmission facilities [used] in the provision of TX service, which includes consideration of the benefits that any beneficiaries derive from those TX facilities in electric service *regardless of the specific contractual relationship that the beneficiaries may have with the owner or operator of these transmission facilities.*”

Compliance Deadlines

- Public utility TPs must file to revise their OATTs to meet regional transmission planning and cost allocation requirements within 12 months of Order No. 1000's effective date (October 11, 2011)
- They have 18 months to file compliance filings re the interregional transmission planning coordination and cost allocation requirements

APPA Rehearing Request (Along with Others)

- APPA argued on rehearing that FERC:
 - Failed to ensure LSE needs are met in TX planning per FPA Section 217(b)(4)
 - Failed to require merchant TX developers to participate fully in regional TX planning
 - Failed to provide assurances to public power TPs that their unique concerns re bond requirements will be accommodated if they participate in regional TX planning

Next Steps

- Rehearing on FERC's 5/17 open meeting agenda; technically should have taken place within 30 days of filings, but FERC gave itself more time
- Compliance proceedings are in progress
- First oversight hearing has already been held in the House; this is an election year and Rep. Ed Whitfield (R-KY) (Chair of Energy and Power Subcommittee) is watching

Meanwhile, Back at the Cost Allocation Ranch....

- Transmission cost allocation methods for various RTOs are being approved case-by-case, *e.g.*, MISO's "multi-value project" (MVP) method, SPP's "highway/byway" method
- Recent FERC decision on remand of *ICC v. FERC* case from 7th Circuit reaffirms PJM's postage stamp allocation of TX costs for new facilities 500 kV and over (citing PJM's own metrics evidence!); Commissioner La Fleur dissented

Merchant Transmission Issues

- FERC workshop held on February 28, 2012 in Docket No. AD12-9 to discuss the rules for allocating capacity on merchant TX projects:
 - Role of open seasons
 - Preference to be given to “anchor customers”
 - Should it be permissible to discriminate among bidders based on credit risk, term of service, price bid?
 - OK to award 100% of capacity to affiliates?

Open Access Requirements for Generator Interconnection TX

- On 4/19/12 FERC issued Notice of Inquiry in AD12-14 re open access policies on generator interconnection facilities
- FERC asks whether open access should apply to these facilities or whether it should modify its policies to provide a “safe harbor” that would allow the generator priority access

Established TX Policies Are Clearly Under the Microscope

- FERC is questioning well-established policies designed to assure non-discriminatory access to transmission facilities, such as open access requirements, open seasons, standard rate schedules and rates
- Do these requirements stand in the way of needed transmission facilities?

How Much TX Is Enough?

- FPA Section 217(b)(4) gives us a hint:
 - *“The Commission shall exercise the authority of the Commission under this Act in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service obligations of the load-serving entities...”*

From APPA's 3/29/12 Comments in AD12-9

- “. . .[S]iting transmission facilities, especially higher voltage facilities covering long distances, is not an easy task under the best of circumstances. . . Once a “first-in-time” transmission project is sited through a region or corridor, it is highly unlikely that there will be much public appetite for additional lines. Therefore, it will be very important to build the optimal set of regional transmission facilities that will best serve the needs of ultimate consumers at the lowest reasonable cost consistent with good environmental stewardship, rather than the set of facilities that might best serve the business plans of particular transmission developers or generation providers. In many cases, there will be only one opportunity to get the job done. It needs to be done right.

NOI on Transmission Rate Incentives

- FERC issued a Notice of Inquiry (NOI) in May 2011 (following substantial lobbying effort)
- FERC asked many questions about its current TX incentives policy, under which some have said TX incentives are the “new normal”
- APPA helped form broad customer-side coalition to file joint comments in August 2011; many state public utility commissions were very involved in this effort

The Joint Comments in One Slide

- Distinguish between transmission rate incentives that reduce utility risk (construction work in progress, abandoned plant cost protection, formula rates, accelerated depreciation) and those that enhance returns (rate of return adders, hypothetical capital structures)
- Don't give return-enhancing incentives to projects already receiving risk-reducing rate treatment
- Favor risk-reducing incentives over return-enhancing ones, reserving return enhancing incentives only for the highest risk projects

What Next on Incentives?

- FERC's next step is unclear, as Commissioners' views vary widely
- Commissioner Moeller's recent partial dissents makes clear he has reservations: "Now is not the time for this Commission to begin retreating from its incentive policy on needed transmission lines."
- But we are seeing more scrutiny of returns on equity; the message may be getting through

RTO Locational Capacity Markets

- Mandatory annual auctions for capacity a few years in the future; pricing is based on the location of the generation (if in constrained zone, will have higher capacity prices)
- PJM and New England have them, although rules differ ; PJM's is called the Reliability Pricing Model (RPM)
- MISO has proposed a “capacity market-lite”; it is pending before FERC

Trouble in PJM Land

- RPM was controversial from the start; the rules were eventually set by a settlement
- States negotiated an “out”—if high prices were not producing new generation in their state, they could take action to require new generation to be developed and purchased by their utilities
- Munis/co-ops negotiated a “self supply” option so their generation resources would “clear” in the auction; could submit a low “offer”

How Long to Wait?

- NJ and MD still had no new generation resources after seven annual auctions; they are concerned about high cost and reliability in their constrained regions
- MD opened docket to consider requiring its utilities to procure new generation
- NJ leap-frogged MD and passed a statute to much the same effect

The Minimum Offer Price Rule (MOPR)

- Generators and PJM filed at FERC to prevent NJ from carrying out its plan; they said if these resources were bid in the auction at a “subsidized” low offer price, prices for all generation in the zone would go down, which would be an exercise of “buyer market power”; they argued that the bids should be mitigated UP to 90% of the “cost of new entry” (CONE) to prevent this result

FERC's MOPR Orders

- FERC in an April 2011 order amended RPM rules to effectively eliminate the state and LSE “self supply” options; it issued a parallel order re ISO NE the next day
- Rule revisions adversely impact public power systems trying to build new gas-fired generation (are we “collateral damage” in the war on NJ and MD?)

MOPR Rehearing and Technical Conference

- Rehearings of the PJM MOPR order were filed in May by APPA, other LSEs
- FERC held a July 2011 technical conference; APPA sponsored Pat McCullar of Delaware Municipal Electric Corporation to explain how LSE self supply rule revisions cripple public power systems' ability to develop new gas-fired generation

MOPR Rehearing/Appeal

- FERC denied rehearings in November 2011 Order; relied on case-by-case exception process PJM proposed in compliance filing for self-supplying LSEs
- APPA/NRECA and PJM members sought rehearing; case-by-case approach does not solve the problem; FERC denied it
- Group has sought review in the 3rd Circuit

From the MD PSC's April 2012 Order re New Capacity for MD

- “. . . [W]e cannot rely on PJM’s Reliability Pricing Model to deliver new generation to Maryland. Maryland has not seen any significant new generation constructed here since 2003. Since its inception in 2007, RPM has brought no new generation to Maryland, in spite of the fact that clearing prices for capacity in SWMAAC have averaged almost double those of the non-constrained portions of PJM. . . . Despite these exorbitant capacity charges, which have increased energy costs to Maryland ratepayers by hundreds of millions of dollars, no new base load generation was bid into the BRA during the 2012-2014 delivery period. Zero. The simple fact is that the one year signal, three years into the future has not provided sufficient certainty for prospective generation suppliers to secure financing in the current economic climate.” MD PSC Order No. 84815 at 22.

Constitutional Clash?

- PPL/PSEG on 4/27/12 sued the MD PSC Commissioners in Federal District Court in MD (Civil Case No. 01286-MJG)
- Alleges the MD PSC order violates the Supremacy Clause and the (dormant) Commerce Clause of the Constitution, and “usurps the FERC’s exclusive role in regulating wholesale transactions”

Where Will the New Capacity Come From?

- Issue may be highlighted in PJM's May 2012 capacity auction:
 - Announcements of coal-fired generation retirements in PJM due to new EPA regs
 - IMM complaint about case-by-case exception
 - Signs that demand response may be tapping out as a resource?
 - Prices may rise, but will those with existing capacity want to keep supply constrained?

FERC, NERC and Reliability

- The North American Electric Reliability Corporation (NERC) is the FERC-designated “Electric Reliability Organization” (ERO) under FPA Section 215 that develops and enforces reliability standards, *subject to FERC oversight*
- “Users, owners and operators of the bulk power system” must comply with standards—that includes about 330 APPA Members, who are on NERC’s “Compliance Registry”

Some Pending Reliability Issues

- Definition of the “Bulk Electric System”:
 - “Phase I” definition responding to a prior FERC Order filed with FERC in January
 - Phase II definition work throughout 2012
 - BES definition affects smaller utilities and generators with facilities “on the margin”
 - Does the system have a “material impact” on the BES? Can it qualify for an exception if it does meet the new BES definition?

Cyber Security

- Cyber Security Standards: FERC issued NOPR on Version 4 of the Critical Infrastructure Protection (CIP) Standards; APPA filed generally supportive comments
- NERC/industry already at work on beefed up Version 5 standards; out for ballot
- Cyber Security bills circulating on the Hill; one of the few items that may in fact pass

Find, Fix, Track and Report

- NERC filed in September 2011 a proposed revamp of its compliance and enforcement procedures to allow NERC to present lesser risk issues that have been mitigated/fixed-in-the-field by the registered entity to FERC in a Find, Fix, Track and Report (FFTR) spreadsheet; will not be processed as violations
- Trade Associations filed joint intervention in October 2011 supporting FFTR; *much needed compliance relief for their members*

FFTR Approval

- In March 15, 2012 Order, FERC approved NERC's FFTR proposal (with a few tweaks)
- Commissioner LaFleur (lead commissioner on reliability issues) issued a statement noting that the order allows “the handling of potential violations in a manner commensurate with their severity.”

And an Invitation in P 81!

- “The Commission notes that NERC’s FFT initiative is predicated on the view that many violations of requirements currently included in Reliability Standards pose lesser risk to the Bulk-Power System. If so, some current requirements likely provide little protection for Bulk-Power System reliability or may be redundant. The Commission is interested in obtaining views on whether such requirements could be removed from the Reliability Standards with little effect on reliability and an increase in efficiency of the ERO compliance program. If NERC believes that specific Reliability Standards or specific requirements within certain Standards should be revised or removed, we invite NERC to make specific proposals to the Commission identifying the Standards or requirements and setting forth in detail the technical basis for its belief.”

Just When We All Thought Relations Were Improving....

- FERC Office of Enforcement released “performance audit” of NERC on 5/4/12 in Docket No. FA11-21
- Faults NERC on items from executive/Board compensation studies to “holiday galas” to failure to ensure funds spent only on “statutory” activities
- Commissioners Moeller, LaFleur and Norris have all noted this was a Staff document
- NERC has now asked for a paper hearing

EPA Regulations—The Next Reliability Battleground?

- Concerns about potential impact of new EPA regulations on retirements/retrofits of coal-fired power plants on regional reliability in coal-dependent regions
- FERC held 11/11 Technical Conference; followed with whitepaper on the issue; docket is on FERC 5/17 meeting agenda
- Olsen bill on FPA Section 202(c)

APPA Has Sought Review of EPA's Mercury Regulations

- Sought both reconsideration from EPA and court review on April 14, 2012
- Our issue: not the substance of the MACT regulations but the *timeline for compliance*
- Members tell us they will need more than the three years (plus one year, plus maybe another or maybe not!) EPA has provided

And Finally, A Word About the CFTC...

- Dodd Frank Act passed in July 2010, P. L.111–203, 124 Stat. 1376 (2010), <http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm>
 - Piecemeal implementation in over 30 rulemaking dockets; some aspects delayed repeatedly (most recently until 12/31/12)
 - A regulatory fiesta

What is a “Swap?”

- Ah, that is the question. As yet, we do not have an answer; the CFTC has issued many rules on many topics, but has not answered this fundamental question
- This has led to efforts to seek exemptions for certain types of energy industry transactions from CFTC jurisdiction, in an attempt to “include us out”

CEA Section 4(c)(6) Exemption Possibilities (if in Public Interest)

- “(A) pursuant to a tariff or rate schedule approved or permitted to take effect by the Federal Energy Regulatory Commission;
- (B) pursuant to a tariff or rate schedule establishing rates or charges for, or protocols governing, the sale of electric energy approved or permitted to take effect by the regulatory authority of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy within the State or municipality; or
- (C) between entities described in section 201(f) of the Federal Power Act (16 U.S.C. 824(f)).”

Under 4(c)(6)(A)

- RTOs have filed a request with the CFTC to exempt transactions in their markets—they point to pervasive FERC regulation of these transactions/tariffs
- RTO exemption request does not cover bilateral transactions in RTO regions
- So far, no filing to cover FERC-tariffed transactions in non-RTO regions

FERC-CFTC MOUs

- CEA calls for Memoranda of Understanding (MOUs) between CFTC and FERC to be filed with Congress by 1/17/11 (180 days of enactment):
 - Jurisdictional MOU (to avoid overlapping regulation) (did not happen)
 - Enforcement MOU (to cover sharing of information)(did not happen)

APPA's Mission

- We need to ensure that cost increases to consumers are justified, and not the result of market power/manipulation, bad RTO market design, or “faith-based” regulation
- We need to support *needed* new infrastructure to comply with new regulations and ensure reliability on a rational timetable
- We need to help FERC remember and carry out its statutory mandate and obligation to protect consumers