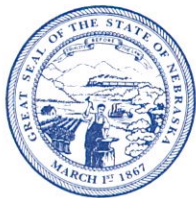


STATE OF NEBRASKA

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DATE: July 3, 2012

TO: Power Review Board Members

FROM: Tim Texel

SUBJECT: Do Nebraska's Incumbent Utilities Have A Right of First Refusal, As Contemplated In FERC Order No. 1000, When A Regional Transmission Organization Determines A Transmission Line Should Be Constructed In Such Utilities' Service Areas?

On July 21, 2011 the Federal Energy Regulatory Commission ("FERC") issued a final rule on Transmission Planning and Cost Allocation, designated as Order No. 1000. The order, as described on FERC's website, is "a Final Rule that reforms the Commission's electric transmission planning and cost allocation requirements for public utility transmission providers. The rule builds on the reforms of Order No. 890 and corrects remaining deficiencies with respect to transmission planning processes and cost allocation methods." See www.ferc.gov/industries/electric/indus-act/trans-plan.asp. On May 17, 2012 FERC issued Order No. 1000-A, in which it denied rehearing requests on Order No. 1000 and provided additional clarification on some issues in Order No. 1000. The rule becomes effective 60 days after publication in *The Federal Register*. The online Code of Federal Regulations indicates the final publication of Order No. 1000-A was published on May 31, 2012. Thus, the rule should be effective July 30, 2012. Among the rulings in FERC Order No. 1000 was the elimination of a federal right of first refusal in Commission-jurisdictional tariffs and agreements. Order No. 1000, paragraph 287. This means that when a Regional Transmission Organization ("RTO") or similar entity determines that a transmission line should be built in a particular area, if the cost to construct the line will be allocated to the utilities throughout the RTO's operating area, then the incumbent utility serving the area at retail where the line would be located cannot be given a right of first refusal to construct the proposed line. Instead, the entity that will construct the line must be chosen using a competitive open bidding process.

In its order, FERC explicitly stated that the rule does not limit or preempt state laws pertaining to the construction of transmission facilities. Thus, if a state has a law

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requiring that the local incumbent utility serving the area where a proposed line will be located has the right to construct the line if it wishes, or to decline the opportunity and allow another entity to construct the line (right of first refusal), such a law still controls with regard to the construction aspects of transmission lines built within that state. The Board and officials in Nebraska's electric utilities wanted to determine whether Nebraska law contains a right of first refusal for its electric utilities. The Nebraska Power Review Board ("PRB" or "the Board") asked me to research the topic and provide my opinion to the question stated in the subject line of this memo. It is my opinion that although Nebraska law clearly indicates a preference that its consumer owned power suppliers construct, own and operate the transmission facilities in Nebraska, state law does not provide an actual right of first refusal to Nebraska's incumbent electric utilities to implement that preference.

Several paragraphs in Order No. 1000 set out the basis for the question posed by the Board. In paragraph 253, FERC states "The Commission concludes that there is a need to act at this time to remove provisions from Commission-jurisdictional tariffs and agreements that grant incumbent transmission providers a federal right of first refusal to construct transmission facilities selected in a regional transmission plan for purposes of cost allocation." Footnote 231 is attached to this sentence. It states:

"As explained in more detail in section III.B.3 below, the Commission purposely refers to 'federal rights of first refusal' in this Final Rule because the Commission's action on this issue in this Final Rule addresses only rights of first refusal that are created by provisions in Commission-jurisdictional tariffs or agreements. Nothing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities. This Final Rule does not require removal of references to such state or local laws or regulations from Commission-approved tariffs or agreements."

In paragraph 287 of the order, FERC states the following:

"The Commission acknowledges that there may be restrictions on the construction of transmission facilities by nonincumbent transmission providers under rules or regulations enforced by other jurisdictions. Nothing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities. It does not follow that the Commission has no authority to remove such restrictions in the tariffs or agreements subject to its jurisdiction."

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Numerous entities petitioned FERC for rehearing and clarification of Order No. 1000. FERC accepted comments and issued Order No. 1000-A, in which it affirmed its basic determinations in Order No. 1000. In paragraph 377 of Order No. 1000-A, FERC stated:

“We affirm the Commission’s finding in Order No. 1000 that the nonincumbent transmission developer reforms do not result in the regulation of matters reserved to the states, such as transmission construction, ownership, or siting. As the Commission explained in Order No. 1000, the nonincumbent transmission developer reforms are focused solely on public utility transmission provider tariffs and agreements subject to the Commission’s jurisdiction and are not intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities.” (Footnote references omitted).

Against this backdrop, the Board, as well as Nebraska’s electric utilities, want to determine if Nebraska law includes a right of first refusal. If it does not, then the Board wishes to decide whether to bring this matter to the Legislature’s attention so that legislation creating a right of first refusal might be considered.

In 2009, the Lincoln Electric System (“LES”), Nebraska Public Power District (“NPPD”) and Omaha Public Power District (“OPPD”) joined the Southwest Power Pool (“SPP”) as transmission-owning members. The SPP is a FERC-approved RTO with member utilities in the states of Arkansas, Kansas, Louisiana, Nebraska, New Mexico, Missouri, Oklahoma, and Texas. The SPP meets the definition of an RTO set out in Nebraska law in Neb. Rev. Stat. § 70-1001.01(4). One of the functions of the SPP is to develop plans for the transmission needs in the organization’s operating area. After undergoing a thorough planning process, the SPP has the authority to issue a notice to construct transmission facilities that have been determined to be necessary.

Nebraska law declares that it is this State’s public policy “to provide adequate electric service at as low overall cost as possible, consistent with sound business practices and, in furtherance of such policy, electric service should be provided by nonprofit entities including public power districts, public power and irrigation districts, nonprofit electric cooperatives, and municipalities.” Neb. Rev. Stat. § 70-1301. Although useful for purposes of assisting in interpreting the legislative intent of the act of which it is part, policy statements are generally not self-implementing. State v. Liston, 271 Neb. 468 (2006); Southern Nebraska Rural Public Power Dist. v. Nebraska Electric Generation and Transmission Cooperative, Inc., 249 Neb. 913, 920, 546 N.W.2d 315, 320 (1996). Thus, without another statute that either prohibits or requires certain conduct, or provides a mechanism to achieve the policy statement’s objective, policy language cannot be

enforced by the courts or the PRB. In this instance, the policy statement is part of Chapter 70, Article 13, which deals with arbitration of wholesale electric rate disputes between power suppliers and wholesale power purchasers.

Nebraska law allows Nebraska's public power utilities the right to construct transmission facilities within their own service areas without the need for PRB approval. Neb. Rev. Stat. § 70-1012 requires PRB approval of all transmission lines or related facilities prior to construction or acquisition of the facilities, but provides an exemption from PRB approval for construction or acquisition of transmission lines or line extensions or related facilities located within a power supplier's own service area. This provides each Nebraska electric utility with the right to construct electric transmission facilities with which to provide retail service to its customers inside its own service area.¹ The statute prohibits power suppliers from constructing transmission facilities in another power supplier's retail service area without first filing an application with the PRB. A utility's right to construct transmission facilities within its own service area is not absolute, though. Another entity could file an application to construct a transmission line through an incumbent utility's service area. Under Nebraska law, private entities are not prohibited from filing an application to construct generation or transmission facilities. Nebraska Att'y Gen. Op. 96073 (1996). If an application were filed without the written consent of the incumbent utility, the PRB would issue a notice of filing and a hearing would be scheduled. The applicant would have the right to provide evidence to the PRB that it meets the requirements in Neb. Rev. Stat. § 70-1011 and/or § 70-1014 and it should be allowed to construct the line. The incumbent utility would have the right to object to the proposed project and present evidence that it is better situated to meet the criteria in the applicable statute. The statutes do not specifically provide a right of first refusal with regard to transmission lines that are determined to be required by a federally-approved regional transmission organization, such as the SPP.

When discussing topics that involve the possibility of private entities constructing transmission or generation facilities in Nebraska, the issue of eminent domain usually arises. Although it is true that Nebraska's public power entities have the ability to use eminent domain, while private entities that might wish to construct transmission facilities would not have that right, that is a practical difficulty for the private entities, not a legal impediment. The lack of eminent domain has the potential to increase the cost for a private entity to construct a transmission line, but it is not a legal prohibition, and it does not mean the incumbent utility has a right of first refusal.

¹ It should be noted that Nebraska statutes often use the term "transmission" in a generic sense to refer to all facilities that are used to transmit electricity. The statutes often do not draw a distinction between bulk transmission, sub-transmission and distribution facilities.

In other states that have enacted a right of first refusal for incumbent electric utilities in whose service area a transmission line proposed by an RTO would be located, the right is quite explicit. South Dakota is one of the states providing its incumbent electric utilities with a right of first refusal. The pertinent part of the statute states:

“If an electric transmission line has been approved for construction in a federally registered planning authority transmission plan, the incumbent electric transmission owner may give notice to the [South Dakota Public Utilities] commission, in writing, within ninety days of approval, of its intent to construct, own, and maintain the electric transmission line. If no notice is provided, the incumbent electric transmission owner shall surrender its first right to construct, own, and maintain the electric transmission line.”

S.D. Codified Laws Ann. § 49-32-20 (2011). It may be worth pointing out that this law was enacted in 2011.

It appears that North Dakota also recently enacted right of first refusal for its incumbent electric utilities. In 2011 the North Dakota Legislature added the following language to one of its statutes:

“In addition, the [North Dakota Public Service] commission may not issue a certificate to an electric transmission provider for construction or operation of an electric transmission line that will interconnect with an electric transmission line owned or operated by an electric public utility if the electric public utility is willing and able to construct and operate a similar electric transmission line.”

N.D. Century Code § 49-03-02(2) (2011).

Another state providing its incumbent utilities with a right of first refusal is Minnesota. The pertinent part of that statute states:

“An incumbent electric transmission owner has the right to construct, own, and maintain an electric transmission line that has been approved for construction in a federally registered planning authority transmission plan and connects to facilities owned by that incumbent electric transmission owner. . . .
Subd. 3. Commission procedure. (a) If an electric transmission line has been approved for construction in a federally registered planning authority transmission plan, the incumbent electric transmission owner, or owners if there is more than one owner, shall give notice to the commission, in writing, within 90 days of approval, regarding its intent to construct, own, and maintain the electric transmission line. . . . (b) If the incumbent electric transmission owner indicates

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that it does not intend to build the electric transmission line, such notice shall fully explain the basis for that decision. If the incumbent electric transmission owner, or owners, gives notice of intent not to build the electric transmission line, then the [Minnesota Public Utilities] commission may determine whether the incumbent electric transmission owner or other entity will build the electric transmission line, taking into consideration issues such as cost, efficiency, reliability, and other factors identified in this chapter.”

Minn. Stat. § 216B.246 (2012). This statute was just enacted in April 2012, and will become effective August 1, 2012.

Conclusion

It is my opinion that Nebraska law does not give incumbent electric utilities a right of first refusal to construct transmission lines or related facilities determined to be necessary as a result of a regional transmission organization’s transmission plan for purposes of FERC Order No. 1000. Nebraska’s stated policy preference is for Nebraska’s public power entities to construct, own, and maintain transmission and generation facilities to be located in the State of Nebraska. Based on the language in existing statutes, the Legislature clearly anticipated that all such facilities would be constructed by Nebraska’s public power entities. However, such policy statements are not self-implementing. If a utility outside Nebraska or a private entity were to file an application for approval of a transmission project determined necessary by a regional transmission organization, there would be an opportunity for Nebraska’s public power entities to file objections, but the Power Review Board would have to weigh the evidence concerning the approval criteria set out in statute. There is no right of first refusal guaranteeing that the incumbent Nebraska public power utility holding the service area rights to the affected area would be able to construct, own or maintain the line. If a right of first refusal is deemed to be needed, it would require Legislative action.

Sincerely,



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