

## C O M M E N T

# Considering Non-Transmission Alternatives

by Randolph Elliott

Randolph Elliott is Senior Regulatory Counsel at the American Public Power Association. The views presented here are his own and do not necessarily represent the positions of APPA or its members. He was counsel for APPA or other parties in a number of the cases discussed.

Shelley Welton's *Non-Transmission Alternatives*<sup>1</sup> is a timely examination of an important issue in energy and environmental policy: What regulatory and business structures would best enable the Nation to plan, build, and pay for the right mix of electric transmission and alternative facilities?

The Article explores reasons why the regional transmission planning process required by the Federal Energy Regulatory Commission's Order No. 1000<sup>2</sup> is not up to that task. It then proposes some reforms that FERC should adopt. As revised for publication here, it suggests that the Supreme Court's recent decision in *FERC v. Electric Power Supply Association*<sup>3</sup> empowers FERC to eliminate a funding barrier for alternative facilities by providing for the regional allocation of their costs.

As the Article describes, Order No. 1000 provides little guidance on how non-transmission alternatives are to be considered alongside transmission in regional planning. This Comment notes ways FERC could clarify key terms used in Order No. 1000—including “non-transmission alternatives” and “comparability”—to better define the roles of the commission and other public agencies and private actors.

One unexplored issue in the Article is the role of transmission customers—particularly load-serving entities—as “stakeholders” in the transmission-planning process. These entities will have the incentive and the ability to be important proponents of non-transmission alternatives.

While the full implications of *FERC v. EPSA* are unclear at this early juncture, the decision on its face does not appear to rest on broad enough principles to support federal jurisdiction over cost allocation for most non-transmission alternatives.

## I. Clarifying the Terms of the Discussion

### A. “Non-Transmission Alternatives”

The Article defines the term “non-transmission alternatives” functionally as “any resource or configuration of resources that can replace or delay the need for additional transmission,” which includes “energy efficiency, demand response, and distributed generation . . . as well as energy storage and centralized generation sited near load.”<sup>4</sup>

Order No. 1000 does not define the term, although it refers to “generation, demand response, and energy efficiency options” as alternatives considered in local resource planning and that “may be” considered in regional transmission planning.<sup>5</sup>

Order No. 1000 also does not address FERC's jurisdiction over the various kinds of non-transmission alternatives. But with minor exceptions, *e.g.*, some energy storage facilities, facilities that are *alternatives* to transmission facilities would not themselves be transmission facilities subject to FERC's jurisdiction.<sup>6</sup> Indeed, most of these alternative facilities would be excluded from FERC's jurisdiction as “facilities used for the generation of electric energy or . . . in local distribution . . . or . . . for the transmission of electric energy consumed wholly by the transmitter.”<sup>7</sup> And most alternative non-transmission *services* would not be provided “for or in connection with” interstate transmission service; to the contrary, they would be substitutes for transmission service. Thus, it is difficult to see how the cost of most of these alternative facilities and services would be recoverable in FERC-jurisdictional rates for transmission service.<sup>8</sup>

Moreover, these nascent alternative technologies, products, services, and facilities are being developed, by utilities

1. Shelley Welton, *Non-Transmission Alternatives*, 39 HARV. ENVTL. L. REV. 456 (2015).

2. Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Order No. 1000, 76 Fed. Reg. 49,842 (Aug. 11, 2011), *order on reh'g*, Order No. 1000-A, 77 Fed. Reg. 32,184 (May 31, 2012), *order on reh'g*, Order No. 1000-B, 77 Fed. Reg. 64,890 (Oct. 24, 2012), *aff'd*, S.C. Pub. Serv. Auth. v. FERC, 762 F.3d 41 (D.C. Cir. 2014).

3. No. 14-840 (U.S. Jan. 25, 2016).

4. Welton, *supra* note 1.

5. Order No. 1000, 76 Fed. Reg. at 49,869 [P 154]. *See generally id.* at 49,868–69 [PP 148, 153–55].

6. 16 U.S.C. § 824(a).

7. *Id.*

8. This issue is important in considering regional cost allocation. *See infra* Part III.

and third parties, primarily at the local distribution level.<sup>9</sup> State public utility commissions are front and center in regulating these matters.<sup>10</sup> So far, FERC has played almost no regulatory role, except for wholesale demand response in regional transmission organization (RTO) markets.<sup>11</sup> Whether FERC can or should use Order No. 1000 to provide a federal regulatory overlay of some subset of non-transmission alternatives, and what would be gained and lost in such an effort, is the key policy question raised by the Article. But to date FERC has remained silent on the matter of its own jurisdictional limits, as the Article notes.

## B. “Comparability”

When FERC required “comparable” consideration of non-transmission alternatives in the regional transmission planning process in Order No. 1000 in 2012, it was applying a comparability principle with a long history in FERC transmission orders.<sup>12</sup>

Order No. 1000’s comparability requirement is a remedy for “unduly discriminatory” transmission service by public utility transmission owners and operators in violation of the statute.<sup>13</sup> Specifically, Order No. 1000 applies to regional transmission planning “the comparability transmission planning principle stated in Order Nos. 890 and 890-A” in 2007.<sup>14</sup> This principle “requires that the interests of public utility transmission providers and similarly situated customers be treated comparably in regional transmission planning.”<sup>15</sup> In 1996, FERC had applied this comparability requirement to open access transmission service and rates in Order No. 888.<sup>16</sup> The term “compara-

bility” first entered the FERC transmission lexicon even earlier, in a tariff order from 1994.<sup>17</sup>

This history is important in assessing the Article’s call for FERC to “Elaborate a More Complete ‘Comparable Consideration’ Methodology.”<sup>18</sup> Because the principle of comparability has this specific, established meaning in FERC transmission policy, and Order No. 1000 applies that principle, the Article appears to seek not just a better-explained methodology, but a different, broader methodology, one focused not on transmission customers’ non-transmission alternatives, but on non-transmission alternatives *qua* alternatives.

Whether FERC intended that policy in Order No. 1000 or wishes to adopt such a policy now, it needs to provide a more detailed explanation of its action. And it would be less confusing if FERC used a different term than “comparability” for this regulatory standard—or better yet, if it simply identified the statutory standard it was applying and explained how it was being applied in this context.<sup>19</sup> That approach would have the advantages of preserving the existing comparability principle and requiring FERC to articulate the legal and factual basis for ordering what would appear to be a different remedy for a different problem.

## II. Creating Proponents of Non-Transmission Alternatives

The Article concludes that public utility transmission providers and RTOs have inherent biases against non-transmission alternatives and are unlikely to champion them.<sup>20</sup> While “stakeholders” in the regional transmission planning process could take on this responsibility, the Article concludes, for various reasons, that they also are unlikely to do so.<sup>21</sup> With no proponent in sight, the Article recommends that FERC remedy the situation by commanding transmission providers and RTOs to propose and analyze reasonable non-transmission alternatives in the regional transmission planning process.<sup>22</sup>

While much of this analysis of incentives and biases appears sound, the Article does not consider the primary stakeholders that Order No. 1000 seeks to protect in the regional transmission planning process—transmission customers, particularly load-serving entities, i.e., utilities

9. See, e.g., PETER FOX-PENNER, SMART POWER: CLIMATE CHANGE, THE SMART GRID, AND FUTURE OF ELECTRIC UTILITIES 157–74 (2010). The author posits two future models for the distribution utility, the “Smart Integrator” see *id.* at 175–88, and the “Energy Services Utility,” see *id.* at 189–202.

10. See, e.g., Reforming the Energy Vision, Case 14-M-0101 (N.Y. Pub. Serv. Comm. Apr. 24, 2014) (staff proposal).

11. See FERC v. EPSA.

12. See Order No. 1000, 76 Fed. Reg. at 49,869.

13. See Order No. 890, 76 Fed. Reg. at 49,860 (citing 16 U.S.C. § 824e). The D.C. Circuit upheld FERC’s authority to issue Order No. 1000 on this basis. See S.C. Pub. Serv. Auth. v. FERC, 762 F.3d 41, 55–64 44 ELR 20197 (D.C. Cir. 2014).

14. Order No. 1000, 76 Fed. Reg. at 49,869. See *id.* at 49,868 (“the requirements of this Final Rule build on the following transmission planning principles that we required in Order No. 890: . . . (3) comparability . . .”). See Preventing Undue Discrimination and Preference in Transmission Service, Order No. 890, 72 Fed. Reg. 12,266, 12,327–28 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241 (2007), order on reh’g, Order No. 890-A, 73 Fed. Reg. 2,984 (Jan. 16, 2008), FERC Stats. & Regs. 31,261 (2007), order on reh’g, Order No. 890-B, 73 Fed. Reg. 39,092 (July 8, 2008), order on reh’g, Order No. 890-C, 74 Fed. Reg. 12,540 (Mar. 25, 2009), order on clarification, Order No. 890-D, 129 FERC ¶ 61,126 (2009). See also Order No. 890-A, 73 Fed. Reg. at 3,008–09.

15. Order No. 1000, 76 Fed. Reg. at 49,869 (citing Order No. 890, 72 Fed. Reg. at 12,327–28).

16. Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), order on reh’g, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997) (Order No. 888-A), order on reh’g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh’g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part and remanded in part, sub nom.*

Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom.* New York v. FERC, 535 U.S. 1 (2002).

17. See *Am. Elec. Power Serv. Corp.*, 67 FERC ¶ 61,168, at 61,490 (1994) (declaring that a public utility’s open access transmission tariff that is not unduly discriminatory must offer service “on the same or comparable basis . . . as the transmission provider’s uses of its system” for “serving its native load customers” and for “serving wholesale requirements customers.”).

18. Welton, *supra* note 1.

19. See *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 535 (2008) (observing that it would be preferable for FERC to explain that its “public interest” standard of review of wholesale power contract rates was simply an application of the statutory just-and-reasonable standard to contract rates).

20. Welton, *supra* note 1.

21. Welton, *supra* note 1.

22. Welton, *supra* note 1.

with a legal obligation (arising from statute, regulation, or contract) to serve end-use electric consumers (or in some cases, another load-serving entity).<sup>23</sup>

Load-serving entities are well positioned to be proponents of non-transmission alternatives. Not only do they have an incentive to keep transmission rates low, they also have expertise in developing and implementing non-transmission alternatives such as distributed generation, demand response, and energy efficiency. As distribution utility service continues to evolve and innovate, load-serving entities should emerge as major proponents of non-transmission alternatives in local and regional transmission planning processes.

This is especially the case with public power and cooperative load-serving entities, which have strong incentives to keep transmission rates low and are able to finance the construction of non-transmission alternatives and to recover the costs from their customers.

Moreover, many public power utilities participate in regional “joint action agencies” to finance, build, and operate generation facilities and to provide themselves wholesale power supply and other services. Many distribution cooperatives are themselves members of regional “generation and transmission” (G&T) cooperatives that perform analogous functions for their member cooperatives. Joint-action agencies and G&T cooperatives may be in a position to aggregate the non-transmission alternatives developed and implemented by their participating member utilities. And by entering the market as proponents of large-scale non-transmission alternatives, these regional entities could provide a new form of “yardstick competition,” pressuring investor-owned utilities to follow suit and RTOs to adapt.<sup>24</sup>

### III. Extending Regional Cost Allocation to Non-Transmission Alternatives

The Article states that by refusing to extend regional cost allocation to non-transmission alternatives, Order No. 1000 “effectively renders non-transmission alternatives infeasible by denying them a viable source of regional financing.”<sup>25</sup> The Article suggests that the Supreme Court’s decision in *FERC v. EPSA* gives FERC authority to remedy this problem, because cost allocation for non-transmission alternatives “directly affects” transmission rates.<sup>26</sup>

23. See 16 U.S.C. § 824q(a) (defining load-serving entity for purposes of FERC’s obligations under this statutory provision). See also S.C. Pub. Serv. Auth. v. FERC, 762 F.3d 41, 90-91, 44 ELR 20197 (affirming Order No. 1000’s compliance with FERC’s obligations under this statutory provision because the order is designed to ensure reliable service to load-serving entities).

24. Yardstick competition refers to the competitive pressure felt between neighboring utilities—especially the competitive pressure on privately owned electric utility companies provided by publicly and cooperatively owned utilities. See 2 ALFRED E. KAHN, THE ECONOMICS OF REGULATION 104–06, 319 (MIT 1988).

25. Welton, *supra* note 1.

26. Welton, *supra* note 1.

That conclusion, however, elides several apparent differences between the two situations:

- (1) Most non-transmission alternative facilities and services are well outside of FERC’s substantive jurisdiction, which is limited to interstate transmission and sales at wholesale.
- (2) Most non-transmission alternative services are not provided “for or in connection with”<sup>27</sup> FERC-jurisdictional transmission service, but rather in lieu of it.
- (3) The allocation of costs for most non-transmission alternative facilities and services would involve FERC in direct rate regulation of entities, services, and facilities outside its substantive jurisdiction.
- (4) The allocation of costs for most non-transmission alternative facilities and services is a “rule, regulation, [or] practice . . . affecting”<sup>28</sup> FERC-jurisdictional transmission rates only indirectly—far less directly than the way wholesale demand response resources affect wholesale energy rates in RTO markets.
- (5) States would have no control over the participation by non-transmission alternatives in FERC-ordered cost allocations of non-transmission alternatives selected for regional cost allocation in the regional transmission plan, whereas states have veto control over whether their state’s demand response resources participate in RTO wholesale markets.

It is therefore unclear how the decision in *FERC v. EPSA* would support the regional allocation of costs of non-transmission alternatives because they are substitutes for FERC-jurisdictional transmission service.

### IV. Conclusions

A blurring of the state-federal jurisdictional lines between local distribution facilities and transmission facilities, between distribution utility services and bulk transmission services, and between retail rate matters and wholesale rate matters, is creating uncertainty among utilities, regulators, and legislators. Welton’s *Non-Transmission Alternatives* is helpful in illuminating many of these developing issues. Even if FERC does not adopt all of its recommendations, the Article points to areas where FERC could helpfully clarify a number of these issues.

27. 16 U.S.C. § 824d(a).

28. 16 U.S.C. § 824e(a).