

NINE FEDERAL AGENCIES SIGN MOU TO SPUR TRANSMISSION LINE SITING ON FEDERAL LANDS

On October 28, nine federal agencies signed a Memorandum of Understanding designed to speed and simplify the process for developing transmission lines on federal lands. Among other things, the agreement aims to promote the Smart Grid and further the use of renewable resources. In addition, at its October 15 public meeting, FERC approved orders confirming its jurisdiction to enforce reliability standards over federal entities, clarifying its standards of conduct for employees of interstate natural gas pipelines and electric transmission providers, and proposing revised Qualifying Facility certification regulations.

TRANSMISSION SITING ON FEDERAL LANDS

Section 1221 of the Energy Policy Act of 2005 requires all federal agencies responsible for reviewing applications for proposed transmission facilities on federal lands to enter into a Memorandum of Understanding (MOU) to ensure timely and coordinated review and permitting of these facilities. The MOU signed on October 28 is intended to speed approval of new transmission lines on federal lands by improving coordination among the Departments of Agriculture, Commerce, Defense, Interior, and Energy as well as the Environmental Protection Agency, the Federal Energy Regulatory Commission, the Council on Environmental Quality, and the Advisory Council on Historic Preservation.

The MOU applies to "Qualifying Projects, which are defined as high voltage transmission lines (generally but not necessarily 230 kV or above) . . . or otherwise regionally or nationally significant transmission lines" where all or part of the transmission line crosses jurisdictions administered by a participating agency.

The MOU carves out the following exceptions:

- Qualifying Projects will not include projects proposed to be sited in a National Interest Transmission Corridor (as designated by the Department of Energy (DOE)).
- The MOU does not apply to transmission lines that cross the U.S. international border, federal submerged lands, national marine sanctuaries or facilities constructed by the federal power marketing administrations.
- The MOU is not intended to authorize siting transmission lines within the boundaries of a National Wildlife Refuge, National Park, or National Marine Sanctuary.

Under the MOU, a "lead agency" will be designated for each proposed qualifying project. This designation will generally be made by the DOE and will go to the agency with the most significant land management interests related to a proposed project. For projects located within National Interest Transmission Corridors (NIETC), FERC will serve as lead agency and the MOU

BEIJING

BRUSSELS

LONDON

NEW YORK

SAN DIEGO

SAN FRANCISCO

SILICON VALLEY

WASHINGTON

WWW.COV.COM

process will be implemented in accordance with FERC's NIETC regulations.

A lead agency has the following responsibilities:

- Notify the other agencies of a proposed qualifying project and facilitate a pre-application meeting of applicants and other agencies and stakeholders to outline data and other application submission requirements.
- Establish a project schedule after consulting with DOE, the project applicant, and other affected parties and agencies.
- Prepare a unified environmental review document incorporating, to the extent practicable, a single environmental record on which all entities can base their decisions.
- Maintain a consolidated administrative record.
- Ensure that all project data are submitted and maintained in electronic formats and provide public access to the data.

The MOU sets out a process with deadlines for resolving disputes among the participating agencies.

A copy of the MOU can be found [here](#).

RELIABILITY JURISDICTION OVER FEDERAL ENTITIES

At its October 15 public meeting, FERC confirmed its jurisdiction to enforce reliability standards over federal entities that use, own or operate the bulk power system.

Under section 215 of the Federal Power Act, FERC certified and oversees the North American Electric Reliability Corporation (NERC) as the electric reliability organization responsible for developing and enforcing mandatory reliability standards for owners, users, and operators of the bulk power system. As such, NERC has authority to assess penalties for violations of its reliability standards, subject to FERC review. The U.S. Army Corps of Engineers self-reported to NERC a violation of a reliability standard, but argued that as a governmental entity it was not required to comply with federal reliability rules. NERC sought a Commission decision on the jurisdictional question.

In its order, FERC says the language of Section 215 requires all users, owners and operators of the bulk power system, including federal entities, to comply with reliability standards. The Commission concluded that "[excluding] federal entities from the reliability provision would run counter to" the legislative purpose of preventing cascading blackouts and "would create significant gaps in an otherwise comprehensive program." The Commission, however, did not rule on the extent of its enforcement authority over such federal entities and expressly reserved on the question of potential sanctions for such a violation.

A copy of the notice can be found [here](#).

STANDARDS OF CONDUCT FOR TRANSMISSION PROVIDERS

FERC approved Order No. 717-A, which addresses requests for rehearing of, and provides clarifications on, Order No. 717. The standards of conduct rules are aimed at ensuring that transmission providers treat affiliated and unaffiliated customers in a non-discriminatory fashion. In Order No. 717, FERC eliminated what was known as the corporate separation approach and instead adopted the employee functional approach that encompasses three fundamental rules:

- Independent Functioning: a transmission provider's transmission function employees must function independently of its marketing function employees.
- No Conduit: prohibits transmission providers from using anyone as a conduit to pass non-public transmission function information to marketing function employees.
- Transparency: allows otherwise prohibited exchanges of information between transmission and marketing employees if the information is made public simultaneously.

Order No. 717-A clarified the following issues:

- The applicability of the standards of conduct to certain transmission and marketing functions
- Which employees should be construed as performing transmission or marketing functions under the Independent Functioning Rule
- The types of information that may be shared under the No Conduit Rule
- The kinds of meetings in which transmission and marketing employees may jointly participate under the Transparency Rule

The order will become effective November 23, 2009. A copy of the order can be found [here](#).

QF CERTIFICATION REGULATIONS

In a Notice of Proposed Rulemaking (NOPR), FERC proposed revisions to its regulations governing the certification of Qualifying Facilities (QFs). QFs are a class of generating facilities established by the Public Utility Regulatory Policies Act of 1978 (PURPA), as amended that receive special rate and regulatory treatment. Two types of facilities are eligible for QF status: small power production (facilities equal to or less than 80 MW in size whose primary energy source is hydro, wind, solar, biomass, waste, or geothermal) and cogeneration. FERC Form 556 must be filed for certification as a QF.

In the NOPR, FERC proposed to:

- Exempt generating facilities less than 1 MW from the QF certification requirement.
- Require that Form 556 be filed electronically.
- Clarify that ownership information must be provided only for: (1) direct owners that hold at least 10% equity in the facility; and (2) upstream owners that both hold at least 10% equity in the facility and are electric utilities or holding companies.
- Codify that FERC may waive QF certification requirement for good cause.
- Require all applicants to serve a copy of the filed Form 556 on affected utilities and state regulatory authorities.

Comments on the proposed rule must be filed on or before December 21, 2009. A copy of the order can be found [here](#).

If you have any questions concerning the material discussed in this client alert, please contact the following members of our energy practice group:

William Massey	202.662.5322	wmassey@cov.com
Robert Fleishman	202.662.5523	rfleishman@cov.com
Bud Earley	202.662.5434	bearley@cov.com
Sharon Jacobs*	202.662.5988	sjacobs@cov.com

*Ms. Jacobs is not yet a member of the District of Columbia bar. She is supervised by principals of the firm.

This information is not intended as legal advice, which may often turn on specific facts. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP is one of the world's preeminent law firms known for handling sensitive and important client matters. This promotional communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts. Covington & Burling LLP is located at 1201 Pennsylvania Avenue, NW, Washington, DC 20004-2401. © 2009 Covington & Burling LLP. All rights reserved.