

EPA Clean Power Plan Considerations: Wheeling Renewable Power

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Here's what you need to know about the opportunities and regulatory impacts.

Investment in renewable generating capacity is a key building block of the U.S. Environmental Protection Agency's ("EPA's") Clean Power Plan to reduce carbon dioxide emissions from electric power generators. Considering the expectation that renewable generation will displace some fossil-fired generation capacity, state programs implementing the EPA regulations could spur development in wind, solar and other renewable energy sources across the country. Renewable developers may approach electric utilities, requesting permission to interconnect their facilities and "wheel" the power to other load-serving utilities. Electric utilities that are exempted from broad regulation under the Federal Power Act ("FPA"), particularly those in prime locations for siting renewables, may want to consider opportunities for and regulatory implications of wheeling renewable power.

The FPA gives the Federal Energy Regulatory Commission ("FERC") authority to regulate wholesale sales and interstate transmissions of electric power. FPA section 201 exempts some electric utilities—municipalities and state agencies, as well as electric cooperatives that receive Rural Utilities Service financing or that sell fewer than four million megawatt hours of electricity per year—from FERC's otherwise broad jurisdiction.¹ Certain FPA provisions apply to these otherwise exempt entities, however, and one provision likely to gain prominence as the Clean Power Plan gains momentum is section 211.

A municipality, state agency or cooperative utility that wheels renewable power to another utility may be regulated by FERC as a transmitting utility.

Section 211 authorizes FERC to require a "transmitting utility" to provide transmission services for others under certain circumstances.² An electric utility otherwise exempted from regulation may be deemed a transmitting utility if it owns, operates or controls facilities used for the transmission of electric energy in interstate commerce for sale at wholesale.³ Thus, if an exempt electric utility wheels power for a renewable generator connected to its system to another utility for resale, it becomes a transmitting utility subject to regulation under section 211.⁴

An exempt electric utility could become subject to section 211 even if it does not own, operate or control transmission-level facilities. FERC may exercise its authority to mandate transmission service under section 211 over transmission and

distribution infrastructure.⁵ Thus, an electric utility that owns only distribution-level facilities may be deemed a transmitting utility.

FERC's authority to regulate transmitting utilities is limited for the purpose of implementing section 211; that is, an exempted municipality, state agency or cooperative that becomes a transmitting utility is not exposed to the full panoply of FPA regulation.

At the request of an interested party, FERC may direct a transmitting utility to provide transmission service. It may require the transmitting utility to expand transmission capacity as needed to accommodate the service request,⁶ and review the transmitting utility's rates and terms of transmission service.⁷ Unless it has FERC approval, a transmitting utility may not unilaterally stop providing FERC-ordered transmission service.⁸

There are some limits on FERC's authority to require transmission service. For instance, FERC generally may not compel wheeling for retail transactions.⁹ Thus, FERC could not deem an exempted utility to be a transmitting utility for wheeling a renewable generator's output to an end-use customer, nor could it require an electric utility, even if it were deemed a transmitting utility, to provide retail wheeling. FERC also may not order transmission service if the transmitting utility's provision of such service would impair reliability of electric service.¹⁰

Notwithstanding the regulatory implications, there may be opportunities for electric utilities to wheel power for renewable resources. Electric utilities ordered by FERC to provide wholesale transmission service are to be fairly compensated for providing the requested service. The transmitting utility may establish rates that provide for recovery of all costs net of system benefits in connection with transmission and any necessary associated services, including the costs of expanding facilities.¹¹ Importantly, and to the extent practicable, the cost of transmission service is to be borne by the entity requesting service, not by the transmitting utility's existing wholesale, retail and transmission customers.

Municipalities, state agencies and cooperatives in prime locations for siting renewables could benefit from wheeling power developed in response to the Clean Power Plan. These exempted entities may want to consider opportunities to wheel power for new renewable resources, as well as the regulatory implications.

¹ See 16 U.S.C. § 824(f) (exempted, except as FPA specifically provides).

² *Id.* § 824j.

³ *Id.* § 796(23).

⁴ *Tex.-La Coop. of Tex., Inc.*, 67 FERC ¶ 61,019, 61,055 (1994) (FERC shall not be "artificially constrained by hypertechnical distinctions" between transmission and distribution infrastructure). Compare *Tex.-N.M. Power Co.*, 78 FERC ¶ 61,187, 61,798 n.1 (1997) ("TNP's Texas facilities do, however, qualify TNP as a 'transmitting utility,' within the meaning of sections 211 and 212 of the Federal Power Act . . . to the extent it uses these facilities for the sale of electric energy at wholesale.") with *Pub. Serv. Co. of Colo.*, 99 FERC ¶ 61,214, 61,898 (2002) (denying applicants' section 211 request for transmission service from a nontransmitting utility cooperative association).

⁵ See *Suffolk Cnty. Elec. Auth.*, 106 FERC ¶ 61,157 (2004) at 9 (FERC "may order transmission services under [s]ection 211 even when they involve the use of 'local distribution' and 'generation' facilities that are otherwise non-jurisdictional") (footnote omitted); *Tex.-La. Coop. of Tex., Inc.*, 67 FERC at 61,056 n.36 (1994) ("The fact, therefore, that transmission services may encompass the use of *facilities* that in other contexts would be classified as distribution facilities has no effect on [FERC's] authority to order transmission services under section 211").

⁶ See 16 U.S.C. § 824j(a).

⁷ See *id.* § 824k(a).

⁸ See *id.* § 824j(d).

⁹ See *id.* § 824k(h).

¹⁰ See *id.* § 824j(b).

¹¹ See *id.* § 824k(a).