STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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August 22, 2011

SENT VIA ELECTRONIC FILING
Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Room 1-A209
Washington, D.C. 20426

Re: Docket No. RM10-23-000 - Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities

Dear Secretary Bose:

Attached, for filing, is the Request for Clarification/ Rehearing of the New York State Public Service Commission in the above-entitled proceeding. The parties have also been provided with a copy of this filing, as indicated in the attached Certificate of Service. Should you have any questions, please feel free to contact me at (518) 473-8178.

Very truly yours,

David G. Drexler
Assistant Counsel

Attachment

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities	)))	Docket No. RM09-18-000

REQUEST FOR CLARIFICATION, OR IN THE ALTERNATIVE, REQUEST FOR REHEARING OF THE NEW YORK STATE PUBLIC SERVICE COMMISSION

INTRODUCTION

On July 21, 2011, the Federal Energy Regulatory Commission (FERC or Commission) issued an order requiring electric transmission providers to revise their tariffs to include an interregional transmission planning process and a methodology for selecting and allocating the costs of new interregional transmission facilities to beneficiaries (Order No. 1000).[1] Order No. 1000 also required that the transmission planning process consider transmission needs that may be driven by public policy requirements established by state or federal laws or regulations (Public Policy Requirements). Through these revisions and others, the Commission seeks to identify

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[1] Docket No. RM10-23-000, Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Order No. 1000, 136 FERC ¶61,051 (issued July 21, 2011) (Order No. 1000). The NYPSC submitted a timely Notice of Intervention and Comments in this proceeding on September 29, 2011.

transmission facilities that more efficiently or cost-effectively meet the region's reliability, economic and Public Policy Requirements, and to increase the likelihood that facilities "selected in a regional transmission plan for purposes of cost allocation" will actually be constructed.[2]

While the NYPSC recognizes the important goal of Order No. 1000 to help ensure that new transmission facilities that are needed are ultimately built, the NYPSC respectfully submits that the Commission has impermissibly asserted jurisdiction beyond the authority Congress has vested in FERC under the Federal Power Act (FPA). In particular, the Commission has asserted, for the first time, that it maintains jurisdiction to impose costs for new interregional transmission facilities involuntarily upon beneficiaries in one region that have neither a contractual nor customer relationship with the transmission developer in another region. As discussed below, the Commission's assertion of jurisdiction is inconsistent with the FPA, case law, and Commission precedent, which has consistently rejected the involuntary imposition of costs on utilities in other regions.

We also note that challenges to the Commission's authority in this respect are currently pending in another FERC

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[2] Order No. 1000, ¶5.

proceeding.[3] We therefore request rehearing pursuant to Rule 713 of the FERC's Rules of Practice and Procedure, so that the Commission may reconsider this issue.

The NYPSC also requests clarification, or in the alternative rehearing, of the Commission's decision to allow any stakeholder to propose a transmission project thought to be consistent with state Public Policy Requirements. We seek to clarify that the Commission will allow states to undertake a formal role in the transmission planning process by identifying the appropriate public policy requirements established by the state. Where states have identified which transmission projects should be considered to address a state public policy objective, including public policies established under regulatory orders,[4] the Commission should provide that those determinations will be given deference.

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[3] Docket No. ER11-1844-000, Midwest Independent Transmission System Operator Inc. The NYPSC filed a Request for Rehearing in this proceeding on January 31, 2011.

[4] The NYPSC has adopted several significant policies, such as the Renewable Portfolio Standard and Energy Efficiency Portfolio Standard, which should be accounted for in the planning process as if the policies were specified by statute or regulation.

STATEMENT OF ISSUES

1) Whether the Federal Power Act authorizes the Commission to involuntarily impose the costs of new transmission facilities on a region that does not have a contractual or customer relationship with another region.[5]

2) Whether the Commission's decision to not defer to a states' identification of its public policy objectives, which should be evaluated to address potential transmission needs, was arbitrary and capricious.[6]

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[5] See, *Permian Basin Area Rate Cases*, 390 U.S. 7474, 822 (1968); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 341 (U.S. 1956); 16 U.S.C. §§ 824, 824a, 824d, and 824e; New York State Electric & Gas Corp. v. Federal Energy Regulatory Commission, 638 F.2d 388, 395 (2nd Cir. Court of Appeals); Docket No. ER95-215-000, Southern California Edison Company, et al. Order Accepting for Filing and Suspending Proposed Rates and Establishing Further Procedures, 70 FERC ¶61,087, 61,250 (issued January 27, 1995); *Midwest Independent Transmission System Operator, Inc.*, Order on Initial Decision, 131 FERC ¶ 61,173 (2010).

[6] In reviewing agency determinations, courts shall "hold unlawful and set aside agency action, findings, and conclusions found to be...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;...in excess of statutory jurisdiction, authority, or limitations, or short of statutory right...; or, unsupported by substantial evidence." See, 5 U.S.C. §706; see also, Public Service Commission of the Commonwealth of Kentucky v. Federal Energy Regulatory Commission, 397 F.3d 1004, 1008-09 (D.C. Cir. 2005) (finding that the Commission may not ignore arguments that have been presented); Federal Communications Commission v. FOX Televisions Stations Inc., 129 S. Ct. 1800, 1811 (2009)(finding that an agency is required to provide a reasoned explanation for "disregarding facts and circumstances that underlay or were engendered by [a] prior policy"); Greater Boston Television Corp. v. Federal Communications Commission, 444 F.2d 841, 852 (D.C. Cir. 1970)(determining that an agency must engage in reasoned decision-making when changing course from its prior precedents), cert. denied, 403 U.S. 923 (1971); Docket No. ER95-215-000, Southern California Edison Company, et al. Order Accepting for Filing and Suspending Proposed Rates and Establishing Further Procedures, 70 FERC ¶61,087, 61,250 (issued January 27, 1995); Cost Allocation NOPR.

DISCUSSION

I. The Federal Power Act does not authorize the Commission to impose the costs of new transmission facilities on a region that does not have a contractual or customer relationship with another region

In Order No. 1000, the Commission adopted a novel extension of its rate-reviewing authority under the FPA to include the imposition of the costs for new transmission facilities on regions that are neither contracting for transmission service from another region, nor served as customers of that other region. Specifically, the Commission asserted that its "jurisdiction is broad enough to allow it to ensure that beneficiaries of service provided by specific transmission facilities bear the costs of those benefits regardless of their contractual relationship with the owner of those transmission facilities."[7] The Commission argues that section 201(b)(1) of the Federal Power Act (FPA)(16 U.S.C. §824(b)(1)), which provides jurisdiction over the transmission of electric energy in interstate commerce and all facilities used for such transmission, supports its assertion of jurisdiction because it contains no requirement that there be a contractual or customer relationship.[8]

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[7] Order No. 1000, ¶¶ 531, 539.

[8] Order No. 1000, ¶¶ 532

The Commission has inappropriately expanded its authority to ensure a just and reasonable allocation of costs for new transmission facilities on an *intraregional* basis, by asserting it can also allocate costs on an *interregional* basis. In the latter case, the involuntary assignment of costs between regions is inconsistent with the provisions of the FPA, court precedent, and prior Commission decisions.

Under the FPA, utilities use the regulatory framework to recover the costs of serving their customers within a region, and the Commission ensures those rates are just and reasonable. This framework was observed by the court in *Permian Basin Area Rate Cases*,[9] which cited *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*,[10] for the proposition that "[t]he regulatory system created by the Act is premised on contractual agreements voluntarily devised by the regulated companies." As the Court articulated in *United Gas Pipe Line*, under the Natural Gas Act, there is a "single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful. The Act merely defines the *review* powers of the Commission...."[11] The Court further indicated that "[t]he basic power of the

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[9] 390 U.S. 7474, 822 (1968).

[10] 350 U.S. 332, 341 (U.S. 1956).

[11] Id. (emphasis added).

Commission is that given...to set aside and modify any rate or contract which it determines, after hearing, to be unjust, unreasonable, unduly discriminatory, or preferential. This is neither a 'rate-making' nor 'rate-changing' procedure. It is simply the power to *review rates and contracts* made in the first instance by natural gas companies, and, if they are determined to be unlawful, to remedy them."[12]

The FPA also contains provisions that indicate the Commission's authority is very limited with respect to compelling actions between regions. Under section 202 of the FPA (16 U.S.C. §824a(a)), "the Commission is empowered and directed to divide the country into regional districts for the *voluntary* interconnection and coordination of facilities for the generation, transmission, and sale of electric energy...." Although the Commission attempts to distinguish a voluntary interconnection pursuant to this section from the transmission planning process requirements under Order No. 1000, the involuntary imposition of costs between regions under Order No.

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[12] 350 U.S. 332, 341 (U.S. 1956) (emphasis added). The "filing and rate-revision provisions of the Federal Power Act 'are in all material respects substantially identical to the equivalent provisions of the Natural Gas Act.' *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353, 76 S. Ct. 368, 371-372, 100 L. Ed. 388, 394 (1956); *see also Permian Basin Area Rate Cases* (Continental Oil Co. v. FPC), supra note 36, 390 U.S. at 821, 88 S. Ct. at 1388, 20 L. Ed. 2d at 366; *Richmond Power & Light v. FPC*, 156 U.S. App. D.C. 315, 317, 481 F.2d 490, 492, cert. denied, 414 U.S. 1068, 94 S. Ct. 578, 38 L. Ed. 2d 473 (1973)." *Cleveland v. Federal Power Comm'n*, 525 F.2d 845, 855 (D.C. Cir. 1976).

1000 may well lead to an involuntary interconnection between those regions as regions would effectively be required to interconnect by being forced to assume the costs. Therefore, the Commission appears to be accomplishing interregional interconnections indirectly, through cost allocations, even though it is prohibited from doing so directly.[13]

The involuntary imposition of costs between regions will likely become manifest in the Order No. 1000 compliance filings. While the Commission articulated the principle that costs shall be allocated "solely within transmission planning region(s) unless those outside voluntarily assume costs,"[14] the compliance filing is required to "describe a transparent and not unduly discriminatory process for evaluating whether to select a proposed transmission facility in the regional transmission plan for purposes of cost allocation."[15] In developing a process for selecting a proposed facility for purposes of cost allocation, it is likely that utilities outside a region may not voluntarily assume the costs, yet would nonetheless be obligated to pay them. To illustrate using the New York Independent System Operator, Inc's (NYISO) process for selecting projects for cost

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[13] See, New York State Electric & Gas Corp. v. Federal Energy Regulatory Commission, 638 F.2d 388, 395 (2nd Cir. Court of Appeals) (indicating that "the Commission [cannot] do indirectly what it cannot do directly").

[14] Order No. 1000, ¶¶650-651.

[15] Order No. 1000, ¶328.

allocation under the Congestion Assessment and Resource Integration Study (CARIS), the requirement that 80% of beneficiaries agree to the cost allocation may still result in the involuntary imposition of costs on up to 20% of beneficiaries that are opposed to the allocation.[16] The Commission should recognize that the practical effect of its compliance filings will likely conflict with its stated principle that entities outside of a region must "voluntarily assume costs," by potentially allocating costs involuntarily. It would be impermissible for the Commission to expand its authority by means of a super-majority vote.

Finally, we point out that the Commission's precedent does not support the involuntary allocation of costs to entities outside of a region.[17] According to its precedent, the Commission has recognized that its rate-related authority under

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[16] Although the NYISO's CARIS process is not controlling, it provides an example of the type of "selection" process the Commission has found acceptable in the past and may likely approve in reviewing future compliance filings.

[17] When the Commission deviates from its prior decisions, as it has done here, it is required to explain the reasons for the deviation. As courts have consistently held, an agency must supply a reasoned analysis when modifying its prior policies. See, Federal Communications Commission v. FOX Televisions Stations Inc., 129 S. Ct. 1800, 1811 (2009)(finding that an agency is required to provide a reasoned explanation for "disregarding facts and circumstances that underlay or were engendered by [a] prior policy"); see also, Greater Boston Television Corp. v. Federal Communications Commission, 444 F.2d 841, 852 (D.C. Cir. 1970)(determining that an agency must engage in reasoned decision-making when changing course from its prior precedents), cert. denied, 403 U.S. 923 (1971).

the FPA is premised on the existence of contractual relationships between a utility and its customers. Consistent with the contractual context of FPA regulation, the Commission has included customer-specific agreements in its *pro forma* tariffs. As recently as May 2010,[18] the Commission reversed the initial finding of an Administrative Law Judge's decision that the Midwest ISO could collect the Seams Elimination Charge/Cost Adjustment/Assignment ("SECA") transmission-related charges from a retail load-serving entity (Green Mountain), which was not a Midwest ISO transmission customer or market participant.[19] To facilitate this collection, the Midwest ISO had filed with the Commission an unexecuted service agreement with Green Mountain. In reversing the ALJ's finding, the Commission stated:

> We disagree with the Initial Decision's finding that "[s]ince the procurement of network transmission service was for the benefit of Green Mountain and its financial responsibility, Green Mountain is the entity that paid transmission costs and should pay SECAs." Thus, we will reverse the Initial Decision's conclusions that Green Mountain is a "customer" under the Midwest ISO tariff and that Midwest ISO properly filed unexecuted service agreements on Green Mountain's behalf pursuant to Schedule 22. Consequently, we will also reverse the Initial Decision's conclusion that Midwest ISO properly assessed Green Mountain SECA

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[18] *See Midwest Independent Transmission System Operator, Inc.*, Order on Initial Decision, 131 FERC ¶ 61,173 (2010) ("*Green Mountain*").

[19] Transmission service had been made available to Green Mountain by its affiliate, BP Energy, a MISO transmission customer.

> charges as a customer within a designated subzone under Schedule 22.[20]

The Commission's finding was premised on the lack of privity of contract between the Midwest ISO and Green Mountain:

> Instead, we find that BP Energy is responsible for the SECA charges here. BP Energy and Green Mountain negotiated a business arrangement in which the rights and responsibilities of the parties were established by contract. Under its contractual arrangement, if BP Energy failed to pay Midwest ISO for network transmission service, Midwest ISO would have had no recourse against Green Mountain. Likewise, if Green Mountain failed to pay BP Energy under their separate Energy Services Agreement, BP Energy was still obligated to pay Midwest ISO for network transmission service. Accordingly, we will reverse the Initial Decision's finding that Green Mountain should pay SECA charges based on its contractual arrangements.[21]

II. The Commission Should Defer To States That Identify The State-Level Public Policy Needs For Which Transmission Solutions Should Be Identified

Order No. 1000 requires public utility transmission providers to identify transmission needs driven by Public Policy Requirements, and to evaluate potential solutions to meet those needs."[22] The Commission specified that "all stakeholders must have an opportunity to provide input and offer proposals regarding the transmission needs they believe should be so

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[20] *Id.* at P 421.

[21] Id. at ¶422.

[22] Order No. 1000, ¶205.

identified."[23] However, the Commission has required transmission providers to "identify, out of this larger set of needs, those needs for which transmission solutions will be evaluated."[24] Although the Commission has suggested the procedures may rely on a "committee of state regulators" to identify those needs for which solutions will be evaluated,[25] we ask the Commission to clarify that when state regulators play a formal role in this process, their determinations regarding needs driven by state public policies will be entitled to deference.

Because states are in the best position to identify which of the state public policies should be included in the planning process for purposes of identifying transmission needs, the Commission should allow states to identify those policies and defer to their determinations. It would be arbitrary and capricious to allow any stakeholder to establish a state public policy need over the objection of the state that established

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[23] Order No. 1000, ¶209.

[24] Id.

[25] Id.

such policy.[26] We believe that this requested clarification is consistent with the Commission's recognition of the important role of state when it "strongly encourage[d] states to participate in both the identification of transmission needs driven by Public Policy Requirements and the evaluation of potential solutions to the identified needs."[27] Moreover, by providing this requested clarification, it should reaffirm FERC's commitment to work with states that become involved in the planning process, as desired by the Commission.

Furthermore, deference should be provided to state determinations as to whether a project selected to meet a state Public Policy Requirement is consistent with state policy. The Commission correctly acknowledges that states can take action to prevent a selected project from attaining fruition through the siting process.[28] By that point in time, however, significant expenditures will have been made in pursuit of the project, and

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[26] Under the "arbitrary and capricious" standard within the Administrative Procedure Act, the Commission must respond meaningfully to the arguments that have been raised. Public Service Commission of the Commonwealth of Kentucky v. Federal Energy Regulatory Commission, 397 F.3d 1004, 1008-09 (D.C. Cir. 2005) (finding that the Commission may not ignore arguments that have been presented). In our initial comments, we requested that the Commission allow states to identify which State-level public policies should be included in the planning process.

[27] Order No. 1000, ¶212.

[28] Order No. 1000, ¶227.

those expenditures will be recoverable under the project's cost allocation. This situation can lead to needless expenditure of ratepayer monies.

CONCLUSION

For the reasons discussed above, the Commission should grant the NYPSC's Request for Clarification, or in the alternative, Request for Rehearing, and modify Order No. 1000 accordingly.

Respectfully submitted,

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for Peter McGowan

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