UNITED STATES OF AMERICA
BEFORE THE
Federal energy regulatory Commission**ERROR! REFERENCE SOURCE NOT FOUND.**

Building for the Future Through Electric Regional Transmission Planning and Cost Allocation	)	Docket No. RM21-17-000

REQUEST FOR REHEARING OF THE MONTANA PUBLIC SERVICE COMMISSION

Pursuant to Rule 713 of the Federal Energy Regulatory Commission's ("Commission" or "FERC") Rules of Practice and Procedure,[1] the Montana Public Service Commission ("MTPSC") respectfully files this request for rehearing in response to FERC Order 1920, Building for the Future Through Electric Regional Transmission Planning and Cost Allocation, issued on May 13, 2024. As explained below, the Commission should reconsider its decision to eliminate voluntary state agreements. The Commission should also reconsider the imposition of mandatory planning and cost allocation criteria that will burden non-consenting states with costs driven by other state's policy goals.

STATEMENT OF THE ISSUES

Pursuant to Rule 713(c)(2) of the Commission's Rules of Practice and Procedure, MTPSC submits the following statement of issues and specification of errors regarding Order 1920:

1. Without a voluntary state agreement process, the Commission erred by exceeding its jurisdiction and interfering with state decisions about generation resource planning and approval. Representative precedent: 16 U.S.C. §824e(a); 12 U.S.C. § 824(b)(1). *FERC v. Elec.*

[1] 18 C.F.R. § 385.713(c).

Power Supply Ass'n, 577 U.S. 260 (2016) ("*EPSA*"); *Pac. Gas & Elec. Co. v. State Energy Resources Conservation & Development*, 461 U.S. 190 (1983); *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (2014) ("*South Carolina*").

2. The Commission erred by adopting a Final Rule that violates the cost causation principle. Representative precedent: *KN Energy, Inc v. FERC*, 968 F.2d 1295 (1992); *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, 476-77 (7th Cir. 2009).

3. The Commission erred by adopting a Final Rule that undermines states' role in transmission planning and ratemaking and does not result in just and reasonable rates. Representative precedent: 16 U.S.C. § 824e.

ANALYSIS

By socializing costs associated with a state's policy decisions, the Final Rule exceeds the jurisdiction of the Commission, violates the cost causation principle, and interferes with state authority over generation resource planning and selection. The significant changes made in the final rule should have undergone a second, more rigorous public comment period. For the reasons explained below, the Commission should reconsider its rule and correct several important flaws.

A. Without a voluntary state agreement process, the Commission erred by exceeding its jurisdiction and interfering with state decisions about generation resource planning and approval.

The planning and selection of generation resources is undeniably within the states' jurisdiction.[2] This Commission's authority under the FPA is expressly limited to "only . . . those matters which are not subject to regulation by the States."[3] The Commission has no jurisdiction

[2] *Pac. Gas & Elec. Co. v. State Energy Resources Conservation & Development*, 461 U.S. 190, 212 (1983).
[3] 12 U.S.C. § 824(b)(1).

"over facilities used for the generation of electric energy."[4] The Supreme Court has acknowledged that FERC regulation of jurisdictional subject matters (wholesale sales and transmission) may influence matters within the states' power to regulate.[5] FERC Order 1000 survived scrutiny under this jurisdictional framework because of its light touch, which did not mandate a "backstop" to a voluntary state agreement. As such, there was little risk of Order 1000 dictating substantive resource planning outcomes.[6]

Here, the removal of the voluntary state agreement was a significant change from the Notice of Proposed Rulemaking to the Final Rule. This process would have allowed states to represent their public policy interests and, in the event of a conflict, prevent other states from forcing their policy decisions on nonconsenting neighbors. By reducing states' roles to mere stakeholders and leaving a "backstop" that fails to connect specific states' cost allocations to their policy decisions, the Commission has placed states in an untenable position of either agreeing to unjust and unreasonable cost allocations, or having that burden foisted upon them by default.[7] A voluntary state agreement process is therefore essential to avoid interfering with states' rights with respect to transmission planning and selection.

Without a voluntary state agreement process, the Final Rule's regional cost allocation scheme ensures that nonconsenting states will be swept up in their neighbors' preferred policy projects. The mandated planning criteria require transmission providers to account for "state and local laws and regulations on decarbonization and electrification, . . . [and] trends in fuel costs and the cost, performance, and availability of generation, electric storage resources."[8] And,

[4] *Id.*
[5] *EPSA*, 577 U.S. at 295–96.
[6] Order No. 1000-A ¶ 188, 77 Fed. Reg. at 32,215; *South Carolina*, 762 F.3d at 56-59.
[7] Order 1920 ¶ 1292.
[8] Order 1920 ¶ 409.

despite the Commission's acknowledged lack of jurisdiction over generation resource planning, the production cost of generation resources is also a benefit transmission providers must measure and account for when allocating costs.[9] These requirements will make certain transmission projects rise to the top in the planning process, even if the projects would not be necessary under a given state's policy goals. This influence over the selection of transmission projects will inevitably affect resource planning and selection at the state level. This Commission's distortion of the generation resource planning process unlawfully invades the jurisdiction of the states.

The Commission emphasizes that this Final Rule is about process, rather than substantive decisions about which projects will get built. As a practical matter, however, it defies reason that transmission providers would eschew the projects identified by their Commission-approved *selection criteria*.[10] Rejecting the results of their tariffed criteria would risk substantial disallowances after a prudency review. Transmission providers are on much stronger footing when implementing not only their established planning process, but also the results of that process. There is no incentive for a transmission provider to reject the results of this Commission's approved transmission planning process. The Commission's emphasis on process throughout the Final Rule ignores the clear, real-world implications of its decision.

B. The Commission erred by adopting a Final Rule that violates the cost causation principle.

As articulated by the D.C. Circuit in *KN Energy, Inc v. FERC*, the cost causation principle means that "all approved rates [must] reflect to some degree the costs actually caused by the customer who must pay them."[11] "To the extent that a utility benefits from the costs of new facilities, it may be said to have 'caused' a part of those costs to be incurred, as without the

[9] Order 1920 ¶ 720.
[10] Order 1920, 187 FERC ¶ 61,068 at ¶ 126.
[11] 968 F.2d 1295, 1300 (1992).

expectation of its contributions the facilities might not have been built, or might have been delayed."[12]

The Final Rule abandons the Order 1000 regional cost allocation principle that allowed a transmission planning region to use different cost allocation methods for different types of facilities in a regional transmission plan. Previously, Order 1000 provided:

> A transmission planning region may choose to use a different cost allocation method for different types of transmission facilities in the regional transmission plan, such as transmission facilities needed for reliability, congestion relief, or to achieve Public Policy Requirements.

The Commission recognized the importance of this flexibility to address public policy requirements that may affect the transmission needs of only one state in a region.[13] The Commission has provided no reasoned basis for its departure from this Order 1000 principle. The Commission's broad attempt at rationalizing its change of course rests on the conclusion that project-type-specific allocation methods are too "siloed" and would not produce the "long-term, forward-looking, more comprehensive regional transmission planning" the Commission intended.[14]

The one-size-fits-all approach adopted in Order 1920 will not solve the siloing problem, however. A state's decision to prioritize or prefer certain projects necessarily treats those favored projects differently than all others. Any benefit that flows from the selection of a state's favored project must therefore be uniquely allocated to the state that has, through its enacted policies, attributed special value to the project. But instead of recognizing how a project's benefits and costs may be uniquely attributed to a state's policy decisions, Order 1920 lumps a state's policy-

[12] *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, 476-77 (7th Cir. 2009).
[13] Order 1000 ¶ 688.
[14] Order 1920 ¶ 1474.

driven facilities in with all others in the *ex ante* allocation methods. The resulting cost allocation will fail to reflect the role of state policy in causing costs and insulate cost-causing states from the burden imposed by their policies. States that have not adopted policies to spur the development of this Final Rule's preferred resources will be forced to fund, at least in part, the costs caused by other state's policy decisions.

C. The Commission erred by adopting a Final Rule that undermines states' role in transmission planning and ratemaking and does not result in just and reasonable rates.

Both the Commission and the MTPSC are required to set just and reasonable rates. 16 U.S.C. § 824e; Mont. Code Ann. § 69-3-330.

As explained in NARUC's initial comments:

> since the projects under consideration in the Long-Term Regional Transmission Planning process are largely driven by state public policies, state regulators should have a key role in evaluating the benefits and allocating the costs. State regulators are attuned to the concerns of the local communities where the transmission will be sited and the retail ratepayers who must, in many instances, foot a large fraction of the cost.[15]

A significant share of the costs of utility transmission are allocated to the utility's retail customers. Although the Commission has concluded that the cost allocated to retail customers should correspond to the benefit they receive, the determination of what costs retail customers must bear is a question best left to the expertise of the states.

Currently, the State of Montana has not made decarbonization a priority.[16] Nevertheless, the planning and cost allocation requirements of this Final Rule would force Montana transmission providers to plan projects based on the decarbonization goals of other states in the

[15] Comments of the National Association of Regulatory Utility Commissioners (August 17, 2022).
[16] To the contrary, the Montana Legislature has even prevented the MTPSC from providing a bonus or adder for the cost of an externality that is not reflected in existing regulation or law. Mont. Code Ann. § 69-3-1206(3).

region. After factoring these goals into the regional plan, the leading transmission projects may not be the most economical, let alone necessary, but for the policy goals of other states. And, when a transmission project based on decarbonization goals is built, Montana's transmission providers would also have to account for some abstract, assumed benefits to Montana retail customers, even if the project would not be considered necessary or economical in the absence of other state's decarbonization goals. But if the costs allocated to Montana retail customers exceed the benefits that Montana policy recognizes from regional transmission projects, the MTPSC would be forced to either assign unjust and unreasonable rates to retail customers, or deny the utility a potentially significant portion of its expected cost recovery. This position is untenable and unlawful.

The MTPSC typically evaluates public utility transmission projects for cost recovery from retail customers through comprehensive rate reviews. In these reviews the MTPSC must determine whether projects are needed for adequate retail service, whether projects are least-cost solutions to a demonstrated need, whether benefits accruing to retail customers are at least roughly commensurate with allocated costs, and whether the rates designed to recover allocated costs are just and reasonable. These rate reviews are typically *post hoc* rather than *ex ante*, so that benefits are more easily determined and justified.

If a portion of the costs of a Long-Term Regional Transmission Facility are to be recovered from Montana retail customers, the MTPSC must evaluate the costs and benefits derived from the project on a *post-hoc* basis to determine that costs allocated to retail customers, and rates designed to recover those costs are just and reasonable. It is not clear to the MTPSC that Order 1920 is designed to accommodate this process.

CONCLUSION

For the reasons set forth above, the Commission should grant rehearing of Order 1920 and reconsider its decision to eliminate voluntary state agreements. The Commission should also reconsider the imposition of mandatory planning and cost allocation criteria that will burden non-consenting states with costs driven by other state's policy goals.

Respectfully submitted,

Montana Public Service Commission

By: */s/ DRAFT*
James Brown
President, Montana Public Service Commission

By: */s/ DRAFT*
Jennifer Fielder
Vice President, Montana Public Service Commission

By: */s/ DRAFT*
Tony O'Donnell
Commissioner, Montana Public Service Commission

By: */s/ DRAFT*
Randy Pinocci
Commissioner, Montana Public Service Commission

By: */s/ DRAFT*
Dr. Annie Bukacek
Commissioner, Montana Public Service Commission

Dated: June 12, 2024

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service lists compiled by the Secretary in these proceedings.

Dated June 12, 2024.

By: */s/ DRAFT*