UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

ALABAMA PUBLIC SERVICE COMMISSION
REQUEST FOR REHEARING

Pursuant to Section 313 of the Federal Power Act, 16 U.S.C. § 825*l* (2000), and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC"), 18 C.F.R. § 385.713 (2011), the Alabama Public Service Commission ("APSC") submits this Request for Rehearing of Order No. 1000.[1] Despite prior assurances in the notice of proposed rulemaking that the Commission had no intention, as part of any rule on transmission planning and cost allocation, of infringing upon state authority with respect to integrated resource planning or otherwise address, change or preempt any state or local law or regulation,[2] the final rule accomplishes these very ends. Accordingly, the APSC respectfully requests that the Commission reconsider its final rule, as set forth below.

I. STATEMENT OF ISSUES AND SPECIFICATIONS OF ERROR

The APSC seeks rehearing of the following issues:

1. Order No. 1000 infringes upon the jurisdiction of Alabama over integrated resource planning ("IRP") and transmission planning processes used in the state. 16 U.S.C. § 824(a); *Altamont Gas Trans. Co. v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996) ("Under the circumstances, the Commission was indeed attempting to

[1] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 136 FERC ¶ 61,051 (2011) ("Order No. 1000").

[2] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Notice of Proposed Rulemaking, PP 69, 98.

do indirectly what it could not do directly, that is, intercede in a matter that the Congress reserved to the State.").

2. Order No. 1000 infringes upon the jurisdiction of Alabama over the implementation and defense of its state public policies. 16 U.S.C. § 824(a); *Altamont Gas Trans. Co. v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996.

3. Order No. 1000 infringes upon the jurisdiction of Alabama over the establishment of just and reasonable retail rates.

4. Order No. 1000 is arbitrary and capricious insofar as it fails to set forth a reasoned, principled or substantial basis – in theory or in evidence – for the rule, contrary to the requirements of the Administrative Procedures Act ("APA"). 5 U.S.C. § 706(2)(A); *National Fuel Gas Supply Corp. v. FERC*, 468 F. 3d 831 (D.C. Cir. 2006); *Tenneco Gas v. FERC*, 969 F. 2d 1187 (D.C. Cir. 1992); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983); *City of Charlottesville, Virginia v. FERC*, 661 F.2d 945, 951 n. 35 (D.C. Cir. 1981).

II. REQUEST FOR REHEARING

Throughout this proceeding, the APSC has availed itself of the opportunities to engage with the Commission and its staff on the topics covered by this rulemaking. Through our staff, we submitted comments in response to both the advanced notice of proposed rulemaking and the notice of proposed rulemaking, participated in a roundtable discussion with FERC staff at the 2010 meeting of the National Association of Regulatory Utility Commissioners in Atlanta, and also had informal dialogue with members of the FERC's staff in an effort to resolve questions the APSC had regarding the direction and potential impact of this rulemaking. We have appreciated the willingness of the FERC's staff to engage with us and others in the regulatory arena (and in industry) on the issues that have arisen as a result of this initiative of FERC. Nevertheless, having reviewed the final rule, we are left to conclude that a fundamental disconnect exists within the rule. Put simply, while the rule includes statements disavowing any infringement on state authority, the requirements of the rule show the contrary.

A. Order No. 1000 infringes upon the jurisdiction of Alabama over integrated resource planning.

The first requirement in the final rule that strikes the APSC as an infringement upon state authority is the regional transmission planning process mandated by the rule. There is no dispute that the final form of this process is subject to Commission (*i.e.*, federal) approval – either through its approval of compliance filings or as backstop in the event there is not a consensus among stakeholders in a region as to a particular process and its associated cost allocation mechanisms.[3] As described in the rule, the goal of this regional planning process is the identification of resolutions to a region's transmission needs that are more efficient and cost-effective than those identified locally.[4] That is to say, the regional process, as approved by the Commission, will appear to have the final say over the implementation of a local plan that is the output of a state's integrated resource planning ("IRP") process.[5]

The rule also makes clear that the regional planning process must not limit its considerations to transmission solutions: "While we require the comparable consideration of transmission and non-transmission alternatives in the regional transmission planning process, we will not establish minimum requirements … [t]hose considerations are best managed … in the regional transmission planning process."[6] The rule does claim that it is not defining the precise mechanics of the process or the facilities (transmission or non-transmission) that will be produced by the regional process and eventually built. It is evident, however, that the rule

[3] Order No. 1000, PP 607-09.

[4] *Id*. PP 6, 11.

[5] Despite assertions that FERC is not requiring regional plan outcomes to be constructed as part of the rule, it is clear that FERC does not see the framework set forth in the rule as the end of its efforts, and that subsequent proceedings are envisioned that invariably will address issues including, but not limited to, the construction of (or failure to contract) regional plan outcomes. *See id*. P 113 (" We disagree with commenters arguing that this requires us to identify the issues that might be raised in future orders by the Commission should disputes arise as to the construction of transmission facilities in the regional transmission planning process").

[6] *Id*. P 155 (emphasis added).

expects the regional planning process to identify transmission projects eligible for cost allocation. Necessarily then, these projects will preempt the transmission or non-transmission alternatives (including generating facilities) identified by the "local", state IRP processes, not to mention the authority of the states, as regulators of those processes, to determine what will serve local needs most reliably and cost effectively. Otherwise, the concerns that the rule purports to address (unjust, unreasonable and discriminatory rates, terms and conditions) would be without remedy through the rule.

To the APSC, this construct infringes on state authority. Under Order No. 1000, the outcome of a state-regulated process is subject to scrutiny at the hands of a federal process and – in future situations upon which the rule declines to elaborate[7] – can be nullified in favor of a regional alternative which may include transmission and non-transmission alternatives. The APSC, and other regulators like it, are left with a rule (and a notice of proposed rulemaking that preceded it) that expressly disclaimed such infringement, but by its very design involves decisions and cost allocations that by operation of law will preempt actions and decisions of the states.[8] Even more troubling, though, is the fact that such action runs contrary to what the APSC understands to be express limitations on the authority of the Commission, as set forth in Section

[7] *See id*. P 113 ("We disagree with commenters arguing that this requires us to identify the issues that might be raised in future orders by the Commission should disputes arise as to the construction of transmission facilities in the regional transmission planning process. This Final Rule is focused on ensuring that there is a fair regional transmission planning *process*, not substantive outcomes of that process" (emphasis in original)).

[8] *See, e.g.*, *Business Roundtable v. SEC*, ___ F. 3d ____, 2011 WL 2936808 at *8 (D.C. Cir. July 22, 2011) (finding the Commission's support for a rule "internally inconsistent and therefore arbitrary"); *General Chemical Corp. v. US*, 817 F. 2d 844, 846 ("We find the Commission's analysis of geographic competition to be internally inconsistent and inadequately explained, and thus we conclude that its ultimate finding of no market dominance was arbitrary and capricious and not supported by substantial evidence on the record considered as a whole.").

201 of the Federal Power Act ("FPA"),[9] as well the absence of any authority granted to FERC over transmission planning.[10]

As the regulator of essential utility services throughout most of Alabama, including the electric utility service provided by Alabama Power Company, the APSC's ultimate goal is reliable electric service provided at rates that are fair and reasonable. Consistent with this goal, we have emphasized throughout this proceeding how utility planning is undertaken on an integrated basis, consistent with the statutory obligations (which are, in the sense of the rule, Public Policy Requirements) our legislature has established. The implementation of our public policies requires evaluation of generation and transmission solutions (along with distribution, purchased power opportunities, and demand side management) together as part of a comprehensive IRP process. This process identifies the most economic and reliable means for satisfying the needs of Alabama retail customers. System expansions and improvements are driven primarily by considerations of long-term reliability, with the transmission system planned to enable the economic dispatch of network resources and other long-term commitments, such as third-party power purchase arrangements, without the incurrence of congestion. This "bottom-up" approach strives to achieve the most reliable service that can be provided to consumers on a least-cost basis.

If the rule is implemented through regional processes whereby such processes will make determinations concerning transmission and non-transmission facilities, the result is a top-down

[9] *See* 16 U.S.C. § 824(a) ("… such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States."); 16 U.S.C. § 824(b) (stating that the Commission shall not have jurisdiction "over facilities used for ... generation"); *cf. Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) ("As a federal agency, FERC is a 'creature of statute,' having 'no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.'" (*quoting Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001))); *Altamont Gas Trans. Co. v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996) ("Under the circumstances, the Commission was indeed attempting to do indirectly what it could not do directly, that is, intercede in a matter that the Congress reserved to the State.").

[10] *See* 16 U.S.C § 824q(b)(4).

mandate concerning how to meet state and federal policy requirements. In such an event, the regional planning processes authorized in the rule effectively will conduct integrated resource planning on behalf of public utility participants.[11] The least-cost, reliable solutions identified for our ratepayers through the IRP process will give way to the solutions identified for the region under the FERC-administered process. And nowhere does the rule provide assurance that this regional solution will hold the local ratepayers harmless. Under the rule, the preemption of a local plan in favor of a regional plan may take place provided that there are "benefits" to the local consumers.[12] The fact that there are "benefits" from the regional plan to the local consumers does not, however, mean the local consumers are better off as a result of the regional plan. For the reasons stated above, the APSC encourages the Commission to grant this request for rehearing and make necessary refinements to the rule so that it not only will comport with the FPA and the APA, but it also will not result in the usurpation of the APSC's prerogative to protect retail consumers.

B. Order No. 1000 infringes upon the jurisdiction of Alabama over its state public policies.

The rule also fails to address the APSC's concerns regarding the integration of state public policies into the regional planning process. As explained in our comments to the notice of proposed rulemaking, the design of the rule can create conflict among states (and the states against federal public policies) if their public policies are forced to compete against one another

[11] To this point, the rule offers little comfort when it says that a bottom-up or top-down approach can be used, "so long as the public utility transmission provider complies with the requirements of this Final Rule." Order No. 1000, P 158 (emphasis added). If the traditional, state IRP process is subject to these limitations, then by definition the rule is not respecting the IRP process.

[12] *Id.* P 544.

in regional planning processes (or against federal laws or regulations).[13] We assumed that a regional process could develop some mechanism for the resolution of such conflicts, but as the likelihood of resolution in all (if many) circumstances was highly doubtful, it seemed likely to us that regional planning process would be left to resolve the impasse by maximizing "regional" benefits, thereby creating winners and losers at the state level. Alternatively, in certain circumstances, the process would look to the Commission for a final decision as to how states' public policies should be implemented.[14]

Thus, the APSC is left with the very issue that prompted our initial comments: state policies are left to compete in a regional planning process, with the very real prospect of a federal authority making a decision as to how state public policies are implemented. In any context, such a paradigm would raise concerns. But here, where we are dealing with decisions that traditionally have been left to state decision-making, consistent with the FPA, the uncertainty that arises from the rule's failure to address our concern is very troubling.[15] Indeed, in one instance, the rule discusses the need for Congressional intervention before states could work together to ensure that their respective polices are implemented as they -- the states --

[13] Indeed, the rule outlines a scenario that appears to represent this very concern, and as described, it seems that the rule in fact envisions the federally-sanctioned regional process making decisions for a particular state. *Id*. P 545. The rule justifies such a decision on the theory that the state whose public policy has been preempted in favor of another state's public policy is nonetheless receiving benefits – whatever those "benefits" may be. *Id.*

[14] *Id.* P 607 ("In the event of a failure to reach an agreement on a cost allocation method or methods, the Commission will use the record in the relevant compliance filing proceeding as a basis to develop a cost allocation method or methods that meets its proposed requirements"). As the Commission explicitly ties the planning process to the cost allocation process, this statement evidences the Commission's intent to develop a regional transmission planning process in the event the entities in a region (not all of whom will be within the statutory scope of the APSC's jurisdiction) cannot develop one in the timeframe permitted.

[15] The APSC does appreciate the fact that the rule does not define what precisely fits within the definition of public policy requirements – beyond the practical recognition that such requirements emanate from laws or regulations. *See id.* P 215. Thus, by way of example, it would seem that a regional plan would be able to recognize such public policies as that embodied in Alabama Code 37-1-49, which discusses the components attendant to the duty to serve imposed upon public utilities.

believe appropriate.[16] As with the IRP process discussed above, the APSC struggles to see how the rule is not infringing, both directly and indirectly, on policy matters that have traditionally been left to the determination of state authorities. In any case, the rule's treatment of the APSC's concerns over this issue does not satisfy the requirements of the APA.[17]

C. Order No. 1000 infringes upon the jurisdiction of Alabama over its authority to establish just and reasonable rates.

The APSC also urges the Commission to grant rehearing with respect to the cost allocation provisions set forth in the rule. Specifically, the APSC believes that these provisions not only offend the commitment in the rule not to infringe on state authority, but they also are inconsistent with the principles of reasoned decision-making required by the APA. Fundamentally, the APSC does not see how the rule can claim to respect state IRP processes while prohibiting a specific manner of cost recovery, *i.e.*, participant funding. The rule claims that it only is imposing that limit insofar as regional or interregional cost allocation is concerned.[18] But, if the regional process is designed to produce situations where a regional plan supersedes or replaces the output of a state plan that might well rely on participant funding, then the regional process is doing exactly what the rule says it is not doing – infringing on the prerogative of the state to manage the costs ultimately borne by its consumers.

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[16] Order No. 1000, P 209, n. 189 ("Public utility transmission providers, for example, could rely on committees of state regulators or, with appropriate approval from Congress, compacts between interested states to identify transmission needs …." (emphasis added)).

[17] *See Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001) (stating that "unless the [Commission] answers objections that on their face seems legitimate, its decision can hardly be classified as reasoned."); *see also Public Service Comm'n of Kentucky v. FERC*, 397 F.3d 1004, 1008 (D.C. Cir. 2005).

[18] Order No. 1000, P 723.

In this regard, the APSC continues to be concerned over the prospect of a regional process that may identify electricity consumers in Alabama as receiving "benefits" from a new transmission project selected in a regional transmission plan for purposes of cost allocation – even if the supposed benefits (or any "roughly commensurate" cost allocation) are completely at odds with the APSC's conclusions. We specifically raised this issue in our comments, with the hope that the rule would give some assurance that retail consumers would be protected. Instead, the rule acknowledges a separate but related point the APSC made as to the inappropriateness of retail consumers in Alabama subsidizing transmission facilities intended to address shortcomings in other areas of the country. And as to that, the rule simply states that Alabama consumers will not be assigned costs "from which they derive no benefits … either at present or in a likely future scenario …."[19] The rule then proceeds to state that "[t]hese cost allocation principles … and its requirements thus conform fully with the position taken by the Alabama PSC."[20]

It appears to us that the Commission misunderstood our comments, as this statement in the rule is incorrect and does not reflect our position. The APSC does not support the involuntary assignment of benefits to Alabama consumers simply on the basis that those consumers may realize "benefits" – a term the rule refuses to define with any certainty and could be construed to include abstract benefits unrelated to electricity consumption and involve time horizons far into the future.[21] Indeed, if the Alabama consumer actually is not better off – or at least held harmless – as a result of the regional plan decision, then the APSC necessarily must

[19] *Id.* P 544.

[20] *Id.*

[21] *See Appalachian Power Company v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (condemning an agency's process of issuing regulations with "broad language, open-ended phrases, ambiguous standards and the like" then issuing clarifications aimed at "expanding the commands in the regulations" and thereby amending its real rules "without following any statutorily prescribed procedures," perhaps in an attempt to "immuniz[e] its lawmaking from judicial review.").

question whether there are really any "benefits" being recognized. Further, there must be a connection between consumer "benefits" ascribed by a regional transmission planning process and actual value needed by consumers. If a "benefit" is not actually needed by the beneficiaries to obtain reliable and cost-effective electricity, then there will be justified opposition to requirements to fund investments selected in a regional transmission planning process. Regional plans must be allowed the opportunity to analyze both the benefits and the burdens associated with any potential product from that plan, and states within a region should be given the opportunity to respond as they deem appropriate, including having the option of vetoing such a course or opting out of any cost allocation.

As to cost allocation methodologies, the APSC also believes the rule fails to satisfy the requirements of the APA through the lack of definiteness in the rule as to the manner by which such allocation will translate into recovery. Particularly, the APSC is concerned by the prospect of stranded costs, due to the inability of the transmission provider to recover such "allocated" costs due to the absence of an appropriate and necessary contractual vehicle,[22] and whether such costs might be shifted to others within the region or borne by the transmission provider itself. Either of these two scenarios is wholly unworkable. The former would further call for local retail consumers to subsidize the failings of others. The latter, however, could have equally detrimental impacts. Should the transmission provider be forced under this new rule to be the financial backstop for regional plan decisions, with cost recovery (at either the wholesale or retail level) left undefined and uncertain, the credit ratings of the transmission provider can be expected to suffer. This in turn will increase the borrowing costs associated with system

[22] See *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County, Washingto*n, 554 U.S. 527, 533 (2008) (stating that the "regulatory system created by the FPA is premised on contractual agreements voluntarily devised by the regulated companies." (citing and quoting with approval *Permian Basin Rate Cases*, 390 U.S. 747, 822 (1968)).

expansion and operation that are contemplated by this rule, which will in turn increase rates to customers.

The ambiguities in the rule also lead to several instances of inconsistency, which is not reasoned decision-making as required by the APA.[23] For example, the rule emphasizes that it is not undertaking to establish mechanisms for cost recovery.[24] Yet, the rule largely prohibits the use of one form of cost recovery (participant funding) in the regional cost allocation methodologies. And elsewhere the rule broadly claims that its reforms "have a direct and discernable affect on rates."[25] As another example, FERC justifies its reforms on the basis of a purely theoretical threat (as discussed below). However, in response to comments seeking assurance that the rule will not affect existing state jurisdiction over utility rates, FERC dismisses such concerns as "premature" and warranting the development of additional "facts and circumstances."[26] Also troubling (as discussed above) is the fact that the rule encroaches on the traditional authority of state agents like the APSC, contrary to the assurances that FERC was not acting in such a manner, and does not foreclose the possibility that retail consumers will be forced to bear costs, involuntarily, under well-established principles of preemption.[27] The FERC should clearly confirm its intent with respect to this aspect of the rule. Otherwise, the rule remains inherently ambiguous on this point and lacking sufficient explanation.

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[23] *See, e.g.*, *Business Roundtable v. SEC*, ___ F. 3d ____, 2011 WL 2936808 at *8 (D.C. Cir. July 22, 2011) (Commission's discussion "was internally inconsistent and therefore arbitrary"); *General Chemical Corp. v. US*, 817 F. 2d 844, 846 ("We find the Commission's analysis of geographic competition to be internally inconsistent and inadequately explained, and thus we conclude that its ultimate finding of no market dominance was arbitrary and capricious and not supported by substantial evidence on the record considered as a whole.").

[24] *Id.* P 563.

[25] *Id.* P 112.

[26] *Id*. P 548.

[27] *See, e.g., Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986)

D. Order No. 1000 fails to provide adequate support for the national reforms being advanced.

As discussed, the rule appears to create a federally-sanctioned process with strong potential to infringe upon and frustrate state authority in areas such as: state-regulated IRP and transmission planning processes, state public polices and the establishment of just and reasonable retail rates. Moreover, the rule expects the states, along with the electric industry, to exhaust the next year and one-half developing these new transmission planning, coordination, and cost allocation processes at a time when state budgets – especially Alabama's – are being subjected to drastic reductions. In sum, the costs and burdens to be imposed by the rule are incredibly ill-timed.

To justify its requirements (and its associated imposition of such costs and burdens), FERC rests solely upon a "theoretical threat", claiming that it needs no "'record evidence of abuse."[28] The burden to the states, however, is not theoretical. And to be sure, while the rule does not require state agencies to participate, state agencies like the APSC are left with little, if any, choice in the matter.[29] The APSC does not believe the speculative benefits identified in Order No. 1000 are legally sufficient to justify the rule's burdens and disruptions, and as such, the rule is not justified under the Commission's authority under Section 206 of the FPA.[30] Should the Commission on rehearing continue to believe that it should press forward with this initiative, the APSC strongly encourages the Commission to consider a regional or case-by-case

[28] Order No. 1000, P 53. The APSC also objects to the Commission's jurisdictional assertion based upon its reliance on a theoretical threat with no record evidence of abuse. *Id.* P 53.

[29] *Id.* P 209 n. 189.

[30] *See, e.g., National Fuels*, 468 F.3d at 844 (Stating that if FERC in that proceeding should, on remand, base its actions solely upon a theoretical basis, then it would somehow have to "justify such costly prophylactic rules.").

basis approach.[31] Such is especially true where, as here, there is an absence of evidence supporting any action at all, let alone action at the national level.

III. CONCLUSION

For the foregoing reasons, the APSC respectfully requests rehearing of Order No. 1000.

Sincerely,

/s/ John A. Garner
Executive Director
Alabama Public Service Commission

[31] Order No. 1000, PP 60-61. *See United States Telecom Ass'n v. Federal Communications Commission*, 290 F.3d 415 (D.C. Cir. 2002) (holding that a federal agency under a limited Congressional mandate cannot impose significant burdens/costs on all regulated entities nationwide where there is no evidence that the problem it seeks to remedy is ubiquitous across the entire nation).

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on those parties on the official Service List compiled by the Secretary in these proceedings.

Dated at Montgomery, Alabama this 22nd day of August, 2011.

/s/ John D. Free
John D. Free