UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Transmission Planning and Cost Management	)	Docket Nos. AD22-8-000
Joint Federal-State Task Force on Electric Transmission	)	AD21-15-000
Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection	)	Docket No. RM21-17-000

POST-TECHNICAL CONFERENCE COMMENTS OF
LS POWER GRID, LLC AND NRG ENERGY, INC.

LS Power Grid, LLC ("LS Power") and NRG Energy, Inc. ("NRG") jointly file these comments to present a pathway for the Federal Energy Regulatory Commission ("Commission" or "FERC") to move forward on meaningful reform to discipline runaway spending on transmission, even while refocusing that spending on higher-value transmission projects that have been neglected. By removing the pass-through regulation that has come to characterize formula ratemaking in this field from its application to certain transmission rate base, the Commission can return to the basic principles of sound utility regulation while achieving the public policy goals that animate much of its recent transmission rulemaking activities.

LS Power is involved in the development of transmission projects as a non-incumbent transmission developer throughout the United States. LS Power was active in the Order No. 1000 rulemaking docket and stakeholder meetings to develop compliance filings and has been active in most regional planning processes since they became effective. The LS Power development companies have been selected to build 10 projects and their bids have consistently included superior comprehensive cost containment commitments.[1] To ensure that the Commission, state regulators, and consumers can verify that the development companies meet their cost containment commitments, the LS Power development companies have included tracking mechanisms in their formula rates.[2] Few parties have the same knowledge of, and experience participating in, regional planning processes and transmission development as LS Power.[3]

Unlike LS Power, NRG is not a transmission developer. Instead, NRG serves 5.5 million electric and gas retail customers, and NRG on behalf of its customers is frequently responsible for the cost of transmission. In its capacity as a gas shipper, NRG actively participates in major gas pipeline ratemaking proceedings before the Commission, which remain more or less traditionally regulated, whereby a utility files a

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[1] For instance, LS Power Grid California, LLC ("LSPGC") was selected by the California Independent System Operator, Inc. as the Approved Project Sponsor for four new projects. LSPGC proposed a unique package of cost containment commitments, including a cap on LSPGC's annual revenue requirement; a schedule guarantee; and a commitment not to seek construction work in progress in rates. *See, e.g.*, CAISO, Manning 500/230 kV Substation Project – Project Sponsor Selection Report (Jan. 23, 2023).

[2] *See, e.g.*, LS Power Grid California, Formula Rate, Attachment 11 – Binding Cost Containment Commitments.

[3] LS Power is separately filing a response to the Commission's questions in the Notice Inviting Post-Technical Conference Comments, Docket No. AD22-8-000 (Dec. 23, 2022) ("December 2022 Notice").

rate case through which a pipeline seeks to adjust its rates, where the pipeline unambiguously bears the burden of proof, and where FERC Staff and intervenors, including gas transmission customers, engage in discovery and provide advocacy before, typically, reaching a settlement that is approved by the Commission. This process allows NRG to be in a position to advocate robustly for its customers, and to have adequate notice and knowledge of the likelihood of rate changes that affect NRG's retail pricing. By contrast, as the payer of electric transmission services, NRG has little notice of rate changes, almost no practical ability to advocate for itself and its customers within the process that the Commission has provided, and is exposed to increasingly volatile swings in transmission costs that are driven by projects about which NRG knows and can know very little, because they are not subject to the same level of transparency and competition that other, larger transmission projects are. In the proposal it is making through these comments jointly with LS Power, NRG is seeking to return to a more appropriate regulatory equilibrium that respects the interests of customers of the electric transmission system.

Although the Commission sought post-technical conference comments[4] in its proceeding on "Transmission Planning and Cost Management" in Docket No. AD22-8-000 together with its ongoing "Joint Federal-State Task Force on Electric Transmission" in Docket No. AD21-15-000, LS Power and NRG offer these comments in those Dockets as well as the Docket on "Building for the Future Through Electric Regional

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[4] *Id*.

Transmission Planning and Cost Allocation and Generator Interconnection" in Docket No. RM21-17-000.[5] The Commission cannot sufficiently address the transmission planning issues raised in its Notice of Proposed Rulemaking ("NOPR") in Docket No. RM21-17-000 ("Planning NOPR") without addressing the intertwined cost management issues raised in AD22-8-000 and during the October 6, 2022 Technical Conference ("October 2022 Technical Conference"). As it evaluates the comments and recommendations, the Commission must ask itself a single question: how does the approach that is being advocated protect consumers?

Demonstrating the intertwined nature of the Dockets, at the October 2022 Technical Conference, then-Chairman Glick indicated that what he was interested in related to transmission planning and cost management was "how the costs associated with new transmission projects are minimized, and whether alternatives such as the deployment of grid enhancing technologies, or bigger regional transmission projects, how they are evaluated, and whether they are sufficiently evaluated."[6] Commissioner Clements stated among her issues was "whether there is sufficient framework in place to ensure that this money is being spent on an optimal mix, or even a sufficiently optimal mix of new transmission infrastructure, and whether it is being constructed as efficiently as possible."[7] Both of these inquiries are inextricably intertwined with the issues raised

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[5] To ensure that the Commission has a complete record in this docket, LS Power and NRG are submitting their comments and answers filed in Docket No. RM21-17-000 in separate filings.

[6] Transcript of October 2022 Technical Conference ("Tr.") 10:15-20.

[7] Tr. 13:15-19.

in the Planning NOPR and the question referenced above as to how various Commission approaches discussed protect consumers.

A seminal obligation of the Commission under the Federal Power Act is to protect consumers.[8] The Commission's jurisdiction applies to all transmission rates in interstate commerce, including retail transmission, although to date the Commission has exercised jurisdiction only over transmission rates whenever they are separately filed and not bundled as part of retail electric service, as they are in each ISO/RTO. While the Commission may decide on the appropriate process by which to administer its review of the justness and reasonableness of these transmission rates, it may not simply decide that someone else is responsible for that question. The Commission must exercise that jurisdiction in a manner to protect consumers from unjust and unreasonable rates. The United States Supreme Court was clear in *New York v. FERC*:

> It is true that FERC's jurisdiction over the sale of power has been specifically confined to the wholesale market. However, FERC's jurisdiction over electricity transmissions contains no such limitation. Because the FPA authorizes FERC's jurisdiction over interstate transmissions, without regard to whether the transmissions are sold to a reseller or directly to a consumer, FERC's exercise of this power is valid.[9]

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[8] *Xcel Energy Services Inc. v. FERC*, 815 F.3d 947, 952-53 (D.C. Cir. 2016) ("It is long-established that the "primary aim [of the FPA] is the protection of consumers from excessive rates and charges." *Mun. Light Bds. of Reading & Wakefield v. FPC*, 450 F.2d 1341, 1348 (D.C.Cir.1971), *cert. denied*, 405 U.S. 989, 92 Sects. 1251, 31 L.Ed.2d 455 (1972).)

[9] 535 U.S. 1, 20 (2002).

Thus, under the Federal Power Act and decades of precedent, the Commission has exclusive jurisdiction over rates for the transmission of electric energy in interstate commerce, *i.e.*, the vast majority of transmission above 100 kV (and a significate amount below that threshold). That is true whether the transmission is wholesale or so-called "retail" transmission.

Thus, when Commissioner Christie asked at the Technical Conference, "[w]ho is scrutinizing transmission projects for both need and prudence of cost?" the right answer must be: the Federal Energy Regulatory Commission. Neither state public service commissions (which have a separate, state-identified jurisdictional focus) nor state legislatures have an identified role under the Federal Power Act in the Commission fulfilling its obligation to maintain just and reasonable transmission rates, except in the limited circumstances where the Supreme Court, over the objections of a dissenting justice,[10] has allowed the Commission to abstain from exercising its statutory authority in

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10 In his dissent in *New York v. FERC*, Justice Thomas wrote:

> Given that it is impossible to identify which utility's lines are used for any given transmission, FERC's decision to exclude transmission because it is associated with a particular type of transaction appears to make little sense. And this decision may conflict with FERC's statutory mandate to regulate when it finds unjust, unreasonable, unduly discriminatory, or preferential treatment with respect to any transmission subject to its jurisdiction. See 16 U.S.C. §§ 824d, 824e . . .. The fact that FERC found undue discrimination with respect to transmission used in connection with both bundled and unbundled wholesale sales and unbundled retail sales indicates that such discrimination exists regardless of whether the transmission is used in bundled or unbundled sales. Without more, FERC's conclusory statement that "unbundling

relation to bundled transmission rates. The Commission found as much in its orders on Order No. 1000[11] compliance filings where it rejected proposals to allow state regulatory agencies to select the developer, holding that:

> We agree that, to the extent that state regulatory authorities want to participate, they are able to participate. However, *the Commission has the responsibility to ensure that the rates, terms and conditions of service provided by public utility transmission providers are just and reasonable and not unduly discriminatory or preferential and that public utility transmission providers comply with our rules and regulations enacted to meet this responsibility.* Thus, the Commission is responsible for ensuring that public utility transmission providers in a region adopt transparent and not unduly discriminatory criteria for selecting a new transmission project in a regional transmission plan for purposes of cost allocation. The role of state regulatory authorities must be to provide guidance and recommendations and must be defined in the Tariff.[12]

FERC's ultimate and exclusive authority for transmission rates exists regardless of whether there is some degree of overlapping state jurisdiction to determine whether a

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> of retail transmission" is not "necessary" lends little support to its decision not to regulate such transmission. And it simply cannot be the case that the nature of the commercial transaction controls the scope of FERC's jurisdiction.
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> 535 U.S. 1, 33-35.

[11] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011) ("Order No. 1000"), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132 ("Order No. 1000-A"), *order on reh'g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S. C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

[12] Midwest Independent Transmission System Operator, Inc. et al, 142 FERC ¶ 61,215 at P 354 (2013) [emphasis added].

transmission project is "needed" in a siting process. Because the Commission has exclusive rate authority, it alone must determine that transmission rates are just and reasonable, a task it cannot achieve unless **it** determines that the "money is being spent on an optimal mix, or even a sufficiently optimal mix of new transmission infrastructure and whether it is being constructed as efficiently as possible."[13]

The Commission has asked important questions related to cost management of local transmission. As NRG previously demonstrated in a study it commissioned for filing in Docket No. RM21-17-000, its customers' lived experience is one where the delivery costs associated with electricity have increased substantially over the past decade, even while supply costs themselves generally have fallen.[14] Indeed, in nearly every utility service territory in the three eastern RTOs evaluated, supply costs began the period of analysis as a higher fraction of a residential or small commercial customer's bill than delivery costs, but by 2021, that had inverted almost everywhere. While supply shocks like occurred in 2022 can temporarily throw off that trend, the reality is that delivery costs included in rate base endure for decades, and the *status quo* imposes a substantial burden to consumers. It may be that these costs are justified, but they deserve regulatory attention and discipline.

As discussed below, and as demonstrated by the Commissioners' comments and questions at the October 2022 Technical Conference, Commission policies must address

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13 Tr. 13:16-19 Clements).

14 NRG Comments, Exh. A ("Historical Tariff Analysis: Generation v. Delivery, ISO-NE, NYISO, and PJM"), Docket No. RM21-17-000 (Aug. 16, 2022).

the skyrocketing costs related to excessive individual transmission owner planning, which has left consumers paying unjust and unreasonable rates for transmission that has not been holistically planned, or otherwise determined to be the more efficient or cost-effective alternative to identified local or regional needs.[15] This fact arises from several policies, or failures to enforce policies, which, taken together, have left consumers begging the Commission for several years to return to the Federal Power Act's primary Commission focus of consumer protection.[16]

The following issues impact the Commission's consumer protection mandate, and all must be addressed. LS Power and NRG's joint comments address four areas:

- Formula Rates – Under the status quo, no one engages in any meaningful prudence review of significant amounts of transmission spending before its costs are passed through to consumers in rates. Current formula rates allow transmission owners to put new transmission investment into rates regardless of how, or by whom, those projects were planned. By doing so, such formula rates shift the prudence burden initially to ratepayers to establish that the projects placed in rates were imprudent, a burden that is not easily addressed by consumers because of limited access to information and expertise. The Commission should review the circumstances under which formula rates are available, or the timing of such availability.

- Return on Equity and Capital Structure – Return on equity and capital structure are set using proxies for what market forces would determine.

[15] Both LS Power and a large contingent of consumers of electricity have made the point that non-radial transmission over 100 kV is rarely "local" and while there may be locally identified needs, there should not be local planning of such high voltage transmission facilities. *See, e.g.*, Comments of LS Power Grid, LLC In Response to the Commission's Advanced Notice of Proposed Rulemaking, Docket No. RM21-17-000 at 49-60 (Oct. 12, 2021) ("LS Power ANOPR Comments"); Comments of the Electricity Transmission Competition Coalition, Docket No. RM21-17-000 at 16 (Oct. 12, 2021).

[16] *See, e.g.*, Comments of the Electricity Transmission Competition Coalition, Docket No. RM21-17-000 at 1-2 (Oct. 12, 2021).

Current Commission proxies for return on equity and capital structures generally no longer reflect actual market conditions because they do not approximate what record proof establishes are the return on equity and capital structure offered by competitive developers – and thus the Commission proxies cannot stand as the regulated proxy for just and reasonable rates in formula rates.

- Dominance of Local Planning – The Commission has failed to control excessive local planning and fully effectuate the regional planning required by Order No. 1000, including local project displacement, which has resulted in less-than-optimal transmission grid investments. LS Power reiterates its position that the Order No. 1000 definition of regional transmission should be modified to include all projects, including aging infrastructure, on transmission facilities 100 kV and above.[17] In addition, the Commission should establish an Independent System Planner standard for each Order No. 1000 Region, and initiate Show Cause Orders for each Order No. 1000 Region related to the topic of the regional planning process displacing any local transmission planning and aging infrastructure determinations.[18] As such, there is insufficient proof to establish that those local transmission projects have rates, collected through formula rates, that are just and reasonable.

- Expand Transmission Competition – Order No. 1000 provided a roadmap to address the planning and cost containment issues that the Commission still grapples with in AD22-8-000 more than a decade later. A significant part of that roadmap is expanding transmission competition. When it is permitted to do so, Order No. 1000 has worked brilliantly to provide just and reasonable rates, providing transmission development cost containment provisions that are nonexistent when competition is absent.[19] Indeed, competition has provided the very cost management the Commission seems to be searching for in initiating AD22-8-000.

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[17] NRG has taken no specific position on this matter but does not necessarily disagree with LS Power on this point.

[18] LS Power ANOPR Comments 79-84.

[19] LS Power ANOPR Comments Appendix II outlining competitive outcomes. Since those Comments were filed, LS Power affiliates have been selected for all or part of 6 different competitively procured transmission projects, each with consumer-beneficial cost containment and rate structures.

As former Commission Chairman Pat Wood recently noted, "Competition on its worst day is better than I ever could be as a regulator on my best day."[20] The existence of Docket No. AD22-8-000, the questions asked, and more importantly the Commissioner comments presented as an introduction to the October 2022 Technical Conference raise concern that the Commission believes that it can regulate its way to lower transmission costs in a way that incentivizes incumbent transmission owners to do the right thing: protect consumers.[21] The result will be the same as it is today, continuing to allow incumbent transmission owners to determine and control the nation's transmission future based on their economic interests not the interests of the nation's electricity consumers. The Commission's requirement under the Federal Power Act is to affirmatively protect consumers from those self-interested decisions, not to incentivize or appease them.

I. COMMENTS

A. Formula Rate Reform: A Continuum Of Commission Options

For several decades, the Commission has promoted the use of forward-looking formula rates as an effective mechanism to establish just and reasonable rates while providing transparency, year-to-year process certainty, and a reduction in administrative

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[20] After a Quarter Century Industry Experts Split Restructuring, available at https://www.rtoinsider.com/articles/31446-after-quarter-century-industry-experts-split-restructuring.

[21] Although LS Power has been awarded nearly $4 billion in transmission investment opportunities, it was not awarded a single dollar of that investment without first establishing that each individual proposal, across all aspects of development including design, engineering, construction, operations, maintenance and rates, was the more efficient or cost-effective result for consumers.

burden for all parties.[22] Unfortunately, formula rates also give transmission owners an opportunity to put new transmission investment into rate base with a presumption that the resulting rate is just and reasonable, providing an incentive to avoid regional planning as the investment will be presumed prudent regardless of how it was planned.[23]

Although the Commission sought in Order No. 679 to encourage transmission "expansion" programs because "public utilities with formula rates will generally be able to flow through increased transmission investment without concern as to the Commission's five-month suspension,"[24] the existence of formula rates, with their presumption that the output is a just and reasonable rate, has resulted in billions in individual transmission owner-planned investments in the last 5 years in new transmission rate base additions[25] flowing through formula rates.[26] In addition to the

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[22] *See, e.g., Promoting Transmission Investment through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057 at P 386 (2006) (highlighting the benefits of formula rates, particularly for large transmission expansion programs).

[23] December 2022 Notice at 7.

[24] *Id*.

[25] The vast majority of the additions fall into a category of transmission additions, end-of-life additions, that the Commission claims are not an "expansion" of the transmission system. While LS Power disagrees with the Commission's analysis of whether those projects are expansions, the Commission cannot have it both way by rewarding the projects with formula rates intended to prompt expansion while denying that adding a 40-70 year rate base addition is a transmission expansion.

[26] LS Power ANOPR Comments at 3, 15-25; LS Power ANOPR Comments at Appendix I: Cost Allocation and Planning Manipulation. See also Rocky Mountain Institute's article discussing whether increased investment in transmission in PJM is in transmission facilities that will be needed in the future. Claire Wayner, *Increased Spending on Transmission in PJM – Is It the Right Type of Line?*, RMI Blog (Mar. 20, 2023), *available at* https://rmi.org/increased-spending-on-transmission-in-pjm-is-it-the-right-type-of-line/.

transmission owner individually planned facilities, there have been billions more in regionally planned facilities that have been directly assigned to incumbent transmission owners without any determination that the transmission owner was the more efficient or cost-effective developer of that facility, and thus no affirmative determination that the incumbent transmission owner's rates for that particular transmission addition are in fact just and reasonable.[27]

In its Questions for Comment related to the October 2022 Technical Conference, the Commission asked:

> Should the Commission alter the rebuttable presumption of prudence of expenditures in certain circumstances, such as with respect to specific types of expenditures (e.g., asset management expenditures), where alternatives to transmission have not been considered, or where a state regulator has not reviewed a project for need and cost? If so, how should the standard be altered and in which circumstances?[28]

The short answer is yes. LS Power and NRG believe that the Commission should do that by changing those transmission projects that automatically flow into formula rates. The status quo is that **all** transmission additions flow into the existing formula rate, if the transmission developer/owner is an incumbent with such a rate on file, and the inclusion of that transmission carries with it the presumption of prudence regardless of the

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[27] For discussion of state protectionist laws and why they should be preempted, see LS Power ANOPR Comments at 99-108. Other exemptions from competition include so-called immediate need reliability projects and upgrades. *See* LS Power ANOPR Comments at Appendix I: Cost Allocation and Planning Manipulation.2

[28] December 2022 Notice at 10.

circumstances under which the transmission was planned or the way the transmission developer determined. This should be compared to competitively procured projects where the rate impact of each proposal is evaluated against other proposals (by a third-party evaluator) and where cost containment commitments are individually accounted for within the formula rate through additions or workpapers that allow consumers annual proof that the commitments are being met.[29]

The obvious solution is for the Commission to place limits on the types of projects that are presumed prudent and permitted, as they are today, to flow through the formula rate without further evaluation. As outlined below, there are a continuum of approaches that the Commission could use.[30]

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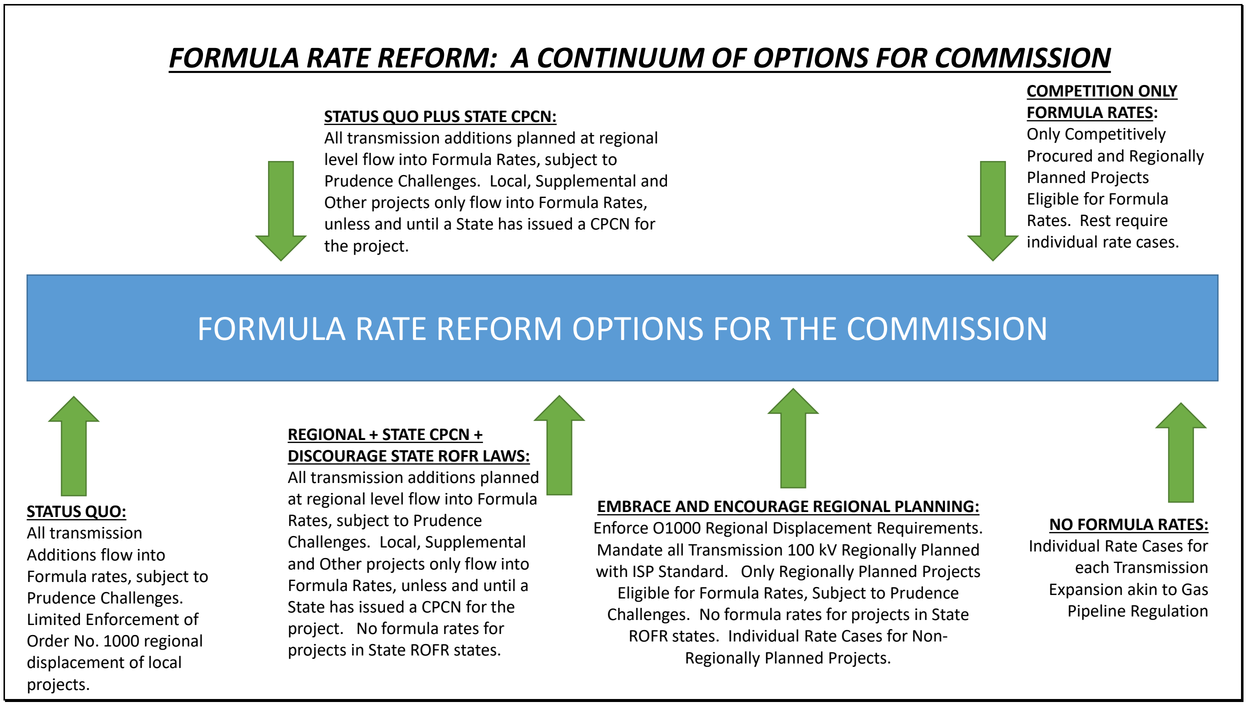
[29] For example, the California Independent System Operator, Inc. ("CAISO") conducts a comprehensive review of project submissions, including any cost containment commitments. *See, e.g.*, CAISO, Manning 500/230 kV Substation Project – Project Sponsor Selection Report (Jan. 23, 2023), available at http://www.caiso.com/InitiativeDocuments/Manning-500-kV-Substation-Project-Project-Sponsor-Selection-Report.pdf. LS Power Grid California, LLC ("LS Power Grid California") has been selected by CAISO as the approved project sponsor several times, in part because of its significant cost containment commitments. To demonstrate its compliance with the cost containment commitments, LS Power Grid California's formula rate template includes a separate worksheet that demonstrates that LS Power Grid California is in compliance. *See LS Power Grid California, LLC*, 175 FERC ¶ 61,256 at P 14 (2021) (accepting LS Power Grid California's formula rate template, including the separate worksheet confirming LS Power Grid California's compliance with its cost containment commitments).

[30] A full-size version of the chart is attached as Exhibit 1.



On one end, the Commission could simply maintain the status quo. On the other end, the Commission could eliminate formula rates for new transmission additions and require transmission owners to return to rate cases to recover investment in such new transmission facilities.[31]

In determining the correct point on the continuum, the Commission should not credit arguments that the claimed administrative burden of traditional rate proceedings outweigh the protections such proceedings would offer, especially in a context of transmission costs that are nowhere else subject to independent review or competition to ascertain their reasonableness. Gas pipeline rate cases have shown that the Commission possesses the ability to process traditional rate proceedings. In those proceedings, a gas

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[31] As used in these comments, "new transmission additions" does not include maintenance projects, such as repairing a part of an existing line. It does include an entirely new line as a replacement for existing transmission facilities.

pipeline files a tariff under Section 4 of the Natural Gas Act and, as it may do under the Federal Power Act, the Commission notices the filing and typically suspends its effectiveness, pending settlement procedures or a hearing. In virtually all gas pipeline cases, the rates are resolved through a settlement approved by the Commission and, in this circumstance, the cases typically can be resolved within approximately 18 months of filing, with rates being charged in the interim that are subject to refund. Since the rates are in effect, but subject to refund, the proceeding means in practice little lag for the regulated party but confers due process on consumer intervenors, and they and FERC Staff obtain a meaningful opportunity to conduct a review of the prudence of costs.

Meanwhile, in the context of these rate cases, transmission owners are able to propose other tariff conditions, including for example riders that do allow for formulaic rate adjustments for incremental spending. These formula rates, however, are the exception and not the rule, and the Commission in a Policy Statement has determined they may only be adopted if five important principles are met: a process to review existing rates, a clear identification of eligible costs, protections to avoid the shifting of costs, a periodic review of the surcharge and the base rates, and the support of shippers (the customers of the gas pipelines).[32] LS Power and NRG suggest that the Commission draw a red line at some appropriate place on the continuum presented above, the options

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[32] Policy Statement on Cost Recovery Mechanisms for Modernization of Natural Gas Facilities ("Policy Statement") 151 FERC ¶ 61,047 (2015). At the present time, only Columbia Gas Transmission and Southern Star Pipeline have formula rates in effect consistent with the Policy Statement.

around which are more fully discussed below, and then should a transmission owner that finds itself on the other side of the line wish to avail itself of formula ratemaking in the future, it may demonstrate the reasonableness of granting that treatment consistent with the Commission's reasoning in this proceeding by application as part of one of its overall rate filings with the Commission.

The continuum of options that the Commission should consider for the purpose of drawing a line, after which point formula rates are not applicable and a developer would have to make anew a Section 205 filing to obtain rate recovery for associated investments, are as follows:

1. Continue Status Quo That Allows All Transmission Investment To Flow Through Formula Rates

One end of the continuum is to maintain the status quo that allows all new transmission investment to flow into existing formula rates. The only benefit of the status quo is that it removes a significant burden from the Commission in addressing the impact of individual planning decisions on transmission rates. Some within the Commission seem to recognize that the status quo is untenable because it creates an incentive for incumbent transmission owners to thwart regional planning.[33] This occurs because under current Commission rules when transmission projects are planned locally, incumbent transmission owners are guaranteed to avoid competition while they

[33] Tr. 164:24-165:2 (Glick).

simultaneously are able to put the completed projects into rates through their formula rate with the resulting rates presumed to be just and reasonable.[34]

That fact provides the same incentive for incumbent transmission owners to lobby for state laws that provide an incumbent preference, which the Commission has allowed to mean circumventing the requirement for competition.[35] Likewise, the status quo approach rewards transmission owners that are able to restrict competition for projects through other tariff changes, as there is no "penalty" for a lack of competition and a high reward with presumed prudent development and rates.

The status quo places a substantial and likely insurmountable burden on electricity consumers as they must establish a prima facie case that the project or rates are imprudent before the burden shifts to the sponsoring transmission owner to establish the prudence of its investment.[36] Plus, consumers must do this project-by-project across

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[34] As discussed below in Section II.B. the presumption of rate prudence is unjustified as the Commission's proxies for market outcomes does not reflect what competitive developers are willing to provide and thus do not reflect just and reasonable rates.

[35] The Commission declared in Order No. 1000 that competition was essential to determining just and reasonable rates for regionally cost allocated projects. The Commission maintained this view on initial compliance, finding both that state preference laws do not overcome the need for those competitive solicitations and that regions could not defer state selection of those required competitive solicitations. *Midwest Independent Transmission System Operator, Inc. et al*, 142 FERC ¶ 61,215 at P 205, P 354 (2013) However, the Commission retreated on compliance rehearing and held that competition could be avoided if a state law required a preference for an incumbent developer. *Midwest Independent Transmission System Operator, Inc.*, 147 FERC ¶ 61,127 PP 149-50 (2014); *see also Southwest Power Pool, Inc.,* 149 FERC ¶ 61,048 at PP 143-46 (2014).

[36] *See Pre-Conference Comments of Kentucky Public Service Commission Chairman and Commissioner Kent A. Chandler*, filed Sept. 16, 2022 in Docket No. AD22-8-

multiple transmission owners. While formula rates with a presumption of prudence may have made sense to apply to existing transmission facilities, post-Order No. 1000, it provides a huge incentive to incumbent transmission owners who can use the local planning loophole to avoid competition yet insert the resulting transmission into rates with a presumption of prudence.

2. Only Regionally Selected Projects And State-CPCN Approved Locally Planned Projects Are Eligible For Recovery Through Formula Rates

Next on the continuum would be to allow formula rate treatment for any regionally planned transmission facility plus those locally planned transmission facilities for which the incumbent must obtain a state-level certificate of public convenience and necessity ("CPCN") through a sufficiently robust review process. Under this approach, the regional planning process or state-level CPCN determination would serve as a proxy for a FERC determination that a project and developer combination are the more efficient or cost-effective solution. Formula rate recovery would be allowed for regional projects when the regionally planned project is included in the regional plan, and the locally planned projects with CPCN would not be eligible for formula rate recovery until the CPCN is final and non-appealable. All locally planned transmission, including so-called asset management projects, that are not subject to a sufficiently robust state-level CPCN process would require a FERC prudency determination in order to be recovered. LS

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000 (explaining how difficult it is for the public to prove that transmission investment was imprudent and making the case for why the burden should be on utilities to demonstrate that their investment was prudent).

Power and NRG believe this point on the continuum is fraught with issues for the Commission.

One issue is that it leaves the Commission with 48 different state CPCN processes to evaluate and determine whether each state CPCN process, as required by the relevant state law, is sufficiently robust that state approval of new transmission under the process warrants FERC jurisdictional formula rates.[37] Rates for transmission are the exclusive responsibility of FERC and that responsibility cannot be fulfilled without FERC determining that the project/developer are the more efficient or cost-effective solution. While a state may or may not have a process to decide whether to site transmission facilities, and such process may include a "need" component, and/or a cost component, without evaluating each specific law the Commission has no way of knowing whether the state analysis addresses the issues that the Commission must consider: (i) whether the transmission project to be developed is the more efficient or cost-effective transmission facility from both a local and regional basis and (ii) whether the transmission developer is the more efficient or cost-effective developer.[38] As the evidentiary record in RM21-17-

[37] The various state processes range from no CPCN requirement to a very vigorous CPCN process that includes consideration of the need for the project requirement. Even where processes exist, whether a CPCN is required can vary by project type, voltage, or a variety of other factors. Attached as Exhibit 2 is a chart summarizing the CPCN requirements in states located in PJM. See also Limited Supplemental Reply Comments of LS Power Grid, LLC to Comments of PJM Interconnection, L.L.C., filed on Sept. 19, 2022 in Docket No. RM21-17-000.

[38] During the Fifth meeting of the Joint Federal-State Task Force on Electric Transmission, Commissioner Christie suggested requiring state commissions to certify that their process is credible and meets certain criteria. Transcript of the Fifth Meeting of the Joint Federal-State Task Force on Electric Transmission held

000 establishes, to ensure that rates are just and reasonable, FERC must make both of these determinations to meet its statutory obligation. It is also important that the Commission evaluate the underlying state CPCN law as well as the CPCN process generally to ensure that the state commission is required to consider the criteria necessary from a FERC-jurisdictional perspective. Otherwise, the Commission cannot be certain that the necessary criteria were considered for every project. If the Commission adopts this approach, incumbents located in states that either do not review most local transmission projects or where the process does not meet the Commission's criteria may push the Commission to accept alternatives. The Commission should resist any watering down of the CPCN requirement, such as allowing states and utilities to substitute alternative certification processes that are not established by state CPCN law.[39] The key

on November 15, 2022 at 86:21-87:7, filed in Docket No. AD21-15-000 on January 13, 2023. If the Commission were to adopt this approach, it should require that the state commission certify it (1) has considered the need for the local project and has met the need requirement in the final and non-appealable CPCN and (2) had robust alternatives process within its CPCN review. The robust alternatives process would have to comply with both Order No. 890 and Order No. 1000.

[39] If FERC devises some sort of new paperwork, "certification process" divorced from a common CPCN "need" determination, many questions come to mind related to its administration. Who is the appropriate state authority to provide the certification? What if the state authority has no jurisdiction over some transmitting utilities in the state, such as a municipality or coop? Is the new certification process subject to state or federal appeal? Does it require a state order resulting from a litigated proceeding? What is the public involvement for this new process? Perhaps most importantly, how can the Commission commandeer a state to engage in a novel review process that is not provided for by state law? Rather than create a new process, the Commission could rely on state CPCN proceedings that litigate and determine whether a local project is needed

is the "need" determination required in the CPCN process and that would be the common thread between the various states.

Another issue is that it is unclear whether individual states are in a position to address whether the project is the more efficient or cost-effective project, at least in a manner that satisfies FERC's just and reasonable rate obligation. An example is relevant: American Electric Power has proposed certain aging facility rebuilds of 345 kV transmission in Ohio.[40] Under current Commission rules, because the facilities are planned by the individual transmission owner, the cost is allocated only to that transmission owner's pricing zone, regardless of beneficiaries. As currently structured, the AEP transmission zone in PJM encompasses portions of Kentucky and West Virginia meaning consumers in both of those states will pay for a portion of the Ohio-located transmission facilities. Under its law, because the AEP facilities will not be in Kentucky, the Kentucky siting process has no relevance. But what obligation does the Ohio process have to the consumers of Kentucky or West Virginia? Indeed, it would seem beneficial to Ohio residents if additional transmission costs are foisted on Kentucky consumers as those are costs that Ohio consumers do not have to pay. And the significant rate benefits arising through competition are not addressed at all.

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and had robust alternatives process within CPCN review. The robust alternatives process would have to comply with both Order No. 890 and Order No. 1000.

[40] *See* Protest of LSP Transmission Holdings II, LLC, filed in Docket No. ER20-2046-000 at Exhibit A (identifying $3.488 billion in examples of asset management projects, many if not all driven by end of life decisions, that could have regional benefits).

Furthermore, while a state CPCN review of locally planned projects would be an improvement over the status quo, a state CPCN review is unlikely to reduce wasteful spending the way that an independent, non-discriminatory competitive process would. A good example is transmission line foundations. The developer of transmission facilities will conduct a geotechnical investigation of a project area and propose a preliminary foundation design that is based on worst-case scenarios, *i.e.*, assume a sandy or loose soil. That foundation proposal is likely to be a large foundation, 8-foot diameter and 40 feet deep. If, once the project is under construction, harder, more stable underground conditions are encountered, the cost-effective yet still prudent design would be to change the design. One, drilling through rock is expensive, and two, a smaller foundation built into the harder rock would be equally reliable and less expensive. A traditional utility, however, is unlikely to change its foundation design, nor does it have the incentive to do so. It recovers more when it spends more, so it has no incentive to change the foundation design to save consumers. This wasteful spending – drilling through rock and an unnecessarily large foundation – is unlikely to ever come to light, even in a fulsome CPCN process. Only competition, with a cost cap, will incentivize the developer to change the design to the appropriate design and avoid wasteful spending.

The bottom line is that no state siting process is a substitute for FERC making the determination that the transmission addition is the more efficient or cost-effective transmission addition and that the rates flowing from that addition through the developer are just and reasonable.[41]

3. Only Regionally Selected Projects And State CPCN-Approved Locally Planned Projects Are Eligible For Recovery Through Formula Rates Except When Located In A State With A Preference Law

The next stop on the continuum is the same as the last, including the drawbacks, with an additional restriction – if the regional project is located in a state with a state incumbent preference law, then projects assigned under the preference cannot be included in formula rates unless FERC determines that the project is prudent. As the Commission is aware, incumbents in many MISO states have convinced state legislators to give them a preference so that incumbents in the state do not have to compete as Order No. 1000 mandated. Because those state laws directly interfere with the Commission's ability to set just and reasonable transmission rates, it would be appropriate for the Commission to exclude projects for which the developer is selected through a state preference law.[42] It also would discourage incumbents from lobbying for such protectionist laws.

4. Embrace And Encourage Regional Planning

A point on the continuum closer to the middle is for the Commission to fully embrace regional planning and allow formula rate treatment only for regionally planned

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41 As discussed in the Section B, because competition for transmission projects has fundamentally changed the rates and allocation of risk for transmission development, existing formula rate structures that arose outside of the competitive era should have no presumption of just and reasonable rates.

42 https://www.rstreet.org/commentary/how-rofr-laws-increase-electric-transmission-costs-in-midwestern-states/

projects that are not subject to a state preference law. As a starting point, the Commission should enforce Order No. 1000's requirement that the regional planning process identify the more efficient or cost-effective solutions, including those that are more efficient or cost-effective than a local solution(s), and confirm that regional solutions can displace local solutions in the regional plan. At the same time, the regional planning process should be improved so that a truly independent system planner is tasked with planning all transmission 100 kV and above for all transmission issues, including aging infrastructure.[43] These reforms will ensure that the more efficient or cost-effective regional transmission projects is better positioned to move forward.

Allowing only regionally planned solutions to automatically flow through formula rates would address, to some extent, the incentive that incumbent transmission owners have today to plan locally. It is without question that such locally planned projects have resulted in huge increases in rate base collected through formula rates with limited or no review as to whether the project itself is the more efficient or cost-effective transmission project. Thus, allowing formula rate treatment only for regionally planned projects would, presumably, incentivize incumbent transmission owners to more fully participate in regional planning.

The Commission also must be vigilant regarding additional efforts to limit competition for regionally planned transmission projects and should consider a further

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[43] LS Power ANOPR Comments at 32-59, 79-84.

exclusion. There are other exclusions to competition[44] that have likewise resulted in regionally planned transmission facilities being assigned to incumbent transmission owners without a determination that the incumbent transmission developer is the more efficient or cost-effective developer for the project. If the Commission selected this point on the continuum as marking the projects that are available for presumptive formula rate treatment, it should evaluate each of these exclusions.

5. Formula Rates Only For Competitively Procured Transmission

Closer to the opposite end of the continuum is to allow continued use of formula rates for existing transmission[45] while prohibiting the automatic inclusion of newly developed transmission in formula rates unless the transmission and/or developer[46] were selected as a result of a FERC jurisdictional competitive process. For any transmission that does not result from a FERC jurisdictional competitive process, before the developing transmission owner could put the transmission facilities into transmission rates they would have to make a Section 205 filing at the Commission to establish that the planning and costs for the project were prudent. This end of the continuum is

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[44] Other exclusions include the so-called immediate-need reliability exception, upgrades, and state protectionist law.

[45] The Commission will have to define "existing" transmission if it follows this path, establishing a cut-off for any under development transmission.

[46] NYISO, PJM, and ISO-NE select both the transmission project and developer through competitive solicitation, when they use competition, while MISO, SPP and CAISO determine the transmission project to be developed, then have competition for the selected develop, when those RTO's employ competition. To date, other than a single withdrawn need in the FRCC region, there has been no competition in non-RTO regions.

consistent with the views of a large number of consumers that transmission competition is the primary way to ensure just and reasonable rates, and consistent with the Commission's desire to remove "perverse incentives" to regional planning.[47] This end of the continuum would shift to incumbent transmission developers the obligation to establish that both the transmission it planned and the resulting rates are just and reasonable for transmission facilities that were either locally planned or planned regionally but simply handed to the incumbent through any of the various exclusions to competition. In this scenario, incumbent transmission owners would be forced to affirmatively decide whether to move forward with individually planned projects at their risk. This is consistent with the Federal Power Act which places the burden on the filing entity to establish that rates it proposes are just and reasonable. As noted above, for transmission additions, the rates cannot be just and reasonable if the transmission facility added was not the more efficient or cost-effective facility, nor if the transmission developer is not the more efficient or cost-effective developer from a rate perspective.

With respect to regionally planned projects for which a state preference law allows the incumbent transmission owner to decide whether it will build the project under the preference, withholding formula rate treatment is appropriate because, under most such laws, the incumbent is not required to accept responsibility for the project and those laws

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47 *See, e.g.*, ETCC ANOPR Comments; Comments of the National Association of State Utility Consumer Advocates at 7, filed Oct. 12, 2021 in Docket No. RM21-17-000; Comments of the Electricity Consumers Resource Council. At 4, filed Oct. 12, 2021 in Docket No. RM21-17-000.

significantly burden transmission customers with higher rates that have not been shown to just and reasonable.[48] With regard to other competition exclusions, the Commission could, based on the evidence in Docket No. RM21-17-000, determine that requiring an incumbent to establish that its project is prudent is proper under the Federal Power Act based on the significant rate disparity between competed and non-competed transmission rates.[49]

6. Eliminate Formula Rates

The opposite end of the spectrum from the status quo would return the Commission to the exclusive use of rate cases, eliminating the use of formula rates entirely. The benefit of this approach is that it gives consumers an opportunity to litigate the prudence of transmission investment. The main downside is well-understood. Because rate cases usually delay the recovery of investment, they create regulatory lag that slows investment in new transmission. Rate cases can also require significant resources from parties to conduct discovery and participate in lengthy settlement conferences and hearing. While participants in the October 2022 Technical Conference highlighted issues with the formula rate process and regulatory gap, none called for the total elimination of formula rates.

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48 https://www.rstreet.org/commentary/how-rofr-laws-increase-electric-transmission-costs-in-midwestern-states/.

49 LS Power ANOPR Comments at 88 and Appendix II: Examples of Competition Success.

B. Commission Proxies For Return On Equity And Capital Structure Must Be Reformed For Formula Rates Remaining

Unless the transmission rate base subject to formula rate treatment was procured through a competitive process that includes a rate analysis, the Commission's formula rates generally incorporate Commission-derived proxies for the just and reasonable return on equity and capital structure. Those proxies are intended to reflect a regulated just and reasonable rate that approximates a market outcome where market outcomes are not available.[50] Although cases involving those proxies were, and continue to be, heavily litigated,[51] there was a general understanding that the ultimately determined proxy reflected an appropriate just and reasonable regulated rate as a substitute for competitive outcomes, balancing the needs of consumers and investors.[52] This general assumption was true for decades as competition for cost of service development for transmission was non-existent. That general assumption is no longer true.

As LS Power and others have demonstrated to the Commission multiple times over the last several years,[53] the existing formula rates and rate outcomes do not reflect the rates that competitive developers have offered. The table of cost containment offered in the Hartburg-Sabine solicitation in MISO reflects this point.

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50 *See FPC v. Hope Nat. Gas. Co.*, 230 U.S. 591, 603 (1944).

51 *See, e.g.*, Ass. Of Business Advocating Tariff Equity v. MISO, Order No. 569, 169 FERC ¶ 61,129 (2019).

52 *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 693 (1923); *FPC v. Hope Nat. Gas. Co.*, 230 U.S. 591, 603 (1944).

53 *See, e.g.*, LS Power ANOPR Comments; LS Power NOPR Comments,

	PROPOSAL NUMBER											
OFFERED COST CAPS / CONTAINMENT	201	202	203	204	205	206	207	208	209	210	211	212
Implementation Cost – nominal ($M)	114.8	127.5	152.3 [1]	127.9	135.0 [2]	119.7	118.8	132.9		122.8	✓ [3]	117.1
Forego AFUDC	✓			✓		✓		✓				
Forego CWIP	✓	✓	✓	✓	✓	✓		✓		✓		✓
PUCT Route Change		✓			✓ [4]				✓			✓
ROE and Incentives (%)	9.8 [5]	9.8 [5]	9.8 [5] [6]	9.8 [5]	10.7 [5]	9.8 [5]	9.75	9.8 [5]		9.8 [5]	10	10.35 [7]
Capital Structure (Equity %)	45	45	45 [8]	45	60	45	52.5	45		45	55	40 [7]
Operations and Maintenance	10 yr.			10 yr.	5 yr.	10 yr.		10 yr.		5 yr.	40 yr.	
ATRR	10 yr.			10 yr.		10 yr.		10 yr.	40 yr.			

1. Also capped the AFUDC
2. Cap increases subject to commodity inflation
3. Only a portion of construction costs capped
4. Project cost cap includes additional 1.5 miles and caps the per mile cost of additional miles
5. Schedule guarantee
6. Reliability guarantee
7. 10 year ROE and capital structure cap
8. Cap on cost of debt through 2025

[54]

The range of competitive offers reflect implementation costs of $114.8 million to as high as $152.3 million (inclusive of allowance for funds used during construction); with return on equity (inclusive of incentives) ranging between 9.8% (with a schedule guarantee that could lower) to 10.7% (with a schedule guarantee that could lower) and one bidder that did not cap return at all; and equity percentages in the capital structure for the referenced returns of 45% equity at 9.8% return and 60% equity at the offered 10.7% return.[55]

While those offers were each submitted into a competitive solicitation, they offer a good representation of the comparison of "regulated" returns versus those arising from competition. For example, a 10.7% return on equity with incentives, at 60% equity in the capital structure, is very similar to the return on equity, capital structure and incentives

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[54] Hartburg-Sabine Junction Selection Report available at https://cdn.misoenergy.org/Hartburg-Sabine%20Junction%20500%20kV%20Selection%20Report296754.pdf

[55] As noted, there was one proposal with no return on equity or capital structure guarantee. In addition, one proposal at offered a return on equity of 10.35 % at 40% equity, both capped for a period of 10 years.

reflected in International Transmission Co.'s ("ITC") existing formula rate in MISO.[56] Thus, for projects in MISO simply handed to ITC and placed into its formula rates – as a result of a state preference law,[57] a declaration that the project is an "upgrade" to existing facilities, a cost allocation methodology that restricts cost allocation to the zone where the project is physically located, or an ITC locally planned project – the return and equity percentage of the capital structure will produce substantially exaggerated rates over competitive outcomes.[58] This outcome is true notwithstanding that the return and equity percentage may be within the zone of reasonableness under Commission proxies for those elements.

That the existing formula rates, in particular the return on equity and capital structure, may have been declared to be within the "zone of reasonableness" under the Commission's precedent when transmission competition was not present, reflects the problem with using formula rates that include those regulated proxies for new transmission facilities. For example, ITC was recently handed a portion of the Huntley-Wilmarth project by MISO as a result of a Minnesota preference law.[59] That project will

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[56] MISO, Tariff, Attachment O, ITC Formula Rate.

[57] Which currently applies in ITC states of Iowa, Michigan, and Minnesota.

[58] The equity percentage of capital structure is 25% higher than market outcomes, applied to return on that equity that is 8.5% higher than market. It is also important to note, using the Hartburg-Sabine proposals as an example, the higher return and equity percentage were on a proposal that had implementation costs that were 15% higher than the selected proposal.

[59] Such laws will result in \$5.5 Billion in MISO's Tranche 1 LRTP Projects being assigned to incumbent transmission owners without Commission mandated competition.

flow into ITC's formula rates at 60 percent equity and a return (with incentive adder) of 10.77% with no contractual cost containment. Despite the fact that the regulated outcomes arising by use of formula rates are well outside the likely (based on evidence) competitive outcomes, because of pre-competition determinations that the formula rates produce just and reasonable results, the burden is on consumers to prove that the regulated proxies do not reflect market realities.

One group of consumers tried just that related to the equity portion of ITC's capital structure, which is 25% above market outcomes, seeking only to lower it closer to the MISO average for existing formula rates.[60] Although the Commission noted consumer support for the complaint, beyond just the complainants, because "ITC Midwest's capital structure is far outside the range of other transmission companies and that a lower equity component would mean lower costs to customers," [61] the Commission denied the Complaint. The Commission found that complainants had "not demonstrated that ITC Midwest's use of its actual capital structure is unjust and unreasonable"[62] under the Commission's precedent for determining an appropriate capital structure. Maybe as a result of the arguments raised, or maybe as a result of inertia, notwithstanding that the

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[60] *Iowa Coalition for Affordable Transmission v ITC Midwest, LLC*, Docket EL22-56-000, asserting that "ITC Midwest's capital structure is not just and reasonable, and the Commission must reduce the equity ratio in ITC Midwest's capital structure to protect consumers from exorbitant transmission rates. ICAT's witness, Dr. Keith Berry, supports a just and reasonable equity ratio for ITC Midwest of 53%." Complaint at 1.

[61] *Iowa Coalition for Affordable Transmission v. ITC Midwest, LLC*, Order Denying Complaint, 181 FERC ¶ 61,100 at P 47 (2022).

[62] *Id*. at P 68.

complained of capital structure is well outside the market outcomes known to the Commission, the Commission stuck with strict application of its pre-competition three-part test for determining whether a capital structure in a formula rate is just and reasonable.[63]

Although the competitive outcome referenced above was just one such outcome, there are multiple such examples[64] that represent a seminal change in the manner in which the Commission must judge the justness and reasonableness of *regulated rates* when competition is not present to provide that clarity as to what is just and reasonable. The recent New Jersey solicitation for transmission projects to address offshore wind reinforced this fact, with 80 proposals submitted with return on equity commitments down to 8.5% and equity percentages down to 40%. Thus, in those situations when competition is not available, the Commission must revise its determination of the regulated rates so that they appropriately reflect market outcomes. To do otherwise, the Commission will continue to incent incumbent transmission owners to avoid competition as they know that regulated returns will be substantially better than they will obtain through competition, if they are awarded the competitive project at all.[65]

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63 *Id*. at P 3.

64 For a review of competitive results as of the time of that filing, *see* LS Power ANOPR Comments, Appendix II – Examples of Competition Success. Multiple additional competitive transmission solicitations have occurred since the referenced filing.

65 *See* Affidavit of Paul Thessen, President LS Power Development, LLC, at 26 attached as Attachment 1 to LS Power's NOPR Comments, explaining the difference in market participant incentives between regulated outcomes and competitive outcomes.

C. Improving Planning Will Address Many Of The Cost Issues Raised During The October 2022 Technical Conference

The issues raised during the October 2022 Technical Conference in large measure reflect issues that consumers and non-incumbent transmission developers have raised for the last several years. Unfortunately, based on the questions asked, the Commission seems to have paid little attention to the clear actions offered by those looking out for consumer interests rather than simply shareholder interests.

"Local" planning of high voltage transmission must be reformed. A substantial focus of the October 2022 Technical Conference revolved around the local planning processes of incumbent transmission owners and whether those individual processes provided sufficient transparency for consumers and the Commission to determine whether the output of those processes reflect just and reasonable results.[66] The unasked question is why those local processes continue to exist. The Commission long ago

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[66] *See*, Supplemental Notice of Technical Conference, Docket No. AD22-8-000, (Sept. 8, 2022) (Panel 1 focused on local planning criteria and asked whether additional transparency is needed in order for stakeholders to understand why the utility determined that a specific facility was appropriate); *see also* Tr. at 8:12-22 (Riehl) ("The purpose of this conference is to explore measures to ensure sufficient transparency into cost-effectiveness of local and regional transmission planning decisions, including the role of cost management measures and ensuring that cost-effective identification of local transmission needs, for example planning criteria, and solutions to address the identified local transmission . . .."); *id.* at 10:10-14 (Glick) ("of issues that I particularly am very interested in . . . first one is the criteria utilities use in local planning, and whether there's sufficient transparency to the process . . ..").

concluded that the interconnected high voltage transmission operates as single unit.[67] Various cascading outages have proven that.[68] Yet the Commission continues to wrestle with individual transmission owners making local determinations as to the transmission changes that will be made to that grid.

The local planning the Commission has allowed to proceed without a procedural or ratemaking check is almost inherently non-transparent. Its emanation into the retail rates and the retail market structure is particularly noxious in the markets in which NRG does business. For example, in the PECO service territory in Pennsylvania, customers may choose to buy a retail electric plan from NRG, from another competitive retailer, or to take "default supply service" from PECO itself. When PECO's local transmission planning causes a rate increase, PECO's default supply service is allowed to collect that increase from its customers through retail rate true-up mechanisms. Meanwhile, NRG is obliged through local regulation to offer a truly fixed-rate product, with no opportunity to true-up the revenues it may collect from customers due to a rate change effected by PECO's local planning and formula ratemaking.[69] It is not unusual to see double-digit

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67 *See, e.g.*, Order No. 1000-A at 560-61 ("the transmission grid constitutes a common infrastructure, 'a cohesive network moving energy in bulk.'") *quoting Pub. Serv. Co. of Colo.*, 62 FERC ¶ 61,013 at 61,061 (1993)).

68 *See* Notice of Proposed Rulemaking: Revision to Electric Reliability Organization Definition of Bulk Electric System, Docket No. RM09–18–000, 130 FERC ¶ 61,204 at 21 (2010).

69 In the parlance of Pennsylvania retail regulation, the Fixed Means Fixed rule. Guidelines for Use of Fixed Price Labels for Products With a Pass-Through Clause, Docket No. M-2013- 2362961 (Order entered November 14, 2013) ("Fixed Means Fixed Order").

percentage rate increases in transmission service be passed through in formula rates, and it is competitive retailers like NRG that must bear the risk of pricing in (or losing on) the risk that the transmission rates will change abruptly. For example, on one occasion, transmission rates for one utility in PJM increased more than 30% in a single year, with only 25 days' notice under the formula ratemaking.[70] This toxic combination of formula ratemaking and local planning is a major consumer harm that would be averted with an end to formula ratemaking and more transparent, regionally focused planning.

LS Power, as well as others, addressed the issue of excess local planning in its ANOPR Comments, but LS Power was not the first, as LS Power quoted former FERC Chair Hoecker, on behalf of WIRES, stating:

> WIRES' long-time contention that planning, upgrading, and expanding the North American high voltage electric transmission system increment-by-increment, without a regional and interregional vision or an appreciation of what will be required of the system to serve consumers cost effectively, reliably, and safely in the future under a broad range of plausible scenarios, creates the risk of leaving customers with only a very expensive, cost ineffective set of choices.[71]

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[70] Public Service Electric and Gas Company Informational Filing of 2020 Formula Rate Annual Update (Second Revision) FERC Docket No. ER09-1257 dated January 17, 2020 and available at: https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=15073350. The original filing for the 2020 Formula Rate Annual Update was October 15, 2019 and is available at: https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=15073350. PSEG filed several revisions to the original filing.

[71] LS Power ANOPR Comments at 33-34, citing WIRES' Preface, Changing The Way We Plan Major Transmission Expansions Can Save Customers Billions During The Coming Transition To New Forms of Electric Generation, New Modes of Managing The Grid, and New Uses of Electricity. Since issuance of that

The Commission continues to try to work within the "increment-by-increment" approach to planning rather than taking the necessary steps to *require* effective regional planning. The October 2022 Technical Conference itself largely ignored the roadmap, instead continuing to focus on mechanisms to make "increment-by-increment" planning more transparent. There is simply no place for localized "increment-by-increment" planning for transmission facilities above 100 kV that are part of an integrated bulk electric system.

LS Power will not repeat its fulsome ANOPR roadmap here to achieving just and reasonable rates through transmission planning reform here, but offer the following points:

- Regional, Holistic, And Independent Planning Is Essential To Ensure Just And Reasonable Rates;[72]
- Aging Infrastructure Is A Regional Issue;[73]
- Regional Planning Entities Should Plan All Transmission Needs On Facilities Above 100 kV, And Some Below That Threshold;[74] and
- Local Planning Should Focus Only On Retail Facilities.[75]

With its focus on local planning transparency and issues such as state-level review of locally planned projects, the October 2022 Technical Conference largely missed an

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proclamation in 2016, WIRES has become an extension of incumbent transmission owners with its Offices and Board all incumbent utility executives. https://wiresgroup.com/about/leadership/.

72 LS Power ANOPR Comments at 32-35, 41-48, and 65-84.

73 *Id*. at 36-40.

74 *Id*. at 49-60.

75 *Id*. at 48-49.

opportunity to understand why, other than their own self-interested needs, incumbent transmission owners object to holistic regional planning of all transmission needs on facilities above 100 kV.

D. Expanding Transmission Competition Is How The Commission Ensures Just And Reasonable Transmission Rates

Even if the Commission institutes limits on formula rate recovery of new transmission investment, brings return on equity and capital structure to levels equivalent to competitive ones, and expands regional planning, the Commission still must expand transmission competition if it is serious about controlling transmission costs.[76] Regulation is a substitute for competition, and where competition is possible, it should be encouraged. Cost scrutiny through a prudency proceeding before costs flow into rates is a weak substitute for competition and the cost caps that it has brought. Cost caps align the interest of the utility with ratepayers to control costs, in contract to the perverse incentive under cost-of-service rates to increase costs. If an investment appears prudent, then a transmission owner under cost-of-service rates has the incentive to spend it.

As explained above, a regulated process can rarely uncover unnecessary spending that may appear prudent, but is not. Intervenors and a commission's staff are not a replacement for entities in the same line of business going head-to-head and bidding against one another. State review typically can help ensure the need of the project, but not that the project is the best project to meet the need. Nor does state certification

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[76] *See id.* at 85-97.

incentivize incumbent developers to reduce unnecessary spending during project development.

Small project design decisions with large impacts on costs permeate transmission development and construction. In addition to the example in Section I.A.2., another example of an area where excess spending can be hidden is in project access. Spending on access includes construction of temporary and permanent roads, installation and removal of timber matting in sensitive areas, and wetlands mitigation, which is a significant project expense. Without competitive pressure or a cost cap to manage these costs a utility can overspend without any ability for even the most diligent review to uncover the additional costs. These types of decisions permeate every aspect of transmission development, and even the best regulator will not uncover such excess in a state proceeding for a certificate of public convenience and necessity or a prudence review following a Section 205 filing. Only with a cost cap, which are only provided in a competitive process, are the interests of a utility aligned with ratepayers to manage potential cost over-runs.

March 23, 2023

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CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of March 2023 served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

By: */s/ Christina R. Switzer*

Christina R. Switzer