- BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION -

Building for the Future through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection	DOCKET NO. RM21-17-000 REQUEST FOR REHEARING OF THE PUBLIC SERVICE COMMISSION OF UTAH

Pursuant to 18 CFR § 385.713, the Public Service Commission of Utah (UPSC) submits this Request for Rehearing regarding the Federal Energy Regulatory Commission's (FERC) Order 1920 (the "Order") issued in this docket on May 13, 2024.

1. Statement of Issues

As 18 CFR § 385.713(c)(2) requires, the UPSC enumerates a Statement of Issues in separately numbered paragraphs below.

1. The Final Rule[1] is *ultra vires*, and a clear overreach of FERC's limited statutory authority that misappropriates power specifically vested in the states to determine their own generation mixes and to ensure their ratepayers' retail rates reflect the cost associated with their preferred generation mix. Representative Authorities: 16 U.S.C. § 824; *West Virginia v. EPA*, 142 S. Ct. 2587 (2022); *FDA v. Brown & William Tobacco Corp.*, 529 U.S. 120 (2000).
2. The Final Rule violates the Federal Power Act (FPA) by requiring the use of processes that will result in unjust and unreasonable rates, and it violates the long-established cost causation principle. Representative Authorities: 16 U.S.C. § 824e;

[1] *Bldg. for the Future Through Elec. Reg'l Transmission Planning & Cost Allocation & Generator Interconnection*, 187 FERC ¶ 61,068 (May 13, 2024) (hereafter "Order" or "Final Rule").

K N Energy, Inc. v. FERC, 968 F.2d 1295 (1992); *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470 (7th Cir. 2009).

3. The Final Rule fails to comply with the Administrative Procedure Act (APA) because it reneges on the Notice of Proposed Rulemaking's (NOPR)[2] commitment to voluntary state agreements, and therefore is not a "logical outgrowth" of the NOPR as the APA requires. Representative Authorities: 5 U.S.C. § 553; *Hercules v. United States*, 938 F.2d 276 (DC Cir. 1991); *Nat'l Black Media Coalition v. FCC*, 791 F.2d 1016 (2d Cir. 1986); *AFL-CIO v. Donovan*, 757 F.2d 330 (D.C. Cir. 1985); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506 (D.C. Cir. 1983).

2. Summary of Arguments

The UPSC has a small staff that must attend to the many dockets over which it presides. Given that the Order spans nearly 1,300 pages and is, in Commissioner Christie's words, "likely one of the longest, most complicated, and confusing orders [FERC] has ever issued[,]"[3] the UPSC cannot reasonably provide a thorough and exhaustive discussion of the Order's myriad shortcomings within the short window allowed for filing this Request for Rehearing. Instead, the UPSC summarizes, as succinctly as it is able, its preliminary arguments relating to the issues identified above.

[2] *Bldg. for the Future Through Elec. Reg'l Transmission Planning & Cost Allocation & Generator Interconnection*, 87 FR 26504 (May 4, 2022), 179 FERC ¶ 61,028 (2022).
[3] Order, (Comm'r Christie dissenting at ¶ 1, n.4).

a. The Final Rule is *Ultra Vires* and an Overreach of FERC's Statutory Jurisdiction that Unlawfully Usurps States' Authority to Determine Generation Mixes and Ensure Retail Customers' Rates Reflect their Particular State's Preferred Generation Mix.

i. *FERC's jurisdiction is limited to that delegated to it under the FPA, which Expressly Precludes FERC from Interfering with States' Sovereignty over Their Preferred Generation Mixes.*

FERC's authority is statutorily delegated under Section 206 of the FPA.[4] The FPA delegates to FERC the power to regulate "the sale of … energy at wholesale in interstate commerce," which empowers FERC to remediate transmission rates and practices that affect transmission rates when it finds substantial evidence demonstrates the rate or practice is unjust, unreasonable, unduly discriminatory, or preferential.

The FPA is explicit that FERC's "regulation, however, [shall] extend only to those matters which are not subject to regulation by the States."[5] Significantly, the FPA explicitly provides that FERC "shall not have jurisdiction … over facilities used for the generation of electric energy."

Consequently, FERC has no authority whatsoever to regulate the generation of electricity, and it certainly has no authority to exercise its limited authority to promote the adoption of one kind of generation resource over another. Similarly, FERC has no authority to exercise its authority to facilitate the policy preferences of any state, local government, or corporation relating to renewable generation. As former Chair Glick recently acknowledged:

[4] 16 U.S.C. § 824.
[5] *Id.* at § 824(a).

"The FPA is clear. The states, not [FERC], are the entities responsible for shaping the generation mix."[6]

ii. *FERC Unreservedly Advertised Its Intention to Promote Renewable Generation and the Policy Preferences of Certain Preferred Stakeholders in the ANOPR and NOPR and, though its Order Now Attempts to Obfuscate the Final Rule's Intended Purpose and Effect, the Final Rule Remains a Significant Overreach of FERC's Authority*.

While the Order makes a limited effort to obscure the Final Rule's purpose, FERC was less reserved when it announced its intentions in both the Advance Notice of Proposed Rulemaking[7] (ANOPR) and NOPR in this docket. In the ANOPR, FERC described its intention to reshape transmission planning and cost allocation for the purpose of expanding the transmission system in "areas with high degrees of renewable resources" that require "extensive" and "more expensive" transmission facilities.[8] Later, as the UPSC previously observed, the NOPR "states more than 100 times that its proposals are 'driven by changes in the resource mix and demand' and makes clear the changes to which it refers predominantly concern expanding transmission access to accommodate remote renewable generation."[9]

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[6] *Calpine Corp., et al. v. PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,035 (2020) (Chair Glick dissenting at ¶ 5).

[7] *Bldg. for the Future Through Elec. Reg'l Transmission Planning & Cost Allocation & Generator Interconnection*, 86 FR 40266 (July 27, 2021), 176 FERC ¶ 61,024 (2021).

[8] ANOPR at ¶ 40.

[9] Comments of the UPSC on NOPR filed August 17, 2022 (quoting NOPR at ¶ 45). The NOPR explained, for example, "[t]he generation fleet is changing rapidly … taking the form of a shift from large, centralized resources located close to population centers toward renewable resources … that are often … located far from load centers." *Id.*

Given the UPSC and representatives from at least 18 states pointed out FERC has no authority whatsoever to promulgate rules to dictate states' generation resource decisions,[10] the Order is less direct in its language and advertises less explicitly FERC's unlawful intentions. The Order also obfuscates FERC's unlawful purpose by scattering and burying the meaningful and effective provisions of the Final Rule within its sprawling Order with 1,240-plus pages of text (not inclusive of appendices).

However, FERC's unlawful purpose remains obvious in the provisions of the Final Rule, which dissenting Commissioner Christie characterizes as a "shell game" employed to unlawfully push FERC's preferred generation mix and to force unwilling states to pay for it.

Among the elements of this shell game is the unjustified restriction that "transmission providers may not establish reliability, economic, or public policy transmission facility types as part of Long-Term Regional Transmission Planning and, therefore, may not establish Long-Term Regional Transmission Cost Allocation Methods based on reliability, economic, or public policy transmission facility types."[11] In plain terms, the Final Rule precludes transmission planners and cost allocation from distinguishing between transmission projects that are necessary to resolve an identified reliability or economic concern from those that are only necessary because some state, local government, or corporation has unilaterally adopted a policy (the "public policy transmission facility type"). Of course, distinguishing between such projects is obviously

[10] Order at ¶ 193 (identifying specific agencies from several states "and Undersigned States" that "contend [FERC] lacks the statutory authority to dictate" states' generation mixes). The Order identifies 18 different states as "Undersigned States," including Utah, Alaska, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Texas, West Virginia, and Wyoming. Order at n.165.

[11] Order at ¶ 1474.

necessary if costs are to be allocated consistent with cost causation principles, and the only reason to implement this nonsensical restriction is to ensure those who drive "public policy" projects can shift some of the costs of their expensive preferences to voiceless ratepayers in other states.

The Final Rule effectively rigs the planning and cost allocation process to ensure (i) FERC's preferred stakeholders' projects are selected in the planning process and (ii) these preferred stakeholders are not required to bear the full costs associated with their choices. For example, the Final Rule mandates that transmission providers incorporate into their long-term planning scenarios any federal, Tribal, state, or local laws and regulations "on decarbonization" or that "affect[] the resource mix" as well as "corporate commitments" that "affect Long-Term Transmission Needs."[12] With respect to cost allocation, the Final Rule requires transmission providers to file an *ex ante* cost allocation formula that is applicable to all projects (again, regardless of whether a project is purely policy-driven because the rule precludes planners from even categorizing projects in such a manner).[13] In the Order's twisted logic, residents in Utah or Wyoming would be "cost causers" of an expensive transmission project necessitated solely because of a policy adopted by an Oregon municipality or any large corporation. The Final Rule precludes arguing otherwise because the transmission planners are barred from identifying the policy-driven project as such in the first instance.

In sum, Commissioner Christie is patently correct in observing that while the Final Rule purports to order all transmission providers "to plan costly regional transmission for some

[12] Order at ¶ 409.
[13] Order at ¶ 1291.

allegedly predictable generation mix 20 years in the future" the obvious purpose "is not to *predict* the generation mix 20 years forward, but to *produce* the *preferred* generation mix" of certain preferred stakeholders.[14] Congress has given FERC no such power, and FERC's politically motivated attempt to circumvent states' sovereignty over their generation mixes and the costs retail customers pay as a result of their preferred generation mixes is unlawful.

iii. *The Order's reliance on South Carolina is wholly misplaced; a reviewing court is virtually certain to recognize the Final Rule violates the Major Questions Doctrine, and the Final Rule will have resulted in nothing but extensive, wasted administrative and litigation costs across the country.*

The United States Supreme Court recently rejected the Environmental Protection Agency's claim to authority under the Clean Air Act to devise carbon emissions caps based on a "generation shifting" approach. As the UPSC previously argued in this docket, the Court "[e]mploy[ed] reasoning that is arguably even more applicable to the FERC context" and "found it 'highly unlikely that Congress would leave to agency discretion the decision of how much coal-based generation there should be over the coming decades.'"[15]

More specifically, the Court employed the "major questions doctrine," explaining this doctrine applies in cases where the "history and the breadth of the authority that [an] agency has asserted" and "the economic and political significance" associated with the agency's assertion of

[14] Order, (Comm'r Christie dissenting at ¶ 4) (emphasis in original).
[15] Comments of the UPSC on NOPR, filed August 17, 2022, at 8-9 (quoting *West Virginia v. EPA*, 142 S. Ct. 2587, 2613 (2022). *See also FDA v. Brown & William Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("We are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.").

that authority provide a "reason to hesitate before concluding that Congress meant to confer such authority."[16]

Here, a reviewing court need not reach the issue of whether the major question doctrine applies because, on its face, the FPA gives FERC no authority to regulate electricity generation and specifically reserves that power to the states. The point is, even if the FPA were ambiguous on the matter, the major questions doctrine would apply, resulting in the ultimate rejection of the Final Rule.

Indeed, in the current social and political context, one would be hard pressed to identify a single domestic issue in the United States that presents more of a "major question" than transitioning the grid away from fossil-fueled generation and toward renewable resources. As Commissioner Christie so succinctly explains: "If imposing a final rule intended to cost consumers literally trillions of dollars to build transmission projects designed to implement a sweeping policy agenda never passed by Congress is *not* a major question of public policy, then there is no such thing."[17]

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[16] *West Virginia* at 2595 (quotation omitted).

[17] Order, (Comm'r Christie dissenting at ¶ 52). For this reason, FERC's reliance on a D.C. Circuit case, *South Carolina Public Service Authority v. FERC*, that upheld FERC's Order 1000 is misplaced. 762 F.3d 41 (D.C. Cir. 2014) (hereafter "*South Carolina*"). While Order 1000 instituted reforms that required transmission providers to engage in regional transmission planning and provided certain expectations with respect to those processes, it did not require them to implicitly discriminate in favor of renewable generation and it certainly did not prohibit them from properly allocating costs to those whose preferred, expensive policy preferences were the cause. Indeed, *South Carolina* emphasizes that Order 1000 "does not promote any particular public policy" and relied on FERC's assurances that it was not purporting to "determine what needs to be built" and that Order 1000 was "concerned with process[,]" "not intended to dictate substantive outcomes[,]" and, critically, did "not dictate how costs are to be allocated." (*Id.* at 57-59, 89.) Unlike Order 1000, the Final Rule patently dictates outcomes and cost allocation and does so to discriminate and favor the policy preferences of certain preferred stakeholders.

b. The Final Rule Violates the Federal Power Act by Requiring Unjust and Unreasonable Rates and It Violates the Long-Established, Basic Cost Causation Principle.

FERC is statutorily required to exercise its limited authority to ensure that no rate within its jurisdiction or rule, regulation, or practice affecting such a rate is "unjust, unreasonable, unduly discriminatory or preferential."[18] "FERC and the courts have added flesh to these bare statutory bones, [by] establishing what has become known in [FERC] parlance as the 'cost-causation' principle."[19] This principle "traditionally require[s] that all approved rates reflect to some degree the costs actually caused by the customer who must pay them."[20] "Properly designed rates should produce revenues from each class of customers *which match, as closely as practicable, the costs to serve each class or individual customer*."[21]

The UPSC acknowledges, of course, "FERC is not bound to reject any rate mechanism that tracks the cost-causation principle less than perfectly" because sometimes it is simply infeasible to do so.[22] However, the Final Rule does not simply fail to perfectly track the cost-causation principle; it purposely ignores it.

The Final Rule expressly prohibits cost allocation consistent with the cost causation principle. As discussed above, the Final Rule flatly enjoins any cost allocation method that

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Because the Final Rule is discriminatory and preferential (which the FPA expressly forbids) and aims to force sweeping changes in the generation mix across the United States (directly usurping states' authority as specifically reserved in the FPA), the UPSC asserts FERC will almost certainly receive no deference to the Rule.

[18] 16 U.S.C. § 824e.

[19] *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. 1992).

[20] *Id.*

[21] *Id.* at 1300-01 (emphasis in original).

[22] *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, 475 (7th Cir. 2009).

distinguishes between projects that are based on economic or engineering necessity and those based on the "public policy" preferences of states, local governments, and corporations. In other words, the Final Rule precludes any cost allocation method that allocates costs to customers because their particular, expensive policy preferences caused them.

This is unprecedented and indefensible. The Final Rule is not only inconsistent with, but diametrically counter to the cost causation principle. This is not only an abdication of FERC's responsibilities under the FPA, the Final Rule expressly requires what the FPA specifically entrusts FERC to avoid: unjust, unreasonable, unduly discriminatory, and preferential rates.

c. The Final Rule Fails to Comply with the Administrative Procedure Act Because It So Substantially Deviates from the NOPR that It Cannot be Considered a "Logical Outgrowth" of the Notice FERC Provided.

The Administrative Procedure Act (APA), specifically 5 U.S.C. § 553, requires agencies "provide interested parties with adequate notice of, and an opportunity to comment on, the provisions that appear in the agency's final regulations."[23]

"While a final rule need not be an exact replica of the rule proposed in the [n]otice, the final rule must be a 'logical outgrowth' of the rule proposed."[24] "Clearly, if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal."[25] The test for determining whether the final rule is a

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[23] *Hercules v. United States*, 938 F.2d 276, 283 (D.C. Cir. 1991).

[24] *Nat'l Black Media Coalition v. FCC*, 791 F.2d 1016, 1022-24 (2d Cir. 1986) (holding agency "did not comply with the notice provision of the Administrative Procedure Act" with respect to new regulation governing applications for broadcast licenses because agency "fail[ed] to provide notice of its decision to abandon its minority preference policy").

[25] *Id*. (internal quotation omitted.)

logical outgrowth of the proposed rule is whether stakeholders "should have anticipated" from the notice that the disputed provision in the Final Rule "might be imposed."[26]

Additionally, "[a]gency notice must describe the range of alternatives being considered with reasonable specificity" and "must itself provide notice of a regulatory proposal … it cannot bootstrap notice from a comment."[27]

Here, the NOPR comprised nearly 350 pages (exclusive of appendices) and solicited comments on approximately 60 issues, many of which were ambiguously broad or otherwise poorly articulated in the NOPR. The Final Rule contains many features that do not constitute a "logical outgrowth" of the NOPR. Commissioner Christie's dissent enumerates and explains numerous of these fundamental departures from the NOPR, which the UPSC incorporates here.[28]

The UPSC specifically highlights, by way of example, one such instance here. The NOPR emphasizes the importance of individual state's agreements to transmission planning and selection criteria and, critically, cost allocation methods. For example, the NOPR states FERC "clarif[ies] that [it is] not proposing to impose any requirements on states to participate in processes to establish regional cost allocation methods" and acknowledges FERC "has no authority over relevant state entities in this regard and, as such, those entities need not engage on a cost allocation approach if they do not wish to do so…."[29] The NOPR insists "[i]nstead,

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[26] *Hercules* 938 F.2d at 283 (quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).
[27] *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).
[28] Order, Comm'r Christie dissenting at ¶¶ 24-29.
[29] NOPR at ¶ 308.

[FERC] propose[s] only to require that public utility transmission providers … seek the agreement of the relevant state entities."[30]

The Final Rule, however, flatly eliminates any requirement that a state agree to the cost allocation that its residents will ultimately bear, *no matter how detached that state's residents are from causing the associated cost and even when the costs stem from policies enacted by another state's legislature or a corporate board*. It reduces state regulators to toothless bystanders that, at best, will have an opportunity to offer input but are powerless to protect their residents from suffering crushing costs associated with agenda-driven, out-of-state interests.

3. Conclusion

The UPSC urges FERC to grant rehearing and reconsider the Final Rule, which Rule is wholly inconsistent with and offensive to the laws and policies of many states whose constituents will be forced to subsidize – at tremendous cost – policy preferences that their own elected state legislatures have rejected. As the UPSC stated in an earlier filing, the "UPSC supports intelligent transmission planning and acknowledges that existing processes for regional planning and cost allocation may be susceptible to improvement" and widespread support seems to exist for reasonable and *fair* changes that will promote increased investment in transmission infrastructure.[31]

Unfortunately, the Final Rule will ultimately serve as an obstacle to increased transmission investment and intelligent long-term planning. Stakeholders will for years be preoccupied with deciphering how its myriad requirements strewn across nearly 1,300 pages are

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[30] *Id.*

[31] UPSC Comments to ANOPR, filed October 8, 2021, at 1.

even supposed to be met and hesitant to commit to new processes because of the inevitable (and likely successful) legal challenges to the rule, not to mention the likelihood that repealing such a divisive rule is likely to be a high priority of some potential future administration that is less enamored with the rapid transition to renewable energy. A reasonable and lawful rule that reflects some compromise and respects states' sovereignty would be a far more effective tool for facilitating increased investment in transmission.

DATED at Salt Lake City, Utah, June 12, 2024.

/s/ Michael Hammer, Counsel

/s/ Jerry D. Fenn, Chair

/s/ David R. Clark, Commissioner

/s/ John S. Harvey, Ph.D., Commissioner

Utah Public Service Commission
Heber M. Wells Building
P.O. Box 4558
Salt Lake City, UT 84145-4558