

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

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Transmission Planning and)	
Cost Allocation by)	Docket No. RM10-23-001
Transmission Owning and)	
Operating Public Utilities)	
)	

**REQUEST FOR CLARIFICATION,
OR IN THE ALTERNATIVE, REHEARING OF
THE COALITION FOR FAIR TRANSMISSION POLICY**

Pursuant to Rules 212 and 713 of the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) Rules of Practice and Procedure, 18 C.F.R. §§ 385.212 and 385.713, the Coalition for Fair Transmission Policy (“Coalition” or “CFTP”), by and on behalf of its member companies (individually and collectively),¹ submit this request for clarification or, in the alternative, rehearing and clarification of the Commission’s July 21, 2011, Order No. 1000.² The Coalition is a group of seven geographically and structurally diverse investor-owned electric utilities that have joined together for purposes of promoting legislative and regulatory policies that will lead to customer-focused development of the nation’s electric transmission system in support of the growing demand for clean generation resources. The Coalition’s members, and those on record supporting the Coalition’s goals, serve more than 28 percent of electric customers in the United States in 26 states.

¹ The Coalition members are CMS Energy Corporation, Consolidated Edison, Inc., DTE Energy Company, Progress Energy Inc., Public Service Enterprise Group, SCANA Corporation, and Southern Company.

² 180 FERC ¶ 61,051 (2011) (“Order No. 1000” or “Final Rule”).

I. BACKGROUND AND OVERVIEW

As the Coalition stated in our comments and reply comments in response to the Proposed Rule,³ we generally agree with the Commission's objectives in Order No. 1000 to ensure that there is an open and transparent transmission planning process within regions, and continued coordination among regions, so that transmission planning can help to ensure that transmission is built that allows consumers to take advantage of the most cost-effective transmission alternatives given reliability and economic needs, as well as applicable federal and state public policy requirements. The Coalition also acknowledges and agrees with the Commission's expressed intent to build upon what is working and retain the parts of the existing transmission planning and cost allocation frameworks that are proven and effective. And the Coalition supports the Commission's decision to allow for regional flexibility in implementing many aspects of the Rule. The Coalition, however, believes that the Final Rule is inconsistent with the Commission's stated objectives in certain areas.

If not corrected on rehearing, the Final Rule could result in higher costs to many consumers, pre-emption of public utility and state prerogatives to determine and decide what generation resources best meet the reliability and economic needs of consumers and public policy requirements, and inefficiencies in competitive electric markets. The Coalition also believes certain aspects of the Final Rule are inconsistent with the Federal Power Act ("FPA") and the Administrative Procedures Act ("APA"), both of which impose requirements and limitations on the Commission's authority to require changes to existing transmission planning

³ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,660 (2010) ("Proposed Rule" or "NOPR").

and cost allocation methodologies, whether pursued on a case by case basis, through adjudicatory rulemaking or by the selected means of generic, notice and comment rulemaking.

Specifically, the Coalition urges the Commission to grant rehearing and/or clarification of Order No. 1000 to ensure that:

- (1) consumers will not pay for transmission lines for which expected benefits are speculative, extend beyond the planning horizon typically used in regional transmission planning processes, are not needed to meet consumer requirements reliably and economically, or that consist of non-measurable “societal” benefits that are not embodied in existing state or federal public policy requirements. In addition, public utilities that are not part of Regional Transmission Organizations (“RTOs”) or Independent System Operators (“ISOs”) and not requiring or desiring the new transmission facilities that may be selected in a regional transmission plan for purposes of cost allocation to meet their own public policy requirements should not be required to pay for new transmission facilities that are driven by public policy requirements applicable to other public utilities, but not to them;
- (2) public utilities that have no transmission related agreement with an entity seeking to allocate costs for new transmission projects should have no obligation to involuntarily assume such costs;
- (3) the primary authority of states and the responsibility of public utilities to conduct and implement integrated resource planning and choose generation or demand-side resources that best meet the needs of their consumers must be respected and preserved, supported (but unimpeded) by regional and inter-regional transmission planning processes and cost allocation methodologies; and,

(4) public utilities and other entities wishing to build regional and inter-regional transmission projects should have the flexibility to pursue cost allocation methods that best meet the needs of their specific projects.

With respect to the potential impact on electricity consumers, the Commission's failure to limit in any way what individual regions may consider as benefits for which costs may be allocated is a fatal flaw of the Final Rule. By failing to specify limits that discipline permissible definitions of "benefits" or "beneficiaries," the Commission implicitly allows individual regions to adopt definitions that could go far beyond what would be considered just and reasonable under the FPA and could still result in the socialization of costs for new transmission projects for which there are no real benefits commensurate with the costs being allocated. The Commission must ensure not only that cost allocation is commensurate with benefits received by consumers, but that the benefits have been properly defined in the regional transmission planning process and that the proponents of regional transmission projects have properly demonstrated a reliability or economic basis to be eligible for cost allocation based on those definitions, or that the supply resources for which new transmission is required have been identified as necessary by their beneficiaries to meet their public policy requirements. Broad definitions of benefits for transmission projects driven by economics or public policy requirements that suggest that certain types or classes of projects have regional benefits per se, and therefore should be widely socialized, are not sufficient to ensure just and reasonable rates.

This concern is exacerbated by the Commission requiring that cost allocation methodologies shall permit assignment of facility costs to public utilities or others that have no transmission related agreement with the entity seeking to assign costs. The FPA precludes such involuntary assignment of costs. And as a matter of policy, utilities or other putative

beneficiaries should not be involuntarily assigned costs for projects selected in a regional transmission plan for which they have no need, even if there is some incidental, amorphous “benefit” ascribed by those seeking broad cost socialization.

The Final Rule also could result in public utilities and their relevant state regulators having duly approved generation resource decisions undermined, overturned or pre-empted by regional transmission planning processes (or even interregional coordination processes) under the Final Rule. Order No. 1000 specifically allows regional planning processes to adopt “top-down” transmission planning processes, which would place regional transmission planning processes in the role of examining the generation resource needs of load-serving public utilities arising either from reliability requirements, service obligations, economic needs, or public policy requirements, and then deciding on the transmission plan or “transmission alternatives” that best support the identified generation resource needs. This is a complete reversal of the bottom-up transmission planning process that we believe is required by the FPA, which does not give the Commission any authority to direct generation resource choices by public utilities. Unless these issues are properly dealt with on rehearing, electric consumers could face higher costs as a result of Order No. 1000, utilities may be unable to meet the needs of consumers with the resources best suited to their own situation, and decision-making in competitive electric markets will be skewed by transmission cost socialization that requires consumers to subsidize transmission for which they receive no real benefit. Further, in competitive wholesale markets this process could cause generators to make location decisions that would add to the total cost of supply to customers without providing appropriate benefits. Order No. 1000 clearly exceeds the Commission’s authority under the FPA, and must be revised substantially as set forth below.

II. STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS

The Coalition believes that four specific aspects of Order No. 1000 should be revised, amplified and/or clarified so that the requirements of the FPA and the APA are satisfied and to better pursue the Commission's policy objectives. These required changes to Order No. 1000 involve the following four separate, but related issues and concerns: (a) leaving the concepts of "benefits" and "beneficiaries" ambiguous and subject to potential broad definition that would result in assignment of costs to electric consumers for facilities not needed to meet those consumers' requirements for economic and reliable electricity services, consistent with public policy requirements that may apply to their electricity providers; (b) asserted authority to permit regions to assign benefits and allocate costs to persons that do not have a service relationship with the party incurring a cost to provide jurisdictional transmission services; (c) ability of regional transmission plans and inter-regional transmission coordination to depart from public utility, state-regulated bottom-up resource planning; and (d) failing to expressly provide that entities developing inter-regional transmission projects may opt-out of regional cost allocation methodologies and pursue customized funding solutions. Each of these required changes are elaborated upon below.

A. Allowing Regions to Define Benefits Too Broadly.

The potential for an overly broad definition of "benefits" could result in regions considering highly speculative benefits that cannot be quantified and that are beyond a typical planning horizon as a basis for cost allocation, resulting in the broad socialization of costs. The Commission should revise Order No. 1000 to narrow the types (and time frames) of benefits that may be used to justify inclusion of a transmission project in a regional transmission plan for

purposes of cost allocation. This would protect electric customers now from having to pay transmission costs from which they receive only trivial or speculative benefits.⁴

B. Assigning Benefits (and Allocating Costs) of New Transmission Projects to Those Without a Customer or Service Relationship

Public utilities and consumers should not be allocated the costs of new transmission facilities built by developers with whom they have no transmission service arrangement. Costs for projects driven by public policy requirements or that are built to provide economic benefits should not be allocated to utilities or consumers that do not have a transmission service agreement governing cost allocation without consent of the relevant local or state regulatory authority, such as by approvals of utility resource plans that drive demand for new transmission facilities.

C. Ability to Depart from Bottom-up Planning.

The regional transmission planning processes should consider state and federal public policy requirements, but such consideration should be driven by resource needs identified by those entities upon whom the public policy requirement is placed. Regional transmission planning processes should not be involved in making those critical and inherently local resource decisions on behalf of entities over which they have no regulatory responsibility or accountability. Regional transmission planning processes should be responsible only for incorporating those needs into a regional transmission plan, ensuring that those transmission plans don't degrade reliability or conflict with one another, and identifying opportunities for transmission cost savings by coordinating transmission needs.

⁴ In the alternative, the Commission should clarify that it will be receptive to claims that any cost allocation based on trivial or speculative benefits will not result in rates that are just and reasonable under the Federal Power Act.

D. Inter-regional Cost Allocation Flexibility.

The same flexibility afforded public utility transmission providers to opt-out of the cost allocation methodology prescribed within a regional transmission planning process (and pursue development using other cost allocation methodologies) should be confirmed as available for both regional and inter-regional projects.

In accordance with Order No. 663-A⁵ and Commission Rule 713,⁶ the Coalition provides the following statement of issues with respect to the four specific concerns listed above. This statement of issues also serves as the concise specification of errors required by Commission Rule 713,⁷

1. Order No. 1000 does not appropriately limit the definitions of “benefits” and “beneficiary,” which fosters uncertainty and dispute, and to that extent renders the mandated reforms unworkable or otherwise contrary to the objectives of the Final Rule. *See, e.g., PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194 (D.C. Cir. 2005); *Mo. Pub. Serv. Comm’n v. FERC*, 337 F.3d 738 (D.C. Cir. 2003).
2. Several of Order No. 1000’s cost allocation principles have not been shown to be just and reasonable and depart from the Commission’s cost causation precedent without justification or reasoned explanation. *See, e.g., Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983); *Williams Gas Proceedings-Gulf Coast Co., L.P. v. FERC*, 475 F.3 319 (D.C. Cir. 2006); *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 127 FERC ¶ 61,250 (2009); *ISO New Engl. Inc.*, 115 FERC ¶ 61,145 (2006).
3. To the extent Order No. 1000 does not sufficiently establish, address, evaluate or explain why the mandated reforms are necessary or in violation of the FPA, it is arbitrary and capricious because it ignores evidence provided by participants in response to the Proposed Rule and further fails to articulate a rational connection between the facts found and the choice made. *See, e.g., Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983); *Williams Gas*

⁵ *Revision of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663-A, 2006-2007 FERC Stats. & Regs., Regs. Preambles ¶ 31,211 (2006).

⁶ 18 C.F.R. § 385.713(c) (2).

⁷ *Id.* § 385.713(c) (1).

Processing-Gulf Coast Co., L.P. v. FERC, 475 F.3d 319 (D.C. Cir. 2006); *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194 (D.C. Cir. 2005).

4. The Commission does not have authority under Section 206 of the FPA to require adoption of transmission cost allocation methodologies that establish rate structures binding on persons that are not party to any agreement or tariff containing such rate structure. *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County, Washington*, 554 U.S. 527 (2008); *Permian Basin Rate Cases*, 390 U.S. 747, (1968)).
5. The Commission exceeded its jurisdiction, taking actions outside its authority to the extent Order No. 1000 mandates regional transmission planning processes that identify and allocate costs for the conveyance of public policy related benefits, rather than for the jurisdictional use of transmission service or facilities. *See, e.g., NAACP v. FPC*, 425 U.S. 662 (1976); *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002); *Office of Consumers' Counsel v. FERC*, 655 F.2d 1132, 1146, 1149 (D.C. Cir. 1980); *Mobil Oil Corp. v. FPC*, 483 F.2d 1238 (D.C. Cir. 1973).
6. Certain regional transmission planning process and cost allocation methodology mandates of Order No. 1000 described herein do not have a sufficient nexus to rates, terms and conditions for transmission service to satisfy the requirements of Section 206 of the FPA. *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983); *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319 (D.C. Cir. 2006); *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194 (D.C. Cir. 2005).
7. Order No. 1000 does not adequately set forth the reasoning employed by the Commission and the evidence upon which the Commission relies to reach its conclusions. *See, e.g., American Gas Ass'n v. FERC*, 593 F.3d 14, 19 (2010).
8. Order No. 1000 does not constitute reasoned decision making and is arbitrary, capricious and not in accord with law to the extent it is based on speculation and hypothesis. *See, e.g., Florida Gas Transmission Co. v. FERC*, 604 F.3d 636 (D.C. Cir. 2010); *Algonquin Gas Transmission Co v. FERC*, 948 F.2d 1305, 1312 (D.C. Cir. 1991).
9. To the extent Order No. 1000 requires that existing transmission related agreements voluntarily entered between transmission owners be modified or amended, and such agreements reflect intent of the parties thereto (including certain members of the Coalition) to limit rights to amend, the Final Rule was subject to but failed to meet the "public interest" standard of review under Section 206. *NRG Power Marketing, LLC v. Maine Public Utilities Commission*, 130 S. Ct. 693 (2010); *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County*, 554 U.S. 527 (2008); *United Case Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

III. REQUEST FOR REHEARING AND CLARIFICATION

A. Potential for Overly Broad Definition of “Benefits” and “Beneficiaries” Must Be Addressed

The Coalition agrees with the Final Rule that regional transmission planning processes and cost allocation methodologies should follow cost-causation principles and that a “beneficiary pays” approach is just and reasonable, consistent with requirements of the FPA. In some situations, such as projects driven by reliability compliance obligations, a beneficiary-pays approach generally suggests that costs should be allocated to all transmission system users within the planning area because the relationship between specific transmission projects, reliability impacts and the benefits of reliability are well established and capable of examination within the framework of existing transmission planning horizons and study methodologies. The primary difficulty rests with upgrades driven by economics and/or public policy requirements and the potential for regional and inter-regional transmission cost allocation methodologies to define “benefits” and “beneficiaries” in a way that is just and reasonable and objectively verifiable using established electric system planning tools and modeling capabilities.

The Commission has declined to limit the definition of the terms “benefit” or “beneficiaries” in any way, opting instead for a principles-based approach (primarily Principles 1 and 2) that provide very little substance other than that benefits should be “roughly commensurate” with costs assigned and that those with no benefits should not be allocated costs. The Final Rule makes it clear that it will allow very broad definitions of benefits and beneficiaries in the Final Rule when it states:

However, the Commission is not prescribing a particular definition of “benefits” or “beneficiaries” in this Final Rule. In our view, the proper context for further consideration of these matters is on review of compliance proposals and a record before us. Moreover, allowing the flexibility to accommodate a variety of

approaches can better advance the goals of this rulemaking. The cost allocation principles are not intended to prescribe a uniform approach, but rather each public utility transmission provider should have the opportunity to first develop its own method or methods. Also, we recognize that regional differences may warrant distinctions in cost allocation methods.⁸

If potential benefits are not defined correctly by regions in compliance filings, or are not corrected by the Commission in its review of compliance filings, then a series of adverse economic and policy impacts will result. For example, if benefits are defined to include broad societal benefits of building renewables in a certain area, and that definition is used as a basis for cost socialization of transmission projects to that area, then uneconomic decisions will be made either by those building generation or by those planning to purchase from facilities in that area, because the generator or customer will not face the true costs of their resource decisions. They may decide to buy from such remote renewable resources that require long-distance transmission simply because they don't have to pay the full transmission costs, even if the delivered cost of local renewable resources would be much more economical if all costs were considered. Competitive wholesale markets using locational-marginal pricing will begin to see price signals break down and will become inefficient, again as customers no longer face the true marginal price of purchases at their location. And siting of new transmission lines may become more, rather than less difficult, as those required to pay for lines from which they don't see true or real benefits litigate both the cost and siting-approval processes.

In order to assure that the mandates of the Final Rule will actually improve on existing local and regional transmission planning processes and inter-regional coordination, and not cause fractures and balkanization (which would be unjust, unreasonable and contrary to the public interest), it is imperative that the principles adopted in the Final Rule that involve identification,

⁸ Order No. 1000, P 624.

quantification and allocation of economic and/or “public policy” benefits to beneficiaries be more narrowly focused on discernable and quantifiable benefits linked directly to transmission facilities within typical utility planning horizons.

Although the courts have long recognized that cost allocations will not be overturned in the absence of scientific precision, and may be “roughly commensurate” with benefits - given its unbounded definitions of “benefits” - Principle 1 provides very little discernable guidance.⁹ The Final Rule offers no explanation or further guidance that could instruct and discipline regional efforts to negotiate and submit on a timely basis transmission planning process and cost allocation methodology compliance filings that will be acceptable. The only additional guidance the Coalition can surmise from Order No. 1000 is that: (a) rates must reflect to some degree the costs actually caused by the entity who must pay them;¹⁰ (b) the entity required to pay the costs assigned to them through the cost allocation process does not have to be in privity of contract or otherwise in agreement to bear those responsibilities;¹¹ (c) “one factor” in consideration of whether an allocation is just and reasonable is whether the funding obligation is “fair” to those that either cause the costs to be incurred or otherwise benefit;¹² (d) benefits may be estimated and allocated based on “likely future scenarios;”¹³ (e) those that receive “no benefits” may not be allocated costs;¹⁴ (f) that the “entire prudently incurred cost” must be allocated;¹⁵ and (g) there must be a “demonstrated link” between the costs imposed and the benefits received by

⁹ *Id.* at P 622.

¹⁰ *Id.*, at PP 505. 530-537

¹¹ *Id.*

¹² *Id.* at P 623.

¹³ *Id.* at P 626.

¹⁴ *Id.* at P 633, 637.

¹⁵ *Id.* at P 640.

beneficiaries.¹⁶

The Coalition strongly urges the Commission to limit and clarify the concept of “benefits,” and “beneficiaries.” Specifically, regions should be limited to considering only benefits that (1) occur within the typical transmission planning horizon of the public utilities within the region that can be measured or projected through the kinds of transmission planning studies that are normally conducted; (2) are not speculative; and, (3) are not based on “societal” benefits that are not embodied in existing federal and state public policy requirements. On rehearing the Commission should also make it clear that regional transmission planning may not adopt presumptions that broad categorizations of types or classes of transmission lines driven by economic or public policy requirements have broad benefits and should be allocated widely. The Commission should require that those seeking cost allocations for individual transmission projects be able to demonstrate quantifiable, observable and tangible reliability and economic benefits with reasonable particularity that is tied directly to those who will be required to pay under a cost allocation methodology.

For the same reasons, the Commission on rehearing should address in greater detail its intent and requirements in terms of how benefits will be denominated for purposes of cost allocation methodologies. For example, in our view, the Commission should clearly articulate that the evidentiary basis and computational methodology upon which “benefits” are identified and quantified must be reasonable, verifiable and substantiated. This in fact was the requirement placed on the Commission by the Seventh Circuit Court of Appeal’s in *Illinois Commerce Commission v. FERC*.¹⁷

¹⁶ *Id.* at P 722.

¹⁷ 576 F.3d 470 (7th Cir. 2009) (*Illinois Commerce Commission*).

1. *The Final Rule Is Impermissibly Vague Concerning Principles for Defining Benefits and Beneficiaries*

Order No. 1000 declines to provide meaningful parameters on how regional transmission planning processes and cost allocation methodologies may define the terms “benefits” and “beneficiaries.” Instead of providing guidance on the point, the Final Rule leaves the matter for later compliance filings, wherein it is expected that the Commission would fill in the gaps that it has left in the Final Rule through the process of accepting or rejecting or requiring modification of proposed definitions. Such an approach, however, has been rejected by the courts as contrary to law, arbitrary and capricious.¹⁸ Although the Coalition supports giving individual transmission providers in separate regions flexibility to adopt definitions of “benefits” and “beneficiaries,” there must be a sufficient explanation given in the regulatory mandate so that public utility transmission providers can assess whether their current Attachment K processes need to be revised, and if so, what sort of narrowly tailored changes are necessary and appropriate. That is, properly limiting the definition of benefits up front also will provide a reasonable benchmark against which proposed regional definitions can be evaluated and which will also discipline and inform the regional collaboration/consensus building process as to required changes to Attachment K processes.¹⁹

Also, without more guidance, there is substantial risk of stalemate in the regional consensus building process and a likelihood that the Commission would ultimately be placed in the position of having to define the terms for a region. Such an occurrence would have the effect of penalizing public utility transmission providers because it would involve creation of a process

¹⁸ See *Appalachian Power Company v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (condemning an agency’s process of issuing regulations with “broad language, open-ended phrases, ambiguous standards and the like” then issuing clarifications aimed at “expanding the commands in the regulations”).

¹⁹ The feasibility of a cost allocation methodology is a relevant consideration in evaluating the justness and reasonableness of a proposal. See, e.g., *Sithe/Independence Power Partners, L.P. v. FERC*, 285 F.3d 1, 5 (D.C. Cir. 2002).

that is designed to fail (particularly in light of a mere twelve month compliance filing time frame), only to be saved by regulatory mandate imposed by the Commission in the exercise of its discretion.

Not only would greater clarity in the Final Rule better guide public utility transmission providers and stakeholders, but the cost-causation principles required of the Commission require more than the bare, generic principles established in Order No. 1000. At a minimum the Commission must revise its cost allocation principles (or at a minimum its explanation and justification for those principles) on rehearing to assure that benefits be defined in such a way that cost allocations based on those assignments meet well-established cost-causation standards. These allocation principles include, but are not limited to, the following:

- Starting point for assessing the validity of a cost allocation is not to start with the “benefits,” but rather to start with the service that is being provided. *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1369 (D.C. Cir. 2004);
- Any allocation of costs to a beneficiary of a transmission facility must have a “relation to” the “costs of rendering [transmission] service.” *Illinois Commerce Commission*, 576 F.3d at 474;
- The evidence upon which benefits are determined for purposes of a cost allocation methodology must be substantial and resulting allocations of benefits and assessments of costs must be justified and explained in sufficient detail to reflect a reasoned regulatory analysis rooted in fact. *Id.* at p. 475-76;
- Asserted benefits must be based on evidence that identifies benefits with reasonable particularity and that such benefits are not speculative in nature. *Id.* at p. 476 (quoting and citing with approval *Transcontinental Gas Pipe Line Corp.*, 112 FERC ¶ 61,170, 61,924-25 (2005));
- Cost allocations based on identified and quantified benefits must be based on an “articulable and plausible” link between the construction of a transmission facility and lawful uses of the transmission facility. Benefits susceptible to cost allocation and assignment under a lawful rate must be based on a thorough assessment and quantification of benefits, including differences in benefits and costs that may result from alternative approaches. *Id.* at p. 477;
- A mere “stake” or “interest” in the performance of a service is not an adequate

basis upon which to assume a benefit that will form the predicate for a cost allocation. *Pacific Gas and Electric Co. v. FERC*, 373 F.3d 1315, 1321 (D.C. Cir. 2004); and

- Determination of benefits from service for purposes of cost responsibility must be based on more than “conclusionary statements about the facility’s benefits” and must be based upon “careful consideration of the benefits that actually flow to the customers who will bear the financial burden.” *Algonquin Gas Transmission Co v. FERC*, 948 F.2d 1305, 1312 (D.C. Cir. 1991)
- Benefits identified for purposes of a cost allocation methodology must be “discernible,” reflect an assessment of benefits with reasonable particularity, and must not be based on conjecture about potential future events. *Id.* at p. 1313-14.

2. *Because the FPA is Focused on Rates, Terms and Conditions for Jurisdictional Transmission Service, “Societal” Benefits Accruing Generically to Citizens From Underlying Public Policy Requirements or Stakeholder Desires as Well as Speculative Benefits Should Be Categorically Excluded As a Basis for Cost Allocation.*

The Commission erred by not limiting the definition of benefits to encompass only economic and reliability benefits that can reasonably be projected in planning and other modeling studies, and that are within the planning horizon of the transmission provider. If the regional planning processes, pursuant to the Final Rule, incorporate “broad” public policy benefits that can’t be measured or projected within a transmission providers’ planning horizon, the proposal is beyond the scope of FERC’s authority to sanction. This is because any construct of “benefits” would require speculation about potential future events that deviate substantially from industry norms for using models to project system conditions and dynamics for planning purposes.²⁰

In issuing Order No. 1000, the Commission is invoking its jurisdiction and authority over

²⁰ As the D.C. Circuit has explained, the Commission may not presume the occurrence of events that are outside of normal planning parameters in order to justify the determination of a benefit and associated allocation of costs: “The Commission asks us to agree that, because, at some point in the future, Algonquin might undertake expansion that might be cheaper because of the [] facilities, a [] roll-in of the facilities is necessary to avoid an unjust or unreasonable result. We decline to join the Commission in such speculation.” *Algonquin Gas Transmission Co.*, 948 F.2d at 1314.

the transmission of electric energy in interstate commerce, and the facilities used for that purpose. This jurisdiction and these authorities are contained in the FPA, as amended at various times through the years. And therefore the purposes and objectives of all legitimate exercises of that jurisdiction and those authorities must be contained within the FPA. The Commission's authority over transmission does not extend to facility siting or construction. For example, the Commission does not have parallel authority with respect to expansion of transmission facilities that it has under the Natural Gas Act (for certification of interstate pipeline construction), but rather is focused on rates, terms and conditions for transmission services.

In the Energy Policy Act of 2005, Congress entrusted the Commission with the first and thus far only, significant new purpose and authorities within the confines of the FPA: maintaining the reliability of the bulk power supply system through its oversight authority over an independent electric reliability organization. Given these mandates, the Act has always required the Commission to make difficult decisions with respect to allocating costs related to transmission facilities. Protection of the electricity customer from unreasonable rates and charges, and from undue preference or advantage, is at the heart of its purposes, and FERC's central responsibility.

Of course, ensuring rate protection for electric consumers is not the only important public policy question in the field of electricity regulation. In separate statutes, Congress has addressed a multitude of other questions such as the optimal combination of generating sources (the Fuel Use Act), the protection of utility investors (the Public Utility Holding Company Act of 1935), conservation of energy supplied by electric utilities (the Public Utility Regulatory Policies Act of 1978), and environmental concerns (the Clean Air Act). In each of these situations, Congress has pursued public policy goals that bore directly on our nation's electricity system but only

indirectly on FERC's mission. Congress recognized distinct roles for various agencies within the Executive Branch of the federal government, and enacted separate statutory schemes assigning responsibilities to different agencies with specific expertise to arrive at complementary policies for the country's electric systems.

However, the Final Rule blurs these distinctions by extrapolating its ratemaking authority into the general public policy realm. Such activity is far afield from the Commission's core mission. For example, Order No. 1000 asserts that the circumstances against which the Commission must fulfill its statutory responsibilities change with developments in the electric industry, including changes with respect to demands placed on the transmission grid. While this general principle makes sense, the Final Rule takes the principle several steps beyond the Commission's existing statutory authority.

In particular, Order No. 1000 muses generally about the impacts of certain "state resources policies, such as renewable portfolio standard measures," various and unspecified "challenges associated with allocating the cost of transmission appear to have become more acute," and generic concerns about the shortcomings of "existing rate structures". These words and phrases are remarkable in their ambiguity. Although these needs for reform may or may not be valid (there is little discussion or evidence of a need for reform set forth in the Final Rule), the Coalition respectfully points out that none of these issues about the state of the industry empowers the Commission to tackle every policy problem arising from such developments or to commandeer regional transmission planning.²¹ If this were so, by way of example, Section 216 of the FPA as adopted by the Energy Policy Act of 2005 would not have been necessary.

²¹ See *State of Missouri v. Southwestern Bell Telephone Co.*, 262 U.S. 276, 289 (1923) (a regulatory agency with general oversight and rate authority "is not the owner of the property of public utility companies, and it is not clothed with the general power of management incident to ownership"). Compare *California Independent System Operator Corp., v. FERC*, 372 F.3d 395, 398 (D.C. Cir. 2004); *Atlantic City Electric Co. v. FERC*, 295 F.3d at 8). See also, *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

B. Cost Assignment for Economic or Public Policy Projects Must Occur in the Context of a Transmission Service Relationship

The Commission errs in finding that costs of new transmission projects may be allocated involuntarily to those that lack any form of transmission utilization or service arrangement that addresses rates, terms and conditions for use of transmission services that are subject to the Commission's jurisdiction under the FPA. If a utility, rural electric cooperative, state utility, municipality, individual retail consumer(s) or other group or person does not have a contractual or tariff vehicle in place with the entity wishing to charge a cost of service/benefit delivery, then there is no lawful mechanism by which costs can be charged and recovered under the FPA. In addition, the alleged benefits may be ones that the alleged beneficiary does not need, affirmatively opposes on public policy grounds, and/or may not otherwise have had any say over. The issue is made all the worse by the Commission's decision to allow benefits to be defined broadly with virtually no principle-based limits. Allocating costs and establishing a rate structure applicable to non-users of new transmission facilities is beyond the Commission's authority under the FPA and will lead to significant disputes over new transmission facilities, contrary to the purpose of the final rule to ease the process for planning and building new transmission.

1. Not Only Is the Presence of a Service Relationship Good Policy, It is Required by the FPA.

FERC has no authority to impose costs "involuntarily" on those who do not have a contractual or service relationship to the public utility who is seeking third party funding. An approach to "beneficiary funding" that requires incidental, third-party beneficiaries to pay for all or a portion of a new transmission facility on the basis of abstract or theoretical value is anathema to the contractual and privity principles that govern the industry, and which are a core

thread of the statutory scheme governing transmission rates, terms and conditions of service under the FPA. This point has been made abundantly clear by the Supreme Court²² and has been a fundamental predicate upon which the industry has been planned and operated since its inception.

The Final Rule concludes that the Commission has legal authority to authorize public utilities to charge third party beneficiaries for transmission facilities, even when those third parties have no service relationship to the facilities in question and may only derive theoretical and speculative benefits at some time down the line (if ever). This finding is not based on any single case or precedent, but rather on a contention that the issue has not been squarely addressed by the courts.²³ The Commission is incorrect in its assumption that the cases have not addressed the issue. If anything, the matter has not risen substantially in cases to merit analysis or discussion because the idea that lawful rates are founded on privity of contracts has been an undisputed bedrock maxim. But, contrary to the suggestion in the Final Rule, the courts have not been silent on the issue.

As recently as 2008, for example, Justice Scalia writing for a majority of the Supreme Court found that “the regulatory system created by the FPA is premised on contractual agreements voluntarily devised by the regulated companies.”²⁴ It is difficult to find a more definitive articulation of the point than provided by the Supreme Court in *Morgan Stanley*, which must be repeated and given emphasis: the “regulatory system created by the FPA” (not just Section 205) “is **premised** on contractual agreements voluntarily devised”. Similarly, in *Otter*

²² *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County, Washington*, 554 U.S. 527, 533 (2008).

²³ Order No. 1000, P 540.

²⁴ *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County, Washington*, 554 U.S. 527, 533 (2008) (citing and quoting with approval *Permian Basin Rate Cases*, 390 U.S. 747, 822 (1968)).

Tail Power Co. v. United States,²⁵ the Supreme Court wrote that the sort of pervasive regulatory scheme for transmission planning and cost allocation that is mandated by the Final Rule was rejected by Congress in the FPA “in favor of voluntarily contractual relationships.” Therefore, the efforts within the Final Rule to distinguish the substantial body of appellate court precedent²⁶ raised by many commenters are incorrect and collide headlong into Supreme Court precedent.²⁷

2. *Given the Commission’s Lack of Authority Over Transmission Siting and Permitting, Service Relationships Are Required as a Practical Matter for Economic or Public Policy Projects to Meet the Objectives of the Final Rule and Satisfy Section 206*

It is beyond reasonable dispute that the Commission (except in very limited circumstances not presented by the Final Rule)²⁸ lacks authority under the FPA over the construction of transmission facilities, including over determination of their need, as such matters are reserved to the States. Indeed, the Final Rule expressly and properly acknowledges the Commission’s lack of authority to regulate in the field of transmission construction, siting, permitting, right-of-way acquisition, and the like. Given this lack of regulatory power, common sense and sound economic policy require an approach to transmission planning and cost

²⁵ 410 U.S. 366, 374 (1973).

²⁶ See e.g., *KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992) (“[I]t has been traditionally required that all approved rates reflect to some degree the costs actually **caused by the customer** who must pay them.”) (emphasis added); *Alabama Electric Cooperative, Inc. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982) (“Properly designed rates should produce revenue from each class of **customers** which match, as closely as practicable, the costs to serve each class or individual **customer**.”) (emphasis added).

²⁷ Further, to the extent the Final Rule contains any findings requiring changes to certain existing, filed agreements between members of the Coalition and others with respect to prospective transmission facility planning or cost allocation and requiring a “public interest” standard of review, such requirements are in error due to the absence of sufficient findings required to satisfy such a “public interest” standard of review under Section 206. See *NRG Power Marketing, LLC v. Maine Public Utilities Commission*, 558 U.S. ___, 130 S. Ct. 693 (2010); *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 o Snohomish County*, 554 U.S. 527 (2008).

²⁸ Cf. *Piedmont Env’tl Council v. FERC*, 558 F.3d 304, 315 (4th Cir. 2009) (“A reading of the entire provision reveals that Congress intended to act in a measured way and conferred authority on FERC only when a state commission is unable to act on a permit application in a national interest corridor, fails to act in a timely manner, or acts inappropriately by granting a permit with project-killing conditions.”).

allocation that is based on consent, not force. The Courts have spoken to transmission planning and voluntary regional coordination as being based on “enlightened self-interest” rather than regulatory mandate. The Final Rule should be revised and clarified to target processes that should be designed to enlighten those that would be required to pay and to define and establish the self-interest of supporting financially proposed regional and inter-regional transmission projects.

C. Bottom-up Planning Must Be Retained

The Coalition agrees with the Commission’s finding that transmission planning processes should have the ability to reflect both federal and state public policy requirements. However, the Coalition believes that the Final Rule has authorized regional transmission planning processes to include procedures that would pre-empt resource decisions by electric utilities made under state regulatory and statutory guidance.

The manner in which regional transmission planning processes address federal and state public policy requirements is critical to ensuring that state regulatory prerogatives are not pre-empted and that local needs are satisfied based on the policy choices of state legislatures and regulators. The Coalition believes that local and regional transmission planning processes and interregional transmission planning coordination should be based first on meeting NERC reliability requirements. Secondly, such processes and coordination should examine cost-effective transmission solutions so that states, load-serving entities and other retail suppliers can access power from their identified (designated) generation resources, including those generation resources needed to meet any public policy requirements. Specifically, with respect to consideration of public policy requirements, regional transmission plans can only be developed through a bottom-up process within the appropriate geographic area relying on information

provided by those with public policy obligations that affect demand for transmission facilities or services.

As the Final Rule acknowledges, the manner in which this information flow occurs will differ from region to region, but it is important that regional transmission plans reflect local needs, and interregional transmission coordination reflect regional and local needs. The regional transmission planning processes should review the information provided and coordinate individual plans to ensure that reliability meets NERC standards and that local and regional transmission plans do not conflict with one another. The regional transmission planning processes and interregional coordination may also identify opportunities for cost savings through projects that meet the needs of multiple entities within the region.

While such bottom-up transmission planning processes are allowable under the Commission's final rule, they are not required. Specifically, the Commission states that top-down or other transmission planning processes are authorized so long as they meet other requirements of the Final Rule.²⁹ Under a "top-down" transmission planning regime, the regional planning group, which is not required to be accountable to state regulators or individual utilities within the region, would be placed in the position of making decisions that affect how utilities and other entities with the responsibility to meet public policy requirements would meet those requirements. In fact, the Final Rule authorizes submission of regional transmission planning processes that would reduce those with public policy obligations and state regulators to mere stakeholders in the regional transmission planning process.³⁰

²⁹ Order No. 1000, P 158: "Additionally, we note that a public utility transmission provider's regional transmission planning process may utilize a "top down" approach, a "bottom up" approach, or some other approach so long as the public utility complies with the requirements of this Final Rule. Public utility transmission providers have flexibility in developing the necessary enhancements to existing regional transmission planning processes to comply with this Final Rule, based upon the needs and characteristics of their transmission planning region."

³⁰ *Id.* at P 212: "In response to commenters that urge us to recognize the role of the states in transmission

If the Final Rule is implemented by regional processes in a top-down manner such that the regional transmission planning processes will decide how to meet state and federal policy requirements, then the regional transmission planning processes would need to conduct integrated resource planning on behalf of its participants. In this regard, it is not an adequate response to point out that Order No. 1000 authorizes public utility transmission providers in a region to create committees of state regulators and load-serving entities, or establish an interstate compact, after consulting with stakeholders. This is because the Commission itself reserves ultimate authority to reject such proposals and to impose whatever mandate it determines is appropriate (including an approach that minimizes or marginalizes the role of load-serving entities or state authorities). Further, in the event transmission providers and load-serving entities in a transmission planning region do not reach consensus (a likely contingency in many regions), the Commission has reserved the authority to determine and fix a regional transmission planning process and/or cost allocation methodology for that region. As a result, the same amorphous “flexibility” and “discretion” delegated to the various regions has been asserted in the Final Rule as authority held by the Commission. To withstand judicial review, therefore, Order No 1000 must be sufficiently clear as to what it requires and, more importantly, what it is now asserting the authority to compel.

Authorizations and delegations set out in the Final Rule, therefore, will allow usurpation

planning, especially as it relates to compliance with Public Policy Requirements, we clarify that nothing in this Final Rule is intended to alter the role of states in that regard. **Through this Final Rule, we are requiring public utility transmission providers to provide an opportunity to all stakeholders, including state regulatory authorities, to provide input on those transmission needs they believe are driven by Public Policy Requirements**, to the extent they are not already doing so. We are not dictating any substantive result with regard to compliance with Public Policy Requirements. In Order No. 890, the Commission stated its expectation that “all transmission providers will respect states’ concerns” when engaging in the regional transmission planning process. This is equally true with regard to the consideration of transmission needs driven by Public Policy Requirements. **We strongly encourage states to participate actively** in both the identification of transmission needs driven by Public Policy Requirements and the evaluation of potential solutions to the identified needs.” (emphasis added)

of state regulatory prerogatives. Neither the Commission, nor regional transmission planning processes, will have direct responsibility or accountability to the state legislatures and regulatory authorities that have jurisdiction over implementing energy and environmental policy within their states. And the FPA gives no authority to the Commission to determine what non-transmission resources may or should be used by load-serving entities to meet their state regulated service responsibilities. In fact, construing the FPA as a whole, and giving meaning each to Sections 201 and 217, requires the Commission to exercise its authority in a manner that both (a) respects as inviolate the generation resource decisions made in bottom-up resource planning processes, and (b) facilitates efficient implementation of resource decisions made by load serving entities, such as through integrated resource planning.³¹

A regional transmission planning process (and, given reserved authority by the Commission to impose a plan in the absence of consensus that aligns with vague principles), should also not be allowed to make decisions as to how to satisfy the public policy requirements of its participants because conflicts are certain to arise. For example, many state renewable resource portfolio standards designate set-asides for specific supply resources or resource types. Often, there is a statutory or regulatory policy to encourage development of local supply and demand response resources for economic development purposes. Some states may favor particular technologies, or favor conservation initiatives over long-distance importation of renewable energy supply. Coastal states may have a legitimate desire to develop close by offshore wind. These legitimate preferences (often embodied in state law or regulation) would result in potential conflicts if a regional process is charged with developing a single top-down

³¹ The Coalition acknowledges this argument may apply more to public utilities outside some of the RTO/ISO markets that rely on locational marginal pricing and that have established reliability and economic planning processes.

plan for a region. All of these are considerations that can only be made at a more local level and then included in the regional planning process as the preferred resource choices of the load-serving entities and states within the region. The regional transmission planning process cannot, on its own, make these resource choices and it should not attempt to anticipate what those choices may be.

Thus, the Coalition believes the Commission should, on rehearing, revise the Final Rule to ensure that decisions on how load-serving entities (or others with such responsibilities) within regions should meet state or federal public policy requirements and should continue to be made by those with responsibilities to meet the requirements, based on federal and state law and applicable regulations. These decisions should then be transmitted in appropriate ways to the regional transmission planning process which should then incorporate them into any regional transmission plans that are developed. It can and should then be the responsibility of the regional transmission planning process to look for ways in which the individual needs of those with resource requirements - including those resource requirements emanating from public policy requirements - can be most efficiently met.

1. *The FPA Does Not Grant FERC Authority to Approve (or Mandate) Cost Allocation Processes That Would Impose Generation Resource Choices on Public Utilities or Frustrate Implementation of State-Approved Resource Plans.*

The Final Rule relies on Section 201(a) of the FPA as important to its statutory authority to impose the requirements set forth in the Final Rule. Although Section 201(a) recognizes Commission authority over transmission of electric energy in interstate commerce, this authority is bounded by the balance of Section 201 that places out of FPA reach certain reserved fields that have been traditionally subject to state regulation.³² The areas of state authority that the FPA

³² 16 U.S.C. § 824(a) ("such Federal regulation, however, to extend only to those matters which are not

clearly leaves to the state include transmission siting and construction authorization,³³ as well as resource planning by public utility load-serving entities.³⁴

The Final Rule appears to acknowledge these limitations on Commission authority when it states: “In establishing these reforms, the Commission is simply requiring that certain processes be instituted. This in no way involves an exercise of authority over those specific substantive matters traditionally reserved to the states, including integrated resource planning, or authority over such transmission facilities.”³⁵ Yet, in explaining the substantive requirements of its mandate and in responding to arguments by participants’ comments, the potential intrusion on state authority of Order No. 1000 manifests itself. For example:

- Paragraph 154 recognizes that integrated resource planning on the state level may result in supply or demand-side resource decisions that drive transmission plans. The Final Rule, however, goes on to state in this paragraph that “just as there may be opportunities for regional transmission solutions to better meet the needs of the region, the same could be true for regional non-transmission alternatives.” The asserted possibility that a regional transmission plan could adopt a “regional non-transmission alternative” that is contrary to the product of a bottom-up, resource plan based on transmission and generating (or other) resources selected by load-serving entities, shows that Order No. 1000 is less than clear that generation or demand-side resource decisions made at the state level will not be preempted by exclusion of such resource or the partial displacement of such resource in a regional transmission plan.
- Similarly, Paragraph 221 acknowledges that a public utility transmission provider may have already addressed compliance with public policy requirements in its integrated resource planning process. Then, two sentences later the Commission states that “the evaluation of potential solutions to those transmission needs [those

subject to regulation by the States”); 16 U.S.C. § 824(b) (FPA does not extend Federal regulatory authority “over facilities used for ... generation”).

³³ *E.g.*, *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, Final Rule, 117 FERC ¶ 61,202 (2006) (“States have always had exclusive, plenary jurisdiction over transmission siting.”), *rev’d. on other grounds*, *Piedmont Environmental Council v. FERC*, 558 F.3d 304 (4th Cir. 2009).

³⁴ *See also New York v. FERC*, 535 U.S. 1, 24 (2002) (“FERC has recognized that the States retain significant control over local matters”), citing Order No. 888 at 31,782 & n. 543, FERC Stats. & Regs., Regs. Preamble, Jan. 1991-June 1996, ¶ 31,036, 31,632, 61 Fed. Reg. 21540 (1996) (“Among other things, Congress left to the States authority to regulate generation and transmission siting”).

³⁵ Order No. 1000, P 107.

resulting from public policy requirements] identified in a local or regional transmission planning process should reflect the resource decisions of the transmission planning process.” This raises the prospect that a transmission planning process will involve non-transmission “resource decisions” which may deviate from the generation resource inputs from a public utility transmission provider’s state level resource planning process. (emphasis added)

At a minimum, the Commission must clarify that regional transmission planning processes and inter-regional coordination of planning shall not have the ability or authority to affect or change resource decisions made by the entities with responsibility to meet public policy requirements and the transmission needs they have identified associated with those resource decisions, except with the voluntary agreement of those responsible utilities or other entities.

2. *Section 217(b)(4) Requires the Integrity of Bottom-Up Resource Decisions to be Maintained Throughout any FERC Mandated Regional or Inter-Regional Transmission Planning and Cost Allocation Process.*

The clarification required to avoid intrusion on states’ rights under Section 201 is also required to protect the rights of load-serving entities to be free of federal encroachment on their planning processes to meet service obligations under Section 217(b)(4) of the FPA, which provides:

The Commission shall exercise the authority of the Commission under this Act in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service obligations of the load-serving entities, and enables load-serving entities to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term power supply arrangements made, or planned, to meet such needs.³⁶

Giving meaning to the FPA’s design to support the exercise of state prerogatives preserved under Section 201, the FPA does more than merely require the Commission to stay out of fields reserved to the states, but rather to exercise its authority concerning transmission in a way that supports and promotes generation decisions made by load-serving entities under

³⁶ 16 U.S.C. § 824q (emphasis added).

guidance of their state regulators. Section 217(b) (4) requires the Commission to exercise its authority over the “planning and expansion of transmission facilities” (the very purpose of the mandated reforms in Order No. 1000) to meet the needs of load serving entities as determined in those state-level, bottom-up plans. Indeed, construction of Section 201 together with Section 217(b) (4) creates a requirement that regional transmission planning processes center on the needs of load-serving entities as a first priority.

Order No. 1000, however, appears to marginalize states, retail customers, and state-regulated load-serving entities into the role of mere stakeholders. For example, Paragraph 108 of Order No. 1000 expressly disclaims any responsibility of the Commission in exercising its authority in the Final Rule to protect and defend the results of state-level resource decisions, dismissively characterizing comments raising Section 217(b) (4) as seeking some undue preference: “We thus cannot agree . . . that we should ensure that our transmission planning and cost allocation reforms give systematic preference to any particular set of interests.” Compliance by the Commission with Section 217(b) (4) in the Final Rule does not involve or require a grant of “systematic preference.” Instead, it is necessary and proper for the Commission to establish principles in its Orders that will deny any region the flexibility to adopt processes or methodologies that would preempt a generation resource decision made through state-regulated resource planning processes. This is not a “preference,” but a request for a reasonable safeguard against process results that breach an unambiguous statutory prescription. Order No. 1000’s dismissal of requests for Section 217(b) (4) protection in the regional transmission process is insufficient in light of Congress’ directive to enable load-serving entities to see fully implemented their resource decisions made under state authority.³⁷

³⁷ See, e.g., *Keyspan-Ravenswood, LLC v. FERC*, 474 F.3d 804, 812 (D.C. Cir. 2007).

D. The Commission Should Clarify That the Option for Opting Out of Regional Cost Allocation Methodologies Should Also Apply to Inter-Regional Transmission Projects

In its initial and reply comments on the NOPR, the Coalition urged the Commission to consider whether it is prudent in all cases to require the filing of cost allocation plans by transmission providers in advance of projects being proposed. The Commission appears to have addressed the Coalition's concerns by allowing transmission projects to be included in the regional plan but at the same time "not be subject to regional cost allocation" to move forward using alternative cost allocation methods, including participant funding. However, it is not clear in the Final Rule that the same alternative is available for inter-regional projects. The Commission states that an Inter-Regional Cost Allocation Plan cannot rely on participant funding. The Commission should clarify on rehearing that if an inter-regional project is included in one or more regional plans as not subject to regional cost allocation, then the Inter-Regional Cost Allocation methodology can also ascribe projects as "not subject to inter-regional cost allocation" so as to allow the same flexibility for inter-regional projects.

Respectfully Submitted,

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