

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

Transmission Planning and Cost
Allocation by Transmission Owning and
Operating Public Utilities

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Docket No. RM10-23-000

**REQUEST FOR CLARIFICATION OR, IN THE ALTERNATIVE,
REQUEST FOR REHEARING OF THE
NORTHERN TIER TRANSMISSION GROUP**

Pursuant to Section 313 of the Federal Power Act (“FPA”)¹ and Rules 212 and 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”),² the Northern Tier Transmission Group (“NTTG”)³ submits this request for clarification or, in the alternative, request for rehearing of the Commission’s Order on “Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities,” issued in the above-captioned proceedings on July 21, 2011.⁴

¹ 16 U.S.C. § 825l.

² 18 C.F.R. §§ 385.212 and 385.713.

³ NTTG is a regional planning group facilitating a transmission planning process spanning substantial portions of the Pacific Northwest and the Rocky Mountains. NTTG is funded by five Commission jurisdictional transmission providers and one non-jurisdictional joint action agency -- Deseret Generation & Transmission Co-operative (“*Deseret*”), Idaho Power Company (“*Idaho Power*”), NorthWestern Energy (“*NorthWestern*”), PacifiCorp, Portland General Electric Company (“*PGE*”), and the Utah Associated Municipal Power Systems (“*UAMPS*”) (collectively, the “*Funders*”). NTTG is managed by a Steering Committee composed of the Funders and state representatives from: the Idaho Public Utilities Commission, Montana Public Service Commission, Montana Consumer Counsel, Public Utilities Commission of Oregon, Utah Public Service Commission, and Wyoming Public Service Commission (collectively, the “*Greater Northwest State Commissions and Consumer Counsel*”). NTTG operates pursuant to its charters, and Attachment K of the jurisdictional Funders’ Open Access Transmission Tariffs (“*OATT*”). The Funders (less UAMPS) and Greater Northwest State Commissions and Consumer Counsel (less the Public Utilities Commission of Oregon) are submitting this Request for Clarification or, in the alternative, Request for Rehearing on behalf of NTTG; however, PacifiCorp and PGE do not join in the request for rehearing described in Section II.A for issues 1, 2 and 3 as set forth in the statement of issues and specification of errors.

⁴ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Order No. 1000*, 136 FERC ¶ 61,051 (2011) (“Order No. 1000” or “Final Rule”).

I. REQUEST FOR CLARIFICATION

A. NTTG requests that the Commission clarify the relationship between cost allocation and cost recovery.

NTTG requests that the Commission clarify the relationship between cost allocation and cost recovery. In the Final Rule, the Commission states that:

- Cost allocation and cost recovery are distinct;⁵
- Transmission planning is focused on “process” and not substantive outcomes of the process;⁶
- Transmission planning and cost allocations are intended to increase transparency⁷ and therefore increase the likelihood that someone will construct the projects;⁸
- Transmission planning does not impose an obligation to construct a project;⁹ and
- Cost allocation does not affect state jurisdiction over rates.¹⁰

⁵ Order No. 1000 at P 563 (“With regard to comments regarding matters of cost recovery, we acknowledge that cost allocation and cost recovery are distinct. This Final Rule sets forth the Commission’s requirements regarding the development of regional and interregional cost allocation methods and does not address matters of cost recovery.”)

⁶ *Id.* at P 113 (“This Final Rule is focused on ensuring that there is a fair regional transmission planning *process*, not substantive outcomes of that process.”)

⁷ *Id.* at P 562 (“...we require the development of a cost allocation method or a set of methods in advance of particular transmission facilities being proposed so that developers have greater certainty about cost allocation and other stakeholders will understand the cost impacts of the transmission facilities proposed for cost allocation in transmission planning.”)

⁸ *Id.* at P 42 (“increase the likelihood that transmission facilities in the transmission plan will move forward to construction.”)

⁹ *Id.* at P 159 (“We also decline to impose obligations to build or mandatory processes to obtain commitments to construct transmission facilities in the regional transmission plan, as requested by some commenters. The package of transmission planning and cost allocation reforms adopted in this Final Rule is designed to increase the likelihood that transmission facilities in regional transmission plans will move from the planning stage to construction.”); *Id.* at P 156 (“exercise of authority over those substantive matters traditionally reserved to the states, including integrated resource planning, or authority of siting, permitting, or construction of transmission solutions.”)

¹⁰ *Id.* at P 548.

Yet, given all these statements, the Commission expends considerable effort in the Final Rule analyzing and defining its authority to impose costs.¹¹ Why is this authority discussion relevant to the Final Rule when cost recovery is outside the scope of the Final Rule? Presumably, because the Commission cites the need to eliminate free rider problems¹² and imposes an obligation that costs be allocated “roughly commensurate with estimated benefits,”¹³ it appears that the ability to recover costs (in a separate proceeding) is merely a factor that can be considered and acknowledged in the cost allocation process. Such information is clearly material to the decision to participate in the construction of a project. It is in this context that NTTG interprets the Commission’s statement that

the designation of a transmission project as a . . . “transmission facility selected in a regional transmission plan for purposes of cost allocation” only establishes how the developer may allocate the costs of the facility in Commission-approved rates if such facility is built.¹⁴

Thus, a clearer understanding of the intended relationship between cost allocation and cost recovery will better inform the methodologies developed for and analyses performed by the regional and interregional transmission planning processes. Since the Commission has made it clear that it does not seek to set retail rates – ultimately the proper concern of the states, the Commission should clarify that it does not intend to set these rates but only seeks to introduce additional clarity into the planning process.

¹¹ For example, in Final Rule, the Commission states “[its] jurisdiction is clearly broad enough to allow it to ensure that all beneficiaries of services provided by specific transmission facilities bear the costs of those benefits regardless of their contractual relationship with the owner of those transmission facilities.” *Id.* at P 531 (emphasis added). *See also Id.* at P 532 (the Commission concludes that it has jurisdiction over “the use of these transmission facilities in the provision of transmission service, which includes consideration of the benefits that any beneficiaries derive from those transmission facilities in electric service regardless of the specific contractual relationship that the beneficiaries may have with the owner or operator of these transmission facilities.”) (emphasis added).

¹² Order No. 1000 at P 535.

¹³ *Id.* at P 622.

¹⁴ *Id.* at P 66.

B. NTTG requests that the Commission clarify the scope of provisions of the ROFR that are prohibited by the Final Rule.

In its NOPR Comments, NTTG sought clarification on how removal of the right of first refusal (“ROFR”) affects bilateral contractual rights.¹⁵ In the Final Rule, the Commission directs public utility transmission providers to “eliminate provisions in Commission-jurisdictional tariffs and agreements that establish a federal right of first refusal for an incumbent transmission provider with respect to transmission facilities selected in a regional transmission plan for purposes of cost allocation.”¹⁶ The Commission states that:

The requirements adopted here apply only to public utility transmission providers that have provisions in their tariffs or other Commission-jurisdictional agreements granting a federal right of first refusal that is inconsistent with the requirements of this Final Rule. If no such provisions are contained in a public utility transmission provider’s tariff or other Commission-jurisdictional agreement, it should state so in its compliance filing.¹⁷

The Commission’s reference to “Commission-jurisdictional agreements” and “federal rights of first refusal” are unclear. Specifically, NTTG requests that the Commission clarify the types of “Commission-jurisdictional agreements” that are subject to the Final Rule’s ROFR prohibition and clarify the types of provisions that constitute “federal rights of first refusal.” These terms are used but not defined in the Final Rule. These clarifications are necessary to determine the bi-lateral agreements that are affected by the rule and the types of provisions that are prohibited in future contracts. NTTG believes these terms are intended to describe only a right to construct transmission facilities in markets administered by regional transmission organizations (“RTO”) or independent system operators (“ISO”). Accordingly, NTTG believes

¹⁵ NOPR Comments at pp. 14-17.

¹⁶ Order No. 1000 at P 313 (emphasis added). The Commission does not require the removal of the ROFR for a local transmission facility. *Id.* at P 258.

¹⁷ *Id.* at P 314 n.294.

that an option to purchase a portion of an existing transmission line contained in a bilateral agreement, in the northwest market (a market that is not administered by an RTO or ISO), that is filed with the Commission is not a prohibited ROFR. The modification of bi-lateral agreements undermines the balance of the agreements and must be accomplished in accordance with relevant Commission precedent.

II. REQUEST FOR REHEARING

A. Statement of Issues and Specification of Errors.

In accordance with Rules 203(a)(7) and 713(c)(1) and (2) of the Commission's Rules of Practice and Procedure,¹⁸ NTTG¹⁹ provides the following statement of issues and specification of errors to be addressed through rehearing:

1. The Commission has not explained the relationship between the mandatory cost allocation process and the ability of a project proponent to recover the costs of a selected transmission facility. This lack of reasoned decision-making renders the Final Rule arbitrary and capricious.²⁰
2. The Commission lacks authority to require the imposition of transmission construction costs on involuntary beneficiaries²¹ who have no privity of contract with the transmission provider.²² Pursuant to the FPA, the Commission's jurisdiction is limited to regulating the rates, terms and conditions of the

¹⁸ 18 C.F.R. §§ 385.203(a)(7), 713(c)(1), and 713(c)(2).

¹⁹ PacifiCorp and PGE do not join in the request for rehearing as described in Section II.A for issues 1, 2 and 3 as set forth in the statement of issues and specification of errors.

²⁰ The court shall set aside Commission orders that are arbitrary and capricious. 5 U.S.C. § 706(2)(A). A court's review under the arbitrary and capricious standard is narrow, but the court shall set aside agency orders that fail to articulate a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citation omitted).

²¹ Order No. 1000 at P 640 ("We disagree with Xcel that Principle 2 gives parties the ability to opt out of a Commission-approved cost allocation for a specific transmission project if they merely assert that they receive no benefits from it. ... Permitting each entity to opt out would not minimize the regional free rider problem that we seek to minimize in this Final Rule.").

²² A reviewing court will also "hold unlawful and set aside agency action . . . in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(C). "In the absence of statutory authority authorization for its act, an agency's action is plainly contrary to law and cannot stand." *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (citation omitted).

transmission of electric energy in interstate commerce.²³ Further, the Commission has previously stated that a public utility may not impose costs on entities that do not receive any services.²⁴

3. The Commission lacks authority to require the imposition of transmission construction costs on non-jurisdictional beneficiaries.²⁵ Pursuant to the FPA, the Commission cannot impose cost recovery on the United States or any state, including any political subdivision.²⁶ Further, the Commission has previously stated that the FPA does not apply to governmental entities.²⁷
4. The Commission has not defined the types of tariffs and agreements that are subject to the Commission's requirement that public utility transmission providers eliminate federal rights of first refusal from Commission-jurisdictional tariffs and agreements.²⁸
5. Under the *Mobile-Sierra* doctrine, the Commission lacks authority to modify rates established by a pre-existing contract except when such modifications are "necessary in the public interest."²⁹ To the extent that the Commission requires revisions of pre-existing contracts, it has not provided the requisite justification in the Final Rule.³⁰

²³ 16 U.S.C. § 824(b)(1).

²⁴ *AES Somerset, LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,337 (2003); *Midwest Independent System Operator, et al.*, 131 FERC ¶ 61,173 (2010). An agency "must conform to its prior practice and decisions or explain the reason for its departure from such precedent," *United Mun. Distrib. Group v. FERC*, 732 F.2d 202, 210 (D.C. Cir. 1984) (citation omitted), and must provide "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Greater Boston Int'l Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970); *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663, 671 (D.C. Cir. 2007) ("[W]here an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.") (citation omitted).

²⁵ *Supra*, n.21.

²⁶ 16 U.S.C. § 824(e) and (f); *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9th Cir. 2005).

²⁷ *New West Energy*, 83 FERC ¶ 61,004, at 61,018 (1998) (FPA was to "subject private enterprise alone to regulation by the Federal Power Commission, and not to extend that regulation to government and its instrumentalities."). An agency "must conform to its prior practice and decisions or explain the reason for its departure from such precedent," *United Mun. Distrib. Group v. FERC*, 732 F.2d 202, 210 (D.C. Cir. 1984) (citation omitted), and must provide "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Greater Boston Int'l Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970); *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663, 671 (D.C. Cir. 2007) ("[W]here an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.") (citation omitted).

²⁸ *Supra*, n.19.

²⁹ *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

³⁰ 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

B. Request for Rehearing.

To the extent that the Commission declines to provide the clarifications requested above, based upon the explanation set forth in the request for clarification and the statement of issues and specification of errors set forth above, NTTG³¹ seeks rehearing on the grounds that the Commission has acted arbitrarily and capriciously in resolving these issues and the Commission's conclusions are not the result of reasoned decision-making.

III. CONCLUSION

For the foregoing reasons, NTTG respectfully requests that the Commission grant clarification as requested herein or, in the alternative, NTTG³² respectfully requests that the Commission grant rehearing of the Final Rule.

Respectfully submitted,

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³¹ *Supra*, n.19.

³² *Id.*

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