UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Building for the Future Through Electric Regional Transmission Planning and Cost Allocation	)))	Docket No. RM21-17-000

REQUEST FOR REHEARING BY THE STATES OF TEXAS, ALABAMA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, IOWA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, AND UTAH

Pursuant to Rules 713 and 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission") and Section 313(a) of the Federal Power Act ("FPA"), the States of Texas, Alabama, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, and Utah ("States") submit this Request for Rehearing ("Rehearing Request") of the Commission's final rule issued in this docket on May 13, 2024 ("Rule" or "Order No. 1920"). In Order No. 1920, the Commission has adopted a rule that exceeds its authority; is arbitrary and capricious; results in unjust, unreasonable, and/or unduly discriminatory rates in violation of the FPA; is not supported by reasoned decision-

making or explanation; and runs counter to the evidence. Through the Rule, the Commission is attempting to do indirectly what it cannot do directly: usurp the States' exclusive authority over generation choices by adopting planning rules designed to benefit remote renewable generation and renewable developers, and shift billions or trillions of dollars in transmission costs from those developers onto electric consumers. The Rule thus exceeds both the Commission's statutory and constitutional authority, is procedurally flawed, and is arbitrary and capricious, among other errors. Texas and the other undersigned States respectfully seek rehearing of Order No. 1920.

I. INTRODUCTION

Texas and the other undersigned States have a significant interest in the electric generation resource mix and demand in their respective jurisdictions. The "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983). And most "economic aspects of electrical generation have been regulated for many years and in great detail by the states." *Id*. at 206. The States seek rehearing to protect their interests in electrical transmission and generation and their regulatory authority. The States (and some of their regulatory agencies) filed comments and reply comments to the Notice of Proposed Rulemaking ("NOPR") in this docket,

along with many other entities, expressing their concerns that the Commission was proposing a rule that exceeded its authority and infringed upon the States' exclusive authority over generation resource planning.

On May 13, 2024, FERC issued Order No. 1920 finding that:

> there is substantial evidence to support the conclusion that the existing regional transmission planning and cost allocation processes are unjust, unreasonable, and unduly discriminatory or preferential because the Commission's existing transmission planning and cost allocation requirements do not require transmission providers to: (1) perform a sufficiently long-term assessment of transmission needs that identifies Long-Term Transmission Needs; (2) adequately account on a forward-looking basis for known determinants of Long-Term Transmission Needs; and (3) consider the broader set of benefits of regional transmission facilities planned to meet those Long-Term Transmission Needs.[1]

This finding is not remotely supported by sufficient record evidence. It also reflects a view of agency action beyond what Congress (or the Constitution) has authorized and violates numerous other foundational principles of administrative law.

The finding that every planning process of every regional transmission organization ("RTO")/independent system operator ("ISO"), and every transmission provider that is not in an RTO/ISO is unjust, unreasonable, and unduly discriminatory demonstrates that the Rule is an arbitrary promotion of the financial interests of renewable developers at the expense of consumers. The Rule's building-

[1] Order No. 1920 at ¶ 1.

block concepts ("Sufficiently long-term," "Long-Term Transmission Needs," "known determinants of Long-Term Transmission Needs," the "broader set of benefits," and particularly, the inputs to this elaborate scheme) mandate new planning processes for transmission facilities that are designed to (1) move remote renewables over long distances and (2) socialize their costs that would otherwise be the responsibility of the interconnecting intermittent generators and renewable developers. Order No. 1920's changes are unnecessary to interconnect non-intermittent generation resources and intermittent resources located closer to the load centers. The Commission ignores that these new long-term transmission costs will be huge. Whether hundreds of billions or trillions of dollars, this cost-shifting from remote intermittent generators imposes an enormous burden upon electric ratepayers.

Texas and the other undersigned States do not oppose renewables. Indeed, Texas is a national leader in both wind and solar generation. What Texas and the States oppose is that the Rule dictates outcomes benefitting intermittent renewables and the policy preferences of some states, utilities, and customers over others. It shifts transmission costs for those remote renewables to consumers under the guise that those consumers will "benefit" from those resources, without considering whether less-remote resources of any type might be less expensive, more reliable, and environmentally beneficial. The remote renewables that the Rule favors are only

"low cost" or "free" if their associated transmission and ancillary services costs are ignored and socialized across a broad group of consumers in guise of their allocation to "beneficiaries" instead of being included as part of the costs of the renewable generation.

Through the Rule, the Commission attempts to implement "an essential component in a comprehensive plan by the current presidential administration to push what the media describe as 'green policies' designed to prefer and promote the wind and solar generation it favors while simultaneously forcing the shutdown of the fossil fuel generation it disfavors . . . ." Commissioner Christie Dissent ¶ 4. It evidently seeks to accomplish that goal by socializing the trillions of dollars in costs of a massive transmission build-out to connect remote renewable energy generators to the grid in a way to distribute the costs of build-out to as wide a base of ratepayers as possible. *Id*. at ¶ 98. The Commission would achieve this wide base by imposing the massive costs of the transmission build-out on the ratepayers in the multi-state regions, without regard to whether those payers have consented to or have any interest in the new renewable energy generation. *Id*. at ¶ 86. There are multiple statutory, evidentiary, and policy-based problems with this effort to profoundly reshape electric grid regulation. The Commission's final Rule, like its proposed rule, remains fatally flawed. Rehearing should be granted.

II. REQUEST FOR REHEARING

A. Statement of Issues and Specifications of Error

Pursuant to Rule 713(c) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(c), the States of Texas, Alabama, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, North Dakota,[2] Oklahoma, South Carolina, South Dakota, Tennessee, and Utah hereby provide the following Statement of Issues and Specifications of Error:

1. The Rule intrudes upon the primary jurisdiction of the states over the selection and approval of generation resources. As a result, the Final Order No. 1920 is in error, is arbitrary and capricious, not based on reasoned decision-making, in violation of the Federal Power Act, and principles of federalism. It results in unjust, unreasonable and unduly discriminatory rates. Generating resource choice is within the states' authority and jurisdiction. *Pac. Gas & Elec. Co.*, 461 U.S. at 212. No statute, including the FPA, gives the Commission the ability to favor one form of generation over another and engage in a wide-scale public policy reform. *West Virginia v. EPA*, 597 U.S. 697 (2022). The FPA provides the Commission with jurisdiction to regulate "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). The FPA is an *economic* regulation statute. Section 205 of the FPA requires the Commission to ensure that "[a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission" be "just and reasonable." 16 U.S.C. § 824d(a). Further, Section 215(i)(3) of the FPA reserves jurisdiction over the "safety, adequacy, and reliability of electric service" to the states. 16 U.S.C. § 824o.

   The Rule usurps the States' authority by adopting transmission planning requirements that dictate the choice of generating resources and then

[2] The State of North Dakota does not join in Statement of Issue and Specification of Error No. 6 below.

determine what planning and benefit metrics will result in transmission build-out to support those resources. These planning requirements would dramatically increase costs imposed on consumers while potentially jeopardizing grid reliability. The Rule thus exceeds the Commission's authority under the FPA by making the FERC the national Integrated Resource Plan ("IRP") designer of the generation mix.

2. The Rule violates the major questions doctrine that reserves major changes in public policy to Congressional action and does not allow administrative agencies, like FERC, to make by a rulemaking a major change as to the generation types that should be favored over others in transmission decision making. *West Virginia*, 597 U.S. at 729-30. In Order No. 1920, FERC has exceeded its authority over interstate transmission by favoring the transmission of one type of energy generation over others—that is, by favoring energy produced from remote intermittent generation. This will result in billions of dollars in transmission investment to move the energy those renewables produce and the shifting of the costs from the generators and developers to load and electric consumers. Furthermore, even if the Rule were statutorily authorized (it is not), it would violate the nondelegation doctrine. Regardless, it violates the states' equal sovereignty.

3. The Rule exceeds the Commission's authority under the FPA. FERC has not identified sufficient evidence to demonstrate that the current long term and other transmission planning processes for all RTOs/ISOs and other transmission providers are unjust and unreasonable. Nor has it demonstrated that the replacement processes are just and reasonable, and not unduly discriminatory. The Rule likewise lacks analysis of the justness and reasonableness of the existing generator interconnection process, local transmission planning processes, or transmission provider transmission planning processes, whether long-term or short-term. And the rates that will result from the Rule's new transmission processes will be unjust, unreasonable, and unduly discriminatory. Order No. 1920 will result in greatly increased transmission rates that reflect cost-shifting from generators to load, despite the requirement to protect ratepayers from excessive rates. 16 U.S.C. §§ 824d, 824e. The Rule is thus contrary to law, procedurally flawed, and arbitrary and capricious.

4. The Rule erroneously and unlawfully mandates transmission planning criteria that marginalize the input from Relevant Electric Retail Regulatory Authority ("RERRA" or "RERRAs") in transmission planning, instead favoring selected

generation. As a result, the Rule usurps the role of the states in transmission planning and violates the FPA. Order No. 1920 requires long-term planning of at least twenty years and use of seven categories of factors to determine transmission solutions and selection of long-term facilities for cost allocation. Those factors include particularly: (2) tribal, state, and local laws on decarbonization and electrification and (7) utility and corporate commitments/goals and tribal, state, and local policy goals that affect long-term transmission planning needs. The requirement to plan, build, and cost allocate to accommodate the particular states and local and corporate goals and commitments of one group of states over another group is unjust, unreasonable, unduly discriminatory, and arbitrary and capricious. It requires that some states, tribes, local governments, and private companies' plans and goals override the plans and goals of other states, tribes, local governments, and private companies, and to charge the latter group for the cost. 16 U.S.C. §§ 824d, 824e. The Rule is thus contrary to law, procedurally flawed, and arbitrary and capricious.

5. The Rule will result in unjust and unreasonable rates by adopting seven required factors and seven benefit metrics to evaluate the proposed long-term transmission facilities. Mandatory use of these factors and benefit metrics that favor some resources over others are unjust and unreasonable because they overlap and will double-count or exaggerate the potential benefits. Insufficient evidence and analysis supports the conclusion that use of these factors and metrics will result in cost-effective solutions. 16 U.S.C. §§ 824d, 824e. The Rule is thus contrary to law and is arbitrary and capricious.

6. The Rule will result in unjust and unreasonable rates because it allows Transmission Providers to utilize a portfolio approach in evaluating the use of Long-Term transmission facilities. Use of portfolios allows for the approval of projects with negative benefits by blending those projects with other transmission projects with positive benefit/cost ratios. Long-term transmission projects that have negative benefits should be evaluated individually and not be built. 16 U.S.C. §§ 824d, 824e. The Rule is thus contrary to law and is arbitrary and capricious.

7. The Rule erroneously and unlawfully adopts a cost allocation process that is unjust, unreasonable, and arbitrary and capricious. The state agreement process is not reasonable because the Rule does not provide adequate time for such processes to be established and for the adoption of a cost allocation methodology that follows any approved state agreement process. In addition,

the requirement of the Rule for an *ex ante* cost allocation will eviscerate the effectiveness of a state agreement cost allocation process. The six-month engagement period for establishing a state agreement process is insufficient, as states will likely need many months to negotiate a state process that provides due process. In addition, the Rule does not require the transmission providers to adopt the state agreement process. If a state agreement process is adopted by the appropriate states, that agreement should be binding and subject only to FERC approval. 16 U.S.C. §§ 824d, 824e. The Rule also is in error because it requires that transmission projects be built to accommodate the policies of some states, utilities, and customers, while ignoring others, and allows the shifting of costs to transmit energy from generators to load. As a result, it usurps states' authority. The Rule will result in unjust and unreasonable rates, in violation of the FPA, because it creates a blending of benefits allowing public policy driven by some state, local, and corporate plans to be favored after being mixed with reliability and economic benefits for planning and cost allocation purposes, that are then allocated broadly with costs shifted to consumers who do not share in those policies, support those projects, or consent to share the costs. 16 U.S.C. §§ 824d, 824e. The Rule is thus contrary to law, procedurally flawed, and arbitrary and capricious.

8. The Rule erroneously and unlawfully usurps state authority and will result in unjust and unreasonable rates because it requires the evaluation of local transmission to be evaluated for "right-sizing" to increase its transfer capability purportedly to be more economically efficient. Essentially, this requirement will allow developers and others to hijack the local transmission planning processes and to contest local transmission projects by urging that they need to be higher voltage, and longer, resulting in more expense for local ratepayers. 16 U.S.C. §§ 824d, 824e. The Rule is thus contrary to law, procedurally flawed, and arbitrary and capricious.

9. The Rule will result in unjust, unreasonable, and unlawful rates because it requires that interconnection and regional planning be coordinated. This is merely another way to shift generator interconnection costs from generators to load. 16 U.S.C. §§ 824d, 824e. The Rule is thus contrary to law, procedurally flawed, and arbitrary and capricious.

10. Order No. 1920 violates the Administrative Procedures Act's ("APA") notice and comment requirement, and due process, because the final Rule completely changed the role of relevant state entities in cost allocation, as described in the NOPR, and made other significant changes without republishing the rule.

It is in essence a new rule that requires another opportunity for comment and input. The Rule is thus contrary to law, procedurally flawed, and arbitrary and capricious.

B. REASONS FOR GRANTING REHEARING

1. The Rule exceeds the Commission's authority and intrudes into states' authority over generation planning.

In Order No. 1920, the Commission found that the existing regional transmission planning process is unjust, unreasonable, and unduly discriminatory or preferential and therefore requires transmission providers to perform long-term planning with planning requirements that are dictated by FERC.[3] Those requirements are designed to favor the transmission for distant renewables, do not balance local generation with renewable siting, and will shift costs to areas and customers that may have adopted different plans. (These may include a different generation mix or promoting greater reliability and lower costs.) But the States have this authority, not FERC. The Rule is FERC's attempt to do indirectly what it is not allowed to do directly: dictate generation resources by building transmission for these remote intermittent resources and socialize the costs. This exceeds the Commission's authority under, *inter alia*, the FPA.

The FPA provides the Commission with jurisdiction to regulate "the transmission of electric energy in interstate commerce" and "the sale of electric

[3] Order No. 1920 at ¶ 139.

energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). The FPA is primarily, and perhaps exclusively, an *economic* regulation statute. Section 205 of the FPA requires the Commission to ensure that "[a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission" be "just and reasonable." 16 U.S.C. § 824d(a). Included in that grant of power, the FERC is also responsible for ensuring that "all rules and regulations affecting or pertaining to such rates or charges" be "just and reasonable." *Id.*

But Congress's grant of authority to the Commission in the FPA is tightly limited. Although the agency may have jurisdiction to regulate the cost of transmission of electric energy in interstate commerce, the FERC has jurisdiction over "only . . . those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a). The FPA specifically provides that the Commission does not have jurisdiction "over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce . . . ." *Id.* § 824(b)(1). Section 215(i)(3) of the FPA further reserves jurisdiction over the "safety, adequacy, and reliability of electric service" to the states. *Id.* § 824o.

Each state has authority over the choice of which generating resources are maintained and constructed within its own jurisdiction. The Supreme Court

acknowledged this authority in *Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 212 (1983), where it found that "states exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like." *Id.* Similarly, in *Northwest Central Pipeline Corporation v. State Corporation Commission of Kansas*, 489 U.S. 493, 522 (1989), the Supreme Court explained in the context of natural gas production, that "[u]nless clear damage to federal goals would result, FERC's exercise of its authority must accommodate a State's regulation of production." *Id.*

The Commission itself has also recognized this jurisdictional bar to its ability to regulate in areas reserved to the states. In *Monongahela Power Company*, 40 F.E.R.C. ¶ 61,256 (1987), the Commission stated:

> In our June 25 order, we concluded that we could not, pursuant to NEPA, regulate the environmental effects of the operations of the OE system's plants if the FPA does not independently grant us operational authority over such plants. We found no such authority to exist in the FPA because jurisdiction over the capacity planning, determination of power needs, plant siting, licensing, construction, and the operations of coal-fired plants had been deliberately withheld from our control or responsibility when Congress specifically preserved the States' authority over such matters in section 201(b) of the FPA.

Id. at 61,861.

Requiring customers in states to pay for infrastructure to support the public policies and generation resource mixes chosen by other states, without demonstrable

benefits to that load, would be a major intrusion on the States' right to choose the resources that best fit their public policies and an over-reach into the traditional area of regulation reserved for the states. The Rule puts into place planning processes that will favor renewables over other generation and ignore the combined generation/transmission benefits that other solutions could provide. It will shift costs to deliver those renewables to customers that do not cause those costs to be incurred and that have selected other generation options with different transmission requirements.

Such actions are foreclosed by unambiguous statutory prohibitions in the FPA. The FPA expressly denies FERC jurisdiction, and preserves authority for the states, over "facilities used for the generation of electric energy." *Id.* § 824(b)(1). "The states, not [FERC], are the entities responsible for shaping the generation mix." *Calpine Corp. v. PJM Interconnection*, 171 FERC ¶ 61,035 (2020) (Commissioner Glick Dissent at ¶ 5). FERC has no authority to circumvent that limitation through the backdoor of regional transmission planning. The Commission may not use regional transmission planning to accomplish "indirectly" the "things that it cannot do at all." *Am. Gas Ass'n v. FERC*, 912 F.2d 1496, 1510 (D.C. Cir. 1990).

2. The Rule involves a "major question" of policy that must be enacted by Congress, not embedded in a transmission planning and cost allocation regulation adopted by an administrative agency and contrary to constitutional requirements.

The Rule states that FERC is acting under its authority under Section 206 of the FPA to ensure just and reasonable rates.[4] But the Commission's rate authority under the FPA does not extend to making the sweeping public policy change—a mandate to build transmission to accommodate distant renewable generation and to override state generation planning authority—that is adopted by Order No. 1920.

Congress, not the Commission, must make this change. National-scale energy grid regulation of this nature is a "major question" because of the massive economic consequences involved. *West Virginia*, 597 U.S. at 729-30. It is also a major question because it implicates a unique and complex jurisdictional divide between state and federal regulatory authority. *See, e.g.*, *Ala. Ass'n of Realtors v. HHS*, 594 U.S. 758, 764 (2021) (Congress must use "exceedingly clear language if it wishes to significantly alter the balance between federal and state power"); *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 264-65 (2016) (recognizing the "steady flow of jurisdictional disputes" involved in energy regulation between states and FERC). In *West Virginia*, the Supreme Court explained that a regulatory program based on

[4] Order No. 1920 at ¶ 1.

"generation shifting" between energy resources was a major question, and that it was "highly unlikely that Congress would leave to agency discretion the decision of how much . . . generation there should be over the coming decades" on a resource-by-resource basis. *West Virginia*, 597 U.S. at 729. Accordingly, it is the type of issue that FERC cannot regulate without "clear congressional authorization." *Id.* at 723-24. FERC, however, has no statutory authority at all—much less "clear congressional authorization"—to revamp the energy grid's mix of generation resources.

The Rule makes sweeping policy changes that will require spending hundreds of billions of dollars or more building transmission to benefit certain developers and support the policy choices of certain states and customers and socialize those costs broadly. Congress has not acted to adopt those policies. Nor has it authorized the Commission to favor certain generation resources or certain states' policy choices over other states'. Whether the Commission can supplant the states' role in generation and transmission planning and cost allocation is particularly major considering the enormous breadth of the transmission grid, the importance of electricity in everyday life, and the billions or trillions of dollars in transmission cost the Rule will impose on consumers. Without Congressional action, the Commission may not usurp the powers of the states in this manner.

The FPA is fundamentally a consumer-protection statute that requires the Commission to protect electric customers from unjust, unreasonable, and unduly discriminatory rates. Section 206 requires that transmission rates be just and reasonable, and not unduly discriminatory or preferential. The Commission's claim that the Rule's proposals are necessary to ensure just and reasonable rates stretches the FPA beyond its limits. Indeed, the proposals set forth in the Rule will not—and are not designed to—ensure just and reasonable rates; they are blatantly preferential and would harm consumers by shifting costs to load, not protect them. The Commission's role as an administrative agency is to apply its technical expertise to establish rules and regulations to carry out the tasks laid out for it by Congress. Congress has assigned the Commission the task of regulating the rates charged for interstate transmission service; it has *not* assigned the Commission the task of determining what resources should be powering the grid twenty years into the future. No Congressional legislation supports this significant policy change. Any federal policy shifting to renewable generation, or more particularly, to distant renewable power generation, with costs arbitrarily shifted away from the cost-causers and beneficiaries, should come from Congress—the legislative branch of government that is chosen by and accountable to the electorate. Unless and until that occurs, each state retains the authority to make those decisions for its own consumers.

The Commission is an administrative agency created by statute. 42 U.S.C. § 7171(a) ("There is established within the Department [of Energy] an independent regulatory commission to be known as the Federal Energy Regulatory Commission."). Thus, it is a "'creature of statute,' having 'no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.'" *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)). "[A]n agency literally has no power to act . . . unless and until Congress confers powers upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). No statute, including the FPA, gives FERC the far-reaching authority it asserts in the Rule. If the nation is to shift to particular renewable generating resources, that decision should be made by legislators who can be held accountable for any sweeping energy policy choices; it should not be hidden in a complex administrative transmission planning and cost allocation rule.

Furthermore, even if the Rule were supported by statutory authorization—and it plainly is not—then it would violate the nondelegation doctrine. *See, e.g.*, *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Mem.) (Kavanaugh, J., statement respecting denial of certiorari) (suggesting that "executive or independent agency to exercise regulatory authority over a major policy question of great economic and political importance [is unconstitutional] . . . . even if Congress expressly and

specifically delegates that authority”); *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring in judgment) (similar); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (holding that regulatory action violated nondelegation doctrine).

The Rule is also beyond the Commission’s authority because—if the statute were interpreted to have the sweeping authority the agency seeks to exercise in the Rule—it would likely violate the Constitution’s equal sovereignty doctrine. The United States of America “was and is a union of States, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself.” *Coyle v. Smith*, 221 U.S. 559, 567 (1911). This “constitutional equality among the States,” *Franchise Tax Bd. v. Hyatt*, 578 U.S. 171, 179 (2016) (internal quotation omitted), derives from the Constitution’s text and structure. And the “constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized.” *Coyle*, 221 U.S. at 580. One of the upshots of equal sovereignty is that “a State admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations.” *Stearns v. Minnesota*, 179 U.S. 223, 245 (1900). And the “fundamental principle of equal sovereignty remains highly pertinent in assessing

subsequent disparate treatment of States" after their admission. *Shelby Cnty. v. Holder*, 570 U.S. 529, 544 (2013).

But the Commission's Rule sets up a scheme where one state can effectively require other states to subsidize their own public policy agenda—a core, sovereign state function. *See* Commissioner Christie Dissent ¶ 87. This would subvert the democratic process that grants the people the authority to impact their state's public policies through the ballot box. *Id*. Furthermore, the Rule would encroach on the traditional state prerogatives of transmission siting and the development of generation that Congress has left with the states. *Id*. at ¶ 54. This would result in the erosion of the states' authority, which is inconsistent with the principle of cooperative federalism reflected in the FPA. *Id*. at ¶ 56. When the Commission goes down this path it risks imposing unjust, unreasonable, and unduly discriminatory rates amongst states. *Id*. at ¶ 88. The Rule's failure to account for this risk means the Rule is contrary to statutory authority and also arbitrary and capricious.

3. Existing transmission planning rules are just, reasonable and not discriminatory for many transmission providers.

Even if the Commission had authority to adopt the Rule (and it does not), the Rule's premises and underlying analyses are infected with critical evidentiary defects. For example, assuming for the sake of argument that the Commission had authority to make a nationally applicable determination that rates are unjust or unreasonable, it would need robust record evidence to support its findings as to the

unlawful deficiencies with the existing planning system. The Commission lacks that here.

The Commission purports to be relying on its authority under Section 206 of the FPA. But the Commission's determinations under Section 206 require factual findings, and those findings must be supported with substantial evidence. *See, e.g.*, *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014). The Commission, however, lacks any evidence altogether for vast swaths of the country, including evidence as to whether there is insufficient transmission or a lack of renewable energy generation in these areas. Thus, it lacks the kind of factual support it would need to support the Rule. For this reason alone, the Commission cannot adopt the Rule but instead should engage in the procedures required by Congress to create a record that satisfies statutory requirements.

The Commission states that there is substantial evidence to support the conclusion that the existing regional transmission planning and cost allocation processes are unjust, unreasonable, and unduly discriminatory or preferential because the Commission's existing transmission planning and cost allocation requirements do not require transmission providers to: (1) perform a sufficiently long-term assessment of transmission needs that identifies Long-Term Transmission Needs; (2) adequately account on a forward-looking basis for known determinants of Long-Term Transmission Needs; and (3) consider the broader set of benefits of

regional transmission facilities planned to meet those Long-Term Transmission Needs.[5] However, the record in this proceeding does not support any of those flawed conclusions.

Pursuant to FPA Section 206, the Commission must find, based upon substantial evidence, that existing rates are unjust, unreasonable, or unduly discriminatory or preferential.[6] FPA Section 206 instructs the Commission to remedy "any . . . practice" that "affect[s]" a rate for interstate electricity transmission services demanded or charged by any public utility if such practice "is unjust, unreasonable, unduly discriminatory or preferential."[7] But any finding under FPA Section 206 that rates are unjust, unreasonable, or unduly discriminatory or preferential must be backed by substantial evidence. In the Rule, the Commission finds that existing regional transmission planning and cost allocation processes are resulting in unjust, unreasonable, unduly discriminatory, and preferential Commission-jurisdictional rates but does not point to evidence in the record sufficient to support such a filing.[8] That is because such evidence does not exist. The Rule is thus both procedurally and substantively flawed.

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[5] Order No.1920 at ¶ 1.

[6] 16 U.S.C. § 824e(a).

[7] *Id.*

[8] Order No.1920 at ¶ 85.

In its rulemakings the Commission is required to support its conclusions by substantial evidence and to adequately connect its conclusions with that evidence.[9] But contrary to FERC's determination, the evidence in the record here demonstrates that there is now effective long-term planning for a substantial portion of transmission providers. Mid-Continent Independent System Operator (MISO), for example, has had a long-term planning paradigm since 2010.[10] The Rule even points to MISO's Multi-Value Projects ("MVP") process as an example of a long-term process that has resulted in "clear and quantifiable benefits."[11] MISO also has in place a Long-Term Transmission Planning ("LRTP") process that includes most of the Rule's requirements. The Southwest Power Pool ("SPP") filed comments indicating that its SPP open access tariff requires planning processes that effectively meet the intent of Order No. 1920 and "are sufficient to meet the Commission's desired outcomes."[12] The Commission's general, unsupported conclusion that all existing transmission planning and cost requirements are unjust and unreasonable does not meet the Section 206 standard. It is certainly an insufficient basis for a finding that the MISO and SPP transmission planning and cost-allocation tariffs are

[9] *S.C. Pub. Serv. Auth.*, 762 F.3d at 64-65.

[10] *Midwest Indep. Transmission System, Inc.* 133 FERC ¶ 61,221 at P. 3 (2010).

[11] Order No. 1920 at ¶ 102.

[12] Comments of Southwest Power Pool, Inc., page 3 (Aug. 2022).

unjust and unreasonable. Other regions, including California Independent System Operator ("CAISO"), New York Independent System Operator ("NYISO"), Southern Companies, and others also have sufficient long-term planning.[13]

Further, the Rule's replacement tariff and planning requirements have not been shown to be just and reasonable. Despite spilling a great deal of ink on irrelevant issues, the Rule nowhere includes any actual analysis demonstrating that the required changes will result in just and reasonable rates. This is unsurprising because the Rule requires the construction of transmission to socialize the costs of the policies of some states and parties over others and shift the costs caused by interconnecting renewables to everyone.

Perhaps most fundamentally, the Commission has no authority to make rate determinations on a generic, national level, which is what this Rule does. Instead, FERC has power under Section 205 of the FPA to review the filed rates of individual "utilit[ies]" to determine if those rates are just and reasonable. 16 U.S.C. § 824d. FERC also has power under Section 206 to determine "after a hearing held upon its own motion or upon complaint" that the rates charged by a specific utility subject to Commission jurisdiction are "unjust, unreasonable, unduly discriminatory or

[13] Order No.1920 at ¶¶ 65-66 (Comm'r Christie dissent).

preferential," and, if so, to adjust such rate. *Id.* § 824e. Neither of those authorities remotely authorizes the Rule, which is procedurally and substantively flawed.

4. The Rule's new planning requirements violate the FPA and usurp the role of RERRAs.

The states have exclusive authority over generation planning and selection processes[14] and have a critical role to play in the transmission planning process. State regulators also are active participants in the RTO stakeholder processes and generally have an outsized first-among-equals position in those stakeholder processes. Many states, including Texas, have transmission certification and siting authority, which give them some measure of control over the transmission decision outcomes. The Rule adopts nationwide criteria and removes the states' critical role in planning and cost allocation. Given this, there is little discretion remaining for flexibility in planning or to work with other RERRAs to achieve the best results. Thus, the Rule thwarts the RERRAs' vital role in the planning and cost allocation processes in violation of the FPA.

The criteria in the Rule for transmission planning and cost allocation are designed to allow the preferred policy goals of certain states, utilities, and corporate interests to dictate transmission planning for all—inevitably shifting the costs of delivering energy from remote generators to load. The Commission should not

[14] *Pac. Gas & Elec. Co.*, 461 U.S. at 212.

pursue this effort to tip the scales in favor of one type of generating resource—a large-scale transmission build-out to support distant renewable resources, not paid for by the cost causers or beneficiaries—over other generating resources. As an independent agency not charged with such determinations, the FERC should not favor one type of generation resource over another. But this is what the Rule does. If such large-scale transmission is to be built to support distant renewable resources, that transmission should be selected only when it is the most economic and beneficial option. The process should not be rigged to enhance the chances of its selection.

The States oppose the Commission's changes because they would lead to an inefficient and expensive build-out of a transmission system and shift the costs of this build-out to load. These changes could also lead to a grid that is less resilient and less reliable. The States also oppose them on jurisdictional grounds. They would interfere with states' rights, impose monolithic mandates on a diverse country, and exceed the Commission's delegated authority as an administrative agency. The Rule violates the FPA and other statutes, as well as the cost-causation principle, by imposing significant costs on ratepayers to provide preferential treatment to a single type of generating resource and to support a massive and unnecessary transmission buildout to support the policy desires of some on the backs of all. It also subsidizes the needs and wants of project developers.

Consumer and reliability impacts should be of paramount concern to the FERC, as they are to Texas and the other undersigned States. It is not just or reasonable to impose upon them the immense costs of an extensive transmission build-out to carry remote renewable generation without a transparent demonstration that it will increase reliability at a reasonable cost or provide some other concrete, quantifiable benefit to ratepayers. With its rigid planning and cost allocation criteria, the Rule will result in the imposition of massive transmission costs necessary to accomplish certain states' policy goals upon other states. The Rule's failure to account for these effects means it is contrary to the Commission's authority and, regardless, is arbitrary and capricious. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

5. The Rule's required benefit metrics for transmission project selection and cost allocation will overvalue transmission benefits and will result in unjust, unreasonable, and unduly discriminatory rates.

Assumptions used in transmission planning should reflect the policy preferences, economic conditions, and geographic particularities of each planning region. The Commission should not mandate a single set of transmission planning assumptions. At the same time, these assumptions must be reasonable. Again, the Rule fails here. It will not ensure that the long-term planning analysis will result in just and reasonable and not unduly discriminatory rates.

The Rule requires transmission operators in each transmission region to engage in long-term planning by developing at least three long-term scenarios for 20 years into the future, utilizing seven required factors:

> 1. federal, federally recognized Tribal, state, and local laws and regulations affecting the resource mix and demand;
>
> 2. federal, federally recognized Tribal, state, and local laws and regulations on decarbonization and electrification;
>
> 3. state-approved integrated resource plans and expected supply obligations for load-serving entities;
>
> 4. trends in fuel costs and in the cost, performance, and availability of generation, electric storage resources, and building and transportation electrification technologies;
>
> 5. resource retirements;
>
> 6. generator interconnection requests and withdrawals; and
>
> 7. utility and corporate commitments and federal, federally recognized Tribal, state, and local policy goals that affect Long-Term Transmission Needs.[15]

While some of these factors do not explicitly promote any specific generation choice (factor 5, for example), many others plainly do. *See* factors 1, 2, 4, 6, and 7. Factor 3 also may not be resource neutral in states served by utilities with differing multi-jurisdictional resource preferences. Five of the factors (1, 2, 4, 6, and 7) require planning to build transmission to meet state and local governments' policy goals and utility and corporate commitments. These requirements are not only unduly

[15] Order No. 1920 at ¶ 409.

discriminatory (by giving preferential treatment to some states over others), they are also unjust and unreasonable (because they will impose formidable costs upon ratepaying loads without sufficient and measurable benefits). Costs should not be assigned to any entity if those costs exceed the burdens imposed or benefits received by that party.[16] In addition, the Rule will shift generation interconnection costs to load and allocate the costs regionally. Requirements that will result in unjust, unreasonable, and unduly discriminatory rates is in violation of the FPA.

In addition, the Rule requires transmission providers in each transmission planning region to measure and assess seven specific benefit metrics for Long-Term Regional Transmission Facilities under every Long-Term Scenario as part of Long-Term Regional Transmission Planning. The seven required benefits are:

> 1. avoided or deferred reliability transmission facilities and aging infrastructure replacement;
>
> 2. benefit categorized as either reduced loss of load probability or reduced planning reserve margin;
>
> 3. production cost savings;
>
> 4. reduced transmission energy losses;
>
> 5. reduced congestion due to transmission outages;
>
> 6. mitigation of extreme weather events and unexpected system conditions; and

[16] *See, e.g.*, *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004).

7. capacity cost benefits from reduced peak energy losses.[17]

The Commission deemed these requirements necessary to ensure that transmission providers effectively evaluate Long-Term Regional Transmission Facilities and select those that efficiently or cost-effectively address Long-Term Transmission Needs.[18] But these benefit metrics should be discussed and developed as part of the RTO stakeholder processes, not mandated by FERC. And it is unclear whether these metrics will result in double-counting of potential benefits. Benefit metrics should be accurate and measurable and not overvalue the proposed transmission projects. The Rule's failure to account for these effects will result in unjust, unreasonable, and unduly discriminatory rates, and also is arbitrary and capricious.

6. Portfolios to evaluate Long-Term Transmission Projects violate the FPA.[19]

The Rule allows, but does not require, transmission providers to use portfolios when evaluating the benefits of Long-Term Regional Transmission Facilities.[20] But this portfolio approach should be prohibited entirely. It improperly allows the

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[17] Order No. 1920 at ¶ 720.

[18] Order No. 1920 at ¶¶ 667-739.

[19] The State of North Dakota does not join in this portion of the request for rehearing.

[20] Order No. 1920 at ¶¶ 669-890.

bundling of economic projects with public policy and other projects that are uneconomic so that all projects appear economic on a collective basis. Each project approved for construction should be economic and meet the required benefits-to-costs ratio on a stand-alone basis. This portfolio planning is merely an allocation tool to make socializing costs appear more equitable and an attempt to justify allocating project costs over a broader geographic area. It is wrong for cost allocation, and it certainly does nothing to make an uneconomic project economically viable.

Grouping qualified projects (*i.e.*, those that independently satisfy tariff criteria) with non-qualified projects (together, a "portfolio") should be prohibited because it reduces the economic benefit to customers. It will also spread uneconomic project costs and require non-beneficiaries to pay project costs. If a project is deemed to have positive benefits only because its negative benefits are averaged with other projects with positive net benefits, then that project should not proceed. It would be unjust and unreasonable under the FPA to allow recovery of costs exceeding benefits. The Rule's failure to account for these effects is also arbitrary and capricious.

7. The Rule erroneously adopts a cost allocation process that effectively eliminates state agreement and is unjust, unreasonable, and arbitrary and capricious.

The Rule abandoned many important aspects of the NOPR's cost allocation proposal. The NOPR proposed either an *ex ante* long-term process or an *ex post* state

agreement process and required the RERRAs' agreement to both. However, the Rule requires a default *ex ante* allocation method and allows a six-month engagement period to allow relevant state entities to develop the *ex ante* process and/or a state agreement process. The *ex ante* process is the default process and requires a cost allocation formula that includes public and corporate-driven policy projects, generator interconnection requests, and local decarbonization goals to be included, and socialize those costs, even to states and regions that object to those projects by treating their consumers as cost causers or beneficiaries.[21] Further, the Rule does not require the RTO/ISO transmission provider to follow an allocation methodology developed by regulators during the engagement period. This makes the engagement period process nearly meaningless. If states jointly agree on a cost allocation process, the rules should require the transmission provider to accept those costs allocations, subject to FERC approval.

Further, by making the *ex ante* cost allocation the default allocation, the state agreement process is a hollow offering. For example, reaching an agreement in MISO within the six-month window may be extremely difficult under the best of circumstances, given the involved states' different goals and agendas. Doing it with a default *ex ante* allocation that will broadly allocate costs will be impossible. A state

[21] Order No. 1920, ¶¶ 1291, 1305.

with differing policy objectives has no incentive to reach a state agreement. After all, why would a state with these goals agree to a cost allocation when it can just socialize those costs under the default *ex ante* allocation?

The Rule, unlike the NOPR, does not require retail regulator consent on cost allocation.[22] Thus, a state agreement process has little, if any, practical value, and the states are effectively cut out of the cost allocation process.

First, the six-month engagement period is not a fair replacement of a requirement for regulator consent. Even if there is an agreed upon *ex ante* method developed during the engagement period, the transmission provider may choose not to support it and simply file a competing proposal with FERC.

Second, the Rule will enable the assessment of the cost of public policy projects of other states upon ratepayers of non-consenting states. This is fundamentally prejudicial and beyond FERC's authority; it is also arbitrary and capricious. State retail regulators should have an effective voice on cost allocation as it is the retail ratepayers that will ultimately pay for the costs of transmission built under the Rule. Retail regulators represent the retail ratepayers. They are familiar with the needs and policies of their respective jurisdictions, and many exercise authority over certification and siting of transmission facilities located in those areas.

[22] *Id.* at ¶ 1354.

Retail regulator acceptance of any long-term transmission projects will be a crucial factor regarding whether these projects will be built and how long it will take to complete approved facilities. The decisions and views of retail regulators should be the primary determinant of the cost allocation methodologies adopted.

The Rule's Long-Term Regional Transmission Process ("LTRTP") concept was designed to shift the costs of transmission needed for intermittent generator interconnection to a broad group of ratepayers. This process engages in speculative planning exercises using speculative futures scenarios, which carries an enormous risk of building the wrong projects in the wrong locations at the wrong time. No one, including the RTO and utility planners, have sufficient information to plan that far into the future. Retail regulators should be highly skeptical about the costs and benefits of these projects and how those costs will be allocated. Their involvement in the development and approval of the cost allocation methods is essential. In no case should an unwilling state be forced to pay the cost of another state or entity's policy preferences or for speculative investment based on conjecture about future resource trends.

Further, the allocation process should not allow the costs associated with environmental and public policy goals of some states to be allocated to states that do not share those same goals. Those costs should be allocated only to those states who share those particular goals or be paid by those states in an agreed-upon amount.

Individual states are free to have their own goals, and customers are free to express preferences for certain types of resources to serve their loads. But those states should themselves fund the transmission needed to satisfy those objectives. The policies of states who prefer 100% renewables are not more important than the policies of the states who have other priorities, such as reliability and lower-cost generation (including less expensive renewables). The FERC has no statutory authority to give preferential treatment among differing types of generation or use the cost allocation process as an alternative means to prefer particular types of generation. The Rule's failure to account for these effects is also arbitrary and capricious.

Any *ex ante* backstop cost allocation should not include a postage-stamp-type cost allocation. If costs are being forced upon a state that has already determined a project is not beneficial, those costs should be allocated to cost causers and beneficiaries on as granular a basis as possible. Postage stamp cost allocation should not be the fallback to make it easy on the RTO and to facilitate the construction of such projects.

The Rule is unjust and unreasonable and in violation of the FPA because it usurps state regulator authority over important cost allocation issues. Further, the Rule is discriminatory as it also creates a methodology to socialize the costs of generation interconnection, the public policy goals of other states and local areas,

and the objectives of some private entities over those other states, local areas, and corporations. The Rule is also arbitrary and capricious for these reasons.

8. The Rule erroneously requires evaluation of local transmission projects for "right-sizing" to increase their transfer capability.

The Rule requires transmission providers during the next ten years to evaluate whether an in-kind replacement can be "right-sized" to meet a long term need if cost effective and using a compliance threshold that does not exceed 200 kV.[23]

Texas and the undersigned States support transparency and information sharing. But they strongly oppose the effort to turn local transmission development into an opportunity for renewable developers to increase the costs of local transmission projects to benefit their corporate interests or delay needed local projects through "rightsizing" them. This particular requirement of the Rule is a clear demonstration of how far the Commission is willing to go to promote the business interests of independent developers over the interests of ratepayers and to intrude upon the jurisdiction of states, even when it is not necessary to meet transmission needs "driven by changes in the resource mix and demand." Local projects are designed to meet local needs, are allocated locally, and the bulk of the costs are paid for in retail rates.

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[23] Order No. 1920 at ¶ 1677.

There has been no demonstration, or even supported allegation, that this paradigm is unjust or unreasonable, or that allowing for "right-sizing" is just and reasonable. The entire right-sizing proposal should be eliminated.

FERC recognized the limitations of its authority here when it stated that the public utility transmission provider would not necessarily be bound by that right-sizing decision made by the region:

> unless the public utility transmission provider was selected to develop the right-sized replacement transmission facility. This is because nothing in this proposed rule would alter existing law concerning the public utility transmission provider's ability to proceed with developing its planned in-kind replacement transmission facility without the right-sizing, in spite of the potential efficiencies of right-sizing identified in the regional transmission planning process.[24]

The "right-sizing" requirements of the Rule unreasonably intrude upon state authority, will result in unjust and unreasonable rates when local projects are turned into transmission highways to satisfy the interests of developers. The right-sizing proposal should be eliminated on rehearing. Should the Commission fail to correct this significant error, the Rule will be both beyond FERC's authority and arbitrary and capricious.

[24] NOPR, 179 FERC ¶ 61,028 at ¶ 408.

9. The Rule will result in unjust and unreasonable rates because it requires that interconnection and regional planning be coordinated to shift costs of interconnection to load.

The Rule requires transmission providers to evaluate in their long-term planning process certain interconnection-related network upgrades previously identified in the generator interconnection process where the upgrades have not been developed because the interconnection request has been withdrawn.[25] The upgrade would need a voltage level of at least 200 kV and an estimated cost of at least $30 million.

The requirement to coordinate the Generator Interconnection Process with the Long-Term Planning Process is another mechanism to potentially transfer network upgrade costs properly allocable to interconnection customers to load. But there is no evidence or analysis in the Rule justifying this conclusion. The shifting of GIP network upgrade costs to load is unjust, unreasonable, and in violation of the FPA. The Rule's failure to account for these effects is also arbitrary and capricious.

10. Order No. 1920 violates the APA's notice and comment requirement and due process.

Order No. 1920 violates the Administrative Procedures Act's notice and comment requirement and due process. The notice and comment requirements are only satisfied if the final rule is a "logical outgrowth" of the proposed rule and

[25] Order No. 1920 at ¶ 1145.

interested parties should have anticipated that the changes to the proposed rule were possible. *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). A final rule fails the logical outgrowth test when "interested parties would have had to 'divine [the agency's] unspoken thoughts,' because the final rule was 'surprisingly distant' from the proposed rule." *Id*. at 1259–60 (quoting *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299 (D.C. Cir. 2000)). Additionally, changes to the proposed rule are not considered a logical outgrowth when they render "the final rule more expansive, more specific, and having a different emphasis in the regulatory structure." *Id*. at 1260.

The Rule completely changed the role of state entities in cost allocation as described in the NOPR and made other significant changes—without republishing the proposed rule. The NOPR placed the states in a central role in the regulatory structure by requiring transmission providers to seek the agreement of states for cost allocation. But the Rule removed the requirement that states give their consent on cost allocation. This essentially treats states like any other stakeholder and deprives them of any meaningful role in cost allocation. The changed emphasis on the states' role in cost allocation in the Rule is "surprisingly distant" from the states' role in the NOPR and is in essence a new rule that requires new opportunities for comment and input. The Rule violated the notice and comment requirements of the APA because the parties did not have an opportunity to do so. Regardless, basic principles of due

process prevent the Commission from springing new regulatory burdens in this manner.

III. CONCLUSION

For the reasons set forth herein, Texas and the undersigned States respectfully request that rehearing be granted in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

Dated this 12th day of June, 2024.

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