UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

MOTION TO INTERVENE AND COMMENTS IN OPPOSITION OF THE STATES OF TEXAS & UTAH ET AL.

The States of Texas, Utah, Alabama, Alaska, Arkansas, Florida, Georgia, Kansas. Kentucky, Louisiana, Mississippi, Montana, Nebraska, Ohio, Oklahoma, South Carolina, and West Virginia, (the States) jointly submit this motion to intervene, pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214, along with comments in opposition to the Commission's Notice of Proposed Rulemaking, *Building for the Future through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, issued April 21, 2022 (179 FERC ¶ 61,208), published May 4, 2022 (87 Fed. Reg. 26,504).

I. COMMUNICATIONS AND SERVICE

All communications, pleadings, and orders with respect to this proceeding should be sent to the following individual:

Ryan S. Baasch
Assistant Solicitor General
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, TX 78711-2548
512-936-1700
Ryan.Baasch@oag.texas.gov

Melissa Holyoak
Utah Solicitor General
160 East 300 South, 5th Floor
P.O. Box 140811
Salt Lake City, Utah 84114-0811
(tel) 801-366-0260
(fax) 801-538-1121
melissaholyoak@agutah.org

II. MOTION TO INTERVENE

The Commission's proposed rule emphasizes that it is designed to address "transmission needs driven by changes in the resource mix and demand" of energy.[1] Each of the States has a significant interest in the "resource mix and demand" of energy regulation in their 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."[2] And most "economic aspects of electrical generation have been regulated for many years and in great detail by the states."[3] The States seek to intervene to protect their interests in electrical generation and their regulation thereof.

III. COMMENTS

Through this proposed rulemaking, "the Commission proposes to change [electric] transmission planning and cost allocation to support a new fleet of renewable

[1] 87 Fed. Reg. 26,504, 26,506 (May 4, 2022).

[2] *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983).

[3] *Id.*

generating resources in preference to other types of generation."[4] It evidently seeks to accomplish that goal by socializing the costs of a massive transmission build-out to connect 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, without regard to whether those payers have any interest in renewable energy generation.[5] There are multiple statutory, evidentiary, and policy-based problems with this proposal to profoundly reshape electric grid regulation. The States submit the following non-exhaustive list of reasons why the Commission's proposed rulemaking is fatally flawed.

1. National-scale energy grid regulation is a "major question" because of the massive economic consequences involved in such regulation.[6] In addition, it is a major question because it implicates a unique and complex jurisdictional divide between State and federal regulatory authority.[7] Just three months ago, the Supreme Court explained that a regulatory program based on "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

[4] Commissioner Danly Dissent ¶ 12.

[5] Commissioner Danly Dissent at ¶ 4.

[6] *West Virginia v. EPA*, 142 S. Ct. 2587 (2022); *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (Congress must use "exceedingly clear language if it wishes to significantly alter the balance between federal and state power").

[7] *See, e.g.*, *FERC v. Elec. Power Supply Ass'n*, 557 U.S. 260, 264-65 (2016) (recognizing the "steady flow of jurisdictional disputes" involved in energy regulation between States and FERC).

over the coming decades" on a resource-by-resource basis.[8] Accordingly, it is the type of issue that FERC cannot regulate without "clear congressional authorization."[9] FERC, however, has no statutory authority at all—much less "clear congressional authorization"—to revamp the energy grid's mix of generation resources writ large.

2. In addition, FERC has no authority to make rate determinations on a generic, national level, which is functionally what this proposed rulemaking seeks to accomplish. Instead, FERC has power under Section 205 of the Federal Power Act to review the filed rates of individual "utilit[ies]" to determine if those rates are just and reasonable.[10] FERC also has power under Section 206 of the Federal Power Act to determine "after a hearing hold 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 preferential," and, if so, to adjust such rate.[11] Neither of those authorities includes power covering the proposed rulemaking.

3. In addition to the lack of "clear congressional authorization," that would be required to survive review under the major questions doctrine, FERC's goals here are also foreclosed by statutory prohibitions in the Federal Power Act. The Federal Power Act expressly denies FERC jurisdiction, and preserves authority for the

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[8] *West Virginia*, 142 S. Ct. at 2613.

[9] *Id.* at 2609.

[10] 16 U.S.C. § 824d.

[11] *Id.* § 824e.

States, over "facilities used for the generation of electricity."[12] "The states, not [FERC], are the entities responsible for shaping the generation mix."[13] 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."[14]

4. The proposed rulemaking is also beyond the Commission's authority because, if FERC were interpreted to have this authority, 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."[15] This "'constitutional equality' among the States"[16] 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."[17] 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

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[12] *Id.* § 824(b)(1).

[13] *Calpine Corp. et al. v. PJM Interconnection*, 171 FERC ¶ 61,035 (2020 (Commissioner Glick Dissent at ¶ 5).

[14] *Am. Gas Ass'n v. FERC*, 912 F.2d 1496, 1510 (D.C. Cir. 1990).

[15] *Coyle v. Smith*, 221 U.S. 559, 567 (1911).

[16] *Franchise Tax Bd. v. Hyatt*, 136 S. Ct. 1277, 1283 (2016) (citation omitted),

[17] *Coyle*, 221 U.S. at 580.

forbid any agreement or compact limiting or qualifying political rights and obligations."[18] And the "fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States" after their admission.[19] But the Commission's proposed rulemaking sets up a scheme where one State can effectively require other States to subsidize their own vision of what resources should be used in electricity generation—a core, sovereign State function.[20] FERC risks "undue discrimination" amongst States when it goes down this path.[21]

5. Even if the Commission had authority to accomplish the proposed rule's goals (and it does not), its premises 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 such a finding. The Commission purports to be relying exclusively on its authority under Section 206 of the Federal Power Act.[22] But the Commission's determinations under Section 206 require factual findings, and those findings must be supported with substantial evidence.[23] The Commission, however, lacks any evidence altogether for vast swaths of the country, including whether in many given areas there is insufficient transmission or a lack of

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[18] *Stearns v. Minnesota*, 179 U.S. 223, 245 (1900)

[19] *Shelby Cty. v. Holder*, 570 U.S. 529, 544 (2013).

[20] *See* Commissioner Danly Dissent at ¶ 4.

[21] *Id.* at ¶ 5.

[22] 87 Fed. Reg. at 26,506.

[23] *See, e.g.*, *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014)

renewable energy generation. For example, "[i]n the southeast, at least . . . public utilities added 3,158 miles of new transmission . . . between 2015-2020, representing 12% of all transmission in the region."[24] That is the opposite of the kind of factual evidence the Commission would have to assemble to support this proposed rule.

6. FERC's action is also arbitrary and capricious. FERC is subject to a congressional mandate to *enhance* energy grid reliability.[25] But it is well-established that "renewable resources are inherently intermittent and not dispatchable."[26] And it is evident from the proposed rule that the Commission is seeking to "socialize the costs" of a transition to a "renewable" energy future by "socializ[ing] the costs" of a massive transmission build-out as broadly as possible.[27] Forcing ratepayers to subsidize the increase of less reliable forms of energy is not consistent with FERC's mission.

7. The proposed rule is also arbitrary and capricious because it fails to adequately explain an important policy change. It is well-established that when an agency reverses "prior policy," it must provide a "detailed justification."[28] An agency must likewise "be cognizant that longstanding policies may have engendered

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[24] Commissioner Danly Dissent at ¶ 15.

[25] 16 U.S.C. § 824o.

[26] Commissioner Danly Dissent at ¶ 12 (quoting comments from Louisiana Public Service Commission).

[27] Commissioner Danly Dissent at ¶ 3.

[28] *FCC v. Fox Television Stations, Inc.*, 566 U.S. 502, 515-16 (2009).

serious reliance interests that must be taken into account."[29] The proposed rule flouts these principles in multiple respects. The Commission has historically allowed utilities to "file their own transmission planning solution under [Federal Power Act] section 205"; but here the Commission appears intent to "scrap everything" about this system and "start from scratch."[30] It has offered no detailed justification for that changed approach. In addition, the Commission has previously explained that "the regional transmission planning process is not the vehicle by which integrated resource planning is conducted."[31] The underlying goal of the proposed rulemaking, however, appears to undermine that established proposition.

CONCLUSION

For the reasons stated above, the States object to the reforms proposed in the notice.

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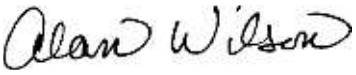
[29] *DHS v. Regents of the University of California*, 140 S. Ct. 1891, 1913 (2020).

[30] Commissioner Danly Dissent at ¶ 29.

[31] Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Order No. 1000, 136 FERC 61,051, at ¶ 154 (2011).

Sean Reyes
Utah Attorney General

Ken Paxton
Texas Attorney General



Alan Wilson
South Carolina Attorney General

Dave Yost
Ohio Attorney General

Douglas J. Peterson
Nebraska Attorney General

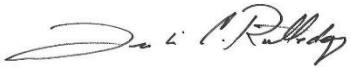
Jeff Landry
Louisiana Attorney General

Patrick Morrisey
West Virginia Attorney General

Daniel Cameron
Kentucky Attorney General

Steve Marshall
Alabama Attorney General

Chris Carr
Georgia Attorney General



Leslie Rutledge
Arkansas Attorney General

Lynn Fitch
Mississippi Attorney General

Ashley Moody
Florida Attorney General

Austin Knudsen
Montana Attorney General

John M. O'Connor
Oklahoma Attorney General

Treg Taylor
Alaska Attorney General

Derek Schmidt
Kansas Attorney General