UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

REPLY COMMENTS OF KENTUCKY PUBLIC SERVICE COMMISSION CHAIRMAN AND COMMISSIONER KENT A. CHANDLER[1]

The Federal Energy Regulatory Commission ("FERC" or "Commission") issued its Advance Notice of Proposed Rulemaking ("ANOPR") on July 15, 2021 in order to reexamine and consider reforms to the electric regional transmission planning, cost allocation, and generator interconnection processes.[2] Initial comments in the ANOPR were due October 12, 2021, and the Commission's September 3, 2021 Notice of Extension of Time set the deadline for Reply comments for November 30, 2021.

Introduction

I want to thank the Commission for initiating this ANOPR. Although a significant undertaking, the issues and items presented in it are relevant and pressing. Indeed, my experience, both as a retail regulator and previously as a consumer advocate, informs my perspective that transmission issues remain the greatest risk to retail electricity affordability. Take for instance Kentucky Power customers located in the eastern part of the Commonwealth. Just a few years ago, a review of Energy Information Administration data indicated Kentucky Power customers had the second highest residential bills of any investor-owned utility in the nation.[3] Contributing significantly to those bills are wholesale transmission costs, allocated to Kentucky Power through FERC-jurisdictional tariffs. Kentucky Power has noted in sworn testimony before the Kentucky Public Service Commission ("PSC") that a specific transmission expense, Kentucky Power's PJM LSE OATT charges, "are the Company's single largest growing expense."[4] Simply, FERC's rules, actions, procedures and processes have been used and abused by utilities to such a degree that many retail customers are unable to afford their monthly electricity bills *exclusively due to*

[1] The Kentucky Public Service Commission endorsed the Initial Comments of the Organization of MISO States, Inc. These comments reflect only the position of Commissioner and Chairman Kent A. Chandler, and not the other members of the Kentucky Public Service Commission, nor the Kentucky Public Service Commission itself.
[2] *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, 176 FERC ¶ 61,024, 86 Fed. Reg. 40,266 (2021) [Hereinafter ANOPR].
[3] Sammy Fretwell, *SCE&G has highest electric bills in the county, new analysis shows*, The State, February 22, 2018.
[4] Case No. 2020-00174, *Electronic Application of Kentucky Power Company For (1) A General Adjustment Of Its Rates For Electric Service; (2) An Order Approving Its 2017 Environmental Compliance Plan; (3) An Order Approving Its Tariffs and Riders; (4) An Order Approving Accounting Practices To Establish Regulatory Assets And Liabilities; And (5) An Order Granting All Other Required Approvals And Relief*, Direct Testimony of Alex E. Vaughan (Ky. PSC Jun. 29, 2020) at 32, (A footnote in the testimony goes on to state that "Fuel expense is larger in total but has been flat to decreasing in recent years") KPCO_APP_Section_III_Testimony_Vol_1_Mattison_Wiseman_Phillips_Blankenship_Osborne_Vaughan_West_Kaiser.pdf (ky.gov).

increasing and already exorbitant wholesale transmission expenses. This ANOPR, and any subsequent rulemaking, provides an opportunity for FERC to change course and focus transmission policy and processes on the impact and benefit to customers, instead of on investor-owned utilities and profits. Unless and until a sweeping change occurs on this front, I find it hard to agree that any of the transmission tariffs that relate to Kentucky consumers are just and reasonable.

Through these comments, I hope to provide the Commission the perspective of a retail regulator who has the unenviable job of regulating retail rates that reflect wholesale costs for which I have no authority to modify or alter. My individual perspective is that monopoly utility regulation is a series and accumulation of incentives. Over the decades, FERC's actions regarding transmission regulation and policy seemingly confirm that perspective. However, instead of merely incentivizing the actions or behavior it believes utilities should exhibit, FERC has chosen to incentivize all behavior and simply incentivize its preferred behaviors even more. This can be observed in return on equity ("ROE") policies generally, perpetual ROE adders for merely being a member of an RTO, and allowing utilities to make billions of dollars of investments and increase rates without ever having to carry a burden of proof.

The Commission's ANOPR is certainly timely. Retail customers will soon be at their breaking point, and FERC's current policies and processes appear to incent economic rents more than they promote the public interest. Parallel planning processes in RTOs, where Transmission Owners[5] ("TOs") are focusing dollars on "local" investments with effectively no oversight, while RTO-planned transmission needs are overcomplicated, underutilized, and stymied at many turns, is leading to inefficient investment and unnecessarily high costs for customers. Without the Commission's intervention, transmission costs will lead to increasingly unaffordable retail bills, while customers will be denied more efficient and reliable energy delivery than they could otherwise receive. I hope that these comments, made in reply to initial comments that I both support and oppose, may assist in the Commission's later proceedings.

As a short background, the Kentucky PSC regulates the rates and service of 4 investor-owned, vertically integrated electric utilities across the Commonwealth: Louisville Gas and Electric ("LG&E"), Kentucky Utilities ("KU", and collectively with LG&E, "LG&E/KU"), Kentucky Power, and Duke Kentucky. Further, the Kentucky PSC regulates the rates and service of two generation and transmission cooperatives and 19 electric distribution cooperatives. The two G&T cooperatives, East Kentucky Power Cooperative and Big Rivers Electric Corporation, are members of PJM and MISO, respectively. Kentucky Power and Duke Kentucky are also members of PJM, while LG&E/KU were founding members of MISO but left the RTO soon after its creation. The southern part of the Commonwealth is served by distribution cooperatives who receive power under contracts with the Tennessee Valley Authority ("TVA"). The Kentucky PSC does not regulate those TVA cooperatives, nor does the Kentucky Commission regulate municipalities that provide electric service.

[5] My reference to Transmission Owners in these comments are specific to investor-owned utilities. These entities inherently have different business models and economic incentives than member-, customer-, or publicly-owned utilities that also own transmission facilities.

Fewer ROFRs. More Competition.

In its initial comments, the Edison Electric Institute ("EEI") noted its perception of the shortcomings of transmission planning, and primarily regional planning, following the Commission's Order 1000. EEI stated "[t]he elimination of the federal ROFR [Right of First Refusal] has not been shown to produce the benefits ultimately underlying the Commission's rationale for removal nor the goals that the Commission is pursuing in the instant proceeding."[6] As part of its rationale for declaring Order 1000 a failure, EEI condemned competition and extolled the virtues of pre-Order 1000 "cooperation and collaboration" between incumbent TOs "as well as regional planning entities."[7] EEI concludes that "[t]his approach to transmission development [a move towards competition] does not foster collaboration and is not focused on the best interest of the customer."[8] EEI has it all wrong.

Initially, cooperation and collaboration are not the goals of monopoly utility regulation, nor have I seen evidence that the two inherently lead to a greater number of outcomes that are in the public interest. Indeed, other than stating how terrible competition is for the cooperation and collaboration business, EEI fails to provide any basis, reasoning or support for why "cooperation and collaboration" is a good thing, except that it put its members back in the driver's seat for all transmission investment, rather than merely the bulk of it as is the case today. I won't spend too much time on this issue, other than asking the Commission to give little weight to the comments of an industry group that is seeking to protect the incumbent status, and earnings, of its membership in perpetuity. Other perspectives and information in this matter can provide the Commission greater instruction on the harms caused by such a dynastic attempt to perpetuate unearned economic advantages, particularly those created by state-granted monopolies initially unrelated to the interstate transfer of electricity.[9]

Furthermore, as opposed to EEI's request to turn back the clock on competition because Order 1000 did not accomplish everything the Commission had hoped, I believe it would instead be better to move even further towards greater competition. As the Commission is well-aware, Order 1000 did not remove all ROFRs. As EEI recounts, "the Commission retained the federal ROFR for immediate need projects and upgrades to an incumbent TO's transmission facilities."[10] Instead, I agree with R Street Institute ("R Street") and the Electricity Transmission Competition Coalition ("ETCC"), that in an attempt to further the public interest of reducing transmission costs, more, not fewer transmission facilities and needs should be subject to competition. However, competition in procurement of supplies and contractors is not sufficient.[11] These types of cost-reduction activities are expected of any eventual chosen transmission operator. Instead, maintaining *and expanding* "competition to the maximum extent possible consistent with the public interest" for activities subject to the Federal Power Act must be a priority for the Commission.[12] Removing

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[6] Initial Comments of EEI at 21–22 [Hereinafter EEI].
[7] EEI at 6.
[8] EEI at 21.
[9] *See* Comments of the R Street Institute at 7–8, supportively citing Ari Peskoe's "Is the Utility Transmission Syndicate Forever?" *Energy Law Journal forthcoming* (2021), p. 3, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3770740.
[10] EEI at 20.
[11] *See* EEI at 6.
[12] *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973).

today's arbitrary thresholds for what facilities are subject to competitive solicitations will increase the number of entities seeking to participate as interested competitors. I also agree with ETCC that the immediate-need rules must be updated. Many transmission needs today that are described as "immediate-need" are rarely the exigent circumstances the rules envision. My first-hand experience with "immediate-need" projects bolsters my concerns that the rules are in need of an overhaul. PJM baseline needs b3087.1-b3087.4 were presented as immediate-need to PJM stakeholders in November 2018 with a necessary in-service date of December 2019.[13] PJM currently lists those projects in the Engineering and Procurement phases, with between 0–25 percent of the project completed (per the percentage designations included in PJM Manual 14B) and a new required in-service date of December 1, 2023.

All of this is to say, if the Commission's Order 1000 did not give us what we hoped it would in terms of increased competition and maximization of the public interest from that competition, instead of going back to what we know does not work, we should stop the "one-foot-in-one-foot-out" paradigm we have today, and instead jump into transmission competition headfirst. A significant reduction in remaining ROFRs, or exceptions to competition, whether that be a bright line voltage threshold or not, is a step in the right direction. This movement must apply to RTO areas, but due consideration should be given to expanding competition to non-RTO areas. However, instead of moving to competition in non-RTO areas in the context of an expansive rulemaking like the present one, I recommend FERC address this issue first through something like a technical conference. I would posit that an entire technical conference dedicated to the issue of competition in non-RTO areas would be a worthy endeavor for state commissions, like Kentucky's, who regulate utilities outside of RTOs, and would provide an opportunity to discuss with the Commission and Commission staff the virtues, concerns, benefits, and opportunities that wholesale competition in a number of areas may bring to non-RTO parts of the country.

Presumption of Prudence

In a subsequent rulemaking, the Commission must address the absurd incentives it has created around cost recovery and changes in wholesale transmission rates. ETCC's comments include a chart of baseline and supplemental investments in PJM over the past 15 years.[14] I am convinced a significant driver of the proliferation of supplemental projects in recent years is that TO investment in supplemental projects is a path of least resistance. For supplemental projects, there is effectively no regulatory oversight. However, the lack of oversight doesn't end at the planning stages. Instead, I have been surprised to learn how little oversight the Commission exerts regarding the cost recovery, and thus rate increases, of transmission investments. TOs are able to recover transmission investments without having to demonstrate expenditures are prudent "unless the Commission's filing requirements, policy or precedent otherwise require."[15] This was highlighted by a number of the initial comments in this matter, including those of NARUC. NARUC, in offering a solution to contain costs, recommended "the Commission explore whether there is some limit at which the presumption of prudence no longer applies and ratepayers would benefit from an automatic review of the prudence of an expenditure."[16] I agree changes are necessary.

[13] PJM's November 2018 presentation of those needs is included with the reply comments as Appendix A.
[14] Initial Comments of ETCC at 23 [Hereinafter ETCC].
[15] *Minnesota Power & Light Co.*, Opinion No. 86, 11 FERC ¶ 61,312 at 61,644–45 (1980).
[16] Initial Comments of NARUC at 51 [Hereinafter NARUC].

It is incomprehensible to me as a retail regulator that many FERC-regulated utilities are able to increase rates as a matter of process or paperwork; that monopoly utilities get to recover costs merely because they expended them. Instead of requiring TOs, for instance, to bear the burden of proof as to why their investments are prudent and should be recovered through just and reasonable rates, the current paradigm allows those utilities to recover those costs, effectively as a matter of right, and the burden of proof falls on the rest of us to show why an investment was *not* prudent. Besides the inherent issue of information asymmetry – that the utility has all the information for why their investment was prudent, while the public has little to no information on why it would be imprudent – that the entity which receives the economic benefit of the investment, namely the return on the capital, does not bear the burden of proof seems patently unjust. I am unaware of a situation whereby a customer has proven a transmission investment was imprudent. Frankly, I cannot imagine a situation where a member of the public, without any access to discovery, would have the information necessary to prove imprudence in an administrative proceeding. As a tool to ensure cost containment and efficient transmission planning, the Commission should give some consideration to amending today's practice of presuming prudence of all transmission investment. The Commission's options are numerous.

The Commission could outright reverse its current policy of not requiring jurisdictional utilities "demonstrate in their cases-in-chief that all expenditures were prudent."[17] However, it appears the Commission began this "practice to ensure that rate cases are manageable."[18] It is understandable that the Commission may continue to choose to not review "all expenditures," particularly those costs that the utility has no economic incentive to inflate, like O&M expenses. The practical effect of the Commission's policy is that a concern for the workload associated with reviewing "all expenditures," has resulted in the Commission currently reviewing *none of them*. The Commission should instead determine which of those expenditures it feels the utilities are most economically incentivized to inflate, and either remove the presumption of prudence, place the entire burden of proof on the utility (consistent with Section 205 of the FPA), or lower the burden of proof to show imprudence under today's policy for those members of the public concerned about the prudence of an investment. This lower burden of proof to show imprudence would be reasonable given the information asymmetry that exists between utilities and the rest of us. Without some risk of denial of expenses based on a finding of imprudence, TOs have no moral hazard and instead have an economic incentive to <u>increase</u> capital investments beyond what the public convenience and necessity demands. The current policy creates a cash printing operation for incumbent TOs and short of hoping that for-profit firms altruistically shirk their responsibilities to shareholders and instead act exclusively in "the best interest of the customer," the policy is unjust and unreasonable.[19]

Another option put forth by initial commenters is to limit the types of investments that receive the benefit of the Commission's policy of presuming prudence. For instance, the ETCC comments that TOs should be required to "affirmatively demonstrate" the prudence of investments "not

[17] *Iroquois Gas Transmission Sys.*, L.P., 87 FERC ¶ 61,295, at 62,168 (1999), quoting *Minnesota Power & Light Company*, 11 FERC ¶ 61,312 at 61,644–45.
[18] *Iroquois Gas Transmission Sys.*, L.P. 87 FERC ¶ 61,295, at 62,168.
[19] EEI at 21.

offered for competitive solicitation."[20] This seemingly would apply both within and outside of RTO areas. Others, and notably the California Public Utilities Commission ("CPUC"), argue the prudency presumption should apply only to projects approved through independently administered transmission planning processes, such as those that can be conducted by RTOs.[21] Subject to my concerns around systemic issues that call into question RTOs' ability to operate independently (most notably, TOs using threats of leaving RTOs to effect outcomes to their benefit, and RTO governance issues), this suggestion has merit. As previously indicated, I believe money and focus will move to the processes that reflect the path of least resistance to cost recovery and thus increased rates. The easier it is for RTO-planned transmission investments to be made and recovered and the harder it is for local projects to be recovered, assuming all else equal, more capital will flow to the former than the latter. Furthermore, for non-RTO areas that may not include the competition the ETCC desires, or the independently administered processes noted by the CPUC, retail regulators likely already have the ability and processes to review investments. Indeed, LG&E/KU, both of whom are not RTO members, must seek Kentucky PSC approval of rate recovery for transmission investments. They bear the burden of proof in each rate proceeding for the entirety of their investments, as well as other expenses. If FERC believes requiring the same level of scrutiny for "all expenditures" is unworkable, there is a solution that allows some utilities to receive the scrutiny of certain transmission investment at the retail level if the Commission can increase the scrutiny or burden of proof for the remainder of transmission investments.

Finally, regardless of the presumption of prudence policy discussed above, the Commission could consider amending its rules applicable to formula rates vis-à-vis Section 205 of the FPA. As the Commission has previously explained, "[w]ith formula rates, the formula itself is the rate, not the particular components of the formula."[22] "Periodic adjustments" of the rates, such as an update to the ROE or annual changes in net investment rate base, "do not constitute changes in the rate itself and accordingly do not require section 205 filings."[23] This, coupled with the presumption of prudence, should be two places the Commission could start if it is genuinely concerned with cost containment. State commissions, consumer advocates, and other stakeholders are interested in addressing issues at the wholesale level. However, with policies like this, the deck is so stacked against them it seems like a waste of precious resources to even participate in or challenge filings made at the Commission.

Independent Transmission Monitor (ITM)

I further agree with NARUC in that the Commission should "consider the cost containment benefits that could be attained by ITMs in each RTO/ISO and non-RTO/ISO region," but I believe the benefit of an ITM can be greater than merely acting as an economic watchdog.[24] For instance, an ITM can review and scrutinize local transmission planning criteria to ensure it is adequate, reasonable and consistently applied. My experience with PJM's M3 local transmission planning process leads me to believe it is in desperate need of an independent and knowledgeable participant

[20] ETCC at 36.
[21] Initial Comments of CPUC at 47–48.
[22] *Ocean State Power II*, 69 FERC ¶ 61,146, 61,544 (1994).
[23] *Ocean State Power II*, 69 FERC ¶ 61,146, 61,544–545 (1994).
[24] NARUC at 54.

with a mandate to act in the public interest. PJM does not, and likely cannot, currently fill the role in the M3 process that an ITM could, particularly given its current status as a facilitator. The ITM could also ensure that the separate, parallel processes of local and regional planning are brought together as much as is practical or reasonable. Having an independent entity provide assistance in the efficient planning of the interstate transmission system is important not just for customers' bills, but for reliability. A system whose planning focus is exclusively on costs runs the risk of being unreliable, while planning a system with only reliability in mind ignores the costs that redundancy drives. FERC should consider ITMs for the RTO regions to provide an impartial, independent, expert review of proposed transmission projects. An ITM could provide direct oversight of the proposed and actual costs of transmission being built within an RTO, maintain direct contact with FERC, and ensure that proposed projects are sufficiently regional or interregional in scope and in benefits delivered.

RTO Membership

Although I am not yet prepared to wholly support LS Power Grid, LLC ("LS Power")'s call for mandatory RTO participation, I do agree with a significant number of the problems they identify with the current scheme that they believe mandatory RTO membership will fix. [25] For instance, any attempt to move transmission planning at PJM towards benefiting customers is met with immediate resistance from at least 1/5 of the sector-weighted senior committees (Transmission Owners), who also effectively control PJM's Planning Committee – where the majority of transmission-related rule changes would have to be initiated, vetted, and voted up from. Similarly, RTO expansion, and the consumer benefits it can bring, has stalled. Instead, transmission-owning utilities have resorted to creating a Potemkin village of an RTO in the Southeast Energy Exchange Market ("SEEM"). The SEEM of course is not an RTO, or even an EIM, but is instead a digital bulletin board for member-TOs to buy and sell energy when it is convenient and affordable, subject to excess capacity on the transmission systems of member-TOs. Although some may consider SEEM a step in the right direction, I believe it to be more of a step backwards, and fear SEEM's member-TOs will use the "savings" created by the venture to erode any benefit-cost analysis of RTO membership. Although I am not yet ready to call for mandatory RTO membership, the problems with voluntary membership are clear and should be addressed in some form through a rule-making process.

Lastly on this subject, it is important for the Commission and stakeholders to appreciate what role some retail regulators play in RTO membership. Today, TOs do use the voluntary nature of RTO membership as a vehicle to advance their own interests. However, some utilities are required by law to be a member of an RTO, while other TOs require state commission approval to join and leave an RTO, by virtue of the fact functional control of the transmission system to and from the RTO is required. The Kentucky PSC has permitted four utilities to join RTOs, and it has further allowed two utilities, LG&E and KU, to leave an RTO. As such, state laws or state commissions serve as a sort of backstop to determine whether not or even if TOs can actually leave an RTO, as their threats may indicate. Whether some utilities' threats are idle or not, many of them do not get the last word in their RTO membership. But for this nuance in states like Kentucky, I would support mandatory RTO membership, and I understand why regulators in other jurisdictions that do not have the same authority as the Kentucky PSC may support it too. As such, I would

[25] Initial Comments of LS Power Grid LLC at 65–72.

appreciate maintaining the Kentucky PSC's authority to determine the RTO membership status of Kentucky utilities.

Conclusion

As previously mentioned, the Kentucky PSC has permitted utilities to leave an RTO without any intention to join another. In 2006, the Kentucky PSC approved LG&E/KU's withdrawal from MISO over then-Kentucky PSC Chairman Mark David Goss' objection and dissent. I am unaware of any instance in which other utilities have otherwise left one RTO and not joined another. Regardless, the dissent of Chairman Goss in that matter was well-reasoned and ultimately, 15 years later, turned out to be quite prescient. I believe the message of a portion of Chairman Goss' dissent may prove to be particularly informative to the Commission as to the perspective of a forward-thinking retail regulator dealing with RTO membership and governance at MISO's inception, particularly pre-Order 1000:

> It is also important that Kentucky and the Companies [LG&E/KU] play a role in MISO's regional transmission planning initiatives. Under MISO's planning procedures, Kentucky would be able to maintain some voice in the process of siting transmission, including sharing the cost of lines that have regional benefits, as lines through Kentucky would likely have. The Companies have been quick to point out that they do not want to pay for any portion of lines in other states that have regional benefits, and the Commission has largely agreed in the past. In the coming years, however, there will likely be transmission lines proposed in Kentucky, having regional benefits that would be paid for in part by other states' ratepayers. These lines will benefit Kentucky by increasing the ability of Kentucky's utilities and merchant plants to export power to higher cost states. The Companies' ratepayers will see benefits from this process because congestion would be reduced, thereby further ensuring that Kentucky's native load will receive the lowest cost power available while maximizing the Companies' ability to sell surplus or higher cost power, the benefits of which should flow back to the ratepayers. I believe that this decision undermines our participation in and impact on this planning.[26]

Kentuckians have seen the benefit RTOs and interregional transmission planning can provide for over 15 years. The Commission has a unique opportunity following this ANOPR to increase the benefits that interstate transmission can provide, while reducing the costs and burdens today's rules place on customers. However, I am concerned with the risk this ANOPR represents, best described by Commissioner Christie in his concurrence in this matter. As Commissioner Christie stated, "some proposals [contained in the ANOPR] … could potentially cause massive increases in

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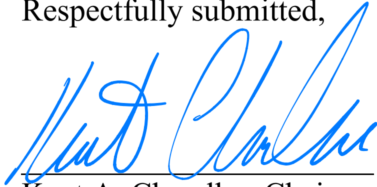
[26] Case No. 2003-00266, *Investigation Into The Membership Of Louisville Gas And Electric Company And Kentucky Utilities Company In The Midwest Independent Transmission System Operator, Inc.*, Dissent of Chairman Mark David Goss (Ky. PSC May 31, 2006) at 29–30.

consumers' bills for little to no commensurate benefit."[27] Respectfully, Kentucky consumers have been sold those types of policies at the wholesale level for too many years already, and they're tired of paying for it.

Respectfully submitted,



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[27] ANOPR, Christie Concurrence at 2, ¶ 5.

Document Content(s)

RM21-17 Chairman Chandler ANOPR Reply Comments Signed.pdf.................1