

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

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| Transmission Planning and Cost Management |) | Docket Nos. AD22-8-000 |
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| Joint Federal-State Task Force on Electric Transmission |) | AD21-15-000 |
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**Motion for Leave to Reply
And Reply Comments of WIRES**

Pursuant to Rules 212 and 213 of the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) Rules of Practice and Procedure,¹ WIRES² requests leave to reply and hereby submits the following reply to certain initial comments filed in this proceeding.³

On March 23, 2023, WIRES submitted comments along with supporting material on the October 6, 2022 technical conference convened by the Commission to discuss transmission planning and cost management for transmission facilities developed through local or regional transmission planning processes (“October 6 technical conference”).⁴ In its comments, WIRES explained that, in light of the numerous studies showing the

¹ 18 C.F.R. §§ 385.212 & .213 (2022).

² For more information about WIRES, please visit www.wiresgroup.com.

³ This filing is supported by the full supporting members of WIRES but does not necessarily reflect the views of the RTO/ISO associate members of WIRES.

⁴ Post-Technical Conference Comments of WIRES, Docket No. AD22-8 (Mar. 23, 2023) (“WIRES Comments”).

tremendous benefits transmission investment provides and that the need for new transmission has never been greater, it is critical that the Commission adopt and implement policies designed to promote and facilitate transmission investment that is needed for the future energy needs of customers, and of the nation.⁵ In light of these circumstances, WIRES cautioned the Commission against trying to fix what is not proven to be broken or, notwithstanding the best of intentions, establishing policy that is inadvertently counterproductive to getting needed transmission infrastructure built efficiently and cost effectively or leads to unintended consequences. WIRES asks leave to submit these reply comments to further address certain issues in light of matters raised in some parties' initial comments.

I. Motion for Leave to Reply

WIRES respectfully requests that the Commission accept this Reply because it will aid the Commission in understanding issues raised in certain initial comments filed in this proceeding and will assist the Commission in its decision-making process.⁶

⁵ WIRES Comments at pp. 2-5 citing The Brattle Group, *Employment and Economic Benefits of Transmission Infrastructure Investment in the U.S. and Canada*, at 33 (May 2011); London Economics International, Inc. ("LEI"), *How Does Electric Transmission Benefit You?* (Jan. 2018) (LEI Report); The Brattle Group, *Recognizing the Role of Transmission In Electric System Resilience* (May 2018); The Brattle Group, *The Benefits of Electric Transmission: Identifying and Analyzing the Value of Investments* (July 2013); The Brattle Group, *The Coming Electrification of the North American Economy, Why We Need A Robust Transmission Grid* (March 2019); ScottMadden, Inc., *Informing the Transmission Discussion: A Look at Renewables Integration and Resilience Issues for Power Transmission in Selected Regions of the United States* (Jan. 2020).

⁶ See, e.g., *Algonquin Gas Transmission, LLC*, 153 FERC ¶ 61,111 at n.5 (2015) (accepting answer to answer "since it will not delay the proceeding, may assist the Commission in understanding the issues raised, and will ensure a complete record."); *Fla. Gas Transmission Co.*, 106 FERC ¶ 61,139 at P 3 (2004) (allowing answer in order to achieve a more complete record in the proceeding); *PJM Interconnection, LLC*, 116 FERC ¶ 61,140 at PP 16 & 18 (2006) (allowing answer that assisted in the decision-making process); *Midcontinent Indep. Sys. Operator, Inc.*, 152 FERC ¶ 61,104 at P 27 (2015) (same).

II. Reply Comments

A. Independent Transmission Monitor

In its initial comments, WIRES maintained that there are fundamental legal, evidentiary, and policy issues with the notion of requiring transmission providers to establish an independent entity to monitor the planning and cost of transmission facilities in the region.⁷ WIRES pointed out that there is a critical threshold legal question as to whether establishing a requirement of an Independent Transmission Monitor (“ITM”) conflicts with the subdelegation doctrine which prohibits an agency from delegating its core statutory functions to private entities.⁸ WIRES further explained that, apart from vague concerns about having to pay for more transmission if it is built, there is no evidence that existing processes or tariffs are producing unjust and unreasonable outcomes.⁹ On the other hand, an ITM requirement would only add to the costs and delay transmission planning as it would duplicate roles already performed by RTOs/ISOs, the North American Electric Reliability Corporation, state consumer advocates, state commissions, and even the Commission itself.¹⁰

The comments submitted in this proceeding make clear that WIRES’s concerns regarding the establishment of an ITM were well-founded. The range of functions proposed by some commenters for an ITM is breathtaking. Proposals run the gamut from

⁷ WIRES Comments at pp. 12-16.

⁸ *Id.* at 12 citing *U.S. Telecom Assoc. v. FCC*, 359 F.3d 554, 555-56 (D.C. Cir. 2004).

⁹ *Id.* at 14.

¹⁰ *Id.* at 14-16.

data collection, coordination, and dissemination to cost review and ratemaking functions,¹¹ to “dispute resolution,”¹² to supplementing FERC audit¹³ and enforcement activities.¹⁴ Self-evidently, these are tasks that must be performed by the Commission itself, not a private entity. To the extent the Commission were to confer these types of ratemaking and other oversight functions on an ITM or any other third party, it would be impermissibly exercising delegated authority.

Some commenters simply point to the broad language in the Federal Power Act (“FPA”) charging the Commission with overseeing and regulating transmission costs or setting just and reasonable rates for transmission service to justify creating and empowering an ITM.¹⁵ But these assertions simply underscore the problem with the ITM proposal. It is axiomatic that a federal agency such as FERC is barred from delegating its statutorily prescribed duties, like those specified in the FPA, to a third party.¹⁶ Because the FPA expressly directs the Commission, not a separate third party, to regulate and

¹¹ See Comment of the Harvard Electricity Law Initiative at 22 (Mar. 23, 2023) (ITM’s role is to “ensure that Commission-jurisdictional rates and processes are just and reasonable and not unduly discriminatory” and “protect transmission customers and non-incumbent developers from undue discrimination...”).

¹² See Post-Technical Conference Comments of the ITM Coalition at pp.3, 10 (Mar. 23, 2023).

¹³ *Id.* at pp. 7-8.

¹⁴ See Post-Technical Conference Comments of Cypress Creek Renewables, LLC, at p. 21 (Mar. 23, 2023).

¹⁵ See *e.g.*, Comments of the New England States Committee on Electricity at p. 5 (Mar. 23, 2023) (“NESCOE Comments”); Comments of the Industrial Customer Organizations at p. 5 (Mar. 23, 2023). They also analogize creation of an ITM to the Commission’s creation of Independent Market Monitors (“IMM”). *Id.* at p. 8 and NESCOE Comments at 6-10 and 13-15. However, these Commenters neglect to point out that no court has ever reviewed or ruled on the question of whether the functions and responsibilities given to the IMMs violate the subdelegation doctrine.

¹⁶ *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) (“when Congress has specifically vested an agency with the authority to administer a statute, it may not shift that responsibility to a private actor.”)

oversee rates, terms and conditions of transmission service, any shift of those responsibilities to an ITM or any similar entity would be impermissible.¹⁷

In an effort presumably to avoid illegal subdelegation concerns, some commenters urge establishing ITMs with a job description that would undertake and duplicate activities and functions that are either the responsibility of or already being performed by others. For instance, some stakeholders suggest that ITMs should perform as a substitute for or supplement to state commissions, reliability authorities, RTOs/ISOs, consumer advocates, customers, or other stakeholders.¹⁸ However, the record simply does not establish that as a generic matter these entities are unable to perform their roles or are incapable of participating in transmission planning processes. In these circumstances, the irony of asking customers to pay for the added cost (and delay) of duplicating existing roles and processes in a proceeding to explore ways of containing costs for transmission should not be overlooked. Nor should such requests be entertained.

B. Transmission Formula Rates

WIRES's initial comments explained how current transmission formula rates ("TFR") processes use a formulaic approach that sets forth templates outlining the rate

¹⁷ See Comment of the Harvard Electricity Law Initiative at p.19 (proposing, in addition to an ITM, a "Ratepayer Transmission Monitor" ("RTM") that "would help the Commission fill an important gap in its transmission rate oversight."). Indeed, the Harvard Electricity Law Initiative implicitly acknowledges the potential legal obstacles to the Commission mandating either an ITM or its new RTM scheme by instead suggesting that "the Commission could encourage utilities to adopt an RTM, rather than imposing it through a section 206 proceeding."

¹⁸ See *e.g.*, Post-Technical Conference Comments of Cypress Creek Renewables, LLC, at p.18-20.

calculation and protocols for stakeholder participation, access to information and opportunities to review, verify, and challenge inputs.¹⁹ These procedures provide stakeholders with a means for requesting and obtaining information, raising informal and formal challenges, and making corrections to annual updates in a timely and efficient manner.²⁰ Importantly, the processes under the protocols provide customers, state commissions, consumer advocates, and other stakeholders the opportunity to “challenge the inputs to the formula rate in the same way as they can challenge costs in a stated rate case.”²¹ While not all interested parties might choose to avail themselves of the many opportunities to fully participate in the process that the formula rate protocols provide, the record shows that they are aware of those processes and can – and frequently do – avail themselves of those opportunities.²² Stakeholders know they can bring informal and formal challenges through the formula rate protocols to ratemaking inputs should they choose to do so, and they have in fact done so.²³ This opportunity is available every year, which provides an opportunity that may not be available with alternate approaches such as a stated rate case, which does not occur annually. Moreover, the Commission’s

¹⁹ WIRES Comments at pp. 17-19. WIRES also provided a recent Primer on TFRs prepared by LEI that thoroughly describes how TFR protocols establish the parameters of stakeholder discovery, review, interaction with the transmission owners, and oversight of updates, including timelines for review, requesting information, and raising challenges. See London Economics International LLC, *Primer on Transmission Formula Rates*, (Feb. 2023) (“LEI Primer”).

²⁰ LEI Primer at pp. 15-17.

²¹ *Delmarva Power & Light Co.*, 145 FERC ¶ 61,055 (2013).

²² LEI Primer at pp. 25-26 (industry surveys indicate that it is typical to receive over 100 information requests during the formula rate annual review period in addition to multiple subparts or several rounds of follow-up).

²³ See, e.g., *Michigan Elec. Transmission Co., LLC*, 156 FERC ¶ 61,026 (2016); *ITC Midwest LLC*, 154 FERC ¶ 61,188 (2016).

own Division of Accounting and Audits also performs annual audits of selected formula rates each year. As none of the comments refute the record evidence of the opportunity to fully examine, question, and challenge the rates set through the formula rate process, there is no demonstrated need for the Commission to modify current formula rate protocols or in any way restrict current use of TFRs. The current approach provides regular and adequate opportunity for stakeholder review, input and as needed, challenge. Moreover, some commenters readily acknowledge that limiting the use of TFRs could create the perverse result of inhibiting the ability to get needed transmission projects built.²⁴ In WIRES's view, the formula rate case process is more flexible than general stated rate cases and provides more opportunity for stakeholder input on a more regular basis. The Commission should consider the benefits of formula rate processes, with its annual reviews, as compared to the stated rate process that would set rates for a longer period of time with different thresholds for participation between filings.

One particularly unreasonable proposal in the comments pushes the Commission to limit TFRs only to competitive developers and to the exclusion of all others.²⁵ Not surprisingly, that proposal is made by entities that would benefit from such discriminatory treatment and also stand to benefit should the resulting policy slow transmission development altogether. The short answer is that there is no record basis or legal basis for justifying discriminatory treatment between competitively procured

²⁴ See LS Power Grid, LLC Answers to Post-Technical Conference Questions at p.23 (Mar. 23, 2023) (acknowledging that restricting use of TFRs “can limit the incentive to invest” in projects).

²⁵ See Post-Technical Conference Comments of LS Power Grid, LLC and NRG Energy, Inc., at pp.

projects and any other projects when it comes to the ability to use TFRs. As a result, this outlier proposal should be summarily rejected.

Finally, the Commission should reject calls from some commenters to limit or eliminate the longstanding rebuttable presumption of prudence which has for decades provided transmission developers with the ability to efficiently and with a degree of certainty invest in transmission projects that are essential to a reliable and affordable transmission system. Casting doubt on the ability of transmission developers to recover their costs will only increase investment risk and uncertainty, inhibit or prevent needed investment in transmission, and jeopardize the ability to build the expanded grid that is warranted to meet the nation's resilience, electrification, and clean energy needs in the decades ahead. The record does not justify such a radical and negatively impactful step.

III. Conclusion

WIRES respectfully submits these reply comments for consideration by the Commission as it considers whether further action, if any, is warranted on these matters.

Respectfully submitted,



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