

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

Improvements to Generator Interconnection)
Procedures and Agreements) **Docket No. RM22-14-000**

REQUEST FOR REHEARING AND/OR FOR CLARIFICATION OF WIRES

Pursuant to Section 313 of the Federal Power Act (“FPA”)¹ and Rule 713 of the Rules of Practice and Procedure² of the Federal Energy Regulatory Commission (“Commission” or “FERC”), WIRES³ hereby respectfully submits this Request for Rehearing and/or for Clarification of the Final Rule issued on July 28, 2023 in the above-caption proceeding.⁴

I. INTRODUCTION

Order No. 2023 is the culmination of the Commission’s effort to revisit and consider reforms to the Commission’s current *pro forma* interconnection procedures and agreements to facilitate expediting the interconnection of ready generation while also accommodating the future generation resource mix.⁵ That effort began with the Commission’s issuance of an Advance Notice of Proposed Rulemaking (“ANOPR”) issued pursuant to section 206 of the FPA⁶ to reexamine regional transmission planning, cost allocation, and generator interconnection

¹ 16 U.S.C. § 825I.

² 18 C.F.R. § 385.713.

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 *Improvements to Generator Interconnection Procedures and Agreements*, Order No. 2023, 184 FERC ¶ 61,054 (2023) (“Order No. 2023” or “Final Rule”).

⁵ Comments of WIRES, October 13, 2022 (“WIRES Comments”).

⁶ 16 U.S.C. § 824e.

processes to fully account for the future energy needs of customers, and of the nation.⁷ While WIRES generally supported the Commission’s review of these processes to better prepare for the future, WIRES urged the Commission to avoid trying to fix what is not broken or, notwithstanding the best of intentions, inadvertently create unintended consequences or counterproductive measures.

Following consideration of the comments submitted in response to the ANOPR, the Commission proposed reforms to its *pro forma* generator interconnection procedures and agreements to address interconnection queue backlogs, improve certainty, and prevent undue discrimination for new technologies.⁸ While WIRES generally supported core aspects of the proposed rule, WIRES asked the Commission to clarify or reconsider certain aspects of the proposed reforms that were at odds with the goal of expediting the interconnection of ready customers to the transmission system in a reliable, efficient, transparent, and timely manner. In particular, WIRES opposed the Commission’s proposal to eliminate the longstanding reasonable efforts standard for transmission providers completing interconnection studies and instead establish firm study deadlines and penalties for failure to meet those deadlines except in situations where force majeure is determined to be applicable. In addition, WIRES urged the Commission to adopt a flexible approach toward accommodating efforts that are already under way in several regions to adopt or implement already approved generator interconnection reforms that are consistent with the Commission’s objectives in the proposed rule and are

⁷ *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, Notice of Proposed Rulemaking, 176 FERC ¶ 61,024 (2021) (“ANOPR”).

⁸ *Improvements to Generator Interconnection Procedures and Agreements*, Notice of Proposed Rulemaking, 179 FERC ¶ 61,194 (2022) (“Interconnection NOPR”). Previously, the Commission proposed changes to existing regional transmission planning and cost allocations processes in a separate proceeding that remains pending. *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, Notice of Proposed Rulemaking, 179 FERC ¶ 61,028 (2022).

designed to improve queue processing and ensure that interconnecting generators that are prepared to go forward with their projects are prioritized in the interconnection process. As discussed herein, WIRES seeks rehearing and/or clarification of certain aspects of the final rule relating to some of the concerns raised in WIRES' earlier comments.

II. SPECIFICATIONS OF ERROR AND STATEMENT OF ISSUES

In accordance with 18 C.F.R. § 385.713(c)(1) and (2), WIRES provides the following specifications of error and statement of issues, including citations to representative Commission and court precedent:

- 1. The Commission's Decision to Abandon its Long-Standing Reasonable Efforts Standard and Impose a Strict Liability Penalty Structure is Arbitrary and Capricious and not Supported by Substantial Evidence.⁹**
- 2. Elimination of the Reasonable Efforts Standard is not Reasoned Decision Making because it will be Counterproductive to the Commission's Goal of Expediting Interconnection Queue Processing.¹⁰**
- 3. The Commission Acted Arbitrarily and Capriciously and Failed to Engage in Reasoned Decision Making in its Determination to Apply Withdrawal Penalties to Network Upgrade Costs¹¹**

III. REQUESTS FOR REHEARING

- A. The Commission Failed to Engage in Reasoned Decision Making in Determining that the Reasonable Efforts Standard is Unjust and Unreasonable and in Imposing as a Remedy Instead a Strict Liability Penalty Scheme.**

For nearly two decades, transmission providers were subject under the *pro forma* Large Generator Interconnection Procedures ("LGIP") to a reasonable efforts standard in processing and analyzing interconnection requests, including completing various studies within certain

⁹ See *Emera Me. v. FERC*, 854 F.3d 9, 21 (D.C. Cir. 2017) ("*Emera*"); *Wis. Gas Co. v. FERC*, 770 F.2d 1144, 1156 (D.C. Cir. 1985); *City of Holyoke Gas & Elec. Dep't v. FERC*, 954 F.2d 740, 743 (D.C. Cir. 1992)

¹⁰ See *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 641 (D.C. Cir. 2010); *City of Holyoke Gas & Elec. Dep't v. FERC*, 954 F.2d 740, 743 (D.C. Cir. 1992)

¹¹ See 5 U.S.C. § 553.

prescribed timeframes.¹² The reasonable efforts standard is a just and reasonable approach because it recognizes the fact that the interconnection study process is fluid and subject to decisions and actions taken by entities beyond the control of the transmission provider, as well as other systemic or emergent issues that can arise in utility operations and planning. In addition, and in recognition of the fact that the complexities of the process do not lend themselves to specific timelines that are identically suited for every project, the *pro forma* LGIP did not include any penalties or financial consequences if a transmission provider failed to meet any of these deadlines.

Order No. 2023 upended these practices by eliminating the longstanding reasonable efforts standard and imposing on transmission providers a strict penalties regime. The penalties can apply even when a transmission provider that fails to complete a study by the deadline is not at fault and follows Good Utility Practice. Penalties are triggered with no consideration for the cause of the delay such as the intervening actions of others, the need for restudy, or changes to a proposed interconnection request. The Commission’s rationale for this reversal of policy is based on its conclusion that there are lengthy interconnection study delays and interconnection queue backlogs throughout the country and the reasonable efforts standard does not provide an adequate incentive for transmission providers to complete interconnection studies on time”¹³

As a threshold matter, the Commission has not met its initial burden under section 206 of the FPA to demonstrate that the reasonable efforts standard is not just and reasonable.¹⁴ The

¹² *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61,103 (2003), *order on reh’g*, Order No. 2003-A, 106 FERC ¶ 61,220, *order on reh’g*, Order No. 2003-B, 109 FERC ¶ 61,287 (2004), *order on reh’g*, Order No. 2003-C, 111 FERC ¶ 61,401 (2005), *aff’d sub nom. Nat’l Ass’n of Regul. Util. Comm’rs v FERC*, 475 F.3d 1277 (D.C. Cir. 2007); *pro forma* LGIP sections 2.2, 6.3, 7.4, and 8.3.

¹³ Order No. 2023 at P 964.

¹⁴ *See Emera Me. v. FERC*, 854 F.3d 9, 21 (D.C. Cir. 2017)(“*Emera*”). *See also* 16 U.S.C. § 824e(b) (“In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation,

finding that the longstanding reasonable efforts standard is no longer just and reasonable must be supported by substantial evidence.¹⁵ When applied to rulemaking proceedings, the substantial evidence test “is identical to the familiar arbitrary and capricious standard,” which “requires the Commission to specify the evidence on which it relied and to explain how that evidence supports the conclusion it reached.”¹⁶

The Commission asserts that its finding that the reasonable efforts standard is no longer just and reasonable is supported by “[t]he lengthy interconnection study delays and interconnection queue backlogs throughout the country....”¹⁷ According to the Commission, these delays and backlogs show that the reasonable efforts standard does not provide an adequate incentive for transmission providers to complete interconnection studies on time.¹⁸ In other words, the Commission appears to draw a connection between delays and backlogs and action or inaction by transmission providers. However, the Commission undercuts its own rationale that the reasonable efforts standard is the cause of study delays and queue backlogs by finding that there are in fact many “factors contributing to significant interconnection queue backlogs and delay – including the rapidly changing resource mix, market forces, and emerging technologies” that “will persist.”¹⁹ Thus, the Commission concedes that delays in interconnection studies often are not the fault of the transmission provider. Indeed, the Commission expressly states “that we

practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be on the Commission or the complainant.”).

¹⁵ See *City of Holyoke Gas & Elec. Dep’t v. FERC*, 954 F.2d 740, 743 (D.C. Cir. 1992) (“The Commission must support its decision with enough data to enable an adversely affected party and by extension a reviewing court, to understand its calculation of the comparison rate upon which it would rely, as well as the underlying assumptions.”).

¹⁶ *Wis. Gas Co. v. FERC*, 770 F.2d 1144, 1156 (D.C. Cir. 1985) (internal quotation marks omitted).

¹⁷ Order No. 2023 at P 966.

¹⁸ *Id.*

¹⁹ *Id.*

are not finding that transmission providers have necessarily acted in bad faith or that their actions are the sole reason for the queue delays.”²⁰ The Commission’s mixed, and in many ways conflicting, findings about transmission providers’ role (or lack thereof) in the delays in interconnection studies and queue backlogs are an inadequate justification for rejecting the reasonable efforts standard. Moreover, because the Commission failed to explain why the existing reasonable efforts standard, which recognizes the fact that the interconnection study process is subject to the many factors, decisions and actions taken by entities beyond the control of the transmission provider, is not adequate to account for those variables, rehearing should be granted.

Even assuming that the Commission satisfied its burden under section 206 of demonstrating that the existing reasonable efforts standard is unjust and unreasonable, the Commission is required to establish a replacement rule that is just and reasonable and not unduly discriminatory or preferential.²¹ At the outset, the rigid penalty scheme imposed by Order No. 2023 is not just and reasonable because its strict liability approach would sanction transmission providers for missing interconnection study deadlines for reasons that are beyond the control of the transmission provider. Strict liability for penalties would only accomplish the objective of meeting interconnection study deadlines if the penalties are imposed upon entities with full control over the interconnection study process. But the Commission’s own findings make clear that often interconnection study deadlines are delayed for reasons that are beyond the control of the transmission provider, and frequently cannot be easily attributed to any one of the numerous involved stakeholders.²² Imposing strict liability penalties on transmission providers for missing

²⁰ *Id.*

²¹ *Emera*, 854 F.3d at 21.

²² Order No. 2023 at P 966.

study deadlines is illogical if the reason for missing a deadline is beyond sole control of the transmission provider and, thus, will not accomplish the purpose underlying the penalties of compliance with study deadlines. Because imposing strict penalties on transmission providers cannot address the Commission's goal of reducing delays in studies caused by reasons that are beyond the control of the transmission provider, the strict penalties provision of Order No. 2023 cannot be just and reasonable and should be reversed.

B. The Commission's Strict Liability Penalty Scheme is Not the Product of Reasoned Decision Making Because it is at Odds with The Commission's Stated Goal of Streamlining and Expediting the Interconnection Process.

In its initial comments and reply comments on the Interconnection NOPR, WIRES (and many others) opposed the Commission's proposal to eliminate the reasonable efforts standard and instead require a strict penalties scheme for missed study deadlines not only because it will impose an unjust and unreasonable burden on transmission providers, but also because it will result in adverse consequences that will be counterproductive to expediting interconnection queue processing.²³ Specifically, WIRES pointed out that elimination of the reasonable efforts standard in favor of a strict penalties regime would necessarily result in transmission providers needing to take a more rigid approach to management of the interconnection queue.²⁴ In order to adhere to strict study deadlines and avoid imposition of penalties, transmission providers will no longer have the flexibility to accommodate requests by interconnecting parties to redesign projects or to modify their requests if such changes would result in delays to the process and potential penalties.²⁵ Ultimately, the consequence of the rule would be to inhibit efforts to streamline and expedite the interconnection process in a manner that continues to effectively

²³ Comments of WIRES, Oct. 13, 2022 at pp. 7-8; Reply Comments of WIRES, Dec. 14, 2022 at 2-4.

²⁴ *Id.*

²⁵ *Id.*

serve the needs of interconnection customers. Furthermore, it will potentially lead to diminished study quality while sacrificing beneficial but time-consuming flexibility and coordination with interconnection customers.²⁶

In response, the Commission merely indicated that it disagreed with these arguments and asserted that the solution is for transmission providers to improve their interconnection study processes by “hiring additional staff.”²⁷ The Commission further offers vague steps that transmission providers can take to improve processing of interconnection studies “from deploying transmission providers’ resources to exploring administrative efficiencies and innovative study approaches.”²⁸ Such suggestions are more hopeful thinking than discrete, tangible actions that can be undertaken by transmission providers. FERC’s response falls far short of its obligation to engage in reasoned decision making.

The Commission’s decisions must be firmly grounded in substantial evidence, not on “speculation, conjecture, divination,” to survive judicial scrutiny.²⁹ Conclusory assertions unsupported by facts are insufficient.³⁰ The Commission’s response to valid arguments against study delay penalties was simply to brush them aside in conclusory fashion. By failing to respond in a meaningful way to legitimate concerns regarding the negative impacts to optimal system planning that the study delay penalties will cause, the Commission failed to engage in reasoned decision making and should grant rehearing.

²⁶ *Id.*

²⁷ Order No. 2023 at P 1007.

²⁸ *Id.* at P 967.

²⁹ *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 641 (D.C. Cir. 2010).

³⁰ See *City of Holyoke Gas & Elec. Dep’t v. FERC*, 954 F.2d 740, 743 (D.C. Cir. 1992) (“The Commission must support its decision with enough data to enable an adversely affected party and by extension a reviewing court, to understand its calculation of the comparison rate upon which it would rely, as well as the underlying assumptions.”).

IV. Request for Clarification and in the Alternative Rehearing

Order No. 2023 requires withdrawal penalties to be assessed on interconnection customers to discourage late-stage withdrawals from the queue. The rule further provides that any withdrawal penalty funds collected by the transmission provider are to be distributed among the remaining interconnection customers in the relevant cluster. Specifically, Order No. 2023 indicates that such withdrawal penalties are to be used to reduce any net increases to the existing network upgrade cost assignments to remaining customers that saw increased costs as a result of the withdrawing customer.³¹ Order No. 2023 modified the Commission's originally proposed withdrawal penalty framework regarding how the withdrawal penalty funds are to be distributed and provided:

Specifically, after withdrawal penalty funds are used to fund studies conducted under the cluster study process in the same cluster, as proposed in the NOPR, *we modify the proposal to require any remaining withdrawal penalty funds be used to offset net increases to network upgrade cost assignments experienced by interconnection customers* from the same cluster that remain in the interconnection queue and are directly affected by the withdrawal of an interconnection request because they previously shared an obligation to fund a network upgrade with the withdrawn interconnection request in the same cluster.³²

This, read together with the new section 3.7.1.2.2 of the *pro forma*, provides that penalty revenues are not directly returned to non-withdrawing customers; rather, the transmission provider is to use those funds to reduce the costs of network upgrades that are ultimately assigned to non-withdrawing interconnection customers.

³¹ Order No. 2023 at PP 780-813.

³² *Id.* at P 781 (citations omitted) (emphasis added).

WIRES appreciates that, in adopting this rule, the Commission appears to be trying to deliver economic relief by distributing penalty revenues to the interconnection customers who remained in a cluster, and whose network upgrade allocations may have increased as a result of a withdrawing cluster member. However, because penalty revenues do not appear to be directly returned to non-withdrawing customers, it is unclear *how* the rule requires the transmission provider to use those funds to reduce the interconnection customers' Network Upgrade "cost assignment."³³ As a consequence, the rule could be read to require the transmission provider to reduce its construction costs included in rates associated with the network upgrade and preclude it from earning a return on the full cost of the network upgrades that transmission owners develop to serve the needs of the cluster. Thus, in effect, the withdrawal penalty crediting mechanism could infringe upon a transmission provider's right to self-fund network upgrades and earn a return of and on their investment. However, as the Commission's proposed rule never specified, much less suggested, that withdrawal penalties would be used to offset network upgrade costs,³⁴ the Commission should clarify that the Order No. 2023 withdrawal penalty distribution may be used to offset payment amounts by the remaining interconnection customers to the transmission owner but does not affect the overall revenue requirement for the network upgrades. Otherwise, the Commission must provide adequate notice and opportunity for public comment on the consequences, impacts, and legality of, and possible alternatives to, this new

³³ As discussed in subsection 3.7.1.2.4, *Transmission provider will amend executed (or filed unexecuted) LGIAs of the remaining interconnection customers in the same Cluster to apply the remaining Withdrawal Penalty funds to reduce net increases in interconnection customers' Network Upgrade cost assignment* and associated financial security requirements under Article 11.5 of the pro forma LGIA attributable to the impacts of withdrawn interconnection customers on interconnection customers remaining in the same Cluster that had a shared cost assignment for Network Upgrades with the withdrawn interconnection customers. Order No. 2023, Appendix C: *Pro forma* LGIP, § 3.7.1.2.2 Assessment of Network Upgrade Costs Previously Shared with Withdrawn Interconnection Customers in the Same Cluster (emphasis added).

³⁴ Order No. 2023 at P 723 (acknowledging that the Commission proposed that "withdrawal penalty revenues be used to fund studies conducted under the cluster study process.)

withdrawal penalty distribution scheme prior to issuing the final rule as required by the Administrative Procedure Act.³⁵

The Commission could also clarify that the withdrawal penalty funds are to be distributed directly to remaining interconnection customers as cash payments. This would achieve the Commission's apparent objectives without impermissibly interfering with a transmission owner's right to fund network upgrades. A non-withdrawing interconnection customer receiving such a distribution could use those funds to satisfy its obligations under its generator interconnection agreement, including satisfying its ultimate cost responsibility for network upgrades. Under this approach, there would be no infringement upon a transmission owner's ability to self-fund and the commensurate ability to earn a return on the entirety of the network upgrades at issue.

Absent the Commission granting the above clarification, WIRES seeks rehearing on the basis that the Commission failed to provide adequate notice and opportunity for public comment on the consequences, impacts, and legality of, and possible alternatives to, this new withdrawal penalty distribution scheme prior to issuing the final rule as required by the Administrative Procedure Act,³⁶ and failed to consider the effects of its withdrawal distribution penalty. The withdrawal penalty crediting mechanism could infringe upon a transmission owner's right to self-fund network upgrades and earn a return of and on their investment.³⁷

³⁵ 5 U.S.C. § 553.

³⁶ *Id.*

³⁷ *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) (“*Hope*”); *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm’n*, 262 U.S. 679 (1923) (“*Bluefield*”); *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, (D.C. Cir. 1987).

V. New Requirements In Order No. 2023 Require Further Clarification and Consideration.

While the most significant error in Order No. 2023 is the Commission's abandonment of the reasonable efforts standard and establishment of a strict liability penalties regime on transmission providers for missed study deadlines, the new rule also includes new requirements that require clarification or further consideration by the Commission.

First, WIRES generally agrees that the shift from a serial study process to a cluster study process is likely to result in greater efficiency and provide more certainty, however, the Commission has not explained how this new requirement will sync up with ongoing efforts that are already under way. Although the Commission has indicated it does not intend to upset ongoing processes, the Commission should clarify how it plans to accommodate those ongoing efforts.

Second, while Order No. 2023 requires the adoption of heat maps, the Commission should clarify that feasibility studies can continue to be performed under the Independent Entity Regional Variation Standard.

VI. CONCLUSION

For the foregoing reasons, WIRES respectfully requests that the Commission grant rehearing and/or clarification of Order No. 2023.

Respectfully submitted,

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