

**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)	

REQUEST FOR REHEARING AND CLARIFICATION OF WIRES

Pursuant to section 313 of the Federal Power Act (“FPA”)¹ and Rules 212 and 713² of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), WIRES,³ on behalf of its members, respectfully requests rehearing and clarification of certain limited aspects of Order No. 1920, the Final Rule on regional transmission planning and cost allocation, issued on May 13, 2024 in the captioned docket.⁴

I. INTRODUCTION

WIRES supports the Commission’s policies underlying this rulemaking that are focused on “conduct[ing] Long-Term Regional Transmission Planning that will ensure the identification, evaluation, and selection, as well as the allocation of the costs, of more efficient or cost-effective regional transmission solutions to address Long-Term Transmission Needs.”⁵ Sharing this important goal, WIRES recognizes the substantial effort put forth by the Commission in this

¹ 16 U.S.C. § 825*l*.

² 18 C.F.R. §§ 385.212 and 385.713 (2023).

³ WIRES is a non-profit trade association of investor-, publicly-, and cooperatively-owned transmission providers and developers, transmission customers, regional grid managers, and equipment and service companies. WIRES promotes investment in electric transmission and consumer and environmental benefits through development of electric transmission infrastructure. This filing is supported by the full supporting members of WIRES but does not necessarily reflect the views of the Regional Transmission Owner/Independent System Operator (“RTO/ISO”) members of WIRES. For more information about WIRES, please visit www.wiresgroup.com.

⁴ *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation*, Order No. 1920, 187 FERC ¶ 61,068 (issued May 13, 2024) (“Order No. 1920” or “Final Rule”).

⁵ Order No. 1920 at i.

rulemaking and appreciates the steps the Commission is taking in the Final Rule to help ensure that the transmission grid can meet the nation's growing demand for a reliable and affordable energy future.

WIRES is pleased that the Commission has declined to adopt the NOPR proposal to limit the availability of the Construction Work in Progress Incentive.⁶ Taking such an action would have risked sending the wrong signals to the investment community at a time when the Commission is seeking to advance policies that facilitate needed investment in transmission infrastructure so that the grid continues to serve customers safely, reliably and affordably. WIRES and its members look forward to continued engagement with the Commission, RTOs/ISOs, transmission planning regions, policy makers and stakeholders to implement Order No. 1920 in a clear and effective manner.

To this end, it is important that each of the requirements set forth in Order No. 1920 are the result of a clear and unambiguous proposal by the Commission upon which the public, including WIRES and its members, has adequate notice and opportunity for meaningful comment. Likewise, each of the rules and procedures intended to facilitate the timely identification and selection of Long-Term Regional Transmission Facilities must comply with the basic procedural requirements of sound rulemaking so that the Commission develops a complete record on which to base its decision making. In this regard, WIRES respectfully submits that there are two aspects of Order No. 1920 that warrant further review and consideration by the Commission.

First, Order No. 1920 requires transmission providers to amend their Open Access Transmission Tariffs ("Tariffs") to include provisions to reevaluate Long-Term Regional

⁶ Order No. 1920 at P 1547.

Transmission Facilities in three specific circumstances.⁷ Transmission providers have flexibility under the Final Rule to propose the specific criteria for determining when one of three situations occurs.⁸ WIRES supports the flexibility provided, but is concerned that the Commission’s decision to add a new, multi-layered reevaluation framework in the Final Rule represents a major change from the scope of the Notice of Proposed Rulemaking (“NOPR”) issued in this docket.⁹ In raising this concern, it is important to note that WIRES appreciates the inclusion of a framework in the Long-Term Regional Transmission Planning process, as discussed herein below,¹⁰ that allows transmission providers to reevaluate a previously-selected Long-Term Regional Transmission Facility when warranted.¹¹

Order No. 1920’s inclusion of a reevaluation process with expansive details related to reevaluation process requirements - which are significant because they may lead to modifying Long-Term Regional Transmission Facilities or removing such facilities from the regional transmission plan¹² - raise a variety of concerns for WIRES members. In particular, the Commission erred by including a prescriptive reevaluation framework in the Final Rule that also included a benefits (re)analysis without first affording the public adequate opportunity for notice-and-comment consistent with section 553 of the Administrative Procedure Act (“APA”).¹³

These provisions have the potential to undermine, by delay or cancelation, the development and timely completion of Long-Term Regional Transmission Facilities. The fact that such

⁷ *Id.* at PP 1049-50.

⁸ *Id.* at P 1050.

⁹ *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, 179 FERC ¶ 61,028 (issued Apr. 21, 2022) (“NOPR”).

¹⁰ See discussion *infra* at Part IV.

¹¹ Order No. 1920 at P 1049.

¹² *Id.* at P 1050.

¹³ See 5 U.S.C. 553 (b) and (c).

important provisions were not clearly and unambiguously developed and included in the NOPR, or subsequently put out for public notice-and-comment so that all interested parties could have had adequate opportunity to review and provide comments on the newly adopted reevaluation framework, runs afoul of the notice-and-comment requirements of section 553 of the APA¹⁴ and raises serious questions about whether the provisions are a logical outgrowth of the NOPR.¹⁵ To remedy this error, the Commission should revert to the flexible approach as contemplated in the NOPR.

Alternatively, to the extent the Commission declines to grant rehearing to correct this procedural error, WIRES requests that the Commission clarify certain aspects of the Final Rule's reevaluation process, as discussed below. Clarification is necessary so that Order No. 1920 can be implemented in a way that will not undermine the Commission's goal of facilitating planning on a "sufficiently long-term, forward-looking, and comprehensive basis such that transmission providers are identifying, evaluating, and selecting more efficient or cost-effective regional transmission facilities to address Long-Term Transmission Needs."¹⁶

Second, WIRES seeks clarification, or in the alternative rehearing, on the timing associated with implementation of the Long-Term Regional Transmission Planning process as proposed in the Final Rule.¹⁷ As written, the Final Rule potentially creates a scenario that would require

¹⁴ *Id.*

¹⁵ *Idaho Conservation League v. Wheeler*, 930 F.3d 494, 508 (D.C. Cir. 2019) ("[A] final rule is not a logical outgrowth if interested parties would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule." (internal quotation marks and citations omitted)); *Int'l Union v. MSHA*, 626 F.3d 84, 94-95 (D.C. Cir. 2010) ("A final rule is a logical outgrowth of the proposed rule only if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." (internal quotation marks and citations omitted)); *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1080 (2009).

¹⁶ Order No. 1920 at P 237.

¹⁷ *Id.* at P 1768.

transmission providers to begin implementing their Tariff provisions submitted in compliance with Order No. 1920 before receiving a Commission Order on Compliance accepting such revised provisions.

II. SPECIFICATIONS OF ERROR AND STATEMENT OF ISSUES

In satisfaction of Rule 713(c)(1) and (2) of the Commission’s Rules of Practice and Procedure,¹⁸ WIRES submits the following specifications of error and statement of issues, including citations to representative Commission and court precedent.

- The Commission erred by failing to comply with the notice-and-comment requirements of section 553 of the APA, by including a new, detailed and prescriptive reevaluation framework in Order No. 1920 that was not included in the NOPR.¹⁹
- The new reevaluation process framework added to Order No. 1920 is arbitrary and capricious under notice-and-comment procedures of section 553 of the APA because the Commission failed to engage in reasoned decision making by requiring transmission providers to include such prescriptive framework in their respective Tariffs on compliance without first providing stakeholders the opportunity to review and comment under the NOPR.²⁰

The Commission committed a procedural error by not satisfying the notice and comment requirements of the APA. *See Idaho Conservation League v. Wheeler*, 930 F.3d 494, 508 (D.C. Cir. 2019) (“[A] final rule is not a logical outgrowth if interested parties would have had to divine the agency’s unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.” (internal quotation marks and citations omitted)). In the event the Commission declines to correct its procedural error, WIRES requests that the Commission clarify certain portions of the reevaluation framework that are vague, confusing, and unworkable.²¹

- Order No. 1920’s compliance procedures are arbitrary and capricious by requiring transmission providers to propose on compliance a date, no later than one year from transmission providers’ initial compliance filing date, on which they will commence the

¹⁸ 18 C.F.R. § 385.713(c)(1) and (2) (2023).

¹⁹ *See* 5 U.S.C. § 553 (b) and (c).

²⁰ *See, e.g., Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 207-10 (D.C. Cir. 2011); *Am. Gas Ass’n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010); *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005); *Canadian Ass’n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001).

²¹ *Northern States Power Co. v FERC*, 30 F.3d. 177, 180 (D.C. Cir. 1994) (citing *Town of Norwood v. FERC*, 962 F.2d. 20, 222 (D.C. Cir. 1992)).

first Long-Term Regional Transmission Planning cycle and the Commission should have required transmission providers to commence implementation of proposed Tariff revisions submitted on compliance with Order No. 1920 after issuance of a final Order on Compliance accepting such Tariff revisions.²²

- The Commission should clarify that Order No. 1920 is not intended to, nor does it require transmission providers to, commence implementation of their proposed Tariff provisions filed in compliance with Order No. 1920 before the Commission issues a final Order on Compliance accepting such provisions.

III. REQUEST FOR REHEARING OF THE ADDITION OF THE REEVALUATION FRAMEWORK IN THE FINAL RULE

A. The Commission Did Not Engage in Reasoned Decision Making Because It Failed to Comply with the APA's Notice-and-Comment Requirements Before Adding the Reevaluation Framework in Order No. 1920

In the NOPR, the Commission proposed to give transmission providers *flexibility* to propose on compliance selection criteria to be used for selection and development of Long-Term Regional Transmission Facilities included in the regional transmission plan for purposes of cost allocation.²³ The flexibility was bounded by the requirement that the criteria, developed by transmission providers in consultation with their stakeholders, must be transparent and not unduly discriminatory and must result in the selection of more efficient or cost effective Long-Term Regional Transmission Facilities that seek to maximize benefits to consumers over time without over-building transmission facilities.²⁴

²² See, e.g., *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 208 (D.C. Cir. 2011); *Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 543-44 (D.C. Cir. 2010).

²³ In the NOPR, the Commission noted that Order No.1000 “does not mandate that public utility transmission providers select any transmission facility, and the Commission declined for the most part to set minimum standards for the criteria used to select a transmission facility in a regional transmission plan for purposes of cost allocation.” NOPR at P 236. See also *Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 16,051 at PP 328-331 (2011) (“Order No. 1000”).

²⁴ NOPR at P 241. The Commission also observed that such flexibility would accommodate regional differences such as (i) different transmission needs each transmission planning region may have, as well as the factors driving those needs or market structures; and (ii) the ability to sufficiently balance individual state interests. Order No. 1920 at PP 243 and 244.

Additionally, with regard to a previously selected Long-Term Regional Transmission Facility, the NOPR proposed that “[p]ublic utility transmission providers should include in their selection criteria how they will address the selection status of a previously selected transmission facility based on the outcomes of subsequent Long-Term Regional Transmission Planning cycles.”²⁵ Importantly, the Commission proposed no further details regarding any requirements to address the selection status of Long-Term Regional Transmission Facilities following their initial selection, and did not use the term “reevaluate.”²⁶

In Order No. 1920, the Commission did not adopt the NOPR proposal to require transmission providers to address the selection status of a previously selected transmission facility based on the outcomes of subsequent Long-Term Regional Transmission Planning cycles,²⁷ but did adopt a prescriptive framework directing transmission providers to revise their Tariffs to provide for reevaluation of selected Long-Term Regional Transmission Facilities in three specific situations, subject to limitations set forth in Order No. 1920.²⁸ Additionally, Order No. 1920 provided transmission providers with flexibility to propose on compliance specific criteria to include in their Tariffs that they will use to determine when one of the three specific situations occurs, thereby triggering the reevaluation of a previously selected Long-Term Regional Transmission Facility.²⁹ In Order No. 1920, the Commission did not propose, nor did it request comment on, any requirements specific to the new reevaluation framework. The Commission explained that this new requirement was included in Order No. 1920 to try to balance the need for

²⁵ NOPR at P 248.

²⁶ *Id.*

²⁷ Order No. 1920 at P 1055.

²⁸ *Id.* at P 1049.

²⁹ *Id.* at P 1052.

adequate investment certainty against the risk (due to significant changes in circumstances) that the construction of a Long-Term Regional Transmission Facility may result in over-building the transmission system.³⁰

WIRES's concern on rehearing is not necessarily the intent of the requirement as much as the fact that the Commission did not adhere to notice-and-comment rulemaking requirements set forth in section 553 of the APA, and instead arbitrarily adopted a reevaluation framework. While WIRES acknowledges that there may have been notice of the Commission's intent to propose a flexible process for transmission providers to demonstrate on compliance how their selection criteria would address the selection status of a previously selected Long-Term Regional Transmission Facility,³¹ the NOPR did not provide notice of the detailed, prescriptive reevaluation requirements set forth in the Final Rule's reevaluation framework. Those requirements are not a logical outgrowth of the NOPR, which only proposed that transmission providers should include in their selection criteria how they will address the selection status of a previously selected transmission facility based on the outcomes of subsequent Long-Term Regional Transmission Planning cycles.³²

The overall requirement of APA, sections 553(b) and (c) is "to provide for public notice and comment procedures before the issuance of a rule."³³ Courts have long recognized that the

³⁰ *Id.* at P 1050.

³¹ NOPR at P 247.

³² *Id.* at P 248.

³³ *Guardian Fed. Savings & Loan Assoc. v. Fed. Savings & Loan Ins. Corp.*, 589 F.2d 658, 662 (D.C. Cir. 1968); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979) (stating "[i]n enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment.").

APA's notice-and-comment procedures serve important policy goals.³⁴ For example, public participation in a rulemaking process,

[A]ssures that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternate solutions. Public rulemaking procedures increase the likelihood of administrative responsiveness to the needs and concerns of those affected. And the procedure for public participation tends to promote acquiescence in the result even when objections remain as to substance.³⁵

Thus, when the public has the opportunity to participate in a public rulemaking through which facts and information are submitted, as well as suggestions for alternative solutions, an agency promulgating a rule can “educate itself before establishing rules and procedures which have a substantial impact on those who are regulated.”³⁶ In addition, and of particular importance here, a notice-and-comment process requires the agency to respond to significant arguments raised by the public.³⁷

Because the reevaluation process as proposed in Order No. 1920 requires transmission providers to include provisions in their Tariffs (*e.g.*, criteria to be used or a point(s) at which a facility will no longer be subject to reevaluation and limitations on the applicability of the reevaluation requirement) that will govern whether previously selected Long-Term Regional Transmission Facilities are reevaluated, and potentially modified or canceled,³⁸ the Commission was obligated to follow the APA's notice-and-comment requirements before including the reevaluation framework in Order No. 1920.

³⁴ See 5 U.S.C. § 553(c) (“[T]he agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.”).

³⁵ *Guardian Fed. Savings & Loan*, 589 F.2d at 662.

³⁶ *Batterton v. Marshall*, 648 F.2d 694, 704 (D.C. Cir. 1980).

³⁷ *Home Box Office v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977); see also *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 468 (D.C. Cir. 1998) (requiring that “an agency must also demonstrate the rationality of its decisionmaking process by responding to those comments that are relevant and significant.”).

³⁸ NOPR at P 1050-1051.

In response to the NOPR, certain commenters proposed that the Commission include in the Final Rule additional customer safeguards from projects included in the regional transmission plan for purposes of cost allocation that may later be found to be unnecessary or inefficient as a result of project changes or changes to the system.³⁹ In particular, Large Public Power Council (“LPPC”) included detailed reevaluation protocols in its comments for “cost management and critical decision-making throughout the period leading to a project’s in-service date meeting specified minimal criteria.”⁴⁰ LPPC urged the Commission to adopt its proposed protocols, noting that such proposal may call for separate notice and comment.⁴¹ The Final Rule adopted LPPC’s reevaluation protocols almost word-for-word without notice or opportunity for comment. In adopting reevaluation requirements resembling those advanced by LPPC, it is also noteworthy that the Commission referenced *non-record* documentation of the LPPC proposal.⁴² By not affording the public the requisite notice and opportunity to comment on this newly proposed and much more prescriptive reevaluation framework, the Commission deprived the public of the ability to provide valuable comments, input, suggestions and criticisms on the practical and legal aspects of the proposal that could have helped shape and improve the Final Rule. Absent the requisite opportunity for notice and comment, neither the Commission, nor the public, can know whether

³⁹ See Order No. 1920 at P 1056, n. 2259, *citing* to Initial Comments filed on behalf of American Public Power Association (opining that there should be “off ramps” protecting transmission customers from Long-Term Transmission Facilities that are subsequently found to be unnecessary or inefficient by intervening changes. *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, APPA Initial Comments, Docket No. RM21-17-000 at 22 (Aug. 17, 2022).

⁴⁰ *Building for the Future through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, LPPC Initial Comments, Docket No. RM21-17-000 at 11-12 (Aug. 17, 2022) (“LPPC Comments”).

⁴¹ *Id.* at 14.

⁴² Order No. 1920 at P 1061.

the Commission might have decided that a different proposal was more appropriate.⁴³ Moreover, taking liberties with APA’s notice-and-comment requirements does not set good precedent.

For the foregoing reasons, WIRES seeks rehearing on this issue and requests that the Commission revise Order No. 1920 on rehearing to reinstate its original NOPR proposal to allow transmission providers the flexibility to submit, on compliance, a process for transmission providers to address the selection status of previously selected Long-Term Regional Transmission Facilities that is workable under each transmission provider’s respective Long-Term Regional Transmission Planning processes, including alternative approaches. While transmission providers, on compliance, may consider the additional process details included in Order No. 1920 as advisory, they should not be considered compliance requirements. Absent the Commission granting rehearing, WIRES seeks clarification on certain aspects of Order No. 1920’s reevaluation framework.

IV. REQUEST FOR CLARIFICATION OF THE ADDITION OF THE REEVALUATION FRAMEWORK IN THE FINAL RULE

In its NOPR Comments, WIRES generally supported core aspects of the proposed rule. However, with respect to the NOPR proposal (not adopted in this Final Rule) allowing transmission providers to make the selection status of a previously selected Long-Term Regional Transmission Facility subject to the outcome of subsequent Long-Term Regional Transmission Planning cycles,⁴⁴ WIRES requested the Commission clarify that “[t]ransmission [p]roviders are not required to reassess previously-approved projects in the triennial review process.”⁴⁵ In support of this position, WIRES, and others, noted that periodic reviews would be disruptive to the progress

⁴³ *Chrysler Corp. v. Brown*, 441 U.S. at 316.

⁴⁴ Order No. 1920 at P 1055.

⁴⁵ *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, Comments of WIRES, Docket No. RM21-17-000 at 7 (Aug. 17, 2022) (“WIRES Comments”).

of those projects and would potentially increase costs and cause development delays.⁴⁶ WIRES also pointed out that “[d]oing so would increase the risk that transmission developers face which could also hinder needed transmission build and increase costs to customers.”⁴⁷

WIRES cautions that if the Commission’s goals of building needed Long-Term Regional Transmission Facilities on a timely basis and at reasonable costs to consumers are to be realized, clarification is necessary so that Order No. 1920’s reevaluation framework under the Long-Term Regional Transmission process will not undermine such goals. More specifically, the transmission provider selecting the project requires certainty that the project will move forward because once a project is included in a regional transmission plan, that project is included in the planning region’s applicable future models that are then used to identify system needs and potential violations in planning for reliability needs, economic considerations and network upgrades required for generation interconnection projects. Additionally, the designated transmission developer responsible for financing and constructing a project must have confidence that the selection of a Long-Term Regional Transmission Facility included in the regional transmission plan represents “definitive directives to invest capital and advance projects towards completion.”⁴⁸

- A. *The Commission Should Clarify How Updating a Previously Selected Long-Term Regional Transmission Facility’s Costs and Benefits in a Subsequent Long-Term Transmission Cycle Would Meet the Criteria Used to Select the Long-Term Regional Transmission Facility Initially*

In Order No. 1920, the Commission requires the reevaluation of a previously selected Long-Term Regional Transmission Facility in three situations, and provided transmission providers with the flexibility to propose and include specific criteria in their Tariffs that they will

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Order No. 1920 at P 1045, citing to *Building for the Future Through Regional Transmission Planning and Cost Allocation and Generator Interconnection*, Comments of Avangrid, Inc. at 11 (Aug. 17, 2022).

use to determine when one of the three situations occur (subject to limitations), thereby triggering the reevaluation process.⁴⁹ However, contrary to the NOPR proposal, the reevaluation framework adopted in Order No. 1920 limits transmission providers' flexibility in developing such criteria as follows:

Reevaluation on the basis of cost increases or significant changes in federal, federally-recognized Tribal, state, or local laws or regulations must be part of a subsequent Long-Term Regional Transmission Planning cycle following selection and must take into account not only updated costs *but also updated benefits* of the Long-Term Regional Transmission Facility.⁵⁰

The Commission further provides (in a footnote) that in performing the reevaluation analysis, it “expects” the transmission provider to use the updated Long-Term Scenarios and associated transmission system models developed for that Long-Term Regional Transmission Planning cycle in which the transmission provider reevaluates the previously selected project.⁵¹ This requirement raises a number of questions and concerns about which WIRES seeks clarification.

The Final Rule requires transmission providers to reassess and revise the Long-Term Scenarios that they use in their Long-Term Regional Transmission Planning cycle at least once every five years.⁵² Practically speaking, if a Long-Term Regional Transmission Facility is reevaluated (five or 10 or 15 years after it was initially selected and included in the regional transmission plan) applying updated costs and updated benefits calculated from models developed for that Long-Term Regional Transmission Planning Cycle,⁵³ such reevaluation is essentially a

⁴⁹ Order No. 1920 at P 1049-1050.

⁵⁰ Order No. 1920 at P 1052 (*emphasis added*).

⁵¹ *Id.* at P 1052, n. 2254.

⁵² *Id.* at PP 377, 378, and n. 872.

⁵³ *Id.* at P 1052, n. 2254.

“do over” for a facility that was selected in a regional plan just a few years earlier. This approach increases the risk of development delays and changing project costs, and could, ultimately, undermine the efficient or cost-effective development of Long-Term Regional Transmission Facilities central to the mission of Order No. 1920. Importantly, such an approach could lead to constant churn and restudy cycles as projects are moved in-and-out of regional transmission plans, and transmission and generation developers alike are left in a state of uncertainty. Moreover, such a framework will add significant risk for transmission developers, as well as customers, beyond what may be just and reasonable under the FPA.

Also, WIRES is concerned as to the specific factors included in Order No. 1920 that the transmission provider must consider in developing reevaluation criteria to be used in determining when one of three specific situations occurs to trigger reevaluation of a previously selected Long-Term Regional Transmission Facility. While such factors could serve as guidelines that may be considered by the transmission providers in proposing their reevaluation criteria on compliance, those factors should not be used to limit a transmission provider’s flexibility in defining such criteria.

Notwithstanding these concerns, if the transmission provider is required to apply updated costs and benefits to the benefit analysis used to reevaluate a previously selected Long-Term Regional Transmission Facility, WIRES seeks clarification that the transmission provider has flexibility to determine the basis upon which to update the benefits included in the analysis.

This clarification request is appropriate because the Commission did not provide adequate notice of Order No. 1920’s reevaluation process framework consistent with the APA requirements. None of these concerns specific to the reevaluation framework seem to have been addressed in Order No. 1920 because the NOPR did not include a reevaluation framework of the type adopted

in Order No. 1920, and commenters did not have an opportunity to make the Commission aware that such circumstances need to be addressed. Instead, the Commission simply states that it “carefully reviewed the record developed here and weighed commenters’ countervailing arguments,”⁵⁴ and that the reevaluation requirements adopted in Order No. 1920 strike a careful balance between “the need to provide transmission developers with adequate investment certainty, absent which more efficient or cost-effective Long-Term Regional Transmission Facilities will not be developed, against the risk that, due to significant changes in circumstances, failing to reevaluate a selected Long-Term Regional Transmission Facility may result in the over-building of transmission.”⁵⁵

The problem is that the NOPR proposal granting transmission providers flexibility to develop the criteria to be used for transmission providers to address the selection status of previously selected Long-Term Regional Transmission Facilities is not the reevaluation process included in Order No. 1920. As such, any review of the record or comments submitted, were specific to the proposal that was not adopted.

As noted above in the request for rehearing, the reevaluation process framework included in Order No. 1920 was not adequately noticed and the public did not have the opportunity to meaningfully respond to the detailed and prescriptive reevaluation requirements included in the order. Nor did the Commission have the benefit of input from various sectors of the industry to help shape this framework. Consequently, the reevaluation framework was not, and could not

⁵⁴ *Id.* at P 1053.

⁵⁵ *Id.* at P 1050.

have been, considered in any detail before it was adopted in Order No. 1920;⁵⁶ and, thus, such framework is not a “logical outgrowth” of the NOPR.⁵⁷

Given the significant impact this process can have on determining whether Long-Term Regional Transmission Facilities will be built, WIRES urges the Commission to clarify that transmission providers have the flexibility (as proposed in the NOPR) to consider the Commission’s concerns raised in Order No. 1920 in developing reevaluation criteria, in consultation with their stakeholders, which is compatible with their respective transmission planning processes.

V. REQUEST FOR CLARIFICATION, OR IN THE ALTERNATIVE REHEARING, OF THE FINAL RULE’S COMPLIANCE PROCEDURES

- A. *The Commission Should Clarify, or in the Alternative Grant Rehearing, that Transmission Providers Are Not Required to Implement Proposed Tariff Revisions Submitted in Compliance with the Final Rule Until the Commission Issues a Final Order on Compliance*

In the Final Rule, with the exception of the interregional transmission coordination requirements, transmission providers are directed to submit a compliance filing within ten months of the effective date of this Final Rule revising their Tariffs, and other documents, consistent with Order No. 1920.⁵⁸ Additionally, on compliance, transmission providers are required to propose a date, no longer than one year from the date of their initial compliance filings, on which they will

⁵⁶ One of the functions of APA, section 553 is to improve the substantive accuracy of rules by ensuring that the promulgating agency considers as much data and criticism as possible. Thus, when a rulemaking agency does not accept comment from interested parties, the rule is of questionable validity. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 777-78 (1969) (Douglas, J., dissenting), *National Tour Brokers Ass’n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978).

⁵⁷ See *Shell Oil Co. v. E.P.A.*, 950 F.2d 741, 751 (D.C. Cir. 1991) (stating that “an unexpressed intention cannot convert a final rule into a ‘logical outgrowth’ that the public should have anticipated. Interested parties cannot be expected to divine the EPA’s unspoken thoughts. The reasons given by the EPA in support of its contention that interested parties should have anticipated the new rules are simply too insubstantial to justify a finding of implicit notice.”).

⁵⁸ Order No. 1920 at P 1768.

commence the first Long-Term Regional Transmission Planning cycle, unless additional time is needed to align the Long-Term Regional Transmission Planning cycle with existing transmission planning cycles.⁵⁹

WIRES seeks clarification, or in the alternative rehearing, on the timing associated with implementation of the Long-Term Reliability Transmission Planning process as proposed in Order No. 1920.⁶⁰ As written, the Final Rule could be read to create a scenario in which transmission providers would be required to begin implementing their OATT provisions submitted in compliance with the requirements of Order No. 1920 *before* receiving a Commission Order on Compliance accepting such revised Tariff provisions.

Absent clarification or modification of this provision, transmission providers would be in the untenable position of expending a significant amount of time and resources in implementing Long-Term Regional Transmission Planning cycles that the Commission finds in a later order are not compliant with Order No. 1920.

Moreover, without explanation, this provision is different than Order No. 1000, which provided that the Commission “would assess whether each compliance filing satisfies the proposed requirements and principles [required under the Order] and issue additional orders as necessary to ensure that each public utility transmission provider meets the requirements of the Proposed Rule” before transmission providers are expected to begin implementation of processes proposed on compliance.⁶¹

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Order No. 1000 at P 780.

Accordingly, WIRES respectfully requests that the Commission clarify what it intended and how it anticipates that a transmission provider would begin implementing proposed tariff revisions that are pending before the Commission on compliance.

VI. CONCLUSION

WHEREFORE, for the foregoing reasons, WIRES respectfully requests that the Commission grant its Requests for Rehearing and Clarification.

Respectfully submitted,

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June 12, 2024

CERTIFICATE OF SERVICE

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

Dated at Washington, D.C., this 12th day of June, 2024.

/s/ Larry Gasteiger
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