ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY, *et al.*, Petitioners,
v.
FEDERAL ENERGY REGULATORY COMMISSION, Respondent.

Case Nos. 12-1232, *et al.*

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

JOINT REPLY BRIEF OF PETITIONERS AND SUPPORTING INTERVENORS CONCERNING TRANSMISSION PLANNING AND PUBLIC POLICY

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GLOSSARY

FPA	Federal Power Act
FERC	Federal Energy Regulatory Commission, the Respondent
Int. Brief	Joint Proof Brief of Intervenors Supporting Respondent Concerning Threshold Issues, Cost Allocation, Transmission Planning and Public Policy, and State Sovereignty
LSE	Load-serving entity
Order No. 1000	*Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, Final Rule, Docket No. RM10-23-000, FERC Stats. & Regs. ¶ 31,323 (2011), JA____
Order No. 1000-A	*Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000-A, Order on Rehearing and Clarification, Docket No. RM10-23-001, 139 FERC ¶ 61,132 (2012), JA____
Order No. 1000-B	*Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000-B, Order on Rehearing and Clarification, Docket No. RM10-23-002, 141 FERC ¶ 61,044 (2012), JA____

SUMMARY OF ARGUMENT

FERC's brief, like its orders below, misses the point. First, FERC claims that its orders do not offend Federal Power Act ("FPA") section 217(b)(4), but again fails to demonstrate its compliance with that statute or why it construes the statute differently in similar circumstances.

Second, FERC argues that its orders are not vague, but again fails to explain how transmission providers are to identify and select the public policy driven transmission needs for which they must plan or how to reconcile different transmission needs driven by competing public policies. The only case FERC cites in support of its position is inapposite.

Third, FERC concedes that it lacks authority to promote specific public policies, repeating the arguments that Order No. 1000 does not promote any "particular" public policy, but only requires the consideration of transmission needs and not the public policies themselves. These are distinctions without differences. Promoting many policies is no less offensive than promoting a single policy. It is not FERC's role to do either. And the underlying public policies cannot be divorced from the transmission needs they are said to drive.

Fourth, FERC again skirts Petitioners' argument that inviting speculation as to future transmission needs will undermine the wholesale energy markets.

ARGUMENT[1]

I. FERC'S MANDATE CONTRAVENES FPA SECTION 217(B)(4)

FPA section 217(b)(4) directs FERC to act "in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy [their] service obligations." 16 U.S.C. § 824q(b)(4). FERC does not dispute that this is mandatory, but fails to demonstrate its orders comply with the statute.

First, FERC acknowledges that it "neither mandated nor prohibited consideration of any particular statute or regulation, including FPA section 217(b)(4), as a public policy requirement driving transmission needs." FERC Br. 107. FERC excuses this ambivalence because it "ensures that all transmission needs are accurately identified and considered in transmission planning." *Id.* at 104. But FERC's intentionally "flexible" approach is unlawful because it requires only "potential consideration" of section 217(b)(4) needs. Order No. 1000 P 215, JA____. "Potential consideration" is not actual consideration, let alone "planning . . . to meet the reasonable needs of load-serving entities." 16 U.S.C. § 824q(b)(4). FERC touts the importance of "regional flexibility," FERC Br. 106, but section 217's directive is not optional for any region.

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[1] The American Public Power Association, National Rural Electric Cooperative Association, and Transmission Access Policy Study Group join only Section I.

FERC contends that it "does not allow load-serving entities' needs to be ignored," because it "mandated that all stakeholders, including load-serving entities, be given meaningful opportunities to provide input" in identifying transmission needs driven by public policy requirements. *Id.* at 107. But it is precisely that input that FERC repeatedly permits to be ignored. Order No. 1000 P 210, JA____; Order No. 1000-A PP 320-21, JA____. As FERC notes, a requirement to "consider transmission needs driven by public policy requirements . . . does not require that every transmission need identified by stakeholders be selected for further evaluation." FERC Br. 115.

Second, FERC argues that requiring consideration of transmission needs driven by section 217(b)(4) would constitute prohibited undue discrimination or preference. FERC contends that section 217(b)(4) only established a preference for load-serving entities in allocating long-term transmission rights, not in transmission planning and expansion. FERC Br. 104-06. But FERC's orders offered no construction of the statutory language supporting this distinction. Earlier, in Order No. 681, FERC read section 217(b)(4) "in its entirety" to provide a "due" preference for allocating long-term transmission capacity to load-serving entities on both existing facilities and new expansions. *Long-Term Firm Transmission Rights in Organized Elec. Mkts.*, FERC Stats. & Regs. ¶ 31,226 at P 320 (2006). Acknowledging that prior reading, FERC nevertheless saw no

inconsistency between its two orders. Order No. 1000-B P 11, JA____. That conclusion remains unexplained and illogical. There is no basis for deferring to FERC's statutory construction, because FERC offered none.

In any event, FERC cannot nullify Congress' explicit directive to facilitate the planning of transmission facilities to meet load-serving entities' reasonable needs by claiming that compliance with that specific directive would create an undue preference. *See, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) ("[A] specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.").

II. FERC'S PUBLIC POLICY MANDATE IS UNREASONABLY VAGUE

Contrary to FERC's insinuation, Petitioners are not opposed to regional flexibility in transmission planning and do not argue that all aspects of the public policy mandate are unclear. *See* FERC Br. 109 (discussing access and record keeping requirements). The part of FERC's rule that remains unreasonably vague is how FERC expects transmission providers (1) to determine which transmission needs are actually driven by public policies and (2) reconcile competing transmission needs and public policies.

FERC argues that its orders do not require transmission providers to reconcile conflicting public policies but only requires that they consider transmission needs as opposed to the underlying policies themselves. FERC Br.

116-17; *see also* Int. Br. 17. The purported distinction is illogical and unworkable: transmission providers cannot rationally divorce consideration of transmission needs driven by public policies from the policies that drive them. FERC's own account of its numerous orders rejecting compliance filings, *see* FERC Br. 112-14, speaks for itself and proves Petitioners' point.

FERC also fails to provide a reasonable explanation for its refusal to limit its mandate to public policies that are consistent with the FPA or amenable to incorporation in transmission plans.[2] Indeed, FERC has rejected compliance filings that limited public policies to those "'that are not inconsistent with the Federal Power Act,'" and specifically required removal of such language. *California Indep. Sys. Operator Corp.*, 143 FERC ¶ 61,057 at P 86 (2013). Nor does FERC require that the body enacting a "public policy" intend to affect transmission planning. Thus, FERC invites unelected stakeholders to speculate about legislative intent and requires them to implement that speculation.

FERC relies exclusively on *American Export-Isbrandtsen Lines, Inc. v. Federal Maritime Commission*, 389 F.2d 962 (D.C. Cir. 1968), to show its

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[2] FERC's supporting intervenors state that "since Order No. 890, there has been an increase in the number of Public Policy Requirements that will likely impact transmission needs." Int. Br. 21. That misses the point. FERC orders are so broad and vague that they embrace a vast array of laws and regulations that were not meant to affect transmission planning. Intervenors focus on a subset of these policies: emissions and environmental regulations. Order No. 1000 is not so narrow.

mandate is not unreasonably vague. FERC Br. 109-11, 117. There, terminal operators argued that it was impossible to comply with an order requiring them to compensate for loading delays because it was impossible to determine the cause of some delays. 389 F.2d at 966. The Court noted that nothing prevented the operators from limiting the compensation to where cause could be ascertained. *Id.* The arguments here are different. Without clearer guidance, transmission providers will not have sufficient information to implement FERC's new requirements.

FERC also relies on *American Export* for the proposition that Petitioners' objections are premature. FERC Br. 117. FERC overlooks the Court's explanation that the terminal operators were not required to "wait[] to object to the orders themselves until the Board affirmatively sought compliance." 389 F.2d at 967 n.12. Here, Petitioners have articulated the specific difficulties faced in attempting to comply with FERC's mandate, and FERC has already rejected numerous compliance filings. Pet. Br. 11-15; FERC Br. 112-14.

FERC's requirements are unclear, but the costs are not. Order No. 1000 will open the litigation floodgates to every stakeholder who may file a complaint in support of its own pet public policy no matter how marginal and unimportant. *See* Int. Br. 24.

III. FERC'S PUBLIC POLICY MANDATE EXCEEDS FERC'S JURISDICTION

Promotion of public policies—however laudable—is not a task Congress delegated to FERC. The FPA does not give FERC "a broad license to promote the general public welfare." *NAACP v. FPC*, 425 U.S. 662, 669-70 (1976). FERC does not dispute this, but instead argues that Order No. 1000 "does not promote any particular environmental or other public policy." FERC Br. 103.

This is too cute by half. FERC necessarily promotes public policies when it mandates that transmission providers consider transmission needs driven by policies that were, heretofore, not a required part of transmission planning. It is of no consequence that FERC promotes those policies in the aggregate rather than individually. Generic promotion of the public good is precisely what the Supreme Court rejected in *NAACP*.

FERC argues that *NAACP* is distinguishable because, unlike the employment practices at issue in *NAACP*, other public policies "can affect the need for, and configuration of, prospective transmission facilities, and, therefore, can have a direct impact on transmission needs." FERC Br. 102. Obviously when one defines a "transmission need" as a need driven by public policy, then the latter will affect the former. FERC's circular definition can embrace almost any public policy, but FERC may not leverage its authority over transmission rates to promote public policies that it has no jurisdiction to address under FPA section 206. *E.g.*,

Altamont Gas Transmission Co. v. FERC, 92 F.3d 1239, 1248 (D.C. Cir. 1996) (holding that FERC may not "do indirectly what it could not do directly").

In all events, FERC's attempt to spar with Petitioners on the unsupported nature of its mandate is halfhearted. Nowhere does FERC's brief address the points that FERC "(i) failed to address concerns that its mandate would harm transmission planning by injecting contention and litigation into the planning process; (ii) failed to rebut data that showed FERC's concerns were not justified; and (iii) failed to explain why its new industry-wide mandate was necessary given its findings that many regions already would comply with the mandate." Pet. Br. 16 (citations omitted). In short, FERC does not "respond meaningfully" to the objections presented. *PSEG Energy Res. & Trade, LLC v. FERC*, 665 F.3d 203, 208 (D.C. Cir. 2011).

IV. FERC'S UNREASONED MANDATE UNDERMINES WHOLESALE ENERGY MARKETS

FERC argues that its rule allowing transmission providers to consider transmission needs driven by unenacted public policy objectives ought to be upheld because it does not actually do anything. *See* FERC Br. 115. Historically, however, transmission providers focused on reliability and cost efficiency in the transmission planning process. Order No. 1000 invites transmission providers to supplant these traditional factors and instead plan to meet other goals, including inchoate public policies. Sinking costs now to meet speculative future needs likely

will result in different and less efficient projects being developed now than would have been developed if transmission needs had been allowed to crystalize without interference.

CONCLUSION

For the reasons set forth above, the petitions for review should be granted.

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Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and the scheduling order dated March 5, 2013, in the above-captioned, I hereby certify that the foregoing document contains no more than 1,800 words (1,787 words using the word-count feature in Microsoft Word) not including the tables of contents and authorities, glossary, signature blocks, and certificates of counsel.

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CERTIFICATE OF SERVICE

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