

168 FERC ¶ 61,106
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur and Richard Glick.

Alternative Transmission Inc.

Docket No. EL19-69-000

ORDER DISMISSING PETITION FOR DECLARATORY ORDER

(Issued August 22, 2019)

1. On May 2, 2019, pursuant to Rule 207 of the Commission’s Rules of Practice and Procedure,¹ Alternative Transmission Inc. (ATI) filed a petition for declaratory order (Petition) requesting that the Commission find that: (1) the facilities and services described in ATI’s Petition provide “transmission of electric energy in interstate commerce” subject to the Commission’s jurisdiction under the Federal Power Act (FPA)² and (2) ATI, as the owner and operator of the facilities, will be a “public utility” under section 201(e) of the FPA.³ As discussed below, we dismiss ATI’s Petition.

I. Petition

2. ATI proposes to own and operate facilities that it asserts will transmit electric energy in interstate commerce without the use of transmission wires or wire corridors into areas accessible by surface transportation (and possibly water or air), where: (1) current or forecasted demand for delivered electric energy cannot adequately be met by existing wire transmission corridors, or (2) it is the most timely or economical solution for meeting existing or forecasted demand.⁴ ATI states that Congress’s assertion of federal jurisdiction over transmission of electric energy in interstate commerce is

¹ 18 C.F.R. § 385.207(a)(2) (2018).

² 16 U.S.C. §§ 824-825 (2012).

³ 16 U.S.C. § 824(e) (2012).

⁴ Petition at 1-3.

sufficiently broad and flexible to reach beyond century-old technology, and should encompass new innovations.⁵

3. ATI's Petition involves construction of what it calls electric energy transfer stations (i.e., charging and discharging stations) at locations in the continental United States.⁶ ATI states that electric energy generated by unaffiliated entities will be used at the charging stations to charge an electrolyte solution in a flow battery,⁷ and that solution will be transferred to a mobile medium, which will then be transported (by rail, tractor-trailer, boat, airplane, or any combination thereof) across state lines to discharging stations at different locations. At the discharging station, the electrolyte solution in the containers will be transferred into a different battery and made available for instantaneous dispatch as instructed, until the charge is depleted, and the electrolyte solution becomes available for recharge.

4. ATI provides an example of its proposed technology. ATI states that it could attach 100 container cars to a locomotive engine at or near a charging station, where electricity generated by an unaffiliated generation source would be transferred to the medium in the container car. Each car would then contain a charge of electric energy, and the locomotive would transport the cars on existing rail across state lines to a discharging station, where the container cars would park and connect to an electrical load (e.g., an electric distribution system or end users). ATI states that, once the charge of each car has been delivered to load at the discharging station, ATI would deliver new charged cars and re-attach to a locomotive the depleted cars for a return trip to the original or different stations for recharging.⁸

⁵ *Id.* at 2.

⁶ *Id.*

⁷ ATI explains that all chemical batteries, including flow batteries, allow conversion between electric energy and the energy in chemical bonds in the component of a battery called its electrolyte. Baldick Aff. ¶ 5. While most chemical batteries hold their electrolyte permanently inside a single enclosure that also includes the other components of a battery, a flow battery stores its electrolyte in tanks separate from the enclosure that holds the other battery components (i.e., the components that allow conversion of chemical energy into electrical energy and vice versa). *Id.* ATI states that a flow battery, therefore, allows the electrolyte to be removed and transferred from one battery to another. *Id.*

⁸ Petition at 2-3.

5. ATI states that further applications of its proposal are both conceivable and likely.⁹ For example, ATI contends that considerable reserves of domestic shale natural gas cannot reach energy markets in the form of natural gas because there is not adequate pipeline capacity.¹⁰ According to ATI, by diverting this natural gas directly to combustion turbines or combined-cycle generating units constructed at or proximate to the production of those natural gas reserves, that generation could be used to electrically charge the media in container cars for transport to markets using neither pipelines nor wire corridors.¹¹ ATI asserts that alternative transmission may also have applications to address emergencies or disasters and notes that overhead wires can be vulnerable to extreme weather events, and natural events like hurricanes and wildfires demonstrate grid vulnerability. Furthermore, ATI notes that human-caused damage to the grid, such as damage inflicted through cyber-attacks or improper maintenance, can disable electric energy deliverability. ATI states that alternative transmission using modes other than wires and wire corridors can speed recovery from all forms of damage to the wires-based grid in areas proximate to discharging stations. ATI avers that discharging stations can be modular and transported where needed using the same form of surface transportation used to transport the cars containing the electrically charged medium.

6. ATI clarifies that, while its proposed facilities will be able to provide some measure of storage, that storage capability will only be incidental to the alternative transmission service, and ATI will submit bids to system planners that charge only for transmission, not for generation or incidental storage.¹² ATI states that the Commission recognized the distinction between transmission and storage when it eliminated the location of an electric energy resource from its originally proposed definition of storage in Order No. 841.¹³ ATI asserts that, instead, the Commission defined storage as “a resource capable of receiving electric energy from the grid and storing it for later injection . . . back to the grid.”¹⁴ ATI contends that the Commission explained it was

⁹ *Id.* at 3.

¹⁰ *Id.* at 3-4.

¹¹ *Id.* at 4.

¹² *Id.* at 4-5.

¹³ *Id.* at 5 (citing *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 841, 162 FERC ¶ 61,127 (2018), *order on reh'g*, Order No. 841-A, 167 FERC ¶ 61,154 (2019)).

¹⁴ *Id.* (citing Order No. 841, 162 FERC ¶ 61,127 at P 29).

“removing the phrase ‘regardless of where the resource is located on the electrical system’ from the [notice of rulemaking] proposal” because “where an electric storage resource may be located does not change the applicability of the definition and will also provide a more adaptable definition for other Commission actions.”¹⁵ ATI states that the Commission meant that storage defers the timing of delivery and consumption. ATI asserts that only transmission changes the location and changing location is the transmission that ATI proposes.

7. ATI states that it seeks a declaration that the alternative transmission services and facilities that it proposes fall within the Commission’s FPA jurisdiction over the rates, terms, and conditions of transmission of electric energy in interstate commerce.¹⁶ According to ATI, the courts and the Commission have never confined the scope of FPA jurisdiction over the transmission of electric energy in interstate commerce to any specific mode of transmission.¹⁷ Rather, ATI contends that what triggers Commission jurisdiction is the use of any type of mode or facility for the movement of electric energy from one state into or through another state.¹⁸

8. ATI also seeks a Commission declaration that, as the owner and operator of the facilities described in its Petition, ATI will be a “public utility” under the FPA.¹⁹ ATI states that it seeks this declaration so that it can invest in alternative modes of transmission with the Commission’s assurance that it will be able to compete fairly with traditional wire and wire corridor modes of transportation. ATI avers that it is prepared to fulfill and commits to fulfill all of the open-access and non-discrimination responsibilities that accompany status as a transmitting public utility.²⁰

¹⁵ *Id.* (citing Order No. 841, 162 FERC ¶ 61,127 at P 29).

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 6-7 (citing *New York v. FERC*, 535 U.S. 1, 6 (2002); *Emera CNG, LLC*, 148 FERC ¶ 61,219, at P 13 & n.15 (2014) (*Emera*)). ATI asserts that the inclusive scope of transmission jurisdiction under the FPA stands in contrast with the Commission’s jurisdiction over natural gas transportation under the Natural Gas Act (NGA), which specifically has been confined to transportation by pipeline. *Id.* at 7 n.2.

¹⁸ *Id.* at 7.

¹⁹ *Id.*

²⁰ *Id.* at 8.

9. ATI argues that the public interest will be furthered by Commission recognition of alternative forms of transmission such as the transmission described in its Petition. ATI asserts that facilitating participation by new forms of interstate transmission of electric energy will help remedy existing and foreseeable deficiencies in the transmission system.²¹ ATI also states that by granting this Petition, the Commission will open to investment new technologies and transmission methods not tethered to century-old, costly, and increasingly difficult-to-site wires and wire corridors.²²

II. Notice of Filing and Responsive Pleadings

10. Notice of ATI's filing was published in the *Federal Register*, 84 Fed. Reg. 20,878 (2019), with interventions and protests due on or before June 3, 2019. Timely motions to intervene were filed by: Dominion Energy Services Company, Inc.; Electric Power Supply Association (EPSA); Massachusetts Attorney General Maura Healey; Calpine Corporation; Oklahoma Municipal Power Authority; American Municipal Power, Inc.; Public Service Electric and Gas Company; CenterPoint Energy Houston Electric, LLC; Ameren Services Company; Duquesne Light Company; and National Rural Electric Cooperative Association.

11. On June 3, 2019, Public Utility Commission of Texas (Texas Commission) filed a notice of intervention and protest; LS Power Associates, L.P. (LS Power), Electric Reliability Council of Texas, Inc. (ERCOT), Edison Electric Institute, on behalf of its member companies (EEI), American Public Power Association (APPA), and Oncor Electric Delivery Company LLC (Oncor) filed motions to intervene and protests; EPSA filed a protest; and Shale Rail and Northeast Freight Transfer (Shale Rail) and Shepstone Management Company, Inc. (Shepstone) filed comments. On June 4, 2019, IMG Midstream LLC (IMG Midstream) filed comments.²³ On June 14, 2019, as amended on June 17, 2019, ATI filed a motion for leave to answer and answer. On July 1, 2019, Oncor filed an answer to ATI's answer.

²¹ *Id.* at 9-10 (citing *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051, at P 46 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014)).

²² *Id.* at 10.

²³ Shale Rail, Shepstone, and IMG Midstream did not file motions to intervene.

A. Supporting Comments

12. Shale Rail, Shepstone, and IMG Midstream support ATI's Petition and state that existing railroad infrastructure can deliver electrically charged containers into many areas lacking adequate electric deliverability.²⁴ They assert that using existing surface transportation can be economical and minimize the environmental impact associated with siting and construction of new or expanded electric transmission lines.²⁵ In addition, Shepstone and IMG Midstream observe that rail offers a way to reach constrained or under-served markets in order to deal rapidly with peak demand, or in times of emergency.²⁶ Shale Rail contends that ATI requires a Commission declaration that ATI's proposed service is transmission of electric energy and that ATI is a public utility in order for fair competition to occur, and that ATI will be selected to address identified transmission needs only when it offers the timeliest or most economical solution or both.²⁷ Shepstone and IMG Midstream aver that allowing new and innovative delivery systems, such as ATI's proposal, to compete on a level playing field with traditional wire solutions would resolve several energy issues.²⁸

B. Protests

1. ATI's Proposal Lacks Detail and Is Not Sufficiently Supported

13. APPA, EEI, EPSA, ERCOT, and the Texas Commission argue that additional information on the specifics of ATI's proposal would be required in order for the Commission to address ATI's Petition. APPA argues that ATI's "alternative transmission" concept is not sufficiently concrete to warrant declaratory relief at this time.²⁹ Further, APPA argues that ATI does not describe any steps that it has taken toward implementing the alternative transmission service or when it might do so. APPA points out that ATI does not identify the regions in which it might seek to implement its alternative transmission service nor provide any details about how ATI would arrange railroad or other surface transportation for the flow battery electrolytes in those regions.

²⁴ Shale Rail Comments at 2; Shepstone Comments at 1-2; IMG Midstream at 1-2.

²⁵ Shale Rail Comments at 2; Shepstone Comments at 2; IMG Midstream at 2.

²⁶ Shepstone Comments at 2; IMG Midstream at 2.

²⁷ Shale Rail Comments at 2.

²⁸ Shepstone Comments at 2; IMG Midstream at 2.

²⁹ APPA Protest at 7 (citing *S. Co. Servs., Inc.*, 108 FERC ¶ 61,139, at P 8 (2004)).

Similarly, EPSA states that it opposes ATI's requested relief in its Petition because the services and/or products to be offered are not sufficiently defined, and ATI's Petition does not include adequate detail. EPSA argues that ATI's Petition is unclear as to whether the container cars carry the mobile medium which is charged and discharged or if the container cars are the mobile medium.³⁰ EPSA argues that more information on technical and operational aspects of ATI's proposal are necessary for the Commission to assess how ATI will function in the markets, and how it must be classified and compensated.³¹ Furthermore, ERCOT argues that ATI does not identify the location of the potential transmission facilities nor demonstrate that the electric energy that it stores in chemical bonds will actually cross state lines such that it is in interstate commerce. ERCOT also argues that it is unclear how ATI proposes to treat transport of uncharged storage medium, when that is to occur. Moreover, ERCOT contends that ATI's Petition raises numerous questions about the nature of the hypothetical facilities and how they would or could be planned and operated, by whom, and at what cost.³²

14. APPA argues that ATI's Petition does not draw a line between facilities ATI asks the Commission to deem jurisdictional and those it does not. APPA explains that this omission is significant because, to the extent that any movement of energy takes place in the process described by ATI, it would be accomplished by train, truck, boat, or plane. According to APPA, this could present the question of whether the Commission could assert its jurisdiction over these vehicles and the infrastructure that supports these vehicles, such as railroad tracks, boat docks, airport facilities, etc..³³

15. APPA argues that, to the extent that the Commission does not dismiss or deny ATI's Petition outright, it should require ATI to explain in full: (1) the specific business model ATI intends to engage in; (2) the specifics of ATI's business, including officers, employees, financing, and transactions; (3) ATI's need for the jurisdictional ruling it seeks; and (4) all stakeholders that are likely to be affected by the relief it seeks. APPA states that the Commission should thereafter provide all interested parties the opportunity to intervene and comment on the petition in light of this additional information.³⁴ Similarly, EEI argues that ATI leaves a number of important questions unanswered, such as whether ATI's facilities would be subject to the North American Electric Reliability

³⁰ EPSA Protest at 1, 4.

³¹ *Id.* at 1-2.

³² ERCOT Protest at 10-11.

³³ APPA Protest at 6-7.

³⁴ *Id.* at 16.

Corporation (NERC) reliability standards and whether interconnection studies or other types of studies would be required to be performed at each of the points at which ATI proposes to interconnect or otherwise discharge electricity into the grid.³⁵

2. Petition Raises Issues That Should Not Be Addressed in a Declaratory Order

16. APPA, EEI, and the Texas Commission argue that a petition for declaratory order is not an appropriate vehicle for ATI's request. APPA and EEI argue that declaratory orders are to be "based on the specific facts and circumstances presented," and should not address broad issues that do not arise from these facts and circumstances.³⁶ APPA asserts that ATI's Petition is neither prompted by a particular planned project or opportunity nor is it based on a concrete proposal and is not limited to a particular set of circumstances. APPA and EEI assert that the Commission should refrain from issuing a generic ruling that could potentially extend Commission jurisdiction to other facts and circumstances that remain undefined in ATI's Petition, including new technologies and the jurisdiction of other federal agencies.³⁷ EEI states that these questions should not be addressed in a petition for declaratory order that does not sufficiently support a specific limited request.³⁸ The Texas Commission argues that expert testimony on the technical, legal, and policy implications of ATI's proposal would be necessary and appropriate in order for the Commission to properly address ATI's Petition.³⁹

17. EEI also argues that ATI does not explain why existing avenues of participation, competition, and compensation available to ATI are not satisfactory for its purposes such that it needs a declaratory order.⁴⁰ Similarly, APPA notes that ATI does not explain why it would be at a disadvantage in competing fairly with traditional transmission projects in the absence of ATI's requested declarations, given that Order No. 1000 requires

³⁵ EEI Protest at 10-11.

³⁶ APPA Protest at 7-8 (citing *ITC Grid Dev., LLC*, 154 FERC ¶ 61,206, at P 45 (2016); *Puget Sound Energy Inc.*, 139 FERC ¶ 61,241, at P 12 (2012)); EEI Protest at 11.

³⁷ APPA Protest at 8; EEI Protest at 9-11.

³⁸ EEI Protest at 9-10.

³⁹ Texas Commission Protest at 5.

⁴⁰ EEI Protest at 10-11.

transmission providers to consider transmission and non-transmission alternatives on a comparable basis.⁴¹

3. **ATI's Proposed Mobile Medium Transportation Does Not Fall under the Commission's Jurisdiction**

18. Several parties argue that the Commission should reject ATI's proposal because it does not fall within the Commission's jurisdiction, as prescribed by the FPA and interpreted by the courts and the Commission.⁴² Specifically, these parties assert that, to be considered engaged in the business of "transmission of electric energy in interstate commerce," an entity must transmit electric energy, not other forms of energy. Further, transmission of electric energy, they argue, is the flow of electric energy that enters a power network, energizes the entire grid, and immediately becomes part of a vast pool of energy that is constantly moving in interstate commerce. These parties argue that, in contrast, ATI's proposal involves chemical energy stored and moved in a mobile medium separate from the grid. Oncor argues that ATI's admission that its facilities will have a storage capability also demonstrates that its proposal does not involve transmission of electric energy, as one of the definitional characteristics of electric energy is that it cannot be stored.⁴³ APPA and ERCOT note that the Commission previously has considered many innovative uses of storage resources and declined to make the leap ATI suggests.⁴⁴

19. Several parties argue that Commission precedent, legislative history, and statutory context indicate that transmission lines and associated equipment used for the

⁴¹ APPA Protest at 7 (citing Order No. 1000, 136 FERC ¶ 61,051 at P 148).

⁴² *Id.* at 9-12 (citing *New York v. FERC*, 535 U.S. 1 (2002); *FPC v. Fla. Power & Light Co.*, 404 U.S. 453 (1972); *Conn. Light & Power Co. v. FPC*, 324 U.S. 515, 529 (1945) (*Conn. Light & Power*)); EEI Protest 6; ERCOT Protest at 5-7 (citing *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 209 n.5 (1964)); Oncor Protest at 9-18 (citing *Utah Power & Light Co. v. Pfof*, 286 U.S. 165, 179 (1932); *Cincinnati Gas & Elec. Co. v. FPC*, 376 F.2d 506, 508 (6th Cir. 1967); *Wis.-Mich. Power Co. v. FPC*, 197 F.2d 472, 477-78 (7th Cir. 1952); *Cross Tex. Transmission, LLC*, 129 FERC ¶ 61,106, at P 22 (2009); *Norton Energy Storage, L.L.C.*, 95 FERC ¶ 61,476, at 62,699 n.4 (2001) (*Norton Energy Storage*)); Texas Commission Protest at 5-7.

⁴³ Oncor Protest at 13-14 (citing *Norton Energy Storage*, 95 FERC at 62,702 n.15).

⁴⁴ APPA Protest at 13 (citing *Third-Party Provision of Ancillary Servs.; Accounting and Fin. Reporting for New Elec. Storage Tech.*, 139 FERC ¶ 61,245, at P 85 (2012)); ERCOT Protest at 8.

transmission of electric energy in interstate commerce are the physical transmission “facilities” covered by the FPA.⁴⁵ Many of these parties argue that such a finding here would be similar to the Commission’s analyses of analogous NGA provisions, finding that Commission jurisdiction over the transportation of natural gas did not extend beyond pipelines.⁴⁶

4. Jurisdictional Conflicts Concerns

20. APPA, EEI, and ERCOT argue that granting ATI’s Petition could create a conflict between the Commission and other regulatory authorities. APPA contends that all of the modes of transportation that ATI proposes to use are subject to some form of regulatory oversight, and thus granting ATI’s Petition would lead to conflicts between the Commission and other federal regulatory regimes such as the Surface Transportation Board’s authority over railroad rates and services.⁴⁷ APPA additionally argues that ATI’s Petition fails to explain whether the proposed “electric energy transfer stations” would be subject to state and local jurisdiction, as is common for other charging stations.⁴⁸ EEI states that, even if the Commission’s jurisdiction could be narrowly construed to encompass only what appears to be sought in ATI’s Petition, transportation of chemicals and other potentially volatile materials is regulated at the federal and state levels by agencies other than the Commission and/or Department of Energy.⁴⁹ EEI explains that the Commission has rejected similar arguments for the extension of its jurisdiction under the NGA to non-pipeline methods to transport natural gas such as Liquefied Natural Gas tankers, and argues that these cases are instructive in considering

⁴⁵ APPA Protest at 10-11; EEI Protest at 4-5 (citing S. Rep. No. 621, 74th Cong., 1st Sess. 48 (1935); H.R. Rep. No. 1318, 74th Cong., 1st Sess. 8 (1935)); ERCOT Protest at 6-7; Oncor Protest at 18-21 (citing *EnergyConnect, Inc.*, 130 FERC ¶ 61,031, at P 27 (2010); *Ne. Utils. Serv. Co.*, Opinion No. 364-A, 58 FERC ¶ 61,070, at 61,191-92, *reh’g denied*, Opinion No. 364-B, 59 FERC ¶ 61,042, *reh’g dismissed*, 59 FERC ¶ 61,089 (1992), *aff’d in part and remanded in part sub nom. Ne. Utils. Serv. Co. v. FERC*, 993 F.2d 937 (1st Cir. 1993); S. Rep. No. 621, 74th Cong., 1st Sess. 48 (1935)).

⁴⁶ APPA Protest at 11-12 (citing *Exemption of Certain Transport and/or Sales of Liquefied Natural Gas from the Requirements of Section 7(c) of the Natural Gas Act*, 49 FPC 1078 (1973)); EEI Protest at 8 (citing *Emera*, 148 FERC ¶ 61,219 at P 19 n.21; Oncor Protest at 20 (citing *Emera*, 148 FERC ¶ 61,219 at P 13 & n.15)).

⁴⁷ APPA Protest at 14.

⁴⁸ *Id.* at 15.

⁴⁹ EEI Protest at 8.

the FPA's jurisdiction over non-wires transmission.⁵⁰ EEI argues that the Commission has long recognized that it is inappropriate to extend its jurisdiction to modes of transportation regulated by other entities without explicit expression of Congressional intent.⁵¹ ERCOT contends that the technology ATI proposes is not meaningfully different from transporting fossil and nuclear fuels across state lines for use at electric generating facilities, and thus the logical result of granting ATI's Petition would be to impose the Commission's FPA jurisdiction on all of these activities.⁵² ERCOT argues that such a paradigm shift in the industry would not only pose a technical and logistical challenge, but also create a direct conflict between the Commission and other regulatory bodies such as the U.S. Department of Transportation and the Federal Aviation Administration.⁵³

21. APPA, ERCOT, Oncor, and the Texas Commission express concerns that granting ATI's Petition could subject ERCOT and ERCOT utilities to Commission jurisdiction if ATI were to build energy transfer stations both inside and outside of ERCOT.⁵⁴ Oncor additionally argues that granting ATI's Petition could also subject any sale for resale in ERCOT to the Commission's jurisdiction under section 201(b) of the FPA.⁵⁵ Oncor explains that, since the passage of the FPA in 1935, the Texas Interconnection has been operated in a manner that allows utilities in the state to avoid becoming subject to federal jurisdiction, and that Congress and the Commission have recognized the importance of maintaining Texas's exemption from full jurisdiction.⁵⁶ Oncor argues that the Commission should not accept ATI's Petition without undertaking further process to address whether the approach that has been used in the past to preserve ERCOT's independence, namely orders under sections 210 and/or 211 of the FPA, would be

⁵⁰ *Id.* at 8-9 (citing *Emera*, 148 FERC ¶ 61,219 at P 19 n.21).

⁵¹ *Id.* at 9 (citing *Exemption of Certain Transport and/or Sales of Liquefied Natural Gas from the Requirements of Section 7(c) of the Natural Gas Act*, 49 FPC 1078 at 1080-81).

⁵² ERCOT Protest at 8.

⁵³ *Id.* at 9.

⁵⁴ APPA Protest at 15; ERCOT Protest at 9; Oncor Protest at 5-6; Texas Commission Protest at 7.

⁵⁵ Oncor Protest at 5-6.

⁵⁶ *Id.* at 6-7.

available and adequate to preserve ERCOT's independence.⁵⁷ However, Oncor argues, it would be far preferable and much more legally sound for the Commission to deny ATI's Petition and confirm that the facilities and services ATI proposes will not involve any electric energy being transmitted in interstate commerce or being commingled with electric energy that is transmitted in interstate commerce, and that any sales associated with the charging and discharging of potential energy transfer stations in ERCOT would be sales of electric energy occurring wholly within ERCOT not subject to the Commission's jurisdiction.⁵⁸

22. APPA, EEI, and Oncor also discuss how ATI's proposal could affect other technologies, such as electric vehicles charging in one state, then driving across state lines and discharging in another state to provide vehicle-to-grid services.⁵⁹ APPA argues that ATI's Petition does not articulate any limiting principle that would preclude such electric vehicle transportation from being deemed jurisdictional interstate transmission.⁶⁰ EEI argues that granting ATI's Petition could effectively impose Commission jurisdiction on such vehicles and other technologies and sectors that are not otherwise susceptible to Commission regulation.⁶¹ Oncor inquires whether the owners and operators of such vehicles would be public utilities subject to Commission jurisdiction if ATI's preferred interpretation of the FPA is adopted.⁶²

5. Preferential Treatment

23. EPSA argues that designating ATI's "alternative transmission" as requested confers preferential rate treatment to those resources based on their function. EPSA states that it supports the development and integration of innovations and new technologies into the Interstate Bulk Power System to provide location-constrained resources with access to markets and to help meet future energy needs. However, EPSA argues that, to maintain a functional, reliable, and competitive market, market rules and compensation mechanisms must treat all similarly-situated resources and facilities largely the same. According to

⁵⁷ *Id.* at 26.

⁵⁸ *Id.* at 26-27.

⁵⁹ APPA Protest at 16; EEI Protest at 7; Oncor Protest at 25.

⁶⁰ APPA Protest at 16.

⁶¹ EEI Protest at 7.

⁶² Oncor Protest at 24-25.

EPSA, allowing ATI assured transmission treatment and cost compensation for the provision of electricity runs counter to these objectives by being unduly discriminatory..⁶³

C. Other Comments

24. LS Power filed comments stating that, although it takes no position on the relief sought in ATI's Petition, it requests that the Commission narrowly tailor its decision to the specific facts presented in ATI's Petition..⁶⁴

D. ATI's Answer

25. In response to arguments that ATI's Petition is not sufficiently detailed, ATI explains that it is not asking the Commission to approve a specific transmission project, only for the Commission to declare that ATI's non-wires alternative would be jurisdictional transmission so that ATI can participate fairly on a level playing field in competitive transmission development processes among other transmission solutions..⁶⁵ ATI further asserts that any argument that Order No. 1000's requirement for transmission providers to consider transmission and non-transmission alternatives on a comparable basis is sufficient misconstrues the business that ATI proposes..⁶⁶ ATI maintains that it will not be a generator or power supplier – whatever electric energy is used to charge the electrolyte in its container cars will be provided by unaffiliated generators or other suppliers – nor will it seek reimbursement for storage service..⁶⁷

26. ATI argues that, regardless of whether it is labeled transmission or mobile storage, ATI's alternative transmission offers a particularly efficient and flexible way to transmit electric energy. ATI notes that, as the Commission previously indicated, if storage provides substantial benefits to the transmission system, then it may warrant treatment as

⁶³ EPSA Protest at 7-8.

⁶⁴ LS Power Comments at 3.

⁶⁵ ATI Answer at 2-3, 17-18 (citing EEI Protest at 9-11; ERCOT Protest at 4-5, 10; Texas Commission Protest at 4-5).

⁶⁶ *Id.* at 18 (citing APPA Protest at 7).

⁶⁷ *Id.*

a transmission asset.⁶⁸ ATI explains that its alternative transmission offers many benefits when compared to conventional transmission and stationary storage including: (1) flexibility in selecting the energy sources that charge the portable media at the charging station; (2) potentially superior performance through the use of precision scheduled railroading to sequence continuous shipments of container cars between charging and discharging stations as the cars deplete and need to be recharged; (3) allowing the regional transmission organization/independent system operator (RTO/ISO) or customer to choose when to charge or discharge the energy and the level of the energy; (4) delivery of new sources of energy to other locations in order to provide energy storage at different locations incidentally from time to time; and (5) increasing the resiliency of the electrical power system.⁶⁹

27. ATI also asserts that it will be subject to all reliability and safety standards and will not violate NERC reliability standards, and ATI asks that the Commission explicitly condition its findings on the requirement that ATI at all times be in full compliance with NERC and any other applicable safety and reliability standards.⁷⁰

28. ATI also disputes the argument that its proposal cannot constitute “transmission of electric energy in interstate commerce” under section 201 of the FPA.⁷¹ ATI states the Commission previously recognized that “electric storage resources may fit into one or more of the traditional asset functions of generation, transmission and distribution.”⁷² ATI explains that, like the proposal considered in *Western Grid Development, LLC*,⁷³ it proposes to provide only transmission service that will be entirely under its control and will neither generate electric energy nor participate in RTO/ISO energy markets. ATI

⁶⁸ *Id.* at 11 (citing *Utilization of Elec. Storage Resources for Multiple Servs. When Receiving Cost-Based Rate Recovery*, 158 FERC ¶ 61,051, at P 5 (2017) (Policy Statement)).

⁶⁹ *Id.* at 11-12.

⁷⁰ *Id.* at 13.

⁷¹ *Id.* at 5 (citing APPA Protest at 9-10; EEI Protest at 4-5; ERCOT Protest at 5-6; Oncor Protest at 10-13; Texas Commission Protest at 3-4).

⁷² *Id.* (citing Policy Statement, 158 FERC ¶ 61,051 at P 2).

⁷³ *Id.* at 7 (citing *Western Grid Development, LLC*, 130 FERC ¶ 61,056 (2010) (*Western Grid*), *reh’g denied*, 133 FERC ¶ 61,029 (2010)).

argues that parties' reliance on the word "lines"⁷⁴ to mean Congress authorized FPA jurisdiction only over transmission by wire overlooks common usage of the word "line" (e.g., air lines, freight lines, landlines, pipelines, rail lines, trunk lines, and shipping lines).⁷⁵

29. ATI also argues that the use of components of a flow battery to store chemical energy and deliver electric energy offers highly efficient transmission as modeled and dispatched by a system operator. According to ATI, confining transmission to wires and excluding surface transportation of chemical energy in the form of electrolytes ignores important developments in energy storage particularly suited to transmission as well as how system operators actually model and dispatch power flows. It is ATI's belief that, if ATI's alternative transmission were selected in a regional transmission expansion plan open season for proposals, then the selecting RTO/ISO could model and dispatch ATI just as it does the rest of the grid with perhaps even more flexibility than transmission by stationary wires.⁷⁶

30. ATI also disputes that its Petition raises potential for jurisdictional conflicts, stating that it intends solely to own charging and discharging stations and either own or lease the electrolyte solution and container cars.⁷⁷ ATI explains that it will contract with the transportation providers that will carry the container cars and who will be subject to the compliance requirements of their own regulators, be it the Department of Transportation, the Surface Transportation Board, the Coast Guard, the Federal Aviation Administration, and state authorities. ATI states that it will not do business with transportation providers not operating in complete compliance with the requirements of their respective regulators and that any order granting ATI's Petition should state so explicitly.⁷⁸

31. ATI disagrees with concerns regarding the jurisdictional status of ERCOT. ATI asks that the Commission affirm that any alternative transmission by ATI into or out of ERCOT would be treated for jurisdictional purposes the same as existing direct current,

⁷⁴ See, e.g., EEI Protest at 5 (quoting Sen. Rep. No. 74-621, at 48 ("Jurisdiction is asserted also over all interstate transmission *lines* whether or not there is sale of the energy carried by those *lines*") (emphasis by EEI)).

⁷⁵ ATI Answer at 7-8.

⁷⁶ *Id.* at 8-10.

⁷⁷ *Id.* at 13 (citing APPA Protest at 14-15; ERCOT Protest at 9).

⁷⁸ *Id.* at 13-14.

asynchronous connections between ERCOT and Southwest Power Pool, Inc. (SPP). ATI notes that it would also be amenable to any other conditions that would ensure no change in the jurisdictional status of ERCOT.⁷⁹

32. ATI argues that granting its Petition would not extend to the movement of fuels or charged consumer products. ATI states that fuels such as coal, oil, natural gas or uranium are not comparable to the charged electrolyte proposed by ATI. ATI explains that those fuels can be used to generate electric energy or be used for other applications, but the potential energy in them is not obtained from the electric system. According to ATI, transporting those fuels is not comparable to the transmission of what is already electric energy obtained from the electric system, transferred into an electrolyte medium, and redelivered as electric energy at a discharging station.⁸⁰

33. ATI also disputes arguments that electrically charged devices such as electric cars are akin to ATI's alternative transmission because these devices do not approximate the scale required to receive or deliver wholesale electric energy and cannot instantaneously and reversibly change between electric and chemical energy as can ATI's alternative transmission. Thus, according to ATI, such devices would not fall within the parameters of ATI's Petition.⁸¹

E. Oncor Answer

34. Oncor asserts that, even if the Commission accepts ATI's argument that transportation of potential energy stored in a chemical solution constitutes "transmission of electric energy in interstate commerce," ATI has submitted that it will not be engaged in providing such transmission services, and instead will contract with third party "transmission provider(s)."⁸² Oncor states that it is the third-party "transmission provider(s)," not ATI, who would become the transmission-owning "public utilities" subject to Commission jurisdiction.

⁷⁹ *Id.* at 16 (citing Oncor Protest at 1-2; Texas Commission Protest at 7; ERCOT Protest at 2-3).

⁸⁰ *Id.* at 14-15.

⁸¹ *Id.* at 15.

⁸² Oncor Answer at 1.

35. Oncor argues that ATI's Answer does not address the shortcoming of ATI's Petition, which is that ATI proposes to contract for transportation of potential energy stored in a chemical solution, and it does not propose to transmit electric energy.⁸³ Oncor contends that the Commission and the courts have emphasized that Commission jurisdiction is to "follow the flow of electric energy," as assessed on an "engineering and scientific" basis.⁸⁴

36. Oncor argues that ATI's Answer relies on precedent that is distinguishable. In particular, Oncor asserts that the *Western Grid* decision, which addressed a "unique" proposal and expressly was "limited to the facts presented," does not support the proposition that any movement of a charged storage device (such as that proposed by ATI) would qualify as transmission service.⁸⁵

37. Finally, Oncor contends that ATI fails to meaningfully address the jurisdictional implications of its Petition. Oncor states that, contrary to what ATI's Answer suggests, ERCOT is not exempt from the Commission's plenary jurisdiction because the ties between ERCOT and SPP are "direct current, asynchronous connections,"⁸⁶ but rather because transmission of electric energy between ERCOT and states other than Texas is provided solely pursuant to Commission orders under section 211 of the FPA. Oncor argues that ATI's Answer reflects confusion about the basic jurisdictional requirements of sections 210 and 211 of the FPA.⁸⁷

III. Discussion

A. Procedural Matters

38. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2018), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. The entities that filed comments but did not file motions to intervene are not parties to this proceeding.⁸⁸

⁸³ *Id.* at 3.

⁸⁴ *Id.* at 5 (citing *Conn. Light & Power*, 324 U.S. at 529).

⁸⁵ *Id.* at 6-7 (citing *Western Grid*, 130 FERC ¶ 61,056 at P 43).

⁸⁶ *Id.* at 7 (citing ATI Answer at 16).

⁸⁷ *Id.* at 7-8 (citing ATI Answer at 16; 16 U.S.C. §§ 796(22)(A), 824i(a)(1)(A)).

⁸⁸ 18 C.F.R. §§ 385.102(c)(3) (2018), 385.214(a)(3).

39. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2018), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We accept ATI's and Oncor's answers because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

40. We dismiss ATI's Petition because we find that its requests that the Commission declare that ATI's proposed alternative transmission facilities and services provide "transmission of electric energy in interstate commerce" and that ATI will be a "public utility" under section 201(e) of the FPA are premature at this time.

41. The Commission has previously stated that, for non-traditional assets that may not readily fit into only one of the traditional asset functions of generation, transmission, or distribution, it addresses the classification of such resources on a case-by-case basis.⁸⁹ For example, in *Western Grid*, Western Grid Development, LLC (Western Grid) proposed to construct several electric storage facilities at sites along the California Independent System Operator Corporation (CAISO) transmission system that Western Grid stated would: (1) mitigate transmission overloads; (2) address transmission line trips; (3) respond to transmission lines taken off for maintenance; and/or (4) react to voltage dips.⁹⁰ The Commission found that, based on the specific circumstances and characteristics of the proposed projects, they would be wholesale transmission facilities subject to the Commission's jurisdiction if operated as described by Western Grid and if approved in the CAISO transmission planning process.⁹¹ The Commission also stated that Western Grid had put forth a proposal that was unique thus far in terms of how it would utilize storage technology to mimic a wholesale transmission function.

42. However, the Commission has dismissed as premature a petition where an applicant has provided insufficient information. In *Nevada Hydro Company, Inc.*, Nevada Hydro Company, Inc. (Nevada Hydro) petitioned the Commission for a declaratory ruling that its proposed pumped storage facility would qualify as a transmission facility.⁹² The Commission dismissed the petition as premature both

⁸⁹ See, e.g., *Western Grid*, 130 FERC ¶ 61,056 at P 44 (citing *Nev. Hydro Co.*, 122 FERC ¶ 61,272, at P 84 (2008), *reh'g denied*, 133 FERC ¶ 61,155 (2010)).

⁹⁰ See *id.* PP 3-4.

⁹¹ *Id.* PP 43, 96.

⁹² 164 FERC ¶ 61,197, at P 22 (2018) ("We dismiss Nevada Hydro's petition and find that a request to designate [the Lake Elsinore Advanced Pumped Storage (LEAPS) facility] as a transmission facility is premature at this time. LEAPS has not been studied

because the applicant's arguments for why its proposed pumped storage facility should be considered transmission were too general to support such a finding, and because its proposed pumped storage facility had not been studied in the CAISO transmission planning process to determine whether it addressed a transmission need identified in the process or how the facility would be operated to address that need.⁹³

43. ATI's Petition provides only a hypothetical example of the proposed alternative transmission facilities and services and does not include a detailed description of the function and operation of the specific facilities that ATI claims would provide jurisdictional transmission service. Furthermore, ATI has neither identified the specific transmission planning region where it wishes to participate, nor a specific transmission need identified as a result of a regional transmission planning process.

44. We find that, absent such information, the Commission cannot make a reasoned decision on whether ATI's proposed facilities and services would, in fact, provide "transmission of electric energy in interstate commerce" or whether ATI would, in fact, qualify as a public utility under section 201(e) of the FPA. Accordingly, we dismiss ATI's Petition as premature.

The Commission orders:

ATI's Petition is hereby dismissed, as discussed in the body of this order.

By the Commission. Commissioner McNamee is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

in the CAISO [regional transmission planning process] Absent such information, the Commission cannot make a reasoned decision on whether LEAPS is a transmission project").

⁹³ *Id.* P 24.