



FEDERAL ENERGY REGULATORY COMMISSION

September 28, 2023

The Honorable Charles E. Schumer
United States Senate
Washington, D.C. 20510

Dear Majority Leader Schumer,

Thank you for your July 20, 2023 letter¹ in which you urge FERC to “strengthen and finalize”² its proposed rulemakings on transmission planning and cost allocation (Transmission Planning NOPR)³ and interstate transmission backstop siting authority (Transmission Siting NOPR).⁴ Specifically, you express concern that the Transmission Planning NOPR is “not strong enough to ‘remedy deficiencies in the Commission’s existing regional transmission planning and cost allocation requirements’” in order to achieve “our electric reliability, affordability, and clean energy goals.”⁵ Among other suggestions, you recommend that FERC “[d]efin[e] a set of benefits and requir[e] the consideration of that defined list from the outset,” establish a “clear cost allocation

¹ Senator Schumer July 20, 2023 Letter, Docket Nos. RM22-14-000, et al. (Accession No. 20230724-4001) (Letter).

² *Id.* at 3.

³ *Building for the Future Through Elec. Reg’l Transmission Planning & Cost Allocation & Generator Interconnection*, 179 FERC ¶ 61,028 (2022) (Transmission Planning NOPR).

⁴ *Applications for Permits to Site Interstate Elec. Transmission Facilities*, 181 FERC ¶ 61,205 (2022) (Transmission Siting NOPR).

⁵ Letter at 1.



mechanism,” and require public utilities to conduct a long-term planning scenario that considers the “high penetration of variable energy resources.”⁶

I, too, believe that long-term transmission planning and permitting reform is needed.⁷ It is troubling that project timelines for transmission projects developed to improve reliability and lower electricity costs often take over ten years. Even more concerning is the fact that, by the time such projects are actually placed into service, yet more transmission is often needed to address declining reliability margins which have tightened during the project’s pendency and construction. For instance, in January 2023, the New York Independent System Operator, Inc. (NYISO) stated that “[e]ven with [the Champlain Hudson Power Express Transmission Line] scheduled to begin operation in 2026, the [reliability] margin . . . narrows again to about 100 MW by 2032 due to increased demand” and without the project “in only a few years margins would be such that there will be more electricity demand on peak days than what the grid can provide.”⁸ Reliability concerns in New York may be likely to arise even sooner. NYISO recently announced that “[it] issued its second quarter 2023 STAR report” which “identified a reliability need in 2025 of up to 446 MW in New York City to address a deficiency in transmission security.”⁹

While I completely agree that reform is needed, strengthening and finalizing the Transmission Planning NOPR and Transmission Siting NOPR will *not* lead to the development of the new transmission necessary to reliably deliver electricity at an affordable price. Both rulemakings advance bad policy and are inconsistent with the

⁶ *Id.* at 1-2.

⁷ See Transmission Planning NOPR, 179 FERC ¶ 61,028 (Danly, Comm’r, dissenting at P 1) (“I welcome long term transmission planning reform.”).

⁸ *Timing of CHPE Transmission Project Vital to Future Grid Reliability*, NEW YORK ISO (Jan. 9, 2023), <https://www.nyiso.com/-/timing-of-chpe-transmission-project-vital-to-future-grid-reliability#:~:text=The%20two%2C%20five%2Dinch%2D,come%20online%20in%20mid%2D2026>.

⁹ NEW YORK ISO, *2023 Power Trends: A Balanced Approach to a Clean and Reliable Grid*, at 16 (Aug. 14, 2023), <https://www.nyiso.com/documents/20142/2223020/2023-Power-Trends.pdf/7f7111e6-8883-7b10-f313-d11418f12fbf?t=1686132123808>.



authority conferred upon FERC by Congress.¹⁰ The Transmission Planning NOPR attempts to use the Federal Power Act (FPA),¹¹ a statute that sounds in rate regulation and reliability, to achieve the particular (and inapposite) policy goal of encouraging massive transmission build-out to facilitate a transition to an aspirational renewable future.¹² The Transmission Siting NOPR, though designed by Congress to provide FERC with the power to ensure that the obstacles presented by state-level permitting processes can be overcome, has advanced a process so burdened by unnecessary NEPA analysis that it threatens to slow down, rather than accelerate, transmission siting.¹³

Without significant revision or Congressional amendment to the FPA, should the proposed rules be finalized, they are likely to be the subject of protracted litigation.

Transmission Planning Reform

To understand the options for reforming transmission planning, a general overview of the relevant provisions in the FPA may be helpful. Under FPA section 205,¹⁴ public utilities (including Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs)) can propose their own transmission planning

¹⁰ “FERC is a ‘creature of statute,’ having ‘no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.” *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)) (emphasis in *Atl. City Elec. Co.*).

¹¹ Transmission Planning NOPR, 179 FERC ¶ 61,028 (Danly, Comm’r, dissenting at P 3) (“[the majority] seek to use the FPA, a statute that sounds in rate regulation and reliability, as a tool to achieve a particular (and inapposite) policy goal”).

¹² *Id.*, (Danly, Comm’r, dissenting at P 2) (“The NOPR’s primary purpose is to achieve narrow environmental policy objectives, not to address legitimate requirements under the Federal Power Act like ensuring just and reasonable rates or reliability. After all, as the NOPR itself repeatedly admits, it is ‘driven by changes in resource mix and demand,’ notwithstanding its references to genuine problems with existing transmission planning.”) (footnotes omitted).

¹³ Transmission Siting NOPR, 181 FERC ¶ 61,205 (Danly, Comm’r, concurring at PP 1-2, 9).

¹⁴ 16 U.S.C. § 824d.



regimes. All FERC decides is whether the proposal is “just and reasonable.”¹⁵ FERC has not been empowered to determine “whether [one] method is more appropriate than a [another] method, but rather whether the [proposed] method is reasonable and adequate.”¹⁶ Courts have described FERC’s role as “essentially passive and reactive.”¹⁷

Under FPA section 206, FERC can investigate whether an existing transmission planning process is just and reasonable.¹⁸ After conducting a hearing, FERC can then impose a new transmission planning regime but only after making two findings: (1) that the existing rate is unjust and unreasonable and (2) that the replacement rate is just and reasonable.¹⁹ The courts have described FERC’s burden as “proving that the existing rate is *unlawful*.”²⁰

Whether acting under FPA section 205 or 206, FERC must support the facts it finds with substantial evidence²¹—that is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”²² In addition, FERC must “articulate

¹⁵ *Id.* § 824d(a), (e).

¹⁶ *Neb. Pub. Power Dist. v. FERC*, 957 F.3d 932, 943 (8th Cir. 2020) (quoting *Cities of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984)).

¹⁷ *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656, 662 (D.C. Cir. 2017) (quoting *City of Winnfield v. FERC*, 744 F.2d 871, 875-76 (D.C. Cir. 1984)).

¹⁸ 16 U.S.C. § 824e; *see also* 18 C.F.R. § 385.309 (regulations on notice of orders to show cause).

¹⁹ *Id.*

²⁰ *Emera Me. v. FERC*, 854 F.3d 9, 24 (D.C. Cir. 2017) (quoting *Ala. Power Co. v. FERC*, 993 F.2d 1557, 1571 (D.C. Cir. 1993)) (emphasis in *Emera Me.*).

²¹ 16 U.S.C. § 825l(b) (“The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.”). The Administrative Procedure Act (APA) requires similarly. 5 U.S.C. § 706 (“The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence.”).

²² *Consol. Edison Co. of N.Y., Inc. v. NLRB*, 305 U.S. 197, 229 (1938).



a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”²³

The Transmission Planning NOPR seeks to unilaterally impose transmission planning requirements on all public utility transmission providers under FPA section 206 “to meet transmission needs driven by changes in the resource mix and demand.”²⁴ This means that in order to satisfy the two prongs of FPA section 206, FERC must prove (1) that transmission planning across the nation—amongst all FERC’s varied regions, with different state regulatory regimes, utilities, and markets, each with their own tariff—is unjust and unreasonable and (2) that replacing all of the extant transmission planning processes with what many have described as FERC’s “highly prescriptive”²⁵—but also highly ambiguous—proposed reforms is just and reasonable.

Such a plan seems, at best, unwise. At worst, it will prove to be unlawful, either as a regulatory exercise in excess of our jurisdiction, or as a uniform, nation-wide mechanism imposed absent the requisite evidentiary showing. Several comments call into question whether existing transmission planning processes, which vary widely across

²³ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *see also id.* at 56 (“failed to offer the rational connection between facts and judgment required to pass muster under the arbitrary and capricious standard”); 5 U.S.C. § 706(2)(A) (“The reviewing call shall—hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.”).

²⁴ Transmission Planning NOPR, 179 FERC ¶ 61,028 at P 3 (citation omitted).

²⁵ *See, e.g.*, NYISO August 17, 2022 Comments, Docket No. RM21-17-000, at 3 (Accession No. 20220817-5198) (NYISO Comments); *see also* Midcontinent Independent System Operator, Inc. September 19, 2022 Reply Comments, Docket No. RM21-17-000, at 2 (Accession No. 20220919-5217) (describing the Transmission NOPR as proposing “overly-prescriptive requirements”); California Independent System Operator Corp. August 17, 2022 Comments, Docket No. RM21-17-000, at 3 (Accession No. 20220817-5290) (similar); Organization of PJM States, Inc. August 17, 2022 Comments, RM 21-17-000, at 10 (Accession No. 20220817-5296) (similar).



the country, are unlawful.²⁶ Indeed, comments jointly filed by the New York State Public Service Commission and New York State Energy Research and Development Authority (collectively, New York State Agencies) argue that NYISO’s “Public Policy Transmission Planning Process [(PPTPP)], along with other, State-led efforts *are working*.”²⁷ Similarly, New York Transmission Operators, including New York Public Power Authority (NYPA) and Long Island Power Authority, argue that “substantial reform . . . is not required. New York *has been doing very well* planning and developing both regional and local transmission facilities.”²⁸ State regulators and market monitors in other regions argue similarly.²⁹

²⁶ See, e.g., National Rural Electric Cooperative Association August 18, 2022 Initial Comments, Docket No. RM21-17-000, at 14 (Accession No. 20220817-5316) (“[National Rural Electric Cooperative Association (NRECA)] . . . is not aware of evidence to support a finding that Commission-jurisdictional transmission rates are unjust, unreasonable, unduly discriminatory or preferential *because of the deficiencies in the Commission’s existing regional transmission planning and cost allocation requirements identified in the NOPR*.”) (emphasis in original) (citation omitted); *id.* at 15 (“existing regional transmission planning appear to be working reasonably well for many of NRECA’s members in many other areas of the country”).

²⁷ New York State Public Service Commission, et al. August 17, 2022 Comments, Docket No. RM21-17-000, at 5 (Accession No. 20220817-5263) (New York State Agencies Comments) (emphasis added).

²⁸ New York Transmission Owners August 17, 2022 Initial Comments, Docket No. RM21-7-000, at 4 (Accession No. 20220817-5212) (emphasis added) (New York TOs Comments); *id.* at 7 (“New York’s existing, *successful*, and ongoing planning processes”) (emphasis added).

²⁹ North Carolina Utilities Commission, et al. August 17, 2022 Comments, at 5 (Accession No. 20220817-5286) (“Up to this point, we have found the current regional transmission planning in [Southeast Regional Transmission Planning (SERTP)] to have been adequate, in which most transmission has been constructed to meet reliability requirements. In particular, as it relates specifically to North Carolina, we do not agree with the Commission’s conclusion that the growth in interconnection-related network upgrades demonstrates a failure of regional transmission planning. As the SERTP Sponsors informed the Commission . . . , they have collectively added 3,158 miles of new transmission and 6,989 miles of uprates in the period of 2015–2020, such that



It is also questionable whether the Transmission Planning NOPR can show that that top-down replacement transmission planning process that would apply to every public utility, in every state, and in every market, would be just and reasonable.³⁰ Respectfully, FERC’s ability to impose such changes (and defend them on appeal) would be even more difficult if it were to adopt your recommendations to prescribe a defined set of benefits and a long-term scenario, which some have cautioned could “lead[] to more conflict”³¹ and “increase reliability risks on the grid.”³²

Any top-down process unilaterally imposed by FERC is virtually certain to be vigorously opposed in many regions. Indeed, New York State Agencies urged that FERC “should confirm in its final rule that . . . the state should be afforded a central role in

approximately 12% of all transmission in the region consists of new or updated lines.”) (NCUC Comments); *see also* Independent Market Monitor for PJM August 18, 2022 Comments, Docket No. RM21-7-000, at 2 (Accession No. 20220818-5017) (“Many of the design flaws that motivated this NOPR are not present in PJM. As one example . . . it is not true in PJM that investments associated with interconnections have been disproportionately large.”) (PJM IMM Comments).

³⁰ *See, e.g.*, NYISO Comments at 3 (“[T]he NOPR also proposes certain highly prescriptive requirements that do not account for the differences among the planning regions that have resulted in unique and varying transmission planning and interconnection approaches. These requirements could create needless administrative burdens on the planning region and impede its effective and timely performance of transmission planning.”); Chair Dwight D. Keen of Kansas Corporation Commission August 18, 2022 Comments in Opposition, Docket No. RM21-17-000, at 2 (Accession No. 20220818-5008) (“[T]here is no evidence that adopting the NOPR will improve interregional cooperation or will inure to the benefit of ratepayers or accomplish the FERC core missions of ensuring just and reasonable rates and ensuring reliability.”). One commenter suggested that top-down replacement would be inconsistent with section 217(b)(4) of the FPA, 16 U.S.C. § 824q(b)(4), which authorizes FERC to “facilitate[] the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service obligations of the load-serving entities” *See* NRECA Comments at 17.

³¹ The ISO/RTO Council August 17, 2023 Initial Comments, Docket No. RM21-17-000, at 5 (Accession No. 20220817-5150) (emphasis omitted).

³² NRECA Comments at 19.



determining the scenarios to be studied, the specific project benefits to be evaluated, and the quantifiable metrics used to assess the benefits that may be achieved through transmission development.”³³ NYPA together with several other New York Transmission Owners reiterated the same point stating, “active state involvement . . . is critically important for New York.”³⁴ New York State Agencies, along with many others, urged FERC to adopt a bottom-up approach that accommodates regional differences.³⁵

³³ New York State Agencies Comments at 8.

³⁴ New York TOs Comments at 6.

³⁵ New York State Agencies Comments at 7 (“We urge the Commission to ensure that any final rule in this proceeding is sufficiently flexible to accommodate regional differences and avoid disrupting the processes already in place and otherwise underway in New York that are working well for the region.”); Southwest Power Pool, Inc. August 17, 2022 Comments, Docket No. RM21-17-000, at 18 (Accession No. 20220817-5141) (“How and when transmission benefits are calculated and incorporated in any regional transmission planning assessment should be at the discretion of each public utility transmission provider and its stakeholders. This would allow for agility in process decisions to balance the value the analysis provides with the burden of the effort.”); ISO New England Inc. August 17, 2022 Comments, Docket No. RM21-17-000, at 5 (Accession No. 20220817-5091) (“Individual regions should be permitted to determine the benefits that will lead to transmission in the region.”); NYISO Comments at 39 (“The final rule should confirm that each planning region is not required to use the specific benefits described in the NOPR While, in practice, the NYISO already uses most of the 12 illustrative benefits identified in the NOPR, the NYISO should be permitted to retain its flexibility to identify, with input from state entities and stakeholders, the benefits used in its processes and how such benefits are calculated.”); *id.* at 11 (“The final rule should not mandate strict requirements concerning how long-term transmission planning must be conducted.”); New York TOs Comments at 15 (“While the NOPR’s list of benefits is largely in line with those the NYISO already uses in the PPTPP process, each planning region should be allowed to identify the types of benefits that are relevant and may be considered to discipline benefit/cost analysis of proposed high-voltage transmission solutions.”); American Public Power Association August 17, 2022 Initial Comments, Docket No. RM21-17-000, at 46 (Accession No. 20220817-5214) (“[American Public Power Association] reiterates its comments above that the



Without satisfying the two-prong test in FPA section 206, and basing those findings upon substantial evidence, FERC will be unable to finalize—let alone strengthen—the Transmission Planning NOPR. Given the legal risk presented by such a rule, the likely opposition it will face if implemented in its current form, and the protracted litigation that is nearly certain to follow, FERC would be well-advised to close this proceeding and seek to reform transmission planning either by encouraging public utilities to file their own transmission planning reforms under FPA section 205 or issue section 206 orders requiring the RTOs—which is where we find most of the problems in transmission planning—to show cause why their existing processes are just and reasonable.

I also caution you as to the consequences of implementing your recommendation that FERC revise the Transmission Planning NOPR to require a cost allocation method when “any state withholds support on a cost allocation method.”³⁶ The result of such a rule would be that ratepayers in states with different public policy goals would be forced to pay for another’s state’s policy objectives.³⁷ Absent legislation, under longstanding case law,³⁸ such a cost allocation mechanism could not be found to be just and reasonable under the FPA. Ratepayers can only be required to pay rates that are roughly commensurate with the benefits they receive from transmission projects.³⁹ If a state receives no benefits from a transmission project, it cannot be said, under the law, to be “act[ing] as [a] free rider[] and avoid[ing] any costs.”⁴⁰

Commission should not prescribe any particular definition of benefits or beneficiaries, and should instead allow regional flexibility.”).

³⁶ Letter at 2.

³⁷ See Transmission Planning NOPR, 179 FERC ¶ 61,028 (Danly, Comm’r, dissenting at P 9).

³⁸ See *Ill. Com. Comm’n v. FERC*, 576 F.3d 470 (7th Cir. 2009); see also *Ill. Com. Comm’n v. FERC*, 721 F.3d 764 (7th Cir. 2013).

³⁹ *Ill. Com. Comm’n v. FERC*, 576 F.3d at 476 (“FERC is not authorized to approve a pricing scheme that requires a group of utilities to pay for facilities from which its members derive no benefits, or benefits that are trivial in relation to the costs sought to be shifted to its members.”).

⁴⁰ Letter at 2.



I am not alone in my concern that the socialization of transmission costs will lead to inequitable and unlawful ratepayer burdens. New York State Agencies have jointly “urge[d] that any final rule . . . make clear that cost allocation for public policy-driven projects should be subject to state review and approval.”⁴¹ The Public Service Commission for West Virginia stated that it “opposes any changes in transmission cost allocation that would require West Virginia customers, or customers of any State, to involuntarily pay for new transmission facilities that are needed to support the public policy generation choices of other States.”⁴² Several other state agencies have made similar arguments.⁴³

⁴¹ New York State Agencies Comments at 14.

⁴² Public Service Commission of West Virginia October 17, 2022 Reply Comments, Docket No. RM21-17-000, at 2-3 (Accession No. 20221017-5016).

⁴³ *See, e.g.*, Mississippi Public Service Commission September 19, 2022 Reply Comments, Docket No. RM21-17-000, at 2-3 (Accession No. 20220919-5080) (“Involving state regulators in cost allocation issues makes certain that one state’s policy choices are not imposed on another state’s consumers without their affirmative consent. . . . If a state cannot agree on cost allocation, that state is signaling that the project is not subjectively beneficial. Where states do not agree that a proposed State Policy Project is beneficial, the project should not be built.”) (citation omitted); Office of the Ohio Consumers’ Counsel August 17, 2022 Comments, Docket No. RM21-17-000, at 17-18 (Accession No. 20220817-5260) (“Such a policy may encourage investment in such transmission facilities, but it will come at the expense of mandated subsidization of such facilities by all consumers in a region regardless of whether they receive any of the electrons from these generating facilities. Ohio consumers should not be forced to pay for other states’ public policy decisions to build renewable resources.”) (citation omitted); Alabama Public Service Commission, August 16, 2022 Comments, Docket No. RM21-7-000, at 9 (Accession No. 20220816-5042) (“In other words, states may not force their preferences on their neighbors, or compel them to subsidize their achievement. Thus, it goes without saying that Alabama ratepayers should not be required to pay for transmission projects that are designed to promote or facilitate the public goals of other states, localities, or entities.”); NCUC Comments at 6 (“the [North Carolina Utilities Commission] and Public Staff urge the Commission to more clearly and directly require transmission providers to seek agreement from states at every stage of the Long-Term Regional Transmission Planning process”).



Forcing states to pay for the public policy goals of another state will only cause the “risk of . . . projects being stalled due to deadlock,”⁴⁴ to be replaced with the risk of protracted proceedings and litigation. I am doubtful that many people will be eager to fund the development of transmission projects in such an environment, one in which they face the perpetual risk that projects may have their costs reallocated and in which all projects, regardless of their merits, must be developed under a continual cloud of uncertainty driven by legal risk and regulatory unpredictability.

Transmission Siting NOPR

As for the Transmission Siting NOPR, in my view, finalizing the proposed rulemaking will not help expedite the permitting of transmission facilities or “decrease the risk of further delays of project approval.”⁴⁵ The NOPR imposes unnecessary and unintelligible requirements that will prolong the time that developers must take to prepare applications. And because developer’s initial attempts to decipher the rule’s compliance requirements will likely be unsuccessful, one should expect the issuance of numerous data requests which will further prolong review.⁴⁶ Ambiguity empowers the Commission to act arbitrarily as it announces vague standards by which it will be able to impose inconsistent requirements on an application-by-application basis. Uncertainty and inconsistency will chill investment and make the rational allocation of capital more difficult. This will slow the very development that Congress sought to encourage when passing the statute. Further, transmission projects sited using this authority will be subject to the paralysis and uncertainty that NEPA creates—years’-long environmental reviews followed by years of litigation in which a determined court can nevertheless identify a shortcoming in the review and vacate the Commission’s action. Any effort to grant additional authorities to the Commission to site transmission must ultimately confront this reality.

⁴⁴ Letter at 2.

⁴⁵ *Id.* at 3.

⁴⁶ *See* Commissioner Danly April 6, 2023 Response to March 2023 McMorris Rodgers Transmission Letter, at 9-10, <https://www.ferc.gov/news-events/news/commissioner-danly-response-march-2023-mcmorris-rodgers-transmission-letter> (responding to Chairs McMorris Rodgers and Duncan’s question regarding the timely issuance of permits under FPA section 216).



* * *

Thank you for the opportunity to share my thoughts. If I can be of any further assistance with these issues or any other Commission matter, please do not hesitate to contact me.

Sincerely,

James Danly

James P. Danly
Commissioner