

Client Advisory:

Federal Energy Regulatory Commission Issues
Two Major Final Rules on Transmission Planning and Siting

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On May 13, 2024, the Federal Energy Regulatory Commission (FERC or Commission) issued two final rules related to the development of transmission infrastructure. The first, Order No. 1920,¹ is a landmark order issued under FERC's Section 206 Federal Power Act (FPA) authority and requiring reforms related to transmission planning and cost allocation, with a focus on long-term transmission planning. Order No. 1920 seeks to ensure more efficient, cost-effective, and comprehensive transmission planning and thereby help ensure just and reasonable rates for transmission. The second, Order No. 1977,² provides additional clarity and detail for the rules regarding applications for permits to use federal backstop siting authority and, in so doing, implements the congressional mandates of the Infrastructure Investment and Jobs Act of 2021 (IIJA) and Section 216 of the FPA. Order No. 1920 was published in the *Federal Register* on June 11, 2024 and the final rule is effective August 12, 2024. Order No. 1977 was published in the *Federal Register* on May 29, 2024 and is effective July 29, 2024.

Order No. 1920 was approved with the support of two of the three current FERC Commissioners, with Chairman Phillips and Commissioner Clements voting for the rule. Commissioner Christie issued a dissent, which no doubt emboldened interested stakeholders to submit the numerous requests for rehearing and/or clarification that have been filed as of the date of this Advisory and will further impact subsequent appeals that are likely to come. Order No. 1977 was approved unanimously by all three FERC Commissioners and thus far has received only a handful of requests for rehearing.

There is no immediate general compliance requirement for Order No. 1977; the requirements of this final rule will only apply when transmission developers seek to use federal siting authority for interstate transmission projects. Order No. 1920, however, will require a substantial compliance effort from transmission providers across the nation, but they will have a reasonable time to submit compliance proposals. Order No. 1920 directs transmission providers to submit compliance filings within 10 and 12 months³ of August 12, 2024.⁴

High-Level Observations

- The impetus behind the issuance of this major transmission planning order has largely been seen as the need for transmission infrastructure to implement the clean energy transition. However, the legal basis for the reforms required by Order No. 1920 is not any substantive outcome, such as achieving the clean energy transition, but on ensuring just and reasonable rates and system reliability through more comprehensive longer-term planning. Some, like Commissioner Christie, will view this effort as pretext to accomplish policy goals and have challenged it as such in requests for rehearing. Others may be dissatisfied that the

¹ *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation*, Order No. 1920, 187 FERC ¶ 61,068 (2024) (“Order No. 1920”), <https://www.ferc.gov/media/e1-rm21-17-000>.

² *Applications for Permits to Site Interstate Electric Transmission Facilities*, 187 FERC ¶ 61,069 (2024) (“Order No. 1977”), <https://www.ferc.gov/media/e-2-rm22-7-000>.

³ Transmission providers are required to file compliance filings within 10 months of the effective date of the Final Rule for all compliance requirements except those related to interregional planning coordination, and within 12 months of the effective date for interregional coordination requirements. *Id.* at P 12.

⁴ *Id.*

final rule does not actually ensure that specific transmission infrastructure will be built to achieve a clean energy future.

- As noted above, despite all of the new planning requirements and process, Order No. 1920 does not presuppose outcomes or guarantee the selection and development of any transmission project to meet long-term needs that are identified in the new process.
- Order No. 1920 contains several requirements that are quite prescriptive in nature, such as the use of specific categories of factors in the transmission needs assessment and solution evaluation and selection processes. A few transmission providers have requested rehearing, arguing that the Commission should permit greater flexibility for certain planning requirements.
- While the states have a special role in some ways under Order No. 1920, including in scenario development and the evaluation and selection of solutions, FERC is quite clear in the final rule that the transmission provider has the decisive role in the new process. Several state entities have challenged Order No. 1920 on rehearing, arguing that it does not provide due deference to the states in planning or cost allocation. In implementation, there will need to be a careful coordination between the states seeking to advance their public policies and the transmission provider with the jurisdictional authority to make decisions in this process.
- There is a strong emphasis in the final rule on open and transparent transmission planning, with input from all interested stakeholders, especially regarding all the many details of scenario development, and solution evaluation and selection.
- The Commission recognizes the inherent uncertainty and risk associated with planning major infrastructure for long-term needs (i.e., 20 years or more in the future) that may not develop as planned, or at all, and has built into the process reevaluation considerations. Having the ability to select a project on a “no-regrets” basis or with the ability to revisit the need for the project as its in-service date approaches makes selection more likely.
- The Commission’s reforms build into the existing planning process a requirement to consider the need to build transmission network infrastructure that would otherwise be the responsibility of one or more interconnecting generators. This requirement appears to be a significant step toward overcoming the barrier to entry that major network upgrade responsibilities can be for interconnecting new generation projects, many of which are being developed in response to state public policy goals.
- Cost allocation is one area where states will have the potential ability to influence the outcome in the planning process, which is appropriate given the fact that much of the long-term transmission projects will be responding to state public policy requirements.

- FERC’s granting of a right of first refusal (ROFR) to incumbent transmission owners for in-kind transmission replacement projects has generated significant requests for rehearing and will continue to be a controversial matter going forward, probably until resolved by an appellate court decision.
- Finally, for Order No. 1920, the Commission avoids some controversial subjects by leaving them out of the order, perhaps to be addressed in future rulemakings. These include the ability of developers to seek recovery of construction work in progress as a transmission rate incentive for developing new transmission, an incumbent transmission owners’ ROFR to build new transmission assets within its service territory, and the use of independent transmission monitors to help oversee the planning and transmission rate related processes of transmission providers. Some of these omissions have also triggered requests for rehearing.
- With respect to Order No. 1977, the Commission’s final rule largely follows the line of the law of the IJA and allows FERC to exercise authority over interstate transmission siting in limited instances. Order No. 1977 also aligns with the Commission’s recent emphasis on engagement with landowners and environmental justice (EJ) communities. Consistent with the IJA’s requirement that the Commission evaluate whether a transmission applicant has made a good faith effort to engage with landowners and stakeholders, the final rule requires that applicants adopt the Applicant Code of Conduct and develop an EJ Engagement Plan describing the applicant’s efforts to engage with those communities.

Order No. 1920 Summary

I. Long-Term Regional Transmission Planning

Order No. 1920 requires transmission providers in each transmission planning region to engage in Long-Term Regional Transmission Planning (LTRTP), meaning regional transmission planning that is long-term (minimum of 20 years), forward-looking, and comprehensive to identify Long-Term Transmission Needs, transmission facilities that meet such needs, measure benefits of those transmission facilities, and evaluate those transmission facilities for potential selection in the regional transmission plan for purposes of cost allocation as the more efficient or cost-effective transmission solutions to meet Long-Term Transmission Needs.⁵ Order No. 1920 requires that LTRTP comply with the following existing Order Nos. 890 and 1000 transmission planning principles: (1) coordination; (2) openness; (3) transparency; (4) information exchange; (5) comparability; and (6) dispute resolution.⁶

FERC also adopted requirements regarding how transmission providers must conduct LTRTP. Specifically, transmission providers must: (1) develop Long-Term Scenarios (LTSs) to

⁵ *Id.* at P 224.

⁶ *Id.* at P 224.

identify transmission needs and which facilities can meet those needs;⁷ (2) use and measure, at least, seven required benefits to evaluate Long-Term Regional Transmission Facilities (LTRTFs) over, at least, 20 years starting from the estimated in-service date of each transmission facility; and (3) evaluate whether LTRTFs are the more efficient or cost-effective transmission solutions to meet Long-Term Transmission Needs, and use selection criteria (in collaboration with states and other stakeholders) that allow transmission providers to select such LTRTFs.⁸

A. Development of LTS and Requirements

Transmission providers must (1) develop and use LTSs as part of LTRTP and (2) use those LTSs to identify and evaluate LTRTFs needed to meet Long-Term Transmission Needs.⁹ The final rule requires that transmission providers use the Seven Required Benefits to help inform their identification of Long-Term Transmission Needs.¹⁰

Horizon and Revisions. Order No. 1920 requires that transmission providers use at least a 20-year transmission planning horizon to develop LTSs to identify Long-Term Transmission Needs that will materialize at any point in the 20-year (or longer) period following the commencement of the LTRTP cycle, and any solutions to those needs.¹¹ Transmission providers must reassess and revise the LTS used in LTRTP at least once every five years.¹² During the five-year LTRTP cycle, transmission providers must develop a minimum of three distinct LTS as part of LTRTP that incorporate the seven categories of factors (discussed below).¹³ Order No. 1920 also requires that transmission providers develop at least one extreme weather event sensitivity per LTS, designed as a “stress test” for the LTS.¹⁴ Transmission providers must use “best available data inputs” when developing LTSs. The “best available data inputs” are timely, developed using best practices and diverse and expert perspectives, and adopted via a process that satisfies the transmission planning principles of Order Nos. 890 and 1000.¹⁵

Categories of Factors for LTSs. Transmission providers must incorporate seven specific categories of factors in developing LTSs:¹⁶

1. Federal, federally-recognized Tribal, state, and local laws and regulations affecting the resource mix and demand;

⁷ In particular, transmission providers must (1) develop at least three LTSs using a transmission planning horizon of at least 20 years; (2) reassess and revise the LTS at least once every five years; (3) incorporate in the LTS Commission-identified categories of factors that drive Long-Term Transmission Needs; (4) ensure that each LTS is plausible and diverse and that the set of LTSs represents a diverse range of plausible outcomes; (5) perform sensitivity analyses on each LTS as a stress test of uncertain operational outcomes during multiple concurrent and sustained generation and/or transmission outages due to extreme weather events across a wide area; and (6) use “best available data” in developing the LTS. *Id.* at P 248.

⁸ *Id.* at P 225.

⁹ *Id.* at P 298.

¹⁰ *Id.* at P 301.

¹¹ *Id.* at PP 344, 346.

¹² *Id.* at P 377.

¹³ *Id.* at P 559.

¹⁴ *Id.* at P 86.

¹⁵ *Id.* at P 633.

¹⁶ *Id.* at P 409.

2. Federal, federally-recognized Tribal, state, and local laws and regulations on decarbonization and electrification;
3. State-approved integrated resource plans and expected supply obligations for load-serving entities;
4. Trends in fuel costs and in the cost, performance, and availability of generation, electric storage resources, and building and transportation electrification technologies;
5. Resource retirements;
6. Generator interconnection requests and withdrawals; and
7. Utility and corporate commitments and federal, federally-recognized Tribal, state, and local policy goals that affect Long-Term Transmission Needs.¹⁷

While additional factors may be included without FERC approval, none of the seven specified categories may be excluded.¹⁸

In the first three categories, transmission providers must assume that legally binding obligations (i.e., federal, federally-recognized Tribal, state, and local laws and regulations) are followed, state-approved integrated resource plans are followed, and expected supply obligations for load-serving entities are fully met. Factors in these categories must not be discounted.¹⁹ Transmission providers have discretion in how to treat factors in the last four categories with input from stakeholders in an open and transparent process.²⁰

Stakeholder Process and Transparency. Transmission providers are required to revise the regional transmission planning processes in their Open Access Transmission Tariffs (OATTs) to outline an open and transparent process that provides stakeholders, including federally-recognized Tribes and states, with a meaningful opportunity to propose potential factors and provide timely input on how to account for specific factors in the development of LTSs.²¹ Transmission providers must publish information about the seven factors on OASIS or other public website.²²

B. Evaluation of the Benefits of Regional Transmission Facilities

Requirement to Use Set of Seven Required Benefits. Order No. 1920 requires transmission providers to measure a set of seven required benefits for selection of LTRTFs under each LTS.^{23,24} The seven required benefits will help transmission providers consider a sufficiently broad range of benefits when selecting a facility and help determine whether the rates for such facilities are just and reasonable. The seven benefits are:

¹⁷ *Id.*

¹⁸ *Id.* at PP 411, 412.

¹⁹ *Id.* at P 507.

²⁰ *Id.* at P 516.

²¹ *Id.* at PP 528, 560.

²² *Id.* at P 531.

²³ *Id.* at P 719.

²⁴ FERC rejected the flexible approach in the NOPR, finding it would not address deficiencies in existing regional planning and cost allocation processes because transmission providers may fail to account for a broader set of benefits and, consequently, fail to identify more efficient or cost-effective regional transmission solutions, resulting in unjust and unreasonable rates. *Id.* at P 723.

1. Avoided or deferred reliability transmission facilities and aging infrastructure replacement;
2. A benefit that can be characterized and measured as either (a) reduced loss of load probability or (b) reduced planning reserve margin;
3. Production cost savings;
4. Reduced transmission energy losses;
5. Reduced congestion due to transmission outages;
6. Mitigation of extreme weather events and unexpected system conditions; and
7. Capacity cost benefits from reduced peak energy losses.

Notably, FERC does not require the other five benefits that were presented in the Notice of Proposed Rulemaking (NOPR),²⁵ but transmission providers have the option to measure and use additional benefits beyond those included in the final rule, including on a transmission facility or plan-specific basis, in a way that is consistent with Order Nos. 890 and 1000.²⁶

C. Evaluation and Selection of Long-Term Regional Transmission Facilities

Requirement to Adopt an Evaluation Process and Selection Criteria. The final rule requires transmission providers to include an evaluation process in their OATs, including selection criteria, to identify and evaluate LTRTFs for potential selection to address Long-Term Transmission Needs.²⁷ Transmission providers in each transmission planning region must establish an LTRTP evaluation process that: (1) identifies LTRTFs that address Long-Term Transmission Needs; (2) measures the benefits of the identified LTRTFs consistent with the final rule requirements; and (3) designates a point in the evaluation process at which transmission providers will determine whether to select or not select identified LTRTFs in the regional transmission plan for purposes of cost allocation.²⁸ The evaluation and selection criteria must be developed using an open and transparent stakeholder process and with input from Relevant State Entities.²⁹ Transmission providers’ evaluation of transmission facilities must culminate in a determination that is sufficiently detailed for stakeholders to understand why a particular LTRTF (or portfolio of such facilities) was selected or not selected.³⁰

²⁵ *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, 179 FERC ¶ 61,028 (Apr. 21, 2022). The NOPR also included mitigation of weather and load uncertainty, deferred generation capacity investments, access to lower cost generation, increased competition, and increased market liquidity. *Id.* at PP 820-821.

²⁶ *Id.* at P 822.

²⁷ *Id.* at P 911.

²⁸ *Id.* at P 916.

²⁹ Relevant State Entities are “any state entity responsible for utility regulation or siting electric transmission facilities within the state or portion of a state located in the transmission planning region, including any state entity as may be designated for that purpose by the law of such state.” *Id.* at P 1309.

³⁰ *Id.*

Transmission providers' evaluation processes must aim to ensure the selection of more efficient or cost-effective LTRTFs to address Long-Term Transmission Needs.³¹ Order No. 1920 accordingly adopts several requirements/guidelines, including:

- Transmission providers must identify one or more LTRTFs (or portfolio of such facilities) that address the Long-Term Transmission Needs identified through LTRTP;³²
- Transmission providers' evaluation processes must estimate the costs and measure the benefits of the LTRTF (or portfolio of such facilities) that are identified or proposed for potential selection, in addition to evaluating the identified LTRTF (or portfolio of such facilities) using any qualitative or other quantitative selection criteria that the transmission providers propose;³³
- Transmission providers must designate a point in the evaluation process at which transmission providers will determine whether to select or not select identified LTRTFs (or portfolio of such facilities);³⁴
- The evaluation process must culminate in determinations that are sufficiently detailed for stakeholders to understand why a particular LTRTF (or portfolio of such facilities) was selected/not selected;³⁵
- Transmission providers are required to develop and use at least three LTSs, and one sensitivity analysis applied to each LTS, when conducting LTRTP. Each LTS or sensitivity analysis may suggest that different Long-Term Transmission Needs exist, that different LTRTFs would resolve those needs, or that such LTRTF would provide different benefits for transmission customers;³⁶
- Transmission providers may not impose as a selection criterion a minimum benefit-cost ratio that is higher than 1.25-to-1.00 (consistent with Order No. 1000 and the regional cost allocation principle);³⁷
- Transmission providers must consult with and seek the support of Relevant State Entities regarding the evaluation process and selection criteria that transmission providers propose to use to evaluate LTRTFs for selection;³⁸
- There are no EJ or equity considerations required;³⁹
- Transmission providers may (but do not need to) propose to use qualitative factors in their evaluation processes and/or qualitative selection criteria, provided that they demonstrate on compliance that their proposals comply with the evaluation process and selection criteria requirements of this final rule;⁴⁰
- Transmission providers may not include in their evaluation process or selection criteria any prohibition on the selection of an LTRTF based on the transmission providers'

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at P 956.

³⁷ *Id.* at P 958.

³⁸ *Id.* at P 959.

³⁹ *Id.* at P 960.

⁴⁰ *Id.* at P 961.

anticipated response of a state public utility commission or consumer advocates to a particular LTRTF;⁴¹

- Transmission providers must propose on compliance an evaluation process and selection criteria that comply with the requirements of this final rule after consulting with and seeking the support of Relevant State Entities;⁴² and
- There is no requirement for the transmission provider to select any particular LTRTF, but transmission providers may propose such a requirement.⁴³

Role of Relevant State Entities. FERC requires transmission providers to consult with and seek (but not necessarily obtain) support from Relevant State Entities regarding the evaluation process, including selection criteria, that transmission providers propose to use to identify and evaluate LTRTFs for selection.⁴⁴

Voluntary Funding Opportunities. Transmission providers must include in their OATTs a process to provide Relevant State Entities and interconnection customers with the opportunity to voluntarily fund the cost of, or a portion of the cost of, an LTRTF that otherwise would not meet the transmission providers' selection criteria.⁴⁵ Transmission providers have flexibility to propose certain features of such a voluntary funding process in their compliance filings but must seek support and consultation from Relevant State Entities. On compliance, transmission providers must propose OATT revisions that describe:

- The process by which transmission providers will make voluntary funding opportunities available to Relevant State Entities and interconnection customers, which must ensure that they receive meaningful and timely notice of such opportunities;
- The period during which Relevant State Entities and interconnection customers may exercise the option to provide voluntary funding;
- The method that transmission providers will use to determine the amount of voluntary funding required to ensure that the LTRTF meets the transmission providers' selection criteria; and
- The mechanism through which transmission providers and Relevant State Entities or interconnection customers will memorialize any voluntary funding agreement, e.g., a pro forma agreement in the OATT.⁴⁶

No Selection Requirement. FERC clarified that transmission providers are not required to select any particular LTRTF, even where a particular transmission facility meets the transmission providers' selection criteria in its OATT.⁴⁷

⁴¹ *Id.* at P 962.

⁴² *Id.* at P 963.

⁴³ *Id.* at PP 1026-1028.

⁴⁴ *Id.* at P 994.

⁴⁵ *Id.* at P 1012.

⁴⁶ *Id.* at P 1013.

⁴⁷ *Id.* at P 1026.

Reevaluation. Transmission providers must include in their OATTs provisions that require them, in certain circumstances, to reevaluate LTRTFs that previously were selected.⁴⁸ Reevaluation must occur when there are:

- Delays in the development of a previously selected LTRTF, which would jeopardize a transmission provider’s ability to meet its reliability needs or reliability-related service obligations;
- Actual or projected costs of a previously selected LTRTF that later significantly exceed cost estimates used in the selection of a LTRTF; or
- Significant changes in federal, federally-recognized Tribal, state, or local laws or regulations that cause reasonable concern that a previously selected LTRTF may no longer meet the transmission providers’ selection criteria.⁴⁹

D. Implementation of Long-Term Regional Transmission Planning

Initial Timing Sequence Implementation. Transmission providers must explain on compliance how the initial timing sequence for LTRTP interacts with existing regional transmission planning processes.⁵⁰ Explanations must contain enough information to ensure that stakeholders understand this interaction, including at least (1) the possible interaction between the LTRTP cycle and existing Order No. 1000 regional transmission planning processes,⁵¹ and (2) the possible displacement of LTRTFs from the existing regional transmission planning processes.⁵²

Transmission providers must propose on compliance a date, no later than one year from the date on which initial filings to comply with this final rule are due, on which they will commence the first LTRTP cycle.⁵³

II. Coordination of Regional Transmission Planning and the Generator Interconnection Process

FERC requires transmission providers to revise the existing regional transmission planning process in their OATTs to evaluate for the selection of regional transmission facilities that address certain interconnection-related transmission needs associated with network upgrades originally identified through the generator interconnection process.⁵⁴ The Commission found that reforms are necessary to require evaluation through the regional transmission planning and cost allocation processes those interconnection-related transmission needs associated with interconnection-related network upgrades that are repeatedly identified through the generator interconnection process.⁵⁵ First, transmission providers must evaluate regional transmission

⁴⁸ *Id.* at P 1048.

⁴⁹ *Id.* at P 1049.

⁵⁰ *Id.* at P 1071.

⁵¹ FERC recognizes the potential for overlap in the time horizon for LTRTP and the existing Order No. 1000 regional transmission planning processes and notes that these processes will likely inform each other. *Id.*

⁵² *Id.*

⁵³ *Id.* at P 1072.

⁵⁴ *Id.* at P 1106.

⁵⁵ *Id.* at PP 1106-1121.

facilities to address interconnection-related transmission needs in the existing Order No. 1000 regional transmission planning and cost allocation processes, rather than in LTRTP. Second, an interconnection-related network upgrade associated with identified interconnection-related transmission needs must satisfy both the minimum cost and voltage criteria (\$30 million in cost and minimum voltage of 200 kilovolts (kV) to qualify for evaluation for selection.⁵⁶ FERC allows some degree of flexibility: Transmission providers may adopt the evaluation method and selection criteria from any of their existing Order No. 1000 regional transmission planning and cost allocation processes (e.g., economic or reliability processes) to evaluate and potentially select these types of transmission facilities.⁵⁷

III. Consideration of Dynamic Line Ratings and Advanced Power Flow Control Devices

The final rule requires that transmission providers consider, in LTRTP and existing Order No. 1000 regional transmission planning processes, dynamic line ratings, advanced power flow control devices, advanced conductors, and transmission switching for each identified transmission need, as well as upgrades to existing transmission facilities.⁵⁸ Thus, for each identified transmission need, transmission providers must consider whether regional transmission facilities that incorporate, or consist of, any of the enumerated list of alternative transmission technologies would be more efficient or cost-effective than selecting new regional transmission facilities or upgrades to existing transmission facilities without these technologies.⁵⁹ While FERC provided the above enumerated list, it noted that transmission providers are not prohibited from suggesting other technologies on compliance.

IV. Regional Transmission Cost Allocation

A. Cost Allocation for Long-Term Regional Transmission Facilities

Overall. Transmission providers are required to file one or more *ex ante* cost allocation methods that apply to selected LTRTFs.⁶⁰ The cost allocation reforms in the final rule apply only to new LTRTFs, not to regional reliability and economic transmission facilities that are selected pursuant to the existing Order No. 1000 regional transmission planning processes.⁶¹

State Agreement Approach and Relevant State Entities. Transmission providers are also permitted to revise their OATTs to include a State Agreement Process, if Relevant State Entities have agreed. However, the State Agreement Approach cannot be the sole method filed for cost

⁵⁶ *Id.* at P 1107.

⁵⁷ *Id.* at P 1111. Transmission providers will still be required to evaluate and select any regional transmission facilities that address the interconnection-related transmission needs as the more efficient or cost-effective regional transmission solution as part of the regional transmission planning process in order for any regional cost allocation method to apply, and this Final Rule does not alter the existing cost allocation methods in either the generator interconnection or existing Order No. 1000 regional transmission planning processes. *Id.* at P 1117.

⁵⁸ *Id.* at P 1198. PP 1240-1247 contain an analysis of each of the enumerated technologies and why FERC found it appropriate to include such technologies and not others (such as storage as transmission).

⁵⁹ *Id.* at P 1198.

⁶⁰ *Id.* at P 1291.

⁶¹ *Id.* at P 1300.

allocation.⁶² FERC established a six-month Engagement Period during which transmission providers must:

- Provide notice of the starting and end dates for the six-month time period;
- Post contact information that Relevant State Entities may use to communicate with the transmission providers about any agreement among Relevant State Entities on a Long-Term Regional Transmission Cost Allocation Method(s) and/or a State Agreement Process, as well as a deadline for communicating such agreement; and
- Provide a forum for negotiation of a Long-Term Regional Transmission Cost Allocation Method(s) and/or State Agreement Process that enables meaningful participation by Relevant State Entities.⁶³

If the Relevant State Entities agree on a Long-Term Regional Transmission Cost Allocation Method and/or State Agreement Process and provide that process within the required time frame, the transmission provider may (but is not required to) file the agreed-to cost allocation method on compliance. However, the ultimate decision lies with the transmission provider.⁶⁴ This discretion on the part of the transmission provider regarding cost allocation is a point of significant controversy with state entities, as reflected in the requests for rehearing.

B. Long-Term Regional Transmission Facility Cost Allocation Compliance with the Six Order No. 1000 Regional Cost Allocation Principles

Order No. 1920 requires Long-Term Regional Cost Allocation Methods to comply with five of the six existing Order No. 1000 regional cost allocation principles. These include:

- The allocation of the costs of selected transmission facilities to those within the transmission planning region that benefit from those facilities in a manner that is at least roughly commensurate with estimated benefits;
- Those that receive no benefit from transmission facilities, either at present or in a likely future scenario, must not be involuntarily allocated any of the costs of those transmission facilities;
- A benefit-to-cost threshold ratio, if adopted, cannot exceed 1.25 to 1.00 for purposes of screening potential solutions;
- Costs must be allocated solely within the transmission planning region unless another entity outside the region voluntarily assumes a portion of those costs; and
- The method for determining benefits and identifying beneficiaries must be transparent.⁶⁵

⁶² If a State Agreement Process fails to result in a cost allocation method agreed to by Relevant State Entities and any other authorized entities, or if FERC ultimately finds that the cost allocation method that results from a State Agreement Process is unjust, unreasonable, or unduly discriminatory or preferential, then the relevant Long-Term Regional Transmission Cost Allocation Method on file would apply as a backstop. *Id.* at P 1292

⁶³ *Id.* at P 1354.

⁶⁴ *Id.* at PP 1355, 1402.

⁶⁵ *Id.* at P 1471. Order No. 1000’s regional cost allocation principle No. 6 provides that that there may be different regional cost allocation methods for different types of transmission facilities in the regional transmission plan but that there can be only one cost allocation method for each type of facility, and that method must be determined in advance. FERC declined to include this principle because “transmission providers may not establish reliability, economic, or public policy transmission facility types as part of Long-Term Regional Transmission

Cost allocation methods resulting from a State Agreement Process and Long-Term Regional Transmission Cost Allocation Methods that Relevant State Entities indicate they have agreed to and have asked transmission providers to file qualify as voluntary alternative cost sharing arrangements and are exempt from the requirement to adhere to the regional cost allocation principles.⁶⁶

V. Construction Work in Progress Incentive

FERC declined to limit the availability of the Construction Work in Progress (CWIP) Incentive for LTRTFs at this time, finding that the CWIP Incentive is more appropriately considered in a separate proceeding after FERC has finalized its LTRTP reforms.⁶⁷ In particular, FERC concluded that whether transmission incentives are appropriately “benefitting consumers by ensuring reliability and reducing the cost of delivered power” is a question better evaluated during a comprehensive review of transmission incentives for all regional transmission facilities.⁶⁸ This decision by FERC to not address the CWIP Incentive for LTRTF projects is also a point of significant controversy, especially among consumer advocates and as reflected in the requests for rehearing.

VI. Exercise of a Federal Right of First Refusal in Commission Jurisdictional Tariffs and Agreements

FERC also declined to adopt the NOPR proposal to allow for a federal ROFR for incumbent transmission providers, conditioned on the incumbent transmission provider establishing joint ownership of the transmission facilities.⁶⁹ FERC stated that it would continue to consider the NOPR proposal and potential federal ROFR issues in other proceedings. FERC does not adopt any changes to Order No. 1000’s nonincumbent transmission developer reforms.⁷⁰

VII. Local Transmission Planning Inputs in the Regional Transmission Planning Process

FERC adopted with certain modifications the two reforms that it identified in the NOPR: (1) enhance the transparency of local transmission planning processes; and (2) require transmission providers to evaluate whether transmission facilities that need replacing can be “right-sized” to more efficiently or cost-effectively address Long-Term Transmission Needs identified in LTRTP.⁷¹

Planning and, therefore, may not establish Long-Term Regional Transmission Cost Allocation Methods based on reliability, economic, or public policy transmission facility types. Permitting such project-type-limited Long-Term Regional Transmission Cost Allocation Methods would be inconsistent with the long-term, forward-looking, more comprehensive regional transmission planning that we require in this Final Rule.” *Id.* at P 1474.

⁶⁶ *Id.* at P 1477.

⁶⁷ *Id.* at P 1546.

⁶⁸ *Id.* at P 1547.

⁶⁹ *Id.* at P 1550.

⁷⁰ *Id.* at P 1553.

⁷¹ *Id.* at P 1577.

A. Enhanced Transparency of Local Transmission Planning Inputs in the Regional Transmission Planning Process

FERC requires transmission providers in each transmission planning region to revise the regional transmission planning process in their OATTs to enhance the transparency of: (1) the criteria, models, and assumptions that they use in their local transmission planning process; (2) the local transmission needs that they identify through the local transmission planning process; and (3) the evaluation of potential local or regional transmission facilities to address those local transmission needs. FERC clarified that this requirement applies only to local transmission planning that is within the scope of Order No. 890 and its transparency requirements. As such, this requirement does not apply to asset management projects.⁷²

To provide the needed transparency and opportunities for stakeholder participation, FERC required that the regional transmission planning process include at least three publicly-noticed stakeholder meetings per regional transmission planning cycle.⁷³ Specifically, FERC adopted the NOPR proposal to require that prior to the submission of local transmission planning information to the transmission planning region for inclusion in the regional transmission planning process, transmission providers convene a stakeholder meeting to review the criteria, assumptions, and models related to each transmission provider’s local transmission planning (Assumptions Meeting).⁷⁴ Next, no fewer than 25 calendar days after the Assumptions Meeting, transmission providers convene, a stakeholder meeting to review identified reliability criteria violations and other transmission needs that drive the need for local transmission facilities (Needs Meeting).⁷⁵ Finally, no fewer than 25 calendar days after the Needs Meeting, transmission providers convene a stakeholder meeting to review potential solutions to those reliability criteria violations and other transmission needs.⁷⁶

B. Identifying Potential Opportunities to Right-Size Replacement Transmission Facilities

FERC requires that transmission providers evaluate whether transmission facilities are (1) operating above a specified kV threshold and (2) that an individual transmission provider anticipate replacing an existing transmission facility with one that can be “right-sized”⁷⁷ to more efficiently or cost-effectively address a Long-Term Transmission Need as part of each LTRTP Cycle.⁷⁸ To effectuate this reform, transmission providers are required to submit in-kind

⁷² *Id.* at P 1625.

⁷³ *Id.* at P 1626.

⁷⁴ *Id.* at P 1627.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ The Final Rule defines “right-sizing” as the process of modifying a transmission provider’s in-kind replacement of an existing transmission facility to increase that facility’s transfer capability. *Id.* at P 1678. A “right-sized replacement transmission facility” is a new transmission facility that: (1) would meet the need to replace an existing transmission facility as identified in the in-kind replacement estimate to address Long Term Transmission Need; (2) results in more than an incidental increase in the capacity of an existing transmission facility as identified for replacement in its in-kind replacement estimate; and (3) is located in the same general route as, and/or uses or expands the existing rights-of-way of, the existing transmission facility as identified for replacement in its in-kind replacement estimate. *Id.* at P 1679.

⁷⁸ *Id.* at P 1677.

replacement⁷⁹ estimates early in each LTRTP cycle (i.e., estimates of the transmission facilities operating at and above the specified kV threshold that a transmission provider will replace within the next 10 years).⁸⁰ With respect to the specified kV threshold, transmission providers must propose on compliance a threshold that does not exceed 200 kV.

Consistent with the NOPR, proposal transmission providers must describe steps for right-sizing reform in their OATTs.⁸¹ They must propose a point sufficiently early in each LTRTP cycle at which each individual transmission provider in the transmission planning region will submit its in-kind replacement estimates.⁸² If transmission providers identify a right-sized replacement transmission facility as a potential solution to a Long-Term Transmission Need as part of LTRTP, that right-sized replacement transmission facility must be evaluated in the same manner as any other proposed LTRTF to determine whether it is the more efficient or cost-effective transmission facility to address the transmission need.⁸³ It is at this stage of the right-sizing reform where transmission providers must use the in-kind replacement estimates to determine whether those facilities could be right-sized to more efficiently or cost-effectively address a Long-Term Transmission Need(s).⁸⁴ If a right-sized replacement transmission facility addresses the transmission provider’s need to replace an existing transmission facility, meets the applicable selection criteria included in LTRTP, and is found to be the more efficient or cost-effective solution to a Long-Term Transmission Need, then the right-sized replacement transmission facility must be considered for selection.⁸⁵

Right of First Refusal. Although FERC did not adopt the NOPR proposal to allow an incumbent transmission provider to have an ROFR to construct a new transmission project if the facilities would be jointly owned by an unaffiliated entity, the Commission did adopt a narrow ROFR for right-sized replacement transmission facilities that are selected to meet Long-Term Transmission Needs.⁸⁶ This ROFR will apply to the transmission provider with the in kind replacement estimate and extends to any portion of the right-sized replacement facility located within that transmission provider’s retail distribution service territory or footprint, which must satisfy the definition of a right-sized replacement facility, including that the right-sized replacement transmission facility is located in the same general route as, and/or uses or expands the existing rights-of-way of, the existing transmission facility.⁸⁷ The adoption of the ROFR in this context is a point of significant controversy, as reflected in the requests for rehearing.

Cost Allocation. FERC declined to adopt the NOPR proposal requiring that only the incremental costs of right-sizing the transmission facility be eligible for the applicable Long-

⁷⁹ An “in-kind replacement transmission facility” is a new transmission facility that: (1) would replace an existing transmission facility that needs to be replaced; (2) would result in no more than an incidental increase in capacity over the existing transmission facility identified as needing to be replaced; and (3) is located in the same general route as, and/or uses the existing rights-of-way of, the existing transmission facility identified as needing to be replaced. *Id.* at P 1678.

⁸⁰ *Id.* at P 1677.

⁸¹ *Id.* at P 1681.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at P 1702.

⁸⁷ *Id.*

Term Regional Transmission Cost Allocation Method, while the costs for the in-kind replacement transmission facility be allocated as they would have been for the original facility.⁸⁸

To the extent that transmission providers propose to allocate the costs of right-sized replacement transmission facilities pursuant to the cost allocation method described in the NOPR, FERC required that the transmission providers explain on compliance (1) the method to determine the portion of the costs of a right-sized replacement transmission facility that is incremental to the costs that would have been incurred for the underlying in-kind replacement transmission facility, and (2) the method by which they will track the portion of costs over time that are allocated in accordance with the Long-Term Regional Transmission Cost Allocation Method (or, if adopted, subject to a State Agreement Process), as well as the portion of costs that would have been allocated pursuant to the cost allocation method that otherwise would have applied to the in-kind replacement transmission facility.⁸⁹

VIII. Interregional Transmission Coordination

FERC requires transmission providers to revise their existing interregional transmission coordination procedures to reflect the LTRTP reforms adopted in this final rule.⁹⁰ Specifically, transmission providers in neighboring transmission planning regions must revise their existing interregional transmission coordination procedures (and regional transmission planning processes, as needed) to provide for: (1) the sharing of information regarding their respective Long-Term Transmission Needs, as well as LTRTFs to meet those needs; and (2) the identification and joint evaluation of interregional transmission facilities that may be more efficient or cost-effective transmission facilities to address Long-Term Transmission Needs.⁹¹

Transmission providers must provide the following additional information concerning LTRTP on their public website or through the email list used for communication of information related to interregional transmission coordination procedures: (1) the Long-Term Transmission Needs discussed in the interregional transmission coordination meetings; (2) any interregional transmission facilities proposed or identified in response to Long-Term Transmission Needs; (3) the voltage level, estimated cost, and estimated in-service date of the interregional transmission facilities proposed or identified as part of LTRTP; (4) the results of any cost-benefit evaluation of such interregional transmission facilities, with such results including both any overall benefits identified (which may occur across multiple transmission planning regions) as well as any benefits particular to each transmission planning region; and (5) the interregional transmission facilities, if any, selected to meet Long-Term Transmission Needs.⁹²

Compliance with this portion of the final rule is 12 months from the effective date, instead of 10 months.⁹³

⁸⁸ *Id.* at P 1716.

⁸⁹ *Id.* at P 1719.

⁹⁰ *Id.* at P 1751.

⁹¹ *Id.*

⁹² *Id.* at P 1753.

⁹³ *Id.* at P 1770.

IX. Compliance Procedures

FERC adopted the NOPR proposal, with modification, and requires each transmission provider to submit a compliance filing revising its OATT and other jurisdictional documents within 10 months of the effective date of this final rule.⁹⁴ FERC also modified the NOPR proposal and requires each transmission provider to submit a separate compliance filing within 12 months of the effective date of this final rule revising its OATT and jurisdictional documents to demonstrate that it meets the interregional transmission coordination requirements adopted in this final rule.⁹⁵

FERC declined to apply the independent entity variation standard, rather than the “consistent with or superior to” standard, for proposed deviations from the requirements in this final rule on compliance.⁹⁶

X. Concurrence and Dissent

Order No. 1920 was issued along party lines. A joint concurring statement was issued by Chairman Phillips and Commissioner Clements and a dissenting statement was issued by Commissioner Christie. In their concurrence, Chairman Phillips and Commissioner Clements emphasize that the final rule is a reliability and affordability imperative, rather than an effort to impose any policy agenda or favor any resource type.⁹⁷ The concurring statement also emphasizes that, although the final rule did not ultimately revise Commission policy on the federal ROFR, nothing in the final rule should be construed as a lack of support for the concept of joint ownership or the potential federal ROFR to effectively encourage the use of joint ownership of transmission facilities.⁹⁸

Commissioner Christie issued a strong, 77-page dissenting statement to the final rule. In his view, there are several core elements at issue with the final rule. First, Commissioner Christie argues that the final rule is simply a pretext for enacting a policy agenda to favor certain resource types that was never passed by Congress.⁹⁹ Second, the dissent argues that the final rule fails to fulfill the Commission’s consumer protection duty required by statute and instead imposes an “absurdly complex bureaucratic blizzard of mandates and micromanagement to be imposed on every transmission provider in the United States for the transparent goal of spending trillions of consumers’ dollars on transmission not to serve consumers in accordance with the FPA, but instead to serve political, corporate and other special-interest agendas that were never enacted into law.”¹⁰⁰

With respect to consumer protection, Commissioner Christie notes that the NOPR’s proposal to deny transmission developers the CWIP Incentive would have benefited consumers

⁹⁴ *Id.* at P 1768.

⁹⁵ *Id.* at P 1770.

⁹⁶ *Id.* at P 1772.

⁹⁷ Phillips, Comm’r, and Clements, Comm’r, concurring at P 1.

⁹⁸ *Id.* at PP 30, 33.

⁹⁹ Christie, Comm’r, dissenting at P 1 and n. 3.

¹⁰⁰ *Id.* at P 1 and n. 4-5.

more than “holistic or efficient planning.”¹⁰¹ It is clear from the dissent that Commissioner Christie is extremely disappointed in the lack of compromise from the NOPR to this final rule. While he voted for the NOPR and found it to be an overall fair compromise, in his view, the final rule subverts and violates the compromise that was struck in the NOPR.¹⁰² Lastly, Commissioner Christie makes a large number of arguments regarding FERC’s statutory and constitutional authority to issue Order No. 1920. In the dissent’s view, the final rule largely exceeds the Commission’s legal authority under Section 206 of the FPA, infringes on states’ authority over electric generation reserved to them by Section 201 of the FPA, and violates the “major questions” doctrine and is, accordingly, an improper policy overstep by an administrative agency that should have been left to Congress.

Order No. 1977 Summary

I. Background: FPA Section 216 and the IIJA

The authority to site electric transmission facilities has traditionally resided solely with the states. However, the enactment of the Energy Policy Act of 2005 (EPAc 2005) established a limited federal role in electric transmission siting by adding Section 216 to the FPA.¹⁰³ Under Section 216, in cases eligible for federal siting, federal siting authority for electric transmission facilities is divided between the Department of Energy (DOE) and FERC. On a triennial basis, the DOE is required to conduct a study and issue a report on electric transmission congestion and designate certain transmission-constrained or -congested geographic areas as national interest electric transmission corridors (National Interest Corridors). Section 216(b) of the FPA authorizes FERC, in certain instances, to issue permits for the construction or modification of electric transmission facilities in areas that the DOE has designated as National Interest Corridors.

FERC’s Jurisdiction to Issue Permits. As originally enacted by EPAc 2005, FERC could only issue permits for the construction or modification of transmission facilities in a National Interest Corridor if: (1) the state in which such facilities are located lacks the authority to approve the siting of the facilities or considers the interstate benefits expected to be achieved by the proposed construction or modification of transmission facilities in the state; (2) the permit applicant is a transmitting utility but does not qualify to apply for a permit or siting approval in a state because the applicant does not serve end-use customers in the state; or (3) a state commission or entity with siting authority has withheld approval¹⁰⁴ of the facilities for more than one year after an application is filed or one year after the designation of the relevant National Interest Corridor, whichever is later, or the state conditions the construction or modification of

¹⁰¹ *Id.* at P 16.

¹⁰² *Id.* at P 11.

¹⁰³ *Id.* at P 2; Pub L. 109-58, Sec. 1221, 119 Stat. 594 (Aug. 8, 2005).

¹⁰⁴ The issue of what it means when a state has “withheld approval” of a siting application was the subject of several FERC decisions and U.S. Court of Appeals decisions. The IIJA deleted “withheld approval” from this subsection. *See Regulations for Filing Application for Permits to Site Interstate Elec. Transmission Facilities*, Order No. 689, 71 FR 69440 (Dec. 1, 2006) 117 FERC ¶ 61,202 (2006); *Piedmont Environmental Council v. FERC*, 558 F.3d 304 (4th Cir. 2009) *cert denied*, 558 U.S. 1147 (2010); *California Wilderness Coalition v. DOE*, 631 F.3d 1072 (9th Cir. 2011).

the facilities in such a manner that the proposal will not significantly reduce transmission congestion in interstate commerce or is not economically feasible.¹⁰⁵

Further, Section 216 of the FPA requires, before issuing a permit, that the Commission find that the proposed facilities (1) will be used for the transmission of electricity in interstate commerce; (2) are consistent with the public interest; (3) will significantly reduce transmission congestion in interstate commerce and protect or benefit consumers; (4) are consistent with sound national energy policy and will enhance energy independence; and (5) will maximize, to the extent reasonable and economical, the transmission capabilities of existing towers or structures.¹⁰⁶ Finally, as relevant for Order No. 1977, Section 216(e) of the FPA authorized a permit holder, if unable to reach agreement with a property owner, to use eminent domain authority to acquire the necessary right(s)-of-way for the construction or modification of transmission facilities for which the Commission has issued a permit under Section 216.¹⁰⁷

Congress passed the IIJA on November 15, 2021. Among other things, the IIJA amended Section 216 of the FPA to (1) expand the circumstances in which the DOE may designate a National Interest Corridor and the factors the DOE may consider in determining whether to designate a National Interest Corridor; (2) modify from Section 216(b)(1)(C) and delete the phrase “withheld approval”; and (3) amend Section 216(e)(1) to require FERC to determine, as a precondition to a permit holder exercising eminent domain authority, that the permit holder has made good faith efforts to engage with landowners and other stakeholders early in the applicable permitting process.¹⁰⁸

II. FERC Jurisdiction and State Siting Proceedings

As noted above, there are limited instances in which FERC can exercise authority over interstate transmission siting.¹⁰⁹ Order No. 1977 modifies Section 50.6(e) of its regulations to align with Section 216 of the FPA and the bases for FERC jurisdiction as modified by the IIJA. Specifically, the Commission added the phrase “or interregional benefits” to 18 C.F.R. § 50.6(e)(1) to clarify that an applicant may provide evidence that a state does not have authority to consider the “interstate benefits or interregional benefits” expected to be achieved by the proposed facilities.¹¹⁰

¹⁰⁵ 16 U.S.C. § 824p(b)(1) (prior to IIJA amendment in 2021).

¹⁰⁶ Order No. 1977 at P 4; 16 U.S.C. § 824p(b)(2)-(6).

¹⁰⁷ *Id.* at P 5.

¹⁰⁸ *Id.* at P 16.

¹⁰⁹ Prior to the IIJA, FERC could only do so if (1) the state in which such facilities are located lacks the authority to approve the siting of the facilities or considers the interstate benefits expected to be achieved by the proposed construction or modification of transmission facilities in the state; (2) the permit applicant is a transmitting utility but does not qualify to apply for a permit or siting approval in a state because the applicant does not serve end-use customers in the state; or (3) a state commission or entity with siting authority has withheld approval¹⁰⁹ of the facilities for more than one year after an application is filed or one year after the designation of the relevant National Interest Corridor, whichever is later, or the state conditions the construction or modification of the facilities in such a manner that the proposal will not significantly reduce transmission congestion in interstate commerce or is not economically feasible.

¹¹⁰ *Id.* at P 33.

Commencement of Pre-Filing. Section 216 of the FPA adopts a statutory scheme that allows simultaneous state and FERC siting processes by allowing FERC to issue a permit one year after the state siting process has begun and requiring a pre-application mechanism for all permit decisions under federal law.¹¹¹ The Commission declined to adopt the NOPR proposal to modify the process and is maintaining the existing scheme whereby in cases where jurisdiction rests on FPA Section 216(b)(1)(C)(i), the applicant should not begin the FERC pre-filing process until one year after the relevant state application(s) have been filed.¹¹²

III. Eminent Domain Authority and Landowner and Stakeholder Engagement

Consistent with the IJA’s requirement that the Commission make a determination as to whether the permit holder has made a good faith effort to engage with landowners and stakeholders prior to granting eminent domain authority, the Commission proposed minimum standards to demonstrate that the IJA’s good faith efforts standard will be met through an Applicant Code of Conduct.¹¹³ The Applicant Code of Conduct sets out 12 commitments to be affirmed by the applicant related to maintaining good faith relations and engagement with affected landowners.¹¹⁴ While the Applicant Code of Conduct sets minimum requirements and reflects the principles FERC finds to be broadly relevant in determining whether the good faith efforts standard has been met, the Commission found that the Applicant Code of Conduct is not the *only* way to demonstrate good faith and that applicants may propose alternative methods.¹¹⁵

IV. Environmental Justice Public Engagement Plan

The Commission modified Section 50.4(a)(4) of its regulations to require an EJ Engagement Plan as a component of the Project Participation Plan. The EJ Engagement Plan must describe an applicant’s efforts to identify, engage, and accommodate “people with limited English proficiency.”¹¹⁶ The Commission found this requirement to be consistent with its statutory authority under both the FPA and the National Environmental Policy Act as well as with Executive Orders on EJ.¹¹⁷ Revised regulations also require applicants to include a Tribal Engagement Plan.¹¹⁸

V. Compliance

The Commission unanimously approved Order No. 1977. The final rule will go into effect on July 29, 2024, 60 days after its publication in the *Federal Register*. There is no compliance filing requirement with Order No. 1977, but applicants seeking to develop transmission under federal authority in a National Interest Corridor will have to comply with the new and revised application process.

¹¹¹ *Id.* at P 38.

¹¹² *Id.* at P 54.

¹¹³ *Id.* at P 74.

¹¹⁴ Updated regulations at 18 C.F.R. § 50.12.

¹¹⁵ Order No. 1977 at P 82. An applicant that uses an alternative method bears the burden to explain how the alternative method is equal to or better than the Applicant Code of Conduct.

¹¹⁶ *Id.* at P 109.

¹¹⁷ *Id.* at P 110.

¹¹⁸ *Id.* at P 163.

Based on state public policy requirements, orders such as these from FERC and the need for major new transmission infrastructure across the nation, transmission development will be a key activity in the electric energy industry for decades to come. Day Pitney lawyers have deep experience in transmission planning, development and siting, and related stakeholder processes, as well as in generator interconnection, and assist clients in these areas.

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