

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Transmission Planning and Cost
Allocation by Transmission Owning and
Operating Public Utilities

Docket No. RM10-23-000

REQUEST FOR CLARIFICATION AND REHEARING OF THE
ELECTRICITY CONSUMERS RESOURCE COUNCIL (“ELCON”), AMERICAN
FOREST & PAPER ASSOCIATION (“AF&PA”), AMERICAN CHEMISTRY COUNCIL,
ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY, CAROLINA
UTILITY CUSTOMERS ASSOCIATION, COALITION OF MIDWEST TRANSMISSION
CUSTOMERS, GEORGIA INDUSTRIAL GROUP-ELECTRIC, INDUSTRIAL ENERGY
USERS - OHIO, OKLAHOMA INDUSTRIAL ENERGY CONSUMERS, PJM
INDUSTRIAL CUSTOMER COALITION, WEST VIRGINIA ENERGY USERS GROUP
AND WISCONSIN INDUSTRIAL ENERGY GROUP (“ELCON, AF&PA, AND THE
ASSOCIATED INDUSTRIAL GROUPS”)

Pursuant to Rules 212 and 713 of the Rules and Regulations of the Federal Energy Regulatory Commission (the “Commission”), the Electricity Consumers Resource Council (“ELCON”), the American Forest & Paper Association (“AF&PA”), the American Chemistry Council, the Association of Businesses Advocating Tariff Equity, the Carolina Utility Customers Association, the Coalition of Midwest Transmission Customers, the Georgia Industrial Group-Electric, Industrial Energy Users - Ohio, the Oklahoma Industrial Energy Consumers, the PJM Industrial Customer Coalition, the West Virginia Energy Users Group, and the Wisconsin Industrial Energy Group (“ELCON, AF&PA, and the Associated Industrial Groups”)¹ hereby move for clarification and rehearing of the Commission’s final rule concerning

¹ See Appendix A to these Comments for descriptions of ELCON, AF&PA and the Associated Industrial Groups.

Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (“Order No. 1000”).²

STATEMENT OF ISSUES

Although the rejection of a rebuttable presumption that the costs of high voltage facilities operating at 345 kV and above should be allocated widely across a transmission planning region³ represents an improvement over the proposed rule, ELCON, AF&PA, and the Associated Industrial Groups believe that, in several important respects, Order No. 1000 is inconsistent with the Federal Power Act, is unsupported by the administrative record before the Commission, and does not represent sound policy. In many cases, Order No. 1000 defers to future outcomes from regional transmission planning processes, without establishing sufficient criteria or guidance to ensure that the results of those processes represent just and reasonable ratemaking. Accordingly, ELCON, AF&PA, and the Associated Industrial Groups urge the Commission to grant rehearing and to address the following, higher priority flaws of Order No. 1000.

1. Notwithstanding extensive comments on the proposed rule by ELCON, AF&PA, and the Associated Industrial Groups and numerous other participants in this proceeding, Order No. 1000 still countenances broad socialization of costs in a manner inconsistent with long-recognized ratemaking concepts under the Federal Power Act. Rehearing is necessary to bring the final rule fully in line with cost causation and beneficiary pays principles.
2. Order No. 1000 grants broad discretion to transmission planning authorities to introduce state “public policy” considerations into the transmission planning process, without sufficient guidance or adequate means of review. These

² *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (July 21, 2011).

³ Order No. 1000, ¶ 713.

considerations are so discretionary as to create a high likelihood of abuse and arbitrary results. Order No. 1000 does not provide sufficient guidance as to when policies not located in specific legal requirements are to be incorporated or how in practice disparate state policies are to be reconciled.

3. Unduly deferring to the regional transmission processes, Order No. 1000 fails to substantively address comments that the costs of new transmission occasioned by low capacity factor resources such as wind energy should be allocated on a capacity basis.
4. Order No. 1000 improperly rejects participant funding as an outcome of the regional transmission planning processes, based on the untenable standard that it could be considered only if commenters on the proposed rule had established that it was “uniquely the cost allocation method that most closely follows ‘but for’ cost allocation principles.”⁴

The disparate approaches to these issues illustrate the arbitrary nature of Order No. 1000. In those cases where the Commission as a policy matter wished to promote certain outcomes – authorizing postage stamp rates, rejecting participant funding, or mandating the reflection of certain state policies – Order No. 1000 did not hesitate to constrain the regional transmission planning processes. Respecting other issues such as capacity allocation that also are significant to just and reasonable rates, Order No. 1000 simply refers back to regional transmission planning. Order No. 1000 should be revised on rehearing to establish a consistent set of criteria mandating adherence to traditional Federal Power Act principles, rather than sending mixed signals that appear to require regional transmission planners to read the tea leaves as to what might ultimately be acceptable to the Commission on a policy basis.

⁴ Order No. 1000, ¶ 726.

REQUEST FOR REHEARING

I. Order No. 1000 Is Inconsistent With “Cost Causation” Principles

Order No. 1000 declares that “by establishing the six principles for regional and interregional cost allocation, the Commission is not attempting to supersede the cost causation principle.”⁵ Unfortunately, in practice Order No. 1000 deviates substantially from well established cost causation principles. Indeed, in the same section of Order No. 1000 in which the Commission claims the final rule does not supersede the cost causation principle, the Commission declined to make a finding that a “postage stamp” rate allocation at the regional or interregional level would be contrary to cost causation principles:

If public utility transmission providers in a region, in consultation with their stakeholders, agree to such a method, and it is demonstrated to be consistent with the cost allocation principles and is supported with an appropriate assessment of benefits, then such an allocation may be submitted to the Commission on compliance, and the Commission will determine then whether the method meets its requirements.⁶

Order No. 1000’s approach to postage stamp rate allocation for regional or interregional projects is inconsistent with the claim that Order No. 1000 does not “supersede the cost causation principle.” When used at the regional or interregional level, postage stamp rate allocation is simply a form of cost socialization, and is inconsistent with cost causation principles.⁷

ELCON, AF&PA, and the Associated Industrial Groups believe that transmission resources should be developed in the most cost efficient manner, and this requires a cost allocation method that sends appropriate price signals for efficient siting decisions. Cost socialization, such as a postage stamp rate allocation, would mask and distort

⁵ Order No. 1000, ¶ 749.

⁶ Order No. 1000, ¶ 748.

⁷ ELCON, AF&PA, and the Associated Industrial Groups recognize that postage stamp rate allocation is often appropriate for local transmission networks. However, at the regional or interregional level postage stamp rate allocation is rarely appropriate based on cost causation principles.

price signals and, as a result, lead to poor resource selection and siting decisions – as well as rates that are not “just and reasonable.” Courts have developed foundational principles to guide the allocation of the costs of transmission investment centering on the basic principle that the beneficiaries of a service are to pay for it. These cases, going back over seventy years, have reaffirmed time and again that a pricing scheme will not pass muster if it subjects ratepayers to costs for facilities from which they derive no benefits, or benefits that are insufficient in relation to the costs sought to be shifted to the ratepayers.

The line of “cost causation” cases traces its origin to *Colorado Interstate Gas Co. v. Federal Power Commission*, a seminal 1945 Supreme Court decision, which stated that “[t]he problem [to be addressed by a rate case] is to allocate to each class of the business its fair share of the costs.”⁸ The *Colorado Interstate Gas* principles subsequently were elucidated in a series of D.C. Circuit cases, including *Algonquin Gas Transmission Co. v. FERC*,⁹ *Complex Consolidated Edison Co. of New York v. FERC*¹⁰ and *Transcontinental Gas Pipe Line Corp. v. FERC*.¹¹ In all three cases, the court required FERC to “outline[] with reasonable particularity the system-wide benefits which each new facility produces” to justify rolled-in pricing – a form of cost socialization.¹² Under these cases, there must be substantial and specific benefits to the system as a whole for just and reasonable rates to

⁸ 324 U.S. 581, 588 (1945).

⁹ 948 F.2d 1305 (D.C. Cir. 1991).

¹⁰ 165 F.3d 992 (D.C. Cir. 1999).

¹¹ 518 F.3d 916 (D.C. Cir. 2008).

¹² *Algonquin*, 948 F.3d at 1313, 1315 (this is not a theoretical exercise, but a question of fact dependent on “the impact the order would actually have on ultimate consumers”). *See also*, *Complex Consol.*, 165 F.3d at 998, 1006 (affirming FERC’s holding that rolled-in rates were not just and reasonable based on FERC’s conclusion that “the alleged system benefits postulated by JMC Power [were] insubstantial”); *Transcontinental*, 518 F.3d at 920 (affirming FERC’s order adopting incremental rates where “FERC . . . correctly concluded that existing customers would have . . . subsidized the Cherokee shippers if [the gas company] had been allowed to roll in rates”).

widely spread the costs of new facilities; otherwise, those ratepayers that do not benefit subsidize those that do.¹³

The courts consistently have applied the principle of cost causation in subsequent electricity cases. As the D.C. Circuit has explained, although “just and reasonable” provides a “spartan” statutory standard, “FERC and the courts have added flesh to these bare statutory bones, establishing what has become known . . . as the ‘cost-causation’ principle.”¹⁴ The cost causation principle is the “touchstone in any legal analysis of FERC-approved rate schemes,” and it requires “that all approved rates reflect to some degree the costs actually caused by the customer who must pay them.”¹⁵ Compliance with the cost causation principle is evaluated “by comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party.”¹⁶

The D.C. Circuit has described the Commission’s cost causation principle as “requir[ing] that all approved rates reflect to some degree the costs actually caused by the customers who must pay them.... Not surprisingly, we evaluate compliance with this unremarkable principle by comparing the costs assessed against a party to the burdens imposed or the benefits drawn by that party.”¹⁷ Although the Commission need not “allocate costs with exacting precision,” it may depart from the principle of

¹³ See, e.g., *Transcontinental*, 518 F.3d at 921 (“Rolling in the power costs of the Cherokee compressors forced existing Transco customers to subsidize the power costs of compressors they had no need for . . .”), *Algonquin*, 948 F.2d at 1313 (“What we do require, however, is that the Commission, before ordering a roll-in . . . offer more than a conclusionary statement that the existence of system-wide benefits renders it unjust to allocate facilities costs incrementally.”); *Complex Consol.*, 165 F.3d at 997 (“[T]he weight of the evidence favored the conclusion that the [new] facilities provided neither operational benefits nor additional reliability to Tennessee’s system customers.”).

¹⁴ *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992).

¹⁵ *Id.*; see also *Village of Bethany v. FERC*, 276 F.3d 934, 937 (7th Cir. 2002) (“The overriding policy concern in a ratemaking proceeding is to establish rates that require each customer to bear a fair and proportional share of . . . costs.”).

¹⁶ *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368-69 (D.C. Cir. 2004).

¹⁷ *Id.* (Citations omitted); see also, *United Distribution Cos. v. FERC*, 88 F.3d 1105, 1188-89 (D.C. Cir. 1996) (“[c]ost causation correlates costs with those customers for whom a service is rendered or a cost is incurred”); and *Cities of Riverside and Colton, California v. FERC*, 765 F.2d 1434, 1439 (9th Cir. 1985).

cost causation only in extraordinary circumstances and for a limited purpose.¹⁸ A rate design that results in some ratepayers subsidizing the service of others is *prima facie* inconsistent with cost causation and presumptively invalid.¹⁹

Cost causation principles also govern choice of rate structure.²⁰ The importance of rate structure as part of the cost causation analysis was emphasized in the Seventh Circuit's decision in *Illinois Commerce Commission v. FERC*.²¹ In that case, the court reversed a Commission decision approving PJM's proposed pricing mechanism for new transmission facilities having a capacity of 500 kV or higher, in part because the Commission had not adequately applied cost causation analysis to justify differential treatment of lines with capacity above 500 kV.

The Commission has described its "long standing policy" on utility cost allocation in these words: "Properly designed rates should produce revenues from each class of customers which match, as closely as practicable, the cost to serve each class or individual customer."²² The Commission has treated as black-letter law the principle that customers using a facility or service, or benefiting from a facility or service, must pay their fair share of the costs of the facility or service. The Commission refers to this principle as "cost causation."²³ Implicit in the cost causation analysis is the principle

¹⁸ *Midwest ISO Transmission Owners*, 373 F.3d at 1369; *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 707 (D.C. Cir. 2000).

¹⁹ *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 188 (D.C. Cir. 1986); *Nat'l Ass'n of Sec. Dealers, Inc. v. SEC*, 801 F.2d 1415, 1420 (D.C. Cir. 1986) ("Avoidance of cross-subsidization of services is a legitimate, non-arbitrary reason for requiring difficult cost allocations.").

²⁰ See e.g., *Midwest Independent Transmission System Operator, Inc.*, 118 FERC ¶ 61,209 (2007) (Applying cost causation analysis to proposed revisions to MISO's Open Access Transmission and Energy Markets Tariff that included special cost allocation for regionally beneficial projects, which were defined in part as facilities with voltages of 345 kV or higher).

²¹ *Illinois Commerce Comm'n v. FERC*, 576 F.3d 470, 476 (7th Cir. 2009).

²² *New Dominion Energy Cooperative*, 122 FERC ¶ 61,174, P 41 (2008), citing *Alabama Electric Cooperative, Inc. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982).

²³ See, e.g., *California Power Exchange Corp.*, 106 FERC ¶ 61,196, P 17 (2004), (the "well-established principle of cost causation requires that costs should be allocated, where possible, to customers based on customer benefits and cost incurrence"). See also *CAISO*, 103 FERC ¶ 61,114, P 26 ("[w]hile this fundamental idea of matching costs to customers is often referred to in terms of cost causation, it has also often been described

that each “customer pay[s] for the service [it] receive[s] and do[es] not subsidize service rendered on behalf of others.”²⁴ Moreover, the Commission has found that a claim of “generalized system benefits” is insufficient to justify charges, there must be a tangible, non-trivial benefit supported by the record.²⁵ The Commission also has acknowledged that the principle of fairly allocating transmission costs among those who use and benefit from transmission facilities fully applies to RTO transmission rates.²⁶

This “cost causation” model of cost allocation results in greater economic efficiency by retaining a direct tie between the costs and the benefits of a given project, enabling the potential beneficiaries to appropriately determine whether the costs are worthwhile. Under this approach, the Commission should allocate costs to a region or sub-region only if the costs are proportionate to the measurable economic and reliability needs that the investments are designed to satisfy for each region or sub-region. The surest way of protecting consumer interests is to require any party proposing new transmission to fully justify their investment with concrete evidence as to the likely needs that will be met and the corresponding benefits provided. This approach also promotes transparency and public accountability. On the other hand, broad cost spreading disproportionate to benefits tends to mask the cost signal and lead to poor resource selection and siting decisions and rates that are not “just and reasonable.”

Getting transmission cost allocation right is essential to ensuring that all consumers benefit from the lowest cost energy alternatives. Order No. 1000 quotes language from the Seventh Circuit’s recent decision to the effect that benefits should be

in terms of the costs which ‘should be borne by those who benefit from them’” (quoting *Gulf Power Co. v. FERC*, 983 F.2d 1095, 1100 (D.C. Cir. 1993)).

²⁴ *Empire State Pipeline and Empire Pipeline, Inc.*, 116 FERC ¶ 61,074 at P 115 (2006).

²⁵ See e.g., *FPL Energy Marcus Hook, L.P. v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,289 at P 50 (2008) (noting that “[e]very addition to the system could be characterized as providing some possible intangible system benefit by adding transmission capacity redundancy”); *Transcontinental Gas Pipe Line Corp.*, 112 FERC ¶ 61,170, 61,924-25 (2005).

²⁶ See *Alliance Companies*, 94 FERC ¶ 61,070, 61,311-13; *Midwest Independent Transmission System Operator, Inc.*, 104 FERC ¶ 61,105, PP 50-51; *Ameren*, 105 FERC ¶ 61,216, PP 32, 57; *Midwest Independent Transmission System Operator, Inc.*, 106 FERC ¶ 61,262, P 6 n.10 (2004) (approving the Going Forward Principles).

“at least roughly commensurate” to the costs. But Order No. 1000 does not actually apply the principles elucidated in that decision, which would mandate the conclusion that a postage stamp rule is impermissible as a form of cost allocation. A postage stamp rate allocation (or similar allocation methodology) is simply not consistent with the cost causation principles that the final rule claims to embrace.

II. Transmission Planning Processes Should Not Consider “Public Policy” Objectives

Although Order No. 1000 is a modest improvement over the proposed rule insofar as it clarifies that a procedure for consideration of general policy objectives “cannot be construed as pursuing broad general welfare goals that extend beyond matters subject to our authority under the FPA,”²⁷ it preserves the principle elements of the proposed rule requiring transmission planning entities to take into account public policy considerations as part of the transmission planning process. In doing so, Order No. 1000 still fails to address several fundamental problems that are unavoidable when transmission planning authorities are asked to take account of vague and potentially conflicting public policy considerations. The corpus of state laws and policies that might be relevant to transmission planning vary widely in content, stringency, and approach. Order No. 1000 provides virtually no practical guidance as to how disparate state policies are to be reconciled. The multitude of differing opinions expressed in the in comments on the proposed rule as to what the phrase “public policy” might possibly encompass highlight the difficulty that transmission planning entities will face during the implementation phase. Order No. 1000 does little to resolve the confusion evident in the comments.

More fundamentally, Order No. 1000 fails to respond to the concerns raised by ELCON and the Associated Industrial Groups that permitting transmission planning entities to take into account public policy would violate principles of federalism. By allowing one state’s public policy agenda to adversely affect electricity prices in other

²⁷ Order No. 1000, ¶ 111.

states that do not share that agenda, the final rule raises significant federalism concerns. Rather than establishing a national policy at the Commission level, with the attendant procedural protections, this provision could be viewed as delegating to ISOs and RTOs, which generally encompass multiple states,²⁸ the authority to impose the “public policy requirements” of one state on another state – or more particularly to impose costs on consumers in the second state – without sufficient democratic or procedural checks and balances. Such an outcome would effectively reverse the concept of regulatory federalism embodied in the Federal Power Act and subsequently reiterated with the Energy Policy Act of 2005. In addition, accounting for the public policy of various states would likely result in transmission planning and cost allocation procedures that vary widely from region to region. We do not believe that such differing results would be consistent with the mandates of the Federal Power Act.

This issue is particularly acute in the case of renewable resources and RPS, where there is little consistency among the states – policies run the gamut from opposition to RPS to adoption of comprehensive and stringent standards. For example, of the states that have enacted binding RPS, the percentage of or renewable resources targeted ranges from 10 percent to 40 percent.²⁹ Furthermore, the definition of a qualifying resource can differ dramatically between states, including for example advanced nuclear power (Ohio) and clean coal technology (West Virginia).³⁰

One of the primary virtues of federalism is that it allows for clear political accountability. Citizens know who is responsible for any given policy and they have the power to vote for new representation if they do not support the policy. In order to ensure that the lines of accountability remain clear, the Supreme Court has been vigilant

²⁸ The New York ISO, which has a single-state footprint, has recently adopted, and FERC has conditionally approved, a series of “Broader Regional Markets” initiatives intended to reduce uplift costs and lower total system operating costs.

²⁹ Pew Center on Global Climate Change, <http://www.pewclimate.org>. As of January 2009, 28 states had enacted RPS. Target years for meeting the portfolio percentage target also vary widely; aside from California and Massachusetts which already have initial targets in place, the earliest target year is 2013 and the latest is 2025.

³⁰ *Id.*

in prohibiting the federal government from commandeering state legislatures and state executives in the name of federal interests.³¹ As the Supreme Court noted in the landmark case *New York v. United States*:

[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider [the policy at issue] in their best interest, they may elect state officials who share their view. That view can always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular.³²

By contrast, the Commission has in this case declined to make any decision at all on how to reconcile and prioritize competing state policies, instead placing the determination as to which public policy to follow solely at the discretion of the ISOs and RTOs. While the law at issue in *New York* merely blurred the lines of political accountability, the proposed regulation here would go further, obscuring political accountability altogether.

If Order No. 1000 is left unchanged, citizens in a non-RPS state whose rates increase because of the public policy of a neighboring state have no recourse whatsoever because they lack a vote in the neighboring state's elections. Moreover, the decision as to which state's public policy should prevail is left to transmission planning entities that are insulated from the checks and balances of electoral politics. This regulatory approach permits the federal government to burden state taxpayers with onerous and unpopular policies without facing the political accountability that principles of federalism demand.

The transmission planning functions of the ISOs and RTOs should not be tasked with having to reconcile inconsistent, and in some cases mutually exclusive, state policies. The result is that if an ISO or RTO decides to construct transmission on the

³¹ See e.g. *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997).

³² *New York v. United States*, 505 U.S. 144 (1992)

basis of one state's public policy, all customers of the ISO or RTO will be forced to adopt by proxy that state's policy agenda regardless of whether they have voted against such a policy in their home state. Thus, ratepayers in one state may be forced to subsidize the public policy decisions of neighboring states. Moreover, voters in the subsidizing states will be left without political recourse because they lack a vote in the RPS enacting state.

ELCON, AF&PA, and the Associated Industrial Groups believe the Commission should reconsider the public policy element of Order No. 1000. If the Commission still wishes to retain the public policy requirement, the Commission should at the very least clarify that: (1) public policy does not trump cost causation considerations; and (2) the beneficiaries for cost causation purposes of a public policy, or a project built to satisfy a public policy, are limited to the state or jurisdiction that enacted the public policy. Order No. 1000 clarified that regional planning entities are only required to consider public policies embodied in laws or regulations, thus it would be clear which state or jurisdiction enacted the law or regulation.³³ This approach would be consistent with traditional cost causation principles, and would ensure that citizens of one state are not being forced to pay for the policy determinations made by another state.

III. Costs Should Be Allocated on a Capacity Basis³⁴

The comments of ELCON and the Associated Industrial Groups on the proposed rule called for the costs of new transmission occasioned by low capacity factor resources such as wind energy to be allocated on a capacity basis. Order No. 1000 deferred this

³³ For example, if state A has a 50% RPS standard and that means project X rather than the less expensive project Y must be built, then cost causation would require the difference between X and Y to be paid for by state A, because it is directly traceable to regulations passed to benefit the citizens of State A.

³⁴ Allocation on a "capacity" basis must recognize that transmission planning is scaled to ensure adequate transmission capacity to meet the system peak. Consequently, a capacity-based cost allocation that reflects customers' coincident peak ("CP") or 5-CP has been determined to be just and reasonable in many regions.

and other similar comments to the regional transmission planning processes, apparently devoting no substantive consideration to this critical issue.³⁵

Order No. 1000 should address this issue, which is critical to ensure rates are just and reasonable. ELCON, AF&PA, and the Associated Industrial Groups believe that cost allocation on a capacity basis is best addressed by the Commission on a national basis, rather than on a piecemeal, region-by-region basis. The superiority of cost allocation on a capacity basis flows directly from the fundamental causal relationship at the heart of transmission planning – system peak demand determines investment in capacity. Wind energy resources are intermittent, variable energy resources. As such, this class of low capacity factor resource tends to be more capacity intensive relative to the volume of delivered energy. Allocating the fixed costs of transmission facilities intended to wheel wind energy to load centers on a volumetric basis has the effect of an inappropriate subsidy to wind energy. Allowing such a subsidy would be inconsistent with resource neutrality and economically efficient resource allocation. Moreover, allocating costs on a coincident peak or 5-coincident peak basis provides the right signals for customers to reduce their demands during system peaks, thus smoothing system load curves and mitigating the need for new investment in transmission (and generation) capacity. Allowing such costs to be allocated on any basis other than a capacity basis would unfairly penalize and significantly increases costs for those customers that have invested in operational changes to minimize consumption during system peak periods. There is simply no convincing reason for the fixed costs of the transmission facilities required for these sorts of variable resources to be treated differently from the cost of transmission facilities required for other supply resources.

³⁵ Order No. 1000, ¶ 705 (“We do not believe that any additional principles are necessary at this time. Moreover, we believe that many of the suggestions of commenters, if required by this Final Rule, would limit the flexibility we provide in this Final Rule for public utility transmission providers to propose the appropriate cost allocation method or methods for their transmission planning region or pair of transmission planning regions. If a commenter believes that one or more of its suggestions is consistent with the six principles we adopt herein, that commenter is free to work within a regional stakeholder process to see if its concerns could be addressed.”).

Furthermore, FERC has provided no explanation why this issue would be better addressed by regional planning agencies.

IV. The Final Rule Provides No Justification for Prohibiting Participant Funding

Notwithstanding the Commission's assertions that it was granting flexibility to the regional planning processes, Order No. 1000 constrains such flexibility in an important respect – "participant funding" is prohibited as a regional or interregional cost allocation method.³⁶ The Commission's stated rationale is based on a "free rider" argument that, "reliance on participant funding as a regional or interregional cost allocation method increases the incentive of any individual beneficiary to defer investment in the hopes that other beneficiaries will value a transmission project enough to fund its development. Because of this, it is likely that some transmission facilities identified as needed in the regional transmission planning process would not be constructed in a timely manner, adversely affecting ratepayers."³⁷ However, the approach taken by the Commission in Order No. 1000 simply creates a new "free rider" problem. Under Order No. 1000, participants who from an economic perspective should be funding transmission, and could do so most expeditiously, will now have an incentive not to do so, because by waiting for the transmission planning process, the costs will be allocated to other more peripheral "beneficiaries."

Participant funding has an important role to play in regional and interregional cost allocation in appropriate circumstances, as is evidenced by the numerous comments citing support for participant funding based on real-world experience using participant funding.³⁸ The Commission offers no reasons or evidence why participant

³⁶ Order No. 1000, ¶ 723.

³⁷ *Id.*

³⁸ *See, e.g.* Comments of the Ad Hoc Coalition of Southeastern Utilities; Arizona Corporation Commission; Arizona Public Service Company; City of Los Angeles Department of Water and Power; E.ON; Large Public Power Council; Nebraska Public Power District; Northern Tier Transmission Group; Transmission Agency of Northern California; Tucson Electric; Washington Utilities and Transportation Commission; WestConnect; and Westar.

funding should be rejected, across the board, as a possible outcome of the regional transmission planning processes. Participant funding is a common cost allocation method used in many regions. As numerous commenters noted, the use of participant funding has not delayed construction of transmission facilities and has been an effective cost allocation method in many planning areas.³⁹ These commenters also offer detailed explanations as to why participant funding is fully consistent with cost causation principles when employed in appropriate circumstances.

In light of the evidence presented by commenters that participant funding is consistent with cost causation, the Commission's explanation as to why participant funding should be prohibited is both arbitrary and inconsistent when compared to determinations made by the Commission in the final rule concerning other cost allocation approaches. The Commission seems to take the position that commenters who support participant funding as one option available for regional or interregional planning must show that "participant funding is uniquely the cost allocation method that most closely follows 'but for' cost causation principles."⁴⁰ In doing so, the Commission holds participant funding to a far more stringent standard than that applied to any of the other cost allocation methods discussed in Order No. 1000.

The Commission's approach to participant funding stands in stark contrast to its approach to postage stamp rate allocation. In that context, the Commission was willing to leave the decision whether a postage stamp rate allocation was an appropriate cost allocation method to regional planning entities, and indeed dismissed arguments by commenters that postage stamp rate allocation will in most circumstances not comply with cost causation principles. There was no mention at all that postage stamp rate allocation must be the "the cost allocation method that most closely follows 'but for' cost causation principles."⁴¹ Order No. 1000 thus subjects two different cost allocation

³⁹See, e.g., Comments of the Ad Hoc Coalition of Southeastern Utilities; Arizona Corporation Commission; City of Los Angeles Department of Water and Power; and Tucson Electric.

⁴⁰ Order No. 1000, ¶ 726.

⁴¹ Order No. 1000, ¶ 726.

methods to widely divergent standards of scrutiny with no explanation as to why such differential treatment would be appropriate. ELCON, AF&PA, and the Associated Industrial Groups seek rehearing so that the Commission may resolve this inconsistency, and properly weigh the arguments in support of participant funding as a cost allocation option. The Commission should clarify that the final rule allows participant funding to be used as the default for certain types of projects on a category basis (for example generator interconnections for merchant power projects), for those categories of projects where participant funding best matches cost causation principles.

CONCLUSION

For the reasons stated herein, ELCON, AF&PA, and the Associated Industrial Groups respectfully request that this Request for Rehearing be granted. ELCON, AF&PA, and the Associated Industrial Groups respectfully request that FERC promptly revise the final rule to: (1) further clarify that broad socialization of costs at the regional and interregional level is inconsistent with cost causation principles; (2) remove the directive requiring transmission planning authorities to weigh “public policy” considerations; (3) adopt transmission cost allocation on a capacity basis, consistent with the factors that drive transmission planning; and (4) maintain the availability of participant funding as a cost allocation method.

NOTICES AND COMMUNICATIONS

Notices and communications with regard to these proceedings should be addressed to:

John P. Hughes
Vice President, Technical Affairs
ELECTRICITY CONSUMERS RESOURCE
COUNCIL
1111 Nineteenth Street, NW, Suite 700
Washington, DC 20036
Email: jhughes@elcon.org
Phone: (202) 682-1390

W. Richard Bidstrup
Mark W. Walker
CLEARY GOTTLIEB STEEN & HAMILTON
LLP
2000 Pennsylvania Avenue, NW, Suite 900
Washington, DC 20006
Email: rbidstrup@cgsh.com
Phone: (202) 974-1500
Counsel for ELCON

Laurie Holmes
AMERICAN FOREST & PAPER
ASSOCIATION
1111 19th Street, NW, Suite 800
Washington, DC 20036
Telephone: 202-463-5174
Fax: 202-463-2423
Email: Laurie_Holmes@afandpa.org

Robert A. W. Strong
CLARK HILL PLC
151 S. Old Woodward, Suite 200
Birmingham, MI 48009
Email: rstrong@clarkhill.com
Phone: (248) 988-5861
*Counsel for Association of Businesses Advocating
Tariff Equity (ABATE)*

Nancy Clark
Director, Regulatory and Technical Affairs
AMERICAN CHEMISTRY COUNCIL
700 2nd Street, N.E.
Washington, D.C. 20002
Email: Nancy_Clark@americanchemistry.com
Phone: (202) 249-6417

Sharon C. Miller
Executive Director
CAROLINA UTILITY CUSTOMERS
ASSOCIATION
5811 Glenwood Avenue
Suite 204, Glenwood Corporate Center
Raleigh, NC 27612
Email: cuca@cucainc.org
Phone: (919) 782-7843

Robert A. Weishaar, Jr.
Dennis P. Jamouneau
MCNEES WALLACE & NURICK LLC
777 North Capital Street, N.E., Suite 401
Washington, D.C. 20002
Email: rweishaa@mwn.com
Email: djamouneau@mwn.com
Phone: (202) 898-5700
*Counsel for Coalition of Midwest Transmission
Customers, Industrial Energy Users – Ohio, and
PJM Industrial Customer Coalition*

David M. Kleppinger
Susan E. Bruce
MCNEES WALLACE & NURICK LLC
100 Pine Street
Harrisburg, PA 17108
Email: dkleppin@mwn.com
Email: sbruce@mwn.com
Phone: (717) 232-8000
Counsel for PJM Industrial Customer Coalition

Thomas P. Schroedter, Esq.
Executive Director
OKLAHOMA INDUSTRIAL ENERGY
CONSUMERS
320 South Boston, Suite 400
Tulsa, OK 74103
Email: tschroedter@hallestill.com
Telephone: (918) 594-0436

Todd Stuart
Executive Director
WISCONSIN INDUSTRIAL ENERGY GROUP
10 East Doty Street, Suite 800
Madison, WI 53703
Email: tstuart@wieg.org
Phone: (608) 441-5740

Samuel C. Randazzo
MCNEES WALLACE & NURICK LLC
Fifth Third Center
21 East State Street, 17th Floor
Columbus, OH 43215-4228
Email: sam@mwncmh.com
Phone: (614) 719-2840
*Counsel for Coalition of Midwest Transmission
Customers and Industrial Energy Users – Ohio*

Randall D. Quintrell
RANDALL D. QUINTRELL, P.C.
23rd Floor
999 Peachtree Street, N.E.
Atlanta, GA 30309-3996
Email: randy.quintrell@sutherland.com
Phone: (404) 853-8366
Counsel for Georgia Industrial Group - Electric

Derrick Price Williamson
SPILMAN THOMAS & BATTLE, PLLC
1100 Bent Creek Blvd., Ste. 101
Mechanicsburg, PA 17050
Email: dwilliamson@spilmanlaw.com
Phone: (717) 795-2741
Counsel for West Virginia Energy Users Group

Respectfully submitted,

ELECTRICITY CONSUMERS RESOURCE COUNCIL

AMERICAN FOREST & PAPER ASSOCIATION

AMERICAN CHEMISTRY COUNCIL

ASSOCIATION OF BUSINESSES ADVOCATING
TARIFF EQUITY

CAROLINA UTILITY CUSTOMERS ASSOCIATION

COALITION OF MIDWEST TRANSMISSION
CUSTOMERS

GEORGIA INDUSTRIAL GROUP - ELECTRIC

INDUSTRIAL ENERGY USERS - OHIO

OKLAHOMA INDUSTRIAL ENERGY CONSUMERS

PJM INDUSTRIAL CUSTOMER COALITION

WEST VIRGINIA ENERGY USERS GROUP

WISCONSIN INDUSTRIAL ENERGY GROUP

Dated: August 22, 2011

APPENDIX A

Description of ELCON, AF&PA and the Associated Industrial Groups

The *Electricity Consumers Resource Council (ELCON)* is the national association representing large industrial consumers of electricity. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing community. As operators of hundreds of major facilities and major consumers of electricity, ELCON members are significantly impacted by charges imposed for the cost of new transmission.

The *American Forest & Paper Association (AF&PA)* is the trade association of the forest, pulp, paper, paperboard, and wood products industry in the United States. AF&PA's members are among the nation's largest consumers of electric power, purchasing over 82 billion kilowatt-hours of electricity annually nationwide. AF&PA's members include electricity consumers and producers.

The *American Chemistry Council (ACC)* represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care[®], common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a \$674 billion enterprise and a key element of the nation's economy. It is one of the nation's largest exporters, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies are among the largest investors in research and development. Safety and security have always been primary concerns of ACC members, and they have intensified their efforts, working closely with government agencies to improve security and to defend against any threat to the nation's critical infrastructure.

The *Association of Businesses Advocating Tariff Equity (ABATE)* is a nonprofit business association formed to represent industrial and other large volume energy

customers in gas and electric regulatory and legislative matters. Among ABATE's members are some of the largest industrials in Michigan, employing hundreds of thousands and paying nearly \$500 million in state taxes each year. The most recent data shows that ABATE members collectively accounted for over 37% of all industrial electricity usage and over 21% of all industrial natural gas usage in Michigan, consuming nearly 11 million MWh and over 51 million Mcf.

The *Carolina Utility Customers Association (CUCA)* is a full-time, statewide manufacturers trade association consisting of 55 members. CUCA monitors, reports, and addresses electrical, natural gas, and telecommunications issues that impact industrial consumers, actively representing the interests of its members in all pertinent energy matters before the appropriate regulatory, legislative and judicial bodies. CUCA is considered the primary voice of industrials in most energy proceedings. CUCA's core function is intervention in utility matters to protect the interests of manufacturers and ensure a dependable supply of utility and energy services at equitable, cost-based rates.

The *Coalition of Midwest Transmission Customers (CMTC)* is an *ad hoc* association of large industrial end-users of electricity. All CMTC members operate one or more manufacturing facilities in the Midwest and purchase electric delivery service or bundled electric service from at least one of the transmission owners encompassed by the Midwest ISO.

The *Georgia Industrial Group-Electric* was formed in the early 1970s to intervene and participate in regulatory matters before the Georgia Public Service Commission on behalf of industrial electric users. Randall D. Quintrell serves as the group's counsel and J. Pollock, Incorporated serves as the group's consultant. The group functions as an informal unincorporated association of approximately 30 large industrial companies. It does not have articles of association or bylaws, but it has a chairman, vice chairman, and a steering committee. The entire group usually meets at the Atlanta law offices of Randall D. Quintrell, P.C. at least once a year and more frequently if there are active matters at the Georgia Public Service Commission.

Industrial Energy Users-Ohio (IEU-Ohio) is an association of large Ohio-based energy consumers. IEU-Ohio has been an active participant in state and federal regulatory proceedings involving member transmission owners participating in the Midwest ISO and PJM Interconnection, LLC ("PJM").

The *Oklahoma Industrial Energy Consumers (OIEC)* is an unincorporated voluntary association of companies that own and operate industrial facilities or other facilities served under utility industrial rate schedules or tariffs. Its purpose is to provide a forum for Oklahoma industrial firms and other similarly-situated firms to promote and protect their interests in matters concerning government regulations affecting natural gas and electric issues including, but not limited to, appropriate cost of service ratemaking principles and competition in the utility industry. OIEC members desire to achieve the greatest energy efficiencies possible in their respective operations by accessing the lowest cost energy in the United States while preserving a high quality of service.

The *PJM Industrial Customer Coalition (PJMICC)* is an *ad hoc* association of large commercial and industrial end-users of electricity. PJMICC members operate manufacturing and institutional facilities throughout the PJM footprint, which encompasses all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and the District of Columbia.

The *West Virginia Energy Users Group (WVEUG)* is an *ad hoc* association currently comprised of 20 large, energy-intensive industrial, chemical, manufacturing, and institutional concerns receiving electric service from Monongahela Power Company, The Potomac Edison Company, Appalachian Power Company, and Wheeling Power Company. WVEUG members collectively consume millions of MWh of electricity and employ thousands of West Virginians. WVEUG represents the interests of its members principally through active participation in proceedings before the Public Service Commission of West Virginia and the Federal Energy Regulatory Commission.

The *Wisconsin Industrial Energy Group (WIEG)* is a voluntary association of companies, which are large users of energy in Wisconsin. Organized in the 1970's WIEG represents many of Wisconsin's largest employers in advocating with the State Legislature, the Governor's office, the Public Service Commission of Wisconsin and the Federal Energy Regulatory Commission to support policies and actions that will ensure the reliable and affordable energy supplies needed to grow the statewide economy and create jobs. WIEG current membership consists of 41 Wisconsin companies that serve as key drivers of economic growth and development through the state. Those businesses employ more than 60,000 Wisconsin residents, each of whom is a state taxpayer and utility ratepayer. WIEG members represent more major manufacturing industries including but not limited to: paper, printing, malting, automobile, plastics, food processing, chemical, insurance, metal casting and fabricating.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary of this proceeding.

Dated at Washington, D.C.: August 22, 2011

/s/ MARK W. WALKER

Mark W. Walker