

MEMORANDUM

TO: NEPOOL Transmission Committee

FROM: NEPOOL Counsel (Eric Runge and Margaret Czepiel)

DATE: June 21, 2024

RE: Order No. 1920 Update: Requests for Rehearing and Clarification

On May 13, 2024, the Federal Energy Regulatory Commission (“FERC” or “the Commission”) issued Order No. 1920, a final rule addressing deficiencies in the existing regional and local transmission planning and cost allocation processes to ensure that the rates, terms, and conditions for transmission service provided by transmission providers remain just and reasonable and not unduly discriminatory or preferential (“Order No. 1920” or the “Final Rule”).¹ Requests for rehearing of Order No. 1920 were due thirty days after the issuance of the Final Rule – on Wednesday, June 12, 2024. On or by that date, forty-eight parties submitted requests for rehearing and/or clarification with the Commission.² This document first summarizes the issues raised in the requests for rehearing by New England parties and then summarizes the general themes raised in the requests for rehearing and/or clarification.

Compliance filings in accordance with Order No. 1920 are currently due within ten or twelve months of the Final Rule’s effective date, August 12, 2024.³ If you have any questions about this memo or its subject matter, please contact Eric Runge, ekrunge@daypitney.com or Margaret Czepiel, mczepiel@daypitney.com.

I. Requests for Rehearing and/or Clarification: Issues Raised by New England Entities

A. Advanced Energy United raised the following:

- The Commission exceeded its authority under the Federal Power Act by granting incumbent transmission providers a right of first refusal for “right-sized” replacement transmission facilities;⁴ and

¹ *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation*, Order No. 1920, 187 FERC ¶ 61,068 at P 1 (2024) (“Order No. 1920”), which can be accessed here: https://www.iso-ne.com/static-assets/documents/100011/a05_order1920.docx. The Day Pitney summary of the Final Rule is available here: https://www.iso-ne.com/static-assets/documents/100011/nepool_counsel_memo_order_no_1920.pdf.

² Attachment 1 to this memo contains the list of all parties that submitted requests for rehearing and/or clarification.

³ The published Final Rule can be found here: <https://www.ferc.gov/media/e1-rm21-17-000>. Compliance filings for the majority of the Final Rule are due within ten months. The Final Rule requirements on interregional transmission coordination are due within twelve months.

⁴ Advanced Energy United Request for Rehearing at 4.

- The Commission’s failure to engage in reasoned decision-making by ignoring relevant considerations, failure to address applicable precedent, and its inadequate explanation for its decision to grant incumbent transmission providers a right of first refusal for “right-sized” replacement transmission facilities is arbitrary and capricious under the Administrative Procedures Act.⁵

B. New England States Committee on Electricity raised the following:⁶

- The Commission should codify a role for states where state policies and laws are implicated in the evaluation and selection of Long-Term Regional Transmission Facilities and in regional transmission cost allocation;⁷
- The Commission should modify the definition of Relevant State Entities to explicitly include regional states committees because it is currently unclear whether they are included and should be as a mechanism for state involvement in regional transmission planning and cost allocation;⁸
- Transmission providers should be required to rely on state input when developing assumptions about state laws, regulations and/or policies;⁹
- Transmission providers should be required to ensure that alternative transmission technologies serve as the starting point for addressing identified transmission needs;¹⁰
- Asset condition projects should not be exempted from the final rule’s transparency requirements because the vast majority of transmission spending in New England stems from in-kind replacements and there is no basis to give project owners a federal right of first refusal unless the Commission grants a rehearing and subjects condition/in-kind replacements projects to the same transparency requirements as local transmission projects.¹¹

⁵ *Id.* at 12.

⁶ The Vermont Public Utility Commission filed comments in support of the New England State Committee’s request for rehearing and added that the Commission should strengthen the states’ role in all phases of LTRTP and cost allocation to best achieve Order No. 1920’s objectives. Comments of the Vermont Public Utility Commission at 1-2.

⁷ New England State Committee Request for Clarification and Rehearing at 7.

⁸ *Id.* at 16.

⁹ *Id.* at 20.

¹⁰ *Id.* at 22.

¹¹ *Id.* at 26.

C. Harvard Electricity Law Initiative raised the following:

- The Commission should amend the *pro forma* OATT to include a process for filing all regional cost allocation methods approved by Relevant State Entities.¹²
- The Commission should clarify that the statement in the final rule regarding transmission-owner filing rights does not go further than the holding in *Atlantic City*¹³ in that the Commission may not force a transmission owner to surrender its ability to file cost allocation methods but can allow for the filing of state cost allocation methods;¹⁴ and
- The Commission should clarify that category factor seven implements the existing requirement to plan for all transmission users on a comparable basis. The Commission should also clarify that all long-term planning rules are similarly rooted in the open access comparability standard.¹⁵

D. Identified Consumer Advocates¹⁶ raised the following:

- The Commission should clarify that it will take action on the Construction Work in Progress Incentive (CWIP Incentive) before any rate impacts resulting from the Long-Term Transmission Facilities constructed pursuant to the final rule;¹⁷ and the Commission should include details on the manner in which it will take action and provide a timeline for when it will take action on the CWIP Incentive to ensure that it achieves the appropriate balance of risks and benefits and sufficient ratepayer protections well before plans and construction are in place.¹⁸

¹² Harvard Electricity Law Initiative Request for Rehearing and Clarification at 2. The seven categories of factors are those that the Commission requires use of in the development of Long-Term Scenarios, which are a core feature of Long-Term Regional Transmission Planning (“LTRTP”). The factor seven category is: “Utility and corporate commitments and federal, federally-recognized Tribal, state, and local policy goals that affect Long-Term Transmission Needs.”

¹³ *Atlantic City Electric v. FERC*, 329 F.3d 856 (D.C. Cir. 2003).

¹⁴ *Id.* at 3.

¹⁵ *Id.* at 9.

¹⁶ Identified Consumer Advocates are the Massachusetts Attorney General, the Connecticut Office of Consumer Counsel, the Maine Office of Public Advocate, the Maryland Office of People’s Counsel, the New Hampshire Office of Consumer Advocate and the Rhode Island Division of Public Utilities and Carriers.

¹⁷ Identified Consumer Advocates Request for Clarification at 4.

¹⁸ *Id.* at 9.

E. Versant Power raised the following:

- The Commission should clarify what is required for a transmission provider to receive a waiver of, or otherwise be exempt, from the final rule's requirements;¹⁹
- The Commission's departure from and failure to explain the reasons for departure from its past practices of discussing the general requirements for a waiver of the final rule requirements and effect of similar waivers on compliance with the final rule is arbitrary and capricious;²⁰
- The Commission should clarify whether and how waivers from previous orders impact the final rule requirements from transmission providers with those waivers;²¹
- The Commission's application of the final rule to all transmission providers in any region is arbitrary and capricious as it applies to transmission providers that are (1) small in terms of loads and the voltage of transmission facilities, (2) located in remote areas that do not often need additional transmission facilities, (3) not directly interconnected with the rest of the national grid, and (4) not part of an RTO or ISO.²²

II. Other Issues Raised on Rehearing

The New England entities raised issues in their Requests for Rehearing that were largely consistent with the issues raised by other parties in the proceeding. The below provides an overview of the main topics for which parties requested rehearing and/or clarification.

A. Federal/State Jurisdiction

The largest group of entities that requested rehearing of Order No. 1920 are state entities (including state attorneys general offices and state PUCs). Many of these entities argue that Order No. 1920 is an unlawful usurpation of the States' exclusive authority over generation as provided in the Federal Power Act ("FPA").²³ These States argue that the transmission planning requirements of Order No. 1920 dictate the choice of generating resources and favors renewable resources and developers of those resources over consumers, which is not an area for FERC to

¹⁹ Versant Power Limited Request for Clarification, or in the Alternative, Rehearing at 9.

²⁰ *Id.* at 12.

²¹ *Id.* at 10, 12.

²² *Id.* at 13.

²³ *See e.g.*, Request for Rehearing by the States of Texas, Alabama, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee and Utah ("States Request for Rehearing"); Request for Rehearing of the Designated Retail Regulators (Louisiana PSC, Mississippi PSC, Arkansas PSC and South Dakota PSC).

regulate.²⁴ In this manner, these States aver that FERC exceeds its authority and issued a Final Rule that is arbitrary and capricious. In addition to the jurisdictional over-step under the FPA, the States also raises the Constitutional concern that Order No. 1920 is contrary to the principle of reserving matters of major political importance in the first instance to Congress and not to administrative agencies such as the FERC.

B. Cost Allocation

Another major topic raised on rehearing by several state entities is cost allocation and the State Agreement Approach. Many parties expressed concern that the State Agreement Approach as defined in Order No. 1920 provides no real role for the states, and is a serious departure from what was presented in the Notice of Proposed Rulemaking (“NOPR”).²⁵ Several parties argue that due to the fact that transmission providers are free *not* to file a State Agreement Approach and are free *not* to adopt an agreement if one is reached, the approach itself provides no real decisive role for the states. Accordingly, while some parties request clarification on the deference granted to the states’ agreed-to decisions,²⁶ others outright request rehearing and argue that FERC’s departure from the NOPR proposal and failure to adopt an approach that gives adequate deference to the states is unjust and unreasonable.²⁷

C. Transmission Planning Factors

Several entities raised issue with the seven factor categories and the seven benefits categories to be used in LTRTP. PJM, for example, sought flexibility and clarification on how prescriptive the LTRTP process must be and requested flexibility while they explore whether and how to incorporate the seven benefits.²⁸ The National Rural Electric Cooperative Association (“NRECA”) sought clarity on the factor categories and how those factor categories are to be used in cost allocation.²⁹ The States raised concern with the seven factors and seven benefits arguing that the factors and benefit metrics favor some resources over others because they overlap and therefore double-count or exaggerate potential benefits.³⁰ The States also raise the concern that a portfolio approach allows for approval of projects with negative benefits by blending those with other projects that have positive cost-benefit ratios.³¹

²⁴ States Request for Rehearing at 4.

²⁵ States Request for Rehearing at 7; Missouri PSC Request for Rehearing at 2; Designated Retail Regulators Request for Rehearing at 5; Organization of PJM States (“OPSI”) Request for Rehearing at 7-8.

²⁶ OPSI Request for Rehearing at 7-8.

²⁷ States Request for Rehearing at 7; Missouri PSC Request for Rehearing at 2; Designated Retail Regulators Request for Rehearing at 5.

²⁸ PJM Interconnection Request for Rehearing at 9.

²⁹ NRECA Request for Rehearing at 2.

³⁰ States Request for Rehearing at 2.

³¹ *Id.*

D. Reevaluation of Selected Facilities

Numerous entities raised concern with the Commission’s reevaluation requirements. There were two main concerns with the reevaluation requirements: (1) the specific requirements were not proposed in the NOPR and to adopt them in the Final Rule goes against the notice and comment requirements of the Administrative Procedure Act (“APA”);³² and (2) the requirements are unworkable within the context of long-term planning and leads to increasing risk that previously-selected projects would be removed from the transmission plan due to updated benefits, thereby impeding transmission development and jeopardizing the goals of Order No. 1920.³³

E. Flexibility

Several entities, including SPP, MISO Transmission Owners and PJM argue that the Commission needs to allow for further flexibility in the Final Rule with respect to scenario and benefit development.³⁴ While these entities generally supported the Final Rule, they seek flexibility with respect to how compliance plans are developed and implemented, particularly in the context of existing long-term regional transmission planning efforts.³⁵

F. Construction Work in Progress

While a handful of entities made note of the Commission declining to act on the CWIP incentive in this proceeding, the reaction on that decision was mixed. While several entities requested rehearing or requested that the Commission promptly open a new docket to evaluate the CWIP incentive, others applauded the Commission’s decision not to reassess CWIP.³⁶

III. Conclusion

Unsurprisingly, numerous parties requested rehearing and/or clarification of Order No. 1920. The timing of a subsequent Commission Order addressing the arguments raised on rehearing is yet to be determined. In all likelihood, the Commission will issue a form Notice of Denial of Rehearing by Operation of Law within thirty days (July 12, 2024). That Notice will allow entities that requested rehearing to initiate appeals to the D.C. Circuit, but will not prevent FERC from

³² WIRES Request for Rehearing at 2; States Request for Rehearing at 5; MISO Transmission Owners Request for Rehearing at 7-9; NRECA Request for Rehearing at 5-7.

³³ International Transmission Co. Request for Rehearing at 2; WIRES Request for Rehearing at 2; MISO Transmission Owners Request for Rehearing at 7.

³⁴ PJM Request for Rehearing at 2-3; SPP Request for Rehearing (seeking clarification that a transmission provider may propose a transmission planning process and cost allocation methodology that deviates from the requirements of Order No. 1920).

³⁵ *Id.*

³⁶ Designated Retail Regulators Request for Rehearing at 4 (FERC should have addressed CWIP); OPSI Request for Rehearing at 9 (FERC should promptly open a rulemaking that includes CWIP); WIRES Request for Rehearing at 2 (commends the Commission for declining to limit availability of CWIP).

subsequently issuing an Order No. 1920-A with substantive responses to the many requests filed in this proceeding.

Attachment 1 – List of Entities that Filed Requests for Rehearing and/or Clarification

Southwest Power Pool, Inc.	Large Public Power Council
CTC Global Corporation	WIRES
MISO Transmission Owners	New England States Committee on Electricity
Dominion Energy Services, Inc.	Transmission Access Policy Study Group
Alabama Public Service Commission	The Electricity Transmission Competition Coalition
Virginia Office of the Attorney General	Pennsylvania Public Utility Commission
Advanced Energy United	Wyoming Public Service Commission
Dairyland Power Cooperative	CTC Global Corporation
Public Service Commission of West VA	State of Texas
Arizona Corporation Commission	MISO Transmission Owners
Identified Consumer Advocates	Designated Retail Regulators
Invenergy Solar Development of North America LLC	International Transmission Company d/b/a ITC Transmission
Industrial Energy Consumers of America	Virginia State Corporation Commission
Idaho Public Utility Commission	Old Dominion Electric Cooperative
The Indicated PJM Transmission Owners	Appalachian Voices
Public Power Association	Edison Electric Institute
National Association of Regulatory Utility Commissioners	Organization of PJM States, Inc.
Northern Virginia Electric Cooperative, Inc.	Public Utilities Commission of Ohio's Office of The Federal Energy Advocate
PJM Interconnection, L.L.C.	Ohio Consumers' Counsel
East Kentucky Power Cooperative, Inc	Georgia Public Utility Commission
National Rural Electric Cooperative Association	Harvard Electricity Law Initiative
Clean Energy Buyers Association	Versant Power
Public Service Commission of Utah	Montana Public Service Commission

Council of the City of New Orleans

Associated Electric Cooperative, Inc.