UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Building for the Future Through Electric Regional Transmission Planning and Cost Allocation	**)** **)** **)**	**Docket No. RM21-17-003**

REQUEST FOR REHEARING OF WIRES

Pursuant to section 313(a) of the Federal Power Act ("FPA")[1] and Rule 713[2] of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission" or "FERC"), WIRES,[3] on behalf of its members, respectfully requests rehearing of certain limited aspects of Order No. 1920-A.[4]

I. INTRODUCTION

WIRES appreciates the Commission's recognition of the critical role states play in the planning of, payment for, and ultimate deployment of much needed transmission infrastructure.[5] WIRES also agrees with the Commission's goal to ensure states have the opportunity to actively engage in transmission planning and cost allocation matters. However, that goal cannot and should not be achieved by impinging upon public utility transmission owners' FPA sections 205 and 206

[1] 16 U.S.C. § 825*l*(a) (2018).

[2] 18 C.F.R. § 385.713 (2024).

[3] WIRES is a non-profit trade association of investor-, publicly-, and cooperatively-owned transmission providers and developers, transmission customers, regional grid managers, and equipment and service companies. WIRES promotes investment in electric transmission and consumer and environmental benefits through development of electric transmission infrastructure. This filing is supported by a majority of, but not all, the full supporting members of WIRES but does not necessarily reflect the views of the Regional Transmission Owner/Independent System Operator ("RTO/ISO") members of WIRES. For more information about WIRES, please visit www.wiresgroup.com.

[4] *Building for the Future Through Elec. Reg'l Transmission Planning and Cost Allocation*, Order No. 1920-A, 189 FERC ¶ 61,126 (Nov. 21, 2024) ("Order No. 1920-A").

[5] *Id.* at P 10.

filing rights.[6] Nevertheless, that is exactly what the following Order No. 1920-A changes purport to do:

- ***Consultation with States Requirement.*** Transmission providers *must* consult with Relevant State Entities[7] before transmission providers may submit an amendment to an *ex ante* Long-Term Regional Transmission Cost Allocation Method pursuant to FPA section 205, or if the states seek to amend the cost allocation method or State Agreement Process.[8]

- ***Submission of State Agreed Alternative***. If the Relevant State Entities in a transmission planning region agree to an alternative Long-Term Regional Transmission Cost Allocation Method(s) and/or State Agreement Process(es) resulting from the Engagement Period,[9] the transmission provider must include that method in its Order No. 1920 compliance filing and the Commission can choose the state agreement over the transmission provider's just and reasonable proposal.

These modifications to Order No. 1920 that either (i) impose limitations on public utilities' ability to submit revisions to their *ex ante* cost allocation methods; or (ii) impinge upon rights accorded to public utilities by Congress by requiring public utilities to include a states' Long-Term Regional Transmission Cost Allocation method ("method") or State Agreement Process ("process") in their Order No. 1920 compliance filing exceed the authority delegated to FERC under FPA sections 205 and 206 and are otherwise contrary to law.

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[6] 16 U.S.C. 824d.

[7] Under Order No. 1920, a Relevant State Entity is "any state entity responsible for electric 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. *See Building for the Future Through Elec. Reg'l Transmission Planning and Cost Allocation,* Order No. 1920, 187 FERC ¶ 61,068 at P 1355 (May 13, 2024) ("Order No. 1920").

[8] Order No. 1920 at P 45 (for purposes of Order No. 1920, a State Agreement Process is "a process by which one or more Relevant State Entities may voluntarily agree to a cost allocation method for Long-Term Regional Transmission Facilities (or a portfolio of such Facilities) before or no later than six months after they are selected.") .

[9] Order No. 1920 at P 1354 (requiring establishment of a six-month time period ("Engagement Period"), during which transmission providers must provide: (i) notice of the starting and end dates for the six-month time period; (2) post contact information that Relevant State Entities may use to communicate with transmission providers about any agreement among Relevant State Entities on a Long-Term Regional Transmission Cost Allocation Method(s) or State Agreement Process, as well as a deadline for communicating such agreement; and (iii) provide a forum for such negotiations that enables meaningful participation by Relevant State Entities).

For the reasons stated below, WIRES requests that the Commission grant rehearing and adopt Order No. 1920 (i) leaving intact the transmission providers' section 205 rights to file an *ex ante* cost allocation method for Long-Term Regional Transmission Facilities "*at any time*" unless voluntarily waived;[10] and (ii) expressly declining to require that transmission providers file two cost allocation methods, *i.e.*, the method chosen by the transmission provider and the method agreed to by the Relevant State Entities.[11]

II. BACKGROUND

A. FPA Section 205: Consultation Requirement with Relevant State Entities After the Engagement Period

On the issue of the *ex ante* cost allocation method for Long-Term Regional Transmission Facilities going forward, Order No. 1920-A modifies the Final Rule to require transmission providers to revise their open access transmission tariffs ("OATTs" or "tariff") to add a requirement that transmission providers *must* consult with Relevant State Entities (i) prior to amending their *ex ante* Long-Term Regional Transmission Cost Allocation Method(s) and/or State Agreement Process(es), or (ii) if Relevant State Entities seek, consistent with their chosen method to reach agreement, for the transmission provider to amend that method or process pursuant to FPA section 205.[12]

According to the Commission, this "consultation requirement" will provide "a mechanism through which transmission providers and Relevant State Entities can engage regarding possible future changes via FPA section 205 to cost allocation methods accepted by the Commission" for

[10] *Id.* at P 1430 (citing *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 9-11 (D.C. Cir. 2002); *Atl. City Elec. Co. v. FERC*, 329 F.3d 856, 858-859 (D.C. Cir. 2003)).

[11] Order No. 1920 at P 1429.

[12] Order No. 1920-A at P 31, 242, 629, and 660.

Long-Term Regional Transmission Facilities.[13] Order No. 1920-A further requires transmission providers to include in their OATTs a description of how they will consult with Relevant State Entities in these circumstances. Specifically, for a consultation initiated by transmission providers, transmission providers are required to document publicly on their OASIS, or other public website, the results of their consultation with Relevant State Entities prior to filing their amendment. For consultations initiated by Relevant State Entities, if the transmission providers choose not to propose any amendments to the *ex ante* Long-Term Cost Allocation Method(s) and/or State Agreement Process(es) preferred by Relevant State Entities during the required consultation, transmission providers must document publicly on their OASIS or other public website the results of their consultation with Relevant State Entities, including an explanation why they have chosen not to propose any amendments.[14]

The Commission reasons that the consultation requirement will afford states the opportunity to be involved in establishing cost allocation methods for Long-Term Regional Transmission Facilities subsequent to acceptance of transmission providers' filings made in compliance with Order No. 1920; and that involvement by the states would potentially "minimize additional costs and delays in the siting process and [ ] facilitate the development of Long-Term Regional Transmission Facilities."[15]

B. Order No. 1920 Compliance Filing Pursuant to FPA Section 206:

Order No. 1920-A also modifies the Final Rule to require that, when the Relevant State Entities in a transmission planning region notify the transmission provider by the deadline for communicating agreement that they have agreed on a Long-Term Transmission Cost Allocation

[13] *Id.* at P 691.

[14] *Id.*

[15] *Id.* at P 692.

Method(s) and/or State Agreement Process(es) resulting from the Engagement Period, transmission provider *must* include that method or process in the transmittal or as an attachment to their compliance filing, even if the transmission provider does not propose the Relevant State Entities' method or adopt a State Agreement Process.[16] Order No. 1920-A also requires that transmission providers include any information, *e.g.*, supporting evidence and/or justification, that any Relevant State Entities provide to them regarding the state negotiations during the Engagement Period.[17] Order No. 1920-A clarifies that transmission providers are not required to separately characterize Relevant State Entities' agreement or independently justify Relevant State Entities' preferred cost allocation.[18]

While each of these modifications may seem innocuous at first blush, each of them represents a limitation on the transmission providers rights that are contrary to the plain language of the statute, as well as court precedent.

III. STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS

In accordance with Rule 713(c)(1) and (2) of the Commission's Rules of Practice and Procedure, WIRES submits the following specifications of error and statement of issues, including citations to representative Commission and court precedent.

FERC has no authority under the FPA section 205 to impose a prerequisite on a public utility's ability to file revisions to an *ex ante* Long-Term Regional Transmission Cost Allocation Method.

See Atl. City Elec. Co. v. FERC, 295 F.3d at 3, 8 (D.C. Cir. 2002) ("As a federal agency, FERC is a 'creature of statute,' having 'no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.'") (citations omitted*)*); *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (stating that in the absence of statutory authorization for its act, an agency's "action is plainly contrary to law and cannot stand") (citations omitted)); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative

[16] *Id.* at PP 651, 654.

[17] *Id.* at PP 651, 655.

[18] *Id.* at P 655.

agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").

Requiring transmission providers to consult with Relevant State Entities prior to submitting revisions to an *ex ante* Long-Term Regional Cost Allocation Method or State Agreement Process previously-accepted by the Commission on compliance with Order No. 1920 is contrary to the plain language of FPA section 205, or at a minimum an unreasonable interpretation of the statutory text, that the Commission may not deviate from.

United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 337-344 (1956) (A utility is entitled "in the first instance" to change its rates at will "unless it has undertaken by contract not to do so."); *See City of Cleveland, Ohio v. F.P.C.*, 525 F.2d 845, 855 (D.C. Cir. 1976) ("[T]the utility may, without negotiation or consultation with anyone, set the rates it will charge prospective customers, and change them at will, so long as they have not been set aside by the Commission on grounds of inconsistency with the Act."); *City of Winnfield*, 744 F.2d 871, 875 (D.C. Cir. 1984) (FPA section 205 is designed to enable a public utility to increase its rates so long as it stays within the zone of reasonableness); *Papago Tribal Utility Authority v. FERC*, 723 F.2d 950, 953 (1983) ("[P]arties may agree that new rates can be unilaterally and immediately imposed by the utility, subject, under section 205, to Commission suspension for no longer than five months, and to ultimate Commission disallowance if they are not just and reasonable").

The Commission erred in requiring transmission providers to include Relevant State Entities' agreed upon Long-Term Regional Transmission Cost Allocation Method(s) and/or State Agreement Process(es) in transmission providers' Order No. 1920 compliance filing as an alternative method or process to transmission providers' chosen cost allocation method. Such a requirement is arbitrary and capricious and beyond the Commission's authority under FPA sections 205 and 206.

16 U.S.C. § 824d(d); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *City of Winnfield*, 744 F.2d at 875 (D.C. Cir. 1984) (section 205 is designed to enable a public utility to increase its rates so long as it stays within the zone of reasonableness); *Atl. City Elec. Co. v. FERC*, 295 F.3d at 9-10 (D.C. Cir. 2002) (FERC has no authority to require utility petitioners to cede rights expressly given to them by Congress in FPA section 205); *United Gas Pipe Line Co. v. Memphis Gas Water Division,* 358 U.S. 103, 110 (1958) (the public utility, "like the seller of an unregulated commodity, has the right . . . to change its rates . . . [at] will, unless it has undertaken by contract not to do so."); *See City of Cleveland, Ohio*, 525 F.2d at 855 (D.C. Cir. 1976).

Order No. 1920-A is arbitrary and capricious and lacks reasoned decision making because it failed to provide a reasoned explanation for its holding.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'") (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (providing that an "agency must make findings that support its decision, and those findings must be supported by substantial evidence" and admonishing the agency for failing to "articulate any rational connection between the facts found and the choice made")); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (providing that an agency's decision must be supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.").

IV. REHEARING REQUEST

A. Order No. 1920-A's Consultation Requirement is an Unlawful Prerequisite to a Public Utility's FPA Section 205 Filing Rights

FPA section 205 was designed to protect the ability of the public utility[19] to "set the rates it will charge prospective customers, and change them at will," subject to Commission review.[20] The statutory language is clear on this point as it specifically provides that:

- A public utility may file changes to rates, charges, classification, or service *at any time* upon 60-days' notice;[21]
- The changes shall take effect after the statutorily required notice period, unless the Commission suspends them (for up to five months) in order to investigate their lawfulness; and
- The Commission can reject the changes only if it finds that they are not just and reasonable."[22]

The Commission has no ratemaking or rate setting authority under FPA section 205.[23] Section 205 simply vests the Commission with the power to review such rates as made by public

[19] Under FPA section 201(e), "public utility" is defined to mean "any person who owns or operates facilities subject to the jurisdiction of the Commission under [Part II of the FPA]."

[20] *City of Cleveland v. FPC*, 525 F.2d at 855 (D.C. Cir. 1976).

[21] 16 U.S.C. § 824d(d).

[22] 16 U.S.C. §824d(a).

[23] *NRG Power Marketing, LLC v. FERC,* 862 F.3d 108, 115 (D.C. Cir. 2017) ("Section 205 does not authorize FERC to impose a new rate scheme of its own making without the consent of the utility or Regional Transmission Organization that made the original proposal.") (citing to *Atl. City Electric Co. v. FERC*, 295 F.3d at 10 (D.C. Cir. 2002)).

utilities and to modify them upon a finding of unlawfulness.[24] The power to initiate rate changes rests with the public utility alone, and the Commission cannot limit or prohibit public utilities from filing changes in the first instance.[25]

The intent of the statute was to allow the public utility to act quickly without obstacles. The courts have recognized that a public utility's FPA section 205 filing rights cannot be restricted by requiring "negotiations or consultations" before submitting revisions to rates under the statute, stating:

> The [Federal Power Act] effectuates a congressional scheme under which electric utilities establish initially, by contract or otherwise, the rates they will charge, subject to revision by the Commission on a finding of unlawfulness. To be sure, the utility may, *without negotiation or consultation with anyone*, set the rates it will charge prospective customers, and change them at will, so long as they have not been set aside by the Commission on grounds of inconsistency with the Act.[26]

Despite the clear language of FPA section 205 restricting the Commission's authority to limit a public utility's right to file revisions to rates in the first instance,[27] Order No. 1920-A adopts a process in direct contravention of this statutory limitation.[28]

Requiring public utilities to consult with states before they submit revisions to an *ex ante* Long-Term Regional Transmission Cost Allocation Method accepted in compliance with the Final

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[24] *City of Cleveland v. FPC*, 525 F.2d at 855 (1976); *cf. also, United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. at 340 (1956) ("[W]hen a natural gas company initiates a rate change under § 4(d), the proceedings are governed exclusively by §4(d) and (e), and hence the Commission's only power is that which it has under § 4(e) to set aside the new rate if that is found to be unlawful").

[25] *Atl. City Elec. Co. v. FERC*, 295 F.3d at 10 (D.C. Cir. 2002).

[26] *See City of Cleveland, Ohio*, 525 F.2d at 855 (D.C. Cir. 1976); *see also Atl. City Elec. Co. v. FERC*, 295 F.3d at 9-10 (D.C. Cir. 2002) (affirming that transmission owning utilities have filing rights under FPA section 205 that FERC may not revoke).

[27] *United Gas Co. v. Mobile Gas Svc. Corp.*, 350 U.S. at 342-343 (1956) ("If the purported change is one the natural gas company has the power to make [under FPA section 4(d)], the "change" is completed upon compliance with the notice requirement and the new rate has the same force as any other rate — it can be set aside only upon being found unlawful by the Commission.").

[28] *See* Order No. 1920 at P 1430 (clarifying that "unless voluntarily waived, a transmission provider retains its FPA section 205 filing rights to submit an *ex ante* cost allocation method for Long-Term Regional Transmission Facilities at any time consistent with any limitations a transmission provider may have agreed to . . . .") (citing to *Atl. City Elec. Co. v. FERC*, 295 F.3d at 9-11 (D.C. Cir. 2002), *Atl. City Elec. Co. v. FERC*, 329 F.3d at 858-859 (D.C. Cir. 2003)).

Rule, is a prerequisite not contemplated under the statute that has the potential to delay a public utility's section 205 filing. In the extreme, the consultation requirement could serve as a prohibition to a public utility's ability to file revisions under FPA section 205. Each outcome (and anything in between) is beyond the authority delegated to the Commission under the FPA.[29]

WIRES understands the value of collaborating with the states prior to amending the Long-Term Regional Transmission Cost Allocation Method accepted by the Commission on compliance with the Final Rule and recognizes that certain transmission providers have *voluntarily* included similar provisions in their tariffs.[30] Moreover, it is likely that transmission providers will reach out to their states when considering revisions to Long-Term Regional Transmission Cost Allocation Methods. That said, the Commission does not have the authority to diminish or impede a public utility's FPA section 205 filing rights with pre-filing conditions in order to give the states a greater role in considering any future changes to the Long-Term Regional Transmission Cost Allocation Method(s) or State Agreement Process(es). That decision rests solely with Congress. Thus, the consultation requirement included in Order No. 1920-A is not sanctioned by FPA section 205, is unlawful, and should be reversed on rehearing.

B. Order No. 1920-A Compliance Filing Requirements Are Outside the Scope of the Regulatory Scheme Established by FPA Sections 205 and 206

In Order No. 1920-A, the Commission restated its determination in Order No. 1920 that its existing regional transmission planning and cost allocation requirements are unjust, unreasonable, and unduly discriminatory or preferential under FPA section 206,[31] and, thus, the Commission has

[29] *See United States v. Amdahl Corp.* 786 F.2d 387 (Fed. Cir. 1986); *see also Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 621 (D.C. Cir. 1992) ("Agency actions beyond delegated authority are '*ultra vires*,' and the court must invalidate them.").

[30] Order No. 1920-A at P 692 (noting that SPP and MISO have included similar mechanisms in their OATTs).

[31] Order No. 1920 at P 114.

both "the authority and the responsibility to 'determine the just and reasonable . . . practice . . . to be thereafter observed and in force' consistent with Order No. 1920's findings."[32] Based on that determination, Order No. 1920-A not only requires transmission providers to submit on compliance an *ex ante* cost allocation method, but adds a requirement that transmission providers must include in their transmittal or as an attachment to their compliance filing a Long-Term Regional Transmission Cost Allocation Method(s) and/or State Agreement Process(es) agreed upon by the Relevant State Entities, even if the transmission provider proposes to adopt a different method or process. [33]

In an effort to justify this compliance directive, the Commission points to the differences between FPA sections 205 and 206, noting that compliance filings are not section 205 filings.[34] The Commission seems to find that this distinction allows it to require transmission providers to include a Relevant State Entities' agreed-upon method or process in the transmission provider's transmittal or as an attachment to its compliance filing, even though the transmission provider proposes to adopt a different Long-Term Regional Transmission Cost Allocation Method or does not propose to revise its tariff to include a State Agreement Process.[35] Such requirement is unsupported by the statute.[36]

FPA sections 205 and 206 "are simply parts of a single statutory scheme under which all rates are established initially by the [public utilities], by contract or otherwise, and all rates are

[32] Order No. 1920-A at P 652 (citing U.S.C. 824e(a)).

[33] Order No. 1920-A at P 654.

[34] *Id.* at P 652.

[35] *Id.* at P 652.

[36] *Atl. City Elec. Co. v. FERC*, 295 F.3d at 10-11 (D.C. Cir. 2002) (stating FERC may not impose filing requirements under FPA section 206 that contravene the terms of the statute).

subject to being modified by the Commission upon a finding that they are unlawful."[37] While FERC has the authority under FPA section 206, in certain circumstances, to take the initiative in setting the replacement rates, that is not what the Commission did in Order No. 1920-A. Rather than prescribing a replacement rate in the Final Rule, the Commission directs public utilities on compliance to submit "just and reasonable" cost allocation methods[38] consistent with the requirements of Order No. 1920.[39]

Thus, like a section 205 filing, a public utility submitting a compliance filing does not have to satisfy the first prong of the FPA section 206 procedure, *i.e.,* a showing that the existing rate is unjust and unreasonable. Rather, the public utility need only propose a just and reasonable replacement rate in compliance with the Commission order. Procedurally, the public utility's obligation under compliance is the same as that under FPA section 205, *i.e.*, the public utility must submit a just and reasonable rate.

C. *FERC Does Not Have the Statutory Authority to Require a Public Utility to File Another Entity's (Including a State's) Rate Proposal*

Under the FPA framework, other entities, including states, wishing to propose an alternative to a public utility's replacement rate, may do so by intervening in the docket and

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[37] *United Gas Pipe Line Co.,* 350 U.S. at 341 (1956) (emphasis added) (addressing the provisions of the Natural Gas Act parallel to the Federal Power Act).

[38] Current Commission precedent provides that when a party files a proposal pursuant to the section 205 just and reasonable standard, the party is not required to demonstrate that its proposal is the best option, but only that it is just and reasonable. *See Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 703 (D.C. Cir. 2007) ("FERC is not required to choose the best solution, only a reasonable one"); *PJM Interconnection, L.L.C.*, 170 FERC ¶ 61,243, at P 57 (2020) ("A party filing a proposal pursuant to FPA section 205 need not demonstrate that its proposal is the best option, but only that it is just and reasonable."); *City of Winnfield v. FERC*, 744 F.2d at 875 (D.C. Cir. 1984) ("[W]hen acting under § 205 the Commission must act within the confines of the utility's proposals; that it may not allow the utility a rate increase of a sort it neither requested nor justified. Nothing in § 205 requires this result.").

[39] *See* Order No. 1920 at PP 268-269; *see also* Order No. 1920-A at P 192 (maintaining Order No. 1000's light touch as to regional cost allocation: "[i]t does not dictate how costs are to be allocated. Rather, the Rule provides for general cost allocation principles and leaves the details to transmission providers to determine in the planning processes." (citations omitted).

submitting comments regarding their proposed rate along with any supporting information.[40] This is because the states do not have independent authority under the FPA to submit their proposed cost allocation method on par with the public utilities' method under the just and reasonable standard.

Despite that clear statutory framework, FERC seeks to rewrite the statute by requiring transmission providers to include the states' Long-Term Regional Transmission Cost Allocation Method in their compliance filing, indirectly granting states a filing status not found in the FPA. But, the Commission cannot do indirectly what it cannot do directly.[41] The Commission references no statutory authority under which it has jurisdiction to require a public utility to include in its Order No. 1920 compliance filing another entity's alternative proposal for consideration by the Commission.[42] Nor is there any authority under the FPA that permits any entity, including states, to participate in a public utility's compliance filing and submit a dueling just and reasonable rate. This approach is not a mere change in the filing process. It is a substantive change not found in the FPA. If there is no statute conferring authority, FERC has none.[43]

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[40] *See* Order No. 1920 at P 1429 (stating "Entities that oppose or prefer a different cost allocation method than the transmission providers' preferred cost allocation method can provide their comments if and when such cost allocation method is filed with the Commission.").

[41] *Michigan v. EPA,* 268 F.3d at 1081 (D.C. Cir. 2001) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.") (citations omitted); *see also Richmond Power Light v. FERC*, 574 F.2d 610, 620 (D.C. Cir. 1978)(providing that "[w]hat the Commission is prohibited from doing directly it may not achieve by indirection.") (citations omitted). Thus, simply because the Commission wishes to provide the states opportunities for state engagement in the development of cost allocation methods, does not mean that it can if it is not permitted under the FPA.

[42] In fact, the Commission acknowledges in Order No. 1920-A that it "generally does not consider alternate compliance proposals other than those filed by the relevant public utility." *See* Order No. 1920-A at P 659.

[43] *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374 (1986) (recognizing that "an agency literally has no power to act . . . unless and until Congress confers power upon it."); *see also Michigan v. EPA*, 268 F.3d at 1081 ("If EPA lacks authority under the Clean Air Act, then its action is plainly contrary to law and cannot stand.") (citations omitted); *American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119-20 (D.C. Cir. 1995) (stating that "EPA cannot use [its] general rulemaking authority . . . as justification for adding new factors to a list of statutorily specified ones.").

In an attempt to overcome any procedural deficiencies resulting from the compliance requirement under Order No.1920-A, the Commission clarifies that the Relevant State Entities' agreed-upon method or process included in the transmission provider's compliance filing "does not constitute a 'proposal' from the transmission provider."[44] Nor will the transmission provider be required "to separately characterize Relevant State Entities' agreement or independently justify Relevant State Entities' preferred Long-Term Regional Cost Allocation Method and/or State Agreement Process,[45]

However, even with those "fixes," this compliance requirement is procedurally flawed because neither states, nor Relevant State Entities, are "public utilities" under the FPA. The Commission's attempt to circumvent the limitations of the FPA by citing to the "good reasons" for considering the states' alternatives,[46] cannot override the limitations of the FPA.

Moreover, by requiring a transmission provider to include in its compliance filing a state-agreed upon method or process, the transmission provider is forced to share its statutory filing rights with another entity under a just and reasonable standard. As the filing entity, the transmission provider has the burden of demonstrating that its proposal is just and reasonable whether filed under FPA section 205 or 206.[47] Thus, the fact that the transmission provider has the filing rights does not mean that the Commission can diminish those rights by granting the states filing status not permitted under the FPA.

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[44] Order No. 1920-A at n. 1651.

[45] *Id.* at P 655.

[46] *Id.* at P 659.

[47] *Midwest Indep. Transmission Sys. Operator, Inc., et al.*, 131 FERC ¶ 61,174 at P 57 (May 21, 2010) ("[W]hether filed under section 205 or 206, a moving party's filing would be equally subject to a requirement that its filing meets a just and reasonable standard because both statutory provisions ultimately rely on that same standard. The just and reasonable standard is, thus, the only standard under which the Commission can review both proposals.").

The Commission justifies this compliance directive stating that these additional requirements "will allow the Commission to better evaluate whether transmission providers have complied with Order No. 1920's requirement to provide a forum for negotiation that enables meaningful participation by Relevant State Entities during the Engagement Period."[48] Pragmatically, FERC has other ways of evaluating whether transmission providers have provided state regulators with a formal opportunity to develop a Long-Term Regional Transmission Cost Allocation Method other than compelling transmission providers to include in their compliance filing a states' alternative proposal. For example, the Final Rule requires that:

> [T]ransmission providers to explain on compliance how they complied with the requirement to establish and provide notice of an Engagement Period for Relevant State Entities to negotiate a Long-Term Regional Transmission Cost Allocation Method(s) and/or State Agreement Process, as well as how they complied with the requirement to provide a forum for such negotiation.[49]

In contrast, Order No. 1920-A adopts an adversarial approach that requires the transmission provider to place dueling cost allocation proposals (under the just and reasonable standard) before the Commission. This approach is likely to engender years of costly litigation that would cast a cloud over successfully siting and developing critically needed transmission in a timely manner. The result is an order that is arbitrary and capricious and lacks reasoned decision making as required by the Administrative Procedure Act.

Finally, the Commission is mistaken when it asserts that because the compliance directives are pursuant to the Commission's FPA section 206 authority, the requirements will not implicate or infringe upon transmission providers' FPA filing rights under section 205.[50] Whether a filing

[48] Order No. 1920-A at P 657.

[49] Order No. 1920 at P 1357.

[50] Order No. 1920-A at P 657.

is submitted under FPA section 205 or 206, the public utility's filing is equally subject to a just and reasonable standard, as both statutory provisions ultimately rely on the same standard.[51] Because the Commission has no authority to grant states' rights not found in FPA sections 205 or 206, WIRES respectfully requests that the Commission grant rehearing and reject this compliance requirement included in Order No. 1920-A.

D. Order No. 1920-A's Consultation and Compliance Requirements are Arbitrary and Capricious and Otherwise Contrary to the Administrative Procedure Act

Under the Administrative Procedure Act ("APA"), agency action that is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" cannot survive judicial scrutiny.[52] Commission orders are reviewed under this standard if FERC's factual findings are supported by substantial evidence.[53]

In considering this standard, it is important to note that the Commission provides no support under the FPA, or Commission or court precedent, for either the consultation or compliance mandates under Order No. 1920-A. Despite that failing, the Commission defends its amendments by using the same justification relied upon in Order No. 1920 to add these new consultation and compliance requirements in Order No. 1920-A. Specifically, the Commission states that "it is critical to the success of the Long-Term Regional Transmission Planning reforms that states have an opportunity to have a significant role in the establishment of just and reasonable Long-Term Regional Transmission Cost Allocation Methods and State Agreement Processes."[54]

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[51] *Midwest Indep. Transmission Sys. Operator, Inc.*, 131 FERC ¶ 61,174 at P 57 (May 21, 2010).

[52] 5 U.S.C. § 706(2)(A).

[53] *See Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010) (citations omitted); *Rio Grande Pipeline Co.*, 178 F.3d 533, 541 (D.C. Cir. 1999).

[54] Order No. 1920-A at P 649, citing Order No. 1920 at P 1415.

And, even though the Commission elaborates on its reasoning, citing to the "good reasons" for considering the states alternative methods and processes, such as the fact that (i) states are responsible for the laws, regulations, and policies that drive the need for Long-Term Regional Transmission Facilities; (ii) states are key in determining whether Long-Term Regional Transmission Facilities are sited, permitted and constructed; and (iii) because of the "inherent uncertainty" associated with planning to meet Long-Term Transmission Needs, states' Long-Term Regional Transmission Cost Allocation Methods and State Agreement Processes should be given "heightened importance,"[55] this justification is simply a restatement of the Commission's reasoning in the Final Rule.

However, given the addition of the consultation and compliance requirements in Order No. 1920-A (impacting transmission provider's sections 205 and 206 filing rights) as compared to Order No. 1920's more reasonable approach that provided for a dedicated process through which states have an opportunity to participate in the development of [Long-Term Regional Cost Allocation] methods in order to establish specific cost allocation requirements that are tailored to Long-Term Regional Transmission Planning reforms,"[56] there seems little connection between what are essentially the same facts and the choices made.

WIRES agrees with the very important role the states will play in determining the success of Long-Term Regional Transmission Planning but does not see any additional evidence to support the extreme intrusion on transmission providers filing rights set forth in Order No. 1920-A. Because the record demonstrates that there are other less intrusive means by which states can

[55] Order No. 1920-A at P 659.

[56] Order No. 1920 at P 1357 (requiring transmission providers in each transmission planning region to "provide for a forum for negotiation that enables meaningful participation by Relevant State Entities during the Engagement Period.").

meaningfully participate in the development of Long-Term Regional Cost Allocation methods and State Agreement Processes, the Commission's revisions are arbitrary and capricious[57] and beyond the Commission's authority under FPA sections 205 and 206. Finding a means by which to meaningfully involve the states should not be at the expense of diminishing public utilities' section 205 and 206 filing rights conferred upon them by Congress.

V. CONCLUSION

For the foregoing reasons, WIRES requests that the Commission grant this request for rehearing of Order No. 1920-A and reverse the consultation and compliance mandates.

Respectfully submitted,

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December 20, 2024

[57] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43 (1983).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day had served the foregoing document upon each person designated on the official service compiled by the Secretary in these proceedings.

Dated at Washington, D.C., this 20th day of December 2024.

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