

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Transmission Planning and Cost Management)	Docket No. AD22-8-000
)	
)	
Joint Federal-State Task Force on Electric Transmission)	Docket No. AD21-15-000
)	

**COMMENTS OF THE
INDUSTRIAL CUSTOMER ORGANIZATIONS**

EXECUTIVE SUMMARY

The Industrial Customer Organizations¹ welcome the opportunity to submit these Comments in response to the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) Notice Inviting Post-Technical Conference Comments regarding the Commission’s dockets on Transmission Planning and Cost Management and the Joint Federal-State Task Force on Electric Transmission (“FERC Notice”). The Industrial Customer Organizations include associations of leading manufacturing companies, large energy-intensive users of electricity, coalitions of transmission customers, and others representing hundreds of billions of dollars in sales, thousands of manufacturing facilities in the United States, and millions of family-sustaining jobs in the United States.

The Industrial Customer Organizations provide the following recommendations to the Commission:

- The Commission should materially expand competition for transmission project development as its primary tool to mitigate transmission costs. Effective

¹ The Industrial Customer Organizations include the Industrial Energy Consumers of America (“IECA”), PJM Industrial Customer Coalition (“PJMICC”), Coalition of MISO Transmission Customers (“CMTC”), the American Forest & Paper Association (“AF&PA”).

competition addresses many, if not all, of the issues that the Commission has raised in this docket.

- The Commission should mandate visibility of local planning and asset management criteria for use in its transmission rate recovery processes.
- The Commission’s rate recovery processes should vary according to the level of independent oversight in the selection and approval of transmission facilities. Transmission facility projects that are not subject to independent review and approval should not be eligible for formula rate recovery.
- Variance analyses should be used, but only in conjunction with the competitive selection of transmission solutions, to maximize customer benefits.
- The Commission should direct the establishment of independent transmission monitors (“ITM”) or, where independent market monitors (“IMM”) already exist, direct the IMM’s inclusion of ITM functional responsibilities.
- The Commission should reform its formula rate and prudence practices to cure the existing procedural and informational deficiencies.

COMMENTS

I. EXPANSION OF COMPETITION FOR ALL NEW TRANSMISSION PROJECTS 100 KV AND ABOVE WILL ADDRESS MANY OF THE ISSUES THAT HAVE BEEN TEED UP IN THIS DOCKET.

The Industrial Customer Organizations have contended, and continue to contend, that a material expansion of competition for the development of transmission projects, coupled with contractual arrangements to fulfill the obligations of the winning bidders in such competitive processes, will address many of the issues the Commission has identified in this docket. If the Commission’s objective is to have more transmission planning occur by independent entities and for regional projects, then expanding competition to eliminate the exceptions for local, supplemental, and “other” projects will help. If the Commission is desirous of avoiding years litigating administratively determined allowed returns on equity, then expanding competition and contractually binding winning bidders to a competitive, market-based return on equity will help. If the Commission aims to achieve capital structures that include equity levels consistently at or below 50%, then expanding competition will help. If the Commission wants to optimize

transmission build-out without causing transmission rates to continue spiraling out of control, then competition is necessary. If the Commission perceives value in having transmission projects delivered on time and on budget, with contractual consequences for failure to achieve these objectives, then competition should be expanded. The Industrial Customer Organizations note, that in Docket RM21-17-000, approximately 150 parties endorsed greater competition for new transmission projects. Competition for transmission solutions, when incorporated into the early phase of transmission planning, and enhanced through contractually binding cost containment provisions offered by the winning developer, is the best way, and perhaps the only way, to ensure just and reasonable rates. The Industrial Customer Organizations have filed in this docket their own comments and the comments of the Electricity Transmission Competition Coalition, both of which include a number of recommendations about how to expand competition for new transmission.²

II. IF THE COMISSION DOES NOT EXPAND COMPETITION, THE COMMISSION SHOULD MANDATE VISIBILITY OF LOCAL PLANNING AND ASSET MANAGEMENT CRITERIA FOR USE IN ITS TRANSMISSION RATE RECOVERY PROCESSES.

The Industrial Customer Organizations support increased transparency measures that would shed light on transmission owners' planning criteria for local transmission and asset management projects. Such information is essential for stakeholders and the Commission to evaluate the prudence of the transmission investment and to allow meaningful participation in the cost recovery process. Without visibility into the planning criteria for local transmission and asset

² See The Electricity Transmission Competition Coalition's ("ETCC") Initial and Reply Comments on the Commission's Advance Notice of Proposed Rulemaking and ETCC's Initial and Reply Comments on the Commission's Notice of Proposed Rulemaking in Docket No. RM21-17-000, also filed in this Docket No. AD22-8-000; The Industrial Customer Organizations' Initial and Reply Comments on the Commission's Advance Notice of Proposed Rulemaking in Docket No. RM21-17-000, and The Industrial Customer Organizations' Initial and Reply Comments on the Commission's Notice of Proposed Rulemaking in Docket No. RM21-17-000, also filed in this Docket No. AD22-8-000.

management projects that often undergo no independent review by regional transmission organizations (“RTOs”) or independent system operators (“ISOs”), the Commission’s cost recovery processes, whether through “stated rates” or formula rates, will continue to be handicapped in several important ways. First, stakeholders will continue to lack essential information to allow for a thorough examination of, and an opportunity to challenge the prudence of, incurred transmission costs. Second, the Commission’s continued reliance on an ineffective annual informational update process in conjunction with formula rates, that presumes the prudence of the previously unreviewed transmission expense, would continue to allow a near-automatic transmission cost recovery with no meaningful check on additions to transmission rate base. Third, absent additional structural changes to its transmission cost oversight, the Commission could not defensively rely on the availability of an unworkable formula rate process that lacks essential prerequisites to allow meaningful stakeholder participation, cost examination, and challenges. Transmission formula rates, as currently devised and implemented, provide no meaningful cost discipline to a rapidly growing transmission rate base. Alleviating rate pressure will be necessary to accommodate any necessary transmission growth to address electrification needs, aging infrastructure, integration of a new generation resource mix, and distributed energy resource deployment.

III. IF THE COMMISSION DOES NOT EXPAND COMPETITION, THE COMMISSION’S RATE RECOVERY PROCESSES SHOULD VARY ACCORDING TO THE LEVEL OF INDEPENDENT OVERSIGHT IN THE SELECTION AND APPROVAL OF TRANSMISSION FACILITIES.

Formula rate recovery may continue to be appropriate in RTO and ISO regions for regional transmission projects that undergo an independent Board review and approval process. Where such RTO/ISO planning processes are open, transparent, and provide an opportunity for stakeholder examination and evaluation of transmission projects, the continued use of the formula

rate recovery may be justified. In such circumstances, however, the transmission owner should have, and maintain, the burden of demonstrating that all costs for which it is seeking pass-through in a formula rate were prudently incurred and are otherwise just and reasonable. The current process of formula transmission rates and formula transmission rate protocols, while allowing for informational requests to be submitted to the transmission owner, does not provide the rigor or the discipline necessary to ensure that all cost recovery is prudent. As Chairman Gerwatowski of the Rhode Island Public Utilities Commission testified, this “spend the money, get the money”³ cycle creates a disincentive for transmission owners to proactively manage costs and add cost containment measures to their planning, procurement, and project execution practices. Lack of adequate independent oversight in the development of projects, and lack of effective oversight in the cost recovery process, will increase the implementation of suboptimal solutions that can lead to higher costs and less access to the transmission system. Therefore, in the absence of a rigorous independent review of transmission project costs, it is appropriate to return to the fundamental principle that has guided cost of service ratemaking for decades and allow full discovery and cross-examination on expenditures, while placing the burden of proof on the party seeking cost recovery, through the use of stated transmission rates implemented in an evidentiary hearing context.

IV. VARIANCE ANALYSIS ALONE IS INFERIOR TO COMPETITION AND SHOULD BE USED ONLY IN CONJUNCTION WITH THE COMPETITIVE SELECTION OF TRANSMISSION SOLUTIONS TO MAXIMIZE CUSTOMER BENEFITS.

During the October 6 Technical Conference, several panelists touted the virtues of a variance analysis, through which transmission expenditures would be subject to more rigorous review if such expenditures exceed estimates by certain percentages. Variance analysis, while potentially helpful, is an inferior alternative to competition. While a variance analysis may offer some

³ Technical Conference Transcript at 212:3-4, Docket No. AD22-8, (Oct. 6, 2022) (hereinafter “Transcript”).

discipline in monitoring and reporting of projected costs, such analysis does not usually include cost caps and other cost containment commitments that often accompany competitively bid projects. With competition, the transmission planner receives the benefit of competition of ideas, whereby various alternative solutions to an identified problem compete with each other, as well as the benefit of competition in terms of financing and project cost containment provisions, which may include variances, bandwidths, tolerances, or precise cost cap commitments. Full deployment of competition offers the independent entity evaluating the competing proposals a greater array of project solutions and means to maximize customer benefits. Once selected, the winning bidder should be contractually bound to its cost containment provisions, adherence to which can be enforced by the Commission in its cost recovery processes. In situations where a competitively selected transmission solution offers no cost containment provisions, variance analysis may be appropriate for coupling with competitive offers.

V. WHETHER OR NOT THE COMMISSION EXPANDS COMPETITION, THE COMMISSION SHOULD DIRECT THE ESTABLISHMENT OF INDEPENDENT TRANSMISSION MONITORS.

A. The Commission's Authority Over Setting Just and Reasonable Rates For Transmission Service Encompasses the Creation of an ITM

The Commission has exclusive jurisdiction to set the just and reasonable rate for interstate electric transmission service provided by jurisdictional public utility transmission owners.⁴ FERC may exercise its authority by acting on tariffs filed by transmission owners or, where appropriate, by initiating a proceeding to set a new rate, charge, or classification where the existing one has become unjust, unreasonable, unduly discriminatory, or preferential.⁵ The Commission's remedial authority is not confined to setting the new just and reasonable rate, but also extends to

⁴ See 16 U.S.C. §§ 824(d), 824e., *New York v. FERC*, 535 U.S. 1, 22 (2002).

⁵ *Id.*

transmission planning and cost allocation practices, as well as transmission competition matters, such as the exercise of transmission owners' rights of first refusal.⁶

Through orders and regulations, the Commission has successfully used its remedial authority under the Federal Power Act to mandate certain market monitoring functions in RTO and ISO regions, while relying on the same statutory provisions that govern its ratemaking authority over the transmission and sale of electric energy in interstate commerce.⁷ Today, IMMs provide an important check on FERC-regulated entities' compliance with Commission-filed tariffs and rules, analyze wholesale market and, in some cases, transmission data to identify market and process inefficiencies and flaws, issue recommendations to the RTOs/ISOs and relevant stakeholders, monitor for the exercise of market power, and issue referrals to the Commission's Office of Enforcement.

Important to the successful implementation of the IMM function was the Commission's recognition that not all RTOs and ISOs fit one size and, therefore, their respective market monitoring scope and structure may need to vary.⁸ As a result, some IMMs may already have certain formalized responsibilities over the monitoring of transmission services, and examination of the respective tariffs would be appropriate to determine if such responsibilities are present and are routinely carried out. Adding more robust transmission monitoring functions to the existing IMMs' responsibilities would also benefit the wholesale rate, which reflects components of the

⁶ *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 56, 70, 75-76 (D.C. Cir. 2014). *See also Trans. Access Policy Grp. v. FERC*, 225 F.3d 667, 687 (D.C. Cir. 2000).

⁷ *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999) (cross-referenced at 89 FERC ¶ 61,285, 65 Fed. Reg. 809, 904 (Jan. 6, 2000), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000) (cross-referenced at 90 FERC ¶ 61,201), 65 Fed. Reg. 12,088 (Mar. 8, 2000), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash. v. FERC*, 272 F.3d 607 (D.C. Cir. 2001). *See also* 18 C.F.R. § 35.34(k)(6).

⁸ *See* Order 2000 at 463.

energy, capacity, and ancillary services markets, as well as certain transmission attributes, such as congestion.

To the best of the Industrial Customer Organizations' knowledge, IMMs do not routinely participate in the RTO's/ISO's transmission planning processes or get involved in transmission rate recovery proceedings before the Commission. Given the staggering increase in transmission spending and the proliferation of asset management and local transmission projects that undergo little, if any, independent review,⁹ the expansion of the existing IMM functions, or the creation of a new ITM function, would be a timely and appropriate exercise of the Commission's authority to remedy unjust, unreasonable, unduly discriminatory, or preferential transmission rates.

The Commission may remedy the informational asymmetry between RTOs/ISOs/ transmission owners, on the one hand, and state authorities and consumer stakeholders, on the other hand, by creating an ITM with monitoring, reporting, and advisory functions with respect to RTO/ISO and jurisdictional transmission owners' transmission planning processes. Additionally, the Commission may remedy the structural deficiency relating to its cost recovery processes by allowing ITMs to participate in formula rate processes, to the extent such formula rate processes remain at all. However, the Industrial Customer Organizations do not see the proposed ITM as a cure to the structural concerns that have been identified by the Commission and raised in these and other parties' comments. Industrial Customer Organizations recommend that the Commission direct the implementation of additional measures to allow for meaningful participation in rate recovery proceedings, as more fully set forth in sections II, III, and VI of these Comments.

⁹ See The Industrial Customer Organizations' Initial Comments on the Commission's Notice of Proposed Rulemaking at 4-6, Docket No. RM21-17-000; see also ETCC's Initial Comments on the Commission's Notice of Proposed Rulemaking at 66, Docket No. RM21-17-000.

B. The Commission Would Not Run Afoul of Sub-Delegation Prohibitions as Long as the ITMs' Roles and Responsibilities are Properly Defined

Concerns that the Commission would unlawfully sub-delegate its authority by creating an ITM and empowering it to monitor transmission planning and cost recovery, as well as report and advise on the same, are unfounded.¹⁰ The Commission addressed identical concerns with respect to the creation of IMMs in Order 2000 where it emphasized that “the performance of market monitoring ... is not intended to supplant Commission authority” but would instead provide FERC with additional means to detect market power abuses, market design flaws and opportunities for improvements in market efficiency.¹¹ Here, too, the Commission would have ultimate authority to determine the ITM’s scope of responsibilities and structure, without sub-delegating its own decision-making authority. For that reason, the sub-delegation prohibition to outside entities in *U.S. Telecom Ass’n v. F.C.C.* is inapplicable.¹²

The Commission may also consider supplementing its existing *Policy Statement on Market Monitoring Units* to include additional transmission monitoring and reporting responsibilities should IMMs be permitted to serve as ITMs, or to issue a new policy statement that separately addresses the scope of the ITM functions.¹³ Regardless of the approach, ultimate decision making on issues such as transmission cost recovery, planning determinations, tariff approval, and assessment of penalties should remain with the Commission.

¹⁰ See Transcript at 194:17-195:25; see also Statement of Larry Gasteiger, Executive Director, WIRES, AD22-8-000 (October 4, 2022).

¹¹ Order 2000 at 465.

¹² *U.S. Telecom Ass’n v. F.C.C.*, 359 F.3d 554 (DC Cir. 2004).

¹³ *Policy Statement on Market Monitoring Units*, 111 FERC ¶ 61.267 (May 27, 2005).

C. Scope and Structure of ITMs

The Commission has broad discretion in determining the scope of the ITM functions.¹⁴ At the very narrow end of a spectrum of authorized duties, the ITM would monitor for compliance with existing legally enforceable obligations of RTOs/ISOs and jurisdictional transmission owners and refer to the Commission any perceived tariff violations. For example, the ITM would monitor compliance with transmission planning process requirements. In regions where competition is deployed, the ITM would monitor for, and report, non-compliance with Commission-approved processes and anti-competitive conduct.

At the broad end of the spectrum of functionality, an ITM may participate in any of the following areas:

- Monitor the transmission planning processes for optimization opportunities with respect to cost containment and competition;
- Report on barriers to deploying competition for new transmission facilities above 100 kV;
- Develop and monitor benchmark estimates of costs using data collected over time;
- Upon request, testify or provide information to state siting and integrated resource plan (“IRP”)-issuing authorities to assist with need and cost determinations;
- Participate in proceedings before the Commission, as necessary, to address transmission competition administration issues; and
- Participate in formula rate and stated rate cost recovery proceedings before the Commission.

The scope of ITM responsibilities could also vary from region to region, recognizing the regulatory differences between RTO and non-RTO regions and, in some places, the existence of robust state regulatory oversight of transmission services. The scope may further be reviewed, on a periodic basis, where legal, structural, or market circumstances warrant such review. To carry

¹⁴ See also Transcript at 197:9-198:2.

out its responsibilities with respect to monitoring, reporting, and advising on transmission issues, the ITM should have access to all transmission planning and cost data, including critical energy infrastructure information (“CEIF”).

With respect to the ITM structure, the Commission may consider enhancing the functions of the existing external IMMs in RTO and ISO regions by expanding their areas of responsibilities and funding to allow for the necessary increases in technical and personnel capacity. The existing IMMs have established capability to monitor the RTO/ISO markets, have a strong command of the applicable legal and regulatory framework, and have invested significant IT resources to monitor markets that interact with the transmission system operated by the respective RTOs/ISOs. The Industrial Customer Organizations do not recommend that ITMs be housed internally within RTOs and ISOs due to the inherent risk of conflicts stemming from monitoring and reporting on RTO/ISO compliance issues related to tariff administration and transmission competition matters. In non-RTO/ISO regions, the Commission may consider creating one ITM to cover the entirety of the Southeast region, and another one to monitor the entirety of the West region outside of the California ISO.

VI. THE COMMISSION SHOULD REFORM ITS FORMULA RATE AND PRUDENCE PRACTICES TO CURE THE EXISTING PROCEDURAL AND INFORMATIONAL DEFICIENCIES.

The Industrial Customer Organizations do not oppose the use of transmission formula rates for those transmission projects that have undergone a thorough independent RTO/ISO Board review

While projects that have undergone such an independent review may continue to recover costs through formula rates, this flow-through recovery should not be synonymous with an automatic cost recovery, and the Commission should address the informational and procedural

deficiencies with respect to current formula rate processes. These two areas are interrelated and addressing only one is not likely to lead to a meaningful correction that allows for setting the just and reasonable rate. To restore the procedural integrity of the ratemaking process, the Commission should return to the transmission owners the burden of demonstrating the prudence, justness and reasonableness of the costs that flow through the formula. A transmission owner may have certain obligations to align cost flow-throughs with its as-filed FERC Form 1 and obligations to maintain consistency with Commission accounting requirements, but when valid issues about the prudence and level of expenditures arise, consumers and other affected parties currently bear the burden to prove that the expenditure was imprudent or too high. Efforts by consumers to establish protocols that shift that burden to the transmission owner have been uniformly rebuffed by transmission owners, citing the MISO Protocol Orders¹⁵ as precedent. Additionally, consumers should have a clear right of recourse to address delays, non-responses, incomplete responses, and other failures by transmission owners to provide full and timely responses to informational requests. The existing transmission formula rate protocols specify little or no recourse for transmission owners' failures to provide reasonably requested information.

The Industrial Customer Organizations consider the above-described independent review prerequisites to be necessary to cure the existing deficiencies in the Commission's formula rate practices. In the event the Commission does not implement these recommendations and, instead, continues to allow the recovery of unreviewed capital investments through formula rates, then at a minimum, the Commission should direct that the transmission owners' protocols be revised to include an obligation on the transmission owners to provide, at the time of the annual informational

¹⁵ *Midwest Indep. Transmission Sys. Operator, Inc.*, 139 FERC ¶ 61,127 at P 9 (2013); *see also Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,149 (2013); *Midcontinent Indep. Sys. Operator, Inc.*, 146 FERC ¶ 61,212 (2014); and *Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,025 (2015) (collectively, MISO Protocol Orders).

filing, full and complete support for any new transmission project that exceeds a reasonably low threshold (e.g., \$500,000).

Additionally, the Industrial Customer Organizations recommend that the Commission expand the authority and resources of its Office of Administrative Litigation (“OAL”) so that OAL may engage in the annual formula rate update process and bring the benefit of its technical wherewithal to assist consumers and state interests in reviewing the actual flow-through of transmission costs.¹⁶ OAL is currently involved only in the initial establishment of transmission formula rates, and, in that limited context, provides significant value in helping to ensure that transmission formula rates are just and reasonable when established. However, experience has shown that, soon after the initial establishment of transmission formula rates, the formula rate annual updates begin producing significant year-over-year transmission rate increases. Routine engagement by the OAL in the annual informational updates that lead to these significant rate increases would impose greater discipline on the expenditure and recovery of transmission-related costs. OAL should be required to review every transmission owner’s formula rate annual update. Consumers and state agencies should not shoulder the entirety of that burden.

Finally, in addition to shifting the burden of prudence demonstrations back to the transmission owner, the Commission should also consider changing the timing of when prudence must be demonstrated in formula rate processes. With any formula rates that include a Projected Transmission Revenue Requirement (“PTRR”) phase or similar phase, the prudence review should occur during the review of the PTRR, instead of during the Annual Transmission Revenue Requirements (“ATRR”) phase. Unless prudence has been demonstrated after a PTRR filing, transmission costs would never flow through an ATRR when the ATRR informational filing is

¹⁶ See Transcript at 180:21-182:11.

made. Rather, the failure to demonstrate the prudence of a particular transmission project would result in the costs of that project never reaching an ATRR. The prudence burden could be met either by an OAL/customer agreement with the transmission owner, or by Commission order. Unless and until such an agreement is accepted by the Commission, or the Commission issues an order in a contested docket finding that the expenditure is prudent, the costs of the transmission project should not be recoverable in an ATRR.

CONCLUSION

WHEREFORE, the Industrial Customer Organizations respectfully request that the Commission afford due consideration to these Comments in fashioning solutions to address recent rapid increases in Commission-jurisdictional transmission rates.

Respectfully submitted,

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Dated: March 23, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have this day served, via first-class mail, electronic transmission, or hand-delivery the foregoing upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated this 23rd day of March, 2023.

/s/ Robert A. Weishaar, Jr.

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