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

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| Transmission Planning and Cost Allocation | ) | |
| By Transmission Owning and Operating | ) | Docket No. RM10-23-001 |
| Public Utilities | ) | |

**REQUEST FOR REHEARING**
**AND MOTION FOR CLARIFICATION OF THE**
**CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION**

The California Independent System Operator Corporation ("ISO") respectfully submits this Request for Rehearing and Motion of Clarification of Order No. 1000,[1] issued on July 21, 2011.[2]

## I. INTRODUCTION AND SUMMARY

The ISO supports the Commission's objectives of improving regional and interregional transmission planning. The ISO supports many aspects of Order No. 1000, including the Commission's recognition of the importance of identifying transmission needs driven by public policy requirements. The ISO also agrees that cost allocation for regional and interregional facilities should reflect principles of cost causation and that the costs of such facilities should be borne by those who benefit from them. The ISO supports voluntary interregional planning. The ISO's tariff includes a regional planning process and provisions for interregional coordination. The ISO also participates in interregional planning groups.

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[1] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 136 FERC ¶ 61,051 (2011) ("Order No. 1000").

[2] The ISO submits this request pursuant to section 313 of the Federal Power Act ("FPA") (16 U.S.C. § 825*l)* and Rule 713 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.713).

The ISO is concerned, however, that certain directives in Order No. 1000 exceed the Commission's legal authority. Under the Federal Power Act, utilities have the right, in the first instance, to choose to include interregional rate methodologies or other practices relating to rates in their tariffs – and the Commission cannot direct such filings unless it finds existing rates unjust or unreasonable. Further, the Federal Power Act also provides that regional coordination, and by extension interregional coordination, must be voluntary. In mandating interregional rates and interregional planning coordination, Order No. 1000 goes beyond the Commission's authority.

**A. The Mandate to File Interregional Cost Allocation Methodologies.**

In its comments on the Noticed of Proposed Rulemaking that preceded Order No. 1000, the ISO expressed its concerns with hardwiring an interregional cost allocation methodology in advance without knowing the specific facts and circumstances of a particular project that will be subject to the allocation methodology. Requiring regions to agree on a cost allocation methodology – or imposing a default allocation on them – without having a specific project in mind could easily mean that by the time an actual interregional project arises, the methodology is outdated and will not properly reflect the benefits of the project.

Order No. 1000 requires that each transmission provider have in its tariff a method or methods for allocating the costs of new interregional transmission facilities that neighboring transmission planning regions determine resolve the individual needs of each region more efficiently and cost-effectively. This mandate will require the ISO and other transmission providers to engage in a difficult and lengthy effort that may not in fact be meaningful or applicable when an actual project arises. That is not an effective use of resources, especially if there never are any interregional

transmission projects between two neighboring planning regions. The ISO believes a voluntary, case-specific approach to interregional cost allocation would be more efficient and meaningful.

The Commission asserts authority for its interregional cost allocation mandate under section 206 of the Federal Power Act, which allows the Commission to modify a rate or related matter if the Commission finds such to be unjust, unreasonable, or unduly discriminatory or preferential. In Order No. 1000, the Commission goes beyond that limited authority, because it directs the filing of new rates but nowhere makes the necessary finding, supported by the record, that existing cost allocation methodologies are unjust, unreasonable, or unduly discriminatory or preferential.

As an initial matter, none of the Commission's findings in support of its ruling pertains to an existing rate or related practice. Each finding in Order No. 1000 supporting the interregional cost allocation mandate cites only the absence of an interregional cost allocation methodology or a hypothetical impact on future rates. An absent rate or a potential that a future rate may be unjust or unreasonable is not the equivalent of an unjust or unreasonable existing rate.

Even if the findings in Order No. 1000 reasonably could be construed as applying to existing rates – which they cannot – the Commission identifies no record support for its conclusion that the conditions described in the order would lead to unjust or unreasonable rates. The Commission nonetheless asserts it can act to address a theoretical threat. There is no precedent, however, for the Commission to find rates or related matters unjust or unreasonable based solely on a hypothesis –

with no empirical support of the hypothesis and no established economic principles or analyses underlying the hypothesis.

Further, even if the Commission had record support for the proposition that an *ex ante* interregional cost allocation methodology would promote greater cost-effectiveness and more transmission development, which in turn would produce lower rates for consumers, such a factual proposition would not be sufficient to support a finding that existing rates would be unjust or unreasonable. Rates are not unjust or unreasonable simply because another rate might be more just and reasonable.

On rehearing, the ISO urges the Commission to establish principles for allocating the costs of interregional transmission projects but to refrain from requiring neighboring regions to hardwire an interregional cost allocation methodology in advance.

**B. The Mandate to Engage in Interregional Planning.**

The ISO also is concerned that imposing additional interregional planning process requirements on transmission planners like the ISO is unwarranted and unduly burdensome. In Order No. 1000, the Commission directs transmission providers, through their regional transmission planning processes, to establish procedures with each of its neighboring transmission planning regions for the purpose of coordinated planning. Requiring the ISO and other transmission planners to negotiate interregional transmission planning protocols with each of its neighboring transmission providers is both unnecessary and impractical. It does not make sense to require the negotiation of interregional planning coordination protocols and cost allocation methods in advance with every single interconnected transmission

provider, especially in circumstances where there are no pending interregional projects or never have been between the ISO and the neighboring transmission provider. The ISO and others in the western United States have already developed workable frameworks for interregional coordination of transmission planning. Any additional agreements or processes can be put in place – as they have voluntarily been put in place in the past – when specific interregional projects arise.

As is the case with its mandate for interregional cost allocation methodologies, the Commission purports to act under section 206 of the Federal Power Act to mandate interregional planning coordination. The mandate is impermissible because it is not based on a finding, supported by the record, that an existing rate is unjust, unreasonable, or unduly discriminatory or preferential. Order No. 1000 does not cite any instance in which the absence in existing tariffs of provisions governing interregional planning has caused a rate to be unjust, unreasonable, or unduly discriminatory or preferential. Order No. 1000 solely offers an unsupported hypothesis that requiring tariffs to include mutually agreeable provisions for planning between or among regions will enhance the Commission's ability to perform its mission.

Order No. 1000 also implies that, by not challenging Order No. 890, utilities waived any right to challenge the interregional planning requirements of Order No. 1000. Order No. 890, however, imposed limited requirements that could have been justified by discrimination concerns, regardless of whether Order No. 890 identified such concerns. That the ISO did not seek judicial review of transmission planning

provisions in Order No. 890 does not preclude an argument here that the Commission's interregional planning requirements are beyond its authority.

Even if the Commission's mandate were permissible under section 206, it would nonetheless be in violation of section 202(a) of the Federal Power Act, which precludes a Commission requirement of involuntary regional or interregional coordination. The Commission contends that Order No.1000 is not in violation of section 202(a) because that section refers only to coordinated operations, not coordinated planning.

The interpretation of section 202(a) included in the order, however, is impermissible because it is contrary to the plain meaning of coordination. There is nothing in the plain meaning of the term "coordination" to suggest it is limited to operational coordination, and Order No. 1000 offers no logical or textual basis for so limiting the meaning of the term. The Commission points out that section 202(a) does not mention planning, but neither does section 202(a) mention operations. If Congress intended to exclude coordinated planning from the scope of section 202(a), it could easily have done so. It did not.

The Commission may encourage voluntary interregional planning coordination, as contemplated by section 202(a). If it desires to compel such coordination, however, it must seek additional authority from Congress, as it has previously done.[3] The Commission cannot presume such authority, however, in the face of the contrary language of section 202(a). On rehearing, the ISO urges the

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[3] *See, e.g.,* Testimony of Honorable Jon Wellinghoff Before the Energy and Environment Subcommittee of the Committee on Energy and Commerce of the House of Representatives, 111th Cong., 2d Sess. (March 23, 2010).

Commission to eliminate the mandate for interregional planning coordination but to consider measures to promote and encourage voluntary coordination on transmission planning between neighboring regions.

### C. Motion for Clarification.

The ISO seeks clarification that neither such cost allocation methodologies as the Commission may require nor such cost allocation guidelines as the Commission may issue will permit a region to allocate to another region the costs of transmission facilities that are not included in the latter region's transmission plan. The ISO interprets this as the Commission's intent, and Order No. 1000 includes statements to that effect. Elsewhere, however, Order No. 1000 sets forth a prohibition against allocating the costs of facilities to regions where they are not located. The ISO believes that Order No. 1000 intends these prohibitions to work cumulatively, and requests that the Commission so clarify. Specifically, the ISO seeks confirmation that one planning region cannot allocate costs to a neighboring transmission planning region for a transmission line that interconnects to the system of the neighboring region but has not been determined to be needed in the planning process of the neighboring region.

## II. SPECIFICATION OF ERRORS AND STATEMENT OF ISSUES

The ISO identifies the following errors and issues:

- The Commission erred in concluding that it has the authority under the Federal Power Act to require transmission providers to include in their tariffs provisions for the cost allocation of regional and interregional facilities. The Commission has not made the necessary finding, supported by record evidence, that existing tariff provisions are unjust or unreasonable. *W. Resources, Inc. v. FERC*, 9 F.3d 1568 (D.C. Cir. 1993); *Nat'l Fuel Gas Supply Corp. v. FERC,* 468 F.3d 831, 844 (D.C. Cir. 2006).

- The Commission erred in concluding that it has the authority under the Federal Power Act to require transmission providers to include in their tariffs mandatory regional and interregional transmission planning coordination. The Commission has not made the necessary finding, supported by record evidence, that existing tariff provisions are unjust or unreasonable. *W. Resources, Inc. v. FERC*, 9 F.3d 1568 (D.C. Cir. 1993); *Nat'l Fuel Gas Supply Corp. v. FERC,* 468 F.3d 831, 844 (D.C. Cir. 2006). In addition, the Commission erred in concluding that section 202(a) of the Federal Power Act does not prohibit the Commission from mandating regional and interregional transmission planning coordination. *Atlantic City Elec. Co. v FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002); *Central Iowa Power Coop. v. FERC*, 606 F.2d 1156 (D.C. Cir. 1979).

The ISO also seeks clarification that neither such cost allocation methodologies as the Commission may require nor such cost allocation guidelines as the Commission may issue will permit a region to allocate to another region the costs of transmission facilities that are not included in the latter region's transmission plan.

## III. REQUEST FOR REHEARING

### A. Because It Has Not Met the Requirements of Section 206 of the Federal Power Act, the Commission Should Grant Rehearing of Its Mandate that Transmission Providers File Cost Allocation Methodologies for Interregional Facilities.

Order No. 1000 requires that each transmission provider have in its tariff a method or methods for allocating the costs of new interregional transmission facilities that neighboring transmission planning regions determine resolve the individual needs of each region more efficiently and cost-effectively.[4] The Commission's mandate goes beyond its authority because the Commission has not made a finding, supported by record evidence, that an existing rate or related practice is unjust, unreasonable, or unduly discriminatory or preferential.

The Commission asserts authority for its action under section 206 of the Federal Power Act, which allows the Commission to modify a rate, charge, or

[4] Order No. 1000 PP 558, 578.

classification "*demanded, observed, charged or collected,*" or a rule, regulation, practice or contract affecting such rate, charge, or classification, if the Commission finds that such a matter is unjust, unreasonable, unduly discriminatory or preferential.[5] Under the plain language of section 206, the Commission's authority is limited to *existing* rates and related matters. Neither section 206 nor any other section of the Federal Power Act provides the Commission with any other authority to compel the filing of rates. As Justice Harlan explained half a century ago regarding the parallel provision of the Natural Gas Act:

> The basic power of the Commission is that given to it by section 5(a) to set aside and modify any rate or contract which it determines . . . to be "unjust . . . ." This is neither a "rate-making" nor a "rate-changing" procedure. It is simply the power to review rates . . . made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them.[6]

In Order No. 1000, the Commission goes beyond that limited authority, because it directs the filing of new rates but nowhere makes the necessary finding, supported by the record, that existing cost allocation methodologies are unjust, unreasonable, or unduly discriminatory or preferential.

The Commission's "findings" regarding cost allocation for interregional facilities can be boiled down to three.

> Without these minimum requirements [specified in the rule] in place, cost allocation methods used by public utility transmission providers may fail to account for the benefits associated with new transmission facilities and, thus, result in rates that are not just and reasonable or are unduly discriminatory or preferential.[7]

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[5] 16 U.S.C. § 824e (emphasis added).

[6] *United Gas Pipeline Co. v. Mobile Gas Serv. Co.*, 350 U.S. 332, 341 (1956). *See also, e.g., W. Resources, Inc. v. FERC,* 9 F.3d 1568 (D.C. Cir. 1993).

[7] Order No. 1000 P 495.

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> We agree with many commenters that the lack of clear *ex ante* cost allocation methods that identify beneficiaries of proposed regional and interregional transmission facilities may be impairing the ability of public utility transmission providers to implement more efficient or cost-effective transmission solutions identified during the transmission planning process.[8]

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> We conclude that the absence of clear cost allocation rules for interregional transmission facilities can impede the development of [interregional transmission facilities that are identified as needed by the relevant regions] due to the uncertainty regarding the allocation of responsibility for associated costs. This may, in turn, adversely affect rates for jurisdictional services, causing them to become unjust and unreasonable or unduly discriminatory or preferential.[9]

These findings suffer from multiple deficiencies and cannot support Order No. 1000's mandate for the filing of interregional cost allocation methodologies.

### 1. The Commission has not found an existing rate to be unjust, unreasonable, or unduly discriminatory or preferential.

As an initial matter, none of the findings in Order No. 1000 pertains to an existing rate or related practice. Each finding cites the absence of a methodology, *i.e.,* of a rate practice, and by definition an *absent* practice affecting a rate is not an *existing* practice affecting a rate. The first and third findings also refer to a hypothetical impact on future rates, but finding a potential that a future rate may be unjust or unreasonable is not the equivalent of finding an existing rate to be unjust or unreasonable. These findings stand in stark contrast to other landmark rulemakings where the Commission directed major modifications of tariffs. In Order No. 888, the Commission concluded that, under existing rate structures, "unduly discriminatory

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[8] *Id.* P 499.

[9] *Id.* P 579.

and anticompetitive practices exist today in the electric industry and will increase."[10] In Order No. 436, the Commission made a finding of discrimination with regard to each of the existing practices it modified.[11] In Order No. 1000, however, the Commission addresses only absent methodologies and hypothetical future rates. This is not enough to satisfy section 206. As the ISO has noted, it does not object to the issuance of interregional cost allocation principles, but the Commission goes beyond its authority by requiring premature rate negotiation and filings.

**2. The Commission identifies no record support for its findings.**

Even if the Commission's findings could reasonably be construed as applying to existing rates – which they cannot – Order No. 1000 identifies no record support for its conclusion that the conditions deficiencies its describes would lead to unjust or unreasonable rates. The Commission acknowledges that it "must show that a 'reasonable mind might accept' that the evidentiary record here is 'adequate to support a conclusion,'"[12] yet it identifies no such evidence.

With regard to the first finding, a failure of a rate to account for the benefits of new facilities may well indeed render the rate unjust and unreasonable, but the Commission offers no evidence that the failure to have the "minimum requirements"

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[10] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, 31,682 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002) ("Order No. 888").

[11] *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, FERC Stats. & Regs. ¶ 30,665, at 31,502 (1985) ("Order No. 436").

[12] Order No. 1000 P 48, *quoting Dickenson v. Zurko*, 527 U.S. 150, 155 (1999).

for cost allocation already in place has caused any existing rates to fail to account for benefits. The Commission might believe its actions are justified on the basis that it cannot show such a relationship because there are not as yet any allocation methodologies in place for interregional facilities. As the D.C. Circuit responded to a similar argument in *National Fuel Gas Supply Corp. v. FERC,* "The Administrative Procedure Act does not tolerate that kind of truism as the basis for the administrative action here."[13] The Commission may also attempt to justify its findings as identifying theoretical impacts, but the Commission offers no explanation of how the failure to have the "minimum requirements" in place *ex ante* would make it any more likely that the rate would fail to account for benefits – particularly in light of the fact that the public utility would need to file the rate for a specific interregional facility and the Commission would need to approve it.

As to the second finding, the Commission provides no record support for the conclusion that the lack of interregional cost allocation methodologies is impairing the ability of transmission providers to implement more efficient or cost-effective transmission expansion. Although the Commission states that it agrees with commenters making that observation, it does not identify any such commenters, and the ISO has not been able to identify any. Although a few commenters cited by the Commission argue that uncertainty about cost allocation is preventing some projects from going forward,[14] the Commission does not base its mandate on a lack of new transmission investment. Indeed, the Commission acknowledges the current growth in transmission investment, noting that it appears to be "the beginning of a longer-

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[13] 468 F.3d 831, 844 (D.C. Cir. 2006).

[14] Order No. 1000 P 488.

term period of investment in new transmission facilities."[15] The Commission justifies the rule not by the need for more investment, but by the need "to ensure that the Commission's transmission planning and cost allocation requirements are adequate to support more efficient and cost-effective investment decisions."[16] Because the Commission identifies no evidence to support a causal connection between a cost allocation methodology and improved cost-effectiveness, it cannot support its ruling on this basis.

The Commission identifies no greater evidentiary support for its third finding, that uncertainty regarding cost allocation can impede the development of transmission facilities "that are identified as needed by the relevant regions."[17] As noted, certain commenters did assert that uncertainty about cost allocation was preventing some projects from going forward. Only two commenters, however, identified any concrete examples, and these do not support the Commission's finding. Solar Energy Industries Association, et al., assert that cost allocation disputes derailed the Palo Verde – Devers #2 line.[18] But it was the Arizona Corporation Commission that derailed the Palo Verde Devers line, however, and none of the costs were proposed to be allocated to Arizona. The project was to be owned and financed by Southern California Edison Company, with a portion to be leased to the Los Angeles Department of Water and Power. The Arizona commission did conclude that the project would impose costs on Arizona, but these

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15 *Id.* P 44.

16 *Id.*

17 Id. P 579.

18 Comments of Solar Energy Industries Ass'n, et al., at 4, 13, submitted in Docket No. RM10-23 (Sept. 29, 2010).

were not transmission costs which would be recovered through rates subject to the Commission's jurisdiction under the Federal Power Act.[19]

The Joint Comments of American Electric Power Corporation, et al., identify three projects that were delayed to reconcile cost allocation methodologies. None of these projects, however, was "identified as needed by the relevant regions." Pioneer Transmission and Green Power Express are not included in either the Midwest ISO plan or the PJM plan.[20] The Brookings Project was only recently *conditionally* approved in the Midwest ISO plan.[21] It is also worth noting that both the Midwest ISO and PJM have rates pending before the Commission that would govern the cost allocation of these projects,[22] so even if these projects become projects identified as needed by the relevant regions, there would still be no evidence that the lack of a cost allocation methodology would delay them.

In short, the record in Order No. 1000 cited to support the interregional cost allocation mandate resembles that of *National Fuel Gas*, in which the Commission asserted that it had record evidence of abuse but the court in that case, after examining the assertions, found none.

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[19] *See, In the Matter of the Application of Southern California Edison Co. et al., Arizona Corporation Commission*, Case No. 130, Decision No. 69638 (Order Denying CEC, issued June 6, 2007).

[20] *See Pioneer Transmission, LLC*, 126 FERC ¶ 61,281 P 37 (2009), *order on reh'g*, 130 FERC ¶ 61,044 P 4 (2010); *Green Power Express LP*, 127 FERC ¶ 61,031P 42 (2009), *order on reh'g*, 135 FERC ¶ 61,141 P 19 (2011); *see also* Joint Comments of American Electric Power Corp., *et al.*, at 9, submitted in Docket No. RM10-23 (Sept. 29, 2010).

[21] *See* https://www.midwestiso.org/Library/Repository/Study/Candidate%20MVP%20Analysis/20110708%20Candidate%20MVP%20Status%20Report.pdf

.[22] *See Midwest Indep. Transmission Sys. Operator, Inc.*, 133 FERC ¶ 61,221 (2010), *reh'g pending*; *PJM Interconnection, L.L.C.*, Opinion No. 494, 119 FERC ¶ 61,063 (2007), *order on reh'g*, Opinion No. 494-A, 122 FERC ¶ 61,082 (2008), *review granted in part and remanded, Illinois Commerce Comm'n v. FERC,* 576 F.3d 470 (7th Cir. 2009), *order on remand establishing paper hearing procedure*, 130 FERC ¶ 61,052 (2010).

### 3. The Commission cannot justify its mandate based on a theoretical threat.

Perhaps anticipating this problem, the Commission asserts, citing *National Fuel Gas*:

> [T]he problem that the Commission seeks to resolve represents a "theoretical threat," . . . the features of which are discussed throughout the body of this Final Rule in the context of each of the reforms adopted here. This threat is significant enough to justify the requirement imposed by this Final Rule.[23]

The Commission's reliance on *National Fuel Gas* in this regard is misplaced. The court in that case specifically declined to determine whether the Commission could support its proposed rule based on a theoretical threat alone.[24] The court also cautioned the Commission that if it chose to attempt to justify the rule based on a theoretical threat, the Commission faced a serious burden. Although the purposes of the rule in that case and the purposes of Order No. 1000 are different, the court's instructions in *National Fuel Gas* are sufficiently informative to quote at length:

> [The Commission] will need to explain how the potential danger of improper communications between pipelines and their non-marketing affiliates, unsupported by a record of abuse, justifies such costly prophylactic rules. [The Commission] would need to explain why the individual complaint procedure under Section 5 of the Natural Gas Act does not suffice to ensure that pipelines are not abusing their relationships with non-marketing affiliates. *. . .* If [the Commission] cites the rise of a variety of new services, mostly relating to the commodity market, it will need to elucidate how those developments relate to and justify the promulgation of costly prophylactic rules governing pipelines' relationships with their non-marketing affiliates. If [the Commission] relies on an increase in the amount of pipeline capacity held by non-marketing affiliates, it must explain how that poses a threat of actual abuse by pipelines and their non-marketing affiliates (and why the rule should also apply to affiliates that do not ship on their affiliated pipelines). If [the Commission] chooses to extend the Standards to

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[23] Order No. 1000 P 52.

[24] *Nat'l Fuel Gas* 468 F.3d at 844.

> entities that do not hold or control capacity, the Commission would need to justify such an extension given that a stronger theoretical threat exists with respect to affiliates that hold or control capacity on affiliated pipelines than to affiliates that do not hold or control such capacity. We cannot say that any of these theoretical rationales, alone or in combination, would justify adoption of the Standards of Conduct under the *Tenneco* standard; they merely illustrate the kind of analysis the Commission would need to undertake if it attempts to support the Order based solely on a theoretical threat.[25]

The Commission has undertaken no comparable analysis here, and thus cannot rely on a theoretical threat.

Neither can the Commission find support for acting based on a theoretical threat in the D.C. Circuit's statement in *Associated Gas Distributors v. FERC* that an agency "do[es] not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall."[26] The court was discussing *Electricity Consumers Resource Council v. FERC* in which it had ruled that "mere reliance on an economic theory cannot substitute for substantial record evidence and the articulation of a rational basis for an agency's decision" and in particular noted that the Commission had distorted the theory it purported to apply.[27] In *Associated Gas Distributors*, the court elaborated:

> Promulgation of generic rate criteria clearly involves the determination of policy goals or objectives, and the selection of means to achieve them. Courts reviewing an agency's selection of means are not entitled to insist on empirical data for every proposition on which the selection depends. . . . Clearly nothing in *Electricity Consumer*'s reference to "economic theory" was intended to invalidate agency reliance on generic factual predictions merely because they are typically studied in

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25 *Id* at 844-45 (citations omitted).

26 Order No. 100 P 58, *quoting* 824 F.2d 981, 1008 (D.C. Cir. 1985). The Commission relies on this discussion in supporting its theoretical conclusions regarding the right of first refusal, but the same reasoning is relevant to its attempt to rely on theoretical threats to support other aspects of Order No. 1000.

27 747 F.2d 1511, 1514 (D.C.Cir.1984).

> the field called economics. Agencies do not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall; nor need they do so for predictions that competition will normally lead to lower prices.
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> In support of this objection [petitioners] do not identify any factual proposition, relied on by the Commission, that they regard as requiring additional support. Accordingly, the objection cannot succeed.[28]

In contrast to *Associated Gas Distributors*, the Commission is not relying on an economic theory to determine the *means* for achieving its goals.[29] Rather, it is attempting to rely on theory to establish *the statutory predicate* for action: a conclusion that rates or related matters are unjust or unreasonable. Moreover, it is not relying on an established economic theory to make that finding; instead it is making specific factual propositions, identified above, based on a mere hypothesis that, in a regulated market, the absence of *ex ante* cost allocation methodologies will cause rates to be unjust or unreasonable. There is no empirical evidence for this hypothesis. Neither does the Commission cite any peer-reviewed or other economic analysis supporting this analysis. As a result, such a hypothesis cannot support action under section 206.

#### 4. The Commission cannot direct the filing of a practice affecting rates based on a finding that another public utility's rates might be lower.

Finally, even if the Commission had record support for the proposition that an *ex ante* interregional cost allocation methodology would promote greater cost-effectiveness and more transmission development, which in turn would produce lower rates for consumers (albeit from a different utility), such a factual proposition

[28] *Assoc. Gas. Distrib.*, 824 F.2d at 1008-09.

[29] It is often noted that the Commission's discretion is at its zenith in fashioning a remedy. *Towns of Concord, Norwood, & Wellesley v. FERC*, 955 F.2d 67, 76 (D.C. Cir.1992)

would not be sufficient to support a finding that rates would be unjust or unreasonable. Cost-effectiveness and transmission expansion are admirable goals – goals that the ISO shares. Toward those goals, the ISO has voluntarily included in its tariff provisions by which it ensures the construction of projects to meet needs and takes into account cost-effectiveness in choosing those projects. Advancing those goals, however, is not the Commission's role under section 206. Section 206 directs the Commission to modify unjust or unreasonable rates. Rates are not unjust or unreasonable simply because another rate might be more just and reasonable.[30] The ISO is aware of no precedent, and no authority, for the Commission to determine that a rate is unjust or unreasonable because another utility might provide the service at a lower cost. Yet, in concluding that the absence from a utility's tariff of a provision for allocating the costs of interregional transmission facilities is unjust and unreasonable because it is a disincentive for another utility's building the project, that is what the Commission attempts.

As the ISO explained in its initial comments on the Noticed of Proposed Rulemaking in this proceeding, it supports the Commission issuance of principles for the cost allocation of interregional facilities, as the Commission has done in Order No. 1000. The Commission's requirement that utilities include *ex ante* cost allocation for interregional facilities in their tariffs, however, is in excess of the Commission's authority.

[30] *See Duke Energy Trading and Marketing, LLC*, 315 F.3d 377, 382 (D.C. Cir. 2003).

## B. The Commission Should Grant Rehearing Because It Erroneously Concluded that It Has the Authority to Compel Interregional Planning.

In Order No. 1000, the Commission directs transmission providers, through their regional transmission planning processes, to establish procedures with each of their neighboring transmission planning regions for the purpose of coordinated planning. The ISO fully supports the furtherance of coordinated interregional planning on a voluntary basis. The Commission, however, lacks the authority to compel such planning.

### 1. The Commission's findings are not supported by the record.

The Commission again purports to act under section 206 of the Federal Power Act. In the previous section, the ISO discussed at length the Commission's lack of authority to act under section 206 absent a finding, supported by the record, that an existing rate is unjust, unreasonable, or unduly discriminatory or preferential. The Commission's findings regarding interregional planning are summed up in a single paragraph:

> We conclude that we have authority under section 206 of the FPA to adopt the reforms on transmission planning in this Final Rule. These reforms are intended to correct deficiencies in transmission planning and cost allocation processes so that the transmission grid can better support wholesale power markets and thereby ensure that Commission-jurisdictional services are provided at rates, terms and conditions that are just and reasonable and not unduly discriminatory or preferential. . . . We conclude that the reforms adopted in this Final Rule are necessary to address remaining deficiencies in transmission planning and cost allocation processes so that the transmission grid can better support wholesale power markets and thereby ensure that Commission-jurisdictional transmission services are provided at rates, terms and conditions that are just and reasonable and not unduly discriminatory or preferential. We note that no party sought judicial

> review of the Commission's authority under Order No. 890 to adopt those reforms that we seek to enhance and improve upon here.[31]

The Commission does not cite, in this paragraph or anywhere in the order, any instance in which the absence in existing tariffs of provisions governing interregional planning has caused a rate to be unjust, unreasonable, or unduly discriminatory or preferential. The Commission offers only an unsupported hypothesis that requiring tariffs to include mutually agreeable provisions for planning between or among regions will enhance its ability to perform its mission. For the reasons discussed above, such an assertion of an unsupported hypothesis does not suffice as a basis for requiring modification of a utility's tariff under section 206.

The Commission also implies that, by not challenging Order No. 890, utilities waived any right to challenge the interregional planning requirements of Order No. 1000. Order No. 890, however, imposed no interregional planning requirements and, as to regional coordination, only required that transmission providers "coordinate with interconnected systems to (1) share system plans to ensure that they are simultaneously feasible and otherwise use consistent assumptions and data and (2) identify system enhancements that could relieve congestion or integrate new resources."[32] These are very limited requirements that could have been justified by discrimination concerns, regardless of whether Order No. 890 identified such concerns. Moreover, because the ISO is a regional organization that performed such a role already, the ISO was not aggrieved by these requirements, as required by

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[31] Order No. 1000 P 99.

[32] *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 P 523, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009) ("Order No. 890").

section 313 as a prerequisite for appellate review. That the ISO did not seek judicial review of Order No. 890 does not preclude an argument here that the Commission's interregional planning requirements are beyond its authority.

#### 2. The Commission's interregional planning directive is contrary to section 202(a) of the Federal Power Act.

Even if the Commission's mandate were permissible under section 206, it would nonetheless be in violation of section 202(a) of the Federal Power Act. The ISO explained in its initial comments that the Commission's interregional planning requirements constituted involuntary regional coordination, which is contrary to the requirements of section 202(a) as interpreted in *Atlantic City Electric Co. v. FERC*[33] and *Central Iowa Power Cooperative. v. FERC*.[34] The Commission's only response to these arguments, as advanced by the ISO and others, is that section 202(a) refers only to coordinated operations, not coordinated planning.[35]

Where Congress has left a gap in a statute, or where the statutory language is ambiguous, agencies, such as the Commission, have considerable leeway in interpreting the statute.[36] If, however, "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."[37] There is nothing in the plain meaning of the term "coordination" to suggest it is limited to operational coordination

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[33] 295 F.3d 1, 8 (D.C. Cir. 2002) ("*Atlantic City*").

[34] 606 F.2d 1156 (D.C. Cir. 1979) ("*Central Iowa*").

[35] Order No. 1000 P 100.

[36] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

[37] *Id.* at 842-43.

and the Commission offers no logical or textual basis for so limiting the meaning of the term.

In defense of its interpretation, the Commission points out that section 202(a) does not mention planning. But neither does section 202(a) mention operations. If Congress intended to exclude coordinated planning – or coordinated operations – from the scope of section 202(a), it could easily have done so. It did not. Congress must be presumed to say what it means. [38]

Although the Commission asserts that the legislative history is not relevant, the Commission also attempts to find support in the legislative purpose of section 202(a). With no specific support, the Commission contends that the words "planned coordination" in the relevant Senate Report do not entail planning, and that Congress was focused on power pooling, which is only operational coordination.[39] Once again, the Commission's premise assumes its conclusion. The Commission offers no evidence that power pools are solely devoted to operations, and do not involve planning. Indeed, the court in *Central Iowa* believed otherwise, both describing planning as part of the greater coordination sought by the petitioner and quoting a Commission report describing coordination as including planning. [40] The Commission provides no reason that its interpretation of power pooling is preferable to that of the court.

While it may be true that limiting the meaning of the term "coordination" in section 202(a) is necessary if the Commission wishes to promote interregional

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[38] *Cox v. Comm'r of Internal Revenue*, 514 F.3d 1119, 1125 (10th Cir. 2008).

[39] Order No. 1000 PP 104-05.

[40] *Central Iowa,* 606 F.2d at 1166 and n. 36.

planning by mandating it, an agency may not read ambiguity into a statute and limit the plain meaning of the words in order to reach a practical result.[41] The Commission may encourage voluntary interregional planning coordination, as contemplated by section 202(a). If it desires to compel such coordination, it should seek additional authority from Congress, as it has previously done.[42] It cannot presume such authority, however, in the face of the contrary language of section 202(a).

## IV. MOTION FOR CLARIFICATION

As discussed above, the ISO has sought rehearing of Order No. 1000's mandate that transmission providers include in their tariffs cost allocation methodologies for interregional facilities. Regardless of whether the Commission affirms that mandate or instead issues cost allocation guidelines, as suggested by the ISO, the ISO seeks clarification that neither such mandated interregional cost allocation methodologies nor such guidelines will permit a region to allocate to another region the costs of transmission facilities unless such facilities have been found by the latter region to provide benefits to that region and the facilities are included in that region's transmission plan for purposes of cost allocation.

This request for clarification is based on a reading of language in earlier Order No. 1000 paragraphs in conjunction with the description of the six interregional cost allocation principles that are set forth later in the Order starting at paragraph 587. In a number of places, Order No. 1000 states or implies that approval of a transmission

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[41] *Cox,* 514 F.3d at 1125.

[42] *See, e.g.,* Testimony of Honorable Jon Wellinghoff before the Energy and Environment Subcommittee of the Committee on Energy and Commerce of the House of Representatives, 111th Cong., 2d Sess. (March 23, 2010).

project in a region's transmission plan is a prerequisite to the allocation of costs to that region. For example, in discussing coordinated planning, the Commission states:

> [T]he Commission clarifies that public utility transmission providers in a transmission planning region will not be required to accept allocation of the costs of an interregional transmission project unless the region has selected such transmission facility in the regional transmission plan for purposes of cost allocation.[43]

Later, in describing its cost allocation reforms, the Commission reiterates:

> [A]n interregional transmission facility must be selected in both of the relevant regional transmission planning processes for purposes of cost allocation in order to be eligible for interregional cost allocation pursuant to a cost allocation method required under this Final Rule.[44]

However, Order No. 1000 makes a slightly different statement in paragraph 587 where the cost allocation principles are discussed: "Costs cannot be assigned involuntarily under this rule to a transmission planning region in which that facility is not located."[45] This statement is also set forth in Interregional Cost Allocation Principle 4 but there is no reference in that discussion to the cost allocation principle that the costs of an interregional project, even if connected to or located in a particular region, cannot be allocated to that region unless the project is included in the region's transmission plan.[46] The ISO seeks clarification that these two principles are cumulative, and that there is no implication that a region can allocate costs of a facility to a second region when the facility is located in the second region (*e.g.*, a new transmission line that interconnects to a transmission facility in the

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[43] Order No. 1000 P 443.

[44] *Id.* P 582.

[45] *Id.* P 587.

[46] *Id.* P 657.

second region) but has not been found to provide benefits to the second region and therefore is not included in the second region's transmission plan.

The ISO's concerns with the fourth cost allocation principle- and its request for clarification that the costs of such projects cannot be allocated to a region unless the facility is identified in that region's transmission plan- are based on various transmission project proposals in the Western Interconnection that traverse several planning areas and propose to connect to the ISO's grid for the purpose of delivering renewable energy to consumers in California. The ISO understands that the Order No. 1000 interregional cost allocation requirements, or guidelines as the ISO has suggested, would not permit the costs of such projects to be allocated to the ISO by the other planning regions unless the ISO had determined, through its own regional planning process, that the project provided benefits to its ratepayers.

The ISO believes that this clarification is consistent with the Commission's intent and with its stated purposes. As the Order No. 1000 stated:

> [B]ased on the information gained during the joint evaluation of an interregional transmission project, each transmission planning region will determine, for itself, whether to select those transmission facilities within its footprint in the regional transmission plan for purposes of cost allocation. Whether a transmission planning region would decide to select an interregional transmission facility in its regional transmission plan likely would be driven by the relative costs and benefits of the transmission project to that region.[47]

As in the example cited above, it is possible that with appropriate siting approval and by making an interconnection request to a transmission owner in the ISO region, one region might locate a proposed transmission project in the ISO's region even though the facility had not been included in the ISO's annual transmission plan. However,

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[47] *Id.* P 443.

the first region should not be able unilaterally to conclude that the new facility benefits the ISO, such that costs could be allocated to the ISO, unless the ISO had determined that the facility provided benefits and identified the project in its annual plan as being eligible for cost recovery. The ISO requests clarification that a unilateral cost allocation by the neighboring region would not be permissible under Order No. 1000 or under any interregional cost allocation principles the Commission might issue on rehearing.

## V. CONCLUSION

For the foregoing reasons, ISO respectfully requests that the Commission grant rehearing of Order No. 1000 to correct the errors discussed above and grant clarification regarding the allocation of the costs of interregional facilities as specified.

Respectfully submitted,

*/s/ Michael E. Ward*

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Dated: August 22, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that I have served the foregoing document upon all of the parties listed on the official service list for the above-referenced proceeding, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010).

Dated at Washington, D.C. this 22nd day of August, 2011.

***/s/ Michael Ward***

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