



United States of America
Before The
Federal Energy Regulatory Commission

Petition for Rulemaking on)
Electric Transmission Cost) Docket No. RM10-__-____
Allocation Principles)
)

**PETITION FOR RULEMAKING ON COST ALLOCATION
PRINCIPLES SUBMITTED BY WIRES**

Pursuant to Rule 207(a)(4) of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or the “Commission”), 18 C.F.R. § 385.207 (a)(4) (2009), WIRES (aka, the Working group for Investment in Reliable and Economic electric Systems)¹ hereby petitions the Commission to institute a rulemaking proceeding and to take action on an aggressive schedule which, at a minimum, will provide the industry with nationally-applicable principles and guidance to govern the allocation of the costs to ratepayers with respect to all future high voltage electric transmission expansions and upgrades that are jurisdictional to the Commission. This petition is a response to numerous developments in the

¹ WIRES is a national non-profit association of investor-, member-, and publicly-owned entities dedicated to promoting investment in a strong, well-planned, and environmentally beneficial high voltage electric transmission grid.

industry and to the disparate approaches ratified by the Commission in the past and the resulting regulatory uncertainty. WIRES will also submit responses to the specific questions provided in Staff's October 8, 2009, Notice of Request for Comments in Docket No. AD09-8-000 ("Staff Notice").² For the reasons set forth herein, WIRES believes that transmission providers, customers, and the economy in general would benefit from a more coherent regulatory framework for cost allocation decisions related to major transmission infrastructure investments. It therefore petitions the Commission to promptly initiate a notice-and-comment rulemaking with the objective, at a minimum, of establishing binding cost allocation principles or methodologies that apply to new electric transmission investments.

WIRES does not advocate any single cost allocation approach. Nor does it contend that one-size-fits-all with respect to how to accommodate important differences in regional transmission operations that may affect who benefits from new facilities. The Commission should afford appropriate flexibility to ensure that the beneficiaries of transmission investments share the cost of those facilities and, conversely, that those who can never benefit from new transmission over its useful life not be burdened with its costs. However, WIRES is persuaded that it is critical for the Commission to advance development of the nation's integrated high voltage transmission infrastructure by establishing and applying "rules of the road" in the cost allocation area instead of relying solely on regional settlements or considerations peculiar to each proposed facility or sub-regional customer group.

² *Transmission Planning Processes Under Order No. 890*, Docket No. AD09-8-000.

I. CORRESPONDENCE AND COMMUNICATIONS. Communications, inquiries, and notices regarding this filing should be sent to:

James J. Hoecker
Counsel to WIRES
HELP PLLC
Husch Blackwell Sanders
750 Seventeenth Street, N.W.
Suite 1000
Washington, D.C. 20006
202-378-2300
Fax 202-378-2319

II. BACKGROUND

There is a growing recognition that major expansions and upgrades of the nation's high voltage transmission system will be needed over the coming two decades or more. While considerable investment will be devoted to installing advanced digital technologies to enhance the efficiency, reliability, and power transfer capabilities of high voltage transmission, the need for additional conventional transmission resources is estimated to approximate \$300 billion by 2030.³ Following a quarter century of underinvestment in transmission, investor-owned transmission companies have expended \$30 billion in the past three years to address the most critical needs of the grid. However, new stresses on the electrical system from the increasing demand for power and competitive bulk power markets as well as the prospect of major shifts in public policy toward alternative, often location-constrained, resources have coincided with the end of the useful lives of many transmission facilities that were installed as long ago as 40 or 50 years. Economic recovery and the portent of major additions to the electrical generation fleet to meet a post-recession resurgence in electrical demand will challenge the adequacy of the transmission system and threaten bulk power reliability in the

³ Brattle Group, *Transforming America's Power Industry: The Investment Challenge 2010-2030*, prepared for the Edison Foundation (2008).

years to come.⁴ At present, the significant contributions that can, and we trust will, be made by energy efficiency and demand response initiatives will not change the underlying need to reinforce the grid.

Part of the difficulty in attracting investment to the transmission sector stems from the industry's transition, over several decades, from a regime comprised largely of vertically-integrated monopolies that planned and built transmission for their native loads, usually within their own service territories, to a system of competitive power markets that are tied together by a network of high voltage lines that cross both service territories and state (and, indeed, national) boundaries. These market operations are regional in character and support a high volume of wholesale bulk power transactions. As transmission planners have come to realize, in this new integrated network environment, the transmission facilities built for one purpose or one's captive customers can now deliver benefits to other utilities, other (often distant) customers, and serve other purposes. As a result of this evolution, the beneficiaries of high voltage transmission have changed and, with this, has come uncertainty about whether the public interest requires a broadening or narrowing of the pool of customers that should pay for existing or new facilities. Opposition to specific transmission projects can be lodged on many grounds, not the least of which is the route that is chosen for linear facilities. The economic, environmental, and reliability costs and benefits of transmission projects are intertwined and the motives for opposing a specific project can be complex or parochial. For that reason, WIRES contends that the Commission should seize the opportunity to make clearer and more compelling its views about how the benefits and costs of transmission are to be shared in this new bulk power environment.

WIRES respectfully suggests that substantial and compelling support for a generic action already exists, including the Commission orders on cost allocation,

⁴ National Electric Reliability Corporation (NERC), *2009 Long-Term Reliability Assessment*. NERC acknowledges that the recession has dampened electricity demand and afforded the industry more time to build needed transmission. However, it states that reliability can be ensured over the next 5 years only if 11,000 miles of the projected 32,000 miles of high-voltage lines are built in that time-frame. Increasing congestion and the need to support dispersed renewable resources require acceleration of many projects. *See also*, NERC, *Special Report: Industry Concerns on Reliability Impacts of Climate Change Initiatives* (2008) (www.nerc.com).

staff's efforts to elicit comment on the issue of cost allocation in the context of regional transmission planning, cost allocation successes in jurisdictions not subject to FERC rate regulation, and resources such as the white paper prepared at WIRES' request by a panel of independent experts in 2007, entitled *A National Perspective On Allocating the Costs of New Transmission Investment: Practice and Principles* ("Blue Ribbon Panel report").⁵ In light of the looming need for transmission expansions and upgrades and the existing evidence upon which to proceed, WIRES respectfully requests that the Commission initiate generic action to rationalize its approach to cost allocation immediately.⁶

III. PETITION FOR RULEMAKING: SIX REASONS WHY THE COMMISSION SHOULD ACT AFFIRMATIVELY AT THIS TIME

A. Disparate Precedents. Commission precedent governing how the costs of new facilities are allocated is inconsistent and difficult to justify as just and reasonable under the Federal Power Act. The cost allocation approaches already approved by the Commission have been driven by stakeholder processes which, while perhaps desirable as a practical matter, provide little guidance to transmission providers and customers with respect to the rate treatment of the costs of new facilities or of transmission originating in other states or regions. As stated in the Blue Ribbon Panel report:

"[w]hile Federal regulators have been attempting in recent years to accommodate the differences of opinion on these topics (e.g., 'us-versus-them' issues between regions or states where transmission bottlenecks separate high- and low-cost power resources, the mismatch between jurisdictional boundaries and market realities, the 'local' or state nature of transmission planning, or the shifts in who benefits over time from specific facilities) by adopting transmission cost-allocation methodologies rooted in settlement discussions or

⁵ The full report is available at www.wiresgroup.com.

⁶ WIRES does not recommend that consideration or resolution of regional cost allocation proposals pending in the meantime be suspended inordinately as a result of such a rulemaking, however.

negotiated agreements among stakeholders in local areas, this approach suffers from lack of common principles supporting transmission investment for the interconnected grid that serves broad regions of the nation. On one hand, the desire for different regional approaches is understandable from a pragmatic point of view; settlement processes often allow issues to be resolved, removing local uncertainty. On the other hand, the question of whether the widely divergent methods proposed and accepted . . . produce a body of policies that together meet the legal standard of just and reasonable result and prove to be sustainable and investment-friendly for the long term, is unclear . . .”⁷

The Commission’s approach to date is particularly troubling with respect to the challenges of coordinating different cost allocation schemes between adjacent regions or allocating transmission costs across the boundaries of regional transmission organizations (“RTOs”) or of other regions or states that are served by the same lines and which are integrated electrically. In such cases, exclusive reliance on informal, consensus-oriented processes in the absence of any national or even interconnection-wide policy guidance founded on principles of economics, physics, and engineering can easily produce anomalous, if not unfair or unlawful, results.

B. Court Challenges. The Commission now has before it, as a result of *Illinois Commerce Commission et al. v. FERC* (“ICC opinion”),⁸ the remand of its acceptance of the outcome of one such stakeholder process unaccompanied by a sufficient record. The Commission had accepted the justifiable (at least on engineering and operational grounds) presumption among PJM’s stakeholders that some or all PJM facilities 500kV or greater created region-wide benefits and should therefore be broadly allocated across the RTO. The court majority nevertheless found the record lacking and the Commission’s briefs inadequate to support the chosen allocation

⁷ Blue Ribbon Panel report, at 10. The Commission should consider basing its proposed rules on the Panel’s Ten Principles. Even if it does not, WIRES contends that the overall approach adopted by these experts, if pursued by the Commission, could lend sorely needed clarity and certainty to this difficult and contentious area.

⁸ *Illinois Commerce Commission, et al. v. Federal Energy Regulatory Commission, et al.*, Nos. 08 - 1306, 08-1780, 08-2071, 08-2124, 08-2239 (7th Cir. August 6, 2009).

method. This may illustrate the risks of relying so heavily on stakeholder processes that do not yield an adequate record and are not otherwise bounded by specific rate requirements. In a dissenting opinion in *ICC*, Judge Cudahy states he would have deferred to the Commission's judgment on the matter. He argues for regulatory activism in pursuit of cost allocations that support a desperately needed electric transmission build-out.

WIRES believes that the *ICC* remand provides the Commission with an opportunity to take a systematic approach to cost allocation policy in all regions of the country. Part of ensuring that any Commission cost allocation decision can be arrived at on a timely basis and is sustainable is to place it upon a well-considered foundation of policies that are systematically applied. That is not to say that generic principles of cost allocation could themselves justify application of a specific cost allocation methodology in the absence of more information. It is to say, however, that a clearly enunciated approach to cost allocation will help ensure that parties will formulate, negotiate, and propose transmission cost allocations that are more likely to meet fundamental legal requirements and current policy objectives without rancor and delay.

C. Commission Staff's Initiative. In examining the status of regional planning efforts under Order No. 890, the Commission Staff has already laid the foundation for quick action in the cost allocation area. Its frank acknowledgment that cost allocation "is not a new problem, but . . . [one that] has become more acute as the need for transmission infrastructure has grown", is long overdue. As the Staff states in its October 8, 2009, Notice (which WIRES applauds), the expansion of regional power markets, the prospects of major grid additions that "affect multiple systems and therefore may have multiple beneficiaries," the adoption of renewable energy requirements, and the relative paucity of rate structures that provide equitable cost recovery for "intersystem" projects are factors that "highlight the lack of a comprehensive solution to the problem of allocating and recovering the cost of

transmission investment.”⁹ In WIRES’ view, the idea that solutions arising out of stakeholder processes would, by themselves, solve the cost allocation problem is now outmoded and ineffective, whether those solutions pertain to cost allocation mechanisms that would apply within the footprint of an RTO or whether they would otherwise apply outside RTOs across multiple jurisdictions or regional systems. In large parts of the country, no regional mechanism exists under which a regional solution that fully comports with Order No. 890 can even be guaranteed. In sum, WIRES’ unequivocal answer to the inevitable question posed by the Staff – “whether it is necessary to pursue generic reform in the area of cost allocation” -- is “yes.” A new set of binding national principles or guidelines that are designed to minimize litigation and delay and accelerate the planning and development of the nation’s high-voltage transmission network in the interest of a 21st century grid is not only the best option; it is the only option. Cost allocation, fully subject to FERC’s existing authority, is the place to start.

D. Access to Alternative Energy. Prolonged debate over the appropriate allocation of transmission costs is often recognized as among the major barriers to appropriate expansion or upgrade of the nation’s electric system to serve developing renewable resources. The lack of transmission infrastructure is among the critical obstacles to the development of wind, solar, and other forms of renewable energy which are frequently located far from major electric load centers.¹⁰ The prospect of interminable debate and litigation over who will bear responsibility for the costs of the major transmission facilities that will link these resources with customers is daunting.¹¹ In its important 2008 report 20% Wind By

⁹ *Transmission Planning Processes Under Order No. 890*, Docket No. AD09-8-000 at p. 6.

¹⁰ For a description of how financial, operational, and regulatory challenges are being met by “best practices,” see WIRES, *Integrating Locationally-Constrained Resources Into Transmission Systems: A Survey of U.S. Practices* (October 2008). www.wiresgroup.com

¹¹ The issue even threatens to unravel the voluntary membership in the RTOs upon which the Commission relies for regional transmission planning and equitable cost recovery arrangements under Order No. 2000. See *Midwest Independent System Operator, Inc. and the Midwest ISO Transmission Owners*, Docket No. 09-1431-000.

2030, the National Renewable Energy Laboratory ("NREL") identified cost allocation as one of the four principal barriers to development of adequate high voltage transmission to connect renewable resources and load.¹²

Although we acknowledge that each region and the nation as a whole must plan carefully to match economically feasible expansion of the grid to realistic and beneficial levels of renewable energy development, the emergence of renewable energy is now perceived as basic to the nation's plans for energy independence and reductions in the emission of greenhouse gases. It has driven new legislative, industry, and regulatory strategies in the renewables area.¹³ Thirty-one states have adopted renewable electricity standards that require their utilities to procure as much as 33 percent of their electric energy from renewable resources in the next decade or two.¹⁴ In many instances, these state objectives will be attainable only if energy can be transmitted from resources in another state or country. Transmission, in other words, must be built or upgraded to meet the renewable energy challenges laid down in state law.

However, where transmission investment was once only a candidate for system-specific rate base, today such costs can be allocated to the users of regionally-interconnected systems. These customers can be very diverse. In both organized markets (i.e., markets run by RTOs) and non-RTO bilateral markets, the disputes over cost allocation and cost recovery, and the procedural delays occasioned by these disputes, can be prolonged and counter-productive.

A variety of cost allocation methodologies have been formulated and, in some cases, implemented. In the absence of a national policy, supporters can *purport* that

¹² NREL identified cost recovery, planning, and facilities siting as the other major challenges. National Renewable Energy Laboratory, U.S. Department of Energy, *20% Wind By 2030* (May 2008) at 98.

¹³ For example, *pending* in the 111th Congress are: Clean Renewable Energy and Economic Development Act, S. 539; National Energy Security Act of 2009, S. 774; and American Clean Energy Leadership Act of 2009, S. 1462. See also, Center For American Progress, *The Clean Energy Agenda: A Comprehensive Approach to Building the Low-Carbon Economy* (September 2009); Susan F. Tierney, *A 21st Century "Interstate Electric Highway System" -- Connecting Consumers and Domestic Clean Power Supplies*, Analysis Group (2008).

¹⁴ <http://www.ferc.gov/market-oversight/othr-mkts/renew/2009/10-2009-othr-rnw-archive.pdf>, pages 3-4.

each is equitable, economically efficient, and reassuring to investors and customers. At one end of a spectrum of approaches is so-called participant funding which seeks to allocate costs of a transmission upgrade or expansion to immediate “cost causers” such as interconnecting generators, even if facilities may have regional reliability or economic benefits. At the other end of the spectrum is the “socialization” of costs, meaning a broad allocation of all project costs to the projected beneficiaries of the project across the market, region, or interconnection served and perhaps over the life of the asset. The controversies that result from the different perceptions of the equities and the reliability or economic benefits of a grid expansion often chill transmission investment.

In response, WIRES is not proposing a specific methodology. It does not advocate transmission development for development's sake. However, once determined through regional planning to provide economic benefits and serve progressive public policy, transmission expansion should not be impeded. Assigning costs to immediate cost-causers without regard to the impact, positive or negative, that new facilities have on other users of the grid or on competitive access to a market may be simple but it may inhibit competition and access to resources. Likewise, socializing all major transmission costs as broadly as possible – even across an entire interconnection – on the assumption that each system user's share of those costs would become all but unnoticeable may promote a surge of development but result in overbuilt capacity. These polar opposite approaches may be equitable and economically justified in many circumstances. Regulators can nevertheless identify their limitations and provide purposeful guidance about who stands to benefit from network facilities and what public policies are served by transmission development.

The complexities of the transmission system and the changes in electric use over time mean that, again as the Blue Ribbon Panel has stated, “quantifying how much transmission development is needed, and more importantly *who benefits* from this development, is very difficult.”¹⁵ WIRES, and indeed most commentators,

¹⁵ Blue Ribbon Panel report, at 26.

accept the basic principle that the beneficiaries of transmission should bear its costs. However, high voltage transmission is now a highly integrated network across interconnections and the economic and reliability benefits of any facility will shift in one or more directions at various points in time over its relatively long useful life. Such shifts may be due to changing economics or demographics or emerging technologies, not to mention changes in public policy that argue for changes in the grid itself.

These complications nevertheless do not render generic principles or methodologies impossible or undesirable to formulate. Like the rigorous regional planning processes of which cost allocation is often (but, not always) a part, the factors which drive decisions about what can be built and who stands to benefit from an investment are products of public policy and regulatory agendas as much as the immediate circumstances surrounding a proposed project. WIRES is persuaded that no entity other than the Commission is in a position, both in terms of its broad authority and its expertise, to assess how those factors ought to be incorporated into transmission planning across multiple states, regions, and electrical systems and thus accommodated in the public interest. The “clean energy economy” will necessarily await a better Commission resolution to this challenge.

E. Congressional Support. In light of these very public policy concerns, a committee of the U. S. Senate has introduced and approved legislation that would require the Commission to institute precisely the kind of rulemaking that WIRES asks for today.¹⁶ Section 121 of S. 1462, the proposed American Clean Energy Leadership Act of 2009, states:

“(1) IN GENERAL. – Not later than 270 days after the date of enactment of the American Clean Energy Leadership Act of 2009, the Commission ---

(A) shall establish by rule an appropriate methodology for allocation of the costs of high-priority

¹⁶ S. 1462, Section 121, *Siting of Interstate Electric Transmission Facilities*.

national transmission projects, subject to the requirement that any cost allocation methodology, and any rates affected by the cost allocation methodology, shall be just, reasonable, and not unduly discriminatory or preferential; . . .¹⁷

WIRES supports and applauds this initiative but perceives no reason in policy or law why the Commission is required to wait for this directive to be enacted before undertaking such a generic decision making process. Congress has attempted to address cost allocation issues in the past¹⁸ and its actions have not meaningfully added to or subtracted from the Commission's authority or discretion to develop a sensible policy on cost allocation. Nor has the Commission's deference to stakeholder processes or its failure to adopt a generic cost allocation policy until now alleviated the difficulty and controversy associated with this issue in specific cases or regions.

At bottom, the issue of cost allocation is fundamentally one of concern about the existence of undue discrimination. That issue is at the heart of the Federal Power Act. The principal advances in the regulation of FERC-jurisdictional power markets have been predicated on a strategic reassessment of how equitably the costs of electric power services and facilities are allocated in relation to the benefits received. As former FERC Chairman Kelliher recently acknowledged, "there is no reason to believe [based on FERC's bold exercise of its FPA jurisdiction to impose open access rules] that FERC cannot rely on §§ 205 and 206 [of the FPA] to impose additional requirements on public utilities if such requirements are designed to promote competition and reduce the potential for undue discrimination and preferences, again relying largely on theory."¹⁹ A set of binding principles in the area of transmission cost allocation have been too long delayed. Such guidance is

¹⁷ The bill contains additional requirements, including that FERC can only approve allocations of costs that are proportionate to the "measurable" benefits of a transmission project. Although well-intentioned, this restriction is impractical and a detriment to investment, as both WIRES and others, including the Blue Ribbon Panel report, have explained.

¹⁸ Section 702 of the EAct 2005.

¹⁹ Joseph T. Kelliher and Maria Farinella, *The Changing Landscape of Federal Energy Law*, 61 *Administrative Law Review* 611, no. 3 at 641 (2009).

becoming urgent and Commission action on cost allocation now would be both timely and appropriate, as well as necessary under the *ICC* remand decision. It is, we believe, within the Commission's existing authority and mandate to establish the metes and bounds of all regional cost allocation methodologies in the public interest.

F. The Need for Regulatory Certainty. At the point where consumer protection, energy policy, the need for new infrastructure, and fundamental fairness intersect, the Commission and its Staff can draw on past proposals and the experiences of others in determining what constitutes a just and reasonable cost allocation approach. Until now, FERC has relied on 'bottom-up' processes as a basis for decisions, with varying and often sub-optimal results. To the extent the decisions of investors and transmission providers can be informed by the early formulation of generic guidance or cost allocation methodologies, the regulatory and financing processes affecting the development of projects can be made more efficient and less contentious. Although there are other examples, the procedures and policies adopted by and for the Electric Reliability Council of Texas ("ERCOT") are instructive. Texas has moved swiftly to execute on a \$5 Billion transmission build-out plan that will largely serve location-constrained wind resources. The resulting facilities will be electrified in the 2012-2013 timeframe. This performance is attributable in large part to early resolution of how to pay for this expansion. Transmission service providers in that interconnection recover their cost of service through a network rate approved by the sole transmission regulator, the Public Utility Commission of Texas ("PUC"). Supported by the state legislature and a consensus about the need for substantial additions to the transmission system, the PUC had a ready-made process for allocating transmission costs when state and ERCOT policies began to focus on interconnecting location-constrained wind resources in distant west Texas to customers in the eastern part of the state. The Competitive Renewable Electricity Zone ("CREZ") process, which has resulted in Texas leading the nation in wind development, has benefitted from this certainty. The prospect for recovery of prudently-incurred transmission costs of service is

further enhanced because rates can be updated annually to reflect changes in transmission-invested capital and costs are recovered from all ratepayers through a retail transmission wires charge, usually without a retail rate case. The genesis of the ERCOT cost allocation was the determination among state policymakers, starting with the legislature, to encourage and support the continued construction of new, efficient electric generation. The key to Texas' success in fostering renewable generation was, and remains, major transmission investment and a single method of allocating costs that not only keeps transmission rates in check but provides substantial regulatory certainty to transmission providers and investors alike. Disputes over cost allocation are no longer a barrier to attracting capital or competitors.

Again, WIRES recognizes that the Commission will face different challenges than Texas in formulating cost allocation principles applicable to different regions with different resource bases. The ERCOT experience nevertheless illustrates the benefit of laying the foundation for cost allocation and recovery up-front and with broad public policy goals in mind. The current absence of a coherent, articulated set of rules and assumptions to guide transmission providers, investors, and customers with respect to how investments will be recouped will continue to inhibit transmission investment and expansion unless and until these issues can be resolved. The Commission is uniquely positioned to provide the kind of clarity and direction needed in this changing environment.

IV. CONCLUSION AND RECOMMENDATION

WIRES respectfully petitions the Commission to institute a rulemaking proceeding to adopt generic rules governing all allocations of the costs of high voltage electric transmission in organized and bilateral markets, to the maximum extent required and permissible under the Federal Power Act. Although WIRES fully appreciates that cost allocation rules may take such form as the Commission deems workable and appropriate, WIRES believes that formulation of binding principles or criteria against which cost allocation schemes will be judged will

advance the public interest in quantifiable ways. It will promote transmission investment, expedite Commission consideration, advance the clean energy economy, and meet the legal requirements of the FPA.

WIRES also respectfully requests that such rulemaking proceeding be instituted as soon as possible and be concluded with a final rule **not later than** the end of 2010. The Commission will undoubtedly be asked to consider specific regional transmission cost allocation proposals during the coming months, making expedition even more important. Consideration of those individual cases should proceed normally as the Commission contemplates generic action in this area.

Respectfully Submitted,



/s/

Paul McCoy, President of WIRES
Trans-Elect Development Company

Dated: November 12, 2009

James J. Hoecker
Counsel to WIRES
Hoecker Energy Law & Policy
Husch Blackwell Sanders LLP
750 Seventeenth Street, N.W.
Suite 1000
Washington, D.C. 20006