Who Should Do What?
How Order 1000's Regional Transmission Planning Can Support State Resource Planning

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Table of Contents

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Introduction

On the subject of regional transmission planning, Order 1000 establishes three key requirements:

1. Each "transmission provider" must "participate in a regional transmission planning process that produces a regional transmission plan and complies with existing Order No. 890 transmission planning principles." Para. 68.

2. These processes must "provide all stakeholders the opportunity to provide input into what they believe are transmission needs driven by Public Policy Requirements, rather than the ... transmission provider planning only for its own needs or the needs of its native load customers." Para. 203.

3. Transmission providers "have an affirmative obligation ... to evaluate alternatives [including transmission and non-transmission alternatives] that may meet the needs of the region more efficiently or cost-effectively [than a transmission provider's proposed transmission solutions]," para. 80; and to give non-transmission alternatives "comparable consideration." Para. 155.

Despite Order 1000's focus on planning, FERC is not a planning agency. Under Sections 201, 205 and 206 of the Federal Power Act, it has authority to set rates for transmission service in interstate commerce and wholesale sales in interstate commerce. It has a duty to ensure that those rates are just and reasonable and not unduly preferential. This authority allows it to send signals about what processes and actions will win its favor. But it cannot develop a power supply plan for a region; nor can it order utilities to make investments.[2]

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[2] See Order 1000-A at para. 123 ("The transmission planning process itself does not create any obligations to interconnect or operate in a certain way. Thus, the Commission found that when establishing transmission planning process requirements, it is in no way mandating or

States can do both these things, and have. States have granted utilities exclusive service territories, including control over facilities and services essential to consumers of all types and sizes. In return, utilities have accepted an obligation to serve. For a century, the states have defined that obligation to serve in different ways, including through integrated resource planning—a process that finds the most economical, reliable mix of conventional generation, renewable generation, distributed generation, transmission, demand response and energy efficiency to meet the state's electric supply needs.

Order 1000 provides a way for FERC and states to combine their different jurisdictions to serve their common goal: identifying and providing that mix of resources that serves consumers cost-effectively and reliably, using a mix of regulation and markets. While states have focused on planning for their in-state loads, FERC has introduced regional transmission planning to ensure that the electricity states want has paths to reach those loads. FERC's efforts, however, go beyond mere path-making; they include advancing bulk power system reliability and spurring effective competition in wholesale generation markets. Reliability consists of adequacy and security: adequate infrastructure and secure operations, both necessary for power to flow when consumers demand it. Reliability is a regional function because of the interstate interconnectedness of the transmission network: Everyone's reliability is affected by everyone else's behavior. Wholesale markets are regional because a market's geographic boundaries are defined not by state lines but by the options economically available to serve customers' needs.

While bulk power system reliability and wholesale markets are FERC functions, they serve states' needs. Even "vertically integrated" states (where utilities generate their own power) need access to reliable wholesale alternatives, to provide both supplemental power and benchmarks for assessing their utilities' generation costs. Each jurisdictional effort needs the other to succeed. Without states' input, regional transmission planning cannot link state-desired resources to state-regulated service territories. Without FERC's reliability and wholesale market efforts, states will not have reliable resources to choose from. Further, states that plan in isolation will not necessarily value sufficiently their fellow states' needs.

With Order 1000's mandates, FERC and state jurisdictions can address all these factors -- states' resource preferences, regional reliability and wholesale markets. States seeking to diversify their resource bases, from (a) historic dependence on conventional generation owned by the local utility and located within the state, to (b) a mix of providers and resources from multiple states, need reliable regional markets. FERC is seeking to make those regional markets competitive, cost-effective, and responsive to the needs of consumers. Order 1000 creates mandatory meeting places where transmission providers must plan their systems, in consultation with "stakeholders," so as to produce cost-effective transmission plans that satisfy states' "public policy requirements." FERC has recognized that states are not mere

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otherwise impinging upon matters that section 202(a) leaves to the voluntary action of public utility transmission providers…."); para 130 ("In addition, to plan is not to mandate some action that occurs beyond the planning process. Between planning and the implementation of a plan stands a decision to proceed or not to proceed with some or all of the planning proposals.").

stakeholders, but co-regulators in the regional system. It follows, then, that the "public policy requirements" must include the outputs of state resource plans.

This paper provides recommendations for helping this bi-jurisdictional effort to succeed. **Part I** compares regional transmission plans to state power supply plans. By understanding their differences and interdependencies, decisionmakers can design ways for each to support the other. **Part II** turns to the individual actors: states, regional transmission organizations, and state-regulated transmission owners. Emphasizing compatibility over conflict, it asks: What actions, by whom, can cause regional processes to accommodate states' needs? **Part III** explains that Order 1000, by not defining "plan," leaves a gap between concepts and commitments. Without commitments by regulators and investors, cost-effective investments in transmission, generation and demand response and other resources will be wanting. Part III therefore asks: What are the possible legal paths from plans to commitments?

I. Regional transmission plans and state power supply plans: What are their differences and interdependencies?

Order 1000 identifies two reasons for regional transmission planning: (a) to create the transmission infrastructure necessary to serve retail loads, consistent with federal and state public policy requirements; and (b) to avoid unnecessary transmission and generation costs by finding cost-effective regional substitutes for utility-centric plans.

Both purposes can support state decisionmaking. To realize this potential, one must understand the differences and interdependencies between FERC-jurisdictional transmission plans and state-jurisdictional power supply plans.

A. Differences in definitions

A state-jurisdictional power supply plan is that mix of conventional and renewable generation, transmission, demand response, distributed generation, and energy efficiency that retail suppliers carry out to fulfill their state law obligations to serve.

An Order 1000 plan is narrower, because FERC's jurisdiction is narrower. An Order 1000 plan, by its terms, is not a full resource plan; it is only a transmission plan: a plan describing the size, location, timing, and cost responsibility for a region's transmission facilities. Which transmission facilities? Transmission facilities that will (a) enable the region's load-serving entities to carry out their retail load obligations cost-effectively; (b) maintain regional reliability under various contingencies; and (c) allow wholesale competitors to interconnect and transact, so that load-serving entities have multiple options.

Order 1000 allows this difference in definition, between state resource plans and Order 1000 transmission plans, to be bridged, however. Order 1000 plans can play the dual function of helping carry out states' plans and creating reliable opportunities for new competitors to

satisfy those plans.[3] As explained next, while the two types of plans are different, they are interdependent.

B. Interdependencies in effects

Transmission providers that are also retail utilities (i.e., all transmission providers other than regional transmission organizations and merchant transmission owners) must satisfy the requirements of two jurisdictions. As both a FERC-jurisdictional transmission provider and a state-jurisdictional load-serving entity, the retail utility must be a party to two types of plans: the state-jurisdictional plan for combining conventional generation (whether owned or purchased), renewable-energy purchases (or construction) flowing from public policy requirements, and demand-side resources; and the FERC-jurisdictional Order 1000 plan, which addresses the transmission facilities necessary to connect power supply resources to loads. Order 1000 acknowledges this point because it requires regional transmission plans to consider alternatives to transmission, like demand response and distributed generation. Regional transmission serves retail needs, as those needs are defined and shaped by state and federal public policies. The regional transmission plans must serve the state plans to be cost-effective; and without the regional plan, the state plans cannot be cost-effective. The plans are different, but interdependent.

II. Compatibility over conflict: What actions can help the regional and state processes to achieve their mutual goals?

In regional transmission decisionmaking, the main players are states, state-regulated load-serving entities, and regional transmission organizations. Each entity has an essential role in finding compatibilities and resolving conflicts.

A. Finding compatibilities

1. States should create statewide plans, then direct their load-serving utilities to take state plans to the regional processes

Order 1000 has two features that support state resource needs: It requires transmission providers to participate in regional processes, and it requires those processes to consider public policy requirements. These features invite, and support, two actions a state can take to ensure cost-effective performance by its jurisdictional utilities: creating a state-level resource plan, and directing the state's utilities to integrate that plan into the regional transmission plan. Order 1000 therefore does not "encroach" on state jurisdiction, as some have argued. By requiring utilities to find regional solutions to state needs, it creates for states a path for performance previously missing.

[3] See, for example, the ISO-NE's "Regional System Plan, a report that "determine[s] resources and transmission facilities needed to maintain reliable and economic operation of New England's bulk electric power system over a ten-year horizon."

a. States can create resource plans

A state resource plan describes a state's preferred mix of conventional and unconventional generation, transmission, demand response, energy efficiency, and distributed generation. This preferred mix will be a product of legislative decisions, existing resources, and practical opportunities to obtain new resources. It is also affected by market structure: A state whose utilities have divested their generation will, in the near term, have only those generation options that wholesale sellers volunteer to provide (subject to transmission availability); and a state that has authorized retail competition will have only those generation options that retail marketers volunteer to provide (although the state can guide resource procurement by its "default" providers). Regardless of a state's market structure, it can have a plan.

States vary in the amount, type, and timing of resource planning—and whether they even have plans. Some states require only that utilities file load forecasts. Others mandate renewable purchases of varying amounts over varying time periods. Others have both of the foregoing, plus specific goals or mandates for demand response and energy efficiency. States also differ in the legal effect of their plans: Some plans have no effects, while others create a positive presumption, in siting and certificate proceedings, for projects consistent with the plan. Further, states differ in the time horizons for their plans.

States also differ in their direct involvement with transmission. States whose utilities have joined regional transmission organizations tend to exercise less legal control over transmission planning than states whose utilities have not joined regional transmission organizations. Finally, some states develop statewide plans, while others have utility-specific plans that are not integrated into a statewide plan.

Recommendation: Whatever level of planning a state does, Order 1000's regional process can help accommodate its goals. But the more ground the state plan covers (including total load, type of load, type of power supply needs, amount of demand resources, and energy efficiency) and the more explicitly it speaks, the more likely that the regional process can incorporate and support the state plan's goals. Further, a state commission that lacks the statutory authority to create plans should obtain that authority.

Some argue that states that have authorized retail competition, or permitted (or required) their retail utilities to divest generation, have no need for a resource plan. Accepting this view ignores several factors. First, in retail competition states there remains a block of non-shopping customers who depend on the "default" provider. This default provider, usually the franchised utility, retains a long-term obligation to serve those customers cost-effectively. Second, if a retail competition state has a renewable-portfolio requirement and demand management goals, planning still is necessary to ensure that that retail providers satisfy these requirements timely and cost-effectively. Third, even a state with full retail competition may wish to influence the power supply mix served by the market, since dependence on the market alone involves uncertainty and volatility. Relying on the "market" is not a belief system that promises good results in proportion to hopes and prayers. Relying on the market is a public policy decision,

but usually backed by insufficiently clear knowledge about what power supply will exist beyond the near term. Even with full reliance on the "market" there can be a state role in demand resource and energy efficiency development, both of which act as hedges against unknown market resource costs.

Recommendation: Differences among the states in the types of planning make it harder for states to ensure that regional transmission plans serve state resource plans. In particular, where states use different time horizons for plans (including different time frames for committing to resources listed in a plan) it is difficult to coordinate a region-wide solution. Aiming for a common scope and schedule among state plans will help the regional process serve state goals.

Recommendation: With statewide plans, the proponents-speakers-leaders within the regional process will be the states pressing for a unified plan, rather than each utility pushing its plan. Whereas a utility will have internal tension between its strategic business interests and its obligation to serve the public interest, the states will have no such tension; they will be better able to negotiate with other states toward a public-interest result.

b. States can direct utilities to obtain regional plans that accommodate state resource plans, consistent with regional reliability and market development goals

State law's insistence on "just and reasonable" rates requires a retail utility to procure resources using the most cost-effective methods. A utility that fails this test faces cost disallowance. By making transmission providers participate in regional processes—processes that have the potential to lower costs—Order 1000 gives the state commissions a new way to ensure their utilities' cost-effectiveness.

Recommendation: States with resource plans should direct their utilities to pursue regional transmission plans that integrate the state plans cost-effectively with regional reliability and market development goals. The converse of this recommendation is equally true. A state commission that fails to press its utility to contribute to, and receive from, the regional process ideas for cost-effectiveness is missing an opportunity to ensure just and reasonable rates.

This recommendation for state action supplies a piece missing from Order 1000. Order 1000 could have required each utility to obtain from its state specific guidance on the state's preferred mix of conventional and renewable generation, transmission, demand response, storage and other non-transmission alternatives. While Order 1000 did not take this step, states can. If a state does not do so, its utilities' natural action will be to pursue in the regional processes only its own strategic interest, rather than the state's interest.

Nothing in Order 1000 or in federal law precludes states from ordering their retail utilities to advance state-designed plan within the regional processes. No federal–state conflict would arise, because Order 1000 does not require transmission providers to commit to any particular action. What Order 1000 does, implicitly, is signal that when a transmission provider

requests cost recovery and cost allocation for a transmission project, FERC will condition cost recovery on proof of cost-effectiveness—specifically, proof that through the regional process, the transmission provider compared the proposed project with all feasible alternatives.

Recommendation: While there is no dispute about a retail regulator's ability to disallow costs from rates based on a utility's failure to act cost-effectively (subject to the limits discussed in the text accompanying note 7 below), state law differs (and is often unclear) on the extent of a commission's power to direct particular activities, or penalize activities that vary from those prescribed or desired.[4] Given this uncertainty, it is better for state commissions to inform their utilities, prior to expenditures, about the types of utility decisions that will lead to cost recovery and cost disallowance. Applied to the regional transmission context, this recommendation means choosing among several ways to specify expectations, and the consequences for not satisfying those expectations, including:

1. directing the utility to undertake specific activities in the regional planning process;

2. identifying certain utility activities as prerequisites for any rate recovery of costs that would be affected by those regional activities;

3. identifying certain regional activities as creating a presumption of prudence for purposes of retail rate recovery of costs that would be affected by those regional activities;

4. identifying certain omissions as creating a presumption of imprudence for purposes of retail rate recovery of costs that would be affected by those regional activities; and

5. saying nothing about regional activities until the rate case in which a utility seeks to recover costs incurred under, or affected by, regional processes.

Setting aside possible state-law limits on a state commission's authority to prescribe, there is no Federal Power Act limit on states. A long line of FERC cases makes clear that the regulation of

[4] As a commission increases its prescriptiveness (by, for example, tightening quality standards, broadening expectations, and specifying actions), it risks hitting the hard-to-define boundary called "management prerogative," "management defense," or, more colloquially, "running the company." Early in regulatory history, courts upheld the "management defense" to regulatory requirements by finding that they (1) "infringed upon" or "usurped" owners' rights; or (2) violated "the now discredited doctrine of substantive due process" or an "overly robust" view of the Takings Clause. See R. Stumberg, “Management Prerogatives in Utility Regulation: Guidance for State Regulators” (2009) (available from author) (*citing* Note, "Management Invaded" – A Real or False Defense? 5 *Stan. L.Rev.* 110, 116-17 (1952)). The modern legal struggle replaces these hoary approaches with a question of statutory interpretation: Did the legislature grant the commission the power to prescribe?

retail-utility purchasing practices is exclusively the state's domain.[5] The only current exceptions to this principle are as follows:

1. According to FERC, a state cannot compel a utility to buy (or to overbuy) wholesale power at a state-specified price.[6] Current FERC precedent provides that a state can compel a utility to buy at wholesale (or forbid the utility from buying at wholesale), provided the state does not specify the purchase price. (The cited paper expresses disagreement with this precedent.)

2. According to the U.S. Court of Appeals for the First Circuit, in certain circumstances (not necessarily all—as the decision dealt with unusual facts), a state is preempted from compelling a utility to make a filing at FERC that will change rates). *Commonwealth of Massachusetts v. United States*, 729 F.2d 886 (1st Cir. 1984).[7]

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[5] In *Central Vermont Public Service Corporation*, 84 FERC para. 61,194 (1998), FERC explained that its approval of a wholesale rate schedule does not preclude the New Hampshire Commission from determining whether Connecticut Valley (the wholesale buyer) acted imprudently by not terminating its purchases where lower-priced power was available. FERC stated:

> "The Commission's decisions and its longstanding practice in setting wholesale rates support the Pike County exception to the Narragansett doctrine. The Commission has consistently recognized that wholesale ratemaking does not, as a general matter, determine whether a purchaser has prudently chosen from among available supply options."

See also Philadelphia Electric Co., 15 FERC 61,264 (1981) ("we did not mean by this order [accepting a wholesale contract] to prejudge, for our own purposes or those of the respective state commissions, a determination of the prudence of either party in entering into this transaction"); *Southern Company Services*, 26 FERC 61,360 (1984) ("the Commission is not empowered to disapprove or modify a power sales agreement on the grounds that the buyer may not be making the best possible deal....[T]he question of the prudence of a utility's power purchases is properly an issue in the buying utility's rate case where it seeks to pass the costs of its purchased power on to its ratepayers"); *Southern Company Services*, 20 FERC 61,332 (1982) (same); *Minnesota Power & Light Co. and Northern States Power Co.*, 43 FERC 61,104 at 61,342-43, reh'g denied, 43 FERC 61,502, order denying reconsideration, 44 FERC 61,302 (1988); *Palisades Generating Co.*, 48 FERC 61,144 at 61,574 and n.10 (1989).

[6] This limitation is discussed in detail in S. Hempling, C. Elefant, K. Cory, and K. Porter, *Renewable Energy Prices in State-Level Feed-in Tariffs: Federal Law Constraints and Possible Solutions*, Technical Report NREL//TP-6A2-47408 (January 2010), available at http://www.nrel.gov/docs/fy10osti/47408.pdf.

[7] In that case, Western Massachusetts Electric Company (WMECO) was a party to a power supply agreement among the three subsidiaries of Northeast Utilities, located in multiple states. The Massachusetts Commission, dissatisfied with the share of power costs the state bore

3. A state cannot disallow from retail rates FERC-jurisdictional costs incurred by a retail utility where the utility was compelled by a FERC decision to incur those costs.[8]

That means a state can order a utility to make a wholesale purchase, forbid a utility from making a wholesale purchase, order a utility to build generation, forbid a utility from building generation, order a utility to build transmission, forbid a utility to buy transmission service—or pursue state-fashioned plans in a regional forum.

c. Order 1000 does not "encroach" on state jurisdiction

There is some sentiment that Order 1000 "encroaches on" or "interferes with" state utility regulation. This sentiment both misunderstands the law and misses Order 1000's main contribution.

When FERC acts within its jurisdiction, it is not legally possible for its action to "encroach on" or "interfere with" state authority. Order 1000 regulates the activities of "transmission providers." That phrase is shorthand for "public utilities" (as defined by the Federal Power Act) that provide a FERC-jurisdictional service—what Section 201(b)(1) describes as the "transmission of electric energy in interstate commerce." Every directive in Order 1000 is grounded in this specific jurisdiction:

1. For utilities serving in retail-competition states and utilities that have joined RTOs, all utility-provided transmission is FERC-jurisdictional transmission.

2. For utilities that neither serve in retail competition states nor have joined RTOs, the FERC-jurisdictional transmission is transmission of wholesale power.

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under the agreement, directed WMECO to file a rate change at FERC under FPA Section 205. The First Circuit (Judge, now Justice, Breyer) found that the Federal Power Act preempted this directive because the Federal Power Act envisioned voluntary filings at FERC by wholesale sellers. Id. at 887 ("To accept Massachusetts' claim that Section 205 includes regulator-compelled utility-proposed changes would prevent the utility from choosing among reasonable rate practice alternatives.").

[8] *See Nantahala Power & Light v. Thornburg*, 476 U.S. 953, 966 (1986); *Mississippi Power & Light vs. Mississippi ex rel Moore*, 487 U.S. 354 (1988). But where the retail utility incurred the costs voluntarily, state disallowance is not preempted because the state's review of the prudence of retail utility's wholesale purchase is distinct from the FERC's regulation of the wholesale seller's costs. *See Kentucky West Virginia Gas Company v. Pennsylvania Public Utility Commission*, 837 F.2d 600 (3d Cir. 1988); *Pike County Light and Power Company v. Pennsylvania Public Utility Commission*, 77 Pa. Commw. 268; 465 A.2d 735 (1983).

In each of these situations, it is the utility's provision of FERC-jurisdictional transmission service that is triggering FERC jurisdiction. FERC is not entering the state's legal domain.

Further, Order 1000 cannot reduce state jurisdiction because it does not require transmission providers to take any actions, other than participate in a process that produces a plan, which itself creates no commitments.[9] FERC nowhere describes a plan as itself requiring any action. Order 1000 thus does not command a utility to take any action that a state commission might wish to prohibit. Any FERC decision with actual cost effect (such as a decision approving or allocating transmission costs) will not occur until the transmission provider seeks FERC-jurisdictional recovery for a FERC-jurisdictional cost. At that time, FERC will apply its "just and reasonable" test to transmission costs within its exclusive jurisdiction.

The "encroachment" concern, besides having no legal basis, distracts from the key fact: that Order 1000 supports state planning by creating ways to find commonality and avoid conflict. In fact, FERC has invited states to find a way to make their joint participation in the regional processes a formal one. See Order 1000-A at para. 290 ("encourage[ing] proposals that seek to establish a formal role for state commissions").

2. LSEs should submit the statewide plans to the regional processes, then identify ways to satisfy them cost-effectively

The retail utility should be carrying its state-approved power supply preferences (consisting of conventional power supply, renewable power, demand response, energy efficiency, and other non-transmission alternatives) to the regional process. Doing so will enable the utility and the RTO to "benefit from a regional planning process that identifies transmission solutions that are more efficient or cost-effective than what may be identified in the local transmission plans of individual public utility transmission providers." Order 1000-A at para. 168. The utility also should be gathering from the regional process ideas and options that can assist it in modifying its original state-based plan to achieve its state-mandated goals more cost-effectively. This state-law obligation to perform cost-effectively applies even if the utility does not own transmission but is merely a purchaser-participant in the regional processes.

3. RTOs and other transmission providers should find the transmission solutions that accommodate the state plans cost-effectively

Order 1000 requires the regional processes to "consider" state public policy requirements. Merely "considering" will not achieve the states' goals, because "consider" includes "consider and reject," and "consider and then disregard." This gap supports the recommendation in Part II.A.1 above, that states should hold their utilities accountable for

[9] *See* Order 1000-A at para. 188 ("… Order No. 1000's transmission planning reforms are concerned with process; these reforms are not intended to dictate substantive outcomes, such as what transmission facilities will be built and where. We recognize that such decisions are normally made at the state level.").

integrating state plans into regional solutions, in both the RTO and non-RTO regions. For RTOs, notwithstanding FERC's decision to stop at "consider," states should press them to "act." RTOs should view the states' relationship to the regional planning process as not merely advice and input but also leadership—as long as the states provide leadership by offering real resource plans.

The RTOs and transmission providers should have an obligation to give the states the information necessary to develop compatible plans. (Procedural vehicles for doing so are the subject of Part III below.) The purpose of the regional planning process is to produce results that are regionally cost-effective. That process will likely require revising state plans developed initially with only the state in mind, so that they fit well with other states' plans. States will be more willing, and better equipped, to make or accept the necessary revisions if they have full regional information.

Recommendation: State commissions should develop a standard data question list and submit it to the RTOs and other transmission providers; all these transmission providers should be required to respond to all states. Question areas could include:

1. Where are the possible incompatibilities among state plans? (Examples: State A subsidizing its generation's wholesale bids vs. State B concerned with wholesale market distortion; States C and D each hoping to be net wind exporters to the same market that cannot accommodate both sources).

2. What are the possible incompatibilities between proposed state plans and regional reliability needs?

3. Are there ways to change the time horizons on state wholesale procurement processes to allow for economies of scale in construction and purchasing?

4. FERC should induce regional consciousness by requiring transmission providers to carry out state power supply plans

Where state plans conflict (or, taken together without change, preclude a regionally cost-effective result), a regional procedure is necessary to resolve the conflict and produce the cost-effective result. Because Order 1000 describes no such procedure, it is up to each region to create one. Without more FERC direction, there is risk that progress in the regional meetings will be slow and expensive, with more time spent disputing costs than creating benefits. Two FERC actions could speed the progress and improve the orientation.

a. Require transmission providers to seek cost-effective regional resolutions of the multiple state resource plans

Order 1000 states (at para. 154) that "the regional transmission planning process is not the vehicle by which integrated resource planning is conducted; that may be a separate obligation imposed on many public utility transmission providers and under the purview of the states." This sentence overstates the difference between regional transmission planning and

state resource planning. The purpose of transmission planning, as with all resource planning, is to satisfy customer needs. It is difficult to reconcile this sentence with Order 1000's purposes. Order 1000 requires planning of transmission to accommodate consumers' needs. Satisfying those consumers' needs is the state-law obligation of load-serving entities, most of whom are the same transmission providers that Order 1000 commands to plan regionally. The outcome of the Order 1000 processes, then, is necessarily a transmission plan that serves the integrated needs of a region's consumers. The region's transmission plan, then, is necessarily a component of a region's resource plan. (Even if there is no explicit regional power supply plan, there is a sum of planned power supply actions in the region that, even if uncoordinated, constitute a plan.) Regional transmission planning might not be the whole "vehicle," but it is essential to the vehicle's forward motion.

Regardless of how explicit or broad are state resource planning practices, some version of integrated resource planning exists in the region. It is either methodical or haphazard, public-spirited or opportunistic, provincial or broad-minded, but it exists. Whatever planning occurs, its outputs will reach the regional level. Since FERC has not mandated integrated resource planning at the regional level, any methodical integrated resource planning must begin at the state level. The question is how to avoid state-level efforts that are uncoordinated, with conflicts unresolved and cost-saving opportunities lost, in favor of a process that integrates individual plans into a best-fit regional plan. FERC may not want to mandate this regional effort, but it still can take actions to induce it. It can start by requiring transmission providers to seek and obtain plans from their states, and bring those plans to the regional forum. In this way, the state mandates recommended in Part II.A.1 above are supported by a FERC mandate. FERC can also induce states to think and act regionally, as discussed next.

b. Induce states to adopt a regional consciousness

All unbundled transmission costs will face a FERC "just and reasonable" review before reaching consumers. States are concerned about bearing unnecessary transmission costs (both excess total transmission costs and an unfair share of appropriate transmission costs). FERC can make clear the path by which states can protect against unnecessary transmission costs by (a) promulgating individual state plans that reduce demand, including plans that allow in-state demand-resource providers to access the regional demand-response markets; (b) coordinating individual state plans to reduce transmission redundancy; (c) coordinating (e.g., staggering) power supply additions to reduce surplus capacity due to "lumpiness;" and (d) reconciling different planning time horizons to allow for coordinated procurement policies among load-serving entities. FERC can make clear that states that follow these practices are less likely to have transmission costs allocated in their direction.

FERC can also declare that regional transmission projects that emerge from such state-directed, state-coordinated efforts will be rebuttably presumed to be prudent. This declaration would give states real influence in regional discussions, because transmission developers, inherently risk averse, will want to please those whose consent will trigger the presumption. FERC has stated that cost-allocation proposals supported by a majority of "stakeholders" will receive deference. This deference may help bring peace in cost-allocation disputes, but cost allocation is not cost reduction. More useful is a different kind of deference: a deference to

transmission project proposals that emanate from regional processes that integrate state power supply plans with regional reliability and market development needs. Turning the coin over, FERC should state that it will not defer to transmission providers' cost proposals where the states have not coordinated; or worse, where the states' statutes or commission decisions have disfavored out-of-state power sources or discouraged transmission construction that serves out-of-state markets. Otherwise, FERC will be approving costs that exceed what is necessary – a violation of the just and reasonable standard. With these statements, Order 1000 would better align the self-interest of transmission providers with the statutory obligations of the states.[10]

B. Resolving conflicts

With a hundred-year history of planning power supply non-regionally, the transition to regional planning will expose conflicts. The generic types of conflicts include the following:

1. The regional transmission cost allocation conflicts with one or more states' views of the appropriate benefit–cost relationship.

2. The regional plan lacks transmission that a particular state views as necessary to facilitate its power supply preferences. .

3. The regional plan has a total transmission amount exceeding the level necessary to accommodate load that is cost-effectively reduced through demand response or operational efficiencies.

Conflicts are more likely if a regional transmission plan is completed without input from state plans. The regional process then becomes a series of battles to avoid costs, rather than efforts to find compatibilities. Conflicts are less likely if the regional process begins with state plans, then focuses on finding cost-effective ways to (a) accommodate their non-conflicting aims and (b) make adjustments necessitated by inevitable conflicts among state plans.

The key is for regions to have procedures that follow a logical sequence for reducing conflict. One approach consists of four main steps: (a) invite state power supply plans, (b) identify the compatibilities and conflicts among those plans, (c) give states an opportunity and deadline to adjust plans to exploit compatibilities and reduce conflicts, and (d) create a regional transmission plan that services the revised state power supply plans. Throughout the process, there should be access to a neutral entity to organize discussions and propose resolutions.[11]

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[10] For now, FERC has declined to create a special role for the states. See Order 1000-A at para. 337 (declining to require "a particular status for state regulators in the transmission planning process"). But it is open to suggestions. *See* Order 1000-A at para. 338 ("[W]e leave it to state regulators and public utility transmission providers, in consultation with stakeholders, in each transmission planning region to determine the appropriate role of state regulators in the transmission planning process generally and in the consideration of transmission needs driven by Public Policy Requirements in particular.").

[11] FERC appears to agree with at least the first two steps. See Order 1000-A at para. 327:

The states' incentive for resolving conflicts is not only achieving better plans but also avoiding Federal Power Act preemption. Suppose the regional process produced a transmission plan that was cost-effective as a whole and that allocated transmission costs to each load-serving entity roughly proportionally to benefits received. FERC would approve the agreements that allocated costs. When those LSEs seek retail cost recovery of those FERC-approved costs, the Federal Power Act would likely preempt the state commission from disallowing costs incurred by a state-jurisdictional utility. This FERC power, if exercised carefully, will drive states toward answers that benefit them in the long run.

> ***Example:*** Suppose State A's utility wants to undertake a regional transmission project, in coordination with utilities from State B. Suppose further that the regional project will reduce regional costs over a 30-year period. Assume that a cost allocation, based on benefits of the 30 years, means that for the first 10 years, State A's consumers will be worse off compared to a solely in-state project. With the regional project, State A will still be better off over the 30-year period. The only way to make regionalism work is to preempt State A from disallowing the excess costs in these first 10 years.[12]

There is some legal uncertainty here concerning preemption. If the costs incurred by the state-jurisdictional utility were costs mandated by a FERC decision (or mandated by the RTO exercising FERC-approved authority), the state commission would be preempted. If instead the costs were incurred by the utility voluntarily (i.e., FERC approved the costs but did not mandate the costs), and the utility had available a lower-cost means of satisfying its state-jurisdictional obligations, the case law leaves room for the state to disallow any excess cost. This is the import of two lines of cases noted in Part II.A.1.b above: the *Nantahala-Mississippi Power* line and the *Pike County-Kentucky West Virginia* line.

> "It is not the function of the transmission planning process to reconcile state policies. If the utilities in one state are required, for example, to procure wind resources and the utilities in another state are required to shut down old fossil units and construct new fossil units, it is not the transmission providers' function to decide on the merits of these federal or state requirements or to decide between wind and coal resources. It is their function to help both sets of utilities comply with the laws they each face by considering in the transmission planning process, but not necessarily including in the regional transmission plan, the new transmission facilities needed by both sets of utilities to meet their obligations, and also to determine if these diverse objectives can be met more efficiently or cost-effectively through regional transmission planning than through individual utility planning."

[12] Of course, a politically wiser approach would be to shift some of the first 10 years' costs to later periods so that State A's consumers are not worse off in the first 10 years. But investor willingness might depend on accelerated depreciation in the first 10 years—a reality that regulators have to accept because they cannot force investor willingness.

While preemption often has a negative connotation for state-level practitioners, in this context the result is positive, because a less-costly long-term solution prevails over a more-costly state plan. The result flows from FERC's obligation to ensure just and reasonable transmission rates and wholesale rates. Order 1000 seeks regional planning processes that identify cost-effective solutions—solutions that would not emerge if individual transmission providers planned and acted independently. A state that precludes its utility from acting regionally, or penalizes its utility for doing so, will be preempted. This legal situation induces states that wish to avoid preemption to think and work regionally.

III. From "plan" to commitment: What are the possible legal paths?

Order 1000 does not require that "plans" produce legal commitments: commitments to invest in generation, transmission, demand response, energy efficiency. But commitments are necessary for benefits to appear. It is worthwhile, therefore, to address methods of moving from plan to commitment.

For a regional plan to produce commitments, there have to be decisionmakers. In this context, the decisionmakers are states, retail utilities, transmission providers, RTOs, and FERC. Because most regional transmission projects will affect all these decisionmakers, either they will reach agreement, or their disagreement will be resolved by the one with the final legal power. There can be alternative paths and multiple contributors to the final decision, but there must be a single final decisionmaker, a single clear commitment, for investment to occur. (Even if all the states come to informal agreement on all aspects of a plan, that agreement cannot become legally binding, in the context of power supply regulation, absent the action of a single final decisionmaker.) And because the context is regulation, that final decisionmaker is a government decisionmaker. Under our constitutional system there are three possibilities for that government decisionmaker: (a) states acting independently but consistently, (b) a federal agency (here, FERC), and (c) an interstate compact. Each has its strengths and weaknesses.

A. States, acting independently but consistently

Under this approach, the individual states reach informal agreement through the regional processes. Then each state takes its assigned portion of the agreement home, to vet and approve through formal state proceedings. From these final state decisions, investment can move forward.

This approach has several vulnerabilities. Opponents can attack the state proceedings as approving prejudgments reached by commissioners beforehand. (One reason state commissioners often give for not making informal agreements regionally is that they will have pre-judged decisions that will come before them at home.) Opponents of the informal agreements also can inspire anti-regional provincialism in state legislatures, which then pass legislation that prevents the commissions from approving their portion of the regional plan. This is a real possibility if there are interest groups with more political power in the state legislature than in the regional process.

B. FERC

FERC can approve transmission costs and cost allocations, and determine transmission rate design. It can also approve wholesale power supply arrangements, including allocations of capacity and energy costs among utilities that have agreed to share those costs. But unlike state commissions (which can order retail utilities to make investments and procure particular resources in a state resource plan), FERC has no authority to order utilities to sign specific agreements. FERC cannot mandate investments in generation, transmission, demand response, or energy efficiency. FERC can only react to cost-recovery proposals, and only for FERC-jurisdictional services. Because FERC-regulated utilities do not have the general obligation to serve that state-regulated utilities do, FERC lacks the general resource-planning authority that states have. FERC can approve allocations of costs, but it cannot order utilities to incur particular costs. That missing piece in Federal Power Act authority makes FERC a suboptimal choice as the final decisionmaker on commitments growing out of regional plans.

What can FERC do? Within its current authority, FERC can guide utility decisions by signaling how it will treat those decisions in cost-recovery proceedings. As discussed in Part II.A.4 above, FERC can declare that it will allow only those transmission costs that result from a regional plan that cost-effectively accommodates state plans along with transmission providers' obligations for reliability and interconnection. An alternative approach is to increase FERC's statutory authority so that it more resembles state commission authority; specifically, the authority to order utility actions in all areas—generation, transmission, non-transmission alternatives—as necessary to achieve regional cost-effectiveness.

Some see a solution in Section 209(a) of the Federal Power Act:

> "The Commission may refer any matter arising in the administration of this Part to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The board shall be appointed by the Commission from persons nominated by the State commission of each State affected or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefore, revoke any reference to such a board."

The key phrase is in the first line: "any matter arising in the administration of this Part...." "This Part" refers to the Federal Power Act. This phrase means that the powers of any FERC-

state board are no greater than FERC's existing powers. Section 209 cannot convert FERC into an agency that approves plans and orders investments. It can, however, provide a procedure by which it can share its authority with affected states. If the states, on their own, reach informal agreement on a regional power supply plan, they could use the Section 209 procedure to obtain FERC-level approval of the FERC-jurisdictional costs associated with that plan. By combining the state plan-convergence process with the FERC cost-approval process, Section 209 could save time and reduce disagreements.

C. Interstate compact

The Compact Clause of the U.S. Constitution (Article I, Section 10, cl. 3.) authorizes interstate compacts but requires Congress's consent.

> "No State shall, without the Consent of Congress, ... enter into any Agreement or Compact with another State...."

A compact could achieve what Order 1000 does not: commitments that bind legally; specifically, commitments to pay for generation, transmission, demand response, or other non-transmission alternatives; commitments for RFPs, bidding processes, and contracts that select providers; and commitments to allocate the associated benefits and costs among utilities and states. A plan collects all the assorted possible actions (each action of which, considered in isolation, could have friends and foes), then combines and shapes them into a unified plan whose cost-effectiveness as a whole, by definition, produces benefits exceeding costs. What attracts investment, however, is not the plan but the commitment.

This positive outcome—commitment reached without strife—is more easily achieved when cost recovery and cost allocations are approved in packages rather than project-by-project. Any individual project decision can induce state-level opposition through decisions on siting or retail cost recovery, since for any single project there are winners and losers. Multi-project packages, in contrast, allow for compromises among projects so that the net effect of the package is winners and no losers.[13]

The compact process, therefore, would be a regional planning process that builds a regional plan from individual state goals. It would design a plan, then convert it into legally binding decisions about who bears what responsibility to carry out the plan, and who recovers from whom the costs of carrying out the plan. The plan would give legally binding directions to those with obligations to serve: RTOs and state-regulated utilities. Those directions could include requirements of competitive bidding procedures for third parties who do not have an obligation to serve.

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[13] *See, e.g., Southwest Power Pool, Inc.*, 125 FERC ¶ 61,054 (2008); and *Midwest Independent Transmission, System Operator, Inc.*, 137 FERC ¶ 61,074 (2011). Both decisions address multi-project packages. The latter decision is on review in the 7th Circuit. For a discussion of how decisions-in-isolation elevate friction over compromise, see my essay "Interconnection Animus."

Compacts require congressional approval. The "compact" approved is not the binding plan; it is the agreement among the states to form a governmental decisionmaking body with a substantive scope of authority, structure, and procedures. The federal legislation approving the compact would address appointments to the compact board, voting rights, and substantive authority. The legislation could place FERC in a position of tie-breaker should the state members not reach agreement within a particular period of time. The legislation also could provide for other FERC roles: administrative assistance, administrative law judges, and staffing, for example. The compact could also provide for joint state–FERC membership (in effect broadening the substantive scope of current Section 209).

A vulnerability of the compact concept is the problem of geographic boundaries and political realities. Some group or groups of states have to agree to form the compact; then the compact requires approval from Congress. The logical boundaries for regional planning will change continuously as technology, cost relationships, and consumption patterns change. But a compact, once formed among the agreeing states, will be hard to change. The concrete would have to be reshaped after it has dried. Further research is necessary to see if a congressionally approved compact could change its membership for particular situations.

Assuming a compact were created, how would it relate to the Order 1000 processes? Here are three options:

1. For each compact region, there is a single process: So the Order 1000 process becomes a compact process. Order 1000 remains in place, i.e., as an order to transmission providers. FERC would amend Order 1000 to say that where the states have formed a compact whose authority incorporates all the Order 1000 obligations, the transmission providers shall comply with Order 1000 by complying with the compact process.

2. For each compact region, there would be two separate processes. The compact process would occur first, producing a plan that then would bind the Order 1000 process.

3. For each compact region, there would be two separate processes. The Order 1000 process would occur first, creating a regional transmission plan. Once the Order 1000 process produces a plan (which, under present Order 1000, is not binding), the state compact process would convert the plan into binding commitments for the creation of generation, transmission, demand response, or other non-transmission alternatives; for RFPs, bidding processes and contracts that carry out those commitments; and for the allocation of the associated benefits and costs among utilities and states.

Summary of Recommendations

Plan coverage: The more ground the state plan covers (including total load, type of load, type of power supply needs, amount of demand resources, and energy efficiency) and the more explicitly it speaks, the more likely that the regional process can incorporate the state plan's goals. Further, a state commission that lacks the statutory authority to create plans should obtain that authority.

Common scope and coverage: Differences among the states in the types of planning make it harder for states to ensure that regional transmission plans serve state resource plans. In particular, where states use different time horizons for plans (including different time frames for committing to resources listed in a plan) it is difficult to coordinate a region-wide solution. Aiming for a common scope and schedule among state plans will help the regional process serve state goals.

States as leaders: With statewide plans, the proponents-speakers-leaders within the regional process should be the states pressing for a unified plan, rather than each utility pushing its plan. Whereas a utility will have internal tension between its strategic business interests and its obligation to serve the public interest, the states will have no such tension; they will be better able to negotiate with other states toward a public-interest result.

State directives to utilities: States with resource plans should direct their utilities to pursue regional transmission plans that integrate the state plans cost-effectively with regional reliability and market development goals. The converse of this recommendation is equally true. A state commission that fails to press its utility to contribute to, and receive from, the regional process ideas for cost-effectiveness is missing an opportunity to ensure just and reasonable rates.

Clarity in state cost recovery intent: It is better for state commissions to inform their utilities, prior to expenditures, about the types of utility decisions that will lead to cost recovery and cost disallowance. Applied to the regional transmission context, this recommendation means choosing among several ways to specify expectations, and the consequences for not satisfying those expectations

Data gathering: State commissions should develop a standard data question list and submit it to the RTOs and other transmission providers; all these transmission providers should be required to respond to all states.