

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Building for the Future Through Electric
Regional Transmission Planning and Cost Allocation

Docket No. RM21-17-001

**REQUEST FOR REHEARING OF THE WESTCONNECT
COORDINATING TRANSMISSION OWNERS¹**

Pursuant to Rule 713 of the Federal Energy Regulatory Commission's (the "Commission" or "FERC") Rules of Practice and Procedure,² the WestConnect Coordinating Transmission Owners (CTOs) request rehearing of one aspect of Order No. 1920-A, 189 FERC ¶ 61,126 (2024) -- FERC's directive that "transmission providers may not plan for the needs of a non-jurisdictional utility transmission provider if that non-jurisdictional transmission provider has not enrolled in the transmission planning region." *Id.* at P 323. Only days before issuance of Order No. 1920-A, the CTOs had sought clarification from the Commission that its order on remand of *El Paso Elec. Co. v. FERC*, 76 F.4th 352, 362-363 (5th Cir. 2023) did not bar jurisdictional utilities from voluntarily agreeing to conduct joint planning with non-jurisdictional utilities under a coordinating transmission owner framework that did not require the latter's enrollment.³ We sought clarification of FERC's order on remand because it is ambiguous. We seek rehearing of Order No. 1920-A because it is not.

¹ The WestConnect Coordinating Transmission Owners are non-jurisdictional members of the WestConnect regional planning organization. They include, Colorado Springs Utilities, Imperial Irrigation District, Los Angeles Department of Water and Power, Platte River Power Authority, Sacramento Municipal Utility District, Salt River Project Agricultural Improvement and Power District, and the Transmission Agency of Northern California.

² 18 C.F.R. § 385.713.

³ Public Service Co. of Colorado, et al, Docket Nos. ER13-75 et al, *Request for Clarification, or, in the Alternative, for Reconsideration of the WestConnect Coordinating Transmission Owners* (filed Nov. 18, 2024).

SPECIFICATION OF ERRORS

1. The Commission's decision *barring* public utilities from voluntarily engaging in transmission planning with their non-jurisdictional counterparts who do not enroll in a planning region violates its obligation under section 202(a) of the Federal Power Act (FPA)⁴ to *encourage* voluntary coordination among utilities.

2. The Commission's decision barring public utilities from voluntarily engaging in transmission planning with their non-jurisdictional counterparts who do not enroll in a planning region misinterpreted *El Paso Elec. Co. v. FERC*, 76 F.4th 352, 362-363 (5th Cir. 2023), which held only that jurisdictional utilities are not "*required* to plan for the transmission needs of [non-jurisdictional utilities]" that do not enroll in regional transmission planning organizations. (Emphasis added).

3. The Commission's decision *barring* public utilities from voluntarily engaging in transmission planning with their non-jurisdictional counterparts who do not enroll in a planning region arbitrarily departs, without acknowledgment, explanation or consideration of CTO reliance interests, from (1) Order No. 1000's goal of *promoting* regional transmission planning; (2) its policy allowing public utilities to engage in regional transmission planning with unenrolled non-jurisdictional utilities; and (3) its requirement that a planning region be integrated.

STATEMENT OF ISSUES

1. Order No. 1920-A mandates that "transmission providers may not plan for the needs of a non-jurisdictional utility transmission provider if that non-jurisdictional transmission provider has not enrolled in the transmission planning region." Order No. 1920-A at P 323. Did the Commission's

⁴ 16 U.S.C. § 824a(a).

directive violate FPA section 202(a), under which the Commission "is empowered *and directed* to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy"?

Relevant authority: 16 U.S. Code § 824a(a).

2. Interpreting *El Paso Elec. Co. v. FERC*, 76 F.4th 352 (5th Cir. 2023) (*El Paso*), Order No. 1920-A mandates that "transmission providers *may not plan* for the needs of a non-jurisdictional utility transmission provider if that non-jurisdictional transmission provider has not enrolled in the transmission planning region." Order No. 1920-A at P 323 and n. 915. (emphasis added). Did the Commission misinterpret *El Paso*, which states only that jurisdictional utilities are not "*required* to plan for the transmission needs of [non-jurisdictional utilities]" that do not enroll in regional transmission planning organizations? *El Paso, supra*, 76 F.4th at 362-3 (emphasis added).

Relevant authority: *El Paso, supra*; *Public Service Co. of Colorado et al.*, 148 FERC ¶61,213 at P 55 ("Order No. 1000 does not preclude the enrolled public utility transmission providers in a transmission planning region from conducting transmission planning for non-enrolled non-public utility transmission providers if the enrolled public utility transmission providers elect to do so.").

3. Interpreting *El Paso Elec. Co. v. FERC*, 76 F.4th 352 (5th Cir. 2023) (*El Paso*), Order No. 1920-A mandates that "transmission providers *may not plan* for the needs of a non-jurisdictional utility transmission provider if that non-jurisdictional transmission provider has not enrolled in the transmission planning region." Order No. 1920-A at P 323 and n. 915. In barring public utilities from voluntarily engaging in coordinated transmission planning with unenrolled non-

jurisdictional transmission providers did the Commission act arbitrarily by departing from Order No. 1000 policies (a) requiring that a planning region be integrated, (b) encouraging non-jurisdictional utility participation and (c) permitting jurisdictional utilities the choice whether to include unenrolled non-jurisdictional transmission providers in regional transmission planning without acknowledgement or explanation or consideration of the reliance interests of unenrolled non-jurisdictional transmission providers?

Relevant authority: FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009); *Dept. of Homeland Security v. Regents of the University of California*, 591 U.S. 1, 30 (2020).

ARGUMENT

I. In Barring Public Utilities From Voluntarily Engaging in Coordinated Transmission Planning with Non-Jurisdictional Transmission Providers The Commission Violated its Obligation to Encourage Voluntary Coordination under FPA section 202(a).

In explaining its determination to bar public utilities from voluntarily engaging in coordinated transmission planning with unenrolled non-jurisdictional transmission providers, FERC reasons as follows (citing *El Paso*, *supra*):

If the transmission provider were to plan for and consider non-jurisdictional transmission providers' Long-Term Transmission Needs without a way to ensure the non-jurisdictional transmission provider contributes to the costs of the resulting Long-Term Regional Transmission Facilities, the resulting cost allocation could violate the cost causation principle and result in free-ridership.

Order No. 1920-A, at P 323. But *El Paso* holds only that public utilities may not be *required* to plan for the transmission needs of non-jurisdictional utilities that do not accept the allocation of costs related to regional transmission project from which they benefit. *El Paso*, *supra*, 76 F.4th at 362-63. Nothing in the *El Paso* opinion bars public utilities from *voluntarily* engaging in coordinated regional transmission planning with their non-jurisdictional counterparts.

More importantly, it is simply untrue that jurisdictional utilities are without "a way to ensure the non-jurisdictional transmission provider contributes [to the cost of a regional project from which it benefits without enrolling in a regional transmission plan]." Order No. 1920-A, at P 323. As the CTOs noted in their request for clarification of the Commission's order on remand of the *El Paso* decision, the jurisdictional members of WestConnect remain open to considering a coordinated transmission owner framework that provides them reasonable assurance that they will not have to subsidize their non-jurisdictional counterparts *without requiring their enrollment*. See n.2, *supra*. By *banning* even the possibility of such voluntary arrangements the Commission violates FPA section 202(a), under which the Commission is affirmatively not only "empowered," but "*directed* to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy." 16 U.S. Code § 824a(a) (emphasis added).

II. *El Paso Elec. Co. v. FERC* Does Not Bar Public Utilities From Voluntarily Agreeing to a Transmission Owner Framework That Does Not Require Non-Jurisdictional Transmission Providers to Enroll in Regional Transmission Organizations.

In seeking clarification of the Commission's order on remand of the *El Paso* opinion, the CTOs pointed to the WestConnect public utility members' statement that they "would like to explore improving the WestConnect regional planning process through a future 205 filing, which could include returning to an improved version of the CTO structure that FERC might approve." See n. 1, *supra*. But, based on the Commission's misreading of the *El Paso* decision, WestConnect's public utility members would be banned from entering even voluntary agreements with non-jurisdictional transmission providers to engage in regional transmission planning that did not include enrollment of those non-jurisdictional entities. As noted in Section I, *supra*, nothing in the *El Paso* decision dictates that result.

The issue raised by the WestConnect public utilities in *El Paso* was their objection to being forced to subsidize projects from which non-jurisdictional utilities who did not accept cost allocation might nonetheless benefit. While both the Commission and the CTOs argued that this was unlikely - given the decades of cooperation between jurisdictional and non-jurisdictional utilities⁵ – it was on *this* issue that the public utilities prevailed over the dissent of Judge Southwick.⁶ But, as was evident from the settlement (rejected by the Commission),⁷ both the jurisdictional and non-jurisdictional utility members of WestConnect believed that the risk of subsidization perceived by the jurisdictional utilities could be sufficiently minimized to allow their long history of beneficial coordinated transmission planning to continue without CTO enrollment.⁸

In ruling out even the *possibility* that some form of CTO framework would be acceptable to public utilities in lieu of an enrollment mandate, the Commission has misconstrued *El Paso*. Its erroneous interpretation, moreover, is counterproductive to the Commission's professed goal of Order Nos. 1000 and 1920 – to encourage and enhance regional transmission planning.

III. The Commission's Ban on Joint Regional Transmission Planning by Public Utilities and Unenrolled Non-Jurisdictional Transmission Providers Is an Unacknowledged and Unexplained – and Hence Arbitrary Departure From Its Order No. 1000 Precedent.

It bears repeating that paragraph 323 of Order No. 1920-A is premised on a false binary choice – that non-jurisdictional utilities are not required to enroll in a transmission planning region and can only participate if they enroll. In voicing their support for a CTO framework more than a decade ago, the WestConnect public utilities explained why enrollment by non-

⁵ *El Paso, supra*, 76 F.4th at 369.

⁶ *Id.* at 369-72.

⁷ *Arizona Public Service Co. et al.*, 181 FERC ¶ 61,223 (2022).

⁸ *Id.* at P 14 (stating that its proposal would "limit circumstances causing free ridership" and make it "unlikely that a transmission project with a non-cost-bound coordinating transmission owner will move forward").

jurisdictional utilities was not a prerequisite to their participation in regional transmission planning, and in fact would run contrary to the goals of Order No. 1000:

It was precisely because of the presence of a large number of both public utility and non-jurisdictional utility transmission owners in the WestConnect region that the Jurisdictional Utilities strove to create a compliance structure that would be superior to one in which non-jurisdictional utilities unwilling to subject themselves to Order No. 1000 cost allocation would be excluded from the region's planning process entirely. The Jurisdictional Utilities intentionally sought to create a planning process structure that would permit non-jurisdictional utility participation in the regional process even for those non-jurisdictional utilities in the region that do not enroll in the region—a process that would identify the needs of the region as a whole (including the needs of non-jurisdictional utilities not formally enrolled in the region); that would evaluate projects seeking to meet those regional needs (without regard to whether the regional needs at issue stem from public utility or non-jurisdictional utility systems); and that would identify the more efficient or cost-effective projects that meet the region's needs.⁹

The Fifth Circuit's opinion states only that jurisdictional utilities are not "*required* to plan for the transmission needs of [non-jurisdictional utilities]." *El Paso, supra*, 76 F.4th at 362-363 (emphasis added). In other words, the jurisdictional utilities may voluntarily include unenrolled non-jurisdictional utilities in regional planning, provided that they have assurance that they will not thereby be required to subsidize projects that benefit non-jurisdictional utilities who decline to pay for the benefits they receive.

As the Commission has noted, it previously "accepted the WestConnect public utility transmission providers' proposed participation framework under which non-public utility transmission providers could participate in WestConnect as either enrolled transmission owners or coordinating transmission owners."¹⁰ "Order No. 1000," it has expressly held, "*does not preclude the enrolled public utility transmission providers in a transmission planning region*

⁹ *Public Service Co. of Colorado et al.*, Docket No. ER13-75, Motion for Leave to Answer and Answer of the WestConnect Public Utilities (filed Nov. 8, 2013).

¹⁰ *Public Service Co. of Colorado et al.*, 189 FERC ¶61,028 at P 6, citing *Public Service Co. of Colorado et al.*, 148 FERC ¶ 61,213 at P 55 (2014).

*from conducting transmission planning for non-enrolled non-public utility transmission providers if the enrolled public utility transmission providers elect to do so."*¹¹

That holding underpinned the coordinated transmission owner framework approved by the Commission and neither challenged, nor therefore addressed in *El Paso*. On the contrary, *El Paso* does not, nor could it, alter Order No. 1000's holdings, which were affirmed by the D. C. Circuit years ago.¹² WestConnect's CTO members make up a significant portion of the region's planning footprint and have historically funded about half of WestConnect's regional planning expenses. And, over the last decade, they have committed millions of dollars and thousands of hours of staff time to the WestConnect regional planning process in reliance on the Commission's approval of a CTO framework. The Commission's ruling barring public utility coordinated transmission planning with non-enrolled non-jurisdictional utilities improperly conflicts with that policy without acknowledgement or explanation – much less consideration of the CTOs' reliance interest in the Commission's prior approval of the CTO framework. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Dept. of Homeland Security v. Regents of the University of California*, 591 U.S. 1, 30 (2020) (agency must "be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.").

Order No. 1000 also required that "the scope of a transmission planning region should be governed by the integrated nature of the regional power grid."¹³ That requirement was important because, as the Commission noted about the WestConnect region, without the participation of

¹¹ *Public Service Co. of Colorado et al.*, 148 FERC ¶ 61,213 at P 55 (emphasis added).

¹² *South Carolina Public Service Authority v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

¹³ *Public Service Co. of Colorado et al.*, 189 FERC ¶ 61,028 at P 23 and n. 49 (2024), citing Order No. 1000, 136 FERC ¶ 61,051 at P 160 (2011).

non-jurisdictional utilities who are interspersed throughout the region and make up half its membership, WestConnect would be like "swiss cheese."¹⁴

One of the reasons the CTOs supported the CTO framework was institutional difficulties faced by public entities in agreeing to enrollment rather than case-by-case acceptance of regional projects.¹⁵ WestConnect's public utility participants, moreover, have admitted that "because the public utility transmission providers in the WestConnect transmission planning region are not contiguous, *meaningful transmission development in the region is dependent on the participation of the non-public utilities.*"¹⁶ Order No. 1920-A, however, does not even acknowledge, much less explain how jurisdictional utilities barred from joint planning with non-enrolled non-jurisdictional utilities could meet Order No. 1000's integration requirement in a region like WestConnect. As the CTOs explained in their motion for clarification of the Commission's remand order, the Commission's ban on use of a CTO framework would all but ensure the failure of regional planning in a CTO-less WestConnect, directly contrary to the objectives of Order No. 1000, and the soon-to-be implemented Order 1920. The Commission's failure even to acknowledge its departure from existing policy, much less explain how a mandatory enrollment requirement would be consistent with Order No. 1000's integration requirement, was arbitrary. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).¹⁷

¹⁴ *Public Service Co. of Colorado et al.*, 142 FERC ¶ 61,206, at P 349 (2013).

¹⁵ *See, e.g., Public Service Co. of Colorado et al.*, Answer of Non-Public Utilities to Motion of American Wind Energy Association for Leave to Answer, pp. 2-3 and n. 4 (filed December 9, 2013) (citing Order No. 1000-A, 139 FERC ¶ 61,132, at P 622 and n. 734 (2012) and noting "institutional limitations, particularly the internal governmental authority approval processes [CTOs] follow" to get approval to participate in individual projects).

¹⁶ 142 FERC ¶ 61,206, at P 331 (emphasis added).

¹⁷ The Commission's order on remand of *El Paso* did purport to determine that WestConnect would still be an integrated region, even without the participation of the CTOs. *Public Service Co. of Colorado, et al.*, 189 FERC ¶ 61,028 at P 23 (2024). The Commission's reasoning: it had previously found that WestConnect was an "electrically integrated region" and that adding Deseret, Basin, and Tri-State as enrolled members would not change that conclusion. *Id.* at P 23. But Order No. 1920-A does not reference or incorporate that discussion. More importantly, in addition to the contradiction between the Commission's integration holding and the public utilities' admission that

CONCLUSION

For the reasons stated above, the CTOs ask the Commission to grant rehearing.

Respectfully submitted,
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they could not engage in coordinated regional transmission planning without CTO participation (discussed supra), as the CTOs have also explained, the flaw in the Commission's reasoning in its remand order was twofold.

First, it is premised on a false binary choice – that non-jurisdictional utilities are not required to enroll in a planning region and can only participate if they enroll. The Fifth Circuit's opinion states only that jurisdictional utilities are not "required to plan for the transmission needs of [non-jurisdictional utilities]." *El Paso Elec. Co. v. FERC*, 76 F.4th 352, 362-363 (5th Cir. 2023) (emphasis added). In other words, the jurisdictional utilities may voluntarily include unenrolled non-jurisdictional utilities in regional planning, provided that they have assurance that they will not thereby be required to subsidize projects that benefit non-jurisdictional utilities who decline to pay for the benefits they receive.

Second, while the Commission did previously find that WestConnect was an "electrically integrated region," that conclusion was premised on the participation of the non-jurisdictional utilities in a region that was otherwise like "swiss cheese." Order on Compliance Filings, 142 FERC ¶ 61,206, at P 349 (2013). It is sheer sophistry, moreover, to say that the departure of Sierra Pacific and Nevada Power from WestConnect did not diminish the electrical integration of the region because Basin Electric, Tri-State, and Deseret have since "enrolled as members." October 17 Order at P 23. Basin Electric and Tri-State were previously CTOs in WestConnect before their jurisdictional status changed.

Docket No. ER13-75, November 18, 2024 Motion for Clarification, n. 2, supra.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December 2024, I have served a copy of the foregoing document on the official service list compiled by the Office of the Secretary for the above-referenced proceeding.

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