
ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY, *et al.*, Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Respondent.

Case Nos. 12-1232, *et al.*

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

JOINT BRIEF OF PETITIONERS AND SUPPORTING INTERVENORS
CONCERNING TRANSMISSION PLANNING AND PUBLIC POLICY

Randolph Lee Elliott
MILLER, BALIS & O'NEIL, PC
1015 15th Street, N.W., 12th Floor
Washington, DC 20005-2605
(202) 296-2960
relliott@mbolaw.com

*Counsel for American Public Power
Association and National Rural
Electric Cooperative Association*

John Lee Shepherd, Jr.
William Rainey Barksdale
Karis Anne Gong
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005-2111
(202) 371-7338
John.Shepherd@skadden.com

Tamara L. Linde
Vice-President – Regulatory
Jodi L. Moskowitz
General Regulatory Counsel
PSEG SERVICES CORP.
80 Park Plaza, T-5G
Newark, NJ 07102
(973) 430-6409
Tamara.Linde@PSEG.com

Counsel for the PSEG Companies

Initial Brief: May 28, 2013

(Additional parties and counsel are listed in the overleaf.)

George Scott Morris
Luther Daniel Bentley, IV
ALABAMA PUBLIC SERVICE
COMMISSION
100 North Union Street, Suite 836
Montgomery, AL 36104
(334) 242-5200
scott.morris@psc.alabama.gov

*Counsel for Alabama Public Service
Commission*

Harvey L. Reiter
Jonathan D. Schneider
Jonathan Peter Trotta
STINSON MORRISON HECKER LLP
1775 Pennsylvania Avenue, N.W.,
Suite 800
Washington, DC 20006
(202) 785-9100
jschneider@stinson.com

*Counsel for South Carolina Public
Service Authority, and the Large Public
Power Council*

Cynthia S. Bogorad
William S. Huang
Spiegel & McDiarmid LLP
1333 New Hampshire Avenue, N.W.
Washington, DC 20036
(202) 879-4000
cynthia.bogorad@spiegelmd.com

*Counsel for Transmission Access Policy
Study Group*

Cynthia Brown Miller
Associate General Counsel
FLORIDA PUBLIC SERVICE
COMMISSION
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0851
(850) 413-6082
cmiller@psc.state.fl.us

*Counsel for Florida Public Service
Commission*

Andrew W. Tunnell
Ed R. Haden
Scott B. Grover
BALCH & BINGHAM LLP
1710 Sixth Avenue North
Birmingham, AL 35203
(205) 251-8100
atunnell@balch.com

*Counsel for Southern Company
Services, Inc.*

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of both the Federal Rules of Appellate Procedure and the local rules of this Court, the undersigned counsel, on behalf of the Petitioners and Intervenors participating in this brief, adopts the Certificate of Parties, Rulings, and Related Cases set forth in the Joint Statement of Facts Brief.

Respectfully submitted,

/s/ John L. Shepherd, Jr.

John Lee Shepherd, Jr.

SKADDEN, ARPS, SLATE,

MEAGHER & FLOM LLP

1440 New York Avenue, N.W.

Washington, DC 20005-2111

(202) 371-7338

john.shepherd@skadden.com

Counsel for the PSEG Companies

*And on behalf of Petitioners and
Intervenors supporting Petitioners*

May 28, 2013

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of both the Federal Rules of Appellate Procedure and the local rule of this Court, the undersigned counsel states as follows:

With the exception of the Transmission Access Policy Study Group (“TAPS”) described below, the corporate disclosure statement for all Petitioners and Intervenors participating in this brief are set forth in the Joint Statement of Facts Brief.

TAPS is a trade association of transmission-dependent utilities in more than 35 states, promoting open and non-discriminatory transmission access. TAPS members include municipal utilities, municipal joint action agencies, electric cooperatives, and an investor-owned utility. TAPS does not have any parent companies, and no publicly-held company has a 10% or greater ownership interest in TAPS.

TAPS is a trade association within the meaning of Circuit Rule 26.1(b) and thus is exempt from the requirement to list the names of its members that have issued shares or debt securities to the public.

Respectfully submitted,

/s/ John L. Shepherd, Jr.

John Lee Shepherd, Jr.

SKADDEN, ARPS, SLATE,

MEAGHER & FLOM LLP

1440 New York Avenue, N.W.

Washington, DC 20005-2111

(202) 371-7338

john.shepherd@skadden.com

Counsel for the PSEG Companies

*And on behalf of Petitioners and
Intervenors supporting Petitioners*

May 28, 2013

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*Authorities upon which we chiefly rely are marked with an asterisk.

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*Authorities upon which we chiefly rely are marked with an asterisk.

GLOSSARY

FPA	Federal Power Act
FERC	Federal Energy Regulatory Commission, the Respondent
ISO	Independent System Operator
Joint Statement of Facts Brief	Joint Initial Brief of Petitioners/Intervenors Concerning Statement of the Case, Statement of Facts, and Standards of Review
Joint Threshold Issues Brief	Joint Initial Brief of Petitioners/Intervenors in Support of Petitioners Concerning Threshold Issues
LSE	Load-serving entity
Order No. 1000	<i>Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities</i> , Order No. 1000, Final Rule, Docket No. RM10-23-000, FERC Stats. & Regs. ¶ 31,323 (2011), JA_____
Order No. 1000-A	<i>Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities</i> , Order No. 1000-A, Order on Rehearing and Clarification, Docket No. RM10-23-001, 139 FERC ¶ 61,132 (2012), JA_____
Order No. 1000-B	<i>Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities</i> , Order No. 1000-B, Order on Rehearing and Clarification, Docket No. RM10-23-002, 141 FERC ¶ 61,044 (2012), JA_____

PJM	PJM Interconnection, L.L.C.
PJM Comments	<i>Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities</i> , Docket No. RM10-23-000, Comments of PJM Interconnection, L.L.C. (Sept. 29, 2010), JA_____
PSEG or PSEG Companies	Public Service Electric and Gas Company, Public Service Enterprise Group Inc., PSEG Power LLC, and PSEG Energy Resources & Trade LLC, Petitioners
PSEG Rehearing	<i>Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities</i> , Docket No. RM10-23-001, Request for Rehearing and Clarification of the PSEG Companies (Aug. 22, 2011), JA_____
RTO	Regional Transmission Organization

The undersigned Petitioners and Intervenors respectfully submit this Brief on Transmission Planning and Public Policy.

JURISDICTIONAL STATEMENT

The Jurisdictional Statement is presented in the Joint Statement of Facts Brief.

STATEMENT OF ISSUES

Section 217(b)(4) of the Federal Power Act (“FPA”) directs the Federal Energy Regulatory Commission (“FERC”) to exercise its authority “in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service obligations of the load-serving entities.” 16 U.S.C. § 824q(b)(4). In Order No. 1000 and its sequels, FERC mandates that public utility transmission plans consider transmission needs driven by unspecified “Public Policy Requirements.” The questions presented are:

(1) Whether FERC contravened the statute by permitting this planning to ignore as optional “the reasonable needs of load-serving entities.”

(2) Whether FERC’s “Public Policy Requirements” mandate is impermissibly vague and ambiguous, unsupported by substantial evidence, departs from precedent without reasoned explanation, and fails to respond to Petitioners’ arguments.

STATUTORY ADDENDUM

All pertinent statutes and regulations are included in the Statutory Addendum to the Joint Statement of Facts Brief.

STATEMENT OF FACTS

The Statement of Facts is presented in the Joint Statement of Facts Brief.

SUMMARY OF THE ARGUMENT

1. The Public Policy Requirements mandate in Order No. 1000 contravenes Congress' directive that FERC exercise its FPA authority "in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the[ir] service obligations." 16 U.S.C. § 824q(b)(4). FERC treats this statutory directive as an optional factor for potential consideration in planning along with myriad other policy requirements. This action conflicts with the statute's plain meaning and with FERC precedent holding that section 217 imposes an obligatory "preference" for load-serving entities.

2. FERC's Public Policy Requirements mandate is impermissibly vague. This violates the clear notice doctrine and sows confusion among transmission providers as evidenced by FERC's rejection of several recent compliance filings. FERC's statutory charge is to promote the reliable delivery of electric power at reasonable prices; that does not include promoting other public policies, no matter

how well-intentioned. Rather than concentrate on matters within its jurisdiction—reliability and rates—FERC has transformed the transmission planning process into an unwieldy, uncertain, and contentious forum for implementing unidentified public policies outside its purview. This action also raises significant federalism concerns because state policies often conflict.

3. FERC’s mandate is arbitrary and capricious because it is based on a presumed theoretical threat, not substantial evidence, and it ignores evidence that contradicts FERC’s theoretical concerns.

4. Order No. 1000 allows transmission providers to consider transmission needs based on *unenacted* public policies. This speculation further burdens the planning process and undermines competitive wholesale markets.

STANDING

The statement of Standing is presented in the Joint Statement of Facts Brief.

ARGUMENT¹

Order No. 1000 requires public utility transmission providers to amend their tariffs to “provide for the consideration of transmission needs driven by Public Policy Requirements.” *E.g.*, Order No. 1000 at P 203, JA____. “Public Policy Requirements” are circularly defined as “public policy requirements established by

¹ The standard of review is described in the Joint Statement of Facts Brief. Petitioners American Public Power Association and National Rural Electric Cooperative Association and Intervenor Transmission Access Policy Study Group join only Section I of the Argument.

state or federal [or local] laws or regulations.” *Id.* at P 2, JA____; Order No. 1000-A at P 102 & n.140, JA____; *id.* at P 319, JA____ (adding “laws or regulations passed by a local governmental entity”). Consideration means “(1) the identification of transmission needs driven by Public Policy Requirements; and (2) the evaluation of potential solutions to meet those needs.” Order No. 1000 at P 205, JA____. The process must allow “all stakeholders” to provide input “regarding the transmission needs they believe are driven by Public Policy Requirements” and must describe how transmission providers “will identify, out of this larger set of needs, those needs for which transmission solutions will be evaluated.” *Id.* at PP 207, 209, JA____-____. Transmission providers also may consider “transmission needs driven by additional public policy objectives not specifically required by . . . laws or regulations.” *Id.* at P 216, JA____.

I. FERC’S PUBLIC POLICY REQUIREMENTS MANDATE CONTRAVENES FPA SECTION 217

A. Order No. 1000 Unlawfully Demotes Congress’ Directive in Section 217(b)(4) to an Optional Planning Consideration

In 2005, Congress amended the FPA to include section 217(b)(4), which requires that FERC “shall exercise the authority of [FERC] under this Act in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service obligations of the load-serving entities.” 16 U.S.C. § 824q(b)(4). A “load-serving entity” is a

utility, whether a transmission provider or customer, with a “service obligation” created “under Federal, State, or local law or under long-term contracts to provide electric service to end-use customers or to a distribution utility.” *Id.* § 824q(a)(2)-(3).

By its terms, FPA section 217(b)(4) does not give FERC additional authority, but imposes specific objectives that constrain FERC’s discretion when, as here, FERC acts under FPA section 206 to remedy transmission rates and related practices that are “unjust, unreasonable, unduly discriminatory or preferential.” 16 U.S.C. § 824e(a). By directing that FERC “shall exercise [its] authority” to achieve FPA section 217(b)(4)’s objectives, Congress issued “a command that admits of no discretion.” *Association of Civil Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994); *see National Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661-62 (2007).

In its orders below, FERC defied that command to meet the needs of load-serving entities and—referring to section 217—“decline[d] to mandate the consideration of transmission needs driven by any *particular* Public Policy Requirement.” Order No. 1000 at P 215, JA____. Rather, FERC intended the transmission planning process to “be flexible enough to allow for stakeholders to suggest consideration of transmission needs driven by *any* Public Policy Requirement, including *potential* consideration of requirements under . . . FPA

section 217.” *Id.* (emphasis added). On rehearing, FERC reaffirmed that it “will not prescribe *any* statutes and regulations as Public Policy Requirements for purposes of Order No. 1000, *including section 217(b)(4).*” Order No. 1000-A at P 176, JA____ (emphasis added).

FERC’s demotion of section 217(b)(4) is contrary to the statute’s plain meaning. It relegates the very transmission needs that Congress singled out for focus in planning—the reasonable needs of load-serving entities to meet their service obligations—to just another optional factor for “potential consideration” in the planning process along with needs driven by every other policy established by federal, state, or local laws and regulations. Order No. 1000 at P 215, JA____. Regardless of whether FERC may require transmission providers to consider transmission needs driven by other, unidentified public policies, FERC does not have authority to make section 217(b)(4) optional or to mandate a planning regime in which consideration of the needs of load-serving entities may be ignored. Yet this is precisely what Order No. 1000 does. *See* Order No. 1000-A at PP 173, 176, JA____, ____.

B. FERC’s Counterarguments Are Unavailing

Below, FERC defended this action as “consistent with” section 217(b)(4) because its planning reforms “will enhance the transmission planning process for all interested entities, including load-serving entities” and “assist load-serving

entities and others in better meeting their transmission needs.” Order No. 1000-A at PP 168, 173, JA____, _____. FERC “believe[d] that these specific reforms may assist load-serving entities in meeting their transmission needs, especially because many, if not all, of the Public Policy Requirements will likely impose legal obligations on load-serving entities.” *Id.* at P 175, JA_____.

Leaving aside FERC’s naked speculation, its expressly “flexible” approach to considering Public Policy Requirements belies any argument that it complies with FPA section 217(b)(4). Order No. 1000 expressly refuses to require the transmission needs of load-serving entities specified in section 217(b)(4) be considered in the mandated planning process. *Id.* at P 176, JA_____.

On rehearing, FERC argued that its action was consistent with section 217(b)(4) by pointing to its prior statement in Order No. 890-A that it “ha[d] a duty under FPA section 206 to remedy undue discrimination in [transmission planning] and a further obligation under FPA section 217 to act in a way that facilitates the planning and expansion of facilities to meet the reasonable needs of LSEs [load-serving entities].” Order No. 1000-A at P 169, JA_____ (quoting *Preventing Undue Discrimination and Preference in Transmission Serv.*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 172 (2007)).² But FERC’s orders nowhere explain how the new Public Policy Requirements mandate, which makes the transmission

² Order No. 890-A was followed by three rehearing orders, irrelevant here.

needs specified in the statute *optional* considerations, meets FERC's "obligation under FPA section 217." *Id.*

Lastly, FERC argued that treating section 217(b)(4) as just another Public Policy Requirement for potential consideration was permissible—and doing otherwise would constitute an undue preference—because section 217(b)(4) does not require “that we should ensure that our transmission planning and cost allocation reforms give systematic preference to [load-serving entities].” Order No. 1000 at P 108, JA____. But FERC has previously held that section 217(b)(4) does exactly that. In Order No. 681, a rulemaking addressing long-term firm transmission rights, FERC held that “a broader preference for load serving entities in general vis-à-vis non-load serving entities is fully supported by the statute” and that section 217 “provides a general ‘due’ preference for load serving entities to obtain long-term firm transmission rights.”³

When confronted with this inconsistency, FERC initially responded that its prior statements concerned “long-term firm transmission rights supported by *existing* transmission capacity,” while Order No. 1000 concerns “the planning and cost allocation for *new* transmission.” Order No. 1000-A at PP 171-72, JA____.

³ *Long-Term Firm Transmission Rights in Organized Elec. Mkts.*, Order No. 681, FERC Stats. & Regs. ¶ 31,226 at PP 319, 320 (2006). FERC later issued two rehearing orders, neither relevant here. Section 217(b)(4) also directs FERC to “enable[] load-serving entities to secure firm transmission rights . . . on a long-term basis” to meet their service obligations. 16 U.S.C. § 824q(b)(4).

That distinction was untenable, and FERC later acknowledged that Order No. 681 also applied the statute's preference to transmission "upgrades," *i.e.*, *new* transmission capacity subject to Order No. 1000. Order No. 1000-B at P 11, JA____-____. Nevertheless, FERC refused to acknowledge "any inconsistency" between Order No. 681 and its new planning mandate. *Id.* FERC neither recognized that its interpretation of section 217(b)(4) had changed nor explained why the statutory "due" preference for load-serving entities should become a merely optional planning consideration.

Because Order No. 1000 mandates planning in which the reasonable transmission needs of load-serving entities may be ignored, the order contravenes section 217(b)(4) and should be remanded for reconsideration consistent with the statute's directive.

II. FERC'S PUBLIC POLICY REQUIREMENTS MANDATE IS IMPERMISSIBLY VAGUE

In addition to defying an express statutory command, FERC's Public Policy Requirements mandate fosters uncertainty and fails to provide transmission owners clear notice of what they are required to do. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012); *accord, e.g., Hayes v. New York Attorney Grievance Comm. of the Eighth Judicial Dist.*, 672 F.3d 158, 169-70 (2d Cir. 2012); *Trinity*

Broad. of Fla., Inc. v. FCC, 211 F.3d 618, 628-32 (D.C. Cir. 2000); *General Elec. Co. v. EPA*, 53 F.3d 1324, 1328-31 (D.C. Cir. 1995). A regulation is void for vagueness where, as here, it “impermissibly delegates basic policy matters . . . for resolution on an ad hoc and subjective basis.” *Chatin v. Coombe*, 186 F.3d 82, 89 (2d Cir. 1999) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)).

Where an agency’s rule is too vague and ambiguous to provide clear notice about what regulated entities must do, then the rule is not only arbitrary and capricious, but also raises due process concerns. *See, e.g., Fox Television*, 132 S. Ct. at 2317; *Timpinaro v. SEC*, 2 F.3d 453 (D.C. Cir. 1993). In *Timpinaro*, this Court found a rule prohibiting certain trading activities on behalf of “professional trading accounts” was vague because it was “subject to seemingly open-ended interpretation” such that “a trader would be hard pressed to know when he is in danger of triggering an adverse reaction” by regulators. *Timpinaro*, 2 F.3d at 460. This Court directed the SEC to reconsider its rule and whether to provide “greater guidance, perhaps by specifying some numerical thresholds.” *Id.* The instant situation is similar. Without a clearer rule or significant additional guidance, transmission providers will have great difficulty discerning exactly what FERC has commanded them to do.

A. FERC Failed to Provide Sufficient Guidance as to Which Public Policies Must Be Considered

“Public Policy Requirements” is a vague and vacuous term. *Cf. Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 494-95 (D.C. Cir. 2010) (describing “in the public interest” as a “vague or vacuous” term) (citation omitted). PSEG and PJM Interconnection, L.L.C.’s (“PJM”) argued below “that FERC’s requirements on public policy planning suffered from a lack of sufficient details and as such were not ‘actionable’ or ‘implementable.’” PSEG Rehearing at 48-49, JA____-____ (quoting PJM Comments, L.L.C. at 5, JA____). “To be actionable—which is to say, result in the transmission planner directing and the transmission developer siting and constructing actual facilities—[FERC] must articulate an identifiable public policy in the form of assumptions, criteria and metrics that transmission planners can translate into an implementable transmission plan.” *Id.* (same) (quoting PJM Comments at 7, JA____).

In Order No. 1000, FERC vaguely defines “Public Policy Requirements” as “public policy requirements established by [local,] state or federal laws or regulations.” Order No. 1000 at P 2, JA____; Order No. 1000-A at P 319, JA____. Instead of clearing up the ambiguity it created by using a defined term in its own definition, FERC expanded upon what it meant by “state or federal laws or regulations.” *Id.* FERC repeatedly shied away from specifying what it meant by “public policies,” declining to designate or exclude “any particular state or federal

law or regulation from the definition of Public Policy Requirements.” Order No. 1000-A at P 319, JA____; Order No. 1000 at PP 209-10, 214-15, JA____-____. In a subsequent compliance filing, FERC has even refused to limit its order to Public Policy Requirements that are consistent with the FPA, directing the California ISO to remove such language from its tariff. *See California Indep. Sys. Operator Corp.*, 143 FERC ¶ 61,057 at PP 86-87 (2013); *id.* at ____ (Clark, Comm’r, dissenting).

FERC’s silence is fatal for two reasons. First, it leaves transmission providers inundated with myriad public policies that they *must* consider. In practice, the range of public policies is limited only by the imagination of stakeholders. There is no requirement that a law expressly state that it is intended to drive, affect, or relate to transmission needs. Moreover, virtually any public policy could be said to drive transmission needs. Job creation, urban development, community planning, and land use are but a few examples of public policies that stakeholders may seek to force transmission providers to consider.⁴

Second, FERC never addressed PSEG’s other concern—that the public policy must come “in the form of assumptions, criteria and metrics that

⁴ In partially rejecting a recent compliance filing, FERC acknowledged that Public Policy Requirements are “not limited to those that provide transmission-related benefits.” *New York Indep. Sys. Operator, Inc.*, 143 FERC ¶ 61,059 at P 138 (2013).

transmission planners can translate into an implementable transmission plan.” While transmission providers have experience implementing concrete requirements, they should not be expected to plan for transmission needs that someone speculates may arise from generic public policies. FERC’s failure to address this issue warrants remand. *See PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 208-10 (D.C. Cir. 2011).

B. FERC Failed to Explain How Competing Policies Must Be Weighed

FERC essentially delegated to ISOs and RTOs, which generally encompass multiple states, the awkward task of considering conflicting state public policies. If a RTO plans or allocates costs on the basis of one state’s public policy, all of its customers will be forced to adopt (and pay for) that state’s policy agenda. FERC provided no guidance about how to reconcile and prioritize different or conflicting public policies. This action also raises significant federalism concerns because RTOs, unlike government officials, are not politically accountable for their actions. *See New York v. United States*, 505 U.S. 144, 168-69 (1992). Unaccountable organizations selecting and promoting some public policies over others, without any guidance from their regulator, is not an exemplar of uniformity, efficiency or anything but the result of unreasoned decisionmaking.

PSEG argued below that FERC’s public policy mandate was arbitrary and capricious because FERC had “not offered guidance on how transmission

providers will reconcile the various competing public policy requirements in a large RTO such as PJM.” PSEG Rehearing at 49, JA____. Although FERC acknowledged PSEG’s concern, Order No. 1000-A at P 304, JA____, it side-stepped PSEG’s argument.

FERC responded that (i) “[i]t is not the function of the transmission planning process to reconcile state policies” and (ii) it is the transmission providers’ function to help utilities comply with the laws of their respective states by “considering in the transmission planning process, but not necessarily including in the regional transmission plan, the new transmission facilities needed by” utilities to meet their respective obligations. Order No. 1000-A at P 327, JA____-____. This is nonsense. “Helping” multiple utilities meet conflicting state law obligations *is* reconciliation. In any event, PSEG’s concern is not that the mandate requires transmission providers to build facilities to address every state requirement, but rather that FERC provided no guidance about how to weigh or decide between conflicting state policies. This important argument remains unaddressed, warranting remand. *See PSEG Energy*, 665 F.3d at 208-10.

C. FERC’s Public Policy Requirements Mandate Has Sown Confusion

The unfortunate but unsurprising result of FERC’s ambiguous Public Policy Requirements mandate is that many transmission providers have been unable to amend their tariffs to FERC’s satisfaction, causing FERC to reject that part of their

compliance filings. FERC, for example, partially rejected PJM's compliance filing because it failed to set forth "just and reasonable and not unduly discriminatory" method for identifying which *particular* public policies it would evaluate for transmission solutions. *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214 at P 115 (2013); *see also South Carolina Elec. & Gas Co.*, 143 FERC ¶ 61,058 at P 116 (2013); *NorthWestern Corp.*, 143 FERC ¶ 61,056 at PP 83-87 (2013); *Public Serv. Co. of Colo.*, 142 FERC ¶ 61,206 at PP 172, 200 (2013); *Maine Pub. Serv. Co.*, 142 FERC ¶ 61,129 at P 41 (2013). This confusion about what FERC actually ordered will only be exacerbated once transmission providers attempt to incorporate FERC's clumsy and unmanageable mandate into their planning processes.

III. THE PUBLIC POLICY REQUIREMENTS MANDATE IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND IS A SIGNIFICANT CHANGE FROM FERC PRECEDENT

A. FERC Did Not Justify Its Rulemaking

FERC asserts that its Public Policy Requirements mandate is needed (i) to "remedy opportunities for undue discrimination" and (ii) because without the mandate, "the needs of wholesale customers may not be accurately identified." Order No. 1000 at PP 203-04, JA____-____. FERC wrongly justified its mandate solely on a presumed "theoretical threat." *See* Order No. 1000 at PP 52-53, JA____; Order No. 1000-A at PP 51, 57, JA____, _____. Not only did FERC

inexplicably fail to develop an evidentiary record of actual problems, it also (i) failed to address concerns that its mandate would harm transmission planning by injecting contention and litigation into the planning process, *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,215 at 62,449 (2013) (Clark, Comm'r, dissenting); (ii) failed to rebut data that showed FERC's concerns were not justified, *see* PSEG Rehearing at 46-47 & n.156, JA____-____; and (iii) failed to explain why its new industry-wide mandate was necessary given its finding that many regions already would comply with the mandate, *see* Order No. 1000 at P 82 & n.72, JA____-____. For the reasons set forth above and in the Joint Threshold Issues Brief at Sections II-III, this falls far short of reasoned decisionmaking.

B. FERC Changed Course and Stepped Outside Its Traditional Role

FERC precedent is sorely at odds with its new approach. In 2007, PJM proposed a flexible approach to incorporate seven congestion metrics into its economic transmission planning process. FERC unequivocally rejected PJM's proposal as too "vague," finding that "parties opposing a project (or the cost allocation that will result from the project) could contest PJM's assumptions and analysis," thus causing "greater uncertainty that could adversely affect decisions by private investors." *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,265 at P 30 (2007), *order on reh'g*, 123 FERC ¶ 61,051 (2008). FERC directed PJM "to file a formulaic approach . . . that describes exactly how any metrics will be calculated,

weighed, considered and combined.” *Id.* at P 31 (footnote omitted). These same objections strongly weigh against FERC’s new Public Policy Requirements mandate.

These public policies may be laudable, but their promotion is not commensurate with FERC’s limited statutory role. In *NAACP v. FPC*, for example, the Supreme Court held that the inclusion of the term “public interest” in the FPA was “not a broad license to promote the general public welfare;” in that instance, the elimination of employment discrimination for the sake of the public interest. 425 U.S. 662, 669-70 (1976).

Additionally, FERC has recognized its limited role in the promotion of environmental policies under the National Environmental Policy Act of 1969, holding that it has no authority to require environmental impact studies because Congress withheld from FERC authority to regulate facility siting. *See Monongahela Power Co.*, 39 FERC ¶ 61,350 at 62,097, *reh’g denied*, 40 FERC ¶ 61,256 (1987); *see also Southern Co. Servs., Inc.*, 22 FERC ¶ 61,047 at 61,084 (1983); *Southern Co. Servs., Inc.*, 12 FERC ¶ 61,081 at 61,161 (1980); *NEPOOL Power Pool Agreement*, 48 FPC 1477 (1972). But FERC has failed to carry this principle forward in Order No. 1000.

IV. FERC'S UNREASONED RULEMAKING WILL UNDERMINE WHOLESALE ENERGY MARKETS

Order No. 1000 allows transmission providers to consider “additional public policy objectives” *not* enacted by statutes or regulations. Order No. 1000 at P 216, JA____. The divination of future public policy objectives is not a transmission provider’s historical role and it will undermine wholesale energy markets by prompting premature and inefficient capital investments to comply with inchoate policies that may never be enacted. Future market participants will be constrained by choices that transmission providers make in the present. FERC acknowledged this argument, *see* Order No. 1000-A at P 304, JA____, but never addressed it. This requires remand. *See PSEG Energy*, 665 F.3d at 208-10.

CONCLUSION

For the reasons set forth above, the petitions for review should be granted.

Respectfully submitted,

/s/ Randolph Lee Elliott

Randolph Lee Elliott
MILLER, BALIS & O'NEIL, PC
1015 15th Street, N.W., 12th Floor
Washington, DC 20005-2605
(202) 296-2960
relliott@mbolaw.com

*Counsel for American Public Power
Association and National Rural
Electric Cooperative Association*

/s/ John L. Shepherd, Jr.

John Lee Shepherd, Jr.
William Rainey Barksdale
Karis Anne Gong
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005-2111
(202) 371-7338
John.Shepherd@skadden.com

Tamara L. Linde
Vice-President –Regulatory
Jodi L. Moskowitz
General Regulatory Counsel –
Operations and Compliance
PSEG SERVICES CORP.
80 Park Plaza, T-5G
Newark, NJ 07102
(973) 430-6409
Tamara.Linde@PSEG.com

Counsel for the PSEG Companies

/s/ George Scott Morris

George Scott Morris
Luther Daniel Bentley, IV
ALABAMA PUBLIC SERVICE
COMMISSION
100 North Union Street, Suite 836
Montgomery, AL 36104
(334) 242-5200
scott.morris@psc.alabama.gov

*Counsel for Alabama Public Service
Commission*

/s/ Harvey L. Reiter

Harvey L. Reiter
Jonathan D. Schneider
Jonathan Peter Trotta
STINSON MORRISON HECKER LLP
1775 Pennsylvania Avenue, N.W.,
Suite 800
Washington, DC 20006
(202) 785-9100
jschneider@stinson.com

*Counsel for South Carolina Public
Service Authority, and the Large
Public Power Council*

/s/ Cynthia S. Bogorad

Cynthia S. Bogorad
William S. Huang
Spiegel & McDiarmid LLP
1333 New Hampshire Avenue, N.W.
Washington, DC 20036
(202) 879-4000
cynthia.bogorad@spiegelmc.com

*Counsel for Transmission Access
Policy Study Group*

/s/ Cynthia B. Miller

Cynthia Brown Miller
Associate General Counsel
FLORIDA PUBLIC SERVICE
COMMISSION
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0851
(850) 413-6082
cmiller@psc.state.fl.us

*Counsel for Florida Public Service
Commission*

/s/ Andrew W. Tunnell

Andrew W. Tunnell
Ed R. Haden
Scott B. Grover
BALCH & BINGHAM LLP
1710 Sixth Avenue North
Birmingham, AL 35203
(205) 251-8100
atunnell@balch.com

*Counsel for Southern Company
Services, Inc.*

CERTIFICATE AS TO LENGTH OF BRIEF

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and the scheduling orders dated March 5, 2013 and May 17, 2013, in the above-captioned, I hereby certify that the foregoing document contains no more than 3,800 words (3,793 words using the word-count feature in Microsoft Word) not including the tables of contents and authorities, glossary, signature blocks, and certificates of counsel.

Respectfully submitted,

/s/ John L. Shepherd, Jr.

John Lee Shepherd, Jr.

SKADDEN, ARPS, SLATE,

MEAGHER & FLOM LLP

1440 New York Avenue, N.W.

Washington, DC 20005-2111

(202) 371-7338

john.shepherd@skadden.com

Counsel for the PSEG Companies

*And on behalf of Petitioners and
Intervenors supporting Petitioners*

May 28, 2013

CERTIFICATE OF SERVICE

Pursuant to Rule 31 of the Federal Rules of Appellate Procedure, I hereby certify that on May 28, 2013, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that I have served the foregoing upon counsel listed in the Service Preference Report via email through the Court's CM/ECF system, and via email and U.S. Mail on the parties indicated below:

Lyle David Larson
BALCH & BINGHAM LLP
1901 Sixth Avenue North
Suite 1500
Birmingham, AL 35203-4642
Email: llarson@balch.com

Neil Lawrence Levy
KING & SPALDING LLP
1700 Pennsylvania Avenue, N.W.
Suite 200
Washington, DC 20006-4706
Email: nlevy@kslaw.com

Frank Rich Lindh
CALIFORNIA PUBLIC UTILITIES COMMISSION
Room 5138
505 Van Ness Avenue
San Francisco, CA 94102
Email: frl@cpuc.ca.gov

Glen L. Ortman
STINSON MORRISON HECKER LLP
1775 Pennsylvania Avenue, N.W.
Suite 800
Washington, DC 20006
Email: gortman@stinson.com

Markham Allen Quehrn
PERKINS COIE LLP
10885 N.E. Fourth Street
The PSE Building, Suite 700
Bellevue, WA 98004-5579
Email: mquehrn@perkinscoie.com

Respectfully submitted,

/s/ John L. Shepherd, Jr.
John Lee Shepherd, Jr.
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005-2111
(202) 371-7338
john.shepherd@skadden.com