

Subcommittee on Energy
Hearing on
“Oversight of FERC: Ensuring Its Actions Benefit Consumers and the Environment”
June 12, 2019

The Honorable Bernard L. McNamee
Commissioner
Federal Energy Regulatory Commission

The Honorable Paul D. Tonko (D-NY)

1. While distributed energy resources and storage are playing a growing role in our electricity system, transmission remains the backbone of our electricity infrastructure. As more utility-scale renewables are developed far from centers of demand, this infrastructure will become even more necessary. However, we know these projects are incredibly difficult to plan, site, permit, and build.
 - a. What in your opinion can FERC do to provide greater incentives to increase the utilization of existing transmission infrastructure through the deployment of advanced technologies and/or adoption of practices to maximize capacity and efficiency?

RESPONSE: The thoughtful deployment of advanced transmission technologies to maximize the capacity and efficiency of the transmission system is an important issue. The use of such technologies can improve reliability, reduce congestion costs, and defer or offset the need for large capital investments in the transmission system, thereby lowering costs to consumers. As the Chairman notes in his response to this question, the Commission issued a Notice of Inquiry regarding the Commission’s electric transmission incentives policies in Docket No. PL19-3-000. The Notice of Inquiry included questions regarding both advanced technologies and how to enhance the capacity, efficiency, and operation of the transmission grid. *See Inquiry Regarding the Commission’s Electric Transmission Incentives Policy*, 166 FERC ¶ 61,208, at P 39 (2019). In addition, Commission staff will be hosting a technical conference on September 10 and 11, 2019 to discuss issues relating to transmission line ratings with a focus on dynamic and ambient-adjusted line ratings. I will consider the record in these proceedings and make a reasoned decision based on the law and the facts.

- b. What are your recommendations for Congress to promote deployment of advanced transmission technologies on existing infrastructure?

RESPONSE: I do not have recommendations for Congress on this issue at this time.

2. We also know that the interregional planning process for new transmission infrastructure has not proven to be effective.

- a. What in your opinion can FERC do to improve the interregional transmission planning process?

RESPONSE: Interregional transmission planning is extremely complicated, involving conflicting interests, complex cost allocation issues, and usually a multitude of viable options. Though the issues involved in interregional transmission planning are complicated, I believe that it is important to keep working with public utilities and all stakeholders to make the process more efficient and transparent so as to reduce barriers, ensure reliability, and provide benefits to customers.

- b. What are your recommendations for Congress to promote a more effective interregional planning process?

RESPONSE: I do not have recommendations for Congress on this issue at this time.

- c. What safeguards should be considered to ensure there is transparency, efficiency, and fairness in that process?

RESPONSE: Ensuring that the interregional transmission planning process is transparent, efficient, and fair is very important. As a Commission, we must be vigilant in balancing the concerns of all interested stakeholders.

3. There are many regions of the nation with high-potential for clean energy deployment and growing interconnection queues. It is my understanding that Texas has successfully aligned incentives to encourage transmission construction to connect those areas with demand centers.

- a. In your opinion, what can FERC do outside of ERCOT to ensure right-sized transmission capacity is developed to meet high-potential clean energy regions?

RESPONSE: The Commission has supported initiatives to promote transmission development to deliver power generated by location-constrained resources. Of course, there is not a one-size fits all approach to transmission development. The

electric grid is a patchwork of various systems that has been built over a long period of time and by different entities. As a result, different regions have different system needs, and the Commission has long recognized the need for different approaches based on regional needs. *See, e.g., Standardization of Generator Interconnection Agreements & Procedures*, 104 FERC ¶ 61,103, at P 26 (2003) (allowing for deviations from the *pro forma* large generator interconnection procedures and agreements based on “regional differences” and setting standards by which such deviations would be reviewed depending on the independence of the applicant). I think it is important for the Commission to continue to consider opportunities for new transmission initiatives within the framework of the Commission’s various statutory authorities. Furthermore, I believe that it is important to keep working with public utilities and all stakeholders to make the process more efficient and transparent so as to reduce barriers, ensure reliability, and provide benefits to customers.

- b. What are your recommendations for Congress to promote efficient development of resources in these regions?

RESPONSE: I do not have recommendations for Congress on this issue at this time.

The Honorable Marc Veasey (D-TX)

1. Standard license Article 5 of the conditions that the Commission includes in licenses for major hydroelectric projects affecting navigable waters of the United States requires licensees to acquire and retain sufficient land or rights to use lands needed to construct, maintain, and operate their projects. In the past, the Commission has taken the position that if project operations require the acquisition of additional lands or use rights, the project’s boundaries may be amended to include lands previously outside of the project boundaries. E.g., *PacifiCorp*, 105 FERC P61, 237 at ¶114 (2003).

- a. Do you believe that the Commission’s hydroelectric licensing jurisdiction should be limited to a project’s original boundary or should the Commission retain its current authority to require a licensee to acquire sufficient land or rights to use lands to operate the project, even if those lands lie outside a project’s historic boundary?

RESPONSE: The Federal Power Act authorizes the Commission to license hydropower projects that “will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, for the adequate protection, mitigation, and

enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes” 16 U.S.C. § 803(a)(1) (2012). To ensure that the project will be best adapted to a comprehensive plan of the waterway, the Commission’s regulations require that the licensed project boundary “must enclose only those lands necessary for operation and maintenance of the project and for other project purposes, such as recreation, shoreline control, or protection of environmental resources.” 18 C.F.R. § 4.41(h)(2)(2018).

Similar to the Chairman’s answer to this question, over the course of a 30 to 50 year license term, environmental conditions and land uses (e.g., recreation) in a project area may change significantly and a new license may need to consider such changes. In any license application, I will base my decisions on the law and the facts in the proceeding. Determining whether the Commission’s jurisdiction and authority should be modified is a decision for Congress.

- b. Do you believe this rule should be different for the Pensacola Hydroelectric Project, FERC No. 1494, than for other hydroelectric projects licensed by the Commission? If so, why?

RESPONSE: Because the Pensacola Hydroelectric Project’s¹ 30 year license will expire in March 2022, section 15 of the Federal Power Act requires GRDA to file a new license application by March 2020. 16 U.S.C. § 808(c)(1) (2012). The issue of the project boundary will be pending before the Commission at that time. I will consider the law and the facts to make a determination about the issues related to the project boundary and the use of the waterway.

2. According to the Compliance Handbook published by the Commission’s Division of Hydropower Administration and Compliance, many licenses “contain conditions that require specific reservoir water levels to be continuously maintained or maintained during specified periods of time . . . or target elevations within required reservoir operating bands. The purpose of these water-level requirements is to protect and enhance the recreational, scenic, and environmental resource values of a project. Non-compliance with the water-level requirements of a project reservoir could adversely affect the project’s environmental integrity and quality.”

- a. Do you believe that the Commission needs the authority to prescribe reservoir water levels in its hydroelectric licenses in order to fulfill its statutory responsibilities under the Federal Power Act?

¹ The Pensacola Hydroelectric Project is owned and operated by the Grand River Dam Authority (GRDA).

RESPONSE: The Federal Power Act authorizes the Commission to “require the modification of any project” to ensure that a licensed hydropower project “will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes” 16 U.S.C. § 803(a)(1) (2012). Further, the FPA authorizes the Commission to require “other conditions not inconsistent with the provisions of [the] Act.” *Id.* § 803(g). In any specific case, I will consider the law and the facts in making a decision. Determining whether the Commission’s jurisdiction and authority should be modified is a decision for Congress.

The Honorable Bill Johnson (R-OH)

1. Ensuring electricity markets do not unduly prohibit the entrance of new energy technologies is an extremely difficult task. The FERC must balance a wide and complex array of stakeholder interest and concerns when looking into these issues, and ultimately ensure that the rules are fair and that the rule of law is followed. Commissioner McNamee expressed concern in this regard to Order No. 841, particularly relating to the separation of federal and state responsibilities. Commissioner McNamee, can you please elaborate on this concern?

RESPONSE: As I discuss in greater detail in my separate statement to Order No. 841-A,² which I am attaching to these QFR responses, the Commission’s jurisdiction is limited to the transmission of electric energy in interstate commerce and wholesale sales in interstate commerce (i.e., sales for resale), and the facilities used for such transmissions or sales. 16 U.S.C. § 824(b)(1). Notably, the Federal Power Act explicitly excludes from Commission jurisdiction “facilities used in local distribution.” *Id.* States have historically exercised jurisdiction over retail sales (i.e., sales to the consumer) and the distribution system, as well as the facilities that make up the distribution system. As I stated in my partial concurrence and dissent to Order 841-A:

[T]he majority has exceeded the Commission’s jurisdictional authority by depriving the states of the ability to determine whether distribution-level ESRs may use distribution facilities so as to access the wholesale markets. By doing so, in my view, the

² 167 FERC ¶ 61,154 (2019).

Commission claimed jurisdiction over functions and assets reserved by statute to the states. Further, even if the majority thought they could rightly exercise jurisdiction in this matter, I think they should have furthered the path of “cooperative federalism” by permitting the states to choose whether or not behind-the-meter and distribution-connected ESRs may participate in the wholesale markets through an opt-out provision.³

To be clear, I think that ESRs have the potential to transform and benefit the electric grid. Indeed, I made this clear in my separate statement on Order No. 841-A. I wish here to reiterate that I supported, and continue to support, the Commission’s storage orders to the extent that they removed barriers to entry and enhanced competition in the wholesale markets and permit ESRs located on the transmission system to participate in the markets on equal footing with other resources.

- a. Can you please comment on FERC’s justification for how it approached Order No. 841?

RESPONSE: I was not a member of the Commission when Order No. 841 was being deliberated or when it was issued. However, I disagreed with the majority’s approach in Order No. 841-A, which upheld the Commission’s assertion of jurisdiction over ESRs on the distribution system and behind the meter to permit them to access the wholesale market. As I noted in my separate statement, “the majority has exceeded the Commission’s jurisdictional authority by depriving the states of the ability to determine whether distribution-level ESRs may use distribution facilities so as to access the wholesale markets.”

The Honorable David B. McKinley (R-WV)

1. We are concerned about an expansion of FERC jurisdiction into distribution and retail areas that state and local authorities currently regulate. In 2018, FERC finalized an order (Order NO. 841) to allow electric storage located on distribution facilities and at the retail level, which is regulated at state and local levels, to participate in RTO and ISO wholesale markets. However, this order does not allow state and local authorities to

³ *Elec. Storage Participation in Mkts. Operated by Reg’l Transmission Orgs. & Indep. Sys. Operators*, 167 FERC ¶ 61,154 (2019) (McNamee, Comm’r, concurring in part & dissenting in part, at P 3) (citing *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 779-80 (2016) (*EPSA*)) (footnote omitted).

determine whether it is appropriate for such participation to occur, in contrast to the 2008 FERC orders (Order Nos. 719 and 719-A) involving the aggregation of demand response resources located at the retail level for participation in RTO and ISO wholesale markets. Since demand response resources exist at the retail level, FERC recognized that state and local authorities have the authority to regulate this activity.

- a. By rejecting the cooperative federalism approach FERC established in its demand response order, doesn't the electric storage order expand FERC's jurisdiction at the expense of state and local authorities?

RESPONSE: Yes. As discussed in greater detail in my separate statement to Order No. 841-A, which I have attached to these QFR responses, and as summarized above in response to Congressman Johnson of Ohio, I believe that the majority's opinion in that order unlawfully expands the Commission's jurisdiction at the expense of state and local authorities.

- b. Can you explain the rationale embedded in the electric storage order for rejecting the cooperative federalism approach FERC established in its demand response order?

RESPONSE: Again echoing my above response to Congressman Johnson of Ohio, I was not a member of the Commission when Order No. 841 was being deliberated or when it was issued. However, I disagreed with the majority's approach on rehearing in Order No. 841-A, which upheld the Commission's assertion of jurisdiction over ESRs on the distribution system and behind the meter to permit them to access the wholesale market.

You are correct in pointing out that the Commission in Order Nos. 841 and 841-A (Storage Orders) went beyond the precedent established in the Demand Response (DR) orders. The DR orders were challenged by the Electric Power Supply Association (EPSA), among others, and the Supreme Court's decision in *EPSA* is directly relevant to the Storage Orders. As I noted in my separate statement:

[T]he *EPSA* Court concluded that the opt-out feature [granted to states] removed "any conceivable doubt as to its compliance with [FPA section 201(b)'s] allocation of federal and state authority."

I also note that, when the *EPSA* Court determined that the Commission's DR regulation did not improperly regulate retail electric sales, it did so by, in part, noting "whatever the effects at the retail level, every aspect of the regulatory plan happens exclusively on the wholesale market and governs

exclusively that market's rules." I believe that the requirement in the Storage Orders that states must permit distribution and behind-the-meter ESRs to use distribution facilities to access the wholesale markets creates a regulatory plan that fails to "happen[] exclusively" on the wholesale market and fails to exclusively govern the wholesale market's rules. The majority's position in this regard goes beyond the position supported by *EPSA*, which involved determining "how" resources will participate in the wholesale market. The issue has been expanded by the majority in this matter to include "whether" ESRs must be permitted to participate in the wholesale market by effectively mandating access to distribution facilities.⁴

The Honorable Billy Long (R-MO)

1. The last time the FERC Commissioners testified before this subcommittee, I asked Chairman McIntyre why City Utilities, a public utility owned by the City of Springfield, Missouri, is paying the highest energy cost in the Southwest Power Pool. I also asked why City Utilities is paying for transmission upgrades where the costs greatly exceed the benefits received, as shown by Southwest Power Pool's own study. The study shows that City Utility's benefit ratio is around .5, lower than the threshold of .8 needed to meet the Federal Power Act's Just and Reasonable Standard. At the same time, Chairman McIntyre expressed surprise that one entity would be paying substantially more for transmission service than others and promised to look into it.
 - a. Are you or any of the other commissioners aware whether a wide discrepancy in benefits to customers remains within SPP?

RESPONSE: As the Chairman notes in response to this question, the Commission issued an order denying the City Utilities of Springfield, Missouri's complaint against SPP on August 12, 2019. *City Utilities of Springfield, Mo. v. Sw. Power Pool, Inc.*, 168 FERC ¶ 61,085 (2019). The time period for requesting rehearing of the Commission order is still open, and therefore I cannot discuss the merits of this proceeding.

⁴ *Elec. Storage Participation in Mkts. Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators*, 167 FERC ¶ 61,154 (2019) (McNamee, Comm'r, concurring in part & dissenting in part, at PP 10-11) (footnotes & citations omitted).

2. On May 10th of last year at a hearing entitled “Examining the State of Electric Transmission Infrastructure: Investment, Planning, Construction, and Alternatives,” John Twitty testified on behalf of the TAPS Group about the benefits of joint transmission ownership arrangements as an effective means of getting needed transmission facilities built. For more than a decade, FERC has reportedly expressed strong support for such arrangements, however your support has not spurred additional joint ownership arrangements. The Commission has recently initiated a notice of inquiry regarding its transmission incentives policies.
 - a. Should the Commission do more to actively promote joint ownership arrangements involving public power entities?

RESPONSE: As you note, the Commission has started a proceeding to inquire about the Commission’s transmission incentives policies, which could include the use of incentives to promote joint ownership arrangements of transmission facilities with non-public utilities. *See Inquiry Regarding the Commission’s Electric Transmission Incentives Policy*, 166 FERC ¶ 61,208, at P 32 (2019). I will consider the record in that proceeding and make a reasoned decision based on the law and the facts about the role that joint ownership arrangements should have going forward.