

175 FERC ¶ 61,225
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

[Docket No. PL21-2-000]

State Voluntary Agreements to Plan and Pay for Transmission Facilities

(June 17, 2021)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of policy statement.

SUMMARY: This policy statement addresses state efforts to develop transmission facilities through voluntary agreements to plan and pay for those facilities. We clarify that Voluntary Agreements are not categorically precluded by the Federal Power Act or the Commission's existing rules and regulations.

DATES: This Policy Statement is effective June 17, 2021.

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SUPPLEMENTARY INFORMATION:

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Before Commissioners: Richard Glick, Chairman;
James P. Danly, Allison Clements,
and Mark C. Christie.

State Voluntary Agreements to Plan and Pay for
Transmission Facilities

Docket No. PL21-2-000

POLICY STATEMENT

(June 17, 2021)

■ This policy statement addresses state efforts to develop transmission facilities through voluntary agreements to plan and pay for those facilities (Voluntary Agreements). Voluntary Agreements include agreements among: (1) two or more states; (2) one or more states and one or more public utility transmission providers; or (3) two or more public utility transmission providers. We clarify that Voluntary Agreements are not categorically precluded by the Federal Power Act (FPA)¹ or the Commission's existing rules and regulations, and encourage interested parties considering the use of such agreements to consult with Commission staff. To the extent that states, public utility transmission providers, or other stakeholders believe that the relevant tariffs impose barriers to Voluntary Agreements, the Commission is open to filings to remove or otherwise address those barriers.

¹ 16 U.S.C. 791a *et seq.*

■ Developing cost-effective and reliable transmission facilities remains a priority of this Commission.² Voluntary Agreements can further those goals by, for example, providing states with a way to prioritize, plan, and pay for transmission facilities that, for whatever reason, are not being developed pursuant to the regional transmission planning processes required by Order No. 1000.³ In addition, in some cases, Voluntary Agreements may allow state-prioritized transmission facilities to be planned and built more quickly than would comparable facilities that are planned through the regional transmission planning process(es).

² See *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 76 FR 49842 (Aug. 11, 2011), 136 FERC ¶ 61,051, at P 2 (2011), *order on reh'g and clarification*, Order No. 1000-A, 77 FR 32184 (May 31, 2012), 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 77 FR 64890 (Oct. 24, 2012), 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014) (instituting reforms to ensure more efficient and cost-effective regional transmission planning); see also *Elec. Transmission Incentives Pol'y Under Section 219 of the Federal Power Act*, 170 FERC ¶ 61,204, at P 31 (2020) (Transmission Incentives NOPR) (noting “FPA section 219(a) requires that the Commission provide incentive-based rates for electric transmission for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion”). The Commission noted in the Transmission Incentives NOPR that there is a need for existing and new transmission facilities to help facilitate integration of a variety of types of resources. Transmission Incentives NOPR, 170 FERC ¶ 61,204 at P 28.

³ Order No. 1000, 136 FERC ¶ 61,051 at P 146. Order No. 1000 established rules and regulations addressing, among other things, regional transmission planning, interregional transmission coordination, and cost allocation methods for new transmission facilities. This includes requiring each public utility transmission provider to participate in a regional transmission planning process that produces a regional transmission plan and complies with certain transmission planning principles.

■ Nevertheless, we are concerned that confusion regarding the relationship between Voluntary Agreements and Commission rules and regulations may be deterring such agreements. Accordingly, in this policy statement, we clarify that neither the FPA nor the Commission’s rules and regulations categorically preclude Voluntary Agreements among: (1) two or more states; (2) one or more states and one or more public utility transmission providers; or (3) two or more public utility transmission providers to plan and pay for new transmission facilities. In particular, we note that Order No. 1000 allows market participants, including states, to negotiate voluntarily alternative cost sharing arrangements that are distinct from the relevant regional cost allocation method(s).⁴

■ As an illustration, we note that the Commission accepted certain non-Order No. 1000, alternative cost sharing arrangements in the context of Order No. 1000 compliance filings.⁵ In the case of PJM, the Commission held that it “need not find that

⁴ *See id.* PP 561, 724; Order No. 1000-A, 139 FERC ¶ 61,132 at PP 728-729; *see also* Order No. 1000, 136 FERC ¶ 61,051 at P 209 n.189 (“[W]e strongly encourage states to participate actively in the identification of transmission needs driven by Public Policy Requirements. Public utility transmission providers, for example, could rely on committees of state regulators or, with appropriate approval from Congress, compacts between interested states to identify transmission needs driven by Public Policy Requirements for the public utility transmission providers to evaluate in the transmission planning process.”). While we focus here on Voluntary Agreements as a potential tool for states to advance state policy goals, the policy statement does not alter market participants’ ability to pursue such arrangements absent state involvement.

⁵ For example, the Commission accepted PJM Interconnection, L.L.C.’s (PJM) State Agreement Approach to transmission planning, which is a transmission planning and cost allocation mechanism supplementary to PJM’s Order No. 1000 regional transmission planning process. Through the State Agreement Approach, one or more state governmental entities authorized by their respective states, individually or jointly, may agree voluntarily to be responsible for the allocation of all costs of a proposed transmission facility that addresses state public policy requirements identified or accepted

the State Agreement Approach and corresponding cost allocation method comply with Order No. 1000.”⁶ Specifically, with regard to PJM’s State Agreement Approach, the Commission found the approach supplemented and did “not conflict or otherwise replace” PJM’s Order No. 1000 process to consider transmission needs driven by public policy requirements.⁷

■ More recently, the Commission approved a study agreement that initiated a Voluntary Agreement process in PJM. There, the New Jersey Board of Public Utilities (New Jersey Board), acting pursuant to PJM’s State Agreement Approach, issued an order formally requesting that PJM open a competitive proposal window to solicit proposals for transmission facilities to expand the PJM transmission system and to identify system improvements to interconnect and provide for the deliverability of 7,500 MW of offshore wind generation into New Jersey by 2035. The New Jersey Board and PJM entered into a study agreement directing PJM to solicit proposals for possible transmission facilities and analyze them to determine the more efficient or cost-effective

by the relevant state(s) in the PJM region. *See PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214, at PP 142-143 (2013), *order on reh’g and compliance*, 147 FERC ¶ 61,128, at P 92 (2014); PJM, Intra-PJM Tariffs, Operating Agreement, sched. 6, section 1.5.9(a) (State Agreement Approach) (26.0.0). Similarly, ISO New England Inc.’s (ISO-NE) tariff includes a voluntary process that enables the New England States Committee on Electricity (NESCOE) and state public utility regulators to plan and pay for transmission facilities. *See ISO New England Inc.*, 143 FERC ¶ 61,150, at P 121 (2013); ISO-NE, ISO New England Inc. Transmission, Markets and Services Tariff, sched. 12, section B.6 (Public Policy Transmission Upgrade Costs) (7.0.0).

⁶ *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214 at P 142.

⁷*Id.*

enhancement or expansion of transmission facilities to meet New Jersey's offshore wind goals.⁸ The New Jersey Board explained that this type of collaborative approach to transmission planning will help ensure that the high-voltage transmission system accommodates state clean energy policies and represents a type of state-federal collaboration consistent with Commission rules and regulations.⁹

■ To the extent that states or public utility transmission providers believe there are barriers to Voluntary Agreements in Commission-jurisdictional tariffs or other agreements, we encourage them to identify those barriers and, as necessary, consider making filings before this Commission to address those barriers. Commission staff is available to consult on these issues as states, public utility transmission providers, and other stakeholders consider addressing such barriers and the topic of Voluntary Agreements more generally. We encourage relevant parties to contact Commission staff regarding all potential Voluntary Agreements.

I. Document Availability

■ In addition to publishing the full text of this document in the *Federal Register*, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (<https://www.ferc.gov>). At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National

⁸ *PJM Interconnection, L.L.C.*, 174 FERC ¶ 61,090 (2021).

⁹ *Id.* P 10.

Emergency concerning the Novel Coronavirus Disease (COVID-19), issued by the President on March 13, 2020.

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By direction of the Commission. Commissioner Chatterjee is not participating.
Commissioner Danly is concurring with a separate statement attached.
Commissioner Christie is concurring with a separate statement attached.

(SEAL)

Debbie-Anne A. Reese,
Deputy Secretary.

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(Issued June 17, 2021)

DANLY, Commissioner, *concurring*:

■ I concur in the issuance of this policy statement on state voluntary agreements to plan and pay for transmission facilities. I do not know what it accomplishes, but we are not “categorically precluded” from issuing it, and if there is a chance that it can help critical transmission infrastructure to be built, then I see no reason to oppose it.

■ The policy states that “[W]e are concerned that confusion regarding the relationship between Voluntary Agreements and Commission rules and regulations may be deterring [Voluntary] agreements.”¹ We do not cite any examples of such confusion, but—who knows—it may well exist.

■ To attempt to dispel this possible confusion, we “clarify that Voluntary Agreements are not categorically precluded by the Federal Power Act (FPA)² or the Commission’s existing rules and regulations.”³ This amounts to a declaration that the FPA and existing rules and regulations do not obviously prohibit all Voluntary Agreements—I have no quarrel with that. But I do believe it necessary to remind everyone that each Voluntary Agreement must still individually pass muster under our statute and regulations.

■ The actual policy in our statement is an invitation:

To the extent that states or public utility transmission providers believe there are barriers to Voluntary Agreements in Commission-jurisdictional tariffs or other agreements, we encourage them to identify those barriers

¹ *State Voluntary Agreements to Plan and Pay for Transmission Facilities*, 175 FERC ¶ 61,225, at P 3 (2021) (Policy Statement).

² 16 U.S.C. § 791a *et seq.*

³ Policy Statement, 175 FERC ¶ 61,225 at P 1.

and, as necessary, consider making filings before this Commission to address those barriers.⁴

■ We do not need a policy statement to invite filings. But there is no harm in it. I also invite and welcome filings before the Commission so that we can ensure that critical transmission, and critical natural gas pipelines, and other critical infrastructure, can obtain the approvals and regulatory certainty they require in order to be built.

For these reasons, I respectfully concur.

James P. Danly
Commissioner

⁴ *Id.* P 6.

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CHRISTIE, Commissioner, *concurring*:

- I concur and write separately to add the following.
- Today's Policy Statement¹ reaffirms that voluntary agreements among states to promote transmission development to meet state public policies are not categorically precluded by Commission rules and regulations. Order No. 1000 made clear that states voluntarily could negotiate alternative cost sharing arrangements that are distinct from the relevant regional cost allocation method² and that order highlighted a vehicle for multiple states to cooperate, interstate compacts.³ As the Policy Statement notes, the Commission has accepted certain alternative cost sharing arrangements in the context of Order No. 1000 compliance filings.⁴ I would note that voluntary agreements are open to all states without regard to whether they participate in Regional Transmission Organizations (RTOs) or Independent System Operators (ISOs)⁵ and they need not be limited in purpose to transmission only. Relevant history illustrates.

¹ *State Voluntary Agreements to Plan and Pay for Transmission Facilities*, 175 FERC ¶ 61,225 (2021) (Policy Statement).

² See Policy Statement at PP 3-4, nn.4-5.

³ See *id.* at n.4. Interstate compacts among states must be approved by Congress. U.S. Const. art.1, §10, cl. 3.

⁴ Policy Statement at n.5 (citing PJM's State Agreement Approach as an example of a vehicle by which a state or states may voluntarily pursue transmission projects to fulfill their own individual public policies and bear the costs of such policy-driven projects themselves.).

⁵ Technically speaking, state-regulated utilities participate in RTOs/ISOs, subject to state law.

■ RTOs/ISOs⁶ were established more than two decades ago during the “restructuring” era that saw about half the states initially adopt some version of policies requiring their vertically-integrated utilities to divest or at least “functionally separate” their generating assets, which were then supposed to compete on price in RTO/ISO markets with independent power producers (“IPPs,” sometimes called “NUGS” for non-utility generators – the acronyms float like confetti in this business).⁷

■ Importantly, the states which chose to participate in RTO/ISO markets during the restructuring era shared a general consensus that the purpose of RTOs/ISOs was to plan the regional transmission necessary to promote reliability at the *least-cost* to consumers and to operate energy and capacity markets to provide consumers with *least-cost* power on a *non-discriminatory* basis, i.e., without regard to the source of the electrons (sometimes called “economic dispatch”). Federal regulation reflected this consensus about the purpose of RTOs/ISOs.⁸

■ That consensus no longer exists at either the state or federal levels. The past several years have seen an increasing divergence of public policies in states that are

⁶ See *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999) (cross-referenced at 89 FERC ¶ 61,285), *order on reh’g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000) (cross-referenced at 90 FERC ¶ 61,201), *aff’d sub nom. Pub. Util. Dist. No. 1 of Snohomish Cty. v. FERC*, 272 F.3d 607 (D.C. Cir. 2001). Order No. 2000 was issued in 1999 and established criteria for RTOs/ISOs.

⁷ The restructuring era was short-lived. Several states subsequently reversed their earlier decisions and returned to some form of vertical integration. See Tyson Slocum, *The Failure of Electricity Deregulation: History, Status and Needed Reforms*, Public Citizen’s Energy Program, March 2007, at 5; see, e.g., Ch. 933, 2007 Va. Acts of Assembly (April 4, 2007). Restructuring was sometimes inaccurately called “deregulation,” which implied a move from highly structured cost-of-service regulation to true free markets in power supply, but it was typically more a swap of one complicated regulatory construct for another one just as vulnerable to rent-seeking. See, e.g., Severin Borenstein and James Bushnell, *The U.S. Electricity Industry after 20 Years of Restructuring*, National Bureau of Economic Research, April 2015, at Abstract (“We argue that the greatest political motivation for restructuring was rent shifting, not efficiency improvements, and that this explanation is supported by observed waxing and waning of political enthusiasm for electricity reform.”); see also *id.* at 1.

⁸ The Energy Policy Act of 2005 provided a definition of economic dispatch: as “the operation of generation facilities to produce energy at the *lowest cost to reliably serve consumers*, recognizing any operational limits of generation and transmission facilities.” Energy Policy Act of 2005 (EPAAct 2005), Pub L. No. 109-58, § 1234(b), 119 Stat. 594, 960 (2005) (codified at 42 U.S.C. § 16432(b)) (emphasis added).

members of multi-state RTOs/ISOs, over such fundamental issues as mandated resource mixes, compensation in capacity markets, transmission planning criteria and cost allocation, and carbon taxes.⁹ The disappearance of the original consensus about the purpose of RTO/ISO markets has serious implications across a range of issues, but the adoption of this Policy Statement by the Commission offers a good time to emphasize that states that wish to cooperate with other states which share similar public-policy goals – whether environmental, reliability or economic – have options for achieving regional benefits outside the context of RTO/ISO participation.

■ In particular, I would point out that while this Policy Statement emphasizes the potential availability of voluntary agreements among states to promote interstate transmission development, voluntary state agreements may also be available for other purposes. Before the restructuring era, many state-regulated utilities participated in multi-state power pools¹⁰ designed to support reliability by wheeling power from state to state when needed to avoid load shedding, as well as facilitating bilateral sales of excess power.¹¹ These sales would benefit customers of the selling utility, when booked as a customer credit for off-system sales, and benefit customers of the purchasing utility when booked in the “fuel factor” at cost, with no return on equity (ROE) applied.

■ Options such as these are still available. Through the use of interstate compacts, enabling legislation¹² could create multi-state entities that can plan transmission projects

⁹ This divergence did not happen yesterday, but has been building. One commentator wrote ten years ago that “. . . state legislation and regulatory choices continue to push the electricity industries of the various states along *vastly different* paths.” Ari Peskoe, *A Challenge for Federalism: Achieving National Goals in the Electricity Industry*, 18 Mo. Env'tl. L. & Pol'y Rev. 209, 211 (2011) (“Peskoe”) (emphasis added).

¹⁰ For over half a century, PJM was a power pool. See <https://pjm.com/about-pjm/who-we-are/pjm-history> .

¹¹ See generally Peskoe at 223-24. Any application to this Commission to establish a power pool or other similar arrangement will, of course, come with its own specific evidentiary record and will be considered individually under applicable laws at the time.

¹² Power pools were generally regulated by the Federal Power Commission, and later by FERC. See, e.g., *id.* Congress could, however, through enabling legislation, grant various regulatory powers to the requesting states which seek to participate in a power pool arrangement. For example, Congress could include in such grant of authority an explicit power to apply a carbon tax to wholesale transactions in a power pool if such power was requested by the member states, avoiding the many questions attendant to

– as this Policy Statement encourages – but such entities also could be designed to function as modern, innovative versions of power pools aligned with the member states’ public policies as to resource adequacy and preferences. The enabling legislation could also ensure a sufficient state role in the governance to ensure that the authority was used only in accordance with member-state policies.¹³

■ States sharing similar public policies which desire to collaborate with each other to obtain the benefits of regional cooperation have innovative options to explore and consider whether they participate in an RTO/ISO or do not. The adoption of this Policy Statement is a good time to emphasize that opportunity.

For these reasons, I respectfully concur.

Mark C. Christie
Commissioner

whether RTOs/ISOs themselves have such power. *See Carbon Pricing in Organized Wholesale Electricity Markets*, 175 FERC ¶ 61,036 (2021) (Christie, Comm’r concurring in part and dissenting in part at PP 12-14, 17-24 (available at <https://www.ferc.gov/news-events/news/item-e-2-commissioner-mark-c-christie-concurring-part-and-dissenting-part>)).

¹³ For an example of such a broad grant of power to the states, Congress in the Energy Policy Act of 2005 allowed three or more contiguous states to enter into a compact, subject to the approval by Congress, to form their own regional transmission siting entities that would have siting authority for those states. EPAct 2005, Pub L. No. 109-58, § 1221(i), 119 Stat. 594, 950 (2005) (codified at 16 U.S.C. § 824p(i)).