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Pre-Technical Conference Statement
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Panel 2: Local Transmission Facility Cost Management Practices

The Commission is a public utility regulator charged with policing market power and preventing monopoly pricing.¹ To achieve these ends, Congress empowered the Commission to hold a “full hearing”² on any utility-proposed transmission rate increase and assigned to the utility the “burden of proof to show that the increased rate or charge is just and reasonable.”³ To facilitate effective rate cases and otherwise protect transmission customers, the FPA demands that utilities keep records in accordance with Commission rules and provides the Commission with sweeping investigative authority, including the power to subpoena witnesses and compel document production.⁴ Although the statute does not specify, it is indisputable that the Commission can disallow utility requests for cost recovery, such as by finding expenditures imprudent or unrelated to utility service or assets not used and useful.

¹ *See, e.g., Pa. Power Co. v. FPC*, 343 U.S. 414, 418 (1952) (“A major purpose of the [FPA] is to protect consumers against excessive prices.”); *National Ass’n of Regulatory Utility Comm’rs v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007) (The Commission’s “authority generally rests on the public interest in constraining exercises of market power”).

² Federal Power Act (FPA) section 205, 16 USC § 824d(e).

³ *Id.*; *Indicated SPP Transmission Owners v. SPP*, 165 FERC ¶ 61,005 at P 10 (2018); 18 CFR § 35.13(e)(3).

⁴ FPA sections 301 and 307, 16 USC §§ 825, 825f.

Yet, over the past few decades, the Commission has used its expansive ratemaking authority to institute several shortcuts that reduce its direct oversight. The Commission’s policies do not protect consumers. Formula rates are a vehicle for avoiding burdens of proof and limiting protests.⁵ The Commission’s default presumption that all transmission expenditures are prudent allows utility costs to flow through to consumers’ bills without scrutiny.⁶ For asset replacement or end-of-life projects, the Commission’s policies provide utilities with what amounts to a blank check that may be worth hundreds of billions of dollars over the next few decades. Customers and ratepayer advocates are pleading for reforms.⁷

In its April 2022 transmission planning notice of proposed rulemaking (NOPR), the Commission proposes to find that its planning rules create “perverse incentives” that encourage utilities to shirk cost-effective regional projects in favor of investments within their state-granted retail footprints.⁸ The NOPR’s attempt to blame regional competition for creating these perverse incentives misses the bigger picture. Regardless of whether they are developed competitively, regional projects are vetted through a stakeholder process that consider alternatives and approved

⁵ See, e.g., *Ameren Illinois Co.*, 162 FERC ¶ 61,025 at P 28 (2018) (dismissing challenges that “are directed to defined cost categories or specified calculations, i.e., to a fundamental component of the formula rate, not inputs that fall within a defined cost category or are subject to a calculation specified in the rate”). The utility often disagrees with its customers about whether a protest in an annual true-up proceeding is a challenge to the formula rate itself, and therefore beyond the scope of the proceeding, or a challenge to the inputs. Permissible challenges are defined when the Commission approves the formula itself. During that proceeding, customers cannot possibly anticipate the challenges they may wish to file decades later.

⁶ *Minnesota Power & Light Co.*, 11 FERC ¶ 61,312, at pp. 61,644–45 (1980) (“As a matter of practice, utilities seeking a rate increase are not required to demonstrate in their cases-in-chief that all expenditures were prudent unless the Commission’s filing requirements, policy or precedent otherwise require.”). A challenger can shift the burden of proof back to the utility by raising “serious doubt” about the prudence of the expenditure. Even where a challenger brings specific evidence of prudence, the Commission rarely shifts the burden back to the utility. See, e.g., *Pacific Gas and Electric Co.*, 173 FERC ¶ 61,045 at PP 165–181 (2020).

⁷ See, e.g., Docket RM21-17, Aug. 17, 2022, [Initial Comments of American Municipal Power](#), at pp. 7–30, [Comments of the Northwest and Intermountain West Power Producers Coalition](#), at pp. 20–22; [Comments of the Colorado Office of Utility Consumer Advocate](#), at pp. 23–33.

⁸ Notice of Proposed Rulemaking, *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, 179 FERC ¶ 61,028 (2022).

by a third-party (RTO)⁹ that may reevaluate the project.¹⁰ By contrast, utilities have nearly unfettered discretion over local projects, particularly low-risk replacement projects,¹¹ and can earn at least the same rate of return as they would on regional investments.¹² While local investment is undoubtedly necessary, the Commission must ensure that local investments are not imposing excessive costs.

Below, I suggest several avenues for reform. Recognizing that the Commission has limited resources to expend on transmission oversight, I order the reforms based on assumptions about the extent of the Commission's ongoing responsibilities under each policy.

⁹ In theory, non-RTO regional planning authorities may also approve regional projects. In practice, these entities merely affirm the feasibility of utility-planned local projects or projects that are regional in nature but planned by a single utility that does not seek regional cost allocation. *See* Docket RM21-17, Aug. 17, 2022, Comments of Southeast Public Interest Groups and Comments of Western Public Interest Organizations.

¹⁰ *See, e.g.* *Newman v. FERC*, 27 F.4th 690 (D.C. Cir. 2022) (noting that PJM cancelled the PATH project because updated analyses showed that there was no longer a projected reliability shortfall).

¹¹ Replacement projects and even upgrades of existing assets may not require state siting authority. *See* Liza Reed, Michael Dworkin, Parth Vaishnav, M. Granger Morgan, *Expanding Transmission Capacity: Examples of Regulatory Paths for Five Alternative Strategies*, 33 *THE ELECTRICITY JOURNAL* 106770 (Jul. 2020) (finding that a utility often does not need state permits to reconnector an existing line and noting that some state siting laws explicitly exempt reconnectoring projects).

¹² Competition has led to consumers paying the developer a lower ROE than the Commission-set ROE that they would otherwise pay to the incumbent.

Disclosing Planning and Cost Information: Information disclosure is at the heart of Open Access transmission service.¹³ Order No. 890 requires each utility to conduct a transparent and open local planning process and share information about assumptions and inputs with interested parties. As a threshold matter, the Commission should investigate whether customers and other parties receive relevant and timely information from the utility.¹⁴

In addition, the Commission should require additional disclosures that may be relevant in rate cases. For instance, utilities collecting rate incentives pursuant to FPA Section 219 must annually divulge actual spending on each project earning incentives in the previous calendar year, anticipated spending for the next five years, expected completion dates, whether the projects are on schedule, and reasons for delays, if any.¹⁵ At least some RTOs already require developers to provide similar information about certain regional projects.¹⁶ Surely, utilities must already

¹³ Order No. 888 requires utilities to separate their power marketing and transmission personnel pursuant to codes of conduct that prohibit employees operating the transmission network from providing non-public information to power marketing personnel. This functional unbundling requirement deprived utilities of informational advantages they had in the power marketing business. Order No. 888, 61 Fed. Reg. 21,540, 21,552 (May 10, 1996). On rehearing, the Commission summarized that “in order to remedy undue discrimination in the provision of transmission services it is necessary to have non-discriminatory access to transmission information.” Order No. 888-A, 62 Fed. Reg. 12,274, 12,281 (Mar. 14, 1997). In Order No. 889, the Commission “opened up the ‘black box’ of [] transmission system information” by requiring utilities to publish, on a real-time basis, information about their transmission systems. Order No. 889, 61 Fed. Reg. 21,737, 21,740 (1996). In Order No. 890, the Commission connected “inadequate transparency requirements” to undue discrimination. Order No. 890 at P 51 aimed to “increase[e] the transparency of pro forma OATT administration.” *Id.* at P 5. The Commission also established transmission planning principles that include transparency and information exchange. *Id.* at P 426.

¹⁴ In its August 17 comments filed in Docket RM21-17, [American Municipal Power](#) identifies numerous deficiencies with local planning processes in PJM and claims that Commission-approval of the attachment M-3 process has “resulted in additional balkanization of the transmission planning process; reduced transparency, efficiency, and oversight in planning; increased planning based on individual transmission owners’ criteria for determining need; and disenfranchised PJM as the regional transmission planner”).

¹⁵ 18 CFR § 35.35(h) (establishing Form 730 filing requirements).

¹⁶ *See, e.g.*, MISO Tariff, [Attachment FF](#), § I.C.11 (specifying requirements for quarterly reports for certain regional projects).

be tracking costs and schedules of all transmission projects and could easily provide this information.

Project-specific disclosures would inform rate cases and allow the Commission and customers to track utility performance. The Commission should consider what additional project-specific information would be useful.¹⁷ More generally, the Commission should limit the amount of information that utilities may deem confidential or otherwise withhold from interested parties. For local transmission investments, there is no justification for secrecy.¹⁸

The Commission could also require utilities to file under section 205 their local planning and asset replacement criteria. Because so much investment is driven by local planning and asset replacement criteria, the Commission could find that those utility documents constitute “rules and regulations affecting or pertaining to” transmission rates.¹⁹ Over the long term, the Commission could develop and enforce relevant policies. As a utility regulator, the Commission should not ignore utility practices that directly increase rate base.

¹⁷ To highlight a trivial example, Form 730 does not include prior years’ spending. Interested parties have to assemble multiple filings to see whether the utility’s projections match actual spending. Utilities could easily disclose past projections and past spending on a single annual filing.

¹⁸ On October 11, 2001, the Commission removed utility Form 715 filings and other materials from its website. It stated that “[t]he September 11, 2001 terrorist attacks on America have prompted the Commission to reconsider its treatment of certain documents that have previously been made available through the Commission’s internet site . . .” *Statement of Policy on Treatment of Previously Public Documents*, Docket No. PL02-01. Less than eighteen months later, the Commission was “unconvinced that the general public’s need for information warrants the risk of disclosure of Critical Energy Infrastructure Information.” Order No. 630, *Critical Energy Infrastructure Information*, 102 FERC ¶ 61,190 (2003). On rehearing, the Commission stated that Order No. 630 “is not intended to limit the ability of companies . . . to share CEII with those with a need for it . . . and the Commission encourages these entities to provide information to legitimate requesters.” Order No. 630-A, 104 FERC ¶ 61,106 (2003). It may be time for the Commission to reevaluate those policies. First, is there still a legitimate reason for continuing to wall off utility transmission system information? Second, are utilities abusing the CEII process or is the CEII process obstructing participation? Comments filed on August 17, 2022 in Docket No. RM21-17 raise concerns. See Comment of [Southern Renewable Energy Association](#) at p. 28; [Comments of the Colorado Office of the Utility Consumer Advocate](#) at pp. 25, 29; [Comments of Pine Gate Renewables](#) at pp. 15–16; [Initial Comment of American Municipal Power](#) at pp. 21–22; [Initial Comments of Joint Consumer Advocates](#) at p. 22.

¹⁹ FPA section 205, 16 USC § 824d(a).

Funding Ratepayer Transmission Monitors: A Ratepayer Transmission Monitor (RTM) could cost-effectively provide information to customers, ratepayer advocates, and the Commission about a utility's transmission plans and expenditures. Pursuant to Order No. 890, utilities must share a range of information that underlies its local plan.²⁰ Connecting that information to rate filings and local planning decisions are complex endeavors. Many interested parties lack the resources to fully analyze utility planning decisions or gather evidence sufficient to file a viable challenge in a future stated rate or formula rate proceeding.

The RTM could provide relevant technical expertise and be a vehicle for pooling customer and stakeholder resources. Rather than each stakeholder hiring its own experts or dedicating its own staff to analyze utility disclosures and filings, stakeholders could hire one RTM that is funded through their transmission rates. Of course, each party could also continue to evaluate utility information as they see fit. Customers and state-recognized ratepayer advocates would contract with the RTM and define its scope.

PJM's tariff provisions that fund Consumer Advocates of the PJM States (CAPS) provide a model for RTM implementation. CAPS is a non-profit run by state consumer advocates and formed to coordinate their participation in the PJM stakeholder process. Under its tariff, PJM allocates CAPS annual budget to transmission customers in proportion to their load.²¹ In approving the tariff schedule, the Commission concluded that funding CAPS is a "reasonable business expense of PJM" because it will make the "stakeholder process more inclusive, transparent, and robust," consistent with the Commission's directives in Order No.

²⁰ Order No. 890 at P 471.

²¹ PJM Tariff, [Schedule 9-CAPS](#). An annual increase of more than 7.5 % requires a section 205 filing.

719.²² Here, an RTM will facilitate achievement of Order No. 890’s vision that “transmission customers and other stakeholders [have] a meaningful opportunity to engage in planning along with their transmission providers.”²³ RTMs will also advance the ultimate goal of ensuring just and reasonable rates.

Enhanced disclosure requirements described above would facilitate better analysis by the RTM, which will enable more robust stakeholder involvement in local planning.

Reducing Utility ROEs: The Commission could set lower ROEs for local investments. Alternatively, the Commission could continue its current approach of setting a single ROE for each utility but adjust it downward to reflect the utility’s preferences for lower-risk transmission investments.

In general, Commission-approved ROEs should provide returns that are “commensurate with returns on investments in other enterprises having corresponding risks.”²⁴ To set ROEs, the Commission uses mathematical models that create presumptively just and reasonable ROE ranges.²⁵ Parties that are dissatisfied with an ROE attack the models and the inputs into those models. The actual risks faced by the utility and the riskiness of its investments play a minor role.²⁶ Recent research shows that ROEs approved by state regulators and the Commission are providing much greater risk-adjusted returns on equity than utilities historically received.²⁷ These higher returns are not justified by any higher

²² *PJM Interconnection*, 154 FERC ¶ 61,147 at P 39 (2016) (citing Order No. 719, 125 FERC ¶ 61,071 at PP 478, 481–482, 503–05, 509 (2008)).

²³ Order No. 890 at P 488.

²⁴ *FPC v. Hope*, 320 U.S. 591, 603 (1944).

²⁵ *MISO Transmission Owners v. FERC*, 45 F.4th --- (D.C. Cir. 2022), [slip op.](#) at p. 10.

²⁶ *Id.* at pp. 15–29; *Pacific Gas & Electric Co.*, 178 FERC ¶ 61,175 at PP 120–126 (outsourcing the risk determination to credit rating agencies that are evaluating the utility’s entire enterprise rather than focusing on Commission-jurisdictional transmission).

²⁷ Albert Lin, Pearl Street Station Finance Lab, “[Electricity Bills Too High? Then, Get The ROE in Line](#),” Aug. 2022 (citing David C. Rode and Paul S. Fishbeck, “[Regulated Equity Returns: A Puzzle](#),”

risks. To the contrary, utilities have decided to focus jurisdictional investments on low-risk projects, such as asset replacements.

Commission-set ROEs and the Commission's rate case policies disproportionately reward utilities for low-risk investments. An economically rational utility will follow the incentives created by the Commission and prioritize local projects, potentially imposing excessive costs on consumers. The Commission should realign utility incentives with consumers' interests by more accurately reflecting in ROEs the risks associated with utility investment decisions.

Imposing Cost-Sharing Mechanisms: The Commission has reviewed and approved numerous cost-sharing mechanisms, such as cost caps.²⁸ The Commission has distinguished “hard caps,” where a developer commits not to recover more than a specified amount from ratepayers, from “soft caps,” where costs above a certain amount are shared between the developer and ratepayers based on a defined percentage.²⁹ The Commission has also allowed cost recovery but disallowed a rate of return on certain types of expenses.³⁰

Recent transmission developer-proposed cost caps have been disciplined by competitive processes. For non-competitive local transmission projects, a cost cap might incentivize utilities to overestimate the cost of a project in order to improve its chances of keeping expenditures below than the cap. For these projects, setting a fair cost-sharing mechanism may be challenging. However, there may instances

133 ENERGY POLICY 110891 (Oct. 2019) and linking to Karl Dunkle Werner and Stephen Jarvis, “[Rate of Return Regulation Revisited](#)” (May 2021, Preliminary version).

²⁸ See *NYISO*, 170 FERC ¶ 61,098 (2020); *PJM Interconnection*, 154 FERC ¶ 61,054 at PP 5–7 (2016); *NYISO v. New York Transco, et al.*, 160 FERC ¶ 63,021 at PP 15–16 (2017).

²⁹ *NYISO*, 170 FERC ¶ 61,098 at P 7 (2020).

³⁰ See, e.g., *NEPCO Municipal Rate Committee v. FERC*, 668 F.2d 1327 (D.C. Cir. 1981) (upholding in part a Commission order that excluded expenditures for cancelled power plants from rate base but allowed for their recovery over time and finding that the Commission's approach “struck a reasonable balance between the interests of investors and ratepayers”).

where the utility has an incentive to accurately estimate the cost of non-competitive projects. For instance, a utility may need to demonstrate to a state siting authority that its proposed project is less expensive than alternative transmission solutions. Or, where an RTO meaningfully compares local projects to potential regional solutions, the utility might be inclined to provide a realistic cost estimate. Cost-sharing mechanisms may be feasible in numerous circumstances.

To reduce the ongoing regulatory burdens associated with enforcing cost-sharing mechanisms, the Commission could issue a policy statement that outlines criteria for investments that must be subject to a cost-sharing mechanism. If the utility fails to file a generic cost-sharing proposal that would apply prospectively to projects meeting the Commission’s criteria, the Commission could impose its own cost-sharing mechanisms or subject relevant investments to heightened scrutiny in a rate case (see below).

Reviewing Prudence with Joint Boards: The Commission reviews prudence of transmission investments only when a party raises “serious doubt” about the prudence of the utility’s expenditures. Saddling protesters with the initial burden frees the utility from having to justify its decisions and actions. Protesters in rate cases must conjure up discovery requests that aim to force utilities to provide the “specific evidence” needed to shift the evidentiary burden to the utility.³¹ Naturally, utilities will not easily expose their imprudence when replying in discovery. Even where a challenger gathers its own evidence outside of a Commission proceeding that challenges prudence, the Commission rarely shifts the burden of proof back to the utility.³² As a result, the Commission has concluded that every dollar utilities

³¹ *Pacific Gas and Electric Co.*, 173 FERC ¶ 61,045 at P 181 (2020).

³² *Id.* at PP 165–181 (2020). In a 2018 filing at this Commission, the California Public Utilities Commission found that because “rate cases usually settle . . . the risk of prudence review is limited, and while serious doubt has been established in a handful of electric transmission cases that have

spent on transmission — \$153 billion from 2014 to 2020 — was prudently incurred.³³ Findings of imprudence are not nearly so rare at state commissions.³⁴

In Docket RM21-17, I outlined and justified a new approach that would subject a limited set of utility investments to prudence review.³⁵ Because these projects are typically paid for solely by captive ratepayers and state regulators may be involved in siting these projects, it is reasonable for the Commission to at least consult with state regulators on these prudence reviews. Rather than merely conferring with state regulators, the Commission could task Joint Boards with applying a new prudence policy and fully adjudicating whether associated transmission rate increases are just and reasonable.

Under a new prudence policy, the Commission could require utilities to prove prudence with cost-benefit analyses and/or evaluations of project alternatives. If a quantitative cost-benefit is infeasible, the Commission could consider qualitative assessments. In the absence of such any analysis, the Commission cannot determine whether capital expenditures are “extravagant and unnecessary”³⁶ or

proceeded to hearing, the CPUC could find only one such case in the past 20 years that resulted in findings of imprudence.” CPUC, Brief on Exceptions, Docket ER16-2320-002, Oct. 31, 2018. However, the Commission subsequently reversed its findings, but its order was later vacated by the D.C. Circuit. *Newman v. FERC*, 27 F.4th 690 (D.C. Cir. 2022).

³³ Edison Electric Institute, [Actual and Projected Transmission Investment](#). Some portion of that amount is regulated by states and not the Commission.

³⁴ See, e.g., Minnesota Public Utilities Commission, [Minutes of Aug. 11, 2022 meeting](#) (summarizing numerous Commission findings of utility imprudence relating to natural gas operations and disallowing nearly \$60 million spread across four utilities); Arizona Corporation Commission, [Decision No. 78317](#), Nov. 9, 2021 (disallowing \$215 million due to a finding that the utility’s installation of pollution control equipment was imprudent); Public Utility Commission of Oregon, [Order No. 20-473](#), Dec. 18, 2020 (making findings of imprudence relating to a transmission line and pollution control equipment). See also State Corporation Commission, [Petition of Virginia Electric and Power Co. for a Prudency Determination with respect to the Coastal Virginia Offshore Wind Project](#), Case No. PUR-2018-00121, Nov. 2, 2018 (“The Commission finds — as a purely factual matter based on this record — that the proposed CVOW Project would not be deemed prudent as that term has been applied by this Commission in its long history of public utility regulation or under any common application of the term.” The Virginia SCC approved the petition, concluding that “new statutes governing this case subordinate the factual analysis to the legislative intent.”).

³⁵ [Comment of the Harvard Electricity Law Initiative](#), Docket RM21-17, Oct. 12, 2021, pp. 44–62.

³⁶ *Re Midwestern Gas Transmission*, 36 FPC 61, at p. 71 (1966).

“reasonably incurred to provide service for the ratepayers.”³⁷ Based on its detailed knowledge of the utility’s assets and expenditures, the RTM (discussed above) would be well-positioned to could supply relevant information and analysis.

I have appended the portion of the Harvard Electricity Law Initiative’s October 2021 filing that discusses a supplementary prudence review policy. Because the Commission’s July 2021 ANOPR discussed an Independent Transmission Monitor (ITM), the appended comment refers to an ITM rather than an RTM.

Thank you for the opportunity to discuss these matters at the October 6 technical conference.

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³⁷ *Iroquois Gas Transmission System*, 87 FERC ¶ 61,295, at p. 62,170 (1999).

Excerpt from Comment of the Harvard Electricity Law Initiative, Docket RM21-17, October 12, 2021

II. The Commission Should Encourage Further Regionalization Through a Supplemental Policy on Transmission Investment Prudence

Section 202(a) requires the Commission to encourage regional coordination among industry participants. The Commission fulfills this duty by promoting RTO membership. Regional governance through RTOs can mitigate Public Utilities' opportunities for undue discrimination and unlock efficiencies associated with regional management of power flows, transactions, and transmission expansion.¹⁸⁹ As the industry increasingly invests in renewable generation and faces new climate and cybersecurity-related challenges, shifting transmission service from locally focused Public Utilities to regional organizations is more important than ever for ensuring just and reasonable rates and maintaining reliability.

A supplemental prudence policy could further the Commission's efforts to encourage regionalization. By narrowing its presumption that transmission expenditures are prudent based on substantive criteria — such as which entity planned the project and whether the project was evaluated at the regional level — the Commission could encourage investment in regional infrastructure and enhance regional planning. In part II.A, we suggest criteria that would encourage utilities to delegate planning responsibilities to independent entities, facilitate new entry into wholesale markets, and ensure that local needs are evaluated by a regional planner. In part II.B, we show that this supplemental policy is modelled after other Commission policies that apply just and reasonable presumptions to wholesale power rates. In part II.C, we suggest that the Commission involve state regulators and Independent Transmission Monitors in transmission rate proceedings.

A supplemental prudence policy could enhance the Commission's long-standing efforts to liberate transmission information from utility control. Transparency is at

¹⁸⁹ Order No. 2000 at pp. 89–90 (listing expected benefits of RTOs and adding that “we expect that RTOs can reduce opportunities for unduly discriminatory conduct by cleanly separating the control of transmission from power market participants”).

the heart of the Commission’s Open-Access regime,¹⁹⁰ including its transmission planning orders.¹⁹¹ To limit Public Utilities’ opportunities to unduly discriminate and ensure just and reasonable rates, the Commission has compelled utilities to share operational and planning data and models. Requiring transmission-owning Public Utilities to demonstrate that certain capital expenditures are prudent will effectively force them to provide additional information about those projects. The prospect for additional sunshine on their spending may prompt utilities to make different investment decisions, and any disclosures will help the Commission ensure rates are just and reasonable.

A supplemental prudence policy could also protect consumers. The Commission adopted its current policy that all transmission expenditures are presumptively prudent as a matter of administrative convenience.¹⁹² This policy effectively results in a presumption that all transmission rate increases are just reasonable and outsources the Commission’s section 205 duties to interested parties protesting Public Utilities’ proposed transmission rate increases.¹⁹³ Rather than relying on intervenors to establish “serious doubt” about whether a rate increase is just and reasonable, the Commission should adopt a new approach that aligns with the statute and protect consumers from excessive transmission rates.

¹⁹⁰ See, e.g., Order No. 888-A, at 12,281 (summarizing that market participants must have “comparable access to information about the transmission system”); *id.* at 12,311 (“in order to remedy undue discrimination in the provision of transmission services it is necessary to have non-discriminatory access to transmission information”); Order No. 889 at 21,740; Order No. 890 at P 51 (concluding that “inadequate transparency requirements, combined with inadequate compliance with existing OASIS regulations, increases opportunities for undue discrimination”); *id.* at P 68 (finding “the lack of a consistent and transparent methodology for calculating ATC gives transmission providers the ability and opportunity to unduly discriminate”).

¹⁹¹ See, e.g., Order No. 890 at P 52 (summarizing finding that “lack of transparency surrounding system planning generally” necessitates reforms); PP 471–73 (finding that transparency requirements will reduce opportunities for undue discrimination and requiring disclosure of “basic criteria, assumptions, and data that underlie [] transmission system plans” and requiring that transmission providers “reduce to writing and make available the basic methodology, criteria, and processes they use to develop their transmission plans”); *id.* at P 486 (finding that the information exchange planning principle is needed to ensure planning is “as open and transparent as possible”); Order No. 1000 at PP 149–52.

¹⁹² See, e.g., *BP Pipelines (Alaska) Inc.*, 153 FERC ¶ 61,233 at P 13 (2015) (citing *Iroquois Gas Transmission Sys.*, 87 FERC ¶ 61,295, at 62,168 (1999)).

¹⁹³ *Minnesota Power & Light Company*, 11 FERC ¶ 61,312, at pp. 61,644–45 (1980).

A supplemental policy is necessary in part because the Commission has not followed through on its pledges to monitor jurisdictional planning processes. In Order No. 890, the Commission said it would “remain actively involved in the review *and implementation* of the transmission planning processes required in Order No. 890, during and beyond the initial compliance phase, to ensure that the potential for undue discrimination in planning activities is adequately addressed.”¹⁹⁴ In 2016, the Commission did review PJM members’ planning processes,¹⁹⁵ but we are not aware of other formal reviews. Similarly, the Commission anticipated that “Order No. 1000 will provide the Commission and interested parties with a record that we believe will be able to highlight whether public utility transmission providers are engaging in undue discrimination.”¹⁹⁶ In 2019, the Commission reviewed immediate-needs exemptions from competitive development.¹⁹⁷ We are not aware of the Commission initiating other reviews, prior to this proceeding.

A. A Supplementary Prudence Policy Will Ensure Just and Reasonable Transmission Rates

The Commission has said that administrative convenience justifies its current policy of presuming that all transmission expenditures are prudent,¹⁹⁸ but that goal has no connection to the FPA’s mandate that all rates be just and reasonable. In other contexts, the Commission only presumes rates are just and reasonable when there is a substantive basis for doing so. The Commission should follow this well-established approach by issuing a supplemental prudence policy that delineates criteria for applying a default prudence presumption to capital expenditures.

¹⁹⁴ Order No. 890-A at P 180 (emphasis added).

¹⁹⁵ See *Monongahela Power, et al.*, 156 FERC ¶ 61,134 (2016).

¹⁹⁶ Order No. 1000-A at P 267.

¹⁹⁷ *ISO-New England*, 171 FERC ¶ 61,211 (2020); *PJM Interconnection*, 171 FERC ¶ 61,212 (2020); *Southwest Power Pool*, 171 FERC ¶ 61,213 (2020).

¹⁹⁸ *Iroquois Gas Transmission System*, 87 FERC ¶ 61,295, at p. 62,168 (1999) (quoting *Minnesota Power & Light Co.*, 11 FERC ¶ 61,312, at pp. 61,644–45 (1980) (stating that FERC adopted this policy as “a matter of procedural practice to ensure that rate cases are manageable”).

Section 205(e) establishes that “the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility.”¹⁹⁹ Based on the plain text of the statute, courts have repeatedly stated that the FPA imposes on the filing utility the burden of proof to show that its proposed rate increase is just and reasonable.²⁰⁰ The Commission has further explained that section 205 filers have “the burden of proof to demonstrate that the rate is just and reasonable, and must ensure that there is a sufficient evidentiary record for the Commission to make a reasoned decision.”²⁰¹

From this straightforward policy, the Commission carves out an exception for prudence. The Commission has explained that “in order to ensure that rate cases are manageable, the Commission presumes that all expenditures are prudent so the utility need not justify in its case-in-chief the prudence of all of its costs.”²⁰² Only when a party has raised “serious doubt” about prudence does the burden shift to the utility to show by preponderance of the evidence that its expenditures were prudently incurred.²⁰³ In announcing this policy forty-one years ago, the Commission specified that in general “utilities seeking a rate increase are not required to demonstrate in their cases-in-chief that all expenditures were prudent *unless the Commission’s filing requirements, policy or precedent otherwise require.*”²⁰⁴ Contemporaneous Commission orders illustrate that Commission policies or

¹⁹⁹ 16 U.S.C. 824d(e).

²⁰⁰ *Supra* note 9.

²⁰¹ *Indicated SPP Transmission Owners v. SPP*, 165 FERC ¶ 61,005 at P 10 (2018); 18 CFR § 35.13(e)(3):

Burden of proof. Any utility that files a rate increase shall be prepared to go forward at a hearing on reasonable notice on the data submitted under this section, to sustain the burden of proof under the Federal Power Act of establishing that the rate increase is just and reasonable and not unduly discriminatory or preferential or otherwise unlawful within the meaning of the Act.

²⁰² *Potomac-Appalachian Transmission Highline, LLC*, 158 FERC ¶ 61,050 at P 100 (2017) (citing *Iroquois Gas Transmission System*, 87 FERC ¶ 61,295, at p. 62,168 (1999)).

²⁰³ *Potomac-Appalachian Transmission Highline, LLC*, 158 FERC ¶ 61,050 at PP 100–01 (2017) (citations omitted).

²⁰⁴ *Minnesota Power & Light Co.*, 11 FERC ¶ 61,312, at pp. 61,644–45 (1980) (emphasis added).

precedents did indeed require utilities to demonstrate prudence in particular circumstances.²⁰⁵

A supplemental prudence policy would not reverse the Commission's general approach to prudence. Rather, a new policy would be a "filing requirement[], policy, or precedent [that] otherwise require[s]" the utility to demonstrate prudence.²⁰⁶ This supplementary policy could begin by distinguishing between operational expenses and capital investments. The Commission would continue to presume that operational expenses are prudent, but subject some capital expenses to scrutiny.

Reviewing the prudence of capital expenses, which fuel utility profits and have competitive implications for wholesale markets, is consistent with the Commission's well-established understanding of transmission monopolists.²⁰⁷ Capital spending on transmission can be a means of blocking wholesale market competition or reinforcing utility dominance in power marketing.²⁰⁸ The Commission has repeatedly recognized that higher consumer prices are an inevitable consequence of such self-interested transmission expansion and other types of anti-competitive conduct.²⁰⁹ Put differently, utilities prioritize their profits and monopoly control over low prices. It is by no means a stretch to note their self-interest in investing

²⁰⁵ See, e.g., *Re Southern California Edison Co.*, 8 FERC 61,198, at p. 61,679 (1979) (stating that "the company must prove that the abandonment was prudent"); *Louisiana Power and Light Co.*, 9 FERC 63,054, at p. 65,183 (1979) (ALJ observing that "the Commission requires that a company requesting the inclusion of CWIP in rate base demonstrate that the construction which resulted in severe financial difficulty was, in fact, a prudent investment prudently managed") (citing Order No. 555, *Amendments to the Uniform System of Accounts*, 56 FPC 2939, at p. 2946 (1976)).

²⁰⁶ *Iroquois Gas Transmission System*, 87 FERC 61,295, at p. 62,169 (1999) (noting that under *Minnesota Power & Light Co.* "the Commission itself has the option of requiring the utility to demonstrate the prudence of an expenditure in the order setting the matter for hearing or in a later order").

²⁰⁷ *Supra* notes 78–85.

²⁰⁸ See, e.g., Order No. 890 at P 422; *supra* Part I.A.

²⁰⁹ See, e.g., *Boston Edison Co. Re: Edgar Elec. Energy Co.*, 55 FERC ¶ 61,382, at p. 62,168 (1991) (explaining that "where a traditional utility is buying from an affiliate not subject to cost-of-service regulation, the buyer has an incentive to favor its affiliate even if the affiliate is not the least-cost supplier, because the higher profits can accrue to the [buyer's] shareholders"); Order No. 888 NOPR, *supra* note 13, at 17,665 ("as profit maximizing firms, [utilities] . . . will deny consumers the substantial benefits of lower electricity prices"); Order No. 1000 at P 256 ("it is not in the economic self-interest of incumbent transmission providers to permit new entrants to develop transmission facilities, even if proposals submitted by new entrants would result in a more efficient or cost-effective solution to the region's needs").

imprudently, particularly where those investments are designed to thwart wholesale market entry. The Commission ought to ensure that utilities do not use their control over transmission planning processes to profit from imprudent expenses.

A supplementary prudence policy can be administrable. Below, we suggest criteria that the Commission could apply to narrow the scope of its prudence review. Clear criteria are necessary for reducing any administrative burden associated with the supplementary policy. In part C, we provide further suggestions on how the Commission could efficiently implement the policy.

The first criterion for capital expenses is about the planning entity. When capital investments are incurred pursuant to transmission-owner controlled planning process, that transmission owner ought to have the burden of demonstrating the project's prudence in a rate case. As discussed below, there is currently no oversight and little transparency for TO-planned capital expenses. Because the utility may be indifferent to a project's cost-effectiveness, particularly if the project benefits its own generation, the Commission should not automatically presume prudence. The Commission could continue to presume that capital expenses planned by an independent entity are prudent.

The second criterion is the dollar amount. For a TO-administered process, the Commission could continue to presume that capital expenses below a threshold amount are prudent. We do not suggest a specific dollar figure. In setting the amount, the Commission should analyze previous transmission rate filings and choose a number that allows the Commission to continue to presume that routine replacement and maintenance projects are prudent. That said, the Commission should not choose a number that is so high that it would allow utilities to rebuild last century's grid without oversight. The Commission should also adopt a policy on segmentation to ensure that utilities do not evade the policy by classifying a single project as multiple smaller projects, each valued at below the threshold amount.

The third criterion is about whether the project might further a utility’s vertical market power. For projects that connect non-utility generation, the Commission could presume the project mitigates vertical market power and that therefore the expenses are prudent. For projects that connect to utility-owned or utility-affiliated generation, the Commission could evaluate either the generation or transmission procurement processes (or both) based on its guidelines on affiliate transactions. In section 203 (corporate mergers) and 205 (wholesale rates) proceedings involving affiliate transactions, the Commission uses four principles to evaluate whether it can presume the transactions meet the FPA’s standards: transparency, definition, evaluation, and oversight.²¹⁰ These four factors could also provide a basis for determining whether TO-planned transmission capital expenditures are a result of “self-dealing abuse.”²¹¹

For other TO-planned transmission capital expenditures that exceed the threshold, the Commission could consider whether the project was evaluated at the regional level by an independent entity. Regional planning processes are supposed to “evaluate alternatives [to TO-planned projects] that may meet the needs of the region more efficiently or cost-effectively.”²¹² As part of its supplementary prudence policy, when the transmission owner presents evidence that the project was evaluated at the regional level and no regional solution was found,²¹³ the Commission could presume that the capital expenditures are prudently incurred.²¹⁴

²¹⁰ *Allegheny Power Supply Company*, 108 FERC ¶ 61,082 at P 22 (2004); *Ameren Generating Company and Union Electric Company*, 108 FERC ¶ 61,081 at P 69 (2004).

²¹¹ *Boston Edison Co. Re: Edgar Elec. Energy Co.*, 55 FERC ¶ 61,382, at p. 62,165 (1991).

²¹² Order No. 1000 at P 80; *id.* at P 148. Regional planners pledged to the Commission that they would do so. *Supra* note 87.

²¹³ Order No. 1000 at P 81 (“In the absence of the reforms implemented below, we are concerned that public utility transmission providers may not adequately assess the potential benefits of alternative transmission solutions at the regional level that may meet the needs of a transmission planning region more efficiently or cost-effectively than solutions identified by individual public utility transmission providers in their local transmission planning process.”).

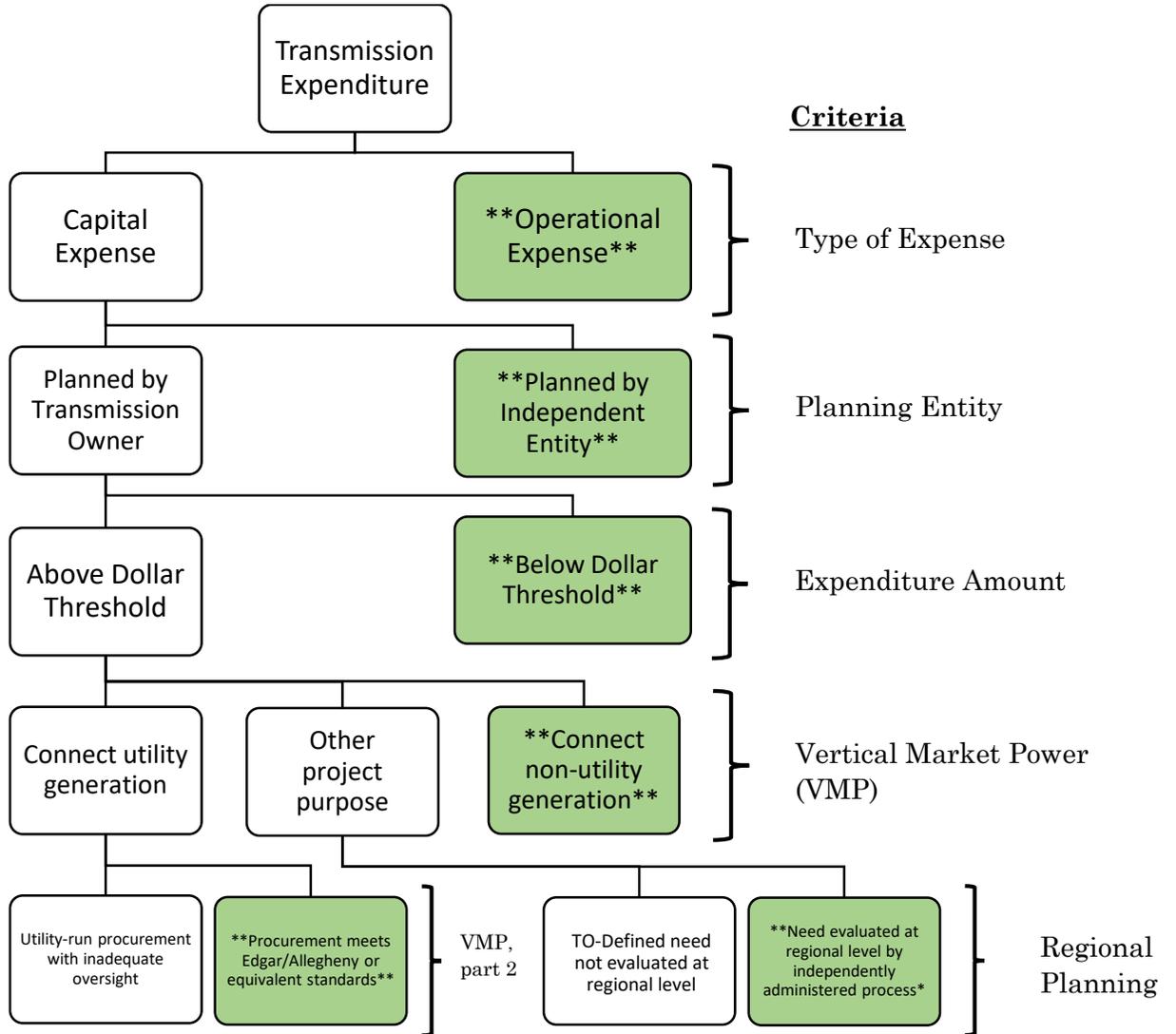
²¹⁴ *See BP Pipelines (Alaska), et al.*, 146 FERC ¶ 63,019 at P 130 (2014) (Administrative Law Judge initial decision requiring proponents of a rate increase to demonstrate that they adequately considered alternatives and noting that it “would be unreasonable, for example, to simply not address studies indicating that an alternative is more cost effective than the option chosen”).

For all other capital expenditures, the Public Utility proposing a rate increase would have the burden of demonstrating that its capital expenditures were prudently incurred.

Below we illustrate our proposed supplementary prudence policy. We propose these criteria for discussion. Other criteria might further Commission duties under sections 205 and 202(a).

Illustrative Supplementary Prudence Policy

**** Denotes**** that the Commission would presume the expense is prudent.



B. The Commission Has Authority to Establish a Supplementary Prudence Policy

Unquestionably, the Commission has authority to establish criteria that determine when it presumes a rate is just and reasonable. The Commission's three-decade old market-based rate regime is built on this authority. If a seller passes a market-power screening test, the Commission presumes that the seller does not have market power and allows the seller to charge market-based rates. The Commission further presumes that those market-based rates will be just and reasonable.²¹⁵ These presumptions are related to the *Mobile-Sierra* doctrine, under which the Commission "must presume that the electricity rate set out in a freely negotiated wholesale-energy contract meets the just and reasonable requirement."²¹⁶ These presumptions about rates that are untainted by market power free the Commission from reviewing the rate itself and allow it to focus instead on the seller's bargaining power.

The Commission's rules on affiliate sales similarly focus on bargaining power. When the Commission was developing its market-based rate regime, it was concerned that "a utility with a monopoly franchise may have an economic incentive to exercise market power through its affiliate dealings."²¹⁷ The Commission explained that "where a traditional utility is buying from an affiliate not subject to cost-of-service regulation, the buyer has an incentive to favor its affiliate even if the affiliate is not the least-cost supplier, because the higher profits can accrue to the [buyer's] shareholders."²¹⁸ To guard against this "inappropriate transfer of benefits from [captive] customers to the shareholders of the franchised public utility,"²¹⁹ Commission rules require sellers to obtain permission before transacting with an

²¹⁵ *Montana Consumer Counsel v. FERC*, 659 F.3d 910, 914–17 (9th Cir. 2011). The Commission has also adopted a rebuttable presumption that RTO/ISO monitoring and mitigation is sufficient to address market power concerns. Order No. 697-A, 123 FERC ¶ 61,055 at P 111.

²¹⁶ *Morgan Stanley Capital Group v. Public Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527, 530 (2008).

²¹⁷ *Boston Edison Company Re: Edgar Electric Company*, 55 FERC ¶ 61,382, at p. 61,167 n. 56 (1991) (citing *Teco Power Services Corporation et al.*, 52 FERC ¶ 61,191, at p. 61,697 (1990)).

²¹⁸ *Boston Edison Company Re: Edgar Electric Company*, 55 FERC ¶ 61,382, at p. 61,168 (1991).

²¹⁹ Order No. 697-A at P 198.

affiliated utility.²²⁰ The Commission will presume that the rate in a wholesale contract between affiliates is just and reasonable when there is evidence that “the proposed sale was a result of direct head-to-head competition between affiliated and competing unaffiliated suppliers.”²²¹ The competitive process, “designed and implemented without undue preference for the affiliate,”²²² mitigates the advantages that the affiliated seller has over other market participants.

The Commission should be similarly concerned that its oversight of transmission rates “present[s] the potential for the inappropriate transfer of benefits from captive customers to [utility] shareholders.”²²³ Transmission-owning Public Utilities are collectively spending billions of ratepayer dollars on projects planned without any transparency or oversight and collecting rates that the Commission has no basis for finding just and reasonable. It is exceedingly rare that the Commission finds any transmission expenditure imprudent.²²⁴

Recent proceedings involving the California Public Utilities Commission (CPUC) illustrate how the Commission’s planning rules block effective oversight and can prevent intervenors from meaningfully challenging utility expenses. As the grid ages, utilities are directing their transmission budgets to replacing last century’s transmission network, rather than expanding it to meet today’s needs.²²⁵ When the CPUC challenged a utility’s closed-door process for planning replacement projects as inconsistent with Commission rules, the Commission dismissed the complaint,

²²⁰ 18 C.F.R. § 35.39(b).

²²¹ *Allegheny Power Supply Company*, 108 FERC ¶ 61,082 at P 18 (2004) (citations omitted).

²²² *Boston Edison Company Re: Edgar Electric Company*, 55 FERC ¶ 61,382, at p. 61,168 (1991).

²²³ *Electric Power Supply Ass’n., et al. v. First Energy Solutions Corp., et al.*, 155 FERC ¶ 61,101 at P 64 (2016).

²²⁴ In a 2018 filing at this Commission, the California Public Utilities Commission found that because “rate cases usually settle . . . the risk of prudence review is limited, and while serious doubt has been established in a handful of electric transmission cases that have proceeded to hearing, the CPUC could find only one such case in the past 20 years that resulted in findings of imprudence.” The CPUC notes that in *Potomac-Appalachian Transmission Highline*, 152 FERC ¶ 63,025 at P 86 (2015), the Commission partially disallowed certain legal expenses due to lack of documentation. CPUC, Brief on Exceptions, Docket ER16-2320-002, Oct. 31, 2018.

²²⁵ See, e.g., *California Public Utilities Comm’n. v. Pacific Gas and Electric Co.*, 168 FERC ¶ 61,171 at P 1 (2019) (alleging that 80 percent of the utility’s spending is on asset replacement projects).

finding that its planning rules only apply to grid expansion projects.²²⁶ The Commission explained that its planning rules aim to counteract monopolists' incentives to provide discriminatory transmission access to wholesale customers and competitors and do not address "concern[s] about self-interest as a cause of imprudent investment, which is subject to review in the ratemaking process."²²⁷ But when the CPUC challenged the utility's replacement projects as imprudent in a separate ratemaking proceeding, the Commission dismissed that claim too, finding that regulators' detailed evidence²²⁸ amounted to nothing more than "general, sweeping allegations of imprudence."²²⁹

In effect, these two orders create a "gap for private interests to subvert the public welfare."²³⁰ Because the Commission allows utilities to plan these projects behind closed doors, stakeholders are left in the dark until the utility reveals its plans in a rate case. When the utility files for a rate increase, it benefits from the Commission's presumption that its previously undisclosed investments are prudent. Intervenors in Commission jurisdictional rate cases must conjure up discovery requests that aim to force utilities to provide the "specific evidence" needed to shift the evidentiary burden to the utility.²³¹ Naturally, utilities will not easily expose their imprudence.

The Commission's approach magnifies the importance of indirect state oversight of Commission-jurisdictional rates. In the California proceedings, the state gathered much of its evidence about the utility's spending through its own audits and investigations.²³² States could force utilities to divulge information about replacement projects through siting proceedings, but some states do not require

²²⁶ *California Public Utilities Comm'n. v. Pacific Gas and Electric Co.*, 168 FERC ¶ 61,171 at P 33 (2019).

²²⁷ *Id.* at P 34.

²²⁸ CPUC, Brief on Exceptions, Docket ER16-2320-002, Oct. 31, 2018, at pg. 13–45.

²²⁹ *Pacific Gas and Electric Co.*, 173 FERC ¶ 61,045 at P 181 (2020).

²³⁰ *FERC v. Electric Power Supply Ass'n.*, 577 U.S. 260, 289 (2016) (quoting *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972)).

²³¹ *Pacific Gas and Electric Co.*, 173 FERC ¶ 61,045 at P 181 (2020).

²³² CPUC, Brief on Exceptions, Docket ER16-2320-002, Oct. 31, 2018, at pg. 13–45.

utilities to obtain permission for replacement projects.²³³ Regardless, the Commission may not abdicate its ratemaking duties, and it should not rely on states to investigate the prudence of expenditures recovered through Commission-jurisdictional rates.

We are not aware of any direct legal challenge to the Commission’s prudence policy. As an initial matter, the Commission clearly has authority to disallow imprudent expenditures in rates.²³⁴ At least one utility has attempted to justify the Commission’s prudence policy by pointing to a 1923 joint concurrence by Justices Brandeis and Holmes. In the seminal ratemaking case *Southwestern Bell Telephone*, the concurring Justices found that a presumption of prudence can fairly apply to “[e]very utility investment [because it] may be assumed to have been made in the exercise of reasonable judgment.”²³⁵ In general, dicta from a concurring opinion in a case that pre-dates enactment of the FPA cannot supersede the Act’s plain text. Dicta also cuts both ways. The D.C. Circuit has observed that

It is a familiar rule of evidence that a party having control of information bearing upon a disputed issue may be given the burden of bringing it forward and suffering an adverse inference from failure to do so. In regulatory proceedings, placing such a burden on the regulated firm, where the relevant information concerns its operations and management, has become part of the ‘common lore’ of regulations.²³⁶

Here, where capital investments are incurred pursuant to a transmission-owner controlled process, that transmission owner ought to have the “burden of bringing []

²³³ See *supra* note 188.

²³⁴ National Ass’n of Regulatory Utility Comm’rs. v. FERC, 475 F.3d 1277, 1280 (D.C. Cir. 2007) (noting the Commission’s “indisputable authority to disallow recovery of costs imprudently incurred by jurisdictional firms”).

²³⁵ Anaheim, et al. v. FERC, 669 F.2d 799, 809 (D.C. Cir. 1981) (noting that Southern California Edison made this argument in its brief and citing to State of Missouri ex rel. Southwestern Bell Telephone Co., v. Public Service Comm’n of Missouri, 262 U.S. 276, 289 n.1 (1923)).

²³⁶ Alabama Power Co. v. FERC, 511 F.2d 383, 391 n. 13 (D.C. Cir. 1974) (citing McCormick, Evidence s 337 at 787 (2d ed. 1972), Commonwealth of Puerto Rico v. FMC, 468 F.2d 872, 880 (D.C. Cir. 1972)); *Iroquois Gas Transmission System*, 87 FERC ¶ 61,295, at p. 62,168 (“the evidence regarding any expenditure is in the hands of the utility and not the parties challenging the expenditure”) (citing *Minnesota Power & Light*, 11 FERC ¶ 61,312, at p. 61,645).

forward” information demonstrating prudence. Where the transmission owner fails to do so, and there is a reasonable concern that the expense may further its own interests rather than benefit ratepayers, it should “suffer[] an adverse inference.”

C. State Regulators and Independent Transmission Monitors Could Assist the Commission in Transmission Rate Cases

We suggest that the Commission create Joint Boards under section 209(a) to assess transmission rate filings. To assist the Joint Boards, the Commission could engage Independent Transmission Monitors to evaluate Public Utilities’ compliance with the Commission’s transmission planning rules, collect feedback from participants in those planning processes, verify that presumptively prudent capital expenses are consistent with the Commission’s supplementary prudence policy, and review utility evidence on prudence of other capital expenditures.

Because most transmission-owner planned projects are paid for solely by captive ratepayers, it is reasonable for the Commission to at least consult with state regulators on transmission rate cases. We suggest that rather than merely conferring with state regulators, the Commission task Joint Boards with applying the Commission’s supplementary prudence policy and fully adjudicating whether associated transmission rate increases are just and reasonable. This approach is permissible under long-standing rules that provide the Commission may “define the ‘force and effect’” of a Joint Board’s action.²³⁷ Here, the Commission would empower Joint Boards, consisting of the Commission and state regulators, to issue section 205

²³⁷ 18 CFR § 385.1304(b). The Commission should disclaim its erroneous understanding that Congress intended the Commission to invoke Joint Boards only in “unusual cases,” 18 CFR § 385.1304(a) as “not supported by the statute or the legislative history.” Frank P. Darr, “A Critical Analysis of Joint Board Policy at the Federal Energy Regulatory Commission,” 30 SAN DIEGO L. REV. 485, 496 (1991). The Senate Report explains that FPA section 209(a) “is designed to permit decentralized administration under the general supervision of the Commission by individuals who are acquainted with the situation and the problems of the locality affected by the particular proceeding.” *Id.* at 492 (quoting S. Rep. No. 621, 74th Cong., 1st Sess. 52 (1935)).

orders. The Commission could convene separate Boards for each utility filing, or designate one Board to adjudicate rate cases filed by all utilities in that state.

State regulators are well-positioned to assist the Commission in determining the prudence of transmission expenditures that are not presumptively prudent under the supplementary policy. It seems likely that most of the reviewable capital expenditures will be for projects within the utility’s local service territory. Many of those projects are grounded in each utility’s bespoke local “planning criteria,”²³⁸ which are presumably aimed at reliably serving captive retail load. The Commission has no particular expertise in evaluating such projects. State regulators may already be familiar with relevant projects through siting proceedings. To the extent that prudence is contingent on a procurement process (*see* Illustrative Supplementary Policy: Vertical Market Power), state regulators may have been directly involved and can help assess whether the procurement meets Commission standards.

To simplify the hearing process, the Commission could conduct hearings virtually. If the policy successfully encourages utilities to delegate planning to independent entities, the volume of expenses subject to prudence review may be minimal, and a paper hearing process may be sufficient.

To further reduce the Commission’s administrative burden and enhance the quality of information in transmission rate cases, the Commission could require Public Utilities to retain Independent Transmission Monitors (ITMs). An ITM’s fundamental task would be ensuring that utility-administered planning processes meet Commission standards. Currently, the Commission does not routinely assess compliance with its planning principles, and we are aware of only one Commission investigation into utility-controlled planning processes.²³⁹ The ITM would ensure

²³⁸ *See Monongahela Power, et al.*, 156 FERC ¶ 61,134 at PP 5–6, n. 10, 14 (2016) (defining “Supplemental Projects”); MISO, [MTEP 2021](#) (draft) (noting that the majority of transmission projects in the region “address localized reliability issues that are due to aging transmission infrastructure, line rebuild due to hurricane damage, or local non-baseline reliability needs that are not dictated by NERC and regional reliability standards”).

²³⁹ *See Monongahela Power, et al.*, 156 FERC ¶ 61,134 (2016).

that local and regional planning processes run by transmission owners are open and transparent, and that TO-run regional processes actually develop a regional plan based on an “evaluat[ion], in consultation with stakeholders, [of] alternative transmission solutions that might meet the needs of the transmission planning region more efficiently or cost-effectively than solutions identified by individual public utility transmission providers in their local transmission planning process.”²⁴⁰

The Commission could require ITMs to file annual or biannual reports with the Commission and might task ITMs with incorporating stakeholder feedback in those reports. The Commission might take action under section 206 based on ITM reports, but the reports would in no way limit any party’s ability to independently file a complaint at the Commission about any planning process. Of course, in acting on any complaint, the Commission could consider the ITM’s report.

ITMs could also monitor compliance with the Commission’s supplementary prudence policy. To implement the policy, the Commission could require Public Utilities to certify that presumptively prudent capital expenditures meet the policy’s criteria. The Commission could task ITMs with confirming compliance. The ITM’s assessment would inform the Commission’s just and reasonable determination and in no way limit Commission authority to independently assess any utility rate filing.

For capital expenditures not deemed presumptively prudent, ITM fact-finding could assist the Commission in making prudence determinations. Under the supplementary policy, a utility would have the burden of demonstrating that capital expenditures not deemed presumptively prudent are prudent. The Commission’s current approach to prudence evaluations begins with the premise that utility managers “have broad discretion in conducting their business affairs and in incurring costs necessary to provide services to their customers.”²⁴¹ In considering whether a particular expense was prudently incurred, the Commission attempts to

²⁴⁰ Order No. 1000 at P 148.

²⁴¹ *New England Power Co.*, 31 FERC ¶ 61,047, at p. 61,084 (1985).

divine whether “a reasonable utility management” would have incurred those costs “in good faith, under the same circumstances, and at the relevant point in time.”²⁴²

In a few orders, the Commission has put bounds on this deferential standard. Most importantly, “[o]ne aspect of the Commission's prudence inquiry focuses on whether the costs in question were reasonably incurred to provide service for the ratepayers.”²⁴³ As the Commission elsewhere explained:

Managements of unregulated business subject to the free interplay of competitive forces have no alternative to efficiency. If they are to remain competitive, they must constantly be on the lookout for cost economies and cost savings. Public utility management, on the other hand, does not have quite the same incentive. Regulation must make sure that the costs incurred in the rendition of the service requested are necessary and prudent. Basically, unless an abuse of discretion is shown, expenses incurred in the rendition of the service are primarily a matter of managerial judgment. This does not mean, however, that extravagant and unnecessary costs can be imposed on the ratepayers, no matter how convinced management may have been that those costs were necessary in its own interest.²⁴⁴

In that order, the Commission elaborated that while “regulation must not engage in a reconsideration of every *operating decision* made by management . . . regulation is reduced to an exercise in futility if it is barred or bars itself from a review of management claims for the recovery of costs running into millions of dollars solely because management has exercised its judgment.”²⁴⁵ As discussed, we do not propose that the Commission automatically review the prudence of any operating expense. Rather, our proposed supplementary prudence policy is designed to result in Commission review of only capital expenditures “running into [the] millions.”

²⁴² *Id.*

²⁴³ *Iroquois Gas Transmission System*, 87 FERC ¶ 61,295, at p. 62,170 (1999).

²⁴⁴ *Re Midwestern Gas Transmission*, 36 FPC 61, at p. 71 (1966) (citing *Acker v. U.S.*, 298 U.S. 426, 430–31 (1935)); *see also* *Cities Services Gas Co. v. FPC*, 242 F.2d 411, 417 (10th Cir. 1969) (“A regulated utility may not impose unnecessary costs upon its consumers.”) (citations omitted); *D.C. Transit System, Inc., v. Washington Metropolitan Area Transit Comm’n.*, 466 F.2d 394, 408 (D.C. Cir. 1972) (noting a “well-settled principle that ratemaking appropriately encompasses an examination and evaluation of the economy and efficiency of a public utility’s operations”).

²⁴⁵ *Id.* (emphasis added).

In 2014, a Commission Administrative Law Judge (ALJ) proposed a three-part test for prudence, tailored to the facts of that case: “a reasonable manager should ensure that expenditures are prudently incurred at sanction by: (1) adequately researching the project before sanctioning it; (2) estimating project costs with reasonable accuracy and weighing them against project benefits to the ratepayers; and (3) adequately considering alternatives to the project.”²⁴⁶ Reviewing the decision, the Commission stated that a prudent utility must “conduct[] reasonable evaluation of the costs and benefits prior to incurring a financial commitment.”²⁴⁷ Because the Commission’s finding of imprudence rested on the developer’s failure to accurately estimate project costs, the order is silent on the third component of the ALJ’s three-part test.

Based on the foregoing, we suggest that the Commission require Public Utilities to prove prudence with cost-benefit analyses and/or evaluations of project alternatives. If a quantitative cost-benefit is infeasible for certain projects, the Commission could consider qualitative assessments. In the absence of such analyses, the Commission cannot determine whether capital expenditures are “extravagant and unnecessary”²⁴⁸ or “reasonably incurred to provide service for the ratepayers.”²⁴⁹ Based on its detailed knowledge of the Public Utility’s transmission network and capital expenditures, the ITM could assist the Commission’s review of the utility’s filing with its own independent analysis.

Finally, we suggest that the Commission find ITMs necessary to ensure just and reasonable transmission rates and therefore amend the pro-forma OATT to require transmission-owning Public Utilities to contract with an ITM. Like RTO market monitors, ITMs will “assist[] the Commission” in ensuring just and reasonable

²⁴⁶ *BP Pipelines (Alaska), et al.* 146 FERC ¶ 63,019 at P 122 (2014).

²⁴⁷ *BP Pipelines (Alaska), et al.* 153 FERC ¶ 61,233 at P 12 (2015).

²⁴⁸ *Re Midwestern Gas Transmission*, 36 FPC 61, at p. 71 (1966).

²⁴⁹ *Iroquois Gas Transmission System*, 87 FERC ¶ 61,295, at p. 62,170 (1999).

rates.²⁵⁰ The Commission could follow the model it established in Order No. 2003 and append to the pro-forma OATT a standard-form agreement. In this case, the agreement would provide terms for soliciting and contracting with an ITM. Any agreement between a Public Utility and an ITM would be jurisdictional. An ITM would have to disclose any potential conflicts and prior work that could jeopardize its independence from the Public Utility, and the Commission could reject any proposed ITM agreement due to perceived or actual conflicts or other reasons.

Conclusion

The ANOPR marks a monumental step in the Commission's ongoing and obligatory efforts to address transmission-owning Public Utilities' incentives and opportunities to unduly discriminate against their customers and competitors. By limiting Public Utilities' discretion in implementing the OATT, the ANOPR's planning reforms would remedy undue discrimination. Creating a supplementary prudence policy could enhance the Commission's long-standing efforts to facilitate regional coordination pursuant to section 202(a) and would protect consumers from excessive transmission rates.

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²⁵⁰ Order No. 719, 73 Fed. Reg. 64,100 at P 354 (2008) (quoting *Market Monitoring Units in Regional Transmission Organizations and Independent System Operators*, 111 FERC ¶ 61,267 at Appendix A (2005)).