

151 FERC ¶ 61,021  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;  
Philip D. Moeller, Tony Clark,  
and Norman C. Bay.

Duke Energy Carolinas, LLC and Duke Energy Progress, Inc.	Docket Nos. ER13-83-006 ER13-83-007
Louisville Gas and Electric Company and Kentucky Utilities Company	ER13-897-003 ER13-897-004
Alabama Power Company	ER13-908-003 ER13-908-004
Ohio Valley Electric Corporation	ER13-913-003 ER13-913-004

ORDER ON REHEARING AND COMPLIANCE

(Issued April 13, 2015)

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1. On June 19, 2014, the Commission issued an order<sup>1</sup> that conditionally accepted in part and rejected in part the filings made by Duke Energy Carolinas, LLC and Duke Energy Progress, Inc. (Duke-Progress), Louisville Gas and Electric Company and Kentucky Utilities Company (LG&E/KU); Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company (collectively, Southern Companies); and Ohio Valley Electric Corporation (OVEC)<sup>2</sup> to comply with

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<sup>1</sup> *Duke Energy Carolinas, LLC*, 147 FERC ¶ 61,241 (2014) (Second Compliance Order).

<sup>2</sup> For purposes of this order, we refer to the public utility transmission providers in the Southeastern Regional Transmission Planning (SERTP) region (Duke-Progress, LG&E/KU, Southern Companies, and OVEC) as Filing Parties. SERTP Sponsors,

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the local and regional transmission planning and cost allocation requirements of Order No. 1000<sup>3</sup> and the Commission's First Compliance Order.<sup>4</sup> In the Second Compliance Order, the Commission directed Filing Parties to submit further revisions to their respective Open Access Transmission Tariffs (OATT or Tariff) in further compliance filings due within 60 days of the date of issuance of the Second Compliance Order. The Commission also granted in part and denied in part requests for rehearing of the First Compliance Order.<sup>5</sup>

2. On July 18, 2014, LS Power Transmission, LLC and LSP Transmission Holdings, LLC (collectively, LS Power) filed a timely request for clarification and rehearing of the Second Compliance Order. On July 21, 2014, SERTP Sponsors<sup>6</sup> filed a timely request for rehearing and clarification of the Second Compliance Order. On July 21, 2014, the Florida Public Service Commission (Florida Commission) filed a timely request for rehearing of the Second Compliance Order.<sup>7</sup>

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identified below, will refer to both the enrolled public utility transmission providers (i.e., Filing Parties) and the non-public utility transmission providers that either are enrolled in the transmission planning region or filed in support of the compliance filing.

<sup>3</sup> *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

<sup>4</sup> *Louisville Gas & Elec. Co.*, 144 FERC ¶ 61,054 (2013) (First Compliance Order).

<sup>5</sup> Second Compliance Order, 147 FERC ¶ 61,241.

<sup>6</sup> SERTP Sponsors consist of Southern Companies, OVEC, LG&E/KU, Duke-Progress (i.e., Filing Parties), the non-public utility transmission providers that have enrolled in the SERTP region (Associated Electric Cooperative Inc., Dalton Utilities, the Municipal Electric Authority of Georgia, PowerSouth Energy Cooperative, and Tennessee Valley Authority (TVA)) and non-public utility transmission providers that have not enrolled in the SERTP region but have filed comments in support of the compliance filing (Georgia Transmission Corporation and the South Mississippi Electric Power Association).

<sup>7</sup> Florida Commission filed its request for rehearing only in Docket No. ER13-908-003.

3. On August 18, 2014, Filing Parties separately submitted, pursuant to section 206 of the Federal Power Act (FPA),<sup>8</sup> revisions to the local and regional transmission planning procedures of their respective OATTs<sup>9</sup> to comply with the Second Compliance Order (Third Compliance Filing).

4. For the reasons discussed below, we accept Filing Parties' compliance filings, subject to additional compliance filings within 30 days of the date of issuance of this order. Specifically, we direct Filing Parties to (1) remove the requirement that a public or non-public utility transmission owner or provider that wishes to enroll in the SERTP region own or provide transmission service over transmission facilities within the SERTP region; (2) delete from the Preamble of Attachment K the language providing that transmission needs "typically arise from, but are not limited to, long-term (i.e., one year or more) firm transmission commitment(s) whether driven in whole or in part by public policy requirements or economic or reliability considerations"; (3) remove language from their OATTs stating that public policy-driven transmission needs include the planning and expansion of physical transmission system delivery capacity to provide long-term firm transmission service to meet i) native load obligations and ii) wholesale transmission obligations under the Tariff; (4) remove language from Duke-Progress's OATT stating the criteria for determining if public policy drives a local transmission need include the existence of facts showing that the identified need cannot be met absent the construction of additional transmission facilities; (5) remove the proposed language stating that for a transmission project to be eligible for selection in the regional transmission plan for purposes of cost allocation it must have two or more Beneficiaries; (6) remove language stating that "the proposed transmission project cannot be located on the property and/or

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<sup>8</sup> 16 U.S.C. § 824e (2012).

<sup>9</sup> Southern Companies, Open Access Transmission Tariff, Attachment K (The Southeastern Regional Transmission Planning Process) (4.0.0) (Southern Companies OATT, Attachment K); OVEC, Open Access Transmission Tariff, Attachment M (The Southeastern Regional Transmission Planning Process) (4.0.0) (OVEC OATT, Attachment M); LG&E/KU, Joint Pro Forma Open Access Transmission Tariff, Attachment K (Transmission Planning Process) (7.0.0) (LG&E/KU OATT, Attachment K); Duke Energy Carolinas, LLC Tariff Volume No. 4, Open Access Transmission Tariff, Attachment N-1, Transmission Planning Process (DEP Zone and DEC Zone) (8.0.0) (Duke-Progress OATT, Attachment N-1). Unless otherwise noted, citations to a Filing Party's proposed OATT revisions are from the versions of the OATTs listed here. Citations to a Filing Party's existing OATT, instead of its proposed OATT revisions submitted as part of its compliance filing, will provide the full cite, including the current version numbers.

right-of-way belonging to anyone other than the transmission developer absent the consent of the owner of the property and/or right-of-way, as the case may be”; and (7) revise and move to the body of their Tariffs a new footnote stating that “[t]he proposed regional transmission project must not contravene state or local laws with regard to rights-of-way or construction of transmission facilities.”

5. We also deny the requests for rehearing and grant in part and deny in part the requests for clarification.

## **I. Background**

6. In Order No. 1000, the Commission adopted a package of reforms addressing transmission planning and cost allocation that, taken together, are designed to ensure that Commission-jurisdictional services are provided at just and reasonable rates and on a basis that is just and reasonable and not unduly discriminatory or preferential. In particular, regarding regional transmission planning, Order No. 1000 amended the transmission planning requirements of Order No. 890<sup>10</sup> to require that each public utility transmission provider: (1) participate in a regional transmission planning process that produces a regional transmission plan; (2) amend its Tariff to describe procedures for the consideration of transmission needs driven by public policy requirements established by local, state, or federal laws or regulations in the local and regional transmission planning processes; and (3) remove federal rights of first refusal from Commission-jurisdictional tariffs and agreements for certain new transmission facilities.

7. The regional cost allocation reforms in Order No. 1000 also required each public utility transmission provider to set forth in its tariff a method, or set of methods, for allocating the costs of new regional transmission facilities selected in a regional transmission plan for purposes of cost allocation. Order No. 1000 also required that each cost allocation method adhere to six cost allocation principles.

## **II. Requests for Rehearing or Clarification**

8. Timely requests for rehearing and/or clarification were filed by SERTP Sponsors, LS Power, and the Florida Commission. SERTP Sponsors seek rehearing and clarification of Commission determinations in the Second Compliance Order addressing

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<sup>10</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh’g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh’g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh’g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

their proposed definition of “Transmission Needs”; enrollment provisions; minimum threshold requirements; and definition of “Beneficiaries.” LS Power seeks rehearing and clarification of Commission determinations in the Second Compliance Order addressing whether a transmission project is “materially different”; references to state or local laws or regulations regarding rights-of-way and easements in the OATT; “rating equivalents” for transmission developers that do not have a credit rating; and the credit rating required for determining whether security is required once a transmission developer is selected. The Florida Commission seeks rehearing and clarification of Commission determinations in the Second Compliance Order addressing the Commission’s authority and jurisdiction.

### **III. Compliance Filings**

9. In response to the Second Compliance Order, Filing Parties have submitted further revisions to their local and regional transmission planning processes to comply with the Commission’s compliance directives.

10. Notice of Duke-Progress, LG&E/KU, Southern Companies, and OVEC’s compliance filings was published in the *Federal Register*, 79 Fed. Reg. 50,642 (2014), with interventions and protests due on or before September 8, 2014. On September 29, 2014, LS Power filed a motion to submit late-filed comments. On October 29, 2014, SERTP Sponsors filed an answer to LS Power’s comments.

### **IV. Discussion**

#### **A. Procedural Matters**

11. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We accept LS Power’s late-filed comments and SERTP Sponsors’ answer because they have provided information that assisted us in our decision-making process.

#### **B. Substantive Matters**

12. As discussed below, we deny the requests for rehearing and grant in part and deny in part the requests for clarification. We also find that Filing Parties’ compliance filings partially comply with the directives from the Second Compliance Order. We direct Filing Parties to submit further compliance filings within 30 days of the date of issuance of this order.

**C. Regional Transmission Planning Requirements**

**1. Transmission Planning Region**

**a. Second Compliance Order**

13. In the Second Compliance Order, the Commission accepted Filing Parties' proposal to require that a public or non-public utility transmission owner or provider that wishes to enroll in the SERTP region be registered with NERC prior to enrollment. However, the Commission found that Filing Parties' additional proposed enrollment requirement – that the transmission owner or provider own or provide transmission service over transmission facilities within the SERTP region – appears circular in nature. The Commission explained, for example, that it is unclear how a transmission provider that owns transmission facilities adjacent to the SERTP region but that has not yet enrolled in the region would be able to meet the requirement to own or provide transmission service *within* the SERTP region before it actually enrolled (because its transmission facilities are adjacent to but not yet within the SERTP region).<sup>11</sup> Therefore, the Commission directed Filing Parties to clarify or remove this requirement.<sup>12</sup>

**b. Requests for Rehearing**

14. SERTP Sponsors request clarification, or in the alternative, rehearing, of the Commission's requirement for SERTP Sponsors to clarify or remove the enrollment criterion that a transmission owner or provider must own or provide transmission service over facilities in the SERTP region. Specifically, SERTP Sponsors request that the Commission clarify that the Commission is not holding that any transmission owner with facilities located adjacent to the SERTP is necessarily eligible to enroll. SERTP Sponsors contend that removing the enrollment criteria that a transmission owner or provider must have facilities located within the SERTP, with nothing more, would allow any transmission owner or transmission service provider located anywhere to be eligible to enroll. SERTP Sponsors assert that such a result would be inconsistent with Order No. 1000's requirement that the region must be integrated and thus seek clarification that it is

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<sup>11</sup> The Commission further explained that, for example, had Filing Parties' proposed provision been in effect prior to Duke-Progress's enrollment, it does not appear that Duke-Progress would have been eligible to enroll in the region. Second Compliance Order, 147 FERC ¶ 61,241 at n.89.

<sup>12</sup> Second Compliance Order, 147 FERC ¶ 61,241 at P 53.

appropriate to require that a transmission provider or owner that wishes to enroll in the SERTP region must own facilities that are integrated with the SERTP Sponsors.<sup>13</sup>

**c. Summary of Compliance Filings**

15. Filing Parties propose to revise their OATTs to clarify the enrollment requirement that a transmission provider or owner own or provide transmission service over transmission facilities within the SERTP region. Specifically, Filing Parties propose to add new language in a footnote stating that, “should a NERC-registered transmission owner or transmission service provider that owns or provides transmission service over facilities located adjacent to, and interconnected with, transmission facilities within the SERTP region provide an application to enroll in the SERTP region, such a request to expand the SERTP region will be considered by the transmission provider, giving consideration to the integrated nature of the SERTP region.”<sup>14</sup>

**d. Commission Determination**

16. With regard to SERTP Sponsors’ request that the Commission clarify that we are not holding that any transmission owner with facilities located adjacent to the SERTP is necessarily eligible to enroll, we need not speculate and address that issue as that matter is not currently before us.

17. We find that Filing Parties’ proposal to add a footnote to the enrollment criterion in their OATTs fails to comply with the Second Compliance Order. The enrollment requirement that the Commission directed Filing Parties to revise or remove – “A public utility or non-public utility transmission service provider and/or transmission owner who is registered with NERC as a Transmission Owner or a Transmission Service Provider and that owns or provides transmission service over transmission facilities within the SERTP region may enroll in the SERTP” – has neither been revised nor removed. Instead, Filing Parties add a footnote modifying an unrelated sentence in its OATT section addressing enrollment eligibility that states, “should a NERC-registered transmission owner or transmission service provider that owns or provides transmission service over facilities located adjacent to, and interconnected with, transmission facilities within the SERTP region provide an application to enroll in the SERTP region, such a

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<sup>13</sup> SERTP Sponsors Request for Rehearing at 13-14.

<sup>14</sup> Southern Companies, OATT, Attachment K, § 13.1, n.12.

request to expand the SERTP region will be considered by the transmission provider, giving consideration to the integrated nature of the SERTP region.”<sup>15</sup>

18. Filing Parties’ footnote does not modify or revise the language as directed in the Second Compliance Order, but instead only addresses an example the Commission provided in the Second Compliance Order to illustrate its concern regarding the requirement that a transmission provider or owner must own or provide transmission service over transmission facilities in order to enroll. Creating enrollment criteria that prohibit enrollment in the SERTP region by public utility transmission providers that currently do not own or provide transmission service over transmission facilities within the SERTP region remains our concern.

19. To the extent Filing Parties wish to include language in their OATTs addressing the geographic scope of their transmission planning region, we remind them that Order Nos. 890 and 1000 provide the appropriate standard, specifically “the scope of a transmission planning region should be governed by the integrated nature of the regional power grid and the particular reliability and resource issues affecting individual regions.”<sup>16</sup>

20. For the reasons discussed above, we require Filing Parties to file, within 30 days of the issuance of this order, further compliance filings to remove the italicized language below as well as remove the proposed footnote.<sup>17</sup>

A public utility or non-public utility transmission service provider and/or transmission owner who is registered with NERC as a Transmission Owner or a Transmission Service Provider *and that owns or provides transmission service over transmission facilities within the SERTP region* may be eligible to enroll in the SERTP.

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<sup>15</sup> *Id.*

<sup>16</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 160 (citing Order No. 890, FERC Stats. & Regs. ¶ 31,261 at 527). Moreover, the geographic requirements set forth in Order No. 1000 make it clear that Filing Parties’ assertion that “removing the enrollment criteria that the applicant must have facilities located within the SERTP, with nothing more, would allow any transmission service provider located anywhere to be eligible to enroll” is not in fact the case. SERTP Sponsors Request for Rehearing at 13-14.

<sup>17</sup> Southern Companies, OATT, Attachment K, § 13.1, n.12.

e. **Requirement to Plan on a Regional Basis to Identify More Efficient or Cost-Effective Transmission Solutions**

i. **Affirmative Obligation to Plan**

(a) **Second Compliance Order**

21. In the Second Compliance Order, the Commission stated that it was concerned with Filing Parties' proposed definition of "Transmission Needs" (a new term) because it unreasonably limits the universe of transmission projects that are allowed to be considered to address regional transmission needs to those associated with a long-term commitment for transmission service. The Commission explained that, in Order No. 890, it noted that the process addressing individual requests for service under the OATT is adequate for customers who request specific transmission rights to purchase power from a particular resource in a particular location during a defined time period,<sup>18</sup> but found that such a process does not provide an opportunity for customers to consider whether potential upgrades or other investments could reduce congestion costs or otherwise integrate new resources on an aggregated or regional basis outside of a specific request for interconnection or transmission service.<sup>19</sup> In addition, the Commission stated that in Order No. 1000, it found that the existing requirements of Order No. 890 are inadequate because, among other things, public utility transmission providers are currently under no affirmative obligation to develop a regional transmission plan that reflects the evaluation of whether alternative regional solutions may be more efficient or cost-effective than solutions identified in local transmission planning processes.<sup>20</sup> Thus, the Commission found, limiting transmission needs that will be considered in the regional transmission planning process to those associated with a commitment for long-term firm transmission service (i.e., associated with individual requests for transmission service under the OATT) is inconsistent with Order No. 890 and Order No. 1000. Accordingly, the Commission rejected the proposed definition of "Transmission Needs" and directed Filing Parties to either remove the new defined term "Transmission Needs" from their OATTs or to define "Transmission Needs" without the limitation that such transmission needs be associated with long-term firm transmission service commitments.<sup>21</sup>

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<sup>18</sup> Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 543.

<sup>19</sup> *Id.*

<sup>20</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 3.

<sup>21</sup> Second Compliance Order, 147 FERC ¶ 61,241 at P 101. Consistent with this finding, the Commission in the Second Compliance Order also required Filing Parties to

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22. The Commission also required revisions in Filing Parties' OATT provisions relating to transmission needs driven by public policy requirements that were related to the definition of Transmission Needs. First, in the Second Compliance Order, the Commission required that Filing Parties remove or revise the following language in their OATTs: "The Transmission provider addresses Transmission Needs driven by the Public Policy Requirements of load serving entities and wholesale transmission customers through the planning for and *expansion of physical transmission system delivery capacity to provide* long-term firm transmission services to meet i) native load obligations and ii) wholesale Transmission Customer obligations under the Tariff."<sup>22</sup>

23. The Commission also required Duke-Progress to remove the requirement in its local transmission planning process that a transmission need driven by public policy requirements be supported by the existence of facts showing that the public policy drives a physical transmission system delivery capacity requirement that must be fulfilled on a reliable basis to satisfy long-term (i.e., one year or more) firm transmission commitments or, in the alternative, modify the requirement based on the revised definition of Transmission Need that SERTP Sponsors will submit in response to the Second Compliance Order.<sup>23</sup>

(b) **Requests for Rehearing or Clarification**

(1) **Summary of Requests for Rehearing or Clarification**

24. SERTP Sponsors request rehearing of the Commission's decision requiring SERTP Sponsors to either remove the defined term "Transmission Needs" from their OATTs or define "Transmission Needs" without the limitation that such transmission needs be associated with long-term firm transmission service commitments.<sup>24</sup> SERTP Sponsors argue that the Commission's conclusion that the proposed definition inappropriately limits the scope of SERTP's planning process is misplaced, and assert

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make any appropriate changes to the provisions related to the identification of transmission needs driven by public policy requirements at the same time that it submits the corresponding revisions to the definition of Transmission Needs. Second Compliance Order, 147 FERC ¶ 61,241 at n.376.

<sup>22</sup> *Id.* P 198 (emphasis in original).

<sup>23</sup> *Id.* P 218.

<sup>24</sup> *See id.* P 101.

that the holding that the definition is inconsistent with Order Nos. 890 and 1000 is unsupported and otherwise arbitrary and capricious.<sup>25</sup>

25. Specifically, SERTP Sponsors argue that their proposed definition addresses long-term service taken under Filing Parties' OATTs (which they assert includes both third-party OATT customers and a Filing Party taking transmission service under its OATT) and also addresses the larger reality of long-term service to "Native Load Customers"<sup>26</sup> consistent with the OATT.<sup>27</sup> SERTP Sponsors contend that by conducting transmission planning to effectuate such service commitments (whether for native load or by transmission customers), SERTP Sponsors ensure that economic, reliability, and public policy needs are all addressed.<sup>28</sup> SERTP Sponsors also argue that their retail commissions in the Southeast have not allowed the expansion of the transmission system for other reasons (i.e., speculative or non-firm reasons).<sup>29</sup>

26. SERTP Sponsors argue that the proposed definition of Transmission Needs does not prevent customers from having an opportunity to consider potential upgrades or other investments to reduce congestion as required by Order No. 890's economic planning principle.<sup>30</sup> SERTP Sponsors assert that their Attachment Ks continue to allow stakeholders to request the performance of economic studies "to evaluate potential upgrades or other investments on the Transmission System that could reduce congestion or integrate new resources" as well as "[b]ulk power transfers from one area to another area."<sup>31</sup> SERTP Sponsors contend that these economic studies are not tied to specific

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<sup>25</sup> SERTP Sponsors Request for Rehearing at 4.

<sup>26</sup> "Native Load Customers" are defined as the Transmissions Provider's retail load and wholesale requirements customers. Southern Companies, OATT, Attachment K, § 1.21.

<sup>27</sup> SERTP Sponsors Request for Rehearing at 5.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 12-13.

<sup>30</sup> SERTP Sponsors Request for Rehearing at 8, *see* Southern Companies, OATT, Attachment K, § 7.2.

<sup>31</sup> SERTP Sponsors Request for Rehearing at 5-6, *see* Southern Companies, OATT, Attachment K, § 7.2.

OATT service requests.<sup>32</sup> In addition, they assert that nothing in Order Nos. 890 or 1000 required transmission providers to include facilities in their transmission expansion plans without firm transmission commitment drivers.

**(2) Commission Determination**

27. We deny SERTP Sponsors' request for rehearing and affirm the finding in the Second Compliance Order that Filing Parties must either remove the defined term "Transmission Needs" from their OATTs or define "Transmission Needs" without the limitation that such transmission needs be associated with long-term firm transmission service commitments.<sup>33</sup> We affirm the finding in the Second Compliance Order that the proposed definition of "Transmission Needs" unreasonably limits the universe of transmission projects that could be considered to address regional transmission needs and is inconsistent with Order No. 1000 because a commitment for long-term firm transmission service should not be a prerequisite for consideration of a transmission need.<sup>34</sup> While the process addressing individual requests for service under the OATT is adequate for customers who request specific transmission rights to purchase power from a particular resource in a particular location during a defined time period, such a process does not provide an opportunity for customers to consider whether potential upgrades or other investments could reduce congestion costs or otherwise integrate new resources on an aggregated or regional basis outside of a specific request for interconnection or transmission service.<sup>35</sup> The regional transmission planning process required by Order No. 1000 provides the opportunity for public utility transmission providers, transmission customers, and stakeholders to identify transmission needs on a regional level, which may or may not be addressed by individual transmission service requests.

28. In addition, contrary to SERTP Sponsors' claim, the Commission is not requiring it to expand its transmission system for non-firm transmission service. As an initial matter, as the Commission has made clear, nothing in Order No. 1000 requires a transmission facility that is selected in the regional transmission plan for purposes of cost allocation to be built, nor does it give any entity permission to build a transmission

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<sup>32</sup> SERTP Sponsors Request for Rehearing at 7, *see* Southern Companies, OATT, Attachment K, § 7.3.

<sup>33</sup> Second Compliance Order, 147 FERC ¶ 61,241 at P 101; *see also* South Carolina Gas & Elec. Co., 150 FERC ¶ 61,036, at PP 29-30 (2015).

<sup>34</sup> Second Compliance Order, 147 FERC ¶ 61,241 at P 71.

<sup>35</sup> Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 543.

facility.<sup>36</sup> Further, the Commission concluded in Order No. 1000 that the existing requirements of Order No. 890 were inadequate because public utility transmission providers had no affirmative obligation to develop a regional transmission plan that reflects the evaluation of whether alternative regional transmission solutions may be more efficient or cost-effective than solutions identified in local transmission planning processes.<sup>37</sup> The fact that SERTP Sponsors' transmission planning processes complied with the economic planning study principle of Order No. 890 is not a sufficient basis to conclude that they also comply with all the requirements of Order No. 1000.

(c) **Compliance**

(1) **Summary of Compliance Filings**

29. In their Third Compliance Filings, Filing Parties propose to revise their OATTs to replace the defined term "Transmission Needs" with the undefined term "transmission needs" and remove the limitation that such transmission needs be associated with long-term firm transmission service commitments.<sup>38</sup> Filing Parties have also revised the preamble to Attachment K to state that:

Transmission needs consist of the physical transmission system delivery capacity requirements necessary to reliably and economically satisfy the load projections; resource assumptions, including on-system and off-system supplies for current and future native load and network customer needs; public policy requirements; and transmission service commitments within the region. These needs typically arise from long-term (i.e., one year or more) firm transmission commitment(s) whether driven in whole or in part by public policy requirements or economic or reliability considerations.<sup>39</sup>

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<sup>36</sup> See, e.g., Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 66; Order No. 1000-A, 139 FERC ¶ 61,132 at P 191.

<sup>37</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 3, 12.

<sup>38</sup> Southern Companies Transmittal Letter at 7.

<sup>39</sup> Southern Companies, OATT, Attachment K, Preamble.

30. With respect to the Commission's requirement that Filing Parties remove or revise the following language in their OATTs: "The Transmission Provider addresses Transmission Needs driven by the Public Policy Requirements of load serving entities and wholesale transmission customers through the planning for and *expansion of physical transmission system delivery capacity to provide* long-term firm transmission services to meet i) native load obligations and ii) wholesale Transmission Customer obligations under the Tariff,"<sup>40</sup> Filing Parties propose to revise the provision to read:

The Transmission Provider addresses transmission needs driven by enacted state, federal and local laws and/or regulations ("Public Policy Requirements") in its routine planning, design, construction, operation, and maintenance of the Transmission System. This includes the planning for and expansion of physical transmission system delivery capacity to provide long-term firm transmission services to meet i) native load obligations and ii) wholesale Transmission Obligations under the Tariff.<sup>41</sup>

31. In response to the Commission's directive to remove or revise its OATT language regarding transmission needs driven by public policy requirements, Duke-Progress proposes to delete the language that the Commission referenced and replace it with a provision stating that "the criteria for determining if public policy drives a local transmission need include the existence of facts showing that the identified need cannot be met absent the construction of additional transmission facilities."<sup>42</sup>

## (2) Protests/Comments

32. LS Power states that the undefined term, transmission needs, remains in nearly every place in Filing Parties' OATTs where the defined term was located. LS Power states that transmission needs, whether defined or not, must still be determined in order to know what transmission proposals to submit and then to evaluate the transmission proposals. LS Power states that it is concerned that the application of the undefined term transmission needs will lead to the same results found improper by the Commission as the defined term. LS Power states that transmission needs, whether defined or not, must be clearly articulated before each transmission planning cycle so that prospective

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<sup>40</sup> Second Compliance Order, 147 FERC ¶ 61,241 at P 198 (emphasis in original).

<sup>41</sup> *E.g.*, Southern Companies, OATT, Attachment K, § 10.1.

<sup>42</sup> Duke-Progress, OATT, Attachment N-1, § 4.3.2.2.

transmission developers know the scope of transmission projects for which alternatives are being solicited.<sup>43</sup>

**(3) Answer**

33. SERTP Sponsors respond that they did not merely replace the defined term “Transmission Needs” with the undefined “transmission needs,” but also removed certain elements as directed by the Second Compliance Order while adding other details that the Commission found were lacking. SERTP Sponsors note that the description of transmission needs now includes needs driven by economics and public policy requirements. SERTP Sponsors argue that LS Power should have sought rehearing of Order No. 1000 if it was concerned about the lack of a specific definition of transmission needs as it appears in Order No. 1000 and now appears in Filing Parties’ OATTs. SERTP Sponsors state that the only way to accomplish the change sought by LS Power would be through further rulemaking.<sup>44</sup>

**(4) Commission Determination**

34. We find that Filing Parties’ proposed revisions partially comply with the Second Compliance Order’s directive to either remove the new defined term “Transmission Needs” from their OATTs or to define “Transmission Needs” without the limitation that such transmission needs be associated with long-term firm transmission service commitments. By specifying that “Transmission Needs” will no longer be a defined term, Filing Parties have responded partially to the directive from the Second Compliance Order. However, Filing Parties removed the definition of “Transmission Needs” and replaced it with language qualifying the undefined term “transmission needs.” Filing Parties’ proposed new language includes limiting language that was not directed on compliance, and is similar to the limiting language that the Commission rejected in the Second Compliance Order.<sup>45</sup> Although Filing Parties request the Commission treat revisions that exceed compliance directives as a section 205 filing, the Commission generally does not permit a party to combine a compliance filing with an unrelated or unnecessary tariff filing under section 205.<sup>46</sup> We thus reject this proposed new language

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<sup>43</sup> LS Power Protest at 5-6.

<sup>44</sup> SERTP Sponsors Answer at 10-11.

<sup>45</sup> Southern Companies, OATT, Attachment K, Preamble.

<sup>46</sup> See, e.g., *ISO New England, Inc.*, 99 FERC ¶ 61,070, at 61,322 (2012); see also *Midwest Indep. Transmission Sys. Operator, Inc.*, 112 FERC ¶ 61,169, at P 15 (2005).

as outside the scope of the compliance filing and direct Filing Parties to submit, within 30 days of the date of issuance of this order, further compliance filings to revise the Preamble of Attachment K and remove the following language: “these needs typically arise from long-term (i.e., one year or more) firm transmission commitment(s) whether driven in whole or in part by public policy requirements or economic or reliability considerations.” We note as we did above that, contrary to SERTP Sponsors’ claim, the Commission is not requiring Filing Parties to expand their transmission system for non-firm transmission service.<sup>47</sup>

35. We find Filing Parties neither revised nor removed the problematic language regarding transmission needs driven by public policy requirements, and we require Filing Parties to submit, within 30 days of the date of issuance of this order, further compliance filings removing the phrase: “This includes the planning for and expansion of physical transmission system delivery capacity to provide long-term firm transmission services to meet i) native load obligations and ii) wholesale Transmission Obligations under the Tariff.”

36. We disagree with LS Power’s concern that Filing Parties’ proposal does not provide sufficient clarity about which transmission needs will be considered during each transmission planning cycle to ensure that such needs are not inappropriately limited. We are requiring Filing Parties to make revisions to their OATTs to make clear that transmission needs in the transmission planning region arise in whole or in part from public policy requirements or economic or reliability considerations. In addition, the transmission needs will be discussed at various stakeholder meetings during the transmission planning cycle, and stakeholders have an opportunity to provide input at all of those meetings.<sup>48</sup> Thus, the open and transparent regional transmission planning process will make clear to all stakeholders which transmission needs will be evaluated for potential solutions during each transmission planning cycle, and stakeholders can provide input about particular transmission needs they believe should be considered.

37. In the Second Compliance Order, the Commission required Duke-Progress to remove the requirement in the Duke-Progress local transmission planning process that a transmission need driven by public policy requirements be supported by the existence of

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<sup>47</sup> See *supra* P 28.

<sup>48</sup> For example, the regional planning analysis that includes an assessment of transmission needs will be discussed at the second stakeholder meeting. See, e.g., Southern Companies, OATT, Attachment K, § I.1.2 (noting that an update on the regional planning analysis will be presented and any stakeholder planning issues will be discussed).

facts showing that the public policy drives a physical transmission system delivery capacity requirement that must be fulfilled on a reliable basis to satisfy long-term (i.e., one year or more) firm transmission commitments or, in the alternative, modify the requirement based on the revised definition of Transmission Need that SERTP Sponsors will submit in response to the Second Compliance Order.<sup>49</sup> The Commission found that this requirement was based on SERTP Sponsors' definition of "Transmission Need," which we found to be noncompliant with Order No. 1000.<sup>50</sup> In response to compliance directives in the Second Compliance Order, Filing Parties propose another definition for "transmission need" we find to be noncompliant, and Duke-Progress proposes to delete the language that the Commission referenced and replace it with a provision stating that "the criteria for determining if public policy drives a local transmission need include the existence of facts showing that the identified need cannot be met absent the construction of additional transmission facilities."<sup>51</sup> Although the language was revised, the new language substantively provides the same requirement as the language in Duke-Progress's Second Compliance Filing, which we still find to be noncompliant with Order No. 1000. Through the regional transmission planning process, public utility transmission providers are required to evaluate, in consultation with stakeholders, 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.<sup>52</sup> When evaluating the merits of such alternative transmission solutions, public utility transmission providers in the transmission planning region must also consider proposed non-transmission alternatives on a comparable basis.<sup>53</sup> Accordingly, we find that Duke-Progress may not limit consideration, in its local transmission planning process, of transmission facilities that address transmission needs driven by public policy requirements by first requiring a showing that the needs cannot be met without the transmission facility, as such a restriction would improperly preclude consideration of possible solutions to those needs. Thus we require Duke-Progress to submit, within 30 days of the issuance of this order, a further compliance filing removing this requirement.

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<sup>49</sup> Second Compliance Order, 147 FERC ¶ 61,241 at P 218.

<sup>50</sup> *Id.*

<sup>51</sup> Duke-Progress, OATT, Attachment N-1, § 4.3.2.2.

<sup>52</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 148.

<sup>53</sup> *Id.*

**ii. Minimum Threshold Requirements****(a) Second Compliance Order**

38. In the Second Compliance Order, the Commission rejected Filing Parties' proposed threshold that to be eligible for selection in the regional transmission plan for purposes of cost allocation, a transmission project must be at least 100 miles. The Commission found that Filing Parties failed to justify why a proposed transmission project must meet the proposed 100-mile threshold to be eligible for consideration for evaluation and potential selection in the regional transmission plan for purposes of cost allocation. The Commission directed Filing Parties to remove the 100-mile threshold from their OATTs.<sup>54</sup>

39. The Commission also rejected Filing Parties' proposed alternative threshold that to be eligible for selection in the regional transmission plan for purposes of cost allocation, a transmission project must be at least 50 miles *and* displace transmission projects in more than one balancing authority area or state. The Commission explained that, in the First Compliance Order, it rejected the proposed requirement that, to be eligible for regional cost allocation, a regional transmission project must displace transmission projects in two balancing authority areas or states within the SERTP region because it may inappropriately exclude certain transmission projects that might provide regional benefits from being evaluated for selection in the regional transmission plan for purposes of cost allocation.<sup>55</sup> The Commission found that the requirement that a transmission project between 50 and 100 miles displace transmission projects in two or more balancing authority areas or states within the SERTP region creates the same concerns as the proposed 100-mile threshold and thus directed Filing Parties to remove this provision from their OATTs.<sup>56</sup>

40. In regard to Filing Parties' proposal that, to be eligible for possible selection in the regional transmission plan for purposes of cost allocation, a transmission project must be "materially different" than transmission projects currently being considered in the SERTP process, the Commission required Filing Parties to make transparent any determination that a proposed transmission facility is not materially different than a project already under consideration. Specifically, the Commission directed Filing Parties to revise their OATTs to require a posting be made for stakeholders in the regional transmission

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<sup>54</sup> Second Compliance Order, 147 FERC ¶ 61,241 at P 144.

<sup>55</sup> First Compliance Order, 144 FERC ¶ 61,054 at P 78.

<sup>56</sup> Second Compliance Order, 147 FERC ¶ 61,241 at P 145.

planning process of any determinations made by the transmission providers that a proposed transmission project is not “materially different,” which also may include an explanation regarding cost estimates.<sup>57</sup>

41. The Commission also required Filing Parties to revise their proposed definition of “materially different.” The Commission directed Filing Parties to revise their OATTs to state that a transmission project will be deemed materially different as compared to another transmission alternative(s) under consideration if the proposal contains significant geographic *or* electrical differences in the alternative’s proposed interconnection point(s) *or* transmission line routing.<sup>58</sup>

(b) **Requests for Rehearing**

(1) **Summary of Requests for Rehearing or Clarification**

42. SERTP Sponsors seek clarification that they may retain the 50-mile threshold criteria so long as they decouple it from the requirement that the transmission project also displace transmission projects located in more than one balancing area or state.<sup>59</sup> SERTP Sponsors assert that the Second Compliance Order rejected on the grounds of insufficient evidence their originally-proposed, general threshold criteria that a transmission project would be regional if it were at least 100 miles in length; SERTP Sponsors contend that the Second Compliance Order did not make a similar finding regarding the 50-mile threshold.<sup>60</sup> Thus, SERTP Sponsors seek clarification that they have adequately justified a 50-mile minimum threshold for transmission projects to be eligible for selection in the regional transmission plan for purposes of cost allocation within SERTP. To the extent clarification is not granted, SERTP Sponsors request rehearing, as they argue that such finding would be arbitrary and capricious and unsupported by substantial record evidence.<sup>61</sup>

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<sup>57</sup> Second Compliance Order, 147 FERC ¶ 61,241 at PP 146-147.

<sup>58</sup> *Id.* P 148.

<sup>59</sup> SERTP Sponsors Request for Rehearing at 14.

<sup>60</sup> *Id.* at 15.

<sup>61</sup> *Id.* at 16 (citing 5 U.S.C. § 706; *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983); *City of Charlottesville, Virginia v. FERC*, 661 F.2d 945 (D.C. Cir. 1981); *Center for Auto*

(continued...)

43. In its request for clarification, LS Power requests that the Commission confirm that “materially different” for purposes of the SERTP regional transmission planning process includes transmission projects that are geographically or electrically similar, but for which there are material cost or rate impact differences.<sup>62</sup> LS Power asserts that transmission projects that have legitimate cost differences can also be materially different.<sup>63</sup> LS Power argues that by not recognizing verifiable cost differences between proposals as establishing a proposal to be “materially different” from a proposal being studied, the Commission ignores the very issue that forms the foundation for its jurisdiction, which is electric rates.<sup>64</sup> LS Power contends that the Second Compliance Order ignores the very material differences a transmission project that is geographically and electrically similar can have on ratepayers if the cost commitments between transmission developers are different.<sup>65</sup>

## (2) Commission Determination

44. We clarify that Filing Parties may retain their minimum threshold requiring that a transmission project be at least 50 miles, so long as they follow the Commission’s directive in the Second Compliance Order to remove the requirement that the transmission project also displace transmission projects located in more than one balancing area or state.<sup>66</sup> As Filing Parties assert in their transmittal letters,

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*Safety v. Federal Highway Administration*, 956 F.2d 309 (D.C. Cir. 1992); *Missouri Pub. Serv. Comm’n v. FERC*, 337 F.3d 1066 (D.C. Cir. 2003)).

<sup>62</sup> LS Power Request for Rehearing at 8.

<sup>63</sup> *Id.* at 6.

<sup>64</sup> *Id.*; *see* Federal Power Act, 16 U.S.C. § 824d (2012).

<sup>65</sup> LS Power Request for Rehearing at 6. For example, LS Power claims that the PJM Interconnection (PJM) Artificial Island RFP provides an example of how cost differences can be material differences. LS Power asserts that in the Artificial Island request for proposals, a public utility eventually agreed to cap the construction cost for its proposal at a figure that was \$40 million less than what PJM estimated as the low end of the cost range. LS Power argues that a cost capped proposal that is at least \$40 million less than cost estimates for an identical proposal without such containment commitments is “materially different” from a ratepayer perspective. *Id.* at 7.

<sup>66</sup> Filing Parties propose this language in their Third Compliance Filings, as further discussed in P 47 below.

[T]he average distance between each load center in the SERTP region with its closest neighboring load center is 91 miles and the average distance between each load center and its second closest neighboring load center is 124 miles, far in excess of the proposed 50-mile limit. Moreover, there are currently 63 transmission lines within the SERTP region [rated 300kV or above] that exceed the 50-mile threshold.<sup>67</sup>

45. In establishing minimum thresholds, a balance must be reached between “excluding clearly local transmission projects that are unlikely to provide regional benefits from being submitted for evaluation in the regional transmission planning process with the need to evaluate ... those transmission facilities that are likely to provide regional transmission benefits.”<sup>68</sup> We recognize that this balance is not an exact science and that there could be some transmission projects that do not meet the minimum threshold, but could still provide regional benefits. However, by limiting potential transmission projects to those that are likely to provide regional benefits, minimum thresholds establish clear and objective standards and avoid the need for the public utility transmission providers to expend resources on the consideration of transmission projects that are less likely to provide regional transmission benefits.<sup>69</sup>

46. We reject LS Power’s request to clarify that a “materially different” transmission project for purposes of the Filing Parties’ competitive process includes transmission projects that are geographically or electrically similar, but for which there are material cost or rate impact differences. Under the sponsorship model Filing Parties have established to comply with Order No. 1000, transmission developers can propose transmission projects for potential selection in the regional transmission plan for purposes of cost allocation and, if the transmission project is selected, the developer that proposed it is eligible to use the regional cost allocation for that project. Thus, the purpose of the “materially different” provision that LS Power requests us to clarify is related to whether a transmission *project* is materially different than transmission projects currently in the regional or local transmission plans, not to distinguish between developers that propose materially similar transmission projects. Thus, we find it unnecessary to require as part of a sponsorship model that Filing Parties expand their analysis to also differentiate

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<sup>67</sup> *E.g.*, Southern Companies Transmittal Letter at 8-9.

<sup>68</sup> *See Tampa Elec. Co. et al.*, 143 FERC ¶ 61,254, at P 67 (2013).

<sup>69</sup> *See Tampa Elec. Co.*, 148 FERC ¶ 61,172 (2014) at P 139 (citing *Tampa Elec. Co.*, 143 FERC ¶ 61,254 (2013) at P 67).

between developers who wish to develop transmission projects that are materially the same.

(c) **Compliance**

(1) **Summary of Compliance Filings**

47. Filing Parties propose to remove the minimum threshold requirement that a transmission project must be at least 100 miles within the SERTP region to be eligible for selection in the regional transmission plan for purposes of cost allocation. Filing Parties also propose to delete the requirement that a transmission project displace transmission projects in two or more balancing authority areas or states in the SERTP region. However, consistent with and for the reasons outlined in Filing Parties' request for clarification,<sup>70</sup> Filing Parties propose to retain the minimum threshold requirements that a transmission project must be at least 50 miles and be located within the SERTP region.<sup>71</sup>

48. In addition, Filing Parties propose a new minimum threshold specifying that for a transmission project to be eligible for selection in the regional transmission plan for purposes of cost allocation it must have two or more Beneficiaries,<sup>72</sup> with the caveat that a transmission developer is not responsible for determining whether a regional transmission project would have more than one Beneficiary, but that the transmission provider will determine the Beneficiaries of any proposed project.<sup>73</sup> Filing Parties state that this requirement is similar to one the Commission approved in the South Carolina Regional Transmission Planning region.<sup>74</sup>

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<sup>70</sup> *E.g.*, Southern Companies Transmittal Letter at 8 (citing SERTP Sponsors Request for Rehearing at 14-16).

<sup>71</sup> *E.g.*, Southern Companies, OATT, Attachment K, §§ 15.1.2 – 15.1.3.

<sup>72</sup> Filing Parties define Beneficiaries as “enrollees that are identified pursuant to Section 17 to potentially receive cost savings (associated with the regional cost allocation components in Section 18) due to the transmission developer’s proposed transmission project for possible selection in a regional transmission plan for regional cost allocation purposes (“RCAP”).” *E.g.*, Southern Companies OATT, Attachment K, n.5.

<sup>73</sup> *E.g.*, Southern Companies, OATT, Attachment K, § 15.1.4, n.13.

<sup>74</sup> *E.g.*, Southern Companies Transmittal Letter at 9 (citing *South Carolina Elec. & Gas Co.*, 147 FERC ¶ 61,126, at P 87 (2014)).

49. Finally, Filing Parties propose changes to their OATTs to commit to explaining why a particular transmission project is deemed to not be “materially different.” In particular, Filing Parties propose language stating that “[s]hould the proposed transmission project be deemed not materially different than projects already under consideration in the transmission expansion planning process, the transmission provider will provide a sufficiently detailed explanation on the Regional Planning Website for stakeholders to understand why such determination was made.”<sup>75</sup> Filing Parties also revised the proposed definition of “materially different” to state that a transmission project is materially different if it contains “significant geographic *or* electric differences in the alternative’s proposed interconnection points(s) *or* transmission line routing.”<sup>76</sup>

## (2) Protests/ Comments

50. LS Power asserts that although Filing Parties’ revisions to their respective Tariffs address the minimum required by the Commission, they do not go far enough as they do not address transmission projects that have verifiable cost differences which can also be “materially different.” LS Power explains that the Commission’s jurisdiction under the Federal Power Act is limited to the determination of “rates” or “any rule, regulation, practice, or contract affecting such rate, charge, or classification...” LS Power states that this fundamental precept of Commission jurisdiction was the legal foundation upon which the Commission issued Order No. 1000 and its requirement that alternative transmission projects must be evaluated on the same terms as projects proposed by incumbent transmission owners. LS Power states that by not recognizing verifiable cost differences between proposals as establishing a proposal to be “materially different” from another proposal being studied, SERTP Sponsors ignore the very issue that forms the foundation for the Commission’s jurisdiction.<sup>77</sup>

51. LS Power contends that cost estimates should not equate to a transmission project being determined to be materially different; rather, LS Power believes that the Tariff provision, to be just and reasonable, must account for *verifiable* cost differences such as fixed price arrangements, cost caps, or caps on return on equity. LS Power explains that for purposes of the SERTP process, even if an entity sponsors a transmission project which is electrically *and* geographically similar to a transmission project under consideration, the agreement to a cost cap or other cost containment provision is “materially different” than an entity that is unwilling to agree to such cost containment

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<sup>75</sup> *E.g.*, Southern Companies, OATT, Attachment K, § 15.3.

<sup>76</sup> *Id.*

<sup>77</sup> LS Power Protest at 6.

commitment. LS Power believes that a proposal agreeing to cap return on equity in any section 205 filing is materially different than a transmission developer that has no such return on equity cap, or even Commission review of its return on equity.<sup>78</sup>

### (3) Answer

52. SERTP Sponsors state that LS Power's protest confuses the proposed SERTP process with competitive bidding-modeled processes in other regions with its argument that different verifiable cost estimates should result in transmission projects being deemed to be materially different. SERTP Sponsors state that in the Second Compliance Order, the Commission agreed that permitting suggestions such as LS Power's would allow multiple developers to submit essentially identical proposals, which would not identify alternatives to the transmission solutions already identified and under evaluation, and instead could require additional resources and reduce the overall efficiency of the regional transmission planning process. SERTP Sponsors note that the Commission also found that allowing transmission developers to propose nearly identical proposals could result in disputes between and among transmission developers and transmission planners over selection of transmission projects in the regional transmission plan for purposes of cost allocation and related access to the cost allocation determinations.<sup>79</sup>

53. SERTP Sponsors explain that the Second Compliance Order is clear in its directives to revise the proposal and SERTP Sponsors believe they have met those requirements with their current proposal. SERTP Sponsors believe LS Power's argument seeks not only to override the Commission's rejection of this argument with an unauthorized collateral attack on the Second Compliance Order, but also seeks to force SERTP Sponsors to adopt requirements contained neither in the Second Compliance Order nor in Order No. 1000.<sup>80</sup>

### (4) Commission Determination

54. We find that Filing Parties comply with the directive to remove the regional threshold requirement that a transmission project must be at least 100 miles to be eligible for selection in the regional transmission plan for purposes of cost allocation from their OATTs. We also find that Filing Parties comply with the directive to remove the

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<sup>78</sup> *Id.* at 6-7.

<sup>79</sup> SERTP Sponsors Answer at 11 (citing Second Compliance Order, 147 FERC ¶ 61,241 at P 146).

<sup>80</sup> *Id.* at 11-12.

regional threshold requirement that a transmission project must displace transmission projects in two balancing authorities or states.

55. In addition, as explained in the previous section of this order, we accept Filing Parties' proposal to retain their minimum threshold requiring that a transmission project be at least 50 miles.

56. We also find that Filing Parties comply with the requirement to revise their OATTs to require a posting be made for stakeholders in the regional transmission planning process of any determinations made by the transmission providers that a proposed transmission project is not "materially different."

57. However, we reject the new proposed language stating that for a transmission project to be eligible for selection in the regional transmission plan for purposes of cost allocation, it must have two or more Beneficiaries.<sup>81</sup> This is an entirely new proposal that is not related to any compliance directive from the Second Compliance Order and is not otherwise necessary to comply with Order No. 1000. Although Filing Parties request the Commission treat revisions that exceed compliance directives as a section 205 filing, the Commission generally does not permit a party to combine a compliance filing with an unrelated or unnecessary tariff filing under section 205.<sup>82</sup> We thus reject this proposed new threshold as outside the scope of the compliance filing and direct Filing Parties to submit, within 30 days of the date of issuance of this order, a further compliance filing that removes from their OATTs the requirement that to be eligible for selection in the regional transmission plan for purposes of cost allocation, a transmission project must have two or more Beneficiaries.

58. We reject LS Power's request to clarify that when SERTP Sponsors determine whether a proposed transmission project is "materially different" from a transmission project currently in the local or regional transmission plan, they should address projects that have verifiable cost differences. As we noted above, under the sponsorship model Filing Parties have established to comply with Order No. 1000, transmission developers can propose transmission projects for potential selection in the regional transmission plan

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<sup>81</sup> Filing Parties define Beneficiaries as "enrollees that are identified pursuant to Section 17 to potentially receive cost savings (associated with the regional cost allocation components in Section 18) due to the transmission developer's proposed transmission project for possible selection in a regional transmission plan for regional cost allocation purposes (RCAP)." *E.g.*, Southern Companies, OATT, Attachment K, n.5.

<sup>82</sup> *See, e.g., ISO New England, Inc.*, 99 FERC ¶ 61,070, at 61,322 (2012); *see also Midwest Indep. Transmission Sys. Operator, Inc.*, 112 FERC ¶ 61,169, at P 15 (2005).

for purposes of cost allocation and, if the transmission project is selected, the developer that proposed it is eligible to use the regional cost allocation for that project.<sup>83</sup> Thus, the purpose of the “materially different” provision that LS Power protests is related to whether a transmission project is materially different than transmission projects currently selected, or under consideration for selection, in the regional or local transmission plans, not to distinguish between developers that propose fundamentally similar transmission projects. LS Power itself states that cost estimates do not equate to a materially different project.<sup>84</sup> Therefore, LS Power’s request is outside the scope of this compliance directive.<sup>85</sup>

59. Finally, we find Filing Parties comply with the directive to revise their OATTs to state that a transmission project will be deemed materially different as compared to another transmission alternative(s) under consideration if the proposal contains significant geographic *or* electrical differences in the alternative’s proposed interconnection point(s) *or* transmission line routing.

## **2. Nonincumbent Transmission Developer Reforms**

### **a. Federal Rights of First Refusal**

#### **i. Second Compliance Order**

60. In the Second Compliance Order, the Commission granted rehearing and reversed its earlier finding regarding whether Filing Parties may require that, to be eligible for potential selection in the regional transmission plan for purposes of cost allocation, a proposed transmission project cannot be located on the property and/or right-of-way belonging to anyone other than the transmission developer absent the consent of the owner of the right-of-way.<sup>86</sup> The Commission found, upon further consideration, that the provision merely recognized state laws and regulations and did not create a federal right of first refusal.<sup>87</sup>

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<sup>83</sup> *See supra* P 46.

<sup>84</sup> LS Power Protest at 6.

<sup>85</sup> *See S. Carolina Gas & Elec. Co.*, 150 FERC ¶ 61,036, at P 43 (2015) (rejecting the same request by LS Power as outside the scope the compliance proceeding).

<sup>86</sup> Second Compliance Order, 147 FERC ¶ 61,241 at P 228.

<sup>87</sup> *Id.* P 227.

61. The Commission continued to require the elimination of federal rights of first refusal from Commission-jurisdictional tariffs or agreements. Here, however, the Commission found that it was addressing the question of “whether it is appropriate for the Commission to prohibit Filing Parties from merely recognizing the rights and restrictions relating to a state or local right-of-way when deciding whether to consider a proposed transmission project for selection in the regional transmission plan for purposes of cost allocation.”<sup>88</sup> The Commission concluded that, on balance, it should not prohibit Filing Parties from recognizing state or local laws and regulations as a threshold issue.<sup>89</sup>

62. The Commission found that requiring Filing Parties to remove the provision from their OATTs would result in a regional transmission planning process that does not efficiently account for the existence of state or local laws or regulations that impact the siting, permitting, and construction of transmission facilities, and would require Filing Parties’ regional transmission planning process to expend time and resources to evaluate potential transmission projects that, under state or local laws or regulations, cannot be developed by a nonincumbent transmission developer.<sup>90</sup> The Commission found that requiring such consideration would create unnecessary inefficiencies and delays.<sup>91</sup> Therefore, it granted rehearing and found that Filing Parties may retain their proposed provisions providing that, to be eligible for potential selection in the regional transmission plan for purposes of cost allocation, a proposed transmission project cannot be located on the property and/or right-of-way belonging to anyone other than the transmission developer absent the consent of the owner of the right-of-way.<sup>92</sup>

**ii. Summary of Requests for Rehearing or Clarification**

63. LS Power argues the Commission erred in reinstating SERTP Sponsors’ provision providing that, to be eligible for potential selection in the regional transmission plan for purposes of cost allocation, a proposed transmission project cannot be located on the property and/or right-of-way belonging to anyone other than the transmission developer

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* PP 227-228.

<sup>91</sup> *Id.* P 228.

<sup>92</sup> *Id.*

absent the consent of the owner of the right-of-way.<sup>93</sup> LS Power further argues that rights-of-way and other property issues are not the type of matter that can be determined as a threshold matter, as the scope of rights-of-way and easements is a complicated legal matter that changes with each individual parcel of land impacted by a proposed line. LS Power asserts that SERTP Sponsors' proposed OATT provision would require that 100 percent of those property impacts must be resolved for a project to be submitted for consideration.<sup>94</sup> LS Power urges that even if it could be determined that some of the expected impacts were to rights-of-way controlled by a SERTP Sponsor (and presumably paid for by ratepayers), actual determination of whether the impact is one prohibited by state or local law or regulation is not a simple issue, nor one that can be determined by SERTP Sponsors as a preliminary or threshold matter.<sup>95</sup>

64. LS Power contends that to the extent that the Commission permits SERTP Sponsors to exclude projects from regional plan development, and thus cost allocation, based on SERTP Sponsors' assertions that the developer would be excluded under state or local property law or regulation from accessing the property included in its proposal, the Commission is shifting the decision of real property issues from state courts or agencies to SERTP Sponsors, and if disputed, the Commission.<sup>96</sup> LS Power claims that the Commission will put itself in the position of arbiter of those SERTP Sponsors decisions and thus state law.<sup>97</sup>

### iii. Compliance Filings

#### (a) Summary of Compliance Filings

65. With regard to the Second Compliance Order's requirement to restore language contained in Filing Parties' original compliance filing that provided that to be eligible for consideration for potential selection in the regional transmission plan for purposes of cost allocation, a proposed transmission project cannot be located on the property and/or right-of-way belonging to anyone other than the transmission developer absent the

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<sup>93</sup> LS Power Request for Rehearing at 8.

<sup>94</sup> *Id.* at 10.

<sup>95</sup> *Id.* at 10-11.

<sup>96</sup> *Id.* at 9-10.

<sup>97</sup> *Id.* at 9.

consent of the owner of the property or right-of-way, this language has been reincorporated into Filing Parties' OATTs.<sup>98</sup>

66. Filing Parties also state that related to restoration of the language regarding rights-of-way above, language that was added in Filing Parties' Second Compliance Filings providing that right-of-way considerations would be included in the evaluation stage has been removed since it is now moot.<sup>99</sup> However, Filing Parties note that these deletions do not mean that the ability and likelihood of a transmission developer to obtain any necessary property rights in the form of easements or the like would not be considered in evaluating a transmission project, as that factor would play into both cost and the feasibility of the project being constructed by the required in-service date. Filing Parties also include in their OATTs a footnote stating that "[t]he proposed regional transmission project must not contravene state or local laws with regard to construction of transmission facilities."<sup>100</sup>

67. With regard to revising the provision in Filing Parties' Second Compliance Filings providing that nothing precludes the transmission provider from building new transmission facilities located in its local footprint "and/or" that are not submitted for regional cost allocation purposes, Filing Parties explain that they are concerned with the Commission's directive to remove the "or" from this statement. Filing Parties state that including such a revised statement would cause confusion because by negative implication it might be construed to indicate a limitation on the transmission provider's ability to pursue negotiated/merchant transmission projects outside of its local footprint. To prevent any confusion, Filing Parties propose to delete the entire referenced sentence.<sup>101</sup>

**(b) Summary of Protests**

68. LS Power reiterates that, consistent with their rehearing request, the Commission's reversal on recognition of state or local laws should be resolved by state and local jurisdictional entities, not as part of a Commission jurisdictional transmission planning process. Additionally, LS Power argues that Filing Parties made an additional change that was not required by the Second Compliance Order. Specifically, LS Power argues

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<sup>98</sup> *E.g.*, Southern Companies, OATT, Attachment K, § 15.2.

<sup>99</sup> *E.g.*, *id.* §§ 11.2.1, 17.5.1.

<sup>100</sup> *E.g.*, *id.* § 15.2, n.14.

<sup>101</sup> *E.g.*, Southern Companies Transmittal Letter at 11-12.

that Filing Parties added a footnote in section 15.2 stating “[t]he proposed regional transmission project must not contravene state or local laws with regard to construction of transmission facilities.” LS Power states that while Filing Parties indicate that it was added for clarification, it is unclear which Tariff provision needs clarification. LS Power argues that the proposed footnote either adds nothing to the language that is already present in the Tariff, or is an improper addition to the Tariff that is not appropriate for a compliance filing and should be rejected.<sup>102</sup>

69. LS Power contends that Order No. 1000 makes it clear that it did not override state laws, which the Commission reiterated in the Second Compliance Order. LS Power states that there is no reason for the addition of a footnote in the Tariff ‘clarifying’ this fact yet again, especially since Filing Parties do not identify why they believe such clarification is necessary. LS Power also states that Filing Parties do not identify what they will do with the footnote clarification, such as whether SERTP Sponsors will use it to be the arbiter of whether or not a proposed transmission project contravenes state or local laws.<sup>103</sup> LS Power also argues that to the extent Filing Parties intended the footnote to do more than what is already in the Tariff, the addition is improper in a compliance filing.

70. LS Power is also concerned about Filing Parties’ additional language in the transmittal letter regarding the deletion of right-of-way considerations in the evaluation stage, which states the:

deletions do not mean that the ability and likelihood of a transmission developer to obtain any necessary property rights in the form of easements or the like would [not] be considered in evaluating a project, as that factor would play into the feasibility of the project being constructed by the required in-service date.<sup>104</sup>

71. LS Power contends that the Third Compliance Filing does not explain how SERTP Sponsors propose to address this “likelihood” of evaluation of chances of negotiating property rights between private parties and how the evaluation will impact SERTP Sponsors’ overall selection of the more efficient or cost-effective transmission project.

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<sup>102</sup> LS Power Protest at 7.

<sup>103</sup> *Id.* at 8.

<sup>104</sup> *Id.* (citing *e.g.*, Southern Companies Transmittal Letter at 11).

LS Power is concerned that this loose language, even if not in Filing Parties' OATTs, could somehow be used against it in the future.<sup>105</sup>

(c) **Answer**

72. SERTP Sponsors reiterate that the Commission granted rehearing and permitted, in the project proposal stage, provisions that acknowledged applicable state law. SERTP Sponsors specifically point out that they were directed to incorporate into their evaluation stage references to state laws and rights-of-way. As such, SERTP Sponsors state that they added the specified language in Attachment K Section 15.2 and incorporated related language in footnote 14, which SERTP Sponsors argue is substantively the same as language already approved in Attachment K Section 17.1<sup>106</sup> of their Tariffs. SERTP Sponsors further argue that the additional footnote is also materially the same as language approved in PJM<sup>107</sup> and MISO.<sup>108</sup>

73. SERTP Sponsors also claim that LS Power's arguments in this regard are misleading. SERTP Sponsors explain that the authority to authorize and certify the construction of transmission lines remains a matter of state primary jurisdiction, and LS Power should be aware that such provisions have already been accepted in other regions based upon the acknowledgement that a state law may prevent a putative transmission developer from ever actually constructing the transmission project it proposes. SERTP Sponsors point out that since the time of the initial regional compliance filings, North Carolina has enacted such a law. SERTP Sponsors also state that the Commission clarified that ignoring such laws would merely cause inefficiency and delay in the regional transmission planning process.<sup>109</sup> SERTP Sponsors thus argue that in

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<sup>105</sup> *Id.*

<sup>106</sup> SERTP Sponsors Answer at 12-13 (citing, *e.g.*, Southern Companies, OATT, Attachment K, § 17.1, "Such evaluation will be in accordance with, and subject to (among other things), state law pertaining to transmission ownership, siting, and construction.").

<sup>107</sup> *Id.* at 13 (citing *PJM Interconnection, LLC, et al.*, 147 FERC ¶ 61,128, at PP 130-33 (2014)).

<sup>108</sup> *Id.* (citing *Midwest Independent Transmission System Operator, Inc. and the MISO Transmission Owners, et al.*, 147 FERC ¶ 61,127, at P 150 (2014)).

<sup>109</sup> *Id.* at 13-14 (citing Second Compliance Order, 147 FERC ¶ 61,241 at PP 227-228).

accordance with this guidance, the Commission should approve this language, as it has in other regions.<sup>110</sup>

74. SERTP Sponsors clarify to the extent the footnote is an improper addition to the Tariff that is not appropriate for a compliance filing, they point to their request in the transmittal letter that should the Commission consider certain elements of the third compliance filing to be outside the scope of the compliance obligations, then they request that any such additions be treated as being made under FPA section 205.<sup>111</sup> SERTP Sponsors state that the relevant standards of review under sections 205 and 206 are identical, and no prejudice would flow from the Commission ruling on certain elements under section 206 and others under section 205, especially with regard to a provision that the Commission has already accepted in other regions.<sup>112</sup>

75. SERTP Sponsors also state that LS Power's argument, that SERTP Sponsors should not be able to consider during the evaluation stage the feasibility of a transmission project actually being completed by the proposed transmission developer, is misplaced. SERTP Sponsors state that the remaining language in section 11.2.1 remains unchanged and to the extent LS Power seeks to re-litigate that point, its request is fatally late, as it should have been raised when such language was originally proposed or in a request for rehearing after it was approved. Moreover, SERTP Sponsors explain that under the current proposal, any decision by the region to select or reject a transmission project will be made transparent, with explanations posted for stakeholder review, subject to the Commission's oversight. SERTP Sponsors contend that rather than now object to a potential rejection of a future proposed transmission project for the wrong reasons, the appropriate course would be to rely upon the Order No. 1000 compliance process, which permits any transmission developer to use the regional dispute resolution process, including through a challenge before the Commission, regarding determinations made to reject its proposal based upon the actual substance of the rejection. SERTP Sponsors allege that LS Power's objection is based on the premise that the other provisions of the Order No. 1000 compliance processes do not work. However, SERTP Sponsors state that taken as a whole, this provision as proposed provides stakeholders the necessary clarity to know why a transmission project was selected so that any improper decisions can be resolved pursuant to the regional dispute resolution process, including by petition to the Commission.<sup>113</sup>

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 14 (citing Southern Companies Transmittal Letter at 1-2 nn.2, 18).

<sup>112</sup> *Id.* at 14-15.

<sup>113</sup> *Id.* at 15.

#### iv. Commission Determination

76. We deny LS Power's request for rehearing and we confirm the Commission's finding in the Second Compliance Order that it is appropriate for Filing Parties to recognize state or local laws or regulations relating to the use and control of rights-of-way as a threshold matter in the regional transmission planning process.<sup>114</sup> As the Commission stated in the Second Compliance Order and we reiterate here, Order No. 1000's focus is on federal right of first refusal provisions in Commission-jurisdictional tariffs and Order No. 1000 does not require removal from Commission-jurisdictional tariffs or agreements of references to state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities.<sup>115</sup>

77. Order No. 1000 defines the phrase "federal right of first refusal" to refer only to rights of first refusal that are created by provisions in Commission-jurisdictional tariffs or agreements. In particular, Order No. 1000 explained that a federal right of first refusal in a region's Commission-jurisdictional tariffs or agreements would operate, at the federal level, to "prevent [nonincumbent] entities from constructing and owning new transmission facilities located in that region." However, in the Second Compliance Order, the Commission explained that "ignoring state or local laws or regulations at the outset of the regional transmission planning process would be counterproductive and inefficient, as it would require Filing Parties' regional transmission planning process to expend time and resources to evaluate potential transmission projects that, under state or local laws or regulations, cannot be developed by a nonincumbent transmission developer."<sup>116</sup> LS Power has not demonstrated that the Commission made an error when it allowed Filing Parties to include references to state and local laws or regulations in their Tariffs.

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<sup>114</sup> Second Compliance Order, 147 FERC ¶ 61,241 at P 228.

<sup>115</sup> *Id.* PP 226-228; *see* Order No. 1000, FERC Stats & Regs. ¶ 31,323 at PP 253, 377, and n.231.

<sup>116</sup> *See* Second Compliance Order, 147 FERC ¶ 61,241 at P 228; Order No. 1000-A, 139 FERC ¶ 61,132 at P 381 (A right of first refusal "based on a state or local law or regulation would still exist under state or local law even if removed from the Commission-jurisdictional tariff or agreement and nothing in Order No. 1000 changes that law or regulation, for Order No. 1000 is clear that nothing therein is 'intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities.'").

78. However, after further consideration, we find that Filing Parties' specific provision providing that "the proposed transmission project cannot be located on the property and/or right-of-way belonging to anyone other than the transmission developer absent the consent of the owner of the property and/or right-of-way, as the case may be" is not consistent with Order No. 1000. The Commission stated in Order No. 1000 that "the retention, modification, or transfer of rights-of-way remain subject to relevant law or regulation granting the rights-of-way," but Filing Parties' proposed provision goes beyond a reference to rights-of-way because it also includes "property" and does not refer to the relevant laws or regulations granting the rights-of-way. Thus, we direct Filing Parties to submit, within 30 days of the date of issuance of this order, further compliance filings to remove the entire provision from their Tariffs.

79. We note that although we direct Filing Parties to remove the provision referencing rights-of-way, Filing Parties have proposed new language that is consistent with Order No. 1000 and that can be modified to include references to rights-of-way. Specifically, Filing Parties propose new language stating that, "[t]he proposed regional transmission project must not contravene state or local laws with regard to construction of transmission facilities." We find this language is consistent with the Commission's statement in Order No. 1000 that "nothing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities."<sup>117</sup> This language can also be expanded as follows to capture the references to rights-of-way that Filing Parties included in the provision we are directing them to delete: "The proposed regional transmission project must not contravene state or local laws with regard to rights-of-way or construction of transmission facilities." With this change, Filing Parties will be able to include references to recognize state or local laws or regulations relating to the use and control of rights-of-way in the regional transmission planning process, as the Commission found appropriate when granting rehearing in the Second Compliance Order. Therefore, we direct Filing Parties to submit, within 30 days of the date of issuance of this order, a further compliance filing to move the language in the proposed new footnote into the body of their Tariffs and to modify the provision to add the phrase "rights-of-way or" as shown above.

80. With regard to the directive to delete the "or" from the proposed language in the introduction of the Regional Transmission Planning section of Filing Parties' OATTs, stating that nothing precludes the transmission provider from building new transmission facilities located solely in its local footprint and that are not submitted for regional cost allocation purposes, we accept Filing Parties' proposal to delete the entire referenced

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<sup>117</sup> Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 227, 287, & n.231.

sentence because it is consistent with the intent of the directive. LS Power is also concerned about Filing Parties' additional language in the transmittal letter regarding the deletion of right-of-way considerations in the evaluation stage and is concerned that this language, even if not in Filing Parties' OATTs, could somehow be used against it in the future. We agree with SERTP Sponsors that any decision by the region to select or not to select a transmission project in the regional transmission plan for purposes of cost allocation will be transparent, with explanations posted for stakeholder review, subject to the Commission's oversight. In addition, any transmission developer may use the regional dispute resolution process regarding any determinations made not to select its proposal in the regional transmission plan for purposes of cost allocation based upon the actual substance of the rejection. As such, we will not require further compliance on this matter. We note, however, that consistent with our historical practice, to the extent any language in Filing Parties' transmittal letters conflicts with their proposed OATT language, the OATT language controls.<sup>118</sup>

**b. Qualification Criteria**

**i. Second Compliance Order**

81. In the Second Compliance Order, the Commission found that the information that Filing Parties propose to require to determine a transmission developer's rating equivalent, while comprehensive, could also be prohibitive to some capable unrated developers. The Commission found that requiring a potential transmission developer without a credit rating to submit only the financial information applicable to that potential transmission developer will eliminate the potential for precluding any unrated transmission developer from being considered for regional transmission projects that they may otherwise be qualified to develop, construct, own, operate, and maintain. The Commission directed Filing Parties to revise their OATTs to state that the information required for assigning rating equivalents must be submitted by unrated transmission developers, as applicable.<sup>119</sup>

82. The Commission further found that Filing Parties' proposed requirement that a transmission developer or its parent company, if relevant, provide evidence that it has been in existence for at least three years would needlessly restrict the pool of creditworthy transmission developers that may become qualified to companies that are at

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<sup>118</sup> See *Cal. Indep. Sys. Operator Corp.*, 132 FERC ¶ 61,154, at P 10 (2010); *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,268, at n.8 (2009); *Cal. Indep. Sys. Operator Corp.*, 124 FERC ¶ 61,095, at P 22 (2008).

<sup>119</sup> Second Compliance Order, 147 FERC ¶ 61,241 at P 282.

least three years old. The Commission found that Filing Parties' proposal to require that transmission developers or their parent be in existence for at least three years is unreasonably stringent because it unduly restricts newly-formed companies from proposing transmission projects in the regional transmission planning process, regardless of their financial and other abilities to undertake a transmission project. The Commission directed Filing Parties to revise their OATTs to remove the requirement that a transmission developer provide evidence that it or its parent company has been in existence for at least three years.<sup>120</sup>

ii. **Requests for Rehearing or Clarification**

(a) **Summary of Requests for Rehearing or Clarification**

83. LS Power contends that the Commission erred in accepting "credit rating equivalents" as the only alternative to actual credit ratings.<sup>121</sup> LS Power argues that rather than taking the vast array of financial information provided and determining whether a prospective transmission developer can finance and construct a sponsored transmission project, SERTP Sponsors will use the information to determine their own view as to what the unrated transmission developer's credit rating would be, if it had one. LS Power further argues that despite the First Compliance Order's clear statement that reliance on credit ratings alone was unreasonably stringent, a finding it asserts was reiterated in the Second Compliance Order,<sup>122</sup> the only mechanism to qualify in SERTP is a credit rating, either obtained from a rating agency, a rated affiliate entity, or as determined by SERTP Sponsors.<sup>123</sup>

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<sup>120</sup> *Id.* P 283.

<sup>121</sup> LS Power Request for Rehearing at 17.

<sup>122</sup> *Id.* at 14 (citing Second Compliance Order, 147 FERC ¶ 61,241 at P 254 ("We maintain that Filing Parties' proposal to rely on credit ratings as the sole measurement of a transmission developer's financial ability did not provide sufficient flexibility for potential transmission developers to demonstrate their financial capabilities to develop, construct, own, operate, and maintain transmission facilities.")).

<sup>123</sup> *Id.* at 17.

**(b) Commission Determination**

84. We deny LS Power's request for rehearing and affirm the finding in the First and Second Compliance Orders that the information required of unrated transmission developers to determine their rating equivalent is adequate to determine their financial capabilities in the absence of a credit rating because Filing Parties provided a credit rating equivalent similar to the initial credit evaluation provisions for entities that apply for transmission service.<sup>124</sup> We are still not persuaded by LS Power's argument that the rating equivalent does not provide a sufficient alternative to a credit rating or that Filing Parties do not possess the requisite expertise to determine the creditworthiness of a transmission provider. By allowing a prospective transmission developer to provide financial information instead of a credit rating so that the transmission providers can determine an unrated transmission developer's rating equivalent, Filing Parties have provided prospective transmission developers with a means to demonstrate their financial capabilities to develop, construct, own, operate, and maintain transmission facilities, as measured by their rating equivalent, without obtaining an actual credit rating.

**iii. Compliance**

**(a) Summary of Compliance Filings**

85. Filing Parties note that the requirement to revise their respective OATTs to state that the information required for assigning rating equivalents must be submitted by unrated transmission developers, as applicable, has been revised as the Commission specified.<sup>125</sup> Filing Parties also note that their OATTs have been revised to state that financial statements are to be provided "audited if available."<sup>126</sup>

86. Finally, Filing Parties state that their OATTs have been revised to remove the proposed requirement that a transmission developer must be in existence for at least three years. Instead, Filing Parties propose that a prospective transmission developer must

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<sup>124</sup> Second Compliance Order, 147 FERC ¶ 61,241 at P 281 (citing First Compliance Order, 144 FERC ¶ 61,054 at P 154).

<sup>125</sup> *E.g.*, Southern Companies, OATT, Attachment K, § 14.1(2)(C)(ii) ("Upon request by the Transmission Provider, an Unrated transmission developer must submit to the Transmission Provider for determination of a Rating Equivalent, and not less than annually thereafter, the follow information with respect to the transmission developer, as applicable...").

<sup>126</sup> *E.g.*, *id.* § 14.1(2)(C)(ii)(A).

provide evidence of how long the transmission developer and its parent company, if relevant, have been in existence.<sup>127</sup>

(b) **Commission Determination**

87. We find that Filing Parties comply with the directive to revise their OATTs to state that the information required for assigning rating equivalents must be submitted by unrated transmission developers, as applicable. We also find that Filing Parties comply with the directive to revise their OATTs to remove the requirement that a transmission developer provide evidence that it or its parent company has been in existence for at least three years.

b. **Reevaluation Process for Transmission Proposals for Selection in the Regional Transmission Plan for Purposes of Cost Allocation**

i. **Financial, Collateral, and Damage Provisions**

(a) **Second Compliance Order**

88. In the Second Compliance Order, the Commission rejected Filing Parties' proposal to retain the provision stating that a transmission developer would be responsible to the impacted utilities for any increased costs due to delay or abandonment of a transmission project included in the regional transmission plan. The Commission found a lack of precision in defining costs and damages and the potential for making transmission developers liable for costs beyond those directly attributable to the delay or abandonment. The Commission also noted that even if a transmission project is delayed, customers in the region would still benefit from that project—regardless of who ultimately develops it—because it addresses a regional transmission need identified through the regional transmission planning process. Further, the Commission found that Filing Parties' proposal would subject a transmission developer to costs even for acts beyond the developer's control. The Commission directed Filing Parties to remove the section from their OATTs.<sup>128</sup>

89. The Commission rejected Filing Parties' proposal to require a transmission developer with less than a BBB+ credit rating to provide and maintain collateral equal to the total cost of the transmission project. The Commission found that, while it may be

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<sup>127</sup> *E.g., id.* § 14.1(4).

<sup>128</sup> Second Compliance Order, 147 FERC ¶ 61,241 at PP 414-416.

appropriate to require additional collateral once a transmission project has been selected in a regional transmission plan for purposes of cost allocation to ensure that the transmission developer has adequate resources to construct the transmission project, requiring collateral equal to the total cost of the transmission project is unreasonable and places an unreasonable barrier on a transmission developer whose project has already been selected in the regional transmission plan. The Commission directed Filing Parties to remove these provisions or revise these provisions to provide more reasonable collateral requirements.<sup>129</sup>

90. The Commission rejected Filing Parties' proposal that gives the beneficiaries of a transmission project selected in the regional transmission plan for purposes of cost allocation discretion to decide whether the collateral requirements apply. The Commission found that allowing the beneficiaries to determine whether a transmission developer must provide the collateral could result in undue discrimination, given that the beneficiaries with the discretion are likely to be the incumbent transmission providers, who may choose to require nonincumbent transmission developers to provide collateral but not apply the requirements to themselves. The Commission directed Filing Parties to revise their OATTs to eliminate this discretion and to apply the collateral requirements to all transmission developers, both incumbent and nonincumbent.<sup>130</sup>

**(b) Requests for Rehearing or Clarification**

**(1) Summary of Requests for Rehearing or Clarification**

91. LS Power contends the Commission erred in determining that it was acceptable for SERTP Sponsors to require transmission developers to meet one credit rating to qualify and then raise the credit rating requirement once a transmission project is selected in the regional transmission plan for purposes of cost allocation.<sup>131</sup> LS Power argues that the Commission cited to no evidence regarding the rationale for this change in credit rating requirement and SERTP Sponsors did not offer any. LS Power asserts there is nothing in Order No. 1000 to suggest that one credit rating may be appropriate to propose a transmission project while a higher credit rating is necessary to actually construct and own that same transmission project.<sup>132</sup> LS Power adds that both BBB+ and BBB- are

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<sup>129</sup> *Id.* P 417.

<sup>130</sup> *Id.* P 418.

<sup>131</sup> LS Power Request for Rehearing at 17.

<sup>132</sup> *Id.* at 18.

investment grade credit ratings, and that the primary difference between the two is the interest rate charged on debt obligations of the rated entity, with debt costs less for higher rated companies.<sup>133</sup> Thus, LS Power argues that on rehearing the Commission should require that all rating references be set at BBB-.<sup>134</sup>

## (2) Commission Determination

92. We deny LS Power's requests for clarification and rehearing of the holdings in the Second Compliance Order. We affirm the findings in the Second Compliance Order to allow Filing Parties to raise the minimum credit rating or credit rating equivalent a transmission developer must maintain, without providing additional collateral, after its transmission project is selected in the regional transmission plan for purposes of cost allocation from BBB- to BBB+.<sup>135</sup> As the Commission found in the Second Compliance Order, it may be appropriate to require additional collateral once a transmission project has been selected in a regional transmission plan for purposes of cost allocation to ensure that the transmission developer has adequate resources to construct the transmission project.<sup>136</sup> LS Power has not persuaded us that the credit rating or credit rating equivalent threshold that applies to the qualification process must be the same as that which determines whether or not a transmission developer whose transmission project has been selected in the regional transmission plan for purposes of cost allocation must provide collateral.

## (c) Compliance

### (1) Summary of Compliance Filings

93. Filing Parties explain that section 20.3, which requires a transmission developer to bear responsibility for costs associated with delay or abandonment of its transmission project, has been removed from its OATT.<sup>137</sup> They also explain that section 22.1.2 has been revised to provide that a transmission developer having less than a BBB+ credit

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Second Compliance Order, 147 FERC ¶ 61,241 at P 217.

<sup>136</sup> *Id.* P 417.

<sup>137</sup> *E.g.*, Southern Companies Transmittal Letter at 14; Southern Companies, OATT, Attachment K, § 20.3.

rating or rating equivalent must provide security in an amount equal to 25 percent of the total costs of the transmission developer's project.<sup>138</sup> Filing Parties state that the reasonableness of this 25 percent criterion is demonstrated by comparison to the Miller Act, 40 U.S.C. § 3131(b), and its implementing regulations. Filing Parties also state that the Miller Act protects against possible delay or abandonment by contractors in the performance of federal public works projects in excess of \$100,000 and protects their subcontractors and suppliers so as to ensure their continued participation in public works.<sup>139</sup> Specifically, they explain the Miller Act provides that:

Before any contract of more than \$100,000 is awarded for the construction, alteration, or repair of any public building or public work of the Federal Government, a person must furnish to the Government the following bonds, which become binding when the contract is awarded:

(1) PERFORMANCE BOND. – A performance bond with a surety satisfactory to the officer awarding the contract, and in an amount the officer considers adequate, for the protection of the Government.

(2) PAYMENT BOND. – A payment bond with a surety satisfactory to the officer for the protection of all persons supplying labor and material in carrying out the work provided for the contract for the use of each person. *The amount of the payment bound shall equal the total amount payable by the terms of the contract unless the officer awarding the contract determines, in a writing supported by specific findings, that a payment bond in that amount is*

*impractical, in which case the contracting officer shall set the amount of the payment bound.*<sup>140</sup>

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<sup>138</sup> *E.g.*, Southern Companies Transmittal Letter at 14; Southern Companies OATT, Attachment K, § 22.1.2.

<sup>139</sup> *E.g.*, Southern Companies Transmittal Letter at 14.

<sup>140</sup> *E.g.*, Southern Companies Transmittal Letter at 14-15 (citing 40 U.S.C § 313(b)) (emphasis added).

94. Filing Parties explain that the implementing regulations further provide that for contracts exceeding \$150,000, the amount of such performance bonds and payment bonds generally must equal: (i) 100 percent of the original contract price; and (ii) if the contract price increases, an additional amount equal to 100 percent of the increase.<sup>141</sup>

95. Filing Parties explain that as the security contemplated by section 22.1.2 is similarly designed to protect consumers against the risks of the nonperformance by the transmission developer related to the development of significant, regional public utility infrastructure, the Miller Act demonstrates the reasonableness of a security that does not exceed 100 percent of the project's costs.<sup>142</sup> They also contend that as the proposed 25 percent is far below that ceiling amount, it should be accepted.

96. Additionally, Filing Parties explain that sections 22.4.1 and 22.4.2 have been revised to replace "may" with "shall" such that the beneficiaries of a transmission project selected in the regional transmission plan for purposes of cost allocation no longer have the discretion to decide whether the collateral requirements apply.<sup>143</sup>

## (2) Protests/Comments

97. LS Power argues that the sole basis offered by SERTP Sponsors' proposal to require 25 percent security is that the Miller Act requires such security.<sup>144</sup> LS Power asserts that the Miller Act relates only to federal public works projects and has no relationship to the regional transmission projects identified by SERTP Sponsors.<sup>145</sup> LS Power argues that it is geared to protecting labor and material suppliers on a government project. LS Power argues that SERTP Sponsors have given no indication that their intent is to protect such entities with their security requirement. Further, LS Power contends if the Miller Act had any relevance to SERTP Sponsors' transmission planning process at all, it would lead to the conclusion that the security requirement would apply to all

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<sup>141</sup> *E.g., id.* at 15 (citing 8 C.F.R. § 102-2(b)).

<sup>142</sup> *E.g., id.*; Southern Companies, OATT, Attachment K, § 22.1.2.

<sup>143</sup> *E.g.,* Southern Companies Transmittal Letter at 15; Southern Companies, OATT, Attachment K, § 22.4.1; Southern Companies Transmittal Letter at 15; Southern Companies, OATT, Attachment K, § 22.4.2.

<sup>144</sup> LS Power Comments at 4.

<sup>145</sup> *Id.*

projects of all sponsors, regardless of credit rating.<sup>146</sup> LS Power explains that the Miller Act has no credit rating threshold, but applies to all contracts for public works with a value more than \$100,000.<sup>147</sup>

98. LS Power argues that what SERTP Sponsors' reliance on the Miller Act reveals is that SERTP Sponsors have no relevant proof as to what it is they are actually seeking to protect through the security requirement.<sup>148</sup> They contend that SERTP Sponsors make no reference to actual costs that will be incurred if a transmission project is abandoned by an entity with a credit below BBB,<sup>149</sup> nor do they address what will happen to the security if the transmission project is abandoned.<sup>150</sup> LS Power argues that like Filing Parties' proposal for a 100 percent security requirement, the newest proposal for a 25 percent security requirement is not supported by any relevant evidence regarding the actual risks to ratepayers if a transmission project is abandoned, or the relative increase in that risk if a transmission developer is selected with a credit rating below BBB+ rather than a transmission developer with a rating above BBB+.<sup>151</sup> LS Power contends that without such evidentiary support, the Commission cannot find the security requirement just and reasonable.<sup>152</sup>

### (3) Answer

99. SERTP Sponsors assert that the regulations implementing the Miller Act demonstrate that, when Congress decided what amount of security is required to protect the federal government (and, by extension, federal taxpayers) from the risk that a contractor on whom it relies would delay or abandon performance in the construction of public buildings and infrastructure, it chose 100 percent of the projects costs as the presumed reasonable collateral amount.<sup>153</sup> Therefore, SERTP Sponsors contend that the

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 4-5.

<sup>152</sup> *Id.* at 5.

<sup>153</sup> SERTP Sponsors Answer at 4.

Miller Act and its implementing regulations establish that a 100 percent security requirement to secure performance is consistent with the government's own practices and, accordingly, reasonable.<sup>154</sup>

100. SERTP Sponsors assert that with respect to such BBB+ rating/rating equivalent threshold, below which security must be provided, they note that such threshold was already accepted by the Commission in the Second Compliance Order.<sup>155</sup> They argue that objection to the retention of such proposal here is an unauthorized collateral attack on the Second Compliance Order and must be rejected.<sup>156</sup> Nevertheless, they argue that it is telling that other transmission developers have acknowledged to the Commission the importance of maintaining a BBB+ credit profile. For example, SERTP Sponsors state that in its recent filing with the Commission, Xcel Energy Transmission Development Company, LLC (XETD) noted that "receiving and maintaining an investment grade credit rating profile" is crucial for ... success as a new entrant in the Order No 1000 competitive solicitation process"<sup>157</sup> and evidenced its intent to obtain an investment grade BBB+ rating.

101. SERTP Sponsors argue that if LS Power or any other transmission developer (whether incumbent or nonincumbent) elects not to embrace the reasoning (such as that espoused by XETD and Xcel Energy Southwest Company, LLC) to obtain a BBB+ rating/rating equivalent, SERTP Sponsors and ratepayers must be protected against the risks that a less creditworthy developer will not have the wherewithal to reliably "develop, construct, own, operate and maintain facilities," especially if credit markets deteriorate or become more volatile.<sup>158</sup> They argue evidence indicates that entities with a BBB- rating are nearly twice as likely to default within a five year period as those rated BBB+, and entities that are the highest "junk" rated (BB+) are more than three times as likely to default within five years as are entities rated BBB+.<sup>159</sup>

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<sup>154</sup> *Id.* at 5.

<sup>155</sup> *Id.* at 6 (citing Second Compliance Order, 147 FERC ¶ 61,241 at P 417).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* (citing *Xcel Energy Transmission Development Company, LLC*, at p. 13 of Transmittal Letter, FERC Docket No. 14-2752, filed August 29, 2014 (XETD Filing) (citing *DATC Midwest Holdings, LLC*, 139 FERC ¶ 61,224, at P 76 (2012)).

<sup>158</sup> *Id.* at 7.

<sup>159</sup> *Id.*

102. SERTP Sponsors assert that it is worth emphasizing that many transmission developers may be expected to satisfy the BBB+ rating/rating equivalent threshold and not be required to provide security.<sup>160</sup>

103. SERTP Sponsors argue that it is reasonable that less creditworthy entities be required to post meaningful collateral to help secure their obligations for increased costs related to delay or abandonment of their project.<sup>161</sup> SERTP Sponsors assert that as Order No 1000-A explains, the purpose of its qualification criteria is to ensure that the developer “has the necessary financial resources ... to develop, construct, own, operate, and maintain transmission facilities.”<sup>162</sup> SERTP Sponsors contend that their qualification criteria and related security requirements are designed to do exactly that and to help protect ratepayers from potential delay or abandonment.<sup>163</sup>

104. SERTP Sponsors assert that LS Power appears to argue that SERTP Sponsors’ proposal will somehow advantage incumbent transmission developers over nonincumbent transmission developers when their transmission projects are selected in the regional transmission plan for purposes of cost allocation, but such insinuation is unfounded.<sup>164</sup> SERTP Sponsors argue that any transmission developer of a transmission project selected in the regional transmission plan for purposes of cost allocation that does not meet the BBB+ rating/rating equivalent threshold will be required to post the required security, whether incumbent or nonincumbent,<sup>165</sup> They argue that incumbent transmission developers, thus, would be required to comply with SERTP Sponsors’ security requirements to the extent they did not meet such creditworthiness requirements.<sup>166</sup>

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 8-9 (citing Order No 1000-A, 139 FERC ¶ 61,132 at P 439).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 9.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

**(4) Commission Determination**

105. We find that Filing Parties' proposed revision to remove the discretion that the beneficiaries of a transmission project selected in the regional transmission plan for purposes of cost allocation would have to decide whether the collateral requirements apply by replacing "may" with "shall" comply with the directives in the Second Compliance Order.<sup>167</sup>

106. We find that Filing Parties' proposal to require a transmission developer with less than a BBB+ credit rating/ rating equivalent to post collateral equal to 25 percent of the of the total costs of the transmission developer's project once it has been selected in a regional transmission plan for the purposes of cost allocation is reasonable and is consistent with the Commission's findings in the Second Compliance Order. In the Second Compliance Order, the Commission found that it may be appropriate to require additional collateral once a transmission project has been selected in a regional transmission plan for purposes of cost allocation to ensure that the transmission developer has adequate resources to construct the transmission project, but requiring collateral equal to the *total cost* of the transmission project is unreasonable and places an unreasonable barrier on a transmission developer whose project has already been selected in the regional transmission plan. The Commission also stated that Filing Parties could revise their Tariffs to provide more reasonable collateral requirements.<sup>168</sup> We find that Filing Parties' current proposal that any transmission developer that has less than a BBB+ rating/rating equivalent, whether incumbent or nonincumbent, must provide and maintain collateral in the amount of 25 percent of the total costs of the transmission developer's project is reasonable and does not place an unreasonable barrier on a transmission developer whose project has already been selected in the regional transmission plan for purposes of cost allocation. We find reasonable SERTP Sponsors' argument that the security requirement will help protect customers from the potential costs due to delay or abandonment of an incumbent or nonincumbent transmission developer's performance. Therefore, we find that Filing Parties have sufficiently justified the reduced security requirement and we reject LS Power's protest regarding this matter.

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<sup>167</sup> Southern Companies, OATT, Attachment K, §§ 22.4.1, 22.4.; Second Compliance Order, 147 FERC ¶ 61,241 at P 418.

<sup>168</sup> Second Compliance Order, 147 FERC ¶ 61,241 at P 417.

### 3. Cost Allocation

#### a. Second Compliance Order

107. The Commission found that Filing Parties' proposed regional cost allocation method partially complied with Regional Cost Allocation Principle 1. The Commission found that Filing Parties' proposed metrics<sup>169</sup> represent a reasonable approximation of the benefits that a transmission facility selected in the regional transmission plan for purposes of cost allocation may provide, as they recognize additional benefits of transmission facilities while also accounting for the value of avoiding the costs of certain transmission projects. The Commission stated, however, that Filing Parties' proposed definition of beneficiaries failed to take all of these metrics into consideration, as Filing Parties defined beneficiaries as only those enrolled transmission providers for which one or more of their planned transmission projects may be displaced by a transmission project proposed for potential selection in the regional transmission plan for purposes of cost allocation, based on their cost savings. The Commission directed Filing Parties to revise the definition of beneficiaries to include all of the proposed metrics.<sup>170</sup>

108. The Commission noted that Filing Parties' proposed definition of beneficiary, an entity that has one or more of its local or regional transmission projects displaced by a transmission project selected in the regional transmission plan for purposes of cost allocation, was inconsistent with Filing Parties' avoided cost benefit metric with respect to regional transmission projects. The Commission stated that under Filing Parties' proposal, in the event that a regional transmission project that was previously selected in the regional transmission plan for purposes of cost allocation is also (or subsequently) displaced as part of the regional transmission planning process, the beneficiaries of the newly proposed more efficient or cost-effective regional transmission project would include, or potentially be limited to, the transmission provider whose regional

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<sup>169</sup> Filing Parties proposed to allocate the costs of a regional transmission project selected in the regional transmission plan for purposes of cost allocation to beneficiaries based on the cost savings associated with: (1) the displacement of one or more transmission projects previously included in the beneficiaries' 10 year expansion plans; (2) the displacement of one or more regional transmission projects previously included in the regional transmission plan; (3) if the proposed regional transmission project addresses a transmission need for which no transmission project is included in those plans, any alternative transmission projects that would be required in lieu of the proposed regional transmission project; and (4) the reduction of real power transmission losses on the beneficiaries' transmission systems. *See id.* P 461.

<sup>170</sup> *Id.*

transmission project is being displaced. The Commission directed Filing Parties to clarify and revise their OATTs to address this issue. The Commission suggested that Filing Parties may specify that, if a regional transmission project displaces a different regional transmission project that was previously selected in the regional transmission plan for purposes of cost allocation, the portion of the costs of the newly proposed more efficient or cost-effective regional transmission project associated with the benefits calculated using the costs of the displaced regional project will be allocated to the beneficiaries that were allocated costs for the displaced regional transmission project in accordance with the regional cost allocation method.<sup>171</sup>

109. The Commission found that Filing Parties' proposal did not comply with the Regional Cost Allocation Principle 4 requirement that the regional transmission planning process identify the consequences of a transmission facility selected in the regional transmission plan for purposes of cost allocation for other transmission planning regions, such as upgrades that may be required in another region. The Commission also found that Filing Parties did not address whether the SERTP transmission planning region has agreed to bear the costs associated with any required upgrades in another transmission planning region or, if so, how such costs will be allocated within the SERTP region. The Commission directed Filing Parties to address these requirements.<sup>172</sup>

110. The Commission found that Filing Parties' proposed OATT provisions partially complied with Regional Cost Allocation Principle 5. The Commission found that Filing Parties' proposed OATT provisions allow a cost allocation determination to be changed in future planning cycles based on the then-current determination of benefits (calculated consistent with the relevant section of the OATTs), cost allocation modifications as mutually agreed by the beneficiaries, or cost modifications found acceptable by both the transmission developer and the beneficiary(ies). The Commission found that the proposed language did not make clear that, in accordance with Order No. 1000, the entire prudently-incurred cost will be fully allocated in subsequent planning cycles. The Commission directed Filing Parties to revise this section of their OATTs to state that all prudently-incurred costs will be fully allocated in subsequent planning cycles.<sup>173</sup>

111. Finally, the Commission directed Filing Parties to revise their OATTs to provide that the transmission provider will provide adequate documentation to allow a stakeholder to determine how the regional cost allocation method and data requirements

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<sup>171</sup> *Id.* P 462.

<sup>172</sup> *Id.* P 466.

<sup>173</sup> *Id.* PP 467-468.

for determining benefits and identifying beneficiaries were applied to a proposed transmission facility.<sup>174</sup>

**b. Requests for Rehearing or Clarification**

**i. Summary of Requests for Rehearing or Clarification**

112. SERTP Sponsors request clarification that they will be allowed to incorporate a reasonable limitation such that an enrollee will not be allocated costs if the benefits are relatively minimal.<sup>175</sup> SERTP Sponsors argue that this would require that an enrollee will be a beneficiary even if its only projected benefit is reduced losses. SERTP Sponsors contend that the Commission has allowed other transmission planning regions to exempt relatively minor cost allocations,<sup>176</sup> and if the Commission denies the request for clarification, then SERTP Sponsors request rehearing of the Commission's decision to require their proposed definition of "beneficiaries" to be expanded to include all of Filing Parties' metrics.<sup>177</sup>

**ii. Commission Determination**

113. We grant clarification and find to be just and reasonable Filing Parties' proposal that if the estimated changes in real power transmission losses is less than one megawatt on a given transmission system of an impacted utility, then no cost savings and/or cost increase for change in real transmission losses on their system will be assigned to the transmission project proposal. We find that excluding from cost allocation beneficiaries that receive *de minimis* benefits from a transmission facility selected in the regional transmission plan for purposes of cost allocation would allocate costs in a manner that is at least roughly commensurate with estimated benefits.<sup>178</sup>

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<sup>174</sup> *Id.* P 469.

<sup>175</sup> SERTP Sponsors Request for Rehearing at 17.

<sup>176</sup> *Id.* (citing *PacifiCorp, et al.*, 147 FERC ¶ 61,057, at P 190 (2014) (accepting NTTG's proposal to deem a beneficiary's net benefits to be zero if its net benefits fall below a *de minimis* threshold)).

<sup>177</sup> *Id.*; see Second Compliance Order, 147 FERC ¶ 61,241 at P 461.

<sup>178</sup> See, e.g., Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 639; *Pub. Serv. Co. of Colo.*, 142 FERC ¶ 61, 206 at P 315; *PacifiCorp et al.*, 143 FERC ¶ 61,151 at

**c. Compliance**

**i. Summary of Compliance Filings**

114. In accordance with the requirement from the Second Compliance Order to revise the definition of beneficiaries, Filing Parties propose to define as beneficiaries any enrollees that are identified to potentially receive cost savings due to a transmission developer's proposed transmission project for possible selection in a regional transmission plan for regional cost allocation.<sup>179</sup> To be consistent with the revised definition of beneficiaries and its inclusion of power loss savings as a benefit, Filing Parties propose that if the estimated changes in real power transmission losses is less than one megawatt on a given transmission system of an impacted utility, then no cost savings and/or cost increase for change in real transmission losses on their system will be assigned to the transmission project proposal.<sup>180</sup>

115. Additionally, with respect to the requirement to clarify how the beneficiaries of a transmission project that displaces regional transmission projects that were previously selected in the regional transmission plan for purposes of cost allocation are determined, Filing Parties propose that if a regional transmission project addresses the same transmission need(s) as a transmission project selected in the regional transmission plan for purposes of cost allocation and displaces that project as a more efficient or cost-effective alternative, then cost allocation will be based upon the costs of the original project that were to be allocated to the beneficiaries in accordance with the application of the regional cost allocation method to the transmission project being displaced.<sup>181</sup>

116. Regarding the Commission's directive to address the Regional Cost Allocation Principle 4 requirement that the regional transmission planning process identify the consequences of a transmission facility selected in the regional transmission plan for purposes of cost allocation for other transmission planning regions, such as upgrades that may be required in another region, Filing Parties propose that the transmission provider

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P 248 (2013).

<sup>179</sup> *E.g.*, Southern Companies Transmittal Letter at 16; Southern Companies, OATT, Attachment K, n.5.

<sup>180</sup> *E.g.*, Southern Companies Transmittal Letter at 16; Southern Companies, OATT, Attachment K, § 17.2.3.

<sup>181</sup> *E.g.*, Southern Companies Transmittal Letter at 16-17; Southern Companies, OATT, Attachment K, § 18.2.

will perform analyses to determine whether the proposed transmission project could potentially result in reliability impacts to the transmission system(s) of an adjacent neighboring transmission planning region(s), and that if a potential reliability impact is identified, the transmission provider will coordinate with the neighboring planning region on any further evaluation. Filing Parties further propose that costs for potential upgrades required in neighboring regions will not be allocated within SERTP.<sup>182</sup>

117. With respect to the Commission's Regional Cost Allocation Principle 5 directive to Filing Parties requiring they revise their OATTs to state that all prudently-incurred costs will be fully allocated in subsequent planning cycles, Filing Parties propose that "All prudently incurred costs of the regional transmission project will be allocated if the project remains selected in the regional plan for [cost allocation] and is constructed and placed into service."<sup>183</sup>

118. With respect to the requirement to identify the consequences of a transmission facility selected for cost allocation on neighboring transmission planning regions, Filing Parties propose that "for projects selected in the regional transmission plan for purposes of [cost allocation], the documentation will also include sufficient information regarding the application of the regional cost allocation method to determine the benefits and identify the Beneficiaries of the proposed regional transmission project."<sup>184</sup>

## ii. Commission Determination

119. We find that Filing Parties' proposed revisions with respect to the definition of beneficiary comply with the Commission's directives in the Second Compliance Order. Specifically, Filing Parties propose to define as beneficiaries any enrollees that are identified to potentially receive cost savings due to a transmission developer's proposed transmission project for possible selection in a regional transmission plan for regional cost allocation, complying with the Commission's directives in the Second Compliance Order that Filing Parties revise their definition of beneficiaries to reflect all of the proposed benefit metrics.

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<sup>182</sup> *E.g.*, Southern Companies Transmittal Letter at 17; Southern Companies, OATT, Attachment K, § 17.5.2.

<sup>183</sup> *E.g.*, Southern Companies Transmittal Letter at 17; Southern Companies, OATT, Attachment K, § 19.3.

<sup>184</sup> *E.g.*, Southern Companies Transmittal Letter at 17; Southern Companies, OATT, Attachment K, § 17.5.1.

120. As directed in the Second Compliance Order, Filing Parties have revised their OATTs to provide that if a regional transmission project addresses the same transmission need(s) as a transmission project selected in the regional transmission plan for purposes of cost allocation and displaces that project as a more efficient or cost-effective alternative, then cost allocation will be based upon the costs of the original project that were to be allocated to the beneficiaries in accordance with the application of the regional cost allocation method to the transmission project being displaced. We find that this proposal is consistent with the example that the Commission provided in the Second Compliance Order.<sup>185</sup>

121. We find Filing Parties' proposals regarding Regional Cost Allocation Principle 4 comply with the Commission's directives in the Second Compliance Order. We accept their proposal to identify the consequences of a transmission facility selected for cost allocation on neighboring transmission planning regions and also find that they have sufficiently addressed whether the SERTP transmission planning region will bear any costs associated with required upgrades in other transmission planning regions. We note that to the extent there are processes in place to resolve issues arising from third party cost impacts, we encourage the continuation of voluntary arrangements, as well as the consideration of new opportunities to work together to address any such issues that might arise. Order No. 1000 was not intended to disrupt or impede any such arrangements.<sup>186</sup>

122. We find that Filing Parties' proposal regarding Regional Cost Allocation Principle 5 partially complies with the Commission's directive in the Second Compliance Order. We accept their proposal to allocate prudently-incurred costs for cost allocation determinations that change after a project is originally accepted; however, we require Filing Parties to remove the words in italics as they are beyond the scope of our directive: "All prudently incurred costs of the regional transmission project will be allocated if the

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<sup>185</sup> Second Compliance Order, 147 FERC ¶ 61,241 at P 462 (stating that one way for Filing Parties to address the Commission's directive may be for Filing Parties to specify that, if a regional transmission project displaces a different regional transmission project that was previously selected in the regional transmission plan for purposes of cost allocation, the portion of the costs of the newly proposed more efficient or cost-effective regional transmission project associated with the benefits calculated using the costs of the displaced regional project will be allocated to the beneficiaries that were allocated costs for the displaced regional transmission project in accordance with the regional cost allocation method).

<sup>186</sup> See *California Indep. System Operator Corp.*, 146 FERC ¶ 61,198, at P 172 (2014).

project remains selected in the regional plan for [cost allocation] *and is constructed and placed into service.*”

123. Lastly, we find that Filing Parties comply with the transparency requirement to provide documentation of the regional cost allocation method to determine benefits, identify beneficiaries, and allocate costs of specific proposed transmission facilities.

#### **4. Other Compliance Directives**

124. In the Second Compliance Order, the Commission noted that Southern Companies’ Attachment K refers to the list of enrolled entities in both “Exhibit K-9” and “Attachment K-9,” though the list itself is provided as Exhibit K-9. The Commission directed Southern Companies to change all references to “Attachment K-9” to “Exhibit K-9.”<sup>187</sup> In the Third Compliance Filings, Filing Parties propose to change references that state “Attachment K-9” to “Exhibit K-9.”<sup>188</sup>

125. In the Second Compliance Order, the Commission required Duke-Progress to revise its OATT to include the same definition of a SERTP “stakeholder” as the one in the other Filing Parties’ respective OATTs.<sup>189</sup> In its August 18, 2014 compliance filing, Duke-Progress proposes to add a definition of “Stakeholder” to its Attachment N-1<sup>190</sup> that is identical to the definition of “Stakeholder” found in the Southern Companies OATT.

126. In the Second Compliance Order, the Commission stated that because Southern Companies and OVEC rely on the SERTP process to create both their separate individual local transmission plans and the combined regional transmission plan, they must revise their OATTs to distinguish and make clear how and at what points in the SERTP process stakeholders can provide input into the creation of the Southern Companies and OVEC local transmission plans and the SERTP regional transmission plan and to clarify which aspects of the SERTP procedures apply to the local transmission planning processes and which apply to the regional transmission planning process.<sup>191</sup> In their Third Compliance

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<sup>187</sup> Second Compliance Order, 147 FERC ¶ 61,241 at P 50.

<sup>188</sup> Southern Companies, OATT, Attachment K, § 13.4.

<sup>189</sup> Second Compliance Order, 147 FERC ¶ 61,241 at P 61.

<sup>190</sup> Duke-Progress, OATT, Attachment N-1, § 12, n.1; Southern Companies OATT, Attachment K, § 1.47.

<sup>191</sup> Second Compliance Order, 147 FERC ¶ 61,241 at P 64.

Filings, Southern Companies and OVEC propose to add language to their OATTs to clarify that Southern Companies and OVEC each perform their local transmission expansion planning concurrently with the development of the SERTP regional transmission plan. Southern Companies and OVEC also propose language stating that stakeholders are provided the opportunity to provide input into both of their local transmission planning processes and the regional transmission planning process at all the points already designated throughout the SERTP processes for stakeholder input.<sup>192</sup>

127. In the Second Compliance Order, the Commission directed Filing Parties to revise the proposed OATT language to delete the requirement for stakeholders to submit an analysis of any transmission plan alternatives or enhancements that they intend to propose in the regional transmission planning process.<sup>193</sup> In the Third Compliance Filings, Filing Parties propose to revise their OATTs to state that a stakeholder may provide input at the Preliminary Expansion Plan Meeting with regard to the evaluation of potential transmission solutions to identified transmission needs driven by public policy requirements and, if a stakeholder has performed an analysis regarding those transmission solutions, the stakeholder may provide that analysis as well.<sup>194</sup>

128. In the Second Compliance Order, the Commission directed Filing Parties to revise their OATTs to modify the definition of upgrades so that only the replacement of part of an existing transmission facility can be considered an upgrade.<sup>195</sup> In their Third Compliance Filings, Filing Parties propose to modify the definition of upgrade to provide that only the replacement of a part of an existing transmission facility can be considered an upgrade.<sup>196</sup>

129. In the Second Compliance Order, the Commission directed Filing Parties to remove the proposed language in Filing Parties' OATTs to treat as an upgrade the construction of a new substation that interconnects existing transmission lines that may be owned by a single transmission owner or group of transmission owners or, in the

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<sup>192</sup> Southern Companies, OATT, Attachment K, Local Transmission Planning; OVEC OATT, Attachment M, Local Transmission Planning.

<sup>193</sup> Second Compliance Order, 147 FERC ¶ 61,241 at P 196.

<sup>194</sup> Southern Companies, OATT, Attachment K, § 10.4.2.

<sup>195</sup> Second Compliance Order, 147 FERC ¶ 61,241 at P 239.

<sup>196</sup> *E.g.*, Southern Companies, OATT, Attachment K, § 15.2.

alternative, provide further justification.<sup>197</sup> In their Third Compliance Filings, Filing Parties remove the language from their OATTs.

130. In the Second Compliance Order, the Commission found it unacceptable for Filing Parties to require transmission developers and stakeholders proposing transmission projects that they do not intend to develop to provide documentation of the technical analyses performed to support that the proposed transmission project addresses the specified transmission needs. The Commission directed Filing Parties to either remove the requirement from their OATTs or submit OATT revisions stating that such documentation is not required, but stakeholders may submit it voluntarily.<sup>198</sup> In their Third Compliance Filings, Filing Parties propose to revise their OATTs to state that documentation of specific transmission needs to be submitted *may* include the technical analysis performed to support that the proposed transmission project addresses the specified transmission needs.<sup>199</sup>

131. In the Second Compliance Order, the Commission noted that Filing Parties' OATTs contain the heading, "The Transmission Developer to Provide More Detailed Financial Terms Acceptable to the Beneficiaries and the Performance of a Detailed Transmission Benefit-to-Cost Analysis." The Commission directed Filing Parties to revise their respective OATTs to remove the words "Acceptable to the Beneficiaries."<sup>200</sup> In their Third Compliance Filings, Filing Parties remove the terms "Acceptable to Beneficiaries" from the relevant headings in their OATTs.<sup>201</sup>

132. In the Second Compliance Order, the Commission directed Filing Parties to amend their OATTs to provide transmission developers with a detailed explanation of any adjustments made to the transmission developers' cost estimates when performing the initial high-level analysis of competing transmission proposals.<sup>202</sup> In their Third

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<sup>197</sup> Second Compliance Order, 147 FERC ¶ 61,241 at P 240.

<sup>198</sup> *Id.* P 306.

<sup>199</sup> Southern Companies, OATT, Attachment K, § 16.1(5).

<sup>200</sup> Second Compliance Order, 147 FERC ¶ 61,241 at P 339.

<sup>201</sup> *E.g.*, Southern Companies Transmittal Letter at 13; Southern Companies, OATT, Attachment K, § 17.3 (The Transmission Developer to Provide More Detailed Financial Terms and the Performance of a Detailed Transmission Benefit-to-Cost Analysis).

<sup>202</sup> Second Compliance Order, 147 FERC ¶ 61,241 at P 355.

Compliance Filings, Filing Parties revised their respective OATTs to include language stating that if the transmission provider uses a cost estimate different than a detailed cost estimate(s) provided by the transmission developer for use in performing the regional cost-to-benefit ratio, the transmission provider will provide a detailed explanation of such difference to the transmission developer.<sup>203</sup>

133. In the Second Compliance Order, the Commission directed Filing Parties to provide additional clarity regarding the number of days between the transmission provider's decisions in both cost-benefit analyses and the transmission provider's notification to the transmission developer, and the number of days between the time that the transmission developer is notified that it has passed each cost-benefit test and the time that the developer must provide detailed financial data.<sup>204</sup> The Commission also directed Filing Parties to set a deadline for the impacted utilities and a transmission developer to have an agreed upon schedule.<sup>205</sup> In their Third Compliance Filings, Filing Parties propose to revise their OATTs to establish that the transmission developer will be notified within 30 days of the transmission provider determining the outcome of a cost benefit analysis.<sup>206</sup> Additionally, Filing Parties have revised their OATTs to provide that the transmission developer and the impacted utilities will have 90 days to establish the referenced schedule following the notification to the developer that the transmission project satisfies the initial benefit-to-cost analysis (including the deadline that the developer must provide detailed financial data).<sup>207</sup>

134. In the Second Compliance Order, the Commission stated that evaluation factors include impacts on reliability and the relative costs of the transmission project and, thus, should always be considered in the evaluation process. Therefore, the Commission directed Filing Parties to revise their OATTs to change the word "may" to "shall" so that the evaluation factors listed in the OATT are always considered in the evaluation

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<sup>203</sup> Southern Companies, OATT, Attachment K, § 17.2.2.

<sup>204</sup> Second Compliance Order, 147 FERC ¶ 61,241 at P 356.

<sup>205</sup> *Id.* P 357.

<sup>206</sup> Southern Companies, OATT, Attachment K, §§ 17.2.4 (Transmission Benefit-to-Cost Analysis Based Upon Planning Level Cost Estimates) and 17.3.2 (The Transmission Developer to Provide More Detailed Financial Terms and the Performance of a Detailed Transmission Benefit-to-Cost Analysis).

<sup>207</sup> *E.g.*, Southern Companies Transmittal Letter at 13; Southern Companies, OATT, Attachment K, § 17.2.4.

process.<sup>208</sup> In their Third Compliance Filings, Filing Parties propose to replace “may” with “shall.”<sup>209</sup>

135. In the Second Compliance Order, the Commission directed Filing Parties to revise their OATTs to clearly describe how the transmission providers will identify alternative local or regional transmission projects that would be required in lieu of the proposed regional transmission project for purposes of calculating the benefits of the proposed project.<sup>210</sup> In their Third Compliance Filings, Filing Parties propose to revise their OATTs to provide that “[t]he Transmission provider will identify and evaluate such an alternative transmission project(s) consistent with sections 6 and 11.”<sup>211</sup> Filing Parties explain that the coordination provisions of section 6 describe the bottom-up transmission planning processes and coordination with other SERTP Sponsors and interconnected systems used by some of the SERTP Sponsors (Southern Companies and OVEC) to develop transmission projects while Section 11 describes the regional analysis that SERTP Sponsors will perform to identify and evaluate potentially more efficient or cost effective transmission solutions.<sup>212</sup>

136. In the Second Compliance Order, the Commission directed Filing Parties to revise their respective OATTs to provide a fair and not unduly discriminatory mechanism that the SERTP process will use to grant a transmission developer (whether incumbent or nonincumbent) the right to use the regional cost allocation method for unsponsored transmission facilities identified through the regional transmission planning process. In their Third Compliance Filings, Filing Parties propose new Tariff language that states that if the transmission provider identifies a regional transmission project for cost allocation that does not have a transmission developer, then the transmission provider will post that project on the regional transmission planning website where prequalified transmission developers, whether incumbent or nonincumbent, may then propose the project with themselves as the intended transmission developer for the project’s on-going

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<sup>208</sup> Second Compliance Order, 147 FERC ¶ 61,241 at P 379.

<sup>209</sup> Southern Companies Transmittal Letter at 13; Southern Companies, OATT, Attachment K, § 11.2.1 (Identification and Evaluation of More Efficient or Cost Effective Transmission Project Alternatives).

<sup>210</sup> Second Compliance Order, 147 FERC ¶ 61,241 at P 382.

<sup>211</sup> *E.g.*, Southern Companies Transmittal Letter at 13; Southern Companies, OATT, Attachment K, § 17.1(3).

<sup>212</sup> *E.g.*, Southern Companies Transmittal Letter at 13.

consideration for selection in the regional transmission plan for purposes of cost allocation.

137. We find that Filing Parties' proposals, described above, comply with the directives of the Second Compliance Order. Filing Parties have revised their OATTs as directed.

## 5. Jurisdictional Arguments

### a. Requests for Rehearing or Clarification

138. The Florida Commission argues that in the Second Compliance Order, the Commission exceeded its authority under the FPA and infringed on the Florida Commission's role in transmission planning, siting, and reliability.<sup>213</sup> The Florida Commission argues that the Commission's statements in paragraphs 85 and 452 of the Second Compliance Order indicate that there are two separate processes, one at the state level and one at the federal level. The Florida Commission argues that, if the Commission makes a decision based on the federal process that overrules and conflicts with a decision made by the Florida Commission in its transmission planning process, then the Commission's actions would infringe upon and effectively undermine the Florida Commission's transmission planning process authority in contravention of the Federal Power Act. The Florida Commission claims that the court's rationale in *Elec. Power Supply Ass'n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014), a case addressing the Commission's authority in demand response markets, prevents the Commission from mandating the transmission planning arrangement set forth in the Second Compliance Order.<sup>214</sup>

139. The Florida Commission also argues that the Commission erred by creating an "overarching framework that pushes the utilities to form a duplicative and inefficient Regional Transmission-like transmission planning process," without authority to do so.<sup>215</sup> The Florida Commission asserts that while some states have ceded some authority to the Commission due to the creation of Regional Transmission Organizations and Independent System Operators, "the Florida Commission has retained this authority."<sup>216</sup>

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<sup>213</sup> Florida Commission Request for Rehearing at 2-3.

<sup>214</sup> Florida Commission Request for Rehearing at 3.

<sup>215</sup> The Florida Commission also relies on *Elec. Power Supply Ass'n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014) for this assertion. *Id.* at 1.

<sup>216</sup> *Id.* at 5.

The Florida Commission claims that Florida law provides the Florida Commission with express authority to make decisions with respect to determining the need for transmission projects and for the recovery of costs through retail rates, and it mentions a consulting company's analysis that concluded creating a Regional Transmission Organization in Florida would be too costly.<sup>217</sup>

**b. Commission Determination**

140. We deny the Florida Commission's requests for rehearing. As an initial matter, the Florida Commission's requests for rehearing regarding the Commission's jurisdiction to impose the transmission planning requirements are a collateral attack on Order No. 1000 and therefore outside the scope of this compliance proceeding. In any event, we note that the D.C. Circuit Court upheld the Commission's authority underlying Order No. 1000 and all of the requirements therein.<sup>218</sup>

The Commission orders:

(A) The requests for rehearing are hereby denied, and the requests for clarification are granted in part and denied in part, as discussed in the body of this order.

(B) Filing Parties' compliance filings are hereby accepted, effective June 1, 2014,<sup>219</sup> subject to a further compliance filing, as discussed in the body of this order.

By the Commission. Commissioner Honorable is not participating.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>217</sup> *Id.* at 5-6.

<sup>218</sup> See *S. Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014), *reh'g en banc denied* (Oct. 17, 2014).

<sup>219</sup> See Second Compliance Order, 147 FERC ¶ 61,241 at n.46.

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