

## A R T I C L E

# Non-Transmission Alternatives

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## I. Introduction

The United States is approaching an electricity-transmission crisis at the same time that transmission has become the critical “fulcrum” on which the future of the U.S. energy mix may pivot.<sup>1</sup> If the United States is to meet ambitious federal and state goals for transitioning its electricity system to one that relies far more on renewable power, and far less on fossil fuels, expanding transmission is critical.

Yet transmission faces many well-documented challenges, including siting battles and complicated questions about how to allocate the costs of new lines.<sup>2</sup> It also creates significant environmental impacts, which often lead to protracted litigation over the adequacy of environmental analyses.<sup>3</sup> Often it is easier, cheaper, and environmentally preferable to eliminate or shift demand, or to locate generation strategically, than it is to build new lines. As demand-reduction and demand-shifting strategies gain in scale and sophistication, they will prove increasingly viable alternatives to building new transmission. Not only might these strategies often prove cheaper, they might also bring environmental benefits in the form of reduced carbon emissions, reduced conventional pollutants, and avoided environmental degradation from not building new transmission lines.

However, there are persistent governance and jurisdictional hurdles that impede the United States’ ability to deploy these “non-transmission alternatives.” Transmission development occurs through a complex web of federal and state processes and approvals.<sup>4</sup> States have taken some steps

to evaluate alternatives to local transmission solutions, but transmission planning is increasingly an interstate, regional issue, carried out by bodies beyond state control.<sup>5</sup> These regional transmission planning processes fail to properly consider or promote non-transmission alternatives.

This failure has major ramifications. Much expensive new transmission will inarguably be necessary in the coming decades. The ability to understand when *not* to build transmission because other solutions out-perform it will be an important, complementary part of accomplishing U.S. energy goals.

The Federal Energy Regulatory Commission (“FERC”) has recognized that non-transmission alternatives deserve greater attention during transmission planning and has taken steps to better promote their consideration. FERC’s 2007 “Order 890” and 2011 “Order 1000” mandated comparable consideration for non-transmission alternatives, but left the details of achieving comparability to be worked out at the regional and local levels. Unfortunately, planners at these levels are doing no more than making vague promises to “comparably consider” non-transmission alternatives proposed by participating stakeholders.

This Article argues that such process-focused, participatory reforms are unlikely to do much to alleviate the challenges non-transmission alternatives face. It identifies three impediments that will prevent FERC’s participatory governance reforms from facilitating comparable consideration in practice. First, the United States has ceded the function of transmission planning to private, transmission-focused entities, creating institutional biases and expertise in favor of building actual transmission. Second, non-transmission alternatives have societal benefits that are not considered, and likely cannot be fully considered, in FERC-led transmission planning processes. Third, non-transmission alternatives are ineligible to have their costs allocated among regional beneficiaries—a privilege that FERC accords to approved transmission projects.

FERC’s heavy reliance on participatory reforms to promote non-transmission alternatives pays lip service to these alternatives without meaningfully changing planning processes. Such a lack of fit between rhetoric and action is troubling. FERC declares that it has created a process for

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1. PETER FOX-PENNER, SMART POWER: CLIMATE CHANGE, THE SMART GRID, AND THE FUTURE OF ELECTRIC UTILITIES 80 (2010).
2. See generally, e.g., Alexandra B. Klass & Elizabeth J. Wilson, *Interstate Transmission Challenges for Renewable Energy: A Federalism Mismatch*, 65 VAND. L. REV. 1801 (2012).
3. See Nat’l Council on Elec. Policy, *Updating the Electric Grid: An Introduction to Non-Transmission Alternatives for Policymakers* 1 (2009).
4. See Ashley C. Brown & Jim Rossi, *Siting Transmission Lines in a Changed Milieu: Evolving Notions of the “Public Interest” in Balancing State and Regional Considerations*, 81 U. COLO. L. REV. 705, 710–13 (2010) (detailing the problems with the multi-layered approval process for transmission, including state and sometimes local approvals).

5. See, e.g., FERC Order No. 2000, *Regional Transmission Organizations*, 65 Fed. Reg. 810, 810 (Jan. 6, 2000) (codified at 18 C.F.R. pt. 35) [hereinafter Order 2000].

comparable consideration, but there are clear reasons that this process is likely to fail, making these reforms cosmetic rather than substantive. If FERC truly intends to promote non-transmission alternatives to a place of parity, then it has more work to do.

## II. Non-Transmission Alternatives and Transmission Planning

### A. Non-Transmission Alternatives

Non-transmission alternatives are any resource or configuration of resources that can replace or delay the need for additional transmission.<sup>6</sup> These alternatives include energy efficiency, demand response, and distributed generation (often collectively called “distributed energy resources”); as well as energy storage and centralized generation sited near load.<sup>7</sup> Within the transmission planning context, all of these technologies are grouped together under the label “non-transmission alternatives,” as they are weighed against a specific proposed transmission project as a possibly superior solution. A non-transmission alternative might also be a hybrid solution, employing some transmission capacity, but reducing the overall amount of new transmission by strategically utilizing some distributed energy resources.<sup>8</sup>

Non-transmission alternatives’ chief benefit is their ability to serve as a cost-effective substitute for transmission projects, negating or delaying the need to build a new line. They also have several co-benefits. By subjecting transmission to competition, non-transmission alternatives may help lower the future price of transmission and reduce the need for subsidiary investments in distribution infrastructure.<sup>9</sup> Distributed energy solutions also cut the overall amount of power flowing through the system, thereby easing congestion and further lowering electricity bills. Distributed energy solutions also often reduce air pollutants, water usage, land usage, and carbon emissions when compared to a transmission solution. Utilizing these alternatives in place of transmission might also help grow the marketplace for these relatively new technologies, helping their own costs fall as well.

Despite their promise, non-transmission alternatives—in particular distributed energy resources—have played a

limited role in meeting electricity grid constraints to date. In part, this limited role is attributable to the emerging nature of these technologies. But there is a second, more pervasive reason that non-transmission alternatives have not yet gained traction as a viable alternative to transmission, which forms the crux of this Article’s argument: transmission planning processes are flawed in ways that prevent their fair consideration.

### B. An Introduction to Transmission Planning

Two hundred thousand miles of high-voltage transmission lines traverse the United States in historical rather than optimal patterns, and hundreds of individual utilities own portions of this larger system.<sup>10</sup> Transmission planning attempts to coordinate these entities in order to build the additional transmission necessary to maintain reliability, reduce congestion, and connect new resources to load.<sup>11</sup> It is a critical part of maintaining a functioning electricity grid, given the grid’s disparate ownership patterns but inherent interconnectedness.<sup>12</sup>

During transmission planning, grid operators project the need for new transmission—based on anticipated electricity supply and demand growth—and select projects to meet those needs. In the past few decades, transmission planning has evolved from a utility-by-utility exercise into a more coordinated regional endeavor. Two-thirds of the country’s transmission planning is governed by “Regional Transmission Organizations” (RTOs) or “Independent System Operators” (ISOs).<sup>13</sup> These not-for-profit organizations, comprised of member utilities, run the grid’s daily operations and plan for future grid expansions on a regionally efficient scale.<sup>14</sup> In those regions of the country that have chosen not to form an ISO or RTO, FERC requires that utilities work together to develop “an open, transparent, and coordinated transmission planning process” among transmission providers and stakeholders in the region.<sup>15</sup> Within these regional planning processes (RTO/ISO or otherwise), non-transmission alternatives are required to be considered on a comparable basis to transmission resources.<sup>16</sup> But FERC has not set forth any specific requirements

6. See NEW ENGLAND STATES COMM. ON ELEC., REGIONAL FRAMEWORK FOR NON-TRANSMISSION ALTERNATIVES ANALYSIS 2 n.2 (2012), <http://perma.cc/7QTZ-ZL8X>; Elizabeth Watson & Kenneth Colburn, *Looking Beyond Transmission: FERC Order 1000 and the Case for Alternative Solutions*, PUB. UTIL. FORTNIGHTLY, Apr. 2013, at 37, <http://perma.cc/5FTL-N85D>.  
7. See Watson & Colburn, *supra* note 6, at 37.  
8. NEW ENGLAND STATES COMM. ON ELEC., *supra* note 6, at 6 n.11. “Demand-side” in this context refers to resources that reduce demand, rather than increase supply.  
9. See Scott Hempling, “Non-Transmission Alternatives”: FERC’s “Comparable Consideration” Needs Correction 7 (May 2013), <http://perma.cc/EH8L-TQ7E>.

10. Klass & Wilson, *supra* note 2, at 1805, 1808.

11. See *Transmission Infrastructure: Hearing on Legislation Regarding Electric Transmission Lines Before the S. Comm. on Energy & Natural Res.*, 111th Cong. 8, at 2, 7 (2009) (statement of Jon Wellinghoff, then-Acting Chairman, FERC).

12. See *id.*

13. FERC Order No. 1000, Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Facilities, 76 Fed. Reg. 49,842, 49,869 (Aug. 11, 2011) (codified at 18 C.F.R. pt. 35).

14. See Order 2000, *supra* note 5, at 813–15.

15. FERC Order No. 890, Preventing Undue Discrimination and Preference in Transmission Service, 72 Fed. Reg. 12,266, 12,267 (Mar. 15, 2007) (codified at 18 C.F.R. pt. 37).

16. *Id.* at 12,326 (“[W]here demand resources are capable of providing the functions assessed in a transmission planning process, and can be relied

for what comparability requires, and this regulatory choice significantly limits the effect of its command.

### III. Non-Transmission Alternatives' Persistent Challenges

FERC has over-relied on participatory reforms to fix a process that is substantively hostile to non-transmission alternatives. In translating FERC's broad mandates into concrete planning mechanisms and incentives, regions have failed to craft frameworks capable of elevating non-transmission alternatives to a place of true parity. This part first describes FERC's requirements with respect to non-transmission alternatives, and then outlines three challenges that non-transmission alternatives continue to face in spite of FERC's reforms.

#### A. Non-Transmission Alternatives in Transmission Planning Today

FERC's directives to regions with respect to non-transmission alternatives are relatively vague. FERC identifies Order 890 as the genesis of its comparable consideration requirement for non-transmission alternatives. In that order, FERC recognizes that "where demand resources are capable of providing the functions assessed in a transmission planning process, and can be relied upon on a long-term basis, they should be permitted to participate in that process on a comparable basis."<sup>17</sup> In its clarification order, Order 890-A, FERC again reiterated that "advanced technologies and demand-side resources must be treated comparably where appropriate in the transmission planning process and, thus, the transmission provider's consideration of solutions should be technology neutral."<sup>18</sup>

Order 1000 builds upon these requirements to explicitly require "comparable consideration of transmission and non-transmission alternatives." It then, however, explains that stakeholders and public utility transmission providers know best how to manage this consideration, and that FERC will not establish specific metrics to be used to compare non-transmission alternatives and transmission alternatives.<sup>19</sup>

In response to Order 1000, regions were required to file submissions to FERC explaining how their regional transmission planning processes complied with the requirements of the Order.<sup>20</sup> By and large, FERC has approved regional

filings that provide little detail about how the particular features of non-transmission alternatives will be included in the comparability process, and that rely on stakeholders to put forth any proposals for non-transmission alternatives.<sup>21</sup> To date, this strategy has proven ineffective: public interest organizations have observed in filings to FERC a "virtually complete absence . . . of stakeholder proposals" for NTAs.<sup>22</sup> The next section explains why FERC's process-focused, participatory approach to promoting non-transmission alternatives is unlikely to achieve the parity that the agency ostensibly desires.

#### B. The Challenges Non-Transmission Alternatives Face

##### I. Misaligned Expertise and Incentives

The first challenge created by FERC's weakly enforced comparable consideration mandate is that there is no one with the right match of expertise and incentives to act as a serious proponent of non-transmission alternatives. Regional processes place no obligation on any party to put forth potential non-transmission alternatives. Instead, these processes rely on participants to voluntarily generate potential non-transmission solutions, which regional planners then commit to evaluate on a comparable basis. FERC has approved of these processes, interpreting "comparable consideration" only to require comparability once several independently generated proposals are on the table. This version of comparability, however, is unlikely to ever result in proposals for non-transmission alternatives, because no stakeholder or provider is likely to champion non-transmission alternatives.

Transmission providers themselves are unlikely to propose a non-transmission alternative because it cuts against their bottom line. Whereas these utilities earn a regulated rate of return on investment for any transmission projects, investing in energy efficiency, demand response, and distributed generation—strategies that reduce electricity consumption—often *lowers* transmission providers' profits. In RTO regions, it might seem that the RTO itself could be a good candidate for proposing potentially lower-cost,

upon on a long-term basis, they should be permitted to participate in that process on a comparable basis."); Order 1000, *supra* note 13, at 49,869.

17. FERC Order No. 890, Preventing Undue Discrimination and Preference in Transmission Service, 72 Fed. Reg. 12,266, 12,326 (Mar. 15, 2007) (codified at 18 C.F.R. pts. 35, 37).

18. FERC Order No. 890-A, Preventing Undue Discrimination and Preference in Transmission Service, 73 Fed. Reg. 2984, 3009 (Jan. 16, 2008) (codified at 18 C.F.R. pt. 37).

19. Order 1000, *supra* note 13, at 49,869.

20. Beginning with its Order 888, FERC requires utilities to "file open access non-discriminatory transmission tariffs that contain minimum terms and conditions of non-discriminatory service." FERC Order No. 888, Promoting Wholesale Competition Through Open Access Non-Discriminatory

Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540, 21,541 (May 10, 1996).

21. In a few regions, FERC did push back against certain burdens imposed on non-transmission alternatives, but not required for proposed transmission projects. *See, e.g.*, Order on Compliance Filing, Pub. Serv. Co. of Colo., 142 FERC ¶ 61,206, at ¶¶ 89–90 (Mar. 22, 2013) (FERC Docket Nos. ER13-75-000 et al.) (requiring the WestConnect region reconsider its plans to subject non-transmission alternatives to the same information and fee requirements as transmission proposals, given their differing natures); Order on Compliance Filing, Avista Corp., 143 FERC ¶ 61,255, at ¶¶ 76–81 (June 20, 2013) (FERC Docket Nos. ER13-93-000 et al.) (rejecting language in ColumbiaGrid participants' proposed tariffs that would have required the study team to subject non-transmission alternatives alone to a determination that "such alternative[s] [have] a reasonable degree of development").

22. Motion to Intervene and Protest of Public Interest Organizations at 21, Midwest Indep. Transmission Sys. Operator, Inc. & Midwest Transmission Owners, FERC Docket Nos. ER13-186-000, ER13-897-000, ER13-187-001 (Dec. 10, 2012).



more-effective non-transmission alternatives as regional solutions. But RTOs, with their central focus on grid reliability and management, are at risk of fostering a “transmission-first culture” given that their employees tend to have expertise in transmission development.<sup>23</sup> Moreover, the voluntary structure of RTOs “has ended up leaving those entities [who can exit, including transmission owners] with disproportionate influence.”<sup>24</sup>

It falls on stakeholders, then, to take up the mantle of non-transmission alternatives. Several sophisticated regional- and national-scale environmental non-profit organizations have actively intervened in FERC Order 1000 compliance processes to encourage regions to create procedures receptive to non-transmission alternatives.<sup>25</sup> But these entities have no experience with on-the-ground implementation of energy efficiency, demand response, or distributed generation, and have limited technical capacity to engage in the kind of large-scale modeling and studies that would be necessary. Conversely, those entities with the most on-the-ground experience with distributed energy programs—Energy Service Companies, who interface with customers to run demand response programs and install energy efficiency technologies—lack any incentive to focus on packaging distributed energy resources specifically into regional transmission solutions. These companies also often operate at a smaller geographic scale than might be necessary to propose a transmission-level project.

States are the stakeholders that might seem best positioned to promote non-transmission alternatives, but there is reason to doubt that states adequately take on this function in the regional process. Many states have adopted mandates and other mechanisms for promoting energy efficiency, demand response, and distributed generation within their state borders. However, what is useful for the purpose of regional transmission planning is whether coordinated activity across states might result in a decision to promote *more* distributed energy than any state has decided to do on its own, because it might avoid the need for building certain transmission infrastructure. Accordingly—at least without cost allocation reform, discussed *infra*—it is unlikely that a single state would emerge as a champion of a regional non-transmission alternative, given that it would be taking on the task and expense of building the non-transmission alternative without reaping full benefits.

Ideally, a team of states might work together to examine the possibility of additional, cross-state distributed energy solutions that could function in place of new transmission infrastructure. One region—the Northeast—is actively pursuing just such a collaboration, but it is unclear whether this strategy will achieve success.

## 2. The Comparability Challenge

Even if an entity could overcome these disincentives and put forth a reasonable non-transmission alternative for comparable consideration, there remains a second structural challenge: it is far from clear how comparable consideration of non-transmission alternatives would or could be achieved in regional processes. Regions are charged with developing metrics to compare various proposed solutions.<sup>26</sup> In practice, when comparing two potential transmission projects, such metrics logically focus on economic considerations that differentiate the projects from one another.

Fitting non-transmission alternatives into these frameworks adds a layer of complexity. Non-transmission alternatives often bring co-benefits, which may include lowering air pollution, improving health and the comfort of homes, and reducing strain on the electric grid.<sup>27</sup> In many cases, such benefits are likely to be substantial. But there is a legal hurdle to incorporating such benefits into the regional comparability analysis. FERC and the courts understand the agency’s authority to ensure “just and reasonable” transmission rates only to include economic considerations, *not* environmental concerns.<sup>28</sup>

For this reason, non-transmission alternatives face a comparability conundrum. Ignoring non-transmission alternatives’ co-benefits undervalues their full societal worth. Society would be better off if regions selected non-transmission alternatives whenever their total societal costs were lower than the next best transmission alternative. Yet there is no legal basis for FERC to consider options that are rendered superior on the basis of overall societal benefits alone. Here, then, is one place where FERC might have recognized that there are limitations to what regions can do to incorporate these non-transmission alternatives. Instead, FERC chose to pass the buck to regional planners to design comparability metrics.<sup>29</sup>

23. Scott Hempling, Order 1000: Can We Make the Transmission Provider’s Obligation Effective and Enforceable? 22 (Mar. 2012) (paper prepared for the Sustainable FERC Project), <http://perma.cc/G4NQ-6R3X>; see also Watson & Colburn, *supra* note 6, at 38.

24. Michael H. Dworkin & Rachel Aslin Goldwasser, *Ensuring Consideration of the Public Interest in the Governance and Accountability of Regional Transmission Organizations*, 28 ENERGY L.J. 543, 579 n.200 (2007) (quoting Memorandum from Roy Thilly, President and Chief Executive Officer of Wisconsin Public Power, Inc., to Mariah Sotelino (Sept. 25, 2007) (alterations in Dworkin & Goldwasser)); Pub. Util. District No. 1 v. FERC, 272 F.3d 607, 613 (D.C. Cir. 2001) (dismissing a challenge by utilities to FERC Order 2000 on several grounds, including the fact that RTO membership is voluntary).

25. See generally, e.g., Motion to Intervene and Protest of Public Interest Organizations, *supra* note 22.

26. Order 1000, *supra* note 13, at 49,869.

27. See Watson & Colburn, *supra* note 6, at 37–38; CHRIS NEME & RICH SEDANO, REGULATORY ASSISTANCE PROJECT, US EXPERIENCE WITH EFFICIENCY AS A TRANSMISSION AND DISTRIBUTION SYSTEM RESOURCE 18 (2012), <http://perma.cc/Q8B9-PD4H>.

28. See Grand Council of Crees (of Quebec) v. FERC, 198 F.3d 950, 956–57 (D.C. Cir. 2000) (reviewing cases and FERC decisions and finding that, “[u]nsurprisingly, the Supreme Court has never indicated that the discretion of an agency setting ‘just and reasonable’ rates for sale of a simple, fungible product or service should, or even could, encompass considerations of environmental impact (except, of course, as the need to meet environmental requirements may affect the firm’s costs)”).

29. See Order 1000, *supra* note 13, at 49,869.

### 3. Cost Allocation and Jurisdictional Boundaries

The most fatal challenge facing non-transmission alternatives is one of funding. In Order 1000, FERC observed that regions faced difficulties funding transmission lines that would be constructed by a single utility, but served to meet a larger regional need for additional transmission infrastructure. To remedy this problem, Order 1000 requires regions to adopt a methodology for forcing utilities with the region to apportion and contribute to the costs of transmission projects that benefit multiple entities. Requiring these regional “cost allocation” methodologies counters what had previously been a “significant risk” of transmission underdevelopment.<sup>30</sup>

However, in the same order, FERC explicitly refused to extend cost allocation to non-transmission alternatives.<sup>31</sup> This decision effectively renders non-transmission alternatives infeasible by denying them a viable source of regional financing. No developer will propose a non-transmission alternative financed only by its customers, when much of the non-transmission alternative’s benefit comes from its role in filling a regional transmission need. In contrast, developers will have ample incentive to put forth proposed transmission projects—even if less efficient and effective than a non-transmission alternative—given the guarantee that, if selected in a regional plan, costs will be apportioned among beneficiaries.

FERC said nothing about why it chose to place cost allocation for non-transmission alternatives “beyond the scope” of Order 1000, but the most likely reason is that FERC was uncertain whether its jurisdiction extended to allowing cost allocation for non-transmission alternatives. Allowing these small-scale distributed resources to qualify for regional cost allocation would move RTOs and regional transmission planners closer to the exclusively state-controlled domain of retail electricity sales.<sup>32</sup> However, as the next section explains, recent Supreme Court precedent might cause FERC to re-evaluate its timidity on this score.

## IV. Meaningful Reforms, Honest Admissions

FERC’s approach to non-transmission alternatives is troubling because the Commission has lacked forthrightness about the poor fit between its means and ends. FERC has taken a hands-off, stakeholder- and delegation-focused approach to non-transmission alternatives despite knowing that there are significant risks of discrimination and bias across RTOs, ISOs, and unorganized regions—risks that have *driven* many of its reforms over the last twenty years. Consequently, FERC’s regional delegates can assert that FERC has approved their methodologies for accord-

ing non-transmission alternatives comparable treatment, while in point of fact the structure of transmission planning offers nothing of the sort.

There are several reforms that FERC could undertake to create more truly “technology neutral” transmission planning processes.<sup>33</sup> This Article outlines four of what it judges to be the most feasible and effective reforms below. It also argues, however, that irrespective of whether FERC pursues these reforms, it should also engage in more institutional honesty regarding what it has accomplished, and can accomplish, with respect to promoting non-transmission alternatives. Such honesty is crucial to send the appropriate message to stakeholders, Congress, and the states about how law and policy may need to evolve to facilitate true comparable consideration.

### A. Require Regional Analysis of Non-Transmission Alternatives

Transmission providers themselves are in the best position to propose non-transmission alternatives, but have no incentive to do so. An affirmative burden placed on these best-positioned entities to analyze reasonable non-transmission alternatives seems appropriate.<sup>34</sup> An obligation on transmission providers themselves accomplishes two objectives: first, it helps mitigate the transmission-first culture that dominates these entities by requiring them to look beyond their financially and technically preferred solutions. Second, it puts the entity with the most knowledge and expertise in the position of primary evaluator of potential non-transmission alternatives. Stakeholders can then assume the more appropriate role of monitoring the adequacy of these analyses.

A requirement for RTOs and transmission providers to make a good faith effort to design and evaluate non-transmission alternatives would also begin to unlock the comparability conundrum, as regions would be forced to create metrics and evaluation criteria to compare transmission and non-transmission alternatives. Similarly, such a requirement would further our understanding of the true potential that these alternatives hold as regional solutions.

### B. Deny Cost Allocation to Inferior Transmission Alternatives

FERC could also require regions to make clear that when a non-transmission alternative out-performs a transmission option, the transmission option *may not be included* in the regional transmission plan for purposes of cost allocation. In Order 1000, FERC alluded to this possibility, but endorsed it only as permissible.<sup>35</sup> But in fact, it seems

30. Order 1000, *supra* note 13, at 49,920.

31. *Id.* at 49,956 (“[W]e conclude that the issue of cost recovery for non-transmission solutions is beyond the scope of the transmission cost allocation reforms we are adopting here . . .”).

32. See 16 U.S.C. § 824(a) (2012).

33. Order 890, *supra* note 15, at 3009.

34. A burden of this type could likely be justified under FERC’s general jurisdiction over transmission planning, which it has asserted as part of its prerogative to keep transmission rates “just and reasonable.” See, e.g., Order 1000, *supra* note 13, at 49,849.

35. FERC Order No. 1000-A, Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 77 Fed. Reg. 32,184,

not only permissible but arguably obligatory under FERC's obligation to ensure that transmission rates are "just and reasonable"<sup>36</sup>; if a non-transmission alternative were cheaper and more effective than a transmission solution, it would be unreasonable to select the transmission project. If FERC were to clarify that the obligation to ensure reasonable costs precludes using regional cost allocation for a transmission project that has failed in comparison to a non-transmission alternative, regions, states, and/or providers might become more receptive to cost allocation for non-transmission alternatives, or might look for other collaborative funding solutions.

### C. Elaborate a More Complete "Comparable Consideration" Methodology

In approving regional transmission planning processes, FERC could decide to be more rigorous in what qualifies as the appropriate elaboration of a regional comparable consideration methodology. FERC has chosen to permit mere recitation of a promise to grant comparable consideration to suffice as proof of a sufficient, fair process. The agency could bolster its requirements regarding comparability either by maintaining regional flexibility but asking for more detail in regional tariffs, or by elaborating its own requirements or guidelines for what must be considered during a comparability evaluation.

### D. Extend Cost Allocation to Non-Transmission Alternatives

In its original 2015 version, this article asserted that in refusing to extend cost allocation to non-transmission alternatives, FERC appropriately considered itself jurisdictionally constrained by the D.C. Circuit's decision in *Elec. Power Supply Ass'n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014) ("EPSA"). However, the Supreme Court's recent reversal of that decision, 136 S. Ct. 760 (2016), should cause FERC to reevaluate this conclusion.

EPSA concerned the permissibility of FERC rules that dictate terms for demand response's participation in wholesale electricity markets. In upholding FERC's rules, the Supreme Court clarified that under the Federal Power Act (FPA), FERC can regulate any practices that "directly affect" wholesale electricity and interstate transmission rates.<sup>37</sup>

Cost allocation for non-transmission alternatives would likely qualify as having a direct effect on transmission rates. To be sure, non-transmission alternatives do not immediately lower the marginal cost of transmission in the same way demand response lowers wholesale electricity rates, given the longer time horizons of transmission planning

and construction. Nevertheless, selection of a more cost-effective non-transmission alternative during transmission planning would lead directly to lower transmission rates for all beneficiaries of the project.<sup>38</sup> Thus, under the logic of EPSA, cost allocation for non-transmission alternatives, which is decidedly necessary to ensure non-transmission alternatives' full and effective participation in transmission planning, should fall within the scope of a practice "directly affecting" transmission rates. Accordingly, and as suggested by certain language in the EPSA opinion, FERC may now have not just the authority, but "indeed, the duty" to take this step towards ensuring "just and reasonable" transmission rates.<sup>39</sup>

### E. Honest Admissions

Given recent turmoil over the boundaries of its jurisdiction, FERC has understandable reasons for having moved slowly on non-transmission alternatives. Even so, if FERC believes (as it says) that incorporating non-transmission alternatives will create better transmission-planning processes, then it has ill-served its responsibility to maintain just and reasonable transmission rates by pretending to have solved a problem where it has barely scratched the surface. Where it believes itself jurisdictionally constrained, FERC might benefit the policy process by airing some of the reasons for its hesitation more publicly. There are certainly limitations to this suggestion, the most obvious being that FERC would want to avoid making any admissions that might come to haunt it in future litigation. Nevertheless, more signaling by FERC about the ways in which it believes it cannot go the full distance to achieve adopted aims would be beneficial for the deliberative democratic process.<sup>40</sup>

By admitting those policy spaces where it feels unable to cope unilaterally with the burden of utilizing the grossly outdated FPA to solve modern day grid and transmission-planning constraints, FERC could better advance a regional and national conversation about the best ways to address such challenges. Ultimately, such delineation of FERC's own fallibilities and legal constraints seems an important part of being a responsible agency working with a statute designed for a different era.

## V. Conclusion

Current transmission planning processes are unlikely to result in selection and implementation of non-transmission solutions, even where they are demonstrably superior. This shortcoming is obviously bad for proponents of distributed energy. It is also bad for those who hope to implement

32,216 (May 31, 2013) (to be codified at 18 C.F.R. pt. 35) ("It may be the case that non-transmission alternatives may result in a regional transmission planning process deciding that a proposed transmission facility is not a more efficient or cost-effective solution and, accordingly, that facility may not be selected in the regional transmission plan for purposes of cost allocation.").

36. See 16 U.S.C. § 824d.

37. Slip Op. at 15.

38. As FERC did with demand response, it might institute a "net benefits" test to ensure that all utilities affected by cost allocation for non-transmission alternatives would in fact see a reduction in transmission costs. Cf. EPSA, Slip Op. at 10.

39. Slip Op. at 15.

40. Cf. Sharon B. Jacobs, *Bypassing Federalism and the Administrative Law of Negawatts*, 100 IOWA L. REV. 885, 917 (2015) (finding that agencies are not as well situated in the deliberative process as Congress to make reforms that shift jurisdictional boundaries).

significant but thoughtful grid expansion in the coming decades. More transmission is critically needed to update infrastructure and to keep pace with renewable resource development, but each transmission line is also a fractious, expensive, and environmentally damaging endeavor. Where transmission can be avoided, it should be. FERC knows this, but has not yet translated its aspirations into effective regulations. Further reforms will be necessary to

achieve true parity, and FERC should consider using its recently affirmed jurisdiction over practices affecting transmission rates to extend cost allocation to non-transmission alternatives. In the meantime, however, FERC needs a more forthright approach to non-transmission alternatives, which articulates the limitations of a stakeholder-driven comparable consideration mandate and seeks creative, collaborative solutions and reforms.