161 FERC ¶ 61,188
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, and Robert F. Powelson.

Public Service Company of Colorado	Docket Nos. ER13-75-011 ER15-416-001
Tucson Electric Power Company	ER13-77-010 ER15-433-001
UNS Electric, Inc.	ER13-78-011 ER15-434-001
Public Service Company of New Mexico	ER13-79-009 ER15-413-001
Arizona Public Service Company	ER13-82-009 ER15-411-006
El Paso Electric Company	ER13-91-008 ER15-426-001
Black Hills Power, Inc.	ER13-96-009 ER15-431-001
Black Hills Colorado Electric Utility Company, LP	ER13-97-009 ER15-430-001
NV Energy, Inc.	ER13-105-005
Nevada Power Company	ER15-423-001 ER15-428-003
Sierra Pacific Power Company	ER15-424-001
Cheyenne Light, Fuel, & Power Company	ER13-120-009 ER15-432-001

ORDER ON REMAND

(Issued November 16, 2017)

1. In response to a petition for review of the Commission's orders addressing Order No. 1000[1] compliance filings[2] submitted by public utility transmission providers in the WestConnect transmission planning region,[3] the United States Court of Appeals for the Fifth Circuit (Fifth Circuit) issued an order on August 8, 2016 remanding the matter, in part, to the Commission for further explanation and proceedings.[4] At issue is the role of non-public utility transmission providers in the WestConnect transmission planning region's process for allocating the costs of transmission facilities selected in the regional transmission plan for purposes of cost allocation. Per the Fifth Circuit's direction, in this order we further explain why the Commission's determinations in the Compliance Orders will not result in unjust and unreasonable rates in the WestConnect transmission planning region.

I. Background

A. Order No. 1000

2. 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. The

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[1] *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 and clarification*, 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).

[2] *Pub. Serv. Co. of Col.*, 142 FERC ¶ 61,206 (2013) (First Compliance Order); *Pub. Serv. Co. of Col.*, 148 FERC ¶ 61,213 (2014) (Second Compliance Order); *Pub. Serv. Co. of Col.*, 151 FERC ¶ 61,128 (2015) (Third Compliance Order) (collectively, Compliance Orders).

[3] The WestConnect transmission planning region is comprised of public and non-public utility transmission providers located in Arizona, California, Colorado, Nebraska, Nevada, New Mexico, South Dakota, Texas, and Wyoming.

[4] *El Paso Elec. Co. v. FERC*, 832 F.3d 495 (5th Cir. 2016) (*El Paso Elec.*).

transmission planning reforms in Order No. 1000 required, among other things, that each public utility transmission provider participate in a regional transmission planning process that produces a regional transmission plan. The regional cost allocation reforms in Order No. 1000 required each public utility transmission provider to set forth in its Open Access Transmission Tariff (OATT) 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. Of relevance here, Regional Cost Allocation Principle 1 specifies that the cost of transmission facilities must be allocated to those within the transmission planning region that benefit from those facilities in a manner that is at least roughly commensurate with estimated benefits.[5] Under Regional Cost Allocation Principle 3, if a benefit-to-cost ratio is used as a threshold to determine which facilities have sufficient net benefits to be included in a regional transmission plan for purposes of cost allocation, the ratio should not exceed 1.25.[6]

3. Order No. 1000 did not require any non-public utility transmission provider to enroll or otherwise participate in a regional transmission planning process. However, the Commission stated that, if a non-public utility transmission provider chooses to enroll in a transmission planning region, then it is subject to regional cost allocation, and if an enrolled non-public utility transmission provider is determined by the transmission planning process to be a beneficiary of transmission facilities selected in the regional transmission plan for purposes of cost allocation, then that enrolled non-public utility transmission provider is responsible for the costs associated with such benefits.[7]

B. <u>Reciprocity Condition</u>

4. In Order No. 888,[8] the Commission required each public utility transmission provider to provide open access transmission service for the sale of wholesale electricity

[5] Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 622.

[6] *Id*. P 586.

[7] Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 629; Order No. 1000-A, 139 FERC ¶ 61,132 at PP 275, 279, 622, 776.

[8] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC

in interstate commerce. To encourage open access to transmission service, the Commission established the reciprocity condition, which allows a public utility transmission provider to deny access over its transmission system to a non-public utility transmission provider that does not provide the public utility transmission provider with comparable access to the non-public utility transmission provider's transmission system.[9]

5. In Order No. 1000, the Commission applied the reciprocity principles set forth in Order Nos. 888 and 890[10] regarding non-public utility transmission provider participation in transmission planning processes.[11] In Order No. 1000-A, the Commission clarified that the scope of the reciprocity requirement established under Order Nos. 888 and 890 remained unchanged under Order No. 1000.[12] The Commission reiterated that a non-public utility transmission provider could continue to satisfy the reciprocity condition in one of three ways. First, a non-public utility transmission provider may provide service under a tariff that the Commission has approved under the voluntary "safe harbor" provision of the *pro forma* OATT, in which case the non-public utility transmission provider submits a reciprocity tariff to the Commission seeking a declaratory order that the reciprocity tariff substantially conforms, or is superior to, the

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¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

[9] *See* Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,760-31,761 (stating that "[a]ny public utility that offers non-discriminatory open access transmission for the benefit of customers should be able to obtain the same non-discriminatory access in return"); Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,289 ("[A] public utility may refuse to provide open-access transmission service to a non-public utility if its denial is based on a good faith assertion that the non-public utility has not met the Commission's reciprocity requirements."). The reciprocity provision is set forth in section 6 of the *pro forma* OATT.

[10] *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).

[11] Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 117.

[12] Order No. 1000-A, 139 FERC ¶ 61,132 at P 771.

pro forma OATT as it has been revised by Order No. 1000. If the Commission finds that the reciprocity tariff substantially conforms, or is superior to, the *pro forma* OATT, then the non-public utility transmission provider must offer service under its reciprocity tariff to any public utility transmission provider whose transmission service the non-public utility transmission provider seeks to use. Second, the non-public utility transmission provider may provide comparable service to a public utility transmission provider under a bilateral agreement. Finally, the non-public utility transmission provider may seek a waiver of the reciprocity condition from the public utility transmission provider.[13]

6. In the absence of a safe harbor tariff, a non-public utility transmission provider's obligation to a public utility transmission provider to provide comparable transmission service that it is capable of providing on its own system begins when that public utility transmission provider requests comparable reciprocal service from the non-public utility transmission provider.[14] The Commission has noted that it did not intend to enforce the reciprocity tariff provisions sua sponte, except insofar as the Commission permits a public utility transmission provider to refuse to offer open access transmission service to a non-public utility transmission provider, in accordance with Order No. 888.[15]

C. <u>Compliance Orders</u>

7. Public utility transmission providers in the WestConnect transmission planning region (collectively, Filing Parties)[16] submitted their first filings to comply with Order

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[13] *Id.* PP 771-773. The Commission did not require non-public utility transmission providers having safe harbor tariffs on file to modify those tariffs specifically to address the transmission planning and cost allocation processes required by Order No. 1000. Rather, the Commission stated that it remains up to each non-public utility transmission provider to determine whether it wants to maintain its safe harbor status by meeting the transmission planning and cost allocation requirements of Order No. 1000. Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 816.

[14] Order No. 1000-A, 139 FERC ¶ 61,132 at P 774.

[15] *Id.* P 774.

[16] Filing Parties consisted of: Arizona Public Service Company, Black Hills Power, Inc., Basin Electric Power Cooperative, Powder River Electric Cooperative, Black Hills Colorado Electric Utility Company, LP, Cheyenne Light, Fuel, & Power Company, El Paso Electric Company, NV Energy, Inc., Xcel Energy Services, Inc., on behalf of Public Service Company of Colorado, Public Service Company of New Mexico, Tucson Electric Power Company, and UNS Electric, Inc.

No. 1000 on October 11, 2012 (Compliance Filings). Filing Parties first proposed to adopt a non-binding regional cost allocation method whereby the costs of a transmission project selected in the regional transmission plan for purposes of cost allocation and associated transmission rights would be allocated proportionally to the beneficiaries of the project who agreed to participate. Under Filing Parties' proposal, no entity would be obligated to pay costs of any transmission project in accordance with any cost allocation.[17]

8. In the First Compliance Order, the Commission found that the Filing Parties' proposal partially complied with the regional cost allocation requirements of Order No. 1000.[18] While the Commission found that Filing Parties generally met the Order No. 1000 requirement that each public utility transmission provider have in place a method, or set of methods, for allocating the costs of new transmission facilities selected in the regional transmission plan for purposes of cost allocation, the Commission also found that the Filing Parties' proposed non-binding cost allocation provisions did not comply with Order No. 1000.[19] The Commission stated that a regional cost allocation method that is not binding on identified beneficiaries does not comply with the principle that costs must be allocated in a manner that is roughly commensurate with estimated benefits.[20] The Commission further explained that a fundamental driver of Order No. 1000 was the need to minimize free ridership[21] and increase the likelihood that transmission facilities in the regional transmission plan will move forward to construction. The Commission noted that Order No. 1000 expressly rejected the notion that an entity may opt out of a Commission-approved cost allocation for a specific transmission project if it merely asserts that it receives no benefits from the project, stating that such an opportunity to opt out would not minimize the regional free rider

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[17] First Compliance Order, 142 FERC ¶ 61,206 at PP 281-282.

[18] *Id.* P 306.

[19] *Id.* PP 306-309.

[20] *Id.* P 308.

[21] Order No. 1000 described free riders as entities who do not bear cost responsibility for benefits that they receive in their use of the transmission grid, specifically benefits they receive from new transmission facilities selected in a regional transmission plan for purposes of cost allocation. Order No. 1000-A, 139 FERC ¶ 61,132 at P 576.

problem.[22] The Commission also explained that a non-binding cost allocation method does not provide the required certainty about who is obligated to pay for transmission facilities selected in the regional transmission plan for purposes of cost allocation and, as a result, would be a disincentive for nonincumbent transmission developers to propose more efficient or cost-effective solutions.[23] The Commission directed Filing Parties to file further compliance filings to revise their respective OATTs to provide a regional cost allocation method that was binding on identified beneficiaries.[24]

9. Filing Parties requested rehearing of the Commission's determination in the First Compliance Order that the regional cost allocation must be binding on identified beneficiaries.[25] Among other things, Filing Parties argued that the Commission's determination would discourage participation by non-public utility transmission providers in the regional transmission planning process, resulting in less meaningful transmission development in the region, and would impose cost responsibility without a mechanism for costs to be recovered.[26]

10. On compliance with the First Compliance Order, Filing Parties proposed to create separate categories of transmission providers eligible to participate in the WestConnect regional transmission planning process: enrolled transmission owners and coordinating transmission owners. Enrolled transmission owners would be subject to the entirety of Order No. 1000 regional transmission planning, including Order No. 1000's regional cost allocation provisions. Coordinating transmission owners (i.e., participating non-public utility transmission providers) would not be subject to regional cost allocation, but could fully participate in every other aspect of the regional transmission planning process. Coordinating transmission owners' transmission facilities and proposed transmission

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[22] First Compliance Order, 142 FERC ¶ 61,206 at P 308 (citing Order No. 1000, FERC Stats. & Regs ¶ 31,323 at P 640).

[23] *Id.* P 308.

[24] *Id.* P 309.

[25] *Pub. Serv. Co. of Col.*, *et al.*, Request for Rehearing and Clarification, Docket No. ER13-75-001, *et al*. (filed Apr. 22, 2013) (Filing Parties 2013 Rehearing Request).

[26] *See* Second Compliance Order, 148 FERC ¶ 61,213 at PP 329, 331-332. Filing Parties explained that, under their proposal, cost allocation determinations would not have been binding until the beneficiaries of a transmission project negotiate and enter into an agreement, which would provide a legal mechanism for cost recovery. *Id.* P 332.

projects would be considered in the regional transmission planning process.[27] Filing Parties stated that the proposal to create separate categories of transmission owners was set forth in response to the Commission's requirement that cost allocation determinations for transmission projects selected in the regional transmission plan for purposes of cost allocation be binding upon identified beneficiaries. Filing Parties argued that subjecting non-public utility transmission providers to binding cost allocation would have likely resulted in a regional transmission planning process without participation of non-public utility transmission providers.[28] Additionally, under Filing Parties' proposal, any transmission project that would provide quantifiable benefits to, or electrically interconnect with the transmission facilities of, a coordinating transmission owner or a transmission owner not enrolled in any transmission planning region would not be subject to binding cost allocation.[29]

11. In the Second Compliance Order, the Commission denied rehearing, stating, among other things, that the foundation of Order No. 1000's cost allocation reforms was binding cost allocation, that non-binding cost allocation would not provide assurance that costs will be allocated roughly commensurate with estimated benefits, and that the obligation to have a cost allocation method is not a matter of cost recovery.[30] The Commission explained that in Order No. 1000 it found that the lack of an *ex ante* regional cost allocation method, which identified the beneficiaries of proposed regional transmission facilities and that was known in advance to transmission planners, as well as the existence of free riders on the transmission grid, resulted in inefficient transmission planning that impeded the development of more efficient and cost-effective new transmission facilities, with the result that jurisdictional rates were higher than they would otherwise be.[31] The Commission explained that if enrolled transmission providers that are identified as beneficiaries have the option not to accept transmission costs allocated pursuant to a regional cost allocation method, in reliance that other beneficiaries

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[27] Under Filing Parties' proposal, a coordinating transmission owner could submit a proposed regional transmission project to be studied, but the project would not be eligible for regional cost allocation. Second Compliance Order, 148 FERC ¶ 61,213 at P 29.

[28] *Id.* PP 28, 41.

[29] *Id.* PP 27-29.

[30] *Id.* PP 336-337, 342.

[31] Second Compliance Order, 148 FERC ¶ 61,213 at P 336 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at PP 562, 592).

would fund the costs needed for a transmission project's development, this could lead to the scenario where the potential transmission developer did not have the required certainty to move forward with the transmission project.[32]

12. Additionally, the Commission accepted the proposed coordinating transmission owner framework, but rejected the proposal to exclude a transmission project from binding regional cost allocation solely on the basis that the project provides quantifiable benefits to, or electrically interconnects with the transmission facilities of, a coordinating transmission owner or a transmission owner not enrolled in any transmission planning region. The Commission explained that excluding such projects would "unduly restrict consideration of transmission facilities that nonetheless may have regional benefits and are determined to be more efficient or cost-effective transmission solutions to regional transmission needs."[33] Additionally, the Commission clarified that a non-public utility transmission provider that participates in the WestConnect transmission planning process as a coordinating transmission owner, and that is determined to be a beneficiary of a transmission project proposed for selection in the regional transmission plan for purposes of cost allocation, may determine whether, consistent with its view of its statutory obligations, it will accept its share of the costs of that transmission facility. Thus, the Commission directed Filing Parties to set forth a process by which a coordinating transmission owner identified as a beneficiary of a transmission project would inform enrolled transmission owners whether it would accept its share of the costs of that project.[34] If a coordinating transmission owner declines its share of project costs, the Commission explained that the parties could reapply the region's cost allocation method to determine whether the project continues to satisfy the applicable cost allocation requirements.[35]

13. Filing Parties requested rehearing of the Second Compliance Order's rejection of the proposal to exclude from binding cost allocation any transmission project that provides quantifiable benefits to, or electrically interconnects with, a coordinating transmission owner or a transmission owner not enrolled in any transmission planning

[32] *Id.* P 336.

[33] *Id.* PP 55-56.

[34] *Id.* P 57.

[35] *Id*. n.104.

region.[36] Filing Parties asserted that the Commission's rejection of their proposal was inconsistent with Order No. 1000 because if a coordinating transmission owner that is an identified beneficiary of a transmission project declines to accept its share of the project's cost, the transmission project may still qualify for selection and the costs of such project would be borne by the other benefitting transmission owners. Filing Parties argued that this would result in free ridership, as coordinating transmission owners that decline cost allocation would receive benefits from the transmission project without paying. Additionally, Filing Parties argued that the Commission's directive was inconsistent with the Order No. 1000 cost allocation principle requiring assignment of costs at least roughly commensurate with the benefits received.[37]

14. At the same time they requested rehearing of the Second Compliance Order, Filing Parties submitted filings to comply with the Commission's directives in the Second Compliance Order, which proposed an evaluation process for transmission projects that involved several steps. First, the cost-benefit analysis and beneficiary determination for the transmission project would be posted on the WestConnect website. Second, identified beneficiaries would vote on whether to implement the transmission project, with 80 percent approval required (on a beneficiary-weighted basis) for the transmission project to move forward. Third, coordinating transmission owner beneficiaries would be able to decide whether to accept cost allocation for the transmission project. Fourth, the cost-benefit analysis and beneficiary identification would be adjusted to remove the benefits or transmission needs of coordinating transmission owners that did not accept cost allocation. Fifth, if a coordinating transmission owner's decision to not accept cost allocation resulted in a shift in cost to other beneficiaries exceeding 10 percent of their prior cost allocation, then the transmission project would not move forward. Otherwise, if the transmission project continued to meet the region's cost-benefit analysis and other criteria for regional cost allocation, it would remain eligible for selection in the regional transmission plan for purposes of cost allocation.[38]

15. In the Third Compliance Order, the Commission denied rehearing, stating that the Commission's rejection of Filing Parties' proposal to exclude from binding cost allocation any transmission project that provides quantifiable benefits to, or electrically interconnects with, a coordinating transmission owner or a transmission owner not

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[36] *Pub. Serv. Co. of Col., et al.*, Request for Rehearing and Clarification, Docket No. ER13-75-006, *et al*. (filed Oct. 20, 2014).

[37] *See* Third Compliance Order, 151 FERC ¶ 61,128 at PP 22-25.

[38] *Id.* PP 37-44.

enrolled in any transmission planning region was not inconsistent with Order No. 1000.[39] The Commission further explained that accepting this proposal would undermine Order No. 1000's broader goal of identifying more efficient or cost-effective transmission solutions to regional transmission needs. The Commission noted that Order No. 1000 did not seek to eliminate all instances of free ridership, that the Commission had to balance a number of factors to achieve the goal of improved transmission planning and cost allocation, and that the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) recognized that the Commission could implement reforms incrementally and is not required to "ensure full or perfect cost causation."[40] Moreover, the Commission stated that because of the significant level of interconnection between public and non-public utility transmission providers in the WestConnect transmission planning region, excluding from regional cost allocation transmission projects that either benefit or interconnect with unenrolled non-public utility transmission providers would likely disqualify a significant number of projects that provide meaningful benefits to enrolled transmission providers.[41]

16. Additionally, the Third Compliance Order rejected aspects of the Filing Parties' proposal to comply with the Second Compliance Order. The Commission rejected the 10 percent cost shift proposal, stating that it might cause transmission projects to be rejected when they are more efficient or cost-effective transmission solution for remaining beneficiaries compared to other alternatives even after the cost shift. The Commission explained that it is the transmission planning region's Commission-approved cost allocation method, rather than the newly proposed cost shift cap, that Filing Parties were directed to use as a means for determining whether a transmission project identified as the more efficient or cost-effective transmission solution is eligible for binding cost allocation. The Commission stated that the 10 percent cost shift proposal might lead to the transmission planning process rejecting regional cost allocation for a proposed transmission project that continued to be a more efficient or cost-effective transmission solution for the remaining beneficiaries even after a cost shift. Further, the Commission stated that the 10 percent cost shift proposal ignored the fact that if a coordinating transmission owner does not accept the cost allocation for a transmission project, the transmission planning process removes from the analysis the benefits of those coordinating transmission owners that do not accept the cost allocation. Thus, the Commission stated, the cost allocation determinations that result after the re-run are

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[39] *Id.* P 28.

[40] *Id.* P 30 (quoting *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d at 88).

[41] *Id.* P 32.

commensurate with the estimated benefits considered.[42] Additionally, the Commission rejected the 80 percent voting proposal because it was beyond the scope of the applicable Commission directive in the Second Compliance Order.[43]

17. On November 18, 2014 and May 18, 2015, El Paso Electric Company (El Paso Electric) petitioned the Fifth Circuit for review of the Compliance Orders.

D. WestConnect Cost Allocation Methods

18. Under the WestConnect public utility transmission provider OATTs, there are three separate regional cost allocation methods: one applicable to reliability transmission projects; one applicable to economic transmission projects; and one applicable to public policy transmission projects. Only transmission projects that fall within one or more of these categories and satisfy a cost-benefit analysis are eligible for regional cost allocation.[44]

19. For a regional reliability transmission project to qualify for selection in the regional transmission plan for purposes of cost allocation, the project must be needed to meet a North American Electric Reliability Corporation (NERC) Transmission Planning Standards reliability need during the ten-year planning horizon and to replace components of multiple local transmission plans. The WestConnect process identifies beneficiaries, defines benefits, and allocates costs of a regional reliability transmission project based on the avoided cost of local transmission facilities that would otherwise be needed to comply with the NERC Transmission Planning Standards.[45]

20. For a regional economic transmission project to qualify for selection in the regional transmission plan for purposes of cost allocation, the project must have a benefit-to-cost ratio that is greater than 1.0 under each of the scenarios evaluated, and an average benefit-to-cost ratio of at least 1.25 under all scenarios evaluated. The WestConnect process identifies beneficiaries, defines benefits, and allocates costs of a

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[42] *Id.* PP 57-58.

[43] *Id.* P 56.

[44] *See* First Compliance Order, 142 FERC ¶ 61,206 at P 283.

[45] *E.g.*, El Paso Electric Company, OATT, Attachment K § VI.C.1.

regional economic transmission project based on production cost savings and reduction in reserve sharing requirements.[46]

21. For a regional public policy transmission project to qualify for selection in the regional transmission plan for purposes of cost allocation, the project must provide access to resources needed to satisfy identified public policy requirements. The WestConnect process identifies beneficiaries, defines benefits, and allocates costs of a regional public policy transmission project based on the number of megawatts of public policy resources that the public policy transmission project enables.[47]

22. If a transmission project provides multiple types of benefits but cannot pass the cost allocation threshold for any one of the three benefit categories alone, the sum of benefits from each benefit category may be considered to determine if the regional transmission project provides, in total, benefits that meet or exceed the 1.25-to-1.0 benefit-to-cost ratio. Costs for these transmission projects are allocated in accordance with the cost allocation procedures defined above for each category of benefits.[48]

II. <u>Court of Appeals Determination</u>

23. In its August 8, 2016 opinion, while holding that "[t]he vast majority of [El Paso Electric's] challenges to FERC's actions through [the Compliance Orders] fail,"[49] the Fifth Circuit also held that the Commission had acted arbitrarily and capriciously in its mandates regarding the role of non-public utility transmission providers[50] in cost

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[46] *E.g.*, *id.* § VI.C.2.

[47] *E.g.*, *id.* § VI.C.3.

[48] *E.g.*, *id.* § VI.C.4.

[49] *El Paso Elec.*, 832 F.3d at 498. El Paso Electric argued that the Commission's actions in the Compliance Orders violated the Administrative Procedure Act, unlawfully sub-delegated the Commission's ratemaking authority under the Federal Power Act (FPA), violated the *Mobile-Sierra* doctrine, and infringed upon exclusive state authority over siting and construction of transmission facilities. The Fifth Circuit dismissed or denied all of these challenges. *Id.* at 508-510.

[50] The Fifth Circuit used the term "non-jurisdictional utilities" in its opinion, while the Commission used the term "non-public utility transmission providers" in the Compliance Orders. For consistency, we refer to "non-public utility transmission providers" throughout this order.

allocation and regional transmission planning in the WestConnect transmission planning region.[51] Specifically, the Fifth Circuit concluded that the Compliance Orders "fail to adequately explain how the mandates in those orders do not ensure *un*just and *un*reasonable rates as between [public and non-public utility transmission providers] (and their customers) in the WestConnect region."[52]

24. The Fifth Circuit observed that "Sections 205 and 206 of the FPA only give FERC the authority to directly regulate 'jurisdictional' utilities" and that "[t]he regional planning and cost allocation requirements of Order No. 1000 therefore only directly apply to jurisdictional utilities."[53] The Fifth Circuit also observed that in Order No. 1000 the Commission declined to regulate non-public utility transmission providers and therefore does not address free ridership by those utilities. The Fifth Circuit stated that it is within the Commission's discretion to balance competing objectives and that the Commission's regulations need only roughly correlate costs to benefits.[54] The Fifth Circuit concluded that the Commission has a statutory duty to ensure just and reasonable rates and that Order No. 1000 emphasized the cost causation principle in service of that goal. However, the Fifth Circuit found that "[a]s they stand, the Compliance Orders do not apply that foundational principle of cost causation for about half of the utilities in the WestConnect region."[55]

25. The Fifth Circuit concluded that the Compliance Orders did not provide "a reasoned explanation" for why non-public utility transmission providers in the WestConnect transmission planning region "have incentive or obligation to participate in binding cost allocation when they can get many of the same benefits at the [public utility transmission providers'] expense."[56] Additionally, the Fifth Circuit stated that the Commission did not "explain how it can meet its obligation to ensure just and reasonable

[51] A two-judge majority issued the opinion, with one judge dissenting from the holding that the Commission had acted arbitrarily and capriciously.

[52] *El Paso Elec.*, 832 F.3d at 504 (emphasis in original).

[53] *Id*. at 500 (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 275).

[54] *Id*. at 505.

[55] *Id*. at 505 & n.10 ("Order No. 1000 clearly linked cost causation, the elimination or reduction of free ridership, just and reasonable rates, and more efficient transmission planning and development.").

[56] *Id.* at 505.

rates by effectively assuring that many of the costs of new development will be imposed on only half of the utilities in the WestConnect region."[57]

26. The Fifth Circuit rejected an argument that the Commission made in its initial brief that the reciprocity condition would incentivize non-public utility transmission providers to participate in binding regional cost allocation. The Fifth Circuit stated that the Commission did not explain in the Compliance Orders why the reciprocity condition would provide such an incentive, and because the agency record lacked the information needed to evaluate the issue, the Fifth Circuit could not make any determination.[58]

27. Additionally, the Fifth Circuit rejected the dissenting opinion's argument that if a non-public utility transmission provider does not accept regional cost allocation for a transmission project that would provide it benefits, the transmission planning process removes those benefits and recalculates future cost allocation determinations such that they only account for benefits to entities that have agreed to binding cost allocation. The Fifth Circuit stated that this argument was "merely a reworded version" of the Commission's argument that it need not account for the benefits that accrue to non-public utility transmission providers. The Fifth Circuit stated that even if the benefits are excluded from cost allocation calculations public utility transmission providers would still be left to pay the entire cost of the transmission project and non-public utility transmission providers "may thus receive benefits for free" while public utility transmission providers "and their customers may pay more than their share of the costs associated with the benefits they receive."[59] In addition, the Fifth Circuit observed that "FERC has thus far declined to exercise any authority it may or may not have under Section 211A of the FPA to *require* participation in these processes by [non-public utility transmission providers]."[60]

28. The Fifth Circuit held that the Compliance Orders were arbitrary and capricious "[a]bsent a more reasoned explanation for why the [non-public utility transmission

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[57] *Id.* at 505-506.

[58] *Id.* at 506-507.

[59] *Id.* at 507 n.13.

[60] *Id.* at 500 (emphasis in original). The Fifth Circuit also stated that "[w]e express no opinion about whether (if at all) or in what manner FERC may exercise authority over [non-public utility transmission providers] under Section 211A of the FPA, since FERC has not attempted to exercise any authority it may or may not have under this provision." *Id.* n.7.

providers] will participate in the binding cost allocation process, or why their lack of participation will not result in unjust and unreasonable rates."[61] Consequently, the Fifth Circuit granted the petitions for review and remanded the case to the Commission for further explanation and proceedings.

III. Discussion

29. The Fifth Circuit held that the Commission did not adequately explain why its mandates in the Compliance Orders would not result in unjust and unreasonable rates. Accordingly, in this order, we provide further explanation about why the approach the Commission accepted in the Compliance Orders is consistent with Order No. 1000 and will not result in rates that are unjust and unreasonable. Additionally, we provide further explanation about why we expect non-public utility transmission providers in the region will be incentivized to participate in regional cost allocation, thereby limiting any potential free ridership in the region. Finally, we further explain why, even if a non-public utility transmission provider does not participate in regional cost allocation for a particular transmission project for which it benefits and the project is subsequently selected in the regional transmission plan for purposes of cost allocation, the rates for such transmission project will remain just and reasonable.[62]

[61] *Id.* at 507.

[62] The Fifth Circuit remanded this case to the Commission "for further explanation and fact finding." *Id.* at 508, 510. In this order, we make, where appropriate, additional factual findings regarding the WestConnect regional transmission planning process to reflect developments since the Commission issued the Compliance Orders. *See infra* PP 36, 38. However, we find that it is not necessary at this time to order additional proceedings to investigate the participation of non-public utility transmission providers in regional cost allocation in WestConnect. We note that the WestConnect regional transmission planning process did not identify any regional transmission needs in its abbreviated 2015 regional planning cycle or its current 2016-17 regional planning cycle, the only two regional planning cycles it has conducted thus far. Because the WestConnect transmission planning process has not identified any regional transmission needs, no regional transmission projects have been submitted, and thus there have been no opportunities for non-public utility transmission providers to participate in cost allocation for regional transmission projects. As noted below, the Commission can continue to monitor developments in the WestConnect regional transmission planning process to determine whether further changes to the planning structure and participation rules are needed.

A. **The Commission Appropriately Considered the Unique Characteristics of the WestConnect Region When Considering How to Address Non-public Utility Transmission Provider Participation in the Regional Transmission Planning Process**

30. In considering Filing Parties' Compliance Filings, the Commission took into account the particular characteristics of the WestConnect transmission planning region. The region's transmission system is a heavily-integrated combination of public and non-public utility transmission providers, the result of a history of significant joint transmission planning and development between public and non-public utility transmission providers. The service territories of the public utility transmission providers are, in certain instances, physically separated from one another by one or more non-public utility transmission providers, and the public utilities have few electrical interconnections between them. In addition, some public utility transmission providers in the region are connected via transmission lines that are wholly- or partially-owned by non-public utility transmission providers.[63] As a result, and as the parties themselves repeatedly asserted, effective transmission planning in the WestConnect region would be hampered without the cooperative involvement of both public and non-public utility transmission providers.[64]

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[63] For example, Black Hills Power, Inc., has transmission located in areas in which it is physically separated from any other public utility transmission provider by one or more non-public utility transmission providers.

[64] The public and non-public utility transmission providers in WestConnect have commented on their "long and successful history of coordinated transmission planning." Basin Electric Power Cooperative, et al., Request for Rehearing and Clarification, Docket No. ER13-75-001, et al. at 9-10 (filed Apr. 22, 2013); Filing Parties 2013 Rehearing Request at 23. Filing Parties have stated that

> [t]he success of the WestConnect Region depends on the participation of all entities, because the [public utility transmission providers] are not themselves contiguous . . . .
>
> . . .
>
> The loss of the WestConnect [non-public utility transmission providers] would deal a severe setback to the usefulness and

31. Given these considerations, the Commission had to determine what approach to regional transmission planning and cost allocation in WestConnect would best satisfy Order No. 1000's requirements and facilitate its stated goals of more efficient or cost-effective regional transmission planning and fair allocation of costs to those who receive benefits.[65] As further explained below, the Commission continues to conclude that the approach it ultimately accepted in the Compliance Orders satisfies Order No. 1000 while taking into account the uniquely integrated nature of public and non-public utility transmission systems in the WestConnect transmission planning region.

32. First, the Commission considered the Filing Parties' initial proposal of a non-binding regional cost allocation method under which no entity would be obligated to pay costs of any transmission project in accordance with any cost allocation.[66] The Commission rejected this proposal as non-compliant with the principle that costs must be allocated in a manner that is roughly commensurate with estimated benefits. Order No. 1000 expressly rejected the notion that a public utility transmission provider may opt out of a Commission-approved cost allocation for a specific transmission project if it merely asserts that it receives no benefits from the project, stating that such an opportunity to opt out would not minimize the regional free rider problem.[67] This element of Order No. 1000 is a core requirement of the rule. Thus, given the unique composition of the transmission providers in the WestConnect region, the Commission

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> efficacy of the WestConnect regional planning process. . . . Their continued, full participation is essential to meaningful transmission planning.

Filing Parties 2013 Rehearing Request at 20-23. *See also* Public Service Company of Colorado, et al., Compliance Filing, Docket No. ER13-75-000, at 18 (filed Oct. 11, 2012) ("An additional factor that sets WestConnect apart from many other regions in the country is the significant role [non-public utility transmission providers] do and must play in order to develop an effective Regional Plan."); Basin Electric Power Cooperative, et al., Comments, Docket No. ER13-75-002, et al. at 3 (filed Oct. 21, 2013) (stating that non-public utility transmission providers' participation in regional planning "will help to ensure that transmission planning in WestConnect will continue to be efficient and effective").

[65] Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 4.

[66] *See supra* P 7.

[67] First Compliance Order, 142 FERC ¶ 61,206 at P 308 (citing Order No. 1000, FERC Stats. & Regs ¶ 31,323 at P 640).

was presented with the challenge of determining how to comply with the requirements of Order No. 1000 while considering how non-public utility transmission providers could participate in the regional transmission planning process. Critically, the Commission has to ensure that any participation model for non-public utility transmission providers does not functionally exempt public utility transmission providers from Order No. 1000's binding cost allocation requirement.[68] As explained further below, the Commission decided to approve a participation structure in WestConnect that would facilitate the participation of non-public utility transmission providers in the regional transmission planning process while preserving Order No. 1000's binding cost allocation requirement for public utility transmission providers that enroll in the region. We continue to conclude that this decision is just and reasonable and, critically, is preferable to other approaches the Commission could take.

33. In the WestConnect region, the clearest alternative before the Commission would have been to require non-public utility transmission providers to make a binary choice to either enroll or not enroll in the transmission planning region (i.e., rejecting Filing Parties' proposal to allow non-public utility transmission providers to participate as coordinating transmission owners). This approach would have presented a stark choice to non-public utility transmission providers in the heavily-integrated WestConnect region to either (1) enroll, in order to include their transmission needs in the regional transmission planning process, and therefore be subject to binding cost allocation; or (2) not enroll. Should they choose not to enroll, they would not be subject to binding cost allocation; however, their needs would not be included in the WestConnect regional transmission planning process,[69] which would significantly undermine the effectiveness of that process, given the high level of integration between public and non-public utility transmission systems in the region.

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[68] This concern was the basis for the Commission's rejection in the Second Compliance Order of the proposed requirement that any project that benefits or interconnects with a non-public utility transmission provider would be ineligible for regional cost allocation. Second Compliance Order, 148 FERC ¶ 61,213 at P 56.

[69] *See* Order No. 1000-A, 139 FERC ¶ 61,132 at P 276 ("the regional transmission planning process is not required to plan for the transmission needs of . . . a non-public utility transmission provider that has not made the choice to join a transmission planning region"). Any non-public utility transmission provider that did not enroll could participate in the WestConnect transmission planning process only as a stakeholder. *Id.* P 275. Stakeholders may attend meetings, express their views and concerns as part of the transmission planning process, and provide input on proposed solutions. First Compliance Order, 142 FERC ¶ 61,206 at P 47.

34. Given the high level of integration between public and non-public utility transmission systems in the WestConnect region, the Commission believes that this binary choice approach would be less effective in satisfying Order No. 1000's goals in the WestConnect region while also failing to address the free ridership concerns articulated by the court. We find no basis in the record to conclude that, if presented with that choice, any non-public utility transmission provider in the WestConnect region would voluntarily choose to enroll and subject themselves to binding cost allocation.[70] Their decision not to enroll would mean that, under this approach, WestConnect would not conduct transmission planning to meet the non-public utility transmission providers' transmission needs. Given the unique integration of the public and non-public utility transmission provider systems in WestConnect, excluding the non-public utility transmission providers' transmission needs from the regional transmission planning process would lead to fragmented and significantly less effective regional transmission planning.[71] This outcome, while compliant with the requirements of Order No. 1000, would undermine the goals of Order No. 1000 in the WestConnect region because WestConnect would not plan for a large part of the integrated transmission system.

35. Moreover, excluding non-public utility transmission providers' transmission needs from the WestConnect regional transmission planning process would *not* eliminate or reduce free ridership because transmission projects selected in the regional transmission plan for purposes of cost allocation could still provide benefits to non-public utility transmission providers even if their transmission needs are excluded from the

[70] *See El Paso Elec.*, 832 F.3d at 503 ("[I]t is clear now that [non-public utility transmission providers] in WestConnect do not intend to subject themselves to binding cost allocation."); Filing Parties 2013 Rehearing Request at 21-22 (stating that non-public utility transmission providers would likely not enroll if they would be subject to binding cost allocation).

[71] Second Compliance Order, 148 FERC ¶ 61,213 at P 57 n.100 (quoting Filing Parties 2013 Rehearing Request, which stated that without the participation of non-public utility transmission providers, "it would be very difficult for any of the [public utility transmission providers] in WestConnect to participate in joint planning, as in many cases those entities are completely separated from one another by [non-public utility transmission providers]"). *See also id.* P 31 (stating that Filing Parties concluded that a planning structure for only enrolled public utility transmission providers "is less attractive because it removes from the WestConnect regional transmission planning process a large part of the current transmission system in the WestConnect transmission planning region and bars participation by non-public utility transmission providers who contribute financial and human resources for regional transmission planning activities").

WestConnect region's analysis. However, under this approach, while non-public utility transmission providers would likely benefit due to the uniquely integrated nature of public and non-public utility transmission providers in the WestConnect region, the regional analysis would not account for their benefits, notwithstanding that those benefits exist. This result would make identification of benefits less transparent without addressing any resulting free ridership. Furthermore, unlike the approach the Commission accepted in the Compliance Orders, this approach would not provide an opportunity for a benefitting non-public utility transmission provider to pay its share of the costs of a transmission project.

36. In addition, as the Fifth Circuit noted, in the Compliance Orders, the Commission did not "attempt[] to exercise any authority it may or may not have under [section 211A of the FPA]."[72] We continue to conclude that, based on the record before us, possible action under section 211A is neither necessary nor appropriate at this time. Section 211A of the FPA gives the Commission authority to require non-public utility transmission providers to provide transmission services on a comparable and not unduly discriminatory or preferential basis.[73] In Order No. 1000, the Commission stated that it "did not believe it is necessary at this time to invoke our authority under FPA section 211A," concluding that "if the Commission finds on the appropriate record that non-public utility transmission providers are not participating in the transmission planning and transmission cost allocation process required by [Order No. 1000], the Commission may exercise its authority under FPA section 211A on a case-by-case basis."[74] While it now appears that non-public utility transmission providers in the WestConnect transmission planning region do not intend to enroll in the WestConnect region and thereby become subject to binding cost allocation, to date the Commission has not been presented with any evidence of harms that have resulted from the approach accepted in the Compliance Orders.[75] Therefore, we continue to believe it is not

[72] *El Paso Elec.*, 832 F.3d at 500 n.7.

[73] 16 U.S.C. § 824j–1(b) (2012).

[74] Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 815.

[75] As noted above, the WestConnect transmission planning process has not yet identified any regional transmission needs, and thus no regional transmission projects have been submitted.

necessary to invoke FPA section 211A at this time.[76] However, if the Commission finds on the appropriate record that a public utility transmission provider has in fact been harmed by a non-public utility transmission provider not accepting cost allocation for a transmission project from which it benefits, the Commission may consider at that time whether to exercise any authority it may have under section 211A.

B. **The Approach Approved by the Commission Is Just and Reasonable and Should Not Create Significant Free Ridership Concerns**

37. Turning to the approach that the Commission ultimately accepted in the Compliance Orders, we conclude that this approach, under which a non-public utility transmission provider may participate in the region as a coordinating transmission owner, is consistent with Order No. 1000 and its stated goals and will not result in rates that are unjust and unreasonable. Under this approach, if a non-public utility transmission provider elects to participate as a coordinating transmission owner, the WestConnect transmission planning process will reflect that non-public utility transmission provider's transmission needs in transmission system assessments and will consider transmission projects proposed to meet those needs.[77] The coordinating transmission owner will not be subject to binding cost allocation. However, if the coordinating transmission owner is determined to be a beneficiary of a transmission project proposed for selection in the regional transmission plan for purposes of cost allocation, it may determine whether, consistent with its evaluation of its unique statutory obligations, it will accept its share of the costs of that transmission facility.

38. By establishing a process under which the transmission system needs of non-public utility transmission providers that do not enroll in the WestConnect transmission planning region are assessed and planned for, this approach advances the stated purpose in Order No. 1000 of supporting more efficient and cost-effective regional transmission planning and recognizes the uniquely integrated nature of transmission facilities owned by public utility and non-public utility transmission providers in the WestConnect

[76] As the D.C. Circuit has noted, "[t]he Commission is 'free to undertake reform one step at a time.'" *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d at 88 (quoting *Interstate Natural Gas Assoc. v. FERC*, 285 F.3d 18, 35 (D.C. Cir. 2002)). Regarding FPA section 211A, the D.C. Circuit has said that "the word 'may' in Section 211A plainly permits, but does not mandate, the Commission to require a nonpublic utility to provide transmission service on given terms." *Id.* at 95-96.

[77] *See* Second Compliance Order, 148 FERC ¶ 61,213 at PP 27, 29-30.

region.[78] Notably, the non-public utility transmission providers in the WestConnect region have elected to participate in the WestConnect transmission planning process as coordinating transmission owners, and therefore their transmission needs will be assessed and planned for in the process. Thus, the approach the Commission accepted also identifies benefits and corresponding costs for the non-public utility transmission providers in the region in a transparent manner. Additionally, this approach provides an up-front, clear process for the non-public utility transmission providers to pay their respective share of the costs of any transmission project selected in the regional transmission plan for purposes of cost allocation. Finally, as discussed in the Second Compliance Order, allowing non-public utility transmission providers to participate as coordinating transmission owners fosters continued, proactive cooperation among public and non-public utility transmission providers in the region.[79]

39. While, as the Commission previously recognized, the potential for some free ridership could exist under the approach the Commission accepted,[80] such free ridership could theoretically occur for only a limited subset of transmission projects. That is the case because the WestConnect transmission planning process is structured to incentivize non-public utility transmission providers to accept regional cost allocation. Under this process, if a non-public utility transmission provider does not agree to accept cost allocation for a transmission project that provides it significant benefits, the project may not remain eligible for regional cost allocation. If the non-public utility transmission provider's refusal to accept cost allocation causes the project to become ineligible to use the *ex ante* regional cost allocation method, the lack of certainty about who will pay for the project will make it less likely that the transmission project will be constructed.[81]

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[78] *See id.* P 55 (finding the coordinating transmission owner framework would "allow regional transmission planning to be conducted inclusive of non-public utility transmission providers, so as to expand opportunities for identifying and proposing more efficient or cost-effective regional transmission projects").

[79] Second Compliance Order, 148 FERC ¶ 61,213 at P 55.

[80] Third Compliance Order, 151 FERC ¶ 61,128 at P 30.

[81] *See, e.g.*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 562 (finding that requiring a cost allocation method in advance of a transmission project being proposed provides greater certainty about cost allocation for transmission developers and will increase the likelihood that transmission facilities selected in the regional transmission plan for purposes of cost allocation are actually constructed, rather than later encountering cost allocation disputes that prevent their construction).

40. Specifically, for each transmission project proposed for selection in the regional transmission plan for purposes of cost allocation, the WestConnect Planning Management Committee (the Committee)[82] performs a cost-benefit analysis to determine whether the transmission project is eligible for regional cost allocation. The Committee then identifies the project benefits associated with each beneficiary and provides this determination of benefits and beneficiaries and the results of the cost-benefit analysis to the identified beneficiaries for review and comment.[83]

41. Importantly, after the Committee performs the cost-benefit analysis for each proposed regional transmission project, a non-public utility transmission provider identified as a beneficiary has the opportunity to determine whether, consistent with its statutory obligations, it will accept regional cost allocation for the transmission project if it is found to be eligible for regional cost allocation. If the non-public utility transmission provider does not accept cost allocation for the transmission project, the Committee re-runs the cost-benefit analysis to determine whether the project remains eligible for regional cost allocation.[84] Specifically, the Committee removes the benefits that the non-public utility transmission provider would have received, and whose benefits were previously reported as a regional transmission need for purposes of justifying a project's approval as an eligible project for regional cost allocation. If a regional transmission project continues to meet the required cost-benefit analysis and other criteria for regional cost allocation, it will remain eligible for regional cost allocation.[85]

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[82] The Committee organizes and governs WestConnect's Order No. 1000 regional transmission planning and cost allocation processes. The Committee is comprised of representatives from five membership sectors: Transmission Owners with Load Serving Obligations; Transmission Customers; Independent Transmission Developers and Owners; State Regulatory Commissions; and Key Interest Groups. *See* Second Compliance Order, 148 FERC ¶ 61,213 at P 17 & n.18.

[83] *See* Third Compliance Order, 151 FERC ¶ 61,128 at PP 38-41; *e.g.*, Arizona Public Service Co., OATT, Attachment E, § III.6.

[84] *See* Third Compliance Order, 151 FERC ¶ 61,128 at PP 42-43.

[85] *See* WestConnect Regional Planning Process Business Practice Manual (Feb. 17, 2016), section 4.7.3.2 (Recalculation of Benefits and Costs). The other criteria may include, for example, whether the project displaces local transmission projects that otherwise would be needed to meet NERC reliability standards (for reliability projects) and the number of megawatts of public policy resources enabled (for public policy projects).

42. However, by removing the benefits the non-public utility transmission provider would have received from the analysis, the transmission project may, upon reevaluation, fail to meet the required cost-benefit analysis, rendering it ineligible for regional cost allocation. In other words, a non-public utility transmission provider's decision about whether to accept cost allocation may determine whether the transmission project is eligible for regional cost allocation or not. If a transmission project is not eligible for regional cost allocation, it is less likely that the project will move forward to construction because the enrolled transmission providers will not be required to fund the project, and absent the project's development, the non-public utility transmission provider would not receive any of the benefits it may have otherwise received.

43. A regional economic transmission project will be ineligible for regional cost allocation if the transmission project does not have a benefit-to-cost ratio that is greater than 1.0-to-1.0 under each scenario evaluated and an average benefit-to-cost ratio of at least 1.25-to-1.0 under all scenarios evaluated.[86] The Committee will initially identify benefits to both public and non-public utility transmission providers and will determine whether those combined benefits satisfy the benefit-to-cost ratio for regional economic transmission projects. If such a project initially satisfies the benefit-to-cost ratio, a non-public utility transmission provider may then decide whether it will accept regional cost allocation for the project. If a non-public utility transmission provider declines to accept regional cost allocation, the Committee will reevaluate whether the economic transmission project satisfies the benefit-to-cost ratio without the non-public utility transmission provider's benefits. In some circumstances, the benefits a non-public utility transmission provider receives will change what was initially an average benefit-to-cost ratio of 1.25-to-1.0 or more (which would result in a transmission project being eligible for regional cost allocation) to an average benefit-to-cost ratio of less than 1.25-to-1.0 (which would result in a transmission project being no longer eligible for regional cost allocation).

44. A similar analysis applies to regional reliability transmission projects and regional public policy requirements transmission projects. In initially determining whether there is a regional transmission need for a reliability or public policy requirements transmission project, the Committee will consider the needs of both public and non-public utility transmission providers. For reliability transmission projects, the Committee will determine whether the regional reliability transmission project: (1) is needed to meet a NERC Transmission Planning Standards reliability need during the 10-year planning

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[86] *E.g.*, El Paso Electric Company, OATT, Attachment K § VI.C.2. The WestConnect process identifies beneficiaries, defines benefits, and allocates costs of a regional economic transmission project based on production cost savings and reduction in reserve sharing requirements. *Id.*

horizon and (2) replaces local transmission projects in multiple local transmission plans. If a non-public utility transmission provider refuses to fund a regional reliability transmission project that would replace one or more of its local reliability upgrades, the Committee will re-run its analysis. In the re-run of the analysis, the Committee removes the needs that would have been addressed by the regional reliability transmission project if the non-public utility transmission provider had agreed to fund a regional reliability transmission project. In addition, the Committee would exclude from consideration as a benefit the local reliability upgrades that would have avoided the need for the non-public utility transmission provider to include in its local transmission plan an alternative local reliability upgrade.

45. For public policy requirements transmission projects, the Committee will determine whether the project provides access to resources needed to satisfy identified public policy requirements. If a non-public utility transmission provider declines to accept regional cost allocation for a public policy requirements transmission project, the Committee will remove the needs that were included within the identification of the region's transmission needs as a regional transmission need for purposes of justifying the project's approval as a project eligible for inclusion in the regional transmission plan for purposes of cost allocation.

46. When a non-public utility transmission provider's transmission needs are removed from the analysis, the reliability or public policy requirements transmission project may no longer meet the requirements for a regional transmission need for purposes of justifying the project's approval as a project eligible for selection in the regional transmission plan for purposes of cost allocation, and the project will no longer be eligible for regional cost allocation.[87] Because a non-public utility transmission provider's decision about whether to accept cost allocation may determine whether a specific transmission project is eligible for regional cost allocation and thus how likely it is to move forward, a non-public utility transmission provider should be incentivized to participate in regional cost allocation if the analysis demonstrates that it will benefit from a transmission project and the project will not be eligible for regional cost allocation without that non-public utility transmission provider's participation.

47. This is of particular significance if benefits of the transmission project to the non-public utility transmission provider make up a significant proportion of the transmission project's total benefits. If the non-public utility transmission provider declines to participate in regional cost allocation in these circumstances, then it is less likely to receive the benefits of the transmission project because the transmission project may not move forward. Thus, non-public utility transmission providers will have the incentive to participate in regional cost allocation in order to increase the likelihood

[87] *See* Third Compliance Order, 151 FERC ¶ 61,128 at P 43.

that a transmission project that benefits them will remain eligible for regional cost allocation and therefore be more likely to move forward. Their participation would help ensure that they will bear costs that are roughly commensurate with the benefits they receive from new transmission facilities selected in a regional transmission plan for purposes of cost allocation, which in turn will limit free ridership and help ensure that rates are just and reasonable. Indeed, if the benefits are meaningful enough to theoretically create meaningful free ridership concerns, then there is a high likelihood that the transmission project cannot satisfy the cost-benefit threshold without the non-public utility transmission provider agreeing to accept its share of the costs. In these circumstances, there would be no free ridership concerns, as the non-public utility transmission provider would either accept its share of costs, or, if it chooses not to, then the project would fail the requisite cost-benefit analysis and would not be selected in the regional transmission plan for purposes of cost allocation.[88]

48. Moreover, non-public utility transmission providers have an incentive to accept regional cost allocation for reliability transmission projects because their transmission facilities must adhere to NERC Reliability Standards. As explained above, WestConnect identifies beneficiaries, defines benefits, and allocates costs of a regional reliability transmission project based on the avoided costs of local reliability upgrades that would otherwise be needed to comply with the NERC Reliability Standards.[89] Therefore, if the Committee determines that a regional reliability transmission project that would have displaced a non-public utility transmission provider's local reliability upgrade should not go forward because it is no longer the more efficient or cost-effective transmission project after that non-public utility transmission provider declines cost allocation, that non-public utility transmission provider will have to build local reliability upgrades to meet NERC Reliability Standards. The non-public utility transmission provider's local reliability upgrades will always cost more than its share of the regional reliability transmission project cost it would have been assigned because WestConnect designed its regional reliability cost allocation formula to ensure that a beneficiary's share of the costs of the regional reliability transmission project will always be less than the beneficiary's avoided cost[90]—if this is not the case, then the regional reliability transmission project

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[88] However, as discussed in more detail below, we recognize that in some circumstances a regional transmission project may continue to satisfy the cost-benefit analysis and thus remain eligible for regional cost allocation even after a non-public utility transmission provider refuses to fund the project. *See infra* PP 50-52.

[89] *See supra* P 19 (citing, *e.g.*, El Paso Electric Company, OATT, Att. K § VI.C.1).

[90] Under WestConnect's avoided cost method for allocating the costs of regional reliability transmission projects, a transmission provider will not be allocated any share

will not qualify for selection in the regional transmission plan for purposes of cost allocation.[91] Thus, in these circumstances, non-public utility transmission providers are incentivized to accept the cost allocation for regional reliability transmission projects in order to reduce the cost of meeting applicable NERC Reliability Standards.

49. Further, even if a regional reliability transmission project remains eligible for selection in the regional transmission plan for purposes of cost allocation after a non-public utility transmission provider beneficiary declines to accept regional cost allocation, a public utility transmission provider may elect to complete a local reliability upgrade in lieu of a regional transmission project selected in the regional transmission plan for purposes of cost allocation. In this case, the regional transmission project may be subject to re-evaluation in a subsequent transmission planning cycle and will likely be removed because it will no longer benefit the public utility transmission provider by displacing its local reliability upgrade. Knowing that the public utility transmission provider may elect to construct a local reliability upgrade instead of the regional reliability transmission project that provides benefits to non-public utility transmission providers disincentivizes those non-public utility transmission providers from declining to accept the cost allocation for the regional transmission project. As a result, it is less likely that the non-public utility transmission provider will receive benefits from that regional transmission project without bearing any costs.

50. Given the incentives to participate in regional cost allocation described above, we expect that non-public utility transmission providers could theoretically be able to significantly benefit from free ridership for a limited subset of transmission projects where they do not have those incentives to participate. However, we expect this subset

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of the cost of a project unless its share of the cost of the regional reliability transmission project is less than the cost of the local reliability upgrade(s) that the transmission provider would otherwise have to build to meet the NERC Transmission Planning standards. *See, e.g.*, El Paso Electric Company, OATT, Att. K § VI.C.1 (outlining the WestConnect regional reliability transmission project cost allocation formula that assigns costs to each transmission provider based on the cost of the local reliability upgrades on the transmission provider's system that would otherwise be necessary to avoid construction of the regional reliability transmission project).

[91] *See id.* Under the WestConnect regional reliability transmission project cost allocation formula, a beneficiary's share of the costs of a regional reliability transmission project is derived from the proportion of its individual avoided cost to the collective avoided costs for all beneficiaries. Because the costs of the regional reliability transmission project must be less than the collective avoided costs for all beneficiaries, an individual beneficiary's proportion of the regional cost will always be less than its proportion of the collective avoided costs.

of transmission projects to be small, to the extent it exists at all. For example, if a non-public utility transmission provider would receive significant benefits from a regional transmission project, its refusal to fund that project will have a correspondingly significant impact on the cost-benefit calculation. That is because, in that scenario, the significant benefits the non-public utility transmission provider would receive are removed from the benefit side of the calculation, but the costs that would have been allocated to the non-public utility transmission provider remain. As a result, it is much less likely that a regional transmission project that provides significant benefits to a non-public utility transmission provider that refuses to pay for its share of the project would continue to satisfy the benefit-cost analysis. Therefore, the WestConnect transmission planning region's cost allocation method, which the Commission accepted in the Compliance Orders, already includes a protection against significant free ridership concerns because it is designed to make it more difficult for a regional transmission project to move forward if non-public utility transmission providers that benefit from the project refuse to pay for their share of the project's costs.

51. We recognize that a non-public utility transmission provider's decision to accept or decline cost allocation might not always be determinative and that there could be some transmission projects that provide benefits to a non-public utility transmission provider that would be eligible for regional cost allocation regardless of whether the non-public utility transmission provider accepts regional cost allocation. However, as discussed above, to remain eligible for regional cost allocation, the transmission project must continue to meet the cost-benefit threshold for those that will be allocated costs. Thus the allocation of the remaining costs to public utility transmission providers and any non-public utility transmission providers that have agreed to accept binding cost allocation for a regional transmission project will remain roughly commensurate with the benefit received, consistent with Order No. 1000's regional cost allocation principles. And while costs may not be perfectly allocated to those that benefit from the transmission project, the Commission is not required to ensure full or perfect cost causation and need only roughly correlate costs to benefits.[92]

52. Furthermore, the required reevaluation of a transmission project for which a non-public utility transmission provider declines cost allocation ensures that the resulting rates are just and reasonable. As explained above, if a non-public utility transmission provider declines to participate in regional cost allocation for a transmission project that is initially eligible for regional cost allocation, that transmission project is reevaluated. Such a transmission project will be selected in the regional transmission plan for purposes of cost allocation as the more efficient or cost-effective transmission project only if the Committee determines that, after removing the non-public utility transmission

[92] *El Paso Elec.*, 832 F.3d at 505; *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d at 88.

provider's benefits from the cost-benefit analysis, the transmission project continues to satisfy the WestConnect transmission planning region's cost-benefit analysis. In other words, the transmission project continues to produce benefits that outweigh the costs even without the non-public utility transmission provider's participation. Conversely, if a transmission project provides insufficient benefits to enrolled transmission providers absent the participation of any non-public utility transmission provider that declines binding regional cost allocation, then the transmission project would not satisfy the cost-benefit analysis and would no longer be eligible for regional cost allocation. Therefore, the cost-benefit analysis process screens out transmission projects that are not more efficient or cost-effective without the participation of non-public utility transmission providers in regional cost allocation, ensuring that rates remain just and reasonable regardless of their participation.

53. We also note that the reciprocity condition provides public utility transmission providers with the means to incentivize non-public utility transmission providers to participate in binding regional cost allocation. A non-public utility transmission provider that does not have a reciprocity tariff that substantially conforms, or is superior to, the *pro forma* OATT as it has been revised by Order No. 1000 would not qualify for the voluntary "safe harbor" provision of the *pro forma* OATT.[93] Therefore, under the reciprocity condition, a public utility transmission provider in the WestConnect transmission planning region can decline to provide transmission service to a non-public utility transmission provider that does not have a reciprocity tariff and that refuses to participate in binding regional cost allocation. The risk of being denied transmission service by a public utility transmission provider creates an incentive for non-public utility transmission providers to adopt regional transmission planning and cost allocation processes that comply with Order No. 1000.[94]

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[93] Order No. 1000, FERC Stats. & Regs. ¶ 61,323 at P 816) ("[I]t remains up to each non-public utility transmission provider [to determine] whether it wants to maintain its safe harbor status by meeting the transmission planning and cost allocation requirements of this Final Rule.").

[94] *See* Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 214 ("A nonpublic utility transmission provider with reciprocity obligations that declines to adopt a planning process that complies with Order No. 890 therefore may not be considered to be providing reciprocal transmission service and may be at risk of being denied open access transmission services by a public utility transmission provider.").

C. **Conclusion**

54. Accordingly, consistent with the further explanation provided above, the Commission expects that its mandates in the Compliance Orders will ensure just and reasonable rates between public and non-public utility transmission providers in the WestConnect transmission planning region. Given the benefits of an improved regional transmission planning process and the limited possibility of free ridership under the approach the Commission accepted in the Compliance Orders, the Commission's determinations in the Compliance Orders are consistent with Order No. 1000 and its stated goals and will not result in rates that are unjust and unreasonable. If free ridership concerns do occur, the Commission could consider revisiting this approach.

The Commission orders:

The Commission hereby responds to the remand from the Fifth Circuit, as set forth in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.