

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Alternative Transmission, Inc.

)

Docket No. EL19-69-000

**MOTION TO INTERVENE AND PROTEST OF
THE AMERICAN PUBLIC POWER ASSOCIATION**

Pursuant to Rules 211 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission” or “FERC”),¹ the American Public Power Association (“APPA”) hereby moves to intervene in the above-captioned proceeding and protests the May 2, 2019 Petition for Declaratory Order (“Petition”) filed by Alternative Transmission Inc. (“ATI”). As discussed below, the Commission should dismiss the Petition because it does not present an appropriate case for a declaratory ruling. If the Commission reaches the merits of the Petition, the Commission should find that ATI has not carried its burden to show that the services described in the Petition would constitute interstate transmission of electric energy under the Federal Power Act (“FPA”).

I. INTRODUCTION

ATI’s Petition describes a process in which a flow battery would be charged at an “electric energy transfer station,” the flow battery electrolyte containing chemical energy would then be removed, placed in shippable containers, and transported across state lines by rail, tractor-trailer, boat, or airplane (or some combination thereof), and, finally, the electrolyte would be placed into a flow battery at a second transfer station location and converted back to electrical energy available for dispatch.² ATI asks the Commission for a declaratory order that: (1) the

¹ 18 C.F.R. §§ 385.211 and 385.214 (2018).

² See Petition at 1-2, Baldick Aff. at ¶¶ 5-6.

“facilities and services described in [the] Petition provide ‘transmission of electric energy in interstate commerce’ subject to the Commission’s jurisdiction” under the FPA;³ and (2) ATI would be a “public utility” under the FPA by virtue of being the owner or operator of “the described facilities” used in this alternative transmission process.⁴

APPA supports new technologies and innovation in the production and delivery of energy to consumers, and increased use of mobile energy storage certainly may prove to be an innovative aspect of the modern energy landscape. APPA disagrees, however, that ATI’s Petition serves to establish a “new paradigm” in jurisdictional transmission.⁵

The Petition is insufficiently developed and, at best, premature. Virtually no information is provided about ATI itself, let alone any indication that it would have the resources to implement the kinds of services discussed in the Petition. ATI also fails to sufficiently demarcate the facilities that would be deemed jurisdictional transmission facilities under its “alternative transmission” process. ATI’s services that would allegedly constitute interstate transmission are only generally described in the Petition, and appear at this point to be purely aspirational. The declarations requested by ATI, moreover, are potentially sweeping in scope and broadly applicable, yet are not grounded in any concrete proposal or specific facts and circumstances. For these reasons, the Commission should dismiss the Petition without addressing the jurisdictional issues raised by ATI.

If the Commission does not dismiss the Petition outright, it should conclude that ATI has failed to demonstrate that the services described in the Petition provide “transmission of electric

³ Petition at 1.

⁴ *Id.*

⁵ *Id.*

energy in interstate commerce” within the meaning of FPA section 201,⁶ or that ATI’s facilities will be jurisdictional transmission facilities. The Petition does not establish that ATI would be moving “electric energy” as that term is used in FPA section 201. Further, while ATI is correct that the FPA does not specifically make reference to transmission *by wire*, the Petition’s legal analysis does not adequately support an interpretation of FPA section 201 that extends Commission jurisdiction to the “alternative transmission” services and facilities described in the Petition. Nor does ATI tackle the legal and practical complications that granting its Petition would present – including the potential impingement upon other federal regulatory schemes – were the Commission to accept ATI’s jurisdictional arguments. The Federal Power Commission’s (“FPC”) 1973 finding that it did not have jurisdiction under the Natural Gas Act (“NGA”) over the transportation of liquefied natural gas (“LNG”) by methods other than pipeline is instructive in evaluating ATI’s Petition,⁷ and a similar analysis supports a finding that ATI’s alternative transmission service is not subject to the Commission’s jurisdiction.

If the Commission does not dismiss or deny the Petition, additional information would be required to evaluate it.

APPA emphasizes that its concerns with the legal declarations requested in the Petition should not be interpreted as opposition to portable storage services generally. Mobile energy storage systems may be an innovation that can bring value to energy consumers. Nor does APPA necessarily take the position that transmission of electric energy by wire is the only conceivable form of energy transmission that could be subject to the Commission’s jurisdiction under FPA section 201. ATI has not demonstrated, however, that the Commission should make

⁶ 16 U.S.C. § 824.

⁷ *Exemption of Certain Transp. and/or Sales of LNG from the Requirements of § 7(c) of the NGA*, 49 F.P.C. 1078, 1973 FPC LEXIS 808 (1973) (“LNG Transportation Order”).

a finding that the services and facilities generally described in the Petition provide transmission of electric energy in interstate commerce within the meaning of the FPA.

II. MOTION TO INTERVENE

APPA is the national service organization representing the interests of not-for-profit, state, municipal, and other locally-owned electric utilities throughout the United States. More than 2,000 public power utilities provide over 15 percent of all kWh sales to ultimate customers and to businesses in every state except Hawaii. APPA utility members' primary goal is providing customers in the communities they serve with reliable electric power and energy at the lowest reasonable cost, consistent with good environmental stewardship. This orientation aligns the interests of APPA-member electric utilities with the long-term interests of the residents and businesses in their communities. Collectively, public power systems serve over 49 million people.

ATI's Petition requests a declaratory order that could have significant implications for the way the Commission interprets and exercises its FPA jurisdiction over the transmission of electric energy in interstate commerce. The outcome of this proceeding, therefore, may directly affect the interests of APPA members and the consumers that they serve, and APPA wishes to intervene in this proceeding to represent the interests of its members. For these reasons, the participation of APPA in this proceeding is consistent with the public interest. Accordingly, APPA moves for leave to intervene as a party.

Communications regarding this proceeding should be directed to the following individuals, who should also be included on the Commission’s official service list:

Delia Patterson
Senior Vice President, Advocacy &
Communications and General Counsel
American Public Power Association
2451 Crystal Drive
Suite 1000
Arlington, VA 22202
(202) 467-2900
dpatterson@publicpower.org

John E. McCaffrey
Regulatory Counsel
American Public Power Association
2451 Crystal Drive
Suite 1000
Arlington, VA 22202
(202) 467-2900
jmccaffrey@publicpower.org

III. PROTEST

A. The Commission Should Dismiss the Petition Because it Does Not Present an Appropriate Case for a Declaratory Ruling

The Commission’s authority to issue declaratory orders is discretionary.⁸ The Commission has explained that “[i]t is a common practice for the Commission to dismiss a petition that is not ripe for consideration or that is otherwise premature.”⁹ Further, the Commission will decline to exercise its discretion to issue a declaratory order where a petition contains insufficient information on which to grant declaratory guidance.¹⁰ ATI’s Petition is unripe and contains insufficient information for the Commission to make a reasoned decision on the merits, let alone recognize a “new paradigm” in jurisdictional transmission of electric energy.¹¹

⁸ See 5 U.S.C. § 554(e); 18 C.F.R. § 385.207(a)(2) (2018); *Idaho Power Co.*, 161 FERC ¶ 61,284, at P 13 (2017).

⁹ *Southern Md. Elec. Coop., Inc. and Choptank Elec. Coop., Inc.*, 162 FERC ¶ 61,048, at P 13 & n.25 (2018) (citing cases).

¹⁰ See, e.g., *Panhandle Eastern Pipe Line Co.*, 88 FERC ¶ 61,262, p. 61,822 & n.18 (1999).

¹¹ Petition at 1. The affidavit of Dr. Ross Baldick included with the Petition does not provide any additional concrete information that would support issuance of a declaratory order at this time. Indeed, several paragraphs of Dr. Baldick’s affidavit are devoted to describing potential beneficial uses of the alternative transmission service, which, APPA submits, are not relevant to the jurisdictional questions the Commission is being asked to address. See Petition, Baldick Aff. at ¶¶ 7-9.

In the first place, the Petition is almost entirely lacking in information about ATI itself. There is no information about the company's background, size, corporate affiliations, or funding and financial resources.¹² The only things that one can glean about ATI from reading the Petition are the company's mailing address and the identity of its President and CEO, who signed the filing.¹³ This lack of information about ATI is significant because it makes it impossible for the Commission and other interested stakeholders to assess whether ATI's plans are sufficiently concrete and realistic to warrant the Commission exercising its discretionary authority to provide guidance on the jurisdictional status of ATI and the services described in the Petition.

The Petition is also vague about the facilities it may be asking the Commission to deem jurisdictional transmission facilities. ATI asks for a declaratory order that it will be a jurisdictional public utility "as the owner or operator of the described facilities,"¹⁴ without providing any clear description of those facilities. ATI suggests that "charging and discharging stations, container cars and rechargeable media in those cars" would be jurisdictional,¹⁵ but the Petition does not articulate any principle for drawing a line between jurisdictional and non-jurisdictional facilities. This is a significant omission because, to the extent that any *movement* of energy actually takes place in the process described by ATI, it would be accomplished by train, truck, boat, or airplane.¹⁶ Endorsing ATI's position could therefore present a question of whether the Commission could assert its "facilities" jurisdiction over these vehicles and the infrastructure that supports these vehicles, such as railroad tracks, boat docks, airport facilities,

¹² A search of eLibrary indicates that ATI has not previously made any FERC filings.

¹³ The "www.alternativetransmission.com" web address listed for ATI does not appear to be a functioning website.

¹⁴ Petition at 1.

¹⁵ *Id.* at 8.

¹⁶ *See id.* at 1-2, Baldick Aff. at ¶¶ 5-6.

etc.

The “alternative transmission” concept, moreover, does not appear sufficiently concrete to warrant declaratory relief at this time.¹⁷ ATI does not describe any steps that it has taken toward implementing the alternative transmission service, or when it might do so. ATI neither identifies the particular regions in which it might seek to implement this alternative transmission service, nor provides any details about how ATI would arrange railroad or other surface transportation for the flow battery electrolytes in those regions. Indeed, the Petition contains only a high-level description of the service ATI says it might provide.

ATI’s purpose in seeking the declaratory order at this time is also obscure. ATI states that it is seeking confirmation that it would be a FERC-jurisdictional public utility “so that it can invest in alternative modes of transmission with the Commission’s assurance that it will be able to compete fairly with traditional wire and wire corridor modes of transmission.”¹⁸ The Petition, however, does not appear to have been prompted by a particular planning need or opportunity in a transmission planning region. ATI also does not explain why it would be at a disadvantage in competing fairly with traditional transmission projects in the absence of the requested declarations, given that Order No. 1000 requires transmission providers to consider transmission and non-transmission alternatives on a comparable basis.¹⁹

Declaratory orders are to be “based on the specific facts and circumstances presented,”²⁰

¹⁷ Cf. *Southern Co. Servs., Inc.*, 108 FERC ¶ 61,139, at P 8 (2004) (explaining that, with limited exceptions, the Commission “does not adjudicate policy questions outside of concrete cases”).

¹⁸ Petition at 7.

¹⁹ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 61,051, at P 148 (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).

²⁰ *ITC Grid Dev., LLC*, 154 FERC ¶ 61,206, at P 45 (2016) (quoting *Puget Sound Energy Inc.*, 139 FERC ¶ 61,241, at P 12 (2012)) (footnote omitted).

and should not address broad issues that do not arise from these facts and circumstances.²¹ As discussed above, the Petition does not appear to have been prompted by a particular planned project or opportunity; it describes what seems at this juncture to be only a hypothetical business plan. ATI nonetheless asks the Commission to endorse a “new paradigm” in jurisdictional transmission²² that is not based on any concrete proposal and that would not be limited to a particular set of circumstances. Further, ATI specifically characterizes the process described in the Petition as only an “[e]xample of [a]lternative [t]ransmission,”²³ that is provided “[b]y way of illustration.”²⁴ The Petition also identifies a number of general situations where its alternative transmission process might be used, but states that “[f]urther applications are conceivable and likely.”²⁵ The Commission should refrain from issuing a generic ruling that could potentially extend Commission jurisdiction to facts and circumstances that remain undefined in the Petition.

ATI’s Petition seeks a potentially far reaching expansion of the activities and facilities that the Commission regulates under its interstate transmission authority. Such a significant enlargement of the Commission’s jurisdictional domain should not be considered in response to ATI’s Petition, which lacks sufficient information about the business feasibility of its alternative transmission concept, and includes only the most skeletal discussion of the purpose and need for the requested declaratory order. Because the Petition does not present an appropriate case for declaratory relief, the Commission should dismiss the Petition without reaching the merits.

²¹ *See id.*

²² Petition at 1.

²³ *Id.* at 2 (emphasis added).

²⁴ *Id.*

²⁵ *Id.* at 3.

B. ATI Has Not Adequately Supported its Requested Legal Rulings

If the Commission chooses to consider the merits of ATI's requested declaratory relief, it should conclude that ATI has failed to establish that the services described in the Petition would provide "transmission of electric energy in interstate commerce" within the meaning of FPA section 201(b)(1).²⁶ The Petition's brief legal analysis does not support an interpretation of FPA section 201 that extends Commission jurisdiction to the "alternative transmission" services and facilities described in the Petition.

1. The Petition Does Not Support a Finding that ATI Would be Moving Electric Energy

The Petition does not adequately establish that ATI's alternative transmission process involves the movement of "electric energy" within the meaning of FPA section 201. In his affidavit, Dr. Baldick opines that "what ATI proposes to transmit is electric energy."²⁷ He also makes clear, however, that the storage medium that ATI would be moving would contain *chemical* energy converted from electrical energy "taken from the conventional AC system."²⁸ At a discharge station, "the energy in the chemical bonds in the electrolyte [would] be converted into electrical energy again."²⁹ The FPA gives the Commission jurisdiction over transmission of "electric energy," not the transportation of chemical energy convertible to electric energy at its destination.

APPA recognizes that the Commission has characterized electric storage resources,

²⁶ See *Northwest Pipeline Corp.*, Op. 396-A, 76 FERC ¶ 61,068, at p. 61,405 (1996), *reh'g denied*, 78 FERC ¶ 61,289 (1997), *remanded on other grounds*, *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289 (D.C. Cir. 2001) (applicant for a petition for declaratory order has the burden of proof).

²⁷ Petition, Baldick Aff. at ¶ 2.

²⁸ *Id.* at ¶ 6.

²⁹ *Id.*

including storage resources that use chemical processes, as storing “electric energy.”³⁰ The Commission has also said, however, that storage of electricity involves a “conversion/storage” cycle where electric energy is converted to some other medium for storage and then converted back to electric energy.³¹ While the way in which the storage media is characterized ordinarily might not be all that crucial, here ATI asks the Commission to accept that the movement of the storage medium itself constitutes transmission of “electric energy.” APPA submits that the Petition does not adequately establish this threshold requirement.

2. The Petition’s Statutory Argument is Insufficient to Establish Commission Jurisdiction Over “Alternative Transmission”

ATI acknowledges that it is asking the Commission to meaningfully expand the interpretation of what may constitute “transmission of electric energy in interstate commerce” under the FPA.³² Its legal argument for this position, however, boils down to little more than an assertion that the phrase “transmission of electric energy in interstate commerce” used in FPA section 201 is not *expressly* restricted to any particular mode of transmission.³³ In considering an analogous point in the LNG Transportation Order, however, the FPC reasoned that an analysis of the broader statutory context was necessary to determine whether the NGA’s use of the phrase “transportation of natural gas in interstate commerce” could encompass non-pipeline means of

³⁰ See *Elec. Storage Participation in Markets Operated by Regional Transmission Orgs. and Indep. Sys. Operators*, Order No. 841, 162 FERC ¶ 61,127, at P 29 (2018), *order on reh’g and clarification*, Order No. 841-A, 167 FERC ¶ 61,154 (2019) (defining an electric storage resource as “a resource capable of receiving electric energy from the grid and storing it for later injection of electric energy back to the grid.”).

³¹ See Order No. 841 at P 289 n.357.

³² See Petition at 1 (arguing that “[f]or over 80 years this Commission has exercised its FPA transmission jurisdiction over transmission wires. That exercise of jurisdiction has been cabined by the state and deployment of available technology.”).

³³ See *id.* at 6 (arguing that section FPA section 201(c) does not specify “[t]he mode of transmission,” and that “[i]n the 80-plus year history of the FPA, never have the courts or this Commission confined the scope of FPA jurisdiction over transmission of electric energy in interstate commerce to any specific mode of transmission.” (footnote omitted)).

gas transportation.³⁴ The FPC determined, based on this analysis, that its NGA jurisdiction only extended to transportation by pipeline.³⁵ A similar contextual evaluation of the FPA would be required to assess whether ATI's proposed service could be considered jurisdictional "transmission of electric energy," but the Petition does not present such an analysis.³⁶

A contextual analysis shows that there are provisions of the FPA that contemplate, at least implicitly, that interstate transmission of electric energy is accomplished by fixed, immobile facilities, such as transmission lines and substations. For example, sections 202 and 210 of the FPA³⁷ both address circumstances in which the Commission may require utilities to *physically connect* their transmission facilities with the facilities of other persons.³⁸ Similarly, the provisions of FPA section 216 relating to designation of national interest electric transmission corridors and federal backstop siting authority for electric transmission facilities, (including exercise of eminent domain), also implicitly contemplate traditional transmission lines.³⁹ Notably, the Commission found in the LNG Transportation Order that analogous NGA

³⁴ LNG Transportation Order, 49 FPC 1078, 1973 FPC LEXIS 808, at *5.

³⁵ *Id.* at *4-7; *see also Emera CNG, LLC*, 148 FERC ¶ 61,219, at P 13 n.15 (2014).

³⁶ *See, e.g., King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (observing that it is a "cardinal rule that a statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context" (citations omitted)); *Aluminum Co. of America v. Bonneville Power Admin.*, 903 F.2d 585, 594 (9th Cir. 1989) (finding the Commission's interpretation of the Pacific Northwest Electric Power Planning and Conservation Act unreasonable in light of the statute as a whole); *see also* LNG Transportation Order, 49 FPC 1078, 1973 FPC LEXIS 808, at *6-7.

³⁷ 16 U.S.C. §§ 824a and 824i.

³⁸ Section 202 provides in relevant part that when the Commission "finds such action necessary or appropriate in the public interest it may by order direct a public utility . . . to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons . . ." 16 U.S.C. § 824a(b). The relevant portion of section 210(a) states that "[u]pon application of any electric utility, Federal power marketing agency, geothermal power producer (including a producer which is not an electric utility), qualifying cogenerator, or qualifying small power producer, the Commission may issue an order requiring – (A) the physical connection of any cogeneration facility, any small power production facility, or the transmission facilities of any electric utility, with the facilities of such applicant." 16 U.S.C. § 824i(a)(1)(A).

³⁹ 16 U.S.C. § 824p. Dr. Baldick specifically contrasts ATI's alternative transmission service with electric transmission lines built in corridors. *See* Petition, Baldick Aff. at ¶ 7.

provisions were inconsistent with a conclusion that jurisdictional transportation extended to movement of LNG by truck or barge.⁴⁰

ATI's terse legal analysis also fails to address judicial and Commission precedent that is at odds with ATI's interpretation of "transmission of electric energy." The Commission and the courts have found that the Commission's jurisdiction over the interstate transmission of electric energy is grounded in the "flow" of power, such as occurs across wire conductors and related equipment. In *FPC v. Florida Power & Light Co.*,⁴¹ the Supreme Court upheld the Commission's assertion of jurisdiction over Florida Power & Light, finding that the Commission had established by evidence of the commingling of energy in an electric bus "that the energy flows that are a prerequisite to jurisdiction occurred."⁴² The Court observed in this regard that an "engineering and scientific test" controlled the outcome of the case.⁴³

In *New York v. FERC*,⁴⁴ the starting point for the Court's analysis of the Commission's jurisdiction over transmission of electric energy in interstate commerce was the recognition that energy is delivered over three major grids, and that "any electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce."⁴⁵ The Court cited the FPC's previous recognition (ultimately upheld in *FPL*) that transmission of electric energy involves almost instantaneous delivery of energy through the

⁴⁰ LNG Transportation Order, 49 FPC 1078, 1973 FPC LEXIS 808, at *6-8. The FPC observed that "[t]hese terms conceivably could be applied to railroads, but all railroads are common carriers and subject to ICC jurisdiction." *Id.* at *7.

⁴¹ 404 U.S. 453 (1972) ("*FPL*").

⁴² *Id.* at 459.

⁴³ *Id.* at 467; *see also Conn. Light & Power Co. v. FPC*, 324 U.S. 515, 529 (1945). The FPA also applies a "legalistic or governmental test" to determine what constitutes jurisdictional transmission. *FPL*, 404 U.S. at 467 (internal quotes omitted). Thus, "[f]ederal jurisdiction may not reach facilities used in local distribution of energy." *Id.* (citing 16 U.S.C. § 824(b)) (internal quotes omitted).

⁴⁴ 535 U.S. 1 (2002).

⁴⁵ *Id.* at 7.

interconnected interstate grid.⁴⁶ ATI's proposal to move flow battery electrolytes on trains, tractor-trailers or other vehicles is a fundamentally different type of activity that the Petition does not attempt to square with this longstanding legal and technical understanding of transmission as involving an instantaneous flow of electric energy.⁴⁷

From a purely practical perspective, ATI would be engaged in nothing more than traditional "transportation" of batteries or chemicals by rail (something that is otherwise regulated under federal law) as opposed to the transmission of electric energy in interstate commerce.⁴⁸ Mobile energy storage already exists in the electric industry, as the Commission has recognized.⁴⁹ The Commission has not suggested that such movement of an electric storage resource would itself constitute transmission of electric energy. ATI does not directly address these mobile energy storage services or attempt to explain how its alternative transmission process is distinguishable such that ATI would be providing a jurisdictional transmission service while the others would not.⁵⁰

⁴⁶ *Id.* (citing *In re Florida Power & Light Co.*, 37 FPC 544, 549 (1967)).

⁴⁷ The Commission has said that certain simultaneous exchanges of electric power "may resemble transmission service because they involve a party placing power onto the grid at one delivery point and then simultaneously receiving power at another delivery point." *Puget Sound Energy, Inc.* 138 FERC ¶ 61,121, at P 13 (2012), *order on reh'g and clarification*, 153 FERC ¶ 61,131 (2015), *reh'g denied*, 155 FERC ¶ 61,175 (2016). The Commission's treatment of certain simultaneous exchanges of electric power as transmission transactions was intended as a way to address concerns "that the marketing function of a transmission provider could use the complexity of simultaneous exchanges to effectively perform transmission functions where the transactions involve the transmission provider's system, circumventing Commission regulations involving open access transmission service." *Id.* at P 14. By contrast, the Petition does not argue for an extension of the Commission's authority in order to preserve its jurisdiction over utility-owned transmission, nor is there a concern over a discriminatory priority given to the clearly jurisdictional utility-affiliated wholesale merchant function.

⁴⁸ The dictionary defines "transport" as "[t]o carry from one place to another." *Transport*, American Heritage Dictionary (4th ed. 2006).

⁴⁹ See *Third-Party Provision of Ancillary Servs.; Accounting and Fin. Reporting for New Elec. Storage Tech.*, 139 FERC ¶ 61,245, at P 85 (2012).

⁵⁰ The Commission has found that storage devices may be characterized as transmission facilities, depending on how they are operated. See, e.g., *Western Grid Dev., LLC*, 130 FERC ¶ 61,056, *reh'g denied*, 133 FERC ¶ 61,029 (2010). The characterization of a storage device as a transmission facility is based the function performed by the storage device, not the movement of the storage resource itself. In any event, ATI denies that it would be providing a storage service, except to the extent it is incidental to transmission service. See Petition at 5.

Because ATI has not established that its proposed service would constitute transmission of electric energy in interstate commerce, it has also not shown that the facilities used for such service would be jurisdictional transmission facilities, or that ATI would be a public utility under the FPA by virtue of owning or operating these facilities.

3. The Petition Does Not Address the Considerable Jurisdictional and Regulatory Complications that Could Arise if the Commission Grants the Requested Declaratory Order

The Petition also fails to address the jurisdictional and regulatory complications that could arise if the Commission were to assert jurisdiction over the conveyance of the flow battery electrolyte container cars by rail, tractor-trailer, boat, or airplane. Such complexities were a matter of significant concern for the FPC in the LNG Transportation Order, which noted that “a judicial construction giving the Commission jurisdiction over interstate rail, motor carrier, and barge shipments . . . would establish without Congressional legislation a vast new area of regulation.”⁵¹ As in the LNG Transportation Order, the modes of transportation that ATI proposes to use for its “alternative transmission” process are all subject to some form of regulatory oversight. Granting the Petition, therefore, could give rise to persistent conflicts between the Commission’s plenary jurisdiction over interstate transmission by public utilities and other federal regulatory regimes.⁵² For example, the Surface Transportation Board (“STB”) has authority over railroad rates and services. ATI does not explain how the Commission could exercise its authority to review cost-based rates for “transmission” of electric energy by railroad when the same operative transaction is subject to economic regulation by the STB.

⁵¹ LNG Transportation Order, 49 FPC 1078, 1973 FPC LEXIS 808, at *8-9.

⁵² As noted above, ATI’s Petition does not clearly identify which “facilities” would be jurisdictional under its “alternative transmission” service, nor does it articulate a standard for distinguishing between jurisdictional and non-jurisdictional facilities.

ATI's petition also raises significant issues of state and local jurisdiction and whether ATI's proposal conflicts with state and local jurisdiction over "facilities used in local distribution or only for the transmission of electric energy in intrastate commerce" under FPA section 201(b).⁵³ For example, the Petition states that the proposed alternative transmission "involves construction of electric energy transfer stations – charging and discharging – at locations in the continental United States."⁵⁴ Charging stations are often, if not typically, subject to state and local jurisdiction. Again, the skeletal nature of ATI's Petition makes it difficult to assess this issue in a proper and necessary manner.

Consistent with the traditional scientific and engineering understanding of interstate transmission, the Commission deems transmission in the Electric Reliability Council of Texas ("ERCOT") to be non-interstate because ERCOT is generally not interconnected to the interstate grid.⁵⁵ A finding that the process described by ATI constitutes interstate transmission could also prompt arguments that the use of this form of "transmission" between ERCOT and other states would make ERCOT and ERCOT utilities subject to the Commission's jurisdiction as public utilities.⁵⁶

Taken to its logical extension, ATI's legal theory also raises the question of whether drivers of battery-equipped electric vehicles would be engaged in transmission of electric energy in interstate commerce when they drive across state lines. Like ATI's proposed service, electric

⁵³ 16 U.S.C. § 824(b)(1).

⁵⁴ Petition at 2.

⁵⁵ See, e.g., *LS Power Dev., LLC and Cross Tex. Transmission, LLC*, 155 FERC ¶ 61,176, at P 1 n.2 (2016) ("The ERCOT grid is not synchronously interconnected to the rest of the United States but is asynchronously interconnected through HVDC interconnections with the Southwest Power Pool, Inc. (SPP) grid. These interconnections were established pursuant to Commission orders under sections 210 and 211 of the [FPA] and do not trigger Commission jurisdiction under FPA sections 203, 205 or 206.").

⁵⁶ See, e.g., *Tres Amigas LLC*, 130 FERC ¶ 61,205, at P 41, *reh'g denied*, 132 FERC ¶ 61,232 (2010).

vehicle owners can draw energy from the grid at one location (such as a third-party charging station), store the energy in a battery, transport the energy across state lines, and discharge the energy back on to the grid at a second location (such as the vehicle owner's home). The Petition does not articulate any obvious limiting principle that would preclude such EV transportation from being deemed interstate transmission of electric energy under ATI's theory of jurisdiction.⁵⁷

APPA reiterates that its concerns about the legal findings requested in the Petition should not be interpreted as opposition to portable storage services generally. Mobile energy storage systems may be an innovation that can bring real value to energy consumers. ATI has not demonstrated, however, that the Commission should make a finding that the services and facilities described in the Petition provide transmission of electric energy in interstate commerce within the meaning of the FPA.

C. If the Commission Does Not Dismiss or Deny the Petition, More Information Would be Required to Evaluate It

To the extent the Commission does not dismiss or deny ATI's Petition outright, it should require ATI to identify and explain in full: (i) the specific business model ATI intends to engage in; (ii) the specifics of ATI's business, including officers, employees, financing, and transactions; (iii) ATI's need for the jurisdictional ruling it seeks; and (iv) all stakeholders likely to be impacted by the relief it seeks. The Commission should thereafter provide all interested parties the opportunity to intervene and comment on the petition in light of this additional information.

⁵⁷ ATI states that it "will not take title to the electrical energy," Petition at 5, suggesting that ATI may view this as a factor that could distinguish its proposed process from mere transportation of electric storage resources. To the extent that this factor has legal significance, however, ATI does not explain what it is.

IV. CONCLUSION

APPA submits that its participation in this proceeding is in the public interest and respectfully asks the Commission to grant APPA's motion to intervene and consider its protest in this proceeding. As discussed above, ATI's Petition does not present an appropriate case for a declaratory ruling and should be dismissed. If the Commission reaches the merits of the Petition, it should find that ATI has not carried its burden to show that the services described in the Petition would constitute interstate transmission of electric energy under the FPA. Finally, if the Commission does not dismiss or deny the Petition, additional information would be required to evaluate it.

Respectfully submitted,

**AMERICAN PUBLIC POWER
ASSOCIATION**

/s/ John E. McCaffrey _____

Delia Patterson

Senior Vice President, Advocacy &
Communications and General Counsel

John E. McCaffrey

Regulatory Counsel

2451 Crystal Drive

Suite 1000

Arlington, VA 22202

(202) 467-2900

dpatterson@publicpower.org

jmccaffrey@publicpower.org

Dated: June 3, 2019

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Arlington, Virginia, this 3rd day of June, 2019.

/s/ John E. McCaffrey

John E. McCaffrey

2451 Crystal Drive

Suite 1000

Arlington, VA 22202

(202) 467-2900

jmccaffrey@publicpower.org