

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

Building for the Future Through Electric )  
Regional Transmission Planning and Cost )  
Allocation and Generation Interconnection )

Docket No. RM21-17-000

**REPLY COMMENTS  
BY THE ELECTRICITY TRANSMISSION COMPETITION COALITION**

September 19, 2022

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The Electricity Transmission Competition Coalition (“Competition Coalition”) appreciates the opportunity to submit these Reply Comments to the Federal Energy Regulatory Commission’s request for Comments on this Notice of Proposed Rulemaking (“NOPR”) regarding regional transmission planning and cost allocation.<sup>1</sup> The Competition Coalition supports transmission planning that is focused on maintaining reliability at the lowest reasonable cost to consumers. This is best achieved through competition. However, in this proceeding, some parties have sought to discredit or oppose the benefits of competition to consumers. The Commission should not be swayed. The arguments against competition lack merit. Further, arguments in support of reversing Order No. 1000 are not supported by substantial evidence and have not demonstrated any change in circumstances from the Commission’s prior findings. In Order No. 1000, the Commission found that rights of first refusal (“ROFRs”) cause unjust and unreasonable rates. That finding is even more sound today than it was more than a decade ago. Just because the benefits of competition have not materialized as much as expected since Order No. 1000 does not mean that elimination of ROFRs was not successful at reducing costs to consumers or preventing discriminatory rates. The Commission should abandon its proposal to establish new ROFRs for jointly-owned facilities and right-sizing, and reject calls for more expansive ROFRs. The Commission should firmly and

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<sup>1</sup> See Appendix A for the members of the Competition Coalition.

unquestionably embrace competition as a means for achieving just and reasonable transmission rates.

## **I. EXECUTIVE SUMMARY**

The Commission should exclude from any Final Rule the NOPR's proposals to establish a new ROFR for jointly owned facilities and a new ROFR for right-sizing because both proposals are unlawful, unjust, unreasonable, unduly discriminatory, and preferential. Likewise, the Commission should reject the arguments by utilities for additional or more expansive ROFRs. The joint ownership and right-sizing (*i.e.* over-sizing) ROFRs proposed by the Commission would restrict development of competition to the detriment of consumers and fail to provide adequate consumer protections against unjust, unreasonable, and unduly discriminatory or preferential rates. "It is long-established that the 'primary aim' [of the Federal Power Act] is the protection of consumers from excessive rates and charges."<sup>2</sup> The Commission has already found that ROFRs are unjust and unreasonable, and thus inconsistent with the primary aim of the Federal Power Act ("FPA"). Nothing has changed to support a different finding.

Commenters representing the interests of consumers, competitive transmission developers, and generation suppliers uniformly support competition and oppose ROFRs.<sup>3</sup> Meanwhile, transmission utilities and utility interest-groups have an economic self-interest to maintain their monopoly stranglehold on transmission construction. For this reason, they generally oppose competition. In Order No. 1000, the Commission noted that competition was most likely to be undermined by utilities acting in their own economic self-interest. That economic self-interest,

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<sup>2</sup> *Xcel Energy Services v. FERC*, 815 F.3d 947, 952-53 (D.C. Cir. 2016).

<sup>3</sup> See Appendix B for a list of Commenters that, along with this Competition Coalition, support transmission competition and oppose the proposed ROFRs.

unchanged with the passage of time, is the foundation of their Comments filed in this proceeding.<sup>4</sup> Utilities, by and large, oppose competition because demonstrates beyond doubt that the development of new transmission infrastructure no longer constitutes a natural monopoly, *i.e.*, others are just as capable of funding and building safe, reliable, resilient, and innovative transmission facilities and can do so at a lower cost and with greater consumer protections..

The record in this case contains comments by dozens of consumer interests – including those in the Competition Coalition – who want to see the right transmission projects get built at the lowest reasonable costs.<sup>5</sup> The body of evidence overwhelmingly indicates that regional transmission expansion would best be achieved by expanding competition (*i.e.*, closing loopholes), holistic and proactive planning, independent oversight, and tighter scrutiny of projects not subject to competition.

## **II. TRANSMISSION UTILITIES AND UTILITY INTEREST ORGANIZATIONS MISSTATE THE APPROPRIATE LEGAL AND EVIDENTIARY STANDARDS FOR REVERSAL OF ORDER NO. 1000.**

The Commission’s decision regarding a ROFR is not a policy issue, but rather an evidentiary and legal issue. Transmission utilities and utility interest organizations assert that an agency can change course and rescind a prior policy determination: (1) if the change is within the authority delegated to the agency by statute, and (2) the agency has supplied a reasoned analysis for the change, based on consideration of relevant factors.<sup>6</sup> However, this is not the standard

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<sup>4</sup> Order No. 1000 at ¶ at 256; Solar Energy Industries and Large-Scale Solar Comments at 127.

<sup>5</sup> “Comments of the Electricity Transmission Competition Coalition in Building for the Future Through Electric Regional Transmission planning and Cost Allocation and Generation Interconnection,” Docket No. RM21-17-000, Oct. 12, 2021. [http://electricitytransmissioncompetitioncoalition.org/wp-content/uploads/COMPETITION\\_COALITION-ANOPR-Comments-Filed1.pdf](http://electricitytransmissioncompetitioncoalition.org/wp-content/uploads/COMPETITION_COALITION-ANOPR-Comments-Filed1.pdf).

<sup>6</sup> EEI Comments at 25, *citing Motor Vehicle Mfrs Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (*citing American Trucking Assoc., Inc. v. Atchison, T. & S.F.R. Co.*, 387 U.S. 397, 416, 87 S. Ct. 1608, 1618, 17 L.Ed.2d 847 (1967)) (“*State Farm*”), *citing also F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (upholding the FCC’s change in policy when the Court found that the new policy was permissible under the statute, there are good reasons for it, and the agency believes it to be better.); *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (stating “[a]gencies are free to change their existing policies as long as they provide a reasoned

imposed by the FPA, recognized by the Commission in Order No. 1000, or upheld by courts when implementing Order No. 1000 and Order No. 1000-A.

FPA Section 313(b) requires a “substantial evidence” standard for findings of fact.<sup>7</sup> And, in Order No. 1000, the Commission recognized that “When applied in a rulemaking context, ‘the substantial evidence test is identical to the familiar arbitrary and capricious standard.’”<sup>8</sup> So, while any rulemaking change must inherently be within the authority delegated to the agency by statute, the real standard to be applied for a rulemaking reversal is whether it is supported by substantial evidence and a change in circumstances.<sup>9</sup> The substantial evidence standard, like the familiar arbitrary and capricious standard, holds that the prior finding not be reversed unless it has no reasonable basis or was determined without an adequate consideration of the circumstances.<sup>10</sup> That is simply not the case here. “Empirical evidence . . . based upon reasonable predictions rooted in basic economic principles” Was the foundation for the Commission’s findings that ROFRs are unjust and unreasonable.<sup>11</sup> The Commission fully and adequately considered the evidence in that

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explanation for the change”) (citing *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 981–982, 125 S. Ct. 2688, 162 L.Ed.2d 820 (2005) (stating “if the agency adequately explains the reasons for a reversal of policy, “change is not invalidating”) (citations omitted); *Chevron*, 467 U.S., at 863–864, 104 S. Ct. 2778); *American Trucking Ass’n, Inc. v. Federal Motor Carrier Safety Admin.*, 724 F.3d 243, 250 (D.C. Cir. 2013) (finding that FMCSA was free to change its views because it offered reasonable explanations and justifications for its departure); *National Ass’n of Home Builders v. E.P.A.*, 682 F.3d 1032, 1038 (D.C. Cir. 2012) (denying petition for review of the EPA’s amendment to a rule, explaining that an agency’s view can change if it provides a reasoned explanation); *Associated Gas Distributors*, 824 F.2d 981, 1008 (D.C. Cir. 1985) (stating that “[t]he Commission’s remedial authority under FPA section 206 of the FPA is broad . . .”); *Am. Trucking Ass’ns v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416, 87 S.Ct. 1608, 18 L.Ed.2d 847 (1967) (declaring that an agency, “in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings”).

<sup>7</sup> 16 U.S.C. 8251(b).

<sup>8</sup> Order No. 1000 at ¶ 48, citing *Wisconsin Gas Co. v. FERC*, 770 F.2d 1144, 1156, 248 U.S. App. D.C. 231 (1985); see also *Associated Gas Distributors v. FERC*, 824 F.2d 981 at 1018, 263 U.S. App. D.C. 1.

<sup>9</sup> See Order No. 1000 at ¶ 239, 256 (When the Commission issued Order No. 1000, it rejected EEI’s argument that there was substantial evidence that a ROFR benefitted consumers. Accordingly, EEI itself has previously recognized that substantial evidence is the appropriate standard to be used.).

<sup>10</sup> *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009).

<sup>11</sup> *Emera Maine* at 671 citing *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 76 (D.C. Cir. 2014) (per curiam).

proceeding. Even more evidence exists today demonstrating the benefits of competition and its consistency with basic economic principles. The benefits of competition exist today as much as in 2011 when the Commission issued Order No. 1000.

Further, the Commission cannot reverse Order No. 1000 and its prior determination that ROFRs are unjust and unreasonable.. More is required than substantial evidence and changes in circumstances because, when implementing Order Nos. 1000 and 1000-A, the Commission demonstrated to the D.C. Circuit that ROFRs are so unjust and unreasonable that they cause severe harm to the public, so much so that contract abrogation was warranted. Contract abrogation has a higher standard because “more is required to justify regulatory intervention in a private contract than a simple reference to the policies served by a particular rule.”<sup>12</sup> The D.C. Circuit noted that the Commission had to clear a high bar to abrogate the contractual right as “the FPA intended to reserve the Commission’s contract-abrogation power for those extraordinary circumstances where the public will be severely harmed.”<sup>13</sup> The Court held that the Commission had met the higher burden because “FERC went further and found that the specific ROFR in ISO-NE’s Transmission Operating Agreement ‘would adversely affect transmission development.’”<sup>14</sup> The Court further held that “severe harm to the public constitutes extraordinary circumstances. . . . FERC made such a finding here, *see* Initial Order ¶ 172, thereby clearing the *Mobile-Sierra* bar as articulated in *Morgan Stanley.*”<sup>15</sup> The Commission and the D.C. Circuit agreed that ROFRs are not simply unjust and unreasonable, but they also severely harm the public.

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<sup>12</sup> *Texaco Inc. v. FERC*, 148 F.3d 1091, 1097 (D.C. Cir. 1998).

<sup>13</sup> *Emera Maine*, 854 F. 3d at 671, *citing Morgan Stanley Capital Group Inc. v. Public Utility District No. 1*, 554 U.S. 527, 551 (2008)[emphasis in original].

<sup>14</sup> *Emera Maine v. FERC*, 854 F.3d 662, 671 (D.C. Cir. 2017).

<sup>15</sup> *Emera Maine* at 671.



Further, the Seventh Circuit upheld the Commission’s determination that ROFRs are so antithetical to the public interest that they are not entitled to the contractual protection of *Mobile-Sierra*. The Seventh Circuit noted that “if there are indeed good things to be said about the [ROFRs] claimed by the petitioners [incumbent MISO transmission owners], they are not said in any of the voluminous filings in this case.”<sup>16</sup> The Court held that a legitimate arms-length contract is “different from a contract in which the parties are seeking to protect themselves from competition from third parties (cartels are the classic example of such contracts). In summary, Commission’s abrogation of the ROFR in the MISO Transmission Owners Agreement was lawful.”<sup>17</sup> In this case, the Commission has not met the legal or evidentiary standards for reversal of its findings in Order No. 1000 that ROFRs are unjust, unreasonable, and unduly discriminatory and preferential.

Commission adoption of a ROFR would be arbitrary, capricious, an abuse of discretion, and unlawful for many reasons. The Commission has failed to demonstrate substantial evidence for reversing Order No. 1000, failed to address the material contention of the parties that competition benefits consumers and is in the public interest, failed to meet FPA Section 206 requirements, and failed to provide the extraordinary circumstances warranting reversal of the extraordinary circumstances that warranted contract abrogation following Order No. 1000.

**A. The Commission Should Reject The Assertion That “Good Reasons” Are All That Is Needed To Reverse Order No. 1000.**

The Edison Electric Institute (“EEI”) and others argue that good reasons are sufficient to support a change in policy, citing the D.C. Circuit’s statement in *FCC. v. Fox Television Stations*

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<sup>16</sup> *MISO Transmission Owners v. FERC*, 819 F.3d 329, 334 (7th Cir. 2016).

<sup>17</sup> *Id.* at 333. The Seventh Circuit held that “[a] market that can support only one firm because conditions of supply and demand leave room for no more—what is called a “natural monopoly”—has no need for a [ROFR]. Such a right implies a possibility of entry (why otherwise create such a right?)—in other words room for an additional firm or firms, yet the right enables the incumbent firm to ward off entry.”

*Inc.* that for a change in policy, “an agency must show that there are *good reasons* for the new policies. But it need not demonstrate to a court’s satisfaction that the reasons for the new policies are better than the reasons for the old ones; it suffices that the new policies are permissible under the statute, that there are good reasons for them, and that the agency believes the disputed policies to be better, which the conscious change of course adequately indicates.”<sup>18</sup> The Commission should note, however, that EEI’s quotation ends too soon and omits the portion of the court’s opinion that has the most direct relevance to this case: “This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must – when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.”<sup>19</sup>

In the first instance, this language refers to a change in policy under the Administrative Procedure Act (“APA”), not reversal of a prior finding of fact under FPA Section 206. More is required than “good reasons” to overcome the FPA Section 206 burden and prior findings that ROFRs are so harmful to the public that they meet the standard for contract-abrogation. The Commission met the higher standard for contract abrogation by demonstrating to the D.C. Circuit that “the specific ROFR in ISO-NE’s Transmission Operating Agreement ‘would adversely affect transmission development’” and causes “severe harm to the public [which] constitutes extraordinary circumstances.”<sup>20</sup> While it may be possible for what was once unjust and

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<sup>18</sup> *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009); *Ass’n of Oil Pipe Lines v. FERC*, 876 F.3d 336, 343 (2017); see also, *New Eng. Power Generators Ass’n v. FERC*, 879 F.3d 1192, 1201 (D.C. Cir. 2018) (emphasis added); *Nat’l Cable & Telecomms. Ass’n v. FCC*, 567 F.3d 659, 667 (D.C. Cir. 2009).

<sup>19</sup> *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009).

<sup>20</sup> *Emera Maine v. FERC*, 854 F.3d 662, 671 (D.C. Cir. 2017).

unreasonable to later become just and reasonable, the Commission must demonstrate substantially more than simply that it has changed its mind.<sup>21</sup>

In 2011, the Commission rejected the same arguments that EEI has raised in this proceeding, finding that it was “not persuaded to abandon our proposed reforms to [ROFRs] based on arguments that incumbent transmission providers are better situated to build and operate transmission facilities.”<sup>22</sup> There has been no change in circumstances since 2011 such that incumbent utilities are now better situated to build and operate transmission facilities. What the Commission found to be true in 2011 remains true: “just because an incumbent public utility transmission provider may have certain strengths, a nonincumbent transmission developer should [not] be categorically excluded from presenting its own strengths in support of its proposals or bids.”<sup>23</sup> The Commission does not have the legal or evidentiary basis to overrule its prior findings in Order No. 1000 or the prior holdings of the D.C. Circuit that ROFRs cause severe harm to the public.

**B. *State Farm* Does Not Support The Argument That An Agency Can Change A Policy Upon Simple Reasoned Decision-Making.**

Some parties rely on the Supreme Court’s opinion in *State Farm* as support for the argument that an agency can change a policy based upon simple reasoned decision-making.<sup>24</sup> They are mistaken.

In *State Farm*, the National Highway Traffic Safety Administration (“NHTSA”) issued a motor vehicle safety standard requiring newly sold cars to be equipped with airbags or seatbelts. However, before the effective date of the safety standard, NHTSA adopted a final rule dropping

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<sup>21</sup> *Id.*

<sup>22</sup> See Order No. 1000 at ¶ 260.

<sup>23</sup> Order No. 1000 at ¶ 260.

<sup>24</sup> *Motor Vehicle Mfrs Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (“*State Farm*”).

the requirement for seatbelts. The D.C. Circuit held that the agency’s decision to drop the seatbelt requirement from the final rule was arbitrary and capricious. The Supreme Court agreed but vacated the matter because further consideration by the agency was required and remanded it. This case involved a true change in policy, where NHTSA issued a standard and then subsequently issued a final rule with a different result. The Court stated that under its review, “Normally, an agency rule will be arbitrary and capricious if the agency relies on factors which Congress has not intended it to consider, entirely fails to consider an important aspect of the problem, offers an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it cannot be ascribed to make up for such difference in view or the product of agency expertise.”<sup>25</sup> The Court stated “[t]he ultimate question before us is whether NHTSA’s rescission of the passive restraint requirement of Standard 208 was arbitrary and capricious. We conclude, as did the Court of Appeals, that it was.”<sup>26</sup> Since NHTSA failed to consider all of the evidence supporting its rule and did not reasonably explain its change of direction. The Court found that it failed to provide a reasoned analysis for its decisions.<sup>27</sup>

In the present case, establishment of any kind of ROFR “will be arbitrary and capricious if the [Commission] relies on factors which Congress has not intended it to consider, entirely fails to consider an important aspect of the problem, offers an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it cannot be ascribed to make up for such difference in view or the product of agency expertise.”<sup>28</sup> The FPA, Sherman Act, and a long-

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<sup>25</sup> *State Farm*, 463 U.S. 29, 43 (1983).

<sup>26</sup> *State Farm*, 463 U.S. 29, 46 (1983).

<sup>27</sup> *Id.*

<sup>28</sup> *State Farm*, 463 U.S. 29, 43 (1983).

line of federal precedent support competition and competitive processes.<sup>29</sup> Congress, in passing the FPA, has identified the factors which the Commission must consider – justness, reasonableness, discriminatory purpose or effect, and preferential treatment. A ROFR, by its nature, is discriminatory and preferential on its face. It allows an incumbent transmission utility to discriminate by opting to construct a transmission upgrade, at whatever price, to the exclusion of all others. Establishing new ROFRs would, violate the FPA, reverse many prior Commission Orders, defy the holdings of the D.C. Circuit, Fifth Circuit, and Seventh Circuit, and be inconsistent with the body of evidence in support of competition.. Further, the benefits of competition are well-demonstrated, with numerous real-world examples demonstrating the cost savings that competition provides in transmission planning and construction. The evidence before the Commission in this case is so compelling on the benefits of competition that establishment of a ROFR would be “so implausible that it cannot be ascribed to make up for such difference in view or the product of agency expertise.”<sup>30</sup> The Commission’s rationale for the proposed “conditional” ROFRs is not that they will reduce costs, but rather that competition has not developed regional transmission sufficiently fast enough to support the so-called “changes in demand and resource mix.” A ROFR will not support the policy direction that the Commission intends to pursue, but more importantly, a ROFR violates the directive of Congress set forth in the FPA that rates be just, reasonable, and not unduly discriminatory or preferential.

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<sup>29</sup> The Sherman Act, despite its exception for utilities which have historically been recognized as natural monopolies, broadly supports competition and competitive processes, *see Gulf States Utilities Co. v. Fed. Power Comm’n*, 411 U.S. 747, 758-59 (1973) (“within the confines of a basic natural monopoly structure, limited competition of the sort protected by the antitrust laws seems to have been anticipated.”). While transmission utilities may be excepted from the Sherman Act, that exception is not exhaustive. Courts and the Commission have both refined their understanding of which parts of the electricity industry are natural monopolies. *See, e.g., Transmission Access Study Group v. FERC*, 225 F.3d 667, 683 (D.C. Cir. 2000) (per curiam), *aff’d sub nom New York v. FERC*, 535 U.S. 1 (2002).

<sup>30</sup> *See State Farm*, 463 U.S. 29, 43 (1983).

**C. *Fox Television* Holds That More Than Reasoned Decision-Making Is Required When A New Policy Would Contradict Factual Findings Underlying A Prior Policy; Or When There Has Been Serious Reliance On The Prior Policy.**

Some parties rely on the Supreme Court’s opinion in *Fox Television* in support of the argument that an agency can change a policy based upon simple reasoned decision-making.<sup>31</sup> As the Court noted in *Fox Television*:

To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. . . . And of course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the agency believes it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must – when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.<sup>32</sup>

Establishment of a ROFR would fall in this latter category. The Commission must demonstrate substantial evidence, but also the change in circumstances because the new policy would necessarily rest upon factual findings that contradict Order No. 1000 and the Commission’s arguments to the D.C. Circuit that ROFRs cause severe harm to the public. While the Court in *Fox Television* held that the APA does not always require a heightened standard of review for subsequent agency action, it still requires that the change meet the same standard as the initial agency action, and that heightened review may exist where prior facts and circumstances supported the agency action. When an agency’s “new policy rests upon factual findings that contradict those

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<sup>31</sup> *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009).

<sup>32</sup> *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009).

which underlay its prior policy,” the agency must provide a “more detailed justification than what would suffice for a new policy created on a blank slate.”<sup>33</sup>

The Commission’s findings in Order No. 1000 and its subsequent arguments to the D.C. Circuit were based on empirical evidence. The evidence now is even stronger – competition works. Since Order No. 1000, numerous competitive solicitations have resulted in projects being completed at less cost than if they had been completed by the incumbent utility. For some of these projects, the incumbent utility submitted a bid yet failed to win the competitive solicitation, demonstrating that the utility was not capable of completing the project at the lowest cost. The entire industry has relied upon the Commission’s determination that ROFRs are unjust and unreasonable, even if competition has been obstructed by utilities acting in their own self-interest.

Additionally, regarding serious reliance upon the Commission’s decision, the Commission demonstrated to the D.C. Circuit that the ROFRs were so harmful to the public that they warranted contract abrogation.<sup>34</sup> Each of the projects, contracts, and parties to which contract abrogation applied would have necessarily relied upon the Commission’s decision to execute new contracts and new competitive solicitations. However, the Commission now attempts to establish new ROFRs, threatening to upend the progress on competitive development of the transmission system. There is not substantial evidence or a change in circumstance that warrants establishment of a ROFR. Creating a new ROFR would violate the plain language of the FPA that the Commission remedy any rate that is unjust, unreasonable, and unduly discriminatory or preferential, as well as the primary aim of the FPA to protect consumers.

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<sup>33</sup> *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009).

<sup>34</sup> *Emera Maine*, 854 F. 3d at 671, citing *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1*, 554 U.S. 527, 551 (2008)[emphasis in original].

**D. ROFRs Are, By Their Nature, Unduly Discriminatory And Preferential.**

In the intervening time between Initial Comments and Reply Comments in this docket, the United States Court of Appeals for the Fifth Circuit issued an Opinion finding that Texas’s state ROFR unlawfully discriminates in favor of in-state incumbent monopoly transmission utilities.<sup>35</sup> In making its decision, the Fifth Circuit relied upon the Commission’s findings that ROFRs might “be leading to rates . . . that are unjust and unreasonable,” in large part because “it is not in the economic self-interest of incumbent[s] to permit new entrants to develop transmission facilities,” even if those facilities “would result in a more efficient or cost-effective solution.”<sup>36</sup>

While the Fifth Circuit’s opinion focuses on a state’s ROFR, the principle that ROFRs are unduly discriminatory and preferential applies to all ROFRs. The FPA prohibits the Commission from establishing rates that are discriminatory and preferential. As the Commission has recognized, ROFRs, by their nature, are discriminatory and preferential. Instead of in-state discrimination in interstate commerce, the Commission’s proposed ROFRs would discriminate in favor of incumbent transmission utilities against all others. As the Fifth Circuit states, “‘incumbent’ is just another word for an entity that already has a presence. In fact, an incumbency requirement is a more anticompetitive version of the in-state presence requirements held unconstitutional in cases like *Granholm* or *Dean Milk*.”<sup>37</sup> The Fifth Circuit recognized that incumbency and in-state discrimination are both anticompetitive and have been held unconstitutional or unlawful.

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<sup>35</sup> *NextEra Energy Capital Holdings, Inc. v. Lake*, \_\_\_ F.4th \_\_\_ (Aug. 30, 2022).

<sup>36</sup> *NextEra Energy Capital Holdings, Inc. v. Lake*, \_\_\_ F.4th \_\_\_ (Aug. 30, 2022), citing Order No. 1000 at ¶ 256, ¶ 253 (explaining that failing to remove [ROFRs] might ‘result in rates . . . that are unjust and unreasonable.’).

<sup>37</sup> *NextEra Energy Capital Holdings, Inc. v. Lake*, \_\_\_ F.4th \_\_\_ (Aug. 30, 2022), citing Merriam Webster (defining incumbent as “one that occupies a particular position or place.”); *Granholm v. Heald*, 544 U.S. 460, 465-66 (2005) (holding unconstitutional two state laws that allowed only wineries with an in-state physical presence to ship wine to state residents); *Dean Milk v. City of Madison*, 340 U.S. 349, 354 n.3 (1945) (“It is immaterial that Wisconsin milk from outside the Madison area is subject to the same proscription as that moving in interstate commerce.”).



A ROFR is precisely the type of anti-competitive mechanism that the Sherman Act and FPA are designed to guard against: contracts, combinations, and conspiracies that restrain trade.<sup>38</sup>

The United States Supreme Court long ago recognized the important role of competition, finding that:

[t]he Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, and lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.<sup>39</sup>

Competition in electric transmission development does just that – it yields the best allocation of economic resources to obtain the highest quality improvements in reliability at the lowest prices.

It is not just the Sherman Act, though, that guards against anticompetitive behavior. In Order No. 1000, quoting the Supreme Court in *Otter Tail Power Co.*, the Commission found that:

“[t]he Commission has long recognized that it has a responsibility to consider anticompetitive practices and to eliminate barriers to competition. Indeed, the Supreme Court has said that ‘the history of Part II of the [FPA] indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest.’ In requiring the elimination of [ROFRs] from Commission-jurisdictional tariffs and agreements, we are acting in accordance with our duty to maintain competition.”<sup>40</sup>

The Commission’s duty to maintain competition has not changed.

Finally, the Federal Trade Commission (“FTC”) and Department of Justice (“DOJ”) have established Collaboration Guidelines to determine if agreements are, by their nature, anticompetitive. These guidelines provide that “[t]he central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price

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<sup>38</sup> 15 U.S.C. § 1.

<sup>39</sup> *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958).

<sup>40</sup> Order No. 1000 at P 286, citing *Otter Tail Power Co. v. United States*, 410 U.S. 366 at 374 (1973).

above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.”<sup>41</sup> The proposed ROFRs fail to meet these guidelines. The FPA does not demand expeditious transmission development, but instead requires the Commission to remedy any rate that is unjust, unreasonable, or unduly discriminatory or preferential. The Commission has proposed to establish precisely that which the FPA prohibits, ROFRs that are unjust, unreasonable, and unduly discriminatory and preferential.

### **III. THE COMMISSION SHOULD DISREGARD THE COMMENTS FILED BY EEI BECAUSE THEY LACK MERIT.**

#### **A. The Commission Should Disregard The Argument By EEI That Competition Results In Lack Of Coordination And Duplicative Costs.**

EEI argues that the regime in which one utility is responsible for building transmission in a designated service territory “arose in response to unfettered free market competition in the utility industry, which resulted in lack of coordination and duplicative costs to customers.”<sup>42</sup> EEI is referring here to transmission expansion that occurred in the early 20<sup>th</sup> century. However, no party to this case is calling for a return to the type of (or lack of) transmission planning, cost allocation, and construction that existed in the early 1900s. Today, transmission planning is a coordinated effort to maintain reliability at just and reasonable rates. Competition has been utilized since Order No. 1000 and demonstrated reduced costs to consumers for the same improvements in reliability that would have occurred through incumbent utility construction. Competition, as proposed by the Competition Coalition and others, includes the competition of ideas to ensure that the lowest cost solutions to identified transmission needs are implemented, as well as competition over construction of transmission facilities. Competition, when implemented, has resulted in significant

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<sup>41</sup> FTC & DOJ, Antitrust Guidelines for Collaborations Among Competitors 4 (2000) [emphasis added].

<sup>42</sup> EEI Comments at 26, citing *General Motors Corp. v. Tracy*, 519 U.S. 278, 289-91 & nn. 5-7 (1997).

savings to consumers. And it is competition, if expanded, that could result in regional transmission expansion in the most cost-effective manner. On the other hand, ROFRs will be nothing more than a roadblock to regional transmission development at substantial cost to consumers.

**B. The Commission Should Reject EEI’s Proposed Modifications To The ROFRs.**

ROFRs are unlawful, unjust, and unreasonable for many reasons. The ROFRs proposed in the NOPR specifically will result in piecemeal adoption and inconsistent application. EEI recognizes these shortcomings of the Commission’s proposal, but instead of encouraging the Commission to abandon its proposal, EEI proposes two remedies. EEI proposes that the Commission make ROFRs mandatory in all regions and, regarding jointly owned facilities, authorize transmission utilities to implement established criteria for what constitutes meaningful participation. EEI’s arguments in support of these two modifications demonstrate the implementation problems that will come with the Commission’s proposed new ROFRs. As EEI notes, the ROFRs as proposed “will make it more difficult to navigate the planning processes in the different regions and would not resolve the problem that the Commission wants to remedy in support of its policy objections (i.e., timely, efficient and cost effective regional transmission development.)”<sup>43</sup> EEI is right that the ROFRs will make the planning processes more difficult and fail to result in timely, efficient, and cost-effective regional transmission development. However, EEI’s proposed remedies will not change this outcome – ROFRs in any form will fail to result in timely, efficient, and cost-effective regional transmission development.

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<sup>43</sup> EEI Comments at 36.

#### **IV. WIRES PRESENTS NO EVIDENCE, DATA, OR CHANGE IN CIRCUMSTANCE FOR ESTABLISHING A ROFR.**

In the first instance, it should be recognized that WIRES members do not universally support the Commission's ROFR proposal.<sup>44</sup> Beyond that, WIRES presents no data or evidence to meet the required legal or evidentiary standards for the Commission to reverse its prior findings in Order No. 1000.

As noted previously, under FPA Section 206, the Commission must find that existing rates are unjust and unreasonable, and then that the replacement rate is just and reasonable. However, because the Commission already found that ROFRs are unjust and unreasonable, it must also demonstrate substantial evidence and change in circumstances to reverse its prior findings. Beyond that, because the Commission demonstrated to the D.C. Circuit that ROFRs cause severe harm to the public warranting contract abrogation, the Commission must meet an even higher standard to establish a new ROFR.

In 2011, the Commission found that ROFRs were unjust, unreasonable, unduly discriminatory, and preferential and required that all ROFRs be removed from transmission utility tariffs. Now, more than ten years later, the Commission intends to reverse its prior findings that ROFRs are unjust and unreasonable, and to implement new so-called *conditional* ROFRs. WIRES states that it supports the Commission's efforts, but like the Commission, has provided no evidentiary support for finding that existing rates are unjust, unreasonable, unduly discriminatory, or preferential; nor does WIRES provide evidentiary support that the new ROFRs would be just, reasonable, and not unduly discriminatory or preferential. In short, while WIRES supports the Commission's effort to reverse Order No. 1000 under the authority of FPA Section 206, it provides

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<sup>44</sup> Initial Comments of WIRES at fn. 38 ("This section is supported by a majority of, but not all, WIRES Full Supporting Members.").

no support for the Commission to meet the required legal or evidentiary standards. For this reason, the Comments filed by WIRES should be disregarded for lack of evidentiary or legal value.

**V. INCUMBENT TRANSMISSION OWNERS IGNORE THE BENEFITS OF COMPETITION.**

**A. Collaboration Can Exist With Competition, But Only If The Commission Requires Competition And Eliminates Exceptions To Competition.**

Collaboration can exist with competition, but only if incumbent monopoly transmission utilities are required to allow competition and competitive processes to develop. To this end, incumbent monopoly utilities must be required to accept competitive proposals for reliability needs, as well as competitive proposals for construction. Utilities are responsible for prohibiting the benefits of competition from being realized by consumers. For example, a recent 2021 study by The Brattle Group and Grid Strategies identified seven ways in which utilities evade competition and regional planning benefits: 1) small utility planning areas; 2) differing transmission owner incentives between local and regional plans; 3) economies of scale; 4) economies of scope; 5) network externalities; 6) horizontal market power; and 7) vertical market power.<sup>45</sup>

A group of incumbent transmission owners, calling themselves Developers Advocating Transmission Advancements (“DATA” or “Incumbent Transmission Group”), argues that the “consequences of Order No. 1000 have resulted in undermining the type of collaboration that is needed to timely and effectively identify the more efficient, cost-effective, and constructable regional transmission projects.”<sup>46</sup> The problem here is not competition, but rather the exceptions

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<sup>45</sup> Johannes Pfeifenberger et al., “Transmission Planning for the 21<sup>st</sup> Century: Proven Practices that Increase Value and Reduce Costs,” October 2021, pp. 19-23. (available at: <https://www.brattle.com/wp-content/uploads/2021/10/Transmission-Planning-for-the-21st-Century-Proven-Practices-that-Increase-Value-and-Reduce-Costs.pdf>).

<sup>46</sup> DATA Comments at 4.

to competition in Order No. 1000 that allowed incumbent monopoly transmission utilities to act in their own self-interest. Further, the Incumbent Transmission Group argues that “the introduction of Order No. 1000 planning processes has stifled the free flow of information among transmission owners and between transmission owners and RTOs that is critical to developing the most efficient and cost-effective transmission solution for the region.”<sup>47</sup> In other words, transmission utilities only willingly collaborate with other transmission utilities and RTOs. If competition were required and the exceptions eliminated, utilities would be more likely to collaborate, resulting in more regional transmission development at lower cost.

To remedy the failure of utilities to collaborate and cooperate with competitive processes, the Commission should establish Independent Transmission Planners (“ITPs”) and Independent Transmission Monitors (“ITMs”). The Comments filed by the Incumbent Transmission Group underscore the need for a market monitor to review the transmission planning and competitive processes to determine if they are resulting in reliability improvements at the lowest reasonable cost. To this end, it is worth noting that Potomac Economics, Ltd., the existing market monitor for MISO, ISO New England, Inc., and the New York Independent System Operator, Inc. (“NYISO”), asserts that “it should have access to the planning models and data to develop independent scenarios for comparison. These scenarios would inform recommendations by the monitor for improving the modeling and processes, as well as improvements in the identification and evaluation of competing transmission projects.”<sup>48</sup> Existing independent market monitors like Potomac Economics should be given access to these planning models and data and then tasked with ensuring that utilities collaborate to promote reliability at the lowest reasonable cost.

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<sup>47</sup> DATA Comments at 5.

<sup>48</sup> Potomac Economics Ltd. Comments at 7.

**B. The 2022 Concentric Report Is An Unreliable Source.**

The Incumbent Transmission Group relies upon a 2022 Concentric Report for the proposition that competition does not result in projects being constructed in any more efficient or cost-effective manner than if they had been constructed by the incumbent utility in an area.<sup>49</sup> The 2022 Concentric Report is an unreliable source. The Concentric Report was funded by incumbent utilities and cherry-picks certain data to arrive at a pre-determined outcome. For example, the Concentric Report only includes projects won by non-incumbent transmission developers between 2015 and 2017. So, while the Concentric Report is a so-called 2022 report, it uses stale data to arrive at its conclusions.

Further, the selection criteria for the projects that Concentric reviewed omits competitive and non-competitive projects developed by incumbent utilities, as well as projects awarded during more-recent competitive solicitations. Projects developed by incumbent utilities have experienced cost overruns and delays just like projects developed by competitive transmission developers. The Concentric Report lays blame for cost-overruns on competitive transmission developers but ignores cost overruns that occur in non-competitive solicitations. Incumbent monopoly utilities experience cost overruns in non-competitive solicitations just as competitive transmission developers do, and often the incumbent monopoly transmission utility will not be bound by any type of cost-cap or cost-containment measure. However, cost-caps and cost-containment measures have become more commonplace since 2015-2017, which are the years reviewed by the Concentric Report. As the table below demonstrates, competitively developed projects are significantly more likely to contain cost-caps and/or cost-containment measures.

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<sup>49</sup> EEI Comments at 7; see Concentric Energy Advisors, Inc., *Competitive Transmission: Experience to-Date Shows Order No. 1000 Solicitations Fail to Show Benefits*, August 2022, prepared for Ameren Services, Eversource Energy, Exelon Corp., ITC Holdings Corp., National Grid USA, Public Service Electric And Gas Company, and Xcel Energy.



Sources: Project Selection Reports, RTO Board Approvals, Project RFPs; NEET and Secretariat Economists analysis.

Further, the Concentric Report focuses on differences between incumbent utilities and competitive transmission developers, but competition does not exclude incumbent transmission utilities from developing projects. Remember, the point of competition is not to exclude incumbent utilities, but for the strengths of incumbent utilities and competitive developers to be maximized in order for transmission development at lowest reasonable cost. As the Commission stated in Order No. 1000, “we do not believe that, just because an incumbent public utility transmission provider may have certain strengths, a nonincumbent transmission developer should be categorically excluded from presenting its own strengths in support of its proposals or bids.”<sup>50</sup> And, as the FTC/DOJ state in their Comments, “Even when the incumbent wins, consumers also win, because incumbents tend to make more competitive proposals when they face competition.”<sup>51</sup> The Concentric Report is an unreliable and uncredible data source that provides no evidentiary value on the costs and benefits of competition in transmission development.

<sup>50</sup> Order No. 1000 at ¶ 260.

<sup>51</sup> FTC/DOJ Comments at 13-14.



### **C. The Incumbent Transmission Group Ignores Recent Studies And Real-World Data.**

The Incumbent Transmission Group attempts to discredit the 2019 report by The Brattle Group but ignores more recent data and successful competitive solicitations that are reducing costs to the consumers. Recent studies and real-world data indicate that competition reduces transmission costs to consumers. Further, competitive benefits continue to grow, as evidenced by the increasing number of processes and competitive solicitations containing cost caps and other cost containment measures. As these cost caps and cost containment measures become more commonplace, competitive proposals will continue to improve, reflecting closer alignment with the true market price to design and construct a transmission project.<sup>52</sup>

National studies since the 2019 study by The Brattle Group confirm that competition has been successful when used, and greater benefits would be realized by expanding competition and restraining incumbent monopoly market power. For example, 2019 study by Paul Joskow found that progress with the competitive transmission procurement model has been slow but promising and recommends refinements to capture more benefits from competition.<sup>53</sup> Additionally, a 2022 study by the R Street Institute (the “Consumer Study”) took input from a convening of all major transmission consumer groups and found that effective competition is one of four pillars of transmission reforms that maximize net benefits to consumers.<sup>54</sup> The study supports the aforementioned evidence on the benefits of competition, noting that newer evidence suggests a

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<sup>52</sup> See NextEra Comments, Attachment B, Affidavit of Ryan Colley at ¶ 6.

<sup>53</sup> Paul Joskow, “Competition for Electric Transmission Projects in the U.S.: FERC Order 1000,” MIT Center for Energy and Environmental Policy Research, March 2019, pp. 1, 55. <https://ceepr.mit.edu/wp-content/uploads/2021/09/2019-004.pdf>.

<sup>54</sup> Jennifer Chen and Devin Hartman, “Transmission Reform Strategy from a Customer Perspective: Optimizing Net Benefits and Procedural Vehicles,” R Street Policy Study No. 257, May 2022. <https://www.rstreet.org/wp-content/uploads/2022/05/RSTREET257.pdf>.

cost savings of 20 to 40 percent, as compared to the 20 to 30 percent figure in the 2019 Brattle Report.<sup>55</sup>

These more-recent studies are consistent with the real-world examples of the cost-savings and benefits of competition. In its Comments, the New Jersey Board of Public Utilities (“NJBPU”) states that the NJBPU’s own experience with competitively soliciting transmission solutions indicates that The Brattle Group’s savings estimates may be *too conservative*.<sup>56</sup> For New Jersey offshore wind integration projects, PJM received 80 proposals. Fifty-seven of those proposals included voluntary measures for cost containment, including caps on construction costs, return on equity, and capital structure.<sup>57</sup> The PJM analysis identified return on equity caps as low as 8.5% and the equity component of the capital structure cap at 40%.<sup>58</sup> Under PJM’s analysis, the overall cost (\$7.59 billion) and per-MW cost (\$2.03 (\$M/SAA MW) of an incumbent New Jersey transmission owner, with a joint partner, proposal was the highest, while nonincumbents offered the lowest relative cost of \$0.88-\$0.92¢ (\$M/SAA MW).<sup>59</sup> The NOPR and utility comments make no reference to the outcome of actual competition, nor do they offer any comparison of competitive to non-competitive projects, yet proclaim that a federal ROFR could “potentially lower costs of transmission development.”<sup>60</sup> There is not substantial evidence to support this assertion.

Regional transmission competition continues to indicate strongly positive net benefits for consumers:

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<sup>55</sup> Chen and Hartman, 2022, at 8.

<sup>56</sup> NJ BPU Comments at 29-30.

<sup>57</sup> PJM Transmission Expansion Advisory Committee, 2021 SAA Proposal Window to Support NJ OSW (Jul. 18, 2022), at 43, available at [item-01---nj-osw-saa.ashx](https://www.pjm.com/committees-panels-subcommittees/transmission-expansion/2021-saa-proposal-window-to-support-nj-osw) (pjm.com).

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

<sup>59</sup> *Id.*

<sup>60</sup> NOPR at P 353.

- A 2021 assessment of transmission projects in the Midcontinent Independent System Operator (“MISO”) found a range of 22% to 42% cost savings from competition.<sup>61</sup> The report uses these findings to recommend the advancement of transmission competition, noting that its benefits are likely to far outweigh implementation costs.<sup>62</sup>
- In 2021, the Southwest Power Pool (“SPP”) approved its third competitive transmission project, Wolf Creek to Blackberry, developed by NextEra Energy Transmission (“NEET”), where the winning bid of \$85 million came in 27% lower than the next-closest bid of \$116 million.<sup>63</sup> Bids went as high as \$151 million.<sup>64</sup> The \$31 million savings between the winning and next-best bid understate the savings attributable to competition, considering incumbent-only final costs in the absence of competition typically surpassed initial RTO cost estimates.<sup>65</sup> In this case, even if an incumbent-only process would deliver on-par with the highest competitive bid, then competition would have saved 44% or \$66 million.
- Another successful competitive transmission project in SPP, the Minco-Pleasant Valley-Draper project, also developed by NEET, was awarded in April 2022.<sup>66</sup> Competition netted tens of millions in cost savings as the winning bid for this project came in at 43% lower cost than the highest bid and at 32% lower cost than the average bid.<sup>67</sup>
- A competitively bid transmission project in New York, coordinated by the NYISO/NYISO – the Empire State Line – was commissioned in 2022 and praised by consumer groups.<sup>68</sup> In particular, it showcased the innovation value of competition. The winning bid employed an innovative phase-angle regulator to control power flows.<sup>69</sup> This creates a new

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<sup>61</sup> “Impact Assessment on developing arrangements to allow for early competition to be applied to future projects on the onshore electricity transmission network,” Ofgem, August 2021, p. 5. [https://www.ofgem.gov.uk/sites/default/files/2021-08/Transmission\\_Early\\_Competition\\_IA\\_Final.pdf](https://www.ofgem.gov.uk/sites/default/files/2021-08/Transmission_Early_Competition_IA_Final.pdf).

<sup>62</sup> *Id.*

<sup>63</sup> Tom Kleckner, “SPP Board of Directors/Members Committee Briefs: Oct. 26, 2021,” RTOInsider, Nov. 1, 2021. <https://www.rtoinsider.com/articles/28966-spp-board-directors-mc-102621>.

<sup>64</sup> *Id.*

<sup>65</sup> “Reply Comments of the R Street Institute on the Advanced Notice of Proposed Rulemaking: Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection,” Docket No. RM21-17-000, November 20, 2021. <https://www.rstreet.org/2021/11/30/r-street-reply-comments-on-ferc-anopr-on-potential-reforms-to-improve-generator-interconnection-processes-regional-transmission-planning-and-cost-allocation/>.

<sup>66</sup> “NextEra Energy Transmission awarded Minco-Pleasant Valley-Draper transmission line project by SPP,” Cision PR Newswire, April 27, 2022. <https://www.prnewswire.com/news-releases/nextera-energy-transmission-awarded-minco-pleasant-valley-draper-transmission-line-project-by-spp-301534600.html>.

<sup>67</sup> “Industry Expert Panel Transmission Provider Public Report,” April 12, 2022, p. 8. <https://www.spp.org/documents/66929/minco-pleasant%20valley-draper%20rfp%20iep%20public%20report.pdf>.

<sup>68</sup> *See, e.g.*, “Statement from Competition Coalition Chair Paul Cicio on NYISO’s New, Competitively Bid Empire State Line Project,” July 12, 2022 (available at: <https://electricitytransmissioncompetitioncoalition.org/statement-from-Competition-Coalition-chair-paul-cicio-on-nyisos-new-competitively-bid-empire-state-line-project/>).

<sup>69</sup> Robert Walton, “New York turns to transmission expansion to meet clean energy goals as NextEra energizes 3.7-GW line,” *UtilityDive*, July 12, 2022. <https://www.utilitydive.com/news/new-york-transmission-next-era-clean-energy/627025/>.

transmission hub that provides grid operators with greater operational flexibility to move renewable energy, which will enhance grid reliability and emissions outcomes.<sup>70</sup> In 2021, competitive bidding on NYISO's Central East Energy Connect project resulted in projected costs approximately \$200 million less than the NYISO's independent evaluation.<sup>71</sup>

- Competition is responsible for unearthing a solution in the most recent PJM Interconnection biennial transmission planning process with massive cost savings, in addition to effectiveness and expediency benefits.<sup>72</sup> The French's Mill upgrades would be as or more effective at mitigating congestion and have an earlier in-service date than the other solutions that were identified, with comparative cost savings ranging from 59% to 99%. Experts have noted that, in the absence of a transparent, competitive process, the incentive of transmission owners would gravitate towards the most expensive solution to maximize rate base, which is more than two orders of magnitude in cost.<sup>73</sup>
- PJM also facilitated the 2022 New Jersey offshore wind competitive solicitation, which induced a range of proposals on innovative cost caps, equity caps, return on equity caps and more. Multiple proposals submitted ROE caps below 9%, indicating cost containment benefits of competition extend beyond capital costs and encompass the return on those capital investments.<sup>74</sup>

The record here is abundantly clear, competition reduces costs to consumers. Reliable studies demonstrate the benefits of competition, and real-world data indicates that the studies may even be too conservative.

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<sup>70</sup> "New York Gov. Hochul joins NextEra Energy Transmission to celebrate commissioning of Empire State Transmission Line," *StreetInsider.com*, July 11, 2022. <https://www.streetinsider.com/PRNewswire/New+York+Gov.+Hochul+joins+NextEra+Energy+Transmission+to+celebrate+commissioning+of+Empire+State+Transmission+Line/20311212.html>.

<sup>71</sup> "First 5-Mile Section of Central East Energy Connect Transmission Line Complete," *T&D World*, June 14, 2021. <https://www.tdworld.com/overhead-transmission/article/21166855/first-5mile-section-of-central-east-energy-connect-transmission-line-complete>.

<sup>72</sup> Nick Dumitriu, "Market Efficiency Update," PJM, Nov. 30, 2021, p. 26. <https://pjm.com/-/media/committees-groups/committees/teac/2021/20211130/20211130-item-02-market-efficiency-update.ashx>.

<sup>73</sup> Steve Huntoon, "Counterflow: Say It Ain't So, Joe," *RTOInsider*, July 4, 2022. <https://www.rtoinsider.com/articles/30413-counterflow-say-it-aint-so-joe>.

<sup>74</sup> "2021 SAA Proposal Window to Support NJ OSW," PJM Transmission Expansion Advisory Committee, July 18, 2022, pp. 42-43. <https://www.pjm.com/-/media/committees-groups/committees/teac/2022/20220718-special/item-01---nj-osw-saa.ashx>.

**VI. THE AMERICAN PUBLIC POWER ASSOCIATION PROPERLY RECOGNIZES THAT THE COMMISSION’S ROFR PROPOSAL IS UNJUST AND UNREASONABLE, BUT ITS PROPOSED REVISION IS ILLOGICAL.**

The Commission’s ROFR proposal is unjust and unreasonable, and the American Public Power Association (“APPA”) appears to recognize as much.<sup>75</sup> As the APPA states, “Because the NOPR’s proposed approach to qualifying joint ownership arrangements is unlikely to produce the full range of benefits that the Commission describes in the NOPR, the Commission cannot conclude that such an approach is just and reasonable and not unduly discriminatory or preferential.”<sup>76</sup> However, the APPA then argues, essentially, that such a proposal *could be* just and reasonable if the Commission provides more opportunity for joint ownership with not-for-profit public power utilities and electric cooperatives. This argument is illogical – a ROFR does not become just and reasonable depending on which type of entity an incumbent transmission owner chooses as its partner. The reason a ROFR is unjust, unreasonable, and unduly discriminatory or preferential is because it cuts off competition and, as such, produces *rates* that are unjust, unreasonable, and unduly discriminatory or preferential. APPA has not shown that joint ownership between a transmission utility and a not-for-profit electric utility or cooperative would result in project completion at lower cost. Any ROFR, even one for joint ownership between a utility and a not-for-profit electric utility or cooperative, would increase rates in a manner that is unjust and unreasonable, just like the Commission said in Order No. 1000.

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<sup>75</sup> APPA Comments at 12.

<sup>76</sup> APPA Comments at 12.

**VII. TRANSMISSION UTILITIES SUPPORT A ROFR BECAUSE IT IS IN THEIR OWN SELF-INTEREST, NOT BECAUSE IT IS IN THE BEST INTEREST OF CONSUMERS OR RELIABILITY AT THE LOWEST REASONABLE COST.**

The Indicated PJM Transmission Owners (“PJM TOs”), Dominion Energy Services, Inc. (“Dominion”), and Xcel Energy Services, Inc. (“Xcel”) support full reinstatement of a ROFR, without requiring joint ownership.<sup>77</sup> However, the Commission should recognize in this case, as the Commission did when it issued Order No. 1000, that the utility comments support their own self-interest and not benefits to consumers or reliability. The Commission stated in Order No. 1000, “As the Commission recognized in Order Nos. 888 and 890, it is not in the economic self-interest of public utility transmission providers to expand the grid to permit access to competing sources of supply.”<sup>78</sup> In Order 890, the Commission required greater coordination in transmission planning on a regional level. The Commission sought in Order No. 890 for “comparable evaluation of all potential transmission solutions . . . to ensure that the more cost-efficient or cost-effective solutions are in the regional transmission plan.”<sup>79</sup> But implementing a ROFR undermines this evaluation of cost-efficient and cost-effective solutions in the regional transmission plan. The Commission found in Order No. 890 that the incentives inherent to incumbent transmission providers erect barriers to regional transmission development.<sup>80</sup> As is the case with the Commission’s current problem statement, the Commission then found that in an era of increasing congestion and a need for new transmission investment that:

We cannot rely on the self-interest of transmission providers to expand the grid in a nondiscriminatory manner. Although many transmission providers have an incentive to expand the grid to meet their State-imposed obligations to serve, they

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<sup>77</sup> PJM TOs Comments at 5; Dominion Energy Services’ Comments at 7; Xcel Energy Services at 5.

<sup>78</sup> Order No. 1000 at ¶ 253.

<sup>79</sup> See, e.g., *Northwestern Corp.*, 128 FERC P 61,040, at P 38 (2009); *El Paso Electric Co.*, 128 FERC P 61,063, at P 15 (2009); *New York Independent System Operator, Inc.*, 129 FERC P 61,044, at P 35 (2009).

<sup>80</sup> 72 Fed. Reg. 12266 (March 15, 2007). <https://www.govinfo.gov/content/pkg/FR-2007-03-15/pdf/E7-3636.pdf>.

can have a disincentive to remedy transmission congestion when doing so reduces the value of their generation or otherwise stimulates new entry or greater competition in their area. For example, a transmission provider does not have an incentive to relieve local congestion that restricts the output of a competing merchant generator if doing so will make the transmission provider's own generation less competitive. A transmission provider also does not have an incentive to increase the import or export capacity of its transmission system if doing so would allow cheaper power to displace its higher cost generation or otherwise make new entry more profitable by facilitating exports.<sup>81</sup>

There will always be an inefficient investment problem where there is a concentration of supply-side market power combined with the absence of independent planning and economic regulatory oversight. To this end, it is in the utilities' best interest to oppose independent planning and economic regulatory oversight, which is why they support the ROFR.

As the Commission stated in Order No. 1000, "Just as it is not in the economic self-interest of public utility transmission providers to expand transmission capacity to allow access to competing suppliers, it is not in the economic self-interest of incumbent transmission providers to permit new entrants to develop transmission facilities, even if proposals submitted by new entrants would result in a more efficient or cost-effective solution to the region's needs. We conclude that an incumbent transmission provider's ability to use a [ROFR] to act in its own economic self-interest may discourage new entrants from proposing new transmission projects in the regional transmission planning process."<sup>82</sup> It should come as no surprise, then, that incumbent transmission utilities now support reinstatement of a ROFR. What was true in 2011 is just as true now – incumbent transmission utilities will use a ROFR to act in their own economic self-interest to discourage new entrants from proposing new transmission projects in the regional transmission planning process.

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<sup>81</sup> 72 Fed. Reg. 12318 (March 15, 2007)(available at: <https://www.govinfo.gov/content/pkg/FR-2007-03-15/pdf/E7-3636.pdf>).

<sup>82</sup> Order No. 1000 at ¶ 256.

Because of the overly broad exception for local projects, incumbent transmission owners have been able to exclude 97% of projects from competition by circumventing regional planning.<sup>83</sup> The NOPR suggests that this is to be blamed on Order No. 1000 itself. The Commission asserts that Order No. 1000's elimination of ROFRs created "perverse investment incentives", instead of properly recognizing that it was utilities circumventing the type of competition spurred by Order No. 1000. The Commission's assertions, however, ignore that incumbent utilities have always had the investment incentive to own all transmission in their service territory. Transmission utilities support the ROFR because it concentrates their monopoly market power, not because it is in the best interest of reliability or lower transmission rates for consumers. Transmission utilities lack credibility on this issue and their arguments lack merit.

**A. The Commission Should Reject Ameren's Argument That Utilities Will Not Act In Their Own Self-Interest.**

Ameren asserts that if a ROFR is reinstated, the Commission need not be concerned that incumbent utilities will act in a self-interested manner. This assertion strains belief. According to Ameren, the ROFR is just an option for the incumbent utility, so it will not stop transmission from getting built. Further, Ameren asserts that the overlay of FERC-approved transmission planning processes provides assurance that a utility's "self-interest" does not enter into the equation when it comes to deciding which transmission facilities would be in the best interest of the region. Neither of these two points support the proposition that utilities will not act in their own self-interest.

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<sup>83</sup> Johannes Pfeifenberger et al., "Cost Savings Offered by Competition in Electric Transmission," April 2019, pp. 2, 20.  
[https://www.brattle.com/wpcontent/uploads/2021/05/16726\\_cost\\_savings\\_offered\\_by\\_competition\\_in\\_electric\\_transmission.pdf](https://www.brattle.com/wpcontent/uploads/2021/05/16726_cost_savings_offered_by_competition_in_electric_transmission.pdf)



First, ROFRs can and have stopped transmission from getting built. Take, for example, the Hartburg-Sabine Junction 500 kV Line in Texas originally awarded to NEET. Entergy, the primary incumbent utility, altered its generation plans to kill MISO's economic justification for the \$130 million market efficiency transmission project so that it could include a far costlier amount of new generation in its rate base.<sup>84</sup> MISO took the transmission project off the table even though Entergy's generation proposal was not approved by state regulators. This move has been met with resistance from MISO transmission customers and proponents of importing clean, lower-cost energy to the region.<sup>85</sup> And now, the Fifth Circuit has held that the Texas ROFR that killed the Hartburg-Sabine Junction line is discriminatory. Efficient regional transmission development is less likely where competition is inhibited. Entergy's actions regarding the Hartburg-Sabine Junction line are just one straightforward example of how ROFRs enable incumbent utilities to block competitive transmission development when it is in their own self-interest. As the Commission previously observed, Order No. 1000's elimination of ROFRs created perverse incentives for utilities to circumvent competition.<sup>86</sup> Instead of participating in competitive solicitations, incumbent utilities routinely modify their planning to focus investment on local facilities exempt from competition or other means (such as building a generation plant) to thwart competitive transmission development.

Beyond that, Ameren's assertion that the overlay of regional transmission planning processes somehow protects consumers from utilities acting in their own self-interest lacks merit. The Commission found in Order No. 1000 that the ROFRs that existed at the time were causing

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<sup>84</sup> Amanda Durish Cook, "MISO on Verge of Cancelling Hartburg-Sabine Tx Project," RTO Insider, July 21, 2022. <https://www.rtoinsider.com/articles/30505-miso-verge-cancelling-hartburg-sabine-tx-project>.

<sup>85</sup> *Id.*

<sup>86</sup> NOPR at P 350.

utilities to act in their own self-interest to inhibit transmission development.<sup>87</sup> Nothing has changed since the Commission issued that decision to prevent utilities from acting in their own self-interest. As Paul Joskow noted, “For all intents and purpose the [Commission’s transmission] regulatory process is a model of cost pass-through regulation with little scrutiny of costs.”<sup>88</sup> Utilities want to keep it that way, which is why they support monopolization and a presumption of prudence instead of competition. And, if Ameren is correct that utilities will not act in their own self-interest, then they should be indifferent to competition because they can win competitive bids on the same footing as any other competitive participant. Once again, just as the FTC/DOJ stated in their Comments, “Even when the incumbent wins, consumers also win, because incumbents tend to make more competitive proposals when they face competition.”<sup>89</sup>

**B. State ROFRs Are Unconstitutional, Anti-Competitive, And Have Caused Inconsistent Implementation Of Order No. 1000.**

Ameren notes in its Comments that “the exercise of certain state authority over transmission has led to inconsistent implementation of Order No. 1000’s [ROFR] reforms, with some public utility transmission providers within a region effectively retaining a [ROFR], while other do not.”<sup>90</sup> This is true, that state ROFRs have obstructed competition and the development of Order No. 1000’s reforms from fully providing their benefits to consumers. However, Ameren then states that “courts have respected such a field of state regulation ‘to avoid intrusion of the traditional role of the States’ in regulating the siting and construction of transmission facilities and found these laws to be an appropriate exercise of state police powers that do not run afoul of the

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<sup>87</sup> Order No. 1000 at \_\_\_\_.

<sup>88</sup> Paul L. Joskow, MIT Center for Energy and Environmental Policy Research, Working Paper, Competition for Electric Transmission Projects in the U.S.: FERC Order 1000, (March 2019), p. 13.

<sup>89</sup> FTC/DOJ Comments at 13-14.

<sup>90</sup> Ameren Comments at 5.

Dormant Commerce Clause.”<sup>91</sup> This is false. Subsequent to the filing of Initial Comments, the Fifth Circuit issued its Opinion in *NextEra Energy Capital Holdings, Inc. v. Lake* finding that Texas’s state ROFR is an unconstitutional infringement on interstate commerce and thus a direct violation of the Dormant Commerce Clause. The Court found that Texas’s state ROFR discriminates on its face against interstate commerce.<sup>92</sup> Likewise, any ROFR established by the Commission would be discriminatory on its face. However, as previously noted, instead of a Dormant Commerce Clause violation by a state law, a Commission-approved ROFR would be a direct violation of the FPA’s prohibitions on discriminatory and preferential rates.

**C. ROFRs Are Not In The Public Interest; The Commission Should Reject Ameren’s Argument That They Are.**

ROFRs are not in the public interest. Ameren asserts that an unconditional ROFR could serve the public interest by building new transmission more quickly and cost-effectively. This is false. ROFRs would fail to result in timely and cost-effective transmission buildout. In fact, implementing a ROFR is likely to restrict regional transmission development. By giving incumbent monopoly utilities the first right to construct a project, they can agree to construct the project at a cost higher than what would otherwise be achieved. This uneconomic deployment of capital will result in the incumbent utility directing less capital to be spent on other, more beneficial, transmission projects. By directing capital to be allocated to the most economic projects in the most economic manner, as competition does, more capital will be available for the type of regional transmission projects the Commission intends to see developed. The most

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<sup>91</sup> Ameren Comments at 5-6, citing *LSP Transmission Holdings, LLC v. Sieben, et al.*, 954 F.3d 1018, 1031 (8th Cir. 2020), cert. denied, 141 S.Ct. 1510 (2021); see also *NextEra Energy Capital Holdings, Inc. v. Walker*, No. 1:19-CV-626-LY, 2020 WL 3580149 at \*8 (W.D. Tex. Feb. 26, 2020).

<sup>92</sup> *NextEra Energy Capital Holdings, Inc. v. Lake*, \_\_\_\_ F.4th \_\_\_\_ (Aug. 30, 2022).

effective means to free up capital for regional transmission expansion is to remove the seven barriers to competition identified by Grid Strategies and The Brattle Group.<sup>93</sup>

Further, while there may be instances where an incumbent transmission utility could complete a project more quickly, know the state siting processes better, or be well-positioned to make use of existing rights-of-way, they can incorporate those strengths into their competitive bid. If the process takes longer to arrive at a lower-cost solution, so be it (if it is even true). The primary aim of the FPA is to protect consumers from discriminatory rates – not to ensure timely expansion.<sup>94</sup> Monopoly power harms consumers, even in instances where it may result in project completion more quickly. For example, an early 20<sup>th</sup> Century oil-distribution monopoly (*e.g.* Standard Oil) might have been capable of delivering oil more quickly than by a competitive market. Or, for certain projects, the oil monopoly might even have been able to set prices below market. But it is the presence of monopoly market power, not the exercise of it, that the Sherman Act prohibits.<sup>95</sup> Monopoly market power is inherently discriminatory, even for those monopolies (like transmission utilities) that are excepted from the Sherman Act. The Sherman Act rests on the premise that on a market-wide basis, free and unfettered competition “will yield the best allocation of our economic resources, and lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation

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<sup>93</sup> Johannes Pfeifenberger et al., “Transmission Planning for the 21<sup>st</sup> Century: Proven Practices that Increase Value and Reduce Costs,” October 2021, pp. 19-23. (available at: <https://www.brattle.com/wp-content/uploads/2021/10/Transmission-Planning-for-the-21st-Century-Proven-Practices-that-Increase-Value-and-Reduce-Costs.pdf>) (small utility planning areas, differing transmission owner incentives between local and regional plans, economies of scale, economies of scope, network externalities, horizontal market power, and vertical market power).

<sup>94</sup> See *Xcel Energy Services v. FERC*, 815 F.3d 947, 952-53 (D.C. Cir. 2016).

<sup>95</sup> See *Standard Oil Co. v. United States*, 221 U.S. 1 (1911) (“The monopoly of a trade at common law was forbidden because, and only because, it excluded all others from practicing such trade . . . It was and is a distinct thing from engrossing, regrating or forestalling the market, all of which were based on the prevention of artificial prices for the necessities of life.”).

of our democratic, political and social institutions.”<sup>96</sup> Consistent with the rationale of the Sherman Act, in Order No. 1000 “the Commission rested its [ROFR] ban on competition theory, determining that [ROFRs] posed a barrier to entry that made the transmission market inefficient, that transmission facilities would therefore be developed at a higher-than-necessary cost, and that those amplified costs would be passed on to transmission customers.”<sup>97</sup> This is consistent with the United States Supreme Court’s finding that “The [FPA] did not render antitrust policy irrelevant to the Commission’s regulation of the electric power industry.”<sup>98</sup> Similarly, the D.C. Circuit has observed that the Commission’s “authority generally rests on the public interest in constraining exercises of market power.”<sup>99</sup> And, in this case, the Federal Government, in the form of the Department of Justice and Federal Trade Commission, have filed Comments demonstrating that ROFRs increase barriers to entry and distort the competitive process, whereas competition can “solve the problems FERC has identified.”<sup>100</sup> Prohibiting monopoly market power, even by regulated monopoly utilities, preserves the democratic and social institutions of this nation. Accordingly, competition is in the public interest, not ROFRs.

**D. The Commission Should Reject Arguments By Ameren And Others That Competitive Processes Do Not Result In Timely Transmission Expansion.**

The evidence in this case demonstrate that competition completes projects more quickly and at lower cost than what would be achieved by a ROFR. While improvements can be made to competitive processes, and are being made over time, the evidence and real-world experience do not show that competition delays needed transmission investment or completion. In fact, as

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<sup>96</sup> *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958).

<sup>97</sup> *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 77.

<sup>98</sup> *Gulf States Utilities Co. v. Fed. Power Comm’n*, 411 U.S. 747, 758-59 (1973).

<sup>99</sup> *Nat’l Ass’n of Reg. Util. Comm’rs v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007).

<sup>100</sup> FTC/DOJ Comments.

competitive processes have become better managed by ISO/RTOs, delays associated with these processes have become minimal or nonexistent. For example, schedule guarantees have become more and more common in competitive solicitations, resulting in timely project completion or, in some cases, project completion ahead of schedule. Project completion today is significantly accelerated relative to the pre-competitive era.<sup>101</sup> Moreover, for projects that cannot be timely completed, there are often cost offsets that would not have existed if the project were being developed by an incumbent utility in a non-competitive environment.<sup>102</sup> As LS Power notes in the affidavit of its President, the “unreasonable length of many of the processes was an intentional feature of the processes to allow assertions by those opposed to competition that the processes are cumbersome. This view is supported by a review of the parties that now repeatedly argue that the processes are cumbersome, which are generally among the very parties that devised the processes currently in place but who vehemently oppose competition.”<sup>103</sup> LS Power is not alone in recognizing that utilities have acted in their own self-interest to obstruct competitive processes from developing.

**E. The Commission Should Reject Ameren’s Allegation That, With A ROFR, FPA Section 205 Will Protect Consumers From Unjust And Unreasonable Rates.**

Competition is the best means for the Commission to ensure just and reasonable rates. However, Ameren alleges that if the Commission establishes a ROFR, FPA Section 205 will protect consumers from unjust and unreasonable rates. The fallacy in Ameren’s argument is that FPA Section 205 rate proceedings will exist with competition as much as without it. Ameren argues that if a transmission utility exercises a ROFR, consumers can utilize FPA Section 205 to

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<sup>101</sup> NextEra Comments at 37-39.

<sup>102</sup> NextEra Reply Comments, Attachment A, Affidavit of Dr. John Morris.

<sup>103</sup> LS Power Comments at Affidavit of Paul Thessen at 12.

challenge the prudence of the incumbent utility's costs. However, because FPA Section 205 applies to all projects, the reverse is also true – if a project is competitively developed, consumers can utilize FPA Section 205 to challenge the prudence of the competitive developer's costs. FPA Section 205 is a consumer protection mechanism with or without a ROFR. Ameren itself even points out that even when a non-incumbent wins an Order No. 1000 competitive solicitation, FPA Section 205 is still the way the Commission ensures just and reasonable rates. Accordingly, Ameren's argument lacks merit.

**VIII. TO PROMOTE REGIONAL TRANSMISSION DEVELOPMENT, THE COMMISSION SHOULD REQUIRE REGIONAL PLANNING AND COMPETITION FOR ALL PROJECTS ABOVE 100 KV.**

The Commission should adopt a uniform, objective voltage threshold of 100 kV for regional planning and competition to eliminate much of the incumbent transmission owner gaming of the exemptions to competition. The Commission should adopt a bright-line 100 kV threshold for competition eligibility to ensure consumers receive the full benefits of transmission development at the lowest reasonable cost. A voltage threshold of 100 kV would provide a bright-line, non-subjective criterion for determining transmission projects eligible for competitive solicitations. The Commission, as well as the North American Electric Reliability Corporation (“NERC”), have historically recognized that power lines 100 kV and above are considered transmission facilities and are part of the bulk electric system.<sup>104</sup> Further, there should be no difference in the application of the 100 kV bright-line threshold between new build transmission facilities and upgrades that are necessary to accommodate generator interconnections. All

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<sup>104</sup> Revision to the Electric Reliability Organization Definition of Bulk Electric System, Order No. 743, 133 FERC ¶ 61,150 at P 30 (2010).

transmission facility upgrades at 100 kV and above, including generator-funded upgrades, should be subject to competition.

Further, the Organization of PJM States, Inc. (“OPSI”) notes that for many small projects and locally planned projects, existing processes only provide transparency to *observe* that they are being constructed.<sup>105</sup> For example, in PJM’s M-3 process, many stakeholders find it difficult to see the full benefit of participation in PJM’s process because the transmission owners are under no obligation to respond to stakeholder questions or even acknowledge their receipt. Further, while these processes allow stakeholders to see that local and small projects are being constructed, as well as data about the project, they generally do not demonstrate whether the transmission need could have been addressed in a lower-cost manner, or whether it would have been alleviated altogether in another way. As noted above, by requiring competition for all projects 100 kV and above, the cost of local and smaller projects would decrease, resulting in more capital available for the types of regional projects that the Commission desires to support. Importantly, requiring competition for all projects 100 kV and above would not impose upon state jurisdiction or oversight for local projects, but only ensure that competition is implemented by ISO/RTOs and transmission utilities. As the Pennsylvania Public Utilities Commission (“PaPUC”) notes, “projects built by incumbent transmission owners are demonstrably more expensive in almost every case. By mile and by peak load served, over the last decade, PJM baseline projects, which are mostly subject to competition, are less expensive than transmission owner-driven local ‘supplemental’ projects.”<sup>106</sup> For this reason, regional planning and competition for all projects

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<sup>105</sup> OPSI Comments at 6.

<sup>106</sup> PaPUC Comments at 22, citing 2021 PJM Regional Transmission Expansion Plan at 294-295, <https://www.pjm.com/-/media/library/reports-notices/2021-rtep/2021-rtep-report.ashx> (accessed Sept. 14, 2022).



100 kV and above will reduce transmission costs to consumers while freeing up capital for regional transmission development.

**IX. THE COMMISSION SHOULD ESTABLISH INDEPENDENT TRANSMISSION MONITORS (“ITMs”) AND INDEPENDENT TRANSMISSION PLANNERS (“ITPs”) IN COLLABORATION WITH COMPETITION.**

The Commission should establish ITPs and ITMs in all regions. The ITP would conduct transmission planning and cost allocation, generator interconnection studies, competitive solicitations, and coordination with other regions. The Commission should also establish ITMs to oversee the ITP’s compliance with transmission planning and cost allocation processes, competitive solicitations, and coordination efforts. Comments filed in this case underscore the need for the Commission to establish and appoint both ITPs and ITMs.

As one example of comments that underscore the needs for ITPs and ITMs, Exelon notes that consideration and implementation of Grid-Enhancing Technologies ("GETs") in transmission planning processes could become a time-consuming check-the-box exercise.<sup>107</sup> But ITPs and ITMs could ensure that transmission planners and utilities undertake good-faith considerations of GETs, as well as good faith commitments to competitive transmission planning and construction. ITPs and ITMs do not need to be started from scratch in all regions – the organizational infrastructure for such entities exists in many regions. Existing ISO/RTOs are essentially the ITPs for those regions, but the Commission should appoint new ITPs in non-ISO/RTO regions to prevent transmission owners from switching between regions. Additionally, existing market monitors could seamlessly step into the ITM role with minimal changes to the existing market monitors’ scope of authority. The Commission should provide this authority to the existing independent market monitors. The ITPs and ITMs, properly established alongside competitive

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<sup>107</sup> Exelon Comments at 23.

processes, could dramatically reduce incumbent transmission owner impediments to competition. For example, if utilities are constructing lower voltage or small projects in order to circumvent competitive processes (as they are), then the ITPs and ITMs could work to identify how this is preventing regional transmission development and provide solutions to the problem. Appointing ITPs and ITMs would ensure that the consumer protections and consumer benefits that come with competition are fully realized.

The Competition Coalition reiterates the value of ITPs and ITMs and asks the Commission to pursue avenues toward requiring ITPs and ITMs in all Order No. 1000 regions. Even if the Commission does not require ITPs and ITMs in this NOPR, the Competition Coalition welcomes the thorough examination of the merits of independent governance institutions in other proceedings, such as the October 6, 2022, technical conference on transmission planning and cost management.<sup>108</sup>

**A. The Commission Should Appoint The ISO/RTO As The ITP In Its Respective Region And Appoint New ITPs In All Non-ISO/RTO Regions.**

The Competition Coalition supports a well-defined ITP in all interstate transmission regions (with ITMs to oversee these ITPs).<sup>109</sup> The Consumer Study stresses the imperative of having an ITP in all planning regions to eliminate the concern over incumbent transmission owners leaving RTO/ISOs for other regions where there is no ITP.<sup>110</sup> The Competition Coalition recommended in the ANOPR Comments that an ITP should be tasked with conducting transmission planning and cost allocation, generator interconnection studies, competitive

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<sup>108</sup> See <https://www.ferc.gov/news-events/events/technical-conference-transmission-planning-and-cost-management-10062022>.

<sup>109</sup> Chen and Hartman, 2022, at 13.

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

solicitations, and coordination with other regions.<sup>111</sup> The ISO/RTOs can already do this, but the Commission should ensure that there are not some regions with an ITP and others without, to prevent transmission owners from switching between regions in order to avoid competition. The purpose of the ITP is to conduct transmission planning and cost allocation, competitive solicitations, and coordination, so the ITP would work collaboratively with competition. The ITP would develop competitive processes to meet the Commission's goal of maintaining reliability at the lowest reasonable cost, while furthering the FPA's primary aim to protect consumers from excessive rates and charges.

**B. The Commission Should Appoint Existing Independent Market Monitors As The ITMs in ISO/RTO Regions And Appoint New ITMs In Non-ISO/RTO Regions.**

In RTO/ISO regions, the Commission should appoint existing market monitors to fulfill the role of an ITM with explicit authority to monitor administration of all transmission-related aspects of the RTO/ISO tariff. Outside of RTO/ISO regions, the ITM should be established as a stand-alone entity, separate and apart from, and with monitoring and reporting responsibility concerning the actions of the ITP. This ITM would further work to ensure that these competitive transmission processes are not established or implemented in a manner that undermines expedience. The ITM would also monitor compliance with the rules for competitive transmission processes, make suggestions for process improvements, and report any rules violations directly to the FERC Office of Enforcement.

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<sup>111</sup> Competition Coalition ANOPR Comments at 20 (see [http://electricitytransmissioncompetitioncoalition.org/wp-content/uploads/COMPETITION\\_COALITION-ANOPR-Comments-Filed1.pdf](http://electricitytransmissioncompetitioncoalition.org/wp-content/uploads/COMPETITION_COALITION-ANOPR-Comments-Filed1.pdf)).

**C. Existing ISO/RTOs Should Be Prohibited From Acting As Independent Transmission Monitors.**

The Competition Coalition supports both ITPs and ITMs in all Commission-jurisdictional regions. ISO/RTOs should serve as ITPs, and existing market monitors should serve as ITMs. However, under no circumstance should an ISO/RTO be appointed to serve as an ITM. The ITM is a monitoring role, much like existing market monitors, and putting the transmission operator in the role of monitor would be counter-intuitive, as well as potentially harmful to the goals the Commission intends to achieve. For example, there is ample evidence in this case that transmission utilities are targeting small-scale and local transmission upgrades in order to circumvent currently existing competitive regional transmission processes. Meanwhile, existing ISO/RTOs have been ineffective at stopping or even slowing this behavior by transmission utilities, or analyzing whether it is prudent from an over-all transmission planning perspective. The ISO/RTOs can fulfill the transmission planning role (*i.e.* the ITP) but not the transmission monitoring role (*i.e.* the ITM). To reduce transmission costs to consumers while at the same time promoting regional transmission projects, the Commission should embrace competition and appoint transmission monitors to ensure that competitive processes are being implemented, followed, and successful. This role can most effectively be fulfilled by existing market monitors; appointing ISO/RTOs to this role would undermine the very purpose of having a monitor.

**X. FPA SECTION 309 DOES NOT PROVIDE THE COMMISSION WITH AUTHORITY TO REWRITE ORDER NO. 1000.**

The Commission's proposal to use FPA Section 309 to rewrite Order No. 1000 is unlawful, but also inconsistent with the policies of the current administration. The Competition Coalition opposes the Commission's usage of FPA Section 309 to implement new ROFRs. Ostensibly realizing the legal invalidity of relying on Section 309, EEI, WIRES, DATA, the PJM TOs, and others do not support the Commission's use of FPA Section 309 to amend its rules to reinstate a

ROFR.<sup>112</sup> For example, WIRES asserts that “the Commission should require whatever change it makes concerning ROFR pursuant to its authority under FPA section 206, rather than under FPA section 309.”<sup>113</sup>

Quite simply, FPA Section 309 does not provide the Commission with authority to amend its rules to reinstate a ROFR, and the Comments filed in this case do not provide an evidentiary or legal basis for the Commission to attempt to implement such authority where it does not exist. The MISO Transmission Owners aver that FPA Section 309 gives the Commission broad remedial authority to correct its own errors, but provide no legal analysis, precedent, or argument to back up their support. While FPA Section 309 may provide broad remedial authority, it is still subject to the normal limits of statutory interpretation.<sup>114</sup> To this end, FPA Section 309 does not give the Commission discretion to adopt rules that are inconsistent with statutory authority, including the FPA and numerous opinions requiring rates to be just, reasonable, and not unduly discriminatory or preferential.

## **XI. CONCLUSION**

The Competition Coalition requests that the Commission adopt rules that support competition. As noted in the Initial Comments filed by the Competition Coalition, the Coalition includes all of the following

Ag Processing	Ardagh Group
Alliance of Western Energy Consumers	Arglass Yamamura
Aluminum Association	Arkansas Electric Energy Consumers, Inc.
American Chemistry Council	Arkansas Forest and Paper Council
American Forest and Paper Association	Association of Businesses Advocating for
American Foundry Society	Tariff Equity
American Iron and Steel Institute	CalPortland Company

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<sup>112</sup> EEI Comments at 35 (recommending that the Commission rely exclusively on FPA Section 206); WIRES Comments at 16; DATA at 17-18; [Comments] at \_\_\_\_\_;

<sup>113</sup> WIRES Comments at 16.

<sup>114</sup> See *Niagara Mohawk Power Corp. v. Federal Power Commission*, 379 F.2d 153 (D.C. Cir. 1967).

Can Manufacturers Institute  
 Carolina Industrial Group for Fair Utility Rates  
 Carolina Utility Customers Association, Inc.  
 Century Aluminum  
 Chemistry Council of New Jersey  
 Chemical Industry Council of Illinois  
 Coalition of MISO Transmission Customers  
 Coastal Energy Corporation  
 Commercial Metals Company  
 Council of Industrial Boilers Organization  
 Delaware Energy Users Group  
 Digital Realty  
 Domtar Corporation  
 Eramet Marietta Inc.  
 Formosa Plastics Corporation, U.S.A.  
 Foundry Association of Michigan  
 Gerdau Ameristeel Inc.  
 Glass Packaging Institute  
 Illinois Industrial Energy Consumers  
 Indiana Cast Metals Association  
 Indiana Industrial Energy Consumers  
 Industrial Energy Consumers of America  
 Industrial Energy Consumers of Pennsylvania  
 Industrial Energy Users-Ohio  
 Industrial Minerals Association-North America  
 Iowa Business Energy Coalition  
 Iowa Industrial Energy Group, Inc.  
 Iron Mining Association of Minnesota  
 Large Energy Users Coalition (NJ)  
 Lehigh Hanson, Inc.  
 LS Power Development, LLC  
 Maine Industrial Energy Consumer Group  
 Marathon Petroleum Company  
 Messer Americas  
 Metalcasters of Minnesota  
 Michigan Chemistry Council  
 Midwest Food Products Association  
 Minnesota Large Industrial Group  
 Multiple Intervenors, NY  
 National Council of Textile Organizations  
 National Retail Federation  
 NextEra Energy, Inc.  
 North Carolina Manufacturers Alliance  
 NovoHydrogen  
 Office of the People's Counsel for the District of Columbia  
 Ohio Cast Metals Association  
 Ohio Chemistry Technology Council  
 Ohio Energy Group  
 Ohio Manufacturers' Association  
 Oklahoma Industrial Energy Consumers  
 Olin Corporation  
 Owens-Illinois  
 Pennsylvania Energy Consumer Alliance  
 PJM Industrial Customer Coalition  
 Portland Cement Association  
 Public Citizen, Inc.  
 R Street  
 Resale Power Group of Iowa  
 Retail Industry Leaders Association  
 Riceland Foods, Inc.  
 Rio Tinto  
 Skana Aluminum Company  
 Steel Manufacturers Association  
 Texas Cast Metals Association  
 TimkenSteel Corporation  
 Vallourec STAR LP  
 Vinyl Institute  
 Virginia Manufacturers Association  
 West Virginia Energy Users Group  
 Wisconsin Cast Metals Association  
 Wisconsin Industrial Energy Group

WHEREFORE, the Competition Coalition respectfully request that the Commission afford due consideration to these Reply Comments.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By: */s/ Robert A. Weishaar, Jr.*

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Robert A. Weishaar, Jr.  
1200 G Street NW, Suite 800  
Washington, DC 20005  
Phone: (202) 898-5700  
Fax: (717) 260-1765  
Email: bweishaar@mcneeslaw.com

Bryce A. McKenney  
21 East State Street, 17<sup>TH</sup> Floor  
Columbus, OH 43215  
Phone: (614) 719-2842  
Fax: (614) 469-4653  
Email: bmckenney@mcneeslaw.com

Counsel to the Industrial Energy Consumers of America, the American Forest & Paper Association, the PJM Industrial Customer Coalition, and the Coalition of MISO Transmission Customers, and on behalf of the American Chemistry Council and many other member companies and organizations that comprise the Electricity Transmission Competition Coalition

Dated: September 19, 2022

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served, via first-class mail, electronic transmission, or hand-delivery the foregoing upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 19<sup>th</sup> day of September, 2022.

*/s/ Robert A. Weishaar, Jr.*

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Robert A. Weishaar, Jr.  
McNees Wallace & Nurick LLC  
1200 G Street, NW, Suite 800  
Washington, DC 20005  
Phone: (202) 898-5700  
Fax: (717) 260-1765  
Email: [bweishaar@mcneeslaw.com](mailto:bweishaar@mcneeslaw.com)



## **Appendix A**

### **Electricity Transmission Competition Coalition Members**

#### **Alliance of Western Energy Consumers**

A non-profit organization comprised of manufacturing companies in the western states.

#### **Ag Processing**

A leading U.S. agribusiness with primary operations as a soybean processor/refiner producing and marketing soybean meal, refined soybean oil, and biodiesel.

#### **Aluminum Association**

The association is the industry's leading voice, representing companies that make 70% of the aluminum and aluminum products shipped in North America.

#### **American Chemistry Council**

Represents more than 190 companies engaged in chemical and plastics production.

#### **American Forest & Paper Association**

Represents companies who make the paper and wood products Americans use every day.

#### **American Foundry Society**

Represents the metal casting industry nationwide.

#### **American Iron and Steel Institute**

The voice of the American steel industry in the public policy arena.

#### **Ardagh Group**

A global supplier of sustainable, infinitely recyclable, metal and glass packaging for brand owners around the world.

#### **Arglass Yamamura**

A major glass producer.

#### **Arkansas Electric Energy Consumers, Inc.**

Represents diverse manufacturing companies in Arkansas on electricity issues.

#### **Arkansas Forest and Paper Council**

Represents the major paper related companies in Arkansas.

#### **Association of Businesses Advocating for Tariff Equity**

Represents manufacturing entities before regulatory and governmental bodies that affect Michigan's energy prices, reliability, and terms and conditions of service.

#### **CalPortland Company**

CalPortland, a major producer of cement with operations through-out the western states.

#### **Can Manufacturers Institute**

Represents manufacturers that produce cans nationwide.

### **Carolina Industrial Group for Fair Utility Rates**

Represents manufacturing companies on energy issues in North Carolina.

### **Carolina Utility Customers Association, Inc.**

Represents North Carolina industry and manufacturing by securing reliable energy services at the lowest possible cost.

### **Century Aluminum**

A global producer of primary aluminum and operates aluminum reduction facilities in the United States.

### **Chemistry Council of New Jersey**

Represents the chemical industry in New Jersey.

### **Chemical Industry Council of Illinois**

Represents the chemical industry in the state of Illinois.

### **Coalition of MISO Transmission Customers**

Represents large diverse electricity intensive manufacturing on MISO electricity related issues.

### **Coastal Energy Corporation**

Manufacturer and distributor of asphalt products.

### **Commercial Metals Company**

A steel producer with 41 facilities in several states and whose products are used in sports stadiums, public buildings, highways, bridges, railways and other structures.

### **Council of Industrial Boilers Organization**

Represents non-utility industrial, commercial and institutional energy producers in order to continue to provide safe, cost-effective and reliable energy.

### **Delaware Energy Users Group**

Represents large manufacturing companies on electricity issues in the state of Delaware.

### **Digital Realty**

Builds and operates data centers. 290 in operation with \$3.2 billion in revenues.

### **Domtar Corporation**

Produces North America's largest selection of uncoated papers - from high-quality office, printing and digital papers to innovative converting and specialty papers with \$6 billion in revenues.

### **Eramet Marietta Inc.**

A metallurgical manufacturing company located in Marietta, Ohio.

### **Formosa Plastics Corporation, USA**

A vertically-integrated supplier of plastic resins and petrochemicals with annual revenues of more than \$5 billion, we employ over 3,000 people.

**Foundry Association of Michigan**

Represents Michigan metal casters.

**Gerdau Ameristeel Inc.**

A major producer of steel and special steel products.

**Glass Packaging Institute**

Represents the North American glass container industry.

**Illinois Industrial Energy Consumers**

Represents large diverse manufacturing companies on electric issues in the state of Illinois.

**Indiana Cast Metals Association**

Represents companies in the cast metals industry in Indiana.

**Indiana Industrial Energy Consumers**

Represents large users of energy in Indiana on electricity issues.

**Industrial Energy Consumers of America**

A non-profit non-partisan organization that represents major diverse manufacturing companies on electricity and natural gas issues in Washington, DC. Members have \$1.1 trillion in annual sales, over 11,700 facilities nationwide, and with more than 1.8 million employees.

**Industrial Energy Consumers of Pennsylvania**

Represents energy-intensive manufacturing customers on electricity issues in the Commonwealth of Pennsylvania.

**Industrial Energy Users-Ohio**

Represents energy-intensive Ohio industrial and commercial manufacturers on electricity, natural gas and related energy services.

**Industrial Minerals Association-North America**

Represents the interests of North American companies that mine or process minerals used throughout the manufacturing and agricultural industries.

**Iowa Business Energy Coalition**

Represents diverse commercial entities on electricity issues in Iowa.

**Iowa Industrial Energy Group, Inc.**

Represents diverse industrial Iowa-based companies on electricity issues.

**Iron Mining Association of Minnesota**

Represents iron ore mining industry in Minnesota.

**Large Energy Users Coalition (NJ)**

Represents industrial, commercial, and non-profit consumers on energy matters in the state of New Jersey.

**Lehigh Hanson, Inc.**

A major producer of cement, aggregates, ready mixed concrete, asphalt, pipes, pavers, tiles, bricks, and construction materials with over 200 facilities across the US.

**LS Power Development, LLC**

LS Power is a development, investment, and operating company focused on power generation, electric transmission and energy infrastructure.

**Maine Industrial Energy Consumer Group**

Represents industrial and commercial companies on electricity issues in Maine.

**Marathon Petroleum Company**

A major producer of refined energy products with operations nationwide with revenues over \$70 billion.

**Messer Americas**

A leading industrial and medical gas producer.

**Metalcasters of Minnesota**

Represents metal casting companies in the state of Minnesota.

**Michigan Chemistry Council**

Represents the chemical industry in in Michigan which supports 80,000 jobs in the state.

**Midwest Food Products Association**

Represents the food products industry in Minnesota, Wisconsin and Illinois.

**Minnesota Large Industrial Group**

Represents major energy intensive companies on energy issues in Minnesota.

**Multiple Intervenors, NY**

Represents large industrial, commercial and institutional energy consumers with manufacturing and other facilities located throughout New York State.

**National Council of Textile Organizations**

Represents the textile industry nationwide.

**National Retail Federation**

Represents the retail industry nationwide and the nation's largest private-sector employer that contributes \$3.9 trillion to the annual GDP.

**NextEra Energy**

The world's largest utility company with revenues over \$18 billion.

**North Carolina Manufacturers Alliance**

Represents North Carolina manufacturers on legislative and regulatory issues.

**NovoHydrogen**

NovoHydrogen deploys energy transition technologies that includes solar, wind, hydrogen and battery storage assets.

**Office of the People’s Counsel for the District of Columbia**

The Office of the People's Counsel is an independent agency of the District of Columbia government and advocates for consumers of natural gas, electric, and telephone services.

**Ohio Cast Metals Association**

Represents the cast metals industry in Ohio.

**Ohio Chemistry Technology Council**

Represents the chemistry technology industry in the public policy arena in Ohio.

**Ohio Energy Group**

An organization of large energy-intensive, trade-exposed utility customers who share a common aim of securing reliable service at competitive rates.

**Ohio Manufacturers’ Association**

Represents Ohio manufacturing companies from transportation of raw materials to manufacturing design and production, to delivery of finished products.

**Oklahoma Industrial Energy Consumers**

Represents Oklahoma industrial consumers on energy issues.

**Olin Corporation**

A major producer of chlor alkali, vinyls and epoxy products with revenues of over \$6 billion.

**Owens-Illinois**

A major glass producer with multiple facilities across the US with revenues over \$7 billion.

**Pennsylvania Energy Consumer Alliance**

Represents diverse manufacturers on electricity issues in Pennsylvania.

**PJM Industrial Customer Coalition**

Represents large manufacturing companies on electricity issues in PJM.

**Portland Cement Association**

Represents America’s cement manufacturers.

**Public Citizen, Inc.**

A nonprofit consumer advocacy organization that champions the public interest with 500,000 members and supporters throughout the country.

**R Street**

A nonprofit, nonpartisan, public policy research organization. Our mission is to engage in policy research and outreach to promote free markets and limited, effective government.

**Resale Power Group of Iowa**

An association of public and private agencies existing pursuant to an agreement authorized by Chapter 28E of the Code of Iowa that purchases electric energy,

capacity, and transmission service as agent for and on behalf of members.

### **Retail Industry Leaders Association**

The US trade association for leading retailers.

### **Riceland Foods, Inc.**

Provides marketing services for rice and soybeans grown by its 5,500 farmer-members in Arkansas and Missouri.

### **Rio Tinto**

A leading global mining company that focuses on finding, mining and processing the Earth's mineral resources with revenues over \$65 billion.

### **Skana Aluminum Company**

A large producer of aluminum products.

### **Steel Manufacturers Association**

Represents the electric arc furnace (EAF) steel industry, which accounts for 70% of domestic steel made today.

### **Texas Cast Metals Association**

Represents foundries, die casters, steel mills, as well as other peripheral businesses who share a common goal in promoting the needs of the metals industry.

### **TimkenSteel Corporation**

TimkenSteel is a leading steel manufacturer of world-class, custom clean steel.

### **Vallourec STAR LP**

Produces steel products in 20 US locations.

### **Vinyl Institute**

Represents the leading manufacturers of vinyl, vinyl chloride monomer, and vinyl additives and modifiers.

### **Virginia Manufacturers Association**

The only statewide association exclusively dedicated to manufacturers and their allies.

### **West Virginia Energy Users Group**

Represents large, energy intensive industrial, chemical and institutional companies on electricity issues in West Virginia.

### **Wisconsin Cast Metals Association**

Represents foundries in Wisconsin.

### **Wisconsin Industrial Energy Group**

Represents manufacturing companies in support of affordable and reliable energy.

## **Appendix B**

### **NOPR Comments Supporting Transmission Competition and Opposing the Proposed ROFRs**

#### **Advanced Energy Buyers Group**

- “Efficient, competitive transmission infrastructure will deliver customer cost savings, improve reliability outcomes, and enable the transition to a decarbonized electricity system that is being driven by shifts in technology, policy, and the needs and preferences of customers such as the members of the AEBG.” (page 2)
- “In summary, AEBG expressed support for transmission policies that would: ...(2) Always consider and aim to minimize the cost of meeting transmission needs (e.g., through competition and through use of grid-enhancing technologies); (3) Improve the reliability and market efficiency of necessary transmission expansion (e.g., by leveraging the benefits of competition); ... AEBG stands by these principles, and emphasizes the importance of identifying opportunities to unlock the most cost-effective renewable energy resources while minimizing the costs of transmission investment by increasing the efficiency of existing transmission infrastructure and leveraging the benefits of competition.” (page 4)
- “Consistent with our support of competition as a means to reduce the cost of needed transmission buildout, AEBG does not support finalization of any reinstatement of the federal Right of First Refusal in a final rule in this proceeding, and we support the comments of Advanced Energy Economy urging the Commission to instead take this issue up through another vehicle, such as the pending cost containment proceeding in Docket AD22-8-000.” (footnote 6, page 4)

#### **Advanced Energy Economy**

- “For these reasons, AEE recommends that the Commission decline to finalize its proposed partial reinstatement of the federal ROFR in the final rule, and instead conduct a fulsome examination of the issues surrounding transmission competition in another docket (such as the pending cost containment docket) before proceeding to make changes.” (page 37)

#### **Americans Clean Power Association (ACP), MAREC Action, Clean Grid Alliance, The Alliance for Clean Energy-New York, and New York Offshore Wind Alliance**

- “The Clean Energy Associations do not take a position on the Commission’s proposal to allow federal Rights of First Refusal for regional transmission projects that utilize a joint ownership structure, or whether a ROFR should be provided to facilities identified through ‘right-sizing’. However, consistent with ACP’s past positions on MISO and SPP’s proposals for storage-as-transmission, the Clean Energy Associations urge the Commission to determine that ownership and operation of these resources is open to any qualified entity.” (page 42)

### **Americans for Fair Energy Prices, Inc**

- “Simply put, the ROFR should be removed from the NOPR.” (page 2)
- “Without competition, the only other option is more regulation, which would likely drive costs higher.” (page 3)
- “It is clear that competitive bids for transmission would provide savings to consumers.” (page 3)
- “Consumers’ need for immediate improvement in transmission planning and delivery at the lowest reasonable cost is of the utmost importance. Reinstating the federal ROFR would increase costs to consumers, delay improvements to regional development, and counter the Commission’s efforts to improve competition in markets. Going backwards and spending more time to remove competition is not the right approach. Removing the ROFR [proposal] would help the Commission move forward in the development and implementation of electric transmission.” (page 4)

### **Anbaric**

- “The short answer is that the proposed Conditional ROFR in no way aligns with the pro-competition goals embodied in the Order No. 1000 reforms. The proposal will harm consumers, as its adoption would cement further the demonstrated hold that many incumbent transmission owners have on the development of new and needed facilities. Worse, this proposal will undermine efforts in regions which competition has been, and continues to be, used successfully to select project developers.” (page 12)
- “That many incumbents prefer projects that can be built without the fear of competition is not surprising. But this preference is not a reason to jettison competition and its benefits it provides customers. It is instead a reason to close the loopholes left by Order 1000.” (page 14)
- “Allowing for the possibility that some third parties could buy into a portion of a project developed by an incumbent is not a substitute for competition. And, in any event, beneficial joint ownership is far more likely to emerge when competition is permitted to flourish.” (page 16-17)
- “Concerns about placing control in the hands of incumbents is particularly acute with respect to the development of transmission needed to connect offshore wind.” (page 17)
- “But the incumbent transmission owners, who may receive ROFR rights over land-based improvements, have an incentive to support more expensive onshore upgrades that will be needed if offshore wind generation is integrated through suboptimal, radial-by-radial interconnection facilities. In other words, the incumbents-unlike competitive entrants-have little incentive to implement the most efficient offshore wind transmission configuration-and the Conditional ROFR insulates them from needing to do so.” (page 17)
- “Worse, the Conditional ROFR as proposed leaves ample room for gaming and abuse. The NOPR is express that partnerships between affiliated entities will not meet the requisite "condition" (NOPR P 371), but is silent as to other arrangements that are equally undesirable. While the NOPR states that the Commission "intend[s] for incumbent transmission providers pursuing joint-ownership proposals to offer unaffiliated entities a reasonable chance at meaningful participation," it fails to foreclose the potential for two incumbent transmission



owners (or their affiliates) to team up and swap a portion of their respective projects as a means to satisfy the joint ownership requirement. Id. These seemingly acceptable arrangements would simply maintain the status quo.” (page 18)

- “Accordingly, any expectation that jointly-owned projects will benefit from the diverse experience and abilities of non-incumbent participants will not be served by a policy that subordinates those experiences and abilities to incumbent control” (page 19)
- “But if the Commission intends for "meaningful participation" requirement to be met with a third-party ownership share that is well below 50%, then we expect the effect of such participation to be little more than window dressing on what would otherwise be simply another incumbent project.” (page 20)
- ” Rather than turn away from a competitive regime that continues to hold great promise and has not been given sufficient chance to work, the Commission should affirm Order 1000's mandates and expand opportunities for competitive transmission development. Doing so requires removing the "immediate need" and other exceptions approved in various ISO and RTO Order 1000 compliance plans.” (page 21)

### **American Chemistry Council**

- “While acknowledging that under the current policy, Transmission Providers may be underinvesting in Regional transmission to circumvent the competitive process, ACC questions where reinstating a broad right of first refusal "ROFR" policy is the proper solution, with or without the requirement for joint ownership. For a more detailed discussion on the risks and benefits of the current proposal, ACC directs the Commission to the comments of the Electricity Transmission Competition Coalition. ACC recommends FERC consider whether there may be other policy options, short of reestablishing ROFR, that would address the infirmities of the current policy and retain the benefits of competition while incentivizing appropriate attention to Regional Transmission needs. To provide time for this analysis, ACC recommends FERC establish a separate proceeding focusing on the competition issue, with a focus on identifying more targeted policy reforms to prioritize regional transmission investment.” (page 8)

### **California Department of Water Resources State Project**

- “Yet, in-kind replacements constitute the majority of spending within CAISO - PG&E, for example, spends 75% of its overall revenue requirement on asset management projects. In the NOPR, the Commission expressed its concerns "that local transmission planning processes may lack adequate provisions for transparency and meaningful input from stakeholders, and that regional transmission planning processes may not adequately coordinate with local transmission planning processes." Those problems are magnified for in-kind replacements. SWP supports the Commission's proposal for much-needed improvements to the local planning process. And SWP supports the proposal, subject to the competition concerns raised below, to require evaluation of right-sizing in-kind replacement projects... But, in addition, the Commission should expand the improvements for local planning process to include in-kind replacements.” (page 3)
- “SWP supports the Commission's goal of encouraging the "right-sizing" of in-kind replacement projects. But the NOPR's proposal to apply the right of first refusal ("ROFR") to right-sized replacement projects will erase the cost benefits of the local planning process and

potential right-sizing. Currently, and as described elsewhere in these comments, California's competitive process is working well, with projects garnering multiple bids and saving ratepayers up to 50%. If a right-sized replacement project satisfies CAISO's requirements for competitive solicitation, then there is no reason to exempt that project from competition and forgo the potential savings.” (page 8)

- “Instead of providing a ROFR to incumbent transmission owners, the Final Rule should make clear that any construction of in-kind replacements after a right-sized project has been selected will be presumed imprudent. The burden should then be on the incumbent transmission owner to prove that the double building was necessary before recovering the cost of the in-kind replacement project from ratepayers. Providing a ROFR for right-sized projects will not capture the cost containment potential of the Commission's proposed planning enhancements. Instead, it will allow incumbent transmission owners to construct right-sized projects without any cost guardrails, which could end up being more expensive than if they had simply constructed the in-kind replacements. To adequately protect ratepayers from unjust and unreasonable rates, the Commission should revise its proposal to allow right-sized projects to be eligible for competitive solicitations.” (page 9)
- “The Commission should require competition for upgrades and local projects.... The Commission should address this problem by expanding competition to include upgrades and local projects. SWP also supports the CPUC's suggestion in its ANOPR Comments, where it encourages the Commission to "delink" eligibility for competition from cost allocation and subject both regional and local projects to competition. Competition has been successful in containing costs in California and the local planning process should not only look to provide oversight into projects, it should also look to contain costs and the most efficient way to do that is to foster competition.” (page 10)
- “The Commission's proposal to reinstate the federal ROFR for projects that are jointly owned will harm California ratepayers” (page 10)
- “Instead of reinstating the ROFR for jointly-owned projects the Commission should instead: (1) subject projects not selected through competitive bidding to heightened prudence review; (2) increase scrutiny of local projects; (3) subject local projects to competition. These proposals will solve the competitive solicitation problems identified by the Commission and will provide even more benefit to California's ratepayers. Because the Commission is proposing to undertake the second item on this list (increasing scrutiny into local projects), it should, at the very least, delay action on reinstating the federal ROFR until after the NOPR's proposed local planning processes have had time to be established and utilized.” (page 11)
- “In California, joint ownership works with competition. CAISO's competitive solicitation process specifically includes an ‘Opportunity to Collaborate’ that allows for incumbent transmission owners to offer joint ownership for projects that are eligible for competition.” (page 12)
- “The Commission presents no evidence that the benefits of joint ownership that it cites could not accrue through the competitive process. Therefore it is not just and reasonable to strip California of the cost-savings that it gains through competition for a process that does not assure that ratepayers will earn benefits above and beyond what they have already received through the competitive solicitation process.” (page 14)

### **California Independent System Operator**

- “The CAISO’s ability to evaluate and ‘right-size’ such replacement or maintenance projects to meet CAISO-identified transmission needs is not limited to just to high voltage facilities, i.e., facilities at and above the 230 kV threshold proposed in the NOPR, it applies to all transmission facilities under the CAISO’s operational control... Finally, the CAISO requests that the Commission clarify that the NOPR does not preclude the CAISO from continuing to consider modifications to “in-kind” replacements for facilities below 230 kV in its annual transmission planning process. As indicated above, in its Commission-approved planning framework the CAISO approves facilities at all voltage levels in its transmission planning process. Thus, if the CAISO identifies a transmission need, and modifying or expanding an in-kind replacement of a facility below 230 kV can meet that need, the CAISO has the authority to approve such a project in its planning process. Precluding the CAISO from modifying in-kind replacements of facilities below 230 kV would undermine efficient transmission planning in the CAISO region.” (page 48 and 50)

### **California Municipal Utilities Association**

- “Transmission costs have almost tripled for certain California wholesale customers over the last decade. As set forth below, CMUA studies suggest adding anticipated long-lead time policy transmission identified by the CAISO and historical rate of utility CAISO and self-approved (not subject to CAISO-approval) capital additions lead to transmission costs twice today's already high rates over the next decade and a half. This is an unacceptable escalation in costs, and must be considered when assessing planning reforms that may, on balance, produce further cost increases.” (page 3)
- “CMUA has concerns about the vague joint ownership articulation in the NOPR and its linkage to the conditional Right of First Refusal. CMUA members do not support sacrificing competition and possible cost containment measures for a "joint ownership" provision that is largely symbolic. The Order No. 1000 competitive solicitation process administered by the CAISO appears to result in meaningful competition and should not be discarded.” (page 4)
- “The joint ownership constructs in the NOPR require more discussion, articulation, and specification. They should not be linked to proposals to erode competitive processes.” (page 14)

### **California Public Utilities Commission**

- “The CPUC is particularly concerned, however, by the Commission's proposals to retreat from competition, as reflected in both the NOPR's proposed reinstatement of a right of first refusal ("ROFR") for regionally cost allocated transmission projects conditioned on incumbent utilities entering joint ownership arrangements, and the ROFR proposed in conjunction with the NOPR's right-sizing proposal. By disregarding the demonstrated cost savings benefits of competition, as thoroughly documented in the record of this proceeding, these NOPR proposals would result in ratepayers being compelled to pay significantly more to modernize the grid, than if competitive processes were used to procure regional transmission projects. (page 2-3)
- “Thus, the Commission's proposals, if applied in the CAISO, could result in the loss of expected project cost savings from competition of over \$8.8 billion in the next two decades.” (page 3)

- “The CPUC notes that recent experience suggests the expected cost savings from competition attainable in the CAISO would likely be greater than 29%. See notes 243-253 infra and accompanying text (explaining that the actual cost of two recently completed projects in the CAISO that were procured using competitive processes demonstrate cost savings of 29% and 55%, respectively, as compared to the CAISO's initial estimates and the historical cost escalation of 41% experienced in the region for traditional project development by incumbent utilities).” (FN 9, pg4)
- “The Commission Should Increase Competition for the Development of Transmission Infrastructure; Not Effectively Eliminate it.” (page 58)
- “To paraphrase Kansas Corporation Commission Commissioner Andrew French: with the SPP presently reaping substantial cost savings, now seems an imprudent time to constrain competitive solicitation processes.” (page 71-72)
- “Significantly, the NOPR does not specifically address whether an incumbent utility could invoke its conditional right of first refusal to preclude a state from using a competitive procurement process for a regional transmission project that it intends to fund itself, namely, whether the Conditional ROFR would effectively supersede the State Agreement Approach in PJM Operating Agreement.” (page 78)
- “...the Conditional ROFR raises the precise concerns that led the Commission to eliminate federal ROFRs in the first place. As set forth below, there are many problems with the Conditional ROFR. Most fundamentally, it proposes the wrong remedy: instead of improving the competition mandate in Order 1000 by broadening the applicability of competitive procurement requirements and getting rid of anti-competitive carve-outs, the Commission proposes to greatly restrict competition, if not eliminate it all together. For all of the reasons explained below, the CPUC strongly urges the Commission to reconsider the efficacy of, and legal support for, its proposal.” (page 79)
- “As explained above in Section II(G)(2)(a)(1), however, there is nothing that would prevent incumbent utilities from simply agreeing to partner with each other to circumvent competition and simultaneously create barriers to entry for other potential market participants.” (page 80)
- “This begs the question: why, when given the choice, would incumbent utilities now choose to partner with transmission dependent utilities ("TDUs"), including public power entities, when, historically, so few incumbent utilities have previously agreed to do so?... Given incumbent utilities' historical reluctance to share transmission ownership with TDUs, including public power entities, and that the Conditional ROFR allows incumbent utilities to choose their development partners, it is illogical for the Commission to assume that incumbent utilities will now prioritize joint ownership arrangements with TDUs and other potential new entrants, over other options, including, as described above, foreseeable reciprocal agreements to divvy up regional transmission projects among incumbent utilities.” (page 84-85)
- “First, limiting the Conditional ROFR to only apply to inclusive joint ownership arrangements would discriminate against all other potential market participants... Second even were the Commission to only apply the Conditional ROFR to inclusive joint ownership arrangements, such a limitation would not necessarily result in the other two benefits that the NOPR contends will accrue to customers, i.e., "greater innovation," "and potentially lower costs of transmission development.” (page 86-87)

- “Thus, instead of trying to improve upon the flawed construct of the Conditional ROFR, if the Commission wants to encourage more inclusive joint ownership arrangements, it should adopt TAPS' recommendation to treat “[i]nclusive joint ownership ... as a positive factor in evaluating bids” in competitive processes, provided that such arrangements result in demonstrable benefits to customers, e.g., by returning project revenues to customers.” (page 88)
- “In regions such as PJM and the NYISO that use the sponsorship model, the Conditional ROER would not just discourage, but explicitly preclude, consideration of potentially more innovative, efficient, and cost-effective solutions.” (page 89)
- “The results of PJM's New Jersey Offshore Wind SAA proposal window illustrate the negative consequences for ratepayers of eliminating any consideration of alternative proposals for how to address an identified transmission need. As shown by the results of the solicitation presented to stakeholders on July 18, 2022, the joint proposals submitted by the incumbent utility, Public Service Electric and Gas (“PSE&G”), and its affiliate Orsted, do not appear as competitive as other transmission developers' proposals. For example, the Transmission Expansion Advisory Committee concluded that among combined proposals for Option 1B, i.e., “Onshore New Transmission Connection Facilities,” and Option 2, i.e., “Offshore New Transmission Connection Facilities,” “PSEG-Orsted has the highest unit cost, as measured by \$million/MW.” Further, it appears that PSEG-Orsted only offered cost containment commitments for one of their two joint proposals, and that proposal contained the highest cost cap-of \$7 billion-as compared to the other seven transmission developers that offered some form of capping mechanism. Under the Conditional ROFR, however, if PSEG had invoked its right of first refusal, and selected an unaffiliated entity to partner with, then PJM would not have been permitted to administer a proposal window seeking solutions to the identified transmission need and New Jersey would be stuck with a potentially significantly less competitive proposal. Thus, not only would the Conditional ROFR have precluded consideration of potentially more innovative, efficient, and cost-effective alternative solutions, but it would also have prohibited New Jersey from using the State Agreement Process in the first instance.” (page 91)
- “In addition, although the NOPR identifies a handful of parties, including the CPUC, that support increased use of competitive processes to procure transmission projects, the Commission fails to acknowledge, as documented in LS Power's ANOPR Reply Comments, that “over a hundred individual entities,” including “State commissions, federal agencies, consumer groups, and environmental groups,” “agree that competitive transmission delivers cost discipline and is needed to ensure that dollars are spent on more efficient and cost-effective transmission solutions, and, in tum, that rates are just and reasonable.” Most importantly, the NOPR fails to substantively address any of the arguments contained in the thousands of pages of comments submitted by this diverse group of stakeholders who urge the Commission to increase and improve upon the implementation of competitive processes-not effectively eliminate their use altogether.” (page 94)
- “Apart from the many instances in which the Commission successfully invokes section 309 to handle individual cases, applying the provision jointly with section 205 to amend a general order is entirely without precedent. The Commission cannot rely on section 309, a provision clearly intended for a different set of circumstances, as the authority for the Conditional ROFR

simply because it finds no such authority to enact this proposal elsewhere in the FPA.” (page 102)

- “The CPUC respectfully submits that, for all the reasons explained above, the Commission should not pursue the Conditional ROFR, but should instead hold a technical conference to comprehensively consider parties' proposals for eliminating anti-competitive carve outs, improving implementation of Order 1000 compliant competitive processes, and expanding the applicability of such processes to a greater number of transmission projects in Docket No. AD22-8-000 or a new proceeding.” (page 103)
- “First, the Commission should expressly provide that the proposed Stakeholder Review Process applies to both local transmission planning and utility self-approved projects. This is a critical point of clarification because as the CPUC, NARUC, and many other parties emphasized in response to the ANOPR, there needs to be more external scrutiny of utility self-approved projects to reduce incumbent utilities' existing perverse incentive to overinvest in these types of projects due to their lack of external review.” (page 111)
- “The Right-Sizing ROFR would needlessly expand the existing ROFR for upgrades to a utility's own facilities... In direct contradiction of Order 1000-A, under the Right-Sizing ROFR proposal, if a grid operator determined that a regional transmission project would more efficiently and cost-effectively address the identified transmission need than an incumbent utility's planned in-kind replacement, then the Commission would allow a "federally established monopoly over the development of an entirely new [regionally cost allocated ] transmission facility." The Commission does not attempt to reconcile, or even acknowledge, this contradiction in the NOPR, i.e., that the Right-Sizing ROFR would expand the scope of the existing ROFR for upgrades to an incumbent utility's own facilities by now allowing it to apply to "entirely new" transmission facilities. As explained above in Section II(G)(3)(a) in relation to the Conditional ROFR, the NOPR also fails to articulate a reasoned explanation supported by substantial evidence for its departure from the nonincumbent transmission developer reforms of Order 1000 and Order 1000-A in proposing the Right-Sizing ROFR.” (page 116- 117)
- “Third, the Commission's proposal to limit replacement projects eligible for right-sizing to those operating at or above 230 kV would impose an arbitrary and significant limitation on the proposal's effectiveness.” (page 117)
- “In addition, limiting review of projects under the Commission's Right-Sizing Proposal to only those that would operate at voltages of 230 kV or above fails to effectively promote consideration of advanced technologies as potential alternatives to asset replacement projects... This laudable goal is undermined, however, by the 230 kV limitation because some advanced conductor technologies, such as DLRs are often more effective at voltages below 230 kV. Broader deployment of advanced technologies, like DLRs, could be hampered by setting the threshold for right-sizing in-kind replacements at or above 230 kV.” (page 118)

### **Center for Biological Diversity**

- “Rejecting these arguments, the D.C. Circuit explained that "basic economic principles make clear that rights of first refusal are likely to have a direct effect on the costs of transmission facilities because they erect a barrier to entry; namely, non-incumbents are unlikely to

participate in the transmission development market because they will rarely be able to enjoy the fruits of their efforts." (page 25)

- “However, in moving in this direction the Commission has thus far failed to seriously consider another solution suggested in comments: expanding the competitive transmission development process. It is certainly logical that under Order 1000 transmission providers had "flawed investment incentives," given that they could continue to avoid competition by focusing on projects where rights of first refusal remain. However, the purpose of this provision in Order 1000 was to maximize cost-effective solutions and avoid preferential treatment by opening these projects up to competition. Thus, while the new approach the Commission proposes might succeed in incentivizing these projects, the Commission has not explained how doing so will address the concerns this aspect of Order 1000 sought to remedy. Indeed, reinstating the right of first refusal would appear to conflict with the D.C. Circuit's conclusion that such an approach is "likely to have a direct effect on the costs of transmission facilities because they erect a barrier to entry. On the other hand, expanding the projects in which providers would have to compete - by, for example, eliminating rights of first refusal for all projects, including local projects- could address this concern. At the same time, it would also remove providers' "flawed investment incentives" by no longer providing avenues for them to invest without being subject to competition.” (page 26)

### **City of New York**

- “The Commission similarly expressed concern that the in-kind replacement of existing transmission facilities is not subject to any transmission planning process. Avoiding such process may create a lack of coordination between local and regional transmission planning processes that misses opportunities to "right-size" local upgrades to existing transmission facilities so that they can meet broader regional needs.” (page 11)
- “Competition has led to the ongoing development of several important transmission solutions in New York. Commissioner Clements acknowledged as much, describing the success of competitive solicitations for the NYISO's competitive public policy transmission planning process as "a bright spot in the Order No. 1000 landscape." Importantly, Commissioner Clements also recognized that the continuation of this success will depend on how federal ROFRs are (or are not) enabled in New York. The City agrees with this assessment.” (page 12)
- “When multiple developers compete to serve customers, however, the competitors have a compelling motivation to minimize costs as well as to maximize benefits through innovation. Competition can increase economic efficiency and produce lower costs to consumers. The NYISO's solicitations for transmission solutions to public policy needs have demonstrated this economic principle. There was robust participation by non-incumbent developers in each of these solicitations, and the non-incumbent proposals included some form of cost containment (whereas incumbent transmission owners have opposed cost containment).” (page 12)
- “When multiple developers compete to serve customers, however, the competitors have a compelling motivation to minimize costs as well as to maximize benefits through innovation. Competition can increase economic efficiency and produce lower costs to consumers. The NYISO's solicitations for transmission solutions to public policy needs have demonstrated this economic principle. There was robust participation by non-incumbent developers in each of these solicitations, and the non-incumbent proposals included some form of cost containment (whereas incumbent transmission owners have opposed cost containment).” (page 13)

- “If, notwithstanding the foregoing, the Commission decides to expand the federal ROFRs as proposed in the NOPR, then the City respectfully urges the Commission to limit such expansion to only those regions where competition has fallen far short of its expectations. Transmission planning regions such as the NYISO, where competitive transmission development processes have had some success, should be allowed to continue without being undermined by expanding federal ROFRs.” (page 13)

### **Clean Energy Buyers Association**

- “CEBA believes the federal right of first refusal (ROFR) conditioned on transmission owners developing projects under a ‘joint-ownership’ model is a significant departure from precedent and could cause substantial harm to consumers. While we stop short of providing a ringing endorsement of competition in all aspects of transmission development, CEBA believes the NOPR’s proposal is a solid step in the wrong direction.” (page 5)
- “Fundamentally, the re-establishment of a federal ROFR, even if conditional, likely fails to provide the necessary incentives for transmission developers to provide the most cost-effective solutions.” (page 31)
- “The evidence in the record is simply too scant to justify such a significant departure from precedent and we therefore encourage the Commission to remove this proposal from an otherwise very positive NOPR. If the Commission is concerned that “recent investment appears to be concentrated in transmission facilities not subject to Order No. 1000 competitive transmission development processes”, perhaps the other reforms in the NOPR, requiring development of a Long-Term Regional Transmission Plan and related cost allocation reforms, along with reforms being considered in other generic proceedings, will result in creating increased opportunities for competition in transmission development. We are poised to continue to invest substantially in transmission for the next 10-20 years and appropriate measures-for cost containment should be implemented while accelerating the buildout of transmission in a prudent manner.” (page 32)

### **DC Office of People’s Counsel and MD Office of People’s Counsel**

- “Even at the low end of the Brattle Report’s demonstrated savings, the potential reduced costs for consumers are in the billions of dollars.” (page 42)
- “Beyond cost saving and a reduction of ratepayer risk, transmission competition can play an important role in the type of grid transformation envisioned by the NOPR-especially in a region with a “sponsorship solutions-based competitive procurement process like PJM. As the Brattle Report explains ‘competition can foster significant additional benefits from innovative project design and risk mitigation to address the identified need. Under the sponsorship approach, developers and incumbent transmission owners are not only competing on price, but on design qualities. Such an approach ensures that the best project is selected-one that is not only cost conscious, but also best addresses the transmission needs for the region it will serve.” (page 42)
- “It is an unfortunate step backwards- abandoning rather than enhancing opportunities for competitive transmission solicitation. The Joint PCs vigorously oppose this proposed rule as it will raise consumer costs in an unjustified and unreasonable fashion, is clearly discriminatory, and will lead to decreased innovation in transmission solutions at a time when creativity and flexibility should be paramount. It is particularly distressing that the NOPR would not even



allow the existing competitive solicitation structure in regions and markets such as PJM where they have a proven history of successfully bringing transmission project on-line while saving ratepayer dollars.” (page 43)

- “The NOPR rewards those who have perverted the incentives for regional planning.” (page 44)
- “To begin with, the proposal is nearly as unworkable as it is illogical and illegal. The NOPR provides scant rules defining exactly how any potential joint ownership would operate. For example, what level of ownership of the unaffiliated entity would be required for their investment to be ‘meaningful’? What level of management and control by the unaffiliated entity would be required for their participation to be ‘meaningful’? What if the level of investment and management of the unaffiliated entity were non-synchronous (for example, the unaffiliated entity contributes 80% of the project capital but all its interests are class ‘B’, non-voting shares). Do the unaffiliated entity's interest and investment need to remain constant throughout the life of the project or can the incumbent utility buy out some or all of its partner's interest (with ratepayer money)? If so, when - immediately after solicitation is finalized; during construction; or only after the facility has been in-service for a set time period? These aren't simply hypothetical questions but go to the heart of whether the unaffiliated entity is a true partner in the joint ownership of the transmission facility or simply a front to subvert competitive solicitation. The lack of clarity on the important questions this late in the development of an potential final rule undermines the legitimacy of the rulemaking process and calls into question the reasoned decision making regarding this aspect of the NOPR.” (page 45)
- “Finally, the return of the ROFR is simply bad transmission policy.” (page 46)
- “Instead of reinstating a costly and discriminatory policy like federal ROFR, the NOPR could tackle the deficiencies of Order No. 1000 by removing the requirement that cost allocation or project size are determinative in a project's eligibility for competitive solicitation.” (page 47)
- “The NOPR also proposes to end-of-life transmission planning by incorporating in its rules a process that is nearly identical to the existing Attachment M-3 process in PJM. As previously discussed, the current Attachment M-3 has utterly failed to either control spending or provide opportunities for meaningful stakeholder participation in the PJM region.” (pages 47-48)
- “Adoption of an Attachment M-3 like process will result another new avenue for incumbent transmission owners to exercise a ROFR, all but ensuring that competition will be eliminated and further unjustifiably raising consumer costs.” (page 48)
- “However, granting incumbent transmission owners a ROFR on end-of-life projects demotes the RTO/ISO role as the regional planner at a time when that responsibility is most needed.” (page 48)

#### **Department of Justice (US) and Federal Trade Commission**

- “The Agencies, however, are concerned that the reinstatement of a federal right of first refusal (“ROFR”) is not justified. With a ROFR, consumers will lose the many benefits that competition can bring, including lower rates, improved service, and increased innovation, leading to a more efficient, reliable, and resilient grid. The rulemaking requirement that the ROFR can be exercised only if the incumbent transmission provider establishes joint

ownership of the new transmission facilities does not alleviate the Agencies' concern.” (page 1)

- “The NOPR includes many proposals other than the ROFR that may meaningfully improve regional transmission development. Until FERC evaluates the impact of those proposals that it ultimately approves, there will be an insufficient basis to conclude that transmission policy cannot harness the benefits of competition.” (page 2)
- “The President's Executive Order specifically highlights FERC's role in protecting conditions of fair competition.” (page 2)
- “Similarly, the Supreme Court has recognized FERC’s obligation to consider competition policy, noting that the Commission's "power clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations .... The [Federal Power] Act did not render antitrust policy irrelevant to the Commission’s regulation of the electric power industry." (page 2)
- “American consumers and-businesses should not be denied the benefits of competition when paying for this significant transmission investment. Thus, consistent with longstanding antitrust policy generally disfavoring regulatory barriers to entry, the Agencies have significant concerns about the proposed ROFR.” (page 3)
- “To the extent that Order No. 1000 may have inadvertently led incumbent utilities to overinvest in local transmission facilities at the expense of more efficient regional facilities, the Agencies point out that this distortion has multiple causes, including ones that the NOPR does not address. One cause is that the continued existence of ROFRs for local and other exempt facilities gives incumbents incentives to invest in those facilities rather than pursuing regional facilities that are subject to competition. Another cause raised by a number of commenters is the continued existence of mechanisms that enable incumbent utilities to exert undue influence over the allocation of ratepayer dollars between local and regional transmission projects. The distortion could be resolved by addressing either of these causes. The Agencies therefore urge FERC not to displace competition, but instead to consider solutions to utilities' misaligned incentives that are consistent with and promote competition.” (page 7)
- “Previous experience has demonstrated that allocating the design and construction of regional transmission facilities to developers through competitive processes can significantly reduce costs and drive innovation. The Agencies therefore encourage FERC to reconsider its current proposal to use a ROFR, conditional or otherwise, to attempt to resolve the regional and interregional transmission challenge.” (page 9)
- “Reforms that will encourage new regional transmission development can take place without abandoning competition. FERC's proposals around transmission planning and cost allocation may go a long way toward addressing the logjam that FERC has identified, and those reforms can go further if FERC addresses the anticompetitive incentive and ability for incumbent transmission owners to influence transmission planning processes to favor transmission projects over which they can maintain their monopolies. We urge FERC to focus on these initiatives, including potential reforms suggested by a range of ANOPR commenters to address the adverse effects of ROFRs for local and exempt projects, before concluding that the absence of a ROFR is the cause of the current industry problems, or that the adoption of a ROFR is the cure.” (page 10)

- “Enabling competition in transmission development, where viable, is the best way to achieve these goals. We urge FERC to examine the competitive impacts that the proposed ROFR is likely to have, including increasing entry barriers that may result in higher prices for transmission and electricity, reducing innovation, and a less efficient, less reliable, and less resilient grid. Moreover, the proposed ROFR may not only yield sub-optimal transmission development in the short run, but could also serve to further entrench incumbents over the long run.” (page 11)
- “Even when the incumbent wins, consumers also win, because incumbents tend to make more competitive proposals when they face competition.” (page 13)
- “To illustrate, there are many instances in which the competitive process benefitted consumers, including the following:
  - PJM's Artificial Island Project: PJM initiated this project to improve performance of the bulk electric system in the Artificial Island area in Southern New Jersey, which is the site of three nuclear reactors. In 2013, PJM received 26 proposals from seven sponsors reflecting a diverse range of technologies, including new overhead and underground/underwater 230 kV lines, overhead 500 kV lines, and HVDC lines. Original cost estimates ranged from \$100 million to \$1.55 billion. During the process, LS Power submitted a cost commitment of \$146 million for its portion of the project. In response to this proposal, PJM allowed three of the other bidders to supplement their proposals. Three of the four finalists submitted proposals containing a cost commitment or cost containment proposal. In 2015, LS Power was awarded the project, which was then expanded in 2017 to include additional work performed by the incumbents to address permitting issues and technical challenges identified after the initial award. 43 Including the incumbents' portion of the work on their transmission facilities, the total cost is estimated at \$280 million. PSE&G, the incumbent transmission owner, submitted fourteen proposals ranging in cost from \$692 million to \$1.173 billion, meaning PSE&G's lowest-cost proposal was more than twice as expensive as the estimated total cost of the project.
  - NYISO 's Western New York Public Policy Transmission Project: In November 2015, the New York Independent System Operator ("NYISO") sought proposals to relieve transmission congestion in Western New York, including access to renewable energy from the Niagara hydroelectric facility and imports of renewables from Ontario. NYISO received twelve proposals from seven transmission developers. NYISO determined that ten proposals were viable and sufficient and ranked those proposals. In October 2017, the NYISO Board selected one of NextEra's Energy Transmission's proposed projects as the winner, noting that it was "both the more efficient and more cost-effective transmission solution" to address the identified need. That NextEra project cost \$181 million, while the lowest-cost proposal from an incumbent- a joint proposal from the New York Power Authority and New York State Electric & Gas Corporation-was \$222 million. NextEra's project represents a 22 percent savings over the incumbent's proposal.
  - California Independent System Operator ("CAISO") identified a reliability-driven need for this project in its 2018-19 transmission planning process. In 2019, CAISO conducted a competitive solicitation for proposals for two alternative configurations of the project. Six developers submitted a total of fourteen proposals, twelve of which were qualified under CAISO's tariff. In February 2020, CAISO selected LS Power Grid California, LLC to finance, construct, own, operate, and maintain the project. In discussing the selection factors, after noting there were

no material differences or only slight differences among the proposals with regard to many of the selection factors, CAISO highlighted the cost containment factor, which did have material differences. CAISO noted that LS Power "proposed the strongest binding cost containment commitment proposal." CAISO further noted that LS Power proposed more robust capital or construction cost, return on equity, and equity percentage caps that should result in lower costs and present less risk compared to the proposals of the other five project sponsors ... thus benefitting ratepayers." CAISO also noted LS Power's 15-year annual revenue requirement cap and lower interconnection costs as advantages of LS Power's proposal." (page 13-16)

- “FERC's proposed conditional ROFR could have the effect of eliminating similarly competitive bids in the future. Indeed, courts have recognized the anticompetitive effects of ROFRs... And these critiques of unconditional ROFRs also apply to the proposed conditional ROFR.” (page 16)
- “A ROFR conditioned on joint ownership does not result in multiple bidders, so it is not a competitive process and does not offer the same benefits as competition. While joint ownership proposals can be procompetitive if they are part of a competitive process, they cease to be so if tied to a ROFR, which eliminates competition.” (page 17)
- “Here, the conditional ROFR does not create this type of incentive to seek out the best partner in order to compete, because the joint venture will not be facing pressure to compete. That is, the mere existence of a joint venture partner does not bring competition to a project, nor does it necessarily result in the best partner for a project in terms of skill, cost, or innovation. Instead, the conditional ROFR supplants competition, and a conditional ROFR as proposed by FERC will result in a joint venture that faces no competition.” (page 18)
- “To the extent that a joint venture could bring these benefits to a project, competition will provide incentives to incumbent transmission owners to form joint ventures to achieve these benefits regardless of whether a conditional ROFR policy is advanced. It is far better to rely on competition, rather than the promise of a share of monopoly profits, to provide such incentives.” (page 18)
- “Moreover, the ROFR encourages the formation of a partnership when it may or may not be efficient and raises the risk that parties will act collusively, especially where two incumbent transmission owners form a joint venture that protects each other's territories from competition. To the extent that FERC seeks to encourage efficient joint ventures, FERC should do this in ways consistent with competition.” (page 18)
- “Many stakeholders have proposed solutions that specifically address the potential issue of incumbent utilities facing a "perverse investment incentive" to overdevelop local facilities to avoid Order No. 1000 competitive processes for regional projects. Without assessing the merits of any particular proposal, we note the following examples:
  - Eliminating exceptions to Order No. 1000 that enable incumbents to circumvent competitive processes.
  - Expanding the set of transmission projects that are subject to competitive processes.
  - Subjecting local and/or noncompetitive transmission investments to increased scrutiny.

- Creating an Independent Transmission Monitor (or regional Monitors) to limit the influence of incumbent utilities over the planning process.
- Applying a standardized cost-benefit analysis to all transmission projects, including local projects.

To the extent that Order No. 1000 may have inadvertently caused incumbent utilities to overinvest in local facilities, we urge FERC to pursue solutions that would bring investments in local and in regional transmission facilities back into alignment by reducing incumbents' opportunities and incentives to avoid competitive processes.” (page 22)

- “Rather than attempting to encourage long-distance transmission development by granting market participants exclusive design and construction rights for regional and interregional transmission networks, the Agencies encourage FERC to employ better, procompetitive options. A ROFR conditioned on formation of a joint venture will eliminate or distort the benefits of competition. Adopting reforms that promote competition where possible will make transmission development less costly, more resilient, and more innovative for the American consumer than it otherwise would be. **Further, failure to do so would be counter to the Executive Order's call to FERC to avoid exercising its regulatory authority in a way that creates unnecessary barriers to competition.**” (page 22)

### Elcon

- “In ELCON’s view, competition should thus be applied as broadly as feasible in both the generation and transmission development to ensure consumers are paying rates that are just and reasonable.” (page 22)

### Electric Power Supply Association

- “More specifically, EPSA has deep concerns over the move away from competitive mechanisms to support not only the development of transmission but also the assessment and support for all technical solutions – transmission and non-transmission solutions alike – which may resolve emerging system concerns or assist in the infrastructure expansion necessary to meet aggressive national, regional, and state climate goals. This retreat from competition is in fact a perverse step backwards at the very time that there is broad consensus regarding the extent of infrastructure development needed to drive and support changes in the resource mix and demand.” (page 3)
- “If anything, the Commission should address and enforce the independence of the regional transmission planning processes to disallow the inordinate influence of incumbent transmission developers both in the organized markets (...) and in all other regions.” (page 4)
- “For this reason, EPSA urges the Commission to reassess its retreat from competitive transmission development principles...” (page 5)
- “The ROFR closes the door on competitive solutions which include, for instance, generation alternatives, innovative non-transmission solutions options, projects subject to competitive bidding processes, and merchant transmission projects which address identified needs. Reinstatement of the ROFR in this NOPR represents a radical change to how the regional transmission planning process may function. Rather, it is critical that the Commission leverage its long-standing commitment to competitive procurement and competitive wholesale markets

to achieve our shared goals for reliable, cost-effective, and cleaner power for consumers.” (page 6)

- “Further, the competitive procurement process assists in determining the system need to be addressed and offers opportunity for all options to participate, including non-transmission solutions which may be more timely, efficient, cost-effective, and/or technologically advanced than the addition of new high-voltage transmission facilities. A competitive procurement also disciplines the costs of possible solutions, often incenting voluntary cost caps or cost containment measures which protect consumers from unnecessary or unchecked excess costs or development delays.” (page 9)
- “Alas, as seems inevitable in hindsight, incumbent transmission developers saw this vulnerability in the Order No. 1000 process and pulled that thread until the fabric unraveled enough to allow them to circumvent competitive pressures entirely. By focusing development efforts on Order No. 1000 exempt projects, expanding the reach of local planning, and utilizing state ROFRs or other barriers to thwart competition whenever possible, this class of incumbents has proliferated obstructionist self-interest to the detriment of large-scale regional planning as a tool to identify and support regional transmission planning or other systems solutions. The answer to this experience is not to hand a win to the obstructionists.” (page 10)
- “The duty of the Commission is to address the perverse incentives for incumbents by better enforcing the principles of Order No. 1000 and doubling down on competition...” (page 10)
- “It is hard to square the logic in the NOPR that the ROFR elimination was overly broad, thus allowing ‘potentially flawed investment incentives that may be restraining otherwise more efficient or cost-effective regional transmission facility development. It is in the fact the preponderance of loopholes that has allowed incumbents to circumvent Order No. 1000...” (page 10)
- “EPSA is concerned that these ‘joint partnership ROFRs’ offer a means to specifically preclude non-transmission alternatives from being considered. Effectively, as soon as an incumbent raises its hand with a partner, competition for the best ideas, including non-transmission solutions, is eliminated.” (page 11)
- “How does a ROFR, which offers incumbents the ability to block any alternative proposals in their footprints, offer a way to incent new market entry or spur innovate projects? It is of great concern to EPSA, as it should be to all parties, how implementation of a ROFR excludes all viable alternatives and options, including non-transmission solutions which may include deployment of demand side resources, grid-enhancing technologies, battery or storage options, or supply resources which can be quickly and more cost effectively developed.” (page 12)
- “Competition in development of transmission projects is the only means to achieve greater reliability, at lower costs, in a manner that results in fewer emissions.... We agree with ETCC.” (page 14)
- “Further, while the reliance on Section 309 in the NOPR is unlawful and misguided, it also raises grave concerns that this would establish a precedent, paving a road of seemingly unlimited authority for any Commission to change course by overturning previous determinations outside of the requirements established by the FPA.” (page 16)
- “Thus, the Commission should remove ROFR provisions from any final rule.” (page 17)

## **Harvard Electricity Law Institute**

- “In this comment, we explain that while the Commission is correct not to disturb its conclusion that ROFRs are unduly discriminatory barriers to entry, its proposed remedy will not cure undue discrimination or lead to just and reasonable rates. Once implemented by incumbents, the proposed conditional ROFRs will be nearly indistinguishable from the pre-Order No. 1000 status quo. Incumbent investor-owned utilities (IOUs) will again be the only entities with incentives to propose regional projects. The evidence shows that incumbent IOUs will pair with each other in order to exclude non-profit utilities and non-incumbent developers. IOU pairings induced by the Commission's proposed remedy will not facilitate new entry or result in innovative transmission solutions. To the contrary, by allowing incumbents to cartelize transmission development, the NOPR would abandon the innovative potential of competitive transmission and doom customers to incumbents' suboptimal and unduly discriminatory planning.” (page 3-4)
- “As an initial matter, the Commission could defer the ROFR issue and its proposed decision to disallow construction work-in-progress (CWIP) financing to another proceeding” (page 4)
- “First, the Commission could allow an incumbent utility to apply for a ROFR only following the completion of a competitive process. The ROFR would allow the utility to own no more than fifteen percent of the project.” (page 5)
- “Second, the Commission could leave the scope of competition up to state regulators.” (page 6)
- “Regardless of which option it chooses, the Commission must not provide ROFRs to incumbent IOUs in PJM when they partner with each other. Earlier this year, the Commission approved revisions to the PJM Consolidated Transmission Owners Agreement that incentivize incumbents to maintain a 95% ownership share of transmission. If they dilute their ownership share through joint ventures with non-profit utilities or non-incumbent developers, PJM incumbents will lose absolute control over the PJM Transmission Owners Agreement Administrative Committee. Through that committee, the incumbents write section 205 filings on rate design and other matters. They will not voluntarily give up their control for the sake of partnering with their longtime rivals.” (page 6)
- “Moreover, removing the ROFR issue from this proceeding will eliminate a significant legal risk from the final rule.” (page 9)
- “In the NOPR, the Commission proposes to invoke FPA section 309 to edit Order No. 1000...The Commission has never used section 309 to revise an Open Access Rule.” (footnote 28, page 10)
- “History and recent IOU advocacy show that incumbents will partner exclusively with each other.” (page 12)
- “History shows that IOUs are likely to engage in tacit collusion, taking turns partnering with each other in order to exclude non-IOUs.” (page 16)
- “By abandoning competition, and in particular the sponsorship model that allows non-incumbent developers to propose transmission projects, the Commission forces ratepayers to fund only those transmission solutions preferred by incumbent utilities.” (page 28)

- “Transparency is not a proxy for competition. Without competition, no party will have sufficient incentives to probe utility assumptions or develop alternatives to incumbents’ preferred projects. Transmission networks will feature last century’s technologies, as incumbents without competitive pressures will have no incentive to implement grid-enhancing technologies, adopt non-transmission alternatives, or develop transmission to connect low-cost power that might undercut utility-owned generation.” (page 28)
- “The Commission’s proposed conditional ROFR will not facilitate new entry or lead to innovative transmission solutions.” (page 35)

### **Illinois Commerce Commission**

- “The ICC Opposes the Proposed Reinstatement of a Modified Federal Right of First Refusal” (page 18)
- “The Commission’s proposal would allow joint ownership proposals to be included in the transmission planning without soliciting either alternative proposals to the proposed transmission facility or competitive bids to construct the proposed transmission facility. This provides little comfort that the proposed transmission facility will either be the most efficient or cost cost-effective. This is a key concern, as transmission costs, as a percentage of overall electricity costs, continue to increase and the construction of new transmission facilities has a significant impact on prices in both the energy and capacity markets. Moreover, the costs of these projects will most likely be regionally allocated, making parties that have no say in the design and/or approval process of these projects shoulder a portion of their potentially inflated costs.” (page 19)
- “The ICC believes that competition among transmission developers spurs innovative results and helps control costs. While the Commission contends that competition is not working, the ICC would counter that there is no meaningful, transparent and/or robust mechanism for competition in the development of transmission.” (page 19)
- “While the joint ownership proposal will surely result in the construction of new transmission, there needs to be protections in place to ensure that the projects are the most efficient solutions and the most cost effective. Realistically, neither the RTOs, nor the Commission are in a position to perform the scrutiny and project review necessary to make such assurances. Rather, consumers would be better served by the use of competition that would hone the cost and efficiency of transmission projects.” (page 20)
- “Moreover, the affiliate restrictions provide little assurance that the partnership proposal will control project costs. Indeed, as two gas stations at the same intersection have a strong incentive to work together to maintain or elevate prices, under the partnership proposal, incumbent transmission owners have no incentive to work together to create the most efficient and cost-effective transmission solutions.” (page 20)
- “In light of this, the ICC opposes the proposal to abandon competition with the proposed joint ownership approach. While the ICC shares the Commission’s concerns regarding the need for new transmission facilities, the Commission needs to ensure that its partnership proposal is more than just a coordinated oligopoly approach that builds more expensive, less than optimal transmission solutions. The Commission has a longstanding responsibility to consider



anti-competitive practices and to eliminate barriers to competition to the maximum extent possible.” (page 20)

### **Institute for Policy Integrity at New York University School of Law**

- “While the Commission's intent encouraging transmission build-out is commendable, a ROFR will generally lead to anticompetitive behavior because it will give more bargaining power to the incumbent transmission developer. Under the proposed Conditional ROFR, where the incumbent transmission developer partners with a non-utility transmission developer, it is likely that the partner will have little bargaining power in practice. As such, the proposed condition is unlikely to limit anticompetitive behavior and the associated consequences.” (page 19)
- “The Commission should carefully consider other options for facilitating greater regional transmission development, including closing the loopholes that allow transmission developers investment to local projects not subject to competition to address the problem.” (page 19)

### **Invenergy Solar Development North America LLC, Invenergy Thermal Development LLC, Invenergy Wind Development, and Invenergy Transmission LLC**

- “Incumbent Utilities’ Right of First Refusal Should Not Be Reinstated” (page 17)
- “This proposal should be rejected entirely. The portion of new transmission for which the Commission previously removed federal right of first refusal and which is currently subject to competition is already exceedingly low. Indeed, transmission providers recently narrowed this portion even further. Even though competitive bidding and competition typically results in lower prices for consumers, in most regions there are already so many exceptions, under which- incumbent utilities can still exercise the right of first refusal that reinstating the right of first refusal as to this last narrow class of transmission would only foreclose any chance of competition. For example under the NOPR proposal that would reinstate the ROFR where there is ostensibly a joint ownership of the transmission facilities, the incumbent utility could simply coordinate or partner with a neighboring incumbent utility to exercise the ROFR and effectively foreclose even the illusion of competition for the entire area.” (page 18)
- “To the extent competition reforms set out in Order No. 1000 have not produced the anticipated results, this is due primarily due to the concerted utility efforts to undermine competitive transmission.” (page 20)
- “Yet it remains true that competition can invite innovation and may also result in lower costs, and if the Commission wants to promote transmission construction at the least cost to ratepayers, instead of adopting the NOPR proposal, it should focus efforts on improving the competitive process by refining the current rules to make more transmission subject to competition and to make competitive processes more efficient.” (page 20)

### **ISO-NE**

- “For example, under the Commission’s proposal, only transmission facilities operated at or above 230 kV would be eligible for right-sizing considerations. This would limit the right-sizing opportunities in New England, where the regional transmission system comprises mostly transmission facilities at or above 115 kV, along with a limited amount of grandfathered 69 kV.” (page 39)

## **Kentucky Public Service Commission Chair Kent Chandler**

- “I vehemently disagree with the Commission’s proposal to reinstate a Federal Right of First Refusal, conditional or otherwise. While the Commission may see the results of Order No. 1000 to be a failure to some degree, the cause of at least a portion of that failure is obvious. My experience over the past six years is that the entities who seek to gain from the implementation of a federal ROFR (and proposed the reinstatement of a ROFR in the ANOPR) are the same folks who have fought the implementation and expansion of competition since Order No. 1000.” (page 10)
- “However, taking the TAPS comments, especially given the focus of the comments on competitive bidding processes, and using it as a basis to reinstate a federal ROFR is an unsupportable leap.” (page 11)
- “Kentucky is proud of the benefits and success of the Duff-Coleman line, and at first blush its success might appear to provide support for the Commission’s jointly-owned ROFR proposal. However, it does not. Duff-Coleman was MISO’s first competitive transmission project under the Order No. 1000 framework. LS Power and Big River’s proposal blew the others out of the water as part of the MISO competitive selection process, scoring a 95 out of 100, with the remaining 10 proposals scoring between 80 and 41... For example, the Duff-Coleman line included proposals that the Commission would not or legally could not require of the incumbent transmission owners. For instance, the LS Power & Big Rivers joint proposal included a cost cap, ROE cap, equity percentage cap and schedule guarantee.” (page 12-13)
- “I scoured the comments in the ANOPR and noticed incumbent transmission owners and their trade groups proposing the reinstatement of rules permitting them to exclusively build the transmission grid moving forward. However, notably absent from those requests were any commitments to not raise the return on previously employed capital, limit the percentage of equity capital for the life of the investments, or hard cost caps. Without those commitments, I suspect, based on precedent and applicable law, the Commission would be unwilling or unable to otherwise cap ROE returns or equity percentages.” (page 13-14)
- “Instead of promoting greater market entry, or new players, given the broad nature of the proposal I expect it will simply result in incumbent transmission owners entering into agreement with other incumbent transmission owners for some negligible amount of joint ownership.” (page 15)
- “Instead, facilities between 100 and 200 kV are going to play a greater role in the regional delivery of energy from generators to customers. Should the Commission keep its in-kind proposal, setting the facility voltage floor at 230 kV will miss much of the regional grid of the future.” (page 19)
- “Regardless, the proposed rule’s ROFR for the transmission owner to build the ‘right-sized’ facility because “nothing in this proposed rule would alter existing law concerning the public utility transmission provider’s ability to proceed with developing its planned in-kind replacement transmission facility without the ‘right-sizing’ renders this proposal unreasonable. The ‘solution’ to this “problem” which prompted the Commission to provide additional ROFRs, further eroding competition, is for the Commission to alter the existing law accordingly.” (page 19)

- “Furthermore, the Commission’s apparent belief that 230 kV is the threshold between regional and local planning may not be accurate. Based on my experience in Kentucky, that threshold should be lowered to 100 kV for multiple reasons... Second, simply lowering the proposed threshold to 100kV does not necessarily mean fewer benefits to the system. Correctly or not, AEP has argued for years that, irrespective of the fact that the AEP-East zone in PJM stretches from Tennessee to Michigan and largely consists of 69kV and 138kV lines, that ‘AEP developed an extensive transmission system that serves as the medium for integrating the power supply resources of the member companies’ across the region, and thus it is purportedly fair to allocate all the transmission revenues and expenses among the AEP member transmission companies even though many facilities are located only within state borders and are of lower voltage. There are few stretches longer between discrete service areas in PJM than the AEP service territories in Tennessee and Michigan.” (page 22-23)

### **LS Power**

- “The Commission’s proposed justifications for the resurrection of these two rights of first refusal are entirely unsupported by the extensive record in this docket and the administrative and judicial records and findings associated with Order No. 1000. Because the Commission cannot make the requisite finding under Section 206 that Order No. 1000’s elimination of the right of first refusal for incumbent transmission providers is unjust and unreasonable, to undo the sound policy decisions made in Order No. 1000, the Commission attempts to circumvent the inconvenient factual record through the use of a tortured interpretation of Section 309. Section 309 does not abrogate the Commission’s obligations to make the necessary findings under Section 206 that existing tariffs are unjust and unreasonable before ordering changes to such tariffs.” (page 2)
- “The NOPR will discourage nonincumbent transmission providers from engaging in regional planning processes, which the evidence demonstrates will have a negative impact on costs and therefore on ratepayers, while rewarding incumbent transmission owners’ self-interested actions to avoid the requirements of Order No. 1000 since its inception. The proposed revival of rights of first refusal will also raise significant antitrust concerns by encouraging even more collusion and making it more difficult to police anticompetitive utility behavior.” (page 3)
- “When permitted to work, the regional planning process and competitive reforms of Order No. 1000 work better than the Commission envisioned. Indeed, competition has shown such positive consumer-centric rate impacts that when transmission competition is a viable option, as it is in most instances for transmission facilities above 100 kV, the Commission cannot determine just and reasonable rates without it.” (page 4)

### **Massachusetts Attorney General Maura Healey**

- “In finalizing the rule, we urge the Commission to: abandon its misguided proposals to partially reverse its prior findings and perm it the exercise of conditional federal rights of first refusal (“ROFRs”), which would significantly decrease competition for regional transmission solutions and increase consumer costs” (page 2)
- “The NOPR does not explain how the extensive findings in Order Nos. 890 and 1000 about the adverse effects of monopolies, the self-interest of incumbent utilities and the benefits of

transmission competition are consistent with the Commission's proposal to allow conditional exercise of federal ROFRs. Indeed the Commission cannot do so." (page 42)

- "In addition, the Commission should clarify the implication that RTOs/ISOs may choose to adopt the new conditional ROFR in their sole discretion. In New England, both the states and NEPOOL stakeholders would and should have a substantial say in this decision." (page 44)
- "Because the NOPR does not define the parameters of the 'condition' of joint ownership, incumbent transmission owners could maintain their monopoly by simply banding together and 'jointly' owning all of the regional projects. Even if they allowed a third party to have some ownership interest in a project there is no evidence that this kind of joint ownership will actually simulate the proven benefits for consumers of competition (e.g., lower cost innovation, and transparency)." (page 45)
- "In New England, there is no evidence that the competition requirement has discouraged regional transmission development or caused 'perverse investment incentives'. Instead competition in regional transmission development has been almost non-existent here due to flaws in the implementation of Order No. 1000 competition." (page 47)
- "Besides the fact that joint ownership in and of itself is not an adequate substitute for the many benefits of competitive solicitations, the current proposal would afford too much power to incumbent transmission owners to dictate self-interested terms rather than terms that are most cost-effective and beneficial to consumers or even to joint owners. The broad outlines of the Commission's proposal appear to allow an incumbent transmission owner, in its unfettered and self-interested discretion, to decide with whom to partner and on what terms. The joint ownership proposal in its current form raises the specter in New England of incumbent utilities "collaborating" to divide up the regional transmission project pie as joint owners of all of the regional transmission projects. Without a variety of safeguards that do not exist today such an approach would be extremely hostile to consumer interests and would not result in just and reasonable rates." (page 48-49)
- "A 'meaningful' ownership should be no less than 50 percent." (page 50)
- "Certain incumbent transmission owners and their associated trade groups argued in their ANOPR comments that the federal ROFR should be fully restored. The Commission asked for comment on this point. The Massachusetts AGO's answer is an unequivocal no. Instead of doubling down on this legally unsound proposal, or reviving it in a conditional form, the Commission should leave the federal ROFR in the past for all the same reasons the Commission discarded it in the first place." (page 50)
- "First, this is not a conditional ROFR subject to joint ownership. Instead, the Right-Sizing ROFR would be a complete reinstatement of the federal ROFR for projects of this type. There is no "rational connection" between the Commission's findings and an unconditional federal ROFR. This result is directly at odds with the Commission's proposed findings and reasoning in this NOPR with respect to the conditional ROFR, as well as with the Commission's findings in Order Nos. 890 and 1000. The Commission fails to provide "good reasons" for departing from its prior finding that federal ROFRs are unjust and unreasonable." (page 51)
- "The Commission should reconsider the flawed ROFR proposals and abandon them in the final rulemaking." (page 53)

**Massachusetts Municipal Wholesale Electric Company, New Hampshire Electric Cooperative, Connecticut Municipal Electric Energy Cooperative, and Vermont Public Power Supply Authority**

- “Public Systems support both the expansion of the use of competitive processes to elect projects and the Commission's efforts to promote joint ownership, both of which can lower consumer costs. We are concerned, however, that as structured, the proposed conditional ROFR may well fail to meet the Commission's objectives. The proposal lacks clear guideposts regarding eligibility, especially with respect to the scope of the "meaningful participation" requirement and the range of projects that are potentially subject to the ROFR. Absent the imposition of limitations, we fear that incumbents will be able to maneuver around the conditional obligation by offering proposals that are facially consistent with the NOPR's requirements, but provide consumers none of the benefits that flow from joint ownership.” (page 3)
- “In addition, we urge the Commission to act to expand the scope of potential projects subject to the joint ownership or competitive solicitation, including the current exemption for so-called ‘immediate need’ projects.” (page 3)
- “Over the past two decades, New England’s Regional Network Service transmission rate has grown nine-fold, from \$15.60 per KW-year (in 2003) to \$140.98 per KW-year (in 2021)... Worse, the region has compiled an abysmal record of cost containment: on average, between 2013 and 2017, actual transmission costs in New England exceeded projections by 70 percent.” (page 5)
- “Public Systems recognize the need to expand the transmission grid to facilitate the integration of the coming wave of clean energy resources. We believe the most cost-effective way to do so is by expanding the opportunities in the region for competition.” (page 7)
- “...any final rule should clarify that the conditional ROFR does not apply to ocean-based transmission facilities. This clarification is common sense: there are no incumbent service territories in the ocean, and therefore no incumbent TOs to seek or awarded a conditional ROFR.” (page 10)
- “Second, where a state or states are undertaking efforts to develop transmission outside the regional planning process, any final rule issued in this proceeding should honor and support those state-initiated arrangements-not impede them. For example, Massachusetts has very recently enacted legislation enabling the Massachusetts Department of Energy Resources to "competitively solicit and procure proposals for offshore wind energy transmission." To the extent a state or states decide to develop transmission through competitive solicitation, the Commission should honor that choice, and make clear in any final rule that the conditional ROFR is inapplicable to such state- administered procurements.” (page 11)

**Minnesota Public Utilities Commission**

- “Therefore, it appears to us that the joint ownership model proposed in the NOPR would create additional complexity but is not likely to provide the anticipated innovation and cost control benefit.” (page 8)

## MISO

- “MISO addresses the NOPR’s proposed reforms below. However, it is first necessary to discuss the Commission’s proposed findings of fact. Respectfully, for MISO, the presence of nonincumbent transmission developer requirements for projects selected in a regional plan for purposes of cost allocation does not influence MISO’s decision with respect to selecting the appropriate project to address a transmission need during the planning process... the potential application of competitive requirements is not a factor in determining the project type.” (page 73)
- “Fourth, the proposed reforms, while adding additional process and uncertainty, do not eliminate the implementation uncertainty created by the existing requirements for competition and may raise additional challenges with implementation. As explained above, MISO does not believe that the existence of competitive requirements informs the identification of regionally cost allocated transmission projects.” (page 83)
- “...MISO would encourage the Commission to not impose any prescriptions surrounding right-sizing.” (page 87)

## NARUC

- “First, FERC has proposed limiting local projects eligible for right-sizing to those operating at or above 230 kV. NARUC is concerned that this threshold could exclude a significant portion of utility self-approved projects and other grid-critical projects. For example, in PG&E’s service territory, 52% (\$5.6 billion) of the utility’s forecast capital expenditures for 2021 to 2026 (\$10.9 billion) are self-approved repair and replacement projects that are under 200 kV and are therefore not currently subject to CAISO review and would not be subject to review under FERC’s proposal. Providing another example, ISO-NE has many 115 kV lines, and the proposed 230 kV threshold would impede the ability to consider right-sizing many transmission projects in ISO-NE. States should have discretion and flexibility to agree to require right-sizing asset replacement at voltages below 230 kV to help ensure that the majority of project opportunities are addressed.” (page 64)

## New England Consumer-Owned Systems

- “First, the Commission needs to take more forceful steps in ensuring that the ability to participate in transmission development fully open consumer-owned utilities, in order to advance realization of the promise of competitive entry as a market-based means of transmission cost containment and promoting efficiency in design and operation of new transmission facilities. The means by which the NOPR proposes to pursue that objective - relaxing the limited ban imposed by Order No. 1000 on the massive barrier to entry imposed by a federal right of first refusal - is a poor choice of tool for promoting competitive entry. Effectively writing the removal of that barrier to entry out of the Commission’s rules (as the NOPR’s delineation of potential joint ownership partners does) is simply a massive step backward from the pro-competitive policies that animate Order No. 1000. The Commission should abandon the idea of using such a treacherous tool - federal ROFR - in such a foreseeably ineffectual way (allowing collusion between incumbents as a vehicle for preserving the federal ROFR) in the name of promoting competition.” (page 2-3)

## **NESCOE**

- “The Commission should not move forward with proposed actions on reinstating the ROFR in certain circumstances. Meaningful competition is critical to encouraging new market entrants, a bigger pool of ideas, and cost containment practices that incumbent transmission providers have no incentive to offer outside a competitive process. To the extent the Commission continues to be inclined to pursue a rollback of ROFR reforms, it should do so in a separate proceeding where a more focused record can be developed to facilitate the Commission’s decision.” (page 11)
- “The Commission Should Not Reinstate Any Form of Federal Rights of First Refusal at this Time In this Proceeding” (page 74)
- ”It is unfortunate that the Commission inserts into a rulemaking aimed at improving long-term regional transmission planning a proposal that retreats from competition. In so doing, the Commission fails to give meaningful consideration to comments representing state and consumer interests in relation to the ROFR.” (page 75)
- “The Commission Should Not Use 230 kV as The Threshold. The NOPR proposes that transmission providers must evaluate whether they can right-size any 230 kV or above transmission facility that they anticipate replacing in-kind with a new transmission facility during the next ten years to more efficiently or cost-effectively address regional transmission needs identified in Long-Term Regional Transmission Planning. NESCOE urges the Commission not to lock in a fixed voltage level in this final rule. This would provide limited usefulness for the proposed reform in New England, where there are many 115kV transmission facilities.” (page 80)

## **New Jersey Board of Public Utilities**

- “The Board fully supports all of the Commission’s proposed reforms, with the notable exception of its proposal to restrict competition by reinstating federal rights of first refusal (“ROFR”) for regional transmission projects. The Board’s experience has been that transmission competition is one of the most effective mechanisms for developing innovative transmission solutions at competitive costs.” (page 1)
- “The Board vigorously opposes any proposal that would shield incumbent transmission owners from competition at ratepayers’ expense. Both the record evidence in this docket and the Board’s own experience soliciting transmission solutions for New Jersey’s offshore wind projects conclusively proves that transmission competition works and can save ratepayers billions of dollars.” (page 29)
- “Eliminating nearly all competition, as the Commission’s proposed ‘conditional’ ROFR would, will inflate ratepayers’ electricity bills by billions of dollars without offering them any improved service. The Commission should therefore exclude any provision rolling back current prohibitions on transmission ROFRs in any final order.” (page 29)
- “If anything, the Board’s own experience competitively soliciting transmission solutions through PJM’s State Agreement Approach to support New Jersey offshore wind development shows that Brattle’s savings estimates may be conservative.” (page 30)
- “Indeed, the Board itself received 80 proposals from 13 separate entities in response to its competitive solicitation of transmission solutions for New Jersey’s offshore wind needs. The

number of possible choices for how to implement New Jersey's offshore wind policies would simply not have been available outside of a competitive solicitation format. As to interest from competitive developers, the findings of the Commission's own Staff indicates "that there is significant interest from and participation by many transmission developers in competing for the available opportunities. Furthermore, the Board received a number of cost-capping mechanisms from various competitors, again allowing New Jersey the option to select between a number of transmission proposals. These results suggest that employing a competitive solicitation process with no ROFR for incumbent transmission owners may result in substantial savings to New Jersey ratepayers." (page 31)

- "As competitive solicitation of transmission solutions can save ratepayers billions of dollars, it necessarily follows that artificially preventing such competition by granting ROFRs to incumbent transmission owners costs ratepayers billions of dollars." (page 31)
- "...indeed the evidence the Board has seen suggests that non-incumbent solutions tend to innovatively provide the same or even greater benefits at lower costs than incumbent solutions." (page 31)
- "Consequently, the Board strenuously opposes any proposal that would expand the current scope of ROFRs or otherwise limit opportunities for competition in transmission planning and development." (page 31)
- "Rather, the Board believes that the probable outcome of implementing the Commission's proposal will be a network of incumbent-transmission-owner duopolies enveloping the country that will result in virtually the same rate impacts as granting unconditional ROFRs would... Indeed, the rate impacts would likely be materially indistinguishable from simply reinstating an unconditional ROFR" (page 33-32)
- "The Commission's 'conditional' ROFR proposal would thus end virtually all competition in transmission planning and development." (page 33)
- "Lastly, the Board notes that enabling the maximum amount of competition in transmission development is currently the policy of both New Jersey and many other states. Moreover, the Commission should not expect states like New Jersey to take threats to such policies lightly. This is because our ratepayers will likely save billions of dollars on their electricity bills due to the Board's decision to competitively procure transmission solutions to support State's offshore wind goals." (page 37)
- "Indeed, based on this experience, the Board is highly concerned that federal ROFRs that preclude competitive solicitations will needlessly inflate the costs of future LTRT portfolios designed to meet the needs of the PJM region." (page 37)
- "To illustrate, assume PJM plans a LTRT portfolio along the lines of MISO's MVP or LRTP portfolios, and that if built by incumbent utilities exercising ROFR rights, it will cost \$15 billion. Based on Brattle's findings, it is reasonable to assume that transmission competition could reduce that cost by 20% to 30%-which in this case would amount to ratepayer savings of \$3 to \$4.5 billion. In other words, allowing incumbent transmission owners to exercise ROFRs would increase the portfolio's cost to ratepayer by \$3 to \$4.5 billion. If New Jersey was allocated 20% of the cost of this portfolio, such ROFRs would unjustly and unreasonably increase our ratepayers' electricity costs by \$600 to \$900 million. In the Board's view, such



federal interference with state pro-competition policies - interference that may significantly increase electricity costs for our citizens - is unacceptable.” (page 37)

### **New York Independent System Operator**

- “The NYISO has enjoyed significant success in expanding transmission in New York through its Public Policy Process... First in 2015, the NYPSC identified a need for transmission in western New York to obtain the full output of the Niagara hydroelectric project and imports of renewable resources from Ontario without fossil-fueled generation... The NYISO received 12 proposed transmission projects and determined that 10 were viable and sufficient to meet the need. The transmission line has entered into service in June 2022. Second, in December 2015, the NYPSC identified a Public Policy Transmission Need... The NYISO received seven viable and sufficient transmission proposals for Segment A and six viable and sufficient transmission proposals for Segment B. Both projects commenced construction in 2021 and are expected to enter service in 2023. Lastly, the NYISO is addressing a Public Policy Transmission Need identified by the NYPSC in 2021 to deliver at least 3,000 MW of offshore wind from Long Island to New York City and the rest of the New York Control Area through a new tie line and associated transmission upgrades on Long Island (“Long Island PPTN”). After soliciting solutions to the Long Island PPTN, the NYISO received 19 proposals from four developers. The NYISO identified 16 viable and sufficient transmission projects from three developers... The NYISO is currently evaluating the proposed solutions...The selected Public Policy Transmission Projects represent the largest additional of transmission in New York in the over 30 years.” (page 11-13)
- “The Commission should consider the potential for complications, disputes, and delays in the transmission planning process due the addition of procedural steps to identify the incumbent transmission owner(s) that are eligible to exercise a conditional ROFR and identify transmission projects that fit the requirements of the conditional ROFR in planning regions using the sponsorship model.” (page 55)
- “...the [conditional ROFR in the] NOPR does not appear to address a situation that could arise in a sponsorship model in which two or more incumbent transmission owners could separately propose jointly owned regional transmission projects to be located in their separate service territories that could fully address the same transmission need.” (page 55)
- “... the voltage threshold for transmission facility replacements of 230 kV and above is too limiting... Although most New York State Bulk Power Transmission Facilities (“BPTFs”) operate at or above 230 kV, certain 115 kV and 138 kV function at or in parallel to the BPTFs. In addition, the 115 kV systems in the upstate New York and the 138 kV system in downstate New York feed resources interconnected at those levels to the BPTFs.” (page 59)
- “The proposed treatment of a ROFR for transmission replacements and the allocation of cost of only the incremental costs of right-sizing the transmission facilities create additional, complex new requirements that could bog down transmission proposals in disputes over the ROFR and cost allocation.” (page 60)

### **New York Power Authority**

- “By limiting those eligible to exercise a CROFR to a service territory, transmission entities that do not have a service territory but do own substantial transmission facilities, like NYPA, would be arbitrarily excluded. In the interest of competition and encouraging diversity among

projects, eligibility of transmission entities should be based on a variety of relevant considerations, like ownership of the impacted property or ability of the developer to meet that specific public need. Whether a transmission owner has a state-granted franchise territory should be irrelevant to a federally established CROFR.” (page 3)

- “But the existing competitive transmission processes under the NYISO OATT for public policy transmission needs assessment and competition in proposing and building solutions has been successful since the Commission required public utilities to remove certain ROFR provision from transmission tariffs. The absence of a CROFR for new high-voltage transmission facilities under the Order No. 1000 process has not prevented transmission developers from proposing, or the NYISO from selecting, more innovative, competitive, and cost-effective solutions to meet the transmission needs identified by the NYSPSC.” (page 6)
- “Competition among infrastructure and transmission providers in New York has benefitted the market and encouraged developers to propose new cost-efficient, innovative projects to address specific transmission needs.” (page 7)
- “The Transmission NOPR is unclear as to how a CROFR would apply when multiple service territories are involved without causing an inefficient segmentation of the identified transmission need or the development of multiple, inconsistent proposals by the multiple affected transmission owners (and the Transmission NOPR provides no guidance on how a single project would be selected from among the potential multiple proposals). Additional concerns arise if an identified need could be serviced by competing service territories.” (page 8)
- “As currently proposed, the CROFR is vaguely conditioned on the incumbent transmission provider establishing joint ownership of the transmission facilities. The Transmission NOPR does not explain with specificity the nature of the joint ownership required, how partners would be selected, what partners would be eligible, what contractual arrangements must be included and whether those arrangements would be subject to public disclosure, regulatory review, or competitive solicitations. Joint ownership, of course, does not ensure equality or protect against uneven bargaining power that could produce inefficient terms and conditions. Would there be protections for minority partners? Would there be a cap on how much equity the incumbent party could own? Would there be requirements for partners to be selected through a competitive RFP process? The Transmission NOPR is silent on these and other mechanisms necessary to appropriately implement the joint development requirements.” (page 9)

### **New York Public Service Commission and NYSEERDA**

- “The NY State Agencies oppose the imposition in New York of the conditional right of first refusal (ROFR) proposed in the NOPR. New York currently has only a limited ROFR that affords the state's transmission owners priority rights to construct "upgrades" to their own facilities. We do not support any further expansion of those rights, which could be a significant departure from the pro-competition policy announced in Order No. 1000. At least when it concerns New York, there is no basis for change.” (page 15)
- “The NOPR suggests that the conditional ROFR is needed to encourage incumbent providers to build large, regional facilities. As detailed above, the State has been successful in developing (at times through competitive solicitations) new and needed facilities without an expanded ROFR. In these circumstances, there is little to no additional benefit that would result

from enlarging the scope of incumbent transmission owner priority rights, which would likely have a detrimental impact on competition. To the extent the FERC seeks to promote joint ownership, we see no reason to believe that a conditional ROFR is a prerequisite to doing so. Competition and diversification of ownership are not mutually exclusive.” (page 16)

- “Even more importantly, there is no showing in the NOPR that joint ownership is a substitute for the benefits of competition. The most likely outcome of the adoption of a conditional ROFR is to limit competition. We are concerned that doing so would leave consumers exposed to higher costs. Our experience has been that the use of competitive solicitations leads to proposals that include cost-containment measures. We believe that the same would not be true where an incumbent transmission owner proposal is the only game in town. In addition, competition offers the possibility of greater innovation, as there may be a multitude of proposals offered to meet any particular system need. An incumbent who faces no competition would have little incentive to search for the “fix” to a particular need that is either the most cost-efficient or the most forward-looking.” (page 16)

#### **New York State Department of State – Utility Intervention Unit**

- “The Commission’s reasoning is concerning. The Commission should do all in its power to encourage the participation of non-incumbent transmission developers in the market.” (page 16)
- “In New York, incumbent transmission owners, 3rd party developers, and joint ventures have proposed projects into the public policy solicitations run pursuant to NYISO’s tariff under Order 1000... It may be the case that in some parts of the country the observed fact pattern governs, however I am concerned that it is not the universal situation and that applying the conditional ROFR reform uniformly across the country may not be uniformly beneficial.” (page 17)

#### **New York Transco, LLC**

- “As can be seen from the number of PPTN determinations and, importantly, the developer participation numbers, the NYISO PPTPP and competitive solicitation process has accomplished precisely what the Commission was hoping in issuing Order No. 1000: competition, innovation, and more efficient and cost effective development of new transmission assets.” (page 8)
- “As referenced above, NYISO has had significant success in conducting competitive solicitations for the development of new transmission facilities needed to address public policy requirements. The Commission should not mandate policy initiatives that could thwart or otherwise limit competition in New York. As discussed below, the Commission’s limitation on the right of an incumbent to exercise its federal right-of-first-refusal could inadvertently limit opportunities for an entity like NY Transco to compete for new transmission development.” (page 9)

#### **NextEra Energy**

- “Specifically, the NOPR proposes: (1) to allow federal ROFRs for regionally planned facilities “conditioned on the incumbent transmission provider with the federal [ROFR] for such regional transmission facilities establishing joint ownership of the transmission facilities,” and (2) to mandate a new federal ROFR for regionally planned facilities that result from the “right-

sizing” of in-kind replacements. Bestowing these monopoly transmission development rights on incumbent transmission owners is irreconcilable with the Commission’s prior holdings, which have been affirmed by the courts of appeal, that federal ROFRs for regionally planned transmission facilities are unlawful under Section 206 of the Federal Power Act (the “FPA”), and are also irreconcilable with the findings of fact and law underpinning those holdings.” (page 4)

- “As a practical matter, the NOPR’s federal ROFR proposals would all but eliminate competitive transmission development and thereby deprive consumers of the cost discipline, cost containment, innovation, and schedule guarantees that competition provides – and would do so at the very time when the Commission is proposing to significantly increase the amount of regional transmission project development. There is no rational basis for assuming that these ROFR proposals would do anything to increase investment in regional transmission facilities or that the proposed limitations on these ROFRs would do anything to protect consumers from higher costs. Nor is there any evidence supporting such an irrational theory. In fact, the results of competitive solicitations run to date under Order No. 1000 show substantial savings, cost containment and innovative solutions in just a decade of competitive transmission experience.” (page 4)
- “Accordingly, the Commission should move the sensible, long-term planning reforms proposed in the NOPR forward in the final rule without permitting or requiring any new, anti-competitive ROFRs.” (page 8)

#### **Northwest & Intermountain Power Producers Coalition**

- “NIPPC is opposed to the Commission's proposal to restore a federal right of first refusal. Restoring the federal right of first refusal would harm competition because it would eliminate any incentive for incumbent transmission providers to reduce costs or delays. NJPPC recommends the Commission wait to see how these reforms to the regional transmission planning process play out before considering restoring a federal right of first refusal. The Commission should allow an opportunity for its original Order 1000 mechanisms for competitive solicitations for the construction and ownership of regional transmission facilities to be implemented through these reforms before restoring the federal right of first refusal.” (page 9)
- “NIPPC is opposed to the Commission's proposal to restore even a limited federal right of first refusal. In the non-RTO West, the lack of competitive solicitation is more a factor of the failure of the Order 1000 regional planning process to identify any regional transmission facilities that would have qualified.” (page 19)
- “Accordingly, NIPPC believes the proposal to restore even a limited right of first refusal is premature. The reforms proposed here significantly expand the opportunities for stakeholders to participate in the planning process and enhance state oversight over the regional transmission planning process. NIPPC anticipates that these reforms will result in more transmission projects being identified for regional cost allocation. The Commission should allow its original Order 1000 mechanism for competitive solicitations for the construction and ownership of regional transmission facilities an opportunity to be implemented.” (page 20)
- “The Commission should require a competitive solicitation for any “rightsized” projects that meet regional transmission needs.” (page 22)

## **NRG Energy**

- “Meanwhile, NRG opposes the Commission's proposal to abolish competition in one of the few spaces in electric transmission that exists. The Commission has negligently allowed electricity transmission rates to go effectively unregulated, even while the space remains largely monopolized. In its instant proposal the Commission now complains that the attractive nuisance it has built induces capital investment to the many unregulated-but-monopolized opportunities in the electric-transmission industry, rather than to the solitary corner of the industry reserved for competition. This sorry outcome was foreseen even as the Commission issued its last major reform in transmission planning, and the Commission's proposal here is not a remedy but a capitulation. The Commission's proposal on the federal right of first refusal should be withdrawn, and the Commission should begin to take steps to enforce competition and to actively regulate electric-transmission rates for which it has jurisdiction.” (page 4-5)
- “In its current proposal, the Commission has it backwards, for it is the lack of either competition or meaningful rate regulation in transmission generally-and not the presence of competition in one small part of the electric-transmission sector-that is the problem that causes "perverse investment incentives that do not adequately encourage" incumbents to compete for regional projects. (page 27-28)
- “But the "perverse investment incentives" at issue here are created wholly or in largest part by the Commission's decisions to regulate transmission service subject to its jurisdiction in a particular way. The Commission cannot reasonably conclude that it bears no responsibility for cleaning up this attractive nuisance, and instead conclude that the monopoly fence-line should once again be built up around the one part of the electric-transmission sector the Commission has sought to clean up through Order 1000's elimination of the tariffed federal ROFR.” (page 30)
- “Channeling regional transmission planning into a more and more limited set of potential projects and owners-which is the inevitable end-state of the cartelization that the Commission proposes to set in motion will not yield a competition between differing proposals. This was a rationale of Order 1000's reform – the presence of multiple transmission developers would lower costs to consumers and it was reiterated by the Seventh Circuit in affirming Order 1000's removal of the federal ROFR.” (page 32)
- “It is not at all clear how joint ownership in and of itself will serve to discipline costs.” (page 32)
- “To the degree that a cartelization of transmission is undertaken merely to remove an incumbent's political blockade of transmission by entities other than itself, that approach is likely to increase costs, not minimize them. That is contrary to the Commission's statutory mandate to ensure just and reasonable rates.” (page 33)
- “Or, if incumbency is seen as a necessary expedient for transmission projects deemed local or for more urgent reliability purposes, the Commission could eliminate the presumption of prudence and the formula ratemaking that these projects enjoy and reinstitute its classical tradition of rate cases where multiple parties and FERC trial staff scrutinize periodic filings.” (page 33)

- “As a corollary of this return to classical principles of utility regulation, the Commission should consider an approach proposed by Ari Peskoe that in addition to reversing its longstanding adoption of a presumption that all transmission expenses are prudent, that the Commission should replace it with a presumption that only capital expenditures committed pursuant to an independently administered planning process are prudent.” (page 34)

### **Office of Ohio’s Consumer Counsel**

- “The Federal Energy Regulatory Commission (“FERC”) should continue to promote competition for the provision of transmission services.” (page 1)
- “FERC's proposal contains inadequate consumer protection. FERC should broaden its proposal. FERC should assume oversight of not just facilities rated at 230 kV and above but should review facilities down to the 69 kV level. Many of the end-of-life transmission facilities in the PJM transmission planning process are expensive rebuilds of transmission facilities reaching the end of their useful lives that are rated below 230 kV.” (page 23)
- “FERC gives too much deference in the NOPR to state authority over cost and siting decisions. However, oversight does not occur in every state and is particularly absent in Ohio. Without action by FERC, these local transmission projects will continue to evade regulatory review... In *New York vs. FERC*, the United States Supreme Court found that FERC may properly exercise authority over transmission planning and the rates charged for transmission service in retail states like Ohio.” (page 26)
- “FERC provides no evidence that allowing a federal right of first refusal to public utility transmission providers that undertake joint ownership initiatives would save consumers money.” (page 27)
- “To protect Ohio consumers from excessive rates and charges, FERC must safeguard the competitiveness of both the local and regional transmission planning processes. Eliminating the federal right of first refusal and requiring competitive solicitation of local as well as all regional facilities would better facilitate FERC’s energy market objectives.” (page 28-29)

### **Public Utilities Commission of Ohio - Federal Energy Advocate**

- “Unfortunately, the Ohio FEA envisions that the proposed condition of joint ownership will prove to be an illusory remedy. A duopolist faces the same perverse incentive structure as that of a monopolist. Such a market structure produces little incentive for cost containment, nor does it reward efficiency.” (page 18)
- “The Ohio FEA does not believe it is in the public interest for FERC to establish a federal right of first refusal for transmission facilities selected in a regional transmission plan for purposes of cost allocation, conditioned on the incumbent transmission provider establishing joint ownership of the transmission facilities. The proposal improperly rolls back the promises of competition envisioned by FERC Order No. 1000, while proposing a remedy of joint ownership that is unlikely to yield any commensurate benefit to ratepayers. Expanding the federal right of first refusal will produce transmission rates that are unjust and unreasonable. FERC should abandon this proposal.” (page 19)
- “The Commission's proposal to amend the federal right of first refusal to enable joint ownership groups to have preferential treatment also raises concerns about whether costs can

be deemed just and reasonable if they are caused by developers that do not have to compete to get the business.” (page 23)

### **Organization of PJM States**

- “OPSI therefore urges the Commission not to allow any TO or RTO to impose any federal ROFR that would undermine states' pro-competition policies or within states that do not explicitly support a ROFR.” (page 14)
- “At the very least, the Commission should not allow both parties to a joint ownership arrangement that qualifies for a conditional federal ROFR to be incumbent TOs. OPSI is concerned that the conditional ROFR as proposed by the Commission would allow incumbent TOs to effectively prevent any nonincumbent from participating in any transmission development in its territory. Specifically, it appears that an incumbent TO could satisfy the joint ownership requirements by entering into a permanent agreement with another incumbent TO to be the exclusive co-owner of any transmission project in the other's territory. If so, TOs then always exercise their ROFR rights, they could create transmission duopolies that permanently block all competition from non incumbent developers. This feature would likely destroy the ability of the joint ownership requirement to replicate any of the benefits of full transmission competition that many states seek to achieve.” (page 14)
- “Rather, OPSI is simply concerned that any reinstatement of federal ROFRs will necessarily undermine the policy choices that many of its members have made and should be allowed to make without federal interference. For that reason the majority of OPSI opposes both reinstating a federal ROFR in full and the Commission's proposed conditional federal ROFR.” (page 14)

### **Pennsylvania Public Utility Commission**

- “The PAPUC opposes FERC's proposal to amend Order No. 1000's reforms in order to permit the exercise of a federal right of first refusal ("ROFR") for transmission facilities selected in LTRT planning for purposes of cost allocation, even where the transmission provider with the ROFR for such regional transmission facilities establishes joint ownership of the transmission facilities. The PAPUC maintains its opposition to implementing a ROFR or any other limits on competition in the regional transmission planning process, consistent with its stance during the Order No. 1000 proceeding.” (page 18)
- “Given FERC's articulated desire to increase the number of regional transmission projects to meet future needs, it is counterproductive to increase or reinstate barriers that would thereby disadvantage competitive transmission developers who may propose more cost-effective solutions.” (page 19)
- “To the extent that FERC determines that the elimination of the ROFR by Order No. 1000 resulted in transmission providers focusing on local projects rather than regional projects, the solution is not to appease incumbent transmission owners' reluctance to engage in competition from nonincumbent transmission developers, by restoring the ROFR. To take advantage of the ROFR in FERC's joint-ownership proposal, incumbent transmission providers would be permitted to establish joint-ownership with another incumbent transmission provider- an arrangement which could effectively extend the exclusion of competitive transmission developers to include both local and regional transmission projects. Such a mechanism clearly grants preferential treatment to the incumbent transmission providers and discriminates against

competitive transmission developers, in violation of the principle of an 'open' transmission planning process, as articulated in Order No. 890.” (pages 19-20)

- “The PAPUC supports competition in transmission development. Order No. 1000 failed to engage the levels of competition to build out the transmission system that its supporters, including the PAPUC, would have hoped, but the solution is not to abandon competition in favor of rights of first refusal. As explained above, FERC should not give transmission owners' an incentive to choose local projects by granting them new rights of first refusal. The consequence of granting a ROFR for right-sized projects might not just be to displace small local projects, but incumbent transmission owners may use this as a powerful new tool to avoid regional competition. FERC goes so far as recognizing this possibility, noting that proposed right-sizing may displace other regional transmission needs (which may have been competitively procured).” (page 21-22)
- “Moreover, projects built by incumbent transmission owners are demonstrably more expensive in almost every case. By mile and by peak load served, over the last decade, PJM baseline projects, which are mostly subject to competition, are less expensive than transmission owner-driven local "supplemental" projects.” (page 22)
- “While the PAPUC supports the concept of right-sizing to increase efficiencies in planning, the ROFR for right-sized transmission projects proposed by FERC will not result in costs savings or more efficient transmission. The result is more likely to merely allow more avoidance of competitive processes.” (page 23)

### **Independent Market Monitor for PJM**

- “The Market Monitor opposes this provision because it weakens rather than strengthens competition to build transmission. Extending the prohibition on the right of first refusal rather than weakening it would support the Commission's other transmission planning goals. The goals of Order No. 1000 continue to be an essential guide for transmission policy.” (page 6)
- “The Commission fails to draw the self evident conclusion that the observed facts are a result of incumbent transmission owners successfully avoiding the requirement to compete by reclassifying transmission projects as project types not subject to competition. The solution would be to extend the Order 1000 prohibition of the federal right of first refusal to additional categories of transmission projects in order to ensure that competition really occurs. Instead, the Commission blames the competition requirement and proposes to further limit competition.” (page 7)
- “The proposal to require joint ownership as defined in the NOPR is antithetical to competition. Allowing the incumbent transmission owner to pick its partner, allowing the incumbent transmission owner to pick a fellow incumbent transmission owner as its partner, and allowing the incumbent transmission owner to define the level of ownership that qualifies are simply extending the incumbent transmission owners' monopoly position. The proposal substantially weakens competition rather than strengthening it.” (page 7)

### **Public Interest Organizations (“PIOs”)**

- “PIOs support the goals of competition for transmission development.” (page 83)
- “While the Commission has preliminarily chosen to reinstate a limited federal ROFR, we note that the Commission has a variety of tools available to address unintended consequences of



Order No. I 000's removal of the federal ROFR to incentivize local projects over regional projects. Rather than reduce competition, the Commission could, as many commentors have suggested previously, attempt to fix the misaligned incentives by expanding rather than retracting competition requirements.” (page 83)

- “FERC should be cognizant of the unintended consequences of any re-introduction of the federal ROFR. For example, the adoption of a limited federal ROFR could unintentionally incentivize utilities to propose transmission wholly within their own service territories to take advantage of the ROFR, even when the most efficient and cost-effective transmission solution, and one that would provide multiple regional benefits would span multiple utility territories. As discussed throughout these comments, regional lines-and especially portfolios of regional lines-are crucial for the buildout of much needed transmission infrastructure. If incumbent utilities have an incentive to keep lines solely within their service territories, this could have the unintended consequence of continuing to balkanize the transmission system through piecemeal development, resulting in higher costs for customers.” (page 84)
- “Similarly, the Commission should not impose a limited federal ROFR on states that prefer competition.” (page 85)
- “As PIOs stated in our Initial ANOPR Comments. the Commission should give great weight to independent evaluation of transmission projects such as a review carried out by an independent regional planning body, an RTO/ISO, or a hypothetical Independent Transmission Monitor. Conversely, the Commission should take a dim view of approving cost recovery for investments that are not susceptible to review.<sup>229</sup> This is particularly true for any project that is selected pursuant to a ROFR given that such projects, by definition, do not go through any independent review.” (page 85-86)

### **R Street Institute**

- “With this in mind, the NOPR overall is a mixed bag.” (page 2)
- “Exercise of a Federal Right of First Refusal. The Achilles' heel of the NOPR are anti-competitive right-sizing and conditional federal right of first refusal (ROFR) provisions. Based on incentive structure, a conditional ROFR would be employed unconditionally, thus signaling the death knell for transmission competition. Substantively, the justification provided would reinterpret "undue discrimination" in a manner that contradicts all precedent to promote "closed access" by institutionalizing discrimination. This is at odds with the Commission's statutory duty to combat anti-competitive behavior and promote "open access;" it would also reverse course on the basis of the entire history of the Commission's landmark rulings. Procedurally, the NOPR ignores the evidence on the record of the benefits of competition-and thus the damages federal ROFR would inflict-and seeks to use an obscure legal tool (Section 309 of the Federal Power Act) which creates massive legal risk that may not be severable from the rule. Worst of all, a federal ROFR may exacerbate the very problem the Commission seeks to address, by empowering incumbent TPs whose incentives are to pursue less efficient transmission development and stifle regional transmission development in a manner that insulates their generation. This behavior is the historic norm from well before competition was introduced into transmission-a federal ROFR would revert the industry back to the dark ages. Based on competition's cost savings alone and the potential for trillions of dollars in future transmission expenditures, **reinstating federal ROFR could easily prove to be a \$100 billion mistake.** RSI implores the Commission to:

- o Remove federal ROFR considerations from the final rule;
  - o Pursue the complementary merits of expanding competition and independent planning through separate proceedings in a proper Section 206 manner; and
  - o Adopt the recommendations of the Electricity Transmission Competition Coalition (ETCC) on this manner, whose comments RSI has contributed to and formally endorses in this proceeding.” (page 3-4)
- “Any ‘problem’ with competition is that it has been used too little because incumbent TOs took advantage of competitive carve-outs in Order 1000 and the dearth of oversight over local projects. Rather than close these loopholes, the NOPR proposes to exacerbate them.” (page 13)
  - “Reinstating a federal ROFR would mark a radical shift in Commission policy toward appeasing incumbents after decades of progress making them more accountable, transparent and subjected to competitive discipline.” (page 13)
  - “The legal and policy mechanisms used to pursue ROFR are deeply problematic. Using Section 309 of the Federal Power Act in this manner carries major legal risk that may not be severable from the rest of the final rule, which makes ROFR the Achilles' heel of the NOPR.” (page 13)
  - “The ANOPR record already reflects comments by dozens of consumer interests-including those in the ETCC-who want to see the right transmission projects get built at the lowest reasonable costs. The ETCC recommended an ITP in all Order 1000 regions and minimizing exemptions from competitive processes to accomplish this. The NOPR has failed to acknowledge not only the benefits of competition submitted by such parties on the ANOPR record, which ignores the economic damages ROFR would impose, but it ignores the solution set these parties presented to get to the root cause of the problem.” (page 17)
  - “As such, there are elevated odds of successful litigation against conditional ROFR via Section 309. Further, there is a significant limitation on the severability of this provision, meaning the entire final rule would be made vulnerable. Merits aside, the Commission must recognize that federal ROFR is a legal liability that jeopardizes all the productive reforms that will come in a final rule.” (page 19)
  - “The case for expanding - not eliminating - competition is overwhelming for ensuring just and reasonable rates. However, the Commission is highly unlikely to pursue any action in the final rule that it did not mention in the ANOPR. As such, the Commission should remove federal ROFR considerations from the final rule and pursue the merits of competition and independent planning through separate proceedings in a proper Section 206 manner.” (page 21)

### **Rail Electrification Council**

- “Although the Commission's proposal was probably not drafted with railroad ROWs in mind, the Council points out that railroads, particularly those with useable ROWs, could figure prominently as third parties in grid-related partnerships for the construction and operation of energy and communications infrastructure. In the future, new market entrants and incumbent transmission providers could partner with railroads to develop new transmission along railroad rights of way. S00 Green is a notable example of such a partnership to co-locate and install 350 miles of underground HVDC transmission within Canadian Pacific Railway's ROW. 22 We urge the Commission to take care administering the limited ROFR in this specialized context to treat all railroad-related partnerships similarly as would be the case under Order No.

1000's 'sound theoretical approach.' (P 353) The Council shares the Commission's desire to achieve more "efficient and cost-effective regional transmission development." Our goal is to encourage utilization of railroad ROWs in pursuit of that goal. No class of transmission developers should be disadvantaged in successfully making such arrangements. The Council supports both traditional transmission-owning utilities and new entrants having the same 'not unduly discriminatory' opportunity to partner with railroads for LTRTP and other transmission expansions along the network of railroad ROWs stands the best chance of success." (page 15)

### **Resale Power Group of Iowa**

- “RPGI is a member of the Electricity Transmission Competition Coalition ("ETCC") and joins in ETCC's comments filed in this proceeding. Competition for constructing new transmission infrastructure, if implemented as ETCC recommends, will produce the innovation, cost discipline, and accountability that are the foundation of just and reasonable transmission rates in the 21st Century. RPGI is concerned that the NOPR's proposed reforms represent the Commission's reimposition of the impediments to competition that it removed for regionally planned transmission projects in Order No. 1000. RPGI strongly urges the Commission reconsider the NOPR's approach. More, not less, competition is required, for reasons addressed in the ETCC's comments and hereinafter.” (page 1-2)
- “‘Joint ownership’ is not the same as an active partnership. While the NOPR contemplates ‘a meaningful level of participation and investment in proposed transmission facilities,’ it does not require critical design, material selection, and other cost-related decisions to be made jointly.” (page 5)
- “The NOPR's joint ownership proposal also does not take into account the particular context in which an incumbent operates. In Iowa and other states with such laws, an incumbent will have no impetus to seek joint ownership of new transmission projects. Why should an incumbent be incentivized to enter into a joint ownership arrangement under a federal ROFR when it could develop regional projects by itself pursuant to a state ROFR and earn a return on all, not just a portion, of the facilities' full value? An incumbent whose monopoly status is protected by state law has no need for a federal ROFR.” (page 5-6)
- “Mandating competition for all projects to the greatest extent possible is a better approach to regional transmission project development that correctly connects the Commission's desired outcomes with the incentive to achieve them. RPGI recognizes the Commission's concern that given a choice, transmission utilities will choose local projects over regional projects that may be subject to competition. The answer, however, is not prohibiting competition, but rather following, and expanding upon, Order No. 1000's competition mandate. All transmission projects with a capacity above 100 kV should be competed if that is possible. All projects that could be competed, but are not, should be subject to prudence review before they are included in rate base for recovery through rates.” (page 6)
- “RPGI does not doubt that incumbent transmission providers will balk at being required to compete and for a time, they may lose regional and local projects to nonincumbent developers. **But in a market economy, losing is the most effective teacher.** Rather than reinforcing the utilities' aversion to competition or trying to mitigate the ill effects of a monopoly mindset by creating a "conditional" ROFR, the Commission should require incumbents to learn how to compete, i.e., how to appropriately identify, and accurately price, risk; how to use value

engineering to achieve reliability at the lowest cost; and how to innovate within a fixed price.” (page 6)

- “Translating theory into practice, however, is extremely difficult and RPGI is deeply concerned with the practicalities right-sizing currently poses. RPGI agrees with the ETCC about the potential for overbuilding transmission infrastructure and consequently strongly disagrees with creating a federal right of first refusal in this context. Shielding a monopoly from competition is the surest path to excessive, unjust, and unreasonable pricing.” (page 8)
- “The answer, however, is not to restrict competition, but require transmission providers to learn how to compete by opening local projects above 100 kV to competition.” (page 9)

### **Six Cities (California)**

- “The Six Cities have reviewed the comments on the Commission's NOPR by CMUA, of which each of the Six Cities is a member, and they agree with the positions taken in the CMUA comments regarding the joint ownership of transmission facilities and the existing cost containment measures that have been applied within the CAISO region as a consequence of the CAISO's competitive solicitation procedures. ...Today, assets under the CAISO's operational control reflect diverse ownership structures, including investor-owned utilities, independent transmission developers, municipal, cooperative, and tribal participants, a non-profit entity, and a federal entity. And, as the CMUA comments describe, the competitive solicitation processes have attracted multiple participants, some of which have been selected in part on the basis of their cost containment proposals. The Six Cities support continued use of these processes within the CAISO region as an alternative to a uniform ROFR.” (page 12)

### **State Agencies (CT DEEP, CTAG, CT Office of Consumer Counsel, CT PURA, California Energy Commission, Delaware Division of Public Advocate, DC Attorney General, Maine Office of the Public Advocate, Attorney General of Maryland, MA AG, Attorney General of Michigan, Pennsylvania Office of Consumer Advocate, RI AG)**

- “The State Agencies generally have long supported competition in transmission development.” (page 9)
- “The U.S. Department of Energy (DOE) agrees. DOE has noted that “[regional transmission planning and commissioning will ... facilitate competition for transmission project development, yielding potential transmission cost savings.” DOE repeatedly has pointed to the Texas CREZ model and stated that, with this mode “two factor - good natural resources and competition - ensure that ... customers will be able to get wind and solar at the lowest reasonable cost.” (page 10-11)
- “Despite the many demonstrated benefits of competition, the NOPR proposes to permit incumbent transmission owners to block competition if they partner with a non-affiliate. This proposal is wholly unjustified and would harm consumers. We urge the Commission to keep regional transmission development open to full competition.” (page 11)
- “The proposal to reinstate a conditional ROFR would significantly impact consumers and is sufficiently distinct from the regional transmission planning reforms set forth in the NOPR. The State Agencies, therefore, believe that the ROFR proposal should be separated from the present NOPR rulemaking and considered in its own docketed proceeding under section 206. This would allow development of an appropriate record in a fully transparent manner with

review by relevant experts and consideration by all stakeholders. Such a procedure would also enable the Commission and stakeholders to explore competition reform more generally, including consideration of proposals to improve implementation of competitive processes.” (page 11)

- “The State Agencies broadly support the proposed changes to incorporate right-sizing considerations into Long Term Regional Planning but do not support the Commission’s proposed federal ROFR for right-sized projects. In addition, the State Agencies urge the Commission to reconsider its proposed voltage threshold.” (page 21)
- “However, the proposed 230 kV threshold seems arbitrary and would exclude potentially important projects from the planning requirement simply on the basis of voltage. In addition, limiting the proposed reforms to lines at or above 230 kV would undercut consideration of dynamic line ratings, which are often effective at voltages below 230 kV.” (page 21)
- “Finally, the State Agencies fully recognize that some states have state laws providing for a utility right of first refusal but object to the Commission’s proposal for a federal right of refusal for right-sized projects for many of the same reasons they oppose the conditional ROFR proposal. This ROFR is not conditional but absolute, offering no benefits to ratepayers and directly conflicting with the Commission’s findings in Order 1000 on the adverse effects of federal ROFRs. Further, the State Agencies are concerned that if right-sizing is routinely used or overused for long term regional projects, competition, and the attendant ratepayer benefits will effectively be eliminated.” (page 21-22)

#### **Transmission Access Policy Group (TAPS)**

- “TAPS also questions whether the NOPR’s proposed 230 kV cut-off for in-kind replacement projects may be too high with the unintended consequence of encouraging TOs to simply replace 161 kV facilities that, from an individual TO or regional perspective, merit upgrading to 230 kV. While not every 161 kV facility that is estimated to need replacement in a ten-year period should be upgraded, excluding such facilities from the TO reporting process prevents regions from even considering more efficient and cost-effective alternatives from a regional perspective.” (page 68)
- “Second, with the widespread need for replacement of our aging infrastructure, TAPS is concerned that expanding the federal ROFR to encompass right-sized alternative projects could substantially reduce opportunities for competitive transmission development. TAPS suggest that the Commission consider developing a more tailored approach (as TAPS has urged with respect to the conditional joint ownership ROFR) to leave room for competitive transmission development.” (page 68)

#### **Vermont Public Utility Commission and Vermont Department of Public Service (also a member of NESCOE)**

- “The opportunity for right-sizing is important to Vermont (and the rest of New England) ratepayers because asset-condition projects, which are primarily directed to aging, damaged, or otherwise obsolete equipment, are becoming an increasingly material component of the overall regional network service charge but receive less visibility than other project types in the ISO New England planning process. Asset-condition projects are a separate category of projects that are not part of the regional planning process that ISO New England uses to select reliability projects for inclusion in the Regional System Plan to solve issues identified in Needs

Assessments. Nonetheless, the costs of asset-condition projects are allocated to consumers in the same way as reliability projects that ISO New England selects – i.e., on a pro rata or postage stamp basis across regional network monthly loads.” (page 12-13)

- “The NOPR proposes limiting local projects eligible for right-sizing to those operating at or above 230-kV. The VPUC and VDPS are concerned that this threshold would exclude a significant portion of opportunities to right-size replacement transmission facilities. The ISO New England region, Vermont in particular, has many 115 kV lines, and the proposed 230 kV threshold would impede ability to consider right-sizing many transmission projects in ISO-New England. The VPUC and VDPS—recommend that the Commission not establish a fixed voltage level for the final rule and allow regional flexibility to establish a threshold level for right-sizing.” (page 13)