

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

Building for the Future Through Electric	)	
Regional Transmission Planning and	)	Docket No. RM21-17-000
Cost Allocation and Generator	)	
Interconnection	)	
	)	
Transmission Planning and Cost	)	Docket No. AD22-8-000
Management	)	
	)	
Joint Federal-State Task Force on	)	Docket No. AD21-15-000
Electric Transmission	)	

**MOTION FOR LEAVE TO ANSWER AND ANSWER  
OF THE ELECTRICITY TRANSMISSION COMPETITION COALITION TO  
THE UNAUTHORIZED SUPPLEMENTAL REPLY COMMENTS  
OF CERTAIN ANTI-COMPETITION INCUMBENT UTILITIES**

Pursuant to Rules 212 and 213 of the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) Rules of Practice and Procedure, 18 C.F.R. §§ 385.212, 385.213 the Electricity Transmission Competition Coalition (“Competition Coalition”)<sup>1</sup> moves to answer and answers the supplemental comments and lodging of an untimely<sup>2</sup> and unverified “whitepaper” filed in the above-referenced dockets on December 15, 2023 by a group of large, incumbent transmission owners advocating against competition to protect their own preferential development opportunities (“Incumbent Transmission Owners” or “Incumbent TOs”).<sup>3</sup>

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<sup>1</sup> More information about the Competition Coalition and its members/partners is available here: [Who we are - ETC Coalition \(electricitytransmissioncompetitioncoalition.org\)](https://electricitytransmissioncompetitioncoalition.org) (last accessed Feb. 1, 2024). The Competition Coalition filed initial comments and reply comments to the ANOPR in Docket No. RM21-17 on October 12, 2021 and November 21, 2021 respectively. The Competition Coalition filed initial comments and reply comments to the NOPR on August 17, 2022 and September 19, 2022, respectively. *See* Docket No. RM21-17.

<sup>2</sup> Indeed, the unauthorized comments/whitepaper were lodged in the rulemaking docket in RM21-17-00- 15 months after the reply comment deadline.

<sup>3</sup> The anti-competition coalition of transmission-owning utilities consisting of Ameren Services Company, Eversource Energy, Exelon Corporation, ITC Holdings Corp., National Grid USA, Public Service Electric and Gas Company, and

## I. EXECUTIVE SUMMARY

The Incumbent TOs claim that the competitive transmission process does not offer meaningful cost containment or cost savings to consumers, but the Incumbent TOs' comments/whitepaper (collectively, "Incumbent TO Filing") overlooks an inconvenient truth that competition is the best solution for consumers and the best mechanism to spur innovation and help curb exponentially rising electric transmission prices.<sup>4</sup> Ensuing just and reasonable rates requires that "a nonincumbent transmission developer of a transmission facility selected in the regional transmission plan for purposes of cost allocation have the same opportunity as an incumbent transmission developer..."<sup>5</sup> Contrary to their plea to revisit the Commission's prior determinations supporting competitive solicitations under Order No. 1000,<sup>6</sup> the Incumbent TOs fail to demonstrate that cost-of-service regulation is as effective as competition in establishing just and reasonable transmission rates.<sup>7</sup>

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Xcel Energy. Incumbent TOs' Comments at fn. 2. On December 7, 2023, several Incumbent TOs' members (including Ameren, Exelon, ITC Holdings, PSEG, and Xcel Energy) submitted a generic letter to the FERC Commissioners, without noting a specific docket, advocating reinstatement of anti-competition provisions for transmission development. The letter from a "cross-sector coalition" has been docketed in RM21-17.

<sup>4</sup> "Comment of United States Department of Justice and Federal Trade Commission," at p. 1, Docket No. RM21-17 (filed Aug. 17, 2022) (hereinafter "DOJ/FTC Joint Comments") ("**With a ROFR, consumers will lose the many benefits that competition can bring, including lower rates, improved service, and increased innovation...**") (emphasis added). *See also* Reply Comments of NextEra Energy, Inc., Docket No. RM21-17-000 (filed Sep 19, 2022), Attachment A, Reply Affidavit of Dr. John R. Morris (the "Morris Reply Affidavit"), at ¶ 3 ("**A return to regional monopoly control of transmission investment could have devastating consequences for ratepayers**") (emphasis added) (citing Dennis Carlton and Jeffrey Perloff, *Modern Industrial Organization* 656 (3<sup>rd</sup> Ed. 2000)).

<sup>5</sup> *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000 at PP 332, 335, 136 FERC ¶ 61,051 (2011) ("Order No. 1000"), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132 ("Order No. 1000A"), *order on reh'g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012) ("Order No. 1000-B"), *aff'd sub nom. S. C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

<sup>6</sup> *See* Incumbent TO Filing at 5, *see generally* TO whitepaper.

<sup>7</sup> *See* Affidavit of Paul Thessen in support of comments of LS Power Grid, LLC at 26-31, Docket No. RM21-17 (executed Aug. 17, 2022) (hereinafter "Thessen Affidavit"); Morris Reply Affidavit at ¶ 9.

Unlike cost-disciplining pressures provided by competition, regulated utilities with monopolistic rights and guarantees to projects will “have an incentive to press for the highest returns they can get the Commission to permit.”<sup>8</sup> In a regulated cost of service model, the utility has an inherent incentive to spend more because the utility can then earn more through a return of and on its investment.<sup>9</sup> Through competition, a developer has an inherent incentive to find an innovative and efficient solution while an incumbent with monopolistic, exclusive rights has no such incentive.<sup>10</sup> Given the differences in incentives between monopolistic incumbents and competitive non-incumbents,<sup>11</sup> “the Commission will not be able to replicate the benefits of competition through regulation.”<sup>12</sup> Because a regulator will generally hesitate to second-guess the business decisions and operations of a regulated entity that provides an essential public service,<sup>13</sup> the Commission must unleash transmission competition to the greatest extent practicable because **“[c]ompetition is still the best way to ensure that our electric grid is built out in a way that lowers rates, increases innovation, and improves sustainability and resiliency.”**<sup>14</sup>

The Commission should not give weight to the Incumbent TO Filing when rendering any further rulings in the above-referenced dockets because:

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<sup>8</sup> Thessen Affidavit at 26:7-9.

<sup>9</sup> See Thessen Affidavit 27:8-28:7.

<sup>10</sup> See Thessen Affidavit 27:8-28:7.

<sup>11</sup> See DOJ/FTC Joint Comments at p. 7 (“urg[ing] FERC to not displace competition, but instead to consider solutions to utilities misaligned incentives that are consistent with and promote competition”).

<sup>12</sup> See Thessen Affidavit at 29:1-3.

<sup>13</sup> See Thessen Affidavit at 26:15-17:7.

<sup>14</sup> “Federal Trade Commission, DOJ Urge FERC to Preserve Robust Wholesale Electricity Markets: Agencies’ Joint Comment Urges the Federal Energy Regulatory Commission not to Restore Incumbent Transmission Owners’ Right of First Refusal for new Facilities,” FTC Press Release (Aug. 17, 2022) (quoting Director of the Office of Policy Planning) (emphasis added), available at [Federal Trade Commission, DOJ Urge FERC to Preserve Robust Wholesale Electricity Markets | Federal Trade Commission \(ftc.gov\)](https://www.ftc.gov/press-release/20220817-ftc-doj-urge-ferc-preserve-robust-wholesale-electricity-markets) (last accessed Feb. 1, 2024).

- The Incumbent TO Filing – which includes an unverified, authorless, and self-serving whitepaper/pamphlet – lacks credibility and analytical evidence and its late filing is not supported by good cause;
- The Incumbent TOs claim their 11<sup>th</sup> hour filing – 15 months after the reply comment deadline in RM21-17-000 – is needed to “update” the 2019 Brattle Report,<sup>15</sup> yet they ignore more recent updates in the record in RM21-17, including the comments of the California Public Utilities Commission (“CPUC”)<sup>16</sup> that specifically updated the 2019 Brattle Report as well as affidavits from competitive transmission developers<sup>17</sup> that corrected the misinformation in a report from Concentric Energy Advisors<sup>18</sup>;
- The Incumbent TOs cherry-pick data from select competitive projects, misleadingly describe those projects, and advance anecdotes that do not represent the spectrum of the competitive transmission experience;
- The Incumbent TOs selectively exclude successful competitive projects from their analysis – projects that were in the original 2019 Brattle Report – as those projects do not help advance their narrative;
- The Incumbent TOs ignore substantial cost escalations associated with non-competitive, incumbent utility projects;
- The Incumbent TOs do not give full credence to the cost caps and consumer protections established in competitive solicitations;
- The Incumbent TOs fail to account for the substantial inflation that has occurred since 2019 and do not recognize that certain competitive projects allow for inflation adjustments within cost-cap mechanisms;

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<sup>15</sup> See “Cost Savings Offered by Competition in Electric Transmission: Experience to Date and the Potential for Additional Customer Value,” The Brattle Group (April 2019), *available at* [Cost Savings Offered by Competition in Electric Transmission: Experience to Date and the Potential for Additional Customer Value \(brattle.com\)](https://www.brattle.com/wp-content/uploads/2019/04/Cost-Savings-Offered-by-Competition-in-Electric-Transmission-Experience-to-Date-and-the-Potential-for-Additional-Customer-Value.pdf) (last accessed Feb. 1, 2023). Brattle responded to the critique of its 2019 report by Concentric Energy Advisors. Brattle’s response to Concentric is available here: [Brattle Economists Respond to Critique of Prior Report on Value of Competitive Transmission - Brattle](https://www.brattle.com/wp-content/uploads/2019/08/Brattle-Economists-Respond-to-Critique-of-Prior-Report-on-Value-of-Competitive-Transmission-Brattle.pdf); see “Response to Concentric Advisors’ Report on Competitive Transmission,” Brattle Group (Aug. 2019), *available at* [Response to Concentric Energy Advisors’ Report on Competitive Transmission \(brattle.com\)](https://www.brattle.com/wp-content/uploads/2019/08/Response-to-Concentric-Energy-Advisors-Report-on-Competitive-Transmission.pdf) (last accessed Feb. 1, 2024).

<sup>16</sup> Initial Comments of the California Public Utilities Commission,” at p. 61-72, Docket No. RM217-17 (filed Aug. 17, 2022) (hereinafter “CPUC NOPR Comments”). The excerpt from pages 61-72 of the California Public Utilities Commission filing related to their Update of the Brattle Report is attached here as **Exhibit A**.

<sup>17</sup> See Thessen Affidavit at 30-39; Morris Reply Affidavit at ¶¶ 2-10, 24-58.

<sup>18</sup> See “Competitive Transmission: Experience To-Date Shows Order No. 1000 Solicitations Fail to Show Benefits,” Concentric Energy Advisors (Aug. 2022), *available at* [Competitive-Transmission-Experience-To-Date-Shows-Order-No.-1000-Solicitations-Fail-to-Show-Benefits.pdf \(ceadvisors.com\)](https://www.ceadvisors.com/wp-content/uploads/2022/08/Competitive-Transmission-Experience-To-Date-Shows-Order-No.-1000-Solicitations-Fail-to-Show-Benefits.pdf) (“Concentric Report”) (last accessed Feb. 1, 2024).

- The Incumbent TOs fail to demonstrate that an array of innovative transmission planning solutions and cost containment approaches can be effectively achieved in the absence of transmission competition;
- The Incumbent TOs fail to show that incumbent utilities would adhere to any kind of cost containment measures to avoid passing cost overruns through to consumers; and
- The Incumbent TOs’ whitepaper rests on a false premise and fatal flaw – that a competitive developer will actually recover from consumers any final project costs that exceed a competitive developer’s initial winning bid. As a result, the Incumbent TOs ignore the actual amount of project costs that are recovered in consumer rates, resulting in a convenient mischaracterization of the ultimate rate impact of competitive projects.

Competition incentivizes transmission developers to offer innovative and cost-efficient solutions across four key financial dimensions:

- 1) **Competitive Bidding Lowers Capital Costs** – competition incentivizes transmission developers to sharpen their pencils on project costs with robust cost scrutiny;
- 2) **Competitive Bidding Lowers Requested Return on Equity (“ROE”)** – competitive bidding brings additional consumer savings by incentivizing robust ROE competition among multiple bidders;
- 3) **Competitive Bidding Lowers the Overall Cost of Capital Structures** – competitive bidding encourages financial innovation and lower cost capital structures, with equity percentages that are materially lower than those found in the regulated formula transmission rates of Incumbent TOs; and
- 4) **Competition Yields Accountability** – the cost containment commitments of winning bidders are legally binding and become part of project rate cases, thereby ensuring accountability for project costs and schedules in the more stringent competitive developer agreements.<sup>19</sup>

The record in Docket No. RM21-17-000 contains widespread opposition to any new rights of first refusal for Incumbent TOs, and that opposition comes from an array of differently situated sectors and parties, as reflected in Appendix B to the Competition Coalition’s Reply Comments.<sup>20</sup>

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<sup>19</sup> See, e.g., *PJM Interconnection, L.L.C.*, 164 FERC ¶ 61,021, at PP 2, 33-48 (2018) (finding that the competitive developer agreement in PJM is more stringent than Consolidated Transmission Owners Agreement).

<sup>20</sup> “Reply Comments by the Electricity Transmission Competition Coalition,” RM21-71 (filed Sep. 19, 2022).

Consistent with the administration’s executive order<sup>21</sup> and the growing consensus among federal<sup>22</sup> and state<sup>23</sup> regulators, academia,<sup>24</sup> and the general public<sup>25</sup> as to the critical need for transmission competition, the Competition Coalition requests this Commission to expand the use of competition to help combat rising transmission costs.

## **II. DUE PROCES REQUIRES AN OPPORTUNITY FOR THE COMPETITION COALITION TO RESPOND TO THE UNAUTHORIZED SUPPLEMENTAL REPLY COMMENTS OF THE INCUMBENT TOS**

The deadline for reply comments to the pending transmission Notice of Proposed Rulemaking (“NOPR”) in Docket No. RM21-17 was September 19, 2022.<sup>26</sup> The Commission

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<sup>21</sup> See “Executive Order on Promoting Competition in the American Economy” The White House (issued July 9, 2021), available at [Executive Order on Promoting Competition in the American Economy | The White House](#) (last accessed Feb. 1, 2024).

<sup>22</sup> See DOJ/FTC Joint Comments at 1-3, 5-16.

<sup>23</sup> For example, comments of consumer advocates and state commissions in FERC Docket No. EL23-105, a complaint contending that local planning and local cost allocation for incumbent-reserved, non-competitive PJM Supplemental Projects is unjust and unreasonable. See generally *Office of the Ohio Consumers’ Counsel (OCC) v. PJM Interconnection, L.L.C.*, Docket No. EL23-105 (complaint filed Sep. 28, 2023). After noting that during the 2012-2022 period Baseline Project spending in PJM totaled \$23 billion while Supplemental Project spending neared \$43.5 billion, the New Jersey Board of Public Utilities asserted that monopoly utilities are reserving PJM Supplemental Projects and spending “billions of dollars of ratepayer money without any exposure to cost-disciplining competition.” “Comments of the New Jersey Board of Public Utilities in Support of Complaint,” at p. 6-7, *OCC v. PJM*, Docket No. EL23-105 (filed Nov. 17, 2023). The New Jersey Rate Counsel pointed out that, in New Jersey, the Board of Public Utilities can only conduct competitive solicitations when the project supports New Jersey’s offshore wind goals. See “Comments of the New Jersey Rate Counsel in Support of Complaint,” at 3-4, *OCC v. PJM*, Docket No. EL23-105 (filed Nov. 17, 2023); see also “Comments of the Indiana Office of Utility Consumer Counselor in Support of Complaint,” at p.7, *OCC v. PJM*, Docket No. EL23-105 (filed Nov. 17, 2023) (Supplemental Projects comprised 94.57% of the total Indiana transmission infrastructure in 2022); see also “Comments of the Pennsylvania Office of Consumer Advocate in Support of Complaint,” at p.2, *OCC v. PJM*, Docket No. EL23-105 (filed Nov. 17, 2023) (Supplemental Projects comprised 82.1% of the total Pennsylvania transmission infrastructure in 2022); see also “Comments of the Maryland Office of People’s Counsel,” at p. 9, *OCC v. PJM*, Docket No. EL23-105 (filed Nov. 17, 2023) Supplemental Projects comprised 76% of the total Maryland transmission infrastructure from 2015-2022).

<sup>24</sup> See, e.g., “Comment of the Harvard Law Initiative,” RM21-17, at p. 3-4 (Aug. 17, 2022) (“**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**”) (emphasis added).

<sup>25</sup> See, e.g., Letter of U.S. Senators Martin Heinrich and Mike Lee to the Commission Urging Transmission Competition, Docket No. RM21-17 (Sep. 30, 2022), available at [2022.9.30-FINAL-Pro-Competition-Senate-ENR-letter-to-FERC -Heinrich-Lee.pdf \(electricitytransmissioncompetitioncoalition.org\)](#) (last accessed Feb. 1, 2024).

<sup>26</sup> See “Notice Denying Extension of Time,” Docket No. RM21-17 (Aug. 9, 2022) (firmly establishing an initial comment deadline of August 17, 2022 and a reply comment deadline of September 19, 2022).

should proceed to reject the Incumbent TO Filing because it is unauthorized and constitutes an improper attempt to inject advocacy into the docket and influence the Commission's final adjudication when other parties have not been noticed of any opportunity to also provide supplemental comments and evidence. The Incumbent TO Filing causes undue prejudice among the commenting parties. Deadlines exist to provide clear opportunities for parties impacted by an agency's proposed rule to timely submit comments (and reply comments if afforded) to protect their interests and provide their perspectives. The filing of unauthorized pleadings prior (and perhaps immediately prior) to the issuance of a final rule makes it more difficult for the agency to timely render that final rule and ensure fairness for all commenting parties.

The Incumbent TOs have not supported, with good cause, the timing of their filing well past the Commission's comment deadlines in Docket No. RM21-17. Several parties in their comments to the NOPR referenced the landmark 2019 peer-reviewed Brattle Report (that Incumbent TOs attempt to now undermine), in comments filed in 2021 and 2022 in RM21-17.<sup>27</sup> The Incumbent TOs did not respond to these comments in over a year. The Incumbent TOs do not demonstrate that supplemental *reply* comments are authorized under the Commission's rules. While the Incumbent TOs purported to file the supplemental comments pursuant to Rule 212 of the Commission's Rules of Practice and Procedure governing motions, the Incumbent TOs should have filed a motion for leave to provide supplemental reply comments and/or a motion to lodge new evidence.

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<sup>27</sup> For example, the ETCC last referenced the 2019 Brattle Report in their reply comments to the NOPR, filed on September 19, 2022 in Docket No. RM21-17.

The Incumbent TOs claim that the supplemental comments will “help the Commission finalize any future rulemaking”;<sup>28</sup> however, the Commission cannot rely on the evidence in the Incumbent TOs’ whitepaper because the authorless whitepaper was not verified or attested to by any independent, technical, reputable firm. As a result, the Incumbent TOs are not helping the Commission – they are just causing more “noise in the docket.” The Incumbent TOs claim their evidence is “neither repetitive nor duplicative of any other evidence submitted in the NOPR proceeding,”<sup>29</sup> however, the Commission will not accept an unauthorized pleading on that basis alone. If the Commission desires more or newer evidence, the Commission has authority to issue a notice seeking supplemental comments and evidence and establish deadlines for all parties to participate. The Commission has not taken that path.

Although the Commission’s procedural rules do not allow for answers to unauthorized supplemental comments,<sup>30</sup> the Commission may permit answers for good cause. The Commission will accept answers that contribute to a more accurate and complete record, help the Commission better understand the issues, clarify misstatements, respond to new issues raised, or provide useful and relevant information that will assist the Commission in its decision-making process.<sup>31</sup> In the event the Commission were to consider in any way the unauthorized Incumbent TO Filing in rendering a final rule in Docket No. RM21-17, then due process requires an opportunity for the Competition Coalition to respond to the Incumbent TO Filing. The Competition Coalition requests

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<sup>28</sup> Incumbent TO Filing at 2.

<sup>29</sup> Incumbent TO Filing at 2.

<sup>30</sup> 18 C.F.R. §§ 385.213(a)(2) & 385.713(d)(1).

<sup>31</sup> See *NSTAR Elec. Co. v. ISO New England, Inc.*, 120 FERC ¶ 61,261 at P 32 (2007) (accepting the answer to an answer because the answers assisted the Commission in its decision-making process). See also, *Midwest Indep. Transmission Sys. Operator, Inc.*, 126 FERC ¶ 61,144 at P 8 (2009) and *Me. Pub. Utils. Comm’n v. ISO New England, Inc.*, 126 FERC ¶ 61,090 at P 37 (2009).



that the Commission accept this answer to clarify the record and to have an evidentiary basis for disregarding the misstatements and misleading information in the Incumbent TO Filing.

**III. THE INCUMBENT TRANSMISSION OWNERS FAIL TO UNDERMINE THE BENEFITS OF TRANSMISSION COMPETITION AND THE NEED FOR COMPETITION IN ENSURING JUST AND REASONABLE RATES.**

The Commission need not even engage the substance of the Incumbent TOs' supplemental comments because the whitepaper is authorless and lacks any kind of verification, affidavit, or attestation from any kind of fact witness or technical expert. As a result, the authorless whitepaper and the comments should be given no weight or credibility.<sup>32</sup> In contrast to the Incumbent TO whitepaper, the Brattle Report was prepared by six experts from a highly reputable firm. The Brattle Report was prepared at the request of a competitive transmission developer, but expressly notes that the report was peer-reviewed and received helpful feedback "from transmission developers, policymakers, regulators, and customer representatives in response to various presentations of the draft results of this study."<sup>33</sup> The Brattle Report concluded that competitive transmission processes can provide between 20% and 30% cost savings to consumers on average.<sup>34</sup>

The Incumbent TOs claim their 11<sup>th</sup> hour filing is needed to "update" the Brattle Report," yet they ignore more recent updates in the record in RM21-17, including the comments of the CPUC that specifically updated the Brattle Report.<sup>35</sup> The Incumbent TO Filing neither responds nor acknowledges the CPUC comments in the record and the affidavits of competitive transmission

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<sup>32</sup> An agency may reject and decline to admit into evidence an unverified written statement. *See Riker (Station KFQU) v. Federal Radio Comm'n*, 55 F.2d 535, 536 (D.C. Cir. 1931).

<sup>33</sup> Brattle Report at Cover, p. 2.

<sup>34</sup> *See* Brattle Report at 10; *see also* Brattle Summary of Findings, available at [Report by Brattle Economists Discusses the Benefits of Competitive Transmission - Brattle](#) (last accessed Feb. 1, 2023).

<sup>35</sup> CPUC NOPR Comments at p. 61-72. The excerpt from pages 61-72 of the California Public Utilities Commission filing related to their Update of the Brattle Report is attached here as **Exhibit A**.

developers,<sup>36</sup> which corrected misinformation in the Concentric Report. The Incumbent TO Filing fails to respond to the comprehensive affidavits and evidence in the record demonstrating the benefits of transmission competition and the 20% to 42% in average cost savings attained through competitive solicitations.<sup>37</sup>

**A. The Incumbent TOs Cherry-Pick Project Data, Use That Data Improperly, Selectively Exclude Important Competitive Projects in Their Whitepaper, and Draw Improper Inferences as to the Ultimate Cost Impact on Consumers.**

The Incumbent TOs selectively focus on certain competitive projects from the Brattle Report and misleadingly describe the costs associated with those projects<sup>38</sup> to attempt to paint a picture that consumers will be better off without transmission competition, a notion that is both counterintuitive and contrary to the hard evidence. The Incumbent TOs then review those select projects in a vacuum, failing to account for practical realities such as inflation, and conveniently overlook the substantial cost overruns for incumbent utility projects. Critically, the Incumbent TO whitepaper rests on the flawed premise that costs exceeding a competitive developer's initial winning bid will be recovered from consumers. Unlike the incumbent utilities, which can generally flow their project cost overruns into rates, most competitive developers cannot pass through cost overruns to consumers because binding cost caps and cost containment commitments are necessary for a competitive developer to win a solicitation and be awarded a project – now

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<sup>36</sup> See generally Thessen Affidavit and Morris Reply Affidavit.

<sup>37</sup> See generally Thessen Affidavit, Morris Reply Affidavit; see Comments of the New Jersey Board of Public Utilities, RM21-17, at p. 29-30, 37, (Aug. 17, 2022); Initial Comments of Massachusetts Attorney General, RM21-17, at p. 30-31, 36 (Aug. 17, 2022); Electricity Competition Coalition Initial Comments at p. 4 (citing 2021 analysis of competition in onshore electricity transmission networks by the United Kingdom's Office of Gas and Electricity Markets finding 22-42% cost savings in MISO projects). The UK study is available here: [Early Competition IA \(ofgem.gov.uk\)](https://www.ofgem.gov.uk/early-competition-ia) (last accessed Feb. 1, 2024).

<sup>38</sup> For example, some of the realized project costs the Incumbent TOs include in Figures 2 and 3 of their whitepaper are also misleading because they appear to include costs for project-related incumbent costs that were not part of the competitive bids. See, e.g., Incumbent TO Whitepaper at fn. 21 (noting that the Artificial Island costs include both non-incumbent and incumbent costs).

more so today than ever. Commission approval is required to secure cost recovery beyond a developer's contractual cost containment measures. Even if there are cost caps that allow for certain escalations that track inflation, or allow developers to recover a return of, but not on, project cost overruns, such flexible cost caps protect consumers better than the projects developed by incumbent utilities without any cost containment at all. Competition demands accountability, cost transparency, and cost discipline that simply does not occur in the absence of competition.<sup>39</sup> The Incumbent TOs fail to demonstrate otherwise.

The Incumbent TO whitepaper reviewed eight to nine competitive projects where the realized costs were higher than their bids or initial cost estimates. This outcome was not unanticipated. Importantly, the 2019 Brattle Report anticipated that, as a practical matter, realized or actual project costs could be higher than bids and initial cost estimates.<sup>40</sup> The Incumbent TOs fail to mention that, aside from the Ten West Link Project,<sup>41</sup> the projects they reviewed did not

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<sup>39</sup> See Thessen Affidavit at 30:12-31:5 (explaining how competitive developer cost containment agreements are incorporated into FERC-approved formula rates and how the public bidding process creates more cost transparency and cost discipline). Mr. Thessen further observed that, without competition, a project will not have “a binding construction cost cap, a return on equity cap for the life of the project, consumer favorable caps on capital structure, or any other risk shifting concession.” *Id.* at 25:14-17.

<sup>40</sup> See Brattle Report at 9 (noting that “overall cost savings of 15% for MISO and 29% for CAISO would result from the competitive processes even if the competitively-developed projects were to experience percentage cost escalations similar to the historical experience with major transmission projects in these regions”).

<sup>41</sup> The Ten West Link Project by DCR Transmission (“DCRT”) is still an evolving story. Concerned about the potential detrimental impact on transmission competition, the Competition Coalition has intervened in FERC Docket No. ER23-2309 wherein DCRT is attempting to obtain authorization to significantly increase the cost of the Ten West Link Project beyond the previously established cost caps. The Competition Coalition explained any adjustments to DCRT's binding cost cap commitment harms the public interest and “will embolden transmission owners to further engage in efforts to undercut transmission competition to protect their monopolistic footholds,” resulting in “high electric transmission prices for captive consumers.” *DCR Transmission, L.L.C.*, ETCC Motion to Intervene at p. 5, Docket No. ER23-2309 (filed Aug. 4, 2023). Importantly, the Commission has also found the DCR's filing has not been found to be just and reasonable. *DCR Transmission, L.L.C.*, 184 FERC ¶ 61,199 at P 40 (2023). There is no basis to assume that the contractual cost containment provisions which require both CAISO and FERC to agree on any cost overruns will be granted by both CAISO and FERC. CAISO has strongly protested DCRT's proposal. See *id.* at PP 25-28. If the DCRT cost containment language is enforced, it will be a good example that competition shields ratepayers from increased costs and that cost risk has been shifted from ratepayers to developers. In any case, the DCRT situation is an example that competition brings accountability. DCRT is accountable in a hotly contested

seek any cost recovery beyond their cost cap. The Incumbent TOs conveniently overlook that traditional incumbent projects have no such cost caps and are not subject to cost discipline that can only be achieved through the competitive transmission process with oversight over the contractual cost caps.<sup>42</sup> Cost overruns for a non-competitive transmission project only subject the incumbent to a prudence review;<sup>43</sup> in contrast, DCR Transmission is held accountable by tariff and contractual language that should preclude its ability to recover any of the cost overruns, as noted in the strong objections of the California Independent System Operator, Inc. (“CAISO”), California Public Utilities Commission, and consumers, and evidenced by FERC’s initial conclusion that DCR Transmission’s sought-after cost-cap exception would not yield just and reasonable rates.<sup>44</sup>

The Incumbent TO whitepaper recognizes that the Brattle Report reviewed 22 discrete competitively bid projects in North America, but the whitepaper fails to review and analyze all of those 22 projects.<sup>45</sup> In Figure 1 in the whitepaper, the Incumbent TOs include the Miguel project as one of the nine projects that were reviewed, in order to depict higher costs for that project.<sup>46</sup> Then, the Incumbent TOs later explain that they excluded the Miguel project from their updated analysis because there was no cost associated with the winning bid for the project, as incumbent San Diego Gas & Electric was awarded the project as the only bidder.<sup>47</sup>

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docket for its cost overruns, and the existence of those contractual commitments is creating far more accountability than a mere prudence standard that uncompetitive projects enjoy.

<sup>42</sup> See Incumbent TO Whitepaper at Appendix 3, p. 3 (“For the purposes of this Whitepaper, the focus is on the amount of the cost cap at the time of the award, so the initial stated amount is used”).

<sup>43</sup> The Commission in a formula rate proceeding “presumes that all expenditures are prudent, so the utility need not justify in its case-in-chief the prudence of all of its costs.” *Potomac-Appalachian Transmission Highline, LLC*, 158 FERC P 61,050 at P 100 (2017) (citing *New England Power Co.*, 31 FERC P 61,047, 61,084 (1985)).

<sup>44</sup> See *DCR Transmission, L.L.C.*, 184 FERC ¶ 61,199 at PP 20-29, 40.

<sup>45</sup> See Incumbent TO Whitepaper at 3.

<sup>46</sup> See Incumbent TO Whitepaper at 1, Figure 1.

<sup>47</sup> See Incumbent TO Whitepaper at fn. 27.

The Incumbent TOs exclude from their whitepaper certain large, successful competitive projects in Canada (such as the Alberta project) that were reviewed in the Brattle Report.<sup>48</sup> The Incumbent TOs claim such Canadian projects are not relevant because they were not FERC-regulated, Order No. 1000 solicitations.<sup>49</sup> However, ascertaining the viability and benefits of transmission competition can be demonstrated outside the context of the limited number of Order No. 1000 solicitations. It is important to note that the CAISO competitive solicitation process predated Order No. 1000, and therefore, the proper benchmark for review is the use of a competitive transmission process.<sup>50</sup> For example, Brattle showed a 21% cost advantage of the winning proposal for the Fort McMurray West 500 kV project in Alberta compared to the RTO's initial estimate.<sup>51</sup> The Incumbent TOs generically assert that the 2019 Brattle Report "tended to bias the results towards higher calculated savings from competitive solicitation,"<sup>52</sup> but fail to support that assertion (and therefore fail to rebut Brattle's cost savings determinations).

The Incumbent TO whitepaper excludes two New York Independent System Operator ("NYISO") projects that Brattle reviewed – NYISO Public Policy Segments A and B – due to a lack of data that allows for the establishment of a baseline project cost estimate.<sup>53</sup> Yet, the Incumbent TOs maintained inclusion of the Western New York Empire State Line project in their

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<sup>48</sup> Incumbent TO Whitepaper at 4.

<sup>49</sup> Incumbent TO Whitepaper at 4, fn. 11 (claiming the Canadian projects are "poor analogs" but failing to explain why).

<sup>50</sup> See Brattle Report at 26, fn. 45 (noting that PJM's Artificial Island and several early CAISO competitive solicitations were not subject to Order No. 1000).

<sup>51</sup> See Brattle Report at 33, Figure 15.

<sup>52</sup> See Incumbent TO Whitepaper at fn 6. Notably, the Incumbent TOs assert that their whitepaper should not be viewed "as validating the approach taken by the authors of [the Brattle] report," yet the Incumbent TOs do not challenge the methodological approach, the analytical rigor, or the credibility of the approach taken by the authors of the Brattle Report.

<sup>53</sup> See Incumbent TO Whitepaper at 4.

review, which also resulted from the NYISO competitive solicitation process. Notably, the cost of Segment A was \$200 million (25%) less than the independent cost estimate.<sup>54</sup>

Additionally, the whitepaper excluded projects that were cancelled, withdrawn, or placed on indefinite hold.<sup>55</sup> While current cost data may not have been available for those projects, the exclusion of those projects omits the potentiality of cost savings and cost containment for those projects. For example, the Hartburg-Sabine Junction project was withdrawn primarily due to issues around litigation concerning a Texas right-of-first refusal (“ROFR”) law granting preferential transmission development rights to incumbents after the Hartburg-Sabine project was assigned to NextEra during the Midcontinent Independent System Operator, Inc.’s (“MISO”) competitive transmission process.<sup>56</sup> MISO received proposals from nine different respondents for the Hartburg-Sabine Junction 500 kV project.<sup>57</sup> MISO’s competitive developer selection process for both the Duff-Colman EHV 345 kV transmission line and the Hartburg Sabine Junction EHV

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<sup>54</sup> See “Governor Hochul Announces Completion of Central East Energy Connect Transmission Line,” (Dec. 13, 2023 Press Release), available at [Governor Hochul Announces Completion of Central East Energy Connect Transmission Line | Governor Kathy Hochul \(ny.gov\)](#) (last accessed Feb. 1, 2024); “LS Power Rate Settlement Reduces Transmission Project Cost Estimate by \$200+ Million,” (Apr. 27, 2021 Press Release), available at [LS Power Rate Settlement Reduces Transmission Project Cost Estimate By \\$200+ Million \(prnewswire.com\)](#) (last accessed Feb. 1, 2024).

<sup>55</sup> See Incumbent TO Whitepaper at 3.

<sup>56</sup> See generally “Order Addressing Arguments Raised on Rehearing and Denying Motion for Stay,” *Midcontinent Indep. Sys. Op. Inc.*, Docket No. ER23-865 (July 11, 2023) (cancelling the project due to schedule delays caused by the Texas ROFR law litigation).

In 2022, the Fifth Circuit Court of Appeals determined that the Texas ROFR law violated the U.S. Constitution by interfering with federal jurisdiction over transmission. See *NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306 (5th Circ. 2022), cert. denied *Lake et al. v. NextEra Energy, et al.*, 22-601 (Dec. 11, 2023), available at [https://www.supremecourt.gov/orders/courtorders/121123zor\\_e29g.pdf](https://www.supremecourt.gov/orders/courtorders/121123zor_e29g.pdf). On brief before the U.S. Supreme Court, the U.S. Solicitor General’s Office informed the U.S. Supreme Court that the Fifth Circuit correctly found that the Texas ROFR law giving incumbent transmission utilities the first opportunity to build transmission lines is unconstitutional and discriminates against interstate commerce by imposing a local-presence requirement. The U.S. Solicitor’s brief is available here: [sg-lake-nextera.pdf \(law360news.com\)](#) (last accessed Feb. 1, 2024).

<sup>57</sup> Hartburg-Sabine Junction 500 kV Competitive Transmission Project, Selection Report, p. 5, available at <https://cdn.misoenergy.org/Hartburg-Sabine%20Junction%20500%20kV%20Selection%20Report296754.pdf> (last accessed Feb. 1, 2024) (hereinafter “Hartburg Sabine Selection Report”).

500 kV transmission line resulted in innovative technical approaches and cost caps that protected customers from cost overruns and excessive rates.<sup>58</sup> The project would have set a life-of-the-project cap of 45% on the equity component for financing structures and froze the return on equity at 9.8%<sup>59</sup> (well below MISO’s then current base equity return of 10.32%). The Hartburg Sabine Project also set a 10-year cap on the project’s annual transmission revenue requirements.<sup>60</sup>

The Incumbent TO whitepaper provides an incomplete view of the current transmission competition landscape because the Incumbent TOs omit successful competitive transmission processes that have occurred since the 2019 Brattle Report, including the Wolf Creek-Blackberry Transmission Line in the Southwest Power Pool, Inc. (“SPP”) region<sup>61</sup> and the Hiple to Indiana/Michigan State Border 345 kV project in MISO.<sup>62</sup> Accordingly, because the Incumbent TO whitepaper provides a partial and self-servingly selective analysis that does not constitute an “apples-to-apples comparison with the 2019 [Brattle] report,”<sup>63</sup> the supplemental comments of the Incumbent TOs are not the most current, complete, and objective review of the competitive transmission experience in North America.

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<sup>58</sup> Hartburg Sabine Selection Report at p. 21.

<sup>59</sup> See Hartburg Sabine Selection Report at p. 6.

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

<sup>61</sup> See Wolf Creek-Blackberry RFP Public Report, available at [wolf creek-blackberry rfp public report.pdf \(spp.org\)](https://www.spp.org/wolf-creek-blackberry-rfp-public-report.pdf) (last accessed Feb. 1, 2024). The SPP Industry Expert Panel reviewing the competitive bids unanimously recommended Proposal C (by NextEra) due to its lowest cost proposal to SPP customers and high scores for engineering design, operations, and finance. Wolf Creek-Blackberry RFP Public Report at p. 8. Proposal C offered a project cost of \$85.2 million compared to SPP’s cost estimate of \$143 million. See *id.* at Public Report Appendix at 100. Proposal C also offered a competitive cost structure, including a competitive present value revenue requirement of \$63 million, compared to other bids ranging from \$90 million to \$116 million. See *id.* at 40-42, Public Report Appendix at 107.

<sup>62</sup> See Hiple to IN/MI State Border 345 kV Selection Report, available at [HIMB 345 kV Selection Report628866.pdf \(misoenergy.org\)](https://www.misoenergy.org/HIMB-345-kV-Selection-Report-628866.pdf) (last accessed Feb. 1, 2024). MISO explained that the winner of the Hiple project, Republic Transmission, “had a well-supported project implementation cost estimate, a superior revenue requirement commitment, and a well-reasoned routing strategy.” *Id.* at p. i. Republic committed to a 9.8% ROE, a 45% equity in the capital structure, and an ROE reduction if there are project delays. See *id.* at p. 14, Figure 9.

<sup>63</sup> See Incumbent TO Whitepaper at 3, fn. 4.

**B. The Incumbent TO Whitepaper Fails To Account For Inflation And Conveniently Overlooks The Substantial Project Cost Overruns For Incumbent Utility Projects.**

The Incumbent TO whitepaper erroneously claims it uses the same methodology from the 2019 Brattle Report “but updates project costs with the most current data.”<sup>64</sup> The Incumbent TO whitepaper selectively avoids including in its “update” to the 2019 Brattle Report one of the most significant macroeconomic events since 2019 – the substantial and persisting escalation in inflation and the price of goods post-Covid-19.<sup>65</sup> The Incumbent TOs concede that they “exclude any cost escalations calculations of the type used in the 2019 [Brattle] Report as they are unnecessary” and “for simplicity, we opted not to factor in inflation adjustments for any project cost figures.”<sup>66</sup> The Incumbent TOs further concede that their “exclusion of inflation adjustments in some cases may skew results.”<sup>67</sup>

Unlike the Incumbent TOs, Brattle comprehensively analyzed a range of potential cost escalations for competitively developed projects, including 1) projects completed with no escalation; 2) projects with cost escalation equal to 5 years of inflation (assuming, at that time, a 2.5% inflation rate); and 3) projects with cost escalation similar to historical average cost escalations for transmission projects.<sup>68</sup> Brattle recognized that many competitive projects specifically allow for inflation-related adjustments.<sup>69</sup> Brattle concluded as follows:

If the projects subject to competition could be developed and constructed *without any*

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<sup>64</sup> Incumbent TO Whitepaper at 1; *see* Incumbent TO Filing at 3 (claiming the same methodology as the Brattle Report).

<sup>65</sup> *See, e.g.*, “Inflation continues to climb in U.S. after hitting 40-year high,” World Economic Forum, (Mar. 16, 2022), available at [Here's how much the inflation rate has risen in the US | World Economic Forum \(weforum.org\)](https://www.weforum.org/articles/2022/03/16/inflation-continues-to-climb-in-u-s-after-hitting-40-year-high/) (last accessed Feb. 1, 2024).

<sup>66</sup> Incumbent TO Whitepaper at 5, fn. 17 (emphasis added).

<sup>67</sup> Incumbent TO Whitepaper at 5, fn. 17

<sup>68</sup> *See* Brattle Report at 9, 10 (Figure 3).

<sup>69</sup> *See, e.g.*, Brattle Report at 41 (explaining that the Artificial Island Project included a cost cap that escalates with inflation until the start of construction based on changes in the Handy-Whitman cost index).



*cost increases, the estimated average cost savings could be as high as 28% in MISO and 50% in CAISO relative to the likely costs of these projects if they had been traditionally developed. Actual cost savings are expected to be smaller given the potential for at least some level of cost escalations. We estimate that overall cost savings of 15% for MISO and 29% for CAISO would result from the competitive processes even if the competitively-developed projects were to experience percentage cost escalations similar to the historical experience with major transmission projects in these regions.*<sup>70</sup>

The Incumbent TOs contend that they utilized the same methodology as Brattle, but that's not the case as the Incumbent TOs approached inflation much differently than did Brattle. The Incumbent TOs' methodological approach leads to errors when comparing estimates developed in one year to the final costs and terms of the cost cap in a future year.<sup>71</sup>

Inflation affects both competitive and incumbent projects, yet the Incumbent TOs conveniently omit cost increases and cost overruns for incumbent projects. For example, Incumbent TO member Xcel Energy's Minnesota Energy Connection, a planned transmission line across southwest and central Minnesota that was approved in Tranche 1 of MISO's long-range transmission plan in July 2022, has more than doubled from initial cost estimates, to a present level of \$1.14 billion.<sup>72</sup> Incumbent TO member Ameren's Pana-Mt. Zion-Kansas-Sugar Creek 345 KV line was approved in the 2011 MISO Transmission Expansion Plan at an estimated cost of \$284 million, with a 2018/2019 completion date.<sup>73</sup> The Ameren project was completed in December 2020 at a cost of \$408 million, almost 44% above the initial estimate.<sup>74</sup>

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<sup>70</sup> Brattle Report at 9 (emphasis added).

<sup>71</sup> For example, as to the Artificial Island Project, the Incumbent TOs focused "on the amount of the cost cap at the time of the award, so the initial stated amount is used." Incumbent TO Whitepaper at Appendix 3, p. 2. As a result, the Incumbent TOs do not account for inflation and the actual terms of the cost cap mechanism.

<sup>72</sup> See "Price for huge Xcel transmission line more than doubles to \$1.14B," StarTribune (Nov. 16, 2023), available at [Price for huge Xcel transmission line more than doubles to \\$1.14B \(startribune.com\)](https://www.startribune.com/price-for-huge-xcel-transmission-line-more-than-doubles-to-1.14b/) (last accessed Feb. 1, 2024).

<sup>73</sup> See Multi-Value Project Portfolio: Results and Analyses at p. 81 (Jan. 10, 2012), available at [Microsoft Word - MVP Portfolio Analysis Full Report.docx \(misoenergy.org\)](https://www.misoenergy.org/MVP-Portfolio-Analysis-Full-Report.docx) (last accessed Feb. 1, 2024).

<sup>74</sup> See MISO Transmission Expansion Plan In Service Project List (11/29/2023), available at [MTEP In Service Projects106330.xlsx \(live.com\)](https://www.misoenergy.org/MTEP-In-Service-Projects106330.xlsx) (last accessed Feb. 1, 2024). The project is listed in Row 3011.

Critically, because these projects were not competitively awarded and were instead developed without any cost containment, customers absorb these project cost overruns through formula transmission rates. Cost overruns are common among incumbent utility projects. The cost containments that flow out of the competitive solicitation process serve to protect consumers and impose cost discipline on the developer by shifting some or all of the risk of cost overruns to the competitive developer and its shareholders. As discussed more fully in Section C of this answer, Incumbent TO members Ameren and Public Service Electric & Gas Company (“PSEG”) were recently awarded projects through MISO and PJM Interconnection, L.L.C. (“PJM”) competitive solicitations, respectively. Unlike Ameren’s and PSEG’s other, non-competitive projects, their competitive proposals in the MISO and PJM processes included significant cost containment commitments, underscoring the cost-disciplining power of competition.

The Incumbent TOs’ analysis is misleading because the Incumbent TOs fail to review or provide any comparable information on cost overruns for non-competitive, incumbent projects above their initial cost estimates. In contrast, Brattle reviewed cost savings by properly comparing competitive projects to incumbent-built projects, with consideration of cost increases between initial estimates and final realized costs for both incumbent and competitive projects.

**C. Competitive Solicitations Impose Cost Discipline on Incumbent Utilities and Still Provide an Opportunity for Incumbents to Succeed.**

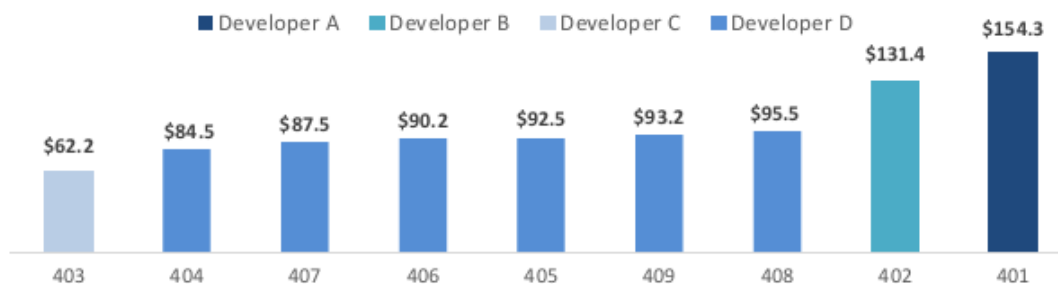
The Incumbent TOs claim that the competitive transmission process does not offer meaningful cost containment or cost savings to consumers,<sup>75</sup> but the Incumbent TOs overlook the impact of the proposals, offers, and opportunities of incumbent utilities participating in competitive solicitations. For example, MISO recently awarded a competitive solicitation to

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<sup>75</sup> See Incumbent TO Filing at 4.

Incumbent TO member affiliate Ameren Transmission Company of Illinois (“ATXI”) to serve as the developer for the Fairport to Denny to Iowa/Missouri State Border 345 kV project.<sup>76</sup> ATXI partnered with the Missouri Joint Municipal Electric Utility Commission (“MJMEUC”) to submit a creative and winning public-private partnership proposal. MISO credited ATXI’s agreement to transfer 49% of the project via a joint operating agreement after completion of facility construction to MJMEUC, a local municipal agency that is exempt from income and property taxes.<sup>77</sup> As a result, ATXI’s [“project implementation] cost cap, 40-year weighted cost of equity cap, and 10-year O&M cap enabled its [present value of proposed revenue requirements] to remain superior under all scenarios modeled by MISO.”<sup>78</sup> The Annual Transmission Revenue Requirement of \$62.2 million for ATXI’s proposal was significantly lower than the other proposals, as reflected in the below chart<sup>79</sup>:

**Figure 13. 40-Year Present Value Revenue Requirement (\$M)**



Although ATXI did not offer to cap annual project revenue, MISO determined that ATXI’s other cost commitments, including a project implementation cap, a ten-year O&M cap, and a ten-year

<sup>76</sup> See generally “Selection Report: Fairport to Denny to Iowa/Missouri State Border 345 kV Competitive Transmission Project,” MISO (Oct. 27, 2023), available at [FDIM\\_345\\_kV\\_Selection\\_Report630669.pdf \(misoenergy.org\)](https://www.misoenergy.org/FDIM_345_kV_Selection_Report630669.pdf) (last accessed Feb. 1, 2024) (hereinafter “Fairport-Denny-IA/MO Border Selection Report”).

<sup>77</sup> Fairport-Denny-IA/MO Border Selection Report at iii.

<sup>78</sup> *Id.*

<sup>79</sup> Fairport-Denny-IA/MO Border Selection Report at 18, 19.

weighted return on equity caps (as noted below wherein ATXI is Developer C)<sup>80</sup> “significantly limit the degree to which [ATXI’s] actual revenue could deviate from its estimates.”<sup>81</sup>

**Figure 14. Cost commitments**

	Developer A	Developer B	Developer C	Developer D
Project implementation cap			\$97 M	
Annual revenue caps (years) <sup>11</sup>		(40)		(40)
Cap increase over PTW amounts		0.0%		~1.4%
Cap adjustment for POI		+1%/mile		
Return on equity % (years)	10% (10)	9.8% (40)		9.8% (40)
Weighted cost of equity % (years)			5.55%/4.87% (40)	
Equity/capital % (years)	50% (10)			
Pre-in-service carrying costs	return on CWIP	AFUDC	AFUDC	return on CWIP
Annual O&M caps (years)			10	
Tax exemption (% of project)			49%	
Forego return on working capital				✓
Forego pre-commercial costs				✓

As a result, consumers can benefit when incumbents compete with new entrants, as competition can force an incumbent to make a more creative and cost-effective proposal. And, importantly, the combination of an incumbent utility with a non-incumbent publicly-owned transmission entity occurred as a direct result of competition, not from any regulatory safe haven such as the joint-ownership ROFR proposed in the NOPR. Competition delivers; regulatory mandates do not.

Another Incumbent TO member, PSEG, recently realized success in a competitive solicitation run by PJM to facilitate \$5 billion in system upgrades to account for the siting of up to 7,500 MW of new data centers in Maryland and Virginia, combined with widespread effects from the deactivation of more than 11,000 MW of generation.<sup>82</sup> PJM selected PSEG to complete a

<sup>80</sup> Fairport-Denny-IA/MO Border Selection Report at 18.

<sup>81</sup> Fairport-Denny-IA/MO Border Selection Report at 19.

<sup>82</sup> See “PJM Board of Mangers Approves Critical Grid Upgrades,” PJM Inside Lines (Dec. 11, 2023), *available at* [PJM Board of Managers Approves Critical Grid Upgrades | PJM Inside Lines](#) (last accessed Feb. 1, 2024). The full PJM Reliability Analysis Report is available here: [20231205-2022-rtep-window-3-reliability-analysis-report.ashx \(pjm.com\)](#) (last accessed Feb. 1, 2024) (hereinafter “December 2023 PJM Reliability Analysis Report”).

\$447.5 million project to construct a new 40-mile 500 kV line in the service territory of other incumbent utilities.<sup>83</sup> In its financial analysis, PJM noted that PSEG proposed a hard cap on capital costs, foregoing recovery “of any depreciation expense, return on equity, or debt costs associated with any capital expenditures above [PSEG’s] cost cap” that was set at 120% of the original estimate.<sup>84</sup> Notably, PSEG proposed a binding ROE cap of 9.60% and a binding equity percentage cap of 45%.<sup>85</sup> These values compare to an allowed ROE of 10.4% and a capital structure equity percentage of 55.11% in PSEG’s annual informational update for its non-competitive, incumbent projects.<sup>86</sup>

PSEG also realized success in response to competitive solicitations to provide PJM transmission upgrades in furtherance of New Jersey’s offshore wind goals.<sup>87</sup> New Jersey continues ongoing robust competitive solicitations for open access offshore wind transmission facilities.<sup>88</sup> Incumbent utility Jersey Central Power and Light Company also won a competitive transmission solicitation in New Jersey for the Larrabee Tri-Collector Solution (“LTCS”) project.<sup>89</sup> The

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<sup>83</sup> December 2023 PJM Reliability Analysis Report at 52 (explaining PSEG Proposal 637), 65.

<sup>84</sup> “Constructability and Financial Analysis Report: 2022 RTEP Window 3,” PJM, at p. 101 (Nov. 17, 2023), *available at* [20231205-2022-rtep-window-3-constructability--financial-analysis-report.ashx \(pjm.com\)](https://pjm.com/20231205-2022-rtep-window-3-constructability--financial-analysis-report.ashx) (last accessed Feb. 1, 2024).

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

<sup>86</sup> See PSEG Annual Informational Update, Docket No. ER09-1257-000, filed Oct. 16, 2023, *available at* <https://pjm.com/markets-and-operations/billing-settlements-and-credit/formula-rates> (last accessed Feb. 1, 2024).

<sup>87</sup> See [PSEG and Offshore Wind](#) (explaining that the Board of Public Utilities awarded to PSEG multiple onshore transmission projects to connect customers to offshore wind farms); *see also* [NJBPU](#); [Board of Public Utilities | Newsroom & Public Notices \(nj.gov\)](#) (last accessed Feb. 1, 2024).

<sup>88</sup> See *In the Matter of the Second State Agreement Approach for Offshore Wind Transmission*, BPU Docket No. QO23030129 (Apr. 26, 2023), *available at* [NJBPU](#) (last accessed Feb. 1, 2024); N.J.S.A. 48:3-87.1(e) (authorizing the Board of Public Utilities to “conduct one or more competitive solicitations for open access offshore wind transmission facilities”).

<sup>89</sup> See [JCP&L Selected to Connect Offshore Wind-Generated Electricity to the Grid \(firstenergycorp.com\)](#) (last accessed Feb. 1, 2024); *In the Matter of Declaring Transmission to Support Offshore Wind a Public Policy in the State of New Jersey*, “Order on the State Agreement Approach SAA Proposals,” at p. 2, BPU Docket No. QO20100630 (Oct. 26, 2021), *available at* [NJBPU](#) (last accessed Feb. 1, 2024).

competitive solicitation process for the LTCS project saves New Jersey ratepayers over \$900 million and takes advantage of an additional \$2.2 billion in savings through federal tax incentives.<sup>90</sup>

As the above examples of incumbent utilities participating in competitive solicitations aptly demonstrate, the competitive transmission process works because it incentivizes all participants in the process – whether incumbent utilities or non-incumbent transmission developers or publicly-owned entities or some combination of the foregoing – to offer more competitive and innovative proposals than they would offer in the absence of competition.<sup>91</sup> For example, in the Duff-Coleman project and Hartburg-Sabine Junction competitive solicitations in MISO, both incumbents and non-incumbents proposed cost caps. MISO observed that respondents in the Harburg-Sabine Junction project “offered a variety of cost caps, concessions, and commitments, as well as schedule guarantees, which enhanced competition on project cost, [and] annual transmission revenue requirement.”<sup>92</sup> These outcomes simply do not happen in a non-competitive, regulated, setting with monopolistic protections over transmission development.

#### **D. The Incumbent TOs Mischaracterize Several of the Projects in Their Whitepaper**

The mischaracterizations of several of the projects reviewed in the Incumbent TO whitepaper and the Incumbent TOs’ selective omission of information about those projects cannot

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<sup>90</sup> See “New Jersey Board of Public Utilities Selects Offshore Wind Transmission Project Proposed by Mid-Atlantic Offshore Development and Jersey Central Power & Light Company in First in Nation State Agreement Approach Solicitation” (Oct. 26, 2022 Press Release), available at [Board of Public Utilities | Newsroom & Public Notices \(nj.gov\)](https://www.nj.gov/governor/newsroom/2022/10/26/new-jersey-board-of-public-utilities-selects-offshore-wind-transmission-project-proposed-by-mid-atlantic-offshore-development-and-jersey-central-power-light-company-in-first-in-nation-state-agreement-approach-solicitation/) (last accessed Feb. 1., 2024).

<sup>91</sup> See FTC/DOJ Comments at 13 (“**Even when the incumbent wins, consumers also win, because incumbents tend to make more competitive proposals when they face competition**”) (emphasis added).

<sup>92</sup> See Hartburg Sabine Selection Report at 6; see also Duff-Coleman Selection Report at p. 26, available at: <https://cdn.misoenergy.org/Duff-Coleman%20EHV%20345kv%20Selection%20Report82339.pdf> (last accessed Feb. 1, 2024).

go uncorrected. Above all, the Incumbent TOs fail to show that incumbent utilities would adhere to any kind of cost containment measures to avoid passing cost overruns through to consumers.

### 1. Artificial Island Project

The well-known Artificial Island Project concerned transmission upgrades that were necessary to support stability-based reliability issues at the Salem and Hope Creek Nuclear Generating Stations in New Jersey. The Incumbent TO whitepaper gives no credence to the existence of PJM’s competitive solicitation process itself for the Artificial Island Project, through which several developers – incumbents and non-incumbents alike – ultimately proposed a wide range of solutions to meet the identified transmission need, thereby resulting in innovative proposals and “lower voltage design options that addressed all the needs identified by PJM at substantially lower costs and reduced constructability risk.”<sup>93</sup> Ultimately, Brattle found that the cost of the selected solution for the Artificial Island project was 60% below the lowest-cost incumbent utility submission initially submitted.<sup>94</sup>

Without a competitive process, there is no ability or incentive for the advancement of more project designs or solutions that are more innovative and efficient than an incumbent proposal. The Incumbent TO Filing notes that PSEG lowered its original cost estimate of \$692 million down to \$285 million for its incumbent portion of the Artificial Island project, and states that using the lower figure would be a “reasonable” modification to the Brattle figures.<sup>95</sup> But this understates the strength of competition because, absent any competitive process, there never would have been a modified project scope at all. In addition, the combined PSEG solutions proposed at the start of

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<sup>93</sup> See Brattle Report at p. 11; *see id.* at p. 32, Figure 13.

<sup>94</sup> Brattle Report at p. 29.

<sup>95</sup> Incumbent TO Whitepaper at 7.

the competitive process were well over \$1.5 billion, so the true savings from competition on capital costs alone was over \$1 billion when you combine both the incumbent and non-incumbent capital cost portions of Artificial Island project.<sup>96</sup> Lower ROE savings over time add to this benefit. This outcome is consistent with the United States Department of Justice and Federal Trade Commission comments that the mere existence of competition produces consumer benefits.<sup>97</sup> Incumbents did not rebid the competitive developer's lower-cost, smaller scope solution until after seeing the innovative solution proposed by the non-incumbent. As noted by the Incumbent TOs, the lowest incumbent bid was \$285 million compared to selected competitive developer's bid of \$146 million.<sup>98</sup> Absent competition, consumers and the grid would not benefit from the lower-cost, innovative solution to address the project's transmission needs.<sup>99</sup> Competitive solicitations can yield innovation and a competition of ideas. The Incumbent TOs fail to demonstrate that an array of innovative transmission planning solutions can be effectively achieved in the absence of transmission competition.

## 2. The Harry-Allen to El Dorado and Suncrest Projects in CAISO

The CPUC extensively extolled the benefits of Order No. 1000 solicitations in its NOPR comments in RM21-17.<sup>100</sup> The CPUC explained that it, along with several other commenters, relied on the 2019 Brattle Report to support its conclusions.<sup>101</sup> The CPUC then took a step further

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<sup>96</sup> See Thessen Affidavit at 33-34.

<sup>97</sup> See FTC/DOJ Comments at 1-3.

<sup>98</sup> See Incumbent TO Whitepaper at Appendix 3, p. 3; Brattle Report at p. 41, Table 10.

<sup>99</sup> See "Artificial Island Project Nears Completion," PJM Inside Lines (Apr. 2, 2021), available at [Artificial Island Project Nears Completion | PJM Inside Lines](#) (last accessed Feb. 1, 2024).

<sup>100</sup> See "Initial Comments of the California Public Utilities Commission," at p. 61-72, Docket No. RM217-17 (filed Aug. 17, 2022) (hereinafter "CPUC NOPR Comments").

<sup>101</sup> See CPUC NOPR Comments at 61; see also LS Power Grid, LLC ANOPR Comments, Appendix II, RM21-17 (filed Oct. 12, 2021) (including a detailed appendix of Order No. 1000-compliant processes as of October 2021).



to update the Brattle Report’s analysis, and concluded that two CAISO projects – Harry Allen-El Dorado and Suncrest – provided cost savings at 29% and 55% respectively compared to typical cost escalations above CAISO’s estimate.<sup>102</sup> The CPUC noted “the strong cost containment commitments” made by the non-incumbent project sponsors, including DesertLink’s \$145.5 million cost cap and ROE cap of 9.8% (including any incentive adders).<sup>103</sup> The CPUC concluded that “[t]he *actual* cost of these two completed projects demonstrate the critical value of cost containment commitments and provide further evidence of the cost saving benefits attainable from the use of competitive processes to develop transmission projects.”<sup>104</sup> Notably, the Incumbent TO whitepaper conveniently ignores and fails to rebut CPUC’s updated analysis of the Brattle Report and evaluation of the Harry Allen-El Dorado and the Suncrest projects in CAISO.<sup>105</sup> Contrary to the Incumbent TOs’ inaccurate depiction of the current cost for the El Dorado project (wherein the whitepaper includes allowance for fund used during construction and out-of-scope interconnection upgrades in the final cost, the final cost of the project was \$145.9 million). The Incumbent TO’s continue to misrepresent the costs for the El Dorado project by including incumbent transmission owner upgrade costs in the project costs in an effort to assert cost cap exceedance. This is a

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<sup>102</sup> See CPUC NOPR Comments at 65-67.

<sup>103</sup> See CPUC NOPR Comments at 67; see Harry Allen-Eldorado 500 kV Transmission Line Project Selection Report, CAISO (Jan. 11, 2016), available at [Estrella Substation – Project Sponsor Selection Report March x, 2015 \(desertlinktransmission.com\)](https://www.caiso.com/Documents/Estrella_Substation_-_Project_Sponsor_Selection_Report_March_x,2015_(desertlinktransmission.com)) (last accessed Feb. 1, 2024); see also Thessen Affidavit at 10:16-19.

<sup>104</sup> CPUC NOPR Comments at 67-68.

<sup>105</sup> In its NOPR comments, the CPUC also noted two more recent successful competitive processes in CAISO that were not addressed by the Brattle Report. The CPUC noted two solicitations won by LS Power Grid due in large part to “robust cost containment commitments and [] ability to meet the accelerated construction schedules for the projects.” CPUC NOPR Comments at 68 (citing Round Mountain 500 kV Area Dynamic Reactive Support Project, Project Sponsor Selection Report at 185 (February 28, 2020), available at <http://www.caiso.com/Documents/RoundMountain500kVAreaDynamicReactiveSupportProject-ProjectSponsorSelectionReport.pdf> and Gates 500 kV Dynamic Reactive Support Project, Project Sponsor Selection Report at 136-137 (January 17, 2020), available at [Gates Dynamic Reactive Support – Project Sponsor Selection Report January 17, 2020 \(lspowergrid.com\)](https://www.caiso.com/Documents/Gates_Dynamic_Reactive_Support_-_Project_Sponsor_Selection_Report_January_17,2020_(lspowergrid.com)) (last accessed Feb. 1, 2024)).

perpetuation of prior misstatements by Concentric that LS Power specifically responded to in a signed Affidavit.<sup>106</sup> The Affidavit confirmed that the El El Dorado project was delivered below its cost cap at \$144.7 million.<sup>107</sup> Further, in referencing the 2022 Annual Update for DesertLink, the Incumbent TOs ignore that DesertLink committed to providing annually an attachment to its Formula Rate update demonstrating continued compliance with its cost cap commitments.<sup>108</sup>

As to Suncrest, CAISO approved the development of the new 300-million-volt-ampere reactive dynamic reactive device at the existing Suncrest Substation's 230 kV bus to meet California's Renewable Portfolio Standard in its 2013-2014 Transmission Plan. In 2015, CAISO selected NextEra Transmission affiliate Horizon West Transmission, LLC ("Horizon West") to permit, construct, own, operate, and maintain the Suncrest Project. Horizon West was the first CAISO non-incumbent transmission owner to be awarded a FERC Order No. 1000 competitive solicitation. The Suncrest SVC Project was put into service on February 29, 2020.<sup>109</sup>

As noted by the CPUC, the Suncrest project demonstrates the potential for cost caps to protect ratepayers from cost overruns. Horizon West honored its cost cap and absorbed approximately \$4 million in unexpected project costs associated with undergrounding a portion of the project required by the incumbent utility (San Diego Gas & Electric).<sup>110</sup> An incumbent utility

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<sup>106</sup> Thessen Affidavit at 37:16 – 38:18.

<sup>107</sup> *See id.*

<sup>108</sup> *See* The Incumbent TOs ignore Desert Link's formula rate template that they in their whitepaper. *See* Incumbent TO Whitepaper, Appendix 3 at p. 2 (citing DesertLink 2022 Annual Formula Rate Update, *available at* [20230630\\_DesertLink\\_2022\\_Annual\\_Update.pdf \(desertlinktransmission.com\)](https://www.desertlinktransmission.com/20230630_DesertLink_2022_Annual_Update.pdf)). Desert Link's 2022 rate update reflects transmission plant in service at \$145,914,160; *also* Thessen Affidavit at 37:16-38:2 (attesting to meeting the cost cap at \$144.7 million). Attachment A to the DesertLink Protocols is available here: [20211001\\_DesertLink\\_2022\\_Projection-Attachment\\_A.pdf \(desertlinktransmission.com\)](https://www.desertlinktransmission.com/20211001_DesertLink_2022_Projection-Attachment_A.pdf) (last accessed Feb. 1, 2024).

<sup>109</sup> For background on the project, see [NextEra Energy Transmission West, LLC, Suncrest Dynamic Reactive Power Support Project \(ca.gov\)](https://www.nexteraenergy.com/nextera-energy-transmission-west-llc-suncrest-dynamic-reactive-power-support-project) (last accessed Feb. 1, 2024); *see also* [Horizon West | Suncrest SVC Project \(horizonwesttransmission.com\)](https://www.horizonwesttransmission.com/horizonwesttransmission.com) (last accessed Feb. 1, 2024).

<sup>110</sup> *See* Morris Reply Affidavit at ¶ 40.

not subject to competition would have likely sought to pass through such cost overruns to customers. Therefore, cost cap provisions have and will result in lower rates to ratepayers if competition is maintained for new transmission solutions.<sup>111</sup>

The Incumbent TO whitepaper, like the Concentric Report, erroneously ignores inflation for the Suncrest cost analysis, artificially inflating the project’s true final cost figure. CAISO appropriately allows project developers to adjust cost caps to account for inflation at a specified rate.<sup>112</sup> After accounting for inflation of CAISO’s initial cost estimate, the final project cost of Suncrest reported in the Incumbent TO whitepaper, like the Concentric Report, was still below the lowest range of CAISO’s estimate of the project cost.<sup>113</sup>

In Appendix 3 (Data References), the Incumbent TO whitepaper questions the \$20 million increase in gross plant in the 2023 formula rate filing, contending it is “unclear what has led to the increase in plant in service or the details of the regulatory asset.”<sup>114</sup> The \$53 million final cost figure for the project includes approximately \$20 million spent by Horizon West – after the project was placed in service – on capital improvements related to wildfire mitigation/hardening, consistent with CPUC and California state law requirements.<sup>115</sup> The Suncrest Facility is located near the town of Alpine in San Diego County in an area that is designated as a Tier 3 (extreme)

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<sup>111</sup> *See id.*

<sup>112</sup> Morris Reply Affidavit at ¶ 49.

<sup>113</sup> Morris Reply Affidavit at ¶ 49.

<sup>114</sup> DATA Whitepaper at Appendix 3, p. 2.

<sup>115</sup> *See* Horizon West Formula Rate Filing for the 12 months ended 12/31/23 (available at <https://www.horizonwesttransmission.com/regulatory.html>) (last accessed Feb. 1, 2024); for more information on Horizon West’s Wildfire Mitigation Plan, see [https://www.horizonwesttransmission.com/content/dam/horizonwest/us/en/pdf/Horizon\\_West\\_Transmission\\_2023\\_WMP.pdf](https://www.horizonwesttransmission.com/content/dam/horizonwest/us/en/pdf/Horizon_West_Transmission_2023_WMP.pdf) (last accessed Feb. 1, 2024).

Fire-Threat Area based on the CPUC’s Fire-Threat Map.<sup>116</sup> Critically, these costs were unrelated to the original competitive project – and any in-state incumbent utility would have recovered these costs in rates.

### 3. Empire State Line Project

In 2015, the New York Public Service Commission (“NYPSC”) identified a transmission need to solve congestion in western New York, including unlocking access to 2,700 MW from the Niagara hydroelectric facility and additional imports from Ontario.<sup>117</sup> NYISO determined that NextEra Energy Transmission affiliate NextEra Energy Transmission New York, Inc.’s (“NEETNY”) Empire State Line project was the more efficient or cost-effective solution to address the identified need.<sup>118</sup> The 20-mile, 345 kV Empire State Line travels through Erie and Niagara counties to enable greater utilization of renewable energy from the Robert Moses Niagara Hydroelectric Power Plant and electricity imports from Ontario, Canada. Project construction began in March 2021 and was completed and put in-service on June 1, 2022.<sup>119</sup>

The Incumbent TO whitepaper, like the Concentric Report, conveniently ignores important fact that cost-caps were not part of the Western New York project selection process and were not included in NEETNY’s competitive proposal. Per the NYISO Tariff,<sup>120</sup> NYISO was not allowed

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<sup>116</sup> For more information on the CPUC’s Fire-Threat Map, see [Fire-Threat Maps and Fire-Safety Rulemaking \(ca.gov\)](#) (last accessed Feb. 1, 2024).

<sup>117</sup> See “NYISO’s Role in Public Policy-Driven Transmission Projects,” at p. 5, available at [fc1b48f8-121e-052b-920e-6ce2fdde777b \(nyiso.com\)](#) (last accessed Feb. 1, 2024).

<sup>118</sup> See *id.*; “Western New York Public Policy Transmission Planning Report,” NYISO, at p. 7 (Final Report Oct. 17, 2017) available at [42762c1d-cabc-866e-2cac-4f291c10d39a \(nyiso.com\)](#) (last accessed Feb. 1, 2024) (hereinafter “NYISO 2017 Report”).

<sup>119</sup> See “Empire State Line Project Overview,” NextEra, available at [Empire State Line | Project Overview](#) (last accessed Feb. 1, 2024).

<sup>120</sup> See New York Independent System Operator, Inc., Proposed Tariff Revisions Regarding Cost Containment in the Public Policy Transmission Planning Process, FERC Docket No. ER20-617, (filed Dec. 17, 2019). The Commission accepted the proposed revisions in an order issued on February 14, 2020.

to consider cost containment in their evaluation process. The whitepaper also overlooks that NEETNY’s cost containment proposal – offered after being awarded the project – placed NextEra on the hook to earn a lower ROE on cost overruns that were foreseeable and within NEETNY’s control.<sup>121</sup> Items outside the original work scope and beyond NEETNY’s control, including third party costs and unforeseeable costs, would be eligible for full equity return.<sup>122</sup> The whitepaper fails to acknowledge that the Empire State Line project cost overruns were unforeseeable not only to NEETNY, but also to incumbents and NYISO itself in its independent consultant’s analysis of expected costs.<sup>123</sup> Lastly, the whitepaper savings attributable to the Empire State Line are not limited to the final project cost. For example, NYISO found that the Empire State Line project offered greater production cost savings than the other competing proposals.<sup>124</sup> The Empire State Line project includes \$950 million in potential lifetime customer savings.<sup>125</sup>

#### 4. Duff-Coleman Project

The Incumbent TOs include the 345k kV Duff-Coleman Market Efficiency Project in MISO in their whitepaper but are unable to demonstrate that the project has not provided robust cost savings or that the competitive solicitation process did not provide benefits to consumers and the grid.<sup>126</sup> The Incumbent TOs avoid discussing MISO’s competitive solicitation process for the Duff-Coleman project in detail because it is a success story wherein MISO highlighted the

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<sup>121</sup> See Morris Reply Affidavit, ¶ 54.

<sup>122</sup> See Morris Reply Affidavit, ¶ 54.

<sup>123</sup> See Morris Reply Affidavit, ¶ 55.

<sup>124</sup> See NYISO 2017 Report at 78.

<sup>125</sup> See “Governor Hochul Announces Commissioning of Empire State Transmission Line,” (July 11, 2022 Press Release), available at [Governor Hochul Announces Commissioning of Empire State Transmission Line | Governor Kathy Hochul \(ny.gov\)](https://www.governor.ny.gov/news/governor-hochul-announces-commissioning-of-empire-state-transmission-line) (last accessed Feb. 1, 2024).

<sup>126</sup> See Incumbent TO Whitepaper at p. 6.

“dedication, innovative thinking, and competitive spirit” of the respondents that will “benefit MISO, its members, and ultimately all consumers of electricity in helping us build a stronger and more reliable electric grid for today and tomorrow.”<sup>127</sup>

The chart below from MISO Selection Report for the Duff-Coleman Project reflects rate concession proposals from all the solicitation respondents:<sup>128</sup>

Summary of Cost Caps, Concessions, and Commitments											
Uncertainty	101	102	103	104	105	106	107	108	109	110	111
ROE		✓		✓ <sup>i</sup>			✓	✓ <sup>ii</sup>	✓ <sup>iii</sup>	✓	
Capital Structure		✓		✓						✓	
Implementation Costs	✓ <sup>iv</sup>	✓ <sup>v</sup>	✓	✓ <sup>iv</sup>		✓	✓	✓	✓ <sup>iv</sup>	✓	✓ <sup>iv</sup>
Operations and Maintenance Costs				✓							
Inflation Rate			✓	✓		✓		✓		✓	
Rate Concessions						✓					✓

- i Limited duration ROE cap
- ii Cap on weighted average cost of capital (includes ROE), limited duration
- iii No ROE cap, but will forego ROE incentive adders in initial FERC filing
- iv AFUDC is not included in the cap
- v Only a portion of construction costs are capped

The above chart also shows that 10 of 11 respondents to the MISO solicitation provided some form of cost containment. “MISO noted that all of the proposals came in lower than MISO’s initial cost estimate and developers provided a range of cost caps, concessions, and commitments, including caps on construction costs.”<sup>129</sup> The winning bid offered an ROE cap of 8.8% inclusive of

<sup>127</sup> Duff-Coleman Selection Report at p. 2.

<sup>128</sup> See Duff-Coleman Selection Report at 26.

<sup>129</sup> *Id.* at 34.

incentives when MISO wide returns were well over 10% plus incentives.<sup>130</sup>

The selected non-incumbent developer, LS Power affiliate Republic Transmission, provided a binding cost cap that “includes all project implementation costs, such as changes in the route, design, subsurface conditions, real estate costs, environmental mitigation, permitting requirements, escalation, and an allowance for funds used during construction including the cost of debt and equity during construction.”<sup>131</sup> The proposal also contained a cap (but not a floor) on the ROE for the life of the project and a limitation on the equity component in rates of 45% (of the capital structure) for the life of the project.<sup>132</sup> MISO explained that Republic Transmission’s proposal “was comparatively advantageous and exhibited the best balance of high-quality design and competitive cost, best-in-class project implementation, and top-tier plans for operations and maintenance.”<sup>133</sup> MISO further noted that Republic Transmission’s proposal was “among the strongest and most detailed submitted, reflecting leading experience and a best-in-class risk plan.”<sup>134</sup> The grid and consumers benefit through such detailed project plans, cost transparency, and cost containment commitments.

##### 5. Estrella Project

CAISO approved the development of the new 230/70 kV Estrella substation and a new 70 kV power line to interconnect to the substation to improve reliability in San Luis Obispo County

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<sup>130</sup> Thessen Affidavit at p. 28.

<sup>131</sup> Duff-Coleman Selection Report at 6, n.18.

<sup>132</sup> See Thessen Affidavit at 28:12 (further explaining that other MISO incumbent transmission owners had much higher equity percentage caps, such as ITC Midwest’s 60% cap). The Thessen affidavit also rebutted the Incumbent TOs’ Concentric Report regarding its criticism of both the Artificial Island Project and the Duff-Coleman project. See Thessen Affidavit at 31-39. Notably, the Incumbent TO whitepaper failed to rebut the Thessen affidavit or otherwise provide any legitimate critique of the competitive solicitations for the Artificial Island Project and the Duff-Coleman Project.

<sup>133</sup> Duff-Coleman Selection Report at 2.

<sup>134</sup> Duff-Coleman Selection Report at 43.

in its 2013-2014 Transmission Plan. Following a competitive solicitation, CAISO awarded the substation component of the project to Horizon West in 2015.<sup>135</sup> CAISO awarded the 70 kV power line component to Pacific Gas & Electric Company's ("PG&E") as the incumbent utility. The Incumbent TO whitepaper overlooks that the Estrella Project has been subject to an extraordinary six-plus year environment impact review and permitting delays.<sup>136</sup> Notably, the timing, final design, and cost are dependent upon final permits and the PG&E component of the project. An accurate cost estimate of the Estrella substation will only be available when the environment impact review is complete, required permits are issued, government mandated project changes are known, and a construction schedule that is dependent on the PG&E component of the project is finalized. Any comparison of initial cost estimates to final project costs are premature given the project is still in the permitting phase; and even if such a comparison were possible, the project will be developed subject to binding cost containment so customers will very likely not be exposed to cost overruns (unlike the non-competitive components of the project being developed by PG&E.)

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<sup>135</sup> For more information on the project, see [Estrella Substation and Paso Robles Area Reinforcement Project \(ca.gov\)](#) (last accessed Feb. 1, 2024).

<sup>136</sup> Horizon West and PG&E currently have a permit application pending before the CPUC in CPUC Proceeding No. A.17-01-023. The opening brief of Horizon West/PG&E, dated October 6, 2023, provides an overview of the project and case history. The brief is available here: [520532840.PDF \(ca.gov\)](#) (last accessed Feb. 1, 2024). The permitting issues are set forth in "Administrative Law Judge's Ruling Setting Prehearing Conference and Notice of Anticipated Issues," at p. 3-4, A.17-01-023 9 (issued Apr. 7, 2023), available at [505462898.PDF \(ca.gov\)](#) (last accessed Feb. 1, 2024).



#### IV. CONCLUSION

**WHEREFORE**, the Electricity Transmission Competition Coalition respectfully requests that, if the Commission accepts the Incumbent Transmission Owners' supplemental comments and whitepaper into the record in these dockets, the Commission also consider these comments when rendering its decisions.

Respectfully submitted,

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*Counsel to the Industrial Energy Consumers of America, the PJM Industrial Customer Coalition, and the Coalition of MISO Transmission Customers, and on behalf of the Electricity Transmission Competition Coalition*

February 1, 2024

## **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 this 1<sup>st</sup> day of February, 2024.

/s/ Kenneth R. Stark  
Kenneth R. Stark  
McNees Wallace & Nurick LLC

## **EXHIBIT A**

# **EXCERPT OF COMMENTS OF CALIFORNIA PUBLIC UTILITIES COMMISSION UPDATING THE BRATTLE REPORT IN RM21-17**

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298



August 17, 2022

**VIA ELECTRONIC DELIVERY**

Ms. Kimberly D. Bose  
Office of the Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E., Room 1A, East  
Washington, D.C. 20426

**Re: FERC Docket No. RM21-17-000: Building for the Future Through Electrical Regional Transmission Planning and Cost Allocation and Generator Interconnection.**

Dear Ms. Bose:

Enclosed for filing in the above-docketed case, please find an original electronic filing of the attached document entitled **“INITIAL COMMENTS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION.”**

Thank you for your cooperation in this matter.

Sincerely,

/s/ JONATHAN PAIS KNAPP

Jonathan Pais Knapp  
Attorney

Enclosure

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

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

Docket No. RM21-17-000

**INITIAL COMMENTS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION**

Pursuant to the Federal Energy Regulatory Commission’s (“FERC” or the “Commission”) April 21, 2022 Notice of Proposed Rulemaking (“NOPR”) in the above-captioned docket,<sup>1</sup> the California Public Utilities Commission and the People of the State of California (“CPUC”) submit these Initial Comments in response to the Commission’s proposed reforms to improve the electric regional transmission planning and cost allocation processes, among other areas.

**I. INTRODUCTION**

The CPUC commends the Commission for issuing the comprehensive and ambitious set of policy proposals in the NOPR, and wholeheartedly supports the Commission’s overarching goal for these proposed regulatory reforms, *i.e.*, to ensure that long-term regional transmission planning (“LTRTP”) is conducted “on a sufficiently forward-looking basis to meet transmission needs driven by changes in the resource mix and demand,”<sup>2</sup> and “to remedy deficiencies in the

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<sup>1</sup> *Notice of Proposed Rulemaking: Building for the Future through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, 179 FERC ¶ 61,028 (April 21, 2022) (“NOPR”); 87 FR 26504 (specifying initial comments in response to the NOPR are due July 18, 2022, and reply comments are due August 17, 2022); Notice on Requests or Extension of Time, 87 FR 33476 (May 25, 2022) (extending deadline to submit initial comments in response to the NOPR to August 17, 2022 and reply comments to September 19, 2022). See also *Advanced Notice of Proposed Rulemaking: Building for the Future through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, 176 FERC ¶ 61,024 (July 15, 2021) (“ANOPR”).

<sup>2</sup> NOPR at P 3.

may give ‘customers . . . the benefits of competition in transmission development, and associated potential savings.’<sup>218</sup>

**b) Order 1000 competitive processes provide multiple benefits to consumers.**

As the CPUC explained in its Initial Comments in response to the ANOPR, the Order 1000 competitive processes that have been conducted to date have provided substantial benefits to consumers in the form of significantly lower project offer prices, cost containment commitments, and the identification of innovative solutions to address transmission needs.<sup>219</sup> Many parties that submitted comments in response to the ANOPR similarly emphasized the benefits of competition.<sup>220</sup> For example, LS Power filed a comprehensive appendix that documented the results of Order 1000 compliant competitive processes completed as of approximately October 2021,<sup>221</sup> and a summary of the many comments filed by parties extolling the benefits of competition and urging the Commission to improve implementation of competitive processes.<sup>222</sup> To illustrate and quantify the benefits of competition, the CPUC, along

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<sup>218</sup> NOPR at P 340 (emphasis added) (*citing* Order No. 1000, 136 FERC ¶ 61,051 at PP 284-286, 291; *see also id.* at PP 229, 315). As the D.C. Circuit explained, “the Commission rested its right of first refusal ban on competition theory, determining that rights of first refusal posed a barrier to entry that made the transmission market inefficient, that transmission facilities would therefore be developed at higher-than-necessary cost, and that those amplified costs would be passed on to transmission customers.” *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 77 (D.C. Cir. 2014).

<sup>219</sup> CPUC ANOPR Initial Comments at 27-30.

<sup>220</sup> *See e.g., Joint Comments of the Industrial Customer Organizations*, Docket No. RM21-17-000 (Oct. 12, 2021), eLibrary No. 20211012-5653 (referred to below as “Industrial Consumers Comments”) at 10 (“[w]hile competition has been clearly demonstrated to provide substantial cost savings, as discussed further below, dynamic competition has been woefully absent in transmission planning and construction, resulting in incumbent transmission owners maintaining a stranglehold on the development of new transmission facilities, while transmission investment costs routinely exceed projected costs.”).

<sup>221</sup> *Comments of LS Power Grid, LLC in Response to the Commission’s Advanced Notice of Proposed Rulemaking*, Docket No. RM21-17-000 (Oct. 12, 2021) (referred to below as “LS Power ANOPR Initial Comments”), Appendix II.

<sup>222</sup> *Reply Comments of LS Power Grid, LLC*, Docket No. RM21-17-000 (Nov. 30, 2021) (referred to below as “LS Power ANOPR Reply Comments”) at 1-39; *see also e.g., Motion to Intervene and Comments of the National Association of Regulatory Utility Commissioners*, Docket No. RM21-17-000

with many other commenters in response to the ANOPR, relied, in part, on the Brattle 2019 Competition Report, which analyzes the results of Order 1000 compliant competitive processes conducted between 2013 and 2017.<sup>223</sup>

The Brattle 2019 Competition Report concluded that these competitive processes “have yielded project offer prices that, on average, were significantly below the projects’ initial cost estimates, averaging 40% “below either the initial project cost estimates or the lowest cost incumbent project offer price,” even assuming historical levels of cost escalation.<sup>224</sup> Further, the Brattle Group observed that many winning proposals have included binding cost caps or various cost control measures, such as return on equity (“ROE”) caps and equity percentage caps, that “will likely limit the cost increases to levels below those experienced by projects historically.”<sup>225</sup>

For example, factoring in the average historical levels of cost escalation in the CAISO, *i.e.*, 41%, the winning proposals for the 9 projects awarded through Order 1000 compliant competitive processes between 2013-2019 in the region that were evaluated in the Brattle April 2019 Competition Report result in average expected cost savings of 29%, as compared to the CAISO’s initial cost estimates.<sup>226</sup> Based on similar results with competitive procurement

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(Oct. 12, 2021) at 56 (urging the Commission to “investigate how to encourage the use of current competitive processes and discourage overinvestment in local transmission facilities where the development of more competitively priced projects will maximize regional (and interregional) benefits.”); *see id.* at 13 (“Planners should also use competitive processes to minimize costs to consumers.”).

<sup>223</sup> CPUC ANOPR Initial Comments at 7; Johannes P. Pfeifenberger et al., Brattle Group, *Cost Savings Offered by Competition in Electric Transmission Experience to Date and the Potential for Additional Customer Value*, prepared for LSP Transmission Holdings, LLC (April 2019) (“Brattle 2019 Competition Report”), [https://www.brattle.com/wp-content/uploads/2021/05/16726\\_cost\\_savings\\_offered\\_by\\_competition\\_in\\_electric\\_transmission.pdf#:~:text=Based%20on%20the%20experience%20with%20competitive%20projects%20in,transmission%20processes%20in%20Canada%2C%20the%20U.K.%2C%20and%20Brazil.](https://www.brattle.com/wp-content/uploads/2021/05/16726_cost_savings_offered_by_competition_in_electric_transmission.pdf#:~:text=Based%20on%20the%20experience%20with%20competitive%20projects%20in,transmission%20processes%20in%20Canada%2C%20the%20U.K.%2C%20and%20Brazil.)

<sup>224</sup> Brattle 2019 Competition Report at 40.

<sup>225</sup> *Id.* at 40.

<sup>226</sup> *Id.* at 41, Figure 18; *id.* at 43, Figure 19. *See* CPUC ANOPR Initial Comments, Exhibit 1, Declaration of Simon Hurd, Senior Regulatory Analyst, California Public Utilities Commission, October 12, 2021 at

solicitations conducted between 2013-2017 in PJM (average expected cost savings of 60%), MISO (18%), SPP (50%), and NYISO (22%),<sup>227</sup> and “the estimated cost savings from competitive transmission development abroad—21% savings in Alberta, 16% in Ontario, 23% to 34% in the U.K., and 25% in Brazil”—the Brattle Group Report concluded that “competitive transmission development processes can be expected to yield cost savings averaging between 20% and 30%.”<sup>228</sup>

The Brattle Group’s 2019 findings regarding average cost savings attainable through competitive processes were subsequently affirmed by Great Britain’s Office of Gas and Electricity Markets (“Ofgem”) in a study of the cost benefits to consumers from the use of “early” competitive procurement solicitations for onshore transmission projects (“Ofgem Impacts Assessment”).<sup>229</sup> “Since 2009 [Ofgem has] successfully applied [late] competition to

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P 6 (explaining that although 12 projects in total have, to date, been identified in CAISO’s Transmission Plans as eligible for competition, only 11 competitive processes moved forward. “The Imperial Valley Flow Control Project identified in the CAISO’s 2013-2104 Transmission Plan eventually adopted a less-expensive phase shifting transformer alternative within the existing Imperial Valley Substation, thereby disqualifying the project from being competitively bid.”).

<sup>227</sup> Brattle 2019 Competition Report at 41, Figure 18.

<sup>228</sup> *Id.* at 42-43, Figure 19.

<sup>229</sup> Ofgem, Draft Impact Assessment on developing arrangements to allow for early competition to be applied to future projects on the onshore electricity transmission network, (“Ofgem Impact Assessment”) at 2 [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) (emphasis added) (explaining that “[e]arly competition refers to a competition, to determine a solution to a need on the network, that is run before detailed design of the preferred solution has been carried out.”).

The distinction between “early” and “late” competitive processes in Great Britain appears to correspond to the distinction between the two types of competitive transmission development processes used in the United States to comply with Order No. 1000’s requirements: a competitive bidding model and a sponsorship model. 2017 Transmission Metrics, Staff Report, Federal Energy Regulatory Commission at 8 (October 2017) (“2017 FERC Transmission Metrics Report”), [https://www.ferc.gov/sites/default/files/2020-04/transmission-investment-metrics\\_0.pdf](https://www.ferc.gov/sites/default/files/2020-04/transmission-investment-metrics_0.pdf) at 8 (explaining that under the *competitive bidding model*, the transmission planning region identifies regional transmission needs and selects the most efficient or cost-effective transmission solutions to meet those needs. The transmission planning region then solicits competitive proposals from qualified bidders—both incumbent and nonincumbent transmission developers—for the selected transmission solutions. By contrast, under a *sponsorship model*, the transmission planning region identifies regional transmission



significantly reduce the costs of offshore electricity transmission.<sup>230</sup> Ofgem determined that comparable competitive processes in North America, *i.e.*, “the Hartburg-Sabine Junction and Duff-Coleman projects undertaken by the Midcontinent ISO, suggests a range of savings is possible from 22% to 42% relative to the initial indicative design.”<sup>231</sup> Thus, Ofgem used a “conservative estimate” of the likely cost benefits to consumers of 22%, “the bottom end of the range,” in its analysis.<sup>232</sup>

As the Brattle Group’s analysis is limited to the 2013-2017 period, it does not consider the *actual* costs<sup>233</sup> of competitively procured projects that have since been completed in the U.S.,

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needs and then qualified bidders may sponsor or propose transmission projects to meet the identified regional transmission needs. Thus, under the sponsorship model, the transmission project selected by the transmission planning region may represent a solution proposed by the transmission developer.)

<sup>230</sup> Ofgem Impact Assessment at 2; *id.* at 17-18 (explaining that “[w]e have seen the savings that late competition can bring to the operation and financing of offshore electricity transmission infrastructure. The first three tender rounds of the OFTO regime are estimated to have saved consumers in the region of £700m - £1.3bn.”); *see also* Brattle 2019 Competition Report at 43, Figure 19; *id.* at Table 22, Summary of Experience with Competition in UK.

<sup>231</sup> *Id.* at 5.

<sup>232</sup> *Id.*; *id.* at 28 (where Ofgem concludes, “[w]e therefore consider that the evidence overwhelmingly suggests that the potential savings from introducing competition are likely to be above the costs we have modelled [of conducting early competitions] in this [impact assessment]. Furthermore, the above analysis does not consider the likely wider benefits of introducing early competition in terms of driving innovation, providing price discovery, and a wider set of intangible network benefits.”).

<sup>233</sup> Brattle 2019 Competition Report did, however, consider the *actual* project costs of multiple, completed transmission projects that were procured with competitive processes, including, in California, the Path 15 Upgrade” project. *See* Brattle 2019 Competition Report at 43-44 (citation omitted) (explaining that “[t]he Path 15 Upgrade project, completed in 2014 and initiated prior to the time period studied in this report, was the first independent, project-financed, greenfield transmission development in the U.S. . . . The development team structured and competitively procured an innovative fixed-price Engineer-Procure-Construct (EPC) contract that left key decisions about project design and execution to the EPC contractors, thereby providing strong incentives for cost reductions through innovative project design and construction management. This structure combined the selection of qualified contractors with strong incentives for on-time completion of the project. *The end result was that the Path 15 Upgrade was completed on time and under budget at a cost of approximately \$250 million and well below the \$306 million cost initially estimated by PG&E (the incumbent transmission owner) during the planning phase.*”); *see also id.* at 49-51 (citing numerous international examples of where the use of competitive procurement processes to develop transmission projects resulted in substantial cost savings for customers).

or the results of more recent competitive processes.<sup>234</sup> For example, in the CAISO, since the Brattle 2019 Competition Report was published, both the Harry Allen – El Dorado and Suncrest projects have been completed.<sup>235</sup> As shown in the table below, these projects, which were built by independent transmission developers, demonstrate the significant cost savings attainable from competition.

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<sup>234</sup> See e.g., Commission Staff, State of the Markets 2020 (Mar. 2021) at 14, available at <https://www.ferc.gov/sites/default/files/2021-03/State-of-the-Markets-2020-Report.pdf> (explaining that in 2020, PJM, NYISO, SPP, and ISO-NE each “awarded to developers or requested proposals for new transmission projects as part of a competitive bidding process compliant with Order No. 1000.”).

<sup>235</sup> The CPUC notes that there is a third complete, competitively procured project in the CAISO, though it is not analyzed below. In 2014, pursuant to an Order 1000 compliant solicitation process, the 15-mile Sycamore-Peñasquitos 230kV line was awarded to incumbent utility San Diego Gas & Electric Company (“SDG&E”) in partnership with Citizens Energy Corp. *Sycamore-Peñasquitos Project, Project Sponsor Selection Report*, CAISO, March 4, 2014, at 2. The project was completed in 2018 at a final cost of at least \$230 million. *SDG&E’s Fifth Transmission Owner Formula Rate Filing*, FERC Docket No. ER19-221 (TO5, Cycle1), Exhibit No. SD-008, October 30, 2018, at 1 (forecasting capital additions of \$224,832,000 in August 2018); *SDG&E’s Fifth Transmission Owner Formula’s Third Annual Informational Filing*, FERC Docket No. ER21-526 (TO5, Cycle3), December 1, 2020, at 00186 (forecasting capital additions of \$3,973,000 in August 2020). However, it is difficult to draw insights from the Sycamore-Peñasquitos project because the scope of the project materially changed two years after the CAISO first awarded the bid.

In 2016, the CPUC directed SDG&E/Citizens to build an alternative project, “Alternative 5,” following CEQA review. *Decision Granting Certificate of Public Convenience and Necessity for the Sycamore-Peñasquitos 230 kV Transmission Line Project*, CPUC D.16-10-005, October 13, 2016, at 22. CEQA guidelines require the CPUC to consider a range of alternatives to the original transmission project proposal and select the most environmentally friendly alternative, so long as it feasibly attains core project objectives. *Id.* at 3-4. In the case of Sycamore-Peñasquitos, Alternative 5 was determined to be the environmentally superior project *and* feasible; therefore it was selected. *Id.* at 13-15. Alternative 5 was a more complex, combination overhead-underground project “routed almost entirely within a new alignment from the proposed project. . . Up to eight additional staging yards would be added for equipment and materials storage.” *Id.* at 12. In other words, the project mandated by the CPUC in 2016, Alternative 5, was substantially different and greater in scope than the original proposed project agreed to by SDG&E/Citizens. Accordingly, the project’s usefulness as a data point is limited.

Project	Project Sponsor	Selected Bid/Offer Price	CAISO's Estimated Cost	Actual Cost	Cost Savings Compared to CAISO's Estimate	Estimated Cost if Developed Traditionally (Historical Cost Escalation of 41%)	Cost Savings Compared to Typical Cost Escalation Above CAISO's Estimate
Harry Allen – El Dorado	DesertLink/LS Power	\$133 million <sup>236</sup>	\$144 million <sup>237</sup>	\$145 million <sup>238</sup>	-0.7%	\$203 million	29%
Suncrest	Horizon West /NextEra	\$37 million <sup>239</sup>	\$50-75 million <sup>240</sup>	\$48 million <sup>241</sup>	36%	\$70.5-\$106 million	55%

<sup>236</sup> Brattle 2019 Competition Report, Table 9: CAISO Competitive Projects Summary (showing selected proposal cost for Harry Allen – El Dorado Project of \$133 million).

<sup>237</sup> Harry Allen-Eldorado 500 kV Transmission Line Project, Project Sponsor Selection Report, CAISO, January 11, at 2 (2016) (referred to below as “Harry Allen-El Dorado Selection Report”), <http://www.caiso.com/Documents/HarryAllentoEldoradoTransmissionLine-ProjectSponsorSelectionReport.pdf> (emphasis added) (“the ISO estimated the cost of the portion of the proposed Harry Allen-Eldorado project subject to competitive solicitation to be *\$144 million in 2015 dollars.*”).

<sup>238</sup> See DesertLink’s 2020 Annual Update, Attachment A to the DesertLink, LLC Protocols DesertLink Commitment Work Paper at 2 (2020) (referred to below as “DesertLink Cost Commitment Work Paper”), [https://desertlinktransmission.com/wp-content/uploads/2022/04/20210701\\_DesertLink\\_2020-Annual\\_Update-Attachment\\_A.pdf](https://desertlinktransmission.com/wp-content/uploads/2022/04/20210701_DesertLink_2020-Annual_Update-Attachment_A.pdf) (unnumbered) (showing actual project costs of \$145,436,446). Desertlink explains that the “work paper will be used . . . to demonstrate compliance with the rate commitments made for the Harry Allen to Eldorado 500 kV Transmission Project . . . in the First Amended and Restated Approved Project Sponsor Agreement between DesertLink and the California Independent System Operator, Inc. dated January 11, 2017 . . . .”). Desertlink’s FERC filings are available on the company’s website at <https://desertlinktransmission.com/documents/>.

<sup>239</sup> Brattle 2019 Competition Report, Table 9: CAISO Competitive Projects Summary (showing selected proposal cost for Suncrest Project of \$37 million).

<sup>240</sup> Suncrest Reactive Power Project, Project Sponsor Selection Report, CAISO at 2 (January 6, 2015) (referred to below as “Suncrest Selection Report”) (emphasis added), <http://www.caiso.com/Documents/SuncrestProjectSponsorSelectionReport.pdf> (“The Suncrest Functional Specification estimates that the cost of the proposed dynamic reactive power support project would be *approximately \$50 to \$75 million.* The Suncrest Functional Specification also provides that, if proposed, a 230 kV tie-line from the dynamic reactive power support facility to the Suncrest Substation would be the responsibility of the project sponsor up to within 100 feet of the Suncrest Substation fence line.”).

<sup>241</sup> Horizon West Transmission LLC formula rate, Attachment 2-Cost Support, Plant in Service Worksheet (showing \$48,100,000 for 10 months ending December 31, 2020).

While the actual costs for both these projects were incrementally higher than the selected bids/offer prices, when compared to the CAISO's estimated cost for each project, and the historical level of cost escalation in the region for traditionally developed projects, *i.e.*, 41% above the top of the CAISO's estimate, the cost savings are substantial. If using the historical cost escalation number, development by an incumbent utility would have resulted in expected costs of \$203 million for the Harry Allen – El Dorado project and \$106 million for the Suncrest project. Thus, assuming the historical level of cost escalation experienced in the CAISO, the cost savings are \$58 million, *i.e.*, 29%, for the Harry Allen – El Dorado project, and \$59 million, *i.e.*, 55%, for the Suncrest project.

Significantly, the CAISO's project sponsor selection reports for each of these projects emphasized the strong cost containment commitments made by Desertlink and NEET West, respectively.<sup>242</sup> For example, DesertLink committed to a cost cap of \$145.5 million,<sup>243</sup> to limit the equity share of its capital structure to no more than 50%, and to limit its return on equity ("ROE") to no more than 9.8%, including any incentive adders.<sup>244</sup> The *actual* costs of these two completed projects demonstrate the critical value of cost containment commitments and provide

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<sup>242</sup> See Harry Allen-El Dorado Selection Report at 97 (emphasis added) ("One of the key selection factors for which the ISO identified material differences among the project sponsors' proposals is the cost containment selection factor, particularly the project sponsors' commitments to binding cost containment measures. [The cost containment selection factor] is particularly important in this instance given that the justification for this project is solely based on economic benefits to ratepayers. *DesertLink proposed the strongest binding cost containment commitment proposal. In particular, it proposed more robust capital/construction cost and ROE caps that should result in lower costs and present less risk compared to the proposals of the other two project sponsors, thus benefitting ratepayers.*"); Suncrest Selection Report at 46 (emphasis added) ("The ISO has determined that, given the specific nature of this project and taking into account the key selection factors, *the slight overall edge goes to NEET West primarily because (1) its proposed binding cost containment measures are more robust, in particular, it has agreed to a materially lower cap on capital costs and (2) it has proposed to assume more cost increase risk than SDG&E.*").

<sup>243</sup> DesertLink Cost Commitment Work Paper at 3 (unnumbered) (specifying "Binding Cost Cap" of \$145,500,000).

<sup>244</sup> *Id.*

further evidence of the cost saving benefits attainable from the use of competitive processes to develop transmission projects.<sup>245</sup>

In addition, as noted, the Brattle 2019 Competition Report did not include projects selected for competitive procurement after 2017. For example, the CAISO selected two projects for competitive procurement in its 2018-2019 Transmission Planning Process (“TPP”),<sup>246</sup> the Gates 500 kV dynamic reactive support project, and the Round Mountain 500 kV area dynamic reactive support project. LS Power Grid California, LLC (“LSPGC”), a wholly-owned subsidiary of LS Power, won both solicitations based, in large part, on the strength of the company’s robust cost containment commitments and its demonstrated ability to meet the accelerated construction schedules for the projects.<sup>247</sup> In particular, CAISO emphasized the

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<sup>245</sup> *Reply Comments of the California Independent System Operator Corporation*, Docket No. RM21-17-000 (Nov. 30, 2021) at 77 (emphasis added) (contending that “[w]hen assessing potential cost savings associated with competitive procurement, the Commission should focus on completed project costs. Cost cap proposals can include a variety of exclusions that allow the cap to be adjusted upward. The CAISO has seen bid cap exclusions or cap adjustment provisions for routing changes, scope or design changes, force majeure events, labor and materials cost increases, regulatory and schedule delay, inflation, siting authority or regulator-imposed environmental mitigation measures, and other regulatory changes.”). While the CPUC submits that demonstrably lower offer prices and cost containment commitments obtained through competitive processes represent significant consumer benefits, completed project costs are, of course, the best evidence of the cost savings attainable from competition.

<sup>246</sup> Notably, no transmission projects were competitively procured in the CAISO in the annual transmission planning processes for the following years: 2014-2015; 2015-2016; 2016-2017; 2017-2018; and 2019-2020.

<sup>247</sup> Round Mountain 500 kV Area Dynamic Reactive Support Project, Project Sponsor Selection Report at 185 (February 28, 2020) (referred to below as “Round Mountain Selection Report”), <http://www.caiso.com/Documents/RoundMountain500kVAreaDynamicReactiveSupportProject-ProjectSponsorSelectionReport.pdf> (explaining that “LSPGC proposed the strongest binding cost containment commitment proposal. In particular, it 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.”); *id.* at 186 (“Regarding another key selection factor, the project sponsor’s proposed schedule and ability to meet that schedule, which is particularly critical due to the need for this project to address a reliability issue, LSPGC proposed a schedule that provides a substantial cushion for meeting the in-service date of June 1, 2024 specified in the ISO Functional Specifications and included a penalty for failure to meet the in-service date.”). *See also* Gates 500 kV Dynamic Reactive Support Project, Project Sponsor Selection Report at 136-137 (January 17, 2020) (referred to below as “Gates Selection Report”), <http://www.caiso.com/Documents/Gates500kVDynamicReactiveSupport-ProjectSponsorSelectionReport.pdf> (similarly emphasizing the strength of LSPGC’s cost containment

benefits of LSPGC’s proposed “robust, 15-year annual revenue requirement cap[s]” for both projects “that will provide lower cost, greater rate certainty, and less cost risk than the proposals of the other project sponsors.”<sup>248</sup> LSPGC’s two recent winning proposals in the CAISO further demonstrate and underscore that Order 1000 competitive processes serve as “a complement to FERC regulation” by “introducing performance incentives over the capital costs, operating costs, [and] performance of new transmission facilities,” in the form of binding cost commitments,<sup>249</sup> which have not been offered by incumbent utilities outside of competitive processes.<sup>250</sup>

Since the Brattle 2019 Competition Report was released, there have also been successful competitive solicitation processes in other regions besides the CAISO. The NYISO recently administered several competitive solicitations to the benefit of New York ratepayers.<sup>251</sup> Commissioner Clements characterized the NYISO’s success implementing competition as “a bright spot in the Order No. 1000 landscape.”<sup>252</sup> For example, pursuant to a 2017 competitive

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commitments and ability to meet the accelerated project schedule).

<sup>248</sup> Round Mountain Selection Report at 185; Gates Selection Report at 136.

<sup>249</sup> Paul L. Joskow, *Competition for Electric Transmission projects in the U.S.: FERC Order 1000*, March 2019 (referred to below as “Joskow Paper”) at 21 (emphasis added) (explaining that “[i]n the context of FERC regulation of transmission, I view competitive bidding as a partial substitute for the absence of performance-based regulatory mechanisms.”).

<sup>250</sup> See e.g., Artificial Island Project, Delaware Public Service Commission, <https://depsec.delaware.gov/artificial-island-project/> (emphasis added) (demonstrating the effectiveness of cost caps for deterring cost overruns by explaining that the costs of the part of the project constructed by LS Power, a non-incumbent developer, i.e., primary construction of a 230 kV transmission line across the Delaware River, “are subject to a ‘cap’ at \$146 [million] and have not changed since approved by the PJM Board.” By contrast, the original cost estimate for the work performed by the incumbent utility, Public Service Electric & Gas Company (“PSE&G”), mainly at their Salem substation, was approximately \$137 million. “Since approved by the PJM Board the cost estimates for PSE&G’s portion of the work have been ‘updated’ resulting in a staggering \$135.3 [million] increase, or 98.7%.”).

<sup>251</sup> “The NYISO, acting on public policy requirements identified by the NYPSC, over the past several years has undertaken several competitive solicitations to develop major efficient and cost-effective transmission projects to relieve or avoid constraints on the bulk transmission system to access existing and future renewable resources.” *Comments of the New York Transmission Owners*, Docket No. RM21-17-000 (October 12, 2021), eLibrary No. 20211012-5497 at 4.

<sup>252</sup> NYISO, 175 FERC 61,038, Clements, concurring at P 3 (2021).



process, the NYISO selected a NextEra proposal to fulfill its identified “Western NY” Need.<sup>253</sup> The NYISO found NextEra’s project to be “both the more efficient and more cost-effective transmission solution . . . across the selection metrics and scenarios.”<sup>254</sup> Additionally, pursuant to a 2019 competitive process, the NYISO selected LS Power/New York Power Authority (“NYPA”) and New York Transco (“Transco”) to respectively upgrade two major state transmission segments, fulfilling the NYISO’s identified “AC Transmission” Need.<sup>255</sup> The NYISO recognized the advanced designs of both the LS Power/NYPA<sup>256</sup> and Transco<sup>257</sup> winning proposals to provide superior public benefits amongst competing projects. Taking stock of the technologically sophisticated and cost-efficient features of the winning NYISO proposals, it is worth considering whether similar innovation could be expected absent competitive forces.

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<sup>253</sup> Western New York Public Policy Transmission Planning Report, NYISO at iii (October 17, 2017) (referred to below as “Western NY Planning Report”), <https://www.nyiso.com/documents/20142/2892590/Western-New-York-Public-Policy-Transmission-Planning-Report.pdf>.

<sup>254</sup> *Id.* at iii. The NYISO Board found NextEra’s project proposal T014 offered the greatest benefits among competing proposals in terms of operability, cost per MW ratio, and production cost savings. While the selected project did not explicitly include cost containment measures, the competitive solicitation process produced numerous low-cost proposals, including proposals offering aggressive cost containment. NextEra’s proposal was still selected because of its comprehensive grid efficiency and savings benefits, based on the full range of the NYISO metrics considered. *Id.* at iv.

<sup>255</sup> AC Transmission Public Policy Transmission Plan, NYISO at 6 (April 8, 2019) (referred to below as “AC Transmission Plan”), <https://www.nyiso.com/documents/20142/5990681/AC-Transmission-Public-Policy-Transmission-Plan-2019-04-08.pdf>.

<sup>256</sup> The NYISO found LS Power/NYPA’s winning proposal for segment A—project T027—“will not only add more efficient and cost-effective new transmission facilities, but will also obviate the need to incur a significant amount of transmission refurbishment costs,” among other benefits. AC Transmission Plan at 6. “Although Project T027 has higher costs relative to some other Segment A projects, it replaces the greatest amount of aging infrastructure among the Segment A projects and provides the highest Central East interface transfer capability among all of the 345k Segment A projects. . . . Additional benefits provided by Project T027’s double-circuit 345 kV design include increased production cost savings, excellent operability and expandability, and a lower electromagnetic field compliance risk due to double-circuit design.” *Id.*

<sup>257</sup> NY Transco’s winning proposal T019, covering segment B of the AC Transmission Need, “demonstrates superior performance across a broad range of metrics that warrants the project cost.” AC Transmission Plan at 7.

The benefits of competitive solicitation are further demonstrated by the recent experience in the SPP, which has awarded a major transmission project to a nonincumbent developer in each of the last three years, effecting meaningful cost savings. In 2020, Transource Missouri (“Transource”) won a bid to build the Sooner-Wekiwa project, a 76-mile line intended to facilitate low-cost power across Oklahoma and surrounding states.<sup>258</sup> In 2021, NextEra won a bid to construct the Wolf Creek-Blackberry project, a 94-mile line between Kansas and Missouri, offering a project cost 27% lower than the next least expensive proposal.<sup>259</sup> Finally, in 2022, NextEra was again selected by the SPP to develop the 48-mile Minco-Pleasant Valley-Draper line in Oklahoma. NextEra’s bid was not only the least expensive but also included the best cost cap guarantees of any proposal.<sup>260</sup> Despite these promising outcomes, Minco-Pleasant Valley-Draper is potentially the last competitively procured project of the FERC Order 1000 era.<sup>261</sup> To paraphrase Kansas Corporation Commission Commissioner Andrew French: with the SPP

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<sup>258</sup> In the SPP’s blind grading of ten competing RFP responses, Transource’s project earned the highest combined score of any proposal across the five categories considered by the SPP. *See* Industry Expert Panel Transmission Provider Public Report - Final - Sooner-Wekiwa 345kV, SPP at 8 (October 13, 2020), [https://spp.org/documents/63196/sooner-wekiwa\\_public\\_process\\_report\\_and\\_appendix\\_10122020\\_final.pdf](https://spp.org/documents/63196/sooner-wekiwa_public_process_report_and_appendix_10122020_final.pdf).

<sup>259</sup> NextEra’s RFP Proposal C, ultimately selected by the SPP, bid the Wolf Creek-Blackberry project at \$85.2M, while the next least expensive proposal provided a cost of \$116.5M. *See* Industry Expert Panel Transmission Provider Public Report - Final - Wolf Creek-Blackberry 345kV, SPP at 8 (October 11, 2021), [https://www.spp.org/documents/65719/wolf\\_creek-blackberry\\_rfp\\_public\\_report.pdf](https://www.spp.org/documents/65719/wolf_creek-blackberry_rfp_public_report.pdf).

<sup>260</sup> NextEra’s RFP Proposal E, ultimately selected by the SPP, bid the Minco-Pleasant Valley-Draper project at \$55.1M, 26% lower than the next least expensive proposal of \$74M. *See* Industry Expert Panel Transmission Provider Public Report - Final - Minco-Pleasant Valley-Draper 345kV, SPP at 8 (April 12, 2022), [https://www.spp.org/documents/66929/minco-pleasant\\_valley-draper\\_rfp\\_iep\\_public\\_report.pdf](https://www.spp.org/documents/66929/minco-pleasant_valley-draper_rfp_iep_public_report.pdf). Additionally, “Proposal E provided the most valuable guarantee related to Project cost protection and was rated Best.” *Id.* at 58.

<sup>261</sup> *See* Ari Peskoe, Director of Harvard Law School’s Electricity Law Initiative, *Could NextEra’s \$55M winning bid for SPP’s transmission project be among the last of its kind?*, Utility Dive (April 27, 2022), <https://www.utilitydive.com/news/southwest-power-pool-spp-nextera-transmission-FERC/622769/> (posing the question, “Is this SPP project the last competitive transmission project?”).



presently reaping substantial cost savings, now seems an imprudent time to constrain competitive solicitation processes.<sup>262</sup>

**c) The elimination of federal ROFRs for regionally cost allocated transmission projects created a perverse incentive for incumbent utilities.**

As Chair Glick has previously observed,<sup>263</sup> and the CPUC and other commenters explained in response to the ANOPR,<sup>264</sup> the NOPR is correct that Order 1000's elimination of the federal ROFRs for regionally cost allocated transmission projects<sup>265</sup> inadvertently created a *perverse incentive* that incumbent utilities have used to circumvent competitive procurement requirements.<sup>266</sup> Instead of risking that their proposals for regional transmission projects might

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<sup>262</sup> *Joint Fed.-State Task Force on Elec. Transmission*, July 20, 2022 Meeting, Docket No. AD21-15-000, video available at <https://www.ferc.gov/news-events/events/fourth-meeting-joint-federal-state-task-force-electric-transmission-07202022> at approximately 3:24:00-3:24:45, <https://www.ferc.gov/news-events/events/fourth-meeting-joint-federal-state-task-force-electric-transmission-07202022> (“we have seen tremendous cost savings in our region [SPP] as well over the last few years on several projects, and it seems the wrong time to turn away from that [competition].”).

<sup>263</sup> Transcript from 1060th Commission Meeting, Open Session at 11:25-12:1-22 (October 17, 2019), [https://www.ferc.gov/sites/default/files/2020-08/transcript\\_2.pdf](https://www.ferc.gov/sites/default/files/2020-08/transcript_2.pdf) (emphasis added) (where Chairman Glick observed that Order 1000's preservation of a ROFR for locally cost allocated projects created a “very strange incentive for utilities to develop transmission projects *that might not necessarily be the best type of transmission project*” or “*as beneficial*” by encouraging incumbent utilities to prioritize investment in their local systems to recover guaranteed returns for their investors).

<sup>264</sup> See e.g., CPUC ANOPR Initial Comments at 3; see also Reply Comments of the Office of the People's Counsel for the District of Columbia on the Advanced Notice of Proposed Rulemaking, Docket No. RM21-17-000 (Nov. 30, 2021) at 16 (emphasis added) (noting that “[a] *common theme in the comments* is the incentive and ability for transmission owners to build local transmission with little oversight, while regionally planned transmission is discouraged because it is highly scrutinized and bid out to third parties, making it much less attractive to transmission owners.”).

<sup>265</sup> Order No. 1000 at PP 284–85 (where the Commission found that the “federal rights of first refusal in favor of incumbent transmission providers deprive customers of the benefits of competition in transmission development and associated potential savings.”).

<sup>266</sup> NOPR at P 350 (emphasis) (where the NOPR recognizes that “[i]ncumbent transmission providers, as a result of [Order No. 1000's nonincumbent transmission developer] reforms, may be presented with *perverse investment incentives* that do not adequately encourage those incumbent transmission providers to develop and advocate for transmission facilities that benefit more than just their own local retail distribution service territory or footprint.”). *Id.* at P 353 (explaining that the status quo presents “*potentially flawed investment incentives* that may be restraining otherwise more efficient or cost-effective regional transmission facility development.”).

An “agency’s decision to change course may be arbitrary and capricious” if it “simply disregard[s] contrary or inconvenient factual determinations.”<sup>347</sup>

The NOPR contradicts fundamental factual findings in Order 1000 that support the elimination of “*all* federal rights of first refusal for entirely new transmission facilities selected in a regional transmission plan for purposes of cost allocation” to ensure just and reasonable rates.<sup>348</sup> The Conditional ROFR would amend Order 1000 “findings and mandates” to create an exception, or *carve out*, to Order 1000’s elimination of federal ROFRs for regionally cost allocated projects,<sup>349</sup> which incumbent utilities would predictably utilize to circumvent competitive processes, thereby effectively eliminating competition. Such amendments would directly contradict the Commission’s finding in Order 1000, as explained above in Section II(G)(1)(a), that the elimination of *all* federal ROFRs for regionally cost allocated projects is necessary to attain the benefits of competitive processes for customers.<sup>350</sup>

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<sup>347</sup> *Fox Television*, 556 U.S. at 537 (Kennedy, J., concurring).

<sup>348</sup> NOPR at P 353 (emphasis in original).

<sup>349</sup> *Id.* at P 355 (emphasis added) (“*Order No. 1000’s findings and mandates would be amended* such that joint ownership conditions may presumptively be found to ensure just and reasonable Commission-jurisdictional rates and limit opportunities for undue discrimination by public utility transmission providers, if imposed upon the exercise of an incumbent transmission provider’s federal right of first refusal for transmission facilities selected in a regional transmission plan for purposes of cost allocation.”)

<sup>350</sup> *See also e.g.*, Order 1000 at P 268 (emphasis added) (“Although the Commission has previously accepted, in some cases, and rejected, in others, a federal right of first refusal, *we find more persuasive in light of the comments in this proceeding, the Commission’s reasoning in rejecting the federal right of first refusal.*”); *see also id.* at P 256 (emphasis added) (“*Allowing federal rights of first refusal to remain in Commission-jurisdictional tariffs and agreements would undermine the consideration of potential transmission solutions proposed at the regional level.* 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 right of first refusal to act in its own economic self-interest may discourage new entrants from proposing new transmission projects in the regional transmission planning process.*”).

As a condition precedent necessary to amend the pertinent findings in Order 1000, and thus, “regulate a practice affecting rates pursuant to section 206, the Commission must find that the existing practice is ‘unjust, unreasonable, unduly discriminatory or preferential,’ and that the remedial practice it imposes is ‘just and reasonable.’”<sup>351</sup> “These findings must be supported by substantial evidence.”<sup>352</sup> In Order 1000, the Commission explained that “[i]n light of our finding . . . that federal rights of first refusal in favor of incumbent transmission providers deprive customers of the benefits of competition in transmission development, and associated potential savings, *the Commission is compelled under section 206(a) to take corrective action here.*”<sup>353</sup> In order for the Commission to now revisit its prior determination that all federal ROFRs for regionally cost allocated should be eliminated, it must satisfy “the [same] test under section 206 of the FPA.”<sup>354</sup> In the NOPR, the Commission does not even attempt to satisfy this standard,<sup>355</sup>

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<sup>351</sup> *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d at 64–65 (citing 16 U.S.C. § 824e(a)).

<sup>352</sup> *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d at 64–65 (internal quotation omitted) (citing 5 U.S.C. § 706(2)(E)).

<sup>353</sup> Order 1000 at P 285 (emphasis added).

<sup>354</sup> See NOPR, Commissioner Danly dissent, at P 21 (emphasis added) (explaining that the applicable standard of review for assessing the reforms proposed in the NOPR is “*the test under section 206 of the FPA*,” which requires the Commission “*must have substantial record evidence that the existing rate is unjust and unreasonable*. We must find that the current planning processes are so unacceptable that the existing system essentially must be scrapped. *We must also have record evidence that the replacement rate—the final rule to follow the NOPR—is just and reasonable.*”); see also *id.* at P 25 (emphasis added) (underscoring “the required legal showings for *this section 206 proposal*” is “that existing rates are unjust and unreasonable, and that the proposed replacement rate is just and reasonable.”).

<sup>355</sup> The NOPR’s attempt to sidestep this foundational requirement by emphasizing that the nonincumbent developer reforms adopted in Order 1000 continue to have a “sound theoretical basis,” NOPR at P 353, and by affirming that “the *unconditional* use of federal ROFRs for [regionally cost allocated] facilities remains unjust and unreasonable *given the likelihood that the presence and exercise of those rights may prevent the realization of more efficient or cost-effective transmission solutions to regional transmission needs,*” *id.* at P 351 (emphasis added), is unavailing. These internally contradictory statements simply further underscore the lack of a principled and reasoned basis for the Commission’s proposed carve out from the requirement to eliminate federal ROFRs for regionally cost allocated projects.

and, instead, as explained below, untenably relies on sections 309 and 205 as the putative source of authority to make the proposed amendments.<sup>356</sup>

Instead of providing the requisite “detailed justification” for its proposed amendments to the findings in Order 1000 that would allow grid operators to include the Conditional ROFR in their OATTs—and thereby establish another perverse incentive incumbent utilities could exploit to circumvent competition—the NOPR does not substantively address the track record of Order 1000 compliant competitive processes other than to observe that they have been implemented inconsistently in different regions,<sup>357</sup> and have only resulted in a small percentage of procured projects since Order 1000 was issued.<sup>358</sup> Thus, the NOPR proposes a significant reversal in national policy that would contradict key findings in Order 1000, controvert the Federal Power Act’s<sup>359</sup> “overriding policy of maintaining competition to the maximum extent possible consistent with the public interest,”<sup>360</sup> and potentially compromise the NOPR’s other important proposed reforms intended to expedite build out of the grid to facilitate the clean energy transition, without even determining for itself whether Order 1000 compliant competitive processes have, to date, resulted in benefits to consumers. Specifically, as explained above in Sections II(G)(1)(b) and II(G)(2)(a)(2)(c), the NOPR entirely disregards the evidence submitted

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<sup>356</sup> See *Chippewa & Flambeau Imp. Co.*, 325 F.3d 353 (D.C. Cir. 2003) (holding that section 309 does not relieve the Commission of its duty to support administrative decisions with substantial evidence) (“[a] grant of discretion to an agency does not, of course, authorize it to make an unprincipled decision.”).

<sup>357</sup> See e.g., NOPR at P 343 (citation omitted).

<sup>358</sup> See e.g., NOPR at P 349 (citation omitted); *id.* at P 344 (citation omitted).

<sup>359</sup> 16 U.S.C. § 791a, *et seq.*

<sup>360</sup> *Otter Tail Power Co. v. United States*, 410 U.S. 366 at 374 (1973); Order 1000 at P 286 (*citing Otter Tail Power*, 410 U.S. at 374) (emphasis added) (explaining 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 Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest.’ *In requiring the elimination of federal rights of first refusal from Commission-jurisdictional tariffs and agreements, we are acting in accordance with our duty to maintain competition.*”).

in this proceeding of the substantial benefits to consumers that competition has provided since Order 1000 was adopted in the form of lower project offer and *actual* prices, myriad cost containment commitments, and the identification of more innovative, efficient, and cost-effective solutions to address transmission needs. There is nothing in the Commission’s proposed rule, despite its length, that suggests it has even examined this critical data. The Commission has thus “entirely failed to consider an important aspect of the problem,” and, consequently, the Commission’s proposed action is arbitrary and capricious.<sup>361</sup>

In addition, as explained above in Section II(G)(2)(a), given incumbent utilities’ historical reluctance to share transmission ownership with new market entrants, including incumbent utilities’ deliberate (and largely successful) efforts to impede and avoid Order 1000 compliant competitive processes, the Commission’s *assumption* that incumbent utilities will now, under the Conditional ROFR proposal, prioritize joint ownership arrangements with potential new entrants over other options is illogical and neither supported by the record of this proceeding, nor by the record underlying Order 1000.<sup>362</sup> Thus, the Commission “offer[s] an explanation for [the proposed Conditional ROFR] that runs counter to the evidence before the agency.”<sup>363</sup> Moreover, this *assumption* flatly contradicts the Commission’s determination in Order 1000 “that it is not in the economic self-interest of incumbent transmission providers to

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<sup>361</sup> *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.* (“State Farm”), 463 U.S. 29, at 43 (1983).

<sup>362</sup> See e.g., Harvard ANOPR Reply Comments at 5-6 (citations omitted) (summarizing comments submitted in support of elimination federal ROFRs for regionally cost allocated projects in the rulemaking proceeding that resulted in Order 1000).

<sup>363</sup> *State Farm*, 463 U.S. 29 at 43.

permit new entrants to develop transmission facilities . . . .”<sup>364</sup> This is not reasoned decision-making supported by substantial evidence.<sup>365</sup>

**b) The NOPR fails to address material contentions of parties to the proceeding that competition for transmission infrastructure has provided substantial consumer benefits and should be expanded.**

Although “[i]t is well established that the Commission must ‘respond meaningfully to the arguments raised before it,’”<sup>366</sup> the NOPR entirely fails, as explained above in Section II(G)(2)(a)(2)(c), to substantively address parties’ arguments demonstrating that Order 1000 compliant competitive processes have provided substantial benefits to consumers and should be implemented more broadly, not eliminated. Thus, for example, although many parties rely on the Brattle 2019 Competition Report, the NOPR does not substantively address, or even acknowledge, its core conclusions about the benefits of competition. Similarly, the Commission does not address why, given the demonstrated benefits of competition, the appropriate policy response to the ineffective implementation of competitive processes over the past decade would be to eliminate anti-competitive carve outs, not effectively create a new one in the form of the Conditional ROFR.<sup>367</sup> The Commission’s complete disregard of these material contentions represents arbitrary and capricious decision-making.<sup>368</sup>

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<sup>364</sup> Order 1000 at P 256; Order 890 at P 422.

<sup>365</sup> See e.g., *Mo. PSC v. FERC*, 337 F.3d 1066, 1070 (D.C. Cir. 2003) (substantial evidence requires the Commission “articulate the critical facts upon which it relies,” and when it “finds it necessary to make predictions or extrapolations from the record, it must fully explain the assumptions it relied on to resolve unknowns and the public policies behind those assumptions.”).

<sup>366</sup> *TransCanada Power Mktg. Ltd. v. Fed. Energy Regul. Comm’n*, 811 F.3d 1, 12 (D.C. Cir. 2015) (citing *Pub. Serv. Comm’n v. FERC*, 397 F.3d 1004, 1008 (D.C. Cir. 2005)).

<sup>367</sup> See e.g., NOPR at P 347 (where the NOPR summarizes arguments by the CPUC, NARUC, and other parties for expanding competition but fails to substantively address any of the parties’ contentions).

<sup>368</sup> *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998) (remanding a Commission order after finding that the Commission acted arbitrarily by disregarding the material contentions of a party before it); *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992)

A developer can propose an interregional transmission project as an alternative in the CAISO control area to regional solutions identified in the TPP. The CAISO will then assess whether the proposed interregional transmission project provides a more efficient or cost-effective solution.<sup>434</sup>

### III. CONCLUSION

The CPUC commends the Commission for opening this public inquiry and appreciates the opportunity to provide these Comments on the NOPR.

Respectfully submitted,

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<sup>434</sup> See CAISO Business Practice Manual for Transmission Planning Process Version 22.0 at 68 (August 30, 2021), [https://bpmcm.caiso.com/BPM Document Library/Transmission Planning Process/Transmission Planning Process BPM Version 22\\_08302021.docx](https://bpmcm.caiso.com/BPM_Document_Library/Transmission_Planning_Process/Transmission_Planning_Process_BPM_Version_22_08302021.docx) (“The CAISO will assess whether proposed interregional transmission projects provide more cost effective or efficient solutions to regional transmission needs than identified regional solutions that are in the CAISO transmission plan. The CAISO will generally conduct its evaluation over a two year evaluation cycle, as described in this section of this BPM. However, because the CAISO’s evaluation must be coordinated with the evaluations of other relevant planning regions the CAISO’s evaluation cannot be concluded until all relevant planning regionals complete their assessments.”)