UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Notice of Proposed Rulemaking	)	Docket No. RM21-17-000
Building for the Future Through Electric	)	
Regional Transmission Planning and Cost	)	
Allocation and Generator Interconnection	)	

REPLY COMMENTS OF THE STATE AGENCIES

Pursuant to the Notice of Proposed Rulemaking[1] (Notice or NOPR) in Docket No. RM21-17-000, referred to as "Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection," the signatory state parties (together, the State Agencies) provide the following reply comments. The State Agencies continue to assert the arguments raised in their initial comments filed August 17, 2022. The State Agencies submit these reply comments solely to respond to comments filed regarding the NOPR's proposed federal rights of first refusal (ROFR).

The State Agencies agree with the Commission that significant upgrades are needed to the nation's transmission system to facilitate new generation resources, including those promoted through state policies, to better protect consumers and the public welfare, to enhance reliability and resilience, and to efficiently accommodate the transition to the electric power system of the future. But the State Agencies do not believe there is justification to support reinstatement of a federal ROFR. Given the importance and distinct character of this issue, the extensive judicial review of the Order No. 1000 rulings, and the complex issues of law and evidence needed if the Commission chooses to reverse its prior rulings, the State Agencies continue to urge the

[1] 179 FERC ¶ 61,028; 87 Fed. Reg. 26,504 (May 4, 2022)

Commission to address any reinstatement of a ROFR in a separate docketed proceeding, which would permit stakeholders to provide detailed and specific comments, allow development of an adequate administrative record, and permit the Commission to give this issue in depth consideration.

REPLY COMMENTS OF THE STATE AGENCIES

Proposed Federal Right of First Refusal

The NOPR would amend Order No. 1000[2] to permit the exercise of a federal ROFR for transmission facilities selected in a regional transmission plan for purposes of cost allocation. The proposed federal ROFR would be conditioned on the incumbent transmission provider agreeing to joint ownership of the transmission facilities with a non-affiliated entity.[3] The State Agencies consider the ROFR proposal advanced in the NOPR to be a significant and unjustified step backwards.

The State Agencies recognize, however, that some states have adopted state laws that provide a ROFR for transmission projects and, in some states, there are established policies favoring limiting greenfield transmission line development. These comments concern only a federal ROFR.

The State Agencies Support Competition

In general, the State Agencies have long supported competition in transmission development. The Commission itself, in Order No. 890, embarked on a process of reforming

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[2] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

[3] NOPR at PP 3-5.

transmission rules because it concluded that it could not “rely on the self-interest of transmission providers to expand the grid in a non-discriminatory manner.”[4] In Order No. 1000, the Commission went further and concluded 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.”[5]

However, despite Order No. 1000, progress in expanding competition in transmission development has not proceeded as quickly as anticipated for a variety of reasons, including the lack of forward-looking regional transmission planning processes, the generation interconnection process, and state siting challenges.[6] A Massachusetts Institute of Technology study points out that “meaningful competitive solicitations account for a tiny fraction of transmission projects approved since Order 1000 went into effect.”[7] Nonetheless, multiple studies have convincingly concluded that competition in transmission development is critical.[8] For instance, a 2019 Brattle Group study showed that “while the scope of competition ha[d] been limited to only 2% of total U.S. transmission investments over the [prior] 5 years, competitive processes led to innovations in proposed solutions, low bids, cost caps, cost control measures, and innovative financial structuring.”[9] In fact, a review of competitive projects demonstrated “[w]inning bids average 40% below initial cost estimates while non-competitive projects are completed at 34% above initial estimates, offering 55% of potential cost savings.”[10] The study

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[4] Order No. 890 at P 422.

[5] Order No. 1000 at PP 284-285

[6] *See*, Comments of United States Department of Justice and Federal Trade Commission, RM21-17, p. 6.

[7] *Competition for Electric Transmission Projects in the U.S.: FERC Order 1000*, Paul Joskow, March 2019.

[8] *Cost Savings Offered by Competition in Electric Transmission*, The Brattle Group, April 2019, page 19, https://brattlefiles.bl e_transmission_report_final_with_data_tables_ 04-09-2019.pdf

[9] *Id*. at 1.

[10] *Id*.

concluded that transmission savings would provide consumer benefits of $8 billion over just five years if the scope of the regional transmission organization and independent system operator (RTO/ISO) competitive processes could be expanded to cover a larger portion of total transmission investments.[11]

The U.S. Department of Energy (DOE) agrees.[12] DOE has noted that "[r]egional transmission planning and commissioning will … facilitate competition for transmission project development, yielding potential transmission cost savings."[13] DOE repeatedly has pointed to the Texas CREZ model and stated that, with this model, "two factors – good natural resources and competition – ensure that . . . customers will be able to get wind and solar at the lowest reasonable cost."[14]

Despite the many demonstrated benefits of competition, the NOPR proposes to permit incumbent transmission owners to block competition if they partner with a non-affiliate. This proposal is wholly unjustified and would harm consumers. We urge the Commission to keep regional transmission development open to full competition. This would be consistent with national policy and Supreme Court precedent regarding the Commission's authority and would provide important protections for consumers.

Specifically, President Biden's Executive Order on Promoting Competition in the American Economy explained, a "fair, open, and competitive marketplace has long been a cornerstone of the American economy." The President's Executive Order specifically highlights FERC's role in protecting conditions of fair competition. The Order urges federal agencies to

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[11] *Id*. at 16.

[12] Comments of the United States Department of Energy, RM21-17 (Aug. 17, 2022).

[13] *Id*. at 11.

[14] *Id*., Appendix A at 65.

"further the policies" of the Order "by, among other things . . . rescinding regulations that create unnecessary barriers to entry that stifle competition." Similarly, the Supreme Court has recognized FERC's obligation to consider competition policy, noting that the Commission's "power clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations…. The [Federal Power] Act did not render antitrust policy irrelevant to the Commission's regulation of the electric power industry." Indeed, as the D.C. Circuit observed, "FERC's authority generally rests on the public interest in constraining exercises of market power." *Nat'l Ass'n of Reg. Util. Comm'rs v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007).

In this regard, it is telling that two federal agencies responsible for "promoting and protecting competition . . . . [and] entrusted with enforcing the federal antitrust laws," specifically the Federal Trade Commission and the U.S. Department of Justice, filed comments opposing the proposed ROFR. As they note: "Competition is a core organizing principle of the American economy."[15] The federal agencies made a particularly important point regarding the joint ownership proposal in the NOPR:

> A ROFR conditioned on joint ownership does not result in multiple bidders, so it is not a competitive process and does not offer the same benefits as competition. While joint ownership proposals can be procompetitive if they are part of a competitive process, they cease to be so if tied to a ROFR, which eliminates competition.[16]

The State Agencies fully agree with this position.

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[15] Comments of United States Department of Justice and Federal Trade Commission, RM21-17, p. 3. See also, *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951) ("The heart of our national economic policy long has been faith in the value of competition.")

[16] *Id*., p. 17.

Any ROFR Proposal Should Be Part of a Separate, Dedicated Proceeding

The proposal to reinstate a conditional ROFR would significantly impact consumers and is sufficiently distinct from the regional transmission planning reforms set forth in the NOPR that it warrants individualized investigation. The State Agencies, therefore, continue to urge that, if the Commission does not abandon its misguided ROFR proposal, it should separate that proposal from the present NOPR and consider it in its own docketed proceeding under section 206. This would allow development of an appropriate record in a fully transparent manner with review by relevant experts and consideration by all stakeholders. Such a procedure would also enable the Commission and stakeholders to explore competition reform more generally, including consideration of proposals to improve implementation of competitive processes. And it would enable the Commission to review the suggested reforms that numerous other commenters proposed to address the concerns the transmission companies raised in support of reinstating the ROFR.

The Proposed ROFR Would Inhibit Competition and Increase Costs

Finally, some commenters, principally transmission owners and trade organizations to which they belong, argue that the lack of a ROFR inhibits open communication and cooperation between transmission companies and this adversely impacts transmission development.[17] Thus, they claim that a ROFR is needed to incentivize transmission owners to invest in the larger, regional projects as well as to foster open communication between transmission owners.[18]

There are several problems with these arguments. As some have pointed out, overinvestment in local projects is caused by several factors, and a major one is that the

[17] *See* Comments of Developers Advocating Transmission Advancements, RM21-17, pp. 3-22 (Aug. 17, 2022); Initial Comments of the MISO Transmission Owners, RM21-17, pp 53-62 (Aug. 17, 2022).

[18] Initial Comments of the MISO Transmission Owners, RM21-17, pp. 59-60 (Aug. 17, 2022).

continued existence of the post-Order No. 1000 ROFR for smaller and other exempt facilities has encouraged developers to invest in these facilities.[19] The solution, though, is not to reject competition but to close the exemptions. Beyond this, rewarding transmission owners for engaging in undesired conduct by eliminating their competition would be counterintuitive. More logical would be to consider other solutions to the misaligned incentives that may be driving overinvestment in local projects.

The Commission, in fact, has already included in the NOPR the elements of a potential alternative solution. Specifically, the Commission is proposing to require transmission providers to conduct "long-term, forward-looking" transmission planning "driven by changes in the resource mix and demand."[20] In addition, the NOPR calls upon transmission developers to actively involve state regulators in planning and cost allocation processes.[21] The Commission's planned reforms also mandate improved transparency regarding transmission planning criteria, needs assessments, and assumptions.

Taking these reforms together, the Commission can improve the competitive landscape considerably. If transmission providers, working cooperatively with state resource planners, are required to develop transmission plans over longer timeframes that adequately anticipate and meet state resource needs, this will reduce the need for short-term "emergency" projects that are currently exempt from competition. Increased transparency alone can prevent unnecessary investment in local projects.

Of course, possibly the simplest approach to increasing transparency, cooperation and collaboration between stakeholders in the regional transmission planning process would be to

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[19] Comments of United States Department of Justice and Federal Trade Commission, RM21-17, p. 7.

[20] NOPR, P 56.

[21] *Id*., pp 278-79.

establish an Independent Transmission Monitor (ITM). An ITM can provide great value as an independent check on the transmission planning process and provide expert and informed advice to regional planners, state officials, and other stakeholders on ways to improve competition and the planning process generally. An ITM can also act as a form of auditor, reviewing project developments and acting as a check on cost overruns and inefficiencies and preventing overinvestment in local projects at the cost of broader, regional projects.

CONCLUSION

The State Agencies appreciate the Commission's solicitation of public input on regional transmission planning and cost-allocation processes. We respectfully urge the Commission to consider the above comments and recommendations as it considers potential reforms.

Respectfully Submitted

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