

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

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

Docket No. RM21-17-000

**COMMENTS BY THE ELECTRICITY TRANSMISSION
COMPETITION COALITION IN OPPOSITION TO
CERTAIN ASPECTS OF THE PROPOSED RULE**

August 17, 2022

TABLE OF CONTENTS

	<u>Page No.</u>
I. EXECUTIVE SUMMARY	2
II. THE NOPR PROPOSALS FAIL TO PROVIDE ADEQUATE CONSUMER PROTECTIONS AGAINST UNJUST, UNREASONABLE, AND UNDULY DISCRIMINATORY TRANSMISSION RATES.....	3
A. Competition Has Been Successful. The Problem The NOPR Seeks To Address Should Be Remedied By Expanding Competition, Independent Oversight, And Tighter Scrutiny Of Projects Not Subject To Competition.	3
1. Competition has proven to be the basis of just and reasonable rates.....	3
2. The faults of competition as claimed in the NOPR are inaccurate and do not reflect the root cause of the problem the NOPR claims to address.	7
3. Expanding competition reduces the regulatory asymmetry between projects subject to, and not subject to, competition.	12
B. Any Move To Encourage Or Facilitate Substantial Transmission Investment Must Include The Consumer Protections And Benefits Provided By Competition.	15
1. Transmission planning must be holistic.....	15
2. Transmission projects 100 kV and above should be subject to competition.	16
3. Developers of new transmission must be bound by agreement to deliver projects on time and on budget.	19
4. The Commission should eliminate barriers to transmission competition, including state ROFRs that are intended to limit, or have the effect of limiting, competition for new transmission projects.....	20
5. The Commission should narrowly define any exceptions to transmission competition, such as for projects that are needed immediately as a result of force majeure conditions to address reliability issues.	22
6. Independent Transmission Planners and Independent Transmission Monitors must be part of the organizational structure to ensure competition.	23

III.	FPA SECTION 309 DOES NOT PROVIDE THE COMMISSION WITH AUTHORITY TO REWRITE ORDER NO. 1000.....	24
A.	FPA Section 309 Does Not Authorize The Commission To Repeal Its Findings In Order No. 1000 Without Substantial Evidence.	26
B.	FPA Section 309 Does Not Authorize The Commission To Preliminarily Find That A Subsequent Section 205 Filing Is Presumptively Just And Reasonable.	34
C.	The Premises Upon Which The Commission Bases Its Use Of FPA Section 309 Are Not Supported.	37
IV.	THE NOPR’S PROPOSAL TO REINSTATE A FEDERAL ROFR, FOR JOINT OWNERSHIP, IS UNLAWFUL.	39
A.	The Commission’s Proposal To Establish A Federal ROFR For Jointly Owned Facilities Violates Order No. 1000 And Directly Relevant Appellate Precedent.	40
B.	The NOPR Does Not Find That The Existing Approach, Which Eliminated The Federal ROFR Is Unjust, Unreasonable, Or Unduly Discriminatory.	42
C.	The Commission Relies On Factually Inaccurate Evidence For Its Proposal To Reinstate A Federal ROFR For Jointly Owned Facilities.	44
V.	THE NOPR PROPOSAL TO REINSTATE AN INCUMBENT-LED ROFR TIED TO JOINT OWNERSHIP HAS NOT BEEN SHOWN TO BE JUST AND REASONABLE.	47
A.	Expected Benefits From Competitive Transmission Development Processes Cannot Be Achieved Or Approximated By A Reinstated ROFR.	49
1.	The Commission’s Joint Ownership Proposal Will Not Reasonably Achieve Order No. 1000’s Objective Of Encouraging Entry Of New Transmission Developers.	49
2.	A ROFR Tied To Joint Ownership Will Diminish Innovation Rather Than Support Additional Innovation.....	53
3.	Competition Is Unparalleled In Lowering The Cost Of Transmission Development.	55
B.	The NOPR Would Facilitate Collusion Among Incumbent Transmission Owners.	59

VI.	THE NOPR PROPOSAL TO ESTABLISH A RIGHT-SIZING ROFR (ACTUALLY, AN “OVER-SIZING” ROFR) IS UNLAWFUL.	62
A.	The NOPR Makes No Finding That Order No. 1000’s Elimination Of A ROFR Is Unjust, Unreasonable, Or Unduly Discriminatory Warranting Establishment Of The Proposed Over-Sizing ROFR.	64
B.	The NOPR Does Not Premise Its “Need for Reform” On Any Specific Section 206 Finding.	64
C.	The NOPR Avoids Identifying And Addressing The Underlying Problem That Has Resulted In Rapidly Escalating Transmission Rates – Commission Decisions That Allow Incumbent Transmission Owners To Evade Competition.	65
VII.	THE COMMISSION HAS NOT DEMONSTRATED THAT THE PROPOSED OVER-SIZING ROFR WOULD BE JUST, REASONABLE, AND NOT UNDULY DISCRIMINATORY OR PREFERENTIAL	66
A.	The Proposed Replacement Rate Would Aggravate, Not Ameliorate, The Underlying Problem Of Evasion Of Competition.	66
B.	The Proposed Replacement Rate Fails to Extend Competition To Address the Underlying Concern.	68
VIII.	CONCLUSION.....	71

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

Building for the Future Through Electric)
Regional Transmission Planning and Cost)
Allocation and Generation Interconnection) Docket No. RM21-17-000

**COMMENTS BY THE ELECTRICITY TRANSMISSION
COMPETITION COALITION IN OPPOSITION TO
CERTAIN ASPECTS OF THE PROPOSED RULE**

The Electricity Transmission Competition Coalition (“Competition Coalition”) appreciates the opportunity to submit these Comments to the Federal Energy Regulatory Commission’s request for Comments on this Notice of Proposed Rulemaking (“NOPR”) regarding regional transmission planning and cost allocation. The Competition Coalition is a broad-based and diverse coalition of large intensive energy users, non-incumbent transmission developers, state consumer advocates, public power representatives, and others that support competition in transmission planning. The Competition Coalition includes all of the following:

- | | |
|---|--|
| Ag Processing Inc. | Century Aluminum |
| Alliance of Western Energy Consumers | Chemistry Council of New Jersey |
| Aluminum Association | Chemical Industry Council of Illinois |
| American Chemistry Council | Coalition of MISO Transmission Customers |
| American Forest and Paper Association | Coastal Energy Corporation |
| American Foundry Society | Commercial Metals Company |
| American Iron and Steel Institute | Council of Industrial Boilers Organization |
| Ardagh Group | Delaware Energy Users Group |
| Arglass Yamamura | Digital Realty |
| Arkansas Electric Energy Consumers, Inc. | Domtar Corporation |
| Arkansas Forest and Paper Council | Eramet Marietta Inc. |
| Association of Businesses Advocating for
Tariff Equity | Formosa Plastics Corporation, U.S.A. |
| CalPortland Company | Foundry Association of Michigan |
| Can Manufacturers Institute | Gerdau Ameristeel Inc. |
| Carolina Industrial Group for Fair Utility
Rates | Glass Packaging Institute |
| Carolina Utility Customers Association, Inc. | Illinois Industrial Energy Consumers |
| | Indiana Cast Metals Association |
| | Indiana Industrial Energy Consumers |

Industrial Energy Consumers of America
Industrial Energy Consumers of
Pennsylvania
Industrial Energy Users-Ohio
Industrial Minerals Association-North
America
Iowa Business Energy Coalition
Iowa Industrial Energy Group, Inc.
Iron Mining Association of Minnesota
Large Energy Users Coalition (NJ)
Lehigh Hanson, Inc.
LS Power Development, LLC
Maine Industrial Energy Consumer Group
Maryland Office of People's Counsel
Messer Americas
Metalcasters of Minnesota
Michigan Chemistry Council
Midwest Food Products Association
Minnesota Large Industrial Group
Multiple Intervenors, NY
National Council of Textile Organizations
National Retail Federation
NextEra Energy, Inc.
North Carolina Manufacturers Alliance
NovoHydrogen
Office of the People's Counsel for the
District of Columbia

Ohio Cast Metals Association
Ohio Chemistry Technology Council
Ohio Energy Group
Ohio Manufacturers' Association
Oklahoma Industrial Energy Consumers
Olin Corporation
Owens-Illinois
Pennsylvania Energy Consumer Alliance
PJM Industrial Customer Coalition
Portland Cement Association
Public Citizen, Inc.
R Street
Resale Power Group of Iowa
Riceland Foods, Inc.
Rio Tinto
Skana Aluminum Company
Steel Manufacturers Association
Texas Cast Metals Association
TimkenSteel Corporation
Vallourec STAR LP
Vinyl Institute
Virginia Manufacturers Association
West Virginia Energy Users Group
Wisconsin Cast Metals Association
Wisconsin Industrial Energy Group

The Competition Coalition supports transmission investment driven by the needs of consumers and competitive market outcomes. Competition in transmission planning and construction reduces costs to consumers and results in project construction to meet reliability requirements and market-driven transmission needs. Competition in transmission planning and construction would achieve the Commission's objective of planning for changes in the resource mix and demand, but at a lower cost than what would be achieved through other means.

I. EXECUTIVE SUMMARY

The Competition Coalition supports competition and competitive prices to maintain just and reasonable transmission rates. "It is long-established that the 'primary aim' [of the Federal

Power Act] is the protection of consumers from excessive rates and charges.”¹ Accordingly, the Commission should exclude from any Final Rule the NOPR’s proposals to establish rights of first refusal (“ROFRs”) because, instead of implementing competition and competitive processes in transmission planning and construction, the NOPR restricts development of competition to the detriment of consumers and fails to provide adequate consumer protections against unjust, unreasonable, and unduly discriminatory or preferential rates. In particular, the Commission’s proposals to permit the exercise of ROFRs for joint ownership of transmission facilities (“joint ownership ROFR”) and for over-sizing of transmission facilities (“over-sizing ROFR”) do not clear the necessary legal hurdles to upset Order No. 1000’s pro-competition directives, and the proposals themselves have not been shown to be just, reasonable, and not unduly discriminatory or preferential.

II. THE NOPR PROPOSALS FAIL TO PROVIDE ADEQUATE CONSUMER PROTECTIONS AGAINST UNJUST, UNREASONABLE, AND UNDULY DISCRIMINATORY TRANSMISSION RATES.

A. Competition Has Been Successful. The Problem The NOPR Seeks To Address Should Be Remedied By Expanding Competition, Independent Oversight, And Tighter Scrutiny Of Projects Not Subject To Competition.

1. Competition has proven to be the basis of just and reasonable rates.

The data unequivocally indicate that transmission competition is a success story and, as such, provides the basis for just and reasonable rates. The first comprehensive report on competition was conducted in 2019 by The Brattle Group (Brattle Report) for projects between 2013 and 2017.² The Brattle Report found cost savings between 20 to 30 percent for domestic

¹ *Xcel Energy Services v. FERC*, 815 F.3d 947, 952-53 (D.C. Cir. 2016).

² Johannes P. Pfeifenberger et al., “Cost Savings Offered by Competition in Electric Transmission,” The Brattle Group, April 2019.

https://www.brattle.com/wp-content/uploads/2021/05/16726_cost_savings_offered_by_competition_in_electric_transmission.pdf.

transmission projects, which is consistent with the experience in other countries that have adopted competition for transmission projects.³ The report also found evidence that competition stokes innovation, including forms of technological, engineering, and financial solutions that mitigate cost and risk.⁴ Indeed, the case for transmission competition is stronger now than when the Commission issued Order No. 1000 because actual experience with competitive transmission projects has confirmed the Commission’s expectation of competitive benefits.⁵

Since the end of the Brattle data set in 2017, the data continue to demonstrate the success of transmission competition and suggest that the benefits identified in the Brattle Report may be understated. Recent experiences with competition at the regional level continue to indicate strongly positive net benefits from transmission competition:

- A 2021 assessment of transmission projects in the Midcontinent Independent System Operator (MISO) found a range of 22% to 42% cost savings from competition.⁶ The report uses these findings to recommend the advancement of transmission competition, noting that its benefits are likely to far outweigh implementation costs.⁷
- In 2021, the Southwest Power Pool (SPP) approved its third competitive transmission project, Wolf Creek to Blackberry, developed by NextEra Energy Transmission (“NEET”), where the winning bid of \$85 million came in 27% lower than the next-closest bid of \$116 million.⁸ Bids went as high as \$151 million.⁹ The \$31 million savings between the winning and next-best bid understate the savings attributable to competition, considering incumbent-only final costs in the absence

³ *Id.* at 1.

⁴ *Id.* at 2.

⁵ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011)(“Order No. 1000”).

⁶ “Impact Assessment on developing arrangements to allow for early competition to be applied to future projects on the onshore electricity transmission network,” Ofgem, August 2021, p. 5. https://www.ofgem.gov.uk/sites/default/files/2021-08/Transmission_Early_Competition_IA_Final.pdf.

⁷ *Id.*

⁸ Tom Kleckner, “SPP Board of Directors/Members Committee Briefs: Oct. 26, 2021,” RTOInsider, Nov. 1, 2021. <https://www.rtoinsider.com/articles/28966-spp-board-directors-mc-102621>.

⁹ *Id.*

of competition typically surpassed initial RTO cost estimates.¹⁰ In this case, even if an incumbent-only process would deliver on-par with the highest competitive bid, then competition would have saved 44% or \$66 million.

- Another successful competitive transmission project in SPP, the Minco-Pleasant Valley-Draper project, also developed by NEET, was awarded in April 2022.¹¹ Competition netted tens of millions in cost savings as the winning bid for this project came in at 43% lower cost than the highest bid and at 32% lower cost than the average bid.¹²
- A competitively bid transmission project by the New York Independent System Operator (NYISO) – the Empire State Line – was commissioned in 2022 and praised by consumer groups.¹³ In particular, it showcased the innovation value of competition. The winning bid employed an innovative phase-angle regulator to control power flows.¹⁴ This creates a new transmission hub that provides grid operators with greater operational flexibility to move renewable energy, which will enhance grid reliability and emissions outcomes.¹⁵ In 2021, competitive bidding on the Central East Energy Connect project resulted in projected costs approximately \$200 million less than the NYISO’s independent evaluation.¹⁶
- Competition is responsible for unearthing a solution in the most recent PJM Interconnection biennial transmission planning process with massive cost savings,

¹⁰ “Reply Comments of the R Street Institute on the Advanced Notice of Proposed Rulemaking: Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection,” Docket No. RM21-17-000, November 20, 2021. <https://www.rstreet.org/2021/11/30/r-street-reply-comments-on-ferc-anopr-on-potential-reforms-to-improve-generator-interconnection-processes-regional-transmission-planning-and-cost-allocation/>.

¹¹ “NextEra Energy Transmission awarded Minco-Pleasant Valley-Draper transmission line project by SPP,” Cision PR Newswire, April 27, 2022. <https://www.prnewswire.com/news-releases/nextera-energy-transmission-awarded-minco-pleasant-valley-dra- per-transmission-line-project-by-spp-301534600.html>.

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

¹³ See, e.g., “Statement from Competition Coalition Chair Paul Cicio on NYISO’s New, Competitively Bid Empire State Line Project,” July 12, 2022 (available at: <https://electricitytransmissioncompetitioncoalition.org/statement-from-Competition-Coalition-chair-paul-cicio-on-nyisos-new-competitively-bid-empire-state-line-project/>).

¹⁴ Robert Walton, “New York turns to transmission expansion to meet clean energy goals as NextEra energizes 3.7-GW line,” *UtilityDive*, July 12, 2022. <https://www.utilitydive.com/news/new-york-transmission-next-era-clean-energy/627025/>.

¹⁵ “New York Gov. Hochul joins NextEra Energy Transmission to celebrate commissioning of Empire State Transmission Line,” *StreetInsider.com*, July 11, 2022. <https://www.streetinsider.com/PRNewswire/New+York+Gov.+Hochul+joins+NextEra+Energy+Transmission+to+celebrate+commissioning+of+Empire+State+Transmission+Line/20311212.html>.

¹⁶ “First 5-Mile Section of Central East Energy Connect Transmission Line Complete,” *T&D World*, June 14, 2021. <https://www.tdworld.com/overhead-transmission/article/21166855/first-5mile-section-of-central-east-energy-connect-transmission-line-complete>.

in addition to effectiveness and expediency benefits.¹⁷ The French’s Mill upgrades would be as or more effective at mitigating congestion and have an earlier in-service date than the other solutions that were identified, with comparative cost savings ranging from 59% to 99%. Experts have noted that, in the absence of a transparent, competitive process, the incentive of transmission owners would gravitate towards the most expensive solution to maximize rate base, which is more than two orders of magnitude in cost.¹⁸

- PJM also facilitated the 2022 New Jersey offshore wind competitive solicitation, which induced a range of proposals on innovative cost caps, equity caps, return on equity caps and more. Multiple proposals submitted ROE caps below 9%, indicating cost containment benefits of competition extend beyond capital costs and encompass the return on those capital investments.¹⁹

National studies since the 2019 Brattle Report confirm that competition has been successful when used, and greater benefits would be realized by expanding competition. For example, a 2019 study by Paul Joskow found that progress with the competitive transmission procurement model has been slow but promising and recommends refinements to capture more benefits from competition.²⁰ Additionally, a 2022 study by the R Street Institute (the “Consumer Study”) took input from a convening of all major transmission consumer groups and found that effective competition is one of four pillars of transmission reforms that maximize net benefits to consumers.²¹ The study supports the aforementioned evidence on the benefits of competition,

¹⁷ Nick Dumitriu, “Market Efficiency Update,” PJM, Nov. 30, 2021, p. 26. <https://pjm.com/-/media/committees-groups/committees/teac/2021/20211130/20211130-item-02-market-efficiency-update.ashx>.

¹⁸ Steve Huntoon, “Counterflow: Say It Ain’t So, Joe,” *RTOInsider*, July 4, 2022. <https://www.rtoinsider.com/articles/30413-counterflow-say-it-aint-so-joe>.

¹⁹ “2021 SAA Proposal Window to Support NJ OSW,” PJM Transmission Expansion Advisory Committee, July 18, 2022, pp. 42-43. <https://www.pjm.com/-/media/committees-groups/committees/teac/2022/20220718-special/item-01---nj-osw-saa.ashx>.

²⁰ Paul Joskow, “Competition for Electric Transmission Projects in the U.S.: FERC Order 1000,” MIT Center for Energy and Environmental Policy Research, March 2019, pp. 1, 55. <https://ceepr.mit.edu/wp-content/uploads/2021/09/2019-004.pdf>.

²¹ Jennifer Chen and Devin Hartman, “Transmission Reform Strategy from a Customer Perspective: Optimizing Net Benefits and Procedural Vehicles,” R Street Policy Study No. 257, May 2022. <https://www.rstreet.org/wp-content/uploads/2022/05/RSTREET257.pdf>.

noting that newer evidence suggests cost savings of 20 to 40 percent, as compared to the 20 to 30 percent figure in the 2019 Brattle Report.²²

2. The faults of competition as claimed in the NOPR are inaccurate and do not reflect the root cause of the problem the NOPR claims to address.

The rationale presented in the NOPR for proposing anti-competitive provisions, like the joint ownership ROFR and the over-sizing ROFR, is to counteract Order No. 1000's supposed discouragement of existing transmission owners from pursuing regional transmission projects and unintentional encouragement of local transmission projects where regional transmission facilities would be more efficient or cost-effective.²³ The NOPR specifically states concern with the types of transmission facilities incumbent transmission providers "develop and advocate for."²⁴ This assessment ignores the full suite of perverse incentives facing incumbent transmission providers, misdiagnoses the root cause of incumbents' behavior to avoid efficient regional transmission expansion, and mischaracterizes the implications of introducing anti-competitive measures, such as reintroducing two types of federal ROFRs.

The problems the NOPR blames on competition actually existed before competition was introduced. Preceding Order No. 1000, the Commission found in Order No. 890 that the incentives inherent to incumbent transmission providers erect barriers to regional transmission development.²⁵ As is the case with the Commission's current problem statement, the Commission then found that in an era of increasing congestion and a need for new transmission investment that:

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

²² Chen and Hartman, 2022, at 8.

²³ NOPR at P 350.

²⁴ *Id.*

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

they can have a disincentive to remedy transmission congestion when doing so reduces the value of their generation or otherwise stimulates new entry or greater competition in their area. For example, a transmission provider does not have an incentive to relieve local congestion that restricts the output of a competing merchant generator if doing so will make the transmission provider's own generation less competitive. A transmission provider also does not have an incentive to increase the import or export capacity of its transmission system if doing so would allow cheaper power to displace its higher cost generation or otherwise make new entry more profitable by facilitating exports.²⁶

Both before and after the introduction of competition, the inefficient investment problem exists where there is a concentration of supply-side market power combined with the absence of independent planning and economic regulatory oversight. Order No. 1000's flaw was that it introduced one form of economic regulation – competition – in a piecemeal fashion while leaving virtually no oversight over projects exempt from competition. Commission orders issued since Order No. 1000 have reinforced the incentive for incumbent transmission owners to evade competition and have opened additional avenues for them to do so. The problem is not competition itself, but rather the extremely limited number of transmission projects subject to competition. Undermining competition even further will not alter the fundamental incentive structure of incumbent transmission providers, but rather will result in cartel behavior that is likely to exacerbate the very problems the Commission seeks to fix.

A collection of studies identifies the root cause of inefficient transmission development, including:

- A 2021 study by Ari Peskoe that finds that the syndicate of incumbent utilities is “the heart of the problem.”²⁷

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

²⁷ Ari Peskoe, “Is the Utility Transmission Syndicate Forever?” Energy Law Journal, Vol. 42:1, May 5, 2021, p. 2. (available at: https://www.eba-net.org/assets/1/6/5_-_5bPeskoe%5d%5b1-66%5d.pdf).

- Paul Joskow identifies the problem as “FERC does not have a well-developed process to scrutinize the costs presented to it for inclusion in the transmission owners’ revenue requirements or a history of disallowing unreasonable costs.”²⁸
- The Consumer Study finds that “[c]ost-of-service utilities will not seek to build the transmission projects that result in greater efficiency in the absence of competition from non-incumbent developers, such as projects that are exempted from the Order 1000 competitive planning process.”²⁹

The Commission must proceed with the complete picture of what causes under-investment in efficient regional projects and over-investment in inefficient local/supplemental projects, specifically those outside of RTO scrutiny. A 2021 study by the Brattle Group and Grid Strategies identifies seven such causes of evasion of regional planning and competition: 1) small utility planning areas; 2) differing transmission owner incentives between local and regional plans; 3) economies of scale; 4) economies of scope; 5) network externalities; 6) horizontal market power; and 7) vertical market power.³⁰ The NOPR only acknowledges and seeks to remedy the second cause, ignoring the fact that such actions would exacerbate other catalysts of the problem. For example, the NOPR’s anti-competitive ROFR measures would actually encourage horizontal market power, which would induce cartel behavior, with the potential side effect of exacerbating other perverse incentives like enabling generation-owning incumbents the ability to manipulate the transmission process to protect their generation assets (*i.e.*, vertical market power).

Several case studies have emerged in the post-Order No. 1000 era that reveal how incumbents stifle efficient regional transmission expansion in the absence of competition. For example, incumbent utilities in the southern part of MISO obstructed plans to build regional

²⁸ Joskow, 2019, at 17.

²⁹ Chen and Hartman, 2022, at 5.

³⁰ Johannes Pfeifenberger et al., “Transmission Planning for the 21st Century: Proven Practices that Increase Value and Reduce Costs,” October 2021, pp. 19-23. (available at: <https://www.brattle.com/wp-content/uploads/2021/10/Transmission-Planning-for-the-21st-Century-Proven-Practices-that-Increase-Value-and-Reduce-Costs.pdf>).

transmission facilities that would enable lower-cost energy imports for the region while boosting resilience from storms like Hurricane Ida.³¹ In 2018, NEET won a competitive bid from MISO to build the lines, but utilities in Texas urged state lawmakers there to pass a stated-based ROFR despite objections from the Justice Department that the action would stifle competition and increase rates. Entergy, the primary incumbent utility, has altered its generation plans to kill MISO’s economic justification for the \$130 million Hartburg-Sabine Junction transmission project so that it can rate base a far costlier amount of new generation.³² MISO took the transmission project off the table even though Entergy’s generation proposal has not been approved by state regulators. This move has been met with resistance from MISO transmission customers and proponents of importing clean, lower-cost energy to the region.³³

Efficient regional transmission development is less likely where competition is inhibited. In fact, only one project has been developed under a state ROFR – the Huntley-Wilmarth line in Minnesota – which undermines regional cooperation on interstate transmission development. The added cost burden of Minnesota’s ROFR is raising costs on neighboring states, which resent the project and the Minnesota ROFR statute. For example, the Iowa Office of Consumer Advocate filed an amicus brief claiming that the “Minnesota ROFR Statute will likely impose additional costs on Iowa consumers for the Huntley-Wilmarth project” and stresses that the courts should find that state ROFRs “like the Minnesota ROFR Statute impermissibly burden interstate commerce.”³⁴

³¹ Jon Schuppe, “Hurricane Ida power grid failure forces a reckoning over Entergy’s monopoly in the South,” NBC News, Sept. 24, 2021 (available at: <https://www.nbcnews.com/news/amp/ncna1279971>).

³² Amanda Durish Cook, “MISO on Verge of Cancelling Hartburg-Sabine Tx Project,” RTOInsider, July 21, 2022. <https://www.rtoinsider.com/articles/30505-miso-verge-cancelling-hartburg-sabine-tx-project>.

³³ *Id.*

³⁴ *Brief of the Iowa Department of Justice, Office of the Consumer Advocate as Amicus Curiae in support of LSP Transmission Holdings, LLC*, 23 Oct. 2018, 8th App. Cir., No. 18-2559, at 7-8.

To address the interstate feuds presented by state ROFRs, an alliance of MISO consumer groups has requested that the Commission require competitive bidding to the maximum extent possible consistent with its long-range transmission plan and expansion planning as the means to secure the most efficient or cost-effective transmission projects.³⁵ The consumer alliance has asked the Commission not to proceed with MISO's Tranche 1 project assignments of issuances of notices to construct for those subjected to state ROFRs and instead require they go through the competitive process.³⁶ The consumer alliance "supports the development of needed transmission when such development is undertaken by qualified developers offering the most efficient or cost-effective solution at the least cost to consumers."³⁷

MISO and other regional cases demonstrate that stakeholders are more likely to support regional transmission development if they know and are confident that it is the least-cost option to meet economic, reliability, and public policy objectives. Competition is the only demonstrated means of achieving this and, in some cases, has broken stakeholder impasses. For example, the Empire State Line is the first greenfield project constructed in New York in 40 years.³⁸

Further, efficient regional transmission development is more likely to occur in an independently administered planning process, such as those administered by RTOs. An objective of this process is to use cost-benefit analyses to screen prospective projects. Incorporating the cost savings of competitively bid projects into the methodology would materially increase the amount

³⁵ See Complaint of Industrial Energy Consumers of America, et. al, v. MISO, Docket No. EL22-78.

³⁶ *Id.* at P 10.

³⁷ *Id.* at P 9.

³⁸ See "Statement from Competition Coalition Chair Paul Cicio on NYISO's New, Competitively Bid Empire State Line Project," July 12, 2022. <https://electricitytransmissioncompetitioncoalition.org/statement-from-Competition-Coalition-chair-paul-cicio-on-nyisos-new-competitively-bid-empire-state-line-project/>; Robert Walton, "New York turns to transmission expansion to meet clean energy goals as NextEra energizes 3.7-GW line," *UtilityDive*, July 12, 2022. <https://www.utilitydive.com/news/new-york-transmission-next-era-clean-energy/627025/>

of regional transmission expansion passing cost-benefit analyses. Applying the 20 to 40 percent cost reduction range associated with competition to past projects reveals that a significant number of projects that previously failed a cost-benefit test would have passed such test if the cost estimates had been in-line with competitive solicitations.³⁹

3. Expanding competition reduces the regulatory asymmetry between projects subject to, and not subject to, competition.

Consumers are deeply concerned about the ability of incumbent transmission providers to evade competition and pursue projects with no economic or independent oversight. The same consumer interests that seek more efficient transmission expansion and less inefficient projects want competition to be expanded as part of the solution. The ANOPR record already reflects comments by dozens of consumer interests – including those in the Competition Coalition – who want to see the right transmission projects get built at the lowest reasonable costs.⁴⁰ The body of evidence overwhelmingly suggests that the solutions to this problem are expanding competition (i.e., closing loopholes), holistic and proactive planning, independent oversight, and tighter scrutiny of projects not subject to competition.

Of the seven categories identified in the Brattle Group and Grid Strategies study as the causes of the problem the NOPR seeks to address, the NOPR only touches upon one: differing TO incentives between local and regional plans, which the paper attributes to differing regulatory treatment between local and regional transmission.⁴¹ The Brattle Report recommends addressing

³⁹ See, e.g., Johannes Pfeifenberger et al., “Transmission Planning for the 21st Century: Proven Practices that Increase Value and Reduce Costs,” October 2021. <https://www.brattle.com/wp-content/uploads/2021/10/Transmission-Planning-for-the-21st-Century-Proven-Practices-that-Increase-Value-and-Reduce-Costs.pdf>.

⁴⁰ “Comments of the Electricity Transmission Competition Coalition in Building for the Future Through Electric Regional Transmission planning and Cost Allocation and Generation Interconnection,” Docket No. RM21-17-000, Oct. 12, 2021. http://electricitytransmissioncompetitioncoalition.org/wp-content/uploads/COMPETITION_COALITION-ANOPR-Comments-Filed1.pdf.

⁴¹ *Id.* at 20.

this regulatory asymmetry by expanding the scope of competition, noting that this approach would facilitate a more robust transmission infrastructure by using competitive forces to increase opportunities for transmission developers.⁴²

The Consumer Study, as well as the Joskow and Peskoe studies, all reach the conclusion that competition should be expanded as a solution to inefficient incumbent behavior. The Consumer Study and Joskow emphasize revising the criteria for transmission projects to expand the required scope of competition. Leaving pervasive discretion to transmission owners and to RTO/ISOs to decide competitive exemptions is a central, but correctable, error of Order No. 1000. This discretion has enabled incumbents' strategic behavior to maneuver between local and regional projects to preserve their ability to build what they want, when they want it, at the price they determine. As noted by Joskow, RTO/ISOs are not economic regulators; rather, this responsibility rests with the Commission. The Commission should take actions to prevent incumbent utilities' anti-competitive behavior.⁴³

Expanding independent economic oversight over the scope of all transmission projects at and above 100 kV is imperative to equalize the regulatory asymmetry. The Consumer Study finds that transmission planning dependence on incumbent utilities is at the core of why inefficient transmission gets built and efficient transmission does not, which stresses the need for more independent institutions.⁴⁴ Peskoe states that the Commission should reclaim its transmission

⁴² Johannes Pfeifenberger et al., "Cost Savings Offered by Competition in Electric Transmission," April 2019, pp. 2, 20. https://www.brattle.com/wp-content/uploads/2021/05/16726_cost_savings_offered_by_competition_in_electric_transmission.pdf.

⁴³ Joskow, 2019, at 10.

⁴⁴ Chen and Hartman, 2022. <https://www.rstreet.org/wp-content/uploads/2022/05/RSTREET257.pdf>.

agenda and use its Section 206 authority to remedy anti-competitive behavior by requiring third-party controlled planning.⁴⁵

The NOPR's proposal to have more holistic and proactive planning will naturally mitigate many opportunities for strategic behavior. Much manipulation of regional transmission planning by incumbents, such as the aforementioned MISO South example, occur because of the short-term focus of benefits calculations. This makes cost-benefit analyses of regional transmission planning often highly sensitive to near-term assumptions in the plans of incumbent generation owners, who use their status as transmission owners to insulate their generation fleet by altering generation plans to thwart regional transmission development and thereby preventing long-term regional transmission planning. A long-term, independent perspective is necessary to make certain that the transmission facilities best-suited to relieving congestion and accommodating all forms of new generation, at the lowest overall cost to consumers, is built.

The damage of imposing anti-competitive measures as those proposed in the NOPR is not simply the foregone economic gains demonstrated by transmission competition to-date. Such measures preclude the expansion of competition, which not only exacerbates the problem the NOPR attempts to address, but also induces billions in additional economic benefits. For example, both the Brattle Report and Consumer Study conclude that the expansion of transmission competition would result in billions in additional cost savings and spur innovation. Altogether, should any Final Rule include the NOPR's anti-competitive provisions, based on competition's cost savings alone, the decision will go down as at least a \$100 billion dollar mistake.⁴⁶

⁴⁵ Ari Peskoe, "Is the Utility Transmission Syndicate Forever?" *Energy Law Journal*, Vol. 42:1, May 5, 2021, at 3. https://www.eba-net.org/assets/1/6/5_-_5bPeskoe%5d%5b1-66%5d.pdf.

⁴⁶ For transmission expenditure projections, see, e.g., Eric Larson et al., "Net-Zero America: Potential Pathways, Infrastructure, and Impacts," Princeton University, December 2020, p. 106. https://netzeroamerica.princeton.edu/img/Princeton_NZA_Interim_Report_15_Dec_2020_FINAL.pdf.

B. Any Move To Encourage Or Facilitate Substantial Transmission Investment Must Include The Consumer Protections And Benefits Provided By Competition.

Growth in transmission has been driven primarily by reliability-based and locally developed projects, which are typically exempt from competition.⁴⁷ Restrictive regional planning criteria have precluded most transmission investment from being subject to competitive processes, which explains why so few projects are subjected to competitive planning processes.⁴⁸ The following recommendations address the joint objectives of expanding competition while remedying the causes of inefficient transmission development and barriers to efficient regional transmission development.

1. Transmission planning must be holistic.

Current transmission planning is short-sighted and does not co-optimize the benefits of economic and reliability objectives. A longer planning and benefits horizon will reduce the susceptibility of transmission planning to shifts in short-term assumptions, such as the near-term generation plans of incumbent utilities that stifle efficient regional transmission development to justify rate basing generation assets at much higher cost to consumers. This, alone, will go a great distance in driving more efficient regional transmission development through competitive processes.

The expansive definition of reliability projects is made easier by planning processes that treat reliability criteria as independent from economic benefits. Economic quantification of reliability benefits could form the basis of a consolidated cost-benefit framework, rather than the present artificial categories for reliability and economic projects. Reliability projects tend to

⁴⁷ Johannes Pfeifenberger et al., 2019, at 2-4.

⁴⁸ Johannes Pfeifenberger et al., 2019, at 1.

ignore cost-benefit analysis and ignore considerations of alternatives in determining transmission solutions. In the absence of such economic regulatory oversight, incumbent transmission providers have utilized these reliability designations to pursue solutions with higher capital costs.

All projects have economic and reliability effects and should not be separated. Reliability upgrades reduce the probability of a cascading blackout or forced curtailments, which carry economic benefits that have been quantified. It is far more efficient to analyze reliability and economically efficient projects concurrently as economic projects. Considering reliability benefits as economic benefits will expand the scope of competitive transmission criteria and help avoid the evasion of competitive requirements and, by extension, efficient regional project development by incumbent transmission providers.

The Commission should undertake several actions to instill holistic benefits planning. The Commission should require a minimum set of benefits for planning evaluation, including the economic quantification of reliability benefits. The Commission should also require that all transmission projects require passage of cost-benefit analysis administered by an independent transmission planner (ITP) and evaluated by an independent transmission monitor (ITM). Further, consistent with the NOPR's intent to make planning inputs more accurate, the Commission could require that cost estimates reflect whether the projects are subjected to competition, which would shift a variety of projects in favor of efficient regional transmission development through competitive processes.

2. Transmission projects 100 kV and above should be subject to competition.

One of the most prolific competitive exemptions under Order No. 1000 are arbitrary voltage determinations. These vary extensively by RTO/ISO.⁴⁹ A uniform, objective voltage

⁴⁹ Johannes Pfeifenberger et al., 2019, at 20.

threshold would eliminate much of the incumbent transmission owner gaming of competitive exemptions and expand the scope and benefits of competition.

The Commission should adopt a bright-line threshold for competition eligibility to ensure consumers receive the full benefits of transmission development. A voltage threshold of 100 kV would provide such a bright-line, non-subjective criterion for determining transmission projects eligible for competitive solicitations. The Commission, as well as the North American Electric Reliability Corporation (NERC), have historically recognized that power lines 100 kV and above are considered transmission facilities and are part of the bulk electric system.⁵⁰ In Order No. 743, the Commission affirmed that the “bulk electric system” definition would retain the 100 kV threshold and that the “Commission is not proposing to change the threshold value already contained in the definition, but rather seeks to eliminate the ambiguity created by the current characterization of that threshold as a general guideline.”⁵¹ The Commission justified this threshold as:

...many facilities operated at 100 kV and above have a significant effect on the overall functioning of the grid. The majority of 100 kV and above facilities in the United States operate in parallel with other high voltage and extra high voltage facilities, interconnect significant amounts of generation sources and operate as part of a defined flow gate, which illustrates their parallel nature and therefore their necessity to the reliable operation of the interconnected transmission system.⁵²

The current definition of bulk electric system includes “all Transmission Elements operated at 100 kV or higher and Real Power and Reactive Power resources connected at 100 kV or

⁵⁰ Revision to the Electric Reliability Organization Definition of Bulk Electric System, Order No. 743, 133 FERC ¶ 61,150 at P 30 (2010).

⁵¹ Revision to the Electric Reliability Organization Definition of Bulk Electric System, Order No. 743, 133 FERC ¶ 61,150 at P 30 (2010) (emphasis added).

⁵² Order No. 743 at P 73.

higher.”⁵³ Recognizing the importance of transmission facilities 100 kV and above as necessary for the reliability of an interconnected system, competition should be applied to the development of such facilities to ensure that the most beneficial and cost-effective facilities are built. In fact, the Commission has viewed transmission projects at 100 kV as having the potential to provide wider benefits than just locally.⁵⁴

The NOPR also rightfully asks whether there should be more coordination between regional planning processes and generator interconnection cycles. These Comments do not take a position on the rules governing generation interconnection queue reforms or generation interconnection cost allocation. Each of the Competition Coalition members may take positions on those issues in their individually filed comments. However, the Competition Coalition notes that because Network Upgrades to accommodate generator interconnection are part of larger transmission plans and are (or should be) integrated into the transmission planning process, there should be no difference in the application of the 100 kV bright-line threshold between new build transmission facilities and upgrades that are necessary to accommodate generator interconnections.

All transmission facility upgrades at 100 kV and above, including generator-funded upgrades, should be subject to competition. With generator-funded upgrades, consumers may or may not ultimately pay for the upgrades depending on the market-competitiveness of the

⁵³ North American Reliability Corporation, Rules of Procedure, Appendix 2 – Definitions Used in the Rules of Procedure, at P 3 (effective Jan. 19, 2021).

⁵⁴ See, e.g., *PJM Interconnection, et al.*, 161 FERC ¶ 61,005 at P 61 (2017) (“The [Targeted Market Efficiency Projects] process is designed to identify and evaluate transmission projects that could alleviate historical congestion on Reciprocal Coordinated Flowgates along the MISO-PJM seam—including the types of projects identified in the Quick Hit Study, which considered and evaluated transmission solutions operating as low as 69 kV. Accordingly, we find that it is just and reasonable to consider transmission solutions operating below 100 kV in the TMEP planning process.”); *Northern Indiana Public Service Co. v. Midcontinent Indep. Sys. Op.*, 155 FERC ¶ 61,058 at P 129 (2016) (“because the current cost and voltage thresholds prohibit from consideration certain transmission projects in the MISO-PJM interregional transmission planning process that benefit both regions... we require MISO to reduce its minimum voltage threshold for an interregional economic transmission project from 345 kV to 100 kV.”).

interconnecting generator. With consumer-funded upgrades, consumers will necessarily be paying for the upgrades. In both cases, consumers face cost exposure, and should be given the benefit of having those upgrades be subject to open competition. The bottom-line is that, with only a few exceptions, all new transmission facilities and all transmission upgrades 100 kV and above should be subject to competitive bidding. This is especially important in rural states like Iowa where transmission facilities less than 230 kV are more prevalent. Requiring projects at or greater than 100 kV to be competed would enable rural consumers to realize the cost reductions and other benefits competition provides.

To minimize any residual regulatory asymmetry between project categories subject and not subject to competitive requirements, a form of robust economic oversight is necessary for projects under 100 kV. The Customer Study finds that reducing competitive carve-outs for local projects and subjecting remaining projects to some form of economic regulatory oversight is a complementary strategy for which numerous options exist.⁵⁵ For example, the Commission could adopt, or coordinate with state commissions and stakeholders to implement, a process whereby the needs for transmission projects under 100 kV are also transparently identified and competition is encouraged or required for those new projects.

3. Developers of new transmission must be bound by agreement to deliver projects on time and on budget.

Competition, properly implemented, can be more efficient on both a timing and cost basis than current incumbent-based transmission development where no real incentive exists for the incumbent transmission owner to complete the project ahead of schedule or under budget. However, competitive processes can introduce added time requirements to planning processes.

⁵⁵ Chen and Hartman, 2022, at 3.

The Commission should consider, and adopt rules, that improve upon existing “open window” processes to include either an “open bid” process or a “request for proposal” process to keep competitive solicitations from getting bogged down in process, which can ultimately stymie some of the benefits that competition provides for new projects and delay the consumer benefits of the projects themselves.

Many current open-window processes are unnecessarily time consuming and inefficient. Accordingly, the Commission should adopt rules to streamline this process, including adopting rules that (1) require all open window proposals to be submitted no later than 90 days after posting of the identified transmission need; (2) selecting the winning bidder no later than 90 days after the close of the open window; and (3) requiring winning bidders to execute designated entity agreements, no later than 30 days after selection as the winning bidder, that memorialize the commitments that the winning bidder included in its bid in the competitive process. The filing of designated entity agreements should be treated similarly to the filing requirements for interconnection service agreements. In RTO/ISO regions, winning bidders would then enter into the designated entity agreement with the RTO/ISO, much like they currently do in PJM with Designated Entity Agreements. Meanwhile, outside of RTO/ISO regions, such agreements should be executed between the winning developer and the aforementioned ITP before being filed with the Commission. To ensure that competitive processes are being conducted in a timely and transparent manner, this process should be overseen by new ITMs.

4. The Commission should eliminate barriers to transmission competition, including state ROFRs that are intended to limit, or have the effect of limiting, competition for new transmission projects.

State and federal ROFRs present prohibitive barriers to transmission competition. The Commission should eliminate the federal ROFR for all transmission projects subject to

competition, instead of categorizing transmission projects as it did in Order No. 1000 and allowing the federal ROFR to continue for certain projects. State ROFRs are a more delicate matter, but there is no question that the Commission has the statutory authority to eliminate state ROFR laws that impede competition for electric transmission facilities.

State ROFR laws (1) increase costs to ratepayers by discouraging competition and new entry, (2) increase the obstacles faced by a merchant or independent transmission developer in obtaining funding for a new project, and (3) provide a disincentive for a merchant or independent developer to propose a project, especially a proposal for a transmission facility that spans multiple utilities' service territories, because any investment made in developing a proposal may be lost if the incumbent transmission owner can exercise a ROFR or otherwise delay or prevent the project. State ROFR laws are quite effective at protecting incumbent transmission owners, nullifying competition, and increasing costs to consumers, not only in the state in which the ROFR law is enacted, but in neighboring states where the new transmission project may be cost-shared. In order to protect against the infringement of one state's rights by another, as previously noted in the Minnesota ROFR case, the Commission should pre-empt state ROFR laws. Commission pre-emption of state ROFR laws would enable competition without impeding states' rights over transmission siting.

The Competition Coalition recognizes that state ROFR preemption was not mentioned in the NOPR. However, the Commission should take note that engaging states on the handling of state ROFRs is welcomed by many states themselves. In this docket, the National Association of Regulatory Utility Commissioners ("NARUC") specifically asked the Commission to encourage transmission competition, while numerous state utility regulators and consumer advocates came out in support of competition, including some explicitly asking the Commission to reduce or reject

ROFRs.⁵⁶ The Competition Coalition submits that removing impediments to competition advances both federal and state interests while respecting the distinct role each has in transmission infrastructure modernization and expansion.

5. The Commission should narrowly define any exceptions to transmission competition, such as for projects that are needed immediately as a result of force majeure conditions to address reliability issues.

The only exceptions to competition should be in situations where time is of such the essence that engaging in the competitive process would be at odds with system reliability. Examples may include emergency restoration or new construction after an extreme weather event, where a new transmission-voltage substation needs to be rebuilt or new towers or new conductors need to be installed. These true “immediate-need” projects may be reasonably exempt from competition. There may be other examples of potential exemptions that are necessary in the consumers’ best interest, but any exemptions should be narrowly constructed and narrowly interpreted.

ISO-NE, PJM, and SPP have competitive exclusions for reliability projects based on need date.⁵⁷ However, many projects qualifying as “immediate-need” projects are “immediate need” in name only. The Commission should require narrow and strict criteria – such as “immediate need” predicated on force majeure conditions – to limit competitive exemptions to only rare conditions where a valid, imminent reliability need requires expedited transmission project development.

⁵⁶ Jennifer Chen and Devin Hartman, “Pruning the thorns in transmission and generator interconnection reform,” *UtilityDive*, March 8, 2022. <https://www.utilitydive.com/news/pruning-the-thorns-in-transmission-and-generator-interconnection-reform/619961/>.

⁵⁷ Johannes Pfeifenberger et al., 2019, at 20.

6. Independent Transmission Planners and Independent Transmission Monitors must be part of the organizational structure to ensure competition.

The Consumer Study found that quality governance is sorely missing from the NOPR, yet it provides the foundation that enhances all other transmission reforms, including improved planning, optimizing the existing system and effective competition.⁵⁸ It is imperative that the Commission prioritize planning stakeholder inclusiveness, transparency, accountability and independence to achieve quality governance and maximize the potential of all productive transmission policy reforms to the extent possible in this proceeding and others. Similarly, the Competition Coalition noted in its initial ANOPR comments that independent entities – both in the planning capacity and in the monitoring/reporting capacity – are critical to the success of introducing competition into a space that has historically been subject to monopoly control.⁵⁹

The Consumer Study specifically recommends a well-defined ITP across all interstate transmission regions with an ITM to oversee planners.⁶⁰ The Consumer Study stresses the imperative of having an ITP in all Order No. 1000 planning regions, which would eliminate the concern over incumbent Transmission Planners leaving RTOs altogether given their voluntary membership.⁶¹ The Competition Coalition recommended in the ANOPR Comments that an ITP should be tasked with conducting transmission planning and cost allocation, generator interconnection studies, competitive solicitations, and coordination with other regions.⁶²

⁵⁸ Chen and Hartman, 2022. <https://www.rstreet.org/wp-content/uploads/2022/05/RSTREET257.pdf>.

⁵⁹ Competition Coalition ANOPR comments at 26. http://electricitytransmissioncompetitioncoalition.org/wp-content/uploads/COMPETITION_COALITION-ANOPR-Comments-Filed1.pdf.

⁶⁰ Chen and Hartman, 2022, at 13.

⁶¹ *Id.*

⁶² Competition Coalition ANOPT Comments at 20. http://electricitytransmissioncompetitioncoalition.org/wp-content/uploads/COMPETITION_COALITION-ANOPR-Comments-Filed1.pdf.

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

The Competition Coalition reiterates the value of an ITP and ITM and asks the Commission to pursue avenues toward requiring an ITP and ITM across all Order No. 1000 regions. Even if the Commission does not address the ITP and ITM in this NOPR, the Competition Coalition welcomes the thorough examination of the merits of independent governance institutions in other proceedings, such as the October technical conference on transmission planning and cost management.⁶³

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

The Commission's proposal to use FPA Section 309 to rewrite Order No. 1000 is unlawful. The Competition Coalition opposes the Commission's usage of FPA Section 309 to rewrite Order No. 1000, particularly regarding the Commission's proposals to reinstate federal ROFR provisions. In multiple instances throughout the NOPR, the Commission proposes to use FPA Section 309 to rewrite its findings in Order No. 1000, but without meeting the higher burden of

⁶³ See <https://www.ferc.gov/news-events/events/technical-conference-transmission-planning-and-cost-management-10062022>.

demonstrating that any of the findings in Order No. 1000 were unjust, unreasonable, or unduly discriminatory or preferential. Specifically, the Commission proposes in the NOPR to “use the discretion afforded by FPA Section 309 to ‘amend, and rescind such orders, rules and regulations as [the Commission] may find necessary or appropriate’ in implementing the FPA, including FPA Section 205, to amend Order No. 1000s findings and mandates in part.”⁶⁴ FPA Section 309 does not provide the Commission with authority to amend or rescind rules, whether standing alone or in conjunction with FPA Section 205. Accordingly, the Commission cannot lawfully amend Order No. 1000 as the Commission proposes in the NOPR.

To reverse its determinations in Order No. 1000, the Commission must find that those determinations are no longer just and reasonable. Although the NOPR begins with an assertion that the Commission is acting under the authority of FPA Section 206,⁶⁵ when it comes to rewriting Order No. 1000, the Commission relies exclusively on FPA Section 309. While FPA Section 309 may be broadly worded, it does not allow the Commission to simply re-write prior, fully litigated findings made under FPA Section 206 and subsequently approved in numerous court opinions. Public interest findings made in the implementation stage of Order No. 1000 reinforce that the provisions at issue are unjust and unreasonable, but also that they cause significant public harm.⁶⁶ FPA Section 309 does not provide the Commission with the latitude to lessen the FPA Section 205 burden so that future tariff filings – which are prohibited by current Commission rules because of the Commission’s specific findings in Order No. 1000 that certain contract or tariff provisions would not produce just and reasonable rates – nevertheless “may presumptively be found to ensure just and reasonable Commission-jurisdictional rates and limit opportunities for undue

⁶⁴ NOPR at P 351.

⁶⁵ NOPR at P 1.

⁶⁶ *Emera Maine v. FERC*, 854 F.3d 662, 671 (D.C. Cir. 2017)(“*Emera Maine*”).

discrimination by public utility transmission providers”⁶⁷ If the Commission believes that changes to the findings of Order No. 1000 are necessary, the Commission must specifically declare that it is overruling its prior findings that ROFRs are unjust, unreasonable, unduly discriminatory, and cause significant public harm, and support that declaration with substantial evidence.

A. FPA Section 309 Does Not Authorize The Commission To Repeal Its Findings In Order No. 1000 Without Substantial Evidence.

FPA Section 309 provides the Commission only with authority for actions that conform with the purposes and policies of Congress and that do not contravene any terms of the FPA. The NOPR uses *Am. Pub. Power Ass’n v. FPC*, 522 F.2d 142, 144, 145-47 (D.C. Cir. 1975) (“*Am. Pub. Power*”) as support for using FPA Section 309 to amend or rescind aspects of Order No. 1000. However, that case provides no support for the Commission’s proposal to amend or rescind aspects of Order No. 1000 using FPA Section 309. The Commission cites to *Am. Pub. Power* as “affirming Commission action taken under FPA section 309 to change rules regarding cost basis for wholesale electric power rates, observing in part that ‘ratemaking methodologies perceived to produce just and reasonable results in the past may be scrapped in favor of other methodologies now perceived to be preferable.’”⁶⁸

In *Am. Pub. Power*, the Commission merely revised the test period for rate determinations that the Commission had previously found just and reasonable, to a forward-looking test period. The Court in *Am. Pub. Power* confirmed that the Commission can use FPA Section 309, together with Section 4 of the Administrative Procedure Act (“APA”), to prospectively change its rules regarding the test period applicable to filings to change jurisdictional rates even though the Commission had previously determined that backwards looking test periods were just and

⁶⁷ NOPR at P 355.

⁶⁸ NOPR at P 351, footnote 571.

reasonable. In *Am. Pub. Power*, it is important to understand what the Commission did not do – the Commission did not first find that a forward-looking test period would be unjust and unreasonable, and then subsequently exercise authority under FPA Section 309 to find that such a forward-looking test period would be just and reasonable. Instead, the Commission simply found that a new method of determining rates would be just and reasonable even though an existing methodology was *also* found to be just and reasonable. The holding in *Am. Pub. Power* was narrow.⁶⁹ The Court simply determined that FPA Section 309 could be used in combination with the informal rulemaking procedures under Section 4 of the APA to prospectively change FERC regulations that had not previously been found unjust and unreasonable.⁷⁰

Am. Pub. Power provides no support for the Commission to rely on FPA Section 309 to now declare just and reasonable that which the Commission had previously declared to be unjust and unreasonable. Further, the Commission not only found that federal ROFRs were unjust and unreasonable, but also found that they cause “severe harm to the public.”⁷¹ FPA Section 309 provides no authority for the Commission to now abandon that finding and “amend Order No. 1000s findings and mandates” as proposed in the NOPR.

In multiple opinions, the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) has rejected attempts to use FPA Section 309 in a manner that abrogates the need for the Commission to meet the substantive requirements of FPA Sections 205 or 206. In *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967), the Court found that NGA Section 16 and FPA Section 309 permit the Commission “to use means of regulation not spelled out in detail, *provided the agency’s action conforms with the purposes and policies of*

⁶⁹ *Am. Pub. Power*, 522 F.2d at 143-44.

⁷⁰ *Id.*

⁷¹ Order No. 1000 at P 7; *Emera Maine*, 854 F.3d at 671.

Congress and does not contravene any terms of the Act.”⁷² The D.C. Circuit subsequently explained that NGA Section 16 and FPA Section 309 “are of an implementary rather than substantive character.”⁷³ The Court went on to find that:

while these provisions must be read in a broad expansive manner, they can only be implemented ‘consistently with the provisions and purposes of the legislation,’ and ‘that they authorize an agency to use means of regulation not spelled out in detail, provided the agency’s action conforms with the purposes and policies of Congress and does not contravene any terms of the Act.’ These sections merely augment existing powers conferred upon the agency by Congress, they do not confer independent authority to act. *Id.* at 430-31 [citations omitted].

In *New England Power Co.*, the Commission had sought to use NGA Section 16 in conjunction with FPA Section 309 to impose fees on regulated industry stakeholders. The Court held that the Commission had exceeded its statutory authority because FPA Section 309 did not authorize Commission action that is not otherwise authorized under the substantive provisions of the FPA or NGA. By its own terms, FPA Section 309 requires that “the agency’s action [must] conform[] with the purposes and policies of Congress and [] not contravene any terms of the Act.”⁷⁴

The interaction between FPA Sections 206 and 309 was also addressed by the D.C. Circuit in *Verso Corporation v. FERC*, 898 F.3d 1 (D.C. Cir. 2018), *rehearing en banc denied, certiorari denied* 139 S.Ct. 2044, 204 L.Ed.2d 238 (“*Verso Corp.*”). In *Verso Corp.*, following a complaint, the Commission found that under FPA Section 206, a provision of the “MISO Tariff is unjust, unreasonable, unduly discriminatory, or preferential because ... it does not follow cost causation principles.”⁷⁵ In establishing the remedy, the Commission ordered refunds for rates that were too

⁷² *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967) (emphasis added).

⁷³ *New England Power Co. v. Federal Power Commission*, 467 F.2d 425, 430 (D.C. Cir. 1972) (“*New England Power Company*”).

⁷⁴ *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967) (emphasis added).

⁷⁵ *Verso Corp.*, 898 F. 3d at 5.

high.⁷⁶ After noting that FPA Section 206 provided the Commission with “no concomitant authority . . . to retroactively correct rates that were too low,” the Court found instead that FPA “Section 309 accordingly permits FERC to advance remedies not expressly provided by the FPA, as long as they are consistent with the Act.”⁷⁷ The Court held that the surcharges were “well within FERC’s remedial authority under Section 309, read in harmony with Section 206 and the filed-rate doctrine and then outlined how the FPA Section 309 was supported in the language of FPA Section 206.”⁷⁸ Pursuant to this case, the Commission can only use FPA Section 309 when it is consistent with the Act (the FPA), and in that case the consistency with the Act was the finding under FPA Section 206 that rates were unjust, unreasonable, unduly discriminatory or preferential.

In the present case, the NOPR does not propose to utilize FPA Section 309 “in harmony with Section 206” or the Commission’s very clear findings in Order No. 1000 made pursuant to FPA Section 206. In Order No. 1000, the Commission found that federal ROFR provisions are unjust and unreasonable and harm consumers. In the NOPR, instead of supporting its FPA Section 206 findings in Order No. 1000, the Commission seeks to use FPA Section 309 to “amend . . . findings and mandates” determined under FPA Section 206 to address the generic “concerns” of a new Commission that the transmission system is not being planned for changes in the resource mix and demand. Further, in the NOPR, the Commission backtracks on additional findings that were region-specific regarding the significant consumer harm that results from a federal ROFR.

In *TNA Merchant Projects, Inc. v. FERC*, 857 F.3d 354 (D.C. Cir. 2017)(“*TNA Merchants*”) the D.C. Circuit reinforced that “any actions that FERC takes under Section 309 must ‘conform[] with the purposes and policies of Congress’ and cannot ‘contravene any terms of the

⁷⁶ *Id.* at 5-6.

⁷⁷ *Id.*

⁷⁸ *Id.*

Act.”⁷⁹ “[T]hus, Section 309 cannot be used to supersede specific statutory strictures, such as [Sections] 201(f) and 205’s prohibition on requiring a non-jurisdictional entity to provide a refund to another entity.”⁸⁰ The Court held that “beyond strictures of this sort, that plainly limit FERC’s authority, Section 309 affords the agency broad authority to ‘remedy its errors’ and correct unjust situations.”⁸¹ The *TNA Merchants* court further noted that “[t]he decision in *Xcel* makes it clear that FERC enjoys broad authority *when its past actions are determined to be wrong*.”⁸²

Not a single case analyzing FPA Section 309, or Section 16 of the NGA, supports reading the authority provided by those sections to allow the Commission to resurrect under FPA Section 309 that which it has already found to be unjust and unreasonable under FPA Section 206. In the NOPR, the Commission has made no finding that its past actions were unjust, unreasonable, unduly burdensome or preferential. The Commission does not assert that Order No. 1000 was decided in error. Further, the Commission does not identify any “unjust” situation, particularly not one caused by incumbent transmission owners, that warrants reinstatement of a federal ROFR. Indeed, the Commission finds that “*Order No. 1000 remains correct regarding the unconditional exercise of federal [ROFRs] for entirely new transmission facilities . . .*” The Commission then notes that “the unconditional use of federal [ROFRs] for such 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.”⁸³ In making these findings, the Commission appears to contemplate some distinction

⁷⁹ *Id.* at 359 citing *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967).

⁸⁰ *Id.*

⁸¹ *Id.* citing *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 956 (D.C. Cir. 2016).

⁸² *Id.* at 361, citing *Xcel*, 815 F.3d at 954–56 [emphasis added].

⁸³ NOPR P 351 (emphasis added).

between an “unconditional” and “conditional” exercise of a ROFR without explaining the difference. Nowhere in Order No. 1000 does the Commission recognize any distinction or difference between an exercise of a so-called “unconditional” ROFR and exercise of a “conditional” ROFR. The Commission found that federal ROFRs, whether conditional or not, are unjust and unreasonable and harm consumers. Further, given the opportunity to backtrack on this finding in Order No. 1000-A, the Commission did not. Order No. 1000 eliminated all contractual federal ROFRs for regionally cost allocated projects that did not involve upgrades to existing facilities. This included the conditional 90-day ROFR in the SPP region.⁸⁴ The Commission’s findings in Order No. 1000 were not conditional, they were absolute – federal ROFRs are unjust, unreasonable, and harm consumers.

Further demonstrating the scope of Order No. 1000 and Order No. 1000-A, when the Commission applied Order No. 1000 to regions with a contractual ROFR, the Commission successfully demonstrated that it had met the higher standard for contract abrogation than even the original FPA Section 206 findings because “more is required to justify regulatory intervention in a private contract than a simple reference to the policies served by a particular rule.”⁸⁵ The D.C. Circuit noted that the Commission had to clear a high bar to abrogate the contractual right as “the FPA intended to reserve the Commission’s contract-abrogation power for *those extraordinary circumstances where the public will be severely harmed.*”⁸⁶ The Court held that the Commission met the higher burden because “FERC went further and found that the specific ROFR in ISO-NE’s Transmission Operating Agreement ‘would adversely affect transmission development.’”⁸⁷ The

⁸⁴ Order No. 1000, Dissent of Moeller at footnote 7.

⁸⁵ *Texaco Inc. v. FERC*, 148 F.3d 1091, 1097 (D.C. Cir. 1998).

⁸⁶ *Emera Maine*, 854 F. 3d at 671, citing *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1*, 554 U.S. 527, 551 (2008)[emphasis in original].

⁸⁷ *Emera Maine v. FERC*, 854 F.3d 662, 671 (D.C. Cir. 2017).

Court further held that “severe harm to the public constitutes extraordinary circumstances. . . . FERC made such a finding here, *see* Initial Order ¶ 172, thereby clearing the *Mobile-Sierra* bar as articulated in *Morgan Stanley*.”⁸⁸

The Seventh Circuit upheld the Commission’s determination that ROFRs are so antithetical to the public interest that they are not entitled to the contractual protection of *Mobile-Sierra* at all. There the Court noted that “if there are indeed good things to be said about the [ROFRs] claimed by the petitioners [incumbent MISO transmission owners], they are not said in any of the voluminous filings in this case.”⁸⁹ The Court held that a legitimate arms-length contract is “different from a contract in which the parties are seeking to protect themselves from competition from third parties (cartels are the classic example of such contracts). In summary, Commission’s abrogation of the ROFR in the MISO Transmission Owners Agreement was lawful.”⁹⁰

The Commission’s proposals to reinstate federal ROFRs go directly against the Commission’s FPA Section 206 findings in Order No. 1000. The proposals would also *severely harm the public interest*. The NOPR is particularly troubling because the Commission now has significantly more evidence to support the findings in Order No. 1000. The findings in Order No. 1000 were based on “empirical evidence . . . based upon reasonable predictions rooted in basic economic principles.”⁹¹ Instead of empirical evidence based upon reasonable predictions rooted in economic principles, the Commission now has evidence and data to demonstrate that competition works and saves ratepayers money. While it may be true that competition did not

⁸⁸ *Emera Maine* at 671.

⁸⁹ *MISO Transmission Owners v. FERC*, 819 F.3d 329, 334 (7th Cir. 2016).

⁹⁰ *Id.* at 333. The Seventh Circuit held that “[a] market that can support only one firm because conditions of supply and demand leave room for no more—what is called a “natural monopoly”—has no need for a [ROFR]. Such a right implies a possibility of entry (why otherwise create such a right?)—in other words room for an additional firm or firms, yet the right enables the incumbent firm to ward off entry.”

⁹¹ *Emera Maine* at 671 *citing* *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 76 (D.C. Cir. 2014) (per curiam).

fully develop following Order No. 1000 as intended, that is far different from finding that competition has not worked following Order No. 1000. Competition works and provides real savings to consumers while maintaining reliability, but has not fully developed because of the self-interest of incumbent transmission provider and barriers to entry of competitive developers.

The Commission itself has held that “[ROFRs] ‘reflect the economic self-interest of incumbent transmission providers and prevent new entrants from developing transmission facilities, new entrants are either barred from the planning process altogether or deterred from submitting proposals by the threat of losing the rights to their project.’”⁹² The so-called “conditional” ROFR proposed in the NOPR would reinstate exactly this. Because incumbent transmission owner economic self-interest is what has thwarted regional planning required by Order No. 1000,⁹³ the Commission must assume that such economic self-interest will lead to the reinstated ROFRs thwarting all potential transmission competition. In the NOPR proposes that for regions with a sponsorship model (*e.g.* ISO-NE, NYISO and PJM), reinsertion of a ROFR would displace the sponsorship of proposals to address identified transmission needs, leaving those regions with a competition of ideas and instead evaluating a single incumbent proposal. In regions that determine the project to address identified needs and then solicit developers, competitive model regions, resurrection of ROFRs removes incentives for nonincumbent developers to participate in the planning process, the very problem the Commission sought to address in Order No. 1000 by removing of ROFRs. ROFRs remove participation incentives because incumbents can declare a right to any project. For consumers, this means the loss of competition on cost, return

⁹² Commission Brief to the D.C. Circuit in Case No. 15-1139, at 50, *quoting ISO New England Inc.*, 143 FERC ¶ 61,150, P 187 (May 17, 2013).

⁹³ NOPR at P 340, citing Order No. 1000 at P 256; LS Power ANOPR Comments at 28-31.

on equity, capital structure, risk transfer, or any other consumer friendly aspect of the project proposals seen through competition.

B. FPA Section 309 Does Not Authorize The Commission To Preliminarily Find That A Subsequent Section 205 Filing Is Presumptively Just And Reasonable.

The Commission states that “under FPA sections 309 and 205, we preliminarily find it necessary or appropriate to carry out the provisions of the FPA to amend Order No. 1000 in part as described in this section.”⁹⁴ The problem with the Commission’s finding here is that its proposed amendments to Order No. 1000 are not necessary or appropriate to carry out its provisions, and the Commission has not provided substantial evidence indicating otherwise!

In Order No. 1000, the Commission found that ROFRs “allow practices that have the potential to undermine the identification and evaluation of a more efficient or cost-effective solution to regional transmission needs, which in turn can result in rates for Commission-jurisdictional services that are unjust and unreasonable or otherwise result in undue discrimination by public utility transmission providers.”⁹⁵ In other words, ROFRs lead to unjust and unreasonable rates.

The Commission nevertheless now proposes to “permit the exercise of federal [ROFRs] for transmission facilities selected in a regional transmission plan for purposes of cost allocation . . .”⁹⁶ The Commission cannot correct its error by finding that the ROFR will be “conditioned on the incumbent transmission provider with the federal [ROFR] for such regional transmission facilities establishing joint ownership of the transmission facilities consistent with the proposal below.”⁹⁷ A joint ownership ROFR is as unjust, unreasonable, unduly discriminatory and

⁹⁴ NOPR at P 353.

⁹⁵ Order No. 1000 at P 7.

⁹⁶ NOPR at P 351.

⁹⁷ *Id.*

preferential, and harmful to consumers as any other ROFR. The Commission does not identify any error in Order No. 1000 warranting establishment of a joint ownership ROFR. Instead, the Commission asserts that it takes this action because “Order No. 1000 *may have overlooked the possibility* that, as an alternative to elimination of [ROFRs] for transmission facilities selected in a regional transmission plan for purposes of cost allocation, conditions *could be applied* to the use of federal [ROFRs] for such facilities that would make their exercise just and reasonable and not unduly discriminatory or preferential.”⁹⁸ This assertion is not supported. No condition can be applied to a ROFR to make it just and reasonable, and the Commission has not provided sufficient evidence demonstrating that its proposed condition makes the joint ownership ROFR different from any other ROFR.

The Commission has no FPA Section 205 filing before it. Accordingly, the Commission can make no finding that rates are just and reasonable. So, instead, the Commission proposes “to allow public utility transmission providers to propose, pursuant to FPA section 205, new federal [ROFRs] for incumbent transmission providers, provided that such rights are conditioned on the incumbent transmission provider with the [ROFR] for such regional transmission facilities establishing joint ownership of the transmission facilities consistent with the proposal below.”⁹⁹ This is unlawful.

⁹⁸ *Id.* at P 352 [emphasis added].

⁹⁹ *Id.* at P 354.

FPA Section 309 does not authorize the Commission to preliminarily find that a future tariff finding is presumptively just and reasonable. The Commission proposes to preliminarily “find presumptively just and reasonable and not unduly discriminatory or preferential the establishment of a federal [ROFR] for transmission facilities selected in a regional transmission plan for purposes of cost allocation, conditioned on the incumbent transmission provider with the federal [ROFR] for such regional transmission facilities establishing joint ownership of the transmission facilities consistent with this subsection.”¹⁰⁰

Typically, and pursuant to the requirements of the FPA, the Commission would review the FPA Section 205 filing to determine whether it is just and reasonable based upon the record evidence. In this case, there is no FPA Section 205 filing and no record evidence regarding what features could possibly make a ROFR just and reasonable. The Commission proposes in the NOPR that “Order No. 1000’s findings and mandates would be amended” to “presumptively” find as just and reasonable that which Order No. 1000 already unequivocally declared unjust and unreasonable. There is no support, either in the NOPR or case law, that the Commission can use FPA Section 309 to amend an FPA Section 206 Order to presumptively find just and reasonable that which the Commission already declared unjust and reasonable. The Commission found in Order No. 1000 that FPA Section 206 *required* that the Commission find the ROFR unjust and unreasonable.¹⁰¹ The Commission has not provided the law or evidence demonstrating that FPA Section 206 now requires the very opposite.

The Commission has no FPA Section 205 filing before it to reinstate a ROFR, either partially or fully. If a filing had been made, it would have been immediately rejected for violating

¹⁰⁰ NOPR at P 365.

¹⁰¹ FERC Order No. 1000 at P 78.

Order No. 1000. FPA Section 309 “cannot enlarge the choice of permissible procedures beyond those that may fairly be implied from the substantive sections and the functions there defined” and therefore the Commission cannot rule on a Section 205 that is not before it. The Commission’s authority under FPA Section 205 is reactive,¹⁰² requiring the Commission to determine whether the rate before is just and reasonable. Because Section 309 cannot expand Commission authority, and Section 205 places the Commission in a reactive posture, the NOPR’s reliance on FPA Section 309 tied with FPA Section 205 does not lower the regulatory burden for the Commission or permit the Commission to “presumptively” declare a future filing just and reasonable.¹⁰³ Unless correcting an error or otherwise implementing its findings, the Commission is not permitted by FPA Section 309 to amend a finding made under FPA Section 206. As such, to amend Order No. 1000’s required removal of ROFRs and its declaration that such provisions are unjust and unreasonable, the Commission must act under FPA Section 206. If the Commission is unable to make that finding, the joint-ownership ROFR is unlawful.

C. The Premises Upon Which The Commission Bases Its Use Of FPA Section 309 Are Not Supported.

The Commission bases the NOPR on numerous false premises. The Commission states in the NOPR that “we preliminarily find that Order No. 1000’s remedy—requiring the elimination of all [ROFRs] for entirely new transmission facilities selected in a regional transmission plan for purposes of cost allocation—was overly broad.”¹⁰⁴ The Commission cites no record findings to support the premise that its finding was overly broad. The record in this proceeding and numerous cases since Order No. 1000 was issued demonstrate that Order No. 1000’s remedy was, if anything,

¹⁰² *Advanced Energy Management Alliance v. FERC*, 860 F.3d 656, 662 (D.C. Cir. 2017).

¹⁰³ *See Public Service Com’n of State of N.Y.*, 866 F.2d at 491-492.

¹⁰⁴ NOPR at P 352.

too narrow. In fact, the Commission excepted “local” projects from the required elimination of ROFR provisions, which resulted in exactly the “perverse investment incentives” that the Commission seeks now to eliminate by amending Order No. 1000.

As the Brattle Report noted, because of the overly broad exception for local projects, incumbent transmission owners have been able to exclude 97% of projects from competition by circumventing regional planning.¹⁰⁵ The NOPR suggests that this is to be blamed on Order No. 1000 itself. The Commission asserts that Order No. 1000’s elimination of ROFRs created “perverse investment incentives”, instead of properly recognizing that it was utilities circumventing the type of competition spurred by Order No. 1000. The Commission’s assertions ignore that incumbent utilities have always had the investment incentive to own all transmission in their service territory. As the Seventh Circuit held, “[a] market that can support only one firm because conditions of supply and demand leave room for no more—what is called a “natural monopoly”—has no need for a [ROFR]. Such a right implies a possibility of entry (why otherwise create such a right?)—in other words room for an additional firm or firms, yet the right enables the incumbent firm to ward off entry.”¹⁰⁶

Order No. 1000 did not create “perverse investment incentives,” but instead intentionally left incumbent transmission owners an opportunity to act in their own economic self-interest rather than the public interest. This was not a surprise to the Commission, as the Commission itself has identified this expectation.¹⁰⁷ The incumbent transmission owners also made it abundantly clear

¹⁰⁵ Johannes Pfeifenberger et al., “Cost Savings Offered by Competition in Electric Transmission,” April 2019, pp. 2, 20. https://www.brattle.com/wp-content/uploads/2021/05/16726_cost_savings_offered_by_competition_in_electric_transmission.pdf

¹⁰⁶ *MISO Transmission Owners v. FERC*, 819 F.3d 329, 333 (7th Cir. 2016).

¹⁰⁷ See NOPR at P 340; see also Order No. 1000 at P 256.

that they never intended to go into the world of competitive transmission willingly.¹⁰⁸ The Commission observes that “given the investment trends observed since Order No. 1000’s implementation, it is possible that the Commission’s Order No. 1000 nonincumbent transmission developer reforms may in fact be inadvertently discouraging investment in and development of regional transmission facilities to some extent.”¹⁰⁹ There is simply nothing “inadvertent” about the incumbent transmission owners’ response to Order No. 1000 - the issue is the Commission’s refusal to prohibit incumbent transmission owners’ self-interested behavior despite overwhelming record evidence that transmission rates developed through competition provide consumer benefits that cannot be replicated without competition. Rather than eliminate the opportunities for incumbent transmission owners to circumvent competition, the Commission proposes to transmission owners for their anti-competitive and self-interested behavior by returning regional transmission development to the incumbent transmission owners through use of the very type of contractual ROFR provisions that Order No. 1000 eliminated.

IV. THE NOPR’S PROPOSAL TO REINSTATE A FEDERAL ROFR, FOR JOINT OWNERSHIP, IS UNLAWFUL.

The Commission’s proposal to “permit the exercise of federal [ROFRs] for transmission facilities selected in a regional transmission plan for purposes of cost allocation, conditioned on the incumbent transmission provider with the [ROFR] for such regional transmission facilities establishing joint ownership of the transmission facilities” should be withdrawn for numerous reasons.¹¹⁰ In the first instance, as demonstrated in Section III of these Comments, FPA Section 309 does not provide the Commission with authority to amend Order No. 1000 to reinstate a federal

¹⁰⁸ See Competitive Transmission Development Technical Conference, Docket No. AD16-18-000, Responsive Supplemental Comments of LSP Transmission Holdings, LLC, at Exhibit A.

¹⁰⁹ NOPR at 350.

¹¹⁰ NOPR at P. 336.

ROFR for jointly-owned transmission facilities. Further, as demonstrated in further detail below, the proposal violates Order No. 1000 and is not premised upon a finding that elimination of a federal ROFR was unjust or unreasonable.

A. The Commission’s Proposal To Establish A Federal ROFR For Jointly Owned Facilities Violates Order No. 1000 And Directly Relevant Appellate Precedent.

The Commission’s proposal to reinstate a federal ROFR for jointly owned facilities violates the Commission’s findings in Order No. 1000 that exercise of a federal ROFR is unjust, unreasonable, and unduly discriminatory. In Order No. 1000, the Commission found that federal ROFRs “create a barrier to entry” and their existence could lead to the loss of incumbent transmission developer investment opportunities to incumbent transmission providers, which “discourages nonincumbent transmission developers from proposing alternative solutions for consideration at the regional level” in regional transmission planning processes.¹¹¹ The Commission eliminated the federal ROFR for the purpose of giving customers “the benefits of competition in transmission development, and associated potential savings.”¹¹² In the time since the Commission issued Order No. 1000, the savings associated with competition are no longer a potentiality, they have been demonstrated and realized, despite the efforts of incumbent transmission utilities to circumvent competitive processes for their own self-interest.¹¹³

In proposing to reinstate a federal ROFR for jointly-owned facilities, the Commission finds preliminarily that “Order No. 1000 remains correct regarding the unconditional exercise of federal [ROFRs] for entirely new transmission facilities selected in a regional transmission plan for

¹¹¹ Order No. 1000, 136 FERC ¶ 61,051 at PP 229, 256-257, 284, 320.

¹¹² *Id.* at 229, 284-286, 291, 315.

¹¹³ “Transmission Competition Under FERC Order No. 1000: What we Know About Cost Savings to Date,” The Brattle Group, October 25, 2018, https://www.brattle.com/wp-content/uploads/2021/05/14786_brattle_competitive_transmission_wires_10-25-18.pdf.

purposes of cost allocation – the *unconditional* use of federal [ROFRs] for such 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.”¹¹⁴ Accordingly, the Commission recognizes that the federal ROFR prevents the realization of more efficient and cost-effective transmission solutions for regional transmission needs.

However, despite its finding that a federal ROFR remains unjust and unreasonable, the Commission then proposes to reinstate a federal ROFR, but just for jointly owned facilities which it classifies as a “conditional ROFR.” A federal ROFR for jointly owned facilities is equally as unjust, unreasonable, and unduly discriminatory as any other federal ROFR. By labeling a ROFR as “conditional” or “unconditional”, the Commission seeks to create a distinction without a difference to justify approval of what has already been found unjust and unreasonable. Through the ROFR, the Commission essentially declares, in other words, that the exercise of a federal ROFR is unjust and unreasonable, except for this one instance where it was formerly unjust and unreasonable but is now presumptively just and reasonable.¹¹⁵ This is unlawful.

Further, appellate precedent following Order No. 1000 supports elimination of federal ROFRs. As the Seventh Circuit noted, “[n]either in their briefs nor at oral argument were [transmission utilities] able to articulate any benefit that such a right would (with limited

¹¹⁴ NOPR at P 351, *citing* Order No. 1000, 136 FERC ¶ 61,051 at PP 5, 7, 226.

¹¹⁵ *See* NOPR at P 365 (“We preliminarily find presumptively just and reasonable and not unduly discriminatory or preferential the establishment of a federal [ROFR] for transmission facilities selected in a regional transmission plan for purposes of cost allocation, conditioned on the incumbent transmission provider with the [ROFR] for such regional transmission facilities establishing joint ownership of the transmission facilities consistent with this subsection.”).

exceptions discussed later in this opinion) confer on consumers of electricity or on society as a whole under current conditions.”¹¹⁶

B. The NOPR Does Not Find That The Existing Approach, Which Eliminated The Federal ROFR Is Unjust, Unreasonable, Or Unduly Discriminatory.

The Commission’s proposal to reinstate a federal ROFR for joint ownership facilities fails to find that the existing approach is unjust, unreasonable, or unduly discriminatory. The Commission finds in the NOPR that “elimination of all federal [ROFRs] for entirely new transmission facilities selected in a regional transmission plan for purposes of cost allocation – was overly broad.”¹¹⁷ Overly broad does not justify reinstatement of a federal ROFR, even one that is limited to jointly owned facilities. Further, after declaring its former filing overly broad, the Commission then uses FPA Sections 309 and 205 to preliminarily find “it necessary or appropriate to carry out the provisions of the FPA to amend Order No. 1000 in part as described in this section.”¹¹⁸ Nowhere in that section of the NOPR does the Commission ever find that Order No. 1000 was unjust, unreasonable, or unduly discriminatory. Further, the Commission has not identified the provisions of the FPA that make it “necessary or appropriate” to amend Order No. 1000, nor demonstrated how the NOPR is consistent with the policies of Congress and the purposes of the FPA.

Instead, the Commission creates a new rulemaking standard - the preliminarily “*presumptively* just and reasonable and not unduly discriminatory or preferential” standard. There is no basis in law for the Commission to find that what was once unjust and unreasonable is now preliminarily “*presumptively* just and reasonable.” Even if the Commission has authority to create

¹¹⁶ See *MISO Transmission Owners v. FERC*, 819 F.3d 329, 333 (7th Cir. 2016).

¹¹⁷ NOPR at P 352.

¹¹⁸ NOPR at P 353.

such a standard, it certainly cannot apply it without identifying the significant change in circumstances or substantial evidence underlying such a reversal. As applied here, this preliminary “*presumptively* just and reasonable” standard creates enormous risk for transmission owners, developers, and customers. For example, what happens if the Commission finds, at a later date, that exercise of a federal ROFR for a jointly owned facility is once again unjust and unreasonable? In such a case, a transmission owner will have detrimentally relied upon a presumptive finding in a Commission rulemaking to exercise a ROFR that was subsequently (again) declared unjust and unreasonable. Further, under this presumptively just and reasonable standard, do consumers have the opportunity to rebut such presumption, and what is the process for consumers to rebut such presumption - an FPA Section 206 proceeding?

The “presumptively just and reasonable” standard used by the Commission in the NOPR is an administrative standard that the Commission has used to identify the zone of reasonableness when establishing an appropriate Return on Equity (“ROE”). In such instances, the Commission uses the Discounted Cash Flow and Capital Asset Pricing Model models for establishing a composite zone of reasonableness for setting a utility’s Return on Equity (“ROE”). The Commission applies these models to determine the zone of reasonableness and then finds that an ROE within that zone of reasonableness is “presumptively just and reasonable.” That is because the evidence, the financial models and data, establish the boundaries of the ROEs that can be presumed to be just and reasonable. In other words, the Commission utilizes a methodology and factual evidence to determine a range of presumptively just and reasonable ROEs. If an ROE falls outside of the presumptively just and reasonable range, then it is presumed unjust and unreasonable. The standard is not meant for, nor has it been used for, finding that proposed rules and subsequent tariff filings will be presumed just and reasonable. The Commission cannot

preliminarily find that creation of a federal ROFR for jointly owned facilities is presumptively just and reasonable without an FPA Section 205 proceeding before it.

The Competition Coalition opposes the Commission’s preliminary finding that a federal ROFR for jointly owned facilities will be “presumptively just and reasonable.”¹¹⁹ FPA Section 309 does not authorize the Commission to lessen the Section 205 burden so that future tariff filings – currently prohibited by Commission rules because of the Commission’s specific findings in Order No. 1000 that certain contract or tariff provisions would not produce just and reasonable rates – nevertheless “may presumptively be found to ensure just and reasonable Commission-jurisdictional rates and limit opportunities for undue discrimination by public utility transmission providers”¹²⁰ To change the findings of Order No. 1000, the Commission must specifically declare that it is overruling its prior finding that the federal ROFRs are unjust and unreasonable, applying the same standard by which it made that declaration to find, based on record evidence, that prior findings regarding those rights are no longer valid.

C. The Commission Relies On Factually Inaccurate Evidence For Its Proposal To Reinstate A Federal ROFR For Jointly Owned Facilities.

In reversing course and attempting to reinstate a federal ROFR, the Commission asserts that “Order No. 1000 *may have* overlooked the possibility that, as an alternative to elimination of federal [ROFRs] for transmission facilities selected in a regional transmission plan for purposes of cost allocation, conditions could be applied to the use of federal [ROFRs] for such facilities *that would make their exercise just and reasonable and not unduly discriminatory or preferential.*”¹²¹ Then, without citing any evidence to support its point, the Commission asserts that “the remedy

¹¹⁹ NOPR at P 358.

¹²⁰ NOPR at P 355.

¹²¹ *Id.* at P 352 [emphasis added].

prescribed by Order No. 1000 *failed to recognize* that at least some of the most notable expected benefits from competitive transmission development processes (e.g., new transmission developer market entry, greater innovation in and potentially lower costs of transmission development) could be achieved or at least reasonably approximated through other means.”¹²² To the extent that the “remedy prescribed by Order No. 1000 failed to recognize” that there are other means to realize the benefits of competitive transmission development processes, it is because the record in Order No. 1000 does not support such a premise. Federal ROFRs result in unjust and unreasonable rates, and harm consumers. There is no record evidence to support the premise that some of the most notable expected benefits from competitive transmission development processes could be achieved through any federal ROFR. Even if the expected benefits of competitive transmission can be achieved through other means, a federal ROFR is not one. There is no record evidence that a federal ROFR can realize the most notable benefits of competition.

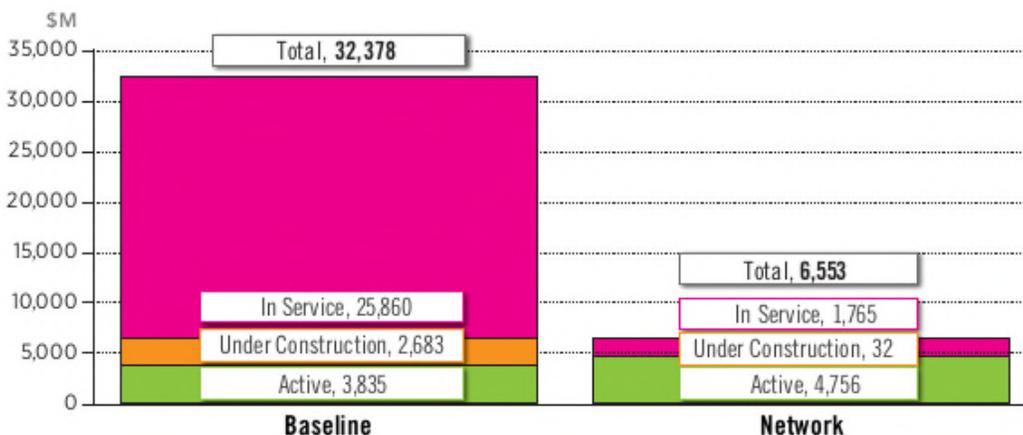
Further, the Commission asserts that “transmission investment trends suggest that despite increased investment in facilities overall, in many transmission regions there has been comparatively limited investment in transmission facilities selected in a regional transmission plan for purposes of cost allocation as a result of a competitive process; transmission investment has instead largely been concentrated in transmission facilities generally not subject to competitive transmission development processes.”¹²³ While it is true that competition has not fully developed and transmission utilities have circumvented competitive processes, that does not mean transmission system expansion through baseline reliability projects is not occurring. The Commission states in the NOPR that “[s]ignificant expansion of the transmission system instead

¹²² *Id.* at P 353 [emphasis added].

¹²³ NOPR at P 344.

appears to occur through interconnection-related network upgrades constructed as a result of generator interconnection requests.”¹²⁴ This is not necessarily correct. As demonstrated in the chart below, baseline reliability projects in PJM, for example, far exceed network generator interconnection upgrades in both number and spend.¹²⁵

Figure 1.3: Board-Approved RTEP Projects as of Dec. 31, 2021



While transmission spending is increasing rapidly, particularly for baseline projects, demand remains generally flat. EEI found that transmission spending from investor-owned electric utilities has surged 42 percent from \$17.7 billion in 2013 to \$25.1 billion in 2019¹²⁶ while demand during this period remained essentially flat.¹²⁷ Annual transmission investment in Commission-regulated

¹²⁴ NOPR at P 36.

¹²⁵ PJM 2021 Regional Transmission Expansion Plan, March 7, 2022 (last accessed Aug. 17, 2022), <https://pjm.com/-/media/library/reports-notices/2021-rtep/2021-rtep-report.ashx>; see also, Steve Huntoon, “Counterflow: Stuff That Ain’t So,” *RTOInsider*, June 21, 2022, <https://www.rtoinsider.com/articles/30322-counterflow-stuff-that-aint-so>

¹²⁶ “Financial Review 2019,” Edison Electric Institute (EEI), https://www.eei.org/issuesandpolicy/Finance%20and%20Tax/Financial_Review/FinancialReview_2019.pdf.

¹²⁷ “Annual Energy Outlook 2021,” U.S. Energy Information Administration (EIA), February, 2021, page 12, figure 8, https://www.eia.gov/outlooks/aeo/pdf/AEO_Narrative_2021.pdf

RTO/ISO regions continues to steadily increase, driving increased transmission costs to consumers.¹²⁸

V. THE NOPR PROPOSAL TO REINSTATE AN INCUMBENT-LED ROFR TIED TO JOINT OWNERSHIP HAS NOT BEEN SHOWN TO BE JUST AND REASONABLE.

The Commission has not demonstrated under FPA Section 206 that the replacement rate, the reinstatement of the federal ROFR for joint ownership, is just and reasonable. Even if the Commission had met the first part of the two-part FPA Section 206 analysis (demonstrating that the existing tariff without the ROFR is unjust and unreasonable), the Commission is still obligated under FPA Section 206 to establish that the replacement rate is just and reasonable. The NOPR not only fails to establish that an incumbent ROFR tied to joint ownership is just and reasonable, but the record before the Commission establishes that when competition is viable, it produces the only just and reasonable rate. The expansive record before the Commission in response to the ANOPR sets a high bar for the Commission to overcome to establish that any ROFR is just and reasonable.

The Commission does not present the evidence or data underlying a determination that a joint-ownership ROFR is just and reasonable. The record evidence does not support the Commission's presumption that the remedy prescribed by Order No. 1000 failed to recognize that at least some of the most notable expected benefits from competitive transmission development processes (e.g., new transmission developer market entry, greater innovation in and potentially lower costs of transmission development) could be achieved or at least reasonably approximated through other means.¹²⁹

¹²⁸ S&P Global Market Intelligence Regulatory Research Associates Regulatory Focus: An Overview of Transmission Ratemaking in the U.S. – 2021 Update.

¹²⁹ NOPR at P 353.

There is no evidence that any of these factors can be achieved by alternative means, but specifically by means of a ROFR tied to joint ownership that the NOPR proposes. Notwithstanding the lack of evidence, the Commission jumps quickly from an unsupported factual statement – that some of the benefits of Order No. 1000 could be achieved by other means – to a legally unsupportable assertion that “[w]e believe that this reform will *help to ensure just and reasonable Commission-jurisdictional rates* and limit opportunities for undue discrimination by public utility transmission providers.”¹³⁰ The NOPR identified no evidence to support this assertion. The Commission cannot point to any record evidence that allowing any ROFR, including one tied to joint ownership, supports just and reasonable rates. The overwhelming record evidence in this case demonstrates just the opposite: competition (made possible by the *absence* of a ROFR) leads to transmission project development costs, and thus rates, that are substantially lower than the costs and rates achieved without competition, whether that be through a ROFR or other impediment to competition.¹³¹

Despite the overwhelming record evidence, the Commission nevertheless proposes to “find presumptively just and reasonable and not unduly discriminatory or preferential the establishment of a federal [ROFR] for transmission facilities selected in a regional transmission plan for purposes of cost allocation, conditioned on joint-ownership requirements”¹³² The Commission’s failure to support its conclusory statement that granting a ROFR will “help to ensure just and reasonable Commission-jurisdictional rates and limit opportunities for undue discrimination by public utility

¹³⁰ NOPR at P 354.

¹³¹ To the extent that the NOPR makes any connection between just and reasonable rates and the issue it seeks to address at all, the NOPR ties unjust and unreasonable rates to inappropriate local planning. Section 206 requires that the Commission address that action, the inappropriate local planning, rather than other actions that have not been shown to be unjust and unreasonable.

¹³² NOPR at P 358.

transmission providers” but to “presumptively” find them just and reasonable after the Commission found those very ROFR provisions unjust and unreasonable under FPA Section 206, reflects a lack of reasoned decision-making.¹³³ The Commission’s NOPR harms American consumers at a time when American consumers need the Commission to hold the line on substantial inflationary pressures in transmission rates. “It is long-established that the ‘primary aim’ [of the FPA] is the protection of consumers from excessive rates and charges.”¹³⁴ The NOPR fails that Commission obligation.

A. Expected Benefits From Competitive Transmission Development Processes Cannot Be Achieved Or Approximated By A Reinstated ROFR.

1. The Commission’s Joint Ownership Proposal Will Not Reasonably Achieve Order No. 1000’s Objective Of Encouraging Entry Of New Transmission Developers.

Although the Commission hypothesizes that its joint ownership proposal will “approximate” new transmission developer entry consistent with Order No. 1000, that hypothesis is easily dismissed just based on the nature of the joint-ownership proposal. As an initial matter, the joint ownership ROFR offers *incumbent transmission owners* an opportunity to claim a ROFR, so already the NOPR is cutting against the Commission’s premise that it will spur new transmission developer entry approximating Order No. 1000 as incumbent transmission owners are not “new transmission developers”. Second, as a result of the NOPR accepting for purposes of the joint agreement ROFR the Commission’s definition of “nonincumbent”¹³⁵ a region’s incumbent transmission developers need only enter into joint agreements among themselves to

¹³³ NOPR at P 354.

¹³⁴ *Xcel Energy Services v. FERC*, 815 F.3d 947, 952-53 (D.C. Cir. 2016).

¹³⁵ A “nonincumbent is defined in Order No. 1000 as an incumbent transmission developer that is seeking to develop outside its retail distribution service territory or footprint. NOPR at P 337, citing Order No. 1000 at P 225. For purposes of comparison to a true nonincumbent developer (i.e., no retail distribution service territory) it is the [consumer interest parties’] view that only incumbent transmission owners operating outside their RTO/ISO should be considered nonincumbent for purposes of determining new developer market entry.

qualify as a joint proposal as the NOPR currently stands. Thus, any such agreements also bring no new transmission developer entry, particularly not approximating Order No. 1000.

Of course, the NOPR leaves open that the joint owner could be a true nonincumbent developer or public power (which may or may not be a nonincumbent), although with no requirement for that outcome. Thus, bringing new transmission developer entry through joint ownership is surmised if a nonincumbent or public power entity is involved, but even here the NOPR does not establish the required level of joint ownership so the level of new entry is vague. For comparative purposes, to determine the accuracy of the Commission's presumption that joint ownership could approximate the benefits of the Order No. 1000 ROFR removal, the [consumer interest parties] will presume 40% joint ownership.¹³⁶ Does 40% new transmission developer entry for projects selected in the regional plan for cost allocation approximate Order No. 1000? No, not even close.

In comparing, the Commission must compare the new entry that has occurred for projects that have been subject to competition rather than all regionally planned projects as the various exclusions to competition have severely limited the number of projects subject to competition. For competed projects, there have been 14 nonincumbent transmission developers selected as the more efficient or cost-effective developer, representing more than \$2 billion in new developer entry. In most of those instances, the nonincumbent owns 100% of the project, but as the NOPR identified, some of the selected competitive projects have joint ownership arrangements of the very type that

¹³⁶ The Competition Coalition uses 40% because it is presumed that the incumbent will have no incentive to give up a control of the project, but 40% is the minimum that could bring even a sliver of the benefits FERC claims will approximate Order No. 1000. 40% public power ownership of a \$100 million regional project may be a well outside public power's ability to participate, but there is no evidence that a small joint ownership portion (\$5 million or \$10 million (5%-10%)) would bring any value to transmission customers.

the Commission seeks to encourage.¹³⁷ LS Power had two projects selected as the more efficient or cost effective through competition with a joint ownership component. The NYISO selected LS Power's Segment A proposal with NYPA owning more than 30% of the completed project.¹³⁸ MISO selected LS Power's Duff-Coleman project proposal with Hoosier Electric owning 20% of the LS Power affiliate submitting the proposal, and the Kentucky portions of the LS Power selected proposal assigned to Big River Electric Corporation after completion by LS Power.¹³⁹

However, new entry reflected by the selected developer is just one piece of the new entry on which Order No. 1000 was focused. Order No. 1000 recognized that new transmission developer entry in the planning process provided significant benefit to the determination of the appropriate project, and thus the first piece of the just and reasonable rate determination.¹⁴⁰ As the D.C. Circuit held in upholding Order No. 1000,

“[b]y removing a pre-existing barrier to entry, the orders make it more likely that those key parties [nonincumbent transmission developers] will actually join that process, making the transmission development process more

¹³⁷ Although the Commission cites to San Diego Gas & Electric's comments regarding joint ownership, NOPR at 360, the Commission fails to acknowledge that one of the two referenced projects was selected through a competitive process.

¹³⁸ LS Power ANOPR Comments at Exhibit 2, Figure 10.

¹³⁹ *Id.* at Exhibit 2, Figure 16.

¹⁴⁰ Order No. 1000 at P 284. The Competition Coalition notes that the NOPR overall appears to reflect a position by the Commission with which the Competition Coalition fundamentally disagrees: the presumption that the planning process can produce a just and reasonable rate independent of the determination of the developer of the planned project. Determining a just and reasonable rate for new transmission facilities is a two-step process, neither of which can be skipped. Step 1 is what is the right project to address the identified transmission needs. As the NOPR recognizes, local planning interferes with this step, resulting in unjust and unreasonable rates for those locally planned projects that are not the more efficient or cost-effective project to address the identified needs. But even when the right project is selected through appropriate independent planning, the just and reasonable cost of implementing that project requires a competitive process whenever viable. The record evidence in this docket demonstrates that when competition is available, the consumer-friendly attributes of competitive proposals demonstrate that the rates achieved without competition are unjust and unreasonable on their face. Stated differently, if the Huntley-Wilmarth line can be built for a cost-capped \$100 million, at a 9.8% capped (but not floor) return on equity inclusive of incentives, and a 45% equity component in the capital structure, both for the life of the project, rates that have no risk mitigating construction cap, a return above 10% plus incentives with no cap, and equity components in the capital structure of 53% to 60% are, on their face, unjust and unreasonable. See *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

competitive, which, in the Commission's reasoned expert judgment, will help to ensure that rates are just and reasonable.”¹⁴¹

Order No. 1000's requirement for a qualification process brought dozens of newly qualified developers to every region of the country with even a glimmer of hope for winning a competitive process.¹⁴² When competition has been available, those new entrant transmission developers have participated fully. For example, in the initial MISO competitive process, the eleven proposals submitted had 12 nonincumbent developers under the Commission definition, and 8 under the definition above. Interestingly, one of the proposals was submitted by the incumbent transmission owner in the relevant area, as a joint proposal.¹⁴³ That incumbent joint proposal was not determined to be the more efficient or cost effective.¹⁴⁴

The NOPR recognizes that its proposed ROFR resuscitation based on joint ownership would have far-reaching impacts on the elements of the tariff supporting new transmission developer participation:

we propose to permit changes to existing tariff provisions that were adopted to comply with the following requirements of Order No. 1000: the federal [ROFRs] elimination requirement; the qualification requirement; the information requirement; and the access to use the regional cost allocation method(s) requirement.¹⁴⁵

Thus, far from the NOPR achieving or reasonably approximating the new transmission developer entry brought about by Order No. 1000, the NOPR would remove all incentive for fulsome new transmission developer entry, other than the new transmission developer entry

¹⁴¹ *South Carolina Pub. Serv. Auth. v. FERC*, 762 F3d 41, 77 (D.C. Cir. 2014).

¹⁴² See LS Power ANOPR Comments.

¹⁴³ Duff-Coleman Section Report, (2016) at 2, available at <https://cdn.misoenergy.org/Duff-Coleman%20EHV%20345kv%20Selection%20Report82339.pdf>

¹⁴⁴ *Id.*

¹⁴⁵ NOPR at P 356 [footnotes omitted].

avored, if any, by the incumbent transmission owners that the Commission would reestablish as the gatekeepers for participation in the regional process. The Commission simply has no factual or legal basis to support its assumption that joint ownership can achieve or reasonably approximate the goals of Order No. 1000. For this reason, it has no logical basis on which to presumptively determine that it will support just and reasonable rates or that a ROFR itself, with joint ownership, is just and reasonable.

2. A ROFR Tied To Joint Ownership Will Diminish Innovation Rather Than Support Additional Innovation.

The Commission's belief that a ROFR tied to joint ownership can achieve, or reasonably approximate, the innovation as sought under Order No. 1000 is even more farfetched. Whether the post-order No. 1000 region uses a competitive solicitation model or a sponsorship model, innovation is greater when competition is available.

As just discussed, a significant reason for the Commission issuance of Order No. 1000 was to encourage nonincumbent participation in the planning process. In regions using a competitive solicitation model it is that planning process that selects the more efficient or cost-effective project and then its competitive solicitation process selects the more efficient or cost-effective developer. As Order No. 1000 held, ROFRs discourage nonincumbent developer participation in the planning process, reducing innovation. If a joint ownership ROFR is in place in what was a competitive process region, the incentive for participation of nonincumbents in the planning process is reduced if not eliminated. The NOPR offers no explanation for the supposed innovation that a ROFR will foster in these regions.

In regions that use a sponsorship model - PJM, NYISO, and ISO-NE - any innovation would be lost under a joint ownership ROFR. In those regions, the competitive process is a competition of ideas, with each participant in the competitive process submitting its idea to solve

a transmission need. For example, in PJM’s first competitive solicitation “seven different sponsors submitted 26 separate proposals . . . with original cost estimates (as submitted) ranging from \$100 million to \$1.55 billion.”¹⁴⁶ In the PJM run solicitation to address New Jersey’s request for transmission to integrate offshore wind, PJM received 80 proposals, each with different approaches to cost-effectively linking offshore wind facilities to the PJM-operated grid.¹⁴⁷ By ignoring these outcomes, the NOPR suggests a Commission intent to eliminate this innovation, and replace it with evaluation of a single solution submitted by the incumbent transmission owner and its joint ownership partner.

In a transmission planning region with a sponsorship model, a joint ownership ROFR would mean that public utility transmission providers would evaluate in their regional transmission planning process the jointly-owned regional transmission facility proposal for potential selection in the regional transmission plan for purposes of cost allocation without soliciting any sponsored transmission facility proposals.¹⁴⁸

Thus, not only does the NOPR lack support for its assertion that a ROFR tied to joint ownership can achieve, or reasonably approximate innovation as sought Order No. 1000, the NOPR itself demonstrates why that assertion is not true. The above discussion also only addresses innovation in the first part of the two-part determination of just and reasonable rates, the determination of the more efficient or cost-effective project. As discussed immediately below, some of the greatest innovation from Order No. 1000 has been in the area of the financial implications of developing the selected project. That innovation has demonstrated that the

¹⁴⁶ Artificial Island Project Recommendation White Paper at 1 (available at: <https://www.pjm.com/~media/committees-groups/committees/teac/postings/artificial-island-project-recommendation.ashx>).

¹⁴⁷ PJM Inside Lines, PJM Receives Strong Response in Effort to Aid NJ’s Offshore Wind Goals (posted Oct. 8, 2021).

¹⁴⁸ NOPR at P 370.

Commission’s presumption that a ROFR for a jointly owned project can lead to “potentially lower costs of transmission development” is wholly unsupported.

3. Competition Is Unparalleled In Lowering The Cost Of Transmission Development.

Like the other areas in which the Commission presumed that a reinstated ROFR could provide the very benefits that Order No. 1000 sought to foster by its elimination of such rights, the NOPR provides no substantive support for the presumption that the reinstated right could “potentially lower costs of transmission development.” When the Commission went to the D.C. Circuit to defend Order No. 1000’s reliance on the economic theory that competition will lower rates, the D.C. Circuit held “[a]gencies do not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall, nor need they do so for predictions that competition will normally lead to lower prices.” *South Carolina v. FERC*, 762 F.3d at 65 (quoting *Assoc. Gas Distribs. v. FERC*, 824 F.2d 981, 1008-09 (D.C. Cir. 1987)). President Biden’s Executive Order on Competition recognized this same principle. The Commission now asks American transmission consumers to believe just the opposite. This flip flop is particularly egregious given that it is no longer merely a “prediction that competition will normally lead to lower prices,” but an established fact.

As the record in this proceeding, and numerous other Commission dockets demonstrates, competition has led to innovative financial proposals that lowers rates for American consumers, like those in the Competition Coalition. As has been presented to the Commission multiple times, but largely ignored, two MISO-led competitive processes demonstrate the power of competition to lower costs and reduce ratepayer exposure to cost overruns. In MISO’s first competitive solicitation, MISO received 11 proposals with the following attributes: 10 of the 11 proposals offered construction cost containment commitments (some binding), 6 offered binding return on

equity commitments, 5 offered to accept inflation risk, 3 offered to cap the equity portion of the capital structure, 2 offered additional rate concessions, and 1 offered a rate concession on Operations & Maintenance.¹⁴⁹ Among the submissions was a joint proposal from the incumbent transmission owner and an incumbent from PJM bidding as a nonincumbent in MISO. That proposal was not selected as the more efficient or cost-effective proposal but, instead, a joint proposal from a nonincumbent with a Cooperative joint owner prevailed. In selecting the nonincumbent over the incumbent joint owner proposal, MISO concluded:

Republic Transmission's performance collectively across MISO's four evaluation criteria was *unmatched by any other proposal*, scoring 95 out of a possible 100 points. Compared to Republic Transmission's total score of 95, *the other proposals scored between 80 and 41 points.*¹⁵⁰

For MISO's second competitive solicitation, MISO itself took notice of the financial innovation, stating: "RFP Respondents proposed a wide range of cost caps, concessions, and other cost containment commitments in their proposals."¹⁵¹ MISO noted that 10 of the 12 proposals offered binding construction cost caps, 10 of 12 offered to forego construction work in progress payments, 8 of the 12 proposals capped return on equity at 9.8% or lower (inclusive of incentives), 8 offered a capital structure cap of 45% equity or lower, 7 agreed to cap Operations and Maintenance costs, 5 to cap the Annual Transmission Revenue Requirement, 4 agreed to forego AFUDC, and 4 agreed to take routing risk.¹⁵² The NOPR makes no reference to the outcome of actual competition nor offers any comparison of competition to non-competed projects, yet proclaims that a ROFR for

¹⁴⁹ MISO Duff-Coleman Section Report, (2016) at 26, available at <https://cdn.misoenergy.org/Duff-Coleman%20EHV%20345kv%20Selection%20Report82339.pdf>.

¹⁵⁰ Duff-Coleman Selection Report at 2-3, 4.

¹⁵¹ Hartsburg-Sabine Junction 500 kV Competitive Transmission Project, Selection Report, November 27, 2018, at 19, available at <https://cdn.misoenergy.org/Hartburg-Sabine%20Junction%20500%20kV%20Selection%20Report296754.pdf>.

¹⁵² *Id.* at 20, Table 2.2.

joint ownership projects could “potentially lower costs of transmission development.” This assertion does not reflect reasoned decision-making.

The recent PJM solicitation puts any such claim of potentially lower costs from a ROFR to rest. As noted above, PJM received 80 proposals for New Jersey offshore wind integration projects. Fifty-seven of those proposals included voluntary cost containment, including caps on construction costs, return on equity, and capital structure.¹⁵³ The PJM analysis identified return on equity caps as low as 8.5% and the equity component of the capital structure cap at 40%.¹⁵⁴ Under PJM’s analysis, the overall cost (\$7.59 billion) and per-MW cost (\$2.03 (\$M/SAA MW) of an incumbent New Jersey transmission owner, with a joint partner, proposal was the highest, while nonincumbents offered the lowest relative cost of \$0.88-\$0.92¢ (\$M/SAA MW).¹⁵⁵ The NOPR makes no reference to the outcome of actual competition nor offers any comparison of competition to non-competed projects, yet proclaims that a federal ROFR for joint ownership projects could “potentially lower costs of transmission development.” This assertion does not reflect reasoned decision-making.

The joint ownership ROFR reinstatement fails to make any requirement that the identified consumer-friendly results of competition are included in any joint arrangement, at the same time prohibiting the competition that produced such arrangements. Of course, the Competition Coalition is not suggesting that the Commission insist that joint arrangements contain such consumer centric beneficial components. Instead, the existence of such consumer centric financial arrangements when competition is present means that the Commission cannot presumptively

¹⁵³ PJM Transmission Expansion Advisory Committee, 2021 SAA Proposal Window to Support NJ OSW (Jul. 18, 2022), at 43, available at [item-01---nj-osw-saa.ashx](https://www.pjm.com/committees-panels-subcommittees/transmission-expansion/2021-saa-proposal-window-to-support-nj-osw) (pjm.com).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

determine as just and reasonable a structure that prohibits the competition that drove such financial arrangements.

The record here is abundantly clear, where competition is viable but unused, the rates resulting from those non-competitive projects are presumptively NOT just and reasonable. In this regard, the Competition Coalition also thinks that it is important to note that there is no Commission regulatory oversight that can match the consumer-centric value of competition. While the Competition Coalition expects to participate significantly in the Commission's technical conference on transmission cost mitigation, the position of the Competition Coalition is unequivocal: granting monopoly power, even with regulatory oversight, is not a substitute for competition in terms of lowering costs to consumers. Competition as the means of regulatory oversight would also substantially reduce or eliminate the contentious litigation over allowed returns on equity and the equity component of capital structure, as these issues would be addressed on a competitive basis and, as experience has shown, with innovative financial approaches that deliver consumer benefits.

The foregoing should make clear that the Commission incorrectly opines in the NOPR that “at least some of the most notable expected benefits from competitive transmission development processes (e.g., new transmission developer market entry, greater innovation in and potentially lower costs of transmission development) could be achieved or at least reasonably approximated through other means.”¹⁵⁶ There is no record support for that claim. As Commission LaFleur recognized when Order No. 1000 competition was in its infancy, “Order No. 1000’s competitive solicitation processes – and in some cases, the mere prospect of competitive solicitation processes – have already led to a host of innovative rate structures and cost containment proposals that, if

¹⁵⁶ NOPR at P 353.

properly designed, could provide significant benefits for customers.”¹⁵⁷ Further, the claim in the NOPR goes directly against the economic theory upon which the Commission concluded that just the opposite was true, competition will lead to lower costs.¹⁵⁸

The number of qualified developers in the various regions as well as the response to recent solicitations, like New Jersey’s offshore wind integration solicitation, demonstrate that nonincumbent developers are poised to deploy the capital needed to deliver on the Nation’s transmission needs in a consumer beneficial manner. The NOPR would not only stymie that opportunity, but the joint ownership ROFR together with the right sizing ROFR would likely fully eliminate competition. The Commission has failed to establish that a reestablished ROFR tied to joint ownership or any other ROFR is just and reasonable. As such the NOPR proposal must be withdrawn.

B. The NOPR Would Facilitate Collusion Among Incumbent Transmission Owners.

Even if the Commission could establish its foundational basis for a reestablished ROFR – that some of the most notable expected benefits from competitive transmission development processes could be achieved through other means – the proposed ROFR is not just and reasonable. Antitrust and competition analysis has long found that joint ownership creates opportunities for anticompetitive behavior, it does not mitigate that behavior.¹⁵⁹ The NOPR make this basic premise of competition analysis more probable by proposing to allow an incumbent transmission owner to determine its joint owner partner and would permit that joint interest partner to be another

¹⁵⁷ *Public Service Electric and Gas Co. v. PJM Interconnection, L.L.C.*, 151 FERC 61,229 LaFluer concurring at 1. The case represents another incumbent effort to impede the consumer benefits of competition, in that instance challenging PJM’s selection of a nonincumbent proposal that included a binding cost cap.

¹⁵⁸ *South Carolina Pub. Serv. Auth. v. FERC* at 77.

¹⁵⁹ See, e.g., FTC & DOJ, *Antitrust Guidelines for Collaborations Among Competitors* 4 (2000); Areeda and Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶¶ 2100-04.

incumbent transmission owner in the region.¹⁶⁰ In this regard the Commission has traded a monopolist-ensured outcome (less efficient or cost effective local planning) for a collusive anticompetitive outcome (incumbent-selected joint owner), ensuring that the result is anticompetitive and anti-consumer either way.

The NOPR puts in place what the Sherman Act was designed to guard against: contracts, combinations and conspiracies that restrain trade.¹⁶¹ The United States Supreme Court long ago recognized the import role competition play in the U.S. economy, finding:

[t]he Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, and lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.¹⁶²

Competition in electric transmission development has done just that. The NOPR, however, sets up the entire purpose of the joint ownership arrangement as eliminating competition by providing a ROFR based on the mere fact of such joint ownership. In determining whether joint ownership is appropriate, the Department of Justice and the Federal Trade Commission have established Collaboration Guidelines which provide that “[t]he central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.”¹⁶³ The joint ownership based ROFR is solely focused on prohibiting competition, thus directly attacking the nation’s competition policies by “increasing

¹⁶⁰ NOPR at P 365.

¹⁶¹ 15 U.S.C. § 1.

¹⁶² *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958).

¹⁶³ FTC & DOJ, Antitrust Guidelines for Collaborations Among Competitors 4 (2000) [emphasis added].

the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below *what likely would prevail in the absence of the relevant agreement.*” Competition for electric transmission development has shown that those projects not subject to competition indeed result in prices above and innovation below “what likely would prevail in the absence of” the competition restriction.

Of course, this anticompetitive impact of any ROFR is not a surprise. The Commission found in Order No. 1000 that “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.”¹⁶⁴ The incumbent transmission owners reacted to this Commission finding by proving the Commission exactly right; planning exclusively locally when it became clear that competing for regional projects was not in their economic self-interest.¹⁶⁵ The NOPR offers no explanation how the NOPR-proposed anticompetitive joint ownership arrangement with a ROFR is any different for consumers than the anticompetitive wholesale ROFRs that the Commission determined in Order No. 1000 caused significant harm to the public.¹⁶⁶

It is important here to be clear that even if the NOPR proposal is modified to prohibit incumbent with incumbent joint ownership arrangements, the anticompetitive effects are not resolved. As an initial matter, what constitutes an incumbent is subject to loose interpretation. Many incumbent transmission owners have created affiliates that do not currently own transmission, and thus could be treated as a nonincumbent. But such entities do not, without competition, offer the benefits of nonincumbent developers because there is a disincentive for such

¹⁶⁴ Order No. 1000 P 256.

¹⁶⁵ NOPR at 344.

¹⁶⁶ *Emera Maine v. FERC*, 854 F.3d 662, 671-72 (D.C. Cir. 2017).

entities to provide any consumer-centric benefits that are in excess of what the parent is offering on its captured projects.

The consumer detriment from such arrangements is further exacerbated by the fact that the burden of proof in challenging the joint ownership arrangements shifts to consumers based on a post hoc Commission review of the award of a project under the supposed joint ownership ROFR. The NOPR offers no insight into how the Commission would effectively police the vague requirements for a joint ownership ROFR, or how such a joint ownership ROFR would not result in shifting the burden to consumers to prove that any particular arrangement is not just and reasonable after the Commission has presumptively found such arrangement to be acceptable. The enforcement difficulties of any joint ownership based ROFR would make the underlying basis for granting the right essentially unenforceable.

VI. THE NOPR PROPOSAL TO ESTABLISH A RIGHT-SIZING ROFR (ACTUALLY, AN “OVER-SIZING” ROFR) IS UNLAWFUL.

The Commission’s proposal for an “over-sizing” ROFR should be withdrawn because it is unlawful, violates Order No. 1000 without any finding that Order No. 1000 is unjust or unreasonable, and veers further from competition and its price-suppressing effects for consumers. In Order No. 1000 the Commission found unequivocally that ROFRs “allow practices that have the potential *to undermine the identification and evaluation of a more efficient or cost-effective solution to regional transmission needs*, which in turn can result in rates for Commission-jurisdictional services that are unjust and unreasonable or otherwise result in undue discrimination by public utility transmission providers.”¹⁶⁷ Now, in seeking to establish a federal ROFR, the Commission finds the very opposite, that the ROFR would help identify more efficient or cost-

¹⁶⁷ Order No. 1000 at P 7 (emphasis added).

effective solutions. The Commission makes this assertion based upon no record evidence, but rather its own generalized “concern” about transmission planning. In describing the proposed over-sizing ROFR, the Commission explains:

. . . there may be circumstances under which ‘right-sizing’ the planned transmission replacement would result in a more efficient or cost-effective transmission facility to meet both the need for the transmission provider to replace the existing transmission facility and transmission needs identified through Long-Term Regional Transmission Planning.

. . . [W]e are concerned that, absent reform, there may be a lack of coordination between regional transmission planning processes and in-kind replacement of existing transmission facilities to identify whether these replacement transmission facilities could be modified to more efficiently or cost-effectively address transmission needs identified through Long-Term Regional Transmission Planning. This lack of coordination may result in a regional transmission planning process that fails to identify opportunities to right size planned in-kind replacement transmission facilities and may result in the development of duplicative or unnecessary transmission facilities that increase costs to consumers and render Commission-jurisdictional rates unjust and unreasonable.¹⁶⁸

By “right-sizing” the Commission states that it means the process of “modifying a public utility transmission provider’s in-kind replacement of an existing transmission facility to increase that facility’s transfer capability” which could include, for example, increasing the voltage level, adding circuits to the towers, or incorporating other advanced technologies.¹⁶⁹ The Commission’s so-called “right-sizing” ROFR is more correctly called “over-sizing” and would result in overbuilding the transmission system now for speculative future transmission needs, leaving customers with the bill for any stranded costs.

¹⁶⁸ NOPR at P 399.

¹⁶⁹ NOPR at P 403.

A. The NOPR Makes No Finding That Order No. 1000’s Elimination Of A ROFR Is Unjust, Unreasonable, Or Unduly Discriminatory Warranting Establishment Of The Proposed Over-Sizing ROFR.

If the Commission seeks to change the findings of Order No. 1000, it must specifically declare that it is overruling its prior finding that federal ROFR provisions are unjust and unreasonable, applying the same standard by which it made that declaration to find, based on record evidence, that prior findings regarding those rights are no longer valid. The Commission bases its so-called “right-sizing” ROFR on its concerns that public utility transmission providers will replace aging transmission infrastructure without evaluating whether those replacement transmission facilities could be over-sized, which the Commission alleges would result in a more efficient or cost-effective transmission facility to meet both the need for the transmission provider to replace the existing transmission facility and transmission needs identified through Long-Term Regional Transmission Planning.¹⁷⁰ This “concern” by the Commission is not a firm finding that Order No. 1000 or current processes are unjust, unreasonable, or unduly discriminatory or preferential.

B. The NOPR Does Not Premise Its “Need for Reform” On Any Specific Section 206 Finding.

The Commission fails to demonstrate the alleged need for reform on any Section 206 finding. Further, the NOPR is not clear whether the Commission is relying on FPA Section 309 for the over-sizing ROFR proposal in the same way the Commission is for the NOPR’s joint ownership ROFR. As demonstrated in these Comments at Section III, FPA Section 309 does not provide the Commission authority to declare just and reasonable what it formerly declared to be unjust and unreasonable, and certainly not without substantial evidence.

¹⁷⁰ NOPR at P 399.

C. The NOPR Avoids Identifying And Addressing The Underlying Problem That Has Resulted In Rapidly Escalating Transmission Rates – Commission Decisions That Allow Incumbent Transmission Owners To Evade Competition.

Incumbent transmission utilities have effectively evaded competition and the cost-reducing benefits that competition can provide for consumers. Instead of committing to competition, the Commission proposes to create the over-sizing ROFR to allow incumbent transmission owners to further evade competition and competitive processes. The Commission notes that “[a]bsent reform, if a public utility’s transmission provider’s estimated in-kind replacement were right-sized and then selected in the regional transmission plan for purposes of cost allocation to meet transmission needs identified through LTRT Planning, the right-sized replacement transmission facility might then be subject to the transmission planning region’s competitive transmission development process.”¹⁷¹ Accordingly, the Commission proposes to require the establishment of the over-sizing ROFR for a public utility transmission provider that included the in-kind replacement transmission facility in its in-kind replacement estimates, which would extend to any portion of such a transmission facility located within the utility transmission provider’s retail distribution service territory or footprint. This aspect of the NOPR is another instance of the Commission enabling incumbent transmission owners to evade competition. This proposal should be excluded from any Final Rule.

¹⁷¹ NOPR at P 408.

VII. THE COMMISSION HAS NOT DEMONSTRATED THAT THE PROPOSED OVER-SIZING ROFR WOULD BE JUST, REASONABLE, AND NOT UNDULY DISCRIMINATORY OR PREFERENTIAL

Pursuant to FPA Section 206, the Commission must both find that Order No. 1000 was unjust and unreasonable, and then determine that the replacement rate is, in fact, just and reasonable. Not only does the NOPR fall short in making the necessary findings to enable a replacement rate, but the NOPR also fails to demonstrate that the proposed replacement rate – i.e., an over-sizing ROFR - is just, reasonable, and not unduly discriminatory or preferential.

A. The Proposed Replacement Rate Would Aggravate, Not Ameliorate, The Underlying Problem Of Evasion Of Competition.

The premise underlying the proposal to require planning regions to evaluate whether in-kind replacements of facilities operated at 230 kV or higher should be over-sized into larger, regional facilities is that investment in transmission infrastructure since Order No. 1000 has been disproportionately skewed toward local projects that are not subject to regional planning requirements and that do not increase the ampacity of the transmission system. The Commission queried in the ANOPR whether this phenomenon might be a reflection of incumbent utility preference for non-competitive investment. The Commission expresses concern in the NOPR that excessive investment in local facilities may not lead to the most cost-effective outcomes for consumers.

To the extent utilities are investing disproportionately in less efficient local facilities under current planning requirements, the proposal to require planning regions to better coordinate local and regional planning processes, and to consider regionally-cost allocated alternatives to utility-planned in-kind replacements is a sensible reform proposal on a stand-alone basis. However, the Commission undermines its own policy proposal by inexplicably mandating that incumbent utilities will have a ROFR on any such facilities. By offering incumbents a ROFR for certain local

projects, the Commission will only exacerbate the problem it is trying to solve by *doubling the incentive* for incumbent utilities to plan local transmission facilities. Specifically, under the current planning requirements, an incumbent is only incentivized to plan local upgrades because, while tending to comprise smaller and less chunky additions to rate base, at least such upgrades cannot be competitively awarded to a non-incumbent. Under the Commission’s over-sizing ROFR proposal, however, the profit-motivated incumbent will be incentivized to add even more in-kind replacements into its local plan because of the possibility that the planning region will then over-size those projects into an even larger facility in which the incumbent utility would be allowed to invest without any competition, thus preserving, reinforcing, and expanding its monopoly position.

Indeed, each in-kind replacement the utility includes in its local plan would effectively be a quintessential win/win proposition for the incumbent transmission - if its project is selected for over-sizing, the utility gets to build, and earn a return on, a higher-voltage transmission facility, and if the project is not selected for over-sizing, the utility simply proceeds with the project at its originally planned voltage, without being subject to competition, just as it does today. It is hard to see that any investor-owned incumbent would be overly disappointed by this outcome, much less disincentivized from including unnecessary in-kind replacements in its local plan. If anything, incumbents will include even more investment in in-kind replacements in their local plans, hoping to cash in on the “over-sizing” opportunities.

If the Commission’s objective is to disincentivize unnecessary in-kind replacements, making such projects open to competition would be an effective deterrent and perhaps the only effective deterrent.¹⁷² Making right-sized projects subject to competition would of course lead to

¹⁷² The Commission’s concern that an incumbent utility would proceed with an undersized, in-kind replacement after losing a “right-sized” opportunity to a competitor, thereby leading to duplication of facilities, has an easy solution: any such imprudent investment would be denied cost recovery in FERC-jurisdictional rates.

other benefits for consumers, discussed elsewhere in these Comments, including reduced costs and reduced exposure to cost overruns. And, as discussed in the following section, the benefits of competition need not be limited to in-kind replacements or projects that are over-sized for regional cost allocation. Consumers would benefit from further expanding competition to all locally planned transmission facilities rated 100 kV and higher.

B. The Proposed Replacement Rate Fails to Extend Competition To Address the Underlying Concern.

In Order No. 1000, the Commission required regional planning and cost allocation only for regional facilities, which it defined rather circularly to include transmission facilities that are selected in the regional transmission plan for purposes of cost allocation.¹⁷³ Projects not selected for regional cost allocation, and cost allocated only to a single pricing zone or retail distribution service territory, were categorized as “local,” and the planning of such facilities remained subject to the discretion of individual transmission owners, outside the coordinated regional process.

The elimination of ROFRs in Order No. 1000 was similarly limited to regional projects. Unfortunately, this created a strong incentive for incumbent transmission owners to plan projects locally, rather than through the regional process, and to use their influence at the RTO/ISO level to adopt restrictive thresholds around voltage, cost, and distance that further insulated projects from regional planning, cost allocation, and competition. As a result, consumers not only missed out on the benefits of more efficient regionally planned solutions, but also were harmed by the absence of competition for locally planned projects.

¹⁷³ See Order No. 1000 at P 64; Order No. 1000-A at PP 423-24 (clarifying that “any regional allocation of the cost of a new transmission facility outside a single transmission provider’s retail distribution service territory or footprint, including an allocation a ‘zone’ consisting of more than one transmission provider, is an application of the regional cost allocation method and that new transmission facility is not a local transmission facility.”)

While the reforms proposed in the NOPR to better coordinate existing local and regional planning processes will help, the most impactful solution for consumers would be to eliminate the arbitrary and circular definition of “regional” transmission facility from Order No. 1000 and replace it with a bright-line, voltage-based definition of 100 kV.¹⁷⁴ Clearly, allowing planning regions and their constituent transmission owners the discretion to determine which projects are selected in the regional transmission plan for purposes of cost allocation – and therefore which projects are competitive – has not worked. The Commission’s proposed solution in the NOPR – to effectively eliminate competition by implementing new ROFRs for regional projects – inexplicably prioritizes the needs of incumbent utility shareholders over consumers. Instead, the Commission should, at the appropriate time, and consistent with its mission under the FPA, protect customers by expanding the benefits of regional planning and competition to all projects 100 kV and above.

Such a reform would be consistent with past recognition by the Commission – as well as supporting empirical evidence – that facilities operated at or above 100 kV provide regional benefits. Indeed, the Commission adopted 100 kV as the bright line threshold for the bulk electric system, noting that:

many facilities operated at 100 kV and above have a *significant effect* on the overall functioning of the grid. The majority of 100 kV and above facilities in the United States operate in parallel with other high voltage and extra high voltage facilities, interconnect significant amounts of generation sources and operate as part of a defined flow gate, which illustrates their parallel nature and *therefore their necessity* to the reliable operation of the interconnected transmission system. Parallel facilities operated at 100-200 kV will experience

¹⁷⁴ The Commission has not proposed to re-define “regional” transmission facilities in the NOPR, nor has it proposed to expand competition to a broader subset of projects. The Competition Coalition provides suggestions in this section for policy changes the Commission can and should make in a future notice and comment rulemaking.

similar loading as higher voltage parallel facilities at any given time and the lower voltage facilities will be relied upon during contingency scenarios.¹⁷⁵

The Commission also recognized the regional benefits of facilities operated at 100 kV and above when it approved SPP's Highway/Byway hybrid cost allocation scheme for 100-300 kV facilities, which requires 1/3 of the cost of such facilities to be regionally allocated. In approving the proposed cost allocation, the Commission observed, in response to distribution factor analysis filed by SPP in support of the proposal, that facilities in that voltage range "are responsive to inter-zonal flows ..."¹⁷⁶ such that regional cost allocation would be justified.

There is no legal impediment to the Commission reexamining its decision in Order No. 1000 to allow regions to self-select the projects that are subject to regional planning requirements. Regional planning and competition benefit consumers. The Commission should expand these benefits of competition to all facilities operated at 100 kV and above in order to address its apparent concern that incumbent transmission owners are over-investing in local and supplemental projects and under-investing in regional projects.

¹⁷⁵ *Revision to Electric Reliability Organization Definition of Bulk Electric System*, Order No. 743, 133 FERC ¶ 61,150 at P 73 (2010) (emphasis added).

¹⁷⁶ *Id.* P 94.

VIII. CONCLUSION

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

Respectfully submitted,

McNEES WALLACE & NURICK LLC

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

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

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

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

Dated: August 17, 2022

CERTIFICATE OF SERVICE

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

Dated at Washington, DC this 17th day of August, 2022.

/s/ Robert A. Weishaar, Jr.

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

Appendix

Electricity Transmission Competition Coalition Members

Alliance of Western Energy Consumers

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

Ag Processing

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

Aluminum Association

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

American Chemistry Council

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

American Forest & Paper Association

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

American Foundry Society

Represents the metal casting industry nationwide.

American Iron and Steel Institute

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

Ardagh Group

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

Arglass Yamamura

A major glass producer.

Arkansas Electric Energy Consumers, Inc.

Represents diverse manufacturing companies in Arkansas on electricity issues.

Arkansas Forest and Paper Council

Represents the major paper related companies in Arkansas.

Association of Businesses Advocating for Tariff Equity

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

CalPortland Company

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

Can Manufacturers Institute

Represents manufacturers that produce cans nationwide.

Carolina Industrial Group for Fair Utility Rates

Represents manufacturing companies on energy issues in North Carolina.

Carolina Utility Customers Association, Inc.

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

Century Aluminum

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

Chemistry Council of New Jersey

Represents the chemical industry in New Jersey.

Chemical Industry Council of Illinois

Represents the chemical industry in the state of Illinois.

Coalition of MISO Transmission Customers

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

Coastal Energy Corporation

Manufacturer and distributor of asphalt products.

Commercial Metals Company

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

Council of Industrial Boilers Organization

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

Delaware Energy Users Group

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

Digital Realty

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

Domtar Corporation

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

Eramet Marietta Inc.

A metallurgical manufacturing company located in Marietta, Ohio.

Formosa Plastics Corporation, USA

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

Foundry Association of Michigan

Represents Michigan metal casters.

Gerdau Ameristeel Inc.

A major producer of steel and special steel products.

Glass Packaging Institute

Represents the North American glass container industry.

Illinois Industrial Energy Consumers

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

Indiana Cast Metals Association

Represents companies in the cast metals industry in Indiana.

Indiana Industrial Energy Consumers

Represents large users of energy in Indiana on electricity issues.

Industrial Energy Consumers of America

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

Industrial Energy Consumers of Pennsylvania

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

Industrial Energy Users-Ohio

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

Industrial Minerals Association-North America

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

Iowa Business Energy Coalition

Represents diverse commercial entities on electricity issues in Iowa.

Iowa Industrial Energy Group, Inc.

Represents diverse industrial Iowa-based companies on electricity issues.

Iron Mining Association of Minnesota

Represents iron ore mining industry in Minnesota.

Large Energy Users Coalition (NJ)

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

Lehigh Hanson, Inc.

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

LS Power Development, LLC

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

Maine Industrial Energy Consumer Group

Represents industrial and commercial companies on electricity issues in Maine.

Marathon Petroleum Company

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

Maryland Office of People's Counsel

Represents Maryland residential customers before the Public Service Commission and federal agencies.

Messer Americas

A leading industrial and medical gas producer.

Metalcasters of Minnesota

Represents metal casting companies in the state of Minnesota.

Michigan Chemistry Council

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

Midwest Food Products Association

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

Minnesota Large Industrial Group

Represents major energy intensive companies on energy issues in Minnesota.

Multiple Intervenors, NY

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

National Council of Textile Organizations

Represents the textile industry nationwide.

National Retail Federation

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

NextEra Energy

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

North Carolina Manufacturers Alliance

Represents North Carolina manufacturers on legislative and regulatory issues.

NovoHydrogen

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

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

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

Ohio Cast Metals Association

Represents the cast metals industry in Ohio.

Ohio Chemistry Technology Council

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

Ohio Energy Group

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

Ohio Manufacturers’ Association

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

Oklahoma Industrial Energy Consumers

Represents Oklahoma industrial consumers on energy issues.

Olin Corporation

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

Owens-Illinois

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

Pennsylvania Energy Consumer Alliance

Represents diverse manufacturers on electricity issues in Pennsylvania.

PJM Industrial Customer Coalition

Represents large manufacturing companies on electricity issues in PJM.

Portland Cement Association

Represents America’s cement manufacturers.

Public Citizen, Inc.

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

R Street

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

Resale Power Group of Iowa

An association of public and private agencies existing pursuant to an agreement authorized by Chapter 28E of the Code of Iowa that purchases electric energy, capacity, and transmission service as agent for and on behalf of members.

Riceland Foods, Inc.

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

Rio Tinto

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

Skana Aluminum Company

A large producer of aluminum products.

Steel Manufacturers Association

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

Texas Cast Metals Association

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

TimkenSteel Corporation

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

Vallourec STAR LP

Produces steel products in 20 US locations.

Vinyl Institute

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

Virginia Manufacturers Association

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

West Virginia Energy Users Group

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

Wisconsin Cast Metals Association

Represents foundries in Wisconsin.

Wisconsin Industrial Energy Group

Represents manufacturing companies in support of affordable and reliable energy.