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 OF THE ELECTRICITY TRANSMISSION COMPETITION COALITION

October 12, 2021

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The Electricity Transmission Competition Coalition ("ETCC") appreciates the opportunity to submit these Comments in response to the Federal Energy Regulatory Commission's ("Commission" or "FERC") request for Comments on this Advance Notice of Proposed Rulemaking ("ANOPR") regarding regional transmission planning, regional cost allocation, and generation interconnection processes.[1] The ETCC, a broad-based and diverse coalition of large intensive energy users, non-incumbent transmission developers, state consumer advocates, public power representatives, and others, supports competition in transmission planning. Transmission investment should be driven by the needs of consumers and by competitive market outcomes. Competition in transmission planning and construction reduces costs to consumers, results in project construction to meet reliability requirements and market-driven transmission needs, and will help achieve the same public policy objectives that the Commission intends to achieve through the ANOPR.

I. EXECUTIVE SUMMARY

The absolute best way for the Commission to ensure that transmission planning results in just and reasonable rates is through competition. The ETCC urges the Commission to support

[1] *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generation Interconnection*, 175 FERC ¶ 61,035 at p. 1 (2021) ("ANOPR").

transmission planning processes that follow well-established legal precedent, principles of prudent regulation, and competitive market processes. The ETCC supports rational and effective regional and interregional transmission planning processes with improved coordination and greater stakeholder involvement. The Commission should consider that competition serve as the means to the same public policy ends sought by states and, as indicated in the ANOPR, by the Commission. Competition in the development of new transmission projects is the only means to achieve greater reliability, at lower costs, in a manner that results in fewer emissions.

This ANOPR proceeding is not the first time the Commission has considered reforms to address transmission planning, cost allocation, or generator interconnection processes. In 2011, the Commission issued Order No. 1000 to usher electric transmission competition into national policy. The Commission took the position at that time that transmission competition was in consumers' interest and the public interest. As part of Order No. 1000, the Commission directed the removal of federal rights of first refusal ("ROFR") from tariffs. The Commission's orders requiring that transmission expansion processes have competitive pressures to ensure just and reasonable rates has been upheld by the D.C. Circuit and appellate courts across the country.[2] However, subsequent to Order No. 1000, incumbent transmission owners have managed to secure for themselves a combination of exceptions to competitive processes, adoption of state ROFR laws, and other anti-competitive barriers to thwart competition in transmission planning and construction. And even when state ROFR laws have not been enacted, local transmission owner planning has grown substantially relative to regional planning, thus undermining the objective of greater transmission competition that the Commission embraced in Order No. 1000. Now, it is time for the Commission to accomplish the objective that the Commission set out to accomplish

[2] See *New York v. FERC*, 535 U.S. 1, 17, 22 (2005).

in Order No. 1000 – promote efficient and cost-effective transmission development by facilitating greater competition among companies and among technologies in transmission planning.

The ETCC and its consumer members should not be further burdened with the significant transmission cost increases that continue to occur, much less the significant additional transmission investment costs that certain industry stakeholders claim are necessary. Transmission investment is already growing rapidly, as shown in the chart below, and additional transmission investment without competition and additional consumer protections will only continue to hurt manufacturers, job creators, and other consumers.

Comparison of Transmission Investment by Region 2014 – 2020 ($ millions)[3]

Year	CAISO	FRCC	ISO-NE	MISO	NYISO	PJM	SERC	SPP	WECC	Yearly Total
2014	$7,964	$1,646	$6,347	$15,373	$22,896	$20,373	$7,504	$6,015	$7,044	$95,163
2015	$11,533	$2,228	$7,043	$17,187	$23,858	$24,957	$8,007	$6,622	$7,395	$108,831
2016	$13,015	$2,472	$7,665	$20,072	$24,303	$29,554	$8,616	$7,265	$7,859	$120,821
2017	$15,137	$2,700	$8,259	$22,846	$25,645	$33,877	$9,003	$7,832	$8,227	$133,526
2018	$15,594	$2,851	$8,823	$25,197	$26,660	$37,542	$10,067	$8,508	$8,543	$143,784
2019	$16,217	$3,030	$9,545	$27,206	$27,740	$42,319	$10,834	$8,931	$8,950	$154,773
2020	$17,481	$3,115	$10,269	$30,532	$29,796	$48,799	$11,568	$9,292	$9,240	$170,092
Grand Total	$96,941	$18,042	$57,950	$158,414	$180,899	$237,421	$65,600	$54,465	$57,257	$926,989

The Commission should explore every opportunity to accommodate necessary and cost-effective new transmission while minimizing the burden on consumers. The ETCC Comments offer concrete suggestions for balancing and reconciling those objectives.

II. THE ETCC AND ITS MEMBERS SUPPORT COMPETITION

The ETCC is a diverse coalition of large energy-intensive consumers, non-incumbent transmission developers, state consumer advocates, public power representatives, and others that

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

are firmly committed to deploying competitive market processes wherever feasible in the development of new transmission facilities. The ETCC members in support of these Comments are listed in the attached Appendix. The transmission component of ETCC consumer members' electric bills has soared over the past few years. Transmission projects subject to competition represent only about 3 percent of total transmission investments between 2013 and 2017.[4] Far too few projects are subject to competition, despite the actual and projected savings for the consumer members of the ETCC.

Transmission additions subject to competition can reduce costs to consumers by 33 percent or more, and routinely include a variety of other ratepayer protections.[5] The ETCC supports appropriately designed transmission planning and expansion and new transmission where necessary, but opposes monopoly control that leads to unnecessary transmission investment or unnecessarily expensive transmission investment. Such monopoly control often results in costs that are not checked against alternative transmission non-wires solutions and alternative, lower-cost transmission solutions. ETCC supports the addition of needed transmission capacity at the lowest possible cost, which can be achieved with more competition in transmission planning, design, and construction. Expanding the integration and deployment of competition in transmission development must be an element of the Commission's efforts to facilitate reasonable transmission expansion and replacement at rates that are just, reasonable, and not unduly discriminatory. The alternative – continuing to enable the exercise of monopoly control over transmission development – is an unacceptable outcome.

[4] "Cost Savings Offered by Competition in Electric Transmission," The Brattle Group, April 2019, page 19, https://brattlefiles.blob.core.windows.net/files/15987_brattle_competitive_transmission_report_final_with_data_tables_ 04-09-2019.pdf

[5] *Id*. at page 13.

III. COMPETITION IN TRANSMISSION DEVELOPMENT PRODUCES CLEAR CONSUMER BENEFITS AND HELPS ENSURE THAT TRANSMISSION RATES ARE JUST, REASONABLE, AND NOT UNDULY DISCRIMINATORY OR PREFERENTIAL.

Going back to the early 2000s when RTO/ISOs were being formed and were in their infancy, the Commission stated in its Final Rule implementing Order No. 2000 that "traditional management of the transmission grid by vertically integrated electric utilities [is] inadequate to support the efficient and reliable operation that is needed for the continued development of competitive electricity markets, and that continued discrimination in the provision of transmission services by vertically integrated utilities may also be impeding fully competitive electricity markets."[6] Thereafter, when enabling the creation of RTO/ISOs, the Commission stated that "regional institutions can address the operational and reliability issues now confronting the industry, and eliminate any residual discrimination in transmission services that can occur when the operation of the transmission system remains in the control of a vertically integrated utility."[7] The Commission addressed the problem of monopoly market power in the *operation* of the transmission system by facilitating transfer of operational control to ISOs and RTOs, by imposing conditions to merger approvals, and by denying market-based rate authority when monopoly market power over transmission could be exercised to interfere with competitive outcomes in energy and capacity markets. With the issuance of Order No. 1000, the Commission went farther down the path of addressing monopoly control over the planning and development of transmission projects. The ANOPR anticipates fairly substantial new investment in transmission facilities. Now is the time to redouble efforts, not abandon them, to require competition for that new

[6] *Regional Transmission Organizations*, FERC Stats. & Regs. ¶ 31,089 (1999) ("Order No. 2000"), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000).

[7] Order No. 2000 at 30,993.

transmission investment. Transmission competition must be a core feature of any Commission effort to promulgate a NOPR and any Final Rule.

A. Experience With Individual Solicitations in RTOs/ISOs.

Actual experience with competitively developed transmission projects shows significant consumer benefits in all cases, with no or reduced corresponding risk to consumers. The Brattle Group analyzed 15 projects selected through the ISO/RTO competitive planning processes to demonstrate that competition provides major cost advantages to consumers.[8] On average, the winning bids of these 15 competitive transmission projects were priced 40 percent below the ISO/RTOs' or incumbent Transmission Owners' initial project cost estimates. This analysis considered 15 total projects across multiple RTO/ISOs - 10 projects in CAISO, 1 in MISO, 1 in NYISO, 2 in PJM, and 1 in SPP. In total, the ISO/RTO or incumbent estimate of the project cost was $1.9 billion, but with an average cost advantage of competitive bids coming in at $1.1 billion.[9] Those are real and substantial cost savings to consumers for the same benefit in reliability. Further, not only are competitive bids often lower at the bidding phase, but winning bids also often provide cost caps or other cost-control measures that reduce the risk and magnitude of significant cost increases as the projects are developed and constructed. When competitive processes are not used, actual transmission investment costs average approximately 34 percent more than the projected cost.[10] The combination of non-competitive initial cost estimates and a lack of competitive

[8] "Transmission Competition Under FERC Order No. 1000: What we Know About Cost Savings to Date," The Brattle Group, October 2018, pages 10-15, http://files.brattle.com/files/14786_brattle_competitive_transmission_wires_10-25-18.pdf

[9] *Id.*

[10] *Id*. at 14.

discipline to the actual expenditures results in a total 55 percent savings potential for competitive transmission project bids relative to non-competitive transmission projects.[11]

These average cost savings are not merely conjecture. An analysis building upon the data compiled by Brattle and updated through 2020 indicates that competitive projects are expected to, on average, save customers 50% relative to traditionally developed transmission projects.[12] Further, an analysis of recently completed competitive projects shows that all have been delivered at or below competitive cost caps, with final project costs providing savings up to 60% relative to the initial bid by the incumbent utility. Further detail on the four completed projects analyzed is included in the following table.

Comparison of Completed Competitive Projects to Incumbent Initial Cost Estimates[13]

Table 2: Competitive Transmission Projects Summary

Project Name	ISO / RTO	Initial Incumbent Bid	Final Competitive Project Costs	% Savings
Suncrest	CAISO	$75	$37	-50%
Harry Allen-Eldorado Project	CAISO	$144	$133	-8%
Duff-Coleman 345 kV	MISO	$59	$50	-15%
Artificial Island Project	PJM	$692	$256	-63%

Regarding the Duff to Coleman Project in MISO, resulting in Republic Transmission becoming a new Transmission-Owning member of MISO, Aubrey Johnson, MISO's Executive Director of Systems Planning and Competitive Transmission, stated "the competitive transmission process allows us to work with our members to identify projects that create value for the entire bulk electric system."[14] The Duff to Coleman Project is a 31-mile, 345 kV line spanning between southern

[11] *Id*. at 15.

[12] Original analysis included in the Brattle Benefits of Competition Report, Table 20, with updated values.

[13] Analysis of each project using publicly available information; Note that final competitive project costs are not escalated to COD, ensuring that the cost at COD matches the originally submitted cost in the original bid year.

[14] "New member company Republic Transmission energized their first line this month," MISO Press Release, June 11, 2020, https://www.misoenergy.org/about/media-center/miso-first-competitive-transmission-project-completed/

Indiana and western Kentucky. Further, this was the first project in the MISO footprint to be eligible for competition under FERC Order No. 1000.[15] "MISO noted that all of the proposals came in lower than MISO's initial cost estimate and developers provided a range of cost caps, concessions, and commitments, including caps on construction costs."[16] Further, in a subsequent project, MISO noted that "it was clear RFP Respondents that participated in the Duff-Coleman solicitation brought forward meaningful insights and experience they gained in that process."[17]

B. Total Costs Savings Potential In Light of Transmission Investment Projections.

Transmission spending is increasing rapidly while demand remains generally flat. For example, 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 2019[18] while demand during this period remained essentially flat.[19] Annual transmission investment in Commission-regulated RTO/ISO regions continues to steadily increase, as evidenced by the chart below.

[15] "New member company Republic Transmission energized their first line this month," MISO Media Center, June 11, 2020, https://www.misoenergy.org/about/media-center/miso-first-competitive-transmission-project-completed/.

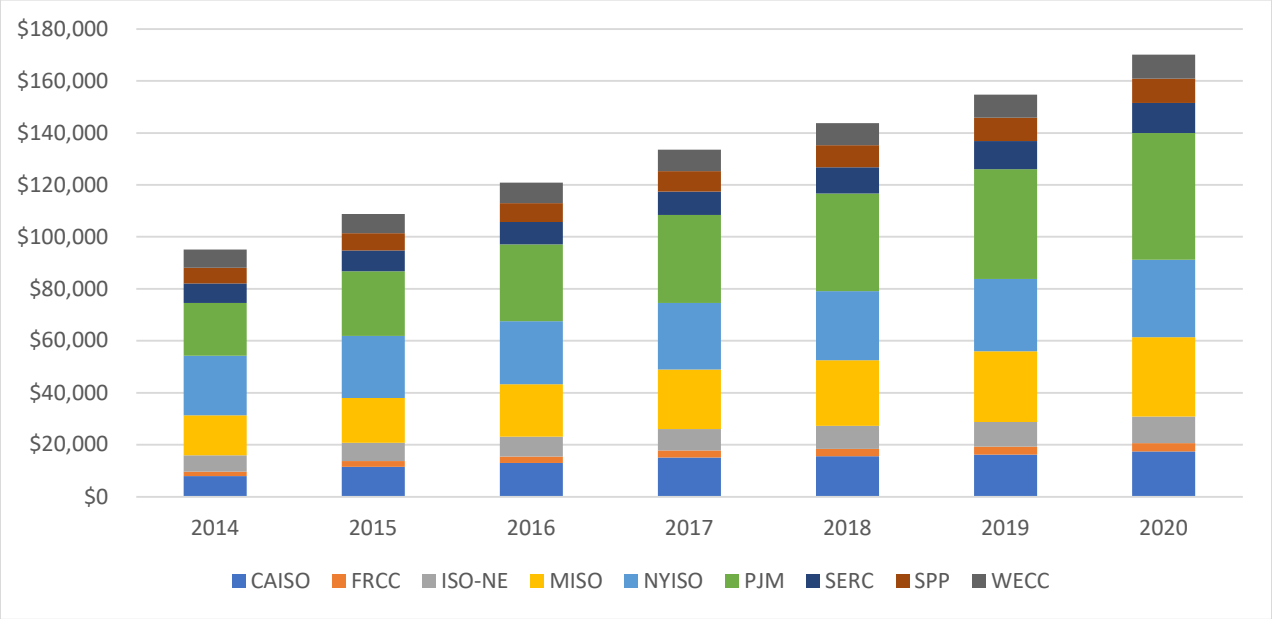
[16] *Id*. at 34.

[17] Benefits of Competition Report at 34, *citing* Hartsburg-Sabine Junction 500 kV Competitive Transmission Project, Selection Report, November 27, 2018, https://cdn.misoenergy.org/Hartburg-Sabine%20Junction%20500%20kV%20Selection%20Report296754.pdf at 3 ("Hartsburg-Sabine Junction Selection Report").

[18] "Financial Review 2019," Edison Electric Institute (EEI), https://www.eei.org/issuesandpolicy/Finance%20and%20Tax/Financial_Review/FinancialReview_2019.pdf.

[19] "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

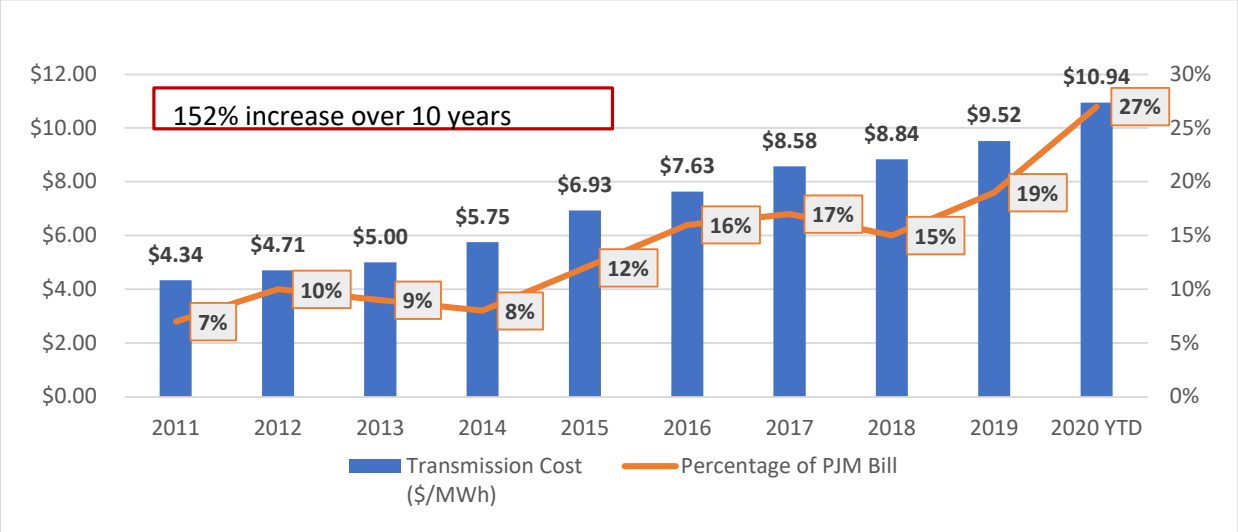
Annual Transmission Investment 2014-2020 ($ millions)[20]

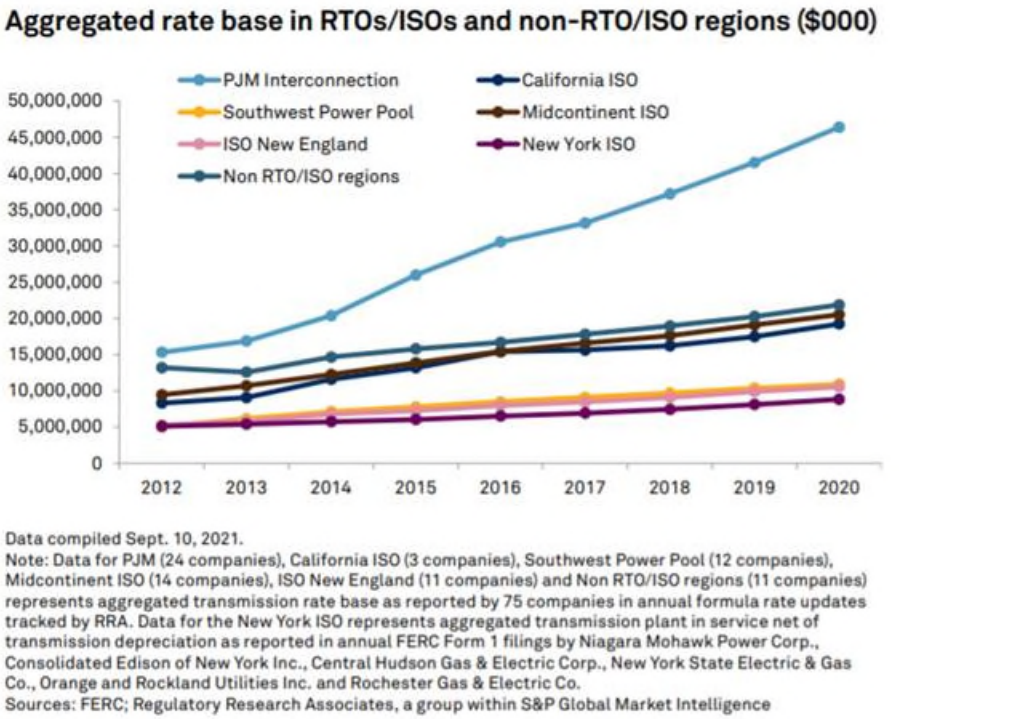


This growth in transmission investment is driving commensurate increases in transmission rates. In PJM, for example, transmission rates, on a $/MWH basis, increased by 152% from 2011 to 2020, driven by significant increases in transmission rate base, as shown in the charts below.

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

Growth in PJM Transmission Rates[21]





[21] Data sourced from PJM Transmission Owner NITS Rates (available at: https://pjm.com/markets-and-operations/billing-settlements-and-credit/formula-rates) and PJM State of the Market Reports (available at: https://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2021.shtml).

Similar increases exist in all RTO/ISO and non-RTO/ISO regions. These increases in transmission rates exist, in part, because transmission projects subject to competition only represent approximately 3 percent of transmission investments between 2013 and 2017 while the remaining 97 percent of transmission investment is being deployed under monopoly conditions with little or no "check" on costs.[22] Far too few projects are subject to competition, despite the actual and projected savings for consumers. Transmission additions subject to competition can reduce costs to consumers by 33 percent or more, and routinely include a variety of other ratepayer protections.[23] Competitive dynamics in the transmission planning processes drive innovations in proposed solutions, lower bids for the same project, cost caps to protect consumers from cost over-runs, cost control measures, and innovative financial structuring.

The cost savings from competition that have already been demonstrated will only continue to expand as transmission investment increases. Over the past few years, the costs for transmission service have increased at a remarkable pace with no sign of abating, while competition remains largely absent from transmission development. Numerous reasons exist for the increase in transmission costs to consumers, including expanding use of formula transmission rates and unchecked transmission utility investment in incumbent-controlled transmission projects, such as Supplemental Projects in PJM and Other Projects in MISO. Very little debate exists, or should exist, that competition is very capable of delivering significant consumer benefits when used in the transmission planning and new transmission development processes. The current problem is

[22] "Cost Savings Offered by Competition in Electric Transmission," The Brattle Group, April 2019, page 19, https://brattlefiles.blob.core.windows.net/files/15987_brattle_competitive_transmission_report_final_with_data_tables_ 04-09-2019.pdf.

[23] *Id*. at page13.

not that competition cannot work; the current problem is that competition has not been enabled to work.

C. Section 206 of the Federal Power Act Authorizes The Commission To Adopt Rules Implementing Competition In Transmission Planning And Construction As A Practice Affecting Rates Charged By Public Utilities.

Transmission planning and construction without competition is unjust, unreasonable, and is unduly preferential. Consumers are paying transmission rates that are too high; competitive developers are not being given a non-discriminatory opportunity to help ameliorate the staggering transmission rate increases that consumers have faced over the past few years. Section 206 of the Federal Power Act ("FPA") authorizes the Commission to adopt rules implementing competition in all jurisdictional areas, on the same grounds that Section 206 of the FPA authorized the Commission to issue Order No. 1000. Section 206 of the FPA instructs the Commission to remedy "any . . . practice" that "affect[s]" a rate for interstate electricity transmission services "demanded" or "charged" by "any public utility" if such practice "is unjust, unreasonable, unduly discriminatory or preferential."[24] While the text does not define the term "practice", the use of the word "any" amplifies the breadth of the delegation to the Commission.[25]

In 2007, when the Commission issued Order No. 890, it noted that the United States had "witnessed a decline in transmission investment relative to load growth," and found that the resulting grid congestion could "have significant costs to consumers."[26] Today, the exact opposite scenario exists - transmission investment and costs are increasing rapidly, while load remains generally flat. And even though load is projected to remain relatively flat, the combination of

[24] 16 U.S.C. § 824e(a).

[25] *See United States v. Gonzales*, 520 U.S. 1, 5, 117 S. Ct. 1032, 137 L. Ed. 2d 132 (1997).

[26] *Prevent Undue Discrimination and Preference in Transmission Service*, FERC ¶ 60,421, 72 Fed. Reg. at 12,276, 12,318.

rapid growth in new renewable generation, public policy concerns about emissions, and the age of certain existing transmission facilities are projected by some to drive substantial additional transmission investment in the future. In Order No. 890, the Commission noted that a "lack of coordination, openness, and transparency" existed in transmission planning that "result[ed] in opportunities for undue discrimination" because "participants ha[d] no means to determine whether the plan developed by the transmission provider in isolation is unduly discriminatory."[27] Accordingly, in June 2010, the Commission published a Notice of Proposed Rulemaking entitled *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*.[28] It was from this rulemaking that the Commission would later adopt Order No. 1000.[29] Now, over ten years later, the Commission has issued the ANOPR to address transmission needs in light of future projected growth in renewable resources. Under the same authority with which the Commission adopted Order No. 1000, Section 206 of the FPA authorizes the Commission to adopt rules implementing far-reaching competition in transmission planning and construction as a practice affecting rates charged by public utilities.

IV. THE COMMISSION SHOULD ADOPT RULES THAT DEPLOY TRANSMISSION COMPETITION FOR MORE PROJECTS AND IN ALL AREAS OF THE COUNTRY

Under Order No. 1000, incumbent transmission owners were required to eliminate all federal rights of first refusal from Commission-jurisdictional tariffs to allow for nonincumbent transmission owner proposals to be considered in regional transmission planning. The Commission justified this directive "based on an expectation that '[t]he presence of multiple

[27] *Prevent Undue Discrimination and Preference in Transmission Service*, FERC ¶ 60,421-60,425, 72 Fed. Reg. at 12,276, 12,318.

[28] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities,* 131 FERC ¶ 61,253, 75 Fed. Reg. 37,884 (2010).

[29] *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 55, 412 U.S. App. D.C. 41 (D.C. Cir. 2014).

transmission developers would lower costs to customers.'"[30] This requirement excluded local projects that were not part of, or selected in, the regional planning process for cost allocation and were located solely within a transmission provider's retail distribution service area or for upgrades to a transmission provider's existing transmission facilities. Transmission providers were directed to incorporate new transmission planning processes in their tariffs to establish qualification criteria for entities wishing to propose transmission solutions, provide a framework for project consideration and evaluation, and develop a cost allocation methodology that provided comparable opportunities for both incumbents and nonincumbents to recover transmission project costs.[31] However, the Commission provided flexibility for each planning region to determine the process for evaluating projects proposed by incumbent and nonincumbent transmission owners. The Commission stated that "we have sought to provide flexibility for public utility transmission providers in each region to propose, in consultation with stakeholders, how best to address participation by nonincumbents as a result of removal of the federal right of first refusal from Commission-jurisdictional tariffs and agreements."[32]

In many RTO/ISO regions, the RTO/ISO has developed a competitive process that allows incumbent and nonincumbent transmission developers to propose solutions to regional transmission needs (known as the "sponsorship model") or for competing transmission developers to propose the most cost-effective and efficient way to build a designated project (known as

[30] Order No. 1000 at P 268, quoting *Cleco Power LLC*, 101 FERC ¶ 61,008 at P 117 (2002), *order terminating proceedings*, 112 FERC ¶ 61,069 (2005).

[31] *See* Order No. 1000 at P 293.

[32] Order No. 1000 at P 227; *see also id* at P 259, "current mechanisms used to evaluate competing transmission projects vary by region… the public utility transmission providers in a region may, but are not required to, use competitive solicitation to solicit projects or project developers to meet regional needs."

"competitive bidding").[33] The "sponsorship model" has been used in NYISO and PJM as a "solutions-based" competitive procurement process whereby developers propose a wide range of solutions to meet the identified transmission need. Alternatively, in the "competitive bidding" model, the competition resides exclusively with the construction phase of a project. In other regions outside of RTOs/ISOs, competition is almost entirely absent.[34]

Although there have been a handful of successful open solicitations, most transmission projects remain exempt from competitive processes. In order to benefit from the advantages that competitive transmission solicitation provides, open solicitation windows and eligibility of transmission solutions need to be expanded and applied across all regions of the country.

A. The Commission Should Adopt Rules That Eliminate the Requirement That Project Cost Allocation Dictates Project Eligibility for Competition.

The method of project cost allocation should not dictate project eligibility for competition, as it does today. Transmission providers can use, and have used, cost allocation as a way of carving out projects from competition by focusing on smaller, more local solutions that are subject to localized cost allocation and thus shielded from competition.

Cost allocation, as it is currently implemented, is more of an art than a science, and typically involve complicated analyses of known and measurable costs relative to known and measurable benefits. Such criteria should not be the basis for determining whether a transmission project should be eligible for competition. To enable consumer to realize the full benefits of transmission competition, a clear, bright-line threshold should be implemented to eliminate the subjectivity, uncertainty, and potential gaming of project eligibility for competition. Although

[33] "Cost Savings Offered by Competition in Electric Transmission," The Brattle Group, April 2019, page 19, https://brattlefiles.blob.core.windows.net/files/15987_brattle_competitive_transmission_report_final_with_data_tables_ 04-09-2019.pdf.

[34] *Id*.

such a proposal does not remedy the complications surrounding cost allocation itself, it removes more of the barriers to competition and unleashes the corresponding benefits to consumers in a defined, demonstrable, and conclusive manner. Establishing a threshold for transmission project competition would reduce contention over local planning, supplemental projects, and certain upgrades (whether for aging infrastructure or generator interconnection) and help eliminate the potential for transmission providers to exploit loopholes in competitive solicitation exemptions.

B. The Commission Should Adopt Rules Requiring That, With Limited Exceptions, All Transmission Projects 100 kV and Above Must Be Eligible for 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.[35] 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*."[36] 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

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

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

> 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.[37]

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 higher."[38] 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.[39]

The ANOPR 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 ETCC members may take positions on those issues in their individually filed comments. However, the ETCC 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

[37] Order No. 743 at P 73.

[38] North American Reliability Corporation, Rules of Procedure, Appendix 2 – Definitions Used in the Rules of Procedure, p. 3 (effective Jan. 19, 2021).

[39] *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.").

upgrades that are necessary to accommodate generator interconnections. All transmission facility upgrades at 100 kV and above should be subject to competition, irrespective of whether the interconnecting generator is funding the upgrade or whether the Commission moves forward with socialization of those upgrade costs. With generator-funded upgrades, consumers may or may not ultimately pay for the upgrades depending on the market-competitiveness of the interconnecting generators. 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.

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.

C. The Commission Should Adopt Rules Requiring That, With Limited Exceptions, Transmission Competition Should Apply In All Regions Of The Country.

In addition to the 100 kV bright-line threshold (with narrowly tailored exemptions), competitive processes should be applied in both RTO/ISO regions and non-RTO/ISO regions. Although the Commission provided for regional flexibility in Order No. 1000 to adopt methods

for evaluating alternative proposals, many consumers are not benefitting from the cost savings and innovation provided by competing proposals. Without clear criteria for evaluating alternative proposals, there can be no *ex-ante* or *ex-post* review of whether non-competitive projects provided superior benefits to potential alternatives. Similarly, merchant developers, joint ventures, and nonincumbents lack incentive to participate in regional planning processes that do not offer competitive bidding, so there is no guarantee that the most beneficial transmission solution is considered, much less implemented.

Finally, while competition should be injected in all regional and interregional planning processes, there are certain necessary exemptions that need to be respected, such as Immediate Need Reliability Projects, as discussed above. Reliability is priority one for the bulk electric system and should not be subject to lengthy and sometimes complex evaluations that could delay timely solutions and cause grid instability. The five criteria that exempt projects from Order No. 1000's ROFR removal[40] suitably provide protections for impending reliability violations and for consumers as well. However, the Commission must continue to ensure that any such exemption is justified, enforceable, and not abused.[41] Other exemptions from Order No. 1000 for local projects would be subject to the 100 kV threshold, which will minimize potential exploitation and the perverse incentive to limit the scope of transmission projects that fail to take into consideration the benefits of a larger regional solution. The burden for justifying any and all exemptions by incumbent transmission providers is addressed in Section VII below.

[40] *ISO New England Inc., et al.,* 169 FERC ¶ 61,054 at P 3 (2019).

[41] *See id.*

D. The Commission Should Adopt Rules Requiring That an Independent System Planner Administer Competitive Bidding For New Transmission Projects.

A fair, balanced, and independent transmission system planning process that embraces the benefits of competition is crucial to ensuring that the best transmission solutions are implemented. An Independent System Planner should be tasked with conducting transmission planning processes, generator interconnection studies, competitive solicitations, and coordination with other regions. An Independent System Planner will perform an independent analysis of transmission needs, including generator interconnection requests; ensure that the transmission planning process is open and transparent; review and evaluate all transmission proposals 100 kV and above; select the most beneficial and cost-effective transmission solutions; develop and enforce a fair cost allocation process; and participate in joint planning with neighboring regions to determine whether interregional projects could provide superior benefits to regional projects.

1. For those regions that are served by RTOs/ISOs, the new rules should require that RTOs/ISOs will continue serving as the Independent System Planner.

In RTO/ISO regions, the tasks described above for transmission planning are traditionally administered by the RTO/ISO. These RTO/ISOs should be required to continue in their role as Independent System Planners and develop necessary tariff changes emphasizing their independence from all membership groups, as well as incorporating competitive process rules that will take into consideration all transmission projects 100 kV and above. The Independent System Planner should be responsible for reviewing and confirming any exemptions to competition alleged by incumbent transmission developers, consistent with the rules adopted by the Commission for open competitive bidding.

2. In regions that are not served by an RTO or ISO, the new rules should require establishment of, and funding for, an Independent System Planner.

In other regions not governed by an RTO/ISO, transmission owners and operators are not currently required to turn over operation of their transmission assets, and they largely plan for transmission needs independent of third-party oversight. Because the ETCC is suggesting that competition be applied for almost all transmission projects above 100 kV, these non-RTO/ISO planning regions would be subject to the same rules regarding transmission planning and competition. Therefore, they too should be required to establish and fund an Independent System Planner to serve the same planning and oversight duties as the transmission system operator in RTO/ISO regions. The Independent System Planner would be designated and funded in each planning region, although transmission assets would continue to be controlled and operated in non-ISO/RTO regions by the transmission owner. Stakeholders should be involved with developing, and transmission owners should be required to file, any necessary tariff changes to implement an independent planner and to establish rules for competitive processes for all transmission projects 100 kV and above in the transmission owner's service territory. The Independent System Planner should be tasked with conducting transmission planning processes, generator interconnection studies, competitive solicitations, and coordination with other regions, as noted above. The independent nature of this role is crucial to ensure that all interested parties are able to participate in transmission planning, submit project proposals for competition, and have their proposals given equal evaluation as an incumbent's proposal. Without such an independent role, incumbent transmission owners wield significant power for their own self-interest, foreclosing opportunities for considering competitive solutions.

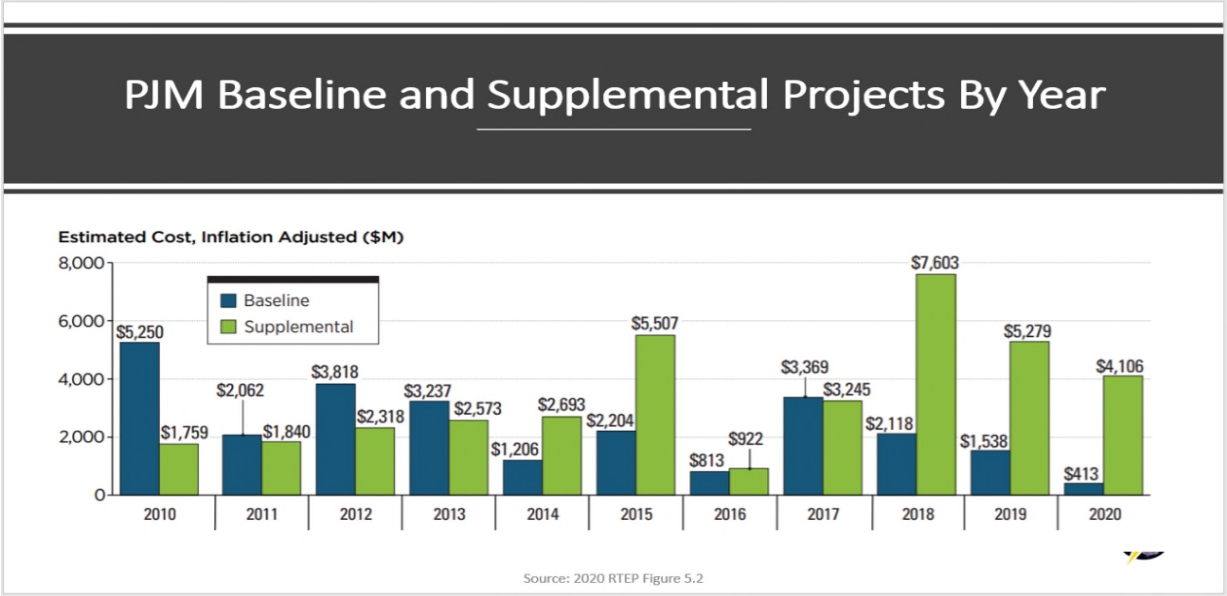
E. The Commission Should Collaborate With States And Stakeholders To Encourage Competition For Transmission Projects Below 100 kV.

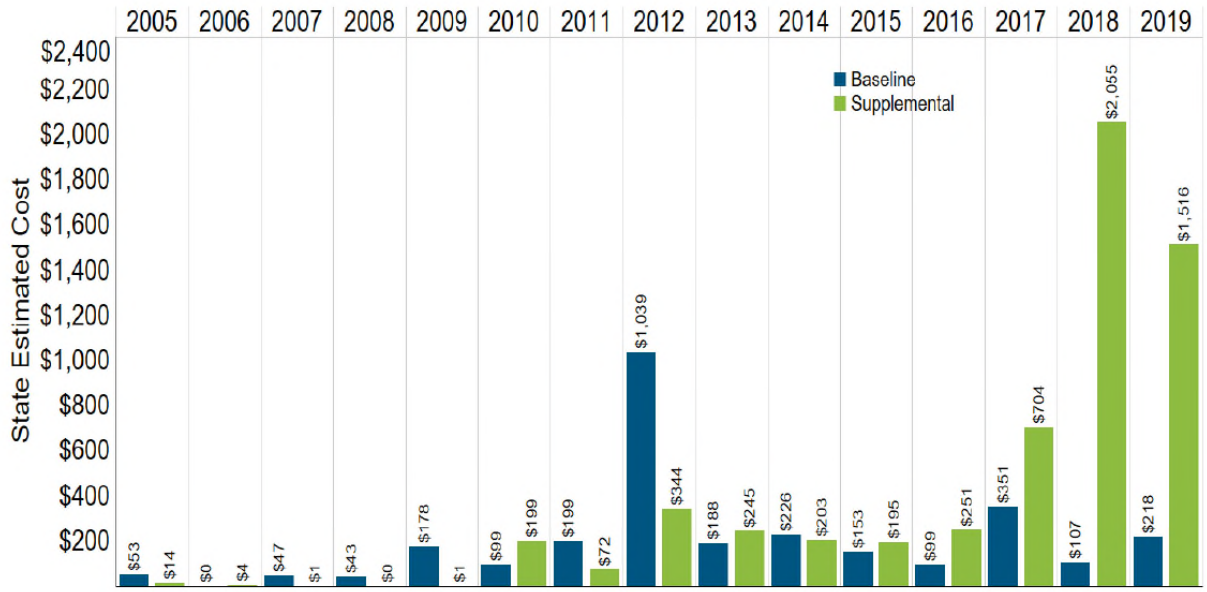
As noted above, the Commission should require that, with very few exceptions, all transmission projects at 100 kV in all regions of the country must be eligible for competition. In addition to this necessary step, the Commission should encourage competition for the development of any transmission projects below 100 kV. The Commission, working through the Joint Task Force that it recently established in coordination with the National Association of Regulatory Utility Commissioners ("NARUC"), should coordinate with state commissions and other stakeholders to explore options for expanding competition to encompass facilities below 100 kV that are classified and booked as transmission facilities.

Projects at voltages under 100 kV that are not determined to be needed for reliability, operational performance, or economic reasons are referred to in PJM, for example, as Supplemental Projects because they are supplemental to the Regional Transmission Expansion Plan.[42] Spending on Supplemental Projects in PJM now far exceeds spending on baseline reliability projects, and by a wide margin, as indicated in the table below.

[42] PJM refers to projects under 100 kV not needed for reliability as "supplemental projects." Accordingly, these Comments use the term "supplemental projects," though other RTOs/ISOs have their own terms for such projects under 100 kV not needed for reliability.

PJM and Ohio Baseline and Supplemental Projects By Year[43]





Incumbent transmission owners in PJM plan supplemental transmission projects under Attachment M-3 of the PJM Tariff. This "M-3 Process" was added to the PJM Tariff to address the framework for planning supplemental transmission projects in accordance with the requirements of FERC

[43] Charts sourced from PJM Transmission Expansion Advisory Committee (TEAC) information; data as of June 30, 2020 (Baseline Projects are PJM Board Approved, Supplemental Projects are reviewed at PJM TEAC meetings).

Order No. 890.[44] While the Commission has found that the M-3 Process at PJM provides transparency regarding the planning criteria, assumptions, and data underlying transmission system planning,[45] neither the Commission nor PJM has taken a direct role in reviewing whether supplemental transmission projects are being planned and constructed in a manner that serves the public interest or that the expenditures are, in fact, prudent. The Commission has even noted that "When transmission owners participate in an RTO, the Commission did not require them to allow the RTO to do all planning for local or Supplemental Projects. Rather, the Commission recognized 'RTO planning processes may focus principally on regional problems and solutions, not local planning issues that may be addressed by individual transmission owners.'"[46] Supplemental Projects are not approved by the RTO/ISO and have, so far, been devoid of competitive solutions with no competitive opportunity on the horizon.

In the 2020 PJM State of the Market Report, the PJM Market Monitor found that if there is a demonstrable need for a supplemental transmission project, then that need should be demonstrated and a mechanism implemented to allow competition to build the project:

> The process for determining the reasonableness or purpose of supplemental transmission projects that are asserted to be not needed for reliability, economic efficiency or operational performance as defined under the RTEP [Regional Transmission Expansion Planning] process needs additional oversight and transparency. <u>If there is a need for a supplemental project, that need should be clearly defined and there should be a transparent, robust, and clearly defined mechanism to permit competition to build the project.</u> If there is no defined need

[44] *Preventing Undue Discrimination and Preference in Transmission System Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 ("Order No. 890"), *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

[45] *See Monongahela Power Co*., 162 FERC ¶ 61,129, *on reh'g and compliance*, 164 FERC ¶ 61,217 at P 30, citing Order No. 890 FERC Stats. & Regs. ¶ 31,241 at PP 454, 461, 471 (2018).

[46] *Monongahela Power Co*, 164 FERC ¶ 61,217 at P 13, *quoting* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at PP 440.

> for a supplemental project for reliability, economic efficiency, or operational performance then the project should not be included in rates.[47]

Accordingly, in addition to adopting a bright-line rule that, with few exceptions, requires all transmission facilities at 100 kV and above to be eligible for competition, the Commission should also 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.

V. THE COMMISSION SHOULD ADOPT RULES THAT STREAMLINE AND EXPEDITE THE SELECTION OF COMPETITIVE OFFERS FOR NEW TRANSMISSION FACILITIES.

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

[47] 2020 State of the Market Report,

PJM with Designated Entity Agreements. Meanwhile, outside of RTO/ISO regions, such agreements should be executed between the winning developer and the aforementioned Independent System Planner 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 Independent Transmission Monitors. In RTO/ISO regions, this 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 Independent Transmission Monitor should be establish as a stand-alone entity, separate and apart from, and with monitoring and reporting responsibility concerning the actions of the Independent Transmission Planner. This Independent Transmission Monitor, or Independent Market Monitor as the case may be, would further work to ensure that these competitive transmission processes are not established or implemented in a manner that undermines expedience. The Independent Transmission Monitor 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. 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. 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.

VI. THE COMMISSION SHOULD ADOPT RULES THAT EXPLICITLY PREEMPT STATE ADOPTION OF RIGHT-OF-FIRST REFUSAL ("ROFR") LAWS THAT IMPEDE TRANSMISSION COMPETITION.

The Commission should explicitly preempt state laws that provide incumbent transmission owners a state right of first refusal. In Order No. 1000, the Commission found that "an incumbent transmission provider's ability to use a right of first refusal to act in its own economic self-interest may discourage new entrants from proposing new transmission projects in the regional transmission planning process,"[48] an outcome that can "undermine the identification and evaluation of more efficient or cost-effective solutions to regional transmission needs."[49] This is exactly what state ROFR laws do – they undermine identification and evaluation of more efficient or cost-effective solutions to regional transmission needs. 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. Commission pre-emption of state ROFR laws would enable competition without impeding states' rights over transmission siting.

[48] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051, at P 256 (2011).

[49] *Id.* P 253.

A. Several States Have Adopted ROFR Laws That Impede Transmission Competition, To The Detriment Of Consumers Both Within Those States And In Neighboring States.

In Order No. 1000, the Commission amended the transmission planning requirements of Order No. 890 to remove federal rights of first refusal from Commission-jurisdictional tariffs and agreements for certain new transmission facilities. Now it is time for the Commission to go further and explicitly preempt state ROFR laws that impede transmission competition and, thus, result in transmission rates that are non-competitive and unjust, unreasonable, and unduly discriminatory.

Order No. 1000 has had less of an effect than was originally hoped. Since the order went into effect, only 3 percent of new transmission investment in the United States has been subject to competition. A major reason for this limited impact has been the expansion of state ROFR laws that give incumbent utilities the exclusive right to build and own transmission projects within their service territory. Since Order 1000, a number of states, including Minnesota (Minn. Stat. § 216B.246) and Texas (Tex. Util. Code Ann. § 37.056), have enacted their own ROFR requirements for electric transmission. Minnesota's ROFR statute is illustrative, and states:

> An incumbent electric transmission owner has the right to construct, own, and maintain an electric transmission line that has been approved for construction in a *federally registered planning authority transmission plan* and connects to facilities owned by that incumbent electric transmission owner.[50]

These anti-competitive actions frustrate and undermine efforts by other states to promote transmission competition. Some states have explicitly rejected attempts to enact ROFR requirements and have passed laws *increasing* competition for electric transmission.[51]

[50] Minn. Stat. §216B.246, Subd. 2 (emphasis added).

[51] *See* Del. HB 127 (149th Gen. Assembly 2017-2018); Maryland SB 460 (2015).

State ROFR laws are harmful to electric consumers, including electric consumers outside of the state that enacted the ROFR law. In *MISO Transmission Owners v. FERC*, the Seventh Circuit noted that under Minnesota's ROFR law, "[w]hen a regional transmission line connects to a Minnesota transmission owner's facilities, therefore, outsiders are not allowed to compete to build that line if the Minnesota transmission owner chooses to build it."[52] Because the scope of the state ROFR law includes projects with regional cost allocation, it means that a state ROFR can raise rates not only for residents of the ROFR state itself, but also for residents of other, neighboring states who must help pay for the project.

As an example, in 2019 the Iowa Department of Justice Consumer Advocate Office took the unusual step of filing an amicus brief in support of a legal challenge to the Minnesota ROFR law.[53] Iowa cited the example of the Huntley-Wilmarth transmission project, a 50-mile transmission line project between two substations in Minnesota. Despite being an intrastate line, the project was approved by MISO as a Market Efficiency Project, meaning that "Iowa customers should expect to pay approximately half the costs of the Huntley-Wilmarth project."[54] Similarly, at a later stage of the challenge to the Minnesota statute, a coalition of interstate electricity consumers also filed an amicus brief supporting the challenge.[55]

State ROFR requirements create bad incentives for transmission investment. "[B]asic economic principles make clear that rights of first refusal are likely to have a direct effect on the costs of transmission facilities because they erect a barrier to entry: namely, non-incumbents are

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[52] *MISO Transmission Owners v. FERC*, 819 F.3d 329, 336 (7th Cir. 2016).

[53] *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018 (8th Cir. 2020), Brief of the Iowa Department of Justice, Office of Consumer Advocate as Amicus Curiae filed Oct. 24, 2018.

[54] *Id*. at 3.

[55] Brief of Amici Curiae Resale Power Group of Iowa, Coalition of MISO Transmission Consumers, Industrial Energy Consumers of America and the American Forest & Paper Association in Support of Petitioner, S.Ct. No. 20-641.

unlikely to participate in the transmission development market because they will rarely be able to enjoy the fruits of their efforts."[56] In addition, the system encourages states to alter transmission projects in order to allow a ROFR to apply. Utilities in states with a ROFR law also occasionally break a project into smaller pieces in order to bring the project within the scope of the ROFR law, which inhibits the construction of large, multi-state projects. The existence of ROFR requirements can also impede cooperation among stakeholders necessary to support regionally cost allocated projects. These are worrisome trends, especially given the projected need for further increases in transmission investment in response to growing renewable energy generation. The Commission should explicitly preempt all state laws that provide incumbent transmission owners a state right of first refusal.

B. The Commission Has The Statutory Authority And Obligation To Eliminate State ROFR Laws That Cause Transmission Rates To Be Unjust, Unreasonable, or Unduly Discriminatory.

Under the FPA, the Commission has jurisdiction over the interstate transmission of electric energy and wholesale transactions.[57] The Commission also has the obligation to ensure that "any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission" is not "unjust, unreasonable, unduly discriminatory or preferential."[58] The Commission has traditionally recognized that certain areas of electricity regulation remain the province of the states.[59] At the same time, the line between the realm of federal and state jurisdiction is not a sharp one, and the

[56] *South Carolina Pub. Serv. Authority v. FERC*, 762 F.3d 41, 75 (D.C. Cir. 2014).
[57] 16 U.S.C. § 824(b)(1).

[58] 16 U.S.C. § 824e(a).

[59] Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utilities, Order No. 1000, 136 FERC ¶ 61051, ¶ 107 (July 21, 2011) ("We acknowledge that there is longstanding state authority over certain matters that are relevant to transmission planning and expansion, such as matters relating to siting, permitting, and construction").

Commission can and has issued regulations that have an effect on even intrastate elements of the transmission and electric system where doing so has an impact on transmission rates and cost allocation among different states.

Courts have explicitly rejected the argument that the FPA "shows a congressional intent to safeguard pre-existing state regulation of the delivery of electricity," holding instead that the Commission's authority in this area is "clear and specific," to the exclusion of states' prerogatives.[60] In fact, among the reasons the FPA was enacted was to prevent disputes between states over electricity costs and rates.[61] And beyond the FPA, the Commerce Clause "has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce."[62] To this end, "State and local governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities."[63] However, while the Commission should preempt state ROFR laws that prevent consumers from receiving the benefits of competition, such rules or actions should be limited to those state laws that directly undermine Commission oversight of competition and transmission rates. The ETCC is not advocating in these Comments the preemption of any state laws regarding the siting and safe operation of electric transmission facilities.

The Commission has the authority to regulate matters that involve transmission projects if they affect interstate transmission of electricity. For example, eminent domain laws are

[60] *New York v. FERC*, 535 U.S. 1, 17, 22 (2005).

[61] *See, e.g., Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

[62] *Sough-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984).

[63] *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 394 (1994); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982) ("The order of the New Hampshire Commission, prohibiting New England Power from selling its hydroelectric energy outside of New Hampshire, is precisely the sort of protectionist regulation that the Commerce Clause declares off-limits to the states."); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 352 (1977).

traditionally a matter of state authority. Yet the Commission has decided that "it would be an impermissible barrier to entry to require, as part of the qualification criteria [for determining an entity's eligibility to propose a transmission project for inclusion in the regional transmission plan], that a transmission developer demonstrate that it either has, or can obtain, state approvals necessary to operate in a state, including ... [conferral of] public utility status and the right to eminent domain."[64] Similarly, the Commission has the authority to preempt state ROFR requirements if it determines (as it should) that state ROFR laws use "'highly ineffective means'" to accomplish the interests of states."[65]

The history of Order No. 1000 itself shows that the Commission has authority to determine whether transmission projects can be subject to a ROFR requirement. Prior to Order No. 1000, the Commission allowed federal ROFR requirements on some projects. This limited the states' ability to determine the requirements for such projects but was considered legitimate because of the Commission's determination at that time that non-incumbents might lack the experience and resources needed to complete projects in a timely manner. As new information has demonstrated that non-incumbents are very capable of routinely matching or exceeding the efficiency and cost-effectiveness of incumbents on most transmission projects, the Commission revised its view on the appropriate balance to draw between ROFRs and the need to keep rates reasonable. In Order No. 1000, the Commission noted 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," and therefore that removing ROFR requirements at the ISO level could result in benefits

[64] *Transmission Planning & Cost Allocation by Transmission Owning & Operating Public Utilities,* Order No. 1000-A, 139 FERC ¶ 61132 at P 441, 77 Fed. Reg. 32,184, 32,254; see also ***MISO***, 819 F.3d at 337.

[65] ***LSP Transmission v. Sieben***, 954 F.3d 1018, 1030 (8th Cir. 2020).

of competition in transmission development, and associated potential savings."[66] Even the United States Department of Justice has recognized that state ROFR requirements "similarly reduce competition and thereby harm consumers".[67]

The Commission's decision to allow state ROFR requirements to continue was upheld on the grounds that "the costs of such a project to consumers are limited to the service area of the company that builds the project rather than allocated across an entire region."[68] To the extent that costs were not so limited, this was "modest enough to make the local allocation of costs "roughly commensurate" with the allocation of benefits.[69] Now, however, it is clear that the burdens of state ROFR requirements do not fall solely on customers within ROFR states, and so the Commission has a duty to preempt these requirements that needlessly raise costs to consumers and unfairly disadvantage non-incumbents.[70]

In the last several years, multiple Constitutional challenges have been brought to state ROFR laws, one of which is still currently pending before the United States Court of Appeals for the Fifth Circuit. These challenges are based on the claim that state ROFR laws impermissibly discriminate against out of state businesses in violation of the Constitution's Dormant Commerce Clause. However, as then-FERC Chairman Norman C. Bay noted, the issues raised in the Constitutional challenges are distinct from the questions at issue here, and the determination of

[66] Order No. 1000, 136 FERC ¶ 61,051 at PP 284, 313 (2011).

[67] *Letter of the U.S. Department of Justice Antitrust Division to the Honorable Travis Clardy*, April 19, 2019.

[68] *MISO Transmission Owners v. FERC*, 819 F.3d 329, 335 (7th Cir. 2016); *see also South Carolina Pub. Serv. Authority v. FERC*, 762 F.3d 41, 73 (D.C. Cir. 2014) ("rights of first refusal could be retained for facilities located wholly within the service territory of an incumbent whose development costs would not be spread to other parties.").

[69] *Id.* at 336.

[70] *See Illinois Commerce Commission v. FERC*, 576 F.3d 470, 476 (7th Cir.2009) ("FERC is not authorized to approve a pricing scheme that requires a group of utilities to pay for facilities from which its members derive no benefits, or benefits that are trivial in relation to the costs sought to be shifted to its members.").

those challenges in the different forum, "whether state or federal court," does not preclude the Commission from acting to preempt state ROFR laws on its own authority.[71]

VII. THE COMMISSION SHOULD ADOPT RULES TO ELIMINATE ANY FEDERAL RIGHT OF FIRST REFUSAL FOR TRANSMISSION UPGRADES THAT ARE PART OF A COMPETITIVELY SELECTED TRANSMISSION PROJECT.

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. On April 15, 2021, the Commission issued a declaratory order that, pursuant Order No. 1000, transmission owners in the state of New York have the opportunity to seek a federal ROFR for upgrades to their own transmission facilities, including upgrades to part of another transmission project selected in a regional transmission plan for cost allocation.[72] The Commission should put a halt to any steps currently being taken to expand a federal ROFR. Instead, the Commission should adopt rules to eliminate any federal ROFR for transmission upgrades that are part of a competitively selected transmission project. As Commissioner Clements noted in concurrence, "it is hard to imagine how [the ISO/RTO] can leverage competitive forces in the planning process for consumers' benefits if [transmission owners] are permitted to stifle competition through their exercise of rights of first refusal over upgrades within a new transmission facility project."[73] The comment hits the mark – ROFR laws, where state or federal, are inherently incompatible with the deployment of competition in transmission planning and new transmission projects.

In Order No. 1000, the Commission addressed federal ROFR provisions in Commission-jurisdictional tariffs and agreements for three categories of transmission facilities: (1) transmission

[71] Order on Rehearing and Compliance Filings, 150 FERC ¶61,037 (2015).

[72] *Order on Petition for Declaratory Order*, Docket No. EL20-65-000, 175 FERC ¶ 61,038 (April 15, 2021).

[73] *Id*. (Clements, concurring).

facilities selected in regional transmission plans for purposes of cost allocation, (2) incumbent transmission providers' upgrades to their own transmission facilities; and (3) incumbent transmission providers' local transmission facilities. Regarding transmission facilities selected in regional transmission plans for purposes of cost allocation, Order No. 1000 required utility transmission providers to "eliminate provisions in Commission-jurisdictional tariffs and agreements that establish a federal [ROFR] for an incumbent transmission provider with respect to transmission facilities selected in a regional transmission plan for purposes of cost allocation."[74] On the other hand, Order No. 1000 did not require elimination of federal ROFR provisions for an incumbent transmission provider's upgrades to its own transmission facilities. In Order No. 1000, the Commission found that transmission owners can have a federal ROFR to build, own, and recover the costs of upgrades *to existing transmission facilities* under Order No. 1000, including upgrades that are part of another transmission developer's proposed transmission project selected in a regional transmission plan for purposes of cost allocation. However, Order No. 1000 required public utility transmission providers to eliminate from Commission-jurisdictional tariffs and agreements provisions that establish a federal ROFR for an incumbent transmission provider with respect to transmission facilities selected in a regional transmission plan for purposes of cost allocation.[75]

Now, the Commission should go further and adopt rules to eliminate any federal ROFR for transmission upgrades that are part of a competitively selected transmission project. With the expansion of competition as advocated in these Comments to include (with very few exceptions)

[74] Order No. 1000 defined a transmission facility selected in a regional transmission plan for purposes of cost allocation as a transmission facility that has been selected pursuant to a transmission planning region's Commission-approved regional transmission planning process for inclusion in a regional transmission plan for purposes of cost allocation because it is a more efficient or cost-effective solution to regional transmission needs. Order No. 1000, 136 FERC ¶ 61,051 at 5, 63, 313.

[75] Order No. 1000, 136 FERC ¶ 61,051 at P 313.

all transmission facilities 100 kV and above and in all areas of the country, the federal ROFR should be further scaled back to apply only to the limited set of transmission facilities that are legitimately exempt from the pro-consumer dynamics of competition. Because the federal ROFR is a barrier to competition, elimination of the barrier will enable a commensurate increase in competition across the country, resulting in substantial cost savings for consumers. Transmission planners should be required to leverage competitive forces in the planning process for consumers' benefit, and the Commission should prohibit incumbent transmission owners from stifling competition through their exercise of a federally recognized ROFR.

VIII. THE COMMISSION SHOULD ADOPT RULES THAT IMPOSE ON TRANSMISSION OWNERS THE AFFIRMATIVE BURDEN OF DEMONSTRATING THE PRUDENCE OF TRANSMISSION FACILITY INVESTMENTS THAT ARE NOT OFFERED FOR COMPETITIVE SOLICITATION.

The Commission should adopt rules requiring that transmission owners affirmatively demonstrate to the Commission the prudence of any transmission facility investment that is not offered for competitive solicitation. The ETCC recognizes that, in some very limited instances, a transmission owner may need to construct a transmission project without offering it for competitive solicitation. For example, if a transmission transformer or conductor is rendered inoperable by a storm, and needs to be replaced immediately, the incumbent transmission owner should be permitted to build and place into service the new facility without going through a competitive process. However, if the transmission owner must make such a transmission investment without offering it for competitive solicitation, that transmission owner should carry the burden of demonstrating that such investment is prudent. Such demonstration must be made at the time the costs of that project are first passed through an existing formula rate, or in a stand-alone Section 205 proceeding, or via a petition for declaratory order.

The requirement in Section 205 of the FPA that "all rates, charges, terms and conditions be just and reasonable and not unduly discriminatory or preferential" carries with it a directive that all investments must be "prudently incurred."[76] The Commission should ensure that transmission investment is prudent and complies with the directives of federal law. The simplest way to meet this directive is for competitive solicitations to be independent administered, and the winning competitor be bound to its commitments in a designated entity agreement or similar contract. However, when competitive solicitations cannot be accepted, for whatever limited reasons that may be, the transmission owner should be required to demonstrate that the investment is prudent and not out of proportion to what the projected cost would be if such project had been offered for competitive solicitation. As the Commission has stated:

> The Supreme Court of the United States early recognized that that the determination of what is just compensation for a public utility involves consideration of the utility's conduct in incurring its costs . . . [W]e reiterate that managers of a utility have broad discretion in conducting their business affairs and in incurring costs necessary to provide services to their customers. In performing our duty to determine the prudence of specific costs, the appropriate test to be used is whether they are costs which a reasonable utility management (or that of another jurisdictional entity) would have made, in good faith, under the same circumstances, and at the relevant point in time. We note that while in hindsight it may be clear that a management decision was wrong, our task is to review the prudence of the utility's actions and the costs resulting therefrom based on the particular circumstances existing either at the time the challenged costs were actually incurred, or at the time the utility became committed to incur those expenses.[77]

Compliance with the directives of federal law to ensure that only investment that is prudent gets built is a cornerstone of consumer protection from unjust, unreasonable, and unduly discriminatory rates. The Commission has recognized that it has a duty to determine the prudence of specific

[76] *See, e.g., Public Utilities Comm'n of the State of California v. FERC*, 24 F.3d 275 (D.C. Cir. 1994); *Cities of Batavia, et al. v. FERC*, 672 F.2d 64 (D.C. Cir. 1982).

[77] *New England Power Company, Opinion 231*, 31 FERC ¶ 61,047 at 61,081-61,084 (1985).

costs, which is a responsibility to determine whether costs are what reasonable utility management would have made, in good faith, under the circumstances that existed at the time of the investment decision. To this end, offering projects for competitive solicitation is prudent, but where a utility is permitted not to offer a project for competitive solicitation and makes that election, the utility must bear the burden to demonstrate that such decision was reasonable and prudent under the circumstances. Placing this affirmative obligation on transmission owners should provide a reasonable and sufficient "check" on any transmission owner efforts to skirt the pro-consumer dynamics of competition.

Today, with most transmission owners having adopted formula transmission rates, the responsibility for evaluating the prudence of transmission investment decisions typically falls on the consumer or the state agency that involves itself in the transmission owner's annual informational update process and pursuant to the protocols adopted in conjunction with the transmission formula rate. The consumer or state agency must rely on the discovery processes under the protocols to seek information from the transmission owner about the prudence of an investment, with very little recourse under the protocols if the transmission owner is not fully forthcoming with all available information. For example, there is no right for the consumer or state agency to file a motion to compel discovery responses during the course of reviewing an annual update of a transmission formula rate. If the consumer or state agency does obtain sufficient information to make out a credible case for imprudence, the consumer or state agency must then engage in the informal challenge and then formal challenge processes to demonstrate imprudence. The deck is stacked against the intervening consumer or state agency.

In sharp contrast, requiring an independent transmission planner to identify the transmission system need, and then deploying competitive forces to engender creative and cost-

effective solutions to that independently identified need, cures many of the ills that would otherwise need to be subject to a prudence challenge. However, where those competitive dynamics do not exist, as in the case of supplemental projects or immediate-need transmission projects, transmission owners must be required to fully support, with substantial evidence, the prudence of those investments, either in advance or at the time of cost pass-through.

IX. CONCLUSION

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

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Dated: October 12, 2021

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 12th day of October, 2021.

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Appendix

ETCC Members

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

Iron Mining Association of Minnesota
Iowa Business Energy Coalition
Iowa Industrial Energy Group, Inc.
Lehigh Hanson, Inc.
LS Power Development, LLC
Maine Industrial Energy Consumer Group
Maryland Office of People's Counsel
Metalcasters of Minnesota
Messer Americas
Michigan Chemistry Council
Midwest Food Products Association
Minnesota Large Industrial Group
National Council of Textile Organizations
North Carolina Manufacturers Alliance
Office of the People's Counsel for the District of Columbia
Ohio Cast Metals Association
Ohio Energy Group
Ohio Manufacturers' Association
Ohio Steel Council
Olin Corporation
Owens-Illinois
Pennsylvania Energy Consumer Alliance
PJM Industrial Customer Coalition
Portland Cement Association
R Street
Resale Power Group of Iowa
Retail Industry Leaders Association
Riceland Foods, Inc.
Rio Tinto
Steel Manufacturers Association
Texas Cast Metals Association
Vallourec STAR LP
Vinyl Institute
Virginia Manufacturers Association
West Virginia Energy Users Group
Wisconsin Cast Metals Association
Wisconsin Industrial Energy Group