



**U.S. Department of Justice**

Antitrust Division

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Washington, DC 20001*

April 19, 2019

The Honorable Travis Clardy  
Texas House of Representatives  
P.O. Box 2910  
Austin, TX 78768-2910

Dear Representative Clardy,

The Antitrust Division of the U.S. Department of Justice (the “Division”) appreciates your invitation<sup>1</sup> to comment on Texas House Bill 3995 (“H.B. 3995” or “the Bill”).<sup>2</sup> The Bill would amend Texas law to restrict which entities are permitted to develop facilities for the transmission of electricity in Texas. The Division is concerned that these restrictions would limit competition, thereby potentially raising prices and lowering the quality of service for electricity consumers.

I. Interest of the Division

Competition is a core organizing principle of the American economy,<sup>3</sup> and vigorous competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality goods and services, increased access to goods and services, and greater innovation.<sup>4</sup> The Division works to promote

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<sup>1</sup> Letter from Travis Clardy, State Rep., Tex. House of Rep., to Daniel Haar, Acting Chief, Competition Pol’y & Advocacy Sec., Antitrust Div., U.S. Dep’t of Justice (Apr. 15, 2019).

<sup>2</sup> H.B. 3995, 86th Leg., Reg. Sess. (Tex. 2019) (as passed out of Comm. on State Affairs, Apr. 4, 2019); *see also* S.B. 1938, 86th Leg., Reg. Sess. (Tex. 2019) (as passed out of Comm. on Bus. & Com., Apr. 9, 2019).

<sup>3</sup> *See, e.g.*, N.C. State Bd. of Dental Exam’rs v. FTC, 135 S. Ct. 1101, 1110 (2015) (referencing “the Nation’s commitment to a policy of robust competition”); *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951) (“The heart of our national economic policy long has been faith in the value of competition.”).

<sup>4</sup> *See, e.g.*, Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 695 (1978) (noting that the antitrust laws reflect “a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . The assumption that competition is the best method of allocating resources in

competition through enforcement of the antitrust laws, which prohibit certain transactions and business practices that harm competition and consumers, and through competition advocacy efforts, which urge federal, state, and local government bodies to make decisions that benefit competition and consumers. Those advocacy efforts take the form of written comments on proposed legislation, discussions with regulators, and court filings, among other channels.<sup>5</sup>

Over the years, the Division has developed considerable expertise in examining wholesale electricity markets. For instance, this industry has been the subject of the Division's antitrust enforcement efforts.<sup>6</sup> In the Division's experience, competition in wholesale electricity markets and in the development of transmission facilities – including competition from independent, transmission-only companies – produces important benefits for wholesale and retail electricity consumers.

Additionally, as part of the Division's competition advocacy mission, the Division has evaluated the effects of government regulations on competition in wholesale electricity markets and transmission development and has publicly advocated for market reforms because of the expected benefits of competition for consumers. For example, in the 1990s, the Division publicly encouraged efforts at the Federal Energy Regulatory Commission ("FERC") to unbundle wholesale generation and transmission services and to develop an architecture to provide for competitive markets in wholesale power.<sup>7</sup>

## II. Background on Competition to Develop Transmission Facilities

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a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.”).

<sup>5</sup> *Mission*, ANTITRUST DIV., U.S. DEP'T OF JUSTICE, <https://www.justice.gov/atr/mission> (last updated July 20, 2015).

<sup>6</sup> *See e.g.*, Competitive Impact Statement, *United States v. Morgan Stanley*, 881 F.Supp.2d 563, (S.D.N.Y. Sept. 30, 2011) (No. 11-cv-6875), <https://www.justice.gov/atr/case-document/file/505056/download>; Competitive Impact Statement, *United States v. Keyspan Corp.*, 763 F.Supp.2d 633 (S.D.N.Y. Feb. 23, 2011) (No. 10-cv-1415), <https://www.justice.gov/atr/case-document/file/500576/download>; Competitive Impact Statement, *United States v. Exelon Corp.*, No. 1:06-cv-1138 (D.D.C. Aug. 10, 2006), <https://www.justice.gov/atr/case-document/file/495451/download>; Competitive Impact Statement, *United States v. Enova Corp.*, 107 F.Supp.2d 10 (D.D.C. June 8, 1998) (No. 98-cv-583), <https://www.justice.gov/atr/case-document/file/495196/download>.

<sup>7</sup> *See, e.g.*, Comments of the U.S. Dep't of Justice, FERC Docket No. RM99-2-000 (Aug. 23, 1999), <https://www.justice.gov/atr/comments-us-department-justice-0>; Comments of the U.S. Dep't of Justice, FERC Docket Nos. RM95-8-000 & RM94-7-001 (Aug. 7, 1995), <https://www.justice.gov/sites/default/files/atr/legacy/2000/08/03/ferc2.txt>; Reply Comments of the U.S. Dep't of Justice, FERC Docket No. RM94-20-000 (Apr. 3, 1995), <https://www.justice.gov/atr/reply-comments-us-department-justice>.

Since the 1990s, FERC has continued to reform U.S. electricity markets through the greater use of competitive processes. For example, in 2011, FERC issued Order No. 1000 that, among other things, addressed certain federal rights of first refusal (“ROFR”).<sup>8</sup> Prior to Order No. 1000, FERC granted incumbent electric facility owners (“incumbents”) a ROFR to build new high-voltage transmission lines that connect to the incumbent’s facilities. At the encouragement of the U.S. Federal Trade Commission,<sup>9</sup> FERC Order No. 1000 eliminated certain federal ROFRs because they restricted competition, were not just and reasonable, and created opportunities for undue discrimination and preferential treatment.<sup>10</sup> As FERC explained:

- “[A]n 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.”
- “Federal rights of first refusal exacerbate these problems by . . . creating a barrier to entry that discourages nonincumbent transmission developers from proposing alternative solutions for consideration at the regional level.”
- “[S]ignificant investment is needed to support the development of a successful transmission project, yet there is a disincentive for a nonincumbent transmission developer to commit its resources to a potential transmission project when it runs the risk of an incumbent transmission provider exercising its federal right of first refusal once the benefits of the transmission project are demonstrated.”
- “Greater participation by transmission developers in the transmission planning process may lower the cost of new transmission facilities, enabling more efficient or cost-effective deliveries by load serving entities and increased access to resources.”<sup>11</sup>

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<sup>8</sup> Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils., 136 FERC ¶ 61,051, at ¶¶ 225-344 (July 21, 2011) [hereinafter FERC Order No. 1000], <https://www.ferc.gov/whats-new/comm-meet/2011/072111/E-6.pdf>.

<sup>9</sup> Comment of the Fed. Trade Comm’n 2, 7-11, 136 FERC ¶ 61,051 (Sept. 29, 2010) (No. RM10-23-000), [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-comment-federal-energy-regulatory-commission-concerning-transmission-planning-and-cost.rm10-23-000/100929transmissionplanning.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-comment-federal-energy-regulatory-commission-concerning-transmission-planning-and-cost.rm10-23-000/100929transmissionplanning.pdf).

<sup>10</sup> FERC Order No. 1000, *supra* note 8, at ¶¶ 285-86.

<sup>11</sup> *Id.* at ¶¶ 256-57, 291.

FERC Order No. 1000 has withstood challenges in two Courts of Appeals.<sup>12</sup> As the D.C. Circuit explained in affirming FERC's order, even if the incumbent prevails in a competitive process, "the threat of competitive entry (e.g., through competitive bidding) will lead [incumbent] firms to lower their costs."<sup>13</sup> By contrast, ROFRs are "likely to have a direct effect on the costs of transmission facilities because they erect a barrier to entry: namely, non-incumbents are unlikely to participate in the transmission development market because they will rarely be able to enjoy the fruits of their efforts."<sup>14</sup>

Since FERC Order No. 1000, several states have implemented state ROFR laws.<sup>15</sup> However, just as a now-eliminated federal ROFR granted by FERC could do, ROFRs granted by state law can restrict entry to develop high-voltage transmission lines, particularly where there would otherwise be a competitive process. Consequently, such laws can similarly reduce competition and thereby harm consumers. State ROFR laws also may interfere with interstate commerce.<sup>16</sup>

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<sup>12</sup> *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 71-81 (D.C. Cir. 2014); *MISO Transmission Owners v. FERC*, 819 F.3d 329, 333-35 (7th Cir. 2016) (Posner, J.).

<sup>13</sup> *S.C. Pub. Serv. Auth.*, 762 F.3d at 69.

<sup>14</sup> *Id.* at 74.

<sup>15</sup> *See e.g.*, Minn. Stat. § 216B.246.

<sup>16</sup> Of particular relevance here, the Division submitted filings in a private case challenging Minnesota's "ROFR" law under the dormant Commerce Clause. Brief for the United States of America as Amicus Curiae in Support of Neither Party, Vacatur, and Remand, *LSP Transmission Holdings, LLC v. Lange*, No. 18-2559 (8th Cir. Oct. 24, 2018), <https://www.justice.gov/atr/case-document/file/1102866/download> [hereinafter Amicus Brief]; Statement of Interest on Behalf of the United States, *LSP Transmission Holdings, LLC v. Lange*, 329 F. Supp. 3d 695 (D. Minn. 2018) (No. 17-cv-04490), <https://www.justice.gov/atr/case-document/file/1053256/download> [hereinafter Statement of Interest]. Broadly speaking, the U.S. Supreme Court's dormant Commerce Clause doctrine guards against "economic protectionism" that "benefit[s] in-state economic interests by burdening out-of-state competitors." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988)).

The Division's filings articulate the view of the United States that state ROFR laws are not protected by a general exception to the dormant Commerce Clause and do not have the approval of the federal government. Amicus Brief *supra* note 16, at 10, 15; Statement of Interest, *supra* note 16, at 16, 25. The Division's filings also call attention to the way that under a state ROFR law, "companies must own a facility in the state to benefit from the state law." Amicus Brief, *supra* note 16, at 8; *see also* Statement of Interest, *supra* note 16, at 11. "That restrictive in-state presence requirement' is what concerns the dormant Commerce Clause." Amicus Brief, *supra* note 16, at 8 (internal citations omitted) (quoting *Granholt v. Heald*, 544 U.S. 460, 475 (2005)); *see also* Statement of Interest, *supra* note 16, at 12.

### III. The Bill

H.B. 3995 would amend Texas law to restrict which entities are permitted to develop facilities for the transmission of electricity in Texas. In particular, the Bill would restrict construction by entities that do not directly interconnect with the new facilities.<sup>17</sup> The Bill also may limit what type of entity may obtain a required state certificate of convenience and necessity (“CCN”) to construct or extend transmission facilities in Texas.<sup>18</sup> These provisions would prevent non-local utilities and independent transmission-only companies from competing to construct new transmission facilities.

We understand that this is a shift from current practice in Texas: “[T]hroughout Texas today, utilities have transmission facilities that are located, at least in part, in other utilities’ certificated service areas,” and the Texas Public Utility Commission “has certificated transmission lines that run across other utilities’ certificated service areas since the first certificates were issued by the Commission.”<sup>19</sup> Moreover, independent, transmission-only companies have previously developed facilities in Texas.<sup>20</sup> In fact, MISO recently awarded a transmission project between Hartburg and Sabine in Texas from among a dozen competing proposals.<sup>21</sup> MISO’s request for proposals sought proposals that could “enhance cost certainty and convey substantial benefits to ratepayers over

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<sup>17</sup> H.B. 3995 § 4(e) (limiting CCNs for a new transmission facility only to those entities whose existing facilities directly interconnect with the new facility); *see also id.* § 4(f) (determining the sequence in which local entities may be granted a CCN to “create the first interconnection between a load-serving station and an existing transmission facility”), *id.* § 4(g) (providing a local entity limited authority to designate another entity to build, own, or operate a new transmission facility).

<sup>18</sup> H.B. 3995 §§ 1-3 (removing “or other person” from the Public Utility Regulatory Act of Texas (“PURA”) in sections that currently include “electric utility or other person”). *But see* Declaratory Order at 4, Joint Petition of Southwestern Public Service Company and Southwest Power Pool, Inc., Docket No. 46901 (Tex. Public Util. Comm’n Oct. 26, 2017), [https://interchange.puc.texas.gov/Documents/46901\\_76\\_959583.pdf](https://interchange.puc.texas.gov/Documents/46901_76_959583.pdf) [hereinafter PUC Declaratory Order] (finding that the addition of “or other person” language to PURA in 2009 did not remove preexisting authority of the Texas Public Utility Commission “to grant a CCN to an electric utility or other person that will provide only transmission service outside of ERCOT without a service area”) (citing Public Utility Commission of Texas v. Cities of Harlingen, 311 S.W.3d 610 (Tex. App.—Austin 2010)).

<sup>19</sup> PUC Declaratory Order, *supra* note 18, at 19.

<sup>20</sup> *Id.* at 10 (noting that three entities selected for the competitive renewable-energy zones in Texas would provide only transmission service without a service area).

<sup>21</sup> MIDCONTINENT INDEP. SYS. OPERATOR, INC., SELECTION REPORT: HARTBURG-SABINE JUNCTION 500 kV COMPETITIVE TRANSMISSION PROJECT 30-95 (2018), <https://cdn.misoenergy.org/Hartburg-Sabine%20Junction%20500%20kV%20Selection%20Report296754.pdf>.

time.”<sup>22</sup> MISO selected the winning project – proposed by a transmission-only company – after determining that its proposal represented “an outstanding combination of low cost and high value” with respect to cost and design, project implementation plans, and plans for operation and maintenance.<sup>23</sup> As we read the bill, H.B. 3995 would prevent this type of competition from occurring in the future.

#### IV. Discussion

The Division urges Texas to consider whether H.B. 3995 may harm competition and consumers in ways that resemble the harm that can be caused by ROFR laws found in other states.<sup>24</sup> In particular, by restricting the development of transmission facilities to local incumbents, H.B. 3995 can harm consumers by reducing or eliminating competition. For example, even if a non-local utility or a transmission-only company was more efficient and could develop higher quality transmission facilities at a lower cost, H.B. 3995 could deny that firm the opportunity to construct that project and likewise deny consumers the benefits of the new competitor’s efforts.<sup>25</sup> Consequently, such entities also would not have the incentive to look for and propose such beneficial projects. Even if an incumbent is best-situated to develop a particular project, H.B. 3995 would likely reduce the competitive pressure on such incumbents to develop higher quality, lower cost transmission facilities. Thus, as a result of lost competition, consumers may have higher expenses in the form of greater transmission rates. Furthermore, consumers may face higher electricity rates and less reliable service as H.B. 3995 may limit construction of transmission that would increase the supply of generation available to serve a local territory or area.

Lastly, the Division notes that many state electric markets operate without restrictions like a ROFR law. To the extent legitimate and well-founded safety or public welfare concerns underlie H.B. 3995, the Division urges Texas to consider

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<sup>22</sup> *Id.* at 6.

<sup>23</sup> *Id.* at 2.

<sup>24</sup> In certain ways, H.B. 3995 may be more restrictive than a typical ROFR law. A ROFR law typically affords the incumbent the opportunity to develop a proposed project in lieu of a non-incumbent, if that right is exercised over a certain window of time. *See e.g.*, Minn. Stat. § 216B.246 Subd. 3 (providing an incumbent 90 days to exercise a state ROFR). By contrast, H.B. 3995 restricts the CCNs required to develop a project to local incumbents. H.B. 3995 §§ 4(e)-(f).

<sup>25</sup> For example, the benefits MISO expects from competitive processes like the Hartburg-Sabine line might not materialize in Texas under H.B. 3995.

whether it can achieve those considerations through mechanisms that do not restrict unnecessarily competition to develop transmission facilities in Texas.

We appreciate the opportunity to present our views.<sup>26</sup>

Respectfully submitted,



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Antitrust Division  
U.S. Department of Justice

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<sup>26</sup> Please feel free to contact the staff if you have questions about these comments or the attached materials, or if new questions arise as Texas considers these issues: Matthew C. Mandelberg ([matthew.mandelberg@usdoj.gov](mailto:matthew.mandelberg@usdoj.gov)), Competition Policy & Advocacy Section, Antitrust Division, U.S. Department of Justice & J. Chandra Mazumdar ([chan.mazumdar@usdoj.gov](mailto:chan.mazumdar@usdoj.gov)), Transportation, Energy, & Agriculture Section, Antitrust Division, U.S. Department of Justice.