

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

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

Docket No. RM21-17-000

**COMMENT OF UNITED STATES DEPARTMENT OF JUSTICE AND
FEDERAL TRADE COMMISSION**

I. INTRODUCTION

The United States Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) (collectively, the “Agencies”) appreciate this opportunity to share their views with the Federal Energy Regulatory Commission (“FERC” or “the Commission”) in the above-captioned proceeding. The Agencies commend FERC for considering how to better encourage needed regional transmission planning and construction, and appreciate its consideration of the initiatives proposed in its April 2022 Notice of Proposed Rulemaking (“NOPR”), *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*.¹ As the NOPR observes, in order to reliably and economically serve consumers, additional investment in transmission facilities is required. A larger, and more integrated, transmission system would allow for greater redundancy, which would promote resiliency, and unlock the forces of competition, which can benefit consumers through access to lower cost power and a wider range of generation resources.² Many of the initiatives considered in the rulemaking are consistent with competition principles.

The Agencies, however, are concerned that the reinstatement of a federal right of first refusal (“ROFR”) is not justified. With a ROFR, consumers will lose the many benefits that competition can bring, including lower rates, improved service, and increased innovation, leading to a more efficient, reliable, and resilient grid. The rulemaking’s requirement that the ROFR can be exercised only if the incumbent transmission provider establishes joint ownership of the new transmission facilities does not alleviate the Agencies’ concerns. Like an

¹ *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, 179 FERC ¶ 61,028 (Apr. 21, 2022) (“NOPR”).

² NOPR, PP 28-29.

unconditional ROFR, a conditional one displaces competition and thus forgoes the important benefits that competition produces for consumers. The NOPR includes many proposals other than the ROFR that may meaningfully improve regional transmission development. Until FERC evaluates the impact of those proposals that it ultimately approves, there will be an insufficient basis to conclude that transmission policy cannot harness the benefits of competition.

As President Biden’s Executive Order on Promoting Competition in the American Economy explained, a “fair, open, and competitive marketplace has long been a cornerstone of the American economy.”³ The President’s Executive Order specifically highlights FERC’s role in protecting conditions of fair competition.⁴ The Order urges federal agencies to “further the policies” of the Order “by, among other things . . . rescinding regulations that create unnecessary barriers to entry that stifle competition.”⁵ Similarly, the Supreme Court has recognized FERC’s obligation to consider competition policy, noting that the Commission’s “power clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations. . . . The [Federal Power] Act did not render antitrust policy irrelevant to the Commission’s regulation of the electric power industry.”⁶ Indeed, as the D.C. Circuit observed, “FERC’s authority generally rests on the public interest in

³ Exec. Order No. 14,036, § 1, 86 Fed. Reg. 36,987 (July 9, 2021).

⁴ *Id.*, § 2(e) (noting that the agencies charged with protecting conditions of fair competition include FERC). Commissioner Wilson has reservations regarding the use of “fair competition” rather than “competition.” Although there may be a future debate regarding the differences between “fair competition” and “unfair methods of competition,” the substance of today’s comment is not impacted by this distinction.

⁵ *Id.*, § 2(g).

⁶ *Gulf States Utilities Co. v. Fed. Power Comm’n*, 411 U.S. 747, 758–59 (1973). The Court in *Gulf States* went on to state that “within the confines of a basic natural monopoly structure, limited competition of the sort protected by the antitrust laws seems to have been anticipated.” *Id.* at 759. Over the years, courts and FERC have refined their understanding of which parts of the electricity industry are natural monopolies. See, e.g., *Transmission Access Study Group v. FERC*, 225 F.3d 667, 683 (D.C. Cir. 2000) (per curiam), *aff’d sub nom New York v. FERC*, 535 U.S. 1 (2002). For example, Order No. 1000’s elimination of the federal right of first refusal was premised on the efficiency benefits for transmission from competition by new entrants. See *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 77 (D.C. Cir. 2014).

constraining exercises of market power.” *Nat’l Ass’n of Reg. Util. Comm’rs v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007).

Significant expansion of regional and interregional transmission will be needed to accommodate growing demand, including the U.S. electricity sector’s transition to greater utilization of renewable energy resources and to obtain other benefits outlined in the NOPR.⁷ In a “Net Zero America” study conducted by Princeton University, the “high electrification” scenario contemplates that in order to connect wind and solar facilities to demand, high voltage transmission capacity must expand by 60 percent by 2030 at a capital cost of \$330 billion, and must triple by 2050 at a capital cost of \$2.2 trillion.⁸ American consumers and businesses should not be denied the benefits of competition when paying for this significant transmission investment. Thus, consistent with longstanding antitrust policy generally disfavoring regulatory barriers to entry, the Agencies have significant concerns about the proposed ROFR.

A. Agencies’ Interest

As the U.S. Government agencies responsible for promoting and protecting competition, the DOJ and FTC are well-positioned to comment on the Commission’s proposed ROFR. The Agencies are entrusted with enforcing the federal antitrust laws, which prohibit certain business practices and transactions that harm competition and consumers. Competition is a core organizing principle of the American economy,⁹ and vigorous competition gives consumers the

⁷ *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, 176 FERC ¶ 61,024, P 28 (July 15, 2021); Comments of the U.S. Dep’t of Energy to Advance Notice of Proposed Rulemaking, FERC Docket No. RM21-17-000, 1-2 (Oct. 12, 2021) (“DOE Comments”).

⁸ Eric Larson *et al.*, *Net-Zero America: Potential Pathways, Infrastructure, and Impacts*, PRINCETON UNIV. 108 (Oct. 29, 2021), <https://netzeroamerica.princeton.edu/the-report>.

⁹ *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.”).

benefits of lower prices, higher quality goods and services, increased access to goods and services, and greater innovation.¹⁰ The Agencies work to promote 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 governmental bodies to make decisions that benefit competition and consumers. Those advocacy efforts include written comments on proposed legislation, discussions with regulators, and court filings.¹¹ In the Agencies' experience, competition in wholesale electricity markets and in the development of transmission facilities—including competition from independent, transmission-only companies and other non-incumbent transmission owners—produces important benefits for wholesale and retail electricity consumers.

Over the years, the Agencies have developed considerable expertise in examining wholesale electricity markets, including through pursuing enforcement actions and evaluating the effects of government regulations on competition in wholesale electricity markets and transmission development.¹² And the Agencies have drawn on this expertise to publicly advocate for market

¹⁰ 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 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.”).

¹¹ *Mission*, ANTITRUST DIV., U.S. DEP'T OF JUSTICE, <https://www.justice.gov/atr/mission> (last updated July 20, 2015); *Mission*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/mission> (last visited July 27, 2022).

¹² 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>; 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/replycomments-us-department->

reforms because of the expected benefits of competition for consumers. For example, in the 1990s, the DOJ publicly encouraged FERC's efforts to unbundle wholesale generation and transmission services and to develop an architecture to provide for competitive markets in wholesale power.¹³ Similarly, in 2010, the FTC filed a comment with FERC in support of Order No. 1000's elimination of a federal ROFR.¹⁴

B. FERC's NOPR

The Agencies recognize that there is a significant need for new regional and interregional electric transmission lines, and that there has been insufficient investment thus far to meet the need.¹⁵ FERC Order No. 1000 was an attempt in 2011 to expedite the building of such transmission facilities and inject competition into the process by eliminating the federal ROFR from FERC jurisdictional tariffs and agreements and by requiring that certain transmission development projects with regional benefits be subject to competition.¹⁶ The proposed ROFR

justice; Letter from Daniel Haar, Acting Chief, Competition Pol'y & Advocacy Sec., Antitrust Div., U.S. Dep't of Justice, to Travis Clardy, State Rep., Tex. House of Rep. (Apr. 19, 2019), <https://www.justice.gov/atr/page/file/1155881/download>; Analysis of the Complaint and Consent Order to Aid Pub. Comment, *DTE Energy Company and MCN Energy Group Inc.*, FTC Docket No. C-4008 (Mar. 22, 2001), <https://www.ftc.gov/legal-library/browse/cases-proceedings/0010067-dte-energy-company-mcn-energy-group-inc>; Analysis of the Complaint and Consent Order to Aid Pub. Comment, *Entergy Corporation and Entergy-Koch, LP*, FTC Docket No. C-3998 (Jan. 31, 2001), <https://www.ftc.gov/legal-library/browse/cases-proceedings/0010172-entergy-corporation-entergy-koch-lp>; Comment of the Fed. Trade Comm'n, FERC Docket No. RM09-16-000 (Mar. 29, 2010), <https://www.ftc.gov/legal-library/browse/advocacy-filings/ftc-comment-federal-energy-regulatory-commission-concerning-rulemaking-competitive-assessments>.

¹³ Comment of the U.S. Dep't of Justice, FERC Docket No. RM99-2-000 (Aug. 23, 1999), <https://www.justice.gov/sites/default/files/atr/legacy/2008/01/02/200221.pdf>.

¹⁴ Comment of the Fed. Trade Comm'n, FERC Docket No. RM10-23-000 (Sept. 29, 2010), 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.

¹⁵ NOPR, P 6 ("We are concerned that the absence of sufficiently long-term, comprehensive transmission planning processes appears to be resulting in piecemeal transmission expansion to address relatively near-term transmission needs"); P. R. Brown and A. Botterud, *The Value of Inter-Regional Coordination and Transmission in Decarbonizing the US Electricity System*, 5 *JOULE* 115–134 (2021); see also Larson, *supra* note 5 (projecting under one scenario that high voltage transmission capacity expands by 60 percent by 2030 and triples by 2050).

¹⁶ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011).

threatens to displace competition where it exists today for transmission design and construction for certain new projects selected in a regional transmission plan.¹⁷

In explaining why regional and interregional development is not occurring at the desired pace, the NOPR identifies a number of reasons unrelated to competition. These include the lack of sufficiently forward-looking regional transmission planning processes;¹⁸ a failure to consistently incorporate known determinants of transmission needs into forward-looking assessments (such as information about impending retirements, the generation interconnection process, energy efficiency improvements, risks of extreme weather, state laws, and other regulatory actions);¹⁹ and a failure of public utility transmission providers to accurately identify the benefits and beneficiaries of regional transmission facilities.²⁰

The NOPR also observes that there may also be competition-related reasons for the lack of regional transmission development, stating that “it is possible that the Commission’s Order No. 1000 nonincumbent transmission developer reforms may in fact be inadvertently discouraging investment in and development of regional transmission facilities to some extent. Incumbent

¹⁷ The proposed ROFR applies to new projects selected in a regional plan for purposes of cost allocation. For these projects, costs are allocated to market participants under principles adopted in Order No. 1000, and FERC is considering reforms in the current NOPR. *See generally* NOPR § 5.

¹⁸ As the NOPR explains, the “existing regional transmission planning processes may not be planning on a sufficiently long-term, forward-looking basis to meet transmission needs driven by changes in the resource mix and demand, leading to the piecemeal and inefficient development of new transmission facilities in a manner that is not more efficient or cost-effective.” *Id.*, P 64.

¹⁹ *Id.*, P 52. The NOPR explains that failure to model factors such as these in regional assessments “may delay planning for the transmission system’s changing operational needs until shortly before those needs manifest, despite the fact that the continued shift in the resource mix and changes in demand can be reasonably forecast based on known factors. ... [T]he lack of sufficient long-term transmission planning appears to be resulting in significant transmission investment in recent years occurring through generator interconnection processes to satisfy near-term transmission needs, resulting in piecemeal development of transmission facilities that may not more efficiently or cost-effectively meet transmission needs driven by changes in the resource mix and demand.” *Id.*

²⁰ *Id.*, P 53. The NOPR explains that “[f]ailing to adequately identify and consider the benefits of such transmission facilities may lead to sub-optimal or inefficient investment therein ... In addition, by not considering an expanded set of benefits and beneficiaries, cost allocation methods may fail to assign the costs of such facilities to beneficiaries in a manner that is at least roughly commensurate with the benefits they derive from them.” *Id.*

transmission providers, as a result of those reforms, may be presented with perverse investment incentives that do not adequately encourage those incumbent transmission providers to develop and advocate for transmission facilities that benefit more than just their own local retail distribution service territory or footprint.”²¹ This dichotomy between competitive and uncompetitive projects may lead incumbents to prioritize local projects over regional projects, thus ensuring that incumbents monopolize new transmission investments.

To the extent that Order No. 1000 may have inadvertently led incumbent utilities to overinvest in local transmission facilities at the expense of more efficient regional facilities, the Agencies point out that this distortion has multiple causes, including ones that the NOPR does not address. One cause is that the continued existence of ROFRs for local and other exempt facilities gives incumbents incentives to invest in those facilities rather than pursuing regional facilities that are subject to competition. Another cause raised by a number of commenters is the continued existence of mechanisms that enable incumbent utilities to exert undue influence over the allocation of ratepayer dollars between local and regional transmission projects.²² The distortion could be resolved by addressing either of these causes. The Agencies therefore urge FERC not to displace competition, but instead to consider solutions to utilities’ misaligned incentives that are consistent with and promote competition. As discussed below, competitive

²¹ *Id.*, P 350.

²² Comments of Advanced Energy Econ., FERC Docket No. RM21-17-000, 29 (Oct. 12, 2021) (“Advanced Energy Econ. Comments”) (“Commenters have noted that shortcomings in existing transmission planning processes allow incumbent transmission owners to exert undue influence over those processes to direct transmission investments to local projects and away from larger regional projects that would be subject to competition from third-party developers...”); Comments of the Resale Power Group of Iowa, FERC Docket No. RM21-17-000, 7 (Oct. 12, 2021) (“Resale Power Group of Iowa Comments”) (“In short, transmission owners are focusing on these local projects because there are few, if any, institutional checks on project selection, timing, or cost.”). *See also* Comments of Transmission Access Policy Study Grp., FERC Docket No. RM21-17-000, 19 (Oct. 12, 2021) (“TAPS Comments”); Comments of the Institute for Policy Integrity at N.Y. Univ. School of Law, FERC Docket No. RM21-17-000, 16 (Oct. 12, 2021) (“NYU Policy Integrity Comments”); Union of Concerned Scientists, FERC Docket No. RM21-17-000, 24-25 (Oct. 12, 2021).

processes have significantly reduced the costs of regional transmission development when they have been implemented.

The purpose of the present NOPR is to offer proposals to unblock the regional and interregional transmission logjam. Increasing transmission investment can lead to more competition in the wholesale energy and capacity markets by reducing congestion and allowing lower-cost generation to be interconnected and dispatched.²³ We applaud FERC for recognizing the problem and issuing the Advanced Notice of Proposed Rulemaking (“ANOPR”)²⁴ and the NOPR to consider solutions. In the NOPR, FERC proposes to unblock the regional and interregional transmission logjam by changing the financial incentive for incumbent utilities to pursue regional and interregional projects. One such change would give incumbents that establish a “joint ownership structure” with a partner that has “a meaningful level of participation and investment” a monopoly ROFR to design and construct certain proposed facilities. FERC refers to this proposed right of first refusal as a “conditional” right of first refusal.²⁵

The proposed ROFR threatens to displace competition where it exists today for transmission design and construction for new projects selected in a regional transmission plan. Broadly speaking, transmission development falls into two categories —transmission planning and transmission design and construction. In this comment, the Agencies use the term “transmission

²³ See ELECTRIC ENERGY MARKET COMPETITION TASK FORCE, *Report to Congress on Competition in Wholesale and Retail Markets for Electric Energy*, at PP 5, 37, 72, and 81 (2007), <https://www.energy.gov/oe/downloads/report-congress-competition-wholesale-and-retail-markets-electric-energy>.

²⁴ *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, 176 FERC ¶ 61,024, P 28 (July 15, 2021).

²⁵ FERC proposes to allow ROFRs in FERC jurisdictional tariffs. See NOPR. The extent to which transmission owners and/or RTOs will actually adopt tariffs with ROFRs remains to be seen. See also *id.*, P 355 (public utility transmission providers are not obligated to adopt the federal ROFR and have an opportunity to “consider whether this type of a conditional federal right of first refusal, if adopted, would help improve their particular regional transmission planning process or help address potentially misaligned incentives regarding regional and local transmission facility investment”).

planning” to refer to determining where the electrical grid needs more capacity as well as how much capacity is needed. The Agencies use “transmission design and construction” to refer to developing particular solutions to install transmission capacity to meet the identified need, which may include variation in the proposed routes and/or voltages of proposals for particular solutions.²⁶

Previous experience has demonstrated that allocating the design and construction of regional transmission facilities to developers through competitive processes can significantly reduce costs and drive innovation. The Agencies therefore encourage FERC to reconsider its current proposal to use a ROFR, conditional or otherwise, to attempt to resolve the regional and interregional transmission challenge.

As the Commission noted when it removed the ROFR from federal tariffs, “granting incumbent transmission providers a federal right of first refusal ... effectively restricts the universe of transmission developers offering potential solutions for consideration in the regional transmission planning process.”²⁷ The Commission correctly recognized that this “may result in the failure to consider more efficient or cost-effective solutions to regional needs and, in turn, the

²⁶ Competition for transmission design can vary by RTO. Under PJM’s “sponsorship” model, PJM puts both the transmission design and construction cost out to bid for system constraints it has identified. Transmission developers propose competing designs, along with their costs, to solve the constraints. FERC, *Competitive Transmission Development Technical Conference, Panel 1: Cost Containment Provisions in Competitive Transmission Development Processes; Panel 2: Commission Consideration of Rates That Contain Cost Containment Provisions and Result from Competitive Transmission Development Processes* 4 (June 22, 2016) (testimony of Craig Glazer, VP of Fed. Gov’t Policy, PJM Interconnection), <https://www.ferc.gov/sites/default/files/2020-08/Glazer-PJM.pdf>. In other regions, such as CAISO, the RTO identifies the solution and only formally puts the construction out for competitive bid. Comments of the Cal. Indep. Sys. Operator Corp. on Advance Notice of Proposed Rulemaking, FERC Docket No. RM21-17-000 (Oct. 12, 2021) (noting that CAISO conducts a competitive solicitation for the regional transmission solution). In those regions, there may be informal design competition as transmission developers propose solutions to the RTO before the RTO decides on a solution to put out for bid. *See, e.g., id.* at 15 (noting that CAISO works with stakeholders to identify the solutions for any identified transmission need).

²⁷ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051, P 284 (2011).

inclusion of higher-cost solutions in the regional transmission plan.”²⁸ The Commission recognized that it was compelled to take action in light of its finding that “federal rights of first refusal in favor of incumbent transmission providers deprive customers of the benefits of competition in transmission development, and associated potential saving...”²⁹ Regional transmission investment has not occurred to the degree FERC envisioned when it issued Order No. 1000 and eliminated the ROFR for certain projects, but that does not mean that competition has not been and cannot be successful in ensuring just and reasonable rates. As FERC recognizes, a number of factors contribute to the lack of regional investment, and abandoning the benefits of competition is not necessary to address the issue.

Reforms that will encourage new regional transmission development can take place without abandoning competition. FERC’s proposals around transmission planning and cost allocation may go a long way toward addressing the logjam that FERC has identified, and those reforms can go further if FERC addresses the anticompetitive incentive and ability for incumbent transmission owners to influence transmission planning processes to favor transmission projects over which they can maintain their monopolies. We urge FERC to focus on these initiatives, including potential reforms suggested by a range of ANOPR commenters to address the adverse effects of ROFRs for local and exempt projects,³⁰ before concluding that the absence of a ROFR is the cause of the current industry problems, or that the adoption of a ROFR is the cure.

FERC’s proposal arises as our nation continues to prioritize competitive energy markets and pursues a major “grid modernization” effort to deliver reliable energy to businesses and

²⁸ *Id.*

²⁹ *Id.* P 285.

³⁰ See Part III, *infra*, at pages 20-21.

consumers.³¹ Enabling competition in transmission development, where viable, is the best way to achieve these goals. We urge FERC to examine the competitive impacts that the proposed ROFR is likely to have, including increasing entry barriers that may result in higher prices for transmission and electricity, reducing innovation, and a less efficient, less reliable, and less resilient grid. Moreover, the proposed ROFR may not only yield sub-optimal transmission development in the short run, but could also serve to further entrench incumbents over the long run.

Regulatory barriers to entry can prevent consumers from realizing the full benefits of competition. The Agencies urge FERC to avoid restrictions on competition unless they are necessary and narrowly tailored to achieve FERC's stated mission to "[a]ssist consumers in obtaining reliable, safe, secure, and economically efficient energy services at a reasonable cost."³² We have not seen such a need here and believe it would be premature to abandon competition before seeing the effects of FERC's other proposals.

II. ROFRS INCREASE BARRIERS TO ENTRY AND DISTORT THE COMPETITIVE PROCESS

By its nature, a ROFR, conditional or otherwise, limits who can build transmission projects and is thus a regulatory barrier to entry. Although at this time competition may not be feasible in transmission planning due to the unique characteristics of the industry, recent experience in some RTOs underscores that competition in the design and construction of specific projects can work and benefits consumers.

³¹ Exec. Order No. 14,057, 86 Fed. Reg. 70,935 (2021); Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (2021).

³² *Overview*, FED. ENERGY REGUL. COMM'N, <https://www.ferc.gov/what-ferc#:~:text=FERC's%20Mission%3A%20Assist%20consumers%20in,market%20means%2C%20and%20collaborative%20efforts> (last visited July 31, 2022).

As part of the transmission development process, the Agencies recognize that there is an important role for integrated regional and national planning by entities with grid-wide perspectives. Local, regional, and interregional transmission networks are physical networks, like interstate highways and interstate gas pipelines, that gain value through the efficiency of their interconnections. Consequently, transmission developers acting independently and approaching their work from a local perspective cannot be expected to plan efficiently integrated regional or interregional transmission networks.³³ Moreover, “as the Commission has long recognized, ‘vertically-integrated utilities do not have an incentive to expand the grid to accommodate new entries or to facilitate the dispatch of more efficient competitors.’”³⁴

Instead, RTOs can more efficiently plan the transmission system than developers acting independently. For example, the Midwest Independent System Operator (“MISO”) annually develops the MISO Transmission Expansion Plan (“MTEP”). As part of the MTEP process, “MISO evaluates various types of projects ... that, when taken together, build an electric infrastructure to meet local and regional reliability standards.”³⁵ The PJM Interconnection (“PJM”) undertakes similar planning as part of its Regional Transmission Expansion Plan (“RTEP”) process.³⁶

³³ See, e.g., James Bushnell & Steven Stoft, *Improving Private Incentives for Electric Grid Investment*, DEP’T OF ECON, IOWA ST. UNIV. 5-6 (1997) (noting that “[t]he interconnected nature of electricity networks has necessitated a great deal of coordination and negotiation between neighboring utilities” and that “when many of these parties are driven by an undiluted profit motive, this approach of voluntary coordination of transmission will break down.”).

³⁴ NOPR, P 32 (quoting *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 118 FERC ¶ 61,119, P 57 (2007) (acknowledging incentive of incumbent transmission providers to discriminate in favor of their own generation)).

³⁵ MIDCONTINENT INDEPENDENT SYSTEM OPERATOR, *MISO Transmission Expansion Plan*, <https://www.misoenergy.org/planning/planning/> (last visited July 27, 2022).

³⁶ PJM INTERCONNECTION, L.L.C., *Manual 14F: Competitive Planning Process* (rev.09, 2022), <https://www.pjm.com/-/media/documents/manuals/m14f.ashx>.

A. Competition Benefits Consumers by Lowering Costs and Increasing Innovation

In contrast to the need for integrated transmission planning, the design and construction of specific transmission projects clearly benefits from competition. Competition for the construction of transmission facilities creates incentives for rival transmission developers to minimize costs—incentives that are not present when construction rights are exclusive. Similarly, competition in transmission design can reduce final costs to consumers by encouraging firms to propose creative solutions to meet identified transmission needs more efficiently.

Previous experience with competitive processes confirms these outcomes. When competitive processes have been implemented, a significant number of incumbent and nonincumbent competitors have participated, and nonincumbents have often won. Even when the incumbent wins, consumers also win, because incumbents tend to make more competitive proposals when they face competition. Electricity customers have also been able to benefit from competition leading to innovative designs and financial terms, such as cost containment mechanisms. To illustrate, there are many instances in which the competitive process benefitted consumers, including the following:

- *PJM's Artificial Island Project*: PJM initiated this project to improve performance of the bulk electric system in the Artificial Island area in Southern New Jersey, which is the site of three nuclear reactors.³⁷ In 2013, PJM received 26 proposals from seven

³⁷ PJM INTERCONNECTION, L.L.C., *Artificial Island Project Recommendation White Paper* (July 29, 2015), <https://www.pjm.com/~media/committees-groups/committees/teac/postings/artificial-island-project-recommendation.ashx>. Although PJM sought solutions for Artificial Island before the implementation of its Order No. 1000 competitive solicitation tariff, “PJM utilized those procedures to the extent feasible as a trial run of Order 1000 tariff provisions.” *Id.*, § 1.

sponsors reflecting a diverse range of technologies, including new overhead and underground/underwater 230 kV lines, overhead 500 kV lines, and HVDC lines.³⁸ Original cost estimates ranged from \$100 million to \$1.55 billion.³⁹ During the process, LS Power submitted a cost commitment of \$146 million for its portion of the project.⁴⁰ In response to this proposal, PJM allowed three of the other bidders to supplement their proposals.⁴¹ Three of the four finalists submitted proposals containing a cost commitment or cost containment proposal.⁴² In 2015, LS Power was awarded the project, which was then expanded in 2017 to include additional work performed by the incumbents to address permitting issues and technical challenges identified after the initial award.⁴³ Including the incumbents' portion of the work on their transmission facilities, the total cost is estimated at \$280 million.⁴⁴ PSE&G, the incumbent transmission owner, submitted fourteen proposals ranging in cost from \$692 million to \$1.173 billion,⁴⁵ meaning PSE&G's lowest-cost proposal was more than twice as expensive as the estimated total cost of the project.

- *NYISO's Western New York Public Policy Transmission Project*: In November 2015, the New York Independent System Operator ("NYISO") sought proposals to relieve transmission congestion in Western New York, including access to renewable energy

³⁸ *Id.* tbl.2.1, at 12-13.

³⁹ *Id.*

⁴⁰ *Id.*, § 5.

⁴¹ *Id.*

⁴² *Id.*

⁴³ PJM INTERCONNECTION, L.L.C., *Transmission Expansion Advisory Committee (TEAC) Artificial Island Recommendations to the PJM Board 5-7* (Apr. 5, 2017), <https://www.pjm.com/-/media/committees-groups/committees/teac/20170413/20170413-artificial-island-teac-board-whitepaper.ashx>.

⁴⁴ *Id.* at 7; Johnson, Tom, *Plan for high voltage power line between Del. and N.J. moving ahead*, WHYY (Apr. 7, 2017), <https://whyy.org/articles/pjms-high-voltage-plan-to-enhance-power-grid-back-on-track/>.

⁴⁵ PJM INTERCONNECTION, L.L.C., *Artificial Island Project Recommendation White Paper*, tbl.2.1 at 12-13 (July 29, 2015), <https://www.pjm.com/-/media/committees-groups/committees/teac/postings/artificial-island-project-recommendation.ashx>.

from the Niagara hydroelectric facility and imports of renewables from Ontario.⁴⁶ NYISO received twelve proposals from seven transmission developers.⁴⁷ NYISO determined that ten proposals were viable and sufficient and ranked those proposals.⁴⁸ In October 2017, the NYISO Board selected one of NextEra’s Energy Transmission’s proposed projects as the winner, noting that it was “both the more efficient and more cost-effective transmission solution” to address the identified need.⁴⁹ That NextEra project cost \$181 million, while the lowest-cost proposal from an incumbent—a joint proposal from the New York Power Authority and New York State Electric & Gas Corporation—was \$222 million.⁵⁰ NextEra’s project represents a 22 percent savings over the incumbent’s proposal.

- *CAISO Round Mountain 500 kV Area Dynamic Reactive Support Project*: The California Independent System Operator (“CAISO”) identified a reliability-driven need for this project in its 2018-19 transmission planning process.⁵¹ In 2019, CAISO conducted a competitive solicitation for proposals for two alternative configurations of the project.⁵² Six developers submitted a total of fourteen proposals, twelve of which were qualified under CAISO’s tariff.⁵³ In February 2020, CAISO selected LS Power Grid California, LLC to finance, construct, own, operate, and maintain the

⁴⁶ NEW YORK INDEPENDENT SYSTEM OPERATOR, INC., *Western New York Public Policy Transmission Planning Report* at 3, 15 (Oct. 17, 2017), <https://www.nyiso.com/documents/20142/2892590/Western-New-York-Public-Policy-Transmission-Planning-Report.pdf/d3f62964-2e2d-588c-2da4-9aa33bb5470b?t=1541702788476>.

⁴⁷ *Id.* at 4.

⁴⁸ *Id.* at 4, 21.

⁴⁹ *Id.* at 4.

⁵⁰ *Id.* at 78, tbl.4.1 at 74.

⁵¹ CALIFORNIA ISO, *Round Mountain 500 kV Area Dynamic Reactive Support Project, Project Sponsor Selection Report*, §§ 1, 2.1 (Feb. 28, 2020), <http://www.caiso.com/Documents/RoundMountain500kVAreaDynamicReactiveSupportProject-ProjectSponsorSelectionReport.pdf>.

⁵² *Id.*, § 2.1

⁵³ *Id.*, § 1, 2.1.

project.⁵⁴ In discussing the selection factors, after noting there were no material differences or only slight differences among the proposals with regard to many of the selection factors, CAISO highlighted the cost containment factor, which did have material differences.⁵⁵ CAISO noted that LS Power “proposed the strongest binding cost containment commitment proposal.”⁵⁶ CAISO further noted that LS Power “proposed more robust capital or construction cost, return on equity, and equity percentage caps that should result in lower costs and present less risk compared to the proposals of the other five project sponsors ... thus benefitting ratepayers.”⁵⁷ CAISO also noted LS Power’s 15-year annual revenue requirement cap and lower interconnection costs as advantages of LS Power’s proposal.⁵⁸

FERC’s proposed conditional ROFR could have the effect of eliminating similarly competitive bids in the future. Indeed, courts have recognized the anticompetitive effects of ROFRs. *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 74 (D.C. Cir. 2014) (“rights of first refusal are likely to have a direct effect on the costs of transmission facilities because they erect a barrier to entry”); *MISO Transmission Owners v. FERC*, 819 F.3d 329, 333 (7th Cir. 2016) (ROFRs “create[] a potential for higher rates to consumers of electricity than if competition to create transmission facilities in transmission companies’ service areas was allowed”). And these critiques of unconditional ROFRs also apply to the proposed conditional ROFR.

⁵⁴ *Id.*, § 1.

⁵⁵ *Id.*, § 3.19.1.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*, § 3.21.

B. A ROFR Conditioned on Joint Ownership Is Not Competition

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

The DOJ/FTC Antitrust Guidelines for Collaborations Among Competitors recognize that an economically integrated joint venture between competitors can eliminate competition, yet also yield procompetitive benefits.⁵⁹ When analyzing such collaborations, the Agencies consider the extent of the joint venture's anticompetitive effects and procompetitive benefits. Even if a venture yields some procompetitive benefits, it would be considered anticompetitive overall if those benefits can be achieved through less restrictive means or are outweighed by the anticompetitive effects.⁶⁰ Often, the impetus for a joint venture's formation relates to competition—*i.e.*, companies join forces in order to better compete against other firms. In these instances, the joint venture participants seek out partners who can offer them the most value, *e.g.*, by bringing together complementary capabilities and expertise.⁶¹

Here, the conditional ROFR does not create this type of incentive to seek out the best partner in order to compete, because the joint venture will not be facing pressure to compete. That is, the mere existence of a joint venture partner does not bring competition to a project, nor does it

⁵⁹ FED. TRADE COMM'N & DEP'T OF JUSTICE, *Antitrust Guidelines for Collaborations Among Competitors*, §§ 2.1, 2.2 (Apr. 2000), <https://www.justice.gov/atr/page/file/1098461/download>.

⁶⁰ *Id.*, §§ 2, 3.2 (discussing when an agreement is reasonably related and reasonably necessary).

⁶¹ *See, e.g., id.*, § 3.2 (“Participants in an efficiency-enhancing integration typically combine, by contract or otherwise, significant capital, technology, or other complementary assets to achieve the procompetitive benefits that the participants could not achieve separately.”); *id.*, § 3.36 (“Efficiencies generated through a competitor collaboration can enhance the ability and incentive of the collaboration and its participants to compete, which may result in lower prices, improved quality, enhanced service, or new products.”).

necessarily result in the best partner for a project in terms of skill, cost, or innovation. Instead, the conditional ROFR supplants competition, and a conditional ROFR as proposed by FERC will result in a joint venture that faces no competition.

In a competitive process, on the other hand, an incumbent utility will have an incentive to find an efficient partner when doing so would help the partnership win the project. As the NOPR details, transmission joint ventures have the potential to yield significant benefits, including cost savings, design expertise, and reduced financial risks.⁶² To the extent that a joint venture could bring these benefits to a project, competition will provide incentives to incumbent transmission owners to form joint ventures to achieve these benefits regardless of whether a conditional ROFR policy is advanced. It is far better to rely on competition, rather than the promise of a share of monopoly profits, to provide such incentives. Moreover, the ROFR encourages the formation of a partnership when it may or may not be efficient and raises the risk that parties will act collusively, especially where two incumbent transmission owners form a joint venture that protects each other's territories from competition. To the extent that FERC seeks to encourage efficient joint ventures, FERC should do this in ways consistent with competition.⁶³

⁶² NOPR, PP 372-76.

⁶³ Some ANOPR commenters representing municipals and cooperatives have called for consideration of joint ownership as part of transmission planning selection processes. *See, e.g.*, Initial Comments of Mass. Mun. Wholesale Electric Co., N.H. Elec. Coop., Inc., Conn. Mun. Elec. Energy Coop., and Vt. Pub. Power Supply Auth., FERC Docket No. RM21-17-000, 30-31 (Oct. 12, 2021) (“Public Systems Comments”) (“Public Systems urge that the Commission direct ISOs and RTOs to prioritize joint ownership projects when selecting the winners of competitive transmission solicitations.”); Initial Comments of the Am. Pub. Power Ass’n on Advance Notice Of Proposed Rulemaking, FERC Docket No. RM21-17-000, 28 (Oct. 12, 2021) (“APPA urges the Commission also to promote joint ownership through the transmission planning process by[,] for[] example, specifying that joint ownership of transmission facilities is a positive factor in evaluating transmission solutions in regional transmission planning processes.”); *see also* TAPS Comments at 55-56 (“...competitive processes have significantly reduced costs in the relatively few instances in which they have been used. While state ROFRs limit where such competition can be effective, the Commission should not abandon this important tool to minimize costs to consumers. Rather, it should foster this process in a manner that advances the role of inclusive joint ownership.”). These commenters did not tie joint transmission ownership to a conditional ROFR.

III. TO SOLVE THE PROBLEMS FERC HAS IDENTIFIED, THE AGENCIES ENCOURAGE FERC TO EXAMINE ALTERNATIVES CONSISTENT WITH COMPETITION PRINCIPLES

As discussed *supra* (section I), there are many obstacles to regional transmission development. The Agencies support FERC’s implementation of solutions consistent with competition principles that address these obstacles, such as by improving transmission planning and cost allocation. Without assessing the merits of any particular proposal, the Agencies note that FERC has proposed several such mechanisms in its NOPR:

- Requiring that public utility transmission providers “conduct regional transmission planning on a sufficiently long-term, forward-looking basis to identify and plan for transmission needs driven by changes in the resource mix and demand.”⁶⁴
- Requiring that public utility transmission providers involve state regulators in determining cost allocation methods and establish a time period for states to negotiate alternative cost allocation methods.⁶⁵
- Requiring public utility transmission providers to improve transparency of local transmission planning criteria, models, and assumptions, as well as identified transmission needs and the potential local or regional transmission facilities they will evaluate to address those needs.⁶⁶
- Requiring neighboring public utility transmission providers to revise their interregional coordination procedures to improve sharing of information regarding transmission needs identified in their respective Long-Term Regional Transmission

⁶⁴ NOPR, P 56.

⁶⁵ *Id.*, P 278-79.

⁶⁶ *Id.*, P 400. FERC also proposes requiring public utility transmission providers to evaluate whether certain transmission facilities due to be replaced within 10 years “can be ‘right-sized’ to more efficiently or cost-effectively address regional transmission needs identified in Long-Term Regional Transmission Planning.” *Id.*, P 403.

Planning processes and to identify and jointly evaluate interregional facilities that may address these needs more efficiently or cost-effectively.⁶⁷

By strengthening regional transmission planning processes, improving transparency, and clarifying cost allocation, these policies may enable more frequent realization of the benefits of competition in transmission design and construction. For example, if transmission planners are required to consider longer time horizons, fewer regional projects will be exempted from competitive processes on the basis of immediate need. FERC's proposed reforms to increase transparency may also mitigate overinvestment in local projects that are not subject to competition. FERC notes that its proposal to increase transparency into local transmission planning processes "will better facilitate the identification of regional transmission facilities that may be more efficient or cost-effective than proposed local transmission facilities through the regional planning process."⁶⁸

In addition to these proposed reforms, we encourage FERC to consider additional solutions that have been proposed by interested stakeholders in their ANOPR comments. Many stakeholders have proposed solutions that specifically address the potential issue of incumbent utilities facing a "perverse investment incentive" to overdevelop local facilities to avoid Order No. 1000 competitive processes for regional projects.⁶⁹ Without assessing the merits of any particular proposal, we note the following examples:

⁶⁷ *Id.*, P 427. FERC also proposes requiring public utility transmission providers to allow entities to propose interregional transmission facilities as potential solutions to regional needs identified in Long-Term Regional Transmission Planning. *Id.*, P 428.

⁶⁸ *Id.*, P 402.

⁶⁹ *Id.*, P 350.

- Eliminating exceptions to Order No. 1000 that enable incumbents to circumvent competitive processes.⁷⁰
- Expanding the set of transmission projects that are subject to competitive processes.⁷¹
- Subjecting local and/or noncompetitive transmission investments to increased scrutiny.⁷²
- Creating an Independent Transmission Monitor (or regional Monitors) to limit the influence of incumbent utilities over the planning process.⁷³
- Applying a standardized cost-benefit analysis to all transmission projects, including local projects.⁷⁴

⁷⁰ Initial Comments of the Cal. Pub. Utilities Comm’n, FERC Docket No. RM21-17-000, 40, 49 (Oct. 12, 2021) (“CA PUC Comments”); Public Systems Comments at 28; Advanced Energy Econ. Comments at 44; Comments of the R Street Inst., FERC Docket No. RM21-17-000, 8 (Oct. 12, 2021); Comments of Potomac Economics, Ltd., FERC Docket No. RM21-17-000, 7-8 (Oct. 12, 2021); Comments of LS Power Grid, LLC in Response to the Commission’s Advanced Notice of Proposed Rulemaking, FERC Docket No. RM21-17-000, 133-134 (Oct. 12, 2021) (“LS Power Comments”); Comment of the Harvard Elec. Law Initiative, FERC Docket No. RM21-17-000, 24-25 (Oct. 12, 2021) (“Harvard Elec. Law Initiative Comments”); Comments for Protecting Consumers from Socialized Transmission Charges that do not Benefit them, from Subsidizing Network Upgrades Needed for Generation Interconnections, and from Paying for Potential Unneeded and Costly Supplemental Transmission Projects by Office of the Ohio Consumers’ Counsel, FERC Docket No. RM21-17-000, 5-6 (Oct. 12, 2021) (“Ohio Consumers’ Counsel Comments”).

⁷¹ Comments of the N.J. Board of Pub. Utilities, FERC Docket No. RM21-17-000, 11-13 (Oct. 12, 2021); CA PUC Comments at 39-40; Public Systems Comments at 8, 30; Resale Power Group of Iowa Comments at 9, 11. Some commenters have suggested using a specific voltage threshold. *See, e.g.*, LS Power Comments at 50, 85; Comments of the Electricity Transmission Competition Coalition, FERC Docket No. RM21-17-000, 16-19 (Oct. 12, 2021) (“ETCC Comments”).

⁷² DOE Comments at 42-43; CA PUC Comments at 47-48; Comments of Pub. Int. Orgs., FERC Docket No. RM21-17-000, 61-62, 77-79 (Oct. 12, 2021) (“Joint NGO Comments”); Harvard Elec. Law Initiative Comments at 44-57; Resale Power Comments at 9, 11; Ohio Consumers’ Counsel Comments at 5-6, 15; NYU Policy Integrity Comments at 20.

⁷³ CA PUC Comments at 52-65; ETCC Comments at 26; Comments of the Office of the People’s Counsel for the District of Columbia on the Advanced Notice of Proposed Rulemaking, FERC Docket No. RM21-17-000, 12-16 (Oct. 12, 2021); Comments of the Office of the State Agencies at 33-37, FERC Docket No. RM21-17-000, 33-37 (Oct. 12, 2021).

⁷⁴ NYU Policy Integrity Comments at 41-49; Joint NGO Comments at 120-124. *See also* DOE Comments at 12-15 (“FERC should support the development of a common modeling framework to maintain consistency and comparability in regional transmission planning and cost allocation processes ... Standardizing input assumptions can increase consistency and comparability across planning processes.”).

To the extent that Order No. 1000 may have inadvertently caused incumbent utilities to overinvest in local facilities, we urge FERC to pursue solutions that would bring investments in local and in regional transmission facilities back into alignment by reducing incumbents' opportunities and incentives to avoid competitive processes.

IV. CONCLUSION

For the reasons above, the Agencies encourage FERC to pursue the alternative proposals to solve the problems FERC has identified before adopting an inefficient, noncompetitive system that relies on any type of ROFR. In particular, FERC should adopt reforms that will improve regional transmission planning and cost allocation processes without harming competition, as well as reforms that will strengthen and expand the implementation of existing competitive processes for transmission design and construction. Rather than attempting to encourage long-distance transmission development by granting market participants exclusive design and construction rights for regional and interregional transmission networks, the Agencies encourage FERC to employ better, procompetitive options. A ROFR conditioned on formation of a joint venture will eliminate or distort the benefits of competition. Adopting reforms that promote competition where possible will make transmission development less costly, more resilient, and more innovative for the American consumer than it otherwise would be. Further, failure to do so would be counter to the Executive Order's call to FERC to avoid exercising its regulatory authority in a way that creates unnecessary barriers to competition.