

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Industrial Energy Consumers of America)	
Coalition of MISO Transmission Customers,)	
Wisconsin Industrial Energy Group,)	
Resale Power Group of Iowa,)	
Association of Businesses Advocating Tariff)	
Equity, and Michigan Chemistry Council)	
Complainants)	Docket No. EL22-78-000
v.)	
Midcontinent Independent System Operator, Inc.,)	
Respondent)	

Motion to Intervene and Comments of the R Street Institute

Pursuant to Rule 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (FERC or Commission), 18 C.F.R. §§ 385.214, the R Street Institute hereby moves to intervene and submit comments in support of the complaint against the Midcontinent Independent System Operator, Inc. (MISO) submitted by the Industrial Energy Customers of America, Coalition of MISO Transmission Customers, Wisconsin Industrial Energy Group, Resale Power Group of Iowa, Association of Businesses Advocating Tariff Equity and Michigan Chemistry Council (collectively Consumer Alliance) submitted on July 22, 2022 in the above-captioned proceeding.

I. Motion to Intervene

A. About the R Street Institute

The R Street Institute (R Street) is a nonprofit, nonpartisan public policy research organization. Our mission is to engage in policy research and outreach to promote free markets and limited, effective government. We favor regulation that is transparent and applied equitably, as well as systems that rely on price signals rather than central planning. At the same time, we recognize that natural monopolies and externalities are real concerns that governments must address. We offer research and analysis that advance the goals of a more market-oriented society and an effective, limited government, with the full realization that progress takes time.

As one of the preeminent free-market entities in the United States, R Street has a unique perspective as to the issues raised in this proceeding regarding the growth and development of wholesale markets, ensuring transparency in wholesale market structures, reducing barriers to entry in wholesale markets and seeking to lower costs via market-based solutions. Accordingly, their interests cannot be represented by any other party, and their intervention is in the public interest.

B. Communications

Correspondence and communications regarding this filing should be addressed to the undersigned as follows:

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II. Comments

A. Background

a. Consumer Alliance Complaint

On July 22, 2022, the Consumer Alliance filed a complaint against MISO asking the Commission to find that Attachment FF of MISO's tariff unjust and unreasonable and that FERC assert jurisdiction to prohibit the use of state right of first refusal (ROFR) laws in determining who will be allowed to construct transmission projects in the MISO territory.² As described in the Complaint, state ROFR laws allow incumbent transmission owners to circumvent FERC Order 1000 directives to ensure that transmission development is competitive.³ In other words, deferring to a state ROFR, as applied in MISO's tariff Attachment FF "unduly discriminates against nonincumbent utilities" which raises transmission rates that are then passed on to retail customers.⁴

Furthermore, as described in the Complaint, state ROFR laws "directly interfere with the Commission's jurisdiction," as a state ROFR, in effect, pre-determines the winner of any transmission project.⁵ This is despite FERC's determination in Order 1000, which directed removal of ROFRs from regional transmission organization (RTO)/independent system operator (ISO) tariffs, that a federal ROFR "facilitates unjust and unreasonable rate through 'the development of transmission facilities 'at a higher cost than necessary.'"⁶

Specifically, the Consumer Alliance encourages the Commission to reassert jurisdiction over transmission in accordance with the following findings:

¹ Person designated for service.

² "Complaint of the Industrial Energy Consumers of America, the Coalition of MISO Transmission Customers, the Wisconsin Industrial Energy Group, the Resale Power Group of Iowa, Association of Businesses Advocating Tariff Equity and Michigan Chemistry Council," Docket No. EL22-78-000, July 22, 2022 (Complaint). https://elibrary.ferc.gov/eLibrary/filelist?accession_number=20220722-5173.

³ *Id.* at 6-7.

⁴ *Id.* at 7.

⁵ *Id.*

⁶ *Id.* (citing *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 72 (D.C. Cir. 2014)).

- 1) The Commission adopted transmission planning and cost allocation reforms in Order No. 1000, including the competition requirement, to allow the Commission to establish just and reasonable transmission rates.
- 2) State ROFR laws are anti-competitive, invade FERC's jurisdiction over interstate and interregional transmission planning/cost allocation and undermine FERC rules and policies on determining just and reasonable transmission rates through competition.
- 3) The ROFR laws are unrelated to States' historical limited jurisdiction over construction siting and permitting.
- 4) As a result, State ROFR laws infringe on the Commission's exclusive duty and ability to establish just and reasonable transmission rates.
- 5) Therefore, the Commission can order MISO to revise Tariff Attachment FF so that MISO does not prohibit transmission competition based on a State preference for the builder of a transmission project.⁷

As a result, the Consumers Alliance asks that FERC "find that MISO's Tariff language in Attachment FF is unjust, unreasonable, and unduly discriminatory or preferential because it automatically requires MISO to assign projects located in States with ROFR laws to incumbent utilities without competitive bidding and solicitation," and that FERC "should order MISO to conduct competitive bidding to the greatest extent possible for regional and interregional projects" in MISO's Long Range Term Transmission Plan (LRTP) effort.⁸

b. MISO's Long Range Transmission Plan

As discussed in the Complaint, the development of MISO's LRTP represents a significant opportunity for new transmission development in MISO North. The LRTP process resulted in the identification of 18 transmission projects in MISO's Midwest Subregion that totals over \$10 billion in investments.⁹ These projects were based on an identification of those "least-regrets transmission projects that will help ensure a reliable, resilient and cost-effective transmission system as the resource mix continues to change and represents the largest and most complex transmission study effort in MISO's history."¹⁰ While looking forward to the next 10-20 years, MISO's planning effort seeks "to identify the transmission investments needed to enable regional delivery of energy."¹¹

Several important changes are occurring across the MISO footprint that are behind MISO's LRTP effort (and related MTEP21 initiative) such as the growth of renewable generation, the retirement of fossil units, and changing system conditions that require moving into emergency conditions more often than

⁷ *Id.* at 42.

⁸ *Id.* at 94.

⁹ "MISO Board Approves \$10.3B in Transmission Projects," Midcontinent Independent System Operator, Inc., July 25, 2022. [https://www.misoenergy.org/about/media-center/miso-board-approves-\\$10.3-in-transmission-projects](https://www.misoenergy.org/about/media-center/miso-board-approves-$10.3-in-transmission-projects).

¹⁰ "MTEP21 Report Addendum: Long Range Transmission Planning Tranche 1," Midcontinent Independent System Operator, Inc., at 1, July 25, 2022. <https://cdn.misoenergy.org/MTEP21%20Addendum-LRTP%20Tranche%201%20Report%20with%20Executive%20Summary625790.pdf>.

¹¹ "MTEP21 Report Addendum: Long Range Transmission Planning Tranche 1 Portfolio Report," Midcontinent Independent System Operator, at 3, July 25, 2022. <https://cdn.misoenergy.org/MTEP21%20Addendum-LRTP%20Tranche%201%20Report%20with%20Executive%20Summary625790.pdf>.

in the past.¹² As stated by MISO, “The objective of LRTP is to provide an orderly and timely transmission expansion plan that supports these primary goals:

- Reliable System – maintain robust and reliable performance in future conditions with greater uncertainty and variability in supply;
- Cost Efficient – enable access to lower-cost energy production;
- Accessible Resources – provide cost-effective solutions allowing the future resource fleet to serve load across the footprint
- Flexible Resources – allow more flexibility in the fuel mix for customer choice.

LRTP is designed to assess the region’s future transmission needs in concert with utility and state plans for future generation resources.”¹³

The 18 projects identified in the LRTP process were identified by looking at a series of forecasts across the Midwest and which projects provided the most benefits, including:

- Congestion and fuel cost savings
- Avoided capital costs of local resource investment
- Avoided future transmission investment
- Reduced resource adequacy requirements
- Avoided risk of load shedding
- Decarbonization.¹⁴

As identified in the image below, the project needs to cover the breadth of the MISO Midwest region.¹⁵

¹² *Id.* at 10.

¹³ *Id.* at 13.

¹⁴ *Id.* at 47.

¹⁵ *Id.* at 22.

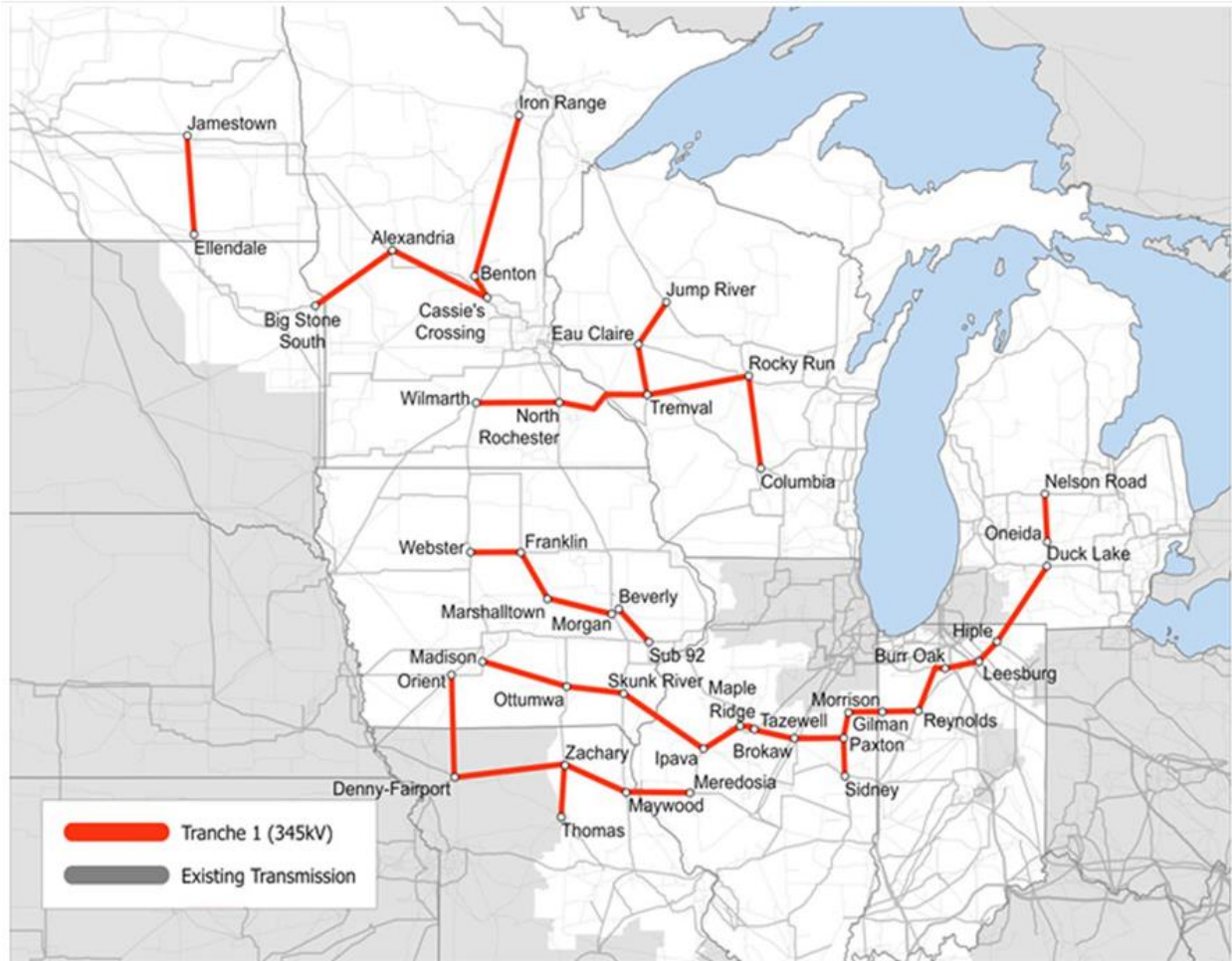


Figure 6-1: L RTP Tranche 1 Transmission Portfolio

c. FERC Transmission Notice of Proposed Rulemaking

On April 21, 2022, the Commission published a Notice of Proposed Rulemaking (NOPR) proposing several modifications to existing FERC authority over transmission.¹⁶ Topics in the NOPR include conducting long-term transmission planning, considering dynamic line ratings and advanced power flow devices in transmission planning; adding requirements to identify potential opportunities to right-size replacement transmission facilities; and allowing transmission providers a federal ROFR for those facilities chosen in a regional transmission plan.¹⁷ In essence, this NOPR recognizes that existing transmission policies have not resulted in the amount of transmission that needs to be constructed to address the system needs of the country. As FERC states in the NOPR, “these proposed reforms would work together to remedy deficiencies in the Commission’s existing regional transmission planning and

¹⁶ *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, Notice of Proposed Rulemaking, 179 FERC ¶ 61,028, Docket No. RM21-17-000, April 21, 2022 (NOPR). <https://www.ferc.gov/media/rm21-17-000>.

¹⁷ “Initial Comments of the R Street Institute Before the Federal Energy Regulatory Commission,” Docket No. RM21-17-000, at 1, Aug. 17, 2022. https://elibrary.ferc.gov/eLibrary/filelist?accession_number=20220817-5207.

cost allocation requirements.”¹⁸ As such, the proposals in the NOPR build on prior FERC orders, notably FERC Order Nos. 888, 890 and 1000.¹⁹

Importantly, for the purpose of this complaint, Order 1000 removed the federal ROFR, but the NOPR proposes to re-install one. Order 1000, in particular, directed incumbent transmission developers, such as monopoly utility companies, to remove ROFR requirements in their Commission-jurisdictional tariffs, “with respect to entirely new transmission facilities selected in a regional transmission plan for purposes of cost allocation.”²⁰ However, shortly after release of Order 1000, several states, such as North Dakota and Minnesota, passed state ROFRs to maintain the ability of the local incumbent transmission provider (and distribution utility) to be the primary provider of transmission.²¹ The NOPR identifies that transmission development has not kept pace with the needs of the system and raises the possibility of recreating a federal NOPR as a solution to increase transmission development.

B. FERC should grant Consumer Alliance’s Complaint

R Street encourages FERC to grant the Consumer Alliance’s Complaint and direct MISO to remove references to state ROFRs in its tariff. While the subject of the Complaint is state ROFRs generally, the LRTP looms large in this conversation and the timing of this complaint. The Consumer Alliance raises numerous jurisdictional and legal arguments supporting their complaint, but the importance of this Complaint is tied to the MISO LRTP Tranche 1 approval. As the Complaint notes, and in reference to the final LRTP Tranche 1 Transmission Portfolio, these projects are going to be built in states with ROFRs. Six of nine states covered by the LRTP Tranche 1 have ROFRs in place, and two other states (Missouri and Wisconsin) had ROFRs proposed in their state legislatures within the past year.²² Furthermore, MISO has stated its intent to do another set of tranches in the future, including in MISO South where one state—

¹⁸ NOPR at P 9. <https://www.ferc.gov/media/rm21-17-000>.

¹⁹ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Pub. Utils.; Recovery of Stranded Costs by Publ. Utils. & Transmitting Utils.*, Order No. 888, 61 FR 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996) (cross-referenced at 75 FERC ¶ 61,080), *order on reh’g*, Order No. 888-A, 62 FR 12274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (cross-referenced at 78 FERC ¶ 61,220), *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part sub nom. Transmission Access Pol’y Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. N. Y. v. FERC*, 535 U.S. 1 (2002); *Preventing Undue Discrimination & Preference in Transmission Serv.*, Order No. 890, 72 FR 12266 (Mar. 15, 2007), 118 FERC ¶ 61,119, *order on reh’g*, Order No. 890-A, 73 FR 2984 (Jan. 16, 2008), 121 FERC ¶ 61,297 (2007), *order on reh’g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh’g*, Order No. 890-C, 74 FR 12540 (Mar. 25, 2009), 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009); *Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, Order No. 1000, 76 FR 49842 (Aug. 11, 2011), 136 FERC ¶ 61,051 (2011), *order on reh’g*, Order No. 1000-A, 77 FR 32184 (May 31, 2012), 139 FERC ¶ 61,132, *order on reh’g and clarification*, Order No. 1000 -B, 141 FERC ¶ 61,044 (2012), *aff’d sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014). <https://www.ferc.gov/sites/default/files/2020-04/OrderNo.1000.pdf>.

²⁰ NOPR at P 338 (citing Order 1000 at P 313).

²¹ Complaint at 27-28.

²² *See, Id.* at 15, 27-28.

Texas—has a ROFR in place. As discussed below, the Texas ROFR has already been used to cancel a transmission project identified by MISO as needed which was to be built by a non-incumbent.²³

At its core, the Complaint seeks to close a gap in the Order 1000 structure related to who can build a transmission line subject to a regional transmission plan. Order 1000 exempted local transmission facilities that are to be constructed by an incumbent transmission provider “to build, own and recover costs for upgrades to its own transmission facilities.”²⁴ Nevertheless, in the same paragraph, FERC itself recognized that reforms, such as elimination of ROFRs in FERC-jurisdictional tariffs, “are necessary in order to eliminate practices that have the potential to undermine the identification and evaluation of more efficient or cost-effective alternatives to regional transmission needs, which in turn can result in rates for Commission-jurisdictional services that are unjust and unreasonable, or otherwise result in undue discrimination by public utility transmission providers.”²⁵ This is, in fact, what a state-level ROFR does and allows. While FERC allowed states to maintain authority “with respect to construction of transmission facilities,” by giving states an inch they instead took the proverbial yard.²⁶

The result of that gap is the passage of state-level ROFR laws that have had the effect of eliminating competition across the MISO footprint, despite the Order 1000 goal of a non-incumbent transmission developer to “have an opportunity comparable to that of an incumbent transmission developer.”²⁷ Instead, MISO has seen a significant lack of competition across the region, and what transmission projects do make it through its process tend to be those that are exempted from Order 1000 and protected by state-level ROFRs: additions to existing incumbent transmission provider lines. The Complaint asks FERC to assert its authority over interstate transmission and direct MISO to remove language in its tariff that defer to those state laws as violating FERC jurisdiction and infringing on the directions of Order 1000 to enable transmission competition.

By allowing states, and the incumbent transmission providers, to limit competition, the types of transmission projects that are needed across the region have failed to show up. Since non-incumbent transmission providers have little hope of making progress through MISO transmission planning process due to state-level ROFRs, and due to their protection from competition, incumbent transmission providers are incentivized to simply add on to their existing facilities. As a result, incumbent transmission providers in the MISO region are allowed to protect their monopoly from competition, despite FERC finding 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.”²⁸ Furthermore, “Federal rights of first refusal exacerbate these problems by ... creating a barrier to entry that discourages nonincumbent transmission

²³ “MISO announces developer for Texas transmission project,” Midcontinent Independent System Operator, Inc., Nov. 27, 2018. <https://www.misoenergy.org/about/media-center/miso-announces-developer-for-texas-transmission-project>.

²⁴ Order 1000 at P 226.

²⁵ *Id.*

²⁶ *Id.* at P 227.

²⁷ *Id.* at P 225. *See, also*, Order 1000-A at P 426 (“The concept is that there should not be a federally established monopoly over the development of an entirely new transmission facility that is selected in a regional transmission plan for purposes of cost allocation to others.”).

²⁸ Order 1000 at P 256.

developers from proposing alternative solutions for consideration at the regional level.”²⁹ FERC correctly identified the peril that ROFRs create for nonincumbents seeking to participate in regional transmission plans and correctly directed the removal of federal ROFRs from tariffs. However, such peril was simply shifted from FERC to the states that passed ROFR laws that allowed the continued protection of monopoly incumbent transmission providers.

This also results in projects that are not necessarily close to new generation projects, like wind and large solar, or large enough transmission facilities to support regional needs. By not being able to build projects closer to the needs of these new resources, the costs to interconnect those projects are higher and are borne by the developer. Additionally, by focusing only on local projects, which fall under a state-level ROFR, the MISO region is not building enough larger projects. This is supported by two sets of data.

- In 2021, MISO saw 77 gigawatts (GW) of new generation seeking interconnection, with 64 GW coming from renewables and solar comprising 44 GW of that total.³⁰
- A joint MISO and Organization of MISO States survey identified potential resource adequacy deficits through summer 2023, primarily in the MISO North and Central regions.³¹

An outcome of these needs was the LRTP Tranche 1 effort to identify transmission projects to help reduce the interconnection queue for new generation projects and to enhance the resource adequacy of MISO North. However, with the presence of state-level ROFRs, the actual projects that were picked pursuant to the LRTP are going to mostly be constructed by the incumbent, monopoly transmission provider at a higher cost than one subject to competitive procurement. In essence, state-level decisions to protect incumbent transmission providers, via a state-level ROFR, are pushing higher costs onto other MISO states. Hence, the Complaint is timely filed before the Commission as the needs of the MISO North area are significant and FERC must ensure that state-level ROFRs do not unfairly limit the opportunities for nonincumbent transmission providers to participate in the construction of these needed lines.

C. State ROFRs hinder transmission competition

In Order 1000, FERC directed the RTO/ISOs to remove ROFR language from their then-existing tariffs as FERC found that ROFRs impeded competition. While FERC directed the removal of ROFR language from incumbent transmission providers’ FERC-jurisdictional tariffs, Order 1000 created a gap allowing states to fill it by passing state-level ROFR laws to protect incumbent transmission providers from the very same competition that FERC sought to enable via Order 1000. By protecting incumbent, monopoly transmission providers, the state-level ROFRs lost the benefits of competition for development of these transmission projects. The Complaint outlines examples of how competition allows for innovation and alternative means for reducing costs that are not otherwise available to incumbents.³² Amongst the ways that competition can lower costs and lead to alternatives is that nonincumbents bear greater risk

²⁹ *Id.* at P 257.

³⁰ “2021 Generator Interconnection Queue applications set new record,” Midcontinent Independent System Operator, Inc., Sept. 15, 2021. <https://www.misoenergy.org/about/media-center/2021-generator-interconnection-queue-applications-set-new-record>.

³¹ “2023 OMS-MISO survey projects adequate reserve margins for MISO South Region,” Midcontinent Independent System Operator, Inc., June 10, 2022. <https://www.misoenergy.org/about/media-center/2023-oms-miso-survey-results>.

³² Complaint at 86-90.

for performance and are willing to express that risk through lower returns on equity (ROE) or acceptance of cost caps.

For example, the first competitive transmission project built in the MISO territory—the Duff-Coleman line—was substantially more cost-effective than other projects and was built by nonincumbents.³³ According to MISO, the project provided more than \$1 billion in estimated benefits, well in excess of its costs and was completed six months ahead of schedule. In its report detailing why MISO selected the winner to build the Duff-Coleman line, MISO noted that amongst the reasons for choosing the winner included a lower ROE for the life of the project than other bidders and “one of the strongest cost caps.”³⁴ In other words, the winner of the bidding process had greater flexibility in making the case and a willingness to bear more risks in order to win the competition. A state-level ROFR, on the other hand, ensures that the incumbent transmission provider does not have to accept less than their authorized ROE, or even agree to a cost cap. As a result, by eliminating competition, state-level ROFR laws do not exert downward pressure on costs; instead, they keep costs higher than they could be if there was competition.

FERC has a long history of promoting competition in RTO markets, starting with Order 888. Subsequent orders, such as Orders 890 and 1000, were focused on reducing undue discrimination and lowering barriers to entry for transmission providers. In other contexts, FERC also has focused on eliminating barriers to entry and encouraging new entrants and innovation into wholesale markets. For example, Order 745 notes that:

...effective wholesale competition protects customers by, among other things, providing more supply options, encouraging new entry and innovation, and spurring deployment of new technologies. Improving the competitiveness of organized wholesale energy markets is therefore integral to the Commission fulfilling its statutory mandate under the [Federal Power Act] to ensure supplies of electric energy at just, reasonable, and not unduly discriminatory or preferential rates.³⁵

In Order 841, related to enabling energy storage to participate in wholesale markets, FERC found that barriers to entry for energy storage product hinder competition:

...adversely affect competition in the RTO/ISO markets by limiting the participation of resources that are technically capable of providing services in those markets. Moreover, these barriers reduce competition and market efficiency by inhibiting developers’ incentives to design their electric storage resources to provide all capacity, energy, and ancillary services that these resources could otherwise provide.³⁶

³³ “MISO first competitive transmission project completed,” Midcontinent Independent System Operator, Inc., June 11, 2020. <https://www.misoenergy.org/about/media-center/miso-first-competitive-transmission-project-completed>.

³⁴ “Selection Report: Duff-Coleman EHV 345 kV Competitive Transmission Project,” Midcontinent Independent System Operator, Inc., Dec. 20, 2016, at 36. <https://cdn.misoenergy.org/Duff-Coleman%20EHV%20345kv%20Selection%20Report82339.pdf>.

³⁵ *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, 134 FERC ¶ 61,187, at P 8 (2011), *order on reh’g and clarification*, Order No. 745-A, 137 FERC ¶ 61,215 (2011), *reh’g denied*, Order No. 745-B, 138 FERC ¶ 61,148 (2012), *vacated sub nom. Elec. Power Supply Ass’n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014), *rev’d & remanded sub nom. FERC v. EPSA*, 577 U.S. ___, 136 S. Ct. 760 (2015). <https://www.ferc.gov/sites/default/files/2020-06/Order-745.pdf>.

³⁶ *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 841, 162 FERC ¶ 61,127 at P 20 (2018), *order on reh’g*, Order No. 841-A, 167 FERC ¶

These orders, issued since Order 1000, show FERC's commitment to enabling competition in organized markets. FERC should apply the same rationale in Orders 745 and 841 to the complaint in this proceeding. State-level ROFRs adversely affect competition which impacts costs in organized markets.

i. Brattle Report

As detailed in the Complaint, the Brattle Group has completed several studies that consider the effects of competitive transmission projects.³⁷ In its analysis, the Brattle Group found that cost savings in the MISO territory from competitively developed projects "could be as high as 28%" compared to non-competitively developed projects.³⁸ According to the Brattle report, "the cost savings reflected in the selected competitive proposals can be attributed to a wide range of innovative approaches to transmission development," such as "using new technologies for conductors, tower type, materials, and foundations; optimized routing to reduce permitting costs; innovative contracting; [and] cost-control mechanisms."³⁹ However, due to Order 1000's carve-out for local reliability projects, "MISO only applies its competitive process to multi-value projects that are above \$20 million and 100 kV and market efficiency projects that are above \$5 million and 345 kV," which "has greatly limited the scope of MISO's competitive process given that reliability projects account for the overwhelming majority of MISO-planned and approved transmission investments."⁴⁰ In essence, state-level ROFRs have allowed states and incumbent transmission providers to exploit the gap created in Order 1000 regarding the types of projects not covered by Order 1000. According to Brattle, if there were greater amounts of competition for transmission, customers would save approximately \$8 billion.⁴¹ Put another way, "using competitive forces to stimulate innovation and reduce the costs of necessary investments both increases opportunities for transmission developers while providing value to customers."⁴²

ii. Hartburg-Sabine Junction Project

An example of how a state-level ROFR affects costs, project feasibility and protects incumbent transmission providers can be found in MISO South and the Hartburg-Sabine Junction project. In 2018, MISO awarded a contract to a nonincumbent transmission provider to build a new 500 kilovolt (kV) transmission line in Texas to address economic congestion in that region.⁴³ This project was to cost \$115 million in the construction of five new lines and a new substation and was "the best overall balance of cost and value."⁴⁴ In its selection report for the project, MISO found that the winner's proposal was \$6.5 million below the median cost estimate and \$11 million below the median annual transmission revenue

61,154 (2019), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 964 F.3d 1177 (D.C. Cir. 2020). <https://www.ferc.gov/media/order-no-841>.

³⁷ Complaint at 88. *See also*, Complaint, Attachments B and G.

³⁸ Complaint Attachment B at 9.

³⁹ *Id.* at 10

⁴⁰ *Id.* at 20-21.

⁴¹ *Id.* at 1.

⁴² *Id.*

⁴³ "MISO announces developer for Texas transmission project." <https://www.misoenergy.org/about/media-center/miso-announces-developer-for-texas-transmission-project>.

⁴⁴ *Id.*

requirement estimate.⁴⁵ The project also included a cost cap and a lower ROE.⁴⁶ As described by MISO, the winner's "multiple categories of cost caps and cost containment measures increase cost certainty, and convey substantial benefits to ratepayers over time."⁴⁷ Overall, the winning project proposal carried an estimated benefit-to-cost ratio of 2.20, much higher than MISO's initial 1.35 estimate for the project.⁴⁸

However, in 2019, Texas passed a ROFR law allowing Entergy Texas, the incumbent, monopoly transmission provider, to take over the project from the nonincumbent awardee.⁴⁹ With the incumbent now in control of the project, Entergy Texas sought alternatives to the reliability needs in that region by building generation via a competitive generation solicitation, which it won, and building numerous other local transmission projects of limited scope and benefits. One of the generation projects, the Montgomery County Power Station, cost nearly \$1 billion.⁵⁰ More broadly, Entergy Texas intends to spend "more than \$2 billion in new generation, transmission and distribution upgrades."⁵¹

As a result of Entergy Texas' actions, MISO determined that the new generation facilities and the piecemeal transmission facilities, constructed by Entergy Texas, reduced the benefits of the Hartburg-Sabine Junction transmission project from 2.20 benefit-to-cost ratio to 0.05 and the conclusion that the project "no longer provides any meaningful production cost benefits."⁵²

What this example shows is that a state-level ROFR resulted in the cancellation of a \$115 million transmission project and in exchange, Entergy Texas customers are now funding more than \$2 billion in spending by the utility. This example also shows that the impacts of state-level ROFRs are endemic throughout the MISO footprint, and that while the immediate need for FERC action, consistent with the requests of the Consumers Alliance, is focused on the LRTP Tranche 1 projects, this also will have an impact in MISO South.

⁴⁵ "Selection Report: Hartburg-Sabine Junction 500 kV Competitive Transmission Project," Midcontinent Independent System Operator, at 5-6. (Nov.27, 2018). <https://cdn.misoenergy.org/Hartburg-Sabine%20Junction%20500%20kV%20Selection%20Report296754.pdf>

⁴⁶ *Id.* at 6.

⁴⁷ *Id.* at 21.

⁴⁸ *Id.*

⁴⁹ On Aug. 30, 2022, the U.S. 5th Circuit Court of Appeals issued an opinion in *NextEra v. Lake* declaring the Texas ROFR statute violated the dormant Commerce Clause of the U.S. Constitution. <https://cases.justia.com/federal/appellate-courts/ca5/20-50160/20-50160-2022-08-30.pdf>. This is the second opinion issued by an appellate court on the constitutionality of a state-level ROFR; the other decision, from the 8th Circuit in *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018 (8th Cir. 2020), *cert denied*, No. 20-641 (March 1, 2021), upheld a state-level ROFR from the state of Minnesota. The 5th Circuit appears to disagree with the conclusion reached by the 8th Circuit panel. *See, NextEra*, slip op at 25-26.

⁵⁰ "Entergy breaks ground on 993MW Montgomery County Power Station in Texas," NS Energy, Feb. 18, 2019. <https://www.nsenergybusiness.com/news/montgomery-county-power-station-news/>

⁵¹ "A Tale of Two Cities' in the Energy [sic] Texas Region," Entergy, July 7, 2021. <https://goentergy.com/a-tale-of-two-cities-in-the-energy-texas-region>.

⁵² "MTEP17 Hartburg-Sabine Junction Market Efficiency Project," Midcontinent Independent System Operator, Inc. South TSTF, at 2, 6, July 20, 2022. <https://cdn.misoenergy.org/20220720%20STSTF%20Item%2002%20MTEP17%20-%20Hartburg%20-%20Sabine%20Junction%20Market%20Efficiency%20Project625679.pdf>.

In its opinion finding the Texas ROFR in violation of the dormant Commerce Clause, the 5th Circuit explained that “the only way a company without a Texas presence can build, operate, or own transmission lines is to buy a utility that already owns a power facility in the state.”⁵³ The 5th Circuit’s opinion details how Texas’ ROFR discriminates against nonincumbents and how that law protects incumbents against competition by noting related applications of dormant Commerce Clause from Supreme Court decisions in other industries, including the sales of alcohol and milk. As stated by the 5th Circuit, “What is true for alcohol and milk under the dormant Commerce Clause must be true for electricity transmission.”⁵⁴ Finally, the 5th Circuit rebuffs arguments that a ROFR provides assurances and protections that transmission will be built safely and reliably by concluding that a ROFR “may end up justifying the discrimination against out-of-state interests, but it does not avoid the conclusion that the law discriminates. ... Limiting competition based on the existence or extent of a business’s local foothold is the protectionism that the Commerce Clause guards against.”⁵⁵

FERC can address the discrimination enabled and protected by state-level ROFRs, as this example from Texas shows, by granting the Consumer Alliance’s complaint and direct MISO to remove references to state-level ROFRs in its transmission tariff.

D. FERC can act while the NOPR is pending

The issues raised by the Complaint are distinct from those being addressed in the NOPR. As such, FERC does not need to wait until completion of the NOPR or decide that these issues are best left to the NOPR. Rather, the Complaint focuses on a specific issue—state-level ROFRs which fall outside the context of the NOPR. In other words, FERC can decide, in this proceeding, that state-level ROFRs fall afoul of FERC jurisdiction and that MISO should remove references to state-level ROFRs. The question of whether state-level ROFRs are a violation of FERC authority can move independently of whether or not FERC should re-impose a federal ROFR. While R Street opposes a federal ROFR as well, FERC can find that state-level ROFRs unlawfully infringe on its authority and, subsequently, could decide to resurrect a federal ROFR in the NOPR.⁵⁶

Indeed, as shown in the Complaint, with the release of the LRTP Tranche 1 projects, time is of the essence to ensure that state-level ROFRs do not interfere or infringe on the competitive process, as laid out in Order 1000, for these new transmission projects. State-level ROFRs pose a distinct statutory and jurisdictional challenge from the broader conversation occurring in the NOPR regarding the federal ROFR. State-level ROFRs have increased costs to customers by protecting incumbent transmission providers from competition, in contravention of Order 1000, and has resulted in limited amount of competition from nonincumbents. As FERC has noted since the passage of Order 888, competition is important to ensure access to markets, just and reasonable prices, and non-discriminatory access to markets by competitors. Whichever way FERC rules in the NOPR should have no impact on whether a state-level ROFR unduly intrudes into FERC jurisdiction and unduly discriminates against nonincumbents.

⁵³ *NextEra*, slip op. at 9.

⁵⁴ *Id.* at slip op. 28.

⁵⁵ *Id.* at slip op. 30.

⁵⁶ *See*, R Street Comments, *supra* fn. 17.

III. Conclusion

R Street supports the Consumers Alliance Complaint filed in this proceeding seeking FERC to direct MISO to modify its tariff to remove references to state-level ROFRs. The result of these ROFRs has been a reduction in competition and innovation and increases in costs, which are then borne by ratepayers. There is substantial need for the MISO region to construct new transmission lines, as identified in the MISO LRTP Tranche 1 project, but if these lines are to be built without the benefit of competitive pressure and nonincumbents, then it will be the customers that pay for those extra costs.

Respectfully submitted,

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Dated at Washington, D.C.
This 1st Day of September 2022

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the foregoing pleading has this day been served in a manner permitted by Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010) on each person whose name appears on the Official Service List compiled by the Secretary in this proceeding.

/s/ Christopher Villarreal
Christopher Villarreal

Dated at Washington, D.C.
This 1st Day of September 2022.