

February 5, 2024

The Honorable Willie L. Phillips, Chairman  
The Honorable Allison Clements, Commissioner  
The Honorable Mark C. Christie, Commissioner  
Federal Energy Regulatory Commission  
888 First Street, NE  
Washington, DC 20426

*Submitted via FERC's electronic filing system*

**Re: Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection, Docket No. RM21-17-000**

Dear Chairman Phillips, Commissioner Clements, and Commissioner Christie,

It is well established by industry, academia, and public policy energy experts that our nation needs increased transmission development and that we need it now.<sup>1</sup> Although numerous sophisticated power system models identify substantial benefits of grid expansion,<sup>2</sup> transmission planning processes are failing to build the clean, affordable, and reliable energy infrastructure that American consumers and businesses deserve.<sup>3</sup> A final rule reflective of long-term holistic benefits modeling would go far in addressing the Commission's stated intent to "remedy deficiencies" with existing regional transmission planning.<sup>4</sup>

The undersigned commends the Commission for its thoughtful and thorough proposal and encourages its swift finalization. However, there are serious considerations regarding the Commission's proposed amendments relative to rights of first refusal ("ROFR") that, at the very least, the Commission should address separately and apart from the other provisions of the Proposed Rule.<sup>5</sup>

*Consideration of a Developing Legal Landscape.*

Recent court decisions underscore the obvious problem with rights of first refusal – primarily, their tendency to stifle competition and innovation in the power sector and transmission line

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<sup>1</sup> The undersigned's support for transmission development is not to the exclusion of high priority support for prioritizing distributed energy resources and ensuring responsible transmission siting review processes that mitigate environmental and community harms.

<sup>2</sup> United States Department of Energy, "National Transmission Needs Study," October 2023 (report dated Oct. 2023; notice of availability published in Fed. Reg. Nov. 13, 2023) ("DOE Needs Study"), [https://www.energy.gov/sites/default/files/2023-12/National%20Transmission%20Needs%20Study%20-%20Final\\_2023.12.1.pdf](https://www.energy.gov/sites/default/files/2023-12/National%20Transmission%20Needs%20Study%20-%20Final_2023.12.1.pdf).

<sup>3</sup> See e.g., Liza Reed et. al., *How Are We Going to Build All That Clean Energy Infrastructure?* (Niskanen Center and Clean Air Task Force, August 2021) ("Niskanen Infrastructure Report") (discussing a Princeton study's draft findings on the scale of needed change) at 6–9, [https://www.niskanencenter.org/wp-content/uploads/2021/08/CATF\\_Niskanen\\_CleanEnergyInfrastructure\\_Report.pdf](https://www.niskanencenter.org/wp-content/uploads/2021/08/CATF_Niskanen_CleanEnergyInfrastructure_Report.pdf); DOE Needs Study at 21–31.

<sup>4</sup> *Notice of Proposed Rulemaking: Building for the Future through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, 179 FERC ¶ 61,028 at P 1 (Apr. 21, 2022) ("NOPR" or "Proposed Rule").

<sup>5</sup> Comment of the Harvard Electricity Law Initiative at 7–10, Docket No. RM21-17-000 (filed Aug. 17, 2022) (suggesting the Commission consider construction work in progress and ROFR as part of a separate proceeding about transmission incentives).

development. One pivotal case recently occurred in Texas, where the Fifth U.S. Circuit Court of Appeals found that the state's law excluding non-incumbent developers from transmission development likely violates constitutional protections of interstate commerce. The court analogized: “[i]magine if Texas—a state that prides itself on promoting free enterprise—passed a law saying that only those with existing oil wells in the state could drill new wells. It would be hard to believe.”<sup>6</sup> In another recent case, the Iowa Supreme Court said it was “not surprised the ROFR lacked enough votes to pass [the state legislature] without logrolling. The provision is quintessentially crony capitalism. This rent-seeking, protectionist legislation is anticompetitive.”<sup>7</sup>

While Commission-approved ROFRs would not trip over the same legal hurdles as the state ROFRs at issue, courts’ skepticism about ROFRs should give the Commission pause. From a court’s neutral perspective, ROFRs are a handout to entrenched firms. Indeed, when courts reviewed challenges to Commission orders finding that ROFRs are contrary to the public interest, courts unanimously sided with the Commission and against incumbents.<sup>8</sup> By prioritizing competition, the Commission can contribute to more economical transmission development and increase the buy-in of those paying for it and their government representatives.

*The Proposed Conditional Right of First Refusal Will Not Further the Commission's Goals.*

The Proposed Rule suggests granting a federal ROFR to incumbent transmission providers conditioned on joint ownership of facilities (the “Conditional ROFR”)<sup>9</sup>. The fact is that any no-bid monopoly, conditional or otherwise, precludes consumers from gaining the benefit of non-incumbent transmission developers bringing innovative ideas to the planning process and competitive pressures applied to incumbent developers.

A central issue of the NOPR is whether non-incumbent transmission providers should be excluded from independently bidding on regional cost-allocation projects, which are typically higher voltage and involve more expertise than more local lower voltage projects.

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<sup>6</sup> *NextEra Energy Cap. Holdings, Inc. v. Lake*, 48 F.4th 306, 309 (5th Cir. 2022), cert. denied sub nom. *Lake v. NextEra Energy*, No. 22-601, 2023 WL 8531876 (U.S. Dec. 11, 2023). At least one court decision took an opposing view. *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1031 (8th Cir. 2020) (upholding a Minnesota ROFR law), cert. denied, 141 S.Ct. 1510 (2021). There is a bill currently pending in Minnesota to repeal the state’s ROFR law. See S.F. 1456, 93rd Legislature (Minnesota, 2024), <https://www.revisor.mn.gov/bills/sf1456>. Relatedly in Illinois, the Governor issued an amendatory veto to ROFR language inserted into the House General Assembly omnibus energy bill, stating that the ROFR “will eliminate competition and raise costs for ratepayers by giving incumbent utility providers in the MISO region a monopoly over new transmission lines.” See Senate Amendment 4 to H.B. 3445, 103rd General Assembly (Illinois, 2023), <https://www.ilga.gov/legislation/fulltext.asp?DocName=10300HB3445sam004&GA=103&LegID=148612&SessionId=112&SpecSess=0&DocTypeId=HB&DocNum=3445&GAID=17&Session=>; see also “Governor’s Message,” 103rd General Assembly (Illinois, Aug. 16, 2023) (statement of Governor JB Pritzker before the Illinois House), <https://www.ilga.gov/legislation/fulltext.asp?DocName=10300HB3445gms&GA=103&LegID=148612&SessionId=112&SpecSess=0&DocTypeId=HB&DocNum=3445&GAID=17&Session=>.

<sup>7</sup> *LS Power Midcontinent, LLC v. State*, 988 N.W.2d 316, 338 (Iowa Mar. 24, 2023), reh’g denied (Apr. 26, 2023).

<sup>8</sup> See, e.g. *Oklahoma Gas and Electric Co. v. FERC*, 827 F.3d 75 (D.C. Cir. 2016); *MISO Transmission Owners, et al. v. FERC*, 819 F.3d 329 (7th Cir. 2016), reh’g denied (Jun. 16, 2016); *Emera Maine v. FERC*, 854 F.3d 662 (D.C. Cir. 2017); see also *American Transmission Systems Inc., v. FERC*, 2016 WL 3615443 (D.C. Cir. 2016, unpublished) (dismissing challenge from providers against FERC on procedural grounds).

<sup>9</sup> NOPR at P 358.

The ability of non-incumbent transmission providers to take on more complex, higher voltage projects can be seen in data from Grid Strategies and Americans for a Clean Energy Grid's recent inventory of “ready-to-go”/under construction high voltage transmission projects.<sup>10</sup> Twenty-eight projects in this inventory are active, onshore projects over 25 miles in length.<sup>11</sup> Non-incumbent transmission providers bidding without an incumbent utility partner won over 50 percent of these projects.<sup>12</sup> Compared to the entire universe of projects, these projects are disproportionately more complex: They constitute nine of the ten high voltage direct current (“HVDC”) projects; three of the four buried projects; and eleven of the sixteen multi-state/multi-country projects.

Non-incumbent expertise goes beyond the *design and construction* of transmission projects. For example, voltage-sourced converters (“VSC”) capability in HVDC lines is important for onshore and offshore renewables integration into system operations. As one NOPR commenter noted, “No incumbent utility in the country has HVDC VSC operating capabilities today.”<sup>13</sup> The final rule should not exclude developers from regional planning processes who have valuable development and operation experience and expertise.

While the Commission acknowledges competition to develop transmission lines has a sound theoretical basis,<sup>14</sup> it argues that in practice, the absence of a ROFR has presented “perverse investment incentives” resulting in overinvestment of transmission in incumbents’ local service territories and underinvestment in transmission benefiting a wider geographic area.<sup>15</sup> Thus, the Commission proposes a conditional ROFR.<sup>16</sup> However, independent research and consumer groups have found that the Commission’s valid concern incorrectly blames competition, whereas the fault rests with Order 1000 exemptions and a lack of proactive, independent planning.<sup>17</sup>

Reforms that address the “perverse incentives” without resorting to an anticompetitive ROFR include the following:

- Long-term scenario-based regional transmission planning – which we strongly support – may reduce “perverse investment incentives” by making it more difficult for incumbent transmission providers to justify transmission buildout typically exempt from competitive procurement.<sup>18</sup> This falls squarely in the scope of the pending rulemaking.

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<sup>10</sup> Zachary Zimmerman, Michael Goggin, and Rob Gramlich, *Ready-To-Go Transmission Projects 2023: Progress and Status Since 2021* (Grid Strategies, with support from Americans for a Clean Energy Grid, September 2023), [https://cleanenergygrid.org/wp-content/uploads/2023/09/ACEG\\_Transmission-Projects-Ready-To-Go\\_September-2023.pdf](https://cleanenergygrid.org/wp-content/uploads/2023/09/ACEG_Transmission-Projects-Ready-To-Go_September-2023.pdf).

<sup>11</sup> Projects were classified as non-incumbent, IOU, or IOU/non-incumbent joint ventures. Projects with no identifiable developer were not included in the statistics.

<sup>12</sup> The precise percentage is 54% (or, 15 out of 28 projects).

<sup>13</sup> Comments of NextEra at 34, Docket No. RM21-17-000 (Aug. 17, 2022).

<sup>14</sup> NOPR at P 353.

<sup>15</sup> NOPR at P 350.

<sup>16</sup> NOPR at 287–300.

<sup>17</sup> Jennifer Chen and Devin Hartman, *Transmission Reform Strategy from a Customer Perspective: Optimizing Net Benefits and Procedural Vehicles* (R Street Institute, May 2022), <http://www.rstreet.org/research/transmission-reform-strategy-from-a-customer-perspective-optimizing-net-benefits-and-procedural-vehicles>.

<sup>18</sup> *E.g.*, Such as immediate-need reliability projects and upgrades to existing facilities. Comments of R Street at 5, Docket No. RM21-17-000 (filed Sept. 19, 2022).

- The Commission can better enforce *existing* Orders.<sup>19</sup> To the extent the Commission seeks to do so outside this proceeding, one option is to act in AD22-8-000 in accordance with customer groups seeking a reduction in Order 1000 exemptions.<sup>20</sup> Another option is to grant relief to consumer complaints aimed at fixing incumbents' perverse incentives.<sup>21</sup>
- And while outside the scope of this Proposed Rulemaking, the Commission could establish new institutions to address these perverse incentives, such as an Independent Transmission Planner ("ITP") and an Independent Transmission Monitor ("ITM").<sup>22</sup> The Commission can accomplish this in a new proceeding or continuation of current proceedings, especially AD21-15-000 and AD22-8-000.

### *Conclusion*

The Commission's proposed rule represents a commendable step toward reinforcing transmission planning, cost allocation, and support for grid-enhancing technology. However, introducing the conditional ROFR raises significant concerns, particularly considering comments filed in response to the NOPR and recent judicial rulings highlighting the detrimental impact of ROFRs on competition and consumer interests. We urge the Commission to act judiciously in ensuring that a final rule reflects the principles of competition and transparency, and at the very least, consider the potential impacts of its proposed conditional ROFR separate and apart from the remainder of the Rule in a separate proceeding.

Respectfully submitted,

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<sup>19</sup> Comments of NextEra at 39, Docket No. RM21-17-000 (filed Nov. 30, 2021); Comments of Electricity Transmission Competition Coalition at 11, Docket No. RM21-17-000 (filed Nov. 30, 2021); Comments of LS Power at 85–86, Docket No. RM21-17-000 (filed Nov. 30, 2021).

<sup>20</sup> See, e.g., Comments of Electricity Customer Alliance, Docket No. AD22-8-000 (filed Mar. 23, 2023), [https://elibrary.ferc.gov/eLibrary/filelist?accession\\_number=20230323-5062](https://elibrary.ferc.gov/eLibrary/filelist?accession_number=20230323-5062).

<sup>21</sup> See, e.g., *The Office of the Ohio Consumers' Counsel v. PJM Interconnection, L.L.C.*, Complaint of the Office of the Ohio Consumers' Counsel, Docket No. EL23-105-000 (filed Sept. 28, 2023), [https://elibrary.ferc.gov/eLibrary/filelist?accession\\_number=20230928-5134](https://elibrary.ferc.gov/eLibrary/filelist?accession_number=20230928-5134).

<sup>22</sup> The ITP would conduct transmission planning and cost allocation, generator interconnection studies, competitive solicitation and coordination with other regions and the ITM would oversee the ITP's compliance with these stated duties. Comments of Electricity Transmission Competition Coalition at 38, Docket No. RM21-17-000 (filed Nov. 30, 2021); Comments of Harvard Electricity Law Initiative at 57–62, Docket No. RM21-17-000 (filed Oct. 21, 2021) (Independent Transmission Monitor); Comments of State Agencies at 33–37, Docket No. RM21-17-000 (filed Aug. 17, 2022).

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