

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Building for the Future through Electric)
Regional Transmission Planning and) Docket No. RM21-17
Cost Allocation and Generator)
Interconnection)

Comment of the Harvard Electricity Law Initiative¹

The WIRES-filed report discusses the central issue plaguing transmission planning: “institutions and their constraints and incentives.”² The report provides evidence that institutional barriers may be impeding effective transmission development. Unfortunately, the WIRES-filed report is too late for consideration in this rulemaking.

The report documents how institutions are not aligned with beneficial planning outcomes. The report shows that transmission owners may rationally withhold planning-relevant information from regional planners and are more likely to collaborate on planning when they have monopolies.³ The report also says that RTOs may be too cautious in how they share information with transmission owners and developers and explains why RTOs may be ill-suited to run developer selection processes.⁴ These issues all warrant attention. The report may be describing undue discrimination.

The Commission is a utility regulator with “broad power to stamp out undue discrimination.”⁵ For nearly 30 years, it has been using that authority to address information asymmetry and secrecy and monopolists’ incentives to unduly discriminate. The WIRES-filed report raises issues similar to those that the Commission has addressed in other proceedings across both the power and gas industries. Yet according to WIRES’ cover letter, these are unsolvable issues, and the appropriate regulatory response is to limit

¹ The Harvard Electricity Law Initiative is an independent organization based at Harvard Law School’s Environmental & Energy Law Program. These comments do not represent the views of Harvard University or Harvard Law School.

² WIRES-filed Report at 2.

³ *Id.* at 33–34, 41–43.

⁴ *Id.* at 44–45.

⁵ *Associated Gas Distributors v. FERC*, 24 F.2d 981, 1001 (D.C. Cir. 1987).

cost-of-service transmission rates to several dozen incumbent firms. So-called rights-of-first-refusal (ROFRs) may be convenient for WIRES members but not for consumers. The Commission has other options for ensuring that transmission planning prioritizes consumer benefits over the interests of market participants who have incentives and opportunities to tilt planning in their favor.

I. WIRES Is Too Late

October 12, 2021 was the deadline for initial comments on the Commission's transmission ANOPR. In their filings, numerous utilities and utility trade groups urged the Commission to restore ROFRs in order to encourage "collaboration and cooperation" among transmission owners and RTOs.⁶ Those filings repeated the industry's "collaboration and cooperation" talking point without tying it to consumer benefits. Now, almost three years after the ANOPR's publication, WIRES is attempting to bolster its members' claims about intra-industry collaboration. Obviously, it's too late for that.

There is very little information in the WIRES-filed report that was unavailable in 2021 or by the August 2022 NOPR comment deadline. Of the report's 29 "historical examples of successful transmission development,"⁷ 26 concluded planning activities prior to 2020.⁸ The report also relies on filings in this docket, but most of the report's citations to this docket are to filings from WIRES own members. WIRES could have discussed these matters with its members at any time.

II. WIRES Undervalues the Innovative Potential of Competition and Provides Evidence of Utility Conduct that May Be Unduly Discriminatory

To set up its discussion about collaborative transmission planning, the WIRES-filed report reviews Commission actions under FPA section 202 that encourage coordination

⁶ See Indicated PJM Transmission Owners at pp. 4, 29, 30, and 31; MISO Transmission Owners at p. 26; Edison Electric Institute at pp. 6, 21; Exelon at pp. 26, 29; PPL Electric Utilities Corporation at pp. 4, 22; International Transmission Company at p. 18.

⁷ WIRES-filed Report at 3.

⁸ The only exceptions are MISO Long Range Transmission Plan Tranche 1, Grid North Partner Transmission Project Upgrades, and Eastern Connecticut Needs Assessment Reliability Upgrades.

across the power sector. By focusing on section 202, the report avoids discussion of superseding Commission authority granted by section 206. For instance, the Commission's longstanding policy was to promote utility power pools in furtherance of its section 202(a) mandate.⁹ In Order No. 888, the Commission reversed course and found utility power pool agreements unduly discriminatory.¹⁰ In light of its new approach to detecting undue discrimination, the Commission determined it had to review "discriminatory practices that once did not constitute undue discrimination."¹¹ As a result, the Commission discarded filed agreements that had enabled utility industry collaboration.

Order No. 888 and subsequent Commission orders about transmission operations and planning are premised on findings about transmission owners' market power and their incentives to discriminate. Starting with the Order No. 888 NOPR, the Commission understood that "the single greatest impediment to competition" was utilities' "market power through control of transmission."¹² The WIRES-filed report overlooks the role of section 206 and therefore misses that restraining transmission owner market power has been essential for realizing industry coordination that benefits consumers. While

⁹ See, e.g., *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414 (1952) ("[T]he Commission found here ready-made by prior contractual arrangements a regional coordination of power facilities of precisely the type which the Commission is authorized to require under s 202."); Federal Power Commission, 1964 National Power Survey at 1 ("In short, the Survey was conducted by the Commission as the most effective means of carrying out the provisions of section 202(a)"); *Alabama Electric Co-Op v. Alabama Power*, 38 FPC 962, 973 (1967) ("We are directing our staff, in accordance with the philosophy expressed in Section 202(a) . . . to work together with [utilities omitted] through informal conferences, and where necessary to make independent studies and recommendations for the purpose of encouraging the development of coordination between the several systems . . ."); *Reliability and Adequacy of Electric Service – Reporting of Data – Participation of Regulatory Personnel in Regional Councils*, 41 FPC 846 (1969) (explaining that its actions are undertaken pursuant to section 202(a) and defining two areas where voluntary coordination can be improved). The Commission updated these so-called 383 orders several times. See also FERC, Office of Electric Power Regulation, *Power Pooling in the United States* (Dec. 1981) (detailing existing power pools and promoting their benefits).

¹⁰ Order No. 888, 61 Fed. Reg. 21,540, at p. 21,568 (May 10, 1996).

¹¹ Order No. 888 at p. 21,568; Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997) ("Utility practices that were acceptable in past years, if permitted to continue, will smother the fledgling competition in electricity markets."); *id.* at 12,296 ("Given the . . . efficiencies that could be gained through encouragement of coordination and pooling transactions, the Commission was willing to accept utility practices that provided third parties with transmission services that were distinctly inferior to the utility's own uses of the transmission system.").

¹² Proposed Rule, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities, 60 Fed. Reg. 17,662, at p. 17,664 (Apr. 7, 1995).

collaboration is an important goal of Commission policy, it must yield to the prohibition on undue discrimination.

Commission orders on transmission planning illustrate how utility collaboration is limited by the Commission's duty to protect consumers from undue discrimination. In December 1999, the Commission issued its RTO guidelines (Order No. 2000) under section 202(a). The WIRES-filed report emphasizes the benefits of regional coordination the Commission hoped to realize through RTOs,¹³ but it ignores that the primary justification for RTOs was to separate utilities from transmission operations and planning in order to limit the potential for undue discrimination.¹⁴ When it reviewed RTO proposals, the Commission prioritized policing undue discrimination over the industry's voluntary efforts to coordinate by repeatedly rejecting utility proposals to control regional planning,¹⁵ emphasizing the need for meaningful stakeholder involvement,¹⁶ and even declining to grant ROFRs.¹⁷

In Order No. 890, the Commission finally incorporated transmission planning into its Open Access transmission rules because it could not "rely on the self-interest of transmission providers to expand the grid in a nondiscriminatory manner."¹⁸ The Commission's goal was to limit transmission owners' "discretion" in transmission planning

¹³ WIRES-filed Report at 6–7.

¹⁴ See, e.g., Notice of Proposed Rulemaking, *Regional Transmission Organizations*, 64 Fed. Reg. 31,390, at 31,402 (1999) (finding that there remain "impediments to competition caused by continued discriminatory conduct by transmission owners"); Order No. 2000, 89 FERC ¶ 61,285, at pp. 16–17 (1999) (summarizing NOPR's findings on undue discrimination); *id.* at p. 27–29 ("we do conclude that opportunities for undue discrimination continue to exist"); Order No. 2000-A, 65 Fed. Reg. 12,088, at 12,091 (2000) (stating that RTOs can "reduce opportunities for unduly discriminatory conduct" by transmission owners).

¹⁵ See, e.g., *PJM Interconnection*, 96 FERC ¶ 61,061, at p. 61,240 (2001); *NYISO*, 96 FERC ¶ 61,059, at p. 61,203 (2001); *Southwest Power Pool*, 106 FERC ¶ 61,110 at P 188 (2004).

¹⁶ *PJM Interconnection*, 96 FERC ¶ 61,061, at p. 61,240 (2001); *Alliance Cos.*, 96 FERC ¶ 61,052, at p. 61,144 (2001); *Translink Transmission Co.*, 101 FERC ¶ 61,140 at P 58 (2002); *ISO New England*, 106 FERC ¶ 61,280 at P 213 (2004).

¹⁷ *PJM Interconnection*, 96 FERC ¶ 61,061, at p. 61,241 (2001); *Carolina Power & Light Co.*, 94 FERC ¶ 61,273, at p. 62,010 (2001), *order on reh'g*, 95 FERC ¶ 61,282, at p. 61,996 (2001); *Cleco Power*, 101 FERC ¶ 61,008 at P 117 (2002); *Arizona Pub. Serv. Co.*, 101 FERC ¶ 61,033 at P 212 (2002), *order on reh'g*, 101 FERC ¶ 61,350 at PP 65–66 (2002); *Southwest Power Pool*, 111 FERC ¶ 61,118 at P 79 (2005), *order on reh'g*, 112 FERC ¶ 61,319 at P 48 (2005).

¹⁸ Order No. 890, Preventing Undue Discrimination and Preference in Transmission Service, 118 FERC ¶ 61,119 at P 422 (2007); *id.* at P 524 ("It is not in the economic self-interest of transmission providers to expand the grid to permit access to competing sources of supply.").

by requiring that tariffs include planning provisions “sufficient to prevent undue discrimination and transparent enough to detect any remaining instances of undue discrimination.”¹⁹ Four years later, the Commission held that incumbent monopolies on cost-of-service rates were unduly discriminatory²⁰ and abolished ROFRs. It found that those unduly discriminatory limits to transmission development might “result in the failure to consider more efficient or cost-effective solutions” in regional transmission plans.²¹

The WIRES-filed report promotes an incomplete view of the Commission’s role. Insular collaboration unrestrained by section 206 can harm consumers. By restricting cost-of-service transmission rates to incumbents, ROFRs eliminate incentives for meaningful participation in the planning process. As a result, projects favored by incumbents advance into regional plans while more projects more beneficial for consumers may be left out. Transmission cartels created by ROFRs allow utility collaborators to prioritize their financial gains over consumer benefits and facilitate the exercise of vertical market power.²²

Because it overlooks section 206, the WIRES-filed report misses that its own evidence about information asymmetry and secrecy and utility incentives may show undue discrimination. WIRES’ cover letter excuses this behavior and interprets the report’s findings as justification for discarding the potential benefits of competition. WIRES overlooks that the Commission has dealt with similar challenges to competition under section 206.²³

¹⁹ *Id.* at P 61; *id.* at PP 39–61.

²⁰ Order No. 1000, 136 FERC ¶ 61,051 at P 286 (2011); Order No. 1000-A, 139 FERC ¶ 61,132 at PP 361–363 (2012).

²¹ Order No. 1000 at PP 284, 289 (2011).

²² For an explanation of how ROFRs create “successful” cartels that harm consumers, see Joseph E. Harrington, Jr., *The Practical Requirements of a Successful Cartel* (2021).

²³ *See, e.g.,* *Tenneco Gas v. FERC*, 969 F.2d 1187, 1196 (D.C. Cir. 1992) (concluding that information sharing rules for pipelines were a “reasonable means of advancing a permissible objective, eliminating the anti-competitive consequences of pipelines’ market power over transportation” and that ordering pipelines to separate employees by function was “a useful prophylactic to deter and prevent anticompetitive abuse”); Order No. 889, Open Access Same-Time Information System and Standards of Conduct, 61 Fed. Reg. 21,737, 61,740 (1996) (ordering utilities to share previously untracked data and create new information-sharing platforms that meet Commission standards); Order No. 890, 118 FERC ¶ 61,119 (2007) (ordering utilities to improve disclosure of available transmission capacity and codify transmission planning processes that meet nine principles, including coordination and information sharing).

Generation competition works because the Commission and RTOs strive to improve market performance. Detailed market reports, continual deliberations about market rules, and robust engagement by market participants and stakeholders have benefited consumers. Ensuring that transmission development benefits consumers requires similar engagement from the Commission, state officials, and all industry participants and stakeholders.

III. Collaboration Is Needed Among All Industry Participants and Stakeholders to Define Planning Goals, and Competition Is Needed to Identify Cost-Effective Solutions

The Commission’s NOPR diagnoses a problem with existing regional transmission planning processes: they are not “long-term” or “forward-looking.”²⁴ To remedy this deficiency, the Commission proposes to require scenario-based planning and points to successful implementations in MISO.²⁵ As the Commission documents, MISO’s long-term planning processes worked because they began by identifying long-term planning goals with all industry stakeholders.²⁶ The Commission proposes to require that transmission providers emulate these goal-setting processes.²⁷

Competition is consistent with a robust, stakeholder-driven goal-setting process and may even be necessary for identifying cost-effective transmission solutions. In the NOPR, the Commission proposes to find that “realization of more efficient or cost-effective transmission solutions to regional transmission needs” may be impossible without competition.²⁸ This conclusion would be consistent with prior Commission statements about the potential of transmission competition to generate innovative projects.²⁹

²⁴ NOPR at PP 33–35.

²⁵ NOPR at PP 31, 101.

²⁶ *Id.*; see also *MISO*, 179 FERC ¶ 61,124 at P 18 (2022) (“As part of the LRTP Initiative, Filing Parties state that MISO conducted various studies and futures modeling . . .”); *id.* at P 24 (filing parties assert that “as part of the transmission planning study, MISO and stakeholders work together to develop an appropriate study scope, evaluate the issues, and identify a reliable and cost-effective portfolio of transmission facilities.”).

²⁷ NOPR at P 123.

²⁸ *Id.* at P 351.

²⁹ See, e.g., *Primary Power*, 131 FERC ¶ 61,015 at P 65, n. 56 (2010): (“PJM and the PJM Transmission Owners have not offered a justification for why PJM is precluded from assigning a project to “other entities,” particularly since such an interpretation will reduce the incentive for parties to propose innovative transmission solutions.”); Order No. 1000 at PP 284, 289 (2011); Order No. 1000-A, 139 FERC ¶ 61,132 at P 82 (“Barriers to entry affect markets in various ways. These include their ability to discourage innovation.”); *PJM*

Conclusion

We applaud WIRES for raising important questions about transmission governance and encourage the Commission to investigate further after it finalizes this rulemaking. In this proceeding, the Commission must disregard WIRES' late filing and should preserve and promote transmission competition.

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Interconnection, et al., 147 FERC ¶ 61,128 (Commissioner Norris, concurring: “no single entity, whether incumbent or non-incumbent, has a lock on ideas for better transmission and non-transmission alternatives”).