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

Reply Comment of the Harvard Electricity Law Initiative[1]

Instead of ending competitive transmission development, as numerous Public Utilities request in their initial comments, the Commission should adapt competitive processes so they facilitate innovation and foster beneficial investments. Ultimately, allowing non-incumbent developers to build transmission can focus Public Utilities' interstate activities on reliability. Financing and constructing regional infrastructure distracts from this essential function.

In this proceeding, Public Utilities' initial comments provide no evidence that reinstating Rights of First Refusal (ROFRs) would improve transmission planning. Instead, utilities posit that industry alliances reinvigorated by ROFRs will achieve better results for consumers than competition. They do not specify what the consumer benefits might be or explain how they might be realized by reinstating ROFRs. Their calls for "cooperation and collaboration" through ROFRs attempt to mask the exclusionary effects of providing the utility industry with perpetual control over the nation's interstate power networks.

I. Public Utilities' Innuendo about Cooperation and Collaboration Cannot Overcome the Commission's Findings about Undue Discrimination

In their respective comments, PJM and MISO-member Public Utilities each echo a talking point touted by the Edison Electric Institute (EEI), asserting that ROFRs would encourage "greater *cooperation and collaboration* within RTOs."[2] Individual PJM and MISO member utilities emphasize this message.[3] But repetition is no substitute for evidence.

---

[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] Indicated PJM Transmission Owners at p. 4 (emphasis added); *id* at pp. 29, 30, and 31 (stating competition has a "chilling effect on *collaboration and coordination*," has "undermined the historic atmosphere of *coordination and collaboration*, and "does not foster . . . *collaboration and cooperation* among utilities"); MISO Transmission Owners at p. 26 (stating that ending competition will "restore [] greater *collaboration* that was common" prior to Order No. 1000); EEI at p. 6 (stating that competition has "stifled the *cooperation and collaboration* that has historically existed among transmission owners"); *id.* at p. 21 (repeating the same point).

[3] Exelon at p. 26 (stating that since the introduction of competition, "the spirit of cooperation and collaboration among transmissions owners, PJM, the states and others to work collectively towards jointly-developed projects has been undermined"); *id.* at p. 29 (reinstating ROFRs "will better foster a spirit of cooperation and collaboration . . ."); PPL Electric Utilities Corporation at p. 4 (noting a "lack of cooperation and collaboration"); *id.* at 22 (stating that if the Commission reinstates ROFRs, "transmission owning utilities would once again be free to *collaborate*"); International Transmission Company at p. 18 (competition disrupts the "environment of *trust and cooperation*" necessary for portfolio-based regional planning).

The industry says little else about reviving ROFRs. Public Utilities fail to identify any benefits that might accrue to transmission customers from exclusionary planning processes.[4] Utilities do not describe how "collaboration" among incumbents enhances regional planning, do not specify what planning information must be restricted to incumbents, and do not explain why the "historic" transmission planning practices of the pre-Open Access era are appropriate for today's industry.[5] Utilities provide no facts, no data, no analysis, no expert reports, and no affidavits to demonstrate any value of insular intra-industry "collaboration."[6]

PJM and MISO utilities also fail to identify any deficiencies with existing planning processes that might be remedied by "collaboration" among incumbents. Transmission owners in both RTOs claim that their regional planning processes are "models" that the Commission should apply to other regions.[7] Utilities do not explain how behind-the-scenes "collaboration" will improve planning processes that they claim already lead the nation. Neither MISO nor PJM utilities claim that ROFRs will spur additional regional investment. Utilities in both regions assert that ROFRs have not skewed incentives away from regional projects and are not to blame for the steep drop in regionally planned projects since Order No. 1000 compliance.[8] In short, utilities do not connect competitive development processes or the lack of "collaboration" to any substantive planning outcomes.

That said, the Commission is not locked in to its prior policy. If the Commission changes its approach to ROFRs, it must offer a "reasoned explanation . . . for disregarding facts and circumstances that underlay its . . . prior policy."[9] This standard "demands enhanced justification" when the new policy "rests upon factual findings that contradict those which

---

[4] Several transmission owners assert that competition delays development. ITC provides data showing "timelines for RTO competitive solicitations." Comment of International Transmission Company, Docket No. RM21-17, at pp. 13–14 (Oct. 12, 2021). That data lacks context. Whatever utilities have in mind when they refer to "coordination and collaboration" must take time. Utilities provide no evidence about whether a "collaborative" process will be more timely than competitive development.

[5] *See* Indicated PJM Transmission Owners at p. 30 (claiming that a 1960s planning process among some vertically integrated PJM transmission owners that also resulted in the construction of 3.5 GW of coal-fired power plants "demonstrates how utilities working cooperatively together can develop infrastructure"); *id.* at p. 4 ("eliminating the ROFR has significantly undermined historical coordination and collaboration between PJM and Transmission Owners"); *id.* at p. 30 (stating the same); EEI at p. 6 ("has also stifled the cooperation and collaboration that has historically existed among transmission owners"); *id.* at p. 21 (stating same); Dayton Power & Light at p. 15 ("the primary results of eliminating ROFR have been to undermine historical coordination and collaboration between PJM and Transmission Owners"). *See also* Illinois Commerce Comm'n v. FERC, 576 F.3d 470, 475 (7th Cir. 2009) ("The eastern utilities that created PJM refer to themselves revealingly as the 'classic' PJM utilities, and the fact that these utilities thought it appropriate to share costs in 1967 says nothing about the advantages and disadvantages of such an arrangement in the larger, modern PJM network.").

[6] To the contrary, transmission-owning Public Utilities in MISO urge the Commission not to impose planning rules that would "undermine the *collaborative* and effective processes in MISO and other RTOs" that are in place today. MISO Transmission Owners at p. 2.

[7] MISO Transmission Owners at p. 2 ("in large part, the MISO region serves as a model for effective regional transmission planning"); *id.* at pp. 6, 16; PJM Indicated Transmission Owners at p. 18 ("PJM has a successful regional planning process that can serve as an example for the nation.").

[8] MISO Transmission Owners at pp. 22–24; PJM Indicated Transmission Owners at pp. 16–20.

[9] FCC v. Fox Television Stations, 556 U.S. 502, 515–16 (2009).

underlay its prior policy."[10] If the Commission does not rely on new facts, it must explain its "reevaluation" of ROFRs in light of the factual record.[11] The Commission "cannot simply disregard contrary or inconvenient factual determinations."[12]

Because ROFR reversal would defy the economically justified assumption that competition benefits consumers, the Commission would have a particularly high evidentiary bar.[13] It must explain why it can now "rely on the self-interest of transmission providers to expand the grid in a nondiscriminatory manner."[14] The Commission must similarly explain why it now believes that the "inherent characteristics of monopolists"[15] will not lead utilities to exploit ROFRs to further their own financial and strategic goals. The Commission must also address why ROFRs do not exacerbate Public Utilities' incentives and opportunities to unduly discriminate against their competitors in planning system expansion, and why the potential for discrimination would no longer pose a theoretical threat to just and reasonable rates.[16] If the Commission reinstates ROFRs, it must also rationalize abandoning its general goal of "improv[ing] the competitive structure of the industries which it regulates."[17] Given the availability of new transmission technologies,[18] the Commission should explain why reviving decades-old pacts among century-old incumbents will be an effective mechanism for encouraging innovation and cost-effectively maintaining reliability.

In this proceeding, utilities' assertions cannot help the Commission meet these standards and cannot overcome the record the Commission developed on ROFRs a decade ago. In the Order No. 1000 proceeding, non-incumbent transmission developers detailed how RTO tariffs blocked their participation in the planning process and prevented them from proposing and developing projects.[19] Generation developers identified benefits of non-

---

[10] Ark Initiative v. Tidwell, 816 F.3d 119, 127 (D.C. Cir. 2016).
[11] National Ass'n of Homebuilders v. EPA, 682 F.3d 1032, 1037 (D.C. Cir. 2012).
[12] FCC v. Fox Television Stations, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring).
[13] In general, "reasonable and cogent explanations of predictable economic outcomes" are sufficient to justify findings of undue discrimination. "The Commission [is] not required to . . . to offer empirical proof for all the propositions upon which its order depended, before promulgating a generic rule to eliminate undue discrimination." *See* Harvard Electricity Law Initiative, Docket No. RM21-17, at pp. 14–16 (citations omitted). With regard to ROFRs, a reversal by the Commission would defy basic economics and would therefore demand a robust explanation.
[14] Order No. 890 at P 422; *see also id.* at P 524, Order No. 1000 at P 254 (noting that the Commission "bas[ed] its actions [on transmission planning in Order No. 890] on its authority to remedy undue discrimination").
[15] Order No. 888, 61 Fed. Reg. 21,540, at p. at 21,567 (May 10, 1996) ("the inherent characteristics of monopolists make it inevitable that they will act in their own self-interest to the detriment of others . . ."); *id.* at p. 21,568 ("Transmission monopolists . . . will continue to engage in unduly discriminatory practices unless [the Commission] fashion[s] a remedy to eliminate their ability and incentive to do so.").
[16] Order No. 890 at PP 26, 84, 422–424, 524; Order No. 1000 at P 256; Order No. 1000-A at PP 80, P 82, 363.
[17] *Re Incentive Rate Making for Interstate Natural Gas Pipelines, Oil Pipelines, and Electric Utilities*, 61 FERC ¶ 61,168, at p. 61,595 (1992); Order No. 1000-A at P 86 (clarifying that the Commission "has never found that natural monopoly is antithetical to competition in all respects" and that competition in transmission development could "promote benefits that are similar to the benefits [competition] produces elsewhere in our economy, in terms of improved facilities, enhanced technology, or better transmission solutions generally.").
[18] *See, e.g.* WATT Coalition, Docket No. RM21-17 (Oct. 12, 2021).
[19] *See, e.g.,* Pattern Transmission, Docket No. AD09-8, at p. 8–9 (Nov. 23, 2009) (claiming that RTO planning processes have "an almost unconscious assumption that transmission planning begins with the incumbent transmission owners and that stakeholders have a right to participate in the process at some point but not at the beginning" and illustrating that point with CAISO processes); *id.* at pp. 10–11 (explaining how ROFRs discourage non-incumbents from proposing transmission solutions); Filings of Nevada Hydro Company, Docket No. AD09-8 (Oct. 14, 2009) (attaching various correspondence with CAISO and other entities to illustrate the

incumbent transmission and added that ROFRs prevented them from offering non-transmission alternatives.[20] State officials hoped that eliminating ROFRs would "increase competitive pressure on incumbent providers," which would remedy their tendencies to inaccurately estimate project costs and go over-budget during construction.[21] The Federal Trade Commission found that "the pro-competitive, efficiency-enhancing grounds for eliminating the ROFR" extend to local projects because "the incumbent may have incentives to maintain a less than robust transmission system to discourage new generation entry and competition from distant generators."[22] The American Antitrust Institute similarly concluded that there was "no compelling logic that supports treating transmission so differently from generation as to necessitate a preference in the form of a [ROFR], which could be exercised to stifle transmission entry and impair competition."[23]

Utilities' contradictory claims in this proceeding also cannot be sufficient to reverse the Commission's generic and RTO-specific findings that ROFRs were unduly discriminatory. In Order No. 1000, the Commission found that ROFRs "create opportunities for undue discrimination . . . against non-incumbent transmission developers."[24] Moreover, by "effectively restrict[ing] the universe of transmission developers offering potential solutions for consideration in the regional transmission planning process," ROFRs "may result in the failure to consider more efficient or cost-effective solutions" and lead to unjust and unreasonable rates.[25] In response to utility and RTO protests, the Commission determined in RTO compliance proceedings that ROFR provisions were not entitled to *Mobile-Sierra* protection. Instead, in each proceeding, the Commission concluded that Public Utilities forming RTOs shared the common aim of "protecting themselves from competition in transmission development."[26] Under those circumstances, where the parties to the RTO agreement were not adversarial with respect to ROFR provisions, the Commission held that

---

difficulties of developing a project and becoming a CAISO Participating Transmission Owner); Anbaric Holding and PowerBridge, Docket No. RM10-23, at pp. 3–4 (Sep. 29, 2010) (stating that "many transmission planning processes today are in practical effect closed to non-incumbent transmission developers"); Green Energy Express and 21st Century Transmission, Docket No. RM10-23, at pp. 3–4 (Sep. 29, 2010) (outlining how the CAISO tariff and recently filed amendments left non-incumbent developers with limited options to develop tariffed projects); *id.* at pp. 7–8 ("expressing concern" that CAISO is relying primarily on incumbent utilities to "to develop a conceptual plan that will serve as a critical input in the planning process"); Primary Power, Docket RM10-23, at pp. 14–16 (Sep. 29, 2010) (finding that ISO-NE, NYISO, PJM, and CAISO tariffs block non-incumbent developers and warning that ROFR elimination may "be ineffective if incumbent transmission owners can continue to exercise broad control over the planning process, particularly outside organized markets").

[20] Northwest and Intermountain Power Producers Coalition, Docket No. RM10-23, at p. 8 (Sept. 29, 2010) (arguing that ColumbiaGrid's agreement "erects artificial barriers to non-incumbents even where the non-incumbents offer more economical, more technologically advanced, or more efficient solutions"); NRG Companies, Docket RM10-23, at p. 3 (Sep. 29, 2010) (citing ISO-New England data to demonstrate that ROFRs were part of a package of advantages incumbents enjoyed that led planners to favor transmission solutions "even when a reliability concern can be addressed more efficiently by demand-side management or a generation alternative") Comment of First Wind Energy, Docket RM10-23, at p. 9 (Sep. 29, 2010) (observing that "incumbent providers typically take more time to design and install projects than non-incumbents").

[21] New England State Committee on Electricity, Docket RM10-23, at p. 25 (Sep. 29, 2010).

[22] Federal Trade Commission, Docket RM10-23, at p. 10 (Sep. 29, 2010).

[23] American Antitrust Institute, Docket RM10-23, at p. 6 (Sep. 29, 2010).

[24] Order No. 1000 at P 286, *reh'g denied,* Order No. 1000-A at PP 361–363.

[25] Order No. 1000 at PP 284, 289.

[26] *PJM Interconnection, et al.*, 142 FERC ¶ 61,214, at P 189 (2013); *Midwest Indep. Sys. Operator, et al.*, 142 ¶ FERC 61,215, at P 183 (2013); *ISO-New England*, 143 FERC ¶ 61,150, at P 169 (2013); *Southwest Power Pool*, *et al.*, 144 FERC ¶ 61,059, at P 133 (2013).

it cannot presume ROFRs are just and reasonable.[27] Four federal appeals court upheld the orders that stripped ROFRs from RTO tariffs.[28]

The Commission can strengthen its pro-competitive approach by finding that states' ROFR laws conflict with its duty under the Federal Power Act to ensure just and reasonable rates.[29] The preemption case is particularly strong with regard to state laws that explicitly target RTO-administered processes.[30] If the Commission chooses not to make any new legal determinations about state ROFR laws, it could consider clarifying its current approach, with the goal of streamlining development processes.

II. The Commission Should Consider How Competitive Transmission Development Can Support Planning Reforms and Transition Public Utilities into Reliability-Focused Organizations

Reliability is paramount. As the Commission states in the ANOPR, "[e]nsuring just and reasonable rates as the resource mix changes, while maintaining grid reliability, remains the priority."[31] State regulators have recently echoed that sentiment.[32]

But Commission-jurisdictional rates have a fundamental flaw that prevents Public Utilities from focusing solely on reliability and resilience. Transmission rates tie profits to capital spending and not operational performance. The capital bias hardwired into jurisdictional rates is an artifact of a financing model designed to channel all power sector investment through a local monopolist. But experience has demonstrated that financing and constructing transmission is not a "natural monopoly." Consumers do not necessarily benefit when utilities are obligated to both maintain reliability (including at the distribution level) and spend time, effort, and resources on building interstate transmission. The Commission might address the fundamental flaw in transmission rates by separately compensating monopoly and competitive functions. New rate structures

---

[27] *See, e.g., PJM Interconnection*, 147 FERC ¶ 61,128, at PP 106–111 (2014).

[28] Oklahoma Gas and Electric Co. v. FERC, 827 F.3d 75, 80 (D.C. Cir. 2016) ("Just as unfair dealing, fraud, or duress will remove a provision from the ambit of *Mobile–Sierra*, so also will terms arrived at by horizontal competitors with a common interest to exclude any future competition."); MISO Transmission Owners, et al. v. FERC, 819 F.3d 329, 335 (7th Cir. 2016) (finding that because the parties to the MISO agreement were "seeking to protect themselves from competition from third parties," the Mobile-Sierra presumption does not apply); *see also* American Transmission Systems Inc., v. FERC, 2016 WL 3615443 (D.C. Cir. 2016, unpublished) (dismissed for lack of jurisdiction); Emera Maine v. FERC, 854 F.3d 662 (D.C. Cir. 2017) (dismissing transmission owners' arguments that the Commission's order was inconsistent with precedent, applied the wrong legal standard, and lacked an evidentiary basis).

[29] *See, e.g.,* Electricity Transmission Competition Coalition, Docket No. RM21-17, at pp. 27–34 (Oct. 12, 2021).

[30] *See, e.g.,* Minn. Stat. § 216B.246, subd. 2 ("An incumbent electric transmission owner has the right to construct, own, and maintain an electric transmission line that has been approved for construction in a federally registered planning authority transmission plan and connects to facilities owned by that incumbent electric transmission owner. . . .") (emphasis added). A federal district court held that Minnesota's law did not violate the dormant Commerce Clause doctrine. The Eighth Circuit upheld the decision. Federal Power Act preemption was not at issue. LSP Transmission Holdings v. Sieben, 954 F.3d 1018 (8th Cir. 2020).

[31] ANOPR at P 3.

[32] *See* November 18 Commission Meeting, Opening Remarks of Commissioner Clements ("I heard several state colleagues at the NARUC [transmission] task force and during Monday's technical conference [on transmission] express some version of "reliability is job #1." I absolutely agree.").

should focus utilities on their essential reliability functions and motivate outstanding operational performance.

ROFRs are an obstacle to reforming rates' fundamental flaw. By relieving utilities of competitive pressures, ROFRs fuel capital bias and lock-in default rate structures that burden consumers with bearing all project risks while rewarding utility shareholders with all of the upside. Ultimately, transmission rates ought to align utility conduct with cost-effective reliability and resilience. Currently, they do not. Rates divide a utility's focus between capital deployment and reliability, while also incentivizing utilities to discount cost-effective reliability investments.[33]

Although comprehensive rate reform is unlikely to be achieved through this rulemaking, the Commission can take steps in this proceeding to address default rates that impede beneficial investments.[34] For instance, some commenters have suggested "subscription" models for developing new transmission that connects to energy production zones.[35] Parties argue that subscription-based development would protect captive ratepayers from project risks. Allocating risks is an essential element of ratemaking, and the Commission has wide discretion to approve new risk allocation mechanisms. But if states, regional planning entities, and the Commission are locked in by a ROFR, they may be constrained in how they allocate risks, in part based on the reasonable goal of protecting utility ratepayers. Including non-incumbent developers might lead to innovative proposals for sharing risks among project beneficiaries, including utilities, generators, *and the non-incumbent developer*. Non-incumbent developers might have different risk appetites than utilities, and their participation may open up new possibilities for risk allocation.

Competition can also be an antidote to Public Utilities' opportunities and incentives to unduly discriminate against potential competitors in planning network expansion.[36] As the Commission has recognized, utilities may rationally undermine transmission expansion

---

[33] *See, e.g., Re Incentive Rate Making for Interstate Natural Gas Pipelines, Oil Pipelines, and Electric Utilities*, 61 FERC ¶ 61,168, at p. 61,588 (1992) ("Traditional regulation lacks mechanisms that foster long-run productive efficiency. Utilities face few explicit rewards for taking risks to cut their costs aggressively, and few penalties for excessive spending."); Katharine M. Mapes, Lauren L. Springett, and Anree G. Little, *Retooling Ratemaking: Addressing Perverse Incentives in Wholesale Transmission Rates*, 42 ENERGY L. J. 339, 345–46 (2021) (explaining how cost-of-service rates can lead utilities to "perform unnecessary capital work on which they earn a return rather than cheaper, simpler operations and maintenance work on which they don't"); *id.* at 346–58 (showing how "budgetary discretion" allows utilities to claim high maintenance costs for ratemaking purposes and then "underspend on maintenance in order to boost profits, to the long-term detriment of safety and reliability"); Lon L. Peters, *Shareholders v. Ratepayers*, 34 THE ELECTRICITY J. 106905 (Jan. 2021) (attached to the Comment of the New England Consumer-Owned Systems, Docket No. RM21-17, Oct. 12, 2021) (finding that the "bias toward capital is reinforced by the governing structure of the ISO, which defers to transmission owners, and the deference of FERC to the ISO").

[34] Previously, the Commission has similarly acted to ensure that transmission rates, terms, and conditions "are adequate to support more efficient and cost-effective investment decisions." Order No. 1000 at P 44, 46. The Commission has also said that transmission rates "should promote good decision-making and foster efficient expansion of transmission capacity, efficient location of new generators…[and] efficient use of existing transmission facilities . . ." Policy Statement, Inquiry Concerning the Commission's Pricing Policy for Transmission Services Provided by Public Utilities Under the Federal Power Act, 59 Fed Reg. 55,031, 55,035 (Nov. 3, 1994). In short, rates should incentivize investments that benefit consumers.

[35] *See, e.g.,* New Jersey BPU, Docket No. RM21-17, at pp. 15–17 (Oct. 12, 2021).

[36] *See* Harvard Electricity Law Initiative, Docket No. RM21-17, at pp. 6–26 (Oct. 12, 2021) (discussing undue discrimination).

that threatens their own generation assets.[37] Planning entities, particularly those explicitly controlled by generation-owning Public Utilities, might easily subvert a Commission mandate to "consider" transmission expansion to energy production zones.[38] Requiring planning entities to instead administer competitive processes for new transmission would prevent transmission owners from treating the Commission's rule as a check-the-box paper exercise. Non-incumbent developers participating in the process would be motivated to solicit interest from generation developers and energy buyers. Competition can assist planners in realistically assessing market demand and finding the most beneficial transmission solution for consumers, while also ensuring that Public Utilities pursuing their local interests do not stifle regional development.[39]

In addition to complementing regional planning reforms, competitive development can also accelerate the long-term transition to rates that incentivize reliability. The record in this proceeding shows that utilities have splurged on local transmission projects with little oversight. As the R Street Institute puts it "transmission may be the only domain where incumbent cost-of-service utilities often roam free of the economic regulation that is supposed to serve as a surrogate for competition. Given the lack of competition and economic regulatory oversight, poor economic discipline results."[40] The record justifies immediate action by the Commission to enhance transparency, improve coordination between local and regional planning, and actively review prudence of utility-planned capital expenditures. See the Appendix for relevant evidence in the record.

While ongoing ratepayer support of utilities is necessary to sustain them, we cannot afford rates that are invariant to actual performance and impede cost-effective operational and low-cost capital solutions. The future of utility rates may be beyond the scope of this proceeding, but as the Commission has numerous open transmission investigations and rulemakings,[41] it is worth considering the endgame. Competitive regional development and heightened scrutiny of local spending[42] may reduce utilities' share of transmission revenue.

---

[37] *Id.;* Order No. 890 at PP 422, 524.

[38] *See, e.g.,* Public Interest Organizations, Docket No. RM21-17, at p. 44 (Oct. 12, 2021) (stating that interregional coordination "has essentially become a box checking exercise" and noting that the annual interregional coordination meeting among Western planning entities is just "a single morning online session"); Northwest and Intermountain Power Producers Coalition, Docket No. RM21-17, at pp. 6–7 (Oct. 12, 2021) (stating that planning entities in the West have "refused" to consider stakeholder scenarios for planning purposes and suggesting that they are biased in favor of utility generation); *id.* at p. 23 (stating that in the West "stakeholders can take months or even years to agree on the plausible scenarios").

[39] *See* Harvard Electricity Law Initiative, Docket No. RM21-17, at pp. 31–43 (Oct. 12, 2021) (discussing the Commission's authority to order regional planning entities to consider factors affecting transmission expansion and plan transmission to areas with energy generating potential),

[40] R Street Institute, Docket No. RM21-17, at p. 15 (Oct. 12, 2021).

[41] *See* Docket No. RM20-10 (various transmission rate incentives); Docket No. RM20-16 (improving transmission line ratings); Docket No. AD20-9 (hybrid resources, including interconnection issues); Docket No. AD20-18 (whether RTO policies can effectively integrate offshore wind); Docket No. AD21-12 (electrification, including effects on the bulk power system); Docket No. AD21-13 (threats to reliability posed by climate change and extreme weather); Docket No. RM21-3 (incentive-based rates for cybersecurity investments); RM21-15 (accounting treatment of industry association dues).

[42] In our initial comment, we suggest how the Commission could review the prudence of a limited set of utility capital expenditures and propose that the Commission create Joint Boards and utilize independent monitors to ease the administrative burden of doing so.

That decline may provide an opening for the Commission to begin shifting utility incentives to align with performance.

Competitive development can ease reforms that remedy the fundamental flaw in transmission rates. Rates that tie profits to capital investment may still have a long-term role, but other forms of compensation for transmission owners or operators may better incentivize cost-effective reliability.[43] Ultimately, the Commission might separately compensate capital deployment from operational performance, recognizing that infrastructure development can be open to competition while certain reliability functions may be handled most effectively by a single entity.

Conclusion

Collaboration among jurisdictional planning entities, state regulators and siting boards, and the Commission might unlock beneficial transmission investments. Reinstating ROFRs will reinforce the status quo by providing incumbents with control, removing whatever incentive they might have to find innovative solutions, and inviting undue discrimination. In the long run, ROFRs will be an obstacle to reforming transmission rates so they align with operational performance.

/s/ Ari Peskoe
Ari Peskoe
Harvard Electricity Law Initiative
6 Everett St., Suite 4133
Cambridge, MA 02138
617.495.4425
apeskoe@law.harvard.edu

November 30, 2021

[43] *See generally* Hope v. FPC, 320 U.S. 591 (1944) (holding that the Commission is not bound by any particular ratemaking methodology).

Appendix — Record Evidence on:
- **Enhanced Oversight of Local Planning**
- **Improved Integration of Local and Regional Planning**
- **Active Prudence Reviews of Utility-Planned Investments**

Evidence and Proposals in Support of Enhanced Oversight and Transparency:

- California PUC at pp. 12–23 (highlighting spending by California IOUs, observing "a gaping hole nationwide in the coverage of Order 890's transparency planning requirement," stating that "asset replacement decisions are precisely the type of capital projects that should go through a comprehensive review process," claiming that the lack of oversight leads to unjust and unreasonable rates, and requesting that the Commission either extend Order No. 890 requirements to asset replacement projects or provide that state regulators can fund review processes through rates);
- California Department of Water Resources at pp. 11–13 (echoing concerns of the California PUC);
- Michigan PSC at pp. 8–10 (seeing a "glaring lack of transparency" in local planning and suggesting that an independent monitor could "inject needed transparency");
- Pennsylvania PUC at pp. 16–18 (showing that "the overwhelming majority of transmission spending in PJM . . . is done by local transmission planners" and recommending that the Commission require those entities to "incorporate principles of cost containment, seek efficient transmission solutions, and evaluate alternatives");
- PUC of Ohio, Office of Federal Advocate at pp. 10–11, 24–25 (stating that "the most important change that would foster cost-effectiveness in transmission planning is increased oversight over transmission projects that are defined as 'supplemental projects' for the PJM region" and suggesting that the Commission either direct PJM to exercise greater oversight or task a new independent monitor with that responsibility);
- Office of the Ohio Consumers' Counsel at pp. 12–15 (tallying $5.8 billion in local spending by Ohio utilities in just four years, finding that nearly all transmission rate increases in Ohio are due to these local projects "that escape any regulatory review", and calling for the Commission "to impose more oversight for Supplemental Transmission Projects and the local transmission planning process in PJM");
- New Jersey BPU at pp. 4–7 (providing data showing escalating costs of Supplemental Projects in PJM and observing that these projects "do not receive sufficient oversight, analysis, or benchmarking to ensure adequate transparency");
- Office of the People's Counsel for the District of Columbia at pp. 8–12 (urging the Commission to reconsider its approach to local planning);
- Alliant Energy, Consumers Energy, and DTE Electric at p. 25 (noting that "transmission owners can unilaterally change their local planning criteria and there is very little review of those changes, even though such changes can have a significant effect on transmission expansion costs imposed on customers");
- National Association of Regulatory Utility Commissioners (NARUC) at pp. 48–49 ("Increased oversight of utilities' planned replacements of assets that are then

capitalized is critical . . . the most critical reform needed at this time is to apply Order No. 890's transparent planning principles to utility self-approved projects.");

- American Public Power Association at p. 20 (urging the Commission to "consider whether reforms are necessary to ensure that local transmission planning processes are adequately identifying optimal transmission solutions");
- Transmission Access Policy Study Group at pp. 24–25 (urging the Commission to "provide for a more interactive and transparent local planning process, with regional and independent oversight");
- American Municipal Power at pp. 24–32 (showing escalating transmission costs across PJM, stating that "a lack of transparency and regulatory scrutiny means customers are unable to know if the amount of transmission spend is really needed or provides the most effective solution," and urging reforms);
- California Municipal Utilities Association at pp. 8–9 (citing escalating transmission costs and calling for "progress to improve transparency and accuracy" in local planning and cost estimates of regional projects);
- LS Power Grid at pp. 15–25 (showing recent transmission rate increases and stating that they are "largely due to transmission owner self-interest gaming of transmission planning");
- R Street at p. 15 (finding that the "lack of competition and economic regulatory oversight" results in "poor economic discipline" and suggesting that an independent monitor "oversee TO asset management" to determine if "alternative technologies are economic");
- Union of Concerned Scientists at pp. 24–28 (claiming utilities "hide opportunities for more economic alternatives" by "proposing a set of potentially related upgrades individually over time or simply as individual projects . . . masking the possibility that an alternative can provide superior benefits" and providing an example of AEP doing just that), at 28–31 (explaining how Local Planning Criteria created by MISO TOs have anti-competitive effects in interconnection processes);
- Resale Power Group of Iowa at pp. 4–11 (stating that ITC Midwest transmission rates have increased 750% since 2008, claiming that transmission owners "are focusing on these local projects because there are few, if any, institutional checks on project selection, timing, or cost," noting the lack of oversight by MISO, calling for additional "transparency" and third-party review of local planning, and proposing that local needs be assigned to a task force within the regional planning process and that an independent entity annually review each utility's local planning criteria);
- Americans for a Clean Energy Grid at Appendix A, pp. 19–20 (explaining that local planning "creates barriers to coordinated planning over a larger regional footprint" and explaining how "differing TO incentives between local and regional plans leads to inefficient levels of each");

- Public Interest Organizations at pp. 33, 36–37 (observing that most transmission spending in PJM and MISO is on local projects), at pp. 62–65 (suggesting the Commission reevaluate ROEs of local projects and consider "ROE subtractors").

Calls for Better Integration between Regional and Local Planning:

- New Jersey BPU at pp. 3–4, 11–13 (finding that "locally-planned projects distinctly lack any coordination with a broader regional process" and urging the Commission to "ensure that local needs are evaluated at the regional level");
- NARUC at p. 15 (calling for the Commission to "examine how to buttress the way in which local transmission or supplemental transmission projects and regional generation or reliability needs are interwoven" and stating that local and regional planning models do not align in PJM); *id.* at pp. 48–49 (stating that "utility self-approved projects . . . should be evaluated in regional transmission planning processes to ensure they are needed and are cost-effective" and that FERC must "eliminate incumbent utilities' incentive to overinvest in these projects");
- Organization of MISO States at pp. 18–21 (stating that "there is still a need to ensure that local planning processes and regional planning processes inform each other to ensure that any transmission expansion is needed and cost-effective," with some OMS members suggesting that independent monitors play a role);
- State Agencies at p. 36 (suggesting that an "independent transmission monitor be empowered to identify inefficiencies in regional planning processes, or between local and regional transmission planning processes");
- California Department of Water Resources at p. 14 (calling for "an independent monitor [to] consider whether a regional solution could be more efficient than those local projects – a role that is currently not filled by anyone");
- Transmission Access Policy Study Group at pp. 16–17 (stating that in non-RTO regions, "when a regional alternative to a TO-planned project has been identified, that TO can move the goalpost by unilaterally eliminating, modifying, or changing the timing of the base case local projects that a regional alternative would displace.").
- American Municipal Power at p. 21 (observing that "PJM transmission owners routinely drive the development of transmission projects into the Supplemental category . . . without consideration of whether regionally planned projects could resolve multiple transmission issues and provide better value for customers.");
- LS Power Grid at pp. 130–32 (showing that in various regions "local needs are not being posted for displacement in the regional planning processes"); *id*. at 134–35 (urging the Commission to require regional planning entities to demonstrate that their planning processes allow for displacement of local projects);
- Union of Concerned Scientists at pp. 24–31 (using examples from PJM and MISO to highlight the "lack of transparency, openness, and data sharing that enables billions of dollars in local projects to evade scrutiny year over year in the regional transmission planning processes");

- Resale Power Group of Iowa at p. 7 (observing "very limited MTEP planning and minimal review for [local] projects within MISO's functional control and no oversight for projects outside MISO's control");
- PJM Internal Market Monitor at p. 7 (noting that "permitting Transmission Owners to redefine supplemental projects and end of life projects as outside the RTEP does create inappropriate siloing of the planning process and interferes with the regional planning process.");
- Public Interest Organizations at pp. 92–94 (explaining that "current planning processes prioritize local projects over regional . . ." and urging the Commission to ensure information flows from local to regional processes and to align planning cycles).

Supporting Active Prudence Reviews of Utility-Planned Investments:

- California PUC at pp. 47–48 (stating that new approach to prudence is necessary because half of all IOU transmission spending is on self-approved projects and the existing process provides "little scrutiny");
- Michigan PSC at p. 9 (suggesting that an independent monitor could "ensure transmission investment decisions are prudent," and in particular review spending on local projects);
- Institute for Policy Integrity at pp. 20–21 (arguing that "a presumption of prudence should be maintained only for projects that are planned 1) independently and 2) using the tools prescribed by the Commission");
- Public Interest Organizations at p. 62 (stating that the Commission should not presume that transmission investments are prudently incurred and urging the Commission to find prudence only where a transmission-owner has demonstrated that a self-planned project has been considered by an independent planning entity and that the transmission need is best addressed by a local solution); at pp. 72–75 ("Prudent transmission investments must include independent review verifying the cost/benefit analysis, showing adequate consideration of alternatives, and identifying any anti-competitive concerns or confirming none exist");
- Electricity Transmission Competition Coalition at pp. 36–39 (arguing that competitive processes can ensure prudent investments, "but where a utility is permitted not to offer a project for competitive solicitation and makes that election, the utility must bear the burden to demonstrate that such decision was reasonable and prudent");
- Industrial Customer Organizations at pp. 15–17 (urging the Commission to "ensure that transmission investment is prudent" and suggesting a role for the Commission's Office of Administrative Litigation in rate cases);
- Resale Power Group of Iowa at p. 11 (asking the Commission to "require each transmission owner to prove that the cost of any project that is not open to competition is demonstrably prudent");

- Renewable Energy Buyers Alliance at p. 32 (suggesting that for projects that did not proceed through a "Commission-approved planning process," the utility could be required to demonstrate . . . the prudency of costs expended or to be expended");
- Americans for a Clean Energy Grid at Appendix C, pp. 72–73 (suggesting the Commission "consider proactively evaluating the cost-effectiveness of local projects and end-of-life project replacements where there is reason to believe that the same needs could have been addressed more cost-effectively by a regional solution" and proposing that any prudence review be "aimed narrowly at the set of circumstances where [there is a] failure to interface between local and regional planning . . .)"
- Harvard Electricity Law Initiative at pp. 44–62 (arguing that a new approach to prudence will ensure just and reasonable rates, illustrating a proposed supplementary prudence policy that would subject a defined set of capital investments to prudence review, showing that the Commission has legal authority to establish a supplementary prudence policy, and suggesting that the Commission establish Joint Boards and independent monitors to assist with prudence reviews).