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Re: Request for Information on Merger Enforcement (Docket No. FTC-2022-0003)

The Harvard Electricity Law Initiative<sup>1</sup> appreciates the opportunity to comment on “how effectively the current guidance documents capture the competitive issues raised by mergers today and whether these documents adequately equip enforcers to identify and proscribe unlawful, anticompetitive transactions.”<sup>2</sup> Our comment provides evidence and commentary about consolidation in the electric utility industry. Electric utility mergers require approval by the Federal Energy Regulatory Commission (FERC). FERC’s merger review framework incorporates the 1992 Horizontal Merger Guidelines.<sup>3</sup>

We are enclosing a recent academic article that details industry consolidation from 1986 to 2018 and criticizes FERC’s merger review process, including its reliance on the Merger Guidelines. The article, entitled “Inconsistent with the Public Interest: FERC’s Three Decades of Deference to Industry Consolidation” was written by noted utility industry expert Scott Hempling and published in the *Energy Law Journal*, a peer-reviewed journal published by the Energy Bar Association. Following a brief overview of the electric utility industry, we summarize relevant points from the article and then provide our own perspective on electric utility industry consolidation, questioning whether it fuels anti-competitive IOU conduct aimed at protecting control over infrastructure development.

### **Overview of the Electric Utility Industry**

Investor-owned utilities (IOUs) are monopolists. Pursuant to state laws, IOUs have exclusive rights to deliver electricity to consumers. Approximately three-quarters of U.S. homes receive electricity from an IOU, with the remainder served by a non-profit utility. IOUs finance the construction, upgrade, operation, and maintenance of distribution infrastructure through state-regulated cost-of-service rates that tie IOU profits to the amount of money the IOU invests in physical assets, such as distribution lines and meters. Although state-granted exclusive rights do not typically extend to interstate infrastructure,

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<sup>1</sup> 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.

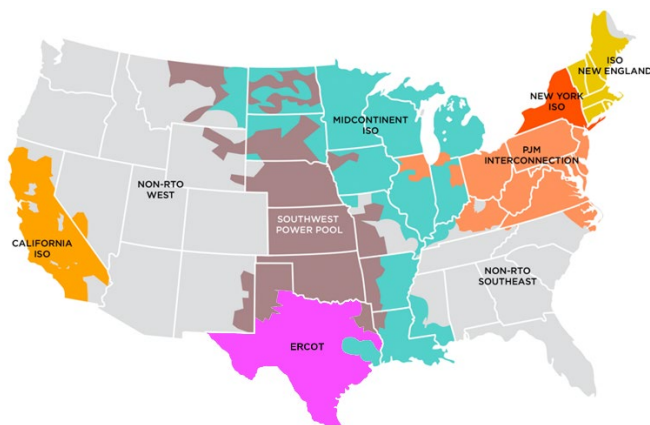
<sup>2</sup> Request for Information on Merger Enforcement, Docket No. FTC-2022-0003, Jan. 18, 2022.

<sup>3</sup> See Order No. 592, *Inquiry Concerning the Commission’s Merger Policy under the Federal Power Act: Policy Statement*, 61 Fed. Reg. 68,595, at p. 68,606 (Dec. 30, 1996) (“In this policy statement, the Commission has adopted the DOJ Merger Guidelines as the basic framework for evaluating the competitive effects of proposed mergers.”); *Analysis of Horizontal Market Power under the Federal Power Act*, 138 FERC ¶ 61,109 (2011) (summarizing FERC’s framework for evaluating proposed mergers and terminating an inquiry into whether FERC should update its approach to account for the 2010 Merger Guidelines).

as a matter of historical practice IOUs have built most of the high-voltage transmission lines within their state-granted retail service territories.

Reforms initiated in the 1990s facilitated competition in the generation and sale of electric power but did not disrupt utility ownership of local and interstate delivery infrastructure. In fourteen states, utility restructuring legislation and/or regulatory orders required or incentivized IOUs to sell their power plants to affiliates or third parties.<sup>4</sup> With some significant exceptions, in these states consumers may choose among energy marketers that procure power on their customers' behalf but must pay the local IOU for delivery service. Elsewhere, IOUs are vertically integrated, continue to own most power plants, enjoy the exclusive right to sell energy to consumers, and may recover the costs of building, maintaining, and operating power plants via state-regulated retail rates. In these states, laws and regulations requiring IOUs to conduct competitive solicitations before constructing a new power plant have yielded mixed results. In many states, IOUs continue to dominate power plant development.

Across the continental United States, FERC's Open Access transmission rules aim to facilitate competition in power generation.<sup>5</sup> FERC recognized that IOU control over transmission facilitated anti-competitive conduct. Beginning in the mid-1990s, FERC therefore required IOUs to provide comparable transmission service to all power marketers and other transmission customers and encouraged IOUs to cede operational control of their transmission to Regional Transmission Organizations (RTOs). RTOs provide standardized transmission service across their footprints administer energy and related markets. FERC reviews all RTO rules about transmission operations and rates and markets. The geographic scope of an RTO's territory is based primarily on which IOUs voluntarily join. Although FERC requires an RTO's governance rules to "prevent control, and appearance of control, of decision-making by any class of participants,"<sup>6</sup> IOUs nonetheless have significant influence over RTO rules, which have competitive implications.<sup>7</sup>



In short, IOUs own most of the nation's electricity delivery infrastructure, at both the interstate and local level. Their share of power generation varies widely, with IOUs dominating some regions, such as the Southeast, while owning very little generation in other regions, such as the Northeast.

<sup>4</sup> Those states are: California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, and Texas.

<sup>5</sup> FERC's rules do not apply to the Electric Reliability Council of Texas, or ERCOT.

<sup>6</sup> FERC, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities, 61 Fed. Reg. 21,540, at p. 21,596 (May 10, 1996).

<sup>7</sup> See Ari Peskoe, [Is the Utility Transmission Syndicate Forever?](#) 42 ENERGY LAW JOURNAL 1 (2021).

## Recent Industry Consolidation and Resulting Complication

For this section, we rely on Mr. Hempling’s comprehensive review of IOU mergers from 1986 to 2018. He summarizes that:

Since the 1980s, mergers have brought two major changes to the electric industry. The first is consolidation of control of state-granted, exclusive retail franchises; and of the physical facilities of generation, transmission, and distribution. The second is complication of utility holding company systems in terms of business activity, corporate structure and financial structure.<sup>8</sup>

With regard to consolidation, Mr. Hempling documents approximately seventy mergers or acquisitions involving IOUs with state-granted distribution monopolies.<sup>9</sup> Several metrics illustrate the scale of consolidation:

- Of the several hundred IOUs that existed independently in the early 1980s, only 17 IOUs remain uncoupled from another utility.<sup>10</sup>
- The 10 most active acquirers own what used to be 62 independent IOUs.<sup>11</sup>
- Eighty-one (81) formerly independent IOUs are owned by 13 holding companies.<sup>12</sup>
- In 1993, the EEI Utilities Stock Index, which includes all publicly traded U.S.-based IOU companies, included 100 stocks. Today, it includes 39 stocks.<sup>13</sup>
- Congress’s repeal of the Public Utility Holding Company Act, which provided the Securities and Exchange Commission with jurisdiction over IOU mergers, enabled mergers of utilities whose remoteness precludes physical integration. For instance, Xcel owns IOUs in Minnesota, Colorado, New Mexico, and Texas. In addition, twenty IOUs are owned by five foreign corporations. For example, Canada-based Fortis owns IOUs in Arizona and New York.<sup>14</sup>

According to Mr. Hempling, “the typical 1980s electric utility was a single corporation, vertically integrated, owning generation, transmission, and distribution. It earned most of its revenues from a single retail monopoly franchise subject to a single state’s jurisdiction.”<sup>15</sup> That model is no longer relevant. Consolidation had led to complications along three dimensions:<sup>16</sup>

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<sup>8</sup> Scott Hempling, *Inconsistent with the Public Interest: FERC’s Three Decades of Deference to Industry Consolidation*, 38 ENERGY L. J. 233, 242 (2018).

<sup>9</sup> *Id.* at p. 237.

<sup>10</sup> *Id.* at p. 251–52. While Mr. Hempling counts 18 uncoupled utilities, since publication of his article, one of those uncoupled utilities was acquired. *See Dominion Energy Inc.*, 164 FERC ¶ 62,025 (2018) (authorizing a transaction whereby SCANA and South Carolina Electric & Gas Company will become wholly owned subsidiaries of Dominion).

<sup>11</sup> Hempling at p. 249.

<sup>12</sup> *Id.* at p. 251.

<sup>13</sup> *Id.* at p. 251, note 32; Edison Electric Institute, [Finance and Tax](#) (2022).

<sup>14</sup> *Id.* at p. 247–48.

<sup>15</sup> *Id.* at p. 252.

<sup>16</sup> *Id.* at p. 254.

- 1) Business Activities – Many mergers moved IOUs from single-purpose companies focused on a state-granted monopoly to part of a corporate family that included geographically scattered utilities and non-utility and non-electric businesses.<sup>17</sup>
- 2) Corporate Structure – Most IOUs are now owned wholly by a holding company, which in turn might be owned by a holding company owning other companies. New corporate structures attract a different mix of shareholders, which can lead management to pursue strategies that would have been unfamiliar to a standalone IOU. Such “pure play” IOUs historically pursued low-risk strategies that provided investors with stable dividends but low growth potential. Holding company shareholders may be more risk tolerant and push the company to engage in higher-risk strategies designed to achieve faster growth.<sup>18</sup>
- 3) Financial Structure – A merger changes the debt-equity mix of the IOU’s corporate structure and can affect IOU performance. For instance, while a pure play IOU has direct access to equity markets, an acquired IOU must rely on its parent holding company for equity. This dependence may be problematic if the holding company prioritizes acquisitions or other investments over the IOU’s needs. In addition, the holding company has an incentive to extract from the IOU the funds it wants and may balance the steady revenue from a lower-risk IOU with less predictable revenue from riskier ventures.<sup>19</sup>

Mr. Hempling summarizes that these three complications interact. For instance,

Adding higher-risk, non-utility businesses can cause a holding company to acquire more lower-risk utility businesses. Doing so can lower the consolidated holding company system’s cost of capital by reducing its overall risk, but this action increases the industry’s consolidation. And the new income produced from the acquired utility businesses can support more borrowing for purposes of starting or acquiring non-utility businesses, thus continuing the cycle.<sup>20</sup>

### **FERC’s Use of the Merger Guidelines and Hempling’s Critique**

FERC’s authority to review mergers was provided by Congress in 1935 “in response to great concentrations of economic and even political power vested in” interstate utility holding companies.<sup>21</sup> A seven-year investigation by this Commission “chronicled at length the venal conditions and iniquitous practices” of the utility holding companies and motivated

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<sup>17</sup> *Id.* at pp. 254–56.

<sup>18</sup> *Id.* at pp. 256–58.

<sup>19</sup> *Id.* at pp. 258–59.

<sup>20</sup> *Id.* at p. 260.

<sup>21</sup> *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 758 (1973); *North Am. Co. v. SEC*, 327 U.S. 686, 703 n.13 (1946) (quoting Report of the National Power Policy Committee on Public-Utility Holding Companies, H.Doc. 137, 74th Cong., 1st Sess., p. 5) [hereinafter NPPC Report] (power trusts were motivated “by a desire for size and the power inherent in size”); *Re Dairyland Co-Op*, 37 F.P.C. 12, at p. 15 (1967) (“The purpose of that legislation was most clear: it was designed to prevent the notorious investment and profit abuses which had developed in the industry under the domination of the holding companies.”)

Congress to grant federal regulators authority over certain aspects of the power industry.<sup>22</sup> Part I of the Act charged the Securities and Exchange Commission with addressing “economic evils resulting from uncoordinated and unintegrated public utility holding company systems” by controlling their corporate structures.<sup>23</sup> As mentioned above, Congress repealed Part I (known as the Public Utility Holding Company Act) in 2005. Part II tasked FERC with regulating the interstate sales and service provided by the holding companies’ local operating companies (the IOUs). Section 203 of the Act prohibits IOUs from merging, consolidating, or disposing of property above a certain dollar threshold without obtaining an order from FERC that finds the “proposed transaction will be consistent with the public interest.”<sup>24</sup>

In 1996, during the early stages of industry restructuring, FERC formalized its approach to section 203 reviews. Recognizing that the industry was “in the midst of . . . [a] transition to competitive power supply markets,” FERC “intend[ed] to ensure that future mergers are consistent with the competitive goals of the Energy Policy Act of 1992 and the Commission’s recent Open Access Rule.” The Commission therefore declared that for mergers to meet the statutory “public interest” standard they “must account for changing market structures and pay close attention to the possible effect of a merger on competitive bulk power markets and the consequent effects on ratepayers.”<sup>25</sup>

To analyze a proposed merger’s effect on competition, FERC incorporated the Merger Guidelines into its merger review framework.<sup>26</sup> FERC found that the Guidelines will assist it in “identify[ing] proposed mergers that clearly *will not harm* competition.”<sup>27</sup> FERC also analyzes a proposed merger’s effects on rates and regulation. Mr. Hempling discusses those two factors in detail, but they are beyond the scope of this summary. In addition, in 2000, FERC adopted vertical merger guidelines that aimed at regulatory evasion, whereby an upstream affiliate would overcharge downstream affiliates for inputs.<sup>28</sup>

Mr. Hempling’s overriding criticism of FERC’s merger review policy is that FERC “has not defined the public interest; not in a way that advances the purpose of both competition and regulation—continuous improvement in performance.”<sup>29</sup> Mr. Hempling argues that FERC’s analysis of competition incorrectly focuses solely on wholesale power markets and is deficient because it requires only “no harm” and applies that standard only to pre-merger competition. As Mr. Hempling explains, FERC “requires applicants to define only status quo markets, then calculate the merger-caused changes to those markets. Whether a merger will preclude improvements to competition . . . is ignored. Also ignored is any

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<sup>22</sup> *Salt River Project Agric. Improv. & Power Dist. v. FPC*, 391 F.2d 470, 475 (D.C. Cir. 1967) (quoting Summary Report of the FTC to the Senate, Document 92, Part 73-A, 70th Cong., 1st Sess., p. 63 (1935)).

<sup>23</sup> *North Am. Co.*, 327 U.S. at 706 (1946).

<sup>24</sup> 16 USC § 824b(a)(4).

<sup>25</sup> Order No. 592, *Inquiry Concerning the Commission’s Merger Policy under the Federal Power Act: Policy Statement*, 61 Fed. Reg. 68,595, at p. 68,596 (Dec. 30, 1996).

<sup>26</sup> FERC’s order cites to U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, issued April 2, 1992, 57 Fed. Reg. 41,552 (1992).

<sup>27</sup> *Id.* (emphasis added).

<sup>28</sup> Order No. 642, *Revised Filing Requirements Under Part 33 of the Commission’s Regulations*, 70 Fed. Reg. 70,984 (Nov. 28, 2000).

<sup>29</sup> Hempling at p. 238.

competitive ineffectiveness in the pre-merger market. The Commission ignores such sub-optimality as long as the proposed merger doesn't make things worse.”<sup>30</sup>

FERC's “no harm” standard, according to Mr. Hempling, “is inconsistent with effective competition”<sup>31</sup> and leads FERC to approve transactions whose contributions to performance are “necessarily suboptimal.”<sup>32</sup> Mr. Hempling argues that FERC should establish “accountable metrics” that detail how it will assess whether a merger improves performance. He suggests FERC consider applying the standards outlined by Scherer and Ross that analyze structure, conduct, and performance.<sup>33</sup> Applying standards that demand better performance would ultimately benefit consumers. Mr. Hempling hypothesizes that “mergers designed for maximum benefit to customers would replace mergers designed for maximum strategic benefit to acquirers and maximum gain to target shareholders.”<sup>34</sup>

Mr. Hempling also criticizes FERC for “assessing each merger in isolation, ignoring the cumulative effects and offering no indication of necessary end points to the consolidation and complication that its policies have allowed.”

Instead of approving applications based only on their self-descriptions, isolated from all other industry events, the Commission should treat each application as contributing to a cumulative effect: the long-term, likely irreversible consolidation and complication of the U.S. electric industry. Instead of treating “public interest” as a conclusory label attached to a routine approval of a multi-billion-dollar, market structure-changing transaction, FERC should define the public interest in terms of its own long-term vision for industry structure, corporate structure, and financial structure. Then with each transaction, the FERC can ask this question: “How does this proposal contribute to, or impede, the trend toward the outcomes that satisfy the public interest?”<sup>35</sup>

### **Additional Competitive Concerns that FERC's Merger Policy Disregards**

Industry consolidation and complication can raise competitive concerns about both IOU-owned local distribution infrastructure and interstate high-voltage transmission. Our analysis in this section is not based on Mr. Hempling's article.

State laws protect IOU monopolies over local distribution. Under traditional state utility regulation, IOUs have incentives to oppose distributed energy resources (DER), small-scale resources installed by customers or third parties, because they can reduce electricity

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<sup>30</sup> *Id.* at p. 282.

<sup>31</sup> *Id.* at p. 273.

<sup>32</sup> *Id.* at pp. 233, 239.

<sup>33</sup> *Id.* at pp. 269–270 (citing F. M. Scherer & D. Ross, *Industrial Market Structure and Economic Performance* (1990); *id.* at p. 281. Hempling finds that “on conduct, the FERC looks only for anti-competitive conduct—ignoring how a merger undisciplined by competition can displace more efficient transactions and absorb resources better used in other ways. . . . On structure, the FERC addresses only the control of bottleneck transmission and strategic generation—again omitting Scherer and Ross's positive structural elements.”)

<sup>34</sup> *Id.* at p. 274.

<sup>35</sup> *Id.* at pp. 308–09.

deliveries over IOU-owned infrastructure.<sup>36</sup> Those incentives are particularly strong for vertically integrated IOUs or IOUs with generation-owning corporate affiliates whose long-term power plant development opportunities and short-term wholesale sales could be threatened by greater DER adoption. In addition, a rule that FERC issued in 2020 requiring RTOs to facilitate energy sales by DERs in wholesale markets provides another pathway for DERs to reduce IOU or holding company revenues and profits.

While all IOUs have incentives to inhibit DER adoption, IOU mergers may fuel their DER opposition. This concern led two utility commissioners in Maryland to dissent from their colleagues' approval of a utility holding company's acquisition of two IOUs. In that 2015 decision, they expressed concern that the holding company, itself one of the largest generation owners in the region, would use its control over the Maryland IOUs to inhibit DER growth in order to "shield its fleet [of power plants] from emerging distributed energy technologies and other competitive threats." The dissenting regulators warned that the companies' investments in large-scale power plants "are inherently misaligned with the interests of the customers of [the IOUs] who are predominantly concerned with efficient, cost-effective and reliable electric service."<sup>37</sup> FERC's merger policy ignores whether a proposed transaction might increase IOU incentives to act anti-competitively against DERs.

FERC also overlooks whether a merger has anti-competitive effects on transmission development. The Commission has long recognized the competitive salience of transmission. In response to a FERC workshop in 2012, Commission staff commented that

Transmission lines have significant implications for competition and consumers, because these facilities can allow more resources – including distant, lower-cost generation – to compete to serve consumer demand. Transmission line investments that allow many resources to compete will reduce wholesale and retail (consumer) power prices if the reduction in power purchase costs offsets the cost of the transmission capacity, all else being equal. Conversely, transmission congestion can prevent resources from competing and give significant market power to resources within the transmission-constrained area. Firms, however, may seek to structure transmission investments in ways that allow them to profit from the exercise of market power in the generation or transmission market at the expense of consumers.<sup>38</sup>

In responding to a separate FERC proceeding, the Commission approved of FERC's efforts to facilitate non-IOU investment in new transmission. The Commission commented that then-existing FERC-approved transmission tariffs that provided IOUs with rights-of-first refusal to build any project within their state-granted service territories "increase risk for potential entrants, without any countervailing incentives, and encourage free riding by [IOUs] on the investments of potential entrants in developing transmission project

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<sup>36</sup> See Ari Peskoe, *Unjust, Unreasonable, and Unduly Discriminatory: Utility Rates and the Campaign against Rooftop Solar*, 11 TEX. J. OF OIL, GAS, AND ENERGY LAW, 101 (2016).

<sup>37</sup> *In the Matter of the Merger of Exelon Corporation and Pepco Holdings, Inc.*, Maryland Public Service Commission (No. 9631) (Md. Pub. Serv. Comm'n, May 15, 2015) (Commissioners Hoskins and Williams, dissenting).

<sup>38</sup> [Comment of the Staff of the Federal Trade Commission](#), FERC Docket AD12-9, Jun. 14, 2012.

proposals.”<sup>39</sup> The Commission observed that FERC was correct to address plausible IOU “incentives to maintain a less than robust transmission system to discourage new generation entry and competition from distant generators.”<sup>40</sup> And the Commission urged FERC to eliminate all IOU rights-of-first-refusal, concluding that FERC’s “policies should not prevent willing, qualified non-incumbents from building transmission projects that have proceeded through the planning process.”<sup>41</sup>

Despite FERC’s efforts, IOUs continue to dominate transmission development. There remain numerous obstacles to non-incumbent investment, many of which can be traced to IOUs’ explicit or implicit control over planning and cost allocation processes that determine which projects are paid for via regulated rates and which projects must be developed through competitive processes.<sup>42</sup> FERC’s merger review policy does not consider whether IOU consolidation has exacerbated challenges for non-incumbents.

Consolidation has allowed a handful of holding companies to effectively control regional transmission development. In New England, three holding companies (Eversource, National Grid, and Iberdrola) own approximately 90% of the integrated high-voltage network covering six states. In PJM, which spans from North Carolina to Chicago, four holding companies (AEP, FirstEnergy, Exelon, and Dominion) own lines covering the vast majority of the RTO’s footprint. Ownership allows these holding companies to act anti-competitively in transmission development processes. For instance, by over-building transmission in their IOU service territories, these holding companies can obviate the need for a regional project that might be built by a non-IOU developer and be more cost-effective for ratepayers. Ownership also allows IOUs to impose RTO rules, subject to FERC’s approval, that can limit non-incumbent development.<sup>43</sup>

FERC has not considered how IOU consolidation affects transmission development. Apart from examining specific transmission bottlenecks that may enable the exercise of market power in wholesale generation markets,<sup>44</sup> FERC’s merger reviews do not consider transmission ownership. Because all IOUs generally have an incentive to block non-IOU transmission investment, it is plausible that consolidation does not materially increase IOUs’ incentive to act anti-competitively. Yet, perhaps FERC should at least ask the question. As Mr. Hempling argues, “FERC should define the public interest in terms of its own long-term vision for industry structure, corporate structure, and financial structure.”<sup>45</sup>

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<sup>39</sup> [Comment of the Federal Trade Commission](#), FERC Docket No. RM10-23, Sep. 29, 2010.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> See Ari Peskoe, [Is the Utility Transmission Syndicate Forever?](#) 42 ENERGY LAW JOURNAL 1 (2021).

<sup>43</sup> *Id.* See also [Protest of AMP Transmission, Old Dominion Electric Cooperative, and Silver Run Electric](#), FERC Docket No. ER22-358, Nov. 29, 2021 (describing “ongoing efforts” by PJM IOUs to maintain control of a PJM committee and limit participation of non-IOU transmission developers and characterizing their effort as anti-competitive and unduly discriminatory). FERC rejected this protest and approved the IOUs’ proposed rule change. *Public Service Electric and Gas Co. et al.*, 179 FERC ¶ 61,001 (2022).

<sup>44</sup> Hempling at p. 281.

<sup>45</sup> *Id.* at p. 309.



This investigation would be particularly timely, as the Biden Administration has prioritized transmission development.<sup>46</sup> If industry consolidation trends continue, the nation's interstate power networks could be owned by just a few companies in each region. The Commission should consider whether that level of consolidation might further facilitate anti-competitive IOU conduct, dampen innovation, and lead to higher consumer prices.

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April 21, 2022

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<sup>46</sup> See U.S. Department of Energy, Notice of Intent, [Building a Better Grid Initiative to Upgrade and Expand the Nation's Electric Transmission Grid to Support Resilience, Reliability, and Decarbonization](#), Jan. 11, 2022 (outlining numerous initiatives aimed at improving and increasing transmission development).