

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Comment of the Harvard Electricity Law Initiative¹

Just and reasonable and not unduly discriminatory transmission planning can reduce power sector costs by improving the efficiency of the nation’s transmission networks. However, as the NOPR explains, transmission providers’ planning processes are not up to speed with the industry’s long-term needs or capabilities. Planning has failed to address backlogged interconnection queues of low-cost generation, inexpensive technologies that can increase transmission capacity, and operational challenges best addressed at the regional level. Transmission rates are not just and reasonable because transmission development is not harnessing opportunities to reduce wholesale power and transmission costs.

Like the Commission’s prior reforms to its transmission Open-Access standards, the NOPR aims to ensure just and reasonable rates by accelerating beneficial industry trends and ensuring transmission providers are meeting customer demands.² The Commission has legal authority to find

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 Order No. 888, 61 Fed. Reg. 21,540, at p. 21,541 (May 10, 1996) (“The continuing competitive changes in the industry and the prospect of these benefits to customers make it imperative that this Commission take the necessary steps within its jurisdiction to ensure that all wholesale buyers and sellers of electric energy can obtain non-discriminatory transmission access, that the transition to competition is orderly and fair, and that the integrity and reliability of our electricity infrastructure is maintained”); *see generally* Order No. 2003, 104 FERC ¶ 61,103 (2003); Order No. 890, 118 FERC ¶ 61,119, at PP 2–3 (2007) (summarizing that reforms will “ensure that customers are treated fairly in seeking

that deficient planning threatens the justness of reasonableness of jurisdictional rates, and it has jurisdiction to order changes to transmission planning practices.³

But the Commission should bolster the legal defensibility of its final rule. Courts have consistently upheld remedies to transmission providers' practices when the Commission is acting to cure undue discrimination.⁴ While previous Open-Access reforms improved industry performance by remedying undue discrimination,⁵ the NOPR proposes to erect unduly discriminatory barriers to entry and condone anti-competitive conduct. Although the proposed conditional rights of first refusal (ROFR) is severable from the planning reforms, the Commission's justification for its conditional ROFR exposes legal infirmities that infect the NOPR's planning reforms.

According to the NOPR, the dichotomy between uncompetitive local transmission development and competitive regional transmission development has incentivized incumbents to prioritize local over regional spending. Eliminating regional competition through conditional ROFRs, as the Commission proposes, may diminish the unjust, unreasonable, and "perverse" incentives that lead incumbents to evade regional planning,⁶ but it will also exacerbate the undue discrimination underlying regional processes.

alternative power supplies . . . [and] will increase the ability of customers to access new generating resources"); Order No. 764, 139 FERC ¶ 61,246 at P 1 (2012) ("reforms are needed in order to ensure that transmission customers are not exposed to excessive or unduly discriminatory charges").

³ South Carolina Public Service Authority v. FERC, 762 F.3d 41 (D.C. Cir. 2014); Order No. 1000-A, 139 FERC ¶ 61,132 at PP 56–75 (2012).

⁴ See Harvard Electricity Law Initiative, Docket No. RM21-17, Oct. 12, 2021, at pp. 27–43.

⁵ See, e.g., Order No. 888-A, 62 Fed. Reg. 12,274, at p. 12,296 (concluding that it cannot "allow what have become unduly discriminatory practices to erect barriers between customers and the rapidly emerging competitive electricity marketplace"); Order No. 890, 118 FERC ¶ 61,119 at PP 44, 57–63 (2007); Order No. 1000 at PP 25–29 42–46; Order No. 764 at PP 16–24, 46 (2012).

⁶ NOPR at P 350.

The Commission previously attempted to address this undue discrimination. In Order No. 890, the Commission imposed planning rules because it could “not rely on the self-interest of transmission providers to expand the grid in a nondiscriminatory manner.”⁷ The Commission now acknowledges that this undue discrimination persists. In the ROFR reform discussion, the Commission recognizes that incumbents are still able to defeat beneficial regional projects through their “advocacy.”⁸ Yet the Commission not only ignores incumbents’ unduly discriminatory influence over regional planning, it proposes to reinforce it by eliminating any incentive for non-incumbent developers to participate in regional planning.

In this comment, we explain that while the Commission is correct not to disturb its conclusion that ROFRs are unduly discriminatory barriers to entry,⁹ its proposed remedy will not cure undue discrimination or lead to just and reasonable rates. Once implemented by incumbents, the proposed conditional ROFRs will be nearly indistinguishable from the pre-Order No. 1000 status quo. Incumbent investor-owned utilities (IOUs) will again be the only entities with incentives to propose regional projects. The evidence shows that incumbent IOUs will pair with each other in order to exclude non-profit utilities and non-incumbent developers. IOU pairings induced by the Commission’s proposed remedy will not facilitate new entry or result in innovative transmission solutions. To the contrary, by allowing incumbents to cartelize transmission development, the NOPR would abandon the

⁷ Order No. 890, 118 FERC ¶ 61,119 at P 422 (2007); *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”).

⁸ NOPR at P 350.

⁹ NOPR at P 351 (citing Order No. 1000, 136 FERC ¶ 61,051 at PP 5, 7, 226).

innovative potential of competitive transmission and doom customers to incumbents' suboptimal and unduly discriminatory planning.

The ultimate remedy is planning administered by a body free that is not beholden to incumbent transmission owners. Truly independent planning is consistent with the Commission's initial vision of RTOs.¹⁰ But the Commission has yet to propose governance reforms that might facilitate independent planning in both RTO and non-RTO regions. Alternatively, the Commission could address the perverse incentives of its current rules by subjecting local planning to heightened scrutiny. The Commission may be pursuing this approach in a separate docket.¹¹

In this proceeding, the Commission has options that would be a logical outgrowth of its proposal, could address the perverse incentives that are impeding beneficial regional development, and would not erect unduly discriminatory barriers to entry. As an initial matter, the Commission could defer the ROFR issue and its proposed decision to disallow construction work-in-progress (CWIP) financing to another proceeding. In other dockets, the Commission is exploring oversight mechanisms and transmission incentives. Rather than deciding the ROFR and CWIP incentives in this proceeding,¹²

¹⁰ *ISO New England*, 91 FERC ¶ 61,311, at p. 62,076 (2000) (rejecting planning proposal that put incumbents “in a position to unduly influence the projects included or how the projects are ranked or classified”); *Carolina Power & Light Co.*, 94 FERC ¶ 61,273, at p. 62,009 (2001) (“[I]ndividual transmission owners . . . should not be able to dictate transmission plans”); *New York ISO, et al.*, 96 FERC ¶ 61,059 at p. 61,203 (2001) (an RTO “must have ultimate responsibility for both transmission planning and expansion”); *Avista Corp., et al.*, 100 FERC ¶ 61,274, at p. 62,085 (2002); *Southwest Power Pool*, 106 FERC ¶ 61,110, at P 188 (2004) (RTOs must “independently oversee the regional transmission plan and solely determine the priority of transmission planning projects”).

¹¹ See Supplemental Notice of Technical Conference, Docket AD22-8 – Transmission Planning and Cost Management, Jul. 22, 2022.

¹² As the Commission acknowledges, a ROFR is an incentive. NOPR at P 350 (noting that the Commission's rules about competition provide utilities with “perverse incentives”).

the Commission could consider them as part of a comprehensive package of carrots and sticks aimed at improving industry performance.

If the Commission finalizes any ROFR reform, we offer two alternative proposals that could provide many of the benefits of competitive development, remedy undue discrimination, and address the “perverse incentives” of the Commission’s current approach. First, the Commission could allow an incumbent utility to apply for a ROFR only following the completion of a competitive process. The ROFR would allow the utility to own no more than fifteen percent of the project. Providing non-incumbent developers with at least eighty-five percent of the project might incentivize them to continue participating in planning processes and developing transmission solutions. Gifting the incumbent utility an unearned cut of the project might discourage the utility from advocating against regional projects. Consumers would benefit from an increase in competition and regional development.

Second, the Commission could leave the scope of competition up to state regulators. The NOPR envisions robust roles for state regulators in project selection and cost allocation. The record in this proceeding shows that competition has worked in some regions, and that regulators and other state officials from certain regions continue to support competition. State officials are best positioned to determine whether competition is feasible and beneficial. The Commission routinely provides flexibility to RTOs and other planning regions in implementing Commission orders.¹³ Region-specific section 205 proceedings about competition will allow the Commission to

¹³ See, e.g., Order No. 1000 at P 61 (“[T]he Commission recognizes that each transmission planning region has unique characteristics and, therefore, this Final Rule accords transmission planning regions significant flexibility to tailor regional transmission planning and cost allocation processes to accommodate these regional differences.”); *id.* at PP 149, 155, 158.

examine the evidence and determine whether competition or ROFRs are the just and reasonable approach in each planning region.

Regardless of which option it chooses, the Commission must not provide ROFRs to incumbent IOUs in PJM when they partner with each other. Earlier this year, the Commission approved revisions to the PJM Consolidated Transmission Owners Agreement that incentivize incumbents to maintain a 95% ownership share of transmission.¹⁴ If they dilute their ownership share through joint ventures with non-profit utilities or non-incumbent developers, PJM incumbents will lose absolute control over the PJM Transmission Owners Agreement Administrative Committee. Through that committee, the incumbents write section 205 filings on rate design and other matters. They will not voluntarily give up their control for the sake of partnering with their longtime rivals.

¹⁴ *Public Service Gas & Electric*, 179 FERC ¶ 61,001 (2022).

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I. In a Separate Proceeding, the Commission Should Consider ROFR Reforms and the CWIP Incentive, Together with Other Incentives and Oversight Mechanisms

The Commission is in the midst of reforming transmission rates and service.¹⁵ To support its policy goals, the Commission should consider

¹⁵ Relevant open dockets include: RM21-17 (long-term planning); RM22-14 (generator interconnection reforms); RM22-10 (extreme weather reliability planning standard); RM22-16 (vulnerability assessments); RM20-10 (incentives); RM21-3 (cybersecurity incentives); and AD22-5 (dynamic line ratings). Last year, the Commission finalized Order No. 881, *Managing Transmission Line Ratings*, 177 FERC ¶ 61,179 (2021). The Commission also

developing a holistic package of incentives, penalties, and oversight mechanisms. There is no rush to finalize incentives in a piecemeal fashion, as the Commission proposes in the NOPR. Initial long-term transmission plans are years away, and there will be ample time for transmission providers to account for incentives down the line.

For decades, the Commission has employed incentives to meet policy objectives and improve performance of regulated utilities.¹⁶ With regard to transmission incentives, prior to the Energy Policy Act of 2005, the Commission proposed to “reward transmission owners for pursuing additional measures to operate and expand the transmission grid efficiently in ways that solve RTO-identified system needs using either classic

opened a proceeding to consider its accounting rules for public utility transmission owners. *Rate Recovery, Reporting, and Accounting Treatment of Industry Association Dues and Certain Civic, Political, and Related Expenses*, 177 FERC ¶ 61,180 (2021). The Commission has also announced in Docket No. AD22-8 a technical conference on transmission planning and cost management. Meanwhile, the U.S. Department of Energy is also in the midst of numerous transmission financing and planning efforts. 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*](#), 87 Fed. Reg. 2769 (Jan. 19, 2022). Finally, Congress last year passed the Infrastructure Investment and Jobs Act, which includes several billions of dollars to support transmission development and amends the Commission’s transmission siting authority in section 216 of the Federal Power Act. See H.R. 3684 (117th Congress), 135 Stat. 429. More recently, Congress passed the Inflation Reduction Act, which provides an additional \$2 billion for transmission loans, \$760 million to facilitate siting, and \$100 million for planning-relevant studies.

¹⁶ See, e.g., *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) (holding that incentive pricing was permissible under the Natural Gas Act); *Construction Work in Progress for Electric Utilities*, 48 Fed. Reg. 24,323 (Jun. 1, 1983) (establishing regulations to govern the inclusion of the costs of construction work in progress (CWIP) in the rate base of public utilities); *MISO*, 100 FERC ¶ 61,292 at P 31 (2002) (awarding a 50 basis points ROE adder to utilities that turned operational control of transmission facilities to MISO and stating it will “consider providing additional upward adjustments for greater levels of independence”); *Transbay Cable*, 112 FERC ¶ 61,095 at P 24 (2005) (providing incentives due to the “difficult to quantify” benefits of the project, including “enhanced reliability, more efficient dispatch and possible environmental benefits”); *Bangor Hydro-Electric Co., et al*, 117 FERC ¶ 61,129 at P 103 (2006) (“The Commission’s authority to encourage investment in infrastructure through the application of incentive pricing is not new. The Commission, exercising its existing authority under section 205, has done so for the purpose of encouraging new investment to meet demonstrated needs.”).

transmission investments or innovative technologies.”¹⁷ In that proposed policy statement, the Commission considered how incentives could complement its efforts across numerous proceedings to “promote competitive wholesale electric markets, reduce wholesale electric costs and improve electric reliability.”¹⁸ Courts have held that the Commission has broad authority under sections 205 and 206 to include incentives in rates.¹⁹

The Commission could take a similar approach here. Through ongoing and recent proceedings, the Commission is amending its suite of policies aimed at improving the performance of regulated utilities. Accounting for these proceedings, the Commission’s Open Access standards aim to control costs of transmission expansion by encouraging or requiring providers to:

- Administer open and transparent planning processes;²⁰
- Coordinate through regional and interregional planning;²¹
- Integrate local needs in regional planning processes;²²
- Account for long-term needs driven by resource mix and demand changes and extreme weather;²³
- Increase utilization and capacity of existing infrastructure;²⁴ and

¹⁷ *Proposed Pricing Policy for Efficient Operation and Expansion of the Transmission Grid*, 102 FERC ¶ 61,032 at P 1 (2003). Although the Commission never finalized its proposed policy statement, it continued to award incentives similar to those outlined in the proposed policy statement on a case-by-case basis. *See, e.g., Michigan Electric Transmission Co.*, 105 FERC ¶ 61,214. The Energy Policy Act of 2005 superseded the Commission’s proposed policy statement. Notice of Proposed Rulemaking, *Promoting Transmission Investment through Pricing Reform*, 113 FERC ¶ 61,182 at P 2 n. 7 (2005).

¹⁸ *Id.*

¹⁹ *See* *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *Consumers Union v. FPC*, 510 F.2d 656, 660 (D.C.Cir.1974) (“reliance on non-cost factors has been endorsed by the courts primarily in recognition of the need to stimulate new supplies”); *Interstate Natural Gas Ass’n. of America v. FERC*, 285 F.3d 18, 34 (“The presence of these non-cost factors here distinguishes the present case from prior decisions cited . . . where we set aside FERC departures from cost-based rate ceilings”) (citations omitted); *Maine Public Utilities Comm’n. v. FERC*, 454 F. 3d 278, 287–90 (D.C. Cir. 2006) (upholding incentives for New England transmission owners who joined ISO-NE).

²⁰ *See* Order No. 890, 118 FERC ¶ 61,119 at PP 418–602 (2007).

²¹ *See* Order No. 1000 at PP 67–84. 345–481.

²² Order No. 1000 at PP 78–81; NOPR at PP 383–415.

²³ *See* NOPR at PP 64–277.

²⁴ Order No. 890, 118 FERC ¶ 61,119 at P 4 (2007); NOPR at PP 256–277.

- Administer competitive development processes.²⁵

In general, the Commission aims to achieve its policy goals by issuing procedural rules and requiring utilities to file tariffs that enshrine those mandated procedures. While utilities may uphold the letter of those rules, transmission development does not always reflect the spirit of the Commission's orders. For instance, in the NOPR the Commission recognizes that "perverse incentives" have led utilities to prioritize uncompetitive local projects over competitive regional projects,²⁶ despite the Commission's clear intent that transmission providers prioritize regional development.²⁷ These recent transmission investment trends demonstrate that incentives trump the Commission's procedural rules.

The NOPR's procedural rules are well-intentioned. But to motivate conformity with the NOPR's planning directives, the Commission needs a coherent set of incentives and penalties backed by consistent oversight. Once the Commission has its full goals and procedural rules in place, it will be better positioned to design this suite of tools that will drive improved outcomes for consumers. Moreover, removing the ROFR issue from this proceeding will eliminate a significant legal risk from the final rule.²⁸

II. The Commission's Proposed Remedy to Unduly Discriminatory ROFRs Will not Cure Undue Discrimination and Will Result in Unjust and Unreasonable Rates

In Order No. 1000, the Commission found that ROFRs in jurisdictional tariffs "create opportunities for undue discrimination . . . against non-

²⁵ Order No. 1000, 136 FERC ¶ 61,051 at PP 293–340 (2011).

²⁶ NOPR at PP 349–350.

²⁷ Order No. 1000, 136 FERC ¶ 61,051 at PP 46, 78–82 (2011); Order No. 1000-A, 139 FERC ¶ 61,132 at PP 50–52 (2012).

²⁸ In the NOPR, the Commission proposes to invoke FPA section 309 to edit Order No. 1000. NOPR at P 351. The Commission has never used section 309 to revise an Open-Access rule.

incumbent transmission developers.”²⁹ 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.³⁰ Following extensive proceedings at the Commission and in federal appeals courts, the four multi-state RTOs ultimately removed the ROFRs from their tariffs and received Commission approval for competitive transmission development processes.³¹

In the NOPR, the Commission does not revisit its finding in Order No. 1000 that ROFRs “create opportunities for undue discrimination” or its conclusion in compliance proceedings that ROFRs are anti-competitive.³² Instead, the Commission suggests that the remedy it then ordered has resulted in unjust and unreasonable rates.³³ Because the Commission then mandated that only certain types of transmission projects be developed competitively, the Commission now proposes to find that its rules send “perverse investment incentives that do not adequately encourage [] incumbent transmission providers to develop and advocate for” regional

²⁹ Order No. 1000, 136 FERC ¶ 61,051 at P 286 (2011), *reh’g denied*, Order No. 1000-A, 139 FERC ¶ 61,132 at PP 361–363 (2012).

³⁰ Order No. 1000, 136 FERC ¶ 61,051 at PP 284, 289 (2011).

³¹ *PJM Interconnection, et al.*, 142 FERC ¶ 61,214 (2013), *aff’d*, American Transmission Systems Inc. v. FERC, 2016 WL 3615443 (D.C. Cir. 2016, unpublished) (dismissed for lack of jurisdiction); *Midwest Indep. Sys. Operator, et al.*, 142 ¶ FERC 61,215 (2013), *aff’d*, MISO Transmission Owners, et al. v. FERC, 819 F.3d 329 (7th Cir. 2016); *ISO-New England*, 143 FERC ¶ 61,150 (2013), *aff’d*, Emera Maine v. FERC, 854 F.3d 662 (D.C. Cir. 2017); *Southwest Power Pool, et al.*, 144 FERC ¶ 61,059 (2013), *aff’d*, Oklahoma Gas and Electric Co. v. FERC, 827 F.3d 75 (D.C. Cir. 2016).

³² In each proceeding, the Commission found that Public Utilities forming RTOs shared the common aim of “protecting themselves from competition in transmission development.” *PJM kInterconnection, 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).

³³ NOPR at PP 351–53.

projects.³⁴ The Commission finds that its current approach “place[s] unintended emphasis on the development of local transmission facilities or other transmission facilities not subject to competitive transmission development processes.”³⁵ To “help address potentially misaligned incentives regarding regional and local transmission facility investment,”³⁶ the Commission proposes to allow incumbent transmission providers to file for new ROFRs that are conditioned on the incumbent establishing joint ownership of the relevant transmission facility with an unaffiliated entity, including another incumbent transmission provider.³⁷

Providing ROFRs to pairs of incumbents will nearly replicate the pre-Order No. 1000 status quo. The Commission attempts to justify its reform, but it cannot show that its proposal will meet its policy goals or cure undue discriminatory restrictions. To the contrary, the NOPR exposes a second layer of undue discrimination underlying regional transmission processes. Whether administered by an RTO or an incumbent-controlled entity, the NOPR finds that IOU “advocacy” is stymieing regional transmission development.³⁸ Any ROFR reform must address this “factual finding.”³⁹

A. Under the NOPR’s Conditional ROFR, Incumbent IOUs Will Partner with Other IOUs and Exclude Other Developers

History and recent IOU advocacy show that incumbents will partner exclusively with each other. Yet, the Commission’s justifications for allowing conditional ROFRs presume that an incumbent IOU will partner with a non-

³⁴ NOPR at P 350.

³⁵ NOPR at P 377.

³⁶ NOPR at P 355.

³⁷ NOPR at P 365.

³⁸ NOPR at P 350.

³⁹ *Ark Initiative v. Tidwell*, 816 F.3d 119, 127 (D.C. Cir. 2016).

incumbent developer or non-profit utility. The Commission’s assumption cannot withstand scrutiny.

MISO’s Multi-Value Project (MVP) planning process is illustrative. While the initial MVP process may be a model to emulate in many respects,⁴⁰ it also highlights that, when given the choice, incumbents will partner with each other. Of the initial sixteen MVPs, thirteen projects were jointly developed.⁴¹ Of those thirteen projects, only one project included a non-incumbent developer or non-profit utility.⁴² In SPP, three of its initial pre-Order No. 1000 “High Priority” projects were joint ventures, and two of those three were between incumbent IOUs.⁴³ Yet the MISO and SPP territories include vast areas where cooperatively and municipally owned utilities deliver power to consumers. MISO MVP and SPP High Priority projects traversed these non-IOU regions, but IOUs chose to partner with each other and exclude those non-profit utilities.

PJM incumbents have also demonstrated that they will partner with each other, to the exclusion of non-profit utilities and non-incumbent developers. Prior to Order No. 1000, incumbent IOUs tried to block non-incumbent developers from participating in regional planning and earning tariffed

⁴⁰ The key lesson from the MVP process is the importance of state leadership, and in particular early involvement of state governors and sustained engagement and decisionmaking by state officials. See AESL Consulting, [A Transmission Success Story: The MISO MVP Portfolio](#) (2021) (appended to the Reply Comments of the Edison Electric Institute, Docket No. RM21-17, Nov. 30, 2021).

⁴¹ See MISO, [Multi Value Project Portfolio: Results and Analyses](#), Jan. 12, 2012, pp. 22-41.

⁴² MISO incumbent IOUs include transmission-only companies, including ITC and ATC. Those companies formed to purchase the transmission assets of load-serving IOUs as part of utility restructuring initiatives in Wisconsin and Michigan in the early 2000s. ITC later expanded by purchasing Alliant Energy’s transmission assets in Iowa. Both ATC and ITC are members of the incumbent IOUs’ trade association, the Edison Electric Institute.

⁴³ SPP, SPP Priority Projects Phase II Report, Feb. 1, 2010, at p. 33. Prairie Wind

rates.⁴⁴ Foreshadowing ROFR debates, the PJM IOUs then claimed the “exclusive right to build economic transmission expansion or enhancement projects within [their] respective state-established utility service territory.”⁴⁵ The Commission rejected that claim in multiple proceedings.⁴⁶ More recently, incumbent IOUs gained complete control over section 205 filings, despite objections of non-IOU transmission owners who argued that the IOUs’ proposal was part of a “broader ongoing effort by the incumbent PJM TOs to maintain control” over the relevant PJM committee.⁴⁷ Claiming to need protection from the “proliferation of smaller, non-traditional Transmission Owners,”⁴⁸ incumbent IOUs received Commission approval to “rebalance the voting rules to better align with individual PJM Transmission Owners’ economic stakes in the transmission system.”⁴⁹ Against this backdrop, the Commission now imagines that incumbent IOUs will voluntarily partner with non-incumbents.

Incumbents have long opposed joint ventures with non-incumbents. In the Order No. 890 proceeding, for instance, the Edison Electric Institute urged the Commission not to pursue joint ownership rules for transmission. It rejected the claim, advanced here by the Commission, that “joint ownership [will] stimulate investment in transmission facilities,”⁵⁰ and warned the

⁴⁴ *Primary Power*, 131 FERC ¶ 61,015 (2010) (issuing a declaratory order that finds PJM’s tariff does not preclude PJM from designating a non-incumbent a developer of a regional project), *reh’g denied*, 140 FERC ¶ 61,052 (2012).

⁴⁵ Brief of the PSEG Companies, The PPL PJM Companies, and Exelon Corporation, *Public Serv. Elec. and Gas Co. v. FERC*, Docket No. 12-1382 (D.C. Cir. Apr. 10, 2013)

⁴⁶ *Supra* note 44; *Central Transmission v. PJM*, 131 FERC ¶ 61,243 (2010), *reh’g denied*, 140 FERC ¶ 61,053 (2012); *PJM Interconnection, et al.*, 142 FERC ¶ 61,214 (2013).

⁴⁷ Protest of AMP Transmission, Old Dominion Electric Cooperative, and Silver Run Electric, Docket No. ER22-358, Nov. 29, 2021.

⁴⁸ Transmittal Letter, Docket No. ER22-358, Nov. 8, 2021, at p. 13.

⁴⁹ *Public Service Gas & Electric*, 179 FERC ¶ 61,001 at P 30 (2022).

⁵⁰ Initial Comments of the Edison Electric Institute, Docket No. RM05-25, Aug. 7, 2006, at p. 66.

Commission that joint ownership with non-profit utilities could complicate siting processes.⁵¹ Incumbent Entergy claimed that joint ownership with non-incumbents would raise a host of issues, ranging from financing terms and O&M cost allocation to tax issues.⁵² New York IOUs predicted that joint ownership would lead to “fragmentation of transmission grid ownership and may make it more difficult in the long term to construct transmission facilities.”⁵³ Incumbent IOUs commenting in that proceeding universally opposed mandating joint ownership with non-jurisdictional utilities.⁵⁴ In this proceeding, incumbents have urged the Commission to restore unconditional ROFRs *so that incumbents could work with other incumbents* to choose regional transmission solutions.⁵⁵

Nevertheless, citing to its own aspirational statements from 2006, the Commission now “believe[s] that jointly-owned regional transmission

⁵¹ *Id.* at p. 68 (“there are complications concerning the transfer of right-of-way condemnation rights to non-public utilities”).

⁵² Reply Comments of Entergy Services, Inc., Docket No. RM05-25, Sep. 20, 2006, at p. 21 (“Joint ownership would raise a host of issues, including (a) the relative financing obligations of the parties, (b) the methodology to allocate on-going costs, such as administrative and general costs, (c) the terms under which ‘new capital’ will be supplied, (d) the terms regarding the joint ownership rights and responsibilities of the co-owners, including obligations regarding on-going operation and maintenance of the facilities, (e) the allocation of risks among the joint owners, including liability and indemnification; (f) insurance requirements; and (g) potential tax issues.”).

⁵³ Comments of Indicated New York Transmission Owners, Docket No. RM05-25, Aug. 7, 2006 at p. 15.

⁵⁴ See Comments filed in Docket No. RM05-25 by: Southern California Edison, Aug. 7, 2006, at pp. 4–5; National Grid USA, Nov. 22, 2005, at pp. 23–25; Duke Energy, Sep. 20, 2006, at pp. 14–15; MidAmerican Energy and PacifiCorp, Aug. 7, 2006, pp. 32–33; Public Service Electric & Gas Co., Aug. 7, 2006, at pp. 11–13; Ameren Services Co., Aug. 7, 2006, at pp. 22–24; Southern Company Services, Nov. 22, 2005, at pp. 90–91.

⁵⁵ Indicated PJM Transmission Owners, Docket RM21-17, Aug. 17, 2022 (noting “the decline in collaboration and coordination *between the RTOs and their transmission-owning utility members*” and claiming that the “PJM planning process was established to be a *close partnership between PJM regional planners and transmission owner planners and operators*”); Edison Electric Institute Comment, Docket RM21-17, Oct. 12, 2021, at p. 21 (claiming that “cooperation and collaboration that exists *between neighboring TOs*” is needed for regional planning; Indicated PJM TOs, Docket RM21-17, Oct. 12, 2021, at pp. 30–32 (asking the Commission to restore the “cooperation *between the RTOs, states, and their transmission-owning members*”).

facilities, which may involve the participation of multiple nearby load-serving entities and potentially those that are public power entities, *may increase collaboration within the regional transmission planning process.*⁵⁶ But the Commission cites no actual experience with RTOs or non-RTO planning regions to support this vision of egalitarian planning. To the contrary, the NOPR concedes that IOUs are firmly in control and have collectively decided to suppress regional development because it is open to non-incumbents.⁵⁷

The proposed conditional ROFR will recreate the IOU cartels that historically dominated bulk power infrastructure development. Before Order No. 1000, incumbent IOUs built nearly all regionally planned projects located within their state-granted retail territories. For projects that spanned multiple retail territories, each IOU would build the segment within its retail area. The conditional ROFR would restore that practice. For regional projects contained within one IOU's retail area, the conditional ROFR would require the IOU to partner with another entity in order to avoid competition. Prior to Order No. 1000, the IOU would have built the project itself. The NOPR would thus slightly alter the pre-Order No. 1000 status quo by requiring a host IOU to pair with another IOU in order to block competing developers.

History shows that IOUs are likely to engage in tacit collusion, taking turns partnering with each other in order to exclude non-IOUs.⁵⁸ Prior to the

⁵⁶ NOPR at P 372 (citing to Order No. 679, *Promoting Transmission Inv. through Pricing Reform*, 116 FERC ¶ 61,057, at PP 354, 355 (2006); *see also* NOPR at P 373 (“may achieve efficiencies in addressing their collective transmission needs and, therefore, achieve lower overall costs compared to developing transmission facilities to resolve more individualized needs in a more piecemeal manner as is the case today.”).

⁵⁷ NOPR at P 350.

⁵⁸ The Supreme Court has explained that “[t]acit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supra-competitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.” *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). This definition does

Commission's Open-Access rules, planning arrangements associated with Commission-approved power pool agreements allowed IOUs to co-own facilities or take turns building new facilities.⁵⁹ Regionally beneficial joint development was contingent on compatibility with the expansion plans and financial goals of each individual IOU.⁶⁰ In general, IOUs did not invite non-

not precisely apply to transmission, which is priced using a cost-of-service methodology. Without competitive pressures that might lower the price of transmission (ROEs), public utilities would in effect all receive the same price for transmission via Commission-set ROEs that are often standardized across a region. Like textbook tacit collusion, incumbent utilities with ROFRs would "in effect share monopoly power" and would control regional development in a manner consistent with "their shared economic interests." In regions where utilities own generation, the "profit-maximizing" strategy might entail suppressing new transmission that could unlock competing generators. Elsewhere, utilities will build transmission at a pace and scale that meets their goals, rather than what's best for consumers, transmission customers, and competitors.

⁵⁹ Federal Power Commission, 1970 National Power Survey, at I-17-24 ("Most joint ownership arrangements are among utilities within the same power pool or planning organization."); *id.* at I-17-4 n.4 ("Membership of most power pools consists entirely of the larger investor-owned systems"); *id.* at I-17-25 ("A recent development of great significance is the increasing use of joint ownership of facilities by members of formal power pools," finding that 27.6 GW of jointly developed pool capacity would be put in service from 1968 to 1975 and noting that pools had procedures to "utilize joint enterprises on a continuing basis"); *id.* at I-17-23 (describing various approaches to "staggered construction," where IOUs take turns building new plants); *Mid-Continent Area Power Pool*, 58 FPC 2622, at p. 2649 (1977) ("Emphasis is placed upon staggered and timely construction of large generating units"); Abraham Gerber, *Power Pools and Joint Plant Ownership*, 82 PUB. UTIL. FORTNIGHTLY 23, 26 (Sept. 12, 1968) (stating that under the Carolina-Virginia (CARVA) power pool agreement, each new baseload unit is built by a single IOU and sized so that load growth on that IOU's system absorbs the excess capacity while other systems purchase the excess capacity during that interval).

⁶⁰ 1970 National Power Survey, *supra* note 59, at I-17-9 (noting that "corporate rate-base requirements" are an obstacle to coordinated planning of new construction and observing that IOU management may be reluctant to "subordinate its individual decisions" over construction to the pool due to corporate preferences for profitable capital investments over cost-saving cooperative agreements and listing other factors). FERC, Office of Electric Power Regulation, *Power Pooling in the United States*, 103 (Dec. 1981) ("Staggered construction, jointly owned generating units, and other informal coordination techniques to achieve improved economy can be employed only when they are compatible with the generation expansion plans of individual utilities."); *id.* at 116 ("Under prevailing pool practices, [MAPP] members develop their individual generation and transmission plans and act independently to identify and implement coordination opportunities with other pool members. Staggered construction, jointly owned generation . . . and other coordinating opportunities . . . are employed to modify individual utility expansion plans so as to further reduce investment and operating costs."); *id.* at 243 (Letter from the Mid-America Interpool Network stating that the "rights and duties of IOU power systems, among them the right to compete for investment capital and the duties to pay a return to investors . . . have placed some unavoidable restraints on complete power pooling"); *id.* at 254 (Letter from Southwest Power

profit utilities to jointly develop new infrastructure.⁶¹ While these arrangements focused on generation, transmission typically followed. With the exception of transmission designed for seasonal exchanges,⁶² IOUs generally planned and built transmission as an adjunct to new generation.⁶³

Pool observing that because full coordination renders only one to three percent savings “one can readily understand why utility executives are reluctant to give up their autonomy”).

⁶¹ 1970 National Power Survey, *supra* note 59, at I-17-4 n.4 (“Membership of most power pools consists entirely of the larger investor-owned systems”); Small utilities urged the Atomic Energy Commission and the Securities and Exchange Commission to consider antitrust law in its approval of IOUs’ nuclear power plant construction applications. *See City of Statesville v. Atomic Energy Commission*, 441 F.2d 962 (D.C. Cir. 1969) (affirming AEC despite complaints from municipalities that they were denied opportunities to participate in an IOU consortium developing a nuclear reactor); *Municipal Elec. Ass’n of Mass. v. SEC*, 413 F.2d 1052 (D.C. Cir. 1969) (remanding an order approving IOUs’ acquisition of stock of two nuclear generating companies because the SEC failed to consider municipal utilities’ argument that they must be given an opportunity to obtain the associated low-cost power).

⁶² For example, IOUs in the Southwest Power Pool region built 1,140 miles of high-voltage lines to enable exchanges with the Tennessee Valley Authority that parties agreed to in 1964. *Power Pooling in the U.S.*, *supra* note 60, at 125. The Pacific Northwest-Southwest Intertie, with a delivery capacity of 1.4 GW, was developed to market surplus hydro from the northwest and deliver California thermal energy to the northwest during low hydro periods. *Id.* at 139, 151. In the upper Midwest, utilities built a high-voltage network linking major load areas in ten states. *Mid-Continent Area Power Pool*, 58 FPC 2622, at p. 2646 (1977).

⁶³ 1970 National Power Survey, *supra* note 60, at I-16-3 (noting that “many new transmission facilities are associated with new generating plant additions”); Richard P. Bonnifield & Ronald L. Drewnowski, *Transmission at a Crossroads*, 21 *Energy L. J.* 447, 461 (2000) (“It was the generation prudence review by the state utility commissions that justified the investment in transmission expansion.”); James J. Hoecker and Douglas W. Smith, *Regulatory Federalism and Development of Electric Transmission: A Brewing Storm?* 35 *Energy L. J.* 71, 75 (2014) (observing that historically “virtually all transmission facilities were constructed by vertically integrated utilities, generally for the purpose of moving power from central service station generators owned by the local utility to load served by that same utility”); Charles G. Stalon and Reinier H.J.H. Lock, *State-Federal Relations in the Economic Regulation of Energy*, 7 *YALE J. ON REG.* 427, 460 (1990) (observing that “states traditionally have taken relatively little interest in transmission facility planning. . . [and] additions typically have been viewed by utility planners and state regulators as adjuncts to the much larger generation investments”); Eric Hirst and Brendan Kirby, [Transmission Planning and the Need for New Capacity](#), National Transmission Grid Study Issue Paper, at D-6 (2003) (stating that historically “transmission planning was closely coupled to generation planning”); Joseph Eto and Bernard Lesieutre, The Consortium for Electric Reliability Technology Solutions, Lawrence Berkeley Nat’l Lab., [Transmission-Planning Research & Development Scoping Project](#), at 3 (July 2004) (“In the past, utilities planned transmission jointly with generation.”).

IOU domination harmed transmission customers, who became increasingly dependent on transmission-owning IOUs to generate and deliver power.⁶⁴

While the Commission's Open Access regime formally abolished IOU collusion and cartelization in generation development,⁶⁵ the Commission has flip-flopped on whether to condone local transmission monopolies and regional transmission cartels. As an initial matter, the Commission has held that incumbents do not have any inherent "right" to monopolize transmission within their state-granted retail territories.⁶⁶ Following Order No. 2000, the Commission rejected ROFRs, concluding that they do not benefit consumers and that providing opportunities for non-incumbent developers would further the Commission's efforts to foster competition.⁶⁷ Yet the Commission ultimately ignored its own orders and approved agreements between RTOs and incumbents who shared the common aim of "protecting themselves from competition in transmission development."⁶⁸ In Order No. 1000, the Commission again changed its approach, reaching the unimpeachable

⁶⁴ James E. Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy*, 72 Columbia L. Rev. 64, 68 (1972) ("Given the increasing reliance upon wholesale purchases by many of the smaller systems of all three varieties, control over transmission becomes a most important factor in analyzing the wholesale market."); Power Pooling in the U.S., *supra* note 16, at 39–40.

⁶⁵ Order No. 888, 61 Fed. Reg. 21,540, at p. at 21,593 (finding that power pool agreements were unduly discriminatory).

⁶⁶ The Commission has never endorsed any incumbent right to own or build non-merchant transmission and implicitly rejected it in numerous RTO formation orders (*supra* note 67) and in the *Primary Power* proceeding, where incumbents claimed that their "exclusive right[s] to build planned cost-of-service transmission in their zones . . . pre-existed PJM." *Primary Power*, 140 FERC ¶ 61,052, at P 58 (2012).

⁶⁷ *ISO New England*, 91 FERC ¶ 61,311, at p. 62,076 (2000); *New York ISO*, 96 FERC ¶ 61,059, at p. 61,203 (2001); *PJM Interconnection*, 96 FERC ¶ 61,061, at p. 61,241 (2001); *Cleco Power*, 101 FERC ¶ 61,008, at P 117 (YEAR); *Carolina Power & Light Co.*, 94 FERC ¶ 61,273, at pp. 62,009–10, *order on reh'g*, 95 FERC ¶ 61,282, at p. 61,996 (2001); *Arizona Pub. Serv. Co.*, 101 FERC ¶ 61,033, at P 212, *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).

⁶⁸ *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).

conclusion that ROFRs are unduly discriminatory. Here, the Commission is in danger of relapsing on ROFRs.

The only evidence the Commission musters that suggests IOUs might partner with non-incumbents is two California projects: Powerlink and Sycamore-Peñasquitos.⁶⁹ These unusual projects — one of which was developed through a CAISO-administered competitive process⁷⁰ — were developed by incumbent San Diego Gas & Electric. A non-profit corporation financed part of the project and pledged fifty percent of its profits to assisting local low-income families, with other half supporting the organization’s other charitable endeavors.⁷¹ While the non-profit’s involvement may have served laudable ends, it’s not clear how this arrangement furthered any Commission policy goals.⁷²

B. Inevitable Incumbent Pairings Will Result in Unjust and Unreasonable Rates

The Commission reiterates its conclusion from Order No. 1000 that unconditional ROFRs are unjust and unreasonable because they “may prevent the realization of more efficient or cost-effective transmission solutions to regional transmission needs.”⁷³ The Commission justifies its

⁶⁹ NOPR at PP 360, 373.

⁷⁰ See CAISO, [Sycamore-Penasquitos 230 kV Line Description and Functional Specifications Eligible for Competitive Solicitation](#), Apr. 1, 2013 (“The ISO identified, in the 2012-2013 Transmission Plan, the Sycamore-Penasquitos 230 kV Line as a reliability-driven project eligible for competitive solicitation because of its additional policy benefits.”).

⁷¹ Citizens Energy Corp. Petition for a Declaratory Order, Docket No. EC10-3, Oct. 9, 2009, at p. 38 n. 37. See also *Citizens Energy Corp.*, 129 FERC ¶ 61,242 (2009); *San Diego Gas & Electric*, 151 FERC ¶ 61,011 (2015).

⁷² In its petition, Citizens Energy represented that its total rate would be “no higher” than SDG&E’s rate (petition at p. 38), although it also claimed that its “hypothetical capital structure will provide rate stability and protection against potential capital cost increases over time,” which would benefit consumers (petition at p. 43). Given that Citizen’s \$166 million investment was approximately nine percent of the total project costs, it’s possible that the joint venture had a small consumer benefit.

⁷³ NOPR at P 351 (citing Order No. 1000, 136 FERC ¶ 61,051 at PP 5, 7, 226 (2011)).

replacement conditional ROFR with hypothetical benefits of transmission joint ventures. These benefits will not materialize through IOU-IOU pairings. Because the NOPR's proposed conditional ROFR will only result in incumbent pairings, the Commission cannot conclude that its conditional ROFR will result in just and reasonable rates.

At a high level, the Commission “believes that [its] joint ownership proposal may help promote innovative transmission ownership structures for transmission development, as well as innovative regional transmission facilities that more efficiently or cost-effectively address regional transmission needs.”⁷⁴ By definition, an IOU-IOU pairing is not an innovative ownership structure, and two IOUs with the same or similar Commission-set ROEs have little incentive to pursue innovative financing approaches. As to whether they will develop innovative projects, the Commission offers no theory as to why two local monopolists, freed from competitive pressures in the interstate planning process, will innovate. To the contrary, the Commission has repeatedly connected innovation to competition, and with regard to transmission development, has tied innovation to transmission-only and non-incumbent developers.⁷⁵

⁷⁴ NOPR at P 373.

⁷⁵ See, e.g., *PJM Interconnection*, 102 FERC ¶ 61,296 at P 44 (2002) (“The Commission's policy has been to encourage innovative actions and investments by [Independent Transmission Companies]”); *Cross-Sound Cable Co.*, 109 FERC ¶ 61,223 at P 25 (2004) (“[T]he Commission has a policy of encouraging innovative proposals to provide an incentive for construction of new infrastructure . . .”); *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”). More generally, the Commission has connected innovation to competitive markets. See, e.g., *Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design*, Notice of Proposed Rulemaking, 67 Fed. Reg. 55,452 at P 96 (Aug. 29, 2002) (“The promise of competition is the opportunity to develop more innovative technologies, improve services, lower average electric rates and provide more customer choice than is likely under a strictly regulated monopoly environment.”); Order No. 719, 125 FERC ¶ 61,071 at P 1 (2008) (“[E]ffective wholesale

The Commission also speculates that joint ventures will “leverage the combined transmission development strengths of the parties, potentially including the parties’ knowledge of siting and permitting processes or other strengths.”⁷⁶ There is no evidence that incumbents have a better record of siting projects than non-incumbent developers or non-profit utilities. Even if the Commission’s assertion were true, it could support a condition that an incumbent partner with any utility whose retail footprint includes the relevant project and whose local siting expertise would therefore be relevant.

The Commission also claims that joint ventures will “ensure not unduly discriminatory access to the transmission system by transmission customers.”⁷⁷ The Commission traces this prediction to Order No. 890, where it was responding to comments filed by public power entities about potential benefits of joint ventures between incumbents and non-profit utilities.⁷⁸ While the Commission’s predictions about the effects of its regulations are entitled to deference, the Commission provides no basis for applying this prediction to ventures between two incumbents.

competition protects consumers by “providing more supply options, encouraging new entry and innovation, spurring deployment of new technologies, promoting demand response and energy efficiency, improving operating performance, exerting downward pressure on costs, and shifting risk away from consumers.”); Order No. 2222, 172 FERC ¶ 61,247 at P 18 (“[E]ffective wholesale competition encourages entry and exit and promotes innovation, incents the efficient operation of resources, and allocates risk appropriately between consumers and producers.”).

⁷⁶ See also NOPR at P 373 (“the entities in a joint ownership arrangement might bring different strengths to the process of developing a regional transmission facility, potentially reducing the costs for development or leveraging their expertise to design a more efficient or cost-effective transmission facility than the partners would have designed separately, thus benefiting customers.”).

⁷⁷ NOPR at P 372 (citing Order No. 890, 118 FERC ¶ 61,119 at PP 593–594).

⁷⁸ Order No. 890, 118 FERC ¶ 61,119 at PP 592–593 (2007).

C. *If the Commission Finalizes the Proposed Conditional ROFR, It Must Explain Why It Is Recreating Unduly Discriminatory Barriers to Entry That Facilitate Incumbents' Unduly Discriminatory Influence Over Transmission Planning*

If the Commission changes its approach to ROFRs, it must offer a “reasoned explanation . . . for disregarding facts and circumstances that underlay its . . . prior policy.”⁷⁹ This standard “demands enhanced justification” when the new policy “rests upon factual findings that contradict those which underlay its prior policy.”⁸⁰ The Commission “cannot simply disregard contrary or inconvenient factual determinations.”⁸¹ If the Commission finalizes the proposed conditional NOPR, it must explain this new policy in light of several prior findings and policy decisions about transmission planning.

In Order No. 890, the Commission imposed transmission planning rules on all transmission providers because it could “not rely on the self-interest of transmission providers to expand the grid in a nondiscriminatory manner.”⁸² The Commission hoped that non-discriminatory transmission planning would be an antidote to vertical market power and would facilitate competition in wholesale markets.⁸³ In Order No. 1000, the Commission aimed at another unduly discriminatory aspect of transmission planning. Backed by

⁷⁹ FCC v. Fox Television Stations, 556 U.S. 502, 515–16 (2009).

⁸⁰ Ark Initiative v. Tidwell, 816 F.3d 119, 127 (D.C. Cir. 2016).

⁸¹ FCC v. Fox Television Stations, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring).

⁸² Order No. 890, 118 FERC ¶ 61,119 at P 422 (2007); *see also id.* at P 524, Order No. 1000, 136 FERC ¶ 61,051 at P 254 (2011) (noting that the Commission “bas[ed] its actions [on transmission planning in Order No. 890] on its authority to remedy undue discrimination”).

⁸³ *Id.* (finding that transmission providers may have “a disincentive to remedy transmission congestion when doing so reduces the value of their generation or otherwise stimulates new entry or greater competition in their area . . . [and] also does not have an incentive to increase the import or export capacity of its transmission system if doing so would allow cheaper power to displace its higher cost generation or otherwise make new entry more profitable by facilitating exports”).

voluminous evidence about the consequences of incumbent control,⁸⁴ the Commission found that ROFRs “create opportunities for undue discrimination . . . against non-incumbent transmission developers.”⁸⁵ 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.”⁸⁶

⁸⁴ Non-incumbent transmission developers detailed how RTO tariffs blocked their participation in the planning process and prevented them from proposing and developing projects. *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 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”). Generation developers identified benefits of non-incumbent transmission and added that ROFRs prevented them from offering non-transmission alternatives. 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”).

⁸⁵ Order No. 1000, 136 FERC ¶ 61,051 at P 286 (2011), *reh’g denied*, Order No. 1000-A, 139 FERC ¶ 61,132 at PP 361–363 (2012).

⁸⁶ Order No. 1000, 136 FERC ¶ 61,051 at PP 284, 289 (2011).

The NOPR would exacerbate both forms of undue discrimination that the Commission had previously attempted to remedy. The Commission cannot finalize its proposed conditional ROFR without explaining why it is reinvigorating these two forms of undue discrimination that it previously targeted under section 206. Moreover, the Commission’s proposed findings and remedy suggest that regional planning processes do not comply with Commission standards in two respects.

First, the NOPR proposes to find that incumbents’ advocacy is a necessary condition for including a project in a regional plan.⁸⁷ This conclusion is at odds with the Commission’s prior determinations that incumbents may not have “any decisional role” and must “not be in a position to unduly influence the projects included or how the projects are ranked or classified.”⁸⁸ The NOPR similarly suggests that RTO planning is deficient because RTOs are not “independently oversee[ing] the regional transmission plan and solely determin[ing] the priority of transmission planning projects,”⁸⁹ The NOPR suggests that RTOs may be “operat[ing] under a faulty governance system (e.g., a governance system that allows market participants to block expansions that will harm their commercial interests).”⁹⁰

⁸⁷ NOPR at P 350.

⁸⁸ *ISO New England*, 91 FERC ¶ 61,311, at p. 62,076 (2000); *Carolina Power & Light Co.*, 94 FERC ¶ 61,273, at p. 62,009 (2001) (“[I]ndividual transmission owners . . . should not be able to dictate transmission plans”); *PJM Interconnection*, 96 FERC ¶ 61,061, at p. 61,240 (2001) (rejecting a proposal that would have made regional expansion contingent on a “study process significantly influenced by TOs”); *New York ISO, et al.*, 96 FERC ¶ 61,059 at p. 61,203 (2001) (rejecting NYISO planning and cost allocation principles that “appear to condition transmission expansion upon the satisfaction of transmission owners . . . [and] seem to give the transmission owner the ultimate decision-making ability to carry out transmission upgrades”).

⁸⁹ *Southwest Power Pool*, 106 FERC ¶ 61,110, at P 188 (2004); *New York ISO, et al.*, 96 FERC ¶ 61,059 at p. 61,203 (2001) (an RTO “must have ultimate responsibility for both transmission planning and expansion”); *Avista Corp., et al.*, 100 FERC ¶ 61,274, at p. 62,085 (2002).

⁹⁰ *New York ISO, et al.*, 96 FERC ¶ 61,059 at p. 61,203 (2001).

Second, the NOPR acknowledges that incumbent utilities can toggle between local and regional projects and have chosen to prioritize local spending over regional development.⁹¹ Incumbents' discretion contravenes Order No. 1000 where the Commission obligated transmission providers to "identify and evaluate transmission alternatives at the regional level that may resolve the region's needs more efficiently or cost-effectively than solutions identified in [] local transmission plans."⁹² A decade earlier, the Commission similarly recognized that siloed planning processes within a region would lead to "potential discrimination by transmission owners acting in their self-interest . . . [as] different transmission entities that also own generation plan separate portions of the integrated transmission grid."⁹³ The Commission then reiterated its conclusion in Order No. 2000 that an RTO must "have ultimate responsibility for transmission planning."⁹⁴

In the NOPR, the Commission overlooks the flaws in planning processes that its ROFR proposal exposes. The Commission's apparent hope is that placating incumbents will "increase opportunities for investment in the transmission system."⁹⁵ Disregarding two forms of undue discrimination as well as violations of Commission orders would clearly mark major shifts in Commission policy. The Commission's new policy cannot withstand judicial review without acknowledging and explaining these policy changes.

⁹¹ NOPR at PP 350, 377.

⁹² Order No. 1000, 136 FERC ¶ 61,051 at PP 78–80, 148 (2011).

⁹³ *Carolina Power & Light Co.*, 94 FERC 61,273, at p. 62,009 (2001).

⁹⁴ *Id.*

⁹⁵ NOPR at P 372.

III. Any ROFR Reform Should Be Aimed at Improving Competition

The Commission correctly recognizes that incumbent IOUs are frustrating regional transmission development. Given IOU denials,⁹⁶ the Commission’s finding is particularly noteworthy and ought to initiate a discussion of how to overcome IOU obstruction and reinvigorate competition. However, rather than clearing that obstruction to enable open and competitive regional development, the Commission proposes to end competition.

The Commission should not discard competitive transmission development. As four Commissioners recently acknowledged, without competition in transmission development an incumbent has “less incentive to reduce costs and maximize benefits to the greatest extent possible.”⁹⁷ It is an unimpeachable tenet of economics that competition reduces costs and increases innovation. On the former benefit, competitive processes lead to lower ROEs, cost caps, and other rate-reducing consumer benefits. The evidence is overwhelming that these benefits have materialized.⁹⁸

The Commission suggests that it might later adopt cost containment mechanisms that might partially replicate the cost-reducing effects of competition, but the Commission offers no substitute mechanism that can facilitate innovative transmission solutions enabled by open and competitive planning and development processes.⁹⁹ By abandoning competition, and in

⁹⁶ See, e.g., Reply Comment of PJM Indicated Transmission Owners, Docket No. RM21-17, Nov. 30, 2021, at p. 3 (“Claims that Transmission Owners focus only on local projects to avoid the need for regional projects are patently false . . .”); *id.* at pp. 7–8; Reply Comment of the Edison Electric Institute, Docket No. RM21-17, Nov. 30, 2021, at pp. 5–6; *Id.* at 15–16.

⁹⁷ *MISO*, 180 FERC 61,040 (2022) (concurring statement by Chairman Glick and Commissioners Clements, Christie, and Phillips).

⁹⁸ See LS Power, [Appendix II: Summary of Completed Competitive Processes](#), Docket No. RM21-17, Oct. 12, 2021.

⁹⁹ The sponsorship model leads to innovating proposals. See, e.g., PJM, [2021 SAA Proposal Window to Support New Jersey Offshore Wind](#), Jul. 18, 2022 (summarizing 26 proposals in

particular the sponsorship model that allows non-incumbent developers to propose transmission projects,¹⁰⁰ the Commission forces ratepayers to fund only those transmission solutions preferred by incumbent utilities.¹⁰¹

Transparency is not a proxy for competition. Without competition, no party will have sufficient incentives to probe utility assumptions or develop alternatives to incumbents' preferred projects. Transmission networks will feature last century's technologies, as incumbents without competitive pressures have no incentive to implement grid-enhancing technologies,¹⁰² adopt non-transmission alternatives, or develop transmission to connect low-cost power that might undercut utility-owned legacy generation.

A. The Commission Should Provide a Conditional ROFR Only After a Competitive Process

The Commission could revive competition, remedy undue discrimination, and address “perverse incentives” by allowing for ROFRs following a competitive process. As discussed above, the NOPR's proposed conditional ROFR would end competitive transmission development and will not cure undue discrimination or result in just and reasonable rates. Nonetheless, the

response to offshore wind transmission solicitation); ISO-NE, [Boston 2028 RFP – Review of Phase One Proposals](#) (Jul. 17, 2020) (summarizing 36 proposals in response to a an RFP); NYISO, [Western New York Public Policy Transmission Planning Report](#), Oct. 17, 2017 (finding that ten of twelve proposals in response to an RFP were “viable and sufficient” and selecting a project proposed by a non-incumbent developer); PJM, Transmission Expansion Advisory Committee, [Recommendations to the PJM Board](#), Aug. 2016, at p. 2; PJM, Transmission Expansion Advisory Committee, [Recommendations to the PJM Board](#), Dec. 2015, at p. 2 (“In response to the 2015 RTEP Proposal Window #1, PJM received 91 baseline upgrade proposals to address these reliability criteria violations. The Window produced a wide range of proposals, from 9 different entities . . .”); PJM, Transmission Expansion Advisory Committee, [Recommendations to the PJM Board](#), Oct. 2015, at p. 2 (“There were ninety-three proposals submitted during the Long Term [Order No. 1000 Market Efficiency Project] window that closed in February of 2015. Projects submitted ranged in costs from \$0.1 to \$432 million. Proposals included both Transmission Owner upgrades and Greenfield projects from both incumbent transmission owners and non-incumbent entities.”).

¹⁰⁰ NOPR at P 370 (proposing to abandon the sponsorship model).

¹⁰¹ Order No. 1000, 136 FERC ¶ 61,051 at PP 284, 289 (2011).

¹⁰² See, e.g. WATT Coalition, Docket No. RM21-17 (Oct. 12, 2021).

conditional aspect of the proposal provides a path forward for a remedy that might salvage the benefits of competitive transmission development.

We suggest a conditional ROFR with the following terms:

- If an incumbent participates in the competitive process but does not win, the incumbent could file for a ROFR under section 205 following the completion of the competitive process.
- The incumbent would have to accept all financing terms, including the ROE and risk-sharing mechanisms, such as a cost cap, proposed by the winning developer.
- The ROFR would entitle the incumbent to own no more than fifteen percent of the project. The incumbent could elect to own a smaller percentage of the project.

By providing a ROFR conditioned on an incumbent losing a completed competitive process, this proposed reform might thread the needle between incumbents' and non-incumbents' interests while ultimately benefiting consumers. Guaranteeing the winning developer no less than eighty-five percent of the project ensures that most of the profits flow to the entity that deserves it. Providing the incumbent with no more than fifteen percent mitigates some of the perverse incentives that are steering incumbents away from regional projects. Competing developers would price the ROFR into their proposals, which would presumably temper some of the cost-reducing benefits of competition. Importantly, however, if the ownership split allowed by the ROFR incentivizes non-incumbents to participate while also mitigating incumbents' self-interest to oppose competition, this conditional

ROFR would encourage new entry, reward innovation, and accelerate beneficial regional investments.

If the incumbent finds the terms unattractive — for instance, if the ROE is too low or the cost cap places too much risk on the developer — the incumbent can decline to exercise its ROFR. In this situation, consumers clearly benefit by having a developer willing to shoulder more risk and accept less upside than the incumbent. If the incumbent loses the competitive process but finds the winner’s terms acceptable, it may exercise its right to own no more than fifteen percent of the project while accepting all downside risks, such as cost overruns. Consumers benefit from the competitive process, which in this case yielded better terms than the incumbent offered.

The critical question is whether fifteen percent ownership will induce incumbents to “advocate” for regional solutions. Although not a perfect analogy, recent filings by incumbents in PJM, NYISO, and MISO suggest that perhaps this something-for-nothing bargain will be sufficient. In those proceedings, the Commission rejected or set for hearing proposals filed by incumbents to earn a rate of return on network upgrades.¹⁰³ In essence, utilities sought to profit from their incumbency, requesting Commission permission to take a piece of the action from all third parties that would connect to the utility’s system. Because the number of non-utility generators is growing at a record pace, these proposals could have allowed utilities to squeeze out substantial revenue from legacy assets. Here, the fifteen percent

¹⁰³ *Cent. Hudson Gas & Elec. Corp. v. N.Y. Indep. Sys. Operator, Inc.*, 176 FERC ¶ 61,149 (2021), *reh’g denied*, 178 FERC ¶ 61,194 (2022) (rejecting tariff revisions that would have provided transmission owners with an option to fund network upgrades required for generator interconnections); *PPL Electric Utilities Corp, et al.*, 177 FERC ¶ 61,123 (2021) (setting a similar proposal filed by PJM transmission owners for hearing); *MISO*, 179 FERC ¶ 61,074 (2022) (rejecting MISO tariff amendments that would have expanded unilateral transmission owner funding to certain upgrades needed for HVDC interconnections).

ROFR grants incumbents a piece of all future regional development. Like the recent IOU proposals seeking to profit from non-affiliated generation, this fifteen percent ROFR would pay incumbents merely for their incumbency.

Even if the fifteen percent cut is a sufficient payoff for most projects, this proposal does not account for utilities' interest in ensuring new regional transmission does not undercut their local generation. Despite the availability of a fifteen percent cut, incumbents may continue to obstruct regional projects that connect low-cost competing generators. But the Commission's proposed conditional ROFR may actually exacerbate vertical market power, as it would empower and embolden incumbents by restoring their transmission cartels. By allowing for competition, the fifteen percent conditional ROFR will incentivize non-incumbent developers to propose projects that connect generation that may undercut incumbents' legacy assets. Incumbents may seek to block those projects, but at least those projects will be up for consideration in the planning process.

B. Alternatively, the Commission Should Allow State Regulators to Decide the Scope of Competitive Development

The Commission often affords transmission providers with flexibility in how they implement Commission rules. The NOPR would be no exception. The Commission proposes to provide planning entities with "flexibility" in how they comply with many of the rule's most significant reforms.¹⁰⁴ The

¹⁰⁴ See NOPR at P 71 (whether to use a portfolio approach in evaluation of benefits and project selection); *id.* at P 107 (in how regional planners incorporate various factors into scenarios); *id.* at P 183 (in defining benefits and beneficiaries); *id.* at P 184 (on which benefits to calculate); *id.* at P 233 (on whether to use a portfolio approach for benefit calculations); *id.* at PP 242–44 (on project selection criteria); *id.* at P 249 (on whether to use a portfolio approach for benefit calculations for purposes of cost allocation); *id.* at P 304 (on what constitutes state agreement); *id.* at P 306 (on the state agreement process and what constitutes an agreement).

Commission also proposes robust involvement of state regulators in project selection and cost allocation. With regard to ROFRs, the NOPR says it would “would allow for regional flexibility,” but it provides incumbents with the discretion over that flexibility. We suggest that state regulators are the appropriate entities to determine the scope of competition.

Experience with RTO-administered competitive processes varies.¹⁰⁵ On the one hand, competition has been hampered in MISO by state legislatures that have gifted ROFRs to incumbents.¹⁰⁶ On the other hand, CAISO’s most recent transmission plan includes four projects eligible for competitive solicitation, including an HVDC line that may cost several hundred million dollars.¹⁰⁷ That project alone may exceed the total dollar value of all competitive projects across MISO and SPP for the past decade.

State regulators are best positioned to assess the proper scope of competitive processes. The Commission, however, proposes to let incumbents choose whether competition should continue. We know what their choice will be. Incumbents will file for ROFRs, regardless of the costs for consumers. If state regulators are allowed to make the choice between competition and ROFRs, they are likely to consider feasibility, consumer costs, state laws, and other relevant factors.

Ensuing section 205 proceedings will provide a forum for the Commission to weigh the evidence about the prospects for competition in that region. The Commission has never made any region-specific findings about transmission competition, such as the costs and benefits to consumers and factors

¹⁰⁵ NOPR at P 343.

¹⁰⁶ See Complaint of Industrial Energy Consumers of America, Docket No. EL22-78, Jul. 22, 2022.

¹⁰⁷ CAISO, Notice — 2021–22 Transmission Plan, [Appendix G: Description and Functional Specifications for Transmission Facilities Eligible for Competitive Solicitation](#), Apr. 12, 2022.

contributing to its success or failure. Yet without considering that competition may be working in some regions, the Commission proposes to allow incumbents to impose a nationally uniform approach. If the Commission chooses to allow any ROFR, it should let state regulators initiate region-specific approaches.

C. The Commission Must Not Approve ROFRs for PJM Incumbents that Partner with Each Other

As discussed in the introduction and Part II.A, the Commission recently approved changes to a PJM governing document that bases control over a PJM committee on transmission ownership.¹⁰⁸ Under the revised Consolidated Transmission Owners Agreement, vote tallies based on ownership share can supersede vote tallies of individual transmission owners. As a result, incumbent IOUs can control the Transmission Owners Agreement Administrative Committee when they vote as a block, so long as they maintain ninety-five percent ownership of PJM transmission assets. This new voting counting method provides incumbents with a significant incentive to collectively maintain at least a ninety-five percent share of regional transmission. If the Commission finalizes its proposed conditional ROFR, it is exceedingly unlikely that any incumbent IOU would choose to partner with a non-incumbent developer or non-profit utility, in part because doing so would dilute IOUs' collective ownership share and jeopardize their control over the committee.¹⁰⁹

This committee has been at the center of recent controversies in PJM. As non-IOU developers told the Commission, incumbents' vote counting

¹⁰⁸ *Public Service Gas & Electric*, 179 FERC ¶ 61,001 (2022).

¹⁰⁹ PJM incumbents are primarily four companies: American Electric Power (AEP), Dominion, Exelon, FirstEnergy. PSE&G and PPL also own significant transmission but far less than those four companies. AES and Duquesne are minor transmission owners.

proposal, was part of a “broader ongoing effort by the incumbent PJM TOs to maintain control” over the relevant PJM committee.¹¹⁰ A non-incumbent developer has alleged that the committee has developed cost allocation methodologies that “skirt cost causation principles in favor of their own economic interests, particularly their interest in avoiding the specter of competition.”¹¹¹ The D.C. Circuit recently agreed, vacating the Commission’s denial of a complaint about one such cost allocation methodology. The panel concluded that PJM incumbents’ method was designed to favor large incumbents over smaller transmission owners and held that “violates the cost causation principle and causes undue discrimination.”¹¹²

Last year, in response to a request by consumer advocates, PJM incumbents released an agreement between the committee and PJM staff that facilitated confidential discussions between PJM and incumbents.¹¹³ Notably, PJM and incumbents entered into the agreement shortly after the Commission finalized Order No. 1000. PJM does not have similar agreements with other classes of market participants. Should the Commission provide state regulators with the right to file proposed changes to competitive processes, as discussed above, stakeholders would likely bring these issues to the Commission’s attention in greater detail.

When the Commission reviewed PJM incumbents’ initial RTO proposal, it concluded that “[t]hird party construction and ownership of new facilities is needed because of PJM's proposed RTO structure allows the TOs, as market

¹¹⁰ Protest of AMP Transmission, Old Dominion Electric Cooperative, and Silver Run Electric, Docket No. ER22-358, Nov. 29, 2021.

¹¹¹ LSP Transmission Holdings II, [Comments in Support of Complaint](#), Docket No. EL21-39, Feb. 9, 2021.

¹¹² [Consolidated Edison v. FERC](#), slip op. at p. 26.

¹¹³ [Letter from Transmission Owners Agreement Administrative Committee to PJM](#), Feb. 23, 2021.

participants, to have rights not available to other parties.”¹¹⁴ That finding remains true. The Commission should not restore PJM incumbents’ transmission cartel.

Conclusion

The Commission’s proposed conditional ROFR will not facilitate new entry or lead to innovative transmission solutions. Incumbents will pair with other incumbents in order to end competition and cartelize transmission development. The Commission has better options. It could defer any decision on the ROFR and other incentives to a separate proceeding about carrots and sticks designed to achieve the Commission’s full suite of transmission policy goals. If the Commission does order reforms to competitive transmission development processes, it should consider providing a limited conditional ROFR only after the completion of a competitive process. This conditional ROFR would grant the incumbent a small share of the winning project, provided that the incumbent accept downside risks. Alternatively, the Commission could consider letting state regulators propose the scope of competition within their region. Finally, regardless of what the Commission does, it should not grant ROFRs to incumbent pairings in PJM.

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

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¹¹⁴ *PJM Interconnection*, 96 FERC ¶ 61,061, at p. 61,240; *Midwest ISO*, 97 FERC ¶ 61,326, at p. 62,520 (2001).