

**UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION**

**Building for the Future Through Electric  
Regional Transmission Planning and  
Cost Allocation and Generator  
Interconnection**

**Docket No. RM21-17-000**



unconditional ROFR, a conditional one displaces competition and thus forgoes the important benefits that competition produces for consumers. The NOPR includes many proposals other than the ROFR that may meaningfully improve regional transmission development. Until FERC evaluates the impact of those proposals that it ultimately approves, there will be an insufficient basis to conclude that transmission policy cannot harness the benefits of competition.

As President Biden’s Executive Order on Promoting Competition in the American Economy explained, a “fair, open, and competitive marketplace has long been a cornerstone of the American economy.”<sup>3</sup> The President’s Executive Order specifically highlights FERC’s role in protecting conditions of fair competition.<sup>4</sup> The Order urges federal agencies to “further the policies” of the Order “by, among other things . . . rescinding regulations that create unnecessary barriers to entry that stifle competition.”<sup>5</sup> Similarly, the Supreme Court has recognized FERC’s obligation to consider competition policy, noting that the Commission’s “power clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations. . . . The [Federal Power] Act did not render antitrust policy irrelevant to the Commission’s regulation of the electric power industry.”<sup>6</sup> Indeed, as the D.C. Circuit observed, “FERC’s authority generally rests on the public interest in

---

<sup>3</sup> Exec. Order No. 14,036, § 1, 86 Fed. Reg. 36,987 (July 9, 2021).

<sup>4</sup> , § 2(e) (noting that the agencies charged with protecting conditions of fair competition include FERC). Commissioner Wilson has reservations regarding the use of “fair competition” rather than “competition.” Although there may be a future debate regarding the differences between “fair competition” and “unfair methods of competition,” the substance of today’s comment is not impacted by this distinction.

<sup>5</sup> , § 2(g).

<sup>6</sup> , 411 U.S. 747, 758–59 (1973). The Court in went on to state that “within the confines of a basic natural monopoly structure, limited competition of the sort protected by the antitrust laws seems to have been anticipated.” at 759. Over the years, courts and FERC have refined their understanding of which parts of the electricity industry are natural monopolies. , , , 225 F.3d 667, 683 (D.C. Cir. 2000) (per curiam),

constraining exercises of market power.”

, 475 F.3d

1277, 1280 (D.C. Cir. 2007).

Significant expansion of regional and interregional transmission will be needed to accommodate growing demand, including

benefits of lower prices, higher quality goods and services, increased access to goods and services, and greater innovation.<sup>10</sup> The Agencies work to promote competition through

reforms because of the expected benefits of competition for consumers. For example, in the 1990s, the DOJ publicly encouraged FERC's efforts to unbundle wholesale generation and

re4 17.4 ( D(r)2nct mo14.8-1n)3g 2.8-11 H(r)2nct mo14.8-1a( 2.8-1rs)-.[RnrAl 14.8-1rd[7-1,5gr crcrc 2.8-1c( 14

threatens to displace competition where it exists today for transmission design and construction for certain new projects selected in a regional transmission plan.<sup>17</sup>

In explaining why regional and interregional development is not occurring at the desired pace, the NOPR identifies a number of reasons unrelated to competition. These include the lack of sufficiently forward-looking regional transmission planning processes;<sup>18</sup> a failure to consistently incorporate known determinants of transmission needs into forward-looking assessments (such as information about impending retirements, the generation interconnection process, energy efficiency improvements, risks of extreme weather, state laws, and other regulatory actions);<sup>19</sup> and a failure of public utility transmission providers to accurately identify the benefits and beneficiaries of regional transmission facilities.<sup>20</sup>

The NOPR also observes that there may also be competition-related reasons for the lack of regional transmission development, stating that “it is possible that the Commission’s Order No. 1000 nonincumbent transmission developer reforms may in fact be inadvertently discouraging investment in and development of regional transmission facilities to some extent. Incumbent

---

<sup>17</sup> The proposed ROFR applies to new projects selected in a regional plan for purposes of cost allocation. For these projects, costs are allocated to market participants under principles adopted in Order No. 1000, and FERC is considering reforms in the current NOPR. NOPR § 5.

<sup>18</sup> As the NOPR explains, the “existing regional transmission planning processes may not be planning on a sufficient amount of

transmission providers, as a result of those reforms, may be presented with perverse investment incentives that do not adequately encourage those incumbent transmission providers to develop and advocate for transmission facilities that benefit more than just their own local retail distribution service territory or footprint.”<sup>21</sup> This dichotomy between competitive and uncompetitive projects may lead incumbents to prioritize local projects over regional projects, thus ensuring that incumbents monopolize new transmission investments.

To the extent that Order No. 1000 may have inadvertently led incumbent utilities to overinvest in local transmission facilities at the expense of more efficient regional facilities, the Agencies point out that this distortion has multiple causes, including ones that the NOPR does not address. One cause is that the continued existence of ROFRs for local and other exempt facilities gives incumbents incentives to invest in those facilities rather than pursuing regional facilities that are subject to competition. Another cause raised by a number of commenters is the continued existence of mechanisms that enable incumbent utilities to exert undue influence over the allocation of ratepayer dollars between local and regional transmission projects.<sup>22</sup> The distortion could be resolved by addressing either of these causes. The Agencies therefore urge FERC not to displace competition, but instead to consider solutions to utilities’ misaligned incentives that are consistent with and promote competition. As discussed below, competitive

---

<sup>21</sup> , P 350.

<sup>22</sup> Comments of Advanced Energy Econ., FERC Docket No. RM21-17-000, 29 (Oct. 12, 2021) (“Advanced Energy Econ. Comments”) (“Commenters have noted that shortcomings in existing transmission planning p E



processes have significantly reduced the costs of regional transmission development when they have been implemented.

The purpose of the present NOPR is to offer proposals to unblock the regional and interregional transmission logjam. Increasing transmission investment can lead to more competition in the wholesale energy and capacity markets by reducing congestion and allowing

planning” to refer to determining where the electrical grid needs more capacity as well as how much capacity is needed. The Agencies use “transmission design and construction” to refer to developing particular solutions to install transmission capacity to meet the identified need, which may include variation in the proposed routes and/or voltages of proposals for particular solutions.<sup>26</sup>

Previous experience has demonstrated that allocating the design and construction of regional transmission facilities to developers through competitive processes can significantly reduce costs and drive innovation. The Agencies therefore encourage FERC to reconsider its current proposal to use a ROFR, conditional or otherwise, to attempt to resolve the regional and interregional transmission challenge.

As the Commission noted when it removed the ROFR from federal tariffs, “granting incumbent transmission providers a federal right of first refusal ... effectively restricts the universe of transmission developers offering potential solutions for consideration in the regional transmission planning process.”<sup>27</sup> The Commission correctly recognized that this “may result in the failure to consider more efficient or cost-effective solutions to regional needs and, in turn, the

---

<sup>26</sup> Competition for transmission design can vary by RTO. Under PJM’s “sponsorship” model, PJM puts both the transmission design and construction cost out to bid for system constraints it has identified. Transmission developers propose competing designs, along with their costs, to solve the constraints. FERC,

4 (June 22, 2016)

(testimony of Craig Glazer, VP of Fed. Gov’t Policy, PJM Interconnection), <https://www.ferc.gov/sites/default/files/2020-08/Glazer-PJM.pdf>. In other regions, such as CAISO, the RTO identifies the solution and only formally puts the construction out for competitive bid. Comments of the Cal. Indep. Sys. Operator Corp. on Advance Notice of Proposed Rulemaking, FERC Docket No. RM21-17-000 (Oct. 12, 2021) (noting that CAISO conducts a competitive solicitation for the regional transmission solution). In those regions, there may be informal design competition as transmission developers propose solutions to the RTO before the RTO decides on a solution to put out for bid. \_\_\_\_\_, \_\_\_\_\_ at 15 (noting that CAISO works with stakeholders to identify the solutions for any identified transmission need).

<sup>27</sup>

\_\_\_\_\_, Order No.

1000, 136 FERC ¶ 61,051, P 284 (2011).

inclusion of higher-cost solutions in the regional transmission plan.”<sup>28</sup> The Commission recognized that it was compelled to take action in light of its finding that “federal rights of first refusal in favor of incumbent transmission providers deprive customers of the benefits of competition in transmission development, and associated potential saving...”<sup>29</sup> Regional transmission investment has not occurred to the degree FERC envisioned when it issued Order No. 1000 and eliminated the ROFR for certain projects, but that does not mean that competition

consumers.<sup>31</sup> Enabling competition in transmission development, where viable, is the best way to achieve these goals. We urge FERC to examine the competitive impacts that the proposed ROFR is likely to have, including increasing entry barriers that may result in higher prices for transmission and electricity, reducing innovation, and a less efficient, less reliable, and less resilient grid. Moreover, the proposed ROFR may not only yield sub-optimal transmission development in the short run, but could also serve to further entrench incumbents over the long run.

Regulatory barriers to entry can prevent consumers from realizing the full benefits of competition. The Agencies urge FERC to avoid restrictions on competition unless they are necessary and narrowly tailored to achieve FERC's stated mission to "[a]ssist consumers in obtaining reliable, safe, secure, and economically efficient energy services at a reasonable cost."<sup>32</sup> We have not seen such a need here and believe it would be premature to abandon competition before seeing the effects of FERC's other proposals.

## **II. ROFRS INCREASE BARRIERS TO ENTRY AND DISTORT THE COMPETITIVE PROCESS**

As part of the transmission development process, the Agencies recognize that there is an important role for integrated regional and national planning by entities with grid-wide perspectives. Local, regional, and interregional tra

## A. Competition Benefits Consumers by Lowering Costs and Increasing Innovation

In contrast to the need for integrated transmission planning, the design and construction of specific transmission projects clearly benefits from competition. Competition for the construction of transmission facilities creates incentives for rival transmission developers to minimize costs—incentives that are not present when construction rights are exclusive. Similarly, competition in transmission design can reduce final costs to consumers by encouraging firms to propose creative solutions to meet identified transmission needs more efficiently.

Previous experience with competitive processes confirms these outcomes. When competitive processes have been implemented, a significant number of incumbent and nonincumbent competitors have participated, and nonincumbents have often won. Even when the incumbent wins, consumers also win, because incumbents tend to make more competitive proposals when they face competition. Electricity customers have also been able to benefit from competition leading to innovative designs and financial terms, such as cost containment mechanisms. To illustrate, there are many instances in which the competitive process benefitted consumers, including the following:

x : PJM initiated this project to improve performance of the bulk electric system in the Artificial Island area in Southern New Jersey, which is the site of three nuclear reactors.<sup>37</sup> In 2013, PJM received 26 proposals from seven

---

<sup>37</sup> PJM INTERCONNECTION, L.L.C., (July 29, 2015), <https://www.pjm.com/~media/committees-groups/committees/teac/postings/artificial-island-project-recommendation.ashx>. Although PJM sought solutions for Artificial Island before the implementation of its Order No. 1000 competitive solicitation tariff, “PJM utilized those procedures to the extent feasible as a trial run of Order 1000 tariff provisions.” , § 1.

sponsors reflecting a diverse range of technologies, including new overhead and underground/underwater 230 kV lines, overhead 500 kV lines, and HVDC lines.<sup>38</sup>

Original cost estimates ranged from \$100 million to \$1.55 billion.

from the Niagara hydroelectric facility and imports of renewables from Ontario<sup>46</sup>  
NYISO received twelve proposals from seven transmission developers.<sup>47</sup> NYISO  
determined that ten proposals were viable and sufficient and ranked those proposals.<sup>48</sup>  
In October 2017, the NYISO Board selected one of NextEra's Energy Transmission's  
proposed projects as the winner, noting that it was "both the more efficient and more  
cost-effective transmission solution to address the identified need."<sup>49</sup> That NextEra  
project cost \$181 million, while the lowest-cost proposal from an incumbent—a joint  
proposal from the New York Power Authority and New York State Electric & Gas  
Corporation—was \$222 million.<sup>50</sup> NextEra's project represents a 22 percent savings  
over the incumbent's proposal.

- x CAISO Round Mountain 500 kV Area Dynamic Reactive Support Project  
California Independent System Operator ("CAISO") identified a reliability-driven  
need for this project in its 2018-





## B. A ROFR Conditioned on Joint Ownership Is Not Competition

A ROFR conditioned on joint ownership does not result in multiple bidders, so it is not a competitive process and does not offer the same benefits as competition. While joint ownership proposals can be procompetitive if they are part of a competitive process, they cease to be so if tied to a ROFR, which eliminates competition.

The DOJ/FTC Antitrust Guidelines for Collaborations Among Competitors recognize that an economically integrated joint venture between competitors can eliminate competition, yet also yield procompetitive benefits.<sup>59</sup> When analyzing such collaborations, the Agencies consider the extent of the joint venture's anticompetitive effects and procompetitive benefits. Even if a venture yields some procompetitive benefits, it would be considered anticompetitive overall if those benefits can be achieved through less restrictive means or are outweighed by the anticompetitive effects.<sup>60</sup> Often, the impetus for a joint venture's formation relates to competition—i.e., companies join forces in order to better compete against other firms. In these instances, the joint venture participants seek out partners who can offer them the most value, e.g., by bringing together complementary capabilities and expertise.<sup>61</sup>

Here, the conditional ROFR does not create this type of incentive to seek out the best partner in order to compete, because the joint venture will not be facing pressure to compete. That is,

~~Herbstein (x) Test (c) Tjfb pp (n) 9 v m l 3 d - 2 a (t f e 4) d b E J n 2 C 2 2 n g n 4 0 6 p a t h i o n ( 3 ) 4 ( 1 ) 9 1 - 2 ( 3 r 9 1 ( n ) 2 4 ( i t 5 4 ) + 0 ] 0 0 y - 0 M~~



III. TO SOLVE THE PROBLEMS FERC HAS IDENTIFIED, THE AGENCIES

11/11/11

11/11/11

11/11/11

7

11/11/11

11/11/11

11/11/11

11/11/11

11/11/11

11/11/11

11/11/11

11/11/11

11/11/11



To the extent that Order No. 1000 may have inadvertently caused incumbent utilities to overinvest in local facilities, we urge FERC to pursue solutions that would bring investments in local and in regional transmission facilities back into alignment by reducing incumbents' opportunities and incentives to avoid competitive processes.

#### IV. CONCLUSION

For the reasons above, the Agencies encourage FERC to pursue the alternative proposals to solve the problems FERC has identified before adopting an inefficient competitive system that relies on any type of ROFR. In particular, FERC should adopt reforms that will improve regional transmission planning and cost allocation processes without harming competition, as well as reforms that will strengthen and expand the implementation of existing competitive processes for transmission design and construction. Rather than attempting to encourage long-distance transmission development by granting market participants exclusive design and construction rights for regional and interregional transmission networks, the Agencies encourage FERC to employ better, procompetitive options. A ROFR conditioned on formation of a joint venture will eliminate or distort the benefits of competition. Adopting reforms that promote competition where possible will make transmission development less costly, more resilient, and more innovative for the American consumer than otherwise would be. Further, failure to do so would be counter to the Executive Order's call to FERC to avoid exercising its regulatory authority in a way that creates unnecessary barriers to competition.