

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

Building for the Future Through	)	
Electric Regional Transmission	)	
Planning and Cost Allocation and	)	Docket No. RM21-17-000
Generator Interconnection	)	
	)	

**COMMENTS OF THE ELECTRIC POWER SUPPLY ASSOCIATION**

The Electric Power Supply Association (“EPSA”)<sup>1</sup> hereby submits these comments in response to the Notice of Proposed Rulemaking issued by the Federal Energy Regulatory Commission (“FERC” or “Commission”) on April 21, 2022,<sup>2</sup> which presents potential reforms to improve the electric regional transmission planning and cost allocation processes. The Commission is considering the need for potential regulatory revisions pursuant to Section 206 of the Federal Power Act (“FPA”) in the face of an evolving transformation of the electric grid. As noted in the Advanced Notice of Proposed Rule,<sup>3</sup> which initiated this proceeding over a year ago, the Commission’s stated priority is to ensure just and reasonable, non-discriminatory rates while maintaining grid reliability as the generation resource mix changes.

---

<sup>1</sup> EPSA is the national trade association representing competitive power suppliers in the U.S. EPSA members provide reliable and competitively priced electricity from environmentally responsible facilities using a diverse mix of fuels and technologies. EPSA seeks to bring the benefits of competition to all power customers. This pleading represents the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

<sup>2</sup> *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, Notice of Proposed Rulemaking, 179 FERC ¶ 61,028, Docket RM21-17-000, (issued April 21, 2022) (“NOPR” or “April NOPR”).

<sup>3</sup> *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, Advanced Notice of Proposed Rulemaking, 176 FERC ¶ 61,024, (issued July 15, 2021) (“ANOPR”).

## I. OVERVIEW

EPSA reiterates its message to the Commission that this proceeding should be utilized as an opportunity to continue to strengthen and support *competitive* electricity markets and procurement of new transmission in order to deliver reliable and affordable energy, to spur innovation, and to support decarbonization of the grid. Competitive market mechanisms not only discipline prices but also solicit innovative solutions and support the entry of new market participants. To meet the vast challenges involved with decarbonizing our economy, we need every viable, affordable tool in the box to be deployed while – most critically – maintaining the reliability and resilience of the system.

While this NOPR focuses on transmission policies and processes, which are due for reasonable reforms, those policies cannot create barriers to the full panoply of solutions or any competition of ideas to accommodate the evolving grid and reduce emissions. This is particularly crucial as we peer into a future that includes deep electrification of our national economy, though the pathway to getting there remains uncharted. Thus, the Commission should not establish rules or policies that pre-select winners and losers but, rather, create a framework that allows for innovation and deployment of the most cost-effective solutions the market can offer. This thoughtful transition requires that any reforms work in an operationally sound manner based on realistic timelines and manageable cost impacts in order to protect the reliability of the system at every point along this transition.

Additionally, care must be taken in extending the timeline for regional transmission planning. While it is true that transmission development takes time and thus can be served by a longer view forward, it is also true that identifying a transmission project solution up to 20 years in the future could prove to be problematically speculative. A longer view could also lock in a specific approach to the detriment of any other solution that could be developed on a

more timely basis or close the door to options for a transmission project that does not reach the final phase of development, which is all the more likely decades out. This could also prove to be short-sighted based on the pace of technological change. The imminent but as yet elusive further electrification of the economy will continue to change demand profiles at varying rates across regions and may render obsolete certain current resources or technologies, all of which suggests a more measured approach is appropriate. These concerns are exacerbated should a 20-year regional planning process lock in cost allocation for that same time period, further hardening the identified solution and diminishing any flexibility or adaptability over time.

More specifically, EPSC has deep concerns over the move away from competitive mechanisms to support not only the development of transmission but also the assessment of and support for all technical solutions – transmission and non-transmission alike – which may resolve emerging system concerns or assist in the infrastructure expansion necessary to meet aggressive national, regional, and state climate goals. This retreat from competition is in fact a perverse step backwards at the very time that there is broad consensus regarding the extent of infrastructure development needed to drive and support changes in the resource mix and demand. It is also critical to ensure that Commission-jurisdictional rates are just and reasonable and not unduly discriminatory or preferential. In fact, the discussion of transparency and fairness criteria needed to ensure proposed transmission facilities are efficient and cost-effective for cost allocation purposes contradicts the move to amend Order No. 1000 to reinstate a right of first refusal (“ROFR”), conditioned or not, for incumbent transmission providers. The force and success of competition to drive innovation and cost-effective development is well established, having been embraced by the Biden

Administration<sup>4</sup> and demonstrated through vast precedent from this Commission itself,<sup>5</sup> and supported by the Supreme Court.<sup>6</sup> If anything, the Commission should address and enforce the independence of the regional transmission planning processes to disallow the inordinate influence of incumbent transmission developers both in the organized markets (Independent System Operators and Regional Transmission Organizations, “ISOs” and “RTOs”) and in all other regions.

---

<sup>4</sup> *Executive Order on Promoting Competition in the American Economy*, (EO 14036) (issued July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

<sup>5</sup> See e.g., *Wholesale Competition in Regions with Organized Elec. Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 1 (2008) (“Order No. 719), *on reh’g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009); *Preventing Undue Discrimination & Preference in Transmission Serv.*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 60 (2007) (discussing Department study finding that “wholesale electricity markets . . . lowered consumers’ electricity bills by nearly \$13 billion annually”), *on reh’g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *on reh’g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *on reh’g*, Order No. 890-C, 126 FERC ¶ 61,228, *on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009); *Demand Response Compensation in Organized Wholesale Energy Mkts.*, Order No. 745, FERC Stats. & Regs. ¶ 31,322 at P 8 (2011) (“Effective wholesale competition protects customers by, among other things, providing more supply options, encouraging new entry and innovation, and spurring deployment of new technologies.”), *on reh’g*, Order No. 745-A, 137 FERC ¶ 61,215 (2011); *Regional Transmission Orgs.*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 30,993 (1999) (“Competition in wholesale electricity markets is the best way to protect the public interest and ensure that electricity consumers pay the lowest price possible for reliable service.”), *on reh’g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff’d sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001); *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. by Pub. Utils.; Recovery of Stranded Costs by Pub. Utils. & Transmitting Utils.*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,634 (1996) (“Order No. 888”) (adopting rules “designed to remove impediments to competition in the wholesale bulk power marketplace and to bring more efficient, lower cost power to the Nation’s electricity consumers”), (footnote omitted), *on reh’g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002); Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,652 (describing the “non-quantifiable benefits” of a rule removing impediments to wholesale competition as including “(1) better use of existing assets and institutions; (2) new market mechanisms; (3) technical innovation; and (4) less rate distortion”). *Cf. also* Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 48 (stating that demand response benefits consumers by “providing competitive pressure to reduce wholesale power prices, providing for the more efficient operation of organized markets, helping to mitigate market power and enhance system reliability, and encouraging development and implementation of new technologies”).

<sup>6</sup> *Otter Tail Power Co. v. United States*, 410 U.S. 366 at 374 (1973), finding “the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest.” *Nat’l Soc of Prof’l Engineers v US* 435 US 679, 695 (1978); *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951) (“The heart of our national economic policy long has been faith in the value of competition.”).

As EPSA previously pointed out in this docket,<sup>7</sup> the myriad of rulemakings and administrative inquiries underway at the Commission attest to the multitude of issues which impact the Bulk Power System (“BPS”) as the resource mix evolves – both controllable pressures like technology advances and clean energy policies, and uncontrollable pressures like the extremity and duration of weather events. And while in this proceeding the Commission proposes reforms to improve regional transmission planning and cost allocation, any and every reform across the spectrum must consider whether and how it supports a resilient and reliable energy system at the most affordable price for consumers. This is no small task.

For this reason, EPSA urges the Commission to reassess its retreat from competitive transmission development principles and instead craft reforms that enable a longer-term, forward-looking assessment for regional transmission planning that is sustainable, addresses emerging conditions, and adapts to evolving system needs and developments. Rather than less independence and accountability, there must be more independence and accountability in regional transmission planning processes to ensure that all options are offered and assessed to meet expected cost and time parameters pursuant to the planning process.

In light of the deployment of greater intermittent and non-dispatchable resources across the grid, it is particularly critical that Commission-jurisdictional wholesale power markets provide customers access to a robust open access transmission system and sufficient flexible generation to deliver power to consumers reliably. While this will likely include the development of additional major high-voltage transmission lines, it also requires

---

<sup>7</sup> Comments of the Electric Power Supply Association, *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, Advanced Notice of Proposed Rulemaking, Docket RM21-17-000, pp. 2-3, (filed October 13, 2021) (“EPSA ANOPR Comments”), <https://epsa.org/wp-content/uploads/2021/10/EPSA-ANOPR-Comments-RM21-17-Final.pdf>.

strategically located flexible or controllable resources to balance and strengthen the nation's electric system. EPSA is gravely concerned that the reinstatement of a right of first refusal (ROFR) for incumbent transmission providers – to tip the scales for major transmission project development to move renewable supply to load centers – closes the door to many necessary, cost-effective, and adaptable approaches that can enable the deployment of new, diverse, and reliable power supply resources. The ROFR closes the door on competitive solutions which include, for instance, generation alternatives, innovative non-transmission options, projects subject to competitive bidding processes, and merchant transmission projects which address identified needs. Reinstatement of a ROFR in this NOPR represents a radical change to how the regional transmission planning process may function. Rather, it is critical that the Commission leverage its long-standing commitment to competitive procurement<sup>8</sup> and competitive wholesale markets to achieve our shared goals for reliable, cost-effective, and cleaner power for consumers.

#### **A. The Extent of the NOPR's Long-Term Transmission Planning Policies and Process Poses Competitive Concerns**

The NOPR contains no proposals – and in fact eradicates existing proposals – which meaningfully assess and compare non-transmission and transmission solutions for grid reliability or expansion needs. This omission is a serious weakness in the NOPR and should be addressed. Since their adoption, competitive wholesale markets have brought tremendous benefits to both consumers and the grid. While transmission expansion will be important as the economy continues to electrify, leaning too much on transmission development may

---

<sup>8</sup> See generally, Joskow, Paul L., *Competition for Electric Transmission Projects in the U.S.: Order 1000*, MIT Center for Energy and Environmental Policy Research, CEEPR WP 2019-004, (Issued March 2019), p. 55, “What I have called the “competitive transmission procurement model” is a framework that expands the role of competition in the development and potentially operation of transmission projects. FERC Order 1000 gave new life to this model. Competitive procurement for incumbents and non-incumbents and opportunities for non-incumbents to participate in regional transmission planning and project selection have increased. The progress has been slow but promising. There is still much to be done.”

foreclose on more timely and cost-effective generation solutions. Further, as technology continues to evolve and improve, locking into long-term planning timelines – like the 20-year horizon proposed in the NOPR – could further deprive consumers of an array of benefits. As a recent paper from Resources for the Future (RFF) notes,

FERC should be sensitive to the trade-off between potential gains from longer-term planning and the costs of forgoing learning in the interim. To reduce these costs, FERC should consider reducing the planning horizon, including allowing review of original plans and implementation of revised plans over shorter periods.<sup>9</sup>

RFF further highlights the concern that “reducing the duration of planning [captures] some of the “option value” of waiting to make otherwise irreversible commitments.”<sup>10</sup>

In addition to forgoing potential future benefits, overly long-term forecast horizons introduce uncertainty risk. While they can provide valuable information to policymakers about the plausible extent of construction necessary to achieve decarbonization, using them as a basis to justify investment by involuntarily allocating costs shifts risks to consumers for purported decarbonization solutions that, if achieved through the competitive generation or transmission market, would reside with developers and facility owners. Consequently, cost allocation should be voluntary to the maximum degree possible, which may include allowances for state-level cost allocation approaches to support state-assigned public policy projects.

As EPSA has outlined in the past, rather than socializing the costs of transmission as broadly as possible, the Commission should focus on reducing transaction costs, speeding

---

<sup>9</sup> Brennan, Timothy J., *Is Transmission Expansion for Decarbonization Compatible with Generation Competition?*, Resources for the Future Working Paper 22-12, (August 2022), p. 16.

<sup>10</sup> *Id.*

up lagging processes, and adopting market-based approaches, like an open season, to ensure subscription.<sup>11</sup> EPSA explained last year:

The amount of capital invested in or ready to be invested in the renewables sector is enormous...The Commission should not infantilize that industry by treating it as incapable of tolerating and problem-solving around development risk, lag, and upfront cost associated with transmission. Indeed, the Commission rightly expects the very same thing of developers and shippers on new gas pipelines – an industry that, as the Commission knows, faces perhaps even more profound development risks, and nevertheless attracts capital and shippers willing to subscribe and fund new projects...As EPSA member companies do for generation, the assumption of risks by developers rather than customers yields an array of benefits and disciplines that lead to the most appropriate and economical projects being built.<sup>12</sup>

Opting for a shorter time horizon – or at the very least one that has a very stringent review process every 3 years – could prevent innovative solutions from being locked out of a market with such long lead times.

#### **B. Reinstitution of a Federal Right of First Refusal for Incumbent Transmission Providers Rewards Anti-Competitive Behavior and Penalizes Consumers**

As explained in the NOPR, the Commission took steps in Order No. 1000 to distinguish between incumbent transmission developers or providers (collectively, “incumbents”) and nonincumbent transmission developers in order to eliminate tariff provisions which established a federal right of first refusal for incumbents with respect to new transmission facilities identified and selected in a regional transmission plan.<sup>13</sup> These corrective revisions were required in that landmark order because open, transparent, competitive solicitations lead to cost savings and innovation – benefits of competition that are quashed when an incumbent not only tips the scales in its favor, but holds the scale which weighs all options (if any). Further, the competitive procurement process assists in determining the system need to be addressed and offers opportunity for all options to

---

<sup>11</sup> EPSA ANOPR Comments, p 5.

<sup>12</sup> *Id.*

<sup>13</sup> NOPR, PP 337-342.

participate, including non-transmission solutions which may be more timely, efficient, cost-effective, and/or technologically advanced than the addition of new high-voltage transmission facilities. A competitive procurement also disciplines the costs of possible solutions, often incentivizing voluntary cost caps or cost containment measures which protect consumers from unnecessary or unchecked excess costs or development delays.<sup>14</sup> The Commission's reasoning to eliminate the federal ROFR was extensively stated in Order No. 1000,<sup>15</sup> on rehearing,<sup>16</sup> and before courts where those nonincumbent revisions were defended by the Commission<sup>17</sup> and upheld – even under the more stringent public interest standard applied to contractual arrangements.<sup>18</sup>

Notably, Order No. 1000 created several exemptions to allow expedited development of local upgrades and facilities or immediate need reliability transmission development or upgrades. Alas, as seems inevitable in hindsight, incumbent transmission developers saw this vulnerability in the Order No. 1000 process and pulled that thread until the fabric unraveled enough to allow them to circumvent competitive pressures entirely. By focusing development efforts on Order No. 1000 exempt projects, expanding the reach of local planning, and utilizing state ROFRs or other barriers to thwart competition whenever

---

<sup>14</sup> Huntoon, Steve, *Say it Ain't So, Joe*, Counterflow Column, RTO Insider, (Issued July 5, 2022), citing to PJM biennial transmission cluster analysis offering comparative data on projects to address congestion: "PJM selected Proposal 756, which called for spending \$770,000 on terminal equipment upgrades at the French's Mill and Junction 138-kV substations, to improve market efficiency in the APS zone. Proposal 547, new 500-kV line found to be slightly less effective, would have cost more than \$136 million." See Huntoon column here: <https://energy-counsel.com/wp-content/uploads/2022/07/Say-It-Ain-t-So-Joe.pdf>; See PJM 2021 Market Efficiency Update here: <https://pjm.com/-/media/committees-groups/committees/teac/2021/20211130/20211130-item-02-market-efficiency-update.ashx>, slide 26.

<sup>15</sup> *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Docket RM10-23-000, (Issued July 21, 2011), 136 FERC ¶ 61,051 ("Order No. 1000").

<sup>16</sup> *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Docket RM10-23-001, (Issued May 17, 2012), 139 FERC ¶ 61,132, ("Order No. 1000-A"); *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Docket RM10-23-002, (Issued Oct 18, 2012), 141 FERC ¶ 61,044, ("Order 1000-B").

<sup>17</sup> *South Carolina Public Service Authority v. FERC*, (D.C. Circ 2014), Case No. 12-1232.

<sup>18</sup> *Emera Maine v. FERC*, 854 F. 3d at 671, (D.C. Circ 2017), supporting FERC's finding that the specific right of first refusal would adversely affect transmission development and thus elimination of contractual right of first refusal provisions meets the higher standard required for contract abrogation.

possible, this class of incumbents has proliferated obstructionist self-interest to the detriment of large-scale regional planning as a tool to identify and support regional transmission projects or other system solutions.

The answer to this experience is *not* to hand a win to the obstructionists. This inexplicably rewards anti-competitive self-interest which is the very behavior an array of previous FERC orders attempted to prevent in order to “address disincentives that may be impeding participation by nonincumbent transmission developers,”<sup>19</sup> and ensure that the self-interest of incumbents does not interfere with grid expansion in a non-unduly discriminatory manner.<sup>20</sup>

In fact, the systemic “undue discrimination or preferential treatment” which requires attention from the Commission *is the anti-competitive behavior exhibited by incumbent transmission developers*. The duty of the Commission is to address the perverse incentives for incumbents by better enforcing the principles of Order No. 1000 and doubling down on competition: revise regional transmission planning to utilize more independent oversight of the process and project selection, and eliminate the loopholes created in Order 1000. Quite simply, that so few transmission projects are subject to a competitive, transparent regional planning process traces back to the anticompetitive practices of the incumbents which unduly influence the regional planning and project selection processes and, hence, the outcomes. It is hard to square the logic in the NOPR that the ROFR elimination was overly broad, thus allowing “potentially flawed investment incentives that may be restraining otherwise more efficient or cost-effective regional transmission facility development.”<sup>21</sup> It is in fact the preponderance of loopholes that has allowed incumbents to circumvent Order No. 1000

---

<sup>19</sup> Order No. 1000, P 320.

<sup>20</sup> Order No. 1000, P 17, referencing Order 890.

<sup>21</sup> NOPR, P 353.

competitive planning processes and thus continue to stymie alternative proposals which may, in fact, offer more efficient, cost-effective or innovative solutions to demonstrated system needs.

Indeed, the implementation of a conditioned ROFR may provide incumbents a new tool to stymie competitive alternatives by creating a pathway to avoid state competitive transmission planning or procurement processes. Armed with the ability to find a partner transmission owner in order to invoke a ROFR, incumbents may utilize that federal-level cover to fashion transmission projects which meet FERC guidelines for regional development and circumvent any state planning process that may require competitive considerations. Taken further, an incumbent ROFR can stymie the planning process more generally by allowing an incumbent's joint project proposal to simply close the window for consideration of all ideas or solutions to an identified system need.<sup>22</sup> As outlined in the NOPR, there is no limiting principle or timeframe for utilization of the ROFR by a joint incumbent partnership. This is thus a radical change that undercuts the planning process itself, much less the fairness, transparency, or robustness of the process.

EPSA is concerned that these "joint partnership ROFRs" offer a means to specifically preclude non-transmission alternatives from being considered. Effectively, as soon as an incumbent raises its hand with a partner, competition for the best ideas, including non-transmission solutions, is eliminated. The NOPR offers no evidence that this partnership structure supports the dismissal of any non-transmission alternatives from consideration in the transmission planning process. And yet, this ownership structure is somehow deemed sufficient in the NOPR to carry with it a right of first refusal which thwarts new entrants including storage while stifling competition between transmission and non-transmission

---

<sup>22</sup> NOPR, P 379.

alternatives. This is an unacceptable outcome as it limits options at the very time we need every tool available to support a reliable modernized grid.

Another stretch of logic is that somehow Order No. 1000 “failed to recognize that at least some of the most notable expected benefits from competitive transmission development processes (e.g., new transmission developer market entry, greater innovation in and potentially lower costs of transmission development) could be achieved or at least reasonably approximated through other means.”<sup>23</sup> Such a statement begs the question of how FERC landed on reinstating a conditional ROFR as the solution, or “other means,” to realizing these benefits. How does a ROFR, which offers incumbents the ability to block any alternative proposals in their footprints, offer a way to incent new market entry or spur innovate projects? It is of great concern to EPSA, as it should be to all parties, how implementation of a ROFR excludes all viable alternatives and options, including non-transmission solutions which may include deployment of demand side resources, grid-enhancing technologies, battery or storage options, or supply resources which can be quickly and more cost effectively developed.

It is no comfort that in response to the practice of incumbent transmission developers skirting the Order No. 1000 ROFR, the NOPR attempts to implement an ostensibly narrower ROFR by conditioning its application on the incumbent establishing joint ownership with an unaffiliated nonincumbent transmission developer or other unaffiliated entity for the new transmission facilities to be developed. Somehow this condition – substituting competition with a joint partnership arrangement – is expected to “address the potentially misaligned incentives for transmission facility development faced by incumbent transmission providers while still largely ensuring at least some of the potential cost-related benefits of competitive

---

<sup>23</sup> NOPR, P 353.

transmission development process.”<sup>24</sup> While there may be instances where joint ownership arrangements have facilitated transmission development, that option has always been available to transmission developers. Allowing such projects to retain the monopoly protections provided by a right of first refusal does not negate the public harm caused by the potential self-interest or self-dealing on these projects. History has demonstrated that incumbents continue to have, and will continue to exert, an inordinate level of influence over local and regional planning and cost allocation processes. This may explain why ANOPR comments supporting joint ownership structures from partnership candidates did not request the protection of a ROFR over these joint ownership arrangements and, in fact, suggested that competitive bidding processes be utilized for the cost of construction and competitive protections for partners that may be transmission-dependent entities.<sup>25</sup>

The reinstatement of even a conditioned right of first refusal is an inappropriate and unlawful retreat from competitive transmission development in a political calculation to prioritize high-voltage transmission development absent the cost discipline, incentives for innovation, and consideration of all alternatives offered by competition. As summed up by the Electricity Transmission Competition Coalition – a group of large energy consumers, non-incumbent transmission developers, state consumer advocates, public power representatives, and others (“ETCC”):

The absolute best way for the Commission to ensure that transmission planning results in just and reasonable rates is through competition. The ETCC urges the Commission to support transmission planning processes that follow well-established legal precedent, principles of prudent regulation, and competitive market processes... Competition in the development of new

---

<sup>24</sup> NOPR, P 355.

<sup>25</sup> NOPR, PP 363-364; Comments of the Transmission Access Policy Study Group, *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, ANOPR, Docket RM21-17-000, (filed October 12, 2021). See pp. 14-15, and p. 4, (“And we urge the Commission not to abandon competitive transmission development, which has been effective in reducing costs where it has been used.”).

transmission projects is the only means to achieve greater reliability, at lower costs, in a manner that results in fewer emissions.<sup>26</sup>

We agree with ETCC.

### **C. Reliance on FPA Section 309 to Reinstate the ROFR Is Unlawful and Could Set Troubling Precedent**

Compounding the problematic reinstatement of a federal right of first refusal as explained above is the Commission's attempt to utilize Section 309 of the FPA to do so. This misapplication of Section 309 exposes the tortured route that the NOPR takes to roll back competition. While the NOPR was issued in the context of a broad rulemaking undertaken pursuant to FPA Section 206 to ensure that Commission-jurisdictional rates remain just and reasonable and not unduly discriminatory or preferential, the NOPR resorts to FPA Section 309 in proposing to reinstate the ROFR for incumbent transmission developers (see, NOPR, Section VII). Apparently, the Commission believes that it can use Section 309 to reverse its prior findings regarding the need for the elimination of ROFRs in Order No. 1000 without making the factual or legal findings necessary to overturn those previous findings. That belief is a mistake. It is black-letter law that, "[w]ithout a showing that the existing rate is unlawful, FERC has no authority to impose a new rate."<sup>27</sup> Here, without such a finding the Commission declares that a conditional federal ROFR for incumbents is just and reasonable and not unduly discriminatory or preferential – the very opposite finding made in Order No. 1000 when the ROFR was eliminated but for certain limited exceptions because it was unjust,

---

<sup>26</sup> Comments of the Electricity Transmission Competition Coalition, *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, ANOPR, Docket RM21-17-000, (filed October 12, 2021), PP. 1-2.

<sup>27</sup> *Emera Maine v. FERC*, 854 F.3d 9, 25 (D.C. Cir. 2017) (citations omitted). See also, e.g., *FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346, 353 (D.C. Cir. 2014) (discussing the Commission's "dual burden" when it institutes a section 206 proceeding").

unreasonable, and “deprive[s] customers of the benefits of competition in transmission development, and associated potential savings...”<sup>28</sup>

Order No. 1000 found elimination of the ROFR to be necessary, but for certain limited exceptions, because it was unjust, unreasonable, and causes severe harm to the public. As explained above, since that finding, a vast number of self-interested incumbents have found ways to expand the limited exceptions such that they effectively swallow the rule whole. The experience since the issuance of Order No. 1000 therefore does not support a reversal of the policy. Nonetheless, to get around the lack of logical or evidentiary support for the proposal, the NOPR invokes Section 309 to avoid having to meet the requirements of Section 206 of the FPA. However, Section 309 only gives the Commission a limited authority to allow the Commission to remedy a past legal error, such as by providing retroactive refunds that would not ordinarily be permitted under Sections 205 and 206,<sup>29</sup> and “to use means of regulation not spelled out in detail” in the FPA.<sup>30</sup> As the courts have repeatedly explained, however, the remedial authority granted by Section 309 must occur in harmony and consistent with the FPA and the filed-rate doctrine.<sup>31</sup>

Here, the Commission is attempting to *prospectively* modify its previous Section 206 determinations without the support or evidence required by Section 206. In this case, the elimination of the ROFR in Order No. 1000 was premised on the Commission’s “duty to consider anticompetitive practices and to eliminate barriers to competition,”<sup>32</sup> and its recognition that “[f]ederal rules should not prevent consumers from being able to benefit from the full range of advantages that competition can provide, which the preservation of barriers

---

<sup>28</sup> Order No. 1000, P 285.

<sup>29</sup> See, e.g., *TNA Merchant Projects, Inc. v. FERC*, 857 F.3d 354, 359 (D.C. Cir. 2017).

<sup>30</sup> *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967) (“*Niagara Mohawk*”).

<sup>31</sup> See, e.g., *Verso Corp. v. FERC*, 898 F.3d 1, 10 (D.C. Cir. 2018); *Niagara Mohawk*, 379 F.2d at 158.

<sup>32</sup> Order No. 1000-A, 139 FERC ¶ 61,132 at P 361.

to entry does not allow.”<sup>33</sup> The Commission would therefore have to find there is no harm from barriers to entry and no benefits from competition in order to “repair” its previous Section 206 determinations in Order No. 1000. Notably, the instant NOPR does not do so or even attempt to demonstrate that Order No. 1000’s elimination of the ROFR was an error; it instead references “recent transmission investment trends” indicating that developers concentrate investment in local facilities that are exempt from competitive transmission development processes. Again, that a preponderance of transmission developers found ways to legally skirt federal regulations does not support reversing those regulations to recreate their monopoly power. This is not an action supported by the “remedial” authority granted under Section 309.

Further, while the reliance on Section 309 in the NOPR is unlawful and misguided, it also raises grave concerns that this would establish a precedent, paving a road of seemingly unlimited authority for any Commission to change course by overturning previous determinations outside of the requirements established by the FPA. Pairing Section 309 with presumed subsequent Section 205 filings does not repair or address the infirmity of using Section 309 authority to rewrite the mandates of Order No. 1000 to allow the very action – exertion of a ROFR by self-interested incumbents – that was clearly prohibited by Order No. 1000. As applied here, the Commission is presupposing or, in fact, pre-adjudicating a tariff proposal under Section 205 which is not in fact before the agency and is improper. This clearly puts the cart before the horse to reach a desired result by the current Commission which is not contemplated or allowed under its longstanding regulations upheld over the course of two subsequent rules (Orders 1000-A, 1000-B) and review by several courts. The NOPR implies that expecting Section 205 filings to be submitted to implement what has been

---

<sup>33</sup> *Id.* at P 82.

“rewritten” under Section 309 somehow lessens the burden or requirements on the Commission to amend or override a finding made under Section 206. This is not the case and cannot be allowed here or in any future circumstance before the Commission.

Quite simply, if the Commission believes that ROFR findings in Order No. 1000 are now not just and reasonable and are unduly discriminatory or preferential or need to be conditioned in some new manner in order to be just and reasonable, then that determination can and must be made under Section 206. Section 309, even tied with Section 205 as is the case here, does not offer a lawful detour around that requirement and that option for the Commission. Thus, the Commission should remove ROFR provisions from any final rule.

## II. CONCLUSION

**WHEREFORE**, EPSA respectfully requests that the Commission consider the comments submitted herein in evaluating and prioritizing issues to be included in a final rule.

Respectfully submitted,

*N. E. Bagot*

---

Nancy Bagot, Senior Vice President  
Bill Zuretti, Director, Regulatory Affairs & Counsel  
Electric Power Supply Association  
1401 New York Ave, NW, Suite 950  
Washington, DC 20005  
(202) 628-8200  
NancyB@epsa.org

August 17, 2022