UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

INITIAL COMMENTS OF ANBARIC DEVELOPMENT PARTNERS, LLC

Anbaric Development Partners, LLC (Anbaric) appreciates the opportunity to comment on the Commission's April 21, 2022 Notice of Proposed Rulemaking issued in the captioned proceeding.[1]

INTRODUCTION AND SUMMARY

The Supreme Court established long ago that Congress' purpose in adopting the Federal Power Act was to "encourage the orderly development of plentiful supplies of electricity . . . at reasonable prices." *NAACP v. FPC*, 425 U.S. 662, 670 (1976) (footnote omitted). The NOPR fails that standard.

The Commission concludes correctly that regulated, regional planning processes are not identifying and planning for much of the transmission needed to meet long-term regional goals. But the change the NOPR proposes to address this concern—requiring that transmission providers engage in long-term, multi-scenario planning to meet public policy needs—is insufficient. The NOPR leaves in place a balkanized and inefficient planning

[1] *Bldg. for the Future Through Elec. Reg'l Transmission Plan. & Generator Interconnection*, 179 FERC ¶ 61,028 (NOPR). The NOPR follows a 2021 Advanced Notice of Proposed Rulemaking in this proceeding. *Bldg. for the Future Through Elec. Reg'l Transmission Plan. & Generator Interconnection*, 176 FERC ¶ 61,024 (2021) (ANOPR). Anbaric submitted comments on the ANOPR. Comments of Anbaric Development Partners, LLC (Oct. 12, 2021), eLibrary No. 20211012-5692.

process, with separate planning tracks for reliability, economic, and public policy projects. Consumers are harmed by this siloed planning because it results in the under-utilization of limited rights-of-way and encourages piecemeal solutions where a single project could have cost-effectively addressed multiple system needs. To address this concern, the final rule should mandate the use of "holistic" planning, in which the transmission needed to meet reliability, economic, or public policy goals is identified through a single, comprehensive process. The failure to break down the existing, siloed processes will continue planning that—by design—does not identify projects calibrated to meet current and future needs (whether driven by economic, public policy, or reliability concerns) in a cost-efficient manner.

The NOPR also proposes to abandon competition in transmission development—a retreat from the policy course set by the Commission in Order No. 1000 that is not supported by evidence and is at odds with the various findings that formed the basis for Order No. 1000.[2] The proposal is a response to largely successful efforts by many incumbent transmission owners to stifle competition by limiting investment to "local" projects that are not subject to competitive solicitation. Transmission owner resistance has hurt consumers. Where implemented, competitive transmission development has been—and continues to be—successful. By contrast, there is compelling evidence that the continued reliance on incumbents to develop the grid will result in cost overruns and project delays.

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[2] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011) (Order 1000), *reh'g denied*, Order No. 1000-A (Order 1000-A), 139 FERC ¶ 61,132, *on reh'g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *review denied sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014) (per curiam).

The NOPR fails to demonstrate that its proposed replacement for competition—a "conditional" right of first refusal (ROFR) tied to offers of "meaningful" participation in new projects built by the incumbents—is just or reasonable. Two core benefits of a competitive market—pressure to reduce prices and drive innovation—will vanish if incumbents are in put in charge of all development. This is not conjecture. Data in this record demonstrate that incumbent-developed transmission has been subject to massive cost overruns. And the new ROFR will mean that the only proposal presented for consideration is the one favored by the incumbent. A key benefit of competitive procurements—the presentation of many possible solutions to a system need—will disappear.

And there is no evidence that the proposed meaningful participation "condition" will in fact foster diverse ownership. Merchant project developers do not seek opportunities to be passive investors, and will likely have no interest in investments in which they have little chance to influence or control project direction. The result will be to limit the instances in which merchant developers can participate. Restricting their participation opportunities robs consumers of the benefits merchant developers bring to the table, including efficient operations, creative project designs, and cost-saving measures including reduced returns on equity (ROE) and spending caps.

The participation requirement imposes an additional problem: substantial opportunity for gaming. Just as incumbents have found ways to exploit perceived loopholes in Order 1000, there is good reason to believe that a similar fate will befall the conditional ROFR, as some incumbents have found ways to shape transactions that "comply" with the

final rule, but are structured to ensure continued and complete control over every aspect of project development.

None of this is news. Indeed, the same four Commissioners who support the NOPR recently issued a joint, concurring opinion in a MISO proceeding in which they highlighted the dangers of exempting regional projects from competitive solicitation. The Commissioners observed that doing so "has the negative consequence of expanding the scope of projects for which the transmission owner has less incentive to reduce cost and maximize benefits to the greatest extent possible."[3] The NOPR suffers from the same malady.

The NOPR's response to the paucity of competition—reinstating incumbent priority rights—is the wrong answer. Nothing in this record justifies abandoning the competitive development of new and needed facilities. There is no question that changes are needed. But rather than expand incumbent control, the Commission should renew its efforts to enforce the policy direction laid out in Order 1000.

In short, there is simply too much at stake in this proceeding for the Commission to take steps that are unsupported in the record and contradicted by foundational economic principles. In the coming decades, consumers will be called upon to fund historic levels of renewable generation and accompanying transmission investment. It is essential that whatever projects are built be as system- and cost-efficient as possible. For the reasons stated here and in its ANOPR comments, Anbaric urges that the Commission issue a final rule that ensures the broadest possible approach to transmission planning and expands the

[3] *Midcontinent Independent Sys. Op.,* 180 FERC ¶ 61,040, P 2 (2022) (Glick, Clements, Christie, Phillips, Comm'rs, concurring).

opportunity for competitive entry. In addition, the Commission should ensure that whatever action is taken here supports, rather than undermines, processes that are currently in place and working to promote the development of cost-effective transmission.

COMMENTS

I. THE FINAL RULE SHOULD REQUIRE HOLISTIC TRANSMISSION PLANNING.

The NOPR seeks comment on "whether there is a need to coordinate the initial timing sequences between Long-Term Regional Transmission Planning and the existing near-term regional transmission planning processes." NOPR P 254. The answer is "yes."

Anbaric supports the adoption of forward-looking, long-range planning to accommodate anticipated resource mix changes and to incorporate expressly federal/state decarbonization policies. Early and comprehensive identification of and planning for the integration of resources to meet ambitious state clean energy targets is essential. But the current planning regimen—under which the transmission build-out needed to integrate new resources has proceeded on a one-project-at-a-time basis through the interconnection process—has missed opportunities to achieve economies of scale, and yielded higher ratepayer costs.

While the NOPR correctly seeks to impose an obligation to conduct long-range planning, FERC wrongly proposes to limit that obligation to Long Range Regional Transmission Projects (LTRTPs).[4] Reliability and economic projects should likewise be examined on the same 20-year time horizon and, equally important, must be examined

[4] NOPR P 72 ("In other words, public utility transmission providers may continue to rely on their existing regional transmission planning and cost allocation processes to comply with Order No. 1000's requirements related to transmission needs driven by reliability concerns or economic considerations.").

together. A planning process that takes into account all needs examined over a long-term planning horizon is needed to ensure that transmission is developed efficiently and cost-effectively. Order 1000 recognized this concern by highlighting some of the failings of the ISO and RTO planning processes to identify efficient and cost-effective solutions when planning may align more with incumbent interests than big picture power system needs.[5] A well-planned project can meet renewable deployment targets as well as reliability and/or economic needs. Such multi-purpose projects best position the grid to meet future needs while ensuring that ratepayers get the most bang for their buck.[6]

The NOPR moves in the direction of comprehensive planning, but stops well short of requiring it.[7] While the Commission would require evaluation of a wide-ranging set of

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[5] *See* Order 1000 P 146 ("This Final Rule requires that each public utility transmission provider participate in a regional transmission planning process that produces a regional transmission plan . . . . such transmission planning *will expand opportunities for more efficient and cost-effective transmission solutions for public utility transmission providers and stakeholders*" and, "in turn, help ensure that the rates, terms and conditions of Commission-jurisdictional services are just and reasonable and not unduly discriminatory or preferential.") (emphasis added). *See also id*. PP 11, 890 (similar).

[6] There should be no question that holistic planning promises great consumer benefits. For example, in the only competitive solicitation that ISO New England (ISO or ISO-NE) has administered since Order 1000 took effect, the ISO selected the "cheapest" option to solve the identified Greater Boston reliability need. *See* ISO New England, *Boston 2028 Request for Proposal (RFP) – Review of Phase One Proposals* at 33 (2020), https://www.iso-ne.com/static-assets/documents/2020/07/final_boston_2028_rfp_review_of_phase_one_proposals.pdf. But that selection was cheapest only in the short-term. As developers noted following the selection process, the winning bid solved only the narrow reliability issue framed by the ISO. ISO New England, *Response to Stakeholder Comments on the Boston 2028 FP – Review of Phase One Proposals* at 18-19, https://www.iso-ne.com/static-assets/documents/2020/07/response_to_stakeholder_comments_on_boston_2028_rfp_w_appendices.pdf (Anbaric Letter at 1-2). In contrast, other proposed projects could have addressed that reliability concern while also facilitating the integration of offshore wind generation needed to meet state public policy goals. *Id.* at 19-20 (Anbaric Letter at 2-3). Just a few months after that solicitation, ISO-NE identified the need for large-scale upgrades to integrate offshore wind. *See* ISO New England, *Notice of Initiation of the Cape Cod Resource Integration Study* at 2 (2020), https://www.iso-ne.com/static-assets/documents/2020/10/a6_initiation_of_the_cape_cod_resource_integration_study.pdf. If the Greater Boston solicitation had considered and solved for both the state policy and reliability needs, those upgrades could have been delivered at a lower total cost to customers. Focusing narrowly on only the reliability need fumbled a valuable opportunity to position the grid to accommodate incoming offshore wind generation and improve grid resilience at the lowest possible cost.

[7] The NOPR suggests that adopting a "combined" planning approach is an option, but not an obligation. NOPR P 75 ("we preliminarily find that public utility transmission providers could propose a regional transmission planning process that plans for reliability needs, economic needs, transmission needs driven by

LTRTP benefits, NOPR P 185, it does not propose to direct the adoption and use of any specific set of benefits, *id.* P 183.[8] In addition, FERC directs transmission providers to evaluate whether transmission facilities "operating at or above 230 kV that an individual public utility transmission provider . . . anticipates replacing in-kind with a new transmission facility during the next 10 years can be 'right-sized' to more efficiently or cost-effectively address regional transmission needs." *Id.* P 403. While potentially helpful, this proposal also raises concerns in that FERC proposes to incentivize incumbents to build the right-sized facility (rather than an in-kind replacement) by giving them a ROFR for those projects. *Id.* P 409. Absent the ROFR, the right-sized replacement project would be subject to competition, which would mean savings for customers.

Projects to address reliability needs, on the one hand, and those needed to replace aging infrastructure at the end of its useful life, on the other, should be studied and planned in the context of overall, immediate-, medium- and long-term system needs and public policy targets, rather than relegated to separate processes. The NOPR's proposal to include in the planning process particular network upgrades where there has been a pattern of interconnection request withdrawals associated with those upgrades (NOPR P 166) is a useful start, but does not go far enough.[9] The Commission must direct changes to its planning and interconnection processes to ensure that a planning assessment is conducted

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Public Policy Requirements, and transmission needs driven by changes in the resource mix and demand simultaneously through a combined approach").

[8] The NOPR likewise requires that local planning needs be incorporated into the regional planning processes. *Id.* P 400.

[9] Specifically, the Commission proposes to require the evaluation of interconnection-related network upgrades in the LTRTP where, among other things, the upgrades "have not been developed and are not currently planned to be developed because the interconnection request(s) driving the need for the upgrade has been withdrawn." NOPR P 166.

when an interconnection request triggers significant upgrades beyond a tie line to reach substations and directly related substation upgrades.[10]

Adopting a "de-siloed" or holistic regional planning approach will further help to limit overreliance on the interconnection process (and interconnecting generators) for the buildout of needed facilities. The current use of the interconnection process as a planning tool—an inevitable outcome in areas where policy-based planning is not happening—creates barriers to needed generation development and suboptimal utilization of scarce rights-of-way.[11] For example, during the technical conference in *Offshore Wind Integration in RTOs/ISOs,* Docket No. AD20-18-000, panelist Johannes Pfeifenberger noted that while it may be possible to develop "thousands of megawatts of low cost onshore wind" in Northern Maine,[12]

> none of it is getting developed under the generation interconnection process because a transmission solution necessary to interconnect that wind is too large for individual generators to pay for, or to develop on behalf of individual generators.
>
> The solution[] to that is regional planning.

[10] We note that the Commission has proposed in Docket No. RM22-14 improvements to its interconnection rules to facilitate cluster studies and reconfigure cost allocation. *Improvements to Generator Interconnection Procedures and Agreements*, 179 FERC ¶ 61,194 (2022). But those proposals offer only incremental improvements. Addressing the root of the problem requires *planning process* reforms.

[11] NOPR P 88 ("In addition, we preliminarily find that failing to develop Long-Term Scenarios means that transmission facilities needed to meet transmission needs driven by changes in the resource mix and demand are more likely to be identified in the generator interconnection process instead of the regional transmission planning process, similarly leading to the increased potential for piecemeal and inefficient transmission development, as described above.").

[12] Staff-led Technical Conference Regarding Offshore Wind Integration in RTOs/ISOs Transcript at Tr. 19:25-20:7 (Oct. 27, 2020), eLibrary No. 20201207-4002. Anbaric notes that the Maine cluster study identified interconnection upgrades that were too expensive not just for a single generator, but also for a *group* of generators to finance.

The same concern was raised in pre-technical conference comments submitted by Tufts University.[13] The comments focused on the same dilemma in the OSW context, observing:

> The 2,400 MW of OSW procured by Massachusetts and Connecticut are poised to use all the available transmission capacity in the Cape Cod/Pilgrim area. On October 21—just a few days ago—ISO-NE announced its intent to conduct a "Cape Cod Resource Integration Study" to assess at least five queue positions as a cluster. The announcement acknowledges there are limits to how much power Cape Cod can export, and it further states that grid weaknesses and thermal issues between Cape Cod and Boston may only be resolvable through a new transmission line in its own right-of-way.
>
> Future developers (OSW or transmission) will be faced with an expensive choice: upgrade coastal substations already serving existing projects or interconnect further inland. It is our view that a planned, networked grid would improve the stewardship of existing [points of interconnection] and facilitate systems planning that reduces conflict and confusion surrounding interconnection.

Id. at 10 (footnotes omitted).

By contrast, a holistic planning approach would leave interconnection processes limited to their intended purpose: upgrades needed to connect to the existing or planned system, and not for use in building large scale system expansions. Interconnection upgrades beyond transmission extensions to reach substations and directly related substation upgrades are evidence of insufficient grid infrastructure and should trigger a planning assessment.

In short, the measures proposed in the NOPR are inadequate and, in some cases, run counter to the efficient development of needed transmission. And the NOPR itself

[13] Comments of Tufts University Power Systems and Markets Research Group School of Engineering/The Fletcher School 8 (Oct. 26, 2020), eLibrary No. 20201027-5162.

explains why. The Commission there acknowledges that combined planning may identify projects that solve multiple concerns:

> It is also possible that, in some cases, transmission facilities selected in a regional transmission plan for purposes of cost allocation to address transmission needs driven by changes in the resource mix and demand may provide near-term reliability or economic benefits and thus potentially displace regional transmission facilities that are under consideration as part of existing regional transmission planning processes.

NOPR P 253. Keeping separate the evaluation of reliability, economic, and public policy transmission needs means that identification of the most cost-efficient solution to address multiple needs is unlikely.

In place of a directive to plan on a holistic basis, FERC gives transmission providers the option to propose a process that "combine[s]" planning for "reliability needs, economic needs, transmission needs driven by Public Policy Requirements, and transmission needs driven by changes in the resource mix and demand." NOPR P 75. This is insufficient. A holistic planning regimen is necessary to achieve just and reasonable rates for consumers, and should be the default rather than an optional approach.[14] Those providers who would oppose holistic planning should be obliged to explain why that is the case. NOPR P 253 ("We propose that public utility transmission providers must explain on compliance how the initial timing sequence for Long-Term Regional Transmission Planning interacts with existing regional transmission planning efforts.").

[14] Commissioner Christie notes that the NOPR "leaves unchanged the planning criteria and cost allocation frameworks for Reliability and Economic projects," which he calls the "meat and potatoes of regional transmission planning." NOPR P 8 (Christie, Comm'r, concurring) (footnotes omitted). The Commissioner's accurate observation highlights that the proposed changes to the planning process are insufficient to identify the projects needed both to transition to a low-carbon economy while minimizing ratepayer impacts.

II. THE PROPOSED ABANDONMENT OF THE COMPETITIVE MANDATE IN ORDER 1000 IS UNJUSTIFIED AND HARMFUL TO CONSUMERS.

The Commission determined in Order 1000 that awarding incumbents federal ROFRs for regionally-allocated transmission projects "deprive[s] customers of the benefits of competition in transmission development, and associated potential savings," and "create[s] opportunities for undue discrimination and preferential treatment against nonincumbent transmission developers," Order 1000, PP 285-286. Acknowledging that "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," *Id.* P 286 (quoting *Otter Tail Power Co. v. United States*, 410 U.S. 366 at 374 (1973)), the Commission directed the elimination of federal ROFRs. *Id.* In short, Order 1000 was premised on the "concept . . . that there should not be a federally established monopoly over the development of an entirely new transmission facility that is selected in a regional transmission plan for purposes of cost allocation to others." Order No. 1000-A, P 426.

The NOPR goes in the opposite direction, seeking comments on a proposal to permit "the exercise of federal [ROFRs] for transmission facilities selected in a regional transmission plan for purposes of cost allocation, conditioned on the incumbent transmission provider with the federal [ROFR] for such regional transmission facilities establishing joint ownership of the transmission facilities." NOPR P 336. Commenters are asked to address how the Conditional ROFR proposal "aligns with or advances the goals of Order No. 1000's reforms, or otherwise ensures just and reasonable Commission-jurisdictional rates." *Id.* P 378 (footnote omitted).

The short answer that the proposed Conditional ROFR in no way aligns with the pro-competitive goals embodied in the Order No. 1000 reforms. The proposal will harm consumers, as its adoption would cement further the demonstrated hold that many incumbent transmission owners have on the development of new and needed facilities. Worse, this proposal will undermine efforts in regions in which competition has been, and continues to be, used successfully to select project developers.

The Commission is free to change policy directions, but must justify such changes.[15] The NOPR falls short of this obligation. The Commission should not adopt the Conditional ROFR.

A. Incumbent transmission owners' focus on local transmission investment is a reason to reaffirm and expand competition, not abandon it.

The NOPR says that the Conditional ROFR is a response to the limited amount of investment in regional transmission facilities since the issuance of Order 1000. NOPR P 344. Noting the Commission's concerns that the Order 1000 process has "place[d] unintended emphasis on the development of local transmission facilities or other transmission facilities not subject to competitive transmission development processes," *id.* P 377, the NOPR advances the Conditional ROFR as a solution. The decision by many incumbent transmission owners to undermine rather than embrace competition is not a reason to change course.

Nor is the incumbents' position a surprise; the Commission identified the same concern when it issued Order No. 1000, stating, "it is not in the economic self-interest of

[15] *See Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.")

incumbent transmission providers to permit new entrants to develop transmission facilities, even if proposals submitted by new entrants would result in a more efficient or cost-effective solution to the region's needs." Order 1000, P 256. While FERC directed the elimination of federal ROFRs for *regionally* cost-allocated transmission facilities, Order 1000 left in place incumbent transmission owners' monopoly over *local* facilities. *Id.* P 258 ("[T]his Final Rule does not require removal of a federal right of first refusal for a local transmission facility."). A table compiled as part of a 2018 report done by The Brattle Group shows that, on compliance, the Commission approved exclusionary criteria—on the basis of voltage, "need by" dates, and minimum cost requirements—that further chipped away at the pool of projects subject to competition.[16]

	CAISO	ISO-NE	MISO	NYISO	PJM	SPP
Types of Projects Eligible for Competition						
	Reliability, Economic, Public Policy	Reliability, Economic, Public Policy	Market Efficiency, MVP	Reliability, Economic, Public Policy	Reliability, Economic, Public Policy	Reliability, Economic, Public Policy
Exclusions						
Exclusions Based on Need Date		✓ *(For Reliability)*	✓ *(For Reliability)*	✓ *(For Reliability)*	✓ *(For Reliability)*	✓ *(For Reliability)*
Exclusions for Local Reliability or Local Cost Allocated	✓	✓	✓ *(Except for MVP)*		✓ *(For Reliability)*	✓
Excludes Upgrades/Addition to Existing Facilities and on Existing ROW	✓	✓	✓		✓	✓
State Mandated Exclusion			✓		✓	✓
Exclusions Based on Minimum Cost Requirements			✓			
Additional Exclusions Based on Voltage						
Voltage > 300 kV			✓ *(For Reliability)*			
Voltage 200-300 kV			✓ *(For Reliability)*			
Voltage 100-200 kV	✓		✓ *(Except For MVP)*		✓	✓
Voltage < 100 kV	✓	✓	✓		✓	✓

The table shows that, in several regions, the Commission has approved competition exceptions for "immediate need" projects—i.e., those needed to meet a reliability need

[16] Johannes P. Pfeifenberger, et al., The Brattle Group, *Transmission Competition Under FERC Order No. 1000: What We Know About Cost Savings to Date* at 13 (2018), https://www.brattle.com/insights-events/publications/brattle-economists-competitive-transmission-planning-offers-significant-cost-savings-and-consumer-benefits/ (Brattle October 2018 Report).

within three years or less.[17] And while the Commission in 2019 raised concerns over the extent to which these exceptions were being used to avoid competition,[18] it ultimately kept those exceptions in place.[19]

That many incumbents prefer projects that can be built without the fear of competition is not surprising. But this preference is not a reason to jettison competition and benefits it provides customers. It is instead a reason to close the loopholes left by Order 1000.

B. The Conditional ROFR will not replicate competition's benefits.

The combination of broadly-framed exceptions and transmission owner recalcitrance has restricted the role played by competition in transmission development. As reported by The Brattle Group, between 2013 and 2017, transmission owners in the six RTOs invested nearly $76 billion in transmission infrastructure, but only 2.2% of that investment (roughly $1.7 billion) was subject to competition.[20]

To the extent there is evidence on competition, that evidence demonstrates that competition benefits consumers.

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[17] *See, e.g., ISO New England Inc.*, 143 FERC ¶ 61,150, PP 235-239 (2013), *order on reh'g and compliance*, 150 FERC ¶ 61,209, PP 221-226; *order on reh'g and compliance*, 153 FERC ¶ 61,012 (2015) (approving an immediate need exception for reliability projects needed within three years or less); *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214, PP 247-251, *correcting order*, 143 FERC ¶ 61,010 (2013), *order on reh'g and compliance*, 147 FERC ¶ 61,128, PP 164-167, 194-199 (2014), *order on reh'g and compliance*, 150 FERC ¶ 61,038, P 74, *order on reh'g and compliance*, 151 FERC ¶ 61,250, P 25 (2015) (similar); *Sw. Power Pool, Inc.*, 144 FERC ¶ 61,059, PP 195-198 (2013), *order on reh'g and compliance*, 149 FERC ¶ 61,048, P 166 (2014), *order on reh'g and compliance*, 151 FERC ¶ 61,045 (2015) (similar).

[18] *See ISO New England Inc.*, 169 FERC ¶ 61,054, P 7 (2019) ("we are concerned that the Responding RTOs [(ISO-NE, PJM, and SPP)] may be implementing the exemption in a manner that is inconsistent with or more expansive than what the Commission directed").

[19] *See, e.g., ISO New England Inc.*, 171 FERC ¶ 61,211, *reh'g denied*, 172 FERC ¶ 61,293, *reh'g denied*, 172 FERC ¶ 62,096 (2020), *aff'd sub nom.*, *LSP Transmission Holdings II, LLC v. FERC*, No. 20-1422 (D.C. Cir. 2022).

[20] Brattle October 2018 Report at 14.

The Commission has repeatedly recognized that competition disciplines price.[21] And the Brattle October 2018 Report demonstrates that there is a sound basis for that recognition. Brattle found that average cost savings in competitive processes were on the order of 40-55%.[22] While the NOPR suggests that the Conditional ROFR will "largely ensur[e] at least some of the potential cost-related benefits of competitive transmission development processes," NOPR P 358, it contains no data supporting that view, and the information that is available suggests the opposite. Between 2013 and 2017, the final cost of non-competitive, incumbent transmission projects exceeded estimates by an average of 34% nationwide.[23] Region-specific cost escalation data paint an even bleaker picture: in ISO-NE, final costs exceeded estimates by an average of 70%, while average overruns in CAISO were on the order of 41%.[24] These data do not justify moving to a regulatory design in which competitive solicitations will be even less likely than has previously been the case.

In addition to cost savings, competition encourages innovation, which is likewise a potential benefit to consumers. The reason is obvious: competitive processes present transmission planners with multiple potential solutions to address system needs.[25] In

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[21] *Cleco Power LLC*, 101 FERC ¶ 61,008, P 117 (2002) ("The presence of multiple transmission developers would lower costs to customers"), *order terminating proceedings*, 112 FERC ¶ 61,069 (2005)*; see also Carolina Power and Light Co.*, 94 FERC ¶ 61,273, at 62,010, *on reh'g*, 95 FERC ¶ 61,282, at 61,995 (2001) (finding that a federal right of first refusal would unduly limit the planning authority and present the possibility of discrimination by self-interested transmission owners, potentially reduce reliability, and possibly precluding lower cost or superior transmission facilities or upgrades by third parties from being planned and constructed).

[22] Brattle October 2018 Report at 13.

[23] *Id.* at 14.

[24] *Id.*

[25] For example, New Jersey's request for proposals for OSW transmission was met with more than 80 proposed solutions. *See* PJM, *PJM Receives Strong Response in Effort To Aid NJ's Offshore Wind Goals* (2021), https://insidelines.pjm.com/pjm-receives-strong-response-in-effort-to-aid-njs-offshore-wind-goals/

contrast, the Conditional ROFR means that RTOs and ISOs will have just one proposal to consider. There is likewise no evidence that the use of competitive processes causes delays in the delivery of needed infrastructure. Experiences in New Jersey and New York show that competitive solicitations can be conducted on reasonable timelines without undue delay. For example, New Jersey's solicitation for transmission to connect 7.5 gigawatts (GW) of offshore wind generation is expected to be completed on two-year timeframe (November 2020 announcement, with selection of winning bid targeted for October 2022).[26] In New York, NYISO completed a competitive Public Policy Transmission Planning Process to support additional renewable imports into the state in just over two years.[27] In contrast, the Conditional ROFR offers the possibility of substantial project delays due to protracted litigation over whether an incumbent has provided "meaningful" investment opportunities to third-parties.

The "condition" that triggers the ROFR is the opportunity for joint ownership of needed new facilities. But the NOPR's premise—that joint ownership can capture the benefits of competition—is wrong. Allowing for the possibility that some third parties could buy into a portion of a project developed by an incumbent is not a substitute for

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Likewise, ISO NE's Greater Boston Needs studies saw a substantial response of nearly 40 proposals.

[26] *See* NJ Board of Public Utilities, *New Jersey Offshore Wind Transmission State Agreement Approach Overview* at 3(2022), https://www.nj.gov/bpu/pdf/publicnotice/3.22.2022%20SAA%20Stakeholder%20Master%20Slide%20Deck.pdf.

[27] *See* NYISO, *Western New York Public Policy Transmission Planning Report* (2017), https://www.nyiso.com/documents/20142/1396391/Western%20New%20York%20Public%20Policy%20Transmission%20Planning%20Report.pdf/42762c1d-cabc-866e-2cac-4f291c10d39a. The winning project was energized on-time in June 2022. Utility Dive, *New York turns to transmission expansion to meet clean energy goals as NextEra energizes 3.7-GW line* (2022), https://www.utilitydive.com/news/new-york-transmission-next-era-clean-energy/627025/.

competition. And, in any event, beneficial joint ownership arrangements are far more likely to emerge where competition is permitted to flourish.[28]

Concerns about placing control in the hands of the incumbents are particularly acute with respect to the development of transmission needed to connect offshore wind.[29] The integration of offshore wind generation needed to meet state targets will require both substantial offshore transmission and onshore upgrades.[30] Studies have shown that integrating these resources through planned, networked transmission capable of supporting multiple projects rather than through individual radial facilities can support the interconnection of greater amounts of offshore wind and reduce the need for costly onshore upgrades.[31] But the incumbent transmission owners, who may receive ROFR rights over land-based improvements, have an incentive to support more expensive onshore upgrades that will be needed if offshore wind generation is integrated through suboptimal, radial-by-radial interconnection facilities. In other words, the incumbents—unlike competitive entrants—have little incentive to implement the most efficient offshore wind transmission configuration—and the Conditional ROFR insulates them from needing to do so.

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[28] We note that efforts to promote joint ownership are underway outside of the NOPR. For example, the Commission in February 2022 approved changes to the ISO-NE planning process intended to facilitate joint proposals in competitive solicitations. *ISO New England Inc.*, 178 FERC ¶ 61,138, PP 26 (2022).

[29] We address *infra* the need for the Commission to address concerns specific to offshore wind integration, whether in the final rule in this proceeding or through action in Docket No. AD20-18-000.

[30] As there are no service territories in the ocean, we assume that there are no ROFR limitations associated with offshore OSW transmission facilities.

[31] *See, e.g.,* Johannes Pfeifenberger et al., The Brattle Grp., *Offshore Wind Transmission: An Analysis of Options for New York* at 2 (2020), https://web.archive.org/web/20201211195644/https://brattlefiles.blob.core.windows.net/files/19744_offshore_wind_transmission_-_an_analysis_of_options_for_new_york.pdf; Johannes Pfeifenberger et al., The Brattle Grp., *Offshore Transmission in New England: The Benefits of a Better-Planned Grid* at 11 (May 2020), https://www.brattle.com/wp-content/uploads/2021/05/18939_offshore_transmission_in_new_england_-the_benefits_of_a_better-planned_grid_brattle.pdf.

Worse, the Conditional ROFR as proposed leaves ample room for gaming and abuse. The NOPR is express that partnerships between affiliated entities will not meet the requisite "condition" (NOPR P 371), but is silent as to other arrangements that are equally undesirable. While the NOPR states that the Commission "intend[s] for incumbent transmission providers pursuing joint-ownership proposals to offer unaffiliated entities a reasonable chance at meaningful participation," it fails to foreclose the potential for two incumbent transmission owners (or their affiliates) to team up and swap a portion of their respective projects as a means to satisfy the joint ownership requirement. *Id.* These seemingly acceptable arrangements would simply maintain the status quo.

The proposal also offers no detail regarding the ownership share that would constitute "meaningful participation." The NOPR states that an incumbent "would not be allowed to structure joint-ownership arrangements such that unaffiliated entities were offered less than a meaningful level of participation and investment in the proposed regional transmission facility." *Id.* But that directive implies that there will be case-by-case adjudications over whether particular joint ownership arrangements are sufficiently "meaningful," leaving developers like Anbaric—and any other entity seeking to participate through joint ownership—facing potential uphill battles on multiple fronts. And punting these questions to the compliance stage—or, worse, the project development phase—will have a chilling effect on the pool of entities willing to compete for these joint ownership "opportunities."

Even more fundamental, absent guidance from the Commission that "meaningful" participation requires offering something resembling a controlling interest, the expectation that the Conditional ROFR will bring new developer participants into the market is unlikely

to be realized. Merchant developers, if not other third-parties, may be unable to provide their investors the assurances necessary to obtain capital to invest if there is not a corresponding opportunity to direct (or even influence) the course of transmission investment.

Non-incumbent transmission developers are generally not in business to pursue opportunities to become passive investors. Non-incumbent developers possess numerous advantages, including fewer levels of management, which enables more expedient decision-making, and access to non-traditional sources of capital. And non-incumbent developers can bring to the table fresh and innovative perspectives on the engineering and design elements of a project. But, based on Anbaric's experience, private sector investors will not consider minority investments where the investment does not provide a level of control sufficient to maintain a consistent corporate culture or align transaction terms with other projects and investments. Even if a non-incumbent developer can secure the capital necessary to partner with incumbent utilities to develop regional transmission facilities, awarding these entities minority partnership positions significantly reduces the opportunity to realize the benefits of non-incumbent participation—the presumed impetus for the Commission's proposal.

It is widely understood that, in any partnership, its objectives and actions will reflect the intentions of the controlling partner through customary governance provisions regarding budgets, capital contributions, partnership management and day-to-day decision making. Accordingly, any expectation that jointly-owned projects will benefit from the diverse experience and abilities of non-incumbent participants will not be served by a policy that subordinates those experiences and abilities to incumbent control. Indeed, if a

non-incumbent were to enter into a partnership in which decision-making and governance are controlled by the incumbent utilities and incumbent requirements and culture are prioritized, the benefit of non-incumbent developers' experience and abilities would be lost.

These concerns are not speculation; they are inherent in a project's governance structure. Just as the objectives and actions of a partnership always reflect the intentions of the controlling partner, a partner's influence on partnership governance is generally proportional to that partner's ownership share. Accordingly, a partner with a minority interest that is close to 50% may have the opportunity to influence the direction of the partnership. But if the Commission intends for "meaningful participation" requirement to be met with a third-party ownership share that is well below 50%, then we expect the effect of such participation to be little more than window dressing on what would otherwise be simply another incumbent project.

C. The Commission should expand and enforce Order 1000's competitive mandate rather than abandon it.

FERC chose in Order 1000 to pursue competitive development because it recognized that competition has value for customers.[32] Indeed, the Commission has long and correctly been committed to competition in the electricity industry as a means of

[32] The Commission found in Order No. 1000 that federal ROFRs have "the potential to undermine the identification and evaluation of more efficient or cost-effective solutions to regional transmission needs," Order 1000, P 253, and proposed competition to ensure just and reasonable rates.

benefitting consumers. Through Order Nos. 888,[33] 841,[34] 2222,[35] and various other rules, the Commission has acted to remove barriers to market access for new and emerging resources. The Commission should similarly remain committed to competition in transmission development.

Rather than turn away from a competitive regime that continues to hold great promise and has not been given sufficient chance to work, the Commission should affirm Order 1000's mandates and expand opportunities for competitive transmission development. Doing so requires removing the "immediate need" and other exceptions approved in various ISO and RTO Order 1000 compliance plans. *See* Section II.A & n.13. These barriers to competition have enabled many transmission owners to successfully game the Order 1000 process and effectively block market entry, while creating incentives to avoid large scale regional projects that would reduce the need for potentially exempt-from-competition reliability projects. Having now recognized that reality (*see* NOPR P 350), the Commission must act to remedy the situation, not give up on its policy objectives.

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[33] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. by Pub. Utilis.; Recovery of Stranded Costs by Pub. Utils. & Transmitting Utils.*, Order No. 888, 75 FERC ¶ 61,080, *clarified*, 76 FERC ¶ 61,009 (1996), *modified*, Order No. 888-A, 78 FERC ¶ 61,220, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

[34] *Electric Storage Participation in Mkts. Operated by Reg. Transmission Orgs. & Indep. Sys. Operators*, Order No. 841, 162 FERC ¶ 61,127 (2018), *on reh'g and clarification*, Order No. 841-A, 167 FERC ¶ 61,154 (2019), *petition for review denied sub nom. Nat. Ass'n of Regulatory Util. Comm'rs v. FERC*, 964 F.3d 1177 (D.C. Cir. 2020).

[35] *Participation of Distrib. Energy Res. Aggregations in Mkts. Operated by Reg. Transmission Org. & Indep. Sys. Operators*, Order No. 2222, 172 FERC ¶ 61,247 (2020), *on reh'g*, Order No. 2222-A, 174 FERC ¶ 61,197, *on reh'g*, Order No. 2222-B, 175 FERC ¶ 61,227 (2021).

III. THE FINAL RULE SHOULD SUPPORT ONGOING AND EMERGING INITIATIVES AIMED AT DEVELOPING NEEDED NEW TRANSMISSION.

In crafting a final rule in this proceeding, Anbaric urges that the Commission recall the Hippocratic Oath: "first do no harm." In the context of transmission development, this admonition means that any final rule should not impose a universal set of obligations that would require modifying or eliminating transmission planning protocols that are in place and working in the various regions, or similar initiatives underway in particular states. Instead, Anbaric urges that the Commission ensure that actions taken in this proceeding complement, and not disrupt, processes that are already in place and working well.[36]

For example, the State of New Jersey is the first state to use the PJM OATT's "State Agreement Approach" (SAA) to pursue the transmission development needed to interconnect and deliver 7,500 MW of offshore wind generation by 2035.[37] In November 2020, New Jersey solicited developer proposals for the construction of these new and needed facilities. The request produced a robust set of responses—more than eighty proposals were presented to the State's Board of Public Utilities.[38] In response to that

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[36] Commenters in this proceeding have urged a similar course. For example, ISO New England's initial ANOPR comments note the "critical need for the Commission to afford flexibility to account for regional differences in any final rule issued in this proceeding" and ask that the Commission "allow the regions to develop forward-looking, scenario-based planning constructs that work best for them, instead of mandating a 'one-size, fits-all' approach." Initial Comments of ISO New England Inc. 2 (Oct. 12, 2021), eLibrary No. 20211012-5581. PJM takes a similar tack, asserting that "[i]n considering any reforms, it is important that the Commission recognize the unique characteristics of each transmission planning region, and accord each region the flexibility needed to tailor processes to accommodate such regional differences rather than requiring wholesale changes to such processes." Initial Comments of PJM Interconnection L.L.C. at 9 (Oct. 12, 2021), eLibrary No. 20211012-5612. The Commission itself has previously acknowledged this concern. FERC observed in Order No. 1000-A, P 266, that "various regions of the country differ significantly in resources, industry organization, market design, and other ways so that a one-size-fits-all approach to regional transmission planning would not be appropriate."

[37] In April 2022, the Commission issued an order accepting the executed State Agreement between the New Jersey Board of Public Utilities and PJM. *PJM Interconnection, L.L.C.*, 179 FERC ¶ 61,024 (2022).

[38] By contrast, and as noted earlier, where projects are awarded without a competitive solicitation, there may only be one proposal presented for consideration.

solicitation, several bidders, including Anbaric, proposed aggressive cost containment measures and competitive ROEs.[39] For example, Anbaric proposed an ROE of 8.5%, with no additional incentive adders. And the proposed return would be in place for the life of the project, subject to downward adjustments in the event of cost overruns or implementation delays.[40] LS Power offered to cap its ROE and equity percentage for the life of the project, and to cap its transmission revenue requirement for the first 10 years of commercial operation.[41]

A winning bidder (or bidders) will be selected in October 2022, meaning that the vetting and selection process associated with this challenging project will have been completed in less than two years—a significant success story.[42] And there is broad support among state commissions for expanding the use of the SAA mechanism. NARUC noted in its ANOPR comments that "most states think that more should be done to encourage and incent states with similar public policy profiles to use the State Agreement Approach, which . . . has the benefit of being a stakeholder-driven product that enjoys significant state support." NOPR P 289. Along those lines, in June 2021 the Commission issued a "Policy Statement" on the subject of state efforts to develop transmission facilities through voluntary agreements. That Policy Statement "encourage[s] interested parties considering

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[39] New Jersey Board of Public Utilities, *New Jersey Offshore Wind Transmission State Agreement Approach Overview* at 110 (2022), https://www.nj.gov/bpu/pdf/publicnotice/3.22.2022%20SAA%20Stakeholder%20Master%20Slide%20Deck.pdf.

[40] *Id.* at 46.

[41] *Id*. at 64.

[42] State of New Jersey Board of Public Utilities, New Jersey Advances Offshore Wind Transmission Proposal at Federal Energy Regulatory Commission, https://www.nj.gov/bpu/newsroom/2022/approved/20220127.html ("New Jersey's [SAA] has the potential to serve as a national model for transforming the way state clean energy priorities are incorporated into the regional transmission planning process.")

the use of such agreements to consult with Commission staff."[43] Any Final Rule in this proceeding should (a) support (if not promote) similar efforts; and (b) make clear that states that choose to develop projects using the SAA or a similar approach are authorized to select those projects through competitive solicitation.

The New York ISO has in place a structure for the consideration of public policy transmission projects that includes the solicitation of competing proposals to meet identified needs. As explained in NYISO's "Public Policy Transmission Planning Process Manual":[44]

> [t]he Public Policy Process consists of three main steps: (1) identification of Public Policy Transmission Needs; (2) requests for proposed Public Policy Transmission Projects and Other Public Policy Projects and the evaluation of the viability and sufficiency of proposed transmission and non-transmission projects to address the Public Policy Transmission Needs; and (3) evaluation and selection of the more efficient or cost-effective Public Policy Transmission Project, if any, to satisfy each Public Policy Transmission Need to be eligible for cost allocation under the ISO OATT.

The Manual goes on to explain that subsequent to the identification of a Public Policy Transmission Need:

> All submissions, regardless of project type, are evaluated for their viability and sufficiency to meet the Public Policy Transmission Needs. The NYISO then evaluates the proposed Public Policy Transmission Projects seeking regulated cost recovery that have satisfied the viability and sufficiency requirements and ranks them based on the quality of their satisfaction of numerous metrics. Based on this evaluation, the NYISO may select the more efficient or cost effective regulated Public Policy Transmission Project

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[43] *State Voluntary Agreements to Plan & Pay for Transmission Facilities*, Policy Statement, 175 FERC ¶ 61,225, P 1 (2021).

[44] N.Y. Indep. Sys. Operator, *Public Policy Transmission Planning Process Manual* at 10 (2020), https://www.nyiso.com/documents/20142/2924447/M-36_Public%20Policy%20Manual_v1_0_Final.pdf (Manual).

> to satisfy the Public Policy Transmission Need(s), if any. A selected project is eligible for cost allocation under the NYISO OATT.

Id. at 11.

NYISO noted in its initial ANOPR comments that it "has enjoyed significant success in expanding transmission in the New York Control Area to meet transmission needs in the state," and, "under its Public Policy Process, the NYISO has selected . . . significant transmission expansions in Western New York, Central New York and the Hudson Valley Region." Comments of the New York Independent System Operator, Inc. 13-14 (Oct. 12, 2021), eLibrary No. 20211012-5611 (NYISO Initial ANOPR Comments). The recently-completed Empire State Line is New York's first competitively-bid transmission project.[45]

In addition, NYISO suggested that certain of the reforms under consideration in this proceeding could enhance (but not replace) NYISO's existing transmission planning processes:

> NYISO agrees with the Commission that there are benefits in preparing for future system needs, including planning for transmission upgrades required to accommodate future generation. In particular, . . . increasing the breadth of considerations and objectives that guide the identification of transmission upgrades can foster a more proactive rather than reactive transmission planning process. Such an approach could lead to a broader identification of transmission needs and solutions by enhancing the NYISO's

[45] New York State, *Governor Hochul Announces Commissioning of Empire State Transmission Line* (2022), https://www.governor.ny.gov/news/governor-hochul-announces-commissioning-empire-state-transmission-line ("Developed and now operated by NextEra Energy Transmission New York, Inc., the new 20-mile 345 kilovolt line connects the new Dysinger switchyard in Royalton, NY with the new East Stolle switchyard in Elma, NY. In addition to providing access to existing renewable resources, the new transmission line advances New York's clean energy goals by supporting the integration of future renewable resources from Western New York.")

> existing approved reliability, economic and public policy planning processes.

NYISO Initial ANOPR Comments at 3.

Similarly, the California ISO has a process in place to assess transmission needs and select projects to meet them. As explained in its Initial ANOPR comments:

> CAISO follows a "top down" transmission planning approach in which it assesses transmission needs annually and works with stakeholders to identify the more efficient or cost-effective transmission or non-transmission solution to meet any identified transmission need. The CAISO then conducts a competitive solicitation open to all interested entities to select an approved project sponsor to construct, own, operate, and maintain the approved regional transmission solution.

Comments of The California Independent System Operator Corporation on Advanced Notice of Proposed Rulemaking 15 (Oct. 12. 2021), eLibrary No. 20211012-5583.[46]

And, just this week, President Biden signed the historic Inflation Reduction Act (IRA), which, among its many provisions, makes unprecedented investments in renewable energy to power the fight against climate change. The Biden Administration has made clear since its beginning days that investment in the clean energy transition is critical to the addressing climate change, and investment in the needed infrastructure to deliver that clean energy has been a consistent priority. The IRA greatly expands upon existing investment, including allocating $100 million for transmission planning directed at interregional and offshore wind transmission. This and other IRA transmission investments, which total $2.9 billion, encourage collaborative, thoughtful, long-term and interregional planning by

[46] CAISO goes on to explain that under its Tariff, "Regional Transmission Facilities" that are eligible for competitive solicitation, are "those facilities 200 kV and above or located in the service territories of more than one transmission owner, and that do not constitute upgrades or improvements to, additions on, or replacements of, an existing participating transmission owner facility." *Id.* at 23 (citing CAISO Tariff Section 24.5.1.).

the states. FERC must ensure that no provisions of the NOPR, intended or not, run contrary to the intent of the Administration and Congress as it relates to transmission planning, particularly by the states.

For all of these reasons, it is imperative that the Commission make clear in any Final Rule adopted here that FERC's intent is not to disrupt existing processes that are working well, or promising mechanisms that have only recently been enacted. Indeed, it is the other way around: any final rule should enhance, expand, and encourage their use.

IV. CONCLUSION

Anbaric respectfully requests that the Commission consider and take actions consistent with these comments in any final rule in this proceeding.

Respectfully submitted,

/s/ 

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