

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

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

REPLY COMMENTS OF WIRES

Pursuant to the Notice of Proposed Rulemaking (“NOPR”) issued by the Federal Energy Regulatory Commission (“Commission” or “FERC”) on April 21, 2022, in the above-captioned proceeding,¹ WIRES, on behalf of its members, hereby submits the following reply comments.²

On August 17, 2022, WIRES filed initial comments generally supporting the proposed rule.³ On balance, WIRES believes the Commission’s proposal is likely to facilitate investment in transmission infrastructure to meet the nation’s well-documented needs of the future, and for the most part, WIRES agrees with the core aspects of the NOPR’s approach. In contrast, some of the initial comments urge the Commission to revise certain well-supported determinations in the proposed rule, or the scope of the proposed rule, in ways that would be contrary to achieving the Commission’s goal of efficiently and cost-effectively meeting the nation’s future transmission needs to accommodate a changing resource mix and getting beneficial transmission built. WIRES submits these limited reply comments to address some of the assertions raised in certain parties’ initial comments.

¹ *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, Notice of Proposed Rulemaking, 179 FERC ¶ 61,028 (2022) (“NOPR”).

² This filing is supported by the full supporting members of WIRES but does not necessarily reflect the views of the RTO/ISO associate members of WIRES.

³ Comments of WIRES, August 17, 2022 (“WIRES Comments”).

I. REPLY COMMENTS

A. Conditional Right of First Refusal⁴

In its initial comments, WIRES agreed with the Commission's determination that the implementation of Order No. 1000's competitive transmission planning process has not been successful in spurring regional transmission development on a level required to meet the nation's transmission needs of the future.⁵ To the contrary, the record showed that since the implementation of Order No. 1000, transmission investment through the regional transmission planning and cost allocation processes in some regions has actually declined.⁶ WIRES further agreed with the Commission's determination that there appears to be a connection between the incumbent transmission developer reforms eliminating longstanding federal rights of first refusal ("ROFR") with respect to new transmission facilities selected in a regional transmission plan and the trend in flat or even declining long distance regional transmission investment.⁷

Most, if not all, commenters agree that, with a record based on a decade of actual experience gained in the implementation of Order No. 1000, the nonincumbent transmission developer reforms simply have not been working as anticipated. But while the commenters may agree on the existence of a shortcoming in the implementation of Order No. 1000's

⁴ This section is supported by a majority of, but not all, WIRES Full Supporting Members. The Full Supporting Members of WIRES otherwise support the other comments and recommendations in this filing.

⁵ WIRES Comments at p. 14.

⁶ NOPR at P 349 and fn. 567 observing that investment in regional transmission facilities in PJM averaged \$2.76 billion from 2005 to 2013 and dropped to \$1.65 billion from 2014 to 2020.

⁷ WIRES Comments at pp. 13-14.

nonincumbent transmission developer reforms, there is broad disagreement as to the nature of those shortcomings as well as the cure.

WIRES agrees with the Commission’s determination that “Order No. 1000’s remedy—requiring the elimination of *all* federal rights of first refusal for entirely new transmission facilities selected in a regional transmission plan for purposes of cost allocation—was overly broad.”⁸ As other commenters have acknowledged, “if FERC’s aim is to reverse the current trend of stifled competitive economic transmission development and, ultimately, to build sufficient regional and interregional transmission in time to mitigate potential reliability deficits resulting from an ever-accelerating resource transition, then removing the prohibition on the federal right of first refusal and incenting incumbent regional and interregional transmission development may be the best course of action.”⁹ WIRES joins those commenters who support, with certain modifications and clarifications, the NOPR’s proposal to allow Transmission Providers to propose federal rights of first refusal conditioned upon the incumbent Transmission Provider establishing joint ownership of the transmission facilities.¹⁰

In particular, WIRES generally supports the Commission’s effort to revisit the overly broad remedy of unconditional elimination of federal rights of first refusal established in Order No. 1000 by providing the opportunity for conditional federal rights of first refusal through joint ownership projects.¹¹ Opportunities for integrating varied transmission ownership models

⁸ *Id.* at p. 15.

⁹ Comments of the Indiana Utility Regulatory Commission at p. 12 (August 17, 2022). Similarly, WIRES expressed concerns that the lack of a ROFR has caused delays and limited opportunities for dialogue between transmission developers, market participants, and RTOs/ISOs, in addition to not delivering regional transmission projects under the timeframes necessary to meet increasingly aggressive climate targets. WIRES Comments at p. 14. To the extent the Commission’s goal is to encourage the approval of a larger volume of regional projects, the practical difficulties and development delays associated with bidding processes are at odds with that goal.

¹⁰ WIRES Comments at pp. 15-16.

¹¹ *Id.*

should appropriately focus on those areas where partnerships are valuable, such as long-distance, multi-jurisdictional projects that are challenging to build. In addition, WIRES urged the Commission to be flexible in promoting opportunities for parties with rights of first refusal to partner with and develop transmission projects with other transmission developers holding rights of first refusal, or, alternatively, parties without those rights that could provide other advantages.¹² Importantly, the Commission should provide flexibility with respect to eligibility of transmission affiliates of utilities that have ROFR rights to form qualifying partnerships as an effective model that delivers needed transmission projects.¹³

Finally WIRES recommended that the Commission should expressly allow Transmission Providers to secure conditional ROFRs for project types that will be jointly owned by two or more incumbent transmission owners consistent with existing joint ownership structures contained in regional tariffs.¹⁴ Examples of such structures include (1) split ownership between two or more incumbents for projects which connect two or more transmission owner systems, and (2) regional portfolios, which are inherently jointly owned by multiple transmission owners.

Many of those urging the Commission to abandon its conditional ROFR proposal and instead expand competition for transmission projects rely on general platitudes about the benefits of competition without providing any data or analysis based on the past ten years of experience with implementation of competitive bidding processes to support their assertions.¹⁵ However, generalized assertions that “competition is good,” do not amount to the substantial evidence needed to justify or support an expansion of existing competitive bidding processes. Nor should

¹² *Id.*

¹³ The New York Transco is an example of an effective model.

¹⁴ WIRES Comments at pp 15-17.

¹⁵ See e.g., Comments of Electric Power Supply Association, Comments of NRG, Comments of PA PUC.

the comparisons made by some commenters to competitive processes outside of the particular and unique circumstances involved with high voltage transmission development, or reliance on academic or think-tank competition theories that have not been borne out through actual experience provide a basis for modifying existing FERC rules. Indeed, Order No. 1000 was based on theory that has not borne out as anticipated, as shown in a recent report based on real world results.¹⁶

Other commenters point to a 2019 report prepared by The Brattle Group (“Brattle Report”) for a competitive transmission developer as support for their claim that competitive bidding processes will result in cost savings to customers.¹⁷ However, these commentors conveniently fail to acknowledge a subsequent report documenting significant methodological flaws in the Brattle Report that render the Brattle Report’s analysis and conclusions questionable and unreliable.¹⁸ The 2019 Concentric Report not only refuted the cost savings findings in the Brattle Report, it also demonstrated the accuracy of incumbent transmission owner initial cost estimates.¹⁹ As a result, the Commission should pay no heed to certain commenters’ continued reliance on the Brattle Report’s refuted analysis and conclusions for the discredited assertion that competitive bidding processes lead to inflated cost savings to customers.

¹⁶ See p. 7 below.

¹⁷ See The Brattle Group, *Cost Savings Offered by Competition in Electric Transmission* (April 2019) (“Brattle Report”).

¹⁸ See Concentric Energy Advisors, Inc., *Building New Transmission: Experience To-Date Does Not Support Expanding Solicitations* (June 2019) (“2019 Concentric Report”).

¹⁹ *Id.* at pp. 3-12.

By contrast, there is support in the record based on actual data documenting the added costs and lack of benefits over a ten-year track record of experience implementing Order No 1000's competitive transmission bidding processes. For instance, PJM Interconnection's initial comments included data regarding its experience with the competitive solicitation process from 2013 through 2021.²⁰ According to PJM's data, since the initiation of competitive solicitation processes in PJM, it has convened 28 competitive window proposals, received 1,097 project proposals, approved 185 projects, and only three project proposals by nonincumbent developers were found to be the more efficient or cost-effective solution. The data illustrates that despite the over one thousand project proposals submitted by non-incumbent developers, in nearly every instance, the non-incumbent's proposal was **not** found to be the more efficient or cost-effective solution. In other words, despite extensive efforts over ten years of implementing competitive processes in PJM, those efforts have yielded almost no benefits.

Conversely, PJM points out numerous added costs associated with addressing competitive solicitation processes that significantly increase the administrative and analytical workload associated with accommodating competitive solicitation processes.²¹ Those additional burdens, delays, and added costs include:

- Performing “consultant” work for nonincumbent transmission developers who lack sufficient understanding of certain powerflow analyses;
- Additional administrative needs associated with collection of fees for project proposals;
- Additional extensive analysis by RTO staff, as well as the need to engage additional outside consultants, to address cost commitment provisions that have not realized the benefits expected;

²⁰ Initial Comments of PJM Interconnection, LLC, at pp. 32-46, August 17, 2022 (“PJM Comments”).

²¹ *Id.* at 47-48.

- Additional engineering and legal staff resources to respond to questions regarding competitive proposal windows;
- Additional workload challenges and delays resulting from confidentiality issues that are at odds with transparency requirements.²²

PJM’s data and experience confirm significant costs associated with its administration of competitive bidding processes that at best have yielded rare instances of more efficient or cost-effective solutions. As ELCON states in its comments, “Time and money have been wasted in the stakeholder process due to infighting, ongoing litigation, and less than forthcoming behavior.”²³

The data provided by PJM is further supported and corroborated by a new report by Concentric Energy Advisors, Inc. (“2022 Concentric Report”) detailing the added costs and delays associated with competitive solicitation processes filed in this proceeding.²⁴ The Concentric Report conducts an in-depth analysis of several transmission projects that have resulted from competitive solicitations where a non-incumbent developer was selected and the project was constructed. That analysis shows that while there was no demonstration that the projects were completed in a more efficient or cost-effective manner than if they had been constructed by the incumbent utility (or incumbent utilities), the competitive solicitation process added significant time, delaying benefits to customers. Moreover, MISO recently indicated that they will need to stagger the issuance of request for proposals for the first tranche of Long-Range Transmission Process (“LRTP”) projects over two years after the projects were approved for

²² *Id.* at p. 47.

²³ Comments of ELCON at pp. 21-22, August 17, 2022.

²⁴ *See* Comments of Developers Advocating Transmission Advancements Attachment A, August 17, 2022 (“DATA Comments”).

construction.²⁵ With time of the essence and the need for transmission only continuing to grow, the Commission should support processes that consider implementation timelines as expediently as possible.²⁶

In sum, based on the actual results of competitive solicitations to date, as opposed to early-stage competitive bids, or projections or speculation as to potential cost savings, the demonstrated lack of benefits realized from Order No. 1000 competitive bidding is sufficiently documented to support the Commission's proposal to implement a conditional ROFR for jointly-owned projects. Moreover, nothing in the conditional ROFR proposal that has been put forth, conditioned on partnership, prevents partnership among incumbents and non-incumbents, and as WIRES points out, should also allow partnership with affiliated structures put in place to focus on transmission development.

B. Cost Management

WIRES does not agree with those commenters urging the Commission to address cost management, and in particular, to include a proposal for an independent transmission monitor, in the final rule.²⁷ The Commission's decision to omit an independent transmission monitor requirement from the proposed rule was correct given the fundamental legal and evidentiary infirmities with the Commission requiring transmission providers to establish an entity to

²⁵ See LRTP – Tranche 1 Competitive Transmission Projects Intent to Stagger Request for Proposals Release Dates,” (Aug. 8, 2022) (available at [https://cdn.misoenergy.org/20220808_Notice%20of%20Intent%20to%20Stagger%20RFPs62587 7.pdf](https://cdn.misoenergy.org/20220808_Notice%20of%20Intent%20to%20Stagger%20RFPs62587%207.pdf))

²⁶ Indeed, both studies spark broader consideration of the Commission's query in the NOPR as to whether it should consider fully restoring the federal ROFR eliminated in Order No. 1000. See NOPR at P. 382.

²⁷ See, e.g., Comments of Large Public Power Council at pp. 6-14; Initial Comments of Massachusetts Attorney General Maura Healey at pp. 26-39; Comments of Potomac Economics at pp. 6-8; and Comments by the Electricity Transmission Competition Coalition in Opposition to Certain Aspects of the Proposed Rule at pp. 23-24.

monitor the planning and cost of transmission facilities for a region.²⁸ In addition, the Commission has already initiated a proceeding to explore measures relating to the adequacy of transparency into and the cost effectiveness of local and regional transmission planning decisions at a technical conference scheduled on October 6, 2022.²⁹ Thus, there already is a process under way to address commenters' concerns.

Moreover, the commenters' request will only result in further, and unnecessary, delay to the Commission's consideration of a final rule. Since the Commission never included cost management considerations, much less a proposal to require implementation of a transmission monitor, in the NOPR, if the Commission were to revise the proposed rule now to establish cost management rules or measures in the final rule, such action would clearly constitute a significant substantive change to the NOPR triggering the need for a supplemental notice of proposed rulemaking in order to provide adequate notice and opportunity for the public to comment on the proposed changes. Another round of comments and reply comments to consider significant substantive changes to the proposed rule will inevitably add more stakeholder contention and months of delay to this ongoing proceeding – all while duplicating the Commission's consideration of the same issues in its October 6 technical conference.

In any event, even if the Commission were inclined to address the commenters' request to impose a new cost management framework or require all Transmission Providers to establish an independent transmission monitor, it would need to satisfy the dual burden of section 206 of the FPA: the Commission must both show that existing tariffs or rules are unjust and

²⁸ WIRES Comments at pp. 19-22.

²⁹ See Transmission Planning and Cost Management, FERC Docket No. AD22-8-000, Supplemental Notice of Technical Conference (Sept. 8, 2022).

unreasonable and that the rule it requires to be put in place is just and reasonable.³⁰ The record in this proceeding does not meet this burden.

Tellingly, none of the commenters identify any specific flaws or gaps in any of the existing transmission planning oversight or transparency processes that have been in place for years or in the implementation of those processes that render those processes unjust and unreasonable.³¹ Instead, the basis for the commenters' concerns seems to be that if more transmission facilities are built, they may have to pay for the costs of those new facilities. However, just because more transmission infrastructure may be built to meet the needs of a changing resource mix, and customers will pay the costs of these new transmission facilities (as the case has always been), does not by any means suggest that current processes are unjust and unreasonable. In fact, by the Commission's own reckoning, any transmission that results from the potential reforms to regional transmission planning, cost allocation, and generator interconnection in the proposed ANOPR should be more efficient and cost-effective than before and provide greater protection to customers, thereby making the need for an independent transmission monitor even less necessary and more superfluous.³² With the cost of transmission constituting just 13% of retail customer bills and the significant benefits of transmission, including to further competitive generation, it would seem the better course of action for the Commission would be to return to basics and focus on what has worked to get transmission built (*e.g.*, reinstatement of conditional federal ROFR, compensatory rates of return, timely decisions).

³⁰ See *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 64-65 (D.C. Cir. 2014).

³¹ For instance, the Minnesota Public Utility Commission explains in its comments that Minnesota uses existing state regulatory processes to make sure that transmission lines are economically efficient and prudent. See Initial Joint Comments of the Minnesota Public Utilities Commission and the Minnesota Department of Commerce at p. 8.

³² ANOPR at P 159.

As to some commenters' request for the Commission to require the use of an independent transmission monitor, there is an additional legal obstacle. The FPA charges the Commission, not any outside party, with responsibility for ensuring the just and reasonableness of transmission rates. The proposed creation and authorization of an independent transmission monitor would constitute an illegal subdelegation of the Commission's authority under FPA sections 205 and 206.³³ Even if an independent transmission monitor were not expressly vested with binding decisional authority over rates, terms and conditions of service, such an entity, essentially deputized by the Commission with authority to review transmission provider spending on transmission facilities, conduct necessary analyses, and to make preliminary determinations and recommendations to the Commission regarding transmission facility costs, would be inherently vested with the veneer of the exercise of federal authority given the role's ability to inhibit, interfere, coerce, and influence transmission planning processes and decisions. There is nothing ministerial or "neutral" about the role or function of a transmission monitor calling balls and strikes with regard to significant, long-term, transmission investments as envisioned by the commenters, and the creation and authorization of such an entity would exceed the Commission's authority.

Finally, even if there were sufficient findings that the current process is unjust and unreasonable in some respect, the appropriate remedy would be to require appropriate changes to the process to address any determined flaw instead of adding a general additional and duplicative oversight entity. The addition of a transmission monitor will add another layer of review which will add further delays, result in more costs to consumers, and increase uncertainty at a time when more transmission needs to be built at a faster pace.

³³ See *U.S. Telecom Assoc. v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

II. CONCLUSION

WIRES respectfully submits these reply comments for consideration by the Commission as it considers further action on the proposed rule.

Respectfully submitted,

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September 19, 2022