May 27, 2025

Via Regulations.gov

The Honorable Andrew N. Ferguson, Chairman
Federal Trade Commission
U.S. Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Re: Request for Public Comment Reducing Anti-Competitive Regulatory Barriers
Docket No. FTC-2025-0028

Dear Chairman Ferguson:

WIRES appreciates the opportunity to provide comments on the Federal Trade Commission's ("FTC") request for comment on how federal regulations can harm competition in the American economy.

WIRES is a non-profit trade association representing investor-, publicly- and cooperatively-owned electric transmission providers and developers, transmission customers, regional grid managers, and equipment and service companies. Our membership includes many of the largest transmission owners in the nation. Since its inception, WIRES has focused on supporting a regulatory framework that promotes necessary and cost-effective investment in electric transmission and consumer benefits through development of electric transmission infrastructure.

Continued robust investment in electric transmission infrastructure remains critical to serve customers and the nation reliably, resiliently, and effectively. Electric utilities are facing potentially overwhelming demand driven by the increasing electrification of the economy due to the rapid development of data centers and artificial intelligence technology. Investment in transmission infrastructure will help ensure the ability of the transmission system to reliably serve firm transmission, provide customers with access to lower cost generation resources, accommodate changes in the nation's generating resource mix, support new resources seeking transmission service, adapt to shifts in load patterns, address the impact of increasing extreme weather events on the bulk power system, manage the increasing electrification of the economy, and mitigate the growing cyber and physical security threats.

In response to the FTC's request for comments on issues or concerns related to the consideration of eliminating or modifying regulations impeding the American economy, WIRES submits the attached comments filed today in response to the Department of Justice's ("DOJ") request for input regarding the identification and elimination of anticompetitive state and federal laws and regulations that create unnecessary barriers to competition.

In its DOJ Comments, WIRES addressed one regulation in the energy sector - Federal Energy Regulatory Commission's ("FERC") Order No. 1000, which eliminated incumbent transmission owners' federal rights of first refusal ("ROFR") and implemented a complex and burdensome regulatory solicitation process for the construction and ownership of new regional transmission projects that receive regulated cost-based recovery.

While FERC's past efforts to encourage investment in, and development of, needed and beneficial transmission are to be commended, the fact remains that there continues to be an urgent need for investment in transmission infrastructure to address considerable load growth expectations due to technological advances and general increased economic activity, including unprecedented levels of demand driven by the development of data centers and artificial intelligence technology. Additionally, there is a need to connect supply sources to meet customer demand and to replace aging infrastructure.

As detailed in the attached comments, after 14 years of experience with Order No. 1000's regulatory solicitation processes, the data shows that cost reductions and innovations in electric transmission projects anticipated by FERC, in fact, never materialized. Instead, the actual data demonstrates that nonincumbent developers lack the expertise and system knowledge, particularly at the local level, to effectively substitute for incumbent transmission developers. More specifically, the process has not led to substantial new industry entries, verifiable costs savings for customers, significant increases in transmission expansions (particularly development of large-scale regional projects), or projects with new or innovative technologies. Additionally, the Order No. 1000 regulatory process has resulted in loss of efficiencies in coordinated and collaborative planning, significant procedural delays and litigation, increased administrative costs and burdens, duplicative and redundant processes, and reduced security and system reliability, the costs of which are ultimately borne by transmission customers. Reinstating the federal ROFR for incumbent transmission owners and eliminating the Order No. 1000 solicitation requirements would align with the administration's deregulatory agenda by promoting a regulatory environment that benefits American businesses and consumers, as well as advancing the goals of energy dominance and abundance.

Accordingly, WIRES commits to working with the FTC and DOJ to achieve regulatory reform that supports modifying Order No. 1000 to reinstate the federal ROFR for incumbent transmission owners and eliminate the Order No. 1000 solicitation process.

Thank you for your consideration.

Sincerely,

/s/ Larry Gasteiger

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UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF JUSTICE

Anticompetitive Regulations Task Force	)	Docket No. ATR-2025-0001

COMMENTS OF WIRES

WIRES submits these comments on behalf of its members in response to the Department of Justice's ("DOJ") establishment of "an Anticompetitive Regulations Task Force to advocate for the elimination of anticompetitive state and federal laws and regulations that undermine free market competition and harm consumers, workers, and businesses."[1] As part of that initiative, DOJ seeks information on the laws and regulations specific to the energy industry that "can undermine reliability and affordability by protecting incumbent electricity providers from competition or disruptive innovation."[2] WIRES expects that one regulation in the electric transmission sector will likely receive particular attention - specifically, an aspect of the Federal Energy Regulatory Commission's ("FERC") Order No. 1000[3] that eliminated federal rights of first refusal[4] ("ROFRs") and imposed by regulation a form of competitive bidding for the ownership of new electric transmission projects that receive regulated cost-based recovery.[5]

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[1] *See* DOJ, *Justice Department Launches Anticompetitive Regulations Task Force* at 1 (Mar. 27, 2025) ("DOJ Notice of Inquiry") (*available at* https://www.justice.gov/opa/pr/justice-department-launches-anticompetitive-regulations-task-force).

[2] *Id*. at 2.

[3] *See Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 61,051 at P 7 (2011) ("Order No. 1000"), *order on reh'g & clarification*, Order No. 1000-A, 139 FERC ¶ 61,132 (2012) ("Order No. 1000-A"), *order on reh'g & clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012) ("Order No. 1000-B"), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014) (collectively, "Order No. 1000").

[4] A right of first refusal gives an incumbent transmission owner the right to construct transmission facilities in its service territory.

[5] Order No. 1000 eliminated the federal ROFR for certain transmission expansions selected in a regional plan for purposes of cost allocation and adopted a framework to consider transmission facilities proposed by nonincumbent developers. Such process is referred to herein as the "Order No. 1000 Process" or "Order No. 1000 Bidding Process."

Because it is likely to receive such attention, WIRES focuses our comments to DOJ on this one important topic.

When FERC justified Order No. 1000, it relied on an overly simplified application of economic theory. However, after several years of real-world experience implementing the Order No. 1000 Bidding Process, it has in many ways made it more challenging to plan and develop new regional transmission infrastructure. Instead of achieving the intended purpose of reducing costs and spurring innovation for the benefit of customers, the Order No. 1000 Bidding Process has in too many instances increased regulation, created additional bureaucracy, put constraints on collaboration, and added costs. WIRES, therefore, urges DOJ to support regulatory reform that eliminates the Order No. 1000 Bidding Process and reinstates the federal ROFR for electric transmission expansion.

I. DESCRIPTION OF WIRES

WIRES is a non-profit trade association of investor-, publicly- and cooperatively-owned transmission providers and developers, transmission customers, regional grid managers, and equipment and service companies.[6] WIRES promotes investment in the North American electric transmission system, robust and effective transmission solutions to reliability, economic, and environmental challenges, and the reduction or elimination of uneconomic barriers to transmission development.

WIRES members serve customers throughout major regions of the country, account for more than 165,000 miles of high voltage transmission, and include several technology companies

[6] These comments are supported by most, but not all, of the Full Supporting Members of WIRES. Additionally, this filing does not necessarily reflect the views of the Regional Transmission Organizations ("RTOs") or Independent System Operators ("ISOs") (collectively, "RTOs/ISOs"). For more information about WIRES, please visit www.wiresgroup.com.

focused on advancements in transmission. WIRES members are dedicated to the timely, efficient, and cost-effective development of transmission, utilizing innovative technologies and procurement practices to drive down costs. Additionally, WIRES members are focused on development of transmission to ensure the reliable delivery of energy to serve their existing and new customers. WIRES advocates for constructive regulatory policies and for reforms to regulations that are slowing the development of needed transmission infrastructure and adding unnecessary cost with no clear value. FERC's Order No. 1000 Bidding Process, and specifically the ban on transmission owners' federal ROFR, is one regulation negatively impacting the pace at which transmission infrastructure can be developed.[7] WIRES takes this opportunity to provide record evidence to demonstrate that the Order No. 1000 Bidding Process has not been successful and to clarify that this process is not competition in the conventional "free market" sense.

II. INTRODUCTION AND EXECUTIVE SUMMARY

There is little dispute that the Nation's electric infrastructure will be challenged to meet both the expected rapid load growth and changing resource mix. The North American Electric Reliability Corporation ("NERC") has explained that "the critical reliability challenges facing the industry [include] satisfying escalating energy growth, managing generator retirements, and accelerating resource and *transmission development*."[8] WIRES members are among the largest transmission owners in the country, have extensive expertise and experience in timely executing large-scale transmission projects, have been and will continue to build and own transmission

[7] *See* Exec. Order No. 14219, 90 Fed. Reg. 10583 (2025) ("E.O. 14219") (included in the classes of regulations that undermine the national interest are regulations that "significantly and unjustifiably imped[e] . . . infrastructure development").

[8] NERC 2024 Long-Term Reliability Assessment at 6 (Dec. 2024) (*available at* https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_Long%20Term%20Reliability%20Assessment_2024.pdf) (emphasis added).

projects that deliver value to customers, stand ready to meet the pressing need for new transmission, and remain committed to advocating for effective competitive policies.

The need for additional transmission is clear. Planning regions across the country, both within RTOs and ISOs, as well as regions outside the RTO/ISO framework, are experiencing increasing transmission constraints. These constraints impact regional transmission providers' ability to reliably and cost effectively meet new and existing customer demand for electric service. This demand is driven by significant load growth expectations (*i.e.*, growth in the demand for electricity) due to technological advances, and general increased economic activity, including unprecedented levels of demand driven by the development of data centers and artificial intelligence technology. At the same time, there is a need to connect new supply sources and enable more economic dispatch of generation resources, which requires transmission investment. Not to mention the fact that increasing transmission capacity will also enhance reliability during extreme weather events by enabling regional and interregional transfer of power.[9]

In declaring a national energy emergency, President Trump's Executive Order 14156 states that "[t]he United States' insufficient energy production, transportation, refining, and generation constitutes an unusual and extraordinary threat to our Nation's economy, national security, and foreign policy."[10] That Executive Order defines "generation" to mean "the use of energy to produce electricity or thermal power and the transmission of electricity from its site of

[9] *See* MISO, *LRTP Tranche 2.1 Benefits Analysis Results Review* at 39 (Sept. 25, 2024) (available at https://cdn.misoenergy.org/20240925%20LRTP%20Workshop%20Item%2001%20Tranche%202.1%20Business%20Case%20Overview649810.pdf).

[10] Exec. Order No. 14156, 90 Fed. Reg. 8433 at 8434 (2025) ("E.O. 14156").

generation."[11] The Executive Order aptly recognizes the critical role transmission plays in ensuring reliable energy delivery in furtherance of the Nation's economy and national security.

As set forth herein, the DOJ's focus should be on eliminating barriers that prevent incumbent utilities from delivering transmission investments that support economic growth, as they have successfully done for many decades. The sweeping regulation in Order No. 1000 that reformed the electric transmission planning and cost allocation requirements for public utility transmission providers also eliminated incumbent utilities' right to build regionally cost allocated projects in their service territory. In doing so, FERC established a bidding process that required nonincumbent transmission developers to be given the opportunity to vie to construct and own certain transmission expansion projects. This is exactly the type of government regulation that should be reformed to remove artificial and avoidable barriers to the development of the essential infrastructure necessary to support a robust economy.[12]

In requiring this change, which was intended to supplement other elements of Order No. 1000, FERC theorized that it would lower the cost of new electric transmission infrastructure and encourage the use of innovative solutions.[13] In fact, neither has been demonstrated in the nearly 14 years since Order No. 1000 was adopted. Instead, transmission projects developed through Order No. 1000 Bidding Processes have encountered administrative and schedule delays, scope changes, and cost increases.

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[11] *Id.* at 8436.

[12] *See supra* n. 7.

[13] Order No. 1000 at P 2 ("[T]he electric industry is currently facing the possibility of substantial investment in future transmission facilities to meet the challenge of maintaining reliable service at a reasonable cost. [FERC] concludes that it is appropriate to act now to ensure that its transmission planning processes and cost allocation requirements are adequate to allow public utility transmission providers to address these challenges more efficiently and cost-effectively.").

The fact that the Order No. 1000 has not produced the expected results is understandable. Project bids by nonincumbent developers are developed with limited local knowledge and contain cost estimates that often do not adequately capture the nuanced needs of transmission projects or fully capture cost risk drivers at the local level. Recognizing the risks of being held to their bid estimates, nonincumbent developers are incentivized to include "soft" cost caps, *i.e.*, cost caps with various categories of exclusions to protect against "unanticipated" cost impacts. The actual cost of proposed projects ultimately may differ by a wide margin.

Order No. 1000 also has disrupted the collaboration essential for effective electric transmission planning.[14] Collaboration among transmission owners, operators, and planners on various aspects of system analysis, planning, and technology assessment has been an essential element of network planning over the first 100 years of the U.S. grid's development. The Order No. 1000 Bidding Process replaced the collaborative process with a framework that discouraged cooperation. It led each transmission developer (incumbent and nonincumbent alike) to safeguard their sensitive information from any others vying for the right to build the project.[15] But for the Order No. 1000 bidding requirement, regional transmission planners, transmission owners, and customers would be "working together on analysis, project selection, routing, permitting, sharing ownership, cost recovery, and other aspects of building transmission lines"[16] to reach consensus on the best path forward. Often that path forward would evolve from a melding of the best ideas of the relevant parties.[17] In contrast, under the Order No. 1000 Bidding

[14] *See* Rob Gramlich, Richard Doying and Zach Zimmerman, GridStrategies, LLC, *Fostering Collaboration Would Help Build Needed Transmission* (Feb. 20, 2024) ("GridStrategies 2024 Report") (*available at* https://wiresgroup.com/wp-content/uploads/2024/02/GS_WIRES-Collaborative-Planning.pdf).

[15] *Id.* at 41.

[16] *Id.* at 3.

[17] *Id.* at 41.

Process, each project sponsor becomes a competitor of the other sponsors. Consequently, the sharing of data, models, and experience puts a transmission developer at a competitive disadvantage and, indeed, is highly discouraged. Each project proposal is developed independently, and traditional collaboration among planning experts within a planning region is pushed aside.[18] All of this takes place while the fundamentally complex and interconnected nature of the grid remains an unavoidable fact; and while FERC promotes transparency, it is disincentivized by the Order No. 1000 Bidding Process.

For the reasons described above and further elaborated below, the Order No. 1000 Bidding Process results in the selection of projects that in some instances far-exceed their proposed costs, while also introducing substantial delays in the timeline by requiring more process for the selection and construction of new infrastructure. Moreover, it overlooks the fact that competition already exists within the incumbent utility's framework for the design and construction of transmission projects, which already incorporates competitive identification of vendors and service providers. To the extent there are any benefits to the Order No. 1000 Bidding Processes, they are significantly outweighed by the added costs, delayed benefits of transmission, and costs of litigation.

Ultimately, any policymaker's goal of fostering economic competition is not an end unto itself. Rather, competition is a tool harnessed by the regulator to drive innovation and to discipline prices, all to the benefit of customers. When competition does not achieve the desired results, alternative structures have been used effectively by regulators to ensure value is

[18] *See* Developers Advocating Transmission Advancements (DATA) Coalition, *Recent Experience with Competitive Transmission Projects and Solicitations* at 5 (Feb. 22, 2025) ("DATA February 2025 Whitepaper") (noting that "[a]s a general matter, competitive bidders are often unlikely to reach out to each other in the process of developing proposals to resolve the identified needs whereas, prior to Order No. 1000 competitive requirements, such collaboration would have occurred naturally among incumbent developers.") (*available at* https://www.modernizethegrid.com/wp-content/uploads/2025/02/DATA-Whitepaper-2024_2-5-25_vF_edit.pdf).

delivered to customers. The Order No. 1000 Bidding Process serves as an example where the intended outcome of using competitive forces has not been realized. Instead, the Order No. 1000 Bidding Process has added delay, bureaucracy, and hidden costs while trading away economies of scale and benefits of collaborative frameworks, all to the detriment of customers. Value to customers is best delivered through other regulatory means.

III. BACKGROUND

The early years of the electric industry were characterized by unconstrained competition.[19] The industry had no experience developing and maintaining electric systems to produce and deliver electric power and, therefore, no understanding of how to manage the system effectively. It soon became clear that the electric industry exhibited features of a "natural monopoly," *i.e.*, an industry in which a single firm can supply a market more efficiently than multiple firms due to high fixed costs, economies of scale, and scope.[20] As a result, electric companies became regulated as public utility monopolies with cost-based regulated rates and a regulatory compact.[21] Under the regulatory compact principles, public utilities were granted an exclusive service franchise and, in exchange, accepted the obligation to serve all customers

[19] *See* Jeremiah D. Lambers, *The Power Brokers: The Struggle to Shape and Control the Electric Power Industry* at 9 (MIT Press 2015) (The Chicago City Inspector's Report of 1892 listed "eighteen central stations and almost 500 self-contained systems powering 273,600 incandescent lights and 16,415 arc lamps . . . . business conditions were chaotic . . . . [and] the electric utility business was an everchanging patchwork of 'franchise holders, shoestring utility companies, and 'isolated' plant operators subject to a city government run by venal, pliable politicians. Many small utilities struggled to survive. All remained vulnerable to municipal corruption.") (citation omitted).

[20] Bernard L. McNamee, *The Value of Regulated Electric Utilities: Reliability, Affordability and Accountability* at 1 (Apr. 17, 2023) (noting that "economies of scale were necessary for companies to invest millions of dollars but still keep rates low enough that customers could afford the service . . . . [s]uch factors led to the recognition that the provision of electric service tended to result in natural monopolies.") (*available at* https://assets.realclear.com/files/2023/04/2154_the_value_of_regulated_electric_utilities-_reliability_affordability_and_accountability.pdf.

[21] The regulatory compact involves a set of mutual rights, obligations, and benefits that form a relational contract between the investor-owned public utilities and their customers. *See* Karl McDermott, *Cost of Service Regulation in the Investor-Owned Electric Utility Industry, A History of Adaptation* at vii, Prepared for Edison Electric Institute, Washington, D.C. (June 2012) (available at https://www.ourenergypolicy.org/wp-content/uploads/2012/09/COSR_history_final.pdf).

within its defined service territory and submit to rate regulation. This requirement is embedded in the FPA,[22] as well as in caselaw interpreting the FPA requirements.[23] This form of regulation worked well by avoiding wasteful duplicative infrastructure, lowering capital costs by reducing risk, and providing affordable electric service to consumers.

Following enactment of the Public Utility Regulatory Policies Act of 1978 ("PURPA"),[24] regulators began to recognize that the power generation segment of the electric industry may no longer be a natural monopoly business and that policy changes ultimately could result in effective competition for purchases and sales of electric *generation* products, *i.e.*, competition to supply the energy that flows over transmission and distribution lines. A series of successive policy changes, supported by the Energy Policy Act of 1992 ("EPAct 92")[25] opened the door for competition in the wholesale electric generation market. Unlike the electric generation sector, the electric transmission and distribution segments remained natural monopolies subject to traditional utility regulation, and they have not exhibited the characteristics that supported the shift to competition for electric generation.[26] In 2011, FERC issued Order No. 1000 with the intent of spurring investment in the electric transmission system.[27] Among other reforms, Order

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[22] 16 U.S.C. § 824d.

[23] *Federal Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944) ("Hope") ("the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests."); *Ameren Servs. Co. v. FERC*, 880 F.3d 571, 581 (D.C. Cir. 2018) ("Ameren") ("if Petitioners are conceptually correct that they bear these risks as owners of the transmission lines, it supports their basic contention that they are entitled to be compensated *now* as owners for operating the upgrades.").

[24] Pub. L. 95–617, 92 Stat. 3117 (Nov. 9, 1978), as codified in 16 U.S.C. § 2601 and following.

[25] Pub. L. 102-486, 106 Stat. 2776 (Oct. 24, 1992).

[26] *See, e.g.*, *Morgan Stanley Capital Group v. Pub. Util. Dist. No. 1 of Snohomish Cty*, 554 U.S. 527, 536 (2008) (citations omitted) (explaining that FERC "has sought to promote competition in those areas of the industry amenable to competition, such as the segment that generates electric power, while ensuring that the segment of the industry characterized by natural monopoly - namely, the transmission grid that conveys the generated electricity - cannot exert monopolistic influence over other areas").

[27] The opportunity for competition already existed under the FERC's merchant transmission model through which a merchant transmission project developer is granted negotiated rate authority. This model allows both merchants and *(cont'd)*

No. 1000 established a process providing nonincumbent developers the opportunity to bid against incumbent transmission owners for certain transmission expansion projects. To enable this regulatory outcome, FERC also required transmission providers to eliminate from federal tariffs incumbent utilities' rights to build new transmission facilities in their service territories.[28] Order No. 1000 required that any transmission developer (incumbent and nonincumbent) must have the opportunity to propose a transmission project for selection in a regional transmission provider's regional plan for purposes of cost allocation. FERC anticipated that the Order No. 1000 Bidding Process would lead to cost reductions and innovations in electric transmission projects.

In 2021, FERC examined the results of the first ten years of the Order No. 1000 Bidding Process and found that, contrary to expectations, transmission investment did not necessarily increase after Order No. 1000 and, in fact, declined in some regions.[29] FERC, therefore, proposed to reform the Order No. 1000 Bidding Process by reinstating federal ROFRs in certain instances, including for jointly-owned transmission projects,[30] and sought comments on whether

nonincumbent developers to allocate 100 percent of a transmission project's capacity through bilateral negotiations on key rates, terms, and conditions, subject to certain conditions. *See Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Projects*, 142 FERC ¶ 61,038 (Jan. 17, 2013) (FERC's Merchant Policy Statement").

[28] Order No. 1000 did not eliminate the incumbent transmission owners' right to build upgrades to their existing transmission facilities; nor did it eliminate the rights of states to grant their regulated utilities a ROFR to build in-state transmission facilities, *e.g.*, facilities located solely within the utility's franchise zone the costs of which were allocated solely to the utility's zone ("state ROFRs"). *See* Order No. 1000 at PP 227 & 253, n. 231 (noting that nothing in Order No. 1000 is intended to "limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities." Nor were Order No. 1000 reforms intended to "affect the right of an incumbent transmission provider to build, own and recover costs for upgrades to its own transmission facilities . . . [nor] alter an incumbent transmission provider's use and control of an existing rights-of-way."). *Id.* at P 319.

[29] *See Building for the Future Through Elec. Reg'l Transmission Planning & Cost Allocation & Generator Interconnection*, Notice of Proposed Rulemaking, Docket No. RM21-17-000 at PP 349-50, 353 (Apr. 21, 2022) ("NOPR").

[30] *Id.* at PP 354, 358, 365.

it should pursue broader reforms, including full reinstatement of federal ROFRs that were eliminated in Order No. 1000.[31]

In response to FERC's request for comments, many transmission owners and related organizations (including WIRES) submitted comments describing how the Order No. 1000 Bidding Process failed to deliver on its intended results, and detailing its impact on impeding collaborative planning and delaying transmission investment.[32] Commenters urged the FERC to reinstate federal ROFRs to promote essential collaboration[33] and reinvigorate transmission investment, including transmission development essential for keeping pace with customer needs in a rapidly growing economy. These comments included several studies prepared by Concentric Energy Advisers, Inc. ("Concentric")[34] and DATA.[35] The studies analyzed the actual data and results of Order No. 1000 solicitations and concluded, based on actual experience and final, not projected, project costs, that the Order No. 1000 Bidding Process had not resulted in cost savings

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[31] *Id*. at PP 378 - 382.

[32] *See Building for the Future Through Elec. Reg'l Transmission Planning & Cost Allocation & Generator Interconnection,* WIRES NOPR Comments, Docket No. RM21-17-000 at 14 (Aug. 17, 2022); WIRES Reply Comments, Docket No. RM21-17-000 at 2-8 (Sept. 19, 2022).

[33] *See Building for the Future Through Elec. Reg'l Transmission Planning & Cost Allocation & Generator Interconnection,* WIRES Supplemental Comments, Attachment (GridStrategies 2024 Report), Docket No. RM21-17-000 (Feb. 23, 2024) ("WIRES Supplemental Comments").

[34] *Building for the Future Through Elec. Reg'l Transmission Planning & Cost Allocation & Generator Interconnection,* DATA ANOPR Reply Comments, Attachment A (Concentric, *Transmission Project Development Transparency and Cost Control Procedures* ("Concentric November 2021 Report")), Docket No. RM21-17-000 (Nov. 30, 2021) ("DATA ANOPR Reply Comments"); DATA Initial NOPR Comments, Attachment A (Concentric, *Competitive Transmission: Experience To-Date Shows Order No. 1000 Solicitations Fail to Show Benefits* ("Concentric August 2022 Report")), Docket No. RM21-17-000 (Aug. 17, 2022) ("DATA Initial NOPR Comments").

[35] *Building for the Future Through Elec. Reg'l Transmission Planning & Cost Allocation & Generator Interconnection,* DATA NOPR Reply Comments, Attachment A (Affidavit of Carl R. Peterson), Docket No. RM21-17-000 (Sept. 19, 2022) ("DATA NOPR Reply Comments"); DATA Supplemental Comments, Attachment Whitepaper (DATA, Whitepaper: *Revisiting the Evidence on Cost Savings From Transmission Competition* ("DATA December 2023 Whitepaper")), Docket No. RM21-17-000 (Dec. 15, 2023) ("DATA Supplemental Comments") (updating project cost data included in the 2019 Brattle Report with the most current data, including actual projects' final costs to support the conclusion that transmission competition may lead to 12-19 percent higher costs for competed projects);. DATA Second Supplemental Comments, Attachment Whitepaper (DATA February 2025 Whitepaper), Docket No. RM21-17-000 (Feb. 12, 2025) ("DATA Second Supplemental Comments").

or positive benefits (*e.g.*, timeliness or innovation) for customers.[36] FERC ultimately issued Order No. 1920, in which it granted limited relaxation of the ban on federal ROFRs and decided to defer consideration of any other reforms for the future.[37]

In the past, the DOJ has advocated in support of the Order No. 1000 Bidding Process. For example, in August 2022, the DOJ and the Federal Trade Commission ("FTC") jointly submitted comments to FERC arguing against the reinstatement of federal ROFRs for electric transmission facilities.[38] The DOJ also wrote a letter to Iowa officials expressing concern that an Iowa state ROFR law could foreclose competition to develop electric transmission facilities in the state and potentially raise prices and lower quality of electric services for customers.[39] These DOJ communications relied both on the general principle that competition is good, and on a flawed 2019 study by the Brattle Group[40] suggesting that the Order No. 1000 Bidding Process resulted in cost savings to consumers. As described in more detail herein, the 2019 Brattle study was conducted *before* project development and cost data were finalized. Therefore, the 2019 Brattle study relied on "anticipated" cost savings from competition in electric transmission development, which, in fact, never materialized when the projects were ultimately constructed. Thus, not only were significant inaccuracies and methodological shortcomings identified with

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[36] *See supra* nn. 34 and 35.

[37] *Building for the Future Through Elec. Reg'l Transmission Planning & Cost Allocation*, Order No. 1920, 187 FERC ¶ 61,068 at PP 1563-64 (May 13, 2024) ("Order No. 1920"), *order on reh'g & clarification*, Order No. 1920-A, 189 FERC ¶ 61,126 (Nov. 21, 2024) ("Order No. 1920-A"), *order on reh'g & clarification*, Order No. 1920-B, 191 FERC ¶ 61,026 (Apr. 11, 2025) ("Order No. 1920-B") (collectively, "Order No. 1920").

[38] *Building for the Future Through Elec. Reg'l Transmission Planning & Cost Allocation & Generator Interconnection*, NOPR Comments of the United States Department of Justice and Federal Trade Commission, Docket No. RM21-17-000 (Aug. 17, 2022) ("DOJ/FTC Comments").

[39] Letter from Abigail Slater, Assistant Attorney General, Antitrust Div., U.S. Dep't of Justice to The Honorable Henry Stone, Iowa House of Representatives (Mar. 24, 2025) ("Iowa Letter") (*available at* https://www.justice.gov/atr/media/1394696/dl).

[40] *See* The Brattle Group, *Cost Savings Offered by Competition in Electric Transmission,* prepared for LSP Transmission Holdings, LLC (Apr. 2019) ("2019 Brattle Report").(*available at* https://www.brattle.com/wp-content/uploads/2021/05/16726_cost_savings_offered_by_competition_in_electric_transmission.pdf).

the 2019 Brattle Report, but when final project costs became known the results of the analysis were further undermined.

IV. COMMENTS

A. The Order No. 1000 Bidding Process is a Government Imposed Form of Regulatory "Competition"

Under the Order No. 1000 Bidding Process, transmission owners (unlike electric generation owners) do not negotiate with customers or otherwise sell into a market that leads to rates and terms that are binding and constrained by competitive market forces. Instead, electric transmission companies effectively remain a natural monopoly, and the associated regulatory framework applies. Rates for transmission service are not established through a give-and-take between customers and transmission owners but rather are set by a regulator (*i.e.*, FERC) based on the transmission owner's FERC-approved cost of service. And, because transmission remains a natural monopoly, the owner of any new transmission project will remain subject to ongoing public interest regulation for the life of the transmission facilities.

Order No. 1000 required transmission providers to include in their tariffs provisions that identify how they will evaluate and select among competing solutions for certain transmission expansion projects included in a regional plan for purposes of cost allocation.[41] Before Order No. 1000, the incumbent transmission owner - a utility owning distribution and transmission systems with an obligation to deliver power to customers within its defined service territory - was responsible for constructing the transmission facilities needed to reliably serve its customers and generally had a federal ROFR to build those facilities. In Order No. 1000, FERC eliminated federal ROFRs held by incumbent transmission owners and required that nonincumbent

[41] Order No. 1000 at P 315.

developers be given the opportunity to vie for the right to build and own certain transmission expansion projects. In this manner, nonincumbent developers were encouraged to vie for the right to build and own a discrete segment of the transmission network. If successful, the nonincumbent developer becomes a transmission-owning monopolist, owning and operating facilities in the same service territory as the incumbent transmission owner. This type of competition is "competition *for* the market" not the typical "competition *in* the market" that exists in the electric generation industry and that is ordinarily expected to benefit society.[42] As GridStrategies observed, this type of competition to become the monopolist "has little foundation in economic theory and is very rare in practice, and was not part of the [EPAct92] or [the Energy Policy Act of 2005],[43] or FERC's efforts in the 1990s or 2000-2010 reforms aimed at generation competition."[44] This observation stems from the generally accepted view within the economics profession that there are five conditions that must be present for a market to be considered "competitive" in order to produce the kind of price discipline and innovation that will benefit customers.[45] Arguably none of these precursors exist for electric transmission.

In addition to the lack of a theoretical foundation, none of the federal statutes giving FERC authority over the electric industry = *e.g*., the FPA, PURPA, EPAct92 and EPAct 2005 - contain any language conferring on FERC the authority to introduce a form of competition into

[42] DATA NOPR Reply Comments, Peterson Affidavit, Docket No. RM21-17-000 at 12 (Sept. 19, 2022).

[43] Pub. L.109-58, 119 Stat. 594 (Aug. 8, 2005) ("EPAct 2005").

[44] GridStrategies 2024 Report at 45.

[45] *Id.* The five conditions include: (i) the market is comprised of many buyers and sellers where all are price takers and lack the market power to influence prices; (ii) the firms in the market produce the same product; (iii) there is transparent information about prices and products; (iv) transaction costs are low; (v) buyers and sellers can freely enter and exit the market. However, for regulated electric transmission (i) there are not many buyers or sellers; (ii) the product is highly heterogeneous; (iii) there may be price transparency, though pricing agreements are permeable and the product is only partially defined at the time of bid acceptance; (iv) there are extremely high transaction costs; and (v) entry and exit are highly constrained by regulation.

the regional planning of the electric transmission grid. From the enactment of Part II of the FPA in 1935 until Order No. 1000, the electric transmission business was regulated at the state and federal levels, while consistently delivering reliable and cost-effective power to consumers nationwide, through various technological innovations and economic booms. Executive Order 14219 requires federal agencies to eliminate regulations that exceed an agency's statutory powers when they are "not authorized by clear statutory authority" and not based on "the best reading of the underlying statutory authority."[46]

B. The Alleged Benefits of the Order No. 1000 Bidding Process Are Overstated

Proponents of the Order No. 1000 Bidding Process have argued that nonincumbent participation will reduce costs, encourage innovation, and improve the functioning of the electric grid. While cost reduction and innovation generally accompany the introduction of competition in most industries, that outcome has not generally proven to be the case under the unique and flawed bidding construct created by regulation under Order No. 1000.[47]

1. Order No. 1000 Bidding Processes Stymie Construction Collaboration

Under the Order No. 1000 Bidding Process, incumbent and nonincumbent developers are pitted against one another as competitors and thereby become unwilling or unable to exchange information or ideas about their projects for fear that doing so could cause them to lose a competitive advantage or violate their tariffs. In addition, suppliers that previously worked

[46] E.O. 14219 at 1.

[47] RTOs have implemented the Order No. 1000 Bidding Process in two general forms. Some RTOs (*e.g.*, the California Independent System Operator Corp. ("CAISO"), Midcontinent Independent System Operator, Inc. ("MISO"), and Southwest Power Pool, Inc. ("SPP")) use the "competitive bidding" model in which the RTO identifies the specific projects to be built and solicits proposals to build and own those projects. Other RTOs (*e.g.*, PJM, ISO New England, Inc. ("ISO-NE"), and the New York Independent System Operator, Inc. ("NYISO")) use the "sponsorship" model in which the RTO identifies the specific needs to be addressed, and the solicitation process allows bidders to submit the proposed projects to meet those needs. The flaws discussed in this section apply to both models of the bidding process.

collaboratively with multiple transmission owners helping to streamline projects, drive out costs, and increase efficiencies are now restricted to partnering with only one bidder.

Identifying the more efficient or cost-effective transmission project typically requires flexibility, collaboration, and robust information sharing.[48] DATA previously presented affidavits from three industry executives responsible for transmission expansions in their regions who explained how the competitive process impedes transmission development by eliminating collaboration and information sharing. They provided specific examples of projects that were adversely impacted.[49]

2. Order No. 1000 Bidding Processes Do Not Lead to Innovation

Some also argue that the Order No. 1000 Bidding Process could lead to the identification of innovative projects that otherwise would not be identified by incumbent transmission owners. However, this theoretical benefit has rarely, if ever, materialized. Nonincumbent developers do not possess specialized expertise over regional transmission providers or incumbent transmission owners in designing transmission projects. To the contrary, incumbent transmission owners have the benefit of their unique knowledge, substantial experience of their own transmission systems, access to their existing rights-of-way corridors, familiarity with the communities they serve, and experience in building and maintaining transmission facilities. PJM made this exact point in recent comments to FERC, stating: "[B]ecause nonincumbent developers do not have unique knowledge of the transmission owners' systems, or extensive experience in building and maintaining transmission facilities, their proposed solutions are either an overly expansive

[48] *See* GridStrategies 2024 Report at 32-34, 49.

[49] DATA Initial NOPR Comments, Exhibit 1 (Affidavit of William J. Quinlan), Exhibit 2 (Affidavit of David W. Weaver), and Exhibit 3 (Affidavit of Jarred J. Cooley), Docket No. RM21-17-000 (Aug. 17, 2022).

overbuild to address the identified need or do not solve the problem."[50] Moreover, under the FERC-approved open and transparent transmission planning process, transmission planners hold open meetings, solicit comments, and consider views from a wide variety of interested parties when developing transmission expansion plans. It is not realistic to expect that nonincumbent developers will identify projects and solutions that cannot be identified by incumbent transmission owners, transmission planners, and interested parties participating in the regional transmission planning processes.

In fact, in an important respect, the Order No. 1000 Bidding Process actually *discourages* the selection of innovative projects. A major focus of the competitive process is on the ability to offer cost reduction. Competitors are highly motivated to submit bids that are as low as possible to win a solicitation. New and innovative technologies, however, generally are more expensive and riskier than standard technologies - especially when they are first developed. Thus, the Order No. 1000 Bidding Process is not conducive to inclusion/adoption of new technologies because of the increased upfront costs. To that end, President Trump's Executive Order 14219 urges federal agencies to identify and eliminate regulations that "imped[e] technological innovation" in infrastructure development.[51] The Order No. 1000 Bidding Process is an example of such an impeding regulation.

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[50] *Building for the Future Through Elec. Reg'l Transmission Planning & Cost Allocation,* PJM Initial NOPR Comments, Docket No. RM21-17-000 at 34 - 35 (Aug. 17, 2022) (citations omitted) ("PJM Initial NOPR Comments"); *see also* PJM NOPR Reply Comments, Docket No. RM21-17-000 at 18 - 19 (Sept. 19, 2022) ("PJM NOPR Reply Comments") (stating "even when nonincumbent transmission developers have had the opportunity to submit project proposals through PJM's competitive proposal windows … in almost all instances the nonincumbent transmission developers' proposals were not found to be the more efficient or cost effective solution (even with a cost containment solution)").

[51] E.O. 14219 at 1.

3. Order No. 1000 Bidding Processes Have Not Resulted In, Nor Should They Be Expected to Result In, Cost Savings for Customers

The Order No. 1000 Bidding Process also has not resulted in projects with the expected cost savings for customers. As an initial matter, it is unrealistic to think that competitive solicitations would have any material effect on the costs of the facilities and services essential to the construction of transmission expansion projects, at least not when the quality of the underlying project is held constant. Incumbent transmission owners already avail themselves of robust competitive markets for the services and equipment needed to construct transmission facilities. There is no reason to conclude that nonincumbent developers will be situated to outperform incumbent transmission owners when attempting to access these markets, particularly given incumbent transmission owners extensive experience with constructing new transmission infrastructure in their service territories.

In fact, the Order No. 1000 Bidding Process is designed to inherently encourage bidders to develop their project proposals strategically, aiming to win by bidding low rather than accurately reflecting the final costs of the project. This is true in part because the final cost of a transmission project is extremely difficult to predict at the bidding stage as both incumbent transmission owners and nonincumbent developers face significant uncertainties and difficult-to-foresee problems due to factors like market changes, supply chain constraints, terrain, environmental considerations, local siting approvals, and community opposition. These complications are further exacerbated by the lengthy construction timelines for such projects. Consequently, a project proposal at the bidding stage is often substantially different when completed because of scope changes and, in some cases, delays, caused by these factors. Thus, while it is hard for all developers to predict the final cost of a transmission expansion project, it is likely to be more challenging for a nonincumbent developer who does not have the historical

knowledge and expertise with, among other things, local conditions, siting authorities, and community sensitivities.

Policy arguments that focus on cost estimates submitted at the bidding stage often lead to discussions regarding project proposals submitted by nonincumbent developers. These proposals frequently include cost containment mechanisms, known as "cost caps," to manage changes in actual project costs, which commonly fluctuate during the project development stage. If cost caps were binding, the way that other markets expect delivery of a product at a binding, pre-specified price, concerns about strategic bidding behavior would be somewhat mitigated. However, cost caps included with project proposals often exclude certain costs and allow costs to exceed the cap for unforeseeable circumstances due to the enormous uncertainty in predicting final project costs. Indeed, in one of the only examples where a nonincumbent developer agreed to a binding maximum price cap, the developer, who did not have a statutory obligation to serve any customers, ultimately walked away from the project when it became clear that the cost of hardware had increased and that increase could not be passed on to customers.[52] Because exceptions are a necessary feature of cost caps, the competitive results of the Order No. 1000 Bidding Processes are inherently more challenging and simply do not deliver the value to customers that may have been anticipated.

Uncertainty in predicting the costs, combined with the clear potential to recover unforeseen costs later, gives some project developers a strong economic incentive to submit aggressive or unrealistically low bids in order to win a solicitation. After its bid is selected, the developer may then negotiate increases to the cost cap to allow recovery of actual project costs.[53]

[52] DATA February 2025 Whitepaper at 10 - 11.

[53] DATA NOPR Reply Comments, Peterson Affidavit, Docket No. RM21-17-000 at 12 (Sept. 19, 2022).

Realistically, a regulator cannot strictly enforce a nonincumbent developer's cost cap and require that developer to bear significant economic losses due to increased project costs. Without price adjustments, the developer may elect to walk away from the project leaving transmission customers with inadequate transmission infrastructure. This scenario could compromise the reliability of the system and leave the incumbent transmission owner responsible for system reliability needs.[54]

C. Any Theoretical Benefits Arising from the Order No. 1000 Bidding Process are Outweighed by its Adverse Effects

Even if there were some benefits from the Order No. 1000 Bidding Process, those benefits are outweighed by the adverse effects of the process such as the loss of efficiencies in coordinated, collaborative planning; significant procedural delays and litigation; increased administrative costs and burdens; the creation of duplication and redundancies; and reduced security and system reliability.

The Order No. 1000 Bidding Process imposes significant additional costs and burdens on participants and transmission customers in the form of administrative costs and the burdens of the process itself. For example, under the Order No. 1000 Bidding Process, in the RTO/ISO context, proposals are developed and presented to the regional transmission provider, who subjects those proposals to a detailed and lengthy evaluation process. Once a proposal is selected for inclusion in the regional plan for purposes of cost allocation, the regional transmission provider and the successful developer negotiate a transmission owner designation agreement, including cost cap provisions if applicable. A *pro forma* designation agreement is then reported in FERC's Electric Quarterly Report or, if non-conforming, the agreement is filed

[54] DATA February 2025 Whitepaper at 11.

with the FERC. There are significant administrative costs associated with each of these steps. By way of example,

- In its recent comments to FERC, PJM outlined the significant administrative and analytical workload linked to Order No. 1000 solicitations. PJM reported that its planning staff alone logged approximately 49,354 hours evaluating its competitive proposal windows, not including hours of other support groups such as legal.[55] Most of these additional costs ultimately are borne by transmission customers one way or another.

- In the MISO region, some competitive projects will be delayed for two years while they wait for MISO's Bidding Process to conclude. Also, it is possible that the costs associated with the bidding process (*e.g.*, bid development and bid evaluation), as a whole, outweigh any arguable potential cost savings.

Order No. 1000 also imposes huge costs on consumers due to delays and litigation. A Concentric study showed that the time to conduct Order No. 1000 competitive solicitations ranged from 113 to 1,498 days for a certain set of studied projects.[56] Little or no meaningful work is done to advance the project during this delay because it is not known which project will eventually be selected. These delays are costly because transmission customers lose the benefits of the transmission project – or at the very least, progress toward the project's completion - during the period of delay.[57] Also, not surprisingly, the projects awarded through the Order No. 1000 Bidding Process often are disputed by disgruntled bidders or opponents of selected projects, resulting in litigation costs and more delays.[58]

[55] PJM NOPR Reply Comments, Docket No. RM21-17-000 at 19 (Sept. 19, 2022); *see, e.g.*, PJM Initial NOPR Comments, Docket No. RM21-17-000 at 47 (Aug. 17, 2022).

[56] Concentric, *Building New Transmission: Experience to-Date Does Not Support Expanding Solicitations* at v, Table E-1 (June 10, 2019) ("Concentric June 2019 Report") (*available at* https://ceadvisors.com/wp-content/uploads/2024/10/CEA_Order1000report_final.pdf) (the table shows the time between the date the project need was first identified and final ISO/RTO Board approval of the winning bidder).

[57] GridStrategies 2024 Report at 39.

[58] *See e.g.*, *Midcontinent Indep. Sys. Operator, Inc.*, 182 FERC ¶ 61,175 (Mar. 17, 2023) (approving MISO's request to cancel a competitively-bid transmission project due to ongoing litigation and project delay).

The Order No. 1000 Bidding Process also results in costly and burdensome duplication and redundancies. Before Order No. 1000, a single utility - one that owns the distribution system and has a statutory obligation to serve its end use customers - was responsible for owning, maintaining, establishing cost-based rates for, and physically operating its own transmission system. Order No. 1000 introduced the potential for new entities - developers that often have little experience with the local conditions, do not own distribution facilities, and have no obligation to serve end-use customers - to own, maintain, establish cost-based rates for, and physically operate a discrete section of the transmission system. This requires new entities to develop separate and redundant capacities to establish rates and to maintain and physically operate one segment of the transmission system.

Instead of one utility being responsible for the maintenance and physical operation of the transmission system within its service territory, the Order No. 1000 Bidding Process results in multiple organizations being responsible for different segments of the network in a service territory. And, transmission customers are responsible for covering the formation and start-up costs of these new entities, as well as these entities' ongoing operational, maintenance, administrative, and general expenses annually. Clearly, these additional costs were not considered when the FERC required transmission providers to implement the Order No. 1000 Bidding Process with the intent of lowering costs and encouraging innovation.

Allowing new entities to own, maintain and physically operate discrete portions of the transmission network creates other concerns and potential weaknesses. For example:

- Nonincumbent developers that are unaffiliated with an incumbent transmission owner do not have the benefit of historic knowledge or experience with the local conditions;
- Nonincumbent developers do not have an obligation to serve end-use customers in those service territories they are bidding to build;

- Nonincumbent developers may not be as well suited as incumbent transmission owners to maintain and physically operate discrete portions of the transmission system;

- Nonincumbent developers do not own and are not intimately familiar with the interconnected distribution system;

- Nonincumbent developers may not be able to adapt as well as the incumbent transmission owner to distribution system changes that directly impact the transmission system - this concern is becoming increasingly important as more and more distributed energy resources that impact the transmission system are added at the distribution system level;[59]

- The addition of transmission owners in a single service territory increases the complexity (and therefore the risk) of coordinating system outages for system maintenance and upgrades, which further delays and complicates transmission development and adds to the costs and risks of managing a complex system at a time when the focus should be on timely expanding transmission capacity to ensure data centers and other large loads have access to reliable sources of energy;

- The addition of transmission owners in a single service territory expands the demand for and complexity of sharing equipment, even if there are sharing programs in place; and

- Introducing more transmission owners (some may have little or no experience owning and operating transmission) to own and be responsible for the reliability and security of a part of the integrated grid increases operational security risks (including cyber-security risks).[60] Eliminating the Order No. 1000 Bidding Process and reducing the number of separately-managed links that could be exploited by hostile foreign actors supports national security interests.

D. Actual Results Show that the Order No. 1000 Bidding Process Has Not Worked as Expected

We now have 14 years of data to evaluate the Order No. 1000 Bidding Process. The results, which have been assessed by several entities[61] and analyzed in several reports prepared

[59] *See, e.g.*, *Participation of Distributed Energy Resource Aggregations in Markets Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators*, Order No. 2222, 172 FERC ¶ 61,247 (2020), *order on reh'g*, Order No. 2222-A, 174 FERC ¶ 61,197 (2021), Order No. 2222-B, 175 FERC ¶ 61,227 (2021).

[60] *See* E.O. 14156. In declaring a National Energy Emergency, President Trump emphasized that "energy security is an increasing crucial theater of global competition" and that "[i]n an effort to harm the American people, hostile state and non-state foreign actors have targeted our energy infrastructure."

[61] *See, e.g.,* Marc Spitzer, *I Voted to Eliminate ROFR and That Was Unwise* (April 23, 2025) (*available at* https://www.realclearenergy.org/articles/2025/04/23/i_voted_to_eliminate_rofr_and_that_was_unwise_1105936.html); Tony Clark, *Order No. 1000 at the Crossroads: Reflections on the Rule and Its Future* (Apr. 2018) (available at https://www.wbklaw.com/uploads/file/Articles-%20News/2018%20articles%20publications/WBK-%20TC-

(cont'd)

by Concentric[62] and DATA,[63] demonstrate that the Order No. 1000 Bidding Process has not lived up to expectations. The process has not resulted in substantial new entry in the industry; has not resulted in verifiable cost savings to customers; has not resulted in a significant increase in transmission expansion (particularly development of large-scale regional projects); and has not resulted in projects with new or innovative technologies. By any objective measure, the experiment has failed.

First, Order No. 1000 Bidding Processes *have not resulted in significant new entry in the industry*. The vast majority of transmission expansion projects planned since Order No. 1000 have been constructed by incumbent transmission owners. The Concentric Report found that the number of discrete new entrants participating in Order No. 1000 Bidding Processes in each RTO region ranged from between three to six entities, with many proposals submitted jointly with incumbent transmission owners.[64] And, two new entrants—NextEra (an affiliate of incumbent Florida Power & Light Company) and LS Power - have dominated the nonincumbent developers' category by winning nearly as many solicitations as all other nonincumbent developers combined.[65]

Order%201000%20whitepaper%20Final.pdf); Alliance for Innovation and Infrastructure, *Building New Critical Infrastructure: No Time to Waste* (July 2024) (available at https://www.aii.org/wp-content/uploads/2024/07/Building-New-Critical-Infrastructure.-No-Time-to-Waste.pdf).

[62] *See supra* nn. 34, 56; *see also* Concentric, *An Updated Examination of FERC Order No. 1000 Projects* (Apr. 17, 2024) ("Concentric April 2024 Update Report") (updating and expanding the research and analysis performed by Concentric included in its 2022 Report) (*available at* https://ceadvisors.com/publication/an-updated-examination-of-ferc-order-no-1000-projects/).

[63] *See supra* nn. 18, 35.

[64] DATA Initial NOPR Comments, Concentric August 2022 Report, Docket No. RM21-17-000 at 9 (Aug. 17, 2022) (also available at https://ceadvisors.com/publication/competitive-transmission-experience-to-date-shows-order-no-1000-solicitations-fail-to-show-benefits/).

[65] *Id*. at 11.

Second, Order No. 1000 Bidding Processes *have not resulted in verifiable cost savings for consumers*. In several studies, Concentric and DATA examined actual results of projects awarded to nonincumbent developers. Those studies have shown that when bids for nonincumbent projects are subsequently updated to reflect actual costs, there is no evidence of cost savings and, to the contrary, the solicitations may have resulted in cost increases between six and 19 percent over expected levels.[66] One study showed that actual costs for nonincumbent projects have exceeded the winning bids by 59 - 66 percent and recoverable costs have exceeded agreed-to cost caps by 57 - 67 percent.[67] For one project—the Ten West/Delaney to Colorado River project—actual costs to be recovered under the formula rate could be more than double the cost cap stated in the winning bid.[68]

The studies show not only substantial cost escalation in the nonincumbent projects and delays resulting from the bidding process, but they also show that projects have encountered significant delays beyond the projected in-service dates.[69] These delays, extending up to four years beyond a project's proposed in-service date,[70] have been due to factors like permitting, re-routing requirements, and supply chain challenges. These delays result in direct and indirect costs for customers as they are unable to benefit from in-service infrastructure and may incur higher costs or reduced reliability in the meantime. As infrastructure needs expand in the

[66] DATA Supplemental Comments, DATA December 2023 Whitepaper, RM21-17-000 at 1, 11 (Dec. 15, 2023).

[67] *Id.* at 8-10. *See also* Concentric August 2022 Report.

[68] Concentric April 2024 Update Report at 9.

[69] Concentric August 2022 Report at 3.

[70] Concentric April 2024 Update Report at 9.

coming decades due to significant load growth, the costs of delay are likely to increase, making timely transmission development critical for grid reliability.[71]

The Concentric and DATA studies addressed an oft-cited 2019 report by the Brattle Group that purported to show substantial expected cost savings from nonincumbent developer projects selected through Order No. 1000 Bidding Processes.[72] The Concentric and DATA studies showed that there were fundamental flaws in the calculation of cost savings in the Brattle Report. To demonstrate cost savings, the Brattle Report compared an estimated baseline of what a project was expected to cost if completed by the incumbent transmission owner to the winning bid submitted by the nonincumbent developer. But both parts of that equation were flawed.

- Brattle's estimates of what the incumbent project would have cost was based on the assumption that the costs of an incumbent project would escalate 18-70% above its initial estimate (while there would be no escalation of nonincumbents' bids). Concentric showed that Brattle's cost escalation factor for incumbent projects was grossly inflated and the proper escalation factor was much lower—between -2.9% and 7%.[73]

- Also, most significantly, for the cost of the nonincumbent developer projects, the 2019 Brattle Report relied on the soft cap prices proposed by developers of the winning bids. Brattle did not have sufficient information at the time about the final project costs after considering price adjustments. When DATA examined the actual results, the alleged cost savings disappeared.[74]

[71] These comments are not intended to support the assertion that projects developed by nonincumbent developers with or without cost caps (or other cost control measures) are more, or less, subject to issues that arise when building transmission. Transmission project development is fundamentally a challenging endeavor and projects developed by incumbent transmission owners also face cost and schedule variance. However, the critical insight is that assertions about the cost saving benefits of the Order No. 1000 Bidding Process are not, in the final accounting, supported by current evidence.

[72] *See supra* n. 40.

[73] Concentric June 2019 Report at 3.

[74] DATA Supplemental Comments, DATA December 2023 Whitepaper, Docket No. RM21-17-000 at 11 (Dec. 15, 2023).

Besides the 2019 Brattle Report, the shortcomings of which are well established, WIRES is not aware of any comprehensive study that purports to show that there have been overall cost savings to consumers from the Order No. 1000 Bidding Process.

Third, Order No. 1000 Bidding Processes *have not resulted in a significant increase in transmission expansion projects being built*. FERC recognized the lack of regional transmission just a few years ago, when in 2021 it noted the "investment in regional transmission facilities in some regions has declined compared to prior Order No. 1000."[75] This concern was addressed in the context of the changing generation fleet, and the move from large, centralized resources located close to population centers toward renewable resources, due in part to the federal, state, and local policies incentivizing various forms of generation. As noted above, FERC found that Order No. 1000 was not successful in promoting transmission expansion; and, to the contrary, has led to reductions in new transmission in some regions.[76]

The experience under Order No. 1000 stands in contrast to the large-scale regional transmission projects developed before Order No. 1000. The CapX2020 projects, developed in 2009 and 2010, are one such example.[77] The CapX2020 projects resulted in more than 800 miles of new high-voltage transmission infrastructure in the Upper Midwest at a cost of $2.1 billion.[78]

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[75] NOPR, Docket No. RM21-17-000 at P 39 (Apr. 21, 2022).

[76] *Id.* at PP 349-50.

[77] *See, e.g.*, Grid North Partners, *CapX2020 utilities continue successful collaboration as Grid North Partners*, at 1 (Mar. 9, 2021) (available at https://gridnorthpartners.com/wp-content/uploads/2021/02/Grid-North-Partners-Press-Release-Final.pdf).

[78] Marta C. Monti, Stephen Rose, Kimberley A. Mullins, Elizabeth J. Wilson, Humphrey School of Public Affairs, *Transmission Planning and CapX2020: Building Trust to Build Regional Transmission Systems*, at x (April 2016) (available at https://gridnorthpartners.com/wp-content/uploads/2021/03/uofm-humphrey_capx2020_final_report.pdf) (explaining that the CapX2020 Project involved a group of several utilities that serve load in several Upper Midwest states that worked together to plan, develop, and build $2.1 billion worth of new high-voltage transmission lines spanning nearly 800 miles in Minnesota, Wisconsin, North Dakota, and South Dakota).

It involved the collaboration and facilities of Xcel Energy, as well as ten cooperative and municipal utilities.[79]

There is likewise a correlation between the considerable success of transmission development in the MISO footprint over the last two decades and the fact that most states in MISO have state ROFR laws in place.[80] The tie between state ROFRs and successful infrastructure development should not be overlooked.

E. DOJ Should Update Its Position on the Order No. 1000 Bidding Process and Support the Reinstatement of Federal ROFRs

In the DOJ/FTC Comments[81] and Iowa Letter,[82] the DOJ supported the Order No. 1000 Bidding Process and opposed reinstatement of state and federal ROFRs. Certainly, competition can benefit consumers in many industries, such as the electric generation sector, where certain conditions are met for the product being transacted. However, under the practical realities of the electric transmission industry, the construction of transmission infrastructure does not align with competition; and, as experience with the Order No. 1000 Bidding Process has demonstrated, solicitations for the construction of transmission infrastructure do not result in cost savings, increases in innovation, or improvements in project selection.[83] Moreover, any benefits to the Order No. 1000 Bidding Process must be weighed against the likelihood of substantial delays, increased administrative costs and burdens, increased operational complexity, redundancies, and concerns that the combined results will lead to reductions in reliability and security.[84]

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[79] *Id.*

[80] States enacting ROFR laws include Alabama, Indiana, Iowa, Michigan, Minnesota, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, and Texas.

[81] *See supra* n. 38.

[82] *See supra* n. 39.

[83] *See* Section B, above.

[84] *See* Section C, above.

Any belief that the Order No. 1000 Bidding Process has been a success is mistaken. The Iowa Letter highlights three nonincumbent projects that won Order No. 1000 Bidding Processes as examples of how those processes led to better outcomes and lower prices. But the examples cited in the Iowa Letter are far from success stories. When the actual outcomes of those projects are considered – looking beyond what those projects were hoped or promised to be - those projects did not result in better outcomes or lower costs to consumers. To the contrary, they are good examples of the flaws in the Order No. 1000 Bidding Process discussed above:

- **Artificial Island Project**. There is no evidence that the selection of the nonincumbent proposal resulted in cost savings. The Iowa Letter calculated cost savings by comparing the estimated cost of an early incumbent transmission owner proposal ($692 million) to the cost of the winning nonincumbent developer proposal ($280 million). But as a matter of fact, the project's scope and need were dramatically reduced by PJM planners during an evaluation process that lasted four years, thus rendering unnecessary many elements of the incumbent transmission owner's early proposal.[85] Comparing an early incumbent transmission owner's proposal to the final project, therefore, is unhelpful. The early project proposals were designed to meet a different and more expansive set of requirements and were naturally larger and more expensive. Furthermore, the project experienced operational difficulties when soon after commercial operation, the line tripped due to cable damage and experienced a substantial derate that reduced benefits to customers.[86] Around the same time, regional transmission planners determined that, despite its recent completion, the Artificial Island project would already need to be expanded. This incremental cost and work was likely foreseeable years earlier, but the myopic cost-minimization focus of the bidding process did not allow for consideration of expected future needs in a way that may have been more cost effective in the long run. This project is an example of the type of problem that can occur when less-experienced nonincumbent developers are responsible for maintaining and physically operating discrete segments of the transmission system and when regional transmission providers are not able to develop and build transmission projects with customers' long-term needs in mind.

- **Western New York Public Power Project**. The cost savings identified in the Iowa Letter regarding this line – called the "Empire State Line" – are based on the $181

[85] Concentric June 2019 Report at 21, 28 - 29.

[86] Concentric August 2022 Report at 20 - 21.

million winning bid by the nonincumbent developer. But that is not the project's final costs. As discussed extensively above, winning bids in Order No. 1000 Bidding Processes are based on cost estimates that are often different from the final costs borne by customers. In this case, the actual costs of the project significantly exceeded the winning bid's cost estimate, wiping out any cost savings touted at the time of the award. Put in dollar terms, system planners in the NYISO region initially estimated this project to cost $181M and the winning bidder agreed to cost cap provisions below this level.[87] Despite early claims that savings would follow, customers are now bearing the costs of the transmission project with a rate base in excess of $260M.[88] This project illustrates the problem that winning bids and initial cost caps cannot be relied on to demonstrate costs savings.[89]

- **Hartburg-Sabine Project**. This project was delayed due to litigation and subsequently withdrawn and never built because it violated the Texas ROFR law in effect at the time.[90] Therefore, it is unknown whether or not this project would have provided any actual cost savings. This project is an example of the litigation costs and contentiousness that the competitive process can create, especially when a federal agency seeks to mandate a program against the opposition of the state that will have to live with the results.

Beyond the three projects highlighted by the Iowa Letter, there are other projects that further illustrate the shortcomings with nonincumbent developer projects developed through Order No. 1000 Bidding Processes, including the following three case studies that illustrate how ill-fitting attempts to impose competition in regulated transmission development fail to deliver benefits to customers.

- **Ten West Link (Devers to Colorado River Transmission) –** This project was designed to deliver reliability and economic benefits in California following the retirement of a major nuclear plant. At the time of the award to a nonincumbent consortium, the project was expected to cost $280M against an early planning estimate of $300M. While the developer initially agreed to an even lower cost cap

[87] *Id.* at 17.

[88] Concentric April 2024 Report at 14.

[89] *Id.* at 10.

[90] *See supra* n. 58.

of $242M, it then renegotiated a revised contractual cost cap of $259M.[91] When the project ultimately entered service – in 2024, four years late – the cost of the line was $553M.[92] The developers have requested to recover the full amount and are now attempting to resolve the disputed cost recovery at FERC.[93] This is yet another example of the fact that promising early results of transmission bidding processes are not the same as real cost savings.

- **Aroostook Renewable Gateway** – This approximately $2.7B project was awarded through a transmission bidding process to a developer to facilitate renewable generation development in Maine.[94] The project was terminated when the developer made clear that it could not hold to the fixed price in its term sheet and the State of Maine was not willing to allow recovery of exceedances and contingencies that would shift further cost and risk to customers.[95] This example epitomizes how bidding processes for rate regulated transmission are not the same as other types of competition that results in set commitments to deliver a product at a certain place, time, volume, and price. For transmission, "hard" cost caps are simply unrealistic and fundamentally incompatible with the realities of transmission development.[96]

- **Mid-Atlantic Resiliency Link** – This project was originally awarded to a nonincumbent along with a portfolio of other projects needed to reliably serve load growth in Virginia stemming from data center development.[97] Within months, the selected developer recognized the potentially fatal challenges associated with siting the assigned project, for which it had developed the notional routing plan using Google Maps.[98] Incumbent developers stepped in to support modification of the project to address routing considerations and to use existing rights-of-way.[99] While the nonincumbent developer will get to keep other portions of the project and develop its business through those opportunities,

[91] *DCR Transmission, L.L.C.*, 184 FERC ¶ 61,199 at P 5 (Sept. 29, 2023) ("September 2023 Order Establishing Hearing and Settlement Procedures").

[92] *Id.* at P 7.

[93] *Id.* at P 36.

[94] DATA February 2025 Whitepaper at 7 - 8.

[95] *Id.* at 9.

[96] *Id.* at 19.

[97] *Id.* at 3.

[98] *Id.* at 4.

[99] *Id.* at 4 – 5.

the ultimate cost of the projects is estimated to increase by $167M.[100] This is illustrative of the flimsy nature of competitive commitments and the criticality of having the kind of system knowledge and experience that incumbents have when developing transmission plans.

V. CONCLUSION

Executive Order 14219 seeks to protect Americans from "the overbearing and burdensome administrative state" by, among other things, requiring federal agencies to identify and eliminate regulations "that impose significant costs upon private parties that are not outweighed by the public benefits."[101] The Order No. 1000 Bidding Process is an example of such costly federal regulation that has failed to yield meaningful benefits. The 14 years of experience with the Order No. 1000 Bidding Process has provided more than enough data to evaluate the actual results of this process. That data shows that the Order No. 1000 Bidding Process has been counterproductive and a lengthy and failed experiment. The time and money expended in conducting and implementing the solicitation process would be better spent building new transmission expansion projects. It is time to end the experiment and reinstate a federal ROFR.

WIRES respectfully requests the DOJ update its previously stated position on this issue. WIRES commits to working with the DOJ to achieve regulatory reform that supports modifying

[100] *Id.* at 5.

[101] E.O. 14219 at 1. *See also* E.O. 14192 ("The ever-expanding morass of complicated Federal regulation imposes massive costs on the lives of millions of Americans, creates a substantial restraint on our economic growth and ability to build and innovate, and hampers our global competitiveness.").

Order No. 1000 to reinstate the federal ROFR for incumbent transmission owners and eliminate the Order No. 1000 Bidding Process.

Respectfully submitted,

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