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

Industrial Energy Consumers of America)
Coalition of MISO Transmission Customers,)
Wisconsin Industrial Energy Group,)
Resale Power Group of Iowa,)
Association of Businesses Advocating Tariff)
Equity, and Michigan Chemistry Council)
Complainants)
v.)
Midcontinent Independent System Operator, Inc.,)
Respondent)

Docket No. EL22-_____

**COMPLAINT OF
THE INDUSTRIAL ENERGY CONSUMERS OF AMERICA,
THE COALITION OF MISO TRANSMISSION CUSTOMERS,
THE WISCONSIN INDUSTRIAL ENERGY GROUP,
THE RESALE POWER GROUP OF IOWA, ASSOCIATION OF BUSINESSES
ADVOCATING TARIFF EQUITY, AND THE MICHIGAN CHEMISTRY COUNCIL**

Pursuant to Sections 206, 306, and 309 of the Federal Power Act (“FPA”)¹ and Rule 206 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or the “Commission”),² the Industrial Energy Consumers of America (“IECA”), the Coalition of MISO Transmission Customers (“CMTC”), the Wisconsin Industrial Energy Group (“WIEG”), Resale Power Group of Iowa (“RPGI”), Association of Businesses Advocating Tariff Equity (“ABATE”), and the Michigan Chemistry Council (collectively, “Consumer Alliance”) submit this Complaint against the Midcontinent Independent System Operator, Inc. (“MISO”) to challenge provisions of Attachment FF of its Open Access Transmission, Energy and Operating Reserve Markets Tariff (“Tariff”) that exclude regional transmission projects from MISO’s competitive transmission developer process based on state “right of first refusal” (“ROFR”)

¹ 16 U.S.C. §§ 824e, 825e, and 825h.

² 18 C.F.R. § 385.206.

laws.³ The Consumer Alliance requests the Commission to find these provisions to be unjust and unreasonable and to require the just and reasonable replacement rate to be based on project costs resulting from competitive solicitation. The Consumer Alliance also requests the refund effective date to be the date of the filing of this Complaint and requests that the Commission act on this Complaint as soon as practicable because on July 25, 2022, MISO’s Board of Directors is expected to apply the challenged Tariff provisions to approve and assign at least \$5.5 billion in projects in Tranche 1 of MISO’s Transmission Expansion Plan (“MTEP”) and Long Range Transmission Plan (“LRTP”) to incumbent utilities, which will result in consumers throughout MISO’s northern and central regions paying higher costs – as much as \$1 billion – for those regional transmission projects that are cost allocated to consumers pursuant to FERC-jurisdictional transmission rates.

The Complaint asks the Commission to act “comprehensively and effectively” in an area in which it has exclusive jurisdiction (the setting of rates for interstate electric transmission service⁴) to make certain that its policy requiring competition in new transmission project development can be implemented as the Commission intended. In Order No. 1000, the Commission specifically held that the determination of just and reasonable Commission-jurisdictional rates requires “a nonincumbent transmission developer of a transmission facility selected in the regional transmission plan for purposes of cost allocation have the same opportunity as an incumbent transmission developer to allocate the cost of such transmission facilities through a regional cost allocation method or methods.”⁵ State ROFR laws circumvent

³ For ease of reference and due to its common use, this Complaint refers to the State anticompetitive laws granting preferential treatment to in-state incumbent utilities as State “ROFR” laws or “ROFRs.”

⁴ *National Association of Regulatory Utility Commissioners v. Federal Energy Regulatory Commission*, 964 F.3d 1177, 1187-88 (D.C. Cir. 2020) (citing *Northern Nat. Gas Co. v. State Corp. Comm’n*, 372 U.S. 84, 91-92 (1963)).

⁵ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000 at PP 332, 335, 136 FERC ¶ 61,051 (2011) (“Order No. 1000”), *order on reh’g*, Order No. 1000-A, 139 FERC

Order No. 1000 to preserve incumbent monopoly power and deprive nonincumbent transmission developers of this opportunity, to consumers' ultimate detriment through higher rates. The Consumer Alliance respectfully requests FERC to exercise its exclusive jurisdiction to prevent this harm and assure that costs of new transmission infrastructure are set by robust competition as envisioned in Order No. 1000.

I. EXECUTIVE SUMMARY

This Complaint presents the Commission with a stark choice: retain its exclusive jurisdiction over the determination of just and reasonable transmission rates for regionally allocated projects, or acquiesce to State efforts to thwart competition and thereby dictate the entities entitled to charge FERC-jurisdictional rates for regional transmission projects.

The Federal Power Act directs the Commission to regulate the transmission of electric energy in interstate commerce and to set just and reasonable rates for the transmission of electricity provided by public utilities under its jurisdiction.⁶ As determined by the Commission in Order No. 1000, transmission competition is an essential element of the Commission's ability to ensure that transmission rates are just, reasonable, and not unduly discriminatory or preferential.⁷ The results of FERC-mandated competition have demonstrated that the Commission was correct in 2011 when it issued Order No. 1000: FERC cannot effectively determine just and reasonable rates for interstate transmission without competition. State ROFR laws, mandatorily applied by a regional transmission organization ("RTO") or independent system operator ("ISO") prohibit transmission competition by requiring assignment of a project in a Commission-jurisdictional regional transmission plan to an incumbent utility. Without competition, the incumbent utility

¶ 61,132 ("Order No. 1000A"), *order on reh'g*, 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).

⁶ See Sections 201, 205, and 206 of the Federal Power Act, 16 U.S.C. §§ 824, 824d, 824e.

⁷ Order No. 1000 at P 286 (quoting *Otter Tail Power Co. v. United States*, 410 U.S. 366 at 374 (1973)).

has few incentives to engage in any cost containment strategies or commitments of the type present when competition is required.⁸ The application of State ROFR laws in MISO’s regional transmission planning in Tariff Attachment FF unduly discriminates against nonincumbent transmission providers in favor of otherwise similarly situated incumbent utilities, thereby harming consumers through the imposition of higher costs for transmission projects, which result in higher transmission rates.

State ROFR laws in the MISO region impermissibly and intentionally invade the Commission’s exclusive jurisdiction over interstate and interregional transmission planning, public utility regulation (including regulation of RTOs and ISOs), and transmission rate setting. By dictating outcomes in the process for assigning regional transmission projects subject to regional cost allocation, State ROFR laws directly interfere with the Commission’s jurisdiction and have the practical effect of serving as a federal ROFR when an RTO/ISO’s tariff requires accommodation of the state law dictating the project developer. The Commission has already determined that the removal of a federal ROFR from RTO/ISO tariffs/agreements is in the public interest and that the existence of a federal ROFR facilitates unjust and unreasonable rates through “the development of transmission facilities ‘at a higher cost than necessary.’”⁹ Using the same logic and to achieve Order No. 1000’s desired outcome, the Commission must act to prevent the application of State ROFR laws that conflict with and undermine the Commission’s

⁸ See *Xcel Energy Services v. Federal Energy Regulatory Commission*, No. 20-1295, issued July 19, 2022, slip op at 18 (upholding Commission rejection of utility surplus interconnection proposal on competitive grounds, in part, because “[d]ecades of precedent support the Commission’s decision to prevent undue discrimination and promote competition. After all, the Commission’s ‘authority generally rests on the public interest in constraining exercises of market power[.]’” *National Ass’n*, 475 F.3d at 1280. The Commission, in fact, has a “responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations” in exercising its authority under the Federal Power Act. *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 758-759 (1973).

⁹ *S. C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 72 (D.C. Cir. 2014) (citing Order No. 1000 at PP 228-230) (further noting that higher costs would be passed on to consumers, yielding rates that are not just and reasonable in violation of the FPA).

ability to set just and reasonable rates for the transmission of electricity in interstate commerce through competition. Granting this Complaint is necessary so that the Commission can: 1) establish more uniform regulation to ensure just and reasonable rates for long-term, regional transmission projects that are cost allocated to consumers throughout several states; and 2) establish more uniform regulations on how the more efficient or cost-effective developer entitled to use the regional cost allocation methodology is chosen.

To be clear, the Consumer Alliance recognizes that certain matters are reserved to the States, even with respect to transmission projects in interstate commerce. Historically, the regulation of generation and intrastate transmission have been reserved to the States, along with siting, permitting, zoning, construction, and land use matters related to interstate transmission. The FPA, however, assigns the authority to regulate interstate and interregional electric transmission *rates* exclusively to the Commission. State ROFR laws, the product of incumbent utilities' efforts to lobby state legislatures, interfere with FERC's jurisdiction by allowing states to dictate which entity is entitled to seek FERC-jurisdictional transmission rates for projects in a FERC-jurisdictional regional transmission plan and which entity is entitled to receive FERC-jurisdictional regional cost allocation. These matters are squarely within the Commission's exclusive jurisdiction under the FPA and have no relation to the land use matters reserved to the states. The Commission cannot allow this jurisdictional overreach by the States to thwart the Commission's exclusive transmission rate authority. The Commission must therefore prohibit MISO and other RTOs/ISOs from applying State ROFR laws to prevent competitive solicitation of the developer for long-range, regional transmission projects that facilitate the transmission of electric energy in interstate commerce with costs allocated among consumers in multiple transmission zones or States. Given the billions of dollars in planned transmission projects

throughout the MISO region, consumers will be irreparably harmed if the Commission continues to allow MISO to acknowledge and apply State ROFR laws to avoid competitive solicitation. Such harm is imminent and the need for Commission action is imperative since at least \$5.5 billion in projects in Tranche 1 are set for MISO Board approval on July 25, 2022.

Attachment FF in MISO's Tariff is unjust and unreasonable because it requires MISO to broadly apply a State law granting a ROFR to an incumbent, even though it explicitly invades FERC's exclusive transmission rate setting jurisdiction and rules/policies on determining just and reasonable rates through transmission competition. Attachment FF unduly discriminates against nonincumbent transmission developers in favor of similarly situated incumbent transmission owners, even though both entities are required to undergo the same certification and review process to become Qualified Transmission Developers in MISO.¹⁰ The Consumer Alliance respectfully asks the Commission to grant this Complaint and direct MISO to file Tariff revisions that 1) prohibit MISO from applying anti-competitive State ROFRs in MISO's long-range transmission planning and 2) require MISO to competitively bid projects, to the maximum extent possible, in its long-range transmission plan and MTEP, assigning the right to access regional cost allocation to the developer selected as the more efficient or cost-effective through that competitive process. The Consumer Alliance understands that additional transmission is needed in the MISO region and supports the development of needed transmission when such development is undertaken by qualified developers offering the most efficient or cost-effective solution at the least cost to consumers. Competition has shown that there are qualified developers representing billions in capital poised to compete for the opportunity to develop needed transmission, and when they compete consumers benefit in a myriad of ways that the

¹⁰ See MISO Tariff Attachment FF, Section VIII.B.

Commission cannot replicate without that competition. Thus, even if the MISO Board approves all of Tranche 1 on July 25, 2022, the Commission should, at its earliest convenience, direct MISO to not proceed with project assignments or issuances of notices to construct with respect to the \$5.5 billion in projects currently protected by State ROFR laws and require that those projects go through MISO’s competitive process.¹¹

II. SERVICE AND COMMUNICATIONS

All correspondence and communications in this docket should be addressed to the following individuals, whose names should be entered on the official service list maintained by the Secretary in connection with these proceedings:

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¹¹ The Consumer Alliance is not asking the Commission to direct MISO to delay any projects that are needed in the short-term for system reliability.

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III. DESCRIPTION OF RELEVANT PARTIES AND INTEREST IN AND STANDING TO PROSECUTE THIS COMPLAINT

A. Industrial Energy Consumers of America

The Industrial Energy Consumers of America is a nonpartisan association of leading manufacturing companies with \$1.1 trillion in annual sales, over 11,700 facilities nationwide, and with more than 1.8 million employees worldwide. IECA is an organization created to promote the interests of manufacturing companies through advocacy and collaboration for which the availability, use and cost of energy, power or feedstock play a significant role in their ability to compete in domestic and world markets. IECA membership represents a diverse set of industries including: chemicals, plastics, steel, iron ore, aluminum, paper, food processing, fertilizer, insulation, glass, industrial gases, pharmaceutical, building products, automotive, brewing, independent oil refining, and cement. The industries use a tremendous amount of electricity in their industrial processes.

IECA has members throughout MISO. In MISO states, of the electricity produced, the manufacturing sector consumes approximately 34 percent of all electricity at a cost of approximately \$22 billion. The vast majority of IECA member companies are energy intensive trade exposed (“EITE”), which means that relatively small increases in the price of electricity can have relatively high negative impacts to their global competitiveness – directly impacting jobs and investment. IECA member companies support the use of cost-causation principles as the foundation of a just and reasonable cost allocation methodology. IECA member companies

also believe that transmission policy that maximizes the use of competition in building electric transmission results in lower rate payer costs and without jeopardizing electric reliability. Today, IECA member companies are being denied the benefits of competition for the development and ownership of regional and interregional transmission projects in MISO and throughout the country. Such competition is especially important in the current inflationary environment with ever-rising transmission rates.

B. The Coalition of MISO Transmission Customers

CMTC is an *ad hoc* association of large industrial customers with facilities located throughout the MISO region. CMTC is a member of MISO and represents the end-use customer sector and advocates for the interests of industrial customers in the MISO stakeholder process. CMTC represents the interests of industrial users before regulatory, judicial, and legislative bodies. For over 20 years, CMTC has participated in MISO market and transmission issues. CMTC facilities located within MISO's footprint consume more than 8 billion kilowatt-hours ("kWh") of electricity annually. Some CMTC member facilities are assessed transmission charges as a separate, stand-alone charge on invoices assessed by market suppliers. Other CMTC member facilities pay for transmission charges on a bundled basis, as a component of retail electricity charges that also included charges for generation and distribution service.

CMTC members are also being deprived of the benefits of competition for the development and ownership of MISO LRTP projects and the loss of efficiencies, innovation, and cost containment strategies delivered through competitive solicitation. CMTC members support vibrant competition, including in the development of new transmission projects that can provide substantial and proven cost savings to consumers. CMTC has actively supported competition for transmission projects within the MISO stakeholder process, before FERC, and in United States

Courts of Appeals and Supreme Court. ROFR laws adopted by states in the MISO region prevent the efficiency and price-lowering benefits of competition for transmission projects. CMTC's members include manufacturers facing significant domestic and international competition. Increased energy costs impair CMTC members' competitiveness and have directly contributed to elevated risks of facility closures and job losses.

C. Wisconsin Industrial Energy Group (“WIEG”)

WIEG is a voluntary member association consisting of large industrial and commercial customers in the State of Wisconsin. As key drivers of economic growth and development throughout the state, WIEG members collectively employ roughly 35,000 people in Wisconsin and consume 6.3 billion kWh of electricity each year. The electric transmission charges paid by most WIEG members are passed through by transmission dependent utilities. The charges to the transmission dependent utilities are determined according to NITS Schedule 9 formula rate for American Transmission Company ATC LLC set forth in Attachment O to MISO's OATT. In addition, transmission dependent utilities also pass through transmission costs of projects that are cost shared. WIEG is concerned about affordability and the impact the rising trend in transmission costs will have on customers.

D. Resale Power Groups of Iowa (“RPGI”)

RPGI is a special-purpose governmental entity organized in 1986 pursuant to Iowa law to purchase electric supply, transmission, and related services as agent for its members. RPGI's members are 24 Iowa municipal utilities, one cooperative, and one privately-owned utility that (with one exception)¹² are exempt from the Commission's jurisdiction under Section 201(f) of

¹² The Amana Society Service Company is a small transmission-dependent electric utility that is privately owned by the Amana Society and provides service only to retail customers within the Amana Society in Iowa. Its current annual sales are 96,000 MWh and its peak load is 15 MW. Because of its size, it is not subject to rate regulation by the Iowa Utilities Board.

the Federal Power Act.¹³ RPGI is legally separate and fiscally independent from other state and local governmental entities.

E. Association of Businesses Advocating Tariff Equity (“ABATE”)

ABATE is an association of large industrial end-users who are located in and do business in Michigan and the wider MISO footprint. ABATE’s members purchase substantial quantities of electricity and natural gas and, in Michigan alone, their combined gas and electric bills are approximately \$1.4 billion per year.

F. The Michigan Chemistry Council (“MCC”)

The Michigan Chemistry Council is a statewide organization representing manufacturers, distributors, and formulators in the business of chemistry. Chemistry is one of Michigan's largest and most energy-intensive manufacturing sectors, and MCC members have been burdened by Michigan's above-average electricity rates. The MCC has advocated for competitive policies for electricity supply and transmission and is concerned about potential cost overruns – multiplied by generous rates of return – by incumbent developers. These burdens would only add to the inflationary cost pressures already facing domestic manufacturers.

G. Consumer Alliance Efforts on Competition and Retail Consumer Standing to Challenge FERC-Jurisdictional Transmission Rates

Instead of applying State ROFR laws to assign LRTP projects to the incumbent transmission owner, MISO should be required to submit the projects to competition under MISO’s Order No. 1000-complaint competitive process, a process that has shown definitive ratepayer benefits.¹⁴ The Consumer Alliance has consistently supported competition for

¹³ 16 U.S.C § 824f.

¹⁴ See *The Brattle Group*, “Cost Savings Offered by Competition in Electric Transmission: Experience to Date and the Potential for Additional Customer Value” (released April 2019) (“Brattle Competition Report”), [available at Cost Savings Offered by Competition in Electric Transmission: Experience to Date and the Potential for Additional Customer Value \(brattle.com\)](http://brattle.com). That presentation is attached to this Complaint as **Attachment B**.

transmission facilities as a necessary component of ensuring just and reasonable rates. The Consumer Alliance has also advocated for the elimination of State ROFRs in the MISO region. For example, IECA, CMTC, and RPGI participated in an *amicus curiae* brief before the United States Supreme Court in Case No. 20-641 in support of a Petition for Writ of Certiorari that challenged a decision by the Eighth Circuit Court of Appeals that upheld Minnesota’s ROFR law against a challenge based on the dormant commerce clause. CMTC and RPGI participated in separate *amicus curiae* briefs before the Iowa Supreme Court in Case No. 21-0696 in support of appellants challenging Iowa’s ROFR law.

Several members of the Consumer Alliance are part of the Electricity Transmission Competition Coalition,¹⁵ which has advocated for competition in Commission proceedings¹⁶ and before legislators and policy decision-makers. The Consumer Alliance, along with other consumer groups and competitive developers throughout the MISO region, have been active in their efforts to prevent the promulgation of ROFRs in Minnesota, Michigan, Iowa, Wisconsin, and Missouri. Despite those efforts, ROFRs were passed in Minnesota, Michigan, Montana, and Iowa. However, a ROFR was recently defeated in both Wisconsin and Missouri, and both legislatures have adjourned for the year. Specifically, WIEG engaged in several initiatives and efforts to prevent the enactment of a ROFR law in Wisconsin. One example is Assembly Bill 892, which was introduced by Wisconsin Representatives on January 21, 2022.¹⁷ WIEG opposed Assembly Bill 892 and the bill failed to pass pursuant to Senate Joint Resolution 1 on March 15, 2022. The Bill, if passed, would have provided incumbent transmission facility

¹⁵ The Electricity Transmission Competition Coalition’s web site is available here: [ETC Coalition – ETC Coalition \(electricitytransmissioncompetitioncoalition.org\)](https://www.etc-coalition.org/) (last accessed July 11, 2022).

¹⁶ See, e.g., “Comments of the Electricity Transmission Competition Coalition,” *Building for the Future Through Regional Transmission Planning and Cost Allocation and Generation Interconnection*, Docket No. RM21-17-000 (filed Oct. 12, 2021).

¹⁷ A.B. 892, 2021-2022 Session (Wis. 2022).

owners the right to construct, own, and maintain a transmission facility that has been approved specifically by MISO.¹⁸

The Commission has held that retail customers have standing to challenge transmission rates and wholesale power sales rates by filing a complaint with the Commission.¹⁹ The primary aim of the Federal Power Act is to protect consumers from excessive rates and charges.²⁰ Accordingly, the Consumer Alliance and its individual members have standing to challenge FERC-jurisdictional rules and rates under FPA Section 206. The Consumer Alliance files this Complaint on behalf of their members who would otherwise have standing to sue in their own right – “the interests at stake are germane to the organization’s purposes, and neither the claim asserted, nor the relief requested required the participation of individual members.”²¹ The Commission has held:

The plain language of the FPA and the Commission’s implementing regulations allow broad participation in proceedings before the Commission. Specifically, section 306 of the FPA explicitly authorizes ‘[a]ny person’ to file a complaint with the Commission. The Commission’s regulations are to a similar effect. For example, Rule 206(a) of the Commission’s Rules of Practice and Procedures provides that ‘[a]ny person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission or for any other alleged wrong over which the Commission may have jurisdiction.’²²

¹⁸ *Id.*

¹⁹ *American Electric Power Service Corp.*, 153 FERC ¶ 61,167, at P 21 (2015) (further holding that “allowing retail customers to challenge transmission and wholesale power sales rates does not violate principles of federalism”); *See also Potomac-Appalachian Transmission Highline, LLC Alison Haverty*, 140 FERC ¶ 61,229 at P 106 (2012). (“A complaint regarding a transmission rate can, under Commission rules, be filed by any person, including an end-use customer that will pay that some portion of that rate when flowed through its retail bill. As we found in *Potomac-Appalachian Transmission Highline, LLC*, these characteristics are sufficient to satisfy our intervention requirements, and *we also find them sufficient to enable an aggrieved party to file a complaint.*”) (emphasis added).

²⁰ *Xcel Energy Servs. v. FERC*, 815 F.3d 947, 952 (D.C. Cir. Mar. 8, 2016).

²¹ *Sierra Club v. EPA*, 926 F.3d 844, 848 (D.C. Cir 2019) (emphasis added).

²² *American Electric Power Service Corp.*, 153 FERC ¶ 61,167 at P 13 (2015) (emphasis in original).

The FPA and the Commission’s regulations allow *any person* to file a complaint concerning matters that are within the Commission’s jurisdiction. As the Commission has noted, “allowing retail customers to challenge transmission and wholesale power sales rates does not violate principles of federalism.”²³ Here, the Consumer Alliance is challenging a Commission-jurisdictional rate. Given the potential for at least \$1 billion in excess costs in the first tranche of projects in MISO’s LRTP, consumers will be directly harmed if MISO continues to recognize and apply ROFRs. Accordingly, the Consumer Alliance and their members have standing to pursue this Complaint. This Complaint is ripe, the Consumer Alliance will realize a clear harm if the Complaint is not granted, and the Commission is well-positioned to redress this Complaint and grant the requested relief: removal of MISO’s Tariff provisions in Attachment FF that accommodate and apply State ROFRs in MISO’s long-range transmission planning.

H. Midcontinent Independent System Operator, Inc.

MISO is a “public utility” as that term is defined in Section 201(b)(2)(e) of the FPA.²⁴ MISO provides transmission and other FERC-jurisdictional market services under MISO’s FERC-approved Tariff. MISO is a duly authorized regional transmission organization (“RTO”) and independent system operator approved by the Commission pursuant to 18 C.F.R. § 35.34. MISO is the Transmission Provider, as that term is defined in MISO’s Tariff and, as such, is responsible for the administration of the MISO Tariff.²⁵ MISO’s footprint includes fifteen states in the central United States and the Canadian province of Manitoba. MISO oversees the development of a transmission expansion plan in its region and Tranche 1 of MISO’s LRTP, where MISO is poised to protect about \$5.5 billion in transmission projects for incumbent

²³ *Id.* at P 21.

²⁴ 16 U.S.C. § 824(b)(2)(e).

²⁵ MISO Tariff, Module A (Definitions).

utilities by applying Attachment FF, Section VIII.A., of MISO’s Tariff that requires MISO to recognize and comply with State ROFR laws.

IV. RELEVANT BACKGROUND

A. MISO’s Long-Range Transmission Plan

MISO began its most recent MTEP Process in 2020 (“MTEP21”) when stakeholders first submitted proposed transmission projects.²⁶ MISO then completed a series of transmission studies that culminated in adoption of the MTEP21 plan by its Board of Directors in December 2021.²⁷

In August 2020, MISO also began a Long-Range Transmission Planning process to “address the future challenges of the resource fleet evolution.”²⁸ This process resulted in the development of a group of large-scale Multi-Value Projects (“Tranche 1”) with a total estimated cost of \$10.4 billion to address MISO’s transmission reliability needs for the next ten to twenty years.²⁹ MISO described the LRTP process and these projects in its Long-Range Transmission Planning Portfolio Report (“Tranche 1 Report”) dated April 22, 2022. The proposed project have expected in-service dates between June 2028 and June 2030. The Tranche 1 Report did not identify which Tranche 1 projects would be subject to MISO’s Competitive Transmission Process and did not mention the need for any modification of its Tariff provisions that would be related to Tranche 1. MISO’s Board of Directors will consider approving the Tranche 1 projects as an addendum to the MTEP21 plan on July 25, 2022.³⁰

²⁶ <https://www.misoenergy.org/planning/planning/mtep21/> (last viewed on June 16, 2022).

²⁷ *Id.*

²⁸ *Id.* (LRTP Addendum Tab).

²⁹ *MISO Long-Range Transmission Planning Tranche 1 Portfolio Report (dated April 12, 2022)*, pp. 4, 6-8. The Final Report was recently updated on July 7, 2022 and is available here: [MTEP21 Addendum - Final Draft LRTP Tranche 1 Portfolio Report624003.pdf \(misoenergy.org\)](https://www.misoenergy.org/planning/planning/mtep21-addendum-final-draft-lrtp-tranche-1-portfolio-report-624003.pdf) (last accessed July 22, 2022).

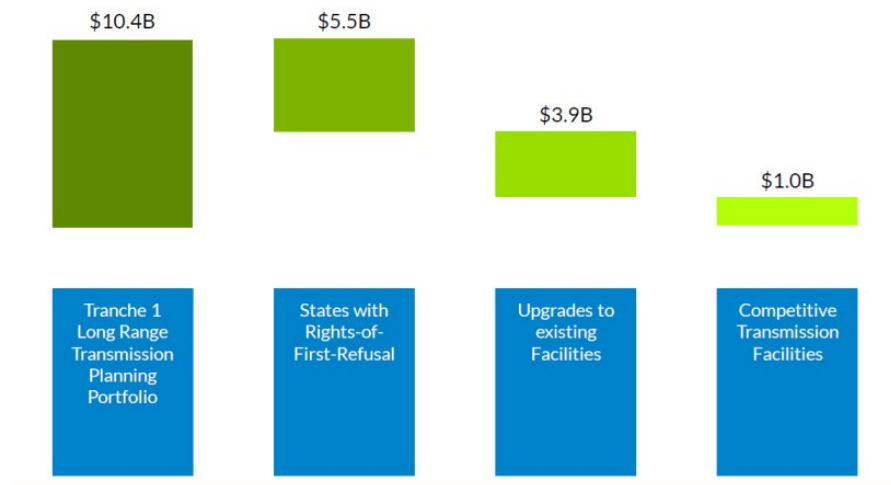
³⁰ <https://www.misoenergy.org/planning/planning/mtep21/> (last accessed June 17, 2022).

On June 15, 2022, MISO provided a Competitive Transmission Update to the Board's System Planning Committee ("System Planning Committee"). In that presentation, MISO explained that only one of its active transmission expansion projects, a project from MTEP 2017, was subject to its Competitive Transmission Process.³¹ MISO indicated that as a result of various exclusions out of Tranche 1's total estimated cost of \$10.4 billion, only around \$1.0 billion would be subject to competition while approximately \$5.5 billion of the Tranche 1 projects would be subject to State ROFR laws, thereby providing incumbent transmission owners with the first opportunity to build and own Tranche 1 projects in those states. MISO classified the vast majority of the remaining Tranche 1 projects as upgrades of existing facilities, which, under the Tariff and the pending proposal,³² also would be built and owned by incumbent transmission owners, as noted in the below slide. Given the carveouts for State ROFRs and Upgrades, the incumbent utilities enjoy an opportunity to build and own over 90% of the interregional, long-range projects in Tranche 1.

³¹ "Competitive Transmission Update," MISO, the System Planning Committee of the Board of Directors (June 15, 2022) at Slides 2,5, available at [Current and Emerging Technologies Update \(misoenergy.org\)](https://www.misoenergy.org/Current-and-Emerging-Technologies-Update) (last accessed July 7, 2022). That presentation is attached to this Complaint as **Attachment C**.

³² Recently, members of the Consumer Alliance protested MISO's proposal on grounds that the proposal, unvetted through the stakeholder process and lacking in transparency, would result in excess exclusions from competition. See "Protest of the MISO Consumer Alliance," *Midcontinent Independent System Operator, Inc.*, Docket No. ER22-1955-001 (filed June 17, 2022).

State laws and the nature of each project within a transmission portfolio also impact what facilities are subject to competition



On June 30, 2022, the System Planning Committee of the MISO Board of Directors met and recommended that the MISO Board approve Tranche 1 on July 25, 2022.³³

B. Order No. 1000 and Development of Transmission Competition

Nearly 20 years ago the Commission concluded that competition was essential for keeping transmission rates just and reasonable, declaring that “[t]he presence of multiple transmission developers would lower costs to customers.”³⁴ In the early 2000s when RTO/ISOs were being formed, the Commission stated in its Final Rule implementing Order No. 2000 that “traditional management of the transmission grid by vertically integrated electric utilities [is] inadequate to support the efficient and reliable operation that is needed for the continued development of competitive electricity markets, and that continued discrimination in the provision of transmission services by vertically integrated utilities may also be impeding fully

³³ See “Reliability Imperative: Long Range Transmission Planning,” MISO System Planning Committee of the Board of Directors (June 30, 2022), available at [PowerPoint Presentation \(misoenergy.org\)](https://www.misoenergy.org) (last accessed July 7, 2022) That presentation is attached to this Complaint as **Attachment D**.

³⁴ *Cleco Power LLC*, 101 FERC ¶ 61,008 at P 117 (2002), order terminating proceedings, 112 FERC ¶ 61,069 (2005).

competitive electricity markets.”³⁵ Thereafter, when enabling the creation of RTO/ISOs, the Commission stated that “[r]egional institutions can address the operational and reliability issues now confronting the industry, and eliminate any residual discrimination in transmission services that can occur when the operation of the transmission system remains in the control of a vertically integrated utility.”³⁶ The Commission addressed the problem of monopoly market power in the *operation* of the transmission system by facilitating transfer of operational control to ISOs and RTOs, by imposing conditions to merger approvals, and by denying market-based rate authority when monopoly market power over transmission could be exercised to interfere with competitive outcomes in energy and capacity markets.

In 2007, when the Commission issued Order No. 890, it noted that the United States had “witnessed a decline in transmission investment relative to load growth,” and found that the resulting grid congestion could “have significant costs to consumers.”³⁷ In Order No. 890, the Commission noted that a “lack of coordination, openness, and transparency” existed in transmission planning that “result[ed] in opportunities for undue discrimination” because “participants ha[d] no means to determine whether the plan developed by the transmission provider in isolation is unduly discriminatory.”³⁸ Accordingly, in June 2010, the Commission published a Notice of Proposed Rulemaking entitled *Transmission Planning and Cost Allocation*

³⁵ *Regional Transmission Organizations*, Order No 2000, FERC Stats. & Regs. ¶ 31,089 (1999) (“Order No. 2000”), *order on reh’g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000).

³⁶ Order No. 2000 at ¶ 30,993.

³⁷ *Preventing Undue Discrimination and Preference in Transmission Service*, 72 Fed. Reg. at 12,276, 12,318 (2007).

³⁸ *Id.*

by *Transmission Owning and Operating Public Utilities*.³⁹ It was from this rulemaking that the Commission would later adopt Order No. 1000.⁴⁰

On July 21, 2011, pursuant to Section 206 of the FPA, the Commission issued the proposed rule (that would become Order No. 1000) to usher transmission planning and cost allocation reforms that included electric transmission competition for regionally cost allocated projects as the national policy. The Commission found under Section 206 of the FPA that the changes, including the requirement for competition, were necessary to ensure that Commission-jurisdictional services are provided at just and reasonable rates and on a basis that is just and reasonable and not unduly discriminatory or preferential.⁴¹ The Commission determined that transmission competition was in consumers' interest and the public interest.⁴² The Commission's orders requiring that transmission expansion processes have competitive pressures to ensure just and reasonable rates has been upheld by the D.C. Circuit and appellate courts across the country.⁴³

Order No. 1000: (1) requires that each public utility transmission provider participate in a regional transmission planning process that produces a regional transmission plan⁴⁴; (2) requires that each public utility transmission provider amend its Tariff to describe procedures that provide

³⁹ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 131 FERC ¶ 61,253, 75 Fed. Reg. 37,884 (2010).

⁴⁰ *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 55 (D.C. Cir. 2014).

⁴¹ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 136 FERC ¶ 61,051, at P 78 (2011).

⁴² See Order No. 1000 at P 286.

⁴³ See *New York v. FERC*, 535 U.S. 1, 17, 22 (2005); *South Carolina*, 762 F.3d at 55, 65 (D.C. Cir. 2014); *Groton v. FERC*, 587 F.2d 1296, 1301 (D.C. Cir. 1978); *New England Power Generators Ass'n v. FERC*, 881 F.3d 202, at 206 (D.C. Cir. 2018).

⁴⁴ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 136 FERC ¶ 61,051, at P 78 (2011); *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 139 FERC ¶ 61,132 (2012); *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 141 FERC ¶ 61,044 (2012).

for the consideration of transmission needs driven by public policy requirements in the local and regional transmission planning processes⁴⁵; (3) requires the removal from Commission-approved tariffs and agreements a federal right of first refusal for certain new transmission facilities subject to regional cost allocation⁴⁶; and (4) improves coordination between neighboring transmission regions for new interregional transmission facilities.⁴⁷ Order 1000 builds off the Commission's previous Order Nos. 888⁴⁸ and 890⁴⁹, which were aimed at addressing unduly discriminatory and anticompetitive practices in the electric industry. In Order No. 890, the Commission evaluated transmission planning and established nine transmission planning principles, including coordination, regional participation, and cost allocation.⁵⁰ Importantly, the Commission issued FERC Order 1000 because the Commission realized that Order No. 890 on its own was insufficient to implement the transmission planning and cost allocation requirements of Order 1000.⁵¹

In Order No. 1000, the Commission reiterated FERC's longstanding responsibility to consider anti-competitive practices and to eliminate barriers to competition.⁵² The Commission concluded that removing incumbent preference ROFR requirements incorporated at the

⁴⁵ *Id.* at P 82.

⁴⁶ *Id.* at P 284.

⁴⁷ *Id.* at P 578.

⁴⁸ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities*, Order No. 888, 75 FERC ¶ 61,080 (1996).

⁴⁹ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 121 FERC ¶ 61,297 (2007), *order on rehearing and clarification*.

⁵⁰ *See id.* at P 181.

⁵¹ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 136 FERC ¶ 61,051, at P 78 (2011).

⁵² Order No. 1000 at P 286 (citing *Gulf States Utils. Co.*, 5 FERC ¶ 61,066 at 61,098 (1978)).

RTO/ISO level though rights of first refusal provisions could result in “benefits of competition in transmission development, and associated potential savings.”⁵³ The Commission explained:

Indeed, the Supreme Court has said that “the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest. In requiring the elimination of federal rights of first refusal from Commission-jurisdictional tariffs and agreements, we are acting in accordance with our duty to maintain competition.”⁵⁴

Therefore, the Commission directed RTOs/ISOs to remove the federal ROFR from their Tariffs. Recognizing areas of historic state jurisdiction regarding siting of interstate transmission, that Commission held: “[n]othing in this Final Rule 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.”⁵⁵ In reviewing Order No. 1000, the D.C. Circuit Court of Appeals concluded that FERC’s removal of the ROFR mandate was a legitimate exercise of the Commission’s authority.⁵⁶ The D.C. Circuit has found that a ROFR is a practice that affects a FERC-jurisdictional transmission rate.⁵⁷ Order No. 1000 stopped short of prohibiting recognition of a State ROFR in an RTO/ISO Tariff. By that time, certain MISO Transmission Owners were already working state legislative bodies to circumvent the required removal of federally acknowledged rights of first refusal and the newly required use of competition for projects with regional cost allocation. Thus, when MISO and the Transmission Owners submitted proposed revisions to MISO’s Tariff and the Transmission Owners Agreement to comply with Order No. 1000, they added additional provisions not

⁵³ Order No. 1000 at PP 285, 313; *see also MISO Transmission Owners v. FERC*, 819 F.3d 329, 333 (7th Cir. 2016) (noting that FERC instituted Order 1000 because it “was convinced that competition among firms for the right to build transmission facilities would result in lower rates to consumers of electricity.”).

⁵⁴ Order No. 1000 at P 286 (quoting *Otter Tail Power Co. v. United States*, 410 U.S. 366 at 374 (1973)).

⁵⁵ *Id.* at P 287.

⁵⁶ *S. C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 72 (D.C. Cir. 2014).

⁵⁷ *Id.* at 72-76.

specifically required for compliance that would ensure that MISO was required to follow any newly enacted State ROFR Laws.

C. MISO Tariff Attachment FF: Competitive Transmission Process

Attachment FF in MISO's Tariff includes MISO's Transmission Expansion Planning Protocols. Section VIII in Attachment FF establishes MISO's Competitive Transmission Process, including the requirements associated with identifying Competitive Transmission Facilities contained within a Market Efficiency Project or Multi-Value Project approved by the MISO Board. At the outset of Section VIII, MISO establishes the applicability of the Competitive Transmission Process, providing that it is applicable to all transmission facilities and substation facilities to include in an Eligible Projects, subject to certain exceptions, including Section VIII.A.1. (State or Local Rights of First Refusal), Section VIII.A.2. (Upgrades to Existing Transmission Facilities), and Section VIII.A.3. (Immediate Need Reliability Projects). Section VIII.A1.1 on State/Local ROFRs provides:

VIII.A.1. State or Local Rights of First Refusal:

The Transmission Provider **shall comply** with any Applicable Laws and Regulations granting a right of first refusal to a Transmission Owner. The Transmission Owner will be assigned any transmission project within the scope, and in accordance with the terms, of any Applicable Laws and Regulations granting such a right of first refusal. These Applicable Laws and Regulations include, but are not limited to, those granting a right of first refusal to the incumbent Transmission Owner(s) or governing the use of existing developed and undeveloped right of way held by an incumbent utility.⁵⁸

⁵⁸ MISO Tariff, Attachment FF, Section VIII.A.1. (State or Local Rights of First Refusal) (emphasis added).

The Commission initially rejected MISO’s proposed tariff provision in Section VIII.A.1. requiring that MISO apply State ROFR laws in MISO’s transmission planning in determining whether Commission mandated competition will occur. Specifically, the Commission held:

We find that, as discussed further below, MISO’s proposed new provision at section VIII.A of Attachment FF—State or Local Rights of First Refusal must be removed from its Tariff. . . MISO’s proposal goes beyond mere reference to state or local laws or regulations; it references state and local laws and then uses that reference to create a federal right of first refusal. Order No. 1000 does not permit a public utility transmission provider to add a federal right of first refusal for a new facility based on state law.⁵⁹

On rehearing, the Commission reverse course and accepted the State ROFR provision, accepting arguments that the provision “merely acknowledges state and local laws and regulations and does not create a federal right of first refusal.”⁶⁰ In a third order on compliance, the Commission explained its reversal by arguing that Order No. 1000’s focus is on the federal ROFR provisions in FERC-jurisdictional tariffs, and that “Order No. 1000 does not require removal from Commission-jurisdictional tariffs or agreements references to 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.**”⁶¹ In concurring with the Commission’s determination, Chairman Bay stated that the state laws violated the Constitution through the dormant commerce clause but that such a determination was for a court.⁶²

The Seventh Circuit upheld FERC’s abrogation of the federal ROFR in the MISO Transmission Owners’ Agreement, concluding that the [MISO transmission owners] “made no effort to show that the [federal ROFR] is in the public interest.”⁶³ However, the Court deferred

⁵⁹ *Midwest Independent Transmission System Operator, Inc.*, 142 FERC ¶ 61,215, at P 205 (2013).

⁶⁰ *Midwest Independent Transmission System Operator, Inc.*, 147 FERC ¶61,127, at P 147 (2014).

⁶¹ *Midwest Independent Transmission System Operator, Inc.*, 150 FERC ¶ 61,037, at P 25 (2015) (emphasis added) (hereinafter “Third Compliance Order”).

⁶² *Id.*, Bay Concurrence.

⁶³ *MISO Transmission Owners v. FERC*, 819 F.3d 329, 333-335 (7th Cir. 2016).

to FERC’s determination to allow MISO to include the Attachment FF Tariff provisions on State ROFRs because Order No. 1000 did not intend to “limit, preempt, or otherwise affect state or local laws or regulations with **respect to construction of transmission facilities.**”⁶⁴

MISO has 47 Qualified Transmission Developers, ready, willing, and able to compete.⁶⁵ However, MISO's Competitive Transmission Process has been limited because of restrictions on which projects have regional cost allocation such that only two projects have been subject to competition.⁶⁶ From the perspective of the Consumer Alliance, those two competitions (together with the outcome of competition in other RTOs/ISOs) demonstrated that competition wherever or whenever viable is necessary for the determination of just and reasonable rates. For example, in each of the solicitations, return on equity was capped at a level substantially below levels determine through FERC litigation,⁶⁷ as was the capital structure.⁶⁸ In addition, cost caps on the implementation of the project provided consumers with risk mitigation that is not present without competition.

D. State Right of First Refusal Laws that Impede Transmission Competition in MISO

Presently, there are eight States in the MISO region that implemented an incumbent preference after Order No. 1000, dictating that the State’s incumbent Transmission Owners have the first opportunity to build projects in a regional transmission plan: Iowa, Indiana, Michigan,

⁶⁴ *MISO Transmission Owners*, 819 F.3d at 336 (citing Order No. 1000, *supra*, 136 FERC ¶ 61051 at P 227).

⁶⁵ See <https://cdn.misoenergy.org/MISO%20Qualified%20Transmission%20Developers%20List82330.pdf> (last accessed July 13, 2022).

⁶⁶ See [Eligible Projects \(misoenergy.org\)](https://cdn.misoenergy.org/Eligible%20Projects.pdf).

⁶⁷ Commission orders concerning the return on equity are currently pending on appeal before the D.C. Circuit. See *MISO Transmission Owners v. FERC*, Nos. 16-1325, et al. (consolidated) (D.C. Cir.). The FERC orders under review are available in Docket Nos. EL14-12 and EL15-45.

⁶⁸ Expert testimony in a recently filed Section 206 complaint proceeding estimated savings of \$114 million over four years from capping the equity component of a MISO transmission owner’s capital structure at 53% instead of the current 60%. *Iowa Coalition for Affordable Transmission v. ITC Midwest LLC*, Docket No. EL22-56-000, Complaint, Attachment A, Testimony of S. Keith Berry, at 20:8-9 (filed May 10, 2022).

Minnesota, Montana, North Dakota, South Dakota, and Texas.⁶⁹ All of their ROFR statutes, in their current form, were passed subsequent to the Commission's proposed rulemaking in 2010 (that culminated in Order No. 1000).

Iowa

Iowa Code section 478.16 provides that:

2. An incumbent electric transmission owner has the right to construct, own, and maintain an electric transmission line that has been approved for construction in a federally registered planning authority transmission plan and which connects to an electric transmission facility owned by the incumbent electric transmission owner. Where a proposed electric transmission line would connect to electric transmission facilities owned by two or more incumbent electric transmission owners, each incumbent electric transmission owner whose facility connects to the electric transmission line has the right to construct, own, and maintain the electric transmission line individually and equally. If an incumbent electric transmission owner declines to construct, own, and maintain its portion of an electric transmission line that would connect to electric transmission facilities owned by two or more incumbent electric transmission owners, then the other incumbent electric transmission owner or owners that own an electric transmission facility to which the electric transmission line connects has the right to construct, own, and maintain the electric transmission line individually.⁷⁰

3. If an electric transmission line has been approved for construction in a federally registered planning authority transmission plan, and the electric transmission line is not subject to a right of first refusal in accordance with the tariff of a federally registered planning authority, then within ninety days of approval for construction, an incumbent electric transmission owner, or owners if there is more than one owner, that owns a connecting electric transmission facility shall give written notice to the board regarding whether the incumbent electric transmission owner or owners intend to construct, own, and maintain the electric transmission line. If the incumbent electric transmission owner or owners give notice of intent to construct the electric transmission line, the incumbent electric transmission owner or owners shall follow the applicable franchise requirements pursuant to this chapter. If the incumbent electric transmission owner or owners give notice declining to construct the electric transmission line, the board may determine whether another person may construct the electric transmission line.⁷¹

⁶⁹ Of these, Iowa, Minnesota, North Dakota, South Dakota and Texas also have connections to SPP, which has a similar tariff provisions that foregoes competition when a State ROFR Law is present. The ROFR Statutes in the MISO Region are appended to this Complaint as **Attachment H**.

⁷⁰ Iowa Code § 478.16(2).

⁷¹ *Id.*, § 478.16(3).

Iowa's ROFR statute became effective 2020. Iowa's statute is directly aimed at eliminating competition, as the statute⁷² expressly provides the State's incumbent electric transmission owners the rights to "construct, own, and maintain" an electric transmission line that has been approved for construction in "a federally registered planning authority transmission plan."⁷³ An incumbent electric transmission owner may decline to construct a transmission line approved for construction by a federally registered planning authority (*i.e.*, MISO), but must provide MISO notice of its intent to not construct the electric transmission line. Subsequently, the Iowa Utilities Board may determine whether another person may construct the electric transmission line.

Indiana

Indiana Code section 8-1-38-9 provides that:

(a) An incumbent electric transmission owner has the right to construct, own, operate, and maintain the following:

(1) A local reliability electric transmission facility that connects to an electric transmission facility owned by the incumbent electric transmission owner.

(2) Upgrades to an existing electric transmission facility owned by the incumbent electric transmission owner.

(b) The right to construct, own, operate, and maintain a local reliability facility that connects to electric transmission facilities owned by two (2) or more incumbent electric transmission owners belongs individually and proportionately to each incumbent electric transmission owner, unless the incumbent electric transmission owners otherwise agree in writing.⁷⁴

The State of Indiana passed its law in 2013, subsequent to FERC Order 1000's issuance.

The statute is aimed at blocking competition for construction, ownership, operation, and maintenance of transmission lines, as the State's definition of "local reliability electric

⁷² *Id.*, § 478.16(2).

⁷³ *Id.*

⁷⁴ Burns Ind. Code Ann. § 8-1-38-9(a)-(b).

transmission facility” is an “electric transmission facility ... required by a regional transmission organization.”⁷⁵ Indiana’s statutes protect Indiana’s incumbent transmission owners, but without explicitly mentioning how the ROFR would impact MISO. The statutes provides that an “incumbent electric transmission owner has the right to construct, own, operate, and maintain: (1) upgrades to an existing electric transmission facility and (2) local reliability electric transmission facility that connects to an electric transmission facility.”⁷⁶ The State statute specified that the protection would apply to lines above 100 kilovolts.⁷⁷

Michigan

Michigan Code section 460.593 provides that:

(1) An incumbent electric transmission company has the right to construct, own, operate, maintain, and control a regionally cost-shared transmission line if both of the following apply:

(a) The regionally cost-shared transmission line or its construction was included in a plan adopted or otherwise approved by a recognized electric planning authority for the incumbent electric transmission company.

(b) The regionally cost-shared transmission line will interconnect to facilities owned, or that will be owned, by that incumbent electric transmission company.⁷⁸

The State of Michigan’s ROFR statute became effective December 17, 2021, subsequent to FERC issuance of FERC Order 1000. The State’s statute directly is intended to provide incumbents the ROFR and eliminate competition because the text of the statute reads, in relevant part, “[a]n incumbent electric transmission company has the right to construct, own, operate, maintain, and control a regionally cost-shared transmission line if (1) the line was approved by a recognized electric planning authority (“MISO”) and (2) the regionally cost-shared transmission

⁷⁵ *Id.*, § 8-1-38-3(a).

⁷⁶ *Id.*, § 8-1-38-9, *et seq.*

⁷⁷ *Id.*, § 8-1-38-3(a)(1).

⁷⁸ M.C.L.S. § 460.593(1)(a)-(b).

line will interconnect to facilities owned ... by that incumbent transmission company.”⁷⁹ “Once MISO approves the construction of a transmission line, an incumbent Michigan electric transmission company has 90 days to provide written notice to the Michigan Public Service Commission indicating whether the incumbent electric transmission company intends to construct the transmission line.”⁸⁰

Minnesota

Minnesota Code section 216B.246 provides that:

2. Incumbent electric transmission owner rights. An incumbent electric transmission owner has the right to construct, own, and maintain an electric transmission line that has been approved for construction in a federally registered planning authority transmission plan and connects to facilities owned by that incumbent electric transmission owner. The right to construct, own, and maintain an electric transmission line that connects to facilities owned by two or more incumbent electric transmission owners belongs individually and proportionally to each incumbent electric transmission owner, unless otherwise agreed upon in writing. This section does not limit the right of any incumbent electric transmission owner to construct, own, and maintain any transmission equipment or facilities that have a capacity of less than 100 kilovolts.⁸¹

The State of Minnesota enacted its ROFR April 18, 2012, immediately after FERC’s issuance of Order 1000. The Minnesota statute, titled “**Federally Approved Transmission Lines; Incumbent Transmission Lineowner Rights,**” is directly intended to eliminate competition over transmission lines, providing that “an incumbent electric transmission owner has the right to construct, own, and maintain an electric transmission line that has been approved for construction by a federally registered planning authority transmission plan and connects to facilities owned by that incumbent electric transmission owner.”⁸² Most of Minnesota’s ROFR

⁷⁹ *Id.*

⁸⁰ *Id.*, § 460.593(3)(a).

⁸¹ Minn. Stat. § 216B.246(2).

⁸² *Id.*

provision is lock-step with the other MISO ROFRs and also provides the ROFR for transmission equipment that have a capacity of 100 kilovolts or less.⁸³ Similar to other MISO States' ROFRs, Minnesota's statute requires incumbent Transmission Owners to provide the Minnesota Public Utilities Commission written notice of its plan to construct, own, and maintain the transmission line within 90 days of MISO's approval the line.⁸⁴ The Minnesota ROFR was used by MISO to exclude the Huntley-Wilmarth Market Efficiency Project from MISO's competitive solicitation process.

Montana

Montana Code section 69-5-202 provides that:

(1)(a) Except as provided in subsection (1)(b), an incumbent electric utility has the right to construct, own, and maintain an electric transmission line on or after January 1, 2017:

- (i)** located in an area included in the midwest reliability organization;
- (ii)** approved for construction by a federally registered planning authority;
and
- (iii)** planned to interconnect with an incumbent electric utility's transmission facilities.⁸⁵

On April 6, 2017, the Governor of Montana signed House Bill 297 into law. The Bill was titled "An Act Providing Incumbent Electric Utility with a First Right to Construct, Own, and Maintain Certain Electric Transmission Lines Approved by Federally Registered Planning Authorities and Located in Certain Areas".⁸⁶ The statute specifically provides the State of Montana's incumbent utilities the ROFR, but also requires the incumbent electric utility to

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ MCA § 69-05-202(1).

⁸⁶ *Id.*, § 69-05-202(2).

provide a “federally registered planning authority” notice if the incumbent utility does opt to waive its right to “construct, own, and maintain an electric transmission line”.⁸⁷

North Dakota

North Dakota Code section 49-03-02 provides that:

... the commission may not issue a certificate to an electric transmission provider for construction or operation of an electric transmission line that will interconnect with an electric transmission line owned or operated by an electric public utility if the electric public utility is willing and able to construct and operate a similar electric transmission line.⁸⁸

North Dakota’s ROFR became effective July 1, 2013, subsequent to FERC’s issuance of Order 1000. North Dakota’s ROFR provision is much broader than other MISO States’ ROFR laws. The North Dakota Legislature passed a statute that explicitly prohibits the State’s Public Service Commission from issuing a Certificate of Public Convenience and Necessity to construct, own, and maintain an electric transmission line interconnected with an incumbent electric Transmission Owner if the incumbent Transmission Owner is willing and able to construct and operate a similar electric transmission line.⁸⁹ The difference between North Dakota and other States within MISO’s service territory is that North Dakota’ does not provide a 90 day period for the utility to report their decision to the North Dakota Public Service Commission. Typically, 90 days is the period of time the incumbent transmission company will have, but North Dakota does not have a time period codified in statute.

South Dakota

South Dakota Code section 49-32-20 provides that:

Any incumbent electric transmission owner may construct, own, and maintain an electric transmission line that connects to facilities owned by the incumbent

⁸⁷ *Id.*

⁸⁸ N.D. Cent. Code § 49-03-02(2).

⁸⁹ *Id.*

electric transmission owner. The right to construct, own, and maintain an electric transmission line that connects to facilities owned by two or more incumbent electric transmission owners belongs individually and proportionally to each incumbent electric transmission owner, unless otherwise agreed in writing. If an electric transmission line has been approved for construction in a federally registered planning authority transmission plan, the incumbent electric transmission owner may give notice to the commission, in writing, within ninety days of approval, of its intent to construct, own, and maintain the electric transmission line. If no notice is provided, the incumbent electric transmission owner shall surrender its first right to construct, own, and maintain the electric transmission line. Within eighteen months after the notice, the incumbent electric transmission owner shall file an application for a permit in accordance with chapter 49-41B.⁹⁰

The State of South Dakota enacted its ROFR March 11, 2011, which is before the July 21, 2011 date of issuance of FERC Order 1000; however, FERC Order 1000's promulgation process began with its Notice of Proposed Rule-Making 2010. The State intended to eliminate competition, as the State provided incumbent electric transmission owners the ROFR.⁹¹

Texas

Texas Code section 37.056 provides that:

(e) A certificate to build, own, or operate a new transmission facility that directly interconnects with an existing electric utility facility or municipally owned utility facility may be granted only to the owner of that existing facility. If a new transmission facility will directly interconnect with facilities owned by different electric utilities or municipally owned utilities, each entity shall be certificated to build, own, or operate the new facility in separate and discrete equal parts unless they agree otherwise.

(f) Notwithstanding Subsection (e), if a new transmission line, whether single or double circuit, will create the first interconnection between a load-serving station and an existing transmission facility, the entity with a load-serving responsibility or an electric cooperative that has a member with a load-serving responsibility at the load-serving station shall be certificated to build, own, or operate the new transmission line and the load-serving station. The owner of the existing transmission facility shall be certificated to build, own, or operate the station or tap at the existing transmission facility to provide the interconnection, unless after a reasonable period of time the owner of the existing transmission

⁹⁰ S.D. Codified Laws § 49-32-20.

⁹¹ *Id.*

facility is unwilling to build, and then the entity with the load-serving responsibility or an electric cooperative that has a member with a load-serving responsibility may be certificated to build the interconnection facility.

(g) Notwithstanding any other provision of this section, an electric utility or municipally owned utility that is authorized to build, own, or operate a new transmission facility under Subsection (e) or (f) may designate another electric utility that is currently certificated by the commission within the same electric power region, coordinating council, independent system operator, or power pool or a municipally owned utility to build, own, or operate a portion or all of such new transmission facility, subject to any requirements adopted by the commission by rule.⁹²

The State of Texas' current ROFR became effective on September 1, 2021. Texas' first ROFR was enacted 2019 with the passing of Senate Bill 1938 on May 16, 2019 after MISO selected an affiliate of NextEra as the more efficient or cost-effective developer of a MISO Market Efficiency Project located in Texas but allocated regionally. The State of Texas passed ROFR was passed for the purpose of providing incumbent utilities the exclusive right to construct transmission facilities, including facilities in MISO and Southwest Power Pool, Inc. ("SPP") areas of Texas. Specifically, the State of Texas will only provide permits to the incumbent transmission owner to interconnect with the facility's owner.⁹³ Texas' law provides that an incumbent transmission owner will be certified to build transmission infrastructure, unless the transmission owner is unwilling to build the transmission infrastructure. The State will require new certificates if the incumbent transmission provider is unwilling to provide that transmission.

Wisconsin does not have a ROFR law and has instead adopted competition policies

Wisconsin currently does not have a ROFR law. Attempts were made by introducing identical companion bills (Assembly Bill 892 and Senate Bill 838) in January 2022 that would

⁹² Tex. Utilities Code § 37.056(e)-(g),

⁹³ *Id.*, § 37.056(e).

grant the incumbent transmission facility owner the right to construct, own, and maintain a transmission facility that has been approved for construction in the MISO Transmission Expansion Plans. A broad and diverse coalition representing the public interest were actively engaged and opposed these bills. WIEG joined ratepayer organizations like Citizens Utility Board, taxpayer advocate groups like Americans for Prosperity and Americans for Tax Reform, free market advocates like Wisconsin Institute of Law and Liberty, and other trade associations representing thousands of Wisconsin employees like Midwest Food Products Association and Wisconsin Cast Metals Association in opposing this legislation. The ROFR bills had public hearings in February 2022, but the bills did not have a vote from the standing committees in either house. Consequently, neither of the bills had a floor vote and AB 892/SB 838 failed to pass pursuant to Wisconsin Senate Joint Resolution 1.⁹⁴

State ROFR Litigation

In the last several years, State ROFR laws have been challenged on federal and state constitutional grounds, one of which is still currently pending before the United States Court of Appeals for the Fifth Circuit , and one of which is still pending before the Iowa Supreme Court.⁹⁵ These challenges include claims under state law and claims that state ROFR laws impermissibly discriminate against out of state businesses in violation of the Constitution’s Dormant Commerce Clause.

Minnesota’s ROFR statute was unsuccessfully challenged⁹⁶ under the U.S. Constitution’s Dormant Commerce Clause. A competitive developer argued that the State of Minnesota’s ROFR statute violated the Dormant Commerce Clause “by discriminating against or placing an

⁹⁴ A.B. 892, 2021-2022 Session (Wis. 2022); <https://docs.legis.wisconsin.gov/2021/proposals/reg/asm/bill/ab892>; S.B. 892, 2021-2022 Session (Wis. 2022); <https://docs.legis.wisconsin.gov/2021/proposals/sb838>

⁹⁵ See *NextEra Energy Capital Holdings v. D’Andrea*, Case No. 50160 (5th Cir. 2020).

⁹⁶ See *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, at 1025 (8th Cir. 2020).

undue burden on interstate commerce.”⁹⁷ The Eighth Circuit Court of Appeals affirmed the District Court’s dismissal. The Iowa Department of Justice, Office of Consumer Advocate filed an Brief Amicus Curiae in support of the challenge to the law, noting that although the project was solely physically located in Minnesota “Iowa customers should expect to pay approximately half the costs of the Huntley-Wilmarth project.”⁹⁸ The competitive developer petitioned for review of the Eight Circuit decision by the United States Supreme Court; however, the Supreme Court denied certiorari.⁹⁹ Members of the Consumer Alliance supported that petition for certiorari. Efforts are underway to repeal the Minnesota ROFR statute.¹⁰⁰

Challengers to Texas’ ROFR argued that the law violated (1) the Commerce Clause and (2) Contracts Clause of the United States Constitution.¹⁰¹ In this case, NextEra Transmission Midwest, LLC was selected by MISO to construct the Hartburg-Sabine Junction Transmission Project 500 kilovolt transmission line in November 2018. In May 2019, the State of Texas passed its ROFR provision, only permitting an incumbent utility the ability to obtain the needed permitting to complete the project.

In a state court proceeding, challengers have argued that Iowa’s ROFR statute, which was thrown into an omnibus appropriations bill in the wee hours of the last day of the legislative session, violated Iowa’s Constitution.¹⁰² The District Court held that the competitive developers

⁹⁷ *Id.*

⁹⁸ Brief of Iowa Department of Justice, Office of Consumer Advocate As Amicus Curiae In Support Of Plaintiff-Appellant, filed October 23, 2018 before the United States Court of Appeals for the Eight Circuit, Case No. 18-2559, *citing* <https://cdn.misoenergy.org/20171019%20RECBWG%20Item%2002%20Cost%20Allocation%20Refresher90355.pdf>.

⁹⁹ *LSP Transmission Holdings, LLC v. Sieben et al.*, Case No. 20-641 (U.S.) (*cert. denied* on March 1, 2021).

¹⁰⁰ *See* House Bill 22-06505 (introduced May 18, 2022).

¹⁰¹ *NextEra Energy Capital Holdings v. Walker*, Cause No. 1 19-CV-626-LY, at 10 (W.D. Tex. 2020).

¹⁰² Iowa Const., art. I § 6.

lacked standing to bring the suit.¹⁰³ However, the Appellants' Application for Further Review and Motion for Emergency Injunction Pending Further Review are pending before the Iowa Supreme Court.

V. COMPLAINT

The Commission is obligated to ensure that all rates for jurisdictional service under the FPA are just and reasonable.¹⁰⁴ The FPA's "primary aim is the protection of consumers from excessive rates and charges."¹⁰⁵ Rates are "excessive" if they result in consumers paying more in rates (including risk shifting provisions) than would be available through competition. The Commission enjoys broad discretion and powers to remedy unjust, unreasonable, and unduly discriminatory practices affecting rates.¹⁰⁶ Section 309 of the FPA authorizes the Commission to "perform any and all acts...it may find necessary or appropriate to carry out the provisions of [the FPA]."¹⁰⁷

On complaint, the Commission can find that a tariff, once determined to be just and reasonable, is now unjust and unreasonable.¹⁰⁸ Under Section 206 of the FPA, a complainant must show that (1) the current rate is unjust and unreasonable and (2) the alternative rate proposal is just and reasonable.¹⁰⁹ The fact that the Commission previously accepted a rate does

¹⁰³ *LS Power Midcontinent, LLC and Southwest Transmission, LLC v. State of Iowa*, Case No. 21-0696 (Iowa Ct. of Appeals) (Filed July 8, 2022).

¹⁰⁴ 16 U.S.C. §§ 824d, 824e.

¹⁰⁵ *Municipal Light Boards of Reading and Wakefield, Mass. v. Federal Power Commission*, 450 F.2d 1341, 1348 (D.C. Cir. 1971).

¹⁰⁶ 16 U.S.C. § 824e; *South Carolina*, 762 F.3d at 55-58.

¹⁰⁷ *Consol. Edison of N.Y., Inc. v. FERC*, 347 F.3d 964, 967 (D.C. Cir. 2003) (citing 16 U.S.C. § 825h); *Concord v. FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992); see also *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 149 FERC ¶ 61,116, at P 61,736 (2014). If the Commission finds that a rate unjust, unreasonable, unduly discriminatory or preferential, it must determine a just and reasonable rate and order that rate to be "observed and in force." *Port of Seattle v. FERC*, 499 F.3d 1016, at 1023 (9th Cir. 2007).

¹⁰⁸ *PJM Interconnection, L.L.C.*, 158 FERC ¶ 61,093, at P 50 (2017).

¹⁰⁹ *Ark. Pub. Serv. Comm'n v. Entergy Corp. et al.*, 174 FERC ¶ 63,024, at P 459 (2021).

not preclude the Commission from later reexamining that rate in a subsequent proceeding.¹¹⁰ Section 206 of the FPA instructs the Commission to remedy “any . . . practice” that “affect[s]” a rate for interstate electricity transmission services “demanded” or “charged” by “any public utility” if such practice “is unjust, unreasonable, unduly discriminatory or preferential.”¹¹¹ Further, if this is the case, the FPA instructs the Commission to “determine the just and reasonable rate, charge, classification, rule, regulation, practice or contract to be thereafter observed and in force, and shall fix the same by order.”¹¹² While the text does not define the term “practice,” the D.C. Circuit Court of Appeals has held that a ROFR is a practice that affects a FERC-jurisdictional transmission rate.¹¹³

For a rate previously determined by the Commission to be just and reasonable, a complainant must demonstrate that the existing rate is unjust and unreasonable by presenting new evidence or evidence that circumstances have changed. MISO’s Tariff is unjust and unreasonable because it requires MISO to apply a State law granting an incumbent Transmission Owner preference to build a MISO-planned and regionally cost allocated transmission project and establish a FERC-jurisdictional rate for that project, even though the State ROFR law invades FERC’s exclusive transmission planning, cost allocation, and rate jurisdiction by undermining FERC’s rules and policies on transmission competition.

¹¹⁰ *Massachusetts Municipal Wholesale Electric Company (MMWEC) v. Northeast Utilities Service Company*, 58 FERC ¶ 61,202, at 61627 (1992) (“We believe that MMWEC more than adequately has demonstrated the existence of changed circumstances warranting the institution of a hearing.”); *California Indep. Sys. Operator Corp.*, 129 FERC ¶ 61,144, at P 4 (2009) (instituting a section 206 investigation upon finding that, due to changes in circumstances, the Exceptional Dispatch provisions of the MRTU Tariff may no longer be just and reasonable.); *Old Dominion Elec. Coop. & Direct Energy Bus., LLC on Behalf of Itself & Its Affiliate, Direct Energy Bus. Mktg., LLC & Am. Mun. Power, Inc.*, 164 FERC ¶ 61,116, at P 17 (2018) (citing *Oxy USA Inc. v. FERC*, 64 F.3d 679, 690 (D.C. Cir. 1995)) (“The fact that a rate once found to be reasonable does not preclude a finding of unreasonable in a subsequent proceeding.” (internal quotations omitted)).

¹¹¹ 16 U.S.C. § 824e(a).

¹¹² *Id.*

¹¹³ *South Carolina*, 762 F.3d at 72-76.

Circumstances have substantially changed since 2013-2014 when the Commission accepted the MISO Tariff provisions in Attachment FF that mandate that MISO apply any State law that includes a ROFR to circumvent transmission competition in MISO. In accepting the competition avoidance provision the Commission held that “even if a transmission project is subject to a state right of first refusal, the regional transmission planning process still results in the selection for planning and cost allocation purposes of transmission projects that are more efficient or cost-effective than would have been developed but for such processes.”¹¹⁴ While this may be true as far as it goes, *i.e.*, that the ‘planning process’ determines more efficient or cost effective ‘projects’ than if the planning process were not in place, it fails to address the impact of competition on rates for those planned projects. Since the issuance of Order No. 1000, competition has demonstrated that the rates for developing transmission facilities are not just and reasonable if competition is viable, as it is here, and not utilized. Further, it is now clear that the burdens of State ROFR requirements do not fall solely on customers within ROFR states, forcing pro-competition states to pay for the parochial policies of incumbent preference states. Under Section 206, the Commission has a duty to prohibit its jurisdictional public utilities from applying requirements that needlessly raise costs to consumers by unfairly and discriminatorily disadvantage non-incumbents transmission development.¹¹⁵ Given the \$5.5 billion in MISO-planned transmission that will be protected by State imposed ROFRs after issuance of Order No. 1000 for Tranche 1 of MISO’s LRTP alone, the costs at issue are far from modest, and so the time is ripe for the Commission to act.

Several changes have occurred in the last eight to ten years. In accepting MISO’s

¹¹⁴ *Midwest Independent Transmission System Operator, Inc.*, 150 FERC ¶ 61,037 (2015).

¹¹⁵ See *Illinois Commerce Commission v. FERC*, 576 F.3d 470, 476 (7th Cir.2009) (“FERC is not authorized to approve a pricing scheme that requires a group of utilities to pay for facilities from which its members derive no benefits, or benefits that are trivial in relation to the costs sought to be shifted to its members.”).

Attachment FF Tariff provisions requiring MISO to adhere to State ROFRs in regional transmission planning, the Commission could not have envisioned the degree to which State ROFRs would proliferate to intentionally circumvent the Commission's mandate that competition was necessary for regionally cost allocated transmission projects. Unlike in 2013-2014, the Commission now has a record that includes ample RTO/ISO experience with the price-lowering and risk shifting benefits of competition. In 2013-2014 when the Commission allowed Attachment FF's competition avoidance provision, the benefits of competition was just based on economic theory.¹¹⁶ The facts of competition, when permitted to happen, far exceed the hope of that economic theory. But the proliferation of new legislatively enacted ROFR laws in the MISO region thwarts such competition. Those laws flagrantly target and conflict with the Commission's exclusive transmission ratemaking jurisdiction by dictating to the Commission which entities are entitled to regional cost allocation through Commission FERC-jurisdictional rates.

The accelerated change in the generation resource mix in the MISO region has contributed to the need for substantial investment in new transmission in long-range projects bringing this rate issue to a head, starting with the \$10.4 billion in projects in Tranche 1 of MISO LTRP. With \$5.5 billion of that initial Tranche subject to incumbent protection by post-Order No. 1000 anti-competition State ROFR laws, the Consumer Alliance, and thus the Commission, is at a crossroads. The criticality of maximizing transmission competition to avoid rates in excessive of that needed to obtain the critical capital for these projects has never been greater, nor the impacts of inaction more severe. Transmission rates in MISO have already been far outstripping inflation even before this massive buildout. The impact on the Consumer Alliance

¹¹⁶ *South Carolina*, 762 F.3d at 65 (“Agencies do not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall; nor need they do so for predictions that competition will normally lead to lower prices.”)

could be catastrophic. But with transmission competition, MISO's regional transmission planning will be more efficient and cost-effective, thereby lessening the likelihood of challenges to the identified projects. Further, any concern about temporary delays (Tranche 1 projects are not due in service until June 1, 2028 – June 1, 2030) or costs associated with the use of competitive solicitations (paid for by the participating bidders) are misplaced. Competition will provide long-term cost savings for long-term, long-range projects.

The Commission must reassert its exclusive transmission rate jurisdiction as follows: 1) The Commission adopted transmission planning and cost allocation reforms in Order No. 1000, including the competition requirement, to allow the Commission to establish just and reasonable transmission rates. 2) State ROFR laws are anti-competitive, invade FERC's jurisdiction over interstate and interregional transmission planning/cost allocation and undermine FERC rules and policies on determining just and reasonable transmission rates through competition. 3) The ROFR laws are unrelated to States' historical limited jurisdiction over construction siting and permitting.¹¹⁷ 4) As a result, State ROFR laws infringe on the Commission's exclusive duty and ability to establish just and reasonable transmission rates. 5) Therefore, the Commission can order MISO to revise Tariff Attachment FF so that MISO does not prohibit transmission competition based on a State preference for the builder of a transmission project.

¹¹⁷ See *Piedmont Environmental Council v Federal Energy Regulatory Commission*, 558 F.3d 304 (4th Circuit 2009) (states have traditionally assumed all jurisdiction to approve or deny permits for the siting and construction of electric transmission facilities.); *PacifiCorp*, 72 FERC ¶ 61087 (1995) (It is well-settled that the Commission does not have authority over the siting and construction of electric transmission facilities that are not part of licensed hydroelectric projects.); Order No. 1000 at 287 (“not 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.*” (emphasis added))

A. The Commission Should Exercise its Authority and Jurisdiction Over the Interstate Transmission of Electricity to Require RTOs/ISOs to Disregard State ROFR Laws That Prohibit Transmission Competition and Interfere with the Commission’s Ability to Set Just and Reasonable Rates.

In enacting the FPA, the United States Congress assigned to the Commission the responsibility to regulate “the transmission of electric energy in interstate commerce” and “the sale of electric energy at wholesale in interstate commerce.”¹¹⁸ Accordingly, FERC jurisdiction extends to “all facilities for such transmission or sale of electric energy,” but *not* facilities used for “generation of electric energy” or facilities used solely for “local” distribution or “intrastate” transmission.¹¹⁹ Within that jurisdictional ambit, “rates and charges” for such interstate transmission or sale—as well as any “rules and regulations *affecting*” such rates—must be “just and reasonable.”¹²⁰ Under Section 206 of the FPA, the Commission retains jurisdiction over any “practice” affecting a FERC-jurisdictional rate.¹²¹ Furthermore, a FERC-regulated public utility may not “grant any undue preference or advantage” “with respect to any transmission or sale subject to” FERC’s jurisdiction.¹²² The Commission also has the obligation to ensure that “any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission” is not “unjust, unreasonable, unduly discriminatory or preferential.”¹²³ In carrying out this task the Commission may order refunds or investigate costs of production or transmission,¹²⁴ issue an

¹¹⁸ 16 U.S.C. §824(b)(1).

¹¹⁹ *Id.*

¹²⁰ 16 U.S.C. § 824d(a) (emphasis added).

¹²¹ 16 U.S.C. § 824e(a).

¹²² 16 U.S.C. §824d(b).

¹²³ 16 U.S.C. § 824e(a).

¹²⁴ 16 U.S.C. § 824e(a).

order requiring the connection of transmission facilities,¹²⁵ or may issue permits for constructing interstate transmission lines where: states lack authority to “consider the interstate benefits or interregional benefits expected to be achieved.”¹²⁶

While the Commission may not be able to invalidate a state law on its own accord, it is clear that, if States are regulating in a sphere or manner that conflicts with Congress’s mandates and the Commission’s rules and orders, then the Commission is obligated to use its jurisdictional authority to issue an order that requires RTOs/ISOs to revise their Tariffs so they do not apply provisions in State laws that invade and conflict with the Commission’s exclusive jurisdiction to determine just and reasonable rates, including the mechanism by which such rates are determined.¹²⁷ This is particularly true where, as here, a State-imposed ROFR is used to prohibit transmission competition for MISO planned project and has the direct effect of needlessly and excessively increasing FERC-jurisdictional transmission rates, including in States outside the State with the ROFR.

Notably, Minnesota, a ROFR State, has acknowledged FERC’s authority to invalidate State ROFR laws by requiring MISO to refuse to recognize the State ROFR law:

If FERC were so inclined, it could prohibit MISO from recognizing state ROFR laws for electricity transmission. In that situation, MISO would select a transmission developer through a competitive bidding process. But instead of prohibiting recognition of state ROFR laws in MISO’s transmission developer selection process, FERC has repeatedly decided to allow MISO to recognize such laws...**Any changes to these**

¹²⁵ 16 U.S.C. § 824e(b)

¹²⁶ 16 U.S.C § 824p(b)(1)(A)(ii).

¹²⁷ *Midwestern Gas Transmission Company*, 85 FERC ¶ 61,358 (1998) (rejecting argument that bypass authorization would violate Indiana law and FERC should defer action pending decision by the Indiana Public Utility Commission in part citing court cases involving the preemptive effect of FERC’s jurisdiction over interstate transmission facilities and that while Indiana law prohibits wasteful duplicative utility facilities and services that law proposal had no bearing on Midwestern’s proposal given that Midwestern’s proposal falls within the Commission’s exclusive jurisdiction.).

longstanding utility practices and preferences should be left to FERC or Congress.¹²⁸

This is precisely the action that the Consumer Alliance requests the Commission to take.

1. While the Principles of Federalism and Concurrent Jurisdiction Apply to the Regulation of Electricity, State ROFRs Prohibiting Transmission Competition Conflict with and Intrude Upon the Federal Energy Regulatory Regime.

Aside from the express carveouts in the FPA for State regulation of generation and wholly intrastate transmission, the Commission has traditionally recognized that certain areas of electricity regulation related to interstate transmission remain the province of the states, including siting, permitting, and construction.¹²⁹ The Consumer Alliance recognizes State jurisdiction over those local land use matters that are within the State's safety and police powers; however the Commission enjoys exclusive *rate-setting* authority over FERC-jurisdictional public utilities that are transmitting electricity in interstate commerce, including determining the entity or entities allowed to access regional cost allocation and the terms of that access. Although the Commission has no authority to regulate within a state's sole jurisdiction, it may enact regulation that has substantial effects on matters pertinent to States' interest, such as prohibiting right of first refusal provisions in federal tariffs in determining which entity is entitled to the FERC-jurisdictional transmission rate and FERC-jurisdictional regional cost allocation for a transmission facility planned under a FERC-jurisdictional planning process. State laws may direct requirements around siting, permitting, and construction of transmission lines;¹³⁰ however,

¹²⁸ Brief of Defendants-Appellees (State of Minnesota), *LSP Transmission v. Sieben*, Case No.18-2559 at p. 31 (8th Cir.) (filed Dec. 27, 2018) (emphasis added).

¹²⁹ Order No. 1000 at P 107 (“We acknowledge that there is longstanding state authority over certain matters that are relevant to transmission planning and expansion, such as matters relating to siting, permitting, and construction”).

¹³⁰ *Piedmont Environmental Council v Federal Energy Regulatory Commission*, 558 F.3d 304 (4th Circuit 2009) (states have traditionally assumed all jurisdiction to approve or deny permits for the siting and construction of electric transmission facilities.); *PacifiCorp*, 72 FERC ¶ 61087 (1995) (It is well-settled that the Commission does not have authority over the siting and construction of electric transmission facilities that are not part of licensed hydroelectric projects.).

State laws invade and conflict with the Commission’s jurisdiction when those laws are used to prohibit transmission competition, thereby providing an exclusive first right to the in-state incumbent utility to build to an interstate or interregional transmission project – the costs and rates of which are subject to the Commission’s jurisdiction.

Under the concurrent jurisdiction scheme, a state is permitted to impose on a project – selected through a FERC regulated planning process, including after a competitive solicitation – the conditions on which it can be permitted, whether it be built in a certain location or under certain restrictions (undergrounding), and whether it be subject to particular environmental requirements. What the ROFR laws do, however – and what the Commission cannot allow – is say that no project developer selected through a FERC-jurisdictional process, other than the local utility, can build in the state regardless of the outcome of a FERC regulated competitive solicitation, providing the incumbent utility the exclusive right to the FERC-jurisdictional transmission rate and cost allocation. The laws in place today allow this State declaration because the MISO tariff (as well as SPP) mandates that MISO follow the dictates of the state in declaring what entity is entitled to develop a project in MISO's planning process. As a result, FERC improperly delegates its exclusive jurisdiction over interstate transmission rates to the States.¹³¹

¹³¹ *U.S. Telecom Ass’n v. F.C.C.*, 359 F.3d 554, 556 (D.C. Cir. 2004) (“U.S. Telecom”) (“case law strongly suggests that sub-delegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization.”); see also *Florida Power & Light Company, et. al.*, 29 FERC ¶ 61,140 (1984) (agreeing with Florida Power and Light that this Commission may not delegate its jurisdiction to the Florida Commission and should not defer to the Florida Commission's rate for transmission service to qualifying facilities, in part, because, “[o]nce the Commission's jurisdiction under the FPA is determined, it is exclusive and preempts the States from regulating the transmission of electric power or the sale of wholesale electric power in interstate commerce and “we [the Commission] recognized that we have “no discretion to reject jurisdiction” under the FPA, citing *City of Colton v. Southern California Edison Co.*, 26 FPC 223, 236 (1961) (rejecting argument that wholesale sale otherwise subject to the Commission jurisdiction was not subject to Commission jurisdiction because could be regulated by states because Supreme Court decisions have squarely rejected the view “that the scope of Commission is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis. This was done in the Power Act by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.”).

The promulgation of a ROFR statute to prohibit transmission competition for projects that are regionally cost allocated among electricity consumers in multiple states is not a legitimate exercise of a State’s policy or safety powers. Any State’s claimed police powers within a ROFR statute are not relevant to exclusively FER-jurisdictional, regional transmission planning and rate-setting that is squarely under FERC’s jurisdiction. The Commission must prevent the invasion of and application of State ROFR laws by MISO by proceeding to act “comprehensively and effectively” in the area to which it has exclusive jurisdiction, *i.e.*, the setting of rates for interstate electric transmission service.¹³²

2. States Cannot Derogate the Federal Energy Regulatory Regime

As noted above, the State ROFR laws at issue all arose in response to Order No. 1000. Even if they had not, courts have explicitly rejected the argument that the FPA “shows a congressional intent to safeguard pre-existing state regulation of the delivery of electricity,” holding instead that the Commission’s authority in this area is “clear and specific,” to the exclusion of states’ prerogatives.¹³³ In fact, among the reasons the FPA was enacted was to

¹³² *National Association of Regulatory Utility Commissioners*, 964 F.3d at 1187-1188 (D.C. Cir. 2020) (rejecting argument that because States have the authority to manage and oversee their distribution systems, and because a local energy storage resource could not participate in the federal wholesale market (and come within FERC’s authority) until after it navigates through those State-regulated facilities, finding that because “FERC has the exclusive authority to determine who may participate in the wholesale markets, the Supremacy Clause requires that States not interfere” and therefore “[A]ny State effort that aims directly at destroying FERC’s jurisdiction by “necessarily deal[ing] with matters which directly affect the ability of the [Commission] to regulate comprehensively and effectively” over that which it has exclusive jurisdiction “invalidly invade[s] the federal agency’s exclusive domain.” (quoting *Northern Nat. Gas Co.*, 372 U.S. at 91-92) (“NARUC”); *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1372 (D.C. Cir. 2004) (rejecting argument by MISO TOs that FERC could not impose Cost Adder on bundled and grandfathered loads because the costs could not be recovered, finding that the federal regulatory action can interfere with a state regulatory scheme, adding “[f]ederal preemption and the Supremacy Clause do not circumscribe FERC’s authority; those principles operate to prevent the states from taking regulatory action in derogation of federal regulatory objectives,” and recommending to MISO TOs that if FERC-approved application of the Cost Adder to bundled and grandfathered loads results in “trapped” costs, their initial recourse is to their state regulators and contractual partners armed with principles of federal preemption and the Supremacy Clause — not to FERC) (“MISO TOs Cost Adder”).

¹³³ *New York v. FERC*, 535 U.S. 1, 17, 22 (2005).

prevent disputes between states over electricity costs and rates.¹³⁴ Beyond the FPA, the Commerce Clause “has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce.”¹³⁵

States may not legislate or take regulatory authority in derogation of federal energy regulatory objectives.¹³⁶ State efforts to regulate interstate commerce must fall when they conflict with or interfere with federal authority over the same activity.¹³⁷ In *Nantahala Power & Light v. Thornburg*, the United States Supreme Court held that the state regulatory authority, by increasing the utility’s cost of service after the Commission had established a cost-based rate for the utility, impermissibly interfered with FERC’s authority to set just and reasonable rates.¹³⁸

In explaining and upholding the Commission’s rationale for removing federal ROFRs in Order No. 1000, the D.C. Circuit explained that deterring proposals from non-incumbents “would impede the identification of some cost-efficient projects, resulting in the development of transmission facilities ‘at a higher cost than necessary.’”¹³⁹ The Court further observed that ROFRs allow for higher costs that will be passed on to consumers, yielding rates that are not just and reasonable in violation of the FPA.¹⁴⁰ The FPA – combined with FERC’s conclusions and

¹³⁴ See, e.g., *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

¹³⁵ *Sough-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984).

¹³⁶ *MISO TOs Cost Adder* principles of federal preemption and Supremacy Clause “operate to prevent the states from taking regulatory action in derogation of federal regulatory objectives.”)

¹³⁷ See *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318–319 (1981); see *Louisiana Public Service Commission v. Entergy Services, Inc.*, 76 FERC ¶ 61,168, 61,955 (1996) (“a ratemaking methodology proposed at the retail level... does not govern the Commission’s determination of the appropriate ratemaking methodologies to be used in developing wholesale rates”) (citations omitted), reh’g denied, 80 FERC 61,282 (1997), rev’d on other grounds, 184 F.3d 892 (1999)).

¹³⁸ See 476 U.S. 953, at 970-72 (1986).

¹³⁹ *South Carolina*, 762 F.3d at 72 (citing Order No. 1000 at PP 228-230 (further noting that higher costs would be passed on to consumers, yielding rates that are not just and reasonable in violation of the FPA)).

¹⁴⁰ *Id.*

appellate court findings that ROFRs severely harm the public interest¹⁴¹ and are thus unjust, unreasonable, and unduly discriminatory or preferential rates – enables the Commission to exercise its jurisdiction to require MISO to disregard State ROFR laws in selecting the more efficient or cost-effective developer for MISO-planned transmission additions with FERC-jurisdictional regional cost allocation. While the FPA does not expressly refer to State ROFR laws, the FPA anticipated potential interference by States in the regulation of *interstate* transmission. As the Commission has previously held, “the findings of states on ratemaking issues do not govern the Commission's review of jurisdictional rates.”¹⁴²

Further, in Order No. 1000, the Commission exercised its rate jurisdiction under Section 206 to set just and reasonable interstate transmission rates. Relevant here, the Commission did three things. First, the Commission required the development of a regional transmission plan. Second, the Commission required that projects included in regional transmission plan that would be subject to regional cost allocation, *i.e.*, projects that benefit ratepayers other than the ratepayers in the zone where the project was physically located, would be subject to a competitive solicitation process to determine the developer that would build the project. Third, in the process of adopting a competitive solicitation process for developing certain projects, the

¹⁴¹ *Emera Maine v. FERC*, 854 F.3d 662, 671 (D.C. Cir. 2017).

¹⁴² *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267 at P 87 (2018) (disagreeing with argument that state statutes and state public utility commission proceedings support imposing caps on incentive pay because as “[t]he Commission has previously held that the findings of states on ratemaking issues do not govern the Commission's review of jurisdictional rates” citing *Barton Village Inc. v. Citizens Utilities Co.*, 100 FERC ¶ 61,244 at P 12 (2002) (“Under the [FPA] ... the Commission has exclusive jurisdiction over [] wholesale power sales rates ... [t]hus, we have no legal obligation to review, much less rely on, the findings of the [state.]”); *Louisiana Pub. Serv. Comm'n v. Entergy Serv., Inc.*, 76 FERC ¶ 61,168, at 61,955 (1996) (“a ratemaking methodology proposed at the retail level ... does not govern the Commission's determinations of the appropriate ratemaking methodologies to be used in developing wholesale rates.”), *reh'g denied*, 80 FERC ¶ 61,282 (1997), *rev'd on other grounds*, 184 F.3d 892 (1999); see also, *Alabama Municipal Electric Authority v. Alabama Power Company and Southern Company Services, Inc.*, 119 FERC ¶ 61,286 at P 39 (2007) (rejecting argument that the Commission must use state-set rates as the Commission-jurisdictional rate, in part, because “that would turn a long-standing Congressionally-established and judicially-sanctioned regulatory scheme on its head.”)

Commission eliminated a right of first refusal created by a federal tariff. That federal ROFR would have allowed the transmission owner in the area where the transmission project is located the first right to build that project. In eliminating federal ROFR in conjunction with promoting competition for certain projects, the Commission asserted: “the history of Part II of the Federal Power Act [Sections 205 and 206] indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest.”¹⁴³ State ROFR laws contradict this policy by targeting the competitive solicitation process otherwise required by Order No. 1000 so that the incumbent utility can preserve its monopoly on building new facilities.

In *Northern Natural Gas Co. v. State Corporation Comm’n of Kansas*, the Court preempted a state law because the state law “aimed directly at interstate purchasers and wholesales for resale” – matters within FERC’s jurisdiction – and not at subjects left to the states to regulate, in that case requirements to produce natural gas.¹⁴⁴ State ROFR laws are aimed directly at regulating FERC-jurisdictional public utilities, both regional transmission organizations that regionally plan transmission projects and transmitting utilities that are entitled to receive regional cost allocation for regionally planned projects (*i.e.*, MEPS, MVPs, and interregional projects in MISO) pursuant to a transmission owner’s FERC-regulated annual transmission revenue requirement (“ATRR”).

States may argue that their ROFR laws are consistent with State jurisdiction over matters relating to siting, permitting, and construction of transmission facilities.¹⁴⁵ But by targeting the

¹⁴³ Order No. 1000 at P 286 (“stating that in eliminating federal rights of first refusal from Commission-jurisdictional tariffs and agreements, the Commission was acting in accordance with our duty to maintain competition”).

¹⁴⁴ *Northern Nat. Gas Co.*, 372 U.S. 84, 94 (1963).

¹⁴⁵ Order No. 1000 at P 107, *see also* *Piedmont Environmental Council v Federal Energy Regulatory Commission*, 558 F.3d 304 (4th Circuit 2009) (states have traditionally assumed all jurisdiction to approve or deny permits for the siting and construction of electric transmission facilities.); *PacifiCorp*, 72 FERC ¶ 61087 (1995) (It is well-settled

projects approved for construction in a federally registered planning authority transmission plan, *i.e.*, projects subject to competitive solicitation under Order No. 1000, such laws stand as an intended and direct obstacle to the Commission setting just and reasonable interstate transmission rates as required by the Congress in the Federal Power Act.¹⁴⁶ Further, as noted above, Minnesota acknowledged its intent and indicated that if the Commission “were so inclined, it could prohibit MISO from recognizing state ROFR laws for electricity transmission.”¹⁴⁷ Therefore, any State arguments are meritless.

The Commission has the exclusive authority to regulate matters that involve the planning for transmission projects if they affect interstate transmission of electricity, including cost allocation and the circumstances under which Commission jurisdictional rates can be sought. For example, eminent domain laws are traditionally a matter of state authority. Yet, the Commission has decided that “it would be an impermissible barrier to entry to require, as part of the qualification criteria [for determining an entity’s eligibility to propose a transmission project for inclusion in the regional transmission plan], that a transmission developer demonstrate that it either has, or can obtain, state approvals necessary to operate in a state, including ... [conferral of] public utility status and the right to eminent domain.”¹⁴⁸

If States are regulating or legislating in a sphere or manner that conflicts with Congressional mandates, then the Commission must proceed to exercise its jurisdiction over the interstate transmission of electricity, even if doing so nullifies the practical effect and intent of State ROFR laws. When the Commission does find that exercising its jurisdiction does

that the Commission does not have authority over the siting and construction of electric transmission facilities that are not part of licensed hydroelectric projects.)

¹⁴⁶ See *NARUC*, 964 F.3d at 1187-1188.

¹⁴⁷ See Brief of Defendants-Appellees (State of Minnesota), *LSP Transmission v. Sieben*, Case No.18-2559 at p. 31 (8th Cir.) (filed Dec. 27, 2018).

¹⁴⁸ Order No. 1000-A at P 441; *see also MISO*, 819 F.3d at 337.

indirectly nullify a state’s law, if there is opposition, a reviewing court will likely concede that as long as the Commission did not aim or target matters that were directly reserved for state jurisdiction, the Commission acted reasonably.¹⁴⁹ The Complaint here merely asks that the Commission reconfirm that it has the exclusive jurisdiction to determine the manner in which the entity selected to develop transmission facilities in a Commission-jurisdictional transmission plan is selected, and thus the exclusive right to determine the entity entitled to use the regional cost allocation methodology and seek a Commission-jurisdictional transmission rate. To prevent unduly discriminatory practices presented through state ROFRs, the Commission, using its logic and findings in eliminating the federal ROFR, can determine that, to ensure FERC-jurisdictional rates are just and reasonable, the developer of transmission facilities in a regional transmission plan must be selected through competition and only the selected entity is entitled to FERC-jurisdictional regional cost allocation and to seek a Commission jurisdictional transmission rate for the competitively assigned portion of the project.

3. By Allowing State ROFRs to Shield Incumbent Transmission Owners from Competition and Preferentially Granting Incumbents the Exclusive Opportunity to Construct Transmission Projects Under the Federal Regulatory Regime, MISO’s Tariff Harms Transmission Development and Prevents More Cost-Effective, Efficient, Innovative Solutions, Thereby Resulting in Unjust and Unreasonable Rates.

The principal reason ROFRs are needed to protect incumbent interests is because non-incumbents may outbid incumbents in MISO’s competitive selection process for interstate transmission projects. In other words, ROFRs are economically inefficient by design.¹⁵⁰ By inhibiting a competitive bidding process, and thus ensuring more cost-efficient proposals are unable to be selected, MISO’s mandated adherence to a State ROFR will increase rates across

¹⁴⁹ See *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 776-7 (U.S. 2016) (citing *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. at 373, 385 (2015)).

¹⁵⁰ See *Hughes v. Talen Energy Mktg.*, 578 U.S. 150, 163–66 (2016).

the regional corridor without delivering either local or region-wide benefits. State ROFR laws hamper and detrimentally impact the ability of the Commission to determine just and reasonable rates by excluding more efficient, more innovative, and more cost-effective developers of a long-range transmission projects.¹⁵¹

In Order No. 1000, the Commission noted that “it is not in the economic self-interest of incumbent transmission providers to permit new entrants to develop transmission facilities, even if proposals submitted by new entrants would result in a more efficient or cost-effective solution to the region’s needs,” and therefore that removing ROFR requirements at the RTO/ISO level could result in benefits of competition in transmission development, and associated potential savings.¹⁵² Even the United States Department of Justice has recognized that state ROFR requirements “similarly reduce competition and thereby harm consumers.”¹⁵³ Commissioner Clements, in a recent concurrence, observed: “it is hard to imagine how [the ISO/RTO] can leverage competitive forces in the planning process for consumers’ benefits if [transmission owners] are permitted to stifle competition through their exercise of rights of first refusal over upgrades within a new transmission facility project.”¹⁵⁴

As the court noted in *South Carolina Public Service Authority v. FERC*, when Order No. 1000 was challenged, the Commission eliminated federal ROFR requirements because it “concluded that the economic self-interest of electric transmission monopolists lay in denying transmission or offering it only on inferior terms to emerging competitors.”¹⁵⁵

¹⁵¹ Section IV.C of this Complaint details the benefits of transmission competition and the need for such competition to provide the Commission with a full opportunity to ensure that the costs of FERC-jurisdictional transmission rates are just and reasonable.

¹⁵² Order No. 1000 at PP 284-285, 313.

¹⁵³ *Letter of the U.S. Department of Justice Antitrust Division to the Honorable Travis Clardy*, April 19, 2019.

¹⁵⁴ *Order on Petition for Declaratory Order*, 175 FERC ¶ 61,038 (April 15, 2021). (Clements, concurring).

¹⁵⁵ *South Carolina*, 762 F.2d at 50.

In *MISO Transmission Owners v. FERC*, the Seventh Circuit observed:

[a] market that can support only one firm because conditions of supply and demand leave room for no more—what is called a “natural monopoly”—has no need for a right of first refusal. Such a right implies a possibility of entry (why otherwise create such a right?)—in other words room for an additional firm or firms, yet the right enables the incumbent firm to ward off entry.¹⁵⁶

Transmission utilities were unsuccessful in retaining a contractual right to divide the market because, as the Seventh Circuit observed, “[n]either in their briefs nor at oral argument were they able to articulate any benefit that such a right would. . . confer on consumers of electricity or on society as a whole under current conditions.”¹⁵⁷

In Order No. 1000, the Commission found that “an incumbent transmission provider’s ability to use a right of first refusal to act in its own economic self-interest may discourage new entrants from proposing new transmission projects in the regional transmission planning process,”¹⁵⁸ an outcome that can “undermine the identification and evaluation of more efficient or cost-effective solutions to regional transmission needs.”¹⁵⁹ By limiting competitive solutions and options for project routing and project scope available to the regional planner, State ROFR laws can undermine identification and evaluation of more efficient or cost-effective solutions to regional transmission needs.

In short, State ROFR requirements prevent optimal development of new transmission infrastructure. As the D.C. Circuit Court of Appeals has observed:

[B]asic economic principles make clear that rights of first refusal are likely to have a direct effect on the costs of transmission facilities because they erect a barrier to entry:

¹⁵⁶ *MISO Transmission Owners v. FERC*, 819 F.3d 329, at 333 (7th Cir. 2016).

¹⁵⁷ *Id.*

¹⁵⁸ Order No. 1000 at P 256.

¹⁵⁹ *Id.* at P 253.

namely, non-incumbents are unlikely to participate in the transmission development market because they will rarely be able to enjoy the fruits of their efforts.¹⁶⁰

In addition, the current framework for planning out the transmission system encourages alteration of transmission projects in order to allow a ROFR to apply. MISO is required to break regional projects into smaller ownership pieces if the project crosses a state line in a state with a ROFR law in order to bring the project within the scope of the ROFR law, which inhibits the construction of large, multi-state projects.¹⁶¹ The existence of ROFR requirements can also impede cooperation among stakeholders necessary to support regionally cost allocated projects. These worrisome trends necessitate Commission action, especially given substantial need for further increases in transmission investment (*i.e.*, \$10.4 billion in Tranche 1 in MISO) in response to growing renewable energy generation. The Commission should explicitly prohibit MISO from applying State ROFRs in its regional transmission planning and cost allocation processes.

4. Because Transmission Costs Are Regionally Shared Among Several States, a State ROFR Increases Costs for Transmission Customers in Other MISO States and Frustrates the Efforts of Non-ROFR States to Pursue Competition.

State ROFR laws are effective at protecting incumbent transmission owners, nullifying otherwise required competition under MISO's Attachment FF, and increasing costs to consumers, not only in the state in which the ROFR law is enacted, but in neighboring states where the new transmission project is to be cost-shared. In Tranche 1 of MISO's LTRP, all of the states in the MISO North/Central region are impacted by State ROFRs because of region-

¹⁶⁰ *S. C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 74 (D.C. Cir. 2014).

¹⁶¹ For example, see Project ID 17 in MISO MTEP21 Final Draft Addendum Appendix A where a new 127 mile greenfield 345 kV transmission line is proposed to be broken up into a 55 mile competitive segment in Indiana and a 72 mile non-competitive segment in Michigan based on a Michigan ROFR law passed in 2021. The project also demonstrates the difficult position MISO is put in by being required to interpret whether the Michigan ROFR provision applies to a new greenfield transmission facility is that facility does not connect to existing incumbent facilities but instead requires the construction of a new substation.

wide cost allocation for the transmission projects under the MVP cost allocation methodology. Accordingly, State policy choices that are implemented through ROFRs impede the ability of other states to fully implement their policies that support transmission competition. States in the MISO region do not enjoy jurisdictional rights under the FPA and the federal energy regulatory regime to determine the entity entitled to use the regional cost allocation, yet MISO's Tariff provides them with precisely that authority. And as applied in MISO currently, a State would be permitted to impose its regional cost allocation decision on another State. The Commission is best-situated to prevent such imposition. As such, the situation is little different than the multitude of cases where the Commission found it necessary to ensure that one state's policy choice did not interfere with another state's choices or result in unjust and unreasonable regional rates.¹⁶²

When allowed to dictate circumvention of FERC-jurisdictional transmission competition, State ROFR laws are harmful to electric consumers, including electric consumers outside of the state that enacted the ROFR law. In *MISO Transmission Owners v. FERC*, the Seventh Circuit noted that under Minnesota's ROFR law, "[w]hen a regional transmission line connects to a Minnesota transmission owner's facilities, therefore, outsiders are not allowed to compete to build that line if the Minnesota transmission owner chooses to build it."¹⁶³ Because the scope of the State ROFR law includes projects with regional cost allocation, it means that a State ROFR raises rates and risks not only for residents of the ROFR State itself, but also for residents of

¹⁶² See e.g., *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, at P 143 (2011) ("2011 MOPR Order"), *reh'g denied*, 137 FERC ¶ 61,145, at P 3 (2011) ("2011 MOPR Rehearing Order") (finding "Our intent is not to pass judgment on state and local policies and objectives with regard to the development of new capacity resources, or unreasonably interfere with those objectives. We are forced to act, however, when subsidized entry supported by one state's or locality's policies has the effect of disrupting the competitive price signals that PJM's [capacity auction] is designed to produce, and that PJM as a whole, including other states, rely on to attract sufficient capacity") *aff'd sub nom. New Jersey Bd. of Pub. Util. v. FERC*, 744 F.3d 74 (3rd Cir. 2014).

¹⁶³ *MISO Transmission Owners v. FERC*, 819 F.3d 329, 336 (7th Cir. 2016).

other, neighboring states who must help pay for the project. These anti-competitive actions frustrate and undermine efforts by other states to promote transmission competition. States in MISO, like Wisconsin, and elsewhere in the country¹⁶⁴ have explicitly rejected attempts to enact ROFR requirements and have passed laws *increasing* competition for electric transmission.

Allowing State ROFR laws to impact Commission-jurisdictional transmission competition results in unfair and discriminatory rates, as consumers are forced to pay higher rates to recoup the inflated costs and risk shifts that come from a lack of competition in transmission projects. For example, consider two neighboring states – State A and State B. State A has a ROFR requirement, while State B does not. Where a transmission project involving cost allocation between both states falls under State A’s ROFR requirement, Commission jurisdictional cost allocation rules will dictate the portion of the higher costs due to the ROFR that will be passed on to consumers in State B. By contrast, where a project with cost allocation between both states does not fall under State A’s ROFR requirement, consumers in State A receive the benefit of the competition reduced costs allocated to it under those same Commission jurisdictional cost allocation rules. The result is that residents of State B must pay higher rates to benefit the policy preference of State A for incumbent transmission operators.

This is not merely a hypothetical. States have already resisted other states’ ROFR laws and demonstrated a proclivity for rejecting transmission lines that they believe do not benefit them. In some instances, states oppose other states’ ROFR laws because they adversely impact customers in multiple states, and further, any mismatches between costs and benefits in a state has resulted in some states denying authorizations for new transmission, which means that one state’s ROFR law impedes transmission development in other states. Any action that erodes the

¹⁶⁴ See Del. HB 127 (149th Gen. Assembly 2017-2018); Maryland SB 460 (2015).

net benefits of transmission development, especially excessive costs of the magnitude imposed on one state by another's ROFR, undermine state cooperation on transmission development. The discriminatory nature of state ROFR requirements has even provoked engagement from the United States Department of Justice, which has cautioned state legislatures contemplating enacting ROFR requirements that the laws reduce competition and harm consumers.¹⁶⁵ The most straightforward way to remedy the discriminatory rates brought about by State ROFR requirements – and protect one state from another state's anti-competitive practice in interstate commerce – is for the Commission to proactively prevent FERC-regulated ISOs and RTOs from including language in their tariffs that accommodates or requires ISOs/RTOs to apply State ROFRs in their regional transmission planning processes and to require those RTOs/ISOs with such tariff provisions to remove them. Requiring MISO to disregard State ROFR laws in determining whether competition should occur and in competition evaluation would help assuage the aggravating tension between States, making it easier for different States to work together on needed transmission infrastructure buildouts. Additionally, a Commission order reiterating the scope of its exclusive jurisdiction with regard to the developer entitled to access regional cost allocation and Commission-jurisdictional transmission rates for interstate transmission facilities would help reduce the constant use of in-court and out-of-court resources to either facilitate or impede ROFR laws in the MISO region.

¹⁶⁵ “Letter of the U.S. Department of Justice Antitrust Division to the Honorable Travis Clardy,” Department of Justice, April 19, 2019. See [Comments on Texas House Bill 3995 \(justice.gov\)](#)

a. Impact in a Non-ROFR State: Wisconsin

Wisconsin's electric rates have been well above the Midwest average since 2003 and continue to be above the national average.¹⁶⁶ Transmission costs have been a major contributing factor in Wisconsin's persistently high rates. Transmission has steadily grown and now makes up a significant and growing line item on electricity bills in Wisconsin. According to the Public Service Commission of Wisconsin's Strategic Energy Assessment issued in October 2020, transmission costs increased at an annual rate of 4.5% between 2009 and 2018.¹⁶⁷ Based on MISO's expectation that the LRTP investment could be up to \$100 billion, Wisconsin customers, particularly manufacturers who typically operate energy-intensive processes, are very concerned about the potential rate impacts associated with this unprecedented level of transmission investment. Wisconsin manufacturers cannot afford rate hikes due to unnecessary or wasteful spending caused by inefficient and uncompetitive transmission planning. Wisconsin's advocacy groups, including WIEG, have worked hard to remove barriers to competitive bidding in Wisconsin. Therefore, it is patently unfair for Wisconsin residents to be exposed to higher rates to benefit incumbent transmission operators in surrounding states with ROFR provisions, while on the other hand, residents in states with ROFR laws benefit from potentially competitively procured, cost effective projects in a non-ROFR state such as Wisconsin.

MISO's Tranche 1 includes \$5.5 billion of transmission investment that is subject to ROFR laws which will prevent customers from realizing millions of dollars in savings on an annual basis. Wisconsin has historically been exposed to approximately 13% cost share of

¹⁶⁶ For information in Wisconsin's electric costs, see the Strategic Energy Assessment Reports submitted by the Public Service Commission of Wisconsin. For the specific report regarding 2003, the docket is 05-ES-106. Strategic Energy Assessment, November 2012 in docket 05-ES-106, page 41.

¹⁶⁷Public Service Commission of Wis., Final Strategic Energy Assessment (Oct. 2020), <https://apps.psc.wi.gov/ERF/ERFview/viewdoc.aspx?docid=397611>

regional projects. Given that MISO's LRTP process is expected to result in up to \$100 billion in infrastructure investment, not only will transmission costs rise rapidly but so will the amount of projects not subject to competition due to State ROFR laws. To put this in perspective, assuming the same percentage share applicable as ROFR eligible projects as included in Tranche 1, and if the Commission does not require MISO to disregard State ROFR laws, \$53 billion of the \$100 billion could potentially be designated as ROFR projects and be excluded from the benefit from competitive bidding. Given the 100% socialization of the MVP cost allocation throughout the North and Central portion of the MISO footprint, Wisconsin customers served by American Transmission Company, LLC (ATCLLC) would be asked to pay for roughly \$6.7 billion or 13% of the investment. To put this in context, most Wisconsin customers pay Network Integration Transmission Service ("NITS") Schedule 9 charges associated with ATCLLC, whose typical average annual investment cost is \$400 million per year.¹⁶⁸ Underwriting investment worth \$6.78 billion is approximately 17 times more than ATCLLC annual investment and will be layered as a high cost burden on top of ATCLLC's annual investment. The excess costs to Wisconsin consumers resulting from the lack of competition associated with paying costs associated with \$6.78 billion in investment from states restricting competition due to ROFR could easily reach into the billions from cost overruns and lack of cost containment measures/concessions over time. The preferential ROFR treatment to incumbent monopoly utilities saddles Wisconsin customers with underwriting high and unprecedented levels of investment with no cost controls or safeguards against unnecessary rate hikes.

¹⁶⁸ See [Introduction | ATC 10 Year Assessment - 2021 \(atc10yearplan.com\)](#) (last visited July 19, 2022)

b. Impact in a ROFR State: Iowa

Like Wisconsin electric consumers, Iowa electric consumers are bearing substantial cost burdens imposed by the lack of competition for new transmission project development and construction. Unlike their Wisconsin counterparts, however, Iowa consumers are experiencing the “double whammy” of excess costs caused by other states’ ROFR statutes *and* its own ROFR statute.

For example, the Huntley-Wilmarth Project (“Huntley Project”) is a new 50-mile transmission line connecting two substations in Minnesota that was constructed by two incumbent transmission owners pursuant to Minnesota’s ROFR statute.¹⁶⁹ In 2016, MISO designated the Huntley Project as a Market Efficiency Project, meaning that its costs (estimated at \$108 million) would be shared throughout the MISO-North/Central region. Approximately half of these costs were projected to be allocated to customers of Iowa utilities.¹⁷⁰ When the Huntley Project was planned and permitted, Iowa law permitted competition for new transmission projects. In fact, Iowa’s General Assembly defeated a ROFR bill in 2018. Minnesota’s choice to enact a ROFR statute imposed the burden of unnecessarily increased costs on Iowa consumers at a time when Iowa law did not impose a similar burden on Minnesota consumers and consumers in other states.¹⁷¹

¹⁶⁹ *MTEP 16: MISO Transmission Expansion Plan*, available at <https://www.misoenergy.org/planning/planning/previous-mtep-reports/#t=10&p=0&s=FileName&sd=desc> (last accessed July 22, 2022), at pp. 110-112. Minnesota’s ROFR statute is codified at Minn. Stat. §216B.246.

¹⁷⁰ *Id.*, Appendix A1 A2 A3 Spreadsheet, Tab A-1. ITC Midwest customers (most of which are located in Iowa) were allocated \$21,874,935 of these estimated costs and customers of MidAmerican Energy Company were allocated \$31,866,974).

¹⁷¹ The Minnesota Public Utilities Commission approved the Huntley Project’s certificate of public convenience and necessity on August 5, 2019. <https://mn.gov/eera/web/project/545/> (last accessed July 22, 2022).

This asymmetry did not last. Iowa enacted its own ROFR statute in 2020.¹⁷² Like other ROFR laws, Iowa’s ROFR statute insulates the state’s incumbent transmission utilities from competition for development and construction of new transmission system expansion projects. The statute’s potential effects are considerable. Nearly \$1.8 billion of Iowa projects are included in MISO’s Tranche 1.¹⁷³ Major portions of these projects would be eligible for competition under MISO’s Competitive Transmission Process if Iowa’s ROFR had not been enacted.¹⁷⁴ As it is, however, Iowa’s consumers will be compelled to pay for these projects without the demonstrated, cost-reducing benefits of competition.

Imposing such burdens exacerbates the extraordinarily high transmission rate increases Iowa consumers have experienced for more than a decade. Since 2008, ITC Midwest LLC (“ITC Midwest”), the primary provider of Network Integration Transmission Service (“NITS”) for co-complainant RPGI increased its rate base from \$367.8 million to \$3.263 billion in 2022, a cumulative increase of nearly 789%, the largest percentage rate base increase of any transmission utility in the MISO North and Central regions.¹⁷⁵ As ITC Midwest’s rate base has grown, its

¹⁷² Iowa Senate Journal, 88th General Assembly Reg. Sess. 840 (June 14, 2020). Soon after the ROFR statute was enacted, two competitive transmission project developers challenged it as violating the single-subject and title clauses and the privileges and immunity clauses of the Iowa Constitution. *LS Power Midcontinent, LLC v. State*, Case No. CVCV060840 (before the District Court of Polk, County, Iowa). Following an adverse procedural ruling by the district court and the Iowa Court of Appeals, the plaintiffs have sought review by the Iowa Supreme Court. *LS Power Midcontinent, LLC v. State*, Case No. 21-0696 (before the Iowa Supreme Court). The developers have requested the Court to enjoin the statute’s enforcement temporarily to prevent irreparable harm before the case is decided on its merits.

¹⁷³ Iowa Projects in Tranche 1 include Project 7 (Webster to Morgan line at \$716 million), Project 8 (Beverly to Substation 92 line at \$178 million), and the Madison to Skunk River line at \$683 million). MTEP21 3rd Draft Long Range Transmission Planning Addendum Appendix Annotated, Project Tab and Facilities Tab, *available at* <https://www.misoenergy.org/planning/planning/mtep21/> (last accessed July 21, 2022).

¹⁷⁴ Under MISO’s current Attachment FF, a 53-mile portion of Project 12’s new transmission line would be eligible for competition because it requires a new transmission cable on new support structures. Attachment FF §VIII.A.

¹⁷⁵ These data are taken from ITC Midwest’s Attachment O filings for January of each year since 2008, which are available at https://www.oasis.oati.com/woa/docs/ITCM/ITCMdocs/ITCMW_proj_rate.html (last visited on July 22, 2022).

zonal NITS rates rose from \$2.65 per kW/month in 2008 to \$11.666 per kW/month in 2022, a cumulative increase of 339.56%.¹⁷⁶

During the same period, transmission costs have comprised an increasing percentage of RPGI's total wholesale electric costs. Currently, transmission and ancillary services constitute approximately 43% of such costs, as compared to 18.1% in 2009. These increases, combined with the resulting disparity between ITC Midwest's zonal NITS rates and those of MidAmerican Energy Transmission Company ("MidAmerican"), have incentivized RPGI members located anywhere near MidAmerican's territory to bypass ITC Midwest by whatever means possible including the construction of otherwise *uneconomic* transmission lines. Other RPGI members interconnected to the Southwest Power Pool's transmission system have chosen to wheel power from MISO into SPP using MISO's point-to-point transmission rates, which, at \$4.223 per kW/month, are substantially lower than ITC Midwest's zonal NITS rates. RPGI members without these options, however, must pass the increased costs on to their customers, impairing municipal economic development programs and eliminating any cost benefits resulting from lower cost energy supplies.

Granting the relief sought by this Complaint will not resolve all of these economic dislocations or lift all of these burdens. However, it would permit competitive forces to reduce costs where possible and assure Iowa consumers that the reasonableness of the costs they pay for new transmission infrastructure are the results of a competitive process that optimized cost and technical approach.

¹⁷⁶ RPGI, on behalf of its members, does not pay ITC Midwest's full NITS rates, but rather pays the ITC Midwest's Zonal NITS rates, which are slightly lower than the ITC Midwest-only rates. The zonal rate is an average rate that is calculated based on the weighted average of the rates of ITC Midwest and seven other much smaller MISO transmission utilities that are located in the ITCM Transmission Rate Zone. ITC Midwest's rates comprise 85% of the weighted average cost.

B. The MISO Tariff Attachment FF Provision that Requires MISO to Acknowledge and Apply State ROFR Laws – Thereby Excluding Projects in those States from Competition – Is Unjust, Unreasonable, and Unduly Discriminatory or Preferential Because it Facilitates Unjust and Unreasonable Rate Outcomes in Violation of the Federal Power Act.

Section III.A1.1 in Attachment FF of MISO’s Tariff broadly requires MISO “shall comply with any Applicable Laws and Regulations granting a right of first refusal to a Transmission Owner.”¹⁷⁷ As a result of the broad language in Section III.A.1., MISO automatically bypasses the Competitive Transmission Process for any and all regional projects located in States or Localities with ROFR laws, regardless of how flagrantly that State or Local law may target or interfere with the Commission’s jurisdiction or MISO’s obligations as a FERC-regulated ISO. MISO’s Tariff is unjust and unreasonable because it requires MISO to broadly apply a State law granting a ROFR to an incumbent Transmission Owner to exclusively build a transmission project with MISO-established regional cost allocation and thereby establish a FERC-jurisdictional rate for that project, even though the State ROFR law targets and conflicts with FERC’s jurisdiction and rules/policies on transmission competition.

In 2013, the Commission initially rejected MISO’s proposed tariff provisions in Section VIII.A.1. that not only allow, but require MISO to accommodate and apply State ROFR laws in MISO’s transmission planning. Specifically, the Commission held:

We find that, as discussed further below, MISO’s proposed new provision at section VIII.A of Attachment FF—State or Local Rights of First Refusal must be removed from its Tariff. . . . **However, MISO’s proposal goes beyond mere reference to state or local laws or regulations; it references state and local laws and then uses that reference to create a federal right of first refusal.** Order No. 1000 does not permit a public utility transmission provider to add a federal right of first refusal for a new facility based on state law.¹⁷⁸

¹⁷⁷ MISO Tariff, Attachment FF, Section VIII.A.1. (State or Local Rights of First Refusal).

¹⁷⁸ *Midwest Independent Transmission System Operator, Inc.*, 142 FERC ¶ 61,215, at P 205 (2013) (emphasis added) (hereinafter “Initial Attachment FF Order”).

However, on rehearing, the Commission accepted the provision deferring to State ROFR laws thereby deferring competition, accepting arguments that the provision “merely acknowledges state and local laws and regulations and does not create a federal right of first refusal.”¹⁷⁹ On rehearing, the Commission reiterated its view on the federal ROFR, asserting: “Nothing has changed the Commission’s view that Order No. 1000’s requirement to remove federal rights of first refusal is in the public interest.”¹⁸⁰ The Seventh Circuit upheld FERC’s abrogation of the federal ROFR in the MISO Transmission Owners’ Agreement, concluding that the [MISO transmission owners] “made no effort to show that the [federal ROFR] is in the public interest.”¹⁸¹ However, the Court deferred to FERC’s determination to allow MISO to accommodate State ROFRs because Order No. 1000 did not intend to “limit, preempt, or otherwise affect state or local laws with **respect to construction of transmission facilities.**”¹⁸²

In the Attachment FF Rehearing Order, the Commission affirmed the elimination of the federal ROFR but concluded that, on balance, the Commission should not prohibit MISO from recognizing state and local regulations because Order No. 1000 did not intend to “limit, preempt, or otherwise affect state or local laws with **respect to construction of transmission facilities.**”¹⁸³ In a third order on compliance and subsequent rehearing, the Commission explained that Order No. 1000’s focus is on the federal ROFR provisions in FERC-jurisdictional tariffs, and that “Order No. 1000 does not require removal from Commission jurisdictional tariffs or agreements references to state or local laws or regulations with respect to construction of

¹⁷⁹ *Midwest Independent Transmission System Operator, Inc.*, 147 FERC ¶61,127, at P 147 (2014) (“Attachment FF Rehearing Order”).

¹⁸⁰ Attachment FF Rehearing Order, at P 148.

¹⁸¹ *MISO Transmission Owners v. FERC*, 819 F.3d 329, 333-335 (7th Cir. 2016).

¹⁸² *MISO Transmission Owners*, 819 F.3d, at 336 (citing Order No. 1000 at P 227) (emphasis added).

¹⁸³ Attachment FF Rehearing Order, at P 149.

transmission facilities, **including but not limited to authority over siting or permitting of transmission facilities.**”¹⁸⁴ The Seventh Circuit strongly criticized federal ROFRs and refused to find that a federal ROFR is reasonable as requested by the MISO Transmission Owners;¹⁸⁵

Accordingly, Commission and appellate precedent on the Attachment FF provisions in MISO’s Tariff has focused on deferring to State laws concerning siting, permitting, and construction of transmission facilities. Importantly, while the Commission sought to balance State and federal interests,¹⁸⁶ the Commission did not intend to, nor could it, cede transmission cost allocation or rate jurisdiction to the States or to allow the States to markedly interfere with the transmission competition findings, policies, and objectives of Order No. 1000.

Now, it is clear that while a robust regional planning process may establish a more efficient or cost-effective project than if that process were not present, the planning process alone cannot meet the Commission’s obligation to ensure just and reasonable rates if competition is viable but avoided. Competitive solicitations held to date prove that competition lowers costs and risks of transmission development in ways that no other mechanism can. Thus, rates arrived at outside such available competition are by definition excessive and therefore unjust and unreasonable. This is particularly true where the burdens of State ROFR requirements are allowed to apply to regionally cost allocated projects and thus do not fall solely on customers within ROFR states. The Commission has a duty under the FPA to require MISO to disregard state ROFR laws when determining the more efficient or cost-effective developer of transmission facilities subject to regional cost allocation as to do otherwise allows such state preferences to that needlessly raise costs to consumers by raising Commission jurisdictional rates by unfairly

¹⁸⁴ *Midwest Independent Transmission System Operator, Inc.*, 150 FERC ¶ 61,037, at P 25 (2015) (emphasis added) (citing Order No. 1000 at P 227) (hereinafter “Third Compliance Order”).

¹⁸⁵ *MISO Transmission Owners*, 819 F.3d, at 333-335.

¹⁸⁶ *See* Attachment FF Rehearing Order at P 149.

and discriminatorily disadvantage non-incumbents developers.¹⁸⁷ Given the \$5.5 billion that is currently slated to be protected by ROFRs in Tranche 1 of MISO’s LRTP, the costs at issue are far from modest, and so the time is ripe for the Commission to act.

1. Attachment FF is Unjust and Unreasonable Because It Broadly Requires MISO to Apply State ROFRs that Conflict with FERC’s Jurisdiction and Ability to Determine Just and Reasonable Rates for Transmission.

a. FERC’s Prior Assumptions and Conclusions About Attachment FF’s ROFR Provisions Warrant Reexamination Because Those Provisions Will Prevent Efficient and Cost-Effective Transmission Planning and Investment in MISO.

The Commission and MISO have ample experience with the provisions in Attachment FF that have accommodated ROFRs and facilitated unjust and unreasonable rate outcomes in MISO and are poised to be applied to \$5.5 billion in projects in Tranche 1 of MISO’s LRTP. The fact that the Commission previously accepted the Attachment FF provisions does not preclude the Commission from reexamining the Tariff provisions, especially in light of the changed circumstances and new information available to the Commission since 2013-2014.¹⁸⁸

Whether it originates in a FERC-approved tariff or a State law, a ROFR is a ROFR and has the same intended objective and effect – prohibiting transmission competition to grant preferential treatment to incumbents, thereby harming both consumers by discriminating against non-incumbent developers. In Order No. 1000, the Commission determined that federal ROFRs in FERC-approved tariffs/agreements impacted “competition and in turn the rates for jurisdictional

¹⁸⁷ See *Illinois Commerce Commission v. FERC*, 576 F.3d 470, 476 (7th Cir.2009) (“FERC is not authorized to approve a pricing scheme that requires a group of utilities to pay for facilities from which its members derive no benefits, or benefits that are trivial in relation to the costs sought to be shifted to its members.”).

¹⁸⁸ *Massachusetts Municipal Wholesale Electric Company (MMWEC) v. Northeast Utilities Service Company*, 58 FERC ¶ 61,202 (1992) (“We believe that MMWEC more than adequately has demonstrated the existence of changed circumstances warranting the institution of a hearing.”); *California Indep. Sys. Operator Corp.*, 129 FERC ¶ 61,144, at P 4 (2009) (instituting a section 206 investigation upon finding that, due to changes in circumstances, the Exceptional Dispatch provisions of the MRTU Tariff may no longer be just and reasonable. *Old Dominion Elec. Coop. & Direct Energy Bus., LLC on Behalf of Itself & Its Affiliate, Direct Energy Bus. Mktg., LLC & Am. Mun. Power, Inc.*, 164 FERC ¶ 61,116, at P 17 (2018) (citing *Oxy USA Inc. v. FERC*, 64 F.3d 679, 690 (D.C. Cir. 1995)) (“The fact that a rate once found to be reasonable does not preclude a finding of unreasonable in a subsequent proceeding.” (internal quotations omitted)).

transmission services.”¹⁸⁹ The Commission, as affirmed by the Seventh Circuit and the D.C. Circuit, has already determined that removal of federal ROFRs from ISO/RTO tariffs/agreements is in the public interest.¹⁹⁰ Using the same logic and rationale along with evidence of the benefits of competition and efforts by States and incumbents to target Order No. 1000, taking advantage of MISO’s lenient and accommodative tariff provisions in Attachment FF, the Commission must now reevaluate whether the MISO Tariff’s acquiescence to State ROFR determinations in determining whether competition is necessary remains just and reasonable and in the public interest.

In the Third Compliance Order on Attachment FF,¹⁹¹ the Commission emphasized the following points, which now warrant reexamination and reconsideration, given the changes circumstances:

- **We disagree...that the Second Compliance Order “abdicates” the Commission’s statutory responsibility to determine what transmission solution and transmission developer is eligible for regional cost allocation and to ensure that the rates for that transmission project are just and reasonable** and allows states to dictate to the Commission which transmission developers are eligible for regional cost allocation . . . With respect to LS Power’s argument that the Commission will not be in a position to determine if the rates are in fact just and reasonable, **we reiterate that Order No. 1000 ensure[s] that the Commission’s transmission planning and cost allocation requirements are adequate to support more efficient and cost-effective investment decisions moving forward.**¹⁹²
- . . . We continue to ‘recognize that, even if a transmission project is subject to a state right of first refusal, **the regional transmission planning process still results in the selection for planning and cost allocation purposes of**

¹⁸⁹ Order No. 1000 at P 285.

¹⁹⁰ *South Carolina*, 762 F.3d at 72 (citing Order No. 1000 at PP 228-230 (further noting that higher costs would be passed on to consumers, yielding rates that are not just and reasonable in violation of the FPA); *MISO Transmission Owners*, 819 F.3d at 333-335.

¹⁹¹ *Midwest Independent Transmission System Operator, Inc.*, 150 FERC ¶ 61,037 at P 30 (2015) (hereinafter “Attachment FF Third Compliance Order”).

¹⁹² Attachment FF Third Compliance Order at P 30 (emphasis added) (quotations and footnotes omitted).

transmission projects that are more efficient or cost-effective than would have been developed but for such processes.’¹⁹³

- . . . We reiterate that, while Order No. 1000 sought to remove barriers to competition in regional transmission planning processes, **it did not purport to address every barrier to participation by nonincumbent transmission developers and did not address all disincentives to competition in the regional transmission planning process.**¹⁹⁴

Contrary to the Commission’s prior assumptions about Attachment FF, this Complaint demonstrates that the accommodation of State ROFRs in MISO’s Tariff has prevented the Commission and MISO from fully implementing Order No. 1000 requirements that ensure that “the Commission’s transmission planning and cost allocation requirements are adequate to support more efficient and cost-effective investment decisions moving forward.”¹⁹⁵ This Complaint demonstrates that the planning process, envisioned by Order No. 1000, will not automatically lead to a just and reasonable rate outcomes without competition where competition is viable. Simply put, the Commission’s suppositions around MISO Attachment FF and Order No. 1000 have not proven the test of time. While the Commission asserted that Order No. 1000 “ensures...transmission planning and cost allocation requirements...adequate to support more efficient and cost-effective investment decisions moving forward,”¹⁹⁶ the State ROFR requirement in Attachment FF facilitates unjust and unreasonable rates, yielded inefficient planning solutions and investment decisions that are not the most cost-effective, and impeded the Commission’s ability to fully exercise its jurisdiction over transmission regional cost allocation and rates. The Commission has an obligation under Section 206 of the Federal Power Act to

¹⁹³ Attachment FF Third Compliance Order at P 32 (emphasis added) (quotations and footnotes omitted).

¹⁹⁴ Attachment FF Third Compliance Order at P 33 (emphasis added) (quotations and footnotes omitted).

¹⁹⁵ Attachment FF Third Compliance Order at P 30 (emphasis added) (quotations and footnotes omitted).

¹⁹⁶ Attachment FF Third Compliance Order at P 30 (emphasis added).

strengthen Order No. 1000's important, and accurate, findings on transmission competition by ordering MISO to remove requirement in Attachment FF that mandates that MISO implement the State ROFR policy choices thereby foregoing competition for determination of the developer for regionally cost allocated MISO planned project, harming consumers.

b. Incumbents and States Have Sought to Circumvent the Commission's Transmission Cost Allocation and Rate Jurisdiction Since the Issuance of Order No. 1000, Including With Acceptance of Attachment FF.

In issuing Order No. 1000 and in accepting MISO's Attachment FF ROFR Tariff provisions, the Commission likely did not envision the degree to which State ROFRs would proliferate in the MISO region and make transmission expansion, planning, and investment so expensive in the absence of competition. The Commission also may not have envisioned the billions of planned transmission spending in MISO and the accelerated changes in the generation fleet in the MISO region.¹⁹⁷ The accommodation of ROFR laws in Attachment FF has facilitated an ongoing State-level assault on FERC Order No. 1000 and the circumvention of FERC's jurisdiction by incumbent utilities seeking (and States granting) preferential advantages to in-state incumbent utilities to the detriment of competitive transmission developers and consumers throughout the MISO region.

Order No. 1000 has had less of an impact than originally hoped and envisioned in MISO. Since MISO's competitive solicitation process went into effect, it has only solicited competitive

¹⁹⁷ The point of renewable wind and solar generation is often distant from the load centers that consume the electricity, thereby necessitating major enhancements and expansions to the MISO transmission system to connect many of these new generation facilities over a wide geographic area to load centers. See MISO Renewable Integration Impact Assessment, available here [Renewable Integration Impact Assessment \(misoenergy.org\)](https://www.misoenergy.org/RIIA) (last accessed July 13, 2022).

bids for three projects.¹⁹⁸ The MISO States with ROFRs passed their ROFR laws after the Commission's issuance its proposed rulemaking in 2010 (that culminated in Order No. 1000):

- The first ROFR in the MISO service territory was enacted by South Dakota in 2011. The South Dakota ROFR allows incumbent utilities in the state ninety days to provide the South Dakota Commission with notice of its intention to construct, own, and maintain the electric transmission line.¹⁹⁹
- Minnesota enacted its ROFR on April 18, 2012. The Minnesota statute provides incumbent electric transmission owners the right to construct, own, and maintain an electric transmission line that has been approved by a federally registered planning authority transmission plan and connects to facilities owned by that incumbent electric transmission owner.²⁰⁰
- North Dakota enacted a ROFR in 2013. North Dakota, like South Dakota, provided incumbent utilities in North Dakota 90 days to provide the North Dakota Public Service Commission notice of its decision of whether the incumbent utility will construct a transmission line.²⁰¹
- Indiana enacted a ROFR in 2013. The Indiana statute provides that an incumbent transmission owner has the right to construct, own, and maintain an electric line that has been approved by in a federally registered planning authority (*i.e.*, MISO) and which connects with an electric transmission facility owned by the incumbent transmission owner.²⁰²
- Montana provided the ROFR to its incumbent utilities in 2017 with the enactment of House Bill 297. Incumbent utilities are required to provide notice to the federally registered planning authority if the incumbent utility opts to waive its right to “construct, own, and maintain” and electric transmission line.”²⁰³
- Iowa enacted its ROFR in 2020, after twice failing to enact one, providing incumbent electric transmission owners the right to construct, own, and maintain an electric transmission line. Importantly, the statute provides that right to

¹⁹⁸ See “Competitive Transmission Update,” MISO (Mar. 24, 2020) (explaining that the three regionally cost shared projects are Duff-Coleman, Huntley-Wilmarth, and Harburg-Sabine), available at [Competitive Transmission Update \(misoenergy.org\)](https://www.misoenergy.org) (last accessed July 21, 2022).

¹⁹⁹ S.D. Codified Laws § 49-32-20.

²⁰⁰ Minn. Stat. § 216B.246(2).

²⁰¹ N.D. Cent. Code § 49-03-02(2).

²⁰² Burns Ind. Code Ann. § 8-1-38-9(a).

²⁰³ MCA § 69-5-202(2).

incumbent utilities for federally registered planning authority's (*i.e.*, MISO) transmission plan.²⁰⁴

- Michigan enacted a ROFR in 2021. The Michigan statute provides incumbent utilities the right to “construct, own, operate, maintain, and control a regionally cost-shared transmission line.”²⁰⁵ Importantly, the statute explicitly provides that the project will be cost-shared and that the plan would have been developed by a recognized planning authority (*i.e.*, MISO or PJM) for the incumbent electric transmission company.
- Texas also enacted its current ROFR statute in 2021, replacing one enacted in 2019 following MISO's selection of a non-incumbent developer. Texas' statute prohibits the Public Utilities Commission from permitting for build[ing], owning, or operat[ion] of a transmission facility²⁰⁶ for an entity outside of an incumbent utility prior to the incumbent providing written notice the incumbent's decision to decline construction.
- The State of Missouri considered its own ROFR statute. On December 2, 2021, Representative Hicks introduced House Bill 1811 before the Missouri General Assembly. The bill would permit for an incumbent electric transmission owner to own, construct, and maintain an electric transmission line. The Bill has not passed at this time.²⁰⁷
- Legislators in Wisconsin proposed legislation that would have provided a ROFR for planned transmission projects that connect existing transmission infrastructure also owned by incumbent utilities. The Bill directly targeted approved transmission plans from MISO, as the text explicitly provided the ROFR applied to “transmission projects approved by MISO.”²⁰⁸ The bill failed to pass pursuant to Senate Joint Resolution 1 March 15, 2022, in large part due to the efforts of Complainant WIEG and other pro-consumer and pro-competition groups.

Several of the above ROFRs explicitly target and interfere with FERC's jurisdiction over just and reasonable rates for electric transmission service and MISO's role as the regional transmission planner responsible for selecting more efficient and cost-effective solutions and developing cost allocation methodologies that assign costs in a manner that is roughly

²⁰⁴ Iowa Code §§ 478.16(2)-(3).

²⁰⁵ M.C.L.S. § 460.593 (1)(a)-(b).

²⁰⁶ Tex. Utilities Code § 37.056(e).

²⁰⁷ H.B. 1811, 101st Gen. Assemb., 2nd Reg. Sess. (Mo. 2022).

²⁰⁸ S.B. 838, 2021-2022 Session (Wi. 2022).

commensurate with benefits to consumers throughout the MISO region. Minnesota’s ROFR statute explicitly targets the federal energy regulatory scheme:

An incumbent electric transmission owner has the right to construct, own, and maintain an electric transmission line that has been approved for construction in a ***federally registered planning authority transmission plan*** and connects to facilities owned by that incumbent electric transmission owner.²⁰⁹

Minnesota’s ROFR statute is not limited to local land use, siting, construction, or permitting. Instead, the Minnesota ROFR explicitly affirms that the incumbent utility maintains “the right to construct, own, and maintain an electric transmission line that has been approved for construction in a ***federally registered planning authority transmission plan***.”²¹⁰ MISO and SPP are the intended federally-regulated planning authorities that oversee regional transmission projects relevant to Minnesota. Importantly, the annual transmission revenue requirement (“ATRR”) of incumbent transmission owners benefitting from these state preferences falls under FERC jurisdiction. By automatically subjecting consumers both inside and outside of Minnesota to the incumbent’s ATRR, which includes costs for building the interstate transmission line, the MISO Tariff’s deference to the Minnesota ROFR conflicts with and intrudes upon the Commission’s ratemaking jurisdiction.

Several of the MISO States’ ROFRs were enacted with the same intent of usurping MISO and FERC authority. In a hearing on January 25, 2017 on HB 297, Montana specifically targets the MISO/SPP Planning processes in only the eastern part of MISO and not the entire state of Montana.²¹¹ Montana’s statute explicitly provides that the incumbent utilities of the State have the “right to construct, own, and maintain an electric transmission line ... approved for

²⁰⁹ Minn. Stat. § 216B.246, Subd. 2 (emphasis added).

²¹⁰ *Id.* (emphasis added).

²¹¹ H.B. 297, 65th Legis. (Mont. 2017); https://leg.mt.gov/bills/2017/hb0299/HB0297_x.pdf.

construction by a federally registered planning authority.”²¹² Michigan’s statute explicitly provides incumbent utilities in Michigan a ROFR for (1) regionally cost-shared transmission line[s] ... planned by a recognized planning authority.²¹³ Transcripts of a Senate Bill 103 in Michigan provide that the Bill was intended to usurp Order 1000. Poignantly, the transcript shows that the intent of the bill was for “Michigan to determine who should build and invest in its transmission infrastructure, not the federal government or an RTO such as MISO.”²¹⁴ Similarly, South Dakota’s ROFR Statute provides the protection to transmission line projects “approved in a federally registered planning authority transmission plan.”²¹⁵

Given that these States are explicitly targeting FERC’s jurisdiction and the regional planning processes conducted by FERC-jurisdictional RTOs/ISOs, the Commission must reclaim its exclusive jurisdiction to determine the terms under which qualified transmission developers are selected to build regionally allocated projects.

c. The Results of Competition in MISO and Elsewhere Demonstrate that the ROFR Exemption in Attachment FF is Unjust and Unreasonable.

Unlike in 2013-2014 when its decisions were still based on economic theory, the Commission now has a record that includes ample RTO/ISO experience with the price-lowering benefits of competition. Sections V.A. and V.C. in this Complaint detail the legal support and analytical evidence demonstrating the need for transmission competition in establishing just and reasonable rates. The substantial investment in new transmission in the MISO region for long-range projects, starting in Tranche 1 of MISO’s LRTP, includes \$5.5 billion in projects protected under MISO’s existing tariff by State ROFR laws, thereby further demonstrating the criticality of

²¹² MCA § 69-5-202(2).

²¹³ M.C.L.S. § 460.593 (1)(a)-(b).

²¹⁴ Feb. 16, 2021 S.B. 103 Hearing of the Michigan Senate Energy and Technology Committee.

²¹⁵ S.D. Codified Laws § 49-32-20.

facilitating transmission competition at this time. MISO's regional transmission planning and the rates arising therefore will be more efficient and cost-effective with transmission competition.

The competition exemption in Attachment FF allows States to dictate the entity entitled to use regional cost allocation irrespective of whether the entitled incumbent utility is more efficient or cost effective than any potential non-incumbents. Accordingly, the Commission must revisit its prior conclusion in the Third Compliance Order that "even if a transmission project is subject to a state right of first refusal, the regional transmission planning process still results in the selection for planning and cost allocation purposes of transmission projects that are more efficient or cost-effective..."²¹⁶ Competition has proven that selection of the more efficient or cost-effective developer of the project identified by the planning process is an essential to the Commission's just and reasonable rate determination pursuant to section 206 of the FPA. In short, efficient planning alone cannot ensure just and reasonable rates when competition is viable.

Under the existing tariff, when a state ROFR law is in place, MISO is not able to engage in a fulsome planning and developer selection process. The planning process is less efficient as there is no incentive for non-incumbent developers to propose idea into the planning process in states with incumbent preferences if the MISO Tariff requires it to honor those preferences and forego competition. In explaining the Commission's rationale in removing federal ROFRs in Order No. 1000, the D.C. Circuit explained that deterring proposals from non-incumbents "would impede the identification of some cost-efficient projects, resulting in the development of

²¹⁶ Attachment FF Third Compliance Order at P 33.

transmission facilities ‘at a higher cost than necessary.’”²¹⁷ The D.C. Circuit recognized that ROFR requirements create bad incentives for transmission investment:

[B]asic economic principles make clear that rights of first refusal are likely to have a direct effect on the costs of transmission facilities because they erect a barrier to entry: namely, non-incumbents are unlikely to participate in the transmission development market because they will rarely be able to enjoy the fruits of their efforts.²¹⁸

Specific projects in MISO show the differences between those projects subject to competition and those which are just assigned to incumbent transmission owners. In 2016 MISO held a solicitation for a 345 kV market efficiency project referred to as the Duff-Coleman project. The chart below from MISO Selection Report for the Duff-Coleman Project²¹⁹ reflects rate concession proposals from all the solicitation respondents:²²⁰

Summary of Cost Caps, Concessions, and Commitments											
Uncertainty	101	102	103	104	105	106	107	108	109	110	111
ROE		✓		✓ ⁱ			✓	✓ ⁱⁱ	✓ ⁱⁱⁱ	✓	
Capital Structure		✓		✓						✓	
Implementation Costs	✓ ^{iv}	✓ ^v	✓	✓ ^{iv}		✓	✓	✓	✓ ^{iv}	✓	✓ ^{iv}
Operations and Maintenance Costs				✓							
Inflation Rate			✓	✓		✓		✓		✓	
Rate Concessions						✓					✓

- i Limited duration ROE cap
- ii Cap on weighted average cost of capital (includes ROE), limited duration
- iii No ROE cap, but will forego ROE incentive adders in initial FERC filing
- iv AFUDC is not included in the cap
- v Only a portion of construction costs are capped

²¹⁷ *South Carolina*, 762 F.3d at 72 (citing Order No. 1000 at PP 228-230 (further noting that higher costs would be passed on to consumers, yielding rates that are not just and reasonable in violation of the FPA).

²¹⁸ *South Carolina*, 762 F.3d at 74.

²¹⁹ Benefits of Competition Report at 34, footnote 53, *citing* Duff-Coleman Selection Report, available at: <https://cdn.misoenergy.org/Duff-Coleman%20EHV%20345kv%20Selection%20Report82339.pdf>.

²²⁰ *See* Duff-Coleman Selection Report at 26.

The above chart also shows that 10 of 11 respondents to the MISO solicitation provided some form of cost containment. “MISO noted that all of the proposals came in lower than MISO’s initial cost estimate and developers provided a range of cost caps, concessions, and commitments, including caps on construction costs.”²²¹ The non-incumbent developer selected provided a binding cost cap that “includes all project implementation costs, such as changes in the route, design, subsurface conditions, real estate costs, environmental mitigation, permitting requirements, escalation, and an allowance for funds used during construction (“AFUDC”) including the cost of debt and equity during construction.”²²² The proposal also contained a cap (but not a floor) on the return on equity for the life of the project and a limitation on the equity component in rates of 45% for the life of the project.

When MISO held a solicitation for Hartburg-Sabine Junction, its second market efficiency project, even more respondents provided rate reducing proposals because MISO had valued cost containment in its first solicitation. For Hartburg-Sabine Junction, 8 of the 11 proposals offered a return on equity of 9.8% or below and an equity percentage of 45% or below. In addition, 11 of the 12 proposals contained some form of cost cap.

The rate benefits of competitive solicitation may be compared to the Huntley-Wilmarth Project, a MISO market efficiency project directly assigned to Northern States Power and to ITC Midwest.²²³ The directly assigned project contains no construction containment provisions. MISO estimated the cost of the project as \$88 million to 108 million. The Commission reported

²²¹ *Id.* at 34.

²²² *Id.* at 6, n.18.

²²³ For a review of competition in MISO and the impact of State ROFRs in the region, see “Comments of LS Power Grid, LLC In Response to the Commission’s Advanced Notice of Proposed Rulemaking,” Docket No. RM 21-17-000 at p. 87-108 (filed Oct. 12, 2021).

return on equity for Xcel is 10.52% and for ITC 10.77%.²²⁴ The respective capital structure skewed to higher cost equity – 52% equity for Xcel and 60% ITC²²⁵ – rather than lower cost debt.

In its siting evaluation of the project, the Minnesota Public Service Commission estimated that the project cost ranged \$104.8 million to 160.7 million (17% to 33% higher than the MISO estimate).²²⁶ These increased costs impact not only Minnesota consumers but ultimately all consumers across MISO’s northern region because the costs are paid by customers in other states such as Iowa. Such an outcome is antithetical to the purpose of the FPA – “prevent consumers from being charged any unnecessary or illegal costs.”²²⁷

Competition has been demonstrated to provide consumers with at least 20% in cost savings, if not more. Pursuant to Attachment FF in the Tariff, MISO plans to assign at least \$5.5 billion in long-term projects in Tranche 1 of MISO’s LRTP to the incumbent utility pursuant to a State ROFR law, thereby resulting in as much \$1 billion in excess rates to consumers.²²⁸ The cost impact is substantial and will be even greater in the long-term if the Commission does not act and if more states enact ROFR laws throughout the MISO region. Accordingly, the Attachment FF provisions that accommodate State ROFRs in determining the selected developer

²²⁴Taken from MISO Attachment O information <https://www.misoenergy.org/markets-and-operations/settlements/to-rate-data/> (last accessed July 22, 2022).

²²⁵ *Cost Savings Offered by Competition in Electric Transmission: Experience to Date and the Potential for Additional Customer Value*, (Competition Report) April 2019.

²²⁶ The Minnesota Administrative Law Judge recommended estimated the cost for the recommended route as \$140.8 million (23% to 37.5% higher than MISO estimate; see <https://www.transmissionhub.com/articles/2019/05/minnesota-alj-calls-for-approval-of-huntley-wilmarth-345-kv-line.html> – adopted <https://www.transmissionhub.com/wp-content/uploads/2019/08/MinnCommissionOrderAug52019.pdf>

²²⁷ *Public Service Company of New Mexico, et. al.*, 25 FERC ¶ 61,469 (1983).

²²⁸ If the \$5.5 billion in projects is subject to competitive bidding, it is likely that competitive forces will result in approximately 20% in savings. Consumer Alliance estimates that approximately \$1 billion of the \$5.5 billion (18%) in savings could be realized. Sections V.C. of this Complaint contains evidence demonstrating cost savings well above 18% when projects have been assigned to non-incumbents.

for Commission jurisdictional transmission, under Commission jurisdictional cost allocation, and Commission jurisdictional rates, are unjust and unreasonable.

d. By Accepting Tariff Provisions That Require MISO to Adhere to State ROFRs Prohibiting Transmission Competition, the Commission Improperly Transfers Its Jurisdictional Duty Under the Federal Power Act to the States. As a Result, FERC Endorses the Policies of States With ROFRs and Fails to Protect the Pro-Competition Policies of States Without ROFRs.

By allowing MISO to eliminate competitive solicitations pursuant to Attachment FF in states with ROFR laws, the Commission has acquiesced in those states' deliberate frustration of its competitive policy initiative and rules.²²⁹ In effect, the Commission's has delegated its exclusive jurisdiction over interstate transmission rates to the States.²³⁰ The Consumer Alliance respectfully submits that such delegation is bad policy. As the court in *U.S. Telecom* recognized, "delegation to outside entities increases the risk that these parties will not share the agency's 'national vision and perspective,' and 'thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme.'"²³¹ The Commission should assert its authority to prevent states from imposing excess costs on consumers.

²²⁹ See *Midwest Independent System Operator*, 147 FERC ¶ 61,127 at P 150 (2014) (allowing MISO to keep in its Tariff provisions requiring MISO to stop competitive solicitation in states with ROFR laws because to do otherwise "would result in a regional transmission planning process that does not efficiently account for the existence of state or local laws or regulations that impact the siting, permitting, and construction of transmission facilities.").

²³⁰ *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 556 (D.C. Cir. 2004) (U.S. Telecom) ("case law strongly suggests that sub-delegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization."); see also *Florida Power & Light Company, et. al.*, 29 FERC ¶ 61,140 (1984) (agreeing with Florida Power and Light that this Commission may not delegate its jurisdiction to the Florida Commission and should not defer to the Florida Commission's rate for transmission service to qualifying facilities, in part, because, "[o]nce the Commission's jurisdiction under the FPA is determined, it is exclusive and preempts the States from regulating the transmission of electric power or the sale of wholesale electric power in interstate commerce and "we [the Commission] recognized that we have "no discretion to reject jurisdiction" under the FPA, citing *City of Colton v. Southern California Edison Co.*, 26 FPC 223, 236 (1961).

²³¹ *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d at 556.

2. Attachment FF Unduly Discriminates Against Non-Incumbent Transmission Developers in Favor of Otherwise Similarly Situated Incumbent Transmission Owners.

A FERC-regulated public utility may not “grant any undue preference or advantage” “with respect to any transmission or sale subject to” FERC’s jurisdiction.²³² The Federal Power Act only prohibits “undue” discrimination.²³³ Undue discrimination arises when similar classes or groups that are similarly situated are treated differently without justification.²³⁴ In Order No. 1000, the Commission determined that federal ROFRs “create opportunities for undue discrimination and preferential treatment against nonincumbent transmission developers within existing regional transmission planning processes.”²³⁵ In citing Supreme Court precedent, the Commission emphasized that “the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest.”²³⁶ Therefore, the Commission eliminated federal ROFRs from FERC-jurisdictional tariffs and agreements, consistent with the Commission’s duty to maintain competition.²³⁷

In Order No. 1000, the Commission sought to establish a level playing field between incumbent utilities and non-incumbent transmission developers for purposes of the development regional transmission projects in an RTO/ISO’s regional transmission plan subject to regional cost allocation. In Order No. 1000 the Commission held that “a nonincumbent transmission developer of a transmission facility selected in the regional transmission plan for purposes of

²³² 16 U.S.C. § 824d(b).

²³³ See *N.J. Bd. of Public Utilities v. FERC*, 744 F.3d 74, 106 (3d Cir. 2014).

²³⁴ See *Dynegy Midwest Generation v. FERC*, 633 F.3d 1122, 1125-1129 (D.C. Cir. 2011).

²³⁵ Order No. 1000 at P 286.

²³⁶ Order No. 1000 at P 286 (quoting *Otter Tail Power Co. v. United States*, 410 U.S. 366 at 374 (1973)).

²³⁷ Order No. 1000 at P 286.

cost allocation have the same opportunity as an incumbent transmission developer to allocate the cost of such transmission facilities through a regional cost allocation method or methods.”²³⁸ Therefore, for purposes of Attachment FF, incumbents and non-incumbents are similarly situated – both entities undergo an approval process to become Qualified Transmission Developers and are provided an opportunity to compete for regional transmission projects in MISO’s MTEP, namely MVPs and MEPs that are regionally cost allocated and included in Appendix A of MISO’s Transmission Expansion Plan.²³⁹ MISO publishes its list of Qualified Transmission Developers, which includes incumbents and non-incumbents.²⁴⁰ Both incumbents and non-incumbents must undergo a substantial prequalification process to be certified by MISO as an Attachment FF Qualified Transmission Developer.²⁴¹ To remain qualified, each Qualified Transmission Developer must recertify every second calendar year.²⁴² Additionally, Qualified Transmission Developers are subject to several general requirements outlined in Section VIII.B.4 in Attachment FF.

Despite being similarly situated, *i.e.*, determined by MISO to be a qualified developer, incumbents and non-incumbents are treated differently. Specifically, Attachment FF Section VIII.A. discriminates against non-incumbents by not allowing them to compete to build projects 1) subject to a State ROFR (Section VIII.A.1.); 2) that fall within the definition of Upgrades to Existing Transmission Facilities (Section VIII.A.1); and 3) Immediate Need Projects (Section VIII.A.3.). The Consumer Alliance recognizes that there *may* exist some justification for giving

²³⁸ Order No. 1000 at PP 332, 335.

²³⁹ See Attachment FF at Section VIII.

²⁴⁰ See <https://cdn.misoenergy.org/MISO%20Qualified%20Transmission%20Developers%20List82330.pdf> (last accessed July 13, 2022).

²⁴¹ See Attachment FF at Section VIII.B.2. (Prequalification Process).

²⁴² Attachment FF at Section VIII.B.3. (Biennial Recertification Process).

incumbents preferential treatment for certain system upgrades and Immediate Need Projects under Sections VIII.A.2. and VIII.A.3 because incumbents could be differently situated for purposes of those types of projects.²⁴³ However, the discrimination by MISO against non-incumbents in Section VIII.A.1. via MISO's mandated recognition of State ROFR laws to prohibit competition and thus participation by non-incumbents for certain regional transmission projects *unduly discriminates* against non-incumbents in favor of similarly situated incumbents. There does not exist any legitimate justification for such undue discrimination against a non-incumbent when it is otherwise similarly situated to the incumbent. Accordingly, the Commission should find, consistent with its prior findings on undue discrimination and competition in Order No. 1000, that MISO's Sections VIII.A. and VIII.A.1. in Attachment FF unduly discriminate against non-incumbent Qualified Transmission Developers in favor of incumbent Qualified Transmission Developers.

3. Proposed Replacement Rate

With respect to a proposed replacement rate, the Commission can direct MISO to file Tariff revisions to Attachment FF that do not accommodate State ROFRs, consistent with the relief sought in this Complaint. For the avoidance of doubt and to clearly affirm its jurisdiction, the Commission must direct MISO to include language in its Tariff revisions that expressly acknowledges that MISO will not accommodate or comply with State ROFRs in its determination of the more efficient or cost-effective transmission developer selected for regionally cost allocated projects. Importantly, the selected developer would still be required to

²⁴³ The Consumer Alliance recognizes that the merits of such exemptions in Sections VIII.A.2. and VIII.A.3., which entitle incumbents to broad exemptions from competition, may require further examination in another proceeding, as such exemptions could be prone to abuse and applied too broadly. However, those exemptions are not part of this Complaint. MISO's proposed changes to the Upgrade exemption, which would further limit competition, are pending in Docket No. ER22-1955-001.

comply with legitimate State authority over siting and permitting of transmission facilities, or meet the requirements for Commission backstop siting authority.

The Consumer Alliance recognizes that the Commission retains discretion and authority to determine the just and reasonable replacement rate. As a starting point, the Consumer Alliance suggests the following revisions to Section III.A1 in Attachment FF:

VIII.A. APPLICABILITY

Except as otherwise provided in Sections ~~VIII.A.1.~~, VIII.A.2 and VIII.A.3 of this Attachment FF, the Competitive Developer Selection Process shall be applicable to all transmission facilities and substation facilities included in an Eligible Project.

~~**VIII.A.1. State or Local Rights of First Refusal:**~~

~~—The Transmission Provider shall comply with any Applicable Laws and Regulations granting a right of first refusal to a Transmission Owner. The Transmission Owner will be assigned any transmission project within the scope, and in accordance with the terms, of any Applicable Laws and Regulations granting such a right of first refusal. These Applicable Laws and Regulations include, but are not limited to, those granting a right of first refusal to the incumbent Transmission Owner(s) or governing the use of existing developed and undeveloped right of way held by an incumbent utility.~~

The deletion of Section VIII.A.1 in Attachment FF will also require other numbering adjustments and administrative updates to Section VIII.A. Therefore, the Commission should direct MISO to make any other necessary revisions to its Tariffs, governing documents, and business practice manuals, confirming that MISO will not accommodate and apply State ROFR laws in determining whether a project is subject to competition under MISO's Attachment FF Competitive Transmission Process. Instead, the Commission should place on MISO an

affirmative burden and good faith obligation and responsibility to maximize transmission competition to the greatest extent practicable.

C. Transmission Competition is Essential to Ensuring Just and Reasonable Rates, Especially Given the Billions of Dollars in Planned Projects in the Short and Long Term in MISO and Throughout the Country.

In 2007 when the Commission issued Order No. 890, it noted that the United States had “witnessed a decline in transmission investment relative to load growth,” and found that the resulting grid congestion could “have significant costs to consumers.”²⁴⁴ Today, the exact opposite scenario exists – transmission investment and costs are increasing rapidly, while load remains generally flat. And even though load is projected to remain relatively flat, the combination of rapid growth in new renewable generation, public policy concerns about emissions, and the age of existing transmission facilities is driving substantial additional transmission investment. The Commission issued Order No. 1000 to usher electric transmission competition into national policy as a means for the Commission to meet its obligation under the FPA to ensure just and reasonable rates. However, since the issuance of Order No. 1000, incumbent transmission owners have managed to secure for themselves a combination of exceptions to competitive processes, adoption of state ROFR laws, and other anti-competitive barriers to thwart the competition in transmission planning contrary to the Commission’s finding that competition is necessary to establish just and reasonable rates. Pursuant to its statutory obligation, the Commission must carry out fully the objectives of Order No. 1000 by eliminating recognition of State ROFRs in MISO’s Tariff, which will facilitate competition among qualified developers and thereby ensure efficient and cost-effective transmission development.

²⁴⁴ *Preventing Undue Discrimination and Preference in Transmission Service*, 72 Fed. Reg. at 12,276, 12,318.

Transmission investment continues to grow exponentially,²⁴⁵ and additional transmission investment without competition and additional consumer protections will only continue to hurt manufacturers, job creators, and other consumers.

Although there have been a handful of successful open solicitations, most transmission projects remain exempt from competitive processes. In order to benefit from the advantages that competitive transmission solicitation provides, open solicitation windows and eligibility of transmission solutions need to be expanded and applied across all regions of the country, especially in MISO where there have only been two competitive solicitations since the issuance of Order No. 1000. While MISO may boast that more projects will soon be subject to competition than ever before, less than 10% of the \$10.4 billion in Tranche 1 is poised to be subject to competition, due in large part to the fact that more than half, \$5.5 billion, would be protected from competition due to State ROFRs. The Commission must act now to prevent an otherwise unjust and unreasonable rate outcome – the allocation of billions of dollars in excess cost in MISO’s LRTP, which is expected to include a total of four tranches of projects, totaling up to \$100 billion.²⁴⁶

1. Competition in Transmission Development Produces Meaningful Consumer Benefits and Helps Ensure that Transmission Rates Are Just, Reasonable, and Not Unduly Discriminatory or Preferential.

It is undisputed that competition lowers costs. In upholding Order No. 1000, the D.C. Circuit affirmed prior precedent:

²⁴⁵ See “Comments of the Electricity Transmission Competition Coalition,” at p. 2-3, Docket No. RM21-17-000 (filed Oct. 12, 2021).

²⁴⁶ Xcel Energy, First Quarter 2021 Earnings Report Presentation (Apr. 29, 2021) at Slide 8, available at [PowerPoint Presentation \(q4cdn.com\)](https://www.xcelenergy.com/~/media/PowerPoint%20Presentation%20(q4cdn.com)) (last visited July 18, 2022) That presentation is attached to this Complaint as **Attachment E.** ; see MISO, Long Range Transmission Planning Strategy (Mar. 23, 2021) at Slide 8, available at [Long Range Transmission Planning - Preparing for the Evolving Future Grid \(misoenergy.org\)](https://www.misoenergy.org/~/media/Long%20Range%20Transmission%20Planning%20-%20Preparing%20for%20the%20Evolving%20Future%20Grid%20(misoenergy.org)) (last accessed Sep. 28, 2021). MISO appears to have removed from its website prior references regarding the \$30-\$100 billion dollar cost of its LRTP.

Agencies do not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall; nor need they do so for predictions that competition will normally lead to lower prices.²⁴⁷

Given the proliferation of State ROFR laws that endanger transmission competition throughout the MISO region,²⁴⁸ the Commission must direct MISO to facilitate competition at a time when \$10.4 billion in LRTP Tranche 1 projects is proposed to be assessed on consumers in MISO North/Central. In light of the vast amount of planned investment and spending on transmission, the Commission must balance inherent utility incentives to invest in transmission and earn a return on and of that investment²⁴⁹ with the ratepayer impact of that spending, especially at a time of such unprecedented transmission spending, increased electricity and natural gas prices, inflation, and concerns about the overall economic outlook in the near- and long-term. Competitive bidding helps constrain costs at a time when cost containment is vital. When permitted in the transmission planning process, competitive forces drive innovation in proposed solutions, lower bids for the same project, and result in cost caps to protect consumers from cost over-runs, cost control measures, and innovative financial structuring.

2. Experience with Competitive Solicitations in MISO and other RTOs/ISOs

Actual experience with competitively developed transmission projects shows significant consumer benefits in all cases, with no or reduced corresponding risk to consumers. Two recent competitive processes conducted by MISO demonstrate the consumer benefits of competition for

²⁴⁷ *South Carolina*, 72 F.3d at 65 (quoting *Associated Gas Distributors*, 824 F.2d 981, 1008-09 (D.C. Cir. 1987) (emphasis added) (citing *FPC v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 29, (1961); *Interstate Natural Gas Ass'n of Am. v. FERC*, 285 F.3d 18, 37-38 (D.C. Cir. 2002); *Am. Pub. Gas v. FPC*, 567 F.2d 1016, 1037 (D.C. Cir. 1977)).

²⁴⁸ See “States in the MISO Footprint with Right of First Refusal,” available at [State or Local Rights of First Refusal514796.pdf \(misoenergy.org\)](#). That presentation is attached to this Complaint as **Attachment F**.

²⁴⁹ See WEC Energy Group, “Investor Update: June 2022,” Slide 8, available at [PowerPoint Presentation \(q4cdn.com\)](#) (highlighting the LRTP Tranche investment opportunity for investors); see also Xcel Energy June 6-7, 2022 Investor Meetings at Slides 57-58, available at [PowerPoint Presentation \(q4cdn.com\)](#) (highlighting MISO transmission expansion opportunities).

new transmission.²⁵⁰ MISO received comprehensive proposals from 11 different respondents for ownership, construction, and maintenance of the Duff-Coleman 345 kV project.²⁵¹ MISO received proposals from nine different respondents for the Hartburg-Sabine Junction 500 kV project.²⁵² MISO's competitive developer selection process for both the Duff-Colman EHV 345 kV transmission line and the Hartburg Sabine Junction EHV 500 kV transmission line resulted in innovative technical approaches and cost caps that protected customers from cost overruns and excessive rates.²⁵³ Both projects set a life-of-the-project cap of 45% on the equity component of their financing structures and froze the return on equity at 9.8% (over 500 basis points below MISO's then current base equity return of 10.32%). The Hartburg Sabine Project also set a 10-year cap on the project's annual transmission revenue requirements.

These cost caps can produce significant customer savings. Expert testimony in a recently filed Section 206 complaint proceeding estimated savings of \$114 million over four years from capping the equity component of a MISO transmission owner's capital structure at 53% instead of the current 60%.²⁵⁴ Utilizing a 45% equity cap, customers would save over \$10 million over a similar period on a \$350,000,000 transmission project developed by a non-incumbent transmission developer instead of the MISO transmission owner in the complaint case. An

²⁵⁰ Duff-Coleman EHV 345 kV Competitive Transmission Project Selection Report, p. 5, 38 (December 20, 2016), available at <https://cdn.misoenergy.org/Duff-Coleman%20EHV%20345kv%20Selection%20Report82339.pdf> (last visited Sep. 30, 2021); Hartburg-Sabine Junction 500 kV Competitive Transmission Project, Selection Report, p. 5 (November 27, 2018), available at <https://cdn.misoenergy.org/Hartburg-Sabine%20Junction%20500%20kV%20Selection%20Report296754.pdf> (last visited Sep. 30, 2021).

²⁵¹ Duff-Coleman EHV 345 kV Competitive Transmission Project Selection Report, p. 5.

²⁵² Hartburg-Sabine Junction 500 kV Competitive Transmission Project, Selection Report, p. 5.

²⁵³ *Duff Colman EHV 345 kV Competitive Transmission Project Selection Report*, p. 36 (2016), available at <https://cdn.misoenergy.org/Duff-Coleman%20EHV%20345kv%20Selection%20Report82339.pdf>; *Hartburg Sabine EHV 500 kV Competitive Transmission Project Selection Report*, p. 21 (2018), available at <https://cdn.misoenergy.org/Hartburg-Sabine%20Junction%20500%20kV%20Selection%20Report296754.pdf>.

²⁵⁴ *Iowa Coalition for Affordable Transmission v. ITC Midwest LLC*, Docket No. EL22-56-000, Complaint, Attachment A, Testimony of S. Keith Berry, at 20:8-9 (filed May 10, 2022).

analysis by the Brattle Group found that the winning bidders in competitive projects were 40 percent less costly than the initial cost estimates for projects, whereas non-competitive projects ended up costing 34 percent more than initial estimates.²⁵⁵ The Brattle Group analyzed 15 projects selected through the ISO/RTO competitive planning processes to demonstrate that competition provides major cost advantages to consumers.²⁵⁶ On average, the winning bids of these 15 competitive transmission projects were priced 40 percent below the ISO/RTOs' or incumbent Transmission Owners' initial project cost estimates. The 15 projects were located across multiple RTO/ISOs - 10 projects in CAISO, 1 in MISO, 1 in NYISO, 2 in PJM, and 1 in SPP. In total, the ISO/RTOs' or incumbent Transmission Owners' estimate of the project cost was \$1.9 billion, but the average cost advantage of competitive bids came in at \$1.1 billion.²⁵⁷

Those are real and substantial cost savings to consumers for the same benefit in reliability. Further, not only are competitive bids often lower at the bidding phase, but winning bids also often provide cost caps or other cost-control measures that reduce the risk and magnitude of significant cost increases as the projects are developed and constructed. When competitive processes are not used, actual transmission investment costs average approximately 34 percent more than the projected cost.²⁵⁸ The combination of non-competitive initial cost estimates and a lack of competitive discipline to the actual expenditures results in a total 55

²⁵⁵ Johannes P. Pfeifenberger et al., "Cost Savings Offered by Competition in Electric Transmission," The Brattle Group, April 2019, pp. 29, 40. An independent review in August 2021 of North American transmission projects "suggests a range of savings is possible from 22% to 42% relative to the initial indicative design." See "Draft Impact Statement," Ofgem, Consultation on our views on early competition in onshore electricity transmission networks, August, 2021, at 5, available at [Consultation on our views on early competition in onshore electricity transmission networks | Ofgem](#) (last accessed July 19, 2022).

²⁵⁶ "Transmission Competition Under FERC Order No. 1000: What We Know About Cost Savings to Date," The Brattle Group, October 2018, pages 10-15, [Presentation Title Goes Here Line Two of Title \(brattle.com\)](#). This presentation is available in the Complaint as **Attachment G**.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 14.

percent savings potential for competitive transmission project bids relative to non-competitive transmission projects.²⁵⁹

These average cost savings are not merely conjecture. An analysis building upon the data compiled by the Brattle Group and updated through 2020 indicates that competitive projects are expected, on average, to save customers 50% relative to traditionally developed transmission projects.²⁶⁰ Further, an analysis of recently completed competitive projects shows that all have been delivered at or below competitive cost caps, with final project costs providing savings up to 60% relative to the initial bid by the incumbent utility. Further detail on the four completed projects analyzed is included in the following table.²⁶¹

Project Name	ISO / RTO	Initial Incumbent Bid	Final Competitive Project Costs	% Savings
Suncrest	CAISO	\$75	\$37	-50%
Harry Allen-Eldorado Project	CAISO	\$144	\$133	-8%
Duff-Coleman 345 kV	MISO	\$59	\$50	-15%
Artificial Island Project	PJM	\$692	\$256	-63%

Regarding the Duff to Coleman Project in MISO, resulting in Republic Transmission, LLC (“Republic Transmission”) becoming a new Transmission-Owning member of MISO, Aubrey Johnson, MISO’s Executive Director of Systems Planning and Competitive Transmission, stated “the competitive transmission process allows us to work with our members to identify projects that create value for the entire bulk electric system.”²⁶² The Duff to Coleman Project is a 31-mile, 345 kV line spanning between southern Indiana and western Kentucky. Further, this was

²⁵⁹ *Id.* at 15.

²⁶⁰ Original analysis included in the Brattle Benefits of Competition Report, Table 20, with updated values.

²⁶¹ Analysis of each project using publicly available information; Note that final competitive project costs are not escalated to COD, ensuring that the cost at COD matches the originally submitted cost in the original bid year.

²⁶² “New member company Republic Transmission energized their first line this month,” MISO Press Release, June 11, 2020, <https://www.misoenergy.org/about/media-center/miso-first-competitive-transmission-project-completed/>

the first project in the MISO footprint to be eligible for competition under FERC Order No. 1000.²⁶³ “MISO noted that all of the proposals came in lower than MISO’s initial cost estimate and developers provided a range of cost caps, concessions, and commitments, including caps on construction costs.”²⁶⁴ Further, in a subsequent project, Hartsburg-Sabine Junction 500 kV Competitive Transmission Project, MISO noted that “it was clear RFP Respondents that participated in the Duff-Coleman solicitation brought forward meaningful insights and experience they gained in that process.”²⁶⁵

Out of the \$10.4 billion in long-range transmission projects in Tranche 1, only roughly \$1 billion has been set aside for competition, falling well short of Commission’s objectives in Order No. 1000 and depriving consumers of the price-lowering benefits of competition. The Commission should find that the provisions in Attachment FF that MISO uses to accommodate State ROFRs are unjust, unreasonable, and unduly discriminatory and preferential. Competition would provide a much-needed check on increasing transmission rates driven by current and future transmission investment and increasing energy inflation. The Commission should direct MISO to engage in competitive solicitation for the \$5.5 billion that is currently protected by State ROFRs under the MISO Tariff and, as necessary, further investigate the practices occurring in MISO that have impeded competition in the region.²⁶⁶

²⁶³ “New member company Republic Transmission energized their first line this month,” MISO Media Center, June 11, 2020, <https://www.misoenergy.org/about/media-center/miso-first-competitive-transmission-project-completed/>.

²⁶⁴ *Id.* at 34.

²⁶⁵ Benefits of Competition Report at 34, *citing* Hartsburg-Sabine Junction 500 kV Competitive Transmission Project, Selection Report, November 27, 2018, <https://cdn.misoenergy.org/Hartburg-Sabine%20Junction%20500%20kV%20Selection%20Report296754.pdf> at 3 (“Hartsburg-Sabine Junction Selection Report”).

²⁶⁶ In late May 2022, MISO proposed amending the Competitive Transmission Process provision in its Tariff to exclude certain transmission infrastructure improvements from its Competitive Transmission Process and assign such improvements to the incumbent Transmission Owner(s). *Midcontinent Independent System Operator, Inc.*, Docket No. ER22-1955-001 (filed May 27, 2022). Consumer groups and competitive developers protested that proposal, which is pending before the Commission. In an unauthorized answer to the protests, MISO asserted that it

D. The Commission is Best Positioned to Provide Uniform Relief and Affirm Its Jurisdiction Over the Interstate Transmission of Electric Energy.

There currently exists an uneven patchwork of State ROFR laws throughout the MISO region that yield differential and varying transmission rate outcomes for consumers throughout the region. Given the nature of this dispute and the exclusive federal jurisdictional issues relating to transmission cost allocation, rates, and competition, the Commission is well-positioned to adjudicate and provide a uniform and efficient resolution. If the Commission declines to adjudicate and establish a uniform resolution by requiring MISO to not accommodate or comply with State ROFR laws, consumers in the MISO region will continue to be burdened by excessively high transmission rates that are unjust and unreasonable under the FPA and will be differentially impacted, depending on where the consumer resides. States may be encouraged to promulgate additional state incumbent preferences thereby frustrating the pro-competition policies of States without ROFRs, such as Wisconsin. Because the Commission's adjudication of this Complaint could impact the use of State ROFR laws in other ISOs/RTOs (and any tariff language accommodating those ROFR laws), the Commission (and not any individual RTO/ISO) is best positioned to resolve this dispute and establish an even and fair playing field for transmission development and regional cost allocation in the MISO region.

VI. COMPLIANCE WITH RULE 206

In the paragraphs below, the Consumer Alliance demonstrates compliance with the specific requirements for complaints in Rule 206 of FERC's Rules of Practice and Procedure:

"is a strong proponent of the competitive development process," but that it defers to State ROFR statutes to respect "individual States' policy choices." MISO Answer, Docket No. ER22-1955-001, at 19, n.87 (filed July 8, 2022).

A. Description of Alleged Violation and Quantification of Financial Impact and Burden (18 CFR § 385.206(b)(1)-(5)):

The Consumer Alliance has provided the information and available documents required by Rule 206(b)(1)-(5) in Parts I-V of this Complaint. In the absence of competition, consumers will be subjected to excessively higher transmission rates associated with interregional and interstate transmission projects that are assigned to incumbent transmission owners. Competition has proven to provide consumers with at least 20% in cost savings, if not more. Pursuant to Attachment FF in the Tariff, MISO plans to assign at least \$5.5 billion in long-term projects in Tranche 1 of MISO's LRTP to the incumbent utility pursuant to a State ROFR law, thereby resulting in as much \$1 billion in excess rates to consumers.²⁶⁷ The cost impact is substantial and will be even greater in the long-term if the Commission does not act and if more states enact ROFR laws throughout the MISO region. MISO's Tariff provisions in Attachment FF that accommodate this unjust and unreasonable rate outcome violate the FPA.

Importantly, this Complaint does not ask the Commission to find that State laws around local land use issues, siting, permitting, zoning, and any environmental/safety matters are improper or should be disregarded. Instead, this Complaint asks the Commission to affirm (as it did in Order No. 1000 (as upheld by the D.C. Circuit Court of Appeals)) that transmission competition is an essential element of just and reasonable rates under the FPA and that recognition of State ROFR laws under Attachment FF – that dictate the builder of the transmission project that is entitled to a FERC-jurisdictional rate that is regionally cost allocated

²⁶⁷ If the \$5.5 billion in projects is subject to competitive bidding, it is likely that non-incumbents will successfully underbid the incumbents. Accordingly, if \$5.5 billion in projects is assigned to non-incumbents, then approximately 20% savings can be realized. Therefore, Industrial Customers estimate that approximately \$1 billion of the \$5.5 billion (18%) in savings could be realized. Sections V.A and V.C. of this Complaint contain evidence demonstrating cost savings well above 18% when projects are assigned to non-incumbents.

to consumers in States without a ROFR law – is unjust, unreasonable, and unduly discriminatory or preferential.

B. Other Proceedings (18 CFR § 385.206(b)(6)):

As discussed herein, several State ROFRs have been subject to legal challenges in state or federal district court in the MISO region and have also been scrutinized and challenged through state legislative processes. However, to the best of Complainants' knowledge, MISO's Tariff language in Attachment FF that accommodates State ROFRs and prevents competitive bidding for projects that assesses costs to consumers outside the state where the incumbent utility is located has not been challenged on federal jurisdictional grounds.

Related proceedings/challenges to State ROFRs in the MISO region include the following:

- *LSP Transmission Holdings, LLC v. Sieben et al.*, Case No. 20-641 (U.S.) (*cert. denied* on March 1, 2021) (challenging Eight Circuit Court of Appeals decision upholding the Minnesota ROFR in *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, at 1025 (8th Cir. 2020)) (completed proceeding).
- *NextEra Energy Capital Holdings v. D'Andrea*, Case No. 50160 (5th Cir.) (pending before the Court).
- *LS Power Midcontinent, LLC and Southwest Transmission, LLC v. State of Iowa*, Case No. 21-0696 (Iowa Ct. of Appeals) (Filed July 8, 2022) (Application for Further Review and Motion for Emergency Injunction Pending Further Review are pending).

Given that those proceedings do not involve federal jurisdictional issues and specific relief sought in this Complaint, the MISO Consumer Alliance submits that the Commission may proceed with adjudicating this Complaint. The civil litigation has concerned commerce clause issues or state constitutional issues, not FERC's jurisdiction under the Federal Power Act.

Therefore, the Commission need not wait for the resolution of any pending litigation in Iowa or before the Fifth Circuit prior to acting on this Complaint.

C. Specific Relief or Remedy Requested (18 CFR § 385.206(b)(7)):

The Consumer Alliance is not seeking refunds or retroactive relief for any projects or costs that have already been assigned prior to the date of the filing of this Complaint, July 22, 2022. The Consumer Alliance requests the refund effective date to be the date of the filing of this Complaint. The Consumer Alliance is asking the Commission to find that MISO's Tariff language in Attachment FF is unjust, unreasonable, and unduly discriminatory or preferential because it automatically requires MISO to assign projects located in States with ROFR laws to incumbent utilities without competitive bidding and solicitation, which is proven to substantially drive down costs for consumers. The Commission should order MISO to conduct competitive bidding to the greatest extent possible for regional and interregional projects in MISO's LRTP, including MTEP21 and Tranche 1. To the extent MISO attempts to assign any projects (or issue notices to construct) in LRTP Tranche 1 after the filing of this Complaint to the incumbent utility without conducting competitive bidding that would otherwise occur absent the State ROFR law, the Commission should order MISO to pause or rescind such assignments of projects and require competitive bidding for those projects. Because MISO is poised to protect \$5.5 billion in LRTP projects under State ROFRs in the very near term, the Consumer Alliance requests the Commission to act as soon as practicable.

The MISO Board plans to act (and likely approve) the projects in Tranche 1 of MISO's LRTP on July 25, 2022. The D.C. Circuit has granted the Commission "great deference" in fashioning remedies, where the Commission's "discretion is often at its zenith."²⁶⁸ Consistent with that robust discretionary authority and its authority to regulate FERC-jurisdictional RTOs and ISOs, the Consumer Alliance asks the Commission to issue an interim order, as soon as

²⁶⁸ *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 541 (D.C. Cir. 2010); see *Shetek Wind, Inc. et al.*, 138 FERC ¶ 61,250, at P 124 (2012).

practicable, directing MISO to postpone the assignment of the \$5.5 billion in projects subject to State ROFRs while this Complaint is pending. Importantly, the Consumer Alliance is not requesting the Commission to require MISO to unduly delay any projects in Tranche 1, only that MISO delay issuing any project assignments and Notices to Construct for the projects currently protected by State ROFR laws.

When the MISO Board approves projects in LRTP Tranche 1, which is part of MTEP21, MISO will publish the approved projects in Appendix A to MTEP21.²⁶⁹ When MISO publishes Appendix A, MISO could include an asterisk that notes that although all of the projects in Tranche 1 have been approved, the assignment of the \$5.5 billion in projects subject to State ROFR laws is pending and subject to the outcome of this Complaint. The Consumer Alliance suggests an asterisk for the ROFR-protected projects along these lines:

*A pending complaint at FERC in Docket No. EL22-___ challenges, under Section 206 of the Federal Power Act, the justness and reasonableness of MISO's Tariff provisions in Attachment FF that require MISO to assign this project to an incumbent transmission owner pursuant to a State law without referral to MISO's competitive developer selection tariff provisions. MISO is currently awaiting FERC's guidance before final assignment in the event FERC directs MISO to hold a competitive solicitation for this project.

Importantly, MISO's Tariff envisions the need for MISO to update MTEP Appendix A to accommodate any changes occurring with respect to Competitive Transmission Projects.²⁷⁰

The Consumer Alliance recognizes the need for transmission buildout in the MISO region and is not seeking to unnecessarily or unduly delay any projects. Importantly, the MTEP21 Final Draft LRTP Addendum Appendix²⁷¹ does not indicate any Immediate Need Projects that need to go into service within 36 months; instead, the draft Appendix indicates that

²⁶⁹ See generally MISO Attachment FF (Transmission Expansion Planning Protocol)

²⁷⁰ See MISO Attachment FF, Section V (envisioning MISO's need to update Appendix A by identifying the Selected Developer for the Competitive Transmission Project or by designating the appropriate Transmission Owner in the event the project is reclassified as upgrades to existing facilities).

²⁷¹ See [MTEP21 Final Draft LRTP Addendum Appendix A624002.xlsx \(live.com\)](#) (last accessed July 20, 2022).

the earliest expected in service date is not until June 1, 2028. As necessary, MISO could prioritize and stagger the assignment of projects in Tranche 1, including the issuances of notices to construct and requests for proposals, proceeding as soon as practicable with respect to projects in Tranche 1 that are not being challenged in this Complaint, followed by the projects subject to this Complaint in an order based on the projected in-service date. Such an approach would be consistent with MISO's Competitive Transmission Process Philosophy wherein MISO strives to be "flexible," "accountable," and "proactive" in achieving its three key objectives of "project success," "value," and "fairness."²⁷²

D. Supporting Documents (18 CFR § 385.206(b)(8)):

The documents provided in support of this Complaint are identified throughout the Complaint and attached as the following:

- Attachment A: Form of Notice of Complaint
- Attachment B: Brattle Competition Report 2019
- Attachment C: MISO Competitive Transmission Update
- Attachment D: System Planning Committee Update
- Attachment E: Xcel Energy Quarter 2021 Earnings
- Attachment F: States in MISO with ROFR
- Attachment G: Transmission Competition under FERC Order 1000
- Attachment H: Compilation of State ROFR Statutes in MISO Region

²⁷² See Attachment C: MISO Competitive Transmission Update at Slide 4.

E. Prior Efforts to Resolve this Dispute and Statement Regarding the Use of Alternative Dispute resolution (18 CFR § 385.206(b)(9)):

The Enforcement Hotline, Dispute Resolution Service, and tariff-based dispute resolution mechanisms were not used. Given the nature of this dispute, involving federal jurisdictional issues and transmission competition policy on which the Commission is well-positioned to adjudicate and provide a uniform resolution, the use of those alternative dispute resolution mechanisms would have been impractical and unlikely to produce a resolution. Furthermore, use of the MISO stakeholder process would have been impractical, time-consuming, protracted, and unlikely to produce a resolution on the policy and legal issues raised by this Complaint. Because the Commission's adjudication of this Complaint could impact the use of State ROFR laws in other ISOs/RTOs (and any tariff language accommodating those ROFR laws), the Commission (and not any individual RTO/ISO or any individual State) is best positioned to resolve this dispute.

On July 7, 2022, counsel for IECA and CMTC provided MISO's Commission-designated corporate officials with advance notice regarding the planned filing of this Complaint and offered an opportunity to discuss the issues raised herein. Also on July 7, 2022, counsel for IECA/CMTC provided the Organization of MISO States ("OMS") with advance notice regarding the planned filing of this Complaint and offered an opportunity to discuss the issues raised herein. Both MISO and OMS responded in appreciation of the advance notice. On July 19, 2022, counsel for IECA and CMTC discussed this Complaint with counsel for MISO.

F. Form of Notice (18 CFR § 385.206(b)(10)):

A form of notice is attached and submitted in electronic form.

G. Fast Track Processing (18 CFR § 385.206(b)(11)):

An expedient resolution of the legal and policy issues raised herein would help provide market certainty and would help MISO move forward with its transmission development and project assignment in Tranche 1. An expedient grant of this Complaint would also discourage efforts to implement ROFRs throughout the MISO region. An expedient grant of this Complaint could minimize any costs that are incurred in the event that MISO proceeds with assigning Tranche 1 transmission projects to the incumbent utilities and then MISO is directed by the Commission to run competitive solicitations for those projects and to not apply the State ROFRs to shield \$5.5 billion in projects from competition. However, the Consumer Alliance is not requesting Fast Track Processing, as the Consumer Alliance recognizes that the Commission may require some time to adjudicate the legal and policy issues raised by this Complaint. The Consumer Alliance submits that the Commission may proceed to resolve the legal and policy issues raised by this Complaint without holding an evidentiary proceeding. Foregoing an evidentiary hearing would also help the Commission more expeditiously resolve this Complaint and allow MISO to proceed with its transmission planning and implementation of Tranche 1.

H. Service on Respondents and Interested Parties (18 CFR § 385.206(c)):

The Consumer Alliance certifies that copies of this Complaint are being served by email to the contacts for MISO that are listed on the Commission’s list of Corporate Officials:

Andre T. Porter Vice President, General Counsel & Secretary Midcontinent Independent System Operator, Inc. 720 City Center Drive Carmel, IN 46032 Telephone: 317-249-5352 Fax: 317-249-5912 Email: misolegal@misoenergy.org	Kristina M. Tridico Deputy General Counsel - Regulatory Midcontinent Independent System Operator, Inc. 720 City Center Drive Carmel, IN 46032 Telephone: 317-249-5159 Fax: 317-249-5912 Email: ktridico@misoenergy.org
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VII. CONCLUSION AND REQUEST FOR RELIEF

WHEREFORE, the Consumer Alliance respectfully asks the Commission to grant this Complaint and exercise its authority to require FERC-jurisdictional RTOs/ISOs to not apply in their regional transmission planning and regional cost allocation processes any anticompetitive State ROFR laws that interfere with the Commission's rules on transmission competition and the Commission's jurisdictional obligation to establish transmission rates that are just, reasonable, and not unduly discriminatory or preferential. This Complaint requests the Commission to find that the existing MISO Tariff provisions in Attachment FF that prohibit MISO from holding a competitive solicitation for regionally cost allocated projects based on a State ROFR laws, are unjust and unreasonable, and that the just and reasonable replacement rate is a rate in which a regionally cost allocated project is subject to competitive solicitation. Accordingly, the Consumer Alliance respectfully asks the Commission to direct MISO to file Tariff revisions that:

- 1) prohibit MISO from applying State ROFR laws in MISO's long-range transmission planning, including for Tranche 1 of MISO's LRTP; and
- 2) direct MISO to hold a competitive solicitation for regionally cost-allocated transmission projects that would be subject to competition but for State law granting preferential treatment to an incumbent utility; and
- 3) require MISO to competitively bid projects, to the maximum extent possible, in its long-range transmission plan and MISO Transmission Expansion Plan.

Given that the MISO Board plans to act (and likely approve) the projects in Tranche 1 of MISO's LRTP on July 25, 2022, the Consumer Alliance asks the Commission to issue an interim order, as soon as practical, that directs MISO to postpone the assignment of the \$5.5 billion in projects subject to State ROFRs while this Complaint is pending. Importantly, the Consumer Alliance is not requesting the Commission to require MISO to unduly delay any reliability projects in the short-term, only that MISO delay issuing any Notices to Construct to projects currently protected by State ROFR laws in Tranche 1.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

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Counsel to the Industrial Energy Consumers of America and Coalition of MISO Transmission Customers and on Behalf of the Consumer Alliance

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<p><u>/s/ Michael J. Pattwell</u> Michael J. Pattwell Clark Hill PLC 212 East César E. Chávez Avenue Lansing, MI 48906 Phone: (517) 318-3100 mpattwell@clarkhill.com</p> <p><i>Counsel to the Association of Businesses Advocating Tariff Equity</i></p>	<p><u>/s/ John Dulmes</u> John Dulmes Executive Director Michigan Chemistry Council John@MichiganChemistry.com 517-372-8898</p> <p><i>Michigan Chemistry Council</i></p>

Dated: July 22, 2022

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing document and attachments to be served electronically on the Respondent, Midcontinent Independent System Operator, Inc., to the individuals listed on the Commission's Corporate Officials List and interested persons, in accordance with 18 CFR § 385.206(c).

/s/ Kenneth R. Stark
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Dated at Harrisburg, PA this 22nd day of July 2022.