

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Transmission Planning and Cost Allocation)
By Transmission Owning and Operating) Docket No. RM10-23-000
Public Utilities)

COMMENT OF THE FEDERAL TRADE COMMISSION

September 29, 2010

The Federal Trade Commission (FTC) appreciates the opportunity to comment on the most recent initiative by the Federal Energy Regulatory Commission (FERC) to encourage needed transmission construction through clearer, nondiscriminatory rules regarding transmission planning, investment, and cost allocation. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Notice of Proposed Rulemaking (NOPR), Docket No. RM10-23-000, 75 Fed. Reg. 37884 (June 30, 2010), 131 F.E.R.C. ¶ 61,253 (2010).¹ The NOPR proposes that public utility transmission providers, pursuant to the transmission planning processes established by Order No. 890,² (1) incorporate state and federal public policies, such as renewable energy portfolio requirements, as valid rationales for projects in the transmission planning process; (2) include more explicit coordination between neighboring transmission planning regions with respect to the construction

¹ The Federal Register notice established August 30, 2010, as the deadline for comments. In a subsequent notice issued on August 10, 2010, FERC extended the deadline to September 29, 2010. Citations to the NOPR will be to the paragraph numbers assigned by FERC, e.g., “NOPR P #.”

² *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh’g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh’g*, Order No. 890-B, 123 F.E.R.C. ¶ 61,299 (2008), *order on reh’g*, Order No. 890-C, 126 F.E.R.C. ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 F.E.R.C. ¶ 61,126 (2009).

of inter-regional facilities; and (3) eliminate from FERC-approved tariffs and agreements a right of first refusal (ROFR) that provides incumbent transmission providers with the right to build transmission projects developed and proposed by other entities. The NOPR also would require transmission providers to develop and file transmission cost allocation methodologies that satisfy cost allocation principles for intra-regional and inter-regional transmission projects.

As developed below, the FTC comments on three issues raised by the NOPR:

- The regional and inter-regional joint transmission planning envisioned by the NOPR likely will result in varying degrees of discussions and collaborations among competitors, as well as with customers. Although such interactions are not immune from antitrust scrutiny, the antitrust laws are not a barrier to competitors' (or competitors' and customers') ability to work together in procompetitive ways.
- Consistent with longstanding antitrust policy disfavoring regulatory barriers to entry outside of very limited circumstances, the FTC supports elimination of transmission incumbents' ROFR, not only for projects proposed through the regional transmission planning process, but also for transmission planning processes for individual transmission systems. FERC also should ensure that the standards set for participation in transmission projects by incumbents and non-incumbents alike are not exclusionary in favor of the incumbents.
- Regarding the NOPR's cost allocation proposals, the FTC encourages FERC to seek broad consensus on cost allocation sooner rather than later. The FTC consistently has urged Interconnection-wide coordination of transmission policies, because of the broad dynamic impacts that transmission has on electricity flows and markets. The FTC is concerned that the multiple cost allocation methodologies envisioned by the NOPR may hamper the inter-regional transmission investments that can both support effective competition and minimize the societal costs of complying with state and federal environmental and energy security initiatives. Consistent transmission cost allocation policies also can help overcome efforts to protect existing generation investments and market power from competitive forces and to free-ride on other entities' transmission development and planning investments.

Interest of the FTC

The FTC is an independent agency of the United States Government responsible for maintaining competition and safeguarding the interests of consumers, both through enforcement of the antitrust and consumer protection laws and through competition policy research and

advocacy. The FTC often analyzes regulatory or legislative proposals that may affect competition or allocative efficiency in the electric power industry. The FTC also reviews proposed mergers that involve electric and natural gas utility companies, as well as other parts of the energy industry. In the course of this work, as well as in antitrust and consumer protection research, investigation, and litigation, the FTC applies established legal and economic principles and recent developments in economic theory and empirical analysis.

The energy sector, including electric power, has been an important focus of the FTC's antitrust enforcement and competition advocacy.³ The FTC's competition advocacy program has produced two staff reports on electric power industry restructuring issues at the wholesale and retail levels.⁴ The FTC staff also contributed (as did FERC staff) to the work of the Electric Energy Market Competition Task Force, which issued a *Report to Congress* in 2007.⁵ In addition, the FTC has held public conferences on energy topics, including *Energy Markets in the*

³ See, e.g., Opening Remarks at the FTC Conference on *Energy Markets in the 21st Century: Competition Policy in Perspective* (Apr. 10, 2007), available at <http://www.ftc.gov/speeches/majoras/070410energyconferencereemarks.pdf>. FTC merger cases involving electric power markets have included the *DTE Energy/MCN Energy* (2001) (consent order), available at <http://www.ftc.gov/os/2001/05/dtemcndo.pdf>; and *PacifiCorp/Peabody Holding* (1998) (consent agreement), available at <http://www.ftc.gov/os/1998/02/9710091.agr.htm>. (The FTC subsequently withdrew the *PacifiCorp* settlement when the seller accepted an alternative acquisition offer that did not pose a threat to competition.)

⁴ FTC Staff Report, *Competition and Consumer Protection Perspectives on Electric Power Regulatory Reform: Focus on Retail Competition* (Sept. 2001), available at <http://www.ftc.gov/reports/elec/electricityreport.pdf>; FTC Staff Report, *Competition and Consumer Protection Perspective on Electric Power Regulatory Reform* (July 2000), available at <http://www.ftc.gov/be/v000009.htm> (compiling previous comments from the FTC staff provided to various state and federal agencies).

⁵ See <http://www.ferc.gov/legal/fed-sta/ene-pol-act/epact-final-rpt.pdf>.

21st Century (April 10-12, 2007)⁶ and *Carbon Offsets & Renewable Energy Certificates* (January 8, 2008).⁷

The FTC and its staff have filed numerous competition advocacy comments with FERC and participated in FERC technical conferences on market power issues. On December 3, 2009, the FTC submitted a reply comment in Transmission Planning Processes Under Order No. 890 (Docket No. AD09-08-000), the policy inquiry that led to the current NOPR.⁸ Also in December 2009, the FTC submitted comments in FERC's proceedings on possible elements of a National Action Plan on Demand Response (Docket No. AD09-10-000).⁹ Other FTC participation in FERC's competition-related inquiries has included the March 2007 appearance by the Deputy Director for Antitrust in the FTC's Bureau of Economics as a panelist for a technical conference on FERC's merger and acquisition review standards under Federal Power Act (FPA) Section 203 (Docket No. AD07-2-000). The FTC also has commented on FERC's initiatives to promote wholesale electricity competition and on various state issues associated with restructuring the

⁶ Conference materials *available at* <http://www.ftc.gov/bcp/workshops/energymarkets/index.shtml>.

⁷ Conference materials *available at* <http://www.ftc.gov/bcp/workshops/carbonoffsets/index.shtml>. Other programs have included the FTC's public workshop on *Market Power and Consumer Protection Issues Involved with Encouraging Competition in the U.S. Electric Industry*, held on September 13-14, 1999 (workshop materials *available at* <http://www.ftc.gov/bcp/elecworks/index.shtm>); and the Department of Justice and FTC workshop on *Electricity Policy*, held on April 23, 1996.

⁸ Reply Comment of the Federal Trade Commission, *Transmission Planning Processes Under Order No. 890*, Docket No. AD09-08-000 (Dec. 3, 2009) (FTC Reply Comment), *available at* <http://www.ftc.gov/os/2009/12/V100001ferc.pdf>.

⁹ This comment is available at <http://www.ftc.gov/os/2009/12/V100002ferc.pdf>.

electric power industry.¹⁰

Comment on Transmission Planning

The NOPR addresses what FERC characterizes as “deficiencies in the transmission planning and cost allocation processes so that the transmission grid can better support wholesale power markets and thereby ensure that Commission-jurisdictional services are provided at rates, terms and conditions that are just and reasonable and not unduly discriminatory or preferential.” NOPR P 33. Among the deficiencies identified by the NOPR are the lack of a requirement for a regional transmission plan and the relative lack of inter-regional transmission planning. NOPR PP 35, 39. Regional planning and inter-regional planning are necessary because the highly interconnected nature of the transmission grid and of the interstate markets it supports means that many – perhaps most – transmission projects will have effects beyond the boundaries of a single transmission entity.

The FTC observed in its comment of December 3, 2009, in AD09-08-000 that transmission planning should reflect the geographic scope of power flows so that it incorporates relevant congestion, reliability, and environmental considerations. Ideally, the scope would be as broad as each Interconnection in the United States, because “the physical reality is that, within the three interconnection grids, any action taken by one transmission provider can have major and nearly instantaneous effects on the transmission facilities of all other transmission providers.” *Regional Transmission Organizations*, Notice of Proposed Rulemaking, Docket No.

¹⁰ See, e.g., Federal Trade Commission, Comment before the Federal Energy Regulatory Commission on Wholesale Competition in Regions with Organized Electric Markets (Apr. 17, 2008), available at <http://www.ftc.gov/be/v070014b.pdf>. A listing of FTC and FTC staff competition advocacy comments to federal and state regulatory agencies (in reverse chronological order) is available at http://www.ftc.gov/opp/advocacy_date.shtm.

RM99-2-000, 64 Fed. Reg. 31390, 31398 (June 10, 1999). The most obvious examples are blackouts that spread between areas and threaten reliability over even larger areas.

Not only does broad regional planning reflect the physical flows on the grid, but also it captures the economic and policy developments in wholesale and retail electricity markets. For example, areas producing renewable energy, which are often located far from areas of consumption, will need to be integrated into the grid. Demand response and dynamic pricing initiatives can be more effective and valuable if, for example, air conditioning loads in one area can respond to a reduction in wind energy generated thousands of miles away. Although the NOPR does not explicitly require Interconnection-wide transmission planning, the FTC recommends that FERC lead efforts to institutionalize transmission planning on an Interconnection-wide scale. Even broader-scale transmission planning is likely to be efficacious as ties between Interconnections are strengthened.

FERC's policy proposal to require additional regional and inter-regional planning necessarily will require market participants – often competitors – to collaborate with each other (and with customers) not only in transmission planning, but also in transmission construction, ownership, and operation. Competitor collaborations are not immune from antitrust scrutiny. *American Needle, Inc. v. National Football League, et al.*, 560 U.S. ___, 130 S. Ct. 2201 (2010). At the same time, such collaborations can be, and often are, procompetitive. The antitrust agencies provide considerable guidance to market participants to structure their collaborations in ways that are lawful and efficiency-enhancing. *See, e.g.*, Federal Trade Commission and the U.S. Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (June 2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>. With this guidance and the advice of antitrust counsel, participants in collaborative transmission planning and cost

allocation processes should not view the antitrust laws as an impediment to their participation.

Comments on Remediating Discrimination against Non-incumbents

Another deficiency identified in the NOPR is the opportunity for undue discrimination against non-incumbent developers of transmission projects. NOPR P 38. To address this deficiency, the NOPR proposes the “removal from a transmission provider’s OATT [open access transmission tariff] or agreements subject to the Commission’s jurisdiction of provisions that establish a federal right of first refusal for an incumbent transmission provider.” NOPR P 93. The NOPR explains: “Where an incumbent transmission provider has a right of first refusal, a nonincumbent transmission developer risks losing its investment in developing a proposal for submittal to the regional transmission planning process, even if the proposal is selected for inclusion in the regional transmission plan.” NOPR P 87. Further, “such a planning process may not result in a cost-effective solution to regional transmission needs and projects that are included in a transmission plan therefore may be developed at a higher cost than necessary.” NOPR P 88.

The FTC concurs with FERC’s proposed elimination of the ROFR. Consumers benefit from market competition that often takes the form of new entry. “The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain – quality, service, safety, and durability – and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.” *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 695 (1978); accord *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 423 (1990). In general, sound competition policy calls for competition to be restricted only when necessary to protect the public from significant demonstrated harm, and for the restriction to be drawn narrowly to minimize its anticompetitive

impact. Thus, an inquiry into the public interest involves an assessment of the effects of new entry on consumers and competition and whether there are likely to be any significant countervailing impacts. The existing federal right of first refusal increases risk for potential entrants, without any countervailing incentives, and encourages free riding by incumbent transmission owners on the investments of potential entrants in developing transmission project proposals.

The antitrust agencies have long criticized mechanisms by which incumbents may impede new entry that can improve market performance. For example, the agencies frequently identify certificates of necessity (CON) as entry barriers and generally oppose statutory or regulatory requirements for CONs in the absence of a compelling justification for restricting entry. *See* Joint Statement of the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission before the Illinois Task Force on Health Planning Reform (Sept. 15, 2008), available at <http://www.ftc.gov/os/2008/09/V080018illconlaws.pdf>. CON requirements can increase the costs of entry by more efficient firms, provide incentives and opportunities for incumbents to thwart or delay new entry, and protect incumbent market power. *Id.* at 5-8. The NOPR associates similar concerns with the ROFR. NOPR PP 79-80.¹¹

¹¹ The ROFR that the NOPR would eliminate appears to play a role different from the ROFR sometimes agreed to by parties to a private contract. In private contracting, one party may wish to control the identity of the other party to the contractual relationship, such as where the lessee of a property seeks a say over who owns the property that it is leasing. If the lessor decides to sell the property, the ROFR might give the lessee the opportunity to purchase the property by matching the terms of the proposed sale. *See, e.g.,* David I. Walker, *Rethinking Rights of First Refusal*, 5 *Stan. J.L. Bus. & Fin.* 1, 8 (1999). The ROFR in that case affects the rights of the parties to the contract. By contrast, the ROFR at issue in the NOPR does not affect the rights of private contracting parties; rather, it provides incumbents with property rights over third parties with which the incumbents have no contractual relationship. The ROFR thus may prevent new entry, to the detriment of competition.

Objections to elimination of the ROFR, as described in the NOPR, do not appear to be well-founded. One objection is that incumbents may be obligated to build transmission facilities identified through the transmission planning process and should have a right to own them. NOPR P 77. Elimination of the ROFR, however, should not cause incumbents to lose the right to own any transmission facilities that they build pursuant to their construction obligation, so the *status quo* would not change in such circumstances. Rather, pursuant to the NOPR, the ROFR simply would not extend to facilities that *non-incumbents* seek to build and that are approved in the recognized transmission planning process. Another objection is that incumbents may have obligations to ensure reliable service, including obligations pursuant to mandatory reliability rules developed by the North American Electric Reliability Corporation and enforced by FERC. NOPR P 77. But as we understand it, the new entrants also would be subject to the mandatory, FERC-enforced reliability rules, violations of which carry substantial penalties.¹² Consequently, entrants' transmission investments should not threaten reliability. Moreover, the Supreme Court has rejected similar arguments that competition routinely must be restrained in the name of public safety, stating that such a claim is "a frontal assault on the basic policy of the Sherman Act." *Prof'l Eng'rs*, 435 U.S. at 695.

State ratemaking – for example, a requirement that retail customers receive credits for revenues earned by utilities that operate and maintain a co-owned transmission system – is identified as another ground for continuing the ROFR. NOPR P 77. Yet the transmission systems owned by multiple entities that are successfully operated by just one owner (usually the

¹² 18 C.F.R. Part 40; *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242, *order on reh'g*, Order No. 693-A, 120 F.E.R.C. ¶ 61,053 (2007).

regulated utility subject to state law requirements to provide reliable service at the lowest reasonable cost) demonstrate that such requirements are not an insurmountable obstacle to competitive ownership and investment in the transmission grid.¹³ Similarly, successful examples of transmission systems that are owned by multiple entities, but operated by a third party (for instance, a regional transmission organization or an independent system operator), further undermine this ROFR rationale.

The procompetitive, efficiency-enhancing grounds for eliminating the ROFR are not limited to transmission projects included in regional or inter-regional transmission plans. On a single system, the incumbent may have incentives to maintain a less than robust transmission system to discourage new generation entry and competition from distant generators, or it may simply have made a decision not to invest in transmission. In the former case, FERC's allowing the incumbent to shield itself from generation competition would be clearly contrary to federal policy promoting competitive, geographically broad generation markets. In the latter case, the incumbent loses no investment opportunity if it would not have built new transmission in any event. In both cases, FERC-jurisdictional policies should not prevent willing, qualified non-incumbents from building transmission projects that have proceeded through the planning process.¹⁴

¹³ For example, the Integrated Transmission System in Georgia is owned by municipal, cooperative, and investor-owned utilities but operated by the state-regulated investor-owned utility, Southern Companies. In Indiana, the Joint Transmission System is owned by municipal, cooperative, and investor-owned utilities but operated by the state-regulated investor-owned utility, Duke Energy.

¹⁴ The FTC recognizes that other obstacles to new entry may need to be overcome, such as claims that any required state eminent domain authority may be exercised only on behalf of franchised utilities. Such issues, however, should not keep FERC from adopting procompetitive policies.

Another of the NOPR's proposals for addressing undue discrimination in favor of incumbent transmission owners is a requirement that each public utility transmission provider, in cooperation with customers and other stakeholders, participate in a regional transmission planning process that "establishe[s] appropriate qualification criteria for determining an entity's eligibility to propose a project in the regional transmission planning process, whether that entity is an incumbent transmission owner or a nonincumbent transmission developer." NOPR P 90. In effect, the NOPR requires a form of standard setting. Standards have long played an important role in ensuring the introduction of new technologies and facilitating interoperability, which makes them procompetitive. The FTC, however, has brought a number of cases in which the standard-setting process was impaired by one or more participants and led to an anticompetitive result.¹⁵ Accordingly, the FTC urges FERC to enforce vigilantly the NOPR's requirement that the qualification criteria not be unduly discriminatory or preferential (NOPR P 90), so as not to diminish or lose the procompetitive benefits of eliminating the ROFR.

Comment on Cost Allocation

FERC is concerned that "existing cost allocation methods may not appropriately account for benefits associated with new transmission facilities and, thus, may result in rates that are not just and reasonable or are unduly discriminatory or preferential." NOPR P 154. FERC identifies a number of industry developments giving rise to these concerns. One is expanded regional

¹⁵ *Rambus Inc.*, Docket No. 9302 (docket entries available at <http://www.ftc.gov/os/adjpro/d9302/index.shtm>); *Union Oil Co. of California*, Docket No. 9305 (docket entries available at <http://www.ftc.gov/os/adjpro/d9305/index.shtm>); see also *Dell Computer Corp.*, Docket No. C-3658 (FTC press release available at <http://www.ftc.gov/opa/1996/06/dell2.shtm>).

power markets, which have “led to a growing need for new transmission facilities that cross several utility, RTO, ISO or other regions.” NOPR P 150. Broader markets lead to a “broader diffusion of the benefits associated with transmission upgrades and new transmission facilities.” *Id.* In addition, compliance with state resource policies at the lowest societal cost to customers is likely to necessitate the integration of distant, poorly connected renewable energy sources with loads. NOPR P 151. We observed in our comment of December 3, 2009, that transmission also may be needed to integrate distributed generation and demand response resources with other generation and loads at the lowest societal cost. FTC Reply Comment at 10. We agree that the lack of rate structures to allocate the costs of needed transmission, and the free-rider problem that arises when project beneficiaries seek to shift transmission construction costs onto others,¹⁶ add uncertainty and conflict to the debate over what transmission to build and how to pay for it.

To address these concerns, the NOPR proposes that every public utility transmission provider adopt cost allocation rules for various kinds of transmission facilities, which the NOPR categorizes by need and area served. The needs identified are reliability, economics, and public policy (*e.g.*, supporting renewable energy resources). The areas identified are inter-regional projects (facilities that cross more than one neighboring transmission planning region) and intra-regional projects (facilities confined to a single planning region). The NOPR states that a transmission provider must propose a cost allocation methodology for each need and each area. This could mean six different methodologies (one for each category), a single methodology applied to all categories, or some number in between. NOPR P 160. The NOPR also outlines cost allocation principles that the methodologies must reflect. NOPR PP 164-76.

¹⁶ For example, “participant funding” requires only the project sponsors to bear the costs of new facilities, even when other grid users need (and benefit from) the investment.

The FTC agrees that FERC should take steps, such as the NOPR, to bring certainty to transmission cost allocation rules. At least for now, it appears that FERC does not anticipate consensus on a single cost allocation methodology or a uniform set of methodologies. Instead, FERC will look to transmission providers, their customers, and other stakeholders to develop such methodologies in the first instance, with the hope that there will be ready coordination of methodologies for projects that span areas with disparate cost allocation methods. We encourage FERC to consider providing stronger guidance regarding transmission cost allocation principles. We are concerned that unnecessary variance in transmission allocation methods will have a disruptive effect on multi-area transmission proposals, akin to the disruptive effects that unnecessary diversity in methods for calculating available transmission capability (ATC) had on transmission services spanning multiple areas.¹⁷

As FERC is aware, transmission investment can involve considerable sums of money, which can intensify efforts to advance narrow interests at the expense of the public. We encourage FERC to consider whether stronger guidance could promote consensus sooner and avoid creating and entrenching a patchwork of transmission cost allocation methodologies that may not support broad, efficient regional markets and low-cost compliance with environmental and energy security policy initiatives. FERC's goal should be to establish consistent, reasonably uniform cost allocation rules that govern an entire Interconnection. Barring proof to the contrary, the manner in which new transmission – whether built for reliability, economic, or

¹⁷ The FTC's comment in *Information Requirements for Available Transmission Capability*, Docket No. RM05-17-000 (Aug. 22, 2005) (available at <http://www.ftc.gov/os/2005/08/050823availtranscapab.pdf>), focused on inefficiencies associated with the lack of ATC standardization.

public policy purposes – benefits grid users is not likely to vary greatly within an Interconnection.¹⁸ Therefore, neither should cost allocation methods – which are to be based on the pattern of present and future benefits – vary substantially.

Based upon comments filed by parties in Docket No. AD09-8, we note that some cost allocation methodologies seem to have obtained reasonably widespread acceptance and are succeeding at supporting robust levels of transmission investment. FERC may wish to consider using the NOPR’s compliance stage to determine which methodologies are more likely to succeed or are succeeding. For example, FERC could require proponents of a particular methodology to demonstrate why it has worked or would work better than other methodologies. FERC could use the successful methodologies as the framework for transmission cost allocation methodologies applied in regions where consensus has not formed or where it appears that proposed methodologies are not likely to overcome current conflicts over cost allocations.

¹⁸ The specific customers benefitted could vary depending on the nature of the project, but that result should arise from differences in transmission system topography, not from differences among cost allocation methodologies for the same kinds of projects.