

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

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

**REPLY COMMENTS OF NORTH DAKOTA PUBLIC SERVICE COMMISSION  
AND  
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION**

Pursuant to the Federal Energy Regulatory Commission’s (FERC) June 17, 2010 Notice of Proposed Rulemaking (NOPR) regarding transmission planning and cost allocation by transmission owning and operating public utilities,<sup>1</sup> the North Dakota Public Service Commission (NDPSC) and the South Dakota Public Utilities Commission (SDPUC) joined the comments of the Organization of MISO States, Inc. submitted on August 29, 2010 in response to the FERC’s NOPR. Pursuant to FERC’s subsequent notice on September 29, 2010 providing for reply comments, the NDPSC and the SDPUC offer the following limited reply comments and respectfully request that the FERC allow the comments out of time.

**I. INTRODUCTION**

The NDPSC and the SDPUC generally support many of the concepts set forth in the NOPR and are interested in working closely with FERC and other interested stakeholders to promote many of the goals discussed in the NOPR, such as the development of more efficient and effective transmission expansion plans and cost allocation methodologies. As state regulators of public utilities that will be impacted by FERC’s proposed rulemaking, we submit these reply comments to address certain issues related to the public interest of consumers.

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<sup>1</sup> *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 131 FERC ¶ 61,253 (2010) (hereafter “NOPR”).

The NDPSC is a three-member elected body created by the Constitution of the State of North Dakota, and statutorily charged with the duty to regulate investor owned electric utility services, rates, and charges in North Dakota. In addition, the NDPSC has siting jurisdiction over generation and transmission resources and is statutorily empowered to participate in federal administrative proceedings affecting utility rates or service in North Dakota

The SDPUC is a statutorily created three-member body with the authority and jurisdiction to regulate the rates and services of investor-owned electric utilities operating in South Dakota. The SDPUC also has authority over the siting of certain generation and transmission facilities in South Dakota

We submit these limited reply comments specifically to ask FERC to fully consider the consequences of creating new rights for non-incumbent transmission developers and eliminating rights of first refusal (ROFR). We ask that FERC be careful to avoid (1) impinging on state rights, (2) diminishing service and increasing costs to customers, and (3) up-heaving and delaying the development of transmission.

We strive to protect retail customers and ensure that the transmission lines sited in our states are reliably maintained. Incumbents are best suited to have the first opportunity to construct because (1) there is currently a well-established process within the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) to ensure the necessary transmission is constructed, (2) the first opportunity does not unduly discriminate, (3) it is not unreasonably expensive, (4) we are familiar with the history of the incumbent utilities and have authority to require these utilities to reliably maintain the lines they construct, and (5) the vertically-integrated incumbent utilities provide retail service to customers and therefore have a vested interest in providing safe and reliable service at least cost.

## II. REPLY COMMENTS

### A. Role of States

The NOPR acknowledges the important role that the states play in transmission planning and siting and defers to states' preferences in rights of first refusal cases. Specifically, the NOPR states, "[i]f a Commission-approved tariff or agreement contains a reference to a right provided under state or local laws or regulations, such a provision would not be subject to this requirement."<sup>2</sup> Furthermore, "[w]e also propose to require each public utility transmission provider to amend its OATT to describe how the regional transmission planning process in which it participates provides for the sponsor (whether an incumbent transmission provider or a non-incumbent transmission developer) of a facility that is selected through the regional transmission planning process for inclusion in the regional transmission plan to have a right, *consistent with state or local laws or regulations*, to construct and own that facility." (Emphasis added.)<sup>3</sup> We support the FERC's deference to the states and urge the FERC to remain mindful of the states' important roles in these issues and to defer to state interests.

North and South Dakota utilities continue to have jurisdictional service territories within which they have the right, as well as the obligation, to provide reliable transmission and distribution service to all customers. We believe that the right of first refusal should be maintained consistent with all of the obligations and responsibilities of incumbent utilities, despite the Commission's preliminary decision not to link these two practices.<sup>4</sup>

The right of first refusal is a natural result of the incumbent utility being ultimately responsible for the construction and maintenance of needed projects. Moreover, the proposed

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<sup>2</sup> NOPR at P 92, footnote 100.

<sup>3</sup> NOPR at P 93.

<sup>4</sup> NOPR at P 100.

NOPR provisions regarding ROFR might unintentionally restrict the authority of state commissions to take actions to enforce the construction of such needed projects consistent with the interests of all the stakeholders in the transmission development process at the state level: incumbents, independent developers, customers, and ratepayers.

The FERC proposes to grant a “right” to non-incumbent developers to construct and own system upgrades that is “consistent with state or local laws or regulations,”<sup>5</sup> with the corollary implication that if granting such right to non-incumbents is inconsistent with state or local laws, it will not be available. It is not clear how FERC intends to implement this exception and whom (the states or FERC) shall make such a determination to establish that a ROFR is “provided under state or local laws” or that a non-incumbent’s construction and ownership of transmission would be “inconsistent” with state or local laws or regulations. It appears that FERC is trying to federalize a right – the ROFR – that is borne out of state law obligations to serve load and maintain safe, adequate and proper service.<sup>6</sup> While appearing to recognize this issue in footnote 100 of the NOPR, where FERC acknowledges rights “provided under state or local laws or regulations,” by its actions FERC seems to be ignoring the state law-derived nature of the ROFR. FERC should clarify any such determination on whether ROFR is applicable within a state shall reside with the individual states.

#### **B. Impact On Customers**

We are concerned about the potential adverse impact on consumers if FERC eliminates ROFR in FERC-filed rate schedules. There is no evidence to suggest that non-incumbents are better situated to provide lower cost or more reliable service. In fact, one can reasonably

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<sup>5</sup> NOPR at P 89.

<sup>6</sup> NDCC 49-04-01 holds the “obligation to serve” provision, stating that “*every public utility shall furnish, provide and maintain such service, instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience...of the public and shall be in all respects adequate, convenient, just and reasonable and without any unjust discrimination or preference.*”

anticipate that the elimination of ROFR may actually increase the costs upon the consumer and introduce additional complexities in the reliable operation of the networked transmission grid.

Non-incumbent transmission developers are not regulated by state commissions and are not subject to state law obligations with respect to reliability or state law oversight of their operations. Numerous considerations should be thoroughly evaluated and addressed before FERC considers the elimination of ROFR. Such considerations include, but are not limited to, cost, reliability and diminished efficiencies.

When introducing numerous additional parties into the operational decisions and coordination, maintaining reliability will certainly increase in risk and complexity, with no enhanced benefit or cost reduction to ratepayers. If anything, there are sure to be increased costs with similar services provided by multiple parties in the same region.

Elimination of the ROFR will eliminate the benefits achieved with respect to economies of scale. The ROFR creates economies of scale by eliminating the need for duplicative transmission owner functions, in turn minimizing the equipment and manpower needed to perform utility functions. Such economies of scale reduce the overall cost of utility service to end use customers.

Moreover, the impact on local customers is further exacerbated by extracting a fundamental input from a generally balanced equation. Under today's structure, the incumbent utility invests in a transmission project, its customers are assigned costs, and the incumbent utility provides a transmission revenue credit to its customers. Extract the incumbent utility's ability to invest and receive transmission revenues, and the incumbent utility's ratepayers are left only with an allocation of costs for the project with no roughly commensurate revenue stream. The FERC has not shown that ROFR is increasing costs to customers and, in this scenario, one

could argue that elimination of ROFR introduces an unjust and unreasonable impact on the local ratepayers.

**C. Development of Needed Transmission may be Disrupted and Delayed**

We recommend the FERC carefully consider the balanced relationship between incumbent utility contractual rights, and its privileges and obligations at state and federal levels before acting on the proposal. The RTO planning process is well-defined and understood. Once a project has undergone the stakeholder process established under Order No. 890, the independent evaluation of the Transmission Provider, and is identified as a project that must be constructed, the incumbent transmission owners have the obligation to ensure that the needed project is constructed. The process is clearly defined, well understood and is not currently contested.

The new “sponsorship” paradigm that the Commission proposes in the NOPR is likely to turn current transmission planning processes into an unmanageable “free for all” that will undermine the existing orderly and rational process for planning and expanding the interconnected transmission grid. Regardless of what controls or processes are introduced this abrupt paradigm shift will stifle the much needed development of transmission. To the extent the process creates a new system of entitlements regarding project sponsorship; the process may well become more adversarial and less collaborative.

In the Midwest ISO, transmission is being built and the Midwest ISO is at the pinnacle of a major transmission expansion build out.<sup>7</sup> We are concerned that now is not the time to introduce an untested and highly contentious proposal to eliminate ROFR when the Midwest ISO transmission owners stand ready to construct. The impediment to the development of a

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<sup>7</sup> Comments of the Midwest ISO Transmission Owners, Docket No. RM10-23-000, at 35-36 (Sept. 29, 2010) (indicating that, since 2003, the Midwest ISO Board of Directors has approved over \$8.4 billion in new transmission projects, with \$4.7 billion approved during the most recent planning cycle).

transmission build out has not been ROFR, but the allocation of costs for such an expansion. With the FERC's recent decision in the Midwest ISO cost allocation proposal for Multi Value Projects, the processes are in place to swiftly move forward on these projects and construct the needed major transmission infrastructure necessary to meet the policy drivers within the Midwest ISO states.<sup>8</sup> Consequently, at a minimum, the elimination of ROFR and introduction of a new process will take a long time to work its way through the courts, introduce unreasonable uncertainty now, and inevitably introduce delay while all parties sort out the application of new rules and processes. Given that there has been no showing that the current paradigm does not work, there is no reason to risk such potential consequences.

We again ask that the FERC be aware of the impact its actions will have and work to avoid impinging on state rights, diminishing service while increasing costs to customers, and delaying the development of transmission.

Respectfully submitted,

at Bismarck, North Dakota AS December 2010

NORTH DAKOTA PUBLIC SERVICE COMMISSION

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<sup>8</sup> See Midwest Independent Transmission System Operator, Inc. and the Midwest ISO Transmission Owners, Docket No. ER10-1791-000 (July 15, 2010).

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at Pierre, South Dakota 28 December 2010

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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