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	)	Docket No. EL22-78-000
Complainants	)	
v.	)	
	)	
Midcontinent Independent System Operator, Inc.,	)	
Respondent	)	

MOTION TO DISMISS AND PROTEST OF
THE EDISON ELECTRIC INSTITUTE AND WIRES

Pursuant to Rules 206, 211, and 212 of the Federal Energy Regulatory Commission's ("FERC" or "Commission") Rules of Practice and Procedure,[1] the Edison Electric Institute ("EEI") and WIRES respectfully submit this Motion to Dismiss and Protest in the above-referenced docket.

EEI is the association that represents all investor-owned electric companies in the United States. Our members provide electricity for more than 235 million Americans and operate in all fifty states and the District of Columbia. As a whole, the electric power industry supports more than seven million jobs in communities across the United States. EEI members are united in their commitment to get the energy they provide as clean as they can, as fast as they can, while keeping reliability and affordability front and center, as always, for the customers and communities they serve.

[1] 18 C.F.R. §§ 385.206, 385.211, and 385.212.

WIRES is a non-profit trade association of investor-, publicly-, and cooperatively-owned Transmission Providers and developers, transmission customers, regional grid managers, and equipment and service companies. WIRES promotes investment in electric transmission and consumer and environmental benefits through development of electric transmission infrastructure.[2] Since its inception, WIRES has focused on supporting investment in needed and beneficial transmission infrastructure – investments that Congress and the Commission have recognized are critical to establishing a reliable, resilient, reliable, cost-effective, modern, and clean bulk power system.[3]

As discussed in greater detail below, the complaint in the above-referenced docket ("Complaint")[4] requests relief that the Commission cannot grant; Complainants have failed to meet their burden of proof under section 206 of the Federal Power Act ("FPA");[5] the Complaint makes assertions that the Commission and federal appellate courts have denied on identical tariff language and amounts to a collateral attack on Commission proceedings beginning nearly a decade ago; and, as the Commission already has recognized, granting the relief sought would result in bad policy. Accordingly, the Commission should dismiss the Complaint on jurisdictional and procedural grounds or deny it on policy grounds.

I. NOTICES AND COMMUNICATIONS

All communications and correspondence with respect to these comments should be served upon the following individuals, who should be included on the official service lists compiled by the Secretary of the Commission in these proceedings:

[2] For more information about WIRES, please visit www.wiresgroup.com.

[3] This filing is supported by the majority of its full supporting members of WIRES and does not necessarily reflect the views of the RTO/ISO associate members of WIRES.

[4] Industrial Energy Consumers of America, et. al., Complaint, Docket No. EL22-78-000 (July 22, 2022).

[5] 16 U.S.C. § 824e.

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II. BACKGROUND

On July 22, 2022, Complainants submitted the Complaint against the Midcontinent Independent System Operator, Inc. ("MISO") challenging provisions in its Open Access Transmission, Energy and Operating Reserve Markets Tariff ("Tariff"). More specifically, the Complaint targets language in Appendix FF that recognizes state and local laws granting a right of first refusal ("ROFR") to build certain transmission facilities. The Complaint asserts that the Commission should prohibit MISO from applying the state ROFR laws in its long-range transmission planning and require MISO to competitively bid all projects in its long-range transmission plan and the MISO Transmission Expansion Plan.

This is not the first time that the Commission has considered matters related to state ROFRs, or even the specific language and issues addressed in the Complaint. In 2011, the Commission issued Order No. 1000,[6] removing the then-existing federal ROFR from

[6] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012).

Commission-jurisdictional tariffs and agreements. The Commission required all regional transmission organizations and independent system operators, including MISO, and all jurisdictional public utilities to submit compliance filings implementing Order No. 1000. In its October 25, 2012 compliance filing, MISO included the language that the Complaint now challenges.[7] The Commission initially considered the Appendix FF language referencing state and local ROFRs in its March 21, 2013 order,[8] again on rehearing in its May 15, 2014 order,[9] and a third time in its January 22, 2015 order on rehearing and compliance filings.[10] In the 2014 order, the Commission approved the relevant MISO Tariff language.[11] The arguments raised on rehearing bear a striking semblance to those raised in the instant Complaint.[12] In the 2015 order, the Commission rejected these arguments and affirmed its approval of MISO's Tariff provisions.[13] For example, the Commission explained,

> We disagree with LS Power that the [2014] 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

[7] MISO, FERC Electric Tariff, Docket No. ER13-187-000 at Tab A, Attachment FF (Transmission Expansion Planning Protocol), Section VIII.A (8.0.0) (Oct. 25, 2012).

[8] *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,215, at PP 202-07 (2013) ("First Compliance Order"). Complainants did not participate in these proceedings, but their frequent collaborator, LS Power, did.

[9] *Midwest Indep. Transmission Sys. Operator, Inc.*, 147 FERC ¶ 61,127 (2014) ("Second Compliance Order").

[10] *Midwest Indep. Transmission Sys. Operator, Inc.*, 150 FERC ¶ 61,037 (2015) ("Third Compliance Order").

[11] Second Compliance Order at PP 147-50.

[12] For example, LS Power argued that in the Second Compliance Order the Commission "abdicates [its] 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." Third Compliance Order at P 18. LS Power further asserted that "MISO's proposal places MISO and the Commission as the arbiters of state or local law and thus allows MISO to create federal rights of first refusal out of state laws." *Id.* at P 19.

[13] Third Compliance Order at PP 24-33. While the Complainants style this as a petition under FPA section 206 to address alleged unjust and unreasonable rates, it is an untimely and impermissible attempt at a fourth bite at the rehearing apple. *See* arguments, *infra.*

> 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."[14]

As discussed in greater detail below, two separate federal appellate courts have upheld the Commission's conclusions.

Most recently, the Commission has instituted a Notice of Proposed Rulemaking to examine various issues related to transmission planning ("Transmission Planning NOPR").[15] Through the Transmission Planning NOPR, the Commission seeks feedback on issues, including its proposal to reverse its prior complete revocation of the federal ROFR and allow a conditional federal ROFR, as well as its request for comments on complete reinstatement of the ROFR.

III. MOTION TO DISMISS

While the Commission has modified the federal ROFR over the years, one constant has been its recognition and protection of the rights reserved by Congress to the states in the FPA. And for good reason—to do otherwise would be inconsistent with the scope of authority provided to the Commission by the FPA and would threaten to upend the regulated utility model.[16] Moreover, state ROFR authority predates the Commission's creation and exists

[14] Third Compliance order at P 30 (internal citations omitted).

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

[16] As EEI explained in its brief before the Eighth Circuit in *LSP Transmission Holdings v. FERC*, 953 F.3d 1018 (8th Cir. 2020):

> For over one hundred years, states have granted companies in the power and gas industries exclusive designated service territories. As *Tracy* documented, this regime arose in response to the states' historic experiences with unfettered free market competition in the utility industry. Specifically, for a time, many states left regulation of the electric industry to municipal or local governments. *See Tracy*, 519 U.S. at 289 n.7. Those local entities handed out multiple franchises, resulting in duplicative utility systems. *See id.* As the Supreme Court noted,

independent of FERC jurisdiction. Order Nos. 1000 and 1000-A recognized state occupation of the field,[17] and FERC should reject this attempt to ignore jurisdictional lines.

The Complaint asks the Commission to effectively find state ROFR laws invalid or to take an action to preempt these state laws. Neither would be appropriate here as both seek relief that the Commission cannot grant. Furthermore, the Complaint fails to meet its FPA section 206 burden of proof and amounts to a collateral attack on a near decade's old Commission proceeding regarding the same MISO Tariff language. The Complaint, therefore, should be dismissed.

1. Courts are the Appropriate Body to Determine Whether a State Law Impermissibly Conflicts with Federal Law.

As a federal agency, "FERC is a creature of statute, having no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress. Thus, if there is no statute conferring authority, FERC has none. In the absence of statutory authorization for its act, an agency's action is plainly contrary to law and cannot stand."[18] Nothing in the FPA

> "[t]he results were 'ruinous and short lived.'" *Id.* Eventually, in both the power and gas industries, states concluded that it was "virtually an economic necessity" to "provide a single, local franchise with a business opportunity free of competition from any source, within or without the State, so long as the creation of exclusive franchises under state law could be balanced by regulation and the imposition of obligations to the consuming public upon the franchised retailers." *Id.* at 290.

Amicus Curiae's Br. in Support of Appellant-Intervenor at 3-4.

[17] In Order No. 1000, the Commission acknowledged

> that there may be restrictions on the construction of transmission facilities by nonincumbent transmission providers under rules or regulations enforced by other jurisdictions. Nothing 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.

Order No. 1000 at P 287. Similarly, in Order No. 1000-A the Commission "affirm[ed] the Commission's finding in Order No. 1000 that the nonincumbent transmission developer reforms do not result in the regulation of matters reserved to the states, such as transmission construction, ownership or siting." Order No. 1000-A at P 377 (internal citations omitted).

[18] *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (citations and internal quotations omitted).

provides the Commission with the authority to make a finding as to whether a state law violates the FPA. Instead, the authority to find a state statute in conflict with federal law rests with the courts.[19]

2. Regardless of the Commission's Lack of Authority to Make Such a Determination, the FPA Does Not Preempt State ROFR Laws.

Even if this question were before a federal court, the FPA does not preempt state ROFR laws. In order for a reviewing court to find that an agency action appropriately preempted state law, Congress must have given the agency the authority to take the relevant preemptive action.[20] It clearly did not do so here. Instead, in enacting the FPA, Congress expressly reserved authority over certain matters to the states.[21] Among matters reserved to state regulation is the siting and construction of new transmission lines. States have exercised the authority reserved to them under the FPA by adopting various models to regulate the power industry within their borders. This has included state ROFR laws. Among other reasons, a state's exercise of its ROFR law can be a reflection of its determination—based on its extensive history and unique characteristics—that such laws result in a better, more efficient way to ensure the provision of a service that is indispensable to daily life for its citizens. Such a determination is entirely within the discretion of states under the FPA and in accordance with the U.S. Constitution.[22]

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[19] *See, e.g., Elec. Power Supply Ass'n v. FERC*, 753 F.3d 216, 291 (D.C. Cir. 2014) (explaining that "[t]he Administrative Procedure Act (APA) directs us to 'hold unlawful and set aside agency action ... in excess of statutory jurisdiction, authority, or limitations.'" (citing 5 U.S.C. § 706(2)(C))). *See also* Third Compliance Order, Bay Concurrence at 2 ("The Commission's order today does not determine the constitutionality of any particular state right-of-first-refusal law. That determination, if it is made, lies with a different forum, whether state or federal court.").

[20] *See, e.g., Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 357 (1986) ("a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority. . . .[as] an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.").

[21] 16 U.S.C. § 824(b)(1).

[22] *See, e.g., infra* notes 27-31 and accompanying text.

The Commission itself has repeatedly interpreted the scope of its FPA authority in the context of the precise question the Complaint raises. Each time, the Commission has taken action in a way to preserve states' ability to exercise the authority reserved to them in the FPA. For example, in Order No. 1000, the Commission explained that while it was eliminating the federal ROFR, "[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."[23] The Commission was similarly mindful of the limits on its authority in its 2015 order confirming its 2014 finding approving the language in MISO's Tariff recognizing state ROFRs.[24] There, the Commission explained that its decision in Order No. 1000 to limit its action to federal ROFRs "struck an important balance between removing barriers to participation by potential transmission providers in the regional transmission planning process and ensuring the nonincumbent transmission developer reforms do not result in the regulation of matters reserved to the states."[25]

Courts reviewing the same claims alleged in the Complaint—on the identical MISO Tariff language and state law principles—have agreed with the Commission. In reviewing the Commission's decision to approve the language in MISO's Appendix FF recognizing state ROFRs, the U.S. Court of Appeals for the Seventh Circuit explained that "Order No. 1000 terminated only federal rights of first refusal; it did not 'limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities.'"[26] The court

[23] Order No. 1000 at P 287.

[24] Third Compliance Order at PP 27-33.

[25] *Id.* at P 27 (internal citations omitted).

[26] *MISO Transmission Owners v. FERC*, 819 F.3d 329, 336 (7th Cir. 2016) (citing Order No. 1000 at P 227).

explained that the Commission's desire "'to avoid intrusion on the traditional role of the States' in regulating the siting and construction of transmission facilities"[27] was "a proper goal *even though* LSP has cited state laws that might interfere with regional transmission development."[28] The U.S. Court of Appeals for the Eighth Circuit also had the opportunity to consider issues related to state ROFRs. In rejecting arguments that "the cumulative effect of [state ROFRs] would nullify Order No. 1000's abolition of federal ROFRs and eliminate competition,"[29] the court explained that Minnesota's goal in enacting its ROFR law "was 'to preserve the historically-proven status quo for the construction and maintenance of electric transmission lines.'"[30] The court concluded that "[t]his goal is within the purview of a State's legitimate interest in regulating the intrastate transmission of electric energy."[31]

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[27] *Id.* at 336 (citing *South Carolina Public Service Auth. v. FERC*, 762 F.3d 41, 76 (D.C. Cir. 2014)).

[28] *Id.* (emphasis added). The Commission should not be persuaded to address the merits of contours of individual state ROFR laws–such decisions are the domain of the judiciary. *See supra* note 19 and accompanying text. The U.S. Court of Appeals for the Fifth Circuit recently undertook such an examination of a Texas ROFR law. *NextEra Energy Cap. Holdings, Inc. v. Lake*, No. 20-50160, 2022 WL 3753258 (5th Cir. Aug. 30, 2022). In its decision, the court reversed a lower court's dismissal of claims challenging the Texas ROFR law and remanded to the lower court. *Id.* at *13-14. Notably, the court did not conclude that state ROFR laws in general are unconstitutional. Instead, in its decision, the Fifth Circuit compared specific aspects of the Texas law to other states' ROFR laws, noting, for example, that five other states restored their state ROFR laws after Order No. 1000 removed the federal ROFR, "[b]ut none of these laws is as restrictive as Texas's." *Id.* at *4. The court further compared the Texas law to Minnesota's ROFR law, which was upheld by the Eighth Circuit. In particular, the Fifth Circuit noted that the Minnesota law "does not go nearly as far as the Texas law in banning new entrants outright." *Id.* at *11 (internal citation omitted). Further, the court noted that the Eighth Circuit had "concluded that the [Minnesota ROFR law's] preference for incumbents was not discriminatory because it 'applie[d] evenhandedly to all entities, regardless of whether they are Minnesota-based entities or based elsewhere.'" *Id.* (citing *LSP Transmission Holdings LLC v. FERC*, 954 F.3d 1018, 1028 (8th Cir. 2020)). With respect to the Texas law, the Fifth Circuit explained that "*[w]hat matters* . . . is that the Texas law prevents those without a presence in the state from ever entering the portions of the interstate transmission market that cross into Texas." *Id.* at *12 (emphasis added).

Of particular relevance to the instant proceeding, the Fifth Circuit also noted that "Order 1000 is consistent with the Federal Power Act *in leaving room for state regulation*." *Id.* at *3 (emphasis added) (citing *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 289 (2016) (observing that the Act "makes federal and state powers 'complementary' and 'comprehensive'")). As multiple federal appellate courts, now including the Fifth Circuit, have recognized, Congress reserved authority over the siting of transmission facilities to the states in the FPA and the fact remains that the Commission does not have authority to invalidate state law and the FPA does not preempt state ROFR laws. Consequently, the Commission should dismiss the Complaint as it seeks relief the Commission cannot grant.

[29] *LSP Transmission Holdings LLC*, 954 F.3d at 1030-31.

[30] *Id.* at 1031 (citing Defendants-Appellees' Br. at 34).

[31] *Id.* (citing 16 U.S.C. § 824(b)(1)).

The U.S. Supreme Court also has considered matters related to the Commission's authority to preempt state laws that are relevant to the instant proceeding. For example, in *FERC v. EPSA*,[32] the Court considered the scope of the Commission's FPA jurisdiction in the context of Commission action seeking to regulate the amount that market operators must pay for demand response bids in the organized wholesale electricity markets. There, the Court found that the Commission did not impermissibly infringe on the authority reserved to the states in the FPA over retail sales. In reaching this conclusion, the Court expressly noted that the Commission's action explicitly left room for the "States [to] continue to make or approve all retail rates, and in doing so . . . insulate them[selves] from price fluctuations in the wholesale market."[33] In addition, the Commission's action still "allow[ed] any State regulator to prohibit its consumers from making demand response bids in the wholesale market."[34] By contrast, granting the relief requested in the Complaint would not leave the same room for states to exercise their authority to determine the siting and construction of new transmission lines within their borders. Stated simply, it would not show the same "notable solicitude towards the States"[35] that the Court found persuasive in *EPSA*.

Importantly, in *EPSA*, the Court instructed that, with respect to areas reserved to the

[32] *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 760 (2016), *as revised* (Jan. 28, 2016) ("*EPSA*").

[33] *Id.* at 777.

[34] *Id.*

[35] *Id.* The relief requested in the Complaint stands in contrast to the Commission action that the D.C. Circuit upheld in *NARUC v. FERC*. 964 F.3d 1177 (D.C. Cir. 2020). There, the Commission declined to provide a state opt-out from participation in wholesale markets for local energy storage resources. *Id.* at 1183. The court explained that this Commission action "solely targets the manner in which an ESR may participate in wholesale markets," *id.* at 1186, and that it did not directly regulate distribution systems, which authority is reserved to the States under the FPA. *Id.* at 1187. By contrast, the relief sought in the Complaint would go to the heart of the authority reserved to the states and directly regulate the siting of transmission facilities. The effect of the requested Commission action would be to eviscerate the ROFR laws through which states exercise the authority reserved to them in the FPA and would cause the Commission to impermissibly cross the line Congress established in the FPA. The Commission has carefully avoided taking such action in the past and should decline to do so here. *See, e.g., supra* notes 23-25 and accompanying text.

states in the FPA, "FERC cannot take an action transgressing that limit no matter how direct, or dramatic, its impact on wholesale rates."[36] The Court also explained that an overly broad reading of the Commission's authority to ensure that practices affecting rates are just and reasonable "could extend FERC's power to some surprising places."[37] This could include "markets in just about everything – the whole economy . . . FERC could regulate now in one industry, now in another, changing a vast array of rules and practices to implement its vision of reasonableness and justice."[38] The Court concluded that it "cannot imagine that was what Congress had in mind."[39] The Complaint invites the Commission to open the door to a similarly broad reading of its FPA authority—a reading where any state action that allegedly impacts the cost of transmission, including other state laws and actions related to siting and environmental permitting, must be preempted.[40] The Commission should decline the invitation as it would require action that improperly infringes on an array of matters expressly reserved by Congress to the states. Accordingly, the Commission should dismiss the Complaint as granting the relief requested would contravene the division of authority between the Commission and the states that is established in the Constitution and that Congress enshrined in the FPA.

3. Complainants Have Not Met Their FPA Section 206 Burden of Proof.

For the foregoing reasons, the Commission has ample reason to dismiss the Complaint, which the Commission should do without reaching the purported merits of the Compliant. However, the Complaint also fails on its merits because Complainants have not met their burden

[36] *EPSA* at 775.

[37] *Id.* at 774.

[38] *Id.*

[39] *Id.*

[40] Such expansive readings of statutory authority also could raise Major Questions Doctrine concerns. *See, e.g., West Virginia v. Envtl. Prot. Agency*, No. 20-1520 (U.S. June 30, 2022).

under FPA section 206. Indeed, nothing in the record compels a different conclusion than the one that the Commission previously reached in accepting and upholding the relevant provision in MISO's Tariff.

The Complaint contends that state ROFR laws somehow infringe on the Commission's ability to determine just and reasonable rates. However, the Complaint relies on illusory claims and suppositions.[41] Most significantly, it fails to reconcile its claims with the Commission's substantial involvement in setting rates for projects selected for cost allocation in a regional transmission planning process. The fact is, such projects are selected pursuant to a Commission-approved competitive process in compliance with Order No. 1000; with costs allocated pursuant to a Commission-approved methodology; and ultimate cost-based rates paid by customers, like Complainants, approved only after the Commission determines they are just and reasonable.[42] Critically, the Complaint fails to demonstrate how, despite this process, the existence of state ROFRs results in unjust and unreasonable rates.[43] Accordingly, the Complaint fails to draw the

[41] *See infra* notes 44-46 and accompanying text for discussion of a recent Concentric Energy Advisors study providing evidence that competitively built transmission projects do not reduce costs relative to projects built through the exercise of a state ROFR. Of course, the determination of whether a rate is just and reasonable is not a formula to determine least cost. "The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise [ ] definition." *Morgan Stanley Cap. Group Inc. v. Public Util. Dist. No. 1*, 554 U.S. 527, 532 (2008). This is especially the case when the matters at issue are "either fairly technical or involve policy judgments that lie at the core of the [Commission's] regulatory mission[,]" *South Carolina Pub. Serv. Auth.*, 762 F.3d at 54–55 (internal quotation marks and citation omitted).

[42] Complainants could participate in those proceedings, assuming that they had evidence-based claims that the resulting transmission rates for any particular line selected and approved via the MISO process were unjust and unreasonable. That would be a more appropriate venue to address concerns about the costs of transmission service. *See Coal. of MISO Transmission Customers v. FERC*, No. 20-1421, 2022 WL 3571390, at *12 (D.C. Cir. Aug. 19, 2022) ("We agree with Petitioners that the Commission is under a statutory mandate to ensure that all rates are just and reasonable, and Petitioners have shown that rates are not presently just and reasonable for a small number of Baseline Reliability Projects. But that does not get the Petitioners home. That is because their petition for review does not seek as-applied relief just for those Baseline Reliability Projects that they have shown run afoul of the cost-causation principle.")

[43] Moreover, even if some transmission lines built through the exercise of the ROFR would result in lower costs if instead subject to competitive solicitation, this does not render MISO's entire Tariff provision recognizing the existence of state ROFR laws unjust and unreasonable. *See, e.g., id.* (in finding that it was not unreasonable for the Commission to dismiss a section 206 complaint alleging that an entire portion of MISO's tariff was unjust and

necessary line between the harm claimed and the relief sought and, therefore, falls short of its FPA section 206 burden of proof.

Furthermore, the Complaint does not account for relevant experience in the ten years since Order No. 1000 that, while in the context of federal ROFRs, undermines the tie between the relief that the Complaint seeks and the harm claimed. This experience shows that, rather than resulting in lower rates and increased transmission build, the removal of the federal ROFR has resulted in uncertainty, increased costs, and increased delays. This has been due to a number of factors, including the additional layer of administrative processes that substantially increase costs[44]—these costs are allocated to bidders, but "likely to be recovered from load"[45] —and the potential of litigation. Moreover, in its study of the savings claimed in competitive solicitation processes since Order No. 1000, Concentric Energy Advisors explains that

> although many of the winning bids [in competitive solicitations] have cost caps, many of the cost caps have exclusions and exceptions that permit the project's final cost to exceed the cost submitted in the initial winning bid. Furthermore, the cost cap exclusions for some projects apply to the project cost components with the highest risk of cost increases (e.g., routing changes).[46]

unreasonable because a fraction of the relevant projects might raise concerns about cost allocation, the court held that "the scope of [] petitioners' challenge [must] match [] the scope of their evidence" and petitioners' claim "overreaches their evidence."). *See also LSP Transmission Holdings II, LLC v. FERC*, No. 20-1465, 2022 WL 3570679, at *9-10 (D.C. Cir. Aug. 19, 2022) (finding that FERC appropriately dismissed a section 206 compliant against an entire portion of MISO's tariff, challenged on the basis of hypotheticals and a few examples).

[44] For example, the Order No. 1000 process includes opening the solicitation windows, allowing time for proposal development and submission, reviewing proposals, project selection, and exhausting all challenges to a project selection. *See, e.g.*, Concentric Energy Advisors, *Building New Transmission, Experience to Date Does Not Support Expanding Solicitations* (June 2019) ("Concentric"), https://ceadvisors.com/publication/building-new-transmission-experience-to-date-does-not-support-expanding-solicitation/. As implemented by some regional processes, the resources needed to evaluate multiple proposals (estimated to take between 133 and 1,498 days when there is more than one bidder) increase time and cost while exposing projects to possible litigation. *Id.* at 37. Concentric notes that "MISO estimates that it incurred $1,331,940 to select the winning developer in the Duff-Coleman solicitation." *Id.* at 31.

[45] *Id.* at 30.

[46] *Id.* at iv.

Competition, therefore, may result in lower bids, but these rarely translate into actual customers savings.

In addition, to support its assertions, the Complaint points to non-incumbent transmission developers' returns on equity or capital structures that are lower than those provided by Commission rules.[47] However, just as new retail establishments slash prices to attract customers but ultimately must raise prices to sustain business in the long-term, these non-incumbent transmission developer practices are not sustainable.[48] By contrast, incumbent utilities have a relationship with, and responsibility to, their state regulators and customers that goes beyond bidding on a single project, which necessitates providing bids that are reflective of the cost of building transmission today and in the future.

Further to the point, the Commission recently explained in its Transmission Planning NOPR that

> in light of the years of experience since the issuance of Order No. 1000 and the comments received in response to the ANOPR, we preliminarily find that Order No. 1000's remedy—requiring the elimination of all federal rights of first refusal for entirely new transmission facilities selected in a regional transmission plan for purposes of cost allocation—was overly broad. Order No. 1000 may have overlooked the possibility that, as an alternative to elimination of federal rights of first refusal for transmission facilities selected in a regional transmission plan for purposes of cost allocation, conditions could be applied to the use of federal rights of first refusal for such facilities *that would make their exercise just and reasonable and not unduly discriminatory or preferential*.[49]

[47] Complaint at 27.

[48] Importantly, the Commission has a responsibility to set a return on shareholder investment at a level that is "commensurate with returns on investments in other enterprises having corresponding risks," and that is "sufficient to assure confidence in the financial soundness of the utility, and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise capital necessary for the proper discharge of its public duties." *FPC v. Hope*, 320 U.S. 591, 603 (1944); *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 693 (1923).

[49] Transmission Planning NOPR at P 352 (emphasis added).

The Complaint fails to square its contentions with these Commission statements recognizing the Commission's determination that it is possible to set just and reasonable rates, including instances in which ROFRs are a component of the process—Complainants do not because they cannot without admitting that their arguments are unsustainable.

4. The Complaint is a Collateral Attack on Commission Proceedings from Nearly a Decade Ago.

As noted above, the relevant Tariff language remains the same today as it was when MISO submitted its initial Order No. 1000 compliance filing on October 25, 2012.[50] As discussed, the Commission and two separate federal appellate courts have reviewed and dismissed claims stemming from the relevant MISO Tariff language that are nearly identical to those alleged in the Complaint. Complainants have not made a showing of changed circumstances sufficient to overcome their burden and justify submission of the instant Complaint now.[51] Accordingly, the Commission should recognize the Complaint for what it is—a procedurally flawed collateral attack that must be denied.

Absent a showing sufficient to carry its burden and that somehow overcomes the congressional reservation of authority to the states in the FPA (if that is even possible), the Commission cannot grant the relief requested in the Complaint. The Complaint fails on both counts, amounts to an out of time collateral attack on tariff provisions that the Commission approved nearly a decade ago, and therefore must be dismissed.

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[50] *See supra* note 7 and accompanying text. Notably, none of the named Complainants intervened or filed comments in the related Commission proceedings.

[51] *Cf. Coal. of MISO Transmission Customers v. FERC*, No. 20-1421, 2022 WL 3571390, at *9 (D.C. Cir. Aug. 19, 2022) (explaining that "Petitioners' relevant arguments are based on new evidence derived from actual experience since 2013, placing them outside the rule barring collateral attacks on previous orders") (citing *Blumenthal v. FERC*, 552 F.3d 875, 881 n.2 (D.C. Cir. 2009) (finding no improper collateral attack where petition relied on "factual developments" that were "unanticipated" at the time of the original orders)). Here, despite their efforts, Complainants cannot sufficiently allege actual changes in circumstances or new information. *See also supra* note 42.

IV. PROTEST

If the Commission decides to rule on the merits of the Complaint, it should deny the relief requested. The Complainants ask the Commission to require planning tariffs that ignore reality. The Complaint seeks a federally regulated transmission planning process entirely detached from the regulatory environment in which transmission is built. Doing so not only fails to respect the clear state jurisdiction over siting that predated the creation of FERC, as discussed above, but it is also simply bad policy. The Commission's recent Transmission Planning NOPR recognizes that significant transmission development is needed to meet the changing energy needs in this country. In the Second Compliance Order, the Commission also acknowledged the inefficiencies that would be created by requiring MISO to remove the language from its Tariff recognizing state ROFRs and acknowledged the authority of state and local laws in this area, as well as the limits of its own jurisdiction. More specifically, the Commission explained that

> requiring MISO to remove this provision from its Tariff 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. In particular, we find that ignoring these state or local laws or regulations at the outset of the regional transmission planning process would be counterproductive and inefficient, as it would require MISO's regional transmission planning process to expend time and resources to evaluate potential transmission developers for transmission projects that, under state or local laws or regulations, ultimately must be assigned to the incumbent transmission developer. Moreover, the designation of a transmission developer that is not eligible under state or local laws or regulations to develop a given transmission project selected in the regional transmission plan for purposes of cost allocation could hinder the possibility that needed transmission facilities would move forward. It could also unnecessarily delay the development of needed transmission facilities because MISO would still be required to evaluate potential transmission developers for a transmission project selected in the regional transmission plan for purposes of cost allocation that only the incumbent transmission developer may develop under state or local laws or regulations, postponing the development of the

> selected project. Indeed, one purpose of Order No. 1000 is to facilitate the likelihood that needed transmission facilities will move forward.[52]

Complainants now ask this Commission to take a step backwards, thwart efficient transmission development, and allow a planning process that results in infeasible outcomes, which will waste time and delay needed infrastructure—all while disrespecting the states that will be critical to get the needed transmission sited and constructed. The Commission should refuse.

V. CONCLUSION

For the foregoing reasons, the Commission should either dismiss the Complaint on jurisdictional and procedural grounds or deny it on policy grounds. EEI and WIRES appreciate the opportunity to comment on this proceeding.

[52] Second Compliance Order at P 150 (citations omitted).

Respectfully Submitted,

/s/ *Emily Fisher*

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September 1, 2022

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 1st day of September 2022.

/s/ *Sandra Safro*

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