Nos. 121302, 121304, 121305 & 121308 Consolidated

IN THE SUPREME COURT OF ILLINOIS

ILLINOIS LANDOWNERS ALLIANCE, NFP, et al.,	)	**On Petition for Leave to Appeal from the Appellate Court of Illinois, Third District, Nos. 3-15-0099, 3-15-0103 & 3-15-0104 (consolidated)**
Appellees,	)	
v.	)	
ILLINOIS COMMERCE COMMISSION , et al.,	)	**There Heard on Review of the Order of the Illinois Commerce Commission, ICC Docket No. 12-0560**
Appellants.	)	

BRIEF *AMICUS CURIAE* OF LSP TRANSMISSION HOLDINGS, LLC IN SUPPORT OF APPELLANT, ILLINOIS COMMERCE COMMISSION

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POINTS AND AUTHORITIES

I. INTRODUCTION

LSP Transmission Holdings, LLC ("LS Power") submits this Brief *Amicus Curiae* in support of the Appellant Illinois Commerce Commission ("ICC") in its appeal of the Third District's order reversing the ICC's issuance of a certificate of public convenience and necessity ("CPCN") to Rock Island Clean Line, LLC ("Rock Island"). As discussed below, in overturning the ICC's issuance of a CPCN to Rock Island, the judgment of the Appellate Court in Nos. 3-15-0099, 3-15-0103 & 3-15-0104, reported at 2016 IL App (3d) 150099 ("Third District Opinion") has the potential unintended consequence of limiting competition for regionally planned cost-of-service transmission additions, a consequence that would significantly harm Illinois ratepayers.

If the Third District's Opinion were to be applied broadly, its conclusion – that as a threshold jurisdictional matter Rock Island could not obtain status as a "public utility" under the Public Utilities Act (220 ILCS 5/1-101 *et seq*. (West 2012)) because it did not already own, control, operate, or manage utility assets in the state of Illinois – will inappropriately limit competition for new transmission development. Because only a "public utility" may seek a CPCN permitting the addition of new electric related facilities, the Third District's analysis could inappropriately be used to assert that only an existing owner of utility assets will be able to seek a certificate of public convenience and necessity for the construction of new transmission facilities, even those approved in a transmission planning process administered by a regional transmission organization ("RTO") and unquestionably meeting the public use requirement.

Recently adopted requirements of the Federal Energy Regulatory Commission ("FERC") mandate that new regionally planned and regionally cost-allocated transmission additions should, with certain limited exceptions, be subject to competition

to ensure just and reasonable wholesale rates. One of the exceptions to the competition requirement is when a state law or regulation prohibits assignment of such transmission to a new entrant. If applied beyond the instant case, the Third District Opinion could be used by the existing Illinois transmission owners, who have steadfastly opposed competition,[1] to assert that the Public Utilities Act prohibits transmission development by any entity other than an entity currently holding utility assets, thereby prohibiting the very competition, or the ability to assign projects to new entrants, that the Federal Energy Regulatory Commission has determined is essential to determining just and reasonable transmission rates.

Although the majority of its opinion focused on whether Rock Island would be contributing its transmission assets to "public use" under the Act, the Third District Opinion also found that Rock Island neither owned, controlled nor managed transmission assets in Illinois for purposes of meeting the Act's definition of "public utility" under Section 3-105(a) of the Public Utilities Act (220 ILCS 5/3-105(a) (West 2012)). *See*, Third District Opinion at ¶ 43. The Third District appeared to conclude[2] that Rock

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1 For example, Ameren Illinois Company is one of several transmission owners seeking a writ of certiorari from the United States Supreme Court on the basis that FERC exceeded its authority in mandating competition in light of a contract between existing transmission owners that allocated the construction of new projects among themselves. *Ameren Services Company et al, v Federal Energy Regulatory Commission*, Case No. 16-531, Petition for Writ of Certiorari filed October 14, 2016. Ameren sought Supreme Court review because the 7th Circuit firmly rejected its argument of a contractual right to avoid competition and found that such provisions were improper. *MISO Transmission Owners v. FERC*, 819 F.3d 329 (7th Cir. 2016).

2 Reference is made to an apparent conclusion because the Third District's opinion is internally inconsistent; both finding that an entity may seek public utility status at the same time it seeks a CPCN, but also finding that Rock Island could not be a public utility for purposes of seeking a CPCN because it did not own, control,

Island's lack of ownership of utility assets created a jurisdictional bar under to the ICC's issuance of a CPCN to Rock Island.

In addition to being internally inconsistent on the appropriate impact of the lack of current ownership of utility assets on the issuance of a CPCN, the Third District's conclusion is contrary to Illinois law. As the Third District itself recognized, interpreting the Illinois statutory definition of "public utility" to only apply to entities which already own or control assets that can be used for utility related purposes creates an inconsistency between that interpretation and the application of the CPCN requirements that prohibit an entity from owning, controlling, operating, or managing utility assets without first obtaining a CPCN. (220 ILCS 5/8 406(a), (b) (West 2012)).

The Third District Opinion appears to reflect a results-driven approach to the interpretation of the definition of "public utility" under the Public Utilities Act. The Third District's results-driven approach fails to consider, however, the significant impact on Illinois ratepayers that the new interpretation could have beyond the instant matter if the opinion were to be applied broadly. Interpreting the definition of public utility in the context of the CPCN statute in the manner the Third District's Opinion appears to require has the potential to detrimentally impact the citizens of Illinois by erecting a barrier to new entry, potentially depriving Illinois ratepayers of the competition that the FERC has said is essential to determining just and reasonable rates. There was no evidence that the legislature intended the statutory definition of public utility, standing alone, to operate as a prohibition on new entrants committed to being public utilities through the development of new infrastructure for public use. Indeed, the legislatures subsequent 2015

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operate, or manages utility assets in Illinois. Compare, Third District Opinion at ¶49 with ¶43.

requirement to obtain a CPCN, both to be a public utility and to build infrastructure projects, appears intended to fulfill the role of determining those entities entitled under Illinois law to apply for and to become public utilities.

As discussed below, Illinois has been a strong proponent of the transmission planning reforms required by the FERC and staunchly opposed to barriers to entry in the form of state imposed restrictions preserving to existing public utilities the right to build new transmission additions. The FERC mandated competition, when it has been available, has already provided ratepayers with saving of tens of millions of dollars for regionally planned projects as a result of binding cost containment commitments that new entrants have proposed for the new transmission facilities that have been subject to competition.

This Court should grant appeal to affirmatively clarify that ownership or control of existing utility assets is not a prerequisite to applying to become a public utility in Illinois and to seek a CPCN to build utility assets. Once that issue is clarified, determination of whether a particular project will be offered for public use is a factual analysis.

II. ARGUMENT

A. SUMMARY OF DECISION

In November 2014, the ICC granted Rock Island a CPCN to construct, operate and maintain the Illinois portion of an overall 500 mile high voltage direct current ("HVDC") electric transmission line,[3] as well as the associated AC connection from the

[3] HVDC transmission lines accept electricity inputs from alternating current ("AC") facilities, through a converter station converts that electricity to direct current electricity whereupon it is transmitted to a fixed point converter station,

HVDC converter station to the AC transmission grid in Illinois. In conjunction with its grant of a CPCN, the ICC also determined that Rock Island would be a public utility in Illinois.

Several parties appealed the ICC order granting a CPCN. On August 10, 2016, the Appellate Court of Illinois, Third District issued its Opinion reversing and remanding the ICC order, finding that "Rock Island failed to meet both requirements" to obtain "public utility status" in Illinois, (Third District Opinion at ¶ 41) a prerequisite to obtaining a CPCN. *See*, 220 ILCS 5/3-105(a) and 220 ILCS 5/8-406(a), (b)(West 2012). The Court held that under § 3-105(a) of the Public Utilities Act, "there are essentially two prongs to attaining public utility status: (1) a company must own, control, operate, or manage utility assets, directly or indirectly, within the State; and (2) it must offer those assets for public use without discrimination." (Third District Opinion at ¶41)

B. LS POWER'S INTEREST

LS Power's Brief *Amicus Curiae* only addresses the Third District's Opinion as to the first prong of the Third District's analysis and its apparent use of that prong to conclude that the ICC had no jurisdiction to grant Rock Island a CPCN as Rock Island because Rock Island did not currently "own, control, operate, or manage assets within the state." (*Id*. at ¶43). LS Power refers here to the Third District's "apparent" conclusion because although the Court laid out the two prongs, and the factual underpinnings to Rock Island's case for meeting the two prongs, as to the first prong the Court also confirmed that "[t]he Act does not require an applicant to be a public utility before it

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converted back to alternating current electricity and thereafter placed on the interconnected AC transmission grid.

seeks certification under the appropriate provisions. A plain reading of the statute shows that an applicant may seek public utility status while, at the same time, applying for a certificate of public convenience and necessity to transact business and construct facilities." (*Id.* at ¶49).

LS Power addresses only this prong of the Third District's analysis because, if upheld and applied beyond the facts of the instant case, it could be held to erect an insurmountable hurdle preventing transmission development in Illinois by any entity other than entities that own existing public utility assets. The Illinois legislature has expressed no such intent and application of the Public Utilities Act in this manner would harm Illinois ratepayers by providing incumbent transmission providers an argument for limiting the competition that the Federal Energy Regulatory Commission has determined is essential to determining just and reasonable rates.

In addressing only the first prong of the Third District's analysis, LS Power is not suggesting that the Third District's analysis of the second prong is correct. Indeed, review of the Third District's Opinion reflects an effort by the Court to shift its analysis of the ICC's factual findings regarding "public use" of Rock Island's facilities into a threshold jurisdictional analysis. Whether a particular use of utility assets is a "public use without discrimination" (*Id*. at ¶41) will always be a factual analysis, including consideration of an entity's willingness to offer its assets for public use. As such, the ICC's conclusions are appropriately accorded deference and deemed *prima facie* true and correct. 220 ILCS 5/10-201(d). Before setting aside such findings, a reviewing Court must conclude that the ICC's findings are not supported by substantial evidence. 220

ILCS 5/10-201(e)(iv)(A). The Third District appears to have circumvented this requirement by turning the factual review into an asserted threshold jurisdictional matter.

Nevertheless, cognizant of the unique role of *Amicus Curiae*, LS Power focuses its Brief on the issue for which it brings a unique perspective: the potential impact of the Third District's Opinion on the first prong of public utility status holding in paragraph 43 of the Opinion (that Rock Island cannot qualify as a public utility for CPCN purposes because it does not currently own, control or manage utility assets) on broader competitive transmission development in Illinois and on the substantial harm to Illinois ratepayers likely to arise if the Third District's Opinion is broadly applied.

In this regard, the limited competition held to-date for regionally planned cost-of-service transmission additions has already resulted in projected ratepayer saving of tens of millions of dollars and the introduction of binding cost commitments on the part of transmission developers (unseen when competition is absent). As the Acting Chair of the Federal Energy Regulatory Commission stated:

> One of Order No. 1000's key goals was to harness the benefits of competition in transmission development for customers, and it is important that, as regions implement their Order No. 1000 procedures, we do not lose sight of that goal: facilitating the identification, development, and ultimately the construction of more efficient or cost-effective transmission projects that are better for customers. Order No. 1000's competitive solicitation processes – and in some cases, the mere prospect of competitive solicitation processes – have already led to a host of innovative rate structures and cost containment proposals that, if properly designed, could provide significant benefits for customers. I believe that these efforts should be encouraged, both by the [Federal Energy Regulatory] Commission and in the regional transmission planning processes, to foster a dynamic environment for new transmission development. (*Public Service Electric and Gas Company v PJM Interconnection. L.L.C.*, 151 FERC ¶ 61,229 (June 16, 2015) (LaFleur *concurring*)).

These ratepayers' savings could be lost to Illinois ratepayers if the Third District's Opinion is broadly applied and used as a mechanism to exclude non-incumbent transmission developers from Illinois. Clarification is needed.

C. DEVELOPMENT OF ELECTRIC TRANSMISSION IN THE UNITED STATES GENERALLY AND ILLINOIS SPECIFICALLY

Electric transmission development in the United States is subject to concurrent state and federal jurisdiction. The Federal Energy Regulatory Commission has jurisdiction over the rates charged for the transmission of electricity in interstate commerce while states retain jurisdiction over siting and construction. Because of the integrated nature of the electric transmission grid and the fact that generally electricity placed on the grid cannot be distinguished from any other electricity on the interconnected grid, nearly all transmission of electricity is considered transmission of electricity in interstate commerce with rates therefore subject to federal jurisdiction.

At the same time, the Federal Energy Regulatory Commission has limited authority to address the siting or construction of transmission, which authority, is left to the jurisdiction of the various states as an initial and primary matter. In Illinois, the Public Utilities Act requires a public utility to obtain a CPCN from the ICC before transacting any business in the state and before constructing a high voltage transmission line, allowing the ICC to determine the need for and location of new transmission infrastructure. 220 ILCS 5/8-406(a), (b) (West 2012). The CPCN provision limits the ICC to granting a CPCN only if the new facility "is the least-cost means of satisfying the service needs of its customers or that the proposed construction will promote the development of an effectively competitive electricity market that operates efficiently, is

equitable to all customers, and is the least cost means of satisfying those objectives . . .." *Id*.

For its part, since the late 1990's the Federal Energy Regulatory Commission has issued a series of orders and rules addressing transmission development, access and planning to ensure that transmission service is available on a nondiscriminatory basis and at just and reasonable rates.[4] Until those orders, electric transmission service was provided by vertically integrated utilities (utilities owing transmission, distribution and supply). At that time rates for transmission service to captive electricity customers was part of bundled rates (transmission, distribution and supply reflected as a single rate).

The Federal Energy Regulatory Commission orders ultimately led to the creation of RTOs, two of which cover portions of Illinois: (i) the Midcontinent Independent Transmission System Operator, Inc. ("MISO"); and (ii) PJM Interconnection, L.L.C. ("PJM"). Illinois has been largely supportive of the creation of RTOs. For example, in its 2003 *ASSESSMENT OF COMPETITION IN THE ILLINOIS ELECTRIC INDUSTRY: FINDINGS AND RECOMMENDATIONS*, the ICC's first recommendation to the General Assembly of Illinois was "Require Illinois Utility Membership in Properly Designed and Configured RTOs." *See, ASSESSMENT OF COMPETITION IN THE ILLINOIS ELECTRIC INDUSTRY: FINDINGS AND RECOMMENDATIONS,* Illinois Commerce Commission Triennial Report to the General Assembly as required by Sec. 16-120(a) of the Public Utilities Act, submitted January 2003, at Executive Summary Page v.

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[4] For a recitation of the history of FERC transmission rules, *see*, *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

Illinois incumbent transmission owners transferred functional control of their transmission to MISO and PJM. As utilities transferred functional control of transmission assets to RTOs, the development of new transmission additions evolved as well, shifting some transmission development from locally planned to regionally planned transmission. The RTOs now administer regional planning, developing mechanisms to plan for new transmission additions for system reliability, market efficiency, achievement of public policy goals, or a combination of all of the above. RTO approved transmission additions are paid for by ratepayers under tariffs through cost-of-service rates. Cost-of-service rates apply to transmission additions where the utility is reimbursed by ratepayers for its prudently incurred costs, including a reasonable return on investment. In cost-of-service transmission development, ratepayers have traditionally borne all the risk of development, subject only to an after-the-fact FERC prudence review.

To spur development of new transmission infrastructure, FERC also has encouraged the "merchant transmission" business model. Merchant transmission refers to transmission development where a developer assumes development and market risk. Instead of charging cost-of-service rates to captive ratepayers, the developer charges market-based rates based on the ability to subscribe customers through negotiated contracts for use of the available transmission capacity. *See*, Final Policy Statement, Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Projects (AD12-9-000) & Priority Rights To New Participant-Funded Transmission (AD11-11-000), 142 FERC ¶ 61,038 (2013). Rock Island's proposed 500 mile HVDC line is a merchant transmission facility, as Rock Island is taking all development risk rather than shifting that risk to captive ratepayers

and will make the capacity on the line available to subscribers. Non-discriminatory access to merchant transmission facilities is addressed by the Federal Energy Regulatory Commission through the use of an "open season" and other tools, similar to the mechanisms long used by the FERC regarding non-discriminatory access to interstate gas pipelines.

In the most recent in its series of transmission-planning related rules, in July 2011 the FERC issued Order No. 1000 which addressed a number of issues facing transmission development, particularly the need to assure just and reasonable rates and appropriate cost allocation. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011)("Order No.1000"); *order on reh'g and clarification*, Order No. 1000-A, 139 FERC ¶ 61,132 (2012)("Order No.1000A"), *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012) ("Order No. 1000B") *aff'd sub nom.*, *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014). To ensure just and reasonable rates, Order No. 1000 required the removal of "federal rights of first refusal" which are federal tariff or contract provisions that require the RTO to automatically assign new transmission facilities to existing transmission owners.

Specifically, Order No. 1000 held that "[w]e conclude that leaving federal rights of first refusal in place for these facilities would allow practices that have the potential to undermine the identification and evaluation of a more efficient or cost-effective solution to regional transmission needs, which in turn can result in rates for [FERC]-jurisdictional services that are unjust and unreasonable or otherwise result in undue discrimination by public utility transmission providers." Order No.1000 at ¶7. The United States Court of

Appeals for the District of Columbia Circuit upheld Order No. 1000's general mandate to remove rights of first refusal, while preserving to compliance filings the determination of whether any contractually protected exceptions to the removal were appropriate. *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

Among the parties challenging the removal of rights of first refusal were the incumbent transmission owners in MISO and PJM. Those parties again challenged FERC's directive to remove rights of first refusal when MISO and PJM made their compliance filings to comply with Order No. 1000, asserting that their contract right to divvy up new transmission among themselves could not be abridged. When FERC denied the incumbent transmission owners arguments that they had an unchangeable contractual right to a "right of first refusal" excluding assignment of projects to new entrants, – s*ee*, *Midwest Independent Transmission System Operator, Inc., et al.*, 142 FERC ¶ 61,215 (2013), *reh'g denied*, 147 FERC ¶ 61,127 (2014); *PJM Interconnection L.L.C.*, 142 FERC ¶ 61,214, P 182 (2013), *reh'g denied*, 147 FERC ¶ 61,128 (2014) – the MISO and PJM transmission owners each appealed FERC's orders. Both the United States Court of Appeals for the Seventh Circuit (MISO) and the District of Columbia Circuit (PJM) upheld the requirement to remove rights of first refusal from MISO and PJM tariffs and agreements. *See*, *MISO Transmission Owners v. FERC*, 819 F.3d 329 (7th Cir. 2016).[5]

[5] On July 1, 2016 in Case Nos. 14-1085 and 14-1136 the United State Court of Appeals for the District of Columbia Circuit entered a *per curiam* order dismissing the PJM Transmission Owners appeal without a published opinion upon a finding that the petitioners had not appropriately preserved issues for appeal.

As noted above, transmission facilities are subject to concurrent state and federal jurisdiction. As a result, Order No. 1000 noted that "nothing in this Final Rule involves an exercise of siting, permitting or construction authority." Order No. 1000 at ¶107. Order No. 1000 further held that "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 ¶227. These proclamations by the Federal Energy Regulatory Commission in Order No. 1000 are not surprising given that both the FERC and the states have distinct jurisdiction with respect to transmission development and the fact that numerous incumbent transmission owners sought to stop competition altogether by asserting that the FERC was trampling on state jurisdiction by ordering competition for the project and developer permitted to access regional cost allocation. Order No. 1000 rejected this notion of interference with state jurisdiction, (*see, e.g.*, Order No. 1000 at ¶¶ 66, 107) and the FERC again rejected the assertion on rehearing (*see, e.g.*, Order No. 1000A at ¶¶ 187-188, 190-191, 374-376, 378-379,381-382). The United States Court of Appeals for the District of Columbia Circuit rejected these same assertions of infringement on state jurisdictional matters on the petitions for review of more than 40 parties, including MISO and PJM transmission owners. *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 62-64 (D.C. Cir. 2014).

For their part and not to be deterred, MISO transmission owners, who have staunchly opposed competition, proposed a provision in the MISO tariff that provided that MISO would not subject a transmission project to competition at all if a state law

dictated that the project must ultimately be built by an incumbent transmission owner.[6] Although the Federal Energy Regulatory Commission initially rejected the provision as creating anew a federal right of first refusal out of a state right of first refusal (*see*, *Midwest Independent Transmission System Operator, Inc., et al.*, 142 FERC ¶61,215 (2013)), the FERC subsequently accepted the provision (*Midwest Independent Transmission System Operator, Inc., et al.*, 147 FERC ¶61,127 (2015)). Both LS Power and the ICC sought rehearing of the FERC's reversal, noting the FERC's original decision that competition was essential to determining just and reasonable rates and was focused on process rather than ultimate construction. In seeking rehearing, the ICC asserted that allowing the exclusion of projects from competition based on state rights of first refusal: "thwarts the competitiveness of the selection process in the regional transmission planning process, increases costs of transmission development, thereby failing to ensure just and reasonable rates, and unduly discriminates against ratepayers in *states without state rights of first refusal statutes such as Illinois.*" Request for Rehearing And/Or Reconsideration of Illinois Commerce Commission, filed June 13, 2014 in Docket No. ER13-187-002 et seq., at 1-2 [emphasis added] attached as Exhibit 1.

While the ICC asserted in its rehearing request to the FERC that Illinois is a state "*without* a state right of first refusal statute," *id.* the Third District's Opinion could be held to make Illinois just such a state, without any express legislative intent to impose such a barrier to entry. If this court fails to clarify that existing ownership of utility assets is not a prerequisite to becoming a public utility and obtaining a CPCN to build utility assets, the Third District's Opinion would allow those opposing competition to assert that

[6] PJM has a similar provision in its tariff, requiring PJM to assign project proposals consistent with state law, although PJM's does not exclude competition entirely.

MISO can limit competition for projects in Illinois to those with existing public utility assets and that PJM could assign a sponsored project to an incumbent public utility because only a then existing Illinois public utility could seek a CPCN for the new project. Such an interpretation has the potential to significantly harm Illinois ratepayers by preventing them from reaping the benefits of a competitive process.

As relevant to Illinois, Order No. 1000 required the RTOs to develop a competitive process for determining the project and developer permitted to collect regionally allocated cost-of-service rates for projects needed within the region based on a RTO finding that the project and developer are more efficient or cost-effective. To address the requirements of Order No. 1000, both MISO and PJM implemented formal competitive processes. MISO established a process whereby MISO, with stakeholder input, determines the project that should be built to address the identified regional need and then submits that chosen project for competition, subject to certain limitations on the need to compete the project. PJM established a competitive process based on project "sponsorship" whereby prospective developers propose the solution to an identified need and if the developer's solution is selected as the more efficient or cost-effective solution then the developer submitting that solution is assigned the right to build the project, again subject to certain limitations.

MISO has only solicited competitive proposals for one project, which resulted in designation of a project team led by LS Power affiliate, Republic Transmission, LLC as the selected developer. The Republic Transmission Proposal contained several ratepayer protections including a binding cost commitment and a concessionary cap on return on equity, neither of which had been previously provided for cost-of-service rates in MISO.

MISO declared the LS Power proposal to be more efficient or cost-effective than 10 other proposals. (Because of the length of the Developer Selection Report LS Power has not attached it to this Brief, but it is available publically at https://www.misoenergy.org/Library/Repository/Study/Transmission%20Developer/20161220_FINAL_Selection%20Report_SRPT_v1.pdf). Notably, 10 of the 11 competing proposals submitted were identified as containing some form of cost containment, further evidence of the ratepayer benefits that flow from competition. *Id*, p. 39, *see* Table 3-2: Selected Proposal Cost Cap Summary.

PJM has had several planning windows that allowed for competitive submittals. In a proposal window related to issues surrounding the Artificial Island nuclear complex, an LS Power affiliate was designated to build a sponsored project, where the LS Power construction cost cap for its portion of the project was more than $60 million less than PJM's cost estimate for that portion of the project. (Because of the length of the Developer Selection Report LS Power has not attached it to this Brief, but it is available publically at http://www.pjm.com/~/media/committees-groups/committees/teac/postings/artificial-island-project-recommendation.ashx).[7]

While the number of projects subject to competition has been limited, these examples are not isolated. For example, the California Independent System Operator Corporation ("CAISO") has selected five competitive proposals with significant ratepayer benefits including: the Suncrest Project, was estimated by CAISO to cost $50 million to $75 million and the selected developer cost cap was $42.2 million; the Estrella

[7] The project is currently on hold due to significant cost increases for the portions of the project automatically assigned as upgrades to the incumbent utility and not subject to any incumbent utility cost containment commitments.

Project was estimated by CAISO to cost $35 million to $45 million, and the selected developer cost cap was $24.5 million; the Delaney to Colorado River Project was estimated by CAISO to cost $337 million, and the selected developer cost cap was $241 million; and the Harry Allen to Eldorado Project was estimated by CAISO to cost $159 million and the selected developer cost cap was $147 million. *See*, Post-Technical Conference Comments of LSP Transmission Holdings, LLC, FERC Docket No. AD16-18-000, filed October 3, 2016, at 4, attached hereto as Exhibit 2. This represents capital cost savings of $125 million, over 20% less than the RTO estimated costs.

Simply put, if nonincumbent developers are limited in competing for or being assigned Illinois-based transmission projects because of the Third District's Opinion, Illinois ratepayers lose.

D. THE COURT SHOULD REVERSE THE THIRD DISTRICT'S HOLDING THAT EXISTING OWNERSHIP, CONTROL OR MANAGEMENT OF TRANSMISSION ASSETS IS REQUIRED TO SEEK A CPCN

As noted above, the Third District held:

> The Act does not require an applicant to be a public utility before it seeks certification under the appropriate provisions. A plain reading of the statute shows that an applicant may seek public utility status while, at the same time, applying for a certificate of public convenience and necessity to transact business and construct facilities. See 220 ILCS 5/8¬406(a), (b) (West 2012).

Third District Opinion at ¶49. Notwithstanding this finding, the Third District found relevant and apparently dispositive that "Rock Island does not own, control, operate, or manage assets within the State" and "Rock Island currently does not own any

transmission assets in Illinois . . .." Id. at 43.[8] Of course if the assets that were the subject of a request for a CPCN were to be the assets that formed the basis of its status as a public utility, it would not be surprising that Rock Island does not currently own any transmission assets in Illinois, it is prohibited by law from doing so until it obtains a CPCN. Thus, the Third District Opinion potentially creates an insurmountable barrier to new entry in Illinois if not clarified, allowing assertions that only existing public utilities can obtain a CPCN to build new facilities notwithstanding the Third District's acknowledgment that the Act provides no such bar.

As described above, such a conclusion could be used by those who oppose competition to exclude nonincumbent developers from full participation in RTO competitive processes for Illinois projects, depriving Illinois ratepayers of the benefits of such competition. There is no evidence that the Illinois legislature in enacting the definition of public utility, or the subsequent CPCN statute, intended the definition of public utility to act as a *de facto* barrier to new entry into transmission development in Illinois. Indeed, the agency charged with protecting Illinois ratepayers has been a strong proponent of the competitive requirements that the Federal Energy Regulatory Commission imposed and sought to protect Illinois ratepayers from such barriers to entry imposed by other states. In arguing the negative impact of any such laws would have on Illinois, the ICC specifically noted that Illinois was a state without a restriction on new entrants.

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[8] LS Power is aware that Rock Island challenges this factual finding. LS Power defers to Rock Island on the issue of whether the Third District erred in that factual analysis as LS Power's position is that under Illinois law, current ownership, control or management of utility assets in Illinois is not a prerequisite to seeking a CPCN to allow for the construction of the very facilities that will form the basis of public utility status.

In determining whether to reverse the Third District's apparent finding that current ownership is a prerequisite to seeking a CPCN for new transmission facilities that will form the basis of public utility status, the Court should weigh the potential harm to Illinois ratepayers against any protection provided Illinois citizens by a narrow interpretation of the statute. As discussed above, the harm to ratepayers is substantial if the definition of public utility is viewed narrowly so as to allow incumbent utilities to argue that Illinois law prohibits new transmission developers of cost-of-service transmission from seeking a CPCN or obtaining public utility status, notwithstanding that the CPCN statute requires a finding that the proposed project is the least cost means to address the need. Without competition it simply cannot be established that a project handed to the holder of existing utility assets meets the least cost requirement.

A narrow interpretation likewise provides no apparent benefit to Illinois. As noted above, the expectation is that regionally planned cost-of-service projects are needed to address reliability, market efficiency, public policy or other recognized concerns and will need to be built whether competition occurs or not. Thus, while the narrow ruling may stop a merchant project in its tracks – because no incumbent transmission owner is likely to build the project – in the context of RTO planned and approved transmission projects, the effect of the Third District Opinion will not stop the project entirely by require that it be assigned to an entity eith existing utility assets but without competition to determine whether that entity is the more efficient or cost effective developer.

As the Third District Opinion showed, the primary focus of the public utility analysis is whether the facilities at issue will be available for public use. If they will be, it should not matter when public utility status was obtained through the ownership of said

facilities. It they will not be, then public utility status can never be obtained and the date of ownership is likewise irrelevant. In this regard, the Third District's first prong analysis was wholly unnecessary as its analysis of the second prong sufficiently protect Illinois interests in assuring public utility assets are available to the public.

The Third District seemed to accept this concept as its analysis of the Rock Island proposal focused on this public use aspect extensively and the Third District appeared substantially troubled by the merchant model Rock Island was pursuing. For projects planned and approved by RTOs, however, the concern about public use is significantly reduced as the projects are all determined to be needed to support public use, be that system reliability, market efficiency, achievement of public policy goals, or a combination of all of the above. Such projects are therefore presumed to be for public use, although still subject to approval by the ICC to assure they meet that requirement and a determination of the siting for the project.

It appears that rather than take on as the factual analysis that it warrants the issue of the availability for public use of Rock Island's facilities, or even addressing that issue as a jurisdictional issue in the context of a merchant facility, the Third District instead turned current ownership into a jurisdictional necessity. While such a ruling may have addressed the Third District's concerns with the matter before it, the potentially far-reaching impact of current ownership of utility assets as a prerequisite to seeking a CPCN for new transmission assets creates an inappropriate barrier to new entry in Illinois that this Court should not allow to stand. To the extent that merchant transmission projects raise heightened concerns as to whether the project meets the public use requirement to

attain public utility status, this Court should focus its review there rather than on the timing of asset ownership.

IV. CONCLUSION

WHEREFORE, LSP Transmission Holdings, LLC respectfully requests that the Court reverse the Third District's opinion and find, as the Illinois Commerce Commission did, that the ownership, control or management of existing transmission assets is not a prerequisite under the Public Utility Act to seeking the right to construct such assets and become a public utility with respect to the assets subject to the CPCN.

Respectfully submitted,

February 2, 2017

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CERTIFICATION OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 21 pages. In addition, the number of words, excluding the words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 5953 words.

s/John C. Martin
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CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2017, I caused the foregoing Brief *Amicus Curiae* of LSP Transmission Holdings, LLC in Support of Appellant, Illinois Commerce Commission to be electronically filed with the Clerk of the Supreme Court of Illinois using the I2File.Net system.

Pursuant to the "Supreme Court of Illinois Electronic Filing User Manual" and upon acceptance of the electronic Response for filing, I certify that I will cause an original and eleven copies of the Response to be transmitted to the Court within five (5) days of that notice. I further certify that I will cause the Response to be served upon the parties listed on the attached Service List by e-mail.

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Exhibit 1

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Midwest Independent Transmission System Operator, Inc. and the MISO Transmission Owners	Docket Nos.	ER13-187-002 ER13-187-003 ER13-187-004
MidAmerican Energy Company and Midwest Independent Transmission System Operator, Inc.	Docket No.	ER13-186-001
American Transmission Company LLC and Midwest Independent Transmission System Operator, Inc.	Docket Nos.	ER13-89-001 ER13-89-002
Cleco Power LLC	Docket No.	ER13-84-001
Entergy Arkansas, Inc.	Docket No.	ER13-95-001

REQUEST FOR REHEARING AND/OR RECONSIDERATION OF THE ILLINOIS COMMERCE COMMISSION

Pursuant to Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission"), 18 C.F.R. §385.713, and Section 313 of the Federal Power Act ("FPA"), 16 U.S.C. § 8251, the Illinois Commerce Commission ("ICC") hereby respectfully submits this Request for Rehearing or Reconsideration of the Commission's *Order on Rehearing and Compliance Filings* issued on May 15, 2014 ("May 15 Order")[1] in the above captioned dockets[2] on one discrete issue upon which the Commission reversed its decision in its underlying order creating new Commission policy which, among other things, thwarts the competitiveness of the selection process in the regional transmission planning process, increases costs of transmission development, thereby failing to ensure just and reasonable rates, and

[1] *Midwest Independent Transmission System Operator, Inc., et al*. 147 FERC ¶ 61,127 (2015).
[2] On December 10, 2012, the ICC filed a notice of intervention (and Comments) in Docket Nos. ER13-187 and ER13-186, and, therefore, the ICC is a party to those dockets. To the extent that the dockets captioned above are being considered together, the ICC includes them all here.

unduly discriminates against ratepayers in states without state rights of first refusal statutes such as Illinois.[3]

I. BACKGROUND

On October 25, 2012, in Docket No. ER13-187-000, the Midwest Independent Transmission System Operator, Inc. ("MISO"), now the Midcontinent Independent System Operator, Inc., submitted revisions to its Tariff and Transmission Owners Agreement to comply with the local and regional transmission planning and cost allocation requirements of Order No. 1000.[4] On December 10, 2012, the ICC submitted comments to the Commission in response to MISO's October 25, 2012, compliance filing.

On March 22, 2013, the Commission conditionally accepted MISO's compliance filing, subject to further modifications.[5] On April 18, 2013, in Docket No. ER13-187-002, the ICC submitted a request for rehearing of the Commission's March 22 Order, the First Compliance Order, regarding references to state or local rights of first refusal ("ROFR") and cost allocation.

On July 22, 2013, in Docket Nos. ER13-187-003 and Docket No. ER13-187-004, MISO submitted another Order No. 1000 compliance filing that included language regarding state or local rights of first refusal that created a federal ROFR for an incumbent transmission provider with respect to transmission facilities selected in a regional transmission plan for purposes of cost allocation. On August 21, 2013, the ICC submitted an intervention and comments to the

[3] "The Commission may always entertain motions to reconsider its orders if it so chooses, regardless of whether such motions are properly characterized as requests for rehearing for purposes of appellate review." *CMS Midland, Inc*., 56 FERC ¶61,177 (July 31, 1991); *Louisville Gas and Electric Co*., 59 FERC 61,231 (May 28, 1992) (a party may request rehearing of an order on rehearing where that order established new Commission policy).

[4] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011), order on reh'g, Order No. 1000-A, 139 FERC ¶ 61,132, order on reh'g and clarification, Order No. 1000-B, 141 FERC ¶ 61,044 (2012).

[5] *Midwest Independent Transmission System Operator, Inc*., 142 FERC ¶ 61,215 (2013). ("March 22 Order").

Commission regarding proposed tariff language in the MISO filing which was not directed by the Commission that effectively creates a federal ROFR in violation of the Commission's direction in the March 22 Order and extensive tariff language describing transmission projects that are considered to be upgrades of existing transmission infrastructure that effectively serves as a federal ROFR for transmission facilities selected in a regional transmission plan for purposes of cost allocation.

II. STATEMENT OF ERRORS

A. The Commission Erred in Reversing its Policy and Finding That MISO May Retain Its Proposed State Or Local ROFR Provision Without Adjusting its Cost Allocation Methodology to Eliminate the Resulting Undue Prejudice, Disadvantage and Discrimination Against States Without Statutory Rights Of First Refusal in Violation of Section 205 of the FPA, 16 USCS §824d(b).

- The Commission's May 15 decision to exempt from MISO's competitive developer selection process some transmission expansion projects that are in MISO's transmission plan for the purposes of regional cost allocation solely on the basis that such projects are planned for states that have a state ROFR law is unduly prejudicial, disadvantageous and discriminatory in violation of Section 205 of the Federal Power Act, 16 USCS §824d(b)(1), and constitutes an unreasonable difference in rates, charges, service, facilities, and in other respects between states, localities, and classes of service, in violation of Section 205 of the FPA, 16 USCS §824d(b)(2).
- Failure to apply MISO's competitive developer selection process to all transmission expansion projects that are in MISO's transmission plan for the purposes of regional cost allocation will produce results that are not competitive and, therefore, fail to adequately resemble or ensure just and reasonable rates, in violation of Section 205 of the FPA, 16 USCS §824d(a).

B. To the Extent that the Commission Permits Transmission Projects That Are Subject to a State or Local ROFR Law to be Exempt From Application of an Effectively Competitive Developer Selection Process, the Commission Erred by Not Eliminating Regional Cost Allocation for Such Projects in violation of Section 205 of the FPA, 16 USCS §824d.

- If the Commission chooses not to apply an effectively competitive developer selection process to transmission projects planned for states

> with state ROFR laws, then the Commission must exercise its authority to prohibit regional cost allocation for such projects. Otherwise there can be no assurance that transmission rates are just and reasonable and not unduly discriminatory in violation of Section 205 of the FPA, 16 USCS 824d(a) and (b).

III. ICC POSITION AND RECOMMENDATION

The ICC seeks rehearing and/or reconsideration of the Commission's May 15 Order on one discrete issue upon which the Commission reversed its underlying decision and policy and which has multiple negative implications and requests that the Commission: (1) return to its March 22 Order position on the state ROFR issue and provide clarification needed to address assertions regarding inefficiency, delay of process, and jurisdictional conflict; and (2) eliminate regional cost allocation for all projects in MISO's transmission expansion plan that are subject to a state ROFR law.

IV. ARGUMENT

A. The Commission Erred in Reversing its Policy and Finding That MISO May Retain Its Proposed State Or Local ROFR Provision Without Adjusting its Cost Allocation Methodology to Eliminate the Resulting Undue Prejudice, Disadvantage and Discrimination Against States Without Statutory Rights Of First Refusal in Violation of Section 205 of the FPA, 16 USCS §824d(b).

In its March 22 Order, the Commission found that MISO's proposal to include a new provision at section VIII.A of Attachment FF – State or Local Rights of First Refusal, must be removed from its Tariff, stating that 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."[6] The Commission said that Order No. 1000 does not permit a public utility transmission provider to add a federal ROFR for a new facility based on state law.[7]

[6] March 22 Order, at P 205.
[7] *Id*.

As stated above, in July 2013, MISO, nevertheless, flouted the Commission's intent in directing the removal of this provision and reinserted it in a slightly modified way. Now in its May 15 Order, the Commission reversed its position, noting that it agreed with the petitioners on rehearing that argued that the provision MISO proposed merely acknowledges state and local laws and regulations and does not create a federal right of first refusal and granted the requests to reverse that issue. It did so without taking into account the unduly discriminatory impacts of its reversal and without explaining why a provision it found to create a federal ROFR in its March 22 Order, now no longer does so.[8] At a minimum, this new policy creates an undue preference for states and state incumbent utilities in states that have made a policy decision to establish a state ROFR, and unduly discriminates against those that have not.

In its May 15 Order, the Commission found that MISO may retain its proposed state or local ROFR provision,[9] but it failed to require MISO to adjust its cost allocation methodology to eliminate the resulting undue prejudice, disadvantage and discrimination against states that do not have a state right of first refusal. This reversal, without adequate mitigating protections, violates Section 205 of the FPA, 26 USCS §824d(b). Aside from the impacts on any non-incumbent transmission developers, the ratepayers in the state of Illinois, and other states without state ROFR laws, will also be unduly disadvantaged and discriminated against as the Commission's decision limits competition in the transmission planning process, resulting in higher transmission costs and unjust and unreasonable rates.

While the ICC recognizes the necessity to take into account and comply with state and local laws and regulations, and indeed supports that truism, the policy decisions of some states

[8] May 15 Order, at P 147.
[9] May 15 Order, at P 150.

should not supersede those of the others. This means that where certain states have chosen to implement policies, such as the state ROFR laws, that will necessarily result in less competition and, therefore, higher costs, fairness requires that the cost allocation methodologies must be adjusted to reflect those choices and protect consumers in states without ROFR laws. The Commission arbitrarily and capriciously failed to do so here. The Commission's new policy approach essentially pits one state against another, forcing states embracing transmission competition to subsidize those favoring their own incumbent in-state providers. This does not encourage the transparent and competitive regional planning approach that the Commission purports to advance.

It is unclear why the Commission reversed its policy on this point, without any accompanying mitigating protections such as reasonable adjustments to the cost allocation, particularly when there was adequate support in the record to provide those protections. In the March 22 Order, the Commission correctly said that "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."[10] The Commission noted in Order No. 1000 that, "[n]othing in [Order No. 1000] is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities."[11] The ICC supports this position. The Commission properly determined that it could eliminate federal rights of first refusal in Commission-approved tariffs and agreements without limiting, preempting or otherwise affecting state or local laws or

[10] March 22 Order, at P 205.
[11] Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 253 n.231.

regulations with respect to construction of transmission facilities.[12] As the Commission correctly ruled in Order No. 1000, there is nothing improper about references in Commission-approved tariffs or agreements to state or local laws or regulations dealing with construction of transmission facilities.[13] Indeed, it is appropriate to recognize the existence of such state or local laws or regulations, where they do exist. There are certainly ways to do so, however, without unduly discriminating against other states, or failing to ensure just and reasonable rates.

The Commission reiterated this earlier point when it stated in the March 22 Order that MISO must "make the decision to choose which developer may allocate the cost of such projects through the regional cost allocation method."[14] In that March 22 Order, the Commission stated that MISO must "decide which developer is eligible to use the regional cost allocation method for a transmission project selected in the regional transmission plan for purposes of cost allocation."[15] It further ruled that, when a project is being selected in the regional transmission plan for purposes of cost allocation, "state laws and regulations may not be used to automatically exclude bids to develop more efficient or cost-effective transmission solutions to regional transmission needs."[16] The Commission reasoned that when regional cost allocation is at stake, MISO "must adopt a transparent and not unduly discriminatory evaluation process and must use the same process to evaluate a new transmission facility proposed by a nonincumbent transmission developer as it does for a transmission facility proposed by an incumbent transmission developer."[17] It emphasized that "the Commission is responsible for ensuring that [MISO] adopt[s] transparent and not unduly discriminatory criteria for selecting a new

[12] March 22 Order, at P 205.
[13] Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 253 n.231.
[14] March 22 Order, at P 352.
[15] March 22 Order, at P 354.
[16] March 22 Order, at P 206.
[17] March 22 Order, at P 206 *citing* Order No. 1000-A, FERC Stats. & Regs ¶ 31,132 at P 454.

transmission project in a regional transmission plan for purposes of cost allocation."[18] This was a reasonable approach.

Moreover, in the March 22 Order, the Commission correctly determined that MISO's proposed tariff language with respect to the state ROFR law issue went "beyond mere reference to state or local laws or regulations."[19] MISO's proposed tariff language provided for discriminatory treatment in MISO's Commission-jurisdictional function of "mak[ing] the decision to choose which developer may allocate the cost of such projects through the regional cost allocation method"[20] depending on whether or not a transmission expansion project was planned for a state with a state ROFR law. The Commission was correct in exercising its authority for "ensuring that [MISO] adopt[s] transparent and not unduly discriminatory criteria for selecting a new transmission project in a regional transmission plan for purposes of cost allocation."[21] Nothing in these actions violated the Commission's pledge not to "limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities."[22] The Commission-approved RTO-managed competitive developer selection process can operate to non-discriminatorily identify the more efficient or cost-effective transmission developer without limiting, preempting, or otherwise affecting any state or local ROFR laws or regulations.

In contrast, in the May 15 Order, the Commission pointed to arguments of inefficiencies and delays that may occur if MISO must remove the provision requiring it to assign a transmission project that has been selected in the regional transmission plan for purposes of cost

[18] March 22 Order, at P 354.
[19] March 22 Order, at P 205.
[20] March 22 Order, at P 352.
[21] March 22 Order, at P 354.
[22] Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 253 n.231.

allocation to the incumbent transmission owner "within the scope, and in accordance with the terms, of any [applicable state or local laws or regulations] granting … a right of first refusal."[23] Despite all the support for eliminating undue preferences presented in the March 22 Order, the Commission changed its policy and characterized the removal of the ROFR provision as "ignoring these state or local laws or regulations" and said to do so 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."[24] Its sole rationale for reversal appears to be that "[p]etitioners [for rehearing] have persuaded us . . ."[25] The ICC is not persuaded. Nevertheless, if such arguments were so compelling as to warrant reversal of its policy to eliminate undue discrimination in transmission planning and development, the Commission should not do so by ignoring the consequences of the reversal without sufficient mitigating protections in place. The Commission had other options to address any concerns about potential inefficiencies or delay.

If the Commission made any error in the March 22 Order with respect to this issue, it was in not explaining what the Commission expected MISO to do when the developer selected by MISO in the non-discriminatory competitive developer selection process is rejected by a state legitimately exercising its state authority. Such rejection could come, for example, through exercise of a state's ROFR law authority or through a state's siting and certification proceeding.

[23] May 15 Order, at P 150.
[24] *Id.*
[25] *Id.*

If the Commission had provided MISO with reasonable guidance and necessary direction about what actions would be acceptable in such circumstances, the Commission could have easily headed off accusations of "inefficiency and delay."[26] The inefficiency charge could have been addressed by ensuring that developers which voluntarily choose to participate in the competitive developer selection process bear some reasonable proportion of MISO's costs of operating that process. The delay charge could have been averted by Commission specification of a reasonable process for selecting a replacement developer in circumstances where the developer selected through MISO's competitive developer selection process has its proposed project rejected by a state exercising its legitimate state authority.

This delay argument is, however, a red herring as, while a developer may not in some cases meet state requirements for being deemed a public utility under state law, it is the proposed project itself that is at issue in the state siting process, not the developer. The fact that a proposed project may be rejected by a state commission may have more to do with a project not meeting the requirements of a state siting statute, such as an inadequate showing of a necessity for the project. As such, there will likely always be inevitable delays in the process, regardless of the developer. This should not be used as an excuse to thwart the competitive bidding in the selection process.

The Commission could also have explained in the March 22 Order how a MISO-managed competitive developer selection process that operates pursuant to MISO's Commission-jurisdictional transmission tariff can be designed so as to not pre-empt state authority or be perceived to pre-empt state authority. Despite assertions to the contrary by some petitioners,[27]

[26] May 15 Order, at P 130.
[27] *See*, May 15 Order, at PP 134-136 for a summary of petitioners arguments in this regard.

there was nothing in the Commission's March 22 Order ruling regarding the state ROFR law issue that would have the effect of pre-empting state laws. The process sketched out by the Commission in the March 22 Order simply provided for MISO to exercise authority provided under its Commission-jurisdictional tariff and for states to exercise their state law authority under state laws. The Commission simply did not sufficiently explain its position in this regard in the March 22 Order. It could have provided such additional explanation in the May 15 Order, rather than completely abandoning its attempt to correct the undue discrimination in the planning process.

As the Commission noted in its May 15 Order,[28] the Organization of MISO States requested that the Commission clarify its position on how MISO can develop a competitive developer selection process that works in synch with state laws so that balance can be reached "between MISO's planning process and state autonomy when moving into this new competitive bidding process for selecting the best transmission developer to meet identified transmission needs."[29] That would have been a preferred approach.

Despite its compounding error in reversing position in the May 15 Order, the Commission can still correct its original error by taking action on rehearing or reconsideration in this case, specifically, by returning to its March 22 Order position and providing the requested clarification needed to address assertions of inefficiency, delay and pre-emption. The ICC recommends that the Commission take such actions and provide the needed clarification, rather than sanctioning undue discrimination in violation of the FPA by allowing a planned transmission project to be dealt with differently by MISO merely due to the presence or absence

[28] May 15 Order, at P 137.
[29] May 15 Order, at P 137 citing Organization of MISO States' Comments at 4-5.

of a state ROFR law with regard to that project, and by putting into place a process that undermines competition, results in higher costs, and therefore unjust and unreasonable rates, and forces some states to subsidize others in violation of established cost causation principles for cost allocation.

It is important for MISO to conduct its competitive developer selection process even in cases where a modified version of it may be necessary if the transmission expansion project is subject to a state ROFR law. As the Commission put it, the purpose of the competitive developer selection process is "the identification and evaluation of more efficient or cost-effective alternatives to regional transmission needs."[30] As Commissioner Norris explained, processes that increase competition in the identification of transmission solutions (like a competitive developer selection process) "provide real consumer benefits by lowering costs."[31] The information provided by the competitive developer selection process, namely the more efficient or cost-effective transmission developer, is useful information for all states in the MISO region, both the state with the ROFR law and the other states in the region whose citizens will bear a portion of the project's cost due to regional sharing of transmission project costs. The citizens of all states in the MISO region (and their public policy representatives) will want to know if they are being required to pay for inefficient or non-cost effective transmission projects because of one state's ROFR law. The operation of MISO's competitive developer selection process will provide that information, especially when the developer selected through a MISO-managed, non-discriminatory competitive process proposes a project that is rejected by a state with an incumbent preference or when the developer itself fails to meet the criteria to obtain

[30] May 15 Order, at P 148.
[31] May 15 Order, Norris Dissent, at 3.

public utility status within such a state. The transparency of such information does not, by itself, create any dispute between state and federal laws.

In the May 15 Order, the Commission states that "the issue is whether it is appropriate for the Commission to prohibit MISO from recognizing state and local laws and regulations when deciding whether MISO will hold a competitive solicitation for a transmission facility selected in the regional transmission plan for purposes of cost allocation."[32] That is a straw man argument. Nothing in the Commission's March 22 Order prohibited MISO from recognizing state and local laws and regulations in conducting its Commission-jurisdictional competitive developer selection process for a transmission project selected in the regional transmission plan for purposes of cost allocation.

In Order No. 1000, the Commission correctly determined that nothing in that rule requires removal from Commission-approved tariffs of references to state or local laws or regulations.[33] The Commission explained in the March 22 Order that including references in the MISO tariff to recognize state ROFR laws is perfectly consistent with Order No. 1000.[34] In the May 15 Order, the Commission correctly noted that, "[r]egardless of whether state or local laws or regulations are expressly referenced in the MISO Tariff, some such laws or regulations may independently prohibit a nonincumbent transmission developer from developing a particular transmission project in a particular state, even if the nonincumbent transmission developer would otherwise be designated to develop the transmission project under MISO's regional transmission planning process."[35] While the Commission explained that recognition of state ROFR laws in

[32] May 15 Order, at P 149.
[33] Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 253 n.231.
[34] March 22 Order, at P 205.
[35] May 15 Order, at P 149.

Commission-jurisdictional tariffs is perfectly reasonable, the Commission correctly determined that "state laws and regulations may not be used to automatically exclude bids to develop more efficient or cost-effective transmission solutions to regional transmission needs."[36] In the May 15 Order, with respect to the issue of whether it is appropriate for the Commission to prohibit MISO from recognizing state and local laws and regulations when deciding whether MISO will hold a competitive solicitation for a transmission facility selected in the regional transmission plan for purposes of cost allocation, the Commission concluded that it "should not prohibit MISO from recognizing state and local laws and regulations as a threshold issue."[37] But, then it in effect stated that its decision in the March 22 Order constituted such a prohibition. It did not. Specifically, the Commission found that requiring MISO to remove the provision at issue 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.[38] The Commission, in the March 22 Order, however, said that state laws and regulations may not be used to automatically exclude bids to develop more efficient or cost-effective transmission solutions to regional transmission needs; it recognized that it is "not impermissible to consider the effect of the state regulatory process at appropriate points in the regional transmission planning process."[39] This is an important distinction.

As noted above, in the May 15 Order, the Commission decided that "ignoring" state ROFR laws "at the outset of the regional transmission planning process" would be

[36] March 22 Order, at P 206.
[37] May 15 Order, at P 149.
[38] *Id*., at P 150.
[39] March 22 Order, at P 205.

"counterproductive and inefficient," as it would require MISO to expend time and resources to evaluate potential transmission developers for transmission projects that, under a state ROFR law, "ultimately must be assigned to the incumbent transmission developer."[40] The Commission need not, however, reverse its March 22 Order position regarding state ROFR laws in order to address these concerns about inefficiency and delay. Rather, as explained above, the Commission need only clarify what actions MISO may permissibly take in cases where the developer selected by MISO through the non-discriminatory competitive developer selection process proposes a project that is rejected, or is itself rejected as a public utility, by a state legitimately exercising its state authority. In order to avoid potential cost inefficiency in the process, the Commission need only clarify that developers which voluntarily choose to participate in the competitive developer selection process, including incumbent transmission owners, must bear some reasonable portion of MISO's costs of operating that process. Ratepayer dollars need not be used for that purpose. Rather, those desiring to make use of MISO's developer evaluation process would pay the costs of that service. If no non-incumbents choose to participate, MISO may select the incumbent, provided that the incumbent meets all qualification standards. With these clarifications, inefficiency in the process can be avoided.

The Commission's concern about reliability consequences from project implementation delays only applies to the subset of projects with relatively near in-service deadlines and may be addressed in other ways. Because MISO's competitive developer selection process will apply only to market efficiency projects and multi-value projects (a category primarily aimed at public policy projects), and not reliability projects, the number of projects for which in-service delays would be problematic are likely to be very small. However, to address instances where

[40] May 15 Order, at P 150.

reliability concerns about delay may be relevant, the Commission need only provide clarification to MISO regarding permissible expeditious actions regarding replacement developer selection (for example, reversion to the incumbent) should the developer selected through MISO's competitive developer selection process be rejected as a public utility by a state exercising its legitimate state authority.

In his Dissent from the May 15 Order, Commissioner Norris provides sound legal and policy reasons for the Commission to return to its previous March 22 Order position on the state ROFR issue. The ICC agrees and strongly supports these arguments. Commissioner Norris explains that:

- Order No. 1000 does not allow the MISO regional transmission planning process "to automatically exclude non-incumbents from being designated to develop a transmission project due to consideration of state law."[41]
- "allowing non-incumbents to participate in the regional transmission planning process without consideration of potential state law restrictions does not infringe upon the state's authority over siting, permitting and construction of transmission facilities."[42]
- from a policy perspective, "providing an open and fair opportunity for all stakeholders, including non-incumbents, to participate fully in the regional transmission planning process will ensure that the planning process provides complete transparency regarding all reasonable alternatives that would be available to meet identified transmission needs."[43]
- the Commission's May 15 reversal undermines MISO's "ability to identify the more efficient or cost-effective transmission solutions"[44] and the result is a failure to ensure "just and reasonable rates."[45]
- incumbent transmission developers may "lack innovation,"[46] may have a "conflict of interest"[47] and "may be more interested in preserving the status quo to insulate themselves from competition"[48]
- "Order No. 1000-A states that a goal of its reforms is to provide more information and options for stakeholders and state regulators to consider, in order to ensure that

[41] May 15 Order, Norris Dissent, at 2.
[42] May 15 Order, Norris Dissent, at 4 (note 5).
[43] May 15 Order, Norris Dissent, at 3.
[44] *Id*., Norris Dissent, at 1.
[45] May 15 Order, Norris Dissent, at 1.
[46] May 15 Order, Norris Dissent, at 2.
[47] *Id*., Norris Dissent, at 2.
[48] May 15 Order, Norris Dissent, at 2.

they are able to make the best decision regarding how to meet their transmission needs."[49]

- provision of information about the more efficient or cost-effective transmission projects obtained through application of a competitive developer selection process would enable MISO, "in consultation with stakeholders and the relevant regulatory authorities" to "decide whether to move forward and realize the benefits from such transmission projects."[50]
- competition in identifying in transmission development solutions would "provide real consumer benefits by lowering costs"[51] and that "[l]imiting the set of projects and developers that can even be considered in the planning process is inconsistent with that goal and results in unjust and unreasonable rates."[52]
- "Concerns about an inefficient planning process can, and should be, mitigated by the fact that transmission developers who submit bids will fully fund the competitive bidding process and will not submit bids for projects that are unlikely to succeed."[53]

The ICC agrees with each of these points and strongly encourages the Commission to consider these arguments on rehearing or reconsideration before fully departing from its Order No. 1000 policy position so as to ensure just and reasonable rates and to eliminate undue discrimination in the transmission planning and development process as it has done in the May 15 Order.

The Commission's May 15 decision to exempt from MISO's competitive developer selection process some transmission expansion projects that are in MISO's transmission plan for the purposes of regional cost allocation solely on the basis that such projects are planned for states that have a state ROFR law is unduly prejudicial, unduly disadvantageous, and unduly discriminatory in violation of Section 205 of the FPA.[54] Furthermore, failure to apply MISO's competitive developer selection process to all transmission expansion projects that are in MISO's transmission plan for the purposes of regional cost allocation will produce results that fail to

[49] May 15 Order, Norris Dissent, at 3, citing Order No. 1000-A, 139 FERC ¶ 61,132, at P 190 (2012).
[50] *Id*., Norris Dissent, at 3.
[51] May 15 Order, Norris Dissent, at 3.
[52] May 15 Order, Norris Dissent, at 3.
Id., Norris Dissent, at 3.
[54] 16 USCS §824d(b).

ensure just and reasonable rates, also in violation of Section 205 of the FP A.[55] As such, the ICC seeks rehearing or reconsideration of the May 15 Order and requests that the Commission return to its March 22, 2013 position on the state ROFR issue, and provide clarification needed to address assertions regarding inefficiency, delay of process, and jurisdictional conflict.

B. To the Extent that the Commission Permits Transmission Projects That Are Subject to a State or Local ROFR Law to be Exempt From Application of an Effectively Competitive Developer Selection Process, the Commission Erred in Not Eliminating Regional Cost Allocation for Such Projects in violation of Section 205 of the FPA, 16 USCS §824d.

Absent effective competition in MISO's developer selection process for transmission expansion projects that are in MISO's transmission plan for the purposes of regional cost allocation, the Commission cannot ensure that the resulting transmission rates will be just and reasonable. To altogether exempt certain projects (those planned for states that have a state ROFR law) from MISO's competitive developer selection process, as the Commission has decided to do in the May 15 Order, leaves no effective mechanism to ensure the selection of the more efficient and cost effective developer and removes the most effective and transparent way of ensuring just and reasonable transmission rates. Indeed, it calls into question whether resulting rates would be just and reasonable at all.

The ICC supports the rights and authority of public representatives in states with state ROFR laws to exercise incumbent preference in such a way as to raise transmission rates (or in any other way) as applied to the ratepayers in those states. The ICC believes that any state law, such as a state ROFR law, is an expression of state public policy and respects all states' option to make public policy decisions for their citizens.

[55] 16 USCS §824d(a).

The ICC adamantly objects, however, to the Commission permitting states with state ROFR laws to shift the increased costs of their incumbent preference on to the ratepayers of other states (particularly Illinois). Such cost shifting occurs when the Commission allows MISO to operate an insufficiently competitive developer selection process or allows certain projects to be exempt from the competitive developer selection process altogether and the Commission permits regional cost allocation for such transmission projects. If both of those conditions exist, there can be no assurance that the transmission rates for such projects, imposed on ratepayers across the MISO region through the regional cost allocation mechanism, will be just and reasonable. These are the conditions set up by the Commission's May 15 Order, thus leading to this request for rehearing or reconsideration.

In a region where state ROFR laws exist in some states, but not all states (as is the case in the MISO region), the Commission's policy also results in unduly preferential, disadvantageous and discriminatory cost allocation treatment amongst the states. In particular, states with ROFR laws enjoy the benefits flowing from application of MISO's competitive developer selection process (i.e., identification of the more efficient and cost effective developers) to transmission projects located in states without ROFR laws. At the same time, states with ROFR laws enjoy the benefits of shifting most of the higher costs of transmission projects in their states (higher costs due to MISO's competitive developer selection process not being applied to projects in ROFR states)[56] to ratepayers in the other states in the region. In this way, the Commission's policy creates undue preferences, undue advantages and undue discrimination in the distribution of costs and benefits of transmission expansion amongst the states in the MISO region. In

[56] Competitive pressure is commonly recognized as spurring cost-control and/or innovation. Conversely, a reduction in the level of competition, or the complete absence of competition, can lead to higher costs and less innovation.

particular, the Commission is providing preference to ROFR states and creating incentives for all states in the MISO region to adopt ROFR laws in a "beggar thy neighbor" race to the bottom.

The Commission noted that when the transmission planning process "effectively restricts the universe of transmission developers offering potential solutions for consideration in the regional transmission planning process" and such restriction constitutes a federal right of first refusal, the Commission has clear authority to eliminate that restriction.[57] The Commission explained that, "[h]ighlighting the relationship between regional transmission planning and cost allocation, the Commission found that the removal of the federal right of first refusal, combined with cost allocation reforms, would 'address disincentives that may be impeding participation by nonincumbent transmission developers in the regional transmission planning process.'"[58] The Commission further emphasized the point by clarifying that "if any costs of a new transmission facility are allocated regionally or outside of a public utility transmission provider's retail distribution service territory or footprint, then there can be no federal right of first refusal associated with such transmission facility [i.e., the federal right of first refusal is prohibited in such cases]."[59] The same principles apply with respect to the application of state ROFR laws, yet the Commission did not apply the same policy.

The Commission states that its decision to not address the same inequity with respect to region-wide costs that stem from a state ROFR provision is an exercise of "remedial discretion designed to ensure that its nonincumbent transmission developer reforms do not result in the regulation of matters reserved to the states."[60] The Commission, however, does not

[57] May 15 Order, at P 154, citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 284.
[58] May 15 Order, at P 154, citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 320.
[59] May 15 Order, at P 154, citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 430.
[60] May 15 Order, at P 156, citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 377.

acknowledge that the simple protective measures of fairness that the ICC seeks would not have the effect of, or be reasonably interpreted as, pre-empting state authorities. The ICC respects and supports the Commission's decision in Order No. 1000 stating that "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."[61] Moreover, the Commission's assertion in its May 15 Order that the regional transmission planning process that is subject to a state ROFR "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"[62] provides no relief to those unduly discriminated against.

The ICC is, therefore, requesting that the Commission exercise its authority under the FPA to disallow regional cost allocation for transmission projects to which an effectively competitive developer selection process has not been applied (or no competitive developer selection process at all has been applied). Specifically, in circumstances where a transmission project is planned for a state that has a state ROFR law, MISO's competitive developer selection process will either not be applied at all (as provided for in the May 15 Order) or, if the competitive developer selection process is applied (as provided for in the March 22 Order), the competition is unlikely to be effective because non-incumbents are much less likely to compete on projects they know have incumbent preference, as explained in the ICC's Request for Rehearing of the March 22 Order filed on April 18, 2013. To be clear, the Commission need not challenge state ROFR laws, rather, the Commission need only exercise its authority with respect

[61] Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 253 n.231
[62] May 15 Order, at P 157.

to transmission cost allocation by prohibiting regional cost sharing for transmission projects planned for states that prefer to retain a policy of incumbent preference.

The Commission's statements about the planning process do not address the ICC's concerns about the unfairness of regional cost allocation in state ROFR circumstances. In particular, the Commission states that MISO's regional transmission planning process is "also an important tool" for identifying "more efficient or cost-effective transmission solutions in the regional transmission plan for purposes of cost allocation."[63] The Commission states that, even without a competitive developer selection process, MISO's "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."[64]

The Commission however, should not overlook the importance of the competitive developer selection process for identifying the more efficient or cost-effective transmission solution. Participation in MISO's regional transmission planning process is entirely voluntary and the time, resources and costs necessary to actively and effectively participate in that process are beyond the reach of many state regulatory authorities and consumer representatives. In addition, the planning process is advisory only and MISO need not act on, or even take into account, recommendations made by stakeholders. So, while the ICC agrees with the Commission that having a regional transmission planning process is better than not having one, having a regional transmission planning process is not a substitute for having, and applying, an effectively competitive developer selection process.

[63] May 15 Order, at P 157.
[64] May 15 Order, at P 157.

If the Commission chooses not to apply an effectively competitive developer selection process to transmission projects planned for states with state ROFR laws, then the Commission must exercise its authority to prohibit regional cost allocation for such projects. Otherwise there can be no assurance that transmission rates are just and reasonable and not unduly discriminatory as explained in this section. Accordingly, the ICC seeks rehearing or reconsideration of the decision in the Commission's May 15 Order not to eliminate regional cost allocation for all projects in MISO's transmission expansion plan that are subject to a state ROFR law.

V. CONCLUSION

WHEREFORE, for the reasons explained above, the ICC seeks rehearing and/or reconsideration of the Commission's May 15 Order and requests that the Commission: (1) return to its March 22, 2013 position on the state ROFR issue and provide clarification needed to address assertions regarding inefficiency, delay of process, and jurisdictional conflict; and (2) eliminate regional cost allocation for all projects in MISO's transmission expansion plan that are subject to a state ROFR law.

Respectfully submitted,

/s/Christine F. Ericson

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ILLINOIS COMMERCE COMMISSION

Dated: June 13, 2014

CERTIFICATE OF SERVICE

I hereby certify that I caused copies of the foregoing document of the Illinois Commerce Commission to be served this day upon each person designated on the official service list compiled by the Secretary in this proceeding, a copy of which is attached, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Chicago, Illinois, this 13th day of June, 2014.

/s/ Christine F. Ericson

Christine F. Ericson
Deputy Solicitor General and
Special Assistant Attorney General
Illinois Commerce Commission

Document Content(s)

Exhibit 2

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Competitive Transmission Development Technical Conference	**)** **)**	**Docket No. AD16-18-000**

POST-TECHNICAL CONFERENCE INITIAL COMMENTS OF LSP TRANSMISSION HOLDINGS, LLC

Pursuant to the Commission's Notice inviting Post-Technical Conference Comments regarding its Competitive Transmission Development Technical Conference, LSP Transmission Holdings, LLC ("LS Power") submits the following comments. In soliciting comments, the Commission identified a number of specific questions and LS Power responds to most of those questions below. Many of LS Power's responses point to a few discrete recommendations to ensure that the promises to ratepayers in Order No. 1000[1] can be fully realized. To fully realize the potential that Order No. 1000 already has demonstrated , the Commission should issue a Policy Statement on Cost Containment and its Role in the Selection Process to reinforce Order No. 1000's focus on rates and confirm that binding, enforceable cost containment commitments are encouraged and should prevail over cost estimates in competitive solicitations. This national policy statement, applying to all Order No. 1000 regions, would cover the following areas:

1. The Benefits of Cost Containment to Consumers.

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[1] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011)("Order No.1000"); *order on reh'g and clarification*, Order No. 1000-A, 139 FERC ¶ 61,132 (2012)("Order No.1000A"), *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012) ("Order No. 1000B") *aff'd sub nom., S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

2. The Role of Cost Containment in the Selection Process.

3. Rate Case Protocols for selected proposals with a cost containment commitment.

LS Power's proposed Policy Statement on Cost Containment and its Role in the Selection Process is attached as Exhibit A.

The Commission also should significantly reduce the exclusions that prevent projects from being subject to Order No. 1000 mandated competition. In addition to a Policy Statement addressing the role and application of cost containment in the selection process, the Commission should consider the tools available to it under the Federal Power Act to remove exceptions and carve-outs to competitive processes on an Order No. 1000 region by region basis, to ensure the benefits of competition are realized for all ratepayers on all jurisdictional transmission investments.

I. INTRODUCTION

In evaluating Order No. 1000 implementation, the Commission should focus on ensuring just and reasonable rates, which was the foundation of Order No. 1000.[2] As the D.C. Circuit confirmed, "there is ample reason to think that injecting competition into the planning process will help to ensure that rates remain just and reasonable."[3] Despite the limited implementation to

[2] On appeal, the Commission defended the requirements in Order No. 1000 based on a clear connection between the requirements of the Order and rates. *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 82-82 (D.C. Cir. 2014)(noting that "The Commission concluded that including rights of first refusal was a 'practice . . . affecting . . . rate[s]' within the meaning of the [Federal power Act]." The Court of Appeals upheld the Order based on that connection, finding "Transmission service providers recoup the costs of their transmission facilities through their rates. The lower those costs, the lower their rates." *Id*. at 84 (citations omitted).

[3] *Id*. at 93.

date, Order No. 1000 has proven its ability to assure just and reasonable rates. When given the opportunity, transmission developers can apply their expertise to control costs for the benefit of ratepayers. Participants in Order 1000 processes have been willing to accept risk and provide ratepayer benefits through binding, enforceable cost containment commitments, including construction cost caps, ROE caps and various other innovative cost containment commitments. On the other hand, as discussed below, Transmission Providers under cost of service rates, with no incentive for cost control, continue to expose ratepayers to cost overruns. The question now must be how the Commission assures that **all ratepayers** benefit from the innovation and rate certainty that competitive pressures have brought and can bring. In making these determinations, the Commission should take into account the following.

A. Competition Through The Elimination Of Rights Of First Refusal Has Been Successful In Delivering Rate-Related Benefits To Consumers.

In issuing Order No. 1000, the Commission held that the reforms, including the removal of rights of first refusal were "necessary at this time to ensure that Commission-jurisdictional services are provided at rates, terms and conditions that are just and reasonable and not unduly discriminatory or preferential."[4] As discussed in the sections below, Order No. 1000 processes, when implemented, have offered binding cost containment commitments while projects not subject to competitive forces continue to result in cost escalations and overruns, many quite substantial.

1. Competitive Solicitations Have Resulted In Transmission Proposals With Legally Enforceable, Binding Cost Containment.

The relatively limited number of projects subject to competition has shown that

[4] Order No. 1000 at P 30.

participants are willing to submit proposals with legally enforceable, binding cost containment.

- The California Independent System Operator, Inc. ("CAISO") has held several competitive solicitations under its Commission approved Order No. 1000 competitive solicitation process.[5] Binding cost containment commitments were proposed in all 6 such competitively solicited projects since the beginning of 2015, and in five the selected Approved Project Sponsor was selected primarily because of its contractually enforceable cost containment mechanism.[6] Cost contained proposals were as much as 30%-40% less than CAISO's estimates.[7]
- The Southwest Power Pool ("SPP") has held a single competitive

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[5] CAISO's Order No. 1000 competitive solicitation occurs after the CAISO Board has approved the project to be placed into the transmission plan, referred to herein as the "Competitive Bidding Model".

[6] http://www.caiso.com/Documents/DelaneyColoradoRiverTransmissionLineProject-ProjectSponsorSelectionReport.pdf

http://www.caiso.com/Documents/ProjectSponsorSelectionSpringFinalReport.pdf

http://www.caiso.com/Documents/ProjectSponsorSelectionEstrellaFinalReport.pdf

http://www.caiso.com/Documents/SuncrestProjectSponsorSelectionReport.pdf

http://www.caiso.com/Documents/HarryAllentoEldoradoTransmissionLine-ProjectSponsorSelectionReport.pdf

[7] The Suncrest Functional Specification estimated the project cost to be approximately $50 million to $75 million and the cost cap was $42.2 million, 15%-43% lower than the estimate. The Estrella Project was estimated to be $35 million to $45 million, and the cost cap was $24.5 million, 30%-45% less than the estimate. The Delaney to Colorado River Project was estimated to cost $337 million, and the cost cap was $241 million, 28% less than the estimate. The Harry Allen to Eldorado was estimated at $159 million in 2020 dollars and the cost was $147 million, 8% less than the estimate but also inclusive of a return on equity cap.

solicitation for a project that SPP's preliminary analysis indicated would cost approximately $16.8 million.[8] There were 11 proposals for the project with proposal costs submitted that were less than half of the SPP cost estimate, as low as $7.5 million,[9] and 6 of the proposals offered some form of cost containment.[10]

- The Midcontinent Independent System Operator ("MISO")[11] just held its first competitive solicitation. MISO is in the process of evaluating proposals so the cost containment parameters of the proposals submitted by the eleven qualified entities are not yet public.[12] Nevertheless, LS

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8 SPP-RFP-000001 at 6, available at https://www.spp.org/documents/28843/spp-rfp-000001_website%20watermarked%20posting%20version_regdateupdate080315.pdf .

9 SPP Recommendation Report at 4, available at https://www.spp.org/documents/37708/iep%20recommendation%20report%20with%20process%20and%20appendix%20public%20redacted%20041216_redacted.pdf . This disparity in the proposal cost commitments and the SPP preliminary cost estimate challenges SPP's assertion that "given that SPP develops cost estimates during the ITP process and bidders are likely to base their bids on SPP's cost estimate, other factors are necessary to distinguish among bidders to ensure efficiency and cost-effectiveness." Southwest Power Pool, Inc. Second Compliance Filing Letter, filed November 15, 2013 in Docket No. ER13-366-001, at 27.

10 *Id*.

11 Like CAISO, MISO's Order No. 1000 compliant process relies on a Competitive Bidding Model. Like SPP, MISO relies on a points based evaluation process.

12 MISO responded to the 11 proposals by stating "MISO is pleased with the robust number of responses to our first RFP." https://www.misoenergy.org/AboutUs/MediaCenter/PressReleases/Pages/MISOCompetitiveTransmissionDeveloperRFPWindowCloses.aspx; MISO identified proposals from the entities identified at: https://www.misoenergy.org/Library/Repository/Study/Transmission%20Developer/List%20of%20Proposals_Duff-Coleman%20EHV%20345_Final.pdf .

Power fully expects that numerous proposals for this Market Efficiency Project will contain binding cost containment provisions.[13] LS Power's affiliate, Republic Transmission, is a bidder.

- The New York Independent System Operator ("NYISO") has issued two open windows under its Order No. 1000 planning process.[14] NYISO is currently in the process of evaluating those open windows so definitive proposal terms are not public yet. The second process included a requirement to include an 80/20 risk sharing proposal and the recent NYISO VSA report identifies that bidders accepted the 80/20 risk sharing requirement in their proposals. LS Power, whose affiliate North America Transmission, LLC is a bidder, expects those proposal windows to produce multiple proposals including only 80/20 risk sharing mechanisms and but also additional binding cost containment commitments.
- PJM Interconnection L.L.C. ("PJM") has held several open windows based on its Order No. 1000 planning process.[15] PJM does not present cost containment information for all of the proposals submitted, but has

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[13] As discussed below, to qualify as a Market Efficiency Project in MISO, a project must be at least 345kV. Like SPP, MISO's Commission approved proposal evaluation criteria places minimal evaluative weight on the actual cost components of the bid and it is unclear how MISO will distinguish between bids with a cost containment mechanism and bids without such mechanisms.

[14] NYISO's Order No. 1000 compliant competitive process relies on qualified entities to propose the solution to the identified reliability, economic or public policy need. The model is referred to as the sponsorship model.

[15] PJM's Order No. 1000 compliant process is a sponsorship model.

identified multiple instances where cost containment has been offered. This has included the solicitation known as Artificial Island, which resulted in a cost contained proposal being selected which included a construction cost cap that was $60 million below the PJM cost estimate and a solicitation known as Pratts which included a cost contained proposal at $95.2 million versus a cost estimate of $103.7 million for the selected incumbent solution.[16] While not presented by PJM, LS Power has offered many additional cost containment proposals for both reliability and market efficiency windows in PJM. As LS Power noted in Docket Nos. ER15-1344-001 and ER15-1387-001, even in instances in which PJM has awarded a project to an incumbent utility, LS Power offered a binding cost cap on a viable alternative which was not selected.[17]

2. Traditional Cost of Service Transmission Continues to Experience Significant Cost Increases Over Original Estimates.

Ratepayers continue to suffer from significantly higher costs in many circumstances where the cost estimate provided for a project that did not go through competitive processes has proved inaccurate. LS Power identified multiple recent projects in MISO and PJM in which the updated costs exceeded the original cost by a low of 9% and a high of 520%.[18] Two projects in

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[16] *See*, http://www.pjm.com/~/media/committees-groups/committees/teac/20150910/20150910-teac-reliability-analysis-update.ashx at 29.

[17] *See*, Post-Technical Conference Comments of Northeast Transmission Development, LLC in Docket Nos. ER15-1344-001 and ER15-1387-001 at 5, footnote 11.

[18] *See e.g.*, MISO MVP Dashboard, available at https://www.misoenergy.org/Library/Repository/Study/MTEP/MVP%20Portfolio%20Triennial%20Review/MVP%20Dashboard.pdf ; http://pjm.com/~/media/committees-

(continued ...)

MISO alone resulted in cost increases of more than half a billion dollars, with the entire portfolio of MVP projects increasing by over $1 billion.[19] For example, on the Maywood-Herleman project the estimated cost went from $432.2 million to $705.4 million because of increased route length and additional costs associated with river crossing.[20] In LS Power's Artificial Island proposal in PJM, LS Power's affiliate Northeast Transmission provided a construction cost cap for a river crossing project, which cost cap included Northeast Transmission assuming routing risk.

PJM has provided the Commission information that it has held 7 open windows, approved 5 greenfield projects and 96 'upgrades' and has awarded the project to the incumbent transmission owner 101times and to nonincumbent developers twice.[21] In each referenced instance where PJM selected an incumbent transmission owner as the sponsor of the selected transmission solution, there was not a binding cost containment proposal from the incumbent for the project assigned, although in multiple instances there were viable cost contained alternatives offered. PJM notes that "out of 280 greenfield proposals submitted in proposal windows, 100 of those proposals contained some type of cost cap proposal."[22] Likewise, when projects were not

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groups/committees/teac/20160811/20160811-board-whitepaper-august-2016.ashx; http://www.pjm.com/planning/rtep-upgrades-status/construct-status.aspx; Summary spreadsheet attached as Exhibit B.

[19] *See*, MISO MVP Dashboard, available at https://www.misoenergy.org/Library/Repository/Study/MTEP/MVP%20Portfolio%20Triennial%20Review/MVP%20Dashboard.pdf .

[20] *Id.*

[21] Competitive Transmission Development Technical Conference Testimony of Steven R. Herling of PJM at 6, Docket AD16-18-000.

[22] Speaker Materials Of Craig Glazer of PJM Interconnection, L.L.C., submitted June 22,

(continued ...)

competitively solicited by PJM but simply assigned to an incumbent transmission owner because the selected project was an upgrade to an existing facility, there have been no legally enforceable, binding cost containment provisions.

LS Power is not aware of a single instance in any region where an 'upgrade,' or project withheld from competition as a result of the either the Commission's single zone exclusion from Order No. 1000 or one of the other post-Order No. 1000 exclusions, have had binding cost containment commitments offered by the incumbent utility. In MISO alone such non-competed Baseline Reliability Projects have a value of $ 1.496 billion since Order No. 1000 became effective because, as discussed below, Baseline Reliability Projects are excluded from competition.[23] The record is clear; the result of competitive solicitation has been proposals with cost containment mechanisms while the result of directly assigned projects is no cost

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2016 in Docket AD16-18-000 at 5. While PJM focuses on the "challenges" these proposals created, the Commission should focus on the tremendous ratepayer benefits such cost contained proposals bring.

[23] *See*, MTEP 2014 Executive Summary at page 3, showing $269,506,000 in Baseline Reliability Project (with no MEP or MVP projects), available at https://www.misoenergy.org/Library/Repository/Study/MTEP/MTEP14/MTEP14%20Executive%20Summary.pdf; MTEP 2015 Executive Summary at page 3, showing $1,227,215,000 in Baseline Reliability Projects (with no MVP and a single MEP valued at $67,443,000), available at https://www.misoenergy.org/Planning/TransmissionExpansionPlanning/Pages/MTEP15.aspx. In addition, the MISO Board will shortly decide whether to approve four transmission additions in the "other" category. Although the projects are based on production cost savings, the projects do not qualify as a MISO Market Efficiency project because they are below 345 kV and thus not subject to the competitive solicitation. As currently proposed, because there will be no competition these market efficiency projects have no binding cost containment associated with them. https://www.misoenergy.org/Library/Repository/Meeting%20Material/Stakeholder/PAC/2016/20160817/20160817%20PAC%20Item%2002c%20MCPS%20South%20Update.pdf . MTEP 2015 included 242 projects in the "Other" category totaling $1.38 billion. MTEP 2015 Executive Summary at 3. MTEP 2014 had 312 "Other" projects totaling $1.5 billion. MTEP 2014 Executive Summary at 3.

containment provisions.

3. Order No. 1000 Has Been Successful in Attracting Financially and Technically Qualified Developers

Nonincumbent developers have established that they are capable of financially and technically developing projects while also offering binding cost containment. Each region has established thorough qualification criteria that ensure that viable entities are the only entities proposing projects or responding to Transmission Provider solicitations. For example, SPP lists 48 qualified RFP participants.[24] The CAISO evaluation reports referenced *supra* set forth a good recitation of the quality of entities participating in the competitive solicitations. MISO released a list of the bidders for its Duff-Coleman competitive solicitation process.[25] Because all entities submitting an Order No. 1000 proposal are financially and technically qualified in the relevant region, these factors should not subsequently be used to artificially override definitive cost differences between proposals.[26]

4. The Number Of Projects Subject To Order No. 1000 Competition Has Eroded Substantially Since The Issuance Of Order No. 1000 In 2011.

Order No. 1000 required that all projects subject to regional cost allocation be subject to

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[24] *See*, https://www.spp.org/spp-documents-filings/?id=19372. A list of SPP's extensive qualification criteria can be found at SPP OATT Attachment Y, Section III b.

[25] https://www.misoenergy.org/Library/Repository/Study/Transmission%20Developer/List%20of%20Proposals_Duff-Coleman%20EHV%20345_Final.pdf.

[26] For an example of using criteria fully covered in qualification assessment to distinguish between qualified entities without a connection to the ratepayer benefits of any alleged distinction, *see* the SPP Recommendation Report regarding Project Management and Operations, pages 24-30 of the Recommendation Report, available at https://www.spp.org/documents/37708/iep%20recommendation%20report%20with%20process%20and%20appendix%20public%20redacted%20041216_redacted.pdf.

competition, with the limited exception of upgrades. Order No. 1000-A defined regional cost allocation as a project where "any" costs are allocated outside a single retail distribution service territory, if the incumbent has one, or the footprint of the individual transmission owner if it does not have a retail distribution service territory.[27]

Starting with the very first compliance filings, some incumbent transmission owners and regional planning entities began to create exceptions to the requirement to compete projects with regional cost allocation. For example, MISO and the MISO transmission owners sought removal of the longstanding regional cost allocation methodology for Baseline Reliability Projects, which methodology would have resulted in cost allocation to more than one pricing zone, and therefore competition, for the vast majority of Baseline Reliability Projects.[28] That cost allocation methodology was replaced with a cost allocation methodology that removed Baseline Reliability Projects from Competition. In just two planning cycles since the change the revised cost allocation has meant nearly $1.5 billion in projects removed from competition.

Similar efforts were undertaken in PJM (200kv restriction (ER16-1335-000)[29] and incumbent Form 715 criteria projects (Docket No. ER15-1387-000)), FRCC (230 kV threshold),[30] and SERTP (300kV threshold).[31] Certain other rules pre-dating Order No. 1000

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[27] Order No. 1000A at P 430.

[28] *See* Docket No. ER13-186-000 et seq.

[29] The effort to diminish the number of projects subject to competition continues as PJM and the PJM transmission owners responded to the Commission Order requiring competition for 200 kV projects that were initially withheld from competition on the assumption the project would not result in cost allocation outside a single zone by seeking to change the cost allocation for such projects rather than complying with the Commission's directive. *See*, September 26, 2016 filing in Docket No. ER15-1335-002.

[30] *Tampa Electric Company, et al*, 148 FERC ¶61,172 (2014) at P 138.

also limit beneficial projects entirely, such as MISO's 345 kV threshold for Market Efficiency Projects. The above list does not include the increased use of generic project categories that are currently excluded from Order No. 1000 solicitation such as PJM's "supplemental" projects and MISO's "other" category.

In the many regions, additional exceptions have been made for projects with a near-term need date. PJM has its Immediate-need Reliability Projects which removes most projected needed prior to 3 years from competition.[32] ISO-NE's transmission process imposes a right of first refusal on projects needed in 3 years or less.[33] These automatic assignments to incumbent transmission owners often do not calculate the costs, if any, of alternatives available to address the alleged problem on an interim basis in order to allow for competition.

Numerous incumbent utilities have sought and obtained state right of first refusal laws to ensure projects are assigned to the incumbent, to avoid competition. The net result of these many carve outs and exceptions is that the application of Order No. 1000 competitive processes has been overly limited.

5. Many Transmission Providers Seek Guidance from the Commission Related to Order No. 1000 Implementation.

In implementing Order No. 1000, the Commission allowed each region to devise its own competitive selection process, including qualification and evaluation criteria. Transmission Providers have different levels of experience with Order No. 1000 implementation. Those

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31 *Louisville Gas & Elec. Co.*, 144 FERC ¶ 61,054 (2013) at P 76.

32 The Commission's Order in Docket No. ER16-736-001 would allow this exclusion regardless of whether *any* developer could meet the need date. *PJM Interconnection, L.L.C.*, 156 FERC ¶ 61,096 (2016) at P24.

33 *ISO New England Inc.*, 150 FERC ¶ 61,209 (2015)

regional planning entities that have had many competitive processes, such as in CAISO and PJM, have seen successful nonincumbent proposals while many others have not yet completed or even initiated any processes. However, even those with the most experience have requested specific guidance from the Commission on cost containment implementation. Although LS Power believes that Transmission Providers currently have the authority necessary to fully consider binding cost containment proposals in their competitive evaluation processes, as discussed in Section II, Commission guidance may nevertheless be appropriate through a Commission Policy Statement.[34]

a. Many regional entities remain uncertain regarding how to deal with proposals containing binding cost containment.

Prior to Order No. 1000, many industry participants believed that the ability to significantly control transmission development costs was limited, other than through ensuring that such costs were prudently incurred. For example, SPP argued to the Commission that cost estimates were largely uncertain and that transmission development was too speculative to have

[34] LS Power agrees with pre-technical conference statements from Duke-ATC on page 4 of their comments: "From DATC's perspective, continued uncertainty regarding cost containment could unnecessarily delay competitive transmission processes with administrative questions, regulatory challenges and/or litigation, or could even lead to developers foregoing the risk of containing costs altogether, which could negatively impact customers. DATC encourages the Commission to resolve the concerns and questions raised in this technical conference in an expeditious and concrete manner – such as an issuance of a Policy Statement – in order to achieve its stated Order No. 1000 objective of ensuring that transmission projects open to competition are built in the most cost-effective manner possible. Each ISO/ RTO, along with the regions' stakeholder process, would then be responsible for developing cost containment mechanism processes consistent with the Policy Statement." Pre-Technical Conference Comments Of Duke-American Transmission Company LLC, submitted May 31, 2016 in Docket AD16-18-000.

binding cost estimates.[35] While that understanding may have reflected SPP's experience with incumbent transmission developers as of that time, the assertion is, based on SPP's own experience,[36] a false assumption regarding the willingness of nonincumbent transmission developers to provide bind cost containment commitments. This erroneous assumption led to a competitive evaluation process in both SPP and MISO that places limited value on costs or cost containment and a disproportionate value on factors that are covered in the qualification criteria. The experience of Order No. 1000 implementation in many regions has now proven that transmission developers are in a position to accept risks they can manage, in situations where they have an incentive to control cost. The Commission should provide guidance to Transmission Providers that the benefits of cost containment should be highly valued.

b. Many regional entities remain uncertain regarding the enforceability of binding cost containment.

Some Transmission Providers fail to understand the difference between cost containment offered in a competitive environment and cost of service cost overages, leading many to under-value cost containment proposals. A lack of enforceability assertion has been repeated by a number of incumbent transmission owners.[37] In contrast, the nonincumbents that have made

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[35] Southwest Power Pool, Inc. Second Compliance Filing Letter, filed November 15, 2013 in Docket No. ER13-366-002 at 26-27 (asserting that "cost estimates are inherently inaccurate); Answer of Southwest Power Pool, Inc. filed February 19, 2014 in Docket No. ER13-366-002 (referring to the "speculative cost estimate submitted by the RFP respondent during the conceptual stage of the project").

[36] See, SPP Selection Report at 4 https://www.spp.org/documents/37708/iep%20recommendation%20report%20with%20process%20and%20appendix%20public%20redacted%20041216_redacted.pdf.

[37] *See, e.g.*, Speaker materials of Kim Hanemann, Public Service Electric and Gas Company, Competitive Transmission Development Technical Conference, June 27-28, 2016, Docket No. AD16-18-000 at 4 (asserting that "[t]here are also many practical

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binding cost containment proposals have repeatedly acknowledged their expectation that such commitments are fully contractually and rate enforceable. For example, LS Power's affiliate, Northeast Transmission, reflected its binding construction cost cap not only in the Designated Entity Agreement executed with PJM, but also in its formula rate.[38] CAISO has taken a similar approach of reflecting cost containment commitments in its Approved Project Sponsor Agreement. Nevertheless, guidance from the Commission on this question would be beneficial to assure all Transmission Providers that cost containment commitments arising out of Order No. 1000 competitive solicitations are fully enforceable.

II. ORDER NO. 1000 IMPLEMENTATION WARRANTS COMMISSION ACTION IN THE FORM OF A DEFINITIVE POLICY STATEMENT AS WELL AS CERTAIN DISCRETE ACTIONS UNDER THE FEDERAL POWER ACT

With a focus on just and reasonable rates, it is appropriate for the Commission to take action now to ensure the ratepayer promise of Order No. 1000. Speakers at the Technical Conference had differing opinions on the future direction of Order No. 1000 implementation. Some encourage the Commission to pull back, arguing against the rule's value. However, Order No. 1000 has brought the rate innovation and ratepayer benefits that the Commission anticipated. The Commission should demonstrate its continued support through a Policy Statement on Cost Containment and Its Role in the Selection Process.[39] This national policy statement, applying to

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issues around cost containment provisions that limit (or even cancel out) whatever theoretical value they may have. We hear the term 'binding' cost cap quite a bit in the Order 1000 context. But, what does that really mean? . . . PSE&G questions whether this is the proper role for an RTO and whether RTOs have the requisite capabilities to be making those types of determinations.")

[38] *See*, Northeast Transmission Development, LLC, December 2, 2015 filing in Docket No. ER16-453-000, Exhibit No. NTD-200 at 6-7.

[39] PJM Interconnection, L.L.C. suggests that a Policy Statement on cost containment would *(continued ...)*

all Order No. 1000 regions, would cover the following areas:

1. The Benefits of Cost Containment to Consumers
2. The Role of Cost Containment in the Selection Process
    a. Cost containment proposals must meet a three-pronged test to be considered.
    b. Preference for proposals with cost containment in transmission planning region competitive processes.
3. Rate Case Protocols for selected proposals with cost containment commitment

The full proposed Policy Statement is attached as Exhibit A.

In addition to a Policy Statement addressing the role and application of cost containment in the selection process, the Commission should consider the tools available to it under the Federal Power Act to remove exceptions and carve-outs to competitive processes, to ensure the benefits of competition are realized for all ratepayers on all jurisdictional transmission investments. Furthermore, for regions, such as SPP and MISO, with a defined and narrow point allocation in their tariff relating to real cost to ratepayers, the Commission should proceed under the Federal Power Act to insure that those tariffs appropriately address cost and cost containment proposals in the selection of project developers. This will ensure that the more efficient and cost effective project is selected and that rates are just and reasonable.

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be appropriate, although PJM differs from LS Power on the direction that Policy Statement should take. Speaker Materials Of Craig Glazer of PJM Interconnection, L.L.C., submitted June 22, 2016 in Docket AD16-18-000 at 5-6.

III. LS POWER'S RESPONSES TO COMMISSION INQUIRIES

Panel One: Cost Containment Provisions in Competitive Transmission Development Processes

1. **How do public utility transmission providers in regions compare proposals with and without cost containment provisions for transmission facilities eligible to be selected in a regional transmission plan for purposes of cost allocation? Please provide examples. What, if any, guidance or requirements should the Commission provide with respect to the comparison of proposals with and without cost containment provisions?**

   In LS Power's experience, the treatment of cost containment provisions[40] for transmission facilities varies widely among Transmission Providers as summarized in the table below. The Commission should provide definitive guidance that proposals with binding cost containment provisions should be more highly valued in evaluation of proposals by Transmission Providers, as more fully described in the proposed Policy Statement described in Exhibit A.

Region	Treatment of Cost Containment Provisions
CAISO	In the more recent evaluations for economic projects, cost containment provisions were significant factors in the selection of the Approved Project Sponsor and overrode perceived differences in other areas of evaluation.[41] When evaluating a proposal for a reliability project, however, CAISO selected an incumbent developer notwithstanding the fact that a Nonincumbent proposal included a binding cost containment mechanism.[42]

[40] Certain bidders have proposed "cost containment mechanisms" that limit incentive rate treatment for costs above a specified estimate. LS Power does not consider these proposals as containing a cost containment mechanism as such limitations on recovering incentive rate adders for costs above estimates are a requirement of the Commission's 2012 Policy Statement on transmission investment where the Commission stated: "the Commission expects applicants for an incentive ROE based on a project's risks and challenges to commit to limiting the application of the incentive ROE based on a project's risks and challenges to a cost estimate." Promoting Transmission Investment through Pricing Reform, 141 FERC ¶ 61,129 (2012) ("Policy Statement") at P28. Simply following Commission requirements is not a cost containment mechanism nor innovation.

[41] *See, infra* at footnote 8 for a link to CAISO selection reports.

[42] http://www.caiso.com/Documents/ProjectSponsorSelectionWRJFinalReport.pdf .

PJM	PJM's evaluation of binding cost containment has been inconsistent. Cost containment was recognized as an important consideration in the Artificial Island process, but not even described in the comparison of proposals in the most recent market efficiency window evaluation.[43] Part of this inconsistency arises from the fact that PJM is a sponsorship model under which PJM is evaluating the appropriate solution to a transmission need. PJM appears to take the position that binding cost commitments are a secondary consideration at best and potentially irrelevant as it determines the project proposal to be selected. For example, as LS Power identified, LS Power proposed a reliability solution that was half the cost of the recommended solution, and LS Power's proposal had a binding cost commitment.[44] PJM nevertheless selected the incumbent proposal, resulting in ratepayers paying double what they would have paid under the LS Power proposal.[45]
SPP	Cost containment provisions were considered but as a small portion of one factor in the evaluation of the single competitive solicitation held by SPP. The selected proposal did not include cost containment although multiple other proposals contained such commitments.[46]
ISO-NE	Unknown as no projects have been subject to competition through the ISO-NE Order No. 1000 process.[47]

[43] http://www.pjm.com/~/media/about-pjm/who-we-are/public-disclosures/20160725-ntd-letter-to-pjm-board-2014-15-market-efficiency.ashx . *See also*, Letter from Linden VFT, LLC to PJM Board of Managers regarding the importance of cost containment provisions, particularly with regard to market efficiency, available at http://www.pjm.com/~/media/about-pjm/who-we-are/public-disclosures/20160801-linden-vft-letter-regarding-cost-containment.ashx. Both letters are attached as Exhibit C.

[44] See, Post-Technical Conference Comments of Northeast Transmission Development, LLC in Docket Nos ER15-1344-001 and ER15-1387-001 at 5, footnote 11.

[45] *Id*. PJM asserted that its decision was in part based on the fact that the costs for either solution would be allocated to a single zone thus entitling the incumbent to a right of first refusal regardless of the project selected. A right of first refusal should not mean a right to build any project on any terms.

[46] *See*, SPP Selection Report at 4 https://www.spp.org/documents/37708/iep%20recommendation%20report%20with%20process%20and%20appendix%20public%20redacted%20041216_redacted.pdf .

[47] The New England States Committee on Electricity ("NESCOE") has expressed great

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MISO	Unknown in practice as MISO is currently evaluating its first competitive solicitation, a market efficiency project.[48] The MISO Order No. 1000 process provides for consideration of cost containment provisions as a part of the general cost component of proposal evaluation, but costs are minority weighted in MISO's evaluation, like the SPP evaluation referenced above. As a result of the diminutive evaluative weigh accorded cost under MISO's formula, a proposal containing a binding cost commitment could lose out to a project with no cost containment commitment as reflected in the SPP evaluative process.
NYISO	Unknown in practice. NYISO is currently evaluating their first competitive solicitations. LS Power believes that NYISO has full authority under its existing tariff to heavily weight cost caps in the evaluation process and to enforce those cost caps through inclusion in the Developer Agreement.[49]

openness to encouraging cost cap proposals in ISO-NE. LS Power encourages the Commission to look carefully at the ideas of NESCOE as national models, as NESCOE is a clear thought leader in this regard. *See*, https://cleanenergyrfp.com/ for the NESCOE sponsored 2015 New England Clean Energy RFP which stated "proposals including cost containment features such as fixed price components, cost overrun restrictions, or other cost bandwidth provisions to limit customer risk will be viewed more favorably." The Clean Energy RFP further states that projects without "significant cost containment features" are unlikely to be selected and "strongly encourages" bidders to include such elements in their proposals.

[48] Under MISO's process, notwithstanding that market efficiency projects are identified in the first instance based on the ratio of costs to benefits, cost containment carries no more weight for such projects than any other project type.

[49] For example, Tariff Section 31.2.4.8.2 requires the submission of "(8) capital cost estimates for the project." Tariff section 32.6.5.1 provides in part that "In determining which of the eligible proposed regulated transmission solutions is the more efficient or cost effective solution to satisfy the Reliability Need, the ISO will consider, . . . the following metrics set forth in this Section 31.2.6.5.1 and rank each proposed solution based on the quality of its satisfaction of these metrics: Tariff Section 31.2.6.5.1.1 identifies the metric of "The capital cost estimates for the proposed regulated transmission solutions, including the accuracy of the proposed estimates." The Section goes on to discuss a variety of information that must be submitted to ensure accuracy. From LS Power's perspective a proposal with a binding cost commitment is 100% accurate to the extent of the commitment and a cost 'estimate' is never comparable. Notwithstanding the authority available in the current Tariff, LS Power would support specific tariff revisions to give NYISO further assurance that it has the legal authority to

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Non-RTO/ISO Regions	The treatment of cost containment provisions in project proposals in non-RTO/ISO regions is uncertain because no such proposals have been evaluated. Of note however, two nonincumbent developers submitted project proposals containing binding cost commitments to the Florida Reliability Coordinating Council, Inc. ("FRCC") administered planning process to displace a project rolled into the regional plan from an incumbent transmission owner's local plan.[50] Shortly after the nonincumbent proposals were made public by the FRCC, the incumbent transmission owner removed its project from its local and asserted that it should be removed from the Order No. 1000 process on the basis that it was no longer needed.

In addition to the inconsistency between regions in the role of cost containment in the selection process, there is generally a lack of transparency regarding how regional planning entities evaluate proposals with and without cost containment. For example: (i) how proposals are evaluated against each other generally; (ii) how a proposal with cost containment is evaluated against a proposal with no cost containment; and (iii) and how proposals with cost containment are evaluated against other proposals with cost containment. This lack of transparency provides little guidance to developers as they prepare proposals. This problem also would appear inconsistent with the Order No. 1000 requirement for transparency.

To address the deficiencies in compliance with Order No. 1000's transparency requirement, issuance of a Policy Statement on Cost Containment and its Role in the Selection Process is an appropriate. This is the best way to encourage the realization of further benefits for ratepayers in the form of cost containment for transmission projects – by making it clear to entities developing proposals and Transmission Providers evaluating proposals that such provisions must be properly valued in the selection process. While the role of binding cost containment should be important in all project categories, the role of binding cost containment is especially important as it relates to economic or market efficiency projects. In this instance, the project is being approved solely in regards to economic benefits measured relative to its costs.

Section 2 of LS Power's proposed Policy Statement specifically addresses the comparison, transparency, and selection issues described above. An excerpt is pasted

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implement cost containment.

[50] The process administered by the FRCC is not a competitive solicitation *per se* as the Order No. 1000 compliant process allows interested qualified entities to sponsor a 'regional' project as a substitute for a project in a transmission owner's 'local' plan which the FRCC combines with other incumbent local plans to create a 'regional' plan.

below (footnotes omitted):

> 2. The Commission in the Policy Statement should address the role of legally binding cost containment proposals in the selection process for Order No. 1000 compliant regional planning processes.
>
> a. **Three-Pronged Test-** To be considered a 'cost containment proposal,' the proposal must meet a three-pronged test and if it does not, the selection process should consider the costs within the proposal the same as a cost estimate. Cost containment proposals must meet the three-pronged test of Distinction, Clarity and Enforceability.
>
> i. ***Distinction*** **-** The standard for the Distinction requirement in a cost containment proposal is that the proposal should be something more than required under current Commission regulations or policies (e.g., a proposal agreeing that incentive return on equity adders will not be applied to costs above a defined cost estimate would not be considered a 'cost containment proposal' because it is already required by the Commission's Policy Statement on Incentives).
>
> ii. ***Clarity*** **-** The standard for the Clarity requirement in a cost containment proposal is that the proposal shall include, at the time of proposal submittal, specific details regarding the matters covered by the cost containment proposal as well as any exclusions to the cost containment proposal, each accompanied with the proposal sponsor's proposed contractual language on such covered and excluded items. The Commission should acknowledge that a proposal meeting the Clarity requirement for cost containment proposals can include openers, caveats, and other flexible mechanisms so long as clearly identified. The developer should clearly identify these openers, caveats and other flexible mechanisms in their proposal.
>
> iii. ***Enforceability*** - The standard for legal Enforceability in a cost containment proposal shall be the following: the developer shall agree in their

proposal that the cost containment proposal is legally binding, and that it will be reflected in any Developer Agreement required in the regional planning process and will be reflected and enforced in the developer's existing or future FERC rate case.

b. Preference for Proposals with binding cost containment commitments:

i. If a proposal meets the three-pronged standard established in the Policy Statement as a cost containment proposal, the cost containment proposal should be viewed as: 1) fundamentally superior to a cost estimate without cost containment, and 2) benefit from a rebuttable presumption that it is the more efficient and cost effective proposal as compared to a cost estimate without cost containment. A proposal with stronger cost containment, with fewer carve-outs and exceptions would be most preferred. This is especially true for cost containment proposals related to market efficiency and public policy proposals but should also be true for reliability projects unless a demonstrable reliability concern overrides the importance of the cost commitments.

ii. Each Order No. 1000 region should develop or contract for the capability to analyze, compare and evaluate cost containment proposals for all types of transmission projects planned for within the relevant region. This capability should include the ability to analyze the legal scope of the cost containment proposal and the economic impact of any exclusion from that proposal.

iii. As part of the region's requirement for transparency in selection under Order No. 1000, the region shall post all cost containment proposals in their evaluation materials, outline in the selection process which proposals met the standard for a "cost containment proposal," outline in their selection process how it compared the proposals meeting the "cost containment" standard, and the region shall outline how it weighted the "cost containment" proposal in the

overall selection process. The Commission should direct the Order No. 1000 regions to clearly identify and compare the openers, caveats, and other flexible mechanisms against other cost containment proposals in their evaluation and selection process, with a preference for proposals with fewer exceptions, openers, caveats or flexible mechanisms.

iv. As noted above, to ensure that the benefits of cost containment proposals are given due consideration and weight, a proposal that includes cost containment should be rebuttably presumed to be more efficient and cost effective than a proposal that relies only on cost estimates and does not provide effective cost containment The situations under which a region could conclude that this "more efficient or cost effective" presumption has been rebutted will depend on the circumstances, but could include cases where the worst case/conservative estimated total costs of a cost estimate proposal are significantly lower than the total costs of the cost containment proposal or if there are other benefits that outweigh the benefits of the cost containment proposal (taking into account the overall quality of the cost containment proposal). In any event, the establishment of such rebuttable presumption will ensure that, in cases where an Order No. 1000 region selects a cost estimate proposal over a cost containment proposal, the reasons for such selection are clearly articulated by the region as part of the final selection process.

2. **What can public utility transmission providers in regions do to ensure there is sufficient transparency for transmission developers to understand:**
   a. how a proposal will be evaluated in advance of the proposal submission;
   b. developments, if any, that occur during the evaluation process; and
   c. the reasons the selection decision was made?
   Should cost containment provisions in all proposals, and not just winning proposals, be made known? What, if any, guidance or requirements should the Commission provide with respect to this issue?

With regard to 2.a. the primary improvement to the pre-submission transparency would be for the Commission and Transmission Providers to make it clear that proposals with binding cost containment will be valued more favorably than projects with only cost

estimates, regardless of the competitive process type. As discussed in response to Panel 1, Question 1 immediately above, LS Power's proposed Policy Statement suggests just that. In addition, between proposals with binding cost containment provisions, the proposal with the most certainty for ratepayers, on all aspects of rates, will be valued more favorably.

Regarding 2.c., as noted above, transparency is a significant issue with regard to the "reasons the selection was made." The cost containment proposals should be compared against each other for the various legal terms and conditions, design, amount, and various caveats.[51] All of these comparison factors should be known and part of the selection report, so, consistent with Order No. 1000, it can be clear to the stakeholders why a particular proposal was selected over another.[52] The selection information provided to date has been a mixed bag.

- The level of detail in the CAISO evaluation reports has improved over time although there is no definitive analysis of the effect on ratepayers as a result of CAISO's determinations regarding differences between proposals.
- PJM selection information has been generally good, although substantially less transparent than CAISO and in at least one instance lacked information on how a binding cost containment commitment was factored into the analysis.[53]
- SPP's single selection report was informative regarding the overall evaluation metrics (and why those metrics are deficient), but provided little definitive information regarding the manner in which SPP will evaluate binding cost commitments. In addition, a deficiency in the SPP process is that fact that each process will have a different Independent Expert Panel which will apply its own evaluation criteria, so feedback from one evaluation report is not necessarily applicable for the evaluation of future proposals.

Regarding the inquiry on whether "cost containment provisions in all proposals, and not just winning proposals, be made known?" as described in Exhibit A, LS Power's proposed Policy Statement, all cost containment provisions in proposals should be made known as well as the Transmission Provider's relative evaluation of each.[54]

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[51] *See* Section 2.b.ii of the proposed Policy Statement in Exhibit A.

[52] *See* Section 2.b.iii of the proposed Policy Statement in Exhibit A.

[53] http://www.pjm.com/~/media/committees-groups/committees/teac/20160407/20160407-teac-market-efficiency-update.ashx. PJM's TEAC presentation on market efficiency projects made no reference to any evaluation of cost containment proposals in the selection process.

[54] To qualify as a cost containment proposal, LS Power recommends that the proposal meet a three-prong test of a) distinction, b) clarity, and c) legal enforceability. To meet the three prong test, the cost containment proposal must offer a cost containment mechanism

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Regarding the "guidance" the Commission can provide regarding cost containment transparency, consistent with LS Power's proposed Policy Statement, the Commission can provide guidance that it (i) considers binding cost commitments fully enforceable;[55] (ii) that such commitments are entitled to superior evaluative weight as compared to proposals with no such commitments; and (iii) the Transmission Provider's evaluation must be fully disclosed.

See next question for specific recommendations on cost containment evaluation.

3. Should there be standardization of cost containment provisions or exclusions of certain costs to facilitate comparison of proposals with differing cost containment provisions? If so, what role should the Commission and/or public utility transmission providers in regions play in pursuing standardization?

No, there should not be standardization of cost containment provisions at this time. Although standardized cost containment provisions and exclusions would make the comparison and evaluation of proposals simpler, such standardization reduces innovation. Different utilities have different risk tolerances, and overly rigid standardized provisions could limit participation from some entities reducing the level of competition. Likewise, standardized provisions that were too limited could "leave money on the table" for ratepayers by reducing the ability of a developer to distinguish its proposal. Although LS Power does not believe that it is necessary to put any parameters around the scope of cost containment proposals, requiring bidders to clearly identify exclusions would assist in the evaluation, and could provide consistency among proposals. Although SPP did not

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that is distinguishable from existing Commission requirements. For example a proposal in PJM indicated that it contained a cost containment commitment but the proposal only committed to not apply any incentive return on equity adders to costs above a defined cost estimate. This would not be treated as a 'cost containment proposal' because it is required by the Commission's Policy Statement on Incentives. *Promoting Transmission Investment through Pricing Reform*, 141 FERC ¶ 61,129 (2012) at P28. In addition, the proposal must clearly state the included and excluded items and provide the developers proposed language implementing those inclusions and exclusions, and the proposal must commit to inclusion of cost containment in both a developer contract (if required by the region) and the developers rate filing.

[55] LS Power believes that binding cost containment commitments are both contractually enforceable and through inclusion in the ultimate rate case. To date, CAISO and PJM have differed on whether developer agreements between the Order No. 1000 selected developer and the Transmission Provider must be filed with the Commission when the developer proposed a binding cost commitment. LS Power takes no position on this issue, and is happy to have its language before Commission review if required.

require developers to identify which cost containment provisions and exclusions would be applicable for any specific proposal the SPP bid evaluation matrix lists exclusions identified within each bid. Providing a similar document for bidders to identify exclusions that apply to a specific bid could help standardize cost containment provisions and exclusions, while still providing each bidder's flexibility to tailor its proposal to include the level of risk it is willing to accept. Projects are different, and this will impact the risk appetite of competitors, and different competitors have different risk appetites.

Allocation of Discretionary Points - Rate Analysis					
Proposal 4					
Guarantee Element		**L**	**S**	**P**	**Explanation**
First Cost Cap	fixed and binding cost of $298,387 per mile based on 24.8 miles equating to $7.4 mm gross plant.	H	H	45	Limited unprotected risk of longer route makes for a tight cost guarantee significantly lower than competitive cost extimate for project.
Exclusions					
- SPP changes to project scope	N				
- Changes in law or regulation that result in higher first cost	N				
- Force majeure	N				
- Inflation	N				
- AFUDC	N				
- Pipeline and Wellhead Mitigation	N				
- Interconnecting TO Scope Changes	N				Same impact on all bidders if occurred. No basis for distinction.
- CCN	N				
- Property Taxes	N				
- Transmission Line Route	N				
- Easement Acquisition	N				
- Legal Challenge to TO Designation	N				
- TO must negotiate tie-in outages, crossover of existing lines,	N				
Notes	No specific exclusions provided. The cost cap is below the "actual cost" in cost roll up of proposal based on expectation of lowering contract costs.				
ROE Cap	N/A				
Equity Cap	N/A				
Note: Bidders that did not offer a cost guarantee provision are not included in this analysis.					
Note: L is likelihood that event guaranteed against will occur. S is potential significance of that event IIf it does occur to 40-year NPV of project. P is point allocation.					

At this point in the implementation of Order 1000, LS Power cautions that overly rigid standardization may limit creativity to the detriment of ratepayers. It can be expected that, over time, as the details associated with various cost containment proposals come to light through regional project selection processes, the terms being offered by developers to address certain types of risks, and the contract language associated with such terms, will naturally become more standardized. With the nature and scope of cost containment proposals still evolving, the Commission should not take action that could or would discourage creativity and competition in the formulation of new types of ratepayer beneficial cost containment proposals. At this point, qualified developers should decide what cost items are included or exempt from their cost containment proposals in terms and conditions, not the regions.

4. **What quantitative and qualitative methods can public utility transmission providers in regions use to evaluate proposals with different cost containment provisions, such as cost caps with different exclusions or that cap different components of the revenue requirement?**

Critical to the success of implementing the selection of the most efficient and cost effective proposal is having regional entities develop the capability to evaluate all aspects of proposals. RTOs and ISOs have significant transmission planning expertise, which includes consideration of evaluating relative costs of alternatives, but do not necessarily have historical experience with permitting, construction, and financing of facilities. RTOs and ISOs have been doing a good job at adjusting to Order No. 1000 competition by adding experience internally and supplementing with outside experts. For example, SPP seats an Industry Expert Panel to aid in the evaluation, and CAISO and PJM have engaged outside consultants with expertise in permitting, engineering, and financing to provide independent reports. To date, however, it has been unclear the level of comparison of cost containment proposals respective regions have conducted and the expertise they have available to undertake that analysis. Because of the significant advantages provided ratepayers by the inclusion of cost containment commitments, LS Power recommends that the Commission's Policy Statement call on regional planning entities to develop or hire the capability to evaluate cost containment proposals from a ratepayer perspective.

The quantitative methods used by public utility transmission providers vary. Generally, a quantitative evaluation of the revenue requirement is used to conduct a comparative evaluation of proposals. SPP, MISO, and CAISO require submittals to include an estimate of the elements that will determine the annual revenue requirement. However, even under this approach it may be difficult to quantity the benefit of different cost containment provisions. A low estimate without any cost containment provisions should be given less value that a higher estimate supported by binding cost containment. In fact, when there is an advantage to the appearance of a low cost, and no repercussions for higher actual costs, a proponent has an incentive to provide an aggressively low estimate.

If a process were to have a standard list of potential exclusions as identified in response to Panel 1 Question 3 above, it would be important for the Transmission Provider to clearly define the manner in which exclusions are evaluated, giving the proper evaluative weight to the risk assumed by each bidder and shifted away from ratepayers. It is our position that if a bidder excludes a certain cost from its cost containment, then a very conservative or worst case outcome for that factor should be figured into the evaluation. For example, if a bid does not include inflation, a conservative/worst case inflation rate should be identified and applied to all bids that do not include inflation limitation. If no inflation, or a very low inflation, rate is applied in the evaluation process then a bidder would be better off to carve out such risk and put it on ratepayers. This would undermine the benefits of cost caps, and drives the market to a large number of exclusions.[56]

This approach would also assist in evaluating cost containment provisions for elements other than capital costs, such as return on equity concessions. Bids without any containment related to return on equity would also be evaluated at the highest return on equity, including incentive adders, which could be approved for the project. Cost containment should be inherently favored as it results in less risk to ratepayers.

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[56] Alternatively, a Transmission Provider could clearly define how each component of an estimate will be evaluated absent a cap prior to opening of window. Proposals would be evaluated and compare accordingly. Evaluation will naturally fall out regardless of what combination of items bidders cap. For proposals with non-capped items the evaluation should be conservative to reflect the risks of cost increases for such items. For example, inflation may be expected to be 2.5% but uncapped should be evaluated at a higher level such as 5%.

Panel Two: Commission Consideration of Rates that Contain Cost Containment Provisions and Result from Competitive Transmission Development Processes

1. **Should the Commission have a role in evaluating the rate-related components of competing proposals for transmission facilities eligible to be selected in a regional transmission plan for purposes of cost allocation (e.g., terms of cost containment provisions, rate of return, transmission incentives) before the public utility transmission providers in a region select a proposal? If so, what role? What steps could the Commission take to prevent such a role from creating undue delays in transmission planning processes?**

   No, the Commission does not need a direct role in the evaluation and selection process. LS Power believes that most requests for Commission involvement in selection process arise out of the erroneous assumption that binding cost commitments either are not enforceable or cannot be enforceable until the Commission enforces the commitment in rates. Rather than actually participate in the selection process, the Commission should confirm that it views binding cost commitments as both contractually enforceable and subject to inclusion as rate limitations in any rate filing as described in Exhibit A, Policy Statement. Confirmation by the Commission that it will hold transmission developers to their commitment is sufficient and the public utility transmission providers should make their selections accordingly.

   The Commission cannot avoid having an indirect role as the regulator of the process, and as the ultimate recourse for disputes. In this role, the Commission should provide the clearest guidance possible related to the weight of cost containment provisions, rate of return, and incentives in the process.

2. **What types of performance-based rates could the Commission accept to reduce asymmetrical risk?**

3. **The Commission has accepted proposals to allow incumbent and non-incumbent transmission developers to recover, under certain circumstances, costs associated with developing transmission projects that are proposed but not selected in a regional transmission plan for purposes of cost allocation. Should the Commission reexamine, in general, whether such costs may be recovered?**

   LS Power's position is that whatever approach is adopted by the Commission must be non-discriminatory. If the costs of proposal and project development for projects not selected in a regional transmission plan are recoverable for incumbent transmission providers, then the costs should be equally recoverable for nonincumbent transmission developers. In general, LS Power believes that this issue should not be a Commission priority given the acute need Commission focus on cost containment policy generally and on opening more projects to competition.

4. Which entities should monitor, verify, and/or enforce compliance with cost containment provisions of selected transmission facilities? What are effective ways for them to do so and what are the advantages and disadvantages of different approaches?

Like many Commission jurisdictional matters, monitoring, verifying and enforcing compliance with cost containment commitments made in Order No. 1000 competitive processes involves a role for ratepayers, transmission providers and the Commission. There are multiple effective mechanisms for monitoring, verifying and enforcement that rely on existing processes – implementation in the agreement between the developer and the Transmission Provider, and directly in the rates of the developer.

The initial enforcement involves ensuring that cost containment commitments are fully reflected in the contractual agreement between the Transmission Provider and the selected developer.[57] This enforceable contract is a natural mechanism to memorialize and enforce provisions of the proposal, including binding cost containment provisions. In the event of an attempt to breach the cost containment provision, the developer risks losing the agreement with the Transmission Provider, and losing the ability to recovery any of its costs. Any such effort would be subject to general contract enforcement at the Commission.

In addition cost containment commitments must be reflected directly in the rates proposed by the developer. The developer's rate filing with the Commission is the avenue by which the developer will be able to recover its costs, and defines the terms and conditions of such recovery. Any binding cost containment provisions must be implemented into the rate filing. This provides the Transmission Provider and any transmission customer the ability to oppose any attempt by the developer to violate its commitment. The Commission's approval of rates will be expected to ensure that commitments made by the developer are fully enforceable in the filed rate.[58] As with all rates, annual updates provide verification of ongoing complain with cost containment commitments.

Despite the clear enforceability of cost containment provisions through multiple

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[57] In all organized regions (and several processes in unorganized regions), there is a contract entered into between the developer and the Transmission Provider to implement the selection and identify the rights and responsibilities of the parties.

[58] One example in practice is Northeast Transmission's proposal for its portion of the Artificial Island project selected in a competitive process conducted by PJM. The details of the enforceable cap were included in the Designated Entity Agreement, which PJM filed with the Commission, and incorporated directly into Northeast Transmission's formula rate. PJM, or any party, can ensure enforcement of the binding commitment at FERC.

mechanisms, claims persist that cost commitments may not be enforceable under the Federal Power Act, which provides that a utility can recover all prudently incurred costs. This argument attempts to cloud the enforceability of a rate concession on the premise that the utility will attempt to renege on its commitment. This is an area where the Commission can take action to clarify there is no room for interpretation. **Any** cost overruns not explicitly excepted out of a proposal would not be prudently incurred for rate purposes, and would not be recoverable in rates. Competitive developers have an obligation to follow through on commitments made in a proposal and should understand an attempt to violate its commitments would fail.

Certain Transmission providers seem to argue that they should make limited or no findings with regard to cost containment provisions as rates are the province of the Commission. For example, PJM asserts that cost containment provisions:

> represent the allocation of risk that each developer is proposing to split with the load. The evaluation of the reasonableness of such allocations are the types of decisions the Commission makes every day for non-market assets, such as transmission and for which this Commission has a host of trial staff, administrative law judges and advisory staff. Assigning those decisions to the RTO thrusts PJM into a quasi-regulatory role which we are ill-fitted to handle and which is clearly far afield from the traditional planning process that Order No. 1000 assigned to RTOs.[59]

While PJM may be correct that such analysis is a deviation from the limited cost containment role RTO's played in its early years, PJM is simply wrong when it asserts that such evaluation is "far afield from the traditional planning process that Order No. 1000 assigned to the RTOs."[60] Indeed, Order No. 1000 mandates the comparison of projects against each other to determine the more efficient or cost effective project for inclusion in the regional transmission plan. Such evaluation cannot occur under PJM's sponsorship model without the PJM evaluating the costs to be foisted upon ratepayers (balanced against the benefits received) for a particular project versus the costs to be foisted upon ratepayers (balanced against the benefits received) for an alternative project.[61] The Commission's role in this process should not be to make that decision but

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[59] Speaker Materials Of Craig Glazer of PJM Interconnection, L.L.C., filed June 30, 2016 in Docket AD16-18-000, at 6.

[60] *Id.*

[61] This analysis necessarily involves some discretion on behalf of the Transmission Provider under a sponsorship model, but this discretion mandates that the transparency in how the Transmission Provider uses its discretion address not only varying cost containment provisions but also PJM's analysis of the merits of one project over another based on its evaluation of the benefits versus the costs of each project.

rather simply to ensure that the outcome of the transmission provider's decision met the requirements of Order No. 1000 and is put into rates.

As discussed above, the Commission should issue a definitive Policy Statement, as described in Exhibit A, to clarify that cost containment provisions are enforceable through both contractual provisions and developer rate filings. Section 3 of LS Power's proposed Policy Statement on Cost Containment and its Role in the Selection Process further discusses this and reads as follows (footnotes omitted):

> 3. The Commission in the Policy Statement should state that the entities that have been selected based on a proposal containing cost containment commitments must reflect those commitments in any rate filing. The Policy Statement should also reflect that such commitments are fully binding in proceedings before the Commission for the full term of the commitment. Fully binding would also mean that any cost overruns not explicitly excepted out of a proposal would not be prudently incurred, and would not be recoverable in rates.

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Panel Three: Transmission Incentives and Competitive Transmission Development Processes

1. **Should the Commission pre-approve any or all of the following incentives for transmission facilities selected in a regional transmission plan for purposes of cost allocation through competitive transmission development processes: 100 percent construction work in progress in rate base; regulatory asset treatment; or recovery of 100 percent of the cost of abandoned facilities?**

   Yes, it would improve the processes and provide greater certainty for developers and ratepayers to have more certainty related to the availability and applicability of certain transmission incentives for competitive transmission projects. Uniformity that abandonment recovery, CWIP in rates, and regulatory asset treatment would be applicable to all competitively selected transmission developers would be beneficial. It would also be beneficial to clarify that an RTO participation adder will apply for projects within an RTO/ISO. However, it should also be clear that pre-approval of such incentives would not translate into a requirement for all developers to avail themselves to such incentives, and would not limit the ability for a developer to forego any specific incentives in any proposal.

   While the above are worthwhile concepts, LS Power believes that if the Commission focuses on addressing the role of cost containment in the selection process (as LS Power's Policy Statement suggests) and undertake efforts to ensure more projects are open for competition, developers will remain engaged in the transmission planning process.[62]

2. **If there are benefits to customers from risk mitigation measures that transmission developers use in competitive transmission development processes, should the Commission revise its incentive policy to encourage similar risk mitigation measures that may provide customer benefits for transmission projects that are not subject to a competitive transmission development process? If so, what risk mitigation measures should the Commission encourage through application of the incentive policy?**

   This question seems to ask two questions in one. First is whether the Commission should revise its incentive policy to encourage risk mitigation measures. Currently, Commission incentive policy does not encourage risk mitigation. LS Power does not believe a risk premium is necessary for it to accept certain risks related to competitive proposals. That

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[62] Because there is a glaring contrast between the number of Order No. 1000 windows in PJM and CAISO and the rest of the country LS Power believes that the Commission's other focus should be on eliminating the multitude of exclusions to Order No. 1000 competition. Until these underlying issues are addressed, standardization of incentives should take a backseat.

said, the Commission should recognize the risks associated with binding cost commitments as a viable risk warranting incentives, including ROE incentives, just as it does project specific risks and challenges. If a developer has not waived such incentives, they should be available if the proposal produces ratepayer benefits beyond the incentive sought. While LS Power has not sought such incentives, and indeed submitted a binding return on equity cap inclusive of incentives as part of its prevailing proposal in CAISO,[63] such incentives need not be prohibited.

In asking the question, the Commission seems to infer a change in its incentive policy to encourage risk mitigation only "for transmission projects that are not subject to a competitive transmission development process." LS Power believes that this approach is backwards. The Commission should encourage projects going through competitive development. To the extent that there are changes to the incentive policy those changes should be to encourage competitive processes for more transmission projects.

3. **In light of the emphasis that Order No. 1000 places on regional transmission planning, do the risks and challenges of a particular transmission project remain an appropriate focal point for incentives requested pursuant to Federal Power Act section 219? If not, what are the attributes that warrant incentives?**

   Yes, the risk and challenges of a project are an appropriate focal point for risk based incentives, in accordance with Order 679. There is not a reason to treat competitive projects differently than cost of service regulated projects for risk based incentives.

4. **What, if any, changes are needed to the framework the Commission uses to evaluate return on equity adders and other transmission incentives for transmission projects that use cost containment provisions?**

   As discussed in answer to Panel 3 Question 2, the Commission should not preclude binding cost containment risk from qualifying for an incentive ROE adder. Incentive adders should continue to be addressed on a case by case basis based on the facts of each particular cost containment provision. While LS Power has not, to date, found it necessary to seek an incentive adder for it to accept certain risks related to competitive proposals, seeking such adders should not be precluded. However, no such adders should be available unless disclosed as part of a competitive proposal so that they may be fully accounted for in the evaluation process. A proposal with incentive adders may nevertheless be the more efficient or cost effective proposal when the removed ratepayer risk is accounted for in the evaluation.

5. **Order No. 1000 requires public utility transmission providers in regions to have an ex ante cost allocation method for transmission facilities selected in the regional**

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63 Petition of DesertLink, LLC, Docket No. EL16-68-000.

transmission plan for purposes of cost allocation. To what extent does the *ex ante* cost allocation method reduce risks to transmission developers?

LS Power does not believe that *ex ante* cost allocation either reduces risk for developers or increases risks on a generic basis. As the Commission is aware, cost allocation is often a contentious issue. Having an *ex ante* cost allocation methodology is beneficial, so long as the methodologies produce appropriate results. An *ex ante* cost allocation methodology is not an end unto itself. To be of value an *ex ante* cost allocation methodology must produce a project specific cost allocation that meets the Commission's cost allocation principals. If it does not, and litigation arises, the methodology provides no risk reduction.

6. **Transmission developers face at least two types of risks: risk associated with participation in the transmission planning processes and risk associated with developing a transmission project. The Commission's current incentive policies focus on the latter. Please comment on risks associated with participation in the transmission planning processes and indicate what, if any, changes to the planning processes could mitigate the risk.**

LS Power believes that the Commission's current incentive policies appropriately focus on risks related to transmission development rather than risks associated with the transmission planning process. The risks associated with participation in the transmission planning are process related risks that are best mitigated by process specific improvement. Transmission developers are willing to accept the risk associated with participating in the transmission planning processes so long as the process provides a level playing field and a legitimate opportunity to be the selected developer. If the outcome of the planning process demonstrates that does not exist, developers will stop participating. For example, if the evaluation criteria provides little incentive for cost containment proposals but instead overly values existing utility overhead, the limited opportunity for success in the competitive process will not warrant participation in planning processes where there is no sponsorship rights associated with project submission into the planning process. Supporting the overall competitive transmission process, ensuring fair outcomes and broadening opportunities will each serve to mitigate the risk of participation in transmission planning processes.

Because it directly rewards creative solutions by ensuring the right to build submitted solutions, the sponsorship model generally does a better job of directly addressing the risk of planning process participation, and providing a reward for accepting the risks associated with participating in the transmission planning process.

The primary risk to participation is that there are still issues with the selection process in the various regions and there are not enough windows for competition. As noted previously, the single competitive processes in SPP and MISO each garnered proposals from 11 developers or development teams. The submissions in NYISO's open windows have been equally robust. Yet that is only 4 proposal windows total in these three regions in the 5 years since Order No. 1000 was issued by the Commission. If the selection

process is addressed and there are more windows, the appropriate incentives will be there for full participation in the transmission planning process.

7. **Do public utility transmission providers in regions consider that a transmission developer may request and be awarded transmission incentives when evaluating transmission proposals and, if so, how? For example, how would public utility transmission providers in regions consider a proposal with a potential transmission incentive given that the incentive might or might not be granted? Should a competitive transmission development process clearly state whether, and, if so, how incentives should be part of a developer's proposal and how requests and grants of such incentives will be evaluated by the public utility transmission providers in the region? Is there an optimal time for submission of incentive requests to the Commission and for Commission decisions upon them?**

Yes, some Transmission Providers, but not all, take information regarding transmission incentives into account in the evaluation. For example, several require a developer to identify if it will seek CWIP in ratebase or AFUDC, and to identify if other incentives will be sought. However, it is not clear if all incentives are consistently evaluated and how the risk of a denial of incentives is treated.

Region	**Consideration of Transmission Incentives**
CAISO	Requests identification of incentives to be sought and considers in evaluation
ISO-NE	Unknown as no Order No. 1000 competitive windows have been held so no proposals have been evaluated
MISO	Requests identification of incentives to be sought and considers in limited cost portion of evaluation
NYISO	Unknown
PJM	Focused on construction capital costs in their evaluation. PJM has no stakeholder-approved protocols for consideration and evaluation of incentives. PJM argues that it should not be required to address ROE or ROE incentives, either capped or uncapped, in its evaluation process.[64]
SPP	Requests identification of incentives to be sought and considers in limited cost portion of evaluation

[64] Speaker Materials Of Craig Glazer of PJM Interconnection, L.L.C., filed June 30, 2016 in Docket AD16-18-000, at 5.

Non-RTO/ISO Regions	Unknown as no projects have been reviewed but given the 'avoided cost' approach of such regions, incentives and other rate related matters should be a primary focus of the evaluation.

As discussed in response to Panel 3 Question 1 above, it would benefit the process to provide clarity on the applicability of certain 'standard' incentives, without limiting the ability for a developer to propose to forego any specific incentives in a proposal. Further, as discussed *supra*, where a proposal does not specify exactly what incentives it will seek, and does not exclude any incentives, the regional planning entity should clearly define on what basis proposals will be evaluated and assumptions that will be made as to available incentives. Conversely, if a developer proposal: (a) is selected as the more efficient or cost effective transmission project (b) such selection was based primarily on the cost of the proposal to ratepayers, and (c) the developer proposed a specific return on equity and/or incentive program within the zone of reasonableness consistent with recent precedent; then the Commission should apply a rebuttable presumption that the return on equity and incentive package set forth in the proposal is just and reasonable.[65]

If a region fully evaluates the rate impact to ratepayers, and selects the project with the lowest overall impact, the selected developer can be presumed to provide the best deal for ratepayers, and thus a rebuttable presumption of just and reasonable rates would be appropriate.

[65] For example, SPP applies a selection process that focuses little on definitive costs so there can no presumption that a selected developer's rates are just and reasonable. Review of the SPP selection report for North Liberal - Walkemeyer 115 kV project, indicates that numerous other parties offered lower cost estimates or binding cost commitments yet the prevailing developer was selected based on an evaluation system that places relatively high weight on non-cost factors. In addition, "bonus points" under SPP's evaluation appeared to make the difference in the selection. Thus, the prevailing developer's proposal cannot be presumed to be just and reasonable from a cost perspective for purposes of providing the rebuttable presumption. https://www.spp.org/documents/37708/iep%20recommendation%20report%20with%20process%20and%20appendix%20public%20redacted%20041216_redacted.pdf .

Panel Four: Interregional Transmission Coordination Issues

LS Power, as a member of the AWEA Transmission Committee, generally supports the thoughtful comments filed by AWEA on Interregional Transmission Coordination Issues in Panel Four.

1. **What factors have contributed to the lack of development of interregional transmission facilities (i.e., a transmission facility that is located in two or more transmission planning regions)? Are there actions the Commission could take to facilitate such development?**

   Interregional transmission facilities face multiple hurdles with the requirement for the identification and quantification of benefits in two or more planning regions. In addition, certain areas include additional limitations, such as the voltage limitations for interregional projects in MISO. There is no reason that there should not be a 100 kV voltage threshold for all MISO seams, including SPP and SERTP. Lowering the voltage threshold to 100 kV for the PJM / MISO seam was an appropriate first step, but FERC should extend this voltage threshold of 100 kV for all MISO seams.

   By extension, a 100 kV voltage threshold would be appropriate for any interregional seam, as well as for MISO Market Efficiency Projects generally once the MISO/ SERTP and MISO/SPP interregional seams are also clarified to have a 100 kV voltage threshold.[66]

   LS Power has observed that certain regions have a "check the box" approach interregional coordination, doing the bare minimum necessary to comply with the requirement to coordinate with adjacent regions. Rather than looking for interregional solutions as an opportunity to optimize solutions beyond the normal regional planning evaluation, their preference is to approving regional solutions that member Transmission Providers have identified, to the exclusion of interregional projects. An example is LS Power's SWIP-North project that was submitted as an interregional project into three regions that would directly benefit. There was a disagreement among the three regions regarding whether it was a two-region or three-region project because of one region's interpretation of the tariff language. Although one region would receive substantial benefits, another region would not recognize that as part of the formal interregional process. Regardless of which interpretation is correct, this approach flies in the face of the spirit of Order No. 1000. Rather than a default interpretation of their respective tariffs toward inclusions, many regions seem to use any tariff discretion for the exclusion of projects. The Commission should reiterate that regions should be encouraged to use

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[66] There is no real policy difference between why voltage thresholds should be different between interregional and regional projects. It would seem appropriate for the Commission to take action to lower the regional voltage threshold in SERTP to 100 kV as well.

discretion to be inclusive of projects that may bring interregional benefits, resolving all doubt in favor of inclusion for purposes of further study and planning.

As another example of regions using tariff language to create hurdles for beneficial interregional projects, one region in particular has less than clear tariff language regarding the requirements for pre-qualifying for cost allocation, particularly on an ongoing basis. Rather than taking an inclusive interpretation, there appears to be an attitude of exclusion whenever and wherever possible. Again, the regions should be encouraged to use discretion to be inclusive of beneficial interregional projects where application of the tariff language may be unclear.

2. **What would be the advantages and disadvantages to the use of common models and assumptions by public utility transmission providers in regions in their interregional coordination processes? Are there problems that such an approach would solve or create? If such common models and assumptions could be developed, how should they be developed and by which entity or entities?**

The development and assessment of inter-regional projects remains in its infancy. The difficulty in developing common models and assumption is that each Transmission Provider typically develops assumptions within its own stakeholder process. Non-RTO/ISO planning regions must work to develop a common set of assumptions for the region that is consistent and reasonable based on the assumptions developed for each of its member Transmission Providers. To coordinate assumptions then with adjacent regions takes additional time and coordination that is not easily built into the planning process. This remains a significant barrier to interregional planning, as without common models and assumptions to evaluate proposed interregional projects, interregional projects cannot be studied to be approved. A requirement to develop common models and assumptions within a very short and narrow time frame is one option to close the gap. At a minimum regions should be required include basic assumptions for adjacent regions when evaluating regional needs to accommodate the potential that interregional solutions may be more efficient and cost effective than regional solutions to meet those regional needs.

3. **Should the Commission revisit Order No. 1000's requirement that an interregional transmission facility be selected in the regional transmission plan of all transmission planning regions where the facility will be located before it is eligible for interregional cost allocation? Why or why not?**

Interregional planning has proven difficult, at best. Acceptance of a proposed project in each region is often a difficult hurdle but LS Power does not believe that transmission development is particularly feasible if there is not regional buy-in prior to project development. In this regard, rather than revisit the rules regarding each region selecting an interregional project in its plan, the Commission should undertake a more focused analysis to determine whether beneficial interregional projects are being inappropriately left on the side-line by the rule, and address those regions directly. As the Commission recognized in EL11-88-00, disparate rules between regions can contribute to the failure

of projects to be approved in each regional plan.[67] MISO's approach to the Commission order was to change on the rule for market efficiency projects on its seam with PJM, resulting in different rules for different seams.

4. **What reforms, if any, could the Commission adopt to facilitate the identification of shared interregional transmission needs?**

Please see the response to Panel 4 Question 1.

5. **Do interregional cost allocation methods accepted by the Commission, such as the "avoided cost only" method, impede interregional transmission coordination?[68] If so, are there alternative cost allocation methods that could better facilitate interregional transmission development? Would those methods be consistent with interregional transmission coordination processes or would the interregional transmission coordination processes need to change to accommodate such alternative cost allocation methods?**

LS Power's view is that the "avoided cost" approach impedes not only interregional planning, it impedes regional planning generally and is largely the reason there have been no competitive projects in any non-RTO/ISO region. Whether it is applied on a regional or interregional basis, the avoided cost methodology generally fails to focus on the true benefits of a truly regional or interregional project but focuses only of the cost of a project devised to provide more local benefits.[69] The avoided cost approach generally takes the position that if the proposed regional or interregional project costs even $1 more[70] than the avoided project the proposed regional or interregional project cannot

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67 *Northern Ind. Pub. Serv. Co. v. Midcontinent Indep. Sys. Operator, Inc., et al.*, 155 FERC ¶ 61,058 (2016)(requiring MISO to lower the threshold for interregional market efficiency based projects to 100 kV to conform to PJM's approach).

68 *See, e.g. Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,045, at PP 176-180 (2015) (describing an "avoided-cost only method" and finding such an approach can comply with Interregional Cost Allocation Principle 1).

69 For an example of this in practice, *see*, http://southeasternrtp.com/docs/general/2015/2015%20Regional%20Transmission%20Planning%20Analyses%20Summary.pdf . There is no indication that any potential benefits other than avoided costs were reviewed.

70 Some regional processes assign previously incurred costs of the avoided project to the new project in determining whether the new project meets the avoided cost threshold. This approach encourages premature development spend by incumbent developers knowing that any dollars spent will negatively impact the viability of alternatives.

move forward. This approach fails to account for potential benefits that the regional or interregional project provides above those provided by the displaced project.[71]

There are a number of non-RTO regions that are currently discussing "lessons learned" from their initial Order No. 1000 processes, for example West Connect and FRCC. The Commission should encourage the abandonment of the "avoided cost" approach in favor of any other reformed competitive bid framework.

[71] *See e.g.*, LS Power Transmission, LLC and LSP Transmission Holdings, LLC November 26, 2012 Protest of Florida Sponsors' Order No. 1000 Compliance, filed in Docket Nos. ER13-80-000, *et al*, referring at page 2 to the Florida Sponsors' model as "unworkable." *See also* Florida Municipal Power Agency November 26, 2012 Protest of Florida Sponsors' Order No. 1000 Compliance filing in ER13-80-000, *et al*, where the protests call the Florida Sponsors' model as "unworkable" on page 2. Similar LS Power protests related to the inherent flaws with the avoided cost framework were filed by LS Power in the Order No. 1000 compliance dockets of West Connect, NTTG, and Columbia Grid. Movement away from the avoided cost framework in interregional and regional planning would be a welcome change.

Panel Five: Regional Transmission Planning and Other Transmission Development Issues

1. **To maximize the benefits of competition, should the Commission broaden or narrow the type of transmission facilities that must be selected through competitive transmission development processes? If so, how?**

   As discussed in the Introduction, the Commission should broaden the types of transmission facilities that would be selected through competitive transmission development processes to conform to the original intent of Order No. 1000. This would maximize the benefits of competition both directly by having competitive pressure applied more broadly but also indirectly by attracting a wider pool of competitors to the opportunity.

   Broadening the type of transmission facilities that must be selected through competitive development processes can be accomplished by eliminating carve-outs and exclusions from the provisions of Order 1000. While Order No. 1000 had a carve out for upgrades and projects whose costs are allocated to a single zone, both of those carve-outs have been exploited to significantly increase the number of projects excluded from competition. This is particularly true of the single pricing zone carve out that has meant that nearly $1.5 billion in MISO Baseline Reliability projects alone have been withheld from competition. For example, in MTEP 2015 at least six projects, representing over $300 million in transmission investment that would have been competitively solicited under Order No. 1000, were not competitively solicited because of the MISO change in cost allocation methodology for Baseline Reliability Projects.

BRP Projects That Would Have Been Subject To Order No. 1000 Mandated Competitive, But For BRP Cost Allocation Change (apx. $340 Million)	**MTEP**	**State**	**Expected In-service date**
New 138kV Plains-National transmission line ($114 million)	MTEP 2015	Michigan (ATC – UP Michigan)	Dec. 2020
New 230kV China-Stonewall transmission line ($47 million)	MTEP 2015	Entergy Texas	Dec. 2018
Rebuild Blackbrook - Bunker Hill portion of M-13. Retire Blackbrook and Bunker Hill stations and build new Roehring Rd ring bus. ($25.2 million)	MTEP 2015	Wisconsin (ATC)	Nov. 2019
Rebuild the Jim Hill - Datto 115kV line and convert it from 115kV to 161kV operation. ($44 million)	MTEP 2015	Entergy Arkansas	Dec. 2018
Entirely new 345kV switching station - Reconfigure the Pleasant Prairie - Arcadian 345kV (PLPL81) and	MTEP 2015	Wis./Ill. (ATC)	Dec. 2020

Zion - Libertyville 345 kV (2224) transmission lines to loop into a new 4 position (breaker and half) 345 kV Switching Station. ($52 million)			
New 500 kV substation ($57 million) on ISES-Dell 500 kV line	MTEP 2015	Entergy Arkansas	June 2018

There will likely be another $500 million in MTEP 2016 that would be subject to competition but for the revisions to BRP cost allocation. MISO and the MISO incumbent transmission owners supported their request to change the cost allocation for Baseline Reliability Projects in part on the assertion that Market Efficiency and Multi-value projects would largely displace Baseline Reliability Projects. The Commission relied on this assertion, finding "we find persuasive MISO's contention that, going forward, its MEP and MVP project categories will displace Baseline Reliability Projects when more efficient or cost effective regional solutions (i.e., MEPs or MVPs) are available to meet multiple transmission needs."[72] As MISO's Commission required (Id.) informational filing reflects, this assertion has proven false. See, Informational Filing Reporting on MVPs, MEPs, and BRPs approved during the MTEP 2014 and MTEP 2015 cycles of Midcontinent Independent System Operator, Inc. under ER13-186-000, *et al*. dated August 1, 2016.

Carve-outs from competition harm ratepayers. Regions have added broad carve-outs including voltage thresholds, cost thresholds, timing requirements (near-term needs), consideration of state rights of first refusal, etc. For example, ISO-NE's transmission process imposes a right of first refusal for projects needed in less than three years from date the need is identified. ISO-NE's website indicates that from 2016 to 2020, approximately $4.3 billion in transmission investment is planned to meet reliability requirements, improve the economic performance of the system, and position the region to integrate renewable resources and alternative technologies (as of the June 2016 Regional System Plan Project List) yet not a single project will be competitively solicited.[73]

In addition, a number of incumbent transmission developers have lobbied state legislative bodies for protection from competition. In SPP, Minnesota,[74] North Dakota, South

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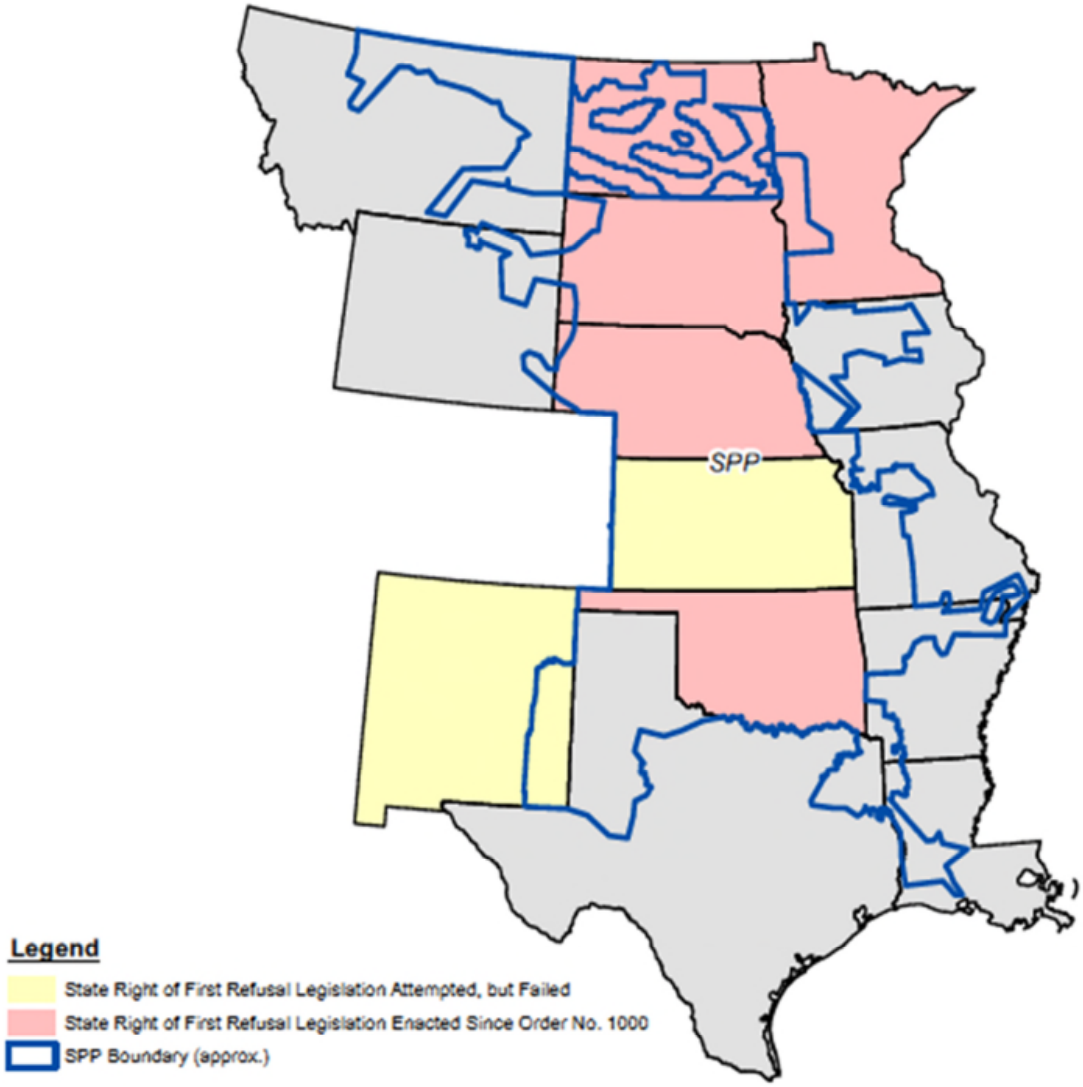
72 Midwest Independent Transmission System Operator, Inc. et al, 142 FERC ¶61,215 (2013) at P 519.

73 https://www.iso-ne.com/about/key-stats/transmission .

74 The vast majority of Minnesota is in MISO which currently has an MEP project under review that is located in Minnesota. It is likely to be approved by the MISO Board in December 2016, and MISO has already stated that this Market Efficiency Project will not go out for competitive bid due to the State of Minnesota law.

Dakota, Nebraska and Oklahoma all passed state right of first refusal laws after issuance of Order No. 1000.



Although the laws themselves do not foreclose competition, the Commission allowed MISO and SPP to use the existence of these laws to prohibit projects currently under consideration by MISO and SPP from being subject to competitive pressures and the advantages such as cost containment proposals that such competition offers. Incumbent transmission owners sought right of first refusal laws twice in New Mexico and once in Kansas, but those efforts have not, to date, been successful. State right of first refusal

legislation has been threatened in Montana a well.[75] As LS Power pointed out in its Reply Brief in Case No. 15-1157 before the United States Court of Appeals for the District of Columbia Circuit, the Commission's policies in allowing RTOs to use the existence of such laws to circumvent competition has itself led to additional efforts to pass such laws.[76]

Many of the efforts at whittling away at Order No. 1000 have been couched in terms of balancing the effort or expense of competitive solicitation against the value to ratepayers. These arguments are misplaced. It is important that the Commission recognize the fallacy of PJM's assertion that too many proposal windows cause too much work and SPP's assertion that the single proposal window it has held may not have provided value compared to the value of the project. PJM proudly notes that it has "authorized $29 billion in transmission additions and upgrades since the first Regional Transmission Expansion Plan was approved in 2000."[77] Since its inception as a RTO in 2004, SPP has approved approximately $8 billion more. Ratepayers largely foot the bill for these additions. If competition can reduce those costs by only 5%, ratepayers have saved $1.85 billion. In the Artificial Island process, LS Power's construction cost cap commitment was $60 million below PJM's estimate of the cost for LS Power's portion of the project, reflecting a 30% reduction in the estimated cost.[78] The proposals in SPP reflected a similar or higher percentage reduction below the SPP cost estimate.[79] While the $60

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75 https://www.basinelectric.com/News-Center/News-Articles/News-Briefs/right-of-first-refusal-bill-passed-in-north-dakota-legislative-session1.html .

76 See, Reply Brief of Petitions LSP Transmission Holdings, LLC and LS Power Transmission, LLC in Case No. 15-1157, District of Columbia Circuit, at 39-40 (noting that Testimony filed before the Kansas Legislature focused on the Commission's Orders in SPP as support for passage of a state right of first refusal in Kansas because the Commission would ensure compliance with the state law).

77 *See*, PJM Press Release http://www.pjm.com/~/media/about-pjm/newsroom/2016-releases/20160809-rtep-news-release-market-efficiency-project.ashx .

78 Conversely, for the portions of the project that were not subject to binding cost commitments, the incumbent transmission owner's cost estimates have increased more than 100% above PJM's estimate.

79 Notwithstanding the fact that SPP estimated the cost of the competitive portion of the project at $16.8 million, and that 6 of the 11 proposals were under $10 million, At the Technical Conference SPP asserted that the costs of the competitive process may outweigh the benefits. SPP's assertion is wrong. SPP based its claim on an assertion that

> "the project cost resulting from the process was $8.3 million. The administrative costs for the solicitation and selection process was approximately $4 - $5 million dollars. This estimate is based on an

(continued ...)

million in rate payer savings on the one project alone would pay for a lot of additional PJM employees to address the work load created by competition, the comments by PJM and SPP also fail to reflect that it is prospective developers that pay the cost incurred in holding competitive process, simply for the right to compete. In this regard, as the interest in SPP's small project indicated, there are plenty of prospective developers that are willing to pay to participate, providing ratepayers with all the benefits of competition and none of the costs. SPP ratepayers saved 50% off one transmission project without it costing them a dime. THAT is precisely what Order No. 1000 is about.

Because nonincumbent developers have shown a willingness to offer cost contained proposals, the Commission cannot assume that projects that do not face competition, and for which no binding cost contained proposal is offered, result in just and reasonable rates. If a competitive solicitation is held and no entity offers a binding cost containment proposal, the Commission can assume that the resulting costs, if prudently incurred, are just and reasonable. The converse is not true. If a project is not subject to competition simply because the costs are likely to be allocated to a single zone, the Commission has no way of knowing whether other developers would offer a binding cost containment proposal, although the limited experience with Order No. 1000 suggests they would. Simply put, if even one nonincumbent developer is willing to offer a binding cost commitment through competition, a rate that shifts risks to ratepayers because it does not

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> SPP processing cost of over $500,000, and estimated project proposal development costs of $3.3 - $4.4 million (11 projects with estimated proposal development costs of approximately $300,000 - $400,000). Assuming the competitive solicitation administrative cost estimate approximates the actual costs, when compared to the total project cost, the administrative cost was approximately 46% - 59% of the selected project."

See, Prepared Statement Of Paul Suskie, Executive Vice President And General Counsel, Southwest Power Pool, Inc., posted June 30, 2016 in Docket No. AD16-18-000. SPP's assertion fails to acknowledge a number of relevant facts. For example, the $8.3 million project cost for the selected developer was a 50% savings for ratepayers off SPP's pre-solicitation estimates. In addition, while SPP references the processing costs of $500,000 it fails to acknowledge that these costs were paid for through proposal fees submitted by the 11 project proponents, approximately $47,000 each, with no cost to SPP ratepayers. Finally, SPP's inclusion of its estimate of the "proposal development costs of $3.3 - $4.4 million" is misplaced entirely. SPP does not identify a single complaint from the 11 developers regarding the costs they incurred in order to compete. Those developers may have a lot of questions regarding SPP's evaluation process, or its planning process generally given that it promptly canceled the project after conducting the competitive solicitation, but the developers have not complained about internal costs of proposal submission. If the process is seen by bidders as fair, they will continue to be willing to incur the costs to participate for the business opportunity.

limit costs in a similar manner is not just and reasonable.

2. **Has the introduction of competition into the regional transmission planning processes led public utility transmission providers to focus more on developing local transmission facilities or other transmission facilities not subject to competitive transmission development processes?**

   Yes. As discussed fully above, incumbent transmission developers, often with the assistance of Transmission Providers, have changed the cost allocation applicable to projects to make them "local" for cost allocation purposes, regardless of their actual characteristics, and have increasing used carve outs from competition such as "supplemental" projects in PJM or "other" projects in MISO. LS Power addressed the use, and abuse of the Supplemental Project designation by PJM transmission owners in its initial Post-Technical Conference Comments Of Northeast Transmission Development, LLC in Docket Nos. ER15-1344-001 and ER15-1387-001[80]

3. **Are there other competitive approaches compared to the existing competitive transmission development processes that could potentially reduce the time and cost to conduct the process, or the risk of litigation over proposal selection, but still benefit consumers? If so, what are the strengths and weaknesses of such approaches and could they be used in transmission planning regions in specified circumstances, for example, for transmission projects needed in the near-term to address reliability needs, in conjunction with existing competitive transmission development processes?**

   LS Power does not see the need to identify other competitive approaches other than the sponsorship model or competitive bid model, but does suggest refinements to each of these models to benefit consumers. For example, clearly defined evaluation criteria and well-documented selection reports would reduce the risk of litigation under any approach. As noted above, although CAISO has held 6 competitive solicitations under Order No. 1000 since 2015, its very thorough selection reports have resulted in no litigation. Likewise, while PJM cautions the Commission that the "L" in planning should not stand for litigation, the only litigation filed to date related to PJM was related to a pre-Order No. 1000 implementation project selection and was filed by an incumbent transmission owner prior to any selection.[81] Further, PJM's suggestion to move certain decisions from

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[80] Northeast Transmission's comments focused on two examples, one the use of a supplemental project to thwart a PJM proposal window, and another to build a project PJM's analysis had deemed unnecessary.

[81] Despite the lack of litigation, LS Power believes that PJM has made decisions inconsistent with both the mandate of Order No. 1000 that it select the "more efficient of cost effective solution" and its tariff, but has to date chosen to work to improve PJM's implementation rather that challenge individual selections.

the RTO to the Commission seeks to create 'litigation' where none currently exists.[82] The complaint filed against NYISO regarding its competitive solicitations was filed by one entity that failed to submit a proposal and acknowledged that its real complaint was with the New York Public Service Commission. Thus, LS Power believes that the threat of litigation is overstated.

Having a pre-qualification process and removing financial and operating capabilities from the comparative evaluation (after having established all bidders to be capable of delivering the project) would help expedite the evaluation and also eliminate criteria that may be subjective and therefore reduce the risk of litigation.[83] Having definitive process deadlines (such as for CAISO, SPP and MISO) would also help expedite the process compared to an open-ended process (such as PJM and NYISO).

4. **What types of information (please be specific) could be used to measure the impact of the Order No. 1000 reforms on transmission development? For example, what information could be used to evaluate whether the more efficient or cost-effective transmission facilities are being selected within and between transmission planning regions? How should that information be tracked and reported or posted? Should common metrics be developed for evaluation of the information?**

Metrics should be developed to measure the cost savings of competitive processes, in order to avoid controversy related to the benefits of competition.[84] Currently, no consistent metrics exist as there are not consistent estimates of benefits. Requiring consistent measurement and reporting will provide for benefits to be quantified, and demonstrate the benefits to skeptics of competition. There are many similarities between competitive transmission and renewable resource integration, where many industry participants initially opposed large scale renewables on the basis of technical issues of intermittency, but now that benefits of such resources have been demonstrated and quantified many of those same entities are strong supporters of renewables. To ensure

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82 Speaker Materials Of Craig Glazer of PJM Interconnection, L.L.C., filed June 30, 2016 in Docket AD16-18-000, at 6-7.

83 In this regard, the competitive process in Alberta is more straight-forward. There was an initial process to get the bidders down to five, and then the five qualified "finalists" competed solely on cost. http://poweringalberta.com/wp-content/uploads/2010/09/Competitive-Process.pdf .

84 For example, as noted above, SPP claims its single competitive proposal resulted in a solicitation with administrative cost of 46% to 59% of the project cost. Yet the real outcome of the solicitation was a savings of 50% on the pre-competition estimate of project cost at no cost to ratepayers. https://www.spp.org/documents/37708/iep%20recommendation%20report%20with%20process%20and%20appendix%20public%20redacted%20041216_redacted.pdf .

consistent information the Commission should look at pre-Order No. 1000 estimates versus the actual costs to construct. This high level information is a starting point. The Commission could also look at the pre-Order No, 1000 cost per mile for transmission additions in discrete regions, the cost per mile in similar areas between incumbent and non-incumbent, cost contained and not cost contained, etc. There are a variety of metrics that could provide valuable information, but LS Power encourages the Commission to collect the information and do its own analysis.

5. **How do the sponsorship model and competitive bidding model, respectively, and variations on these models, capture the benefits of competition, such as increased innovation and selection of the more efficient or cost-effective transmission facilities? What are the positive features and drawbacks of each model? How can their drawbacks be addressed?**

Both the sponsorship model and the competitive bidding model are capable of capturing the benefits of competition. Affiliates of LS Power have participated in competitive processes under both approaches and found that either approach can provide competition that is beneficial to ratepayers if implemented properly.

The sponsorship model has the benefit of imposing greater competitive pressure in the identification of transmission solutions, which has the potential to drive additional innovation, and the potential for greater cost savings in the identification of a least cost overall solution. In our experience, even under a sponsorship model a bidder has the incentive to provide the least cost and benefits of cost containment due to the potential for other bidders to identify a very similar overall project submittal. The only disadvantage of the sponsorship model is that the evaluation of submittals is more complicated due to the need to evaluate proposals that differ in more respects, including potentially with differing cost regimes. This highlights the need for Transmission Providers to develop capabilities to evaluate all aspects of a proposal, not just the technical aspects. In such evaluations, cost should be the key consideration, not just a tie-breaker in the case of otherwise similar proposals.

At this point in Order No. 1000's evolution it is too early to make conclusions regarding a single approach. LS Power believes that the Commission should continue to respect the regional differences in this regard, and strategically focus on each region's tariff and get the process right within each tariff. LS Power does not support a "best practices" rulemaking as suggested by some, as it is better to focus on a Policy Statement on Cost Containment and specific tariff changes need in specific regions to fully effectuate Order No. 1000.

6. Are changes to the Commission's current application of the Discounted Cash Flow (DCF) analysis needed to better accommodate nonincumbent transmission developers, in particular with respect to the identification of appropriate proxy groups? If so, what changes are necessary?

LS Power does not believe that changes to the Commission's current application of the DCF analysis are needed for competitive transmission. However, as noted in response to Panel 3 Question 7 above, standardization or pre-identification of the ROE applicable for competitive processes could be beneficial for all participants. Further, the Commission should be flexible in its application of the DCF methodology so that the Commission's application of the "zone of reasonableness" does not place form over substance but recognizes the overall impact of the requested return on equity to the rates paid. A project proposal that has a definitive binding cost containment proposal provides real ratepayer benefits. If that proposal was made in a proposal submission that included an expected return on equity, when that binding commitment is proposed in rates it should not be treated under the DCF methodology in the same manner as a transmission developer that offered no binding cost containment. As the Commission has held, the DCF methodology is just that, a methodology, it is up to the Commission to determine, on a case by case basis, where the appropriate return on equity sits within the zone of reasonableness.[85]

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[85] *Martha Coakley v. Bangor Hydro-Electric Company*, Opinion No. 531, 147 FERC ¶ 61,234 (2014), *reh'g denied*, 150 FERC ¶ 61,165 (2015) at P 143; *see also See, Bangor Hydro*, 122 FERC ¶ 61,038 (2008) at P 11, *quoting Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) ("When the Commission identifies a 'zone of reasonableness' in a particular case, it identifies a range that reflects the 'substantial spread between what is unreasonable because it is too low and what is unreasonable because it is too high.'"

LS Power's Proposed FERC Policy Statement on Cost Containment and Its Role in the Selection Process

LS Power suggests that the Commission establish a national policy statement on cost containment and its role in the selection process ("Policy Statement"), applying to all regions subject to Order No. 1000, that addresses the following areas:

1. The Benefits of Cost Containment to Consumers

2. The Role of Cost Containment in the Selection Process

    a. Cost containment proposals must meet a three-pronged test to be considered.

    b. Preference for proposals with cost containment in transmission planning region competitive processes.

3. Rate Case Protocols for selected proposals with cost containment commitment

More specifically, under the Policy Statement the Commission should address the following::

1. Cost containment proposals have the potential to provide significant benefits to consumers. Since the effective date of Order No. 1000, where meaningful competition has occurred, we have seen a proliferation of innovate proposals, including alternative project designs and cost caps that limit customer's exposures to cost overruns. On appeal, the Commission defended the requirements in Order No. 1000 based on a clear connection between the requirements of the Order and rates. *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 82-82 (D.C. Cir. 2014)(noting that "The Commission concluded that including rights of first refusal was a 'practice . . . affecting . . . rate[s]' within the meaning of the [Federal Power Act]." The Court of Appeals upheld the Order based on that connection, finding "Transmission service providers recoup the costs of their transmission facilities through their rates. The lower those costs, the lower their rates." *Id*. at 84 (citations omitted). As a matter of policy, cost containment proposals could have the potential to lower costs, and therefore rates.

    The Commission, therefore, should encourage innovative rate structures and cost containment mechanisms and should not, at this time, limit such proposals to a defined set of parameters. The Policy Statement should reflect the view espoused by Commissioner LaFleur in Docket EL15-40-000:

    > One of Order No. 1000's key goals was to harness the benefits of competition in transmission development for customers, and it is important that, as regions implement their Order No. 1000 procedures, we do not lose sight of that goal: facilitating the identification, development, and ultimately the construction of more efficient or cost-effective transmission projects that are better for customers. Order No. 1000's competitive solicitation processes – and in some cases, the mere prospect of competitive solicitation processes – have already led to a host of

innovative rate structures and cost containment proposals that, if properly designed, could provide significant benefits for customers. I believe that these efforts should be encouraged, both by the Commission and in the regional transmission planning processes, to foster a dynamic environment for new transmission development.

2. The Commission in the Policy Statement should address the role of legally binding cost containment proposals in the selection process for Order No. 1000 compliant regional planning processes.

    a. **Three-Pronged Test-** To be considered a 'cost containment proposal,' the proposal must meet a three-pronged test and if it does not, the selection process should consider the costs within the proposal the same as a cost estimate. Cost containment proposals must meet the three-pronged test of Distinction, Clarity and Enforceability.

        i. ***Distinction*** - The standard for the Distinction requirement in a cost containment proposal is that the proposal should be something more than required under current Commission regulations or policies (e.g., a proposal agreeing that incentive return on equity adders will not be applied to costs above a defined cost estimate would not be considered a 'cost containment proposal' because it is already required by the Commission's Policy Statement on Incentives).

        ii. ***Clarity*** - The standard for the Clarity requirement in a cost containment proposal is that the proposal shall include, at the time of proposal submittal, specific details regarding the matters covered by the cost containment proposal as well as any exclusions to the cost containment proposal, each accompanied with the proposal sponsor's proposed contractual language on such covered and excluded items. The Commission should acknowledge that a proposal meeting the Clarity requirement for cost containment proposals can include openers, caveats, and other flexible mechanisms so long as clearly identified. The developer should clearly identify these openers, caveats and other flexible mechanisms in their proposal.

        iii. ***Enforceability*** - The standard for legal Enforceability in a cost containment proposal shall be the following: the developer shall agree in their proposal that the cost containment proposal is legally binding, and that it will be reflected in any Developer Agreement required in the regional planning process and will be reflected and enforced in the developer's existing or future FERC rate case.

    b. Preference for Proposals with binding cost containment commitments:

        i. If a proposal meets the three-pronged standard established in the Policy Statement as a cost containment proposal, the cost containment proposal

should be viewed as: 1) fundamentally superior to a cost estimate without cost containment, and 2) benefit from a rebuttable presumption that it is the more efficient and cost effective proposal as compared to a cost estimate without cost containment. A proposal with stronger cost containment, with fewer carve-outs and exceptions would be most preferred. This is especially true for cost containment proposals related to market efficiency and public policy proposals but should also be true for reliability projects unless a demonstrable reliability concern overrides the importance of the cost commitments.[1,2]

ii. Each Order No. 1000 region should develop or contract for the capability to analyze, compare and evaluate cost containment proposals for all types of transmission projects planned for within the relevant region. This capability should include the ability to analyze the legal scope of the cost containment proposal and the economic impact of any exclusion from that proposal.

iii. As part of the region's requirement for transparency in selection under Order No. 1000, the region shall post all cost containment proposals in their evaluation materials, outline in the selection process which proposals met the standard for a "cost containment proposal," outline in their selection process how it compared the proposals meeting the "cost containment" standard, and the region shall outline how it weighted the "cost containment" proposal in the overall selection process. The Commission should direct the Order No. 1000 regions to clearly identify and compare the openers, caveats, and other flexible mechanisms against other cost containment proposals in their evaluation and selection process, with a preference for proposals with fewer exceptions, openers, caveats or flexible mechanisms.

iv. As noted above, to ensure that the benefits of cost containment proposals are given due consideration and weight, a proposal that includes cost containment should be rebuttably presumed to be more efficient and cost

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[1] This policy is consistent with NESCOE's statement in its 2015 Annual Report to the New England Governors that cost containment can "limit the risk of cost overruns ultimately paid for by consumers and are an appropriate selection criterion on which to base the evaluation of competing transmission projects.

[2] This is consistent with language from the 2015 New England Clean Energy RFP which stated "proposals including cost containment features such as fixed price components, cost overrun restrictions, or other cost bandwidth provisions to limit customer risk will be viewed more favorably." The Clean Energy RFP further states that projects without "significant cost containment features" are unlikely to be selected and "strongly encourages" bidders to include such elements in their proposals. https://cleanenergyrfp.com/

effective than a proposal that relies only on cost estimates and does not provide effective cost containment The situations under which a region could conclude that this "more efficient or cost effective" presumption has been rebutted will depend on the circumstances, but could include cases where the worst case/conservative estimated total costs of a cost estimate proposal are significantly lower than the total costs of the cost containment proposal or if there are other benefits that outweigh the benefits of the cost containment proposal (taking into account the overall quality of the cost containment proposal). In any event, the establishment of such rebuttable presumption will ensure that, in cases where an Order No. 1000 region selects a cost estimate proposal over a cost containment proposal, the reasons for such selection are clearly articulated by the region as part of the final selection process.

3. The Commission in the Policy Statement should state that the entities that have been selected based on a proposal containing cost containment commitments must reflect those commitments in any rate filing. The Policy Statement should also reflect that such commitments are fully binding in proceedings before the Commission for the full term of the commitment.[3] Fully binding would also mean that any cost overruns not explicitly excepted out of a proposal would not be prudently incurred, and would not be recoverable in rates.

[3] To the extent that a region files comments in this proceeding that they have concerns on whether they have the ability to enforce cost containment proposals in their existing tariff, the Commission should immediately file a proceeding under Section 206 of the Federal Power Act related to those specific tariffs and require a tariff modification that would provide additional clarification in the tariff and/or Developer Agreement related to cost containment enforceability consistent with the Statement of Policy related to Cost Containment.