

**Via Regulations.gov**

U.S. Department of Justice  
Antitrust Division  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

May 27, 2025

**Re: Docket No. ATR-2025-0001**, Anticompetitive Regulations Task Force

Ladies and Gentlemen:

The Electricity Transmission Competition Coalition (“ETCC”) appreciates this opportunity to provide comments to the Anticompetitive Regulations Task Force of the U.S. Department of Justice Antitrust Division.<sup>1</sup> We are particularly grateful for the opportunity to respond to the Department’s stated interest in incumbent transmission owner preference (often called Right of First Refusal) laws (“Preference Laws”) and other regulations in the energy sector which prevent competition and cost American homeowner and businesses billions of dollars each year. The adoption, or efforts to adopt, Preference Laws at the state level and continued efforts to prevent competition through federal regulations are reflective of a concerted effort by existing transmission owners to capture the market for the hundreds of billions of dollars of investment in transmission the country will need over the coming years. As we discuss below, we fully expect those efforts to continue here with incumbent transmission owners or their surrogates trotting out discredited studies or false narratives to downplay the proven benefits that competition for transmission development delivers to American electricity consumers. The Anticompetition Task Force’s effort to root out anticompetitive laws and regulations regarding transmission development will be essential to ensure that electricity remains economically available to American consumers and that American businesses remain globally competitive.

**I. THE ELECTRICITY TRANSMISSION COMPETITION COALITION’S  
INTEREST AND WHY THIS TASK FORCE MATTERS**

ETCC represents a diverse group of more than 94 companies and organizations from all 50 states, including manufacturing groups, retail electric consumers, state consumer advocates, public power representatives, think tanks, and non-incumbent transmission developers. As the Chair of the Federal Energy Regulatory Commission (“FERC”) recently reiterated “[t]he electric transmission grid is the backbone of the American economy and essential to the national security of our country.”<sup>2</sup> Representing manufacturers who are some of the largest users of electricity, small businesses where the cost of electricity can mean the difference between success and failure,

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<sup>1</sup> Press Release, U.S. Dep’t of Justice, Anticompetitive Regulations Task Force (Mar. 27, 2025), <https://www.justice.gov/opa/pr/justice-department-launches-anticompetitive-regulations-task-force> [hereinafter DOJ Press Release].

<sup>2</sup> Joint Concurrence of Chair Phillips and Commissioner Clements to FERC Order No. 1920, at P 1, available at <https://www.federalregister.gov/documents/2024/06/11/2024-10872/building-for-the-future-through-electric-regional-transmission-planning-and-cost-allocation>.

and consumer advocates for residential consumers, ETCC members feel the direct monetary impact of transmission Preference Laws and regulations thwarting competition. As such, we advocate for common-sense laws and regulations that will ultimately require all transmission projects to be competitively bid, reducing electricity costs for all ratepayers – from large manufacturers to residential consumers. Efforts to keep the market for development of the hundreds of billions of dollars of future transmission monopolized to only existing transmission owners is inconsistent with American economic policies and a vestige of an electric grid that has not existed since the middle of the last century. As has been proven over and over, where competition for transmission development is employed, consumers big and small benefit.

A 2023 study found that “[w]here electricity transmission competition has been allowed, it was shown to have an estimated range of cost savings from 15% to 60% for new transmission projects.”<sup>3</sup> The advantages of allowing transmission competition to enter the market are clear:

[A]ssuming a conservative estimate, if only 33% of new transmission projects were competitively bid and there is an average cost savings of 40%, ratepayers could save an estimated \$277 billion. If all new transmission projects were competitively bid at an average cost savings of 40%, ratepayers could save an estimated \$840 billion by 2050.<sup>4</sup>

The savings from competition are established by more than just studies. A comparison of a competed project and one assigned to existing transmission owners under a preference law demonstrated the real-world impact financial impact on consumers of incumbent Preferences Laws. Looking at just return on equity and capital structure, that analysis demonstrated that:

the return on equity and capital structure on competed versus non-competed projects means consumers are paying \$14 million dollars in excess rates on a \$100 million transmission project over the project life. Thus, if \$1 billion in new transmission investment is subject to competition, the rate impact value to consumers would be savings of \$140 million (or conversely if not competed excess rates of \$140 million).<sup>5</sup>

The filing went on to note that just related to the \$30 billion in transmission planned by the Midcontinent Independent System Operator, Inc. (“MISO”) the savings would be “\$4.2 Billion,

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<sup>3</sup> Electricity Transmission Competition Coalition, Report & Survey, FERC’s \$277 Billion Electricity Price Hike - How the Federal Energy Regulatory Commission’s Failure to Enforce Transmission Competition Will Lead to Decades of Electricity Price Inflation for American Consumers, ¶ 5, ETCC (Nov. 2023), [https://electricitytransmissioncompetitioncoalition.org/wp-content/uploads/ETCC-Report-Survey\\_Nov-2023-FINAL.pdf](https://electricitytransmissioncompetitioncoalition.org/wp-content/uploads/ETCC-Report-Survey_Nov-2023-FINAL.pdf)

<sup>4</sup> *Id.* ¶ 5.

<sup>5</sup> Comments Of LS Power Grid, LLC In Response To The Commission’s Advanced Notice Of Proposed Rulemaking, Appendix II at 11-12, filed October 12, 2021 in Docket RM21-17-000 ANOPR (“Comments Appendix II”).

only accounting for excessive return on equity and capital structure alone.”<sup>6</sup> Not surprisingly, because the MISO region has the highest level of regional project planning, the MISO region (which overlaps in several relevant states with the Southwest Power Pool region) has the most incumbent Preference Laws.

While limitations on return on equity and capital structure are two easily quantified benefits of competition, there are multiple other benefits. Multiple projects have resulted in caps on significant portions of the capital costs to construct the project.<sup>7</sup> The benefits of competition are also proven when incumbents are required to compete. In this regard, when incumbent transmission owner Ameren was required to compete in Missouri because its efforts to secure a Missouri Preference Law were unsuccessful,<sup>8</sup> to win the competed project it offered concessions by capping capital costs, limiting return on equity, and partnering with a tax-exempt entity, each of which results in significant consumer savings.<sup>9</sup> These type of arrangements are not present when competition is not required.

In 2022, the DOJ and FTC recognized that competition saves consumers money, noting “[w]ith a ROFR, consumers will lose the many benefits that competition can bring, including lower rates, improved service, and increased innovation, leading to a more efficient, reliable, and resilient grid.”<sup>10</sup> Or as the Division expressed in its comment on March 24, 2025, regarding Iowa Senate Study Bill 1113 (“S.S.B. 1113”):

[G]rant[ing] incumbents a ROFR to develop new transmission projects before non-incumbents can offer alternative proposals . . . would *foreclose competition* to develop and build electric transmission and thereby potentially raise prices and lower the quality of service for electricity consumers.<sup>11</sup>

While competition in transmission development has proven to drive down costs, ROFR protections tend to do the opposite. According to Professor Joshua Macey of Yale Law School, competitive transmission projects were roughly “forty percent” cheaper than the incumbents’ proposals, and projects built without competition suffered “average cost escalations of 34%.”<sup>12</sup> Empirical evidence bears this out. For example, an incumbent-designed upgrade in PJM Interconnection LLC (“PJM”) that bypassed competitive bidding recently ran \$775 million over

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<sup>6</sup> *Id.*

<sup>7</sup> See, ANOPR Comments Appendix II (outlining competed projects as of 2021 and the cost caps).

<sup>8</sup> <https://electricitytransmissioncompetitioncoalition.org/missouri-legislature-makes-wise-decision-to-not-support-anti-consumer-rofr-bill-sb-568/>. The efforts of Ameren and others to have a Preference Law passed in 2025 were also unsuccessful - <https://www.powerforwardmo.com/news-posts/1/4/ameren-missouri-supports-the-missouri-first-transmission-act>.

<sup>9</sup> <https://cdn.misoenergy.org/DZTM%20345%20kV%20Selection%20Report632383.pdf>.

<sup>10</sup> See DOJ-FTC Comment, *supra* note 20, at 1.

<sup>11</sup> Letter from Abigail Slater, *supra* note 19, at 1 (emphasis added).

<sup>12</sup> Testimony of Joshua Macey, Associate Professor at Yale Law School, in Opposition of Wisconsin Assembly 25 Senate Bill 28, ¶ 1 (Mar. 4, 2025) hereinafter (“Macey Testimony”).

budget (rising from \$738 million to \$1.51 billion), whereas a competitively bid project in Midcontinent Independent System Operator, Inc. (“MISO”) “still came in below MISO’s initial estimate . . . and below the project’s cost cap” due to the winning developer’s binding cost controls.<sup>13</sup> In short, opening projects to competition consistently yields lower costs for consumers and helps prevent the massive overruns that plague monopoly-built lines.

In addition to lowering costs, competition incentivizes innovation in a way that anticompetitive regulations do not. Incumbent utilities operating under guaranteed returns have historically been “reluctant to invest in new technologies,” often shying away from advanced solutions out of fear of unfamiliar risks.<sup>14</sup> By contrast, when facing competitive solicitations, developers propose creative technologies and designs to gain an edge. In one case, LS Power’s team proposed an underground high-voltage cable “that had never before been used in the United States” to span a river, reducing environmental impact and permitting risk—an innovative approach the local incumbent had not pursued.<sup>15</sup> Competition thus injects new ideas and efficiency improvements into grid expansion, whereas a Preference Law simply entrenches the status quo. As Mr. Thessen cautioned in his FERC affidavit, reversing course on competition would “lead to higher costs for consumers and less innovation.”<sup>16</sup>

Finally, competition brings transparency. When projects are competed the selected developer enters into a binding contractual agreement reflecting development milestones and cost containment commitments. These agreements provide transparency for consumers and regulators alike. The transparency is largely missing for non-competed projects, whether the project was not competed because of a preference law or because of FERC regulations allowing tariffed exceptions to competition.

Despite these clear benefits, proponents of transmission competition have consistently faced barriers to competition, and “only 3%-8% of all transmission projects have been competitively bid.”<sup>17</sup> This has caused American consumers such as ETCC members billions of dollars in excess electricity rates. ETCC’s interest in increasing competition aligns with the views of “an overwhelming majority of Americans.” A recent study found 78% of Americans “believe that competition amongst suppliers leads to lower prices as a result.”<sup>18</sup>

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<sup>13</sup> Macey Testimony, *supra* note 12, ¶ 2. Moreover, MISO and PJM are regional transmission organizations (RTOs). RTOs are electric power transmission system operators (TSOs) that coordinate, control, and monitor multi-state electric grids.

<sup>14</sup> *Id.* ¶ 4.

<sup>15</sup> Thessen Aff. at ¶ 11.

<sup>16</sup> *Id.* ¶ 7.

<sup>17</sup> *Id.*; see also Pfeifenberger, Chang, & Hagerty, Cost Savings Offered by Competition in Electric Transmission ¶ 1, THE BRATTLE GROUP (Dec. 11, 2019) (“If competition could be expanded to 1/3 of total transmission investments, estimated customer benefits would be \$6-9 billion over just five years”), [https://www.brattle.com/wp-content/uploads/2021/05/17805\\_cost\\_savings\\_offered\\_by\\_competition\\_in\\_electric\\_transmission.pdf](https://www.brattle.com/wp-content/uploads/2021/05/17805_cost_savings_offered_by_competition_in_electric_transmission.pdf).

<sup>18</sup> ETCC Report, *supra* note 3, ¶ 7.

ETCC's interest also aligns with those of the U.S. Department of Justice and the Federal Trade Commission (FTC). As Assistant Attorney General Slater recently put it, incumbent Preference Law in the energy sector "foreclose competition to develop and build electric transmission, thereby potentially raising prices" and reducing reliability for consumers.<sup>19</sup> As a result, both the Department and the FTC have recognized that removing and reforming Preference Laws "will make transmission development less costly, more resilient, and more innovative for the American consumer than it otherwise would be."<sup>20</sup>

## **II. INCUMBENT UTILITIES CONTINUE TO PUSH FOR COMPETITION RESTRICTIONS IN AN EFFORT TO MONOPOLIZE TRANSMISSION DEVELOPMENT**

Qualified transmission development competitors<sup>21</sup> encounter significant barriers to entry due to restrictive FERC regulations or FERC approved tariff provisions, lackluster FERC enforcement of existing competition policies, and anticompetitive state Preference Laws, which ultimately lead to "substantially [higher] electricity rates for American families and businesses *for decades to come*."<sup>22</sup> Despite substantial evidence highlighting the benefits of competition and, therefore, the detrimental effects of Preference Laws, utility companies continue to lobby both statehouses across the country and federal agencies to push for anticompetitive state laws and regulations to establish transmission monopolies.<sup>23</sup> These state Preference Law efforts were a direct response to FERC declaring that the contractual agreements and tariff provisions under which incumbent utilities first divided the transmission market were inconsistent with the Federal Power Act. In reviewing the appeal of a group of incumbent utilities of FERC's requirement removal of market division contract or tariff provisions, one court referred to the contractual market division as "cartel" like.<sup>24</sup>

Even while appealing FERC's removal of contract and tariff provisions under which incumbent transmission owners had divided the market among themselves, incumbent utilities

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<sup>19</sup> Letter from Abigail Slater, Asst. Atty. Gen., to Jesse Green, Iowa State Senator, Mar. 24, 2025, available at <https://www.justice.gov/atr/media/1394696/dl?inline> (emphasis added); see also 2022 Comment of DOJ-FTC Comment, *supra* note 20, at 1, 4 (showing how the Antitrust Division's concerns are not new); see also Letter from Daniel Haar, Acting Chief, Competition Pol'y & Advoc. Sec., Antitrust Div., to Rep. Travis Clardy, Tex. House of Reps. (Apr. 19, 2019) ("Haar Letter"), <https://www.justice.gov/atr/page/file/1155881/download> ("consumers may face higher electricity rates and less reliable service").

<sup>20</sup> Comment of United States Department of Justice & Federal Trade Commission, *In re Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, Dkt No. RM21-17-000, at 22 (FERC Aug. 17, 2022) [hereinafter DOJ-FTC Comment].

<sup>21</sup> Each region of the country has transmission developer qualification processes, ensuring that transmission is only developed by financially and technically qualified entities.

<sup>22</sup> ETCC Report, *supra* note 3, ¶ 22.

<sup>23</sup> See, e.g., S.S.B. 1113, 91st Gen. Assemb. (Iowa 2025); H.R. 2747, 60th Leg., 1st Sess. (Okla. 2025); S. B. 28, 107th Leg., 1st Sess. (Wis. 2025).

<sup>24</sup> *MISO Transmission Owners v. FERC*, 819 F.3d 329, 334 (7th Cir. 2016).

were seeking state level incumbent preference laws to accomplish the same market division goal. In making these lobbying efforts, Incumbent transmission owners and their surrogates consistently band together to argue against competition, including advocating for state Preference Laws and federal regulations. In doing so they have repeatedly offered misleading assessments of the competition that has occurred, while highlighting claimed deficiencies in the competitive process that they created. Because their misleading attacks on competition have found success at the state level, ETCC would not be surprised if they seek to insert some version of the same misleading and discredited information into this Task Force. As discussed below, with the assistance of the Expert Analysis Group, this Task Force is uniquely situated to see the incumbent claims for what they are: misleading attacks on competition in an effort to monopolize the transmission market to the detriment of consumers. The U.S. Department of Justice Antitrust Division was formed to fight precisely these type of market grabs.

Following early competitive processes, the Brattle Group—a group that has worked across the electric industry for incumbent utilities, regulatory agencies and independent developers—prepared a report on the savings available from competition.<sup>25</sup> The Incumbent utilities obtained their first misleading report as a rebuttal,<sup>26</sup> with the Brattle Group immediately pointing out the deficiencies.<sup>27</sup> Notwithstanding that the flaws in the Concentric Report were immediately identified, the report was used repeatedly at the state and federal level. Additional reports, some from Concentric, some “Whitepapers” from the utilities themselves, have been produced in the intervening years, each equally misleading. One such report was filed with FERC<sup>28</sup> and immediately rebutted by an affidavit.<sup>29</sup> ETCC encourages the Task Force to review that Affidavit to understand not only how incumbent utilities have misrepresented competitive development,<sup>30</sup> but also for understanding how regulation can never supplant competition in ensuring the nation’s transmission grid is built in a manner protecting electricity consumers. The President of LS Power Development, one of the most successful competitive developers, explained in 2022 that FERC

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<sup>25</sup> Cost Savings Offered by Competition in Electric Transmission: Experience to Date and the Potential for Additional Customer Value at 40 (“Brattle Competition Report”), prepared April 2019 by The Brattle Group, available at [https://www.brattle.com/wp-content/uploads/2021/05/16726\\_cost\\_savings\\_offered\\_by\\_competition\\_in\\_electric\\_transmission.pdf](https://www.brattle.com/wp-content/uploads/2021/05/16726_cost_savings_offered_by_competition_in_electric_transmission.pdf).

<sup>26</sup> Report: Building New Transmission: Experience To-Date Does Not Support Expanding Solicitations, released June 2019 by Concentric Energy Advisors, filed August 9, 2019 in Docket AD16-18-000, also filed in PL19-3-000.

<sup>27</sup> Response to Concentric Energy Advisors’ Report on Competitive Transmission, The Brattle Group, August 2019 available at [https://www.brattle.com/wp-content/uploads/2021/05/16873\\_response\\_to\\_concentric\\_energy\\_advisors\\_report\\_on\\_competitive\\_transmission.pdf](https://www.brattle.com/wp-content/uploads/2021/05/16873_response_to_concentric_energy_advisors_report_on_competitive_transmission.pdf).

<sup>28</sup> Competitive Transmission: Experience To-Date Shows Order No. 1000 Solicitations Fail to Show Benefits, published August 16, 2022.

<sup>29</sup> Affidavit of Paul Thessen in Support of Comments of LS Power Grid, LLC, filed Aug. 17, 2022 in Docket No. RM21-17-000 In re Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection, (hereinafter “Thessen Aff.”)

<sup>30</sup> Thessen Aff. at 30-39.



“will be unable to replicate the consumer benefits of competition through regulation,” since granting incumbents monopoly rights eliminates the market pressure needed to contain costs.<sup>31</sup>

As Professor Macey also noted that utility claims rely on cherry-picked data and do not withstand scrutiny. Professor Macey observed, “utility-sponsored research relies primarily on individual case studies” of a few projects where costs went up, while ignoring the broader record that “the most egregious examples of transmission cost overruns have involved lines that avoided competitive procurements.”<sup>32</sup> In one example, ROFR defenders pointed to a cost overrun on a competitively bid project without mentioning that the overrun was caused by the incumbent utility’s own substation work—work that was not subject to competition.<sup>33</sup> In other words, the very evidence used to cast doubt on competition actually underscores the perils of exempting incumbents from competitive discipline. Professor Macey, like Brattle, recounted that the 2019 Concentric Report (often cited by utilities to defend anti-competition preferences) concluded that incumbent-built projects experienced smaller cost increases—but only by moving the goalposts.<sup>34</sup> The Concentric study “compared the final cost of incumbent-led projects not to the initial cost estimate, but rather to more recent estimates that came in higher,” thereby masking much of the cost growth.<sup>35</sup> By using inflated later estimates as the benchmark, the study “significantly underrepresents the true cost escalations” on projects granted to incumbents without competition.<sup>36</sup> In short, the utility-sponsored reports defending Preference Laws rest on selective and misleading evidence, whereas real-world data—from academic studies and the industry’s own filings—overwhelmingly shows that robust competition lowers costs, drives innovation, and protects consumers from paying for the inefficiencies of an unchecked monopoly.

Another refrain from incumbent utilities is that competition takes too long and delays needed infrastructure. As an initial matter, competition does not change the required in-service dates and any project competed will meet the same in-service date as a non-competed project.<sup>37</sup> While the delay argument is a red herring, it is particularly off base as incumbent utilities designed the Order No. 1000 compliant competitive processes specifically to have unreasonably elongated processes. ETCC as well as Qualified Developers have called for shortened competitive processes.<sup>38</sup> Competition should cause no delay in getting needed infrastructure built and any argument that it does is a false flag.

As the U.S. Department of Justice Antitrust Division considers its involvement in this vital economic issue on the fastest growing portion of consumer’s energy bills (transmission costs), it should consider full involvement in tackling all three of the problem areas: FERC’s lackluster enforcement of existing transmission competition policies and inaction addressing a complaint

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<sup>31</sup> Thessen Aff. at 26-30.

<sup>32</sup> Macey Testimony, *supra* note 12, ¶¶ 4–5.

<sup>33</sup> *See id.* ¶¶ 5–6.

<sup>34</sup> *See id.* ¶ 5 n.19.

<sup>35</sup> *See id.* ¶ 5.

<sup>36</sup> Macey Testimony, *supra* note 12, at ¶ 9.

<sup>37</sup> As noted *infra*, FERC has allowed an exception to competition for projects that are needed “immediately” which is 3 years in most instances.

<sup>38</sup> *See, e.g.* Thessen Aff at 12-13.

targeting preemption of state incumbent Preference Laws, and eliminating state incumbent Preference Laws. An all-in-approach is needed.

### **III. THE FEDERAL GOVERNMENT HAS FOUGHT STATE PREFERENCE LAWS FOR YEARS AND THE FIGHT CONTINUES**

State Preference Laws give existing utility companies a monopoly-like advantage: they get automatically assigned building new transmission lines in their existing transmission footprint—even if another company could do it better, faster, or cheaper.<sup>39</sup> These Preference Laws are often justified by incumbents or legislators as a reliability measures but they are simply parochialism even though the costs of such projects are not limited to the state with the Preference Law. Because Qualified Developers must meet the same reliability standards as incumbents, there is no reliability difference between developers. Preference laws, in practice, stifle competition, limit innovation, and increase costs for customers.<sup>40</sup>

More than a decade ago, the federal government recognized this problem. In 2011, FERC issued Order No. 1000, which opened the market to new players.<sup>41</sup> Courts have since upheld this move, confirming that the law supports more competition in the electric grid—not less. For example, on August 15, 2014, the D.C. Circuit unanimously affirmed Order No. 1000 recognizing that competition will save consumers.<sup>42</sup> On July 1, 2016, the D.C. Circuit denied a petition to review FERC’s determination that notwithstanding Order No. 1000 the contractual market division among incumbents was protected by Supreme Court precedent on contract sanctity.<sup>43</sup>

Following Order No. 1000, incumbent utilities lobbied state lawmakers to bring Preference protections back at the state level. The Trump Administration has a long history of expressing concerns with these Preference Laws – and the courts have listened. On August 30, 2022, agreeing with the Trump Administration Statement of Interest, the Fifth Circuit determined that a Texas Law, SB 1938, discriminates on its face and went too far by only allowing incumbent utilities with existing certificates to construct proposed projects.<sup>44</sup> Following remand, in 2024, the U.S. district

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<sup>39</sup> In most instances, if a Preference Law is in place, competitive processes are not undertaken and the project is simply automatically assigned to the incumbent.

<sup>40</sup> *Id.*; see also Ethan Howland, US district court rules Texas transmission law favoring incumbent utilities unconstitutional, UTILITYDIVE, Oct. 29, 2024, <https://www.utilitydive.com/news/texas-transmission-rofr-law-court-nextera-ls-power/731311/>.

<sup>41</sup> Anne Thrall-Nash, *Right-of-First-Refusal Laws are Unconstitutional and Hinder our Clean Energy Transition*, LEWIS & CLARK L. SCH. ENVIRONMENTAL, NATURAL RES., & ENERGY LAW BLOG, Fall 2023.

<sup>42</sup> See *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 65 (D.C. Cir. 2014) (denying petitions for review)(finding ““Agencies do not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall; nor need they do so for predictions that competition will normally lead to lower prices.””).

<sup>43</sup> See *Okla. Gas & Elec. Co. v. FERC*, 827 F.3d 75, 81 (D.C. Cir. 2016).

<sup>44</sup> See *NextEra Energy Cap. Holdings, Inc. v. Lake*, 48 F.4th 306, 326 (5th Cir. 2022) (“We therefore reverse the Rule 12(b)(6) dismissal of the claim that the very terms of SB 1938 discriminate against interstate commerce.”)



court in Texas ruled that the Texas law granting exclusive rights to incumbent utilities was unconstitutional and in violation of the dormant commerce clause.<sup>45</sup>

But the battle continues and continues to need the Antitrust Division's attention.

There are at least 9 states, and potentially as many as a dozen,<sup>46</sup> that presently have anticompetitive ROFR laws on the books. As shown in Figure 1, ETCC has identified the following states with incumbent Preference Laws: Michigan,<sup>47</sup> North Dakota,<sup>48</sup> South Dakota,<sup>49</sup> Nebraska,<sup>50</sup> Oklahoma (partial ROFR),<sup>51</sup> Alabama,<sup>52</sup> North Carolina,<sup>53</sup> Minnesota,<sup>54</sup> and Indiana.<sup>55</sup> At least two more states that are still in session in 2025—Wisconsin and Kansas—are considering new incumbent Preference legislation.<sup>56</sup> Iowa, Oklahoma, and Missouri rejected proposed incumbent Preference legislation in their legislative sessions in 2025 that have recently concluded. There is a pending case in Indiana to overturn the Indiana State ROFR law<sup>57</sup>, and a DOJ Statement of Interest in this case in the Summer of 2025 could be both timely and strategic.

FERC has done little to stop the madness as it has been sitting on a Complaint on these State Preference Laws almost three years. The FERC docket is EL22-78. The complaint argues, as the evidence shows, that FERC cannot establish just and reasonable transmission rates when Preference Laws prevent competition. If FERC cannot undertake its statutorily mandated obligation to protect consumers from unjust and unreasonable transmission rates, the state Preference Laws should be preempted. Filing Statement of Interests, independent DOJ-initiated action to preempt state Preference Laws, and active engagement with FERC and FERC proceedings by the Antitrust Division – all could be helpful Antitrust Division initiatives. In addition, providing Comments to State Legislatures on pending State ROFR Laws to prevent those laws in the first instance could also benefit electricity consumers.

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<sup>45</sup> See *NextEra Energy Cap. Holdings, Inc. v. Jackson*, 2024 WL 4660920, at 17 (W.D. Tex. Oct. 28, 2024) (“SB 1938 facially discriminates..., the statute is unconstitutional under the Commerce Clause.”)

<sup>46</sup> See Ethan Howland, *US district court rules Texas transmission law favoring incumbent utilities unconstitutional*, UTILIRYDRIVE (Oct. 29, 2024), <https://www.utilitydive.com/news/texas-transmission-rofr-law-court-nextera-ls-power/731311/> (noting, in comments attributed to Harvard Law Professor Ari Peskoe, that about a dozen states have passed anti-competition laws that benefit in state utilities).

<sup>47</sup> S. 103, 101st Cong. (Mich. 2021); Mich. Comp. Laws Ann. §§486.255 § 486.255.

<sup>48</sup> N.D. CENT. CODE § 49-03-02 N.D. Cent. Code § 10-13-11.

<sup>49</sup> S.D. CODIFIED L. § 49-32-20.

<sup>50</sup> R.R.S. NEB. § 70-1028.

<sup>51</sup> OKLA. STAT. tit. 17, §§ 291-293 (2024).

<sup>52</sup> ALA. CODE tit. 37, § 37-4-150 (2024).

<sup>53</sup> N.C. GEN. STAT. § 62-100, 101.

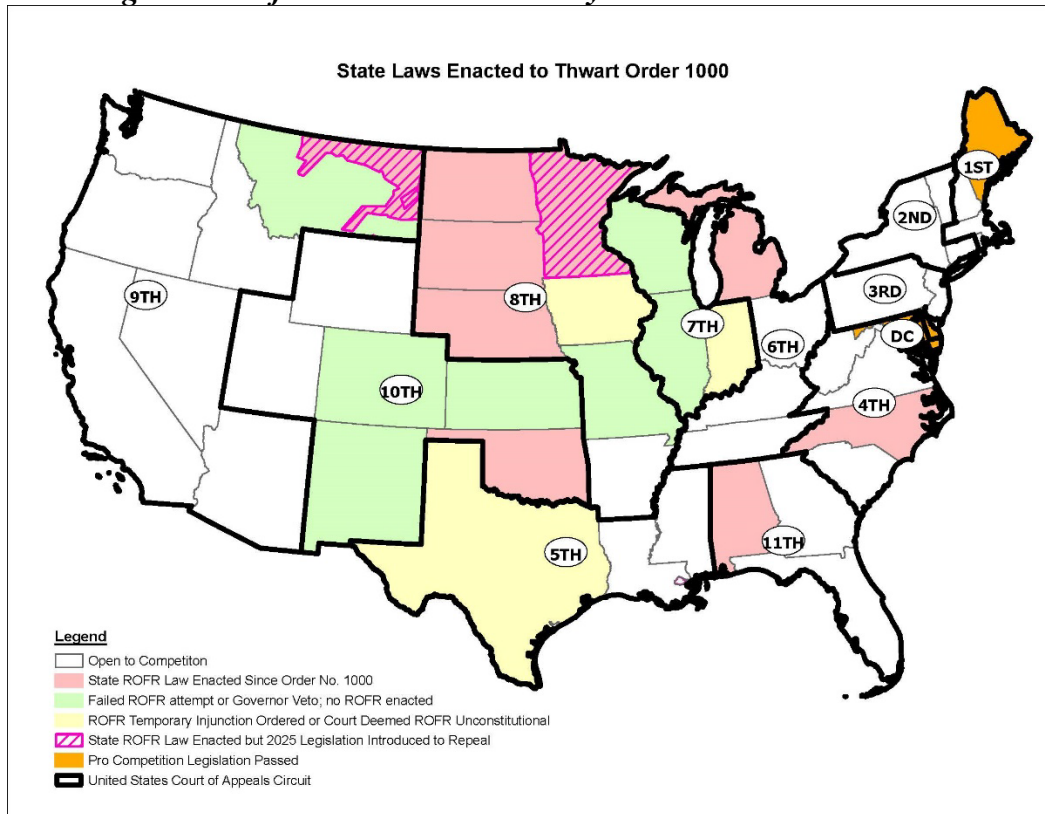
<sup>54</sup> MINN. STAT. § 216B.246.

<sup>55</sup> IND. CODE §§ 8-1-38-1 to -11.

<sup>56</sup> See S.S.B. 1113, 91st Gen. Assemb. (Iowa 2025); H.R. 2747, 60th Leg., 1st Sess. (Okla. 2025); S. B. 28, 107th Leg., 1st Sess. (Wis. 2025).

<sup>57</sup> See FERC Docket EL25-55 for a related case.

**Figure 1: Preference Laws Enacted by States Since FERC's Order**



Finally, in Order No. 1920, FERC itself backtracked on competition by providing incumbent transmission owners a FERC mandated preference for certain regionally planned projects. FERC allowed a preference for future regionally planned transmission that “right-sizes” existing transmission facilities that have reached the end of operational life. FERC’s regression on competition will cost consumers hundreds of millions of dollars in projects that will be automatically assigned to incumbent transmission owners without competition. ETCC and others has filed a Petition for Review of FERC’s determination, which Petition remains pending.<sup>58</sup>

#### **IV. THE TIME FOR ANTITRUST DIVISION ACTION IS NOW**

This timely and helpful action on incumbent Preference Laws and other FERC regulations as described above aligns with Trump Administration direction. On January 31, 2025, President Trump signed Executive Order 14192 that pushes federal agencies to remove “unnecessary regulatory burdens placed on the American people.”<sup>59</sup> On February 19, 2025, President Trump signed Executive Order 14219 directing federal agencies to “review all regulations . . . that impose undue burdens on [] businesses” and hurt competition.<sup>60</sup> Just a few weeks later, on March 27,

<sup>58</sup> *Appalachian Voices, et al. v. FERC*, Case No. 24-1650, United States Court of Appeals for the Fourth Circuit.

<sup>59</sup> Exec. Order No. 14,192, 90 Fed. Reg. 9065 (Jan. 31, 2025).

<sup>60</sup> Exec. Order No. 14,219, 90 Fed. Reg. 10,583 (Feb. 19, 2025).

2025, the Department of Justice launched the Anticompetitive Regulations Task Force to tackle state and local laws—like Preference Laws or so-called ROFRs—that give unfair advantages to incumbent players.<sup>61</sup>

Yet even more than just action on incumbent Preference Laws can be done to promote competition on transmission. On April 9, 2025, President Trump signed Executive Order 14267 that requires agencies to eliminate anti-competitive regulations.

Sec. 3. Rescinding Anti-Competitive Regulations. (a) Agency heads shall, in consultation with the Chairman of the Federal Trade Commission (Chairman) and the Attorney General, complete a review of all regulations subject to their rulemaking authority and identify those that: (i) create, or facilitate the creation of, de facto or de jure monopolies; (ii) create unnecessary barriers to entry for new market participants; (iii) limit competition between competing entities or have the effect of limiting competition between competing entities; (iv) create or facilitate licensure or accreditation requirements that unduly limit competition; (v) unnecessarily burden the agency’s procurement processes, thereby limiting companies’ ability to compete for procurements; or (vi) otherwise impose anti-competitive restraints or distortions on the operation of the free market.<sup>62</sup>

ETCC notes with interest that the April 9, 2025, Executive Order 14267 specifically calls for Federal Trade Commission and U.S. Attorney General engagement with each Agency head on anti-competitive regulations and barriers. This Executive Order applies to FERC as an Agency. As the Antitrust Division is engaged with the U.S. Attorney General in these consultations, ETCC would outline the following competitive barriers in FERC regulations (including proposed regulations, finalized regulations, or in pending FERC complaint docket cases):

1. Order No. 1920 introduces a new incumbent preference for projects replacing existing facilities that incumbents flag for replacement, but regional planners determine need to be larger to create more transmission capacity. Building for the Future Through Electric Regional Transmission Planning and Cost Allocation, Order No. 1920, 187 FERC ¶ 61,068, *order on rehearing & clarification*, Order No. 1920-A, 189 FERC ¶ 61,126 (2024) pending review as *Appalachian Voices, et al. v. FERC*, Case No. 24-1650, United States Court of Appeals for the Fourth Circuit.
2. Implementation of Order No. 1000’s requirement to eliminate ROFRs in federal tariffs or agreement. FERC has allowed transmission providers to chip away at the requirement to compete new regional transmission facilities without sufficient justification.

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<sup>61</sup> See DOJ Press Release, *supra* note 1.

<sup>62</sup> **REDUCING ANTI-COMPETITIVE REGULATORY BARRIERS – THE WHITE HOUSE**

- a. FERC has permitted four RTOs/ISOs – PJM, ISO New England Inc. (“ISO New England”), Midcontinent Independent System Operator, Inc. (“MISO”), and Southwest Power Pool, Inc. (“SPP”) – to exempt transmission projects from competition based on arbitrary near-term need-by dates even where the incumbent cannot meet the arbitrary date. Despite investigations demonstrating that the exemption is abused and harming consumers, FERC has not taken action. Incumbent utilities continue to abuse the exemption with few checks.<sup>63</sup>
  - b. In Order No. 1000, FERC included what appeared to be a common-sense exemption from competition for projects that are “upgrades” to existing transmission facilities, so long as the upgrade is not an entirely new facility. FERC has permitted MISO and the New York Independent System Operator (“NYISO”) to adopt expansive definitions of upgrades that now exempt entirely new transmission facilities from competition in certain circumstances. In its Long-Range Transmission Planning Tranche 1, MISO exempted an estimated \$4 billion as “upgrades.”
  - c. FERC has allowed state incumbent Preference Laws to spread into the MISO, SPP, and PJM FERC-jurisdictional tariffs. These RTOs and ISOs exempt projects from competition where a state Preference Law applies. In addition to elevating state law over federal law, it puts MISO, SPP, and PJM in the troubling position of interpreting and carrying out state Preference Laws with little oversight from FERC. MISO has also made it clear in various filings that once it has exempted a project from competition based on state law, it will not undo its decision even if the law is later found to be unconstitutional or stayed by a federal court.<sup>64</sup>
3. In 2022, FERC opened Docket No. AD22-8-000 to explore cost management and oversight of transmission development.<sup>65</sup> FERC held a technical conference and solicited comments from the public. Despite significant support for greater cost containment and management measures, FERC has failed to take any action.

The examples above are worthy of active consultation with FERC, be it under Executive Order 14267 or in proceedings that reexamine whether rules that FERC approved over the last decade hamper or prevent competition.

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<sup>63</sup> See attached annual status reports listing the number of projects exempt from competition based on arbitrary need-by dates and the status of the project. The reports show that many times the incumbent utility is unable to meet the need by date without harm to the system.

<sup>64</sup> *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057, *order on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345, *order on reh'g*, 119 FERC ¶ 61,062 (2007).

<sup>65</sup> See Transmission Planning and Cost Management, Supplemental Notice of Technical Conference, Docket No. AD22-8-000 (Oct. 4, 2022).

## V. THE ANTITRUST DIVISION EXPERT ANALYSIS GROUP SHOULD CONTINUE TO PROVIDE MEANINGFUL DATA IN THE TRANSMISSION COMPETITION DEBATE

State incumbent Preference Laws restrict investment and innovation in the electric grid and therefore are anticompetitive *by design*. These laws give incumbent utilities special privileges that prevent open competition for transmission projects—privileges that discourage new entrants and drive up costs. If left unchallenged, these laws will slow grid modernization and inflate prices for ratepayers. That harm is especially clear in the construction of power grid infrastructure, where competitive bidding is often eliminated through state laws granting incumbents Preferences. Eliminating anticompetitive state Preference Laws or other regulations benefits consumers nationwide. The Division has already expressed concern about some of these new efforts,<sup>66</sup> which would award billions of federal dollars to the local incumbents without any competitive bidding process. For example, in Wisconsin alone, roughly \$1.8 billion in transmission projects under MISO’s Tranche 2.1 planning process could be handed directly to incumbents if ROFR laws pass.

As is stated on the Antitrust Division website:

“The Expert Analysis Group (“EAG”) of the Antitrust Division is one of the world’s leading venues for developing and applying economics to real world questions of competition. We are a group of approximately 50 Ph.D. economists, complemented by statisticians, data scientists, and financial analysts. Economists here analyze the competitive effects of horizontal and vertical mergers and of potentially anticompetitive business practices. We routinely incorporate internal corporate data, business documents, and information from interviews of executives to understand and model competition from a perspective that is unavailable in typical academic settings. As a result, EAG economists can develop a uniquely relevant understanding of firm conduct in a wide variety of industries. Our analysis plays a central role in enforcement efforts to protect competition and benefit consumers through low prices, high quality, and innovation.”<sup>67</sup>

In 2022, the analytical credibility and horsepower of the Expert Analysis Group of the Antitrust Division supported high quality DOJ-Federal Trade Commission analysis on competitive transmission. The excerpt below (footnotes removed) from this FERC filing is helpful analysis from DOJ-Federal Trade Commission analytic work product that meaningfully contributes to the policy discussion at FERC.

Previous experience with competitive processes confirms these outcomes. When competitive processes have been implemented, a significant number of incumbent and nonincumbent competitors have participated, and nonincumbents have often won. Even when the incumbent wins, consumers also win, because incumbents tend to make more competitive proposals when they face competition. Electricity customers have also been able to

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<sup>66</sup> Letter from Abigail Slater, *supra* note 19.

<sup>67</sup> <https://www.justice.gov/atr/expert-analysis-group>

benefit from competition leading to innovative designs and financial terms, such as cost containment mechanisms. To illustrate, there are many instances in which the competitive process benefited consumers, including the following:

- **PJM’s Artificial Island Project:** PJM initiated this project to improve performance of the bulk electric system in the Artificial Island area in Southern New Jersey, which is the site of three nuclear reactors. In 2013, PJM received 26 proposals from seven sponsors reflecting a diverse range of technologies, including new overhead and underground/underwater 230 kV lines, overhead 500 kV lines, and HVDC lines. Original cost estimates ranged from \$100 million to \$1.55 billion. During the process, LS Power submitted a cost commitment of \$146 million for its portion of the project. In response to this proposal, PJM allowed three of the other bidders to supplement their proposals. Three of the four finalists submitted proposals containing a cost commitment or cost containment proposal. In 2015, LS Power was awarded the project, which was then expanded in 2017 to include additional work performed by the incumbents to address permitting issues and technical challenges identified after the initial award. Including the incumbents’ portion of the work on their transmission facilities, the total cost is estimated at \$280 million. PSE&G, the incumbent transmission owner, submitted fourteen proposals ranging in cost from \$692 million to \$1.173 billion, meaning PSE&G’s lowest-cost proposal was more than twice as expensive as the estimated total cost of the project.

- **NYISO’s Western New York Public Policy Transmission Project:** In November 2015, the New York Independent System Operator (“NYISO”) sought proposals to relieve transmission congestion in Western New York, including access to renewable energy from the Niagara hydroelectric facility and imports of renewables from Ontario. NYISO received twelve proposals from seven transmission developers. NYISO determined that ten proposals were viable and sufficient and ranked those proposals. In October 2017, the NYISO Board selected one of NextEra’s Energy Transmission’s proposed projects as the winner, noting that it was “both the more efficient and more cost-effective transmission solution” to address the identified need. That NextEra project cost \$181 million, while the lowest-cost proposal from an incumbent—a joint proposal from the New York Power Authority and New York State Electric & Gas Corporation—was \$222 million. NextEra’s project represents a 22 percent savings over the incumbent’s proposal.

- **CAISO Round Mountain 500 kV Area Dynamic Reactive Support Project:** The California Independent System Operator (“CAISO”) identified a reliability-driven need for this project in its 2018-19 transmission planning process. In 2019, CAISO conducted a competitive solicitation for proposals for two alternative configurations of the project. Six developers submitted a total of fourteen proposals, twelve of which



were qualified under CAISO's tariff. In February 2020, CAISO selected LS Power Grid California, LLC to finance, construct, own, operate, and maintain the project. In discussing the selection factors, after noting there were no material differences or only slight differences among the proposals with regard to many of the selection factors, CAISO highlighted the cost containment factor, which did have material differences. CAISO noted that LS Power "proposed the strongest binding cost containment commitment proposal." CAISO further noted that LS Power "proposed more robust capital or construction cost, return on equity, and equity percentage caps that should result in lower costs and present less risk compared to the proposals of the other five project sponsors ... thus benefitting ratepayers." CAISO also noted LS Power's 15-year annual revenue requirement cap and lower interconnection costs as advantages of LS Power's proposal.<sup>68</sup>

Given the proliferation of "DATA" reports paid for, with no affidavits<sup>69</sup>, by those with perverse incentives to seek a monopoly at all costs, the continued engagement of the Expert Analysis Group on reviewing non-competitive transmission project costs versus competitive transmission project costs, should continue to be a priority of the Antitrust Division in providing its analysis on transmission competition and transmission costs in FERC proceedings, as one of the world's leading venues for developing and applying economics to real world questions of competition.

## VI. ETCC RECOMMENDATION AND REQUEST

Given the substantial and well-documented harm caused by state incumbent Preference (ROFR) Laws and FERC regulations thwarting competition, we urge the Department to bring the full force of its Department's Antitrust Division to bear on those who seek to create transmission monopolies at the expense of consumers. Those state Preference Laws and anti-competitive regulations in place today will impact consumers for decades as transmission infrastructure often has a 40 or 50 year rate life. Every project assigned as a result of a state incumbent Preference Law or FERC regulation that limits competition puts American businesses at a competitive disadvantage and hurts residential consumers by making essential electricity services less affordable. Nationwide, electricity costs have increased by 24.8 percent in the last three years,

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[https://www.ftc.gov/system/files/ftc\\_gov/pdf/p072104\\_doj\\_ftc\\_transmission\\_comment\\_to\\_ferc.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p072104_doj_ftc_transmission_comment_to_ferc.pdf), pages 12-16.

<sup>69</sup> Available at: [https://ceadvisors.com/wp-content/uploads/2024/10/CEA\\_Order1000report\\_final.pdf](https://ceadvisors.com/wp-content/uploads/2024/10/CEA_Order1000report_final.pdf); <https://ceadvisors.com/wp-content/uploads/2024/10/Transmission-Project-Development-Transparency-and-Cost-Control-Procedures.pdf>; <https://ceadvisors.com/wp-content/uploads/2024/10/Competitive-Transmission-Experience-To-Date-Shows-Order-No.-1000-Solicitations-Fail-to-Show-Benefits.pdf>; <https://dailyenergyinsider.com/wp-content/uploads/2024/01/FERC-white-paper-12.15.23.pdf>; <https://ceadvisors.com/publication/critical-review-of-the-economic-impacts-of-right-of-first-refusal-rofr-legislation/>

driven by escalating transmission spending.<sup>70</sup> In PJM, our largest RTO, transmission costs as a percent of the total electricity price, increased from 9.4 percent to 28 percent in the last ten years. Competition could have limited those escalations. Simply put, state incumbent Preference Laws grant incumbent utilities unjustified privileges and block capable and efficient developers from building new transmission infrastructure. Removing these barriers will open the market to new entrants, encourage innovation, increase reliability, and drive down costs.

The financial stakes are massive. Adopting this recommendation would be beneficial for consumers and the federal government alike, as it would save consumers billions of dollars annually. Independent analyses and sworn affidavits have shown that ratepayers could save an estimated \$277 billion if just 33% of new transmission projects were competitively bid at a conservative 40% cost savings rate.<sup>71</sup> If all new projects were competitively bid, those savings could soar to \$840 billion by 2050.<sup>72</sup> Eliminating state incumbent Preference (ROFR) Laws would also spur the adoption of advanced technologies, improve reliability, and ensure that America's energy infrastructure meets 21st-century demands. This shift would not only modernize the power grid but also align with the federal government's ongoing efforts to eliminate anticompetitive practices and support a more resilient and affordable energy infrastructure.

By promoting competition, we can reduce electricity transmission costs by *billions* of dollars, improve service quality, and enhance grid reliability. The Antitrust Division has been an active proponent of transmission competition, but a more aggressive step is needed and consistent with Executive Order mandates. ETCC urges the Antitrust Division and the Anticompetitive Regulations Task Force to engage FERC, investigate monopolist utilities and agreements among utilities, file actions to preempt state incumbent Preference Laws and otherwise take all actions with the Agency's power to protect consumers from the excess transmission rates that incumbent preferences, whether in state law or federal regulations, impose on consumers.

Sincerely,

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1. Ag Processing Inc
2. Alliance of Western Energy Consumers
3. Aluminum Association

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<sup>70</sup> Source: Electricity, U.S. Energy Information Administration (EIA), <https://www.eia.gov/electricity/>

<sup>71</sup> See ETCC Report & Survey, *supra* note 3.

<sup>72</sup> See *id.*

4. American Chemistry Council
5. American Forest & Paper Association
6. American Foundry Society
7. American Iron and Steel Institute
8. Americans for Prosperity
9. Ardagh Group
10. Arglass Yamamura
11. Arkansas Electric Energy Consumers, Inc.
12. Arkansas Forest and Paper Council
13. Association of Businesses Advocating for Tariff Equity
14. CalPortland Company
15. Can Manufacturers Institute
16. Cardinal Glass Industries
17. Carolina Industrial Group for Fair Utility Rates
18. Carolina Utility Customers Association, Inc.
19. Century Aluminum
20. Chemistry Council of New Jersey
21. Chemical Industry Council of Illinois
22. Coalition of MISO Transmission Customers
23. Coastal Energy Corporation
24. Commercial Metals Company
25. Consumers Council of Missouri
26. Council of Industrial Boilers Organization
27. Delaware Energy Users Group
28. Digital Realty
29. Divers Processing Company, Inc.
30. Domtar Corporation
31. Eramet Marietta Inc.
32. Formosa Plastics Corporation, USA
33. Foundry Association of Michigan
34. Gerdau Ameristeel, Inc.
35. Glass Packaging Institute
36. Illinois Industrial Energy Consumers
37. Indiana Cast Metals Association
38. Indiana Industrial Energy Consumers
39. Industrial Energy Consumers of America
40. Industrial Energy Consumers of Pennsylvania
41. Industrial Minerals Association-North America
42. Iowa Business Energy Coalition
43. Iowa Industrial Energy Group, Inc.
44. Iron Mining Association of Minnesota
45. Kansas Chamber of Commerce
46. Kansas Manufacturing Council
47. Kimberly-Clark Corporation
48. Large Energy Users Coalition (NJ)
49. Lehigh Hanson, Inc.

50. LS Power Development, LLC
51. Maine Industrial Energy Consumer Group
52. Marathon Petroleum Company
53. Messer Americas
54. Metalcasters of Minnesota
55. Michigan Chemistry Council
56. Midwest Food Products Association
57. Minnesota Large Industrial Group
58. Multiple Intervenors, NY
59. National Council of Textile Organizations
60. National Retail Federation
61. NextEra Energy
62. Niskanen Center
63. North Carolina Manufacturers Alliance
64. NovoHydrogen
65. Office of the People's Counsel for the District of Columbia
66. Ohio Cast Metals Association
67. Ohio Chemistry Technology Council
68. Ohio Energy Group
69. Ohio Energy Leadership Council
70. Ohio Manufacturers' Association
71. Oklahoma Industrial Energy Consumers
72. Olin Corporation
73. Owens-Illinois
74. PJM Industrial Customer Coalition
75. Portland Cement Association
76. Public Citizen, Inc.
77. Rain CII Carbon LLC
78. R Street
79. Resale Power Group of Iowa
80. Retail Industry Leaders Association
81. Riceland Foods, Inc.
82. Rio Tinto
83. Skana Aluminum Company
84. South Carolina Small Business Chamber of Commerce
85. Steel Manufacturers Association
86. Sylvamo
87. Texas Cast Metals Association
88. TimkenSteel Corporation
89. Vallourec STAR LP
90. Vinyl Institute
91. Virginia Manufacturers Association
92. West Virginia Energy Users Group
93. Wisconsin Cast Metals Association
94. Wisconsin Industrial Energy Group