

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Building for the Future Through Electric
Regional Transmission Planning and
Cost Allocation and Generator
Interconnection

Docket No. RM21-17

**REPLY COMMENTS OF
TRANSMISSION ACCESS POLICY STUDY GROUP**

The Transmission Access Policy Study Group (“TAPS”) appreciates the opportunity to reply to comments submitted in this important Notice of Proposed Rulemaking (“NOPR”) proceeding.¹ TAPS has long recognized the importance of a robust transmission grid and has been outspoken on the need for improved transmission and ways to get needed transmission built at reasonable cost.² We support the NOPR’s objectives to accommodate the transition in our resource mix in a manner that maximizes benefits to consumers over time without over-building transmission facilities, and to ensure just and reasonable rates. In our initial comments,³ we offered constructive suggestions on modifications to the NOPR’s proposals to better achieve those goals, consistent with the Federal Energy Regulatory Commission’s (“Commission”) statutory mandate to facilitate planning and expansion of the grid to meet the reasonable needs of

¹ *Bldg. for the Future Through Elec. Reg’l Transmission Plan. & Generator Interconnection*, 179 FERC ¶ 61,028 (2022) (“NOPR”).

² See TAPS, *Effective Solutions for Getting Needed Transmission Built at Reasonable Cost* (June 2004), <https://www.tapsgroup.org/wp-content/uploads/2013/01/effectivesolutions.pdf> (“TAPS 2004 White Paper”).

³ Initial Comments of Transmission Access Policy Study Group (Aug. 17, 2022), eLibrary No. 20220817-5183 (“TAPS Initial Comments”).

load-serving entities (“LSEs”) as mandated by Federal Power Act (“FPA”) sections 205,⁴ 206,⁵ and 217(b)(4).⁶

Given the large number and broad scope of initial comments submitted and the limited time for reply, we focus these reply comments on one issue: the NOPR’s proposed conditional federal Right of First Refusal (“ROFR”) for certain jointly-owned transmission facilities. TAPS is particularly appreciative of the NOPR’s inclusion of reforms that would foster joint ownership of transmission, which could significantly reduce cost to consumers. TAPS’s initial comments supported the Commission’s conditional ROFR approach, but strongly urged that it be narrowed to prioritize joint ownership arrangements that are inclusive and advance the NOPR’s stated goal of reducing cost to consumers. We described and documented the benefits that justify doing so; and we proposed mechanisms that would fairly implement this approach without significantly delaying the transmission development process.⁷ These reply comments address certain initial comments pertinent to TAPS’s approach to the conditional ROFR.⁸

COMMENTS

I. THE PROPOSED CONDITIONAL ROFR CAN PROVIDE BENEFITS CONTEMPLATED BY THE NOPR IF NARROWED AS RECOMMENDED BY TAPS.

As described in our initial comments, TAPS strongly urges the Commission to limit the NOPR’s proposed conditional federal ROFR to prioritize “inclusive joint

⁴ 16 U.S.C. § 824d.

⁵ 16 U.S.C. § 824f.

⁶ 16 U.S.C. § 824q(b)(4).

⁷ TAPS Initial Comments at 29-60, summarized at 5-6.

⁸ TAPS’s failure to address an initial comment on this issue, or any other issue, does not signal agreement.

ownership arrangements.”⁹ Specifically, the conditional ROFR should be limited to incumbent TOs¹⁰ that offer a meaningful opportunity for load-ratio-share joint ownership¹¹ on reasonable terms to all LSEs (as defined in FPA section 217(a)(2))¹² in the TO’s footprint. LSEs within a TO’s footprint are likely to be public power or non-profit cooperatives that inherently satisfy the following criteria: (1) they use their net transmission project earnings to offset their customer costs; and (2) their participation otherwise reduces costs to consumers in the TO’s footprint. Inclusive joint ownership arrangements that reflect these criteria may take the form of shared systems, inclusive transcos, or joint ownership of new transmission facilities. Existing inclusive shared system arrangements and inclusive transcos with a substantial level of participation by entities meeting these criteria should also be able to qualify for the conditional ROFR for new projects.¹³

Limiting the conditional ROFR in this manner “is necessary to ensure just and reasonable Commission-jurisdictional rates and limited opportunities for undue discrimination by public utility transmission providers.”¹⁴ TAPS’s proposed limitation

⁹ TAPS Initial Comments at 6.

¹⁰ For our purposes, the term “TO” includes transmission-owning transmission providers (“TPs”). For purposes of the conditional ROFR, “TO” is also intended to include affiliates of such a TO.

¹¹ An LSE offered such participation may elect to take less than its load-ratio ownership share; likewise, parties may agree to a larger share.

¹² FPA section 217(a)(2)’s LSE definition, which feeds off of section 217(a)’s definitions of “distribution utility,” “service obligation,” and “state utility,” encompasses electric utilities that have a service obligation to end-use customers, as well as municipal joint action agencies and generation and transmission cooperatives (or others) that, directly or indirectly, provide electric service to end-users. TAPS’s comments use this statutory definition. *See* TAPS Initial Comments at 31 n.82.

¹³ For example, an existing inclusive transco could qualify if it has a substantial level of joint ownership participation by public power and cooperative owners that satisfy the two criteria.

¹⁴ NOPR P 379.

would prevent more beneficial forms of joint ownership, that have a proven track record of getting needed transmission built at reasonable cost, from being crowded out by forms *without* such benefits.¹⁵ By doing so, it provides a middle ground—furthering the planning, siting, and consumer-savings objectives identified in the NOPR as justifications for the conditional ROFR, while leaving room for competitive projects where incumbent TOs choose not to share ownership in a manner that would achieve those goals. Finding this “sweet spot” is important to TAPS. We have long advocated for inclusive joint ownership arrangements to get needed transmission built at reasonable cost, *and* supported competitive transmission development, which has saved consumers money where effectively implemented.¹⁶ Recognizing that competitive transmission development has been limited in various regions¹⁷ since Order 1000,¹⁸ we ask that the Commission adopt the NOPR’s conditional ROFR, tailored as TAPS has proposed.

To support our proposal, TAPS used real-world examples to demonstrate the many benefits that inclusive joint ownership provides.¹⁹ And we quantified one subset of those benefits: the real and sustainable cost savings from the non-profit and tax-exempt

¹⁵ NextEra asserts that even if the Commission restricts the conditional ROFR to limit or eliminate mutual pacts among TOs, the conditional ROFR is still a ROFR that creates a barrier to competition. Initial Comments of NextEra Energy, Inc. at 50-51 (Aug. 17, 2022), eLibrary No. 20220817-5265 (“NextEra Initial Comments”). Such barrier, however, would be limited to instances where consumers benefit from the savings and other benefits provided by inclusive joint ownership. TAPS also supports leaving it to each region to determine whether to allow for the conditional ROFR. *See* Part IV below.

¹⁶ *See* TAPS Initial Comments at 30 n.77 and Comments of Transmission Access Policy Study Group at 52 n.109 (Oct. 12, 2021), eLibrary No. 20211012-5388 (“TAPS ANOPR Comments”).

¹⁷ NOPR P 349.

¹⁸ *Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 61,051 (2011) (“Order 1000”), *reh’g denied*, Order No. 1000-A, 139 FERC ¶ 61,132, *on reh’g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *review denied sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014) (per curiam).

¹⁹ TAPS Initial Comments at 33-40.

status of public power and cooperatives, to consumers bearing the cost of Long-Term Regional Transmission Facilities.²⁰ These substantial benefits, which the Commission has long recognized,²¹ align closely with the benefits the NOPR contemplates that its conditional ROFR will provide.²²

TAPS is not alone in supporting a narrowed definition of the joint ownership partners that a TO may use as a basis for invoking the conditional ROFR. The American Public Power Association (“APPA”)²³ and the National Rural Electric Cooperative Association (“NRECA”)²⁴ advocate for similar restrictions on the conditional ROFR.

Other commenters agree that if the conditional ROFR is adopted as proposed in the NOPR, it will just produce TO backscratching arrangements that provide no benefits. The California Public Utilities Commission (“CPUC”), for example, describes how the NOPR’s proposal would create a perverse incentive for incumbent TOs to use the conditional ROFR to act in their own economic interest, “*e.g.*, by colluding with other incumbent utilities to carve up the market for regional transmission and bar entry to

²⁰ *Id.* at 40-46 and Appendix A.

²¹ *Id.* at 36-37.

²² *Id.* at 37-38. It is R Street Institute (“R Street”), not the NOPR, which “misconstrues” the transmission dependent utility (“TDU”) joint ownership “concept,” claiming it should be limited to local projects not relevant to this NOPR. Initial Comments of the R Street Institute at 20, 22 (Aug. 17, 2022), eLibrary No. 20220817-5207 (“R Street Initial Comments”). That argument incorrectly ignores the track record of substantial consumer benefits provided by successful joint ownership with public power and cooperatives on regional projects, as documented in TAPS Initial Comments at 32-43, 44-45. For example, inclusive joint ownership has made a valuable contribution to the Midcontinent Independent System Operator, Inc. (“MISO”) Multi-Value Projects (“MVPs”), whether through direct joint ownership of CapX2020 projects (*id.*; *see also id.* at 11 (describing the process leading to the MISO MVPs), as well as indirect joint ownership of inclusive American Transmission Company LLC (“ATCLLC”). Nor can the facilities owned and developed by the inclusively-owned Vermont Transco be viewed as exclusively local.

²³ *See* Initial Comments of the American Public Power Association at 12-14 (Aug. 17, 2022), eLibrary No. 20220817-5214 (“APPA Initial Comments”).

²⁴ *See* Comments of the National Rural Electric Cooperative Association at 12-13, 62 (Aug. 17, 2022), eLibrary No. 20220817-5316 (“NRECA Initial Comments”).

others.”²⁵ And TO comments illustrate how the NOPR’s broad definition of qualifying joint ownership will invite incumbent TOs to exercise the conditional ROFR *without* delivering the benefits of joint ownership recognized by the Commission.²⁶

TAPS’s demonstration of the benefits of inclusive joint ownership is also amplified by others. APPA’s comments include the declaration of James Pardikes of MCR Performance Solutions,²⁷ who draws on his considerable experience with joint ownership arrangements involving public power and cooperatives to detail their many practical, financial, and public policy benefits. These include (but are not limited to) those that the NOPR intends the conditional ROFR to produce.²⁸ In addition to providing numerous specific examples to back up his conclusions as to the benefits provided, he adds further depth and perspective to TAPS’s quantification of a subset of those benefits. Focusing on the joint action agencies that are likely to lead public power participation in future transmission development, his study shows large expected savings attributable to their: relatively lower (by more than 150 basis points) costs of debt; typically thinner (by

²⁵ Initial Comments of the California Public Utilities Commission at 80-81 (Aug. 17, 2022), eLibrary No. 20220817-5255 (“CPUC Initial Comments”). *See also* NextEra Initial Comments at 49 (“There is every reason to expect that incumbent transmission owners will, formally or informally, enter into . . . ‘self-protective,’ ‘anticompetitive,’ and ‘cartel-like’ agreements designed to ensure that only members of the incumbents club enjoy the benefits of reinstated federal ROFRs.”)(footnote omitted); Comments of LS Power Grid, LLC to the Commission’s Notice of Proposed Rulemaking at 91-92 (Aug. 17, 2022), eLibrary No. 20220817-5294 (“LS Power Initial Comments”) (describing likely abuses by TOs).

²⁶ *See* comments seeking clarifications or expansions, *e.g.*, Initial Comments of Southern Company Services, Inc. at 36 (Aug. 17, 2022), eLibrary No. 20220817-5147 (seeking additional flexibility); and Initial Comments of Ameren Services Company at 41-44 (Aug. 17, 2022), eLibrary No. 20220817-5199 (“Ameren Initial Comments”), Comments of the Indicated PJM Transmission Owners at 38-39 (Aug. 17, 2022), eLibrary No. 20220817-5100 (“PJM Transmission Owners Initial Comments”), Initial Comments of Xcel Energy Services at 5-7 (Aug. 17, 2022), eLibrary No. 20220817-5019 (“Xcel Initial Comments”)(all seeking to include some or all affiliates). *See* Part II.A below.

²⁷ APPA Initial Comments, Pardikes Declaration.

²⁸ APPA Initial Comments at 12-13.

roughly 20%) equity ratios; and/or lack of state and federal income tax expense (which alone typically increases service costs by 15%–23%).²⁹ NRECA’s comments describe the financial and cost-reducing, hedging, siting, and permitting benefits produced by such participation,³⁰ supported by a report from GDS Associates, Inc.³¹

Even International Transmission Company (“ITC”)—which seeks full reinstatement of federal ROFRs and flexibility in the joint ownership partners that would trigger the conditional ROFR—recognized the particular, “outsize[d]” benefits of joint ownership with embedded LSEs.³²

[M]any smaller electric cooperatives and public power entities may not have the financial capital to finance a large ownership share of a major transmission facility. Yet these entities may be able to provide outsize benefit to the transmission development process Smaller entities, particularly those which are geographically close to a project, are also likely to be users of the transmission facility, and will thereby be incentivized to contribute cost discipline to the project.

Finally, we note that others highlight the need for clear implementation guidance.³³ As further discussed below, TAPS is one of the few commenters who tackled that issue in their initial comments, providing an implementation approach that

²⁹ *See id.*, Pardikes Declaration at 5-10.

³⁰ NRECA Initial Comments at 60-61.

³¹ *Id.*, Report of GDS Associates, Inc. at 26-27 (highlighting reliability, efficiency and affordability, comparability, and transparency benefits).

³² Comments of International Transmission Company d/b/a ITC *Transmission*, Michigan Electric Transmission Company, LLC, ITC Midwest LLC, and ITC Great Plains, LLC at 42-43 (Aug. 17, 2022), eLibrary No. 20220817-5163 (“ITC Initial Comments”).

³³ *See e.g.*, Comments of the New York Independent System Operator, Inc. at 55-56 (Aug. 17, 2022), eLibrary No. 20220817-5198 (“NYISO Initial Comments”); Initial Comments of PJM Interconnection, L.L.C. at 53-54 (Aug. 17, 2022), eLibrary No. 20220817-5298 (“PJM Initial Comments”).

accommodates TAPS's tailored definition of qualifying joint owners, consistent with the NOPR's timing objectives.

Thus, TAPS supports the adoption of a conditional ROFR that incorporates the restrictions proposed by TAPS, and it has demonstrated how such a conditional ROFR can be implemented. If the Commission nevertheless wishes to adopt a more expansive definition of qualifying joint ownership arrangements (e.g., to promote joint ownership by neighboring TOs of a facility that crosses multiple TO footprints, or joint ownership involving higher percentages of non-affiliated ownership), then it should require the incumbent TOs seeking the conditional ROFR to *also* offer load-ratio-share joint ownership on reasonable terms to all LSEs within the footprint.³⁴ APPA's and NRECA's comments include a similar fallback position.³⁵ However, for the reasons described above and in TAPS's initial comments,³⁶ calls by many TOs for full, unconditional federal ROFR reinstatement—a return to the “bad old days”—should be rejected.³⁷

If the Commission decides not to proceed with a conditional federal ROFR for jointly owned transmission at this time, it should use a different mechanism to make inclusive joint ownership a part of any final rule emerging from this NOPR. Inclusion of joint ownership as a positive factor in the project selection process is an option noted by

³⁴ TAPS Initial Comments at 32-33.

³⁵ See APPA Initial Comments at 19-20; NRECA Initial Comments at 63.

³⁶ TAPS Initial Comments at 59-60.

³⁷ See also, e.g., LS Power Initial Comments at 28-29; Comments by the Electricity Transmission Competition Coalition in Opposition to Certain Aspects of the Proposed Rule at 39-40 (Aug. 17, 2022), eLibrary No. 20220817-5258 (“ETCC Initial Comments”).

several commenters³⁸—as well as TAPS’s ANOPR Comments³⁹—as an alternative means to promote inclusive joint ownership.

II. THE COMMISSION SHOULD REJECT CONDITIONAL ROFR FORMULATIONS THAT NULLIFY ANY REALISTIC POTENTIAL FOR INCLUSIVE JOINT OWNERSHIP.

A. Proposals that keep public power and cooperative LSEs out of meaningful joint ownership should not be accepted.

The Commission should see through commenter proposals that would enable joint ownership arrangements within the “TO club” to evade Order 1000’s elimination of federal ROFRs. For example, Ameren suggests that qualifying joint ownership “could include load ratio share, discrete facility ownership, and not to exceed equity ownership shares based on the qualitative value each entity brings to project development and execution (e.g., land, design expertise, familiarity with advanced technology).”⁴⁰ It expressly opposes tying the conditional ROFR to offers of load-ratio participation to embedded LSEs that depend on and bear the cost of such facilities, dismissing them as of “little value.”⁴¹ Exelon’s inclusion of “*a* public power entity, in any proportion,” among

³⁸ See, e.g., CPUC Initial Comments at 88 (“if the Commission wants to encourage more inclusive joint ownership arrangements, it should adopt TAPS’ recommendation to treat ‘[i]nclusive joint ownership . . . as a positive factor in evaluating bids’ in competitive processes, provided that such arrangements result in demonstrable benefits to customers, e.g., by returning project revenues to customers”)(footnote omitted); LS Power Initial Comments at 102 (to the extent the Commission values joint ownership, it can “provid[e] bonus points in the evaluation of such joint proposals solicited in competitive processes similar to the way in which planning participation is rewarded in some regions could incentivize proposals inclusive of nearby smaller load serving entities or public power”).

³⁹ See TAPS ANOPR Comments at 13-15, which identified other mechanisms for fostering inclusive joint ownership.

⁴⁰ Ameren Initial Comments at 44. See also *id.* at 45 (ownership opportunities for LSEs in the footprint should be limited to those bringing qualitative value (rights of way and development expertise) “up to a load ratio share,” depending on the value of the contribution.).

⁴¹ *Id.* at 46. See also Initial Comments of the PPL Companies re Notice of Proposed Rulemaking at 32-33 (Aug. 17, 2022), eLibrary No. 20220817-5072, which suggest that collaboration with public power may be possible, but urge flexibility, with relatively low “meaningful participation” standards that allow parties to negotiate the partnership that best suits their interests without regard to ownership or load-ratio shares; Xcel

its proposed joint ownership characteristics (most of which are code words for other TOs), any one of which could satisfy the conditional ROFR so long as 10% total minority ownership is achieved,⁴² reinforces the exclusive and limited nature of the joint ownership it has in mind. These and other such proposals⁴³—along with the many seeking to maximize “flexibility” in selecting joint ownership partners,⁴⁴ the “widest possible definition” of eligible joint ownership arrangements,⁴⁵ or that the Commission “not . . . require the incumbent utility to partner with an entity it would have otherwise chosen not to”⁴⁶—make clear that the Commission will not get the cost-savings and other benefits the NOPR identifies unless it limits the conditional ROFR, as TAPS proposed, to apply only to the forms of joint ownership that will deliver them.

Other commenters agree with TAPS that it is unreasonable to expect incumbent TOs to willingly embrace inclusive joint ownership if given the option of qualifying for the conditional ROFR without doing so. As observed by the CPUC:⁴⁷

Initial Comments at 7 (urging against a limitation to “inclusive agreements,” and asserting “that the parties involved are in the best position to determine how to structure any kind of partnership arrangement unencumbered by regulatory constraints.”).

⁴² Comments of Exelon Corporation at 46 (Aug. 17, 2022), eLibrary No. 20220817-5152 (“Exelon Initial Comments”) (emphasis added). Other proposed characteristics include: project use of existing rights of way owned by more than one joint ownership partner; project connects systems of multiple TOs, with ownership shares split among them. Inclusion of the project in a portfolio will also suffice.

⁴³ See also Comments of Avangrid, Inc. at 23 (Aug. 17, 2022), eLibrary No. 20220817-5244 (“Avangrid Initial Comments”), which would sharply limit public power ownership by calculating load-ratio share based on the LSE’s share of *responsibility to pay for the project* (rather than load in the incumbent TO’s footprint). Because the costs of the Long-Term Regional Transmission Facilities to which the conditional ROFR is proposed to apply are highly likely to be regionally cost-allocated, the public power ownership shares will be miniscule and potentially include far-flung entities that provide few of the joint ownership benefits highlighted in the NOPR.

⁴⁴ See *supra* n.26.

⁴⁵ ITC Initial Comments at 42.

⁴⁶ Comments of Eversource Energy Service Company at 44 (Aug. 17, 2022), eLibrary No. 20220817-5266 (“Eversource Initial Comments”).

⁴⁷ CPUC Initial Comments at 85 (emphasis original). See also LS Power Initial Comments at 92 (“The

Given incumbent utilities' historical reluctance to share transmission ownership with TDUs, including public power entities, and that the Conditional ROFR allows incumbent utilities to choose their development partners, it is illogical for the Commission to assume that incumbent utilities will now prioritize joint ownership arrangements with TDUs, and other potential new entrants, over other options, including, . . . foreseeable reciprocal agreements to divvy up regional transmission projects among incumbent utilities.

This conclusion is reinforced by the fact that TOs may well regard embedded LSEs as competitors at retail. Even in the absence of retail competition, other forms of competition (e.g., yardstick competition, competition for new industrial or commercial customers, franchise competition) need to be taken into account by the Commission in connection with its duty to consider the competitive effects of its actions.⁴⁸ NextEra points to yardstick competition as encouraging mutual TO joint ownership pacts that would increase neighboring TO rates to avoid state regulatory scrutiny; as a result, it would provide a basis for TOs to prefer partnering with neighboring TOs (and not competitive developers).⁴⁹ Such competitive considerations seem even more likely to discourage a TO from sharing ownership with embedded public power and cooperative

Commission fails to explain why suddenly under the NOPR proposal an incumbent transmission owner would not be expected to act in its own economic self-interest when choosing among potential partners. There is no reason to believe that incumbent transmission owners will choose the partner that offers the most overall benefits and potential costs savings to consumers. They have no incentive to consider those factors. Their interest will be to find the partner most aligned with the incumbent's incentives.”)

⁴⁸ See, e.g., *S. Ca. Edison Co.*, 34 FERC ¶ 63,086, at 65,296 (1986) (“we focus primarily on this period . . . to assess whether the discrimination had or reasonably probably would have an adverse effect on actual or potential competition between Edison and the Cities. That competition . . . includes rivalry for the business of industrial customers, yardstick competition, franchise competition and the potential competitive generation and transmission by the Cities of bulk power.”). See generally *FPC v. Conway Corp.*, 426 U.S. 271, 277-279 (1976); *San Francisco v. FERC*, 24 F.4th 652 (D.C. Cir. 2022) (the Commission's duty to ensure that rules or practices affecting wholesale rates are just and reasonable required it to consider claims that Pacific Gas and Electric Company was frustrating competition in the retail power market by treating its own retail service preferentially.).

⁴⁹ NextEra Initial Comments at 50, citing *Morris Aff.* ¶ 80.

LSEs that would otherwise bear the TO's resulting increased transmission rates. Inclusive joint ownership would enable such LSEs to hedge the increased costs of new facilities, using their net revenues to reduce costs that must be recovered through their retail rates, and thereby heightening competitive pressure due to rate disparities with the TO.

In addition, while TAPS has generally supported the cost-reducing benefits that competitive transmission development can provide, suggestions that the Commission should create a competitive process for selecting the joint owners of the incumbent TO are unlikely to achieve the NOPR's objectives. Introducing a new competitive request for proposal process into the selection of the joint owners offered the opportunity to participate in each project⁵⁰ will not only add substantial time to the conditional ROFR exercise process, delaying transmission development, but also effectively exclude many potential public power and cooperative co-owners. Small TDUs may not be well-situated to actively participate in such a process given (among other things) the small share of the project they are likely to seek to own; the time and resources involved in quickly responding to such a competitive solicitation; and their lack of development expertise.⁵¹

Requiring a new competitive process also raises many questions that highlight the opportunity for favoritism. Who will be the decisionmaker—the incumbent TO, the regional process, the Commission, or some other entity? What criteria will be used for

⁵⁰ See Initial Comments of the New England Power Pool Participants Committee at 11 (Aug. 12, 2022), eLibrary No. 20220812-5158; Comments of Southwestern Power Group at 17 (Aug. 17, 2022), eLibrary No. 20220817-5020 (“Southwestern Initial Comments”). See also question raised in Comments of the New York Power Authority, Inc. at 9 (Aug. 17, 2022), eLibrary No. 20220817-5087 (“Would there be requirements for partners to be selected through a competitive [request for proposal] process?”).

⁵¹ In contrast, the Southwestern Power Group proposes a minimum 40% minority ownership share. Southwestern Initial Comments at 17.

competitively selecting joint owners and determining the extent of joint ownership offered? Even if feasible, inclusion of a competitive process for each conditional ROFR exercise may well amount to little more than an opportunity for incumbent TOs to use subjective criteria to select their fellow TOs.

B. A conditional ROFR crafted to foster inclusive joint ownership is not unduly discriminatory.

The Commission should not adopt a broad definition of qualifying joint ownership partners based on concerns that it is discriminatory to favor inclusive joint ownership.⁵² TAPS's initial comments identified the myriad benefits those arrangements provide, many of which have long been recognized by the Commission and are well-aligned with the NOPR's stated objectives. TAPS provided evidence to demonstrate the reliable and sustainable cost savings to all consumers that bear the cost of the project as a result of joint ownership by not-for-profit entities.⁵³ While some assert that there is no record showing benefits on par with those from competition,⁵⁴ in much of the country realization of such competitive benefits is unfortunately rare.⁵⁵

Thus, limiting the conditional ROFR to inclusive joint ownership arrangements that are consistent with the NOPR's objective of achieving some of the cost savings benefits of competition while getting needed transmission built⁵⁶ (or at least prioritizing

⁵² See CPUC Initial Comments at 86.

⁵³ TAPS Initial Comments at 33-49 & Appendix A. As noted in Part I above, TAPS's demonstration is supported by evidence submitted by APPA and NRECA.

⁵⁴ LS Power Initial Comments at 88; ETCC Initial Comments at 50.

⁵⁵ NOPR P 349 ("regional transmission facilities subject to a competitive transmission development process represent only a small portion of total transmission investment in recent years across several transmission planning regions.").

⁵⁶ NOPR PP 358, 375.

such arrangements⁵⁷), is *due*—not undue—discrimination.⁵⁸ Further, TAPS’s comments expressly stated that we were open to defining qualifying joint ownership to include others (beyond LSEs in the incumbent TO’s footprint) that meet TAPS’s consumer savings criteria.⁵⁹ Particularly if the Commission has concerns in this regard, it may wish to consider doing so.⁶⁰

III. TAPS’S PROPOSAL WILL FACILITATE IMPLEMENTATION CONSISTENT WITH THE NOPR’S OBJECTIVES.

TAPS’s initial comments included a detailed implementation proposal⁶¹ that would ensure that the conditional ROFR, modified as TAPS recommends, is not an “administrative quagmire.”⁶² It focuses on offers of load-ratio-share ownership participation to all LSEs in the incumbent TO’s footprint, based on pre-established key elements of a joint ownership agreement (“JOA”) that are either: (1) required by the regions⁶³ electing to provide the conditional ROFR; or (2) developed by the incumbent TO through an advance process to iron out any proposed TO-specific additions to the terms required by the region. The resulting terms, as supplemented by project-specific information available when the TO seeks to invoke the conditional ROFR, should

⁵⁷ See TAPS Initial Comments at 32-33.

⁵⁸ *Id.* at 49-52.

⁵⁹ *Id.* at 31 and Appendix B § 1.b.3.

⁶⁰ For example, if appropriate, the Commission could consider additional criteria to include entities such as Citizens Energy Corporation that committed to spending 50% of its after-tax profits to assisting low-income consumers in affected service areas. See Initial Comments of Citizens Energy Corporation at 5 (Aug. 17, 2022), eLibrary No. 20220817-5142.

⁶¹ TAPS Initial Comments at 52-59 and Appendix B.

⁶² R Street Initial Comments at 20.

⁶³ The term “region” includes regional transmission organizations and independent system operators (collectively referred to as “RTO”) and non-RTO planning regions.

position LSEs to evaluate and execute a non-binding Notice of Intent to Participate (“NOI”) that the TO may use to support its exercise of the conditional ROFR. TAPS also urges the Commission to require informational reports on the JOAs ultimately executed (or not). This implementation approach should give the Commission and the LSEs in the incumbent TO’s footprint confidence that the executed NOIs will result in reasonable joint ownership agreements that produce the benefits recognized by the NOPR, without unduly delaying the regional planning process.

TAPS’s implementation proposal addresses commenter concerns. For example, TAPS’s use of pre-established key terms goes a long way toward addressing the timing and other challenges of negotiating JOAs. TAPS’s list of key terms⁶⁴ addresses the bulk of the issues included in Exelon’s long list of JOA terms,⁶⁵ while leaving room for regions and TOs to propose additional elements in the filing process, or in the region’s up-front pre-approval process. TAPS’s key terms address Xcel’s concern that broad replication of CapX’s success would be time-consuming and costly.⁶⁶ TAPS’s key terms were modeled on the CapX agreements. TAPS’s use of execution of non-binding NOIs to participate, rather than execution of full JOAs, as the basis for the exercise of the conditional ROFR further ameliorates JOA negotiation timing concerns. TAPS’s narrowed approach to the conditional ROFR, in combination with establishing key terms

⁶⁴ TAPS Initial Comments at 54-56.

⁶⁵ Exelon Initial Comments at 43 n.79.

⁶⁶ Xcel Initial Comments at 6. *See also* Comments of the Midcontinent Independent System Operator, Inc. at 83 (Aug. 17, 2022), eLibrary No. 20220817-5311 (“MISO Initial Comments”) (pointing to time for agreeing to CapX-like arrangements).

(with Commission review), addresses commenters seeking clear delineation on what is required and to limit the role of regions in resolving implementation disputes.⁶⁷

By defining inclusive joint ownership arrangements to encompass a wide range of alternative structures, TAPS's initial comments also address concerns raised by others. TAPS's comments explain that qualifying inclusive joint ownership arrangements may take the form of shared systems, inclusive transcos, or joint ownership of new transmission facilities.⁶⁸ This flexibility accords well with the NOPR's interest in promoting "innovative transmission ownership structures."⁶⁹ And it broadens the options for implementing inclusive joint ownership, even if there are concerns that a certain structure may not work in certain situations for particular entities.⁷⁰

⁶⁷ See, e.g., Exelon Initial Comments at 43-44 (seeking Commission establishment of baseline criteria and not to make RTOs/TPs the arbiters); Initial Comments of the Edison Electric Institute at 36 (Aug. 17, 2022), eLibrary No. 20220817-5096. See also PJM Initial Comments at 4-5, 51-53 (urging the Commission not to put RTOs in the position of evaluating joint ownership arrangements).

⁶⁸ TAPS Initial Comments at 31.

⁶⁹ NOPR P 373. NextEra's suggestion (NextEra Initial Comments, citing Morris Aff. ¶ 82) that TAPS's citation of ATCLLC, a transco, "is inapposite," as it is not the model proposed in the NOPR, misses the mark. See NOPR P 379.

⁷⁰ For example, Eversource opposes "unnecessary" limitations on permissible joint ownership structures noting that "'shared-system' arrangements are impossible in [ISO New England, Inc. ("ISO-NE")] due to the lack of physical transmission rights for most facilities," and further notes the need to accommodate state laws and franchise restrictions. Eversource Initial Comments at 44. While the range of other ownership structures proposed by TAPS should be able to accommodate any such limitation, we also question the assertion that shared system arrangements are impossible in ISO-NE. Under the ISO-NE tariff, all TOs submit their revenue requirements for regional projects to ISO-NE; and those individual TO revenue requirements are summed to reflect the regional revenue requirement that is the basis for the RTO's regional rate. Nothing in that process prohibits a TO from including its ownership share of a shared system (e.g., an undivided interest or a segment of a line) in its revenue requirement. Nor are shared system arrangements impossible in other RTOs. For example, a shared-system arrangement has long been operating in MISO, in which TAPS member Indiana Municipal Power Agency participates with Duke Energy Indiana and Wabash Valley Power Association. See TAPS Initial Comments at 33 n.90; for more detail, see TAPS 2004 White Paper at 23. Likewise, TAPS's key JOA terms expressly make capacity rights associated with tenancy-in-common ownership interests subject to the rights and obligations of an owner under any applicable tariff. TAPS Initial Comments at 54.

Finally, the New York Independent System Operator, Inc. (“NYISO”) and MISO raise concerns about the NOPR’s suggestion that the opportunity for exercise of the conditional ROFR could occur after a region either identifies a need (sponsorship model) or a needed facility (competitive bidding model),⁷¹ which TAPS incorporated in its implementation proposal.⁷² In particular, NYISO and MISO question how the conditional ROFR will operate in regions that rely on the sponsorship model, given the limitations on the information available when a need is identified by the region. MISO notes that cost, design, and implementation plan would not be known until the end of the allowed 165-day period for developers to submit their proposals.⁷³ NYISO states that at the time of the need determination, it may even be unclear who the incumbent TO will be.⁷⁴

While these issues should be addressed in the filing process for regions that elect to adopt the conditional ROFR, they are not insurmountable. Regions have already adapted their processes to accommodate Order 1000’s limits on the elimination of federal ROFRs.⁷⁵ And regions using sponsorship models currently take any state ROFR laws into account. For example, MISO approved the first tranche of its Long-Range Transmission Planning projects on July 25, 2022,⁷⁶ and just a month later was able to delineate which projects were open to competition, and which were not due to state

⁷¹ NOPR P 367.

⁷² TAPS Initial Comments, Appendix B § 1.b.ii.1.

⁷³ MISO Initial Comments at 80-81.

⁷⁴ NYISO Initial Comments at 55.

⁷⁵ For example, it does not apply to projects that require use of a TO’s existing rights-of-way or upgrades of existing facilities. Order 1000, P 226.

⁷⁶ See MISO, *Tranche 1 Portfolio Focused on Midwest Subregion* (July 25, 2022), [https://www.misoenergy.org/about/media-center/miso-board-approves-\\$10.3-in-transmission-projects/](https://www.misoenergy.org/about/media-center/miso-board-approves-$10.3-in-transmission-projects/).

ROFRs and other limitations.⁷⁷ The Commission should allow regional variation in implementation of the conditional ROFR, so long as crucial elements are included consistent with TAPS's comments.

IV. THE CONDITIONAL ROFR SHOULD BE OPTIONAL TO THE REGION.

Consistent with the NOPR,⁷⁸ the conditional ROFR should not be mandatory.⁷⁹ Instead, regions should have the option to propose the conditional ROFR or to elect not to do so. For example, if a region such as California were to determine that its competitive transmission development processes are robust, not inhibiting regional transmission development, and saving consumers money, then it should be free to decide not to adopt a conditional ROFR for joint ownership. TAPS urges the Commission to take advantage of the record in this proceeding to make whatever findings are necessary to support that flexibility.

⁷⁷ MISO, *Long Range Transmission Planning – Reliability Imperative* (2022), <https://www.misoenergy.org/planning/transmission-planning/long-range-transmission-planning/>; MISO, *MTEP21* (2022), <https://cdn.misoenergy.org/MTEP21%20Addendum-LRTP%20Tranche%201%20Report%20with%20Executive%20Summary625790.pdf>.

⁷⁸ NOPR P 355.

⁷⁹ A number of commenters have urged that the conditional ROFR be mandatory. *See, e.g.*, PJM Transmission Owners Initial Comments at 6, 37-38; Comments of National Grid PLC at 36-37 (Aug. 17, 2022), eLibrary No. 20220817-5095; Pacific Gas and Electric Company's Initial Comments on Notice of Proposed Rulemaking at 11 (Aug. 17, 2022), eLibrary No. 20220817-5092; Comments of Southern California Edison Company on Notice of Proposed Rulemaking Regarding Transmission Planning at 11 (Aug. 17, 2022), eLibrary No. 20220817-5193. *See also* PJM Initial Comments at 30-32.

CONCLUSION

The Commission should consider these comments, as well as TAPS's initial comments, as it formulates a final rule in this important proceeding.

Respectfully submitted,

/s/ Cynthia S. Bogorad

Cynthia S. Bogorad

William S. Huang

David E. Pomper

Lauren L. Springett

Attorneys for

Transmission Access Policy Study

Group

Law Offices of:

Spiegel & McDiarmid LLP

1875 Eye Street, NW

Suite 700

Washington, DC 20006

(202) 879-4000

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