Insight

FERC Dims the Lights on Competition

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Executive Summary

- In a Notice of Proposed Rulemaking, the Federal Energy Regulatory Commission (FERC) is seeking to restore conditionally the anticompetitive practice of the federal right of first refusal on regional transmission projects, a system FERC Order 1000 tried to eliminate in 2011.
- Order 1000 did not appreciably increase competition as intended, as the order's many loopholes were exploited to insulate incumbent firms from competition and undercut its intent.
- Rather than reverse course, however, FERC should address the flaws in Order 1000 that undermined its ability to increase competition.
- The Brattle Group calculated that expanding competitive processes in electricity transmission could lead to an estimated cost savings of up to 40 percent and save customers $8 billion over five years.

Introduction

In 2011, the Federal Energy Regulatory Commission (FERC) issued Order 1000, a rule designed to increase regional transmission development, limit monopoly power of incumbent firms, and promote competition. The order mandated that "public utility transmission providers must remove from Commission-approved tariffs and agreements a federal right of first refusal [ROFR] for a transmission facility selected in a regional transmission plan for the purposes of cost allocation."

Under the ROFR system, a competitive bidding process to build, own, and maintain transmission lines begins only when the incumbent firm declines a project. Removing the

ROFR (subject to certain conditions outlined in Order 1000) immediately opened certain projects to the competitive process.

FERC was concerned that federal ROFR led to "unjust and unreasonable" rates and that it was not in the "economic self-interest of incumbent transmission providers to permit new entrants…even if the proposals submitted by new entrants would result in a more efficient or cost-effective solution to the region's needs."

The order failed to fulfill expectations, however. Flaws in Order 1000 limited the number of competitive projects as loopholes were exploited to insulate incumbent firms from competition and undercut the order's intent.

In an April 2022 Notice of Proposed Rulemaking (NOPR), FERC included a plan to rewrite Order 1000. Should the proposed rule become final, the federal ROFR would be reinstated with the condition that the incumbent transmission owners agree to a joint ownership structure with a nonincumbent partner. Such a change would likely limit competition.

In response to the NOPR, the United States Department of Justice and the Federal Trade Commission issued a joint statement urging FERC to preserve competition. The statement highlighted the benefits consumers receive from competition including "lower rates, improved service, and increased innovation, leading to a more efficient, reliable, and resilient grid."

Reinstating the federal ROFR at a time when laws and regulations are pushing for the adoption of renewable energy that require massive investments in interregional transmission infrastructure threatens to leave consumers with higher energy costs. Rather than reversing course, FERC can modify Order 1000 to address its original flaws by closing loopholes and broadening the scope of projects subject to competition.

Order 1000 Was Kneecapped from the Start

When Order 1000 was issued in 2011, the intent was to "remove barriers to the development of transmission, promoting cost-effective planning and the fair allocation of costs for new transmission facilities." The rule created incentives for regional and interregional transmission planning and encouraged competition. Yet because its many loopholes were exploited by incumbent providers—which led to their narrow application—the order was about as effective as a burned-out light bulb and fell wildly short of expectations. A study by The Brattle Group found that "transmission projects subject to competition represent[ed] 3% of U.S. nationwide transmission investments between 2013 and 2017."

The shortfall was multi-pronged. The Electricity Transmission Competition Coalition (ETCC) submitted comments to FERC's Advanced Notice of Proposed Rulemaking and summarized some of the policies and practices that undercut what Order 1000 tried to do. ETCC noted "incumbent transmission owners have managed to secure for themselves a combination of exceptions to competitive processes, adoption of state ROFR laws, and other anti-competitive barriers.… Even when state ROFR laws have not been enacted, local transmission owner planning has grown substantially relative to regional planning …."

Rather than removing barriers to competition, the order's limited scope and carveouts were exploited, insulating incumbent firms from competition.

Competition Can Save Consumers Money as Transmission Needs Swell

American Action Forum research estimated between $314 billion to $504 billion in capital outlays for the construction of new transmission facilities will be needed to attain the Biden Administration's goal of carbon pollution-free electricity by 2035.

The Brattle Group's analysis showed that competition can bring down those costs. It found that the winning bid in competitive transmission projects was 40 percent lower than the initial cost estimate. It also estimated that $175 billion in project cost savings would be generated by 2050 if just one-third of electricity transmission investments were subject to competition. This estimate assumed a savings rate of just 25 percent.

ETCC highlighted some of the potential savings competitive bids could provide taxpayers including $591 million from the Artificial Island Project in New Jersey, $500 million from the Empire State Line in Western New York, and $200 million from the Central East Energy Connect in Central New York. These three examples alone totaled nearly $1.3 billion in savings.

FERC Has Options to Limit ROFR and Promote Competition

Rather than resurrecting ROFR, FERC has options to modify Order 1000 to further promote competitive practices, and it can do so armed with estimates and examples of how competition yields lower costs for consumers.

Addressing ROFR carveouts that shield incumbents is a place for FERC to start.

Comments submitted by Kent Chandler, Kentucky Public Service Commission Chairman, advocated for a "significant reduction in remaining ROFRs, or exceptions to competition" and cited "a bright line voltage threshold" as an example.

Additionally, The Brattle Group observed "[t]he introduction of the competitive processes

coincide[d] with substantial increases in locally-planned transmission that are outside of the full regional planning process." This loophole allowed incumbents to circumvent the order.

Providing additional incentives for increased regional planning is needed, especially with the large scale of alternative energy resources being developed that require long transmission routes.

The legality of such changes may come into question, but former FERC Chairman Norman Bay is not concerned. In an article from Utility Dive, Bay stated that "given the way in which Order 1000 has been upheld in court, there's little question that FERC has the authority to push harder, with respect to interregional planning and cost allocation."

Conclusion

Reinstituting a version of federal ROFR would be anticompetitive and would likely drive up the cost of transmission projects.

Though the sample size of competitive projects is small, the cost savings are apparent. As the need for regional and interregional transmission projects continues to grow, creating an environment where competition is the rule rather than exception will promote a more cost-effective, innovative, and robust, transmission system.

Rather than reverse course, FERC can modify Order 1000 to remove carveouts that protect incumbents and broaden the scope of projects subject to competition.