



# **ROFR Not Over: Rights of First Refusal After FERC Order 1000-A**

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# Order 1000-A ROFR Ruling

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- Affects Right of First Refusal (“ROFR”) to build certain new transmission projects
- Upon compliance, FERC-filed tariffs and agreements should no longer create ROFRs that apply to transmission projects funded through regional cost allocation

BUT

- ROFRs are *not* entirely eliminated

# State Law ROFRs Remain Valid

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- Rulemaking is very clear that ROFRs conferred by state law are not pre-empted
- Minnesota has already adopted legislation (signed April 2012, effective August 2012) giving “incumbent electric transmission owners” priority rights to build transmission
- State law continues to define who may condemn land for transmission, what easements entail, etc.

# Certain Federal ROFRs Too

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- Federal ROFRs remain valid for “local” facilities, i.e. (at least) those “located solely within ...retail distribution service territory or footprint [and] ...not selected in the regional transmission plan for purposes of cost allocation”
- No change in incumbent rights “to build, own and recover costs for upgrades to the[ir] facilities” and “to use [their] rights-of-way”

# Continuing Scope for ROFRs Remains Unsettled

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- Will additional states (Indiana?) follow Minnesota in legislating state-law ROFRs? Federal preemption limits?
- Breadth of “local,” “upgrade,” and “existing ROW” as bases for continuing federal-law ROFRs? Segmentation?
- Clash of two models:  
Market Model vs. Monopoly Model

# Market Model

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- Remove barriers to entry; let all qualified firms compete over ideas, effectiveness, price
- Although transmission services are sold through non-bypassable rates, qualified firms can compete for designation to build regionally-planned projects
- Facility-by-facility form of franchise competition

# Monopoly Model

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- Scope economies, “natural monopoly”
- Value of new grid facilities comes from their linkages with existing facilities
- Rights to extend and intensify grid are part of the bundle of rights for which incumbents have already competed and won; don't let new entrants expropriate that right

# State regulators' perspective/role

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## Sympathetic to monopoly model

- Comfort with incumbents' cost and environmental policies and practices
- Institutional preference for ownership by traditional utilities whose bundled retail rates they can regulate
- FERC/State differences in allowed ROEs
- Experienced in siting for long-term grid evolution

MISO may let states choose developer, recasting ROFR as state role at RTO



# Debate will continue, but...

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- Without federal siting and certificating, state law will remain paramount
- Firms that lack eminent domain power will have limited opportunities to build significant new transmission
- More significant federal role may lie in resolving conflicts and fostering cooperative planning and development among state-authorized utilities



## QUESTIONS?

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