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Testimony from:
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Testimony on Informational Hearing on Right of First Refusal

April 3, 2024

Senate Committee on Energy, Utilities, Environment, and Climate

Chair Frentz, Vice-Chair Xiong, Ranking Member Mathews, and members of the committee,

My name is Chris Villarreal. I am an associate fellow with the R Street Institute, a center-right, free-market think tank that supports limited effective government in many areas, including electricity markets. R Street's interest in the topic of Right of First Refusal or ROFR, stems from its interest in promoting market-based solutions to electricity markets, including the construction of new transmission projects.

ROFR laws are anti-competitive and bad for consumers. ROFR laws allow incumbent utility monopolies to insulate themselves from competition for transmission projects. These state-sanctioned monopoly utilities operate under cost-of-service regulation, meaning the more capital they spend, the more profit they make under utility commission-approved rates of return. Historically, the absence of transmission competition has resulted in a severe lack of economic discipline, leading to cost overruns, with captive customers footing the bill.

We all know that competition can help keep costs down and spur better service. When it comes to building electric transmission, the cost savings from competition can be substantial. For example, the Brattle Group studied how competitive transmission projects fared compared to their non-competitive counterparts. For electric transmission projects open to competition, the winning bid averaged 40 percent less than the initial cost estimate for the project, while non-competitive projects historically cost 34 percent more than initial estimates. [1] Transmission costs are already a growing fraction of the price of delivering electricity to consumers throughout the country, and up to \$100 billion in new transmission projects are expected in the region in the coming years.



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The question of who can build transmission in Minnesota, and broadly across the Midcontinent Independent System Operator (MISO) footprint, is important as MISO is beginning a major transmission expansion process. The initial list of Tranche 1 projects, which includes Minnesota, are expected to cost over \$10 billion. ROFR laws would increase the costs of those projects by \$665 million, compared to if they were built using competitive solicitations. In fact, according to R Street research, if Minnesota repealed its ROFR law, customer savings would rise by an additional \$495 million across the MISO states. [2]

The anti-competitiveness of ROFR laws have been identified by a number of courts in recent years. Last year, the Iowa Supreme Court found that the Iowa ROFR law “is quintessentially crony capitalism” and anticompetitive, calling it a “rent-seeking, protectionist legislation.” As stated by the Iowa Court, “Common sense tells us that competitive bidding will lower the cost of upgrading Iowa’s electric grid and that eliminating competition will enable the incumbent to command higher prices for both construction and maintenance. Ultimately, the ROFR will impose higher costs on Iowans.” [3] Similarly, the 5th Circuit Court of Appeals found that a ROFR law in Texas violated the Dormant Commerce Clause and was “an intrusion on interstate commerce.”[4] Lastly, the U.S. Department of Justice has routinely argued that ROFR laws “result in lost competition,” which may result in higher rates and less reliable service.[5]

In conclusion, ROFR laws harm competition by unfairly protecting utility monopolies from such competition. By limiting competition, transmission projects are not subject to competitive pressure, which would lower costs; instead, transmission projects are costlier, which increases customer bills and makes states less competitive.

Thank you,

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- [1] Johannes P. Pfeifenberger et al., “Cost Savings Offered by Competition in Electric Transmission,” The Brattle Group, April 2019, pp. 29, 40. <https://www.brattle.com/insights-events/publications/report-by-brattle-economists-discusses-the-benefits-of-competitive-transmission>.
- [2] Josiah Neeley, “How ROFR Laws Increase Electric Transmission Costs in Midwestern States,” R Street, March 7, 2023. <https://www.rstreet.org/commentary/how-rofr-laws-increase-electric-transmission-costs-in-midwestern-states/>
- [3] *LS Power Midcontinent v State of Iowa*, 988 N.W.2d 316, slip op. at 34 (Iowa Sup. Ct. 2023). <https://www.iowacourts.gov/courtcases/15908/embed/SupremeCourtOpinion>
- [4] *NextEra Energy Capital Holdings v. Lake*, 48 F.4th 306, 326 (5th Cir. 2022), *cert. denied*, 601 U.S. ____ (2023).
- [5] “Letter of the U.S. Department of Justice Antitrust Division to the Honorable Travis Clardy,” U.S. Department of Justice, April 19, 2019. <https://www.justice.gov/atr/page/file/1155881/download>.