

Competitive Transmission Panel

Challenges to Right of First Refusal Provisions in Federal Tariffs and in State Laws

and

Policy Reasons for a Texas ROFR

August 10, 2018

Introductory Comments

1. Order 1000 eliminates federal ROFRs, but allows state-created ROFRs.
2. Appeal of Order 1000.
3. The RTOs' Order 1000 implementation cases.
4. Opponents of state-created ROFRs have raised the dormant Commerce Clause.
5. Federal district court upholds the Minnesota ROFR statute.
6. State ROFRs: Minnesota, North Dakota, South Dakota, Nebraska, and Oklahoma. Texas ROFR (or not) is on appeal.
7. Transmission competition is not solely price competition.
8. Policy for a Texas state-created ROFR.
 - A. Ratemaking: Texas retail customers benefit when their retail public utility owns the transmission facilities.
 - B. The PUCT retains retail ratemaking control over the costs of the transmission facilities.
 - C. Federal policy allows state-created ROFRs.
 - D. Even with state-created ROFRs, RTO-designated transmission facilities will still be built and the United States will have a robust transmission grid.
 - E. States have an interest in the financial health of their state-rate regulated retail public utilities, who have an obligation to serve all customers.

(Sample of) FERC Orders and Court Cases Addressing Right of First Refusal (“ROFR”)

Transmission Planning & Cost Allocation by Transmission Owning & Operating Public Utilities, Order No. 1000, 136 FERC ¶ 61051, 2011 WL 2956837 (July 21, 2011).

- Order 1000 eliminated the presumption that the local, incumbent electric utility automatically gets to build the new transmission lines in its service area. Instead, FERC said that the regional transmission organizations should allow competition in building new transmission lines unless a state law provides a ROFR.
- FERC said that Order 1000 is not intended to limit, preempt, or otherwise affect state laws with respect to construction of transmission facilities.
- This creates a distinction between a *federal ROFR* and a *state-created ROFR*.
- FERC has approved the regional transmission organization’s Order 1000 implementation plans that honor state-created ROFRs. Thus, state-created ROFRs are part of the policy FERC established in Order 1000.

South Carolina Public Service Authority v. FERC, 762 F.3d 41 (D.C. Cir. 2014).

- The court denied numerous challenges to FERC Order No. 1000, including the portion that struck down the federal ROFR.
- The court did not reach the issue of whether the abrogation of those federal ROFRs created by contract violates the *Mobile-Sierra* doctrine. (The doctrine holds that FERC can abrogate a contract when the public interest warrants.¹)

MISO Transmission Owners v. FERC, 819 F.3d 329 (7th Cir. 2016).

- The court upheld FERC’s right to remove the federal ROFR from the MISO OATT.
- The court, however, upheld FERC’s decision to keep state-created ROFRs in the MISO OATT. The court rejected LS Power’s argument that FERC erred by allowing MISO to include state-created ROFRs in its OATT. Thus, a regional transmission organization can honor a state-created ROFR.
- The court rejected a challenge to federal ROFRs on *Mobile-Sierra* grounds. According to the court, *Mobile-Sierra* protects the sanctity of contracts made by parties with adverse interests. It does not protect contracts in which the parties agreed to shield themselves from competition from third parties.
- The court rejected LS Power’s argument that projects must be bid competitively even if they provide reliability benefits in one zone and are paid for entirely or primarily by that zone.

¹ *United Gas Pipeline Co. v. Mobile Gas Services Corp.*, 350 U.S. 332 (1956); and *Federal Power Comm’n v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

Oklahoma Gas & Elec. Co. v. FERC, 827 F.3d 75 (D.C. Cir. 2016).

- The federal ROFR in the Southwest Power Pool (“SPP”) OATT is not protected by the *Mobile-Sierra* doctrine because it was the product of an agreement by horizontal competitors with a common interest to exclude all future competition.
- The *Mobile-Sierra* doctrine does not apply to anti-competitive measures that were not arrived at through arm’s length bargaining. The contractual term protected by the *Mobile-Sierra* doctrine must be the product of adversarial negotiations between sophisticated parties pursuing independent interests.
- The *court* did not reach the issue of whether the *Mobile-Sierra* doctrine applies to the SPP Membership Agreement, which is a contract.

LSP Transmission Holdings, LLC v. Lange, et al., 2017 U.S. Dist. LEXIS 221260, Memorandum Opinion and Order at *29 (June 21, 2018) [D. Minn].

- The court upheld the Minnesota ROFR statute against a dormant Commerce Clause challenge.
- The court relied on *General Motors Corp. v. Tracy*.

Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3.

- “The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
- The dormant Commerce Clause: The Commerce Clause contains dormant implications, which prohibit states from enacting laws that discriminate against out-of-state interests or unduly burdening interstate commerce.

General Motors Corp. v. Tracy, 519 U.S. 278 (1997).

- Involved an Ohio statute that gave in-state regulated public utilities a tax exemption on the sale and use of natural gas for retail purposes, but denied that exemption to interstate natural gas transmission companies.
- The court held that regulated utilities that provide retail service are not substantially similar entities to wholesale providers, and the state has legitimate, local policy interests in treating state-rate regulated public utilities differently from other businesses.

Southwest Power Pool Transmission Bid Scoring System

1. Operations - 250 points (22.7%)

- Measures safety and capability of bidder to operate, maintain, and restore a transmission facility

2. Project Cost - 225 points (20.5%)

- Measures bidder's cost to construct, own, operate, and maintain the project over a 40-year period

3. Engineering Design - 200 points (18.2%)

- Measures the quality of the design, material, technology, and life expectancy of the project

4. Project Management Expertise – 200 points (18.2%)

- Measures an RFP respondent's expertise in implementing similar construction projects

5. Finance - 125 points (11.4%)

- Measures bidder's ability to obtain financing for the project

6. Project Originator – 100 points (9.0%)

- Company(ies) receive 100 points for proposing the solution that is selected by SPP as the final approved project configuration

Total points possible for bid: 1100 points