UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Inquiry Regarding the Commission's	)	
Electric Transmission Incentive Policy	)	Docket No. PL19-3-000

INITIAL COMMENTS OF COMPETITVE TRANSMISSION DEVELOPERS

I. INTRODUCTION

BHE U.S. Transmission and GridLiance Holdco, LP ("GridLiance) (collectively "Competitive Transmission Developers")[1] respectfully submit the following comments in response to the Notice of Inquiry ("NOI") issued by the Federal Energy Regulatory Commission ("FERC" or "Commission") on March 21, 2019.[2] In the NOI, the Commission states that in light of significant developments in how transmission is planned, developed, operated, and maintained, it is timely to revisit how it evaluates requests for incentives consistent with section 219 of the Federal Power Act ("FPA").[3] As developers seeking to participate in competitive processes to construct transmission at a cost-effective rate for customers, we are uniquely situated to provide feedback on how transmission incentives can be balanced with successful development at a just and reasonable rate, commensurate with the Commission's full range of considerations under the FPA.

A portfolio company of Blackstone Energy Partners, GridLiance is an independent transmission company formed to partner, through its subsidiaries in California ISO,

[1] BHE U.S. Transmission and GridLiance have been working together for nearly three years on an *ad hoc* basis, focused on developing common recommendations for independent transmission developers who participate in competitive transmission opportunities. The comments submitted here represent the common ground among the developers and are not the exclusive positions taken by these companies.
[2] *Inquiry Regarding the Commission's Electric Transmission Incentives Policy*, 166 FERC ¶61,208 (2019).
[3] 16 USC § 824s.

Midcontinent ISO ("MISO"), and Southwest Power Pool ("SPP"), with electric cooperatives, municipally-owned electric utilities, joint action agencies, and renewable energy developers to identify and develop transmission solutions to meet its partners' ownership, capital investment, and reliability goals. GridLiance subsidiaries have participated in several Order No. 1000 competitive transmission processes as a non-incumbent transmission developer, including in MISO and SPP.

BHE U.S. Transmission is a subsidiary of Berkshire Hathaway Energy, a holding company with more than $90 billion in assets, 12,650 in employees, providing electric energy to nearly 4 million customers in 11 states. Through its subsidiaries and joint ventures, BHE U.S Transmission has bid on several Order No. 1000 competitive transmission projects as well as competitive transmission projects in other jurisdictions, and has participated in FERC proceedings on transmission and incentives in the past, including testifying at the Order No. 1000 technical conference held in June 2016.

II. COMMENTS

The Commission has been wrestling with application of transmission incentives since Congress enacted FPA section 219 in EPAct 2005.[4] In section 219, Congress provided that the Commission must "establish, by rule, incentive-based (including performance-based) rate treatments for the transmission of electric energy in interstate commerce" to "promote reliable and economically efficient transmission and generation of electricity by promoting capital investment in the enlargement, improvement, maintenance, and operation of all facilities for the transmission of electric energy in interstate commerce, regardless of the ownership of the

[4] Energy Policy Act of 2005, Pub. L. No. 109-58, sec. 1261 et seq., 119 Stat. 594 (2005).

facilities,"[5] among other things. As the Commission has considered how to apply the incentives policy in recent years, it has been buffeted by countervailing questions in its development of Order No. 1000 and its impact on competitive transmission development and cost allocation,[6] and return on equity policies, including whether a return on equity is considered just and reasonable and comports with *Emera v. Maine*.[7]

Competitive transmission developers are focused on how to enhance large scale transmission development, clarify appropriate competitive opportunities and best practices, and identify incentives that will promote the construction of transmission consistent with the goals established by the Commission and the regional transmission planning regions. To that end, "incentives" are more than just return on equity adders. As Commissioner LaFleur noted at the Commission's Order No. 1000 technical conference held June 2016, "when including non-incumbents, [developers said they] can do it without ROE adders."[8] Rate treatments that reduce uncertainty and provide clarification of the transmission planning processes, as described further below, would be the most successful methods of incentivizing new transmission and act consistently with Congress' direction to promote capital investment in all facilities for the transmission of electric energy in interstate commerce, regardless of the ownership of the facilities.

A. Non-ROE Incentives Should Apply Broadly

Incentives should apply to transmission broadly: transmission to reduce congestion and ensure reliability, which arguably all transmission projects do. Transmission infrastructure is a

[5] 16 U.S.C. § 824s(a)(1).
[6] Competitive Transmission Development Technical Conference, Docket No. AD16-18-000 (June 27-28, 2016) (including topics such as cost containment and rates and transmission incentives and competitive transmission development processes).
[7] 854 F.3d 9 (D.C. Cir. 2017).
[8] *Competitive Transmission Development Technical Conference*, Docket No. AD16-18-000, Transcript, P 56, lines 8-9 (June 28, 2016) (Commissioner LaFleur summarizing comments from June 27, 2016 technical conference).

costly endeavor - a 2012 study produced for the Western Electric Coordinating Council estimated that a 345 kV double circuit would cost more than $2 million per mile, not including multipliers for difficult terrain and other challenges[9] - and cost recovery is carefully scrutinized by regulators and stakeholders in state and federal proceedings. It is hard to imagine a "frivolous" transmission project in this context, or one that does not achieve the aims set out in FPA section 219. Moreover, transmission construction reduces congestion costs, facilitates interconnection of new generation, and enhances reliability and resilience. The Commission does not have the problem of too much transmission being built, but rather not enough to achieve the goals it has set forth. For these reasons, we advocate broad application of certain risk-reducing incentives.

As competitive transmission developers, we are focused on recovery of costs and incentives in the context of projects awarded through Order No. 1000-compliant processes, in which we participate. Ensuring a level playing field relates to allowing new developers the ability to compete and reducing barriers to entry, not eliminating elements on which new entrants can compete. Fundamentally, competitive developers seeking to prevail in regional transmission planning processes seek every opportunity to limit costs to benefit customers. For this reason, we do not advocate for incentives that inflate investment returns for their own sake, as they are likely counterproductive to prevailing in Order No. 1000 transmission planning processes. Competitive developers focus more on risk-reducing incentives and applying them early in the process, commensurate with application of those incentives for incumbent transmission developers, to provide regulatory certainty to further spur transmission development.

[9] Capital Costs for Transmission and Substations, Recommendations for WECC Transmission Expansion Planning (issued October 2012) (available at https://www.wecc.org/Reliability/1210_BV_WECC_TransCostReport_Final.pdf).

To say that certain risk-reducing incentives should apply "automatically" is a misnomer; recovery of amounts under each risk-reducing incentive must still be achieved through a section 205 proceeding at the Commission.[10] However, broad application of risk-reducing incentives, without requiring specific Commission approval prior to the start date of the incentives, would provide regulatory certainty for competitive transmission developers to participate in regional transmission processes more robustly.

- Hypothetical capital structure should apply during the pre-commercial phase and construction of the first project of a non-incumbent developer, limited only by the capital structure approved by the Commission for incumbent transmission owners.
- A regulatory asset should apply to all start-up and pre-commercial costs, including Order No. 1000 planning costs, incurred before the non-incumbent developer has the ability to recover costs through a regional tariff.
- Construction Work in Progress should also apply for non-incumbent developers, to place them on a level playing field with incumbent transmission owners, although non-incumbent developers may waive the incentive in competitive planning processes.
- Abandonment should apply to all costs incurred after the date that a project is awarded by a transmission regional planning process.[11] In the spirit of a level playing field, this incentive should apply equally to competitive developers and

[10] 16 U.S.C. §824d.

[11] If abandonment upon award of a project is not made automatic, then it should at least become effective as of the date of an application for the abandonment incentive under section 219. Given that there is no statutory deadline for Commission issuance of an order on transmission incentives, the uncertainty related to whether an abandonment incentive would be granted devalues the incentive. Knowing that the incentive will be effective as of the date of application, if it is granted, would strengthen its value as an incentive.

incumbent developers who prevail in a transmission regional planning process and are awarded a project that is subsequently canceled.

For these reasons, these non-ROE incentives should be granted under section 205. The Commission has noted that applications for incentives "under certain circumstances, such as to promote important public policy goals," could be submitted under section 205.[12] Moreover, certain incentives help ensure a level playing field in Order No. 1000 planning processes, as discussed below, further supporting granting incentives under section 205.[13] Although certain heightened incentives such as project-specific ROE adders will merit stronger scrutiny on case by case basis under section 219, given the benefits of transmission more generally, these particular incentives should be granted under section 205.

B. The Commission Should Continue to Ensure a Level Playing Field

In question 54, and implied in other questions as well, the Commission asks whether certain incentives should be used to place non-incumbent transmission developers on a level playing field with incumbent transmission owners.[14] The Commission has recognized the value of non-incumbent transmission developers in participating in regional transmission processes to spur new development and discipline costs.[15]

Fundamentally, new entrant incentives such as the regulatory asset incentive are still needed to level the playing field with incumbents. Eliminating new entrant incentives without expanding competitive bidding opportunities will spur new entrants to exit the market to the detriment of customers.

[12] *Xcel Energy Southwest Transmission Co., LLC*, 149 FERC ¶ 61,182 at P 22 (2014).
[13] *Id.*
[14] NOI at P 34.
[15] *See, e.g.*, Order No. 1000-A, 139 FERC ¶ 61,132 at P 87 ("[T]he Commission seeks to make it possible for nonincumbent transmission developers to compete in the proposal of more efficient or cost-effective transmission solutions.").

Additionally, the Commission asks whether the costs of unsuccessful Order No. 1000 proposals should be recoverable through regulatory asset and deferred pre-commercial cost recovery incentives, and if so, what costs are appropriate for recovery.[16] Currently, as an incentive, the Commission has allowed competitive developers to recover Order No. 1000 proposal costs in a regulatory asset. The Commission has recognized that the competitive developers need to be able to recover their costs in order to continue to participate in offering transmission solutions, similar to the way in which incumbent transmission developers recover their costs, and provision of recovery for Order No. 1000 proposal costs assists in leveling the playing field between the two business models. However, to the extent that competitive transmission developers seek to discipline costs in proposing transmission projects, they may agree to exclude costs related to previous unsuccessful Order No. 1000 proposals. To the extent that the Commission decides to disallow cost recovery of unsuccessful Order No. 1000 projects for competitive transmission developers, it should also similarly disallow such recovery for incumbent developers, who currently recover such amounts through their operating and maintenance accounts in their existing rate.

Similarly, the Commission asks whether developers should share the risk of pursuing "risky" transmission projects by absorbing some of the costs of abandonment, such as 10 percent.[17] It is worth reviewing how developers qualify for abandonment. First, a project is proposed by a transmission planning region following an extensive process to consider the needs of the area and the best transmission solution. Next, the region goes through a competitive process, which can attract numerous developers that cumulatively spend millions of dollars on drafting proposals, and then selects a developer that then seeks appropriate incentives under FPA

[16] NOI at P 40.
[17] NOI at P 42.

section 219. And then – due to circumstances that presumably could not have been forecasted by the transmission planning region at the outset – the project is canceled. Under current Commission policy, only those developers who sought and were granted the abandonment incentive are permitted to recover the full amount of their prudently incurred costs developing the project, albeit prospectively from the date of the order. It is not clear how a developer that won a competitive bid to construct a project and secured abandonment protection – in compliance with the Commission's own regulations implementing Order No. 1000 and 679 – should be held partially liable for the cost of an abandoned project. If such a sharing mechanism for abandonment of "risky" Order No. 1000 transmission projects is implemented, it should again be done similarly for competitive and incumbent transmission developers alike. However, by enacting such a sharing mechanism, the Commission would appear to be making a judgment as to the quality of the regional transmission planning process and criteria, without judging the criteria directly, but instead punishing developers who are making every effort to participate in the process implemented to comply with the Commission's requirements under Order No. 1000. Unless there is additional reasoning that is not inherently obvious, the Commission should not require developers permitted abandonment protection to share the costs of abandoned projects properly recovered under a section 205 proceeding.

C. Regulatory Certainty is a Transmission Incentive

While the Notice of Inquiry asks about a broad range of transmission incentives under FPA section 219, originally enacted in 2005, transmission policy at the Commission since 2011 has been inextricably intertwined with planning and cost allocation under Order No. 1000. At its core, transmission incentives still reflect a cost-based methodology to valuing transmission, echoed in FPA section 219's requirement that all rates approved under the incentive rules must

be "just and reasonable and not unduly discriminatory or preferential."[18] On the other hand, Order No. 1000 introduced a market mechanism for transmission to reduce costs and produce more innovative transmission solutions. This tension has limited the effectiveness of Order No. 1000 processes to achieve those goals. In the spirit of a broad range of inquiry under the Notice, we propose an additional incentive to provide greater regulatory certainty for bids submitted under Order No. 1000.

Specifically, where a developer submits a competitive cost-capped bid that is selected by the regional planning process, the developer cannot seek to increase the rate to recover increased costs except in limited and extreme cases as permitted by its bid. However, if a developer does successfully limit its costs, or if conditions change such that the return on equity as calculated at a later date is lower than that proposed by the selected developer, customers typically retain the right to submit a section 206 complaint with the Commission to seek to lower the rate. This issue was raised by NextEra in its application to recover its costs related to a bid approved by CAISO to build a transmission line for a 10 percent return on equity, and an incentive for any difference between a subsequent return and the approved 10 percent, up to 150 basis points. The Commission rejected the request, noting that it would subsequently hold a technical conference and evaluate issues related to transmission incentives and the tension with Order No. 1000 processes.[19] Additionally, ITC Grid Development submitted a petition for a declaratory order, requesting that the Commission find that any competitive bid would be protected by the *Mobile-Sierra* doctrine. The Commission dismissed the petition, noting that it would host a technical

[18] 16 USC § 824s(d).
[19] *NextEra Energy Transmission West, LLC*, 154 FERC ¶ 61,009 at P 75-78 (2016).

conference on the issue.[20] The Commission held that technical conference in June 2016 but did not address the issue further.

To address this issue, we propose that the Commission apply the framework that it uses for market-based rate authority for generation to transmission on a limited basis, in which a competitive process is used to select the most cost-effective solution. On the generation side, a generation seller must first show that it does not have market power. After the Commission makes that finding, the seller may enter into a power purchase agreement with a buyer, on the assumption that the rates, terms, and conditions of the agreement are entered into at arms'-length and are inherently just and reasonable, subject to follow up filings and ongoing monitoring by the Commission to assure there is no exercise of market power.[21] If there is a sale of generation between affiliates, the Commission examines whether a competitive solicitation was transparent, well-defined, objectively evaluated, and overseen by a third party.[22] Similarly, the Commission has permitted negotiated rate authority between a transmission owner and customer where a transmission owner can show it does not have market power – specifically, that a transmission developer is not building in its traditionally regulated footprint and cannot erect barriers to entry, and that customers have other transmission options in the area. Additionally, the developer applying for negotiated rate authority must show a widely-publicized solicitation for customers and that the transmission owner did not prefer its affiliates in allocating transmission capacity.[23]

The Commission should provide for a similar framework for transmission bids under Order No. 1000 processes. First, the Commission should consider whether a proposed Order No.

[20] *ITC Grid Development, LLC*, 154 FERC ¶ 61,206 (2016).
[21] *California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Circ. 2004).
[22] *Ameren Energy Generating Company*, 108 FERC ¶ 61,081 (2004); *Allegheny Energy Supply Company, LLC*, 108 FERC ¶ 61,082 (2004).
[23] *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134 at P 37 (2009).

1000 bid process is sufficiently competitive. Criteria should include whether there is a level playing field between the incumbent transmission owners in the footprint of the proposed project and other transmission developers; whether projects are clearly described so that all bidders have an equal opportunity to propose transmission solutions and craft competitive bids; whether the selection criteria are appropriate, transparent, and clearly applied; and whether the selection will be made or overseen by an objective party. By so doing, the region will have created a transmission "market" for a specific project in which market power could not be exercised, subject to the Commission's ongoing monitoring. Once a competitive process for a transmission projects is approved by the Commission and set in a region's tariff, any processes conducted in compliance with that tariff to select a transmission solution would necessarily result in a rate that was just and reasonable. If the tariff were violated, the Commission could find that the resulting rate was not just and reasonable. The end result would provide that developers agreeing not to seek higher future returns under a section 205 rate moratorium would have regulatory certainty when they submit their bid in a process carried out in compliance with a Commission-approved tariff that their bid would not subsequently be reduced by a future section 206 proceeding. This symmetrical risk-sharing mechanism would allow developers to take greater risks in making proposals that would control costs in an effort to win the project, resulting in lower rates for customers.

In seeking to promote development, the Commission has noted that Order No. 1000 is still in its infancy and requires further evolution to facilitate additional construction. We support the Commission's continued evaluation of Order No. 1000 and efforts to enhance competitive bidding opportunities and make the competitive solicitation processes more cost-effective. Whether this proposal is considered as a transmission incentive or a refinement to Order No.

1000 processes, we hope that the Commission gives it due consideration in its ability to drive costs lower and provide for more innovative solutions for customers, in keeping with the original goals of Order No. 1000.

III. CONCLUSION

Since FPA section 219 was implemented, changing transmission development conditions have arisen, and we support the Commission's evaluation of which incentives will achieve the desired outcome of developing new transmission to promote reliability and integration of new resources. To that end, we recommend that the Commission consider greater flexibility in regulatory models, broader application of risk-reducing incentives, and increased certainty around competitive transmission bids. These measures will help support transmission development while maintaining cost discipline that ultimately benefits consumers.

Respectfully submitted,

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