

Bill Number	House Bill No. 2623
Date of Hearing	February 12, 2016
Stance	Neutral
Testimony By	Adrienne Clair, Partner, Stinson Leonard Street
Summary	<ul style="list-style-type: none"> • HB 2623 establishes a Right of First Refusal (ROFR) for incumbent electric transmission owners to construct, own and maintain new transmission facilities between 100-200 kV. • In Order No. 1000, the Federal Energy Regulatory Commission (FERC) ordered removal of federal ROFRs from FERC-jurisdictional tariffs and agreements, for the construction of new transmission facilities selected in a regional transmission plan for cost allocation. • FERC made clear in Order No. 1000 that it did not intend to affect state or local laws or regulations regarding construction of transmission facilities. Order No. 1000 has been upheld by an appellate court. • The Southwest Power Pool (SPP) Open Access Transmission Tariff (OATT), which was approved by FERC, eliminated the federal ROFR with respect to, among other things, transmission facilities rated 100 kV or greater. • The FERC-approved SPP OATT also requires compliance with relevant law where the transmission facility is to be built. • FERC's orders in the SPP proceeding for compliance with Order No. 1000 allow consideration of state or local laws in deciding whether to hold a competitive solicitation for new transmission facilities. Similar rulings have been issued by FERC for other regional transmission organizations. • Appeal has been sought of FERC's orders on SPP's Order No. 1000 compliance filings. However, appeal of FERC's orders does not stay the effectiveness of the orders unless specifically ordered by the court. No such order has been issued with respect to the SPP Order No. 1000 compliance proceeding. • Other states in the region have enacted legislation providing a ROFR for electric transmission facilities, including the following: Minnesota, Nebraska, North Dakota, South Dakota, and Oklahoma.

**TESTIMONY SUBMITTED BY ADRIENNE CLAIR, STINSON LEONARD STREET,
ON BEHALF OF SUNFLOWER ELECTRIC POWER CORPORATION
BEFORE THE HOUSE ENERGY AND ENVIRONMENT COMMITTEE
REGARDING HB 2623**

February 12, 2016

Good morning, Mr. Chairman and Members of the Committee. My name is Adrienne Clair and I am a lawyer with the law firm of Stinson Leonard Street. I am appearing before you today on behalf of Sunflower Electric Power Corporation and Mid-Kansas Electric Company, LLC. The purpose of my testimony is to provide you with information regarding the status of federal rulings and directives with respect to the right of first refusal, or ROFR. Sunflower Electric Power Corporation and Mid-Kansas Electric Company support HB 2623 and as I will discuss further, the Federal Energy Regulatory Commission (FERC)'s prohibition of rights of first refusal (ROFR) is limited to those created by tariffs or agreements that are subject to FERC jurisdiction. FERC has neither prohibited nor preempted state ROFR laws. To the contrary, FERC has specifically acknowledged the need to consider state laws including a right of first refusal as part of the transmission planning process.

The FERC's Order No. 1000 established certain transmission planning and cost allocation requirements.¹ One of those requirements was to eliminate from FERC-jurisdictional tariffs and agreements provisions that provided an incumbent transmission provider² a ROFR to construct new transmission facilities selected in a regional transmission plan for purposes of cost allocation.³ Instead, a competitive solicitation process will be used to designate a transmission developer/owner for construction of such projects.

The Commission's directive to eliminate federal ROFRs does not apply to local transmission facilities.⁴ It also does not apply to an incumbent transmission provider's

¹ *Transmission Planning by and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

² An "incumbent transmission provider/developer" is "an entity that develops a transmission project within its own retail distribution service territory or footprint." Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 225. A "non-incumbent transmission developer" is "(1) a transmission developer that does not have a retail distribution service territory or footprint; and (2) a public utility transmission provider that proposes a transmission project outside of its existing retail distribution service territory or footprint, where it is not the incumbent for purposes of that project." *Id.*

³ For purposes of this requirement, a "federal right of first refusal" is limited to "rights of first refusal that are created by provisions in [FERC]-jurisdictional tariffs or agreements." Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 253, n. 231.

⁴ *Id.* at P 318. A local transmission facility is "a transmission facility located solely within a public utility transmission provider's retail distribution service territory or footprint that is not selected in the regional transmission plan for purposes of cost allocation. *Id.* at P 63.

upgrades to its own transmission facilities,⁵ and it does not "alter an incumbent transmission provider's use and control of its existing rights of way."⁶

In directing the removal of federal ROFRs, the Commission made clear that it did not intend to affect state or local laws or regulations regarding construction of transmission facilities. Order No. 1000 provides as follows:

. . . the Commission purposely refers to 'federal rights of first refusal' in this Final Rule because the Commission's action on this issue in this Final rule addresses only rights of first refusal that are created by provisions in Commission-jurisdictional tariffs or agreements. Nothing in this Final Rule is intended to limit, preempt or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities. This Final Rule does not require removal of references to such state or local laws or regulations from Commission-approved tariffs or agreements.⁷

The Commission further acknowledged that a ROFR "based on a state or local law or regulation would still exist under state or local law even if removed from the Commission-jurisdictional tariff or agreement, and nothing in Order No. 1000 changes that law or regulation . . ."⁸ Therefore, as the law exists, FERC has expressly limited its directive to eliminate ROFRs to only federal ROFRs, and has explicitly stated its intent not to impact state laws, including the possibility of state ROFRs.

Each Regional Transmission Organization (RTO), including the Southwest Power Pool (SPP), was required to file revised FERC tariffs to comply with Order No. 1000. FERC's decision to limit its exercise of authority to federal ROFRs is reflected in SPP's FERC-approved Open Access Transmission Tariff (OATT). Through several compliance filings and orders, FERC approved SPP's revised OATT as compliant with the requirements of Order No. 1000.⁹ SPP eliminated the federal ROFR with respect to Competitive Upgrades, which include "transmission facilities with a nominal operating voltage of 100 kV or greater."¹⁰ Although FERC initially rejected provisions requiring SPP to recognize state and local laws and regulations in deciding whether to hold a competitive solicitation for new transmission facilities,¹¹ the Commission later

⁵ *Id.* at P 319.

⁶ *Id.*

⁷ *Id.* at P 253, n. 231.

⁸ Order No. 1000-B at P 382.

⁹ *Southwest Power Pool*, 144 FERC ¶ 61,059 (2013) ("*SPP I*"); *order on reh'g and compliance filing*, 149 FERC ¶ 61,048 (2014) ("*SPP II*"); *order on reh'g and compliance filing*, 151 FERC ¶ 61,045 (2015) ("*SPP III*").

¹⁰ SPP OATT, Attachment Y, Section I.1.b.

¹¹ *SPP I*, 144 FERC ¶ 61,059 at P 178.

determined that it "should not prohibit SPP from recognizing state and local laws and regulations as a threshold issue."¹² The Commission reasoned as follows:

On balance, we conclude that the Commission should not prohibit SPP from recognizing state and local laws and regulations as a threshold issue. Regardless of whether state or local laws or regulations are expressly referenced in the SPP OATT, some such laws or regulations may independently prohibit a nonincumbent transmission developer from developing a particular project in a particular state, even if the nonincumbent transmission developer would otherwise be designated to develop the transmission project under SPP's regional transmission planning process. . .¹³

In rejecting arguments that the Commission should prohibit SPP from considering whether state or local laws or regulations require SPP to exclude transmission projects from competitive solicitation, the Commission found that limiting the directive to only federal ROFRs "struck an important balance between removing barriers to participation by potential transmission providers in the regional transmission planning process and ensuring the nonincumbent transmission developer reforms do not result in the regulation of matters reserved to the states."¹⁴ Appeal of the Commission's orders in the SPP proceedings is pending before the U.S. Court of Appeals for the D.C. Circuit.¹⁵ However, the Commission's orders and SPP's OATT provisions allowing consideration of state or local laws¹⁶ are effective and remain in effect unless and until directed otherwise.¹⁷

The Commission's rulings in the *SPP* orders acknowledging and allowing the RTO to consider state and local laws in deciding whether to hold a competitive solicitation for new transmission projects are consistent with its rulings with respect to other RTOs. For example, in proceedings regarding the Midcontinent Independent System Operator, Inc.'s (MISO) compliance with Order No. 1000, the Commission approved provisions requiring MISO to "comply with any Applicable Laws and

¹² *SPP II*, 149 FERC ¶ 61,048 at P 145.

¹³ *Id.*

¹⁴ *SPP III*, 151 FERC ¶ 61,045 at P 31. FERC Chairman Bay issued a concurring statement to *SPP III*. Therein, Chairman Bay concurred with the results of the order, but noted that "the Constitution limits the ability of states to erect barriers to interstate commerce" and observed that "state laws that discriminate against interstate commerce . . . may run afoul of the dormant commerce clause." He concluded that the Commission's order "does not determine the constitutionality of any particular state right-of-first refusal law. That determination, if it is made, lies with a different forum, whether state or federal court."

¹⁵ See *LSP Transmission Holdings, LLC and LS Power Transmission, LLC v. Federal Energy Regulatory Commission*, U.S. Court of Appeals for the District of Columbia Circuit, Case No. 15-1157.

¹⁶ SPP's OATT includes the following criteria for a competitive transmission project: "Transmission facilities located where the selection of a Transmission Owner . . . does not violate relevant law where the transmission facility is to be built."

¹⁷ Federal Power Act Section 313(c) provides, in relevant part, that appeal of an agency order "shall not, unless specifically ordered by the Court, operate as a stay of the Commission order." 16 U.S.C. § 313(c)(2015).

Regulations" granting a right of first refusal to a Transmission Owner."¹⁸ Similar rulings regarding compliance with state laws have been made in other RTO Order No. 1000 compliance proceedings.¹⁹

Several states have enacted legislation providing a ROFR for electric transmission facilities. Among them are the following states in this region: Minnesota, Nebraska, North Dakota, Oklahoma and South Dakota. Excerpts of these laws are provided below:

1. Minnesota:

"An incumbent electric transmission owner has the right to construct, own and maintain an electric transmission line that has been approved for construction in a federally registered planning authority transmission plan and connects to facilities owned by that incumbent electric transmission owner. . ." Minn Stat. § 216B.246 (2015)

2. Nebraska:

"If an electric transmission line has been approved for construction in a regional transmission organization transmission plan, the incumbent electric transmission owner of the existing electric transmission facilities to which the electric transmission line will connect shall give notice to the Nebraska Power Review Board, in writing, within ninety days after such approval, if it intends to construct, own and maintain the electric transmission line. If no notice is provide, the incumbent electric transmission owner shall surrender its right to construct, own and maintain the electric transmission line and any other incumbent electric transmission owner may file an application for the electric transmission line under section 70-1012. Within twenty-four months after such notice, the incumbent electric transmission owner shall file an application with the board pursuant to section 70-1012." R.R.S. Neb. § 70-1028(1)(2015).

3. North Dakota:

". . . the commission may not issue a certificate to an electric transmission provider for construction or operation of an electric transmission line that will interconnect with an electric transmission line that is owned or operated by an electric public utility if the electric public utility is willing and able to construct and operate a similar electric transmission line." N.D. Cent.Code § 49-03-02.2 (2013); "Except as provided in subsection 3, an electric transmission provider or designee may not construct an electric transmission line interconnecting with an existing electric transmission line owned, leased, or operated by a rural electric cooperative, unless the

¹⁸ MISO Tariff Attachment FF, Section VIII.A.1.

¹⁹ See, e.g., *PJM Interconnection, L.L.C.*, 147 FERC ¶ 61,128 (2014) at P 133. (The Commission found that requiring PJM to ignore state or local laws considering the siting, permitting and construction of transmission facilities "at the outset of the regional transmission planning process would be counterproductive and inefficient, as it would require PJM's regional transmission planning process to expend time and resources to evaluate potential transmission developers for transmission projects that, under state or local laws or regulations, ultimately must be assigned to the incumbent transmission developer.").

electric transmission provider or designee has provided written notice to the rural electric cooperative of its intention to do so. If the rural electric cooperative provides written notification to the electric transmission provider or designee within one hundred eighty days from receipt of the written notice under this subsection, that the rural electric cooperative is willing and able to construct and operate a similar electric transmission line, the rural electric cooperative shall have the right to construct the line." N.D. Cent. Code § 49-10-13.

4. Oklahoma:

"An incumbent electric transmission owner has the right to construct, own and maintain a local electric transmission facility that has been approved for construction in a Southwest Power Pool transmission plan and will interconnect to facilities owned by that incumbent electric transmission owner . . ." 17 Okl. St. § 292 (2015).

5. South Dakota:

"Any incumbent electric transmission owner may construct, own, and maintain an electric transmission line that connects to facilities owned by the incumbent electric transmission owner. The right to construct, own, and maintain an electric transmission line that connects to facilities owned by two or more incumbent electric transmission owners belongs individually and proportionally to each incumbent electric transmission owner, unless otherwise agreed in writing. If an electric transmission line has been approved for construction in a federally registered planning authority transmission la, the incumbent electric transmission owner may give notice to the commission, in writing, writing ninety days of approval, of its intent to construct, own and maintain the electric transmission line. If no notice is provided, the incumbent electric transmission owner shall surrender its right to construct, own, and maintain the electric transmission line. . ." S.D. Codified Laws § 49-32-20 (2013).