

128 FERC ¶ 61,018
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Southwest Power Pool, Inc.

Docket No. ER09-1130-000

ORDER ACCEPTING DESIGNEE QUALIFICATION
AND NOVATION AGREEMENT

(Issued July 10, 2009)

1. On May 12, 2009, pursuant to section 205 of the Federal Power Act (FPA),¹ Southwest Power Pool, Inc. (SPP) filed an executed Designee Qualification and Novation Agreement (Agreement) between SPP, Western Farmers Electric Cooperative (Western Farmers), and ITC Great Plains, LLC (ITC). For the reasons discussed below, the Commission will accept the Agreement for filing to be effective April 29, 2009, as requested.

I. Background

2. SPP is a regional transmission organization (RTO) with 54 members, including Western Farmers and ITC. Western Farmers is a Transmission Owner under the SPP Membership Agreement. ITC is an independent transmission company and is not currently a Transmission Owner under the Membership Agreement. Under section 3.3(b) of the Membership Agreement, when SPP approves a new transmission project to be built, SPP directs the appropriate Transmission Owner(s) to begin implementation of the project. A Transmission Owner directed by SPP to construct specific transmission facilities can engage another Transmission Owner or other entity to construct the facilities in its place.² Additionally, Attachment O of SPP's Open Access Transmission

¹ 16 U.S.C. § 824d (2006).

² Section 3.3(c) of the Membership Agreement provides, in pertinent part, "A designated provider for a project can elect to arrange for a new entity or another Transmission Owner to build and/or own the project in its place."

Tariff (OATT) contains language similar to the Membership Agreement, specifying that SPP will issue a Notification to Construct to the Transmission Owner.³

II. SPP's Filing

3. SPP states that on January 16, 2009, SPP issued a Notification to Construct to Western Farmers (Western Notification) directing Western Farmers to construct several projects identified by SPP in the SPP Transmission Expansion Plan⁴ as necessary to serve customers, including two projects in Oklahoma—a 19-mile long 345 kV transmission line between the Hugo generation plant and the Valliant generation plant and a 345/148 kV transformer at the Hugo plant (Projects).⁵ SPP states that Western Farmers indicated to SPP that Western Farmers would be unable to construct and own the Projects due to the large size of the Projects and a potential inability to obtain financing from the Rural Utilities Service, and that ITC could construct and own the Projects in Western Farmers' place. SPP states that because ITC is not currently a Transmission Owner under the Membership Agreement, ordinarily ITC would not be subject to the rights and obligations of a Transmission Owner under the Membership Agreement and could not qualify as a Transmission Owner until it transfers operational control over its transmission facilities to SPP and executes the Membership Agreement as a Transmission Owner. SPP states that although its interests are generally not served by relieving a Transmission Owner of its obligation to construct necessary transmission facilities, it supports ITC's assumption of Western Farmers' obligation to construct the new facilities, because SPP has an interest in and responsibility for ensuring the construction of transmission facilities identified as necessary to serve customers.⁶

4. SPP states that to ensure ITC is qualified to build and own the Projects, SPP engaged in a due diligence review of ITC's qualifications in the areas of transmission development, operations, maintenance and financial capability, and the creditworthiness

³ Section VIII.4 of Attachment O of the SPP OATT provides, in pertinent part, that the Notification to Construct "shall include but not be limited to: (1) the specifications of the project . . . and (2) a reasonable project schedule"

⁴ The SPP Transmission Expansion Plan includes transmission upgrades relating to transmission service requests, generation interconnection service requests, and satisfaction of reliability criteria, as well as transmission upgrades that provide economic benefits.

⁵ SPP Filing, Exhibit 1, Attachment 1 to Agreement. In the Western Notification, SPP also directed Western Farmers to construct other projects that are not relevant here.

⁶ *Id.* at 7.

of ITC Holdings Corporation, ITC's parent company. Based on this due diligence review, SPP states that it has determined that ITC is qualified to develop, operate, and maintain the Projects, and that ITC is authorized by the Oklahoma Corporation Commission to construct and own transmission facilities in Oklahoma, where the Projects will be located. SPP also states that ITC's parent company has executed a performance guaranty that covers the period between execution of the Agreement and ITC's completion of the construction of the Projects, transfer of operational control over the Projects to SPP, and ITC's execution of the Membership Agreement as a Transmission Owner.

5. Under the Agreement, ITC will assume Western Farmers' obligation to construct the Projects, pursuant to section 3.3(c) of the Membership Agreement and Attachment O of SPP's OATT. SPP states that the Agreement relieves Western Farmers of its obligation under section 3.3 of the Membership Agreement and the Western Notification and places that obligation on ITC.

6. Under Article 4.1 of the Agreement, ITC will, at its own expense, design, procure, construct, install, own, and operate the Projects under the terms of the Western Notification and ITC will be bound by the Membership Agreement as a Transmission Owner, including, but not limited to, the obligation to use due diligence to construct the Projects as directed by SPP. SPP will recognize ITC as a Transmission Owner after ITC has executed the Membership Agreement and upon transfer of the Projects to SPP's control and energization of the Projects. Article 4.2 provides that SPP must extend to ITC all rights of a Transmission Owner under the Membership Agreement, including the right to be fully compensated as permitted by the Commission for the costs of constructing the Projects, and that SPP may enforce all its rights against ITC as against a Transmission Owner, even before ITC becomes a Transmission Owner under the Membership Agreement.

7. Article 4.3 outlines Western Farmers' release from its obligations with regard to the Projects. Specifically, Article 4.3 indicates that the Parties recognize that Western Farmers' arrangement with ITC to build and own the Projects satisfies Western Farmers' obligation to build and construct the Projects but that Western Farmers is not released from any of its other obligations under the Membership Agreement and SPP OATT, or for any other project. Article 4.4 provides that if ITC fails to fulfill its obligations under the Agreement and Western Notification in a timely manner, then SPP may, pursuant to section 3.3(c) of the Membership Agreement and Attachment O of the SPP OATT, seek another entity to construct and own the Projects.

8. The term of the Agreement is the period between the date of execution or Commission acceptance (whichever is later), and the date upon which ITC has transferred functional control over the Projects to SPP and executed the Membership Agreement as a Transmission Owner.

9. SPP asserts that the Agreement is just and reasonable because Western Farmers has demonstrated a potential inability to construct and own the Projects, ITC has agreed to construct the Projects in Western Farmers' place, and SPP has determined through due diligence and the performance guaranty that ITC is qualified to construct and own the Projects.

10. SPP notes that prior to the issuance of the Western Notification, the SPP Markets and Operations Policy Committee had discussed whether to permit Transmission Owners to obtain a novation whereby the Transmission Owner would identify another entity to build a project and the other entity would assume all obligations of the Transmission Owner regarding the project, relieving the Transmission Owner of the obligation to construct in the event that the assigned entity fails to construct the project as directed by SPP.⁷ SPP states that ultimately the SPP Markets and Operations Policy Committee recommended and the SPP Board of Directors agreed that no general policy regarding assignment of transmission construction obligations and novation should be adopted. Instead the SPP Markets and Operations Policy Committee decided that the SPP staff should review third parties seeking to build and/or own a transmission project in accordance with SPP OATT criteria. If no issues arise during the reviews, SPP would proceed with a novation agreement, which would be presented to the SPP Markets and Operations Policy Committee and the SPP Board of Directors.

11. SPP states that the Agreement was approved by the SPP Markets and Operations Policy Committee on April 15, 2009 and the SPP Board of Directors on April 28, 2009. SPP adds that the Agreement furthers the Commission's policy of encouraging construction and ownership of transmission facilities by third-party transmission owners.⁸ SPP requests that the Agreement become effective on April 29, 2009.

III. Notice of Filing and Responsive Pleadings

12. Notice of SPP's filing was published in the *Federal Register*, 74 Fed. Reg. 24,003 (2009), with interventions and protests due on or before June 2, 2009. Oklahoma Gas and Electric Company and Western Farmers filed motions to intervene. ITC filed a motion to intervene and comments. Arkansas Electric Cooperative Corporation (AECC) and Golden Spread Electric Cooperative, Inc. (Golden Spread) jointly filed a motion to

⁷ *Id.* at 5.

⁸ *Id.* at 9 (citing *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, at P 593-94, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261, at P 263-64 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009)).

intervene, limited protest, and motion for clarification. Western Farmers and SPP filed answers to the AECC/Golden Spread limited protest and motion for clarification, and ITC filed an answer to the AECC/Golden Spread motion for clarification. AECC and Golden Spread filed an answer and conditional motion to consolidate, responding to the answers of Western Farmers, SPP, and ITC. ITC filed an answer to the AECC/Golden Spread motion to consolidate.

13. In its comments, ITC states that the Commission's acceptance of the Agreement will help enable the first-ever construction of transmission facilities in SPP by an entity that does not currently own transmission facilities in SPP. ITC adds that the Agreement is a model for future instances in which incumbent Transmission Owners designated by SPP to construct projects do not wish to undertake all or any of the projects.

IV. Discussion

A. Procedural Matters

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the timely motions to intervene serve to make the entities that filed them parties to this proceeding.

15. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answers filed by ITC, SPP, Western Farmers, and AECC and Golden Spread because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

16. For the reasons discussed below, the Commission accepts the Agreement, to be effective April 29, 2009 as requested. As ITC notes, the Agreement will facilitate the construction of transmission facilities in the SPP region for the first time by an entity that does not currently own facilities in the SPP region. The Agreement also supports the Commission's goals of encouraging third-party participation in the planning and construction of transmission facilities.⁹

⁹ See Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 593-94; Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 263-64.

1. Novation and Release

a. Protest

17. In their limited protest, AECC and Golden Spread state that Western Farmers should not be released from its obligations to construct the Projects under section 3.3 of the Membership Agreement and Attachment O of the SPP OATT based only on ITC's agreeing to fulfill that obligation in the future. Instead, they argue, Western Farmers should be released only after the Projects are built. AECC and Golden Spread argue that if Western Farmers is released from its obligation and ITC subsequently fails to construct the Projects, then no entity will have an obligation to construct the Projects. AECC and Golden Spread add that requiring Western Farmers to retain the obligation to construct is consistent with a modification to section VIII.6 of Attachment O that SPP has proposed in Docket No. OA08-61-001, which provides that if SPP is unable to find a third party to construct a transmission upgrade, then the designated Transmission Owner retains the obligation to construct.¹⁰ AECC and Golden Spread assert that having no entity obligated to construct the Projects compromises the principle that a Transmission Owner's obligation to construct is unavoidable, which is the "linchpin" of the SPP planning and expansion process.¹¹

b. Answers

18. SPP responds that the Commission should deny the AECC/Golden Spread limited protest. SPP agrees with AECC's and Golden Spread's assertion that without the Agreement, if ITC failed to construct the Projects, then SPP could not enforce the obligation to construct against ITC, because under the SPP Membership Agreement and the SPP OATT the obligation to construct applies only to Transmission Owners, and ITC would not yet be a Transmission Owner. SPP states that the Agreement fills this gap by specifically providing that ITC is assuming Western Farmers' obligation to construct, and that SPP can enforce that contractual obligation against ITC, even though ITC would not yet be a Transmission Owner. SPP states that the Agreement removes Western Farmers as the "middle-man" by allowing SPP to enforce the construction obligation directly against ITC.¹² SPP states that the Agreement saves time because otherwise, under section 3.3(c) of the Membership Agreement and Attachment O of SPP's OATT, SPP

¹⁰ On May 21, 2009, the Commission accepted SPP's filing in Docket No. OA08-61-001, subject to modifications and a further compliance filing. *See Southwest Power Pool, Inc.*, 127 FERC ¶ 61,171 (2009).

¹¹ AECC/Golden Spread Limited Protest and Motion for Clarification at 7.

¹² SPP Answer at 6.

would have to wait until ITC fails to construct the Projects before SPP could solicit a new third-party entity to construct the Projects.¹³

19. Western Farmers argues in its answer that the Agreement is in accordance with SPP's authority, ensures that the projects will be constructed, was adopted following SPP's duly constituted procedures, and will serve the best interests of SPP's customers. In addition, Western Farmers argues that nothing in section 3.3(c) of the SPP Membership Agreement or section VIII.6 of Attachment O precludes SPP from releasing the designated provider once it has arranged for another entity to construct a project in its place or limits such a release to the period after the project has been constructed. Western Farmers contends that SPP has negotiated suitable arrangements for ITC to assume responsibility for the projects, including a corporate parent performance guaranty of ITC's obligations. Thus, Western Farmers argues, Western Farmers' release is based on more than just a third party's agreement to fulfill the obligation in the future as AECC and Golden Spread claim. Western Farmers also argues that AECC and Golden Spread have offered no evidence to suggest that the arrangements with ITC are insufficient for ensuring that the Projects will be completed, and points to section 4.4 of the Agreement, which states that a failure by ITC to complete the projects will constitute a breach of its obligations and authorizes SPP to find a replacement developer to complete the projects.

20. Western Farmers also states that holding Western Farmers responsible until completion and operation of the Projects creates uncertainty for Western Farmers and thus makes it more difficult for Western Farmers to plan its future utility plant investments to serve its native load. Western Farmers adds that the potential reversion to Western Farmers also creates financial uncertainty for Western Farmers due to the liability that would ensue if the obligation were to revert to Western Farmers, and this uncertainty would make it more difficult for Western Farmers to obtain financing for other investments that Western Farmers has planned to meet its native load requirements. Western Farmers concludes that these difficulties are all avoidable by the release of Western Farmers, which is appropriate under the circumstances of this case where ITC is fully prepared and contractually responsible to construct the Projects.

21. In their answer, AECC and Golden Spread state that while they do not object to the choice of ITC as the third party transmission developer, they object to SPP releasing a Transmission Owner from its obligations under the SPP OATT and Membership Agreement under circumstances where neither document provides for such a release.

¹³ *Id.* at 5. Section 3.3(c) of the Membership Agreement states, in pertinent part:

If a designated provider(s) does not or cannot agree to implement the project in a timely manner, SPP will solicit and evaluate proposals for the project from other entities and select a replacement.

AECC and Golden Spread argue that, by releasing Western Farmers from its obligation to construct the Projects before the Projects are completed, the Agreement conflicts with the Membership Agreement and the SPP OATT.¹⁴ Specifically, AECC and Golden Spread state that because the Membership Agreement and SPP OATT do not provide for the release of a Transmission Owner from its obligation prior to the completion of a project, SPP is bound to hold Western Farmers to the obligation until the Projects are completed. AECC and Golden Spread state that failing to hold Western Farmers to its obligation would be inconsistent with the Membership Agreement, the SPP OATT, and consequently the filed rate doctrine.

c. Commission Determination

22. The Commission finds the Agreement to be just and reasonable under the circumstances of this case. Under section 3.3 of the Membership Agreement and Attachment O of the SPP OATT, a Transmission Owner whose facilities will interconnect with facilities proposed to be constructed has an obligation to construct the facilities. A Transmission Owner may find another Transmission Owner or another entity to construct the facilities if it is unable or unwilling to do so. Here, Western Farmers has responded to the Western Notification by indicating that it is unable to construct the Projects due to the size of the Projects and a potential inability to obtain adequate financing. Additionally, Western Farmers has exercised the option under section 3.3(c) of the Membership Agreement to engage a third party to construct the Projects. Under the Agreement, ITC will assume Western Farmers' obligation to construct the Projects and Western Farmers will be released from its obligation to construct the Projects under section 3.3 of the Membership Agreement and Attachment O of the SPP OATT. SPP states that through its due diligence, it has determined that ITC is qualified to develop, operate and maintain the Projects, and that ITC's parent company has executed a performance guaranty to ensure completion of the Projects.

23. By assigning to ITC Western Farmers' obligations with regard to the Projects and by enabling SPP to work directly with ITC in Western Farmers' place, the Agreement allows needed transmission facilities to be constructed even though the entity designated to construct that transmission is unable to do so. This is particularly important here where Western Farmers has informed SPP that it is unable to construct the Projects and where SPP, after conducting due diligence, has found ITC to be qualified to construct and operate the Projects. Further, ITC's duty to fulfill its obligations under the Agreement has been insured under the performance guaranty issued by its parent company. AECC and Golden Spread have offered no evidence to indicate that ITC will be unable to meet its obligations under the Agreement.

¹⁴ AECC/Golden Spread Answer at 6.

24. Regarding AECC's and Golden Spread's concern that if ITC fails to construct the Projects then no entity will be obligated to perform the construction, we find that under Article 4.1 of the Agreement, ITC expressly assumes the same obligation to construct as Western Farmers would have had under the Membership Agreement and the SPP OATT. Specifically, Article 4.1 provides in pertinent part as follows:

[ITC] Rights and Obligations as a Transmission Owner.

*** Notwithstanding the definition of "Transmission Owner" contained in Section 1.25 of the SPP Membership Agreement, [ITC] shall at all times during the term of this Agreement be bound by the SPP Membership Agreement as a Transmission Owner, including but not limited to the obligation to use due diligence to construct the ITC Projects as directed by SPP as required in Section 3.3 of the SPP Membership Agreement and to transfer functional control of its Tariff Facilities to SPP as required in Section 3.1 of the SPP Membership Agreement.

25. Additionally, Article 4.4¹⁵ provides SPP with the same right to seek another party to construct the facilities if ITC fails to construct as is provided under section 3.3 of the Membership Agreement.¹⁶ Accordingly, we find AECC's and Golden Spread's concern to be misplaced.

¹⁵ Article 4.4 provides as follows:

Failure to Implement the Project in a Timely Manner. In the event [ITC] fails to fulfill its obligations under this Agreement, including the terms specified in the Notifications [sic] to Construct issued to Western Farmers for the Project, SPP shall deem the obligation to build the Project in a timely manner as specified in Section 3.3 (c) of the SPP Membership Agreement and Attachment O of SPP's OATT as being breached and may solicit and evaluate proposals for the project from other entities and select a replacement to build and/or own the Tariff Facilities in a manner specified in SPP's OATT.

¹⁶ As noted above, Section 3.3(c) of the SPP Membership Agreement provides in pertinent part as follows:

If a designated provider(s) does not or cannot agree to implement the project in a timely manner, SPP will solicit and evaluate proposals for the project from other entities and select a replacement.

26. Further, we reject AECC's and Golden Spread's argument that the Agreement conflicts with the Membership Agreement and the SPP OATT, and as a result the filed rate doctrine. The Membership Agreement and the SPP OATT both provide that a Transmission Owner can be released from its obligation by completion of projects by a third-party entity; however, neither document prohibits the release of the Transmission Owner from its obligation to construct where a Transmission Owner has notified SPP that it is unable to perform the needed transmission construction and a qualified third party has agreed to assume that obligation. Here, Western Farmers has notified SPP that it is unable to construct the Projects, and SPP has determined that ITC is qualified to assume Western Farmers' obligations and has obtained a performance guaranty. In this regard, we note that ITC's affiliated transmission companies have demonstrated the ability to finance and construct significant transmission expansions.¹⁷ In these circumstances, we find the release of Western Farmers from its obligations under the Membership Agreement and the SPP OATT concerning the Projects to be just and reasonable.

2. Recovery of Project Costs

a. Motion for Clarification

27. In their motion for clarification, AECC and Golden Spread request that the Commission clarify that costs related to the Projects will not be recovered through the formula rate that ITC proposed in Docket No. ER09-548-000 absent a new FPA section 205 filing. AECC and Golden Spread note that ITC has pending, in Docket No. ER09-548-000, a request for approval of a formula rate to recover costs associated with various facilities that ITC hopes to construct in the state of Kansas. They also note that the Commission approved certain incentives for the proposed Kansas facilities and set for hearing and settlement procedures questions pertaining to the proposed formula rate and rate protocols.¹⁸ AECC and Golden Spread state that the Agreement is silent as to how

¹⁷ ITC and its affiliates, including Michigan Electric Transmission Company (METC) and International Transmission Company (International Transmission), have successfully constructed over \$1 billion in transmission facilities. *See* ITC Exhibit GP-200 at 6, in Docket No. ER09-548-000. The Commission has cited the success of METC and International Transmission Company as independent transmission companies. *See, e.g., Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222, at P 176 (2006) (“[W]e believe that transcos [i.e., independent transmission companies] offer significant benefits and the [incentives] that we approved for METC and International Transmission were helpful to establish those transcos.”).

¹⁸ AECC/Golden Spread Limited Protest and Motion for Clarification at 8 (citing *ITC Great Plains, LLC*, 126 FERC ¶ 61,223, at P 102 (2009) (ITC Order))

the costs of the Projects will be recovered and that differences in the nature of various projects can make the use of a single transmission formula rate inappropriate.¹⁹ AECC and Golden Spread note particular concern that any payments ITC may have made or agreed to make for the right to construct the Projects should not be passed on to transmission customers.

b. Answers

28. In response, ITC states that in Docket No. ER09-548-000, ITC requested and received from the Commission a rate for ITC as a company. ITC states that in written testimony filed with its application in that proceeding, its witness explained that ITC planned to construct projects including, among other things, projects in the SPP Transmission Expansion Plan.²⁰ ITC states that the SPP Transmission Expansion Plan includes the Projects. ITC also states that in its application in Docket No. ER09-548-000, ITC explained that it planned to obtain Transmission Owner status in the SPP region, which would enable ITC to be designated by other SPP Transmission Owners to construct SPP-authorized transmission projects.²¹ ITC adds that its witness stated that ITC “intends to use the proposed formula rate to determine its revenue requirement for other transmission facilities that it will construct in SPP, including both routine facilities and major new transmission expansions, and for other transmission facilities that it may acquire in SPP.”²² Thus, ITC reasons that in approving the formula rate for ITC, the Commission cannot have intended to limit the rate only to the Kansas projects as AECC and Golden Spread insist.

29. ITC also states that in the formula rate proceeding, it sought a base rate, including return on equity (ROE) incentives for independence and RTO membership, applicable to all projects it might build in SPP and certain non-ROE incentives for the Kansas projects involved in that proceeding. ITC states that it recognizes that the non-ROE incentives that it sought in Docket No. ER09-548-000 will not be applicable to the Projects but that

¹⁹ AECC and Golden Spread state that in summarizing comments on ITC’s proposed formula rate in the ITC Order the Commission stated that “if the nature of future projects is different from the projects at issue in this proceeding, . . . it might not be appropriate to recover the costs of all the projects under a single transmission formula rate.” *Id.* at 8 (citing ITC Order, 126 FERC ¶ 61,223 at P 102).

²⁰ ITC Answer at 3.

²¹ *Id.*

²² *Id.* at 3-4 (quoting ITC January 15, 2009 application in Docket No. ER09-548-000, Exhibit No. GP-100 at 31).

the base rate approved by the Commission is applicable to the Projects without the need for ITC to submit another FPA section 205 filing. ITC points out that the Western Notification, which is Attachment 1 to the Agreement, expressly states that the Hugo to Valliant line project is partially base plan funded. ITC states that the remainder of the costs will be directly assigned to the transmission customer, Western Farmers. ITC also states that the final cost allocations will be determined by SPP. ITC states that if the Commission determines that the ITC formula rate filed in Docket No. ER09-548-000 does not apply to other projects ITC owns in SPP, and each such project requires a new FPA section 205 filing, then the formula rate has no purpose.

30. With regard to AECC's and Golden Spread's concern regarding any payment from ITC to Western Farmers for the right to construct the Projects, ITC and Western Farmers both state that no such payments were made or are being made. Western Farmers adds that ITC will not make any payment to Western Farmers for the right to construct the Projects.

31. In response, AECC and Golden Spread state that ITC's statements regarding its rate formula proceeding do not accurately reflect the ITC Order. AECC and Golden Spread argue that in the ITC Order the Commission granted ITC ROE incentives applicable only to the Kansas projects specified in Docket No. ER09-548-000 and non-ROE incentives only to two of those Kansas projects.²³ AECC and Golden Spread note that in the ITC Order "the Commission stated clearly that its 'approach in evaluating requests for rate incentives is to examine each project on a case-by-case, fact-based basis to determine if the project is eligible for incentives and whether the applicant has met the nexus test.'"²⁴ According to AECC and Golden Spread, if ITC wants incentives for projects beyond those proposed in Docket No. ER09-548-000, ITC must submit a request for specific incentives for specific projects and demonstrate that the projects are eligible. AECC and Golden Spread add that no such demonstration has been made with regard to the Projects.

32. AECC and Golden Spread also renew their request that the Commission clarify that ITC may not recover, through the formula rate at issue in Docket No. ER09-548-000, the costs of any payments ITC will make to Western Farmers for the right to construct the Projects. AECC and Golden Spread point out that ITC's statement in its answer that no such payments "are being made" and Western Farmers' statement in its answer that "it did not receive any such payment" do not preclude the possibility that such payments might occur in the future.

²³ See AECC/Golden Spread Answer at 4.

²⁴ *Id.* at 5 (quoting ITC Order 126 FERC ¶ 61,223 at P 51).

33. Additionally, AECC and Golden Spread request that if the Commission determines that ITC can recover the costs of the Projects through the formula rate to be determined in Docket No. ER09-548-000, then the Commission consolidate this docket and Docket No. ER09-548-000.²⁵ ITC responds that consolidation is unnecessary because any ITC rate issues regarding the Projects are already within the scope of the hearing and settlement proceedings ordered by the Commission in Docket No. ER09-548-000.

c. Commission Determination

34. We find that the rate for service on the Projects will be determined according to Attachment H (Annual Transmission Revenue Requirement) of the SPP OATT, which will be ITC's base rate formula as conditionally accepted in Docket No. ER09-548-000. In that proceeding, ITC stated that the formula rate determined in that docket would apply to transmission facilities that ITC plans to construct or acquire in SPP.²⁶

35. As ITC explains, while certain rate incentives it was granted in Docket No. ER09-548-000 would only apply to certain facilities it was constructing, it specifically sought to apply the base formula rate to all of the facilities it would own in the SPP region. In their answer AECC and Golden Spread respond that ITC should be required to make a new FPA section 205 filing regarding the Projects because the Commission stated in the ITC Order that the Commission's approach in evaluating requests for rate incentives is to examine each project on a case-by-case, fact-based basis. However, by that statement the Commission was describing its approach to incentives for construction of new facilities pursuant to the requirements of FPA section 219²⁷ and Order No. 679,²⁸ which is not the issue here.²⁹ Here, the issue is whether ITC must submit a new FPA section 205 filing

²⁵ AECC and Golden Spread filed their Limited Protest and Motion for Clarification and their Answer and Motion to Consolidate in this docket and in Docket No. ER09-548-000.

²⁶ See e.g., ITC's Exhibit GP-100 in Docket No. ER09-548-000 ("ITC Great Plains intends to use the formula rate to determine its revenue requirements for other transmission facilities that it will construct in SPP . . . and for other transmission facilities that it may acquire in SPP.").

²⁷ 16 U.S.C. § 824s (2006).

²⁸ *Promoting Transmission Investment Through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222, *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007).

²⁹ See ITC Order, 126 FERC ¶ 61,223 at P 51.

for non-construction related incentives (i.e., the ROE incentives granted ITC for independence and RTO membership) for each new transmission project it undertakes when its formula rate includes non-construction incentives. Accordingly, the ITC base rate determined in Docket No. ER09-548-000 will apply to the Projects, including the non-construction incentives granted in that docket for ITC's participation in SPP as a regional transmission organization and ITC's status as an independent transmission company.³⁰

36. Furthermore, with regard to AECC's and Golden Spread's request that we clarify that any payments ITC may make in the future to Western Farmers for the right to construct the Projects should not be included in the formula rate, we find that the Agreement does not specify such payments let alone address recovery of such payments in ITC's rates. Instead, such concerns should be raised in the ongoing proceeding addressing ITC's formula rate proposal in Docket No. ER09-548-000.³¹

37. Lastly, the Commission's practice is to consolidate proceedings where the issues are closely intertwined with each other.³² We find that the factual situations in the instant proceeding and in Docket No. ER09-548-000 are not sufficiently similar to justify consolidation. Thus, we deny AECC's and Golden Spread's motion for consolidation. Accordingly, the Commission accepts the Agreement effective April 29, 2009, as requested.³³

³⁰ As ITC states in its answer, the *non-ROE* incentives that ITC requested in Docket No. ER09-548-000 will not apply to the Projects. *See* ITC Answer at 5; *see also* ITC Order, 126 FERC ¶ 61,223 at P 6 (rejecting ITC's request that the non-ROE incentives proposed for the projects at issue in Docket No. ER09-548-000 also apply to Similar Future Projects).

³¹ We note that in Docket No. ER09-548-000, ITC stated that it had agreed not to recover such a payment in rates. *See* ITC's February 20, 2009 Answer at 14, in Docket No. ER09-548-000.

³² *Missouri River Energy Servs.*, 124 FERC P 61,309, at P 39 (2008).

³³ *See Central Hudson Gas & Electric Corp., et al.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992), and *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, *clarified*, 65 FERC ¶ 61,081 (1993).

The Commission orders:

The Agreement is hereby accepted for filing, to become effective April 29, 2009, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.