

132 FERC ¶ 61,006
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

Champlain Hudson Power Express, Inc.

Docket No. ER10-1175-000

ORDER AUTHORIZING PROPOSAL AND GRANTING WAIVERS

(Issued July 1, 2010)

1. On May 3, 2010, Champlain Hudson Power Express, Inc. (Champlain) filed an application requesting authorization to charge negotiated rates for transmission rights on a proposed high voltage direct current (HVDC) merchant transmission project (Project)¹ linking Montreal, Quebec to the New York City and New England area markets and seeking waiver of certain Commission regulations. Champlain filed its request pursuant to section 205 of the Federal Power Act (FPA)² and section 35 of the Commission's regulations.³ In this order, the Commission authorizes Champlain to charge negotiated rates for transmission rights on its Project and grants Champlain's request for waiver, as discussed below.

I. Background

A. Applicant

2. Champlain is owned by TDI-USA Holdings Corp (TDI-USA) (75 percent) and National Resources Energy, LLC (NRE) (25 percent). TDI-USA is owned by

¹ Commission precedent distinguishes merchant transmission projects from traditional public utilities in that the developers of merchant projects assume all of the market risk of a project and have no captive customers from which to recover the cost of the project. *See, e.g., Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134 (2009) (*Chinook*).

² 16 U.S.C. § 824d (2006).

³ 18 C.F.R. Part 35 (2010).

Transmission Developers Inc., a Canadian Corp. (TDI), and Sithe Global TDI LLC. TDI is a privately-held corporation owned by private investors and investment funds.⁴ The Blackstone Group, L.P. (Blackstone) owns 80 percent of Sithe Global Power, a privately held international power development company with generation interests in Ontario, Canada.⁵ NRE is a diversified clean energy development company and a wholly owned subsidiary of National Resources Group, a real estate development and investment firm.

B. Description of Project

3. Champlain proposes to develop an approximately 400-mile HVDC transmission Project that will originate at an HVDC converter station⁶ near Montreal and terminate in the New York City and Bridgeport, Connecticut areas. The Champlain Project consists of two 1,000 MW bipole transmission cable systems, each containing two transmission lines, with a total Project capacity of 2,000 MW. According to Champlain, the Project will benefit the New York and New England markets by providing up to 2,000 MW of transmission capacity to deliver renewable hydro and wind power from Canada and the United States to the New York and New England markets.⁷

4. From Canada, the cable systems will run overland to the Richelieu River. The submarine cable systems will travel south through Lake Champlain and down the Hudson River. The cable systems will be predominantly buried in the riverbed.⁸ One 1,000 MW cable system will terminate at an HVDC converter station in Yonkers, New York and the other at an HVDC converter station in Bridgeport, Connecticut. From the Yonkers converter station, alternating current (AC) service will continue to New York City, and the Bridgeport cable system will connect to the United Illuminating Company's Singer Substation. The Project sponsors estimate that the cost of the Project will be \$3.8 billion and that it will be in-service by 2015.

⁴ Champlain reports that one of the investment fund managers, BlackRock, Inc., may hold passive interests in jurisdictional utilities.

⁵ Blackstone also reports an interest in a refinery in Delaware.

⁶ This HVDC converter station will be located southeast of Montreal near Hydro-Quebec TransÉnergie's 765/315 kV Hertel substation.

⁷ Champlain Application at 2.

⁸ The Project will also rely on underground land routes to bypass locks and the Hudson River dredging project.

C. Application

5. Champlain requests negotiated rate authority. Champlain also requests approval to presubscribe 75 percent of the Project's transmission capacity through bilateral negotiations with anchor customers and to allocate the remaining 25 percent through an open-season.

6. Champlain states that it intends to turn over operational control of the completed Project to the New York Independent System Operator, Inc. (NYISO) and to ISO New England Inc. (ISO-NE). Champlain states that NYISO and ISO-NE will each operate its portion of the Project under its open access transmission tariff (OATT), and the Project will thereby meet regional reliability and operational efficiency requirements. Champlain explains that both NYISO and ISO-NE have completed feasibility studies for the Project, with system impact studies to follow.⁹ Champlain states that on January 27, 2010, it applied for a Department of Energy (DOE) Presidential Permit authorizing construction and operation of transmission facilities that cross or connect at the international border. Champlain states that it will seek permits from the Army Corps of Engineers in August 2010. Champlain claims that it is performing environmental impact studies to inform these agencies' review pursuant to the National Environmental Policy Act.¹⁰

7. Champlain asserts that it applied for a Certificate of Environmental Compatibility and Public Need (CPN) with the New York State Public Service Commission (New York Commission) on March 30, 2010 and will seek Certificates of Environmental Compatibility and Public Need from the Connecticut Siting Council for the Bridgeport converter station and related facilities.¹¹ Champlain requests that the Commission approve its application by July 2, 2010, in order to meet Champlain's schedules for permitting, financing, and scheduling of the Project.

8. Champlain contends that it meets the four factor analysis in *Chinook* for approval of negotiated rate authority,¹² as discussed more fully below.

⁹ Champlain Application at 11.

¹⁰ 42 U.S.C. §§ 4321, *et seq.* (2006).

¹¹ Champlain Application at 10.

¹² *Chinook*, 126 FERC ¶ 61,134 at P 37-53.

II. Procedural History, Notice of Filings and Responsive Pleadings

9. Notice of Champlain's application was published in the *Federal Register*, 75 Fed. Reg. 26,218 (2010), with motions to intervene, notices of intervention, comments and protests due on or before May 24, 2010.

10. Timely motions to intervene raising no substantive issues were filed by Calpine Corporation; Entergy Nuclear Power Marketing, LLC; Public Service Electric & Gas Co., PSEG Power LLC and PSEG Energy Resources & Trade LLC; and TransCanada Power Marketing Ltd. and TC Ravenswood, LLC.

11. Motions to intervene and comments in support of Champlain's request were filed by Blackstone, H.Q. Energy Services (U.S.) Inc. (HQ Energy), and Nalcor Energy (Nalcor). The City of Yonkers, New York (Yonkers) filed a motion to intervene and comments, and the Independent Power Producers of New York, Inc. (IPPNY) filed a motion to intervene and protest. The County of Westchester, New York (Westchester) filed a late motion to intervene and comments.

12. On May 27, 2010, Champlain filed an answer to IPPNY's protest and Yonkers' comments. On June 9, 2010, the NRG Companies¹³ filed a late motion to intervene.

III. Discussion

A. Procedural Matters

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

14. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2010), the Commission will grant Westchester's and the NRG Companies' late-filed motions to intervene given their interests in this proceeding, the early stage of the proceeding and the absence of undue prejudice or delay.

15. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest, unless otherwise ordered by the decisional authority. We will accept Champlain's answer because it has provided information that assisted us in our decision-making process.

¹³ The NRG Companies are NRG Power Marketing LLC, Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, and Oswego Harbor Power LLC.

B. Negotiated Rate Authority

16. In addressing requests for negotiated rate authority from merchant transmission providers, the Commission has demonstrated a commitment to fostering the development of such projects where reasonable and meaningful protections are in place to preserve open access principles and to ensure that the resulting rates for transmission service are just and reasonable.¹⁴ The Commission's analysis for evaluating negotiated rate applications focuses on four areas of concern: (1) the justness and reasonableness of rates; (2) the potential for undue discrimination; (3) the potential for undue preference, including affiliate preference; and (4) regional reliability and operational efficiency requirements.¹⁵ This approach simultaneously acknowledges the financing realities faced by merchant transmission developers and the consumer protection mandates of the FPA and the Commission's open access requirements. Moreover, this approach allows the Commission to use a consistent analytical framework to evaluate requests for negotiated rate authority from a wide range of merchant projects that can differ substantially from one project to the next.

1. Four-factor Analysis

a. Just and Reasonable Rates

17. To approve negotiated rates for a merchant transmission project, the Commission must find that the rates are just and reasonable.¹⁶ To do so, the Commission must determine that the merchant transmission owner has assumed the full market risk for the cost of constructing its proposed transmission project and is not building within the footprint of its own (or an affiliate's) traditionally regulated transmission system. If so, there are no "captive" customers who would be required to pay the costs of the project. The Commission also considers whether the merchant transmission owner or an affiliate already owns transmission facilities in the particular region where the project is to be located, what alternatives customers have, whether the merchant transmission owner is

¹⁴ See, e.g., *TransEnergie U.S., Ltd.*, 91 FERC ¶ 61,230, at 61,838-39 (2000) (*TransEnergie*) (accepting a request to charge negotiated rates on a merchant transmission project, subject to conditions addressing, among other things, the merchant's open season proposal); *Mountain States Transmission Intertie, LLC*, 127 FERC ¶ 61,270 (2009) (denying a request to charge negotiated rates on a merchant transmission project because, among other things, sufficient protections did not exist to ensure that rates for service would be just and reasonable).

¹⁵ *Chinook*, 126 FERC ¶ 61,134 at P 37.

¹⁶ 16 U.S.C. § 824d(a) (2006).

capable of erecting any barriers to entry among competitors, and whether the merchant transmission owner would have any incentive to withhold capacity.

18. For the reasons discussed below, the Commission finds that Champlain has supported its request and concludes that negotiated rate authority is just and reasonable.

i. Champlain's Proposal

19. In demonstrating that the resulting rates will be just and reasonable, Champlain states that it will assume full market risk of the Project and there will be no captive customers. Champlain states that it is a new market entrant and does not own or operate any electric facilities in the NYISO or ISO-NE regions. Champlain states that it will be unable to exercise market power or establish barriers to entry in the New York or New England markets because it will turn over operational control of the Project to NYISO and ISO-NE, to be operated under their respective OATTs. Champlain adds that another disciplining force to ensure just and reasonable rates is the cost of expansion of neighboring facilities. Champlain states that incumbent transmission owners have an obligation under the NYISO and ISO-NE OATTs to expand their transmission capacity, on request, at cost-based rates. Champlain avers that no entity would purchase transmission service from Champlain unless it was cost-effective when compared to the cost-based alternative.¹⁷ Furthermore, Champlain cites Commission policy which recognizes that negotiated rates for merchant transmission service are effectively capped at the differential in power prices between markets at either ends of the lines.¹⁸

ii. Comments

20. HQ Energy states that the Project meets the Commission's four factor analysis for negotiated rate authority. Nalcor supports Champlain's assertion that negotiated rates for the sale of transmission rights on the Project will be just and reasonable. Nalcor contends that entities will not purchase transmission service over a merchant transmission facility

¹⁷ Champlain Application at 11-12 (citing the NYISO OATT, § 15.4, FERC Electric Tariff, Original Vol. No. 1, Original Sheet No. 124; the ISO-NE OATT, Transmission Markets and Services Tariff, § II.31.4, FERC Electric Tariff No. 3, First Rev. Sheet Nos. 541-43, and *Northeast Utils. Serv. Co.*, 127 FERC ¶ 61,179, at P 27 (2009) (*Northeast Utilities*) (utilities that turn over operational control of their existing facilities to an independent system operator are not relieved of their residual obligations under Order No. 888 to expand their systems on request)).

¹⁸ See, e.g., *TransEnergie*, 91 FERC ¶ 61,230, at 61,838-39 (accepting premise underlying merchant transmission proposal that the price for transmission service will be disciplined by the difference in generation prices in the markets connected by the line and neighboring transmission providers' cost of expansion).

unless it is cost-effective compared to the incumbent utilities' cost of expanding their transmission capacity and the price differential between power sales at the beginning and at the end of Project.

21. Westchester submits that the Project could provide tremendous benefits, but it also may entail tremendous costs and risks to ratepayers. Westchester cautions the Commission against rushing to action on Champlain's proposal and requests that the Commission limit its consideration to the "four corners" of the application and set a reasonable schedule to enable all parties to participate fully in the development of a complete record.¹⁹ Specifically, Westchester argues that the record is unclear whether certain risks exist, including whether "a merchant transmission owner has assumed the full market risk for the cost of constructing a particular transmission project," "any 'captive' customers would be required to pay the cost of the project," and the "anchor customer" referred to in the application is an "anchor tenant" or "anchor shipper."²⁰ Nalcor urges the Commission to approve Champlain's request and bring the overall Project to timely completion, to provide needed certainty in financing and induce anchor customers to make long-term commitments.

iii. Commission Determination

22. For the reasons discussed below, the Commission concludes that Champlain adequately supports as just and reasonable its request for authority to charge negotiated rates for service on the Project. Champlain meets the definition of a merchant transmission owner because it assumes all market risk associated with its Project and has no captive customers. We find unpersuasive Westchester's claim that Champlain has not shown whether certain market risks exist. It is sufficient that Champlain has agreed to bear the risk that the Champlain Project will succeed or fail based on whether a market exists for its services and the fact that Champlain has no ability to pass on any costs to captive ratepayers.

23. Champlain is a new entrant into the transmission market and is therefore not increasing an existing presence in the area. Nor does Champlain have local affiliates that own transmission facilities in the region. Moreover, once the Project is operational and control is turned over to NYISO and ISO-NE, the Commission's open access requirements will ensure that Champlain cannot create barriers to entry or exercise market power in the relevant markets. Although Champlain will hand over operational control to NYISO and ISO-NE, and Champlain will have a separate schedule under the NYISO and ISO-NE OATTs for use of the Champlain line, Champlain will remain at risk

¹⁹ Westchester Comments at 5.

²⁰ *Id.* at 4.

for the cost of the line because Champlain will collect rates only from those customers that transmit energy over the proposed line.

24. No entity operating on either end of the Project is required to purchase transmission service from Champlain, and customers will do so only if it is cost-effective. The Commission has recognized that negotiated rates for service over merchant transmission projects are effectively capped at the differential in power prices between markets at either end of the Project.²¹ Another disciplining force on the negotiated rates that Champlain will be able to charge is the cost of expansion on neighboring utilities. Pursuant to their OATTs, public utilities have an obligation to expand their transmission capacity upon request, at cost-based rates.²² Therefore, the cost of expansion provides additional downward pressure on the negotiated rates that Champlain will charge.

25. These factors lead us to the conclusion that the requested negotiated rate authority is just and reasonable for service on the Project.²³

b. Undue Discrimination

26. As explained in *Chinook*, when approving negotiated rate authority, the Commission primarily looks at two factors to ensure that applicants cannot exercise undue discrimination: (1) the terms and conditions of a merchant transmission developer's open season; and (2) its OATT commitments (or in the Regional Transmission Organization/Independent System Operator (RTO and ISO, respectively) context, its commitment to turn operational control over to the RTO or ISO).²⁴

27. The open season enables the merchant transmission developer to determine the extent of interest in the Project, which in turn enables it to determine whether the Project needs to be re-sized to fit the market. The Commission requires merchant transmission owners to file reports on the open season results shortly after the close of the open

²¹ *Tres Amigas LLC*, 130 FERC ¶ 61,207 (2010) (*Tres Amigas*).

²² *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, at P 814, FERC Stats & Regs. ¶ 31,261 (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), *order on reh'g*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

²³ Because Westchester has not articulated any significance as to whether the "anchor customer" referred to in the application is an "anchor tenant" or an "anchor shipper," we will not address this concern.

²⁴ *Chinook*, 126 FERC ¶ 61,134 at P 40.

season. Such reports provide transparency to the allocation of initial transmission rights, as well as the basis for an entity to file a complaint if it believes it was treated in an unduly discriminatory manner.²⁵

i. Champlain's Proposal

28. In order to prevent the exercise of undue discrimination, Champlain commits to holding an open-season for any transmission capacity that is not secured by anchor customers. Champlain also commits to offering the same rates, terms, and conditions given to anchor customers, to any open-season participant willing to purchase transmission capacity for the same term. Champlain states that to ensure transparency, the specific rules of the open season, detailed bidding guidelines, estimated rates, and precedent agreements will be posted on an Internet website and forwarded to interested parties. Champlain asserts that it will also provide public notice of the open season in appropriate trade publications, and, as with the open season conducted in *Chinook*, a successful bidder will have to meet reasonable credit requirements, identify the amount of transmission capacity and the length of term desired, and commit to a standard form of precedent agreement.²⁶ Champlain states that it will retain an independent third party consultant to conduct, evaluate, and rank the open season bids based on the greatest net present value to Champlain, including any proposed changes to the standard form precedent agreement.

29. Champlain explains that once the agreements have been executed, it will post on its website the winning bidder's name, quantity, and the expiration date of the transmission rights awarded, and the contact information of the bidder for the purposes of potential resale of the transmission rights. Champlain states that the results will be provided to the Commission within 30 days of the open season.²⁷ Champlain also makes the following commitments with respect to the continued operation of its Project: (1) books and records for the Project will comply with the Uniform System of Accounts in Part 101 of the Commission's regulations²⁸ and will be subject to examination as required in Part 41 of the regulations;²⁹ (2) Champlain will file financial statements and

²⁵ See *Montana Alberta Tie, Ltd.*, 116 FERC ¶ 61,071, at P 37 (2006) (*MATL*) (“[T]he Commission’s concern in evaluating the open season process is to provide transparency in the bidding process and to enable unsuccessful bidders to determine if they were treated in a fair manner.”).

²⁶ Champlain Application at 13-14.

²⁷ *Id.* at 14.

²⁸ 18 C.F.R. Part 101 (2010).

²⁹ *Id.* Part 41.

reports in accordance with Part 141 of the Commission's regulations;³⁰ and (3) Champlain's books and records will be audited by an independent auditor.³¹

(a) **Presubscription of 75 Percent of Capacity**

30. Champlain states there is good cause to grant its request to presubscribe 75 percent of the Project capacity to anchor shippers. Champlain points to the Commission's statement when it accepted a 50 percent presubscription proposal in *Chinook*; the Commission acknowledged the financing and cost recovery concerns faced by merchant transmission developers and reaffirmed its "commitment to fostering the development of merchant transmission projects through adoption of a more flexible approach toward negotiated rate applications."³² Employing this precedent, Champlain offers several justifications for its presubscription request.

31. First, Champlain notes that it is seeking a \$3 billion loan guarantee from the DOE³³ and is scheduled to meet with DOE in July 2010. Champlain states that it intends to secure the loan guarantee from DOE by demonstrating that it has the regulatory approvals necessary to execute 30-year contracts for 75 percent of the capacity of the Project.

32. Second, Champlain states that, while Blackstone is expected to commit \$800 million of private equity to the Project, Blackstone seeks assurances that Champlain can timely secure 30-year bilaterally-negotiated contracts. Champlain asserts that without the contracts, the Project will be exposed to unacceptable levels of risk for private equity investors, thereby likely causing Blackstone to cease continued participation.³⁴

³⁰ *Id.* Part 141.

³¹ Champlain Application at 14.

³² *Id.* at 3 (citing *Chinook*, 126 FERC ¶ 61,134 at P 44).

³³ The DOE loan guarantee program was authorized by the Title XVII of the Energy Policy Act of 2005 (EPAAct 2005) and funded by the American Recovery and Reinvestment Act of 2009 (ARRA). Champlain states that it has submitted a proposal in response to the DOE solicitation, Federal Loan Guarantees for Electric Power Transmission Infrastructure Investment Projects, Solicitation Number DE-FOA-0000132 (Jul. 29, 2009). Champlain states that its application was selected by DOE to proceed into Phase II of the loan guarantee program. Champlain Application at 16-18 (citing ARRA, Pub. L. No. 111-5, § 406, 123 Stat. 115, 145 (2009); and EPAAct 2005, § 1703, 42 U.S.C. § 16512 (2006)).

³⁴ Champlain Application at 18.

33. Third, Champlain describes the Project as uniquely situated due to its origin on the Canadian border and notes that vertically integrated Canadian utilities are likely to be the potential anchor customers, because they are the only sellers that control sufficient generation to support 30-year agreements. According to Champlain, an open-season for the full capacity would be impractical, inefficient, and cause unnecessary delay, given the very limited number of potential customers that would pass creditworthiness requirements and agree to a 30-year term.

34. Champlain states that, if 75 percent of the capacity is presubscribed to anchor customers for 30 year terms, this would free open-season participants to sign up for shorter terms for the remainder of capacity.

35. Champlain suggests that the Commission's acceptance of the proposal will likely motivate additional sources of private equity to follow Blackstone's lead and to support additional merchant transmission development.

36. Champlain states that "[p]recedent agreements with anchor customers will be negotiated at arm's length and will commit anchor customers to pay a negotiated rate for up to 1,500 MW of guaranteed firm transmission capacity for an expected term of 30 years."³⁵ Champlain explains that it commits to offer the same rates, terms, and conditions that are offered to anchor customers to any open season participant.

ii. Comments

37. In comments, Blackstone, Nalcor, and HQ Energy support Champlain's application for negotiated rate authority and its request for 75 percent presubscription of transmission capacity to anchor shippers. Further, Blackstone states that it supports Champlain's request for expedited action.

38. Nalcor explains that it intends to enter into negotiations to become an anchor customer on the Project to transmit substantial wind and hydroelectric energy currently under development. Nalcor and its subsidiaries own approximately 7,300 MW of installed generation capacity in Newfoundland and Labrador. Nalcor explains that it is planning to add 3,000 MW of new hydroelectric generation in Labrador and has significant wind resources. Nalcor states that it intends to increase its participation in the Northeast United States energy markets via its existing transmission service agreement with Hydro-Québec.³⁶

³⁵ *Id.* at 2 (emphasis added).

³⁶ Nalcor Comments at 2-4.

39. IPPNY urges the Commission to reject Champlain's application.³⁷ IPPNY argues that the application does not fulfill the Commission's open access requirements, characterizing the open season as a sham, because only Canadian generators will realistically be able to obtain interconnection and transmission service from the injection point in Canada.³⁸ Therefore, IPPNY contends that open access to the Project is not guaranteed because the Canadian injection point is outside of FERC jurisdiction and NYISO and ISO-NE control. IPPNY states that unlike two other Commission-approved merchant transmission lines linking Canada and the United States, this Project is not intended to wheel power from the United States into Canada.³⁹ IPPNY contends that the sole purpose of this line is to wheel power from Canada into the United States.⁴⁰ IPPNY argues that generation can only be wheeled from the injection point near Montreal, and, as a result, New York generators will be effectively precluded from accessing the Project. IPPNY asserts that a generator seeking to wheel power over an HVDC project must first convert its power from AC to direct current (DC) at a converter station and convert the power back at the point of delivery.⁴¹

iii. Answer

40. In its answer, Champlain affirms its intention to turn over operational control of the facilities to an ISO or RTO.⁴² Champlain counters IPPNY's claims that its open season will be a "sham" and that generators located in New York will lack access the Project at reasonable rates. Champlain responds that it intends to turn over operational control of the Project to NYISO and ISO-NE pursuant to tariff schedules to be filed with the Commission. Champlain avers that such an approach was recently accepted for another proposed HVDC line connecting Hydro-Quebec TransÉnergie's system to the

³⁷ IPPNY Protest at 3.

³⁸ IPPNY states that even assuming an open season would meet the Commission's open access requirements for merchant transmission lines, Champlain's proposal to allocate only 25 percent of the capacity of the line in an open season is inadequate to meet the Commission requirements. *Id.* at 4 n.7.

³⁹ *Id.* at 4 (citing *Sea Breeze Pacific Juan de Fuca Cable, LP*, 112 FERC ¶ 61,295 (2005) (*Sea Breeze*); *MATL*, 116 FERC ¶ 61,071).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Champlain Answer at 4.

United States.⁴³ According to Champlain, IPPNY's contention that transfer of operational control to NYISO and ISO-NE is meaningless and does not guarantee open access is unsupported. Champlain argues that IPPNY's position is inconsistent with the Commission's findings in *Northeast Utilities* regarding HVDC lines that emanate from Canada. Champlain also points out that the Commission has never required merchant transmission owners to provide economic analyses demonstrating whether certain individual generators will benefit from the development of new transmission projects.⁴⁴ Champlain asserts that it is complying with the Commission's requirements for an open season by engaging in a fair, transparent, and non-discriminatory process, including conducting the open season through experienced, independent third parties.⁴⁵

41. Champlain avers that, while Commission precedent does not require an applicant to identify anchor customers prior to seeking authority to offer transmission at negotiated rates, there is a demonstrated interest in its Project. Champlain cites those comments filed in support of its application in these proceedings as demonstrating interest in the Project.⁴⁶

iv. Commission Determination

42. The Commission looks specifically at the merchant transmission owner's open season and OATT commitments in determining whether negotiated rate authority could lead to undue discrimination on a particular merchant transmission project. The Commission agrees with Champlain that its proposal, as conditioned below, is consistent with *Chinook* and should not lead to undue discrimination.

43. We find unpersuasive IPPNY's arguments raising open access issues. Champlain will meet the Commission's open access requirements for merchant transmission by allocating capacity through an open process (filing the presubscription agreements and results of the open season, as described elsewhere in this order) and turning over control of its facilities to NYISO and ISO-NE to be operated under their OATTs. Once constructed and in operation, Champlain will become a public utility subject to the OATTs. With regard to IPPNY's concerns that access to the line in Canada is inconsistent with our open access policies, we note that IPPNY's allegations are vague

⁴³ *Id.* (citing *Northeast Utilities*, 127 FERC ¶ 61,179, *order on reh'g*, 129 FERC ¶ 61,279 (2009) (reviewing proposal for participant funded line from Canada to Southern New Hampshire)).

⁴⁴ *Id.*

⁴⁵ *Id.* at 5.

⁴⁶ *Id.* at 2.

and fail to establish that the proposal is inconsistent with our policies. The line will originate in Canada, on a transmission system operated under a reciprocity tariff.⁴⁷ Champlain has committed to turn over control of the Project to NYISO and ISO-NE, thus mitigating the opportunity to control or manipulate access to transmission service. Under Champlain's proposal, it will not be affiliated with any generation-owning transmission customer, and the Project will link the New York and New England markets to an established source of hydroelectric power, with a merchant developer bearing all financial risk. Furthermore, the results of precedent agreement negotiations with anchor customers and the open season will be provided to the Commission, and interested parties will have an opportunity to raise any concerns with the resulting agreements at that time.

44. Acceptance of Champlain's application is conditioned on Champlain making an informational filing with the Commission for any anchor customer transaction describing the terms of the agreement and the relevant facts and circumstances leading to the agreements.

45. Consistent with our findings in *Sea Breeze*, we find that the ownership and operation of the transmission facility, as well as wholesale sales made over the facility in interstate commerce, will be jurisdictional.⁴⁸ Champlain commits to an open season reporting requirement. As stated in *Chinook*, open seasons must be fair, transparent and non-discriminatory, and we will continue to require open season reports to be filed with the Commission shortly after the close of the open season. The reports must include, at the very least, the terms of the open season (including notice of the open season and the method for evaluating bids), the identity of the parties that purchased capacity, and the amount, term, and price of that capacity. This open season reporting requirement and the process by which parties are afforded an opportunity to file complaints will continue to be the primary tools by which the Commission ensures that merchant transmission developers do not unduly discriminate.⁴⁹ Based on the commitments and the conditions articulated herein, the Commission finds that Champlain's application provides sufficient assurances that approving negotiated rate authority for the Project does not pose a risk of undue discrimination.

46. The Commission evaluates all project proposals on their individual merits. Champlain's Project has unique characteristics in scope and function when compared to cables that are currently in operation. The proposed cable system will be among the

⁴⁷ The Commission has found that Hydro-Québec's transmission tariff meets the reciprocity requirements of Order No. 888. See *H.Q. Energy Services (U.S.) Inc.*, 79 FERC ¶ 61,152 (1997).

⁴⁸ *Sea Breeze*, 112 FERC ¶ 61,295 at 13-15.

⁴⁹ *Chinook*, 126 FERC ¶ 61,134 at P 41.

longest and highest capacity majority underground and subaqueous HVDC systems in the world.⁵⁰ It will transmit power to historically congested areas such as New York City and Connecticut and, therefore, has the potential to provide substantial economic benefits to these areas. In addition, Champlain's pursuit of DOE funding presents unique circumstances. Champlain has applied for a DOE loan guarantee that would provide \$3 billion in debt financing for the development of the Project. When considering whether to grant such a loan guarantee, DOE reviews factors that affect the success of the project, such as total costs of the project, financial information, (e.g., sources of equity and debt, credit history of the sponsor, and preliminary assessment of the project without loan guarantees) and the financial strength of the project sponsor, among other factors.⁵¹ To continue to be eligible for this financing, however, Champlain must meet a number of milestones. Included among these milestones are (1) a demonstrated establishment of long term agreements that will support the term and size of the debt financing, and (2) commencement of construction of the project by September 30, 2011.⁵² Granting Champlain's request for 75 percent presubscription could facilitate its expeditious achievement of these near-term milestones as well as allow it to demonstrate that it has the necessary regulatory approvals in advance of its July 2010 meeting with DOE. The Commission notes that no party has protested the 75 percent presubscription of capacity to anchor customers.

47. Therefore, given the specifics of the Project and the facts and commitments presented in the application, we accept Champlain's proposal to seek up to 75 percent presubscription from anchor customers.

48. In addition to the commitments made concerning the open season (e.g., posting winning bidders and amount and length of service, reporting results with the Commission), Champlain also commits to the following: (1) books and records for their respective projects will comply with the Uniform System of Accounts in Part 101 of the Commission's regulations⁵³ and will be subject to examination as required in Part 41 of

⁵⁰ "Subaqueous" here means buried under the floor of the body of water, as opposed to simply lying on the river bed.

⁵¹ The Commission is taking official notice of the factors required under the DOE Loan Guarantee Program pursuant to Rule 508(d) of the Commission's Rules of Practice, 18 C.F.R. § 385.508(d)(2010). The factors may be found in the DOE Loan Guarantee Solicitation Announcement, Federal Loan Guarantees for Commercial Technology Renewable Energy Generation Projects under the Financial Institution Partnership Program, Solicitation DE-FOA-0000166, pp. 83-87 (2009), available at <http://www.lgprogram.energy.gov/CTRE.pdf> .

⁵² Champlain Application at 16-17.

⁵³ 18 C.F.R. Part 101.

the regulations;⁵⁴ (2) Champlain will file financial statements and reports in accordance with Part 141 of the Commission's regulations;⁵⁵ and (3) Champlain's books and records will be audited by an independent auditor. These commitments will assist the Commission in carrying out its oversight role and in ensuring that Champlain continues to live up to the commitments discussed herein.

c. Undue Preference and Affiliate Concerns

49. In the context of merchant transmission, our concerns regarding the potential for affiliate abuse arise when the merchant transmission owner is affiliated with either the anchor customer, participants in the open season, and/or customers that subsequently take service on the merchant transmission line.

i. Champlain's Proposal

50. Champlain states that it satisfies any undue preference and affiliate concerns because none of its affiliates owns or operates electric facilities in NYISO or ISO-NE and the Project will not interconnect with any facilities owned by an affiliate of Champlain. Champlain further states that no anchor customers will be affiliated with Champlain, and it anticipates that no participant in the open season will be affiliated with Champlain. Champlain also states that it will employ safeguards eliminating any potential for affiliate abuse in the event that affiliates do participate in the open season. For example, Champlain states that it will file a post-open-season report with the Commission, maintain separate books of account and records in accordance with the Commission's regulations, turn over operational control of its facilities to ISO-NE and NYISO, file electric quarterly reports (EQR), use the independent consultant to evaluate open season bids, and comply with any applicable affiliate rules, among other commitments.⁵⁶

ii. Commission Determination

51. No party protested or filed adverse comments concerning affiliate preference. Based on this fact and in light of the commitments made in the application, we find that Champlain adequately addresses any affiliate concerns present at this early stage of the

⁵⁴ *Id.* Part 41.

⁵⁵ *Id.* Part 141.

⁵⁶ Champlain Application at 15.

Project. Furthermore, we accept Champlain's commitment to comply with Standards of Conduct and file EQRs of its transactions as required of transmission providers.⁵⁷

d. Regional Reliability and Operational Efficiency

52. Merchant transmission projects, like cost-based transmission projects, are subject to mandatory reliability requirements.⁵⁸ Merchant transmission developers are required to comport with all applicable requirements of the North American Electric Reliability Corporation (NERC) and any regional reliability council in which they are located.

i. Champlain's Proposal

53. Champlain states that it meets the regional reliability and operational efficiency requirements by turning over operational control of its facilities to NYISO and ISO-NE and committing to comply with all applicable reliability rules.

ii. Commission Determination

54. No party protested this issue. Champlain commits to turning over operational control of its Project to the NYISO and ISO-NE. Champlain also states that it will comply with applicable reliability requirements and procedures of NERC. Additionally, Champlain indicates that it has already entered into the reliability planning processes of both NYISO and ISO-NE, which provide an opportunity for all stakeholders to cooperatively provide input to the proposed Project. Accordingly, the Commission finds that Champlain has met the regional reliability and operational efficiency requirement subject to Champlain's continued participation in the regional planning processes.

2. Waiver Requests and Other Items

a. Champlain's Proposal

55. Champlain requests that the Commission grant it waivers of the same filing requirements that the Commission granted the merchant transmission providers in *Chinook*.⁵⁹ Specifically, Champlain requests waiver of the filing requirements in

⁵⁷ 18 C.F.R. § 35.10(b); *see also* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 817; Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 394.

⁵⁸ *See, e.g., Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

⁵⁹ Champlain Application at 22 (citing *Chinook*, 126 FERC ¶ 61,134 at P 68-69).

Subparts B and C of Part 35 of the Commission's regulations, except for sections 35.13(a) (filing of changes in rate schedules, tariffs or service agreements, general rule), 35.13(b) (general information to be filed with rate schedules), and 35.16 (notices of succession), and waiver of the Form No. 1, Annual Report of Major Electric Utilities, Licensee and Others, filing requirement.

b. Comments

56. Yonkers asserts in its protest that the Commission should limit its consideration of Champlain's request solely to the approval of the sale of transmission rights and not infringe on the jurisdictional rights of other federal, state, and local authorities.⁶⁰ Yonkers and Westchester argue that the Project is still in the early stages of the federal, state and local permitting processes and that Champlain has yet to receive approval from various federal, state and local entities.⁶¹ Yonkers argues that the filing is premature and observes that Champlain admits that its application to the New York Commission for a CPN "contains large gaps" and "has not paid the required application fee as the application has not been completely submitted."⁶² Yonkers argues that Champlain's filing lacks the necessary commitments required in *Chinook*.⁶³

57. Yonkers adds that it understands the time constraints Champlain faces and is not opposed to transmission development *per se*. However, Yonkers questions whether the facts in the proceeding demonstrate a need for expedited action, given the fact that various other proceedings will continue apace.⁶⁴ Accordingly, Yonkers requests that the Commission deny the requested approvals without prejudice.

c. Answer

58. In its answer, Champlain states that its application is not premature and the Project is entitled to expedited treatment under the Commission's policy. Champlain reiterates

⁶⁰ Yonkers Protest at 3.

⁶¹ *Id.*; see also Westchester Comments at 4.

⁶² Yonkers Protest at 5-6 (citing Champlain's March 29, 2010 application for a New York CPN).

⁶³ *Chinook*, 126 FERC ¶ 61,134.

⁶⁴ Yonkers states that it does not take a position at this time generally regarding the use of merchant transmission projects, negotiated rates, the NYISO planning process, or other related issues. Nevertheless, Yonkers reserves the right to file supplemental comments.

that it filed the application at this early stage because it needs up-front regulatory certainty as to its financing structure and the amount of long-term transmission capacity available to ensure further commitment of anchor customers.⁶⁵ Champlain contends that the Project is at a critical stage of debt financing and that Commission precedent does not require it to have completed other federal and state regulatory processes prior to seeking approval for negotiated rate authority.⁶⁶

d. Commission Determination

59. Because Champlain is proposing to charge negotiated rates, the regulations requiring the filing of cost-based data are not applicable. We note that Champlain omits section 35.13(a) from its waiver request. Section 35.13(a) governs, in part, requirements for abbreviated cost of service filings. As a merchant developer charging negotiated rates, these cost-based data are not applicable to Champlain. Because Champlain has requested “waiver of any other part of the Commission’s regulations as necessary,”⁶⁷ the Commission will grant waiver of the section 35.13(a) filing requirements. For good cause shown and consistent with our findings for other merchant transmission proposals, we will waive the filing requirements of Subparts B and C of Part 35 of the Commission’s regulations, except for the requirements of sections 35.12(a) (filing of initial rate schedules), 35.13(b) (general information to be filed with rate schedules), 35.15 (notices of cancellation or termination), and 35.16 (notices of succession). The Commission will grant Champlain’s requests for waiver of the Form No. 1 filing requirement.

60. Finally, in answer to Yonkers and Westchester, we agree with Champlain that Champlain is not required to complete other federal and state regulatory processes prior to seeking approval for negotiated rate authority. The Commission has previously considered requests for negotiated rate treatment for projects where the state siting authority had not yet authorized construction of the projects.⁶⁸ In such cases, applicants were still required to receive the necessary state permits and approvals.⁶⁹ In light of that precedent and based on the considerations discussed above, we will conditionally approve negotiated rate authority for the Project.

⁶⁵ Champlain Answer at 2.

⁶⁶ *Id.* at 3.

⁶⁷ Champlain Application at 22.

⁶⁸ *See, e.g., Xcel Energy Services, Inc.*, 121 FERC ¶ 61,284, at P 53 (2007).

⁶⁹ *Tres Amigas*, 130 FERC ¶ 61,207.

The Commission orders:

(A) Champlain is hereby granted authority to sell transmission rights at negotiated rates, subject to conditions as discussed in the body of this order.

(B) Champlain is hereby directed to file a report of the open season results with the Commission within 30 days of the end of the open season.

(C) The Commission grants Champlain's requests for waiver of the provisions of Subparts B and C of Part 35 of the Commission's regulations, with the exception of sections 35.12(a), 35.13(b), 35.15, and 35.16, as discussed in the body of this order.

(D) The Commission grants Champlain's request for waiver of the Form No. 1 filing requirement, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.