

139 FERC ¶ 61,003
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

International Transmission Company

Docket No. EC12-48-000

ORDER AUTHORIZING ACQUISITION AND DISPOSITION
OF JURISDICTIONAL FACILITIES

(Issued April 2, 2012)

1. On December 14, 2011, International Transmission Company (ITC) filed an application pursuant to section 203(a)(1) of the Federal Power Act (FPA)¹ requesting Commission authorization, on a prospective basis, for ITC's prior acquisition from DTE Energy Company (DTE Energy) of certain jurisdictional assets and prior transfer to DTE Energy of certain other jurisdictional assets. The Commission has reviewed the application under the Commission's Merger Policy Statement.² As discussed below, we will authorize the transfers on a prospective basis from the date of this order, as consistent with the public interest.

¹16 U.S.C. § 824b (2006).

² See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). See also *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253, 120 FERC ¶ 61,060 (2007) (Supplemental Policy Statement), *order on clarification*, 122 FERC ¶ 61,157 (2008). See also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). See also *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

I. Background

A. Description of ITC

2. ITC, a wholly-owned subsidiary of ITC Holdings Corp., owns, operates, and maintains approximately 2,800 circuit miles of transmission lines, 17,000 transmission towers and poles, and 155 stations and substations in southeast Michigan serving 5.1 million people. ITC is a transmission-owning member of the Midwest Independent Transmission System Operator, Inc. (MISO).

B. Description of the Closed Transactions

3. The facilities subject to the application are transmission facilities that have been transferred from DTE Energy³ to ITC and from ITC to DTE Energy. ITC describes three categories of jurisdictional transactions that took place in 2005 and 2007 (Closed Transactions). ITC argues that these sales and asset transfers were already addressed in the Commission's approval of prior transactions and agreements⁴ but is seeking FPA section 203 authorization for the Closed Transactions out of an abundance of caution.

4. The first transaction involves an August 12, 2005 Resolution of Disputed Matters (the 2005 Agreement) between ITC and DTE Energy. Under the 2005 Agreement, DTE Energy transferred to ITC certain assets that should have been classified as transmission while ITC transferred back to DTE Energy certain other assets that should have remained with DTE Energy as part of its distribution system when the Commission approved certain jurisdictional transfers in the 2000 SSA Order and the 2003 CIA Order. ITC states that some assets were not transferred at that time due to administrative error.

5. The 2005 Agreement provided for the following transfers: (1) nine transactions from DTE Energy to ITC valued at \$6,919,401; (2) the transfer of numerous assets from

³ DTE Energy is a diversified energy company involved in the development and management of energy-related business and services nationwide. Its operating subsidiary, Detroit Edison, generates and distributes electricity to 2.1 million customers in southeastern Michigan. DTE Energy is a non-transmission owning member of MISO.

⁴ ITC relies upon the Commission orders approving its Separation and Subscription Agreement (SSA) and the Coordination and Interconnection Agreement (CIA). Application at 1-2 (citing *DTE Energy Co.*, 91 FERC ¶ 61,317 (2000) (2000 SSA Order) (filed under section 203); *ITC Holdings Corp.*, 102 FERC ¶ 61,182 (2003) (2003 CIA Order) (filed under sections 203 and 205)).

ITC to DTE Energy valued at \$8,396,574; and (3) the reclassification of certain facilities leading to ITC's acquisition of additional assets valued at \$619,728.⁵

6. With respect to the second transaction, in an August 2007 Bill of Sale, DTE Energy transferred to ITC certain facilities and equipment at the Prizm Tap valued at \$1,586,647.⁶ ITC claims that the transfer was in accordance with the methodology the Commission previously approved in the 2003 CIA Order.⁷

7. With respect to the third transaction, in a November 2007 Bill of Sale, DTE Energy transferred to ITC certain facilities and equipment at the Cosmo Tap valued at \$2,207,366.⁸ ITC claims that the transfer was in accordance with the methodology the Commission previously approved in the 2003 CIA Order. The facilities and equipment included circuit breakers, disconnect switches, steel structure, and other related assets.⁹

II. Notice of Filing

8. Notice of the application was published in the *Federal Register*, 76 Fed. Reg. 80,356-7 (2011), with interventions and protests due on or before January 4, 2012. None was filed.

III. Discussion

A. Standard of Review Under Section 203

9. Section 203(a)(4) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest.¹⁰ The Commission's analysis of whether a transaction will be consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the

⁵ Application at Exh. I, 2005 Agreement at P 11.

⁶ Application at Exh. I., Aug. 2007 Bill of Sale.

⁷ Application at 6.

⁸ Application at Exh. I, Nov. 2007 Bill of Sale.

⁹ Application at 6.

¹⁰ 16 U.S.C. § 824b(a)(4) (2006).

effect on rates; and (3) the effect on regulation.¹¹ Section 203(a)(4) also requires the Commission to find that the transaction “will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.”¹² The Commission’s regulations establish verification and informational requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.¹³

10. Under section 203(a)(1)(B), a public utility must obtain authorization from the Commission prior to acquiring, merging, or consolidating facilities subject to the Commission’s jurisdiction. ITC claims that the transfers under the 2005 Agreement are consistent with the 2000 SSA Order and the 2003 CIA Order.¹⁴ However, Paragraph 11 of the 2005 Agreement acknowledges that these were not previously identified to the Commission.¹⁵ In addition, section 3.9 of the CIA explicitly provides that future transfers and classifications must be made in accordance with any required approvals by Governmental Authorities.¹⁶ While ITC may have applied the methodology approved in the 2003 CIA Order, neither the 2003 CIA Order nor the 2000 SSA Order authorized the transfer of these facilities. ITC also claims that, with respect to several jurisdictional transactions under the 2005 Agreement, prior Commission authorization was not required because the transactions had a value below \$50,000.¹⁷ Nonetheless, ITC should have, but did not, request authorization under FPA section 203 from the Commission prior to

¹¹ See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

¹² 16 U.S.C. § 824b(a)(4).

¹³ 18 C.F.R. § 33.2(j) (2011).

¹⁴ Application at 2.

¹⁵ Application at Exh I, 2005 Agreement at P 11.

¹⁶ Joint Application of ITC Holdings Corp., Docket Nos. EC03-40 and ER03-343, Vol. 3 of 3, Exh. F, CIA at 15, § 3.9 (Dec. 24, 2002).

¹⁷ Application at 2, n.7. Prior to Order No. 669, section 33.1(a)(2) of the Commission’s regulations provided that a public utility was required to seek prior authorization to acquire facilities under FPA Section 203 if the value of the facilities exceeded \$50,000.

effectuating the transfers of other jurisdictional assets with a value greater than \$50,000. Accordingly, contrary to the requirements of FPA section 203, ITC failed to obtain Commission authorization in a timely manner.¹⁸

B. Analysis Under Section 203

1. Effect on Competition – Horizontal Market Power

11. ITC states that the Closed Transactions involve no disposition of any generating assets, thus there is no change in market concentration for generation. Therefore, ITC argues that there are no horizontal market power concerns raised as a result of the Closed Transactions.

12. We find that the Closed Transactions do not raise horizontal market power concerns. Applicants have demonstrated that, because the Closed Transactions do not involve the disposition of generating assets, the Closed Transactions do not affect the relevant geographic markets.

2. Effect on Competition – Vertical Market Power

13. ITC states that transmission service over facilities developed and owned by it (including the assets subject to the Closed Transactions) is provided pursuant to the MISO Open Access Transmission Tariff (Tariff). Therefore, ITC argues that there are no vertical market power concerns raised as a result of the Closed Transactions

14. Applicants have shown that the Closed Transactions will not harm competition. ITC has turned operational control of its transmission facilities over to MISO. Turning over operational control of transmission facilities to an independent entity mitigates any concerns about transmission-related vertical market power because it eliminates a

¹⁸ ITC and its affiliates have submitted 10 filings under FPA section 203 that are between five months and six years and four months late. *See* Docket Nos. EC11-108, EC12-6, EC12-10, EC12-11, EC12-12, EC12-13, EC12-15, EC12-21, EC12-44 and EC12-48. With respect to the lateness and the volume of late filings by ITC and its affiliates, we have referred this matter to the Commission's Office of Enforcement for further examination and inquiry as may be appropriate. ITC is reminded that it must submit required filings on a timely basis or face possible sanctions by the Commission.

company's ability to use its transmission system to harm competition.¹⁹ As a result, we find that the Closed Transactions do not raise any vertical market power concerns.

3. Effect on Rates

15. ITC states that no adverse effect on rates has resulted or will result from the Closed Transactions. ITC states that it provides transmission service pursuant to the MISO Tariff. ITC further asserts that transmission customers using the facilities to receive such service are protected because the facilities were transferred to ITC's transmission rate accounts at their current net book value.²⁰ ITC also states that the total net plant balance of the acquisition represents only approximately one percent of its total net transmission plant, thus any effect on the transmission revenue requirement as a result of the Closed Transactions is *de minimis*. ITC asserts that the very slight increase in its transmission plant should be offset by a corresponding decrease in DTE Energy's distribution plant resulting in a nearly equal offset to DTE Energy's customers.

16. Also, ITC offers a hold harmless commitment. Under its hold harmless commitment, ITC pledges to hold transmission customers harmless from any costs associated with the Closed Transactions for a period of five years to the extent that such costs exceed savings related to the Closed Transactions.²¹

17. We accept ITC's hold harmless commitment, which we interpret to include all transaction-related costs.²² We note that nothing in the application indicates that rates to

¹⁹ See, e.g., *National Grid plc and KeySpan Corp.*, 117 FERC ¶ 61,080, at P 45 (2006) (*National Grid*).

²⁰ ITC states that the assets were conveyed at 1.80 times the net book value consistent with the CIA, but the 1.80 premium was recorded to non-rate base account. Application at 9.

²¹ Application at 10.

²² Transaction-related costs do not include any acquisition premium (or acquisition adjustment), including goodwill, associated with the Closed Transactions. The Commission has stated that it "historically has not permitted rate recovery of acquisition premiums." Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,126. Any acquisition premium (or acquisition adjustment) associated with the Closed Transactions is not permitted to be included in rates absent Commission approval in a section 205 rate filing. *Duke Energy*, 86 FERC ¶ 61,227, at 61,816 (1999) (citing *Mid-Louisiana Gas Company*, 7 FERC ¶61,316 at p. 61,682, *rehearing denied*, 8 FERC ¶61,227 (1979), *aff'd*

(continued...)

customers will increase as a result of the Closed Transactions, and no customer argues otherwise. The Commission will be able to monitor ITC's hold harmless commitment under the books and records provision of PUHCA 2005²³ and its authority under section 301(c) of the FPA, and the commitment is fully enforceable based on the Commission's authority under section 203 of the FPA.²⁴

18. If ITC sought or seeks to recover transaction-related costs through its transmission rates within five years of consummation of the Closed Transactions, it must submit a compliance filing that details how it is satisfying the hold harmless requirement. If ITC sought or seeks to recover transaction-related costs in an existing formula rate that allows for such recovery, then that compliance filing must be filed in the section 205 docket in which the formula rate was approved by the Commission, as well as in the instant 203 docket.²⁵ We also note that, if ITC sought or seeks to recover transaction-related costs in a filing within five years of consummation of the Closed Transactions whereby it is proposing a *new* rate (either a new formula rate or a new stated rate), then that filing must be made in a *new* section 205 docket as well as in the instant section 203 docket.²⁶ The Commission will notice such filings for public comment. In such filings, ITC must: (1) specifically identify the transaction-related costs it is seeking to recover, and (2) demonstrate that those costs are exceeded by the savings produced by the Closed Transactions, in addition to any requirements associated with filings made under section 205. Such a hold harmless commitment will protect customers' transmission rates from being adversely affected by the Closed Transactions.

sub nom. Transcontinental Gas Pipe Line Corp. v. FERC, 652 F.2d 179 (D.C. Cir. 1981))(rate recovery of an existing facility is generally limited to the original cost of the facility).

²³ Public Utility Holding Company Act of 2005, 42 U.S.C. § 16451 *et seq.* (2006) (PUHCA 2005).

²⁴ See *PPL Corporation and E.ON U.S. LLC*, 133 FERC ¶ 61,083 (2010); *ITC Midwest LLC and Northern States Power Company*, 133 FERC ¶ 61,169 (2010); and *BHE Holdings Inc. and Maine & Maritimes Corporation*, 133 FERC ¶ 61,231 (2010).

²⁵ In this case the filing would be a compliance filing in both the section 203 and 205 dockets.

²⁶ In this case the filing would be a compliance filing in the section 203 docket, but a rate application in the section 205 docket.

19. Accordingly, in light of these considerations and requirements, we find that the Closed Transactions will not adversely affect rates.

4. Effect on Regulation

20. ITC states that the Closed Transactions will have no adverse effect on federal regulation because ITC will remain subject to the Commission's jurisdiction under the FPA. At the state level, ITC states that the Closed Transactions will not have an adverse effect as the transmission assets are located entirely in the state of Michigan.

21. We find no evidence that either state or federal regulation will be impaired by the Closed Transactions. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap at the federal or state level.²⁷ We find that the Closed Transactions will not create a regulatory gap at the federal level because the Commission will retain its regulatory authority over the companies after the transaction. The Commission stated in the Merger Policy Statement that it ordinarily will not set the issue of the effect of a transaction on state regulatory authority for a trial-type hearing where a state has authority to act on the transaction. However, if the state lacks this authority and raises concerns about the effect on regulation, the Commission stated that it may set the issue for hearing, and that it will address such circumstances on a case-by-case basis.²⁸ We note that no party alleges that regulation would be impaired by the Closed Transactions, and no state commission has requested that the Commission address the issue of the effect on state regulation.

5. Cross Subsidization

22. ITC states that, based on facts and circumstances known to it or that are reasonably foreseeable, the Closed Transactions will not result in, at the time of the transaction or in the future, cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company. Specifically, ITC states that:

(a) ITC's utility assets are not pledged or encumbered except as through general bond issuances such as those routinely used by utilities to raise capital. ITC will not be issuing additional debt or equity to fund the [Closed Transactions] and the assets subject to the [Closed Transactions] will not be

²⁷ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

²⁸ *Id.* FERC Stats. & Regs. ¶ 31,044 at 30,125.

pledged or encumbered in any manner different from that applicable to ITC's utility assets generally.

(b) The [Closed Transactions] will not result in “[a]ny transfer of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company” because (i) the only facilities to be transferred pursuant to the [Closed Transactions] are the Transmission Assets, which will be transferred from Consumers [sic] to ITC, and (ii) Consumers [sic] is neither an associate company nor an affiliate of ITC.

(c) The [Closed Transactions] will not result in “[a]ny new issuance of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company” because, as noted above, ITC will not be issuing additional debt or equity to fund the [Closed Transactions].

(d) The [Closed Transactions] will not result in “[a]ny new affiliate contract between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the Federal Power Act.”²⁹

23. Based on our review of the representations as presented in the application, we find that the Closed Transactions will not result in cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company. We note that no party has argued otherwise.

24. When a controlling interest in a public utility is acquired by another company, whether a domestic company or a foreign company, the Commission's ability to adequately protect public utility customers against inappropriate cross-subsidization may be impaired unless it has access to the acquirer's books and records. Section 301(c) of the FPA gives the Commission authority to examine the books and records of any person who controls, directly or indirectly, a jurisdictional public utility insofar as the books and records relate to transactions with or the business of such public utility. In addition, ITC

²⁹ Application, Exh. M.

is subject to the record-keeping and books and records requirements of PUHCA 2005. The approval of this transaction is based on such ability to examine books and records.

C. Accounting Analysis

25. ITC must account for the transaction in accordance with Electric Plant Instruction No. 5 and Account 102, Electric Plant Purchased or Sold, of the Uniform System of Accounts. ITC shall submit updated final accounting entries in Docket No. AC08-126-000 within 30 days of the date of this order, and the accounting submission shall provide all the accounting entries and amounts related to the transaction along with narrative explanations describing the basis for the entries.

D. Other Considerations

26. Information and/or systems connected to the bulk power system involved in this transaction may be subject to reliability and cyber security standards approved by the Commission pursuant to FPA section 215. Compliance with these standards is mandatory and enforceable regardless of the physical location of the affiliates or investors, information databases, and operating systems. If affiliates, personnel or investors are not authorized for access to such information and/or systems connected to the bulk power system, a public utility is obligated to take the appropriate measures to deny access to this information and/or the equipment/software connected to the bulk power system. The mechanisms that deny access to information, procedures, software, equipment, etc., must comply with all applicable reliability and cyber security standards. The Commission, NERC or the relevant regional entity may audit compliance with reliability and cyber security standards.

27. Order No. 652 requires that sellers with market-based rate authority timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. The foregoing authorization may result in a change in status.

The Commission orders:

(A) The Closed Transactions are hereby authorized on a prospective basis from the date of this order, as discussed in the body of this order.

(B) ITC must inform the Commission within 30 days of any material change in circumstances that departs from the facts the Commission relied upon in granting the application.

(C) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts,

valuation, estimates or determinations of costs, or any other matter whatsoever now pending or which may come before the Commission.

(D) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

(E) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(F) If the Closed Transactions result in changes in the status or the upstream ownership of ITC's affiliated qualifying facilities, if any, an appropriate filing for recertification pursuant to 18 C.F.R. § 292.207 shall be made.

(G) ITC shall adhere to the accounting requirements discussed at P 25 in the body of the order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.