139 FERC ¶ 61,020
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Zephyr Power Transmission, LLC, Pathfinder Power Transmission, LLC, and Duke-American Transmission Company, LLC — Docket No. EL12-22-000

ORDER AUTHORIZING PROPOSAL

(Issued April 6, 2012)

1. On January 30, 2012, Zephyr Power Transmission, LLC (Zephyr), Pathfinder Power Transmission, LLC (Pathfinder Transmission), and Duke-American Transmission Company, LLC (Duke-ATC) (collectively, Applicants) filed a petition for declaratory order requesting to transfer negotiated rate authority the Commission previously granted to the Zephyr merchant transmission project (Project) in 2009 [1] to a new owner, and requesting confirmation of capacity rights on the Project. In this Order, the Commission authorizes Zephyr to charge negotiated rates for transmission rights on the Project, under its new ownership, and grants Applicants' requested waivers, as discussed below.

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[1] *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134 (February 19 Order), *order on reh'g*, 128 FERC ¶ 61,074 (2009) (2009 Rehearing Order).

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.*, *Southern Cross Transmission LLC*, 137 FERC ¶ 61,207 (2011) (*Southern Cross*); *Hudson Transmission Partners, LLC*, 135 FERC ¶ 61,104 (2011); *Champlain Hudson Power Express, Inc.*, 132 FERC ¶ 61,006 (2010) (*Champlain Hudson*); February 19 Order, 126 FERC ¶ 61,134.

I. Background

A. The Applicants

2. Zephyr is a Delaware limited liability company established to develop and finance the Project. When the Commission granted the requested negotiated rate authority, Zephyr was a wholly-owned subsidiary of NorthernLights, Inc., an indirect wholly-owned subsidiary of TransCanada Corporation (TransCanada). Applicants state that Zephyr does not own any physical transmission facilities or have any rate schedules on file with the Commission, and, therefore, is not currently a public utility under section 201 of the Federal Power Act (FPA).[2]

3. Pathfinder Transmission was established by Pathfinder Renewable Wind Energy, LLC (Pathfinder Wind) to acquire ownership of the project on a temporary basis, as discussed below. Pathfinder Wind is a Wyoming company that owns and operates Wyoming's Pathfinder Ranch and is developing a 2,100 MW wind generation project near Chugwater, Wyoming. Applicants state that neither Pathfinder Transmission nor Pathfinder Wind is a public utility under the FPA.[3]

4. Duke-ATC was formed in April, 2011 to develop, build, and operate transmission facilities across the U.S. Duke-ATC is jointly owned by Duke Energy Transmission Holding Company, LLC (Duke Energy Transmission) and American Transmission Company, LLC (ATC). Equity ownership of Duke-ATC is divided equally between Duke and ATC. Applicants also state that Duke-ATC has no FERC jurisdictional facilities and is not a public utility.

5. Duke-ATC is a subsidiary of Duke Energy Corporation (Duke Energy Corporation), an electric utility holding company. Duke Energy Corporation's regulated utility operations serve approximately four million customers in five states in the Southeast and Midwest. Duke Energy Corporation's commercial power and international business segments own and operate diverse power generation assets in North America and Latin America. Applicants state that Duke Energy Corporation affiliates own and operate the following wind generation facilities in Wyoming: (1) the 29 MW Happy Jack project, the output of which is sold to Cheyenne Light, Fuel and Power; (2) the 42 MW Silver Sage Project, the output of which is sold to Cheyenne Light, Fuel and Power and to Platt River; (3) the 99 MW Campbell Hill project, the output of which is sold to PacifiCorp; and (4) the 200 MW Top of the World project, the output of which is also

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[2] Petition at 3.

[3] *Id*. at 4.

sold to PacifiCorp. Applicants add that Duke Energy Corporation has optioned property in Platte County Wyoming for another project called Little Rose, but this project is in the early stage of development.[4]

6. ATC is a multi-state, independent transmission-only company. ATC has invested $2.5 billion in constructing and reconstructing nearly 2,000 miles of transmission over the past ten years in four states: Wisconsin, Michigan, Minnesota, and Illinois. ATC owns and operates 9,440 miles of transmission lines and 515 substations.[5]

B. History of the Project

7. On December 19, 2008, in Docket No. ER09-433-000, Zephyr filed a request for authorization to charge negotiated rates for the Project, a proposed 1,100-mile, 500kV high voltage direct current transmission line originating in southeast Wyoming and terminating south of Las Vegas, Nevada.[6] The Project is expected to be capable of delivering approximately 3,000 MW of generation to the southwestern United States. On February 19, 2009, the Commission granted Zephyr's request to pre-subscribe 50 percent of the Project's transmission capacity to an anchor customer and to sell the remaining 50 percent of transmission capacity in an open season process, subject to conditions. The Commission also granted Zephyr's requested waivers of the Commission's filing requirements.[7]

8. Applicants state that after the Commission granted the negotiated rate authority, Zephyr and its original potential anchor customer were unable to reach an agreement; therefore, Zephyr offered all 3,000 MW of transmission capacity in an open season in 2010. The open season resulted in all of the Project's capacity being allocated to three potential customers: Pathfinder Wind, 2,100 MW; BP Wind Energy North America, LLC (BP Wind), 500 MW; and Horizon Wind Energy, LLC (Horizon Wind), 400 MW. The three potential customers and Zephyr entered into precedent agreements that specified the terms and conditions for transmission service on the Project. The parties intended that the precedent agreements would be replaced with transmission service

[4] *Id*. at 5 n.3.

[5] *Id*. at 5.

[6] The Project is now proposed to be 975 miles long originating near Chugwater, Wyoming and terminating south of Las Vegas, Nevada in the Eldorado Valley with an interconnection to the California Independent System Operator.

[7] February 19 Order, 126 FERC ¶ 61,134 at PP 68-69.

agreements when Zephyr's open access transmission tariff (OATT) became effective. The three potential customers also entered supplemental agreements with TransCanada under which TransCanada was granted certain rights to terminate the Project, and the customers were granted "step in" rights to acquire Zephyr and take over development of the Project in the event TransCanada exercised its termination rights. On May 20, 2010, Zephyr filed with the Commission an open season report prepared by an independent evaluator.[8]

C. Transfers of the Project's Ownership

9. In June 2010, TransCanada exercised its right to terminate the precedent agreements and withdrew from the Project. Applicants state that because BP Wind and Horizon were not prepared to purchase a share of the Project, on July 27, 2011, Pathfinder Wind exercised its step-in option, and through its newly formed affiliate, Pathfinder Transmission, acquired 100 percent of TransCanada's ownership interest in Zephyr.[9] Subsequently, both Horizon and BP Energy withdrew from participation in the Project. As a result, 900 MW of the Project's transmission capacity was un-contracted.

10. Applicants explain that Pathfinder Transmission's intention in purchasing Zephyr was to assume ownership of the Project temporarily until it could find a replacement transmission developer to acquire Zephyr and resume the active development of the Project. Applicants note that Pathfinder Transmission has no interest in remaining in the

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[8] Zephyr filed an interim open season report on April 19, 2010 and a final report on May 10, 2010. Report on the Open Season for Zephyr Power Transmission, LLC, Docket No. ER09-433-000, filed May 20, 2010 (Open Season Report). In the Open Season Report, Zephyr states that the open Season was held from October 13, 2009 to March 10, 2010 and that it engaged Boston Pacific Company Inc. (Boston Pacific) as an independent evaluator. Among other things, Boston Pacific participated in the design of open season processes, and once the open season started, monitored communications with potential bidders and TransCanada's determinations about bidder's creditworthiness. The Open Season Report also indicates that Boston Pacific monitored, in-person, the receipt of bids and then independently evaluated bids and determined capacity allocations following the pre-established methodology. Zephyr states that Boston Pacific verified that Zephyr fully complied with nine commitments specified in the February 19 Order to ensure that the open season is conducted without undue discrimination. *See* Open Season Report at 1-2.

[9] Petition at 7. Applicants state that Pathfinder Transmission and Pathfinder Wind share no employees.

transmission business and did not attempt to exercise any of the rights that the Commission granted to Zephyr.

11. According to Applicants, in August 2011, Duke-ATC expressed interest in acquiring the Project. On December 16, 2011, Duke-ATC, Pathfinder Transmission, and Pathfinder Wind negotiated two primary agreements.[10] First, Duke-ATC and Pathfinder Transmission entered into a Membership Interest Purchase Agreement (Purchase Agreement), under which Pathfinder Transmission agreed to sell its 100 percent ownership interest in Zephyr and all rights to the Project to Duke-ATC. Applicants state that the Purchase Agreement requires Duke-ATC and Pathfinder Transmission to obtain the Commission's approval for the transfer of Zephyr's negotiated rate authority from TransCanada to Duke-ATC. Applicants also explain that, although the Purchase Agreement provides for an immediate transfer of ownership of Zephyr to Duke-ATC for a nominal consideration, the Purchase Agreement contemplates that Duke-ATC will have until October 1, 2012, to complete the open season for the un-contracted 900 MW of Project transmission capacity. If the capacity is not subscribed by October 1, 2012, Duke-ATC has the right to terminate its participation in the Project, and Pathfinder Transmission will have an option to repurchase the Project and attempt to complete the Project with another transmission developer.

12. Second, Pathfinder Wind and Duke-ATC entered into a restated precedent agreement (New Precedent Agreement) based on the precedent agreement Pathfinder Wind and Zephyr executed when TransCanada owned the Project. According to Applicants, the New Precedent Agreement updates some of the terms of the original precedent agreement, including amending the parties' termination rights prior to construction and clarifying certain of the parties' rights and obligations during the development phase of the Project. Applicants state that the New Precedent Agreement does not change the formula rates, terms, and conditions of transmission service for the Project when it enters into commercial operation from the terms and conditions of service established in the 2010 open season process. Under the New Precedent Agreement, Pathfinder Wind retains the 2,100 MW of the Project's capacity that it was awarded in the 2010 open season. In addition, the New Precedent Agreement requires Duke-ATC to file an OATT more than one year before the Project enters into service, and it requires Duke-ATC and Pathfinder Wind to enter into a transmission service agreement under the Zephyr OATT that will supersede the New Precedent Agreement before Project

[10] *Id*. at 8. A third agreement sets forth Duke-ATC's obligation to assume certain contingent obligations that Pathfinder Wind has to TransCanada in the event that the Project achieves commercial operation. *See id.* at 8 n.6.

construction begins.[11] The parties closed on the Purchase Agreement and the New Precedent Agreement on the same day they were executed, subject to a condition that the Commission would approve the Petition.

13. Applicants state that although Duke-ATC is now the conditional owner of the Project, it has not taken any action to exercise the negotiated rate authority that the Commission previously granted to Zephyr and will not do so unless and until the instant petition is granted.

D. Requested Relief

14. In their Petition, Applicants request the following: (1) confirmation that Zephyr may continue to exercise the negotiated rate authority the Commission granted to it in 2009 in light of the transaction under which Duke-ATC has become the new one hundred percent owner of Zephyr; and (2) an order revising Zephyr's 2009 negotiated rate authority to allow Zephyr to enter into a the Precedent Agreement with Pathfinder Wind as a bilaterally negotiated anchor customer contract; or in the alternative, an order allowing Zephyr and Pathfinder Wind to continue to give effect to the results of the open season that Zephyr held in 2009 when Zephyr was owned by an affiliate of TransCanada. Applicants also seek waivers of certain filing requirements under the Commission's regulations.

15. Applicants argue that the change in Zephyr's ownership from TransCanada to Pathfinder Transmission and now to Duke-ATC did not produce any material change affecting the factors that the Commission relied upon in the February 19 Order in granting Zephyr negotiated rate authority. Nevertheless, Applicants offer support for their requests by evaluating their proposal for the Project under the four-factor analysis set forth in the February 19 Order, as discussed below.

II. Notice of Filing and Responsive Pleadings

16. Notice of Applicants filing was published in the *Federal Register*, 76 Fed. Reg. 58,806 (2011), with interventions or protests due on or before February 21, 2012. PacifiCorp filed a motion to intervene,[12] and Applicants filed an answer to PacifiCorp's motion to intervene.

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[11] *Id*. at 9.

[12] Although PacifiCorp labeled its filing as a motion to intervene, it included comments that raise substantive issues; therefore we will treat it as a protest for the purposes of Rule 213 of the Commission's Rules of Practice and Procedure.

17. PacifiCorp states that it has not yet formulated its position in this proceeding, noting that Attachment A to the Petition indicates that the interconnection point for the project has been modified from Medicine Bow to Chugwater, Wyoming. PacifiCorp explains that, while it is not formally protesting the Petition at this time, it "is concerned that Applicants have failed to provide an adequate level of information (e.g. the New Precedent Agreement) about the Project for potentially affected systems to have a clear understanding as to any possible impacts."[13] In response, Applicants argue that PacifiCorp's concerns are outside the scope of this proceeding and should be dismissed.

III. Discussion

A. Procedural Matters

18. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the timely, unopposed motion to intervene serves to make the entity that filed it a party to this proceeding.

19. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept Zephyr's answer and will, therefore, reject it.

B. Negotiated Rate Authority

20. As an initial matter, we find PacifiCorp's comments regarding the sufficiency of information Applicants provided in their Petition to be misplaced. As discussed below, Applicants have provided sufficient information for the Commission to determine whether to grant their negotiated rate authority request. Furthermore, PacifiCorp and other interested market participants will have an opportunity raise any concerns regarding how the Project may affect their systems when the Project is considered in the Western Electricity Coordinating Council (WECC) project coordination and project rating review processes.

21. We now turn to Applicants' request for negotiated rate authority. In the February 19 Order, the Commission granted Zephyr negotiated rate authority based on the circumstances present at that time, including the Project's ownership structure and affiliations.[14] Although the Project's planned structure remains essentially the same as it

[13] PacifiCorp Motion to Intervene at 3.

[14] In the February 19 Order, the Commission explained that it would "evaluate any proposal to allocate all or a portion of initial capacity outside of an open season on a

(continued…)

was when Commission issued the February 19 Order, the Project's upstream ownership has changed since that time. Additionally, Zephyr already held an initial open season for capacity on the Project that resulted in subscription of capacity to Pathfinder Wind. Therefore, due to the changed circumstances, the Commission will conduct a *de novo* analysis to determine if the Project, as currently structured, meets the requirements for a grant of negotiated rate authority, as discussed below.

22. The Commission has demonstrated a commitment to fostering the development of merchant transmission 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.[15] 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.[16] This approach simultaneously acknowledges the financing realities faced by merchant transmission developers and mandates of the FPA and the Commission's open access requirements. Moreover, this approach allows the Commission to use a consistent 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.

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case-by-case basis to ensure that merchant transmission developers do not act in an unduly discriminatory manner in allocating initial capacity." February 19 Order, 126 FERC ¶ 61,134 at P 42.

[15] *See, e.g., TransEnergie U.S., Ltd.*, 91 FERC ¶ 61,230, at 61,838-39 (2000) (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); *Hudson Transmission*, 135 FERC ¶ 61,104 (authorizing Hudson Transmission to charge negotiated rates for transmission service).

[16] February 19 Order, 126 FERC ¶ 61,134 at P 37.

1. Four-factor Analysis

a. Just and Reasonable Rates

23. To approve negotiated rates for a transmission project, the Commission must find that the rates are just and reasonable.[17] 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. Additionally, the Commission must determine whether the project is being built within the footprint of the merchant transmission owner's (or an affiliate's) traditionally regulated transmission system; if so, the Commission must determine that 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 region where the project is to be located, what alternatives customers have, whether the merchant transmission owner is capable of erecting any barriers to entry among competitors, and whether the merchant transmission owner would have any incentive to withhold capacity.

i. Applicants' Proposal

24. Applicants state that under Duke-ATC's ownership, negotiated rates will be just and reasonable, consistent with the Commission's findings in the February 19 Order. According to Applicants, Zephyr will bear all market risk for the Project and will not have any captive customers to whom it can transfer cost responsibility. Applicants add that Zephyr, Duke-ATC, Duke Energy Corporation, and ATC have no affiliates in WECC that own transmission facilities or have any open access obligations.[18]

25. Applicants also state that, although Duke Energy Corporation and ATC have affiliates with captive customers located in the eastern interconnection, under existing law neither Duke Energy Corporation nor ATC can impose Zephyr's costs on those captive customers. Applicants assert that Duke Energy Corporation and ATC commit that they will not make any filing or take other action that attempts to impose any of the Project's costs on their captive customers.[19] Applicants also contend that Duke Energy Corporation's and ATC's affiliates' ownership of transmission facilities in the eastern interconnection cannot affect their exercise of negotiated rate authority, because the

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[17] *See Champlain Hudson*, 132 FERC ¶ 61,006 at P 17.

[18] Petition at 12.

[19] *Id*. at 11.

OATTs they administer cannot provide a cost-based alternative to Zephyr, and these companies do not have any obligation to provide transmission service or build new transmission facilities in the region where Zephyr is located or any other part of WECC.

26. In addition, Duke-ATC confirms the commitment Zephyr made under its prior ownership to provide non-discriminatory service pursuant to a Commission approved OATT, including firm tradable secondary transmission rights. Duke-ATC also commits that Zephyr will establish an Open Access Same-Time Information System (OASIS) to facilitate the trading of the secondary transmission rights.[20]

27. Finally, consistent with the Commission's finding in the February 19 Order, Applicants state that the potential expansion of transmission facilities on neighboring utilities' systems under their OATTs will discipline the rates that Zephyr may charge.[21] Applicants argue that Zephyr's change of ownership does not affect the Commission's finding that the prices Zephyr can charge for transmission service over the Project will be constrained by the differential of prices for power at both ends of the Project.[22]

ii. Commission Determination

28. The Commission finds that Applicants' proposal supports a finding that negotiated rates for service on the Project will be just and reasonable. Zephyr meets the definition of a merchant transmission owner because it assumes all market risk associated with the Project. In addition, Zephyr is a new entrant to the transmission market in the western interconnection. Furthermore, although Duke Energy Corporation owns and operates transmission facilities in the Eastern Interconnection, Duke-ATC, Duke Energy Corporation, ATC and their affiliates do not own transmission in the Western Interconnection. Therefore, they lack the ability to pass on any costs to captive ratepayers.

29. Additionally, Zephyr commits to provide non-discriminatory service pursuant to the OATT requirements in Order No. 890, including firm tradable secondary transmission rights and establish an OASIS to facilitate the trading of those secondary transmission rights.

30. We also note that no entity at either end of the Project is required to purchase transmission service from Zephyr, and customers will only do so if it is cost-effective.

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[20] *Id*.

[21] *Id*. at 12 (citing February 19 Order, 126 FERC ¶ 61,134 at PP 58-59).

[22] *Id*. at 12-13 (citing February 19 Order, 126 FERC ¶ 61,134 at P 58).

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.[23]

31. As the Commission noted in the February 19 Order, another disciplining force on the negotiated rates that Zephyr will be able to charge is the cost of expansion on neighboring utilities.[24] Pursuant to their OATTs, public utilities have an obligation to expand their transmission capacity upon request, at cost-based rates.[25] Therefore, the cost of expansion provides additional downward pressure on the negotiated rates that Zephyr will charge. Additionally, neither Duke-ATC nor its affiliates own any transmission facilities within WECC and, although Duke Energy Corporation owns generation facilities within the region of the Project, the output of Duke Energy Corporation's Wyoming wind generation facilities is fully committed under long-term contracts to third parties, and transmission arrangements already exist for them.[26] In addition, Duke-ATC, Duke Energy Transmission, and ATC commit that neither they nor any of their affiliates will participate in the Project's open season unless the Commission issues an order authorizing such participation.[27] Accordingly, Zephyr has no ability to erect barriers to entry or exercise market power in the relevant market. These factors lead us to conclude that the requested negotiated rate authority is just and reasonable for service on the Project.[28]

b. <u>Undue Discrimination</u>

32. As explained in the February 19 Order, the Commission primarily looks at two factors to ensure that applicants cannot exercise undue discrimination when approving negotiated rate authority: (1) the terms and conditions of a merchant developer's open

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[23] *E.g.*, *Tres Amigas LLC*, 130 FERC ¶ 61,207, at P 64 (2009).

[24] February 19 Order, 126 FERC ¶ 61,134 at P 58.

[25] *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).

[26] Petition at 5.

[27] *Id*. at 16.

[28] *Id*. at 13.

season; and (2) its OATT commitments (or in the RTO/ ISO context, its commitment to turn operational control over to the RTO or ISO).[29] The Commission requires merchant transmission owners to file reports on the open season results shortly after the close of the open 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.[30]

i. Applicants' Proposal

(a) Allocation of Capacity

33. Applicants state that, under the Purchase Agreement and the New Precedent Agreement, Pathfinder Wind will retain the 2,100 MW of transmission capacity it was awarded in the 2009 open season, under the same formula rate and terms and conditions for transmission service that were in the original precedent agreement, subject to Zephyr's OATT filing and subject to certain renegotiated rights and obligations related to the development phase of the project.[31] In addition, Zephyr and Duke-ATC commit to use a non-discriminatory open season process to offer the remaining 900 MW of the Project's transmission capacity in an open season process that complies with the requirements of the February 19 Order. Applicants state that the open season will be monitored by a third party that will prepare an open season report for submission to the Commission.

34. Applicants also commit to offering transmission service to qualifying bidders (i.e., those that can demonstrate sufficient credit quality) under the same rates, terms and conditions included in the New Precedent Agreement, including comparable provisions for cost sharing and termination rights during the development phase of the Project. Applicants note that under the Purchase Agreement, Pathfinder Transmission has the right to repurchase Zephyr from Duke-ATC if Duke-ATC terminates its participation in the Project during the development phase. Applicants assert that these repurchase rights were part of the consideration for Duke-ATC's acquisition of Zephyr, are not in the New

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[29] February 19 Order, 126 FERC ¶ 61,134 at P 40.

[30] *See Montana Alberta Tie, Ltd.*, 116 FERC ¶ 61,071, at P 37 (2006) ("[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.").

[31] *See* Petition at 14.

Precedent Agreement, and will not be offered to other purchasers in the 2012 open season.[32]

35. Applicants request that the Commission permit Pathfinder Wind to retain the rights it obtained under the 2009 open season either by treating the New Precedent Agreement as an anchor customer contract or, alternatively, by permitting the parties to carry forward the results of the 2009 open season.

36. First, applicants request that the Commission permit Zephyr and Pathfinder Wind to enter the New Precedent Agreement as an anchor customer contract. Applicants note that the February 19 Order gave Zephyr authority to negotiate an anchor customer contract for 50 percent of the Project's capacity (i.e., 1,500 MW) pursuant to a bilaterally negotiated contract, subject to Zephyr offering the remaining capacity to other interested potential customers at the same rates, terms and conditions contained in the anchor customer contract.[33] Applicants explain that, in order to grant their request for the New Precedent Agreement to be an anchor customer contract, the Commission would need to increase the allowed anchor customer quantity from 50 percent to 70 percent, which equals the 2,100 MW of the Project's capacity.

37. Applicants argue that the Commission has recently approved anchor customer arrangements for up 75 percent of the capacity of two merchant transmission projects.[34] Applicants argue that the circumstances in this case warrant an expansion of allowable anchor customer capacity on the Project. First, Applicants argue that, consistent with *Champlain Hudson* and *Southern Cross*, the changes contained in the New Precedent Agreement are important to the successful financing of the Project. Applicants state that the New Precedent Agreement establishes pre-construction stages of investment delineated by important Project milestones, such as Pathfinder Wind obtaining a Power Purchase Agreement for its power and Duke-ATC obtaining critical siting and other regulatory approvals. Applicants argue that this carefully staged development process will allow the parties to advance the approximately $130 million in funds necessary to

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[32] *See id.* at 14 n.15.

[33] *Id*. at 18 (citing February 19 Order, 126 FERC ¶ 61,134 at PP 60-61).

[34] *See id*. at 19 (citing *Champlain Hudson Power Express Inc.*, 132 FERC ¶ 61,006 (2010) (*Champlain Hudson*); *Southern Cross Transmission LLC*, 137 FERC ¶ 61,207 (2011) (*Southern Cross*)).

proceed through a staged pre-construction development without undue risk, which increases the likely success of the Project.[35]

38. Second, Applicants argue that Pathfinder Wind has already successfully bid in an open season for the Project. Applicants add that the New Precedent Agreement modifies some of the terms relating to the development phase of the Project, but it does not contain substantive changes to the formula rates, or the terms and conditions of jurisdictional transmission service when the Project enters service. Applicants explain that the development period changes modify the parties' rights and obligations with respect to the timing of certain payments, possible early termination of the Project before construction commences, and certain warranty, indemnification, and other administrative procedures.[36] Applicants note the circumstances here are unique in that this is the first time that a developer and customer have negotiated for a complete change in upstream ownership of a merchant transmission project that is already under development.[37]

39. Third, Applicants note that Pathfinder Transmission kept the Project alive and assumed additional economic risk in order to do so through its temporary acquisition of Zephyr from TransCanada. Applicants argue that because that transaction was necessary for the Project to move forward, it is appropriate that Pathfinder Wind be permitted to retain the capacity it originally contracted to purchase.[38]

40. Applicants state that BP Wind and Horizon Wind were offered the opportunity to participate in the Project on equal terms with Pathfinder Wind and to participate in the negotiation of a common new precedent agreement following Pathfinder's and then Duke-ATC's acquisition of the Project. Applicants note that the BP Wind, and Horizon both voluntarily chose not to pursue the transmission service rights under the original

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[35] *Id*. at 19.

[36] Applicants note that the New Precedent Agreement includes a few clarifying editorial changes in the post-operational service terms that do not change the substance of the transaction, which Duke-ATC requested to confirm the original intent of the precedent agreement because Duke-ATC was not a party to the original negotiations. *See id*. at 22 n.22.

[37] *Id*. at 19-20.

[38] *See id*. at 20.

open season, and the Project would have been fully subscribed if they had not withdrawn.[39]

41. Finally, Applicants argue that they have satisfied the February 19 Order's requirement to offer transmission service to other potential customers at the same rates, terms and conditions as those negotiated with the anchor customer by committing to offer the remaining 900 MW of the Project's capacity to third parties in an open season pursuant to the terms of the New Precedent Agreement.

42. Alternatively, Applicants argue that, if the Commission does not approve their request to treat the New Precedent Agreement as an anchor customer contract, it should allow Pathfinder Wind to retain the transmission rights that it acquired under the 2009 open season process. Applicants state that the New Precedent Agreement retains the same transmission service terms and conditions as the original precedent agreement, and no valid public policy reason would require Pathfinder Wind to re-bid for the same capacity that it originally acquired in the prior non-discriminatory open season process.

(b) OATT Commitments

43. Applicants renew Zephyr's commitment to file a non-discriminatory OATT based on the Commission's *pro forma* Order No. 890- OATT, as provided in the February 19 Order.[40] Applicants state that the New Precedent Agreement requires that an OATT be filed no later than December 31, 2014, to allow Zephyr and the transmission customers sufficient time to arrange the necessary project financing to meet the Project construction schedule. Applicants also explain that the construction is anticipated to take approximately three years; therefore, the OATT will be filed well within the time constraints of the 2009 Rehearing Order that allowed Zephyr to file its OATT no later than one year before the Project goes into commercial operation.[41]

ii. Commission Determination

44. 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 Zephyr that its proposal to treat the New Precedent Agreement

[39] *Id*. at 23.

[40] *Id*. at 15 (citing February 19 Order, 126 FERC ¶ 61,134 at P 63).

[41] *Id*. at 15 (citing 2009 Rehearing Order, 128 FERC ¶ 61,074 at P 11).

as an anchor customer contract for 70 percent of the Project's capacity is consistent with the February 19 Order and subsequent precedent and should not lead to undue discrimination.

45. Here, Pathfinder Wind acquired 2,100 MW of transmission capacity through an open and transparent open season process for which Zephyr filed an open season report, prepared by an independent third-party evaluator, in accordance with the February 19 Order. In addition, when the original owner withdrew from the Project, Pathfinder Wind, through its affiliate Pathfinder Transmission, made significant financial commitments to keep the Project viable. As Applicants explain, the New Precedent Agreement establishes stages of investment prior to construction, which are important to the successful financing of the Project. In approving proposals for up to 75 percent presubscription on merchant transmission projects, the Commission has recognized the need for long-term commitments from creditworthy anchor customers to support financing these projects.[42]

46. In addition, no party has protested treating the 2,100 MW of transmission capacity that Pathfinder Wind was awarded as a presubscription for 70 percent of the Project's capacity. Moreover, Applicants commit to offer the remaining 900 MW of the Project's transmission capacity in a new open season to be conducted no later than one year before the Project goes into commercial operation and to offer transmission service to third parties at the same terms and conditions for transmission service once the Project is operational as provided to Pathfinder Wind in the New Precedent Agreement. Accordingly, treating the New Precedent Agreement as an anchor customer contract for 70 percent of the Project's capacity should not lead to undue discrimination.

47. With regard subscription for the remaining 900 MW of the Project's capacity, the open season must be fair, transparent, and non-discriminatory, and we will continue to require an open season informational report to be filed with the Commission within 30 days of the completion of the open season.[43] 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 the capacity. This open season reporting requirement and the process by which parties are afforded an opportunity to file complaints will continue to be the

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[42] *See Southern Cross*, 137 FERC ¶ 61,207 at P 28; *Champlain Hudson,* 132 FERC ¶ 61,006 at P 46.

[43] *Hudson Transmission*, 135 FERC ¶ 61,104 at P 30; February 19 Order, 126 FERC ¶ 61,134 at P 41.

primary tools by which the Commission ensures that merchant transmission developers do not unduly discriminate.[44]

48. Consistent with its commitment, Zephyr must also file an OATT that adheres to the *pro forma* OATT no later than one year prior to the commencement of service. Any deviations from the *pro forma* OATT must be supported and will be evaluated by the Commission when they are submitted so that the Commission can be sure Duke-ATC will provide open and non-discriminatory service on the Project.

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. Applicants' Proposal

50. Applicants assert that the merchant transmission projects will not result in any undue preference to any particular entity. Applicants also state that Duke Energy Corporation has wind generating projects operating and under development in the region where the Project will operate. However, Applicants explain that the output of Duke Energy Corporation's Wyoming wind generation facilities is fully committed under long-term contracts to third parties, and transmission arrangements already exist for them.[45] According to Applicants, Duke-ATC, Duke Energy Transmission, and ATC commit that neither they nor any of their affiliates will participate in the open season for the remaining 900 MW of the Project's capacity unless Zephyr files for and obtains another order from the Commission allow for such participation. Applicants state that they do not have any current plans to seek such an Order, but wish to retain the right to request amended negotiated rate authority from the Commission in the event of a future change in circumstances.[46]

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[44] *Hudson Transmission*, 135 FERC ¶ 61,104 at P 30; *Champlain Hudson*, 132 FERC ¶ 61,006 at P 45; February 19 Order, 126 FERC ¶ 61,134 at P 41.

[45] Petition at 5.

[46] Petition at 16.

ii. Commission Determination

51. Applicants state that although Duke Energy Corporation has generation projects in the region in which Zephyr is being built, the output of Duke Energy Corporation's Wyoming generation facilities is fully committed under long-term contracts to third parties, and transmission arrangements already exist for them. Applicants also commit that neither Duke Energy Corporation, ATC nor any of their affiliates will be permitted to participate in the open season unless Zephyr files for and obtains an order from he Commission amending the negotiated rate authority.[47] In light of the commitments made in the Petition, we find that Zephyr adequately addresses any affiliate concerns. Moreover, as discussed above, the commitments Applicants made regarding the open season process and reporting requirements will ensure that all transactions are transparent and arms length.

d. Regional Reliability and Operational Efficiency

52. Merchant transmission projects, like cost-based transmission projects, are subject to mandatory reliability requirements.[48] Merchant transmission developers are required to comport with all applicable requirements of the NERC and any regional reliability council in with they are located.

i. Applicants Proposal

53. Applicants state that the Project will be located in a region that does not currently have an RTO/ISO. However, they commit that if an Order No. 2000 compliant RTO is formed in the region, Zephyr will become a member of the RTO and will transfer

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[47] The Commission expects, among other things, that any application Zephyr may submit proposing to authorize affiliates to participate in an open season process will include the commitments Zephyr made in its prior application for negotiated authority to comply with the Standards of Conduct, any other applicable affiliate rules, and to file quarterly reports of their transactions as required of transmission providers. *See* February 19 Order, 126 FERC ¶ 61,134 at P 65.

[48] *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).

operating control over the Project to such an RTO pursuant to the RTO operating requirements approved by the Commission.[49]

54. Zephyr commits that the Project will comply with applicable reliability requirements and procedures of NERC and WECC that the Commission found Zephyr would comply with in the February 19 Order. Applicants also state that Zephyr will continue to be an active participant in regional organizations such as the Northern Tier Transmission Group and the Northwest Transmission Assessment Committee. Moreover, Applicants commit Zephyr to participate in the WECC Regional Planning Process and the WECC Three Phase Rating Process.[50]

ii. <u>Commission Determination</u>

55. Because the Project is located in area without an RTO or ISO, Zephyr will retain operational control of the Project once it is placed into service. Applicants commit that Zephyr will continue to participate in the WECC's Regional Planning Process and Three Phase Rating Process and in regional organizations such as the Northern Tier Transmission Group and Northwest Transmission Assessment Committee planning process, and that the Project will comply with applicable NERC reliability requirements. Accordingly, we find that Zephyr satisfies the regional reliability and operational efficiency requirements, subject to Zephyr's continued participation in the regional planning processes.

2. <u>Request for Waivers</u>

a. <u>Applicant's Proposal</u>

56. Applicants state that in the February 19 Order the Commission granted Zephyr waivers of the following filing requirements that it found were not applicable to merchant transmission developers: (1) Subparts B and C of Part 35 of the Commission's regulations, other than requirements of section 35.12 (a) (filing of initial rate schedules) and 35.13(b) (general information to be filed with rate schedules), 35.15 (notices of cancellation or termination) and 35.16 (notices of succession); and (2) waiver of the requirement to file Form No. 1, Annual Report of Major Electric Utilities, Licensee, and Others.

57. Applicants request that the Commission grant the same waivers in connection with the instant Petition. In addition, Applicants request waiver of section 35.13(a)

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[49] Petition at 17.

[50] *Id*. at 18.

(requirements for abbreviated cost of service filings), Parts 41 (accounts, records, and disposition audit findings), 101 (uniform system of accounts), and 141 (forms and reports, with the exception of sections 41.1 through 41.8, 141.14 and 141.15).

b. Commission Determination

58. Applicants request the same waivers previously granted plus waiver of section 35.13(a) of the Commission's regulations. Because Zephyr is proposing to charge negotiated rates, the regulations requiring the filing of cost-based data are not applicable. Therefore, 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), 35.13(b), 35.15, and 35.16.

59. The Commission will also grant Zephyr's requests for waiver of the Form No. 1 filing requirement. In analyzing a merchant transmission owner's requests for waiver, the Commission weighs the need for the Commission and the public to have access to the information contained in Form No. 1, and the goal of developing policies that will promote competition.[51] For public utilities with cost-based rates, the information provided in Form No. 1 is necessary to ensure that rates are just and reasonable. However, Zephyr's rates will be negotiated rather than cost-based and, as discussed above, Zephyr will not have captive customers. Therefore, the Commission believes that, on balance, it is appropriate to grant Zephyr's request for waiver of the Form No. 1 filing requirement.

60. Finally, because Zephyr will not sell transmission services at cost-based rates, the Commission will also grant Zephyr's request for waiver of Parts 41 (accounts, records, and disposition of audit findings), 101 (uniform system of accounts), and 141 (forms and reports) with the exception of the sections: 41.1 through 41.8, 141.14, and 141.15.[52]

The Commission orders:

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

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[51] *See* February 19 Order, 126 FERC ¶ 61,134 at P 69; *Montana Alberta Tie, Ltd.*, 116 FERC ¶ 61,071, at P 66 (2006).

[52] *See Hudson Transmission Partners, LLC*, 135 FERC ¶ 61,104 at P 43 (stating that the Commission has traditionally granted waivers and blanket authorizations only to those entities that are not subject to traditional cost-based regulation).

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

(C) Zephyr is hereby directed to file its OATT in compliance with this Commission order no later than one year prior to the commencement of service on the Project.

(D) The Commission grants Zephyr's request 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.

(E) The Commission grants Zephyr's request for waiver of the FERC Form No. 1 filing requirement, and Parts 41, 101, and 141 of the Commission's accounting and periodic reporting regulations with the exception of sections: 41.1 through 41.8, 141.14, and 141.15, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.