144 FERC ¶ 61,203
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Lake Erie CleanPower Connector | Docket No. ER13-1979-000

ORDER CONDITIONALLY AUTHORIZING PROPOSAL AND GRANTING WAIVERS IN PART

(Issued September 16, 2013)

1. On July 15, 2013, Lake Erie CleanPower Connector (LECC) filed a request for authorization to sell transmission rights at negotiated rates on a proposed high-voltage direct current merchant transmission project (Project) and for waiver of certain Commission regulations.[1] In this order, the Commission conditionally authorizes LECC to sell transmission rights on the Project at negotiated rates and grants LECC's request for waiver in part of selected Commission reporting requirements as described below.

I. Background

A. Applicant

2. LECC is a wholly-owned subsidiary of Lake Erie Power Corporation (LEPC), which is a privately-owned corporation organized and existing pursuant to the laws of Canada. In addition to the Project, LEPC is developing transmission projects outside of the United States. However, LEPC does not own or operate any existing electric generation, transmission, or distribution facilities.

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[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.*, *Hudson Transmission Partners, LLC*, 135 FERC ¶ 61,104 (2011) (*Hudson Transmission*); *Champlain Hudson Power Express, Inc.*, 132 FERC ¶ 61,006 (2010) (*Champlain Hudson*); *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134 (2009) (*Chinook*).

B. Description of Project

3. The Project is a 60-mile high-voltage direct current transmission line of up to 2,000 MW, which will originate in Nanticoke, Ontario, Canada and terminate in Erie, Pennsylvania.[2] The Project will directly connect the markets operated by PJM Interconnection, L.L.C. (PJM) and the Independent Electricity System Operator of Ontario, Canada (IESO). LECC is currently considering two alternative routes for the Project, both of which will run under Lake Erie. LECC states that it has completed an engineering pre-feasibility study and market analysis to assess the commercial opportunities available to the Project's potential customers, optioned land in Canada and Pennsylvania for converter stations, filed interconnection applications with PJM, and retained engineering and environmental consultants to assist in procuring necessary permits.[3] Upon completion of the transmission line, LECC states that it will turn over operational control of the Project to PJM.[4]

C. Application

4. LECC seeks authority to charge negotiated rates for the sale of transmission rights on the Project. LECC contends that it meets the four factor analysis as outlined in *Chinook* for approval of negotiated rate authority. In its application, LECC proposes to conduct an open solicitation process in compliance with the Commission's January 17, 2013 Final Policy Statement.[5] LECC's application is described in further detail below.

II. Notice, Intervention, and Responsive Pleadings

5. Notice of LECC's Filing was published in the *Federal Register*, 78 Fed. Reg. 43,876 (2013), with interventions and protests due on or before August 5, 2013. None were received.

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[2] Filing at 4.

[3] *Id.* at 5.

[4] *Id.* at 1-2.

[5] *Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Projects*, 142 FERC ¶ 61,038 (2013) (Policy Statement).

III. Discussion

A. Negotiated Rate Authority

6. In addressing requests for negotiated rate authority from merchant transmission providers, the Commission is committed 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.[6] 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.[7] This approach simultaneously acknowledges the financing realities faced by merchant transmission developers and the consumer protection mandates of the Federal Power Act (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.

1. Policy Statement

7. On January 17, 2013, the Commission issued the Policy Statement to clarify and refine its policies governing the allocation of capacity for new merchant transmission projects and new nonincumbent, cost-based, participant-funded transmission projects.[8] The Policy Statement allows the developer of a new merchant transmission project to select a subset of customers, based on not unduly discriminatory or preferential criteria, and negotiate directly with those customers to reach agreement for procuring up to 100

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[6] *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, at PP 57, 59 (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 at ordering para. (A) (authorizing Hudson Transmission to charge negotiated rates for transmission service).

[7] *Chinook*, 126 FERC ¶ 61,134 at P 37.

[8] Policy Statement, 142 FERC ¶ 61,038.

percent of transmission capacity when the developer: (1) broadly solicits interest in the project from potential customers and (2) demonstrates to the Commission that the developer has satisfied the solicitation, selection and negotiation process set forth in the Policy Statement.[9] To the extent the Commission determines that a merchant transmission developer complies with such policies, the Commission will find that the developer has satisfied the second (undue discrimination) and third (undue preference) factors of the four-factor analysis.[10]

8. Under the Policy Statement, once a developer has identified a subset of customers through the open solicitation process, the Commission will allow the developer to engage in bilateral negotiations with each potential customer. In these negotiations, the Commission will allow for distinctions among prospective customers based on transparent and not unduly discriminatory or preferential criteria, with the potential result that a single customer, including an affiliate, may be awarded up to 100 percent of the transmission capacity.[11]

2. <u>Four-factor Analysis</u>

a. <u>Factor One: Just and Reasonable Rates</u>

9. To approve negotiated rates for a transmission project, the Commission must find that the rates are just and reasonable.[12] 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 particular 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.

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[9] *Id.* P 16.

[10] *Id.* P 15.

[11] *Id.* P 28.

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

i. <u>LECC's Proposal</u>

10. LECC states that it will assume all market risks for the Project and that there will be no captive customers.[13] LECC asserts that it is a new market entrant that does not own or operate any existing facilities in IESO or PJM, and that no affiliate owns or operates facilities in these markets. LECC also states that when the transmission line is completed, it will turn over operational control of the line to PJM, which will operate the line under PJM's Open Access Transmission Tariff (OATT), thus preventing LECC from acquiring market power or controlling barriers to entry in the PJM market.

11. LECC states that incumbent transmission owners have an obligation under the PJM OATT to expand their transmission capacity, upon request, at cost-based rates, and therefore no entity will purchase transmission service from LECC unless it is cost-effective to do so when compared to the incumbent transmission owners' cost of expanding capacity. LECC also states that the Commission has recognized that negotiated rates for service over merchant transmission lines are effectively capped at the differential in power prices between markets, in this case the markets operated by IESO and PJM.[14] Finally, LECC states that the anchor customers likely to subscribe to the Project are sophisticated utilities that would only secure transmission service at competitive rates.[15]

ii. <u>Commission Determination</u>

12. The Commission concludes that LECC's request for authority to charge negotiated rates for service on the Project has met the first of the *Chinoook* factors, that is, it is just and reasonable. LECC assumes all market risk associated with the Project and has no captive customers. LECC will bear all market risks that the Project will succeed or fail based on whether a market exists for its services. Additionally, LECC has no ability to pass on any costs to captive ratepayers.

13. No entity on either end of the Project is required to purchase transmission service from LECC, and customers will do so only if it is cost-effective. LECC will be unable to charge more for transmission than the expected differential in electric prices between Canada and a competitive price in PJM. Additionally, because neither LECC nor its affiliates own any transmission facilities within the footprint of the Project, LECC has no

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[13] Filing at 9.

[14] *Id.* at 10 (citing *Tres Amigas*, 130 FERC ¶ 61,207, at P 64 (2010)).

[15] *Id.*

ability to erect barriers to entry in the relevant markets. Accordingly, these factors lead us to conclude that the requested negotiated rate authority meets the first of the *Chinook* factors, that is, it is just and reasonable for service on the Project.

b. **Factor Two: Undue Discrimination**

14. As explained in *Chinook*, the Commission has in the past primarily looked 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 season and (2) its OATT commitments (or in the RTO/ Independent System Operators (ISO) context, its commitment to turn operational control over to the RTO or ISO).[16] The Policy Statement, however, provides an alternative to conducting an open season. Under this alternative, a developer may demonstrate no undue discrimination or preference by conducting an open solicitation that complies with the requirements of the Policy Statement.[17] Specifically, the developer must (1) broadly solicit interest in the project from potential customers and (2) after the solicitation process, demonstrate to the Commission that it has satisfied the solicitation, selection, and negotiation process criteria set forth in the Policy Statement.[18]

i. **Broad Notice under the Policy Statement**

15. Under the Policy Statement, applicants must issue broad notice of the project in a manner that ensures that all potential and interested customers are informed of the proposed project, such as by placing notice in trade magazines or regional energy publications.[19] Such notice should include developer points of contact, pertinent project dates, and sufficient technical specifications and contract information to inform interested customers of the nature of the project, including: (1) project size/capacity, (2) end points of the line, (3) projected construction and/or in-service dates, (4) type of line, (5) precedent agreement (if developed), and (6) other capacity allocation arrangements (including how the developer will address potential oversubscription of capacity).[20] The developer should also specify in the notice the criteria it plans to use to select

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[16] *Chinook*, 126 FERC ¶ 61,134 at P 40.

[17] Policy Statement, 142 FERC ¶ 61,038 at PP 15, 23.

[18] *Id.* P 16.

[19] *Id.* P 23.

[20] *Id.* P 20.

transmission customers. In addition, the developer may also adopt a specific set of objective criteria it will use to rank prospective customers, provided it can justify why such criteria are appropriate. Finally, the Policy Statement states that the Commission expects the developer to update its notice if there are any material changes to the nature of the project or the status of the capacity allocation process, in particular to ensure that interested entities are informed of any remaining available capacity.[21]

ii. <u>Post-Selection Filing under the Policy Statement</u>

16. The Policy Statement states that the Commission will continue to require merchant developers to disclose the results of their capacity allocation process. The Commission's approval of the capacity allocation process will be noticed and acted upon under section 205 of the FPA. The Policy Statement explains that the Commission expects developers to demonstrate that the processes that led to the identification of transmission customers and the execution of the relevant contractual arrangements are consistent with the Policy Statement and the Commission's open access principles. In this filing, the developer should describe the criteria used to select customers, any price terms, and any risk-sharing terms and conditions that served as the basis for identifying transmission customers selected versus those that were not, as well as provide certain information listed in the Policy Statement in order to provide transparency to the Commission and interested parties.[22] The Policy Statement emphasizes that the information in the post-selection demonstration is an essential part of a merchant developer's request for approval of a capacity allocation process, and that the developer will have the burden to demonstrate that its process was in fact not unduly discriminatory or preferential, and resulted in rates, terms, and conditions that are just and reasonable.[23]

17. The Policy Statement allows developers discretion in the timing of requests for approval of capacity allocation processes. The Policy Statement provided two examples. First, a developer can seek approval of its capacity allocation approach after having completed the process of selecting customers in accordance with Commission policies. Alternatively, a developer can first seek approval of its capacity allocation approach, and then demonstrate in a compliance filing to the Commission order approving that approach

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[21] *Id.* PP 24-27.

[22] *Id.* P 30.

[23] *Id.* P 32.

that the developer's selection of customers was consistent with the approved selection process.[24]

iii. LECC's Proposal

18. LECC states that it will turn over operational control of the Project to PJM and conduct an open solicitation process consistent with the Policy Statement.[25] To ensure that its open solicitation process is not unduly discriminatory or preferential, LECC states that it will retain a third-party independent adviser experienced in overseeing open seasons for merchant transmission capacity to facilitate broad notice of the Project and the selection and ranking of prospective customers. To accomplish this broad notice, LECC states that it will establish a website specific to the Project and issue a press release to be circulated to energy trade publications, news outlets within the PJM/IESO region, and a list of potential transmission customers.[26] LECC states that both the website and press release will include the Project's capacity, the interconnection points in IESO and PJM, anticipated construction milestones and characteristics of the line, a statement regarding allocation of capacity, and the criteria to be used to assess potential customers (*e.g.*, creditworthiness, term of transmission service). According to LECC, the website will also contain more detailed information about the Project, such as Project activities completed to date, a confidentiality agreement, additional details regarding selection and ranking criteria (including justifications for each criteria), a form of precedent agreement (when available), and information about dates and locations of public meetings where LECC will address inquiries from potential customers. LECC anticipates holding one public meeting in Canada and one public meeting in the United States. LECC states that it will post and time-stamp on its website and distribute through an email list-serv any material changes to the Project status or the open solicitation process.

19. Once customer agreements have been executed, LECC commits to posting on its website the winning bidder's name, quantity, the expiration date of the transmission rights awarded, and the contact information of the bidder for purposes of potential resale of the transmission rights. LECC states that it will notify the Commission of the results of its capacity allocation process, and will demonstrate that it conducted its open

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[24] *Id.* P 31.

[25] Filing at 11.

[26] *Id.*

solicitation process and execution of contractual agreements in a manner consistent with the Commission's open access policies and the Policy Statement.[27]

20. LECC also states that it will ensure that books and records for the Project will comply with the Uniform System of Accounts in Part 101 of the Commission's regulations and will be subject to examination as required in Part 41 of the regulations, file financial statements and reports in accordance with Part 141.14 and 141.15 of the Commission's regulations, and employ an independent auditor to audit its books and records.[28]

iv. Commission Determination

21. In its filing, LECC describes how it plans to broadly solicit interest from potential customers. In addition to committing to engage in an open solicitation process, LECC states that it will make a future filing under section 205 with the Commission disclosing the results of the capacity allocation process, and describing the process in sufficient detail to demonstrate its capacity allocation was consistent with the Policy Statement. LECC also commits to turn over operational control of the Project to PJM. As described above, the Policy Statement provides a developer with discretion as to the timing of requests for approval of the selection process. The Commission acknowledges LECC's commitment to engage in an open solicitation and capacity allocation process consistent with the Policy Statement and will reserve judgment on whether that open solicitation and capacity allocation process was not unduly discriminatory, pending LECC's subsequent section 205 filing providing the details necessary to judge the open solicitation and capacity allocation process and to LECC filing, through eTariff, a rate schedule for service under the PJM OATT prior to commencement of service.

22. Consistent with *Chinook*, once the Project has commenced operation, LECC must ensure: (1) it maintains books and records for the Project that comply with the Uniform System of Accounts found in Part 101 of the Commission's regulations,[29] subject to examination as required in Part 41 of the regulations;[30] and (2) its books and records are

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[27] *Id.* at 15-16.

[28] *Id.* at 13-14.

[29] 18 C.F.R. Part 101 (2013).

[30] 18 C.F.R. Part 41 (2013).

audited by an independent auditor.[31] These commitments will assist the Commission in carrying out its oversight role.

c. Factor Three: Undue Preference and Affiliate Concerns

23. In the context of merchant transmission, Commission 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 or solicitation, and/or customers that subsequently take service on the merchant transmission line. The Commission noted in the Policy Statement that it will continue to expect an affirmative showing that the affiliate is not afforded an undue preference. The Commission noted that the developer will bear a high burden to demonstrate that the assignment of capacity to its affiliate and the corresponding treatment of nonaffiliated potential customers is just, reasonable, and not unduly preferential or discriminatory.[32]

i. LECC's Proposal

24. LECC states that none of its affiliates own or operate electric facilities in PJM or IESO, and that the Project will not interconnect with any existing facilities owned by an affiliate.[33] LECC asserts that it does not anticipate that an affiliate will purchase transmission rights through the open solicitation process, but that in the event that one does, the post-solicitation filing with the Commission will document the facts and circumstances surrounding this allocation of capacity. Consequently, LECC contends that there will be no opportunity for affiliate abuse. LECC states that it will turn over operational control of its facilities to PJM, file electric quarterly reports of its transactions as required of transmission providers, comply with any applicable affiliate rules, and be subject to the Commission's Standards of Conduct to the extent any affiliate takes transmission service on the Project.[34] Finally, as discussed above, LECC commits to broadly solicit interest in the Project from potential customers and make a filing with the Commission to demonstrate that LECC has satisfied the solicitation, selection, and negotiation process set forth in the Policy Statement.

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[31] *Chinook,* 126 FERC ¶ 61,134 at P 62; *Champlain Hudson*, 132 FERC ¶ 61,006 at P 48; *Tres Amigas LLC*, 130 FERC ¶ 61,207, at P 90 (2010) (*Tres Amigas*).

[32] Policy Statement at P 34.

[33] Filing at 14.

[34] *Id.* at 15.

ii. Commission Determination

25. We acknowledge LECC's commitment to engage in an open solicitation process and make a future filing with the Commission disclosing the results of the capacity allocation process and describing the process in sufficient detail to demonstrate no affiliate has been afforded undue preference. In addition, we acknowledge LECC's commitment to turn over operational control of its facilities to PJM, file electric quarterly reports of its transactions as required of transmission providers, comply with any applicable affiliate rules, and abide by the Commission's Standards of Conduct to the extent any affiliate takes transmission service on the Project. We accept these commitments as addressing our affiliate preference concerns, subject to the Commission's approval of LECC's subsequent filing demonstrating that the assignment of capacity to any affiliate and the corresponding treatment of nonaffiliated potential customers is just, reasonable, and not unduly preferential or discriminatory.

d. Factor Four: Regional Reliability and Operational Efficiency

26. In order to ensure regional reliability and operational efficiency, the Commission expects that any merchant transmission projects connected to an RTO or ISO turn over operational control to the RTO/ISO.[35] Further, merchant transmission projects, like cost-based transmission projects, are subject to mandatory reliability requirements.[36] 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 with they are located.

i. LECC's Proposal

27. LECC commits to turn over operational control of the Project to PJM and to comply with all applicable reliability requirements.[37] Additionally, LECC states that it

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[35] *Chinook,* 126 FERC ¶ 61,134 at P 52.

[36] *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).

[37] Filing at 15.

will, consistent with the requirements of Order No. 1000,[38] provide to PJM all required information regarding its regional planning process.

ii. Commission Determination

28. The Commission acknowledges LECC's commitment to turn over operational control of the Project to PJM and comply with all applicable reliability requirements. We also acknowledge LECC's assertion that it has filed interconnection applications with PJM. Accordingly, we find that LECC has met the regional reliability and operational efficiency requirement, subject to LECC's continued participation in the necessary regional planning processes.

B. Waiver Requests

1. LECC's Proposal

29. LECC requests waiver of: (1) the full reporting requirements of Subparts B and C of Part 35 of the Commission's regulations, except for Sections 35.13(b) (general information to be filed with rate schedules) and 35.16 (notices of succession); and (2) Part 141, except for sections 141.14 and 141.15. LECC states that the Commission has granted similar waiver requests to other merchant transmission owners seeking negotiated rate authority.[39] LECC also requests waiver of any other part of the Commission's regulations as necessary to grant the authorizations requested therein.

2. Commission Determination

30. Because LECC is proposing to charge negotiated rates, the regulations requiring the filing of cost-based data are not applicable. However, the Commission has not granted waiver of section 35.12(a) (filing of initial rate schedules) and 35.15 (notices of cancellation or termination) in previous applications for negotiated rate authority, and

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[38] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 136 FERC ¶ 61,051 at PP 164-65 (2011), *order on reh'g*, 139 FERC ¶ 61,132 (2012), *appeal pending South Carolina Pub. Serv. Auth. v. FERC, et al.*, No. 12-1232 (D.C. Cir. Filed 5/25/2012 and later).

[39] Filing at 19 (citing *Chinook*, 126 FERC ¶ 61,134 at PP 68, 69; *Rock Island Clean Line LLC*, 139 FERC ¶ 61,142, at PP 43-47 (2012); *Neptune Regional Transmission System, LLC*, 139 FERC ¶ 61,110, at P 12 (2012) (*Neptune*)).

LECC has not justified our doing so here.[40] For good cause shown and consistent with our prior orders, we will grant waiver of the filing requirements of Subparts B and C of Part 35 of the Commission's regulations except for sections 35.12(a), 35.13(b), 35.15, and 35.16.[41]

31. The Commission will also grant LECC's request for waiver of Part 141, with the exception of 141.14 and 141.15, including the Form No. 1 filing requirement. The Commission has previously granted waiver of the Form No. 1 filing requirement to merchant transmission owners.[42]

The Commission orders:

(A) LECC is hereby granted authority to sell transmission rights on its proposed merchant transmission project at negotiated rates, subject to the Commission's approval of a subsequent section 205 filing, and to LECC's submission of a rate schedule for service under the PJM OATT, as discussed in the body of this order.

(B) The Commission grants LECC'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, and Part 141 of the Commission's regulations, with the exception of sections 141.14 and 141.15, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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[40] *Champlain Hudson Power Express, Inc.*, 132 FERC ¶ 61,006, at P 59 (2010); *Chinook*, 126 FERC ¶ 61,134 at P 37.

[41] *Hudson Transmission*, 135 FERC ¶ 61,104 at P 42; *Tres Amigas*, 130 FERC ¶ 61,207 at P 103; *Wyoming Colorado Intertie, LLC*, 127 FERC ¶ 61,125, at P 62 (2009) (*Wyoming*); *Linden VFT, LLC*, 119 FERC ¶ 61,066, at P42 (2007) (*Linden*).

[42] *Neptune*, 139 FERC ¶ 61,110 at P 12; *Wyoming*, 127 FERC ¶ 61,125 at P 65; *Linden*, 119 FERC ¶ 61,066 at P 44; *Montana Alberta Tie Ltd.*, 116 FERC ¶ 61,071, at P 66 (2006).