158 FERC ¶ 61,026
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, and Colette D. Honorable.

ITC Lake Erie Connector LLC | Docket No. ER17-350-000

ORDER GRANTING AUTHORIZATION TO CHARGE NEGOTIATED RATES, SUBJECT TO CONDITION, AND GRANTING WAIVERS

(Issued January 13, 2017)

1. On November 14, 2016, ITC Lake Erie Connector LLC (ITCLEC) filed, pursuant to section 205 of the Federal Power Act (FPA)[1] and Part 35 of the Commission's regulations,[2] a request for an order confirming that ITCLEC retains authorization to sell transmission rights at negotiated rates on a proposed high-voltage direct current (HVDC) merchant transmission project (Project) following a change in the Project's upstream ownership. ITCLEC also requests waiver of certain filing requirements, as previously granted by the Commission.[3] In this order, we authorize ITCLEC to charge negotiated rates for transmission rights on the Project under its new upstream ownership, subject to condition, and grant ITCLEC's request for waiver.[4]

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[1] 16 U.S.C. § 824d (2012).

[2] 18 C.F.R. pt. 35 (2016).

[3] *Lake Erie CleanPower Connector*, 144 FERC ¶ 61,203 (2013) (LECC Negotiated Rates Order); *ITC Lake Erie Connector LLC*, 148 FERC ¶ 61,236 (2014) (ITCLEC Negotiated Rates Order).

[4] Under the Commission's precedent, merchant transmission projects differ from those of 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. Thus, on a case-by-case basis, the Commission has allowed merchant projects to be priced based on negotiated rates and has granted certain waivers. *See, e.g.*, *Hudson Transmission Partners, LLC*, 135 FERC ¶ 61,104 (2011) (*Hudson*

(continued ...)

I. Background

A. Applicant

2. ITCLEC states that its membership interests are owned by ITC Lake Erie Holdings LLC, a wholly-owned subsidiary of ITC Holdings Corp. (ITC) formed for the purpose of holding the assets of the Project.[5] ITCLEC explains that it has new upstream owners and affiliations as a result of a Commission-approved transaction under which ITC became an indirect majority-owned subsidiary of Fortis, Inc. (Fortis) and an indirect minority-owned subsidiary of Eiffel Investment Pte. Ltd. (Eiffel).[6]

3. ITCLEC states that ITC is a Michigan corporation that, through its subsidiaries,[7] invests exclusively in the electric power transmission grid.[8] ITC's Operating Subsidiaries are independent, stand-alone transmission companies engaged in the development, ownership, and operation of facilities for the transmission of electric energy in interstate commerce. ITCLEC states that ITC is also the parent company of ITC Grid Development, LLC, whose subsidiaries ITCI and ITC Mid-Atlantic Development LLC (ITC Mid-Atlantic) are members of PJM Interconnection, L.L.C. (PJM) and were formed to pursue new transmission investment opportunities in the PJM region. ITCI owns and operates an approximately one mile, 345kV transmission line that interconnects the 1,100 MW generating facility owned and operated by New Covert Generating Co., LLC (New Covert) to the PJM system.[9] ITC Mid-Atlantic does not currently own any transmission assets. ITCLEC states that ITC does not own or control

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Transmission); *Champlain Hudson Power Express, Inc.*, 132 FERC ¶ 61,006 (2010) (*Champlain Hudson*); *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134, *order on reh'g*, 128 FERC ¶ 61,074 (2009) (*Chinook*).

[5] Filing at 3.

[6] *Id.* at 1 & n.2 (citing *Fortis Inc.*, 156 FERC ¶ 61,219 (2016)).

[7] ITC's operating subsidiaries include International Transmission Company (ITC Transmission), Michigan Electric Transmission Company, LLC, ITC Midwest LLC, ITC Great Plains, LLC, and ITC Interconnection, LLC (ITCI) (collectively Operating Subsidiaries). *Id.* at 4.

[8] *Id.* at 3.

[9] *Id.* at 4-5.

any existing electric generation, transmission, or distribution facilities in the market operated by the Independent Electricity System Operator of Ontario, Canada (IESO).[10]

4. ITCLEC states that its new upstream owner, Fortis, has interests in the PJM market through Central Hudson Enterprises Corporation (CHEC), an indirect wholly-owned subsidiary of Fortis.[11] ITCLEC states that Eiffel, its second new upstream owner, is indirectly wholly owned by GIC (Ventures) Pte. Ltd. (GIC Ventures).[12] ITCLEC explains that, in addition to Eiffel, GIC Ventures holds indirect interests in certain Commission-regulated entities, including Epsom Investment Pte. Ltd. (Epsom) and Cambourne Investment Pte. Ltd. (Cambourne), which own subsidiaries that operate in the PJM market, as discussed below.[13]

5. Specifically, ITCLEC states that Epsom owns an approximately 31 percent interest in DQE Holdings LLC, which, in turn, indirectly owns Duquesne Light Company (a public utility with no generation assets) and Duquesne Power, LLC (a power marketer operating within PJM).[14] ITCLEC also states that Cambourne has indirect minority interests in several entities operating in the PJM market, through its minority interest in Eastern Generation Holdings, LLC (Eastern Holdings).[15] Eastern Holdings owns 100 percent of Crete Energy Venture LLC, Lincoln Generating Facility, LLC, New Covert, and Rolling Hills Generating L.L.C., each of which owns generating

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[10] *Id.* at 5.

[11] *Id.* at 6. CHEC has a 50 percent ownership interest in Hunterdon Cogeneration Limited Partnership, which owns a 4 MW cogeneration facility in Union, New Jersey. CHEC also has a 50 percent ownership interest in CH-Community Wind Energy LLC, which in turn owns a 40.7 percent Class B membership interest in JB Wind Holdings, LLC, which owns a 7.5 MW wind project and a 24 MW wind project in PJM. *Id.* at 6-7.

[12] *Id.* at 7. ITCLEC explains that GIC Ventures is affiliated with GIC Private Limited (GIC), an investment company that manages the Government of Singapore's foreign reserves, and GIC Special Investments Pte. Ltd. (GIC SI), the private equity and infrastructure arm of GIC. GIC and GIC Ventures are each wholly owned by the Government of Singapore through the Minister for Finance. *Id.*

[13] *Id.* at 8. ITCLEC states that GIC Ventures' indirect interests in these entities are discussed more fully in its application filed in Docket No. EC16-110-000. *Id.* at 7.

[14] *Id.* at 8.

[15] *Id.* at 8-10.

facilities in the PJM market that are Exempt Wholesale Generators with market-based rate authority, whose output is sold on a merchant basis in the wholesale market. According to ITCLEC, neither Eastern Holdings nor any of these subsidiaries of Eastern Holdings is an affiliate of Cambourne or Eiffel under any affiliate definition in the Commission's regulations, noting that Cambourne's indirect interest in excess of 4.99 percent is held in non-voting units.[16]

B. Description of the Project

6. ITCLEC describes the Project as a 72.4-mile HVDC transmission line capable of delivering up to 1,000 MW. The Project will originate in in Nanticoke, Ontario, be buried underwater across Lake Erie, and terminate in Erie County, Pennsylvania, directly connecting the markets operated by PJM and IESO. ITCLEC notes that it has filed a joint permit application with the Pennsylvania Department of Environmental Protection and the U.S. Army Corps of Engineers, as well as an application for a Presidential Permit with the U.S. Department of Energy.[17] ITCLEC states that, upon completion of the Project, ITCLEC will turn over operational control of the transmission line to PJM, which will operate the line pursuant to its Open Access Transmission Tariff (PJM Tariff).[18]

7. On September 16, 2013, the Commission granted conditional authorization to Lake Erie CleanPower Connector (LECC) to charge negotiated rates for the sale of transmission rights for the Project.[19] The Commission acknowledged LECC's commitment to engage in an open solicitation and capacity allocation process conducted in accordance with the requirements set forth in the Commission's 2013 Policy

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[16] *Id.* at 10. ITCLEC also notes that Cambourne has the right to designate an observer to the Eastern Holdings board or to appoint a member to the board. ITCLEC states that Cambourne has designated an observer to the board but has no intention to appoint a member to the Eastern Holdings Board.

[17] *Id.*

[18] *Id.*

[19] LECC Negotiated Rates Order, 144 FERC ¶ 61,203.

Statement.[20] The Commission also granted LECC waiver of certain filing requirements under Subparts B and C of Part 35, and Part 141, of the Commission's regulations.[21]

8. When ITC acquired LECC in 2014, the Project's name was changed to ITC Lake Erie Connector. ITCLEC filed an application requesting that the Commission confirm that ITCLEC retained authorization to sell transmission rights at negotiated rates, and requesting the same filing requirement waivers the Commission previously granted to LECC. On September 26, 2014, the Commission granted ITCLEC conditional authority to sell transmission rights at negotiated rates and granted ITCLEC's request for waiver, subject to the Commission's approval of ITCLEC's subsequent filing pursuant to section 205 of the FPA demonstrating compliance with the Policy Statement.[22]

C. <u>Application</u>

9. ITCLEC asserts that the change in upstream ownership of the Project has not resulted in a material change to any of the factors upon which the Commission relied in previously granting negotiated rate authority. ITCLEC asserts that its application continues to satisfy the four-factor analysis for authorizing negotiated rates as outlined in *Chinook*.[23] ITCLEC requests that the Commission issue an order confirming that: (1) ITCLEC retains authorization to sell transmission rights on the Project at negotiated rates; and (2) the previously-granted waiver of the Commission's regulations and reporting requirements remain effective. ITCLEC requests Commission action no later than January 13, 2017.[24]

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[20] *Id.* P 21 (citing *Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Projects*, 142 FERC ¶ 61,038 (2013) (Policy Statement)).

[21] *Id.* PP 30-31 (granting LECC waiver 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).

[22] ITCLEC Negotiated Rates Order, 148 FERC ¶ 61,236, at PP 1, ordering para. (A).

[23] Filing at 13-14 (citing *Chinook*, 126 FERC ¶ 61,134 at P 37).

[24] *Id.* at 2.

II. Notice, Intervention, and Responsive Pleadings

10. Notice of ITCLEC's Filing was published in the *Federal Register*, 81 Fed. Reg. 83,832 (2016), with interventions and protests due on or before December 5, 2016. None was filed.

III. Discussion

A. Negotiated Rate Authority

11. As discussed below, we grant ITCLEC authority to sell transmission rights on the Project at negotiated rates, subject to the Commission's approval of a compliance filing providing the details necessary to judge the open solicitation and capacity allocation process. In the ITCLEC Negotiated Rate Order, the Commission granted ITCLEC's request to charge negotiated rates for the Project based on the circumstances presented at that time, including the Project's ownership structure and affiliations. In light of Fortis's and Eiffel's acquisition of the membership interests in ITCLEC, the specific circumstances that the Commission evaluated in granting ITCLEC's original request for negotiated rate authority have changed. Thus, we will conduct a *de novo* analysis to determine if the Project, under its new upstream ownership, meets the requirements for negotiated rate authority.[25]

12. In evaluating negotiated rate applications, the Commission has focused on four areas of concern: (1) the justness and reasonableness of the rates; (2) the potential for undue discrimination; (3) the potential for undue preference, including affiliate preference; and (4) regional reliability and operational efficiency requirements.[26] This approach simultaneously acknowledges the financing realities faced by merchant transmission developers and the 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 transmission projects that can differ substantially from one project to the next.

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[25] *See MATL LLP & Montana Alberta Tie, Ltd.*, 139 FERC ¶ 61,208, at P 11 (2012); *see also Zephyr Power Transmission, LLC*, 139 FERC ¶ 61,020, at P 21 (2012).

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

1. Factor One: Just and Reasonable Rates

13. To approve negotiated rates for a transmission project, the Commission must find that the rates are just and reasonable.[27] In determining whether negotiated rates will be just and reasonable, the Commission looks to whether the merchant transmission owner has assumed the full market risk for the cost of constructing its proposed project and seeks to confirm that the merchant transmission owner is not building within the footprint of its traditionally regulated system (or an affiliate's).[28] In such a case, there are no captive customers who would be required to pay the costs of the project. The Commission also will consider 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.[29]

a. ITCLEC's Proposal

14. ITCLEC asserts that its negotiated rates will be just and reasonable.[30] ITCLEC reaffirms that it will assume all market risks for the Project. ITCLEC asserts that there will be no captive customers, thus no entity will be required to purchase transmission service from ITCLEC, nor will ITCLEC be able to pass on any costs associated with the project to captive customers.[31] ITC further contends that it will not pass any costs associated with the Project on to the customers of its Operating Subsidiaries.[32]

15. ITCLEC also asserts that when the transmission line is completed, it will turn over operational control of the line to PJM, which will operate the line under the PJM Tariff, thus preventing ITCLEC from acquiring market power or controlling barriers to entry in the PJM market. ITCLEC contends that incumbent transmission owners have an obligation under the PJM Tariff to expand their transmission capacity, upon request,

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[27] *Id.*; *Champlain Hudson*, 132 FERC ¶ 61,006 at P 17.

[28] *Chinook*, 126 FERC ¶ 61,134 at P 38.

[29] *Id.*

[30] Filing at 14-15.

[31] *Id.* at 14.

[32] *Id.* at 15.

at cost-based rates, and therefore no entity will purchase transmission service from ITCLEC unless it is cost-effective to do so when compared to the incumbent transmission owners' cost of expanding capacity.[33] ITCLEC asserts 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.[34] Finally, ITCLEC asserts that the customers likely to subscribe to the Project are sophisticated utilities that would only secure transmission service at competitive rates.

16. The only transmission asset owned by ITC in the PJM Region identified in ITCLEC's Filing is an approximately one-mile, 345 kV transmission line owned and operated by ITCI that interconnects the 1,100 MW New Covert generating facility to the PJM system.[35] ITCLEC states that ITC does not own or control any existing electric generation, transmission or distribution facilities in the market operated by the IESO. In addition, ITCLECs new upstream owners, Fortis and Eiffel, indirectly own and control the electric facilities that operate within the PJM market as described above.

b. <u>Commission Determination</u>

17. We conclude that, if executed as explained in ITCLEC's Filing, ITCLEC's request for authority to charge negotiated rates for service on the Project has met the first of the *Chinook* factors. ITCLEC assumes full market risk for the Project and has no captive customers. Additionally, no entity is required to purchase transmission service from ITCLEC, and customers have the alternative of seeking transmission from incumbent owners in the area, which have an obligation under the PJM Tariff to expand their transmission capacity, upon request, at cost-based rates. Further, based on the information provided in the filing, we find that ITCLEC and its affiliates do not own or control any barriers to market entry or have any incentive to withhold capacity on the transmission line. ITCLEC maintains that it will turn over operational control of the line to PJM after the Project is completed. Accordingly, we find that that ITCLEC's Project, if executed as explained in ITCLEC's Filing, satisfies the first factor above.

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[33] *Id*. (citing section 15.4 of the PJM Tariff).

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

[35] *Id.* at 4-5.

2. Factor Two: Undue Discrimination

18. As explained in *Chinook*, in order to prevent undue discrimination when granting merchant transmission owners negotiated rate authority, the Commission has considered: (1) the terms and conditions of a merchant developer's open season; and (2) its tariff commitments (or in the regional transmission operator (RTO)/ independent system operator (ISO) context, its commitment to turn operational control over to the RTO or ISO).[36] The Policy Statement, however, provides an alternative to conducting a formal 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.[37] 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.[38]

19. In the Policy Statement, the Commission stated that 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.[39] 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 the following: (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).[40] The developer should also specify in the notice the criteria it plans to use to select 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.[41] Finally, the Commission expects the developer to update its notice if there are any material changes to the nature

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

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

[38] *Id.* P 16.

[39] *Id.* P 23.

[40] *Id.* P 24.

[41] *Id.* PP 25-26.

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.[42]

20. Additionally, in the Policy Statement, the Commission stated that merchant developers must disclose the results of their capacity allocation process, though this disclosure would be part of the Commission's approval of the capacity allocation process and, thus would be noticed and acted upon under section 205 of the FPA.[43] Developers must 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. Specifically, the developer should describe the criteria that were 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.[44]

21. The Commission emphasized in the Policy Statement 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.[45] The Commission provides developers discretion in the timing of their requests for approval of capacity allocation processes. For example, 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 can demonstrate in a compliance filing filed in response to the Commission's order approving that approach that the developer's selection of customers was consistent with the approved selection process.[46]

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[42] *Id.* P 27.

[43] *Id.* P 30; *see also* 16 U.S.C. § 824d (2012).

[44] Policy Statement, 142 FERC ¶ 61,038 at P 30.

[45] *Id.* P 32.

[46] *Id.* P 31.

a. ITCLEC's Proposal

22. ITCLEC asserts it will have no ability to exercise undue discrimination.[47] ITCLEC reaffirms its prior commitment to turn over operational control of the transmission line to PJM and conduct an open solicitation process consistent with the Policy Statement. ITCLEC explains that in 2015, it retained a third-party independent advisor, The Brattle Group (Brattle), which served as an independent solicitation manager and conducted a month-long open solicitation process seeking expressions of interest from potential transmission customers in the US and Canada.[48] ITCLEC asserts that Brattle (1) established an open solicitation website; (2) ensured that notice of the open solicitation process was published in trade magazines and regional energy publications; and (3) assisted with the selection and ranking of prospective customers.[49] ITCLEC states that it is now in negotiations with prospective customers, with the objective of executing definitive agreements on mutually agreed-upon rates, terms and conditions.

23. ITCLEC reiterates its commitment to make a subsequent filing, pursuant to FPA section 205, seeking Commission approval of its open solicitation process,[50] and states that this filing will explain its solicitation process with sufficient detail to demonstrate its capacity allocation was consistent with the Policy Statement and the Commission's open access policies.[51] ITCLEC also commits to file, through eTariff, a rate schedule for service under the PJM Tariff prior to commencement of service.[52]

24. ITCLEC further asserts that it will: (1) ensure that books and records for the Project will comply with the Uniform System of Accounts (USofA) in Part 101 of the Commission's regulations and will be subject to examination pursuant to Part 41 of the Commission's regulations; (2) file financial statements and reports in accordance with

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[47] Filing at 16-18.

[48] *Id.* at 16-17.

[49] *Id.* at 17.

[50] *Id.* at 16-17 & nn.37-38. ITCLEC notes that its open solicitation process is described in detail in its previous application for negotiated rates in Docket No. ER14-2640-000, and incorporates by reference the detailed description contained therein.

[51] *Id.* at 17.

[52] *Id.*

Parts 141.14 and 141.15 of the Commission's regulations; and (3) employ an independent auditor to audit its books and records.[53]

b. Commission Determination

25. We will reserve judgment on whether ITCLEC's open solicitation and capacity allocation process is not unduly discriminatory, pending ITCLEC's compliance filing providing the details necessary for the Commission's assessment of that process, and pending ITCLEC's filing of a rate schedule prior to commencement of service. We acknowledge ITCLEC's commitments to turn over operational control of the transmission line to PJM and to conduct an open solicitation and capacity allocation process consistent with the requirements of the Policy Statement. We also note ITCLEC's representation that it retained a third-party independent adviser to facilitate broad notice of the Project and the selection and ranking of prospective customers. Once customer agreements are executed, ITCLEC commits to submitting a compliance filing with the results of its capacity allocation process and to seek an approval of the process by demonstrating that its open solicitation process and execution of contractual agreements were compliant with the Commission's open access policies and its Policy Statement.

26. We also acknowledge ITCLEC's commitment that, consistent with *Chinook*, once the Project has commenced operation, ITCLEC will: (1) ensure that the books and records for the Project will comply with the USofA found in Part 101 of the Commission's regulations and will be subject to examination as required in Part 41 of the Commission's regulations; (2) file financial statements and reports in accordance with Part 141.14 and 141.15 of the Commission's regulations; and (3) employ an independent auditor to audit its books and records.[54] These commitments will assist the Commission in carrying out its oversight role.

3. Factor Three: Undue Preference and Affiliate Concerns

27. In the context of merchant transmission, the Commission's 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, or customers that subsequently take service on the merchant transmission line. The Commission expects an affirmative showing that the affiliate is not afforded an undue preference, and the developer bears a high burden to demonstrate that the assignment of capacity to its

[53] *Id.* at 17-18 (citing 18 C.F.R. pts. 41, 101, 141).

[54] *Id.*

affiliate and the corresponding treatment of nonaffiliated potential customers is just, reasonable, and not unduly discriminatory or preferential.[55]

a. ITCLEC's Proposal

28. ITCLEC asserts that its proposal to charge negotiated rates for transmission service rights does not raise any undue preference or affiliate concerns.[56] ITCLEC states that, while ITCLEC is affiliated with entities that own transmission and generation facilities in PJM, its affiliation with these entities does not materially affect the Commission's analysis of whether to grant negotiated rate authority. ITCLEC asserts that the Project will not interconnect with any existing facilities owned by an affiliate of ITCLEC.[57] ITCLEC further asserts that it does not anticipate that any transmission customer initially allocated transmission rights through the open solicitation process will be affiliated with ITCLEC. ITCLEC states that, in the event that an affiliate purchases transmission rights through the open solicitation process, it will document the facts and circumstances surrounding this allocation of capacity in its post-allocation FPA section 205 filing.[58] ITCLEC further asserts that it will turn over operational control of the transmission line to PJM, which, under Commission precedent, demonstrates that the merchant will not erect barriers to entry or have the ability to exercise market power.[59] ITCLEC also commits to file electric quarterly reports of its transactions as required of transmission providers, to comply with any applicable affiliate rules, and to abide by the Commission's Standards of Conduct[60] to the extent applicable, should any affiliate take transmission service on the Project.

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[55] Policy Statement, 142 FERC ¶ 61,038 at P 34.

[56] Filing at 18-20.

[57] *Id.* at 18.

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

[59] *Id.* at 19 (citing *Ne. Util. Serv. Co.*, 98 FERC ¶ 61,310 (2002); *Mountain States Transmission Intertie, LLC*, 127 FERC ¶ 61,270, at P 64, n.39 (2009); and *Hudson Transmission Partners, LLC*, 135 FERC ¶ 61,104, at P 19 (2011)).

[60] 18 C.F.R. pt. 358 (2016).

b. Commission Determination

29. We acknowledge ITCLEC's commitments to engage in an open solicitation process and to make a subsequent compliance filing disclosing the results of the capacity allocation process and describing the process in sufficient detail to demonstrate that no affiliate has been afforded undue preference. We note that the Policy Statement does not preclude assignment of capacity to an affiliate, provided that the post-allocation compliance filing provides sufficient explanation of decisions used to select and reject specific customers and provides an affirmative showing that the affiliate is not afforded an undue preference.[61]

30. In addition, we acknowledge ITCLEC's commitment to turn over operational control of its facilities to PJM, to file electric quarterly reports of their transactions, to comply with all other applicable affiliate rules, and to abide by the Commission's Standards of Conduct to the extent any affiliate takes transmission service on the Project. Moreover, the commitments made by ITCLEC regarding the open solicitation process and reporting requirements will help ensure that all transactions are transparent. We accept these commitments as addressing our affiliate preference concerns, subject to the Commission's approval of ITCLEC's compliance filing demonstrating that the assignment of capacity to any affiliate and the corresponding treatment of nonaffiliated potential customers is just, reasonable, and not unduly discriminatory or preferential.

4. Factor Four: Regional Reliability and Operational Efficiency

31. In order to ensure regional reliability and operational efficiency, the Commission expects any merchant transmission projects connected to an RTO or ISO to turn over

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[61] Policy Statement, 142 FERC ¶ 61,038 at PP 30, 34. The Policy Statement provides:

> The developer will bear a high burden to demonstrate the assignment of capacity to its affiliate and the corresponding treatment of non-affiliated potential customers is just, reasonable, and not unduly preferential or discriminatory. While the Commission will not require non-affiliates to receive the same rates, terms and conditions as affiliates . . . the Commission will carefully scrutinize any differences in rates, terms and conditions for affiliates versus non-affiliates to ensure those differences are appropriately based on objective criteria.

Id. P 34.

operational control to the RTO/ISO. Merchant transmission projects, like cost-based transmission projects, are subject to mandatory reliability requirements.[62] Merchant transmission developers are required to comport with all applicable requirements of the North American Electric Reliability Corporation and any regional reliability council in which they are located.

a. ITCLEC's Proposal

32. As noted above, ITCLEC commits to turn over operational control of the transmission line to PJM and comply with all applicable reliability requirements.[63] Additionally, ITCLEC commits to provide PJM all required information necessary to inform its regional planning process, consistent with the requirements of Order No. 1000.[64]

b. Commission Determination

33. We acknowledge ITCLEC's commitment to turn over operational control of the transmission line to PJM, comply with all applicable reliability requirements, and provide PJM with all required information necessary for its regional transmission process pursuant to Order No. 1000. Accordingly, we find that, if executed as explained in ITCLEC's Filing, ITCLEC's proposal meets the regional reliability and operational efficiency requirements, subject to ITCLEC's continuing participation in the necessary regional planning processes.[65]

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[62] *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).

[63] Filing at 20.

[64] *Id.* (citing *Transmission Planning and Cost Allocation by Transmission Owning* and *Operating Public Utilities*, Order No. 1000, 76 FR 49842 (Aug. 11, 2011), FERC Stats. & Regs. ¶ 31,323 (2011), Order No. 1000-A, 77 FR 32184 (May 31, 2012), 139 FERC ¶ 61,132 (2012)).

[65] Order No. 1000 requires merchant transmission developers to provide "adequate information and data to allow public utility transmission providers in the transmission planning region to assess the potential reliability and operational impacts of the merchant transmission developer's proposed transmission facilities on other systems in the region." Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 164.

B. Waiver Requests

1. ITCLEC's Proposal

34. ITCLEC requests that the Commission grant waiver of certain filing and reporting regulatory requirements that will become effective when ITCLEC becomes a public utility,[66] as previously granted in the ITCLEC Negotiated Rate Order. Specifically, ITCLEC requests waiver of: (1) the full reporting requirements of Subparts B and C of Part 35 of the Commission's regulations, except for sections 35.12(a), 35.13(b), 35.15, and 35.16, and (2) Part 141 of the Commission's regulations, relating to forms and reports, except for sections 141.14 and 141.15.[67]

2. Commission Determination

35. Because ITCLEC is proposing a merchant transmission project wherein it would bear all the financial risks associated with the Project, would not have any captive customers, and would be charging negotiated rates, the regulations requiring the filing of cost-based data are not applicable. Accordingly, consistent with our prior orders,[68] we grant waiver of the full reporting 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), as requested by ITCLEC.

36. We will also grant ITCLEC's request for waiver of Part 141, except for sections 141.14 and 141.15. The Commission has previously granted waiver of these requirements to other merchant transmission owners.[69] We note, however, that ITCLEC

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[66] ITCLEC asserts that, as the Commission has recognized, merchant transmission developers become utilities at the time they become energized or have a rate schedule accepted by the Commission prior to the commencement of service. Filing at 2 & n.5 (citing *Multitrade Limited P'ship*, 63 FERC ¶ 61,252 (1993)).

[67] *Id.* at 21.

[68] *See* ITCLEC Negotiated Rates Order, 148 FERC ¶ 61,236 at P 37 & n.63; *see also e.g.*, *W. Spirit Clean Line LLC*, 155 FERC ¶ 61,252, at P 37 (2016); *Tres Amigas, LLC*, 153 FERC ¶ 61,287, at P 48 (2015); *Lucky Corridor, LLC*, 151 FERC ¶ 61,072, at P 47 (2015) (all granting waiver of Subparts B and C of Part 35 of the Commission's regulations, with exceptions).

[69] *See* ITCLEC Negotiated Rates Order, 148 FERC ¶ 61,236 at P 38 & n.64; *see also, e.g.*, *Plains & E. Clean Line LLC*, 148 FERC ¶ 61,122, at P 35 (2014) (granting waiver of Part 141, with the exception of sections 141.14 and 141.15).

must maintain its books and records in accordance with the Commission's accounting and record retention policies.

The Commission orders:

(A) ITCLEC is hereby granted conditional authority to sell transmission rights on its proposed merchant transmission project at negotiated rates, subject to condition, as discussed in the body of this order.

(B) ITCLEC is hereby directed to file with the Commission a compliance filing within 30 days after the close of its open solicitation process, as discussed in the body of this order.

(C) As discussed in the body of this order, ITCLEC is hereby granted waiver of (1) the provisions 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, and (2) Part 141 of the Commission's regulations, except for sections 141.14 and 141.15.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.