

140 FERC ¶ 61,125
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

ITC Midwest LLC

Docket No. EC12-95-000

ORDER AUTHORIZING ACQUISITION OF JURISDICTIONAL FACILITIES

(Issued August 13, 2012)

1. On April 30, 2012, ITC Midwest LLC filed an application seeking authorization, under section 203(a)(1) of the Federal Power Act (FPA)¹ and Part 33 of the Commission's regulations,² for the acquisition of transmission facilities from Southern Minnesota Municipal Power Agency (SMMPA) (Proposed Transaction). The jurisdictional facilities involved in the Proposed Transaction consist of certain 161 kV assets located at the Hayward and Adams substations in Hayward and Taopi, Minnesota, respectively (collectively, Transmission Facilities).

2. The Commission has reviewed the application under the Commission's Merger Policy Statement.³ As discussed below, we will authorize the Proposed Transaction as consistent with the public interest.

¹ 16 U.S.C. § 824b(a)(1) (2006).

² 18 C.F.R. pt. 33 (2011).

³ See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). See also *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement). See also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). See also *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

I. Background

A. Description of the Parties

3. ITC Midwest is a wholly-owned subsidiary of ITC Holdings Corp.⁴ ITC Midwest owns approximately 6,800 miles of transmission lines and 208 electric transmission substations in Iowa, Minnesota, Illinois and Missouri, and maintains operating locations in Iowa and Minnesota. ITC Midwest is a transmission-owning member of Midwest Independent Transmission System Operator, Inc. (MISO).⁵

4. SMMPA is a joint action agency comprised of 18 member municipalities in Minnesota that own and operate electrical systems. SMMPA is a non-profit political subdivision of the State of Minnesota and functions as the principal power supplier for its members. SMMPA is also a transmission-owning member of MISO.

B. Proposed Transaction

5. The Proposed Transaction consists of the transfer of the Transmission Facilities at net book value⁶ from SMMPA to ITC Midwest. The Transmission Facilities are comprised of 161 kV substation additions, a breaker addition, a lock-out relay, a transformer addition and substation upgrade. ITC Midwest states that SMMPA owns very limited assets in the Hayward and Adams substations and that the Proposed Transaction will eliminate logistical and administrative issues associated with these substations. Upon consummation of the Proposed Transaction, the Transmission Facilities will be under the operational control of MISO.

⁴ ITC Midwest states that ITC Holdings Corp. is an independent electric transmission company headquartered in Cedar Rapids, Iowa. It operates high-voltage transmission systems in Michigan's Lower Peninsula and portions of Iowa, Minnesota, Illinois, Missouri and Kansas, through its regulated operating subsidiaries: ITC Transmission, Michigan Electric Transmission Company, ITC Midwest and ITC Great Plains.

⁵ The costs of the Transmission Facilities are recovered under the ITC Midwest formula rate in Attachment O of the MISO Tariff.

⁶ The net book value of the Transmission Facilities was \$1,059,699.43 as of December 1, 2011. ITC Midwest states that the final purchase price will be reflected in its final accounting treatment, which will be filed with the Commission after the Proposed Transaction closes.

C. Notice of Filing and Responsive Pleadings

6. Notice of the application was published in the *Federal Register*, 77 Fed. Reg. 27,223 (2012), with interventions and comments due on or before May 21, 2012. Interstate Power and Light Company (IPL) filed a timely motion to intervene and comments. ITC Midwest filed an answer.

II. Discussion

A. Procedural Issues

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the timely, unopposed motion to intervene of IPL serves to make it a party to this proceeding.

8. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept ITC Midwest's answer because it has provided information that assisted us in our decision-making process.

B. Standard of Review Under Section 203

9. Section 203(a)(4) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest.⁷ The Commission's analysis of whether a transaction will be consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.⁸ Section 203(a)(4) also requires the Commission, before it approves a transaction, to find that the transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest."⁹ The Commission's regulations establish verification and informational requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or a pledge or encumbrance of utility assets.¹⁰

⁷ 16 U.S.C. § 824(b)(a)(4) (2006).

⁸ See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

⁹ 16 U.S.C. § 824b(a)(4) (2006).

¹⁰ 18 C.F.R. § 33.2(j) (2011).

C. Analysis Under Section 203

1. Effect on Competition

a. ITC Midwest's Analysis

10. ITC Midwest asserts that the Proposed Transaction will have no adverse effect on competition. It states that the Proposed Transaction will result in ITC Midwest acquiring transmission assets. It further states that the Proposed Transaction will not involve any disposition of generating assets and, therefore, will not result in any change in market concentration for generation.¹¹ Accordingly, ITC Midwest asserts that the Proposed Transaction raises no horizontal market power concerns.

11. Regarding vertical competition, ITC Midwest states that transmission service over facilities developed and owned by ITC Midwest (including those related to the Transmission Facilities) is provided pursuant to MISO's Open Access Transmission Tariff (OATT). Accordingly, ITC Midwest asserts that the Proposed Transaction raises no vertical market power concerns.¹²

b. Commission Determination

12. In analyzing whether a transaction will adversely affect competition, the Commission first examines its effects on concentration in generation markets or whether the transaction otherwise creates an incentive to engage in behavior harmful to competition, such as the withholding of generation. The Commission has recognized that "[a]nticompetitive effects are unlikely to arise in a transaction that only involves a disposition of transmission facilities."¹³ In this case, because the Proposed Transaction involves only the transfer of transmission facilities and because transmission service over such facilities will be provided pursuant to MISO's OATT, we find that the Proposed Transaction will not have an adverse effect on horizontal competition.

13. Second, the Commission considers the vertical combination of upstream inputs, such as transmission or natural gas, with downstream generating capacity. Because the Proposed Transaction does not involve any transfer of generation facilities or inputs to electric power generation, we find that it will not have an adverse effect on vertical competition.

¹¹ Application at 4-5.

¹² *Id.* at 5.

¹³ *DTE Energy Co.*, 97 FERC ¶ 61,330, at 62,572 (2001).

2. Effect on Rates

a. ITC Midwest's Analysis

14. ITC Midwest contends that the Proposed Transaction will not adversely affect rates. ITC Midwest states that transmission customers using the Transmission Facilities to receive transmission service under the MISO OATT are protected because the Transmission Facilities will be transferred at their current net book value. It explains that, as a consequence, the Proposed Transaction only increases ITC Midwest's rate base in accordance with the Transmission Facilities' net book value and will not result in an inflation of the rate base used to calculate transmission rates.

15. ITC Midwest states that the total asset purchase balance of the acquisition is \$1,059,699.43, which represents only 0.14 percent of ITC Midwest's total transmission asset rate base. Thus, ITC Midwest asserts that any effect on transmission rates as a result of the Proposed Transaction will be *de minimis*.¹⁴ ITC Midwest also asserts that, because ITC Midwest and SMMPA are both MISO transmission-owning members within the same transmission pricing zone, the transfer of the Transmission Facilities will reflect an updated allocation among ITC Midwest and SMMPA, but will not change the overall zonal rate base. ITC Midwest also states that the effect on transmission rates would be no different or less than if ITC Midwest invested in the construction of alternative replacement facilities. Additionally, ITC Midwest states that ITC Midwest's transmission customers will realize operational efficiency and reliability benefits from the expansion of the transmission system through the acquisition of the Transmission Facilities.¹⁵ Finally, ITC Midwest pledges to hold harmless all transmission customers from any costs associated with the Proposed Transaction for a period of five years to the extent that such costs exceed savings related to the Proposed Transaction.¹⁶

b. IPL's Comments

16. IPL states that ITC Midwest did not provide any analysis to support its assertion that the Proposed Transaction will not have an adverse impact on rates of wholesale power and transmission customers. IPL asserts that the capital costs associated with the Proposed

¹⁴ Application at 6.

¹⁵ *Id.* at 6-7.

¹⁶ *Id.* at 7. ITC Midwest states that the hold harmless commitment is not a rate freeze and would not preclude changes in transmission rates attributable to non-transaction costs or to the costs or value of the substations.

Transaction will rise and ITC Midwest will earn a higher return on capital than SMMPA and pass that difference onto its customers without providing any additional services. IPL further asserts that ITC Midwest did not provide any support for its claim that transmission customers will realize operational efficiency and reliability benefits from the expansion of the transmission system through the acquisition of these assets. It argues that it is unlikely that the Proposed Transaction creates additional benefits to customers.¹⁷

c. ITC Midwest's Answer

17. In its answer, ITC Midwest contends that IPL overlooks the fact that the Commission has found that rate changes due to structural differences (i.e., changing ownership from a non-jurisdictional entity to a public utility) are not necessarily “adverse” for the purposes of section 203 analysis.¹⁸ Further, ITC Midwest contends that the Proposed Transaction actually will result in *lower* rates for IPL because, based on the Attachment O data currently posted on the MISO website, removing the \$2.35 million of gross plant associated with the Transmission Facilities from the calculation of the portion of SMMPA’s annual transmission revenue requirement allocated to the ITC Midwest joint zone reduces the amount of SMMPA’s annual revenue requirement allocated to the ITC Midwest joint zone by \$593,628. ITC Midwest explains that SMMPA’s annual transmission revenue requirement is 27.7 percent of its gross plant while ITC Midwest’s annual transmission revenue requirement is 16.9 percent of its gross plant. Therefore, ITC Midwest states that the zonal annual transmission revenue requirement will decrease by approximately \$200,000 and result in a reduction in the joint zone network rate charged to IPL. Additionally, ITC Midwest maintains that this reduction is primarily due to the fact that SMMPA’s annual transmission revenue requirement per unit of gross plant is higher than ITC Midwest’s, and as a zonal customer of ITC Midwest, IPL pays a fully allocated share of SMMPA’s total company annual transmission revenue requirement.¹⁹

18. Additionally, ITC Midwest asserts that, even if the Proposed Transaction were to result in a rate *increase* to IPL or other ITC Midwest customers, any adverse effect would be offset or mitigated by benefits from the Proposed Transaction, such as the elimination

¹⁷ IPL Comments at 3.

¹⁸ ITC Midwest Answer at 5, 8 (citing *ALLETE, Inc.*, 129 FERC ¶ 61,174, at P 20 (2009)). ITC Midwest states that, in *ALLETE*, the increase in rates resulting from the change in ownership of transmission facilities from a non-jurisdictional entity to a public utility was due to the latter’s need to recover in rates taxes and a return on equity related to the facilities.

¹⁹ ITC Midwest Answer at 6-7.

of logistical and administrative issues relative to apportioning ongoing costs associated with shared features of these substations (i.e., fencing, station batteries, grounds maintenance, etc.). ITC Midwest notes that IPL raised similar issues regarding an adverse effect on rates when ITC Midwest acquired the Fox Lake transmission line from Northern States Power Company in 2010.²⁰ It states that, in that proceeding, the Commission found that a rate increase may be offset by improvements in transmission that result from a proposed transaction. In this case, ITC Midwest claims that the improvement is the more efficient and reliable operation and maintenance of facilities when owned completely by ITC Midwest rather than partially owned by SMMPA. ITC Midwest also states that, as with the Fox Lake acquisition, similar benefits accrue from the Proposed Transaction such as higher reliability due to fewer handoffs of information and more flexibility in day-to-day operations, which are difficult to quantify in terms of dollar per year savings. Lastly, ITC Midwest notes that, the Commission has previously recognized that transfer of a transmission line to a transmission-only company, such as ITC Midwest, “produces additional benefits offsetting a rate increase because the [independent transmission company] business model may enhance asset management and responsiveness to market signals indicating when and where transmission investment is needed.”²¹

d. Commission Determination

19. Our analysis of rate effects under section 203 of the FPA differs from the analysis of whether rates are just and reasonable. Our focus here is on the effect that a proposed transaction itself will have on rates, whether that effect is adverse, and whether any adverse effect will be offset or mitigated by benefits that are likely to result from the proposed transaction.²² Under the circumstances presented, the Commission finds that the Proposed Transaction will not have an adverse effect on rates.

20. The Transmission Facilities will be acquired by ITC Midwest at their net book value and will increase ITC Midwest’s rate base in accordance with that value. Moreover, as noted by ITC Midwest, ITC Midwest and SMMPA are both MISO transmission-

²⁰ *Id.* at 8-9 (citing *ITC Midwest LLC*, 133 FERC ¶ 61,169, at P 23 (2010)).

²¹ *Id.* at 10 (quoting *ITC Midwest LLC*, 133 FERC ¶ 61,169 at P 23 (citing *Startrans IO, LLC*, 122 FERC ¶ 61,307, at P 27 (2008))).

²² *ALLETE, Inc.*, 129 FERC ¶ 61,174 at P 19 (citing Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,123 (noting that an increase in rates “can still be consistent with the public interest if there are countervailing benefits that derive from the transaction”)); *see also Startrans IO, LLC*, 122 FERC ¶ 61,307, at PP 25-28 (2008); *ITC Holdings Corp.*, 121 FERC ¶ 61,229, at PP 120-128 (2007)).

owning members within the same transmission pricing zone and therefore, the transfer of the Transmission Facilities will reflect an updated allocation of transmission assets among ITC Midwest and SMMPA, but will not change the overall zonal rate base. Even if IPL is correct in its assumption that ITC Midwest will earn a higher return on capital than SMMPA, and will pass that difference onto its customers, the record demonstrates that the amount of such rate impact (if any) will be *de minimis*.²³ Finally, we note that ITC Midwest claims that its customers will benefit from reduced logistical and administrative issues associated with allocating costs of the Transmission Facilities, the transfer of ownership of the Transmission Facilities to a transmission-only company, and greater reliability.²⁴ Therefore, we find that the Proposed Transaction will have no adverse effect on rates.

21. We accept ITC Midwest's commitment not to collect from transmission customers any costs associated with the Proposed Transaction. We interpret this statement to mean that ITC Midwest will not collect from transmission customers, for a period of five years, any transaction-related costs that exceed transaction-related savings, which we have interpreted to include all transaction-related costs, not only costs related to consummating the transaction. The Commission will be able to monitor ITC Midwest's hold harmless commitment under its authority under section 301(c) of the FPA²⁵ and the books and records provision of the Public Utility Holding Company Act 2005,²⁶ and the commitment is fully enforceable based on the Commission's authority under section 203 of the FPA.

22. The Commission has found that a hold harmless commitment is enforceable and administratively manageable if customers have an opportunity to scrutinize costs before

²³ As already noted, in its answer, ITC Midwest asserts that the Proposed Transaction will, in fact, result in *lower* rates to IPL, since removal of the \$2.35 million of gross plant associated with the Transmission Facilities from the calculation of the portion of SMMPA's annual transmission revenue requirement allocated to the ITC Midwest joint zone reduces the amount of SMMPA's annual revenue requirement allocated to the ITC Midwest joint zone by an amount that, according to ITC Midwest, is greater than the corresponding increase in ITC Midwest's annual transmission revenue requirement. ITC Midwest Answer at 6-7.

²⁴ See *ITC Midwest LLC*, 133 FERC ¶ 61,169 at P 23 (finding that a rate increase may be offset by benefits and improvements to transmission that result from the transaction).

²⁵ 16 U.S.C. § 825(c).

²⁶ 42 U.S.C. § 16452 (2006).

they are included in the formula rate, and therefore are able to alert the Commission to costs that might be transaction-related. If ITC Midwest seeks to recover transaction-related costs through its transmission rates within five years after the Proposed Transaction is consummated, it must submit a compliance filing that details how it is satisfying the hold harmless requirement. If ITC Midwest seeks to recover transaction-related costs in an existing formula rate that allows for such recovery, then that compliance filing must be filed in the section 205 docket in which the formula rate was approved by the Commission, as well as in the instant section 203 docket.²⁷ We also note that, if ITC Midwest seeks to recover transaction-related costs in a filing, whereby ITC Midwest is proposing a *new* rate (either a new formula rate or a new stated rate), then that filing must be made in a *new* section 205 docket as well as in the instant section 203 docket.²⁸ The Commission will notice such filings for public comment. In such filings, ITC Midwest must: (1) specifically identify the transaction-related costs it is seeking to recover; and (2) demonstrate that those costs are exceeded by the savings produced by the transaction, in addition to any requirements associated with filings made under section 205. Such a hold harmless commitment will protect ITC Midwest's transmission customers from being adversely affected by the Proposed Transaction.²⁹

3. Effect on Regulation

a. ITC Midwest's Analysis

23. ITC Midwest asserts that the Proposed Transaction will have no adverse effect on federal or state regulation. ITC Midwest states that the extent to which ITC Midwest is subject to the jurisdiction of the Commission will not change as a result of the Proposed Transaction. It also states that the Proposed Transaction will have no effect on the status of SMMPA, which is not a jurisdictional entity. Additionally, ITC Midwest states that the Proposed Transaction has not and will not affect state regulation of the substations, both located in Minnesota.³⁰ ITC Midwest also indicates that no state regulatory approval was

²⁷ In this case, the filing would be a compliance filing in both the section 203 and 205 dockets.

²⁸ In this case, the filing would be a compliance filing in the section 203 docket, but a rate application in the section 205 docket.

²⁹ See *ITC Midwest LLC*, 133 FERC ¶ 61,169 at PP 24-25; *FirstEnergy Corp.*, 133 FERC ¶ 61,222, at P 63 (2010); and *PPL Corp.*, 133 FERC ¶ 61,083, at PP 26-27 (2010).

³⁰ Application at 7.

necessary to effectuate the Proposed Transaction, and that assets previously subject to state regulation will become subject to Commission regulation after consummation of the Proposed Transaction.

b. Commission Determination

24. We find that neither state nor federal regulation will be impaired by the Proposed Transaction. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap at the federal or state level.³¹ We find that the Proposed Transaction will not create a regulatory gap at the federal level, because the Commission will retain its regulatory authority over the rates over the Transmission Facilities after the Proposed Transaction. We note that no party alleges that regulation would be impaired by the Proposed Transaction, and that no state commission has asked the Commission to address the issue of the effect on state regulation.

4. Cross-Subsidization

a. ITC Midwest's Analysis

25. ITC Midwest contends that the Proposed Transaction will not result in any cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company. ITC Midwest states that, based on known or reasonably foreseeable information, the Proposed Transaction will not result in, at the time of the transaction or in the future: (1) any transfer of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) any new issuance of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) the assets subject to the Proposed Transaction being pledged or encumbered in any manner different from that applicable to ITC Midwest's utility assets generally; or (4) any new affiliate contracts between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205³² and 206³³ of the FPA.³⁴

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

³² 16 U.S.C. § 824d.

³³ 16 U.S.C. § 824e.

b. Commission Determination

26. Based on the representations as presented in the application, we find that the Proposed Transaction will not result in cross-subsidization, or the pledge or encumbrance of utility assets for the benefit of an associate company.

5. Accounting Issues

27. ITC Midwest states that Hayward and Adams substations will be transferred from SMMPA to ITC Midwest at their net book value, which is estimated to be \$1,059,699. ITC Midwest proposes to record the purchase of the Transmission Facilities through Account 102, Electric Plant Purchased or Sold, consistent with Electric Plant Instruction No. 5 (EPI 5).³⁵ It proposes to record the original cost of the Transmission Facilities in Account 101, Electric Plant In Service, and the related accumulated depreciation in Account 108, Accumulated Provision for Depreciation of Electric Utility Plant.

6. Reliability and Cyber Security Standards

28. Information and/or systems connected to the bulk power system involved in this transaction may be subject to reliability and cyber security standards approved by the Commission pursuant to FPA section 215.³⁶ Compliance with these standards is mandatory and enforceable regardless of the physical location of the affiliates or investors, information databases, and operating systems. If affiliates, personnel or investors are not authorized for access to such information and/or systems connected to the bulk power system, a public utility is obligated to take the appropriate measures to deny access to this information and/or the equipment/software connected to the bulk power system. The mechanisms that deny access to information, procedures, software, equipment, and the like, must comply with all applicable reliability and cyber security standards. The Commission, the North American Electric Reliability Corporation, or the relevant regional entity may audit compliance with reliability and cyber security standards.

³⁴ Application at 9-10, Exhibit M.

³⁵ 18 C.F.R Part 101 (2012).

³⁶ 16 U.S.C. § 824o (2006).

The Commission orders:

(A) The Proposed Transaction is hereby authorized, as discussed in the body of this order.

(B) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates, or determinations of cost, or any other matter whatsoever now pending or which may become before the Commission.

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

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

(E) ITC Midwest shall make appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Transaction.

(F) ITC Midwest must inform the Commission within 30 days of any material change in circumstances that would reflect a departure from the facts the Commission relied upon in authorizing the Proposed Transaction.

(G) ITC Midwest shall notify the Commission within 10 days of the date on which the Proposed Transaction is consummated.

(H) ITC Midwest shall account for the Proposed Transaction in accordance with Electric Plant Instruction No. 5 and Account 102, Electric Plant Purchased or Sold, of the Uniform System of Accounts. ITC Midwest shall submit final accounting entries within six months of the date that the Proposed Transaction is consummated, and the accounting submission shall provide all the accounting entries and amounts related to the Proposed Transaction along with narrative explanations describing the basis for the entries.

(I) If ITC Midwest seeks to recover transaction-related costs through any formula rate, it must submit a compliance filing, which will be subject to notice and comment, to the Commission in this docket that details how it is satisfying the hold harmless requirement. In particular, in such a filing, ITC Midwest must: (1) specifically identify the transaction-related costs it is seeking to recover; and (2) demonstrate that those costs are exceeded by the savings produced by the Proposed Transaction.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.