

146 FERC ¶ 61,167
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Champlain VT, LLC

Docket No. ER14-966-000

ORDER CONDITIONALLY AUTHORIZING PROPOSAL AND GRANTING
WAIVER

(March 10, 2014)

1. On January 8, 2014, Champlain VT, LLC, d/b/a TDI New England (TDI-NE) 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. In this order, the Commission conditionally authorizes TDI-NE to sell transmission rights on the Project at negotiated rates and grants TDI-NE's request for waiver.

I. Background

A. Applicant

TDI-NE is a limited liability company owned by Champlain VT, Ltd., which is indirectly wholly-owned by investment funds controlled by The Blackstone Group LP (Blackstone).¹ TDI-NE states that it was established for the purpose of developing and financing the Project, and does not own or operate any existing electric generation, transmission, or distribution facilities. Through the common control of Blackstone, TDI-NE is affiliated with the Champlain Hudson Power Express project, which is expected to be completed in 2017 and will be under the operational control of New York Independent System Operator, Inc.² TDI-NE states that Blackstone does not own or control any

¹ Filing at 3.

² Filing at 3 n.2.

existing electric generation, transmission, or distribution facilities in the markets operated by ISO New England Inc. (ISO-NE) or Hydro-Québec TransÉnergie (HQT).³

B. Description of Project

2. The Project is a 150-mile, 1,000 MW, high-voltage direct current transmission line, which will originate at a converter station in Quebec, Canada and terminate in Ludlow, Vermont.⁴ Approximately 100 miles of the Project will be buried in Lake Champlain, and the remaining length will be buried underground along existing rights-of-way. The Project will directly connect the markets in Quebec and ISO-NE. TDI-NE 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.⁵ Additionally, TDI-NE states it has filed interconnection applications with ISO-NE and HQT. Upon completion of the transmission line, TDI-NE states that the approximately 150-mile-long section of the Project located in the United States will be under ISO-NE's operational control.⁶

C. Application

3. TDI-NE seeks authority to charge negotiated rates for the sale of transmission rights on the Project. It contends that it meets the four factor analysis outlined in *Chinook* (and further discussed below) for approval of negotiated rate authority.⁷ In its

³ *Id.* at 4.

⁴ *Id.*

⁵ *Id.* at 5.

⁶ *Id.* at 1-2.

⁷ *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134 (2009) (*Chinook*). See also, *Hudson Transmission Partners, LLC*, 135 FERC ¶ 61,104 (2011) (*Hudson Transmission*); *Champlain Hudson Power Express, Inc.*, 132 FERC ¶ 61,006 (2010) (*Champlain Hudson*) (distinguishing merchant transmission projects from traditional public utilities in that developers of merchant projects assume all market risk of a project and have no captive customers from which to recover project costs).

application, TDI-NE proposes to conduct an open solicitation process in compliance with the Commission's January 17, 2013 Policy Statement.⁸ TDI-NE's application is described in further detail below.

II. Notice, Intervention, and Responsive Pleadings

4. Notice of TDI-NE's Filing was published in the *Federal Register*, 79 Fed. Reg. 3,192 (2014), with interventions and protests due on or before January 29, 2014. None were received.

III. Discussion

A. Negotiated Rate Authority

5. In addressing requests for negotiated rate authority from merchant transmission providers, the Commission has stated its commitment 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.⁹ In evaluating negotiated rate applications, the Commission has focused 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.¹⁰ This approach allows the Commission to use a consistent framework to evaluate requests for

⁸ *Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Projects*, 142 FERC ¶ 61,038 (2013) (Policy Statement).

⁹ 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).

¹⁰ *Chinook*, 126 FERC ¶ 61,134 at P 37.

negotiated rate authority from a wide range of merchant projects that can differ substantially from one project to the next.

1. Policy Statement

6. 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 non-incumbent, cost-based, participant-funded transmission projects.¹¹ 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 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.¹² To the extent the Commission determines that a merchant transmission developer complies with such policies, the Commission may find that the developer has satisfied the second (undue discrimination) and third (undue preference) factors of the aforementioned four-factor analysis.¹³

7. 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.¹⁴

¹¹ Policy Statement, 142 FERC ¶ 61,038.

¹² *Id.* P 16.

¹³ *Id.* P 15.

¹⁴ *Id.* P 28.

2. Four-factor Analysis

a. Factor One: Just and Reasonable Rates

8. To approve negotiated rates for a transmission project, the Commission must find that the rates are just and reasonable.¹⁵ In making that determination, the Commission considers whether the merchant transmission owner has assumed the full market risk for the cost of constructing its proposed transmission project. The Commission also considers 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 may 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.

i. TDI-NE's Proposal

9. TDI-NE states that it will assume all market risks for the Project and there will be no captive customers.¹⁶ TDI-NE asserts that it is a new market entrant that does not own or operate any existing facilities in ISO-NE, and that no affiliate owns or operates facilities in these markets. TDI-NE also states that when the transmission line is completed, it will turn over operational control of the line to ISO-NE, which will operate the line under ISO-NE's Open Access Transmission Tariff (OATT), thus preventing TDI-NE from acquiring market power or controlling barriers to entry in the ISO-NE market.

10. TDI-NE states that incumbent transmission owners have an obligation under the ISO-NE OATT to expand their transmission capacity, upon request, at cost-based rates, and therefore no entity will purchase transmission service from TDI-NE unless it is cost-effective to do so when compared to the incumbent transmission owners' cost of expanding capacity. TDI-NE 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 in Canada

¹⁵ See *Champlain Hudson*, 132 FERC ¶ 61,006 at P 17.

¹⁶ Filing at 9.

and ISO-NE.¹⁷ Finally, TDI-NE states that the anchor customers likely to subscribe to the Project are sophisticated utilities that would only secure transmission service at competitive rates.¹⁸

ii. Commission Determination

11. The Commission concludes that TDI-NE's request for authority to charge negotiated rates for service on the Project has met the first of the *Chinoook* factors. TDI-NE will bear all market risks that the Project will succeed or fail based on whether a market exists for its services. Additionally, TDI-NE has no ability to pass on any costs to captive ratepayers.

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

b. Factor Two: Undue Discrimination

13. Under the Policy Statement, a developer may demonstrate no undue discrimination or preference by conducting an open solicitation that complies with the requirements of the Policy Statement.¹⁹ As detailed below, 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.²⁰

¹⁷ *Id.* at 10 (citing *Lake Erie CleanPower Connector*, 144 FERC ¶ 61,203, at P 13 (2014)).

¹⁸ Filing at 10.

¹⁹ Policy Statement, 142 FERC ¶ 61,038 at PP 15, 23.

²⁰ *Id.* P 16.

i. Broad Notice under the Policy Statement

14. 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.²¹ 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).²² 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. 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.²³

ii. Post-Selection Filing under the Policy Statement

15. The Policy Statement states that the Commission will continue to require merchant developers to disclose the results of their capacity allocation process. The developer's request for approval of the capacity allocation process will be noticed and acted upon under section 205 of the Federal Power Act.²⁴ 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. 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

²¹ *Id.* P 23.

²² *Id.* P 20.

²³ *Id.* PP 24-27.

²⁴ 16 U.S.C. § 824d (2012).

Commission and interested parties.²⁵ 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.²⁶

²⁵ Policy Statement, 142 FERC ¶ 61,038 at P 30.

²⁶ *Id.* P 32.

16. The Policy Statement allows developers discretion in the timing of requests for approval of capacity allocation processes. The Policy Statement provides 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 that the developer's selection of customers was consistent with the approved selection process.²⁷

iii. TDI-NE's Proposal

17. TDI-NE states that it will turn over operational control of the Project to ISO-NE and conduct an open solicitation process consistent with the Policy Statement.²⁸ To ensure that its open solicitation process is not unduly discriminatory or preferential, TDI-NE 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, TDI-NE anticipates establishing a website specific to the Project and issuing a press release to be circulated to energy trade publications, news outlets within the ISO-NE/HQT region, and a list of potential transmission customers.²⁹ TDI-NE states that both the website and press release will include the Project's capacity, the interconnection points in HQT and ISO-NE, 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 TDI-NE, 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 TDI-NE will address inquiries from potential customers. TDI-NE anticipates holding one public meeting in Canada and one public meeting in the United States. TDI-NE states that it will post and time-stamp on its website and distribute through an email list-serve any material changes to the Project status or the open solicitation process.

²⁷ *Id.* P 31.

²⁸ Filing at 11.

²⁹ *Id.* at 11-12.

18. Once customer agreements have been executed, TDI-NE 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.³⁰ TDI-NE states that it will file with the Commission the results of its capacity allocation process, and will demonstrate that it conducted its open solicitation process and execution of contractual agreements in a manner consistent with the Commission's open access policies and the Policy Statement.

19. TDI-NE 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.³¹

iv. Commission Determination

20. In its filing, TDI-NE describes how it plans to broadly solicit interest from potential customers.³² In addition to committing to engage in an open solicitation process, TDI-NE 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. TDI-NE also commits to turn over operational control of the Project to ISO-NE. The Commission acknowledges TDI-NE's commitment to engage in an open solicitation and capacity allocation process consistent with the Policy Statement and

³⁰ *Id.* at 13.

³¹ *Id.* at 13-14.

³² We note that TDI-NE has committed to, among other things, issuing a press release to energy trade publications and news outlets within the ISO-NE/HQT region regarding the open solicitation. We also note that the Policy Statement contemplates "[placing a notice] in trade magazines or regional energy publications." Policy Statement, 142 FERC ¶ 61,038 at P 23. As sending a press release to a publisher does not guarantee its actual publication, we note that TDI-NE must ensure that the solicitation information is published sufficiently broadly, including, if necessary, purchasing sufficient supplemental advertisement coverage to establish that TDI-NE has met the "broad notice" requirement of the Commission's analysis under the Policy Statement.

reserves judgment on TDI-NE's section 205 filing (providing details regarding the open solicitation and capacity allocation process) and TDI-NE filing, through eTariff, of a rate schedule for service under the ISO-NE OATT prior to commencement of service. We accept these commitments as addressing our undue discrimination and preference concerns, subject to the Commission's approval of TDI-NE's subsequent section 205 filing demonstrating that the assignment of capacity is not unduly preferential or discriminatory.

21. Consistent with *Chinook*, once the Project has commenced operation, TDI-NE 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,³³ subject to examination as required in Part 41 of the regulations;³⁴ and (2) its books and records are audited by an independent auditor.³⁵

c. Factor Three: Undue Preference and Affiliate Concerns

22. 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.³⁶

i. TDI-NE's Proposal

23. TDI-NE states that none of its affiliates own or operate electric facilities in ISO-NE or HQT, and that the Project will not interconnect with any existing facilities

³³ 18 C.F.R. pt. 101 (2013).

³⁴ 18 C.F.R. pt. 41 (2013).

³⁵ *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*).

³⁶ Policy Statement at P 34.

owned by an affiliate.³⁷ TDI-NE asserts that it does not anticipate that an affiliate will purchase transmission rights through the open solicitation process, but 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, TDI-NE contends that there will be no opportunity for affiliate abuse. TDI-NE states that it will turn over operational control of its facilities to ISO-NE, 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.³⁸ Finally, as discussed above, TDI-NE commits to conduct an open solicitation process that broadly solicits interest in the Project from potential customers and make a section 205 filing with the Commission to demonstrate that TDI-NE has satisfied the solicitation, selection, and negotiation process set forth in the Policy Statement.

ii. Commission Determination

24. We acknowledge TDI-NE'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 TDI-NE's commitment to turn over operational control of its facilities to ISO-NE, 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 TDI-NE's subsequent section 205 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

25. 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

³⁷ Filing at 14.

³⁸ *Id.* at 15.

operational control to the RTO/ISO.³⁹ Further, merchant transmission projects, like cost-based transmission projects, are subject to mandatory reliability requirements.⁴⁰ 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.

i. TDI-NE's Proposal

26. TDI-NE commits to turn over operational control of the Project to ISO-NE and to comply with all applicable reliability requirements.⁴¹ Additionally, TDI-NE states that consistent with the requirements of Order No. 1000,⁴² it will provide to ISO-NE all required information regarding its regional planning process.

ii. Commission Determination

27. The Commission acknowledges TDI-NE's commitment to turn over operational control of the Project to ISO-NE and comply with all applicable reliability requirements, and TDI-NE representation that it has filed interconnection applications with ISO-NE. Accordingly, we find that TDI-NE has met the regional reliability and operational efficiency requirement, subject to TDI-NE's continued participation in the necessary regional planning processes.

³⁹ *Chinook*, 126 FERC ¶ 61,134 at P 52.

⁴⁰ *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).

⁴¹ Filing at 15.

⁴² *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).

B. Waiver Requests**1. TDI-NE's Proposal**

28. TDI-NE 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, except for sections 141.14 and 141.15. TDI-NE states that the Commission has granted similar waiver requests to other merchant transmission owners seeking negotiated rate authority.⁴³

2. Commission Determination

29. Because TDI-NE is proposing to charge negotiated rates, the regulations requiring the filing of cost-based data are not applicable. For good cause shown and consistent with our prior orders, we will grant waiver of the applicable 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 35.16.⁴⁴

30. The Commission will also grant TDI-NE'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.⁴⁵

The Commission orders:

(A) The Commission hereby grants TDI-NE 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 TDI-NE's submission

⁴³ Filing at 18 (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*)).

⁴⁴ *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*).

⁴⁵ *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).

of a rate schedule for service under the ISO-NE OATT, as discussed in the body of this order.

(B) The Commission grants TDI-NE 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)

Nathaniel J. Davis, Sr.,
Deputy Secretary.