

STUNTZ, DAVIS & STAFFIER, P.C.

ATTORNEYS AT LAW

555 Twelfth Street, N.W.
Suite 630
Washington, D.C. 20004
(202) 638-6588 Telephone
(202) 638-6581 Facsimile

July 28, 2015

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

**Re: ITC Grid Development, LLC
Docket No. EL15-___-000
Petition for Declaratory Order Regarding Rates for Competitively
Selected Transmission Projects**

BY ELECTRONIC FILING

Dear Secretary Bose:

Enclosed please find a Petition for Declaratory Order seeking a ruling by the Federal Energy Regulatory Commission (“Commission”): 1) that binding revenue requirement bids selected as the result of Commission-approved, Order No. 1000-compliant, and demonstrably competitive transmission project selection processes will be deemed just and reasonable when filed at the Commission as a stated rate pursuant to Federal Power Act (“FPA”) Section 205; and 2) that such binding bids are entitled to protection under the *Mobile-Sierra* standard, and may not subsequently be changed by means of a complaint filed under FPA Section 206 unless required by the public interest. ITC Grid Development, LLC (“ITC Grid Development”) is filing this Petition pursuant to Rule 207(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.207(a)(2) (2014). ITC Grid Development respectfully requests that the Commission rule on this Petition within 90 days, or by October 26, 2015, in order to facilitate ITC Grid Development’s participation in upcoming competitive project solicitations.

The required filing fee of \$24,730.00 under the Commission’s regulations in 18 C.F.R. § 381.302(a) will be submitted today under separate cover.

Please let me know if you have any questions concerning this filing. Thank you for your assistance.

Respectfully submitted,

/s/ Ellen S. Young

Ellen S. Young

Counsel to ITC Grid Development, LLC

Enclosure

I. SUMMARY

In order to be chosen to build a transmission project pursuant to the competitive processes established in compliance with Order No. 1000,¹ bidders are required by some regional transmission organizations (“RTOs”) to specify the full revenue requirement (costs plus return) for the project for each of the next 40 years or the life of the project. Even where a binding bid is not explicitly required, the submission of bids with cost containment measures has been cited as the determining factor in selecting the winning bidders in recently concluded competitive solicitations.

Binding revenue requirement bids present an asymmetrical risk for transmission developers: any cost incurred by the winning bidder in excess of the binding bid, regardless of prudence or benefit to ratepayers, will not be recoverable, but any cost savings achieved below the binding bid may expose the transmission developer to an FPA Section 206 complaint seeking to adjust stated rates to lower the revenue requirement.

This is an untenable “head’s I win, tails you lose” situation for transmission developers. In a competitive process, the bid operates to set the market price (revenue requirement) for the project and to establish the return on the developer’s investment. A basic underpinning of competitive transmission solicitation processes is that bids are meaningful: simply stated, if developers are not held to their bids, the competitive process loses its integrity. Developers must have confidence that others will be bound by their bids, just as developers are bound by their bids, unless demanded by the public interest. It is therefore essential to the integrity of

¹ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh’g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh’g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff’d sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

competitive transmission solicitation processes that successful binding revenue requirement bids not be upset absent a compelling showing.

To this end, this Petition asks the Commission to declare that binding revenue requirement bids selected as the result of Commission-approved competitive transmission selection processes will be deemed just and reasonable when filed at the Commission as a stated rate, and may not subsequently be changed by means of an FPA Section 206 complaint unless required by the public interest. Such a declaration would be consistent with the United States Supreme Court's *Mobile-Sierra* line of cases, which protect agreements freely entered into, and the Commission's application of the *Mobile-Sierra* standard to rates and rate elements developed through competitive market processes, including capacity auctions. The competitive transmission solicitation processes established under Order No. 1000 possess the same transparency, thorough and independent oversight, level of competition, and other indicators of justness and reasonableness that the Commission previously has found justify applying the *Mobile-Sierra* public interest standard. Applying *Mobile-Sierra* to competitively-set binding revenue requirements, while certainly not eliminating the risks faced by project developers, will provide transmission cost stability, incentivize efficiency in transmission project development, and promote robust competition among transmission developers.

As Commissioner LaFleur recognized in her recent concurrence in *Pub. Ser. Elec. and Gas Co. v. PJM Interconnection, LLC*, a key goal of Order No. 1000 was to “harness the benefits of competition in transmission development for customers.”² Commissioner LaFleur acknowledged that “Order No. 1000’s competitive solicitation processes – and in some cases, the mere prospect of competitive solicitation processes – have already led to a host of innovative rate

² *Pub. Ser. Elec. and Gas Co. v. PJM Interconnection, LLC*, 151 FERC ¶ 61,229 (2015), Commissioner LaFleur, Concurring, at p. 1.

structures and cost containment proposals that, if properly designed, could provide significant benefits for customers.”³ She continued that such efforts should be encouraged by the Commission “to foster a dynamic environment for new transmission development.”⁴ Extending *Mobile-Sierra* protection to binding, full revenue requirement bids will contribute to the design of effective cost containment proposals and meaningfully encourage investment in competitive transmission projects.

II. BACKGROUND AND ORDER REQUESTED

ITC Grid Development is a wholly owned subsidiary of ITC Holdings Corp., the nation’s largest independent electricity transmission company. ITC Grid Development identifies opportunities to build new transmission lines required to improve reliability, reduce the cost of delivered power and access energy resources, including renewable energy resources. Several subsidiaries of ITC Grid Development have been formed for the purpose of developing new, independent transmission projects in different regions of the country.⁵ The ITC Grid Development subsidiaries intend to participate in competitive solicitations to respond to needs identified by RTOs, and/or to finance, build, own and operate transmission projects identified by RTOs.

The competitive processes being implemented by the Midcontinent Independent System Operator, Inc. (“MISO”) and the Southwest Power Pool, Inc. (“SPP”) require competitive transmission project bidders to submit full revenue requirement bids. The competitive selection process contained in the Transmission Expansion Planning Protocol, Attachment FF.VIII of the

³ *Id.*

⁴ *Id.*

⁵ Development subsidiaries of ITC Grid Development include ITC Mid-Atlantic Development LLC, ITC Midcontinent Development LLC, and ITC South Central Development LLC.

MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff (“MISO Tariff”) provides generally that the MISO Board will approve transmission projects for inclusion in Appendix A of the MISO Transmission Expansion Plan (“MTEP”). Upon approval of an Open Transmission Project, MISO will develop and post a Transmission Proposal Request. New Transmission Proposals then may be submitted in response to a posted Transmission Proposal Request by entities that are Qualified Transmission Developers. Applicants submitting a New Transmission Proposal in response to a Transmission Proposal Request must submit cost estimate data for each proposed new facility. Pursuant to the MISO Tariff Attachment FF.VIII.C.4(b), cost estimate data must include, at a minimum, “[e]stimated annual revenue requirements for the first 40 years the facilities included in the New Transmission Proposal will be in service in accordance with Attachment MM of the Tariff for Multi Value Projects and Attachment GG of the Tariff for Market Efficiency Projects, including the supporting detail on the annual allocation factors for operations and maintenance, general and common depreciation expense, taxes other than income taxes, income taxes, and return used to estimate the annual revenue requirements.” Estimated project cost and estimated annual revenue requirements are among the factors on which New Transmission Proposals will be evaluated by MISO. *See* Attachment FF.VIII.E.3.

SPP also requires bidders for competitive transmission projects to submit full revenue requirement bids. The Transmission Owner Selection Process for Competitive Upgrades set forth in Attachment Y of the SPP Open Access Transmission Tariff (“SPP Tariff”) requires a Qualified RFP Participant (“QRP”) responding to an SPP-issued Request for Proposals for a Competitive Upgrade to include itemized revenue requirement calculations, as well as detailed engineering and construction cost estimates. *See* Attachment Y.III.2.c(v)(1).

Transmission project competitions to date suggest that successful bidders will need to agree to binding cost commitments. An example is the Artificial Island Project in PJM, where the cost commitments made by those pursuing the project, and exclusions from cost commitments, were significant factors in the recommendation of the PJM staff regarding which developer was designated to construct a new 230 kV transmission line.⁶ Similarly, the California Independent System Operator (“CAISO”), in a recent solicitation for the Harry Allen-Eldorado 500 kV transmission line project, identified as selection factors the expected capital cost magnitude, cost overrun likelihood and the ability of the project sponsor to contain costs, as well as the presence of “binding cost containment measures, including cost caps.”⁷ Cost containment capabilities were described as “key selection factors.”⁸ CAISO included demonstrated cost containment capability – “specifically, binding cost control measures the Project Sponsor agrees to accept” – as a key selection factor for the competitive Delaney-Colorado River project.⁹ Cost

⁶ See PJM April 28, 2015 Transmission Expansion Advisory Committee Artificial Island Recommendations slide presentation, p. 38, available at: <http://www.pjm.com/committees-and-groups/committees/teac.aspx>.

⁷ See Harry Allen – Eldorado 500 kV Transmission Line Project Phase 3 Competitive Solicitation, p. 16, available at: <http://www.caiso.com/Documents/Presentation-HarryAllenEldoradoCompetitiveSolicitation.pdf>.

⁸ *Id.*, p. 17. In two other competitions, cost containment was a key consideration in CAISO’s selection of the winning bidder. In July 2013, CAISO selected the Imperial Irrigation District (“IID”) to construct the IV Policy Element project. Demonstrated cost containment capability was among the criteria on which competitive bids were evaluated, “including any binding agreement by the Project Sponsor and its team to accept a cost cap that would preclude project costs above the cap from being recovered through the ISO’s Transmission Access Charge.” The selection of IID was made contingent on IID’s accepting a binding cost cap. See Imperial Valley Policy Element Project Sponsor Selection Report, July 11, 2013, at pp. 5-6, available at:

http://www.caiso.com/documents/imperialvalleypolicyelement-projectsponsorselectionreport_jul11_2013.pdf. In March 2014, CAISO selected San Diego Gas and Electric Company (“SDG&E”) to construct the 230 kV Sycamore-Penasquitos project. CAISO placed significant importance on the cost containment capability selection criterion: “the ISO has identified this selection criterion as a key selection factor because the ISO considers commitment to a robust cost cap to be the most effective way in which the ISO can ensure that a project is developed in an efficient and cost-effective manner. A proposal that best satisfies this criterion will contribute significantly to ensuring that the project sponsor selected will develop the project in an efficient and cost-effective manner.” See Sycamore-Penasquitos Project Project Sponsor Selection Report, March 4, 2014, at p. 46. CAISO found (p. 52) that SDG&E provided the “most thorough and comprehensive demonstration of cost containment capability.” The CAISO report is available at: <http://www.caiso.com/Documents/Sycamore-PenasquitosProjectSponsorSelectionReport.pdf>.

⁹ See Delaney-Colorado River 500 kV Transmission Line Project Description, Key Selection Factors, and Functional Specifications for Competitive Solicitation, July 2014, at p. 6, available at: http://www.caiso.com/Documents/DelaneyColoradoRiverFunctionalSpecifications_KeySelectionFactors.pdf.

containment was viewed as particularly important for this project as its justification was based on economic benefits to customers. Cost containment, and specifically the commitment to binding cost containment measures, was the primary area in which the project proposals diverged, and CAISO chose the project sponsor with the superior cost containment proposal.¹⁰

In light of the SPP and MISO tariff requirements, and in view of the early indications from competitive transmission selection processes, ITC would like to propose a 40-year (or life of the asset) binding bid with exemptions¹¹ (“BBE”), including a projected annual transmission revenue requirement (costs plus return) for the duration of the binding bid. This approach would fix the full revenue requirement (except agreed upon exemptions) and be treated in a manner similar to a “black box” settlement. Under this BBE construct, ITC assumes risks for cost overruns not covered by exemptions and is permitted to keep gains from any cost efficiencies achieved below the BBE. This benefits electricity consumers by providing them with maximum rate predictability in obtaining the benefit of needed new transmission while encouraging efficient construction and operation of transmission.

ITC has considered alternatives, such as making a binding bid for a more limited period of time, *e.g.*, the first 5 or 10 years, and then reverting to a more traditional cost-based rate construct, but does not believe such an alternative is feasible. As an initial matter, limiting the duration of the bid would introduce greater uncertainty regarding the rate construct which could significantly affect the developer’s ability to finance projects. Moreover, such an approach could

¹⁰ See Delaney-Colorado River Transmission Line Project Project Sponsor Selection Report, July 10, 2015, at pp. 131-132, available at: <http://www.caiso.com/Documents/DelaneyColoradoRiverTransmissionLineProject-ProjectSponsorSelectionReport.pdf>.

¹¹ Specific exemptions would be proposed as part of each bid. In general, such exemptions would be limited to matters outside of ITC’s control and difficult to predict in light of the long bid duration that could arise, including, for example, cost changes due to route changes, interest rate changes, force majeure, changes in law or regulations, or statutory tax changes. For comparison, exclusions to the cost commitments of the successful bidder for the PJM Artificial Island project include: changes in project scope; changes caused by changes in law or regulations; and changes resulting from breach or default. See note 6, *supra*.

encourage gaming and would not provide consumers with the benefit of rate stability offered by a BBE. And, it is difficult to square a hybrid capped and un-capped bid with the SPP and MISO requirements to submit revenue requirements for 40 years.

ITC has substantial experience with transmission development, including completing major transmission projects in SPP and MISO on time and on or under budget, which demonstrates cost containment capability.¹² In order to offer a long-term BBE, however, ITC needs certainty that its BBE, if selected, will be deemed just and reasonable by the Commission when filed as a stated rate by the sponsoring ITC competitive transmission entity, particularly because ITC will be subject to the competitive pressure to submit the most cost-effective bid and to deliver the project in the most cost-effective manner. Moreover, having given up the opportunity to seek higher cost-based rates under Section 205 in the future, ITC's BBE should not be subject to revision under FPA Section 206 unless required by the public interest. *Mobile-Sierra* protection thus should apply to the stated rate for a project selected by an RTO as a result of implementing a Commission-approved, Order No. 1000 compliant competitive transmission selection process.

Accordingly, ITC seeks a Commission order determining: 1) that binding revenue requirement bids selected as the result of Commission-approved, competitive transmission selection processes will be deemed just and reasonable when filed at the Commission as a stated

¹² In December 2012, ITC Great Plains, LLC, an operating subsidiary of ITC Holdings Corp., placed the final phase of the 227 mile, 345 kV KETA Project in service in Kansas. The project was completed six months ahead of the original schedule, and below budget. See <http://www.itc-holdings.com/images/documents/1383528044KETA%20In-Service%20News%20Release-FINAL%2012-13-12.pdf>. ITC Great Plains also put the 122-mile V Plan project in service on time and on budget in December 2014 (see <http://www.itc-holdings.com/releases-news/item/901-itc-great-plains-energizes-v-plan-transmission-line-and-project-substations-in-western-kansas.html>); ITC Transmission, another operating subsidiary of ITC Holdings Corp., placed Phase 1 of the 140 mile Thumb Loop 345 kV transmission project in Michigan in service in 2013, on time and on budget. See <http://www.itc-holdings.com/images/documents/1383527647ITC%20Thumb%20Loop%20Phase%201%20In%20Service%20news%20release%20FINAL%2009-30-13.pdf>.

rate pursuant to FPA Section 205; and 2) that such binding bids are entitled to protection under *Mobile-Sierra* and may not subsequently be changed by means of an FPA Section 206 complaint unless required by the public interest.

ITC respectfully urges the Commission to grant the requested order for the reasons set forth in this Petition; however, if the Commission determines that the rates approved for a new transmission project in a competitive solicitation are not presumptively eligible for *Mobile-Sierra* protection, ITC requests, in the alternative, that the Commission grant such protection on a case-by-case basis as a policy-based incentive under Section 205 of the FPA.¹³ In approving rates for a project, the Commission could determine, based on the transparent and competitive attributes of the process by which the project was selected, and the binding nature of the bid selected, that application of the *Mobile-Sierra* public interest test to future challenges to the rate is appropriate to encourage beneficial transmission investment.

In order to enable ITC to participate in upcoming transmission competitions in SPP and elsewhere, ITC seeks the requested Order within 90 days.

III. A BINDING BID SELECTED BY MEANS OF A COMMISSION-APPROVED, COMPETITIVE TRANSMISSION SOLICITATION PROCESS UNDER ORDER NO. 1000 SHOULD BE TREATED AS A JUST AND REASONABLE RATE AND ENTITLED TO *MOBILE-SIERRA* PROTECTION

A. A Binding Bid Selected Via An Order No. 1000 Compliant Competitive Transmission Solicitation Process Should Be Deemed To Be Just And Reasonable.

The Commission's fundamental obligation under the Federal Power Act is to assure just and reasonable rates. In furtherance of this, in Order No. 1000, the Commission amended the

¹³ See e.g., *ITC Holdings Corp., et al.*, 102 FERC ¶ 61,182, *reh'g denied*, 104 FERC ¶ 61,033(2003), at P 68 (approving a 100 basis point adder for independence under Section 205). The Commission has confirmed its continuing authority to grant incentives under Section 205 to promote important public policy goals. *Xcel Energy Transmission Development Co., LLC*, 149 FERC ¶ 61,181, P 13 (2014) (footnote omitted).

transmission planning requirements established in Order No. 890 to require elimination of Federal rights of first refusal, thereby removing what it identified as practices “that have the potential to undermine the identification and evaluation of more efficient or cost-effective solutions to regional transmission needs,”¹⁴ and whose existence “may be leading to rates for jurisdictional transmission service that are unjust and unreasonable.”¹⁵ The Commission recognized that RTOs may respond to the elimination of federal rights of first refusal through the use of competitive solicitations for projects or project developers to meet regional needs.¹⁶

In response, RTOs have devised, and the Commission has approved, competitive solicitation processes that comply with Order No. 1000, including the MISO and SPP processes discussed above. These processes use transparent qualification and selection criteria to choose entities to construct transmission projects approved by, or that meet needs identified by, the RTOs. Such Commission-approved competitive solicitation processes administered by an independent transmission planner provide a sound basis on which the Commission may conclude that rates to be charged by the successful bidder will be just and reasonable.

As the D.C. Circuit found in upholding Order No. 1000, “there is ample reason to think that injecting competition into the planning process will help to ensure that rates remain just and reasonable,”¹⁷ and “[b]y removing a pre-existing barrier to entry, [Order No. 1000] make[s] it more likely that those key parties [non-incumbent developers] will actually join that process, making the transmission development process more competitive, which, in the Commission’s reasoned expert judgment, will help to ensure that rates are just and reasonable.”¹⁸

¹⁴ Order No. 1000, P 253.

¹⁵ *Id.*, P 256.

¹⁶ *Id.*, P 259.

¹⁷ *S.C. Pub. Serv. Auth., v. FERC*, 762 F.3d 41, 77 (D.C. Cir. 2014).

¹⁸ *Id.*

1. The Commission must interpret how the just and reasonable standard is to be applied.

The Supreme Court recognized in *Morgan Stanley* that the “just and reasonable” standard is the only statutory standard in the FPA for assessing rates, be they tariff rates or contract rates.¹⁹ The Commission’s role is to interpret how the just and reasonable standard is to be applied in specific circumstances:

Under this statutory “just and reasonable” standard, the Commission is not “bound to any one ratemaking formula;” rather, the Commission must interpret, and necessarily has the discretion to interpret, how this statutory standard is to be implemented. Indeed, because “[t]he statutory requirement that rates be ‘just and reasonable’ is obviously incapable of precise judicial definition,” courts have long “afforded great deference to the Commission in its rate decisions.” That is, the FPA requires only that rates be just and reasonable; it does not specify the manner in which that general formulation must be implemented in any particular context.²⁰

In this context, the Commission should presume that rates resulting from a BBE chosen in a competitive solicitation are just and reasonable.

2. The rates resulting from a competitive selection process should be deemed just and reasonable.

Commission and judicial precedent support reliance on competitive markets and independently administered processes to provide a just and reasonable rate. For example, and as discussed in greater detail below, the Commission has found that rates established by ISO-New England in its Forward Capacity Auctions warrant a presumption of justness and reasonableness. *See Devon Power LLC*, 134 FERC ¶ 61,208 (“*Remand Order*”), *reh’g denied*, 137 FERC ¶ 61,073 (2011). In the *Remand Order*, the Commission exercised its discretion to determine that the results of the annual auctions to set capacity prices would be presumed to be just and

¹⁹ *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dis. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 545 (2008) (*Morgan Stanley*).

²⁰ *Devon Power LLC*, Order Denying Rehearing, 137 FERC ¶ 61,073, P 30 (2011) (*Rehearing Order*) (footnotes omitted).

reasonable. The Commission explained that “rates disciplined by a market are consistent with the FPA’s requirements.”²¹

Similarly, in Order No. 784, the Commission found that the results of a competitive solicitation would be deemed just and reasonable if the solicitation met five requirements:

1. Transparency – the competitive solicitation process should be open and fair;
2. Defined Product – the product sought through the competitive solicitation should be precisely defined;
3. Uniformly Applied Evaluation Criteria – evaluation criteria should be standardized and applied equally to all bids and bidders;
4. Independent Oversight – with exceptions not relevant here, an independent third party should design the solicitation, administer bidding, and make the selection based upon evaluation of the bids; and
5. Competitive process – there must be sufficient bidder interest to assure a competitive result.²²

The Commission-approved, RTO-administered, competitive transmission solicitation processes meet these criteria. It follows, then, that the winning bidder selected in such a process should be deemed to be offering a just and reasonable rate with respect to the proposed transmission assets to be built.

Accordingly, the Commission should confirm that binding revenue requirement bids selected as the result of Commission-approved, Order No. 1000-compliant competitive transmission project selection processes, will be deemed just and reasonable when filed as a stated rate under FPA Section 205.

²¹ *Remand Order*, P 19 (footnote omitted).

²² *Third-Party Provision of Ancillary Services; Accounting and Financial Reporting for New Electric Storage Technologies*, Order No. 784, FERC Stat. and Regs. ¶ 31,349, PP 95, 99 (2013).

B. A Binding Bid Presumed To Be Just And Reasonable Should Receive *Mobile-Sierra* Protection.

Currently, binding bid competitive transmission project selection processes leave transmission developers open to significant uncertainty and unbalanced risk of under-recovery due to the possibility of FPA Section 206 complaints filed after project completion.

Revenue requirements submitted as binding bids prevent a transmission developer from recovering any costs incurred above its accepted bid, regardless of the prudence of those costs. By committing to a binding bid, the developer gives up its rights to seek a higher just and reasonable rate under FPA Section 205 in the event that project costs exceed the bid. However, if the final project revenue requirement is below the binding bid level, the successful transmission developer could face an FPA Section 206 complaint to reduce the rate that it bid and that was accepted.

This asymmetry will discourage transmission developers from pursuing cost savings and efficiencies in constructing competitive transmission projects to the extent those would reduce the costs below bid costs. The Commission can preserve the cost containment aspects of competitive solicitation processes, and encourage the broadest participation by accomplished, qualified developers in new competitive transmission development, by applying the *Mobile-Sierra* standard to FPA Section 206 challenges to rates set based on a BBE. The Commission should exercise its discretion, on a case-by-case basis when rates are filed under FPA Section 205, to confirm that challenges to binding bids accepted as part of a winning bid to develop transmission in an RTO-administered, Order No. 1000 approved process will be evaluated under the *Mobile-Sierra* public interest standard. As discussed below, the Commission has exercised its discretion under Section 205 of the FPA to extend *Mobile-Sierra* protection to non-contract rates. The Commission should declare here that it will do so as well when the entity submitting a

successful BBE in a Commission-approved competitive solicitation process makes such a request.

1. Commission and judicial precedent support *Mobile-Sierra* protection for binding bids selected in competitive transmission solicitation processes.

The Commission’s discretion to extend the protection of the *Mobile-Sierra* public interest standard beyond contract rates to tariff rates, such as those produced by an approved competitive transmission solicitation process, has been affirmed. In *NRG Power Marketing*²³ the Supreme Court made it clear that *Mobile-Sierra* protection extends to third parties, beyond the parties to a contract for the sale of power. The Court’s decision came on appeal of a D.C. Circuit decision reviewing the Commission’s 2006 orders in *Devon Power LLC*, 115 FERC ¶ 61,340 (“*Devon*”), *order on reh’g*, 117 FERC ¶ 61,133 (2006). In *Devon*, the Commission approved a contested Settlement Agreement establishing the Forward Capacity Market (“FCM”) in ISO-New England, Inc. (“ISO-NE”).²⁴ The FCM provided for annual auctions for capacity in the ISO-NE market, in which sellers commit to provide capacity in advance for specified years. Special provisions allow for new capacity to participate in auctions, subject to the submission of qualification documentation. The Settlement Agreement provided that final prices derived from all auctions cannot be changed unless required by the public interest under the *Mobile-Sierra* standard. Settling parties agreed to this standard, in part, to reduce regulatory uncertainty. *Devon*, P 36. Supporters of the Settlement Agreement pointed to the market uncertainty that would result if final auction clearing prices were subject to revision. *Devon*, P 177.

²³ *NRG Power Marketing, LLC v. Maine Pub. Util. Comm’n*, 558 U.S. 165, 169, 176 (2010) (“*NRG Power Marketing*”).

²⁴ The D.C. Circuit in *Maine Pub. Util. Comm’n v. FERC*, 520 F.3d. 464 (2008) generally upheld the Commission’s order approving the Settlement Agreement, but granted a petition for review of the *Mobile-Sierra* issue.

The Commission concluded that the *Mobile-Sierra* provision in the Settlement Agreement “appropriately balances the need for rate stability and the interests of diverse entities who will be subject to the FCM.” *Devon*, P 186. Further, the Commission acknowledged its obligation to ensure that rates for capacity meet its legal requirements, concluding that the *Mobile-Sierra* provision “achieves that balance.” *Id.*

While upholding the application of the *Mobile-Sierra* standard to the Settlement Agreement, the Supreme Court in *NRG Power Marketing* remanded to the D.C. Circuit the question of whether the auction prices found subject to the *Mobile-Sierra* clause constituted “contract rates” to which the *Mobile-Sierra* public interest presumption must be applied. If not, the Court required the D.C. Circuit to consider whether the Commission has discretion to apply the *Mobile-Sierra* public interest presumption to future challenges to the auction results and transition payments.²⁵

The D.C. Circuit was unable to discern the Commission’s rationale for its exercise of discretion to apply the *Mobile-Sierra* presumption to non-contract rates.²⁶ Therefore the court asked the Commission for an explanation of ““why, if the auction rates are not contract rates, they are entitled to *Mobile-Sierra* ‘treatment,’” and how the auction rates “reflect market conditions similar to freely-negotiated contract rates.”²⁷

In the *Remand Order*, the Commission found that the rates at issue in *Devon* were more properly seen as tariff rates and not contract rates that under *Mobile-Sierra* “require a presumption that the rates are statutorily just and reasonable.” *Remand Order*, P 9. Nevertheless, the Commission determined that it had discretion to consider whether future challenges to the

²⁵ *NRG Power Marketing*, 558 U.S. at 176-7.

²⁶ *Maine Pub. Util. Comm’n v. FERC*, 625 F.3d 754, 759 (D.C. Cir. 2010).

²⁷ See *Remand Order*, P 8.

forward capacity auction rates at issue in *Devon* must overcome “a more rigorous application of the statutory ‘just and reasonable’” standard. *Id.*

The Commission observed that while the just and reasonable standard is the only standard under the FPA for reviewing electricity rates, whether set by contract or tariff, neither Section 205 nor Section 206 “speaks directly to the application of this statutory standard when the Commission must apply it to future complaints about rates.” *Id.*, P 15. Moreover, the Commission is not bound to any one ratemaking formula under the just and reasonable standard, and necessarily has discretion to interpret how the statutory just and reasonable standard is to be implemented. *Id.* “[T]he FPA requires only that rates be just and reasonable; it does not specify the manner in which that general formulation must be implemented in any particular context.” *Id.*

The Commission relied on the flexibility inherent in the just and reasonable standard to justify “varying types and degrees of justification for challenges to particular rates or practices, depending on the circumstances.” *Id.*, P 16. There is nothing in the FPA, the Commission found, that precludes application of a more rigorous standard to other rates “as a matter of discretion, if considerations relevant to what is ‘just and reasonable’ make that approach appropriate.” *Id.*

In the *Remand Order*, the Commission argued for the reasonableness of its interpretation and application of Sections 205 and 206 in approving the *Mobile-Sierra* standard of review to the Settlement Agreement. The Commission found that the auction results shared with freely-negotiated contracts “certain market based features that tend to assure just and reasonable rates.” *Id.*, P 19. These include: 1) that the auctions were a market-based mechanism to value capacity resources based on their location, thereby satisfying cost-causation principles; and 2) that the

FCM provided appropriate signals to investors when infrastructure resources are necessary. *Id.* Moreover, the Commission acknowledged the D.C. Circuit’s recognition that “rates disciplined by a market are consistent with the FPA’s requirements.” *Id.*

The *Remand Order* also discussed the importance of rate stability, noting the Supreme Court’s recognition that rate stability is an important goal under the FPA. *Id.*, P 20. Public policy also forms a basis for the Commission’s discretion to apply the *Mobile-Sierra* standard. *Id.*, P 23. Finally, the Commission emphasized that “[t]he ‘public interest’ standard respects the settled expectations of parties, but still allows the Commission to respond as necessary to the threat of serious harm to the public interest.” *Id.*, P 25.

The Commission denied rehearing of the *Remand Order*, and explained the circumstances in which it would in the future apply *Mobile-Sierra* protections to noncontract rates:

. . . the Commission has judged, and intends to judge, various proposed applications of the statutory “just and reasonable” standard, including the *Mobile-Sierra* “public interest” standard of review, on a case-by-case basis. The Commission will accept a more stringent application of the statutory “just and reasonable” standard only when the applicant can demonstrate compelling circumstances, such as those found in this proceeding, that merit such protection from challenges. We will not use our discretion to accept a more rigorous application of the statutory “just and reasonable” standard unless we find, based on the facts presented, that the package offers sufficient benefits to consumers to warrant taking such action. The Commission’s assessment, as in any statutory just and reasonable analysis, must be responsive to the arguments presented and based on the administrative record compiled.²⁸

The Commission’s exercise of its discretion in the *Remand Order* was upheld by the D.C. Circuit in *New England Power Generators Ass’n, Inc. v. FERC*, 707 F.3d 364, 370-371 (D.C. Cir. 2013).

²⁸ *Rehearing Order*, P 37 (footnote omitted).

2. The Commission should exercise its discretion to afford *Mobile-Sierra* protection to rates based on binding bids for projects selected by RTOs in competitive solicitation processes.

The compelling circumstances here justify applying the *Mobile-Sierra* standard to protect a BBE rate approved in a competitive transmission solicitation process. First, the dynamic of competitive forces regulating rate impacts to consumers is present in Order No. 1000 solicitation processes that will use revenue requirement bidding, such as in MISO and SPP. In addition, the need for rate stability the Commission found in the *Devon* cases also is clear, given the 40-year (or more) life of the transmission assets being constructed and the significant capital investment required. A BBE is a tool both for setting the revenue requirement for a transmission project in a competitive bidding scenario, and also providing rate stability for consumers and encouraging efficient investment in needed transmission. It will only be offered, however, if the Commission judgments sought by this Petition are granted.

Second, where a successful bidder has agreed to binding restrictions on its ability to recover its full revenue requirement, fundamental fairness requires that the rates for such a project not be lowered further unless the public interest demands that result.

Third, a transmission project supported by a BBE has been determined by an RTO through a rigorous process to be needed in the public interest. Providing *Mobile-Sierra* protection to a BBE rate selected through that process would protect the integrity of the revenue requirement competition administered by that RTO.

As discussed previously, market-based features of the competitive solicitation process, its prior approval by this Commission, and its administration by an independent RTO will ensure just and reasonable rates. Public policy supports the exercise of the Commission's discretion to apply the *Mobile-Sierra* standard to BBEs approved as a result of such competitive solicitation

processes. Cost containment is a concern of customers and regulators alike. Yet, developers will be less willing and able to offer binding bids without the assurance that they will be able to collect their as-bid revenue requirement unless the public interest demands a different result. Applying the *Mobile-Sierra* standard is the most effective way to encourage creative cost containment measures that serve the shared interests of customers and developers.

3. Alternatively, the Commission should exercise its discretion to award *Mobile-Sierra* protection as a policy-based incentive.

Should the Commission decline to declare that rates resulting from binding revenue requirement bids presumptively are entitled to *Mobile-Sierra* protection, ITC requests that the Commission offer such protection on a case-by-case basis as a policy-based incentive under Section 205 of the FPA. Such a policy incentive would be appropriate to encourage beneficial transmission investment. Under this alternative, in a Section 205 proceeding to approve rates for a project, the Commission would consider the attributes of the competitive process through which a project was selected and the binding nature of the revenue requirement bid submitted to determine whether any future challenges to the project's rates should be subject to the *Mobile-Sierra* public interest test.

The grant of such an incentive would be similar to an abandoned plant incentive. In awarding an abandoned plant incentive, the Commission is exercising its authority to provide protection from risks for transmission developers arising from events beyond their control. Addressing this risk enables transmission developers to access capital at lower rates than would be required if developers had to bear such risks. Similarly, providing protection against subsequent challenges to binding bids, other than when required by the public interest, enables developers to construct transmission facilities and implement financial models based on their bids as selected, without having to address the risk of future rate uncertainty.

IV. CONCLUSION

If the Commission grants this Petition, ITC will be able to offer BBEs for competitive transmission projects in SPP, MISO and potentially other RTOs. If selected, ITC will be held to its bid for the life of the project and will forego any opportunity to recover non-exempt actual costs that may exceed the bid amount. In return, ITC's winning bid will be presumed to be a just and reasonable rate for purposes of FPA Section 205, and will receive *Mobile-Sierra* protection from subsequent FPA Section 206 complaints. Customers will benefit from a competitively chosen transmission solution with rate certainty while the developer will be incentivized to complete the project in the most efficient way. The Commission will retain the authority to respond in cases of a serious threat of harm to the public interest. ITC, therefore, respectfully asks that the Commission grant this Petition.

Action on this Petition within the requested 90 days will facilitate ITC's participation in SPP's first competitive transmission solicitation for the North Liberal-Walkemeyer project, for which responses to the Request for Proposals (SPP-RFP-00001), sent May 5 to qualified transmission developers, are due by November 2, 2015.

Respectfully Submitted,

/s/ Stephen J. Videto

Stephen J. Videto
Practice Group Leader and
Senior Counsel – Regulatory
& Legislative
ITC Holdings Corp.
27175 Energy Way
Novi, MI 48377
T: 248-946-3526
F: 248-946-3552
svideto@itctransco.com

July 28, 2015

Document Content(s)

ITC Grid Development Petition for Declaratory Order.PDF.....1-21