

154 FERC ¶ 61,206  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

ITC Grid Development, LLC

Docket No. EL15-86-000

ORDER DISMISSING PETITION FOR DECLARATORY ORDER

(Issued March 17, 2016)

1. On July 28, 2015, ITC Grid Development, LLC (ITC) filed a petition for declaratory order under Rule 207(a) of the Commission's Rules of Practice and Procedure<sup>1</sup> requesting that the Commission find (1) that binding revenue requirement bids selected as the result of Commission-approved, Order No. 1000-compliant,<sup>2</sup> and demonstrably competitive transmission project selection processes will be deemed just and reasonable when filed at the Commission as a stated rate under section 205 of the Federal Power Act (FPA) and (2) that such binding bids are entitled to *Mobile-Sierra* protection<sup>3</sup> and may not subsequently be changed by means of a complaint filed under FPA section 206<sup>4</sup> unless required by the public interest. In this order, we dismiss ITC's petition. However, we recognize that this case highlights broader policy considerations and, as discussed in this order, we intend to convene a technical conference in the future to explore further these considerations.

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<sup>1</sup> 18 C.F.R. § 385.207(a) (2015).

<sup>2</sup> *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).

<sup>3</sup> *United Gas Pipeline Co. v. Mobile Gas Service Co.*, 350 U.S. 332 (1956); *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

<sup>4</sup> 16 U.S.C. § 824e (2012).

## I. ITC Petition

2. ITC states that it plans to submit bids in competitive transmission project selection processes in Midcontinent Independent System Operator, Inc. (MISO), Southwest Power Pool, Inc. (SPP), and potentially other regions. ITC proposes to make 40-year (or life of the asset) binding revenue requirement bids with exemptions, including a projected annual transmission revenue requirement. ITC states that its approach would fix the revenue requirement (except agreed upon exemptions) and this revenue requirement would be treated similar to a “black box settlement.”<sup>5</sup> ITC asks that the Commission: (1) determine that winning binding revenue requirement bids will be deemed just and reasonable when filed at the Commission as a stated rate under section 205 of the FPA<sup>6</sup>; and (2) determine that such binding bids are entitled to *Mobile-Sierra* protection and may not subsequently be changed by means of a complaint under FPA section 206 unless required by the public interest.<sup>7</sup>

3. ITC states that 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, it 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. ITC states that in approving rates for a transmission project, the Commission could determine, based on the transparent and competitive attributes of the selection process, and the binding nature of the bid selected, that applying the *Mobile-Sierra* public interest test to future challenges to the rate is appropriate to encourage transmission investment. ITC states that granting such an incentive would be similar to an abandoned plant incentive, which provides protection from risks for transmission developers arising from events beyond their control.<sup>8</sup>

4. ITC states that competitive transmission selection processes to date suggest that successful bidders must agree to binding cost commitments. ITC states that, in MISO, developers submitting a bid to develop a transmission facility must submit cost estimate data for each transmission facility. ITC states that the cost estimate data must include, at a minimum, estimated annual revenue requirements for the first 40 years of the facilities included in the request for proposals, including supporting detail on the annual allocation

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<sup>5</sup> Petition at 7.

<sup>6</sup> 16 U.S.C. § 824d (2012).

<sup>7</sup> Petition at 8-9, 13, 20.

<sup>8</sup> *Id.*

factors for operations and maintenance, general and common depreciation expenses, taxes other than income taxes, income taxes, and the return used to estimate the annual revenue requirements.<sup>9</sup> ITC states that estimated project cost and estimated annual revenue requirements are among the factors that MISO uses to evaluate bids.<sup>10</sup> ITC states that SPP likewise requires bidders for competitive transmission projects to submit full revenue requirements in their bids.<sup>11</sup> ITC also asserts that cost commitments in the Artificial Island Project in PJM Interconnection, L.L.C. (PJM) and cost control measures in Harry Allen-Eldorado and Delaney-Colorado River Projects in the California Independent System Operator Corporation (CAISO) were viewed as key selection factors in proposals.<sup>12</sup>

5. ITC states that in light of the SPP and MISO tariff requirements to submit full revenue requirements, and in view of the early indications from competitive transmission selection processes, it would like to submit in future competitive transmission selection processes 40-year (or life of the asset) binding bids with exemptions, including a projected annual transmission revenue requirement (cost plus return) for the duration of the binding bid. ITC states that the exemptions generally would be limited to matters that are outside of its control and difficult to predict in light of the long bid duration. ITC states that examples of exemptions to the binding bid would include cost changes due to route changes, interest rate changes, force majeure, changes in law or regulations, or statutory tax changes.<sup>13</sup>

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<sup>9</sup> *Id.* at 5 (citing MISO, Tariff, Attachment FF, § VIII.C.4(b)).

<sup>10</sup> *Id.* (citing MISO, Tariff, Attachment FF, § VII.E.3).

<sup>11</sup> *Id.* at 4-5 (citing SPP, Tariff, Attachment Y, § III.2.c(v)(1)).

<sup>12</sup> *Id.* at 6-7 (citing PJM, *Transmission Expansion Advisory Committee Artificial Island Recommendations* at 38 (Apr. 2015), available at <http://www.pjm.com/committees-and-groups/committees/teac.aspx>; CAISO, *Harry Allen – Eldorado 500 kV Transmission Line Project Phase 3 Competitive Solicitation* at 16, 17 (Feb. 2015), available at <http://www.caiso.com/Documents/Presentation-HarryAllenEldoradoCompetitiveSolicitation.pdf>; CAISO, *Delaney-Colorado River 500 kV Transmission Line Project Description, Key Selection Factors, and Functional Specifications for Competitive Solicitation* at 6 (Jul. 2014), available at [http://www.caiso.com/Documents/DelaneyColoradoRiverFunctionalSpecifications\\_KeySelectionFactors.pdf](http://www.caiso.com/Documents/DelaneyColoradoRiverFunctionalSpecifications_KeySelectionFactors.pdf)).

<sup>13</sup> *Id.* at 7, n.11.

6. In support of its petition, ITC argues that binding revenue requirement bids currently present an asymmetrical risk for transmission developers. According to ITC, this is because any cost incurred by the winning bidder in excess of the stated rate that is based on the binding bid will not be recoverable, regardless of prudence or benefit to ratepayers, but any cost savings achieved below the binding bid may expose the transmission developer to an FPA section 206 complaint seeking to adjust the stated rate to lower the revenue requirement.<sup>14</sup>

7. ITC maintains that in a competitive transmission selection process, the bid operates to set the market price for the transmission project and to establish the return on the developer's investment. According to ITC, the competitive transmission selection process loses its integrity if developers are not held to their bids. ITC argues that developers must have confidence that others will be bound by developers' bids, just as developers are bound by those bids, unless otherwise required by the public interest. According to ITC, it is therefore essential to the integrity of competitive transmission selection processes that successful bids not be upset absent a compelling showing.<sup>15</sup>

8. In requesting that the Commission deem winning binding revenue requirement bids just and reasonable, ITC asserts that the Commission's role here is to interpret how the just and reasonable standard is applied.<sup>16</sup> ITC argues that, in this context, the Commission should presume the rates resulting from a binding revenue requirement bid with exemptions chosen in a competitive solicitation are just and reasonable.

9. In support of this argument, ITC maintains that Commission and judicial precedent support reliance on competitive markets and independently administered processes to provide a just and reasonable rate. ITC states that in Order No. 784, the Commission found the results of a competitive solicitation would be deemed just and reasonable if the solicitation met five criteria: (1) transparency; (2) defined product; (3) uniformly applied evaluation criteria; (4) independent oversight; and (5) competitive process.<sup>17</sup> ITC argues that Commission-approved, regional transmission organization

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<sup>14</sup> *Id.* at 2.

<sup>15</sup> *Id.* at 2-3.

<sup>16</sup> *Id.* at 11 (citing *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dis. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 545 (2008)).

<sup>17</sup> *Id.* at 11-12 (citing *Third-Party Provision of Ancillary Services; Accounting and Financial Reporting for New Electric Storage Technologies*, Order No. 784, FERC Stats. and Regs. ¶ 31,349, at PP 95, 99 (2013)).

(RTO)-administered, competitive transmission solicitation processes meet these criteria, and therefore, the Commission should confirm that binding revenue requirement bids selected in an Order No. 1000-compliant competitive transmission selection processes will be deemed just and reasonable. ITC also states that the Commission found in *Devon Power* that rates established in a capacity auction warrant a presumption of just and reasonable rates, explaining that “rates disciplined by a market are consistent with the FPA’s requirements.”<sup>18</sup>

10. Regarding its request that binding revenue requirement bids be afforded *Mobile-Sierra* protection, ITC again points to *Devon Power*. ITC states that in approving a settlement agreement providing that prices derived from capacity auctions in ISO New England Inc. (ISO-NE) cannot be changed unless required by the public interest, the Commission concluded that the agreement’s *Mobile-Sierra* provision “appropriately balances the need for rate stability and the interests of diverse entities who will be subject to the [ISO-NE Forward Capacity Market].”<sup>19</sup> ITC argues that given the 40-year life of the transmission assets being constructed and the significant capital investment required, rate stability is also required here.<sup>20</sup>

11. ITC also argues that *Mobile-Sierra* protection is warranted because fundamental fairness dictates that where a successful bid includes a binding revenue requirement, rates for that transmission project should not be lowered further unless the public interest demands the result. ITC further contends that any transmission project with a binding revenue requirement will have been determined by an RTO through a rigorous process to be needed in the public interest. ITC asserts that providing *Mobile-Sierra* protection to such a bid would protect the integrity of the revenue requirement competition administered by that RTO.<sup>21</sup>

## **II. Notice of Filing and Responsive Pleadings**

12. Notice of ITC’s petition was published in the *Federal Register*, 80 Fed. Reg. 46,259 (2015), with interventions and protests due on or before August 27, 2015. On August 27, 2015, the Organization of MISO States filed a motion for extension of

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<sup>18</sup> *Id.* at 12 (quoting *Devon Power LLC*, 134 FERC ¶ 61,208, at P 19, *reh’g denied*, 137 FERC ¶ 61,073 (2011) (*Devon Power*)).

<sup>19</sup> *Id.* at 13-14 (quoting *Devon Power*, 115 FERC ¶ 61,340, at P 186 (2006)).

<sup>20</sup> *Id.* at 18.

<sup>21</sup> *Id.*

time to file comments. On September 2, 2015, the Commission issued a notice extending the due date for interventions, comments, and protests to September 10, 2015.

13. On August 21, 2015, the American Public Power Association, the Kansas Corporation Commission, and the National Rural Electric Cooperative Association (collectively Joint Movants) filed a joint motion to: (1) hold the August 27, 2015 comment date in abeyance pending a ruling on its motion to dismiss; (2) expedite action on its motion to hold comment date in abeyance; (3) dismiss ITC's petition without prejudice; and (4) shorten the response time to its motion. Joint Movants also filed timely comments.

14. Timely motions to intervene and comments were filed by: New England States Committee on Electricity (NE States Committee); MISO Transmission Owners;<sup>22</sup> Duke-American Transmission Company LLC (Duke); Edison Transmission, LLC (Edison Transmission); California Department of Water Resources State Water Project (California SWP); South Central MCN LLC and Midcontinent MCN LLC (MCN Companies); SPP; California Municipal Utilities Association (California Municipals); Consumers Energy Company (Consumers Energy); Delaware Public Service Commission (Delaware Commission); DTE Electric Company (DTE); LSP Transmission Holdings, LLC (LSP Transmission); Modesto Irrigation District (Modesto Irrigation); Organization of MISO States; San Diego Gas & Electric Company (SDG&E); California Cities;<sup>23</sup> Southern California Edison Company (SoCal Edison); Transmission Access Policy Study Group (TAPS); Transource Energy, LLC (Transource); Electricity

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<sup>22</sup> MISO Transmission Owners consist of: Ameren Services Company, as agent for Union Electric Company; American Transmission Company LLC; Central Minnesota Municipal Power Agency; City Water, Light & Power (Springfield, IL); Cleco Power LLC; Dairyland Power Cooperative; Duke Energy Business Services, LLC for Duke Energy Indiana, Inc.; Great River Energy; Indiana Municipal Power Agency; Indianapolis Power & Light Company; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Missouri River Energy Services; Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Prairie Power Inc.; Southern Indiana Gas & Electric Company; Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

<sup>23</sup> California Cities consist of the Cities of: Anaheim, Azusa, Banning, Colton, Pasadena and Riverside, CA.

Consumers Resource Council (ELCON) and Joint Consumers;<sup>24</sup> and Arkansas Electric Cooperative Corporation (Arkansas Coop).

15. Timely motions to intervene were filed by: National Grid; Golden Spread Electric Cooperative, Inc.; Coalition of MISO Transmission Customers; MISO; Public Service Electric and Gas Company; Exelon Corporation; CAISO; PPL Electric Utilities Corporation; Delaware Municipal Electric Corporation, Inc.; BHE U.S. Transmission, LLC; Interstate Power and Light Company; Pepco Holdings, Inc., et al (collectively, PHI Companies);<sup>25</sup> American Public Power Association; National Rural Electric Cooperative Association; Illinois Industrial Energy Consumers; Starwood Energy Group Global, L.L.C.; TransCanyon, LLC; Ameren Services Company; Eversource Energy Service Company; Association of Businesses Advocating Tariff Equity; Pacific Gas and Electric Company; Texas Industrial Energy Consumers; New York Association of Public Power; PJM Industrial Customer Coalition; Louisiana Energy Users Group; Indicated New York Transmission Owners;<sup>26</sup> New York Transco, LLC; Wisconsin Industrial Energy Group; City of Santa Clara, California; Wolverine Power Supply Cooperative, Inc.; Dairyland Power Cooperative; Trans Bay Cable LLC; East Texas Electric Cooperative, Inc.; Abengoa Transmission and Infrastructure, LLC; Public Service Commission of Wisconsin; FirstEnergy Service Company; Transmission Agency of Northern California; Louisiana Public Service Commission; Minnesota Large Industrial Group; Xcel Energy Companies; Westar Energy, Inc.; Michigan Attorney General; South Mississippi Electric Power Association; Michigan Public Service Commission; American Forest & Paper Association; Dominion Resources Services, Inc.; North Carolina Electric Membership Corporation; Entergy Arkansas, Inc.; and Kanstar Transmission, LLC.

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<sup>24</sup> ELCON and Joint Consumers consist of: ELCON, Association of Businesses Advocating Tariff Equity, Coalition of MISO Transmission Customers, Illinois Industrial Energy Consumers, Louisiana Energy Users Group, Minnesota Large Industrial Group, PJM Industrial Customer Coalition, Texas Industrial Energy Consumers, and Wisconsin Industrial Energy Group.

<sup>25</sup> PHI Companies consist of Pepco Holdings, Inc., Potomac Electric Power Company, Delmarva Power & Light Company, and Atlantic City Electric Company.

<sup>26</sup> The Indicated New York Transmission Owners consist of: Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Power Supply Long Island, New York Power Authority, New York State Electric & Gas Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.

16. Timely notices of intervention and comments were filed by: the New York State Public Service Commission (New York Commission); Kansas Corporation Commission; Iowa Utilities Board and Iowa Consumer Advocate (Iowa State Entities); Missouri Public Service Commission (Missouri Commission); and Minnesota Public Utilities Commission and the Minnesota Department of Commerce, Division of Energy Resources (Minnesota State Entities).

17. Timely notices of intervention were filed by: the Illinois Commerce Commission; California Public Utilities Commission; and the Indiana Utility Regulatory Commission.

18. The Maryland Public Service Commission (Maryland Commission) filed a late motion to intervene.

19. ITC filed answers on August 24, 2015 and September 25, 2015, and TAPS filed an answer on October 13, 2015.

### **Comments**

20. A number of parties argue that ITC's request is inappropriate for a petition for declaratory order and that it should be dealt with in a rulemaking, or some other context, because it calls for the creation of rules of general applicability and as a consequence violates Commission regulations and the Administrative Procedure Act (APA).<sup>27</sup> Organization of MISO States argues that granting ITC's petition would violate the APA because ITC is seeking new rules that can only be established in a rulemaking.<sup>28</sup> California Cities maintain that ITC seeks an expansion of policy that is more properly accomplished through rulemaking procedures.<sup>29</sup> SDG&E states that given the paucity of facts that ITC presents and the industry-wide implications of the petition, a generic approach, such as rulemaking or notice of inquiry, would provide a more appropriate way to consider the issues that ITC raises.<sup>30</sup>

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<sup>27</sup> Joint Movants Motion at 5; *see also* Minnesota State Entities Comments at 4-5 (proposing to address these issues through ratemaking ); Arkansas Coop Comments at 3-4; Modesto Irrigation Comments at 6; ELCON and Joint Consumers Comments at 2.

<sup>28</sup> Organization of MISO States Comments at 5, 9.

<sup>29</sup> California Cities Protest at 16-17 (citing *Entergy Power Marketing Corp. v. Southwest Power Pool, Inc.*, 100 FERC ¶ 61,104, at 61,412 n.16 (2002)).

<sup>30</sup> SDG&E Comments at 3-4; *see also* SoCal Edison Comments at 5; Missouri Commission Comments at 2-3.

21. ITC states in its August 24, 2015 answer that it is not seeking new rules of general applicability. ITC states that it is seeking to remove uncertainty regarding how binding bids with exemptions that ITC submits and are selected in qualifying competitive processes may be treated for ratemaking purposes. ITC states that, rather than seeking generally applicable rules, it is seeking an interpretation of the application of the statutory just and reasonable standard to its bids and a declaration by the Commission that, upon a proper showing, it will exercise its discretion to extend to *Mobile-Sierra* protection to ITC's bids.<sup>31</sup>

22. In its September 25, 2015 answer, ITC reiterates that it is not seeking a rule of general applicability, and it states that “[a]s a business matter” it is requesting “guidance to understand whether [ITC’s proposed binding bid with exceptions] can be accommodated by the current regulatory framework.”<sup>32</sup> ITC also states that “a winning bidder and the RTO should be required to show that the process followed was in accord with the approved tariff provisions, and that the solicitation itself attracted sufficient participation to produce a competitive, just and reasonable rate.”<sup>33</sup>

23. In its answer, TAPS disputes that ITC is only seeking guidance, and it asserts that ITC is asking that the Commission establish a general presumption regarding the justness and reasonableness of rates and *Mobile-Sierra* protection for those rates. TAPS also disputes ITC’s proposal regarding a showing that the competitive solicitation attracted sufficient participation to produce a competitive, just and reasonable rate. TAPS states that ITC offers no suggestions on how this showing will be made. TAPS also contests the possibility of such a showing on the grounds that the Order No. 1000 process is not designed to direct all potential developers toward submission of cost-only bids for the same clearly defined, fungible product.<sup>34</sup>

24. A number of parties support ITC’s petition by arguing that ratepayers ultimately will benefit from the relief it seeks through reduction of costs.<sup>35</sup> Some parties argue that

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<sup>31</sup> ITC August 24, 2015 Answer at 2-4.

<sup>32</sup> ITC September 25, 2015 Answer at 2.

<sup>33</sup> *Id.* at 6.

<sup>34</sup> TAPS Answer at 2-4.

<sup>35</sup> Edison Transmission Comments at 3-6 (arguing that without this relief there will be fewer market participants and higher prices); MCN Companies Comments at 5 (stating that ratepayers benefit because uncertainty and risk on the developer side means greater risk for the developer’s lenders and equity investors and higher costs).

the Order No. 1000 competitive transmission solicitation process includes fundamental safeguards that will yield just and reasonable stated rates.<sup>36</sup>

25. A number of parties argue that granting ITC's request for *Mobile-Sierra* protection is appropriate because ratepayers benefit from the downside risk that a developer assumes in submitting a binding bid, but if a developer's actual revenue requirement falls below its binding bid level, the cost savings the developer realizes could be negated in an FPA section 206 proceeding.<sup>37</sup> However, some parties who support *Mobile-Sierra* protection maintain that it should only be offered on a case-by-case basis.<sup>38</sup>

26. New York Commission states that in exchange for holding developers to their bids and preventing the recovery of cost over-runs, the Commission should consider granting the relief that ITC requests, subject to a review on a case-by-case basis and the inclusion of any appropriate exceptions.<sup>39</sup>

27. SoCal Edison states that ITC's proposal reflects an approach that, subject to appropriate protections, could lead to expanded competition in transmission development and result in corresponding customer benefits. However, SoCal Edison also states that ITC's petition is not well defined and raises potential concerns, such as the costs that ITC's proposed exemptions could impose on ratepayers.<sup>40</sup>

28. MISO Transmission Owners state that ITC's proposal balances the equities involved in binding cost-capped bids, but it warrants further consideration and clarification in a number of respects. For example, they state that to be just and reasonable, any exception in a bid should work both ways. Thus, if there is an exception for interest rates, and interest rates decline, the developer should be required to pass the savings through to customers.<sup>41</sup> As another example, the MISO Transmission Owners state that the Commission should clarify how binding bids will be enforced, as it is

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<sup>36</sup> Edison Transmission Comments at 8-10; MCN Companies Comments at 3-4.

<sup>37</sup> MCN Companies Comments at 4-5; Duke Comments at 3-4.

<sup>38</sup> Duke Comments at 4-5; MISO Transmission Owners Comments at 6-7.

<sup>39</sup> New York Commission Comments at 2-4.

<sup>40</sup> SoCal Edison Comments at 4-5.

<sup>41</sup> MISO Transmission Owners Comments at 4-5.

unclear whether the Commission or the RTO will be empowered to enforce the binding aspects of the bid.<sup>42</sup>

29. However, many parties argue that ITC's proposal for exemptions to bids will drive up costs to ratepayers. For example, California SWP characterizes ITC's request for the use of exemptions as essentially a request for a long-term, unspecified ROE adder,<sup>43</sup> and California Cities argue that the exemptions from cost caps improperly transfers risk to ratepayers.<sup>44</sup>

30. A number of parties state that ITC's proposal creates inappropriate risks and burdens for ratepayers. For example, TAPS argues that ITC is proposing to shift risk to consumers, and allowing ITC to mitigate risk in the way it proposes allows it to earn a potentially unlimited return, while stripping ratepayers and the Commission of their statutory rights to check it.<sup>45</sup> Joint Movants state that ITC's proposal is contrary to the fundamental purpose of the FPA, which is to protect consumers.<sup>46</sup>

31. Joint Movants also state that deeming a successful binding revenue requirement bid to be just and reasonable shifts the burden of proof from transmission owners to ratepayers, and providing *Mobile-Sierra* protection for those rates severely limits the rights and abilities of ratepayers to protest a transmission owner's rate filing.<sup>47</sup>

32. A number of parties argue that ITC's petition is premature. For instance, LSP Transmission states that it is premature to make a generalized finding regarding Order No. 1000 competitive solicitation processes or the rates that they produce, and it is also premature to grant *Mobile-Sierra* protection automatically to the rates emanating from

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<sup>42</sup> MISO Transmission Owners Comments at 6.

<sup>43</sup> California SWP Comments at 5-6.

<sup>44</sup> California Cities Protest at 10-11; *see also* Iowa State Entities Comments at 7; Modesto Irrigation Comments at 9; Minnesota State Entities Comments at 4; SDG&E Comments at 4; Delaware Commission Comments at 3.

<sup>45</sup> TAPS Comments at 4, 8.

<sup>46</sup> Joint Movants Comments at 6; *see also* Organization of MISO States Comments at 11-12; California Municipals Comments at 3.

<sup>47</sup> Joint Movants Comments at 3, 13-16; *see also* Modesto Irrigation Comments at 8-9; Arkansas Coop Protest at 4-5.

those processes.<sup>48</sup> NE States Committee similarly argues that given the experiences to date in early phases of implementing Order No. 1000, it is premature to grant the relief that ITC requests.<sup>49</sup>

33. A number of parties question ITC's reliance on Order No. 784, arguing that there is no basis to conclude that the Order No. 784 criteria applied to the Order No. 1000 competitive bidding process would ensure just and reasonable rates.<sup>50</sup> Other parties argue that there are important differences between Order No. 784 and Order No. 1000 competitive solicitations. For example, TAPS notes that Order No. 784 competitive solicitations must seek products that are "precisely defined," but the Order No. 1000 transmission planning process does not seek a precisely defined product and instead gives bidders discretion to fashion their bid and the transmission project they are proposing.<sup>51</sup> TAPS also states that Order No. 1000 expressly recognized that factors other than cost could be crucial to the selection of more efficient and cost-effective transmission solutions and that Order No. 1000 processes are not structured to ensure that a binding bid with exemptions is a just and reasonable rate.<sup>52</sup>

34. Joint Movants state that ITC's reliance on *Devon Power* is misplaced and should be rejected. They state that *Devon Power* involved a settlement agreement that included a *Mobile-Sierra* clause, and, as a result, the parties to the settlement negotiated for, and agreed to, the *Mobile-Sierra* term. On the other hand, the *Mobile-Sierra* protection ITC proposes would be imposed without affording ratepayers or other interested parties any due process rights to challenge that action.<sup>53</sup> TAPS makes a similar argument.<sup>54</sup> California Cities argue that ITC's reliance on *Devon Power* in seeking *Mobile-Sierra*

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<sup>48</sup> LSP Transmission Comments at 2-4.

<sup>49</sup> NE States Committee Comments at 2, 5; *see also* Transource Comments at 11; Minnesota State Entities Comments at 4; Delaware State Commission Comments at 2, 5; Minnesota State Entities Comments at 5.

<sup>50</sup> California SWP Comments at 6-8.

<sup>51</sup> TAPS Comments at 10-11; *see also* Missouri Commission Comments at 3; Modesto Irrigation Comments at 7-8.

<sup>52</sup> TAPS Comments at 9-13.

<sup>53</sup> Joint Movants Comments at 19-20.

<sup>54</sup> TAPS Comments at 13-14.

protection ignores the Commission's statement in that order that in the future it would grant such protection only when there are compelling circumstances for doing so and when doing so offers sufficient benefits to consumers. California Cities maintain that ITC has not shown that either of these criteria is met here.<sup>55</sup>

35. A number of parties argue that ITC misapplies the *Mobile-Sierra* doctrine, primarily because binding bids accepted in a competitive transmission bidding process are not negotiated between ITC and the affected transmission customer at arm's length.<sup>56</sup> DTE Electric argues that granting *Mobile-Sierra* protection is both unjustified and unnecessary because of transmission customers' limited ability to affect the MISO bidding processes and because filing FPA section 206 complaints creates expense, burdens, and responsibilities, and it is thus unlikely that the process will be invoked lightly.<sup>57</sup>

36. A number of parties oppose ITC's alternative request that the Commission find that transmission developers may seek *Mobile-Sierra* protection on a case-by-case basis as a policy-based incentive under FPA section 205. Joint Movants argue that the only guidance or clarification appropriate in this context would be a statement that there will be no presumption of eligibility for *Mobile-Sierra* protection.<sup>58</sup> LSP Transmission states that it is not necessary for the Commission to address ITC's alternative request because the Commission specifically noted in Order No. 679 that incentives other than those enumerated in the order were available when the need for the incentive was established and tied specifically to the risks faced on the project at issue.<sup>59</sup>

37. TAPS states that ITC's requested incentive is not among those incentives listed in Order No. 679, none of which benefit from *Mobile-Sierra* protection. TAPS argues that ITC does not support its request for creation of a new transmission incentive.<sup>60</sup> ELCON

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<sup>55</sup> California Cities Protest at 13-14; *see also* ELCON and Joint Consumers Comments at 3-7.

<sup>56</sup> *See* Consumers Energy Comments at 5-6; Joint Movants Comments at 19-21; Modesto Irrigation Comments at 8, TAPS Comments at 12-13; DTE Comments at 3-4.

<sup>57</sup> DTE Electric Comments at 3-4.

<sup>58</sup> Joint Movants Comments at 22-24.

<sup>59</sup> LSP Transmission Comments at 4-5.

<sup>60</sup> TAPS Comments at 5-6.

and Joint Consumers argue that it would be inappropriate to offer an adjustment to the legal standard of review under the FPA as a financial incentive.<sup>61</sup>

38. SPP states that it takes no position on the merits of ITC's requests, but it states that if the Commission grants the petition, it should specify that doing so does not restrict an RTO's ability to apply its existing reevaluation or cost containment process to a transmission facility whose rate has been granted *Mobile-Sierra* protection. SPP states that the ability to do this is essential for ensuring the efficient and cost-effective expansion of its transmission system and for ensuring continued reliable and economic system operation.<sup>62</sup>

### III. Discussion

#### A. Procedural Matters

39. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>63</sup> the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

40. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure,<sup>64</sup> we accept the Maryland Commission's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

41. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority.<sup>65</sup> We accept the answers filed in this proceeding because they have provided information that has assisted us in our decision-making process.

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<sup>61</sup> ELCON and Joint Consumers Comments at 8.

<sup>62</sup> SPP Comments at 4-7.

<sup>63</sup> 18 C.F.R. § 385.214 (2015).

<sup>64</sup> *Id.* § 385.214(d).

<sup>65</sup> *Id.* § 385.213(a)(2).

## B. Commission Determination

42. ITC's petition highlights important policy issues related to the potential benefits of cost containment proposals in the context of competitive transmission development. However, a petition for declaratory order is not the appropriate means for addressing these issues, and we therefore dismiss ITC's petition for this reason. The Commission's authority to issue declaratory orders is based on Rule 207(a)(2) of its Rules of Practice and Procedure and section 554(e) of the APA, which allow the Commission to issue declaratory orders "to terminate a controversy or remove uncertainty."<sup>66</sup> The determinations that the Commission makes in a declaratory order are generally legal in nature. They cover a broad range of issues, including jurisdictional issues and the applicability to specific parties of specific rights and duties arising under the statutes that the Commission administers.<sup>67</sup>

43. ITC's request involves a policy matter regarding competitive transmission project selection processes, which ITC raises based on a concern that "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."<sup>68</sup> In addition, ITC argues that without *Mobile-Sierra* protection, "the successful transmission developer could face an FPA Section 206 complaint to reduce the rate that it bid and that was accepted."<sup>69</sup> According to ITC, this "will discourage transmission developers from pursuing cost savings and

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<sup>66</sup> 18 C.F.R. § 385.207(a) (2015); 5 U.S.C. § 554(e) (2012).

<sup>67</sup> See, e.g., *Southline Transmission, L.L.C.*, 152 FERC ¶ 61,221 (2015) (authorizing negotiated rate authority for merchant transmission provider, approving capacity allocation methodology under Commission policy, and finding certain applicants to be passive entities and therefore not subject to Commission jurisdiction under the FPA and the Public Utility Holding Company Act of 2005); *Central New York Oil and Gas Co., L.L.C.*, 152 FERC ¶ 61,097 (2015) (determining whether certain transactions would trigger certain rights under agreements on file with the Commission); *San Diego Gas & Electric Co.*, 151 FERC ¶ 61,011 (2015) (determining whether certain transmission rate incentives under section 219 of the FPA and Order No. 679 are appropriate in a specific case); *Bloom Energy Corp.*, 148 FERC ¶ 61,196 (2014) (determining whether certain companies qualify as "non-traditional utilities" under the Commission's regulations under the Public Utility Holding Company Act of 2005).

<sup>68</sup> Petition at 13.

<sup>69</sup> *Id.*

efficiencies in constructing competitive transmission projects to the extent those would reduce the costs below bid costs.”<sup>70</sup>

44. The type of uncertainty that ITC describes is uncertainty that results from applying the law as it currently exists, not uncertainty about what the law requires or whether the law applies to particular facts. To mitigate this uncertainty as ITC requests involves matters of policy that are beyond the normal scope of a declaratory order proceeding. The Commission has previously declined to use a declaratory order for this purpose.<sup>71</sup>

45. In addition, the broad scope of the requests in ITC’s petition confirms that they cannot be dealt with appropriately through a declaratory order. Petitions for declaratory order, and orders granting those petitions, “are based on the specific facts and circumstances presented.”<sup>72</sup> ITC’s petition presents a broad issue to the Commission, not an issue arising from specific facts about transmission projects on which ITC proposes to bid. Instead, the petition seeks a generic finding that will cover all bids made in MISO and SPP and potentially in other regions. This occurs notwithstanding ITC’s assertion in its August 24, 2015 answer that it “is not seeking new rules of general applicability, or to extend *Mobile-Sierra* protection on a generic basis.”<sup>73</sup> Although ITC states that it is only seeking to remove uncertainty regarding the treatment for ratemaking purposes of the specific binding bids with exemptions that it submits and are selected in qualifying

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<sup>70</sup> *Id.*

<sup>71</sup> *Texas Eastern Transmission Corp.*, 62 FERC ¶ 61,196 (1993) (denying a petition for a declaratory order that sought a reinterpretation of the Commission’s regulations that petitioner asserted was needed to avoid “a chilling effect on construction of necessary supply related facilities,” but which “would require altering the text of our regulations” and which “requires what would be in effect a binding norm or rule” and also finding that “it would be inappropriate to make a generic finding that costs associated with facilities constructed under a Part 157 blanket certificate to attach gas supplies necessarily provide a system-wide benefit”).

<sup>72</sup> *Puget Sound Energy Inc.*, 139 FERC ¶ 61,241, at P 12 (2012); *see also Western Grid Development, LLC*, 130 FERC ¶ 61,056, at P 56 (2010) (granting petition for declaratory order and stating “our determination here is strictly limited to the specific circumstances identified by the applicant.”); *Sharyland Utils., L.P.*, 121 FERC ¶ 61,006, at P 23 (2007) (granting petition for declaratory order “[b]ased on the specific facts presented . . .”); accord *Desert Southwest Power, Inc.*, 135 FERC ¶ 61,143, at P 109 (2011).

<sup>73</sup> ITC August 24, 2015 Answer at 10.

competitive processes, ITC's petition seeks a more general finding. Indeed, the 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."<sup>74</sup> Numerous parties that have submitted pleadings in this proceeding have also read ITC's petition as a request for a generally applicable determination by the Commission that should not be read narrowly to apply only to ITC.

46. In addition, while ITC states in its September 25, 2015 answer that it is only seeking guidance concerning its proposed bids, ITC's petition would require us to make binding determinations that certain rates filed at the Commission will be deemed to be just and reasonable and that those rates will be entitled to *Mobile-Sierra* protection. Such determinations would create enforceable rights for successful bidders who file binding bids with exceptions, and those determinations would thus do more than provide guidance.

47. A petition for declaratory order is also not the appropriate vehicle to address ITC's alternative request for *Mobile-Sierra* protection on a case-by-case basis as a policy-based incentive under FPA section 205. This request seeks neither the resolution of a controversy nor the removal of uncertainty. The *Mobile-Sierra* public interest test is simply "a more rigorous application of the statutory 'just and reasonable' standard of review,"<sup>75</sup> and the Commission has the authority to apply it when the facts presented justify doing so.<sup>76</sup> Parties are always free to request a particular standard of review, and a statement by the Commission that it is prepared to consider exercising its authority to consider such requests in the circumstances that ITC specifies would not create a binding commitment on the Commission's part and therefore would not constitute declaratory relief.<sup>77</sup>

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<sup>74</sup> Petition at 3.

<sup>75</sup> *Devon Power LLC*, 137 FERC ¶ 61,073 at P 1.

<sup>76</sup> *New England Power Generators Ass'n, Inc. v. FERC*, 707 F.3d 364, 370-371 (D.C. Cir. 2013).

<sup>77</sup> See, e.g., *Informal Staff Advice on Regulatory Requirements*, 113 FERC ¶ 61,174, at P 17 (2005) (stating "[a]ny person who seeks a binding Commission determination concerning a proposed transaction, practice, situation or other matter may file a petition for a declaratory order"; *Obtaining Guidance on Regulatory Requirements*, 123 FERC ¶ 61,157, at P 19 (2008) (stating "[a]s with other formal Commission actions,

(continued...)

48. Since we are dismissing ITC's petition on the grounds that a declaratory order is not an appropriate means for dealing with the specific requests that ITC makes in the petition, we do not address here the merits of the arguments that ITC makes in support of its requests.

49. Although we are dismissing ITC's petition on the grounds that a declaratory order is not an appropriate means for dealing with the specific requests, we also recognize that this case highlights broader policy considerations related to the potential benefits of binding revenue requirement proposals in the context of competitive transmission development. As the Commission stated in a recent order raising similar issues,<sup>78</sup> we intend to convene a technical conference in the future to explore further such issues. These issues include how the Commission should consider and evaluate rates that result from a competitive development process and that include binding revenue requirements.

The Commission orders:

ITC's petition is dismissed, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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a declaratory order represents a binding statement of policy that provides direction to the public and our staff regarding the statutes we administer and the implementation and enforcement of our orders, rules and regulations"); *American Electric Power Service Corp.*, 82 FERC ¶ 61,131, at 61,472 (1998) (stating that "[f]or definitive rulings, interested persons may seek declaratory orders from the Commission, which have binding effect").

<sup>78</sup> *NextEra Energy Transmission West, LLC*, 154 FERC ¶ 61,009, at PP 76-78 (2015).