

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

ITC Grid Development LLC

Docket No. EL15-86-000

**PROTEST AND COMMENTS OF THE ELECTRICITY CONSUMERS RESOURCE
COUNCIL ("ELCON") AND JOINT CONSUMERS**

Pursuant to Rules 211 and 214 of the Commission's Regulations (18 C.F.R. 385.211, 385.214), the Electricity Consumers Resource Council ("ELCON"), Association of Businesses Advocating Tariff Equity ("ABATE"), Coalition of MISO Transmission Customers ("CMTC"), Illinois Industrial Energy Consumers ("IIEC"), Louisiana Energy Users Group ("LEUG"), Minnesota Large Industrial Group ("MLIG"), PJM Industrial Customer Coalition ("PJMICC"), Texas Industrial Energy Consumers ("TIEC"), and Wisconsin Industrial Energy Group ("WIEG") (collectively, "ELCON and Joint Consumers") hereby file this protest and comments on the Petition for Declaratory Order ("Petition") filed by ITC Grid Development LLC ("ITC").¹

ITC seeks a Commission ruling: (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; (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; and (3)

¹ Each of ELCON and Joint Consumers previously has filed a motion to intervene in this docket.

that in the alternative the Commission should make *Mobile-Sierra* protection available on a project-specific basis as a “policy-based incentive.”

PROTEST AND COMMENTS OF ELCON AND JOINT CONSUMERS

ITC was an active participant in the Order No. 1000 and related ISO/RTO compliance filing dockets. Notwithstanding its prior general support for the procedures proposed by the ISOs/RTOs,² and now being implemented by MISO and SPP, pursuant to Order No. 1000, ITC now presents the novel argument, not previously raised, that bids selected as the result of Order No. 1000 transmission project selection processes require special protection under the *Mobile-Sierra* standard to adequately incentivize participation by transmission developers.

ELCON and Joint Consumers strenuously oppose the Petition. ITC seeks what would be an unprecedented determination by the Commission that *Mobile-Sierra* protection applies to long-term – 40-year or life of the asset – tariff rates. During this extended period, ITC could obtain cost increases for a broad set of “exemptions,” but customers could only obtain reductions in the revenue requirement recovered from ratepayers -- reductions in the unprecedented high return on equities (ROEs) that utilities are now allowed or a host of technological changes and productivity improvements that are likely to reduce future revenue requirements – if they were able to satisfy a stringent “public interest” test. ITC has not established the presence of “compelling circumstances” or “sufficient benefit to consumers,” which are the Commission-established thresholds for *Mobile-Sierra* protection, and it would not be a

² ITC noted that the proposed Order No. 1000 procedures largely continued existing practice; its objections addressed, for example, right of first refusal and other procedural issues. *E.g.*, Comments submitted Dec. 16, 2013 in Docket No. ER13-366-002 at p. 1 (“ITC Great Plains generally supports SPP’s compliance filing as being consistent with the directives contained in the Commission’s July 18, 2013 order on SPP’s previous compliance filing, and with the principles and requirements of Order No. 1000 generally” while “recommending minor modification to the SPP Compliance Filing in two respects”); Comments submitted Dec. 10, 2012 in Docket No. ER13-187-000 at p. 5 (“[t]he ITC Companies support [MISO’s] proposed revisions to the regional transmission planning and regional cost allocation provisions of the TOA and Tariff in this filing”).

“just and reasonable” outcome or otherwise provide sufficient benefits to transmission customers.

Should ITC feel that compelling circumstances and sufficient benefit to consumers require *Mobile-Sierra* protection on a project-specific basis, it could include such a provision in its bid package, and if its bid is selected, it would have the right to seek Commission approval as part of review of the project-specific tariff. However, ITC would have to meet a very heavy burden and the Commission should not prejudge that it will grant any such requests, as the Petition seeks generically. ITC’s proposal that, in the alternative, the Commission should adjust the legal standard for review under the Federal Power Act as a financial “policy-based incentive” starkly illustrates that the Petition seeks to rewrite settled law to give primary protection to transmission developers rather than to consumers.

Alternatively, as a matter of procedure and as further explained in ELCON’s August 24, 2015 filing in this docket, the Commission should dismiss the Petition as the relief requested by ITC should have been submitted in a Petition for Rulemaking under Rule 207(a)(4) rather than in a Petition for Declaratory Order under Rule 207(a)(2).

I. MOBILE-SIERRA PROTECTION SHOULD NOT BE EXTENDED ON A GENERIC BASIS TO 40 YEAR OR LIFE OF PROJECT TARIFFS

ITC cites the recent Supreme Court and D.C. Circuit decisions on *Mobile-Sierra*, and FERC’s 2011 *Devon Power* decision, which related to the results of ISO-New England’s annual forward capacity market auctions, for the proposition that FERC has discretion to extend the protection of the *Mobile-Sierra* public interest standard beyond contract rates, its traditional application, to tariff rates. In *Devon Power*, FERC stated its approach to *Mobile-Sierra* and noncontract rates as follows:

[T]he 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.

Devon Power LLC, Order Denying Rehearing, 137 FERC ¶ 61,073, P 30 (2011) (emphasis added), affirmed in *New England Power Generators Ass’n, Inc. v. FERC*, 707 F.3d 364, 370-371 (D.C. Cir. 2013).

Contrary to ITC’s assertion, transmission solicitation processes established under Order No. 1000 are quite different from the circumstances at issue in *Devon Power*. It is a huge leap from an annual competitive auction with numerous market participants -- the tariff rate context in which FERC previously applied *Mobile-Sierra* -- to the results of a bid for transmission services where the timeframe is 40 years or the life of the project, and it is impossible to predict today that in all cases there will be sufficient bidder participation to assure a competitive result. Locking in such rates for such an extended period, precluding future claims that the rates are no longer “just and reasonable,” also is likely to be to the detriment of consumers. Consumers should have the benefit of the lower of the bid price or, should conditions change in the future, cost of service plus a reasonable rate of return.

The Commission should not grant *Mobile-Sierra* protection absent strong and unequivocal evidence that the *Devon Power* criteria are satisfied. Court and Commission decisions have described the public interest standard as “practically insurmountable” or “almost insurmountable”³ and “much more restrictive”⁴ than the ordinary just and reasonable standard. According to the Supreme Court, a party challenging a rate subject to *Mobile-Sierra* protection must show “serious harm” to

³ *Papago Tribal Auth. v. FERC*, 723 F.2d 950, 954 (D.C. Cir. 1983).

⁴ See, e.g., *Florida Power & Light Co.*, 67 FERC ¶ 61,141 at p. 61,398-99 (1994) (citing *Papago Tribal Util. Auth. v. FERC*, 7 F.2d 950, 953 (D.C. Cir. 1983) and *Kansas Cities v. FERC*, 723 F.2d 82, 87-88 (D.C. Cir. 1983)).

consumers,⁵ and as recently explained by the Commission must demonstrate, and support with detailed analysis, that the rate would impair the applicant's financial ability to provide service, excessively burden third parties, or be unduly discriminatory so as to seriously harm the public interest.⁶ ITC admits as much when it states that *Mobile-Sierra* protection would enable it to proceed "without having to address the risk of future rate uncertainty." Petition at 19. The Commission also stated, in *Devon Power*, that it will "focus . . . on the particular circumstances presented" in making the determination in individual cases.⁷ ITC's proposal therefore represents not only a significant but also an unprecedented expansion of the Commission's *Mobile-Sierra* precedents.

II. ITC HAS NOT ESTABLISHED THAT "COMPELLING CIRCUMSTANCES" OR "SUFFICIENT BENEFITS TO CUSTOMERS" ARE PRESENTED BY ORDER NO. 1000 PROCEEDINGS

The Petition does not identify any "compelling circumstances" that would warrant departure from the traditional "just and reasonable" standard. The Petition makes a number of conclusory statements for which ITC provides no evidence. For example, ITC states without citation that transmission "developers must have confidence" that their bids will be binding "unless demanded by the public interest" and "successful binding revenue requirement bids [must] not be upset absent a compelling showing."

ITC does not provide supporting evidence because there is none. In fact, transmission bidding processes have successfully occurred for years, both before and after Order No. 1000, without giving transmission developers the extraordinarily incentivizing carrot of *Mobile-Sierra* protection. It was a common theme of the Order

⁵ *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish County, Washington*, 554 U.S. 527, 545 (2008).

⁶ *Id.*

⁷ *Devon Power LLC*, 134 FERC ¶ 61,208 at P 24.

No. 1000 compliance filings by the ISOs/RTOs that their procedures for selecting transmission developers had been functioning effectively and required little modification. Tens if not hundreds of transmission projects were developed without *Mobile-Sierra* protection. Under Order No. 1000, the Petition discusses in detail two “successful” bid processes – the Artificial Island Project in PJM and the Harry Allen-Eldorado Project in CAISO. Petition at p. 6. ITC cites these projects for the proposition “that successful bidders will need to agree to binding cost commitments.” *Id.* Actually, what is notable about these projects is that even though binding cost containment was a key consideration, competitive bids were submitted and successfully awarded on that basis, without resorting to the crutch of *Mobile-Sierra* protection.⁸ The experience with transmission selection processes does not support ITC’s novel claim of “compelling circumstances.”

Digging to a deeper level, ITC’s claim that transmission developers face “asymmetrical risk” does not hold water. What is described as a “binding bid” would in fact contain a number of exemptions. The Petition identifies exemptions that generally would enable automatic rate increases – cost changes due to route changes, interest rate changes, force majeure, changes in laws or regulations, or statutory tax changes. Petition at p. 7 & fn. 11. Of course, there may be additional exclusions on a cost specific basis.

ITC’s description of a “binding bid” also ignores the operable language contained in the RTOs’ tariffs and agreements. Initially, ITC’s position ignores PJM’s Transmission Owners Agreement, which provides that entities chosen by PJM to construct a transmission project are entitled to recover all reasonably incurred costs plus a reasonable return on investment.⁹ Further, acceptance of a “binding bid” does not, in many cases, equate to binding obligation to construct a transmission project. For example, PJM’s Transmission Owners Agreement identifies circumstances that may

⁸ Moreover, in an accompanying footnote, the Petition references two additional CAISO project selection processes with similar outcomes – notwithstanding the absence of special *Mobile-Sierra* protection, the selection process concluded successfully with cost containment a prime consideration. *Id.* at p. 6 fn. 8.

⁹ PJM Transmission Owners Agreement at Section 4.2.1.

result in project cancellation or substantial modification.¹⁰ These include failure to obtain the necessary regulatory approvals, secure financing, or acquire the necessary right-of-way.¹¹ MISO's Tariff provides that accepted bids to complete competitive transmission projects may be reevaluated for cost increases that reduce the benefit-cost ratio used to justify the project, for schedule delays, and for deviations of the selected developer's qualifications, any of which may result in project cancellation.¹² CAISO's tariff similarly excuses performance under a "binding bid" if the transmission project developer's good faith effort fails to secure the necessary regulatory approvals to complete the project.¹³

What ITC really seeks is asymmetry in its favor – why should it be entitled to a free reopener to increase rates should interest rates increase, but if interest rates should decrease customers would face the high hurdle of the public interest standard to obtain an analogous rate reduction?

The Petition also does not present valid evidence of the second prong of the *Devon Power* test, "sufficient benefits to consumers." In this regard, ITC claims that transmission customers seek "rate stability". That only states the obvious – that stability and certainty almost always are important considerations. But alone it does not establish a benefit to consumers. It certainly is not the case in a construct that the Petition seeks to establish, where rates are too high and when they can be more readily increased than decreased. Thus, ITC has not established that "sufficient benefits to consumers" – the primary purpose of the Federal Power Act -- call for application of *Mobile-Sierra* protection here.

¹⁰ *Id.*

¹¹ *Id.*

¹² MISO Tariff Attachment FF.IX.

¹³ CAISO Tariff at Section 24.6; *see also id.* at 24.6

III. ITC'S PROPOSAL TO USE *MOBILE-SIERRA* AS A POLICY-BASED INCENTIVE SHOULD BE REJECTED

In the alternative, ITC proposes that the Commission apply *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.

Petition at 19. By presenting its alternative as an “incentive” to benefit transmission developers, ITC clearly demonstrates its intent to capture savings that would otherwise accrue to consumers. Such a new addition to the numerous incentives that already accrue to the benefit of transmission developers would be unwarranted. It would be entirely inappropriate to offer an adjustment to the legal standard of review under the Federal Power Act as a financial incentive.

In any event, as exemplified by the numerous transmission selection processes successfully completed by ISOs/RTOs, there certainly is no need to act on the Petition in a generic, abstract context as ITC now presents it. Should ITC feel that compelling circumstances and sufficient benefit to consumers require *Mobile-Sierra* protection on a project-specific basis, it would always have the option to include such a provision in its bid package, and if its bid is selected, to seek Commission approval as part of review of the project-specific tariff. The Commission should not prejudge that it will grant any such requests, as the Petition seeks. Petition at pp. 13-14.

In fact, a transmission developer even could submit alternative bids, with one contingent on Commission approval of project-specific *Mobile-Sierra* protection. That would starkly illustrate whether “compelling circumstances” and “sufficient benefit to

consumers” were present and inform the decisions of the ISO/RTO initially and the Commission subsequently. In view of the nature of Order No. 1000 proceedings and of the transmission projects at issue, ELCON and Joint Consumers believe that these thresholds would be very difficult for transmission developers to satisfy, but giving them an opportunity to try to do so would be consistent with *Devon Power*.

IV. AS A MATTER OF PROCEDURE, THE PETITION SHOULD BE DISMISSED

The relief requested by ITC should have been submitted in a Petition for Rulemaking under Rule 207(a)(4) rather than in a Petition for Declaratory Order under Rule 207(a)(2). The Petition seeks a new rule that (1) would significantly change the law on the standard of review and burden of proof for Order No. 1000 tariffs, and (2) would have general, nation-wide applicability. This would be a new legislative rule that would “create new law, rights, or duties,” not merely an interpretive rule or a general statement of policy. Accordingly, the Administrative Procedure Act requires notice and comment rulemaking. For the reasons set out in ELCON’s August 24, 2015 filing in this docket, which is incorporated by reference herein, and as further explained in the August 21, 2015 joint motion filing by the American Public Power Association, the Kansas Corporation Commission, and the National Rural Electric Cooperative Association, the Petition should be dismissed.

CONCLUSION

For the reasons set forth above, ELCON and Joint Consumers strenuously oppose the Petition and urges that the Commission deny it.

Respectfully submitted,

ELECTRICITY CONSUMERS RESOURCE COUNCIL

/s/ JOHN P. HUGHES

John P. Hughes
Vice President, Technical Affairs
Electricity Consumers Resource Council
1101 K Street, NW, Suite 700
Washington, DC 20005
Email: jhughes@elcon.org
Phone: (202) 682-1390

/s/ W. RICHARD BIDSTRUP

W. Richard Bidstrup
Cleary Gottlieb Steen & Hamilton LLP
2000 Pennsylvania Avenue, N.W., Suite 900
Washington, D.C. 20006
Email: rbidstrup@cgsh.com
Phone: (202) 974-1500

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY

/s/ ROBERT A. W. STRONG

Robert A. W. Strong
Clark Hill PLC
151 S. Old Woodward Ave., Suite 200
Birmingham, Michigan 48009
Email: rstrong@clarkhill.com
Phone: (248) 988-5861

COALITION OF MISO TRANSMISSION CUSTOMERS AND PJM INDUSTRIAL
CUSTOMER COALITION

/s/ ROBERT A. WEISHAAR, JR.

Robert A. Weishaar, Jr.
McNees Wallace & Nurick LLC
777 N. Capitol Street, N.E., Suite 401
Washington, DC 20002-4292
Email: rweishaa@mwn.com
Phone: (202) 898-5700

Susan E. Bruce
Elizabeth P. Trinkle
McNees Wallace & Nurick LLC
100 Pine Street
Harrisburg, Pennsylvania 17101
Email: etrinkle@mwn.com
Phone: (717) 237-5254

ILLINOIS INDUSTRIAL ENERGY CONSUMERS

/s/ ERIC ROBERTSON

Eric Robertson
Lueders Robertson and Konzen
P. O. Box 735
1939 Delmar Avenue
Granite City, Illinois 62040
E-mail: erobertson@lrklaw.com
Phone: (618) 876-8500

LOUISIANA ENERGY USERS GROUP

/s/ KATHERINE W. KING

Katherine W. King
Randy Young
Carrie R. Tournillon
Kean Miller LLP
Post Office Box 3513
Baton Rouge, Louisiana 70821
Email: katherine.king@keanmiller.com
Phone: (225) 382-0999

MINNESOTA LARGE INDUSTRIAL GROUP

/s/ SARAH JOHNSON PHILLIPS

Sarah Johnson Phillips
Andrew P. Moratzka
Stoel Rives LLP
333 South Sixth Street, Suite 4200
Minneapolis, Minnesota 55402
Email: sarah.phillips@stoel.com
Phone: (612) 373-8843

TEXAS INDUSTRIAL ENERGY CONSUMERS

/s/ PHILIP OLDHAM

Philip Oldham
Katherine Coleman
Thompson & Knight LLP
98 San Jacinto Blvd., Suite 1900
Austin, Texas 78701
Email: katie.coleman@tklaw.com
Phone: (512) 469-6100

WISCONSIN INDUSTRIAL ENERGY GROUP

/s/ TODD STUART

Todd Stuart
Executive Director
Wisconsin Industrial Energy Group
10 East Doty Street, Suite 800
Madison, Wisconsin 53703
Email: tstuart@wieg.org
Phone: (608) 441-5740

Dated: August 27, 2015

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary of this proceeding.

Dated at Washington, D.C.: August 27, 2015

/s/ W. RICHARD BIDSTRUP
W. Richard Bidstrup