

152 FERC ¶ 61,211  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Southline Transmission, L.L.C.  
SU FERC, L.L.C.

Docket No. EL15-65-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued September 17, 2015)

1. On May 11, 2015, Southline Transmission, L.L.C. (Southline Transmission) and SU FERC, L.L.C. (SU FERC) (collectively, Applicants) filed a petition for a declaratory order (Petition) with the Commission seeking the following: (1) a finding that Southline Transmission is a passive entity and therefore not a public utility under the Federal Power Act (FPA) or an electric utility company under the Public Utility Holding Company Act of 2005 (PUHCA 2005); (2) authorization granting SU FERC negotiated rate authority; (3) approval of SU FERC's capacity allocation methodology; and (4) certain waivers of Commission regulations. The Commission grants the petition for declaratory order, as discussed below.

**I. Background**

2. Applicants state that Southline Transmission is an indirect wholly-owned subsidiary of Hunt Power, LP, which is a subsidiary of Hunt Consolidated, Inc. Applicants further state that Hunt Power, LP develops and invests in entrepreneurial electric and gas opportunities. Applicants explain that Hunt Power, LP is part of a larger, privately-owned, group of companies managed by the Ray L. Hunt family, which engage in oil and gas exploration, refining, power, real estate, ranching, and private equity investments. Applicants state that Southline Transmission does not own or operate any existing electric generation, transmission, or distribution facilities.<sup>1</sup>

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<sup>1</sup> Petition at 4.

3. Applicants state that SU FERC is a wholly-owned subsidiary of Sharyland Utilities, L.P. (Sharyland). Applicants explain that Shary Holdings, LLC (Shary Holdings) owns one percent of Sharyland and is the general partner of Sharyland; SU Investment Partners, LP (SU Investment Partners) owns the remaining 99 percent of Sharyland. Applicants state that both Shary Holdings and SU Investment Partners are owned by members of the Hunt family. Applicants state that SU FERC does not currently own or operate any facilities that are subject to Commission jurisdiction.<sup>2</sup>

4. Applicants seek Commission determinations related to their activities in connection with the proposed Southline transmission project (Southline Project). Applicants state that the Southline Project would consist of a new build section and an upgrade section. Applicants explain that the Southline Project would interconnect with up to 14 existing substations and potentially one new substation; the new build section would include approximately 240 miles of new 345 kV double-circuit electric transmission lines and related facilities located in New Mexico and Arizona, and would provide approximately 1,000 MW of bi-directional capacity. According to Applicants, the new build section would connect the existing Afton Substation, south of Las Cruces, New Mexico, to the existing Apache Substation, south of Willcox, Arizona, and may include a new “midpoint” substation in Luna County, New Mexico. Applicants state that this section includes a 30-mile spur that would provide transmission for areas in southern New Mexico that Applicants describe as rich in renewable resources, and a five-mile loop between the existing Afton Substation and the existing Luna-Diablo 345 kV transmission line that Applicants state is necessary to strengthen the existing regional transmission system.<sup>3</sup>

5. Applicants state that the upgrade section would rebuild and convert approximately 120 miles of Western Area Power Administration’s (Western) aging Saguaro-Tucson and Tucson-Apache 115 kV transmission lines to double-circuit 230 kV lines. Applicants state that these lines are used to deliver federal hydropower to customers. Applicants state that these lines are built on wooden H-frame poles that date to 1951 and, as part of its efforts to maintain system reliability and meet customer needs, Western has identified the upgrade of these two 115kV lines in its Desert Southwest Region 10-year plan for construction and maintenance projects. According to Applicants, the upgrade would strengthen the integrated transmission system, increase transmission capacity and improve power delivery. The upgrade section, Applicants explain, would connect the existing Apache Substation with the existing Saguaro Substation located northwest of Tucson, Arizona, and would provide approximately 1,000 MW of transmission capacity

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<sup>2</sup> *Id.* at 4-5.

<sup>3</sup> *Id.* at 5.

between these substations. Applicants state that the upgrade will also include certain minor expansions of the existing Western 115 kV system.<sup>4</sup>

6. Applicants state that Western is considering participation in the Southline Project. According to Applicants, Western and Southline Transmission have executed a Memorandum of Understanding and an Advanced Funding Agreement. Applicants state that Western and Southline Transmission also have finalized a confidential, nonbinding participation principles document that would lead to the development of a definitive participation agreement governing the parties' respective rights and obligations with respect to the Southline Project.<sup>5</sup>

7. Applicants state that under the contemplated public-private partnership, Southline Transmission and Western would contribute certain resources and would obtain capacity rights commensurate with those contributions. Applicants explain that Southline Transmission would fund the costs of all new construction, improvements to existing transmission lines and related facilities, and the acquisition of any needed real property interests. Applicants state that, to the extent federal law permits, Western would utilize existing land rights associated with its two 115 kV lines and manage the process of acquiring additional land rights necessary to complete construction of the Southline Project. According to Applicants, Western would acquire capacity rights on the upgrade section (in addition to its existing capacity) and would acquire capacity rights on the new build section in amounts that correspond to Western's contributions to the Southline Project.<sup>6</sup>

8. Applicants state that Southline Transmission would acquire, and lease to SU FERC, certain Southline Project physical transmission system assets and the associated capacity rights. Further, Applicants state, Southline Transmission would transfer to SU FERC any other capacity rights not associated with the leased Southline Project assets. Applicants state that Western would be the construction manager for the upgrade section, and Southline Transmission or its designee would be the construction manager for the new build section. Applicants state that after the Southline Project construction is complete, Western and SU FERC would operate and maintain the upgrade and new build sections, respectively, consistent with Western Electricity Coordinating Council (WECC) and North American Electric Reliability Corporation (NERC) Reliability Standards. Applicants state that, under the contemplated public-private partnership, Western and SU

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<sup>4</sup> *Id.* at 5-6.

<sup>5</sup> *Id.* at 6-7.

<sup>6</sup> *Id.* at 7.

FERC would share costs and expenses related to the operations and maintenance of the Southline Project in proportion to their respective capacity rights.<sup>7</sup>

9. Applicants state that legal title to various Southline Project facilities would be held separately by Western and Southline Transmission. For the upgrade section, Western would, with certain exceptions, hold title to right-of-way and transmission facilities. In addition, Applicants explain that to the extent federal law permits, Western would manage the process of obtaining land rights for non-federal land in the new build section and would lease those rights to Southline Transmission, which would own transmission facilities as tenant improvements. Applicants state that in the case of transmission facilities located on federal land or land owned by an electric utility, Southline Transmission would own both the land rights and the facilities.<sup>8</sup>

10. Applicants state that Southline Transmission would utilize a real estate investment trust (REIT) structure under which it would hold legal title to, or a leasehold interest in, certain Southline Project land and transmission facilities, and capacity rights commensurate with its contributions to the Southline Project. Applicants state that Southline Transmission would have no operational control over any facilities or services that are subject to Commission jurisdiction. According to Applicants, the REIT structure is an investment vehicle that would allow Southline Transmission to access efficient sources of capital needed to finance the Southline Project while reserving full operational control of jurisdictional services and facilities to SU FERC and Western. Applicants state that, under the REIT structure, Southline Transmission would execute a long-term lease whereby all of its ownership interests and associated capacity rights in the Southline Project would be transferred to SU FERC. SU FERC would have the exclusive right to use the facilities, as well as responsibility for operation and maintenance of the new build section and compliance with all regulatory and reliability requirements. Applicants state that SU FERC would have a controlling managing member interest in Southline Transmission. Applicants explain that Western would not be part of the REIT structure and would operate and maintain the upgrade section, and administer all of its capacity rights on the project using its existing non-jurisdictional open access transmission tariff (OATT).<sup>9</sup>

11. Applicants state that under the long-term lease agreement to be executed between Southline Transmission and SU FERC, SU FERC would make rent payments that include a specified annual base rent and a payment based on a percentage of SU FERC's annual

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 7-8.

<sup>9</sup> *Id.* at 2, 8-9.

gross revenues from the Southline Project. Although the lease term has not yet been established, Applicants state that they anticipate that the initial term will be between five and 20 years, with renewal options. Applicants explain that SU FERC will be responsible for the payment of additional amounts under the lease arrangement for expenses such as insurance premiums, taxes, and other costs (associated with leasing, servicing, insuring, maintaining, repairing, and operating the system); the lease will not permit SU FERC to transfer, assign, surrender, or otherwise cease to be the operator without prior Commission approval.<sup>10</sup>

12. Applicants request that the Commission find that Southline Transmission will not be considered to be a public utility under section 201(e) of the FPA if it holds legal title to, or a leasehold interest in, the Southline Project, as well as the associated capacity rights, as described in the Petition.<sup>11</sup> SU FERC requests authority to charge negotiated rates for transmission service rights related to its interest in the Southline Project and authority to allocate up to 100 percent of its capacity rights through bilateral negotiations concerning key rates, terms and conditions, as well as approval of the capacity allocation process proposed in the Petition.<sup>12</sup>

13. Applicants state that they anticipate completing the Southline Project development activities in 2015, beginning construction in 2016, and commencing service in 2017.<sup>13</sup>

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

14. Notice of Applicants' Petition was published in the *Federal Register*, 80 Fed. Reg. 28,613 (2015), with interventions and protests due on or before June 10, 2015. Southwest Transmission Dependent Utility Group (Southwest Group)<sup>14</sup> filed a timely

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<sup>10</sup> *Id.* at 9-10.

<sup>11</sup> *Id.* at 13.

<sup>12</sup> *Id.* at 18.

<sup>13</sup> *Id.* at 13.

<sup>14</sup> Southwest Group is made up of: Aguila Irrigation District, Ak-Chin Energy Services, Buckeye Water Conservation and Drainage District, Central Arizona Water Conservation District, Electrical District No. 3, Electrical District No. 4, Electrical District No. 5, Electrical District No. 6, Electrical District No. 7, Electrical District No. 8, Harquahala Valley Power District, Hohokam Irrigation and Drainage District, Maricopa County Municipal Water District No. I, McMullen Valley Water Conservation and Drainage District, City of Needles, Roosevelt Irrigation District, City of Safford, Tonopah Irrigation District, and Wellton-Mohawk Irrigation and Drainage District.

motion to intervene and comments, and Arizona Electric Power Cooperative, Inc. and Southwest Transmission Cooperative (collectively, the Cooperatives) filed a timely motion to intervene and protest. Applicants filed an answer to the Cooperatives' protest, the Cooperatives filed an answer to Applicants' answer, and the Applicants filed an answer to the Cooperatives' answer to their answer.

15. Southwest Group states that it is not protesting the issuance of the declaratory order that Applicants request. Instead, it states that it is concerned that the Commission be supplied with additional facts on which it can base its decision.

16. First, Southwest Group states that there are material uncertainties about the Southline Project. According to Southwest Group, there are no agreements between Applicants and Western concerning the Southline Project. Southwest Group states that Western held a meeting on May 28, 2015, regarding the Southline Project where customers raised a number of questions concerning rate impact studies, line de-energizing requirements, facility inclusion, and marketability of additional capacity. Southwest Group states that Western agreed to look at these issues and respond to comments received.<sup>15</sup>

17. Second, Southwest Group states that Applicants' representatives stated that they had not yet contacted the State Land Departments of Arizona and New Mexico, had no arrangements with the owners of existing substations necessary for the Project, and had not initiated siting protocols required under Arizona law.<sup>16</sup>

18. Third, Southwest Group states that the environmental impact statement process has been delayed for the Southline Project. According to Southwest Group, the Bureau of Land Management, Western's co-lead in the process, unilaterally proposed rerouting a segment of the new build portion of the Southline Project. Southwest Group states that this proposal has engendered significant opposition to the Southline Project with this rerouting included, and it is not known how the agencies will proceed.<sup>17</sup>

19. Finally, Southwest Group states that while Applicants may not have captive customers, Western does. Southwest Group states that any costs that Western absorbs

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<sup>15</sup> Southwest Group Comments at 4.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 5.

will have to be recouped from its ratepayers, and therefore Applicants' proposal impacts captive customers.<sup>18</sup>

20. In their protest, the Cooperatives maintain that the Petition does not answer numerous factual questions that would substantiate the basis for the issuance of a declaratory order by the Commission. The Cooperatives argue that the Petition presents a new type of transmission project, in that the Southline Project will include both a new build portion and an upgrade of the existing Western 115 kV transmission lines. The Cooperatives state that while the Petition references Western's continued ownership of its portion of the Southline Project, the delineation of ownership rights and assigned capacity in the upgrade are not well defined. The Cooperatives state that they are concerned that many of the needed details regarding Western's participation in the Southline Project are missing from the Petition, and that the Petition fails to provide necessary assurances that existing Western transmission customers would not bear the financial risk for the additional investment in the upgrade facilities.<sup>19</sup>

21. The Cooperatives assert that the Petition raises important questions regarding the effect of issuing a declaratory order while Western is still in the decision-making phase regarding its participation. They state that Applicants have requested a far-reaching declaratory order instead of simply requesting a disclaimer of jurisdiction over Southline Transmission, and have included a request for authorization to sell transmission service at negotiated rates, and have also included a request for approval of a proposed capacity allocation process. The Cooperatives state that the precedent that Applicants have relied upon involves a narrowly tailored application for negotiated rate authority and approval of a capacity allocation process and relevant waivers and not a petition for a declaratory order.<sup>20</sup>

22. The Cooperatives assert that there is a potential for far-reaching effects if the Commission grants the Petition as submitted. They argue that if a Commission declaratory order is construed in a larger context to mandate a decision and action by Western, the Commission will have usurped the jurisdictional prerogative of Western and its statutory requirements. The Cooperatives assert that delineation of responsibilities between the parties and between the Commission and Western remains unsettled. They state that while Applicants admit that Western's portion of the Southline Project is not subject to Commission jurisdiction, other statements by Applicants suggest that the

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

<sup>19</sup> Cooperatives' Protest at 4-5.

<sup>20</sup> *Id.* at 6 (citing *Plains and Eastern Clean Line, LLC*, 148 FERC ¶ 61,122 (2014); *Grain Belt Express Clean Line LLC*, 147 FERC ¶ 61,098 (2014) (*Grain Belt*)).

Commission will exercise jurisdiction over a portion of the upgrade section. According to the Cooperatives, this presents a question of first impression regarding whether, or at what point, Western's jurisdiction over a transmission line it has built, owns, and maintains, cedes to the Commission because the transmission line has increased capacity that may afford capacity rights to a third party developer.<sup>21</sup>

23. The Cooperatives argue that while Applicants state that they will assume all market risks associated with the Southline Project, their statement fails to acknowledge that Western has current customers who would shoulder the expense and cost of the upgrade portion of the Southline Project if the developer is unable to secure a purchaser for capacity over that portion of the line. The Cooperatives maintain that the Petition is also unclear regarding whether, or to what extent, Western will provide debt financing for the Southline Project. They assert that if Applicants decline to rely on Western's Transmission Infrastructure Program (TIP) as a source of debt financing, then Applicants' representation of market risk is fully credible. However, the Cooperatives argue that if Applicants determine that the federal government should provide some or all of the debt funding, it is unclear whether Commission policy supports Applicants' request in the Petition.<sup>22</sup>

24. The Cooperatives maintain that numerous questions involved in interconnection, design, and cost responsibility have not been answered, in part because Western's participation is not defined. Therefore, the Cooperatives state that any order addressing the Petition should not prejudice the impact of any subsequent determinations on interconnection and cost responsibilities.<sup>23</sup>

25. The Cooperatives argue that the Commission should deny the Petition without prejudice due to insufficient information. They argue that once Western determines whether or not it will participate in the upgrade portion of the Southline Project and the full details of that participation have been fully vetted, Applicants could re-file a request with the Commission for the necessary approvals and waivers that are appropriate for the upgrade portion of the Southline Project.<sup>24</sup>

26. In response, Applicants state that the Cooperatives are incorrect in asserting that they have submitted a broad based petition that seeks a far-reaching declaratory order.

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<sup>21</sup> *Id.* at 6-7.

<sup>22</sup> *Id.* at 8.

<sup>23</sup> *Id.* at 9.

<sup>24</sup> *Id.* at 9-10.



Applicants state that the petition for declaratory order is the appropriate vehicle, as the Commission has previously approved negotiated rate authority and capacity allocation mechanisms in declaratory orders,<sup>25</sup> as well as in FPA section 205 proceedings.

27. Applicants state that the Southline Project is conceptually consistent with other merchant projects that the Commission has approved. Applicants state that in *Lucky Corridor, LLC*,<sup>26</sup> the Commission granted negotiated rate authority and waivers of certain Commission regulations in connection with a project that would upgrade a 93-mile Tri-State Generation and Transmission Association, Inc. (Tri-State) transmission line from 115 kV to 230 kV. Applicants state that, like the upgrade portion of the Southline Project, the applicant in *Lucky Corridor* would have capacity rights on the upgraded portion of the line, but Tri-State would retain ownership of the right-of-way and transmission facilities. Applicants state that, as in *Lucky Corridor*, where the project costs would not be included in the rates under the Tri-State OATT, Southline Transmission costs would not be included in rates under the Western OATT.<sup>27</sup>

28. Applicants also state that the Cooperatives are incorrect in suggesting that granting the Petition could have jurisdictional consequences for Western. Applicants maintain that the Cooperatives have not shown how granting the Petition could be construed as mandating a decision by Western that would result in usurping Western's jurisdictional prerogative.<sup>28</sup>

29. Applicants state that the Petition does not suggest Commission jurisdiction over Western as a public utility. Rather, the Petition explains that the Commission would have full jurisdiction over SU FERC; Western and Southline Transmission would maintain separate ownership interests in the Southline Project, and Western would maintain ownership of its existing upgraded transmission facilities. Applicants note that the Petition explains that Western would operate and maintain the upgrade section, SU FERC would operate and maintain the new build section, and SU FERC and Western would each have their own OATT. Applicants state that to the extent that the Cooperatives argument is based on the fact that Southline Transmission would have capacity rights on

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<sup>25</sup> Applicants' Answer at 3 (citing *SunZia Transmission, LLC*, 135 FERC ¶ 61,169 (2011) (*SunZia*); *Zephyr Power Transmission, LLC*, 139 FERC ¶ 61,020 (2012)).

<sup>26</sup> 141 FERC ¶ 61,002 (2012) (*Lucky Corridor*).

<sup>27</sup> Applicants' Answer at 4.

<sup>28</sup> *Id.*

facilities that Western owns, the Commission has found that structure acceptable in *Lucky Corridor*.<sup>29</sup>

30. Applicants assert that the information the Cooperatives seek is not relevant to the Petition and evidences a misunderstanding of the Commission's policy regarding merchant transmission projects. Applicants state that the Commission has previously recognized that regulatory certainty is essential for the development of such projects and has authorized negotiated rates and approved capacity allocation mechanisms prior to final determinations regarding merchant transmission project routes, commercial agreements, technical specifications, and the completion of environmental studies and state siting authorizations.<sup>30</sup> Applicants argue that the absence of Commission action would create a situation where merchant projects could not finalize their commercial arrangements and obtain financing without regulatory certainty, but could not obtain regulatory certainty without finalizing their commercial arrangements. Applicants state that this would conflict with the Commission's policy of encouraging merchant transmission projects.<sup>31</sup>

31. Applicants argue that a final decision by Western on participation in the Southline Project is not necessary for the Commission to grant the Petition. Applicants state that the Commission can act based on the circumstances that the Petition contemplates, and if the final arrangements between Applicants and Western materially differ from those outlined in the Petition, Applicants could not rely upon the resulting declaratory order.<sup>32</sup> Applicants also argue that the Cooperatives' argument that the Petition fails to ensure that Western customers would not bear the financial risk for the additional investment in the upgrade facilities is irrelevant. Applicants state that Western's portion of the Southline Project is not a merchant line. According to Applicants, Western would utilize rates under its existing tariffs, not negotiated rates, and Western's rates are not at issue in this proceeding.<sup>33</sup>

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<sup>29</sup> *Id.* at 5.

<sup>30</sup> *Id.* at 6 (citing *Plains and Eastern*, 148 FERC ¶ 61,122 at P 4; *Grain Belt*, 147 FERC ¶ 61,098 at P 3; *Lucky Corridor*, 141 FERC ¶ 61,002 at PP 5, 12; *SunZia*, 135 FERC ¶ 61,169 at P 7).

<sup>31</sup> *Id.* at 7 (citing *Morongo Transmission LLC*, 148 FERC ¶ 61,139, at P 17 (2014) (recognizing that the proposed project's success was dependent upon receiving regulatory approvals)).

<sup>32</sup> *Id.* at 8.

<sup>33</sup> *Id.* at 8-9.

32. Applicants deny that Western customers could be exposed to cost shifting if Applicants are unable to secure a purchaser for transmission capacity over the upgrade portion of the Southline Project. Applicants state Western's recovery of project costs in its rates is a matter for a different forum. Additionally, Applicants argue that they assume all market risk associated with the Southline Project, and as a practical matter, if Applicants are unable to secure customers for their capacity, they would be unable to finance and construct the Southline Project, making any cost shifting impossible.<sup>34</sup>

33. In response, the Cooperatives disagree that Western's rates are not at issue here. They state that Western has explained that the new build portion of the Southline Project may become part of Western's Parker Davis transmission system. The Cooperatives state that operation and maintenance of the new build section by SU FERC has financial implications for customers that rely on Western's transmission assets, many of which must rely on the Parker-Davis transmission system. According to the Cooperatives, there is a captive customer base within the Parker-Davis transmission system. The Cooperatives state that this has a factual bearing on the Petition and should encourage denial of the Petition until the question of Western's participation has been determined.<sup>35</sup>

34. Applicants state in response that Western's potential acquisition of capacity rights on the new build segment is consistent with SU FERC's operation and maintenance of that segment. Applicants also maintain that Western's cost recovery methodology and its assessment of capacity rights that it may acquire on the new build segment are irrelevant to Applicants' requested relief. Applicants state that granting the Petition would not allow SU FERC to recover costs from Western customers.<sup>36</sup>

35. Finally, Applicants state that they do not object to the Cooperatives' request that the Commission state in its declaratory order that the order does not resolve any interconnection matters.<sup>37</sup>

#### **A. Procedural Matters**

36. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

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<sup>34</sup> *Id.* at 9.

<sup>35</sup> Cooperatives' Answer at 3-4.

<sup>36</sup> Applicants' Answer to Answer at 3-4.

<sup>37</sup> Applicants' Answer at 10.

37. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We will accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

## **B. Negotiated Rate Authority**

38. In addressing requests for negotiated rate authority from merchant transmission providers, the Commission is committed to fostering the development of such projects, but it requires that reasonable and meaningful protections be in place to preserve open access principles and to ensure that the resulting rates for transmission service are just and reasonable.<sup>38</sup> The Commission's analysis for evaluating negotiated rate applications focuses on four areas of concern: (1) the justness and reasonableness of the rates; (2) the potential for undue discrimination; (3) the potential for undue preference, including affiliate preference; and (4) regional reliability and operational efficiency requirements.<sup>39</sup>

### **1. Policy Statement**

39. On January 17, 2013, the Commission issued the Policy Statement to clarify and refine its policies governing the allocation of capacity for new merchant transmission projects and new nonincumbent, cost-based, participant-funded transmission projects.<sup>40</sup> The Commission allows the developer of a new merchant transmission project to select a subset of customers, based on not unduly discriminatory or preferential criteria, and negotiate directly with those customers to reach agreement for procuring up to 100 percent of transmission capacity when the developer (1) broadly solicits interest in

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<sup>38</sup> See, e.g., *Hudson Transmission*, 135 FERC ¶ 61,104, at Ordering Paragraph (A) (2011) (authorizing Hudson Transmission to charge negotiated rates for transmission service); *Mountain States Transmission Intertie, LLC*, 127 FERC ¶ 61,270, at PP 57, 59 (2009) (denying a request to charge negotiated rates on a merchant transmission project because, among other things, sufficient protections did not exist to ensure that rates for service would be just and reasonable); *TransEnergie U.S., Ltd.*, 91 FERC ¶ 61,230, at 61,838-39 (2000) (accepting a request to charge negotiated rates on a merchant transmission project, subject to conditions addressing, among other things, the merchant's open season proposal).

<sup>39</sup> *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134, at P 37, order on reh'g, 128 FERC 61,074 (2009) (*Chinook*).

<sup>40</sup> *Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Projects; Priority Rights to New Participant-Funded Transmission*, 142 FERC ¶ 61,038, at P 1 (2013) (Policy Statement).

the project from potential customers and (2) demonstrates to the Commission that the developer has satisfied the solicitation, selection, and negotiation process set forth in the Policy Statement.<sup>41</sup> To the extent the developer complies with these requirements, the Commission will find that the developer has satisfied the second (undue discrimination) and third (undue preference) factors of the four-factor analysis.<sup>42</sup>

40. Under the Policy Statement, once a developer has identified a subset of customers through the open solicitation process, the Commission will allow the developer to engage in bilateral negotiations with each potential customer. In these negotiations, the Commission will allow for distinctions among prospective customers based on transparent and not unduly discriminatory or preferential criteria, with the potential result that a single customer, including an affiliate, may be awarded up to 100 percent of the transmission capacity.<sup>43</sup>

## **2. Four-Factor Analysis**

### **a. Factor One: Just and Reasonable Rates**

41. To approve negotiated rates for a transmission project, the Commission must find that the rates are just and reasonable.<sup>44</sup> To do this, the Commission must determine that the merchant transmission owner has assumed the full market risk for the cost of constructing its proposed transmission project. Additionally, the Commission must determine whether the project is being built within the footprint of the merchant transmission owner's (or an affiliate's) traditionally regulated transmission system; if so, the Commission must determine that there are no captive customers who would be required to pay the costs of the project. The Commission also considers whether the merchant transmission owner or an affiliate already owns transmission facilities in the particular region where the project is to be located, what alternatives customers have, whether the merchant transmission owner is capable of erecting any barriers to entry among competitors, and whether the merchant transmission owner would have any incentive to withhold capacity.

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<sup>41</sup> *Id.* P 16.

<sup>42</sup> *Id.* P 15.

<sup>43</sup> *Id.* P 28.

<sup>44</sup> See *Champlain Hudson Power Express, Inc.*, 132 FERC ¶ 61,006, at P 17 (2010) (*Champlain Hudson*).

**i. Applicants' Proposal**

42. Applicants state that they assume all market risks associated with the Southline Project. They state that SU FERC is a new market entrant that has no existing facilities in the region and no affiliates that own transmission facilities in the region. Applicants state that Southline Transmission does not have an ownership interest in facilities other than the Southline Project, and they therefore do not have any captive customers, and neither SU FERC nor any affiliate owns or controls any barriers to market entry or has any incentive to withhold capacity from the Southline Project.<sup>45</sup>

43. Applicants state that because potential customers can pursue alternative transmission service from incumbent transmission owners at cost-of-service rates, customers will purchase transmission service from SU FERC only to the extent that it is cost-effective to do so. Applicants also state that the Commission has previously found that the negotiated rates that merchant transmission customers are willing to pay are effectively capped by the difference in the market price for power at either end of the line.

44. Finally with respect to just and reasonable rates, Applicants state that the Southline Project is not located in an area that is served by a regional transmission organization (RTO) or independent system operator (ISO), but SU FERC commits that it will file and obtain Commission approval of an OATT prior to commencing service. In addition, should the Commission approve an RTO or ISO for the region in which the Southline Project will operate, SU FERC commits to join such an organization if it is reasonable to do so.

**ii. Commission Determination**

45. Based upon the information provided in the Petition, we conclude that Applicants' request for authority for SU FERC to charge negotiated rates for service on the Southline Project meets the first of the *Chinook* factors, that is, the rates will be just and reasonable. Applicants are assuming full financial risk for the Southline Project, have no captive customers, and neither SU FERC nor any affiliate owns or operates transmission facilities in the region served by the Southline Project. Additionally, no entity is required to purchase transmission service from SU FERC, and customers have the alternative of purchasing transmission from incumbent transmission owners in the region. Further, SU FERC and its affiliates cannot erect any barriers to entry or exercise market power on the Southline Project because, as noted above, they do not own or control any transmission facilities in the region. In addition, SU FERC commits that it will file and obtain Commission approval of an OATT prior to commencing service, and commits to join and

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<sup>45</sup> Petition at 20.

RTO or ISO should the Commission approve such an organization for the region in which the Southline Project will operate. Accordingly, based upon these representations, we conclude that the requested negotiated rate authority will result in just and reasonable rates for service on the Southline Project.

46. The interveners' comments raise a number of issues which appear to be related to the question of captive customers, specifically, Western's captive customers. However, as discussed below, the question of whether or not Western has captive customers is not germane to the Commission's analysis to determine whether or not Applicants should be granted the negotiated rate authority they request.

47. Under the Policy Statement, if a project is being constructed within the footprint of the merchant transmission owner's (or an affiliate's) traditionally regulated transmission system, the Commission must determine that there are no captive customers who would be required to pay the costs of the project. According to the Petition, the Southline Project is not being built within a traditionally regulated transmission system of Applicants or any affiliate of Applicants. The interveners are, of course, concerned about Western's captive customers, but Western, an agency of the federal government, is not an affiliate of Applicants.

48. The *pro forma* OATT provides that an "affiliate" of an entity is an entity that it controls or that controls it.<sup>46</sup> Affiliation for purposes of Commission regulation most commonly arises through the acquisition of certain classes of securities of an entity that represent a controlling interest in it.<sup>47</sup> Western is a power marketing administration within the Department of Energy and is thus an agency of the federal government. Private parties such as Applicants do not hold ownership interests in Western, and there is no basis to conclude that Applicants could otherwise control Western. For its part, Western has no ownership interests in either Southline Transmission or SU FERC and does not otherwise control Applicants. In addition, as Applicants explain, Western and Southline Transmission would maintain separate ownership interests in the Southline

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<sup>46</sup> The definitions section of the *pro forma* OATT defines the term "affiliate" as follows:

#### 1.1 Affiliate

With respect to a corporation, partnership or other entity, each such other corporation, partnership or other entity that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such corporation, partnership or other entity.

<sup>47</sup> See 18 C.F.R. § 35.43(a) (2015).

Project. The fact that Southline Transmission would have capacity rights on Western facilities, and that Western would acquire capacity rights on the transmission facilities that Applicants will own, does not establish an affiliate relation between them, and they remain fully independent of each other. In brief, no affiliate relations exist between Applicants and Western.

49. While Western may have captive customers, and SU FERC will operate and maintain the new build section of the Southline Project that will serve Western customers, as Applicants point out those customers will be served at cost-of-service rates under Western's OATT. SU FERC will have neither authority over Western nor an ability to control Western that would allow SU FERC to recover costs from Western customers. Moreover, Applicants have stated that they will assume all market risk associated with the Southline Project. Applicants have also stated that, as a practical matter, if they were unable to secure customers for their capacity they would be unable to finance and construct the Southline Project, which would make any cost shifting impossible.<sup>48</sup>

50. With regard to the other concerns that the interveners have raised, we clarify that nothing in this order should be construed to mandate any decision and action by Western; thus nothing in this order usurps Western's jurisdictional prerogative or its statutory duties. Contrary to the Cooperatives' concern, granting the requested petition for declaratory order will not transfer to the Commission Western's jurisdiction over a transmission line it owns, operates, and maintains. The fact that a third-party developer acquires capacity rights on Western facilities from Western will not affect Western's authority over those facilities any more than Western's acquisition of capacity rights on the new build section of the Southline Project will affect the Commission's jurisdiction over those facilities.

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<sup>48</sup> Given Western's independence, we do not agree that Applicants are able to determine that the federal government should provide some or all of the debt funding through TIP funding. *See* Cooperatives' Protest at 8. As Applicants note, Western's TIP implements section 402 of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, I 402, 123 Stat. 115, 141-143 (2009) (Recovery Act), for the purpose of constructing, financing, facilitating, planning, operating, maintaining, or studying construction of new or upgraded electric power transmission lines and related facilities with at least one terminus within Western's service territory, to deliver or facilitate the delivery of power generated by renewable energy resources constructed, or reasonably expected to be constructed, after the date the Recovery Act was enacted. Petition at 2, n.1. Under the Recovery Act, Western is the borrower of TIP funds and is thus responsible for determining whether they will be used. *See* 42 U.S.C. § 16421a (b)(1) (2012).



51. Furthermore, because Western will maintain its independence and authority, we do not see any basis to conclude that Applicants are seeking a far-reaching declaratory order that could affect Western and its customers and that additional factual support is required before the Commission can act on the Petition. Applicants' Petition seeks negotiated rate authority and approval of a capacity allocation mechanism for SU FERC, and they have provided a sufficient basis to conclude that their proposal satisfies the requirements of the Policy Statement and Commission precedent as to whether their rates will be just and reasonable. As Applicants have pointed out, the Commission has on a number of occasions authorized negotiated rates and approved capacity allocation mechanisms for merchant transmission projects prior to finalization of project routes, finalization of commercial agreements, determination of technical specifications, and completion of environmental studies and state siting authorizations.<sup>49</sup> Given the importance of regulatory certainty regarding negotiated rate authority for securing project financing and completion of other commercial arrangements, it is appropriate for the Commission to act on the Petition at this time.

52. Finally, in response to the Cooperatives' request, we clarify that this order does not address or resolve any interconnection matters.

**b. Factor Two: Undue Discrimination**

53. The Policy Statement allows a developer to demonstrate that approval of its application will not result in any undue discrimination or preference by conducting an open solicitation that broadly solicits interest in the project from potential customers and, following the solicitation process, demonstrating to the Commission that it has satisfied the solicitation, selection, and negotiation process criteria set forth in the Policy Statement.<sup>50</sup>

54. In addition, applicants must issue broad notice of the project in a way that ensures that all potential and interested customers are informed of the proposed project, such as by placing notice in trade magazines or regional energy publications.<sup>51</sup> The notice should include developer points of contact, pertinent project dates, and sufficient technical specifications and contract information to inform interested customers of the nature of the project, including the following: (1) project size/capacity; (2) end points of the line; (3)

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<sup>49</sup> *Plains and Eastern*, 148 FERC ¶ 61,122 at P 4; *Grain Belt*, 147 FERC ¶ 61,098 at P 3; *Lucky Corridor*, 141 FERC ¶ 61,002 at PP 5, 12; *SunZia*, 135 FERC ¶ 61,169 at P 7.

<sup>50</sup> Policy Statement, 142 FERC ¶ 61,038 at P 16.

<sup>51</sup> *Id.* P 23.

projected construction and/or in-service dates; (4) type of line; (5) precedent agreement (if developed); and (6) other capacity allocation arrangements (including how the developer will address potential oversubscription of capacity).<sup>52</sup> The developer should also specify in the notice the criteria it plans to use to select transmission customers. The developer may also adopt a specific set of objective criteria that it will use to rank prospective customers, provided it can justify why such criteria are appropriate. Finally, the Commission expects the developer to update its notice if there are any material changes to the nature of the project or the status of the capacity allocation process, in particular to ensure that interested entities are informed of any remaining available capacity.<sup>53</sup>

55. The Commission stated in the Policy Statement that merchant developers must disclose the results of their capacity allocation process for approval under section 205 of the FPA.<sup>54</sup> Developers must demonstrate that the processes that led to identifying transmission customers and executing the relevant contractual arrangements are consistent with the Policy Statement and the Commission's open access principles. Specifically, the developer should describe the criteria that were used to select customers, any price terms, and any risk-sharing terms and conditions that served as the basis for identifying transmission customers selected versus those that were not, as well as provide certain information listed in the Policy Statement in order to provide transparency to the Commission and interested parties.<sup>55</sup> The Commission emphasized in the Policy Statement that the information in the post-selection demonstration is an essential part of a merchant developer's request for approval of a capacity allocation process, and that the developer will have the burden to demonstrate that its process was in fact not unduly discriminatory or preferential, and resulted in rates, terms, and conditions that are just and reasonable.<sup>56</sup> The Commission allows developers discretion in the timing of requests for approval of capacity allocation processes. The Policy Statement provides two examples. First, a developer can seek approval of its capacity allocation approach after having completed the process of selecting customers in accordance with Commission policies. Alternatively, a developer can first seek approval of its capacity allocation approach, and then can demonstrate in a compliance filing filed in response to the Commission's order

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<sup>52</sup> *Id.* P 20.

<sup>53</sup> *Id.* PP 24-27.

<sup>54</sup> 16 U.S.C. § 824d (2012).

<sup>55</sup> Policy Statement, 142 FERC ¶ 61,038 at P 30.

<sup>56</sup> *Id.* P 32.

approving that approach that the developer's selection of customers was consistent with the approved selection process.<sup>57</sup>

**i. Applicants' Proposal**

56. SU FERC requests approval to allocate up to 100 percent of its initial capacity rights on the Southline Project to anchor customers. Applicants state that they will use an open solicitation process in which they will issue a broad notice to ensure that all potential and interested customers are informed of the Southline Project. At a minimum, Applicants state, the notice will be posted on the Southline Project's website, widely distributed through industry and stakeholder outlets and published in regional news outlets and energy publications. Applicants state that the notice will include the types of information identified in the Policy Statement, the appropriate points of contact, pertinent Southline Project dates, sufficient technical specifications, and contract information to inform interested parties of the nature of the Southline Project and SU FERC's customer selection screening factors and ranking criteria.<sup>58</sup> Applicants state that the notice will also provide interested parties with the option to request a meeting with SU FERC representatives and other stakeholders to discuss bid considerations and will commit SU FERC to host a conference to address questions from interested parties. Applicants state that SU FERC will also provide a password-protected website to provide additional information requested by potential customers. Applicants state that any material changes to the nature of the Southline Project or the status of the capacity allocation process will be reflected in an updated notice and prominently displayed on the Southline Project's website in a timely manner to ensure that interested parties are informed of any remaining available capacity.<sup>59</sup>

57. Applicants state that they have developed objective criteria to select and rank potential customers seeking Southline Project capacity through negotiated agreements. Applicants state that SU FERC will utilize initial customer screening criteria that establish preferred minimum standards for potential customers that are identified through the open selection process. SU FERC intends to use the following screening criteria: (1) first mover status; (2) investment-grade credit rating or alternative evidence of creditworthiness; (3) firm transmission service reservation request for at least 10 years; and (4) firm transmission service reservation request for at least 50 MW of capacity.

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<sup>57</sup> *Id.* P 31.

<sup>58</sup> Petition at 23-24.

<sup>59</sup> *Id.* at 24-25.

Applicants state that these screening criteria are designed to ensure that the Southline Project is economically viable.<sup>60</sup>

58. According to Applicants, first mover status would give potential customers the incentive to submit timely proposals and thus to allow the Southline Project to move forward. Applicants state that creditworthiness is a typical customer screening criteria and is needed to secure financing for Southline Project construction; potential customers would be allowed to demonstrate creditworthiness with an investment-grade credit rating, or alternatively through other commercially reasonable means. Applicants state that requirements for minimum terms and minimum capacity reservations are necessary as a practical matter to reduce costs and increase efficiency and would also help to reduce the overall risk of the Southline Project and thus support construction financing. Applicants state that it may be necessary to refine these criteria based on market circumstances, and SU FERC would provide public notice of any changes and apply them equally to all potential customers.<sup>61</sup>

59. Applicants state that SU FERC proposes to rank potential customers based on the following criteria: (1) price terms contained in the potential customer's offer; (2) level of creditworthiness; (3) early commitment in the Southline Project's development cycle; (4) risk-sharing through phased deposits or financial commitments during the Southline Project's development cycle; (5) ability of the potential customer to assist with the Southline Project's development needs, including obtaining necessary siting approvals and governmental authorizations; (6) longer term of service; (7) larger capacity reservation; and (8) ability to access the Southline Project to deliver or receive power, (e.g., proximity of generation resource to the line, transmission service queue positions on adjacent systems). Applicants state that SU FERC may engage in several phases of negotiation with different subsets of customers to facilitate full subscription of the Southline Project's capacity. In that case, SU FERC would utilize customer ranking criteria to determine which subset of customers may participate in each phase of negotiations.<sup>62</sup>

60. Applicants state that these criteria are designed to minimize the Southline Project's commercial risk and thus to obtain reasonable construction financing terms. Applicants state that minimizing these costs through appropriately ranking initial customers would benefit not only initial customers, but also later customers taking service under SU FERC's OATT as well as secondary market customers. According to

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<sup>60</sup> *Id.* at 25-26.

<sup>61</sup> *Id.* at 26.

<sup>62</sup> *Id.* at 27-28.

Applicants, these criteria would also improve the Southline Project's long-term viability, insofar as they give customers an incentive to share in the Southline Project's risk and development costs.<sup>63</sup>

61. Applicants state that SU FERC would disclose the results of its customer selection and ranking process and bilateral negotiations to the Commission in one or more compliance filings under section 205 of the FPA. Applicants explain that if the Southline Project is oversubscribed, SU FERC's compliance filing would describe its decision to prorate or not to prorate capacity among eligible customers and provide notice of further processes to address requests for more capacity than the Southline Project is initially able to accommodate. Applicants state that SU FERC will consider requests to increase the capacity of the Southline Project, but it would be impracticable to increase the capacity at this point in the development cycle, as this would require restarting the interconnection process, performing additional engineering and routing studies, and likely reengineering portions of the Southline Project. Applicants state that this would significantly increase the anticipated cost of subscribing to capacity on the Southline Project, making it more difficult to secure customers and financial support for the Southline Project.<sup>64</sup>

62. Applicants state that as an additional protective measure, SU FERC commits to the following conditions customarily imposed on merchant transmission owners following commercial operation of the Southline Project: (1) SU FERC's books and records will comply with the Commission's Uniform System of Accounts and will be subject to examination as required by Part 41 of the Commission's regulations; (2) SU FERC will file reports in accordance with sections 141.14 and 141.15 of the Commission's regulations, to the extent applicable; and (3) SU FERC's books and records will be audited by independent auditors. Applicants state that these commitments ensure that the Commission may effectively exercise oversight over SU FERC.<sup>65</sup>

## **ii. Commission Determination**

63. We find Applicants' description of how they plan to solicit interest broadly from potential customers to be satisfactory. In addition to committing to engage in an open solicitation process to ensure broad notice to potential customers, Applicants commit that SU FERC will file one or more detailed post-allocation reports with the Commission pursuant to FPA section 205 disclosing the results of the capacity allocation process and describing the process in sufficient detail to demonstrate that its capacity allocation was

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<sup>63</sup> *Id.* at 28.

<sup>64</sup> *Id.* at 28-29.

<sup>65</sup> *Id.* at 22.

consistent with its Commission-approved process and the Policy Statement. As described above, a developer has discretion as to the timing of its request for approval of the selection process. In this case, Applicants have proposed a detailed process that SU FERC intends to use to select customers and allocate capacity. We find the proposed criteria will allow SU FERC to distinguish among potential customers in a not unduly discriminatory or preferential manner, and we will allow SU FERC to select and rank its customers according to these criteria, subject to Applicant's compliance with the commitments made in the Petition. We note that SU FERC must make a subsequent compliance filing providing the details necessary to provide full transparency as to how SU FERC applied the screening and ranking factors, as well as the weight applied to each factor, to determine whether SU FERC has followed the process approved here. Thus, we direct SU FERC to make a compliance filing disclosing the results of the capacity allocation process within 30 days after the close of the open solicitation process. In addition, SU FERC must obtain Commission approval of an OATT and explain any deviations from the *pro forma* OATT prior to commencing service on the Southline Project.

64. We find SU FERC's commitment that once the Project has commenced operation, it will ensure it maintains books and records for the Southline Project that comply with the Uniform System of Accounts found in Part 101 of the Commission's regulations,<sup>66</sup> subject to examination as required in Part 41 of the Commission's regulations,<sup>67</sup> and that its books and records are audited by an independent auditor, to be consistent with Commission precedent.<sup>68</sup> These commitments will assist the Commission in carrying out its oversight role.

**c. Factor Three: Undue Preference and Affiliate Concerns**

65. In the context of merchant transmission, Commission concerns regarding the potential for affiliate abuse arise when the merchant transmission owner is affiliated with the anchor customer, participants in the open season or solicitation, and/or customers that subsequently take service on the merchant transmission line. The Commission expects an affirmative showing that the affiliate is not afforded an undue preference, and the developer bears a high burden to demonstrate that the assignment of capacity to its

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<sup>66</sup> 18 C.F.R. pt. 101 (2015).

<sup>67</sup> 18 C.F.R. pt. 41 (2015).

<sup>68</sup> *Chinook*, 126 FERC ¶ 61,134 at P 62; *Champlain Hudson*, 132 FERC ¶ 61,006 at P 48; *Tres Amigas LLC*, 130 FERC ¶ 61,207, at P 90 (2010) (*Tres Amigas*).

affiliate and the corresponding treatment of nonaffiliated potential customers is just, reasonable, and not unduly discriminatory or preferential.<sup>69</sup>

**i. Applicants' Proposal**

66. With respect to undue preference and affiliate concerns, Applicants state that no affiliates plan to participate in the open solicitation process for transmission service on the Southline Project. Applicants argue that for this reason, there is no possibility of undue preference or affiliate concerns. Applicants also note that the Commission allows a merchant transmission developer to demonstrate no undue preference by conducting a solicitation, selection, and negotiation process that complies with the requirements of the Policy Statement. Applicants state that SU FERC's open solicitation and capacity allocation processes comply with the Policy Statement and Commission precedent and therefore SU FERC's proposal to allocate up to 100 percent of the Southline Project's transmission capacity through bilateral negotiations would not lead to undue preference.<sup>70</sup>

**ii. Commission Determination**

67. Applicants state that no affiliate of the Applicants plans to participate in the open solicitation process for transmission service on the Southline Project. Based on this representation, we find that the absence of affiliate participation satisfies the requirement that there be no undue preference or affiliate concerns. In addition, a merchant transmission developer may demonstrate that there is no undue preference by conducting a solicitation, selection, and negotiation process that complies with the requirements of the Policy Statement. We find that SU FERC's open solicitation and capacity allocation processes, as described in the Petition, comply with the Policy Statement and Commission precedent. If, in the future, an affiliate of Applicants should take service on the Southline Project, SU FERC must, in addition to complying with applicable reporting requirements and any applicable affiliate rules, as well as abiding by the Commission's Standards of Conduct, make a compliance filing demonstrating that the assignment of capacity to any affiliate and the corresponding treatment of nonaffiliated customers or potential customers is just, reasonable, and not unduly discriminatory or preferential.

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<sup>69</sup> Policy Statement, 142 FERC ¶ 61,038 at P 34.

<sup>70</sup> Petition at 22-23.

**d. Factor Four: Regional Reliability and Operational Efficiency**

68. Merchant transmission projects, like cost-based transmission projects, are subject to mandatory reliability requirements.<sup>71</sup> Merchant transmission developers are required to comport with all applicable NERC requirements and those of any regional reliability council in which they are located.

**i. Applicants' Proposal**

69. With respect to regional reliability and operational efficiency, Applicants state that they commit to comply with all applicable NERC and WECC reliability requirements, and to participate in regional transmission planning to develop coordinated and efficient operations. Applicants state that Southline Transmission initiated regional planning with WestConnect area utilities in 2009 and the WECC Project Coordination and Path Rating Process in 2010. Applicants state that prior to energization, SU FERC would assume transmission planning responsibility for the new build section of the Southline Project.<sup>72</sup>

**ii. Commission Determination**

70. We acknowledge Applicants' commitment to comply with all applicable reliability requirements and their commitment to participate in the regional transmission planning process, as well as their participation in that process to this point. Accordingly, we find that Applicants have met the regional reliability and operational efficiency requirement, subject to Applicants' continued participation in the necessary regional planning processes.

**C. Disclaimers of Jurisdiction**

**1. Petition**

71. Applicants request disclaimers of jurisdiction over Southline Transmission. First, Applicants argue that the Commission should find that, consistent with existing Commission precedent, Southline Transmission should not be considered to be a public utility under section 201(e) of the FPA. Applicants note that section 201(e) of the FPA

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<sup>71</sup> See, e.g., *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

<sup>72</sup> Petition at 23.



defines a “public utility” as “any person who owns or operates facilities subject to the jurisdiction of the Commission.”<sup>73</sup> Applicants state that Southline Transmission would function as a developer and passive investor, would have no operational control over the Southline Project, and would not otherwise engage in the transmission or sale of electric energy. Applicants state that Southline Transmission’s REIT structure is simply an investment vehicle that would allow Southline Transmission to access efficient sources of capital while reserving full operational control of the Southline Project to SU FERC and Western.<sup>74</sup>

72. Applicants state that Southline Transmission would either hold legal title to certain Southline Project land rights and facilities or have a long-term lease for those land rights and facilities and would hold capacity rights commensurate with its contributions to the Southline Project. Applicants state that Southline Transmission would execute a long-term lease that would give SU FERC the exclusive right to operate, maintain, and control all of Southline Transmission’s interest in the Southline Project land rights and facilities, and SU FERC would have sole operational control over the day-to-day management and all operating activities of the new build section; SU FERC would hold all Southline Transmission capacity rights in the Southline Project. Applicants state that the structure they describe would involve a passive financing entity, i.e., Southline Transmission, that leases its assets to a jurisdictional entity that would have exclusive operational control over them, i.e., SU FERC. Applicants argue that because Southline Transmission would function as a developer and passive investor, would have no operational control over the Southline Project, and would not otherwise engage in the transmission or sale of electric energy, the Commission should find that Southline Transmission is not a public utility under the FPA and disclaim jurisdiction over Southline Transmission under that statute.<sup>75</sup>

73. Further, Applicants state that these facts also justify a disclaimer of jurisdiction over Southline Transmission as an electric utility company and a public-utility company under PUHCA 2005. Applicants state that section 1262(5) of PUHCA 2005 defines an electric utility company as “any company that owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale.”<sup>76</sup> Applicants state that the definition of an electric utility company turns on whether an entity owns or operates electric facilities, and the meaning of “own or operate” focuses on whether an entity controls electric facilities. Applicants state that the Commission has determined

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<sup>73</sup> 16 U.S.C. § 824(e) (2012).

<sup>74</sup> Petition at 15.

<sup>75</sup> *Id.* at 17.

<sup>76</sup> *Id.* at 17-18 (quoting 42 U.S.C. § 16451(5) (2012)).

that a passive owner/lessor of such assets will not be considered such an owner or operator. Applicants state that, under the Commission's rules, the term "public-utility company," which includes an "electric utility company," specifically excludes from the definition of public-utility company passive owners/lessors in lease financing transactions involving utility assets.<sup>77</sup> Thus, Applicants argue that Southline Transmission's status as a passive owner justifies a disclaimer of jurisdiction over Southline Transmission under PUHCA 2005.<sup>78</sup>

## 2. Commission Determination

74. We disclaim jurisdiction over Southline Transmission under section 201(e) of the FPA and under PUHCA 2005. Southline Transmission satisfies the requirements for such a disclaimer. As indicated, section 201(e) of the FPA defines a "public utility" as "any person who owns or operates facilities subject to the jurisdiction of the Commission." In cases involving passive investors, the Commission first determines whether the passive investor will operate the facilities. The Commission then determines whether the passive investor is otherwise in the business of producing or selling electric power.<sup>79</sup> In *Pacific Power & Light Co.*,<sup>80</sup> a case involving a passive lease financing transaction, the Commission stated that the threshold question was whether the interest of the lessor and other participants in the lease financing constitutes ownership as contemplated by section 201(e). As in *Pacific Power & Light Co.*, Southline Transmission will hold "mere equitable or legal title" to the jurisdictional facilities included in the Southline Project, and will neither operate nor control the operation of such facilities.<sup>81</sup> Moreover, Southline Transmission's principal business activity is other than that of a public utility, i.e., it is not otherwise engaged in the business of transmitting, selling, or producing electric energy.<sup>82</sup> As a consequence, Southline Transmission's ownership interest in the Southline Project is passive and Southline

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<sup>77</sup> *Id.* at 18 (citing 18 C.F.R. § 366.1 (2015), which provides that "the owner-lessors and owner participants in lease financing transactions involving utility assets shall not be treated as 'public-utility companies.'").

<sup>78</sup> *Id.*

<sup>79</sup> *Neptune Regional Transmission System, LLC*, 111 FERC ¶ 61,306, at P 24 (2005).

<sup>80</sup> 3 FERC ¶ 61,119 (1978) (*Pacific Power & Light Co.*).

<sup>81</sup> *Id.* at 61,337.

<sup>82</sup> Petition at 15.

Transmission will therefore not be deemed to be a public utility under section 201 of the FPA.<sup>83</sup>

75. Section 1262(5) of PUHCA 2005 defines an electric utility company as “any company that owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale,”<sup>84</sup> which is similar (albeit not identical) to the definition of a public utility found in section 201(e) of the FPA. In addition, the Commission’s regulations under PUHCA 2005 provide that “the owner-lessors and owner participants in lease financing transactions involving utility assets shall not be treated as ‘public-utility companies,’” a term that includes any “electric utility company,”<sup>85</sup> which likewise is similar to the Commission’s precedent as to passive ownership under the FPA. Applicants state that Southline Transmission’s REIT structure is an investment vehicle that allows Southline Transmission to efficiently access capital needed to finance the Southline Project, while reserving full operational control of otherwise-jurisdictional services and facilities to SU FERC and Western. Applicants also state that, under the REIT structure, Southline Transmission will execute a long-term lease of all of its ownership interests and associated capacity rights in the Southline Project to SU FERC. Based on these representations, we conclude that Southline Transmission qualifies under the Commission’s regulations as an owner-lessor in a lease financing transaction involving utility assets. Southline Transmission thus should not, solely by reason of its interest in the Southline Project, be considered an electric-utility company under section 1262(5) of PUHCA 2005.

#### **D. Waiver Requests**

##### **1. Applicants’ Proposal**

76. Applicants request certain waivers that would become effective when SU FERC becomes a public utility under the FPA. Specifically, Applicants request that the Commission waive (1) the full reporting requirements of Subparts B and C of Part 35, except for sections 35.12(a), 35.13(b), 35.15 and 35.16; (2) Part 141, relating to forms

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<sup>83</sup> See, e.g., *Edison Mission Huntington Beach, LLC*, 136 FERC ¶ 61,127, at PP 11-12 (2011); *MGE Energy, Inc.*, 109 FERC ¶ 61,175, at PP 14-15 (2004).

<sup>84</sup> 42 U.S.C. § 16451(5) (2012).

<sup>85</sup> 18 C.F.R. § 366.1 (2015). While neither PUHCA 2005 nor the Commission’s regulations defines the term “utility assets,” the definition of that term in section 2(a)(18) of the earlier Public Utility Holding Company Act of 1935 included the facilities of any electric utility company used for the transmission of electric energy. See 15 U.S.C. § 79b(a)(18) (2000).

and reports, with the exception of sections 141.14 and 141.15; and (3) the Form No. 1, Annual Report of Major Electric Utilities, Licenses and Others filing requirement. SU FERC states that it requests waiver of these requirements because it would not sell transmission service at cost-based rates and does not have captive customers. Applicants state that the Commission typically has granted similar waiver requests to merchant transmission projects seeking negotiated rate authority.<sup>86</sup>

## **2. Commission Determination**

77. Because Applicants are proposing a merchant transmission project in which they would bear all the financial risks associated with the Southline Project, would not have any captive customers, and would be charging negotiated rates, the regulations requiring the filing of cost-based data are not applicable. Accordingly, consistent with our prior orders, we will grant waiver of the filing requirements of Subparts B and C of Part 35 of the Commission's regulations except for sections 35.12(a), 35.13(b), 35.15, and 35.16.<sup>87</sup>

78. We also grant Applicants' request for waiver of the Form No. 1 filing requirement and Part 141 relating to forms and reports, except sections 141.14 and 141.15. The Commission previously granted waiver of the Form No. 1 filing requirement to other merchant transmission owners.<sup>88</sup>

### The Commission orders:

(A) SU FERC is hereby granted authority to sell transmission rights at negotiated rates, subject to conditions, as discussed in the body of this order.

(B) SU FERC is hereby directed to make a filing disclosing the results of the capacity allocation process within 30 days after the close of the open solicitation process, as discussed in the body of this order.

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<sup>86</sup> Petition at 29-30.

<sup>87</sup> *Hudson Transmission Partners, LLC*, 135 FERC ¶ 61,104, at P 42 (2011); *Tres Amigas*, 130 FERC ¶ 61,207 at P 103; *Wyoming Colorado Intertie, LLC*, 127 FERC ¶ 61,125, at P 62 (2009) (*Wyoming*); *Linden VFT, LLC*, 119 FERC ¶ 61,066, at P 42 (2007) (*Linden*).

<sup>88</sup> *Neptune Regional Transmission System, LLC*, 139 FERC ¶ 61,110, at P 12 (2012); *Wyoming*, 127 FERC ¶ 61,125 at P 65; *Linden*, 119 FERC ¶ 61,066 at P 44; *Montana Alberta Tie Ltd.*, 116 FERC ¶ 61,071, at P 66 (2006).

(C) SU FERC is hereby directed to obtain Commission approval of an OATT prior to commencing service on the Southline Project, as discussed in the body of this order.

(D) If an affiliate of Applicants should take service on the Southline Project, SU FERC must, in addition to complying with applicable reporting requirements and any applicable affiliate rules, as well as abiding by the Commission's Standards of Conduct, make a compliance filing demonstrating that the assignment of capacity to any affiliate and the corresponding treatment of nonaffiliated customers or potential customers is just, reasonable, and not unduly preferential or discriminatory.

(E) Applicants' request for disclaimer of jurisdiction over Southline Transmission is hereby granted, as discussed in the body of this order.

(F) Applicants' request for waiver of the provisions of Subparts B and C of Part 35 of the Commission's regulations, with the exception of sections 35.12(a), 35.13(b), 35.15, and 35.16, is hereby granted, as discussed in the body of this order.

(G) Applicants' request for waiver of Part 141 of the Commission's regulations, with the exception of sections 141.14 and 141.15, and Applicants' request for waiver of the FERC Form No. 1 filing requirement is hereby granted, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.