

97 FERC ¶ 61,026  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
William L. Massey, Linda Breathitt,  
and Nora Mead Brownell.

Northeast Utilities Service Company Docket No. ER01-2584-000

ORDER FINDING FILING DEFICIENT

(Issued October 11, 2001)

Northeast Utilities Service Company (NUSCO), plans to construct a 330 MW direct current cable under Long Island Sound, the Connecticut-Long Island Cable (CLIC), which will connect Connecticut Light and Power Company's (CL&P's) Norwalk Substation in Norwalk, Connecticut to Long Island Power Authority's (LIPA's) Shore Road Substation on the north shore of Long Island in Nassau County. NUSCO requests, on behalf of one or more yet-to-be-named subsidiaries (NUSUB), approval of its proposed CLIC Transmission Rate Schedule, which provides for transmission service over the CLIC at negotiated rates.

Although the proposal is similar to other underwater cable projects which we recently addressed,<sup>1</sup> the project raises significant affiliate issues that were not before us in those proceedings. NUSCO's proposal does not adequately address market power issues such as barriers to entry and assumption of risk. The Commission therefore finds NUSCO's filing deficient and directs NUSCO to provide additional information in order for the Commission to address the merits of this proposal. This order serves the public interest because it protects customers by ensuring that negotiated rates for transmission services will only be approved when market power issues are adequately addressed. The order further serves the public interest by providing guidance on our evolving policy of negotiated rates for transmission service.

Description of NUSCO & NUSUB

NUSCO is a service company subsidiary of Northeast Utilities (NU), a registered public utility holding company. NUSCO has electric distribution, transmission and

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<sup>1</sup> TransEnergie U.S., Ltd., 91 FERC ¶ 61,230 (2000) (TransEnergie), Order Granting Waiver and Accepting Submission, 91 FERC ¶ 61,347 (2000), and Neptune Regional Transmission System, LLC, 96 FERC ¶ 61,147, order on reh'g, 96 FERC ¶ 61,326 (2001).

generation company affiliates,<sup>2</sup> a power marketing affiliate (Select Energy, Inc.), and a gas distribution affiliate (Yankee Gas Services Company). NUSCO provides centralized accounting, administrative, information, engineering, financial, legal, regulatory, operational, planning, purchasing, and other services to the various NU System Companies.

NUSUB will be one or more special purpose subsidiaries of NU that, among other things, will own and operate the CLIC.

### Proposal

NUSCO requests that the Commission accept the CLIC Transmission Rate Schedule for filing and grant NUSUB the authority to sell transmission service at negotiated rates or "non-rate-based" rates pursuant to that rate schedule. NUSCO states that it does not anticipate that NUSUB will need its own open access transmission tariff, because all of the service that it will supply will be pursuant to the proposed CLIC Rate Schedule.

Transmission services will be sold in the form of scheduling rights for point-to-point transmission service between the receipt and delivery points listed in the service agreement. Rights to transmission service will initially be obtained through a competitive open-season process. Unsubscribed scheduling rights will be made available through subsequent open seasons or by posting the rights on NUSUB's Open Access Same-Time Information System (OASIS). In addition, scheduling rights on the CLIC may be traded in the secondary market, in whole or in part, in segments, on a full or partial term basis, with or without recall rights.

NUSCO proposes an open-season process to assess the market's interest in the CLIC. NUSCO states that an aggressive schedule is necessary to manage project risk and to meet its construction schedule and proposed in-service date of 2004. Under its proposed schedule, a public announcement of the project and individual announcements to the members of ISO New England Inc. (ISO-NE) and New York Independent System Operator, Inc. (NYISO) were made at the end of June 2001. A bidders' conference was scheduled for July 24, 2001. Deadlines for bids were due in mid-August, with bids from any NU affiliate due one day earlier.<sup>3</sup> In September 2001, winners were to be selected and contracts negotiated. NUSCO reserves the right to hold a two-stage bidding process or to reject all bids, if the quality of the bids received is not sufficient to justify investment in the CLIC.

NUSCO proposes to use three sets of criteria to evaluate potential bids. The first set of criteria is threshold criteria. The threshold criteria, inter alia, require bidders to execute a confidentiality agreement, demonstrate commercial creditworthiness, and indemnify NUSUB for impacts from outages caused by the unavailability of the CLIC due to

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<sup>2</sup> The NU Operating Companies are: CL&P, Western Massachusetts Electric Company, Holyoke Water Power Company, Holyoke Power and Electric Company, and Public Service Company of New Hampshire.

<sup>3</sup> This was to eliminate any possibility that an affiliate could be given advance notice of what its competitors were bidding.

constraints of the New York or New England transmission systems. The second set of criteria relates to the financial rankings of the bids. The principle criterion for bid evaluation is the net present value of project revenues over the contract term, with a preference for longer-term bids. The third set of criteria used to evaluate bids relates to business risks associated with individual bids. NUSCO states that it will evaluate all non-financial terms and conditions on a bid-by-bid basis. It states that this evaluation criterion will provide it with the ability to assess the financial impact of sharing of business risks. Bids that demonstrably reduce or minimize risk to NUSCO will be valued more highly.

NUSCO has contracted with Ernst & Young, an independent third party, to review the open-season process, to evaluate whether the process results in preferential treatment for affiliates, and to issue a report upon the completion of its review. In addition, NUSCO states that it fully complies with all code of conduct rules and properly separates the activities of the transmission business unit from its power marketing affiliates.

NUSUB or NUSCO will report the results of the open season to the Commission shortly after the execution of the contracts, which will be about 30 days after the open season closes. The report will include the identity of the parties that purchase scheduling rights on the CLIC, and the amount and term of those rights. NUSUB or NUSCO will also submit the report by Ernst & Young.

NUSCO proposes that affiliates of NUSUB be included in the open-season process. It notes that NUSCO affiliates are involved in both the New England and New York markets and their exclusion from the open season could unduly limit the competitiveness of the solicitation. NUSCO contends that by opening the bidding to the widest possible group of potential purchasers, competition will be enhanced. NUSCO also contends that its open-season process satisfies the requirements for affiliate participation set forth in Boston Edison Re: Edgar Electric Energy Company, 55 FERC ¶ 61,382 (1991) and will be verified by an independent consultant. NUSCO further notes that the pricing safeguards for power sales at market-based rates established in Exelon Generating Company, 93 FERC ¶ 61,140 (2000), are adequate for NUSCO, since NU has no retail or wholesale captive customers and all potential NUSUB customers have access to competitive supply alternatives.

NUSCO proposes to charge negotiated rates for transmission service on the CLIC. NUSCO provides an analysis of market power similar to the analyses used for market-based power sales rates filings and in applications for mergers. NUSCO also notes that the open access transmission tariffs of the neighboring ISOs effectively cap the rates for service. Further, NUSCO notes that the negotiated rates will reflect the market's perception of differences in locational energy prices and available capacity. NUSCO contends that for ratemaking purposes, there is no basis to distinguish the CLIC from TransEnergie U.S. Ltd.'s (TransEnergie's) project, the rates for which were approved by the Commission in TransEnergie.

NUSCO states that if the Commission approves the proposed CLIC Transmission Rate Schedule, NUSUB will assume the financial risk of the project. NUSCO further states that it has procedures in place to track the time and expenses that it devotes to the CLIC.

NUSCO states that NUSUB will join an RTO serving the New York and/or New England geographic areas. NUSUB will coordinate the CLIC's operations by developing a net interchange schedule, which it will submit to ISO-NE and NYISO (or their successor organizations) for implementation. NUSUB will transfer scheduling and operating authority over the CLIC to ISO-NE for deliveries from New England, and to NYISO for deliveries from New York.

NUSCO states that it will comply with the Commission's reporting requirements that are applicable to power marketers. It also states that it will make quarterly filings reporting transactions under the CLIC Transmission Rate Schedule.

NUSCO requests blanket authorization for issuances of securities or assumptions of liabilities pursuant to section 204 of the Federal Power Act, 16 U.S.C. § 204 (1994) (FPA), and Part 34 of the Commission's Regulations, 18 C.F.R. Part 34 (2001) (Regulations).

#### Requests for Waivers

NUSCO requests that the proposed rate schedule be permitted to become effective either on September 30, 2001 or on the date of the Commission order approving the filing. NUSCO requests waiver of the Commission's advance notice requirement under Section 35.3 of the Regulations, 18 C.F.R. § 35.3 (2001), in order to permit NUSCO to make this filing more than 120 days prior to the requested effective date. NUSCO submits that good cause exists for the waiver because NUSCO hopes to obtain regulatory approval from the Commission to enable NUSCO to enter into long-term contracts prior to seeking financing for the CLIC. NUSCO also requests, on behalf of NUSUB: (1) waiver of Part 101 of the Regulations regarding Uniform System of Accounts; (2) waiver of Parts 41 and 141 of the Regulations regarding adjustments and certification of accounts and reports and the filing of certain statements and reports; (3) waiver of Part 45 of the Regulations regarding interlocking directorates, with filing of an abbreviated statement under Part 46 identifying jurisdictional interlocks; (4) waiver of the full reporting requirements of Subparts B and C of Part 35 of the Regulations, except for Sections 35.13(a), 35.13(b), 35.15 and 35.16; (5) a determination that funds received in connection with services provided under the CLIC Transmission Rate Schedule are not "facilities" within the meaning of section 203 of the FPA and that sales of accounts receivable do not constitute disposition of jurisdictional facilities under section 203; and (6) waiver of Section 35.28 of the Regulations regarding the filing of an open access transmission tariff, as required by Order No. 888.<sup>4</sup>

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<sup>4</sup> Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities: Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part, Transmission Access Policy Study Group, et al. v. FERC, 225 F.3d 667 (D.C. Cir. 2000), cert. granted in part and denied in part, 69 U.S.L.W. 3574 (U.S. Feb. 26, 2001).

## Notice, Interventions and Responses

Notice of NUSCO's filing was published in the Federal Register, 66 Fed. Reg. 38,662 (2001), with comments, protests, and interventions due on or before August 3, 2001. NYISO and LIPA filed timely motions to intervene raising no substantive issues. TransEnergie filed a timely motion to intervene, protest and comments. On August 6, 2001, ISO-NE filed a motion to intervene out-of-time and comments. On August 16, 2001, Vermont Department of Public Service filed a motion to intervene out-of-time.

ISO-NE filed comments requesting that NUSUB be treated on the same basis as the TransEnergie proposal. Specifically, ISO-NE requests conditioning approval of NUSCO's proposal on NUSUB joining an adjacent RTO and giving that RTO operational control of the cable.

In its comments, TransEnergie expressed concern that the CLIC might not be evaluated under the same rules that applied to other merchant transmission projects in New England. TransEnergie notes that in the orders approving the rates for the TransEnergie Cross Sound Cable and the Neptune Project proposed by Neptune Regional Transmission System, LLC (Neptune), the Commission used seven evaluation criteria ("safe harbor provisions"). TransEnergie at 61,837 and Neptune at 61,633. TransEnergie requests that the same criteria be applied to the CLIC.

TransEnergie also notes that CL&P is a regulated affiliate of NUSCO with captive ratepayers located in Connecticut. TransEnergie requests that Commission approval of the CLIC be conditioned to assure that any engineering, public relations, legal, accounting or other services provided by NUSCO on behalf of the CLIC not be subsidized by CL&P's captive ratepayers. TransEnergie also requests that the Commission ensure that the CLIC does not inadvertently receive inappropriate treatment relative to other merchant transmission projects.

On August 20, 2001, NUSCO filed an answer to the comments of TransEnergie.

## Discussion

### Procedural Matters

Under Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.214 (2001), the timely, unopposed motions to intervene of NYISO, LIPA and TransEnergie serve to make them parties to this proceeding. In view of the early stage of this proceeding and the lack of any undue prejudice or delay, we find good cause to grant ISO-NE's and Vermont Department of Public Service's untimely, unopposed interventions. 18 C.F.R. § 385.214 (d) (2001).

With respect to NUSCO's answer to TransEnergie's protest, Rule 213(a)(2) of Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2001), generally prohibits an answer to a protest. We are not persuaded to allow the proposed answer, and accordingly will reject the answer.

## NUSCO's Filing

NUSCO's CLIC is the third proposal for approval of negotiated transmission rates on an undersea, high-voltage, direct-current cable linking New England to New York. The Commission is encouraged that innovative and competitive solutions are being proposed to link capacity-rich regions in New England (and Canada) with capacity-deficient regions in the Northeastern United States. In addition, the Commission concurs with NUSCO that the installation of additional transmission lines connecting the transmission systems of Connecticut and Long Island will provide benefits to both New England and New York. Increased transmission capacity between the regions will enhance trade, improve power supply reliability and reduce congestion.<sup>5</sup>

NUSCO's proposal, however, raises affiliate issues that were not present in the TransEnergie and Neptune projects. For example, NUSUB is affiliated with a regulated utility and proposes to connect to that affiliate. Although NUSCO states that NUSUB will assume the full risk of the project and that captive customers will not subsidize the CLIC, the filing does not provide sufficient detail in this regard. As discussed below, the Commission does not have sufficient information to approve the proposal for negotiated transmission rates for the CLIC.

One concern that is not adequately addressed in NUSCO's filing deals with the ability of NU or its affiliates to impede entry into the energy transmission market. Unlike TransEnergie and Neptune, NU controls the facilities with which the proposed facilities will connect. NUSCO does not explain if any entity -- affiliated or not -- would be able to readily connect new transmission facilities to the CL&P facilities. Neither NUSCO nor any of its affiliates should be able to delay potential competitors from interconnecting with the CL&P system and/or the ISO at either end of the CLIC. Interconnections with non-affiliates must be treated under the same terms and conditions as interconnections with NUSUB. The filing is silent as to whether other parties were provided the opportunity to compete for an interconnection with CL&P. Similarly, NUSCO also fails to discuss the rights-of-way it will use for the CLIC, *i.e.* whether the rights-of-way were obtained to assist NU affiliates in serving a franchise area, or whether any sponsor could obtain the rights-of-way at the same costs (including transaction costs) as NUSUB. Also, the role of NYISO and ISO-NE, with respect to authorizing interconnection facilities and/or enhancements and their related costs, needs to be discussed. To ensure that entry into the market is not impeded, NUSCO should provide information to fully address these issues.

Another concern deals with market risk. In the TransEnergie and Neptune proposals, the sponsors of the proposed transmission systems agreed to assume full market risk for the projects. Since neither TransEnergie nor Neptune had the means to shift the risk of the project to captive customers, the issue of market risk was not a concern. Although NUSCO states that NUSUB will assume the financial risk of the project and that it has procedures in place to track the time and expenses that it devotes to the CLIC, those procedures were not included as part of this filing. Furthermore, the filing does not discuss methods by which third parties could verify that NUSUB was indeed assuming all of the

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<sup>5</sup> See Testimony of David H. Boguslawski, pp. 8-9.

financial risk of the project, or that any transactions between NU affiliates for transmission service on the CLIC are negotiated at arm's length. NUSCO is directed to describe in detail the procedures used to ensure that NUSUB assumes full market risk for the CLIC, including (but not limited to) accounting procedures and codes of conduct.

A third concern raised by NUSCO's proposal deals with the participation of affiliates in the open season used to allocate transmission rights. NUSCO proposes to allow affiliates to participate in the open seasons, whereas TransEnergie and Neptune prohibited affiliates from participating in their open seasons. NUSCO submits some safeguards against affiliate abuse, and asserts that the exclusion of affiliates could unduly limit the competitiveness of the open season.<sup>6</sup> The fact that affiliate participation could impact competitiveness could suggest the existence of market power. To more fully develop the record, NUSCO is directed to address this issue.

The Commission also has some specific concerns about the open-season process, as described in Attachment G to NUSCO's filing. Section 3.B. discusses financial criteria for evaluation bids. It states that the principal criterion is the net present value (NPV) of the project revenues over the contract term. NUSCO notes that the NPV recognizes that both price and contract term play a significant role in determining the value of an individual bid. However, NUSCO then states that it will "incorporate a preference for longer-term bids." NUSCO should provide information to explain in detail how a preference for longer-term bids will be incorporated into the evaluation and how this preference is measured vis-a-vis the NPV analysis.

The Commission is also concerned with the business risk criteria discussed in Section 3.C. of Attachment G. This section states that NUSCO will evaluate all non-financial terms and conditions on a bid-by-bid basis, providing NUSCO with the ability to assess the financial impact of sharing business risks as proposed in each bid. NUSCO notes that bids that demonstrably reduce or minimize risk to NUSCO will be valued more highly. In order to provide transparency in the bidding process, and to enable unsuccessful bidders to determine if they were treated in a fair manner, in any subsequent filing NUSCO must explain how non-financial terms and conditions will be factored in a quantifiable way into the open-season bid evaluation process.

Further, the Commission is concerned that NUSUB proposes to provide service on a stand-alone rate schedule. Consistent with our ruling in TransEnergie and Neptune, service on the CLIC should be provided under the terms and conditions of the open access tariff of the RTO which will operate the CLIC.

In their comments, ISO-NE and TransEnergie requested that NUSUB be evaluated on the same basis as we evaluated TransEnergie and Neptune. In those proceedings, we applied certain criteria which we believed applied to the narrow circumstances of the specific projects. However, because the CLIC is being built in competition with the TransEnergie and Neptune Projects, we find that the same criteria should be used. These criteria are that: (1) the transmission facility should assume full market risk; (2) service should be provided

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<sup>6</sup> Application, p. 19.

under the open-access transmission tariff of the ISO or RTO that operates the facilities, and the control of these facilities should be given to that RTO; (3) the transmission facility should create tradable firm secondary transmission rights and these rights should be posted on OASIS;<sup>7</sup> (4) an open-season process should be employed to initially allocate transmission rights and the parameters of the open season should be non-discriminatory, fair and transparent; (5) the results of the open season should be posted on OASIS and filed in a report to the Commission;<sup>8</sup> (6) affiliate concerns are adequately addressed; (7) the transmission facility should not preclude access to essential facilities by competitors; (8) the transmission facilities should be subject to market monitoring for market power abuse and all data requests for an authorized market monitor should be answered; (9) physical energy flows on transmission facilities should be coordinated with, and subject to, reliability requirements of the relevant ISO or RTOs; and (10) transmission facilities should not impair pre-existing property rights to use the transmission grids or inter-connected RTOS or utilities. Except as discussed above, the Commission finds that the CLIC project generally satisfies these criteria.

The Commission orders:

NUSCO is directed to provide additional information within 15 days of the date of this order to address the issues discussed above.

By the Commission.

( S E A L )

David P. Boergers,  
Secretary.

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<sup>7</sup> Consistent with the posting requirements set forth in Order No. 889.

<sup>8</sup> NUSCO is required to report on the results of its open season 30 days after the close of the open season. The report should include the identity of the parties that purchase capacity, the amount and term of the reserved capacity as well as the prices established under the auction. The report should also indicate how many parties requested capacity but did not receive it, the amount of capacity requested, and the reason they were not awarded firm transmission. TransEnergie at 61,839.