No. 24- _____

In the United States Court of Appeals for the District of Columbia Circuit

NAFSICA ZOTOS, THE ILLINOIS AGRICULTURAL ASSOCIATION D/B/A THE ILLINOIS FARM BUREAU, CONCERNED CITIZENS AND PROPERTY OWNERS, THE CONCERNED PEOPLES ALLIANCE AND YORK TOWNSHIP IRRIGATORS,

PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION,

RESPONDENT

PETITION FOR REVIEW

Now come Nafsica Zotos, the Illinois Agricultural Association d/b/a the Illinois Farm Bureau, Concerned Citizens and Property Owners, the Concerned Peoples Alliance and York Township Irrigators (collectively, "Petitioners"), by their counsel, Paul G. Neilan, Law Offices of Paul G. Neilan, P.C., and the other counsel signatory hereto, and, pursuant to Section 313(b) of the Federal Power Act (the "FPA"), 16 U.S.C. § 825*l*(b), and Rule 15(a) of the Federal Rules of Appellate Procedure, hereby petition this Court for review of the following order of the Federal Energy Regulatory Commission ("FERC"):

Grain Belt Express LLC, Order Granting in Part Application for Revised Negotiated Rate Authority, Docket No. ER24-59-000, 186 FERC ¶61,158 (February 29, 2024) (the "Order")

A copy of the Order is attached hereto as Exhibit A. All Petitioners were parties to FERC Docket No. ER24-59.

Pursuant to 16 U.S.C. §825*l*, Petitioners timely filed their Request for Rehearing in FERC Docket No. ER24-59 on March 28, 2024 (the "Request for Rehearing"). Section 313(a) of the FPA, 16 U.S.C. §825*l*(a) provides that unless FERC acts on a request for rehearing within thirty days after it is filed, the request for rehearing may be deemed to have been denied. FERC failed to act on the Request for Rehearing within the thirty-day period after it was filed, and therefore the Request for Rehearing was denied by operation of law on April 29, 2024.

This Petition for Review is timely submitted to this Court in accordance with the statutory requirements of, and jurisdiction and venue in this Court are proper under, Section 313(b) of the FPA, 16 U.S.C. 825*l*(b).

BACKGROUND.

In 2014, FERC granted GBX negotiated rate authority as a merchant transmission service provider. *Grain Belt Express Clean Line, LLC*[1]*, Order Conditionally Authorizing Proposal and Granting Waivers*, 147 FERC ¶61,008 (May 8, 2014) (the "FERC 2014 GBX Order"). Until about January 2020, GBX was

[1] Subsequent to 2014, Grain Belt Express Clean Line LLC changed its name to Grain Belt Express LLC.

a wholly-owned subsidiary of Grain Belt Express Holding LLC ("GBX Holding"). In or about January 2020, GBX Holding sold all its membership (i.e., ownership) interest in GBX, including its FERC-granted negotiated rate authority, to Invenergy Transmission LLC ("Invenergy"), an unrelated entity. The transaction value of this upstream ownership transfer far exceeded the $10,000,000 threshold for which prior FERC approval is required under Section 203(a)(1)(A) of the FPA, 16 U.S.C. 824b(a)(1)(A) ("FPA Section 203"). FPA Section 203 requires prior approval of transactions that fall within its scope ("No public utility shall, *without first having secured an order of the Commission authorizing it to do so*—…."; 16 U.S.C. 824b(a)(1) (emphasis added)). Nothing in FPA Section 203 empowers FERC to retroactively approve transactions to which that section applies.

Neither GBX, GBX Holding, nor Invenergy ever sought or obtained FERC FPA Section 203 approval for the January 2020 upstream ownership transfer of GBX to Invenergy.

FERC'S UNLAWFUL RETROACTIVE APPLICATION OF FPA SECTION 203.

In October 2023, GBX filed with FERC its *Application for Amendment to Existing Negotiated Rate Authority* (the "2023 GBX FERC Application"), for which FERC opened its Docket ER24-59. Absent from the 2023 GBX FERC Application is any mention of its failure to obtain FERC's prior approval under FPA Section 203 for the 2020 upstream ownership transfer of GBX to Invenergy. GBX instead continually characterizes certain noncontroversial changes to its

transmission project[2] as amendments to its *existing* negotiated rate authority. Because FERC never approved the upstream ownership transfer of GBX to Invenergy under FPA Section 203, after the January 2020 closing of that transaction GBX had no negotiated rate authority to amend.

While FERC claims in its Order that it is reviewing GBX's negotiated rate authority *de novo* based on its current ownership structure (Order, ¶71), it plays right along with GBX, dismisses as irrelevant GBX's failure to obtain prior FPA Section 203 approval for the 2020 upstream ownership transfer, and expressly recognizes GBX's *continuing* negotiated rate authority (Order, pg. 27). FERC thus backdates GBX's negotiated rate authority to January 2020.

FERC's recognition of GBX's negotiated rate authority as continuing from any time prior to February 29, 2024 not only gives the lie to its claim that it has conducted a *de novo* review of that authority, it is a patently unlawful retroactive approval of an upstream ownership transfer that closed more than four years before FERC issued the Order.

BY RESERVING THE RIGHT TO SEEK COST ALLOCATION AGAINST ILLINOIS RATEPAYERS, GBX FORFEITED ITS STATUS AS A MERCHANT TRANSMISSION SERVICE PROVIDER.

Under the FERC 2014 GBX Order (¶15), FERC's own precedents such as *Chinook Power Transmission, LLC*, 126 FERC ¶61,134 (2009), and FERC's own 2013 Policy Statement, *Allocation of Capacity on New Merchant Transmission*

[2] These changes include extending the transmission line by fifty miles, increasing the line's capacity by 1500 megawatts, adding an interconnection with a Missouri electric utility, and dividing its financing plan into separate phases.

Projects, Etc., 142 FERC ¶61,038 (January 17, 2013), a merchant transmission service provider must assume the full market risk of its project and may not seek to allocate the costs of its line to ratepayers.

While GBX represents to FERC that it will bear the full market risk of its merchant transmission project, in proceedings before the Illinois Commerce Commission (the "ICC") GBX sang quite a different tune. Before the ICC, GBX reserved its right to recover the costs of its project from Illinois ratepayers. *Final Order,* March 8, 2023, at pg. 50, Ill. C.C. Docket No. 22-0499[3]. Contrary to its promises to FERC, GBX's position before the ICC shows that it will bear the full market risk of its project until it decides not to. Under FERC's own orders going back more than a decade, GBX cannot have its merchant transmission negotiated rate authority and eat its cost allocation cake too. By reserving the right to allocate costs to Illinois ratepayers, GBX forfeited its status as a merchant transmission service provider.

RULE 26.1 DISCLOSURE STATEMENT

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, Petitioners make the following disclosures:

A. Nafsica Zotos ("Zotos") is an individual, a resident of the State of Illinois, and the owner of certain real property of approximately 160 acres located near the Village of Harvel in Montgomery County, Illinois. Zotos's property is designated by the United States Department of Agriculture as prime

[3]Available at: https://www.icc.illinois.gov/docket/P2022-0499/documents/334872/files/583350.pdf

farmland and is used for agricultural purposes. The route of GBX's proposed interstate transmission line will either traverse or run adjacent to the Zotos property.

B. The Illinois Agricultural Association, d/b/a the Illinois Farm Bureau (the "Farm Bureau") is an Illinois not for profit corporation headquartered in Bloomington, Illinois. The mission of the Farm Bureau is to improve the economic well-being of agriculture and enrich the quality of farm family life. The Farm Bureau represents over 74,000 farmer members, including farmers located in the Illinois counties through which the Project will be routed. The Farm Bureau has no subsidiary or parent entities.

C. Concerned Citizens and Property Owners ("CCPO") is a voluntary unincorporated association consisting of several landowners and residents of the geographical area to be traversed by the GBX transmission project, and who own land and/or reside on or near the proposed route of that project. CCPO has no subsidiary or parent entities.

D. Concerned Peoples Alliance (the "CPA") is a voluntary unincorporated association comprised of landowners and residents in the geographical area through which GBX's project is to be routed. The CPA has no subsidiary or parent entities.

E. York Township Irrigators ("YTI") is a voluntary unincorporated association of real estate owners in York Township, Clark County, Illinois whose properties are directly on, or immediately adjacent to the proposed

route of GBX's project. YTI has no subsidiary or parent entities.

Pursuant to Federal Rule of Appellate Procedure 15(c), a copy of this petition will be served upon FERC's Solicitor. Pursuant to 18 C.F.R. § 385.2012 and 28 U.S.C. § 2112(a), Petitioner will electronically file a date-stamped receipt of this petition with FERC.

CERTIFICATE OF SERVICE

Pursuant to Rule 15(c) of the Federal Rules of Appellate Procedure, I, Paul G. Neilan, an attorney, hereby certify that on this 21st day of June, 2024, I caused to be served copies of the foregoing Petition for Review, via electronic mail to:

Robert Solomon, Solicitor
Federal Energy Regulatory Commission
888 First St NE,
Room: 9A-01
Washington , DC 20426
Email: robert.solomon@ferc.gov

and by electronic mail on all parties on the FERC's Service List in FERC Docket ER24-59:

For:

Grain Belt Express LLC

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at their indicated e-mail addresses. and that, upon receiving a file-stamped copy of this petition, I will cause a paper copy of it to be delivered by USPS Express Mail to:

Debbie-Anne A. Reese,
Acting Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Dated: June 21st, 2024

Respectfully submitted,

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ATTACHMENT:

Exhibit A -- Grain Belt Express LLC, Order Granting in Part Application for Revised Negotiated Rate Authority, Docket No. ER24-59-000, 186 FERC ¶61,158 (February 29, 2024)

Exhibit A

To

Petition for Review

Grain Belt Express LLC, Order Granting in Part Application for Revised Negotiated Rate Authority, Docket No. ER24-59-000, 186 FERC ¶61,158 (February 29, 2024)

186 FERC ¶ 61,158
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Chairman;
Allison Clements and Mark C. Christie.

Grain Belt Express LLC Docket No. ER24-59-000

ORDER GRANTING IN PART APPLICATION FOR REVISED NEGOTIATED RATE AUTHORITY

(Issued February 29, 2024)

1. On October 6, 2023, pursuant to section 205 of the Federal Power Act (FPA),[1] Grain Belt Express LLC (Grain Belt) submitted a request (Filing) to amend its previously granted Commission authorization to charge negotiated rates for its proposed high-voltage direct current (HVDC) merchant transmission project (Project). We grant Grain Belt's request in part, as discussed below.

I. Background

A. Grain Belt's Existing Negotiated Rate Authority

2. On May 8, 2014, the Commission granted Grain Belt[2] negotiated rate authority for transmission service on the Project.[3] Grain Belt states that it conducted an open solicitation pursuant to that negotiated rate authority (Initial Open Solicitation), resulting in Grain Belt entering into two transmission service agreements, together totaling no more than 225 MW (Initial TSAs).

B. Project Description and Design Changes

3. Grain Belt states that the Project, as described in its initial application for negotiated rate authority, was planned to be a 750-mile, multi-terminal, 600 kV HVDC transmission line capable of delivering 3,500 MW from western Kansas to southwestern

[1] 16 U.S.C. § 824d.

[2] Grain Belt explains that, under previous ownership, and in its initial application for negotiated rate authority, Grain Belt Express was called Grain Belt Express Clean Line LLC. Filing at 2 n.6.

[3] *Grain Belt Express Clean Line LLC*, 147 FERC ¶ 61,098 (2014) (2014 Order).

Indiana, with a connection point in Missouri.[4] Grain Belt further states that, in 2020, Invenergy Transmission LLC (Invenergy) acquired Grain Belt from Clean Line Energy Partners LLC (Clean Line).[5] Grain Belt explains that the Project has since undergone modifications in structure and capacity, including a corporate name change.[6] Grain Belt states that the Project's commercial plan, including its anticipated contractual arrangements, has also evolved substantially since the 2014 Order and Invenergy's acquisition.

4. Grain Belt explains that Invenergy has pursued updating the Project design to increase its total capacity to up to 5,000 MW, adding an additional interconnection to Associated Electric Cooperative, Inc. (AECI), and splitting the project financing, construction, and commercial operation dates into two separate phases (Phase 1 and Phase 2).[7] Grain Belt states that, as updated, the Project will be an approximately 800-mile HVDC transmission line capable of delivering renewable energy from projects located in southwest Kansas,[8] with points of interconnection with Midcontinent Independent System Operator, Inc. (MISO), AECI, and PJM Interconnection, L.L.C. (PJM).[9]

5. Grain Belt states that Phase 1 will be a transmission solution with the capacity to deliver up to 2,500 MW of energy, primarily from renewable energy sources in southwest Kansas to northeastern Missouri.[10] Grain Belt states that major Phase 1 facilities consist of: (1) HVDC voltage source converter stations; (2) approximately 542 miles of overhead HVDC transmission line in a 600 kV bipolar configuration with dedicated metallic return conductor; (3) AC switchyards built adjacent to the HVDC converter stations; and (4) AC overhead transmission lines to connect the converter stations to portions of the SPP, MISO, and AECI managed electrical systems in Kansas and

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[4] Filing at 3.

[5] *Id.* at 2. Grain Belt is a wholly owned subsidiary of Invenergy, which is a wholly owned subsidiary of Invenergy Renewables LLC.

[6] *Id.*

[7] *Id.* at 3-4.

[8] Grain Belt notes that this area is within the geographic footprint of Southwest Power Pool, Inc. (SPP), but the generation will not be interconnected to the SPP transmission system. *Id.* at 4 n.11.

[9] *Id.* at 1, 4.

[10] *Id.* at 4.

Missouri. Grain Belt contends that Phase 1 will increase resilience for the SPP, MISO, and AECI Balancing Authority Areas (BAAs) by allowing the potential of one BAA to import a large amount of power from another BAA to bolster system reliability and improve the ability of each BAA to recover after a power failure.[11]

6. Grain Belt states that Phase 2 will extend the project to PJM through an interconnection point located near the Illinois-Indiana state line.[12] Grain Belt explains that Phase 2 will include a transmission solution that can deliver an additional 2,500 MW of energy from renewable energy sources in southwest Kansas to customers in Illinois, Indiana, and other states, for a combined total of 5,000 MW between Phase 1 and Phase 2.

C. Filing

7. Grain Belt states that it is submitting this application to update the Commission on Project changes and to proceed with an open solicitation to sell transmission service over the Project at negotiated rates, in compliance with the Commission's 2013 Policy Statement pertaining to merchant transmission projects.[13]

8. Grain Belt explains that, with its acquisition by Invenergy and significant advances in the Project's development in the intervening years, Grain Belt now intends to hold a Phase 1 Open Solicitation.[14] Grain Belt states that it seeks increased flexibility with respect to its future open solicitation(s) to allow bidders to submit bids with flexible bidding terms and conditions and, in conjunction with an independent evaluator, intends to determine what selection criteria to use to determine which bids provide the greatest economic value, rather than to limit the criteria to pre-determined weighting.[15] Further, Grain Belt states that it anticipates transferring the remainder of the Phase 1 capacity to buyers and/or lessees via sales and/or leases of undivided interests, subject to

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[11] *Id.* at 4-5.

[12] *Id.* at 5.

[13] *Id.* at 1-2 (citing *Allocation of Capacity on New Merch. Transmission Projects & New Cost-Based, Participant-Funded Transmission Projects*; *Priority Rights to New Participant-Funded Transmission*, 142 FERC ¶ 61,038, at P 43 (2013) (2013 Policy Statement)).

[14] *Id.* at 8.

[15] *Id.* at 9.

Commission approval for each transfer pursuant to section 203 of the FPA,[16] which would reduce the portion of the Project that Grain Belt controls.[17]

9. Grain Belt also notes that its Initial TSAs remain contingent upon Commission approval of a post-solicitation compliance filing, for which approval has not yet been sought.[18] Grain Belt states that it intends to seek approval of the Initial TSAs, and of the process that led to entering into them, in a post-solicitation compliance filing that will also cover the additional open solicitation contemplated in the instant filing.[19]

II. Notice and Responsive Pleadings

10. Notice of Grain Belt's Filing was published in the *Federal Register*, 88 Fed. Reg. 71,347 (Oct. 16, 2023), with interventions and protests due on or before October 27, 2023.

11. Missouri Joint Municipal Electric Utility Commission, Ameren Services Company, and Clean Line Investment, LLC filed timely motions to intervene. Sierra Club filed a timely motion to intervene and comments in support of Grain Belt's application (Sierra Club Comments). On October 20, 2023, the Missouri Landowners Alliance (MLA) filed a protest (MLA Protest). On November 6, 2023, Grain Belt filed an answer to MLA's protest (Grain Belt November 6 Answer). On November 8, 2023, MLA filed an answer to the Grain Belt November 6 Answer (MLA November 8 Answer). On November 13, 2023, Grain Belt filed a limited answer to the MLA November 8 Answer (Grain Belt November 13 Answer). On November 24, 2023, the Illinois Landowners Alliance (ILA) submitted a late-filed motion to intervene. On December 28, 2023, ILA filed a motion for summary disposition of Grain Belt's Filing (ILA Motion). On January 12, 2024, Grain Belt filed an answer to the ILA Motion (Grain Belt January 12 Answer). On January 29, 2024, Grain Belt filed a renewed request for expedited consideration of its request to amend its existing negotiated rate authority.

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[16] 16 U.S.C. § 824b.

[17] Filing at 8 (citing 16 U.S.C. § 824b).

[18] *Id.* at 2-3.

[19] *Id.* at 3 n.8.

III. Discussion

A. Procedural Matters

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2023), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

13. In its answer to the ILA Motion, Grain Belt argues that the ILA Motion should be denied for procedural reasons, including that the motion was filed after the comment deadline, ILA is not a party to the proceeding and therefore lacks rights to file a motion, and the motion will delay the proceedings as well as prejudice and place additional burdens on Grain Belt.[20] Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d), we grant ILA's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay. Given that we accept ILA's late-filed motion to intervene, we will treat the ILA Motion as a protest, and we will address the arguments therein on the merits.

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2023), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We accept the answers because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

1. Review

a. Application for Amended Negotiated Rate Authority

i. Filing

15. Grain Belt states that it submits the instant application to amend its existing negotiated rate authority.[21] Grain Belt states that it seeks increased flexibility with respect to its future open solicitation(s) to allow bidders to submit bids with flexible

[20] Grain Belt January 12 Answer at 1-3 (citing 18 C.F.R. §§ 385.214(d)(1)(ii), (iv)).

[21] Filing at 1.

bidding terms and conditions and that it will use an independent evaluator to assist with its open solicitation.[22]

ii. Comments and Protests

16. MLA argues that Grain Belt's application for negotiated rate authority should be re-evaluated based on the Commission's four-factor analysis because circumstances – including project ownership, capacity, and interconnection points, among others – have changed significantly since Grain Belt's negotiated rate authority was originally granted.[23] MLA states that Grain Belt did not previously inform the Commission of its change in ownership and fails to explain why it did not notify the Commission when the Project changes occurred.[24] Additionally, MLA asserts that Invenergy controls a large inventory of energy facilities, including generation facilities, within the Project area and could have the incentive to withhold capacity or give undue preference to its affiliate customers and, therefore, the Commission should treat Grain Belt's filing as a new application instead of an amendment.[25] MLA further argues that Grain Belt's use of an independent evaluator should not take the place of regulatory scrutiny and guidance.[26]

17. MLA also objects to Grain Belt filing its application for amended negotiated rate authority in a new Commission docket, which MLA alleges evades notification of interested parties that participated in the original proceeding.[27]

18. Sierra Club submitted a comment in support of the Project, arguing that it will enhance grid reliability and resilience, reduce emissions, and lower consumer costs.[28]

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[22] *Id.* at 9 (citing *Linden VFT, LLC*, 162 FERC ¶ 61,297, at PP 1, 23 (2018) (*Linden VFT*); 2013 Policy Statement, 142 FERC ¶ 61,038 at P 25).

[23] MLA Protest at 2-3 (citing *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134, at P 37 (2009) (*Chinook*)).

[24] *Id.* at 2.

[25] *Id.* at 3 (citing 2014 Order, 147 FERC ¶ 61,098 at P 15).

[26] *Id.* at 9.

[27] *Id.* at 1.

[28] Sierra Club Comments at 1-5.

iii. Answers

19. Grain Belt asserts that MLA's concerns that the Commission will not have the opportunity to evaluate the Project's negotiated rate authority are meritless because the Commission typically conducts a *de novo* review when a project seeks to amend its negotiated rate authority.[29] Grain Belt argues that MLA's contention that it may have an incentive to withhold capacity or give undue preference because it has generation affiliates is baseless because the Commission's standards do not permit Grain Belt to unduly discriminate or provide undue preference in the open solicitation process.[30] Grain Belt states that it is incentivized to provide transmission capacity to bidders in the open solicitation that provides the greatest value. In addition, Grain Belt disagrees with MLA's contention that Grain Belt's use of an independent evaluator would take the place of regulatory scrutiny and guidance.[31] Grain Belt asserts that the Commission is expected to apply the same level of scrutiny to its application regardless of whether there is an independent evaluator and, moreover, the Commission has acknowledged that an independent evaluator helps assure there will not be preferential treatment or undue discrimination.[32]

20. Grain Belt notes that the Commission considers amendments to negotiated rate authority *de novo*, and argues that, accordingly, it is appropriate to file such amendments in new dockets.[33] Moreover, Grain Belt notes that the Commission noticed the filing of its application, MLA has not contended that this notice was deficient, and MLA is incorrect to contend that the Commission must be notified of a change in ownership within a designated period of time, especially when there is no transmission service agreement currently on file.[34]

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[29] Grain Belt November 6 Answer at 3.

[30] *Id.* at 4.

[31] *Id.* at 8 (citing MLA Protest at 9).

[32] *Id.* (citing *Chinook*, 126 FERC ¶ 61,134 at P 59).

[33] *Id.* at 2 n.7 (citing *Pattern Energy Grp. LP*, 178 FERC ¶ 61,090, at P 10 (2022); *Ameren Transmission Co.*, 172 FERC ¶ 61,123, at P 10 (2020)).

[34] *Id.* at 3.

21. In response to Grain Belt's answer, MLA asserts that Grain Belt does not support its contention that the Commission does not need to be notified of a change in ownership within a designated time period.[35]

iv. Commission Determination

22. In the 2014 Order, the Commission granted Grain Belt's request to charge negotiated rates for transmission service on the Project based on the specific circumstances at that time. Because those circumstances, including Project ownership, total Project capacity, and interconnection points, have changed, we will conduct a *de novo* review to determine whether Grain Belt continues to meet the requirements for negotiated rate authority using the criteria set forth in the Commission's 2013 Policy Statement. Conducting a *de novo* review of Grain Belt's request for amended negotiated rate authority in this proceeding is consistent with Commission precedent,[36] as both MLA and Grain Belt acknowledge.[37]

23. In addition, we disagree with MLA's contention that Grain Belt inappropriately filed its request in a different Commission docket than that of the proceeding in which it was initially granted negotiated rate authority. Requests for amended negotiated rate authority are properly filed in a new docket, such action does not constitute an attempt to evade notification of interested parties, and Grain Belt's request was appropriately noticed.[38]

b. Initial Open Solicitation and Capacity Allocation

i. Filing

24. Grain Belt notes that the Initial TSAs remain contingent upon Commission approval of a post-solicitation compliance filing, for which approval has not yet been sought.[39] Grain Belt states that it intends to seek approval of the Initial TSAs, and the

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[35] MLA November 8 Answer at 1 (citing Grain Belt November 6 Answer at 3).

[36] *Ameren Transmission Co.*, 172 FERC ¶ 61,123 at P 10; *see also SunZia Transmission LLC*, 179 FERC ¶ 61,135, at P 13 (2022).

[37] Grain Belt November 6 Answer at 2; MLA Protest at 2-3.

[38] *See, e.g.*, SunZia Transmission LLC, Application for Revision of Negotiated Rate Authority, Docket No. ER21-1294-000 (filed Mar. 8, 2021).

[39] Filing at 2-3.

process that led to entering into those TSAs, in a post-solicitation compliance filing that will also cover the additional open solicitation contemplated in the instant filing.[40]

ii. Protest

25. MLA argues that the Initial TSAs, and the resulting up to 225 MW capacity allocations, should be void because Grain Belt's previous owner, Clean Line, never officially closed the Initial Open Solicitation or submitted the required compliance filing upon completion of the process.[41] MLA notes that it has been at least seven years since the Initial TSAs were signed by Clean Line and argues that it is doubtful that needed documentation is accessible.[42] Furthermore, MLA questions whether Grain Belt's solicitation of the Initial TSAs was in compliance with its negotiated rate authority and alleges that the sale of capacity, which MLA asserts was to the Missouri Joint Municipal Electric Utility Commission, may not have been part of the Initial Open Solicitation and may have been part of a later solicitation, which MLA claims was not widely noticed.[43] MLA further argues that, if the Initial Open Solicitation is still open, Grain Belt must explain why it did not update its posting when the Project changed. Finally, MLA states that the Commission should consider any contracts signed by Clean Line for which the company did not submit a timely compliance filing to be void.[44]

iii. Answer

26. Grain Belt argues that MLA's comments regarding the Initial TSAs are speculative and premature because the Commission will consider their merits when Grain Belt submits its compliance filing.[45]

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[40] *Id.* at 3 n.8.

[41] MLA Protest at 3 (citing 2014 Order, 147 FERC ¶ 61,098 at ordering para. B; Filing at 2-3).

[42] *Id.*

[43] *Id.* at 3-4 (citing MLA, Initial Post-Hearing Brief, *In the Matter of the Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity*, Case No. EA-2016-0358 (Missouri Public Service Commission) (filed April 10, 2017), https://efis.psc.mo.gov/Case/FilingDisplay/92579).

[44] *Id.* at 4.

[45] Grain Belt November 6 Answer at 6. Grain Belt states that the Initial TSAs were signed pursuant to the Initial Open Solicitation in 2015 and that the open solicitation is no

iv. Commission Determination

27. In the 2014 Order, the Commission directed Grain Belt "to make a filing disclosing the results of the capacity allocation process within 30 days after the close of the open solicitation process."[46] Grain Belt did not submit a compliance filing during the required timeframe and, as such, has not satisfied the conditions of its initial grant of negotiated rate authority. Grain Belt indicates that it will seek approval of the Initial TSAs in a future compliance filing. Given the Project changes described in the instant filing and the passage of time, the Commission will conduct a *de novo* review of the Initial Open Solicitation and the Initial TSAs at such time as Grain Belt submits a filing providing sufficient detail to evaluate whether the capacity allocation process satisfied the Commission's requirements.

28. Therefore, we decline to address MLA's protests regarding Grain Belt's Initial Open Solicitation and capacity allocation at this time and note that interested parties may file comments or protests in future proceedings.

2. Four-Factor Analysis

29. In evaluating negotiated rate applications, the Commission employs a four-step analysis, as outlined in *Chinook*, to examine: (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.[47] This approach, which was further developed in the 2013 Policy Statement, simultaneously acknowledges the financing realities faced by merchant transmission developers, the mandates of the FPA, and the Commission's open access requirements. Moreover, this approach allows the Commission to use a consistent framework to evaluate requests for negotiated rate authority from a wide range of merchant transmission projects that can differ substantially from one project to the next.

30. As discussed below, we find that Grain Belt satisfies the Commission's requirements for just and reasonable rates (factor one) and regional reliability and operational efficiency (factor four). We reserve judgment on whether Grain Belt's capacity allocation process satisfies the Commission requirements for undue discrimination and undue preference (factors two and three). We will make a determination regarding those factors at such time as Grain Belt submits a filing providing sufficient detail to evaluate whether its capacity allocation process satisfies the

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longer open, and it has not been open since Invenergy acquired Grain Belt. *Id.* at n.18.

[46] 2014 Order, 147 FERC ¶ 61,098 at ordering para. B.

[47] *Chinook*, 126 FERC ¶ 61,134 at P 37.

Commission's requirements, either in advance of its open solicitation or post-open solicitation.

31. We also take this opportunity to clarify certain issues regarding the Commission's review of modifications to negotiated rate authority approved pursuant to the 2013 Policy Statement. The 2013 Policy Statement provides developers with discretion in timing their submission of a capacity allocation process for Commission review.[48] Here, Grain Belt seeks to amend its existing negotiated rate authority, including seeking Commission authorization to deviate from its previously-approved capacity allocation process. We clarify that developers like Grain Belt, which have existing negotiated rate authority under the 2013 Policy Statement, are not required to seek Commission approval *prior* to conducting a solicitation that deviates from their existing negotiated rate authority.[49] Rather, developers continue to have flexibility under the 2013 Policy Statement to seek Commission approval *after* completing a capacity allocation process.

a. Factor One: Just and Reasonable Rates

32. To approve negotiated rates for a transmission project, the Commission must find that the rates are just and reasonable.[50] In determining whether negotiated rates will be just and reasonable, the Commission considers whether the merchant transmission developer has assumed the full market risk for the cost of constructing its proposed project, and is not building within the footprint of the developer's (or an affiliate's) traditionally regulated system. In such a case, there are no captive customers who would be required to pay the costs of the project. The Commission also considers whether the developer or an affiliate already owns transmission facilities in the region where the project is to be located, what alternatives customers have, whether the developer is

[48] 2013 Policy Statement, 142 FERC ¶ 61,038 at P 31 (noting, for example, that developers can seek Commission approval after having completed their solicitation process or seek *ex ante* approval of a capacity allocation approach prior to conducting a solicitation, followed by a compliance filing that demonstrates selections were consistent with that process).

[49] Grain Belt cites language from the 2013 Policy Statement stating that developers "must seek Commission approval to deviate from their current capacity allocation process authority set forth in the Commission order granting them negotiated rate authority." Filing at 1 n.3 (quoting 2013 Policy Statement, 142 FERC ¶ 61,038 at P 43). We clarify that this language refers to developers with negotiated rate authority granted *prior* to issuance of the 2013 Policy Statement.

[50] *Chinook*, 126 FERC ¶ 61,134 at P 37; *Champlain Hudson Power Express, Inc.*, 132 FERC ¶ 61,006, at P 17 (2010).

capable of erecting any barriers to entry among competitors, and whether the developer would have any incentive to withhold capacity.[51]

i. Filing

33. Grain Belt asserts that its negotiated rates will continue to be just and reasonable.[52] Grain Belt states that it has assumed, and will continue to assume, the full market risk for the cost of constructing the Project and that it has no captive pool of customers from which it could recoup the cost of the Project.[53] Further, Grain Belt states that it does not own, and is not affiliated with any entities that own, a traditionally regulated transmission system, that the Project is not within the footprint of a traditionally regulated transmission system that is owned by either Grain Belt or any affiliate, and that neither Grain Belt nor any of its affiliates owns transmission facilities in the same region as the Project, other than interconnection facilities for interconnected generation facilities. Grain Belt also states that potential customers have an alternative option to seek transmission service from an incumbent transmission owner in the region that would be built and paid for via cost-of-service rates and that, accordingly, customers will only purchase transmission service from Grain Belt if doing so is cost-effective. Additionally, Grain Belt argues that it will not have any incentive to withhold capacity. Grain Belt explains that the Phase 1 Open Solicitation will be for a portion of the Phase 1 capacity and, concurrently, Grain Belt will seek to finalize any sales or leases of transmission capacity and obtain associated approvals of such dispositions of facilities under section 203 of the FPA which would, in turn, reduce the portion of the Project that Grain Belt controls.[54]

ii. Protest

34. MLA asserts that Invenergy, Grain Belt's parent, is attempting to limit competition through its pending complaint against MISO that argues that the Project should be included in MISO's Long Range Transmission Plan base case.[55] MLA argues that, in that proceeding, Invenergy contends that inclusion of Grain Belt in the base case will make unnecessary new transmission that MISO found needed and ordered in its Long Range Transmission Plan. MLA alleges that Invenergy is seeking to limit

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[51] *Chinook*, 126 FERC ¶ 61,134 at P 38.

[52] Filing at 9.

[53] *Id.* at 10.

[54] *Id.* at 11.

[55] MLA Protest at 6 (citing *Invenergy Transmission LLC*, Complaint, Docket No. EL22-83 (filed Aug. 8, 2022)).

alternative transmission service owned by incumbents so that customers will have no choice but to purchase Grain Belt's service whether it is cost-effective or not.

35. MLA also asserts that Grain Belt would not assume full market risk, as required to satisfy the Commission's just and reasonable rates requirement, if it receives financial support from the Department of Energy through a loan or other program.[56] MLA notes that Grain Belt may utilize new Department of Energy programs designed to provide financial support to eligible transmission projects through capacity contracts, loans, or loan guarantees. MLA states that Grain Belt's application may be the first instance of a project that applies for negotiated rate authority while receiving financial support from these programs and, therefore, Grain Belt's application presents an issue of first impression for the Commission. MLA states that, prior to new Department of Energy transmission financing programs, when a merchant transmission project failed, only the investor's money was lost; with these programs, "captive taxpayers" will absorb the financial risk of a merchant transmission project that cannot sell enough capacity to repay its loan.[57] MLA argues that risk is shifted from the merchant developer to the "captive taxpayers;" therefore, the merchant developer is no longer assuming the full market risk for its project. MLA contends that Grain Belt must demonstrate to the Commission that it is accepting full market risk for its project and not relying on government subsidies to shift risk. MLA concludes that developers relying on subsidies from the federal government must be rate regulated like other utilities that rely on captive customers to pay for their projects and that the Commission should find that subsidized merchant transmission developers like Grain Belt are not accepting the full market risk of their projects.[58]

iii. Answer

36. Grain Belt argues that Invenergy's pending complaint against MISO does not limit the availability of alternative transmission service because the alternatives to Grain Belt that exist now will continue to exist, regardless of the outcome of the complaint

[56] *Id.* at 7-9 (citing *Report and Order In the Matter of the Application of Grain Belt Express LLC for an Amendment to its Certificate of Convenience and Necessity*, Case No. EA-2023-0017 (Missouri Public Service Commission), at 98 (Oct. 12, 2023), https://efis.psc.mo.gov/Case/FilingDisplay/576033).

[57] *Id.* at 8.

[58] *Id.* at 9.

proceeding, and nothing would stop any customer from choosing any of those available alternatives.[59]

37. Further, Grain Belt argues that, whether a developer receives a federal loan, or any other type of financing, is not a component of the analysis that the Commission applies to determine whether a developer has taken on full market risk.[60] Grain Belt notes that the Commission considers whether there is a captive pool of customers that could be used to recoup the cost of the project. Grain Belt asserts that, if it were to participate in a Department of Energy loan program, that participation would be as part of its financing and that money must be paid back just like any other loan, with the market risk borne by Grain Belt.[61]

iv. Commission Determination

38. We find that Grain Belt's request for continued authorization to charge negotiated rates on the Project satisfies the first *Chinook* factor.

39. Grain Belt has no captive customers, and neither it nor any of its affiliates owns or operates transmission in the areas where the Project will be located. Grain Belt will bear the full market risk for purposes of the *Chinook* factors, will operate the Project on a merchant transmission basis, and will only recover costs from transmission customers awarded transmission capacity through open solicitation.

40. We disagree with MLA that Grain Belt's potential participation in federal programs designed to provide financial support to transmission projects constitutes a failure to assume full market risk. While MLA argues that "captive taxpayers" will absorb the financial risk of a merchant transmission project under such programs, the Commission's analysis of market risk focuses on whether the applicant has captive customers from whom it could recover the costs of the project and that commitments to take service are made by willing counterparties.[62] There is no evidence that federal

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[59] Grain Belt November 6 Answer at 7.

[60] *Id.*

[61] *Id.* at 8.

[62] *See, e.g.*, *Lucky Corridor, LLC*, 184 FERC ¶ 61,195, at P 15 (2023) (finding that the applicant satisfies the first *Chinook* factor and that it will bear the full market risk of the project because it does not have captive customers); *SunZia Transmission LLC*, 179 FERC ¶ 61,135 at P 18 (finding that the applicant satisfies the first *Chinook* factor because it "has no captive customers"); *Anbaric Dev. Partners, LLC*, 162 FERC ¶ 61,097, at P 15 (2018) (finding that the applicant meets the first *Chinook* factor and assumes full market risk because it "has no captive customers" and "no entity is required

programs to provide financial support to transmission projects would impose costs on a captive pool of customers or recover Project costs via cost-of-service rates. Therefore, Grain Belt's potential participation in such programs would not call into question whether Grain Belt has satisfied the first of the *Chinook* factors.

41. Further, we disagree with MLA's contention that the Commission should deny Grain Belt's application because Invenergy's pending complaint related to the manner in which merchant HVDC transmission is incorporated into MISO's transmission planning processes constitutes an attempt to limit alternatives to the Project.[63] Regardless of the resolution in that complaint proceeding, potential transmission customers are, and will continue to be, able to request transmission service directly from MISO or local transmission owners at cost-of-service rates, including being studied for any system upgrades needed to facilitate that service.[64] Therefore, potential transmission customers have alternatives available, and Grain Belt, which neither owns nor is affiliated with any entity that owns existing transmission assets in MISO, has no ability to erect barriers to entry to competition.

42. Accordingly, we find that Grain Belt satisfies the first factor of our negotiated rate analysis.

b. Factor Two: Undue Discrimination

43. To prevent undue discrimination when granting merchant transmission owners negotiated rate authority, the Commission has considered: (1) the terms and conditions

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to purchase transmission service" from the applicant); *see also Montana Alberta Tie Ltd.*, 129 FERC ¶ 61,154, at PP 12-13 (2009) (finding that a financing agreement between applicants and Western Area Power Administration does not raise concerns that the applicants are not assuming the full market risk of the project for purposes of negotiated rate authority).

[63] Invenergy Transmission LLC, Complaint, Docket No. EL22-83-000 (filed Aug. 8, 2022).

[64] *See SOO Green HVDC Link ProjectCo, LLC*, 172 FERC ¶ 61,086, at P 16 (2020) (finding that the applicant satisfies the first *Chinook* factor and noting that "no entity is required to purchase transmission service from [the applicant]" and that "customers have the alternative of seeking service from MISO or PJM, or from an incumbent transmission owner at cost-based rates"); *ITC Lake Erie Connector LLC*, 158 FERC ¶ 61,026, at P 17 (2017) (finding that the applicant satisfies the first *Chinook* factor and noting that "no entity is required to purchase transmission service from [the applicant], and customers have the alternative of seeking transmission from incumbent owners in the area . . . at cost-based rates").

of a merchant transmission developer's open season; and (2) its tariff commitments (or in the case of an interconnection with a regional transmission organization (RTO) or an independent system operator (ISO), its commitment to turn over operational control to that regional entity).[65] The 2013 Policy Statement provides an alternative to conducting a formal open season, allowing a developer to demonstrate no undue discrimination or preference by conducting an open solicitation that complies with the requirements of the 2013 Policy Statement.[66] Specifically, the developer must: (1) broadly solicit interest in the project from potential customers; and (2) after the solicitation process, demonstrate to the Commission that it has satisfied the solicitation, selection, and negotiation process criteria set forth in the 2013 Policy Statement.[67]

44. In the 2013 Policy Statement, the Commission stated that applicants must issue broad notice of the project in a manner 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.[68] Such 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) 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).[69] The developer should also specify in the notice the criteria it plans to use to select transmission customers. In addition, the developer may also adopt a specific set of objective criteria 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.[70]

45. Additionally, in the 2013 Policy Statement, the Commission stated that merchant transmission developers must disclose the results of their capacity allocation process. The merchant transmission developer's disclosure would be part of the Commission's

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[65] *Chinook*, 126 FERC ¶ 61,134 at P 40.

[66] 2013 Policy Statement, 142 FERC ¶ 61,038 at PP 15, 23.

[67] *Id.* P 16.

[68] *Id.* P 23.

[69] *Id.* P 20.

[70] *Id.* PP 24-27.

approval of the capacity allocation process and thus noticed and acted upon under section 205 of the FPA. Developers must demonstrate that the processes that led to the identification of transmission customers and the execution of the relevant contractual arrangements are consistent with the 2013 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 2013 Policy Statement in order to provide transparency to the Commission and interested parties.[71]

46. In the 2013 Policy Statement, the Commission emphasized that the information in the post-selection demonstration is an essential part of a merchant transmission 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.[72] The Commission allows developers discretion in the timing of requests for approval of capacity allocation processes.[73] For example, 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 approving that approach that the developer's selection of customers was consistent with the approved selection process.

i. Filing

47. Grain Belt states that it seeks increased flexibility with respect to its future open solicitation(s) to allow bidders to submit bids with flexible bidding terms and conditions to maximize value and not unnecessarily limit the range of bids that could potentially provide greater economic value to the Project.[74] Grain Belt states that, in conjunction with an independent evaluator, it intends to determine what selection criteria to use and to determine which bids provide the greatest economic value, rather than to limit the criteria to pre-determined weighting.[75] As noted above, Grain Belt also states that it anticipates

[71] *Id.* P 30.

[72] *Id.* P 32.

[73] *Id.* P 31.

[74] Filing at 9 (citing *Linden VFT*, 162 FERC ¶ 61,297 at PP 1, 23; 2013 Policy Statement, 142 FERC ¶ 61,038 at P 25).

[75] Grain Belt notes that, in its initial application, it set forth a specific set of criteria that it intended to use in the Initial Open Solicitation. In the instant application, Grain

transferring the remainder of the Phase 1 capacity to buyers and/or lessees via sales and/or leases of undivided interests subject to Commission approval for each transfer pursuant to section 203 of the FPA, which would reduce the portion of the Project that Grain Belt controls.[76]

48. Grain Belt asserts that there continues to be no potential for undue discrimination.[77] Grain Belt explains that it has engaged the Brattle Group as an independent consultant to run the open solicitation for a portion of capacity for Phase 1. Grain Belt contends that the solicitation process will satisfy the Commission's standard by broadly soliciting interest in the Project from potential customers. Grain Belt also states that it will provide the marketplace with broad notice regarding its intent to subscribe a portion of the Project's Phase 1 capacity to customers with potentially varying durations and payment arrangements. In addition, Grain Belt will work with the Brattle Group to assist in the development of selection criteria and to ensure that the open solicitation process is conducted in a transparent and non-discriminatory manner. Grain Belt states that the selection criteria that Grain Belt develops in conjunction with the Brattle Group will be specified in the notice announcing the open solicitation.[78] Grain Belt asserts that, in the event a Grain Belt affiliate were to participate in the open solicitation, the utilization of an independent evaluator would help to ensure that no undue discrimination is present in the consideration of bids received. Finally, Grain Belt states that, following the solicitation process, Grain Belt will file a post-solicitation compliance filing, including the Brattle Group's report that will explain how the solicitation process satisfied the Commission's criteria set forth in the 2013 Policy Statement.[79]

ii. Protest

49. MLA alleges that Grain Belt has already begun negotiations for capacity sales despite requesting amended negotiated rate authority for a "future" open solicitation

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Belt seeks additional flexibility, which it contends is similar to what the Commission has granted in the past. *Id.* at n.19 (citing 2014 Order, 147 FERC ¶ 61,098 at P 20; *Linden VFT*, 162 FERC ¶ 61,297).

[76] *Id.* at 8 (citing 16 U.S.C. § 824b).

[77] *Id.* at 11.

[78] *Id.* at 12.

[79] *Id.* (citing 2013 Policy Statement, 142 FERC ¶ 61,038 at P 23).

process.[80] MLA also asserts that sales of capacity and undivided interests must be separated because asset sales are subject to section 203 of the FPA and not a part of negotiating rates with potential customers.[81] MLA raises concerns that Grain Belt has not provided sufficient detail on how sales of undivided interests would reduce the capacity available in an open solicitation.[82] Specifically, MLA questions whether Grain Belt must post an update on available capacity each time it makes a sale of an undivided interest as well as the effect should Grain Belt sell the entire Project as undivided interest. MLA contends that Grain Belt must decide whether it is offering capacity in an open solicitation, or sales of undivided interests in its Project through a different process.

iii. Answer

50. Grain Belt agrees with MLA that sales of transmission and sales or leases of undivided interests are separate.[83] Grain Belt argues that it is keeping the two legally distinct processes separate, and is seeking Commission approval through the appropriate procedural and statutory channels applicable to each type of transaction: negotiated rate authority pursuant to section 205 of the FPA for sales of transmission service, and authorization to engage in a sale or lease of an undivided interest in a Commission-jurisdictional facility pursuant to section 203.[84] Grain Belt further argues that MLA's contention that Grain Belt has begun negotiating capacity sales prior to the proposed open solicitation is based on a misapprehension of these two separate processes and is factually incorrect.

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[80] MLA Protest at 5-6 (citing Grain Belt Express LLC Ex. 1 (Testimony of Shashank Sane), *In the Matter of the Application of Grain Belt Express LLC for an Amendment to its Certificate of Convenience and Necessity*, Case No. EA-2023-0017 (Missouri Public Service Commission), at 13:7-10 (filed June 27, 2023) https://efis.psc.mo.gov/Case/FilingDisplay/208635; Jeff St. John, *A $7B power line from Kansas to Indiana moves closer to reality*, Canary Media, (Oct. 2023) https://www.canarymedia.com/articles/transmission/a-7b-power-line-from-kansas-to-indiana-moves-closer-to-reality).

[81] *Id.* at 4-5.

[82] *Id.* (citing Filing at 8).

[83] Grain Belt November 6 Answer at 4.

[84] *Id.* at 5.

iv. Commission Determination

51. Based on the information provided in its request for amended negotiated rate authority, we will reserve judgment on whether Grain Belt's request for continued authorization to charge negotiated rates on the Project satisfies the second *Chinook* factor.

52. Grain Belt requests flexibility regarding its future capacity allocation process but provides limited detail on the selection process or selection criteria for the Commission to evaluate. We defer a determination on whether Grain Belt's proposed capacity allocation process satisfies the Commission's undue discrimination requirements. Moreover, because Grain Belt has not yet held its Phase 1 Open Solicitation, it cannot yet seek *ex post* approval of its capacity allocation process. We also note that use of an independent evaluator alone is not sufficient to satisfy this factor. While Grain Belt may deviate from the capacity allocation approach previously approved by the Commission, we reserve judgment on Grain Belt's open solicitation process.

53. As the Commission is not evaluating in this order whether Grain Belt's future capacity allocation process satisfies the Commission's requirements, we decline to address protests and allegations raised by MLA regarding Grain Belt's future capacity allocation process at this time and note that interested parties may file comments or protests in future proceedings.

c. Factor Three: Undue Preference and Affiliate Concerns

54. In the context of merchant transmission, the Commission's concerns regarding the potential for affiliate abuse arise when the merchant transmission developer is affiliated with either the anchor customer, participants in the open season or solicitation, or customers that subsequently take service on the merchant transmission line. The Commission requires 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 affiliate and the corresponding treatment of nonaffiliated potential customers is just, reasonable, and not unduly discriminatory or preferential.[85]

i. Filing

55. Grain Belt asserts that there continues to be no potential for undue preference.[86] Grain Belt notes that the Commission maintains safeguards to ensure that no undue preference is afforded to affiliate, including generation affiliates, that may participate in

[85] 2013 Policy Statement, 142 FERC ¶ 61,038 at P 34.

[86] Filing at 12.

an open solicitation and ultimately take service on the transmission line.[87] Grain Belt asserts that its utilization of an independent evaluator will help to ensure that no undue preference is exercised and, accordingly, there will be no potential for Grain Belt to exercise undue preference. Grain Belt also notes that, in the unlikely event an affiliate were to participate in the open solicitation, the utilization of an independent evaluator would help to ensure that no undue discrimination is present in the consideration of bids received.[88]

ii. Commission Determination

56. For similar reasons as with *Chinook* factor two, we will reserve judgment on whether Grain Belt's request for continued authorization to charge negotiated rates on the Project satisfies the Commission's undue preference requirements until such time as the record is adequate to support a determination on that issue.

d. Factor Four: Regional Reliability

57. To ensure regional reliability and operational efficiency, the Commission requires that any merchant transmission developer whose project is connected to an RTO/ISO turn over operational control of its project to that regional entity. Merchant transmission projects, like cost-based transmission projects, are also subject to mandatory reliability requirements.[89] Merchant transmission developers are required to comport with all applicable requirements of the North American Electric Reliability Corporation (NERC) and any regional reliability council in which they are located.

i. Filing

58. Grain Belt asserts that the Project will continue to foster regional reliability and operational efficiency.[90] Grain Belt states that it will satisfy this factor by turning over operational control to one of the RTOs with which Grain Belt interconnects and will comply with all reliability requirements, including all applicable NERC standards.

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[87] *Id.* (citing 2013 Policy Statement, 142 FERC ¶ 61,038 at P 34).

[88] *Id.*

[89] *See, e.g.*, *Rules Concerning Certification of the Elec. Reliability Org.*; *& Procs for the Establishment*, *Approval*, *& Enf't of Elec. Reliability Standards*, Order No. 672, 114 FERC ¶ 61,104, *order on reh'g*, Order No. 672-A, 114 FERC ¶ 61,328 (2006).

[90] Filing at 12.

ii. Commission Determination

59. We acknowledge Grain Belt's commitment to turn over operational control of the Project to one of the RTOs/ISOs to which it interconnects and comply with all applicable reliability requirements. Accordingly, we find that Grain Belt's proposal meets these regional reliability and operational efficiency requirements to satisfy the fourth *Chinook* factor, subject to Grain Belt's continuing participation in the necessary regional transmission planning processes.

3. Section 203 Applicability

a. MLA Answer

60. MLA asserts that the sale of Grain Belt to Invenergy in 2020 was a sale of facilities requiring approval by the Commission under section 203(a)(1)(A) of the FPA.[91] MLA states that it cannot find evidence that Clean Line secured Commission approval for the sale of its facilities to Invenergy nor has Grain Belt mentioned such an approval.[92] MLA argues that it is contradictory for Grain Belt to claim that future sales of the Project are subject to approval under section 203, but that the sale of the entire Project in 2020 was not.

b. Grain Belt November 13 Answer

61. Grain Belt argues that MLA is incorrect that section 203 approval was required for the Project to change upstream ownership.[93] Grain Belt asserts that it is not yet a public utility under the FPA and does not own any Commission-jurisdictional assets,[94] and that section 203(a)(1)(A) only applies to the disposition of "facilities subject to the jurisdiction of the Commission."[95] Grain Belt states that it is in the process of developing a transmission line, but that transmission line has not yet been built nor energized, and it

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[91] MLA November 8 Answer at 1 (citing 16 U.S.C. § 824b(a)(1)(A) ("No public utility shall, without first having secured an order of the Commission authorizing it to do so – sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $10,000,000.")).

[92] *Id.* at 1-2.

[93] Grain Belt November 13 Answer at 1.

[94] *Id.* (citing *TransWest Express LLC*, 174 FERC ¶ 61,160, at P 3 n.4 (2021)).

[95] *Id.* at 2 (citing 16 U.S.C. § 824b(a)(1)(A)).

is therefore not yet capable of providing transmission service. Further, Grain Belt states that it does not have any rate schedules on file or associated books and records.[96]

62. Grain Belt states that it is commonplace for entities with negotiated rate authority that are developing transmission facilities to enter into transactions to convey portions of their development project without seeking authorization pursuant to section 203 precisely because such facilities are not yet subject to the jurisdiction of the Commission.[97] Moreover, Grain Belt argues that the Commission has already concluded it does not have jurisdiction over such transactions. Grain Belt states that, in *New York Transco*, the Commission dismissed a section 203 application for lack of jurisdiction where the transmission facilities to be transferred were "not yet in existence, energized or in service," finding that such facilities "are not and will not be in service at the time of closing and therefore are not subject to the Commission's jurisdiction under FPA section 203."[98]

c. ILA Motion

63. Like MLA, ILA asserts that Grain Belt's upstream ownership, together with its negotiated rate authority, was sold without compliance with section 203. ILA argues that Grain Belt therefore does not hold any negotiated rate authority that can be amended, and its application is a nullity that the Commission should dismiss with prejudice.[99]

64. ILA makes several arguments that the sale of interest in Grain Belt to Invenergy required Commission authorization under section 203. First, ILA argues that Grain Belt's assertion that its sale to Invenergy was not subject to the Commission's jurisdiction is incorrect because, if Grain Belt were not subject to Commission jurisdiction, the instant application is unnecessary.[100]

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[96] *Id.*

[97] *Id.* (citing *Pattern Energy Grp. LP*, 178 FERC ¶ 61,090, at P 10; *Ameren Transmission Co.*, 172 FERC ¶ 61,123).

[98] *Id.* at 2-3 (citing *N.Y. Transco, LLC*, 151 FERC ¶ 61,005, at P 16 (2015) (*New York Transco*), *reh'g denied*, 153 FERC ¶ 61,259 (2015) (New York Transco Rehearing Order)). Grain Belt states it is not uncommon for the Commission to dismiss section 203 applications where it lacks jurisdiction. *Id.* at 3 n.8 (citing *PPL Elec. Utils. Corp.*, 168 FERC ¶ 61,046 (2019); *Fla. Power & Light Co.*, 161 FERC ¶ 61,254 (2017)).

[99] ILA Motion at 2.

[100] *Id.* at 7.

65. Next, ILA argues that facilities subject to section 203 include "paper facilities," including negotiated rate authority.[101] ILA argues that section 203 jurisdiction attaches to the transfer of "paper facilities," such as the books and records and wholesale power sale contracts of a power marketing subsidiary,[102] and whenever direct or indirect control over a public utility and its jurisdictional facilities is transferred from one company to another,[103] which ILA contends is the type of transfer effected here. ILA also asserts that the Commission's decision in *Enova* makes clear that it has jurisdiction over "paper facilities."[104]

66. ILA argues that Grain Belt is a "public utility" under the FPA because its negotiated rate authority is a "paper jurisdictional facility."[105] ILA argues that, if Grain Belt were not subject to the Commission's jurisdiction until it has energized physical facilities, then Grain Belt would not have had to request authority to begin solicitation or negotiations, or waiver of reporting and filing requirements, or other requests until it was "ready to put iron in the ground."[106] ILA also disagrees that the transaction is not subject to section 203 because Grain Belt does not yet have any rate schedules on file, given that Grain Belt will not submit any cost-based rates for its transmission services, because negotiated rate authority functions as a tariff that prescribes a formula.[107] Further, ILA argues that, just as market-based rate authority is a "facility" used in the sale of electricity for resale, Grain Belt's negotiated rate authority is a "facility" that it has used and will continue to use in its business of transmitting electricity in interstate commerce.[108] Next, ILA contends that Grain Belt already conducts itself as a public utility as it has entered into a contract to sell transmission capacity using its negotiated rate authority. In addition, ILA argues that, if Grain Belt can freely transfer negotiated rate authority, it undermines the Commission's process for determining whether to grant negotiated rate

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[101] *Id.* at 8.

[102] *Id.* (citing *NorAm Energy Servs., Inc.*, 79 FERC ¶ 61,108, 61,500 (1997); *Portland Gen. Elec. Co.*, 81 FERC ¶ 61,374 (1997)).

[103] *Id.* at 8-9 (citing *Enova Corp.*, 79 FERC ¶ 61,107 (1997) (*Enova*)).

[104] *Id.* at 9.

[105] *Id.* at 10.

[106] *Id.* at 11.

[107] *Id.* at 12.

[108] *Id.*

authority.[109] ILA further notes that the Commission has sought to guard against cross-subsidization and affiliate abuse in determining whether transactions subject to section 203 are consistent with the public interest and asserts that the sale to Invenergy raises such concerns related to Invenergy's generation affiliates.[110]

67. ILA asserts therefore that section 203 applies to the sale of Clean Line's ownership interest to Invenergy because it was a sale of a jurisdictional facility. ILA notes that the transaction value of the sale was in excess of the $10 million threshold under section 203(a)(1)(A),[111] and that no blanket authorization applies to the sale of Grain Belt.[112] Finally, ILA argues that precedent Grain Belt cites to support its assertion that it is not a public utility subject to Commission jurisdiction is inapposite.[113]

d. Grain Belt January 12 Answer

68. Grain Belt argues that the ILA Motion lacks merit.[114] Grain Belt contends that ILA is incorrect that Grain Belt does not hold negotiated rate authority; it holds negotiated rate authority pursuant to a Commission order.[115] Second, Grain Belt reiterates that section 203 approval was not required for Grain Belt's sale because Grain Belt was not a public utility under the FPA at the time, and did not (and does not) own any Commission-jurisdictional assets, and section 203(a)(1)(A) of the FPA only applies to the disposition of "facilities subject to the jurisdiction of the Commission."[116] Grain Belt similarly reiterates that the Commission has dismissed section 203 applications for lack of jurisdiction where the transmission facilities to be transferred were "not yet in existence, energized or in service" and would not be energized at the time of closing,

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[109] *Id.* at 13.

[110] *Id.* at 13-14.

[111] *Id.* at 3, 15 (citing Ex. A).

[112] *Id.* at 21.

[113] *Id.* (discussing, among others, *New York Transco*, 151 FERC ¶ 61,005).

[114] Grain Belt January 12 Answer at 4.

[115] *Id.* (citing Filing at 2).

[116] *Id.* at 5.

finding that such facilities "are not and will not be in service at the time of closing and therefore are not subject to the Commission's jurisdiction under FPA section 203."[117]

69. Conversely, Grain Belt states that section 203 approval would be required for any Grain Belt sales or leases that close after the energization of transmission facilities, since energization would trigger Commission jurisdiction.[118] Grain Belt also argues that, while the Commission has jurisdiction over "paper facilities"[119] as ILA contends, finding that negotiated rate authority is a "paper" facility would be contrary to Commission precedent.[120] Grain Belt asserts that a development-stage transmission project with negotiated rate authority is materially different from a power marketer that makes jurisdictional sales, because negotiated rate authority constitutes permission to enter into negotiations for contracts and is conditioned on subsequent Commission review and approval.

70. Finally, Grain Belt argues that, even if section 203 approval were required for the sale to Invenergy, it would not follow that Grain Belt has not maintained its negotiated rate authority, as the Commission has not issued any order removing Grain Belt's negotiated rate authority.[121] Further, even if the authority did disappear, Grain Belt argues that it would be entitled to reapply for negotiated rate authority and, because the Commission assesses applications for an amendment to negotiated rate authority *de novo* under the same standard that it does for new applications for negotiated rate authority, it would not functionally make a difference for the purposes of the Commission's analysis whether this application was an amendment to existing negotiated rate authority or a newly filed application for negotiated rate authority.[122]

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[117] *Id.* at 6 (citing *New York Transco*, 151 FERC ¶ 61,005 at P 16).

[118] *Id.*

[119] *Id.* at 8 (citing *Enova*, 79 FERC at 61,489).

[120] *Id.* (citing New York Transco Rehearing Order, 153 FERC ¶ 61,259 at P 20 ("[I]n *Enova*, the Commission recognized that while the traditional focus of facilities has been on physical facilities, the term had also been expanded to include paper facilities. At no point, however, did the Commission suggest that facilities that do not provide Commission-jurisdictional service are within the scope of FPA section 203.")).

[121] *Id.* at 9.

[122] *Id.*

e. Commission Determination

71. Given that we are reviewing Grain Belt's filing *de novo*, we find moot protestors' argument that Grain Belt may not rely on the Commission's prior grant of negotiated rate authority in the 2014 Order because Grain Belt failed to obtain section 203 approval. Our findings here are based on Grain Belt's current ownership structure and project design, and thus do not turn on whether prior section 203 authorization was required for either Invenergy's acquisition of Grain Belt, or the transfer of Grain Belt's negotiated rate authority.

The Commission orders:

Grain Belt's request for continued authority to sell transmission rights at negotiated rates is hereby granted in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Debbie-Anne A. Reese,
Acting Secretary.

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