

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Allocation of Capacity on New Merchant)
Transmission Projects and New Cost-Based,) **Docket No. AD12-9-000**
Participant-Funded Transmission Projects)
Docket No. AD12-9-000)

**POST-WORKSHOP COMMENTS OF
CLEAN LINE ENERGY PARTNERS LLC**

Pursuant to Rule 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission), 18 CFR § 385.212 (2010), and the Commission’s Notice in Docket AD12-09-000, Clean Line Energy Partners LLC (Clean Line) respectfully submits these comments in the above-captioned proceeding.

On February 28, 2012, the Commission Staff convened a Staff-facilitated Workshop pursuant to the Commission’s January 31, 2012 Notice to provide interested parties with the opportunity to discuss issues related to the new ownership and capacity sales models that have emerged for developing, owning, and operating electric transmission infrastructure. In the Notice, parties were also invited to submit comments to address issues raised during the Workshop. Clean Line respectfully submits these comments.

I. COMMUNICATIONS

All correspondence, communications, pleading, and other documents relating to this proceeding should be served upon:

Kathryn L. Patton
Vice President and General Counsel
Clean Line Energy Partners LLC
1001 McKinney Street, Suite 700
Houston, TX 77002
832-319-6330
kpatton@cleanlineenergy.com

II. BACKGROUND

On March 15, 2011, the Commission held a technical conference in Docket AD11-11-000 to obtain further information to aid it in considering issues related to the ownership of and priority access rights to new participant-funded transmission projects. In particular, during this Technical Conference, Staff sought to explore issues related to priority rights to use transmission infrastructure developed under two specific contexts: independent and/or merchant transmission and generator lead lines. In both contexts, participants were encouraged to identify and discuss the appropriate balance between the Commission's requirements for open access and the needs of project developers. Participants were also encouraged to propose and discuss specific regulatory alternatives that are consistent with the Commission's open access policies and its statutory responsibility to ensure that rates, terms, and conditions of service are just and reasonable and not unduly discriminatory or preferential. Staff asked participants to be prepared to address how the economics of a proposed project might be affected by the Commission's current affiliate rules and pricing structures (e.g., cost-based or negotiated rates).

Having analyzed the discussion and comments received in Docket AD11-11-000, Commission Staff is now "reviewing a range of more specific policy reforms that the Commission may wish to consider."¹ As described in the Notice for AD12-9-000, the purpose of the specific Staff workshop and subsequent comments is to obtain input on possible policy reforms "to reasonably allocate capacity created by new merchant transmission projects and new cost-based, participant-funded transmission projects,"² while balancing open access principles with the needs of transmission developers. In particular, Commission Staff is seeking "to

¹ Docket No. AD12-9, *Notice of Workshop, Agenda*, p. 1.

² *Id.*

explore the merits of potential reforms to the Commission’s policies governing negotiated rate authority for merchant transmission projects.”³

Clean Line is an independent developer of high voltage, long-haul transmission lines, focusing exclusively on connecting the best renewable energy resources in North America with robust electricity load centers and customers in regions with less plentiful or less cost effective local renewable energy resources. Clean Line provides transmission solutions to generators and load-serving utilities to efficiently interconnect clean energy with consumers. It is Clean Line’s belief that the all-in delivered cost of these high-quality renewable resources, including transmission, is lower than local, less favorable renewable energy sources.

All four of Clean Line’s projects⁴ will facilitate the reliable delivery of power generated by renewable resources, and the development of these projects will support national efforts to significantly increase renewable electric generation capacity. These projects will meet the needs of generators and utilities for new transmission capacity and will enable the construction of thousands of megawatts of new, cost-effective renewable electric generation capacity. The addition of this generation capacity will create new jobs, stimulate domestic manufacturing, and reduce pollution and water consumption.

³ *Id.* at 2.

⁴ Clean Line Energy Partners LLC presently has four major transmission projects underway in the United States. They are (1) the Rock Island Clean Line, a high-voltage, direct current (“HVDC”) transmission line that will connect 3,500 MW of wind power from Iowa, South Dakota, Minnesota and Nebraska with load centers in Illinois and states farther east; (2) the Grain Belt Express Clean Line, an HVDC transmission line that will be capable of moving up to 3,500 MW of renewable power from new generation projects in western Kansas to the service area of the Midwest Independent Transmission System Operator (“MISO”) and the eastern United States. (3) the Plains & Eastern Clean Line, an 800-mile, HVDC line that will transmit up to 7,000 MW of renewable power from the Oklahoma and Texas Panhandles, and potentially Kansas, to Tennessee Valley Authority and the southeastern United States; (4) the Centennial West Clean Line, an HVDV line that will gather up to 3,500 MW of power from renewable energy generation projects in eastern New Mexico and surrounding areas and will transmit it to load centers such as southern Nevada, Southern California, Arizona, and other areas in the Southwest.

III. COMMENTS

Summary of Position

Clean Line does not support the reversion to a requirement that all merchant transmission be allocated through an open season. Anchor tenant processes allow customization and negotiation that is not possible in an open season. If the Commission combines the anchor tenant process and open season process, the collapsed process should be an additional option available to merchant developers, not a replacement for the current model. The current anchor tenant model, though not perfect, is workable. If, however, the Commission replaces the anchor tenant process and requires all capacity to be sold through an open season, it should allow negotiation and customized terms. In Clean Line's view, a better approach for the Commission would be to allow developers to sell 100% of their capacity through an anchor tenant process subject to additional conditions. The key distinction between this anchor tenant process and an open season is a flexible timeline and the ability to negotiate terms and conditions with qualified bidders.

Return to 100% Open Season Is Likely to Harm Developers

Historically, the Commission has required that all merchant transmission capacity be allocated during an open season. Beginning in 2009 in *Chinook*,⁵ the Commission has permitted, on a case-by-case basis, the allocation of some percentage of a line's capacity to anchor customers on a pre-subscription basis, with the remainder made available through an open season. To date, however, the Commission has rejected requests to allocate 100 percent of a line's capacity to anchor customers,⁶. The Commission has not foreclosed the possibility that a merchant transmission developer could propose, and justify, a 100 percent capacity allocation to

⁵ *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134 (2009) (Chinook).

⁶ *SunZia Transmission, LLC*, 131 FERC ¶ 61,162 (2010) (finding that the applicant did not provide sufficient justification to support allocation of 100% of its capacity to anchor customers).

anchor customers.⁷ During the technical conference held in March 2011 in Docket No. AD11-11-000, several commenters suggested that the Commission allow up to 100 percent of a line's capacity to be allocated to an anchor customer. Although Clean Line supports this position, Clean Line also believes the existing regulatory practice is workable, though not ideal.

In this Docket, Staff seeks comment regarding “whether it would be appropriate for the Commission to return to the pre-*Chinook* requirement for open seasons as the means to allocate all capacity on a merchant transmission line, but also to allow for distinctions among prospective customers in the open season based on transparent and not unduly discriminatory criteria, with the possible result that a single customer could be awarded up to 100 percent of capacity.”⁸ Staff also wants to explore the use of the terms “open season” and “anchor customer” as used by the industry.⁹ Senior FERC Staff noted that while petitioners have characterized certain parties as anchor customers, at times the process used to select these anchor tenants looks like what Staff would consider an open season. To help parties think about the issues, Staff put forward several questions in the Notice and during the workshop itself.

For example, “[w]ould the above-noted approach provide similar benefits as presubscription of anchor customers? If not, in what ways does presubscription of anchor customers enable a project to succeed that are not also satisfied by allocating up to 100 percent of capacity through an open season, including to a single customer?”¹⁰ These questions zero-in on the specific concern that Clean Line addressed during the workshop: open season processes are generally characterized by one-way information flow – from bidder to seller; whereas, anchor tenant *negotiations* are characterized by two-way flows between the negotiating parties. In an

⁷ Docket No. AD12-9, *Notice of Workshop, Agenda*, p. 2.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

anchor tenant process, the transmission developer negotiates not only pricing but also many other key terms, including credit support, transmission project development risk, generation project development risk, cost overruns, in-service dates, and availability. In effect, the anchor tenant process results in arrangements that look very much like joint ventures. This negotiation allows parties to address specific needs arising from each party's unique circumstances. Negotiating anchor tenant agreements requires a large commitment of time and resources from the customer. The customer is unlikely to devote such time and resources without a clear view that the effort will result in the ability to procure the desired capacity.

On the other hand, in an open season process, the developer typically defines pricing, terms and conditions at the outset of the process. Because FERC precedent is to offer all customers the same pricing, terms and conditions, the developer has limited opportunity for negotiation in the open season. Without a prior negotiation with an anchor tenant, the developer faces a substantial risk that an open season will fail because the offered pricing, terms and conditions do not adequately address customers' needs. If the terms of the open season evolve as a result of negotiation, the developer then has to offer the same terms to other customers and potentially restart the open season process.

For these reasons, Clean Line does not support Staff's proposal to reinstate the requirement for an open season process for all capacity. The anchor tenant model is valuable to developers, even if not perfect. However well-intentioned, a reinstated requirement for an open season for all capacity will be a step backward for merchant developers. To prevent this unintended consequence, a new, more flexible procedure for open seasons should be an additional alternative, but not a replacement, to the current anchor tenant approach.

If the Commission does reinstate the requirement for an open season for all capacity, it is critical to allow for negotiations with customers. This requires relaxing the mandate that all customers be offered the same pricing, terms and conditions. It is possible that an “open season” or “open solicitation” process could be designed where a “standard offer” type of contract could serve as the safe harbor contract offer, with negotiations off of that contract leading to customized arrangements with one or more parties. The standard offer contract in this context would by necessity contain terms and conditions that might not be as attractive to some bidders as a negotiated arrangement. However, the standard offer would represent a guarantee that all parties could procure transmission capacity if they are willing to accept the standard terms. The standard offer would balance fair, open transmission access with the need for negotiated agreements.

A Better Approach Is To Allow 100% Anchor Tenant Subject to Certain Conditions

Instead of re-instating the open season requirement, Clean Line suggests that the Commission examine those circumstances under which a developer may be permitted to sell 100% of its capacity to anchor tenants. This may accomplish the Commission’s goal of allowing merchant developers the option of a single, more flexible process that nonetheless meets the Commission’s goals. Clean Line recommends that the Commission permit a transmission line to be subscribed through 100% anchor-tenants if the following guidelines are followed:

1. A developer must have a written, publicly available “policy” with respect to its process for soliciting capacity subscribers, explaining how its solicitations are conducted and how the developer ensures a fair process in obtaining anchor tenants or participant funders, including the developer’s credit requirements.

2. A developer must give “notice” to potential capacity subscribers of its policies, including a public announcement of its project, the point of contact for negotiating transmission service, and any applicable deadlines. This notice might include a fully developed standard offer contract for capacity purchase, with any changes to the notice made to all entities who have expressed interest in arranging for transmission capacity.

3. A project website must be maintained, including a point of contact for arranging transmission capacity, any applicable deadlines, and the developer’s policy for arranging for service.

4. Applicant should propose in its filing those screening parameters by which Applicant defines suitable entities that are eligible to be considered as potential anchor-tenant customers, including but not limited to creditworthiness, and minimum subscription amounts,

5. All project information, as well as questions submitted and answers provided by the applicant, should be made publicly available on the project website.

If the anchor-tenant negotiation phase concludes but capacity remains available, that capacity should be made available first through an open season and then on an open access basis through an OASIS or other transparent mechanism. The Applicant must also submit an OATT that allows for the resale of unused capacity rights in secondary markets. However, no traditional open season should be required if the project is fully subscribed during the anchor-tenant negotiation phase, as long as all transparency guidelines suggested above are met.

Early Mover Treatment

Clean Line agrees specifically with Tonbridge Power’s comments during the Technical Conference that “first movers” (for example, those willing to take on early risk) should get the

benefit of advantageous rates. As an analogy, Clean Line notes that a similar risk-reward process exists in the U.S. drug industry, which provides a 20-year drug patent protection as a reward for research and development (R&D).¹¹ By being the only company that can profit from a particular drug for a set period of time in order to recoup the expenditure and earn a profit, this patent protection gives the company who expends the money in R&D and clinical trials incentive to continue developing new drugs. Clean Line suggests that a similar justification exist for merchant transmission developers that invest in the development and permitting process to bring extremely complex projects to market and their customers that commit early or share in those development risks. If a transmission customer receives better pricing and terms because it accepts early stage risk, this preference is not undue or discriminatory. Rather, the favorable pricing and terms compensate the customer for its early risk tolerance. Clean Line notes this is similar to how interconnection applicants are treated under FERC's pro forma Open Access Transmission Tariff. Not all interconnection parties pay the same amount for upgrades. Those applicants that risk money to apply early to secure their spot in the queue often pay lower upgrades. Their favorable outcome, however, is not due to preference or discrimination but rather to their early financial commitments.

¹¹ Patents expire 20 years from the date of filing, and are granted by the patent and trademark office anywhere along the development lifeline of a drug and can encompass a wide range of claims. "Exclusivity" is also granted by the FDA: exclusivity is the exclusive marketing rights as granted by the FDA upon approval of a drug, and can, or not, run concurrently with a patent. Exclusivity is a statutory provision and is granted to an applicant if statutory requirements are met. Exclusivity was designed to promote a balance between new drug innovation and generic drug competition.

Affiliated Anchor Tenants

While Clean Line does not have any affiliates that either own generation or are load serving entities, Clean Line recognizes that entities such as these may make natural partners for the ultimate financing, construction, and operation of Clean Line's projects. For this reason, Clean Line urges the Commission to consider allowing affiliates to be anchor tenants, subject to a FERC-approved capacity limitation for affiliates; Clean Line suggests that an appropriate limit be 75%.

There may be many circumstances in which a generator needs a tie line with excess capacity. This creates the opportunity for the generator to partner with the merchant transmission developer. Such a partnership is prohibited under the current Commission rules. This prohibition presents an impediment to successful merchant development of HVDC projects. Because of their capital costs, transmission line developers require extensive reach into the financial markets. Debt and equity investors in transmission projects underwrite their investments by looking to the quality of the underlying source of revenue. Merchant transmission presents unique challenges as it does not rely on regulated rates or captive ratepayers for the recovery of costs. Debt and equity investors in merchant transmission will closely scrutinize the creditworthiness of transmission service customers and will also likely require long-term contracts of twenty or more years. In order for a transmission service contract to be financed, a customer must typically either have an investment grade credit rating (BBB- or higher from Standard and Poor's or Baa3 or higher from Moody's) or, alternatively, post a large amount of additional security in the form of a letter of credit or cash deposits.

The extensive credit requirements for transmission service exclude a large number of potential customers from purchasing service on merchant transmission lines. The issue is particularly important for the renewable energy sector, where project developers run the gamut of size and creditworthiness from large multinational corporations to small, local, family interests. In order to broaden the customer base of merchant transmission, Clean Line believes that the Commission must allow innovative structures.

One way to limit the credit requirements of merchant transmission service is to finance the generation and transmission line together. In practice, this is done all the time with “gen ties.” Such a joint financing structure requires common ownership of generation and transmission facilities. If the generation and transmission facilities share common financing and ownership, it greatly reduces the payment risk. Implementing such a structure would require the Commission to relax restrictions around affiliate ownership of generation and transmission for merchant transmission projects.

Other Issues

Clean Line notes that arguments were made during the workshop regarding (1) “right-sizing” of independent/merchant projects, and (2) incentives to undersize the projects in order to ensure that the line is fully subscribed. These arguments need to be debunked. As noted by one of the parties, success for merchant transmission projects is the ability to subscribe the capacity to the level needed to support financing. This is the litmus test of whether a transmission project proceeds, but changing the size of a project can introduce uncertainty in this process. Traditional utilities stand ready, willing, and able to continue serving as the regulated backstop, utilizing traditional transmission planning, expansion, and service. Merchant lines serve to accomplish specific goals that cannot or are not being achieved by the traditional

planning processes. In fact, any balkanization of the grid is largely due to uncoordinated planning processes and cost allocation schemes. Interregional and long haul merchant lines such as those being developed by Clean Line decrease fragmentation of the power grid. HVDC lines make the best sense for very long distances (i.e., over 400 miles) and the Commission needs to offer greater flexibility to serve their unique application.

During the workshop, the Commission also asked under what circumstances incumbent utilities should be allowed to pursue participant funded projects (as opposed to project emerging from traditional utility or RTO planning processes and paid for through cost allocation to ratepayers). While participant funded transmission lines should not relieve incumbent utilities to offer open access service through their existing tariffs, as an additional alternative to transmission shippers, participant funded lines can only add value. Clean Line notes that several merchant transmission lines, notably SunZia and the Northeast Transmission Link, have incumbent utilities as equity partners. In many cases, this helps merchant lines achieve a level playing field by availing themselves of incumbents' state regulatory status. The Commission should take care to continue to allow incumbent utilities to partner with other entities on merchant lines.

IV. CONCLUSION

At Clean Line, we are putting our investors' dollars at risk to successfully integrate the best wind resource in the world with load centers and markets. We are working to ensure proper alignment of incentives with multiple parties: customers/shippers (both generators and load-serving entities), as well as owners, and stakeholder communities. The Commission should

allow us the flexibility to best design our projects, and business structures. In addition, FERC should ensure that the lack of existing processes for interconnecting interregional HVDC projects does not stifle projects that are necessary to meet critical policy goals.

Respectfully submitted,

/s/ Kathryn L. Patton

Michael Skelly, President
Jimmy Glotfelty, Executive Vice President
Clean Line Energy Partners LLC
1001 McKinney, Suite 700
Houston, Texas 77002
832-319-6327
jglotfelty@cleanlineenergy.com

Kathryn L. Patton
Vice President and General Counsel
Erin Szalkowski
Corporate Counsel
Clean Line Energy Partners LLC
1001 McKinney, Suite 700
Houston, TX 77002
832-319-6330
kpatton@cleanlineenergy.com

March 28, 2012