UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Maine Power Link, LLC	**)**	**Docket No. ER22-1290-000**

PROTEST OF THE
MAINE OFFICE OF THE PUBLIC ADVOCATE

I. INTRODUCTION

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "the Commission"),[1] the Maine Office of the Public Advocate ("MOPA") hereby protests the Application for Negotiated Rate Authority (the "Application") filed by Maine Power Link, LLC ("MPL" or "Applicant") in the captioned proceeding on March 10, 2022.

For the reasons described herein, MOPA urges the Commission to condition its approval of the Application on the satisfaction of the conditions described below. MOPA *firmly* supports the letter of and intent behind the State of Maine's Act to Require Prompt and Effective Use of the Renewable Energy Resources of Northern Maine, P.L. 2021, Chapter 380 (the "Northern Maine Renewables Act" or "the Act"). Yet, the request for negotiated rate authority made in the Application is not directed by the Act, and MOPA does not believe that Commission can satisfy its obligation to ensure that transmission rates are just and reasonable if the authority sought by the Application is not subject to significant additional conditions. For this reason, MOPA specifically asks that any approval for negotiated rate authority be conditioned as follows:

[1] 18 C.F.R. § 385.211.

1) The Applicant must demonstrate that the competitive bidding process to be administered by the Maine Public Utility Commission ("Maine PUC") will be sufficiently open, transparent and robust to constrain rates;
2) The Commission should ensure that the rates assessed by the Applicant to the Maine utilities actually reflect the results of the competitive bidding process; and
3) In order to ensure that the Applicant does not receive a financial windfall as a result of Commission-approved negotiated rates, there must be some assurance that the cost of excess capacity on the transmission line is not paid for by Maine customers.

Further, if the Commission permits MPL to charge negotiated rates, the Applicant must bear the full market risk of the project, including the potential for under-recovery of the line's costs if the line is not fully used.

II. COMMUNICATIONS

Communications and correspondence regarding this filing should be directed to the following:[2]

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[2] MOPA requests waiver of 18 C.F.R. § 285.203 and 385.2010 to the extent necessary to permit the designation of more than two (2) individuals to receive service in this proceeding.

III. PARTY DESCRIPTION

MOPA is an agency of the State of Maine authorized and directed by the Maine Legislature to represent the interests of consumers of utility services in utility regulatory proceedings and other forums, including participation on behalf of Maine consumers in federal regulatory proceedings "in which the subject matter of the action affects the consumers of any utility doing business in this State."[3] MOPA filed its doc-less Motion to Intervene with the Commission in this proceeding on March 22, 2022.

IV. BACKGROUND

MPL seeks Commission authority to charge negotiated rates associated with transmission capacity rights on MPL's proposed transmission project (the "Project") if it is selected by the Maine PUC in its request for proposals ("RFP") for renewable energy generation and transmission projects (the "Northern Maine RFP").[4] MPL states that the Maine PUC issued the Northern Maine RFP pursuant to the Northern Maine Renewables Act, and states that this RFP seeks proposals for development, construction, and operation of a 345-kV double circuit generation connection line or transmission line(s) of greater capacity (the "Northern Maine Line") to provide access to the ISO-NE transmission system for qualified new renewable energy generation projects in northern Maine (the "Northern Maine Renewables") that themselves will be selected by the Maine PUC through a separate process.

Notably, MPL's Project has *not* been selected in the Northern Maine RFP at this time; it represents only that it has "proposed the Project in response" to that RFP.[5] MPL is one of among any number of potential bidders for the proposed transmission project under this RFP, and such

[3] 35-A M.R.S. § 1702.

[4] Application at 1-2.

[5] *Id*. at 2.

other bidders have not filed at FERC for the negotiated rate authority MLP here seeks. Noteworthy too is that MPL's request for negotiated rate authority made in the Application is not directed by the Northern Maine Renewables Act, nor is it more generally required by Maine law.

V. PROTEST

A. The Commission's Obligation to Protect Captive Customers Calls for Additional Rate Oversight

Commission case law governing a utility's eligibility for negotiated rate authority makes it clear that the authorization is unavailable where customers are captive to the applicant. In *Hudson Transmission Partners, LLC,*[6] *e.g.*, the Commission held that it "must determine there are no captive customers who would be required to pay the costs of the project." Further, the Commission found that negotiated rate authority was appropriate because "[n]o entity operating on either end of the Project is required to purchase transmission service from Hudson Transmission."[7] Only in circumstances where customers are not captive can the Commission make the determination that the applicant for negotiated rates is proposing to assume all market risk.[8]

A like finding would be essential here in order for negotiated rates to be approved, if the Commission is to carry out its responsibility to ensure just and reasonable rates. As the courts and the Commission have long held, relaxation of the Commission's historical commitment to cost of service regulation as a means of ensuring just and reasonable rates is only permissible if

[6] 135 FERC ¶ 61,104 at P 15 (2011) ("*Hudson*").

[7] *Id.,* P 15.

[8] *See also Anbaric Development Partners, LLC,* 162 FERC ¶ 61,097 at P 12 (2018) (negotiated rates available only where "there are no captive customers who would be required to pay the costs of the project.") *Accord, Chinook Power Transmission, LLC,* 126 ¶ 61,134 at PP 38, 56 (2009).

customers are otherwise protected.[9] As discussed below, that finding cannot be made in this case.

The Applicant's own description of the obligations established by the Northern Maine Renewables Act makes it clear that Maine's Transmission and Distribution ("T&D") Utilities will indeed be captive to the transmission provider ultimately chosen by the Maine PUC following the prescribed bidding process. The Application represents that "the State of Maine has made the policy decision to solicit proposals for the Northern Maine Line through the Northern Maine RFP and has voluntarily agreed, *through the Maine T&D Utilities*, to acquire and pay for capacity on the Northern Maine Line to help the State meet its renewable policy goals."[10] But the representation that this is a voluntary matter cannot be squared with the facts. *In fact*, the Northern Maine Renewable Act establishes the authority for the Maine PUC to *compel* Maine's utilities to purchase service on the designated transmission line, establishing their status as captive customers of the line's owners/operators, and triggering FERC's responsibility to provide full rate protection.[11]

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[9] *In California ex rel Lockyer v FERC* (383 F.3d 1006 (9th Cir. 2004), *e.g.*, the court faulted the Commission for failing to follow through with its commitment to police market conditions in order to ensure that competitive rates serve as an effective proxy for cost of service regulating in protecting customers. Also supporting the conclusion that the Commission may not lightly abandon its core obligation to assure just and reasonable rates, it has permitted negotiated pipeline rates under the Natural Gas Act, so long as fully regulated "recourse rates" are available to customers as a cost-of-service backstop. *See Alternatives to Traditional cost of service Ratemaking for Natural Gas Pipelines; Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, Policy Statement, 74 FERC ¶ 61,076 at 61,242 (1996) (expressing the Commission's willingness to permit pipelines to negotiate rates with customers in a manner which is not unduly discriminatory so long as customers also have the option to choose recourse rates determined on a cost of service basis, and provided, too, that customers choosing the recourse rate should be in no worse position as a result of the use of negotiated rates than they would be absent the use of negotiated rates.).

[10] It is a peculiar notion of volunteerism that the *state* of Maine has acted voluntarily "through" its regulated utilities. To the contrary, this Commission has recently stated that a utility's decision to remain in an RTO is not voluntary when it is required by state law. *See The Dayton Power & Light Co.*, 178 FERC ¶ 61,102 (2022) (denying RTO participation adder to utility as not voluntary).

[11] *See* Me. Stat. tit. 35-A § 3210-I(4)(C). That section provides that the MPUC shall:

Further to the point, the Northern Maine Renewables Act requires that the developers of renewable generation in Northern Maine *must* use the transmission capacity of the winning bidder.[12] In *Hudson*, the Commission found that Hudson would have no captive customers because "there were alternatives to use of the merchant transmission line available to NYISO customers," namely service from incumbent transmission providers obligated to build transmission capacity if requested.[13] Northern Maine renewable developers, however, cannot use competing transmission, though governing case law holds that this option must exist as a constraining factor on the rates the merchant transmission provider can charge.[14]

Nor is the rate protection the Commission must provide for captive customers under the Federal Power Act ("FPA") offered by Applicant's representation that it is at risk for recovery of its investment. The absence of competition from incumbent utility service providers (who cannot otherwise connect to the renewables under the Act), and the compulsion that may be exercised requiring Maine utilities to enter into a transmission service agreement, surely gives the merchant transmission provider untoward bargaining leverage. And just as surely, this

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> [a]t its discretion, consistent with this section, use or direct one or more transmission and distribution utilities as contracting parties under this section to participate in a regional or multistate competitive market or solicitation.

Since the Act says that Northern Maine renewables must use the selected merchant line, this means the MPUC essentially has the discretion to require Maine T&D utilities to purchase transmission service from the winning bidder, *i.e*, the purchase is not voluntary. *See also* Section Me. Stat. tit. 35-A § 3210-I(2)(E).

[12] Me. Stat. tit. 35-A § 3210-I-3 (qualified renewable energy projects must be "designed to connect to and transmit generated power using the line or lines to be constructed pursuant to subsection 2.")

[13] *Hudson Transmission, supra* at P 17.

[14] Applicant asserts that it satisfies the *Hudson Transmission* test because it has agreed to assume full market risk for the project and because it does not have a "traditionally regulated transmission system" with "captive customers." Application, pp. 12-13. But as the Applicant notes, Hudson was found to satisfy the second condition because it agreed that it would "recover its costs only from customers who voluntarily agree to purchase transmission capacity on the Project." *Hudson Transmission*, 135 FERC ¶ 61,104 at PP 18-19. If renewable energy developers must utilize the approved project's transmission, the voluntariness criterion is absent whether or not the Applicant operates a "traditionally regulated transmission system."

leverage may be used to assure the Applicant recovery of all of the project's costs from the companies required to subscribe to project capacity even if they subscribe to substantially less than 100 percent of the project's capacity. With this in mind, the Applicant's claim that it has assumed market risk is illusory.

For these reasons, MOPA asks that several conditions be required if negotiated rate authority is to be granted. First, the Applicant must demonstrate that the competitive bidding process to be administered by the Maine PUC will adequately constrain rates. That demonstration must include the assurance that the process is open and transparent[15] and that there is a sufficient pool of interested project developers to support a finding that competition will constrain rates.[16] Without this assurance, the Commission cannot meet its statutory responsibility.

Second, the Commission should ensure that the rates assessed by the Applicant to the Maine utilities actually reflect the results of the competitive bidding process. The Applicant represents that the Northern Maine Renewables Act requires the Maine PUC to evaluate bids "based on cost, economic benefits to northern Maine, the qualification of the bidders(s)" and certain other factors."[17] Yet, the Applicant has made no representation that its ensuing negotiation with Maine utilities over the terms of the transmission service agreements will result in rates no higher than can be reconciled with the project costs projected by the winning bidder

[15] The Commission has outlined criteria for acceptable competitive bidding processes in various settings. *See, e.g., Qualifying Facility Rates and Requirements, Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, Order No. 872, 172 FERC ¶ 61,041, PP 413-14 (2020); 18 C.F.R. § 292.304(b)(8) (setting forth the criteria and factors established in Order No. 872).

[16] By way of reference, we note that the Commission's framework for a grant of market-based rate authority calls for suppliers to meet threshold pivotal supplier or market share tests before that authority can be granted.

[17] Application at 6.

in the competitive bidding process. Again, if captive customers are to be protected by the Commission that assurance is essential.

Third, in order to ensure that the Applicant does not receive a financial windfall as a result of Commission-approved negotiated rates, Maine customers must be given some assurance they will not have to pay for the cost of excess capacity on the transmission line. This can be accomplished by capping the rates they pay and possibly providing them with a rate credit in the event there are new capacity subscribers. Our concern in this respect is underscored by the fact that the proposed line (354 kV) is quite large, and almost certainly larger than needed in order to accommodate the renewable portfolio now contemplated by the relevant legislation. Certainly, if rates are set at a level which reflects the cost of the entire line, Maine customers deserve a credit if once unused capacity is subsequently sold.

B. If Negotiated Rate Authority is Permitted, the Applicant Must Bear Market Risk, Consistent with Commission Policy.

MOPA has discussed above why the Applicant has not demonstrated that its proposal, as currently structured involves no captive customers, a prerequisite for establishing that its rates will be just and reasonable. But even assuming that it satisfies the voluntariness criterion, MPL acknowledges, the Commission has determined that negotiated rates are available to merchant transmission applicants only if they shoulder the full market risk of a proposed project. As the Commission held in *Chinook Power Transmission, LLC,* "[i]n determining whether negotiated rates are just and reasonable, the Commission first looks to whether the merchant transmission owner has assumed the full market risk for the cost of constructing a particular transmission

project and is not building within the footprint of its own (or an affiliate's) traditionally regulated transmission system."[18]

It is essential, then, that MPL provide adequate assurance to the Commission that it will assume all market risk associated with the Project. Like the projects before the Commission in *Chinook*, MPL's Project must "succeed or fail based on whether a market exists for [its] services; [it has] no ability to pass on any costs to captive ratepayers."

MPL's representation that "it will assume the full market risk" for its Project if it is the selected developer, does not adequately satisfy *Chinook*, in failing to assure that excess or unused capacity will not be paid for by captive customers. MPL represents only that if the Northern Maine RFP "does not result in the initial award of PPAs to Northern Maine Renewables that would require the full use of the transmission capacity of the Northern Maine Line (i.e., there is some unused capacity on the Project)," then it "requests authority to reserve the remaining transmission capacity…to be used by generation resource selected through future Maine PUC solicitations issued pursuant to the Northern Maine Renewables Act."[19] That representation certainly falls short of any assurance that the project developer bears full market risk for its project. On the contrary, it is simply as statement that if the line is not fully subscribed MPL will still make sure the capacity can be used to transmit renewables from northern Maine if there are future solicitations for new renewable generation. That is a pretty empty promise that does nothing to protect Maine ratepayers if further subscriptions to capacity do not materialize.

[18] *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134, P 2 and n. 1 (2009) (*Chinook*).

[19] Application at 2-3.

Further, MPL does not address what happens to capacity on the Project once the initial term of the transmission service agreements with the Maine T&D Utilities come to an end.[20] And it provides the Commission with no promise that project costs beyond this contract term will not be borne by ratepayers. There is risk, then, that such costs will be assumed by ratepayers as part of MPL's negotiated rate associated with the instant RFP, or through some future solicitation. Again, the Commission should ensure that MPL agrees to assume full risk for costs of the Project as a condition of granting negotiated rate authorization. And as part of that assumption, MPL should make clear what it will do with capacity on its Project that becomes available upon expiration of these transmission service agreements. If the rates paid by Maine utilities for the MLP transmission facility are set to recover the full value of the line over the prescribed term, the customers funding the recovery of full value should receive a revenue credit should the facility continue to provide service following the expiration of the prescribed term.

VI. CONCLUSION

For the reasons described herein, MOPA urges the Commission to condition its approval of the Application as argued above.

Respectfully submitted,

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[20] We note that while the Northern Maine Renewables Act contemplates 30-ytear terms for these agreements, the Maine PUC is authorized to negotiate shorter terms. *See* Me. Stat. tit. 35-A § 3210-I(2)(A) ("…the commission may, in its discretion, approve a contract term of a different duration…").

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March 31, 2022

CERTIFICATE OF SERVICE

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

/s/Jonathan Trotta

March 31, 2022