

179 FERC ¶ 61,215  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;  
James P. Danly, Allison Clements,  
Mark C. Christie, and Willie L. Phillips.

Maine Power Link, LLC

Docket No. ER22-1290-000

ORDER DENYING APPLICATION FOR AUTHORIZATION  
TO CHARGE NEGOTIATED RATES

(Issued June 22, 2022)

1. On March 10, 2022, pursuant to section 205 of the Federal Power Act (FPA)<sup>1</sup> and part 35 of the Commission's regulations,<sup>2</sup> Maine Power Link, LLC (MPL) submitted a request for Commission authorization to charge negotiated rates for transmission rights on its proposed transmission project (Project) if the Maine Public Utilities Commission (Maine Commission) selects the Project through a request for proposals (RFP) for both renewable energy projects in northern Maine and a 345 kV transmission line to connect the projects to the ISO New England Inc. (ISO-NE) transmission system in southern Maine (Northern Maine RFP).<sup>3</sup> As discussed below, we deny MPL's request for negotiated rate authority because MPL has not shown that it has assumed the full market risk for the Project.

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<sup>1</sup> 16 U.S.C. § 824d.

<sup>2</sup> 18 C.F.R. pt. 35 (2021).

<sup>3</sup> *Request for Proposals for Renewable Energy Generation and Transmission Projects*, Docket No. 2021-00369 (Maine Commission Nov. 29, 2021) (Northern Maine RFP).

## I. Background

### A. Applicant

2. MPL is a New York limited liability company formed for the purpose of owning and operating the Project.<sup>4</sup> MPL is a wholly owned subsidiary of Con Edison Transmission, Inc., a developer of electric transmission projects.

### B. Project Description and the Northern Maine RFP

3. MPL states that it has submitted the Project for consideration in the Northern Maine RFP conducted by the Maine Commission.<sup>5</sup> MPL explains that the 2021 Northern Maine Renewables Act<sup>6</sup> established the Northern Maine Renewable Energy Development Program (Northern Maine Renewables Program) to promote the development of renewable energy resources in northern Maine, which is not directly connected to the ISO-NE transmission system. MPL states that pursuant to the Northern Maine Renewables Program, on November 29, 2021, the Maine Commission issued the Northern Maine RFP for both renewable energy projects in northern Maine and a 345 kV double circuit generation connection line (or a transmission line or lines of greater capacity) to connect the projects to the ISO-NE transmission system in southern Maine.<sup>7</sup> MPL states that the Maine Commission will convey rights to capacity on the selected transmission project to one or more investor-owned transmission and distribution utilities located in Maine.<sup>8</sup> MPL states that these utilities will enter (1) Power Purchase Agreements with the owners of the renewable energy projects and (2) Transmission Service Agreements (TSAs) with the owner of the selected transmission project. MPL states that all agreements will be subject to the Maine Commission's approval, and the TSAs will be filed with the Commission. MPL states that if, at the close of the Northern Maine RFP, the Maine Commission determines that no proposal qualifies to be the selected transmission project or the selected renewable generation projects, or there remains additional capacity on the selected

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<sup>4</sup> MPL Filing at 10.

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

<sup>6</sup> Act to Require Prompt and Effective Use of the Renewable Energy Resources of Northern Maine, P.L. 2021, Chapter 380 (Northern Maine Renewables Act); Me. Rev. Stat. tit. 35-A § 3210-I (2021).

<sup>7</sup> MPL Filing at 6-7. MPL explains that the Maine Commission may select renewable generation projects not only in the Northern Maine RFP, but also in later Maine Commission solicitations. *Id.* at 1-2.

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

transmission line, then the Maine Commission may open a new RFP.<sup>9</sup> MPL states that the selected renewable energy projects will not have the option to connect to any other transmission line.<sup>10</sup>

4. MPL explains that proposals for the transmission project were due by March 1, 2022, and the Maine Commission shared these proposals with the potential developers of the renewable energy projects, whose proposals were due by May 1, 2022.<sup>11</sup> MPL states that the Maine Commission is scheduled to select both the transmission project and the renewable energy projects by November 1, 2022.

5. MPL states the Maine Commission will give preference to transmission project proposals that are cost-effective, use existing rights-of-way, and are likely to reduce transmission costs and costs to ratepayers for electricity over time.<sup>12</sup> MPL states that the Maine Commission provided essential terms for a TSA between the selected transmission project and one or more Maine transmission and distribution utilities.<sup>13</sup>

### **C. Application**

6. MPL requests authority to sell transmission rights over the Project at negotiated rates if the Maine Commission selects the Project through the Northern Maine RFP.<sup>14</sup> MPL requests authority to allocate up to 100% of the Project's transmission capacity (up to 1,200 MW) to investor-owned transmission and distribution utilities in Maine that would sign TSAs with the Project. MPL states that if the RFP does not result in Power Purchase Agreements between the renewable energy projects and the transmission and distribution utilities that require full use of the Project, MPL requests authority to reserve the remaining capacity to provide access to generation resources selected through future

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<sup>9</sup> *Id.* at 9-10 (citing Me. Rev. Stat. tit. 35-A § 3210-H(2)(E), (3)(E)).

<sup>10</sup> *Id.* at 6 n.14 (citing *Request for Proposals for Renewable Energy Generation and Transmission Projects – Question and Answer Log (Version 5)*, Docket No. 2021-00369, at Q7 (Maine Commission Jan. 3, 2022)).

<sup>11</sup> *Id.* at 8-9.

<sup>12</sup> *Id.* at 6-7 (citing Me. Rev. Stat. tit. 35-A § 3210-I(2)(C)).

<sup>13</sup> *Id.* at 8 (citing *Transmission Service Agreement Essential Terms*, Docket No. 2021-00369 (Maine Commission Feb. 1, 2021) (TSA Essential Terms)).

<sup>14</sup> *Id.* at 2-3.

Maine Commission solicitations. MPL states that if the Project is built, MPL will turn over operational control to ISO-NE.

7. MPL states that the Maine Commission has indicated that it will most likely request bidders to propose a TSA form agreement at an appropriate point in its project selection process, such as when a transmission developer bidder has been selected for a short list.<sup>15</sup> MPL states that the TSA terms—as agreed to between the selected transmission line and one or more transmission and distribution utilities, and approved by the Maine Commission—will govern the conveyance of the rights to capacity on the transmission line to one or more of the utilities.<sup>16</sup>

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

8. Notice of MPL's filing was published in the *Federal Register*, 87 Fed. Reg. 15,418 (Mar. 18, 2022), with interventions and protests due on or before March 31, 2022. The Maine Office of the Public Advocate (Maine Public Advocate) and Public Citizen, Inc., filed timely motions to intervene. Maine Public Advocate filed a protest. On April 15, 2022, MPL filed an answer to Maine Public Advocate's protest. On April 19, 2022, Maine Public Advocate filed an answer to MPL's answer.

## **III. Discussion**

### **A. Procedural Matters**

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2021), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

10. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2021), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We accept the answers submitted by MPL and Maine Public Advocate because they have provided information that assisted us in our decision-making process.

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<sup>15</sup> *Id.* at 8 (citing TSA Essential Terms at 1).

<sup>16</sup> *Id.* at 9 (citing Northern Maine RFP, § 3.1).

## **B. Negotiated Rate Authority**

11. In evaluating negotiated rate applications, the Commission employs a four-step analysis, as outlined in *Chinook*,<sup>17</sup> 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.<sup>18</sup> This approach, which was further developed in the 2013 Policy Statement,<sup>19</sup> 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.

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

12. To approve negotiated rates for a transmission project, the Commission must find that the rates are just and reasonable.<sup>20</sup> 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 that 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 capable of erecting any barriers to entry among competitors, and whether the developer would have any incentive to withhold capacity.<sup>21</sup>

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<sup>17</sup> *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134 (2009) (*Chinook*).

<sup>18</sup> *Id.* P 37.

<sup>19</sup> *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 (2013) (2013 Policy Statement). Although the 2013 Policy Statement further developed the approach established in *Chinook*, negotiated rate applicants must continue to satisfy all four *Chinook* factors. See 2013 Policy Statement at P 1.

<sup>20</sup> *Chinook*, 126 FERC ¶ 61,134 at P 37.

<sup>21</sup> *Id.* P 38.

a. **MPL's Proposal**

13. MPL represents that it will assume the full market risk for the Project and argues that it has no captive customers because neither it nor an affiliate owns or operates any transmission facilities in ISO-NE.<sup>22</sup> MPL states that “Maine has made the policy decision to solicit proposals for the [transmission project] through the Northern Maine RFP and has voluntarily agreed, through the Maine [transmission and distribution utilities], to acquire and pay for capacity on the [transmission line] to help the State meet its renewable policy goals.”<sup>23</sup> MPL states that it will recover its costs at rates as specified in the TSA, which will be subject to arm’s-length negotiation between MPL and one or more of the Maine utilities, and subject to approval by the Maine Commission and the Commission.<sup>24</sup> MPL also notes that the Maine Commission’s evaluation of proposals will include consideration of price and terms.<sup>25</sup>

14. As discussed further below in relation to the second *Chinook* factor (but relevant here also), MPL states that the Commission has approved the use of a government-entity-led RFP process by a merchant transmission developer in two separate instances.<sup>26</sup> MPL states that in both *Conjunction* and *Hudson Transmission*, the Commission approved the merchant transmission owner’s participation in a New York Power Authority (NYPA) RFP, on behalf of the government of New York City.<sup>27</sup> MPL states that in both cases, the Commission found that the NYPA RFP was open, competitive, non-discriminatory, fair, and transparent. MPL argues that the Northern Maine RFP has the same material features as the NYPA RFPs in *Conjunction* and *Hudson Transmission*. MPL, for example, states that the Maine Commission is statutorily charged with ensuring that Maine citizens have access to utility services at rates that are just and

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<sup>22</sup> MPL Filing at 13-14.

<sup>23</sup> *Id.* at 13 (citing Me. Rev. Stat. tit. 35-A § 3210-I(2); Northern Maine RFP at § 3.1).

<sup>24</sup> *Id.* (citing Northern Maine RFP, § 3.1).

<sup>25</sup> *Id.* at 14-15.

<sup>26</sup> *Id.* at 17 (citing *Conjunction LLC*, 108 FERC ¶ 61,090, at P 14 (*Conjunction*); *Hudson Transmission Partners, LLC*, 135 FERC ¶ 61,104, at P 28 (2011) (*Hudson Transmission*)).

<sup>27</sup> *Id.* at 17-19.

reasonable.<sup>28</sup> Further, MPL states that the Maine Commission has the authority, in carrying out its obligations under the Northern Maine Renewables Act, to make decisions about transmission and generation development in the context of the overall public interest.<sup>29</sup>

**b. Maine Public Advocate's Protest**

15. Maine Public Advocate notes that the Northern Maine Renewables Act (the state legislation that mandated the Northern Maine RFP) does not direct the bidders of transmission projects to apply for negotiated rate authority.<sup>30</sup> Maine Public Advocate states that MPL is one of among any number of potential bidders, and other bidders have not filed with the Commission for negotiated rate authority.<sup>31</sup>

16. Maine Public Advocate asserts that a utility is eligible for negotiated rate authority only when it makes it clear that it has no captive customers and has therefore assumed all market risk.<sup>32</sup> Maine Public Advocate states that by contrast, the Northern Maine Renewables Act establishes the authority for the Maine Commission to compel Maine's utilities to purchase service on the transmission line selected in the Northern Maine RFP, establishing the utilities' status as captive customers.<sup>33</sup> Maine Public Advocate argues that,

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<sup>28</sup> *Id.* at 19 (citing Me. Rev. Stat. tit. 35-A §§ 101, 103(2)(B) (setting forth the duties of the Maine Commission); *Hudson Transmission*, 135 FERC ¶ 61,104 at P 28; *Conjunction*, 108 FERC ¶ 61,090 at P 13).

<sup>29</sup> *Id.* at 19 (citing Me. Rev. Stat. tit. 35-A § 3210-I(1)(E) (providing that the Maine Commission shall administer the Northern Maine Renewables Program to recognize that “the near-term development of the transmission and other infrastructure necessary to reduce greenhouse gas emissions is in the public interest”); *id.* at § 3210-I(2)(E), (3)(E) (providing that the Maine Commission may reject proposals that it determines are “not in the public interest”).

<sup>30</sup> Maine Public Advocate Protest at 1.

<sup>31</sup> *Id.* at 3-4.

<sup>32</sup> *Id.* at 4 (citing *Hudson Transmission*, 135 FERC ¶ 61,104 at P 15 (noting that “[n]o entity operating on either end of the project is required to purchase service from Hudson Transmission.”)).

<sup>33</sup> *Id.* at 5 (citing Me. Stat. tit. 35-A § 3210-I(4)(C) (providing that the Maine Commission shall “[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”).

because the Northern Maine Renewables Act requires the selected generation projects to use the selected transmission line, the Maine Commission essentially has the discretion to require the utilities to purchase transmission service from the winning bidder.<sup>34</sup> Maine Public Advocate notes that, in comparison, in *Hudson Transmission* the Commission found that Hudson Transmission 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.<sup>35</sup> Maine Public Advocate contends that, here, renewable developers in northern Maine cannot use competing transmission. Maine Public Advocate argues that the absence of competition, along with the Maine Commission’s ability to require Maine utilities to enter TSAs, would give MPL untoward bargaining leverage. Maine Public Advocate contends that this leverage may allow MPL to assure the recovery of all the Project’s costs from the companies required to subscribe, even if they subscribe to substantially less than 100% of the Project’s capacity.<sup>36</sup> Maine Public Advocate argues that this contingency makes any claim that MPL has assumed market risk illusory.

17. Maine Public Advocate asks that the Commission grant MPL’s application only if MPL meets certain conditions.<sup>37</sup> First, Maine Public Advocate requests that MPL be required to demonstrate that the competitive bidding process to be administered by the Maine Commission will adequately constrain rates. Second, Maine Public Advocate states that the Commission should ensure that the rates assessed by MPL to the Maine utilities reflect the results of the competitive bidding process. Third, Maine Public Advocate states that, to ensure that MPL does not receive a financial windfall due to 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 Project. Maine Public Advocate states that this can be accomplished by capping the rates customers pay and possibly providing them with a rate credit if there are new capacity subscribers. Finally, Maine Public Advocate contends that MPL should explain what it will do with capacity on the Project that becomes available upon expiration of the TSAs.<sup>38</sup>

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<sup>34</sup> *Id.* at 6 (citing Me. Stat. tit. 35-A § 3210-I-3 (stating that 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”).

<sup>35</sup> *Id.* at 6 (citing *Hudson Transmission*, 135 FERC ¶ 61,104 at P 17).

<sup>36</sup> *Id.* at 7.

<sup>37</sup> *Id.* 1-2, 7-8.

<sup>38</sup> *Id.* at 10.



c. **MPL's Answer**

18. In response to Maine Public Advocate's arguments, MPL argues that the Northern Maine Renewables Act implicitly requires MPL to obtain negotiated rate authority because the legislation requires bidders to identify, and obtain, necessary FERC approvals.<sup>39</sup> MPL contends that those approvals include those necessary to negotiate rates, terms, and conditions of the TSAs. MPL states that consistent with this requirement, MPL seeks negotiated rate authority from the Commission in accordance with the Commission's policies and precedent.<sup>40</sup> MPL reiterates that it has no captive customers because MPL and its affiliates have no ownership in, or control of, a traditionally regulated transmission system in ISO-NE.<sup>41</sup> MPL argues that selling transmission capacity to a Maine utility pursuant to a negotiated-rate-based TSA does not mean MPL will have captive customers, and MPL will not become a local utility franchise holder due to the Project.<sup>42</sup> In addition, MPL argues that the Northern Maine RFP is not involuntary because the Maine Commission can reject all of the proposals.<sup>43</sup> MPL acknowledges that the Maine Commission may direct the Maine utilities as "contracting parties" under the Northern Maine RFP, but each utility is free to negotiate the terms of the TSA and may decline to enter into a TSA that includes unacceptable rates, terms, or conditions. MPL also contends that although the selected renewable energy projects must use the selected transmission project, the developers of the energy projects have access to information regarding the various proposals for the transmission line, and each of those energy project developers will voluntarily decide whether to

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<sup>39</sup> MPL Answer at 5 (citing Northern Maine RFP, § 5.2.2(B)).

<sup>40</sup> *Id.* at 5-6 (citing 2013 Policy Statement, 142 FERC ¶ 61,038 at P 16 (summarizing that the purpose of negotiated rate authority is for a "developer of a new merchant transmission project to select a subset of customers, based on not unduly discriminatory or preferential criteria, and negotiate directly with those customers to reach agreement on the key rates, terms, and conditions for procuring up to the full amount of transmission capacity"))).

<sup>41</sup> *Id.* at 6 (citing *TransEnergie U.S., Ltd.*, 91 FERC ¶ 61,230, at 61,836 (2000) (determining that captive customers are those "customers located within a franchise area who have no ability to take service from any party other than the local franchise holder"))).

<sup>42</sup> *Id.* at 6 n.18.

<sup>43</sup> *Id.* at 7 n.20 (citing Northern Maine RFP, § 8.5).

respond to the RFP and to which of the potential transmission lines they are willing to connect.<sup>44</sup>

19. MPL also disagrees with Maine Public Advocate's request that the Commission grant MPL's application only under certain conditions.<sup>45</sup> MPL contends that Maine Public Advocate's suggested conditions are either unnecessary or, in the case of Maine Public Advocate's requested rate cap to address the costs of excess capacity, both unnecessary and can be addressed in the negotiation of the TSAs.

**d. Maine Public Advocate's Answer**

20. In its answer, Maine Public Advocate argues that its suggested conditions are needed to address MPL's inability to show that its anticipated customers are not captive and therefore do not need the rate protection that is unavailable when a utility is granted negotiated rate authority.<sup>46</sup> In response to MPL's argument that it has no captive customers because it has no ownership in, or control of, a traditionally regulated transmission system in ISO-NE, Maine Public Advocate argues that the harm is the same whether customers have no choice of suppliers because the seller has a franchise area, or because customers have no viable options due to other circumstances (here by operation of state law).<sup>47</sup> In response to MPL's contention that the negotiation of the TSA will address Maine Public Advocate's concerns about excess capacity, Maine Public Advocate argues that the purpose of its requested rate cap is to restrain the negotiating leverage MPL will have in light of the captive market it will enjoy, and to make sure that MPL will be at risk for unsubscribed capacity, as Commission policy requires.<sup>48</sup>

**2. Factor Two: Undue Discrimination**

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

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<sup>44</sup> *Id.* at 7 n.20 (citing Northern Maine RFP, §§ 3.3, 5.3.1(D)).

<sup>45</sup> *Id.* at 2-4.

<sup>46</sup> Maine Public Advocate Answer at 1-2.

<sup>47</sup> *Id.* at 3.

<sup>48</sup> *Id.* at 4.

that regional entity).<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup>

22. 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.<sup>52</sup> 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).<sup>53</sup> 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.<sup>54</sup>

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

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<sup>49</sup> *Chinook*, 126 FERC ¶ 61,134 at P 40.

<sup>50</sup> 2013 Policy Statement, 142 FERC ¶ 61,038 at PP 15, 23.

<sup>51</sup> *Id.* P 16.

<sup>52</sup> *Id.* P 23.

<sup>53</sup> *Id.* P 20.

<sup>54</sup> *Id.* PP 24-27.

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 to provide transparency to the Commission and interested parties.<sup>55</sup>

24. 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; the developer will have the burden to demonstrate that its process was in fact not unduly discriminatory or preferential and resulted in rates, terms, and conditions that are just and reasonable.<sup>56</sup> The Commission allows developers discretion in the timing of requests for approval of capacity allocation processes. 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 submitted in response to the Commission's order approving that approach that the developer's selection of customers was consistent with the approved selection process.

**a. MPL's Proposal**

25. MPL argues that the Northern Maine RFP satisfies the Commission's open-season requirement. MPL states that the Commission has approved the use of a government-entity-led RFP process to satisfy the Commission's open-season requirement in two separate instances.<sup>57</sup> MPL states that in both *Conjunction* and *Hudson Transmission*, the Commission approved the merchant transmission owner's participation in a NYPA RFP, on behalf of the government of New York City, as consistent with the open-season requirement.<sup>58</sup> MPL states that in both cases, the Commission found that that the applicant satisfied the open-season requirement because the RFP was open, competitive, non-discriminatory, fair, and transparent. MPL argues that the Northern Maine RFP has the same material features as the RFPs in *Conjunction* and *Hudson Transmission*.

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<sup>55</sup> *Id.* P 30.

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

<sup>57</sup> MPL Filing at 17 (citing *Hudson Transmission*, 135 FERC ¶ 61,104 at P 28; *Conjunction*, 108 FERC ¶ 61,090 at P 14).

<sup>58</sup> *Id.* at 17-19.

26. MPL states that if the Maine Commission selects the Project, MPL will make a subsequent compliance filing, if deemed necessary, with the Commission to share the results of the Northern Maine RFP and the allocation of capacity.<sup>59</sup> MPL states that its compliance filing will include a description of the publicly available information regarding the Northern Maine RFP process, including the results thereof, and why it satisfies all four *Chinook* factors as well as the requirements of the 2013 Policy Statement. MPL states that it commits to make this compliance filing out of an abundance of caution to ensure compliance with 2013 Policy Statement. MPL notes that in *Conjunction* and *Hudson Transmission*, the Commission approved the participation in RFPs as satisfying the open-season requirement but did not address whether such participation required a subsequent compliance filing.

27. MPL also proposes to submit, through one or more compliance filings for Commission approval, the processes for the allocation of transmission capacity set forth in the Maine Commission's future RFPs for renewable energy projects, if the Maine Commission chooses to conduct such RFPs due to excess capacity on the Project.<sup>60</sup> MPL states that the Commission has determined that such subsequent filings for the allocation of transmission capacity in an open, fair, and transparent manner is consistent with Commission policy.<sup>61</sup>

### 3. **Factor Three: Undue Preference and Affiliate Concerns**

28. 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 expects an affirmative showing that the affiliate is not afforded an undue preference, and the developer bears a high burden to demonstrate that the assignment of capacity to its affiliate and the corresponding treatment of nonaffiliated potential customers is just, reasonable, and not unduly discriminatory or preferential.<sup>62</sup>

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<sup>59</sup> *Id.* at 23. This compliance filing would be in addition to compliance filings MPL commits to make if the Maine Commission conducts future RFPs.

<sup>60</sup> *Id.* at 15-16.

<sup>61</sup> *Id.* at 16 (citing *Conjunction*, 108 FERC ¶ 61,090 at P 16).

<sup>62</sup> 2013 Policy Statement, 142 FERC ¶ 61,038 at P 34.

**a. MPL's Proposal**

29. With respect to this factor, MPL states that neither it nor its affiliates own or operate any transmission facilities in ISO-NE.<sup>63</sup> MPL states further that the Project will not interconnect with any existing facilities owned or operated by MPL or any affiliate. In addition, MPL states that it does not own or operate any generation facilities in ISO-NE, and no affiliate of MPL will participate in the Northern Maine RFP for the renewable generation projects.<sup>64</sup> MPL states that to prevent any undue discrimination, MPL commits to turn over operational control of the Project to ISO-NE. MPL also commits to file Electric Quarterly Reports of its transactions as required of transmission providers, to comply with any applicable affiliate rules, and to abide by the Commission's Standards of Conduct.<sup>65</sup>

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

30. 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.<sup>66</sup> Merchant transmission developers are required to comport with all applicable requirements of the North American Electric Reliability Corporation and any regional reliability council in which they are located.

**a. MPL's Proposal**

31. MPL commits to turn over operational control of the Project to ISO-NE and to comply with all applicable reliability requirements. In addition, MPL states that it will

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<sup>63</sup> MPL Filing at 21.

<sup>64</sup> MPL also notes that the Maine Commission is a government entity that has no potential for affiliate abuse. *Id.* at 19.

<sup>65</sup> *Id.* at 21 (citing *Standards of Conduct for Transmission Providers*, 129 FERC ¶ 61,043 (2009)).

<sup>66</sup> See, e.g., *Rules Concerning Certification of the Elec. Reliability Org.; & Proc. 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).

provide to ISO-NE all required information necessary to inform the ISO-NE regional transmission planning process, consistent with the requirements of Order No. 1000.<sup>67</sup>

**C. Request for Waivers**

**1. MPL's Proposal**

32. In connection with its request for authority to sell transmission service rights for the Project, MPL requests waiver of: (1) the full reporting requirements of Subparts B and C of Part 35 of the Commission's regulations (except for sections 35.12(a), 35.13(b), 35.15, and 35.16); and (2) Part 141, except for sections 141.14 and 141.15, including the FERC Form No. 1 filing requirement.<sup>68</sup>

**D. Commission Determination**

33. We deny MPL's application because MPL has not met its burden under the first *Chinook* factor to show that the negotiated rates will be just and reasonable. As noted above, in determining whether negotiated rates will be just and reasonable, the Commission considers whether the applicant has assumed the full market risk for the cost of constructing its proposed project. As part of that analysis, the Commission evaluates whether there are any "captive" customers who would be required to pay the costs of the project.<sup>69</sup> In short, to receive authorization to charge negotiated rates, an applicant must show that it has assumed the full market risk of its project; it must do so by sufficiently demonstrating that it has no ability to shift risk or pass any costs onto parties or neighboring utilities that are not participating in the project.<sup>70</sup> We find that MPL has failed to make such demonstration here.

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<sup>67</sup> MPL Filing at 22 (citing *Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Util.*, Order No. 1000, 136 FERC ¶ 61,051, at PP 164-65 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014)).

<sup>68</sup> *Id.* at 24-25.

<sup>69</sup> *See Chinook*, 126 FERC ¶ 61,134 at P 38; *see also, id.* P 1 n.1 ("Merchant transmission projects are distinguished from traditional public utilities in that the developers of merchant projects assume all of the market risk of a project and have no captive pool of customers from which to recoup the cost of the project.").

<sup>70</sup> *Lake Erie CleanPower Connector*, 144 FERC ¶ 61,203, at P 13 (2013) ("No entity on either end of the Project is required to purchase transmission service from [Lake Erie], and customers will do so only if it is cost-effective."); *Hudson Transmission*,

34. Specifically, MPL and Maine Public Advocate disagree over whether MPL would have captive customers, and therefore whether MPL has assumed full market risk, as a result of the Northern Maine Renewables Act and the terms and conditions of the Northern Maine RFP. Based on the record before us, we find that the Northern Maine Renewables Act is ambiguous as to the obligations of the transmission and distribution utilities that would be taking service over the selected transmission project. Under the Northern Maine Renewables Act, “the [Maine Commission] shall approve a contract or contracts between one or more transmission and distribution utilities and the bidder of any proposal selected by the commission,” and the Maine Commission “shall . . . [a]t its discretion . . . 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.”<sup>71</sup> MPL claims that “each utility is free to negotiate the terms of the TSA and may decline to enter into a TSA that includes unacceptable rates, terms, or conditions.”<sup>72</sup> However, while it is clear that the transmission and distribution utilities may be compelled to participate in the solicitation process, it is not clear whether such participation obligates them to execute the TSA and to take service under the TSA over the selected transmission project. If so required, the transmission and distribution utilities may be required to assume some of the Project’s market risk under negotiations that are not at arm’s length, i.e., the Maine Commission would direct them to purchase transmission service from MPL.<sup>73</sup> Therefore, based on the record before us and the ambiguity in the Northern Maine Renewables Act discussed above, we are unable to conclude that MPL would not have captive customers. In addition, MPL also does not provide any information identifying the alternatives that customers could utilize or that

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135 FERC ¶ 61,104 at P 20 (“No entity operating on either end of the Project is required to purchase transmission service from Hudson Transmission, and customers will do so only if it is cost-effective.”); *Tres Amigas LLC*, 130 FERC ¶ 61,207, at P 52 (2010) (“While the design of the Project is somewhat different from merchant transmission projects previously considered by the Commission (e.g., it is designed in a way that requires interconnecting utilities to build transmission lines to it), such a design does not shift a portion of the risk of the Project onto these utilities. Neighboring utilities are under no obligation to connect to or purchase service from Applicant, and they will only do so if it provides sufficient value to justify the new construction. Accordingly, we find that the Project does not shift the market risk to any other entity.”).

<sup>71</sup> Me. Stat. tit. 35-A § 3210-I(2)(E), -I(4)(C).

<sup>72</sup> MPL Answer at 7 n.20.

<sup>73</sup> MPL’s application is distinguishable from *Conjunction* and *Hudson Transmission*. In those cases, NYPA was the voluntary purchaser of transmission line capacity, and there were no captive customers. *See supra* note 70.



would provide any competitive or cost-based alternatives that would place a check on its rates. Accordingly, MPL has not provided sufficient evidence to meet the first *Chinook* factor.

35. The four-factor analysis under *Chinook* requires that an applicant for negotiated rate authority meet each of the four factors. Because MPL has not shown that negotiated rates will be just and reasonable under the first prong of the *Chinook* analysis, we need not decide here whether MPL's application meets the second, third, or fourth factors of the analysis. This action does not prejudice any terms, rates, and conditions of any TSAs associated with the Northern Maine RFP that are ultimately filed with the Commission.<sup>74</sup> Similarly, we will not address MPL's request for waivers in light of our decision to deny MPL's request for negotiated rate authority, as discussed above.

The Commission orders:

MPL's request for authority to sell transmission rights on the Project at negotiated rates is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Debbie-Anne A. Reese,  
Deputy Secretary.

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<sup>74</sup> See, e.g., *Cent. Me. Power Co.*, 165 FERC ¶ 61,034 (2018).