

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

ITC Holdings Corp.)	
Entergy Corporation)	Docket No. EC12-145-000
Midwest Independent Transmission)	Docket No. ER12-2681-000
System Operator, Inc.)	Docket No. EL12-107-000

**COMMENT OF THE
AMERICAN ANTITRUST INSTITUTE**

I. Introduction

The AAI respectfully files this comment in the above-captioning proceeding regarding the joint application by ITC Holdings Corp. (ITC) and Entergy Corporation (Entergy) (collectively, the “Applicants”) for authorization of the acquisition and disposition of jurisdictional transmission facilities under Section 203 of the Federal Power Act (FPA).¹ The AAI’s interest in this matter pertains to the competitive issues potentially raised by combining ITC and Entergy transmission. As a competition advocacy organization, the AAI is uniquely qualified to comment on such matters.

The AAI is an independent and nonprofit education, research, and advocacy organization whose mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. The AAI is managed by its Board of Directors, with the guidance of an Advisory Board consisting of approximately 130

¹ ITC Holdings Corp. and Entergy Corporation, Joint Application for Authorization of Acquisition And Disposition of Jurisdictional Transmission Facilities (Application), September 24, 2012.

prominent antitrust lawyers, law professors, economists, and business experts.² The AAI has long been involved in competition policy and regulatory issues in the electric power and other regulated industries. In the last decade, the AAI has filed a number of comments and interventions in Commission proceedings and appeared at Commission technical conferences regarding competition in the electricity industry. Since 1998, the AAI has also conducted an annual Energy Roundtable for experts in government, academia, and the private sector.

II. Background

ITC's proposed acquisition of Entergy's transmission assets would make ITC the largest transmission company by load served and the second largest by line miles.³ The transaction follows two previous ITC acquisitions involving midwestern transmission systems – Michigan Electric Transmission Company (METC) (2006) and Interstate Power and Light (IPL) (2007) – that have successively enlarged ITC's transmission holdings in the same geographic region. After the merger, ITC will own transmission facilities in a multi-state area in the central United States, running in an arc from upper to lower Michigan, west through Iowa, south through Kansas and Nebraska, and east through Arkansas, Louisiana, and Mississippi. The combined ITC-Entergy system will more than double ITC's existing service footprint (to 204,519 square miles), double its total transmission line mileage (to 30,900 miles), and double its system peak load (to

² The AAI's Board of Directors alone has approved this filing for AAI. The individual views of members of the Advisory Board may differ from AAI positions.

³ Rosy Lum, ITC to Grow Much Bigger, *energybiz*, Dec. 5, 2011, <http://www.energybiz.com/article/11/12/itc-grow-much-bigger>.

54,100 MW).⁴ Applicants state that the merged system will be under the control of the Midwest System Operator (MISO).⁵

Applicants assert that the merger of ITC and Entergy serves the public interest:

...by placing more transmission assets under the ownership of an independent entity with a singular focus on transmission and a proven track record of investment, a regional view toward transmission planning, and the financial ability to invest in transmission projects that bring reliability and economic benefits to customers.⁶

Applicants conclude that no analysis of the competitive effects of combining ITC and Entergy transmission is required.⁷ They base this claim, in part, on Order 669, where the Commission opined that anticompetitive effects are “unlikely to arise with regard to internal corporate reorganizations or transactions that only involve the disposition of transmission facilities.”⁸ Applicants also remind the Commission that it did not require an analysis of the competitive effects of combining transmission in ITC’s past acquisitions of METC and IPL.⁹

The AAI respectfully suggests that the Commission carefully scrutinize Applicant’s assertion that no analysis of the competitive effects of combining ITC’s and Entergy’s transmission is necessary to satisfy the statutory public interest standard of Section 203. Rather, for a variety of compelling and timely reasons, the Commission

⁴ ITC/Entergy Transaction, Fact Sheet, itc-holdings.com, available http://www.itc-holdings.com/images/itc-entergy/factSheets/1_ITCEntergyTransaction.pdf.

⁵ Application, *supra* note 1, at 60.

⁶ *Id.*, at 17-18.

⁷ *Id.*, at 20-21. Applicants also state that there is no horizontal combination of generation assets or vertical combination of generation and adjacent market assets that would require them to file a competitive analysis under the Commission merger filing requirements.

⁸ *Id.*

⁹ *Id.*

should collect and analyze additional information that would allow it to determine the likely competitive and efficiency effects of combining ITC and Entergy transmission.

The Commission has reserved the authority to do just this. Order 669 states, for example:

We note that although the Filing Requirements Rule provided that applicants for a transaction involving only transmission facilities need not provide a competitive analysis under §§ 33.3 or 33.4 of the Commission's regulations, it also states that if the Commission determines that a filing nonetheless raises competitive issues, the Commission will evaluate those issues. Filing Requirements Rule at 31,902.¹⁰

The AAI's comments in this proceeding are neutral as to the likely competitive effects of combining ITC and Entergy transmission. Indeed, based on a lack of record evidence, it would be impossible for the AAI, any other party to this proceeding, or the Commission to conclude anything on this score. The AAI's comments address the three major reasons why the Commission should exercise its authority to collect and evaluate additional information in this case.

- 1. The merger of ITC's and Entergy's transmission systems does not qualify for expedited review under Commission policy because the Entergy transmission system is not under the functional control of an RTO.***
- 2. Applicants' analysis of the projected merger benefits suggests broad efficiencies that are generally the potential result of independent transmission ownership, not the merger itself.***
- 3. The proposed merger tests the limits of Commission policy on transmission market power and Regional Transmission Organizations (RTOs).***

These questions are discussed in more detail in the following sections.

¹⁰ Federal Energy Regulatory Commission, Transactions Subject to FPA Section 203, Order No. 669, Final Rule (Order 669), 113 FERC 61,315 (December 23, 2005), at PP. 190, footnote 135.

III. The Merger of ITC's and Entergy's Transmission Systems Does Not Qualify for Expedited Review Under Commission Policy Because the Entergy Transmission System is Not Under the Functional Control of an RTO

While the Applicants do not explicitly request expedited approval for the proposed transaction, they ask for it in effect by stating that no competitive analysis of combining ITC and Entergy transmission is required. As noted above, the Commission has been careful to reserve flexibility in evaluating the competitive effects of transmission-only transactions. Moreover, it has specifically explained that expedited treatment is not available for transactions with certain characteristics. For example, Order 669 states that the Commission “will generally provide expedited review for a disposition of only transmission facilities, particularly those that both before and after the transaction remain under the functional control of a Commission-approved RTO or ISO.”¹¹

Entergy's transmission assets are not under the functional control of a Commission-approved RTO and therefore Order 669's carve-out applies in the instant case.¹² Moreover, as discussed below, Applicants' proposed plan for integrating Entergy's system into MISO raises issues that are linked to the potential competitive effects of combining ITC and Entergy transmission. Entergy has a long history of allegedly using its transmission system to foreclose rival generators – conduct that has been scrutinized by competition enforcers. In November 2012, for example, the U.S. Department of Justice Antitrust Division issued a press release stating that its investigation into Entergy's alleged control over transmission to foreclose rival

¹¹ *Id.*

¹² Entergy's Independent Coordinator of Transmission (ICT) agreement with the Southwest Power Pool does not constitute even operational control over Entergy's transmission. Moreover, the ICT is not an RTO. *See, e.g.*, Federal Energy Regulatory Commission, Order Conditionally Approving Independent Coordinator of Transmission Filing, 115 FERC ¶61,095 (April 24, 2006). *See also* Federal Energy Regulatory Commission, Order Accepting Amended Agreement and Proposed Tariff Revisions, 141 FERC ¶ 61,011 (October 2, 2012).

generators operating in its four-state area “remains open,” noting that the professed efficiency and regulatory justifications for exclusionary conduct remain unpersuasive.¹³

The DOJ’s press release goes on to explain that if Entergy follows through on its commitments to join an RTO, such action would address the Antitrust Division’s vertical competitive concerns. However, the agency noted that it would “closely monitor developments, and in the event that Entergy does not make meaningful and timely progress, the division can and will take appropriate enforcement action, if warranted.”¹⁴ The absence of a track record involving RTO control over Entergy’s transmission assets, coupled with longstanding concerns that Entergy has potentially used its transmission assets to constrain competition should give the Commission pause in considering Applicants’ claim that the merger raises no concerns regarding the creation or enhancement of transmission market power. Presumably, it is for these reasons that the Commission will not always give expedited treatment to transmission-only transactions.

In light of the foregoing concerns, and the Order 669 carve-out, the burden is therefore on the Applicants to demonstrate how a merger that involves the creation of the largest transmission system in the United States by load served (half of which is not under the functional control of an RTO) would not adversely affect competition. Additional information would allow the Commission to determine whether the merger, by eliminating a transmission competitor, would: (1) create or enhance Applicants’ ability and incentive to exercise transmission market power; or (2) create barriers to entry

¹³ U.S. Department of Justice, Justice Department Statement on Entergy Corp.’s Transmission System Commitments and Acquisition of KGen Power Corp.’s Plants in Arkansas and Mississippi (November 14, 2012), available http://www.justice.gov/atr/public/press_releases/2012/288781.htm.

¹⁴ *Id.*

to rival transmission operators, to the detriment of competition and consumers. At a minimum, such information would include direct evidence of competitive effects in other comparable transactions involving the combination of vertically integrated and independent transmission, together with an analysis of relevant markets, market concentration, competitive effects, and entry.

A closer look would also give the Commission the ability to evaluate Applicants' efficiencies claims, as discussed in more detail below. The independent transmission model is likely to offer many benefits to competition and consumers. However, the Commission was careful not to give independent transmission a "free pass" for Section 203 purposes. In considering comments on the Notice of Proposed Rulemaking that preceded Order 669, for example, the Commission specifically rejected a request by ITC that it expedite review of transactions involving independent transmission. Rather, the Commission explained that "review of such cases would be more appropriately addressed on an individual basis."¹⁵ As the Commission gathers evidence on how the independent ownership model addresses competition, reliability, and investment questions relative to vertically integrated transmission, the benefits of the model will likely become clearer. At present, however, the fact that the ITC-Entergy system would be independently owned does not satisfy the public interest standard under Section 203.

¹⁵ Order 699, *supra* note 10, at PP. 189.

IV. Applicants' Analysis of the Projected Merger Benefits Suggests Broad Efficiencies That are Generally the Result of Independent Transmission Ownership, Not the Merger Itself

The Commission's Merger Policy Guidelines adopted the U.S. Department of Justice/Federal Trade Commission Horizontal Merger Guidelines.¹⁶ Under both, efficiencies such as increased economies of scale or scope may have the effect of lowering prices, improving quality and reliability, and even allowing the firm to bring new products to market. However, it is important for Section 203 purposes to consider only merger-specific and cognizable efficiencies that could potentially result from a transmission-only transaction.¹⁷ Applicants bear the burden of showing why the acquisition is needed to achieve projected benefits, as compared to efficiency-enhancing improvements that are achievable without the merger.¹⁸ Efficiencies also should not be vague or speculative. As such, Applicants should verify each efficiency with evidence of its likelihood and magnitude.¹⁹

The efficiencies offered by ITC center on the expectation that the company will be able to operate and manage Entergy's transmission assets better than Entergy can

¹⁶ Federal Energy Regulatory Commission, Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act, Order 592, Policy Statement, 77 FERC ¶61,263 (December 18, 1996), at 3-4 (citing U.S. Dept. of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines, issued April 2, 1992, 57 FR 41,552 (1992)).

¹⁷ Cognizable efficiencies are those that have been verified and are not the result of anticompetitive reductions in output. *See* Horizontal Merger Guidelines, *supra* note 16 at 31.

¹⁸ Even if it is found that Entergy cannot achieve the projected efficiencies on its own (e.g., through internal transmission upgrades), this does not necessarily mean the efficiencies are merger-specific. Another independent transmission company could, for example, acquire Entergy's transmission assets and achieve the same projected efficiencies without creating the risk of anticompetitive effects.

¹⁹ *Id.* Efficiency claims can be substantiated with historical examples or evidence from similar transactions (i.e., acquisition of vertically integrated transmission assets by an independent transmission company).

today. In contrast to Entergy, which is a vertically integrated utility that owns and operates generation, transmission and distribution assets, ITC is a transmission-only company and has experience operating in multiple RTOs. Due to its specialization and experience, ITC contends that it will be able to improve the operation of Entergy's transmission assets, strengthen regional transmission planning, and increase investment over time.²⁰ ITC stresses its "singular" focus on transmission and how this will translate into improved operation of Entergy's transmission assets.²¹ ITC also projects it will bring a regional approach to transmission planning, describing in detail a portfolio of projects that it may consider pursuing in the future.²²

Applicants offer a mixture of evidence in support of their efficiency claims. ITC presents the Green Power Express project as an example of its regional approach to transmission planning and development.²³ This portfolio of transmission lines under development, covering several states and multiple RTO and non-RTO regions, would reduce transmission congestion and integrate renewable resources into wholesale electricity markets.²⁴ In further support of the claim that ITC will bring a regional approach to transmission development, ITC offers a detailed study on future projects that it may undertake in the Entergy footprint.²⁵ In regard to short-term operational improvements, ITC cites statistics showing two subsidiaries ranking in the top 10 percent

²⁰ Prepared Direct Testimony and Exhibits of Joseph L. Welch on Behalf of ITC Holdings Corp. at 14.

²¹ *Id.* at 14, 21, 25.

²² *Id.* at 22.

²³ *Id.* at 34.

²⁴ *Id.* at 17, 34.

²⁵ Prepared Direct Testimony of Johannes P. Pfeifenberger on Behalf of ITC Holdings Corp. at 3-4.

of all transmission owners as measured by frequency and duration of outages.²⁶ ITC also describes how it significantly reduced the frequency of sustained outages following the acquisition of these two subsidiaries.²⁷

The AAI suggests that the Commission carefully scrutinize Applicants' efficiencies analysis, for two reasons. First, it is worth exploring in more detail whether the claimed efficiencies from the proposed acquisition are actually merger-specific. ITC is a transmission-only business, and Entergy is a vertically integrated utility. While ITC's single line of business may permit it to operate and invest in transmission assets more efficiently than Entergy, merger analysis asks why Entergy cannot improve its transmission operations by strengthening the team managing the assets, dedicating more capital to upgrades, or broadening the scope of its planning process.

Arguably, these internal transmission improvement alternatives have proved elusive for Entergy. One possible explanation is that vertically integrated utilities not under the functional control of an RTO have the ability to foreclose rival generators by constraining transmission availability. In the short run, this can take the form of withholding transmission capacity and in the long run, by failing to invest in upgrades and expansion. Addressing these problems by placing the Entergy system under the functional control of an RTO, however, does not depend on a merger with ITC. Thus, for merger analysis purposes, ITC should offer more specific evidence on why it can achieve efficiencies with the merger that Entergy cannot achieve on its own.

²⁶ Prepared Direct Testimony of Jon E. Jipping on Behalf of ITC Holdings Corp. at 12.

²⁷ *Id.*, at 13.

Second, the verifiability of Applicants' claimed efficiencies is mixed. Some prospective benefits are supported with examples from past experience while others are not. The evidence of ITC's operational improvements following previous acquisitions should be given some weight if such transactions are sufficiently comparable to the proposed merger. However, the evidence in support of ITC's regional approach to transmission planning is not as credible. The Green Power Express project, which Applicants offer in support of ITC's regional approach to transmission development, should be given less weight. ITC has taken steps to develop this project but it is still far from completion.²⁸ The study on future transmission projects, which presents detailed cost-benefit analysis on projects that ITC may undertake, should be treated with some caution. While the information is far from vague, it is not based on past experience and is at best speculative given that ITC has not made a binding commitment or taken any concrete steps to develop any of the projects presented.²⁹ In light of these efficiencies questions, therefore, the Commission should exercise its authority to request additional information and analysis.

V. The Proposed Merger Tests the Limits of Commission Policy on Transmission Market Power and RTOs

In Order 669, the Commission expressed confidence in the ability of RTOs to address competitive issues, explaining that “we believe that ISOs and RTOs are pro-

²⁸ Katie Howell, ‘Green Power Express’ Gains Federal Rate Incentives, N.Y. Times, Apr. 13, 2009, available at <http://www.nytimes.com/gwire/2009/04/13/13greenwire-green-power-express-gains-federal-rate-incenti-10514.html>; Dan Haugen, Transmission Proposals Aim to Break Iowa Wind Bottleneck, Midwest Energy News, Aug. 28, 2012, available at <http://www.midwestenergynews.com/2012/08/28/transmission-proposals-aim-to-break-iowa-wind-bottleneck/>.

²⁹ Pfeifferberger, *supra* note 25, at 19 (“The purpose of this effort was not to identify projects that ITC necessarily would propose to build.”).

competitive and are effective at preventing market power abuse because they have Commission-approved market-monitoring and mitigation measures in place.”³⁰ The proposed merger of the ITC and Entergy transmission systems will test the extent to which the Commission is willing and able to defer to RTO principles, operation, market monitoring functions, transmission planning, and track record to address competitive concerns surrounding the potential exercise of transmission market power. This is particularly true in light of the fact that Entergy’s transmission system is not under the functional control of an RTO. Moreover, the effectiveness with which RTOs address transmission market power concerns is not undisputed. Rules that potentially give transmission owners undue influence over the planning process, for example, have troubled the New York Independent System Operator.³¹

Other intervenors in this proceeding raise a variety of issues relating to the transaction, ranging from the calculation of transmission rates, to the timetable for integrating Entergy’s transmission system in MISO, to how ITC-Entergy will participate in the MISO transmission planning process. While intervenors generally do not cast these questions as competitive concerns, they nonetheless all bear in some way on an analysis of how combining ITC and Entergy transmission is likely to affect competition. First, for example, it is important for the Commission to resolve how the timetable for integrating Entergy’s transmission into MISO will affect the extent to which ITC-Entergy cedes functional control of its system. If total integration requires time – and the Commission determines through additional analysis that a merged ITC-Entergy possesses transmission

³⁰ *Id.*

³¹ *See, e.g.*, Brief for the American Antitrust Institute as Amicus Curiae in Support of the Petitioner in Re: New York Regional Interconnect, Inc., Petitioner, v. Federal Energy Regulatory Commission, No. 09-1309 (July 29, 2010) (D.C. Cir.).

market power – what safeguards are in place to ensure that the merged company is not able to exercise such market power during the transition?

Second, it is unclear how a merged ITC-Entergy will participate in the MISO transmission planning process. Thus, the Commission might ask how the process proposed by Applicants will be kept free of undue influence (should the Commission determine that a merged ITC-Entergy possesses transmission market power), to the potential detriment of smaller, rival independent transmission companies, or other market participants. Finally, there are genuine questions about how the merged company will set transmission rates during the transition period in which Entergy's transmission system is integrated into MISO. This includes the operation of any true-up mechanisms resulting from pre- to post-merger rate calculations. Market power can be exercised even in the presence of regulated rates. Rather than raising rates to supracompetitive levels post-merger, the ability to control prices may be revealed by the failure of the transmission owner to *discount* its rates. The Commission might therefore ask how the merged company's transmission rates will be monitored for this type of scenario, in the event it determines that the merger creates or enhances market power.

If the Commission concludes that any of these questions are not well settled in regard to the transition period and beyond, such questions deserve a closer look before the proposed merger is approved under Section 203. A closer look in this case would allow the Commission to satisfy itself that its current RTO policies adequately address transmission market power. If they do not, particularly given the unique circumstances in play here, the Commission can take the opportunity to clarify the circumstances under which RTOs can be relied upon to address competitive concerns. The public interest

would be better served if this were achieved now, rather than at a later date and in the wake of an even larger transmission-only transaction. Additional information would allow the Commission to evaluate the competitive effects of the ITC-Entergy transaction. If problems are identified, the Commission could also strengthen and refine RTO policies, thus providing more guidance and transparency to market participants and about transmission policy more generally.

For the foregoing reasons, the Commission should grant the AAI's motion to intervene and comment in these proceedings.

Respectfully submitted,

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