

INSIGHTS

Competition Advocacy Group Files Comments in FERC Proceeding Involving Transmission Merger

January 29, 2013

By: [Daniel E. Hemli](#)

On January 22, 2013, the American Antitrust Institute (AAI), an independent non-profit organization with a mission to advance the role of competition in the economy and protect consumers, [filed comments](#) in the Federal Energy Regulatory Commission's proceeding involving the proposed merger of the transmission businesses of ITC Holdings Corp. (ITC) and Entergy Corporation (Entergy). FERC is reviewing the transaction under Section 203 of the Federal Power Act. If the \$1.8 billion transaction is approved, ITC will become one of the largest electric transmission companies in the U.S., with over 30,000 miles of transmission lines spanning 11 states from the Great Lakes to the Gulf Coast. The merger would more than double ITC's system peak load (from 26,100 MW to 54,100 MW). In connection with the transaction, Entergy is obtaining regulatory approval to join the Midwest Independent Transmission System Operator (MISO), a Regional Transmission Organization (RTO) that provides open-access transmission service and monitors the transmission system throughout the Midwest United States and the Canadian province of Manitoba. Unlike Entergy, ITC is focused solely on transmission and does not own electric generation assets. According to the companies' [application](#) to FERC for authorization, the merger serves the public interest by placing more transmission assets under the ownership of an independent entity with a singular emphasis on transmission and a proven track record of investment, a regional and proactive view toward transmission planning, and the financial strength to invest in transmission projects that bring reliability and economic benefits to customers. Despite AAI's assertion that its comments are neutral as to the likely competitive effects of combining ITC and Entergy transmission, it urges FERC to carefully scrutinize the transaction and to collect and analyze additional information to perform a thorough competitive analysis in determining whether the merger is in the public interest. AAI provides three reasons for suggesting an in-depth competition review:

1. The absence of a track record involving RTO control over Entergy's transmission assets, coupled with concerns that Entergy may have used its transmission assets to constrain competition, raise questions regarding the companies' claim that the merger will not create or enhance transmission market power or otherwise harm competition.
2. A closer look would enable FERC to evaluate the companies' efficiencies claims. In particular, AAI questions whether the claimed efficiencies from the proposed transaction

are merger-specific, that is, whether they could not be achieved by Entergy on its own. AAI also argues that the verifiability of the claimed efficiencies is mixed, with some prospective benefits not supported with historical examples from prior acquisitions.

3. The proposed merger tests the limits of FERC's policy to defer to RTOs to address competitive concerns surrounding the potential exercise of market power in transmission. According to AAI, for example, it is unclear how a merged ITC-Entergy will participate in the MISO transmission planning process, and there are questions about how the merged company will set transmission rates during the transition period in which Entergy's transmission system is integrated into MISO (AAI notes that market power can be exercised even when rates are regulated).

Significantly, AAI refers to a November 2012 [statement](#) by the Department of Justice Antitrust Division (DOJ) regarding an ongoing investigation into allegations that Entergy exercised control over its transmission system and fleet of gas-fired power plants to foreclose rival low-cost generators from competing to sell long-term power to wholesale customers. According to the DOJ statement, Entergy's commitments to join MISO and to divest its transmission system to ITC will resolve the DOJ's concerns "by eliminating Entergy's ability to maintain barriers to wholesale power markets, ensuring that all Entergy service area generation is dispatched independently and at lowest cost, increasing market transparency and oversight, and properly aligning incentives for the construction of transmission."² Although the DOJ explicitly reserves the right to take enforcement action if Entergy "does not make meaningful and timely progress"², it is clear that the DOJ approves of the ITC-Entergy transmission merger on antitrust grounds. This may explain why AAI brought its concerns to FERC. The AAI filing serves as a reminder that energy transactions, including those in the electric power industry, often involve numerous stakeholders with differing viewpoints who can raise a wide range of issues that may need to be addressed by the transaction parties.