UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

International Transmission Company Docket No. ER06-1006-000

Midwest Independent Transmission
System Operator, Inc.

ORDER CONDITIONALLY ACCEPTING
REVISED ATTACHMENT O FILING

(Issued July 14, 2006)

1. On May 17, 2006, pursuant to section 205 of the Federal Power Act (FPA), International Transmission Company (International Transmission) and Midwest Independent Transmission System Operator, Inc. (Midwest ISO) filed International Transmission's proposed revisions to attachment O of Midwest ISO's Open Access Transmission and Energy Market Tariff (Midwest ISO Tariff or Tariff).[1] In this order, we conditionally accept International Transmission's tariff filing reflecting a proposed formula rate, and the true-up mechanism, without suspension or hearing, to be effective July 1, 2006, and January 1, 2007, as requested. The Commission rejects International Transmission's request to adjust its accumulated deferred income tax (ADIT) balance.

Background

2. On February 20, 2003, the Commission issued an order authorizing the sale of International Transmission's jurisdictional facilities to ITC Holdings Corporation, which resulted in International Transmission becoming a completely independent, for-profit

[1] As the administrator of the Midwest ISO Tariff, Midwest ISO joins International Transmission in the filing to amend the Tariff but takes no position on the substance of the filing. Consequently, in this order, we refer to the proposed revisions as International Transmission's proposals.

transmission company.[2] In approving the sale, the Commission allowed International Transmission to defer and recover, equally over a 20-year period, an amount equal to the balance of ADIT on International Transmission's books at closing (ultimately, determined to be approximately $60.6 million). International Transmission was also granted its requested ROE of 13.88 percent, which included a 100 basis point incentive for their independent status and a 50 basis point incentive for being a member of a regional transmission organization (RTO), added to the Commission-approved base ROE of 12.38 percent for transmission owning members of Midwest ISO. In addition, the Commission approved the use of International Transmission's actual capital structure of approximately 40 percent debt and 60 percent equity.

3. In a related order, the Commission accepted revisions to the Midwest ISO Open Access Transmission Tariff that implemented International Transmission's proposed attachment O formula rate, effective February 20, 2003.[3] International Transmission's attachment O formula rate was modified to account for the ADIT adjustment, to use a 13.88 percent ROE, and to use International Transmission's actual capital structure. Currently under International Transmission's attachment O formula rate, rates change annually on June 1, based on inputs into the attachment O formula rate from the prior year's FERC Form No. 1. Thus, International Transmission's current-year rates are based on last year's actual costs.

Summary of Filing

4. On May 17, 2006, International Transmission and Midwest ISO submitted proposed revisions to International Transmission's attachment O formula rate under the Midwest ISO Tariff to change from a backward-looking annual adjustment to a forward-looking adjustment, thus eliminating the cost recovery lag caused by using last year's costs for this year's rates. International Transmission states that this proposed change will allow it to maintain an aggressive investment program and complete large, multi-year capital projects. International Transmission proposes to provide estimated costs to its customers each October 15 for the next calendar year with new rates based on those estimates taking effect the following January 1. International Transmission notes that the

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[2] *ITC Holdings Corp.*, 102 FERC ¶ 61,182, *order denying reh'g and accepting compliance filing*, 104 FERC ¶ 61,033 (2003) (*ITC Holdings*).

[3] *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,210, *order on clarification*, 102 FERC ¶ 61,233 (2003).

Commission approved a similar proposal by American Transmission Company (American Transmission).[4]

5. As part of its proposal to use estimated costs, International Transmission proposes an annual true-up mechanism using the current FERC Form No. 1 to calculate any difference between the previous year's "estimated" rate and what the actual rate should have been. Then, in the following calendar year, any revenue over-collection will be returned to customers via a credit and any revenue under-collection will be added to that year's rates. International Transmission also proposes to add interest to any over-recovery or under-recovery using the Commission's refund interest rate.[5]

6. International Transmission also proposes to increase the unamortized ADIT balance that the Commission previously authorized it to recover. International Transmission states that changing to a projected revenue requirement will not affect the recovery of the amortization of the ADIT; however, International Transmission asserts that it will lose 17 months' worth of return on that unamortized ADIT balance as a result of the change it is proposing to its attachment O formula rate.

7. International Transmission states that it is not proposing any other changes to the implementation of its formula rate or to alter any of the cost inputs to the formula.

8. With the exception of two revised tariff sheets, International Transmission requests that the proposed Midwest ISO Tariff revisions be made effective on July 1, 2006. For the changes to the two tariff sheets that reflect its current methodology, International Transmission requests an effective date of January 1, 2007, since those sheets will still apply to the Midwest ISO Tariff through this calendar year, but not for rates calculated after 2006, since the methodology reflected on those sheets will still apply to the Midwest ISO Tariff rates in effect through the end of this calendar year.[6] International Transmission requests waiver of the Commission's 60-day and 120-day notice requirements,[7] respectively, to permit the requested effective dates of July 1, 2006 and January 1, 2007, respectively.

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[4] *Citing American Transmission Company, LLC*, 97 FERC ¶ 61,139 (2001) (Letter Order accepting settlement).

[5] *See* 18 C.F.R. § 35.19a (2005).

[6] That is, the deletion of the current methodology reflected in those two tariff sheets will be take effect on January 1, 2007.

[7] 18 C.F.R. § 35.3 (2005).

9. International Transmission also requests waiver of the Commission's regulations concerning the cost data requirements to the extent that this is deemed applicable to its filing.[8] It states that waiver is appropriate because it is changing the implementation of its formula rate rather than requesting any change or increase in a stated rate and the inputs for the formula rate are contained in the annual FERC Form No. 1.

Notice of Filing and Responsive Pleadings

10. Notice of International Transmission's filing was published in the *Federal Register*,[9] with motions to intervene and protests due on or before June 7, 2006. The Michigan Public Service Commission (Michigan Commission) filed a notice of intervention and protest. Timely motions to intervene and protests were filed by: the Association of Business Advocating Tariff Equity (ABATE); Detroit Edison Company and DTE Energy Trading, Inc. (collectively, DTE Parties); Michigan Public Power Agency and Michigan South Central Power Agency (collectively, Michigan Agencies); and Consumers Energy Company and CMS ERM Michigan, L.L.C. (collectively, Consumers Energy). The City of Croswell, Michigan, the Village of Sebewaing, Michigan, and Thumb Electric Cooperative (collectively, Southeast Michigan Systems) filed a timely motion to intervene, protest and what it characterizes as a conditional complaint. American Transmission filed a timely motion to intervene and comments in support of International Transmission's filing. On June 16, 2006, International Transmission filed an answer to the protests and comments. On June 21, 2006, DTE Parties filed an answer to International Transmission's answer.

Discussion

Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[10] the notice of intervention and the timely, unopposed motions to intervene serve to make the entities who filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[11] prohibits an answer to a protest or an answer to an answer unless otherwise ordered by the decisional authority. We will accept

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[8] 18 C.F.R. § 35.13(d) (2005).

[9] 71 Fed. Reg. 30,910 (2006).

[10] 18 C.F.R. § 385.214 (2005).

[11] 18 C.F.R. § 385.213(a)(2) (2005).

International Transmission's and DTE Parties' answers because they have provided information that assisted us in our decision-making process.

Substantive Matters

1. Projected Revenue Requirement and True-up Mechanism

Responsive Pleadings

12. Michigan Commission states that the annual inputs into the attachment O formula rate are not filed with the Commission or subject to any regulatory review and, along with Michigan Agencies, argue that ratepayers have no means of determining how the estimated costs are derived and whether the future test year estimates are reliable or accurate. In addition, they state that International Transmission has little incentive to contain costs and that the consequences to International Transmission of overestimating its costs is relatively low compared to the benefits received by the company's higher return earned on the estimated amounts. ABATE argues that using estimated costs will increase rates, and the results of the formula will lead to unjust and unreasonable rates. ABATE also argues that the change in the formula will complicate International Transmission's ratemaking treatment as well as increase its customers' expenses to monitor the formula and true-up process.

13. Michigan Agencies state that the Commission should allow International Transmission to use estimated costs for five years, during which International Transmission may implement its multi-year capital investment plan. Rates should then be established as they are today, using historical costs in the Form 1, unless International Transmission seeks and obtains Commission approval for continued use of estimated costs. In its answer, International Transmission contends that "sunsetting" the use of forward-looking costs in five years would introduce rate uncertainty and that limiting the use of the projected revenue requirement is antithetical to the very nature of a long-term capital investment plan.

14. Consumers Energy and Michigan Agencies state that if the true-up results in an over-collection of revenues such over-collected amounts should be refunded based on the 13.88 percent ROE that International Transmission receives or at least the overall rate of return, not the FERC interest rate. Similarly, DTE Parties and Michigan Agencies state that in the event of an under-collection, International Transmission should use its actual short-term debt costs, capped at the Commission's interest rate, when calculating interest on the under-collected amounts. In addition, Michigan Agencies argue that, rather than waiting for up to 24 months to return over-collected amounts, International Transmission should be required to provide refunds promptly upon determination of the actual difference in revenue requirements.

15. In its answer, International Transmission contends that refunding over collections in accordance with the Commission's interest rate gives ample incentive to reasonably estimate its costs and ensures that customers are protected. However, while International Transmission plans to use the FERC interest rate for any over-collections, in its answer, International Transmission agrees to modify its proposal by using its "'actual short-term debt costs, capped at the applicable FERC refund interest rate, on under-estimated cost of service amounts.'"[12] International Transmission also explains that it will not know what, if any, amounts have been over collected until the FERC Form No. 1 for a given year is filed and that if its rates are adjusted immediately following receipt of the FERC Form No. 1 data, there would be a second mid-year rate change, adding uncertainty and complexity for planning purposes.

16. Consumers Energy and Michigan Agencies assert that International Transmission should provide the annual cost projections to customers sooner than October 15. Consumers Energy notes that October 15 is too late for utilities in Michigan to include the cost estimates in their annual power cost recovery filings that must be submitted to the Michigan Commission by September 30. Consumers Energy asks to get the estimates by August 1. Michigan Agencies contends that International Transmission's proposal to hold a meeting on the cost projections by October 30 of each year is not meaningful because it gives customers only 15 calendar days to review the data. In its answer, International Transmission commits to submitting its projected revenue requirements to customers by September 1 of each year, rather than October 15 as originally proposed. International Transmission states that utilities in Michigan will have the information in time to submit its cost recovery filing with the Michigan Commission and International Transmission will be able to file a reasonably accurate projection.

17. DTE Parties state that International Transmission should amortize any true-ups greater than 5 percent over a time period sufficient to ensure that any rate adjustment is no greater than 5 percent per year. In its answer, International Transmission disagrees with DTE Parties and states that while it commits to limiting the rate volatility as much as possible, weather and changes in third party revenues, for example, could cause estimated revenues to vary by a significant amount. International Transmission states that amortizing any true-up would move away from the synchronization of costs and revenues and that prolonging the length of time to recover any shortfall undermines the purpose of the proposed change to a forward-looking attachment O.

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[12] International Transmission's Answer at 9 (quoting from, and agreeing to, the modification proposed by DTE Parties).

18. Michigan Agencies state that a true-up mechanism requires not just a comparison of estimated to actual costs, but use of the appropriate demand divisor and that it is unclear whether International Transmission intends to estimate the demand divisor. In its answer, International Transmission explains that since the true-up process is based on revenues that it actually receives, as reported on the FERC Form No. 1, that the true-up process will take into account the "appropriate demand divisor" as its revenues are the product of rate and actual load.

Commission Determination

19. The Commission will accept for filing International Transmission's formula rate and true-up mechanism, as proposed, without suspension or hearing, effective July 1, 2006, and January 1, 2007, as requested. In addition, we will not impose a five year limit on the proposal, as requested by Michigan Agencies. Our analysis indicates that International Transmission's proposal to switch to forward-looking estimated transmission costs with a true-up mechanism is just and reasonable, and therefore it need not be limited to a 5 year duration. International Transmission is singularly focused on transmission infrastructure, development and maintenance and by switching to a projected revenue requirement, International Transmission can continue its plan of funding necessary transmission infrastructure projects, especially large multi-year capital projects that will relieve congestion and improve reliability. We also note that using estimated costs is not a departure from ratemaking practice,[13] and while rates will initially increase, customers will ultimately only pay the cost of service they would have paid on the lagging basis.

20. We also reject the suggestion that International Transmission should use its 13.88 percent ROE rate or overall rate of return when refunding any over-collections as a result of the true-up process. The Commission's regulations specifically state that the interest rate used when computing refunds is the average prime rate as published in the Federal Reserve Bulletin for each calendar quarter.[14] We are not convinced that we should deviate from the practice of applying the Commission's standard refund interest rate and, therefore, any annual true-up amounts that result in refunds to customers must include interest calculated in accordance with the Commission's regulations. However, for true-up charges assessed to customers based on under-estimated costs, we accept International Transmission's commitment to apply its actual short-term debt costs, capped at the

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[13] *See, e.g., Boston Edison Co.*, 91 FERC ¶ 61,198 (2000).

[14] 18 C.F.R. § 35.19a (2005).

applicable FERC refund interest rate, and direct International Transmission to make such revisions to its proposed tariff sheets in a compliance filing within 30 days of the date of this order.

21. We disagree with protestors that argue that they will have no means of determining if the estimated costs that International Transmission proposes each year are accurate. International Transmission's proposal to submit its projected revenue requirements and estimated data by September 1 of each year gives customers reasonable opportunity to review and provide input on the projected costs before they go into effect. Furthermore, International Transmission intends to hold a customer meeting to explain the formula rate input projections and cost details by October 30 of each year.[15] International Transmission will also provide an explanation of the yearly true-up adjustment in response to customer inquiries and will post on the OASIS information regarding frequently asked questions.[16] Additionally, as International Transmission explains in its answer, since the true-up is based on the previous year's Form 1, customers will be able to determine the accuracy of International Transmission's revenue requirement. Thus, Michigan Agencies' concern about the appropriate demand divisor is addressed by International Transmission's answer. International Transmission must, however, revise its tariff sheets, in a compliance filing within 30 days of the date of this order, to reflect the earlier September 1 deadline that it commits to in its answer.

22. We also disagree with DTE Parties' that International Transmission should amortize any true-ups over 5 percent over a time period sufficient to ensure that any adjustment is not greater than 5 percent per year. As International Transmission explains in its answer, amortizing any true-up defeats the purpose of switching to a projected revenue requirement that better matches its costs and revenues in the periods they are incurred.

2. Proposed ADIT Adjustment

Responsive Pleadings

23. Michigan Agencies argue that any loss on the return that would have accrued on the ADIT as a result of jumping ahead to a "current" rate recovery basis is one of the risks of making that change. Michigan Agencies further argue that International Transmission is in effect proposing a "hold harmless" provision to enable International

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[15] *See* proposed Original Sheet No. 1365Z.05A.

[16] *Id.*

Transmission to be held harmless from its own proposal. In addition, Southeast Michigan Systems argue that International Transmission already over-recovers by using the highest ROE in the Midwest and, therefore, it should not also be able to adjust its ADIT balance. Southeast Michigan Systems contend that if International Transmission switches to a projected cost basis, then for consistency, International Transmission should include in those rates only the return that relates to the current period.

24. In its answer, International Transmission argues that the ADIT proposal is consistent with the Commission's prior approval to recover an ADIT adjustment in rates; that it is seeking only to recover the return on the ADIT adjustment that it was previously authorized to recover. International Transmission agrees with Michigan Agencies that the provision enables it to be "held harmless" and argues that such a provision is entirely appropriate.

Commission Determination

25. We deny, as unjust and unreasonable, International Transmission's request to increase its uncollected ADIT balance. As International Transmission acknowledges, its collection of the total $60.6 million in ADIT over 20 years is unaffected by its proposal to switch to projected costs. In addition, the rate of return applied to the uncollected ADIT balance is not impacted. International Transmission's request here to adjust the ADIT balance appears to be related solely to an aspect of its proposal that will cause the most current ADIT balance to be included in the attachment O formula rate earlier than it was previously. If International Transmission wants to change its formula so that it recovers current costs on a more timely basis, it cannot at the same time pick one cost to continue recovering on a less timely basis.

26. Specifically, in addition to switching to current-year costs, International Transmission asks to change the attachment O formula rate so that the inputs for the annual update take effect on January 1 instead of June 1. One of the inputs is the ADIT balance that remains on December 31 of each year.[17] With the proposed changes, each year International Transmission will earn a return on the most up-to-date ADIT balance from the current year, which includes a reduction in the balance to reflect all payments made by customers during the year. However, if International Transmission had not proposed to change to current-year costs and to revise the input effective date to

[17] Unlike most other inputs into the attachment O formula, where current-year costs are based on estimates and projections, the end-of-year ADIT balance is already known because it is simply a matter of subtracting the un-changing ADIT payments customers made on that balance in the previous year.

January 1, the formula would not be updated with the lower current-year ADIT balance until the following year, and International Transmission would earn a return on the higher ADIT balance until then. To account for this, International Transmission wants to increase its ADIT balance so that the return it earns on the ADIT balance is the same as it would have earned had it not made the instant proposal to modify its formula rate. Essentially, International Transmission asks that the switch to current-year costs and the January 1 effective date apply to all inputs to the attachment O formula *except* the ADIT balance. It claims that, unless its ADIT proposal is accepted, it will "forego", *i.e.*, lose, 17 months' of return on ADIT.

27. International Transmission will not lose any return if its proposed forward-looking methodology using current costs is applied to ADIT. It will recover a return; but the return will simply more accurately reflect its current balance rather than an out-of-date historic balance. Thus, International Transmission's rationale for supporting the ADIT increase conflicts with the rationale it presents for changing to a forward-looking methodology with a January 1 effective date for the formula inputs. For all costs except ADIT, International Transmission wants to use current-year costs and have the updates to the formula become effective 6 months sooner than they do currently because the lag has a negative impact on cash flow (*i.e.*, International Transmission has to wait to begin recovering this year's presumably higher costs until June 1 of next year). Thus, for costs that it expects to increase, International Transmission advocates an earlier effective date so that the formula more closely matches cost recovery with cost incurrence. At the same time, however, International Transmission proposes to adjust the ADIT rate balance so that the mismatch continues for ADIT alone so that it will recover a return on ADIT based on an out-of-date higher ADIT balance. In other words, International Transmission wants to delay the inclusion in the formula rate costs that have decreased (ADIT) while including increased costs as soon as possible. International Transmission cannot have it both ways.

28. Furthermore, we reject International Transmission's assertion that its ADIT proposal is justified because the proposed increase in the ADIT balance allows it to recover amounts for the return on ADIT that the Commission has already approved. It goes without saying that adjusting the ADIT balance to capture the same return as under the originally-approved methodology will result in the same return on ADIT that it would have recovered had it not changed its methodology. But the Commission did not approve an ADIT return methodology separate from the general rate methodology. Nor did it mandate that the ADIT return methodology never change. Here, it is consistent with the general change in methodology that it now proposes, for all elements used to calculate its rates, including ADIT, to reflect the most up-to-date, current costs.

29. In *ITC Holdings*, the Commission approved the deferral of recovery of an initial ADIT balance of $60.6 million by amortization over a 20 year Period and a return on the

unrecovered ADIT balance used for each rate update pursuant to the attachment O formula in effect at the time. In *ITC Holdings*,[18] the Commission did not, as implied by International Transmission, determine that if International Transmission proposed a change to the attachment O formula, as it does here, it was guaranteed a return equal to what it would have recovered under the unchanged attachment O. If International Transmission wants to continue to recover the ADIT balance using the attachment O formula rate as it existed when the ADIT recovery was initially approved, it can withdrawal its request to change the attachment O formula rate. Otherwise, International Transmission must abide by the formula rate it asks the Commission to accept, which nonetheless allows both full recovery of the total ADIT balance of $60.6 million and provides International Transmission a return on the deferred balance over the full 20 year recovery. All that changes is that International Transmission's return on ADIT is more current, consistent with its proposed recovery of other costs.

3. ROE and Capital Structure

Responsive Pleadings

30. Protestors argue that International Transmission's proposal for accelerated cost recovery would decrease its financial risk, and, therefore, International Transmission's current 13.88 percent ROE should be reduced. They contend that International Transmission's filing links current investor risk with the cost recovery lag that International Transmission currently experiences and that the purpose of International Transmission's proposed Tariff revisions is to mitigate the negative cash flow and attendant business risk resulting from its investment program. They argue that because International Transmission's proposed Tariff revisions would reduce its financial risk, its authorized ROE, as well as the equity capital component of its capital structure, should be assessed to determine whether they are reflective of International Transmission's overall risk profile and comparable to other independent transmission companies subject to the Commission's jurisdiction. ABATE cites the Commission's statement that it would not apply the two ratemaking tools proposed by International Transmission in that case to "future transactions"[19] and suggests that the Commission in *ITC Holdings*

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[18] *Id.*, at P 58.

[19] *See ITC Holdings*, 102 FERC ¶ 61,182, at P 68. The two ratemaking tools referred to there were a 100 basis point ROE adder and recovery of deferred income taxes for being an independent transmission company. Both of those were proposed as alternative incentives in a then-proposed policy statement. *See Proposed Pricing Policy for Efficient Operation and Expansion of Transmission Grid*, Proposed Policy Statement, 102 FERC ¶ 61,132, at P 25 (2003) (*Proposed Policy Statement*).

intended for International Transmission's innovative rates to be only temporary. Thus, ABATE contends that it is appropriate to re-examine International Transmission's innovative rates in this proceeding.

31. Further, the protestors argue that although the Commission allows American Transmission to use estimated costs in a manner similar to that proposed by International Transmission, that treatment was part of an overall settlement agreement where American Transmission agreed to forego any incentive ROE. Thus, they note that American Transmission's 12.38 percent ROE is 150 basis points lower than International Transmission's ROE. ABATE also argues that the Commission meant for International Transmission's innovative rates to be temporary, and it is thus appropriate that International Transmission's rates be revisited now. Consumers Energy and Southeast Michigan Systems argue that International Transmission's ROE reflects a 50 basis point adder for participation in Midwest ISO consistent with that received by other transmission owners in Midwest ISO but that the Commission subsequently required Midwest ISO's other transmission owners to refund that adder pursuant to a court remand. They argue that International Transmission's ROE should also be reduced by 50 basis points, consistent with the Commission's reduction of the other transmission owners' ROE. Southeast Michigan Systems argue that to the extent necessary to adjust International Transmission's ROE, the Commission should establish, but summarily resolve, an investigation pursuant to section 206 of the Federal FPA[20] and consolidate that docket with the instant proceeding.

32. Michigan Agencies also argue that if the Commission accepts International Transmission's proposal, the Commission should limit the proposed treatment to this circumstance. They contend that it is not necessarily appropriate for use in other rate zones in Midwest ISO.

33. In its answer, International Transmission argues that it is not proposing to change its attachment O formula rate template or any of the elements that comprise that template. It argues that unless and until it proposes a change to its attachment O formula rate under section 205 of the FPA, matters such as its authorized ROE are not at issue. It further argues that parties that wish to challenge its authorized ROE must file a complaint pursuant to section 206 of the FPA.

34. In their answer, DTE Parties argue that International Transmission is indeed proposing a fundamental change to the attachment O construct by replacing prior year Form 1 data with internal projections. Further, DTE Parties argue that regardless of how

[20] 16 U.S.C. § 824e (2000).

International Transmission characterizes its filing, the Commission has the right to initiate a section 206 investigation of International Transmission's authorized ROE and capital structure.

Commission Determination

35. Protestors contest International Transmission's proposal to retain, unchanged, its existing approved ROE and capital structure. As such, as the proponents of a change in an unchanged component of rates, they bear the burden under section 206 of the FPA to show that the existing ROE and capital structure are unjust and unreasonable and that a specific replacement ROE and capital structure are just and reasonable. The Commission has discretion in deciding whether to initiate investigations pursuant to section 206 of the FPA and whether to set the issue for a formal hearing.[21] In our judgment, the protestors' assertions that International Transmission's financial risk profile would change under the revised Tariff provisions are too general and unsupported to warrant initiation of a section 206 investigation into International Transmission's existing ROE and capital structure. Under both its existing methodology and its proposed forward-looking methodology, International Transmission ultimately recovers its actual costs. The purpose of its proposal is to keep its cost recovery more current; not to reduce its risk of non-recovery of actual costs. Further, we find that the capitalization reflected in its return is generally in line with the industry and falls within a zone of reasonableness. Therefore, we decline to modify or order an investigation of International Transmission's ROE and capital structure.

36. Further, with respect to the 50 basis point adder component of International Transmission's ROE for its participation in Midwest ISO's RTO, we note that the U. S. Court of Appeals for the District of Columbia Circuit recently upheld a 50 basis point ROE adder for participation in RTO New England.[22] In so doing, the court distinguished

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[21] *See, e.g.*, *Ocean State Power v. FERC*, 84 F.3d 1453 (D.C. Cir. 1996); *General Motors Corp. v. FERC*, 613 F.2d 939, 944, 945 (D.C. Cir. 1979); New England Power Co. v. Algonquin Gas Transmission Co., 76 FERC ¶ 61,143 (1996) (discussing the Commission's discretion under section 5 of the Natural Gas Act); *ISO New England, Inc.*, 111 FERC ¶ 61,096, at P 31 (2005) (discussing the Commission's discretion under section 206 of the FPA). Cases under the Natural Gas Act and the Federal Power Act are read *in pari materia*. *See, e.g., FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956); *Arkansas-Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577, n.7 (1981).

[22] *Maine Public Utilities Commission v. FERC*, No. 05-1001 (D.C. Cir. June 5, 2006) (*Maine Public Utilities Commission*).

its earlier rejection of the Midwest ISO 50 basis point adder in *Public Service Commission of Kentucky*,[23] noting that its decision in the earlier case rested on procedural grounds only. The court further held that allowing ROE adders for policy reasons was within the ambit of the Commission's ratemaking authority. The court noted that for both Midwest ISO and RTO New England, the Commission adopted the 50 basis point adder to promote the policy goals of improved competition and efficiency in the nation's transmission system by encouraging participation in RTOs.[24] The court found this to be within the Commission's authority to consider non-cost factors in setting rates.[25] Further, there is no due process notice issue here, unlike in *Public Service Commission of Kentucky* and, in *ITC Holdings*, no one sought rehearing of the Commission's acceptance of International Transmission's proposal to adopt the 50 basis point adder. Therefore, we deny protesters' request to remove or investigate International Transmission's 50 basis point adder.

37. We disagree with ABATE's suggestion that the Commission intended that its authorization for International Transmission's current innovative rate treatment to be temporary. In support, ABATE cites the Commission's statement in *ITC Holdings* that it would not apply the two ratemaking tools proposed by International Transmission in that case to "future transactions."[26] If the Commission had intended to put an expiration date on International Transmission's innovative ROE treatment, it would have done so; but, it did not. Rather, the Commission only meant that the innovative treatment granted to International Transmission in that proceeding was case-specific to the transaction involved there, and that it did not signal a continuation of a generic policy to automatically approve both the 100 basis point adder and ADIT recovery in future filings by other independent transmission companies.[27] Thus, our current expectation is that

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[23] *Public Service Commission of Kentucky v. FERC*, 397 F.3d. 1004 (D.C. Cir. 2005) (*Public Service Commission of Kentucky*). The court in *Public Service Commission of Kentucky* ruled that the Commission violated due process by announcing without prior notice a 50 basis point increase in ROE of transmission companies joining the Midwest ISO.

[24] *Maine Public Utilities Commission*, slip op., at 4-7, 20.

[25] *Id.*, at 19-20.

[26] *See ITC Holdings*, 102 FERC ¶ 61,182, at P 68.

[27] In the Proposed Policy Statement, the Commission proposed to permit parties forming independent transmission companies to receive either the ROE-based incentive or ADIT recovery, but not both ratemaking tools. Recognizing that parties may have

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transmission companies will propose such incentive-type ROE components in individual filings. Here, we are dealing with a continuation of a previously-approved ROE and not a proposal to change an existing ROE to reflect the previous generic ROE basis point adders. Accordingly, we find that the continued innovative treatment for International Transmission continues to be case-specific.

4. Waivers and Effective Dates

38. International Transmission has shown good cause for waiver of section 35.13 of the Commission's regulations,[28] and we will grant its request for waiver.

39. Therefore, as discussed above, we will accept in part and reject in part International Transmission's proposed Tariff revisions, to become effective on July 1, 2006 and January 1, 2007, as discussed above. We will direct International Transmission to file revised tariff sheets in a compliance filing within 30 days of the date of this order to reflect the rejection of its ADIT proposal and its commitments regarding its timeline and interest rate, as discussed in the body of this order.

The Commission orders:

(A) International Transmission's proposed Tariff revisions are hereby accepted in part and rejected in part, to become effective on July 1, 2006 and on January 1, 2007, as modified herein, as discussed in the body of this order.

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been currently negotiating divestiture of transmission assets to form independent transmission companies, and citing the then-pending ITC Holdings application as one example, the Commission stated:

> To avoid delaying such transactions, we propose to permit the parties to any divestiture to an [independent transmission company] filed with us within 6 months of adoption of this policy statement to propose *either* the allowance tied to deferred taxes *or* the ROE-based lump-sum payment incentive for independent ownership proposed herein. (Emphasis added.)

102 FERC ¶ 61,032, at P 27. Subsequently, in *ITC Holdings*, the Commission permitted International Transmission to use both ratemaking tools (ROE-based incentive and ADIT), but it limited application of its determination to that transaction only. *See supra* note 26.

[28] *See Idaho Power Co.*, 115 FERC ¶ 61,281, at P 28 (2006).

(B) International Transmission's request for waiver of section 35.13 of the Commission's regulations is hereby granted, as discussed in the body of this order.

(C) International Transmission is hereby directed to file a compliance filing within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.