

124 FERC 61,246  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Midwest Independent Transmission  
System Operator, Inc. and  
American Transmission Company LLC

Docket No. ER08-1146-000

ORDER REJECTING APPENDIX I AGREEMENT

(Issued September 18, 2008)

1. In this order, we reject a proposed Appendix I Agreement between American Transmission Company LLC and Midwest Independent Transmission System Operator, Inc. (Midwest ISO).

**I. Background**

2. On June 20, 2008, American Transmission Company LLC<sup>1</sup> and Midwest ISO filed a proposed Appendix I Agreement, between American Transmission and Midwest ISO under Appendix I of the Transmission Owners Agreement.<sup>2</sup>

**A. Midwest ISO's Pro Forma Appendix I**

3. Midwest ISO's *pro forma* Appendix I is a framework for membership and operation of independent transmission companies within Midwest ISO. Appendix I generally provides that any independent transmission company that obtains the Commission's approval may assume certain rights and responsibilities that otherwise belong to Midwest ISO. These rights and responsibilities may include revenue distribution, losses, tariff administration, billing, planning, and security coordination.

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<sup>1</sup> American Transmission Company LLC submitted this filing by its corporate manager, ATC Management Inc. (collectively, American Transmission).

<sup>2</sup> Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc., a Delaware Non-Stock Corporation (Transmission Owners Agreement), FERC Electric Tariff, First Revised Rate Schedule No. 1, Sheet No. 211.

The specific rights and responsibilities, and the operational procedures under which Midwest ISO and an independent transmission company would coordinate their operations, are determined on a case-by-case basis under a company-specific Appendix I agreement. An independent transmission company must file with the Commission an Appendix I agreement and must demonstrate that the proposed governance structure of the independent transmission company assures that it is independent from any market participant and that it is of sufficient size and configuration to assume such rights, responsibilities, and functions. In the order accepting Appendix I to the Transmission Owners Agreement and addressing a petition for declaratory order requesting Commission guidance on a proposed independent transmission company,<sup>3</sup> the Commission analyzed whether the proposed independent transmission company met the same Order No. 2000<sup>4</sup> independence standards that regional transmission organizations (RTOs) must meet and reserved judgment on a number of matters until it received a complete proposal. The Commission has analyzed subsequent Appendix I applications using the Order No. 2000 independence standards.<sup>5</sup>

## **B. Policy Statement**

4. After it issued Order No. 2000, the Commission released a Policy Statement clarifying its independence requirements for the purpose of incentive rates, stating that it would be willing to accept innovative rate treatment proposals from independent transmission companies that have market participants as passive minority equity owners.<sup>6</sup> The Policy Statement describes a non-exclusive list of the factors that the Commission will consider when evaluating rate proposals to ensure that such passive ownership does not affect the independent operation, planning and construction of the transmission

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<sup>3</sup> See *Commonwealth Edison Co.*, 90 FERC ¶ 61,192 (2000) (accepting *pro forma* Appendix I to the Transmission Owners Agreement) (*Commonwealth Edison*).

<sup>4</sup> *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

<sup>5</sup> ITC Holdings Corp. owns the two independent transmission companies that currently have Appendix I Agreements – International Transmission Company and ITC Midwest LLC (which purchased Interstate Power and Light Company's transmission assets). See *International Transmission Co.*, 97 FERC 61,328 (2001) and *ITC Holdings Corp.*, 121 FERC ¶ 61,229 (2007).

<sup>6</sup> *Policy Statement Regarding Evaluation of Independent Ownership and Operation of Transmission*, 111 FERC ¶ 61,473 (2005) (Policy Statement).

system. The Commission noted in the Policy Statement that it had approved innovative rate treatments for American Transmission and that it “remains comfortable that the governance structure of [American Transmission] allows some degree of participation by market participants but ensures the operation and managerial independence of the stand alone transmission company.”<sup>7</sup>

### C. American Transmission

5. American Transmission is a transmission-owning member of Midwest ISO. It provides transmission service throughout the eastern two thirds of Wisconsin, the upper peninsula of Michigan, and portions of Illinois and Minnesota. It was created under Wisconsin law as a single-purpose, for-profit transmission company to own and operate the transmission system and to plan, construct, operate, maintain, and expand its facilities to provide adequate and reliable transmission service as a public utility. Wisconsin law prohibits American Transmission from owning any generation or distribution facilities.

6. Four investor-owned utilities (plus their subsidiaries) and one public power entity formed American Transmission by transferring their transmission facilities operating at 50 kV and above and/or contributing cash to American Transmission.<sup>8</sup> These founding companies currently have an approximately 87 percent ownership share in American Transmission. The remaining approximately 13 percent is divided among 24 other entities, primarily municipal electric utilities and cooperatives, that became equity owners of American Transmission after it was formed through cash contributions and/or the conveyance of transmission facilities to American Transmission. The transmission facilities conveyed by these additional equity interest owners are part of American Transmission’s transmission system.

7. American Transmission Company LLC is a limited liability company that is controlled by its corporate manager, ATC Management Inc., which in turn is governed by a ten member Board of Directors. Each of American Transmission’s five founding members selects a director to represent it on the Board. Four board members are not to be directors, employees or independent contractors of a person engaged in the production, sale, marketing, transmission or distribution of electricity or natural gas or an affiliate of such a person and are elected by American Transmission’s 29 equity owners (including

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<sup>7</sup> *Id.* P 9.

<sup>8</sup> These investor-owned utilities and their subsidiaries are: Wisconsin Power and Light Company; Wisconsin Electric Power Company; Edison Sault Electric Company; South Beloit Water; Gas and Electric Company; Madison Gas and Electric Company; Wisconsin Public Service Corp.; and the Upper Peninsula Power Company. The public power entity is Wisconsin Public Power Inc.

the original five founding owners); and the remaining position is held by American Transmission's President and Chief Executive Officer.

## **II. The Appendix I Filing**

8. American Transmission seeks a finding by the Commission that American Transmission meets the qualifications to be an independent transmission company under Appendix I, based on the "operational independence" standard the Commission outlined in the Policy Statement. It also seeks acceptance of the Appendix I Agreement that it negotiated with Midwest ISO. American Transmission states that the proposed Appendix I Agreement is similar to the *pro forma* Appendix I Agreement in Appendix I of the Transmission Owners Agreement and other Appendix I agreements recently accepted by the Commission.

9. American Transmission states that it meets the operational independence standards in the Policy Statement because: (1) its Operating Agreement and Wisconsin law require it to plan, construct and operate its transmission system without favoring any market participant; (2) its contractual obligations under its Distribution-Transmission Agreements with all of its 58 interconnected load-serving entities obligate it to commit to provide service and transmission system adequacy to benefit all users regardless of ownership interests; (3) its Order No. 890<sup>9</sup> planning provisions require it to treat all similarly-situated interconnected transmission and generation customers in a similar manner; and (4) its customer and stakeholder relations process promotes transparency and demonstrates that it operates on behalf of all users of its transmission system, irrespective of their ownership interest in the company.

10. American Transmission proposes to enter into the proposed Appendix I Agreement to strengthen its operational independence as a transmission-only company. American Transmission states that being an Appendix I company will validate its efforts to date and enable it to further fulfill its mission of providing a reliable transmission system for the benefit of all users. American Transmission argues that its past activities demonstrate that it is operationally independent from market participants. It argues that its ability to continue its mission depends, in large part, on various rights and functions that it would maintain under the proposed Appendix I Agreement. Being an Appendix I company would: (1) enhance its ability to continue its pace of transmission investment by facilitating inclusion of its projects in Midwest ISO's Transmission Expansion Plan;

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<sup>9</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 (2007), *order on reh'g*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats & Regs. ¶ 31,261 (2007) *order on reh'g*, Order No. 890-B, 123 FERC 61,299 (2008).

(2) allow it to continue to bill its customers directly for network service, which will provide stability to its revenue stream, and thereby provide a positive revenue stream analysis for credit rating agencies; and (3) consolidate its planning under Appendix B of the Transmission Owners Agreement, the local planning provisions of Attachment FF to the Midwest ISO Open Access Transmission and Energy Markets Tariff (Tariff) and the contractual obligations under its interconnection agreements to ensure that it can continue to meet its commitment to all users to provide an adequate transmission system.

11. American Transmission explains that since June 2002, pursuant to an agreement with Midwest ISO, it has been performing the billing and collection for customers within its transmission zone that take Network Integration Transmission Service under Midwest ISO's Tariff. American Transmission states that invoicing for transmission service is very important to it as a transmission-only company and, under the proposed Appendix I Agreement, its existing billing arrangement with Midwest ISO would be affirmed, providing American Transmission additional certainty and control over a significant source of its revenue. Because American Transmission has no source of revenues from generation or end-use customers, it argues that timely billing is vital to the stability of its operations. Furthermore, American Transmission notes that credit rating agencies take into account American Transmission's stream of revenue in rating its long- and short-term debt, and its credit ratings are very important in determining the cost of debt when American Transmission needs to borrow funds to finance its transmission construction activities.

12. American Transmission requests an effective date of September 19, 2008.

### **III. Notice of Filing and Responsive Pleadings**

13. Notice of Applicants' filing was published in the *Federal Register*, 73 Fed. Reg. 40,569 (2008), with interventions and protests due on or before July 11, 2008.<sup>10</sup>

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<sup>10</sup> On July 11, 2008, a request for an extension of time to file protests and comments was granted through July 31, 2008.

14. The Midwest ISO Transmission Owners,<sup>11</sup> Ameren Services Company,<sup>12</sup> Consumers Energy Company and Dairyland Power Cooperative filed timely motions to intervene.
15. Madison Gas and Electric Company and Wisconsin Public Power Inc. (Wisconsin TDUs), the National Rural Electric Cooperative Association, Alliant Energy Corporate Services, Inc. (Alliant),<sup>13</sup> Municipal Electric Utilities of Wisconsin and Wisconsin Electric Power Company filed timely motions to intervene and comments.
16. International Transmission Company, Michigan Electric Transmission Company, LLC, and ITC Midwest LLC (collectively, International Transmission) filed a timely motion to intervene and protest.
17. The Public Service Commission of Wisconsin (Wisconsin Commission), the Minnesota Public Utilities Commission (Minnesota Commission), the Michigan Public Service Commission (Michigan Commission) and the Illinois Commerce Commission

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<sup>11</sup> The Midwest ISO Transmission Owners for this filing consist of: Ameren Services Company, as agent for Union Electric Company, Central Illinois Public Service Company, Central Illinois Light Co., and Illinois Power Company (collectively, Ameren Public Utility Operating Companies); American Transmission Systems, Incorporated, a subsidiary of FirstEnergy Corp.; City of Columbia Water and Light Department (Columbia, MO); City Water, Light & Power (Springfield, IL); Duke Energy Shared Services for Duke Energy Ohio, Inc., Duke Energy Indiana, Inc., and Duke Energy Kentucky, Inc.; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; Michigan Public Power Agency; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation, subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company; Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

<sup>12</sup> Ameren Services Company filed its motion to intervene on behalf of the Ameren Public Utility Operating Companies and on behalf of its affiliated marketing and generating companies, Ameren Energy Marketing Company, Ameren Energy Generating Company and AmerenEnergy Resources Generating Company.

<sup>13</sup> Alliant is a service company affiliate of Wisconsin Power and Light Company.

(Illinois Commission) filed notices of intervention and comments. The Indiana Utility Regulatory Commission (Indiana Commission) filed a motion to intervene out of time and comments.

18. Integrys Energy Group, Inc., and its subsidiaries, Wisconsin Public Service Corporation, Upper Peninsula Power Company and Integrys Energy Services, Inc. (collectively, Integrys) filed a timely motion to intervene, comments and answer to the Wisconsin TDUs' comments. American Transmission filed an answer to the comments and protests.

19. As discussed in more detail below, some commenters express concerns about American Transmission's proposed Appendix I Agreement. In particular, the Illinois Commission, the Minnesota Commission, the Indiana Commission, the Michigan Commission, and International Transmission oppose the Appendix I Agreement.<sup>14</sup> Generally, they question American Transmission's independence. The Wisconsin Commission, the Municipal Electric Utilities of Wisconsin<sup>15</sup> and the Wisconsin TDUs<sup>16</sup> argue that Commission approval should be conditioned on certain findings and requirements. Integrys Energy Group<sup>17</sup> and Wisconsin Electric Power Company<sup>18</sup> support the Appendix I Agreement.

#### **IV. Discussion**

##### **A. Procedural Matters**

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

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<sup>14</sup> The Indiana Commission states that it generally supports the comments of the Illinois Commission, the Minnesota Commission and the Michigan Commission.

<sup>15</sup> Many of the members of Municipal Electric Utilities of Wisconsin are equity owners of American Transmission.

<sup>16</sup> The Wisconsin TDUs are equity owners of American Transmission.

<sup>17</sup> Alliant filed comments in support of Integry's comments. Alliant is a service company affiliate of Wisconsin Power and Light Company, an equity owner of American Transmission.

<sup>18</sup> Wisconsin Electric Power Company is an equity owner of American Transmission.

21. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R § 385.214(d) (2008), the Commission will grant the Indiana Commission's late-filed motion to intervene, given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

22. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We will accept the answers of Integrys and American Transmission because they have provided information that assisted us in our decision-making process.

## **B. Analysis**

### **1. Comments**

#### **a. Independence**

23. The Illinois Commission, the Indiana Commission, and International Transmission argue that American Transmission's Board of Directors is not independent, as required by Appendix I.<sup>19</sup> They express concern about the influence that American Transmission's original utility members may have on the Board of Directors.<sup>20</sup> For example, the five board members that formed American Transmission have 88.75 percent of American Transmission's ownership interests, and all are senior executives that are still employed by market participants.<sup>21</sup> The Illinois Commission notes that four of the five are the chief executive officers of their companies and, therefore, have a legal fiduciary responsibility to the shareholders of their companies. Expecting these board members "to put aside the long-run interests of their employers and stakeholders that they are legally required to represent is unrealistic."<sup>22</sup>

24. The Illinois Commission also points out that all of the equity owners of American Transmission are investor-owned utilities, municipals and cooperatives, and notes that these entities cast votes for four of the Board seats and are likely to fill those four seats

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<sup>19</sup> Illinois Commission Comments at 1; Indiana Commission Comments at 2-3; International Transmission Companies Protest at 2.

<sup>20</sup> Illinois Commission Comments at 3.

<sup>21</sup> Illinois Commission Comments at 3-4. International Transmission Companies Protest at 8.

<sup>22</sup> Illinois Commission Comments at 4.

with individuals that share similar interests. In contrast, the Midwest ISO Board of Directors are voted on by entities with diverse and competing interests.<sup>23</sup> Similarly, International Transmission states that virtually all of the 29 entities that own American Transmission are market participants and that 26 of the 58 load-serving entities with which American Transmission is interconnected have ownership interests.<sup>24</sup>

25. The Illinois Commission is also concerned because under Wisconsin law, an employee could resign from a utility and then immediately be eligible to fill one of the four Board seats reserved for directors that are not directors, employees or independent contractors of a person engaged in the production, sale, marketing, transmission or distribution of electricity or natural gas or an affiliate of such a person. The Illinois Commission notes that although such a director technically would have no employee affiliation with the utility, it is reasonable to assume that he or she would still reflect some of the utility's influence. In contrast, (1) Midwest ISO does not allow any of its Board members to have any affiliation with members or market participants (including having any financial interest in market participants) within two years before or after their election to the Midwest ISO Board; and (2) while serving on the Midwest ISO Board, and for two years afterwards, a member is not allowed to have a material business relationship or other affiliation with any Midwest ISO member or user, or an affiliate of a member or user.<sup>25</sup> Therefore, the restrictions placed on American Transmission's potential Board members are insufficient to create a Board free from the influence of market participants.

26. International Transmission adds that even if American Transmission's current governance is independent enough to satisfy the requirements of Appendix I, there is no certainty that American Transmission will continue to be governed this way. Under Wisconsin law, the size of American Transmission's Board can be changed without a unanimous vote after 2009. Therefore, with the support of only one non-participant director, the five market participants, along with the Board's President, can change the size (and composition) of the Board as early as next year.<sup>26</sup>

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<sup>23</sup> Illinois Commission Comments at 4.

<sup>24</sup> International Transmission Protest at 5.

<sup>25</sup> Illinois Commission Comments at 5-6, citing Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc., Article Two, Section III.A.2.

<sup>26</sup> International Transmission Protest at 10-11.

27. Several commenters note that American Transmission's filing raises issues about operational independence of RTOs that were raised in the Commission's Wholesale Competition Notice of Proposed Rulemaking.<sup>27</sup> The Minnesota and Indiana Commissions support the comments of the Organization of Midwest ISO States (OMS) on the Commission's Wholesale Competition NOPR, in which the OMS expressed concerns about hybrid board structures. They note that the OMS stated that allowing market participants to hold seats on an RTO board would jeopardize the RTO's independence, and that even the appearance of an RTO's independence being compromised could prove fatal to the credibility of RTO operations.<sup>28</sup> Furthermore, the Minnesota Commission notes that the OMS stated that it is unrealistic to expect board members not to act in the interests of the companies with which they are affiliated, regardless of whether the board member is a top level officer or a subordinate.<sup>29</sup> The Indiana Commission asserts that "American Transmission's proposal to retain a hybrid Board of Directors results in the perception, and potentially the creation, of an entity that lacks independence which runs counter to the principles of transparency that have been the touchstone of the RTO effort."<sup>30</sup>

28. Similarly, the Illinois Commission and International Transmission agree with Commissioner Kelly's dissenting opinion in the Wholesale Competition NOPR, in which she expressed concerns regarding a RTO's independence under a hybrid board. The Illinois Commission states that given that American Transmission is seeking to assume the functions normally reserved for an RTO, Commissioner Kelly's concerns are relevant here. In addition, International Transmission says that entities cannot be "fully independent" with a hybrid board.<sup>31</sup>

29. The Michigan Commission states that although American Transmission explains its statutory and contractual obligations to be independent, Commission policy requires

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<sup>27</sup> *Wholesale Competition in Regions with Organized Electric Markets*, FERC Stats. & Regs. ¶ 32,628 (2008) (Wholesale Competition NOPR).

<sup>28</sup> Minnesota Commission Comments at 2-3 and Indiana Commission Comments at 5, citing OMS Comments to the Wholesale Competition NOPR at 15.

<sup>29</sup> Minnesota Commission Comments at 2-3, citing OMS Comments to the Wholesale Competition NOPR at 15-16.

<sup>30</sup> Indiana Commission Comments at 6.

<sup>31</sup> Illinois Commission Comments at 7 and International Transmission Companies Protest at 10, citing Commissioner Kelly's Concurrence in Part and Dissent in Part to Wholesale Competition NOPR.

more than just rules mandating independence. The Board of Directors must be free from influence by market participants and an independent transmission company can be owned by market participants only if the ownership interest is passive.<sup>32</sup>

30. The Michigan Commission also states that even though each of the ten members of the Board of Directors has one vote, the Commission cannot find the role of such market participants to be passive when, based on what it can tell from the information provided in the filing, there are more market participant votes (5) than non-market participant votes (4). The final (tenth) vote belongs to the President and Chief Executive Officer, which the Michigan Commission assumes the Board itself selects.<sup>33</sup>

31. The Minnesota and Indiana Commissions note that the Policy Statement states that passive ownership must “not affect the independent operation, planning and construction” of the transmission system. They state that unlike Midwest ISO, American Transmission’s Board structure and selection are done entirely by the equity owners of the company. They also state that they are not convinced that American Transmission’s showing of operational activities equates to “passive minority equity owners.”<sup>34</sup>

32. Likewise, the Illinois Commission argues that because all of American Transmission’s equity members have certain voting rights concerning the Board, they are, by definition, not passive owners. Even if American Transmission’s members were considered passive owners, it is unlikely that American Transmission can meet all seven of the factors in the Policy Statement to determine independence.<sup>35</sup>

33. The Wisconsin Commission generally supports the proposed Appendix I Agreement and a Commission finding of “operational independence” for American Transmission. However, this is based on specific determinations and subject to conditions. It argues that American Transmission has provided substantial evidence that it has advanced transmission planning and construction in its service territories, to the benefit of the reliability of the Midwest grid and notwithstanding market participant ownership. The Wisconsin Commission’s support for a finding of “operational independence” is not based exclusively on American Transmission’s planning process but, rather, is based upon the interrelationship of: (1) American Transmission’s planning process; (2) American Transmission’s corporate structure as required by Wisconsin law;

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<sup>32</sup> Michigan Commission Comments at 4.

<sup>33</sup> *Id.*

<sup>34</sup> Minnesota Commission Comments at 3; Indiana Commission Comments at 5-6.

<sup>35</sup> Illinois Commission Comments at 6.

and (3) the Wisconsin Commission's authority to approve construction. Those three elements of American Transmission's operating situation balance each other.<sup>36</sup> The Wisconsin Commission asserts that it is fair, to the extent it is possible, to treat American Transmission similarly to International Transmission by approving the Appendix I Agreement.<sup>37</sup>

34. Integrys argues that American Transmission's independence is protected by a number of safeguards, including Wisconsin law and Order No. 890. Furthermore, Integrys argues that American Transmission's transmission planning, which has resulted in the construction of over \$1.7 billion in new facilities in a short period of time, shows that American Transmission meets the Commission's independence criterion. American Transmission has made progress towards eliminating major transmission constraints affecting the entire Midwest ISO region and has provided important benefits to a diverse utility constituency with a flawless record of impartiality and non-discrimination.<sup>38</sup>

35. International Transmission states that the Commission has approved among other things, an Appendix I agreement between Midwest ISO and ITC Midwest. International Transmission notes that the Commission found that ITC Midwest "would be a fully independent, stand-alone transmission company eligible for an Appendix I relationship with Midwest ISO."<sup>39</sup> International Transmission states that this decision was based on a prior order finding that ITC Holdings' ownership structure will prevent market participants from being able to influence or control International Transmission and thus undermine its independence. Under this precedent, American Transmission fails to meet the independence requirements for an Appendix I agreement.<sup>40</sup>

36. Some commenters also dispute American Transmission's argument relating to the applicability of the Policy Statement to this filing. The Indiana Commission and the

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<sup>36</sup> Wisconsin Comments at 4.

<sup>37</sup> Wisconsin Commission Comments at 2.

<sup>38</sup> Integrys Comments at 4-5.

<sup>39</sup> International Transmission Protest at 6-7, citing *ITC Holdings Corp.*, 121 FERC ¶ 61,229, at P 87 (2007) (ITC Holdings Order II).

<sup>40</sup> See International Transmission Protest at 5, citing *ITC Holdings Corp.*, 111 FERC ¶ 61,149 (2005). See also ITC Holdings Order II at P 87.

Minnesota Commission assert that American Transmission's interpretation of independence according to the Policy Statement is too broad.<sup>41</sup>

37. Other commenters state that American Transmission is operationally independent from market participants. Municipal Electric Utilities of Wisconsin encourage the Commission to find "operational independence" for American Transmission based on certain findings with respect to American Transmission's current operational and governance structure. They request periodic review of the company's independence. The Municipal Electric Utilities of Wisconsin state that American Transmission does not conduct its operations in a manner that suggests it is anything but operationally independent from market participants, despite its "hybrid" management structure.<sup>42</sup>

38. Wisconsin TDUs believe that American Transmission's current governance structure meets the Commission's requirement for independence for the purpose of the agreement.<sup>43</sup> They note that American Transmission has a Board that, for a fixed number of years, by statute, includes an equal number of interested and independent Directors, each with one vote, and the interested Directors represent diverse utility industry entities, assuring different perspectives.

39. The Wisconsin Commission notes that Wisconsin law prohibits any member-owner of American Transmission from abusing the wholesale electric market. It argues that American Transmission's board is different from a hybrid board of an RTO because state law: (1) limits to a single director the board representation of any facility-contributing Load Serving Entity (LSE), or group of LSEs, that meet at least the ten percent ownership threshold; (2) requires representation of differing consuming and generating interests, and the "non-transmission security holders" are LSE owners that historically have not had generation resources or transmission lines, whereas the "transmission security holders" are LSEs that owned generation, but then surrendered their lines to American Transmission; and (3) mandates that the independent directors have four-year terms, compared to the one-year terms for the non-independent directors, and with their longer terms, the independent directors will provide a perspective beyond the short term.<sup>44</sup>

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<sup>41</sup> Indiana Commission Comments at 5; Minnesota Commission Comments at 3.

<sup>42</sup> Municipal Electric Utilities of Wisconsin Comments at 1-3.

<sup>43</sup> Wisconsin TDUs Comments at 3-4.

<sup>44</sup> Wisconsin Commission Comments at 6-8.

40. In its answer, American Transmission acknowledges that it has not met the Commission's Order No. 2000 criteria for independence from market participants. However, American Transmission states that it is not seeking a determination of independence under that standard, but under the Commission's standard for independence in the Policy Statement. It argues that, notwithstanding its ownership and management structure, it is sufficiently "operationally independent" from market participants. American Transmission notes that although some protestors argue that American Transmission's ownership structure does not satisfy the Commission's independence requirements, no party disagrees that American Transmission has operated independently and has a successful record of developing new transmission for the benefit of all its system users.

**b. Requests for Additional Information**

41. Some commenters argue that additional information is necessary to properly assess the proposal. The Michigan Commission states that it is not convinced that historical activity predicts future behavior and that more information is needed to address a variety of unanswered questions.<sup>45</sup> International Transmission argues that an evidentiary hearing is needed to determine whether or not American Transmission has been independent of market participants. It further notes that even if such a determination were made, it would not substitute for independent ownership and independent corporate governance.<sup>46</sup>

42. The Minnesota Commission states that the Commission should at least require American Transmission to clarify how it complies with the Policy Statement.<sup>47</sup> The Indiana Commission adds that the Commission should seek clarification from American Transmission as to how transmission planning and other functions will be coordinated with Midwest ISO, and as to how equitable treatment for all stakeholders within Midwest ISO will be ensured.<sup>48</sup> The Minnesota Commission states that approving the Appendix I Agreement, without additional clarification, would "compromise the independence of essential RTO functions the Commission has worked so hard to establish."<sup>49</sup>

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<sup>45</sup> Michigan Commission Comments at 3.

<sup>46</sup> International Transmission Protest at 6.

<sup>47</sup> Minnesota Commission Comments at 3.

<sup>48</sup> Indiana Commission Comments at 6.

<sup>49</sup> Minnesota Commission Comments at 4.

c. **Requests for Conditions**

43. Many commenters request that if the Commission accepts American Transmission's proposed Appendix I Agreement, the Commission impose conditions.

44. For example, the Wisconsin Commission argues that conditions to ensure operational independence are necessary.<sup>50</sup> It proposes a variety of conditions: (1) that American Transmission remain a separate entity certified under state law as a public utility by the Wisconsin Commission; (2) that American Transmission remain in compliance with Wisconsin statutes; (3) that American Transmission continue the planning procedures, including the Ten-Year Assessment, approved by the Commission in its order approving American Transmission's compliance with Order No. 890 transmission planning principles,<sup>51</sup> as necessary to ensure continued openness, neutrality and responsiveness; and (4) that the proposed Appendix I Agreement may not be amended in the future without an opportunity to revisit an "operational independence" holding.<sup>52</sup>

45. The Municipal Electric Utilities of Wisconsin agree that the Commission, if it approves the Appendix I Agreement, should impose safeguards to ensure that American Transmission maintains its balanced governing structure. These include a biennial review of American Transmission's management and decision-making functions and an automatic review of American Transmission's independent status upon amendment of the Appendix I Agreement.<sup>53</sup>

46. The Municipal Electric Utilities of Wisconsin also state that any approval of American Transmission's application should require American Transmission to expressly affirm the applicability of a 2004 Settlement Agreement executed by American Transmission, the Midwest ISO, and other customer stakeholders with respect to incentive rates.<sup>54</sup> They note that American Transmission has not formally affirmed in this filing that if the Commission decides to grant it independent status, American

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<sup>50</sup> Wisconsin Commission Comments at 9.

<sup>51</sup> See *Midwest Indep. Transmission Sys. Operator, Inc.*, 123 FERC ¶ 61,165 (2008).

<sup>52</sup> Wisconsin Commission Comments at 10.

<sup>53</sup> Municipal Electric Utilities of Wisconsin Comments at 2-3.

<sup>54</sup> See *American Transmission Co. LLC*, 107 FERC ¶ 61,117 (2004). Municipal Electric Utilities of Wisconsin Comments at 3.

Transmission will continue to waive its right to request an incentive on return on common equity for currently held assets and establish a Customer Advisory Panel, both of which American Transmission committed to do in the 2004 Settlement Agreement.<sup>55</sup>

47. International Transmission states that if the Commission decides to approve the Appendix I Agreement, the Commission should make clear that this approval does not mean that American Transmission is independent for any other purpose.<sup>56</sup> Wisconsin TDUs also argue that the Commission should state that its finding of American Transmission's independence depends on American Transmission's current governance structure.<sup>57</sup>

48. The Indiana Commission states that if the Commission accepts the proposed Appendix I Agreement, the Commission should establish oversight to ensure American Transmission's continued operational independence.<sup>58</sup> The Michigan Commission suggests that if the Commission approves the agreement, the Commission should put into place additional safeguards to maintain and encourage more independence in American Transmission's Board. These could include biennial review of the independence of American Transmission's management and decision-making functions.<sup>59</sup> The Minnesota Commission requests that if the Commission approves the agreement, the Commission explain the standards under which it will evaluate Appendix I agreement applications on the basis of operational independence in the future.<sup>60</sup> The Municipal Electric Utilities of Wisconsin agree.<sup>61</sup>

49. Integrys argues that there is no need for the Commission to find that American Transmission is independent based on its current governance structure. Integrys states that American Transmission's application acknowledges that it is not *structurally* independent within the meaning of Order No. 2000, but that an entity can be deemed

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<sup>55</sup> Municipal Electric Utilities of Wisconsin Comments at 3, citing 2004 Settlement Agreement at P 4.

<sup>56</sup> International Transmission Protest at 2.

<sup>57</sup> Wisconsin TDUs Comments at 4.

<sup>58</sup> Indiana Commission Comments at 6.

<sup>59</sup> Michigan Commission Comments at 5.

<sup>60</sup> Minnesota Commission Comments at 3.

<sup>61</sup> Municipal Electric Utilities of Wisconsin Comments at 2-3.

“independent” within the meaning of Order No. 2000 based upon the entity’s *operational* independence.<sup>62</sup> Integrys concludes that Wisconsin TDUs’ comments are irrelevant to the Appendix I Agreement, since the Commission has determined that operational independence can fulfill the need for open access and nondiscriminatory transmission service.<sup>63</sup> Alliant agrees.<sup>64</sup>

**d. Transmission Planning**

50. International Transmission argues that open transmission planning in compliance with Order No. 890 is not a substitute for independent ownership and governance and does not, by itself, support a request for approval of an Appendix I agreement.<sup>65</sup>

51. The Illinois Commission is concerned about the automatic inclusion of American Transmission’s transmission projects into Midwest ISO’s Transmission Expansion Plan. It is unclear why American Transmission’s plan, which focuses only on a small section of Midwest ISO’s footprint, should be incorporated into the Midwest ISO’s Transmission Expansion Plan automatically. Furthermore, the Illinois Commission notes that under the current Midwest ISO Tariff, certain of Midwest ISO’s Transmission Expansion Plan projects are eligible for cost sharing and, therefore, if a disagreement ever arose between Midwest ISO and American Transmission over the need for a certain project, the project would be included in the Midwest ISO’s Transmission Expansion Plan and the costs automatically allocated to Midwest ISO customers.<sup>66</sup> Therefore, the Illinois Commission requests that if the Commission approves the proposed Appendix I Agreement, it ensure that ratepayers are protected from unfairly paying the costs of American Transmission’s transmission projects.<sup>67</sup>

52. The Wisconsin Commission notes that it oversees American Transmission’s proposed transmission construction projects for the regional grid and can require

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<sup>62</sup> Integrys Comments at 4, citing transmittal letter at 6.

<sup>63</sup> Integrys Comments at 4, also note the Illinois Commission and Michigan Public Service Commission comments are also irrelevant with respect the status of American Transmission as an operationally independent entity.

<sup>64</sup> Alliant Comments at 1.

<sup>65</sup> International Transmission Protest at 11.

<sup>66</sup> Illinois Commission Comments at 7-8.

<sup>67</sup> Illinois Commission Comments at 7-8.

additional investments in facilities if American Transmission fails to plan and construct adequate transmission facilities.<sup>68</sup> Therefore, the Wisconsin Commission has “ultimate policing authority to prevent either over- or under-investment in reliable and adequate transmission as needed—should the dynamic tension built into American Transmission’s governance and operations fail for some extraordinary reason.”<sup>69</sup>

53. Several commenters point to American Transmission’s planning process in support of American Transmission’s proposal, mentioning the integrity and openness of American Transmission’s planning process.<sup>70</sup> Integrys states that American Transmission has a successful record in transmission planning and that the Appendix I Agreement will allow American Transmission and Midwest ISO to operate together to provide further benefits to their customers.<sup>71</sup> The Wisconsin Commission says that the proposed Appendix I Agreement more effectively coordinates American Transmission and Midwest ISO planning for the longer term and provides additional administrative efficiencies.<sup>72</sup>

**e. Whether Appendix I Status is Necessary**

54. The Wisconsin Commission wants American Transmission to be able to continue direct billing and collection responsibilities. While this would be a small step for some companies, it is especially significant for American Transmission. The Wisconsin Commission notes that American Transmission is restricted, under Wisconsin law, to transmission planning and construction, yet must borrow capital in the financial markets, based in part upon the bond rating of its revenue stability. Therefore, protecting its revenue and cash streams would strengthen the security of American Transmission’s revenues, which would enhance its bond debt rating and perhaps allow lower interest rate costs to be passed on to consumers.<sup>73</sup>

55. Likewise, Wisconsin Electric Power Company supports approval of the Appendix I Agreement in order to preserve current day-to-day operations, as well as to formalize

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<sup>68</sup> Wisconsin Commission Comments at 8.

<sup>69</sup> Wisconsin Commission Comments at 9.

<sup>70</sup> Municipal Electric Utilities of Wisconsin Comments at 2.

<sup>71</sup> Integrys Comments at 3.

<sup>72</sup> Wisconsin Commission Comments at 3.

<sup>73</sup> Wisconsin Commission Comments at 3.

several existing arrangements between American Transmission and Midwest ISO. For example, the proposal for American Transmission to control its revenue distribution solidifies the existing billing arrangement between American Transmission and Midwest ISO and provides a stable business environment for American Transmission and its customers. Wisconsin Electric Power Company argues that such stability will allow American Transmission to better pursue the objectives of a transmission-only company.

56. International Transmission, however, argues that an Appendix I agreement is not necessary for American Transmission to pursue the objectives set forth in its application.

## 2. Commission Determination

57. As discussed above, under Appendix I to the Transmission Owners Agreement, an independent transmission company that obtains Commission approval may assume certain RTO functions. In *Commonwealth Edison*, the Commission analyzed whether a proposed independent transmission company met the same Order No. 2000 independence standards that the RTO had to meet.<sup>74</sup> Further, Appendix I requires “that the proposed [independent transmission company]’s governance and structure assures independence of the [independent transmission company] from any market participant....”<sup>75</sup> By its own admission, American Transmission does not meet the Order No. 2000 independence requirements.<sup>76</sup> Therefore, we reject American Transmission’s proposed Appendix I because it has not shown that it meets the eligibility requirements.

58. American Transmission does not show that its ownership structure meets the Order No. 2000 requirement that it be able to operate free from influence of its market-participant owners.<sup>77</sup> Its board is beholden to its equity owners, which are all similarly

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<sup>74</sup> *Commonwealth Edison*, 90 FERC ¶ 61,192 at 61,619 (The Commission deferred judgment on the independence of a proposed transmission company from market participants because the proposal did not include the necessary information to evaluate “whether their [independent transmission company] proposal meets the independence requirements of Order No. 2000.”) *Id.* at 61,618-19.

<sup>75</sup> Transmission Owners Agreement at Appendix I, Original Sheet No. 211.

<sup>76</sup> See American Transmission’s August 14 Answer at 3.

<sup>77</sup> The Commission in Order No. 2000 stated that it would consider passive ownership arrangements. To be considered a passive owner under Order No. 2000, the burden of proof is on the RTO to demonstrate that control of the RTO is “truly independent” and that the RTO has a decision-making process that is independent of control by the passive owners. Passive owners must relinquish effective control over operational and investment decisions (See Order No. 2000, FERC Stats. & Regs.

(continued...)

situated market participants. Five of the 10 board members are senior executives that are still employed by the market participants. Indeed, four of the five are the Chief Executive Officers of their respective companies. These utility executives have a legal fiduciary responsibility to the shareholders of their respective companies. In addition, four of the other board members, while not directors, employees or contractors of any market participants, are elected by American Transmission's 29 equity owners, including the original five founding owners, and are not precluded from having financial interests in market participants, including American Transmission's equity owners.

59. American Transmission mistakenly relies on the Policy Statement as a basis for meeting the eligibility requirements in Appendix I. In the Policy Statement, however, the Commission was reconsidering whether an independent transmission company must meet the Order No. 2000 independence requirements for a different purpose: to receive innovative rate treatment. The Commission recognized that an entity that does not meet the Order No. 2000 independence requirements nonetheless achieves a level of independence that merits allowing it to have innovative rates. In contrast, the independence requirements that apply under Appendix I allows Midwest ISO to delegate certain of its RTO responsibilities to an independent transmission company. While the Policy Statement acknowledges that American Transmission has achieved some independence, this was for the purpose of incentive rate treatment, not for determining Appendix I status.

60. The Commission did not state in the Policy Statement or in later orders addressing proposed independent transmission companies that it would judge whether a stand-alone transmission company should be able to perform RTO functions on the same basis as it would judge whether that entity is eligible to receive innovative rate treatment. The Commission approved American Transmission's incentive rate mechanisms based, in part, on its status as a stand-alone transmission company with a governance structure that provides some level of independence from its market participant equity owners. However, the independence standard the Commission applies to entities wanting to perform RTO functions has always been the same standard it applies to the RTO, not the standard used to judge incentive rate proposals.<sup>78</sup> That makes sense, since it was in

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¶ 31,089, at 31,066). Similarly, the Commission stated that any RTO governance proposals, whether from an ISO, transco or a hybrid arrangement, will be judged on a case-by-case basis against the overarching standard that the decision-making process must be independent of individual market participants and classes of market participants. *Id.* at 31,073-74.

<sup>78</sup> See *Commonwealth Edison*, 90 FERC ¶ 61,192; *International Transmission Co.*, 97 FERC 61,328 (2001); *TRANSLink Transmission Co., L.L.C.*, 99 FERC ¶ 61,106, order

(continued...)

Order No. 2000 that the Commission concluded that a single organization is not required to perform all of the RTO functions and that innovative structures and forms that meet the needs of the market participants while satisfying the minimum RTO requirements can be approved.<sup>79</sup>

61. American Transmission explains that it is proposing to become an Appendix I entity to provide certainty about a limited number of rights and functions that it already has. In particular, American Transmission wants to continue performing: (1) the billing function for network service on its system; (2) its own local planning as outlined in Appendix B of the Transmission Owners Agreement and Attachment FF-ATCLLC of the Tariff; and (3) generation interconnection studies on behalf of Midwest ISO. American Transmission argues that its governance structure, its past performance, and the requirements of Wisconsin state law assure that American Transmission has a sufficient level of operational independence to continue performing these functions. However, it appears that the proposed Appendix I Agreement does not just maintain American Transmission's rights, but expands them.

62. If we accepted the proposed Appendix I Agreement, American Transmission would be able to perform RTO functions without having to meet the Order No. 2000 independence standards required of an RTO. For example, interconnection is an element of transmission service,<sup>80</sup> and Order No. 2000 requires that the RTO be the sole provider of transmission service on its system.<sup>81</sup> Under the proposed Appendix I Agreement, American Transmission "shall be responsible for generator interconnection service" within its zone.<sup>82</sup> In addition, "if any study is required to evaluate the interconnection of any generating facility to [American Transmission's] System, then [American

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*on reh'g*, 101 FERC ¶ 61, 140 (2002); *Ameren Services Co.*, 101 FERC ¶ 61,320 (2002), *reh'g denied*, 103 FERC ¶ 61,178 (2003), and ITC Holdings Order II, 121 FERC ¶ 61,229.

<sup>79</sup> Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 31,037.

<sup>80</sup> See *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at P 20 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

<sup>81</sup> Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 31,108

<sup>82</sup> American Transmission proposed Appendix I at section 11.1.

Transmission] shall assume the responsibility for, and perform such study.”<sup>83</sup> American Transmission would only have to “coordinate” with Midwest ISO in performing these studies, and Midwest ISO would no longer have ultimate approval authority over the results of any studies or the interconnection service itself.<sup>84</sup> While Midwest ISO may, and currently does, allow transmission owners such as American Transmission to perform interconnection studies, Midwest ISO maintains ultimate authority over the results of the studies and all transmission service. If American Transmission took over these functions, customers would not have recourse to Midwest ISO if they had concerns about these functions. No party raises concerns here, and, as we note below, American Transmission’s past performance is commendable. That does not mean, however, that American Transmission does not need to meet the same standards as Midwest ISO in order to assume responsibility for RTO functions.

63. In addition, under the proposed Appendix I Agreement, American Transmission would set its own transmission maintenance and outage schedules, subject to dispute resolution if Midwest ISO disagrees.<sup>85</sup> If Midwest ISO determined that system reliability were involved, Midwest ISO’s position would prevail pending dispute resolution. However, when the Commission required in Order No. 2000 that the RTO review and approve maintenance and outage schedules, it noted that transmission owners who also own (or have affiliates who own) generation may have an incentive to schedule transmission maintenance at times that would increase the prices received from their power sales.<sup>86</sup> American Transmission is a stand-alone transmission company that has some degree of operational independence from its generation-owning equity owners, and we have no evidence that American Transmission has acted in any way to favor the generation interests of its owners over other users of the grid. However, American Transmission has not shown that it meets the Order No. 2000 independence requirements that apply to an RTO and, therefore, has not met the standard to perform this RTO function.

64. American Transmission states that it is only asking for approval of the functions it is already performing today and that it does not seek to perform other functions in the

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<sup>83</sup> *Id.* at section 11.2.

<sup>84</sup> *Id.* We note that the Appendix I that the Commission approved for ITC Midwest does not include the provision that is included in American Transmission’s proposed Appendix I at section 11.2 that gives American Transmission responsibility over all studies needed to evaluate generator interconnection service.

<sup>85</sup> American Transmission proposed Appendix I at section 5.2.

<sup>86</sup> Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 31,105 n. 440.

Appendix I Agreement without making a further filing with the Commission.<sup>87</sup> It is true that the proposed Appendix I Agreement provides American Transmission only a “right to file” with the Commission things such as its own loss mechanism or rates, terms and conditions for service within the American Transmission zone. However, as we discuss above, American Transmission’s authority over, for example, generation interconnection service and studies and maintenance schedules, would be expanded under the proposed Appendix I Agreement without a further filing with the Commission.

65. American Transmission also states that it made this filing to give it more certainty that it will be able to continue exercising the rights and functions it already has (e.g., performing the billing function for network service on its system and the inclusion of its construction plan in the Midwest ISO Transmission Expansion Plan). Because it has chosen Appendix I as the mechanism to obtain that certainty, American Transmission must demonstrate that it meets the independence requirements of Order No. 2000 (and thus of Appendix I), which it has not done. That does not mean, however, that we are finding here that Midwest ISO should not continue its existing arrangements with American Transmission. For example, Midwest ISO gives no indication, and no party argues, that American Transmission should not be performing the billing function for certain transactions within American Transmission’s zone. There does not appear to be any reason why American Transmission cannot continue to perform this function on behalf of Midwest ISO given that customers continue to have recourse to Midwest ISO for issues involving bills they receive from American Transmission.

66. For transmission planning, American Transmission notes that its existing planning rights and responsibilities are set forth in the Transmission Owners Agreement and in Attachment FF-ATC to Midwest ISO’s Tariff.<sup>88</sup> Those agreements provide much more detail about American Transmission’s planning rights and obligations than does the proposed Appendix I Agreement. American Transmission indicates that it is primarily concerned with the planning rights and obligations it already has, but it has not explained how supplementing the details already contained in the Transmission Owners Agreement and the Tariff with a much less detailed provision in the proposed Appendix I Agreement provides more certainty. Indeed, American Transmission itself states that questions

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<sup>87</sup> American Transmission Answer at 4.

<sup>88</sup> See *Midwest Indep. Transmission Sys. Operator, Inc.*, 123 FERC ¶ 61,165 (2008) (approving American Transmission’s planning process as satisfying the requirements of Order No. 890, subject to a limited compliance filing incorporating the recovery of planning costs and the outcome of Midwest ISO’s Attachment FF filing).

regarding the operation of its planning process are more appropriately addressed in other dockets.<sup>89</sup>

67. We recognize American Transmission's accomplishments over the past seven years and the fact that it has a history of working with all stakeholders to provide adequate and reliable transmission service for all of its customers. According to American Transmission, as of the end of 2007, American Transmission has invested \$1.7 billion in transmission facilities, constructed approximately 327 miles of new transmission lines and 12 new substations, and reconstructed and upgraded over 1200 miles of existing lines and 103 existing substations. As a result, American Transmission has supported 828 MW of new electric usage by its interconnected customers, connected 2,768 MW of new generation at thirteen sites for a variety of entities, and increased import capability on its system by more than 1000 MW. In addition, American Transmission plans to construct an additional \$2.8 billion in transmission facilities over the next ten years in order to meet the needs of all of its interconnected customers.<sup>90</sup> Furthermore, no party in this proceeding disputes American Transmission's successful record of transmission planning for the benefit of all users of its system.

68. Thus, our rejection of American Transmission's proposed Appendix I Agreement is not a rebuke of its past performance or of its governance. American Transmission simply has not shown that it meets the specific eligibility requirements of Appendix I.

The Commission orders:

American Transmission's proposed Appendix I Agreement is hereby rejected, as discussed in the body of the order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>89</sup> American Transmission Answer at 8.

<sup>90</sup> See, American Transmission's June 20 Filing, Exhibit ATC-2 at 6.