

155 FERC ¶ 61,097  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, Tony Clark,  
and Colette D. Honorable.

PJM Interconnection, L.L.C.  
and Northeast Transmission Development, LLC

Docket Nos. ER16-453-000  
ER16-453-001

ORDER ON TRANSMISSION FORMULA RATE PROPOSAL AND INCENTIVES

(Issued April 26, 2016)

I. Background .....	<u>3.</u>
A. Description of the Artificial Island Project .....	<u>5.</u>
B. NTD’s Filing .....	<u>6.</u>
II. Notice of Filing and Responsive Pleadings .....	<u>10.</u>
III. Discussion.....	<u>12.</u>
A. Procedural Matters .....	<u>12.</u>
B. Transmission Incentives .....	<u>14.</u>
1. Summary of Incentives Requested .....	<u>14.</u>
2. FPA Section 219 Requirement .....	<u>16.</u>
3. Order No. 679 Nexus .....	<u>22.</u>
4. Regulatory Asset for Pre-Commercial and Formation Costs .....	<u>31.</u>
5. Hypothetical Capital Structure .....	<u>45.</u>
6. Abandoned Plant Incentive.....	<u>53.</u>
7. Risks and Challenges ROE Adder.....	<u>56.</u>
8. ROE Adder for RTO Participation .....	<u>90.</u>
C. Transmission Formula Rate .....	<u>98.</u>
1. Base ROE.....	<u>98.</u>
2. Protocols .....	<u>109.</u>
3. Formula Rate .....	<u>131.</u>
4. Depreciation Rates.....	<u>161.</u>
D. Authorization to Replicate the Formula Rate and Incentive Rate Treatments .....	<u>167.</u>

1. On December 2, 2015, PJM Interconnection, L.L.C. (PJM) and Northeast Transmission Development, LLC (NTD) submitted a request for authorization to implement a proposed transmission cost-of-service formula rate template (Formula Rate) and formula rate protocols (Protocols) pursuant to section 205 of the Federal Power Act (FPA)<sup>1</sup> to be included as part of Attachment H to the PJM Open Access Transmission Tariff (Tariff).<sup>2</sup> NTD also requests several transmission rate incentives pursuant to section 219 of the FPA,<sup>3</sup> Order No. 679,<sup>4</sup> and the guidance of the Commission's November 15, 2012 Transmission Incentives Policy Statement.<sup>5</sup> NTD requests that the Commission grant the requested transmission incentives, as well as authorization for other, yet-to-be formed affiliates of NTD that develop transmission facilities in the PJM region to replicate the Formula Rate and to use certain of the incentive rate treatments.<sup>6</sup> NTD requests the Commission accept the Formula Rate, Protocols, and base return on equity (ROE) of 10.5 percent effective February 1, 2016. Finally, NTD requests the requested incentives be effective as of the date of a Commission order on the instant filing.<sup>7</sup>

2. For the reasons discussed below, we accept in part, and reject in part, the transmission rate incentives proposal. We also accept and suspend, for a nominal period, the Formula Rate proposal, subject to refund, and establish hearing and settlement judge procedures for certain aspects of the Formula Rate.

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<sup>1</sup> 16 U.S.C. § 824d (2012).

<sup>2</sup> PJM Interconnection, L.L.C., Intra-PJM Tariffs, OATT Table of Contents, PJM OATT Table of Contents, 15.0.0; OATT ATT H-27, OATT Attachment H-27 - NTD Annual Transmission Rates, 0.0.0; OATT ATT H-27A, OATT Attachment H-27A - NTD Formula Rate, 0.0.0; and OATT ATT H-27B, OATT Attachment H-27B - NTD Rate Implementation Protocols, 0.0.0.

<sup>3</sup> 16 U.S.C. § 824s (2012).

<sup>4</sup> *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222 *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007).

<sup>5</sup> *Promoting Transmission Investment through Pricing Reform*, 141 FERC ¶ 61,129 (2012) (Transmission Incentives Policy Statement).

<sup>6</sup> NTD December 2, 2015 Transmittal at 1-2 (NTD Transmittal).

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

## **I. Background**

3. NTD states that it is a transmission-only company whose business is to develop, own, and operate transmission facilities in the PJM region. NTD states it is a wholly-owned subsidiary of LS Power Associates, L.P.<sup>8</sup>

4. NTD states the Artificial Island area, near PSEG Nuclear LLC's Salem 1 and 2 and Hope Creek nuclear generating units in southern New Jersey, is subject to electric instability, historically managed through special operating procedures. According to NTD, PJM opened a Regional Transmission Expansion Plan (RTEP) process proposal window from April 2013 to June 2013 to solicit proposals to improve operational performance and reliability in the affected area. Seven entities responded to the call with 26 different proposals, NTD states, and the PJM Board of Managers announced the selection of NTD's proposal on July 29, 2015.<sup>9</sup> NTD proposed to cap its Construction Costs<sup>10</sup> at \$146 million, subject to certain conditions and exclusions, in accordance with the Designated Entity Agreement between NTD and PJM.<sup>11</sup>

### **A. Description of the Artificial Island Project**

5. NTD explains the Artificial Island Project (Project) consists of a new Silver Run substation, which will connect the existing Red Lion-Cartanza and Red Lion-Cedar Creek 230 kV transmission lines to a new 230 kV transmission line running from the Silver Run substation to the existing Salem substation in Lower Alloways Creek, New Jersey. The new 230 kV line will be approximately five miles in length, including an approximately

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<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.* at 5.

<sup>10</sup> "Construction Costs" as used herein is defined in the Designated Entity Agreement, PJM Interconnection, L.L.C., PJM Service Agreements Tariff, PJM SA No. 4310, PJM SA No. 4310 among PJM and Northeast Transmission, 0.0.0 (Designated Entity Agreement), and includes: "any and all costs and expenses directly or indirectly incurred by NTD to develop, construct, complete, start-up and commission the Project and place the Project in service in accordance with Schedule B [of the Designated Entity Agreement...]" The definition provides further detail regarding categories of included and excluded costs. Designated Entity Agreement, Schedule E, § 1.2(c).

<sup>11</sup> NTD Transmittal at 6. The Commission accepted the Designated Entity Agreement in *PJM Interconnection, L.L.C.*, 154 FERC ¶ 61,054, at P 1 (2016).

three mile crossing of the Delaware River.<sup>12</sup> NTD states the projected in-service date of the Project is June 1, 2019.<sup>13</sup>

## **B. NTD's Filing**

6. NTD seeks authority to establish a regulatory asset that would allow for the deferral and subsequent recovery of all prudently incurred pre-commercial and formation costs that are not capitalized, including attorney fees, consultant fees, administrative expenses, entity formation costs,<sup>14</sup> travel expenses, and costs to support regional activities that have been or will be undertaken with respect to NTD's participation in PJM's transmission planning and Order No. 1000 solicitation processes.<sup>15</sup> NTD further requests to use a hypothetical capital structure of 50 percent equity and 50 percent debt until the Project is put into service (hypothetical capital structure).<sup>16</sup> NTD also seeks the ability to recover 100 percent of prudently incurred costs, including pre-commercial costs, in the event that the Project must be abandoned for reasons beyond its control (abandoned plant incentive).<sup>17</sup> Finally, NTD requests two ROE adders: the 50 basis point ROE adder for participation in a Regional Transmission Organization (RTO participation adder) and a 50 basis point incentive adder for the increased risks and challenges associated with the Project (risks and challenges ROE adder).<sup>18</sup>

7. NTD requests the Commission accept for filing its Formula Rate and Protocols, as well as certain incentive-based rate treatments, pursuant to sections 205 and 219 of the FPA and Order No. 679. NTD further requests the Formula Rate be effective February 1, 2016, with the incentives effective as of the date of this order.<sup>19</sup> In the alternative, should

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<sup>12</sup> NTD Transmittal at 6.

<sup>13</sup> NTD Ex. 200 (Testimony of Carroll) at 21 (Carroll Test.).

<sup>14</sup> Under the Commission's Uniform System of Accounts, entity formation costs are capitalized to primary plant Account 301, Organization. This account includes the cost of obtaining certificates authorizing an enterprise to engage in the public-utility business, along with fees and expenses for incorporation (18 C.F.R. Part 101 (2016)).

<sup>15</sup> NTD Transmittal at 25-26.

<sup>16</sup> *Id.* at 27.

<sup>17</sup> *Id.* at 28.

<sup>18</sup> *Id.* at 29-30.

<sup>19</sup> *Id.* at 9.

the Commission determine a hearing is necessary, NTD requests that the Commission suspend the instant filing for only one day, to allow the requested effective date.<sup>20</sup>

8. NTD also requests that the Commission authorize yet-to-be-formed affiliates or subsidiaries of NTD to use NTD's Formula Rate, as well as NTD's requested base ROE, RTO participation adder, regulatory asset accounting treatment, and hypothetical capital structure incentive for their projects in the PJM region.<sup>21</sup> Although NTD states it is not seeking an advanced technology incentive, it states that it has not yet determined whether it will construct the new Salem to Silver Run 230 kV transmission line as an overhead or submarine facility. In either case, NTD avers it anticipates using novel techniques and/or advanced transmission technology.<sup>22</sup>

9. NTD states the combination of incentives is well-suited for the specific facts and circumstances presented by the Project, and that these incentives will best mitigate the financial, siting, permitting, construction, and other risks and challenges NTD will face as it finances, develops, owns, and maintains the Project.<sup>23</sup>

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

10. Notice of the December 2, 2015 filing was published in the *Federal Register*, 80 Fed. Reg. 76,280 (2015), with interventions or protests due on or before December 23, 2015. Timely motions and notices to intervene were filed by American Electric Power Service Corporation;<sup>24</sup> American Municipal Power, Inc. (AMP); the Delaware Division of the Public Advocate; Delaware Municipal Electric Corporation, Inc.(DEMEC); Delaware Public Service Commission (Delaware Commission); Mid-Atlantic MCN LLC; NextEra Energy Transmission, LLC; North Carolina Electric Membership Corporation;

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

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

<sup>22</sup> *Id.* at 42.

<sup>23</sup> NTD Attachment C (The Direct Testimony and Exhibits of Lawrence J. Willick, NTD Ex. 100-102) at 7 (Willick Test.).

<sup>24</sup> On behalf of its affiliates, Appalachian Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company, Wheeling Power Company, AEP Appalachian Transmission Company, AEP Indiana Michigan Transmission Company, AEP Kentucky Transmission Company, AEP Ohio Transmission Company, AEP West Virginia Transmission Company, and Transource Energy, LLC.

Old Dominion Electric Cooperative (ODEC); PHI Companies;<sup>25</sup> and Public Service Electric and Gas Company. On December 23, 2016 AMP; Delaware Commission, and DEMEC filed protests. ODEC's motion to intervene contained a statement of support for AMP's protest. NTD filed a motion for leave to answer and answer on January 8, 2016. AMP and DEMEC filed additional answers on January 27, 2016. The New Jersey Division of Rate Counsel filed a motion to intervene out of time, also on January 27, 2016.

11. On January 29, 2016, Commission staff issued a deficiency letter to NTD requesting additional information. On February 26, 2016, NTD submitted a response to the deficiency letter. Notice of NTD's response was published in the *Federal Register* 81 Fed. Reg. 11208 (2016), with interventions and protests due on or before March 18, 2016. On March 18, 2016, DEMEC filed comments regarding NTD's response. On March 29, 2019, NTD filed comments in response to DEMEC's March 18, 2016 comments.

### **III. Discussion**

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

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>26</sup> the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Also pursuant to Rule 214, we grant the unopposed motion to intervene out-of-time filed by the New Jersey Division of Rate Counsel, given its interest, the early stage of this proceeding, and the absence of undue prejudice or delay.

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure<sup>27</sup> prohibits an answer to protests unless otherwise ordered by the decisional authority. We accept the answers filed by NTD, AMP, and DEMEC because they have provided information that assisted us in our decision-making process.

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<sup>25</sup> Including Pepco Holdings, Inc., Potomac Electric Power Company, Delmarva Power & Light Company, and Atlantic City Electric Company.

<sup>26</sup> 18 C.F.R. § 385.214 (2015).

<sup>27</sup> 18 C.F.R. § 213(a)(2) (2015).

## **B. Transmission Incentives**

### **1. Summary of Incentives Requested**

14. NTD requests several transmission incentives, as discussed more fully below, including deferred recovery of pre-commercial costs through the establishment of a regulatory asset, abandoned plant incentive, hypothetical capital structure, RTO participation adder, and risks and challenges ROE adder. NTD states that it does not seek a construction work in progress (CWIP) incentive to include CWIP in rate base because it concluded that that incentive would neither materially reduce NTD's financial risk nor benefit its financing costs and because of ratepayer and stakeholder opposition to this incentive.<sup>28</sup>

15. NTD states that this combination of incentives is best suited for the specific facts and circumstances the Project presents, and would best mitigate the financial, siting, permitting, construction, and other risks and challenges NTD would face as it finances, develops, owns, and maintains the Project. NTD further states that its proposed package of incentives represents a carefully selected balance of risk-reducing incentives and a limited incentive ROE adder that together are designed to address the risks and challenges associated with the scope of the Project.<sup>29</sup>

### **2. FPA Section 219 Requirement**

16. In the Energy Policy Act of 2005,<sup>30</sup> Congress added section 219 to the FPA, directing the Commission to establish, by rule, incentive-based rate treatments to promote capital investment in transmission infrastructure. The Commission subsequently issued Order No. 679, which sets forth processes by which a public utility may seek transmission rate incentives pursuant to section 219, including the incentives requested here by NTD. Additionally, in November 2012, the Commission issued a Transmission Incentives Policy Statement providing additional guidance regarding its evaluation of applications for transmission rate incentives under section 219 and Order No. 679.<sup>31</sup>

17. Pursuant to Order No. 679, an applicant may seek to obtain incentive rate treatment for transmission infrastructure investment that satisfies the requirements of

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<sup>28</sup> NTD Transmittal at 33 n.129.

<sup>29</sup> NTD Ex. 100 at 7.

<sup>30</sup> Pub. L. No. 109-58, § 1241, 119 Stat. 594 (2005).

<sup>31</sup> Transmission Incentives Policy Statement, 141 FERC ¶ 61,129.

section 219, i.e., the applicant must show that “the facilities for which it seeks incentives either ensure reliability or reduce the cost of delivered power by reducing transmission congestion.”<sup>32</sup> Order No. 679 established a process for an applicant to follow to demonstrate that it meets this standard, including a rebuttable presumption that the standard is met if:

(1) the transmission project results from a fair and open regional planning process that considers and evaluates projects for reliability and/or congestion and is found to be acceptable to the Commission; or

(2) a project has received construction approval from an appropriate state commission or state siting authority.<sup>33</sup>

18. The Commission also stated that “other applicants not meeting these criteria may nonetheless demonstrate that their project is needed to maintain reliability or reduce congestion by presenting [to the Commission] a factual record that would support such a finding.”<sup>34</sup>

19. Order No. 679-A clarifies the operation of this rebuttable presumption by noting that the authorities and/or processes on which it is based (i.e., a regional planning process, a state commission, or siting authority) must, in fact, consider whether the project ensures reliability or reduces the cost of delivered power by reducing congestion.<sup>35</sup>

**a. NTD’s Filing**

20. NTD states that the Project satisfies the rebuttable presumption that it meets the requirements of FPA section 219(a) by ensuring reliability or reducing the cost of delivered power by reducing congestion. NTD states that the Project qualifies for the rebuttable presumption because it was approved and included in the PJM RTEP, an open and fair regional transmission planning process.<sup>36</sup> NTD further contends that PJM agrees

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<sup>32</sup> Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 76.

<sup>33</sup> *Id.* P 58.

<sup>34</sup> *Id.* P 57; *see also* Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 41.

<sup>35</sup> Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 49.

<sup>36</sup> NTD Transmittal at 18.

the Project will improve efficient generation dispatch and unlock location-constrained generation resources.<sup>37</sup>

**b. Commission Determination**

21. We find that the Project is entitled to the rebuttable presumption established in Order No. 679 and, therefore, satisfies the section 219 requirement that it either ensure reliability or reduce the cost of delivered power by reducing transmission congestion. The Project was vetted and approved as part of the 2013 PJM RTEP as a baseline reliability project. In this regard, the Commission has held that the PJM RTEP constitutes “a fair and open regional planning process” that considers and evaluates projects for reliability and/or congestion for purposes of the rebuttable presumption provided in Order No. 679.<sup>38</sup>

**3. Order No. 679 Nexus**

22. An applicant for a transmission rate incentive must demonstrate a nexus between the incentives being sought and the investment being made. In Order No. 679-A, the Commission clarified that its nexus test is met when an applicant demonstrates that the total package of incentives requested is tailored to address the demonstrable risks or challenges faced by the applicant.<sup>39</sup> Applicants must provide sufficient support to allow the Commission to evaluate each element of the package and the interrelationship of all elements of the package. The Commission noted that this nexus test is fact-specific and requires the Commission to review each application on a case-by-case basis. The Commission has, in prior cases, approved multiple rate incentives for particular projects as long as each incentive satisfies the nexus test. This is consistent with Order No. 679 and the Commission’s interpretation of section 219 authorizing the Commission to approve more than one incentive rate treatment for an applicant proposing a new transmission project, as long as each incentive is justified by a showing that it satisfies

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

<sup>38</sup> See *Potomac-Appalachian Transmission Highline L.L.C.*, 122 FERC ¶ 61,188, at P 29 (2008) (*PATH*) (“Projects that are identified as ‘baseline’ projects in the PJM RTEP process are those that benefit customers in one or more transmission owner zones for the purpose of maintaining reliability or mitigating congestion on the PJM grid,”); see also Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 58; Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 49.

<sup>39</sup> Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 115.

the requirements of section 219 and that there is a nexus between the incentives proposed and the investment made.<sup>40</sup>

**a. NTD's Filing**

23. NTD states that it meets the nexus test because its requested incentives are tailored to the significant risks and challenges the Project presents. First, NTD states that it will face considerable risks and challenges in developing and constructing the Project. It notes that the Project is the first transmission facility that NTD will construct and place into service.<sup>41</sup> NTD states that the Project presents financial risks and challenges. For example, NTD explains that it must fund and undertake permitting, development and construction activities without supporting revenues until the completed project is placed into service, and thus will need access to credit markets to procure necessary financing.<sup>42</sup> It states that lenders and investors will scrutinize its formula rates and related transmission incentives in determining the terms of their financial support due to NTD's lack of business history, credit rating, and credit history.<sup>43</sup>

24. NTD also states that it faces numerous regulatory and environmental hurdles to permit, site, and construct the Project. These include the need to procure federal, state, and local permits and regulatory approvals that may influence each other and the need to secure rights of way and other land rights.<sup>44</sup> At the federal level, NTD highlights necessary permits and authorizations from the U.S. Army Corps of Engineers, which will require federal consistency certifications from the states of Delaware and New Jersey, consultations with the U.S. Fish and Wildlife Service, National Marine Fisheries Service, and State Historic Preservation Offices. NTD states construction of the Project will also require docket approval by the Delaware River Basin Commission.<sup>45</sup> NTD states the need for project review under the National Environmental Policy Act imposes significant

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<sup>40</sup> Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 26.

<sup>41</sup> NTD Transmittal at 19.

<sup>42</sup> *Id.*.

<sup>43</sup> *Id.* at 20.

<sup>44</sup> *Id.*.

<sup>45</sup> *Id.* at 21 (citing NTD Ex. 200, Carroll Test. at 14-15).

risks, including likely need for analysis of alternative project considerations to minimize environmental impacts.<sup>46</sup>

25. At the state and local level, NTD highlights various regulatory permits, authorizations, and approvals that will be required from entities including the Delaware Department of Natural Resources and Environmental Control, the Delaware Department of Transportation, and the New Jersey Department of Environmental Protection. At the local level, NTD states site plan approval in Delaware may be required by the New Castle County Department of Land Use and NTD explains that local jurisdictions in both states will be asked to authorize storm water management plans and building permits.<sup>47</sup> NTD also notes that it must obtain rights-of-way for the approved route of the Project facilities from individual landowners, as utilities do not have eminent domain authority under Delaware state law, and that such negotiations and the degree to which negotiated routes are consistent with awarded permits pose uncertainties.<sup>48</sup>

26. NTD states that PJM's RTEP process imposed significant risks and challenges on NTD, including risks posed by execution of a Designated Entity Agreement between PJM and NTD for the project, such as a \$5.8 million letter of credit as security and the right of PJM to reevaluate inclusion of the project in the RTEP in the event of project delays.<sup>49</sup>

27. NTD also highlights certain construction risks and challenges associated with the project, notably by the required crossing of the Delaware River, such as restrictions prohibiting work during inclement conditions and potential permit conditions. NTD states that it is currently evaluating either overhead or submarine construction techniques. It states that submarine construction would likely use Horizontal Directional Drilling, which presents several technological challenges, as well as new technical requirements imposed by the U.S. Army Corps of Engineers' Philadelphia District. NTD states that the overhead crossing option would also face substantial challenges, including a minimum clearance of 214 feet above the navigation channel; no transmission structures in the navigation channel, and substantial vessel collision protection systems for structures near the channel.<sup>50</sup> NTD states that other physical constraints and challenges

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<sup>46</sup> *Id.* at 21 (citing NTD Ex. 200, Carroll Test. at 15-18).

<sup>47</sup> *Id.* at 22 (citing NTD Ex. 200, Carroll Test. at 19-20).

<sup>48</sup> *Id.* at 22 (citing NTD Ex. 200, Carroll Test. at 22).

<sup>49</sup> *Id.* at 23 (citing NTD Ex. 200, Carroll Test. at 21-22).

<sup>50</sup> *Id.* at 24 (citing NTD Ex. 200, Carroll Test. at 16-17).

for construction include a nearby historic resource, limitations related to the Project's proximity to the PSEG nuclear power plant, state-owned wetlands, and avoidance of underwater dikes.<sup>51</sup> NTD states that the Project has commercial and contracting attributes that create unique risks compared to most other transmission projects, including the size and depth of the river crossing and a small universe of qualified contractors that complicates negotiating acceptable commercial terms on matters such as cost, schedule, and risk sharing.<sup>52</sup>

**b. Comments, Answers, and Deficiency Response**

28. AMP argues that the Commission should reject NTD's request for project-specific incentives as premature, as NTD has yet to decide even whether the river crossing will be submarine or aerial.<sup>53</sup> AMP argues that, with such a fundamental characteristic of the Project undecided, "it is hard to understand how NTD can claim that its package of incentives is 'tailored to the specific risks and challenges' of the Artificial Island Project."<sup>54</sup> AMP also contends that NTD has provided insufficient support for imposing the "substantial additional cost burden" that the adders and incentives would impose upon transmission customers and consumers.<sup>55</sup>

29. In response, NTD contends that, contrary to AMP's assertion, its requested incentives are not premature, and that the Commission has granted transmission incentives to entities before they were selected as approved project sponsors and before resolution of federal and state permitting issues.<sup>56</sup> NTD states that it is committed to the Project regardless of which method of crossing is chosen, and that it bears corresponding risks for whichever approach is taken.<sup>57</sup> In its Answer, AMP replies that the scope and magnitude of the risks NTD faces in developing the Project are "heavily dependent" on

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<sup>51</sup> *Id.* at 25 (citing NTD Ex. 200, Carroll Test. at 18).

<sup>52</sup> *Id.* at 25 (citing NTD Ex. 200, Carroll Test. at 23-24).

<sup>53</sup> AMP December 23, 2015 Protest at 29 (AMP Protest).

<sup>54</sup> *Id.*.

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

<sup>56</sup> NTD January 8, 2016 Answer at 39-40 (citing *TransCanyon DCR, L.L.C.*, 152 FERC ¶ 61,017, at PP 29-43 (2015)) (NTD Answer).

<sup>57</sup> *Id.* at 41.

whether it employees an overhead or submarine line is used, and states that the Commission should defer action on the incentives request until NTD selects between them.<sup>58</sup>

**c. Commission Determination**

30. We consider, below, whether the total package of incentives requested satisfies the nexus test. NTD has demonstrated that the scope of the Project poses significant risks and challenges. The Project will require a number of siting and permitting processes at multiple jurisdictional levels, and may be cancelled or modified through the PJM RTEP process. The Project also faces significant construction challenges regardless of whether NTD ultimately decides to construct an overhead or submarine line. While the risks and challenges associated with building an overhead line differ from those associated with building a submarine line, we disagree with AMP that the scope and magnitude of such risks and challenges are so different as to require the Commission to defer action on NTD's request. We also find AMP's assertions regarding an alleged excessive cost burden related to the incentives to be insufficiently supported to warrant consideration beyond the general examination of each incentive that we provide below. Thus, we find that in applying the nexus test, NTD has sufficiently demonstrated that certain risk-reducing incentives are warranted, as discussed further below. However, we find that NTD has not provided adequate support for its requested risks and challenges ROE adder and, therefore, deny it, as discussed below.

**4. Regulatory Asset for Pre-Commercial and Formation Costs**

31. NTD requests authorization to recover all prudently-incurred pre-commercial and formation costs that are not capitalized, and to establish a regulatory asset, in Account 182.3, Other Regulatory Assets, that will include such costs incurred up to the date charges are first assessed to customers under NTD's Formula Rate.<sup>59</sup> NTD states that

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<sup>58</sup> AMP January 27, 2016 Answer at 6 (AMP Answer).

<sup>59</sup> NTD uses the term "regulatory asset incentive" to describe the rate and accounting approvals that NTD seeks for the deferral of pre-commercial and formation costs in Account 182.3, Other Regulatory Assets. The deferral and subsequent recovery in rates of pre-commercial costs are the incentives. *See* Order No. 679, FERC Stats. & Regs. ¶ 31,222 at PP 103-122, 175-178. Regulatory asset accounting treatment is not an incentive, but rather, an accounting treatment resulting from the actions of regulatory agencies which covers a broader array of costs, such as costs which cannot be passed through in rates due to a retail rate freeze. Nor does regulatory asset accounting treatment need to be contemporaneous with a section 205 rate request. *See, e.g.,* regulatory asset accounting treatment of certain costs unrelated to transmission incentives in *Midwest Indep. Transmission Sys. Operator, Inc.*, 103 FERC ¶ 61,205 at P 22 (2003),  
(continued ...)

such costs include costs that ordinarily would be booked to expense when incurred, including attorney fees, consultant fees, administrative expenses, entity formation costs, travel expenses, and cost to support regional activities that have been or will be undertaken with respect to NTD's participation in PJM's transmission planning and Order No. 1000 solicitation processes.<sup>60</sup>

32. NTD states that deferral of pre-commercial and formation costs through the creation of a regulatory asset will enable NTD to record and recover necessary and prudent costs that are not capitalized and that are incurred before such costs may be recovered under the Formula Rate as current expenses.<sup>61</sup> NTD states that to participate in PJM's regional transmission planning and solicitation process, NTD incurred organization and administrative costs to develop and compete successfully for the right to construct a transmission project prior.<sup>62</sup> NTD states deferring pre-commercial and formation costs in a regulatory asset will provide "added up-front regulatory certainty and can reduce interest expense, improve coverage ratios, and assist in the construction of" the Project, and will help NTD to obtain financing at competitive terms.<sup>63</sup> NTD contends these benefits are especially important to nonincumbent transmission developers such as NTD that do not have plant in service or rates in effect, and who therefore face more substantial financial risks and challenges when developing new projects.<sup>64</sup>

33. NTD also requests authorization to amortize the regulatory asset for the Project over five years, starting from the date it begins to recover the regulatory asset as part of the revenue requirement under its Formula Rate. NTD also seeks authorization to accrue carrying charges at a rate equal to its allowance for funds used during construction (AFUDC) on the unamortized balance of the regulatory asset for the pre-commercial and

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*PJM Interconnection, L.L.C.*, 109 FERC ¶ 61,012, at P 54 (2004). In denying petitions for rehearing and clarification, the Commission observed it had made no finding regarding "the recoverability of a regulatory asset." *PJM Interconnection, L.L.C.*, 110 FERC ¶ 61,234, at P 41 (2005); *aff'd, Virginia State Corporate Comm'n v. FERC*, 468 F.3d 845 (2006).

<sup>60</sup> NTD Transmittal at 25-26; *see also* NTD Filing, Attachment F (The Direct Testimony and Exhibit of Joseph L. Myers, NTD Ex. 400-401) at 11-12 (Myers Test.).

<sup>61</sup> *Id.* at 26.

<sup>62</sup> Myers Test. at 10-11.

<sup>63</sup> NTD Transmittal at 26.

<sup>64</sup> *Id.* at 26-27.

formation costs beginning on the date the Commission authorizes the creation of the regulatory asset accounting treatment and continuing until the regulatory asset begins to be recovered in rate base, at which point NTD will use its weighted cost of capital.<sup>65</sup> NTD proposes to record such carrying charges by debiting Account 182.3 and crediting Account 421, Miscellaneous Non-operating Income, and to calculate the carrying charge semi-annually.<sup>66</sup>

**a. Comments and Answers**

34. DEMEC protests NTD's recovery of pre-commercial costs incurred prior to NTD being selected as the Project sponsor.<sup>67</sup> DEMEC argues that NTD would not have been able to recover these costs had PJM not selected its proposal during the RTEP, and that allowing NTD to recover such costs unduly discriminates against other bidders in the RTEP process which are not able to recover their pre-commercial costs.<sup>68</sup>

35. NTD disagrees, stating that DEMEC's challenge is premature until NTD files the section 205 filing to collect such costs, in which NTD will bear the burden to demonstrate they are just and reasonable, consistent with Commission precedent.<sup>69</sup> NTD further argues that the purpose of deferring costs is to place nonincumbent transmission developers, who cannot recover early pre-commercial and formation costs because they do not yet have a rate in effect, on equal footing with incumbent transmission developers.<sup>70</sup> NTD also asserts there is no basis to deny NTD's recovery of such costs if they are prudently incurred.<sup>71</sup>

**b. Deficiency Letter and Response and Comments**

36. Staff's deficiency letter requested that NTD provide the accounting entries NTD proposes to use to record the five-year amortization of the regulatory asset for the pre-

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<sup>65</sup> *Id.*; *see also* Myers Test. at 12.

<sup>66</sup> NTD Transmittal at 26; *see also* Myers Test. at 12.

<sup>67</sup> DEMEC December 23, 2015 Protest at 22 (DEMEC Protest).

<sup>68</sup> *Id.*.

<sup>69</sup> NTD Answer at 57.

<sup>70</sup> *Id.* (citing *Xcel Energy Southwest Transmission Company, LLC*, 149 FERC ¶ 61,182, at P 33 (2014) (*XEST*)).

<sup>71</sup> *Id.*.

commercial and formation costs along with a narrative explanation justifying the expense account used to record the amortization. The deficiency letter also requested NTD clarify how it proposes to identify the project-specific regulatory asset costs and explain how it will allocate regulatory asset costs that are not assigned on a project-specific basis.

37. In its response, with respect to amortization of the regulatory asset for the pre-commercial and formation costs, NTD states that it will amortize the regulatory asset and related carrying charges over a five-year period by debiting Account 566, Miscellaneous Transmission Expenses, and crediting Account 182.3, which NTD asserts is consistent with Commission precedent.<sup>72</sup> With respect to identification of project specific regulatory asset costs, NTD reiterates that the costs include “expenses and other costs including costs that ordinarily would be booked as expenses when incurred, including attorney fees, consultant fees, administrative expenses, entity formation costs, travel expenses, and costs to support regional activities that have been or will be undertaken with respect to NTD’s participation in PJM’s transmission planning and Order No. 1000 solicitation processes.”<sup>73</sup> NTD notes that at present, the Project is NTD’s only project and there is no reason to assign or allocate any of NTD’s regulatory asset costs for pre-commercial and formation costs through a mechanism other than through the single regulatory asset NTD requested in its initial filing. NTD states that when it files a section 205 filing to support its request for recovery of these costs it will identify and describe the relevant costs, including any costs not assigned on a project-specific basis.<sup>74</sup>

38. NTD states that if it seeks a regulatory asset for a future project, it will address in that filing (i) the relationship between that future regulatory asset and the regulatory asset NTD requested in the instant filing, and (ii) any question that arises about allocating or assigning any of NTD’s regulatory asset costs through a mechanism other than through the regulatory asset NTD requested in the instant filing.<sup>75</sup>

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<sup>72</sup> NTD February 26, 2016 Deficiency Letter Response at 10 (citing Docket No. ER15-2114-000, Transource West Virginia; *MidAmerican Central California Transco LLC*, 147 FERC ¶ 61,179, at P 33 (2014) (*California Transco*); *Transource Missouri, LLC*, 141 FERC ¶ 61,075, at P 58 (2012) (*Transource Missouri*)) (NTD Deficiency Letter Response).

<sup>73</sup> *Id.*.

<sup>74</sup> *Id.* at 11.

<sup>75</sup> *Id.*.

39. DEMEC states in its comments to NTD's deficiency response that NTD should be required to explain the nature of costs that would be capitalized and the rationale for that decision.<sup>76</sup> In response, NTD states these concerns are premature, and that NTD would not be able to book costs to a regulatory asset until it has made a section 205 filing to demonstrate such costs are just and reasonable.<sup>77</sup>

**c. Commission Determination**

40. We grant NTD's request to defer all prudently-incurred pre-commercial and formation costs specific to the Project that are not capitalized as a regulatory asset in Account 182.3, Other Regulatory Assets. We find that this incentive appropriately addresses the risks and challenges of the Project, because it will provide NTD with upfront certainty, reduce interest expenses, improve coverage ratios, and assist in the construction of the Project.

41. We reject DEMEC's request to disallow inclusion of pre-commercial costs incurred prior to NTD being selected as the Project sponsor. Under Order No. 679, we have previously granted recovery of incentive costs that are incurred prior to selection, conditioned on acceptance of a project in a regional transmission planning process.<sup>78</sup> We disagree with DEMEC that allowing recovery of such costs is discriminatory, as utilities are not required to have plant in service or a Formula Rate on file to request transmission incentives from the Commission. For example, in *TransCanyon DCR*<sup>79</sup> the Commission granted TransCanyon's request, pursuant to sections 205 and 219 and Order No. 679, in the event that it was selected as the approved project sponsor for a project, to establish a regulatory asset for "all prudently-incurred pre-commercial costs for its project that were not capitalized and included in construction work in progress, including pre-commercial costs of permitting and consulting activities."<sup>80</sup> The Commission has not drawn the distinction DEMEC proposes and we see no reason to do so. Rather, consistent with this precedent, we find that NTD's request is appropriate because it furthers the policy goal of facilitating the participation of nonincumbent transmission developers in the Order No. 1000 processes. We also find no basis to grant DEMEC's request for exclusion of bid

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<sup>76</sup> DEMEC Comments on Deficiency Letter Response at 6.

<sup>77</sup> NTD March 29 Comments at 4.

<sup>78</sup> E.g., Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 35; *Green Power Express LP*, 135 FERC ¶ 61,141, at P 17 (2011).

<sup>79</sup> *TransCanyon DCR, LLC*, 152 FERC ¶ 61,017 (*TransCanyon DCR*).

<sup>80</sup> *Id.* P 30.

costs or other PJM solicitation costs for the Project. As NTD notes, DEMEC may challenge such costs when NTD files pursuant to section 205.

42. We grant NTD's request to accrue a carrying charge on the unamortized balance of the regulatory asset until the asset is included in rate base. We also approve NTD's request to record the carrying charges by debiting Account 182.3 and crediting Account 421, Miscellaneous Nonoperating Income, consistent with Commission precedent.<sup>81</sup>

43. Consistent with Commission precedent, we authorize NTD to amortize the regulatory asset and related carrying charges associated with the Project by debiting Account 566, Miscellaneous Transmission Expenses, and crediting Account 182.3.<sup>82</sup> Further, the appropriate carrying charge should not result in a higher amount of interest than is allowed for construction expenditures that accrue an allowance for funds used during construction (AFUDC).<sup>83</sup> We restrict the compounding of interest to no more frequently than semi-annually consistent with the Commission's requirements.<sup>84</sup> Accordingly, we accept, subject to the directive discussed directly below, NTD's proposed effective date of February 1, 2016 to allow it to record a regulatory asset for the pre-commercial and formation costs and begin accruing carrying charges.

44. While we authorize NTD to record its prudently-incurred costs as a regulatory asset, NTD must make a section 205 filing to demonstrate that the pre-commercial and formation costs are just and reasonable before it includes them in its rate base. In that filing, NTD must establish that the costs included in the regulatory asset are costs that would otherwise have been chargeable to expense in the period incurred, but were deferred consistent with the authorization granted herein. Entities may challenge the reasonableness of these costs at that time.

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<sup>81</sup> See, e.g., *TransCanyon DCR*, 152 FERC ¶ 61,017 at P 32; *NextEra Energy Transmission West, LLC*, 154 FERC ¶ 61,009, at PP 32-33 (2016) (*NEETWest*).

<sup>82</sup> See, e.g., *South Central MCN, LLC*, 153 FERC ¶ 61,099, at PP 17 (2015); *TransCanyon DCR LLC*, 152 FERC ¶ 61,017 at P 32; *NEETWest*, 154 FERC ¶ 61,009 at P 33.

<sup>83</sup> See e.g., *TransCanyon DCR LLC*, 152 FERC ¶ 61,017 at P 32; *NEETWest*, 154 FERC ¶ 61,009 at P 33.

<sup>84</sup> See *NEETWest*, 154 FERC ¶ 61,009 at P 33.

## 5. Hypothetical Capital Structure

45. NTD requests authorization to use a hypothetical capital structure consisting of 50 percent equity and 50 percent debt until the Project goes into service, at which point NTD will use its actual capital structure. NTD states that, as a nonincumbent transmission developer with no existing assets, NTD's actual capital structure will fluctuate significantly prior to the Project's in-service date.<sup>85</sup> NTD argues that a hypothetical capital structure will help ensure NTD has access to capital at a reasonable price, thus eventually lowering costs for ratepayers.<sup>86</sup> NTD also avers that a stated capital structure will provide more stable inputs to the Formula Rate, including the rate for AFUDC, which will improve the predictability of NTD's accruals and project costs.<sup>87</sup>

46. NTD states that its target capital structure is similar to the target set by many other transmission-only entities and to the actual capital structure of many transmission owners in PJM.<sup>88</sup> NTD states that a 50 percent equity capital structure is important to achieving a strong credit profile and investment grade credit rating. NTD states that, given its risks as a nonincumbent, transmission-only entity developing its first transmission asset, it will be important for NTD to have a capital structure that is comparable to the capital structure of other transmission owning utilities and that the requested capital structure should help alleviate some of these risks, since it is consistent with capital structure guidelines for an investment grade rating.<sup>89</sup>

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<sup>85</sup> NTD Transmittal at 27-28.

<sup>86</sup> *Id.* at 28.

<sup>87</sup> *Id.* at 27 (NTD filing (Testimony of Joseph D. Esteves) at 27 (Esteves Test)).

<sup>88</sup> *Id.* at 28 (citing Esteves Test. at 9; also citing 2015 Annual Informational Filing of Delmarva Power & Light Co., Docket No. ER09-1158 (actual capital structure of 50.1% equity and 49.9% debt); 2015 Annual Informational Filing of PSEG, Docket No. ER09-1257 (actual capital structure of 52.27% equity and 47.73% debt); 2015 Annual Informational Filing of Dominion Virginia Power, Docket No. ER09-545 (actual capital structure of 57% common and preferred stock and 43% debt)).

<sup>89</sup> *Id.* at 28.

47. NTD cites Commission precedent regarding hypothetical capital structures reducing debt costs and assisting companies in receiving and maintaining investment grade credit rating profile.<sup>90</sup> It states the Commission recently noted the particular need of nonincumbent transmission developers for this incentive.<sup>91</sup>

a. **Comments and Answers**

48. No objections were raised to the use of a hypothetical capital structure of 50 percent debt and 50 percent equity. We deal here in the instant filing with certain more generalized arguments against the incentives, including that they are being awarded prematurely or would improperly result in unjustified cost burdens above. However, both the Delaware Commission and DEMEC believe that NTD's actual capital structure should be capped. DEMEC argues that since neither NTD nor its parent will issue any equity, NTD's actual capital structure will also be hypothetical if it contains any equity. Therefore, in order to discourage NTD from artificially inflating its capital structure, it asks that the Commission impose an upper limit on the equity equal to 50 percent.<sup>92</sup> Similarly, the Delaware Commission objects to NTD's failure to commit in its filing to the actual capital structure that will replace its hypothetical capital structure, such as a limit on actual equity percentage.<sup>93</sup> The Delaware Commission argues that when a utility wishes to alter the capital structure in its rate base, the proper recourse is to seek Commission approval under section 205 of the FPA, and urges the Commission to subject NTD to the same standard.<sup>94</sup>

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<sup>90</sup> *Id.* at 27 (citing *PATH*, 122 FERC ¶ 61,188 at P 55; *Transource Missouri*, 141 FERC ¶ 61,075 at P 66).

<sup>91</sup> *Id.* (citing *XEST*, 149 FERC ¶ 61,182 at P 22 (“Nonincumbent transmission developers have a particular need for the hypothetical capital structure incentive because it establishes certain financial principles that incumbent transmission owners currently have in place but that remain undetermined for nonincumbent transmission developers.”)).

<sup>92</sup> DEMEC Answer at 12.

<sup>93</sup> Delaware Commission December 23, 2015 Protest at 14 (Delaware Commission Protest).

<sup>94</sup> *Id.* at 15.

49. NTD responds that the Delaware Commission's request is unsupported and should be rejected given that the Commission generally requires the use of a utility's actual capital structure unless certain specific facts can be shown and has consistently rejected attempts to impose caps or other limitations on a utility's capital structure.<sup>95</sup> NTD states that in the context of requests for approval of a hypothetical capital structure, the Commission has required that the utility switch automatically to an actual capital structure when a project goes into commercial operation, and that a similar result is warranted in the instant filing.<sup>96</sup>

**b. Commission Discussion**

50. We grant NTD's request to use a hypothetical capital structure of 50 percent debt and 50 percent equity until the Project achieves commercial operation, consistent with Commission precedent.<sup>97</sup>

51. NTD correctly notes that the Commission has held that nonincumbent transmission developers have a particular need for the hypothetical capital structure incentive because it establishes certain financial principles that incumbent transmission owners currently have in place but that remain undetermined for nonincumbent transmission developers.<sup>98</sup> We find that a hypothetical capital structure furthers the policy goal of facilitating the participation of nonincumbent transmission developers in the Order No. 1000 solicitation process, thereby encouraging competition.<sup>99</sup>

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<sup>95</sup> NTD Answer at 18 (citing *XEST*, 149 FERC ¶ 61,182 at P 25; *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 63,027, at PP 190-99 (Initial Decision) (2015) (*ABATE ID*) (Initial Decision); *ITC Holdings Corp.*, 121 FERC ¶ 61,229, at P 49 (2007)).

<sup>96</sup> *Id.* at 18-19 (citing *Transource Missouri*, 141 FERC ¶ 61,075 at P 66).

<sup>97</sup> *See, e.g., XEST*, 149 FERC ¶ 61,182 at P 22 (45/55 debt/equity ratio); *Xcel Energy Transmission Dev. Co., LLC (XETD)*, 149 FERC ¶ 61,181, at P 13 (2014) (45/55 debt/equity ratio); *Transource Kansas, LLC*, 151 FERC ¶ 61,010, at P 25 (2015) (*Transource Kansas*) (40/60 debt/equity ratio) .

<sup>98</sup> *See NEETWest*, 154 FERC ¶ 61,009 at P 37; *XEST*, 149 FERC ¶ 61,182 at P 22; *XETD*, 149 FERC ¶ 61,181 at P 13.

<sup>99</sup> *See NEETWest*, 154 FERC ¶ 61,009 at P 37; *ATX Southwest, LLC*, 152 FERC ¶ 61,193, at P 30 (2015) (*ATX Southwest*) (citing *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000-A, 139 FERC ¶ 61,132, at P 87 (2012)).

52. The Commission finds premature the Delaware Commission's and DEMEC's challenges to NTD's proposal not to cap its use actual capital structure in the future. NTD has not proposed an actual capital structure. The Delaware Commission and DEMEC can challenge that when NTD submits its annual update. They have not shown that an actual capital structure capped at 50 percent equity is necessary to make NTD's proposal just and reasonable. The Commission has not dictated the level of common equity in utility capital structures used in ratemaking beyond very limited and specific circumstances, which the Delaware Commission has not demonstrated are present in this case.<sup>100</sup> Moreover, the Commission has never capped the capital structures used for ratemaking at a particular numerical value and we are not persuaded by the Delaware Commission's request to deviate from that policy here.<sup>101</sup> We note, however, that NTD must use its actual capital structure after the Project goes into service. We further disagree with the Delaware Commission that NTD should be required to make a separate 205 filing to transition to its actual capital rate. We have not required such a filing in the past and see no reason to do so here.

## 6. Abandoned Plant Incentive

53. NTD requests the right to recover, pursuant to an FPA section 205 filing, 100 percent of prudently incurred costs in the event the project is abandoned due to factors beyond its control (abandoned plant incentive).<sup>102</sup> NTD explains that it faces numerous risks and challenges, such as regulatory and siting risks, which could cause the Project to be abandoned, and that the abandoned plant incentive will provide cost recovery assurances which will allow NTD to procure capital at a lower cost.<sup>103</sup> No commenters opposed this incentive request.

### a. Commission Discussion

54. We grant NTD's request for recovery of 100 percent of prudently-incurred costs associated with abandonment of the Project, provided that the abandonment is a result of factors beyond NTD's control, which NTD must demonstrate in a subsequent FPA

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<sup>100</sup> *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,049, at P 190 (2014) (*ABATE Order*).

<sup>101</sup> *Id.* P 193.

<sup>102</sup> NTD Transmittal at 28.

<sup>103</sup> *Id.* at 28-29.

section 205 filing for recovery of abandoned electric transmission facilities costs.<sup>104</sup> As the Commission has explained in other proceedings, the recovery of abandonment costs is an effective means to encourage transmission development by reducing the risk of non-recovery of costs.<sup>105</sup> We find that NTD has demonstrated, consistent with Order No. 679, a nexus between the recovery of 100 percent of prudently incurred abandonment costs and its planned investment in the Project.

55. However, we note that we will not determine the justness and reasonableness of NTD's recovery of costs for abandoned electric transmission facilities, if any, until NTD seeks such recovery in a future FPA section 205 filing.<sup>106</sup> Order No. 679 specifically reserves the prudence determination for the later FPA section 205 filing that a public utility is required to make if it seeks abandoned plant recovery.

## 7. Risks and Challenges ROE Adder

56. NTD requests authorization for a 50 basis point incentive ROE adder to address what it claims are unique risks and challenges it confronts in developing and constructing the Project.<sup>107</sup> NTD argues the adder is appropriate because these risks and challenges are not already addressed through traditional ratemaking policies or risk-reducing incentives.

57. NTD states that it meets the Transmission Incentive Policy Statement's requirements that the Project faces substantial risks and challenges that are not reflected in the requested base ROE or mitigated through risk-reducing incentives, and which support fully the requested risks and challenges ROE adder.<sup>108</sup> NTD states that the Project will address chronic operational issues that have had demonstrated cost impacts on customers, and thus qualifies as one of the types of projects that the Commission anticipated in the Transmission Incentive Policy Statement. It states that the Project will provide operational benefits by enhancing system stability and reliability in the Artificial

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<sup>104</sup> Order No. 679, FERC Stats. & Regs. ¶ 31,222 at PP 165-166.

<sup>105</sup> *Id.* P 163.

<sup>106</sup> *Primary Power LLC*, 131 FERC ¶ 61,015, at P 124.

<sup>107</sup> NTD Transmittal at 30.

<sup>108</sup> *Id.* at 31.

Island area.<sup>109</sup> NTD also states that by eliminating the minimum unit MVAR output requirements, the Project allows for more efficient generation dispatch, and unlocks operationally-constrained generation resources, another type of project that the Commission anticipated in the Transmission Incentive Policy Statement may face risks and challenges that the base ROE and other requested risk-reducing incentives would not address. In addition, NTD claims the Project will provide financial benefits to ratepayers, which it states PJM has calculated as an approximately \$169 million reduction in PJM annual load payments.<sup>110</sup>

58. NTD states that the Project faces a host of significant risks and challenges that are not addressed fully by the other risk-reducing incentives requested herein or in the base ROE. NTD reiterates, as discussed above, that the Project faces numerous risks and challenges associated with obtaining multiple permits and authorizations required to site and construct the Project. It states that individually, these required approvals present significant risks and challenges, and that together these risks and challenges are compounded because various permits and authorizations from different regulatory bodies must be congruent for the Project to be successful, and any changes or delay with regard to one or more required authorizations will impact the related approvals, including those from other jurisdictions. It states that these requirements pose significant risk of project delays due to route changes or delays in the issuance of necessary permits and authorizations. NTD also mentions the possible loss of its \$5.8 million Letter of Credit if it fails to meet applicable deadlines.<sup>111</sup>

59. NTD states that the other requested incentives and RTO participation adder would not adequately address these risks and challenges. It states that the other requested incentives do not mitigate fully the risks and challenges associated with the need to support such investments in the face of delays, route revisions, or other consequences of the required permits and other approvals and authorizations. NTD states that where a project includes complicated and difficult siting and permitting challenges, the Commission has approved requests for risks and challenges ROE adders.<sup>112</sup>

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<sup>109</sup> NTD states that the RTEP process that resulted in the selection of NTD to undertake the Project was commenced to “eliminate Artificial Island Operating Guide complexity regarding stability limitations and minimum unit MVAR output requirements, as well as to address previously identified high voltage reliability issues.” *Id.* at 31 & n.123 (citing Carroll Test. at 13, PJM White Paper at 9).

<sup>110</sup> *Id.* at 32 (citing Carrol Test. at 13; PJM Market Efficiency Study at 5).

<sup>111</sup> *Id.* at 23.

<sup>112</sup> *Id.* at 32.

60. NTD states that the Project also will present numerous financial risks and challenges for NTD. It states that as a transmission-only company without any operational assets, NTD will be required to fund and undertake all of the necessary permitting, development, and construction activities without supporting revenues until the completed project is placed into service. NTD also notes that it is a transmission-only company that has no direct business history, lacks an established credit rating, and has no credit history. As a result, NTD states that it faces a level of funding and financial risk not faced by traditional utilities. NTD states that while the recovery of deferred costs through the creation of a regulatory asset and abandoned plant incentive will address a portion of these risks, the risks and challenges facing the Project extend beyond the risks of higher cost development and construction financing and the risk of non-recovery of certain costs if the project is abandoned for reasons beyond NTD's control. NTD states that the requested incentives do not address fully the significant cash flow shortfalls that NTD will face during the permitting and construction phase of the Project and the overall financial burden associated with the Project up to the date on which it is placed into service.<sup>113</sup>

61. NTD also states that the Project poses significant construction-related challenges, regardless of whether NTD employs overhead or submarine cable construction for crossing the Delaware River. NTD states that a risks and challenges ROE adder is appropriate because these unique and challenging construction conditions and techniques increase the risk profile of the project compared to more standard land-based overhead transmission lines.<sup>114</sup>

62. NTD also represents that its requested base ROE does not address these heightened risks and challenges.<sup>115</sup> NTD states that the 10.5 percent base ROE is derived from a discounted cash flow (DCF) analysis that relies on a proxy group comprised of large, incumbent electric utilities with investment grade credit ratings. It states that while a large, incumbent utility may undertake a new construction project, the new investment would typically be small relative to the larger overall utility rate base and present minimal risk for investors and lenders. Moreover, NTD states, the incumbent utilities that populate the proxy group are operating companies with existing revenues and means to recover their costs. NTD states that such companies pose less risk to potential investors than do small, single-purpose entities such as NTD that have no assets and no

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<sup>113</sup> *Id.* at 33.

<sup>114</sup> *Id.* at 34.

<sup>115</sup> *Id.*

current revenues. As a result, NTD states that its base ROE does not account for these risks, which are more appropriately reflected in an incentive ROE adder.<sup>116</sup>

63. NTD states that, as the Transmission Incentive Policy Statement requires, it is taking all appropriate steps to reduce the risks associated with development of the Project.<sup>117</sup> NTD states that it already has completed initial outreach with a variety of federal and state agencies and has secured certain key property rights with individual Delaware landowners to reduce the right-of-way acquisition challenges. NTD states that it has engaged engineering consultants with expertise and experience with transmission line construction including river crossings similar to that required for the Project, and has met with prospective suppliers and contractors with expertise and experience with transmission line and cable installation across rivers and other water bodies throughout the world. According to NTD, it proposed either an overhead or submarine river crossing in its submittals to PJM, and maintained flexibility among various potential construction and installation techniques to help mitigate the permitting and construction risk inherent in a complex project. NTD also states that it has engaged consultants to complete a desktop geotechnical and geologic conditions report, has completed two field studies to confirm the general expectations found in the desktop report, and vetted the results with qualified engineers and contractors to further evaluate the technical feasibility of various installation techniques and identify constraints which may affect the project plan.<sup>118</sup>

64. NTD contends that the Project satisfies the Transmission Incentive Policy Statement's requirement that alternatives to the Project were considered through a transmission planning process because PJM carefully considered and evaluated a wide range of alternatives to the Project through the RTEP process. NTD states that the Commission consistently has held that projects evaluated and approved by Order No. 890- or Order No. 1000-compliant transmission planning processes, which would include the Project, satisfy fully this requirement.<sup>119</sup>

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<sup>116</sup> *Id.*.

<sup>117</sup> *Id.*.

<sup>118</sup> *Id.* at 35.

<sup>119</sup> *Id.* at 36 & n.135 (citing Transmission Incentives Policy Statement at P 26; *New York Independent System Operator, Inc.*, 151 FERC ¶ 61,004, at P 99 & n.145 (2015) (*NYISO*) (finding that applicant had demonstrated that alternatives to its transmission project were considered by virtue of the project's consideration in a competitive ISO process).

65. Finally, NTD states that it will limit the risks and challenges ROE adder to the Construction Cost cap applicable to the Project to satisfy the Transmission Incentive Policy Statement's requirement that the applicant commit to limit the application of the risks and challenges ROE adder to a cost cap.<sup>120</sup> Unlike traditional ratemaking policies, which permit a public utility to recover through cost-of-service rates the costs of all prudently-incurred transmission investments, NTD has committed to cap the Construction Costs it may include in its Formula Rate at \$146 million, subject to certain conditions and exclusions. Accordingly, if the Construction Costs of the Project exceed the Construction Cost cap, NTD states that the costs that exceed the cap will not be recovered through the Formula Rate, nor will NTD earn a return on these costs. NTD notes that the Commission has relied on such commitments to approve risks and challenges ROE adders in other proceedings.<sup>121</sup>

**a. Comments and Answers**

66. Protesters argue that NTD has failed to demonstrate that its Project warrants the risks and challenges ROE adder. The protesters raise three issues. First, they argue that the Project is not particularly risky. DEMEC argues that NTD has not shown that "the proposed project faces risks and challenges that are not either already accounted for in the applicant's base ROE or addressed through risk-reducing incentives."<sup>122</sup> The Delaware Commission notes that although NTD argues it deserves risk incentives because NTD is a new and inexperienced transmission entity, when NTD was bidding on the project, its parent company extolled its experience and capability.<sup>123</sup> AMP argues that NTD and several other parties were willing to bid for the Project without guaranteed incentives, that many of the "risks and challenges" that NTD cites are inherent to competitive bids, and are no longer applicable once a transmission developer is selected.<sup>124</sup> AMP also criticizes NTD's claim that permitting requirements constitute a risk, arguing that all utilities routinely face permitting requirements.<sup>125</sup>

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<sup>120</sup> *Id.* at 36 & n.136 (citing Transmission Incentives Policy Statement at P 28; NTD Designated Entity Agreement, Schedule E, Section 1.).

<sup>121</sup> *Id.* at 36 (citing *NYISO*, 151 FERC ¶ 61,004 at P 99).

<sup>122</sup> DEMEC Protest at 5 (citing Transmission Incentives Policy Statement, 141 FERC ¶ 61,129 at PP 20-22).

<sup>123</sup> Delaware Commission Protest at 15.

<sup>124</sup> AMP Protest at 32-33.

<sup>125</sup> *Id.* at 33-34.

67. Second, DEMEC argues that NTD has not shown that it “is taking appropriate steps and using appropriate mechanisms to minimize its risks during project development, including seeking risk-reducing incentives before a project-specific ROE adder,” as the Transmission Incentives Policy Statement requires.<sup>126</sup> DEMEC argues that NTD itself admits that the abandoned plant recovery, recovery of deferred costs through the creation of a regulatory asset, and hypothetical capital structure incentives already mitigate its risks. DEMEC further argues that “a forward-looking Formula Rate to recover 100% of its costs ... makes NTD’s investment in the Project almost risk free.”<sup>127</sup> DEMEC also claims that NTD’s decision to forgo seeking the CWIP incentive and related representations suggests that NTD has conceded that its project is not unusually challenging to finance by industry standards.<sup>128</sup>

68. Third, DEMEC argues that NTD has not agreed to limit “application of the incentive ROE to a cost estimate,”<sup>129</sup> as the Transmission Incentives Policy Statement requires.<sup>130</sup> DEMEC and AMP claim that, while NTD stated it would cap Construction Costs at \$146 million, there are numerous costs that are exempt from that cap,<sup>131</sup> “including: (1) financing costs, including the ROE; (2) taxes; (3) costs and expenses associated with the operation and maintenance (O&M) of the Project; (4) costs and expenses associated with PJM-directed additions to or modifications of the scope of work; and (5) costs and expenses incurred as a result of an Uncontrollable Force.”<sup>132</sup>

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<sup>126</sup> DEMEC Protest at 5 (citing Transmission Incentives Policy Statement, 141 FERC ¶ 61,129 at P 24).

<sup>127</sup> *Id.* at 6.

<sup>128</sup> *Id.* at 7.

<sup>129</sup> *Id.* at 12.

<sup>130</sup> *Id.* at 6 (citing Transmission Incentives Policy Statement, 141 FERC ¶ 61,129 at P 28).

<sup>131</sup> *Id.* at 8-9; *see* AMP Protest at 30.

<sup>132</sup> DEMEC December Protest at 8-9; *see also* AMP Protest at 30 and NTD Designated Entity Agreement, Schedule E, § 1.2(c). Uncontrollable Force is defined in Schedule E of the Designated Entity Agreement: “Uncontrollable Force” means (i) any destruction of or damage to any portion of the Project, or any interruption, suspension or interference with NTD’s (or any contractor’s or subcontractor’s) performance of activities required to complete the Project, which destruction, damage, interruption, suspension or interference is caused by landslides; lightning; earthquakes; hurricanes; tornadoes; typhoons; severe weather; fires or explosions; floods; epidemic; acts of a

(continued ...)

DEMEC argues that, considering that NTD's decision to bid for the Project was voluntary, there is no justification for this upward pressure on rates, either from an incentive policy perspective or from a section 205 perspective.<sup>133</sup>

69. If the incentives are not denied outright, some protestors argue that the Commission should set them for hearing and settlement proceedings, given the numerous issues of material fact in the record, and reserve the right to raise additional issues as the proceedings unfold.<sup>134</sup>

70. NTD claims that its "proposal closely follows established Commission precedent," and that its "requested incentives are tailored to the specific risks and challenges associated with the [Project]."<sup>135</sup> NTD rejects challenges to aspects of its requested transmission rate incentives as mischaracterizations and misstatements of NTD's proposals, inconsistent with Commission policy and precedent and, in some instances, contrary to well-established established policy and precedent.<sup>136</sup> NTD states that contingencies regarding its Project demonstrate risks and challenges it faces and so support a grant of incentives.<sup>137</sup>

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public enemy; acts or threats of terrorism; wars; blockades; riots; rebellions; sabotage; vandalism; insurrections; environmental contamination or damage not caused by NTD (or any contractor or subcontractor); strike or labor disruption or civil disturbances (or governmental actions arising from any of the foregoing), (ii) any material change in the enforcement, interpretation or application of any statute, rule, regulation, order or other applicable law existing as of the Effective Date or the issuance or enactment of any of the foregoing on or after the Effective Date, (iii) any Breach or Default by Transmission Provider of its obligations under this Designated Entity Agreement or any request by Transmission Provider to delay or suspend any activities associated with the Project, or (iv) any Breach or Default, by any Transmission Owner under or in connection with an Interconnection Coordination Agreement or any interconnection agreement. *Id.*

<sup>133</sup> DEMEC Protest at 17.

<sup>134</sup> *Id.* at 9; Delaware Commission Protest at 1.

<sup>135</sup> NTD Answer at 6.

<sup>136</sup> *Id.* at 38-39.

<sup>137</sup> *Id.* at 40-41.

71. NTD rejects the Delaware Commission's assertion regarding NTD's experience, and states that while it is "fully qualified and experienced," the Project is undisputedly its first.<sup>138</sup>

72. NTD reiterates that its request for the risks and challenges ROE adder is consistent with the Transmission Incentives Policy Statement and with its earlier representations to PJM during the solicitation process. It contends that DEMEC's and AMP's arguments that the risks and challenges ROE adder is unwarranted due to NTD's participation in the RTEP solicitation process are otherwise without support.<sup>139</sup> NTD states it has demonstrated that the Project would address chronic operating issues with demonstrated cost impacts to consumers, including by creating more efficient generation dispatch, unlocking operationally-constrained generation resources, and providing quantifiable financial benefits to ratepayers.<sup>140</sup> It contends Commission approval of its request would be consistent with recent precedent granting incentive adders for transmission investments that "provide demonstrable consumer benefits by making the transmission grid more efficient, reliable, and cost-effective"<sup>141</sup> and states that the protestors do not deny the benefits of the Project.

73. NTD asserts that the other incentives it seeks would not obviate the need for the risks and challenges ROE adder. NTD asserts it will face such challenges even if the Commission approves all of the other risk-reducing incentives it requested noting, for example that the abandoned plant incentive would not mitigate risks and challenges associated with project changes or delays that do not cause the Project to be abandoned and that deferring costs for later recovery in a regulatory asset would not shield NTD from risks and burdens of financing the development and construction of the Project.<sup>142</sup>

74. NTD also disagrees with DEMEC's challenge to the risks and challenges ROE adder based on NTD's decision not to request the CWIP incentive given that, in this specific case, the CWIP Incentive would not materially reduce NTD's financial risks or benefit its financing costs, and, given ratepayer and stakeholder opposition, it would not

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<sup>138</sup> *Id.* at 41.

<sup>139</sup> *Id.* at 42.

<sup>140</sup> *Id.* at 43 (noting PJM determined that the project would reduce PJM annual total load payments by approximately \$169 million).

<sup>141</sup> *Id.* (citing *NYISO*, 151 FERC ¶ 61,004 at PP 97-100).

<sup>142</sup> *Id.* at 46.

be appropriate to pursue this incentive.<sup>143</sup> NTD also rejects DEMEC's argument that the risks and challenges ROE adder is unnecessary given the base ROE level, because the base ROE does not address the risks of small, single-purpose entities such as NTD that have no assets and no current revenues, with development, permitting, and construction risk.<sup>144</sup> NTD also states that contrary to AMP's assertions, it does not base its application for a risks and challenges ROE adder (or any other incentive) on risks and challenges that arose in the course of the Order No. 1000 solicitation process, but rather seeks to address risks and challenges that may arise now that PJM designated NTD to develop the Project, such as the risk of defaulting on a letter of credit with PJM and of failure to meet applicable milestones, which could lead to removal of the project from the RTEP and NTD's designation as its developer.<sup>145</sup> NTD also asserts that, contrary to AMP's assertion, there are many unique siting and permitting issues that face the Project.<sup>146</sup>

75. NTD challenges DEMEC's contention that NTD failed to justify the risks and challenges ROE adder because it will allegedly recover costs in excess of those allowed by the Construction Cost cap, and that ROE incentives above the base ROE are not justified because NTD's decision to develop and construct the Project was a voluntary business decision. NTD states that certain expenses DEMEC cites will not be capitalized and will not affect the requested incentive ROE adder.<sup>147</sup> NTD also asserts that while NTD will be able to recover certain costs in excess of the \$146 million Construction Cost cap in limited circumstances, these will arise only in the case of (i) PJM-directed additions or modifications to the project's scope of work, or (ii) "Uncontrollable Force," and that such limited exceptions are narrowly defined, were agreed to by PJM and are consistent with the Transmission Incentives Policy Statement.<sup>148</sup> NTD asserts that DEMEC's assertion that the Commission should deny the requested risks and challenges ROE adder because NTD's investment is voluntary ignores that most transmission investment is voluntary.<sup>149</sup>

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<sup>143</sup> *Id.* at 47.

<sup>144</sup> *Id.* at 48.

<sup>145</sup> *Id.* at 49-50.

<sup>146</sup> *Id.* at 51.

<sup>147</sup> *Id.* at 52-53.

<sup>148</sup> *Id.* at 53.

<sup>149</sup> *Id.* at 53-54.

76. NTD challenges DEMEC's assertion that a risks and challenges ROE adder is not justified because other entities were interested in developing the Project, arguing that DEMEC's assertion presents no basis for denial of NTD's section 205 request.<sup>150</sup>

77. DEMEC's replies that NTD's Answer adds no new information to support its request for the risks and challenges ROE adder that DEMEC has not already been refuted by DEMEC, and therefore concludes that the adder is unwarranted.<sup>151</sup>

**b. Deficiency Letter and Response**

78. The Deficiency Letter noted that while NTD stated that it would limit the risks and challenges ROE adder to the Construction Cost cap contained in Schedule E of the Designated Entity Agreement and would not recover costs in excess of the Construction Cost cap through the Formula Rate, NTD's Designated Entity Agreement appeared to provide that NTD may seek recovery in its Annual Transmission Revenue Requirement of certain categories of "excluded costs," such as PJM-directed additions or modifications, costs and expenses incurred as a result of an Uncontrollable Force, and costs and expenses associated with operation and maintenance of the project. The Deficiency Letter requested that NTD explain more clearly whether and how the proposed risks and challenges ROE adder would apply to each category of "excluded costs." The Deficiency Letter also requested that NTD explain if it would apply a risks and challenges ROE adder for any other Construction Costs that would be in addition to the lesser of the Construction Cost cap amount or the aggregate amount of actual Construction Costs associated with the project.

79. In its response, NTD states that the Designated Entity Agreement provides that NTD will not seek to recover through its Annual Transmission Revenue Requirement ATRR Construction Costs in excess of the lesser of (i) the aggregate amount of actual Construction Costs associated with the Project, or (ii) the Construction Cost cap amount, which is \$146 million, subject to escalation based on certain specified factors. NTD states that it is therefore limiting its requested risks and challenges ROE adder to no more than this estimated maximum project cost, and is not requesting an ROE adder for any cost overruns. NTD states that "Construction Costs" is a defined term in the Designated Entity Agreement, and certain specifically-identified "excluded costs" are not within the definition of Construction Costs and are not subject to the Construction Cost cap amount.<sup>152</sup>

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<sup>150</sup> *Id.* at 54.

<sup>151</sup> DEMEC Answer at 10.

<sup>152</sup> NTD Deficiency Letter Response at 20.

80. NTD states that the risks and challenges ROE adder would not, however, apply to all costs and expenses that may be recovered through the Annual Transmission Revenue Requirement, but rather only to costs that are (i) within the limitations on cost recovery imposed by the Designated Entity Agreement, and (ii) capital investments booked to Gross Plant in accordance with NTD's books and records.<sup>153</sup>

81. With regard to taxes and financing costs, which are each excluded costs, NTD states that the Designated Entity Agreement provides that NTD will not seek to recover through its Annual Transmission Revenue Requirement taxes or financing costs to the extent such costs relate or are attributable to Construction Costs that exceed the Construction Cost cap amount (i.e., cost overruns).<sup>154</sup>

82. NTD provides further explanation of Designated Entity Agreement exclusions from the Construction Costs and states that certain additional costs will arise only if the scope of the Project is changed, as a result of either PJM-directed modifications or additions to the Project or as a consequence of an Uncontrollable Force. NTD states that these exceptions to the Construction Cost cap are narrowly drawn and only include circumstances which could not have been caused by NTD, such as a breach or default by a transmission provider of its obligations under the Designated Entity Agreement or a request by a transmission provider to delay or suspend any activities associated with the Project.<sup>155</sup>

83. NTD also states that the Designated Entity Agreement excludes from Construction Costs any costs and expenses associated with the operation and maintenance of the Project (O&M Expenses). However, NTD states that the risks and challenges ROE adder would not apply to O&M Expenses because such costs will not be booked to Gross Plant in accordance with Attachment 1. NTD states that as O&M Expenses are non-capital costs which are recovered on a current basis, the risks and challenges ROE adder is not applicable to such costs and expenses.<sup>156</sup>

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<sup>153</sup> *Id.* at 20-21.

<sup>154</sup> *Id.* at 21.

<sup>155</sup> *Id.*.

<sup>156</sup> *Id.*.

**c. Commission Determination**

84. We deny the requested 50 basis point risks and challenges ROE adder for the Project because NTD has failed to make the demonstration that the Commission set forth in the Transmission Incentives Policy Statement.

85. In the Transmission Incentives Policy Statement, the Commission stated that it expects an applicant seeking an incentive ROE adder based on a project's risks and challenges to make four showings to justify the need for it.<sup>157</sup> First, an applicant is expected to demonstrate that the proposed project faces risks and challenges that are not either already accounted for in the applicant's base ROE or addressed through the risk-reducing incentives. The Commission specifically identified several types of projects that it anticipated may face the types of risks and challenges that would not be addressed by either the base ROE or risk-reducing incentives:

- 1) projects that relieve chronic or severe congestion that has had demonstrated cost impacts to consumers;
- 2) projects that unlock location constrained generation resources that had previously had limited or no access to the wholesale electricity markets; and
- 3) projects that apply new technologies to facilitate more efficient and reliable usage and operation of existing or new facilities.<sup>158</sup>

The Commission explained in the Transmission Incentives Policy Statement, that this list was not exhaustive, but rather is indicative of the types of projects that may merit an incentive ROE adder.

86. Second, an applicant is expected to demonstrate that it has taken appropriate steps and implemented appropriate mechanisms to minimize its risks during project development. Third, an applicant is expected to demonstrate that alternatives to the project have been or will be considered in either a relevant transmission planning process or another appropriate forum. Fourth, an applicant is expected to commit to limit the application of such incentive ROE adder to a cost estimate.

87. We find that NTD has not satisfied the first of these expectations, demonstrating that the proposed project faces risks and challenges either not already accounted for in the applicant's base ROE or addressed through risk-reducing incentives. In particular, we disagree with NTD's argument that the Project falls within one of the types of projects

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<sup>157</sup> Transmission Incentives Policy Statement, 141 FERC ¶ 61,129 at PP 17-21.

<sup>158</sup> *Id.* P 21 & n.28.

that the Commission identified in connection with the first expectation. We disagree with NTD that the Project relieves chronic or severe congestion that has had demonstrated cost impacts to consumers. While, as noted above, PJM included the Project in its RTEP part based on a finding it would reduce congestion or help ensure reliability, NTD does not persuasively argue that the Project will relieve chronic or severe grid congestion.

88. With respect to the second category of projects, those that unlock location constrained generation resources, we find that the generation resources at issue are not location-constrained as the Commission has previously defined this term.<sup>159</sup> The Commission has noted that such resources tend to have an immobile fuel source, are small in size relative to the necessary interconnection facilities, tend to come on line incrementally over time, and are often remotely located from loads.<sup>160</sup> The generation resources that the Project will service are large nuclear units<sup>161</sup> that are not remotely located from loads. With respect to the third category of projects, we find that the technologies NTD plans to apply to the Project, as discussed above, cannot be characterized as “new technologies.” NTD claims that its proposed use of jetted-injection devices is innovative in North America, but other transmission lines have already been constructed in the U.S. using this technology, including the Neptune Project.<sup>162</sup> We also note that this technique does not appear to be NTD's preferred method of underwater cable installation.<sup>163</sup> Applying the policies set forth in the Transmission Incentives Policy Statement, we find that the Applicants have failed to satisfy the first showing for the Project.

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<sup>159</sup> See *California Independent System Operator Corp.*, 119 FERC ¶ 61,061, at n.1 (2007) (defining location-constrained resources as “generation resources that are typically constrained as a result of their location, relative size and the immobility of their fuel source.”).

<sup>160</sup> *Id.* P 64. In that proceeding, CAISO asserted that the location-constrained resources at issue included wind, geothermal and solar resources. *Id.* P 7.

<sup>161</sup> See NTD Transmittal at 3-4 & n.16.

<sup>162</sup> See, e.g., Christopher Hocker, Neptune Regional Transmission System, and Lindsay Martin, Siemens Power Transmission & Distribution, Inc., ElectricEnergyOnline.com (June 29, 2007), [http://www.electricenergyonline.com/show\\_article.php?mag=&article=343](http://www.electricenergyonline.com/show_article.php?mag=&article=343) (“The Hydroplow was equipped with a “stinger,” or blade, that created a trench, as well as water jets to fluidize the sediments in the trench as the cable was laid.”)

<sup>163</sup> NTD Transmittal at 23-24.

89. Second, we find that the risk-reducing incentives granted in this order, e.g., deferred cost recovery, abandonment, and the RTO adder as discussed below, together with the base ROE NTD ultimately receives, will sufficiently address the risks and challenges of the Project that NTD identified. For example, the possibility that the specific challenges associated with obtaining permits and licenses for siting the transmission line could result in the cancellation of the project is sufficiently addressed by the abandonment incentive.<sup>164</sup> Likewise, with respect to NTD's concerns over access to capital as a first-time transmission developer, NTD itself notes that the hypothetical capital structure incentive that we grant will allow it to have capital structure that is comparable to the capital structure of other transmission owning utilities. NTD also notes that the deferral, and later recovery of pre-commercial and corporate formation costs through establishment of a regulatory asset, which we also grant, will improve NTD's ability to obtain financing at competitive terms. Similarly, we note that while, as NTD contends, the abandoned plant incentive may not mitigate risks and challenges associated with project changes or delays that do not cause the project to be abandoned, exclusions to its Construction Cost cap address the costs associated with Project changes or delays beyond NTD's control, such as modifications or additions to the Project that PJM directs or that result from an Uncontrollable Force. We find that NTD has failed to identify any additional risks or challenges that are not addressed by the base ROE or by the risk-reducing incentives authorized herein. Thus, we reject the NTD's request for an incentive ROE adder with respect to the Project.

### **8. ROE Adder for RTO Participation**

90. NTD requests authorization for a 50 basis point ROE adder for participation in PJM, stating that NTD is a transmission owner in PJM pursuant to Schedule 12 of the PJM Tariff and will sign the Consolidated Transmission Owners Agreement as soon as the Project is constructed and NTD turns over functional control of the transmission facilities to PJM.<sup>165</sup> NTD argues the ROE adder for RTO participation is especially important for new, transmission-only entities created to participate in Order No. 1000 solicitation processes, such as NTD.<sup>166</sup>

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<sup>164</sup> See, e.g., *San Diego Gas & Electric Co.*, 151 FERC ¶ 61,011, at P 32 (2015); *NYISO*, 151 FERC ¶ 61,004 at P 96.

<sup>165</sup> NTD Transmittal at 29.

<sup>166</sup> *Id.* at 30.

a. **Comments and Answers**

91. Protesters argue that NTD has failed to demonstrate that it warrants an RTO participation adder. DEMEC argues that NTD has already recognized the value of participating in an RTO by voluntarily bidding the Project into PJM's Order No. 1000 planning process, so granting the adder in this case would not encourage participation in PJM.<sup>167</sup> DEMEC also argues that, given NTD's proposed Formula Rate and other incentives, its financial risk is low, and additional risk mitigation measures are not warranted. DEMEC therefore urges the Commission to reconsider its policy of routinely granting RTO participation adders, and to reject NTD's request.<sup>168</sup> AMP argues that granting this incentive would wrongly imply that the PJM RTEP is a risk for which an ROE participation adder is justified, whereas AMP states that it considers the PJM RTEP an integral part of the regional transmission planning process, in which a bidder's participation is voluntary.<sup>169</sup>

92. In the alternative, DEMEC requests the Commission clarify that NTD cannot begin to collect the RTO participation adder until the Project is both used and useful, and under PJM's operational control.<sup>170</sup>

93. NTD states that Commission approval of this incentive is routine, and DEMEC's arguments as irrelevant.<sup>171</sup> It states DEMEC's request that any RTO participation adder incentive not be awarded until the Project is placed in service should be dismissed as moot since NTD will not begin to recover its ROE and applicable incentives until the date the new facilities are placed in service, scheduled for 2019.<sup>172</sup>

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<sup>167</sup> DEMEC Protest at 30.

<sup>168</sup> *Id.* at 30-31.

<sup>169</sup> AMP Protest at 30-31.

<sup>170</sup> DEMEC Protest at 31.

<sup>171</sup> NTD Answer at 56.

<sup>172</sup> *Id.*

**b. Commission Determination**

94. We grant NTD's request for a 50 basis point adder to its base ROE for its participation in PJM, consistent with previous Commission orders,<sup>173</sup> and subject to the ROE zone of reasonableness established pursuant to the hearing and settlement judge procedures established herein. We note our approval of this adder is contingent on NTD's commitment to become a member of PJM and transfer operational control of the Project to PJM once the Project has been placed in service.

95. We reject DEMEC's contention that we should deny NTD the RTO participation adder because it entered the market as a consequence of bidding on this project. A public utility is presumed eligible if it can demonstrate that it has joined an RTO, ISO, or other Commission-approved Transmission Organization and that its membership is ongoing.<sup>174</sup>

96. We reject DEMEC's request that we reconsider our policies with respect to this incentive as outside the scope of this proceeding. We find AMP's statements regarding the PJM RTEP process to be inapposite to the basis used by the Commission to consider this incentive. The Commission's regulations clearly define RTO participation,<sup>175</sup> and require that applicants "must propose that operational control of the applicant's transmission system will be transferred to the Regional Transmission Organization within six months of filing the proposal."<sup>176</sup> Order No. 679 upheld this key obligation.<sup>177</sup>

97. We also agree with NTD that DEMEC's request that any RTO participation adder not be awarded until the Project is placed in service should be dismissed as moot since

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<sup>173</sup> See *NEETWest*, 154 FERC ¶ 61,009 at P 39; *Transource Kansas*, 151 FERC ¶ 61,010 at P 46; *California Transco*, 147 FERC ¶ 61,179 at P 45; *Transource Missouri*, 141 FERC ¶ 61,075 at P 75; *XEST*, 149 FERC ¶ 61,182 at P 64.

<sup>174</sup> See *Potomac-Appalachian Transmission Highline, LLC*, 153 FERC ¶ 61,308, at P 14 (2015) (noting that Order No. 679-A's finding that "all utilities joining transmission organizations" were eligible for the RTO participation adder referred to "whether to limit the incentive to new companies ... or to open the incentive to utilities already members of an RTO.>").

<sup>175</sup> 18 C.F.R. § 35.34 (2015).

<sup>176</sup> 18 C.F.R. § 35.34(i).

<sup>177</sup> Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 21 (emphasis added).

NTD will not begin to recover its ROE and applicable incentives until the date the new facilities are placed in service.

**C. Transmission Formula Rate**

**1. Base ROE**

98. NTD proposes a 10.50 percent base ROE, based on the analysis and testimony of Mr. Adrien M. McKenzie.<sup>178</sup> NTD states this ROE is within the zone of reasonableness calculated using a two-step DCF model, which extends from 6.30 percent to 12.13 percent.<sup>179</sup> NTD argues that the anomalous capital market conditions that prompted the Commission to approve an ROE at the middle of the top end of the DCF zone in Opinion No. 531 persist, and thus that 10.50 percent is appropriate.<sup>180</sup>

**a. Comments, Answers and Deficiency Response**

99. Independently of the incentives issues, the protesters raise numerous objections to NTD's proposed base ROE. Their three main objections are with NTD's alleged non-compliant methodology, its proxy group selection, and its deliberate choice of an above-median ROE.

100. On methodology, the protesters argue that longstanding precedent, confirmed by Opinion No. 531, requires a specific kind of two-step DCF model, and has warned against other models.<sup>181</sup> AMP argues NTD attempts to justify an artificially high, unjust and unreasonable ROE through analyses unauthorized by the Commission, which it believes are flawed.<sup>182</sup> AMP particularly criticizes NTD's use of Value Line estimates, which it argues is too narrowly focused and inferior to other data sources.<sup>183</sup>

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<sup>178</sup> NTD Transmittal at 14.

<sup>179</sup> *Id.*.

<sup>180</sup> *Id.* at 14-15.

<sup>181</sup> AMP Protest at 13 (citing *Martha Coakley v. Bangor Hydro-Elec. Co.*, Opinion No. 531, 147 FERC ¶ 61,234, *order on paper hearing*, Opinion No. 531-A, 149 FERC ¶ 61,032 (2014), *reh'g denied*, Opinion No. 531-B, 150 FERC ¶ 61,165 (2015), *appeal docketed*, *Emera Maine v. FERC*, No. 15-1118 (D.C. Cir. filed April 30, 2015)).

<sup>182</sup> *Id.* at 3, 4, 15-23.

<sup>183</sup> *Id.* at 10-12.

101. On proxy group selection, several parties argue entities with ongoing merger activities cannot be included.<sup>184</sup> AMP argues that Duke Energy, ITC Holdings, NextEra Energy, and WEC Energy Group have all engaged in recent merger activities that are distorting their value for DCF purposes.<sup>185</sup> DEMEC argues that Edison International and Sempra Energy should be excluded as outliers. Removing these outliers and making no other changes, would lead to a reasonableness range of 6.75 percent to 10.25 percent – and thus, DEMEC argues, NTD’s ROE with incentives should not exceed 10.25 percent.<sup>186</sup>

102. On the selection of an ROE in the upper range of the zone of reasonableness, the parties argue Commission precedent requires setting the ROE at the median,<sup>187</sup> unless there are “anomalous market conditions,” or “highly unusual circumstances,” which they claim are absent here.<sup>188</sup> Even if the market were anomalous, the Delaware Commission argues that NTD would also have to prove that the market anomaly distorted the inputs to its model, which it<sup>189</sup> and DEMEC<sup>190</sup> argue NTD failed to do.<sup>191</sup>

103. As a result, all protesters urge the Commission to impose a lower base ROE or, in the alternative, set the ROE for hearing or settlement proceedings.<sup>192</sup> DEMEC recommends an 8.91 percent base ROE,<sup>193</sup> while AMP recommends 8.88 percent.<sup>194</sup>

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<sup>184</sup> DEMEC Protest at 11; AMP Protest at 6.

<sup>185</sup> AMP Protest at 6.

<sup>186</sup> DEMEC Protest at 11-12.

<sup>187</sup> AMP Protest at 7-8.

<sup>188</sup> DEMEC Protest at 12 (citing *Portland Natural Gas Transmission Sys.*, Opinion No. 510-A, 142 FERC ¶ 61,198, at P 241 (2013)); Delaware Commission Protest at 4; DEMEC Answer at 5-6.

<sup>189</sup> Delaware Commission Protest at 4.

<sup>190</sup> DEMEC Protest at 12-14.

<sup>191</sup> Delaware Commission Protest at 4.

<sup>192</sup> *Id.* at 11.

<sup>193</sup> DEMEC Protest at 16.

<sup>194</sup> AMP Protest at 4.

104. In its answer, NTD asserts that use of the Value Line estimated growth rate data is appropriate because it is consistent with the two-step DCF approach adopted in Opinion No. 531.<sup>195</sup>

105. DEMEC argues that in NTD's own analysis, if corrected for DEMEC's explained exclusions from NTD's proxy group, shows the median ROE of 8.86 percent, midpoint ROE of 8.64 percent and zone of reasonableness of 6.75 percent to 10.25 percent.<sup>196</sup> Therefore, the base ROE should not be more than 8.86 percent and the total ROE inclusive of all incentives allowed should not be more than 10.25 percent.

**b. Commission Determination**

106. We accept and suspend, for a nominal period, subject to refund, and subject to condition, NTD's Formula Rate and Protocols, to become effective February 1, 2016, as discussed below.<sup>197</sup> Our preliminary analysis indicates that NTD's proposed base ROE has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we find that, as part of NTD's proposed Formula Rate, the proposed base ROE raises issues of material fact, and set it for hearing and settlement judge procedures.

107. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.<sup>198</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the Settlement Judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose. The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to

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<sup>195</sup> NTD Answer at 14-15.

<sup>196</sup> DEMEC Answer, Attachment 1.

<sup>197</sup> The Commission can revise a proposal filed under section 205 of the FPA as long as the filing utility accepts the change. *See City of Winnfield La. v. FERC*, 744 F.2d 871, 875-77 (D.C. Cir. 1984). The filing utility is free to indicate that it is unwilling to accede to the Commission's conditions by withdrawing its filing.

<sup>198</sup> 18 C.F.R. § 385.603 (2015).

continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

108. While we set NTD's proposed base ROE for hearing and settlement judge procedures, we find NTD's proposed sections of the PJM tariff to be just and reasonable, subject to a compliance filing due within 30 days of the date of this order to address the matters discussed below.

## **2. Protocols**

109. NTD explains its proposed Protocols set out the procedures for populating and updating NTD's Formula Rate, and claims they are similar to other protocols filed and accepted by the Commission.<sup>199</sup> NTD states its Protocols make clear that the project-specific revenue requirements determined in the Formula Rate are "up to" rates, such that NTD can discount its revenue requirements to accommodate cost commitments made during the Order No. 1000 bidding process.<sup>200</sup> NTD also submitted testimony describing the allocation methodologies for the costs of goods and services that NTD may procure from affiliates. NTD states that LS Power and its subsidiaries operate under the principle that the costs of all goods and services provided by one affiliate to another will be directly assigned to the company receiving goods or services wherever possible. Costs that cannot be directly assigned are grouped into specific functional areas, which are allocated based on general allocators.

### **a. Comments, Answers, and Deficiency Response**

110. Protesters argue that, despite NTD's claims, NTD's Protocols are not entirely consistent with Commission policy and with other recently accepted protocols. The protesters urge the Commission to require several specific changes to the Protocols; in the alternative, they ask the Commission to set the Protocols for hearing and settlement proceedings. The Delaware Commission argues that NTD's Protocols provide substantially less transparency than the Commission has required for other formula rate protocols recently established in settlement proceedings.<sup>201</sup> Delaware Commission also argues that NTD should revise the Protocols to more properly state that, as per Commission policy, "NTD bears the burden of demonstrating not only the prudence, but also the justness and reasonableness, of costs that it proposes to flow through the Formula

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<sup>199</sup> NTD Transmittal at 13.

<sup>200</sup> *Id.* at 14.

<sup>201</sup> Delaware Commission Protest at 12.

Rate.”<sup>202</sup> The Delaware Commission also requests the Protocols be revised to increase the time for interested parties to conduct discovery from 90 to 120 days, and to require NTD to serve working Excel spreadsheets on all parties to this docket, with each Formula Rate update, in addition to posting such information online.<sup>203</sup>

111. DEMEC proposes nine particular changes to the Protocols:

- a. Consistently use the term “Interested Parties,” instead of undefined terms “Interested Persons” and “party”;
- b. NTD must disclose in its variance analysis any change in accounting that affects inputs to the formula;
- c. Rephrase language that does not preclude, in the event of a merger, NTD may recover an acquisition premium without express Commission approval;
- d. Clarify that parties may ground their challenges in either prudence or in reasonableness;
- e. Expand the period for parties to make Informal Challenges from 90 days to 120 days, and clarify that NTD must respond to Informal Challenges in writing;
- f. Post accounting work papers, including estimated completion costs of each new transmission plant costing over \$500,000 and general and intangible plant costing over \$1 million, in their native electronic format, so that parties may inspect the formulas;
- g. State that NTD must explain and support any revisions it makes to its Annual Projection and their impact on the revenue requirement, as well as provide supporting documentation for data used in the annual update not otherwise available in FERC Form No. 1, including all adjustments to that data;

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<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 13.

- h. Specify in the annual update any costs which are fines and penalties, disallowed by a government authority, or more than 10 percent different than the projection;
- i. Specify that information requests may include whether costs and expenses are related directly or indirectly to Transmission Service, whether costs are reasonable, and whether costs have been disallowed or are fines and penalties by a government agency; and
- j. Delete language implying that parties may only challenge changes to the formula, and not challenge overall rate levels.<sup>204</sup>

112. AMP also argues that parties should have the right to challenge overall rate levels. It argues this omission “would create a significant limitation on the rights of customers and on the Commission’s exercise of its statutory authority.”<sup>205</sup> AMP further argues that the Protocols’ reservation of customer rights omits the right to file a section 206 complaint with the Commission regarding the application of the Formula Rate.<sup>206</sup> Finally, AMP highlights several typographical errors in the Protocols.<sup>207</sup>

113. NTD requests that the Commission reject these challenges to its Formula Rate Protocols as contrary to Commission precedent.<sup>208</sup> NTD states that for a utility with formula rates, the formula itself is the “filed rate,” and that it has no burden to demonstrate that the “overall resulting rate” is just and reasonable, as DPSC and AMP demand. NTD states that given a utility’s burden when facing a formal challenge is to show its implementation of the Formula Rate is consistent with the filed rate – not that each individual input to the Formula Rate is just and reasonable<sup>209</sup> – NTD appropriately

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<sup>204</sup> DEMEC Protest at 24-29. Delaware Commission raises similar concerns, especially (e) and (f). *Id.* at 13.

<sup>205</sup> AMP Protest at 43.

<sup>206</sup> *Id.* at 44-45.

<sup>207</sup> *Id.* at 45-46.

<sup>208</sup> NTD Answer at 29-37.

<sup>209</sup> *Id.* at 30 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,149, at P 86 & n.136 (2013) (2013 MISO), *Midcontinent Indep. Sys. Operator, Inc.*, 146 FERC ¶ 61,212, at P 106 (2014) (2014 MISO)).

limited the scope of information exchange, Informal Challenges, and Formal Challenges under Sections 4.a.ii, 4.b.ii, and 5.b.iii.E of the Protocols to “the prudence of the actual costs and expenditures” rather than both their prudence and reasonableness, as DEMEC suggests.<sup>210</sup>

114. NTD asserts that protesters have failed to justify the proposed changes to NTD’s Protocols, particularly those that would cause them to depart from the standards set out in recent MISO Orders and recently approved in *Transource*.<sup>211</sup> NTD cites as among such requested changes those related to the timelines for customers to review and challenge NTD’s Annual Projection and Annual Update. NTD also states that DEMEC’s changes would impose unnecessary and unreasonable burdens on NTD, such as expanding required production of variance analyses.<sup>212</sup> It also asserts that additional proposed changes are unnecessary, such as providing spreadsheets to parties in the docket, given posting obligations already contained in the proposed Protocols.<sup>213</sup> NTD rejects protesters’ proposed inclusion of additional provisions based upon other utilities protocols, as NTD is under no obligation to have protocols that are superior to those of other utilities.<sup>214</sup> However, NTD asserts it should be allowed to correct typographical errors identified by protesters in a compliance filing.<sup>215</sup>

115. In its Answer, AMP reiterates its argument that Commission precedent assigns a public utility the burden of demonstrating the justness and reasonableness of both the components of its formula rate and the overall rate produced.<sup>216</sup>

116. DEMEC claims that NTD’s Protocols warrant revision and that contrary to NTD’s contention, there is not one standard set of protocols adopted by the Commission. There are a variety of protocols accepted by the Commission and the development and improvement of formula rate protocols has been an ongoing process.

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<sup>210</sup> *Id.* at 30-31.

<sup>211</sup> *Id.* at 32.

<sup>212</sup> *Id.* at 34.

<sup>213</sup> *Id.* at 35-36.

<sup>214</sup> *Id.* at 36.

<sup>215</sup> *Id.* at 28, 37.

<sup>216</sup> AMP Answer at 11.

117. In its response to the Deficiency Letter, NTD states that if NTD secures goods and services from a cost-regulated transmission-only affiliate, such goods and services will be based on an “at-cost” price. NTD also states that at present NTD has not entered into a service agreement with any affiliate defining goods and services that will be provided, but that it intends to include a copy of any related future service agreement(s) with its affiliates in its informational filing, as required by its Protocols, to the extent that the agreement(s) went into effect during the rate year addressed by that informational filing.<sup>217</sup>

118. In its comments to the NTD's answer to the Deficiency Letter, DEMEC raises concerns as to the need for transparency as to the allocation of service company or other affiliate costs to ensure that NTD does not subsidize other affiliates and/or over collect its costs. As such, DEMEC requests the Commission to require NTD to revise its Formula Rate Protocols so that the Formula Rate provides that each formula rate annual update will include workpapers showing the details of allocations of costs from all affiliates (e.g., parent, operating company affiliates, service company affiliates) for general and intangible, administrative and general, and operating and maintenance expenses.

119. Further, DEMEC states that while NTD explains that it will use “at cost” pricing this method is not defined, and therefore, NTD should be required to define the term and the method of “at cost pricing”, either in the Protocols or in the worksheets accompanying the formula rate annual update. DEMEC notes that NTD admits that none of its affiliates file a FERC Form 1, there are no cost allocation manuals, and there are no service agreements yet, so the only opportunity to verify or cross-check information as it pertains to affiliates is through specific requirements of the Formula Rate.<sup>218</sup> DEMEC acknowledges that NTD plans to file the service agreements as part of its formula rate informational filing when the service agreements go into effect, and plans to make audit reports available to customers and regulators as part of the Protocol procedures in the year the audit is completed, but argues that it is impossible to verify the justness and reasonableness of affiliate allocations unless NTD is required to provide this allocation information and workpapers for each year affiliate costs are allocated (with appropriate justification for the costs).<sup>219</sup>

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<sup>217</sup> NTD Deficiency Response at 6.

<sup>218</sup> DEMEC Comments on Deficiency Answer Response at 3-4 (citing NTD Deficiency Letter Response at 5-6).

<sup>219</sup> *Id.* at 5.

120. In NTD's answer to DEMEC's comments on NTD's deficiency response, NTD states that DEMEC's concerns are premature with respect to affiliate costs allocation, because many of the costs NTD will incur before the Artificial Island Project is placed into service will be included in NTD's regulatory asset, and that DEMEC would be able to dispute costs incurred by NTD (including those that are the result of an affiliate cost allocation) during the proceeding that follows NTD's request to recover its regulatory asset in rates.<sup>220</sup> NTD further states that DEMEC and other interested parties will have the opportunity to review the allocation of affiliate costs to NTD because NTD has committed to include a copy of such agreements that NTD may enter into in the future in its annual informational filings. NTD states that the proposed revisions sought by DEMEC are unsupported, redundant, and unnecessary, in that NTD's protocols comply fully with Commission precedent, and DEMEC does not mention a single example of a company with a formula rate with the type of provisions that DEMEC requests.<sup>221</sup>

**b. Commission Determination**

121. We accept NTD's proposed Protocols, subject to condition, as described below. We reject Delaware Commission's arguments that NTD's Protocols should be made consistent with various recent settlement decisions as such decisions are not precedential or binding on utilities that are not a party to the agreement. Specifically, we find that it is sufficient for NTD to post working Excel spreadsheets online, rather than serve them on individual parties. Further, we agree with NTD that 90 days is sufficient time to file information requests, and note that while the Commission has previously found 120 days to be sufficient, we have not found less than 120 days to be unreasonable. DEMEC requests a similar extension to the timeline for Formal Challenges, but offers no justification for the change. We find, therefore, that the deadlines proposed by NTD are reasonable.

122. With regards to DEMEC's request that NTD explain various changes which may occur in its annual projection or true-up, we note that utilities are required to disclose any change in accounting during the rate period that affects inputs to the Formula Rate or the resulting charges billed under the Formula Rate. However, utilities are not required to provide an analysis or narrative explanation of those changes, due to the burden involved, and the Commission has held that transmission owners are not required to post a variance report showing the difference between the projected rates and the actuals.<sup>222</sup> Therefore,

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<sup>220</sup> NTD Answer to DEMEC Comments on Deficiency Letter Response Answer at 5.

<sup>221</sup> NTD Reply at 6.

<sup>222</sup> 2014 *MISO*, 146 FERC ¶ 61,212 at P 64.

we decline to require NTD to provide more information than the Commission requires, we are not persuaded that further clarification or additional disclosures are necessary at this time. Similarly, we disagree with DEMEC on its other requests for additional information and explanations. NTD's Protocols already require NTD to post revisions to the annual projection online,<sup>223</sup> and to provide detailed supporting documents for data not stated in the FERC Form No. 1.<sup>224</sup>

123. Similarly, we find it is not necessary for NTD to clarify that responses to informal challenges will be in writing. NTD is already required to post its responses online, and we find that the written format of such posted responses is implied.

124. We disagree with DEMEC that it is appropriate to include whether costs are fines or penalties, disallowed by government authorities, or directly related to transmission service in the scope of information requests. The Commission has found that it is acceptable to limit, as NTD does, the scope of these requests to any information "that may reasonably have substantive effect on the calculation of the charge pursuant to the formula."<sup>225</sup> To the extent such information may fit this category, such as costs disallowed by FERC, for example, it is already provided for in NTD's Protocols, and to the extent it does not, it is properly excluded. Therefore, we reject DEMEC's request. We similarly reject NTD's request that NTD break this information out in its annual update, as this imposes a burden on NTD and, unless the Commission has disallowed inclusion of such costs, it is irrelevant information.

125. DEMEC also asks that NTD be required to specify in its Protocols that it cannot recover acquisition premiums unless given Commission authorization, but we find that such a statement is unnecessary. Absent express Commission authorization to recover acquisition premiums, including goodwill, in rates, the Commission already requires removal of the effects of acquisition premiums and goodwill from utilities' cost of service.<sup>226</sup> Thus, it is not necessary to expressly preclude such recovery in NTD's Protocols.

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<sup>223</sup> NTD Proposed Attachment H-27B Section 1e.

<sup>224</sup> NTD Proposed Attachment H-27B Section 3di.

<sup>225</sup> 2014 *MISO*, 146 FERC ¶ 61,212 at P 107.

<sup>226</sup> See *Ameren Corp.*, 140 FERC ¶ 61,034, at P 30 (2012); *ITC Holdings Corp.*, 139 FERC ¶ 61,112, at PP 47-50 (2012). See also *Arkla Energy Res. Inc.*, 61 FERC ¶ 61,004, at 61,038 (1992); *Locust Ridge Gas Co.*, 29 FERC ¶ 61,052, at 61,114 (1984); *United Gas Pipe Line Co.*, 25 FPC 26, 64 (1961), *rev'd on other grounds sub nom.*, *Willmut Gas and Oil Co. v. FPC*, 299 F.2d 111 (D.C. Cir. 1962).

126. We reject Delaware Commission's, DEMEC's, and AMP's arguments that NTD's Protocols do not sufficiently protect the right of customers to challenge the overall rate levels. Although Commission precedent has explained that the formula is itself the jurisdictional rate that a transmission owner must initially demonstrate is just and reasonable, we reiterate the transmission owner "continues to bear the burden of demonstrating the justness and reasonableness of the rate resulting from its *application* of the formula," consistent with the filed formula rate.<sup>227</sup> That is, the transmission owner will bear the burden of demonstrating the justness and reasonableness *of the implementation* of its formula rate in the context of a Formal Challenge.<sup>228</sup> In its proposed Protocols, NTD describes its burden in a Formal Challenge as demonstrating "that it has reasonably and accurately calculated the annual update."<sup>229</sup> We find this is consistent with Commission precedent, as described above, and note that interested parties retain their right to initiate a section 206 proceeding should they find that the filed rate is unjust or unreasonable. Similarly, we reject protestor's arguments that NTD should bear the burden of demonstrating reasonableness of costs included in future updates. Consistent with the above precedent, the reasonableness of Formula Rate inputs is at issue in the instant filing, and only the prudence of the costs calculated in those inputs is at issue in future updates of the rates.

127. With respect to allocation of costs between NTD and affiliates, we agree with DEMEC that the Protocols should require certain information about such allocations to be provided in the annual updates that are posted for customer review and filed with the Commission in annual informational filings under the Protocols. While NTD is correct that the Commission has not previously required such information to be provided in the annual updates,<sup>230</sup> we believe that utilities should provide certain information about the methodologies for allocation of costs between affiliates that affect the cost inputs to their formula rates in order to allow interested parties and the Commission to understand the reasonableness of such allocation methodologies and the resulting costs that are recovered through the formula rates. Accordingly, we will require that NTD amend its Protocols to include in its annual Formula Rate updates and annual informational filings the following: (1) a detailed description of the methodologies used to allocate and

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<sup>227</sup> 2013 *MISO*, 143 FERC ¶ 61,149 at P 120.

<sup>228</sup> *Id.*.

<sup>229</sup> NTD Proposed Attachment H-27B Section 5f.

<sup>230</sup> We note, however, that the discovery rights that we have required in formula rate protocols provide interested parties the opportunity to request such information about affiliate cost allocation methodologies to the extent that they can request any information necessary to evaluate the reasonableness of cost inputs to formula rates.

directly assign costs between NTD and its affiliates by service category or function for the applicable rate year, including any changes to such cost allocation methodologies from the prior year, and the reasons and justification for those changes; and (2) the magnitude of such costs that have been allocated or directly assigned between NTD and each affiliate by service category or function for the applicable period.

128. Therefore, subject to our condition on NTD's future compliance filing amending its Protocols to include the additional information noted above on the allocators, within 30 days of the date of issuance of this order, we find there are sufficient transparency, reporting requirements, controls, and review procedures to resolve DEMEC's concerns on allocations of affiliate costs.

129. In addition, we reject AMP's protest that the NTD's Protocols do not reserve the customers' right to file a complaint with the Commission under section 206 regarding the application of the NTD Formula Rate. Such a concern is properly brought using the challenge procedures described in the Protocols, which exist for this purpose. Formal Challenges are filed with the Commission and are designed to allow customers to avoid costly section 206 proceedings.<sup>231</sup>

130. Finally, NTD has acknowledged several typographical errors pointed out by protestors and offered to fix them on compliance. We also note that NTD's Protocols are not fully compliant with Commission precedent, and direct NTD to include on compliance a statement that, if a certain deadline for interested parties falls on a weekend or holiday recognized by the Commission, then the deadline will be extended to the next business day. We therefore accept NTD's Protocols, subject to a compliance filing revising the Protocols within 30 days of the date of this order.

### **3. Formula Rate**

131. NTD states its Formula Rate will use projected values, subject to an annual true-up mechanism, which will add or subtract any difference between the actual annual transmission revenue requirement and the projected requirement two years later, with interest.<sup>232</sup> NTD explains that interest will be calculated pursuant to section 35.19a of the Commissions regulations<sup>233</sup> and that the projected values will be based on actual, historic numbers.<sup>234</sup> NTD states its Formula Rate will use thirteen month average plant balances

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<sup>231</sup> 2013 *MISO*, 143 FERC ¶ 61,149 at P 93.

<sup>232</sup> NTD Transmittal 12-13.

<sup>233</sup> *Id.* at 13 (citing 18 C.F.R. § 53.19a (2015)).

to determine the rate base upon which the return and income tax components of the annual net revenue requirement are calculated.<sup>235</sup> According to NTD, competitive concessions accepted by PJM will be reflected in Attachment 1 to the Formula Rate.<sup>236</sup>

**a. Comments**

132. The protesters, while not opposing a formula rate in principle, all argue that the specific formula itself requires further consideration before it can be deemed just and reasonable, and involves issues of material fact that are best resolved through hearing and settlement proceedings. The parties also offer a list of line-item changes in order to correct what they deem are unjust or erroneous aspects of the proposed Formula Rate, but note that their lists are not exhaustive.<sup>237</sup> DEMEC lists twelve line-item issues, namely:

- a. Failing to specify that no General & Intangible plant owned by NTD is used by its parent company or any other affiliate;
- b. Accounting for income taxes, even though NTD is a tax-exempt entity;
- c. A line item that arguably deviates from tax normalization regulations;
- d. A number of accounts that are funded by customers, and thus arguably should be used as rate base deductions;<sup>238</sup>
- e. A proposal to exclude some, but not all, trade association dues and lobbying expenses;
- f. Line items that could allow NTD to recover costs incurred before it was awarded the project;

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<sup>234</sup> NTD Filing, Attachment H (The Direct Testimony and Exhibits of Bruce H. Fairchild, NTD Ex. 600-605) at 5 (Fairchild Test.).

<sup>235</sup> NTD Transmittal at 13.

<sup>236</sup> Fairchild Test. at 8.

<sup>237</sup> DEMEC Protest at 23.

<sup>238</sup> *Id.* at 21. DEMEC refers to Account 228.1, Accumulated Provision for Property Insurance; Account 228.2, Accumulated Provision for Injuries & Damages; Account 228.3, Accumulated Provision for Pensions & Benefits; Account 228.4, Accumulated Miscellaneous Operating Provisions; Account 235, Customer Deposits; and Account 252, Customer Advances for Construction.

- g. An apparently inconsistent calculation of Schedule 12 facilities;
- h. Failing to refund to customers certain revenues that NTD receives for the use of its facilities;
- i. Failing to limit the Land Held for Future Use account to only cover land related to the Project;
- j. Failing to limit the siting expenses account to only cover land related to the Project; and
- k. An apparently inconsistent reference to Gross Receipt Taxes.<sup>239</sup>

133. The Delaware Commission and AMP join in several of the items that DEMEC lists, and add their own. Delaware Commission argues NTD has not shown why a projected rather than historical revenue requirement is just and reasonable. Furthermore, the Delaware Commission argues that NTD's filing does not explain how the projection will be calculated,<sup>240</sup> and therefore NTD may lack an incentive to discipline its forecasts, and could use the lag between projection and true-up to benefit itself.<sup>241</sup> AMP argues that NTD's inclusion of a line-item for post-employment benefits other than pensions is especially troubling, given that NTD has stated that it does not plan to offer such a benefit.<sup>242</sup> AMP also argues that NTD's formula fails to properly address potential revenues booked to Account 451, Miscellaneous Service Revenues, which may allow NTD to unjustly deprive transmission customers of the benefits of such revenues.<sup>243</sup> Finally, AMP provides a 32-item list of what it characterizes as errors and omissions in the formula and supporting documents, which it argues is indicative of numerous flaws in NTD's proposed Formula Rate.<sup>244</sup>

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<sup>239</sup> *Id.* at 19-23.

<sup>240</sup> Delaware Commission December Protest at 13.

<sup>241</sup> *Id.* at 14.

<sup>242</sup> AMP Protest at 37.

<sup>243</sup> *Id.* at 38.

<sup>244</sup> *Id.* at 39-41.

**b. Answers**

134. With respect to protests concerning its proposed Formula Rate, NTD reiterates arguments that its Formula Rate is patterned after other formula rates recently approved by the Commission, and that protestors do not justify why it should deviate Commission precedent.

135. NTD asserts that the Delaware Commission's objection to the use of projected costs and expenses ignores that such inputs will rely on company books and records and will be subject to true-up.<sup>245</sup> NTD also rejects challenges to aspects of the Formula Rate's manner of accounting for income taxes, asserting its filing is consistent with Commission policy, and that the accuracy of its pass-through tax rates can be examined at a later date.<sup>246</sup> NTD contends that DEMEC's call to delete Account 190, Accumulated Deferred Income Taxes, from the Formula Rate would skew the calculation of accumulated deferred income taxes.<sup>247</sup> In response to AMP's request, NTD provides further explanation regarding two income-tax related provisions, Excess Deferred Income Taxes and Tax Effect of Permanent Differences. NTD asserts that certain protestor demands for further information on aspects of its Formula Rate are premature or irrelevant to its operations and facilities, such as information regarding Post Employment Benefits Other Than Pensions (PBOP) expenses, given it has no PBOP expenses and does not anticipate having any.<sup>248</sup> It rejects AMP's call for accounting for potential revenues booked to Account 451 and DEMEC's account for customer funded reserves as irrelevant to a transmission only company which will transfer operational control to PJM.<sup>249</sup> NTD contends protestor demands to limit its recovery of expenses to those related to the Project and to exclude taxes are unwarranted because its Formula Rate is designed to accommodate the potential of NTD's ownership of multiple projects, for which expenses will be reviewed at a later date, and because Commission precedent supports the inclusion of such costs.<sup>250</sup> NTD asserts various protests of errors and omissions in its

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<sup>245</sup> NTD Answer at 17.

<sup>246</sup> *Id.* at 19-22.

<sup>247</sup> *Id.* at 20.

<sup>248</sup> *Id.* at 22-23.

<sup>249</sup> *Id.* at 23.

<sup>250</sup> *Id.* at 24-26.

Formula Rate are “largely” without merit, because it conforms to Commission precedent, including Transource West Virginia’s recently approved formula rate template.<sup>251</sup>

136. AMP points out that Transource West Virginia’s formula rate was accepted by delegated letter order and argues NTD misstates the nature of the Commission’s action when it asserts that the language to which AMP objects was “approved” by the Commission.<sup>252</sup>

137. DEMEC states that it is now known that non-income tax paying entities book income taxes collected from their transmission customers as revenue, since they presumably cannot book such amounts as anything else, and that this results in public utilities obtaining revenues above their just and reasonable revenue requirement authorized by the Commission, which DEMEC submits does not result in just and reasonable rates.<sup>253</sup> DEMEC also states it is not aware whether the Commission had this information when it issued the 2005 Policy Statement on Income Tax Allowances, but requests the Commission review its policy and consider the reasonableness of NTD’s accounting proposal in this proceeding in view of the fact that transmission customers will be paying for fictitious income taxes booked as revenue by NTD.<sup>254</sup>

138. DEMEC argues that NTD’s answer supports removing PBOP from the Formula Rate, as NTD agrees it will not have such expenses, and therefore DEMEC argues it is unnecessary to include it in the Formula Rate.<sup>255</sup>

139. DEMEC’s Answer also questions whether NTD’s assertion that it would not have any customer-funded reserves is accurate, and argues that, if it is accurate, the Formula Rate should state as such.<sup>256</sup>

140. DEMEC reiterates its arguments with respect to Edison Electric Institute (EEI) and other trade associations or business groups. DEMEC argues that once a formula rate is adopted, it becomes difficult and burdensome to exclude erroneously included costs.

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<sup>251</sup> *Id.* at 27 (citing *PJM Interconnection, L.L.C.*, 152 FERC ¶ 61,180, at P 16).

<sup>252</sup> *Id.* at 31 & n.102 (citing *PJM Interconnection, L.L.C.*, Docket No. ER15-2114-001 (Dec. 9, 2015) (unpublished letter order)).

<sup>253</sup> DEMEC Answer at 6.

<sup>254</sup> *Id.* at 7.

<sup>255</sup> *Id.* at 8.

<sup>256</sup> *Id.*

DEMEC also does not understand why NTD excluded EPRI dues at this time but objects to excluding EEI dues.<sup>257</sup>

141. DEMEC claims that NTD's proposed base ROE is unjustified and inconsistent with Commission precedent; and that NTD's request to apply the Formula Rate, including the base ROE, to future transmission projects and to future affiliates of NTD would obviate the obligations in the Federal Power Act and the Commission's conforming regulations, and would skew the Order No. 1000 transmission planning process in favor of NTD and its yet-to-be-formed affiliates; NTD's Formula Rate contains provision that render the Formula Rate unjust and unreasonable; NTD's proposed Protocols warrant revision consistent with Commission policy and precedent and warrant further review; and that NTD's request for a 50 basis point adder to its ROE for its participation in PJM should be denied or at the minimum, should not apply until the Project is placed in service.<sup>258</sup>

142. DEMEC states that there were a few areas that NTD acknowledges its errors (e.g., NTD's agreement of certain errors in the development of its proxy group in support of its proposed ROE and typographical errors in their Protocols).

143. DEMEC claims that NTD disputes its position of not allowing any income taxes in NTD's Formula Rate by stating that it is contrary to the Commission's Policy Statement on Income Tax Allowances.<sup>259</sup> DEMEC states that it is now known that non-income tax paying entities book income taxes collected from their transmission customers as revenue since they presumably cannot book such amounts as anything else and that this results in public utilities obtaining revenues above their just and reasonable revenue requirement authorized by the Commission, which DEMEC submits does not result in just and reasonable rates.

144. DEMEC states that while NTD claims that the purpose of the Formula Rate is to accurately measure and recover NTD's actual costs, DEMEC submits that permitting NTD to include Account 190 amounts in rate base would not reflect NTD's actual costs and that ADIT accounts in NTD's books will be fictitiously created as NTD is a non-income tax paying entity. DEMEC submits that NTD should not be permitted to include Account 190 amounts in Rate Base as Account 190 amounts are simply book entries and do not represent any investment and that NTD will never have a single cent of investment

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<sup>257</sup> *Id.*

<sup>258</sup> NTD Answer at 42-55.

<sup>259</sup> *Id.* at 19, n.63 (citing *Inquiry Regarding Income Tax Allowances*, 111 FERC ¶ 61,139, at P 33 (2005)).

in Account 190. Allowing return on a non-investment is contrary to the sound regulatory principle of allowing a return only on the investment made by shareholders.

145. DEMEC claims that NTD disputes DEMEC's recommendations that NTD's Formula Rate should be revised to exclude dues paid to the EEI and other trade associations or business groups and that NTD states that these recommendations are premature and should be raised in the future. Once a formula rate is adopted, it becomes difficult and burdensome to exclude erroneously included costs. DEMEC also does not understand why NTD excluded EPRI dues at this time but objects to excluding EEI dues. Acceptance of DEMEC's recommendations in this regard would reduce future litigation.

146. DEMEC claims that NTD disputes its suggestion that the Formula Rate approved in this proceeding should only be applicable to the Project and not to yet-to-be-formed NTD affiliates. DEMEC is opposed to providing a competitive advantage to NTD, which inhibits competition. Any future NTD transmission projects in PJM will be selected on a competitive basis, and if NTD's request is accepted, DEMEC understands that it would be the only non-utility entity within PJM with a 100 percent guaranteed recovery of its cost of a new project. Such a guarantee will not be available to other nonincumbent competitors, which DEMEC claims would likely lead to a skewed Order No. 1000 selection process in favor of NTD and such a proposal will not be beneficial to customers, and could result in increased costs for transmission customers.

**c. Deficiency Response**

147. In NTD's response to the Commission deficiency letter directive to supply a workable Microsoft Excel spreadsheet, NTD submitted its Formula Rate in a readable Excel file. NTD indicated that it did not have any cost allocation manuals or guides used in the development of the NTD cost allocation framework. The notes and formulaic equations illustrate how the various plant, O&M, depreciation, return, etc., are calculated and how allocation factors would be used in NTD's Formula Rate.

**d. Commission Determination**

148. DEMEC expresses concern over whether NTD, as a non-taxpaying entity, qualifies for recovering income taxes through its Formula Rate. The Commission finds that NTD has failed to provide sufficient evidence in the record to demonstrate that it qualifies for recovering income taxes through its Formula Rate. Utilities that are limited liability companies are not subject to federal taxation. Instead, the tax obligations incurred through their operations are reported on the tax returns of their corporate parents, provided that the parent has an actual or potential income tax liability. For ratemaking purposes, pass-through companies are treated as corporations and receive an income tax allowance for the tax liability ultimately incurred on the books of their parents provided that the parent has an actual or potential income tax liability. The Commission requires limited liability companies to maintain their books of account based on the

Commission's Uniform System of Accounts as if it were a corporation, including the income tax accounting requirements of the Commission's USofA.<sup>260</sup> Any pass-through entity desiring an income tax allowance on utility operating income must be prepared to establish the tax status of its owners or members or if there is more than one level of pass-through entities, where the ultimate tax liability lies and the character of the tax incurred.<sup>261</sup> NTD states that income taxes will be paid by the appropriate taxpaying entity.<sup>262</sup> However, NTD has only provided a partial explanation of its ownership and affiliate relationships. As a condition of accepting this portion of NTD's proposed rate, NTD must confirm that its owners or members, partners or parent entity has an actual or potential income tax liability in order to demonstrate that NTD has met the standard necessary to have an income tax allowance in rates. If NTD cannot demonstrate that all LS Power Associates, LP's owners or members are taxpaying entities, then NTD should file to correct its tariff record, reducing its revenue requirement to only cover whatever percentage of ownership is incurring income tax liability. In order to demonstrate that an owner or member incurs "actual or potential income tax liability," we will direct NTD to (1) develop, and revise its Formula Rate to include, a weighted income tax allowance, for both federal and state income taxes, using the marginal income tax rates<sup>263</sup> of each category of partners;<sup>264</sup> and (2) provide the projected distributive share of corporate income from the transmission investment attributed to each category of partners. NTD shall submit its compliance filing within 30 days of the date of this order.

149. DEMEC also expresses concern over the manner in which NTD proposes to include ADIT Account 190 in rate base through line 22 of its Formula Rates, arguing that such treatment is not consistent with IRS tax normalization laws under IRC Section 167

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<sup>260</sup> 18 C.F.R. Part 101, General Instructions No. 18, Comprehensive Interperiod Income Tax Allocation; and Text to Account 190, Accumulated Deferred Income Taxes, Account 236, Taxes Accrued, Account 281, Accumulated Deferred Income Taxes-Accelerated Amortization Property, Account 282, Accumulated Deferred Income Taxes-Other Property, and Account 283, Accumulated Deferred Income Taxes-Other. *See PATH*, 122 FERC ¶ 61,188 at P 154; *Pioneer Transmission, LLC*, 126 FERC ¶ 61,281, at P 120 (2009).

<sup>261</sup> *See Inquiry Regarding Income Tax Allowances*, 111 FERC ¶ 61,139 at PP 32, 40.

<sup>262</sup> NTD Transmittal at 42, Myers Test. at 5.

<sup>263</sup> *SFPP, L.P.*, 113 FERC ¶ 61,277, at PP 29-32 (2005).

<sup>264</sup> *Id.* P 45.

(l).<sup>265</sup> Subject to NTD demonstrating its eligibility, as discussed above, we find that NTD's proposed mechanism is consistent with established practice. NTD's Formula Rate, "Note R," states that NTD will "[c]alculate rate base using 13 month average balances, except ADIT. The calculation of ADIT in the annual true-up calculation will use the beginning and end of year balances, and will be performed in accordance with IRS regulation Section 1.167(l)-1(h)(6)." We accept this method of calculating ADIT as reasonable to comply with IRS regulations.<sup>266</sup>

150. We agree with DEMEC's concerns that Accounts 228.1, Accumulated Provision for Property Insurance, Account 228.2, Accumulated Provision for Injuries and Damages, Account 228.3, Accumulated Provision for Pensions and Benefits, Account 228.4, Accumulated Miscellaneous Operating Provisions, Account 235, Customer Deposits, and Account 252, Customer Advances for Construction, should be rate base reductions. NTD's Formula Rate provides a line item subtracting "Unfunded Reserves" from rate base. However, NTD's Formula Rate does not specify the FERC Accounts that would be used to derive the Unfunded Reserves. Unfunded reserves are a type of provision for a future contingency such as storm damage. Commission regulations require prior regulatory approval before these amounts may be collected in rates.<sup>267</sup> Therefore, when NTD seeks to recover Unfunded Reserves amounts in rates, we require NTD to amend Attachment 4 of its Formula Rate to explain for what contingency event the reserve is collecting; the regulatory approval, rule, or agreement governing the reserves; the maximum balance allowed under those reserves which is not already collected through other methods such as incurrence; the description of the property involved; and the character of the risk covered, along with the FERC Accounts, where relevant.

151. We grant clarification to DEMEC's concerns that NTD's Formula Rate should not allow pass through of costs associated with lobbying and EEI dues. The Commission has extensive experience with implementing and adjudicating issues involving lobbying costs. In 1963, the Federal Power Commission (FPC), the predecessor agency to the Commission, issued Order No. 276.<sup>268</sup> The Code of Federal Regulations (CFR) incorporated the order and amended the USofA to include five subaccounts, including

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<sup>265</sup> DEMEC Protest at 20.

<sup>266</sup> See *PJM Interconnection, L.L.C.*, 154 FERC ¶ 61,126, at P 19 (2016).

<sup>267</sup> See 18 C.F.R. Part 101, Special Instructions to Accounts 228.1 through 228.4.

<sup>268</sup> *Expenditures for Political Purposes - Amendment of Account 426, Other Income Deductions, Uniform System of Accounts, and Report Forms Prescribed for Electric Utilities and Licensees and Natural Gas Companies - FPC Forms Nos. 1 and 2*, Order No. 276, 30 FPC 1539 (1963), *order on reh'g*, 31 FPC 411 (1964).

Account 426.4, the account at issue here. This account is titled “Expenditures for certain civic, political and related activities,” and states in relevant part:

This account shall include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation, or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation or ordinances) or approval, modification, or revocation of franchises; or for the purpose of influencing the decisions of public officials....<sup>269</sup>

152. Based on the language of this account, any expenditure by the NTD to influence the decisions of public officials must be included in Account 426.4. Expenses in this account are not recoverable from ratepayers under the terms of the NTD’s Formula Rate.

153. We reject DEMEC’s assertion that we limit NTD’s Formula Rate cost recovery to only the Project. Our approval is consistent with Commission precedent on formula rates allowing prudently-incurred transmission cost recovery.<sup>270</sup>

154. In its protest, DEMEC states that if the costs and expenses of Schedule 12 facilities are included in computing NTD’s gross revenue requirements, other Schedule 12 revenues should be excluded in computing net annual revenue requirements.<sup>271</sup> NTD explains in its answer that the revenue requirement calculations for other projects would not be entered in that schedule.<sup>272</sup> We find that using the format of NTD’s template in that manner would not result in a duplicative recovery of revenue requirements.

155. In its protest, DEMEC asserts that Note A on page 5 of NTD Ex. 604 should be expanded to include all revenues "received by NTD other than those collected via

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<sup>269</sup> See *PJM Interconnection, L.L.C.*, 154 FERC ¶ 61,126 at P 19.

<sup>270</sup> Cf. *PATH*, 122 FERC ¶ 61,188 at P 147; *Pioneer Transmission, LLC*, 126 FERC ¶ 61,281 at P 114; *ATX Southwest*, 152 FERC ¶ 61,193 at P 76; *XEST*, 149 FERC ¶ 61,182 at P 92.

<sup>271</sup> DEMEC Protest at 22.

<sup>272</sup> NTD Answer at 29.

transmission rates, including the use of poles, rights of way, etc."<sup>273</sup> Although NTD responds that its Attachment 12 already provides for calculating revenue credits derived rents arising from the potential uses of its facilities and would deduct them from NTD's gross revenue requirement, NTD's Note A appears to only consider other facility revenues received from PJM.<sup>274</sup> Since the Project facilities will ultimately be paid for by customers in their transmission rates, we find that the customers should benefit from any other rents generated by those Project facilities. We direct NTD in its compliance filing to change Note A to include as a revenue credit all various rents it might receive from the use of the Project's poles, towers, etc.

156. In its protest, DEMEC asserts that Note M of NTD Ex. 604 is inconsistent with respect to the way the template formula includes Gross Receipts Taxes in the calculation of Total Other Taxes. DEMEC expresses further concern regarding the provision for the addition of any new line items for any new tax.<sup>275</sup> NTD responds in its answer that inclusion of Gross Receipts Taxes was a typographical error and indicates that it would correct that error in its compliance filing.<sup>276</sup> Regarding any new other tax line items, we direct NTD to make a compliance filing seeking approval of any new other tax items that are not included as a line item in its FERC Form 1.

157. We reject Delaware Commission's argument that NTD's filing "is devoid of explanation or documentation as to the source for calculating" the projection.<sup>277</sup> NTD's proposal is consistent with Commission precedent on formula rate projections,<sup>278</sup> and provides for a true-up, with interest, for any over- or under-projections. Further, NTD's Protocols provide sufficient customer review, preliminary challenge, and Formal Challenge procedures prior to the rate year implementing the projections.

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<sup>273</sup> DEMEC Protest at 22.

<sup>274</sup> NTD Answer at 26.

<sup>275</sup> DEMEC Protest at 23.

<sup>276</sup> NTD Answer at 31.

<sup>277</sup> Delaware Commission Protest at 13.

<sup>278</sup> Most PJM and Midwest ISO Utilities employ a similar form of formula rate projection. See, e.g., *PATH*, 122 FERC ¶ 61,188 at P 147; *Pioneer Transmission, LLC*, 126 FERC ¶ 61,281 at P 114; *Transource Wisconsin, LLC*, 149 FERC ¶ 61,180 (2014) (*Transource Wisconsin*), *on reh'g and compliance*, 154 FERC ¶ 61,010 (2016); *ATX Southwest*, 152 FERC ¶ 61,193 at P 76; *XEST*, 149 FERC ¶ 61,182 at P 92.

158. Given that NTD has stated that it does not plan to offer a PBOP benefit, but instead let employees rely on the LS Power Development retirement benefits, we agree with AMP and direct NTD to remove recovery of PBOP from its Formula Rate.<sup>279</sup>

e. **Additional Formula Rate Compliance Items**

159. We find that while NTD made several corrections related to AMP's concerns in the Formula Rate in the Excel spreadsheet submitted in NTD's response to the deficiency letter, and indicated that it would make further corrections in its compliance filing, some required corrections remain, which NTD should include in its compliance filing. The required connections in this regard are:

- In Attachment H-27A, page 3 of 5, line 39, the source reference should include “Note D.”
- In Attachments 1 through 12, consistent with Attachment H-27A, the “Year” or “Base Period” should be included in the title section.
- In Attachment 1, page 3 of 3, the heading of column (15) should reference (Note I), not (Note 1).
- Attachment 2, page 1 of 1, lines 25, 26 and 28 source references are missing.
- Attachment 3, columns H and I algebraic source references are missing.
- Attachment 3, Note 2 should be corrected to read: “From the Attachment 1, lines 1a through 6, col. 16 from the template in which the true-up year revenue requirement was initially projected.” Additionally, the Excel formula reference should be corrected.
- Attachment 3, Note 3 should be corrected to read: “From True-Up revenue requirement template Attachment 1, lines 1a through 6, col. 14.” Additionally, the Excel formula reference should be corrected.
- In Attachment 4, column A, lines 1 through 13 and 15 through 27, the applicable year should be indicated.
- In Attachment 4, column E, the source reference for LHFFU should be corrected to “214.47.d.”

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<sup>279</sup> AMP Protest at 37.

- In Attachment 4, column E Adjustments to Rate Base, Account No. 255 Accumulated Deferred Investment Tax Credit, should include a note similar to Note D on Attachment H-27A.
- In Attachment 4 Unfunded Reserves should include a column that identifies the balance sheet account where the reserves are recorded (Account 228.1) and the expense account where the expenses are accrued (Account 924).
- Attachment 5, line 1 Long Term Interest should include a new Note D that reads as follows: “Long Term Interest will exclude any short-term interest included in FERC Account 430, Interest on Debt to Assoc. Companies.”
- Attachment 6, the line numbers are missing.
- Attachment 7, lines 5 and 7 are missing source references.
- Attachment 8, line 3 is missing the algebraic reference.
- Attachment 8, line 26 is missing the algebraic reference.
- Attachment 10 line numbers are missing.
- Attachment 11 appears to address refunds due to customers, but does not address payments due from customers.

160. Finally, we agree with AMP’s comments on shaded cells, and direct NTD to shade any non-formulaic cells in its Formula Rate, whether or not the input is considered static in its compliance filing.

#### **4. Depreciation Rates**

##### **a. NTD’s Filing**

161. NTD states that the Formula Rate contains stated depreciation rates for intangible, transmission, and general plant, which cannot be changed absent a section 205 or 206 filing with the Commission.<sup>280</sup> NTD proposes to use the depreciation rates, to the extent they are available, of its affiliate, Cross Texas Transmission, LLC (Cross Texas), which were approved by the Public Utility Commission of Texas.<sup>281</sup> Cross Texas does not have an approved depreciation rate for Account 358 underground conductors and devices,

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<sup>280</sup> NTD Transmittal at 15.

<sup>281</sup> *Id.* at 16.

according to NTD, so NTD proposes to substitute Cross Texas's rate for Account 356 (Overhead conductors and devices).<sup>282</sup> In addition, NTD states that Cross Texas does not have an approved depreciation rate for Account 357 (Underground conduit), or for a similar asset account.<sup>283</sup> Therefore, NTD proposes to use a proxy depreciation rate constructed from an industry-average.<sup>284</sup> NTD claims such proxies are appropriate because NTD is a transmission-only company that has not yet constructed any facilities, such that NTD does not have an operating history on which to base a depreciation study.<sup>285</sup>

**b. Comments and Answers**

162. Protestors also argue that NTD failed to meet its burden to show its proposed depreciation rates are just and reasonable. Delaware Commission and AMP note that NTD based its depreciation rates on those approved by a different government body (the Public Utility Commission of Texas), on behalf of a different affiliate, in a different RTO, concerning a different project.<sup>286</sup>

163. NTD challenges Delaware Commission and AMP arguments that it should not rely on Cross Texas depreciation rates, as lacking specificity regarding why the Cross Texas depreciation study or rates should not be used. It states that the Cross Texas depreciation rates are supported by a depreciation study reviewed and approved by the Public Utility Commission of Texas and that the Commission has approved the use of depreciation rates initially approved by a state commission.<sup>287</sup>

**c. Commission Determination**

164. We accept NTD's proposed depreciation rates, subject to condition, as discussed below. We recognize that, because NTD does not currently have transmission assets, there is no historical data to support a depreciation study. In the past, the Commission has accepted formula rates that use a corporate affiliate's Commission-approved

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<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 15.

<sup>286</sup> Delaware Commission Protest at 15; AMP Protest at 34-35.

<sup>287</sup> NTD Answer at 16 (citing *Westar Energy, Inc.*, 131 FERC ¶ 61,183, at P 20).

depreciation rates for a transmission joint venture start-up, and we do so here.<sup>288</sup> We find that, as Cross Texas is an affiliate company with other transmission facilities, Cross Texas's depreciation rates would be an appropriate proxy for NTD to adopt in determining that its proposed depreciation rates are just and reasonable.

165. We disagree with protestors that the proxy rates must be for an affiliate in the same RTO/ISO as NTD or geographically close to NTD, as long the depreciation rates are reasonably comparable to other Commission approved jurisdictional depreciation rates. Specifically, we note that NTD averaged the service lives contained in the Form 1 of 60 companies to arrive at an average service life of 54.9592 years for assets booked to account 357.<sup>289</sup> We are also satisfied, based on NTD's response to the deficiency letter, that the Cross Texas depreciation rate for Account 356 (Overhead conductors and devices) is an appropriate proxy for Account 358 (Underground conductors and devices).<sup>290</sup>

166. In *Ameren*,<sup>291</sup> we noted: "the change to the depreciation accrual rates does not change the value of the asset, and would not result in any over- or under-recovery of costs," but rather only affects the timing of collection of the investment. We recognize that these proxy rates are not an exact match and could turn out not to be accurate for NTD. We appreciate that NTD has already stated its willingness to file updated rates, should they become necessary after the facilities have gone into service,<sup>292</sup> and therefore, we condition our acceptance of the proxy rates, consistent with the Commission's regulations, on NTD filing updated depreciation rates pursuant to section 205, after the plant goes into service, and committing to submit its depreciation rates for Commission review every five years.<sup>293</sup>

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<sup>288</sup> See e.g. *NEETWest*, 154 FERC ¶ 61,009 at P 103; *XEST*, 149 FERC ¶ 61,182 at P 124.

<sup>289</sup> See Ex. NTD-504.

<sup>290</sup> NTD Deficiency Letter Response at 15.

<sup>291</sup> *Ameren Illinois Co.*, 141 FERC ¶ 61,264, at P 32 (2012) (*Ameren*).

<sup>292</sup> NTD Attachment G (The Direct Testimony and Exhibits of Dane A. Watson, NTD Ex. 500-504) at 8-9.

<sup>293</sup> See *Indiana and Michigan Distributors Assoc. vs. Indiana Michigan Power Co.*, 59 FERC ¶ 61,260, at 61,972 (1992).

**D. Authorization to Replicate the Formula Rate and Incentive Rate Treatments**

**a. Proposal**

167. NTD requests that the Commission authorize yet-to-be-formed NTD affiliates or subsidiaries, which are chosen to construct transmission projects in the PJM region, to replicate and use the NTD Formula Rate as well as NTD's requested base ROE, RTO participation adder, regulatory asset accounting treatment, and hypothetical capital structure incentive for their projects. NTD states it anticipates such affiliates or subsidiaries may compete for other transmission projects within PJM through the RTEP process. NTD also states there might not be sufficient time for NTD's affiliates to gain approval of a formula rate, and therefore requests that NTD be authorized to replicate its Formula Rate – including the base ROE – for use by these yet-to-be-formed NTD affiliates. NTD further states that this approval would also allow an affiliate to submit an RTEP bid that reflects the expected cost recovery, which would allow it greater accuracy in developing the related cost estimates.<sup>294</sup>

**b. Comments and Answers**

168. All protesters oppose NTD's requested pre-approval to assign any incentives granted in the instant docket to NTD's current or future affiliates on any future projects.

169. DEMEC argues any number of variables could differ between the Project and future projects, such as facilities constructed, services provided, controlling regulations and statutes, and market conditions.<sup>295</sup> DEMEC argues that granting pre-approval “would also improperly flip the burden of proof from the filing entity to any interested party seeking to challenge the [new] rates.”<sup>296</sup>

170. AMP argues that NTD must agree to a significant caveat: “if an issue arises as to whether the nature of a particular project makes the NTD template unsuitable in some way for that project, NTD should bear the burden of demonstrating the application of its template to the affiliate is just and reasonable. Furthermore, if the Commission grants NTD's request for affiliates to use the abandoned plant incentive, it should make clear ...

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<sup>294</sup> NTD Filing at 41.

<sup>295</sup> DEMEC Protest at 17.

<sup>296</sup> *Id.* at 18-19.

NTD is still required to make a Section 205 filing to include any specific costs for abandoned plant in its rates.”<sup>297</sup>

171. AMP concludes that “NTD’s preauthorization request therefore should be denied insofar as would extend to future projects and affiliates any of the rate adders and incentives sought by NTD for itself in this docket.”<sup>298</sup>

172. NTD contends that policy and precedent strongly support the Commission’s approval of NTD’s request by obviating the need to re-litigate the justness and reasonableness of a formula.<sup>299</sup> NTD asserts that the Commission has recently considered and rejected arguments such as those DEMEC makes in its protest,<sup>300</sup> and states that the Commission has recently held that it is reasonable to allow yet-to-be formed affiliates or subsidiaries to replicate the Formula Rate and certain incentives because the Commission fully considered the incentives in the original proceeding and the rationale for granting these incentives would be identical in a subsequent Section 205 or 219 proceeding.<sup>301</sup>

173. In its Answer, DEMEC argues that allowing yet-to-be affiliates and subsidiaries to use the requested incentives would offer them a competitive edge in future Order No. 1000 transmission development projects.<sup>302</sup>

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<sup>297</sup> AMP Protest at 46-47.

<sup>298</sup> *Id.* at 48.

<sup>299</sup> NTD Answer at 58-59 (citing *TransCanyon DCR*, 152 FERC ¶ 61,017, at P 65; *Transource Wisconsin*, 149 FERC ¶ 61,180 at PP 58-64; *Transource Kansas*, 151 FERC ¶ 61,010 at PP 78-82).

<sup>300</sup> *Id.* at 60 & n.196 (citing *Transource Wisconsin*, 149 FERC ¶ 61,180 at PP 58-64 (rejecting arguments that the request to replicate the company’s formula rate and use certain transmission rate incentives was premature and would diminish the rights of third parties); *Transource Kansas*, 151 FERC ¶ 61,010 at PP 78-82 (rejecting arguments that such a request would inappropriately shift the burden away from the filing party “in contravention of the structure of the FPA.”))

<sup>301</sup> *Id.* at 60 & n.197 (citing *TransCanyon DCR*, 152 FERC ¶ 61,017 at P 66).

<sup>302</sup> DEMEC Answer at 11.

c. **Commission Determination**

174. We conditionally grant NTD's request for use of the proposed Formula Rate and ROE by the yet-to-be-formed NTD affiliates or subsidiaries, subject to the outcome of the hearing and settlement judge procedures. We find that there is no reason to open a new proceeding to re-litigate the justness and reasonableness of a Formula Rate that is identical to the one accepted in the instant filing. We clarify, however, that the NTD subsidiaries will each be subject to the resultant ROE that is determined through the hearing and settlement judge procedures ordered above, or any subsequent ROE that is ordered by the Commission.

175. We also grant NTD's request to allow those NTD affiliates or subsidiaries to use the hypothetical capital structure approved herein and defer prudently incurred pre-commercial costs through the creation of a regulatory asset. We note that the Commission has previously held that incentives granted under Order No. 679 can also be granted under the Commission's section 205 authority under certain circumstances, such as to promote important public policy goals. In particular, the Commission has exercised its section 205 authority to grant certain incentives to nonincumbent transmission developers competing in the Order No. 1000 solicitation process, just as NTD seeks to do here. Consistent with the Commission's determinations in *XEST*, *XETD*, *Transource Wisconsin*, and *Transource Kansas* we find that granting the incentives discussed above for future use by yet-to-be formed NTD affiliates or subsidiaries furthers the Commission's policy goal of placing nonincumbent transmission developers on a level playing field with incumbent transmission owners in the Order No. 1000 solicitation process. Moreover, we find that because the rationale for granting these incentives to future NTD subsidiaries would be identical to the rationale adopted in this proceeding, and because the Commission has fully considered the incentives issue in this proceeding, the issue need not be re-litigated through further section 205 or section 219 filings. As discussed above, if and when PJM awards a project to a yet-to-be-formed NTD subsidiary or affiliate through PJM's Order No. 1000 solicitation process, such NTD subsidiary or affiliate will be expected to make a joint section 205 filing to incorporate the Formula Rate into the PJM Tariff. Consequently, we also note that yet-to-be formed NTD affiliates or subsidiaries may only apply the hypothetical capital structure and the deferral of pre-commercial costs in a regulatory asset to projects that are developed through PJM's Order No. 1000 solicitation processes.

The Commission orders:

A. NTD's requested incentives of hypothetical capital structure, recovery of deferred pre-commercial and corporation formation cost through the creation of a regulatory asset, abandoned plant recovery, and RTO participation adder for the Project are hereby granted, as discussed in the body of this order.

B. NTD's proposed risks and challenges ROE adder incentive is hereby denied, as discussed in the body of this order.

C. NTD's proposed base ROE is hereby set for hearing, as discussed in the body of this order.

D. NTD's proposed Formula Rate and Protocols are hereby accepted and suspended, for a nominal period, subject to condition, effective February 16, 2016, subject to refund, as discussed in the body of this order.

E. NTD's request for yet-to-be formed NTD affiliates and subsidiaries to use the Formula Rate and Protocols is granted, as discussed in the body of this order.

F. NTD is hereby directed to submit a compliance filing within 30 days of the date of this order, as discussed in the body of this order.

G. NTD is hereby directed to submit a compliance filing prior to the exchange of any goods or services between NTD and its affiliate service providers, as discussed in the body of this order.

H. Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R., Chapter I), a public hearing shall be held concerning NTD's proposed base ROE reflected therein. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (I) and (J) below.

I. Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2015), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within 15 days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within 5 days of the date of this order.

J. Within 30 days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every 60 days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

K. If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within 15 days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.