

158 FERC ¶ 61,060  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

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

Docket Nos. ER16-453-003  
ER16-453-002

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued January 25, 2017)

1. By order issued April 26, 2016,<sup>1</sup> the Commission accepted, subject to condition, Northeast Transmission Development, LLC's (NTD) proposed transmission cost-of-service formula rate template (Formula Rate) with regard to its part of the Artificial Island Project,<sup>2</sup> to be included in PJM Interconnection, L.L.C.'s (PJM) Open Access Transmission Tariff (OATT). On May 26, 2016, the Delaware Municipal Electric Corporation, Inc. (DEMEC) and NTD separately filed for rehearing of the April 26 Order. Also on May 26, 2016, NTD filed a compliance filing (May 26 Compliance Filing) to revise its Formula Rate and Formula Rate Protocols (Protocols) to comply with the requirements of the April 26 Order. For the reasons discussed below, we deny rehearing and provide certain clarification. Additionally, we accept the compliance filing and direct NTD to make a further compliance filing on certain items, as discussed below.

**I. Background**

2. NTD is a wholly-owned subsidiary of LS Power Associates, L.P, formed in order to develop, own, and operate transmission facilities in the PJM region.<sup>3</sup> In 2015, PJM selected NTD to develop part of the Artificial Island Project, which would interconnect

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<sup>1</sup> *PJM Interconnection, L.L.C. & Northeast Transmission Development, LLC*, 155 FERC ¶ 61,097 (2016) (April 26 Order).

<sup>2</sup> *See* April 26 Order, 155 FERC ¶ 61,097 at P 5 (description of the Artificial Island Project).

<sup>3</sup> NTD December 2, 2015 Transmittal at 2.

transmission facilities in New Jersey and Delaware that are separated by the Delaware River.<sup>4</sup>

3. On December 2, 2015, PJM and NTD submitted a request for authorization to implement a Formula Rate pursuant to section 205 of the Federal Power Act (FPA)<sup>5</sup> to be included as part of the PJM Open Access Transmission Tariff (Tariff). NTD also requested several transmission rate incentives as well as authorization for other, yet-to-be formed affiliates or subsidiaries of NTD that develop transmission facilities in the PJM region to replicate the Formula Rate and to use certain of the incentive rate treatments.

4. The Commission's April 26 Order granted several transmission incentives for NTD's part in the Artificial Island Project, namely, deferred recovery of pre-commercial costs through the establishment of a regulatory asset,<sup>6</sup> a hypothetical capital structure of 50 percent debt and 50 percent equity,<sup>7</sup> and an abandoned plant incentive.<sup>8</sup> The Commission also granted NTD an RTO participation adder of 50 basis points to its base Return on Equity (ROE), discussed further below.<sup>9</sup> The Commission denied NTD's request for a risks and challenges ROE adder, as discussed further below.<sup>10</sup>

5. The April 26 Order accepted NTD's proposed Formula Rate subject to NTD making several accounting corrections and miscellaneous fixes;<sup>11</sup> accepted the accompanying Protocols subject to the Protocols providing more transparency on allocation factors and several miscellaneous fixes;<sup>12</sup> and accepted its depreciation rates subject to NTD updating those rates after the plant goes into service and periodically

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<sup>4</sup> *Id.* at 5-6.

<sup>5</sup> 16 U.S.C. § 824d (2012).

<sup>6</sup> April 26 Order at PP 40-44.

<sup>7</sup> *Id.* PP 50-52.

<sup>8</sup> *Id.* PP 54-55.

<sup>9</sup> *Id.* PP 94-97.

<sup>10</sup> *Id.* PP 84-89.

<sup>11</sup> *Id.* PP 148-160.

<sup>12</sup> *Id.* PP 121-130.

thereafter.<sup>13</sup> As discussed further below, the Commission granted authorization for any yet-to-be-formed NTD affiliates or subsidiaries to replicate NTD's formula rate and certain rate incentives and treatments.<sup>14</sup> Finally, the Commission found NTD's proposed base ROE raised issues of material fact, and set it for hearing and settlement judge procedures.<sup>15</sup>

## **II. Procedural Matters**

6. On May 26, 2016 NTD submitted the May 26 Compliance Filing in response to the April 26 Order. On June 16, 2016, DEMEC and American Municipal Power, Inc. filed protests in response to NTD's May 26, 2016 compliance filing.

7. On June 10, 2016, NTD filed a motion requesting leave to file an answer to DEMEC's rehearing request. On June 22, 2016, DEMEC filed an answer to NTD's answer. Rule 713(d) of the Commission's Rules of Practice and Procedure prohibits answers to a request for rehearing.<sup>16</sup> Accordingly, we reject NTD's and DEMEC's answers.

## **III. Requests for Rehearing**

### **A. RTO Participation Adder**

#### **1. April 26 Order**

8. The Commission granted NTD's request for a 50 basis point adder to its base ROE for its participation in PJM, subject to the ROE zone of reasonableness established pursuant to the hearing established on the base ROE. The Commission found that "approval of this adder is contingent upon NTD's commitment to become a member of PJM and transfer operational control of the [Artificial Island] Project to PJM" on its in-

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<sup>13</sup> *Id.* PP 164-166.

<sup>14</sup> *Id.* PP 174-175.

<sup>15</sup> *Id.* PP 106-108.

<sup>16</sup> 18 C.F.R. § 385.713(d)(1) (2016).

service date.<sup>17</sup> The Commission found granting NTD's request to be consistent with previous Commission orders.<sup>18</sup>

## 2. Rehearing Request

9. DEMEC argues that the Commission erred in granting NTD a 50 basis point adder to its base ROE for NTD's participation in a Regional Transmission Organization (RTO participation adder). DEMEC argues that the Commission's power under the FPA to grant incentives is subject to the resulting rates remaining just and reasonable. DEMEC claims that the April 26 Order summarily granted the PJM "Participation Adder on the grounds that the Commission has previously awarded these adders."<sup>19</sup> DEMEC claims that NTD's circumstances are distinguishable from previous applicants because NTD voluntarily bid for its project, NTD faces relatively few financial risks due to its formula rate, and NTD does not need the RTO participation adder given the other incentives that NTD is receiving. DEMEC also argues that the April 26 Order erred in ruling that it was "outside the scope of this proceeding" to "reconsider its policies" on RTO participation adders in light of Order No. 1000 and other recent developments that increase opportunities for entities like NTD and permit upward adjustments to base ROEs.<sup>20</sup> DEMEC asks that, in the alternative, the Commission either grant NTD a smaller RTO participation adder, or else defer consideration of NTD's request until the completion of Docket No. AD16-18-000, in which the Commission announced a technical conference to consider the relationship of competitive transmission development to transmission incentives.<sup>21</sup>

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<sup>17</sup> April 26 Order, 155 FERC ¶ 61,097 at P 94.

<sup>18</sup> See *NextEra Energy Transmission West, LLC*, 154 FERC ¶ 61,009, at P 39. (2016) (*NEETWest*); *Transource Kansas, LLC*, 151 FERC ¶ 61,010, at P 46 (2015) (*Transource Kansas*); *MidAmerican Central California Transco LLC*, 147 FERC ¶ 61,179, at P 45 (2014) (*California Transco*); *Transource Missouri, LLC*, 141 FERC ¶ 61,075, at P 75 (2012) (*Transource Missouri*); *Xcel Energy Southwest Transmission Company, LLC*, 149 FERC ¶ 61,182, at P 64 (2014) (*XEST*).

<sup>19</sup> DEMEC Request for Rehearing at 23 (citing April 26 Order, 155 FERC ¶ 61,097 at P 94).

<sup>20</sup> *Id.* (citing April 26 Order, 155 FERC ¶ 61,097 at P 96).

<sup>21</sup> *Id.* at 24 (referring to Notice of Technical Conference re Competitive Transmission Development, Docket No. AD16-18-000, March 17, 2016).

### 3. Commission Determination

10. We deny rehearing as to the RTO participation adder. As DEMEC notes, the Commission found granting NTD's request consistent with previous Commission orders.<sup>22</sup> DEMEC is incorrect, however, to the extent it suggests that this statement indicates that the Commission did not consider the facts specific to NTD. Section 219 directs that "the Commission shall, to the extent within its jurisdiction, provide for incentives to *each transmitting utility or electric utility* that joins a Transmission Organization."<sup>23</sup> Thus, *each utility* that joins an RTO is eligible for the RTO participation adder. The April 26 Order conditioned NTD's eligibility on this requirement, stating that "approval of this adder is contingent upon NTD's commitment to become a member of PJM and transfer operational control of the [Artificial Island] Project to PJM" on its in-service date.<sup>24</sup>

11. We also reject arguments that either NTD's decision to bid voluntarily on a new project or the specific characteristics of the Artificial Island Project should diminish NTD's eligibility for an RTO participation adder. As the Commission explained in Order No. 679-A, the RTO participation adder granted pursuant to section 219 is an inducement for entities to not only join, but also remain in, transmission organizations.<sup>25</sup> This approach suggests that all transmission owners within an RTO such as PJM who request an RTO participation adder should receive an adder of the same size because that adder

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<sup>22</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>23</sup> 16 U.S.C. § 824s(c) (2016) (emphasis added).

<sup>24</sup> April 26 Order at P 94. We also note that while "the RTO participation incentive is unrelated to any particular project," if the project for which the developer is seeking recovery has been abandoned, then "the benefits from that project's inclusion in an RTO will not materialize;" therefore, "continued recovery of a basis point adder for RTO participation is not appropriate for recovery in an abandonment application." *PJM Interconnection, LLC and Potomac-Appalachian Transmission Highline, L.L.C.*, 141 FERC ¶ 61,177, at P 71 (2012). As such, there is no need for concern that PJM ratepayers may be paying an RTO participation adder to an entity that has not provided the PJM region with used and useful infrastructure.

<sup>25</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, at P 86 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007).

reflects the same behavior on the parts of those entities. We also note that, despite DEMEC's claims to the contrary, the RTO participation adder is expressly contingent upon NTD's total ROE remaining within the zone of reasonableness.

12. We also reject DEMEC's arguments that NTD should receive a smaller adder, or that the Commission should defer consideration of the adder, pending any further Commission action in Docket No. AD16-18-000. NTD made a section 205 filing in this docket, and the Commission acts on that filing based on the record in this proceeding.

**B. Authorization to Replicate the Formula Rate**

**1. April 26 Order**

13. The April 26 Order granted, subject to condition, NTD's request for use of the proposed Formula Rate and ROE by the yet-to-be-formed NTD affiliates or subsidiaries. The Commission ruled 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."<sup>26</sup> Because NTD's base ROE had not yet been accepted, however, the Commission held that "the NTD subsidiaries will each be subject to the resultant ROE that is determined through the hearing and settlement judge procedures."<sup>27</sup>

14. The Commission also granted NTD's request to allow those NTD affiliates or subsidiaries to use NTD's hypothetical capital structure and approved RTO participation adder, and to defer prudently incurred pre-commercial and formation costs through the creation of a regulatory asset. The Commission found that granting such incentives "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."<sup>28</sup> However, the Commission stated that the NTD affiliate or subsidiary "will be expected to file a joint section 205 filing to incorporate the Formula Rate into the PJM Tariff," and ruled that the incentives would only apply to "projects that are developed through PJM's Order No. 1000 solicitation processes."<sup>29</sup>

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<sup>26</sup> April 26 Order, 155 FERC ¶ 61,097 at P 174.

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

<sup>28</sup> *Id.* P 175.

<sup>29</sup> *Id.*

## 2. Request for Rehearing

15. DEMEC argues that the Commission erred in granting NTD's request for NTD affiliates or subsidiaries to use NTD's proposed ROE, Formula Rate, and certain rate incentives on any future transmission projects within PJM (Affiliate Authorizations). DEMEC argues that the Affiliate Authorization for base ROE is arbitrary and capricious because, according to DEMEC, the Commission ruling lacked supporting evidence, was contrary to precedent, and failed to meaningfully consider DEMEC's objections. DEMEC states that the evidentiary record to date concerns NTD's base ROE, not the ROE of yet-to-be-formed affiliates. Furthermore, DEMEC states, the Commission did not require these affiliates to be in existence before hearing proceedings begin, and, thus, continues DEMEC, it would be "highly speculative to assume that the new NTD affiliates or subsidiaries will have the same financial condition and risks as does NTD."<sup>30</sup>

16. DEMEC also argues that the Affiliate Authorization for base ROE violates the longstanding Commission practice of requiring each entity to establish its ROE on a stand-alone basis, separate from its parent company and affiliates. DEMEC argues that, under Commission precedent, an applicant's ROE should be based on current market data.<sup>31</sup> DEMEC argues that prejudging this issue for affiliates means applying NTD's ROE at some unknown time in the future, without any consideration for how the facts underlying the service, or general economic conditions, will have necessarily changed.

17. DEMEC also argues that granting affiliates the base ROE and the Formula Rate established in NTD's hearing and settlement judge procedures is contrary to the Federal Power Act, which requires the filing entity to demonstrate that its proposed rates are just and reasonable. DEMEC contends that the April 26 Order did not meaningfully respond to its argument that "absolving yet-to-be-formed entities of their obligation to support their rates violates the Federal Power Act by flipping the burden of proof."<sup>32</sup> DEMEC asserts that the Commission summarily declared that there would be "no reason to open a new proceeding to re-litigate the justness and reasonableness of a Formula Rate that is

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<sup>30</sup> DEMEC Request for Rehearing at 11.

<sup>31</sup> *Id.* at 12 (citing *Portland Natural Gas Transmission Sys.*, 142 FERC ¶ 61,198, at P 233 (2013) ("on balance...the use of the most recent data in the record consistent with long standing policy outweighed any adjustment to reflect purportedly anomalous results"); *Consumer Advocate Div. of the Pub. Serv. Comm'n. of W. Va. v. Allegheny Generating Co.*, 68 FERC ¶ 61,207, at 61,998 (1994) (the use of current data is "particularly critical" in determining a just and reasonable ROE)).

<sup>32</sup> *Id.* at 14.

identical to the one accepted in the instant filing.”<sup>33</sup> This declaration, DEMEC argues, rests on the unfounded assumption that market conditions would be the same in the future for the unknown affiliate. DEMEC concludes that “each Unknown Affiliate should be required to support the base ROE to be included in its formula rate as part of its individual Section 205 filing.”<sup>34</sup>

18. DEMEC argues that the Commission needs to evaluate whether the formula rate reflects the then-current evidence at the time of their filing. For example, DEMEC argues, NTD’s affiliates or subsidiaries may ultimately, after the hypothetical capital structure incentive ceases to be applicable, have different capital structures due to differing state requirements, which could require different base ROEs.<sup>35</sup> DEMEC further contends that the Affiliate Authorization for the Formula Rate fails to reflect that tax and pension laws may have different implications for a different affiliate, especially because NTD is not a traditional utility. DEMEC argues that the Affiliate Authorization for the formula rate is based on speculation about the future, not known and measurable facts. DEMEC argues that these future affiliates, when they file, should be required to apply the law as it stands at that time to the specific facts surrounding their applications, business structure, and project to demonstrate that their proposal is just and reasonable.

19. DEMEC further argues that the Affiliate Authorizations are inconsistent with the record, the arguments raised, and the Commission’s policies. In particular, DEMEC argues that granting assurance of cost recovery and rate incentives would give NTD’s unknown affiliates an undue preference in future selection processes. DEMEC asserts that the April 26 Order stated that granting incentives would further the Order No. 1000 policy goal of placing incumbent and non-incumbent developers on a level playing field. However, DEMEC argues, the Commission’s reasoning “failed to recognize that there may be other non-incumbent transmission providers competing for new projects with the Unknown Affiliates and that this determination would grant [NTD’s affiliates] an undue advantage as compared to non-affiliated new entrants that would also have to separately seek Commission approval for such incentives.”<sup>36</sup> DEMEC argues that there is no reason to treat NTD similar to the incumbent utilities at the cost of reducing competition and that

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<sup>33</sup> April 26 Order, 155 FERC ¶ 61,097 at P 174.

<sup>34</sup> DEMEC Request for Rehearing at 14.

<sup>35</sup> *Id.* at 15-16.

<sup>36</sup> *Id.* at 21.

the Commission should recognize the difference between NTD and an incumbent utility, particularly that NTD is not obligated to bid and develop a new transmission project.<sup>37</sup>

### 3. Commission Determination

20. We deny rehearing and provide clarification on this issue. The Commission has explained that yet-to-be formed affiliates or subsidiaries are similarly situated to the parent company and granting authorization to use the same ROE and formula rate to yet-to-be-formed affiliates or subsidiaries “is no different than determining a base ROE for any other [ ]entity at this time using current capital market conditions.”<sup>38</sup> The Commission has long accepted rates based on ROE determinations prior to units being developed or put into service.<sup>39</sup> As the Commission has explained, “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 being accepted” in this filing.<sup>40</sup>

21. Granting NTD authorization to apply the Affiliate Authorizations places a public utility’s similarly situated affiliates or subsidiaries in the same place as traditional public utilities in the regional Order No. 1000 transmission planning processes.<sup>41</sup> A traditional incumbent utility uses its existing just and reasonable formula rate and ROE as its base for each new project that it proposes without having to establish a new formula rate or ROE for each project. Extending the same principle to similarly situated affiliates or subsidiaries of a nonincumbent transmission developer that instead choose to establish a separate formula rate to recover their costs for each project furthers the policy goal of facilitating the participation of nonincumbent transmission developers helps level the field with incumbent utilities in the regional Order No. 1000 transmission planning processes, thereby encouraging competition.<sup>42</sup> Contrary to DEMEC’s argument that

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<sup>37</sup> *Id.* at 19.

<sup>38</sup> *Kanstar Transmission, LLC*, 155 FERC ¶ 61,167, at P 9 (2016); *appeal pending, Kansas Corp. Comm’n v. FERC*, D.C Cir. Case No. 16-1164.

<sup>39</sup> *See XEST*, 149 FERC ¶ 61,182 at P 62.

<sup>40</sup> *Transource Kansas, LLC*, 151 FERC ¶ 61,010, at P 81 (2015), *reh’g denied*, 154 FERC ¶ 61,011 (2016), *appeal pending, Kansas Corp. Comm’n v. FERC*, D.C Cir. Case No. 16-1093.

<sup>41</sup> *See April 26 Order*, 155 FERC ¶ 61,097 at P 175.

<sup>42</sup> *TransCanyon DCR, LLC*, 152 FERC ¶ 61,017, at P 65 (2015).

NTD and its affiliates will have an undue advantage over nonincumbent transmission developers, new developers and their affiliates or subsidiaries are also eligible to receive authorization for rate replication if they satisfy the same conditions. NTD and its affiliates or subsidiaries received these incentives by meeting the same standards that would apply to any new developer. Thus, the same treatment is available to all developers in the Order No. 1000 solicitation process.

22. As to DEMEC's argument that the base ROEs of future NTD affiliates should be based on current market conditions, the Commission has rejected arguments that a predetermined ROE reflecting current market conditions is not just and reasonable when applied to cost recovery for unspecified projects whose costs may not be incurred for many years into the future.<sup>43</sup> Regarding DEMEC's argument that it would be highly speculative to assume that the new NTD affiliates or subsidiaries will have the same financial condition and risks as does NTD, the April 26 Order stated that affiliates or subsidiaries are "expected to make a joint section 205 filing to incorporate the Formula Rate into the PJM Tariff."<sup>44</sup> We clarify here that an affiliate or subsidiary must demonstrate in its section 205 filing that it is similarly situated to the parent company as to warrant use of NTD's approved formula rate and incentives. Thus, the Commission will not be applying NTD's ROE without consideration for how the facts underlying the service or general economic conditions will have changed.

23. We reject DEMEC's assertion that allowing yet-to-be-formed affiliates or subsidiaries to replicate the formula rate, including base ROE, of the parent company violates the FPA by flipping the burden of proof, requiring protestors to show that the formula rate as applied to affiliates or subsidiaries is unjust and unreasonable. DEMEC is correct that the FPA requires the filing entity to demonstrate that its proposed rates are just and reasonable. NTD has established in this filing a just and reasonable formula rate and base ROE and, like an incumbent utility, will be able to apply that just and reasonable rate to similarly situated future affiliates or subsidiaries. We are not here switching the burden of proof, because NTD here as the parent had the burden to establish the base ROE and capital structure applicable to it and to similarly situated affiliates. While DEMEC posits that future affiliates may have different capital structures necessitating a different base ROE, as stated above, affiliates or subsidiaries must demonstrate in their section 205 filings that they are similarly situated to the parent company.

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<sup>43</sup> See, e.g., *XEST*, 149 FERC ¶ 61,182 at P 62; *Transource Kansas*, 154 FERC ¶ 61,010 at P 17; *Kanstar Transmission, LLC*, 155 FERC ¶ 61,167 at PP 7-9.

<sup>44</sup> April 26 Order, 155 FERC ¶ 61,097 at P 175.

24. Regarding the RTO participation adder, we reject the premise that NTD's affiliates or subsidiaries have received any advantage, let alone an undue advantage. The April 26 Order expressly limited the Affiliate Authorization to situations where the affiliate files "to incorporate the Formula Rate into the PJM Tariff," and only for "projects that are developed through PJM's Order No. 1000 solicitation processes."<sup>45</sup> In other words, each affiliate will be judged on exactly the same terms that the Commission has applied to all parties seeking RTO participation adders; it will not receive an undue advantage from its status as an NTD affiliate.

25. As to the remaining two Affiliate Authorizations that the Commission granted regarding regulatory asset accounting treatment and hypothetical capital structure, the Commission has stated before, the rationale for granting the regulatory asset incentive and rate treatment and hypothetical capital structure for a utility's similarly situated affiliate in the same RTO would be identical to the rationale adopted in granting them to the original utility.<sup>46</sup> Further, "since the Commission has fully considered the incentives issue in [the April 26 Order], these issues need not be re-litigated through further section 205 or section 219 filings."<sup>47</sup> Granting these incentives to similarly situated affiliates or subsidiaries furthers the policy goal of facilitating the participation of nonincumbent transmission developers in the regional Order No. 1000 transmission planning processes, thereby encouraging competition.<sup>48</sup> Similarly, new nonincumbent transmission developers are not disadvantaged by granting this rate treatment to NTD's affiliates or subsidiaries as such rate treatment is available to them based on a section 205 filing and the Commission finding that such incentives are just and reasonable.

26. Finally, DEMEC reiterates its arguments that the Affiliate Authorizations should be denied, or deferred consideration, because the Commission is reviewing its incentive policies. As we state above, NTD made a section 205 filing in this docket, and the Commission properly acts on that filing based on the record in this proceeding.

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

<sup>46</sup> *ATX Sw., LLC*, 152 FERC ¶ 61,193, at P 89 (2015).

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

<sup>48</sup> *Cf. id.* P 30 (approving hypothetical capital structure).

### C. Risks and Challenges Adder

#### 1. April 26 Order

27. The Commission denied NTD's requested 50 basis point risks and challenges ROE adder finding that NTD failed to make the demonstration that the Commission set forth in the Transmission Incentives Policy Statement.<sup>49</sup> Specifically, the Commission found that NTD failed to demonstrate that the proposed project faces risks and challenges either not already accounted for in the base ROE or addressed through the authorized risk-reducing incentives.

#### 2. Request for Rehearing

28. NTD argues that the Commission erred in denying NTD a 50 basis point ROE adder for the risks and challenges associated with the Artificial Island Project. NTD argues that the Commission's denial ignored record evidence and precedent, and was based on mistaken assumptions. NTD asserts that: (1) the Commission failed to properly account for the reliability concerns that make the Artificial Island Project necessary;<sup>50</sup> (2) the Commission ignored the substantial benefits that the Artificial Island Project will bring and the precedent for granting the risks and challenges ROE adder based on similar benefits;<sup>51</sup> and (3) the Commission overemphasized the effect that other risk-reducing incentives will have on NTD's risk exposure.<sup>52</sup>

29. NTD argues that the Artificial Island Project is the type of project for which ROE incentives are appropriate because it was specifically designed to respond to significant, long-standing system stability and high voltage reliability issues in the Artificial Island area that have caused transmission system constraints, imposing substantial costs on consumers.<sup>53</sup>

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<sup>49</sup> April 26 Order, 155 FERC ¶ 61,097 at PP 84-85 (citing *Promoting Transmission Investment through Pricing Reform*, 141 FERC ¶ 61,129, at PP 17-21 (2012) (Transmission Incentives Policy Statement)).

<sup>50</sup> NTD Request for Rehearing at 8-11.

<sup>51</sup> *Id.* at 11-17.

<sup>52</sup> *Id.* at 17-25.

<sup>53</sup> NTD Request for Rehearing at 9 (citing Transmission Incentives Policy Statement, 141 FERC ¶ 61,129 at P 21).

30. NTD states that the Commission's Transmission Incentives Policy Statement identifies transmission projects that "unlock" location-constrained generation resources as projects that merit an incentive ROE adder. According to NTD, the Artificial Island Project will reduce existing limitations on the output from Artificial Island generation resources, which are constrained by transmission system stability limitations and the need to operate the Artificial Island area generators with a minimum MVAR requirement to address these stability limits. NTD argues that the Commission erred in finding that the only transmission projects eligible for an incentive ROE adder based on the "unlock location-constrained generation resources" provisions of the Transmission Incentives Policy Statement are those that "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>54</sup> NTD asserts that the order relied on by the Commission for this definition of location-constrained resources does not concern transmission rate incentives. NTD states that the Commission has approved a 50 basis point incentive ROE adder for a project's risks and challenges based on a determination that the proposed transmission line will relieve congestion and provide quantifiable benefits to consumers without making a finding regarding the relative distance from generation to load or the type of generation.<sup>55</sup> NTD contends that there is no reasonable policy basis for the Commission's distinction between transmission projects that expand transmission capacity to provide greater market access for select categories of generation resources sited in remote locations, on the one hand, and transmission projects that remedy constraints caused by transmission system stability limitations and minimum MVAR requirements and thereby provide greater market access for generation resources ostensibly located nearer to loads, on the other hand. NTD further states that the presence of uncontested, quantifiable benefits resulting from a proposed transmission project was a key factor in the Commission's decision to grant an incentive ROE adder in *NY Transco* and no party contested the substantial operational benefits provided by the Artificial Island Project.<sup>56</sup>

31. NTD also argues that an incentive ROE adder is warranted because, according to NTD, it bears significant risks and challenges that are not adequately addressed and mitigated through other incentives or through the Formula Rate's base ROE. NTD asserts that the Commission erred in finding that its risks are addressed by the RTO

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<sup>54</sup> *Id.* at 13 (citing *California Independent System Operator Corp.*, 119 FERC ¶ 61,061, at n.1, *reh'g denied*, 120 FERC ¶ 61,244 (2007)).

<sup>55</sup> *Id.* at 15 (citing *NY Transco*, 151 FERC ¶ 61,004 at PP 97-100).

<sup>56</sup> *Id.* at 17 (citing *NY Transco*, 151 FERC ¶ 61,004 at PP 97-100).

participation adder. NTD states that the Commission treats the RTO participation adder as separate and distinct from incentives related to the construction of new transmission facilities because the RTO participation adder is not intended to encourage construction directly.<sup>57</sup> NTD further argues that deferred cost recovery and abandoned plant incentives do not adequately address the significant risks and challenges of project delays associated with the siting, permitting and construction of the Project. Specifically, NTD states that certain activities to further the development and commence construction of the project cannot be undertaken until the permitting authorities determine whether the Project will involve an overhead crossing or a submarine cable. NTD also argues that the April 26 Order's statement that the construction techniques required for the Delaware River Crossing are relatively routine is inaccurate and that new construction requirements present substantial challenges.<sup>58</sup>

### 3. Commission Determination

32. We reject NTD's argument that a demonstration that a given project addresses reliability concerns is sufficient to warrant a risks and challenges ROE adder for that project. While the Commission has stated that it "anticipates that applicants will seek an incentive ROE based on a project's risks and challenges for projects that provide demonstrable consumer benefits by making the transmission grid more efficient, reliable, and cost-effective,"<sup>59</sup> the Commission only considers such an incentive ROE to the extent that projects "present specific risks and challenges not otherwise mitigated by available risk-reducing incentives."<sup>60</sup>

33. In Order No. 679-A, the Commission stated that a project that receives other risk-reducing transmission incentives may not warrant an incentive ROE, or may warrant a lower incentive ROE, based on the project's risks and challenges.<sup>61</sup> The Transmission Incentives Policy Statement expanded upon this principle, stating, "the Commission expects incentives applicants to seek to reduce the risk of transmission investment not otherwise accounted for in its base ROE by using risk-reducing incentives before seeking

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<sup>57</sup> *Id.* at 18 (citing Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 87 & n.143).

<sup>58</sup> *Id.* at 20-22.

<sup>59</sup> Transmission Incentives Policy Statement, 141 FERC ¶ 61,129 at P 22.

<sup>60</sup> *Id.*

<sup>61</sup> Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 27.

an incentive ROE based on a project's risks and challenges.”<sup>62</sup> Thus, a project that makes the transmission grid more efficient, reliable, and cost-effective must also present certain risks and challenges that cannot otherwise be mitigated in order to warrant an incentive ROE.

34. NTD has failed to establish that its project poses sufficient risks and challenges, in light of its other incentives, to warrant an additional ROE adder. As the April 26 Order stated, the Commission has previously found that “location constrained generation 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>63</sup> Such circumstances do not exist for the Artificial Island Project. Even if we were to posit that the Artificial Island Project may otherwise qualify as unlocking location constrained generation resources, that fact alone would not be sufficient to warrant a risks and challenges adder where, as here, there are other risk-mitigating factors.<sup>64</sup>

35. Further, we do not find that the construction, siting, and permitting risks are significant enough to warrant an ROE adder for risks and challenges in light of the fact of the other incentives requested by NTD and granted by the Commission. In response to NTD's assertion that the Commission erred in finding that its risks are addressed by the RTO participation adder, we clarify that the RTO participation adder was granted to NTD based on NTD joining PJM and turning operational control of its part of the Artificial Island Project over to PJM upon completion, and not as an ROE adder to address risks.

#### **IV. NTD Compliance Filing**

36. In its May 26 Compliance Filing, NTD states that it added Section 3.d.v and amended Section 7 of its Formula Rate Protocols to comply with the Commission's directive that it “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 directly assign costs between NTD and its affiliates by service category or function for the applicable rate year, including any changes to such cost

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<sup>62</sup> Transmission Incentives Policy Statement, 141 FERC ¶ 61,129 at P 16.

<sup>63</sup> April 26 Order, 155 FERC ¶ 61,097 at P 88 (citing *California Independent System Operator Corp.*, 119 FERC ¶ 61,061, at n.1, PP 7, 64 (2007)).

<sup>64</sup> See *San Diego Gas & Elec. Co.*, 151 FERC ¶ 61,011, at PP 18, 32 (2015) (rejecting adder because “construction will occur in an existing right-of-way, and the project will make use of existing facilities.”).

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.”<sup>65</sup>

37. While NTD states that it made appropriate revisions to sections 4.b.i. and 5.e, the April 26 Order required 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.” NTD states that it did not make such revisions to sections 1.d, 3.d, and 8, because it avers that each of those sections provide for a range of days on which the respective meetings might occur.<sup>66</sup>

38. NTD further states that it, as directed by the Commission’s order, (1) removed recovery of post-employment benefits other than pensions from its Formula Rate, (2) amended section 5.h of its Protocols to adopt actual depreciation rates after it has placed transmission facilities into service, and (3) corrected several typographical errors contained in the Protocols that it had committed previously to correct.<sup>67</sup>

39. In response to the Commission’s finding in the April 26 Order that NTD “failed to provide sufficient evidence in the record to demonstrate that it qualifies for recovering income taxes through its Formula Rate,” and the Commission’s directive to NTD that it “confirm that its owners or members, partners or parent entity has an actual or potential income tax liability . . . ,”<sup>68</sup> NTD states that all of the LS Power Partners are individuals or trusts, are residents of the United States, and must file federal and state income tax returns that recognize taxable gains or losses generated by the entities owned by LS Power and that all of the LS Power Partners have an actual or potential income tax liability.<sup>69</sup>

40. In accordance with the Commission’s directive to develop, and revise its Formula Rate to include, a weighted income tax allowance, for both state and federal income

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<sup>65</sup> NTD Compliance Filing at 3.

<sup>66</sup> *Id.* at 3.

<sup>67</sup> *Id.* at 4, 10, and 11.

<sup>68</sup> April 26 Order, 155 FERC ¶ 61,097 at P 148.

<sup>69</sup> NTD Compliance Filing at 5.

taxes, using the marginal income tax rates of each category of partners,<sup>70</sup> NTD states that it will develop a weighted marginal federal income tax rate and a weighted marginal state income tax rate for six categories of partners to arrive at a weighted marginal income tax rates, using the most current information available when preparing and updating its Formula Rate Template.<sup>71</sup>

41. The Commission also required NTD to “provide the projected distributive share of corporate income from the transmission investment attributed to each category of partners.”<sup>72</sup> NTD states that the members of LS Power Partners that indirectly own all of NTD’s membership interests are individuals and trusts. NTD states that it is therefore projecting that individuals and trusts will have a one hundred percent distributive share of income from NTD’s transmission investment.<sup>73</sup> NTD additionally stated that it will update this information when preparing and updating its Formula Rate Template.<sup>74</sup>

42. The April 26 Order also required NTD to make a number of accounting changes, revisions, and clarifications, as well as corrections to typographical errors. NTD also added a commitment to make further compliance filings seeking approval for additional changes or approval for recovery for additional amounts in various accounting categories.

43. Finally, with respect to its proposed proxy depreciation rates, NTD states that it will file to update its depreciation rates after NTD has placed its transmission facilities into service, and will update such depreciation rates every five years thereafter.<sup>75</sup>

**A. Protests to NTD’s Compliance Filing**

44. In its protest, DEMEC requests that the Commission direct NTD to:

(1) ensure that it excludes recovery of Edison Electric Institute dues and all lobbying expenses from its formula rate consistent with the directives of the April 26 Order,

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<sup>70</sup> April 26 Order, 155 FERC ¶ 61,097 at P 148.

<sup>71</sup> NTD Compliance Filing at 6.

<sup>72</sup> April 26 Order, 155 FERC ¶ 61,097 at P 148.

<sup>73</sup> NTD Compliance Filing at 6-7.

<sup>74</sup> *Id.* at 7.

<sup>75</sup> *Id.* at 11.

(2) exclude all references in its formula rate to any recovery of a 50 basis point ROE incentive for the risks and challenges associated with the Project,

(3) revise new subsection 3.d(v) include the provision “including any cha[n]ges to such cost allocation methodologies from the prior year, and the reasons and justification for those cha[n]ges” as directed by the order, and

(4) revise Note E so that the language conforms with the Commission’s requirements pertaining to carrying charges for regulatory assets. Specifically, DEMEC requests that the Commission require NTD to revise Note E so that it provides as follows: “the carrying charge shall not result in a higher amount of interest than is allowed for construction expenditures that accrue an AFUDC, and interest will be compounded no more than on a semi-annual basis.”<sup>76</sup>

45. In its protest, American Municipal Power, Inc.<sup>77</sup> requests that the Commission direct NTD to submit a further compliance filing that includes all the language that Paragraph 127 of the April 26 Order directed NTD to include in its filed tariff sheets, the language requiring a detailed description of “any changes to such cost allocation methodologies from the prior year, and the reasons and justification for those changes.”

**B. Commission Determination**

46. We will accept NTD’s May 26 Compliance Filing in Docket No. ER16-453-002 and direct NTD to file a further compliance filing within 30 days of the date of this order to correct the errors discussed below. NTD’s further compliance filing shall revise its Formula Rate and Protocols:

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<sup>76</sup> DEMEC Protest at 2-4.

<sup>77</sup> American Municipal Power, Inc. Protest at 2.

1. for sake of consistency and clarity with similar edits described above, amend sections 1.d, 3.d, and 8 to add the phrase “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;”
2. ensure that it excludes recovery of Edison Electric Institute dues and all lobbying expenses from its formula rate consistent with the directives of the April 26 Order;<sup>78</sup>
3. because the risks and challenges ROE incentive was denied by the April 26 Order,<sup>79</sup> NTD is directed to exclude all references in its formula rate to any recovery of a 50 basis point ROE incentive for the risks and challenges associated with the Project;
4. revise new subsection 3.d(v) to include the provision “including any changes to such cost allocation methodologies from the prior year, and the reasons and justification for those changes” as directed by the order;<sup>80</sup> and
5. revise Note E so that the language conforms with the Commission’s requirements pertaining to carrying charges for regulatory assets.<sup>81</sup> Specifically, NTD needs to revise Note E so that it provides as follows: “the carrying charge shall not result in a higher amount of interest than is allowed for construction expenditures that accrue an AFUDC, and interest will be compounded no more than on a semi-annual basis.”

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<sup>78</sup> April 26 Order, 155 FERC ¶ 61,097 at P 151.

<sup>79</sup> *Id.* PP 84-89.

<sup>80</sup> *Id.* P 127.

<sup>81</sup> *MidAmerican Transco Central California Transco, LLC*, 147 FERC ¶ 61,179, PP 33-34 (2014); *South Central MCN LLC*, 153 FERC ¶ 61,099, at P 24 (2015); *TransCanyon DCR, LLC*, 152 FERC ¶ 61,017 at PP 32-33, 58. *Revisions to Uniform Systems of Accounts to Account for Allowances under the Clean Air Act Amendments of 1990 and Regulatory-Created Assets and Liabilities and to Form Nos. 1, 1-F, 2, and 2-A*, Order No. 552, FERC Stats & Regs., ¶ 30,967, at 30,825 (1993)(requiring that deferred returns and/or carrying charges accrued on regulatory assets be credited to Account 421, Miscellaneous Nonoperating Income).

The Commission orders:

(A) Rehearing is denied, and clarification granted, as discussed in the body of the order.

(B) NTD is directed to make a further compliance filing, within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.