

122 FERC ¶ 61,135

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Atlantic Path 15, LLC

Docket Nos. ER08-374-000
EL08-38-000

ORDER ACCEPTING AND SUSPENDING PROPOSED TARIFF CHANGES
AND ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued February 19, 2008)

1. This order addresses a proposed tariff change filed by Atlantic Path 15, LLC (Atlantic) on December 21, 2007, to decrease rates that it charges for transmission service over the transmission line upgrade (Path 15 Upgrade) and related substation upgrades to the Path 15 corridor financed by Atlantic. Atlantic requests that the proposed rate decrease be made effective on February 19, 2008, the 60th day after filing. Pursuant to our authority under section 205 of the Federal Power Act (FPA),¹ we accept the proposal for filing, suspend the rates for a nominal period, to become effective on February 20, 2008,² subject to refund, and establish hearing and settlement judge procedures. Additionally, we summarily approve Atlantic's proposed 13.5 percent return on equity, based on the record evidence included in its application. Further, as a matter

¹ 16 U.S.C. § 824d (2000).

² Absent waiver, this is the earliest date that Atlantic's proposed rate can be made effective (*i.e.*, on the 61st day after filing, after 60 days' notice). *See Utah Power & Light Co.*, 30 FERC ¶ 61,015, at 61,024 n.9 (1985) (stating that proposed changes in rates, terms, and conditions cannot become effective (absent waiver) earlier than 60 days' notice to the Commission and that the 60-day notice period required by the Commission's regulations starts to run the first day after the date of the filing); *Central Hudson Gas & Electric Co.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992); *Prior Notice Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 (1993), *clarified*, 65 FERC ¶ 61,081 (1993).

of policy, the Commission finds that, consistent with our prior orders in other regions, it is appropriate to use region-wide proxy groups, with appropriate screening parameters, in applying the discounted cash flow (DCF) method for calculating returns on equity. The Commission finds that use of region-wide proxy groups will simplify rate proceedings, reduce litigation costs and produce reasonable return allowances based on the fact that companies within the same region will typically face similar business risks.

Background

2. The Path 15 Upgrade is an 83-mile, 500-kilovolt (kV) transmission line built along the existing Path 15 corridor in California to relieve a seriously constrained congestion point. The Commission specifically identified the Path 15 corridor as a significant problem area requiring incentives for investment to alleviate costly congestion.³ The Path 15 corridor was identified by the U.S. Department of Energy as a major western transmission bottleneck that had resulted in congestion costs to California energy customers estimated at \$222 million over the 16 months prior to December 2000.⁴ The upgraded Path 15 transmission line went into operation on December 22, 2004, and it added roughly 1,500 megawatts (MW) to the existing 5,400 MW of transmission capacity from southern to northern California, and increased transmission capacity from north to south by about 1,100 MW. It has substantially reduced congestion and its associated costs. On November 20, 2006, the Commission found Atlantic's proposed transmission revenue requirement (TRR) and transmission operator tariff to be just and reasonable, following certain modifications.⁵ Pursuant to a settlement agreement, Atlantic agreed to file rate cases not more than three years apart, starting at the end of the first three-year rate period, and agreed that it would not seek a return on equity (ROE) in excess of 13.5 percent in the first rate case.⁶ The Commission allowed a three-year moratorium on

³ *Removing Obstacles to Increased Electric Generation and Natural Gas Supply in the Western United States*, 94 FERC ¶ 61,272, *reh'g denied*, 95 FERC ¶ 61,225, *order on requests for reh'g and clarification*, 96 FERC ¶ 61,155, *further order on requests for reh'g and clarification*, 97 FERC ¶ 61,024 (2001) (Removing Obstacles Orders)

⁴ U.S. Department of Energy, *National Transmission Grid Study*, at pp. 15, 17, and 22 (May 2002).

⁵ *Trans-Elect NTD Path 15, LLC*, 117 FERC ¶ 61,214 (2006), *reh'g denied* 119 FERC ¶ 61,093 (2007). Trans-Elect changed its name to Atlantic Path 15, LLC, in 2006 and on October 16, 2006, Atlantic submitted, in Docket No. ER07-42, a Notice of Succession to Trans-Elect's tariff and revised tariff sheets reflecting the name change.

⁶ *Western Area Power Administration*, 99 FERC ¶ 61,306, *reh'g denied*, 100 FERC ¶ 61,331 (2002). WAPA owns the new transmission line and associated land.

rate filings and directed Atlantic to file a rate case at the end of the moratorium, including an updated (actual) capital structure for the company.

The Filing

3. On December 21, 2007, Atlantic filed the instant rate decrease application in Docket No. ER08-374-000 pursuant to section 205 of the FPA and section 35.13 of the Commission's regulations.⁷ As noted, Atlantic requests that the rate decrease and related proposed changes become effective February 19, 2008. Atlantic proposes to reduce its TRR to \$32,146,252, which would be a reduction of \$2,774,782 from the current rates on file with the Commission. The proposed TRR was based upon a test year consisting of the 12 months ended December 31, 2006. Atlantic states that its proposed revenue requirement is based upon the company's actual capital structure of 52 percent debt and 48 percent equity. Atlantic requests continuation of its currently approved ROE of 13.5 percent without any suspension, hearing, or refund. Atlantic contends that the 13.5 percent ROE is consistent with the Commission's traditional approach to determining a just and reasonable rate of return and that it would compensate Atlantic for the risks that it took in building a crucial addition to the transmission capacity of the western United States, and eliminating the long-standing Path 15 corridor bottleneck. Atlantic also seeks Commission approval of the amortization in Account 181 (Unamortized Debt Expense) of \$4,500,000 in costs incurred in arranging the upgrade project's debt financing. Atlantic proposes to use Account 186 (Miscellaneous Deferred Debits) to account for distribution of money related to deferred taxes.

Notice of Filing and Responsive Pleadings

4. Notice of Atlantic's filing was issued on December 28, 2007 and published in the *Federal Register* on January 7, 2008, with protests and interventions due on or before January 11, 2008.⁸ Timely motions to intervene and protest were filed by the California Public Utilities Commission (CPUC); Pacific Gas and Electric Company (PG&E); and Southern California Edison Company (SCE). Timely motions to intervene were filed by the City of Santa Clara, California, and the M-S-R Power Agency (City/M-S-R); and the Modesto Irrigation District (MID). Timely, unopposed motions to intervene are automatically granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure,⁹ making the movants parties to this proceeding.

5. On January 28, 2008, Trans Bay Cable, LLC (Trans Bay) filed a late motion to intervene, motion for leave to answer, and answer to the protests filed by CPUC and

⁷ 18 C.F.R. § 35.13 (2007).

⁸ 73 *Fed. Reg.* 1219 (2008).

⁹ 18 C.F.R. § 385.214 (2007).

SCE. We will grant Trans Bay's motion to intervene out-of-time given its interest in this proceeding, the early stage of this proceeding, and the absence of any undue prejudice or delay. Also, Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to a protest unless otherwise ordered by the decisional authority. However, the Commission will accept the answer filed by Trans Bay, because it has provided information that assisted us in our decision-making process

6. Also on January 28, 2008, Atlantic filed a late motion for leave to answer, and an answer, to the protests of CPUC, SCE, and PG&E. For the reasons just set forth concerning Trans Bay's answer, we will allow Atlantic's answer.

7. The intervenors who filed protests raise several concerns about Atlantic's proposed rate changes. CPUC contends that Atlantic's requested TRR is, or may be, overstated in a number of areas by at least \$3.5 million, which would make Atlantic's proposed new transmission rates unjust and unreasonable. CPUC also contends that Atlantic's business in connection with continued operation of the Path 15 Upgrade is "virtually risk free," so that the current 13.5 percent ROE is excessive. CPUC argues that its own preliminary analysis, using a DCF methodology, suggests that a ROE between 9 and 11 percent is appropriate. CPUC also objects to Atlantic's proposed capital structure of 52 percent debt and 48 percent equity, which CPUC contends obscures the fact that Atlantic's capital structure — like the capital structure of its owners — is actually much more highly leveraged.

8. SCE and PG&E oppose Atlantic's request to include in Account 181 the amount of \$4.5 million, to be amortized over 25 years, which Atlantic has described as costs related to the project's debt financing. SCE and PG&E contend that the contested amount is properly described as initial working capital and that its recovery was rejected by the Commission in the order approving the rates for the upgrade.¹⁰ SCE also argues that inclusion of this cost in Account 181 is not consistent with the Commission's Uniform System of Accounts, because it does not consist of expenses related to the issuance or assumption of debt, but is, rather, part of the debt itself. SCE and PG&E also object to the proposed transfer of amounts collected in rate payments and recorded as deferred taxes to retained earnings. PG&E argues that this proposed rate treatment has the effect of increasing the common equity component of the rate of return and increasing Atlantic's rate base. SCE argues that the recording methodology proposed by Atlantic would negate the rate base credit that is normally created for the benefit of the ratepayers, by adding an equal and offsetting rate base debit in Account 186. SCE contends that this proposed treatment of deferred taxes is unjust and unreasonable, because it deprives ratepayers of benefits for the time value of the money collected. Finally, SCE protests Atlantic's use of a test year consisting of the 12 months ended December 31, 2006. SCE

¹⁰ *Trans-Elect NTD Path 15, LLC*, 117 FERC ¶ 61,214 at PP 33-34 (2006).

argues that this will overstate Atlantic's average rate base by ignoring two years of accumulated depreciation.¹¹ SCE contends the Commission should require Atlantic to use a forecast test year, or possibly require it to file a formula rate or levelized rates. SCE requests that the Commission set Atlantic's rate filing for hearing and allow the proposed rate decrease to become effective as soon as possible.

9. Trans Bay requests that the protests of CPUC and SCE be rejected, in that they are attempts to re-litigate matters that have already been resolved, that is, the ROE, the capital structure, and the choice of a test year for setting rates. Trans Bay supports the rate filing of Atlantic. Similarly, Atlantic states that its ROE request is necessary and justified, that its use of its actual capital structure is justified and consistent with Commission precedent, and that the use of a historic test year ending December 31, 2006, is consistent with the Commission's regulations. Atlantic further states that its positions concerning its use of Account 181 for the amortization of additional debt and the treatment of deferred taxes are consistent with the Commission's regulations.

10. Trans Bay contends that SCE and CPUC would have the Commission move in the opposite direction from the directives of Order No. 679¹² and section 219 of the FPA.¹³ According to Trans Bay, adoption of the proposals of SCE and CPUC would have serious adverse impacts not only on Atlantic and its owners, but also on the development and financing of independently-owned transmission projects such as the Path 15 upgrade and the TBC Project.¹⁴ Trans Bay asserts that if SCE and CPUC's arguments are accepted by the Commission, they could have serious adverse impacts on the ability of developers of independently-owned transmission projects to be appropriately compensated for the risks they voluntarily undertake in the development, financing and construction of much-needed transmission projects throughout the United States. Trans Bay additionally asserts that SCE and CPUC's proposals would also have the effect of making it

¹¹ SCE contends that since Atlantic is a single-asset entity, its rate base will continue to decline year by year, unlike the rate bases of most electric utilities, which tend to increase continually as new capital facilities are added.

¹² *Promoting Transmission Investment Through Pricing Reform*, FERC Stats. & Regs. ¶ 31,222 (Order No. 679), *order on rehearing*, FERC Stats. & Regs. ¶ 31,236 (Order No. 679-A) (2006), *order on rehearing*, 119 FERC ¶ 61,062 (2007).

¹³ Pub. L. No. 109-58, § 1241, 119 Stat. 594, 961, *to be codified at* 16 U.S.C. § 824s.

¹⁴ Trans Bay states it is currently constructing an approximately 55-mile, approximately 400-MW high voltage, direct current transmission line and associated facilities to establish a direct connection between PG&E's Pittsburg substation in Contra Costa County and its Potrero Substation within the City of San Francisco (the TBC Project) to address reliability concerns in the greater San Francisco peninsula area.

significantly more difficult to attract new investment in transmission if investors conclude that transmission incentives granted by the Commission can be easily reversed shortly after the new facilities enter service. Trans Bay contends that neither CPUC nor SCE presents any evidence to support what is effectively a dramatic weakening of the rate incentives granted by the Commission after only three years of commercial operations. Trans Bay notes that CPUC opposed the requested ROE for the Path 15 upgrade in the first instance so that its position as set forth in its protest is simply a reiteration of arguments previously made and rejected by the Commission.

11. Trans Bay and Atlantic protest the CPUC's assertion that the Atlantic filing provides no substantive demonstration of Atlantic's capital structure. They contend that CPUC provides no basis to doubt the veracity of Atlantic's actual capital structure but instead argues that the Commission should attribute any debt of Atlantic's upstream owners to Atlantic. Trans Bay notes that limited liability companies are commonly used in the financing of energy infrastructure projects. Finally, Trans Bay and Atlantic disagree with SCE regarding the use of a historical test year and assert that the use of a historic test year in establishing Atlantic's TRR is consistent with the Commission's regulations.

12. In its answer, Atlantic states that its proposed ROE is supported by the Commission's traditional DCF analysis and incentives for new transmission investment, the proposed capital structure reflects Atlantic's actual capital structure, and the resulting ROE and capital structure are well within the ranges supported by Commission precedent. Atlantic states that CPUC does not challenge any specific element of Atlantic's application of the Commission's DCF methodology, and fails to provide any support for its assertion that the requested ROE is unjust and unreasonable. Atlantic also states that CPUC's arguments ignore the benefits the Path 15 upgrade has provided; the Path 15 upgrade continues to provide the benefits of reliability and congestion relief and continues to result in lower rates to consumers in California.¹⁵ Moreover, Atlantic adds, the benefits provided by the Path 15 upgrade outweigh the costs of the requested ROE by a factor of three or more. Atlantic also contends that the requested ROE is entirely consistent with ROEs and incentives that have recently been approved by the Commission in other transmission rate proceedings. Atlantic notes that in several recent proceedings addressing the rates for critical transmission projects, the Commission has affirmed the initial agreement made with investors at the time the rates for those projects

¹⁵ Atlantic cites to Exhibit Nos. ATL -19 and ATL-24.

were initially approved, and continued the ROE and the initial incentives granted those projects to promote investment.¹⁶

13. Atlantic asserts that contrary to CPUC's unsupported assertions, Atlantic could, in fact, be entitled to an ROE greater than the requested 13.5 percent if one were to take into account the 300 basis points of incentive to which Atlantic would be entitled under current Commission policy.¹⁷ Atlantic notes that its DCF analysis based on three different proxy groups all ranged higher than 13.5 percent, and with the inclusion of ITC Holdings, Inc., a pure transmission company consisting of a single asset, ranged up to 18.62 percent.¹⁸

Commission Determination

14. Atlantic's proposed rate change (other than the requested 13.5 percent ROE and the use of a historical test year, each of which are discussed below) raises issues of material fact that cannot be resolved based upon the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. Our preliminary analysis suggests that Atlantic's proposed rates have not been shown to be just and reasonable and may be unjust and unreasonable. Because Atlantic's filing represents a rate decrease, the Commission will exercise its discretion to suspend the revisions to Atlantic's tariff for a nominal period instead of the general five month period and permit the rates to become effective February 20, 2008, subject to refund, the conditions set forth herein, and the outcome of the hearing established in this order.

15. As a preliminary matter, with respect to SCE's argument that the Commission should require Atlantic to use either a projected test year or formula rates, our review indicates that Atlantic's use of a historical test year comports with section 35.13 of the

¹⁶ Atlantic notes that the Commission has twice granted summary disposition and approved the continuation of rate incentive for PG&E's portion of the Path 15 upgrades, and the Commission summarily approved, without a hearing, Michigan Electric Transmission Company's proposed ROE of 13.38 percent which included a 100-basis point adder for independent ownership. *Michigan Electric Transmission Company*, 113 FERC ¶ 61,343 (2005).

¹⁷ Atlantic cites the following ROE adders: 50 basis points for regional transmission organization membership, 200 basis points for the initial investment, and 50 basis points for being an independent transmission company. Atlantic notes that it is limited to 13.5 percent ROE by the June 23, 2003 settlement agreement entered into by Atlantic's predecessor Trans-Elect NTD Path 15, LLC and the CPUC in Docket No. ER02-1672.

¹⁸ See Exh. Nos. ATL-4, ATL-7, ATL-10, and ATL-11.

Commission's regulations.¹⁹ Specifically, section 35.13(a)(2)(A) permits the use of a historical test year for increases of less than \$200,000, and, as noted above, Atlantic is here proposing a rate decrease. Accordingly, SCE's request for use of a different test year is denied.

16. Turning to Atlantic's request for summary approval of its 13.5 percent ROE, we find that it is just and reasonable to allow Atlantic to continue the use of its current ROE. In doing so, we provide below further clarity on our policy regarding the use of region-wide proxy groups for the determination of ROE, the screening parameters to be used in defining the proxy group, and the process by which we can provide up-front certainty to the financial community regarding recovery of investments made in critical infrastructure.

17. In *Western Area Power Administration*,²⁰ we granted Trans-Elect's request for a 13.5 percent rate of return on equity, as an incentive for development of a much needed transmission line in a critically congested area. We stated that our acceptance of the letter agreement was to provide the participants with a way to move forward with the financing of the project upgrade. We also stated that the ROE of 13.5 percent was consistent with what had been granted in the *Removing Obstacles Orders*.

18. It is well-established that the Path 15 upgrades have provided significant rate and service reliability benefits. As the Commission stated in an order denying rehearing of the order accepting the letter agreement to build the Path 15 Upgrade Project, "Path 15 is a uniquely critical path, with transmission limitations that have had serious impacts on the ability to move power over the system."²¹ The Path 15 corridor was identified by the U.S. Department of Energy as a major western transmission bottleneck that had resulted in congestion costs to California energy customers estimated at \$222 million over the 16 months prior to December 2000.²² The Path 15 Upgrade Project has provided and continues to provide significant benefits, including a substantial decrease in actual and potential congestion, along with a substantial increase in system reliability.

19. Furthermore, Atlantic provides detailed testimony that supports its requested continuation of the 13.5 percent ROE, and the use of the single step growth rate in its

¹⁹ 18 C.F.R. § 35.13 (2007).

²⁰ 99 FERC ¶ 61,306 (2002).

²¹ *Western Area Power Administration*, 99 FERC ¶ 61,306 (2002).

²² U.S. Department of Energy, *National Transmission Grid Study*, at pp. 15, 17, and 22 (May 2002).

DCF analysis is consistent with Commission policy.²³ Atlantic's testimony²⁴ provides a detailed analysis demonstrating that its requested return on equity is within the range of reasonable returns developed consistent with Commission policy. As discussed further below, consistent with recent findings in *Bangor Hydro* and *Midwest ISO*,²⁵ we conclude that use of a regional proxy group is appropriate. In *Midwest ISO*, the Commission accepted a proxy group of Midwest ISO transmission owners, in setting an ROE applicable to the participating transmission owners in the Midwest ISO. In *Bangor Hydro*, the Commission utilized a 10-company proxy group made up of northeast utility companies, *i.e.*, transmission-owning entities doing business in the Regional Transmission Organization (RTO) at issue (ISO New England, Inc.), as well as in the broader, but inter-related RTO markets operated by the PJM Interconnection and the New York Independent System Operator, Inc. In consideration of those precedents, we find that Atlantic's proposal to include in its proxy group companies that are within the Western Electric Coordinating Council (WECC) footprint is appropriate.²⁶

20. Atlantic's proposed proxy group comprised 17 investor-owned utilities in the WECC, where the Path 15 Upgrade is located. As part of Atlantic's analysis, it used appropriate screening parameters that include: (1) using only those utilities that are currently paying cash dividends; (2) using utilities that are covered by two generally recognized utility industry analysts; (3) using utilities that had similar senior bond and/or corporate ratings; (4) using utilities that had not announced a merger during the six-month period used to calculate the dividend yields; and (5) using utilities that have both a Thompson Financial First Call growth rate and are covered by Value Line. Employing these screening parameters, the number of companies in Atlantic's proxy group was reduced to nine, with a range of reasonable returns of 7.63 percent to 13.67 percent. Based on this WECC-wide proxy group, we find that the continuation of 13.5 percent ROE is reasonable.

²³ The Commission has previously rejected proposals to apply a two-step DCF model to an electric utility. *See Southern California Edison Co.*, 92 FERC ¶ 61,070, at 61,261-63 (2000) (rejecting SCE's proposal to apply a two-step growth rate, explaining in detail Commission policy on its single-step DCF (for electric utilities) and the model of a two-step DCF (for natural gas companies), and noting the critical differences between these two industries which warrant this distinction).

²⁴ *See, e.g.*, Prepared Direct Testimony of James M. Coyne, Exh Nos. ATL-4 and ATL-7.

²⁵ *See Bangor Hydro Electric Company*, 117 FERC ¶ 61,129 at P 38 (2006) (*Bangor Hydro*), and *Midwest Independent System Operator ROE Order*, 100 FERC ¶ 61,292 at PP 9-12 (2002) (*Midwest ISO*).

²⁶ *See also, Commonwealth Edison*, 119 FERC ¶ 61,238 at P 79 (2007); *Duquesne Light Company*, 118 FERC ¶ 61,087 (2007).

21. The CPUC's position is that, because risk has been reduced since the project upgrade went into operation, a lower ROE is appropriate. We disagree. The continuation of those financial incentives is appropriate in order to compensate investors for taking the risks associated with developing such infrastructure projects. Absent a showing that the continuation of the ROE incentives would result in unjust and unreasonable rates, which, based on our analysis of the evidence in support of the 13.5 percent ROE, is not the case in this filing, we will allow the continuation of incentives initially granted for critically needed infrastructure projects. Moreover, we find that approval of the continuation of the 13.5 percent ROE is consistent with the stated purpose of the recently-enacted section 219 of the FPA,²⁷ the principles set forth in Order No. 679, and recent precedent.²⁸ As we stated in *Trans-Elect NTD Path 15, LLC*,²⁹ the financial community relied upon the Commission's acceptance of certain ratemaking principles concerning rate of return and the inclusion of an income tax allowance associated with a return on equity. We find that, given the need for stability and certainty in the financial community concerning recovery of investments made in critical infrastructure, Atlantic should be allowed to continue the use of a 13.5 percent ROE in developing its TRR. Atlantic has demonstrated that its proposed ROE is sufficiently related to the purposes of the transmission upgrade, and the challenges that Atlantic faced in financing it.³⁰ Accordingly, we will allow the continued use of a 13.5 percent ROE by Atlantic in calculating its TRR and, thus, ROE will not be an issue in the ordered hearing.

22. Additionally, as a matter of policy and consistent with our orders in *Bangor Hydro* and *Midwest ISO*, we find that it is appropriate to use a proxy group with companies from the region in which the utility is located in calculating a ROE using the DCF method.³¹ We find that being located in the same geographic and economic region is a relevant factor to consider in determining whether companies face similar business risks. The Commission has previously found the WECC region to be integrated both electrically and

²⁷ Pub. L. No. 109-58, § 1241, 119 Stat. 594, 961 *to be codified at* 16 U.S.C § 824s.

²⁸ See *Pacific Gas & Electric Company*, 120 FERC ¶ 61,296 (2007), where the Commission summarily accepted PG&E's request for a 50-basis point incentive for participation in the CAISO and a 200-basis point ROE incentive and a 10-year depreciable life for PG&E's share of the Path 15 upgrade.

²⁹ 109 FERC ¶ 61,249, at P 28 (2004).

³⁰ See, e.g., Prepared Direct Testimony of James M. Coyne, Exh. No. ATL-4.

³¹ See *Bangor Hydro Electric Company*, 117 FERC ¶ 61,129 (2006), and *Midwest ISO ROE Order*, 100 FERC ¶ 61,292 (2002).

commercially.³² Nevertheless, we also believe it is appropriate to screen and use in the DCF analysis only those companies that meet the various criteria discussed above to ensure that comparable companies are included in the proxy group.

23. In addition, the use of an established proxy group (such as the WECC-wide proxy group we rely on herein) will allow for an up-front determination of the appropriate ROE for entities seeking general rate changes and those seeking incentive rates under Order No. 679 or those requesting continuation of an incentive, such as Atlantic in the instant filing. We believe that this approach will provide a significant measure of regulatory certainty in the determination of the appropriate ROE and improve the Commission's ability to decide cases quickly for entities seeking financing of necessary infrastructure. Further, we believe this approach will simplify rate proceedings and reduce litigation costs, while still producing reasonable ROE allowances. Finally, this approach is consistent with the evolution of our precedents in this area, particularly our orders in *Bangor Hydro* and *Midwest ISO*.

Hearing and Settlement Judge Procedures

24. Should it be determined that Atlantic's proposed transmission rates are unjust and unreasonable, the Commission would need to institute an investigation of Atlantic's proposed transmission rates pursuant to section 206 of the FPA in order to allow lower rates to be effective. Accordingly, the Commission will institute a proceeding in Docket No. EL08-38-000, and it will establish a refund effective date. When the Commission institutes a section 206 proceeding on its own motion, section 206(b) of the FPA, as recently amended by section 1285 of the Energy Policy Act of 2005,³³ requires the Commission to establish a refund effective date that is no earlier than publication of the notice of its initiation of the proceeding, but no later than five months after that date. The

³² See, e.g., *Order on the California Comprehensive Market Redesign Proposal*, 100 FERC ¶ 61,060, at P 2 (2002) ("We cannot rule in isolation on the California market design, as California is an integral part of a trade and reliability region in the West. Because of this interdependency of market and infrastructure, conditions in and changes to the California market affect the entire region"); *Order Removing Obstacles to Increased Electric Generation and Natural Gas Supply in the Western United States*, 94 FERC ¶ 61,272 at 61,973 (2001) ("In Order No. 2000, the Commission recognized that many of the economic and reliability issues confronting the electric industry could only to [*sic*] be addressed on a regional basis. . . . Any long-term solution to address the crisis and, more importantly, to prevent its recurrence, must be developed on a west wide basis") (footnote omitted).

³³ Pub. L. No. 109-58, § 1285, 119 Stat. 594, 980-981.

Commission will establish a refund effective date in this proceeding to be the date of publication of the notice of initiation of the investigation in the *Federal Register*.

25. Section 206(b) also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of the section 206 proceeding, whichever is earlier, the Commission shall state the reason why it has failed to render such a decision and state its best estimate when it reasonably expects to make such a decision. To implement that requirement, we will direct the presiding administrative law judge (judge) to provide a report to the Commission no later than 15 days in advance of the refund date in the event the presiding judge has not by that date: (1) certified to the Commission a settlement which, if accepted, would dispose of the proceeding; or (2) issued an initial decision. The judge's report, if required, shall advise the Commission of the status of the investigation and provide an estimate of the expected date of certification or a settlement or issuance of an initial decision.

26. While we are setting this matter for a trial-type evidentiary hearing, we encourage participants to make every effort to settle this dispute 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.³⁴ If the parties desire, they may by mutual agreement request a specific judge as a settlement judge in the proceeding; otherwise the Chief Judge will select a judge for this purpose.³⁵ The settlement judge shall report to the Chief Judge and to 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 continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

Tariff Sheet

27. Finally, Atlantic's proposed tariff sheet lists its Transmission Revenue Balancing Account Adjustment (TRBAA) as \$517,398 for the twelve month period effective January 1, 2008. However, we note that on December 28, 2007 in Docket No. ER08-144-000, the Commission accepted Atlantic's proposed tariff sheet which revised the

³⁴ 18 C.F.R. § 385.603 (2007).

³⁵ If the parties decide to request a specific judge, they must make a joint request to the Chief Judge by telephone at (202) 502-8500 within five days of the date of this order. The Commission's web site contains a list of Commission judges and a summary of their backgrounds and experience (www.ferc.gov – click on Office of Administrative Law Judges).

TRBAA to a credit of \$226,804.³⁶ We therefore direct Atlantic to submit a corrected tariff sheet within 30 days of the issuance of this order.

The Commission orders:

(A) Atlantic Path 15, LLC's proposed tariff sheets are accepted for filing and suspended for a nominal period, to become effective February 20, 2008, subject to refund, as discussed in the body of this order.

(B) 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 Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure, and the regulations under the Federal Power Act (18 C.F.R. Part I), a public hearing shall be held concerning Atlantic Path 15, LLC's proposed rates. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2007), the Chief Administrative Law Judge is directed to appoint a settlement judge in this proceeding within fifteen (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 five (5) days of the date of this order.

(D) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and with the Chief Judge on the status of 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 sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) 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 fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in this proceeding in a hearing room of the Commission, 888 First Street, N.E., Washington, D.C. 20426. Such conference shall be to establish a procedural schedule. The presiding

³⁶ Letter Order dated December 28, 2007, 121 FERC ¶ 61,302 (2007).

judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Rules of Practice and Procedure.

(F) Atlantic is hereby directed to file a corrected tariff sheet within 30 days of the issuance of this order, as discussed above.

(G) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of section 206 proceedings in Docket No. EL08-38-000.

(H) The refund effective date established pursuant to section 206(b) of the Federal Power Act will be the date of publication in the *Federal Register* of the notice discussed in Ordering Paragraph (G) above.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.