

135 FERC ¶ 61,141  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
John R. Norris, and Cheryl A. LaFleur.

Green Power Express LP

Docket Nos. ER09-681-000  
ER09-681-001

ORDER DENYING REQUESTS FOR CLARIFICATION AND REHEARING, AND  
APPROVING A PROPOSED SETTLEMENT AGREEMENT

(Issued May 19, 2011)

1. This order addresses the requests for rehearing and clarification of the Commission's April 10, 2009 order,<sup>1</sup> which, among other things, conditionally authorized transmission rate incentives for a proposed transmission project (Project) by Green Power Express LP (Green Power). Green Power proposes to build approximately 3,000 miles of 765 kV transmission lines in the Midwest, which is designed to facilitate the interconnection of nearly 12,000 MW of new wind generation. The order also addresses a proposed settlement agreement between Green Power and several parties regarding Green Power's proposed formula rate. As set forth below, we deny the requests for rehearing and clarification, and approve the proposed settlement agreement.

**I. Background**

2. On February 9, 2009, Green Power filed, under sections 205 and 219 of the Federal Power Act (FPA)<sup>2</sup> and Order No. 679,<sup>3</sup> a request for approval of various transmission infrastructure investment incentives, certain accounting treatments, and new

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<sup>1</sup> *Green Power Express LP*, 127 FERC ¶ 61,031 (2009) (April 10 Order).

<sup>2</sup> 16 U.S.C. § 824d (2008).

<sup>3</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).

*pro forma* tariff sheets that include a formula rate for transmission service. Green Power requested the following incentives and accounting treatments: (1) recovery of costs of abandoned facilities; (2) deferred recovery for start-up, development and pre-construction costs through the creation of regulatory assets; (3) 100 percent construction work in progress (CWIP) in rate base; (4) a hypothetical capital structure of 60 percent equity and 40 percent debt; and (5) a 160 basis point incentive Return on Equity (ROE) adder (50 basis points for participating in a Regional Transmission Organization (RTO), 100 basis points for being an independent transmission-only company, and 10 basis points for the risks and challenges related to the Project).

3. Green Power requested an overall ROE of 12.38 percent, which includes the 160 basis point incentive adder. Green Power supported its request with a Discounted Cash Flow (DCF) analysis showing a median ROE of 10.78 percent. In addition, Green Power requested that the Commission accept for filing a formula rate structure under which the costs of the Project will ultimately be recoverable through the applicable open access transmission tariffs of Midwest Independent Transmission System Operator, Inc. (Midwest ISO) and PJM Interconnection, L.L.C. (PJM).

4. As required by section 219 of the FPA and Order No. 679, Green Power provided evidence to support a finding that the Project would ensure reliability and/or reduce the cost of delivered power by reducing transmission congestion. In particular, Green Power provided a study intended to show that its Project was necessary to handle the more than 62 GW of proposed wind capacity that was in the Midwest ISO interconnection queue. Green Power argued that its Project was the best available option to meet this need. Green Power further claimed that the Project would help to ensure reliability in Midwest ISO by creating much needed system redundancy and additional transmission pathways for unexpected power flows. Additionally, Green Power asserted that it met the Commission's nexus test under Order No. 679, which requires an applicant to show a nexus between the requested incentives and the investment being made.

5. In the April 10 Order, the Commission found that Green Power satisfied the requirements of section 219 and Order No. 679 and, thus, conditionally granted the request for transmission infrastructure incentives. The Commission noted, however, that Green Power will have to make future filings before it can recover any incentive rate costs from customers. In addition, the Commission stated that the granting of incentives does not prejudice the findings of any Commission-approved transmission planning process or the siting procedures at state Commissions that will evaluate the Project before it is built. The Commission also granted Green Power's overall ROE of 12.38 percent, which reflected a base ROE of 10.78 percent and the 160 basis points that were conditionally authorized as incentives. Finally, the Commission found that Green Power's formula rates and rate protocols raised issues of material fact, accepted them subject to refund, and set the matter for a trial-type evidentiary hearing and settlement judge procedures.

6. On February 22, 2010, Green Power filed an Offer of Settlement (Settlement) in Docket No. ER09-681-000. The Settlement is intended to resolve all issues that the Commission set for hearing in the April 10 Order and includes as attachments revised *pro forma* tariff sheets with Green Power's proposed formula rate template and associated revised implementation protocols (Protocols). The revised Protocols set up a formal review process regarding Green Power's annual projected revenue requirement and true-up updates, which includes a requirement for Green Power to make annual informational filings with the Commission. The Settlement also states that the effective date of Green Power's proposed *pro forma* tariff sheets is deferred until Green Power meets all the conditions in the April 10 Order, including but not limited to the condition that the Project is approved by a Commission-approved regional transmission planning process.<sup>4</sup>

## **II. Requests for Rehearing and Responsive Pleadings**

7. Several parties filed requests for rehearing and/or clarification of the April 10 Order. These parties are: Alliant Energy Corporate Services, Inc. (Alliant); American Municipal Power-Ohio, Inc. (AMP-Ohio); FirstEnergy Corporation and Old Dominion Electric Cooperative (together, FirstEnergy);<sup>5</sup> Indiana Utility Regulatory Commission (Indiana Commission); Integrys Energy Group (Integrys); Minnesota Public Utilities Commission and Minnesota Office of Energy Security (collectively, Minnesota Agencies); Old Dominion; the Public Service Commission of Wisconsin (Wisconsin Commission); and Xcel Energy Services, Inc. (Xcel).<sup>6</sup>

8. On May 8, 2009, the ISO/RTO Council<sup>7</sup> filed a motion to intervene out of time and a request for clarification of the April 10 Order. ISO/RTO Council requests to

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<sup>4</sup> On April 13, 2010, Settlement Judge David H. Coffman issued a Report on Offer of Settlement in Docket No. ER09-681-000.

<sup>5</sup> Old Dominion Electric Cooperative (Old Dominion) also submitted a separate request for rehearing and/or clarification.

<sup>6</sup> Xcel filed its request for rehearing on behalf of itself and its utility operating company affiliates, the Northern States Power Companies. Collectively, they will be referred to as Xcel in this order.

<sup>7</sup> The ISO/RTO Council includes: Alberta Electric System Operation, California Independent System Operator, Electric Reliability Council of Texas, Independent Electricity System Operator of Ontario, Inc., ISO New England, Inc., Midwest ISO, New York Independent System Operator, Inc., PJM, Southwest Power Pool, Inc., and New Brunswick System Operator.

intervene out of time “because only upon review of the Commission’s April 10 Order did the [ISO/RTO Council] become aware, given some of the holdings in that Order, of the potential broad reaching implications of the Commission’s April 10 Order on the regional transmission expansion planning processes of all transmission providers under the Commission’s jurisdiction. This determination is of significant interest to the [ISO/RTO Council] and was not known to it earlier in the process.”<sup>8</sup> Two members of the ISO/RTO Council, Midwest ISO and PJM are already parties to the proceeding.

9. Green Power filed an answer to the requests for rehearing and/or clarification on May 26, 2009.

### **III. Discussion**

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

10. We deny ISO/RTO Council’s motion to intervene out of time. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. A moving party bears a high burden to demonstrate good cause for allowing late intervention.<sup>9</sup> We find that the ISO/RTO Council has not met that burden and, thus, deny its untimely motion to intervene. We note, however, that clarifications sought by the ISO/RTO Council have been sought by other parties in this proceeding and, thus, are addressed below.

11. Rule 713(d)(1) of the Commission’s Rules of Practice and Procedure<sup>10</sup> generally prohibits an answer to a request for rehearing. Accordingly, we deny Green Power’s motion to file an answer and will not consider its answer in this proceeding.

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<sup>8</sup> ISO/RTO Council Motion to Intervene Out of Time at 4.

<sup>9</sup> See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003); *H.Q. Energy Serv. (U.S.), Inc. v. New York Indep. Sys. Operator, Inc.*, 100 FERC ¶ 61,028, at 61,072 (2002); *North Baja Pipeline LLC*, 99 FERC ¶ 61,028, at 61,109-10 (2002); *Florida Power & Light Co.*, 99 FERC ¶ 61,318, at 62,358 (2002).

<sup>10</sup> 18 C.F.R. § 385.713(d)(1) (2010).

**B. Rehearing****1. Impact on State and Regional Planning Processes****a. April 10 Order**

12. In the April 10 Order, the Commission addressed numerous concerns about how its determination regarding transmission incentives impacted the regional planning process and/or state regulatory processes. The Commission noted that while the Project would have to be evaluated by the relevant Commission-approved transmission planning processes, “such an evaluation is not a prerequisite to the Commission granting incentives.”<sup>11</sup> The Commission also stated that a determination on Green Power’s request for incentives “does not prejudge the findings of a particular transmission planning process or the siting procedures at state commissions.”<sup>12</sup> The Commission in the April 10 Order also stated that its decision to grant incentives will not change how projects are considered under existing transmission planning initiatives and will not have an impact on existing projects that have already been incorporated into a transmission provider’s expansion plans.<sup>13</sup>

**b. Requests for Rehearing and Clarification**

13. Numerous parties request rehearing or seek clarification on whether and how the April 10 Order impacts state regulatory or regional transmission planning processes. Indiana Commission, as well as other parties, question whether the Commission’s decision to grant incentives may override or interfere with the regional transmission planning process or the state regulatory process. Indiana Commission seek clarification on: (1) whether Green Power can proceed with construction of the Project, even if the Project is not approved in the regional transmission planning processes; (2) whether the Commission’s approval of the Project establishes precedent that would obviate the need for future review by regional transmission planning entities; (3) whether the Commission’s approval of incentives for the Project equates to the Commission’s approval of the Project itself; (4) whether the Commission’s approval of incentives for the Project create a presumption in favor of approval of the Project, either by the Commission or by the relevant RTOs; and (5) whether the Commission’s approval of incentives for the Project creates a presumption in favor of any subsequent rate or tariff filing by Green Power. Indiana Commission also asked whether the Project would be

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<sup>11</sup> April 10 Order, 127 FERC ¶ 61,031 at P 42.

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

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

eligible for rate recovery and incentives if the Project is reconfigured to make the lines more optimal within an RTO.

14. Alliant, AMP-Ohio, FirstEnergy, Minnesota Agencies, Wisconsin Commission and Xcel raise similar concerns in their requests for rehearing. Several parties assert that the Commission's decision to grant incentives disrupts and controverts the regional transmission planning process under Order No. 890. Alliant and other parties question how the Commission could have granted incentives when the proposed Project has not been vetted by the applicable regional transmission planning processes. Minnesota Agencies predict that the failure to vet the Project as part of a regional transmission planning process may lead to negative, unintended consequences. Integrys notes that the Project may not be the most economic or the planning process may reveal that other projects are better suited to protecting reliability and reducing congestion. It further asserts that the Commission has no ability to determine which project, if any, is best suited to addressing reliability concerns in the Midwest ISO. Integrys claims that the Commission would need cost benefit analysis to determine which project is best suited to address reliability concerns.

15. Xcel raises concerns about how the Project will be evaluated against other competing projects in the regional transmission planning process. Several parties question whether the Commission's approval of the Project precludes the possibility that other projects will also be considered in the planning process or whether it creates an undue preference for the Project in the planning process. Wisconsin Commission states that there is an issue as to the deference in planning, if any, that should be accorded by a RTO to the April 10 Order's findings respecting reliability and economics under section 219 of the FPA.

16. Wisconsin Commission seeks clarification regarding the language in the Ordering Paragraph (A), where the Commission found that the effective date of Green Power's proposed tariff sheets will be deferred until the Project is approved by a Commission-approved regional transmission planning process and the Commission approves a cost allocation mechanism for the Project.<sup>14</sup> Wisconsin Commission requests that the

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<sup>14</sup> April 10 Order, 127 FERC ¶ 61,031 at Ordering Paragraph (A) states:

Green Power's proposed *pro forma* tariff sheets are hereby conditionally accepted for filing, suspended and set for hearing and settlement judge procedures, as described below. The effective date for the proposed *pro forma* tariff sheets is deferred until the Green Power Project: (1) is approved by a Commission-approved regional transmission planning processes; and (2) the Commission approves a cost allocation mechanism for the Project, as discussed more fully above.

Commission clarify that the ordering paragraph should have also required that the Project be approved by applicable state commission before the *pro forma* tariff sheets can take effect.

**c. Commission Determination**

17. Parties question the Commission's decision to grant incentives prior to the Project being vetted through a regional transmission planning process or by a state commission and, thus, argue that the request for incentives is premature. We deny those requests for rehearing. As the Commission noted in the April 10 Order, our authority to grant transmission incentives is not limited by whether a project has started or completed the regional transmission planning process or whether it has been approved by a state regulatory or siting commission. Rather, as the Commission stated in Order No. 679, "we will not require participation in regional planning processes as a precondition for obtaining incentives, as section 219 does not require such a precondition."<sup>15</sup> The April 10 Order is consistent with that policy and, thus, we will not grant rehearing.

18. We reiterate the Commission's statements in Order No. 679<sup>16</sup> and in the April 10 Order,<sup>17</sup> that the decision not to make participation in a regional transmission planning process a precondition for obtaining incentives is not meant to diminish or undermine the importance of the regional transmission planning or state commission review process. On the contrary, as the Commission stated in Order No. 679, the "[r]egional planning processes can help determine whether a given project is needed, whether it is the better solution, and whether it is the most cost-effective option in light of other alternatives (e.g., generation, transmission and demand response)."<sup>18</sup> The findings in the April 10 Order do not alter our belief in the important role of the regional transmission planning and state review processes.

19. The April 10 Order also does not diminish the need for the Project to be vetted in a regional transmission planning process and by state regulatory commissions. As the Commission noted in the April 10 Order, Green Power acknowledged that the Project must be evaluated through relevant Commission-approved regional transmission planning processes and must receive approvals and siting authorizations in various combinations

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<sup>15</sup> Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 58.

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

<sup>17</sup> April 10 Order, 127 FERC ¶ 61,031 at P 42.

<sup>18</sup> Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 58.

from seven states prior to being built.<sup>19</sup> In addition, Midwest ISO has confirmed that Green Power submitted the Project into the Midwest ISO Commission-approved regional transmission planning process and that any Commission action will not change how Midwest ISO evaluates the Project.<sup>20</sup> Given these facts, we anticipate that the Project will be reviewed by the relevant regional transmission planning process and/or state regulatory commissions.

20. Furthermore, the April 10 Order did not modify or otherwise controvert the review that will be conducted in any regional transmission planning process or by any state regulatory commission. Thus, while the Commission approved the rate incentives for the Project in the April 10 Order, Green Power's authority to construct the Project is not affected by the April 10 Order. As the Commission stated in the April 10 Order, granting an incentive request does not "prejudge the findings of a particular transmission planning process or the siting procedures at state commissions."<sup>21</sup> Such approval also does not indicate a preference for the Project over any other project. As the Commission has previously stated,<sup>22</sup> the appropriate forum to address whether one or more competing transmission projects should be built is through the regional planning process and the appropriate state siting process. The decision on which project should be built will be based on the rules, regulations, and laws that govern those processes.

21. As the Commission stated in *Tallgrass*, the Commission "reviews each request for incentives on its own merits and on a case-by-case basis."<sup>23</sup> The only project before the Commission is the one proposed by Green Power. Thus, the April 10 Order only addressed whether this specific project meets the requirements for incentives under Commission policy.

22. We also recognize that, as the Project is evaluated through the relevant regional transmission planning and state regulatory processes, there may be changes to the Project. However, as the Commission found when addressing similar concerns in *Pioneer Transmission LLC*, we clarify that such changes will not necessarily alter the basis upon

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<sup>19</sup> April 10 Order, 127 FERC ¶ 61,031 at P 23, 42.

<sup>20</sup> *Id.* P 42.

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

<sup>22</sup> See, e.g., *Tallgrass Transmission, LLC*, 125 FERC ¶ 61,248, at P 57 (2008) (*Tallgrass*).

<sup>23</sup> *Id.* P 42 (citing *Pacific Gas & Elec. Co.*, 123 FERC ¶ 61,067 (2008); *Central Maine Power Co.*, 125 FERC ¶ 61,079 (2008)).

which the Commission granted transmission incentives in the April 10 Order.<sup>24</sup> If the Project is modified in a manner that renders invalid the basis for granting the transmission incentives in the April 10 Order, Green Power should seek approval of changes in the subsequent section 205 filing.<sup>25</sup> Likewise, to the extent it is believed that the Project is modified in a manner that renders invalid the basis for the transmission incentives that the Commission authorize in the April 10 Order, an entity or the Commission may raise its concerns when the section 205 filings are made to incorporate actual tariff sheets into the Midwest ISO and/or PJM tariffs,<sup>26</sup> or in a section 206 proceeding.<sup>27</sup> Thus, we deny as premature the requests for clarification regarding whether the Project will be eligible for rate recovery and incentives if it is reconfigured during the regional transmission planning processes.

23. We also will reject arguments that the Commission erred by not conducting a cost-benefit analysis of the Project. The Commission in Order Nos. 679 and 679-A decided that applicants for incentive-based treatments do not have to provide a cost-benefit analysis.<sup>28</sup> We find the parties' arguments regarding the need for a cost-benefit analysis to be a collateral attack on these orders.

24. Finally, we will deny as unnecessary Wisconsin Commission's request that the Project be approved by the applicable state regulatory processes before the proposed *pro forma* tariff sheets can take effect. The Commission found that the effective date for the proposed *pro forma* tariff sheets is deferred until the Project: (1) is approved by a

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<sup>24</sup> 130 FERC ¶ 61,044, at P 21 (2010) (*Pioneer*).

<sup>25</sup> Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 78, "If an applicant obtains a declaratory order and the proposal changes from the facts on which the declaratory order was issued, the applicant may seek another declaratory order or wait to seek approval of the changes in the subsequent section 205 filing. In that event, interested parties may challenge the changes in the section 205 proceeding."

<sup>26</sup> As the Commission noted in the October 10 Order, Green Power filed *pro forma* tariff sheets, which will need to be replaced by actual tariff sheets. Green Power acknowledged that there will need to be a future filing under section 205 or 206 of the FPA before any tariff sheets are incorporated into the Midwest ISO and/or PJM tariffs. (April 10 Order, 127 FERC ¶ 61,031 at P 104).

<sup>27</sup> 16 U.S.C. § 824e (2006).

<sup>28</sup> Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 65; Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 35-40.

Commission-approved regional transmission planning processes; and (2) the Commission approves a cost allocation mechanism.<sup>29</sup> However, regardless of when the *pro forma* tariff sheets take effect, Green Power has acknowledged that it will need to obtain approval from applicable state regulatory authorities before the Project can be built, including from the Wisconsin Commission.<sup>30</sup> In addition, as we reiterate above, the April 10 Order did not modify or otherwise controvert the review that will be conducted by any state regulatory commission. The Commission also required Green Power to make future filings before it would be able to recover any costs from customers under the formula rate in its proposed *pro forma* tariff sheets.<sup>31</sup> Therefore, Wisconsin Commission will have the opportunity to raise any concerns about the Project both through its own regulatory process at the state level and in future proceedings at the Commission.

## 2. Reliability or Congestion Requirements

### a. April 10 Order

25. In the April 10 Order, the Commission found that Green Power “adequately demonstrated that the Project will ensure reliability and/or reduce the cost of delivered power by reducing transmission congestion and, thus, meets the requirements of section 219.”<sup>32</sup> In particular, the Commission noted that Green Power provided a study that analyzed the existing transmission system in the region, the amount of generation in Midwest ISO’s generation interconnection queue, future renewable energy expansion scenarios, and existing renewable portfolio standards in various states. Based on its analysis, Green Power established a target of improving transfer capability in the region by approximately 12,000 MW.<sup>33</sup>

26. The Commission found in the April 10 Order that Green Power’s analysis showed that its proposed Project would provide a robust transmission backbone that would provide reliability and congestion benefits. Among these benefits, the Commission noted that the Project would: (1) reduce congestion in the future by facilitating the integration of wind energy in the upper Midwest; (2) ensure reliability by providing a robust transmission backbone that is capable of transmitting large amounts of power; and

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<sup>29</sup> April 10 Order, 127 FERC ¶ 61,031 at Ordering Paragraph (A).

<sup>30</sup> *See id.* P 23.

<sup>31</sup> *Id.*, Ordering Paragraph (B).

<sup>32</sup> *Id.* P 38.

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

(3) improve the voltage profile of underlying lower voltage networks.<sup>34</sup> Additionally, the Commission found that the Project would help to relieve congestion on the paths identified in the 2006 Department of Energy Congestion Report.<sup>35</sup>

**b. Request for Rehearing**

27. Several parties argue that Green Power failed to satisfy the requirement under section 219 and Order No. 679 to provide proof that the Project will improve reliability or reduce the cost of delivered power. For example, Integrys argues that the record does not support the Commission's findings that the Project will provide reliability benefits and reduce congestion. Specifically, Integrys argues that: (1) Green Power acknowledged that additional studies will be needed to determine the Project's reliability benefits, including how the Project will impact the existing 345 kV system; (2) there was insufficient evidence to find that the existing 345 kV could not handle unexpected power flows or that there is a present reliability need on the existing system; and (3) the Project has not been fully analyzed and vetted by a Commission-approved regional transmission planning process and, thus, the findings are incomplete. Based on these assertions, Integrys claims that the Commission's decision was arbitrary and capricious.

28. Alliant, AMP-Ohio, Minnesota Agencies, Wisconsin Commission, and Xcel make similar arguments regarding the Commission's expedited consideration and approval of the Project. They assert that such expedited consideration did not allow time for the Project to be incorporated into established Commission-approved transmission planning processes in order to ascertain the true impacts and benefits of the Project on the overall transmission system in the region.

29. FirstEnergy suggests that the Commission violated section 219 and Order No. 679 by "rubber stamping" Green Power's application. FirstEnergy notes that the Commission found that the Project will be able to handle unexpected energy flow and will unload existing lower voltage networks in the Midwest ISO,<sup>36</sup> but FirstEnergy asserts that the addition of any 765 kV transmission would have these attributes. It further questions how the testimony of an engineer-employee of the applicant, along with generic observations about potential renewable generation and regional transmission to serve that generation is sufficient to meet the requirements of section 219.

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<sup>34</sup> *Id.* P 40-41.

<sup>35</sup> *Id.* P 41.

<sup>36</sup> FirstEnergy Request for Rehearing at 12-13 (citing April 10 Order, 127 FERC ¶ 61,031 at P 40).

30. Integrys also argues that there are disputed issues of material fact regarding the Commission's finding on reliability and, thus, argues that the Commission erred by not requiring a hearing to develop additional evidence. Specifically, Integrys claims that there are disputed facts related to whether the Project: (1) actually solves a current reliability need; (2) is the best (i.e., most economical) project to resolve future reliability or congestion issues; and (3) would cause other reliability issues on the existing 345 kV system that would not occur if direct-current (DC) lines were built instead of Green Power's proposed alternating-current (AC) lines. Integrys argues that the record should remain open at least until the results of a Commission-approved regional transmission planning process have been completed, which will allow parties to raise these factual issues at a later time.

31. Integrys further claims that the Commission erred by granting the incentives under section 219 instead of section 205 of the FPA. Integrys notes that the Commission has inherent authority under section 205 to grant transmission incentives and, unlike section 219, it does not require a showing that the Project will improve reliability or reduce the cost of delivered power. Integrys requests that the Commission consider granting the incentives under section 205.

**c. Commission Determination**

32. We deny the request for rehearing of the finding in the April 10 Order that the Project meets the requirements of section 219 and Order No. 679. Contrary to the assertions of FirstEnergy, the Commission did not "rubber stamp" Green Power's application for transmission incentives. The Commission in the April 10 Order carefully analyzed the Project vis-à-vis the current and projected needs of the transmission system in the region, which is expected to need approximately 25,000 MW of new renewable resources in the next 10 to 15 years to comply with renewable portfolio standards.<sup>37</sup> Green Power provided an engineering affidavit and detailed studies showing that the Project would reduce congestion in the region and improve reliability. The Commission stated that Green Power's evidence showed that the Project will: "(1) reduce congestion in the future by facilitating integration and delivery of low-cost wind energy in the upper Midwest; (2) ensure reliability by providing a robust transmission backbone that is capable of moving large amounts of power and handling unscheduled flows; and (3) improve the voltage profile of underlying lower voltage networks."<sup>38</sup>

33. The parties requesting rehearing do not dispute that the addition of 12,000 MW of transfer capability would improve reliability or reduce congestion in the region. Nor do

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<sup>37</sup> April 10 Order, 127 FERC ¶ 61,031 at P 39.

<sup>38</sup> *Id.* P 41 (citations omitted).

they challenge whether there will be a significant increase of renewable generation in the region or the inadequacies of the current transmission system to handle this increased amount of generation. Rather, the parties argue that the Commission's approval of the incentives application was premature because the Project has not been fully studied and has not been vetted through a Commission-approved regional transmission planning process or by a state commission. They also argue that additional studies will be needed to determine the true impacts or benefits of the Project on the regional transmission system.

34. The Commission addressed these issues in the April 10 Order. Green Power acknowledged that the Project will have to undergo further detailed studies as part of the planning review process and these studies will likely require Green Power to make some modifications to the Project. These facts, however, do not undermine the initial study or the reliability and congestion benefits that were clearly evident in that study. Green Power, as the Commission stated in the April 10 Order, "made an adequate showing to satisfy the requirements of section 219."<sup>39</sup> Parties have presented no new arguments or raised any new facts to persuade us to reconsider our findings in the April 10 Order.

35. Further, the Commission stated in the April 10 Order, "[w]e disagree with commenters that believe Green Power's filing is premature. Although Green Power acknowledges that the Project will have to be evaluated through a Commission-approved transmission planning process, such evaluation is not a prerequisite to the Commission granting incentives."<sup>40</sup> The Commission further stated that its decision to grant incentives does not prejudice the findings of a particular transmission planning process or relevant state authorities and will not change their rules for evaluating projects.<sup>41</sup> This determination is consistent with Commission precedent and we find no basis to change it here.

36. We also disagree with the claim that Green Power's request for incentives should have been set for hearing because there were disputed issues of material fact. While parties assert that the Commission should have held hearings to determine whether the Project was the most economic or best solution, as we discuss above, that is not relevant to our review under Order No. 679. Nor do we need to determine whether DC lines would provide superior reliability benefits than the AC lines Green Power has proposed. That issue and the facts surrounding that issue will be reviewed in the regional transmission planning processes and by state regulatory authorities. The decisions about

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* P 42.

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

which projects should be built do not change our finding that the Project as a whole will ensure reliability and reduce congestion in the region.

37. Finally, we disagree with Integrys's claim that the Commission erred by granting incentives under section 219 instead of section 205 of the Federal Power Act. Green Power requested incentive rate treatment under section 205 or, in the alternative, section 219 of the FPA. The Commission determined that Green Power satisfied the requirements of section 219 and, accordingly, granted incentive rate treatment pursuant to that provision.

### 3. Nexus

#### a. April 10 Order

38. In the April 10 Order, the Commission found that Green Power had satisfied the nexus test as outlined in Order No. 679-A, which requires the Commission to analyze the relationship between the total package of incentive being sought and the demonstrable risks and challenges being faced by the applicant proposing a project. As part of that inquiry, the April 10 Order noted that the Commission has found the question of whether a project is "routine" to be particularly probative. The Commission in the April 10 Order analyzed and found that the Project satisfied the nexus test for each incentive being sought.<sup>42</sup>

#### b. Requests for Rehearing and Clarification

39. FirstEnergy argues that the Commission erred by finding a nexus between the incentives being sought and the investment being made by Green Power. In particular, FirstEnergy argues that Green Power did not show how the receipt of incentives, individually or as a package, would have impacted Green Power's ability to obtain financing. It claims that the simple assertion that Green Power intends to build a large scale project is not sufficient to meet the requirements of Order No. 679.

40. FirstEnergy also questions how the Commission could have found a nexus when it is unclear who will ultimately own or develop the Project. For example, FirstEnergy claims that it is impossible to determine whether a 60/40 equity/debt structure is appropriate and necessary to encourage transmission development without knowing the identity of Green Power's partners and eventual owners of the Project. Similarly, FirstEnergy questions how the Commission could determine the reasonableness of the proxy group and the requested 12.38 percent ROE without knowing the ultimate owners of the Project.

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<sup>42</sup> *Id.* P 44-46.

**c. Commission Determination**

41. Contrary to FirstEnergy's claims, Green Power provided sufficient evidence to show that it was entitled to incentives because of the size of the project. Green Power's application provided substantial evidence regarding the nexus between each requested incentive and the risks and challenges associated with the Project. Green Power adequately supported its request for CWIP by providing evidence that approval of CWIP would improve cash flow, lower borrowing costs and result in better rate stability for customers. Similarly, Green Power provided evidence showing that the abandoned plant incentive was warranted to offset numerous regulatory and governmental risks and to provide potential investors with an opportunity to recover some of their investment if the Project is abandoned for reasons beyond Green Power's control. This evidence satisfied the requirements of Order No. 679.

42. We also reject arguments that the Commission erred by finding a nexus when it is unclear who will ultimately own or develop the Project. While the Green Power partnership may change in the future, the Commission did not base its determination on a future hypothetical company. Rather, the Commission based its determination on the Green Power partnership at the time of its application. The parties have not provided us with a basis for revisiting that decision on rehearing.

**4. Return on Equity and Incentive Adders**

**a. April 10 Order**

43. In the April 10 Order, the Commission granted the Project three ROE incentive adders totaling 160 basis points. The three adders for the Project are: (1) a 10 basis point incentive adder in recognition of the size, scope, benefits, risks and challenges of the Project;<sup>43</sup> (2) a 50 basis point ROE adder for Green Power's participation in an RTO;<sup>44</sup> and (3) a 100 basis point adder in recognition of Green Power's status as independent transmission-only company.<sup>45</sup> These three ROE adders totaling 160 basis points were added to Green Power's requested base ROE of 10.78 percent and, thus, provided Green

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<sup>43</sup> April 10 Order, 127 FERC ¶ 61,031 at P 80.

<sup>44</sup> *Id.* P 85 (effective on the date Green Power becomes a transmission-owning member of an RTO and places the Project under an RTO's operational control).

<sup>45</sup> *Id.* P 86-87 (conditioned on Green Power promptly informing the Commission of any changes in its partnership agreement, or any other agreement, or new facts (including but not limited to any new financial interests acquired in or by market participants)).

Power an overall ROE of 12.38 percent for the Project. The Commission also found that Green Power's proposed base ROE of 10.78 percent is reasonable because the Commission's analysis supported a median return on equity of 10.79 percent and a range of reasonableness of 8.91 percent through 14.29 percent.<sup>46</sup>

**b. Requests for Rehearing and Clarification**

44. Old Dominion states that the Commission failed to strike a reasonable balance in granting Green Power's requested ROE of 12.38 percent, including the 160 basis point ROE incentive adder, without a hearing. In particular, Old Dominion states that the Commission's failure to set Green Power's ROE for an evidentiary hearing was an arbitrary and capricious departure from long-standing Commission practice without adequate explanation, was contrary to Commission regulations, and deprived the protesting parties of due process. Old Dominion argues that the Commission's effort to arrive at a reasonable ROE simply by making adjustments to the cost of capital analysis submitted by Green Power was inadequate and improperly deprived parties of the opportunity to address disputed issues of material fact concerning calculation of the base ROE.

45. AMP-Ohio states that the Commission failed to respond to AMP-Ohio's argument that the non-ROE incentives shift virtually all risk to ratepayers, such that the ROE incentives rewarded to stockholders, allegedly to compensate them for risk, are unnecessary. AMP-Ohio states that the Commission failed to consider adequately the reduction in investor-perceived risk resulting from the non-ROE incentives when granting ROE incentives and establishing the return on equity.

**c. Commission Determination**

46. We deny Old Dominion's and AMP-Ohio's requests for rehearing regarding the ROE and the ROE incentive adders. The Commission recently addressed similar arguments in *Pioneer*. In that order, like this one, Old Dominion and AMP-Ohio raised various challenges regarding the Commission's authority to make upfront ROE determinations, as well as its authority to grant ROE incentive adders, without setting both issues for hearing. The Commission rejected those arguments stating that it "need not conduct an evidentiary hearing when there are no disputed issues of material fact, and even where there are disputed issues, the Commission need not conduct a hearing if they may be adequately resolved on the written record."<sup>47</sup> The Commission further stated that

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<sup>46</sup> *Id.* P 92.

<sup>47</sup> *Id.* P 35 (citing *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993) (citations omitted)).

“mere allegations of disputed facts are insufficient to mandate a hearing; petitioners must make an adequate proffer of evidence to support them.”<sup>48</sup>

47. Here, as was the case in *Pioneer*, Old Dominion has not specified what issues of material fact should have been sent to hearing. As noted above, mere allegations of factual errors are not sufficient to require the Commission to set a matter for hearing. Accordingly, we reject Old Dominion’s arguments that the Commission erred by not setting this case for hearing.

48. Nor are we persuaded by Old Dominion’s claim that the Commission should have set Green Power’s ROE for hearing, including the ROE incentive adders, because the Commission has set the proposed ROEs in other incentive cases for hearing. This argument, as discussed in *Pioneer*, ignores the fact that the Commission makes ROE determinations on a case-by-case basis and the Commission “will authorize a unique ROE appropriate to the facts and circumstances of each applicant.”<sup>49</sup> In this case, the Commission analyzed the specific facts of Green Power’s application and determined that Green Power had justified its requested ROE. The Commission’s basis for that decision is set forth in the April 10 Order and, thus, we will not restate that basis here.

49. We also deny AMP-Ohio’s argument that the Commission failed to fully consider the reduction in risk associated with the non-ROE incentives. Contrary to this assertion, in the April 10 Order the Commission specifically considered the overall package of incentives and found that Green Power’s Project merited ROE incentive adders in addition to the other incentives.<sup>50</sup> As the Commission noted, it has in prior cases approved multiple rate incentives for particular projects.<sup>51</sup> The Commission also

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<sup>48</sup> *Id.* (quoting *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124, 129 (D.C. Cir. 1982)). The Commission also stated that it is required to provide a trial-type hearing only if the material facts in dispute cannot be resolved on the basis of written submissions in the record. *Id.* n.73 (citing *Consumers Power Co.*, 58 FERC ¶ 61,323, at 62,045 (1992) (citing *Southern California Edison Co.*, 27 FERC ¶ 61,105, at 61,199 (1984); *Municipal Light Boards of Reading and Wakefield v. Federal Power Comm’n*, 450 F.2d 1341, 1345 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972); *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124, 135 (D.C. Cir. 1982), *order on clarification*, 59 FERC ¶ 61,276 (1992)).

<sup>49</sup> *Pioneer*, 130 FERC ¶ 61,044 at P 43 (quoting Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 65).

<sup>50</sup> April 10 Order, 127 FERC ¶ 61,031 at P 88.

<sup>51</sup> *Id.* (citing *PATH*, 122 FERC ¶ 61,188 (2008); *Southern California Edison Co.*, 121 FERC ¶ 61,168 (2007)).

explained that this is consistent with our interpretation of FPA section 219 as 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 the requirements of FPA section 219 and that there is a nexus between the incentives being proposed, the investment being made. As the Commission discussed in the April 10 Order, Green Power explained why it is seeking each incentive and how each is relevant to the proposed Project. Thus, the Commission correctly found that Green Power had demonstrated that the total package of incentives addresses the demonstrable risks or challenges that Green Power faces in building the Project.

50. Moreover, contrary to AMP-Ohio's claim, the ROE incentive adders were not granted for the sole purpose of minimizing Green Power's financial risk. For example, the Commission authorized the 50 basis point ROE incentive adder to encourage RTO participation and the 100 basis point ROE incentive adder to encourage the development of independent transmission-only companies.<sup>52</sup> In other words, the Commission determined in the April 10 Order that each incentive serves a specific purpose, and the ROE incentive adders are appropriate notwithstanding the Commission's decision to grant other incentives, such as CWIP, abandoned plant, and certain accounting incentives.

51. Finally, as for the 10 basis point adder for the risk and challenges related to the Project, the Commission in the April 10 Order found this request to be reasonable given the level of remaining risk, explaining that given the size, scope, and cost of the Project, notwithstanding the determination to grant the CWIP, abandonment and regulatory asset incentives.<sup>53</sup> We continue to find that decision to be sound and will not grant AMP-Ohio's request for rehearing.

## **5. Ability to Recover Abandoned Plant Costs**

### **a. April 10 Order**

52. In the April 10 Order, the Commission addressed concerns raised by Green Power and other parties about Green Power's ability to recover costs if the Project was abandoned for reasons beyond Green Power's control. In particular, the Commission noted that "if the Project is cancelled before it is completed, it is unclear whether Green Power will have any customers from which to recover the costs it incurred."<sup>54</sup> The

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<sup>52</sup> April 10 Order, 127 FERC ¶ 61,031 at P 85-86.

<sup>53</sup> *Id.* P 80-81.

<sup>54</sup> *Id.* P 52.

Commission stated that before Green Power can recover any abandonment costs, Green Power must “make a filing under section 205 of the FPA to demonstrate that the costs were prudently incurred. Green Power must also propose in its section 205 filing a just and reasonable rate and cost allocation method to recover these costs.”<sup>55</sup> The Commission in the April 10 Order further stated that parties could challenge any proposed allocation of costs at that time.

**b. Requests for Rehearing and Clarification**

53. FirstEnergy and Old Dominion request that the Commission grant rehearing of the abandoned plant incentive because it appears to create an unjust and unreasonable shift of the risk of Green Power’s Project from Green Power to PJM and Midwest ISO customers. FirstEnergy and Old Dominion argue that the Commission, at the very least, should condition recovery of the abandoned plant incentive on the inclusion of the Project in the PJM and Midwest ISO transmission expansion plans. Furthermore, FirstEnergy and Old Dominion state that the Commission should clarify that customers to whom Green Power proposes to allocate its costs will be given ample opportunity to challenge all aspects of Green Power’s required FPA section 205 filing. Moreover, FirstEnergy and Old Dominion assert that the Commission should clarify the “reasons” that are beyond Green Power’s control.

54. Alternatively, FirstEnergy and Old Dominion request that the Commission clarify that Green Power’s ability to collect project abandonment costs from customers is narrowly limited to factors strictly beyond Green Power’s control, and those factors do not include the Project’s failure to be selected for inclusion in the Midwest ISO and/or PJM transmission expansion plans. Similarly, Alliant argues that the Commission erred by not narrowly limiting the abandoned plant incentive to factors strictly beyond Green Power’s control. Alliant requests that, at a minimum, the Commission clarify that not having the Project selected for inclusion in the Midwest ISO or PJM transmission expansion plan is not a factor that is beyond Green Power’s control.

55. Minnesota Agencies, Indiana Commission, and Xcel request rehearing to the extent that the April 10 Order grants Green Power recovery of costs from persons who are not customers of Green Power and never receive service from Green Power. They argue that the April 10 Order fails to adequately describe the burden of proof and mechanism for recovery of costs (including from whom the costs may be recovered) under section 205 of the FPA for the rate incentives that have been granted to Green Power under section 219 of the FPA.

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

**c. Commission Determination**

56. As the Commission noted in the April 10 Order<sup>56</sup> and we reiterate here, if the Project is cancelled before it is completed, it is unclear whether Green Power will have any customers from which to recover the costs it incurred. In order for Green Power to recover any abandoned plant costs, it will have to make a section 205 filing that demonstrates that the costs were prudently incurred and that the Project was cancelled for reasons beyond its control. In addition, Green Power must also propose a just and reasonable rate and cost allocation method to recover these costs. At the time of that section 205 filing, parties will be able to challenge all aspects of Green Power's application to recover abandoned plant costs, including, but not limited to, whether it is just and reasonable to recover these costs from particular customers, whether the costs were incurred prudently, or whether the Project was abandoned for reasons beyond Green Power's control. All of these issues can be addressed if and when Green Power seeks to recover these costs and will give the parties ample opportunity to challenge any such costs or cost allocation.

57. It is also premature to determine, and we will not prejudge here, what is or is not properly considered to be beyond Green Power's control. If Green Power seeks to recover abandoned plant costs, it will have the burden of establishing whether the reason(s) that led to the abandonment were beyond its control, what costs should be recovered, and whether the costs were incurred prudently. Again, parties to that proceeding will have an opportunity to challenge Green Power's ability to recover abandoned plant costs if and when Green Power makes the required filing to recover such costs.

**6. Regulatory Asset Incentive**

**a. April 10 Order**

58. In the April 10 Order, the Commission granted Green Power's request to create an initial regulatory asset for the Project, effective April 11, 2009, and subsequent vintage year regulatory assets, effective January 1 of each year following the year in which Green Power begins recovering the initial regulatory asset. The Commission noted that this incentive would allow Green Power to defer recovery of certain costs and such deferred recovery would help address certain financial risks and challenges faced by Green Power.<sup>57</sup>

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.* P 59.

59. The Commission also addressed concerns about which costs Green Power can include in the regulatory asset, including AMP-Ohio's claim that Green Power should not be able to include costs related to the creation of the Green Power partnership. The Commission stated that, "[l]ike the abandoned plant incentive, if the Project is cancelled before completion, it is unclear whether Green Power will have any customers from which to recover the costs in a regulatory asset."<sup>58</sup> The Commission explained that Green Power "must make a section 205 filing before it starts amortizing the initial regulatory asset, as well each vintage year regulatory asset, to demonstrate that the costs included in the regulatory asset were prudently incurred and are just and reasonable."<sup>59</sup> The Commission noted that parties such as AMP-Ohio could raise their concerns in this future proceeding.

**b. Requests for Rehearing and Clarification**

60. AMP-Ohio argues that the Commission erred by not deciding whether Green Power could accumulate its partnership costs as a regulatory asset. AMP-Ohio reasserts that Green Power's partnership costs do not benefit ratepayers and, thus, should not be included in a regulatory asset. AMP-Ohio asserts that there is no need to wait for a section 205 filing.

**c. Commission Determination**

61. We deny AMP-Ohio's request for rehearing. While AMP-Ohio requests that we decide whether Green Power's partnership costs should be included as part of its regulatory asset, that issue is not properly before us in this proceeding. As the Commission stated in the April 10 Order, any costs that Green Power seeks to recover will have to be filed as part of a section 205 filing where Green Power will have to show that its costs were prudently incurred and are just and reasonable.<sup>60</sup> It is premature for us to decide that issue now when Green Power has not attempted to recover partnership costs as part of a regulatory asset and has not had the opportunity to justify the recovery of those costs.

62. AMP-Ohio has also not explained how it or its ratepayers will be harmed by waiting until Green Power makes the required section 205 filing. Parties will have an opportunity in the future proceeding to scrutinize any and all costs that Green Power may propose to include in a regulatory asset and recover from its customers. The standard

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<sup>58</sup> *Id.* P 61.

<sup>59</sup> *Id.*

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

under which the Commission will review those costs—whether it reviews them now or in the future—will remain the same. As noted above, if Green Power seeks to recover its partnership costs, Green Power will have to demonstrate that the costs were prudently incurred and are just and reasonable. AMP-Ohio suffers no harm by challenging those costs at that time. Accordingly, we will deny its request for rehearing.

### C. Settlement Agreement

#### 1. Green Power Offer of Settlement

63. As noted above, in the April 10 Order the Commission accepted Green Power's proposed formula rate template and related implementation protocols, subject to refund, and set them for hearing and settlement judge procedures.<sup>61</sup> Parties engaged in settlement judge procedures, and on February 22, 2010, Green Power filed a Settlement (Settlement) in Docket No. ER09-681-000. The Settlement is intended to resolve all issues that the Commission set for hearing in the April 10 Order. On April 13, 2010, the settlement judge issued a report on the Settlement.

64. The Settlement includes as attachments revised *pro forma* tariff sheets with Green Power's proposed formula rate template and the associated Protocols for implementing the formula. Among other things, the Settlement provides that the formula rate template shall include stated values for: (a) rate or return on common equity; (b) Post-Employment Benefits other than Pension (PBOP) charges; (c) extraordinary property losses; and (d) rates of depreciation and/or amortization.<sup>62</sup> The Settlement also allows Green Power to recover through the formula rate template effective portions of hedges that reduce exposure to variability in interest rates and that are entered into prior to the issuance of long term debt by Green Power.<sup>63</sup> The revised Protocols set up a formal review process regarding Green Power's annual projected revenue requirement and true-up updates, which includes a requirement for Green Power to make annual informational filings with the Commission.

65. The Settlement at section 4.1 states that the effective date of Green Power's proposed *pro forma* tariff sheets is deferred until Green Power meets all the conditions in

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<sup>61</sup> *Id.* P 102.

<sup>62</sup> The Settlement provides that such stated values shall not change absent a filing made pursuant to section 205 of the FPA.

<sup>63</sup> The Settlement requires Green Power to make a section 205 filing before it can recover costs related to any other types of hedges.

the April 10 Order, including but not limited to the condition that the Project is approved by a Commission-approved regional transmission planning process.

66. The Settlement at section 4.5 states that the Commission shall apply the “just and reasonable” standard of review rather than the “public interest” standard of review when acting on proposed modifications to the Settlement or the *pro forma* tariff sheets submitted as part of the Settlement. Changes to the tariff sheets proposed by a non-party or by the Commission acting *sua sponte* shall also be subject to the “just and reasonable” standard of review.

## 2. Comments

67. Commission Trial Staff (Staff), Wisconsin Commission and Xcel submitted initial comments to the Settlement. Staff, Green Power, and Xcel submitted reply comments.

68. Staff contends that the Settlement represents a reasonable resolution of the issues in this proceeding, produces a formula rate that is more transparent and understandable, and includes Protocols that provide customers with more information and better procedural safeguards than Green Power’s initial filing.

69. Wisconsin Commission objects to the Settlement insofar as the Settlement may be construed as resolving by settlement the issues that Wisconsin Commission raised in its request for rehearing of the April 10 Order. In particular, Wisconsin Commission notes that in its request for rehearing, it argues that the Commission did not explain why the ordering paragraphs explicitly require the Project be approved by a Commission-approved regional transmission planning process but do not explicitly state that Green Power must also obtain approval from state commissions and siting authorities. Wisconsin Commission, consequently, also disagrees with the legal sufficiency of language in section 4.1 of the Settlement, which also requires approval by a Commission-approved regional transmission planning process but does not explicitly provide that state commissions and siting authorities must also approve the Project.

70. Xcel states that it is submitting comments to reiterate the provision at section 1.8 of the Settlement, which provides that nothing in the Settlement is intended to resolve or otherwise affect pending requests for rehearing of issues not set for hearing in the April 10 Order. Xcel also states that Green Power should remove from the proposed Protocols any references to Midwest ISO because the formula rate template and the Protocols will be part of a stand-alone Green Power open access transmission tariff.

71. In their reply comments, Staff and Green Power agree with Wisconsin Commission and Xcel that the Settlement does not affect any pending requests for rehearing. Staff and Green Power note, as Xcel did in its comments, that the Settlement at section 1.8 states, “Nothing in this Settlement is intended to resolve or otherwise affect pending requests for rehearing of issues not set for hearing in the [April 10] Order.”

72. In response to Wisconsin Commission's concern that section 4.1 of the Settlement does not explicitly mention approval by state commissions and siting authorities, Green Power states that the Settlement at section 3.5 explicitly preserves state authority and does not pre-judge issues related to Green Power or the Project that come before a state commission.<sup>64</sup>

73. Both Staff and Green Power disagree with Xcel's request that the proposed Protocols be revised to remove any reference to Midwest ISO. They note that Green Power has expressed its intention to place the Project under the operational control of an RTO. Staff and Green Power also argue that Xcel's concern is premature because Green Power must make a filing under section 205 of the FPA before any tariff sheets can take effect.

74. In response to Staff's and Green Power's reply comments, Xcel argues that even if Green Power intends to place the Project under the control of an RTO, the proposed tariff sheets should not reference only a single RTO (i.e., Midwest ISO) because the Settlement explicitly allows inclusion of the formula rate template and Protocols in one *or more* RTO tariffs.<sup>65</sup> Xcel further asserts that the template and Protocol tariff sheets should be internally consistent in that neither should be designated as specific RTO tariff.

### **3. Commission Determination**

75. We will approve the Settlement and related *pro forma* tariff sheets, subject to the conditions in the April 10 Order. Wisconsin Power and Xcel do not oppose the substance of the Settlement (i.e., the changes related to the formula rate template and Protocols that the Commission set for hearing) and do not raise any genuine issues of material fact. We agree with Staff that the Settlement is a reasonable resolution of the issues set for hearing, produces a formula rate that is more transparent and understandable, and includes Protocols that provide customers with more information and better procedural safeguards than what Green Power initially proposed.

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<sup>64</sup> The Settlement at section 3.5 states:

Nothing in the Offer of Settlement, Protocols or related documents shall be construed as in any way prejudging, or in any way pre-approval of, this or any issues related to Green Power Express that may come before a state commission, including but not limited to such matters as siting, certifications of public convenience and necessity, and/or the merits of the project itself or any part thereof.

<sup>65</sup> Xcel Reply Comments at 2 (citing section 4.1 of the Settlement) (emphasis added).

76. We find unfounded Wisconsin Commission's and Xcel's concern about the effect of the Settlement on their requests for rehearing of the April 10 Order. Section 1.8 of the Settlement explicitly preserves parties' right to pursue their requests for rehearing, and we address those requests above.

77. With respect to Wisconsin Commission's concerns regarding the need for Green Power to obtain approval from state commissions and siting authorities, we agree with Green Power that section 4.1 of the Settlement makes clear that the Settlement has no effect on state authority. In addition, Wisconsin Commission raised the same concern in its request for rehearing of the April 10 Order, which we address above.

78. Finally, we find premature Xcel's concern regarding the reference to Midwest ISO in the proposed Protocol tariff sheets. Green Power must make a filing pursuant to section 205 before the tariff sheets containing the formula rate template and Protocols can take effect. Xcel, or any other party, can raise objections to language in the tariff sheets at that time, including any concern about the correctness of references in the tariff sheets to a particular RTO.

79. Accordingly, we find the Settlement is just and reasonable and will approve it.

The Commission orders:

(A) The requests for rehearing and clarification are denied as discussed in the body of this order.

(B) The Offer of Settlement is approved, subject to the conditions in the April 10 Order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.