

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye
David C. Boyd
J. Dennis O'Brien
Thomas Pugh
Phyllis A. Reha

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Joint Petition for Approval
of the Transfer of Transmission Assets of
Interstate Power and Light Company and ITC
Midwest LLC

ISSUE DATE: February 7, 2008

DOCKET NO. E-001/PA-07-540

ORDER APPROVING TRANSFER OF
TRANSMISSION ASSETS, WITH
CONDITIONS

PROCEDURAL HISTORY

On January 18, 2007, Interstate Power and Light Company (IPL) and ITC Midwest LLC (ITC or ITC Midwest) executed an Asset Sale Agreement (ASA) that, if approved by regulatory authorities, would transfer IPL's transmission assets in Minnesota, Iowa, Missouri, and Illinois to ITC. Hereafter in this Order, IPL's transfer of its transmission assets in Minnesota, Iowa, Missouri, and Illinois to ITC will be referred to as "the Transaction."

On April 27, 2007, IPL and ITC (IPL/ITC or the Joint Petitioners) filed for approval of the transaction with the Minnesota Public Utilities Commission (the Commission).

On June 19, 2007, the Commission issued its NOTICE AND ORDER FOR HEARING. Section II, page 2 of that Order sets out the issues to be addressed.

On September 24, 25, and 26, 2007, evidentiary hearings were held.

On October 10, 2007, the Joint Petitioners filed their initial brief. The Minnesota Department of Commerce (the Department), Office of the Attorney General's Residential and Small Business Utilities Division (RUD-OAG), the Municipal Coalition¹, Energy CENTS Coalition (Energy Cents), and Dairyland Power Cooperative (Dairyland) filed their initial briefs on October 24, 2007.

On October 31, 2007, the Joint Petitioners, the Department, RUD-OAG, and the Municipal Coalition filed reply briefs and additional comments were received from the Department and the Joint Petitioners on November 9, 2007.

On November 16, 2007, the Administrative Law Judge (ALJ) issued her Findings of Fact, Conclusions, and Recommendations (the ALJ Report). She recommended the Commission disapprove the transaction.

¹ The Municipal Coalition is composed of the Midwest Municipal Transmission Group, Missouri River Energy Services, and Wisconsin Public Power, Inc.

On November 26, 2007, the following parties filed exceptions to the ALJ Report: IPL-ITC, DOC, RUD-OAG, the Municipal Coalition and Dairyland.

On December 10, 2007, IPL and ITC filed the Joint Petitioners' Offer of Settlement.

On December 11, 2007, the Commission heard oral argument in this matter.

On December 12, 2007, the Joint Petitioners filed a revised Offer of Settlement stating that the filing reflected the changes discussed at the December 11, 2007 Commission hearing and agreed to by the Joint Petitioners, the Municipal Coalition, and the Department.

On December 13, 2007, the Commission met to hear additional oral argument. The Commissioners directed the parties to file a revised Settlement Agreement (Offer of Settlement) on Monday December 17, 2007 for consideration at the Commission's Tuesday December 18, 2007 meeting.

On December 17, 2007, the Joint Petitioners filed additional stipulated conditions which they stated were acceptable to the Joint Petitioners but which they did not recommend.

On December 17, 2007, the Municipal Coalition filed comments objecting to one of the additional stipulated conditions agreed to but not recommended by the Joint Petitioners in their December 17, 2007 filing.

On December 18, 2007, the Commission heard final oral argument on the case, and the record closed under Minn. Stat. § 14.61, subd. 2.

FINDINGS AND CONCLUSIONS

I. Legal Standard

In evaluating a transfer of transmission assets, the Commission must determine whether the transaction is consistent with the public interest, taking into account, among other things, the following factors as set forth in Section 216B.16, subd. 7c:

- a. Whether the transaction will facilitate the development of transmission infrastructure necessary to ensure reliability, encourage the development of renewable resources, and accommodate energy transfers within and between states;
- b. Whether the transaction protects Minnesota ratepayers against the subsidization of wholesale transactions through retail rates;
- c. The impact on Minnesota retail rates; and
- d. Whether the transaction protects Minnesota ratepayers from paying capital costs for transmission assets that have already been recovered.

II. Summary of the Commission's Analysis and Action

Based on its review of the record in this proceeding, the Commission respectfully declines to accept the Administrative Law Judge's conclusion that the proposed transaction is not in the public

interest, her recommendation that it be disapproved, and supporting findings. The Commission finds that the Offer of Settlement (Settlement Agreement) dated December 12, 2007² in conjunction with the commitments made by the Joint Petitioners during the proceedings before the Commission on December 11, 13, and 18, 2007, adequately address and resolve the concerns underlying such conclusion, recommendation, and findings.

Taking into consideration the parties' Settlement Agreement and the Joint Petitioners' above-referenced commitments, the Commission finds that the transfer of IPL's transmission assets in Minnesota to ITC is consistent with the public interest. Accordingly, the Commission will approve this transaction, subject to the above-referenced conditions.

III. The ALJ's Findings, Conclusion and Recommendation

The ALJ concluded that the Joint Petitioners failed to show by a preponderance of the evidence that the proposed transfer was in the public interest.³ Accordingly, the ALJ recommended that the Commission disapprove the transfer.⁴

In reaching that conclusion and recommendation, the ALJ addressed the five factors that Minn. Stat. § 216B, subd 7c requires the Commission to consider in assessing the proposed transfer of transmission assets. The ALJ also assessed the impact of the loss of jurisdiction over IPL's transmission assets to the Federal Energy Regulatory Commission (FERC). The ALJ made findings regarding each of those factors as discussed below.

A. ALJ Re: Development of Infrastructure [Minn. Stat. § 216B.16, Subd. 7c(1)]

The ALJ summarized her findings on the development of infrastructure consideration as follows:

The Joint Petitioners claim that ITC Midwest's position as a transmission-only company and its parent company's record as an aggressive investor in transmission are evidence that the Transaction will facilitate the development of transmission infrastructure. Although there is no reason to question the sincerity of their claim, there was **no evidence of concrete plans** for investment that will improve reliability, encourage the development of renewable energy or facilitate energy transfer in Minnesota.⁵ (Emphasis added.)

The ALJ concluded that the Joint Petitioners have failed to show by a preponderance of the evidence that the Transaction facilitates the development of transmission infrastructure necessary to

² The Offer of Settlement (Settlement Agreement) dated December 12, 2007 is endorsed by the Joint Petitioners, the Minnesota Department of Commerce, and the Municipal Coalition.

³ See the ALJ's Report, Conclusion 12 on page 56.

⁴ See ALJ's Report, Recommendation #1 on page 57.

⁵ See ALJ's Report, Paragraph 141 on page 32.

ensure reliability, encourage the development of renewable resources, and accommodate energy transfers within and between the states.⁶

B. ALJ Re: Protection of Minnesota Ratepayers Against Subsidization of Wholesale Transactions [Minn. Stat. § 216B.16, Subd. 7c(2)]

IPL serves one small wholesale customer in Minnesota and its wholesale rates are based on a Midwest Independent System Operator (MISO) FERC-approved ratemaking formula.⁷

The ALJ found that as a transmission-only company, ITC Midwest will not engage in purchase or sale of any energy, either for wholesale or retail use. Thus, the ALJ reasoned, there can be no subsidization of ITC Midwest's wholesale transactions through retail rates. The ALJ noted that the Commission will also retain jurisdiction over IPL's retail rates and review the rates to assure that no subsidization occurs.⁸

The ALJ concluded that the Joint Petitioners have shown by a preponderance of the evidence that the Transaction protects Minnesota ratepayers against the subsidization of wholesale transactions through retail rates.⁹

C. ALJ Re: Factor Relevant to Transfer of Operational Control of Transmission Assets [Minn. Stat. § 216B.16, Subd. 7c(3)]

The third consideration required by Minn. Stat. § 216B.16, Subd. 7c is whether the transfer ensures, in the case of operational control of transmission assets, that the state retains jurisdiction over the transferring utility for all aspects of service.

The ALJ found that this criterion applies to a transfer of operational control and has no application to the current case, a change of ownership to a company that will be subject to FERC jurisdiction.¹⁰

D. ALJ Re: Impact of the Transfer on Minnesota Retail Rates [Minn. Stat. § 216B.16, Subd. 7c(4)]

The ALJ noted that the parties disputed the appropriate way to determine whether the Minnesota ratepayers would be adversely affected by the Transaction. While the Department and the RUD-OAG relied on more traditional cost-benefit analyses that showed a negative effect on ratepayers, the Joint Petitioners questioned the usefulness of these analyses due to the rapidly changing regulation and pricing of the transmission industry. The ALJ stated that it was appropriate to consider unquantifiable benefits, such as the lower cost of power in IPL's service territory resulting

⁶ See ALJ's Report, Conclusion #6 on page 55.

⁷ Ex. 12 at 16 (Hampsher Direct).

⁸ See ALJ's Report, Paragraph 211.

⁹ See the ALJ's Report, Conclusion #7 on page 55.

¹⁰ See the ALJ's Report, Paragraph 213.

from ITC's increased investment in transmission infrastructure, but that it was necessary to evaluate the Transaction's quantifiable costs and benefits.¹¹

The ALJ reviewed the various cost-benefit analyses provided by the parties. While acknowledging the possibility of unquantifiable benefits and finding that none of the cost-benefit analyses captured the anticipated, unquantifiable benefits of increased transmission investment,¹² the ALJ found that the Joint Petitioners had failed to demonstrate cost savings from investment to offset the negative effect of the Transaction to ratepayers.¹³

The ALJ concluded that the Joint Petitioners had failed to show by a preponderance of the evidence that the Transaction will not have a negative impact on Minnesota retail rates.¹⁴

E. The ALJ re: Protecting Ratepayers From Paying Capital Costs Already Recovered [Minn. Stat. § 216B.16, Subd. 7c(5)]

The ALJ found that as a condition of the Joint Petitioners' Asset Sale Agreement (ASA) and as reaffirmed by ITC in this proceeding, ITC will not attempt to recover the Acquisition Premium through its rates. The ALJ acknowledged that the parties dispute the proper characterization of the acquisition premium and the gain that IPL will receive from the sale. The ALJ also found, however, that the Joint Petitioners have committed that the ratepayers will not pay any portion of the Acquisition Premium in ITC's rates and that going forward, the book value of the Transmission Assets will be deducted from IPL's rate base and the same amount added into ITC Midwest's rate base. Thus, the ALJ found, ratepayers will not pay capital costs for the Transmission Assets that have already been recovered from them.¹⁵

The ALJ concluded that the Joint Petitioners have shown by a preponderance of the evidence that the Transaction protects Minnesota ratepayers from paying capital costs for transmission assets that have already been recovered.¹⁶

F. ALJ re: Loss of Jurisdiction Over IPL's Transmission Assets

With the transfer of IPL's transmission assets to ITC, the Commission loses and FERC gains substantial jurisdiction over those assets. The ALJ noted that several parties expressed concern about the Commission's decreased authority over rates, quality, terms and conditions of transmission service and FERC's focus on national issues rather than on Minnesota issues. The ALJ stated, however, that the Minnesota Legislature contemplated the transfer of transmission

¹¹ See ALJ's Report, Finding Paragraph 142 on page 33.

¹² See ALJ's Report, Finding Paragraph 202 on page 44.

¹³ See ALJ's Report, Finding Paragraph 203 on page 44.

¹⁴ See ALJ's Report, Conclusion 9 on page 55.

¹⁵ ALJ's Report, Finding Paragraph 214 on page 46.

¹⁶ ALJ's Report, Conclusion 10 on page 56. The question whether the acquisition premium should be paid to the ratepayers is a separate issue and is addressed below in Section G.

assets to FERC jurisdiction when it amended Minn. Stat. § 216B.16, subd. 7c in 2005. As a consequence. The ALJ concluded that the Commission's loss of jurisdiction is not *per se* to the detriment of the public interest.¹⁷

The ALJ stated that the loss of jurisdiction must be balanced against the Joint Petitioners' claim that the Transaction will facilitate the development of transmission infrastructure, and that Minnesota ratepayers will not be adversely affected by the Transaction.¹⁸ The ALJ found that the Joint Petitioners had not shown that FERC jurisdiction over ITC will benefit Minnesota¹⁹ and concluded that the Joint Petitioners have failed to show that the loss of jurisdiction over the Transmission Assets is outweighed by the benefits of the Transaction.²⁰

In so finding, the ALJ stated that the intangible benefits of a more robust transmission system and independent transmission system operation are difficult to quantify, but they must be weighed into the determination of the benefits of lost jurisdiction. The ALJ noted that the Iowa Utility Board (IUB) conducted a similar analysis concerning its loss of jurisdiction, decided to examine the issue in the context of the cost-benefit analysis, and concluded that since ITC had greater incentives to build transmission to fill both economic and reliability needs than IPL, the benefits of transferring IPL's transmission assets to ITC outweighed the costs and the loss of its jurisdiction.²¹

G. The ALJ's Report re: the Acquisition Premium²²

The ALJ stated that when there is a gain on a depreciable asset, such as IPL's transmission assets, the net increase is generally accounted for in a way that benefits the ratepayers. This is appropriate, the ALJ reasoned, because the investors have received the fair rate on their initial investment of capital and to compensate them further would provide a higher rate of return than had been deemed just and reasonable.

The ALJ further stated, however, that the typical concepts of gain and loss on an asset do not clearly apply in this case because the book value of the transferred assets (IPL's transmission lines) will remain the same in the hands of the buyer (ITC) as they have in the hands of the seller (IPL). In this

¹⁷ ALJ's Report, Paragraph 97 on page 24.

¹⁸ ALJ's Report, Paragraph 100 on page 25.

¹⁹ ALJ's Report, Paragraph 98 on page 24.

²⁰ ALJ's Report, Conclusion 11 on page 56.

²¹ ALJ's Report, Paragraph 101 on page 25.

²² The terms Acquisition Premium and Gain on Sale are not equivalent and it appears that it is the allocation of the gain on sale that was actually at issue between the parties. Ultimately, this Order does not decide the parties' dispute regarding the gain on sale, leaving that issue to be decided in a future proceeding. As a consequence, as the Commission reports in this Order the ALJ's findings regarding this dispute (ALJ's Report, Paragraphs 214 - 241) and the parties' exceptions to those findings (see Section IV of this Order), it is not necessary to clarify the terminology and analysis applicable to the parties' dispute. Clarification and decision on that issue is left, as previously indicated, to future proceedings.

case, however, the ALJ found that ITC will pay IPL an Acquisition Premium not because the book value of the assets has increased but because the buyer has an opportunity to earn a higher Return on Equity (ROE) on the same asset. Since the generator of the Acquisition Premium is the opportunity to earn a higher Return on Equity (ROE) on an asset whose book value has not changed, and since the ratepayers have not been charged directly for the planning, construction, or maintenance of the investment that generated the Acquisition Premium, the ratepayers have no claim to benefit from the gain.

The ALJ also noted that the Joint Petitioners have stated that if the Acquisition Premium is required to be paid to the ratepayers, the Transaction will not go forward, thereby eliminating the Acquisition Premium altogether. The ALJ found this statement credible because, she stated, a key benefit to IPL of the sale is that it will receive funds (the Acquisition Premium) that can be used for new investment.

The ALJ concluded that the Joint Petitioners have demonstrated that the Acquisition Premium should not be returned to the ratepayers.

H. ALJ's Recommended Conditions

The ALJ stated that it is appropriate for the Commission to consider whether the Transaction's unquantifiable benefits outweigh the increase in rates and the Commission's loss of jurisdiction over the transmission assets and recommended that if the Commission approved the Transaction it should require the Joint Petitioners to meet the commitments made in the course of the Proceeding.²³ The ALJ listed those commitments in Conclusions 13:

- a. That ITC Midwest will give the Commission access to its books and records;
- b. That ITC Midwest will file annual financial information with the Commission;
- c. That ITC Midwest will comply with a directive from the Commission to invest in a project that the Commission has determined is necessary to ensure safe, adequate, efficient and reliable service;
- d. That ITC Midwest will resolve the system constraints in the IPL service territory as reported by MISO;
- e. That ITC Midwest will honor IPL's contractual agreements related to the Transmission Assets;
- f. That ITC Midwest forego recovery through rates of its Transaction costs, up to \$15 million; and
- g. That ITC Midwest will offer Minnesota customers a choice of taking service under the MISO tariff or the FERC approved ITC Midwest tariff.

²³ ALJ's Report, Conclusion 13 on page 56.

The ALJ listed additional requirements that she recommended be imposed upon the Joint Petitioners if the Commission approved the Transaction in conjunction with the Alternative Transaction Adjustment.²⁴

1. that if the Commission approves the Transaction with the Alternative Transaction Adjustment (ATA), approval shall include: 1) specific approval of a regulatory liability account of approximately \$89 million for the sole purpose of paying IPL's refund obligation and not to reduce the rate base in any general rate proceeding; 2) approval that the interest accrued on the regulatory liability account will not be used for any purpose other than the payment of the refund; and 3) tax savings from the annual refund obligation under the ATA will be excluded from IPL's revenue requirement in future rate proceedings; and
2. that IPL be required to file with the Commission an accounting of taxes paid on the Transaction, including the final accounting for ADIT and ADITC.

IV. Exceptions to the ALJ's Findings, Conclusion and Recommendation

A. Exceptions Filed by the Joint Petitioners

1. Finding Regarding Investment in Transmission Facilities

The Joint Petitioners took exception to the ALJ's findings that they had failed to provide concrete evidence that ITC will build more or better transmission facilities than IPL (Paragraph 128) and no evidence of concrete plans for investment that will improve reliability, encourage the development of renewable energy or facilitate energy transfer in Minnesota.

The Joint Petitioners argued that since the legal standard only requires that the transaction be consistent with the public interest, the Commission need not find that the Transaction will result in increased investment, but only that it would result in investment equal to what would be anticipated if the Transaction were not approved.

The Joint Petitioners further argued, however, that the record contained ample evidence (ITC's proven track record, established infrastructure planning process, and an unequivocal commitment to invest as necessary to improve the transmission system) supporting a finding that there is a "reasonable likelihood" of benefit, the standard that the Joint Petitioners asserted was the proper standard, rather than requiring "concrete plans."

2. Finding Regarding Impact on Retail Rates

The Joint Petitioners also took exception to the ALJ's finding and conclusion that they had failed to show by a preponderance of the evidence that the Transaction will not have a negative impact on Minnesota retail rates.

At the outset, the Joint Petitioners stated that even accepting the ALJ's conclusions based on one long-term study of costs over a twenty-year period (projected increase in retail rates: \$0.16 per

²⁴ ALJ's Report, Conclusions 14, 15, and 16 on pages 56-57.

month if the Transaction Adjustment is adopted to \$0.34 per month if the Alternate Transaction Adjustment is adopted) the perceived benefits do not have to **outweigh** the perceived detriments in order to be “consistent with the public interest.” In addition, the Joint Petitioners argued, the Transaction’s impact on retail rates is only one of several factors to be balanced in assessing the public interest. Most fundamentally, the Joint Petitioners objected that the ALJ’s summation of the cost benefit analyses does not acknowledge the offsetting benefits that will accompany the sale. The Joint Petitioners argued that the Commission’s past Orders demonstrate that all benefits, including likely benefits, should be taken into account in determining the public interest. The Joint Petitioners asserted that when all benefits are considered, they far outweigh the rate increases shown by the twenty year analyses.

3. Agreement to Meet Commitments/Acceptance of Conditions

The Joint Petitioners noted that the ALJ recommended if the Commission approves the Transaction, it would be in the public interest to condition the approval on the Joint Petitioners’ agreement to meet the commitments made in the course of the proceeding. The Joint Petitioners accepted all of these conditions²⁵ and pledged to meet them.

B. Exceptions Filed by the Department

1. Capital Gains and Acquisition Premium

The Department stated that the complexity of the proposed transaction and the record require a clarification on the issue of capital gains and the acquisition premium. The Department noted that in Paragraphs 215 - 241 of her report, the ALJ discusses regulatory treatment of the capital gains, which the ALJ characterizes as the acquisition premium, in the event of a sale of the transmission facilities.

The Department clarified that its position regarding this issue (gain on sale) was not the same as the RUD-OAG’s, which had argued that the value of an asset paid for by the ratepayers (IPL’s transmission assets) has increased and thus should benefit the ratepayers. The Department clarified that its position was that Commission precedent is that the Commission should consider several factors such as: whether the assets being sold were in rate base earning a return, whether ratepayers were paying for costs of the assets, such as depreciation, taxes, operating and maintenance expense, and whether as a result of the overall transaction, customers were made whole.

The Department stated that when operating utility assets are sold, ratepayers must be made whole in order for the sale to be consistent with the public interest under Minn. Stat. § 216B.50 and § 216B.16, subd. 7c. It is of no consequence, in the Department’s view, that shareholders may realize a windfall or a loss as long as ratepayers are not harmed by the proposed sale. Thus, the Department objected to the proposed sale because the sale as proposed included no benefits that offset ITC’s intention to charge higher rates consistent with its authorized higher ROE.

Specifically, consistent with its support for the ALJ’s finding that the record fails to demonstrate that the proposed sale is consistent with the public interest, the Department proposed adding the following language to Paragraph 237 to fully reflect the negative effect of the sale, as proposed, on ITC ratepayers, who would pay the higher ROE that is central to the proposed transaction:

²⁵ ALJ’s Report, Conclusions 13, 14, 15, and 16.

Ratepayers will pay for that higher ROE. Thus, ratepayers will be harmed by the higher ROE, absent offsetting benefits.

2. Comprehensive Conditions Required

The Department stated that if the Commission rejected the ALJ's overall conclusion that Joint Petitioners failed to demonstrate that the proposed sale is consistent with the public interest, the ALJ's Report does not provide a comprehensive set of conditions that would be necessary to ensure that overall benefits of a sale would offset the clear and significant detriments of a sale. The Department stated that the Joint Petitioners' refusal to offer or to accept material conditions of any kind and an incomplete record as to a comprehensive set of conditions makes it particularly difficult to craft conditions of approval.

The Department stated that the costs of the proposed transaction must at least be offset by benefits for the transaction to be in the public interest. According to the Department, the Joint Petitioners had not met this standard in the record.

C. Exceptions Filed by the RUD-OAG

The RUD-OAG agreed with the ALJ's recommendation that the Commission disapprove the proposed transaction because it is not consistent with the public interest. The RUD-OAG acknowledged, however, the possibility that the Commission might approve the Transaction despite the ALJ's recommendation and therefore addressed the ALJ's Findings with regard to the treatment of the acquisition premium, the commitments made by ITC in the course of the proceeding, and the role of the Joint Petitioners' investment advisors in shaping the proposed Transaction.

1. Acquisition Premium

The RUD-OAG argued that the gain on the proposed sale should be refunded to IPL's ratepayers and not to IPL's shareholders. The RUD-OAG acknowledged that the ALJ provided a lengthy analysis of why the Acquisition Premium should be a benefit to IPL's shareholders, but asserted that it was difficult to reconcile the ALJ's recommendation to deny approval of the proposed transaction with her lengthy discussion of the shareholders' right to retain the Acquisition Premium.

The RUD-OAG disputed the ALJ's view of who has the proper claim to the gain on sale in this transaction. The RUD-OAG argued that the ALJ was mistaken in her view that ITC will pay IPL the Acquisition Premium simply because FERC gives ITC an opportunity to earn a higher rate of return on that same asset than the Commission gives IPL and not also because the fair market value of an asset paid for by ratepayers has increased. According to the RUD-OAG, the ALJ was mistaken in construing "value" in the regulatory context and asserted that the ratepayers will essentially "fund the new value" of these assets by paying ITC higher rates for transmission service utilizing these same assets than they would pay to IPL. The RUD-OAG argued that since ratepayers are the funders of the Premium Adjustment by paying ITC higher rates for transmission service, the Department's factor that "as a result of the transaction, the ratepayers are made whole" is not met if IPL's shareholders keep the Acquisition Premium. In these circumstances, the RUD-OAG maintained, it is just and reasonable that ratepayers should be compensated for these higher costs and transmission rates by receiving a corresponding offset from the Acquisition Premium.

The RUD-OAG also objected that ITC's assurance that it will not seek to recover the Acquisition Premium in its rates is inadequate because ITC has also stated with respect to future recovery of the

Acquisition Premium that it is unable to make commitments now as to how it would respond to actions that management, shareholders, ratepayers, commissions, legislators, or various governmental bodies may take in the future. The RUD-OAG concluded that if the transaction were approved, ratepayers would have no iron-clad guarantee that they will not be ultimately both paying higher rates (due to the higher authorized ROE) and the Acquisition Premium.

2. Commission Authority to Enforce Commitments Made in the Course of the Proceeding

The RUD-OAG expressed concern that the Commission may not have sufficient authority to enforce ITC's commitments, even those made in the Joint Petition and the Alternative Transaction Adjustment (ATA), much less those made in the course of the hearings before the ALJ. The RUD-OAG stated that the Commission has limited authority with respect to ITC since ITC is a FERC-jurisdictional entity.

In addition to its concern regarding the Commission's authority to enforce ITC's commitments, the RUD-OAG questioned whether ITC would honor its commitments. The RUD-OAG cited ITC's response to an information request regarding its commitment not to seek recover of the Acquisition Premium as indicating an intent to later argue that it has not fully committed to not seeking recovery of the Acquisition Premium.

3. Joint Petitioners' Investment Advisors

The RUD-OAG objected that the ALJ had not made findings regarding the role of the Joint Petitioners' investment advisors in his matter. The RUD-OAG stated that ratepayers had not been represented in the development of the transaction, which the RUD-OAG asserted had been promoted for the sole benefit of shareholders.

The RUD-OAG stated that its concerns had been amplified by a statement attributed by a news agency to one of the financial advisors relied on by the Joint Petitioners that differed from the testimony of the Joint Petitioners in the course of this proceeding on whether the Joint Petitioners' deal could proceed without IPL's Minnesota transmission assets.

D. Conditional Exceptions Filed by the Municipal Coalition

The Municipal Coalition took exception to the ALJ's statement that the Commission could find the Transaction consistent with the public interest based on its general knowledge about the relative value of integrated and unbundled electric utility service and Minnesota transmission planning. The Municipal Coalition asserted that without a genuine hold-harmless commitment and a legally sound means to enforce it, any claim that future energy savings will offset the proposed rate increase provides no basis to depart from the ALJ's recommendation to reject the Transaction as inconsistent with the public interest.

Subsequently, the Municipal Coalition joined the Joint Petitioners and the Department in recommending approval of the Transaction, as conditioned. See Settlement Agreement, filed December 12, 2007. In so doing, the Coalition effectively withdrew its conditional exceptions, which had expressed objection to approving the Transaction. At oral argument the Municipal Coalition stated that ITC's commitment to a ceiling on the ROE was a core term in the reversal of its recommendation on the Transaction.

E. Dairyland Power Cooperative's Filing

Dairyland stated that it did not take exception to the ALJ's Conclusion 13 proposing certain conditions on approval, but did state that the ALJ, apparently by oversight, had not included as a condition the requirement that the Joint Petitioners respect and preserve the Dairyland-IPL agreements and continue the negotiations until a satisfactory outcome for all parties is achieved. Dairyland stated that it believes no party contests including that requirement as a condition.

Dairyland asked that, if the Commission approves the Transaction, the Commission modify Conclusion No. 13 of the ALJ Report to expressly condition approval upon the Joint Petitioners' commitment, as described in Finding of Fact No. 25, to respect and preserve the Dairyland-IPL agreements and to continue the negotiations until a satisfactory outcome for all parties is achieved.

V. Settlement Agreement

A. Finalizing the Contents of the Settlement Agreement

On December 10, 2007, the Joint Petitioners filed an Offer of Settlement, which was discussed at length during the December 11, 2007 Commission Meeting for Oral Argument. On December 12, 2007, the Joint Petitioners, the Department, and the Municipal Coalition filed a Settlement Agreement based on the Offer of Settlement, but replacing the Joint Petitioners' Offer of Settlement penalty language²⁶ in the second paragraph of the document with the following language proposed by the Department and agreed to by the Joint Petitioners and the Municipal Coalition:

To this end, ITC Midwest and IPL agree that in the event ITC Midwest fails to comply with an Order of the Minnesota Commission that is intended to enforce the provisions of this Settlement Agreement, specifically that are intended to resolve the system constraints in the IPL service territory as reported by MISO or to ensure that both the Arnold-Vinton-Dysart-Washburn 161 kV line and the Salem-Lore-

²⁶ In its Offer of Settlement filed December 10, 2007, the Joint Petitioners' penalty language was as follows: To this end, and in addition to the authority already conferred upon it in accordance with Minn. Stat. §216B.57, the Parties submit to the Commission's jurisdiction for purposes of determining any claim of violation of this Settlement Agreement, and the Commission's authority to directly determine the appropriate fine to be paid by a Party to remedy a knowing and intentional violation of this Settlement Agreement. The Commission shall determine that penalty based on the following factors that it will consider: a) the willfulness or intent of the violation; b) the gravity of the violation, including the harm to customers; c) history of past violations; d) number of violations; e) economic benefit gained by the person committing the violation; f) corrective action taken or planned by the person committing the violation; g) the alleged violator's annual revenue, assets and ability to pay a penalty; and h) other factors that justice requires. The Parties further agree, however, that the sole remedy for a failure of a Party to comply with paragraphs (d) - (g) under Section 4.2 of this Settlement Agreement below, related to the commitments to construct named projects (the "Project Commitments"), is the return on equity discount stated in those provisions, unless a Party that is finally determined to have violated the Project Commitments refuses to implement the return on equity discount remedy stated in the Project Commitments.

Hazelton 345 kV line (described in Section 4.2 below of this document) are built, the Minnesota Commission may require IPL to build these transmission lines or other lines needed to resolve the system constraints in the IPL service territory as reported by MISO.

At the Commission's December 13, 2007 meeting, the Joint Petitioners clarified that it also had been the settling parties' intent to add the following sentence to the December 12, 2007 Settlement Agreement at the end of Section 4.5:

The terms of the settlement agreement shall be binding on the successors and assigns of ITC Midwest and IPL.

A copy of the December 12, 2007 Settlement Agreement, adjusted to include the foregoing sentence, is attached, marked Attachment A.

B. The Settling Parties' Summary of the Settlement Agreement

In Section 3 of the Settlement Agreement, the settling parties describe the terms of the Settlement Agreement and explain why they recommend that the Commission approve their settlement. In this section, settling parties stated, in part:

. . . the Parties have agreed on numerous commitments and actions that will be undertaken to resolve the various issues raised in the ALJ Report. A description of the issues, together with the proposed resolution of those issues, is set forth herein. The Parties believe this Settlement Agreement addresses the areas of concern identified in the ALJ Report related to the Transaction and, with the additional conditions included herein, is in the public interest.²⁷

C. Settlement Agreement Response to the Deficits Found by the ALJ

1. Loss of State Jurisdiction

The settling parties acknowledged that the ALJ had concluded that the Joint Petitioners had failed to show that the loss of Commission jurisdiction over the Transmission Assets was outweighed by the demonstrated benefits of the Transaction. They also acknowledged the concern expressed by the Department and other parties than ITC, because it will not be a public utility under Minnesota law, the state would lose certain jurisdictional authority over ITC.

The settling parties noted that the ALJ had recommended that if the Commission did approve the Transaction, the approval should be conditioned upon the Joint Petitioners' agreement to abide by commitments the companies made in the course of the proceeding. The settling parties stated that the ALJ had identified several conditions that addressed the concern over loss of jurisdiction: ALJ's Report, Conclusions 13a, 13b, 13c, 13g, and 16.

The settling parties stated that these conditions are reasonable and in the public interest and agreed to make them part of the terms of the Settlement Agreement. In addition, the Settlement Agreement committed ITC to several additional terms related to the loss of state jurisdiction, as follows:

²⁷ See Settlement Agreement, pages 5-6.

- ITC Midwest is committed to MISO membership for a minimum of five years and commits to comply in good faith with all applicable stakeholder processes, rules, regulations, and other protocols as set forth by MISO under its tariff. In addition, for an unlimited period of time after five years, ITC Midwest will not execute any plans to exit MISO without prior approval by the Commission. In the event ITC Midwest disagrees with the decision of the Minnesota Commission to not grant approval to exit MISO, ITC Midwest shall not seek before FERC to override or nullify the decision of the Minnesota Commission to not grant such approval.
- ITC Midwest, by May 1 of each year, will submit the Jurisdictional Report referred to in Minn. Rules, Parts 7825.4700 through 7825.5400.
- ITC Midwest, by April 1 of each year, will submit to the Minnesota Commission the report described in Minn. Rule 7825.2200 (A) regarding affiliated interests.
- ITC Midwest will provide a company liaison to regularly work and communicate with the Department and the Minnesota Commission. ITC Midwest will provide the name and contact information for such liaison within 30 days of the close of the Transaction.
- ITC Midwest, within 12 months following the Transaction's closing, will provide the Minnesota Commission and the Department with an analysis of ITC Midwest's findings and opinions with respect to the condition of its transmission system in Minnesota, together with any related plans for remedial measures. ITC Midwest will give the same information that it provides to the Commission and Department to other Parties to this Settlement Agreement, upon request.

2. Facilitation of Transmission Infrastructure Development

The settling parties acknowledged that the ALJ had concluded that the Joint Petitioner had failed to show that the Transaction facilitates the development of transmission infrastructure necessary to ensure reliability, encourage the development of renewable resources, and accommodate energy transfers within and between the states. They noted that the ALJ's conclusion was based primarily on her finding that the Joint Petitioners offered no evidence of ITC's plans to improve system reliability or commitment to address the Narrowly Constrained Area problem²⁸ by building more or better transmission facilities than IPL.

The settling parties noted that the ALJ had recommended that if the Commission did approve the Transaction, the approval should be conditioned upon the Joint Petitioners' agreement to abide by commitments the companies made in the course of the proceeding. The settling parties stated that the ALJ had identified several conditions that addressed the concern over commitments to infrastructure development:

²⁸ The Midwest Independent System Operator (MISO) has designated three "narrowly constrained areas" (NCA) within its region. These are areas with significant transmission constraints, and one of them includes portions of northern Iowa, southwestern Wisconsin and southeast Minnesota, within the IPL service territory. Nearly all of the transmission constraints in the NCA are composed of IPL facilities. ALJ Report, Finding of Fact 121.

- first, that ITC will resolve the system constraints in the IPL service territory as reported by MISO (ALJ's Report, Conclusion 13d, adopted in the Settlement Agreement, Section 4.2(a) on page 11);
- second, that ITC will offer Minnesota customers a choice of taking service under the MISO tariff or the FERC approved ITC Midwest Tariff (ALJ's Report, Conclusion 13g, adopted in the Settlement Agreement, Section 4.2(b) on page 11); and
- that ITC Midwest will comply with a directive from the Commission to invest in a project that the Commission has determined is necessary to ensure safe, adequate, efficient and reliable service (ALJ's Report, Conclusion 13 © adopted by the parties in the Settlement Agreement, Section 4.2© on page 12 and Section 4.1© on page 7.)²⁹

The settling parties stated that these conditions are reasonable and in the public interest and made them part of the terms of the Settlement Agreement. At the hearings on this matter, ITC emphasized its commitment to comply with a directive from the Commission to invest in projects

²⁹ The Settlement Agreement provides Footnote 20 to this commitment. Footnote 20 cites Testimony of J. Welch, Hearing Tr. Vol. 2 at 138-146 for how ITC intends to comply with this directive. The cited testimony contains the following exchanges:

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MS. ANDERSON: As a current CEO of ITC Midwest, would ITC Midwest agree to abide by the Minnesota Commission -- Public Utilities Commission directive to in fact invest under the Minnesota Statutes with respect to building, constructing, etcetera, transmission?

MR. WELCH: Absolutely.

MS. ANDERSON: So that Minnesota Public Utilities Commission, under your statement, you will abide by an order of the Minnesota Public Utilities Commission to invest --

MR. WELCH: In order to build something? Absolutely. I'll take that.

MS. ANDERSON: Even if it is not a project for which Minnesota --ITC Midwest has identified, studied, etcetera?

MR. WELCH: I'll take that. I'll do that.

JUDGE HEYDINGER: You'll take that?

MR. WELCH: Yeah, I'll do that. My company will do that. We'll absolutely submit to that.

MS. ANDERSON: Well, that's terrific. So that the -- to be clear then, the Minnesota -- so if the Minnesota Public Utilities Commission under Minnesota law directs ITC Midwest, following the completion of the proposed transaction in front of this Commission, to invest in transmission facilities in the State of Minnesota as directed by the Commission, that ITC Midwest will do so and will do so in a reasonably prompt manner?

MR. WELCH: Yes.

.....

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MS. ANDERSON: So is your statement today that ITC Midwest will guarantee this Minnesota Public Utilities Commission that it will build or take whatever steps necessary, promptly, to resolve the constraints in the IPL territory as reported by MISO?

MR. WELCH: Yes.

MS. ANDERSON: To alleviate these constrained areas?

MR. WELCH: Yes.

that the Commission determines are necessary to ensure safe, adequate, efficient and reliable service. In discussing ITC's commitment to provide an analysis of its findings and opinions regarding the condition of its transmission system in Minnesota, together with any plans for remedial measures, Mr. Welch stated:

When we give you that report, . . . then at that point, you know, if there's something that you have a real hot burning issue on, we'll certainly step up to the plate and get it done.³⁰

In addition to the ALJ's recommended conditions, the Settlement Agreement committed ITC to several additional terms related to the improving the reliability and efficiency of the transmission system, relieving transmission constraints, and lowering the overall cost of delivered energy for end use consumers, including the following:³¹

- ITC Midwest committed to re-conductor/rebuild the Arnold-Vinton-Dysart-Washburn 161 kV line ("Arnold-Vinton Rebuild"), within two years of closing of the Transaction, which is estimated to be approximately December 31, 2009, two years after the estimated closing date of December 31, 2007.³²
- To ensure that ITC Midwest will meet [this commitment regarding the Arnold-Vinton Rebuild], ITC Midwest agreed that if it fails to complete the Arnold-Vinton Rebuild within two years following close of the Transaction, and such failure is not due to circumstances beyond its control, it will (i) on the second anniversary of the close of the Transaction, and effective for all rate periods after the close of the Transaction, discount the return on equity component ("ROE") of its formula rate to 10.39 percent, until such time as the Arnold-Vinton Rebuild is complete; and (ii) refund with interest to all ITC Midwest customers any amounts collected by ITC Midwest that exceed amounts that would have been collected if the 10.39 ROE had been used in ITC Midwest's formula rate since the close date of the Transaction. In the event of a circumstance beyond ITC Midwest's control (the "Impediment") causes the Arnold-Vinton Rebuild not to be completed within the two year period, ITC Midwest will use commercially reasonable best efforts to promptly remove the Impediment, and in that event, the provisions of the immediately preceding sentence will apply, except that "second anniversary of the close of the Transaction" will be replaced with

³⁰ Transcript, December 11, 2007, page 215, lines 20-25. See also Mr. Merz's statement: ". . . we still have yet one more commitment, and you will find it on page 7 of the settlement agreement, that ITC will comply with directives from the Commission to invest in projects that the Commission has determined are necessary." Transcript, December 13, 2007, page 157, lines 6-11.

³¹ For a complete statement of the commitments regarding transmission infrastructure development undertaken in the Settlement Agreement in addition to the ALJ's recommended conditions commitments, see the attached Settlement Agreement, Section 4.2, d - i, pages 12 - 15.

³² Settlement Agreement, December 12, 2007, Section 4.2 (d), page 12.

the date that follows the close of the Transaction by two years plus the length of the delay caused by the Impediment.³³

- ITC Midwest committed to construct the Salem-Lore-Hazelton 345 kV line ("Salem-Lore Project") and take actions discussed below which are necessary to complete the project, provided ITC Midwest is able to acquire all needed regional transmission organization approvals and acceptances, permits, and regulatory approvals. ITC Midwest committed to completing the project by December 31, 2011 or within three years following the approval of the MISO Board of Directors if later. In this effort, ITC committed to take several specific actions toward completion of the Salem-Lore Project.³⁴ See the Settlement Agreement (attached) at Section 4.2, pages 13 and 14.
- To ensure that ITC Midwest would meet [these commitments regarding the Salem-Lore Project], ITC Midwest agreed to a specific penalty if it fails either to complete the Salem-Lore Project within three years following approval of the Salem-Lore Project by the MISO Board of Directors or to satisfy any other commitment in paragraphs (f)(I)-(vi) if such failure is not due to circumstances beyond its control.³⁵

3. Impact on Retail Rates

The settling parties acknowledged that the ALJ had concluded that the Joint Petitioner had failed to show that the Transaction will not have a negative impact on Minnesota retail rates.

While acknowledging that Minn. Stat. §216B.16, subd. 7© requires the Commission to consider the impact of any proposed transaction on retail rates, the settling parties noted that the statute does not prohibit the Commission from approving a transaction simply because there is a potential rate increase, if other benefits are shown to mitigate, alleviate, or neutralize such rate increases.

The settling parties stated that several factors mitigate the rate impact of the Transaction, factors not known to the ALJ when she issued her Report on November 26, 2007. First, they noted that FERC's December 3, 2007 Order approves a 12.38 percent ROE for ITC, which is 150 basis points lower than the ROE used by the ALJ in calculating ITC's projected revenue requirement. The lower ROE reduces the impact of the Transaction on retail rates.

Second, in the Settlement Agreement filed December 12, 2007, ITC has agreed to lock in the 12.38 percent ROE in determining its revenue requirement through December 31, 2012 as well as any true up amount recovered in later periods resulting from an over or under collection by ITC of its revenue requirement during those periods.

³³ Settlement Agreement, December 12, 2007, Section 4.2 (e), page 12.

³⁴ Settlement Agreement, December 12, 2007, Section 4.2 (f), page 13.

³⁵ Settlement Agreement, December 12, 2007, Section 4.2 (g), page 14.

Third, while the ALJ did not select either the Transaction Adjustment (TA) or the Alternative Transaction Adjustment (ATA), the Settlement Agreement incorporates the ATA³⁶ as a condition of Transaction approval. ITC stated that it expects the ATA to provide a retail rate discount to offset the transmission portion of the currently bundled retail rate by approximately \$30 million.

Fourth, the ATA provides that IPL will refund \$13.04 million total company per year to its full requirements customers in each of eight years, beginning in the year customers experience an increase in rates related to transmission charges assessed by ITC.

In addition to citing these factors which reduce or offset the Transaction's upward pressure on retail rates, the settling parties cited the Settlement Agreement's commitments to comply with all the conditions set forth in the ALJ's Report and added new commitments, additional terms and provisions cited above, including but not limited to ITC's commitment to the energy cost saving investments in the Arnold-Vinton Rebuild and the Salem-Lore Project.

The settling parties asserted that the potential future rate increases are expected to be offset by ITC's commitment to make transmission system improvements, which are expected to result in energy cost savings.

4. Retail Rate Impact of the Loss of Deferred Tax Balances

The settling parties acknowledged that if the proposed sale is approved, IPL's existing deferred tax balances likely will not transfer to ITC, resulting in the loss of offsets in ITC's rates going forward. The settling parties stated that the Transaction should be addressed assuming that there will be a loss of deferred tax benefits and the question should be: are there compensating benefits of the proposal?

The settling parties contended that the issue of Deferred Taxes was resolved because the ATA refunds offset the loss of deferred taxes.

5. Additional Settlement Agreement Commitments

The settling parties stated that the following conditions were reasonable and in the public interest. They made these commitments a part of their Settlement Agreement:

- ITC will honor IPL's contractual agreements related to the Transmission Assets.
- ITC will forgo recovery through rates of its Transaction costs, up to \$15 million.
- ITC will not seek recovery of Acquisition Premium.

³⁶ By terms of the ATA, ITC will provide a rate discount of \$4,125,000 to its customers in each of eight years, beginning in the year customers are first affected by ITC Midwest's transmission rates. For this purpose, ITC Midwest's customers are those customers (including IPL) that will take service under the MISO Open Access Transmission and Energy Markets Tariff (TEMT), including transmission-only customers. ITC Midwest would not attempt to recover this rate discount from customers through its FERC formula rates. IPL estimates that, in the first year that the rate discount is given, approximately 92 percent of the discount would be reflected in the rates of IPL's full-requirements customers. ALJ Report, Finding of Fact 60.

- The terms of the Settlement Agreement shall be binding on the successors and assigns of ITC and IPL.³⁷

VI. Additional Commitments, Representations and Clarifications Made by the Joint Petitioners in the Course of Hearings Before the Commission on December 11, 13, and 18, 2007

A. Introduction

In comments before the Commission on December 11, 2007, ITC counsel clarified that the Parties did not view the Offer of Settlement/Settlement Agreement filed December 10, 2007 as a final “take it or leave it” document and were open to the Commission adding further conditions. Counsel for ITC stated: “. . . This is a document that is subject to change. And so if the Commission believes that there are standards that would be appropriate, we would certainly look at those to be included here.”³⁸ And further: “. . . we, again, regard this document that we — it’s one that we want to be responsive to the Commission’s concerns and would certainly look at ways to improve the document if the Commission had thoughts about that.”³⁹

In the course of the subsequent three days of hearings (December 11, 13, and 18, 2007), in response to concerns expressed by other parties and the Commission, ITC and IPL made several representations and gave several assurances and commitments regarding the benefits of the Transaction and specified additional details regarding their post-Transaction activities.

The Joint Petitioners’ commitments, assurances and representations during the oral argument have been vital to the Commission’s ultimate finding that the Transaction, as conditioned, is consistent with the public interest. Chair Koppendrayner, who ultimately made the motion to approve the Transaction emphasized the important role of the Joint Parties’ commitments and assurances during oral argument:

But I think we've sat here through a long process and gotten **commitments** from the parties that have given at least me the level of comfort that I need to go forward with the transaction. . . . (Emphasis added.)

I think in the process we've got enough **assurances** of how this is going to be done, and that the benefits to the ratepayer will outweigh, at least outweigh the concern that I have for another possible jeopardizing of the -- of the deal going forward by setting up a small deferred account for more assurance, so I'm comfortable leaving that out. (Emphasis added.)

³⁷ A commitment by the Joint Petitioners to add this sentence binding their successors and assigns to the Settlement Agreement was made in the course of the December 11, 2007 meeting for oral argument and added to the December 12, 2007 Settlement agreement at the Commission’s December 13, 2007 meeting for oral argument and deliberations on this matter.

³⁸ Transcript, December 11, 2007 at page 28, lines 20-24.

³⁹ Transcript, December 11, 2007 at page 61, lines 5-9.

... Because, as our order writers go through this, it's my intention that, if it's in a motion, that -- that what the parties agreed to, IPL and ITC, will be in the order that they agreed to on the record, and that'll address this concern. So I would vote in favor of approving the transaction that way.⁴⁰

And following the motion approving the Transaction as conditioned, Chair Koppendrayer further emphasized the role of the parties' verbal commitments during oral argument, stating

... it was my intention, and I hope everybody understood that, that during the proceeding of the last -- of the oral arguments of this for the two days, IPL and ITC said, we are going to do this, we fully intend to do this, we fully intend to do A, B and C. I expect, rather than take the time now to review the record to pull them out and make sure they're worded exactly how they would fit into the stipulation, how they reiterated they were going to do them, I didn't want to do that. My intention was that in the order [the Commission's Order writer] would look at the record and pull them out and make sure.⁴¹

B. Commitments Regarding the Commission's Jurisdiction/Authority to Enforce Terms Imposed by the Commission as Conditions of its Approval of the Transaction

The RUD-OAG and Energy Cents questioned whether the Commission would have jurisdiction or authority over ITC to enforce commitments made by ITC and adopted by the Commission as conditions to finding that it is consistent with the public interest and, hence, approving the Transaction.

ITC argued that this was not a concern. First, it cited that the Joint Petitioners' commitment in the Settlement Agreement:

The Parties agree that the Minnesota Commission has authority to determine whether the **provisions of the Settlement Agreement** have been met and to enforce the provisions of this Settlement Agreement.⁴² (Emphasis added.)

In addition, at the December 11, 2007 hearing, ITC clearly stated its understanding regarding broad application of this provision. In response to the RUD-OAG's argument that the penalty language proposed by the Department was limited to the two promised projects (the Arnold-Vinton Rebuild and the Salem-Lore Project), Counsel for ITC stated:

I do disagree that the language that the Department has proposed is limited in a way that the RUD has suggested because the very first sentence says, "The parties agree that the Commission has authority to determine whether the provisions of the settlement agreement have been met and to enforce the provisions of this agreement." That's a broad grant. That's what we're signing on to, because we're not

⁴⁰ Transcript, December 18, 2007, pages 54 (lines 17-25) and 55 (lines 5-11 and 16-22).

⁴¹ Transcript, December 18, 2007, page 73, lines 11-23.

⁴² December 12, 2007 Settlement Agreement at page 1.

worried about the Commission's jurisdiction to enforce this agreement because we intend to live up to those commitments.⁴³

ITC also emphasized that post-Transaction ITC will be subject to Commission jurisdiction pursuant to several Minnesota statutes. In so doing, ITC committed to act in post-Transaction years as if ITC was, in fact, subject to the Commission's jurisdiction pursuant to these statutes:

And, in fact, the Minnesota statutes give the Commission jurisdiction. For example, ITC will participate in the Commission's planning process relating to transmission. That's required by statute, and that's something the Commission has jurisdiction over. The statutes specifically give the Commission authority to order adequate infrastructure investment and also preventative maintenance. And that ability to make those orders isn't limited to public utilities; it applies to ITC, my client as well. And, finally, the statutes also give the Commission the ability to seek in a court proceeding a fine if the Commission believes that a party has knowingly and intentionally violated one of the Commission's orders. Now, we were, frankly, surprised that there was any issue about the notion that the Commission can enforce its own orders.⁴⁴

In addition to these statutory obligations, ITC counsel emphasized ITC's commitment and obligation to abide by conditions that it has proposed and/or accepted:

First, with respect to your authority. There's been a lot of discussion, and as I understand it that's one of the main sticking points that remains with the agencies. I mean, you obviously have authority to determine that this transaction is or is not in the public interest. That's what the legislature has told you is your job. And if you determine it's not in the public interest unless certain conditions are satisfied, you certainly can place your approval of the transaction under those conditions, and it will then be up to the parties to decide to accept or not accept them. But certainly if they accept them then they're bound to them. So that's another way that I would look at the authority issue, is you have the ability to set conditions for this transaction.⁴⁵

C. IPL's Commitment to Use Sale Proceeds to Fund Major Capital Initiatives and to Refund Customers Through the Alternative Transaction Adjustment

In the December 12, 2007 Settlement Agreement, IPL confirmed its commitment to a refund pursuant to the alternative transaction adjustment. IPL representative Larson stated:

. . . IPL will use a portion of the proceeds to refund customers through the alternative transaction adjustment as noted as well as in the offer of settlement.⁴⁶

⁴³ Transcript, December 11, 2007 at page 175 (line 1) and page 176 (1-10).

⁴⁴ Transcript, December 11, 2007, page 19 (lines 9-25) and [age 20 (lines 1-8).

⁴⁵ Transcript, December 11, 2007, page 67 (lines 23-25) and page 68 (lines 1-6).

⁴⁶ Transcript, December 11, 2007, page 76, lines 9-12.

In addition, at the hearing on December 11, 2007, IPL committed to use proceeds from the sale to help fund major capital initiatives, specified several particular projects, and identified others in general terms. IPL representative Larson stated:

Relative to the use of proceeds, the transaction is part of IP & L's larger plan to invest in major electric utility infrastructure for the benefit of both its Minnesota and Iowa-based customers. As IP & L has stated throughout this proceeding, **it intends on taking the proceeds from the asset sale and use those proceeds to help fund major capital initiatives.** Moreover, the Jobs Creation Act of 2005 specifically requires IPL, for a transaction of this nature, to invest the proceeds from this sale back into utility infrastructure. (Emphasis added.)

I would like to just highlight a number of those major projects that IPL is embarking on. First of all, IPL will complete siting hearings in Marshalltown, Iowa by mid January for the siting of the Sutherland Unit 4, which is IPL's proposed 630-megawatt clean coal technology baseload plant in Marshalltown, Iowa. Secondly, IPL has received approval from the Iowa Utilities Board regarding its rate principles for its proposed 100-megawatt wind farm expected to be in service by 2010 and recently announced that the site for that will be located in Franklin County, which is near Hampton, Iowa. That site has the potential for expansion of up to 200 megawatts of renewable generation. IPL has also completed capital improvements to implement nitrous oxide, or NOX, controls at its Ottumwa generation station and has plans to implement NOX, mercury, and SO2 reductions with control technology over the next number of years in its other generating plants.⁴⁷

D. IPL Commits to Use the Entire \$750 Million Sale Proceeds in Utility Infrastructure Over a Four Year Period

In response to questioning from Commissioner Boyd, IPL representative Larsen clarified that IPL would use the entire \$750 million sale proceeds to make utility infrastructure improvements over the coming four years.

COMMISSIONER BOYD: Mr. Larsen, when you say proceeds, is that the full 750 million?

MR. LARSEN: Correct.

COMMISSIONER BOYD: And you have four years, is that right, to spend \$750 million?

MR. LARSEN: That is correct.⁴⁸

IPL further explained that its commitment to invest the \$750 million in infrastructure investments within four years is reinforced by the Energy Policy Act, which requires that the gross proceeds (\$750 million) must be reinvested in utility infrastructure over a period of four years.⁴⁹

⁴⁷ Transcript, December 11, 2007, page 75 (lines 1-25) and page 76 (lines 1-7).

⁴⁸ Transcript, December 11, 2007 at page 77, lines 15-20.

⁴⁹ Transcript, December 11, 2007 at page 77, lines 21-24.

E. IPL Commits That the Proceeds That it Transfers to its Parent, Alliant, Will be Timely Made Available to Fund IPL's Infrastructure Investment Projects

At the December 11, 2007 hearing, a concern was expressed that if a significant portion of the proceeds is transferred to IPL's parent company, Alliant, IPL may not have sufficient funds to make the promised \$750 million investment in infrastructure. IPL responded to that concern in the following exchange:

COMMISSIONER BOYD: And in terms of funding the projects, if 394 million goes back to Alliant, how do you anticipate funding all these? Is it a matter of borrowing, issuing securities, stock?

MR. LARSEN: Certainly the final decision of that has not been made. But the funds would be -- as we had noted, would be dividend into the parent [Alliant], and we would be able to use those proceeds as we are funding the capital outlay of these projects, and it may also require additional external funding as well.

COMMISSIONER BOYD: And the only reason I ask that question is somewhere in here it was noted that there's -- there are times when you have to stand in line to get the money out of the parent company for projects. And I just want to be sure that that process has been contemplated or discussed such that these projects don't fall flat.

MR. LARSEN: Yeah, certainly. And I would -- I would note that for our ability to gain the advantage of the tax incentive, we are required to reinvest those over a period of four years and required to demonstrate that. So to the degree that we do not, we would lose that tax benefit, which is a material part of our ability to refund customers and reinvest in the grid.⁵⁰

F. ITC Commits to Achieving the Commission's Transmission Goals

During the Commission's December 11, 2007 hearing, ITC's CEO Joe Welch expressed ITC's general commitment to achieve the Commission's transmission goals:

You want market access, that's our calling card for you. You want renewable resources integrated into the grid, that's what we do. You want a fluid market, we're proud to deliver that because that shows you and us that we bring something to the table that no one else can do. You want high reliability service for manufacturing customers, that's what we do, and that's what we want to do.⁵¹

G. Various Economic Stimulus Commitments by ITC

At the December 11, 2007 hearing, ITC listed several implementation steps that the company was committed to take, steps generally viewed as having a beneficial economic impact on the local economy. ITC's CEO Welch stated:

We've committed to building four new regional pull-out stations, as they're called, or warehousing facilities that are also then with our field forces, one of which is going to be in Albert Lea, Minnesota. We are committed to those. And if this deal closes, they will be up and running. We have identified and started making commitments

⁵⁰ Transcript, December 11, 2007 at page 78 (lines 18-25) and page 79 (lines 1-19).

⁵¹ Transcript, December 11, 2007 at page 93, lines 6-14.

for over \$5 million of additional inventory to start to bring in so to make sure that we're ready to serve you as quickly as possible. We've started to hire our union linemen. All of the line folks that we use today are union folks. We will be hiring at least 125. And we've already extended job offers to key people in -- at the union ranks. They have accepted the jobs pending closure. We have identified over 100 new vehicles that will be purchased to support all of the work that we're doing here, and those will be all bought from local dealerships.⁵²

H. ITC Quantifies Fuel Savings Benefit That Will Result From the Two Transmission Line Projects to Which it Has Committed in the Settlement Agreement

At the December 11, 2007 hearing, ITC represented to the Commission that the fuel savings resulting from building the two lines identified in the Settlement Agreement (the Arnold-Vinton Rebuild and the Salem-Lore Project) would be about \$43 million. ITC's CEO Welch stated:

In summation, if you're going to write any numbers down or take any note, have this one: Of the \$97 million total revenue that ITC Midwest will get, 7 million of it comes from Minnesota. Forget all of the other numbers, all of the other rhetoric. It's \$7 million approximately for Minnesota. The savings of the projects that we have committed under severe penalty to build for you [the Arnold-Vinton Rebuild and the Salem-Lore Project] bring you the benefits of about \$43 million in fuel savings. We have committed to that.⁵³

Over the course of succeeding hearings, ITC did not modify or qualify that representation regarding the fuel savings benefits of the Settlement Agreement nor did any proponent of the Settlement Agreement dispute that figure. ITC's quantification of fuel savings was among the factors relied upon by the Commission in evaluating whether to approve the Transaction as consistent with the public interest.

CHAIR KOPPENDRAYER: . . . if this deal falls through and IPL has no obligation to build and the ratepayers continue to pay higher rates because of a lack of investment, then who loses? The ratepayer loses. The ratepayers, according to the numbers thrown around this morning, are losing \$48 million. Here the ratepayers invest 7 million and have a \$43 million return. That's a risk benefit analysis that we also have to take when we look at whether or not we're going to approve the deal. That's an absolute; you have to build this line, absolute. Okay. They don't go through with the deal. The ratepayers have just lost \$43 million. Or, no, they've lost \$36 million – because they could have spent 7 and gained a benefit of 43.⁵⁴

ITC's own view of the status of its representations regarding the benefits of the Transaction (including Mr. Welch's above-cited statement regarding the fuel savings) are that they are commitments that ITC will "stand up for," as the following statement by ITC's counsel indicates:

⁵² Transcript, December 11, 2007 at page 98 (lines 12-25) and page 99 (lines 1-4).

⁵³ Transcript, December 11, 2007 at page 100, line 7-17.

⁵⁴ Transcript, December 11, 2007 at page 114, lines 4-20.

Mr. Merz: What have we heard today about what's at stake? There are **benefits** that this transaction promises for Minnesota. They are concrete **benefits**. They are specific. They are **commitments** that ITC has said they will stand up for. (Emphasis added.)⁵⁵

I. ITC and IPL Commit to the Interrelated Obligations Regarding the Construction of Transmission Lines Appearing in the Sales Agreement

With the apparent agreement of ITC, IPL explained that IPL has obligated itself to build the two lines committed to by ITC in the event that ITC does not in fact build them and that ITC has obligated itself, once IPL has built them, to purchase them from IPL at IPL's installed cost. The IPL representative stated:

MR. LARSEN: The provisions in the sale agreement stipulate that if IP & L were to build transmission that we would then -- ITC would purchase that transmission from us at our installed cost. So, therefore, we would -- If based on this language ITC were to fail to get those completed, we would agree to move forward and get these facilities built, to the degree that we can; and if they were built, ITC would have the obligation to purchase those facilities since we would no longer be in the transmission business.⁵⁶

The Commission understands the phrase "to the degree we can" in Mr. Larsen's statement means that IPL is committed to complete the lines unless it encounters the same impediments that would excuse ITC's failure to complete the lines ("... circumstances beyond ITC Midwest's control" as defined in the Settlement Agreement, Footnote 20 at page 11) rather than to a decision by IPL to direct its financial resources to other priorities.

J. IPL's Commitment Regarding its Reworked Cost-Benefit Analysis and Residential Rate Impact

In her November 26, 2007 Report, the ALJ examined a twenty-year cost-benefit analysis that factored in an ROE of 13.88 percent and the Alternate Transaction Adjustment but did not assume

⁵⁵ Transcript, December 11, 2007 at page 175, lines 18-23. Again referring at least in part the \$43 million fuel cost savings quantified by Mr. Welch earlier in the hearing, ITC counsel argued: "So what's at stake here is you are risking a **huge benefit** because, as I understand it, the RUD just doesn't know yet." Transcription, December 11, 2007 at page 176, lines 11-12. (Emphasis added.) The Commission understands that it is possible that Mr. Merz may have also been including the 20 cent rate decrease (ratepayer benefit) shown by IPL's re-worked cost-benefit analysis (filed December 10, 2007) as part of the Transaction's "huge benefit," "concrete . . . and specific" that he referenced. Weighing against this interpretation, however, is that Mr. Merz specifically referred to benefits that ITC would "stand up for" and the retail rate impact factor was based on a study prepared and argued by IPL. In any event, at the very least Mr. Merz was alluding in very substantial part, to the "huge, concrete, and specific" \$43 million (net \$36 million) fuel cost savings stated earlier by Mr. Welch, underlining the importance of that stated benefit.

⁵⁶ Transcript, December 11, 2007 at page 134, lines 13-23.

that FERC will assume jurisdiction over retail rates in 2013. The ALJ found, based on this analysis, that the Transaction would have a negative effect on ratepayers of \$36.8 million, an increase of approximately 16 cents on an average residential customer's monthly bill.

Subsequent to the ALJ's Report, FERC issued an Order granting ITC an ROE of 12.38 percent rather than the 13.88 percent ROE assumed by the ALJ.

On December 10, 2007, the Joint Petitioners filed a twenty-year cost-benefit analysis that they said was based on the same assumptions that the ALJ used in finding the 16-cent rate increase except that instead of assuming a 13.88 percent ROE, the new analysis used the return on equity actually granted ITC by FERC (12.38 percent). The Joint Petitioners' new twenty-year analysis showed that an average residential customer's monthly bill would actually decrease by 20 cents.⁵⁷

At the December 13, 2007 hearing, IPL affirmed the accuracy of its new 20-year cost-benefit analysis and committed to begin its Alternative Transaction Adjustment refund immediately if further analysis were to show that the change in ROE from 13.88 percent to 12.38 percent does not eliminate the rate detriment found by the ALJ and in fact yield a benefit for Minnesota ratepayers. Counsel for IPL stated:

And what the ALJ was concerned about was that that 20-year analysis that we had with the 13.88 showed a detriment to the customers. And so that's what she was concerned about. So to address that we now have new facts in the record, and we filed that, so you can see that the concern of the ALJ has kind of been mitigated by the FERC decision. And that we now have a . . . benefit to customers.

Further, IPL committed that if further analysis showed the Commission that ratepayers did not benefit as indicated by the new cost-benefit analysis, IPL would begin refunds under the alternative transaction adjustment immediately rather than wait for a rate case.

MR. ALLERS: . . . And if for some reason somebody doesn't think they're right [the numbers in the new cost-benefit analysis filed December 10, 2007] and this Commission doesn't do it, what Jennifer is saying is we'll start that refund to Minnesota customers before and in advance of a rate case. That was our response to try to protect the ratepayers.⁵⁸

.....
COMMISSIONER PUGH: . . with respect to that rate chart, whatever that's called. If that turns out to be incorrect, you've indicated you'd start a refund process to Minnesota ratepayers. Incorrect when, in the first five years? It'll have to be --
MS. MOORE: No, immediately. Immediately. So if our adjustment of the 12.38 --
COMMISSIONER PUGH: Is wrong.

⁵⁷ See Transcript, December 11, 2007 at page 53 (lines 1-25), page 54 (lines 1-8) and page 57 (lines 1-11). See also, IPL counsel Moore's statement: ". . . The summaries that we filed on Monday [December 10, 2007] what we did is, as we explained before, the ALJ relied on that 20-year analysis that was in Mr. Linxwiler's testimony, so we took that and we replaced that 13.88 ROE with the 12.38 to come up with a gain -- well, of a net benefit to ratepayers. Transcript, December 13, 2007, page 105, lines 20-25.

⁵⁸ Transcript, December 13, 2007, page 13, lines 15-20.

MS. MOORE: Correct, does not yield what we filed -- well, if you find that -- again, if we made -- . . . The adjustment we made from the 13.88 to the 12.38 and what it yielded, if our math was wrong, then, yes. And it didn't yield the benefits that we said it would be, then we're willing to begin that refund. You can order us -- in the event that, you know, that the benefits yielded from the cost-benefit analysis turn out to be different, that IPL has committed that it will begin to refund its That we would begin the refund immediately instead of waiting for the next rate case.⁵⁹

K. IPL's Commitment to the Proposition That the Commission Will Have On-Going, Post-Transaction Authority to Decide How the Gain on Sale Should be Treated for Ratemaking Purposes

During the December 13, 2007 oral argument, the Commission considered whether at least a portion of the gain on sale should be set aside, given deferred accounting treatment, so that the Commission could determine at a later date whether and to what extent that amount should be returned to IPL's Minnesota ratepayers. IPL gave the following assurances:

MS. MOORE: I'm not sure it's necessary to defer the funds, we know what Minnesota allocation is, and you can -- you can reevaluate this at any time and then come back and decide how you are going to have the gain be treated.

CHAIR KOPPENDRAYER: You may not think it's necessary. I can understand that. But there's a lot of people who have heartburn over what we're doing right now and if we say yes, and we would get a better chance to look at the numbers, does it all work out the way we had hoped.

MS. MOORE: And I understand that. But . . . for ratemaking authority you can always come back and decide whether it's more proper for the Minnesota portion to be allocated to gain, to accounting 108. So, again, you always have that authority to go ahead and reevaluate that, whether or not you need to do that today, I don't think that you do.⁶⁰

.
MR. ALLER: So the question really becomes, to your point of view, just set aside some of the money, and take and have, whether it's a month or two months or whatever it takes, here would be my response to you. If this sale goes through, IPL is still regulated by you and the members who sit at the dais. And if for some reason in the future, a month or two or three months we find something that's inconsistent with what we've said, you have all the authority at that moment that you do today prior to the sale going through to make whatever adjustments you want in IPL's rates. That doesn't go away or it isn't enhanced or it isn't decreased by this transaction.⁶¹

⁵⁹ Transcript, December 13, 2007, pages 133 (lines 5-24), and 134 (lines 8-14).

⁶⁰ Transcript, December 13, 2007, pages 66 (lines 18-25) and 67 (lines 1-14).

⁶¹ Transcript, December 13, 2007, page 68, lines 5-17).

L. ITC's \$350 Million Commitment

In response to a concern that the ITC's obligation to build a second line to relieve transmission constraints affecting Minnesota may disappear if the Salem-Lore Project fails due to circumstances beyond ITC's control, ITC made two additional commitments. First, ITC committed that if construction of the Salem-Lore Project does fail due to circumstances beyond ITC's control, it will spend \$100 million in the ITC Midwest jurisdiction to relieve constraints affecting Minnesota.

In addition, ITC committed to an additional \$250 million infrastructure work to improve the grid in the Midwest jurisdiction, some of which would be for constraint relief (some benefitting Minnesota and some not) and some of which would be reliability projects. The second commitment (to spend an additional \$250 million on transmission infrastructure improvements) is not contingent upon an inability (or ability) to build the second line, the Salem-Lore Project.

Counsel for ITC stated:

I just want to make sure it's clear here that we're not making -- we're not somehow changing our commitments. **We're not in any way backing away from the commitments to do the work on those two lines that we have agreed to do.** And the discussion after lunch was specifically to Commissioner Pugh's concern about, well, what if you can't build the second line, how are we going to **backstop that obligation.** And **the way we're going to do that** is we're going to commit to do the **100 million in constraint relief** that we had agreed to. And in addition to that, he's committed to do yet more **[the \$250 million]**. (Bracketed material and emphasis added.)⁶²

ITC's CEO Welch detailed the commitments totaling \$350 million in an exchange with Commissioner Reha.

COMMISSIONER REHA: What did you intend, Mr. Welch, with respect to the \$350 million that would be dedicated to ITC Midwest?

MR. WELCH: I was intending to have \$100 million solely allocated for constraint relief --

COMMISSIONER REHA: Right.

MR. WELCH: -- for lack of better terms, the benefit of Minnesota. The rest, the other 250 was to generally improve the rest of the grid. Because we can get one link up here in the northern part really strong, and I'll tell you, the link is going to move south real quick on us where the weak link is in this chain.

COMMISSIONER REHA: But still ITC Midwest, not your other jurisdictions?

MR. WELCH: Yes, I was clear on that, that would have been the IPL asset base.

COMMISSIONER REHA: So what are we talking about if it's not in this Iowa constrained area?

⁶² Transcript, December 13, 2007, pages 156 (lines 17-25) and 157 (lines 1-5).

MR. WELCH: Well, there's a lot of work to be done throughout the IPL footprint that is not just for constraint relief, it's reliability projects, there's a lot of old equipment that just literally is at the end of life.⁶³

Mr. Welch also clarified that the commitment to spend the sum certain, the \$100 million portion of the \$350 million commitment, would be triggered only by the inability to build the second line, the Salem-Lore Project.⁶⁴

VII. Objections to Approving the Transaction Based on the Settlement Agreement and Commitments Made During the Review of the Settlement Agreement

A. Burden of Proof

The RUD-OAG expressed the concern that with the filing of the Offer of Settlement on December 10, 2007, the burden of proof had *de facto* and improperly shifted to objecting parties to show why the Commission should not approve the Transaction or the Settlement Agreement.

On the contrary, in the Commission's view the burden of proof has always remained with the Joint Petitioners to show that the Transaction, as conditioned by the terms contained in the Settlement Agreement and other conditions/commitments made by the Joint Petitioners in the course of these proceedings, was consistent with the public interest, as required by Minn. Stat. §§ 216B.16, subd. 7c and 215B.50.

That view is also reflected in the structure and content of Joint Petitioners' Offer of Settlement/ Settlement Agreement. That document clearly identified the statutory elements on which the ALJ had found the Joint Petitioners showing had failed, including the ultimate failure, failure to show by a preponderance of the evidence that the Transaction was in the public interest. Acknowledging the weak points identified by the ALJ, the Joint Petitioners set out in their Settlement Agreement specifically to overcome the weaknesses of their showing, proceeding from one ALJ-identified failure to the next, bolstering their showings with additional commitments which they believed were sufficient to meet their burden of showing that the Transaction, as conditioned, was consistent with the public interest.

The fact that the Joint Petitioners made additional commitments during the course of oral argument and discussion with Commissioners indicates their awareness of who bore the burden to persuade the Commissioners that the Transaction was in the public interest and to approve the Transaction.

B. Closing of the Record

The RUD-OAG expressed concern that the Commission should not consider information presented by the Joint Petitioners after the record had closed in this matter. The RUD-OAG argued that the record closed upon the filing of exceptions to the ALJ's Report, i.e., prior to the Joint Petitioners' submission of the Settlement Agreement, new cost-benefit analyses, and statements made by the Joint Petitioners at the December 11 and 13, 2007 hearings. The RUD-OAG asserted that the Commission's consideration of these things therefore was inappropriate.

⁶³ Transcript, December 13, 2007, pages 151 (lines 24-25), 152 (lines 1-25), and 153 L(lines 1-21).

⁶⁴ Transcript, December 13, 2007, page 139, lines 6-22.

The Commission finds that the items that the RUD-OAG objected to the Commission considering were properly part of the record in this matter. Minn. Stat. § 14.61, subd. 2 states:

In all contested cases where officials of the agency render the final decision, the contested case record must close upon the filing of any exceptions to the report **and presentation of argument** under subdivision 1 or upon expiration of the deadline for doing so. (Emphasis added.)

In its Orders, the Commission has consistently interpreted that section to mean that the record closes only after the conclusion of post-hearing oral argument.⁶⁵ The Commission most recently expressed this long-standing view in an Order issued February 6, 2007 in Docket No. E-221,148/SA-03-989:

The Administrative Procedure Act requires that agency decisions in contested cases be based only on evidence in the record. [footnote omitted] It prohibits agencies from considering factual information or evidence outside the record, and it provides that the record is closed as of the date that the parties present post-hearing argument to the agency. [footnote omitted].⁶⁶

⁶⁵ See, for example: *In the Matter of the Application of CenterPoint Energy Minnesota Gas, a Division of CenterPoint Energy Resources Corp., for Authority to Increase Natural Gas Rates in Minnesota*, Docket No. G-008/GR-05-1380, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER (November 2, 2006) at page 3; *In the Matter of the Application of Northern States Power Company, d/b/a Xcel Energy, for a Certificate of Need to Establish an Independent Spent Fuel Storage Installation at the Monticello Generating Plant*, Docket No. E-002/CN-05-123, ORDER GRANTING CERTIFICATE OF NEED FOR INTERIM INDEPENDENT SPENT FUEL STORAGE INSTALLATION (October 23, 2006) at page 3; and *In the Matter of the Application of Northern States Power Company d/b/a Xcel Energy for Authority to Increase Rates for Electric Service in Minnesota*, Docket No. E-002/GR-05-1428, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER; ORDER OPENING INVESTIGATION (September 1, 2006) at page 3.

⁶⁶ *In the Matter of the Application of the City of Buffalo to Extend its Assigned Service Area into the Area Presently Assigned to Wright-Hennepin Cooperative Electric Association*, DOCKET NO. E-221,148/SA-03-989, ORDER DETERMINING COMPLIANCE ISSUES (February 6, 2007) at page 7. In this matter, the Commission found that the record closed on March 10, 2005 after the parties presented oral argument. See also the Commission's earlier Order in this matter: ORDER DETERMINING COMPENSATION AND REQUIRING COMPLIANCE FILING dated April 1, 2005. In that Order, the Commission noted the filing of exceptions to the ALJ's Report in November 2004 (the event which the RUD-OAG argues in the current matter signals the close of the docket) and applies the clear language of Minn. Stat. § 14.61, subd. 2 as follows: "On March 10, 2005, the case came before the Commission, the parties presented oral argument, and the record closed under Minn. Stat. § 14.61, subd. 2." Order at page 1.

Based on the clear provisions of Minn. Stat. § 14.61, subd. 2, therefore, all parties, including the Joint Petitioners were entitled to supplement the record with information and arguments based on that record until the close of oral argument and the items objected to by the RUD-OAG are properly considered part of the record in this matter because they were submitted prior to the close of oral argument.

C. Due Process Requirements

The RUD-OAG argued that failure to refer the Joint Petitioners' "new information" back to the ALJ for contested case treatment violated its right to due process. The RUD-OAG stated that if it was not allowed to do discovery and cross-examine the Joint Petitioners' witnesses regarding this information and the Joint Petitioners' newly proposed conditions, the Commission could not rely on this information in reaching a decision on whether the Transaction, as conditioned, was consistent with the public interest.

The Commission disagrees. Contested case treatment for all aspects of and conditions relating to the transfer of transmission lines is not an absolute requirement. Minn. Stat. § 216B.16, subd. 7c states in relevant part:

. . . the Public Utilities Commission must review the request to transfer either in the context of a general rate case under this section **or by initiating other proceedings it determines provide adequate review** of the transmission asset transfer.
(Emphasis added.)

RUD- OAG has requested further proceedings 1) to build additional record regarding the impact of ITC's ROE change and 2) to determine the exact amount of the fuel cost savings that will result from relieving the constraints upon the two identified lines.

1. Rate Impact Information⁶⁷

With respect to the impact of ITC's ROE change, virtually all the information that the rate impact RUD- OAG characterizes as new was, in fact, part of the record established before the ALJ. On December 10, 2007, the Joint Petitioners submitted two re-worked cost-benefit analyses, largely based on the 20-year cost-benefit analysis submitted in Municipal Coalition witness Linxwiler's testimony and examined as part of the ALJ's contested case proceeding. The Joint Petitioners explained that they chose to use this 20-year cost-benefit analysis as the basic framework for their re-worked analyses specifically because the ALJ relied on it finding ratepayer detriment.⁶⁸

⁶⁷ The Legislature does not make rate impact the decisive factor ("super factor") in the Commission's determination of whether the Transaction is in the public interest. Rate impact is but one of several factors that the Commission is required to balance in determining whether a transfer of transmission assets is consistent with the public interest. Minn. Stat. §216B.16, subd. 7c.

⁶⁸ In the Joint Petitioners' first re-worked analysis, the only modeling change between the earlier analysis relied on by the ALJ and what the Joint Petitioners submitted on December 10, 2007 is that the 13.88 percent ROE assumed in the earlier study was replaced by the 12.33

The objection raised by the RUD-OAG about the changed rate impact was that it could not verify the exact size of the change caused by the new ROE figure since it had not had adequate opportunity to review and analyze the Joint Petitioners' re-worked analyses. However, at no point subsequent to the December 10, 2007 filing (including three days of hearings before the Commission) has any party identified an inaccuracy in the Joint Petitioners' re-worked analyses nor did they indicate how errors in the re-worked cost-benefit analysis could reasonably be viewed as altering the ultimate outcome of this docket.

2. ITC's Commitments to Build Transmission Infrastructure

The statutory factor relevant to this discussion is whether the transfer of IPL's transmission assets to ITC would facilitate the development of transmission infrastructure necessary to ensure reliability and to accommodate energy transfers between states. This is generally understood to involve a comparison of ownership by the prospective owner (ITC) with current owner (IPL).

The RUD-OAG objected to the Commission's consideration of the commitments to build transmission infrastructure made by ITC in the Settlement Agreement and during the December hearings before the Commission on the grounds that the record on this matter was closed and that they therefore had no opportunity to do discovery and cross examination regarding these commitments. As indicated in the previous section, Minn. Stat. § 14.61, subd. 2 allows all parties, including the Joint Petitioners, to supplement the record with information and make arguments based on that information until the close of oral argument. The items objected to by the RUD-OAG and Energy Cents are, therefore, properly considered part of the record in this matter because they were submitted prior to the close of oral argument.

With specific reference to the two lines that ITC identified in the Settlement Agreement, there is no question that relieving the transmission constraints associated with those lines will increase the safety, reliability, and efficiency of the grid for the benefit of Minnesota ratepayers. Although the exact amount of resultant fuel cost reduction may not have been specified in proceedings before the ALJ, no party has denied that the improvements ITC has committed to in connection with those lines would enhance reliability and reduce fuel costs associated with congestion, a clear improvement over the status quo.

In addition, ITC has established a record of performance on the record, has demonstrated a compelling sense of commitment and energy for infrastructure improvements on the record, and has

percent ROE, the ROE actually awarded to ITC by FERC on December 3, 2007. According to this re-worked analysis, the new ROE changed the rate impact from an increase of 16 cents on the average residential monthly bill to a decrease of 20 cents.

In the Joint Petitioners' second re-worked analysis submitted on December 10, 2007, in addition to adjusting the ROE to the 12.33 percent ROE actually awarded to ITC, the previously assumed reduced level of Administrative and General (A&G) savings was excluded from the model, reflecting, as the Joint Petitioners acknowledged in their December 10, 2007 filing, the ALJ's finding that the amount of A&G savings was "uncertain". Under this reworked analysis, the average residential monthly bill, rather than increasing by 16 cents, remains unchanged.

made several key infrastructure commitments beyond the two lines in question on the record.⁶⁹ Compared with the prospects of infrastructure work benefitting Minnesota ratepayers if IPL maintains ownership of these transmission assets, therefore, the balance so clearly favors ITC's ownership that embarking upon additional process to specify the exact value of ameliorating the two lines identified by ITC in the Settlement Agreement, as suggested by the RUD-OAG, is not warranted.

3. Conclusion

In this case, based on the entire record established in this matter, the Commission finds that its proceedings to date are adequate to allow it to properly determine that the Transaction, as conditioned, is consistent with the public interest. In light of the substantial enforceable commitments made by ITC and IPL in this case, including ITC's commitment to build transmission lines needed to ensure safe, adequate, efficient and reliable service and IPL's commitment to begin refunds immediately if the Commission later finds that the company's re-worked cost-benefit analyses do not, in fact, show a rate benefit for ratepayers, the Commission concludes that it need not initiate another round of comments or refer this matter back to the ALJ for contested case treatment as urged by the RUD-OAG. In short, gaining additional precision on the points identified by the RUD-OAG would not affect the outcome of this matter.

Since there are no material facts in dispute, the additional proceedings advocated by the RUD-OAG would serve no purpose other than to extend the Commission's decision that the Transaction was in the public interest beyond the time when such a decision could result in a beneficial project proceeding.⁷⁰

VIII. The Commission's Analysis and Action

The legal standard which the Joint Petitioners have the burden to meet to earn Commission approval of the Transaction is to show that the Transaction, as conditioned by the terms contained in the Settlement Agreement and other conditions/commitments made by the Joint Petitioners in the

⁶⁹ Those commitments (see above Sections V and VI of this Order for a complete list) include that ITC will, within 12 months following the Transaction's closing, produce findings and opinions with respect to the condition of its transmission system in Minnesota, together with plans for remedial measures. Settlement Agreement, Section 4.1j, page 10. In addition, ITC has committed that it will comply with a directive from the Commission to invest in any project that the Commission has determined is necessary to ensure safe, adequate, efficient and reliable service. Settlement Agreement, Section 4.2c, page 12.

⁷⁰ The Joint Petitioners asserted 1) that significant tax savings (approximately \$43 million) would be available to ITC if the Transaction were completed by December 31, 2007; 2) that these savings were unlikely to be available after that time; 3) that a decision by the Commission approving/authorizing the Transaction was needed before the Joint Petitioners would complete the Transaction before December 31, 2007; and 4) that without the benefit of the tax savings, the Joint Petitioners would be unwilling to proceed with the Transaction. The Commission finds no reason to dismiss these assertions.

course of these proceedings, is consistent with the public interest, as required by Minn. Stat. §§ 216B.16, subd. 7c and 215B.50.

In her thorough and well-reasoned Report, the ALJ found that the Joint Petitioners had borne their burden with respect to several of the statutory factors that must be considered in determining whether a transfer of transmission assets is consistent with the public interest. The Commission agrees with and adopts the ALJ's thorough Report with respect to those factors. See the ALJ's Conclusion 7 and associated findings of fact 207 - 212 , Conclusion 8 and associated finding of fact 213, and Conclusion 10 and associated finding of fact 214. For reasons explained below, the Commission does not adopt the ALJ's Conclusions 6, 9, 11 and 12 and associated Findings of Fact. In those Conclusions, the ALJ found the Transaction lacking with respect to three specific considerations and ultimately concluded that the Joint Petitioners had failed to show that the Transaction was in the public interest.

With respect to each of the ALJ Conclusions that the Commission does not adopt, the Commission does so because subsequent to the ALJ's Report the Joint Petitioners have committed to substantial conditions that they had not made when the matter was before the ALJ. These commitments have been identified in this Order. See above, Section V, Settlement Agreement and Section VI, Additional Commitments, Representations, and Clarifications. In addition, with respect to assessment of the rate impact factor (ALJ Conclusion 9), the Commission notes the change of a material fact, unknown to the ALJ at the time which significantly alters the actual rate impact of the Transaction. This change, of course, as previously and extensively discussed in this Order is the actual 12.38 percent ROE granted ITC by FERC in an Order issued after the ALJ issued her Report.

Based on its reading of the ALJ's Report, the Commission believes that had FERC's ROE decision been known and had the commitments made to this Commission been made while the matter was before her, the ALJ would have reached conclusions identical to those reached by the Commission in this Order.

- With respect to the ALJ's Conclusion 6 (failure to show development of transmission infrastructure), the Commission finds that through the commitments specified in their Settlement Agreement⁷¹ and during the oral argument of this matter, the Joint Petitioners have remedied that defect. The Commission has specified those commitments in this Order and concludes, based on those commitments, that with respect to that consideration⁷² the Transaction is consistent with the public interest.
- With respect to the ALJ's Conclusion 9 (failure to show that the Transaction will not have a negative impact on Minnesota retail rates), the Commission finds that through the commitments specified in their Settlement Agreement⁷³ and during the oral argument of this matter, the Joint Petitioners have remedied that defect. The Commission has specified those commitments in this Order and concludes, based on those commitments, that with respect to that consideration⁷⁴ the Transaction is consistent with the public interest.

⁷¹ Settlement Agreement, Section 4.2, pages 10-16.

⁷² Minn. Stat. § 216B.16, subd. 7c (1).

⁷³ Settlement Agreement, Section 4.3, pages 16-20.

⁷⁴ Minn. Stat. § 216B.16, subd. 7c (2).

With respect to the ALJ's Conclusion 11 (failure to show that the loss of jurisdiction over IPL's transmission assets is outweighed by the benefits of the Transaction), the Commission finds that through the commitments specified in their Settlement Agreement⁷⁵ and during the oral argument of this matter, the Joint Petitioners have remedied that defect. The Commission has specified those commitments in this Order and concludes, based on those commitments, that with the public interest with respect to that consideration⁷⁶ the Transaction is consistent. Minn. Stat. § 216B.16, subd. 7c (1).

- With respect to the ALJ's Conclusion 12 (failure to show that the Transaction is in the public interest), the Commission notes that the ALJ's conclusion results from the previous Conclusions 6, 9, and 11. Since the Commission has found that the Joint Petitioners have cured the defects identified by the ALJ and the Commission in the course of examining this matter, as discussed in detail above, the Commission concludes that the Joint Petitioners have borne their burden to show that the transaction, as conditioned in this Order is consistent with the public interest. Accordingly, the Commission will approve the Transaction, as conditioned herein.

IX. Variance

The Commission will also grant the Joint Petitioners a variance from the requirements of Minn. Rules, Part 7825.1800, subp. B, which requires asset transfer petitions to include items identified in Minn. Rules, Part 7825.1400, subpts. A through J. The Commission will grant the variance as authorized by Minn. Rules, Part 7829.3200. Items A through J address security issuance issues that are not relevant to this proceeding, their absence from the petition, therefore does not adversely impact the public interest. Further, insisting on their inclusion would be an unnecessary burden. Finally, no law requires that they be supplied other than the Commission's own rule, which the Commission has authority to vary pursuant to Minn. Rules, Part 7829.3200, as the Commission does here.

X. Department Investigation

Finally, the Commission has heard the Department's concerns regarding the degree to which Minnesota ratepayers in general, and IPL's Minnesota retail ratepayers in particular, have paid congestion charges and other charges related to constraints caused by IPL's transmission facilities. The Commission finds that these concerns are reasonable and will therefore encourage the Department to continue the investigation it has initiated regarding these issues. The Commission will benefit from the Department's report and recommendations on this subject.

ORDER

1. The sale of Interstate Power & Light Company's (IPL's) transmission assets to ITC-Midwest LLC (ITC) is approved, subject to the following conditions:

⁷⁵ Settlement Agreement, Section 4.1, pages 7-10.

⁷⁶ Minn. Stat. § 216B.16, subd. 7c does not identify this consideration specifically, but by prefacing the five listed consideration as "among other things" authorizes the Commission to examine other relevant factors.

- a) IPL and ITC shall abide by all the commitments and other terms and conditions set out in the Settlement Agreement filed on December 12, 2007 (copy attached) including the terms and conditions of the Alternative Transaction Adjustment.
 - b) IPL and ITC shall abide by the commitments they made during the proceedings before the Commission on December 11, 13, and 18, 2007: see Section VI, pages 22-34 of this Order.
 - c) If IPL does not take advantage of the tax credit related to the American Jobs Creation Act of 2004 because it does not make sufficient qualified investments or for any other reason, IPL shall notify the Commission within 30 days of any determination by IPL that it will not be able to fully use the tax credits. The filing must include a plan detailing the actions it proposes to assure that IPL Minnesota ratepayers will not be directly or indirectly responsible for any additional IPL income tax liability or any other rate impacts from the loss of these tax credit.
 - d) ITC shall participate in the pending 2007 biennial transmission plan and renewable transmission plan proceedings in Docket No. E-999/M-07-1028 and in any related future studies, plans, and processes. IPL shall also continue to participate in those proceedings unless and until ITC is able to fully supply all needed information and analysis in those proceedings, and IPL shall provide ITC, the parties, and the Commission with information requested in those proceedings; IPL and ITC may be subject to further and more specific requirements to be determined in Docket No. E-999/M-07-1028.
2. The Department of Commerce is encouraged to investigate the degree to which Minnesota ratepayers in general, and IPL Minnesota retail ratepayers in particular, have paid for congestion charges and any other charges related to constraints caused by IPL's transmission facilities; the Commission requests that the Department file a report with the Commission detailing its findings, and recommending any rate adjustments, refunds, or other remedies the Department determines are appropriate.
 3. The Joint Petitioners are hereby granted the variance to Minn. Rule, Part 7825.1400, subs. A through J.
 4. This Order is effective as of December 18, 2007.

BY ORDER OF THE COMMISSION



Burl W. Haar
Executive Secretary



(S E A L)

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STATE OF MINNESOTA)
)SS
COUNTY OF RAMSEY)

AFFIDAVIT OF SERVICE

I, Margie DeLaHunt, being first duly sworn, deposes and says:

That on the 7th day of February, 2008 she served the attached

ORDER APPROVING TRANSFER OF TRANSMISSION ASSETS, WITH
CONDITIONS.

MNPUC Docket Number: E-001/PA-07-540

- XX By depositing in the United States Mail at the City of St. Paul, a true and correct copy thereof, properly enveloped with postage prepaid
- XX By personal service
- XX By inter-office mail

to all persons at the addresses indicated below or on the attached list:

- Commissioners
- Carol Casebolt
- Peter Brown
- Eric Witte
- Marcia Johnson
- Kate Kahlert
- AG
- Janet Gonzalez
- Louis Sickmann
- Chris Fittipaldi
- Bob Cupit
- Mary Swoboda
- Jessie Schmoker
- Sharon Ferguson - DOC
- Julia Anderson - OAG
- John Lindell - OAG

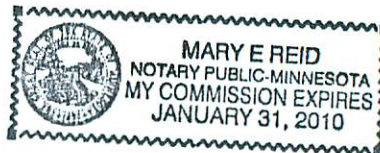
Margie DeLaHunt

Subscribed and sworn to before me,

a notary public, this 7th day of

February, 2008

Mary E. Reid
Notary Public



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