ORAL ARGUMENT HAS NOT BEEN SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

No. 08-1199

CONNECTICUT DEPARTMENT OF PUBLIC UTILITY CONTROL, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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May 6, 2009

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in the brief of Petitioners.

B. Rulings Under Review

1. *Bangor Hydro-Electric Co.*, Opinion No. 489, 117 FERC ¶ 61,129, JA 340 (2006) (Opinion No. 489); and

2. *Bangor Hydro-Electric Co.*, 122 FERC ¶ 61,265, JA 420 (2008) (Rehearing Order).

C. Related Cases

This case has not been before this Court or any other court. In *Maine Pub. Utils. Comm'n v. FERC*, 454 F.3d 278 (D.C. Cir. 2006), this Court addressed a related determination regarding a different incentive adder arising in the same proceeding before the Commission. Additional appeals were filed arising from the same FERC proceeding, not concerning the issue presented here, and were ultimately dismissed on jurisdictional grounds, as described in Petitioners' brief at pp. vi-vii.

Lona T. Perry
Senior Attorney

May 6, 2009

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

COURT CASES:

---

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

PAGE

COURT CASES:

TABLE OF AUTHORITIES

PAGE

COURT CASES:

TABLE OF AUTHORITIES

PAGE

COURT CASES:

ADMINISTRATIVE CASES:

TABLE OF AUTHORITIES

PAGE

ADMINISTRATIVE CASES:

TABLE OF AUTHORITIES

PAGE

STATUTES:

GLOSSARY

2003 Pricing Policy	2003 *Proposed Pricing Policy for Efficient Operation and Expansion of the Transmission Grid*, 102 FERC ¶ 61,032 (2003)
Clarification Order	*Bangor Hydro-Elec. Co*., 124 FERC ¶ 61,136 (2008)
EPAct 2005	Energy Policy Act of 2005
FPA	Federal Power Act
Initial Decision	*Bangor Hydro-Electric Co*., 111 FERC ¶ 63,048 (2005)
ISO	Independent System Operator
Maine PUC	*Maine Pub. Utils. Comm'n v. FERC*, 454 F.3d 278 (2006)
Municipal Intervenors	Massachusetts Municipal Wholesale Electric Company, Braintree Electric Light Department, Reading Municipal Light Department, Taunton Municipal Lighting Plant, Martha Coakley, Attorney General of the Commonwealth of Massachusetts, and Massachusetts Department of Public Utilities
Opinion No. 489	*Bangor Hydro-Elec. Co*., Opinion No. 489, 117 FERC ¶ 61,129 (2006)
Order No. 679	*Promoting Transmission Investment Through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057 (2006)
Order No. 679-A	*Promoting Transmission Investment Through Pricing Reform*, Order No. 679-A, 117 FERC ¶ 61,345 (2006)
Rehearing Order	*Bangor Hydro-Elec. Co*., 122 FERC ¶ 61,265 (2008)
RTO	Regional Transmission Organization

GLOSSARY

State Petitioners	Connecticut Department of Public Utility Control, Maine Public Utilities Commission, Vermont Department of Public Service, New England Conference of Public Utilities Commissioners, Inc., Connecticut Office of Consumer Counsel, and Richard Blumenthal, Attorney General for the State of Connecticut
Suspension Order	*ISO New England, Inc.*, 106 FERC ¶ 61,280 (2004)
Suspension Rehearing Order	*ISO New England, Inc.*, 109 FERC ¶ 61,147 (2004)
Transmission owners	Bangor Hydro Electric Company, Central Maine Power Company, NSTAR Electric & Gas Corporation, New England Power Company, Northeast Utilities Service Company, the United Illuminating Company, Vermont Electric Power Company, Green Mountain Power Corporation, and Central Vermont Public Service Corporation

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether the Commission reasonably approved an incentive return on equity adder, where the projects to which the adder would apply would advance reliability and efficiency in the New England Regional Transmission Organization (RTO) service area, expert evidence adduced at hearing supported the finding that the proposed incentive would assist in ensuring timely, successful completion of the projects, and the resulting return on equity with the adder fell within the zone of reasonableness as defined by the proxy group analysis of investor-owned transmission owners.

STATUTES AND REGULATIONS

The relevant statutes and regulations are contained in the Addendum to this brief.

INTRODUCTION

In 2003, in conjunction with a proposal to establish the New England Independent System Operator (ISO) as an RTO, the New England ISO transmission owners filed a proposal to set the return on equity component recoverable under the New England ISO's regional rates. That return on equity proposal, consistent with the Commission's 2003 *Proposed Pricing Policy for Efficient Operation and Expansion of the Transmission Grid*, 102 FERC ¶ 61,032 (2003) (2003 Pricing Policy), included a request for an incentive adder of 50 basis points for participation in the RTO, and an incentive adder of 100 basis points to encourage future transmission expansions.

In *Maine Pub. Utils. Comm'n v. FERC*, 454 F.3d 278 (D.C. Cir. 2006) (*Maine PUC*), this Court affirmed Commission orders approving the 50 basis point adder for RTO participation. The Court affirmed the Commission's findings that RTO participation provided ratepayer benefits in enhanced competitiveness and efficiency of the market, and the 50 basis point adder fell within the zone of reasonableness as it was capped at the top of the range of reasonable returns on

equity for a proxy group of investor-owned transmission owners. *See id*. at 288-89.

In the orders challenged here, the Commission similarly approved, based upon substantial evidence adduced at hearing, the 100 basis point adder to encourage new transmission facilities. *Bangor Hydro-Elec. Co*., Opinion No. 489, 117 FERC ¶ 61,129 P 4 (2006) (Opinion No. 489), JA 345, *on reh'g*, 122 FERC ¶ 61,265 (Rehearing Order), JA 420, *clarified*, 124 FERC ¶ 61,136 (2008) (Clarification Order). As in *Maine PUC*, the Commission found that the adder would provide valuable ratepayer benefits, in advancing the construction of new transmission facilities found necessary for system reliability and market efficiency by the New England ISO, by providing an important impetus to transmission owners to advocate on behalf of their projects to overcome regulatory hurdles to construction, and by assisting transmission owners in obtaining favorable project financing. Further, as in *Maine PUC*, the adder fell within the zone of reasonableness as it was within the range of reasonable returns on equity for a proxy group of northeastern utilities.

STATEMENT OF FACTS

I. THE DEVELOPMENT OF COMMISSION POLICY ON TRANSMISSION INCENTIVES.

In the decade prior to the Commission's 2003 Pricing Policy, investment in the nation's transmission infrastructure had not kept pace with the load growth or

with the increased demands brought about by industry restructuring, including open access transmission service and regional service provided by ISOs and RTOs. 2003 Pricing Policy, 102 FERC ¶ 61,032 P 19. Indeed, investment in transmission facilities in real dollar terms declined significantly between 1975 and 1998. *Promoting Transmission Investment Through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057 P 10 (Order No. 679), *on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006) (Order No. 679-A). Although investment increased somewhat thereafter, data for the year 2003 still showed investment levels below the 1975 level in real dollars. *Id*. This decline in transmission investment in real dollars occurred while the electric load using the Nation's grid more than doubled. *Id*. Further, the growth rate in transmission mileage since 1999 was not sufficient to meet the expected 50 percent growth in consumer demand for electricity in the next two decades. *Id*.

A. The 2003 Pricing Policy

To address this deficient investment in infrastructure, the 2003 Pricing Policy proposed incentives to promote the efficient operation and expansion of the transmission grid through the development of RTOs and independent transmission companies, including incentives for the construction of grid enhancements or other measures that would yield significant benefits from increased competition and improved reliability. 2003 Pricing Policy P 20. Among other incentives, the

Commission proposed a generic return on equity-based incentive equal to 100 basis points for investment in new transmission facilities which are found appropriate pursuant to an RTO planning process. *Id*. P 30. The proposed incentives, including the 100 basis points for new facilities, would be subject to a cap on the overall return on equity including incentive adders, equal to the top of the range of reasonable returns on equity for a proxy group of investor-owned transmission owners. *Id*. P 37. The Commission found that the additional incentives proposed for new investment in transmission facilities, in combination with RTO system expansion planning, should encourage long-overdue investment in new transmission, increase the number of generators who can compete in the marketplace, improve efficiency and reliability, and ultimately lower the costs paid by customers for electricity. *Id*.

B. The Energy Policy Act of 2005

Before the 2003 Proposed Pricing Policy was finalized, Congress enacted section 1241 of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (EPAct 2005), which added a new § 219 to the Federal Power Act (FPA), 16 U.S.C. § 824s. Order No. 679 P 1. Section 219 directed the Commission to establish by rule, no later than one year after enactment, incentive-based rate treatments for electric transmission for the purpose of benefitting consumers by

ensuring reliability and reducing the cost of delivered power by reducing transmission congestion. *See* FPA § 219(a).

To that end, Order No. 679 provided for incentives for transmission infrastructure investment. Order No. 679 P 1. Order No. 679 did not grant outright any incentives to any public utility, but rather identified specific incentives that the Commission would allow when justified in the context of individual declaratory orders or individual rate filings by public utilities under the FPA. *Id*. Under Order No. 679, an incentive rate of return sought by an applicant must be within the zone of reasonableness before it will be approved. *Id*. P 2. Each applicant must also demonstrate that there is a nexus between the incentive sought and the investment being made. *Id*. P 26. Order No. 679 was applicable to investments made in, or costs incurred for, transmission infrastructure after the date of enactment of FPA § 219 (August 8, 2005). Order No. 679 P 35.

II. THE NEW ENGLAND RTO INCENTIVES

A. The New England ISO Regional Transmission Expansion Planning Process

ISO New England has primary responsibility for ensuring that the New England electric system complies with all applicable planning standards established by the North American Electric Reliability Council, the Northeast Power Coordinating Council and the New England Power Pool to ensure system reliability. Exh. No. NETO-23 (Rebuttal Testimony of Michael Schnitzer), R. 490,

at 4-5, JA 558-59. To carry out this duty, ISO New England regularly assesses the New England electric system's ability to provide safe and reliable electric service under a range of load and system conditions. *Id*. at 5, JA 559. The ISO's annual Regional Transmission Expansion Plan identifies existing system vulnerabilities as well as transmission enhancements needed to address those vulnerabilities and to accommodate projected load growth over the next decade. *Id*. The transmission upgrades identified in the Regional Transmission Expansion Plan are likely to be either the only feasible or the most advantageous means of addressing current system vulnerabilities and meeting applicable regulatory standards. *Id*.

ISO New England's Regional Transmission Expansion Plan for 2004 identified several existing load pockets – Southwest Connecticut, Connecticut as a whole, Boston and Northwest Vermont – as particularly vulnerable to reliability problems. *Id*. at 6, JA 560. The Southwest Connecticut and Connecticut areas were specifically cited for failing to meet New England Power Pool reliability criteria. *Id*. These two areas faced resource deficiencies that were being covered through the use of emergency resources, and the Southwest Connecticut system was also unable to support adequately the operation of new or even existing generation capacity within that subregion. *Id*. All four areas – Southwest Connecticut, Connecticut, Boston and Northwest Vermont – were subject to

involuntary load shedding in high load periods, to avoid cascading outages. *Id*. at 7, JA 561.

B. The Transmission Owners' Return On Equity Proposal

On October 31, 2003, ISO New England and the New England transmission owners[1] submitted for approval, pursuant to FPA § 205, 16 U.S.C. § 824d, a proposal to establish an RTO for New England. *ISO New England, Inc*., 106 FERC ¶ 61,280 P 1 (Suspension Order), JA 6, *on reh'g*, 109 FERC ¶ 61,147 (2004) (Suspension Rehearing Order), JA 89. On November 4, 2003, the transmission owners, joined by Green Mountain Power Corporation and Central Vermont Public Service Corporation (collectively transmission owners), submitted a related FPA § 205 filing, seeking approval for the return on equity component recoverable under the RTO New England transmission rates. The transmission owners proposed a base return on equity of 12.8 percent, and also proposed, pursuant to the 2003 Pricing Policy, an incentive adder of 50 basis points to reward RTO participation, and an incentive adder of 100 basis points to reward future transmission expansions, applicable to all transmission facilities approved by the RTO in its Regional Transmission Expansion Plan. *Id*. P 2, JA 7.

[1] Bangor Hydro Electric Company, Central Maine Power Company, NSTAR Electric & Gas Corporation, New England Power Company, Northeast Utilities Service Company, the United Illuminating Company, and Vermont Electric Power Company.

In the Suspension Order, the Commission conditionally approved the RTO, and approved the 50 basis point adder for RTO participation. *See Maine PUC*, 454 F.3d at 281-82. *Maine PUC* affirmed approval of the 50 basis point adder, finding that it was within FERC's § 205 rate-making jurisdiction, that FERC was entitled to consider policy-related non-cost factors in setting just and reasonable rates, and that the returns on equity with the adder remained within the zone of reasonableness as they fell within the range of reasonable returns on equity for a proxy group of investor-owned transmission owners. *Id*. at 288-89.

The Suspension Order also set for hearing the transmission owners' proposed 100 basis point adder for new transmission investment. Suspension Order PP 3, 249, 250, JA 7, 83-84. The Commission found that the incentive for new transmission facilities was "an appropriate first step to encouraging vital capital investment in the enlargement, improvement, maintenance and operation of facilities for the transmission of electric energy in interstate commerce." Suspension Rehearing Order P 206, JA 154. However, as held in *PJM Interconnection, L.L.C.*, 104 FERC ¶ 61,124 P 75 (2003), applicants seeking this incentive adder are required to demonstrate, *inter alia*, why the adder is needed to incent investment in new transmission facilities. Suspension Order P 249, JA 83. As intervenors had raised issues of material fact relating to this requirement, the

Commission set the issue for hearing, subject to any revisiting of the Commission's 2003 Pricing Policy. *Id.*

C. The Initial Decision

The administrative law judge conducted the hearing in this case in late January 2005, before Congress' August 2005 adoption of EPAct 2005 and before the July 2006 issuance of Order No. 679. Rehearing Order P 68, JA 443. Following the hearing, the administrative law judge issued her initial decision, *Bangor Hydro-Electric Co*., 111 FERC ¶ 63,048 (2005) (Initial Decision), JA 275. In the Initial Decision, the administrative law judge interpreted the standard set forth in the Suspension Order P 249, JA 83, requiring applicants seeking the 100 basis point incentive adder to demonstrate "why the adder is needed to incent investment in new transmission facilities." Initial Decision P 147, JA 315. The administrative law judge interpreted a showing of "need" to require a showing that "the adder will result in building of transmission that would otherwise not be built at all" or would not be built in a "timely" manner. *Id*. P 163, JA 320-21.

Applying this standard, the administrative law judge found that the transmission owners failed to justify the proposed incentive based on the timeliness of construction, as no benchmark was provided for determining whether the projects were being completed quickly or not. *Id*. Further, "[w]hile the promise of a higher [return on equity] would, in theory, encourage investment and assist the

[transmission owners] in obtaining capital," *id*. P 167, JA 321, the primary obstacle to construction was not a lack of capital but rather a host of other difficulties including regulatory approvals. *Id*. P 158, JA 319. The administrative law judge found no evidence that additional capital would assist the transmission owners in overcoming regulatory obstacles to construction. *Id*. P 167, JA 321. "While there is a certain 'trickledown' logic to the argument that the [transmission owners] would respond to the incentive of the adder and try harder to build new transmission projects that offered this higher return," the administrative law judge nonetheless concluded that the adder would not help transmission owners overcome the problems inherent in siting new transmission. *Id*. Accordingly, the administrative law judge found that the transmission owners were not entitled to the 100 basis point adder. *Id.*

D. The Challenged Orders

1. Opinion No. 489

In Opinion No. 489, the Commission reversed the administrative law judge's rejection of the 100 basis point adder. Opinion No. 489 P 4, JA 345. Based on the evidence adduced at hearing, the Commission found that the proposed incentive would provide an important impetus to transmission owners to advocate on behalf of their projects, would assist transmission owners in obtaining favorable project financing, and therefore would provide valuable ratepayer benefits in advancing

the timely and successful completion of necessary transmission facilities. *Id*. PP 4, 109-11, JA 345, 381-82.

The Commission noted initially that its authority to encourage investment in infrastructure is not new. A primary purpose of the FPA and the Natural Gas Act is to encourage plentiful supplies of energy at reasonable prices, through, among other means, the development of needed infrastructure. Opinion No. 489 P 103, JA 378 (citing *Pub. Utils. Comm'n of the State of California v. FERC*, 367 F.3d 925, 929 (D.C. Cir. 2004)) (citing *NAACP v. FPC*, 425 U.S. 662, 670 (1976)). *Maine PUC*, 454 F.3d at 288, affirmed that the Commission has significant discretion within its ratemaking authority to consider both cost-related factors and policy-related factors (*i.e*. the need for new transmission investment). Opinion No. 489 P 103, JA 378. *Maine PUC* held that the Commission's determinations regarding incentive rates "'involve matters of rate design . . . [and] policy judgments [that go to] the core of [the Commission's] regulatory responsibilities.'" *Id*. (quoting *Maine PUC*, 454 F.3d at 288). *Maine PUC* also rejected the argument that the Commission was required to calibrate the level of benefits that an incentive is designed to produce beyond a finding that the incentive at issue is within the zone of reasonableness. *Id*. (citing *Maine PUC*, 454 F.3d at 288).

The Commission found that the administrative law judge erred in requiring that the evidence "'show that the adder will result in building of transmission that

would otherwise not be built at all'" or will result in projects being built in a "'timely'" manner. Opinion No. 489 P 104, JA 379 (quoting Initial Decision P 163, JA 320). The Commission disagreed that the evidentiary burden requires a showing that, "but for" the incentive, the projects at issue would not be built. *Id*.

In stating that applicants are required to demonstrate why the adder is "needed" to incent investment in new transmission facilities, the Commission did not establish an insurmountable burden of proof or require an impossible evidentiary showing. *Id*. P 105, JA 379. The hurdles facing new transmission projects include: (i) regulatory approvals; (ii) prudence reviews; (iii) regulatory disallowances; (iv) expenditure of political capital; (v) siting delays; (vi) zoning regulations; (vii) land use requirements; and (viii) public opposition. *Id*. (citing Initial Decision P 120, JA 308). These risks are amorphous and it is very difficult to measure the extent to which an incentive can help overcome such obstacles. *Id*. (citing Initial Decision P 120, JA 308). The Commission could not, in fact, conceive of a case in which an applicant could ever make a showing with certainty that, absent a 100 basis point incentive, a transmission project would not be built. *Id*. Thus, the Commission rejected the use of a "but for" test, and found instead that the appropriate standard is whether (i) the proposed incentive falls within the zone of reasonable returns; and (ii) there is a nexus between the incentives being

requested and the investment being made, *i.e*. the incentives are rationally related to the investments. *Id*.

The evidence presented at hearing satisfied this standard. *Id*. P 106, JA 380. First, the proposed incentive falls within the zone of reasonable returns determined by the proxy group analysis. *Id*. *See also id*. PP 14-15, JA 349 (setting the zone of reasonable returns based on the proxy group analysis).

Second, the evidence demonstrated a sufficient nexus between the cost of the incentive and the benefits to be derived from it. *Id*. P 106, JA 380. First, there is an undisputed need for the projects to which the proposed adjustment will apply, as evidenced by ISO New England's independent regional planning process, which identifies specific projects necessary to satisfy the needs of the region. *Id*. PP 107-08, JA 380-81.

Second, the proposed incentive would assist in the successful completion of these necessary projects by providing incentives to overcome barriers. Opinion No. 489 PP 109-11, JA 381-82. The proposed incentive would give project owners a significant impetus to push hard for their projects at all phases of the approval process. *Id*. As witnesses Dr. Avera (an economist), Mr. Scott (a utility executive with experience in transmission operations and construction), and Mr. Schnitzer (an expert on regulatory policy, finance and industry restructuring) each testified, utilities can be expected to respond to financial motivations, and, in so doing, to

expend the time and effort necessary to sell the importance of their projects. *Id*. P 109, JA 381 (citing Tr. 217, R. 252, JA 161; Tr. 220, R. 252, JA 164; Tr. 725-27, R. 261, JA 203-05; Tr. 955-59, R. 264, JA 241-45; Exh. Nos. NETO-19, R. 486, at 24-25, JA 532-33, and NETO-23, R. 490, at 31, JA 579). Mr. Schnitzer further testified that an incentive of 100 basis points is sufficient in size to trigger this needed response. *Id*. P 109 and n.98, JA 381-82 (citing Tr. 988-89, R. 264, JA 254-55). Accordingly, the Commission rejected the Initial Decision's finding that the availability of the return on equity incentive could not affect a transmission owner's ability, in turn, to affect the process of obtaining regulatory approvals. *Id*. P 109, JA 381.

The proposed incentive also would assist the transmission owners in obtaining favorable financing terms for their projects. Opinion No. 489 P 110, JA 382. The administrative law judge agreed that the proposed incentive would, in theory, encourage investment, but went on to find that the impediments to bringing new transmission on line were not "primarily" attributable to the lack of capital. *Id*. (citing Initial Decision P 158, JA 319). The relevant point, however, is not that the proposed incentive will allow the transmission owners to obtain capital when they otherwise could not, but rather that the proposed incentive will favorably impact the terms under which capital can be obtained, which will support the completion of the needed transmission infrastructure. *Id*. P 110 & n. 98, JA 382.

This showing met the requirement that the applicants demonstrate that the incentives requested are rationally related to the investments proposed. *Id*. P 110, JA 382.

The proposed incentive therefore reasonably would be expected to result in ratepayer benefits. Opinion No. 489 P 111, JA 382. ISO New England's customers currently are burdened with costs attributable to an insufficiently robust grid, including costs attributable to reliability agreements, reliability must-run arrangements, involuntary load shedding, congestion costs, marginal losses, and stopgap transmission expenditures. *Id*. (citing Exh. No. NETO-23, R. 490, at 15-16, JA 563-64). The timely, successful completion of the projects identified in ISO New England's regional transmission plan should assist in minimizing these costs, thus benefitting ratepayers. *Id*.

Two Commissioners dissented from the decision to approve the 100-basis point adder, on the ground that insufficient evidence supported the need for the adder. *See* Kelly, Commissioner, dissenting in part, JA 389; Wellinghoff, Commissioner, dissenting in part, JA 395.

2. The Rehearing Order

On rehearing, the Commission reaffirmed its approval of the 100 basis point return on equity incentive for existing Regional Transmission Expansion Planning-approved projects that are completed and come on line as of December 31, 2008.

Rehearing Order P 51, JA 437. However, the Commission decided that it would not extend a pre-approved authorization to any future projects without a specific showing justifying the incentive on a project-by-project basis, consistent with the requirements of Order No. 679. *Id*.

The Commission determined not to apply the requirements of Order No. 679 to the locked-in period (ending December 31, 2008) at issue in this case. *Id*. P 65, JA 441. The hearing before the administrative law judge was held under the Suspension Order standard rather than the Order No. 679 standard, and thus the record did not include the project-specific evidence that Order No. 679 requires. *Id*. PP 65-68, JA 441-43. A remand to the administrative law judge to adduce additional evidence was not required, however, because the authorizations granted in Opinion No. 489, for the locked-in period, fall within the zone of reasonable returns. *Id*. P 69, JA 443. Although no project-by-project analysis was conducted, the record nonetheless contained substantial evidence regarding the existing Regional Transmission Expansion Plan projects, and so, with regard to those projects, the difference in standard between Opinion No. 489 and Order No. 679 was not meaningful. *Id*. P 54, JA 438. Remanding the case would be an administrative burden on the Commission and the parties, and would create unnecessary uncertainty concerning the availability of an incentive for a number of important projects included in the 2004 Regional Transmission Expansion Plan,

many of which were required to move forward while this case was pending before the Commission. *Id*. P 70, JA 443.

The Commission reaffirmed that its approval of the incentive was supported by substantial evidence adduced at hearing and was consistent with *Maine PUC*. *Id*. P 53, JA 437 (citing *Maine PUC*, 454 F.3d at 289). The Commission rejected the argument that the record evidence failed to support the required nexus finding. *Id*. P 74, JA 445. Dr. Avera testified that economic incentives motivate people to find ways to solve problems, such as siting problems, and that approval of an incentive return on equity would encourage resolution of siting problems. *Id*. P 75, JA 445 (citing Tr. 216-220, R. 252, JA 160-64). Mr. Scott testified that, while the full range of actions that can be taken in order to facilitate the development of new transmission is difficult to identify *ex ante*, his own experience as a utility executive under an incentive regime in the United Kingdom demonstrates that utilities respond to such financial motivations. *Id*. P 76, JA 445 (citing Tr. 725-27, R. 261, JA 203-05; Exh. No. NETO-19, R. 486, at 24-25, JA 532-33). Mr. Schnitzer similarly testified that a higher return on equity can incent companies to work their way through the complicated technical, political, and regulatory issues associated with the transmission construction process. *Id*. P 77, JA 446 (citing Tr. 955, R. 264, JA 241). Mr. Schnitzer also explained that addressing reliability limitations in New England through timely implementation of projects currently

identified in the Regional Transmission Expansion Plan could avoid higher consumer costs caused by the reliability issues. *Id*. (citing Exh. No. NETO-23, R. 490, at 15-26, JA 563-64).

The Commission rejected arguments that the benefit from this incentive was insufficiently quantified, finding that the need for the additional transmission capacity was undisputed, and the just and reasonable standard does not require the degree of calibration insisted upon by the challenging parties. *Id*. PP 73, 80, JA 444, 447. No competing quantification of benefits was offered to show that the incentive was not supported. *Id*. P 73, JA 444. Under these circumstances, the Commission found that it acted well within its authorized discretion in granting the return on equity incentive for the locked-in period. *Id*.

The Commission also rejected the argument that the incentive is unnecessary because the transmission owners already are subject to an obligation to build. *Id*. P 79, JA 446. A transmission owner's "obligation" to build does not address the manner or circumstances under which this obligation can, or will, be met in a given case, and only applies subject to "the requirements of applicable law, government regulations and approvals. . .; the availability of required financing; the ability to acquire necessary rights-of-way; and satisfaction of . . . other conditions." *Id*. (quoting Exh. No. CT-32 (ISO New England Transmission Owner's Agreement), R. 414, at schedule 3.09(a), JA 480). Moreover, these arguments would deny the

Commission the authority to grant a return on equity transmission investment incentive under *any* circumstances – an authority that Congress expressly granted the Commission in FPA section 219. *Id*.

Commissioners Kelly and Wellinghoff continued to dissent from the decision to approve the 100-basis point adder, on the ground that insufficient evidence supported the need for the adder. *See* Kelly, Commissioner, dissenting in part, JA 450; Wellinghoff, Commissioner, concurring in part and dissenting in part, JA 451.

SUMMARY OF ARGUMENT

In the challenged orders, the Commission reasonably approved the proposed 100 basis point adder for new transmission construction, for a locked-in period ending December 31, 2008. Courts have long recognized that a primary purpose of the Federal Power Act is to encourage plentiful supplies of energy at reasonable prices, through, *inter alia*, the development of needed infrastructure. *Maine PUC* affirmed that FERC has significant discretion within its ratemaking authority to consider both cost-related factors and policy-related factors (*i.e.*, the need for new transmission investment).

State Petitioners'[2] claim that the Opinion No. 489 standard is inconsistent with the Suspension Order standard is jurisdictionally barred as State Petitioners failed to raise it on rehearing. Further, FERC reasonably interpreted the standard expressed in the Suspension Order – whether the incentive was "needed" to incent investment – not to impose a virtually insurmountable evidentiary standard requiring applicants to show that a construction project would not be completed "but for" the incentive adder. Instead, based upon incentive ratemaking caselaw, the appropriate standard to determine if an incentive is "needed" is whether (i) the

[2] Connecticut Department of Public Utility Control, Maine Public Utilities Commission, Vermont Department of Public Service, New England Conference of Public Utilities Commissioners, Inc., Connecticut Office of Consumer Counsel, and Richard Blumenthal, Attorney General for the State of Connecticut.

proposed incentive falls within the zone of reasonable returns; and (ii) there is some nexus between the incentives being requested and the investment being made, *i.e*. the incentives are rationally related to the investments being proposed.

The evidence presented at hearing satisfied this standard. The proposed incentive falls within the zone of reasonable returns determined in the proxy group analysis. The evidence demonstrated a sufficient link between the cost of the return on equity incentive and the benefits to be derived from it: (i) there is a current and projected need for the projects; (ii) the proposed incentive would assist in the successful completion of these projects by providing incentives to overcome regulatory barriers to construction, and by assisting transmission owners in obtaining favorable financing terms; and (iii) the successful completion of these projects would assist in minimizing the costs of an insufficient grid to New England consumers.

In approving the adder, the Commission was not required to determine what specific actions transmission owners would take in response to the adder. Rather than require an impossible predictability, reviewing courts defer to the Commission's predictive judgment that a new rate design will result in more good than harm, as long as the Commission articulates the reasons for its judgment and responds adequately to objections. Likewise, the Commission is not required under *Maine PUC* and other caselaw to quantify or calibrate the level of benefits

that an incentive is designed to produce beyond a finding that the incentive at issue is within the zone of reasonableness.

The incentive is not, moreover, unnecessary in light of the transmission owner's obligation to build under their agreement with the ISO. The obligation to build is subject to a number of conditions, including obtaining regulatory approvals and required financing, and therefore the obligation to build does not mean that a project can or will get built. Even where a project already has been planned, the granting of incentives may help in securing financing for the project or may bring the project to completion sooner than originally anticipated.

Likewise, notwithstanding that transmission owners were awarded a cost-of-service base return on equity, the lack of investment in transmission infrastructure amply demonstrates that traditional ratemaking policies have not adequately encouraged the construction of new transmission. Indeed, FPA § 219 expressly was enacted (in 2005) to counteract the long decline in transmission investment and requires the Commission to use its full discretion under other ratemaking sections of the FPA to adopt incentives to promote capital investment.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See e.g*., *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). The relevant inquiry is whether the agency has "examine[d] the relevant data and articulate[d] a rational connection between the facts found and the choice made." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

The level of a court's "surveillance of the rationality of agency decisionmaking, however, depends upon the nature of the task assigned to the agency." *Nat'l Cable Television Ass'n v. Copyright Royalty Tribunal*, 724 F.2d 176, 181 (D.C. Cir. 1983). "Because [i]ssues of rate design are fairly technical, and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission, [the court's] review of whether a particular rate design is just and reasonable is highly deferential." *Northern States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994) (internal quotation marks and citations omitted). *See also Electricity Consumers Res. Council v. FERC*, 407 F.3d 1232, 1236 (D.C. Cir. 2005) (same). In particular, "[t]he statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and [the Court] afford[s] great deference to the Commission in its rate decisions." *Morgan Stanley*

Capital Group Inc. v. Pub. Util. Dist. No. 1, 128 S.Ct. 2733, 2738 (2008). Specifically, this Court has found that FERC's determinations on return on equity adders involve matters of rate design, and, thus, the court's review of such determinations "is highly deferential." *Maine PUC*, 454 F.3d at 287.

The Commission's factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825*l*(b). The substantial evidence standard "'requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.'" *Florida Municipal Power Agency v. FERC*, 315 F.3d 362, 365 (D.C. Cir. 2003) (quoting *FLP Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)). "When the record would support more than one outcome," the court upholds the Commission's order because the relevant question to answer "is not whether record evidence supports [the petitioner's desired outcome], but whether it supports FERC's." *Maine Pub. Utils. Comm'n v. FERC*, 520 F.3d 464, 470 (D.C. Cir. 2008) (alteration in original, citation omitted). *See Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 703 (D.C. Cir. 2007) (Commission is not required to choose the best solution, only a reasonable one); *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 955 (D.C. Cir. 2007) (FERC need not adopt the best possible policy as long as agency acts within the scope of its discretion and reasonably explains its actions).

II. THE COMMISSION REASONABLY APPROVED THE INCENTIVE ADDER.

A. The Commission Consistently Applied An Appropriate Standard In Approving The Incentive Adder.

1. The Commission's Opinion No. 489 Standard Is Fully Consistent With Caselaw On Incentive Ratemaking.

In Opinion No. 489, the Commission found that the appropriate standard of review for considering the proposed 100 basis point adder was: whether (i) the proposed incentive falls within the zone of reasonable returns; and (ii) there is a nexus between the incentives being requested and the investment being made, *i.e.* the incentives are rationally related to the investments being proposed. Opinion No. 489 P 105, JA 379; Rehearing Order PP 53, 67, 71, JA 437, 442, 444.

This standard is fully consistent with caselaw on incentive ratemaking. *See* Rehearing Order PP 53, 71, JA 437, 444. Courts have long recognized that a primary purpose of the FPA (and the companion Natural Gas Act) is to encourage plentiful supplies of energy at reasonable prices, through, among other means, the development of needed infrastructure. Opinion No. 489 P 103, JA 378 (citing *Pub. Utils. Comm'n*, 367 F.3d at 929 (citing *NAACP*, 425 U.S. at 670)). *See Consolidated Edison Co. of New York, Inc. v. FERC*, 510 F.3d 333, 342 (D.C. Cir. 2007) (the FPA "has multiple purposes in addition to preventing 'excessive rates,' including protecting against 'inadequate service,' and promoting the 'orderly development of plentiful supplies of electricity'") (citations omitted). As this

Court has recognized, the Supreme Court has repeatedly rejected the argument "'that there is only one just and reasonable rate possible . . . and that this rate must be based entirely on some concept of cost plus a reasonable rate of return.'" *Blumenthal v. FERC*, 552 F.3d 875, 883 (D.C. Cir. 2009) (quoting *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 316 (1974)). *See also Permian Basin Area Rate Cases*, 390 U.S. 747, 796-98 (1968) (there is not one reasonable rate but rather a zone of reasonableness); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) (the Commission is not bound to any single formula or combination of formulae in determining rates).

This Court has further found that "[u]sing price incentives to increase the supply of energy available to customers is a valid, non-cost consideration in setting rates." *Pub. Utils. Comm'n*, 367 F.3d at 306 (citing *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.3d 1486, 1503 (D.C. Cir. 1983) and *Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18, 33-34 (D.C. Cir. 2002)). In the context of the transmission owners' request for a 50 basis point adder for RTO participation, *Maine PUC*, 454 F.3d at 288, affirmed that the Commission has significant discretion within its ratemaking authority to consider both cost-related factors and policy-related factors (*i.e*. the need for new transmission investment). Opinion No. 489 P 103, JA 378.

Thus, a return on equity incentive is not susceptible to a precise calculation, but rather the incentive is based on a range of reasonable returns on equity, and may take into account a number of factors that may be both cost-related and policy-related. Rehearing Order P 71, JA 444. *Maine PUC* affirmed the Commission's discretion with regard to approval of incentive rates, and rejected arguments that the Commission was required to calibrate the level of benefits that an incentive is designed to produce beyond a finding that the incentive is within the zone of reasonableness. *Id*. (citing *Maine PUC*, 454 F.3d at 288-89). Here, the Commission reasonably authorized a return on equity incentive within the range of reasonable returns with the objective of encouraging transmission investment that is urgently needed in New England, that will be limited in reach only to new, Regional Transmission Expansion Plan-approved projects that are completed and come on line prior to December 31, 2008. *Id*.

2. State Petitioners' Arguments Challenging The Opinion No. 489 Standard Are Jurisdictionally Barred And Without Merit.

State Petitioners assert that the Opinion No. 489 standard "radically altered" the test the Commission initially established in the Suspension Order. Br. 41-42, 46, 52. However, State Petitioners failed to raise that issue on rehearing before

FERC,[3] and, accordingly, this Court lacks jurisdiction to consider it. FPA § 313(b), 16 U.S.C. § 825*l*(b) ("[n]o objection to the Order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so."). *See also City of Orrville, Ohio v. FERC*, 147 F.3d 979, 990 (D.C. Cir. 1998) (court lacks jurisdiction to hear arguments not made on rehearing); *Platte River Whooping Crane Critical Habitat Trust v. FERC*, 876 F.2d 109, 113 (D.C. Cir. 1989) (same).

While Municipal Intervenors[4] did raise the issue before FERC, *see* Rehearing P 78, JA 446 (referring to argument raised by Municipal Intervenors), a party seeking review must raise its objections in its *own* application for rehearing to FERC. *See Process Gas Consumers Group v. FERC***,** 912 F.2d 511, 514 (D.C. Cir. 1990); *Columbia Gas Trans. Corp. v. FERC*, 848 F.2d 250, 255 (D.C. Cir.

[3] On rehearing, with regard to the 100 basis point adder, State Petitioners argued only that the standard employed was "so indiscriminate that it would ratify virtually every proposal," that the adder was approved based on "unsubstantiated assertions," and that approval of the adder was "inconsistent with the principles and articulated standards the Commission promised it would follow in the [Order No. 679] Price Reform Final Rule." *See* Request for Rehearing by the Connecticut Department of Public Utility Control, *et al*., R. 324, pp. 14-15, JA 405-06. *See also id*. pp. 3-4, JA 402-03.

[4] Massachusetts Municipal Wholesale Electric Company, Braintree Electric Light Department, Reading Municipal Light Department, Taunton Municipal Lighting Plant, Martha Coakley, Attorney General of the Commonwealth of Massachusetts, and Massachusetts Department of Public Utilities.

1988); *ASARCO, Inc. v. FERC*, 777 F.2d 764, 773 (D.C. Cir. 1985). A court cannot "'consider an objection not raised by petitioner but argued to FERC by another party to the same proceeding.'" *Process Gas Consumers Group*, 912 F.2d at 514 (quoting *Columbia Gas Trans. Corp.*, 848 F.2d at 255).

In any event, the Commission reasonably held that the nexus standard employed in Opinion No. 489 was consistent with the standard of review established in the Suspension Order, *i.e.*, whether the incentive is "needed" to encourage investment in new transmission, Opinion No. 489 P 104, JA 379; Rehearing Order PP 67, 78, JA 442, 446 (citing Suspension Order P 249, JA 83). Whether incentive rates are "necessary," Br. 41, or "needed" are broad terms that do not specify the criteria by which such necessity or need is to be determined. *See, e.g.*, Black's Law Dictionary, Fifth Ed., at 928 (defining "necessary" as a word "susceptible of various meanings" which may "import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought.") For example, *Williams Natural Gas Co. v. FERC*, 943 F.2d 1320 (D.C. Cir. 1991) – interpreting a statute authorizing incentive rates where "necessary" to encourage production – held that "necessary" was an extremely broad term left to FERC to interpret, and that FERC's interpretation of what was "necessary" need "'only be grounded in some economic basis"' to be sustained. *Id*. at 1328, 1331. *See also Midwest Gas*

Users Association v. FERC, 833 F.2d 341, 351 (D.C. Cir. 1987) (the terms "necessary" and "reasonable" in the Natural Gas Policy Act reveal Congress' concern that special incentive prices be grounded in some economic basis). The Commission's reasonable interpretation of its own order must be sustained. *Natural Gas Clearinghouse v. FERC*, 108 F.3d 397, 399 (D.C. Cir. 1997).

Moreover, Opinion 489 reasonably rejected the "but for" standard – requiring a showing that the project would not be completed without the incentive – consistent with Order No. 679. *See* Opinion No. 489 P 113, JA 383 (citing Order No. 679 P 48). As explained in Order No. 679, the nexus test and the "but for" test share the common objective to ensure that incentives are not provided in circumstances where they do not materially affect investment decisions, but they differ sharply in the means by which they achieve that objective. Order No. 679-A P 25. The "but for" test requires an applicant to show that a facility would not be constructed unless the incentive is granted, which erects an evidentiary hurdle that can be satisfied only in very rare cases. *Id*. *See also* Opinion No. 489 P 105, JA 379. There are many impediments to investing in new transmission, including siting concerns, financing challenges, and rate recovery concerns. Order No. 679-A P 25. It is therefore unreasonable to expect or require an applicant to show that a facility could not be constructed "but for" the removal of a single impediment – *e.g.*, increased cash flow through an enhanced return on equity. *Id*. This test is

particularly difficult to satisfy, given that incentives are ordinarily sought before investment decisions are made and, hence, before any siting impediments are even confronted. *Id*. The Commission, in fact, could not conceive of a case in which an applicant could ever make a showing with certainty that absent a 100 basis point incentive, a transmission project would not be built. Opinion No. 489 P 105, JA 379.

The "but for" test also is fundamentally incompatible with Congressional intent in enacting the Energy Policy Act of 2005, in which Congress plainly understood that there are many impediments to new transmission investment, and took a variety of actions to address that problem, including giving the Commission transmission siting authority in certain circumstances (FPA § 216(b), 16 U.S.C. § 824p(b)), and, in § 219, 16 U.S.C. § 824s, providing appropriate rate incentives. Order No. 679-A P 26. *See also supra* Statement of Facts section I(B) (discussing transmission policy under EPAct 2005). The Commission would render § 219 ineffective by requiring the demonstration of a negative – that absent an incentive rate treatment, under no circumstances would a transmission project possibly be built. *Id*. Thus, State Petitioners' interpretation of the Commission's standard effectively would deny the Commission the authority to grant a return on equity transmission investment incentive under virtually any circumstances – an authority

that Congress expressly granted the Commission in FPA § 219. Rehearing Order P 79, JA 446.

On the other extreme, the Commission's standard does not permit every application for a transmission incentive adder to be approved. Br. 44-45, 47-49. This incentive adder standard expressly applies only for the locked-in period; incentive requests for projects scheduled to be completed after December 31, 2008, are subject to the Order No. 679 standards. Rehearing Order P 64, JA 441. Further, to meet the Opinion No. 489 standard, transmission owners were required to show that the proposed incentive fell within the zone of reasonable returns and was sufficiently linked to expected benefits. Opinion No. 489 P 106, JA 380. Here, it was fully demonstrated at hearing that the return on equity fell within the zone of reasonable returns, that the projects were urgently needed to meet regional transmission needs, and that an incentive would assist in the timely, successful completion of these projects. Rehearing Order P 39, JA 433.

B. Substantial Evidence Showed That The Proposed Return On Equity Adder Met The Applicable Standard.

The evidence presented at hearing amply satisfied the standard for approving the incentive return on equity adder: whether (i) the proposed incentive falls within the zone of reasonable returns; and (ii) there is a nexus between the incentives being requested and the investment being made, *i.e.* the incentives are

rationally related to the investments being proposed. Opinion No. 489 PP 105-06, JA 379-80; Rehearing Order PP 53, 67, 71, JA 437, 442, 444.

First, the proposed incentive fell within the zone of reasonable returns as defined by the proxy group analysis of investor-owned transmission owners. Opinion No. 489 P 106, JA 380; Rehearing Order P 72, JA 444. The adjustment attributable to the incentive produced a 12.4 percent return on equity, well below the 13.1 percent high-end return on equity indicated by the proxy group analysis. Opinion No. 489 P 106, JA 380; Rehearing Order P 72, JA 444.

While Municipal Intervenors contend that placement within the zone of reasonableness is, standing alone, insufficient for approval, Intervenor Br. 22-23, the Commission further determined that the evidence demonstrated a sufficient link between the cost of the return on equity incentive and the benefits to be derived from it. Opinion No. 489 P 106, JA 380. The Commission reasonably determined, based upon the evidence adduced at hearing, that the proposed return on equity adjustment would aid in overcoming regulatory barriers to construction by providing an important impetus to transmission owners to advocate on behalf of their projects, would assist transmission owners in obtaining favorable project financing, and would produce valuable ratepayer benefits as a consequence of advancing needed transmission construction. Opinion No. 489 PP 4, 111, JA 345, 382.

1. There Is An Undisputed Need For The Facilities Identified By The ISO.

There is an "undisputed need" for the projects to which the proposed adjustment will apply, as evidenced by ISO New England's regional planning process. *Id*. P 107, JA 380.

> Reliability is at risk in load pockets due to a number of factors, including: continued growth in electricity use, generating unit retirements, continued transmission bottlenecks, and inadequate development of new resources, *i.e*. new or repowered generation and demand response programs. Resource reliability could also become a major system-wide issue for New England in two to four years, especially if the region continues to experience the factors noted above. Moreover, heavy reliance on natural gas-fired generators that are subject to interruption of fuel supply poses potential reliability issues for the winter peak load periods.

Rehearing Order P 73 & n.63, JA 444 (quoting Regional Transmission Expansion Plan 2004 (executive summary at 3), Exh. No. NETO-25, R. 492, JA 585).

ISO New England is responsible for independently assessing system reliability and market efficiency needs and identifying regulated transmission solutions to the identified needs. *Id*. The ISO's 2004 Regional Transmission Expansion Plan identified specific projects necessary to satisfy the needs of the region.[5] Opinion No. 489 P 108, JA 381. Based on this independent analysis and

[5] Additional evidence also demonstrated the need for these projects. *Id*. P 108 n. 93, JA 381 (citing Exh. No. NETO-20, R. 487, at 2, JA 539 (U.S. Department of Energy's National Transmission Grid Study); and Exh. No. NETO-21, R. 488, at 4-5, JA 543-44 (prepared testimony of Gordon Van Welie, President

the process pursuant to which it was conducted, the Commission concluded that the proposed incentive would apply only to projects that are: (i) constructed and brought on line; and (ii) meet a demonstrated need. *Id.* *See Pub. Serv. Comm'n of Wisconsin v. FERC*, 545 F.3d 1058, 1062 (D.C. Cir. 2008) (reasonable for FERC to give respect to the regional and independent perspective of the ISO).

2. Substantial Evidence Supported The Finding That The Proposed Incentive Would Assist In The Timely, Successful Completion Of The Identified Projects.

The Commission found substantial evidence that the proposed incentive would assist in the successful completion of the identified projects. Opinion No. 489 PP 109-11, JA 381-82. First, the incentive would aid in overcoming regulatory barriers to construction by providing transmission owners a significant impetus to push hard for their projects at all phases of the regulatory approval process. *Id*. P 109, JA 381; Rehearing Order P 39, JA 433. Witnesses Mr. Scott (a utility executive with experience in transmission operations and construction), Dr. Avera (an economist), and Mr. Schnitzer (an expert on regulatory policy) each testified that utilities can be expected to respond to financial motivations by expending the time and effort necessary to sell the importance of their projects. Opinion No. 489 P 109, JA 381 (citing Tr. 217, R. 252, JA 161; Tr. 220, R. 252,

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and Chief Executive Officer of ISO New England before the House Committee on Energy and Commerce)).

JA 164; Tr. 725-27, R. 252, JA 203-05; Tr. 955-59, R. 264, JA 241-245; and Exh. Nos. NETO-19, R. 486, at 24-25, JA 532-33, and NETO-23, R. 490, at 31, JA 579).

Although State Petitioners assert that the incentive adder will not resolve siting or regulatory hurdles, Br. 31, 39-40, Mr. Schnitzer explained that a higher return on equity can encourage companies to work their way through the technical, political, and regulatory issues associated with the transmission construction process. Rehearing Order P 77, JA 446 (citing Tr. 955, R. 264, JA 241). It is extremely complicated to get these projects completed, both from a technical and a local political perspective. Tr. 941, R. 264, JA 234. While parts of the process are outside of the utilities' control, what the incentive can do is to ensure that the company brings all its creativity to bear on the problem. *Id*. For example, with regard to siting authorities, utilities have a lot of control over the siting process in the sense that they control what the proposal is, how it is supported, how they interact with other interested parties, and whether there are coalitions that can be formed or settlements reached, even though they do not control the siting authority itself. Tr. 942, R. 264, JA 235. Mr. Schnitzer further testified that the amount of the 100 basis point incentive was sufficient in size to trigger this response. Opinion No. 489 P 109 and n.98, JA 381 (citing Tr. 988-89, R. 264, JA 254-55).

Indeed, in the testimony cited by State Petitioners, *see* Br. 31 (citing Tr. 931-33, 936, R. 264, JA 228-30, 231), Mr. Schnitzer explains the complexities of designing transmission projects that will meet with regulatory approval, particularly in more urban and highly populated areas, and how the adder increases the incentive of transmission owners to "find a way through that obstacle course" to get the project completed. Similarly, although Mr. Schnitzer testified that no additional transmission investment was contemplated as a result of the adder, *see* Br. 28 (citing Tr. 987-989, R. 264, JA 253-55) and Intervenor Br. 16-17 n.8, his point was that the incentive is being provided to already-approved projects under the RTO Expansion Plan, so no additional investment (*i.e.* other projects) were contemplated. Tr. 987, R. 264, JA 253.

Dr. Avera testified also that the Commission's approval of an incentive would send a message to utilities and public officials involved in siting matters to try to solve siting problems, and the economic incentive provided would encourage the resolution of such problems. Rehearing Order P 75, JA 445 (citing Tr. 216-220, R. 252, JA 160-64). Mr. Scott likewise testified that, while the full range of actions that can be taken in order to facilitate the development of new transmission is difficult to identify *ex ante*, his own experience as a utility executive under an incentive regime in the United Kingdom demonstrates that utilities respond to such

financial motivations. Rehearing Order P 76, JA 445 (citing Tr. 725-27, R. 252, JA 203-05; Exh. No. NETO-19, R. 486, at 24-25, JA 532-33).

3. The Commission Reasonably Concluded That The Proposed Incentive Would Assist Transmission Owners In Obtaining More Favorable Financial Terms For Their Projects.

The Commission also found that the proposed incentive would assist the transmission owners in obtaining more favorable financing terms for their projects. Opinion No. 489 P 110, JA 382; Rehearing Order PP 39, 80, JA 433, 447. Although Municipal Intervenors assert no evidence links the incentive adder to the cost of capital, Intervenor Br. 19, simple economic theory dictates that higher returns can be expected to stimulate additional capital investment, and that investors will be "much less forthcoming" without the adders. *See* Avera Direct Testimony, Exh. No. NETO-1, R. 468, at 39, 42, 46, 48, JA 497, 500, 501, 502. The administrative law judge agreed that the proposed incentive would, in theory, encourage investment and assist the transmission owners in obtaining capital. Opinion No. 489 P 110, JA 382; Initial Decision P 167, JA 321. However, the administrative law judge then went on to conclude that, because the impediments to bringing new transmission on line were not "primarily" attributable to the *lack* of capital, the adder was unjustified on this basis. Opinion No. 489 P 110, JA 382; Initial Decision PP 158, 167, JA 319, 321. *See* Br. 30 (citing Tr. 606, R. 258, JA

182) (arguing that the evidence showed the *inability* to raise capital was not the impediment to transmission investment).

The Commission found, however, that the relevant issue is not whether capital is available at all, *i.e*. whether the adder is necessary to allow transmission owners to obtain capital at any price. Rather, the relevant issue is whether the proposed incentive will have a favorable impact on the terms under which capital can be obtained, which will support the successful construction of the needed transmission infrastructure in ISO New England. Opinion No. 489 P 110 & n. 98, JA 382 (citing, *e.g*., Tr. 671, R. 261, JA 195 (witness Scott: "It's unlikely that National Grid will not be able to fund its obligations; the question is at what price will we be able to raise the capital to do that and what the share price would be as a result of the effect.")). This showing met the requirement that the applicants demonstrate that the incentives requested are rationally related to the investments proposed. *Id*. P 110, JA 382.

4. The Commission Reasonably Concluded That The Successful Construction Of The Identified Transmission Facilities Would Provide Significant Consumer Benefits.

The Commission reasonably concluded that the successful completion of these necessary transmission facilities would provide direct consumer benefit in reducing the costs of congestion and insufficient transmission facilities. Rehearing Order P 77, JA 446. ISO New England's customers are currently burdened with

costs attributable to an insufficient transmission grid, including costs attributable to reliability agreements, reliability must-run arrangements, involuntary load shedding, congestion costs, marginal losses, and stopgap transmission expenditures. Opinion No. 489 P 111, JA 382 (citing Exh. No. NETO-23 (Schnitzer Rebuttal Testimony), R. 490, at 15-16, JA 563-64); Rehearing Order P 77, JA 446. The successful completion of the projects identified by ISO New England in its Regional Transmission Expansion Plan would assist in minimizing those costs. Opinion No. 489 P 111, JA 382; Rehearing Order P 77, JA 446.[6]

As witness Schnitzer testified:

> Even assuming that the upgrades are likely to be built, time is of the essence. These projects provide benefits to society and the sooner the implementation, the sooner the benefits begin. If an incentive can encourage timely implementation of the [2004 Regional Transmission Expansion Plan] projects, and the cost of the incentive is reasonable compared to the benefits, then providing the incentive is reasonable policy. Of course, no one can state with certainty that an incentive will in fact result in earlier implementation of the projects. However, given the critical importance of the [2004 Regional Transmission Expansion Plan] upgrades, and the difficulty of implementing these projects, it certainly would be counterproductive for regulators to set

[6] Petitioners' citation to *New England Power Pool*, 97 FERC ¶ 61,093 (2001), Br. 28, is inapposite as it concerned a proposed incentive payment for maintenance activities that were largely completed by the time of the Commission's order. *Id*. at 61,480. The Commission found that the proposal "can not provide an incentive to encourage procedures that have already been completed." *Id*. Here, in contrast, the Commission's approval of the incentive adder in 2006, in Opinion No. 489, later limited to a locked-in period, applied to transmission projects constructed and coming on line more than two years into the future, through the end of 2008.

> returns at levels that do not fully align the customer's interests in timely implementation with shareholder/management interests.

Clarification Order, 124 FERC ¶ 61,136 P 14 (quoting Schnitzer Rebuttal Testimony, Exh. NETO-23, R. 490, at 32, JA 580).

5. Arguments That The Incentive Was Inadequately Supported Or Unnecessary Are Without Merit.

a. The Commission Is Not Required To Prove With Certainty The Effect Of The Proposed Incentive.

State Petitioners and Municipal Intervenors complain that witnesses Scott and Avera could not identify any specific action that any transmission owner had taken or will take as a result of the adder. Br. 35 (citing Exh. No. NECOE-47, Deposition of Jeff Scott, R. 460, at 50, JA 494; Tr. 725, R. 261, JA 203; Tr. 727, R. 261, JA 205; Tr. 733-34, R. 261, JA 207-08; Tr. 220-21, R. 252, JA 164-65); Intervenor Br. 13-15. However, Mr. Scott testified that – although he could not in advance identify specific actions that will be taken – based upon his experience with the effect of incentives in the United Kingdom, he was confident that the incentives here would in fact have the effect of altering behavior. Exh No. NECOE-47, Scott Deposition, R. 460, at 50-51, JA 494-95. *See also* Scott Tr. 727, R. 261, JA 205 ("I can't sit here and give you a shopping list now, looking forward, to exactly what we are going to do, specifically in response to this incentive. But this incentive will clearly stimulate the behavior of management to ensure that we get the job done, to deliver the very substantial increase in capital

expenditure that is required in the region."). Likewise, while Dr. Avera could not "speak to specific actions," Tr. 220, R. 252, JA 164, he testified nonetheless that the adder "will create an incentive for utilities to try to solve some of these problems. . . ." *Id.*

Fundamentally, it is not necessary that the Commission know with certainty what actions will be taken by each transmission owner to predict reasonably that the incentive adder will assist in the timely and successful completion of these construction projects. "The law governing [judicial] review does not demand an impossible predictability," but rather "an articulation, in response to serious objections, of the Commission's reasons for believing more good than harm will come of its action." *Md. People's Counsel v. FERC*, 761 F.2d 768, 779 (D.C. Cir. 1985). "[T]he Court will defer to the Commission's predictive judgment that the new rate design will result in 'more good than harm,' as long as the Commission articulates reasons for its judgment and responds adequately to [petitioner's] objections." *Electricity Consumers*, 407 F.3d at 1239 (quoting *Md. People's Counsel*, 761 F.2d at 779).

For example, *Pub. Serv. Comm'n of the State of New York v. FERC*, 463 F.2d 824 (D.C. Cir. 1972), affirmed a Commission policy intended to provide incentives to search for additional gas supplies, even though "[o]n the basis of the record before us, it cannot be determined for certain that the Commission's

incentive policy *will* work to increase the flow of natural gas into interstate commerce, but it is nonetheless true that the record does not show that such a policy *will not* work." *Id*. at 828 (emphasis in original). "[T]he formulation of such an experimental policy (where the probability of success is uncertain) is the type of activity that the [Commission] was created to perform, and we give great weight to the Commission's determinations regarding this policy." *Id*. Similarly, in *Electricity Consumers*, 407 F.3d at 1240, this Court affirmed the Commission's approval of a rate designed to encourage investment even though that rate was not expected to alone result in more investment. Rather, it was sufficient that the new rate design would contribute to a more reliable overall revenue structure and thus "play a role" in improving prospects for financing. *Id*.

Thus, this case is nothing like *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006) (cited Br. 26-27, 40; Intervenor Br. 8-11), in which the Commission issued a new rule based in part upon an alleged record of past abuse between pipelines and their non-marketing affiliates. *Id*. at 841. The Court concluded that "FERC has cited *no* complaints and provided *zero* evidence of actual abuse between pipelines and their non-marketing affiliates," and therefore the Court rejected the Commission's position that its order addressed a real industry problem. *Id*. at 843 (emphasis in original). In contrast, here, there is no dispute that there is a pressing need for new transmission facilities in New

England. In support of its decision here that incentives would assist in the successful completion of such projects, the Commission is not relying on a non-existent record of past abuses, but rather on its predictive judgment concerning the behavior of the entities it regulates, as informed by expert testimony at hearing. The Commission is entitled to "particularly deferential review" where it is making judgments about the future behavior of entities it regulates. *Wisconsin Pub. Power, Inc. v. FERC*, 493 F.3d 239, 260 (D.C. Cir. 2007) (affirming approval of a fixed cost adder, finding that "[t]his forecast – that approval of the fixed cost adder would help ensure that electricity suppliers continue to invest in [narrow constrained areas] – was a reasonable predictive judgment that warrants judicial deference"). *See also Electricity Consumers*, 407 F.3d at 1240 (deferring to Commission policy choice regarding rate design where the Commission's predictive judgment that it would result in long-term savings was supported by substantial evidence; the balancing of short-term costs against long-term benefits is within the Commission's discretion); *Envtl. Action, Inc. v. FERC*, 939 F.2d 1057, 1064 (D.C. Cir. 1991) ("[I]t is within the scope of the agency's expertise to make … a prediction about the market it regulates, and a reasonable prediction deserves our deference notwithstanding that there might also be another reasonable view.")

Nor does the fact of competing expert testimony change the result. *See, e.g.*, Br. 36-37. A dispute between expert witnesses is a factual dispute implicating

agency expertise, in which the court defers to the agency's informed discretion. *Wisconsin Valley Improvement Co. v. FERC*, 236 F.3d 738, 746-47 (D.C. Cir. 2001) (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376 (1989)). The court is not called upon to weigh competing expert opinions as an original matter, but only to inquire whether the agency based its choice on reasonable expert evidence. *Id*. at 747. It is not enough for petitioners to convince the court of the reasonableness of their views. *Id*. So long as the agency's decision is based on substantial evidence, that satisfies arbitrary and capricious review, "whatever may be this Court's views as to the persuasiveness of that evidence." *Id*.

b. The Commission Is Not Required To Quantify Or "Calibrate" With Certainty Or Precision The Relative Burdens And Benefits Of The Proposed Incentive.

In a similar vein, State Petitioners complain that the Commission failed adequately to quantify, Br. 25-26, 28, 34, 43, or to "calibrate," Br. 36, 42-43, the relationship between the incentive and the new transmission construction. As in *Maine PUC*, here, the State Petitioners' "position on calibration demands too much," *Maine PUC*, 454 F.3d at 288, and is contrary to the applicable standard. Opinion No. 489 P 111 n. 100, JA 383; Rehearing Order PP 73, 80, JA 444, 447. While Mr. Schnitzer did quantify specific costs and benefits attributable to the return on equity incentive (calculating that the total cost of the incentive, on a pre-

tax basis, is $148.2 million, while the annual benefits will be at least $76 million, *see* Exh. No. NETO-23 (Schnitzer Rebuttal Testimony), R. 490, at 28-29, JA 576-77), the Commission found it unnecessary to parse these numbers or to consider the various other less quantifiable benefits attributable to the proposed incentive. Opinion No. 489 P 111 n. 100, JA 383. The Commission found it sufficient that, on balance, and based on the specific record evidence presented in this case, the timely, successful completion of ISO New England's requested additions to its transmission grid will ultimately produce benefits to ratepayers. Opinion No. 489 P 111 n. 100, JA 383.

Maine PUC supports this determination. *Maine PUC*, 454 F.3d at 288-89. Because a return on equity is not susceptible to a precise calculation, and is based on the Commission's policy choice among a range of reasonable returns, taking into account cost-related and policy-related factors, the courts have recognized that there is a zone of reasonable returns on equity, and have held the Commission to an end-result test. *Id*. at 288-89. Thus, *Maine PUC* rejected the argument that the Commission was required to calibrate the level of benefits that an incentive is designed to produce beyond a finding that the incentive at issue is within the zone of reasonableness. Opinion No. 489 P 103, JA 378 (citing *Maine PUC*, 454 F.3d at 288); Rehearing Order P 71, JA 444. In *Maine PUC*, "FERC did the necessary calibration, determining the 50 basis point adder to be within the zone of

reasonableness," where FERC ensured that the return on equity would be subject to a cap equal to the top of the range of reasonable returns on equity for a proxy group of investor-owned transmission owners. *Maine PUC*, 454 F.3d at 288. Similarly, here, the Commission authorized a return on equity incentive within the range of reasonable returns. Rehearing Order P 72, JA 444. Moreover, the Commission limited the application of this incentive, ultimately holding (on rehearing) that it would be available only with respect to new, Regional Transmission Plan-approved projects that are completed and come on line by the end of 2008. *Id*.

Although State Petitioners attempt to distinguish *Maine PUC* on the ground that the benefit to consumers there was "specified" and "discernable," Br. 46-47, *Maine PUC* in fact affirmed the 50 basis point adder for RTO participation notwithstanding the fact that "there is not a sufficiently long track record with which to measure the full value of the benefits of RTOs on market performance." *Maine PUC*, 454 F.3d at 289. The adder nevertheless was sufficiently supported where RTO participation would enhance the overall competitiveness and efficiency of wholesale markets, and the resulting rate of return is within the zone of reasonableness. *Id*.[7]

[7] Nor does *Pub. Serv. Comm'n of Ky. v. FERC*, 397 F.3d 1004 (D.C. Cir. 2005) (cited Br. 26) compel a different result. There the Court stated that the hearing on an incentive adder should contain evidence "on the need for – or

For their part, State Petitioners offered no competing quantification, Rehearing Order P 73, JA 444, nor evidence to dispute that successful completion of necessary transmission upgrades will benefit consumers. Nor do State Petitioners dispute the New England region's need (the need of all customers in the region and the public at large) for additional transmission capacity. *Id*.

Thus, contrary to State Petitioners' assertions, Br. 49-50, the Commission's orders are fully consistent with this Court's decision in *Farmers Union*, 734 F.2d 1486. *Farmers Union* recognized that the Commission may consider non-cost factors in rate setting, so long as it explains how the non-cost factor justifies the resulting rate. 734 F.2d at 1502. Indeed, the Court recognized that courts have endorsed reliance on non-cost factors primarily in recognition of the need to stimulate new supplies. *Id*. at 1503. However, *Farmers Union* reversed Commission orders which allowed oil pipelines "creamy returns" outside the zone of reasonableness where no effort was made to establish a link between the higher returns and investment in additional capacity. *Id*. *See Blumenthal*, 552 F.3d at 882 (citing *Farmers Union* for the proposition that the agency "violates its oversight duty" when rate regulation is based on little more than "'undocumented reliance on

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appropriate size of – such a premium." *Id*. at 1012. Here, ample evidence was presented of the need for the incentive adder, and the issue of the size of the adder, *i.e*. whether, if granted, the adder should be more or less than 100 basis points, was never raised. *See* Initial Decision P 145, JA 315; Rehearing Order PP 67-68, JA 442-43.

market forces as the principal means of rate regulation'"). In contrast, here, the incentive rate proposed is within the zone of reasonableness and substantial evidence supports the link between the incentive rate and the timely, successful completion of necessary transmission facilities.

c. The Incentive Was Not Rendered Unnecessary By The Obligation To Build And The Approval Of A Cost-of-Service Return On Equity.

State Petitioners and Municipal Intervenors dispute the need for any incentive where transmission owners already were obligated, under the ISO New England Transmission Owner's Agreement, to build the transmission facilities identified in the planning process, Br. 27, 36, 38-39, Intervenor Br. 11-13, and the transmission owners had already been awarded a cost-of-service base return on equity. Br. 36-38; Intervenor Br. 18.

The obligation to build, however, does not address the manner or circumstances under which this obligation can, or will, be met in a given case. Rehearing Order P 79, JA 446 (citing the ISO New England Transmission Owner's Agreement at schedule 3.09(a) (Exh. No. CT-32, R. 414, JA 480)). As State Petitioners concede, Br. 29, under Schedule 3.09(a) of the Transmission Owner's Agreement, the obligation to build applies subject to "the requirements of applicable law, government regulations and approvals, including requirements to obtain any necessary federal, state, or local siting, construction and operating

permits; the availability of required financing; [and] the ability to acquire necessary rights of way . . . ." *See* Rehearing Order P 79, JA 446 (quoting schedule 3.09(a)).

Accordingly, notwithstanding the general "obligation" to build, new transmission projects nonetheless face numerous regulatory and financial hurdles including: (i) regulatory approvals; (ii) prudence reviews; (iii) regulatory disallowances; (iv) expenditure of political capital; (v) siting delays; (vi) zoning regulations; (vii) land use requirements; and (viii) public opposition. Opinion No. 489 P 105, JA 379 (citing Initial Decision P 120, JA 308). The Regional Transmission Expansion Planning Process thus is not a "light switch" where proposed projects are either "committed" or "uncommitted," but rather it is a dynamic process where, once a project is approved for initial inclusion, the transmission owners begin a process of design, obtaining siting approvals, obtaining financing, and ultimately constructing such projects. Scott Supplemental Testimony, Exh. No. NETO-29, R. 496, at 22-23, JA 604-05. Inclusion of a facility in a plan does not mean that a project can or will get built. Order No. 679 P 35. Even where a project already has been planned or announced, the granting of incentives may help in securing financing for the project or may bring the project to completion sooner than originally anticipated. *Id*. Accordingly, the Commission in Order No. 679 rejected arguments that projects that are already

included in expansion plans, or projects that are subject to contractual commitments or mandatory projects, should be disqualified from receiving incentive-based rate treatment, provided applicants are able to establish the required nexus between the requested incentive and the investment. *Id*.; Order No. 679-A P 122. *See Public Serv. Comm'n*, 545 F.3d at 1064-65 (Commission reasonably distinguished between projects based upon their progress in planning for purposes of application of a going-forward cost-sharing system).

Likewise, the existence of a cost-of-service base return on equity does not assure adequate timely construction. *See* Br. 36-38 (citing Exh. No. CT-10, Landrieu Supplemental Testimony, R. 392, at 9, JA 459, and Exh. No. CT-13, Lyon Supplemental Testimony, R. 395, at 4, JA 462); Intervenor Br. 18-19. Traditional ratemaking policies have not adequately encouraged the construction of new transmission. Order No. 679 P 26. *See, e.g.* Avera Supplemental Testimony NETO-28, R. 495, at 28, JA 602 ("Empirical evidence disproves Mr. Lyon's position that the rates of return established in the context of a traditional rate case have been adequate to attract sufficient capital to the transmission system. . . . [D]espite the fact that utilities have had the opportunity to earn such 'just and reasonable' rates of return, transmission investment has fallen below the level deemed necessary to support a restructured power market."). Indeed, the notion that the traditional approach to setting transmission rates suffices to attract new

transmission investment cannot be squared with FPA § 219, which was enacted (as part of the Energy Policy Act of 2005) to counteract a long decline in transmission investment and requires the Commission to use its full ratemaking discretion under FPA § 205 to promote capital investment. Order No. 679 P 65.

C. Municipal Intervenors' Argument Regarding The Locked-In Period Is Barred And, In Any Event, Is Without Merit.

Municipal Intervenors contend that the Commission erred in approving a December 31, 2008 cut-off date for receipt of the 100-basis point adder based on "'the project owners' reasonable reliance on these filed rates.'" Intervenor Br. 20-22 (quoting Rehearing Order P 55, JA 438). This argument is barred from consideration because it was not raised by State Petitioners. As intervenors, Municipal Intervenors may only join issue on a matter that has been properly brought before the court by the State Petitioners**.** *Cal. Dep't of Water Res. v. FERC*, 306 F.3d 1121, 1126 (D.C. Cir. 2002); *Alabama Mun. Distribs. Group v. FERC*, 300 F.3d 877, 879 (D.C. Cir. 2002).[8] Further, Municipal Intervenors failed

[8] Although in certain circumstances an intervenor may raise an issue if the intervenor has preserved the issue in its own petition for rehearing before the Commission, and the intervenor satisfies the statutory requirements for a petitioner to seek judicial review of the Commission's order, *see Alabama Mun.*, 300 F.3d at 880, here the Municipal Intervenors did not file their motion for intervention within the sixty day time limit for filing petitions for review. The first motion for intervention was filed by the Massachusetts Municipal Wholesale Electric Co. on June 18, 2008, well more than sixty days following the issuance of the Rehearing Order on March 24, 2008.

to seek rehearing of this determination, which was jurisdictionally required under FPA § 313(b) as the locked-in period and the parameters thereof were established for the first time in the Rehearing Order. *See Western Area Power Administration v. FERC*, 525 F.3d 40, 52 (D.C. Cir. 2008) (to preserve the right to judicial review, rehearing of an order on rehearing must be sought when the later order modified the results of the earlier one in a significant way).

In any event, the Commission reasonably selected December 31, 2008, the cut-off date applicable to the New England ISO's annual rate filing, as the cut-off date for application of the incentive adder. Rehearing Order P 55, JA 438. The Commission simply and reasonably concluded that, in picking a date to cut-off application of the Opinion No. 489 adder, it would be least disruptive to allow the ISO's latest rate filing to run its course, particularly given the lead time required to prepare such rate filings, before imposing new rate standards. *See Public Serv. Comm'n of Wisconsin*, 545 F.3d at 1064-65 (affirming Commission's reasonable selection of dates and dividing lines in making ratemaking decisions).

CONCLUSION

For the foregoing reasons, FERC respectfully requests that the petition for review be denied and FERC's orders upheld in all respects.

Respectfully submitted,

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May 6, 2009

Connecticut Department of Public Utility Control v. FERC,
No. 08-1199

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief contains 12,555 words, not including the tables of contents and authorities, the glossary, the certificate of counsel and this certificate.

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May 6, 2009

ADDENDUM

ADDENDUM TABLE OF CONTENTS

PAGE

STATUTES:

Federal Power Act

Section 205 of the Federal Power Act, 16 U.S.C. § 824d, provides as follows:

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

Section 216(b) of the Federal Power Act, 16 U.S.C. § 824p(b), provides as follows:

(b) Construction permit

Except as provided in subsection (i) of this section, the Commission may, after notice and an opportunity for hearing, issue one or more permits for the construction or modification of electric transmission facilities in a national interest electric transmission corridor designated by the Secretary under subsection (a) of this section if the Commission finds that—
(1)

(A) a State in which the transmission facilities are to be constructed or modified does not have authority to—

(i) approve the siting of the facilities; or

(ii) consider the interstate benefits expected to be achieved by the proposed construction or modification of transmission facilities in the State;

(B) the applicant for a permit is a transmitting utility under this chapter but does not qualify to apply for a permit or siting approval for the proposed project in a State because the applicant does not serve end-use customers in the State; or

(C) a State commission or other entity that has authority to approve the siting of the facilities has—

(i) withheld approval for more than 1 year after the filing of an application seeking approval pursuant to applicable law or 1 year after the designation of the relevant national interest electric transmission corridor, whichever is later; or

(ii) conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible;

(2) the facilities to be authorized by the permit will be used for the transmission of electric energy in interstate commerce;

(3) the proposed construction or modification is consistent with the public interest;

(4) the proposed construction or modification will significantly reduce transmission congestion in interstate commerce and protects or benefits consumers;

(5) the proposed construction or modification is consistent with sound national energy policy and will enhance energy independence; and

(6) the proposed modification will maximize, to the extent reasonable and economical, the transmission capabilities of existing towers or structure.

Section 219 of the Federal Power Act, 16 U.S.C. § 824s, provides as follows:

(a) Rulemaking requirement

Not later than 1 year after August 8, 2005, the Commission shall establish, by rule, incentive-based (including performance-based) rate treatments for the transmission of electric energy in interstate commerce by public utilities for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.

(b) Contents

The rule shall—

(1) promote reliable and economically efficient transmission and generation of electricity by promoting capital investment in the enlargement, improvement, maintenance, and operation of all facilities for the transmission of electric energy in interstate commerce, regardless of the ownership of the facilities;

(2) provide a return on equity that attracts new investment in transmission facilities (including related transmission technologies);

(3) encourage deployment of transmission technologies and other measures to increase the capacity and efficiency of existing transmission facilities and improve the operation of the facilities; and

(4) allow recovery of—

(A) all prudently incurred costs necessary to comply with mandatory reliability standards issued pursuant to section 824o of this title; and

(B) all prudently incurred costs related to transmission infrastructure development pursuant to section 824p of this title.

(c) Incentives

In the rule issued under this section, the Commission shall, to the extent within its jurisdiction, provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization. The Commission shall ensure that any costs

recoverable pursuant to this subsection may be recovered by such utility through the transmission rates charged by such utility or through the transmission rates charged by the Transmission Organization that provides transmission service to such utility.

(d) Just and reasonable rates

All rates approved under the rules adopted pursuant to this section, including any revisions to the rules, are subject to the requirements of sections 824d and 824e of this title that all rates, charges, terms, and conditions be just and reasonable and not unduly discriminatory or preferential.

Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), provides as follows:

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.