

135 FERC ¶ 61,136  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Central Maine Power Company

Docket No. EL08-74-001

ORDER DENYING REHEARING

(Issued May 19, 2011)

1. Public Parties<sup>1</sup> and the Massachusetts Municipal Wholesale Electric Company (MMWEC) request rehearing of the Commission's October 2008 order<sup>2</sup> authorizing transmission rate incentives pursuant to Order No. 679<sup>3</sup> for Central Maine Power Company's (Central Maine) Maine Power Reliability Program Project (Project), subject to the condition that ISO New England Inc. (ISO New England) approve the Project in its Regional System Plan as a Reliability Transmission Upgrade. For the reasons discussed below, we deny rehearing.

**I. Background**

2. The Project involves construction of approximately 255 miles of new and rebuilt 345 kV transmission line and approximately 229 miles of new and rebuilt 115 kV

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<sup>1</sup> Public Parties consist of: the Maine Public Utilities Commission, the Maine Office of the Public Advocate (Maine Public Advocate), the New England Conference of Public Utilities Commissioners, Inc. (NECPUC), the Connecticut Department of Public Utility Control, the Connecticut Office of Consumer Counsel, and the Attorney General of the Commonwealth of Massachusetts (Massachusetts Attorney General). Although MMWEC filed a separate rehearing request, it joined Public Parties with respect to certain arguments, as indicated below.

<sup>2</sup> *Central Maine Power Co.*, 125 FERC ¶ 61,079 (2008) (October 2008 Order).

<sup>3</sup> *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222, *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007).

transmission line.<sup>4</sup> The Project's proposed transmission corridor is an approximately 370 mile right-of-way with a width of 170 to 500 feet. While the Project will use existing utility corridors, Central Maine expects to negotiate rights-of-way along the corridor and to purchase approximately 580 parcels of land in approximately 23 towns.<sup>5</sup> The Project is expected to cost approximately \$1.4 billion, which is four to five times the size of Central Maine's current electric transmission plant investment and six times its existing transmission plant in service.<sup>6</sup>

3. Central Maine submitted a petition for declaratory order requesting three incentives for the Project: (1) a 150 basis point return on equity (ROE) adder; (2) recovery in rate base of 100 percent of construction work in progress (CWIP); and (3) guaranteed recovery of prudently incurred costs if the Project is abandoned in whole or in part as a result of factors beyond its control (abandonment).

4. In the petition, Central Maine stated that the Project is necessary for the future reliability of its transmission system and must be built on an accelerated construction schedule. Central Maine explained that it developed the Project after ISO New England conducted a Needs Assessment Study that found that by 2012 Central Maine's transmission system will violate three mandatory Reliability Standards.<sup>7</sup>

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<sup>4</sup> The major 345 kV transmission line will run between Orrington, Maine, and Newington, New Hampshire.

<sup>5</sup> Central Maine Petition for Declaratory Order at 16-17 (Petition).

<sup>6</sup> In the related proceeding, Docket No. ER09-938-000, the Project is estimated to cost \$1.55 billion.

<sup>7</sup> The Needs Assessment Study found that when tested under the N-0 condition (normal operations prior to any contingency), N-1 condition (the system can withstand the first contingency, which may involve the loss of one or more system components, without affecting service to customers), and N-1-1 condition (a regional control area must be designed to withstand the most severe single outage on its system without the occurrence of instability, and within 30 minutes of the first outage, the system must be prepared for the next most severe outage), Central Maine's transmission system would violate: (1) TPL-001-0 – System Performance Under Normal (No Contingency) Conditions (Category A); (2) TPL-002-0 – System Performance Under Loss of a Single Bulk Electric System Element (Category B); and (3) TPL-003-0 – System Performance Following Loss of Two or More Bulk Electric System Elements (Category C). *Id.* at 13-14.

5. Central Maine also stated that the Project will provide opportunities for access to renewable generation. Central Maine explained that the Project has potential to provide reliable access to nearly 1,650 MW of potential wind generation in Maine, 3,000 MW of hydroelectric power under development in Québec, and 5,000 MW to 7,000 MW of hydroelectric and wind power under development in Brunswick/Newfoundland and Labrador.<sup>8</sup> Central Maine further stated that the Project will create production efficiencies and reduce emissions, including greenhouse gas emissions.

6. Central Maine also claimed that the Project will reduce line losses and relieve transmission congestion in areas identified as constrained by the United States Department of Energy. With respect to line losses, Central Maine explained that by 2012 losses on its existing transmission system are expected to range between 18 MW and 120 MW. Central Maine claimed that the Project should shrink this range to between 15 MW and 88 MW, saving customers between \$35 million and \$60 million.<sup>9</sup> With respect to congestion, Central Maine claimed that the Project will improve north-to-south and south-to-north thermal transfer limits within Maine by approximately 725 MW and between Maine and New Hampshire by approximately 900 MW and 625 MW, respectively.<sup>10</sup>

7. In the October 2008 Order, the Commission conditionally granted Central Maine's petition, finding that the Project is not routine and that, therefore, Central Maine had established a nexus between the Project and the requested incentives. Because the Project failed to qualify for a rebuttable presumption of eligibility for incentives under section 219 of the Federal Power Act (FPA),<sup>11</sup> the Commission authorized incentives on the condition that the Project receives approval as a Reliability Transmission Upgrade in the ISO New England's Regional System Plan.<sup>12</sup> The Commission also authorized a 125 basis point ROE adder rather than the requested 150 basis point ROE adder because it found that its decision to authorize CWIP and abandonment reduced the Project's overall risk.<sup>13</sup>

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<sup>8</sup> *Id.* at 26.

<sup>9</sup> *Id.* at 25-26.

<sup>10</sup> *Id.* at 27-28.

<sup>11</sup> 16 U.S.C. § 824s (2006).

<sup>12</sup> October 2008 Order, 125 FERC ¶ 61,079 at P 42-43.

<sup>13</sup> *Id.* P 86-88.

## II. Rehearing Requests

### A. Motion to Hold Petition in Abeyance

#### 1. October 2008 Order

8. Prior to the issuance of the October 2008 Order, the Maine Public Utilities Commission, NECPUC, and the Maine Public Advocate (Joint Protesters)<sup>14</sup> moved to hold Central Maine's petition in abeyance pending the outcome of Central Maine's Certificate of Public Convenience and Necessity (Certificate) proceeding before the Maine Public Utilities Commission. The Joint Protesters argued, *inter alia*, that holding the petition in abeyance would guarantee that the Commission reviewed the Project in its final form and eliminate the prospect of the Commission having to revisit its decision if facts changed as a result of the Certificate proceeding.

9. In the October 2008 Order, the Commission denied the Joint Protesters' motion, explaining that there was no significant risk of administrative inefficiency because the Commission decides petitions for incentives under different criteria than the Maine Public Utilities Commission decides Certificate applications.<sup>15</sup> The Commission also found that a decision on the petition would provide Central Maine with a greater degree of certainty as it discussed its future financing needs with lenders and rating agencies, an outcome consistent with the goals of section 219.<sup>16</sup>

#### 2. Rehearing Request

10. On rehearing, Public Parties claim that the Commission abused its discretion by denying the motion to hold the petition in abeyance. Public Parties argue that the Commission's observation that it reviews incentive applications under different criteria than the Maine Public Utilities Commission reviews Certificate applications fails to address the possibility that features of the Project upon which the Commission based its incentive decision might change as a result of the Certificate proceeding. Public Parties contend that the Certificate proceeding could produce a reconfigured Project with a significantly smaller dollar investment, could demonstrate that Central Maine overstated

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<sup>14</sup> The Connecticut Department of Public Utility Control also filed a protest that adopted the arguments in the protests filed by both the Joint Protesters and MMWEC.

<sup>15</sup> October 2008 Order, 125 FERC ¶ 61,079 at P 39 (footnotes omitted).

<sup>16</sup> *Id.* P 40.

its projections of increased transfer capability, or could conclude that an accelerated construction schedule is unnecessary.<sup>17</sup>

11. Public Parties also argue that the Commission relied on generalizations to justify its finding that immediate action would provide Central Maine with a greater degree of certainty as it enters into discussions with lenders and rating agencies about its financing needs. Public Parties argue that if the incentives are subject to review based on the outcome of the Certificate proceeding, it is questionable how much certainty is actually gained by denying the motion.

12. Finally, Public Parties note that in Order No. 679 the Commission stated that it would consider the views of state bodies and adopt a rebuttable presumption that projects approved by the appropriate state body are eligible for incentives under section 219. Public Parties also note that in Order No. 679-A the Commission explained that it created the rebuttable presumption to avoid duplicating the work of state siting authorities, regional planning processes, or the United States Department of Energy.<sup>18</sup>

### **3. Commission Determination**

13. The Commission denies rehearing. Nothing in the request for rehearing refutes our observation in the October 2008 Order that the Commission evaluates petitions for incentives under different criteria than the Maine Public Utilities Commission evaluates Certificate applications.<sup>19</sup>

14. As stated in the October 2008 Order, when reviewing an application for incentives, the Commission makes two determinations: (1) whether the project qualifies for incentives under section 219 of the FPA, which requires a showing that the project ensures reliability or reduces the cost of delivered power by reducing congestion; and (2) whether the project qualifies for incentives under Order No. 679, which also requires a showing of a nexus between the incentive sought and the investment being made. In contrast, when the Maine Public Utilities Commission reviews a Certificate application, it

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<sup>17</sup> Public Parties Rehearing Request at 10-12.

<sup>18</sup> *Id.* at 13 (citing Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 54; Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 5). Presumably, Public Parties make these observations to demonstrate an inconsistency between the Commission's decision to deny the motion for abeyance and Order Nos. 679 and 679-A.

<sup>19</sup> The Maine Public Utilities Commission, in fact, granted a Certificate of Public Convenience and Need on June 10, 2010, in Docket No. 2008-255. The Certificate excluded certain segments of the Project included in the original petition.

examines whether the project is needed—a different standard that permits inquiry into a broader range of issues.<sup>20</sup> While there may be some overlap between the two inquiries insofar as approval of a Certificate application may give rise to a rebuttable presumption that a project satisfies section 219’s eligibility requirement, whether a project satisfies the section 219 requirement or whether there has been a demonstration that there is a nexus between the incentive sought and the investment being made does not depend on Certificate approval.<sup>21</sup>

15. To the extent that Public Parties imply that the decision to deny the motion is inconsistent with the Commission’s statements in Order Nos. 679 and 679-A, we reject the implication. In Order No. 679, the Commission recognized that incentives for many utilities are incorporated into rates that must receive state commission approval, and that many decisions on siting and permitting of new facilities are under the jurisdiction of state and local authorities. In light of these realities, the Commission stated that it would consider the views of relevant state bodies and adopt a rebuttable presumption that projects approved by the state satisfy the FPA section 219 requirement. The Commission did not state, however, that it would hold incentive petitions in abeyance pending the conclusion of state proceedings.<sup>22</sup> In fact, the Commission stated that applicants required under state law to obtain state approval should initiate state proceedings in “due course,”<sup>23</sup> indicating that pendency of state proceedings would not preclude the Commission’s evaluation of applications for incentives.

16. Moreover, there is nothing inconsistent about the Commission establishing a rebuttable presumption that projects with state approval are eligible for incentives under FPA section 219 and the Commission acting on incentive applications while state proceedings are pending. As the Commission explained in Order No. 679-A, it adopted the rebuttable presumption because it recognized that state approval will likely (but not necessarily) indicate that a project meets at least one of the section 219 requirements, such that it would be an unnecessary duplication of work to examine the question *de novo*.<sup>24</sup> However, state approval is not the only way to satisfy the section 219

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<sup>20</sup> October 2008 Order, 125 FERC ¶ 61,079 at P 39 n.41.

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

<sup>22</sup> The Commission expressly stated that it would not require state approval as a condition for authorizing incentives. Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 54.

<sup>23</sup> *Id.*

<sup>24</sup> Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 49 (“We continue to believe that, these approval processes will, in all likelihood, examine whether a project ensures reliability or reduces congestion.”).

requirement. In establishing the rebuttable presumption, the Commission did not exclude other means of demonstrating eligibility under section 219.<sup>25</sup> In fact, the Commission established an additional rebuttable presumption for projects that receive approval in a regional planning process.

17. Central Maine did not need to rely on the rebuttable presumption for projects with state approval in order to satisfy the section 219 requirement. Instead, Central Maine could satisfy the section 219 requirement by showing that the Project qualified for the rebuttable presumption for projects approved in a regional planning process. Because the Project was undergoing consideration as a Reliability Transmission Upgrade in ISO New England's Regional System Plan, the Commission authorized incentives contingent on the Project receiving final approval as a Reliability Transmission Upgrade, independent of any state proceeding on Certificate approval.<sup>26</sup>

18. Finally, Public Parties attempt to diminish the significance of Central Maine having a greater degree of certainty as it enters into discussions with lenders and rating agencies. However, the Commission continues to believe that a greater degree of certainty with respect to Central Maine's incentive application will benefit Central Maine as it seeks to meet its financing needs, by reducing uncertainty and thus reducing its risk, which in turn should lead to lower financing costs.

## **B. Answer to Requests for Rehearing**

19. On December 4, 2008, Central Maine submitted an answer to the requests for rehearing.

20. Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2010), prohibits answers to requests for rehearing. Accordingly, we will reject Central Maine's answer.

## **C. Obligation to Build**

### **1. October 2008 Order**

21. In their protests, MMWEC and the Joint Protesters argued that the Commission should deny Central Maine's request for incentives because Central Maine has a contractual obligation to build transmission projects included in ISO New England's

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<sup>25</sup> For example, applicants can make an independent showing that their projects satisfy the section 219 requirement. Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 57.

<sup>26</sup> October 2008 Order, 125 FERC ¶ 61,079 at P 42-43.

Regional System Plan, subject to approval by the relevant state siting authorities. MMWEC acknowledged that the Commission had already rejected this same argument in *Northeast Utilities*,<sup>27</sup> but argued that the Commission erred in that case.

22. In the October 2008 Order, the Commission rejected this argument as a collateral attack on *Northeast Utilities*. The Commission explained that, in *Northeast Utilities*, it rejected the same argument as a narrow interpretation of Order No. 679 that would deny the Commission the ability to exercise the authority it was expressly granted in section 219.<sup>28</sup>

## 2. Rehearing Request

23. On rehearing, Public Parties argue that, because rehearing of *Northeast Utilities* was pending when Public Parties submitted its rehearing request in this case, the Commission erred by treating *Northeast Utilities* as a final decision for collateral estoppel purposes. Public Parties also argue that the rules of collateral estoppel are not always applicable in the administrative realm.

24. Public Parties further argue that the Commission erred by finding that the Joint Protesters' theory would deny the Commission the ability to exercise its authority under section 219.<sup>29</sup> Public Parties<sup>30</sup> state that they disagree with authorizing an ROE incentive in New England, where they allege that transmission owners have assumed the obligation to build and already receive an ROE adder in consideration for undertaking this obligation. Public Parties argue that the Commission could still award incentives in those regions of the country where transmission owners have not assumed this obligation, and that even in New England it could still award abandonment, CWIP, and incentives for advanced technologies. Public Parties argue that section 219 does not require the Commission to authorize incentives for every area of the country, regardless of whether they are needed to promote investment, and that if the Commission failed to take Central Maine's contractual obligation into account it would render meaningless the 50 basis point ROE adder that Central Maine already receives for membership in ISO New England.

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<sup>27</sup> *Northeast Utilities Service Co.*, 124 FERC ¶ 61,044, at P 89 (2008) (*Northeast Utilities*), *reh'g denied*, 126 FERC ¶ 61,052 (2009).

<sup>28</sup> October 2008 Order, 125 FERC ¶ 61,079 at P 45.

<sup>29</sup> Public Parties Rehearing Request at 16.

<sup>30</sup> MMWEC joins Public Parties for the purpose of this argument.

25. Finally, Public Parties argue that Order No. 679-A states that an obligation to build may have a bearing on the nexus evaluation of individual incentive applications. Public Parties argue that the October 2008 Order concludes that Central Maine's obligation to build has no bearing on its application without adequate explanation and without identifying the circumstances in which an obligation to build would have a bearing on the application. Public Parties contend that the Commission should, at a minimum, reduce any ROE incentive to reflect Central Maine's obligation to build.

### **3. Commission Determination**

26. We deny rehearing and affirm our conclusion that the Project is eligible for incentives, including an ROE incentive, even though Central Maine may have a contractual obligation to build it.

27. At the outset, we reject Public Parties' challenge to the Commission's reliance on *Northeast Utilities*. Public Parties incorrectly argue that *Northeast Utilities* was not valid precedent while rehearing was pending. Orders are effective in accordance with their terms; rehearing does not by itself operate to stay an order or, while it is pending, diminish the underlying order's precedential value.<sup>31</sup>

28. Moreover, although rehearing of the decision in *Northeast Utilities* was pending when the Commission issued the October 2008 Order, the Commission has since denied rehearing and affirmed its initial conclusions. And no party in the *Northeast Utilities* proceeding sought rehearing on the contractual obligation issue.<sup>32</sup>

29. Furthermore, Order No. 679-A states that in general a contractual, statutory, or regulatory obligation to build does not disqualify an applicant from receiving

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<sup>31</sup> 16 U.S.C. § 8251(c) (2006); 18 C.F.R. § 385.713(e) (2010); *accord Midwest Hydraulics, Inc.*, 120 FERC ¶ 61,247, at P 8 (2007) (“[Energie] is confusing the finality of a Commission order with its effectiveness. Section 313(c) of the Federal Power Act expressly provides that the filing of a request for rehearing or a petition for judicial review does not operate as a stay of the order of which rehearing or judicial review is sought. Although a request for rehearing may make an order non-final and thus subject to potential revocation or modification, the request does not stay the effectiveness or enforceability of the order's provisions.” (citations omitted)).

<sup>32</sup> This fact was already established by November 19, 2008, the day Public Parties submitted their rehearing request in this proceeding. Three of the entities that constitute Public Parties in this proceeding filed together with other entities as “Public Parties” in *Northeast Utilities*. They filed their rehearing request, which did not seek rehearing on the obligation issue, on September 8, 2008.

incentives.<sup>33</sup> In fact, in Order No. 679-A the Commission specifically rejected the argument that an obligation to build arising out of membership in a Regional Transmission Organization creates a *per se* bar to incentives.<sup>34</sup>

30. While Public Parties ignore this aspect of Order No. 679-A, they do reference the Commission's statement, in the same paragraph, that a prior contractual commitment or statute may have a bearing on the nexus evaluation of individual incentive applications. Public Parties argue that the Commission dismissed Central Maine's contractual commitment without adequately explaining why it has no bearing on the nexus evaluation and without identifying the circumstances in which it would have a bearing on the nexus evaluation.

31. We reject Public Parties' interpretation of Order No. 679. The Commission's statement that a prior contractual commitment or statute may have a bearing on the nexus evaluation of individual incentive applications immediately followed its rejection of the unqualified claim that such an obligation is an absolute bar to incentives; as such, the Commission's statement merely recognized that, while contractual or statutory obligations will not generally bar incentives, there may be some cases where *protesters can show* that such obligations are relevant to whether applicants can establish a nexus between the incentives sought and the investment being made.<sup>35</sup> In their protests, neither MMWEC nor the Joint Protesters provided the Commission with any reason why Central Maine's obligation to build should factor into the nexus test in this particular case; instead, both argued that that obligation, standing alone, should disqualify the Project from receiving incentives.<sup>36</sup>

32. While neither protester made a nexus argument, MMWEC attempted to link Central Maine's obligation to build to the 50 basis point ROE adder Central Maine receives for its membership in a Regional Transmission Organization (i.e., ISO New England). MMWEC argued that Central Maine should be ineligible for an ROE incentive under Order No. 679 because the 50 basis point ROE adder it already receives

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<sup>33</sup> Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 122.

<sup>34</sup> *Id.*

<sup>35</sup> We observe that the Commission merely stated that a statutory or contractual obligation *may* have a bearing on the nexus evaluation; the Commission did not state or even imply that any effect on the nexus evaluation would always work against the applicant.

<sup>36</sup> Joint Protesters' Motion for Abeyance and Protest at 9-11; MMWEC Protest at 9-11.

is adequate compensation for undertaking the obligation to build.<sup>37</sup> MMWEC also urged the Commission to adopt this approach as a nationwide policy and refuse to award ROE incentives in regions like New England, where transmission owners have allegedly assumed the obligation to build and allegedly receive an ROE adder in consideration for undertaking this obligation. Public Parties reassert both of these arguments on rehearing, adding that in regions like New England the Commission could still award abandonment, CWIP, and incentives for advanced technologies.<sup>38</sup>

33. We reject these arguments. The Commission did not authorize the 50 basis point ROE adder to compensate Central Maine and other New England Transmission Owners<sup>39</sup> for undertaking the obligation to build, as MMWEC and Public Parties argue. Instead, the Commission authorized the 50 basis point ROE adder as part of its effort to encourage entities to form or join Regional Transmission Organizations and thereby make wholesale electric markets more competitive and efficient.<sup>40</sup> Thus, when the

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<sup>37</sup> MMWEC Protest at 10 (“It is unreasonable to require customers to pay incentives to compel performance of contractual obligations, and for which the transmission owners have already been fully compensated.”), 11 (“As stated above, New England’s transmission-owning utilities have already been awarded a 50 basis point ROE incentive in return for their agreement to participate in a [R]egional [T]ransmission [O]rganization and thereby to assume the obligation to construct facilities identified in [ISO New England’s] [Regional System Plan].”).

<sup>38</sup> Public Parties Rehearing Request at 17.

<sup>39</sup> The Transmission Owners that sought the incentive were: Bangor Hydro Electric Company; Central Maine; NSTAR Electric & Gas Corporation; New England Power Company; Northeast Utilities Service Company; The United Illuminating Company; and Vermont Electric Power Company.

<sup>40</sup> See October 2008 Order, 125 FERC ¶ 61,079 at P 73; see also *id.* P 40, 45. Regional Transmission Organizations allow transmission facilities to be operated more reliably and efficiently because they result in regional transmission pricing and the elimination of rate pancaking, improved congestion management, more accurate estimates of available transmission capacity, more effective management of parallel path flows, and improved grid reliability. *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh’g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff’d sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

Commission granted the incentive, it cited the Transmission Owners' voluntary proposal to establish ISO New England as a Regional Transmission Organization and their commitment to transfer day-to-day operational control over their transmission facilities to ISO New England.<sup>41</sup>

**D. Risks and Challenges and Analysis of Whether a Project is Routine or Non-Routine**

**1. October 2008 Order**

34. In its protest, MMWEC argued that the risks and challenges faced by the Project did not justify finding that the Project is not routine because these risks and challenges are either self-inflicted or were exacerbated by Central Maine. MMWEC claimed that Central Maine failed to demonstrate that it had to build the Project entirely on its own, and made no showing that it attempted to spread its financial risk through some type of joint participation or similar arrangement that would have allowed it to self-fund its portion of the Project. Additionally, MMWEC argued that the Project's cost, while large, might have been considerably less if the Project had been implemented in stages over a period of years rather than as a package in the near-term.

35. In the October 2008 Order, the Commission rejected these arguments, explaining that nothing in Order Nos. 679 or 679-A or their progeny requires an applicant for incentives to show that it proposed necessary investment at the earliest sign of a potential problem, addressed reliability concerns in a "timely fashion," investigated joint financing arrangements, or planned to build its project on a specific timetable. The Commission explained that what is required is that applicants demonstrate a nexus between the incentives being sought and the investment being made.<sup>42</sup>

**2. Rehearing Request**

36. On rehearing, MMWEC argues that the Commission erred by refusing to consider whether Central Maine could have avoided or mitigated the Project's risks and challenges by addressing system problems earlier, seeking investment partners, or constructing the Project in stages. MMWEC contends that the Commission should have considered these factors pursuant to its statement in *BG&E* that it would look at all relevant factors to determine whether a project is routine and pursuant to its statements in Order Nos. 679

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<sup>41</sup> *ISO New England, Inc., et al.*, 106 FERC ¶ 61,280, at P 245, *order on reh'g and compliance*, 109 FERC ¶ 61,147 (2004), *order on reh'g and compliance*, 110 FERC ¶ 61,111, *order on reh'g and compliance*, 110 FERC ¶ 61,335, *order on reh'g*, 111 FERC ¶ 61,344 (2005).

<sup>42</sup> October 2008 Order, 125 FERC ¶ 61,079 at P 56.

and 679-A that incentives must be tailored to address the demonstrable risks and challenges faced by a project.<sup>43</sup>

37. More broadly, MMWEC argues that it is neither just nor reasonable for the Commission to authorize incentives to address risks or challenges that are the result of an applicant's failure to take timely action. MMWEC contends that rewarding remedial efforts to correct past under-investment is poor public policy. MMWEC also contends that an applicant should not receive incentives if it has failed to show that it at least considered alternative ways to mitigate its risks. MMWEC argues that the Commission is required by section 219 to consider, in response to assertions by interveners, whether proposed incentives address risks and challenges that are, in whole or in part, the result of actions or inactions on the part of the applicant. MMWEC contends that in the October 2008 Order the Commission erred by rejecting these concerns out of hand.

### **3. Commission Determination**

38. We deny rehearing. MMWEC either misunderstands or seeks to alter the criteria under which the Commission evaluates applications for incentives under Order No. 679.

39. In order to qualify for incentives under Order No. 679, an applicant must demonstrate that there is a nexus between the incentive sought and the investment being made.<sup>44</sup> In this regard, an applicant must also demonstrate that the total package of incentives requested is "tailored to address the demonstrable risks or challenges faced by the applicant."<sup>45</sup> The Commission has found that the question of whether a project is routine is particularly probative for evaluating that issue,<sup>46</sup> and has stated that projects that are not routine face inherent risks and challenges and/or provide benefits that are worthy of incentives.<sup>47</sup>

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<sup>43</sup> See *Baltimore Gas & Electric Co.*, 120 FERC ¶ 61,084, at P 47 (July BG&E Order), *order granting incentive proposal*, 121 FERC ¶ 61,167 (2007) (November BG&E Order), *order denying reh'g of July BG&E Order*, 122 FERC ¶ 61,034, *order denying reh'g of November BG&E Order*, 123 FERC ¶ 61,262 (2008) (collectively, *BG&E*)

<sup>44</sup> July BG&E Order, 120 FERC ¶ 61,084 at P 46.

<sup>45</sup> *Id.* P 47 (citing Order No. 679-A FERC Stats. & Regs. ¶ 31,236 at P 40).

<sup>46</sup> *Id.* P 48 ("As part of its evaluation of whether the total package of incentives requested is 'tailored to address the demonstrable risks or challenges faced by the applicant,' the Commission has found the question of whether a project is 'routine' to be particularly probative.").

<sup>47</sup> *Id.* P 54.

40. MMWEC lists three risks and challenges that it claims Central Maine could have avoided or mitigated (the 2012 reliability deadline, the financial stress caused by building the Project without a partner, and the difficulties associated with constructing the Project all at once). MMWEC does not dispute the Commission's finding that these are special risks and challenges and, therefore, that the Project is not routine; instead, MMWEC urges the Commission to discount or ignore these risks and challenges because, according to MMWEC, they are self-inflicted. The Commission declines MMWEC's invitation to change its standard.

41. As we explained in our October 2008 Order, prior to granting incentives under Order No. 679, the Commission requires the applicant to demonstrate a nexus between the incentives sought and the investment being made.<sup>48</sup> That is the test Central Maine attempted to meet in its request for incentives, including by providing a project schedule that drove its financing needs. The Commission took this consideration into account in the underlying order. Further, MMWEC does not provide support for its argument that Central Maine should have made investments. For these reasons, we reject MMWEC's argument. We similarly reject MMWEC's proposal to adopt a new requirement that applicants for an incentive show that they considered alternative ways to mitigate their risks.

42. We also reject MMWEC argument that Central Maine should be denied incentives because the financial stress caused by building the Project without a partner could have been alleviated if Central Maine had sought out some partnership arrangement. MMWEC's argument is inconsistent with Order Nos. 679 and 679-A, in which the Commission specifically rejected proposals to require joint investment as a condition for incentives.<sup>49</sup>

**E. ROE Adder and CWIP Incentive Address Same Risks**

**1. October 2008 Order**

43. In the October 2008 Order, the Commission rejected MMWEC's and the Joint Protesters' argument that CWIP and abandonment were sufficient to mitigate the financial and investment risks faced by the Project and, thus, that an ROE incentive is not justified. The Commission found that Central Maine had demonstrated that the total package of incentives was tailored to address the demonstrable risks and challenges faced

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<sup>48</sup> October 2008 Order, 125 FERC ¶ 61,079 at P 56.

<sup>49</sup> Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 356; Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 102.

by the Project.<sup>50</sup> The Commission first explained why each individual incentive was justified and then why the package of incentives was tailored to address the demonstrable risks and challenges faced by the Project.

44. The Commission found that an ROE incentive was justified because the Project is not routine and faces significant siting, construction, regulatory, environmental, and financial risks and challenges. The Commission noted that the Project is expected to be built along a 370-mile transmission corridor; to cross approximately 80 municipalities; to require the purchase of nearly 580 parcels of land; to proceed under an accelerated construction schedule; to require the pre-ordering of costly construction materials; to receive approval from at least two state agencies, two federal agencies, and potentially 80 municipalities; to cross sensitive environmental areas; to require environmental mitigation; to cost approximately \$1.4 billion;<sup>51</sup> and to attract capital in a difficult financial market.<sup>52</sup>

45. The Commission also found that authorizing CWIP would further the goals of section 219 because it would provide Central Maine with up-front regulatory certainty, rate stability, and improved cash flow, thereby reducing the pressure caused by investing in the Project on its finances.<sup>53</sup> The Commission noted that the Project is expected to cost approximately \$1.4 billion, which is four to five times the size of Central Maine's current electric transmission plant investment and six times its existing transmission plant in service. Consistent with Order No. 679, the Commission found that authorizing CWIP would enhance Central Maine's cash flow, reduce interest expense, assist Central Maine with financing, and improve the coverage ratios used by rating agencies to determine Central Maine's credit quality by replacing non-cash Allowance for Funds Used During Construction (referred to as AFUDC) with cash earnings. The Commission explained that this, in turn, would reduce the risk of a downgrade in Central Maine's debt ratings. The Commission also found that authorizing CWIP would result in better rate stability for consumers.<sup>54</sup>

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<sup>50</sup> October 2008 Order, 125 FERC ¶ 61,079 at P 87.

<sup>51</sup> *See supra* note 6.

<sup>52</sup> *Id.* P 70.

<sup>53</sup> *Id.* P 77-79.

<sup>54</sup> *Id.* P 80.

46. The Commission found that an abandonment incentive was justified because it would reduce the risk of non-recovery of costs and be an effective means to encourage the Project's completion.<sup>55</sup> The Commission observed, for example, that in addition to the challenges presented by its scope and size, the Project requires approvals from multiple municipalities within Maine, state siting authority, and various federal approvals, and that the Project risks cancellation should it fail to receive state siting authority. The Commission concluded that these factors introduce a significant element of risk that an abandonment incentive would help ameliorate by providing Central Maine with some degree of certainty as it moves forward.

47. After explaining why each individual incentive was justified, the Commission found that the total package of incentives requested was tailored to address the demonstrable risks and challenges faced by the Project. The Commission determined that Central Maine faces significant risks and challenges in constructing the Project and agreed with Central Maine that authorizing an ROE incentive, CWIP, and abandonment would encourage investment in the Project despite these risks.<sup>56</sup>

48. The Commission noted, however, that when it considers a request for an enhanced ROE, Order No. 679-A requires it to take into account any incentives in the total package of requested incentives that reduce the project's risk.<sup>57</sup> Thus, the Commission found that, while the Project faces risks and challenges that warrant an ROE incentive, its overall risk was reduced by the Commission's decision to authorize CWIP and abandonment.<sup>58</sup> The Commission explained that the ability to include CWIP in rate base would result in an infusion of cash and reduced financial risk during construction. The Commission also observed that an entity allowed to include CWIP in rate base is not required to refund the prudently-incurred costs it collects. The Commission further explained that allowing recovery of abandoned plant cost reduces the financial risk associated with the Project because it ensures that investors will recover their investment. Given these factors, the Commission determined that the Project warranted a 125 basis point ROE adder, rather than the 150 basis point ROE adder that Central Maine requested.

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<sup>55</sup> *Id.* P 83-84.

<sup>56</sup> *Id.* P 87.

<sup>57</sup> *Id.* P 88.

<sup>58</sup> *Id.* P 71, 88.

## 2. Rehearing Request

49. Public Parties<sup>59</sup> argue on rehearing that the Commission did not adequately support its decision to authorize an ROE incentive in light of its decision to authorize CWIP. Public Parties contend that the Commission acknowledged that CWIP helps offset the investment risks associated with the Project but failed to account for any fact or set of facts upon which it relied in concluding that a 125 basis point ROE adder was necessary. Public Parties argue that the Commission failed to account for evidence that, according to Public Parties, demonstrates that abandonment and CWIP would be enough to insulate Central Maine, its lenders, and its investors from the investment risks associated with the Project.

50. Public Parties also contend that the Commission did not adequately explain its rationale for rejecting the Joint Protesters' argument, which Public Parties state was that Central Maine's own evidence demonstrated that an ROE incentive would be unnecessary if the Commission authorized CWIP because both incentives addressed the same risks and that these risks could be addressed by CWIP without the need for an ROE adder. Public Parties point out that Central Maine's witness testified that CWIP would improve Central Maine's cash flow, reduce long-term capital costs, provide up-front regulatory certainty, preserve Central Maine's credit rating, encourage financing, and decrease the amount of borrowing necessary to finance debt. Public Parties further observe that Central Maine's witness stated that CWIP would specifically offset the financial risks and ongoing financial burden inherent in funding a project that is so capital intensive, has such a long lead time, and is of such a large scope. Public Parties also point out that the Joint Protesters presented evidence that CWIP alone would permit Central Maine to maintain its solid investment rating.

## 3. Commission Determination

51. We deny rehearing. Contrary to Public Parties' assertion, the Commission specifically considered the request for an ROE incentive in light of its decision to authorize CWIP and abandonment. The Commission first identified the factors that led it to conclude that an ROE incentive was justified and then considered to what extent CWIP and abandonment reduced the Project's overall risk. The Commission concluded that, while CWIP and abandonment did reduce the Project's overall risk, they did not completely mitigate the need for an ROE incentive. Consequently, the Commission authorized an ROE incentive that reflected, in its judgment, the level of remaining risk.<sup>60</sup>

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<sup>59</sup> MMWEC joins Public Parties for the purpose of this argument.

<sup>60</sup> See October 2008 Order, 125 FERC ¶ 61,079 at P 71.

52. We reject Public Parties' claim that the Commission ignored evidence offered by the Joint Protesters to show that CWIP and abandonment would be sufficient to insulate Central Maine and potential lenders and investors from the Project's risk. The evidence that Public Parties point to is a one-sentence opinion by the Joint Protesters' witness that CWIP and abandonment "should be" sufficient to insulate Central Maine, its lenders, and its equity investors from the investment risks associated with the Project.<sup>61</sup> Even if this sentence is read in the manner suggested by Public Parties, it demonstrates that the witness considered only investment risks and not the significant siting, construction, regulatory, and environmental risks and challenges faced by the Project.

53. Public Parties also argue that the Commission ignored the Joint Protesters' claim that Central Maine's witness testified that CWIP and an ROE incentive would address the same risks and that these risks could be adequately addressed by CWIP alone. We reject this characterization of the testimony. Central Maine's witness testified about the benefits of CWIP but did not testify that the benefits of CWIP negated the need for an ROE incentive, or that CWIP alone would mitigate all of the investment, siting, construction, regulatory, and environmental risks and challenges faced by the Project. In fact, the witness specifically cited these risks and challenges as reasons why the Commission should grant an ROE incentive.<sup>62</sup>

## **F. Formula Rates**

### **1. October 2008 Order**

54. In the October 2008 Order, the Commission rejected the Joint Protesters' argument that, because costs can be recovered quickly and with a minimal expenditure of resources, companies with formula rates face materially less risk than those with stated rates. The Commission found that nothing in Order No. 679, Order No. 679-A, or their progeny requires an applicant for incentives to show that it does not have formula rates. The Commission pointed out that, in *BG&E* and *Duquesne*,<sup>63</sup> it granted incentives to applicants with formula rates.

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<sup>61</sup> See *Kivela Aff.* ¶ 39.

<sup>62</sup> See *Dumais Aff.* ¶ 32.

<sup>63</sup> *Duquesne Light Co.*, 118 FERC ¶ 61,087 (2007) (*Duquesne*).

## 2. Rehearing Request

55. On rehearing, Public Parties<sup>64</sup> contend that the Commission failed to address the Joint Protesters' actual argument and instead responded to an argument that was not made. Public Parties state that the Joint Protesters actually argued that Central Maine's formula rates significantly reduce risk and should be taken into account when the Commission considers the need for and amount of any ROE incentive. Public Parties argue that the Commission's failure to address this point contradicts its recognition in Order No. 679 that formula rates can provide the certainty of recovery that is conducive to large transmission programs.

56. Public Parties claim that the Joint Protesters presented evidence that formula rates significantly curtail regulatory risk, and that this evidence is consistent with testimony recently given before the Commission in another proceeding.<sup>65</sup> Public Parties argue that Central Maine's recovery of investment through formula rates should reduce the rate of return needed to attract capital and either should eliminate the need for an ROE adder or should limit whatever adder is approved.

57. Public Parties also argue that the Commission cannot satisfy its obligation to explain its decision regarding formula rates simply by citing other cases where utilities had formula rates and were granted adders.

## 3. Commission Determination

58. We deny rehearing. While it is true that formula rates can provide a greater certainty of rate recovery,<sup>66</sup> they do not necessarily mitigate all of the risks and challenges faced by a project. Moreover, as demonstrated by *BG&E* and *Duquesne*, the Commission previously has found that the greater certainty of rate recovery provided by formula rates does not disqualify a project from receiving an ROE incentive under Order No. 679.

59. Additionally, we reject Public Parties' assertion that the Commission failed to address Central Maine's argument. The Commission did consider the existence of Central Maine's formula rates and still found that an ROE incentive is warranted;<sup>67</sup>

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<sup>64</sup> MMWEC joins Public Parties for the purpose of this argument.

<sup>65</sup> Public Parties refer to the October 14, 2008 Technical Conference in Docket No. AD08-13-000.

<sup>66</sup> See Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 386.

<sup>67</sup> October 2008 Order, 125 FERC ¶ 61,079 at P 56.

notwithstanding the existence of formula rates, the Project faces significant siting, construction, regulatory, environmental, and financial risks and challenges that are not solved by the existence of such rates.

**G. Change in Bond Yields**

**1. October 2008 Order**

60. In the October 2008 Order, the Commission rejected the Joint Protesters' argument that the 74-basis point ROE adder (to reflect the change in bond prices approved in the Opinion 489 Rehearing Order<sup>68</sup>) was no longer justified because of falling bond yields.<sup>69</sup> The Joint Protesters contended that the Applicants' requested 13.14 percent ROE was equivalent to a 270 basis point adder, due to the effects of the moves in the bond and equity markets since the issuance of Opinion No. 489. The Commission found that, although the bond yields upon which the 74 basis point adjustment was based had declined approximately 120 basis points, this change in bond yields was only one element in determining the base ROE and had no impact on the zone of reasonableness. The Commission denied the request for a hearing but found that, given the passage of time since Opinion No. 489 and the Opinion No. 489 Rehearing Order, it was appropriate to consider a discounted cash flow analysis using more recent data to verify that those findings are still valid.

61. In *Virginia Electric and Power Co.*,<sup>70</sup> the Commission noted that it recently performed a similar analysis based on the Opinion No. 489 methodology. There, the Commission stated that Virginia Electric Power Company (VEPCO) began with a similar group of 15 northeast transmission owners for its proxy group before additional screens

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<sup>68</sup> *Bangor Hydro-Electric Co.*, Opinion No. 489, 117 FERC ¶ 61,129 (2006), *order on reh'g*, 122 FERC ¶ 61,265 (2008) (Opinion No. 489 Rehearing Order).

<sup>69</sup> In the Opinion No. 489 Rehearing Order, the Commission established for New England Transmission Owners a zone of reasonableness from a low-end ROE of 7.3 percent to a high-end ROE of 13.5 percent, with a midpoint and base-level ROE of 10.4 percent. In addition to the 50-basis point ROE incentive for membership in a Regional Transmission Organization, the Commission authorized a 74-basis point ROE adder to reflect updated bond data, applicable as of November 1, 2006. Consequently, out of the Opinion No. 489 Rehearing Order, the "going-forward" ROE for New England Transmission Owners was 11.64 percent (10.4 + 0.5 + 0.74). By granting a 125 basis point ROE adder for Central Maine, its ROE increased to 12.89 percent (10.4 + 0.5 + 0.74 + 1.25), which is in the upper range of the zone of reasonableness established in the Opinion No. 489 Rehearing Order.

<sup>70</sup> 124 FERC ¶ 61,207 (2008) (*VEPCO*).

were applied that reduced the proxy group. The Commission observed that Central Maine and VEPCO are both rated BBB+ by Standard & Poor's, which results in companies rated below BBB or above A- being screened out of the proxy group. The Commission thus found that VEPCO's proxy group provides a reasonable comparison for determining the zone of reasonable returns for Central Maine. The Commission stated that in *VEPCO*, the zone of reasonableness was determined to be 9.46 percent to 14.4 percent,<sup>71</sup> and that the 12.89 percent ROE authorized for Central Maine fell within this range. Consequently, the Commission determined that the zone of reasonableness approved in *VEPCO* demonstrated that it was appropriate to continue to use a zone of reasonableness of 7.3 percent to 13.5 percent for the New England Transmission Owners.

## **2. Rehearing Request**

62. On rehearing, Public Parties assert that the Commission abused its discretion by failing to take into account the change in bond yields when it determined whether any additional ROE adder was appropriate. Public Parties argue that the Commission failed to recognize that the 74 basis point adjustment was an upward adjustment to the midpoint and thus should have been removed to account for current conditions. Public Parties contend that the issue is not whether the 74 basis point adjustment affected the zone of reasonableness, but that it inflated the base level ROE upon which the 125 basis point ROE adder was added. Public Parties argue that the Commission at least should have removed the 74 basis point adjustment to reflect change in bond yields.

63. Public Parties further assert that the Commission erred in conducting a cost of capital analysis without holding an evidentiary hearing. Public Parties claim that the Commission's decision to import the findings of the *VEPCO* case failed to provide parties in this case with the opportunity to contest the basis of the Commission's determination. Public Parties also argue that where issues of material fact have been raised, establishing an ROE without a hearing is an inadequate substitute for an evidentiary hearing.

## **3. Commission Determination**

64. We deny rehearing. In its petition for declaratory order, Central Maine did not request a change in the base ROE that all New England Transmission Owners were awarded in the Opinion No. 489 Rehearing Order.<sup>72</sup> Instead, Central Maine requested

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<sup>71</sup> *Id.* P 120.

<sup>72</sup> In the Opinion No. 489 Rehearing Order, the awarded 10.4 percent base ROE was adjusted upwards by 74 basis points to 11.14 percent to account for the change in capital market conditions that took place between the time of the ALJ's initial decision and the Commission's decision.

several incentives pursuant to Order No. 679, including an ROE adder to its “going-forward” ROE of 11.64 percent, which includes a 50 basis point ROE incentive for RTO participation. Thus, the base ROE established in the Opinion No. 489 Rehearing Order is not open for review in this case, but would instead be subject to review only in a separate proceeding initiated under sections 205 or 206 of the FPA.

65. The Commission also reaffirms its reference to the discounted cash flow analysis performed in *VEPCO* as a reasonable comparison for determining the zone of reasonable returns for Central Maine. For the reasons detailed in the October 2008 Order, the *VEPCO* results verify that an ROE of 12.89 percent remains within the zone of reasonableness.

66. We also reject the claim that this proceeding involves disputed issues of material fact appropriate for an evidentiary hearing and settlement judge procedures. A formal trial-type hearing is unnecessary where there are no material facts in dispute.<sup>73</sup> Public Parties’ arguments in favor of a hearing are based solely on unsupported allegations and, as courts have previously stated, “mere allegations of disputed facts are insufficient to mandate a hearing; petitioners must make an adequate proffer of evidence to support them.”<sup>74</sup>

## **H. Rate Impact of 125 Basis Point ROE Adder**

### **1. Rehearing Request**

67. On rehearing, Public Parties<sup>75</sup> argue that the Commission should have considered the impact on consumers of a 125 basis point ROE adder when determining whether it was just and reasonable. Public Parties contend that the Commission noted that the 150 basis point ROE adder originally requested by Central Maine would have raised the Project’s cost, assuming no major cost overruns, to between \$4.2 and \$4.38 billion, but made no effort to factor cost impact into its decision to grant a 125 basis point ROE adder.

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<sup>73</sup> See, e.g., *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124, 128-29 (D.C. Cir. 1982); *Southern Union Gas Co. v. FERC*, 840 F.2d 964, 970 (D.C. Cir. 1988); *Consolidated Oil & Gas, Inc. v. FERC*, 806 F.2d 275, 280 (D.C. Cir. 1986).

<sup>74</sup> *Cerro Wire & Cable*, 677 F.2d at 129.

<sup>75</sup> MMWEC joins Public Parties for the purpose of this argument.

**2. Commission Determination**

68. We deny rehearing. The Commission reduced the ROE incentive to 125 basis points because it found that a 150 basis point adder was not warranted given the decision to authorize CWIP and an abandonment incentive, not because of the Project's estimated cost, as Public Parties contend.

The Commission orders:

The rehearing requests are hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.