

135 FERC ¶ 61,140
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.

New England Conference of Public Utilities
Commissioners, Inc.

Docket No. EL08-69-001

v.

Bangor Hydro-Electric Company
Central Maine Power Company
National Grid, USA
NSTAR Electric & Gas Corporation
Northeast Utilities Service Company
The United Illuminating Company
Vermont Electric Power Company

ORDER ON REHEARING

(Issued May 19, 2011)

1. The New England Conference of Public Utilities Commissioners, Inc. (NECPUC) and the New England Parties,¹ as well as the Joint Parties² request rehearing of the Commission's September 25, 2008 order³ denying NECPUC's complaint against the

¹ New England Parties include: Vermont Department of Public Service; Vermont Public Service Board; Massachusetts Department of Public Utilities; Patrick C. Lynch, Attorney General of Rhode Island; Rhode Island Division of Public Utilities and Carriers; and Martha Coakley, Massachusetts Attorney General. NECPUC and the New England Parties are collectively referred to herein as NECPUC.

² Joint Parties include: Massachusetts Attorney General and the Connecticut Office of Consumer Counsel.

³ *New England Conference of Pub. Utils. Comm'rs, Inc. v. Bangor Hydro-Elec. Co.*, 124 FERC ¶ 61,291 (2008) (September 2008 Order).

New England transmission owners (Transmission Owners).⁴ In its complaint, NECPUC sought to enjoin the Transmission Owners from applying the return on equity (ROE) incentive authorized for certain transmission projects in Opinion No. 489⁵ to project costs in excess of those estimated at the time of Opinion No. 489. For the reasons discussed below, we deny rehearing.

I. Background

A. Opinion No. 489 Proceeding

2. In November 2003, the Transmission Owners requested an ROE adder of 100 basis points as an incentive for constructing future transmission expansion projects. The Commission accepted and suspended the proposal, subject to refund and to the outcome of a hearing.⁶ Following a hearing, the Presiding Judge denied the incentive.⁷

3. In Opinion No. 489, the Commission reversed the Presiding Judge and authorized in perpetuity an ROE adder of 100 basis points for all present and future projects in ISO New England Inc.'s (ISO New England) Regional Transmission Expansion Plan (RTEP).⁸ The Commission found that the Presiding Judge erred by requiring the Transmission Owners to show that the RTEP projects would not be built "but for" the

⁴ The Transmission Owners responding to the complaint are Bangor Hydro-Electric Co.; Central Maine Power Co.; Florida Power & Light Co.; New England Power Co. d/b/a National Grid (National Grid); NSTAR Electric Co. (NSTAR); Northeast Utilities Service Co. on behalf of The Connecticut Light and Power Co.; Public Service Co. of New Hampshire; Western Massachusetts Electric Co.; Holyoke Water Power Co. and Holyoke Power and Electric Co.; The United Illuminating Co. (United Illuminating); and Vermont Transco LLC.

⁵ *Bangor Hydro-Elec. Co.*, Opinion No. 489, 117 FERC ¶ 61,129 (2006), *order on reh'g*, 122 FERC ¶ 61,265 (2008) (Opinion No. 489 Rehearing Order), *aff'd sub nom. Conn. Dep't of Pub. Util. Control v. FERC*, 593 F.3d 30 (D.C. Cir. 2010).

⁶ *ISO New England Inc.*, 106 FERC ¶ 61,280, *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).

⁷ *Bangor Hydro-Electric Co.*, 111 FERC ¶ 63,048 (2005) (Initial Decision).

⁸ The RTEP is now known as the Regional System Plan (RSP). For continuity with Opinion No. 489, we will maintain the RTEP designation in this order.

incentive. The Commission explained that the Presiding Judge should have examined whether: (1) the proposed incentive fell within the zone of reasonable returns; and (2) there was some link, or nexus, between the requested incentive and the proposed investment, i.e., whether the proposed incentive was rationally related to the proposed investment.⁹

4. The Commission found that the proposed incentive satisfied both of these elements. The Commission found that adding 100 basis points to the base-level ROE did not push the new ROE outside the zone of reasonable returns and that there was sufficient evidence showing a link between the cost of the incentive and its benefits. The Commission explained that the RTEP process demonstrated an “undisputed need” for the incentive-eligible projects¹⁰ and that the incentive would help ISO New England bring the projects on line in a timely fashion by encouraging the Transmission Owners to push hard during all phases of the approval process and by assisting them in obtaining favorable financing terms.¹¹ Focusing specifically on the benefits to ratepayers, the Commission found that the timely and successful completion of the transmission projects would minimize costs attributable to an insufficiently robust grid. The Commission acknowledged that there was evidence in the record quantifying the cost and benefits of the incentive but stated that it did not need to parse these numbers or consider other less quantifiable benefits; rather, it found it sufficient to note that, on balance, and based on the specific evidence in the record, the timely, successful completion of the additions to the grid would inure to the benefit of ratepayers.¹²

5. Further, in Opinion No. 489 the Commission authorized the ROE incentive under its authority under section 205 of the Federal Power Act (FPA)¹³ without reliance on section 219,¹⁴ and employed a standard of review that is consistent with, but different

⁹ See Opinion No. 489, 117 FERC ¶ 61,129 at P 105.

¹⁰ *Id.* P 107-108.

¹¹ *Id.* P 109.

¹² *Id.* P 111 n.100.

¹³ 16 U.S.C. § 824d (2006).

¹⁴ 16 U.S.C. § 824s (2006). The Commission’s Order No. 679 adopted regulations establishing incentive-based (including performance-based) rate treatments for the transmission of electric energy in interstate commerce under the authority established by section 219. *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).

from, the standard of review under Order No. 679.¹⁵ In the Opinion No. 489 Rehearing Order, the Commission explained that an evidentiary record that focused on the RTEP process “in its broadest contours,” rather than on the specific projects themselves, was sufficient to show the required nexus between the ROE incentive and the RTEP projects.¹⁶

6. The Commission affirmed most of Opinion No. 489 on rehearing but found that the decision to authorize the ROE incentive in perpetuity for all future RTEP projects would cause transmission investment in New England to be treated differently than transmission investment in the rest of the country that could receive incentives under the case-by-case, project-specific approach specified in Order No. 679.¹⁷ The Commission explained that in Opinion No. 489 it had authorized the ROE incentive for all future RTEP projects, without the need for any further factual showings of any kind, and that it had applied a standard of review that was satisfied by an evidentiary record that focused on the RTEP process “in its broadest contours” and which did not require the Commission to consider the various classes of RTEP projects involved or the specific projects themselves.¹⁸ The Commission contrasted this approach with the approach taken in Order No. 679, i.e., authorizing incentives for specific projects, requiring a case-by-case showing that the total package of incentives requested is tailored to address the demonstrable risks and challenges presented by each project, and foreclosing incentives for future projects absent a separate case-by-case showing that incentives are justified for each project.¹⁹ Consequently, the Commission granted rehearing with respect to the prospective effect of Opinion No. 489, limiting the ROE incentive granted in that opinion only to projects completed and placed into service by December 31, 2008.

7. On January 29, 2010, in *Connecticut Department of Public Utility Control v. FERC*, the United States Court of Appeals for the District of Columbia Circuit upheld the Commission’s authorization of the ROE incentive in Opinion No. 489.²⁰ The court found that the Commission properly applied the “rationally related” legal standard (i.e., the

¹⁵ See Opinion No. 489, 117 FERC ¶ 61,129 at P 113; Opinion No. 489 Rehearing Order, 122 FERC ¶ 61,265 at P 52-53.

¹⁶ Opinion No. 489 Rehearing Order, 122 FERC ¶ 61,265 at P 54-60, 63.

¹⁷ *Id.* P 67.

¹⁸ *Id.* P 63.

¹⁹ *Id.* P 54-60.

²⁰ 593 F.3d 30 (D.C. Cir. 2010).

incentives are rationally related to the investments being proposed) because it had a reasonable basis for concluding that the incentive might benefit customers by accelerating completion of the RTEP projects. The court explained that the Commission adduced substantial evidence that the incentive was likely to increase the speed with which the projects were completed and that the Commission was not required to pinpoint specific actions that the Transmission Owners would take only because of the incentive. The court specifically distinguished the case from *New England Power Pool*,²¹ which opponents of the ROE incentive had characterized as establishing a rule against rewarding utilities for doing what they are already obligated to do.

8. The court also rejected several arguments against the ROE incentive on the grounds that they were not sufficiently raised on rehearing, including the argument that the Commission's "rationally related" standard impermissibly deviated from Commission precedent.

B. NECPUC's Complaint

9. In June 2008, NECPUC filed a complaint under section 206 of the FPA²² alleging that application of the ROE incentive to project costs in excess of those costs estimated when the Commission authorized the incentive is unjust and unreasonable. According to the complaint, the incentive should apply only to project costs estimated at the time of Opinion No. 489, i.e., to the estimated costs rather than the actual costs.

10. NECPUC argued that the Commission authorized the ROE incentive based on a record that demonstrated a sufficient link between the cost of the incentive and its benefits. NECPUC contended that cost increases for many projects represent a significant change in the "core circumstances" that led the Commission to find this link between the incentive and benefits.²³ NECPUC asserted that the actual cost of the incentive is much larger than what was expected when the Commission issued Opinion No. 489, and that the increase in costs may exceed the assumed benefits, thereby removing the basis for granting the incentive in the first place. As a remedy, NECPUC requested that the Commission restrict application of the incentive to only those costs estimated at the time of Opinion No. 489. NECPUC claimed that this remedy is necessary to prevent the ROE incentive from applying without limit.

²¹ 97 FERC ¶ 61,093 (2001).

²² 16 U.S.C. § 824e (2006).

²³ Complaint at 12.

C. September 2008 Order

11. In its September 2008 Order, the Commission found that NECPUC's complaint rests on the theory that increases in specific cost estimates represent a change in the "core circumstances" underlying the Commission's finding that there is a sufficient link between the cost of the ROE incentive and its benefits, and that applying the incentive to these cost increases is unjust and unreasonable because it renders the cost of the incentive "decidedly larger" than previously expected. The Commission disagreed with this assessment and found that NECPUC's theory incorrectly presumes that the Commission authorized the ROE incentive after a cost-benefit analysis that generated roughly equal results, such that any increase in the cost of the incentive would tip the scale against its benefits. Moreover, the Commission agreed with United Illuminating and the Transmission Owners that this theory is flawed because it mischaracterizes the basis on which the Commission granted the incentive. Further, the Commission noted that NECPUC's complaint was incomplete in its own premise, for while it made a general assertion that costs appear to exceed benefits, it failed to present evidence regarding the benefits and whether they were in fact outweighed by the costs, even given the cost increases.

12. The Commission explained, however, that in authorizing the ROE incentive for all RTEP projects it did not rely on the estimated costs of the projects or the estimated costs of any particular project (from RTEP-04 or from any other year); instead, it relied on an evidentiary record that focused on the "broadest contours" of the RTEP process,²⁴ which the Commission found trustworthy because the independence and quality of this process place the necessity and region-wide benefits of RTEP-approved projects beyond dispute.²⁵ Rather than weigh the cost of the incentive against its benefits, the Commission found that the necessary link between the incentive and the projects was established by their inclusion in the RTEP, the effect the incentive would have in encouraging investment in the projects, and the incentive's role in assisting ISO New England in bringing the projects on line in a timely fashion. In fact, when presented with evidence quantifying the cost and benefits of the incentive, the Commission expressly declined to parse the numbers, finding that on balance and based on the specific evidence in the record, the timely, successful completion of the additions to the grid would inure to the benefit of ratepayers.²⁶ In other words, the Commission authorized the incentive in Opinion No. 489 without reference to the cost estimates of specific projects but rather to

²⁴ *Id.* P 63.

²⁵ *See* Opinion No. 489, 117 FERC ¶ 61,129 at P 107-108.

²⁶ *Id.* P 111 n.100.

their RTEP status and the general benefits expected to result; it found a sufficient link between the incentive and the projects without considering cost estimates for specific projects or for the projects as a whole.²⁷ Consequently, the Commission concluded that NECPUC's attempt to restrict the incentive when a project exceeds its cost estimate—that is, its attempt to limit the incentive based on a project-specific factor distinct from its inclusion in the RTEP—is incompatible with the basis on which the project is eligible for incentives in the first place and erroneously creates the impression that cost estimates in a specific year had a determinative effect in the Commission's analysis. The Commission reasoned that since it did not rely on cost estimates in authorizing the ROE incentive, NECPUC's claim that increases in these estimates constitute changes in the circumstances underlying Opinion No. 489 is mistaken.

13. The Commission added that the place to argue that the incentive should be restricted based on project-specific factors—that is, to challenge the Commission's reliance on the projects' RTEP status in granting the incentive, or to argue that the incentive should apply only to estimated costs—was Opinion No. 489. Thus, the Commission described the complaint as a collateral attack on Opinion No. 489 and the Opinion No. 489 Rehearing Order.

14. The Commission also rejected NECPUC's claim that granting the complaint was necessary to prevent the ROE incentive from applying without limit. The Commission observed that the incentive applies only to costs that are prudently incurred and that it has an established procedure for ensuring that only prudently incurred costs are recovered under section 205 of the FPA. The Commission explained that parties seeking to challenge expenditures must first create a serious doubt as to the prudence of the expenditures before the burden shifts to the filing utility.²⁸ Absent a showing of negligence, mismanagement, or imprudence, the Commission presumes that the utility operations were conducted in good faith consistent with principles of "efficient and economical management."²⁹ The Commission explained that NECPUC presented no evidence suggesting that the cost increases it identified in the complaint were imprudent, and thus failed to make a showing sufficient to call into question whether costs associated with the RTEP projects were imprudently incurred. The Commission stated that if NECPUC has such evidence, it is free to challenge application of the incentive to such imprudently incurred costs on a case-by-case basis.

²⁷ Opinion No. 489 Rehearing Order, 122 FERC ¶ 61,265 at P 63.

²⁸ September 2008 Order, 124 FERC ¶ 61,291 at P 46.

²⁹ *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 693, (1923); *W. Oh. Gas Co. v. Pub. Util. Comm'n*, 294 U.S. 63, 73 (1934).

15. Finally, the Commission rejected NECPUC's assertion that even if the cost increases are supported by valid reasons, such as increased labor and material costs, applying the ROE incentive to a rate base increased by uncontrollable costs serves no public purpose. The Commission reiterated that the incentive applies only to prudently incurred costs, and found that NECPUC's argument amounts to an assertion that no public purpose is served by applying the ROE incentive to prudently incurred costs above original cost estimates. The Commission stated that adopting this policy would send the wrong message to investors because it would create uncertainty about whether an approved incentive could be collected on costs that are unavoidable (but prudently incurred). Since investors and transmission owners might be reluctant to pursue needed projects in the face of such uncertainty, the Commission found that a public purpose is served by applying an approved incentive to prudently incurred costs.

16. Accordingly, the Commission denied the complaint.

II. Requests for Rehearing

17. At the outset, NECPUC contends the Commission's failure to consider NECPUC's answer to the answers to the complaint was arbitrary, capricious, and an abuse of discretion, because the Commission has accepted similar pleadings from others and did not explain why it failed to accept NECPUC's pleading in this case. Further, NECPUC contends that the Commission misapplied section 206 of the FPA. First, NECPUC explains that it sought only prospective relief. Second, NECPUC points out that it did not perceive a need to challenge the application of the adder to actual costs at the time Opinion No. 489 issued, because "the most dramatic problem with cost escalation has arisen in the last two years."³⁰ NECPUC maintains that the (changed) circumstances warrant a reevaluation of whether the unmodified adder continues to be in the public interest.

18. Moreover, NECPUC avers that the September 2008 Order was based on the incorrect assumption that NECPUC's complaint was directed against applying the adder to imprudently incurred costs; NECPUC steadfastly maintains it was not. Rather, NECPUC states that its "concern was (and is) that the [ROE] adder will apply, without limit, to any prudently incurred increase in project costs."³¹ Further, NECPUC contends that the Commission's conclusion that limiting the adder would upset Transmission Owner expectations (and also undermine investor confidence) is inconsistent with the Opinion No. 489 Rehearing Order and is arbitrary. If this were true, NECPUC reasons, the Opinion No. 489 Rehearing Order would have undermined such confidence when it

³⁰ NECPUC Request for Rehearing at 10.

³¹ NECPUC Request for Rehearing at 11.

denied the adder to projects completed after 2008.³² According to NECPUC, denying ROE adder payments associated with costs that greatly exceeded Transmission Owners' own presumably reasonable estimates would not defeat their expectations or the expectation of investors.

19. The Joint Parties incorporate NECPUC's arguments by reference. They state that the Commission failed to consider the argument that the ROE adder should be limited to the lower of the initial estimated costs or the final project costs. They remark that, "[b]ecause the Commission relies upon the integrity of the RTEP process as a basis for finding a nexus between the RTEP projects and the incentives, the fact that the process has been compromised by project costs vastly exceeding cost estimates . . . is a sufficient basis for the Commission to find that there is no nexus between the incentive ROE adder and project expenditures in excess of the submitted costs estimates."³³

III. Discussion

A. NECPUC's Answer to the Answers

1. September 2008 Order

20. The Transmission Owners and United Illuminating (together, the respondents) submitted answers to the complaint. NECPUC responded to the answers, requesting waiver of the Commission's rule barring such pleadings. In the September 2008 Order, the Commission denied the waiver and rejected NECPUC's answer. The Commission explained that Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits an answer to an answer unless otherwise ordered by the decisional authority,³⁴ and that the Commission was not persuaded to accept NECPUC's answer.

2. Request for Rehearing

21. NECPUC recognizes that the Commission's rules prohibit an answer to an answer but states that it requested a waiver on the basis that its answer would clarify the record and assist the Commission in its decision-making process. NECPUC claims that the Commission frequently grants waivers for this reason and that the unexplained refusal to do so in this proceeding was arbitrary, capricious, and an abuse of discretion.

³² NECPUC Request for Rehearing at 13.

³³ Joint Parties Request for Rehearing at 8.

³⁴ 18 C.F.R. § 385.213(a)(2) (2011).

3. Commission Determination

22. With respect to NECPUC's answer to the answers, we deny rehearing. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits an answer to an answer "unless otherwise ordered by the decisional authority." NECPUC, as the complainant, must establish the facts necessary to support its complaint in the complaint itself rather than through subsequent unauthorized pleadings.³⁵ Further, the Commission determined in the September 2008 Order that NECPUC's unauthorized answer did not assist the Commission in its decision-making process, so the Commission properly rejected it. To the extent that NECPUC attempted to raise further issues in the rejected pleading and to supplement its complaint, it has no procedural right to do so, and the admission of such pleadings in limited cases is subject to the Commission's discretion.

B. Collateral Attack

1. September 2008 Order

23. In the September 2008 Order, the Commission found that NECPUC's arguments for restricting the incentive based on project-specific factors—that is, challenges to the Commission's broader reliance on the projects' RTEP status as the reason for granting the incentive or arguments that the incentive should apply only to estimated costs—should have been raised in the Opinion No. 489 proceeding. Thus, the Commission found that NECPUC's complaint was a collateral attack on Opinion No. 489 and the Opinion No. 489 Rehearing Order.

2. Request for Rehearing

24. NECPUC argues that the finding of a collateral attack, which NECPUC describes as the Commission's "principal stated ground" for denying the complaint, misconstrues the complaint and the scope of NECPUC's rights under section 206 of the FPA.³⁶ NECPUC explains that the complaint was not an untimely challenge to Opinion No. 489 but rather a request for prospective relief based on circumstances that have arisen since

³⁵ *330 Fund I, L.P. v. N.Y. Indep. Sys. Operator, Inc.*, 126 FERC ¶ 61,151, at P 12 (2009). We note that, while a complainant may not refine its complaint through an answer to an answer, a complainant may subsequently amend or supplement its complaint, but this would entitle the respondent to submit an additional answer. 18 C.F.R. § 385.206(f) (2011).

³⁶ *Id.* at 8; *see also id.* at 4 ("The Commission's order denying NECPUC's complaint rested primarily on grounds that the complaint was a collateral attack on [Opinion No. 489].").

Opinion No. 489 issued—namely, increases in the costs of the projects eligible for the incentive. NECPUC does not dispute that Opinion No. 489 applied the incentive to the projects' actual costs. Rather, NECPUC describes its complaint as alleging that prospective application of the incentive to actual costs is no longer just and reasonable,³⁷ which, according to NECPUC, is properly within the parameters of section 206.

25. NECPUC avers that, in Opinion No. 489, the Commission stated that the evidence reviewed therein demonstrated a sufficient link between the cost of the incentive and its benefits. NECPUC acknowledges that the Commission did not require a specific quantification of benefits, but claims that in analyzing the record, the Commission “plainly had in mind” the pre-tax cost of the incentive.³⁸ Therefore, NECPUC contends that the Commission’s evaluation of the incentive’s costs had to be based on an assumption about the costs of the projects themselves and, based on this assumption, the Commission “concluded . . . that the [assumed] costs of the ROE incentive . . . were sufficiently linked to the *unquantified* benefits of timely and successful deployment of projects that would reduce congestion.”³⁹ NECPUC argues that these initial circumstances and assumptions, at the time the incentive was adopted, have changed. Therefore, NECPUC asks for relief going forward.

26. Moreover, NECPUC maintains that, even if one accepts that the Commission intended for the incentive to apply to actual costs, and even if one assumes that the Commission anticipated that the actual costs might exceed estimated costs by substantial amounts, the difference between the actual and estimated costs is “so dramatic” that the Commission can consider, prospectively, whether continued application of the incentive to actual costs remains just and reasonable. NECPUC argues that such a complaint accepts Opinion No. 489 and even survives the Commission’s claim in the September 2008 Order that the Commission authorized the incentive without considering its cost.⁴⁰

3. Commission Determination

27. Despite NECPUC’s arguments on rehearing, we continue to find that NECPUC’s complaint constitutes a collateral attack on Opinion No. 489. A collateral attack is “[a]n attack on a judgment in a proceeding other than a direct appeal” and is generally

³⁷ NECPUC Request for Rehearing at 9-10.

³⁸ *Id.* at 9 (citing Opinion No. 489, 117 FERC ¶ 61,129 P 111, n.100).

³⁹ *Id.* (emphasis original).

⁴⁰ *Id.* at 10.

prohibited.⁴¹ Disfavor for collateral attacks is embodied in the doctrine of collateral estoppel: once a court or adjudicative body has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.⁴²

28. While NECPUC asserts that its complaint is based on new evidence and seeks only prospective relief, the crux of NECPUC's argument is that project-specific costs should have been taken into account in granting the ROE incentive adder. This argument is in direct conflict with Opinion No. 489, wherein the Commission specifically declined to rely on the estimated costs of any particular project in authorizing the ROE incentive adder for all RTEP projects as a group.⁴³ NECPUC's complaint here represents an attack on a Commission final order in a proceeding other than on direct appeal of Opinion No. 489 and, therefore, is prohibited as a collateral attack. Furthermore, to the extent that NECPUC alleges fault with the RTEP process for purposes of preventing increases in project-specific estimated and actual costs, NECPUC's complaint is a challenge to the Commission's determination in Opinion No. 489; namely, that inclusion in the RTEP heavily weighs in favor of finding a "sufficient link between the cost of the ROE incentive [for an RTEP project] and the benefits to be derived from it" for purposes of authorizing incentive rates.⁴⁴ NECPUC should have raised its concerns about the RTEP process in the Opinion No. 489 proceeding, and it may not seek to relitigate that issue here. For these reasons, we find that the substantive allegations in NECPUC's complaint may be denied on procedural grounds alone.⁴⁵

29. Nevertheless, we will proceed to discuss the merits of NECPUC's argument on rehearing, because, contrary to NECPUC's assertions, the collateral attack finding was not the Commission's sole or "principal stated ground" for denying the complaint. The Commission offered multiple reasons for denying the complaint in the September 2008

⁴¹ *Wall v. Kholi*, 2011 U.S. LEXIS 1906 at *12 (2011) (citing *Black's Law Dictionary* 298 (Bryan A. Garner ed., Thomson West 9th ed. 2009) (1891)).

⁴² *Oregon v. Guzek*, 546 U.S. 517, 526-27 (2006) ("The law typically discourages collateral attacks . . .") (citing *Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.")).

⁴³ September 2008 Order, 124 FERC ¶ 61,291 at P 44.

⁴⁴ *Id.* P 106.

⁴⁵ September 2008 Order, 124 FERC ¶ 61,291 at P 40.

Order but referenced only two in the opening paragraph of its discussion; namely, (1) NECPUC's reliance on the flawed theory that cost estimates were "core circumstances" underlying the Commission's decision to grant the incentive, and (2) the Commission's determination that the complaint was a collateral attack.⁴⁶ The Commission presented these reasons as two independent grounds for denying the complaint.⁴⁷

30. Relying on NECPUC's own description of the complaint, the Commission stated that the complaint was based on the premise that cost increases are significant changes in the "core circumstances" underlying the Commission's decision to authorize the incentive, and that "applying the incentive to these cost increases is unjust and unreasonable because it renders the cost of the incentive 'decidedly larger' than previously expected."⁴⁸ The Commission elaborated on the consequences of this theory, observing that NECPUC's treatment of cost increases as changes in "core circumstances" entailed the assumption that the Commission had authorized the incentive "after a cost-

⁴⁶ In the September 2008 Order, the Commission denied the complaint on the grounds that it: (1) rested on a flawed theory; (2) constituted a collateral attack on Opinion No. 489; (3) was not necessary to prevent the incentive from applying without limit; and (4) failed to show that continued application of the incentive to actual costs is unjust and unreasonable.

⁴⁷ September 2008 Order, 124 FERC ¶ 61,291 at P 40.

⁴⁸ *Id.* P 43; *cf.* Complaint at 4 ("It is at best questionable whether a project can be considered to have been completed successfully where its costs have risen substantially above the estimates on which the incentive adder request was predicated. On the contrary, the cost overruns may wipe out the assumed benefits, removing the basis for granting the adder in the first place."); *id.* at 8 ("As discussed below, significantly changed circumstances since the approval of the ROE adder in Opinion No. 489 render the unrestricted application of the ROE adder to any and all costs for all RTEP-04 projects unjust and unreasonable and warrant its modification."); *id.* at 12 ("Although project costs cannot be estimated with complete precision, the dramatic increase in estimated costs for the projects identified in this complaint represents a significant change in the core circumstances that led to the finding of 'a sufficient link between the cost of the ROE incentive and the benefits and the benefits to be derived from it.' The 'cost of the ROE incentive' is now decidedly larger for those projects than what was expected at the time of Opinion No. 489.") (emphasis added, accept for last quotation) (internal citations omitted).

benefit analysis that generated roughly equal results, such that any increase in the cost of the incentive would tip the scale against its benefits.”⁴⁹

31. In fact, in a lengthy reflection on Opinion No. 489, the Commission observed that NECPUC’s attempt to portray costs as “core circumstances” was incompatible with the basis on which the Commission had authorized the incentive. The Commission explained that it had authorized the incentive without considering cost estimates for specific projects or for the projects as a whole.⁵⁰ The Commission added that NECPUC’s singling out of costs as a reason to restrict the incentive created the erroneous impression that cost estimates were conclusive factors in Opinion No. 489. To drive home the point that Opinion No. 489 focused on general factors, e.g., the positive attributes of inclusion in the RTEP and the benefits expected from the incentive, rather than on the specific details of each project, e.g., their cost estimates, the Commission dismissed NECPUC’s complaint as an “attempt to limit the incentive based on a *project-specific factor* distinct from its inclusion in the RTEP.”⁵¹ In other words, the Commission described the cost estimate for each project as a “project-specific factor.”

32. After devoting two paragraphs to explaining the flawed theory finding, the Commission introduced and explained the collateral attack finding in just a single sentence:

We also find that the place to argue that the incentive should be restricted based on *project-specific factors*—that is, to challenge the Commission’s reliance on the projects’ RTEP status in granting the incentive or to argue that the incentive should apply only to estimated costs—was Opinion No. 489; thus, we reject the complaint as a collateral attack on Opinion No. 489 and the Opinion No. 489 Rehearing Order.^[52]

The rest of the Commission’s discussion focused on its remaining three reasons for denying the complaint. The only other time the Commission discussed the collateral attack finding was in the first paragraph of its determination section, where it stated that “NECPUC’s attempt to restrict application of the ROE

⁴⁹ September 2008 Order, 124 FERC ¶ 61,291 at P 43; *see also* Complaint at 4.

⁵⁰ September 2008 Order, 124 FERC ¶ 61,291 at P 44 (internal footnotes omitted).

⁵¹ *Id.* P 44 (emphasis added).

⁵² September 2008 Order, 124 FERC ¶ 61,291 at P 45.

incentive to the originally estimated costs of incentive-eligible projects should have been raised in the Opinion No. 489 proceeding.”⁵³

33. As part of its arguments addressing the collateral attack finding, NECPUC disputes the Commission’s finding that the complaint assumed that Opinion No. 489 rested on a “cost-benefit analysis that generated roughly equal results, such that any increase in the cost of the incentive would tip the scale against its benefits.”⁵⁴ On rehearing, NECPUC contends that its complaint did not assume that the Commission had authorized the incentive after a cost-benefit analysis but rather that the Commission had found “some nexus” between its decision to approve the adder and the projects’ expected costs.⁵⁵ In Opinion No. 489, the Commission noted that the incentive would help ISO New England bring the RTEP projects on line in a timely fashion by encouraging the Transmission Owners to push hard during all phases of the approval process and by assisting the projects’ owners in obtaining favorable financing terms.⁵⁶ And the Commission found that the timely and successful completion of the transmission projects would minimize costs attributable to an insufficiently robust grid. These findings were not, however, based on project-specific costs or other factors, or a project-by-project comparison of the costs and benefits. Therefore, we reiterate that NECPUC mischaracterizes the basis on which the Commission granted the incentive.⁵⁷ As previously explained, we “did not rely on the estimated costs of the projects or the estimated costs of any particular project (from RTEP-04 or from any other year); instead, [we] relied on an evidentiary record that focused on the broadest contours of the RTEP process.”⁵⁸

⁵³ *Id.* P 40.

⁵⁴ September 2008 Order, 124 FERC ¶ 61,291 at P 43. NECPUC maintains, however, that the “costs have risen substantially above the estimates on which the incentive adder request was predicated ... the cost overruns may wipe out the assumed benefits, removing the basis for granting the adder in the first place.” Complaint at 4.

⁵⁵ NECPUC Request for Rehearing at 7 (averring that “the complaint was *not* based on the assumption that [the Commission] had relied on a cost-benefit analysis;” rather, it “rested on the conclusion that there was some nexus between the costs of the incentive and the *unquantified* benefits to be derived therefrom”).

⁵⁶ Opinion No. 489, 117 FERC ¶ 61,129 at P 109.

⁵⁷ September 2008 Order, 124 FERC ¶ 61,291 at P 43.

⁵⁸ *Id.* P 44 (citing Opinion No. 489, 117 FERC ¶ 61,129 at P 63).

C. Prudent Costs

1. September 2008 Order

34. In addition to the flawed theory and collateral attack findings, the Commission denied the complaint because it was not persuaded by NECPUC's assertion that the complaint was necessary to prevent the incentive from applying without limit. The Commission explained that the incentive applies only to prudently incurred costs and that the Commission has an established procedure to make sure that only prudently incurred costs are recovered in rates. The Commission added that prudence determinations are based on the facts of each project but that NECPUC presented no evidence suggesting that any cost increase was imprudently incurred. Thus, the Commission found that NECPUC had failed to make a sufficient showing to call into question the prudence of any cost increase. The Commission stated that if NECPUC has evidence of imprudently incurred costs, it is free to specifically challenge application of the incentive to them.

2. Rehearing Request

35. NECPUC argues that the Commission erroneously assumed that the complaint was directed against application of the incentive to imprudently incurred costs. In fact, NECPUC explains that it was concerned that the incentive will apply *without limit* to prudently incurred costs, no matter how much they increase.⁵⁹ NECPUC argues, therefore, that the Commission failed to address the rationale behind its complaint about the continued application of the incentive to actual costs, which NECPUC maintains “would create a perverse incentive because [ROE] adder revenues would increase as a direct result of coming in over budget—and would irrationally reward transmission owners with returns that would increase in lock step with cost increases, even where those cost increases were beyond the transmission owners’ control.”⁶⁰

3. Commission Determination

36. The Commission determined that the incentive for the specified RTEP projects would help ISO New England bring those projects on line in a timely fashion by encouraging the Transmission Owners to push hard during all phases of the approval

⁵⁹ NECPUC Request for Rehearing at 11 n.5.

⁶⁰ NECPUC Request for Rehearing at 12 & n.6 (citing Complaint at 3, in which NECPUC maintains that the incentive adder “irrationally rewards transmission owners when capital costs increase for reasons outside their control” and may “create a perverse incentive to delay project deployment if doing so results in increased project costs, and thus the overall dollar return that can be realized from a project.”).

process and by assisting them in obtaining favorable financing terms. The Commission found that the timely and successful completion of the projects would minimize costs attributable to an insufficiently robust grid. With respect to tying an incentive to project costs, NECPUC explains on rehearing that its complaint is not about whether costs above the estimated costs were prudently incurred.⁶¹ NECPUC states that if it had concerns about the prudence of the transmission investments, it would not have brought a complaint under section 206 that would allow the Transmission Owners to earn an adder on the entirety of their new transmission investments entering service in 2008. Moreover, NECPUC acknowledges that the Transmission Owners would not be entitled to a return on any imprudently incurred capital costs, much less an adder. Rather, NECPUC states that its complaint was about applying the adder without limit to prudently incurred costs, no matter how much they increased.

37. As discussed above, we are not persuaded that NECPUC has identified a changed circumstance that now shows that this incentive (adder) as applied to these transmission projects produces an unjust or unreasonable result. We note that Transmission Owners previously stated that the initial project cost estimates are based on preliminary or conceptual engineering and an imperfect knowledge of field conditions and are subject to change,⁶² notwithstanding that the Commission did not rely on the estimated costs of the projects or any particular project.⁶³ Transmission Owners explained that construction conditions and the siting/permitting process can have a significant impact on project costs, as well as an increase in worldwide demand of raw materials related to constructing the transmission facilities.⁶⁴

38. Lastly, the Joint Parties contend that the Commission failed to consider the argument that the ROE adder should be limited to the lower of the initial estimated costs or the final project costs because the RTEP process—upon which the Commission relies for the nexus between the specific projects and the adder incentive—“has been compromised by project costs vastly exceeding cost estimates.”⁶⁵ We reiterate that the

⁶¹ NECPUC Request for Rehearing at 11-12.

⁶² Transmission Owners Answer, Docket No. EL08-69-000, at 14 (filed July 2, 2008); *see also* September 2008 Order, 124 FERC ¶ 61,291 at P 29, 32.

⁶³ September 2008 Order, 124 FERC ¶ 61,291 at P 43, 44 (“NECPUC’s attempt to restrict the incentive when a project exceeds its costs estimate . . . is incompatible with the basis on which the project is eligible for incentives in the first place . . .”).

⁶⁴ Transmission Owners Answer, Docket No. EL08-69-000, at 15-16, 17-19 (filed July 2, 2008); *see also* September 2008 Order, 124 FERC ¶ 61,291 at P 33, 35.

⁶⁵ Joint Parties Request for Rehearing at 8.

incentive was not based on a valuation of the project costs and benefits. In any event, parties have not presented compelling evidence demonstrating that the RTEP process has been compromised in light of various project cost increases.

D. Expectations

1. September 2008 Order

39. NECPUC argued on complaint that the Transmission Owners, “having made a good faith representation to the New England Power Pool (NEPOOL) Planning Advisory Committee that they could build their projects at a certain estimated cost, including a contingency factor, and having asked for the incentive based on that estimate, . . . could not have had a reasonable expectation that they would earn the incentive on cost overruns.”⁶⁶ In the September 2008 Order, the Commission disagreed, concluding that NECPUC’s preferred outcome “would send the wrong message to investors because it would create uncertainty about whether an approved incentive could be collected on costs that are unavoidable (but prudently incurred).”⁶⁷

2. Rehearing Request

40. NECPUC challenges the Commission’s finding that granting the complaint would upset the Transmission Owners’ expectations of earning the incentive on all prudently incurred costs. NECPUC speculates that the Commission based this finding on the Transmission Owners’ claim that granting the complaint would undermine investor confidence by signaling to investors that the Commission may revoke previously approved incentives on which the investors relied. NECPUC rejects this reasoning. NECPUC contends that such logic would mean that the Commission itself had undermined investor expectations when it limited the universe of projects eligible for the incentive to those completed and placed into service by December 31, 2008. According to NECPUC, the Commission effectively revoked the incentive for projects completed after 2008, irrespective of whether the costs of those projects would be unavoidable or prudently incurred. NECPUC argues that because the Commission’s decision to deny the incentive to post-2008 projects was not tied to whether the costs of the projects were prudently incurred, the Commission’s rationale for denying the complaint is internally inconsistent.⁶⁸

⁶⁶ September 2008 Order, 124 FERC ¶ 61,291 at P 15.

⁶⁷ *Id.* P 47.

⁶⁸ NECPUC Request for Rehearing at 13.

41. NECPUC also points out that the Commission ignored United Illuminating's admission in its answer that it had already factored into its investment decisions the possibility that the Commission might deny the incentive altogether. NECPUC cites this admission as evidence that reducing the adder could not plausibly upset investor expectations. Similarly, NECPUC argues that the Commission failed to address NECPUC's claim that the Transmission Owners: (1) believed their project cost estimates, which included a contingency factor, to be reasonable; (2) thought that the incentive would produce a return based on these estimates; and (3) thought that the incentive payments they anticipated would be sufficient to influence their actions.⁶⁹ NECPUC argues that denying the Transmission Owners an adder on costs that greatly exceed their own reasonable estimates will not defeat their expectations or the expectations of investors.

42. Finally, NECPUC argues that the Commission failed to address NECPUC's claim that the relief requested in the complaint would preserve investors' expectations because: (1) investors would earn the same level of incentives that they would have received if the projects had been completed at their estimated costs; and (2) assuming that the costs were prudently incurred, investors would continue to receive the base return allowed on all the costs of the projects.

3. Commission Determination

43. NECPUC's argument that the Commission itself undermined investor confidence by limiting the universe of projects eligible for incentives under Opinion No. 489 from all RTEP-approved projects into perpetuity to those projects completed and placed into service by December 31, 2008, is not persuasive. On rehearing of Opinion No. 489, the Commission noted that ROE incentive approved under Opinion No. 489 was consistent with Order No. 679, but explained that it was using the newly promulgated Order No. 679 to evaluate future incentive requests to avoid treating transmission investment in New England differently from transmission investment in the remainder in the country.⁷⁰ Thus, we disagree with NECPUC contention that the Commission's actions were internally inconsistent or that the Commission's own actions undermined investor confidence.

44. As we explained in our order on the complaint, the Commission authorized the incentive in Opinion No. 489 without reference to the cost estimates of specific projects and not on the basis of any criteria apart from the projects' RTEP status. The

⁶⁹ *Id.* at 13-14 (citing Complaint at 18, and referring to NECPUC's answer to the answers).

⁷⁰ Opinion No. 489 Rehearing Order, 122 FERC ¶ 61,265 at P 52, 53 and 63.

Commission did not grant the incentive based on a cost-benefit analysis; therefore, the fact that certain costs may go up or certain benefits go down does not necessarily make the incentive unjust and unreasonable as applied. Accordingly, it is reasonable that the Transmission Owners expected the adder to be applied to all prudently incurred costs.

The Commission orders:

NECPUC's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner LaFleur concurring with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

New England Conference of Public Utilities
Commissioners, Inc.

Docket No. EL08-69-001

v.

Bangor Hydro-Electric Company
Central Maine Power Company
National Grid, USA
NSTAR Electric & Gas Corporation
Northeast Utilities Service Company
The United Illuminating Company
Vermont Electric Power Company

(Issued May 19, 2011)

LaFLEUR, Commissioner, concurring:

I agree with the decision to deny rehearing because I believe that the September 2008 Order correctly interprets Opinion No. 489 and the basis for granting incentives in that proceeding. However, I believe that the general issues NECPUC raises regarding the relationship between transmission incentives and project cost estimates are worthy of further consideration. In that regard, I note that today, in Docket No. RM11-26-000, the Commission is initiating a Notice of Inquiry on *Promoting Transmission Investment Through Pricing Reform* that includes specific questions about this issue. I encourage all interested parties to submit comments in that proceeding.

Cheryl A. LaFleur
Commissioner