

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Jon Wellinghoff.

Allegheny Energy, Inc.,
Monongahela Power Company,
The Potomac Edison Company, and
West Penn Power Company

Docket No. EL06-54-001

ORDER ON REHEARING

(Issued January 19, 2007)

1. This order addresses a request for rehearing of an order issued by the Commission on July 20, 2006.¹ The July 20 Order granted the petition for declaratory order filed by Allegheny Energy, Inc. and its subsidiaries, Monongahela Power Company, The Potomac Edison Company, and West Penn Power Company, all doing business as Allegheny Power (collectively, Allegheny), approving Allegheny's proposed incentive rate treatment for a new 500 kilovolt (kV) transmission line (proposed Project) that Allegheny proposes to construct across the APS Zone of PJM Interconnection, L.L.C. Old Dominion Electric Cooperative (Old Dominion) filed a timely request for rehearing of the July 20 Order. As discussed below, we will deny Old Dominion's request for rehearing.

I. Background

2. On February 28, 2006, Allegheny filed a petition for declaratory order requesting that the Commission approve its proposed incentive rate treatments for its proposed Project. Allegheny sought incentive rate treatment including: (1) that the return on equity (ROE) be set at the high end of the zone of reasonableness or, in the alternative, the Commission approve a 200 basis point adder; (2) that the Commission permit Allegheny to recover construction work in progress (CWIP) prior to the in-service date of the proposed Project; (3) that the Commission offer Allegheny the option to expense and

¹ *Allegheny Energy, Inc., Monongahela Power Company, The Potomac Edison Company, and West Penn Power Company*, 116 FERC ¶ 61,058 (2006) (July 20 Order).

recover on a current basis the costs that the companies incur during the pre-construction/pre-operating period; and (4) that the Commission allow Allegheny to recover all development and construction costs if the proposed Project is abandoned as a result of factors beyond its control. Allegheny also sought certain accounting authority for the deferral for future recovery of such costs not yet being recovered plus related carrying costs. Further, Allegheny sought to reserve the right to request additional incentive rate treatments either authorized by a final rule resulting from the rulemaking on Promoting Transmission Investment through Pricing Reform² or that may be approved by future Commission orders.

3. The July 20 Order granted the petition for declaratory order, approving the incentive rate treatments proposed by Allegheny for the Project pursuant to our existing authority under section 205 of the Federal Power Act (FPA),³ consistent with Congress' direction in new FPA section 219⁴ and, generally, the regulations promulgated pursuant to FPA section 219 in Order No. 679.⁵ The July 20 Order noted that although Allegheny's petition need not comply with Order No. 679, because the final rule would not become effective until 60 days after publication in the *Federal Register*, the Commission reviewed Allegheny's proposed incentives for general consistency with Order No. 679 and Congress' direction in FPA section 219. The July 20 Order also

² *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 71 Fed. Reg. 43,294 (July 31, 2006), FERC Stats. & Regs. ¶ 31,222 (Order No. 679), *order on reh'g*, Order No. 679-A, 72 Fed. Reg. 1,152 (Jan. 10, 2007), 117 FERC ¶ 61,345 (2006) (Order No. 679-A); *see also Promoting Transmission Investment through Pricing Reform*, Notice of Proposed Rulemaking, 70 Fed. Reg. 71,409 (Nov. 29, 2005), FERC Stats. & Regs. ¶ 32,593 (2005) (Pricing Reform NOPR).

³ 16 U.S.C. § 824d (2000).

⁴ This section was established by section 1241 of the Energy Policy Act of 2005 (EPAAct 2005). *See* Pub. L. No. 109-58, § 1241, 119 Stat. 594, 961-62 (2005) (to be codified at section 219 of the FPA, 16 U.S.C. § 824s) (section 219). The Commission found that FPA section 219 is a directive to the Commission to use its existing authority to allow incentive-based rates and, further, to provide some of the parameters of the incentives to be allowed in the particular rulemaking ordered under FPA section 219 (*i.e.*, Order No. 679).

⁵ July 20 Order, 116 FERC ¶ 61,058 at P 21.

found that Allegheny demonstrated a nexus between each of its proposed incentive rate treatments and the proposed Project, thus establishing that the particular proposed incentive rate treatments are appropriate for the particular investments being made.⁶

4. In addition, the Commission's approval of Allegheny's proposed incentives was predicated on Allegheny making a subsequent filing with the Commission pursuant to section 205 of the FPA, proposing the rates associated with the rate incentive treatment. The Commission clarified that its approval in the July 20 Order was declaratory in nature, was confined to the particular incentives being approved in that proceeding, and did not constitute approval of any particular rate. The July 20 Order found that Allegheny must demonstrate the justness and reasonableness of Allegheny's overall rates in a subsequent FPA section 205 filing.

5. On August 21, 2006, Old Dominion filed a timely request for rehearing of the July 20 Order. On September 1, 2006, Allegheny filed an answer to the request for rehearing.

II. Discussion

A. Procedural Matters

6. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to requests for rehearing unless otherwise ordered by the decisional authority. We will accept Allegheny's answer because it has provided information that assisted us in our decision-making process.

B. Reliance on Order No. 679

1. Request for Rehearing

7. Old Dominion argues that the Commission erred in its reliance on the regulations set forth in Order No. 679, which were not, at that time, in force.⁷ Old Dominion maintains that Allegheny relied almost exclusively on the proposed rules set forth in the Pricing Reform NOPR in requesting its ROE incentive and the Commission erred in using the standards set forth in Order No. 679 to evaluate Allegheny's proposal. Old

⁶ July 20 Order, 116 FERC ¶ 61,058 at P 3.

⁷ Although Order No. 679 was issued concurrently with the July 20 Order, the regulations promulgated therein became effective on September 29, 2006.

Dominion asks that “the Commission require Allegheny to re-file a more complete application for ROE incentives” that complies with applicable principles in the existing precedent at the time prior to the effective date of Order No. 679.⁸

2. Answer

8. In its answer, Allegheny states that while the July 20 Order complies with Order No. 679, the Commission’s decisions were based in existing precedent and Congress’ mandate in FPA section 219 to establish incentive-based rate treatments. Allegheny states that the precedent Old Dominion cites in support of this proposition is not on point. Allegheny also notes that Order No. 679 will be effective before any FPA section 205 filing and before the relief granted in the July 20 Order begins.

3. Commission Determination

9. We disagree with Old Dominion’s assertions on this point. The July 20 Order granted Allegheny’s petition pursuant to our *existing* authority under FPA section 205 and held that it was *consistent with* Congressional directives in FPA section 219. The July 20 Order noted generally that Allegheny’s petition was also consistent with the regulations implemented pursuant to FPA section 219 (which were being issued concurrently with the July 20 Order).⁹

10. As stated in the July 20 Order, the Commission’s authority to encourage investment in infrastructure through the application of incentive pricing is not new. The Commission, exercising its existing authority under FPA section 205, has done so for the purpose of encouraging new investment to meet demonstrated needs.¹⁰ Indeed, the courts have recognized that a primary purpose of the FPA and the Natural Gas Act is to

⁸ Old Dominion Request for Rehearing at 9.

⁹ July 20 Order, 116 FERC ¶ 61,058 at P 3 and 19-23.

¹⁰ See, e.g., *Western Area Power Administration*, 99 FERC ¶ 61,306, *reh’g denied*, 100 FERC ¶ 61,331 (2002), *aff’d sub nom. Public Utilities Commission of the State of California v. FERC*, 367 F.3d 925 (D.C. Cir. 2004) (*CPUC v. FERC*); *Michigan Electric Transmission Co., LLC*, 105 FERC ¶ 61,214 (2003); *American Transmission Company, L.L.C.*, 105 FERC ¶ 61,388 (2003), *order approving settlement*, 107 FERC ¶ 61,117 (2004) (*ATC*); *ITC Holdings Corp.*, 102 FERC ¶ 61,182, *reh’g denied*, 104 FERC ¶ 61,033 (2003); *Trans Bay Cable LLC*, 112 FERC ¶ 61,095 (2005), *order granting clarification*, 114 FERC ¶ 61,104 (2006).

encourage plentiful supplies of energy at reasonable prices, through, among other means, the development of needed infrastructure.¹¹ As recently as June 2006, the U.S. Court of Appeals for the D.C. Circuit affirmed that the Commission has significant discretion within its ratemaking authority to consider both cost-related factors and policy-related factors (*e.g.*, the need for new transmission investment). In *Maine Public Utilities Commission v. FERC*, the court reviewed the Commission's authority to approve incentive rates, holding that the Commission's determinations "involve matters of rate design, which are technical and involve policy judgments at the core of [the Commission's] regulatory responsibilities."¹² The court further stated that, "the court's review of whether a particular rate design is just and reasonable is highly deferential."¹³ The court also rejected the argument that the Commission was required to calibrate the level of benefits that an incentive is designed to produce beyond a finding that the incentive at issue is within the zone of reasonableness.¹⁴

11. While the regulations promulgated under FPA section 219 were not in effect at the time of the July 20 Order, we appropriately acknowledged the explicit directive from Congress to allow certain incentive-based rate treatments to encourage transmission investment for the purpose of ensuring reliability or reducing congestion. As indicated in the July 20 Order, FPA section 219 is a directive to the Commission to use its existing authority under FPA section 205 to allow incentive-based rate treatments and, *further*, provides some of the parameters of the incentives to be allowed in the particular rulemaking ordered under FPA section 219.¹⁵ In the July 20 Order we found that permitting the requested incentives would further the goals of FPA section 219 by providing, among other things, up-front regulatory certainty, rate stability and improved the cash flow for applicants.¹⁶

¹¹ See, *e.g.*, *CPUC v. FERC*, 367 F.3d at 929, *citing NAACP v. FPC*, 425 U.S. 662, 670 (1976).

¹² 454 F.3d 278, 287 (D.C. Cir. 2006) (*MPUC v. FERC*). See also *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

¹³ *MPUC v. FERC*, 454 F.3d at 287.

¹⁴ *Id* at 287-89.

¹⁵ July 20 Order, 116 FERC ¶ 61,058 at P 2.

¹⁶ *Id.* P 75.

12. Contrary to Old Dominion's contentions,¹⁷ the Commission did not use the Pricing Reform NOPR as the basis upon which to evaluate Allegheny's proposal. We disagree with the implication that the Commission would have found that "the mere issuance of the proposed rulemaking was enough to effectuate the change in this case."¹⁸ As the courts have made clear, "[a] notice of proposed rulemaking [has] no effect upon the existing regulations."¹⁹ Under our existing authority at the time of the July 20 Order, we determined that Allegheny had shown that its proposed incentive rate treatments were just and reasonable. However, we believe that the July 20 Order correctly pointed out that Allegheny's proposed incentive rate treatments also met the requirements of concurrently-issued Order No. 679. Meeting those requirements simply provided further indication as to why it was appropriate for the Commission to find that Allegheny's proposed incentives are just and reasonable. Moreover, complying with the requirements proposed in the Pricing Reform NOPR or ultimately adopted in Order No. 679 was neither mandatory for Allegheny nor dispositive of the Commission's decision in the July 20 Order.

C. Sufficiency of Evidence

1. Request for Rehearing

13. In its request for rehearing, Old Dominion contends that the proposed incentives cannot be approved unless Allegheny's application demonstrates that, *inter alia*: (1) the requested rate increase is needed and is no more than is necessary for the stated purpose; (2) the cost of its non-cost incentives is outweighed by the benefits customers will receive; and (3) the proposed rate incentive mechanism will directly result in the desired outcome.²⁰

14. As to the ROE rate incentive treatment, Old Dominion argues that the proposed incentives cannot be approved because: (a) "Allegheny never claims that an incentive ROE is *required* in order to attract investment in the Project;"²¹ (b) "Allegheny makes no

¹⁷ Old Dominion Request for Rehearing at 7-9.

¹⁸ *Public Service Company of Indiana, Inc. v. FERC*, 584 F.2d 1084, 1088 n.6 (D.C. Cir. 1978).

¹⁹ *Id.* at 1087.

²⁰ Old Dominion Request for Rehearing at 7-8.

²¹ *Id.* at 5 (emphasis in the original).

effort to calibrate the level of increased ROE requested to enhanced capital attraction;”²² and (c) “Allegheny does not claim that but for an enhanced ROE it would not proceed with the project.”²³

15. Old Dominion also contends that the other incentives approved by the Commission for Allegheny significantly reduce the risk associated with the project, but that reduction was not considered in the grant of ROE approval.

16. Old Dominion requests that the Commission defer approval of the rate incentives until Allegheny makes its full FPA section 205 filing. Old Dominion maintains that, at that time, “a thorough review” of the costs and benefits of the rates, including the rate incentives will be done to ensure that the rates and incentives are just and reasonable.²⁴

17. Old Dominion argues that Allegheny’s petition failed to provide sufficient information to support a conclusion that its incentive rate treatments are just and reasonable. Specifically, Old Dominion seeks: (a) “further information on the level and type of CWIP costs for which it seeks pre-approval to collect;” (b) “information to address [its] concerns regarding amortization of expensed capital costs;” and (c) hearing procedures to resolve these concerns.²⁵

18. Old Dominion argues that the Commission erred by not setting a trial-type evidentiary hearing to determine whether the proposed incentives are unjust and unreasonable, as there are genuine issues of material fact that can only be resolved through such a process. Old Dominion asks the Commission to establish trial-type evidentiary hearing procedures to determine whether incentive rate treatment is necessary for the proposed Project and, if so, the level of rate necessary to ensure adequate equity capital while ensuring that the ultimate rates are no higher than necessary as well as to determine whether the proposed incentives are unjust and unreasonable.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 1.

²⁵ *Id.* at 11.

2. Answer

19. Allegheny argues that it has provided sufficient information to justify its incentive proposals under the FPA, maintaining that its petition meets the requirements under Commission precedent. Allegheny argues that the record demonstrates “what is required to obtain new capital for the project and why it would be infeasible to raise the required capital to support the project without the requested incentives.”²⁶ Allegheny also argues that the sufficiency of the evidence provided in its original petition, its further compliance with section 219 of the FPA and Order No. 679, as well as Congress’ mandate in FPA section 219, mitigates the need for an evidentiary hearing.

3. Commission Determination

20. We will deny Old Dominion’s request for rehearing. We find that Allegheny has provided sufficient information to permit the Commission to approve the proposed rate incentive treatment under FPA section 205 and existing precedent, subject to Allegheny’s demonstration of the justness and reasonableness of Allegheny’s overall rates in a subsequent FPA section 205 filing. That our approval was consistent with the directives set forth by FPA section 219 does not change this.²⁷ We disagree that additional demonstrations, such as whether the incentive rate treatment will directly result in the desired outcome, whether “but for” an enhanced ROE Allegheny would not proceed with the proposed Project or whether the cost of the incentives outweighs the benefits to be received by customers, are necessary.²⁸ The Commission has broad authority to provide incentive rate treatments; and the requirement that the resulting rates be just and reasonable does not require “but for” tests, as the courts have recognized.²⁹ Indeed, Congress did not direct such a requirement in FPA section 219.

²⁶ Allegheny Answer at 3.

²⁷ FPA section 219 does not simply “codify” our legal authority; it requires us to take affirmative action to promote new investment. The Commission’s actions on the Allegheny petition are consistent with FPA sections 205 and 219.

²⁸ Order No. 679-A, 117 FERC ¶ 61,345 at P 25-26 (reaffirming Order No. 679’s rejection of a “but for” test as inconsistent with Congressional intent in enacting FPA section 219).

²⁹ See *Permian Basin Area Rate Cases*, 390 U.S. at 791-92; *CPUC v. FERC*, 367 F.3d at 929; see also Order No. 679-A, 117 FERC ¶ 61,345 at P 39 (stating that the courts have held that the Commission may consider non-cost factors in setting rates).

21. In response to Old Dominion's argument that Allegheny has not demonstrated that the proposed incentives are necessary to attract capital, we note that Allegheny is under no obligation under either FPA section 205 or FPA section 219 to establish that the incentives requested are necessary. Indeed, to require an applicant to demonstrate that a proposed incentive is necessary to ensure an investment is made is the equivalent of a "but for" test that we have previously rejected.³⁰ Nonetheless, Allegheny has adequately established a nexus between the incentives requested and the proposed Project.³¹ For example, Allegheny explained that the proposed Project is not the ordinary transmission investment but rather presents special risks that merit an ROE at the high end of the zone of reasonableness. Allegheny offered that the length, scope, and multi-state nature of the proposed Project present substantial risks and challenges in siting and obtaining the required permits, and that in addition to the risk associated with the proposed Project, it will require an enormous investment (preliminary cost estimates for Allegheny's portion of the proposed Project and other upgrades are approximately \$820 million and is estimated to take seven years to complete)³² and thereby presents financing challenges not faced by the ordinary transmission investment. Further, unlike the ordinary transmission project, Allegheny is under no state obligation to construct the line. Allegheny has provided adequate justification for its requested incentives.

22. To the extent that Old Dominion seeks rehearing of the Commission's approval of Allegheny's proposed *rates*, Old Dominion misinterprets the July 20 Order. As noted above, while the July 20 Order granted Allegheny its proposed *rate incentive treatment*, it did not make a decision regarding any specific rates.³³ The July 20 Order clearly stated that Allegheny must propose and support a particular ROE in its FPA section 205 filing.

³⁰ See *supra* note 28.

³¹ We note that the July 20 Order did find that Allegheny demonstrated a nexus between each incentive sought and its proposed Project (*i.e.*, that each incentive was rationally related to the proposed investment). July 20 Order, 116 FERC ¶ 61,058 at P 23. As the Commission determined in Order No. 679-A, applicants must demonstrate that the total package of incentives is tailored to the demonstrable risks or challenges faced by applicant in undertaking the project. Order No. 679-A, 117 FERC ¶ 61,345 at P 6, 21, 27.

³² We note that the seven year time frame is based on the predictions for the proposed Project as set forth in Allegheny's original petition. The proposed Project, as modified by the RTEP process, is anticipated to be complete in five years.

³³ July 20 Order, 116 FERC ¶ 61,058 at P 23, 65.

Accordingly, the Commission reserved its determination regarding the justness and reasonableness of Allegheny's specific ROE for a FPA section 205 filing, which Allegheny stated it will make in the future. In that FPA section 205 proceeding, Allegheny's overall range of reasonableness will be established, as well as a determination of where within that range its ROE should be set.³⁴ This is consistent with the Commission's recent clarification that it "do[es] not intend to grant incentive returns 'routinely' or that, when granted, they will always be at the 'top' of the zone of reasonableness. Rather, each applicant will, first, be required to justify a higher ROE under the [required] nexus test and, second, to justify where in the zone of reasonableness that return should lie."³⁵ Because the Commission granted Allegheny's request for an incentive ROE at the upper end of the range of reasonableness in the July 20 Order,³⁶ the FPA section 205 proceeding would establish where in the upper end the ROE would fall – whether at the top end or at a different point in the upper end of the range.³⁷

23. Moreover, as discussed in the July 20 Order, any person who seeks a binding Commission determination concerning a proposed transaction may file a petition for declaratory order under Rule 207 of the Commission's regulations.³⁸ The fact that the approach taken by Allegheny was consistent with the Commission's proposal in the Pricing Reform NOPR and ultimate determination in Order No. 679 did not affect Allegheny's ability to file a petition for declaratory order nor influence the Commission's determination as to whether the proposed rate incentives are just and reasonable.

24. We disagree with Old Dominion's assertion that the Commission should not have approved Allegheny's proposed incentives until after Allegheny submits its full FPA section 205 filing. Petitions for declaratory orders allow an applicant to receive upfront guidance from the Commission and can be an especially valuable tool for an entity undertaking a significant transmission project. An applicant can obtain an order from the Commission indicating which incentives its project qualifies for before making a FPA section 205 filing and prior to commencing siting, permitting and investing in new facilities. Allegheny must file with the Commission under section 205 of the FPA to put

³⁴ Order No. 679-A, 117 FERC ¶ 61,345 at P 68.

³⁵ *Id.* P 67.

³⁶ July 20 Order, 116 FERC ¶ 61,058 at P 60-69.

³⁷ *See* Order No. 679-A, 117 FERC ¶ 61,345 at P 68.

³⁸ July 20 Order, 116 FERC ¶ 61,058 at P 38.

rates into effect and must demonstrate that its overall rate, including incentives, is just and reasonable in its FPA section 205 filing. This provides all interested parties with an opportunity to comment, and the Commission will evaluate whether the rate is just and reasonable and not unduly discriminatory or preferential.

25. Finally, we also disagree that the Commission should have set a trial-type evidentiary hearing in this proceeding. Interested parties have been afforded an opportunity to present their positions and Allegheny provided sufficient evidence for the Commission to approve Allegheny's proposed incentive rate treatments.

D. Showing Required for CWIP and Pre-Construction/Pre-Operating Cost Incentives

1. Request for Rehearing

26. Old Dominion argues that the Commission erred in approving Allegheny's planned treatment of CWIP and pre-construction/pre-operating costs, arguing that the Commission's approval was "cursory" and "did not completely address Old Dominion's concerns."³⁹

27. Old Dominion argues that Allegheny's petition did not contain sufficient information to demonstrate that its proposals are just and reasonable and that the costs it undertakes are prudently incurred. Old Dominion submits that further information is needed regarding the level and types of costs that Allegheny seeks to recover, as Allegheny appears to believe that all pre-construction/pre-operation costs are eligible for inclusion. Old Dominion argues that expensed capital costs should be appropriately amortized over a reasonable period of years to minimize the rate impact on transmission customers and to dilute the inequity of requiring current customers to fund costs associated with assets that will provide service for decades to come. As an example, Old Dominion argues that it is not clear whether the costs that Allegheny proposes to expense would be associated with long-lived assets. Old Dominion maintains that "[e]xpensing such costs would raise serious inter-generational equity concerns since these types of facilities have extremely long service lives as compared to the shorter term amortization periods for expensed items."⁴⁰

³⁹ Old Dominion Request for Rehearing at 9.

⁴⁰ *Id.* at 9-10.

28. Old Dominion also argues that the Commission erred in failing to require Allegheny to refund any CWIP and pre-construction/pre-operating expenses that have been expensed in the event that the proposed Project is cancelled or abandoned due to factors *within* Allegheny's control.

2. Answer

29. Allegheny argues that the Commission was correct in approving its proposed rate incentives as to CWIP and pre-commercial expenses based on historical precedent and the factual record presented in the proceeding. Allegheny argues that the Commission appropriately found that "the CWIP incentive and expensing and current recovery of pre-commercial costs will help to raise the necessary capital and provide the cash flow necessary to undertake a project this large. The Commission also noted that without CWIP, the cost of service at the in-service date to ratepayers will ultimately be higher. The actual effect of CWIP is revenue neutral."⁴¹

30. Allegheny argues that the remainder of Old Dominion's arguments are not appropriately made at this time. Allegheny argues that the treatment of costs in the event of abandonment or cancellation due to factors within Allegheny's control can be addressed if and when such an event occurs. Allegheny maintains that the types of costs included will be addressed at the FPA section 205 stage if such an event occurs.

31. With respect to Old Dominion's inter-generational equity concerns, Allegheny argues that Order No. 679 adequately addresses those concerns. Allegheny adds that Old Dominion's proposal for the amortization of expensed capital costs "would make rate incentives almost impossible to obtain – in contravention of a Congressional mandate – and would result in rate shock."⁴²

32. With respect to Old Dominion's argument that expensed capital costs should be amortized, Allegheny argues that its proposed expensing treatment, as approved by the Commission in the July 20 Order is beneficial to the consumer. "The ability of [Allegheny] to expense these items currently avoids the need to capitalize the assets, and consequently the booking of [Allowance for Funds Used During Construction (AFUDC)], a situation that is revenue neutral to ratepayers."⁴³

⁴¹ Allegheny Answer at 6-7.

⁴² *Id.* at 7.

⁴³ *Id.* at 7-8.

3. Commission Determination

33. Old Dominion essentially raises no new arguments on rehearing. Old Dominion again asserts that the Commission's approval was cursory. This ignores the substance of the Commission's ruling addressing the proposal on its merits. It also ignores our existing policy on CWIP; a policy that has undergone judicial review. Old Dominion does not explain how the Commission's existing policy creates an unjust or unreasonable rate. Old Dominion also does not address how the Commission erred in requiring that Allegheny demonstrate the overall justness and reasonableness of any future rate recovery in its future FPA section 205 filing.⁴⁴ In fact, Old Dominion does not explain how the Commission's adherence to existing policy is arbitrary or capricious.

34. The concept of earning a return on CWIP in rate base is not new to this Commission,⁴⁵ and in fact, has posed a strong stimulus for investment in much needed infrastructure. We have consistently upheld the need for CWIP in rate base as in the public interest, to mitigate rate shock to consumers.⁴⁶

35. As we stated in the July 20 Order, without CWIP in rate base, a new plant has no direct effect on consumer prices until it begins to provide service.⁴⁷ Without recovery of CWIP, when the project goes into service, consumers' rates reflect the costs and return associated with the plant, as well as an AFUDC. The preliminary cost estimates for Allegheny's portion of the proposed Project and other upgrades are approximately \$820 million and is estimated to take seven years to complete. If the Commission did not permit Allegheny to recover CWIP in rate base, all of Allegheny's cost of borrowing

⁴⁴ July 20 Order, 116 FERC ¶ 61,058 at P 37.

⁴⁵ See *Construction Work In Progress for Public Utilities; Inclusion of Costs in Rate Base*, Order No. 298, 48 Fed. Reg. 24,323 (June 1, 1983), FERC Stats. & Regs. ¶ 30,455, *order on reh'g*, Order No. 298-A, 48 Fed. Reg. 46,012 (Oct. 11, 1983), FERC Stats. & Regs. P 30,500 (1983), *order on reh'g*, Order No. 298-B, 48 Fed. Reg. 55,281 (Dec. 12, 1983), FERC Stats. & Regs. ¶ 30,524 (1983). See also *Boston Edison Company*, 109 FERC ¶ 61,300 (2004), *order on reh'g*, 111 FERC ¶ 61,266 (2005) (*Boston Edison*); *ATC*, *supra* note 10; *Northeast Utilities Service Company*, 114 FERC ¶ 61,089 (2006).

⁴⁶ See *supra* note 45.

⁴⁷ July 20 Order, 116 FERC ¶ 61,058 at P 78 (citing Order No. 298, FERC Stats. & Regs. ¶ 30,455, at 30,499). Old Dominion does not dispute this finding.

would be accrued over seven years and then capitalized once the project goes into service, along with a return of the investment cost through depreciation. Therefore, as Order No. 298 explains, a large project such as the Allegheny proposed Project has the potential to produce a rate shock for consumers that is both extraordinarily large and sudden.⁴⁸ By permitting Allegheny to recover CWIP, the Commission is mitigating this rate shock to consumers.

36. We clarify that the CWIP costs recovered through rates only represent the return on rate base for facilities under construction. Therefore, CWIP does not recover depreciation costs associated with transmission facilities. Also, the costs of the facilities are not recovered over a short period of time. Rather, depreciation costs of the new facilities are recovered when the facilities go into service, and are depreciated over the life of the facilities or a shorter period if requested and granted by the Commission.

37. Finally, we reject Old Dominion's request that the Commission direct Allegheny to adopt the condition that, if the proposed Project is cancelled due to factors *within* Allegheny's control, CWIP and pre-construction/pre-operating costs must be refunded.⁴⁹ We find that Old Dominion's request for refunds in the event of Allegheny's abandonment is premature. Old Dominion has not shown that this issue is ripe for resolution. We agree with Allegheny that any such decision would depend on facts not yet established.⁵⁰

E. Duplicative Incentives

1. Request for Rehearing

38. Old Dominion argues that the Commission erred in ignoring the argument raised in its protest regarding the potentially duplicative nature of the rate incentives requested by Allegheny. In particular, Old Dominion claims that, to the extent that a prospective

⁴⁸ July 20 Order, 116 FERC ¶ 61,058 at P 78 (citing Order No. 298, FERC Stats. & Regs. ¶ 30,455, at 30,499).

⁴⁹ We note, however, that Order No. 679-A provides that if an applicant has been granted authority to recover CWIP or abandoned plant, and subsequently the applicant's project is abandoned, the applicant will not be required to refund the prudently-incurred costs. Order No. 679-A, 117 FERC ¶ 61,345 at P 115-16.

⁵⁰ See Allegheny Answer at 6.

investor perceives an investment in the proposed Project to be more secure as a result of recovery of CWIP and pre-construction/pre-operating costs, an ROE rate incentive may be unjustified.

2. Commission Determination

39. As stated in the July 20 Order, the incentive rate treatments requested by Allegheny are not mutually exclusive.⁵¹ This finding is consistent with precedent that has upheld use of multiple incentives,⁵² Congress' directive to the Commission in FPA section 219 to establish incentive-based rate treatments to construct new transmission, and with Order No. 679. The Commission has, in prior cases,⁵³ approved multiple rate incentives for particular projects. This is consistent with our interpretation of FPA section 219 as authorizing the Commission to approve more than one incentive rate treatment to an applicant proposing a new transmission project, as long as each incentive is justified by a showing that it satisfies the requirements of FPA section 219 and that there is a nexus between the incentives being proposed and the investment being made. Here, Allegheny explained why it sought each incentive and how it was relevant to its proposed Project. Thus, the incentives approved by the Commission were shown to have a nexus between the incentives sought and the proposed Project and was made contingent on a presumption that the proposed Project provided either enhanced reliability or reduced congestion.

40. That being said, we recognize Old Dominion's concern that the assurance of rate incentive treatments such as the recovery of CWIP and pre-construction/pre-operating costs may result in a lowered risk assessment that would affect the need for an ROE rate incentive to compensate for that risk.⁵⁴ We do not believe, however, that is the case here. Allegheny has demonstrated that the ROE rate incentive is appropriate. The

⁵¹ July 20 Order, 116 FERC ¶ 61,058 at P 66.

⁵² *Boston Edison*, *supra* note 45.

⁵³ *Trans-Elect, Inc.*, 98 FERC ¶ 61,142, *reh'g denied*, 98 FERC ¶ 61,368 (2002), *appeal dismissed*, *Transmission Agency of Northern California v. FERC*, No. 05-1400 (D.C. Cir., Mar. 13, 2006) (unpublished); *ATC*, *supra* note 10; *CPUC v. FERC*, *supra* note 10.

⁵⁴ Order No. 679-A, 117 FERC ¶ 61,345 at P 6 ("If some of the incentives in the package reduce the risks of the project, that fact will be taken into account in any request for an enhanced ROE.").

Commission's approval of Allegheny's incentive ROE is based on the Commission's finding that an ROE on the upper end of the zone of reasonableness is appropriate to attract investment, based on all the relevant project characteristics in Allegheny's application.⁵⁵ As we found in the July 20 Order, the length, scope, and multi-state nature of the proposed Project will present substantial risks and challenges in siting and obtaining the required permits. Moreover, preliminary cost estimates for Allegheny's portion of the proposed Project and other upgrades are approximately \$820 million, far more than Allegheny's current net transmission plant in service. We also think it is important to recognize that instead of investing capital in another venture, Allegheny has voluntarily chosen to invest a large amount of capital to build backbone high voltage transmission facilities that it believes will increase reliability and/or reduce the cost of delivered power to customers by reducing transmission congestion. This, coupled with the time for completion – seven years – all support the need for an ROE incentive set at the high end of the zone of reasonableness.⁵⁶ Although the Commission has determined here that Allegheny will receive an ROE in the upper end of the zone of reasonableness, the Commission, in setting the ROE within the upper end of the zone of reasonableness in a section 205 proceeding, will take into account all risk factors including whether the non-ROE incentives granted here serve to lower risk.

41. In the July 20 Order, the Commission conditioned its approval of the rate incentives on Allegheny making a subsequent filing with the Commission pursuant to section 205 of the FPA. This requirement was codified in Order No. 679-A wherein the Commission stated that while an applicant's total package of incentives must satisfy the nexus requirement, the Commission will still evaluate the justness and reasonableness of the rates associated with the incentives that make up that package at the FPA section 205 proceeding. Indeed, the Commission makes clear that it will conduct a case-by-case review of applications for incentives and will examine the unique factors in each case in making such determinations. Allegheny has sufficiently demonstrated that a higher ROE, in conjunction with the other rate incentive treatments, is justified.

⁵⁵ July 20 Order, 116 FERC ¶ 61,058 at P 6, 9.

⁵⁶ *Id.* P 64.

The Commission orders:

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

By the Commission. Commissioner Kelly concurring with a separate statement attached.
Commissioner Wellinghoff concurring in part and dissenting in part with a separate statement attached.
Commissioner Moeller not participating.

(S E A L)

Magalie R. Salas,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Allegheny Energy, Inc.,
Monongahela Power Company,
The Potomac Edison Company, and
West Penn Power Company

Docket No. EL06-54-001

(Issued January 19, 2007)

KELLY, Commissioner, *concurring*:

This order addresses rehearing requests regarding Allegheny's proposal to include certain incentive rate treatments in its to-be-filed transmission rates for a new 500 kV transmission line across the APS Zone that was originally projected to add approximately 3,800 MW of new very efficient transfer capability. I voted for the underlying order and continue to support the grant of certain incentives for this excellent transmission project, which will benefit a large proportion of the American public by greatly enhancing reliability and by improving the competitive markets for generation on which the public depends. That said, I concur in order to expand upon my reasoning for supporting this order.

Framework for Judging Incentive Proposals

I deem it important to identify and assess the following six characteristics of any transmission project in order to make reasoned and consistent decisions on requests for incentives for the project: (1) the public interest benefits of the project; (2) the cost of the project in absolute terms; (3) the cost of the project in proportion to the current transmission ratebase of the applicant; (4) the difficulty of completing it due to the number of jurisdictions traversed and whether they are jurisdictions the applicant regularly deals with; (5) the difficulty of relying on normal rate recovery methods due to the length of time it will take to complete; and (6) whether the applicant would otherwise be required to build the project even without an incentive. The comments submitted in connection with Order Nos. 679 and 679-A, and the experience gained in working on individual incentive cases over the past year lead me to conclude that these particular characteristics are most relevant to deciding whether to award incentives.

I support incentives for this project based on my assessment of these characteristics of the project and I believe this assessment is consistent with Order No. 679 and Congressional intent as embodied in section 1241 of EPAct 2005.

Turning to specifics, I agree with the majority that the “length, scope, and multi-state nature” of the proposed project and the “enormous” \$820 million cost estimate are all important aspects of a comprehensive analysis of why incentives are appropriate for this project. However, as noted above they are not the only characteristics that are important and I believe the Commission should weigh all relevant characteristics in all cases. In this case, I believe that the following facts are also pivotal in supporting incentives in this case.

Threshold Question: Should Incentives Be Considered At All?

First and foremost in my analysis are the broad regional benefits of this project to the public interest and the question of whether Allegheny would otherwise be required to build this project. If, for example, Allegheny were merely proposing to make the bare minimum of transmission improvements to existing facilities necessary to maintain its own service reliably, I would be less inclined to consider incentives because such minimum facilities must be built in any event and may not bring broad-ranging benefits to the public interest deserving of special treatment.

Here, Allegheny originally proposed to create approximately 3,800 MW of new very efficient transfer capability linking Midwest generation with markets in the East, thus greatly improving upon the status quo for both reliability and competition in generation. Furthermore, while this line is to be constructed almost wholly inside of the states within which Allegheny currently operates, and thus will clearly benefit its own system, the main beneficiaries appear to be entities in states on either side of Allegheny’s system. Specifically, Allegheny noted in the earlier stage of this proceeding that the proposed project was designed to increase transfer capability through the APS Zone from generation sources to the west of the APS Zone that are not controlled by Allegheny Companies, to loads east of the APS Zone that are not served by the Allegheny Companies. While the states that oversee Allegheny’s operations may well accommodate such a multi-state, regional transmission investment even though its primary beneficiaries may be located in other states, it is highly unlikely that they would have reason to require the construction of such a large regional project. To me it is a bedrock principle that incentives are meant to encourage behavior that is in the public interest but that is not otherwise required. On balance I believe that Allegheny’s project meets both tests and, accordingly, I believe that incentives can be considered for this project. Next, I will discuss the specific incentives proposed.

The ROE Incentive

The ROE incentive is, perhaps, the incentive of most interest to the industry and the one for which the highest hurdle should be erected because it raises customer transmission cost. I believe the characteristics of this project raise it

over that high hurdle and support an ROE incentive; in particular, setting the ROE somewhere in the upper half of the range as discussed in Order No. 679-A (*see e.g.*, Order No. 679-A at P 67-8). In addition to the broad public interest in the project described above, the fact that Allegheny is under no known obligation to build it, and the great size of the investment in absolute terms (\$820 million), I also believe the fact that this project will greatly increase Allegheny's total transmission plant in service (by roughly 79%), will take a long time to complete (at least 5 years), and will require Allegheny to deal with multiple state and local authorities,¹ support an ROE somewhere in the upper half of the range. The absence of any of these characteristics would have weighed against an ROE guaranteed to be in the upper half of the range, but the balance of characteristics in this case weighs in Allegheny's favor.

Non-ROE Incentives

Regarding, the other proposed incentives, the facts here also support them. The proposals to include 100% of CWIP in ratebase, to expense and recover pre-construction/pre-operating costs on a current basis, and to recover the costs of construction and development even if the project is abandoned before completion as long as abandonment was due to issues beyond Allegheny's control, are all supported by the long construction period and large cost, both in absolute terms and as a percentage of current rate base; the longer the period of spending large sums without cost recovery, the more challenging the project. If the cost and time to completion were both less, I would see far less support for granting these incentives.

Summary and Conclusion

In summary, I concur with this order because it grants incentives that I agree should be granted in this case, and write separately in order to provide the full analysis that I believe is required to support this outcome. Accordingly, I respectfully concur as discussed above.

Suede G. Kelly

¹ I note that Allegheny has likely had regular dealings with these state and local authorities, which might be considered to lessen the challenge as compared with dealing with new state and local authorities. However, I believe that the weight of the public interest benefits and other challenging characteristics listed above more than balances any negative effect of this characteristic in my analysis.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Allegheny Energy, Inc.,
Monogahela Power company,
The Potomac Edison Company, and
West Penn Power Company

Docket No. EL06-54-001

(Issued January 19, 2007)

WELLINGHOFF, Commissioner, concurring in part and dissenting in part:

The Commission recently observed that the need for capital investment in energy infrastructure is a national problem that requires a national solution.¹ That problem stems from both a decades-long decline in transmission investment and a precipitous decline, primarily in the last decade, in demand-side resource investment that now threatens to impair the reliability of the electric system, cause billions of dollars in congestion costs, and generally frustrate the development of efficient competitive wholesale markets. We must promote investment in efficient transmission infrastructure, as well as facilitate the rapid expansion of demand response resources, energy efficiency, and distributed generation, to begin to solve these serious energy problems.

The Congress directed the Commission, among other things, to provide incentives for transmission investment that promotes “reliable and economically efficient transmission” and a return on equity that “attracts new investment in transmission facilities (including related transmission technologies); encourage deployment of transmission technologies and other measures to increase capacity and efficiency of existing transmission facilities and improve the operation of the facilities.”² The Congress also provided guidance to the Commission as to the types of advanced transmission technologies that should be encouraged in infrastructure improvements of both existing and new transmission facilities. Those technologies include high-temperature lines (including superconducting cables), optimized transmission line configurations (including multiple phased transmission lines), high-voltage DC technology, flexible AC transmission systems, controllable load, distributed generation (including PV, fuel cells, and microturbines), and enhanced power device monitoring.³ I agree that incentives should be authorized by this Commission in those instances that I have fully described below. It should be recognized, however, that such incentives for

¹ Order No. 679-A at P 9.

² See Pub. L. No. 109-58, § 1241, 119 Stat. 594, 961-62 (2005) (EPAAct).

³ See Pub. L. No. 109-58, § 1223, 119 Stat. 594, 961-62 (2005) (EPAAct).

long lead time projects such as transmission incentives are benefits not enjoyed by shorter lead time demand-side resource investments. Thus, it should be recognized that such subsidies may encourage the financial community to favor one type of investment over the other.

Allegheny in this proceeding seeks four incentive rate treatments in connection with its planned construction of a new 500 kV transmission line: (1) the option to recover 100 percent of the cost of capital associated with CWIP on a timely basis, (2) the option to expense and recover on a current basis the costs incurred during the pre-construction/pre-operating period, (3) recovery of all development and construction costs if the proposed project is abandoned, and (4) an ROE to be set at the high end of the zone of reasonableness. Allegheny also seeks certain accounting authority for the deferral for future recovery of the pre-construction/pre-operating costs not yet recovered plus carrying costs. In its original order, which issued prior to my becoming a Commissioner, the Commission conditionally granted Allegheny's petition for declaratory order approving the proposed incentives. In today's order, the Commission denies requests for rehearing. I agree with that result, with the exception of the requested ROE rate incentive, but I disagree with the Commission as to the appropriate evidentiary basis for the decision. I do not agree that Allegheny has demonstrated that an ROE in the upper end of the zone of reasonableness is appropriate. Therefore, I respectfully concur in part and dissent in part with today's order.

With regard to the first requested incentive rate treatment, it is important to recognize that allowing the inclusion of CWIP in rate base is not a new ratemaking technique. In 1983, the Commission issued Opinion No. 298, which amended the Commission's regulations to allow utilities to include no more than 50 percent of CWIP in rate base.⁴ As the Commission explained at that time, one policy goal advanced by allowing rate base treatment for CWIP is mitigating the rate shock to consumers.⁵ More recently, the Commission has recognized that allowing 100 percent inclusion of CWIP in rate base is a departure from the status quo, but found that such treatment may be appropriate for some projects because it provides up-front regulatory certainty, rate

⁴ See *Construction Work in Progress for Public Utilities; Inclusion of Costs in Rate Base*, Order No. 298, 48 Fed. Reg. 24,323 (June 1, 1983), FERC Stats. & Regs. ¶30,455, *order on reh'g*, Order No. 298-A, 48 Fed. Reg. 46,012 (Oct. 11, 1983), FERC Stats. & Regs. ¶30,500 (1983), *order on reh'g*, Order No. 298-B, 48 Fed. Reg. 55,281 (Dec. 12, 1983), FERC Stats. & Regs. ¶30,524 (1983).

⁵ Order No. 298, FERC Stats. & Regs. ¶30,455 at 30,499.

stability, and improved cash flow for applicants, thereby easing pressures on their finances caused by transmission development programs.⁶

In this proceeding, the Commission has found that allowing 100 percent inclusion of CWIP in rate base is appropriate, among other reasons, because Allegheny's cost of borrowing an estimated \$820 million in investment (that otherwise would be accrued over five years and capitalized once the project goes into service), along with a return of the investment cost through depreciation, could produce an extraordinary and sudden rate shock for consumers. Thus, the Commission has found that the size of the financial investment in this "backbone" transmission facility, coupled with the length of the construction period, justifies special treatment in the form of incentives that may well be unavailable for potential alternatives that involve shorter lead times, such as distributed generation or demand response investments. In addition, the Commission relies on Allegheny's assertion that the CWIP will assist the company in raising debt and equity capital from investors.

Similarly, the Commission recognizes that Allegheny's requested pre-construction/pre-operating cost rate incentive and accounting treatment are departures from traditional practices. Again, the Commission relies on Allegheny's assertions that current recovery of pre-construction/pre-operating costs will facilitate raising debt and equity capital.

I agree that where the construction cycle is so extended, five years in this case, and the level of investment significant, consumers may be best served by allowing 100 percent of CWIP in rate base. With all CWIP in rate base, the impact of new plant is spread over the entire construction period, and, thus, consumers will face less of a rate shock at the in-service date. Similarly, the proposal to expense pre-construction/pre-operating costs prior to the in-service date, rather than capitalizing those costs as cost of construction and depreciated over the service life of the asset, can be justified. On this basis, I support granting these incentive rate treatments to Allegheny. By contrast, while increasing the percentage of CWIP in rate base will increase cash flow, I do not believe that Allegheny has made a sufficient showing as to why such an increase is needed to ease pressures on the company's finances caused by its transmission development proposal. For example, while Allegheny provides some financial data, Allegheny fails to provide any statistical analysis that shows the impact of 100 percent of CWIP on its financial indicators.⁷ In the absence of such support, I do not base my decision to support Allegheny's request for this incentive rate treatments on its evidentiary presentation.

⁶ Order No. 679 at P 103, 115.

⁷ In Order No. 298, the utility impacts of including CWIP in rate base were presented in five statistical studies. FERC Stats. & Regs. ¶30,455 at 30,512-14.

With regard to requests for ROE incentives, I note that the Commission recently stated (and I agree) that if an applicant desires up-front certainty of the ROE it will receive, then it may seek a particular ROE in a petition for declaratory order and include the appropriate support for that request, such as a DCF analysis.⁸ In such a proceeding, the Commission may have a sufficient record to evaluate the risks associated with a project and determine a specific ROE. The Commission also stated (and I agree) that an applicant may request in a petition for declaratory order an ROE that is at the upper end of the zone of reasonableness.⁹ In that event, the Commission must still provide adequate support for a decision to grant the requested ROE incentive, even if the specific ROE for the project will not be determined until a later hearing process.

Allegheny's application for an ROE incentive presents the latter type of request.¹⁰ In support of its decision to grant an ROE incentive, the Commission states that we have broad discretion within our ratemaking authority to approve incentive adders.¹¹ While I do not disagree with that statement, I do not believe that it, in and of itself, justifies the granting of any particular incentive. The key issue is not whether the Commission has the authority to approve incentive adders, but how we exercise our discretion to do so.

The Commission also finds that the length, scope, and multi-state nature of the proposed facility present substantial risks and challenges in siting and obtaining the required permits and, therefore, warrant an enhanced ROE. In further support of its position, the Commission states that Allegheny's large financial investment in the proposed facility presents financial challenges not faced by ordinary transmission investment, and that because Allegheny is under no state obligation to build the facility, it is important to note that the capital could have been invested in another venture.

Those statements, however, do not provide adequate support for the Commission's decision to grant Allegheny an ROE in the upper end of the zone of reasonableness. Where the Commission is relying on a factual record to support its decision, it must

⁸ Order No. 679-A at P 70.

⁹ *Id.*

¹⁰ Allegheny's petition for declaratory order need not comply with Order Nos. 679 and 679-A because those rules were not effective at the time of its submission. Instead, the Commission evaluated the petition pursuant to its existing authority under FPA section 205. Nonetheless, the Commission in this proceeding has reviewed Allegheny's proposed incentives for general consistency with Order Nos. 679 and 679-A.

¹¹ In support of this statement, the Commission cites *Maine Public Utilities Commission v. FERC*, 454 F.3d 278 (D.C. Cir. 2006).

demonstrate that the record actually contains facts that support the result.¹² The Commission here does not cite sufficient record evidence to demonstrate that the stated problems are likely to arise in this case, or adequately explain why an enhanced ROE in the upper end of the zone of reasonableness is appropriate to address those problems.

I can not support the Commission's decision to grant an ROE incentive to Allegheny. My concerns regarding the appropriate evidentiary basis in this record for an incentive ROE is one reason. Second, Allegheny submitted this project to PJM for inclusion in RTEP as a potential solution to anticipated reliability criteria violations. Therefore, Allegheny would need to make this type of investment even without an ROE incentive. Finally, an ROE incentive should be approved by this Commission in certain instances that I fully describe below.

It is necessary to start first with the base ROE. In setting the base ROE, the Commission must balance the interests of shareholders and consumers, recognizing that the base ROE must be sufficiently high to attract capital and compensate the utility for its risks, including regulatory risk. That review may be conducted in response to an applicant's filing pursuant to FPA section 205 or, as noted above, in a declaratory order proceeding if the applicant submits sufficient evidentiary support for its request, such as a DCF analysis. I have not foreclosed considering variations on the DCF methodology or other methods to determine the cost of equity. I also agree with AEP that the appropriate ROE is not established by simply setting a base ROE at the midpoint of the zone of reasonableness.

In providing an incentive or enhanced ROE over the base ROE, the Commission should focus on encouraging investment decisions beyond the upgrades simply required to meet a utility's service obligations or simply meeting the minimum standard of good utility practice. An incentive adder should be more narrowly targeted to transmission investments that provide incremental benefits. Those benefits should result from the deployment of "best available technologies" that increase operation and energy efficiency, enhance grid operations, and result in greater grid flexibility. In addition, the Commission should ensure that there has been an open, fair, and robust consideration of all the alternatives to the specific transmission investment being proposed. That consideration should include local resource alternatives such as demand response and distributed generation, alternative line configurations such as direct current, and other

¹² See *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 843-44 (D.C. Cir. 2006) ("Professing that an order ameliorates a real industry problem but then citing no evidence demonstrating that there is in fact an industry problem is not reasoned decision-making."), citing *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42-43 (1983).

advanced technologies that may effectively compliment, or in some cases supplant, a proposed new transmission line.

Applying these considerations to the facts of this case, Allegheny has not made its case that an ROE in the upper end of the zone of reasonableness is appropriate. Allegheny makes no commitment to deploy state-of-the-art technologies to maximize the performance and benefits of the proposed project. In any future petition for declaratory order by a utility seeking incentive rates, I expect to see a thorough and complete evaluation of the feasibility of using state-of-the-art technologies.¹³ I would also condition approval of an enhanced ROE on actual deployment of such technologies.

In addition, Allegheny failed to assess its proposed project against other methods of power delivery, including HVDC and adding demand response and distributed generation in eastern PJM. Again, I would require future applicants seeking an enhanced ROE to demonstrate that they have openly, fairly and rigorously considered alternatives to their proposal. To the extent that an applicant can demonstrate that a relevant regional planning process included such an open, fair, and rigorous evaluation, then the applicant could rely on that process in its petition for declaratory order.

For these reasons, I respectfully concur in part and dissent in part with the Commission's order.

Jon Wellinghoff
Commissioner

¹³ Order No. 679 at P 302 (“In as much as EPAAct 2005 requires the Commission to encourage the deployment of transmission technologies, we will require applicants for incentive rate-treatment to provide a technology statement that describes what advanced technologies have been considered and, if those technologies are not to be employed or have not been employed, an explanation of why they were not deployed.”).