

124 FERC ¶ 61,229
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

PPL Electric Utilities Corporation
Public Service Electric and Gas Company

Docket No. EL08-23-001

ORDER DENYING REHEARING

(Issued September 5, 2008)

1. On May 22, 2008, Consumer Advocates¹ filed a request for rehearing of the Commission's order issued in this proceeding on April 22, 2008,² which granted, with one modification, the petition for declaratory order filed by PPL Electric Utilities Corporation (PPL) and Public Service Electric and Gas Company (PSE&G) (collectively, Petitioners) seeking certain rate incentives under Order No. 679³ for a proposed transmission project. On rehearing, the Consumer Advocates challenge the sufficiency of the Commission's findings underlying the April 22, 2008 Order and ask the Commission to grant rehearing and modify the order to eliminate one of the approved rate incentives

¹ Consumer Advocates consist of the following: Pennsylvania Office of Consumer Advocate, Maryland Office of People's Counsel, Office of the Ohio Consumers' Counsel, Office of the People's Counsel for the District of Columbia, New Jersey Division of Rate Counsel, West Virginia Consumer Advocate Division, and Delaware Division of the Public Advocate.

² *PPL Elec. Utils. Corp. and Pub Serv. Elec. and Gas Co.*, 123 FERC ¶ 61,068 (2008) (April 22, 2008 Order).

³ *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 71 Fed. Reg. 43,294 (Jan. 31, 2006), FERC Stats. & Regs. ¶ 31,222 (2006); *order on reh 'g*, Order No. 679-A. 72 Fed. Reg. 1152 (Jan. 10, 2007), FERC Stats. & Regs. ¶ 31,236 (2006), *order on reh 'g*, 119 FERC ¶ 61,062 (2007).

or set the matter for hearing. In this order, we deny the Consumer Advocates' request for rehearing.

I. Background

2. As discussed at greater length in the April 22, 2008 Order, on December 21, 2007, Petitioners filed a petition for declaratory order seeking Commission approval of certain rate incentives under Order No. 679 for a proposed large-scale transmission project, called the Susquehanna Line. The Susquehanna Line is a PJM regional transmission expansion plan (RTEP) baseline project that is being jointly developed by Petitioners as a new 500 kV backbone transmission line that will span 130 miles across Pennsylvania to northern New Jersey and is estimated to cost \$900 million to \$1 billion. Petitioners stated that PPL's share of the Susquehanna Line, which is estimated to be between \$300 and \$350 million, is approximately 60 percent of PPL's net transmission plant in service, and equates to approximately three times its average annual transmission investment. Petitioners further stated that PSE&G's share of the Project, which is estimated to be between \$600 and \$650 million, is approximately 80 percent of PSE&G's net transmission plant in service, and equates to approximately three times its average annual transmission investment.

3. Specifically, Petitioners proposed: (1) a 50-basis-point return on equity (ROE) adder for all transmission facilities as a result of their continued membership in PJM; (2) a 150-basis-point ROE adder due to risks and challenges faced by the Petitioners in constructing the Susquehanna Line; (3) inclusion of 100 percent of construction work in progress (CWIP) expenses in rate base; (4) recovery of 100 percent of prudently incurred costs in the event the Susquehanna Line is abandoned as a result of factors beyond their control; and (5) authority to assign these incentives to yet-to-be identified affiliates, if need be, who would construct and/or own the Susquehanna Line.

4. Consumer Advocates filed a joint protest, arguing that the application: (1) failed Order No. 679's nexus test; (2) failed the Federal Power Act section 219 test;⁴ and (3) raised issues of material fact that can only be resolved through an evidentiary hearing. Specifically, Consumer Advocates challenged the basis for Petitioners' requested incentives and argued that the Petitioners had not demonstrated how each of the incentives, as a package, was appropriate in light of the stated risks of the proposed project. Consumer Advocates similarly challenged the Petitioners' request to transfer the proposed incentives awarded to as yet un-named affiliates.⁵

⁴ 16 U.S.C. §824s (2006).

⁵ 123 FERC ¶ 61,068 at P 18-23.

5. In the April 22, 2008 Order, the Commission found that the Susquehanna Line faces significant risks given the magnitude of the financial investment required, the involvement of multiple jurisdictions, and regulatory risks. Accordingly, the Commission granted Petitioners' requested incentives with one modification to the proposed 150 basis point incentive ROE adder. Specifically, the Commission found that the Susquehanna Line was eligible for incentives under Order No. 679 since it was a baseline project in PJM's RTEP.⁶ Further, the Commission granted the Petitioners' requested 50-basis point ROE adder for PJM membership. The Commission also granted the Petitioners' request for authorization to include in rate base 100 percent of CWIP and for authorization to recover 100 percent of project costs if it is later abandoned for reasons outside the Petitioners' control, subject to Petitioners making the appropriate demonstration in a future section 205 filing. With respect to Petitioners' request for a 150-basis point ROE adder for risks and challenges, the Commission reduced the incentive to 125-basis points to account for the fact that the recovery of CWIP and abandonment costs reduces the overall risk of the Susquehanna Line. Lastly, with the exception of the 50-basis point adder for PJM membership, the Commission concluded that it was appropriate to allow the Petitioners to assign the incentives granted by the order to as-yet unidentified affiliates. In approving the foregoing incentives, the Commission rejected Consumer Advocates' arguments opposing the incentives as well as Consumer Advocates' request for an evidentiary hearing.⁷

6. Consumer Advocates filed a joint request for rehearing, arguing that the April 22, 2008 Order's approval of Petitioners' requested incentives with only one modification violated Order No. 679 and was contrary to the law. Consumer Advocates included with their request for rehearing affidavits of two consultants containing their opinions, which Consumer Advocates refer to in support of their arguments that the 125-basis point adder was unnecessary given the other incentives approved by the order and that Petitioners' reliance on advanced technologies does not support the proposed incentives. Petitioners filed an answer urging the Commission to reject the new evidence or, alternatively if the Commission accepts the new evidence, permit Petitioners to respond to the newly submitted evidence.

II. Discussion

A. Procedural Matters

7. We reject as untimely the two new affidavits which Consumer Advocates included in their request for rehearing. Parties are not permitted to introduce new evidence for the

⁶ *Id.* P 30.

⁷ *Id.* P 27-57.

first time on rehearing since such practice would allow an impermissible moving target, and would frustrate needed administrative finality.⁸ Further, the affidavits contain no new information that would aid in the resolution of the issues and refer solely to information and statements that Petitioners provided in the petition for declaratory order. Finally, Consumer Advocates provide no reason why its new evidence, essentially just the opinions of its two consultants, and related arguments could not have been included in their initial protest in this case. Accordingly, we reject their request to introduce into the record at this late juncture the two new affidavits contained in their rehearing request. For the same reason, we also reject those portions of its rehearing request that contain arguments and factual claims that are based on the rejected affidavits.

8. In light of our rejection of the affidavits and related portions of Consumer Advocates' request for rehearing, Petitioner's request to answer the affidavits is moot. In addition, Rule 713(d)(1) of the Commission's Rules of Practice and Procedures, 18 C.F.R. § 385.713(d)(1) (2008), prohibits an answer to a request for rehearing. Accordingly, we will reject Petitioners' answer.

B. Rehearing

9. Consumer Advocates argue that the Commission failed to address their arguments that, if CWIP and/or abandonment cost incentives are granted, then the ROE adder is not needed and that the Commission otherwise erred in failing to reasonably explain its decision to reduce the requested ROE adder by 25 basis points to 125 basis points. Consumer Advocates argue that the Commission's decision to authorize a 125-basis point ROE adder is arbitrary, capricious, and not the product of reasoned decision making. They also argue that the Commission did not have a sufficient basis to conclude that the total package of incentives awarded to the Petitioners was justified in light of the alleged benefits of the project.

10. Further, Consumer Advocates argue that the incentives that were granted are not justified in light of the risks facing the Susquehanna Line. Consumer Advocates argue that the 125-basis point ROE adder is not appropriate for the Susquehanna Line since the Petitioners' purported risks are addressed by the CWIP and abandonment cost recovery incentives. They assert that the Commission failed to address their argument that allowing CWIP and cost recovery together would eliminate all the stated risks of this Project. Consumer Advocates assert that, while the Commission appeared to consider the impact of the award of the other incentives by reducing the requested incentive ROE adder by 25 basis points, this was a minor reduction that, while a step in the right

⁸ *TransCanada Power Marketing, Ltd. v. ISO New England Inc.*, 123 FERC ¶ 61,149, at P 22 (2008); *New York System Operator, Inc.*, 112 FERC ¶ 61,283, at P 35, n. 20 (2005).

direction, fails to capture in any rational manner the amount of risk that has been eliminated through the granting of the other incentives. With respect to CWIP, the Consumer Advocates also argue that the Commission failed to explain why, if the CWIP incentive were granted, the other incentives granted by the April 22, 2008 Order would be necessary. Finally, they argue that there are genuine issues of material fact as to the risks of this project that can only be resolved through further evidentiary proceedings and that the failure to establish such further proceedings would be an abuse of discretion.

11. We deny the request for rehearing. Consumer Advocates' arguments amount to no more than repeating their original conclusory, unsupported claim that if we approve CWIP or other cost recovery incentives, then no ROE adder is warranted. Responding to the same arguments raised in the Consumer Advocates' protest, in the April 22, 2008 Order, we found that the Petitioners provided ample support in their initial filing for us to find that the incentives granted, both individually and as a package, are appropriate in light of the risks faced by Petitioners with the Susquehanna Line.⁹ As the April 22, 2008 Order indicates, Petitioners demonstrated that the Susquehanna Line requires approvals from multiple jurisdictions, along with various federal approvals and could be cancelled through the PJM RTEP process.¹⁰ Petitioners demonstrated that the Susquehanna Line represents a substantial financial risk due to the magnitude of the project in relation to the Petitioners' net plant in service. We found that, due to the number of approvals needed, the cost of the Project, construction impediments, PJM's request for an accelerated in-service date, and the large increase of debt, Petitioners are exposed to greater risks of project failure which results in increased financial risks. We found that there also are substantial siting risks due to the fact that the project will traverse approximately 130 miles over two states with geographical construction challenges.¹¹

12. In light of these risks and the other regulatory and financial risks discussed in the April 22, 2008 Order, we found that an ROE adder was justified and, specifically, that a 125 basis point adder properly reflected the package of incentives being approved. Further, we found that authorizing 100 percent of CWIP treatment for Petitioners would enhance their short-term cash flow, reduce interest expense, assist Petitioners with financing, and improve Petitioners' coverage ratios used by rating agencies to determine credit quality by replacing non-cash Allowance for Funds Used During Construction with cash earnings.¹² We also determined that CWIP could benefit consumers by potentially

⁹ 123 FERC ¶ 61,068, at P 55.

¹⁰ *Id.* P 47.

¹¹ *E.g., Id.* P 36-37.

¹² *Id.* P 42.

reducing rate shock. Finally, we found that permitting the recovery of abandonment costs is appropriate in light of the risks associated with the numerous regulatory approvals required by the Susquehanna Line.

13. Based on the record, which we discussed in the order below, we affirm that the incentives we granted in the April 22, 2008 Order were appropriately supported by the record as a whole. Ratemaking is “less a science than it is an art,”¹³ and on issues such as this is “not a matter for the slide rule” but rather “involves judgment on a myriad of facts”¹⁴ and so our decision to approve a 125 basis point ROE adder, which was 25 basis points less than Petitioners’ requested 150 basis point ROE adder, does not lend itself to formulaic quantification. Rather, our determination was based on our expertise, giving consideration to all facts and circumstances identified in the record below. In addition, contrary to Consumer Advocates’ assertion that further trial-type evidentiary proceedings are necessary, the record established by the Petitioners and the pleadings is fully adequate to render a decision on the merits of Petitioners’ proposals, i.e., the record contains substantial evidence, including, specifically, evidence on the issue of the risks presented by the Susquehanna Line Project.¹⁵

14. On rehearing, Consumer Advocates note that Petitioners supported their proposed 150 basis point ROE adder, which we did not in fact approve, in part by claiming that it would provide greater certainty for future rate cases. Consumer Advocates reiterate the argument they previously made in their protest that no particular number of additional basis points is required to achieve “certainty” in future rate cases. They assert that any number would provide the certainty Petitioners seek, even a 25 or 50 basis point adder. Consumer Advocates’ argument misses the point. Petitioners sought up front assurance that the ROE ultimately approved in the rate proceeding will have a specific extra component (150 basis points) sufficient to provide an incentive to embark on the Susquehanna Line Project in the first place. Further, Consumer Advocates’ argument on rehearing in this regard attacks only this one claim Petitioners made out of their entire presentation of support for their proposed ROE adder. The Commission did not so limit its rationale for approval of an ROE adder (125 basis points) and, instead, relied on the record as a whole which, the Commission found, supported granting a 125-basis point ROE adder.

¹³ *Cities of Bethany v. FERC*, 727 F.2d 1131, 1138 (D.C. Cir. 1984).

¹⁴ *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 589 (1945).

¹⁵ See, e.g., *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1425-1426 (10th Cir. 1992); *Union Electric Co.*, 93 FERC ¶ 61,158, at 61,530 (2000).

15. We also disagree that the Commission failed to consider the package of incentives as required by the nexus test. We expressly concluded that the requested 150-basis point adder for the risks associated with the Susquehanna Line should be reduced to 125-basis points because the CWIP and abandonment of plant cost incentives reduce the Petitioners' overall risk.¹⁶ As we explained in the April 22, 2008 Order, this is precisely the kind of balancing called for by our precedent.¹⁷

16. Specifically, we found that Petitioners have shown that, consistent with Order No. 679-A, the total package of proposed incentives, as modified by the reduction of the ROE adder to 125 basis points, is tailored to address the demonstrable risks or challenges faced by Petitioners.¹⁸ While we found that Petitioners' requested incentives fall within the scope of incentives outlined in Order No. 679, consistent with Order No. 679-A, we concluded that CWIP and abandonment of plant cost incentives serve to reduce Petitioners' overall risk. We explained that, first, because of the increased cash infusion resulting from the CWIP incentive, Petitioners will have less financial risk during the construction period. Moreover, we observed, an entity allowed to include CWIP in rate base is not required to refund prudently-incurred costs previously collected, again reducing risk.¹⁹ Second, we found that allowing abandoned plant recovery ensures that investors will recover a return *on* and *of* their investment, thereby further reducing the financial risk associated with these investments. For these reasons, in light of all facts of record in this proceeding, we found that a 125-basis point adder (rather than 150 basis points) for the Susquehanna Line Project is warranted along with the other incentives approved as a total package. Consumer Advocates advance no argument on rehearing warranting any modification in our findings or our ultimate ruling.

¹⁶ 123 FERC ¶ 61,068 at P 56.

¹⁷ *Id.*

¹⁸ *See* Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 21, 27.

¹⁹ Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 116 "...where an applicant has satisfied our nexus requirement and has been granted authority to recover CWIP or abandoned plant, and subsequently the applicant's project is unable to obtain state or federal siting authority (and thus no showing is made with respect to ensuring reliability or reducing the cost of delivered power by reducing congestion because the applicant was relying upon those processes) we would not require refunds for the costs already prudently-incurred by the applicant. To require refunds in such circumstances would be contrary to our long-standing policy, which permits recovery of all prudently-incurred costs." (footnote omitted).

The Commission orders:

Consumer Advocates' request for rehearing is hereby denied.

By the Commission. Commissioner Kelly dissenting with a separate statement attached.

(S E A L) Commissioner Wellinghoff dissenting in part with a separate statement attached.

Kimberly D. Bose,
Secretary.

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KELLY, Commissioner, *dissenting*:

In this order, the Commission addresses rehearing requests regarding transmission rate incentives submitted by PPL Electric Utilities Corporation (PPL) and Public Service Electric and Gas Company (PSEG) for their proposed Susquehanna-Roseland Line. In the underlying order,¹ I dissented in part, arguing that a project-specific basis point adder to their respective returns of equity (ROE) was unnecessary given the identified risks of the project and the Commission's approval of other incentives. Specifically, the Commission approved authority to include 100% of prudently incurred Construction Work in Progress (CWIP) expenses in rate base and recovery of 100% of prudently incurred costs in the event the line is abandoned as a result of factors beyond PSEG's and PPL's control.

In their rehearing request, a group of consumer advocates² argues that the 125 basis point adder approved by the majority is inappropriate once consideration has been given to the effects of other granted incentives have on reducing risk. I agree and continue to believe that the project-specific risks identified by PSEG and PPL are addressed by the CWIP and abandoned plant incentives and that an ROE adder on top of those is unnecessary. As such, I dissent from this order on rehearing.

For these reasons, I respectfully dissent from this order.

Suedeem G. Kelly

¹ *PPL Elec. Utils. Corp. and Pub Serv. Elec. and Gas Co.*, 123 FERC ¶ 61,068 (2008).

² Pennsylvania Office of Consumer Advocate, Maryland Office of People's Counsel, Office of the Ohio Consumers' Counsel, Office of the People's Counsel of the District of Columbia, New Jersey Division of Rate Counsel, West Virginia Consumer Advocate Division, Delaware Division of the Public Advocate.

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WELLINGHOFF, Commissioner, dissenting in part:

As the Joint Consumer Advocates state in their request for rehearing, I dissented in part from the April 22, 2008 Order. I continue to believe that the record before us raises serious questions about the incentive ROE adder that the majority granted to Applicants.

For this reason, I respectfully dissent in part from today's order.

Jon Wellinghoff
Commissioner