

**Before the
Federal Energy Regulatory Commission
Washington, D.C. 20426**

In the Matter of)	
)	Docket No. RM06-4-000
Promoting Transmission Investment)	
Through Pricing Reform)	

COMMENTS
OF
THE WYOMING OFFICE OF CONSUMER ADVOCATE
(Submitted January 9, 2006)

The Wyoming Office of Consumer Advocate (Wyoming OCA) is an interested party in this proceeding, as we are charged with representing the interests of Wyoming citizens and all classes of utility customers in matters involving public utilities. In our role as public interest advocates, we are concerned not only that there be adequate infrastructure but also that it be available at prices that allow retail rates to remain reasonable and affordable to customers. Our comments in this proposed rulemaking are submitted with a view toward balancing these two overarching issues.

Background

The Federal Energy Regulatory Commission (Commission) issued its proposed rules, *Promoting Transmission Investment Through Pricing Reform*, on November 17, 2005. These proposed rules are issued pursuant to Section 1241 of the Energy Policy Act of 2005. This provision mandates that the Commission establish rules within one year that include incentive-based (including performance-based) rate treatment for interstate transmission. The purpose of such incentives shall be to benefit customers by assuring reliability and reducing transmission congestion, which in turn, reduces the cost of delivered power. Summarizing, the required rule is to:

Promote transmission investment, which in turn, promotes reliable and economically efficient transmission and generation;

Provide a return on equity that attracts new investment in transmission;

Increase the capacity and efficiency, and improve the operation of transmission facilities, by encouraging the deployment of new and alternative technologies;

Allow recovery of prudently incurred costs necessary to comply with the mandated reliability standards and costs related to transmission infrastructure development (i.e., siting) pursuant to provision of the Energy Policy Act of 2005;

Provide incentives to electric or transmitting utilities that join a Transmission Organization; and

Maintain just and reasonable and not unduly discriminatory or preferential rates, charges, terms, and conditions.

For all jurisdictional public utilities, where it is demonstrated that that the new transmission investment will improve regional reliability and reduce transmission congestion, the following incentives would be authorized, if the new rules were to become effective:

A return on equity adder -- that would better reflect the industry structure that exists today, including the need for new investment – for new transmission investments;

Inclusion of 100% of new transmission investment construction work-in-progress in rate base;

Expensing, rather than capitalizing, pre-commercial operations costs associated with new transmission investment;

The use of an overall rate-of-return based on a hypothetical capital structure that is different from the actual capitalization of the project;

Accelerated depreciable lives of 15 years, rather than the more traditional useful life of the facility;

Recovery of 100% of the prudently incurred costs of transmission facilities that are cancelled or abandoned due to factors beyond the control of the utility;

The use of deferred cost recovery mechanisms that, for instance, allow recovery of new transmission facility costs in FERC-jurisdictional rates at the end of a retail rate moratorium; and

Any other incentives determined to be just and reasonable and non-discriminatory.

For transcos,¹ the Commission proposes to authorize the following incentives, provided the rate treatment is just and reasonable and non-discriminatory,

An ROE that encourages transco formation – in recognition of the perceived benefits they provide -- and attraction of sufficient transmission; and

An adjustment to the book value of transmission assets being sold to a transco to remove the disincentive associated with the impact of accelerated depreciation on federal capital gains tax liabilities.

Additionally, the Commission is considering proposing requests for return-on-equity-based incentives for utilities that join a regional transmission organization (RTO), in recognition of the perceived benefits such organizations bring to customers. Furthermore, it is considering similar return-based incentives for utilities that join an independent system operator (ISO).

As noted above, the Energy Policy Act of 2005 mandates that the Commission's rules allow for recovery of costs associated with new reliability standards and new siting authority authorized within the Energy Policy Act of 2005. The proposed rulemaking follows this directive by indicating that all such prudently incurred costs will be permitted to be recovered provided that the result is still just, reasonable, and non-discriminatory rates.

Lastly, the Commission identifies, describes, and seeks comment on some additional incentives that are not specifically contained within the language of its proposed rules. These concepts include:

¹ Transcos are defined in the proposed rulemaking as a stand-alone transmission company, approved by the Commission, which sells transmission service at wholesale and/or on an unbundled retail basis, regardless of whether it is affiliated with another public utility. The proposal solicits comments on this definition.

Single-issue rate filings that would consider implementing the incentives for the new transmission investment, without a full review of all normal rate case issues, in order to expedite and streamline incentives and the associated additional investment;

Rate recovery of acquisition premiums for purchases of transmission facilities by a transco; and

Performance-based ratemaking to incent efficiency in maintenance and operation of existing transmission facilities.

As described in the proposed rulemaking, the Commission believes that the multitude of incentives described above may be appropriate since they assist with maintaining a positive cash-flow and provide up-front regulatory certainty – both of which are seen as ways of removing disincentives to invest in new transmission.

Comments and Concerns

Overall, the Wyoming OCA is supportive of increasing transmission investment in the United States, and specifically in the Rocky Mountain region of the United States. We are also supportive of unique rate and regulatory treatments when they champion or sustain the public interest. However, these non-traditional rate treatments, such as the incentives described within the proposed rulemaking, must be fully supported and examined to assure that they achieve the purpose for which they are implemented. We are unconvinced that the proposed rules require such a showing. The Commission should clarify within its rules that the proposed incentives will only be allowed with an appropriate showing. We also ask that the Commission consider describing some examples of the type of evidence that should be presented by the applicant, for the case-by-case analysis that will determine whether the public interest tests have been met.

Lack of Required Showing of Need for the Incentive

Section 35.35(d)(2)(ii) of the proposed rules states that an incentive will be allowed to the book value of transmission assets in order “to remove the disincentive

associated with the impact of accelerated depreciation on federal capital gains tax liabilities.” While the rule does state that the rate treatment must be just, reasonable, and non-discriminatory, there is nothing in this section that would require a showing that without the adjustment to book value, assets will be kept from being transferred to a transco, nor is there a requirement to show that this provision is required to accomplish the desired goal of moving transmission assets into the transco.

The language in the proposed rules themselves is different from the explanation contained in the language of the notice in this docket. The notice indicates “the Commission will continue to consider proposals to include adjustments for ADIT in rates when a transco is purchasing transmission facilities.”² The language of the rule states, “the Commission will authorize...(ii) an adjustment to the book value of transmission assets being sold to a transco to remove the disincentive...”³ While the rules continually attempt to clarify that each of these incentives is only to be acceptable if the “rate treatment is just and reasonable and not unduly discriminatory or preferential,” without further clarity, words like *the Commission will authorize* may be misunderstood and misapplied. Therefore, we ask that the Commission carefully review the language of the rules themselves. In doing so, the Commission should assure that there are no guarantees of any of these incentives being applied but that these incentives are available based on evidence to be provided by the applicant. This is the type of case-by-case review that the Commission discusses in its notice but is distinctly absent from the rules themselves.

Specific Exclusion of Cost-Benefit Analysis

The Wyoming OCA is also quite concerned about the Commission’s specific exclusion of a cost-benefit analysis relative to implementation of any of the incentive ratemaking proposals. Paragraph 16 of the notice states,

The Commission does not propose to require applicants for incentive ratemaking treatment under section 35.35 to support their applications with cost-benefit analyses.

² Paragraph 43 of the Notice of Proposed Rulemaking, page 71415, Federal Register, Volume 70, No. 228.

³ Section 35.35(d)(2)(ii) of the proposed rules.

Instead, the Commission refers to more general sections of the law that require just, reasonable, and non-discriminatory rates.

While we appreciate the fact that the Commission has a mandate to keep rates just and reasonable, without a cost-benefit analysis, it is not clear how the just and reasonable test will be met. The Commission does not identify any alternatives to a cost-benefit analysis that would specifically accomplish the same purpose. Instead, the Commission appears to presume that each new transmission project will cause the same cash flow, financing, and investment recovery difficulties – regardless of the individual project or owner involved.⁴ We disagree and find that each project and its surrounding circumstances should be examined on an individual basis. One of the best ways to make this examination is with a cost-benefit analysis.

For example, if an investor-owned public utility has its retail rates regulated on a historical investment basis, cash-flow and financing difficulties may be more likely than for a utility that uses a forward-looking test period, where there is little lag between the time the investment is made and the time that rate recovery begins. Thus, the proposed incentives are not needed, as none of the problems that the incentives are meant to cure exist.

In another example, a utility may have cash flow difficulties because its rates are nearing the end of a rate moratorium and the utility is unable to incorporate new investment into its rates (and cash flow). Based on the notice, one might be able to argue that an incentive is now needed to alleviate this problem. In fact, the notice uses this very example, when it discusses the reason that cost deferrals are included as one of the proposed incentive mechanisms. However, this completely ignores the fact that the utility may have otherwise benefited from the rate moratorium. It may be in a situation where the rate moratorium has allowed it to avoid a rate reduction that the regulator

⁴ Paragraph 19 of the Notice of Proposed Rulemaking states, in part, “Undertaking significant new transmission investment can present cash flow, revenue recovery, and financing issues, regardless of corporate structure.”

would have otherwise imposed. Without an analysis of the specific situation, the investing utility may be benefiting from the rate moratorium and would additionally be allowed to benefit from the proposed incentive(s). In this example, how would the Commission know that the ensuing rates were just and reasonable?

As noted above, the Commission relies heavily on language that any rates imposed must be just and reasonable. But, in examining Sections 205 and 206 of the Federal Power Act, and the Commission's rules implementing these sections of federal law, there is little guidance provided on what that means. The Commission's existing rate filing rules are based in tradition, years of precedent, and a great deal of interpretive case law. Yet, given the non-traditional nature of what the Commission proposes regarding these incentives, we find little in the existing rules that would assist in determining what is presumed to be just and reasonable.

This leaves a great deal of subjectivity in the decision-making process. To many, subjectivity equates to uncertainty. Uncertainty has been one significant cause of underinvestment. Continuing uncertainty is inconsistent with the underlying purpose of the rule, which is to encourage additional, prudent investment. The Commission should consider providing more certainty to the decision of what constitutes a showing of just and reasonable rates, by means of a more thorough discussion of what showing would justify implementation of the proposed incentives.

Presumption that Any and All New Transmission Investment is Necessary and Prudent

The proposed rulemaking reflects through its tone the underlying message that any and all new transmission is desirable. While we agree that there has been underinvestment in electric plant in the past decade or two, particularly in the Rocky Mountain region, this under-investment is not limited to transmission. In looking at investment and system congestion, it is useful to look concurrently at both the transmission and generation investment. As we have found through our review of integrated resource plans over the years, constructing a generation facility in an area may be able to alleviate

transmission congestion, or vice versa. Thus, the obvious efficient solution is not always one over the other.

It is for this reason, that we encourage a more meticulous look at the transmission projects for which an incentive(s) are being sought. Once the cost of the transmission project is considered, including the cost of the incentive, it might turn out to be cheaper for customers if generation was built closer to load to avoid the cost of transmission. Thus, at a minimum, applications seeking incentives should, at a minimum, demonstrate that a project would result in net consumer benefits. Given the significant level of financial incentives that could result from the proposed rules, the Commission should be cautious that only new investments that will be economically beneficial to customers – or projects necessary for system reliability – are able to benefit from the proposed incentives.

Allowed Application of Multiple Incentives to the Same Investment

Nothing in the proposed rulemaking limits the number of incentives that may be applied to the same project. In at least one instance, the notice of proposed rulemaking specifically states that multiple incentives would be permitted on the same new facilities.⁵ We are concerned that this may be an open invitation to a potential investor in new transmission to abuse the system. If any one of these proposed incentives increases cash flow and removes much of the uncertainty regarding cost recovery, it is unclear why more than one of these incentives is necessary for any one project. It appears that if one incentive provides a reason to invest, two incentives may be wasteful and unnecessary. Since these costs are ultimately paid by retail customers, every effort should be made to only provide the level of incentive necessary to assure reasonable service at reasonable rates.

⁵ Paragraph 43 states, in part, “In addition, we clarify that a transco that requests an incentive ROE would not be precluded from also requesting the ADIT adjustment.”

The Wyoming OCA is not asking that the Commission's flexibility to allow multiple incentives be removed. However, we encourage the Commission to raise the bar of evidence that must be provided before multiple incentives are permitted, and to clearly state that the burden of such a showing remains with the applicant. It would be wrong to impose a rebuttable presumption. Those seeking one or more incentives must bear the burden of showing that the project is unfeasible, uneconomic, and unrealistic unless the proposed incentive is provided.

Conclusion

The Wyoming OCA is not conceptually opposed to any of the incentives or non-traditional ratemaking treatments that are proposed in this rulemaking docket. However, we fear that the Commission may be so anxious to encourage new construction – after such a long period of under-investment – that it has lowed the applicant's burden to show a need and a benefit to an unreasonable level. We are concerned that the Commission has provided too little guidance to applicants and other interested parties as to the type of showing that must be made relative to an application for an incentive. Finally, we are concerned that the Notice contains descriptions of tests that must be made and regulatory reviews that are anticipated that are not actually contained in the language of the rules itself. We ask the Commission to consider making the rules more specific, by adding more guidance and definition to them, prior to making the rules final. As we are not philosophically opposed to the intentions of the Commission, a re-working of the specifics of the rules would resolve many of our expressed concerns.

Respectfully Submitted,

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