

123 FERC ¶ 61,262
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.

Baltimore Gas and Electric Company

Docket No. ER07-576-004

ORDER DENYING REHEARING

(Issued June 13, 2008)

1. In an order issued on November 16, 2007,¹ the Commission authorized a 100-basis point return on equity (ROE) adder pursuant to Order Nos. 679 and 679-A² for two Baltimore Gas and Electric Company (BG&E) transmission owner-initiated (TOI) projects. The Maryland Office of People's Counsel (People's Counsel) and the Maryland Public Service Commission (Maryland Commission) submitted separate requests for rehearing. For the reasons discussed below, we deny People's Counsel's timely request for rehearing and reject the Maryland Commission's untimely request for rehearing.

I. Background

2. BG&E submitted a filing under section 205 of the Federal Power Act (FPA)³ requesting transmission rate incentives for two TOI projects (the Downtown Cable

¹ *Baltimore Gas & Electric Co.*, 121 FERC ¶ 61,167 (2007) (November 16 Order).

² *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222, *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007).

³ 16 U.S.C. § 824d(a) (Supp. V 2005).

project⁴ and the Northwest to Finksburg project⁵ (collectively, the TOI projects)), two baseline projects, and 37 future transmission projects.⁶ In the July 24 Order, the Commission granted incentives for the baseline projects, denied incentives for the 37 future projects, and set for technical conference the issue of whether the TOI projects satisfied the Commission's nexus test.⁷ The Commission also clarified the relationship between the nexus test and the question of whether a project is routine:

[W]hen an applicant has adequately demonstrated that the project for which it requests an incentive is not routine, that applicant has, for purposes of the nexus test, shown that the project faces risks and challenges that merit an incentive. By definition, projects that are not routine . . . face inherent risks and challenges and/or provide benefits that are worthy of incentives.^[8]

⁴ The Downtown Cable project consists of five separately-identified TOI projects in downtown Baltimore: (1) redesigning and rebuilding the Westport 115 kV switching substation (TOI-150); (2) building a 115 kV new Gas Insulated Switching (GIS) station which will be known as the Orchard Street Station (TOI-367); (3) paralleling existing cables between the Westport substation and the Center substation (TOI-151); (4) installing new 115 kV cable between the Westport substation and the Orchard Street station (TOI-369); and (5) installing new 115 kV cable between the new Orchard Street station and the Center substation (TOI-370).

⁵ The Northwest to Finksburg project consists of: (1) 3.4 miles of double circuit overhead 115 kV line; and (2) an additional 115 kV breaker at the Northwest substation. (collectively, TOI-324).

⁶ BG&E also requested a 50-basis point adder for all jurisdictional facilities in recognition of its continuing membership in PJM Interconnection, L.L.C. (PJM), and inclusion of 100 percent of its construction work in progress (CWIP) for all new transmission investment. For a more extensive description of BG&E's request for incentives, *see Baltimore Gas & Electric Co.*, 120 FERC ¶ 61,084, at P 3-17 (2007), *reh'g denied*, 122 FERC ¶ 61,034 (2008) (July 24 Order) and November 16 Order, 121 FERC ¶ 61,167 at P 2-4.

⁷ The Commission also granted BG&E's request for a 50-basis point adder in recognition of its continuing membership in PJM, but rejected its request for inclusion of 100 percent of CWIP in rate base.

⁸ July 24 Order, 120 FERC ¶ 61,084 at P 54; *see also id.* P 46-49 (explaining that Order Nos.679 and 679-A require that applicants for incentives demonstrate a nexus between the incentive sought and the investment being made, that this test is met when an applicant demonstrates that the total package of incentives requested is "tailored to
(continued...)

Additionally, the Commission provided guidance⁹ on the factors that it will consider when determining whether a project is routine:

[T]o determine whether or not a project is not routine, the Commission will consider all relevant factors presented by the applicant. For example, an applicant may present evidence on: (i) the scope of the project (e.g., dollar investment, increase in transfer capability, involvement of multiple entities or jurisdictions, size, effect on region); (ii) the effect of the project (e.g., improving reliability or reducing congestion costs); and (iii) the challenges or risks faced by the project (e.g., siting, internal competition for financing with other projects, long lead times, regulatory and political risks, specific financing challenges, other impediments).^[10]

3. Following a technical conference held on September 5, 2007, the Commission evaluated the TOI projects according to the guidance provided in the July 24 Order. After examining the scope, effects, and challenges or risks faced by the TOI projects, the Commission concluded in the November 16 Order that the projects are non-routine, and therefore, that they satisfy the “nexus” test.

4. The Commission determined that the scope of the TOI projects “exceed the normal replacement of facilities and provide for the expansion of service in the Baltimore and Carroll County, Maryland areas at a higher level of reliability than currently exists.”¹¹ The Commission explained that the Downtown Cable project will alleviate situations when excessive overloads during the summer could lead to multiple double contingency violations resulting in outages, while the Northwest to Finksburg project “involves a major reconfiguration of BG&E’s transmission system.”¹² The Commission

address the demonstrable risks and challenges faced by the applicant,” and that the Commission has found the question of whether a project is routine to be “particularly probative” as part of its evaluation of whether the total package of incentives requested meets the nexus test).

⁹ The Commission explained that these factors are only examples of evidence that can help inform the Commission on the question of whether a project is routine, and that it was not proposing a new formulaic checklist that must be met by every applicant for every proposed incentive or project. *Id.* n.53.

¹⁰ *Id.* P 52 (footnote omitted).

¹¹ November 16 Order, 121 FERC ¶ 61,167 at P 28.

¹² *Id.*

also noted that the size and breadth of the dollar investment in the TOI projects is significant, observing that the approximately \$27.2 million cost of the TOI projects is more than double the average cost of transmission investment made by BG&E in each of the last five years.¹³

5. The Commission also concluded that the TOI projects had positive effects, such as increasing reliability and reducing congestion costs. The Commission found, for example, that the Northwest to Finksburg project will help BG&E meet critical space-heating needs during the winter. Similarly, the Commission determined that the Downtown Cable project will help meet peak load by enhancing the PJM grid to meet double contingency criteria during the summer and by correcting a NERC reliability violation. The Commission also noted that the regional congestion costs mitigated by the Downtown Cable project are expected to be approximately \$1.7 million per year.¹⁴

6. Finally, the Commission identified several challenges or risks faced by the TOI projects that exceed those associated with routine projects. For example, the Commission found that the Northwest to Finksburg project has added complexity due to limited access and a narrow 66-foot right-of-way. With respect to the Downtown Cable project, the Commission cited the limited space in downtown Baltimore as an impediment to the installation of the new Orchard Street 115 kV switching station. The Commission explained that BG&E planned to address this challenge by using GIS breakers that will eliminate the need for a larger oil circuit breaker, and that these GIS breakers will reduce by 95 percent the amount of space required for a typical open-air 115 kV insulating switching station. Moreover, the Commission observed that the duct work used in installing the switching station will contain duct banks that will be used in the future for fiber optic cables. The Commission explained that fiber optic technology will enhance SmartGrid technologies and facilitate demand response.

¹³ *Id.*

¹⁴ The Commission noted that this approximation of the congestion cost savings was undisputed and expected to continue. *Id.* P 29.

II. Request for Rehearing

A. Maryland Public Service Commission

1. Rehearing Request

7. In its untimely request for rehearing,¹⁵ the Maryland Commission repeats several arguments that it has advanced throughout this proceeding. For example, the Maryland Commission claims that the TOI projects are routine and do not provide regional benefits. The Maryland Commission also argues, for the first time, that the purpose of the Downtown Cable project is to provide support and “synergistic benefits” to Constellation Power Source Generation, Inc.’s (Constellation) Gould Street project.¹⁶ The Maryland Commission states that Constellation is BG&E’s affiliate, that on October 12, 2007 Constellation applied for a Certificate of Public Convenience and Necessity (CPCN) to reactivate the Gould Street generating facility in downtown Baltimore, and that the Downtown Cable project is a routine network facility upgrade, necessary to facilitate the connection of the Gould Street generator to the bulk electric system and thus required under section 217 of PJM Interconnection, L.L.C.’s (PJM) Open Access Transmission Tariff (OATT). The Maryland Commission argues that the Downtown Cable project could advantage the Gould Street generator relative to other wholesale generators in BG&E’ system, and that but for the Downtown Cable project, the Gould Street project would contribute to congestion at the local and regional level. The Maryland Commission further argues that BG&E should have known about the Gould Street project and presented information about its relationship to the Downtown Cable project at the September 5, 2007 technical conference. The Maryland Commission contends that the Downtown Cable project should not receive an incentive, or at least, should not receive the full 100-basis point incentive, without an evidentiary hearing to determine whether any aspects of the project are necessary facilities upgrades for the Gould Street project. The Maryland Commission argues that any such upgrades should be denied incentives.

8. On December 21, 2007, the Maryland Commission filed a motion requesting that the Commission accept the Maryland Commission’s untimely request for rehearing.

¹⁵ The Maryland Commission’s filing also includes what the Maryland Commission styles as requests for clarification. However, these requests are, in essence, requests for rehearing, and we treat them as such.

¹⁶ Maryland Commission Request for Rehearing at 7.

2. Commission Determination

9. We deny the Maryland Commission's motion and reject the Maryland Commission's untimely request for rehearing. The courts have repeatedly recognized that the 30-day time period within which a party may file a request for rehearing is established by section 313(a) of the FPA¹⁷ and that the Commission has no discretion to extend that deadline.¹⁸ Similarly, the Commission has long held that it lacks the authority to consider untimely requests for rehearing.¹⁹

10. We further note that we would deny rehearing even if the Maryland Commission filed its request on a timely basis. The Maryland Commission raised the Gould Street issue for the first time on rehearing. The Commission looks with disfavor on parties raising issues for the first time on rehearing.²⁰ This is because other parties are not permitted to respond to a request for rehearing.²¹ Such behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision. Moreover, the Maryland Commission offers no reason why its argument could not have been raised earlier in this proceeding. Although BG&E did not discuss the Gould Street project at the September 5, 2007 technical conference, the

¹⁷ 16 U.S.C. § 8251(a) (2000).

¹⁸ See *City of Campbell v. FERC*, 770 F.2d 1180, 1183 (D.C. Cir. 1985) ("The 30-day time requirement of [the FPA] is as much a part of the jurisdictional threshold as the mandate to file for a rehearing."); *Boston Gas Co. v. FERC*, 575 F.2d 975, 977-79 (1st Cir. 1978) (describing identical rehearing provision of the Natural Gas Act as "a tightly structured and formal provision. Neither the Commission nor the courts are given any form of jurisdictional discretion.").

¹⁹ See e.g. *Mississippi Delta Energy Agency*, 122 FERC ¶ 61,277, at P 9 (2008); *Midwest Indep. Sys. Operator, Inc.*, 120 FERC ¶ 61,202, at P 6 (2007); *New York Indep. Sys. Operator, Inc.*, 115 FERC ¶ 61,206, at P 3 (2006); *New England Power Pool*, 89 FERC ¶ 61,022, at 61,076 (1999); *CMS Midland, Inc.*, 56 FERC ¶ 61,177, at 61,623 (1991); *Public Service Co. of New Hampshire*, 56 FERC ¶ 61,105, at 61,403 (1991); *Arkansas Power & Light Co.*, 19 FERC ¶ 61,115, at 61,217-18, *reh'g denied*, 20 FERC ¶ 61,013, at 61,034 (1982).

²⁰ *Allegheny Energy Supply Co., LLC*, 122 FERC ¶ 61,104, at P 6 (2008); *Calpine Oneta Power*, 114 FERC ¶ 61,030, at P 7 (2006); *Midwest Indep. Sys. Operator, Inc.*, 112 FERC ¶ 61,211, at P 34 (2005) (citing *Baltimore Gas & Elec. Co.*, 91 FERC ¶ 61,270, at 61,922 (2000)); *Baltimore Gas & Elec. Co.*, 92 FERC ¶ 61,043, at 61,114 (2000).

²¹ 18 C.F.R. § 385.713(d) (2007).

Maryland Commission itself acknowledges that a Constellation official indicated at a July 27, 2007 electricity planning conference conducted by the Maryland Commission that Constellation was considering re-starting the Gould Street generator, and that the project entered PJM's queue on the next day.²² Similarly, Constellation filed for a CPCN on October 12, 2007, more than a month before the Commission issued the November 16 Order. Thus, the Maryland Commission had ample opportunities to raise this issue before rehearing.

B. People's Counsel

1. Rehearing Request

11. On rehearing, People's Counsel argues that the Commission applied the factors set forth in the July 24 Order²³ in a manner that contravenes the Energy Policy Act of 2005 (EPAAct), which adds section 219 to the FPA.²⁴ Section 219(a) directs the Commission to promulgate a rule on transmission incentives.²⁵ People's Counsel claims that section

²² Maryland Commission Request for Rehearing at 10. In an earlier, but still untimely version of the Maryland Commission's rehearing request, the Maryland Commission identified the Constellation official as the "CEO Vice President of Constellation Energy Resources."

²³ People's Counsel does not challenge the merits of the factors themselves, or the Commission's right to establish the factors to guide its determination of whether a project is routine; rather, People's Counsel challenges the Commission's application of the factors with respect to the TOI projects. *See* People's Counsel Rehearing Request at 14 ("While the Commission's 'factors' test as an outgrowth of its rulemaking may be lawful in and of itself, as applied in its November 16 Order the Commission has acted in contravention of the rule's enabling statute").

²⁴ Pub L. No. 109-58, § 1241, 119 Stat 594, 961 (2005) (to be codified at 16 U.S.C. § 824s) (section 219).

²⁵ Section 219(a) states:

Not later than 1 year after the date of enactment of this section, the Commission shall establish, by rule, incentive-based (including performance-based) rate treatments for the transmission of electric energy in interstate commerce by public utilities for the purpose of benefiting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.

219(b) establishes four goals that the Commission must accomplish in this rulemaking,²⁶ and that the Commission's rule fails if, in its application, all four goals are not met.²⁷ People's Counsel contends that the TOI projects fail to meet two of section 219's goals. Specifically, People's Counsel claims that the TOI projects do not encourage the deployment of new transmission technologies or attract new investment in transmission facilities.

12. People's Counsel argues that the TOI projects lack any new or advanced transmission technologies. With respect to the Downtown Cable project, People's Counsel claims that TOI-151, which will reconfigure two existing cables to act in parallel as one (resulting in an increased circuit capacity of 1784 MW from 348 MW), is a "purported" innovation chosen by BG&E to save \$7 million and to avoid replacing all of its aging infrastructure at the same time.²⁸ People's Counsel also dismisses TOI-369 and TOI-370, which install new 115 kV cable between specified substations, as including

²⁶ Section 219(b) states that the rule shall:

- (1) promote reliable and economically efficient transmission and generation of electricity by promoting capital investment in the enlargement, improvement, maintenance, and operation of all facilities for the transmission of electric energy in interstate commerce, regardless of the ownership of the facilities;
- (2) provide a [ROE] that attracts new investment in transmission facilities (including related transmission technologies);
- (3) encourage deployment of transmission technologies and other measures to increase the capacity and efficiency of existing transmission facilities and improve the operation of the facilities; and
- (4) allow recovery of—
 - (A) all prudently incurred costs necessary to comply with mandatory reliability standards issued pursuant to section 215[of the FPA]; and
 - (B) all prudently incurred costs related to transmission infrastructure development pursuant to section 216 [of the FPA].

²⁷ People's Counsel Rehearing Request at 11.

²⁸ *Id.* at 12.

only the beginnings of an updated communications system rather than a new transmission technology, and as involving simple ductwork that will not include any actual fiber optic communications cable.²⁹ People's Counsel also asserts that the Commission should discount the GIS technology included in TOI-367, the new 115 kV GIS switching station at Orchard St., because GIS technology is an already established and commercially available technology that BG&E is belatedly adopting only because it will reduce the switching station's footprint by 95 percent and save \$8 million. Similarly, People's Counsel argues that BG&E has not presented any evidence of new transmission technology with respect to the Northwest to Finksburg project, but has stated only that its proposed line is designed for optical ground in the static wire position which will allow only for a future dedicated fiber communication link between the Northwest and Finksburg substations.

13. People's Counsel further contends that the TOI projects do not serve to attract new investment in transmission facilities. People's Counsel asserts that because BG&E will fund the TOI projects internally, it is competing against itself for funding and not "attracting" new investment in the sense Congress intended in section 219.

14. People's Counsel also alleges that the November 16 Order is not just and reasonable because the Commission applied the factors set forth in the July 24 Order in a result-determinative way, basing its decision on a few select facts rather than on the record as a whole. People's Counsel contends that the November 16 Order permits incentives for all transmission expenditures that are more than in-kind replacements.³⁰

15. People's Counsel argues that the record as a whole does not support the Commission's finding that the Northwest to Finksburg project is a major reconfiguration of BG&E's transmission system, that it has siting or construction difficulties, or that it has a significant bearing on, or relationship to, the PJM grid. People's Counsel asserts that in Maryland state proceedings, BG&E has stated that the reliability benefit that the project will provide is the enhancement of BG&E's ability to serve load in the area, that the project's regional benefits are limited, and that the project will not have a major effect on the stability of the PJM grid. People's Counsel argues that the Commission's justification for finding that the project has an impact on the PJM grid reflects the tautology that almost all transmission affects interstate commerce, which is why the Commission has jurisdiction in the first place. People's Counsel further states that the project will be constructed entirely within an existing BG&E transmission line right-of-way, so that no additional properties or property rights will need to be acquired to complete the project, and that Maryland authorities have already certified that the

²⁹ *Id.*

³⁰ *Id.* at 14.

project's route is acceptable with respect to environmental, socioeconomic, reliability, maintainability, and system stability issues.

16. People's Counsel also claims that the impediments to building the Downtown Cable project are exaggerated. People's Counsel states that all the work associated with the project is either within BG&E-owned facilities or involves underground cables that do not require siting approval. People's Counsel asserts that BG&E's own evidence shows that it classified half of the anticipated four types of risks associated with each of the five Downtown projects as low risk, while a "preponderance" of the remaining high risks are attributed to currency fluctuations associated with the purchase of copper and steel.³¹ People's Counsel argues that BG&E has failed to present evidence that its construction time will be limited by restricted hours for street closures or that it faces potential risks created by public opposition to siting, zoning, and permitting decisions necessary to complete the project.

17. People's Counsel also asserts that despite the Commission's finding that the Downtown Cable project will reduce PJM congestion costs, Maryland residential ratepayers will not benefit from this reduction because BG&E has stated that the project will not reduce the hours that out of merit generation costs are allocated to Maryland customers. People's Counsel claims that the overall benefits of the project are conditional, and even if realized, are relatively little in comparison to the approximate \$28 million cost of the project. People's Counsel further contends that the record as a whole supports the conclusion that the TOI projects are local in nature, and that BG&E is required to construct them in order to comply with its general obligation under Maryland law to provide reliable service.³²

18. Finally, People's Counsel contends that the Commission has made factual determinations regarding the challenges and risks faced by BG&E, the TOI projects' effect on interstate commerce, and the projects' effect on the PJM grid based on statements by BG&E that cannot be adequately or properly challenged without discovery and a hearing. People's Counsel claims that it has presented the Commission with reason to doubt BG&E's assertions, as well as with affirmative evidence placing a number of material issues in dispute with respect to the evidence that the Commission considered in applying the guidance it set forth in the July 24 Order. Consequently, People's Counsel

³¹ *Id.* at 18-19.

³² *Id.* at 21 (citing Md. Code Ann., Pub. Util. Cos. § 5-303 (1998), which provides, in relevant part, that "[a] public service company shall furnish equipment, services, and facilities that are safe, adequate, just, reasonable, economical, and efficient, considering the conservation of natural resources and the quality of the environment."). The Maryland Commission made a similar argument in its untimely rehearing request.

requests that the Commission grant rehearing and set this case for hearing on these factual issues.

2. Commission Determination

19. We deny rehearing, reject People's Counsel's request for a hearing, and affirm our finding that the TOI projects are non-routine.

20. People's Counsel contends that the Commission applied the factors set forth in the July 24 Order in a manner that contravenes section 219(b). People's Counsel asserts that section 219(b) requires that the Commission use its rule on transmission incentives to promote new transmission technologies and to attract new investment in transmission facilities, but that the TOI projects fail to satisfy these requirements.

21. We reject People's Counsel's argument. We do not read section 219(b) as establishing a checklist of conditions that must be met before the Commission may authorize incentives in any particular case; rather, we read it as establishing general policy objectives to guide the rulemaking mandated in section 219(a) (and satisfied by the Commission in Order No. 679).

22. People's Counsel's argument proceeds from the premise that section 219(b) establishes mandatory requirements that transmission projects must satisfy before the Commission may authorize incentives. This premise is inconsistent with the statute. Section 219(a) directs the Commission to establish by rule, incentive-based rate treatments to promote capital investment in transmission infrastructure. Section 219(b) states that the rule shall, inter alia, "encourage deployment of transmission technologies" and "provide a[n] [ROE] that attracts new investment in transmission facilities (including related transmission technologies)." Thus, the purpose of section 219(b) is to provide general criteria to guide the Commission's (now completed) rulemaking process; it does not purport to establish any criteria for the Commission to use in evaluating cases arising under the rule mandated in section 219(a).

23. In Order No. 679, the Commission rejected a similarly narrow and unsupported reading of section 219 when it rejected the claim that section 219 authorizes incentives only for projects that both improve reliability and reduce congestion. Although section 219(a) directs the Commission to develop a rule authorizing incentive-based treatment for the purpose of "ensuring reliability and . . . reducing transmission congestion," the Commission held that nothing in section 219 states that the Commission may provide incentives only to projects that achieve both purposes. In fact, the Commission found that such an interpretation would be inconsistent with EPAct as a whole, and would lead

to unreasonable results.³³ Accordingly, the Commission interpreted section 219 to authorize incentives for projects that have either reliability *or* congestion benefits.

24. We also reject People's Counsel's basic premise—that the Commission applied the factors set forth in the July 24 Order in contravention of the goals of encouraging deployment of transmission technologies and providing an ROE that attracts new investment in transmission facilities (including related transmission technologies). In Order No. 679, the Commission declined to mandate that new development programs include advanced technologies.³⁴ Moreover, in arguing that the TOI projects do not encourage the deployment of new transmission technologies, People's Counsel has pointed to several examples where the TOI projects do, in fact, promote new transmission technology. People's Counsel's main quarrel with these innovations is not that they do not technologically upgrade BG&E's transmission system, but that they do not upgrade it enough, or that they also provide BG&E with an economic benefit. However, there is no requirement in section 219 or in Order Nos. 679 or 679-A that utilities must deploy the most advanced technology all at once, or that they must do so at a loss.³⁵

25. Moreover, the Commission has stated that providing ROE incentives, like the incentives authorized for the TOI projects, will fulfill section 219(b)'s goal of encouraging the deployment of innovative technologies by stimulating investment in transmission facilities and thus providing opportunities for new technology to be utilized

³³ Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 41, 42

³⁴ *Id.* P 310 (“As previously stated, we expect that new development programs will include, or at least consider, advanced technologies, but we will not mandate it. We agree that improvements in the operation of the grid, perhaps through advanced technologies addressing time of day congestion, could result in efficiency benefits and encourage such proposals on a case-by-case basis”).

³⁵ *See id.* P 288 (“We agree that . . . new technologies will be adopted when they are cost effective.”), P 298 ([C]ase-by-case review also provides flexibility to transmission providers in identifying the technologies that are most appropriate for their project applications and business models”); *see also id.* P 290-291 (finding that the list of advanced technologies included in EPAct are illustrative and “not exclusive of advanced technologies that may be employed and considered for incentive ratemaking treatment,” that new technologies will continually evolve, that “advanced transmission technologies include any other advanced transmission technologies that the Commission considers appropriate,” and that “[t]his includes technologies that may indirectly mitigate congestion and enhance grid reliability, if such technologies can be shown to increase the capacity, efficiency or reliability of an existing or new transmission facility”).

as part of this investment.³⁶ Here, the TOI projects both utilize innovative technology and lay the foundation for future uses of innovative technology.

26. We also reject People's Counsel's claim that BG&E's investment in the TOI projects is not the type of investment contemplated in section 219(b) because it is funded internally by BG&E. People's Counsel argues that the word "attract" in section 219(b) forecloses incentives for projects that are constructed with internal funding rather than external investment. However, in Order No. 679, the Commission explained that it was fulfilling Congress' directive to provide an ROE that attracts new investment in transmission facilities (including related transmission technologies) by allowing, when justified, an incentive-based ROE to all public utilities for new investments in transmission facilities that benefit customers by ensuring reliability or reducing the cost of delivered power by reducing congestion costs.³⁷ The Commission explained that it expected that an incentive ROE would "make transmission projects more attractive, and therefore more likely, *when transmission projects must compete for capital in vertically-integrated utilities* as well as in transmission and delivery utilities."³⁸ Thus, in interpreting and applying section 219(b), the Commission specifically contemplated that incentives could be granted to transmission projects funded by internal capital and that providing incentives for such projects could persuade utilities like BG&E to divert limited resources to investment in transmission rather than other projects.

27. People's Counsel's argument is also inconsistent with and unsupported by section 219. Section 219 is designed to attract investment in transmission, and such investment may come from inside a utility or from external sources. When a utility like BG&E makes a choice to allocate internal funds to a transmission project because of an incentive ROE, the purpose of section 219 is achieved equally as well as if it chose to construct the project with external funds. The purpose of section 219 is to encourage investment in

³⁶ *Promoting Transmission Investment Through Pricing Reform*, Notice of Proposed Rulemaking, 70 Fed. Reg. 71,409 (Nov. 29, 2005), FERC Stats. & Regs. ¶ 32,593, at P 65 (2005) ("[W]e expect that the proposed incentives discussed in this [Notice of Proposed Rulemaking] including the ROE-based incentives, will stimulate investment in new transmission facilities, which will, in turn, provide opportunities for the deployment of innovative technologies for those new transmission facilities. Consequently, providing the proposed incentives will fulfill the requirement of section 219(b)(3) to encourage deployment of transmission technologies and other measures to increase the capacity and efficiency of existing transmission facilities and improve the operation of facilities.").

³⁷ Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 91.

³⁸ *Id.* (emphasis added).

transmission projects, and investment from within a utility is in this respect no different from investment from outside the utility. We further note that there is no language in section 219(b) distinguishing transmission funded by internal investment from transmission funded by external investment, and People's Counsel offers nothing to support its argument except its subjective claim that "it is difficult to conceive" why Congress would wish to provide utilities with an incentive to invest more of their own funds in transmission.³⁹

28. We also reject People's Counsel's arguments challenging the Commission's determination that the TOI projects are non-routine. In the November 16 Order, the Commission applied the guidance set forth in the July 24 Order and concluded that the TOI projects are non-routine. The Commission provided a detailed explanation supporting this finding, which is recounted above.⁴⁰ On rehearing, People's Counsel has not persuaded us to reconsider this determination. Additionally, we reject People's Counsel's assertion that the TOI projects do not merit incentives because BG&E has a general obligation under Maryland law to provide reliable service, or because they do not provide enough of a benefit to Maryland residential ratepayers to overcome skepticism in a state rate proceeding.⁴¹ Whether BG&E has a general obligation under state law to provide reliable service, or whether the TOI projects provide sufficient residential benefits to gain approval in a state administrative hearing, is not relevant to whether the TOI projects are routine. The Commission set forth the criteria for determining whether a project is routine in the July 24 Order, and it is this criteria that the Commission applies in fulfilling Congress' command to encourage investment in transmission projects.⁴²

29. Finally, we reject People's Counsel's claim that the Commission's decision authorizing incentives was not based on substantial evidence and deny People's Counsel's request for an additional hearing in this proceeding. People's Counsel alleges

³⁹ People's Counsel Rehearing Request at 13 ("[I]t is difficult to conceive that Congress inaccurately used the word 'attract' to indicate that BG[&]E should be compelling the interest of itself as opposed to that of capital or debt markets").

⁴⁰ See *supra* P 3-6; November 16 Order, 121 FERC ¶ 61,167 at P 28-30.

⁴¹ People's Counsel based its claim that the TOI projects will not sufficiently benefit Maryland residential ratepayers on a BG&E follow-up response to the Maryland Commission following the technical conference in this proceeding.

⁴² See *supra* P 2. We note that the Commission cited the regulatory and political risks a project may face as one of the challenges or risks faced by a project that is relevant to determining whether it is routine. Consequently, regulatory and political risks at the state level might show that a project is non-routine.

that the Commission ignored its evidence and considered only those facts in the record favorable to BG&E. We disagree. The Commission carefully considered all of the evidence in the record, including all of the arguments raised by People's Counsel, and based its conclusion on the record as a whole. Thus, People's Counsel's claim that the November 16 Order permits incentives for all transmission expenditures that are more than in-kind replacements ignores the fact that the Commission carefully evaluated these specific TOI projects in light of the guidance set forth in the July 24 Order and found that they are non-routine.⁴³ Pursuant to the requirements of Section 205, the Commission concluded that the rates resulting from the grant of incentives to BG&E were just and reasonable. Contrary to People's Counsel's argument, the Commission's order does not lack substantial evidence simply because there is some contradictory evidence in the record; the Commission is entitled to reject People's Counsel's evidence and base its conclusion, as it did here, on different evidence in the record.⁴⁴

30. Similarly, we deny People's Counsel's request for an additional hearing in this proceeding. The parties have had ample opportunity to present their cases in their

⁴³ Although not relevant to our decision here, we further point out that the unstated premise behind People's Counsel's argument—that expenditures that are more than in-kind replacements are routine and cannot qualify for incentives—is inconsistent with the Commission's broader incentive policy. In the July 24 Order, the Commission stated that “if the Commission determines that a project is routine, an applicant is not necessarily foreclosed from incentives. The applicant may still be able to demonstrate that its project faces risks and challenges or provides sufficient benefit to warrant incentive rate treatment.” July 24 Order, 120 FERC ¶ 61,084 at P 55. This policy does not factor into our decision here, however, because the Commission has determined that the TOI projects are non-routine.

⁴⁴ *See Me. PUC v. FERC*, No. 06-1403, 2008 U.S. App. LEXIS 6465, at *26-27 (D.C. Cir. Mar. 28, 2008) (“To be sure, Maine PUC offered some contradictory evidence about capacity price variability, but FERC's orders do ‘not lack substantial evidence simply because petitioners offered some contradictory evidence.’ FERC was entitled to reject Maine PUC's evidence and to base its conclusion on different evidence in the record”) (internal citations omitted); *see also ISO New England Inc.*, 123 FERC ¶ 61,021, at P 65 (“under the FPA, the issue before the Commission now is whether the proposed tariff changes are just and reasonable and not whether the proposal is more or less reasonable than other alternatives”); *Louisville Gas and Elec. Co.*, 114 FERC ¶ 61,282, at P 29 (the just and reasonable standard under the FPA is not so rigid as to limit rates to a “best rate” or “most efficient rate” standard; rather, a range of alternative approaches often may be just and reasonable), *reh'g denied, E. ON U.S. LLC*, 116 FERC ¶ 61,020 (2006).

pleadings and at the technical conference. Therefore, we disagree with People's Counsel's claim that there are additional factual issues to be litigated at hearing.

31. Accordingly, we deny rehearing.

The Commission orders:

(A) The Maryland Commission's request for rehearing is hereby rejected.

(B) People's Counsel's request for rehearing is hereby denied.

By the Commission. Commissioners Kelly and Wellinghoff dissenting with separate statements attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Baltimore Gas and Electric Company

Docket No. ER07-576-004

(Issued June 13, 2008)

KELLY, Commissioner, *dissenting*:

This order addresses rehearing requests regarding the Commission's decision to grant incentive rate treatment to two Baltimore Gas and Electric (BG&E) transmission owner-initiated (TOI) projects. In the underlying order,¹ the majority voted to grant a 100-basis point return on equity (ROE) incentive for the Northwest to Finksburg and Downtown Cable TOI projects. This order denies rehearing requests, upholding the majority's decision in the November 16 Order. I dissent from today's order consistent with my dissent from the November 16 Order.

I dissented from the November 16 Order after reviewing the record evidence and applying criteria that I have relied upon in earlier proceedings to BG&E's projects.² I found that the TOI projects did not appear to exceed "routine investments made in the ordinary course" as discussed in Order No. 679-A,³ nor did they present the types of unique risks or challenges that transmission incentives are meant to address. I also expressed concern that, in granting incentives for these TOI projects, the Commission would have difficulty in the future distinguishing between projects that merited incentive treatment and those that did not. I continue to believe that these projects are routine and, with respect to the instant proceeding, I would have supported an order to grant rehearing.

For these reasons, I respectfully dissent from this order.

Suedeem G. Kelly

¹ *Baltimore Gas & Electric Co.*, 121 FERC ¶ 61,167 (2007) (November 16 Order).

² See *American Electric Power Service Corporation*, 118 FERC ¶61,041 (2007).

³ Order No. 679-A, 117 FERC ¶ 61,345 at P 60.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Baltimore Gas and Electric Company

Docket Nos. ER07-576-004

(Issued June 13, 2008)

WELLINGHOFF, Commissioner, dissenting:

I dissented from the July 24 Order¹ and the November 16 Order² in this proceeding because I believe that BG&E has not demonstrated that an incentive ROE adder is appropriate for the subject TOI projects. I have also discussed in other proceedings how I believe the Commission should apply the requirements of Order No. 679 with respect to consideration of advanced technologies that will increase efficiency, enhance grid operations and reliability, and result in greater grid flexibility, thus benefiting all users of the grid and ultimate consumers.³

Consistent with my prior statements noted above, I disagree with the majority's contention in today's order that the subject TOI projects are non-routine and deserving of an incentive ROE adder. I would grant the request for rehearing of the November 16 Order filed by the Maryland Office of People's Counsel.

For this reason, I respectfully dissent.

Jon Wellinghoff
Commissioner

¹ *Baltimore Gas and Electric Co.*, 120 FERC ¶ 61,084 (2007).

² *Baltimore Gas and Electric Co.*, 121 FERC ¶ 61,167 (2007).

³ *See, e.g., Potomac-Appalachian Transmission Highline, L.L.C.*, 122 FERC ¶ 61,188 (2008) (separate statement of Commissioner Wellinghoff at 2-4); *PPL Electric Utilities Corp.*, 123 FERC ¶ 61,068 (2008) (separate statement of Commissioner Wellinghoff at 2).