

124 FERC ¶ 61,136  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Bangor Hydro-Electric Company  
Central Maine Power Company  
NSTAR Electric & Gas Corporation  
New England Power Company  
Northeast Utilities Service Company  
The United Illuminating Company  
Vermont Electric Power Company  
Central Vermont Public Service Corp.  
Green Mountain Power Corporation

Docket No. ER04-157-026

Florida Power & Light Company –  
New England Division

Docket No. ER04-714-016

ORDER GRANTING CLARIFICATION

(Issued August 4, 2008)

1. The United Illuminating Company (UI) requests clarification, or in the alternative seeks rehearing, of an order issued in this proceeding on March 24, 2008.<sup>1</sup> For the reasons discussed below, we grant UI's request for clarification.

**Background**

2. In the March 24 Order and a series of earlier orders issued in this proceeding, the Commission addressed issues relating to the establishment of the

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<sup>1</sup> *Bangor Hydro-Electric Company*, 122 FERC ¶ 61,265 (2008) (March 24 Order).

ISO New England, Inc. regional transmission organization (ISO-NE).<sup>2</sup> In particular, the Commission addressed a proposed 100 basis point incentive return on equity (ROE) adder for new transmission investment, as sought by the transmission owning utilities whose facilities comprise the ISO-NE RTO (Transmission Owners).<sup>3</sup> In accepting, suspending, and setting for hearing this proposed incentive adder, in the March 2004 Suspension Order, the Commission cited a proposed policy statement allowing applicants to seek a return on equity-based incentive for investment in new transmission facilities approved pursuant to an RTO planning process.<sup>4</sup>

3. While the consideration of this matter remained pending before the Commission, Congress enacted the Energy Policy Act of 2005, directing the Commission to establish, by rule, incentive-based rate treatments applicable to the construction of new transmission facilities.<sup>5</sup> The Commission addressed these requirements in Order No. 679.<sup>6</sup> That order provides that a public utility may file under the FPA a petition for a declaratory order or a section 205 filing to obtain incentive rate treatment for transmission infrastructure investment that satisfies the requirements of FPA section 219, i.e., that the applicant must demonstrate that the facilities for which it seeks incentives either ensure reliability or reduce the cost of

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<sup>2</sup> See *ISO New England, Inc.*, 106 FERC ¶ 61,280 (Suspension Order), *order on reh'g and compliance*, 109 FERC ¶ 61,147 (2004), *order on reh'g and compliance*, 110 FERC ¶ 61,111, *order on reh'g and compliance*, 110 FERC ¶ 61,335, *order on reh'g*, 111 FERC ¶ 61,344; *Bangor Hydro-Electric Company*, 111 FERC ¶ 63,048 (2005) (Initial Decision); and *Bangor Hydro-Electric Company*, 117 FERC ¶ 61,129 (2006) (Opinion No. 489).

<sup>3</sup> In addition to those applicants named in the caption to this proceeding, the Transmission Owners also include Unifil Energy Systems, Inc. and Fitchburg Gas and Electric Light Company.

<sup>4</sup> Suspension Order, 106 FERC ¶ 61,280 at P 249, citing *Proposed Pricing Policy for Efficient Operation and Expansion of Transmission Grid*, 102 FERC ¶ 61,032 (2003). The hearing in this case was held from January 25 through February 1, 2005. The Initial Decision was issued May 27, 2005.

<sup>5</sup> Pub. L. No. 109-58, § 1241, 119 Stat. 594, 961 (2006).

<sup>6</sup> *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).

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4. In Opinion No. 489, the Commission approved the Transmission Owners' proposed 100 basis point ROE incentive adder based on the application of the Commission's pre-Order No. 679 standard. This standard, the Commission found, required a showing that the proposed incentive: (i) falls within the range of reasonable returns; and (ii) bears some link or nexus between the incentive requested and the investment being made, i.e., that the incentive is rationally related to the investments being proposed. The Commission, in Opinion No. 489, also found that this standard is consistent with the Commission's new incentive rate policy, as set forth in Order No. 679.

5. In the March 24 Order, the Commission granted rehearing, in part, finding that a pre-approved authorization of a rate incentive for any future transmission projects, without a specific showing justifying the incentive, was inconsistent with the project-by-project review process contemplated by Order No. 679. Accordingly, while the March 24 Order reaffirmed Opinion No. 489 as to existing projects, provided that these projects are completed and come on line as of December 31, 2008, the Commission determined that applicants seeking a rate incentive for any future projects would be required to satisfy the requirements of Order No. 679.<sup>8</sup>

### **Request for Clarification**

6. UI requests clarification that the rate incentives granted in this proceeding were intended to apply to a project currently being constructed, as a joint undertaking, between UI and The Connecticut Light & Power Company (CL&P), between Middletown and Norwalk, Connecticut (M-N Project).<sup>9</sup>

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<sup>7</sup> 18 C.F.R. § 35.35(d). Order No. 679-A. FERC Stats. & Regs. ¶ 61,236 at P 21.

<sup>8</sup> March 24 Order, 122 FERC ¶ 61,265 at P 51.

<sup>9</sup> UI states that construction of the M-N Project began in 2006 and that the project is now 82 percent complete. UI anticipates that construction will be largely completed by December 31, 2008 and that following testing, the project will be placed into service in 2009. The M-N Project consists of a new 234-kV transmission line extending from Middletown to Norwalk, related switching  
(continued...)

7. UI requests clarification that for the reasons outlined below, the M-N Project falls within the December 31, 2008 cut-off date identified by the Commission in the March 24 Order and thus is eligible to receive a rate incentive, without the need for any further showings as prescribed by Order No. 679. In the alternative, UI requests clarification that to the extent application of its requested rate incentive requires findings made under Order No. 679, these findings have already been made by the Commission in Docket No. ER07-653-000, i.e., in the proceeding in which the Commission accepted, in part, UI's request seeking to include, in its rate base, 100 percent of its Construction Work in Progress (CWIP) costs and a 50 basis point ROE incentive applicable to the M-N Project's use of advanced technologies.<sup>10</sup>

8. With respect to its first request, UI asserts that the rationale relied upon by the Commission in the March 24 Order supports the inclusion of the M-N Project in the class of projects eligible to receive a rate incentive without the need for any further showings as required by Order No. 679. UI asserts that in affirming the Transmission Owners' rate incentive requests for the period before the December 31, 2008 cut-off date, the Commission, in the March 24 Order, stated that it would create unnecessary confusion and uncertainty to further review these projects in an Order No. 679 remand proceeding, i.e., that these projects had already been adequately reviewed and approved based on the record developed in this case and had been required to move forward while this case remained pending before the Commission. UI asserts that the M-N Project is such a project. Specifically, UI argues that the M-N Project was a listed project included in ISO-NE's regional transmission expansion plan (RTEP) for 2004, that it was required to move forward while this case remained pending before the Commission, and that it was specifically addressed at hearing.<sup>11</sup>

9. UI also asserts that the two principal objectives identified by the Commission in mandating a cut-off date will not be jeopardized by the inclusion of the M-N Project in the class of projects falling within the period before the cut-off date. UI notes that the Commission's objectives, in this regard, focused only on the need to bring New England's incentive-setting procedures in line, on a

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station and substation facilities, and the rebuilding and modification of an existing 115 kV line. The total estimated cost of the M-N Project is \$1.3 billion, of which UI's estimated share is expected to be as high as \$260 million.

<sup>10</sup> *The United Illuminating Company*, 119 FERC ¶ 61,182 (2007) (UI Incentive Rate Order), *reh'g pending*.

<sup>11</sup> *See* UI request for clarification at 10, citing Exh. No. NETO-23 at 9.

transitional basis, with the procedures applicable to the rest of the country under Order No. 679, and the need to avoid a delegation to ISO-NE of authority to set and adjust incentives in perpetuity.

10. With respect to its second, alternative request, UI requests clarification that if its rate incentive request is subject to review under Order No. 679, this review has already been made by the Commission in the UI Incentive Rate Order. With respect to the Order No. 679 requirement that there be a nexus between the incentive sought and the investment being made, UI asserts that in the UI Incentive Rate Order, the Commission held that UI had demonstrated the requisite nexus in relation to both the 50 basis point ROE incentive at issue in that proceeding and the underlying 100 basis point ROE authorized by the Commission in Opinion No. 489 and the March 24 Order. UI states that the Commission made this finding based on the Order No. 679-A requirement that a requested incentive be examined as a “total package” along with all other requested incentives.

11. UI asserts that the UI Incentive Rate Order also found that the M-N Project satisfies the second requirement established in Order No. 679, i.e., the requirement that the project, when brought on line, will ensure reliability or reduce the cost of delivered power by reducing transmission congestion. UI notes that under Order No. 679-A, an applicant is entitled to a rebuttable presumption with respect to this requirement if a regional planning commission has determined that the project will reduce costs or increase reliability and has approved the project. UI adds that in the UI Incentive Rate Order, the Commission determined that UI was entitled to this presumption based on ISO-NE’s RTEP approvals and authorizations issued by the Connecticut Siting Council.<sup>12</sup>

### **Responsive Pleadings**

12. On May 8, 2008, the Connecticut Department of Public Utility Control, the Connecticut Office of Consumer Counsel, the Maine Public Utilities Commission, the Maine Office of the Public Advocate, the New England Conference of Public Utility Commissioners, and the Attorney General of the State of Connecticut (collectively, the Public Parties) submitted an answer to UI’s request for clarification. In their answer, the Public Parties urge the Commission to deny UI’s requests.

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<sup>12</sup> *Id.* citing UI Incentive Rate Order at P 57.

13. First, the Public Parties dispute UI's assertion that the M-N Project should be treated as an eligible project falling within the period before the December 31, 2008 cut-off date established by the Commission in the March 24 Order. The Public Parties argue that treating the M-N Project as an eligible project would be inconsistent with the Commission's rationale in establishing a cut-off date because this rationale focused on the need to incent the timely completion of ISO-NE's RTEP-approved projects. The Public Parties assert that with the lapse of time, there is a declining nexus between the assumed urgency of a project and the ability of the incentive to bring the project on line on a speedy basis. The Public Parties argue that based on this reasoning, the March 24 Order properly concluded that if a project is not completed and on line by December 31, 2008, the Commission would no longer presume that the incentive produces customer benefits.

14. The Public Parties argue that this rationale is further supported by record evidence, as summarized by the Commission in the March 24 Order. Specifically, the Public Parties note the Commission's summary of witness Schnitzer's testimony that "the need to address reliability limitations in the New England region could lead to higher consumer costs that could be avoided by the timely implementation of projects currently identified in the RTEP."<sup>13</sup> The Public Parties also rely on the following excerpt from witness Schnitzer's rebuttal testimony:

Even assuming that the [transmission] upgrades are likely to be built, time is of the essence. These projects provide benefits to society and the sooner the implementation, the sooner the benefits begin. If an incentive can encourage timely implementation of the RTEP04 projects, and the cost of the incentive is reasonable compared to the benefits, then providing the incentive is reasonable policy. Of course, no one can state with certainty that an incentive will in fact result in earlier implementation of the projects. However, given the critical importance of the RTEP04 upgrades, and the difficulty of implementing these projects, it certainly would be counterproductive for regulators to set returns at levels that do not fully align the customers' interest in timely implementation with shareholder/management interests.[<sup>14</sup>]

15. The Public Parties conclude that because the completion date of the M-N Project has been delayed (the RTEP 2004 specified a 2007 scheduled in-service

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<sup>13</sup> March 24 Order, 122 FERC ¶ 61,265 at P 77.

<sup>14</sup> Rebuttal Testimony of Michael M. Schnitzer on behalf of the Transmission Owners, Exh. No. NETO-23 at 3-12.

date), extension of the cut-off date, as established in the March 24 Order, would not be appropriate because the incentive, if granted, cannot produce a timely benefit for customers.

16. The Public Parties also take issue with UI's alternative request for clarification, i.e., the requested clarification that the M-N Project has already satisfied the requirements of Order No. 679. The Public Parties argue that in the UI Incentive Rate Order, the Commission expressly reserved judgment regarding all issues then pending in this case on rehearing.

17. On May 23, 2008, UI filed an answer to the Public Parties' answer. In response to the Public Parties' argument that the Commission's cut-off date is designed to reward projects implemented on a timely basis, UI asserts that this argument was not relied upon by the Commission in the March 24 Order. UI also challenges, as unsupported, the Public Parties' assertion that the M-N Project, when it comes on line, will not have been completed on a timely basis. UI argues that the fact that the M-N Project will not come on line until 2009 does not negate the reasons for providing incentives for its construction. UI further argues that any such delays are largely attributable to the Connecticut Siting Council approval process, not to factors within UI's control.

18. UI also responds to the Public Parties' argument that the Commission, in the UI Incentive Rate Order, reserved judgment on its then-pending reconsideration of Opinion No. 489. UI argues that this asserted reservation did not address or otherwise alter the Commission's factual finding that UI had met the Order No. 679 criteria for the entire package of incentives requested, including the 100 basis point ROE incentive for new transmission. UI adds that this finding was left in place by the Commission in the March 24 Order.

## **Discussion**

### **A. Procedural Matters**

19. Rule 213(a) of the Commission's Rules of Practice and Procedure prohibits an answer to an answer unless otherwise permitted by the decisional authority.<sup>15</sup> We will accept the answer submitted by UI because it has provided information that assisted us in our decision-making process.

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<sup>15</sup> 18 C.F.R. § 385.213(a) (2008).

## B. Analysis

20. For the reasons discussed below, we clarify that UI, as a co-owner of the M-N Project, is eligible to receive a 100 basis point incentive rate pursuant to Opinion No. 489. We note, first, that the M-N Project has been the subject of extensive scrutiny in numerous proceedings, each of which has demonstrated the importance of this project regarding the enhancement of reliability and the management of congestion in both southwestern Connecticut and the ISO-NE region as a whole.<sup>16</sup>

21. The M-N Project was first approved by ISO-NE in its 2004 RTEP. It has also been approved at the state level by the Connecticut Siting Council. It is a large-budget (\$1.3 billion) phase II project tied to a larger expansion (the Southwest Connecticut Reliability Project), phase I of which has already come on line and is eligible to receive a 100 basis point incentive rate pursuant to the Commission's prior authorizations issued in this proceeding. At the hearing held in this case, witness testimony was presented regarding the need and importance of this phase II expansion.<sup>17</sup> For example, there was testimony that southwestern Connecticut faced a serious deficiency in transmission capability and that the M-N Project, as phase II of the Southwest Connecticut Reliability Project, was a crucial part of the 2004 RTEP's solution to the reliability problems in this region. Opinion No. 489 accordingly provided a 100 basis point adder for the M-N Project and other transmission projects in the RTEP-2004, holding that there was "an undisputed need for the projects to which the proposed adjustment will apply, as evidenced by ISO New England's regional planning process and the analysis made pursuant to this process."<sup>18</sup>

22. The M-N Project has also been the subject of review by the Commission in the UI Incentive Rate Order. In that order, the Commission held that based on the detailed studies and analyses done by ISO-NE and the findings of the Connecticut Siting Council, the M-N Project satisfies the Order No. 679 rebuttable presumption, i.e., a finding that M-N Project will ensure reliability or reduce the cost of delivered power.<sup>19</sup> In approving UI's requested 100 percent CWIP

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<sup>16</sup> See UI Incentive Rate Order, 119 FERC ¶ 61,182 at P 56; *Northeast Utilities Service Company*, 124 FERC ¶ 61,044 (2008) (NU Incentive Rate Order).

<sup>17</sup> See Exh. No. NETO-23 at 9.

<sup>18</sup> Opinion No. 489, 117 FERC ¶ 61,129 at P 107.

<sup>19</sup> UI Incentive Rate Order, 119 FERC ¶ 61,182 at P 56.

incentive, the Commission also found that UI had satisfied Order No. 679's nexus test by demonstrating that its total package of incentives was tailored to address the risks or challenges it faced. In making this finding, the Commission considered the interrelationship between the CWIP incentive and the 100 basis point ROE incentive granted in Opinion No. 489. The Commission found:

UI has shown *inter alia* that its Project faces unique challenges relating to cash flow, possible deterioration of its credit quality, potential increased borrowing costs, the need to assume significant new short- and long-term debt and regulatory and zoning uncertainties. Indeed, UI has demonstrated that its project faces risk and challenges that are above and beyond those we relied upon in Opinion No. 489. Thus, in examining the total package of incentives, we find that UI should be granted both the Opinion No. 489 enhanced ROE and the 100 percent CWIP recovery requested in the instant proceeding.<sup>20</sup>

23. In addition, the Commission has made findings regarding the M-N Project in a proceeding filed by UI's project co-sponsor, Northeast Utilities Service Company (NU), CL&P's parent corporation.<sup>21</sup> In that proceeding, the Commission granted a requested waiver of the March 24 Order's cut-off date, based on the Commission's findings that the M-N Project will be substantially completed by December 31, 2008, that it will come on line shortly thereafter, and that the regional benefits attributable to the project will not be diminished as a result.<sup>22</sup> As such, the Commission found that NU, as a co-owner of the M-N Project, is eligible to receive the Opinion No. 489 100 basis point incentive rate for its interest in the M-N Project.

24. The rationale supporting our grant of NU's waiver request applies equally here to UI, its project co-sponsor. In both cases, the project at issue is one and the same, with the same regional benefits and the same expected in-service date in early 2009. If we were to deny UI the incentive at this late stage, when it has substantially completed construction of the project, such a denial could create regulatory uncertainty with project developers and could deter the development of future projects.

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<sup>20</sup> *Id.* P 69. The Commission also pointed out that UI's construction costs are approximately 170 percent of its plant in service. *Id.* P 67.

<sup>21</sup> NU Incentive Rate Order, 124 FERC ¶ 61,044 at P 58.

<sup>22</sup> *Id.* at P 58.

25. The Public Parties argue that because the completion date of the M-N Project has been delayed beyond the in-service date contemplated by the 2004 RTEP, an incentive rate cannot produce a timely benefit for customers. They also contend that the Commission's rationale in establishing a cut-off date focused on the need to incent the timely completion of ISO-NE's RTEP-approved projects. However, the Public Parties made substantially the same arguments in their protest of NU's waiver request, which the Commission rejected in the NU Incentive Rate Order.<sup>23</sup> As we found in that order, we did not establish the cut-off date to induce timely or quicker completion of projects. We selected the date as a reasonable approximation of when we thought the 2004 RTEP projects would be completed and in service. The fact the M-N project will not go into service until shortly after the cut-off date because of the additional time needed for testing and commissioning does not diminish the substantial regional benefits provided by the project.

26. The Commission concludes that UI, like NU, should be granted relief from the December 31, 2008 cut-off date. The Commission therefore finds that UI's interest in the M-N Project is eligible for the 100 basis point transmission incentive granted by Opinion No. 489. As such, we need not further consider UI's alternative rationales supporting its requested 100 basis point ROE adder, including its request that we grant the ROE adder pursuant to Order No. 679.

The Commission orders:

UI's request for clarification is hereby granted, as discussed in the body of this order.

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

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>23</sup> NU Incentive Rate Order, 124 FERC ¶ 61,044 at P 58 .

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(Issued August 4, 2008)

KELLY, Commissioner, *dissenting*:

Today's order clarifies that United Illuminating (UI), as co-owner of the Middletown to-Norwalk Project, is eligible to receive a 100 basis point ROE incentive pursuant to *Opinion No. 489*, notwithstanding the December 31, 2008 cutoff date imposed in the March 24, 2008 rehearing of *Opinion No. 489*.<sup>1</sup>

The majority is persuaded in part because the Middletown-to-Norwalk Project "has been the subject of extensive scrutiny in numerous proceedings," each of which the majority asserts demonstrates the Project's reliability benefits and management of congestion. In particular, the majority cites for support the May 2007 *United Illuminating Co.* order in which it found that the Middletown-to-Norwalk Project satisfies the nexus test set forth in Order No. 679-A and granted incentives beyond those received under *Opinion No. 489*.<sup>2</sup> As I noted in my recent

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<sup>1</sup> *Bangor Hydro-Elec. Co.*, Opinion No. 489, 117 FERC ¶ 61,129 (2006) (Com'r Kelly, dissenting), *order on rehearing*, 122 FERC ¶ 61,256 (2008) (Com'r Kelly, dissenting).

<sup>2</sup> *The United Illuminating Co.*, 119 FERC ¶ 61,182 (2007) (Com'rs Kelly and Wellinghoff, dissenting).

dissent in yet another order on which the majority relies today<sup>3</sup>, several parties have filed for rehearing of the May 2007 order, and I believe that today's order inappropriately prejudices the outcome of this pending rehearing request.

Finally, as I noted in my dissents in both *Opinion No. 489* and the March 24, 2008 order on rehearing, I do not agree that approval of the 100 basis point ROE incentive was consistent with our general policy on incentive rates. For the reasons set forth in these dissents, I continue to believe that approving the incentive is arbitrary and capricious.

For these reasons, I respectfully dissent from today's order.

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Suedeem G. Kelly

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<sup>3</sup> *Northeast Utilities Service Company*, 124 FERC ¶ 61,044 (July 17, 2008) (Com'rs Kelly and Wellinghoff, dissenting).

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(Issued August 4, 2008)

WELLINGHOFF, Commissioner, dissenting:

In Opinion No. 489, the Commission approved the ROE Filing Parties' request for a 100 basis point incentive ROE adder for all new transmission investment in New England. One project covered by that action is the Middletown-to-Norwalk Project being constructed as a joint undertaking by United Illuminating and Northeast Utilities. In today's order, the majority clarifies that United Illuminating, as a co-owner of the Middletown-to-Norwalk Project, is eligible to receive a 100 basis point incentive ROE adder pursuant to Opinion No. 489, despite the December 31, 2008 in-service cut-off date that the Commission established in its order on rehearing of Opinion No. 489.

I dissented from Opinion No. 489. I also dissented from two other orders on which the majority relies today, in which the Commission granted incentives to each of United Illuminating and Northeast Utilities in connection with their investment in the Middletown-to-Norwalk Project. Consistent with the concerns I expressed in those prior statements, I respectfully dissent from today's order.

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Jon Wellinghoff  
Commissioner