



Federal Energy Regulatory Commission
December 15, 2016
Open Commission Meeting
Staff Presentation
Item G-1

"Good morning, Mr. Chairman and Commissioners.

"The draft Notice of Inquiry seeks comment regarding how to address any double recovery of income tax costs resulting from the Commission's current income tax allowance and rate of return policies.

"The draft follows the July 1, 2016 decision of the Court of Appeals for the District of Columbia Circuit in *United Airlines v. FERC*.¹ The underlying proceeding to the D.C. Circuit's decision began when an oil pipeline filed to increase its rates and the Commission permitted the pipeline to receive an income tax allowance. As a partnership entity, the pipeline did not incur entity-level taxes, but instead its tax liability flowed through to the partner-investors. The Commission applied its policy of allowing partnerships to recover an income tax allowance provided that the owners can show an actual or potential income tax liability to be paid on income from the regulated assets.

"Shipper-parties to the proceeding argued that permitting a partnership entity with pass-through taxation to receive an income tax allowance results in a double recovery. The shippers asserted that the Commission's current method for determining the entity's return on equity already includes the cash flow necessary to cover the investors' income tax liabilities and to earn a sufficient after-tax return. Therefore, the shippers claimed that allowing partnership entities to recover a separate income tax allowance results in a double recovery.

"In its July decision on appeal, the D.C. Circuit found the shippers' double-recovery argument persuasive and remanded the underlying cases as to the income tax allowance issue. The Court held that the Commission failed to demonstrate that there is no double-recovery of taxes for partnership entities receiving an income tax allowance in addition to a return on equity determined by the discounted cash flow methodology. The Court instructed the Commission to consider mechanisms for which the Commission can demonstrate that there is no double recovery of partnership income tax costs.

"In light of the *United Airlines* decision, the draft Notice of Inquiry seeks comment regarding any proposed methods to adjust the Commission's income tax allowance or rate of return policies to resolve any double recovery of tax costs. The draft seeks broad industry input, recognizing that the impact of the Commission's income tax allowance and rate of return policies extend well beyond the particular parties to the *United Airlines* proceeding. The draft requests that commenters propose methods to allow regulated entities to earn a sufficient return that do not result in a double recovery of investor-level tax costs for partnerships or similar pass-through entities.

"This concludes our presentation. We are happy to answer any questions you may have."

¹ 827 F.3d 122 (D.C. Cir. 2016).