

139 FERC ¶ 61,143
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Virginia Electric and Power Company

Docket No. ER08-1207-002

ORDER DENYING REHEARING

(Issued May 22, 2012)

1. In an order issued on August 29, 2008, the Commission granted a request for Order No. 679¹ transmission rate incentives by Virginia Electric and Power Company (VEPCO) for a return on equity (ROE) adder to be added to its base ROE for eleven transmission enhancement projects.² The Public Service Commission of Maryland (Maryland Commission), the North Carolina Utilities Commission (North Carolina Commission), and Joint Customers³ filed requests for rehearing of the August 29 order. In this order, the Commission denies rehearing, as discussed below.

I. Background

2. On July 1, 2008, as amended on July 2, 2008, VEPCO filed proposed tariff sheets with the Commission, pursuant to section 205 of the Federal Power Act (FPA),⁴ for inclusion within the Open Access Transmission Tariff (OATT) administered by PJM

¹ *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).

² *Virginia Electric and Power Co.*, 124 FERC ¶ 61,207 (2008) (August 29 Order).

³ The Joint Customers include: North Carolina Electric Membership Corporation, Old Dominion Electric Cooperative, the PJM Industrial Customer Coalition, Blue Ridge Power Agency, Maryland Office of People's Counsel, New Jersey Division of Rate Counsel, and the Consumer Advocate Division of the Public Service Commission of West Virginia.

⁴ 16 U.S.C. § 824d (2006).

Interconnection, L.L.C. (PJM). The tariff sheets sought to implement ROE transmission rate incentives pursuant to Order No. 679, the final rule through which the Commission implemented section 219 of the FPA.⁵ Specifically, VEPCO requested that an ROE incentive of 150 basis points be added to its base ROE for four transmission projects and an ROE incentive of 125 basis points for an additional seven projects. The projects were to be placed into service between 2008 and 2012 at a cost of approximately \$877 million, and consisted of various upgrades to its system, including: extending, rebuilding, or reconductoring existing transmission lines, building new lines, upgrading or reconfiguring substations, and replacing transformers at a number of substations. VEPCO requested an effective date of September 1, 2008.

3. On August 29, 2008, the Commission issued an order granting the requested incentives. The August 29 Order found that the projects either satisfied the requirements for a rebuttable presumption established in Order No. 679 or were otherwise shown to reduce congestion and/or ensure reliability, as required by FPA section 219.⁶ In addition, the Commission found that VEPCO was undertaking considerable risks and challenges to develop and construct the projects. The Commission further found that VEPCO had demonstrated that the projects were not routine and, thus, that there was a nexus between its risks and challenges and the requested incentives, both as a package and for each individual project.⁷

4. On September 29, 2008, the Maryland Commission, the North Carolina Commission, and Joint Customers filed requests for rehearing of the August 29 Order. Out of the eleven projects that were granted incentives, the requests for rehearing only address seven projects; of these, six were granted a 125 basis point ROE adder and the seventh received a 150 basis point ROE adder. The incentives granted to four projects are not being challenged on rehearing.⁸

5. On October 14, 2008, VEPCO filed an answer to the requests for rehearing.

⁵ 16 U.S.C. § 824s (2006).

⁶ August 29 Order at PP 32-43.

⁷ *Id.* P 48.

⁸ The cost of the seven projects for which rehearing was requested is approximately \$354 million. The cost of the four projects for which rehearing was not requested is approximately \$523 million.

II. Discussion

A. Procedural Matters

6. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2010), prohibits an answer to a request for rehearing. Accordingly, we reject VEPCO's answer to the rehearing requests.

B. Section 219 and Nexus Test Demonstration

1. Requests for Rehearing

7. Joint Customers request rehearing on the basis that the Commission failed to address facts raised in the protests and that the record does not support conclusions in the order. Joint Customers assert that the order was a rubber stamp of the requested incentives with general statements that the projects are needed for reliability and are not routine; they analyze the Commission's findings on each project and argue that the order's justifications for each are inadequate. Joint Customers also argue that the order failed to adequately explain the departure from prior precedent disallowing incentives for projects that are already completed or almost completed and precedent holding that formula rates are an incentive of sorts, such that ROE adders may be reduced to reflect the cash flow benefits from the formula rates. In addition, Joint Customers claim that the order: (1) fails to set forth clear criteria to establish that a project is non-routine and satisfies the nexus test, and fails to show a "reasoned path" from the facts to the decision; (2) is arbitrary and capricious because it does not distinguish between routine and non-routine projects; (3) fails to address parties' request for an evidentiary hearing; and (4) fails to adequately address advanced technologies.

8. The North Carolina Commission asserts that the Commission erred by: (1) granting transmission incentives for projects that were not economically efficient or that may have had less expensive alternatives; (2) granting incentives for projects upon which construction had already commenced, because VEPCO did not need incentives to pursue those projects; and (3) approving incentives for a project which had not yet completed a regional planning process, which would determine if there were a more economically efficient alternative. The North Carolina Commission concludes that these errors will result in unjust and unreasonable rates and cause economic harm to consumers.

9. The Maryland Commission supports Joint Customers' rehearing request and argues generally that the Commission did not properly apply the nexus test to the projects. It asserts that the Commission is taking an *ad hoc* approach to transmission incentive cases, without consistency, and that the Commission erred by not responding to the well-founded objections of the protesters that the projects were routine. In addition, the Maryland Commission argues that the issues raised by protesters should have been

considered in an evidentiary hearing, rather than dismissed summarily. It specifically raises two issues: (1) the Commission did not adopt specific standards to determine whether a project is routine and whether there is a nexus between the project and the requested incentive; and (2) the Commission erred by failing to explain the extent to which advanced technologies played a role in its determination on incentives.

2. Commission Determination

10. As discussed below, we deny the requests for rehearing.

11. We recognize that the requests for rehearing raise significant issues about the incentives granted in the August 29 Order. Indeed, it can be argued that if a similar request for incentives were submitted to the Commission at this time, the result might be different in light of the Commission's evolving policy with respect to application of the Order No. 679 nexus test. As relevant here, in December 2010 the Commission announced that an applicant may demonstrate that several individual projects are appropriately considered as a single overall project based on their characteristics or combined purpose, and seek incentives for that single overall project.⁹ The Commission also stated that if an applicant is unable to satisfy that criterion, then the applicant may still file a single application seeking incentives for numerous individual and unconnected projects, but the Commission will consider each individual project separately in applying the nexus test and determining whether each project is routine or non-routine.¹⁰ Thus, the Commission found that it would no longer apply the nexus test on an aggregated basis to individual and unconnected projects simply because an applicant sought incentives for those projects in a single application. In announcing this policy evolution, however, the Commission stated that it would apply this revised policy only prospectively.¹¹

12. In the August 29 Order, the Commission applied the Order No. 679 nexus test consistent with its clear practice at that time, which allowed for application of the nexus test on an aggregated basis to individual and unconnected projects. As noted above, the Commission determined, in part on that basis, that the record was sufficient to justify granting the requested incentives. In light of the findings in the August 29 Order and the issues raised on rehearing with respect to whether the Commission applied the nexus test appropriately, the Commission finds that on balance it is more appropriate to deny rehearing. We reach this conclusion based on the record on which the Commission relied

⁹ *PJM Interconnection, Inc.*, 133 FERC ¶ 61,273, at P 45 (2010); *Oklahoma Gas & Electric Co.*, 133 FERC ¶ 61,274, at P 39 (2010).

¹⁰ *Id.*

¹¹ *Id.*

in the August 29 Order when it applied the nexus test consistent with then-existing precedent.¹² We also note the potential inequity to VEPCO of rescinding the previously granted incentives at this time, long after VEPCO relied on those incentives in proceeding with the projects in question.¹³ In addition, we find that granting rehearing at this time would contribute to unnecessary confusion and uncertainty,¹⁴ and that the regulatory uncertainty resulting from such action is likely to cause greater harm than allowing these incentives previously granted to VEPCO to remain in place.

13. We also find that the other arguments raised on rehearing, many of which the Commission has rejected in other cases involving requests for incentives pursuant to Order No. 679, provide insufficient grounds to rescind the incentives at issue here.

14. Contrary to Joint Customers' argument, the Commission has distinguished between projects that are ineligible for incentives under Order No. 679 because they are already complete at the time that an application for incentives is filed,¹⁵ and projects that remain eligible for such incentives even if they are nearly complete.¹⁶ The projects at issue here fall into the latter category because they were not complete at the time that VEPCO filed its application for incentives. Similarly, the Commission has previously rejected the argument that an applicant's use of formula rates necessarily warrants a

¹² The Commission also addressed advanced technologies in the August 29 Order. *Id.* at PP 124-127. We find that discussion to be consistent with the Commission's clear practice at that time, and we deny the requests for rehearing on this issue.

¹³ *Accord Northeast Utilities Service Co.*, 124 FERC ¶ 61,044, at P 62 (2008) (recognizing that denial of the incentive at a late stage could create regulatory uncertainty with project developers and may deter the development of future projects).

¹⁴ *See Bangor Hydro-Electric Co.*, 122 FERC ¶ 61,265, at P 70 (2008) ("Remanding this case back to the Presiding Judge under these circumstances for the presentation of project-by-project evidence would also create unnecessary confusion and uncertainty concerning the availability of an ROE incentive for a number of important projects included in the 2004 [ISO New England regional transmission plan], many of which were required to move forward while this case was pending before the Commission."), *aff'd sub nom. Connecticut Dep't of Pub. Util. Control v. FERC*, 593 F.3d 30, 37 (D.C. Cir. 2010) (noting the Commission's statement that holding a new hearing "would also create unnecessary confusion and uncertainty").

¹⁵ *See, e.g., Commonwealth Edison Co.*, 122 FERC ¶ 61,037, at PP 30-37 (2008).

¹⁶ *See, e.g., Northeast Utilities Serv. Co.*, 126 FERC ¶ 61,052, at P 26 (2009).

reduction of requested incentives,¹⁷ contrary to Joint Customers' argument that the August 29 Order is inconsistent with Commission precedent on that issue.

15. The North Carolina Commission asserts that the Commission erred by approving incentives for a project which had not yet completed a regional planning process. In Order No. 679, however, the Commission did not make such approval a prerequisite for incentives.¹⁸ For this reason, we reject the North Carolina Commission's argument.

16. Finally, Joint Customers argue that the August 29 Order fails to address parties' request for an evidentiary hearing. The Commission need not conduct an evidentiary hearing when there are no disputed issues of material fact and, even where there are disputed issues, the Commission need not conduct a hearing if those issues may be adequately resolve on the written record.¹⁹ In the August 29 Order, the Commission found that the record was sufficient to justify granting the requested incentives. As discussed above, we accept that previous finding; therefore, an evidentiary hearing is unnecessary.

17. Accordingly, we deny the requests for rehearing.

The Commission orders:

The requests for rehearing are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁷ See, e.g., *Northeast Utilities Serv. Co.*, 125 FERC ¶ 61,183, at P 100 (2008).

¹⁸ Order No. 679 established a rebuttable presumption by which approval in a qualifying regional transmission planning process may be used to demonstrate that an applicant has satisfied certain requirements of FPA section 219. Projects may still be eligible for incentives even without that rebuttable presumption if an applicant can otherwise make the required demonstration. Order No. 679 at PP 57-58.

¹⁹ *Moreau v. FERC*, 982 F.2d 556, at 568 (D.C. Cir. 1993) (citations omitted).