127 FERC ¶ 61,301
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Commonwealth Edison Company and
Commonwealth Edison Company of Indiana

Docket No. EL08-78-001

ORDER DENYING REHEARING

(Issued June 26, 2009)

1. On December 4, 2008, the Commission issued an order denying a petition for declaratory order filed by Commonwealth Edison Company, on behalf of itself and its wholly-owned subsidiary, Commonwealth Edison of Indiana, Inc. (collectively, ComEd).[1] ComEd had sought incentive rate treatments for a number of transmission projects pursuant to section 219 of the Federal Power Act[2] (FPA) and Order No. 679.[3] ComEd requested rehearing of the denial of its petition for declaratory order with respect to one of the transmission projects, involving two Static VAR Compensators (SVCs). For the reasons discussed below, we will deny ComEd's request for rehearing.

I. Background

2. ComEd owns over 91,000 miles of transmission and distribution lines in Northern Illinois and provides delivered electric power to over 3.8 million customers, while not

[1] *Commonwealth Edison Co. and Commonwealth Edison Co. of Indiana*, 125 FERC ¶ 61,250 (2008) (December 4 Order).

[2] 16 U.S.C. § 824s (2006).

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

owning any generating facilities. On May 1, 2004, ComEd transferred operational control of its transmission facilities to PJM Interconnection, L.L.C. (PJM).

3. PJM is responsible for planning the enhancement and expansion of the PJM transmission system to ensure reliability. It identifies transmission system upgrades and enhancements necessary to ensure reliability through the PJM Regional Transmission Expansion Plan (RTEP).

4. ComEd requested incentive rate treatment for 22 transmission projects, which included SVCs, capacitor installations, transformer installations, and installation of transmission line upgrades and circuit breakers. All of the projects were approved by the PJM Board of Managers as baseline upgrades through the RTEP process. The SVC Project involved two 300 megavolt ampere reactive (MVAR) SVCs at the Elmhurst substation designed to meet dynamic reactive power requirements.

5. ComEd requested an incentive-based return on equity (ROE) adder of 150 basis points for its investment in each of the 22 projects. Additionally, ComEd requested an advanced transmission technology incentive ROE adder of 50 basis points to be applied to its investment in the two SVCs.

II. December 4 Order

6. In the Energy Policy Act of 2005 (EPAct 2005),[4] Congress addressed incentive-based rate treatments for new transmission construction. Specifically, section 1241 of EPAct 2005 added a new section 219 to the FPA directing the Commission to establish, by rule, incentive-based (including performance-based) rate treatments for electric transmission. The Commission issued Order No. 679, which set forth processes by which a public utility could seek transmission rate incentives under section 219.

7. Order No. 679 provided that a public utility may file a petition for declaratory order or FPA section 205 filing to obtain incentive rate treatment for transmission infrastructure investment that satisfies the requirements of FPA section 219. The applicant must demonstrate that the facilities for which it seeks incentives either ensure reliability or reduce the cost of delivered power by reducing transmission congestion.[5] In addition, an applicant must demonstrate that there is a nexus between the incentive sought for a particular project and the investment being made. In Order No. 679-A, the Commission clarified that the nexus test is met when an applicant demonstrates that the

[4] Pub. L. No. 109-58, 119 Stat. 594, section 1241.

[5] *See* 18 C.F.R. § 35.35(i) (2008).

total package of incentives requested is "tailored to address the demonstrable risks or challenges faced by the applicant."[6]

8. The Commission found in the December 4 Order that ComEd's projects satisfied the requirements of section 219 to ensure reliability or reduce congestion but that ComEd had not met the nexus test. Specifically, the Commission found that ComEd had not demonstrated how the proposed projects present risks or challenges to warrant an incentive ROE and, therefore, ComEd did not meet the nexus test. The Commission explained that ComEd had not presented evidence regarding the scope or effect of the projects, and focused primarily on financing challenges; there was no evidence of technical or siting challenges, long lead times, or regulatory or political risks facing the projects.

9. The Commission found, based on the record in the proceeding, that the projects were "activities undertaken in the ordinary course of business in keeping with good utility management practices."[7] The Commission explained that, in Order No. 679, it found that such activities were not the type of projects that typically warrant incentives,[8] and noted that an applicant seeking incentives for such projects must show that its project faces risks and challenges or provides sufficient benefits to warrant incentive rate treatment. However, the Commission held that ComEd had not shown how its performance of the activities presented risks or challenges to warrant incentives. The Commission noted that some of ComEd's investments appeared to be maintenance activities that pose no special risks or challenges,[9] and stated that the status of the projects as baseline projects in PJM's RTEP did not change this analysis.[10] The Commission reiterated that, while PJM's analysis is significant in the Commission's determination of whether a project meets the nexus test, not all RTEP baseline projects automatically qualify for incentive rate treatment. The Commission explained that it must examine such factors as the scope, the effect, and the risks or challenges faced by

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[6] Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 40.

[7] December 4 Order, 125 FERC ¶ 61,250 at P 37.

[8] Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 27; Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 23.

[9] December 4 Order, 125 FERC ¶ 61,250 at P 37 (referring to capacitors, auto-transformers, and line upgrades).

[10] *Id*. (citing *Commonwealth Edison Co. and Commonwealth Edison Co. of Indiana*, 124 FERC ¶ 61,231, at P 18 (2008)).

the projects and it found, based on these factors, that ComEd had not demonstrated a nexus between the incentives requested and the proposed projects.

10. The Commission also denied ComEd's request for a 50 basis point incentive ROE adder for the use of advanced transmission technology for its SVC Project. The December 4 Order distinguished ComEd's project from the SVCs discussed in *Trans-Allegheny Interstate Line Co.*,[11] where the Commission stated that TrAILCo's SVC might represent the type of project eligible for incentive treatment for the use of advanced transmission technology. Although the project in *TrAILCo* represented three of the advanced transmission technologies defined by Congress in section 1223 of EPAct 2005, the Commission explained in the December 4 Order that:

> we are required under section 1223 of EPAct 2005 to "encourage, as appropriate" the deployment of such technologies, and that use of such technologies does not automatically warrant the granting of incentives. The Commission's evaluations of risks, challenges, and benefits associated with the proposed use of advanced technologies must be a dynamic process that takes into account technological improvements and evolving practices in the industry.[12]

11. The Commission noted that SVC technology itself is not new,[13] but that the SVC employed in *TrAILCo* was one of the largest installations in the world (with a capacity of 675 MVAR), and that it was to be the largest unit installed in the United States to date. The Commission stated that ComEd did not identify any unusual characteristics of its SVC Project that warranted incentive treatment, distinguishing ComEd's proposed project as much smaller in size (two 300 MVAR SVCs) and scope (resulting in little or no increase in dynamic reactive support) than the *TrAILCO* SVC and not appearing to present unusual risks and challenges. Thus, the Commission denied ComEd's request for an ROE adder for the use of advanced transmission technology.

III. Request for Rehearing

12. ComEd requests rehearing of the Commission's denial of incentive rate treatment for the SVC installation. ComEd asserts that the Commission erred both in finding that the SVC Project did not meet the nexus test, and thus denying its request for a 150 basis

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[11] 119 FERC ¶ 61,219, *order on reh'g*, 121 FERC ¶ 61,009 (2007) (*TrAILCo*).

[12] December 4 Order, 125 FERC ¶ 61,250 at P 42 (footnote omitted).

[13] *Id.* P 43, citing *TrAILCo*, 119 FERC ¶ 61,219 at P 19.

point incentive ROE adder, and in denying a 50 basis point adder for the use of advanced transmission technology.

13. ComEd submits with its request for rehearing a supplemental affidavit providing additional evidence to support incentive rate treatment for the SVC Project. The supplemental affidavit provides a detailed description of the project and presents information on risks and challenges. ComEd argues that, "[f]actoring in the originally offered evidence as well as the supplemental evidence, the Commission should conclude that the SVC Project does pose significant risks, challenges, and benefits that make incentive treatment appropriate."[14]

IV. Discussion

A. Procedural Matters

14. We reject as untimely the new affidavit which ComEd includes in its request for rehearing. Parties are not permitted to introduce new evidence for the first time on rehearing since such practice would allow an impermissible moving target, and would frustrate needed administrative finality.[15] Further, ComEd provides no reason why its new evidence could not have been included in its initial petition in this case. Accordingly, we reject ComEd's request to introduce into the record at this late juncture the new affidavit contained in the rehearing request. For the same reason, we also reject those portions of its rehearing request that contain arguments and factual claims that are based on the rejected affidavit.

15. As discussed below, we find that, even if we were to entertain the new evidence, we would deny rehearing on the merits.

B. ROE Incentive Adder

16. The Commission denies rehearing with respect to ComEd's request for a 150 basis point adder for the SVC Project. We continue to find that, based on the record in this case, the SVC Project represents activities undertaken in the ordinary course of business in keeping with good utility management practices.[16] We have clarified that an applicant

[14] Request for Rehearing at 3.

[15] *PPL Electric Utilities Corp*., 124 FERC ¶ 61,229, at P 7 (2008); *TransCanada Power Marketing Ltd*. v. *ISO New England Inc*., 123 FERC ¶ 61,149, at P 22 (2008); *New York Independent System Operator, Inc*., 112 FERC ¶ 61,283, at P 35, n.20 (2005).

[16] December 4 Order, 125 FERC ¶ 61,250 at P 37.

seeking such incentives must show that its project faces risks and challenges or provides sufficient benefits to warrant incentive rate treatment.[17] Based on the facts of this case, we find that the SVC Project does not present risks that exceed the normal risks undertaken by a utility. As discussed above, we reject the new evidence ComEd submitted with its rehearing request. Nevertheless, even if we were to consider the new evidence, we find that it does not overcome the finding in the December 4 Order that ComEd failed to demonstrate a nexus between the incentive sought and the investment in the SVC Project.

17. To determine whether a project is non-routine and whether it passes the nexus test, the Commission has stated that we will consider all relevant factors presented by the applicant, including the scope, effect, risks and challenges the project will face.[18] In an attempt to strengthen its case for meeting the nexus test, ComEd seeks in its request for rehearing to compare the SVC Project to the Black Oak Project in *TrAILCo* – which received incentive treatment – because the two installations have a similar MVAR capacity.[19] ComEd states that "[t]he disparate treatment of facilities on the two systems is unduly discriminatory and not consistent with the Federal Power Act."[20]

18. We disagree. TrAILCo supported its request for incentives by describing significant technological and regulatory risks and including a detailed cash flow analysis demonstrating that "an incentive ROE is essential to maintain financial integrity and investment-grade credit ratings."[21] ComEd, on the other hand, did not demonstrate how its project presented risks or challenges warranting an incentive ROE. ComEd did not present evidence regarding scope or effect, nor was there evidence of technical or siting challenges, long lead times or political or regulatory risks.[22]

19. Moreover, while the Black Oak unit was needed "to enhance the ability to transmit energy on the Black Oak-Bedington 500 kV transmission line and alleviate the effects of

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[17] *Id*. *See also Baltimore Gas & Electric Co.*, 120 FERC ¶ 61,084, at P 55 (2007) (*BG&E*).

[18] *BG&E*, 120 FERC ¶ 61,084.

[19] Request for Rehearing at 7.

[20] *Id.*

[21] *TrAILCo*, 119 FERC ¶ 61,219 at P 16.

[22] December 4 Order, 125 FERC ¶ 61,250 at P 36.

the loss of the Pruntytown-Mt. Storm 500 kV line,"[23] the ComEd SVC Project is replacing an aging facility, and its benefits are local in nature. The SVC Project serves to provide benefits concentrated in its service area by replacing the aging Zion synchronous condensers, which have become difficult and expensive to operate.[24] In contrast, TrAILCo's SVC was installed in an area that previously had no reactive power support, and where the SVC would support the reliable operation of two 500 kV transmission lines by alleviating an existing bottleneck "on one of the most limiting facilities for east-to-west transfer in PJM."[25]

20. Further, while the Black Oak unit faced several risks such as complexities related to procuring and installing the largest SVC unit in the country, [26] the need to obtain state siting approval, and an expedited timeline for putting the unit in-service,[27] ComEd does not face any of these risks. Thus, we reaffirm our conclusion that ComEd's SVC installation has been "undertaken in the ordinary course of business, in keeping with good utility management practices."[28]

21. Even if we were to consider the new evidence that ComEd seeks to introduce on rehearing, we would not alter our earlier determination. On rehearing, ComEd asserts that the project faces the following risks and challenges: excavations for foundations and trench necessary because of the site's location on a landfill; the removal of a 10-foot hill and the construction of another detention pond for storm water runoff; noise mitigation issues; and electrical risks and challenges.[29] ComEd also states that the SVC Project faces risks from being one the first SVCs that will be installed on the ComEd system. While we do not dismiss these challenges that ComEd will face, we nevertheless find that

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[23] *TrAILCo*, 119 FERC ¶ 61,219 at P 14.

[24] ComEd July 18, 2008 Petition, Attachment A at 9.

[25] *TrAILCo*, 119 FERC ¶ 61,219 at P 19.

[26] TrAILCo's single SVC has a dynamic range of 675 MVAR that goes from negative 100 MVAR to positive 575 MVAR which can provide both inductive and capacitive support, whereas each of the ComEd SVC units has a dynamic range of only 300 MVAR, going from zero MVAR to positive 300 MVAR, and provides only capacitive support.

[27] *TrAILCo*, 119 FERC ¶ 61,219 at P 17-19.

[28] December 4 Order, 125 FERC ¶ 61,250 at P 37.

[29] Request for Rehearing at 10-11.

they do not exceed the normal risks and challenges undertaken by a utility in keeping with good utility management practices. The choice to locate the substation at Elmhurst and tailor the installation to ComEd's transmission system represents activities carried out in the ordinary course of business.

22. For all the reasons discussed above, the Commission denies ComEd's request for rehearing with respect to the 150 basis point ROE adder for the SVC Project.

C. Advanced Transmission Technology Adder

23. ComEd argues that the Commission erred in denying its request for a 50 basis point ROE incentive adder for the use of advanced transmission technology for the SVC Project. It asserts that the SVC Project represents four of the technologies defined as advanced transmission technologies in section 1223 of EPAct 2005:[30] (1) an optimized transmission line configuration; (2) a flexible AC transmission system; (3) power electronics; and (4) modular equipment.[31] ComEd claims that, while TrAILCo did not seek advanced technology incentives for its Black Oak SVC, the Commission still found that the project represented advanced technologies, the same technologies that are found in ComEd's SVC Project.

24. In response to the Commission's statement that the evaluation of the use of advanced technologies is a dynamic process that takes into account technological improvements and evolving practices in the industry, ComEd asserts that, whereas ten years ago the Zion synchronous condensers were the most cost-effective means of providing dynamic reactive power on its system, today "SVCs represent the next stage of implementing technology" to meet that need.[32] It states that the SVC Project represents an efficient and progressive form of technology that will increase operational and energy efficiency, and argues that, although SVC technology has been used elsewhere for years, the benefits that its SVC Project will bring warrant incentive treatment.

25. As the Commission noted in the December 4 Order, the use of advanced transmission technologies listed in section 1223 of EPAct 2005 does not automatically

[30] Pub. L. No. 109-58, § 1223, 119 Stat. 594, 953 (2005).

[31] Request for Rehearing at 12.

[32] *Id*. at 13.

warrant the granting of incentives.[33] Indeed, in a recent order, the Commission reaffirmed and further explained this point:[34]

> [S]ection 1223 requires the Commission to "encourage, as appropriate" the deployment of advanced transmission technologies. That directive expressly calls for the Commission to exercise discretion in identifying where and how it is appropriate to incentivize technologies that satisfy the standard set forth in the statute. In fulfilling that responsibility, the Commission recognized in Order No. 679 that advanced technologies will continually evolve.[35] Similarly, we have explained that in reviewing requests for separate incentive ROE adders for advanced technology, the Commission reviews record evidence to decide if the proposed technology warrants a separate adder because it reflects a new or innovative domestic use of the technology that will improve reliability, reduce congestion, or improve efficiency.[36]

26. In discussing the complexities faced in its SVC project, ComEd states that it will need to procure technical training on how to operate and maintain the SVC units. Additionally, ComEd suggests that its decision to replace the Zion synchronous condensers with SVCs is implementing the next evolution in industry practices. However, ComEd acknowledges that SVC technology is not new, and ComEd has not otherwise demonstrated that it is appropriate for the Commission to grant an advanced technology incentive ROE adder for the company's proposed use of that technology.

27. The Commission finds that the arguments presented by ComEd on rehearing do not alter our previous determination that the SVC Project does not merit incentive treatment for the use of an advanced transmission technology. Accordingly, we deny

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[33] December 4 Order, 125 FERC ¶ 61,250 at P 42, citing *The Nevada Hydro Co., Inc.*, 122 FERC ¶ 61,272, at P 84-85 (2008).

[34] *NSTAR Electric Co.*, 127 FERC ¶ 61,052 at P 27 (2009) (*NSTAR*).

[35] *Citing* Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 290.

[36] *Citing The United Illuminating Co.*, 126 FERC ¶ 61,043, at P 14 (2009). The *NSTAR* order further notes that the Commission has also explained how its consideration of requests for such separate advanced technology adders relates to its consideration of issues related to advanced technologies as part of the overall nexus analysis required by Order No. 679. [*NSTAR*, 127 FERC ¶ 61,052 at P 27 & n.52], citing, *e.g.*, *Tallgrass Transmission, LLC*, 125 FERC ¶ 61,248, at P 54-55, 59-60 (2008).

ComEd's request for rehearing on the denial of a 50 basis point adder for the use of advanced technology for its SVC Project.

The Commission orders:

ComEd's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Moeller dissenting with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
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Commonwealth Edison Company of Indiana

Docket No. EL08-78-000

(Issued June 26, 2009)

MOELLER, Commissioner, *dissenting*:

While "new" technology has its place in the transmission grid, we should not discourage the use of advanced technology that is not "new". By this order, the majority does just that. Specifically, the Commission denies an incentive because "ComEd acknowledges that the technology is not new". (P 25 of the Order.) As I stated in my dissent to the initial order in this proceeding, "[w]hile such technology is not brand new, it would be new on the ComEd system, and such installations are rare across the nation."[1]

Perhaps recognizing the weakness in its argument, the order also justifies its denial of an advanced technology incentive because ComEd hasn't "otherwise demonstrated that it is appropriate for the Commission to grant an advanced technology incentive" and because ComEd's petition for rehearing does "not alter our previous determination." (PP 25-26.) While these "otherwise demonstrated" arguments will let the majority change its mind in the next proceeding, these rationales provide no guidance to those who design and operate the transmission system.

In addition to the above, this order on rehearing does not address the concerns that I raised in dissent to the initial order. Thus, I continue to have my original concerns about this case.

For these reasons, I respectfully dissent.

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Philip D. Moeller
Commissioner

[1] *Commonwealth Edison Co. and Commonwealth Edison Co. of Indiana*, 125 FERC ¶ 61,250 (2008) (Commissioner Moeller dissenting).