

130 FERC ¶ 61,210
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

Baltimore Gas and Electric Company

Docket No. ER09-745-001

ORDER DENYING REHEARING

(Issued March 18, 2010)

1. In an order issued on May 29, 2009,¹ the Commission authorized transmission incentives pursuant to Order Nos. 679 and 679-A² for Baltimore Gas and Electric Company's (BG&E) portion of the 500 kV Mid-Atlantic Power Pathway (MAPP) Project. Specifically, the Commission authorized a return on equity (ROE) transmission rate adder of 150-basis points and an abandonment incentive. On June 29, 2009, the Maryland Office of People's Counsel (People's Counsel) and the Maryland Public Service Commission (Maryland Commission) filed requests for rehearing. For the reasons discussed below, the Commission denies the requests for rehearing.

I. Background

2. According to PJM's 2007 Regional Transmission Expansion Plan (RTEP), the 500-kV MAPP Project is a \$1.05 billion PJM backbone project involving the construction of 220 miles of new transmission line from northern Virginia through southern Maryland and the Delmarva Peninsula to southern New Jersey through the service territories of Virginia Electric and Power Company (VEPCO), Pepco Holding,

¹ *Baltimore Gas & Electric Co.*, 127 FERC ¶ 61,201 (2009) (*BG&E/MAPP 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).

Inc. (PHI), BG&E, and Public Service Electric and Gas Company (PSE&G).³ PJM's 2007 RTEP states that the MAPP Project would relieve load deliverability criteria violations that were projected to occur by 2012 in the Delmarva Peninsula. PJM's 2007 RTEP further states that the MAPP Project would bring relief to the Baltimore-Washington area in light of the retirement of the Benning and Buzzard Point generating stations. In addition, PJM's 2007 RTEP anticipates that the MAPP Project, when considered in conjunction with proposals to develop new nuclear generating facilities at North Anna and Calvert Cliffs, would deliver additional megawatts to the Baltimore/Washington area, the Delmarva Peninsula, and southern New Jersey.

3. In the *BG&E/MAPP Order*, the Commission authorized a 150-basis point ROE transmission rate incentive for 10.4 miles of the BG&E facilities associated with the MAPP Project,⁴ which were anticipated to be in service by December 2011 and were estimated to cost \$65 million. In addition, the Commission authorized the recovery of all of BG&E's prudently incurred costs if the MAPP Project is abandoned for reasons beyond BG&E's control.⁵ The Commission found that the MAPP Project met the requirements of section 219, of ensuring reliability or relieving congestion, as a result of meeting the rebuttable presumption established in Order No. 679.⁶ Because the MAPP Project was included in the PJM 2007 RTEP – a fair and open regional planning process – as a baseline project, the Commission found that the MAPP Project was regional in nature and would mitigate congestion or ensure PJM's ability to continue to serve load reliably.⁷ Further, the Commission found that the MAPP Project would increase import capability, reduce congestion, and improve reliability in the Mid-Atlantic region.⁸ Finally, since each portion of the MAPP Project was dependent on the other portions to achieve the reliability and congestion relief benefits, the Commission's evaluation focused on the MAPP Project in its entirety.⁹ Because each of the transmission owners

³ PJM 2007 RTEP at 69-73, *available at* <http://www.pjm.com/documents/reports/rtep-report/2007-rtep.aspx>.

⁴ *BG&E/MAPP Order*, 127 FERC ¶ 61,201 at P 35.

⁵ *Id.* at P 41.

⁶ *Id.* at P 24.

⁷ *Id.*

⁸ *Id.* at P 24, *citing Pepco Holding, Inc.*, 125 FERC ¶ 61,130 (2008) (*PHI/MAPP Order*).

⁹ *Id.*

of the MAPP Project filed separate requests for incentives, the Commission issued separate orders to VEPCO,¹⁰ PHI,¹¹ and PSE&G¹² for their segments of the MAPP Project. The incentives authorized in the *PSE&G/MAPP Order* were granted contingent upon approval from the PJM Board of Managers that PSE&G's portion of the MAPP Project was a PJM baseline RTEP project.

4. On May 20, 2009, as the result of an updated analysis in the April 2009 Retool of the 2013 – MAPP Project (2009 Retool), the PJM Transmission Expansion Advisory Committee (TEAC) found the PSE&G segment of the MAPP Project would not be required and therefore removed the 70-mile New Jersey segment from the list of approved PJM RTEP baseline projects.¹³ In addition, the PJM TEAC delayed the in-service date of portions of the project by two years.

5. On June 29, 2009, People's Counsel and the Maryland Commission filed timely requests for rehearing of the BG&E/MAPP Order. The rehearing requests predominantly focus on the Commission's granting of the 150-basis point ROE adder to BG&E's portion of the MAPP Project.

II. Discussion

A. Procedural Issues

1. Motion To Reopen the Record

6. Pursuant to Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713 (2009), People's Counsel submitted, in its request for rehearing, the results of the 2009 Retool. People's Counsel states that this information was not available at the time of the issuance of the BG&E/MAPP Order, and asks the Commission to reopen the record in this proceeding to include this information. On June 30, 2009, BG&E filed an answer to People's Counsel's request to reopen the record.

¹⁰ *Virginia Electric and Power Co.*, 124 FERC ¶ 61,207 (2008) (*VEPCO/MAPP Order*).

¹¹ *PHI/MAPP Order*, 125 FERC ¶ 61,130 (2008).

¹² *Public Service Electric and Gas Co.*, 126 FERC ¶ 61,219 (2009) (*PSE&G/MAPP Order*).

¹³ See April 2009 Retool of the 2013 – MAPP Project at 43 (2009 Retool), available at <http://www.pjm.com/%7E/media/committees-groups/committees/teac/20090520/20090520-teac-presentation.ashx>.

On July 6, 2009, People's Counsel filed an answer in opposition to BG&E's answer.

7. The Commission finds that the 2009 Retool is a matter of public record. Since this information is important to the Commission's review of the record in this proceeding, we will take official notice of the 2009 Retool. The Commission finds that there is no need to reopen the record, however, since this information is publicly available. Therefore, the Commission denies the request by People's Counsel to reopen the record. In addition, pursuant to Rule 713(d)(1), the Commission rejects BG&E's June 30, 2009 answer and, accordingly, People's Counsel's July 6, 2009 answer to BG&E's answer.

2. Request to Revise Request for Rehearing

8. On June 30, 2009, the Maryland Commission filed what it characterizes as a "correction" to its June 29, 2009 request for rehearing, along with a motion seeking permission to "correct" the request for rehearing, stating that "a minor error" had come to its attention. The revision was to a footnote which responded to Commissioner Kelly's dissent to the *BG&E/MAPP Order*, adding a new sentence and providing a citation to the Annotated Code of Maryland.

9. We deny the Maryland Commission's motion to revise its request for rehearing as untimely. As the Commission noted in *BG&E Incentive Order*,¹⁴ 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 FPA, and the Commission lacks discretion to extend this statutory deadline.¹⁵ Furthermore, the Commission has long held that it lacks the authority to consider untimely requests for rehearing.¹⁶

¹⁴ *Baltimore Gas & Electric Co.*, 123 FERC ¶ 61,262 (2008) (*BG&E Incentive Order*).

¹⁵ 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.").

¹⁶ 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; *Public Service Co. of New Hampshire*, 56 FERC ¶ 61,105 at 61,403 (1991)

(continued ...)

3. Motion for Late Intervention to Submit Comments

10. On July 1, 2009, the Indiana Utility Regulatory Commission (Indiana Commission) submitted an untimely motion to intervene in order to submit comments. The Indiana Commission states that it was not until after the issuance of the *BG&E/MAPP Order* and after discussions with other state commissions belonging to the Organization of PJM States, Inc., that it realized the significance of the issues in the proceeding. In addition, it states that its comments are limited to support of the issues raised by the Maryland Commission and therefore its untimely intervention will not prejudice the parties nor cause any undue delay in the proceedings.

11. We deny the late motion to intervene by the Indiana Commission. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, a moving party bears a high burden to demonstrate good cause for allowing late intervention after the Commission has issued a dispositive order in a proceeding.¹⁷ The Commission finds that the Indiana Commission has not met that burden and, thus, denies its untimely motion to intervene and comments.¹⁸

(“Commission precedent is clear that supplements to timely filed requests for rehearing, when filed after the expiration of the statutory thirty-day period, will be rejected.”); *Arkansas Power & Light Co.*, 19 FERC ¶ 61,115, at 61,217-18, *reh’g denied*, 20 FERC ¶ 61,013, at 61,034 (1982).

¹⁷ See, e.g., *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003); *H.Q. Energy Services (U.S.), Inc. v. New York Independent System Operator, Inc.*, 100 FERC ¶ 61,028, at 61,072 (2002); *North Baja Pipeline LLC*, 99 FERC ¶ 61,028, at 61,109-10 (2002); *Florida Power & Light Co.*, 99 FERC ¶ 61,318, at 62,358 (2002) (“[Any potential party] must take appropriate steps to protect its interests. Adopting a ‘wait and see’ attitude and moving to intervene once the result of Commission deliberation is known falls far short of the demonstration of good cause that would support a late intervention request.”).

¹⁸ In any event, the issues that the Indiana Commission has sought to comment on are before the Commission through the Maryland Commission’s request for rehearing.

B. Excessive Rates**Request for Rehearing**

12. The People's Counsel states that the "primary aim" of the FPA is "the protection of consumers from excessive rates and charges."¹⁹ It contends that by setting the standard of just and reasonable rates, Congress intended to ensure that the Commission's primary focus remains the protection of consumers from excessive rates and charges. It states that the *BG&E/MAPP Order* unlawfully failed to analyze (or state with any particularity) how and why regulated transmission consumers will be protected from excessive rates and charges by the approval of the 150-basis point ROE adder. As such, it states that the *BG&E/MAPP Order* is improper and therefore requests rehearing.

Commission Determination

13. The Commission is charged with protecting consumers from excessive rates and charges, and thus has authority under sections 205, 206 and 219(d) of the FPA to ensure that rates are just and reasonable and not unduly discriminatory or preferential. In addition, the Commission is also charged with, under section 219(a), establishing incentive-based rate treatments for the transmission of electric energy in interstate commerce by public utilities for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion. The FPA's multiple purposes were recognized by the Commission in Order No. 679, when the Commission stated that many parties objecting to the rulemaking were concerned with the impact of incentives on their rates.²⁰ Indeed, the Commission noted that the provisions of section 219 cannot be viewed in isolation:

Section 219 is a part of a larger statutory framework in which Congress directed the Commission to take steps to address reliability of the bulk power system as well as to remedy the adverse effects of transmission congestion. For example, in new section 215 of the FPA Congress enacted a regulatory regime under which the Commission will, for the first time in its history, approve and enforce mandatory reliability standards for the nation's power grid. In new section 216, Congress directed the Secretary of Energy to identify areas of the nation in which transmission congestion

¹⁹ People's Counsel Rehearing at 14, citing *Municipal Light Boards of Reading and Wakefield, Mass. v. Federal Power Commission*, 450 F.2d 1341 (D.C. Cir. 1971), cert. denied, 405 U.S. 989 (1992).

²⁰ Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 43.

adversely affects consumers (national interest electric transmission corridors) and gave the Commission certain permitting authority to ensure timely construction of transmission facilities to remedy transmission congestion in those corridors. In section 1223 of EAct 2005, Congress directed the Commission to encourage the deployment of advanced transmission technologies that increase the capacity, efficiency and reliability of an existing or new transmission facility. In enacting these provisions of EAct, Congress made clear that it was equally concerned with reliability as well as the adverse impacts of transmission congestion and that the Commission should take steps to address both issues. New FPA section 219, which is complementary to these other EAct provisions, directs the Commission to provide rate incentives for the purpose of ensuring reliability and reducing transmission congestion.²¹

14. The *BG&E/MAPP Order* explained that the 150-basis point ROE adder is appropriate for BG&E's portion of the MAPP Project because the MAPP project is not a routine project.²² The *BG&E/MAPP Order* also found that the 150-basis point incentive for BG&E would promote the goals of (1) improving import capability, (2) reducing congestion, and (3) improving reliability in the Mid-Atlantic region.²³ Thus, we find that the 150-basis point adder for BG&E's portion of the MAPP Project results in just and reasonable rates as required by section 205. In addition, we find that the 150-basis point adder will help promote the goals of section 219 of the FPA. Accordingly, we deny People's Counsel's request for rehearing on its claim that the rates are excessive.

C. Risks and Challenges for BG&E's Segment of the MAPP Project

Request for Rehearing

15. The People's Counsel states that BG&E offered no evidence that the construction or financing of its segment of the MAPP Project presented any risks or challenges to warrant an incentive ROE. It asserts that the Commission found that BG&E satisfied the nexus test based on its conclusion the MAPP Project must be considered in its entirety because each portion of the MAPP Project is dependent on the other portions to achieve

²¹ *Id.* at P 41 (footnote omitted).

²² *BG&E/MAPP Order*, 127 FERC ¶ 61,201 at P 35.

²³ *Id.* at P 36.

the reliability and congestion benefits.²⁴ It argues that the recent revisions to PJM's load forecast and RTEP projects contradict and undermine the Commission's assumptions and conclusions about the MAPP Project. Indeed, People's Counsel states that there is no evidence to support the necessity of BG&E's portion of the MAPP Project because that portion would be the fourth 500 kV circuit to deliver power from the two existing nuclear units at Calvert Cliffs. Accordingly, based on the current configuration of the MAPP Project, People's Counsel requests that on rehearing, the Commission (1) evaluate if all segments of the MAPP Project need to be considered as an inseparable whole and (2) examine whether BG&E's portion of the MAPP Project increases reliability or reduces congestion costs.

16. People's Counsel notes that any benefit that may be derived from BG&E's segment would be more properly evaluated in the future, when costs to ratepayers would more specifically be matched with corresponding benefits. People's Counsel further notes that in its testimony before the Maryland Commission, BG&E argued for the independent value of each segment of the MAPP Project because each segment had both regional and localized benefits and because each segment had independent utility.²⁵

17. The Maryland Commission recognizes that the relationship of BG&E's portion of the MAPP Project is a relevant factor in determining the appropriate incentive rate treatment for BG&E, particularly since the MAPP Project has broad regional benefits. However, the Maryland Commission objects to the finding in the *BG&E/MAPP Order* that the relationship is the controlling factor in justifying the proposed incentives. The Maryland Commission states that this position appears contrary to the Commission's requirement that "each applicant must demonstrate that there is a nexus between the incentive sought and the incentive being made"²⁶ and of "a unique ROE appropriate to the facts and circumstances of each applicant."²⁷

18. The Maryland Commission states that the *BG&E/MAPP Order* did not attempt to justify the 150-basis point incentive ROE adder for BG&E's portion of the MAPP Project

²⁴ People's Counsel Request for Rehearing at 22, *citing BG&E/MAPP Order*, 127 FERC ¶ 61,201 at P 24.

²⁵ People's Counsel Request for Rehearing at 24-25, *citing* Maryland Commission Case No. 9179, Needs Determination – Vol. 1, Gausman Direct Testimony at 40.

²⁶ Maryland Commission's Request for Rehearing at 15, *citing* Order No. 679 at P 26.

²⁷ *Id.* at 16, *citing* Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 65.

in terms of regional benefits, special risks, challenges or advanced technologies. In contrast, the Maryland Commission notes that the PHI portion of the MAPP Project involves an overhead crossing of the Delaware River and an underwater crossing of the Chesapeake Bay. In addition, PHI would have challenges relating to (1) the employment of several special technologies, (2) obtaining rights-of-way, and (3) the tripling of its rate base. The Maryland Commission contends that a fair application of the nexus test would not result in BG&E being awarded the same 150-basis point incentive adder as PHI.

Commission Determination

19. People's Counsel and the Maryland Commission contend that the BG&E segment of the MAPP Project must be evaluated by itself and not as part of the entire project. The Commission denies rehearing on this issue because, as explained in the *BG&E/MAPP Order*, the BG&E portion of the MAPP Project is an integral part of the MAPP Project as a whole and the risks and challenges faced by each partner to the MAPP Project, as well as the need for coordination among those partners, could affect the construction of the entire project.²⁸ In the *PSE&G/MAPP Order*, the Commission indicated for the first time that a prospective owner of a separate segment of a transmission project involving multiple owners may continue to file a separate request for rate incentives for its segment, but encouraged them to file jointly if they intend to rely on the scope, effects and risks and challenges of the entire project as a basis for qualifying for such incentives. The Commission explained that, when presented with one such filing, the Commission can analyze most effectively the project as it evaluates the requested incentives. The Commission also stated that, although a prospective owner retains the option of filing a separate request for transmission rate incentives for its segment of a transmission project that involves multiple owners, the individual prospective owner that files in isolation from other prospective owners may not be able to rely on the overall scope, effects, risks and challenges of the entire project as a basis for qualifying for the incentive rates.²⁹ While BG&E filed its request for transmission rate incentives separately, it did so before issuance of the *PSE&G/MAPP Order*, and thus the Commission concluded in the *BG&E/MAPP Order* that it would not hold BG&E's request to that standard.³⁰

20. Although the 2009 Retool updated the MAPP Project presented in PJM's 2007 RTEP and removed PSE&G's portion of the MAPP Project, it did not change the fact that the MAPP Project is an integrated project involving multiple transmission owners in the

²⁸ *BG&E/MAPP Order*, 127 FERC ¶ 61,201 at P 37.

²⁹ *PSE&G/MAPP Order*, 126 FERC ¶ 61,219 at P 55.

³⁰ *BG&E/MAPP Order*, 127 FERC ¶ 61,201 at fn 35.

Mid-Atlantic region. Further, the Commission's determination that the PSE&G portion of the MAPP Project satisfied the rebuttable presumption of eligibility for incentives was conditionally authorized, subject to PJM's approval of the PSE&G portion as an RTEP project.³¹ The 2009 Retool does not alter this condition. In any event, the BG&E portion of the MAPP Project serves as a pathway that provides benefits for the lower Delmarva Peninsula.³² The BG&E portion of the MAPP Project also provides a conduit for new nuclear generation in northern Virginia and southern Maryland into the Baltimore/Washington areas and onto the Delmarva Peninsula.³³

D. Requirements of Section 1241 of EAct of 2005

Request for Rehearing

21. In its protest to BG&E's request for incentives for its portion of the MAPP Project, People's Counsel argued that that BG&E's proposal must be denied unless all four goals identified in section 1241 of EAct 2005³⁴ were met. In the *BG&E/MAPP Order*, the Commission rejected People's Counsel's arguments, noting that it had previously rejected the same argument raised by People's Counsel in another BG&E proceeding.³⁵ In its request for rehearing, People's Counsel's argument is that it expressly added new legal, textual and factual support for its arguments in its protest, which the Commission failed to acknowledge or discuss.³⁶ People's Counsel avers that the Commission failed to provide any basis for abjuring the plain language and grammatical phrasing of section 1241 of EAct 2005, which presents a list (in the conjunctive) of the goals to be accomplished by the rulemaking which led to Order No. 679. People's Counsel therefore requests rehearing, asserting that the Commission's determination in the *BG&E/MAPP Order* was arbitrary and capricious.³⁷

³¹ *PSE&G/MAPP Order*, 126 FERC ¶ 61,219 at P 23.

³² BG&E February 20, 2009 Filing, Exh. No. BGE-13 at 11.

³³ *Id.*, citing PJM 2007 RTEP at 107.

³⁴ Section 1241 of EAct 2005 added FPA section 219.

³⁵ *BG&E/MAPP Order*, 127 FERC ¶ 61,201 at P 25, citing *BG&E Incentive Order*, 123 FERC ¶ 61,262 at P 21 (2008).

³⁶ People's Counsel Request for Rehearing at 29.

³⁷ *Id.* at 30, citing *PPL Wallingford Energy LLC, et al. v. FERC*, 419 F.3d 1194 (D.C. Cir. 2005).

22. People's Counsel further argues that BG&E is not eligible for incentives because its portion of the MAPP Project does not (1) attract new investment or (2) encourage deployment of transmission technologies. People's Counsel asserts that BG&E's investment in the MAPP Project is not the type of investment contemplated in section 219(b) of the FPA, which states that the rulemaking underlying Order No. 679 shall provide an ROE that attracts new investment in transmission facilities. People's Counsel states that the common definition of the word "attract" refers to external funding, outside of its own internal funds. Because BG&E will be financing its portion of the MAPP Project from internal funding within BG&E's corporate family, People's Counsel argues that BG&E cannot attract capital from itself. Further, People's Counsel argues that BG&E has contractual obligations with PJM to construct its portion of the MAPP Project. People's Counsel states that the *BG&E Incentive Order* does not examine BG&E's assertion that it needed to attract funding.

23. In addition, People's Counsel states that to comport with the goals of section 219, section 1223 of EPAct 2005 directs the Commission to encourage the deployment of advanced transmission technologies. People's Counsel further argues that BG&E's portion of the MAPP Project does not use any advanced technologies. Rather, according to People's Counsel, BG&E "bootstrapped" the advanced technologies used in the other portions of the MAPP Project.³⁸

Commission Determination

24. The Commission denies People's Counsel's request for rehearing. In Order No. 679, we explained our interpretation of FPA section 219:

The purpose of section 219 of the FPA is to benefit consumers by promoting transmission capital investments that result in reliable and economically efficient transmission and generation. Congress did not enact section 219 in isolation. Section 219 is a part of the larger statutory framework in which Congress directed the Commission to take steps to address reliability of the bulk power system as well as to remedy the adverse effects of transmission congestion.³⁹

25. Further, the Commission addressed and rejected similar arguments by People's Counsel on the interpretation of section 219 in the underlying order. As we explained in the *BG&E/MAPP Order*:

³⁸ *Id.* at 43.

³⁹ Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 41.

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).⁴⁰

26. People's Counsel's narrow reading of section 219 was rejected in Order No. 679, where the Commission rejected comments "that would limit or circumscribe the nature or applicability of incentives ... because they will only serve to discourage transmission investment."⁴¹ Moreover, as noted above, we read section 219 as establishing general policy objectives and not, as People's Counsel would have it, as a checklist of conditions.

27. Further, we reject People's Counsel's "beefed up" legal, textual and factual support for its position on the same grounds. People's Counsel has raised this argument on the interpretation of section 219 several times. The Commission has rejected this same argument several times, as we do again above. People's Counsel is not permitted to seek additional "bites of the apple" by making the same fundamental argument which has been repeatedly rejected, but each time adding something new or different in hopes that it will eventually stumble upon a winning combination.⁴² As such, we need not address People's Counsel's secondary arguments -- whether BG&E's portion of the MAPP Project (1) attracts new investment and (2) encourages deployment of transmission technologies.

E. Cumulative Effect of Incentives

Request for Rehearing

28. People's Counsel contends that the Commission violated its own policy and precedent by failing to weigh the financial benefits of other incentives granted to BG&E.

⁴⁰*BG&E/MAPP Order*, 127 FERC ¶ 61,201 at P 25, *citing BG&E Incentive Order*, 123 FERC ¶ 61,262 at P 21.

⁴¹ Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 48.

⁴² *See Xcel Energy Services, Inc.*, 118 FERC ¶ 61,071 at P 12 (2007) (rejecting request for rehearing as collateral attack on prior order in part because it repeats arguments made in prior requests for rehearing); *Californians for Renewable Energy, Inc. v. CPUC*, 119 FERC ¶ 61,058 at P 45 n 48 (2007); *ISO New England, Inc.*, 118 FERC ¶ 61,163 at P 29 (2007); *see also JD Wind I, LLC*, 130 FERC ¶ 61,127 at P 20 (2010).

People's Counsel further asserts that the Commission failed to recognize the financial benefits of the abandonment incentive or of BG&E's switch from stated rates to formula rates. In addition, People's Counsel states that in other cases, the Commission reduced the ROE incentive adders to reflect the benefits received from other incentives.⁴³ People's Counsel therefore requests that on rehearing, the Commission (1) balance the incentives granted against the risks of BG&E's portion of the MAPP Project and (2) decrease the amount of the ROE adder awarded to BG&E.

29. The Maryland Commission raises similar arguments. It argues that the *BG&E/MAPP Order* does not provide sufficient explanation as to why BG&E's formula rates and guaranteed recovery of abandonment costs do not operate to reduce the need for the full 150-basis point ROE adder.⁴⁴ It also notes that in Order No. 679-A, the Commission states that it would examine the total package of incentives and if some of the incentives in a package reduce the risks of the project, that fact would be taken into account in a request for an enhanced ROE.⁴⁵

Commission Determination

30. Although the Commission considered BG&E's implementation of formula rates and the total package of incentives, it did not expressly discuss the cumulative effect of BG&E's formula rate in addition to the ROE adder and the abandonment incentive.⁴⁶ On rehearing, we clarify the cumulative effect of the multiple incentives sought by, and granted to, BG&E.

31. The Commission finds that each of the incentives granted to BG&E is designed to address different financial needs. The ROE incentive of 150-basis points is intended to attract investment in the project, notwithstanding the risks of the project. Specifically, BG&E's portion of the MAPP Project is in competition for funding with other utility investments generally but also with other projects within BG&E's parent company, which was on the brink of bankruptcy in September 2008 and whose credit rating was

⁴³ People's Counsel Request for Rehearing at 3-4, citing *Southern California Edison Co.*, 121 FERC ¶ 61,168 (2007), *reh'g denied*, 123 FERC ¶ 61,293 (2008).

⁴⁴ Maryland Commission Request for Rehearing at 20.

⁴⁵ Maryland Commission Request for Rehearing at 19, *citing* Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 6.

⁴⁶ BG&E's formula rate was established as part of a settlement. *See Baltimore Gas & Electric Co.*, 115 FERC ¶ 61,066, at P 3 (2006).

downgraded.⁴⁷ In addition, the 150-basis point ROE incentive recognizes that because of the size and scope of the MAPP Project, it faces the risk that failure to obtain any of the necessary permits by any of the many local, state or federal siting authorities could adversely affect the entire MAPP Project.⁴⁸ The abandonment incentive is intended to encourage utilities like BG&E to take on such projects in the first place by reducing the risk of non-recovery of costs.⁴⁹ The formula rate improves cash flow by providing for the timely and administratively efficient recovery of costs while BG&E is expanding its system. The Commission finds that the cumulative effects of the 150-basis point ROE incentive, the abandonment incentive and the formula rate are not mutually exclusive but together will encourage investors to invest in transmission projects and particularly, this one. Specifically, the Commission finds that BG&E's ROE incentive of 150-basis points and its abandonment incentive, in conjunction with its formula rate, are tailored to address the demonstrable risks or challenges faced by BG&E.⁵⁰

32. The Commission recognizes that, in some cases where applicants requested similar packages of incentives to the instant proceeding, the Commission has reduced the utility's requested ROE incentive.⁵¹ In those cases, the Commission examined the entirety of the project and the requested incentives, and determined that the total packages of incentives requested by the utilities warranted an adjustment to the requested ROE incentives. However, those cases do not stand for the proposition that, whenever a utility requests ROE and abandonment incentives, the utility's ROE request is automatically reduced. The Commission has explained that Order No. 679 did not contemplate a generic rule requiring a reduction in the ROE incentive when other incentives are granted. Rather, each case must be analyzed on its merits to determine if the incentives requested are justified.⁵²

⁴⁷ BG&E February 20, 2009 Filing, Exh. No. BGE-13 at 12.

⁴⁸ *BG&E/MAPP Order*, 127 FERC ¶ 61,201 at P 36.

⁴⁹ *Id.* at P 41.

⁵⁰ Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 21, 27; *see also VEPCO/MAPP Order*, 124 FERC ¶ 61,207 at P 113.

⁵¹ *Cf. Duquesne*, 118 FERC ¶ 61,087 at P 57; *PPL Elec. Utils. Corp.*, 123 FERC ¶ 61,068, at P 56 (2008), *reh'g denied*, 124 FERC ¶ 61,229 (2008); *Southern California Edison Co.*, 121 FERC ¶ 61,168, at P 143 (2007), *reh'g denied*, 123 FERC ¶ 61,293 (2008).

⁵² *See, e.g., PHI/MAPP Order*, 125 FERC ¶ 61,130 at P 78 & n.96.

F. Request for Trial-Type Evidentiary Hearing**Request for Rehearing**

33. People's Counsel argues that the record contained conflicting or insufficient evidence for BG&E to meet its burden of proof that there was competition for funding among BG&E's affiliates for the BG&E portion of the costs associated with the MAPP Project. People's Counsel further argues that the Commission failed to consider the legal and factual impact of BG&E's contractual obligations to PJM with respect to the construction of BG&E's portion of the MAPP Project.⁵³ Based on the changing scope, extent and need for the MAPP Project, People's Counsel requests that the case be set for a trial-type evidentiary hearing.⁵⁴

Commission Determination

34. The Commission denies People's Counsel request for a trial-type evidentiary hearing. With respect to the competition for funding, People's Counsel merely restates its position from its protest. This position was addressed both above and in the *BG&E/MAPP Order*.⁵⁵ There is no dispute as to BG&E's contractual obligations to PJM to construct its portion of the MAPP Project. The only point of contention is whether BG&E should receive incentives for such construction. The Commission's determination regarding incentives for BG&E's portion of the MAPP Project did not involve disputed issues of material fact; rather, it simply addressed the requested incentives. Finally, there is no dispute with regard to the need for the MAPP Project. The VEPCO, PHI and BG&E portions of the project are included in PJM's 2007 RTEP as baseline projects. The PSE&G portion of the MAPP Project was never included in PJM's RTEP as a baseline project. The incentives for the PSE&G portion were approved, conditioned upon its inclusion as a PJM RTEP project. The 2009 Retool determined that the PSE&G portion is not needed, at this time, as a PJM RTEP baseline project. People's Counsel does not dispute the results of the 2009 Retool.

35. A trial-type evidentiary hearing is not warranted in this case because there are no material facts in dispute that cannot be resolved on the basis of written submissions in the

⁵³ People's Counsel Request for Rehearing at 3.

⁵⁴ *Id.* at 45.

⁵⁵ *BG&E/MAPP Order*, 127 FERC ¶ 61,201 at P 38.

record.⁵⁶ Further, “mere allegations of disputed facts are insufficient to mandate a hearing; petitioners must make an adequate proffer of evidence to support them.”⁵⁷ People’s Counsel’s protest did not raise issues of material fact that warranted setting any issue for a trial-type evidentiary hearing.

G. Standards for Evaluating Order No. 679 Proposals

Request for Rehearing

36. The Maryland Commission notes that in Order No. 679, the Commission stated that incentives would not be freely doled out, but rather, would “be applied in a manner that is rationally tailored to the risks and challenges faced in construction new transmission” and would achieve “the proper balance between consumer and investor interests.”⁵⁸ In addition, the Maryland Commission notes that in Order No. 679-A, the Commission specified that incentive ROEs would be based on “the need to attract investment in the context of long-term industry underinvestment and the need to re-evaluate the balance of investor and ratepayer interests.”⁵⁹ The Maryland Commission also states that the “common objective [of the nexus test and the ‘but for’ test] is to ensure that incentives are not provided in circumstances where they do not materially affect investment decisions.”⁶⁰ Further, the Maryland Commission notes that “the applicant will be required to demonstrate that the total package of incentives is tailored to address the demonstrable risks or challenges faced by the applicant” and “if some of the incentives would reduce the risks of the project, that fact will be taken into account in any request for an enhanced ROE.”⁶¹

⁵⁶ *Consumers Power Co.*, 58 FERC ¶ 61,323, at 62,045, *order on clarification*, 59 FERC ¶ 61,276 (1992), *citing Southern California Edison Co.*, 27 FERC 61,105, at 61,199 (1984); *Municipal Light Boards of Reading and Wakefield v. Federal Power Commission*, 450 F.2d 1341, 1345 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972); *Cerro Wire and Cable Company v. FERC*, 677 F.2d 124, 135 (D.C. Cir. 1982).

⁵⁷ *Cerro Wire*, 677 F.2d at 129.

⁵⁸ Maryland Commission Request for Rehearing at 6, *citing* Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 26.

⁵⁹ *Id.*, *citing* Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 65.

⁶⁰ *Id.* at 7, *citing* Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 25.

⁶¹ *Id.*, *citing* Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 27.

37. The Maryland Commission contends that the Commission's *ad hoc* approach to the nexus test has not advanced the objective of ensuring that incentives are not provided in circumstances where they do not materially affect investment decisions, but rather, place unnecessary cost burdens upon ratepayers. The Maryland Commission argues that the Commission has repeatedly issued orders requiring ratepayers to pay inflated incentive ROE adders for routine investments (1) with no benefits extending outside the transmission owner's service territory and (2) which the transmission owner must make to comply with current reliability standards. The Maryland Commission maintains that the Commission should adopt standards to guide its determination of whether a project is "routine" and where there is a sufficient nexus between the project and the incentive. The Maryland Commission states that "[c]learly articulated standards for evaluating requests for transmission incentives would improve [the Commission's] decision-making process and add consistency to transmission incentive awards."⁶²

38. The Maryland Commission contends that the Commission should reconsider the benefits of a project to a transmission owner and its generation affiliates in balancing the interests of utilities and customers in ensuring that rates are just and reasonable, as required by the FPA.⁶³ Indeed, the Maryland Commission states that the plain language of section 219 of EPAct of 2005 specifies that the Commission's authority to grant incentives in connection with transmission investments is subject to the overriding limitation that the resulting rates must be just and reasonable. With respect to the MAPP Project, the Maryland Commission contends that the Commission "handed out" transmission incentives that have little or no nexus to the applicant's circumstances or the project actually being undertaken. The Maryland Commission contends that this approach is not what was intended by Congress when it authorized incentive pricing and does not properly balance the interests of investors and customers. The Maryland Commission states that it has petitioned the Commission on several occasions "to abandon its current *ad hoc* approach to incentive pricing and establish a clear formula to determine whether an incentive ROE is warranted and at what level."⁶⁴ The Maryland Commission therefore asks the Commission to reconsider its refusal to adopt specific factors that should be considered in examining each transmission project to determine whether it is routine and whether there is a sufficient nexus between the project and the incentive. The Maryland Commission contends that the Commission's failure to adopt

⁶² *Id.* at 10.

⁶³ *Id.* at 11, citing *Federal Power Commission v. Hope Natural Gas*, 320 US 591, 603 (1944).

⁶⁴ *Id.* at 3.

standards by which all transmission projects are judged leads to inconsistent, unreasoned decision-making and orders that are arbitrary and capricious.⁶⁵

Commission Determination

39. The Commission has previously rejected the argument that it should reconsider its refusal to adopt specific factors to determine if a project is routine or meets the nexus test. Specifically, in response to comments requesting a narrow reading of FPA section 219, the Commission declined to establish a list of detailed criteria which must be met to be eligible for incentive-based rates and instead stated that it would, on a case-by-case basis, require each applicant to justify the incentives it requests.⁶⁶ As the Maryland Commission notes, it has requested on several occasions that the Commission establish specific criteria for qualifying for incentives, which the Commission has denied. As similarly noted above, the Maryland Commission's request for rehearing in this regard is therefore denied. Moreover, while the Commission has not established the detailed nexus criteria sought by the Maryland Commission, the *BG&E/MAPP Order* cited, and this order likewise references, Commission precedent providing guidance on the factors that the Commission will consider when determining whether a project is routine for purposes of the nexus test.⁶⁷

The Commission orders:

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

⁶⁵ *Id.* at 6.

⁶⁶ Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 43; Order No. 679-A, FERC Stats. & Regs. § 61,236 at P 24 (“The purpose of the Final Rule was to establish criteria to be applied in individual cases, not to provide an exhaustive list of situations where incentives will be granted or denied.”).

⁶⁷ *BG&E/MAPP Order*, 127 FERC ¶ 61,201 at P 27, citing *BG&E Incentive Rate Order*, 120 FERC ¶ 61,084 at P 52-55.

B) The People's Counsel's motion to reopen the record is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.