ORAL ARGUMENT HELD MARCH 15, 2018;
DECISION ISSUED JANUARY 15, 2019

In the United States Court of Appeals for the District of Columbia Circuit

No. 16-1433

SAN DIEGO GAS & ELECTRIC COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

RESPONSE IN OPPOSITION TO PETITION FOR REHEARING

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March 29, 2019

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES (continued): **PAGE**

STATUTES:

TABLE OF AUTHORITIES

REGULATIONS: **PAGE**

INTRODUCTION AND SUMMARY

The panel's January 15, 2019 decision in this case affirms Commission orders granting an incentive-based rate treatment — full cost recovery if the transmission project is abandoned — only prospectively. *See San Diego Gas & Elec. Co. v. FERC*, 913 F.3d 127 (D.C. Cir. 2019). On rehearing, San Diego[1] reiterates arguments that the panel rejected, claiming that the decision, like the Commission's orders before it, contravenes the text and purpose of the incentive regulation by denying incentive treatment for several years of previous investment. San Diego further contends that the panel decision conflicts with the Court's recent decision in *ANR Storage Co. v. FERC*, 904 F.3d 1020 (D.C. Cir. 2018), concerning agency precedents.

San Diego is wrong. The panel considered the full text of the regulation and the statutory and regulatory purpose of benefitting consumers. Based on that review, the panel correctly rejected San Diego's claim of retroactive entitlement to an incentive that the Commission had explicitly made available only upon a case-specific approval by the agency. In particular, the panel correctly found that the regulation affords the Commission flexibility to tailor incentives to demonstrated needs, and agreed that each applicant must demonstrate that a requested incentive

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[1] The Commission here uses terms as defined in its merits brief.

has a nexus to the facilitation of new investment. The Commission did not, as San Diego implies, select an arbitrary percentage limit for the Project's abandonment incentive; rather, the Commission found the requisite nexus between the incentive and prospective investment, but found no such nexus between the incentive and San Diego's past spending.

At bottom, San Diego merely disagrees with the panel's reasonable analysis of the regulation. Rehearing en banc is rarely granted, *see* Fed. R. App. P. 35(a), and San Diego has not demonstrated that such extraordinary review is warranted here.

STATEMENT

In the challenged orders, the Commission granted San Diego's request for a declaratory order ruling that its South Orange County Project met the requirements for the abandonment incentive. That incentive is one of several rate treatments the Commission adopted in its Incentive Rule to encourage transmission investments, as directed by Congress. The abandonment incentive allows a utility to recover 100 percent of its prudently-incurred costs if the project is abandoned for reasons beyond its control, rather than the 50 percent recovery available under the Commission's longstanding policy for cancelled plant costs.

In this case, the dispute arose from San Diego's delay in requesting the abandonment incentive. San Diego filed its application over four years after the

Project was selected by the California System Operator in its transmission planning process. In that time, San Diego had already spent approximately $31 million — without assurance of cost recovery, by its own account — to develop the Project, which it expected to cost $350 to $400 million to construct. *See Declaratory Order* PP 4, 20, JA 2, 10. The Commission found that the Project met the requirements for the abandonment incentive, but only for costs going forward from the date of the Declaratory Order. Costs incurred in the four years preceding the order would be subject to the usual 50 percent recovery.

The panel affirmed the Commission's holding that San Diego failed to show the requisite nexus between the abandonment incentive and its sunk costs. *See* slip op. 3, 15. The panel agreed that a utility's entitlement to any incentive-based rate treatment depends on the Commission's approval: "It could hardly be otherwise." *Id.* 16. The panel found the Commission's approach consistent with the Federal Power Act, the Incentive Rule, and longstanding Commission policy that rate incentives must be prospective and related to the conduct they are meant to induce. *Id.* 16-18. The panel further concluded that, "[b]y insisting that the timing of a declaratory order matters in granting the Abandonment Incentive, FERC reasonably accounts for ratepayers' interests." *Id.* 20. The panel also addressed San Diego's objections and distinguished earlier Commission orders that had granted the incentive for all costs, without ratepayer protests or agency discussion of the issue presented here. *See id.* 20-26.

The dissent contended that the Commission's ruling rested on an invalid theory, was not supported by the regulation's language, and was inconsistent with Commission precedent. Dissent 2. In the dissent's view, the Commission created the incentive to invest when it promulgated the regulation for incentive treatment. *Id.* 2-5. The dissent considered the regulation "unambiguous" in authorizing full recovery of all prudently-incurred costs from the start of the project, rejecting the Commission's case-by-case approach as "either meaningless or capricious." *Id.* 7-9. Finally, the dissent disagreed with the panel's analysis of prior Commission orders, arguing that the Commission had departed from precedent without explanation. *Id.* 10-11.

ARGUMENT

I. THE PANEL DECISION IS CONSISTENT WITH THE TEXT AND PURPOSE OF THE INCENTIVE RULE.

A. The panel decision appropriately considers the full text of the regulation.

San Diego's principal argument is that the panel decision "conflicts with the regulation's unambiguous text . . . ." Pet. 1. San Diego bases this claim on just one subpart of the regulation, which lists one of seven specific types of incentive-based rate treatments (with an eighth subpart that allows for other, unlisted incentives that the Commission may approve): "Recovery of 100 percent of prudently incurred costs of transmission facilities that are cancelled or abandoned due to factors beyond the control of the public utility[.]" 18 C.F.R. § 35.35(d)(1)(vi).

San Diego largely ignores the main body of the rule: section 35.35(d) sets forth the procedural and substantive requirements for a utility to receive *any* of the incentives listed in subsection (d)(1). The Commission will authorize incentive-based rate treatment only if it is just and reasonable; the utility must request the incentive(s) in either a rate filing or a petition for a declaratory order. *See* 18 C.F.R. § 35.35(d). Specifically, the applicant must show that the facilities are eligible (i.e., the project ensures grid reliability or reduces transmission congestion), that "the *total* package of incentives is tailored to address the demonstrable risks or challenges faced by the applicant in undertaking the project," and that resulting rates are just and reasonable. *Id.* The full text of § 35.35 is attached at the end of this Response.

In San Diego's view, if the Commission, at any time, approves an abandonment incentive for a project, the utility is "entitled" to recover 100 percent of all project costs (in the event of abandonment), no matter when the utility filed the application or when it incurred the costs. The Commission has no discretion — the incentive is "fixe[d] . . . in clear, mathematical terms, and the Commission is bound by those terms . . . ." Pet. 1-2; *see also id.* 11 n.2.

The panel, however, properly considered the full text of the regulation and concluded that it does not provide such automatic, all-or-nothing outcomes. *See* slip op. 24. The Incentive Rule "sets the general terms, but a utility's entitlement depends on FERC's approval." Slip op. 16; *see also id.* 21 (San Diego is "simply wrong" that the regulation's text "guarantees" any rate treatment; the Commission's rulemaking expressly cautioned that it did not grant any incentives and that not every listed incentive would be appropriate for every project) (citing Order No. 679 PP 6, 20). To accommodate the complexity and variety of large transmission investments, the Rule "provides for an array of incentive rate treatments" that allow for a customized package of incentives to "meet[] a utility's demonstrated need." *Id.* 16. To that end, a utility must show a nexus between each requested incentive and its specific relation to financing the project. *See id.* 15, 16. "[T]he key role of the nexus requirement [is] 'to ensure that incentives are not provided in circumstances where they do not materially affect investment decisions.'" *Id.* 17 (quoting Order No. 679-A P 25); *see generally id.* 16-18. (As discussed in Part I.B, *infra*, the nexus requirement serves the regulation's purpose of benefitting consumers.)

Moreover, taking the whole of the Incentive Rule into account, including the variety of available rate treatments, the panel correctly concluded that the regulation affords the Commission "some flexibility" to tailor incentives to applicants' demonstrated needs. Slip op. 24-25. "[A]pplicants often obtain packages of more than one incentive." *Id.* 24. Also, the Commission may grant some incentives while denying others. *See*, *e.g.*, *NextEra Energy Transmission W., LLC*, 154 FERC ¶ 61,009 PP 1, 26, 31, 36, 39, 75 (2016) (Commission approved four incentives[2] but denied a fifth[3]). And the listed incentives are "partially overlapping and context-specific." Slip op. 7; *see* Order No. 679-A P 21 (explaining that the Commission will examine "the total package of incentives being sought [and] the inter-relationship between any incentives").

For example, both the return on equity and abandonment incentives may account for the same risk: "a utility that receives approval to recover abandoned plant in rate base would likely face lower risk and thus may warrant a lower [return on equity] than would otherwise be the case without this assurance." Order No. 679 P 167; *see also* Order No. 679-A P 65 (some incentives, including Construction Work in Progress [18 C.F.R. § 35.35(d)(1)(ii)] and abandonment, could lower overall risk, affecting return on equity). Similarly, "if a utility already

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2 *See* 18 C.F.R. § 35.35(d)(1)(iii) ("Recovery of prudently incurred pre-commercial operations costs"), (iv) ("Hypothetical capital structure"), (vi) (abandonment), and (e) ("Incentives for joining a Transmission Organization").

3 *See id.* § 35.35(d)(1)(i) ("A rate of return on equity sufficient to attract new investment in transmission facilities").

recovered survey costs by expensing these costs as a pre-commercial cost, it would be unjust and unreasonable for the utility to recover those costs again if the facility was subsequently abandoned." Order No. 679 P 166, *cited in* slip op. 24. Or, as the panel noted (slip op. 24), cost recovery through Construction Work in Progress could overlap with the abandonment incentive. San Diego disputes the panel's discussion of Construction Work in Progress (*see* Pet. 7-10) but misses the larger point: that San Diego's claim of automatic entitlement to an incentive rate is fundamentally inconsistent with the Commission's core obligation — mandated by both statute and regulation — to ensure just and reasonable rates by considering an applicant's justification for, and the rates resulting from, "the incentive package as a whole." Slip op. 24 (citation omitted).

B. The panel decision is consistent with the regulation's purpose of protecting the interests of ratepayers who bear the costs of incentive rates.

In arguing that the panel decision undermines the regulation's purpose, San Diego focuses entirely on the utilities' interest in receiving incentive rate treatment. *See* Pet. 3, 12 (citing "purpose" of promoting investment); *id.* 1, 6 (defining "benefit" as the incentive to the utility); *see generally id.* 11-13. The panel decision, however, rightly takes into account the essential purpose — set forth in both the statute and the regulation — of benefitting *ratepayers*.

Federal Power Act section 219 directed the Commission to establish incentives "for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion." 16 U.S.C. § 824s(a), *quoted in* slip op. 3, 16-17. Accordingly, the first section of the Incentive Rule defines its "Purpose" using identical language. *See* 18 C.F.R. § 35.35(a). Both the statute and the regulation further provide that all resulting rates are subject to the "just and reasonable" standard under sections 205 and 206 of the Federal Power Act. 16 U.S.C. § 824s(d); 18 C.F.R. § 35.35(c); *see* 16 U.S.C. §§ 824d, 824e; slip op. 3. The panel appropriately grounded its analysis in that consumer-oriented purpose. *See* slip op. 13, 16-17, 19, 20, 23.

As the panel recognized, benefit to consumers underlies the Commission's longstanding policy that incentive rates "must be prospective" — the function of an incentive is to encourage future actions that will benefit ratepayers, not to reward past behavior. Slip op. 17 (quoting *Incentive Rate Making for Interstate Natural Gas Pipelines, Oil Pipelines, and Elec. Utils.*, 61 FERC ¶ 61,168, at 61,589 (1992)); *id.* 13 (citing *Declaratory Order* P 20 & n.48, JA 10). *See also Me. Pub. Utils. Comm'n v. FERC*, 454 F.3d 278, 289 (D.C. Cir. 2006) (noting "the obvious proposition that FERC will not, and cannot, create incentives to motivate conduct that has already occurred"), *quoted in* slip op. 17-18.

With respect to abandoned project costs in particular, ratepayers have long shared in such costs. As noted *supra* at p. 2, the Commission's general policy for cancelled plant costs allows a utility to recover 50 percent of the cost of the investment from its ratepayers, and to write off the other 50 percent as a loss — a policy that the Commission intended to "balanc[e] the interests of ratepayers and shareholders . . . ." *New Eng. Power Co.*, Op. No. 295, 42 FERC ¶ 61,016, at 61,082 (1988); *see also* slip op. 6 (discussing FERC's "standard, burden-sharing treatment" of abandoned project costs). Under the abandonment incentive, the Commission allows a utility to shift more costs to ratepayers — but the Commission reasonably maintains that the greater cost recovery must be based on the benefit to those ratepayers. "[T]he logic of authorizing utilities to charge ratepayers for the occasional abandoned project is that ratepayers enjoy offsetting benefits from improved access to capital on better terms for all other qualified transmission infrastructure upgrades." Slip op. 19.

Here, the panel correctly looked to the specific facts of this case. The Commission found, based on substantial record evidence, that San Diego spent development costs for the Project over several years without assurance of recovery — that is, without the certainty of an approved abandonment incentive. *See Rehearing Order* PP 14, 17, 19, JA 20-22; *see also* slip op. 19-20 (finding no evidence that the potential availability of the abandonment incentive affected San

Diego's past investment). Therefore, though the Commission found the requisite nexus between the risks that San Diego faced going forward and the future investments it would make (*see Declaratory Order* P 17, JA 9), that nexus was lacking as to San Diego's past spending. *See id.* P 20, JA 10; *Rehearing Order* PP 17, 19, JA 21-22; slip op. 15; *see also id.* 19 (San Diego failed to show how "future risk-reduction" from the incentive affected "its investments already made"). Thus, by making the abandonment incentive effective prospectively from the date of the *Declaratory Order*, the Commission "reasonably accounts for ratepayers' interests." Slip op. 20.

Finally, San Diego's argument — even as it ignores the regulation's consumer focus — fails on its own utility-centered terms. San Diego claims that the Commission's approach, as upheld by the panel, "jeopardizes recovery of hundreds of millions in investments nationwide[.]" Pet. 12. But San Diego chose to proceed with the Project for over four years, without assurance of recovery, before seeking incentive treatment.[4] Even so, in the event the Project were to be

[4] San Diego also points to substantial expenditures by intervenors (other California electric utilities) — both of whom similarly waited years to request incentives. *See S. Cal. Edison Co.*, 161 FERC ¶ 61,107 PP 2, 45 (2017), *reh'g denied*, 163 FERC ¶ 61,137 PP 7-8 (2018) (incentives requested in 2017 for projects approved between 2009 and 2014); *Pac. Gas & Elec. Co.*, 160 FERC ¶ 61,018 PP 2, 49 (2017), *on reh'g*, 163 FERC ¶ 61,187 (2018) (incentives requested in 2016 for multiple years-old projects).

canceled, San Diego could recover all costs prudently incurred after the March 2016 *Declaratory Order* (perhaps hundreds of millions of dollars, *see supra* p. 3), plus half of its $31 million in sunk costs under the general 50 percent policy.

San Diego claims, without support, that obtaining an approval order from the Commission "often takes years," leaving applicants at risk. Pet. 3, 12-13. But the Commission, in promulgating the Incentive Rule, stated that it would strive to process petitions for declaratory orders "quickly." Order No. 679 P 77. And it has done so — including in this case, issuing the *Declaratory Order* less than six months after San Diego's filing, even with a substantive protest by intervening parties (and an opportunity for San Diego to answer). *See also S. Cal. Edison*, 161 FERC ¶ 61,107 (issued six and a half months after application). Indeed, in *NextEra*, the Commission issued — also in less than six months — an order on a rate filing (not a mere declaratory order) that included five different incentives, with two rounds of protests. *See* 154 FERC ¶ 61,009 PP 1, 6-10.

II. THE PANEL DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENT.

San Diego argues that the panel decision conflicts with the Court's recent decision in *ANR Storage Co. v. FERC*, 904 F.3d 1020 (D.C. Cir. 2018).[5] The decision here, however, appropriately distinguishes that precedent.

[5] That decision issued several months after oral argument in this case.

In *ANR Storage*, the Court found that the Commission had not adequately distinguished past decisions that were relevant to an issue in the challenged orders. 904 F.3d at 1024. The Commission had previously granted market-based rate authority to ANR's competitor, which appeared to have "virtually indistinguishable" market power within the same market. *Id.* at 1025. Despite the similarities, the Commission had not addressed the earlier case; an administrative law judge noted that the order regarding the competitor contained no substantive analysis, and the Commission affirmed the judge without further discussion on that point. *See id.* This Court reversed, finding that "[t]he mere observation that [the earlier order] was unreasoned does not satisfy FERC's burden to provide some reasonable justification for treating ANR and [its competitor] differently." *Id.*

Here, the panel decision begins with the unremarkable proposition that issues not raised or decided do not amount to precedent. *See* slip op. 26 (citing *Gas Transmission Nw. Corp. v. FERC*, 504 F.3d 1318, 1320 (D.C. Cir. 2007) (regarding FERC cases); *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (regarding court cases)). For that reason, the panel agreed with the Commission that earlier orders granting the abandonment incentive, where the treatment of pre-order costs was "neither contested nor necessarily resolved," did not establish a policy or precedent of categorically granting prior costs. Slip op. 26; *see Rehearing Order* P 23, JA 24 (disagreeing that this case "represents a departure from settled Commission practice. . . . The question of whether such incentive would apply to costs incurred prior to the date of the order was not presented, nor did the Commission address that issue," in several dozen orders San Diego had cited).

In the *NextEra* case — central to San Diego's argument (*see* Pet. 15-17) — NextEra requested that the abandonment incentive be effective from the date of its application (a request that the Commission recited in summarizing the application). *See* 154 FERC ¶ 61,009 P 13. No party objected to any aspect of the abandonment incentive, in contrast to several other incentives that were disputed, and the Commission granted it without discussing the timing (and without specifying the effective date). *See id.* P 26; *see also Rehearing Order* P 24, JA 24 (discussing *NextEra*); slip op. 26 (same).

But the Commission did not rely only on the absence of precedent from cases in which the effective date had not been raised or decided. Rather, the Commission contrasted its "silence" on the uncontested timing issue in *NextEra* with its "express determinations" in several precedential cases. *Rehearing Order* P 24, JA 24; *id.* P 10 & n.14, JA 18 (citing "the only cases that speak in some way to the issue of retroactive application of an Abandonment Incentive under Order No. 679"); *see also id.* PP 11-13, JA 18-19 (discussing one such case); *Declaratory Order* PP 18-19 & nn.41-43, JA 9 (discussing several cases). (San Diego's delay further sets it apart — NextEra filed its application only a few months after the California System Operator selected its projects. *See* 154 FERC ¶ 61,009 PP 4-5. San Diego, by contrast, requested incentive treatment over four years after the Project's selection — an extraordinary interval that the Commission emphasized as a factor in its decision. *See Rehearing Order* PP 14, 17, 19, 25, JA 20, 21, 22, 25; *Declaratory Order* P 20, JA 10.)

The reversible error in *ANR Storage* was the Commission's failure to distinguish an earlier case, where the question of inconsistent treatment was squarely raised by ANR itself. *See* slip op. 26 (citing 904 F.3d at 1025-26). Here, the Commission responded directly to San Diego's argument that the agency had unreasonably treated it differently, by not only refuting inconsistency with earlier orders but also explaining its reliance on precedential cases. Thus, both the Commission and the panel fully addressed San Diego's claims of inconsistency with agency precedents, and the panel decision appropriately distinguishes this case from *ANR Storage*. There is no conflict with the Court's precedents that would warrant *en banc* review.

III. THE PANEL DECISION DOES NOT DEPEND ON *AUER* DEFERENCE TO THE COMMISSION'S INTERPRETATION OF ITS RULE.

San Diego claims that the panel deferred to the Commission's interpretation of its regulation; it further contends that "there is no basis" for such deference and that a case pending before the Supreme Court "may bear on the proper disposition of this case." Pet. 17-18 (citing *Auer v. Robbins*, 519 U.S. 452 (1997), and *Kisor v. Wilkie*, No. 18-15 (U.S. argued Mar. 27, 2019). Here, again, San Diego is mistaken.

Though the Commission did invoke *Auer* (among other grounds for deference) in its merits brief (at 18), the panel did not rely on such deference. (Indeed, the only references to *Auer* — or to ambiguity, interpretation, or deference — appear in the dissent, characterizing the panel decision.) Rather, the panel analyzed the regulatory language at length, concluding that the Commission orders are consistent with both the text and purpose of the Incentive Rule. *See* slip op. 16-20; *supra* Part I. Moreover, the panel affirmatively rejected San Diego's interpretation. *See* slip op. 21 ("[San Diego] is simply wrong that the Incentive Rule by itself 'guarantees' any rate treatment or entitles a utility to any specific incentive."); *id.* 23 ("[San Diego] takes th[e] language [regarding the required nexus] out of context"). Nothing in the decision suggests that the panel found the Commission's interpretation binding, nor San Diego's reasonable. Therefore, *Auer* is not relevant and the questions presented in *Kisor* have no bearing on this case.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be denied.

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i) and 40(b)(1), I certify that the Response in Opposition to Petition for Rehearing has been prepared in a proportionally spaced typeface (using Microsoft Word 2010, in 14-point Times New Roman) and contains 3,708 words, not including the tables of contents and authorities, the certificates of counsel, and the addendum.

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18 C.F.R. § 35.35

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(ii) The Regional Transmission Organization's planning and expansion process must accommodate efforts by state regulatory commissions to create multi-state agreements to review and approve new transmission facilities. The Regional Transmission Organization's planning and expansion process must be coordinated with programs of existing Regional Transmission Groups (See §2.21 of this chapter) where appropriate.

(iii) If the Regional Transmission Organization is unable to satisfy this requirement when it commences operation, it must file with the Commission a plan with specified milestones that will ensure that it meets this requirement no later than three years after initial operation.

(8) *Interregional coordination*. The Regional Transmission Organization must ensure the integration of reliability practices within an interconnection and market interface practices among regions.

(l) *Open architecture*. (1) Any proposal to participate in a Regional Transmission Organization must not contain any provision that would limit the capability of the Regional Transmission Organization to evolve in ways that would improve its efficiency, consistent with the requirements in paragraphs (j) and (k) of this section.

(2) Nothing in this regulation precludes an approved Regional Transmission Organization from seeking to evolve with respect to its organizational design, market design, geographic scope, ownership arrangements, or methods of operational control, or in other appropriate ways if the change is consistent with the requirements of this section. Any future filing seeking approval of such changes must demonstrate that the proposed changes will meet the requirements of paragraphs (j), (k) and (l) of this section.

[Order 2000–A, 65 FR 12110, Mar. 8, 2000, as amended by Order 679, 71 FR 43338, July 31, 2006]

Subpart G—Transmission Infrastructure Investment Provisions

§ 35.35 Transmission infrastructure investment.

(a) *Purpose*. This section establishes rules for incentive-based (including performance-based) rate treatments for transmission of electric energy in interstate commerce by public utilities for the purpose of benefiting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.

(b) *Definitions*. (1) *Transco* means a stand-alone transmission company that has been approved by the Commission and that sells transmission services at wholesale and/or on an unbundled retail basis, regardless of whether it is affiliated with another public utility.

(2) *Transmission Organization* means a Regional Transmission Organization, Independent System Operator, independent transmission provider, or other transmission organization finally approved by the Commission for the operation of transmission facilities.

(c) *General rule*. All rates approved under the rules of this section, including any revisions to the rules, are subject to the filing requirements of sections 205 and 206 of the Federal Power Act and to the substantive requirements of sections 205 and 206 of the Federal Power Act that all rates, charges, terms and conditions be just and reasonable and not unduly discriminatory or preferential.

(d) *Incentive-based rate treatments for transmission infrastructure investment*. The Commission will authorize any incentive-based rate treatment, as discussed in this paragraph (d), for transmission infrastructure investment, provided that the proposed incentive-based rate treatment is just and reasonable and not unduly discriminatory or preferential. A public utility's request for one or more incentive-based rate treatments, to be made in a filing pursuant to section 205 of the Federal Power Act, or in a petition for a declaratory order that precedes a filing pursuant to section 205, must include a detailed explanation of how the proposed rate treatment complies with the requirements of section 219 of the Federal Power Act and a demonstration that the proposed rate treatment is just, reasonable, and not unduly discriminatory or preferential. 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 consistent with the requirements of section 219, that the *total* package of incentives is tailored to address the demonstrable risks or challenges faced by the applicant in undertaking the project, and that resulting rates are just and reasonable. For purposes of this paragraph (d), incentive-based rate treatment means any of the following:

(1) For purposes of this paragraph (d), incentive-based rate treatment means any of the following:

(i) A rate of return on equity sufficient to attract new investment in transmission facilities;

(ii) 100 percent of prudently incurred Construction Work in Progress (CWIP) in rate base;

(iii) Recovery of prudently incurred pre-commercial operations costs;

(iv) Hypothetical capital structure;

(v) Accelerated depreciation used for rate recovery;

(vi) Recovery of 100 percent of prudently incurred costs of transmission facilities that are cancelled or abandoned due to factors beyond the control of the public utility;

(vii) Deferred cost recovery; and

(viii) Any other incentives approved by the Commission, pursuant to the requirements of this paragraph, that are determined to be just and reasonable and not unduly discriminatory or preferential.

(2) In addition to the incentives in §35.35(d)(1), the Commission will authorize the following incentive-based rate treatments for Transcos, provided that the proposed incentive-based rate treatment is just and reasonable and not unduly discriminatory or preferential:

(i) A return on equity that both encourages Transco formation and is sufficient to attract investment; and

(ii) An adjustment to the book value of transmission assets being sold to a Transco to remove the disincentive associated with the impact of accelerated depreciation on federal capital gains tax liabilities.

(e) *Incentives for joining a Transmission Organization.* The Commission will authorize an incentive-based rate treatment, as discussed in this paragraph (e), for public utilities that join a Transmission Organization, if the applicant demonstrates that the proposed incentive-based rate treatment is just and reasonable and not unduly discriminatory or preferential. Applicants for the incentive-based rate treatment must make a filing with the Commission under section 205 of the Federal Power Act. For purposes of this paragraph (e), an incentive-based rate treatment means a return on equity that is higher than the return on equity the Commission might otherwise allow if the public utility did not join a Transmission Organization. The Commission will also permit transmitting utilities or electric utilities that join a Transmission Organization the ability to recover prudently incurred costs associated with joining the Transmission Organization, either through transmission rates charged by transmitting utilities or electric utilities or through transmission rates charged by the Transmission Organization that provides services to such utilities.

(f) *Approval of prudently-incurred costs.* The Commission will approve recovery of prudently-incurred costs necessary to comply with the mandatory reliability standards pursuant to section 215 of the Federal Power Act, provided that the proposed rates are just and reasonable and not unduly discriminatory or preferential.

(g) *Approval of prudently incurred costs related to transmission infrastructure development.* The Commission will approve recovery of prudently-incurred costs related to transmission infrastructure development pursuant to section 216 of the Federal Power Act, provided that the proposed rates are just and reasonable and not unduly discriminatory or preferential.

(h) *FERC–730, Report of transmission investment activity.* Public utilities that have been granted incentive rate treatment for specific transmission projects must file FERC–730 on an annual basis beginning with the calendar year incentive rate treatment is granted by the Commission. Such filings are due by April 18 of the following calendar year and are due April 18 each year thereafter. The following information must be filed:

(1) In dollar terms, actual transmission investment for the most recent calendar year, and projected, incremental investments for the next five calendar years;

(2) For all current and projected investments over the next five calendar years, a project by project listing that specifies for each project the most up-to-date, expected completion date, percentage completion as of the date of filing, and reasons for delays. Exclude from this listing projects with projected costs less than $20 million; and

(3) For good cause shown, the Commission may extend the time within which any FERC–730 filing is to be filed or waive the requirements applicable to any such filing.

(i) *Rebuttable presumption.* (1) The Commission will apply a rebuttable presumption that an applicant has demonstrated that its project is needed to ensure reliability or reduces the cost of delivered power by reducing congestion for:

(i) A transmission project that results from a fair and open regional planning process that considers and evaluates projects for reliability and/or congestion and is found to be acceptable to the Commission; or

(ii) A project that has received construction approval from an appropriate state commission or state siting authority.

(2) To the extent these approval processes do not require that a project ensures reliability or reduce the cost of delivered power by reducing congestion, the applicant bears the burden of demonstrating that its project satisfies these criteria.

(j) *Commission authorization to site electric transmission facilities in interstate commerce.* If the Commission pursuant to its authority under section 216 of the Federal Power Act and its regulations thereunder has issued one or more permits for the construction or modification of transmission facilities in a national interest electric transmission corridor designated by the Secretary, such facilities shall be deemed to either ensure reliability or reduce the cost of delivered power by reducing congestion for purposes of section 219(a).

[Order 679, 71 FR 43338, July 31, 2006, as amended by Order 679–A, 72 FR 1172, Jan. 10, 2007, Order 691, 72 FR 5174, Feb. 5, 2007]

Subpart H—Wholesale Sales of Electric Energy, Capacity and Ancillary Services at Market-Based Rates

SOURCE: Order 697, 72 FR 40038, July 20, 2007, unless otherwise noted.

§ 35.36 Generally.

(a) For purposes of this subpart:

(1) *Seller* means any person that has authorization to or seeks authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates under section 205 of the Federal Power Act.

(2) *Category 1 Seller* means a Seller that:

(i) Is either a wholesale power marketer that controls or is affiliated with 500 MW or less of generation in aggregate per region or a wholesale power producer that owns, controls or is affiliated with 500 MW or less of generation in aggregate in the same region as its generation assets;

(ii) Does not own, operate or control transmission facilities other than limited equipment necessary to connect individual generating facilities to the transmission grid (or has been granted waiver of the requirements of Order No. 888, FERC Stats. & Regs. ¶ 31,036);

(iii) Is not affiliated with anyone that owns, operates or controls transmission facilities in the same region as the Seller's generation assets;

(iv) Is not affiliated with a franchised public utility in the same region as the Seller's generation assets; and

(v) Does not raise other vertical market power issues.

(3) *Category 2 Sellers* means any Sellers not in Category 1.

(4) *Inputs to electric power production* means intrastate natural gas transportation, intrastate natural gas storage

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d) and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 29th day of March 2019, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

/s/ Carol J. Banta
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