

119 FERC ¶ 61,182
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

The United Illuminating Company

Docket No. ER07-653-000

ORDER ACCEPTING IN PART AND REJECTING IN PART, REVISED
TARIFF SHEET AND SECTION 205 FILING, SUBJECT TO CONDITIONS

(Issued May 22, 2007)

1. On March 23, 2007, The United Illuminating Company (UI) filed pursuant to Federal Power Act (FPA) sections 205¹ and 219² a revised tariff sheet³ to incorporate into its approved formula rate costs associated with two transmission investment rate incentives under Order No. 679⁴ in connection with a transmission line construction project located from Middletown to Norwalk, Connecticut (Project). UI is seeking inclusion of 100 percent of Construction Work in Progress (CWIP) costs in rate base and a 50 basis point return on equity (ROE) adder for the entire cost of the Project for using

¹ 16 U.S.C. § 824d (2000).

²Energy Policy Act of 2005 (EPAAct 2005), Pub. L. No. 109-58, § 1241, 119 Stat. 594, 961-62 (2005) (to be codified at 16 U.S.C. § 824s) (section 219).

³ Revised Sheet No. 3441 to ISO New England Inc.'s FERC Electric Tariff No. 3 (Schedule 21-UI).

⁴ See *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, *order on reh'g*, 119 FERC ¶ 61,062 (2007).

advanced technologies.⁵ In this order, the Commission accepts the revised tariff sheet, grants waiver of certain Commission filing requirements, grants 100 percent CWIP recovery, and accepts the 50 basis point ROE adder for the underground portion of the Project, subject to certain conditions as further discussed below.

I. Background

A. The Project

2. UI states that the Project is a joint undertaking between UI and The Connecticut Light & Power Company (CL&P) to build a new 345-kV transmission line from Middletown to Norwalk, Connecticut and to rebuild and modify portions of the existing 115-kV transmission system. UI states that this Project includes a 69-mile transmission line consisting of three segments, with approximately 24 miles of the 69-mile line built underground. UI states that the Project also includes construction of related switching stations and substations that will use several advanced technologies, including underground 345-kV cross-linked polyethylene cable (XLPE).

3. UI states that the total cost of the Project is estimated to be \$1.3 billion. UI will own 20 percent of the Project, with its share of the costs totaling between \$230 and \$260 million, which will be more than triple its current net transmission plant. The Project is scheduled to be in service in 2009.

4. UI states that the Project may help mitigate annual inefficiency costs estimated to be \$308 million by the Connecticut Siting Council, the entity responsible for the siting of specific transmission projects in Connecticut. UI states that the Project is intended to help reduce dependence on reliability must run contracts, the costs of running uneconomic generation, and congestion costs, by providing additional import capability in the southwest Connecticut region, as recognized by the Commission in several orders.⁶

⁵ UI states that it not submitting tariff changes relating to the ROE advanced technologies adder because its current formula rate is able to accommodate ROE incentives that may be subsequently approved by the Commission.

⁶ *Citing PSEG Power Connecticut, LLC*, 110 FERC ¶ 61,120 at P19, *order on reh'g*, 110 FERC ¶ 61,441, *reh'g denied*, 113 FERC ¶ 61,210 (2005); *Devon Power, LLC*, 109 FERC ¶ 61,154 at P 65 (2004), *order on reh'g*, 110 FERC ¶ 61,313, *order on reh'g*, 110 FERC ¶ 61,315 (2005).

5. UI states the total revenue requirement impact of the proposed rate incentive over the 45-year depreciable life of the Project is estimated to be less than \$13 million on a net present value basis. UI claims that the resulting average revenue requirement increase over the life of the Project is only 0.52 percent with a cumulative increase of only 0.25 percent as a result of the incentives requested.

B. UI's Proposed Transmission Investment Incentives

6. UI requests the following incentives to be applied to its share of the Project: (1) inclusion of 100 percent of CWIP in rate base for the construction costs incurred; and (2) a ROE adder of 50 basis points for using advanced transmission technologies, to be applied to the cost of the entire Project.

7. UI claims that the Project qualifies for Order Nos. 679 and 679-A incentives because it will improve reliability and significantly relieve congestion, thereby reducing the costs of delivered power to customers in southwestern Connecticut. UI states that the Project satisfies the "rebuttable presumption" for incentive rate treatment because it has been planned and approved through the fair and open ISO New England Inc. (ISO-NE) Regional Transmission Expansion Plan (RTEP) process and has been approved by the Connecticut Siting Council. UI's two requested incentives are discussed in further detail below.

1. 100 Percent of CWIP in Rate Base

8. UI states that Order No. 679 permits applicants to seek a return on 100 percent of CWIP in rate base. Notably, UI already received authorization from the Commission to include 50 percent of its CWIP for the Project in rate base prior to completion of the Project.⁷ UI claims that permitting inclusion of 100 percent of CWIP in rate base will increase its cash flow, decrease the amount of borrowing necessary to finance the Project, and potentially enhance its debt ratings.

9. UI states that its share of the Project, estimated to be between \$230 and \$260 million, will more than triple its current net transmission plant in service. Similarly, UI notes that its investment in the Project will require a significant increase in its capital expenditure budget for transmission. For example, UI states that historically, for the time period between 2003 and 2005, UI's average annual transmission capital

⁷ Unpublished letter order issued on November 16, 2005, in Docket No. ER05-1409-000, *et al.*

expenditure budget was approximately \$15 million.⁸ In contrast, UI's transmission and distribution capital expenditure program will increase exponentially, to \$545 million for the period from 2006 through 2009, as a result of the Project and other transmission projects.⁹

10. UI shows how the cash impact of receiving 100 percent of CWIP recovery in rate base as opposed to 50 percent of CWIP in rate base for the Project will greatly serve to mitigate the cash need resulting from this \$545 million planned capital expenditure.¹⁰ UI indicates that its estimated total cash need in 2009 will be reduced by \$28 million if it is granted 100 percent of CWIP in rate base, as opposed to a scenario where only 50 percent of CWIP in rate base is permitted. Also, UI points out for the years 2007 and 2008 it would also experience a reduced cash need of \$6 million and \$18 million, respectively, if granted 100 percent of CWIP in rate base.¹¹

11. UI states that allowing the proposed CWIP incentive would greatly reduce the debt necessary to finance the Project. As a result, UI estimates that, if granted the incentive, it would save \$1.5 million in interest in 2009 due to the lower borrowings that would be needed to finance the Project.

12. Additionally, UI asserts that the Commission has found that CWIP is viewed more favorably by investors than Allowance for Funds Used During Construction (AFUDC).¹² For this reason, UI states that the inclusion of 100 percent of CWIP in rate base reduces the costs of obtaining financing for the Project, and as a result, the company's debt ratings will likely improve. UI states that an improved debt rating lowers the cost of debt and thus reduces the total costs to its customers.

⁸ UI states that this averaged over \$7 million per year (out of \$15 million total) budgeted for preliminary investments for the Project.

⁹ UI's Filing at Appendix A, p. 18.

¹⁰ UI's Filing at Exh. No. UI-11.7.

¹¹ *Id.*

¹² See *Construction Work In Progress for Public Utilities; Inclusion of Costs in Rate Base*, Order No. 298, FERC Stats. & Regs. ¶ 30,455, *order on reh'g*, Order No. 298-A, FERC Stats. & Regs. P 30,500 (1983), *order on reh'g*, Order No. 298-B, FERC Stats. & Regs. ¶ 30,524 (1983).

13. Finally, UI proposes accounting procedures to ensure that its rates will not include costs related to both capitalized AFUDC and corresponding amounts of return on CWIP, as required by 18 C.F.R. § 35.25 of the Commission's regulations.¹³ UI claims its proposed accounting procedures also ensure that future collections for depreciation expense will not include AFUDC on CWIP balances that were included in rate base. Specifically, UI proposes to accrue AFUDC on 100 percent of its CWIP balance in Account 107, Construction Work in Progress - Electric, and record a regulatory liability to offset 100 percent of the recorded AFUDC in Account 254, Other Regulatory Liabilities. UI also proposes to amortize the regulatory liability to Account 407.4, Regulatory Credits, over the average life of assets in service to serve as an offset to depreciation expense. UI states these proposed accounting procedures modify those established to include 50 percent of CWIP in rate base, in Docket No ER05-1409-000, to take into account the change to 100 percent of CWIP in rate base.

2. 50 Basis Point ROE Advanced Technologies Adder

14. UI states that the 24-mile underground portion of the Project will use underground XLPE cable. Underground cable technology is on the list of the 18 advanced transmission technologies in section 1223 of EPAct 2005.¹⁴

15. UI also states that the Project includes building related switching stations and substations that will use an innovative combination of design elements. UI claims that the Singer Substation will employ variable shunt reactors, a technology rarely used with 345-kV transmission lines, which will allow system operators to maximize power transfer capabilities at different load levels. UI also states that the Singer Substation includes a gas insulated substation (GIS) technology, which will significantly reduce the amount of space needed for the equipment. UI states that this substation will use an innovative automation package for monitoring of circuit breakers, transformers and reactors, which will provide early warning of abnormal conditions to help minimize unnecessary maintenance outages.

16. UI claims that it will make extensive use of innovative design technologies, including novel application of XLPE cable, that will make the Project siting possible and practical. UI states that the initial capital costs of using XLPE cable are higher than conventional alternatives, but asserts that the XLPE cable will include the following long-term benefits: ability to place cable in existing transmission corridors, greater

¹³ See UI's Exh. Nos. UI-13, UI-14, and UI-15.

¹⁴ See Pub. L. No. 109-58 §1223, 119 Stat. 594, 953-54 (2005).

flexibility in scheduling installation and maintenance, and elimination of the need to condemn 29 houses and acquire 100 acres of additional right-of-way.

17. UI states that if successful, the technologies used in the Project may serve as design prototypes for other transmission projects in highly developed urban and suburban areas. UI further states that the Project's innovative design exposes it to potential technological and business risks and uncertainties given the lack of operating experience for the technologies which justify the proposed ROE technologies adder. UI's filing includes a statement on the use of advanced technologies.¹⁵

C. UI's Existing Formula Rate

18. UI provides its transmission service under an existing formula rate design. UI maintains a Local Network Service (LNS) Schedule under its local service rate schedules, Schedule 21-UI and Schedule 20A-UI of Section II of the ISO-NE Transmission, Markets, and Services Open Access Transmission Tariff (OATT). The formula rate under this LNS Schedule operates by first calculating the revenue requirement for all existing transmission assets in the UI system using historic FERC Form 1 data. Incremental revenue requirements¹⁶ associated with new capital additions that are expected to be placed in-service during the "rate period" are added to this revenue requirement. UI then adds these two amounts to develop a total transmission revenue requirement.

19. From the total transmission revenue requirement, UI subtracts revenues that it receives from other sources. UI's LNS Schedule rate recovers the total costs of its transmission, while revenues received from the Regional Network Service (RNS) rate are credited to this total revenue requirement. This formula rate is subject to an annual true-up adjustment based on total actual transmission-related costs as compared to estimated costs. Any difference is refunded or billed to customers taking service during the year.

20. In the instant proceeding, UI proposes to modify its existing formula rate by modifying the provision for CWIP to include 100 percent of CWIP in rate base for the Project. UI would not need to modify the formula to reflect the ROE incentive, since its formula references that the ROE will be the most recent one accepted by the

¹⁵ See Exh. No. UI-1 at 7.

¹⁶ Estimated incremental revenue requirements are calculated by multiplying the estimated average capital additions by a carrying cost factor, which is developed based on historical costs.

Commission, and will cite the Docket Number in doing so. UI requests that the Commission accept the filing and waive section 35.3 of the regulations (notice requirements) to allow an effective date of March 26, 2007.

II. Notice of Filings and Responsive Pleadings

21. Notice of UI's filing was published in the *Federal Register* with interventions, protests and comments due on or before April 13, 2007.¹⁷ A notice of intervention and timely motions to intervene were filed by the Maine Public Utilities Commission (Maine Commission), the Attorney General for the State of Connecticut (CTAG), National Grid USA, the New England Conference of Public Utilities Commissioners (NECPUC), and The Northeast Utilities Companies.

22. The Connecticut Department of Public Utility Control (CT DPUC) filed a notice of intervention, motion to reject and protest. Connecticut Municipal Electric Energy Cooperative (CMEEEC) filed a timely motion to intervene, reject, protest, or in the alternative, request for hearing. The Massachusetts Municipal Wholesale Electric Company and CTAG also filed comments adopting and supporting CMEEEC's motion. On April 18, 2007, NECPUC filed out-of-time comments and a protest adopting and supporting, for the most part, CT DPUC's arguments. On April 20, 2007, the Maine Commission filed an amendment to its intervention and a partial adoption of the protest filed by the CT DPUC.¹⁸ On April 30, 2007, UI filed an answer to the protests.

A. The Protests

23. In its protest, CT DPUC raises several concerns regarding UI's 100 percent CWIP incentive. CT DPUC state that UI's broad statements supporting its arguments for including CWIP in rate base could be applied to every new transmission project and would clearly improve cash flow for any utility. CT DPUC state that UI fails, however, to provide any factual evidence that this increased cash flow would do anything to improve UI's ability to obtain financing. Further, CT DPUC states that UI's 2004 and 2005 annual reports and other financial reports indicate that UI's parent, UIL Holdings Corporation, has a significant amount of cash on hand, i.e., \$62 million at the end of 2007, which contradicts the need for the 100 percent CWIP incentive.

24. CT DPUC also disagrees with UI's contention that the CWIP incentive will help assure the completion of the Project. To the contrary, CT DPUC states that the nature of

¹⁷ 72 Fed. Reg. 15,874 (2007).

¹⁸ These parties will be collectively referred to herein as the Protestors.

including CWIP in rate base, which allows for immediate returns on the investment, leads the utility to be financially indifferent as to when the Project is completed because it will earn its carrying costs even if there are substantial delays. CT DPUC states that AFUDC defers cost recovery until a project is used and useful, thus providing a great incentive to complete the work as soon as possible. CT DPUC asserts that the transmission incentives must be examined as total package and that the 100 percent of CWIP and the ROE technology incentives were for new transmission investment, not for those already under construction. CT DPUC states that UI uses the same argument and rationale for the two new transmission incentives as were used in the Opinion No. 489, which is to obtain financing on beneficial terms to construct the Project. CT DPUC asserts that UI's goal is to ratchet the ROE to the maximum permissible level to enhance access to capital. CT DPUC states the Project is already reviewed and approved by ISO-NE and the Connecticut Siting Council and that any new incentives will have no appreciable effect on UI's conduct and create no discernable benefit for transmission customers.

25. CT DPUC argues that UI and all the New England Transmission Owners (New England TOs) argued in the Opinion No. 489 that the Commission should not consider "innovative" technologies in approving the existing ROE adders because of their contentious, fact-specific and potentially litigious nature and should rely on ISO-NE's RTEPs. CT DPUC states that UI has failed to explain the contradiction between the need for new 50 basis point ROE technology adder here and its argument in the Opinion No. 489 that all technologies must be treated the same for ROE purposes because it would damage the RTO planning process. CMEEC states that UI is bound by the doctrine of judicial estoppel, and claims that in the Opinion No. 489, UI argued that there should be no distinction drawn between ROE adders for allegedly "innovative" and other traditional technologies used for new transmission projects. Therefore, UI should now be precluded from requesting an ROE adder for using advanced technologies.

26. CT DPUC contends that the XLPE cable is not an "innovative or advanced" technology because both ISO-NE and the Connecticut Siting Council have independently determined it to be proven, reliable and cost-effective. In fact, CT DPUC states that UI's alternative high-pressure fluid filled (HPFF) cable for the Project was rejected by the Connecticut Siting Council in favor of the newer XLPE cable and that it should not be rewarded for merely acting prudently. CT DPUC believes if the XLPE cable is procured and installed properly there will be little or no additional risks and this difference in facts can only be resolved in the context of a hearing. CMEEC questions whether the XLPE cable used in the Project is "innovative" because this determination is highly fact-intensive and requires a hearing. Lastly, CMEEC states that an ROE adder, if any, should be limited to the underground portion of the Project.

27. CT DPUC states that the 100 percent CWIP incentive is a means to borrow from customers in order to pay high dividends to stockholders. CT DPUC states that UI has

already spent \$40 million in CWIP for the Project through 2006 and is completely protected financially in the unlikely event it abandons the Project.

28. CMEEC asserts that UI should have to explain why it is entitled to 100 percent recovery of CWIP, as opposed to the 50 percent recovery to which UI is currently entitled.

29. CMEEC states that the proposed incentives should be rejected because UI has failed to demonstrate that its “total package” of incentives, i.e., the existing ROE incentives that it was granted by the Commission in Opinion No. 489¹⁹ and the two incentives requested in the instant proceeding, meet the nexus requirement and are otherwise just and reasonable. CMEEC states that UI must show that the incentive rate treatment it is already receiving does not adequately address its “demonstrable risks and challenges.”

30. CMEEC also states that UI is under an obligation to build the Project and is already receiving a 50 basis point adder for membership in ISO-NE. CMEEC states that UI also argued in the Opinion No. 489 that the 100 basis point new transmission adder “is significant enough to have impact on utilities considering investment in new transmission.” CMEEC states that the 100 percent CWIP incentive is unnecessary due to the 150 basis point ROE adder already available (50 basis points for RTO participation and 100 basis points for new transmission investment). Further, CMEEC states that UI’s formula rates currently permit it to charge rates based upon unaudited, forecasted, year-end rate base balances which should mitigate any uncertainty, rate instability and cash flow concerns. Also, CMEEC states that since UI has already received requisite regulatory approval by the Connecticut Siting Council, the litigation risk is relatively small²⁰ and the two proposed incentives are thus more of a “reward or bonus” rather than an incentive.

31. Further, CMEEC requests that if the Commission does not reject the filing, the incentives should be set for hearing because UI cannot pancake incentives to address the same “risks and challenges” that the existing incentives address. As noted above, CMEEC states that UI is under a contractual obligation to build this Project, it has already received all of its siting approvals and it is already receiving ROE incentive adders. CMEEC also states that UI has failed to justify or show the nexus for receiving

¹⁹ *Bangor Hydro Electric Co. et al.*, Order on Initial Decision, Opinion No. 489, 117 FERC ¶ 61,129 (2006), *reh’g pending*.

²⁰ CMEEC states that the Project is already under construction, is expected to be in service by 2009, and is located entirely in the state of Connecticut.

another new ROE incentive that would push it to the “top end of the zone of reasonableness.”

32. In its motion, the Maine Commission incorporates and adopts by reference the argument of CT DPUC except in two respects. First, Maine Commission does not agree with CT DPUC that the underground portion of the Project represents a cost-effective approach.²¹ Second, the Maine Commission takes no position on whether it is appropriate to include 100 percent CWIP in rate base.

B. UI's Answer

33. In its answer, UI claims that the arguments of CMEEC and CT DPUC ignore or mischaracterize the applicable statutory and regulatory authority, the basis on which UI seeks incentives for the Project, and the very substantial record offered by UI in support of the incentives. UI argues that CMEEC and CT DPUC confuse two different bases for incentives authorized by Congress – incentives for new transmission investment and the incentive for the use of advanced technologies. In the instant filing, UI notes that it seeks the latter and has demonstrated that the Project's use of advanced technologies is precisely the type of activity Congress sought to encourage through an incentive. UI states that it also has shown a nexus between its request for a 100 percent CWIP incentive and its efforts to construct the Project. Finally, UI states that it has shown that the “total package” of incentives applicable to the Project results in rates that are just and reasonable.

34. UI notes that CMEEC and CT DPUC assert that, because the Commission already has approved certain incentives collectively sought by the New England TOs in the Opinion No. 489, allowing any additional incentives for the Project would constitute “layers of largess with no perceptible benefit.” However, UI argues that the incentives sought in UI's instant filing are distinct in basis and purpose from the incentives approved in the Opinion No. 489.

35. UI adds that nothing in Opinion No. 489 granting a region-wide incentive for new transmission investment or in Order No. 679 bars individual New England TO members from seeking additional incentive treatment for specific projects. UI points out that even CMEEC acknowledges in its filing, “transmission owners that have received incentive rate treatment approval may seek additional incentives.”

²¹ NECPUC also disagrees with CT DPUC that the underground portion of the Project represents a cost-effective approach.

36. UI states that in the Opinion No. 489, the New England TOs sought, and the Commission approved, a 100 basis point ROE adder as an incentive for construction of all new transmission projects approved through the ISO-NE regional planning process. UI adds that in the instant proceeding, by contrast, it seeks a separate ROE incentive for the Project based on and because of the Project's use of advanced transmission technologies. UI adds that the Commission provides for this distinct directive in Order No. 679 by clarifying that it will consider incentives for the use of advanced technologies on a case-by-case basis.

37. UI argues that its prior support for a technology-neutral new transmission investment incentive does not negate the need for additional incentives to encourage use of advanced transmission technologies. UI states that the Commission appropriately determined in Opinion No. 489 that the public interest is served by promoting new transmission infrastructure investment without a threshold requirement that such investment use any specific type of technology. In the present filing, by contrast, UI argues that it asks the Commission to consider whether the advanced transmission technologies being used in the Project merit additional incentive treatment for the reasons set out in the filing.

38. UI also argues that it has justified the "total package" of incentives for the Project. UI argues that it addresses the purposes for which the specific incentives are sought, how those purposes address risks of the Project different from risks addressed by the incentives approved in Opinion No. 489, and the justness and reasonableness of the rates resulting from approval of the proposed incentives in combination with the previously granted incentives.

39. With respect to ROE, UI claims that its filing explains why the advanced technology ROE adder and the 100 basis point ROE adder for new transmission investment previously approved by the Commission serve different purposes and are complementary. UI claims that the ROE adder approved in Opinion No. 489 is intended to provide an incentive to construct all transmission projects approved through the ISO-NE regional planning process, while the 50 basis point ROE incentive adder sought by UI's in the instant filing is intended to compensate for unique risks associated with the use of advanced transmission technologies.

40. UI argues that CMEEC and CT DPUC suggest that UI cites the same reasons for seeking the advanced transmission technology adder as were given in Opinion No. 489 to support the new transmission investment adder. UI argues that CMEEC and CT DPUC may be confusing UI's efforts to justify the combined ROE, including the Opinion No. 489 incentives and the proposed advanced technology adder, with UI's showing of a nexus between the advanced technology adder and the Project.

41. Regarding concerns with its CWIP formula, UI also explains and documents the impact of increasing its CWIP formula from the previously-approved 50 percent to 100 percent, including an analysis of how increasing the CWIP percentage will improve UI's cash flow during construction of the Project. UI also explains how this cash flow enhancement will contribute to its ability to manage and finance the Project.

42. Regarding RTO or siting approval and incentive rate treatment, UI argues that the approach advocated by CMEEC and CT DPUC would be inconsistent with Order No. 679. UI states that in Order No. 679, the Commission established rebuttable presumptions that a project that results from a fair and open RTO planning process that considers reliability and/or congestion, or a project that has received siting approval from a state, is eligible for incentives. Similarly, UI argues that just because RTO approval may give rise to an obligation to build, it does not preclude incentive treatment.

43. UI also states that the Commission should not punish aggressive construction schedules for new transmission projects by barring incentive treatment. UI states that it is a small utility by industry standards, is following an aggressive schedule to complete a Project that will almost triple the size of its investment in transmission infrastructure and transform the overall financial balance of its asset portfolio. UI adds that the Commission should not penalize UI's good-faith efforts to address significant reliability and congestion problems.

44. UI states that the findings of the Connecticut Siting Council and the express language of EAct 2005 make clear that the Project uses advanced transmission technologies. UI states that CT DPUC not only opposes the concept of an advanced transmission technology incentive in general, but asserts that the technologies employed in the Project are not advanced or innovative. UI claims that CT DPUC's position is unsupported because both EAct 2005 and the Connecticut Siting Council documents that CT DPUC itself cites have identified technologies used in the Project as advanced and/or innovative technologies.

45. UI notes that the Commission explained in Order No. 679 that "[a]dvanced transmission technologies are defined in section 1223 of EAct 2005 to be technologies that increase the capacity, efficiency, or reliability of an existing or new transmission facility." By this measure, UI states that the 345-kV XLPE underground cable technology as used in this Project undisputedly qualifies for incentive treatment. Furthermore, UI adds that it is notable that, while CT DPUC heralds the fact that XLPE cable of varying voltages have been used in at least eight European applications, it can cite no comparable examples in the United States, where both geographic conditions and regulatory requirements can be very different than in Europe. Thus, UI states that while the Connecticut Siting Council concluded that the use of XLPE cable would be "reliable enough," it made clear that such use poses a "greater risk" than the use of HPFF cable.

46. Finally, UI argues that a 100 percent CWIP incentive is appropriate in light of UI's financial situation. UI states that it takes particular exception to the many misrepresentations of its finances contained in CT DPUC's motion. UI states, in short, that CT DPUC's efforts to downplay the magnitude of the Project investment for UI, and the implications of that investment on UI's cash flow, are unsupported based upon a more careful review of UI's financial profile.

47. UI states that CMEEC and CT DPUC ignore the detailed financial data UI provided in support of its filing, including testimony of UI's Chief Financial Officer, data on UI's cash flow with and without the additional CWIP, recent downgrades of the issuer ratings for both UI and its parent, and the significant role that UI's small size relative to other utilities plays in market assessments of its risk.

48. UI adds that it is not clear what level of "explanation" would mollify CMEEC and CT DPUC short of an express statement that "but for" the CWIP incentive the Project would not go forward. On this issue, UI claims that the Commission repeatedly has refused to apply a "but for" test to incentive treatment for new transmission investment. Most recently, in Order No. 679-A, UI states that the Commission reaffirmed its rejection of the "but for" test as the appropriate test for applying FPA section 219. UI notes that contrary to CT DPUC's assertion, UI has every incentive to complete the Project on time. Lastly, UI argues against CMEEC's and CT DPUC's arguments that matters in this proceeding should be set for hearing by stating that the Commission has expressed a preference to avoid extensive incentive proceedings.

III. Discussion

A. Procedural Matters

49. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,²² the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. In addition, in view of the early stage of this proceeding and the absence of any undue prejudice or delay, we will accept the unopposed late-filed comments by NECPUC and the Maine Commission.

50. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure²³ prohibits an answer to a protest, unless otherwise ordered by the decisional authority. We will accept the answer submitted by UI because it has aided us in our decision-making process.

²² 18 C.F.R. § 385.214 (2007).

²³ 18 C.F.R. § 385.213(a)(2)(2007).

B. Request for Section 219 Incentives

1. Standard of Review

51. In EPAct 2005, Congress addressed the allowance of incentive-based rate treatments for new transmission construction.²⁴ 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. The Commission issued Order No. 679, as modified and clarified on rehearing, which sets forth procedures by which a public utility could seek transmission rate incentives pursuant to section 219, such as the incentives requested here by UI.

52. Order No. 679 provides that a public utility may file under the FPA a petition for declaratory order or a section 205 filing to obtain incentive rate treatment for transmission infrastructure investment that satisfies the requirements of FPA section 219, *i.e.*, 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.²⁵ Order No. 679 also establishes a rebuttable presumption (as modified by Order No. 679-A) 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.”²⁶ Order No. 679-A also clarifies the operation of this rebuttable presumption by noting that the authorities and/or processes on which it is based (*i.e.*, a regional planning process, a state commission, or siting authority) must, in fact, consider whether the project ensures reliability or reduces the cost of delivered power by reducing congestion.²⁷

53. In addition to satisfying this section 219 requirement, a proposed incentive rate must also be shown to have a nexus between the incentive sought and the investment being made. The Commission stated that in evaluating whether an applicant has satisfied the required nexus test, the Commission will examine the total package of incentives being sought, the inter-relationship between any incentives, and how any requested

²⁴ See Pub L. No. 109-58, 119 Stat 594, 961 (2005).

²⁵ See 18 C.F.R. § 35.35(i).

²⁶ See *id.*; Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 47.

²⁷ Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 49.

incentives address the risks and challenges faced by the project.²⁸ Applicants must provide sufficient explanation and support to allow the Commission to evaluate the incentives.

2. Incentives and the Section 219 Rebuttable Presumption

54. The Commission notes that UI's request for the incentive ROE is based on its use of advanced technologies, while the request for the inclusion of CWIP in rate base is not. As discussed below, we will grant the 50 basis point ROE incentive adder for advanced technologies only for the costs associated with, and electrically necessary to support, the underground XLPE cable portion of the Project. Additionally, as discussed below, we will grant UI's request for recovery of 100 percent CWIP in rate base for the entire Project. These two incentives achieve different purposes, and thus the application of the ROE incentive to the advanced technologies portion of the Project does not preclude the application of the CWIP incentive to the Project as a whole. The Commission finds that some of the technologies that UI plans to use for the Project are advanced and will increase the capacity, efficiency or reliability of the new transmission facilities.²⁹ The granted ROE incentive is intended to encourage such technologies in accordance with section 219 and Order No. 679.³⁰ In contrast, the CWIP incentive will alleviate cash flow deficiencies in order to assist in the financing of the entire Project

55. Our analysis begins with whether UI's Project satisfies the requirements of section 219, *i.e.*, whether the project ensures reliability or reduces the cost of delivered power by reducing transmission congestion. UI states that the Project has been planned and approved through the ISO-NE regional planning process and has been approved by the Connecticut Siting Council. No party contests UI's assertion.

56. Our review of both ISO-NE's RTEP process and the Connecticut Siting Council's findings regarding the Project provides sufficient evidence supporting the Project. Since 2001, ISO-NE has issued numerous studies which have shown that the Project is needed

²⁸ 18 C.F.R. § 35.35(d); Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 26. *See also* Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 21 ("By this we mean that the incentive(s) sought must be tailored to address the demonstrable risks and challenges faced by the applicant in undertaking the project.")

²⁹ In addition, the new technologies expose UI to unique risks that will outlive the construction phase of the Project.

³⁰ Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 298.

to improve reliability in southwest Connecticut and the New England region in general and to reduce transmission congestion.³¹ Also, our review of the ISO-NE RTEP process shows that this Project was designated as a “Reliability Upgrade” and has received the ISO-NE’s section I.3.9 approval, which indicates that a project has “a significant effect on the stability, reliability or operating characteristics of the Transmission Owner’s transmission system, the facilities of another Transmission Owner or the system of a Market Participant.”³²

57. Further, the Connecticut Siting Council stated that:

No one in this proceeding challenged or disputed the need for the proposed project and the Council concludes there is need for a 345-kV transmission line for southwest Connecticut. The existing 115-kV transmission grid serving southwest Connecticut fails to meet North American Electric Reliability Council, Northeast Power Coordinating Council, and New England Power Pool reliability standards. The Federal Energy Regulatory Commission (FERC), ISO-NE, and Connecticut Department of Public Utility Control (DPUC) concur that the southwest Connecticut electric transmission system is not reliable even with the Bethel to Norwalk 345-kV line (Phase I) in service.[³³]

58. Based on the detailed studies and analyses done by ISO-NE and the findings of the Connecticut Siting Council, we find that UI qualifies for the rebuttable presumption that the Project ensures reliability or reduces the cost of delivered power.

3. CWIP Incentive and the Commission’s Nexus Requirement

59. As discussed herein, we accept UI’s 100 percent CWIP incentive for the Project,

³¹ See ISO-NE’s, Regional Transmission Expansion Plans from 2002 through 2006, (RTEP02 through RTEP06).

³² See ISO-NE’s Planning Procedures (PP5-3: Guidelines For Conducting And Evaluating Proposed Plan Application Analyses) – 1.1 Section I.3.9 Requirement.

³³ See the Connecticut Siting Council’s Opinion in Docket No. 272, issued on April 7, 2005 (D272) at 7-8.

but we deny UI's request for incentives for any costs incurred prior to August 8, 2005.³⁴ As explained below, we find that UI has satisfied the Commission's nexus requirement with respect to the CWIP incentive.

60. In Order No. 679-A, the Commission clarified that its nexus test is met when an applicant demonstrates that the total package of incentives requested is "tailored to address the demonstrable risks or challenges faced by the applicant."³⁵ By its terms, this nexus test is fact-specific and requires the Commission to review each application on a case-by-case basis.

61. The Commission believes that permitting the inclusion of 100 percent of CWIP in rate base for UI will further the goals of section 219 by providing up-front regulatory certainty and rate stability. The current cash flow provided by this incentive will ease the pressures on UI's finances caused by the construction of the Project. Without this incentive, UI could experience deterioration in its credit quality that could lead to higher rates and commitment fees, in addition to increasing its borrowing costs under any new long-term borrowing arrangements. The increased cash flow improves corporate credit quality and further supports the nexus between this incentive and the proposed Project.³⁶

62. The Commission finds that UI has demonstrated that the Project is not an ordinary transmission investment and presents special risks. UI will need to assume significant new short- and long-term debt and make long-term capital commitments with UI Holding (UIL), its parent corporation.

³⁴ See Exh. No. UI – 2 which shows UI's cost forecast and spending timeline for the Project through 2010. This exhibit indicates that only \$15,000,000 has been spent on the Project "Thru 2005" which is a relatively small amount compared to the \$260,000,000 total cost estimate for the Project.

³⁵ Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 40.

³⁶ See *American Electric Power Service Corp.*, 116 FERC ¶ 61,059 (2006), *order on reh'g*, 118 FERC ¶ 61,041 (2007) (*AEP*) and *Allegheny Energy, Inc., et al.*, 116 FERC ¶ 61,058 (2006), *order on reh'g*, 118 FERC ¶ 61,042 (2007) (*Allegheny*).

63. We agree with UI that CWIP is viewed more favorably by investors than AFUDC.³⁷ Therefore, the inclusion of 100 percent of CWIP in rate base reduces the costs of obtaining financing for the Project, and as a result, UI's debt ratings will likely improve. An improved debt rating lowers the cost of debt and thus reduces the total costs to UI's customers.

64. UI points out a number of unique challenges facing the Project. The Commission agrees that the Project is important and long overdue, especially in this region of the country. UI claims that even though the Project has been approved by the Connecticut Siting Council, it still faces many other regulatory and zoning uncertainties, construction issues and further legal challenges that could delay the Project and increase the risk to potential investors.³⁸ UI also states that due to its relative small size, its credit rating was downgraded for its senior unsecured debt from Baa1 to Baa2, which is the lowest investment grade rating class used by Moody's.³⁹ The Commission agrees that UI's ability to finance the Project could further affect this rating in a way that could increase its borrowing costs and the rates paid by its customers. UI expects to invest in other future transmission projects in the region, and the incentives requested in the instant proceeding will help UI overcome the size and risk issues presented in financing the Project.

65. The Commission finds that the Protesters' assertions regarding the \$62 million that UI's parent company has on hand do not show that these funds are available to UI for transmission investment. The purpose of granting 100 percent CWIP recovery in the instant proceeding is to ensure that UI, not its parent company UIL, can obtain adequate financing for the Project.

66. The Commission also agrees with UI that allowing the 100 percent CWIP incentive will help ensure completion of the Project. While CT DPUC makes a valid point concerning the financial incentives signaled by AFUDC and CWIP, this reasoning ignores the importance of having sufficient cash flow. AFUDC may in fact provide an incentive to get a project in service as quickly as possible so a company can begin to earn a return on its investment; however, for a public utility with an obligation to serve its

³⁷ See *Construction Work In Progress for Pub. Utils.; Inclusion of Costs in Rate Base*, Order No. 298, FERC Stats. & Regs. ¶ 30,455, at 30,495 *order on reh'g*, Order No. 298-A, FERC Stats. & Regs. ¶ 30,500, at 30,724 (1983), *order on reh'g*, Order No. 298-B, FERC Stats. & Regs. ¶ 30,524 (1983).

³⁸ See Exh No. UI-10 at 10-13.

³⁹ See Exh. No. UI-10 at 12; Exh. No. UI-12.

customers, lacking sufficient cash flow to complete a project may force its abandonment. This potential outcome is the very type of result that Order No. 679 is intended to prevent by authorizing 100 percent of CWIP in rate base when it is needed for stimulating the construction of critical transmission infrastructure. As a relatively small-sized utility taking on a very large project, UI faces financial strain, weakened earnings, and weakened asset protection.

67. Over a twenty-year period, the average amount of CWIP as a percentage of transmission plant in service for electric utilities has ranged from 25 percent in 1985 to 4.7 percent in 2005.⁴⁰ UI's construction costs are approximately 170 percent of its transmission plant in service.⁴¹ Absent CWIP, this scenario results in a disproportionate amount of UI's rate base being tied up in construction, which UI may not rely on for earnings or equity for several years.

68. Additionally, pursuant to Order No. 679 and 18 C.F.R. § 35.25 (the regulations regarding recovery of CWIP in rate base), a company must propose accounting procedures that ensure that customers will not be charged for both capitalized AFUDC and corresponding amounts of CWIP in rate base. The Commission finds that UI's proposed accounting procedures in Exh. No. UI-13 of UI's filing sufficiently meets this burden.

69. Finally, as required by Order No. 679-A, we must "examine the total package of incentives [proposed for the project], the inter-relationship between any incentives and how the requested incentives address the risks and challenges faced by the project."⁴² In performing this examination for the Project, it is appropriate to consider the inter-relationship between the CWIP incentive requested and the ROE granted previously in Opinion No. 489.⁴³ Based on the evidence and support provided by UI discussed above,

⁴⁰ Edison Electric Institute Consolidated Financial Statements 1985-2005, found at http://www.eei.org/industry_issues/finance_and_accounting/finance/research_and_analysis/consolidated_financial_statements/Balance_Sheet_1985_2005.xls

⁴¹ Per UI's FERC Form 1, p. 206.58(g), end of year transmission plant in-service balance of \$147,125,003.

⁴² Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 21.

⁴³ In Opinion No. 489 and pursuant to our authority under section 205 of the Federal Power Act, we provided all transmission owners in ISO-NE, including UI, an enhanced ROE to promote new investment in an area of the country that demonstrated a critical need for new transmission capacity and to appropriately reflect the risks and challenges associated with developing transmission infrastructure in New England. *See*

we find that, the CWIP incentive, when considered in conjunction with the previously-approved ROE, satisfies the Commission's nexus test in which we look at the total package proposed by the applicant. In particular, UI has shown *inter alia* that its Project faces unique challenges relating to cash flow, possible deterioration of its credit quality, potential increased borrowing costs, the need to assume significant new short- and long-term debt and regulatory and zoning uncertainties. Indeed, UI has demonstrated that its project faces risk and challenges that are above and beyond those we relied upon in Opinion No. 489. Thus, in examining the total package of incentives, we find that UI should be granted both the Opinion No. 489 enhanced ROE and the 100 percent CWIP recovery requested in the instant proceeding.⁴⁴

70. For the reasons discussed above, the Commission finds that UI should be granted the incentive to include 100 percent CWIP in rate base for the Project for costs incurred after August 8, 2005, the earliest date that Order No. 679 provides for recovery of incentives pursuant to that rule.

4. ROE Incentive for Advanced Technologies

71. Section 1223 of EPAct 2005 lists underground cables as one of the 18 advanced technologies that Congress sought to encourage.⁴⁵ As discussed below, the underground XLPE cable technology and the supporting 345-kV shunt reactors and substation automation package meet the standard set forth in Order No. 679 and in section 1223 of

117 FERC ¶ 61,129 at P. 103-113, *reh'g pending*. Although the ROE granted was not an incentive ROE pursuant to Order No. 679, it is appropriate in this case to evaluate the proposed 100 percent CWIP recovery incentive proposed by UI together with the Opinion No. 489 ROE, because both are intended to achieve a similar purpose, *i.e.*, to address the risks and challenges faced by the Project.

⁴⁴ The finding that the 100 percent CWIP recovery incentive is appropriate when considered in context with the ROE incentive approved in Order No. 489 does not pre-judge the requests for rehearing of Opinion No. 489.

⁴⁵ We also note that XLPE technology is not widely used within the United States, let alone at such a high voltage application, or at such a distance. While the XLPE underground cable design is not new, it has only recently been used at 345-kV and higher voltage levels.

EPAAct 2005 in that they mitigate congestion and enhance grid reliability by increasing the capacity, efficiency or reliability of an existing or new transmission facility.⁴⁶

72. UI requests a 50 basis point ROE adder for the entire Project claiming that a substantial portion of the Project makes use of advanced technologies. This Project includes a 69-mile transmission line consisting of three segments, with approximately 24 miles of the 69-mile line built underground, and the remaining 45 miles using conventional overhead transmission construction. The 24-mile underground portion of the Project will use underground 345-kV XLPE cable which has not previously been employed at these voltages and distances.

73. We will grant UI's request for a 50 basis point ROE advanced technologies adder, but limit it to only the costs associated with the underground XLPE cable and any other facilities electrically necessary to support the 24-mile underground portion of the Project, such as the 345-kV variable shunt reactors at the Singer substation and its innovative substation automation package. The resulting ROE, however, will be capped at the top of the zone of reasonable returns established in Opinion No. 489. Further, we deny UI's request for incentives for any costs incurred prior to August 8, 2005.

74. We find that the underground portion of the upgrade and its innovative use of the 345-kV XLPE underground cable will make the Project siting possible and practical, facilitate acceptance of the Project in highly concentrated urban and suburban portions of the route, help avoid substantial, costly, and time-consuming condemnations, and reduce the time and costs associated with both installation and maintenance of the transmission facilities. We find that UI's proposed use of such technology, and its continued studies and monitoring of such technology, can also be used to benefit other regions of the country.

75. We find that the Project also includes installation of related equipment in substations that will use an innovative combination of design elements that are electrically necessary to support the underground portion of the Project. Specifically, the Singer substation will employ variable shunt reactors, a technology rarely used with 345-kV transmission lines, which will allow system operators to maximize power transfer capabilities at different load levels. Further, we find this substation will use an innovative automation package for monitoring of circuit breakers, transformers and

⁴⁶ FERC Stats. & Regs. ¶ 31,222 at P 290 and P 291.

reactors, which will provide early warning of abnormal conditions to minimize unnecessary maintenance outages for the underground portion of the Project.

76. However, UI has not provided convincing evidence to support its request to treat the entire Project as advanced technology. In fact, many of the elements described in the Project, including 45 miles of conventional overhead 345-kV transmission construction, 115-kV system modifications and substations at Beseck Junction and East Devon, and the GIS technology employed at the Singer substation, have not been demonstrated to be advanced technology in scope or application. Therefore, we deny the request for a 50 basis point ROE adder for the entire Project.

77. We deny UI's proposal to apply this ROE incentive to portions of Project costs that were incurred prior to August 8, 2005, the date of EAct 2005. These costs are not eligible for incentive rate treatment under Order No. 679.⁴⁷ Thus, we will grant the 50 basis point ROE advanced technologies adder only for materials, supplies, and the cost of construction associated with using the XLPE cable and any other facilities electrically necessary to support the 24-mile underground portion of the Project, such as the 345-kV variable shunt reactors at the Singer substation and its innovative substation automation package, subject to the outcome of the rehearing of Opinion No. 489, as further discussed below.

78. Additionally, based on the evidence and support provided by UI, we find that the total package of incentives requested by UI in the instant proceeding satisfies the Commission's nexus requirement. As discussed above, UI has demonstrated that its Project is not routine in nature, faces special risks and challenges, and is deserving of the 100 percent CWIP in rate base incentive (in addition to the enhanced ROE provided in Opinion No. 489). Turning to the incentive ROE for advanced technologies, we note that an incentive ROE for advanced technologies serves a different purpose than the CWIP incentive or an enhanced ROE to reflect distinct risks and challenges faced by a project. In section 219, Congress directed the Commission to provide incentive-based rate treatment for transmission technologies that increase the capacity and efficiency of existing transmission facilities and improve the operation of the facilities.⁴⁸ Congress also stated in EAct section 1223 that the Commission should encourage the deployment of technology that increases the capacity, efficiency, or reliability of an existing or new transmission facility.⁴⁹ For this reason, in Order No. 679, the Commission indicated that

⁴⁷ See Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 34.

⁴⁸ See Pub. L. No. 109-58, § 1241, 119 Stat. 961 (to be codified at 16 U.S.C. § 824s(b)(3) (section 219(b)(3))).

⁴⁹ See EAct 2005, Pub. L. No. 109-58, 119 Stat. 953-54.

it would provide incentives to technologies that increase the capacity, efficiency or reliability of an existing or new transmission facility.⁵⁰ The Commission understands this Congressional directive to apply regardless of whether such transmission technologies otherwise create demonstrable risks and challenges for the applicant or the project. This is consistent with Order No. 679, in which we stated, “To the extent applicants believe *additional* incentives for their advanced technology applications are needed, they can make a case for advanced technology incentives in their individual proceedings and the Commission will make a case-by-case determination.”⁵¹ Thus, when assessing the total package of incentives, we examine the advanced technology incentive independent of the CWIP incentive and the enhanced ROE for risks and challenges associated with the project. For these reasons, we find that UI has shown that its total package of incentives has met the Commission’s nexus test.

79. Lastly, UI has satisfied Order No. 679’s technology statement requirement in providing a description of the advanced technologies that were considered, and the explanation as to why the XLPE cable was chosen over other alternatives.

C. Estoppel

80. We do not find persuasive the Protesters’ argument that the principle of judicial estoppel⁵² prevents UI from requesting an ROE incentive for advanced technology in the instant filing. UI’s request for a 50 basis point ROE adder for the use of advanced transmission technologies is distinct from the ROE adders approved by the Commission in Opinion No. 489 (i.e., new transmission, and RTO participation), as explained further below. Thus, UI is not precluded from requesting the proposed ROE adder. However, because the zone of reasonable returns for UI is pending rehearing in Opinion No. 489, any determination in the instant proceeding is subject to the zone of reasonable returns determined in that proceeding.

⁵⁰ Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 298.

⁵¹ *Id.* at P 299 (emphasis added).

⁵² The Commission has explained that “[t]he doctrine of judicial estoppel applies only where, as a result of prior testimony, parties have relied upon that testimony and changed positions by reason of that testimony.” *San Diego Gas & Electric Co. v. Sellers of Ancillary Services, et al.*, 115 FERC ¶ 61,230 at P 33 & n.59 (2006) (citations omitted).

81. The Protesters' argument that we are precluded from granting the ROE incentive for advanced technologies through judicial estoppel ignores the fact that Opinion No. 489 did not grant UI's previous incentives based on UI's use of advanced technology.

82. Specifically, on March 24, 2004, the Commission issued an order⁵³ (herein, *RTO Order*) accepting ISO-NE and the New England TOs'⁵⁴ proposal to establish a regional transmission organization (RTO) for New England.

83. As part of the *RTO Order* proceeding, the New England TOs, joined by Green Mountain Power Corporation and Central Vermont Public Service Corporation (ROE Filers), submitted a related section 205 filing, as amended, seeking approval for the ROE component recoverable under the regional and local transmission rates charged by ISO-NE, proposing a single ROE applicable to all regional and local transmission rates, which would consist of a base ROE (12.8 percent), as well as incentive adders of 50 basis points to reward RTO participation and 100 basis points to reward new transmission investment placed into service after January 1, 2004. The ROE Filers stated that they should not be limited to innovative technologies alone, because the benefits of system expansion will not be contingent on or vary depending on the type of technology used to construct it.

84. In the *RTO Order*, the Commission accepted the ROE Filers' proposed 50 basis point adder for Regional Network Service as consistent with rulings in other cases.⁵⁵ The Commission set for hearing, subject to suspension and refund, the ROE Filers' proposed 100 basis point adder as it relates to Regional Network Service, requiring that the ROE Filers demonstrate the following: (1) why the adder is needed to incent investment in new transmission facilities; (2) and, whether the adder should apply to all types of transmission expansion or be more narrowly focused on transmissions expansions that utilize innovative, less expensive technologies.

⁵³ See *ISO New England, Inc.*, 106 FERC ¶ 61,280, at P 246-49 (2004) (*RTO Order*).

⁵⁴ Bangor Hydro Electric Company; Central Maine Power Company; NSTAR Electric & Gas Corporation; New England Power Company; Northeast Utilities Service Company; The United Illuminating Company; and Vermont Electric Power Company.

⁵⁵ See 106 FERC ¶ 61,280 at n.149, citing *PJM Interconnection, L.L.C.*, 104 FERC ¶ 61,124, at P 74 (2003) (*PJM RTO Order*); *Allegheny Power System Operating Companies, et al.*, 106 FERC ¶ 61,003 (2004); *Cleco Power LLC, et al.*, 101 FERC ¶ 61,008, at P 142 (2002); *Midwest Independent Transmission System Operator, Inc.*, 100 FERC ¶ 61,292, at P 31 (2002).

85. On May 27, 2005, the ALJ issued an Initial Decision⁵⁶ following the *RTO Order*, which rejected the ROE Filing Parties' request for a 100 basis point adder for new transmission investment. The Initial Decision found that there was no evidence on the record to show that paying the incentive would lead to timelier implementation of transmission projects, or effectuate transmission expansion. Again, there was no consideration of advanced transmission technologies pursuant to Order No. 679 and section 1223 of EPAct 2005, which had not yet been enacted.

86. On October 26, 2006, the Commission issued Opinion No. 489 on the Initial Decision. In Opinion No. 489, the Commission found that it had the historical authority to encourage investment in transmission infrastructure through the application of incentive pricing, and did not limit the incentive pricing only to new transmission infrastructure that uses advanced technology.

87. In addressing exceptions to the Initial Decision, Opinion No. 489 applied the standard of review of "whether the incentive is needed to encourage investment in new transmission facilities..."⁵⁷ However, Opinion No. 489 clarified that this standard of review does not mean that "... 'but for' the incentive, the project at issue would not be built."⁵⁸ Opinion No. 489 found that the standard used to evaluate the incentive, on the basis of new investment, was consistent with the Commission's prior decisions with respect to analogous incentive rate requests⁵⁹ and was *consistent with* (not pursuant to) EPAct 2005 and Order No. 679.⁶⁰

⁵⁶ *Bangor Hydro Electric Co. et al.*, 111 FERC ¶ 63,048 at P 145.

⁵⁷ Opinion No. 489, 117 FERC ¶ 61,129 at P 104, citing *RTO Order*, 106 FERC ¶ 61,280 at P 249.

⁵⁸ *Id.*

⁵⁹ *See, e.g., PJM Interconnection, LLC*, 104 FERC ¶ 61,124, at P75 (2003) (requiring a showing of why an incentive adder is needed to promote investment in transmission facilities); *Allegheny*; *AEP*.

⁶⁰ Opinion No. 489 cited section 1241 of EPAct 2005 (which added section 219 to the FPA) and Order No. 679, stating that "[a]lthough both EPAct 2005 and the *Pricing Reform Final Rule* [Order No. 679] followed the close of the record in this case and, therefore, cannot govern the outcome of this proceeding, they do represent current law as well as Congress's and the Commission's most recent policy on transmission pricing and incentives." Opinion No. 489, 117 FERC ¶ 61,129 at P 113.

88. Opinion No. 489 adopted a region-wide zone of reasonable returns for the New England transmission owners, including UI, of 7.3 percent to 13.1 percent, with a total ROE of 12.4 percent for all New England TOs, including UI.

89. By contrast, section 1223 of EPCRA 2005 lists several examples of “advanced transmission technologies,” one of which is “underground cables,” and requires the Commission to “encourage, as appropriate, the deployment of advanced transmission technologies.” Further, the Commission has the discretion to decide how it will encourage the deployment of advanced technology, including through consideration of applications for ROE incentives for advanced technology.⁶¹

90. Contrary to Protesters’ arguments, there was no prior consideration in Opinion No. 489 of an Order No. 679-type ROE incentive for advanced technologies for UI. The mere presence of prior incentives pursuant to existing precedent does not prevent the Commission from re-examining the justness and reasonableness of this adder on the basis of a new Congressional mandate. The Commission’s actions in the proceedings cited by the Protesters did not prohibit UI or this Commission from considering an incentive on the basis of advanced technologies under Order No. 679. As UI argues, and we agree, Opinion No. 489 did not treat the 100 basis point ROE adder as an incentive for advanced technology. Rather, the Commission’s intent in Opinion No. 489 was merely to make clear that it was not establishing a threshold requirement that new investment employ advanced technologies. It did not preclude applicants from later seeking incentives based on advanced technologies.

91. Additionally, *res judicata*⁶² does not bar re-litigation of issues in cases based on new facts or arguments.⁶³ Moreover, in a case under the Natural Gas Act (NGA) but equally applicable to cases such as this arising under the FPA, the Commission stated:

⁶¹ See Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at n.10.

⁶² Under the doctrine of *res judicata*, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 (1979), citing 1B J. Moore, Federal Practice para. 0.405[1], pp. 622-624 (2d ed. 1974).

⁶³ *Cincinnati Gas & Electric Co.*, 68 FERC ¶ 61,332 (1994) (“When the Commission sets for hearing the justness and reasonableness of proposed rates, it necessarily sets for hearing all issues that are relevant to an assessment of justness and reasonableness”). See also *Illinois Power Company*, 62 FERC ¶ 61,147, at 62,063 n.23 (1993); *Wisconsin Public Service Corporation* 59 FERC ¶ 61,052, at 61,916 n.23, *reh’g denied*, 60 FERC ¶ 61,279 (1992).

the doctrine of *res judicata* is simply not applicable to Commission rate proceedings. FERC has a continuing obligation to ensure that pipeline rates are just and reasonable pursuant to §§ 4 and 5 of the NGA. The fact that a rate was once found reasonable does not preclude a finding of unreasonableness in a subsequent proceeding.^[64]

D. Filing Requirements and Waivers

92. UI states that it will submit FERC-730 reports annually.⁶⁵ UI requests waivers of section 35.13 of the Commission's regulations ("Filing of Changes in Rate Schedules"), as may be necessary, including: (i) waiver of the full Period I/Period II data requirements;⁶⁶ (ii) waiver of the attestation concerning Period II submissions;⁶⁷ (iii) waiver of the requirement to determine if, and the extent to which, a proposed change constitutes a rate increase based on Period I/Period II rates and billing determinants;⁶⁸ and (iv) waiver of the cost of service statements AA (balance sheets) through BM (construction program statement).⁶⁹

93. In support of its requested waivers, UI states that there is no need or benefit from submitting the cost-of-service information required by section 35.13 of the Commission's regulations. Also, UI states that the information submitted in its Exhibit No. UI-11 showing the modest overall revenue requirement impact does not include or account for a potential reduction in congestion costs and other economic benefits resulting from the Project which serves to eliminate the need for the detailed cost information. We will

⁶⁴ *Texas Eastern Transmission Corp.*, 893 F.2d 767, 774 (5th Cir. 1990).

⁶⁵ FERC-730 annual reports must be filed by public utilities that have been granted incentive rate treatment for specific transmission projects. These reports contain the actual, projected and incremental transmission investment information.

⁶⁶ 18 C.F.R. § 35.13(d)(1) and (2) (2007).

⁶⁷ 18 C.F.R. § 35.13(d)(6) (2007).

⁶⁸ 18 C.F.R. § 35.13(a)(2)(iv) (2007).

⁶⁹ 18 C.F.R. § 35.13(h) (2007).

grant waiver from sections 35.13(a)(2)(iv); 35.13(d)(1) and (2), 35.13(d)(6), and section 35.13(h) consistent with our prior approval of formula rates.⁷⁰

94. Finally, UI requests waiver of section 35.3 of the Commission's regulations to permit a March 26, 2007 effective date to help attract investment in the Project now and maintain its credit rating in order to benefit its customers and the other customers in the region by increasing reliability, relieving congestion and reducing the cost of delivered power to consumers. We will deny waiver of the notice requirement for lack of good cause shown. UI is directed to file a Substitute First Revised Sheet No. 3441 with an effective date of May 23, 2007.

The Commission orders:

(A) UI's proposed 100 percent CWIP incentive for costs associated with construction of the Project is hereby accepted, subject to Ordering Paragraph (C), as discussed in the body of this order.

(B) UI's proposed 50 basis point ROE adder for advanced technologies is hereby accepted in part. It is accepted only for the advanced technology portion of the Project as determined in the body of this order, subject to the outcome of the proceeding in Opinion No. 489, and subject to Ordering Paragraph (C), as discussed in the body of this order.

(C) UI's request for incentives for any costs incurred prior to August 8, 2005 is hereby denied, as discussed in the body of this order.

(D) UI's request for waiver of the requirements of section 35.13 of the regulations to provide full Period I and Period II data, and waiver of sections 35.13(a)(2)(iv); 35.13(d)(1) and (2), 35.13(d)(6), and section 35.13(h) of the regulations is hereby granted for good cause shown, as discussed in the body of this order.

⁷⁰ See *BGE/PHI Companies Formula Rate Order*, 115 FERC ¶ 61,066, at P 55 (2006).

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(E) UI's request for waiver of section 35.3 of the Commission's regulations is hereby denied. UI is hereby directed to file a Substitute First Revised Sheet No. 3441 with an effective date of May 23, 2007.

By the Commission. Commissioners Kelly and Wellinghoff dissenting in part with separate statements attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

The United Illuminating Company

Docket No. ER07-653-000

(Issued May 22, 2007)

KELLY, Commissioner, *dissenting in part*:

In this proceeding, United Illuminating seeks incentives for a particular transmission project beyond those incentives it already receives as a transmission owner in ISO-NE.⁷¹ Specifically, while earlier orders already allow United Illuminating to receive a 100 basis point ROE adder applied to all new transmission construction (including this project), and a 50 basis point ROE adder for RTO membership applied to all transmission rate base (including the portion of rate base that will reflect this project), United Illuminating now seeks to include 100 percent of Construction Work in Progress (CWIP) in rate base and an additional 50 basis point ROE adder for use of advanced technologies on this project. The order approves the CWIP incentive as requested and approves the new 50 basis point adder but limits it to only the advanced technology portion of the project. This means that for the advanced technology portion of the project, a total ROE adder of 200 basis points will apply. In contravention of the requirements of Order No. 679-A,⁷² I do not believe that United Illuminating has adequately demonstrated that the total package of incentives, particularly the combined 200 basis point ROE adders, is appropriately tailored to the demonstrable risks of the project.⁷³

In my separate statement dissenting in part from Opinion No. 489, I explained my position on why the 100 basis point incentive adder approved in that Opinion troubled me greatly on both legal and policy grounds. While this pre-existing adder is not directly at issue in the current incentive case, Order No. 679-A does require us to review this new incentive proposal in light of all other incentives in effect. Beyond arguments that the earlier 100 basis point ROE adder was not granted for use of advanced technology, I see no showing by the applicant that it is appropriate to grant both incentive adders for the

⁷¹ *Bangor Hydro Electric Co. et al.*, Order on Initial Decision, Opinion No. 489, 117 FERC ¶ 61,129 (2006), *reh'g pending*.

⁷² *See 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, *order on reh'g*, 119 FERC ¶ 61,062 (2007).

⁷³ Order No. 679-A at P 21 (“In evaluating whether the applicant has satisfied the required nexus test, the Commission will examine the total package of incentives being sought, the inter-relationship between any incentives, and how any requested incentives address the risks and challenges faced by the project.”)

same project or that the new 50 basis point adder is necessary in light of the earlier-granted 100 basis point adder. Furthermore, the fact that the 100 basis point adder was not predicated on the use of advanced technologies is irrelevant to the question of whether any additional incentive adder is appropriate when the applicant is already receiving a 100 basis point adder for this project involving advanced technologies.

Because Opinion No. 489 did not require any case-by-case nexus showing for grant of the 100 basis point adder, I do not believe that we can rely on that earlier approval to meet the Order No. 679-A requirement that the total package of incentives proposed in this case meets the nexus test. It therefore falls to the applicant to provide further justification for the addition of a new ROE adder on top of the pre-existing adder. I see no such justification and, again, the fact that the earlier adder was not granted in recognition of the use of advanced technology does not mean that the earlier adder isn't more than sufficient to result in an ROE that provides incentives for the use of advanced technology. In other words, I see no arguments to convince me that the pre-existing 100 basis point ROE adder does not already "...encourage, as appropriate, the deployment of advanced transmission technologies."⁷⁴

Accordingly, while this filing contains convincing evidence of the benefits of using this advanced technology in this case, including the admirable benefit of eliminating the need to condemn 29 houses, and might therefore have constituted an adequate showing for a 50 basis point ROE adder for the advanced technology portion of this project if there were no other incentive adders in effect for the same project, I do not believe that the filing makes an adequate showing that the total package of incentives meets the required nexus test. For these reasons, I dissent in part.

Suedeen G. Kelly

⁷⁴ EPAAct 2005, section 1223(b).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

The United Illuminating Company

Docket No. ER07-653-000

(Issued May 22, 2007)

WELLINGHOFF, Commissioner, *dissenting in part*:

In this order, the Commission grants United Illuminating's request for a 50 basis point ROE advanced technologies adder. The Commission also limits that adder to the costs associated with the underground XLPE cable and the other facilities electrically necessary to support the 24-mile underground portion of the upgrade, such as the 345-kV variable shunt reactors and a substation automation package at the Singer Substation.

I have previously stated that in providing an incentive adder over the base ROE, the Commission should focus on encouraging investment decisions beyond the upgrades simply required to meet a utility's service obligations or simply meeting the minimum standard of good utility practice. An incentive adder should be more narrowly targeted to transmission investments that provide incremental benefits, such as benefits that result from the deployment of "best available technologies" that increase operational and energy efficiency, enhance grid operations, and result in greater grid flexibility.⁷⁵ Such investments recognize that efficient transmission facilities and state-of-the-art transmission technologies are essential to solving our serious energy delivery problems. Promoting such investments is also consistent with the Congressional directive set forth in section 1223 of EPAct 2005 that the Commission shall encourage the use of advanced transmission technologies in infrastructure improvements of both existing and new transmission facilities.⁷⁶

United Illuminating's request for a 50 basis point ROE advanced technologies adder is consistent with these goals in many respects. Although the XLPE underground cable technology is not new, it has only recently been used at 345 kV and higher voltage levels and its use may reduce the time and costs associated with both installation and

⁷⁵ See *American Elec. Power Serv. Corp.*, 118 FERC 61,041 (2007) (*AEP*) (concurring statement of Commissioner Wellinghoff at 5).

⁷⁶ See Pub. L. No. 109-58, § 1223, 119 Stat. 594, 953-54 (2005).

maintenance of the transmission facilities.⁷⁷ In addition, United Illuminating states that it will use variable shunt reactors at the Singer substation that will allow system operators to maximize power transfer capabilities at a variety of load levels on the 345 kV cable circuits, resulting in improved reliability and efficiency. Further, United Illuminating states that the Singer Substation will include a substation automation package – including condition monitoring for circuit breakers, transformers, and reactors – that will provide early warning of abnormal conditions and allow the use of a reliability centered maintenance program that will minimize unnecessary maintenance outages.

It is worth noting, however, that entities other than United Illuminating contributed to the decision to use XLPE underground cable technology in this project. Indeed, in its original application to the Connecticut Siting Council, United Illuminating did not propose using the XPLE cable.⁷⁸ There is also no indication that United Illuminating considered using any of the other advanced transmission technologies listed in section 1223 of EAct 2005, such as high-temperature lines (including superconducting cables), optimized transmission line configurations (including multiple phased transmission lines), high-voltage DC technology, flexible AC transmission systems, controllable load, distributed generation (including PV, fuel cells, and microturbines), and enhanced power device monitoring. I have previously indicated that future applicants seeking an enhanced ROE should be required to demonstrate more thoroughly that they have considered other alternatives to their proposal.⁷⁹

Despite these concerns, I believe that United Illuminating would have made an adequate demonstration that a 50 basis point ROE advanced technologies adder is appropriate if not for the fact that in Order No. 489, the Commission – without adequate support – granted United Illuminating a 100 basis point ROE adder for all new transmission that it may construct.⁸⁰ I dissented from Order No. 489 based on a lack of record evidence demonstrating any nexus between the requested ROE adder and the construction of new transmission facilities. United Illuminating, as well as the other ROE Filing Parties, had already committed to build the projects approved by ISO New England,⁸¹ and their own witness conceded that the projects would be built without the

⁷⁷ Section 1223 of EAct 2005 identifies underground cables as one of the 18 advanced transmission technologies that the Congress sought to encourage. *Id.*

⁷⁸ See Protest of the Connecticut Department of Public Utility Control at 10.

⁷⁹ *AEP*, concurring statement of Commissioner Wellinghoff at 5.

⁸⁰ See *Bangor Hydro Electric Co., et al.*, 117 FERC ¶ 61,129 (2006) (Order No. 489) (partial dissent of Commissioner Wellinghoff), *reh'g pending*.

⁸¹ See Docket Nos. ER04-157-004, *et al.*, Initial Brief of Commission Trial Staff at 27 (Trial Staff); Initial Brief of Intervenors Connecticut Department of Public Utility Control and Connecticut Office of Consumer Counsel at 44 (Connecticut Commission).

adders.⁸² In addition, United Illuminating and the other ROE Filing Parties are already obligated to use every effort to push transmission projects forward,⁸³ and the Presiding Judge found that there was “no evidence” that the adder would induce them “to spend ‘political capital’ to overcome resistance to building projects.”⁸⁴

The Commission has previously stated that we have broad discretion within our ratemaking authority to approve incentive adders.⁸⁵ I do not disagree with that statement. The key issue is how we exercise our discretion to do so. The Commission has made clear that incentives will only be permitted if the incentive package as a whole results in a just and reasonable rate.⁸⁶ In light of the unsupported ROE incentive already approved for United Illuminating in Order No. 489, I cannot support burdening consumers with additional costs associated with the further ROE incentive adder that United Illuminating is seeking here.

For this reason, I respectfully dissent in part.

Jon Wellinghoff
Commissioner

⁸² *Bangor Hydro Electric Co.*, 111 FERC ¶ 63,048 at P 158 (2005) (Initial Decision).

⁸³ Trial Staff at 27; Connecticut Commission at 44.

⁸⁴ Initial Decision at P 167.

⁸⁵ Order No. 489 at P 103 (citing *Maine Public Utilities Commission v. FERC*, 454 F.3d 278 (D.C. Cir. 2006)).

⁸⁶ *Promoting Transmission Investment through Pricing Reform*, 117 FERC ¶ 61,345 at P 10 (2006) (Order No. 679-A).