

Bearing the Risk of Abandonment

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In Order Nos. 679 and 679-A, FERC adopted a policy of authorizing rate incentives for new transmission early in the development process to encourage transmission investment. However, the abandoned plant cost recovery incentive creates a tension between ratepayer and investor interests, which is increasingly reflected in FERC's orders.

I. Introduction

In Order Nos. 679 and 679-A, the Federal Energy Regulatory Commission (FERC, or the "Commission") adopted a policy of authorizing rate incentives for new transmission early in the development process to encourage transmission investment.¹ Many projects have been initiated and sought such incentives since the policy was established, indicating its popularity with potential investors. One of the rate incentives available, and frequently sought, allows for 100 percent recovery of prudently incurred abandoned plant costs (the "abandonment incentive"). The abandonment incentive is distinguishable from other commonly sought incentives, such as return-one-quity adders or inclusion of 100 percent of construction work in progress (CWIP) in rate base, because it applies to *projects that fail* during the development or construction phase for reasons beyond the control of management.

However, the abandonment incentive has drawn criticism. As the number of projects for which incentives are sought has burgeoned, intervenors have expressed concern that multiple projects may compete for inclusion in a regional transmission organization's (RTO) regional plan or to meet a regional need and, if the right to recover abandoned plant costs is granted before the winners and losers are sorted out, multiple would-be sponsors might be entitled to recover their costs for projects that never become used and useful. Another articulated concern is that allowing all would-be sponsors to claim abandoned plant cost recovery will lead to speculative projects. Thus, the Commission is forced to walk a narrow path between encouraging transmission investments, including investments in innovative technologies or large, higher-risk projects, and protecting consumers from bearing the costs of projects that never become used and useful. A not surprising consequence is that, increasingly, orders granting abandoned plant cost recovery are conditioned or include cautionary language. While responsive to the concerns raised by consumer representatives, this approach creates uncertainty for investors. A close look at recent orders documents this trend and identifies several emerging key issues related to the topics of demonstrating eligibility, prudence and "who pays?"



Donna Attanasio
White & Case

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1. *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 (2007), *order on reh'g*, 119 FERC ¶ 61,062 (2007).

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II. Central Maine: A Failure of Conditions

*Central Maine*² provides a good focal point for understanding the implications of a conditioned order. In 2008, FERC issued a declaratory order granting two Maine utility companies (the “Maine Companies”) the authority to recover abandoned plant costs in connection with a 200-mile, 345-kV line intended to facilitate the deliverability of 800 MW of power from the planned Aroostook Wind Energy Project in northern Maine to southern Maine (which is interconnected with the remainder of New England) and strengthen ties between northern and southern Maine and with Canada.

As is typical in all orders granting an abandonment incentive, the Maine Companies’ recovery was conditioned on the applicants making a future filing under section 205 of the Federal Power Act (FPA) if and when they sought cost recovery, showing the justness and reasonableness of the proposed rate. The *Central Maine* order was further conditioned on the Maine Companies making a

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subsequent filing showing that the project had been approved by the ISO New England Inc. as a “Market Efficiency Transmission Upgrade.” The reason for this condition is embedded in the statutory language of section 219 of the FPA. Section 219 instructs the Commission to establish, by rule, incentive rate treatments for transmission investments that “benefit[] consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion,” subject to the continuing requirement under sections 205 and 206 that such rates be just and reasonable.³

FERC therefore made a section 219 showing a prerequisite for receipt of any transmission incentive. In Order No. 679, FERC

established a rebuttable presumption that a project is eligible for incentives under section 219 if [the project]: (1) 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 (2) has received construction approval from an appropriate state commission or state siting authority.⁴

Because the Maine Companies proposed to rely on inclusion in the ISO New England Market Efficiency Transmission Upgrade plan (“ISO-NE Plan”) to meet the section 219 requirement, its eligibility for any rate incentive was conditioned on its inclusion.

In November 2009, the *Central Maine* order came before the Commission on rehearing.⁵ Opponents demonstrated that subsequent to issuance of the order granting incentives, the Aroostook Wind Energy Project had been terminated, and the Maine Public Utilities Commission had dismissed the Maine Companies’ Certificate of Public Convenience and Necessity proceeding. FERC accepted this evidence and recognized the Maine Companies’ statements that the project, if it were to go forward, would be modified.

A declaratory order granting rate incentives is based on specific facts and, in particular, a “nexus” between the facts and the incentives granted. In *Central Maine Rehearing*, FERC determined that because the project would not be capable of serving the purpose presented to FERC in the application for rate incentives, the project to which it had granted the incentives “has ceased to exist,” and the Maine Companies could no longer rely upon the order.⁶ Therefore, FERC dismissed the requests for rehearing as having been “overtaken by subsequent events.”⁷

The previously granted abandonment incentive was conditioned on inclusion in the ISO-NE Plan. Since the condition could not be satisfied and, indeed, the entire order was mooted by the change in facts, the rehearing order necessarily called into question the eligibility of the Maine Companies to recover abandoned plant costs.

2. *Cent. Me. Power Co.*, 125 FERC ¶ 61,182 (2008) (“*Central Maine*”), order on reh’g, 129 FERC ¶ 61,153 (2009) (“*Central Maine Rehearing*”), reh’g pending.

3. 16 U.S.C. §§ 824s(a), (d) (2006).

4. *E.g.*, *Green Energy Express LLC*, 129 FERC ¶ 61,165 at P 26 & n.33 (2009) (“*Green Energy Express*”) (citing Order No. 679, FERC Stats. & Regs. ¶ 31,222 at

PP 57-58, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 49), reh’g denied, 130 FERC ¶ 61,117 (2010).

5. 129 FERC 61,153.

6. *Id.* at PP 15–16.

7. *Id.* at P 17.

The Winds of Change: Commitment Secures Transmission Rights

In response to this issue, the Commission referenced language from Order No. 679-A in which it observed that abandoned plant costs had been found to be just and reasonable in cases decided before the enactment of section 219. It therefore found that “the Maine Companies may submit section 205 filing seeking to recover prudently incurred, abandonment-related costs associated with the Project.”⁸ Thus, notwithstanding the Maine Companies’ failure to meet the recovery condition and their inability to rely on the declaratory order, the Commission implied the availability of an alternative avenue for recovery of at least some costs.

Notwithstanding the Maine Companies’ failure to meet the recovery condition and their inability to rely on the declaratory order, the Commission implied the availability of an alternative avenue for recovery of at least some costs.

Whether or not the Maine Companies seek recovery is beside the point of this article; the issue is a broader one for the industry. Other companies have been granted an abandonment incentive conditioned on vetting and approval of the project through a regional planning process or a state siting process.⁹ More may receive such orders in the future, and more may fail to satisfy the condition. So, what does the Commission provide when it conditions the grant of abandoned plant recovery in a declaratory order and what risks remain notwithstanding the order? And, from whom may costs be recovered after failure?

III. The Evolutionary Trail

In Opinion No. 295, issued in 1988, FERC determined that the prudently incurred costs of an abandoned project should be shared equally by ratepayers and shareholders and, further, that the 50 percent share of the canceled plant costs allocated to ratepayers should be amortized over the expected life of the abandoned investment had it gone into service.¹⁰ This approach was affirmed in *Public Service Co. of New Mexico*,¹¹ where FERC rejected the argument of Public Service Company of New Mexico (PNM) for 100 percent abandoned plant cost recovery for a transmission line project which was canceled after it failed to receive necessary regulatory authorizations. Among other things, the Commission specified that the 50/50 abandoned plant cost policy established in Opinion No. 295 was applicable to both transmission and generation projects. The Commission rejected PNM’s argument that open access obligations, “which could force a utility to expend money and resources to comply with transmission expansion requests,” distinguished transmission from generation and therefore justified 100 percent recovery.¹² The Commission observed that the abandoned project was not the result of an open access transmission expansion request, and therefore the argument was inapplicable. The Commission also rejected PNM’s argument that its abandonment of a proposed transmission line due to failure to obtain regulatory approvals was distinguishable from a plant abandoned for economic reasons and therefore deserving of full recovery. Thus, PNM was entitled to recover 50 percent, not 100 percent, of its prudently incurred costs from its ratepayers consistent with the policy established in Opinion No. 295.

In July 2005, FERC carved out an exception to the 50/50 abandoned plant policy in SCE I.¹³ when it determined in a declaratory order that Southern California Edison Company (SCE) would be permitted to recover 100 percent of the prudently incurred costs of two of the three segments of SCE’s Antelope transmission project if they were

8. *Id.* at P 20.

9. See, e.g., *Cent. Me. Power Co.*, 125 FERC ¶ 61,079 (2008) (conditioning incentives for the Maine Power Reliability Program on approval by the ISO New England of the project in its Regional System Plan); *Green Energy Express*, 129 FERC ¶ 61,165, *reh’g denied*, 130 FERC ¶ 61,117 (incentives conditioned on applicant showing the project is approved in the California Independent System Operator Corp.’s planning process and that such process included a finding that the project will ensure reliability or reduce the cost of delivered power by mitigating congestion); *S. Cal. Edison Co.*, 129 FERC ¶ 61,246 (2009) (“SCE IV”)

(same), *reh’g pending*; *W. Grid Dev., LLC*, 130 FERC ¶ 61,056 (2010) (same) *reh’g pending*. See also *Xcel Energy Servs. Inc.*, 121 FERC ¶ 61,284 (2007) (incentives conditioned on receipt of a certificate of need from the Minnesota Public Utility Commission for its CapX 2020 Project, which was subsequently received).

10. *New England Power Co.*, 42 FERC ¶ 61,016 (1988).

11. 75 FERC ¶ 61,266 (1996).

12. *Id.* at 61,859.

13. 112 FERC ¶ 61,014 (2005) (“SCE I”). 61.

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abandoned or canceled (while deferring prudence consideration regarding the size of the line). In support of its decision, the Commission pointed out that SCE did not control the decisions as to whether or not the expected wind generation would be developed, and its development of the Antelope line was specifically in response to a state regulatory directive. FERC distinguished the Antelope line from the PNM transmission project and an earlier SCE Devers-Palo Verde 2 line on the basis that the latter two had not been undertaken as a result of open access transmission policies. It particularly noted that unlike the Antelope line, which was being undertaken by SCE to interconnect unaffiliated wind generation, the Devers-Palo Verde 2 project “may well have been designed for the sole purpose of importing [an SCE] generation resource.”¹⁴

FERC also explained in Order No. 679 that “any declaratory order will only rule on whether the applicant’s proposal qualifies for incentive based rate treatment and, if requested, which incentives the applicant may adopt.”

On rehearing of *SCE I*, FERC clarified that it had not addressed the issue of whether the 50/50 or 100 percent standard would apply in the event that SCE did not receive regulatory approvals to proceed with the project. FERC noted that SCE’s unsupported request that it be allowed 100 percent recovery if it failed to obtain regulatory approvals, rather than 50 percent, would be a departure from PNM and stated “[w]hile it is unlikely that SCE will proceed with the Antelope Project without state approvals, it may be imprudent to incur costs without the necessary approvals.”¹⁵

14. *Id.* at n. 45, citing *Cal. Indep. Sys. Operator Corp.*, 82 FERC ¶ 61,174 at ¶ 61,623 (1998).

15. *S. Cal. Edison Co.*, 113 FERC ¶ 61,143 at P 21 (2005) (“*SCE II*”).

16. Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 163.

17. *Id.*

18. *Id.* at 113.

19. *Id.* at P 166.

IV. Order No. 679

Following issuance of *SCE I*, the Energy Policy Act of 2005 was enacted, which amended the FPA by adding section 219. Accordingly, FERC issued Order No. 679 on July 20, 2006, to implement the new statutory provision. Among the other rate incentives for transmission investment adopted in that order, FERC determined that “an applicant may request 100 percent of prudently incurred costs associated with abandoned transmission projects can be included in transmission rates if such abandonment is outside the control of management.”¹⁶ FERC identified abandoned plant cost recovery as “an effective means to encourage transmission development by reducing the risk of nonrecovery of costs.”¹⁷

FERC retained the Opinion No. 295 standard of allowing recovery over the expected life of the asset had it gone into service.¹⁸ FERC determined that all rate incentive requests would be assessed on a case-by-case basis, but expressed the view that an outright rejection of the project by local, state, or federal siting authorities would generally be considered an abandonment beyond the control of management, while abandonment after a conditioned approval by the local, state, or federal siting authority would require closer scrutiny. It also specified that a section 205 filing would be a prerequisite to any recovery¹⁹ and required the applicant to demonstrate a nexus between the incentives sought and the risks of its project.²⁰

FERC also explained in Order No. 679 that “any declaratory order will only rule on whether the applicant’s proposal qualifies for incentive based rate treatment and, if requested, which incentives the applicant may adopt.”²¹ If an applicant has received a declaratory order authorizing rate incentives, then “the subsequent Section 205 proceeding would be limited to a review of the applicant’s rates and would not include a review of whether the applicant’s facility qualifies to receive incentive-based rate treatments.”²² However, the prudence of the costs that the applicant proposes to recover

20. *Id.* at P 26. In Order No. 679-A, FERC modified its nexus requirement to apply to the total package of incentives sought by the applicant. Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 at P 27.

21. Order No. 679 at P 77

22. *Id.* at P 78.

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as well as the cost allocation and specific rate each remain to be decided in a section 205 proceeding. FERC also warned intervenors that arguments that a particular investment does not qualify for incentive rates must be raised during proceedings addressing the initial request for incentive rates, as it would not revisit the issue in a section 205 proceeding if the question had been decided in a declaratory order.²³ However, it cautioned, a change in facts would require the applicant to file another declaratory order addressing its revised project's qualification or the issue *would* be reopened in the section 205 proceeding.²⁴

V. How and Why Conditions Happen

In accordance with Order No. 679, the Commission has routinely conditioned its subsequent grants of the abandonment incentive on the applicant demonstrating in a future filing pursuant to section 205 that (1) abandonment was due to factors beyond the control of the applicant; (2) the costs sought to be recovered are prudent; and (3) the resulting rates are just and reasonable. With respect to the threshold showing required under section 219 of the FPA, some applicants have provided evidence sufficient to demonstrate that the proposed project meets the section 219 requirements,²⁵ and others have elected to rely on the rebuttable presumption.²⁶ In some cases, where the applicant's proposal is still before the applicable planning body, commission, or authority, the Commission has granted approval conditioned on future satisfaction of the rebuttable presumption to satisfy the section 219 requirement.²⁷ In conjunction with seeking incentives, some applicants have proposed formula rates and filed tariff sheets, which as discussed below, focuses attention on the issue of which ratepayers may be liable.

Tallgrass, issued in December 2008, addressed an application by Tallgrass Transmission, LLC ("Tallgrass") and Prairie Wind Transmission, LLC ("Prairie Wind"), who proposed to recover their projected costs, including the abandonment incentive, if necessary, through a formula rate under the Southwest Power Pool, Inc. (SPP) open access tariff. They acknowledged, however, that such rates could not become effective until SPP filed, and the Commission approved, a cost allocation methodology for recovery of the costs of high-voltage transmission systems.²⁸ The Commission accepted the proposed tariff sheets for filing, subject to additional filings (including a section 205 filing for abandoned plant costs, if and when the applicants sought to collect such costs), and set the proposed rates for hearing.²⁹ Thus, it implicitly recognized the right of Tallgrass and Prairie Wind to collect abandoned plant costs (after making a proper showing) from SPP ratepayers, although the allocation among SPP ratepayers would be subject to further SPP cost allocation proceedings and subsequent FERC approval and thus would not be known until a future date.

The Commission's implicit agreement that abandoned plant costs could be collected from SPP ratepayers is particularly interesting because the Commission explicitly recognized that neither the Tallgrass nor Prairie Wind project had been vetted through the SPP regional planning process nor had they received siting approvals at the time the declaratory order issued. The applicants argued that their projects were consistent with "SPP's vision of a high voltage grid to 'overlay' the existing SPP transmission grid,"³⁰ but intervenors argued that because the projects had not yet crossed these approval hurdles, the application was premature. The applicants acknowledged "most of the requested incentives will become moot unless the projects are included in the SPP regional transmission

23. *Id.*

24. *Id.*

25. See, e.g., *PacifiCorp*, 125 FERC ¶ 61,076 at PP 38–40 (2008) (adequate demonstration the project will ensure reliability and reduce congestion for all but one segment, for which no incentives would be granted); *Green Power Express LP*, 127 FERC ¶ 61,031 at P 41 (2009) ("*Green Power Express*"), *reh'g pending*; *Pioneer Transmission, LLC*, 126 FERC ¶ 61,281 at P 37 (2009) ("*Pioneer*"), *order on reh'g and clarif.*, 130 FERC ¶ 61,044 (2010) ("*Pioneer Rehearing Order*"), *pet.* For review filed sub nom. *Ind. Util. Regulatory Comm'n. v. FERC*, No. 10-1635 (7th Cir., Mar. 16, 2010); *Tallgrass Transmission, LLC*, 125 FERC ¶ 61,248 at P 42 (2008) ("*Tallgrass*"), *reh'g pending*. 76.

26. See, e.g., *S. Cal. Edison Co.*, 121 FERC ¶ 61,168 at PP 38–42 (2007) ("*SCE III*"), *reh'g denied*, 123 FERC ¶ 61,293 (2008); *Potomac-Appalachian Transmission Highline, L.L.C.*, 122 FERC ¶ 61,188 (2008) at P 31 (2008); *Xcel Energy Servs.,*

Inc., 121 FERC ¶ 61,284 at P 53 (2007) ("*Xcel Energy*"); *Otter Tail Power Co.*, 129 FERC ¶ 61,287 at P 27 (2009); *Citizens Energy Corp.*, 129 FERC ¶ 61,242 at P 16 (2009); *Great River Energy*, 130 FERC ¶ 61,001 at P 29 (2010).

27. See, e.g., *Xcel Energy*, 121 FERC ¶ 61,284 at P 53; *Green Energy Express*, 129 FERC ¶ 61,165 at P 30; *Cent. Me. Power Co.*, 125 FERC ¶ 61,079 at P 43; *Central Maine*, 125 FERC ¶ 61,182 at P 56; *Pub. Serv. Elec. & Gas Co.*, 126 FERC ¶ 61,219 at PP 23, 66 (2009), *reh'g denied*, 131 FERC P 61,028 (2010); *SCE IV*, 129 FERC ¶ 61,246 at P 28.

28. *Tallgrass*, 125 FERC ¶ 61,248 at P 12.

29. The Commission pointed out that when a formula rate includes an incentive that is subject to a future filing, such as abandoned plant cost, the formula should include a zero as a placeholder for that amount. *Id.* At P 93.

30. *Id.* at P 7, 10.

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plan” and “state[d] that they would not object to a Commission order conditioning the return on equity and construction work in progress incentives on inclusion of the projects in the SPP regional plan”; but “applicants request approval of the abandoned plant incentive under section 205 without having to establish the rebuttable presumption under Order No. 679.”³¹ Because the Commission found that the applicants demonstrated that the projects satisfied the section 219 requirement without reliance on the rebuttable presumption, the Commission determined that it did not need to explicitly condition its grant of any incentive on the projects’ inclusion in the SPP regional plan.

Pioneer,³² issued in March 2009, adheres closely to *Tallgrass* in most respects, but explicitly reserves comment on which, if any, ratepayers would be responsible for abandoned plant costs and places the burden of proposing a cost allocation methodology on the applicants. Like *Tallgrass* and *Prairie Wind*, *Pioneer Transmission, LLC* (“*Pioneer*”) filed tariff sheets (in its case, for inclusion in the PJM Interconnection, LLC (PJM) and Midwest Independent Transmission System Operator, Inc. (MISO) tariffs) which the Commission

The Commission implicitly recognized the right of Tallgrass and Prairie Wind to collect abandoned plant costs.

accepted for filing, subject to a compliance filing, and set for hearing. It also conditioned the effectiveness of the formula rate on inclusion of the project in the PJM and MISO regional plans.³³ *Pioneer* included in its request for incentives permission “to recover 100 of prudently incurred costs if the project, or any component thereof, were to be abandoned for any reasons outside of its control.”³⁴ Examples of such reasons cited in the Commission order were the failure to obtain regulatory approvals, be included in the regional expansion plans of PJM or MISO or both, or secure rights

of way. A number of intervenors requested the Commission to make abandoned plant cost recovery conditioned on the project’s inclusion in the PJM and MISO regional plans.³⁵ But, having found that *Pioneer*, like *Tallgrass* and *Prairie Wind*, had met the section 219 requirements without reliance on the rebuttable presumption, FERC did not impose that condition.³⁶ It made the incentive effective retroactively to Dec. 15, 2008, the date requested by *Pioneer*. However, it cautioned that should the project be cancelled before it is completed, it is unclear whether *Pioneer* will have any customers from which to recover its abandonment incentive. At such time, *Pioneer* will be required to make a showing in a section 205 filing that the abandonment costs were prudently incurred and it must propose a rate and cost allocation method to recover the costs in a just and reasonable manner.³⁷

In the rehearing order issued in January 2010, the Commission affirmed its prior holding.³⁸ It explicitly denied requests to condition abandoned plant cost recovery on inclusion of the project in the PJM and MISO regional plans.³⁹ The Commission found that the abandoned plant cost incentive and authorization it had granted to *Pioneer* to establish a regulatory asset for all project expenses incurred prior to the date its formula rate is effective (and not capitalized and included in CWIP) would “lessen the amount of risk by providing upfront regulatory certainty to *Pioneer*, and encourages development of more transmission infrastructure,” and “[a]llowing *Pioneer* the opportunity to recover the costs that it prudently incurs will help *Pioneer* finance the project and will assure potential investors that they will likely be able to recover some part of their investments if the project is abandoned.”⁴⁰

These pro-investment sentiments however were tempered by its caution that “while the abandonment incentive became effective Dec. 15, 2008, should the *Pioneer* project be cancelled before it is completed, it is unclear whether *Pioneer* will have any customers from which to recover its abandonment incentive... [The authorization] is not a guarantee of cost recovery.”⁴¹ The Commission also assured intervenors that customers would be able to protest *Pioneer*’s section 205 filing if and when it seeks to recover such costs.⁴²

31. *Id.* at P 36 (emphasis added); see *id.* at P 16.

32. 126 FERC ¶ 61,281, *order on reh’g and clarif.*, 130 FERC ¶ 61,044.

33. 126 FERC ¶ 61,281 at P 126.

34. *Id.* at P 69.

35. *Id.* at PP 70–74.

36. *Id.* at P 37.

37. *Id.* at P 76.

38. *Pioneer Rehearing Order*, 130 FERC ¶ 61,044.

39. *Id.* at P 26.

40. *Id.*

41. *Id.* at P 27.

42. *Id.*

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In *Green Power Express*, decided in April 2009, FERC similarly found the applicant had met the section 219 requirement without reliance on the rebuttable presumption, granted the abandonment incentive, and accepted tariff sheets that would provide for recovery through the MISO and PJM tariffs under a formula rate.⁴³ However, as in *Pioneer*, the language of the *Green Power Express* order is more cautious than in *Tallgrass*. The Commission acknowledged parties' concern that "if the Project is cancelled before it is completed, it is unclear whether Green Power will have any customers from which to recover the costs it incurred."⁴⁴ As in *Pioneer*, the Commission responded by stating that if Green Power sought to collect abandoned plant costs, it would be required to file under section 205 and propose in that filing "a just and reasonable rate and cost allocation method to recover these costs."⁴⁵

Protesters also argued that "it may not be prudent for Green Power to incur significant expenses such as detailed studies and route selection while waiting for regional planning approval" and that to authorize abandoned plant cost recovery prior to the project's approval in a regional planning process would "encourage future speculative projects" and "have ratepayers fund the costs of transmission projects that do not go forward."⁴⁶ The Commission determined that protestors "concerned about their potential exposure to abandoned plant costs will have an opportunity to comment on any proposal to recover such costs if and when Green Power makes the required section 205 filing" and "arguments about whether it was prudent for Green Power to incur specific costs can be raised at that time."⁴⁷ The Commission's language in *Green Power Express* thus recognizes a possible prudence issue linked to when costs are incurred relative to the project's progress through necessary regulatory approvals. This concept echoes the statement in a 2005 *SCE II* order: "While it is unlikely that SCE will proceed with the Antelope Project without state approvals, it may be imprudent to incur costs without the necessary approvals."⁴⁸

VI. Who Is at Risk Under a Conditional Order?

Taken together, *Pioneer* and *Green Power Express*, and to a lesser extent, *Tallgrass*, strike an uneasy balance. The Commission assures owners and investors of an opportunity to recover abandoned plant costs and, in *Pioneer*, explicitly recognizes that failure to be included in the regional plan could be the type of event beyond management's control that could trigger an abandoned plant claim. At the same time, the Commission seeks to pacify intervenors by leaving the identification of customers from whom such costs might be recovered and the cost allocation methodology to a later date and future challenges (although implying that some segment, or all, of the RTO's ratepayers potentially could be liable by its acceptance of tariff sheets). The further caution to management in *Green Power Express* that costs incurred prior to receiving necessary approvals might be subject to prudence review adds weight to the ratepayer side of the balance, making clear that neither investors nor ratepayers have a clear edge in that case—the Commission has pushed to a future date the issue of what will be recoverable and left openings for both sides to argue their positions.

In the more recent *Green Energy Express*,⁴⁹ however, shareholders appear at risk for at minimum 50 percent, and perhaps 100 percent, of abandoned plant costs if the project fails due to exclusion from the regional plan because FERC explicitly conditioned the abandonment incentive on inclusion in the regional plan. It rejected the applicant's arguments that it had met the section 219 requirement without such reliance. *Green Energy Express* LLC ("Green Energy Express") proposed a 70-mile, double-circuit 500 kV project that would be integrated into the CAISO grid but had not been approved (as of the time of its application) for inclusion in the CAISO regional plan. The CAISO expressed concern that the Commission would grant abandoned plant recovery incentives to competing proposals "intended to address the same regional needs," and such a result would "encourage speculative

43. *Green Power Express*, 127 FERC ¶ 61,031.

44. *Id.* at P 52; *see id.* at P 49.

45. *Id.* at P 52.

46. *Id.* at P 49.

47. *Id.* at P 52.

48. 113 FERC ¶ 61,143 at P 21.

49. 129 FERC ¶ 61,165, *reh'g denied*, 130 FERC ¶ 61,117.

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transmission projects” and result in recovery by multiple entities.⁵⁰ Moreover, the CAISO argued against permitting abandoned plant cost recovery for the Green Energy Express project if it were abandoned *due* to rejection in the CAISO planning process.⁵¹ The CAISO also raised the argument that the owner of a project that is approved by the CAISO can become a Participating Transmission Owner (PTO) within the meaning of the CAISO tariff and as such, would be entitled to rate recovery, but if the project is not approved by the CAISO, the developer cannot become a PTO and “there is no mechanism for recovering costs for an entity that does not qualify as a [PTO].”⁵²

The Commission responded to these concerns as follows:

As noted above, we found that the applicants in the *Green Power Express*, *Pioneer*, and *Tallgrass* proceedings satisfied section 219 through the applicants’ own submissions, although their projects had not yet been approved in the relevant planning process. By contrast, we find that Green Energy has not satisfied the section 219 requirement that its Project ensures reliability or reduces the price of delivered power by reducing congestion through the information it provided in its Petition. For this reason, we condition the abandoned cost recovery incentive on the Project being approved in the CAISO’s planning process. We find that this condition, which is applicable to all of the incentives we are granting herein, addresses the CAISO’s concern with respect to the abandoned plant incentive in this case.⁵³

The Commission’s assurance to the CAISO suggests that Green Energy Express will not be entitled to the abandonment *incentive*, absent satisfaction of all conditions. But read in conjunction with *Central Maine*, which was issued four days earlier than *Green Energy Express*, a failure of conditions would not appear to eliminate the possibility of recovery completely. As note above, pre-Order

No. 679 cases permitted at least 50 percent recovery, and FERC indicated that the Maine Companies could seek recovery consistent with its pre-Order No. 679 precedent. However, unlike the Maine Companies, Green Energy Express does not have existing transmission ratepayers, and the CAISO has made clear that it does not view Green Energy Express as eligible to seek recovery from its ratepayers.

Whether having existing ratepayers from whom to recover the abandoned plant costs matters is—as yet—undecided. In December 2009, FERC issued *SCE IV*,⁵⁴ which is similar to *Green Energy Express*, in that the abandonment incentive was opposed by the CAISO, and the Commission conditioned its grant of all incentives on inclusion of SCE’s proposed project, the Eldorado-Ivanpah Transmission Project (EITP), in the CAISO regional plan. However, a group of municipal intervenors who objected to approval of the abandonment incentive (“Six Cities”) argued that

[SCE] should be required to follow the Commission’s policy of allocating equitably the risk of project cancellation between ratepayers and shareholders. According to Six Cities, this approach would not require [SCE’s] shareholders to bear an undue degree of risk in the event of cancellation but, should the Commission determine the EITP to constitute network facilities recoverable through the CAISO access charge, would share all risk of abandonment with CAISO ratepayers.⁵⁵

Thus, Six Cities presumed SCE would have a right to collect 50 percent of its abandoned plant costs from CAISO shareholders.

The Commission did not address whether SCE would be permitted, like the Maine Companies, to seek abandoned plant cost recovery under pre-Order No. 679 cases or not should the project fail. However, this is an emerging issue that will undoubtedly be watched with interest.⁵⁶ A question of equity will arise if the Commission is

50. *Id.*, 129 FERC ¶ 61,165 at PP 46–47.

51. *Id.* at P 46.

52. *Id.* at P 47.

53. *Id.* at P 54 (citation omitted).

54. 129 FERC ¶ 61,246.

55. *Id.* at P 60.

56. The Commission’s cautions to Pioneer and Green Power Express regarding the identity of ratepayers should their projects fail is close to that given to Green Energy Express, but unlike Green Energy Express, each filed tariff sheets that

at least suggests an avenue for collection. The difference in strategic approach may be explained in part by the fact that although Pioneer and Green Power Express are new entrants, their owners, like those of Tallgrass and Prairie Wind, are incumbents. Tallgrass is owned, indirectly, by OGE Energy Corp., American Electric Power Company (AEP) and MidAmerican Energy Holdings Company (MEHC). *Tallgrass*, 125 FERC ¶ 61,248 at P 2. Prairie Wind is owned indirectly by Westar Energy, AEP and MEHC. *Id.* at P 3. *Pioneer* is a joint venture of subsidiaries of AEP and Duke Energy Corporation. *Pioneer*, 126 FERC ¶ 61,281 at P 3. Green Power Express is owned, indirectly, by ITC Holdings Corp., which owns several independent transmission companies. *Green Power Express*, 127 FERC ¶ 61,031 at P 2. Thus, these project companies may have been more familiar with the rate collection mechanisms of the applicable RTOs.

Bearing the Risk of Abandonment

less accommodating of new entrants, like Green Energy Express (a privately owned limited liability company), than incumbent utilities, such as SCE or the Maine Companies.

The most obvious means to avoid the risk of unrecovered abandoned plant costs is to gain approval of the abandonment incentive as early as possible to minimize the costs at risk. But to do so, a project must meet the section 219 requirement without reliance on the rebuttable presumption, as did *Tallgrass* and *Pioneer*. Doing so can be difficult, since FERC's determination of whether a sufficient showing has been made is, to a significant degree, subjective.

On rehearing of *Green Energy Express*, Green Energy Express argued that "it is nonsensical for the Commission to deny granting the incentive based on the fact that one of the least certain hurdles that a project faces, *i.e.*, approval in the regional planning process, has not yet been passed."⁵⁷ It sought again to gain authorization based on the data it submitted to satisfy section 219. The Commission refuted Green Energy Express's contention that it had met the section 219 threshold in the same manner as *Pioneer* by detailing its concerns with Green Energy Express's data, the periods in which it was collected, and Green Energy Express's cost analysis with respect to the effect of the project on congestion. It further found that Green Energy Express had provided insufficient evidence for it to determine that the project would improve reliability.

Green Energy Express also argued that the Commission could have granted it the abandonment incentive without making a finding under section 219 by pointing to an earlier grant of the incentive to Pacific Gas and Electric Company (PG&E) issued in 2008,⁵⁸ with no such showing. However, the Commission pointed out that unlike Green Energy Express's 70-mile line within California, PG&E proposed a 1,000-mile, multistate, international line that was expected to cost several billion dollars. Further, the Commission deferred consideration of other incentives for PG&E until the line reached a later stage of development, but pursuant to its case-specific approach, allowed abandoned plant cost recovery due to its analysis of the facts and policy objectives in that case. Thus, the Commission cited to substantive differences, not a change in

policy, to distinguish *Green Energy Express* from *Tallgrass*, *Pioneer*, *Green Power Express*, and *PG&E*.

VII. Conclusion

The Commission has been careful to state that "ruling on a request for incentives pursuant to Order No. 679 does not prejudge the findings of a particular transmission planning process or the siting procedures at state commissions."⁵⁹ However, it is equally apparent that receiving an unconditioned grant of the abandonment incentive is facilitated by inclusion of the project in a regional plan. In the absence of such an approval, FERC's abandoned plant cost recovery policy is showing a trend toward greater ratepayer protection as the number of projects increase. Each project developer should take heed that, unless the Commission is persuaded that the project has met its section 219 burden, its order may be conditioned on the project's inclusion in a regional plan, and until satisfaction of that condition, the project developer bears the risk that at least 50 percent of its abandoned plant costs may not be recoverable if its project fails. In addition, both incumbent transmission providers and new entrants have a stake in how the Commission's policy for identifying the ratepayers responsible for abandoned plant costs evolves. Until the Commission fully addresses that question, 100 percent of the costs of an abandoned project could be at risk for shareholders in some cases.

Donna Attanasio practices in the Firm's Energy, Infrastructure, Project and Asset Finance Group with an emphasis in energy markets, regulatory matters and transactions. She also often works with bankruptcy and litigation attorneys on energy-related matters. Ms. Attanasio represents clients with respect to transactional matters such as the negotiation and drafting of project documents, and as regulatory counsel in connection with the acquisition and leasing of generation and transmission assets and mergers.

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57. *Green Energy Express*, 130 FERC 61,117 at P 32.

58. 123 FERC ¶ 61,067 (2008) (PG&E).

59. *Green Energy Express*, 127 FERC ¶ 61,031 at P 42 (citing *Pioneer*, 126 FERC ¶ 61,281 at P 40; *Tallgrass*, 125 FERC ¶ 61,248 at P 43)