

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

**Smart Grid Policy**

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**Docket No. PL09-4-000**

**SUPPLEMENTAL COMMENTS  
OF NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION**

On May 19, 2009, the Federal Energy Regulatory Commission (“FERC” or “Commission”) issued a Notice Requesting Supplemental Comments regarding “Smart Grid” policy.<sup>1</sup> Pursuant to the May 21, 2009 notice requesting supplemental comments published in the Federal Register,<sup>2</sup> the National Rural Electric Cooperative Association (“NRECA”) respectfully submits these supplemental comments.

**BACKGROUND**

The FERC Notice observes that in the Proposed Policy Statement,<sup>3</sup> the Commission proposed an interim rate policy for Smart Grid investments providing for the acceptance of single-issue rate filings submitted by public utilities under section 205 of the Federal Power Act (“FPA”) and requiring only that they show that the projects would not affect reliability or security adversely, that the projects are scaled to minimize the likelihood of stranded investment and that information regarding the projects be shared with DOE’s Smart Grid Clearinghouse.<sup>4</sup>

The FERC Notice explains that subsequent to issuance of the Proposed Policy Statement, the U.S. Department of Energy (“DOE”) announced, pursuant to §§ 1304 and 1306 of the Energy

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<sup>1</sup> *Smart Grid Policy*, 127 FERC ¶ 61,139, Docket No. PL09-4-000 (May. 19, 2009).

<sup>2</sup> *Smart Grid Policy; Notice Requesting Supplemental Comments*, 74 Fed. Reg. 23,810 (May. 21, 2009) (“FERC Notice”).

<sup>3</sup> *Smart Grid Policy*, 126 FERC ¶ 61,253 (2009).

<sup>4</sup> Proposed Policy Statement, 126 FERC ¶ 61,253 at PP 46-47.

Independence and Security Act of 2007 (“EISA”),<sup>5</sup> two opportunities to submit proposals for Smart Grid projects for which DOE may supply up to 50 percent of the funding.<sup>6</sup> The FERC Notice acknowledges that the Draft Funding Opportunity Announcement does not explicitly address regulatory approvals, but does instruct applicants to submit a funding plan that identifies all sources of project funds, and directs applicants to include a commitment letter from third parties providing a specific minimum dollar amount of cost sharing.<sup>7</sup> The Notice of Intent states that the evaluation of proposals will accord “additional merit . . . to applications that...[o]ffer the greatest extent of institutional and organizational commitment with consideration given to: ... [r]equired approvals from regulatory organizations.”<sup>8</sup>

The Commission seeks supplemental comments on: (i) how it should address requests for rate recovery that may be necessary for public utilities to qualify for awards under the DOE programs; (ii) whether some form of conditional approval could be useful to public utility applicants with respect to jurisdictional Smart Grid facilities; and (ii) whether the Commission, consistent with its obligations to ensure just and reasonable rates under the FPA, should adopt processes for public utilities that may apply for funding for jurisdictional Smart Grid facilities through the DOE’s Smart Grid funding opportunities.

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<sup>5</sup> Public Law No. 110-140, 121 Stat. 1492 (2007).

<sup>6</sup> For the section 1304 program, the Department’s National Energy Technology Laboratory issued a Draft Funding Opportunity Announcement numbered DE-FOA-0000036 on April 16, 2009 (“Draft Funding Opportunity Announcement”). For the section 1306 program, the Department’s Office of Energy Delivery and Electric Reliability issued a Notice of Intent to Issue a Funding Opportunity Announcement numbered DE-FOA-0000058A on April 16, 2009 (“Notice of Intent”).

<sup>7</sup> Citing Draft Funding Opportunity Announcement at 32-33. The Draft Funding Opportunity Announcement announces the DOE’s funding opportunity for Smart Grid projects under section 1304(b) of the EISA (“Smart Grid Demonstration Project”).

<sup>8</sup> Citing Notice of Intent at 12-13. The Notice of Intent announces the DOE’s intent to issue a Funding Opportunity Announcement for Smart Grid projects under section 1306 of the EISA (“Smart Grid Qualifying Project”).

NRECA provided initial comments in this docket on May 11, 2009.<sup>9</sup> In those initial comments NRECA commended the Commission for its efforts to facilitate the development of a Smart Grid and demonstrated its own and its members' leadership in bringing the benefits of Smart Grid technology to consumers. At the same time, NRECA noted that its members have been cautious to proceed with Smart Grid investments "at the pace of value" in order to assure that those investments in fact work to enhance cooperatives' provision of safe, reliable power at the lowest reasonable cost.

Out of this concern that Smart Grid investments not outpace their value, NRECA cautioned the Commission to adhere to accepted ratemaking policies in developing an interim rate policy for implementation of Smart Grid devices and equipment. Specifically, NRECA urged the Commission to hew to its longstanding policies disfavoring single-issue ratemaking and requiring the demonstration that facilities are "used and useful" before they are included in rates in order to assure that jurisdictional rates and charges continue to be just and reasonable, as still required by FPA sections 205 and 206.

### COMMENTS

The Commission's interest in Smart Grid Projects,<sup>10</sup> which NRECA and its members share, is laudable. And its enthusiasm to advance Smart Grid Projects by responding to the DOE solicitations is understandable. However, even appropriate enthusiasm and promotional impulse must respect the time-tested and court-approved boundaries imposed on Commission action by the FPA. Nothing in the EISA changed the requirement of FPA section 205(a) that "[a]ll rates and charges made, demanded or received by any public utility for or in connection with the

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<sup>9</sup> NRECA provided errata correcting the initials comments on May 14, 2009

<sup>10</sup> Collectively, the Smart Grid Qualifying Project and Smart Grid Demonstration Project are referred to herein as Smart Grid Projects.

transmission or sale of electric energy . . . shall be just and reasonable. . . ,”<sup>11</sup> or the requirement of section 205(e) that the public utility seeking a rate increase bear the burden of proof to show such increase is just and reasonable. Furthermore, DOE has not asked for such action, and this Commission’s ability to contribute significantly to promotion of what will be largely distribution-level programs is constrained by its jurisdiction under the FPA. And in any event, the DOE documents to which the FERC Notice reacts are only drafts.

**1. The Commission should address requests for rate recovery that may be necessary for public utilities to qualify for awards under the DOE programs expeditiously but must do so in accordance with the requirements of sections 205 and 206 of the FPA.**

As a general matter, instead of placing all risk associated with the desired Smart Grid investments on consumers, the burden can be shared equitably and in ways consistent with the Commission’s obligation to protect consumers. In fact, the FPA’s language and structure direct an uncomplicated path to the Commission’s desired result. The very sentence of section 205(e) that allocates to public utilities the burden to justify increased rates also obligates the Commission to “give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.” There is no reason why rate changes needed to accommodate Smart Grid investments cannot be made in the manner prescribed by the statute and Commission’s regulations and precedent but, at the same time, with sufficient expedition to accommodate accelerated development of the Smart Grid. The Commission controls the pace at which hearings on applications for rate increases are conducted and can fashion procedural rules that will accelerate hearings on rate increase applications to accommodate Smart Grid investments so long as the resulting proceedings do not compromise

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<sup>11</sup> 16 U.S.C. § 824d(a).

the Commission's discharge of its obligation to assure that jurisdictional rates are just and reasonable.<sup>12</sup>

It should also be borne in mind that many public utilities have in place—and any can file—formula rates that provide for recovery of costs associated with prudent new investments without further ado. These rates, which the Commission sets, assure investors of timely cost recovery sufficiently to attract private capital. There is no evident reason why the assurance of recovery that formula rates provide should not be sufficient to satisfy the DOE for purposes of Smart Grid Programs funding.

With regard to applicants to DOE for funding of projects pursuant to EISA §§ 1304(b) and 1306 there are three additional points for the Commission to consider. First, as the Commission itself recognizes, the Notice of Intent and the Draft Funding Opportunity Announcement do not state, and it is by no means clear, that DOE intends to condition the grant of awards upon legally enforceable assurance of recovery for Smart Grid facilities in rates. Second, rates subject to this Commission's jurisdiction—as distinguished from rates subject to the jurisdiction of retail regulatory authorities—are unlikely to afford assurance of the recovery of the entire balance of the cost of DOE-funded projects. Finally, the assurance of recovery for facilities not even under construction would stretch the FPA beyond the breaking point.<sup>13</sup>

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<sup>12</sup> See e.g., Order Scheduling Prehearing Conference, Docket No. RP01-245-016 (Jun. 1, 2006) (establishing Track II procedures consistent with time standards available at [www.ferc.gov/legal/timeline.pdf](http://www.ferc.gov/legal/timeline.pdf)); Order of Chief Judge Designating Presiding Administrative Law Judge, Docket No. RP04-360-000 (Aug. 4, 2004) (establishing Track III procedures and directing parties to review time standards available at <http://www.ferc.gov/legal/admin-lit/time-sum.asp>.); Order of Chief Judge Severing Proceedings, Designating Presiding Administrative Law Judge And Establishing Track I Procedural Schedule, Docket No. EL00-105-007 (Feb. 23, 2004) (establishing Track I procedures and directing parties to review time standards available at <http://www.ferc.gov/legal/admin-lit/time-sum.asp>). See also, 18 C.F.R. § 385.206(h) (2008) (providing for option of Fast Track process in complaint cases).

<sup>13</sup> The Commission's regulations provide for the recovery of construction work in progress ("CWIP") in certain circumstances. The key to recovery in those circumstances is that the construction work has commenced and is *in progress*. It would be an extraordinary measure to assure recovery of construction work that has not yet commenced and is not yet in progress.

**2. Neither the Notice of Intent nor the Draft Funding Opportunity Announcement explicitly conditions the grant of awards upon legally enforceable assurance of recovery for Smart Grid facilities in rates and it is not clear that the DOE intends such a limitation.**

The Notice of Intent does, as the Commission suggests, state that the evaluation of Smart Grid investment grant applications may be evaluated, at least in part, based on the “extent of institutional and organizational commitment with consideration given to . . . [r]equired approvals from regulatory organizations.”<sup>14</sup> However, the Commission cannot view specific provisions of the Notice of Intent in isolation, but, instead must consider the Notice of Intent as a whole. On pages 9-10 of the Notice of Intent, for example, the DOE identifies the information that Smart Grid Qualifying Project applicants should submit in their applications. Specifically, the DOE states that an applicant should provide a project plan that includes “[t]he extent of cost share provided by applicant, including *identifying*, if possible, the expenses borne by the applicant versus with the use of government funds.”<sup>15</sup> The DOE requires the applicant merely *identify* the expenses to be borne by the applicant but does not require the applicant provide proof that the applicant has those funds on hand or has received regulatory approval to recover those funds.

The DOE also requires an applicant provide, as part of its project plan, “[a]n *identification* of decisions requiring external approval, e.g., the allowance of investment expenditures by Public Utility Commissions or other authorities.”<sup>16</sup> Again, the DOE requires only that the applicant *identify* whether or not it will seek regulatory approval to recover those expenses borne by it. The Notice of Intent does not require the applicant demonstrate it has already received regulatory approval to recover those expenses.

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<sup>14</sup> Notice of Intent at 12-13.

<sup>15</sup> Notice of Intent at 9 (emphasis supplied).

<sup>16</sup> Notice of Intent at 10 (emphasis supplied).

Similarly, the DOE requires “applications that involve the installation of advanced metering devices . . . *describe* any and all time-varying or other incentive-rate structures that are currently available or will be offered to customers.”<sup>17</sup> Pursuant to the DOE’s instructions, the applicant need only *describe* its rate structure and need not show that it has received approval for such rate structure.

The provision of the Notice of Intent quoted by the Commission in the FERC Notice is but one piece of the Smart Grid Qualifying Project evaluation criteria. On the broadest level, the DOE will review Smart Grid Qualifying Project applications based on: (1) project approach and feasibility; (2) project impact; (3) job creation and retention; and (4) extent of cost-sharing.<sup>18</sup> The DOE will assess the project approach and feasibility prong “based on the comprehensiveness and completeness of the project plan, including the likelihood that the proposed work can be accomplished with the given budget and schedule. . . .”<sup>19</sup> The DOE will give “*additional merit*” under the first prong of the review to applications that “[o]ffer the greatest extent of institutional and organizational commitment with consideration to . . . [r]equired approvals from regulatory organizations.”<sup>20</sup> Under the plain language of the Notice of Intent, any required regulatory approvals already received simply provide *additional merit* to the application. The Notice of Intent does not say that lack of required regulatory approvals operates to bar a successful application. Instead, the DOE will view any regulatory “pre-approval” as icing on the cake.

Regulatory approval is not synonymous with an order providing for increased rates to recover the cost of project facilities. In other words, an applicant may be required to seek and

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<sup>17</sup> Notice of Intent at 10 (emphasis supplied).

<sup>18</sup> Notice of Intent at 12-14.

<sup>19</sup> Notice of Intent at 12.

<sup>20</sup> Notice of Intent at 12-13.

receive siting-type regulatory approval for the installation and operation of Smart Grid equipment and facilities, but not necessarily be required to seek and receive approval of an increase in rates. To be read as requiring the Commission to approve a rate increase in advance of an applicant's demonstration of a Smart Grid Qualifying Project's use and usefulness would be at odds with the FPA.

The DOE appears to recognize this limitation. Under the fourth prong of the Smart Grid Qualifying Project application review analysis, the DOE will evaluate applications "based on the extent of cost-share *proposed*."<sup>21</sup> It is significant that the Notice of Intent does not indicate that applications will be evaluated based on the extent of cost-share *approved*. In this regard, the DOE appears to recognize that a Smart Grid Qualifying Project applicant will not, or at least may not, have received regulatory approval to recover its cost-share.

While the Notice of Intent evinces DOE's awareness of the limits that the FPA imposes on public utilities' revenue collection, to err on the side of caution, NRECA respectfully recommends the Commission apprise the DOE of the limitations imposed by the FPA prior to the DOE's scheduled June 17, 2009 Funding Opportunity Announcement.

The Draft Funding Opportunity Announcement, on the other hand, does, as the Commission suggests, explicitly instruct the applicant to submit a funding plan for the non-DOE share of the Smart Grid Demonstration Project costs.<sup>22</sup> It does not, as the Commission acknowledges, explicitly address regulatory approvals. In this regard, there is no prohibition against receiving federal funding for Smart Grid Demonstration Projects absent regulatory approval to recover non-federal funds. Presumably, this reflects DOE's understanding that the

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<sup>21</sup> Notice of Intent at 14.

<sup>22</sup> Draft Funding Opportunity Announcement at 32-33.

FPA does not permit pre-approval of recovery of costs of facilities not yet proven to be used and useful if installed.

Furthermore, despite the requirement that applicants submit a funding plan for the non-federal share of Smart Grid Demonstration Project costs, the funding plan is not an element of the DOE's review of applications based on their merits.<sup>23</sup> The funding plan is not even an element of the DOE's review of applications based on "other selection factors."<sup>24</sup> In fact, the funding plan appears only to be important to the DOE's evaluation process under the DOE's initial review prior to a comprehensive merit-based review.<sup>25</sup> Given that the funding plan is not a factor in the DOE's merit-based evaluation of Smart Grid Demonstration Project applications, it cannot reasonably be argued that the DOE intends to condition the grant of federal funds upon regulatory approval for recovery of non-federal funds in rates.

The conclusive fact is that neither the Notice of Intent nor the Draft Funding Opportunity Announcement requires an applicant to have received regulatory approval to recover costs of Smart Grid facilities in rates in order to receive federal funding for Smart Grid investments. It is unnecessary to modify the Commission's traditional ratemaking policies to accommodate *draft* notices and announcements of funding opportunities. The better approach, as previously indicated, is for the Commission to remind the DOE of the limitations imposed by the FPA and to await the DOE's issuance of *final* Smart Grid funding opportunity announcements.

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<sup>23</sup> Draft Funding Opportunity Announcement at 38-40.

<sup>24</sup> Draft Funding Opportunity Announcement at p 40.

<sup>25</sup> Draft Funding Opportunity Announcement at p 38.

**3. Rates subject to this Commission’s jurisdiction—as distinguished from rates subject to the jurisdiction of retail regulatory authorities—are unlikely to afford assurance of the recovery of all, or even much of, the balance of the cost of DOE-funded projects.**

Most public utilities recover the bulk of their system costs of service through retail rates not subject to this Commission’s jurisdiction. What is more, they recover virtually *all* of their costs of distribution facilities through such rates. Based on the existing Smart Grid technology, the majority of applications for DOE funding under §§ 1304 and 1306 of the EISA will be for installation of Smart Grid facilities at the distribution level. The desire to control the thermostat in a residence does not make the service drop and metering equipment that serves each residence subject to this Commission’s jurisdiction. If DOE had intended that the ratemaking schemes of the state and local regulatory authorities that actually do regulate distribution be changed to accommodate DOE’s Smart Grid funding proposals, surely it would have said so.

**4. Assurance of recovery for facilities not even under construction is beyond the Commission’s power to afford under the FPA.**

The purpose of section 219 of the FPA is to promote transmission investment to ensure reliable and economically efficient generation and transmission. Section 219 directs the Commission to establish rules providing for incentives to promote capital investment in transmission infrastructure. The Commission accordingly issued Order No. 679 establishing the process by which public utilities may seek transmission rate incentives pursuant to section 219 of the FPA.

The Commission interprets section 219 to “promote capital investment in a wide range of infrastructure investments that can have either reliability or congestion benefits rather than investments that have both reliability and congestion benefits.”<sup>26</sup> The Commission recognizes

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<sup>26</sup> Promoting Transmission Investment Through Pricing Reform, Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 42 (July 20, 2006) (“Order No. 679”).

that many infrastructure investments will require state commission approval and, in Order No. 697, adopted a rebuttable presumption that projects approved by an appropriate state commission are eligible for incentives under section 219.<sup>27</sup> While state commission approval is not required, it is desirable.<sup>28</sup> The rebuttable presumption notwithstanding, the incentive rates are still subject to sections 205 and 206 of the FPA.<sup>29</sup> The presumption is not a substitute for an actual finding by this Commission.

### CONCLUSION

NRECA appreciates the opportunity to supplement its comments on the Commission's proposed Smart Grid Policy statement.

Respectfully submitted,

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<sup>27</sup> Order No. 679 at P 54.

<sup>28</sup> *Id.*

<sup>29</sup> FPA § 219(d).

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