UNITED STATES OF AMERICA

BEFORE THE

FEDERAL ENERGY REGULATORY COMMISSION

Nevada Power Co. & Sierra Pacific Power Co. FERC Docket No. EL22-73

**Protest of Public Citizen, Inc.**

 On June 30, two Nevada utilities owned by Berkshire Hathaway―one of the most well-capitalized and consistently-profitable conglomerates in modern corporate history―submitted a Petition for Declaratory Order seeking the Commission’s authorization to allow its Greenlink project to charge consumers three separate incentive rates. The Commission must disallow the rate incentives as unjust and unreasonable, as the Berkshire Hathaway utilities have failed to demonstrate that “substantial challenges and risks” necessitate such incentives. Nevada state law requires Berkshire Hathaway’s utilities to construct and operate Greenlink, thereby rendering rate incentives unnecessary. The CEO of Berkshire Hathaway’s Nevada utility testified that its consumers would not be charged incentive rates prior to Greenlink being placed in service. The proposed incentives are contrary to the justifications Berkshire Hathaway pledged to the Commission when it acquired the Nevada utilities in 2013. Finally, Berkshire Hathaway’s superior financial resources render these incentive rate treatments unneeded, and unjust and unreasonable. For these reasons, the Commission must dismiss the Petition and disallow the proposed rate incentives.

 Recent Congressional action mitigates risk for transmission projects like Greenlink. On November 15, 2021, President Biden signed H.R.3684 into law, establishing new authority for the Commission to expedite transmission siting, and a $10 billion loan fund to help finance transmission projects like Greenlink.[[1]](#footnote-1)

 Nevada Power Co and Sierra Pacific Power Co―utilities operating as NV Energy, and owned by the financial conglomerate Berkshire Hathaway―have been ordered by the State of Nevada to build nearly 600 miles of 525 kV transmission lines, along with substations and three 345 kV transmission lines, known as Greenlink Nevada.

 The June 30 Petition “requests three incentives for Greenlink Nevada: recovery of 100 percent of prudently incurred costs in the event that Greenlink Nevada is abandoned or cancelled, in whole or in part, for reasons outside of NV Energy’s control (“Abandoned Plant Incentive”); (2) the deferral of prudently incurred pre-commercial costs through the creation of a regulatory asset (“Regulatory Asset Incentive”); and (3) the opportunity to include 100 percent of Construction Work in Progress in rate base (“CWIP Incentive”).”[[2]](#footnote-2) With such cost-recovery rate incentives, there is limited opportunity for a comprehensive review of project costs before those costs are passed on to ratepayers.

 Commissioner Mark C. Christie articulates why asking consumers to pay such generous subsidies is generally wrong and inconsistent with the history of utility regulation:

*A core principle of utility law and regulation for decades is that consumers can only be forced to pay costs for assets that are “used and useful” to them. In Order No. 679, the Commission determined that it may be necessary to depart from this long-standing ratemaking principle to “address the substantial challenges and risks in constructing new transmission.” In my concurrence to a prior order . . . I questioned, among other concerns, whether the Commission’s determination of whether “substantial challenges and risks” exist when granting the abandoned plant and other incentives has become nothing more than a check-the-box exercise. As I have previously discussed:*

*The Commission’s incentive policies—particularly the CWIP Incentive, which allows recovery of costs before a project has been put into service—run the risk of making consumers “the bank” for the transmission developer; but, unlike a real bank, which gets to charge interest for the money it loans, under our existing incentives policies the consumer not only effectively “loans” the money through the formula rates mechanism, but also pays the utility a profit, known as Return on Equity, or “ROE,” for the privilege of serving as the utility’s de facto lender.*

*Further, just as the CWIP Incentive effectively makes consumers the bank for transmission developers, the Abandoned Plant Incentive effectively makes them the insurer of last resort as well. This incentive allows transmission developers to recover from consumers the costs of investments in projects that fail to materialize and thus do not benefit consumers. Just as consumers receive no interest for the money they effectively loan transmission developers, they receive no premiums for the insurance they provide if the project is never built . . . the CWIP Incentive is a de facto loan and the Abandoned Plant Incentive is de facto insurance — both provided by consumers”.*[[3]](#footnote-3)

FERC Order 679 states that “The purpose of our Rule is to benefit customers by providing real incentives to encourage new infrastructure, not simply increasing rates in a manner that has no correlation to encouraging new investment. The Final Rule, therefore, makes clear that not every incentive identified herein will be necessary or appropriate for every new transmission investment”; that incentive rates are required only if there are “substantial challenges and risks in constructing new transmission”; that “the Commission will permit incentives only if the incentive package as a whole results in a just and reasonable rate”; and acknowledged that the certain rate incentives departed from the existing ratemaking doctrine that rates should be based on plant costs that are *used and useful*.[[4]](#footnote-4)

The Commission’s purpose in considering whether to allow incentive rate treatment therefore is conditioned on whether the incentives are necessary to encourage new transmission investment, and that they be just and reasonable. The Petition fails to make the case that “substantial challenges and risks” exist requiring the incentive rates. Instead, the facts demonstrate that the incentive rates are unneeded, as state law imposes a mandate upon Berkshire Hathaway to build the Greenlink transmission line; a Berkshire Hathaway executive pledged in testimony that it would not seek such consumer-funded incentive rates; and that financial attributes of Berkshire Hathaway renders the need for any such incentive rates unnecessary. The Commission must dismiss the Petition and disallow the requested incentive rate treatment.

Nevada law mandates Berkshire Hathaway’s utilities construct Greenlink. SB 448 was signed into law by Nevada Governor Stephen F. Sisolak on June 10, 2021. Sections 15-24 of SB 448 require Berkshire Hathaway’s utilities to build the Greenlink transmission line and place it into service by 2028.[[5]](#footnote-5) A state mandate forcing Berkshire Hathaway to build the Greenlink transmission line significantly mitigates risk for Berkshire Hathaway, and therefore does not require any of the three proposed incentive rate treatments.

Furthermore, Doug Cannon, the President and CEO of NV Energy (parent of Berkshire Hathaway’s Nevada utilities) explicitly pledged that the utility would not seek incentive rate treatments that charged consumers prior to Greenlink being placed in service. Four days after making this vow, the Nevada Senate unanimously passed the legislation requiring the construction of Greenlink. From the official transcript of Cannon’s testimony:

*NV Energy is coming forward with private money and saying we are prepared to fund $2.5 billion into the State.* ***Shareholders do not recover on that money until that asset goes into service.*** *When that asset goes into service, through a contested proceeding with the PUCN where parties can intervene, every party is allowed to question every cost we put into the project. The PUCN then sets how much of the investment we can recover and the rate we can earn on that asset. We will bring $2.5 billion to the table. We will put thousands of people to work today,* ***and Nevadans will not be asked to pay for this investment until at least five to six years down the road.*** [emphasis added][[6]](#footnote-6)

 The Commission must hold Berkshire Hathaway to its word and reject the Petition and its request for incentive rate treatment, and only allow for cost recovery once the Greenlink system is “used and useful”.

Petitioners are subsidiaries of the most well capitalized, and consistently profitable corporations in the history of capitalism: Berkshire Hathaway. Berkshire’s Chairman and CEO Warren Buffett is the world’s 7th wealthiest individual, with net worth of $100 billion. Berkshire Hathaway currently has over $88 billion in cash, enjoyed net earnings of $90.8 billion in 2021 alone,[[7]](#footnote-7) has the 7th highest market capitalization of corporations in the world with $664 billion, and possesses superior credit ratings stemming from the company’s “extraordinarily strong capitalization and liquidity and its highly diversified profits and cash flow”.[[8]](#footnote-8) And that balance sheet is about to get even more impressive, as just weeks ago Berkshire Hathaway applied for permission with FERC to acquire up to 50% of the voting securities of Occidental Petroleum.[[9]](#footnote-9) Once its holdings of Occidental exceed 20%, Berkshire will book its proportionate share of Occidental’s earnings and cash flow with its own results―under the equity method of accounting―allowing it to gobble half of Occidental’s future cash flows of $60 billion, and thereby boosting its already extraordinary financial position.

Berkshire Hathaway functions as capitalism’s ATM: corporations turn to it when desperate and in need of cash. During the 2008 financial crisis, Berkshire Hathaway was the lone corporation with ample cash to lend to needy companies, injecting billions of dollars to keep the likes of Goldman Sachs and GE afloat, akin to John Pierpont Morgan single-handedly bailing out the U.S. federal government in 1893 and then the U.S. economy in 1907.

 It is therefore relevant to return to Berkshire Hathaway’s justifications for the 2013 takeover of Nevada Power and Sierra Pacific.[[10]](#footnote-10) If the Commission is going to approve ginormous utility mergers that claim to produce benefits for consumers, the Commission must hold companies to the promises they made to FERC. Berkshire Hathaway insisted to the Commission in their 2013 application that its acquisition of Nevada Power and Sierra Pacific was in the public interest because consumers would benefit from access to Berkshire’s (MidAmerican) largesse:

*The Transaction, when completed, will provide multiple benefits for customers*

*throughout the regions served by MidAmerican and the NV Energy Utilities. First,*

*MidAmerican’s acquisition of NVE will provide the NV Energy Utilities and their customers with* ***increased financial stability and reduced cost of debt*** *. . . and . . .* ***the NV Energy Utilities’ customers will benefit from access to capital to reliably serve customers, including the potential new investments in generation and transmission.****”* [emphasis added][[11]](#footnote-11)

 So, again, if the point of allowing mega-mergers[[12]](#footnote-12) is that their eager claims of consumer benefits are to be believed, then we should do so here. FERC allowed Berkshire Hathaway to acquire Nevada Power and Sierra Pacific because it trusted their guarantee that the Nevada utilities would be able to tap into Berkshire Hathaway’s gargantuan piggy bank to provide “increased financial stability” and “access to capital” for “new investments” in “transmission”. If the point of allowing a massive conglomerate like Berkshire Hathaway to control much smaller utilities like Nevada Power and Sierra Pacific was to allow them to tap into Warren Buffett’s pile of cash and credit, than it is not only unseemly but contrary to the public interest to now ask working families to pay new subsidies to Buffett’s empire out of their already stretched monthly utility bills.

 Appendix B, Exhibit No. NVE-0006 of the June 30 Petition is the testimony of Michael Cole, CFO and Treasurer for NV Energy. Mr. Cole’s testimony never once mentions the role of Berkshire Hathaway as the parent company to NV Energy, or the opportunities and advantages NV Energy has with such a parent. The failure of the Petition to include any mention or discussion of the financial impact of Berkshire Hathaway's ownership and control over the NV Energy and the Greenlink project is a material omission.

**Conclusion**

 The Commission must dismiss the Petition, and reject Berkshire Hathaway’s request for three separate rate incentives for Greenlink. Nevada’s statutory command to Berkshire Hathaway to construct Greenlink negates need for incentive rate treatment. Berkshire Hathaway’s CEO for its Nevada utilities pledged in testimony that the company would not seek incentive rate treatment for Greenlink. And Berkshire Hathaway’s extraordinarily strong capitalization and liquidity render the corporation uniquely positioned to successfully mitigate risk for Greenlink without need to force captive customers to pay incentive rates as proposed in the Petition. Berkshire Hathaway’s proposed rate incentives would compel hundreds of thousands of captive household customers to function as the utilities’ free bank and insurance, resulting in profoundly unjust and unreasonable rates. Berkshire Hathaway will have ample opportunity to earn guaranteed profits from operating Greenlink once the project is placed in service, when consumers can then pay for such “used and useful” assets.

 Respectfully submitted,

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1. www.congress.gov/bill/117th-congress/house-bill/3684/text [↑](#footnote-ref-1)
2. Petition, at page 3. [↑](#footnote-ref-2)
3. Commissioner Christie concurring statement, *Order Granting Abandoned Plant Incentive*, Docket No. ER22-1886, Issued July 15, 2022. [↑](#footnote-ref-3)
4. *Promoting Transmission Investment through Pricing Reform*, Docket No. RM06-4, issued July 20, 2006, at paragraphs 6, 26, 2 and 116, www.ferc.gov/sites/default/files/2020-05/E-3\_69.pdf [↑](#footnote-ref-4)
5. www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/8201/Overview [↑](#footnote-ref-5)
6. Transcript of Nevada Senate Committee on Growth and Infrastructure hearing, May 17, 2021, at page 32, www.leg.state.nv.us/Session/81st2021/Minutes/Senate/GRI/Final/1254.pdf [↑](#footnote-ref-6)
7. www.sec.gov/ix?doc=/Archives/edgar/data/1067983/000156459022007322/brka-10k\_20211231.htm [↑](#footnote-ref-7)
8. www.moodys.com/credit-ratings/Berkshire-Hathaway-Inc-credit-rating-600046928 [↑](#footnote-ref-8)
9. FERC Docket No. EC22-87. [↑](#footnote-ref-9)
10. Nevada Power and Sierra Pacific themselves had merged in 1999. [↑](#footnote-ref-10)
11. *Joint Application for Authorization under Section 203 of the Federal Power Act*, Docket No. EC13-128, at page 2. [↑](#footnote-ref-11)
12. Suggested reading on the ill-effects of the Commission's permissive merger policy would include Scott Hempling's *Regulating Mergers and Acquisitions of U.S. Electric Utilities: Industry Concentration and Corporate Complication.* [↑](#footnote-ref-12)