111 FERC ¶ 61,139
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Inquiry Regarding Income Tax Allowances Docket No. PL05-5-000

POLICY STATEMENT ON INCOME
TAX ALLOWANCES

(Issued May 4, 2005)

1. On December 2, 2004, the Commission issued a notice of inquiry regarding income tax allowances. The Commission asked interested parties to comment when, if ever, it is appropriate to provide an income tax allowance for partnerships or similar pass-through entities that hold interests in a regulated public utility. The Commission concludes that such an allowance should be permitted on all partnership interests, or similar legal interests, if the owner of that interest has an actual or potential income tax liability on the public utility income earned through the interest. This order serves the public because it allows rate recovery of the income tax liability attributable to regulated utility income, facilitates investment in public utility assets, and assures just and reasonable rates.

I. Background

2. The instant proceeding was initiated by the Commission in response to the U.S. Court of Appeals for the District of Columbia remand in *BP West Coast Products, LLC, v. FERC,*[1] in which the court held that the Commission had not justified the so-called *Lakehead* policy regarding the eligibility of partnerships for income tax allowances. The *Lakehead* case[2] held that a limited partnership would be permitted to include an income tax allowance in its rates equal to the proportion of its limited partnership interests owned by corporate partners, but could not include a tax allowance for its partnership interests that were not owned by corporations. Prior to *Lakehead,* the Commission's policy provided a limited partnership with an income tax allowance for all of its partnership interests, but did so in the context that most partnerships were owned by corporations. This ruling was not appealed until a series of orders involving SFPP,

[1] *BP West Coast Products, LLC v. FERC*, 374 F.3d 1263 (D.C. Cir. 2004) (*BP West Coast*), *reh'g denied*, 2004 U.S. App. LEXIS 20976-98 (2004).

[2] *Lakehead Pipe Line Company, L.P.,* 71 FERC ¶ 61,388 (1995), *reh'g denied*, 75 FERC ¶ 61,181 (1996) (*Lakehead*).

L.P. in the proceedings underlying the remand.[3] The Commission's rationales for permitting a tax allowance for corporate partner interests were (1) the double taxation of corporate earnings, (2) the equalization of returns between different types of publicly held interests, *i.e.* the stock of the corporate partner (which involves two layers of taxation of partnership earnings) and the limited partnership interests (which involve only one), and (3) encouraging capital formation and investment.

3. The court found all of these rationales unconvincing. First, the court rejected the double taxation rationale in *Lakehead*, concluding that (1) only the costs of the regulated entity may be recovered, and (2) taxes are but one cost paid by a corporate partner as part of its cost of doing business.[4] The court also rejected the rationale that the investor should be able to obtain the same returns without regard to which instrument the investor purchases. The court rejected this argument by noting that if any income tax allowance is provided, this benefits all investors holding instruments proportionately because the additional income is shared on a *pro rata* basis.[5] Given this *pro rata* distribution of income by the partnership, the court concluded that non-corporate partners would receive an excess rate of return.

4. Thus, while the double taxation function may affect the eventual return for the investor, the court made clear that this is a function of corporate structure and the attendant tax consequences, not the regulated utility's risk.[6] The court therefore concluded that the investor's return and risk are no more appropriately attributed to the regulated entity than are the investor's various costs in determining the costs or allowances that the regulated entity is permitted to recover.

5. The court also rejected the Commission's third rationale that an income tax allowance should be permitted to encourage capital to flow into public utility industries regulated by the Commission.[7] Throughout its analysis the court stated that the Commission's central assumption in its *Lakehead* decisions was that income taxes are an identifiable cost for the

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[3] *Opinion No. 435* (86 FERC ¶ 61,022 (1999)), *Opinion No. 435-A* (91 FERC ¶ 61,135 (2000)), *Opinion No. 435-B* (96 FERC ¶ 61,281 (2001)), and an *Order on Clarification and Rehearing* (97 FERC ¶ 61,138 (2001)) (collectively the Opinion No. 435 orders.) These are now pending before the Commission on remand and rehearing in Docket Nos. OR92-8-000, *et al.,* and OR96-2-000, *et al.*, respectively.

[4] *BP West Coast* at 1288.

[5] *Id.* at 1292-93.

[6] In making a decision whether to buy a limited partnership interest (where only the unit holder's income is taxed), or a share of a corporate partner (where the corporate income is taxed as well), it should be the individual investor that makes the adjustment for the double taxation. The individual investor can do this by paying prices that equalize the pre-tax return to the investor of the different instruments that have income derived from the same public utility assets.

[7] *BP West Coast.* at 1292-93.

regulated entity. Thus, if a partnership paid no income taxes, or had no potential income tax liability, no cost was incurred and therefore an income tax allowance would reimburse the entity for a phantom cost. Accordingly, the court concluded that a payment for a non-existent cost was still invalid even if designed to encourage needed infra-structure investment.

6. While the court's decision addressed only the Order No. 435 opinions, it became apparent that the remand has implications for other proceedings and regulated utilities as well. As was discussed in the more recent *Trans-Elect* order,[8] denying a tax allowance would significantly reduce the expected returns that were the basis for the investment in that project. In light of the broader implications of *BP West Coast,* the Commission sought comments here on whether the court's ruling applies only to the specific facts of the SFPP, L.P. proceeding, or also extends to other capital structures involving partnerships and other forms of pass-through ownership. The Commission asked whether the court's reasoning should apply to partnerships in which: (1) all the partnership interests are owned by investors without intermediary levels of ownership; (2) the only intermediary ownership is a general partnership; (3) all the partnership interests are owned by corporations; and (4) the corporate ownership of the partnership interests is minimal, such as a one percent general partnership interest of a master limited partnership. The Commission also asked if (1) the court's decision precludes an income tax allowance for a partnership or other ownership interests under any of these situations, will this result in insufficient incentives for investment in energy infrastructure; (2) or will the same amount of investment occur through other ownership arrangements; and (3) are there other methods of earning an adequate return that are not dependent on the tax implications of a particular capital structure?

II. <u>Comments</u>

7. After an extension of the comment period to January 21, 2005, thirty-three comments were timely filed with an additional nine comments filed late. As enumerated below in greater detail, the comments advocate four general positions. While no party argues for the continuation of the *Lakehead* doctrine in its current form, three appear to argue that an approach should be used to preserve the tax allowances now available to certain limited liability corporations (LLCs), or possibly provide a justification for tax allowances for all partnerships and LLCs, as long as there is no additional cost to the rate payers beyond that which would have been incurred through a corporate form. Three commentors argue for granting a tax allowance if a partnership is entirely owned by a tax paying corporation filing a consolidated return. Ten argue that the tax allowance should be granted only to entities that actually pay taxes and that there should be no allowance for "phantom" taxes. Twenty-four commentors would provide a tax allowance to all entities to assure that tax factors do not control the selection of the

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[8] *Trans-Elect NTS Path 15, LLC*, 109 FERC ¶ 61,249 (2004) (*Trans-Elect*).

investment vehicle. Two filings were limited to interventions or minor comments and are not discussed further in this order.[9]

A. **Proposals Akin to *Lakehead***

8. Three commentors expressed concern about the possible impact of the court's decision on existing public utility partnerships that include for-profit private and non-profit public electric utilities.[10] These concerns are summarized by Wisconsin Public Power Inc. (WPPI), which asserts that the Commission should permit LLCs and partnerships to have an income allowance if the LLC demonstrates that its structure would not increase the income tax component of the cost of service to transmission rate payers. WPPI is a part owner of the American Transmission Company, LLC (ATCLLC), which owns transmission lines conveyed to it by various utilities, private and public, in Wisconsin. To maintain cash flow neutrality for its owners after the facilities were transferred to ATCLLC, ATCLLC was provided a tax allowance equal to the blended tax rate of its owners. Thus, to the extent that the income stream to a private owner would be taxed at 35 percent, ATCLLC was provided an allowance for taxes on that income. A municipality pays no taxes and therefore that portion of the income stream did not result in a tax allowance. The ATCLLC income stream is then allocated at the owner level in a way that prevents over or under-recovery.

9. WPPI states that this arrangement assured that the income stream from transmission operations would not be taxed at the operating level of ATCLLC, thus retaining the two tier structure that existed before the various private companies divested their transmission assets to ATCLLC. These two historical taxation tiers were the corporate income tax and the tax on the shareholder dividends. ATLLC states that without the use of the LLC form, and a tax allowance attributable to the utility income stream, the private shareholders would suffer a loss in value because of the additional level of taxation on transmission income. Thus, the value of a transmission interest in ATCLLC would be diminished below the value it had for the private corporation before the transfer of the asset. For this reason the private companies would not have transferred their assets to ATCLLC. WPPI therefore concludes that the tax allowance on the income stream of LCC that pays no income taxes itself was essential to the creation of an independent transmission system on the upper Michigan peninsula.

10. METC likewise requests a solution that would preserve the rate attributes historically extended to LLCs, consistent with the methodology first announced in the *Lakehead* cases. Most importantly, METC asserts that the Commission should take no action that would undermine existing investments in independent transmission companies that are LLCs. Thus,

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[9] Edison Mission Energy, which urged that the income tax allowance issue be resolved quickly, and Piedmont Natural Gas Company, Inc., which only intervened.

[10] Electric Power Supply Association (EPSA); Michigan Electric Transmission Company, LLC (METC); Wisconsin Public Power, Inc.

METC's concerns do not turn on the preservation of the *Lakehead* doctrine as such, but that the corporate shareholders of that LLC are not deprived of the tax allowance that was built into the rates of return on the transmission assets that these firms contributed to METC's independently owned transmission system.

11. EPSA urges that the Commission affirm the *Lakehead* philosophy by providing the Court of Appeals with a better rationale. EPSA suggests that there are six basic options available to the Commission. One is to give utilities organized as corporations a tax allowance, but not partnerships. A second is to treat partnerships and corporations the same and give both a tax allowance. A third is to deny any partnerships with non-corporate owners a tax allowance but permit the allowance for partnerships owned wholly by corporations. A fourth is to readopt *Lakehead*. A fifth is to eliminate the allowance and base rates on pre-tax rates of return. A sixth is to decide matters of partnership income tax allowances on a case-by-base basis.

12. EPSA states that first option would have a serious negative consequence on raising capital for the industry, particularly with regard to large projects with multiple owners. It notes that even if corporate-owned partnerships could reorganize to qualify for a tax allowance, there are additional administrative costs that would be passed on to consumers. It further asserts that a case-by-case approach would result in uncertainty and to disqualify a partnership based on a single non-corporate partner seems unfair and hard to justify analytically. Determining returns on a pre-tax basis is likely to be controversial and difficult to implement.

13. EPSA therefore concludes that the only realistic options are (1) treating all entities the same; or (2) a continuation of the Commission's *Lakehead* policy. ESPA notes that taxes are an imputed cost based on public utility net income. As such, EPSA claims that the court ignored the fact that taxes are imputed to a utility in situations where the utility pays no actual taxes because the corporate income tax allowance is based on the regulatory book income of the utility in question. EPSA's analysis assumes that the required rate of return is 12 percent. EPSA then asserts that in the absence of a tax allowance, a utility subject to the 35 percent corporate income tax would only pay out dividends equivalent to 7.8 percent net income (instead of 12 percent).

14. EPSA states that in contrast, the corporate tax allowance increases the utility's pre-tax return on equity to 18.5 percent, which after application of the 35 percent tax rate, results in the 12 percent equity return. EPSA concludes that if an allowance is not allowed to partnerships owned by one or more corporations, the amount returned to the parent corporation will not be sufficient to attract equity investment. Since EPSA opposes an income tax allowance for pass-through entities that are not owned by a corporation, and believes it unfair to deny an income tax allowance if some of the partnership interests are not owned by a corporation, it concludes that the *Lakehead* approach should be affirmed.

B. If a Corporation Owns the Partnership Interests

15. Three commentors[11] argue that an income tax allowance should be allowed if the partnership interests are owned wholly by corporations filing a consolidated return. In support of this position, Kern River states that the Commission's stand alone rate-making policy should apply, just as it does in the case of a consolidated return that can be filed when a parent corporation owns at least 80 percent of a subsidiary's stock.[12] All three of these commenters assert that in the case of a regulated partnership held within a single corporation and whose income is included in a consolidated return, the income from the regulated partnership generates a tax liability that is included in the jurisdictional cost of service of the corporate group.

16. Kern River further states that there is no question that income generated by a partnership within a corporate group creates an income tax liability for the group. This is because, while the partnership is not taxed directly, its income is flowed through to the corporations that hold the partnership interests. Duke Energy further asserts that *BP West Coast* was not intended to invalidate an income tax allowance for pass-through entities owned by corporations and at a minimum that decision should be restricted to its facts.[13] Thus, regardless of the corporate structure, the income a partnership generates is a part of the consolidated group's taxable income, and therefore generates a corporate tax liability. These commenters therefore assert that a partnership that is wholly owned by a corporation should be granted an income tax allowance.

C. Opposition to Any Allowance if Taxes are not Actually Paid

17. Ten commentors assert that there should be no tax allowance for any entity that does not actually pay income taxes or has a potential liability for such taxes.[14] Only one such commentor, the NGSA, suggests that the court's ruling should be applied on a case-by-cases basis. All others assert that the court's holdings should be applied uniformly to all partnerships, LLCs, or similar pass-through entities, thus creating a single uniform rule. Thus, there would be no income tax allowance for any partnership or LLC, including those owned by corporations that do not have an actual or potential income tax liability. They assert that the court's decision is binding on the Commission, and that there should be no income tax allowance for

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[11] Duke Energy Corporation; Kern River Gas Transmission Company (Kern River); Texas Gas Transmission, LLC.

[12] The stand-alone policy provides that income tax allowance of a corporate subsidiary should be determined based on the actual or potential income tax obligation of that subsidiary. Thus, the amount of the allowance is not based on the tax obligation of the parent company in the test year in which the consolidated return is filed. *See City of Charlottesville v. FERC*, 774 F.2d 1205 (D.C. Cir. 1985) (*City of Charlottesville).*

[13] Kern River at 7-8; Duke Energy at 4-5.

[14] Air Transport Association of America, Inc.; American Public Gas Association; BP West Coast Products; Calpine Corporation; Canadian Association of Petroleum Producers; Missouri Public Service Commission; Natural Gas Supply Association (NGSA); National Rural Electric Cooperative Association; Society for the Preservation of Oil Pipeline Shippers; and Valero Marketing and Supply Company.

partnerships that do not pay income taxes.

18. They assert that any such phantom taxes will result in a significant increase in rates to customers or consumers. This is because the gross-up for the income tax allowance could result in as much as a 60 percent increase in the rate of return on equity assuming that the regulated entity is allowed a twelve percent rate of return on equity.[15] Any gross-up from the tax allowance represents an increase in return for entities that may be already charging unjust and unreasonable rates even if a tax allowance were excluded. Rather than provide an inflated return, they assert that any needed incentives for increased investment should be provided by special actions to increase the pre-tax rate of return. Given this alternative, denying a tax allowance will not act as a disincentive to investment in infra-structure facilities.

19. In addition, BP West Coast Products asserts that the inquiry in Docket No. PL05-5-000 was prompted by *ex parte* communications to the Commission and therefore no determinations of any specific income tax issues should be made in this proceeding. It further asserts that the partners investing in SFPP's parent entities will rarely pay taxes on the income generated by that partnership and that many such master limited partnerships (MLP) are intended to act as tax shelters that remove cash from existing pipelines. BP West Coast Products concludes that providing MLPs an income tax allowance is not necessary to encourage new investment and that this should be done by providing an increased pre-tax rate of return

20. At bottom, these commentors base their argument on three central points in the *BP West Coast* opinion. The first is that "where there is no tax generated by the regulated entity, either standing alone or as part of a consolidated group, the regulator cannot create a phantom tax in order to create an allowance to pass-through to the rate payer."[16] The second is that it is not "the business of the Commission to create a tax liability where neither an actual nor estimated tax is ever going to be paid or incurred on the income of the utility in the rate making proceeding."[17] The third is even if an income tax allowance is necessary to implement a congressional mandate designed to encourage investment in public utility facilities, the court concluded was inadequate to create an allowance for fictitious taxes.[18]

D. <u>Comments Supporting a Tax Allowance for All Entities</u>

21. Twenty-four commentors[19] support a tax allowance for all entities investing in public utility enterprises. These commentors start from the premise that the court did not have before

[15] *See* BP West Coast Products at 6; NGSA at 3.
[16] *BP West Coast* at 1290.

[17] *Id.* at 1292.

[18] *Id.* at 1292-93.

[19] Alaska Gas Transmission Company, LLC; American Gas Association (AGA); Association of Oil Pipe Lines

it the realities of partnership or LLC taxation and as such did not address them. These commenters thus believe there is no barrier to considering the issue of tax allowances for partnerships in light of the fuller record presented in this proceeding. In fact, some state that this proceeding is an opportunity to reconsider the Commission's *Lakehead* decision, which they believe was incorrect, and to return to the Commission's pre-*Lakehead* policies. In this regard, they conclude, contrary to the court's statement in *BP West Coast* and the Commission's *Lakehead* decision, income taxes are not like all other costs. Unlike operating expenses such as office supplies, rent, or wages, they argue that income taxes are imposed on, or imputed to, a public utility's income, and as such income taxes are not a cash deduction from operations. Because the income tax allowance is imputed, it is grossed-up on the utility's allowable dollar return rather than functioning as a charge against operating income. Thus, the income tax allowance is a function of the equity return, and in turn generates the cash flow that is used to pay the utility income taxes.[20]

22. Proceeding from the premise that income taxes are an imputed cost on income, these twenty-four commentors assert that whether the entity is a corporation or a partnership, there is an actual or potential income tax liability generated by utility income. In turn, it is utility income that generates the cash flow used to pay the income taxes. They claim that this is true whether the income tax is actually paid by a corporation as the first tier investor, or the partners of a partnership as the first-tier investors. They define a first tier investor is one that invested funds in assets that are generating the public utility income. These commentors stress that the critical point is that while a partnership owns the public utility assets, it is a flow-through entity whose income is taxed not at the partnership level, but is taxed to and paid by the individuals or entities that own the partnership interests.

23. Thus, they state that in the case of a partnership, the partners include the utility income in their income tax returns and the tax on utility income is paid at that point.[21] The tax on this

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(AOPL); American Transmission Company, LLC; Duke Energy Corporation; Edison Electric Institute and the Alliance of Energy Suppliers, filing jointly; Enbridge Inc. and Enbridge Energy Partnerships; Enterprise Products Partners, L.P.; Guardian Pipeline; Hardy Storage Company, LLC; INGAA; Interested Gas Pipeline Partnerships; Kaneb Pipe Line Operating Partnership, L.P.; Kayne Anderson Capital Advisors and Kayne Anderson MLP (Kayne); Kinder Morgan Interstate Gas Transmission, LLC, Trailblazer Pipeline Company, and Transcolorado Gas Transmission Company, filing jointly; MidAmerica Energy Company; Millennium Pipeline Company, L.P.; Plains Pipeline, L.P.; Publicly Traded Limited Partnerships; Northern Border Pipeline Company; Shell Pipeline Company, L.P.; Tortoise Energy Infrastructure Corporation; Trans-Elect, Inc.; Trans-Elect NTD Path 15, LLC; Wisconsin Electric Power Company and Edison Sault Electric Company, filing jointly; and WPS Resources Corporation (WPSR).

[20] Thus, for example, if gross revenues are \$500, and operating expenses such as rent, fuel, labor, interest, repairs, and depreciation of \$400 are charged against gross revenues, this would leave operating income of \$100. Assuming this equals the allowed equity return, the corporate tax on this \$100 would be \$35. The \$100 is therefore grossed up to approximately \$154 to leave a \$100 return after payment at an income tax rate of 35 percent. *See* Northern Border at 5 – 7 and 16; INGAA at 16.

[21] The individual partner files a Form1040 tax return and pays the marginal individual tax rate on the utility income. The corporate partner files a Form 1120 tax return and pays the marginal corporate tax on the utility income. At the current time the maximum marginal tax rate in both cases is 35 percent. *See* EEI's comments at 10-11 for a concise summary of

income is paid whether or not cash distributions are made to the partners. In contrast, a corporation that owns a public utility asset is the taxpaying entity on the income generated by utility income. These commentors assert that, as with a partnership, the tax on this first tier income is paid whether or not dividends are paid to the corporation's shareholders. The commentors therefore assert that there is no phantom tax liability on partnership income. This is because the tax liability on utility income is real, but it is paid by the partners rather than by a corporation that functions as a separate taxpaying entity.

24. These commentors also start from the basic regulatory premise that a utility must earn a return comparable to that of investment opportunities of similar risk if it is to attract investment.[22] They state that concept refers to the after tax, not the pre-tax, return to the investor in the utility assets is the standard used in public utility rate making regardless of the form of the ownership. Thus, if the after tax return must be 12 percent to attract capital, then all first tier investors in the utility assets must have a reasonable opportunity to earn a 12 percent after tax return if the utility is to attract capital. If partnerships are not permitted a tax allowance on utility income, then cash will not be generated to pay the taxes due on that utility income, and the partnership form of ownership would not be competitive with the corporate form.

25. These commentors also provide various numerical examples of how income tax returns would differ if partnerships are not provided a tax allowance. Assuming that $100 is the after tax return required return to attract capital, the court's decision would permit a tax allowance sufficient to cover the 35 percent maximum corporate tax that would be paid on corporate income. The gross-up to achieve the after-tax return is about 54 percent and generates the cash flow to pay the tax. Thus, after the corporate income tax is paid, the after-tax return is $100.[23]

26. If a partnership is permitted an income tax allowance, the result is the same because the maximum personal income tax allowance is also 35 percent. As with a corporation, the income tax allowance could provide the individual partners with the cash to pay the taxes on utility income, and therefore results in an after tax return of $100, the allowed regulatory return. However, if an income tax allowance is not allowed the partnership, then the partners must pay a $35 income tax on $100 of utility income, leaving them with only an after-tax return of $65. Therefore these commentors conclude that partnerships must be granted an income tax allowance to make the partnership and corporate business forms equally attractive because the tax implications are the same.

27. These commentors also explore some secondary tax factors to demonstrate the need for a partnership tax allowance if such entities are to be a competitive vehicle for investments. While

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partnership tax law and filing procedures.

[22] *F.P.C. v. Hope Natural Gas,* 320 U.S. 591, 603 (1943).

[23] *See* INGAA at 16-17; EEI at 13-14; Northern Border at 3-5, 7-8.

taking some pains to avoid the double taxation issue discussed by the Court of Appeals, they point out that without an income tax allowance partnerships are not competitive with corporations for the individual investor who files a Form 1040 income tax return. As noted in the previous example, without a partnership income tax allowance, the after tax return to a corporate investor is $100 and to the partnership investor it is $65. Assuming that that the corporation pays out all $100 in dividends, the income tax for the Form 1040 individual investor is $15, with a resulting after tax return of $85.

28. Thus, they assert, for a Form 1040 individual investor who has the option of investing either in a corporation or partnership, the partnership is not competitive if, all other things being equal, there is no partnership tax allowance. Moreover, if a corporation owns less than 80 percent of a subsidiary corporation, the subsidiary's dividends are taxed. Pursuing the previous numerical example, if the ownership is greater than 20 percent or less than 80 percent, the 20 percent of the subsidiary's dividends are taxed, or a 7 percent tax differential at the 35 percent bracket. If the ownership is less than 20 percent, 30 percent of the subsidiary's dividends are taxed, or a 9.5 percent tax differential at the 35 percent rate. This increases the cost of participating in large projects in which risk sharing is a consideration.

29. These commentors also assert that there are other significant administrative and commercial advantages to partnerships beyond facilitating risk sharing. Benefits include the ability of some entities, such as municipalities or public transmission owners, to participate in partnerships, but not corporations, avoiding the expense involved in corporate charters, by-laws, shareholder meetings, and greater flexibility in making contributions in-kind and in distributing of earnings. They also argue that Congress clearly intended that utility firms were to be eligible for partnership treatment in order to encourage investment, and that the court's ruling undercuts this important purpose.

30. Finally, these commentors assert that numerous large public utility investments have been made in recent years relying on the tax allowance to provide part of the required after-tax return.[24] They note that as was discussed in the recent *Trans-Elect* order,[25] denying a tax allowance would significantly reduce the expected returns that were the basis for that badly needed investment. They provide lists of numerous publicly traded partnerships that have substantial amounts of equity, and assert that some of these partnerships have made significant

[24] These commentors include Algonquin Gas Transmission, LLC; Alliance Pipeline, L.P; ATLLC; East Tennessee Natural Gas, LLC; Egan Hub Partners, L.P.; Enbridge Pipeline; Horizon Pipeline Company, LLC; Great Lakes Natural Gas Pipeline; Green Banks Gas Pipeline, LLC; Gulfstream Natural Gas Pipeline; Iroquois Gas Transmission Company; Islander East Pipeline Co, LLC; Kinder Morgan Interstate Gas Transmission, LLC; Maritimes & Northeast Pipeline; Market Hub Partners, L.P.; METC; Moss Bluff Hub Partners, L.P; North Baja Pipeline LLC; Portland Natural Gas Transmission System; Texas East Gas Transmission, LLP; TransCanada Corporation; Trans-Elect ND-15; Tuscarora Gas Transmission Company; Saltville Gas Storage Company, L.L.C; and Shell Pipeline Company.

[25] *Trans-Elect NTS Path 15, LLC*, 109 FERC ¶ 61,249 (2004) (*Trans-Elect*).

additional investments in reliance on the income tax allowance.[26] For these reasons these commentors conclude that all entities investing in utility operations, and generating utility income, should be permitted an income tax allowance. As discussed in the WPPI and EEI comments, the size of the allowance would be determined by the weighted maximum tax rate of the partners involved. Any problems of over- or under recovery would be adjusted within the partnership structure to assure that the benefits of any income tax allowance would not flow to a partner that had no actual or potential income tax liability.

III. Discussion

31. The issue is under what circumstances, if any, an income tax allowance should be permitted on the public utility income earned by various public utilities regulated by the Commission. As stated earlier, while the court's decision in *BP West Coast* only addressed the particulars of a certain oil pipeline, the numerous comments submitted here indicate that partnerships or other pass-through entities are used pervasively in the gas pipeline and electric industries as well. Upon review of the comments, there appear to be four possible choices: (1) provide an income tax allowance only to corporations, but not partnerships; (2) give an income tax allowance to both corporations and partnerships; (3) permit an allowance for partnerships owned only by corporations; and (4) eliminate all income tax allowances and set rates based on a pre-tax rate of return.

32. Given these options, the Commission concludes that it should return to its pre-*Lakehead* policy and permit an income tax allowance for all entities or individuals owning public utility assets, provided that an entity or individual has an actual or potential income tax liability to be paid on that income from those assets. Thus a tax-paying corporation, a partnership, a limited liability corporation, or other pass-through entity would be permitted an income tax allowance on the income imputed to the corporation, or to the partners or the members of pass-through entities, provided that the corporation or the partners or the members, have an actual or potential income tax liability on that public utility income. Given this important qualification, any pass-through entity seeking an income tax allowance in a specific rate proceeding must establish that its partners or members have an actual or potential income tax obligation on the entity's public utility income. To the extent that any of the partners or members do not have such an actual or potential income tax obligation, the amount of any income tax allowance will be reduced accordingly to reflect the weighted income tax liability of the entity's partners or members.[27]

33. In reaching this conclusion, the Commission expressly reverses the income tax allowance holdings of its earlier *Lakehead* orders. As stated in EEI's comments, *Lakehead* mistakenly

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[26] *See* comments of: Duke Energy Corporation at 9-10, 30; Enbridge Inc and Enbridge Energy Partners at 4-5; Gas Pipeline Partnerships at 2-4; Millennium Pipeline Company, L.P. at 2; Northern Border Pipeline Company at Appendix A; Publicly Traded Partnerships at 13-14.

[27] This is a technically complex issue that would be addressed in individual rate proceedings as suggested by EEI and WPPI.

focused on who pays the taxes rather than on the more fundamental cost allocation principle of what costs, including tax costs, are attributable to regulated service, and therefore properly included in a regulated cost of service.[28] Relying on *BP West Coast,* some commenters assert that because a pass-through entity pays no cash taxes itself, this results in a phantom tax on fictional public utility income. However, the comments summarized in sections A and D of Part II of this policy statement demonstrate that this assumption was incorrect. While the pass-through entity does not itself pay income taxes, the owners of a pass-through entity pay income taxes on the utility income generated by the assets they own via the device of the pass-through entity.[29] Therefore, the taxes paid by the owners of the pass-through entity are just as much a cost of acquiring and operating the assets of that entity as if the utility assets were owned by a corporation. The numerical examples discussed in sections A and D of Part II of this policy statement also establish that the return to the owners of pass-through entities will be reduced below that of a corporation investing in the same asset if such entities are not afforded an income tax allowance on their public utility income.[30]

34. As several commentors point out, a detailed discussion of the realities of partnership tax practice was not before the court when it reviewed the Opinion No. 435 orders. Because public utility income of pass-through entities is attributed directly to the owners of such entities and the owners have an actual or potential income tax liability on that income, the Commission concludes that its rationale here does not violate the court's concern that the Commission had created a tax allowance to compensate for an income tax cost that is not actually paid by the regulated utility. As explained in detail by the comments summarized in sections A and D of Part II of this order, the reality is that just as a corporation has an actual or potential income tax liability on income from the first tier public utility assets it controls, so do the owners of a partnership or LLC on the first tier assets and income that they control by means of the pass-through entity.

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[28] EEI comments at 8. In support of this point several commenters cite to *City of Charlottesville*, *supra*, note 12, for the proposition that a tax cost involves real taxes but not necessarily require that cash taxes be paid by the regulated entity. *See* EEI at 11-13; INGAA at 12-13; Joint Comments of the Interested Gas Pipeline Partnerships at 10-12; AOPL at 8-9.

[29] The comments and numerical examples submitted by the EEI, INGAA, and Northern Border demonstrate that under partnership law the partners, or members, of pass-through entities pay taxes on the public utility income of the operating entities that they control through the partnership or other pass-through entity. *See* EEI at 13-15; INGAA at 15-17; Northern Border at 5-8; Shell Pipeline Company LP at 4; and WPS Resources at 14-16.

[30] The record suggests that there is a substantial amount of existing investment at issue in this proceeding. *See* Duke Energy at 2 (75 percent of $14.4 billion in energy infrastructure invested for the years 2001 through 2003 is in pass-through entities); Enbridge, Inc. at 4 (ownership interests in over 20,000 miles of crude oil, petroleum products, and natural gas pipelines); Enterprise Products Partners, L.P. at 1 (enterprise value of approximately $14 billion); Kaye Anderson at 1 (in excess of $1 billion in MLP equity); Publicly Traded Partnerships at 1-2, 13 (Figure 1 and text, market capitalization of publicly traded partnerships of $47.3 billion in 2004), and at 14, table of publicly traded partnerships owning and operating energy pipelines (market capital $38.5 billion.)

35. The first tier income involves the investors in the pass-through entity holding the specific physical assets that are generating the public utility income that results in a potential or actual income tax liability. In the case of Trans-Elect, this would be the investment that the partnership made in the upgrade to the Path 15 transmission line in California. As discussed in *Trans-Elect, supra*, the owners of Trans-Elect NTD Path 15, LLC, are a Subchapter C corporation (PG&E) and one LLC, Trans-Elect, LLC.[31] If no income tax allowance is permitted on Trans-Elect NTD Path 15's public utility income, the return to the investing entities would be less than if PG&E had invested directly in the line.

36. As set forth in the previously cited examples provided in the comments discussed in section D of Part II of this policy statement, termination of the allowance would clearly act as a disincentive for the use of the partnership format for two reasons. First is the difference in the nominal return itself. The second is that the income taxes paid by two corporations investing in this situation would increase because one or both would not be able to benefit from the tax advantages of a consolidated income tax return.[32] It should be noted that if such first tier assets are owned only by Subchapter C corporations, their rates would include an income tax allowance designed to recover the 35 percent maximum corporate marginal tax rate.[33] The same result obtains if the assets are owned by a partnership or an LLC that is in turn owned either by Subchapter C corporations or by individual investors.

37. Thus, the policy the Commission is adopting should not result in increased costs to public utility ratepayers, and may actually reduce them if a partnership or LLC has a lower weighted marginal tax rate and fewer administrative expenses than the normal corporate ownership form.[34] The Commission therefore concludes that, as is argued by the commentors urging an income tax allowance for all public utility entities, providing an income tax allowance to partnerships in proportion to the interests owned by entities or individuals with an actual or potential income tax liability does not create a phantom income tax liability. The fact that some partnerships or LLCs may be used for financial investments rather than for making

[31] *Trans-Elect, supra, note 8, at PP 2-4.* Trans-Elect develops merchant transmission lines. Trans-Elect comments at 1-2.

[32] As discussed in the comments, if a Subchapter C corporation owns 80 percent or more of a subsidiary, there is no income tax paid by the subsidiary. All taxation is at the parent level through the use of a consolidated return. *See* Northern Border at 6-7 and 11-12; INGAA at 15-17.

[33] This analysis suggests that if partnerships and limited liability companies are not permitted to have an income tax allowance, there are strong incentives to shift to the taxable corporate ownership form. This could be done by converting a partnership to an LLC and then electing to have that entity taxed as a Subchapter C corporation. Once this was done, then the newly taxable entity, which would be operating the very same assets as it did as a pass-through entity, would be entitled to a 35 percent income tax allowance. *Cf.* AOPL at 9.

[34] As discussed in the WPPI and EEI comments, if a partnership or LLC has municipal governments as some of the partners or LLC members, the tax allowance is reduced because municipalities and their operating entities have no actual or potential income tax liability on utility income.

infrastructure investments does not warrant a different policy result here.[35] Moreover, the Commission emphasizes that the primary rationale for reaching the conclusion here is to recognize in the rates the actual or potential income tax liability ultimately attributable to regulated utility income. Having concluded that this will not result in phantom income taxes, it is then legitimate to conclude that the result here will facilitate important public utility investments such as that made by Trans-Elect NTD Path 15, LLC in the Path 15 upgrade.

38. In retrospect, it was the Commission's failure to distinguish between first and second tier income that lead to the double taxation rationale that the Commission incorrectly advanced in *Lakehead*. Dividends paid to the common stock investor and by the corporate investor in a pass-through entity are second tier income to such a common stock investor. As such, an income tax is paid by the investor in addition to the corporate tax that is due on the first tier income. In contrast, first tier income flows either to the corporation, a corporate partner, or individual partners (or LLC members) and is taxed at that level. To the extent *Lakehead* either concluded or assumed that dividend payments and income, and partnership distributions and income, have the same ownership and income tax characteristics, this is simply incorrect as a matter of partnership and income tax law.[36] The court summarized this situation succinctly when it stated that presumably both corporate owners and individuals would pay taxes on public utility assets they control. Similarly, like a Subchapter C corporation, partners may have deductions or losses that offset the income from a specific public utility asset or which may neutralize the operating income from the asset itself. But this does not preclude such a corporation from obtaining an income tax allowance under the Commission's stand-alone doctrine.[37] Just as there are no

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[35] The partners of master limited partnerships have actual tax liability for any income recognized by the partnership. However, distributions may substantially exceed partnership book income. Such distributions do have an ultimate income tax liability depending on the status of the capital account of the individual partners. This matter can present complex allocation and timing issues that would be addressed in individual rate proceedings. However, a simple numerical example can illustrate the basic principles. For example, assume that an individual invests $100 in a partnership and obtains a ten percent interest in that partnership. This establishes a partnership account (or basis) for the individual of $100. During year one of that investment the partnership has $100 in income before depreciation and depreciation of $70. The partnership therefore has net income of $30 and also makes a distribution of $100. Since the individual partner owns ten percent of the partnership, that partner must declare $3 in income on the individual's 1040 tax form, but does not pay taxes on the $10 distribution made to that partner.

The capital account of the individual partner is adjusted as follows. Ten percent of the partnership income before depreciations (or $10) is allocated to the individual partner and is added to that partner's account. Ten percent of the partnership depreciation, or $7, is deducted from the account, as is the cash distribution. The individual's partnership account therefore stands at $93 ($100 + $10 - $10 - $7). In year two the partnership income is zero and no distributions are made, so the individual's partnership account is unchanged. However, that individual partner sells the partnership interest for $105. This difference is taxable as follows. Since $7 of the sale price is a gain above the year 2 partnership account level of $93, it will be taxed as income. This results in a tax on the cash that was distributed in the prior year but for which no income tax was paid at that time. Depending on the nature of the depreciation taken, the $7 may be taxed as ordinary income through the operation of various recapture provisions. The additional $5 is also income and is also taxed, most likely at the capital gains rate since it is gain in excess of the partner's original capital investment of $100.

[36] *See* ATCLLC at 5.

[37] *See City of Charlottesville, supra,* note 12.

rational grounds for granting an income tax allowance on partnership interests owned by a corporation and denying one to those owned by individuals, there are no rational grounds for reaching a different conclusion for the deductions and offsets for taxpaying partners or LLC members.

39. The Commission further concludes that the alternatives listed at the beginning of this Part III of this policy statement are not practical or are inconsistent with the court's remand. First the Commission agrees with the court's conclusion in *BP West Coast* that the Commission in *Lakehead* did not articulate a rational ground for concluding that there should be no tax allowance on partnership interests owned by individuals, but that there should be one for partnership interests owned by corporations. As the court stated, presumably individual partners pay taxes on their public utility income just as corporate partners pay income tax on theirs. The comments summarized in sections A and D of Parts II of this order affirm that common sense observation. The court's rejection of *Lakehead* likewise establishes why the Commission cannot simply limit income tax allowances to partnerships that are wholly owned by corporations, since doing so in effect denies a tax allowance to the partners of a partnership with no corporate ownership.

40. Similarly, there no rational reason to limit the income tax allowance to public utility income earned by a corporation. Public utility income controlled directly by an individual may also be taxed. The partnership entity is simply an intermediate ownership device that leads to the same tax result. Since both partners and Subchapter C corporations pay income taxes on their first tier income, the inconsistency that undermined *Lakehead* applies here as well. Finally, the comments rightly suggest that it would be difficult to establish rates based on a pre-tax rate of return. If the Commission were simply to raise the rates to equalize the pre-tax and after-tax returns, all this would do incorporate a presumed marginal income tax rate into the rate structure. The result is the same for the rate payer although the nominal rate of return is much higher. Moreover, most comparable securities trade on the basis of a corporation's after-tax return on its public utility income.[38] Thus, it would be hard to determine what the appropriate pre-tax return should be based on traded equities alone. Since it is impractical not to give an income tax allowance to any jurisdictional entities due to the problems of determining an appropriate pre-tax rate of return, the Commission again concludes that an income tax allowance should be afforded all jurisdictional entities, provided that the owners of pass-through entities have an actual or potential income tax liability.

41. There are three final points that should be discussed in addressing the effect of the court's remand. First, the court concluded that denying a partnership an allowance on the proportion of partnership interests owned by individuals would not prevent over-recovery by such individuals,

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[38] As discussed, the investor then receives a dividend and pays a second tax on that income to determine the investor's after tax return. This is somewhat less than the return from a partnership interest that benefits from an income tax allowance.

since any tax savings would be distributed in proportion to all the partnership interests. The Commission recognizes that rate payers should not incur the expense of an income tax allowance to the extent that an owning partner or LLC member has no actual or potential income tax liability for the income generated by the interest it owns. As WPPI and ATCLLC explain, this can be avoided by limiting the income tax allowance to a blended rate that reflects the income tax status of the owning interest.[39] The use of the weighting approach assures that the rate payers will not be charged more than the actual tax cost the investors incur regardless of the ownership form. The problems of over- and under-recovering alluded to in the court's order can be addressed through the distribution provisions of the partnership agreement.[40]

42. Second, whether a particular partner or LCC member has an actual or potential income tax liability, and what assumptions, if any, should determine the amount of the related tax rate, are matters that should be resolved in individual rate proceedings. This is a fact specific issue for which the relative data is uniquely within the control of the regulated entity. Thus, any pass-through entity desiring an income tax allowance on utility operating income must be prepared to establish the tax status of its owners, or if there is more than one level of pass-through entities, where the ultimate tax liability lies and the character of the tax incurred. This could be done through determining the distribution of ownership interests at the end of the standard test year. Finally, some parties assert that this proceeding is tainted by *ex parte* communications that preceded the issuance of the Commission's December 2, 2004 notice of inquiry. These are without merit as the relevant communications were filed in the appropriate dockets and the Commission's notice of inquiry provided all interested parties an opportunity to comment. The decision here is based on the record developed by those comments.

<u>The Commission orders:</u>

The income tax allowance policy adopted in the body of this policy statement shall be applied in pending and future rate proceedings of public utilities subject to the Commission's rate jurisdiction.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

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[39] WPPI at 5-6 and 12-13; ATCLLC at 6.

[40] The court was concerned that the income tax allowance granted for corporate partners would increase the cash available for distribution to all partners, thus providing an increased return to the individual partners that the *Lakehead* doctrine was intended to prevent. Adjustments within the partnership agreement should assure that this does not result while preserving the incentives to establish flexible investment vehicles.