

## Shippers Take Aim at Unresolved Income Tax Allowance Issues in Rate Proceedings

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Although FERC remains hobbled by its continued lack of quorum since then-Commissioner Norman Bay's departure earlier this year, recent ratemaking challenges remind the industry that the specter of FERC's unresolved income tax allowance policy for pass-through entities (e.g., master limited partnership pipelines) remains an ever-present conundrum for the industry and the Commission. Two protests submitted earlier this week in response to Great Lakes Transmission, LP's (Great Lakes') rate case filed in March raised the issue of FERC's unresolved income tax allowance policy. The challenges demonstrate that the income tax allowance policy for pass-through entities can, and in many cases, is likely to, be disputed by customers involved in proceedings seeking to amend the rate structures of pass-through entity pipelines.

In *United Airlines Inc. v. FERC* last year, the US Court of Appeals for the DC Circuit found that FERC's existing income tax allowance policy and rate of return policy, when applied to pass-through entities such as master limited partnerships (MLPs), creates a possibility of double recovery for income taxes. The decision effectively invalidated portions of FERC's 2005 Policy Statement on Income Tax Allowances and directed FERC to reconsider various mechanisms the Commission could use to demonstrate that there is no double recovery. In response, FERC issued a Notice of Inquiry (NOI) in FERC Docket No. PL17-1 requesting all industry participants to weigh in, asking for any proposed methods to adjust FERC's income tax allowance or rate of return policies to resolve any double recovery of tax costs. That issue remains unresolved, and will likely remain so for at least the next few months, given FERC's continued lack of quorum.

However, FERC's NOI has not stopped shippers from continuing to question the policy's application in rate cases. When Great Lakes, a limited partnership that owns and operates a pipeline servicing energy needs primarily in western Canada and the northern central United States, filed a Natural Gas Act Section 4 rate filing last month to change its rate design, multiple shippers attacked the pipeline's continued reliance on FERC's income tax allowance policy that the DC Circuit directed FERC to reassess. Those shippers noted the possibility of double recovery for income taxes based on Great Lakes' status as a limited partnership. The shippers rejected Great Lakes' reliance on FERC's 2005 Policy Statement on Income Tax Allowances to support Great Lakes' derivation of its newly proposed rate design. The shippers asked for the Commission to set the issue for hearing in light of

the fact that FERC's policy on the recovery for partnership income taxes was recently remanded to the Commission in *United Airlines*.

Although FERC's NOI signaled that it remains open to any and all suggestions for a feasible path forward to resolve the issue, its lack of direction means continued uncertainty—particularly for the shippers in the Great Lakes rate case, but more generally for the entire industry. For now, the industry should be prepared and remain vigilant of the litany of challenges involving the looming specter of FERC's income tax allowance policy for pass-through entities that will likely continue over the coming months.

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