

**ORAL ARGUMENT IS SCHEDULED FOR MARCH 17, 2005**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**Nos. 03-1252 AND 04-1269**

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**SOUTHERN COMPANY SERVICES, INC.,  
PETITIONER,**

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,  
RESPONDENT.**

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**ON PETITION FOR REVIEW OF ORDERS OF THE  
FEDERAL ENERGY REGULATORY COMMISSION**

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**BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY  
COMMISSION**

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**JANUARY 6, 2005**

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## CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in the brief of Petitioner.

B. Rulings Under Review

*Southern Company Services, Inc.*, 102 FERC ¶ 61,201 (2003);

*Southern Company Services, Inc.*, 104 FERC ¶ 61,140 (2003);

*Southern Company Services, Inc.*, 103 FERC ¶ 61,117 (2003); and,

*Southern Company Services, Inc.*, 108 FERC ¶ 61,174 (2004).

C. Related Cases

The case on review was not previously before this Court or any other court, and the undersigned counsel is not aware of any related cases pending in this Court or any other court.

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Dennis Lane  
Solicitor

January 6, 2005

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**GLOSSARY**

Br.	Brief of Petitioner (August 6, 2004)
FPA	Federal Power Act, 16 U.S.C. § 824 <i>et seq.</i>
OATT	Open access transmission tariff
Oglethorpe Initial Order	<i>Southern Company Services, Inc.</i> 103 FERC ¶ 61,117 (2003)
Oglethorpe Rehearing Order	<i>Southern Company Services, Inc.</i> 108 FERC ¶ 61,174 (2004)
SMD NOPR	Notice of Proposed Rulemaking on Standard Market Design, 100 FERC ¶ 61,138 (2002)
Supp. Br.	Supplemental Brief of Petitioner (October 18, 2004)
TSA	Transmission service agreement
Williams Initial Order	<i>Southern Company Services, Inc.</i> 102 FERC ¶ 61,201 (2003)
Williams Rehearing Order	<i>Southern Company Services, Inc.</i> 104 FERC ¶ 61,140 (2003)

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**STATEMENT OF THE ISSUES**

1. Did termination of the contract involved in No. 03-1252 render the issues in that case moot?
2. Did the Commission properly determine that its rollover rights policy had required since its establishment in Order No. 888 that a transmission provider identify any restrictions that would limit a customer's future rollover rights in the original transmission service agreement between the provider and customer?

## STATUTES AND REGULATIONS

The applicable statutes and regulations are contained in the addendum to this brief.

### STATEMENT OF THE CASE

#### I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

Two sets of orders, all entitled *Southern Company Services, Inc.*, are under review. The set for No. 03-1252 consists of 102 FERC ¶ 61,201 (2003) (“Williams Initial Order”)(JA 160)<sup>1</sup> and 104 FERC ¶ 61,140 (2003) (“Williams Rehearing Order”) (JA 228). The set for No. 04-1269 consists of 103 FERC ¶ 61,117 (2003) (“Oglethorpe Initial Order”)(JA 45) and 108 FERC ¶ 61,174 (2004) (“Oglethorpe Rehearing Order”)(JA 101). Both sets of orders deal with the same issue: whether Petitioner could, when a long-term firm point-to-point transmission customer sought to roll over service, restrict rollover rights by adding limits that were not found in the original transmission service agreement (“TSA”) between the parties, *see* Williams Initial Order, 102 FERC at P 1, JA 160-61, *and* Oglethorpe Initial Order, 103 FERC at PP 1-2, JA 46.

The key contractual provision in both sets of orders was Section 5.0 of the rollover TSAs, which, except for a variation in the dates, was identical in the two

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<sup>1</sup> “JA” refers to the Joint Appendix page number. “P” refers to the internal paragraph number within a FERC order.

situations. *Compare* Williams Initial Order at P 3, JA 161 *with* Oglethorpe Initial Order at P 6, JA 46-47 (both quoting the section). Essentially, Section 5.0 proposed to limit Williams’ and Oglethorpe’s rollover rights to the extent that Petitioner claims possible insufficient capacity to serve (a) Williams or Oglethorpe, respectively, in addition to (b) any of three groups: (1) a specified list of “Transmission Customers having an earlier priority for transmission service;” or, (2) an estimated 7500 MW of transmission capacity that Petitioner claims will be needed in the period 2003-2011 “to meet forecasted native load growth;” or (3) “requests for transmission service on the Georgia Integrated Transmission System having an earlier priority.” *E.g.*, Williams Initial Order at P 3 (quoting Section 5.0), JA 161.

Both sets of orders accepted Petitioner’s proposed rollover TSAs for filing, but required modification to proposed Section 5.0 to conform with FERC’s rollover rights policy as established in the Order No. 888 rulemaking.<sup>2</sup> In each case, Petitioner submitted a compliance filing in which it modified its proposed

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<sup>2</sup> *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996) (“Order No. 888”), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1996), *on reh’g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *clarified*, 79 FERC ¶ 61,182 (1997), *on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998); *Open Access Same-Time Information System and Standards of Conduct*, Order No. 889, FERC Stats. & Regs. ¶ 31,035 (1996) (“Order No. 889”), *on reh’g*, Order No. 889-A, FERC Stats. & Regs. ¶ 31,049 (1997), *on reh’g*, Order No. 889-B, 81 FERC ¶ 61,253 (1997), *aff’d in part, remanded in part*, *Transmission Access Policy Study Group, et al. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) (“TAPS”), *aff’d sub. nom*, *New York v. FERC*, 535 U.S. 1 (2002).

rollover TSA in conformity with FERC's orders, and concurrently sought rehearing based on largely the same arguments. In both cases, rehearing was denied on the general ground that Petitioner's claims constituted a collateral attack "on the Commission's rollover rights policy as established in Order No. 888," *e.g.*, Williams Rehearing Order at P 10 (footnote omitted), JA 229, and on the refutation of Petitioner's specific claims. *Id.* at PP 12-42, JA 230-35.

The petitions for review followed.

## **II. STATEMENT OF FACTS**

### **A. Statutory and Regulatory Background**

FERC has delegated authority to set just and reasonable rates for public utilities by Sections 205 and 206 of the FPA, 16 U.S.C. §§ 824d and 824e. Because entry into the transmission market is difficult and restricted, utilities owning or controlling transmission facilities can exploit their natural monopoly to favor their own generation and exclude competitors from the market. FERC found that vertically integrated public utilities were using their monopoly control over interstate transmission facilities to gain advantage over potential competitors, and thus to stymie competition. To remedy this situation, Order No. 888 fundamentally altered the wholesale electric power market, requiring all jurisdictional public utilities to unbundle wholesale electric power services and to file open access non-discriminatory transmission tariffs as a remedy for undue discrimination. *See*

generally *TAPS*, 225 F.3d at 683-84.

Utilities are required to have an open access transmission tariff (“OATT”) that includes “pro forma tariff non-price minimum terms and conditions of non-discriminatory transmission” for “both network, load-based service and point-to-point, contract-based service.” Order No. 888 at 31,636. The *pro forma* OATT rights included a rollover (or first refusal) right: “all firm transmission customers (requirements and transmission-only), upon the expiration of their contracts or at the time their contracts become subject to renewal or rollover, should have the right to continue to take transmission service from their existing transmission provider.” *Id.* at 31,665.

A customer’s ability to exercise the rollover right is subject to two conditions: (1) “the underlying contract must have been for a term of one-year or more,” which is, in FERC parlance, a long-term contract, and (2) “the existing customer must agree to match the rate offered by another potential customer,” up to the maximum allowed rate, and “to accept a contract term at least as long as that offered by the potential customer.” *Id.* When a transmission provider does not have sufficient transmission capacity to serve all requests for service, a customer with rollover rights has first call on available capacity, if the customer has met the referenced conditions. *Id.* The rollover right is not considered a transition right, available only through the transition to open access, but “an ongoing right that may

be exercised at the end of all firm contract (including all future unbundled transmission contracts) terms.” *Id.*

To implement its open access policies, the Commission formulated *pro forma* open access tariff provisions, *see generally* Order No. 888-A at 30,503-40 (tariff provisions), as well as various *pro forma* forms of service agreements to be used for different types of transmission service, *id.* 30,540-43. Here, the pertinent *pro forma* tariff provisions are § 2.2 and § 13.2. Section 2.2 provides, in part: “Existing firm service customers (wholesale requirements and transmission-only) have the right to continue to take transmission service from the Transmission Provider when the contract expires, rolls over or is renewed.” *Id.* at 30,511. Section 13.2 provides that long-term point-to-point transmission service is available “on a first-come, first-served basis,” based on the date of reservation, but expressly states that “[r]eservation priorities for existing firm service customers are provided in Section 2.2.” *Id.* at 30,515-16. Here, the applicable *pro forma* service agreement form is the “Form of Service Agreement for Firm Point-To-Point Transmission Service.” *Id.* at 30,541-42.<sup>3</sup>

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<sup>3</sup> A service agreement is a type of form contract that sets out the contract terms between the parties to a particular service transaction. Petitioner used the same form for, but had separate service agreements with, Williams and Oglethorpe to delineate the rates, receipt and delivery points, start and termination dates, etc. for each. A tariff compiles all the rate schedules and forms of contract used by a public utility. *See* 18 C.F.R. § 35.2(b) & n. 1 (2003)(defining “Rate schedule” and explaining “tariff”).

## **B. Events Leading To The Challenged Orders**

### **1. The Williams Rollover Proposal (No. 03-1252)**

Petitioner and Williams entered into a one-year TSA for 50 MW of firm point-to-point transmission service that Petitioner's OATT designated as First Revised Service Agreement No. 451. Williams Initial Order at P 1 n. 2, JA 160. As that Agreement was set to expire on December 31, 2002, Williams notified Petitioner on October 31, 2002, that Williams wished to roll over the contract. *Id.* at P 2, JA 161. Williams and Petitioner could not agree on the terms of the rollover rights, so Petitioner filed an unexecuted rollover agreement, designated as Addendum 1 to the original Agreement No. 451. *Id.* and n. 1.

The unexecuted rollover agreement continued the original Agreement No. 451, but "includ[ed] limitations on future rollovers and condition[ed] the effectiveness of the" original Agreement. *Id.* at P 3, JA 161. Those changes were effectuated through new Sections 5.0. *Id.* Section 5.0 proposed to restrict Williams' rollover rights "after December 31, 2003" by conditioning those rights to available capacity after Petitioner had served "the following [listed] Transmission Customers['] exercise [of] their rights to transmission service or to rollover their respective agreements." *Id.* (quoting proposed Section 5.0). This condition was based on Petitioner's view that the listed Transmission Customers had "an earlier priority for transmission service," *id.*, than did Williams.



A second restriction on Williams' rollover right proposed in Section 5.0 applied to the period 2003-2011, and limited Williams' right to capacity available after Petitioner made available "7500 MW of transmission capacity needed to meet [Petitioner's] forecasted native load growth." *Id.* The final restriction would condition service of Williams' rollover rights to availability of capacity after Petitioner serves "requests for transmission service on the Georgia Integrated Transmission Systems having an earlier priority than" Williams. *Id.*

Petitioner did not indicate if, when, or to what extent the restrictions would affect Williams' rollover rights, but proposed to notify Williams "within a reasonable amount of time" after Williams makes a future rollover request "which (if any) of the above Transmission Customers have exercised their rights to transmission service or to rollover their respective service agreements and . . . of the amounts (if any) of transmission capacity that [Williams] may rollover for purposes of Section 2.2" of Petitioner's OATT. *Id.*

## **2. The Oglethorpe Rollover Proposal (No. 04-1269)**

Much like the Williams original TSA, the TSA between Petitioner and Oglethorpe, designated at Revised Service Agreement No. 431, provided for 50 MW of firm point-to-point transmission service to Oglethorpe over a one-year period beginning December 1, 2001. When that period neared its end, the parties agreed to a rollover TSA. Thus, unlike the Williams situation, Petitioner filed an

executed rollover TSA with the Commission to cover the one-year period beginning December 1, 2002. Nonetheless, Petitioner sought to have “the Commission accept the rollover service agreement with an effective date of December 1, 2001, the effective date of the original service agreement.” Oglethorpe Initial Order at P 2, JA 46.

The Oglethorpe rollover TSA contained a Section 5.0 and a Section 6.0 that were, for purposes of this appeal, identical to those proposed in the Williams rollover TSA. *See* Oglethorpe Initial Order at PP 6-7 (setting out language), JA 46-47. Thus, the language of Section 5.0 contained the same three restrictions on Oglethorpe’s rollover rights that are outlined above in the discussion about the proposed Williams rollover restrictions. *Id.*

### **C. The Challenged Orders**

Petitioner proposed virtually identical restrictions in its Williams and Oglethorpe rollover TSAs, and advanced virtually identical arguments initially and on rehearing as those advanced in *Southern Co. Services, Inc.*, 102 FERC ¶ 61,200 (2003). The Commission thus relied on *Southern* to reject Petitioner’s proposal “to insert limitations on the customer’s future rollover rights based on higher-queued transmission service requests even though the limitations were not included in the original [TSA].” Williams Initial Order at P 12, JA 162. Likewise, the Commission “reject[ed] Southern’s attempt to restrict Williams’ rollover rights based on

reservations for native load growth since these restrictions were not in the original service agreement.” *Id.* (footnote omitted). In addition, the Commission questioned “the nature and accuracy” of the filing. *Id.* at PP 13-14, JA 162-63.

With regard to Petitioner’s filing of the Oglethorpe rollover TSA, FERC Staff apparently did not realize that the proposed rollover TSA did not conform to the original Oglethorpe TSA; as a result, a delegated order rejected the filing as unnecessary. Oglethorpe Initial Order at P 3, JA . Petitioner responded to the rejection by indicating that the rollover TSA was a nonconforming agreement that required separate filing.<sup>4</sup>

As inclusion of Section 5.0 at the rollover stage mirrored inclusion of nearly identical restrictions in earlier Petitioner’s rollover filings, it was rejected for the same reasons given in FERC’s prior orders: “the Commission has consistently reaffirmed its policy in orders directed to [Petitioner] and other parties that a transmission provider can deny a customer the ability to roll over a long-term (one year or longer) firm point-to-point transmission service agreement only if the provider *includes in the original service agreement* a specific limitation based on

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<sup>4</sup> Petitioner asserted its proposed TSA was nonconforming, not because it violated FERC rollover rights policy, but because the “OATT does not provide a form of service agreement for the applicable category of service (*i.e.*, *rollover* long-term firm point-to-point transmission service).” *Id.* at P 9, JA 47. The Commission disagreed, finding “that, contrary to Southern’s understanding, the rollover of a service agreement is not a separate service unto itself that would, of its own accord, necessitate its own separate *pro forma* service agreement.” *Id.* at n. 12 and P 10, JA 47-48; *see also* Order No. 888-A at 30,541-42 (*pro forma* form of service agreement for firm point-to-point transmission service).

reasonably forecasted native load needs for the transmission capacity provided under the contract.” *Id.* at P 5, JA 46 (emphasis in original).

Petitioner’s proposed Section 6.0 would have given it the right to terminate service if it did not agree with any change made by FERC. The Commission found that provision unreasonable, as it “essentially would allow [Petitioner] to decide what terms and conditions it wished to abide by, [and thus] is inconsistent with the Commission’s statutory authority to ensure just and reasonable rates for jurisdictional services.” *Id.* at P 7, JA 47.

In both cases, the Commission required Petitioner to make compliance filings to remove the objectionable provisions. *E.g.*, Oglethorpe Initial Order at p. 61,372, Ordering Paragraphs (A) and (B), JA 48. In each case, Petitioner made the required compliance filing while concurrently seeking rehearing. Oglethorpe Rehearing Order at PP 4-5, JA 101. Petitioner raised the same issues on rehearing in both matters. *Compare* Williams Rehearing Order at PP 7-8, JA 229 *with* Oglethorpe Rehearing Order at P 7, JA 102. Those issues were addressed seriatim in the rehearing orders.

Petitioner claimed that the “rollover policy addressed in *Nevada Power Co.* [97 FERC ¶ 61,324 (2001)] requiring rollover limitations to be specified in the original service agreement is a new policy.” Williams Rehearing Order at P 9, JA 229 (footnotes omitted); *see* Oglethorpe Rehearing Order at P 9, JA 102 (same).

That claim was ruled to be “a collateral attack” on the rollover rights policy as stated in Order No. 888: “all firm transmission customers with contracts for a term of one-year or more should have the right to continue to take transmission service from their existing transmission provider upon the expiration of their contracts or at the time their contracts become subject to renewal or rollover.” *Id.* at P 10 (in both Rehearing Orders), citing Order No. 888 at 31,665; Order No. 888-A at 30,195. As Petitioner’s assertions on rehearing went “to the heart of the” Order No. 888 rollover rights policy, they “should have been raised on rehearing of Order No. 888.” *Id.* at P 11, JA 230.

Next, Petitioner argued that the “rollover policy and procedures in general have been unclear and confused,” and do not require “limits on rollovers to be contained in the original [TSA].” *Id.* at P 12, JA 230. Petitioner alleged that the confusion was evidenced by statements in the Notice of Proposed Rulemaking on Standard Market Design, 100 FERC ¶ 61,138 (2002)(“SMD NOPR”). *Id.* Two of the three clarifications in the SMD NOPR, however, “are not relevant to the present proceeding.” Williams and Oglethorpe Rehearing Orders at P 13, JA 103 and 230. The third clarification noted in the SMD NOPR, that restrictions on rollover rights had to be listed in the original TSA, did not constitute a change in policy, but “is fully consistent with” the Order No. 888 policy, which required that any such limitation must be specified ““at the time the contract is executed.”” *Id.*,

quoting Order No. 888-A at 30,198.

Petitioner made a due process claim that the Commission had not given adequate notice of its allegedly changed policy. *Id.* at P 15, JA 103. The Commission denied its policy had changed since Order Nos. 888 and 888-A, finding that it had “consistently reaffirmed” its policy of requiring that a transmission provider include in the original TSA “a specific limitation based on reasonably forecasted native load need for the transmission capacity provided under the contract at the end of the contract term.” *Id.* at P 16 (footnote listing citations omitted). Similarly, a restriction based on “a pre-existing contract obligation that commences in the future” can restrict a customer’s rollover right if that obligation is listed in the original TSA. *Id.* at P 17, JA 103-04. The instant facts did not show that those conditions had been met because Petitioner “failed to include such limiting language in its original [TSAs] with” Williams and Oglethorpe. *Id.* and JA 231.

There is no due process problem, however, because the industry had “adequate notice” of those requirements through Order Nos. 888 and 888-A as well as through subsequent cases, all of which followed the same consistent policy. *Id.* at P 18, JA 231 and 104. Here, despite having received the specified reservations for capacity listed in Section 5.0 “prior to Williams [and Oglethorpe’s] initial request[s] for service,” Petitioner did not include those limitations on rollover

rights in the original TSAs, but, rather, “sought to add language in this regard upon the first rollover” of the original TSAs. *Id.*

Such sandbagging would erode “the very basis of the rollover rights policy.” *Id.* That policy requires that, at the time a transmission service request is initially evaluated, a transmission provider must “plan [to] operate its system with the expectation that it will continue to provide service to that customer should the customer request rollover of its contract term.” *Id.* at P 19, JA 231. If the provider “is already committed to another transmission customer under a previously-confirmed transmission request,” then it may limit rollover rights only to the extent it “reflect[s] that fact in any initial service agreement that it subsequently enters into with other transmission customers.” *Id.* Without explicit notice of limitations in the initial TSA, a long-term transmission service customer is assured that full rollover rights apply. *See* Order No. 888-A at 30,511 (*pro forma* tariff § 2.2, giving long-term transmission service customers rollover rights).

Petitioner contended the rollover rights policy violated the first-come, first-served reservation priority under Section 13.2 of the *pro forma* tariff. *Id.* at P 23, JA 232 and 105. The Commission dismissed that contention because Section 13.2 expressly states that the “reservation priorities for existing firm service customers are provided in section 2.2” of the *pro forma* tariff. *Id.* Section 2.2 gives existing firm service customers “the right to continue to take transmission service when the

contract expires, rolls over, or is renewed.” *Id.* Thus, denying Petitioner’s proposed rollover restrictions is consistent with Section 13.2.

Petitioner also raised concerns about the effect of the rollover rights on the reliability and operation of its system. *Id.* at P 24-25, JA 232 and 105. Those concerns were misplaced because any cited problems would result from Petitioner’s failure to follow the policy’s requirements, not from the policy itself. *Id.* at P 26. The intent of the policy is “that long-term customers have the right to continue to take service and, accordingly, that the transmission provider be in the position of continuing to provide it.” *Id.* at P 28, JA 233 and 105. This means that providers are “expected to include all long-term transmission customers (*i.e.*, those with rollover rights) in [their] long-term planning.” *Id.* at P 27, JA 232. Therefore, a provider, before agreeing to offer long-term service must “plan [to] operate its system with the expectation that it will continue to provide service to that customer should the customer request rollover of its contract rights.” *Id.* at P 26, JA 232 and 105.

Under FERC’s policy, rollover rights should be factored into reliability and operational planning for each long-term contract before service starts. As the challenged orders make clear, following that policy should minimize constraints or other problems. But if problems occur, “the obligation is on the transmission provider to either build additional transmission facilities to relieve the constraint or



to implement the curtailment procedures set forth in its OATT.” *Id.* at P 27. In view of this clear expectation, FERC viewed Petitioner’s reliability and operational concerns as a “disagree[ment] with the Commission’s policy call in this regard [that] should have [been raised] on rehearing and/or clarification at the time the Commission established the rollover rights policy.” *Id.* at P 28, JA 233 and 106.

The policy’s clear expectation also answers Petitioner’s implication that it “could deny a customer’s rollover request to the extent that [it] did not have sufficient available capacity.” *Id.* at P 35, JA 107 and JA 234 ¶ 34. Under the policy, a provider makes the judgment “that it could provide [transmission] service (including any rollover if requested) using its existing system” at the time it agrees to provide the service, not at the time rollover is requested. *Id.* Thus, providing rollover service should be accommodated within existing system capacity, and not lead to a “need to build additional capacity to serve that rollover request.” *Id.*

Petitioner’s claim that the rollover policy allows long-term customers to hold capacity hostage, thus raising anticompetitive concerns, *id.* at P 33, JA 106, fails to appreciate how the policy works. A provider may post capacity subject to rollover rights on its electronic bulletin board (*i.e.*, its OASIS) “and accept competing reservations until the time that the existing customer chooses to roll over its contract.” *Id.* at P 34, JA 107 and 234. In cases involving competing reservations for limited capacity, the existing, rollover customer will retain its

capacity only if it “agrees to match the rate and term offered by another potential customer seeking the same capacity.” *Id.* By agreeing to match, the existing customer “then takes priority over the competing reservation;” if it declines to match, “the transmission provider may accept the next competing reservation.” *Id.* (footnote omitted). In the instant case, these were hypothetical questions because “there has been no showing of any actual conflicts in demands for capacity at this point” on Petitioner’s system. *Id.* at PP 37-38, JA 107 and 234.

Petitioner argued that execution of the Oglethorpe rollover TSA by both parties required reversal of the Initial Order because “the Commission is obligated to respect the sanctity of the contract agreed to by the parties.” Oglethorpe Rehearing Order at P 42, JA 108. Agreement by the parties was “not controlling” because the modifications are contrary to FERC policy, and the Commission has a responsibility under FPA § 205 to determine whether proposed contract terms, even ones to which parties have agreed, are just and reasonable. *Id.* at PP 43-44, JA 108, quoting *Pennsylvania Elec. Co. v. FERC*, 11 F.3d 207, 210 (D.C. Cir. 1993). The rationale for rejecting the agreed-to rollover restrictions “is contained in the explanations of Commission policy, which had [its] origins in Order Nos. 888 and 888-A.” *Id.* (footnote omitted).

Petitioner’s requests for rehearing were denied. Petitioner’s compliance filing in each case was found, however, to be consistent “with the Commission’s

directive.” Accordingly, the compliance filings were accepted as of the effective dates, respectively, of each rollover period. Williams Rehearing Order at P 44, JA 235; Oglethorpe Rehearing Order at P 49, JA 109.

The petition for review followed.

### **SUMMARY OF ARGUMENT**

The issues raised by Petitioner in No. 03-1252 are moot because a decision by this Court can no longer affect the rights of those parties. The agreement between Petitioner and Williams terminated on December 31, 2003. As shown by Petitioner’s adoption of the very same issues raised in No. 04-1269, dismissal will not result in those issues evading review. Further, as each rollover agreement is not, contrary to Petitioner’s view, a separate contract, service to Oglethorpe will not expire prior to a decision by this Court. Thus, the capable of repetition, yet evading review exception does not apply here.

Petitioner’s challenges question matters that go to the heart of the rollover rights policy established in Order No. 888 and, thus, should have been raised on review of those orders. Petitioner’s failure to challenge the policy when it was established in accordance with the FPA’s requirements means, as FERC found, that its current objections constitute an impermissible collateral attack on those earlier final orders. Both petitions should, therefore, be dismissed on this ground.

Petitioner’s overall theme is that the rollover rights policy compromises the

reliability of transmission systems because transmission providers cannot adequately plan and operate their systems to serve rollover rights. But the dispute here is not whether rollover rights should be included in a provider's planning, but when that planning should occur.

FERC's policy requires that the planning occur prior to execution of the original TSA, and that a provider list in the original TSA all reasonably forecasted needs that might limit rollover rights in the future. Petitioner's attempt to add restrictions at the time when rollover rights were being exercised by Williams or Oglethorpe was prohibited by the objective of the policy – to provide certainty to customers that service would be available to them.

The Commission broke no new ground here. The Order No. 888 rulemaking required that rollover restrictions be listed in the original TSA. For TSAs already in existence at that time, the Commission allowed providers to make specific filings that identified reasonably forecasted restrictions that would limit rollover rights under those contracts. For post-Order No. 888 TSAs, the Commission specified that such restrictions had to be included at the time the original contract was executed. Petitioner did not raise on rehearing its claim on appeal that Order No. 888-A requires planning only for native load and network customers. In any event, that claim ignores language indicating that the long-term point-to-point customers (*i.e.*, those with rollover rights) must be given priority to continue to use

the system. Thus, they must also be factored into planning and operation.

Petitioner's reading of the language, "at the time the contract is executed," to mean when a rollover contract is reached, rather than when the original contract is signed, defies both the letter and the spirit of the rollover rights policy. Section 2.2 of the *pro forma* tariff gives a customer the right to continue service when a contract expires, rolls over, or is renewed. Yet, under Petitioner's reading that right could be gutted at the very time a customer seeks to exercise it by restrictions of which the customer had no prior notice. As Section 2.2 gives a customer the right to seek rollover at the end of a contract term, Petitioner was on notice that it had to plan its system operations to accommodate rollover to the extent it had not identified any restrictions in the original TSA.

Petitioner contends now, though not on rehearing, that § 2.2 was intended to apply only as a tie-breaker in cases of competing requests for limited capacity. As explained in another FERC case, § 2.2 applies not only as a tie-breaker, but also where no competing request for limited capacity is made, obligating a provider to serve rollover rights if no restrictions were identified in the original TSA.

Petitioner argues the SMD NOPR set a new policy that rollover restrictions be identified in the original TSA. But the SMD NOPR indicates that existing policy had been clarified in prior orders, going back to Order No. 888. Thus, the SMD NOPR merely reflected what had already occurred; it did not set new policy.

Petitioner claims here, but did not on rehearing, that as native load and network customers must pay capacity charges related to the entire system, while point-to-point customers pay such charges only for specified portions of the systems, a provider should only have to plan and to operate its system for native load and network customers. That claim fails to recognize how network service differs from point-to-point service: a network customer can call on all system resources to serve the customer's load at any time, while a point-to-point customer only has use of system facilities between its specified receipt and delivery points. That difference explains the different cost responsibilities.

Further, the capacity charges paid by point-to-point customers reduce those that must be paid by native load and network customers. Consequently, where, as here, there are no constraints to serve both native load/network service and point-to-point service, native load/network customers benefit from the rollover of point-to-point service through reduced costs. Accordingly, planning for rollover as well as for native load/network service benefits all customers.

Petitioner's claim that it could not be expected to glean an implicit meaning from FERC's statements rings hollow. FERC's requirement that rollover restrictions must be listed in the original TSA necessarily meant that providers must analyze whether they could provide rollover rights using their existing facilities at the time of the original TSA. If, under FERC's policy, a provider's

analysis showed that it could not provide rollover service without building new facilities or curtailing, then the provider could choose either not to offer service to that customer or to list any restrictions in the original TSA.

For example, Petitioner proposed to restrict the rollover rights at issue for capacity reservations that were made prior to the time of the original TSAs. Thus, Petitioner could have noted the reservations in the original TSA, but elected to wait until the customer exercised its rollover rights to list them as a restriction. In addition, as no competing reservations were made for the rollover capacity at issue, the Commission declined to answer hypothetical questions on this point.

## **ARGUMENT**

### **I. THE WILLIAMS PETITION SHOULD BE DISMISSED AS MOOT**

#### **A. Termination of the Williams Contract Renders Challenges to FERC's Orders Addressing It Moot**

As Petitioner states, because “Williams did not rollover its Agreement in subsequent terms[,] . . . that agreement terminated on December 31, 2003.” Br. 46 n. 23. Termination moots the issues for review in No. 03-1252 by eliminating an actual, ongoing controversy for this Court to resolve. *Honig v. Doe*, 484 U.S. 305, 317 (1988). Petitioner seeks to avoid dismissal by claiming that the issues presented fit the capable of repetition, yet evading review exception to mootness. Br. 47-50. Petitioner also claims that the currently effective Oglethorpe TSA, coupled with the capable of repetition exception, “provide a sound basis for this

Court to retain jurisdiction over both cases.” Supp. Br. 12-13. Neither of Petitioner’s claims can save the No. 03-1252 petition from dismissal.

The mootness doctrine prevents federal courts from issuing advisory opinions or “decid[ing] questions that cannot affect the rights of litigants in the case before them.” *Northwest Pipeline Corp. v. FERC*, 863 F.2d 71, 76 (D.C. Cir. 1988) (quoting *Better Govt. Ass’n v. Dept. of State*, 780 F.2d 86, 90-91 (D.C. Cir. 1986)). In No. 03-1252, Petitioner charges that the challenged Orders, requiring modifications to the proposed Sections 5.0 and 6.0 in the Williams rollover TSA, caused Petitioner injury. *E.g.*, Br. at 23 (“FERC’s rollover policies degrade the reliability of the electric system”).<sup>5</sup> But any possible alleged effect of the challenged orders in No. 03-1252 on Petitioner’s system reliability disappeared, if it ever existed, when the TSA terminated.

Because a remedy cannot be fashioned for a terminated agreement, courts may not consider challenges related to such agreements. “[M]ootness, however it may have come about, simply deprives [a court] of [its] power to act; there is nothing for [the court] to remedy, even if [it] were disposed to do so. [Courts] are not in the business of pronouncing that past actions, which have no demonstrable continuing effect, were right or wrong.” *Spencer v. Kemna*, 523 U.S. 1, 18 (1998).

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<sup>5</sup> FERC’s rollover policies do not degrade system reliability, and we question whether Petitioner’s stated harm constitutes injury-in-fact, as developed more fully in the remainder of the brief.



Here, termination of the Williams TSA meant that the challenged past action (FERC's Williams Orders) no longer could have any demonstrable continuing effect on Petitioner or its system, and thus the petition in No. 03-1252 is moot.

**B. The Issues Presented In No. 03-1252 Will Not Evade Review**

Petitioner asserts the evading review prong of the exception has been met “because there has not been enough time to fully litigate the issues associated with the policies['] effect on the Williams' rollover service.” Br. 47. As that statement is axiomatic whenever a particular case becomes moot, it fails to prove Petitioner's assertion. Whether the moot case evades review is not the issue; rather, the exception applies only where *subsequent* agency action raising the same appellate issues would also evade review. *See, e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978)(“Under no reasonably foreseeable circumstances could appellants obtain plenary review by this Court of the issue here presented”).

The Court need not speculate whether reasonably foreseeable circumstances will arise under which Petitioner could obtain review of the issues presented in No. 03-1252. Petitioner has already raised the same issues in No. 04-1269, which also involves a one-year TSA. *See, e.g., Supp. Br. at 3* (“Petitioner hereby adopts by reference and incorporates herein . . . the Statement of the Issues . . . set forth in its brief” filed in No. 03-1252). Accordingly, the capable of repetition, yet evading review exception does not apply to No. 03-1252.

Petitioner claims evasion here because “the Oglethorpe Rollover Agreement [in No. 04-1269] was a one-year agreement that expired before it could be reviewed by this Court.” Supp. Br. 12. That claim is based on Petitioner’s erroneous focus on the contract, rather than on the service. “[C]ontrary to [Petitioner’s] understanding, the rollover of a service agreement is not a separate service unto itself that would, of its own accord, necessitate its own separate *pro forma* service agreement.” Oglethorpe Initial Order at P 9 n. 12, JA ; *see also* Supp. Br. at 13 n. 7 (“even though the Oglethorpe Rollover Agreement has expired, the fact that service thereunder has been rolled over for a subsequent term means . . . service continues to be provided under the pertinent ‘service agreement.’”). Thus, service to Oglethorpe has not expired prior to judicial review.

### **C. Petitioner’s Challenges Should Have Been Raised In Order No. 888**

Petitioner next asserts that “these consolidated appeals are not moot because they constitute a challenge to the policy adopted and adhered to in all of the orders on review.” Supp.Br. 13.<sup>6</sup> But FERC’s rollover rights policy was not instituted in the Orders challenged here; rather, it was implemented in Order No. 888. “Many of the issues raised by [Petitioner] on rehearing . . . go to the heart of the Commission’s rollover rights policy established in Order No. 888. On this basis

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<sup>6</sup> The Commission repeatedly noted that its rollover policy was “adopted” in Order No. 888, not in the orders on review. *E.g.*, Williams Rehearing Order P 11, JA 230.

they are issues that should have been raised on rehearing of Order No. 888,” and then challenged on review of that Order. Williams Rehearing Order at P 11, JA 230.

Petitioner’s assertion ignores that the judicial review process under FPA § 313, 16 U.S.C. § 825*l*. FPA § 313 requires that review be commenced within 60 days of issuance of an order that allegedly aggrieves petitioner, and does not allow alternative means for seeking judicial review of FERC policy, as were present in the cases cited by Petitioner. Supp. Br. 13-14. For example, in *City of Houston, Texas v. HUD*, 24 F.3d 1421, 1427-29 (D.C. Cir. 1994), 5 U.S.C § 702 offered an alternative means to seek federal district court relief from the agency policy. Likewise, *Payne Enterprises, Inc. v. United States*, 837 F.2d 486. 487-88 (D.C. Cir. 1988), involved a Freedom of Information Act challenge to agency policy that could be brought in district court.

FPA § 313 does not allow for alternative challenges to FERC policy related to jurisdictional tariffs; indeed, Petitioner has not sought alternative judicial review. Petitioner’s challenges to FERC’s rules and policy in this case, Supp Br. 13-14, thus constitute an impermissible collateral attack on Order No. 888, where those rules and policy were set. *See* Williams Rehearing Order at P 10, (finding Petitioner’s rehearing request “is basically a collateral attack on the Commission’s rollover rights policy as established in Order No. 888”), JA 229.

Collateral attacks to rules and policies set by long-since final orders that have been judicially approved violate both the language of FPA § 313 and its intent to provide certainty by prompt resolution of disputes. The Court lacks jurisdiction to hear such attacks, and, therefore, both petitions for review should be dismissed. *City of Nephi v. FERC*, 147 F.3d 929, 934 (D.C. Cir. 1998); *Georgia Industrial Group v FERC*, 137 F.3d 1358, 1363 (D.C. Cir. 1998)(where same issue addressed previously, a judicial challenge in later order is untimely).

## **II. EVEN IF NOT DISMISSED, THE PETITIONS LACK MERIT**

### **A. Standard Of Review**

FERC orders are reviewed under the arbitrary and capricious standard of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A). *E.g.*, *Sithe Ind. Power Ptnrs., L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). That standard requires the Commission to “examine the relevant data and articulate a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Midwest ISO Trans’n Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004). The Commission’s factual findings, if supported by substantial evidence, are conclusive. 15 U.S.C. § 717r(b). This Court gives “substantial deference” to FERC’s interpretation of its own orders, *Natural Gas Clearinghouse v. FERC*, 105 F.3d 397, 399 (D.C. Cir.

1997) as well as to its interpretation of ambiguous tariff language. *E.g.*, *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998).

### **B. Notice Differed For Pre- and Post-Order No. 888 TSAs**

Petitioner's arguments challenging FERC's rollover rights policy are largely variations on the theme that the policy is "at best, indifferent to reliability concerns," and thus unlawfully harms the public interest. Br. 23. That theme relies on the faulty premise that a transmission provider cannot plan and operate its system consistently with the requirements of the rollover rights policy.

But the dispute here does not involve *whether* to incorporate long-term transmission service, including rollover rights, into planning and operation, as both Petitioner and FERC agree it must be done. Rather, the dispute involves *when* such planning, particularly forecasted restrictions on a provider's ability to service roll over rights, must occur. FERC rollover rights policy requires that such planning occur at the time the provider enters into a long-term TSA, while Petitioner would prefer to do so on a rolling basis at the end of each contract term. Petitioner's approach offers no certainty to long-term customers, and would thwart FERC's open access objectives. In short, Petitioner's contentions that the policy will "degrade the reliability of the electric system," Br. 23, are misplaced, and do not support reversal of the challenged orders.

Petitioner argues the requirement that a provider include in the original TSA any future limitations on rollover rights “was announced for the first time in Nevada Power [91 FERC ¶ 61,234 (2001)].” Supp. Br. 16 (emphasis in original). Petitioner claims that prior FERC cases indicated that rollover rights could be “specified in the then-in-effect agreement with the customer” or by making a “specific filing with the Commission, that it had no reasonable expectation of continuing to provide transmission service to the customer at the end of its contract.” *Id.* at 16-17 (citation omitted); *see* Br. 9 (same). Petitioner’s reading of the precedent is wrong.

Petitioner’s interpretation takes the precedent out of context. The rollover rights policy was developed during the transition from bundled to unbundled, open access service that required application of the policy to service in the context of both pre- and post-Order No. 888 contracts. The policy itself required that “all firm transmission customers with contracts for a term of one-year or more should have the right to continue to take transmission service from their existing transmission provider upon the expiration of their contracts or at the time their contracts become subject to renewal or rollover.” Williams Rehearing Order at P 10, JA 229-30; paraphrasing Order No. 888 at 31,665 (“all firm transmission customers (requirements and transmission-only), upon the expiration of their contracts or at the time their contracts become subject to renewal or rollover, should have the

right to continue to take transmission service from their existing transmission provider”); Order No. 888-A at 30,511 (§ 2.2 of *pro forma* tariff).

The rollover right would apply to pre-and post-Order No. 888 contracts: the right is “not a one-time right of first refusal for contracts existing as of the date of the final rule, but is an ongoing right that may be exercised at the end of all firm contracts (including all future unbundled transmission contracts) terms.” Order No. 888 at 31,665. On rehearing, a concern was raised that “imposition of the [rollover] right abrogates existing contracts executed with the expectation that capacity could be recalled for the utility’s own use upon expiration of the contract,” particularly for future native load growth. Order No. 888-A at 30,196.

That concern led to differing means of providing notice of potential future growth that would restrict rollover rights in the two situations. For pre-Order No. 888 contracts (*i.e.*, existing contracts), a provider would be permitted to make “a specific filing . . . demonstrating that it had no reasonable expectation of continuing to provide transmission service to the wholesale transmission customer at the end of its contract.” *Id.* at 30,198. As to post-Order No. 888 contracts, referred to as “future contracts,” a provider could “reserve existing transmission capacity to serve the need (current and reasonably forecasted) of its existing native load (retail) customers,” if the provider “specif[ies] in the contract that the right of first refusal does not apply to that firm service due to a reasonably forecasted need

at the time the contract is executed.” *Id.*

Because this requirement originated with Order No. 888, contracts executed prior to it were not required to identify load that could restrict future rollover rights. Accordingly, the Commission allowed providers with pre-Order No. 888 contracts to make specific filings identifying exactly what forecasted load would limit such rights. *See, e.g., Public Service Co. of New Mexico*, 85 FERC ¶ 61,240, 62,005 (1998)(“*PSNM*”)(discussing “the requirement of Order No. 888-A that [a provider] demonstrate, before reclaiming capacity previously used to provide service under a pre-Order No. 888 contract, that it had no reasonable expectation of continuing to provide transmission service after expiration of a contract”). This refutes Petitioner’s claim that the specific filing exception applies to any “then-in-effect contract,” Br. 9, including post-Order No. 888 contracts.

For post-Order No. 888 agreements, any limits on rollover rights must be listed when those contracts are executed. “Order No. 888-A allows a utility such as PSNM to reclaim capacity only if it has included in the transmission agreement language that the right of first refusal does not apply due to a need for the capacity that is *reasonably forecasted at the time of the agreement’s execution.*” *Id.* at 62,006 (emphasis in original); *see* Oglethorpe Rehearing Order at P 16, JA 103 (“a transmission provider can deny a customer the ability to roll over its long-term firm service contract if the transmission provider includes in the original service



agreement a specific limitation based on reasonably forecasted native load needs”); *see also PSNM*, 82 FERC ¶ 61,127, 61,456 (1998)(“the utility should specify in the contract that the right of first refusal does not apply to that firm service due to a reasonably forecasted need at the time of the contract’s execution”).

### **C. Petitioner’s Interpretation Would Eviscerate The Policy**

As this discussion shows, contrary to Petitioner’s view (Supp.Br. at 16), the requirement that future limits on rollover rights be included in the original TSA did not first arise in *Nevada Power*, but was “fully consistent with the rollover rights policy that [FERC] established in Order No. 888.” Oglethorpe Rehearing Order at P 14, JA 103.<sup>7</sup> Petitioner’s reading of the language, “at the time the contract is executed,” as meaning at the time a rollover, not the original, contract is executed, Supp. Br. 16-17, does not fit the letter or spirit of the rollover rights policy. Section 2.2 of the *pro forma* tariff gives a customer the right to continue service “when the contract expires, rolls over or is renewed.” Order No. 888-A at 30,511. Petitioner’s reading would eviscerate that right by allowing providers to restrict rollover rights at the very time when they are to be exercised.

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<sup>7</sup> This same language appears in all the FERC orders cited by Petitioner at Br. 44 n. 22 as well as in those cases cited at Oglethorpe Rehearing Order at P 14 n. 27, JA 103, and shows that FERC’s view of its policy remained constant in the face of numerous attempts to evade it. Likewise, as the policy originated in Order No. 888, not in *Nevada Power*, as Petitioner claims, the fact that the original Oglethorpe TSA was executed and filed prior to issuance of *Nevada Power* (Supp. Br. 19) is of no moment to whether Petitioner was bound by the requirement that rollover restrictions be contained in that TSA.

Here, the original TSAs had no restrictions on rollover rights, thus providing Williams or Oglethorpe with certainty as to extent of its rollover rights. Yet, one year later, when they exercised those rights, Petitioner sought to place new restrictions through proposed Sections 5.0 and 6.0. Under Petitioner's reading, each year when a customer seeks to roll over, more restrictions could be added. As Petitioner's reading would provide no certainty, it would fail to fulfill one of the policy's major goals. *See* Oglethorpe Rehearing Order at P 18, JA 104 (to allow Petitioner's proposed Sections 5.0 and 6.0 "would have been to ignore the very basis of the rollover rights policy as established by Order No. 888").

Petitioner charges that "the Open Access [Order No. 888] Orders lead to no such understanding," and thus it violated due process to require that restrictions be included in the original TSA. Supp. Br. at 21, citing Br. at 5-10 and 34-43. Petitioner's charge is belied, however, by the Open Access Orders themselves, which identify the very basis of the policy: "*all* firm transmission customers (requirements and transmission-only), upon the expiration of their contracts or at the time their contracts become subject to renewal, should have the right to continue to take transmission service from their existing transmission provider." Order No. 888-A at 30,195, citing Order No. 888 at 31,665 (emphasis in original). Further, this was recognized to be "an ongoing right that may be exercised at the end of all contract terms." *Id.*

A provider knew or should have known from the quoted language that it “is expected to plan its system to accommodate transmission customers’ rollover rights.” Oglethorpe Rehearing Order at P 10 & n. 20, JA 102-03. Requiring that any limits on those rights (and expectation) be identified in the original TSA “assures certainty for all the parties involved.” *PSNM*, 85 FERC at p. 62,006. Customers who enter such contracts know when and to what extent their rollover rights will be limited, while providers must plan and operate their systems with the expectation that customers will roll over existing long-term rights until the time when forecasts show that capacity is needed for use by native load.

[O]nce a transmission provider evaluates the impacts on its system of providing transmission service to a customer and decides to grant such a request (as [Petitioner] did in the case of Oglethorpe), the Commission’s rollover rights policy obligates the transmission provider to plan and operate its system with the expectation that it will continue to provide service to that customer should the customer request rollover of its contract term. Recognizing this obligation, to the extent the transmission provider is already committed to another transmission customer under a previously-confirmed transmission request, it is incumbent upon the transmission provider to reflect that fact in any initial service agreement that it subsequently enters into with other transmission customers.

Oglethorpe Rehearing Order at P 19, JA 104; *see id.* at P 17, JA 104 (giving example).

#### **D. Petitioner Offers No Valid Response**

Petitioner first falls back on a response that it failed to raise on rehearing. This failure means the response -- that the policy rationale behind rollover rights under § 2.2 of the *pro forma* tariff related solely to providing a tie-breaker in the case of competing bids for limited capacity, Br. at 7- 10; *see* Supp. Br. at 21 (referring back to Br. at 5-10) -- cannot be considered by this Court for lack of jurisdiction. FPA § 313(b).

In any event, Petitioner's response is unavailing, as explained in a case where the same point was raised to FERC. "While it is true, as SPP suggests, that Section 2.2. can serve a[s] a tie-breaking mechanism, that provision is not intended to function only as a tie-breaker. In other words, the rollover rights policy is not intended to apply *only* when there are competing and substantially similar firm service requests." *Exelon Gen. Co. v. Southwest Power Pool*, 101 FERC ¶ 61,226 at P 34 (2002)(emphasis in original). Rather, the policy also applies "in the absence of a competing request for service, [where] the transmission provider is obligated under Section 2.2. to grant a request for rollover by an existing long-term transmission customer (assuming that the [TSA] contains no restrictions on rollover rights[)]." *Id.*

Petitioner's second response, which was raised on rehearing, is equally baseless. Petitioner contends that FERC's "'original agreement' requirement was a

new interpretation of FERC precedent and that it altered the rights of regulated entities such that it warranted a notice and comment period.” Supp. Br. at 22, referring to Br. at 35-37. This claim rests on Petitioner’s misreading of the SMD NOPR<sup>8</sup> at PP 121-23 as modifying existing policy. *See* Br. at 36 (“FERC would not have felt the need to clarify it in a formal rulemaking”)(emphasis in original). As the SMD NOPR at P 122 states, however, the clarifications occurred prior to the NOPR: “In several orders, the Commission clarified three significant points;” *see id.* at P 121 (“Since implementation of the existing *pro forma* tariff, the Commission has offered clarifications to various provisions of the tariff”).

The only point (point (2)) in the SMD NOPR relevant here did *not* amount to “a change in [FERC’s] policy with regard to rollover rights.” Oglethorpe Rehearing Order at P 14, JA 103 . Indeed, both that order, *id.* at ns. 27 and 29, and the SMD NOPR, at P 122 n. 79, trace the requirement that rollover restrictions be included in the original TSA back to Order No. 888-A, and list cases that are “fully consistent with the rollover rights policy that we established in Order No. 888.” *Id.* Thus, as the requirement had been clarified long before the SMD NOPR issued, its inclusion there did not reflect a changed policy, but merely incorporated what had already occurred.

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<sup>8</sup> *Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design*, “Notice of Proposed Rulemaking,” 100 FERC ¶ 61,138 at PP 121-23 (2002).

### **E. Requiring Providers To Plan For Point-to-Point Rollover Is Justified**

Petitioner makes a related point, which it failed to raise on rehearing. that the rollover rights policy is inconsistent with Petitioner's view that the Order No. 888 states "transmission providers must plan for and ensure the availability of transmission capacity for native load and network customers, but not for point-to-point customers." Br. 38 (incorporated Supp. Br. 21)(emphasis in original; citations omitted). As Petitioners failed to raise this claim on rehearing, this Court lacks jurisdiction to hear it on review. FPA § 313(b).

In any event, the claim lacks merit. Petitioner's assertion that Order 888-A indicates that reserving capacity for native load and network customers is appropriate because a provider "must plan for and ensure the availability of transmission capacity for native load and network customers, but not for point-to-point customers," Br. at 38, citing Order No. 888-A at 30,306, ignores the very next paragraph. Order No. 888-A at 30,307 states that "in granting a right of first refusal to existing customers, [FERC] afforded existing transmission only point-to-point customers a priority to continue to use the transmission provider's system." Thus, the policy requires that a provider must also plan for and assure the availability of capacity for point-to-point transmission customers. *E.g.*, Order No. 888-A at 30,198.

Likewise, Petitioner's related assertion – that “because point-to-point customers pay only for the capacity that they reserve (leaving native load and network customers to pay for the balance of the transmission system),” providers should not be obligated to plan and operate their system to accommodate point-to-point rollover service (Br. 39) – cannot be heard now because it was not raised on rehearing, FPA § 313(b), and is, in any event, meritless.

Petitioner fails to recognize that network service (available to native load and network customers) allows a customer “to fully integrate load and resources on an instantaneous basis in a manner similar to the transmission owner's integration of its own load and resources.” Order No. 888 at 31,646; *see* Order No. 888-A at 30,530, Part 28 (“Nature of Network Integration Transmission Service”). In other words, those customers pay for and have the right to call on all facilities within the system to serve their needs. In contrast, point-to-point service limits a customer's use of the system to service between two points. *Id.* at 30,510, § 1.35 (“Point-to-Point Transmission Service”). Consequently, point-to-point customers pay for only the network facilities they can actually use, and not for those that they cannot. Both situations thus follow cost causation principles.

Further, Petitioner's implication that, because native load and network customers bear a greater payment risk than do point-to-point customers, providers should have to plan only for native load and network service (Br. 38) is wrong. The

payments made by point-to-point customers, in fact, reduce capacity charges to native load and network customers. Order No. 888-A at 30,220 (native load and network customers “must pay all of the system’s fixed costs *that are not covered by the proceeds of point-to-point service*”)(emphasis added). To the extent that point-to-point customers continue to roll over service, benefits flow not only to them, but also to native load and network customers in the form of reduced capacity costs. It follows that requiring a provider to plan and operate for continued rollover service is warranted as beneficial to all system customers.

#### **F. The Policy Created Clear Expectations**

Petitioner complains that it is “expected to glean the agency’s ‘implicit’ assumption from its various statements, as opposed to acting in reliance with its express language.” Br. 40. That charge arises from FERC’s statement that the rollover rights policy “‘applies to existing capacity and does not require a transmission provider to build additional capacity in response to a request to rollover transmission service.’” Oglethorpe Rehearing Order at P 35, JA 107, citing *Idaho Power Co.*, 95 FERC ¶ 61,224 at 61,759 (2001).

Petitioner interpreted that statement to mean it could deny a request made at the end of a contract term to roll over an existing TSA “if it did not have sufficient capacity to meet the request.” Br. 40. FERC disagreed, finding that “[i]mplicit” in its policy was “the expectation that the transmission provider had already studied



the impacts of its existing [transmission] system . . . and determined it could provide t[he requested] service (including any rollover if requested) using its existing system.” *Id.* Even if that expectation may have been implicit, it hardly required that Petitioner divine a hidden meaning (Br. 40) that was not apparent from the time the policy was instituted in Order No. 888. Rather, the Commission reasonably expected that Petitioner would evaluate its system at the time of the “original request” for long-term transmission service “to determine whether or not it had available existing capacity to serve Oglethorpe, taking into account Oglethorpe’s right to renew or roll over.” Oglethorpe Rehearing Order at P 36, JA 107; *see* Order No. 888-A at 30,198 (restrictions to rollover rights must be based on “reasonably forecasted need at the time the contract was executed”).

Contrary to Petitioner’s claim (Br. 40), Order Nos. 888 and 888-A gave sufficient notice of what was required. To make a reasonable forecast of future need at the time a contract is executed necessarily requires an evaluation of current and expected demands to determine if and for how long transmission service, with rollover rights, can be served with existing capacity. It is a simple matter then to include restrictions in that contract on how long rollover rights, if at all, can be exercised. FERC reasonably expected providers to undertake such an evaluation prior to entering the original TSA as a matter of prudent system planning.

Nonetheless, the unexpected can happen. Where “constraints arise after a transmission provider enters into a long-term agreement with a transmission customer (and that agreement contains no restrictions on the transmission customer’s rollover rights),” so that all “existing customers’ contracts” can no longer be satisfied, the provider “has the choice of either implementing the curtailment procedures set forth in its OATT or building additional transmission facilities to relieve the constraint.” Oglethorpe Rehearing Order at P 36, JA 107.

Further, Petitioner’s purported concerns had no practical effect in the instant matter. First, the restrictive language Petitioner sought to add “upon the first rollover of the Oglethorpe service agreement,” applied to service reservations that “were submitted prior to Oglethorpe’s initial request for service.” *Id.* at P 18, JA 104. Thus, Petitioner knew of the service reservations prior to execution of the original TSA, yet chose not to include those reservations at a limit to rollover rights at that time, as allowed by FERC’s policy. Second, when Oglethorpe made its rollover request at the end of each contract term, there was “no showing of any actual conflict in demands for capacity” on Petitioner’s system. *Id.* at P 38, JA 107. Thus, Petitioner was not faced with a choice between curtailment or building additional facilities to provide the requested rollover service, but merely presented “a hypothetical set of circumstances.” *Id.*

Finally, Petitioner claims that its proposed Section 5.0 was adopted to implement the first-come, first-served policy set forth in Section 13.2 of the *pro forma* and Petitioner's OATT. Br. 42-43. While Section 13.2 does adopt a first-come, first-served approach to allocating capacity, it "*also* states that reservation priorities for existing firm service customers are provided in section 2.2." Oglethorpe Rehearing Order at P 23, JA 105 (emphasis in original); *see* Order No. 888-A at 30,516 (last sentence in § 13.2). Section 2.2 gives existing firm customers, such as Oglethorpe, "the right to continue to take transmission service from the Transmission Provider when the contract expires, rolls over or its renewed." *Id.* at 30,511. As Oglethorpe "properly complied with the requirements to exercise its rollover right and no limitations were contained in the original service agreement," there is no conflict with Section 13.2, and no need for proposed Section 5.0. Oglethorpe Rehearing Order at P 23, JA 105.

## CONCLUSION

For the reasons stated, the petitions should be dismissed, or, if they are not, the challenged Commission orders should be affirmed in all respects.

Respectfully submitted,

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