ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 06-1003

EAST KENTUCKY POWER COOPERATIVE, INC.
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

JOHN S. MOOT
GENERAL COUNSEL

ROBERT H. SOLOMON
SOLICITOR

JEFFERY S. DENNIS
ATTORNEY

FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

JANUARY 26, 2007

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CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

All parties and intervenors appearing below and in this Court are listed in Petitioner's brief. There are no amici.

B. Rulings Under Review:

1. *Transmission Owners of the Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,339 (2006) ("Initial Order"), JA 8.

2. *Transmission Owners of the Midwest Independent Transmission System Operator, Inc.*, 113 FERC ¶ 61,122 (2006) ("Rehearing Order"), JA 34.

C. Related Cases:

This case has not previously been before this Court or any other court. However, eleven Commission orders addressing the approval of the Midwest Independent Transmission System Operator, Inc. ("Midwest ISO") as a regional transmission organization and its administration and operation of spot energy markets are currently on appeal in a comprehensive case before this Court in *Wisconsin Public Power Inc., et al. v. FERC*, Nos. 04-1414, *et al.* (D.C. Cir. filed Dec. 7, 2004 and later).

In those orders, the Commission addressed a cost allocation issue related to the issue presented in the instant case. Specifically, the Commission required that the costs incurred by the Midwest ISO to administer and operate its energy markets

be allocated to all users of the Midwest ISO grid, including parties to grandfathered transmission contracts that pre-date the ISO's formation. Those costs are collected by the Midwest ISO through charges assessed under Schedule 17 of its filed tariff. In the instant proceeding, the Commission's orders approved Schedule 23 of the Midwest ISO's filed tariff, which is a mechanism to collect the Schedule 17 charges assessed to transactions under the grandfathered agreements from the customers to those agreements. The approval of Schedule 23 is not at issue in *Wisconsin Public Power Inc., et al.*

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Jeffery S. Dennis
Attorney

January 26, 2007

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GLOSSARY

East Kentucky	East Kentucky Power Cooperative, Inc.
FERC or Commission	Federal Energy Regulatory Commission
FPA	Federal Power Act
Initial Order	*Transmission Owners of the Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,339 (2005)
Intervenors	Midwest Municipal Transmission Group and Dairyland Power Cooperative
Midwest ISO Transmission Owners	*Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361 (D.C. Cir. 2004)
Midwest ISO	Midwest Independent Transmission System Operator, Inc.
Opinion No. 453	*Midwest Independent Transmission System Operator, Inc.*, 97 FERC ¶ 61,033 (2001)
Opinion No. 453-A	*Midwest Independent Transmission System Operator, Inc.*, 98 FERC ¶ 61,141 (2002)
Rehearing Order	*Transmission Owners of the Midwest Independent Transmission System Operator, Inc.*, 113 FERC ¶ 61,122 (2005)
Schedule 10	Midwest ISO tariff provision to recover the costs of operating the ISO
Schedule 17	Midwest ISO tariff provision to recover the costs of developing and operating energy markets

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether orders of the Federal Energy Regulatory Commission ("Commission" or "FERC") approving a new rate schedule to collect the costs of operating a regional transmission organization, from all transmission customers that benefit from the operation of that organization, were reasonable and consistent with its prior determinations.

STATUTES AND REGULATIONS

The relevant statutes and regulations are contained in the Addendum to this brief.

STATEMENT OF THE CASE

The orders on review in this case are just two in a series of Commission orders concerning the formation and administration of the Midwest Independent Transmission System Operator, Inc. ("Midwest ISO"). These proceedings have required the Commission to address numerous difficult issues arising from the creation of a new independent operator of the electric transmission system and the resulting transformation of the way electricity is bought, sold and distributed in the Midwest ISO region. Earlier Commission orders in this series addressing cost allocation issues similar to those presented here were upheld by this Court in *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361 (D.C. Cir. 2004) ("*Midwest ISO Transmission Owners*"). Eleven of the Commission's more recent orders addressing the operation and administration of Midwest ISO "Day 2" energy markets are on appeal in a comprehensive case before this Court, *Wisconsin Public Power Inc., et al. v. FERC*, Nos. 04-1414, *et al.* (D.C. Cir. filed Dec. 7, 2004 and later).

The two orders on appeal in this case address only one narrow issue: the appropriate method to recover certain Midwest ISO costs from customers to

transmission contracts that predate the 1998 formation of the ISO and that were "grandfathered" during the ISO's formation. The challenged orders approved a tariff filing by the public utilities that own the transmission facilities controlled and operated by the Midwest ISO to add Schedule 23 to the Midwest ISO Transmission and Energy Markets Tariff (Tariff). As described in more detail below, Schedule 23 recovers certain Midwest ISO costs directly from customers taking service under grandfathered transmission service contracts. *See Transmission Owners of the Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,339 (2005) ("Initial Order"), JA00008, *order on rehearing*, 113 FERC ¶ 61,122 (2005) ("Rehearing Order"), JA00034.

STATEMENT OF FACTS

I. Statutory and Regulatory Background

Under Section 201(b) of the Federal Power Act ("FPA"), 16 U.S.C. § 824(b), the Commission has exclusive jurisdiction to regulate the transmission and sale at wholesale of electric energy in interstate commerce. Section 205(c) of the FPA, 16 U.S.C. § 824d(c), requires public utilities to file tariff schedules with the Commission showing their rates and terms of service, along with related contracts, for service subject to FERC jurisdiction. When those tariff schedules are filed, Sections 205(a)-(b) of the FPA, 16 U.S.C. §§ 824d(a)-(b), direct the Commission to assure that the rates and services described in the tariff are just and reasonable

and not unduly discriminatory. The Commission may also institute investigations of existing rates and services on complaint or on its own motion. *See* FPA § 206(a), 16 U.S.C. § 824e(a).

Historically, electric utilities were vertically integrated monopolies that owned electric generating facilities, transmission lines and distribution systems, and sold all of these services as a "bundled" package to their customers. *See Midwest ISO Transmission Owners*, 373 F.3d at 1363 (describing the historic structure of the electric utility industry). In recent years, however, the generation, transmission and distribution functions have become increasingly "unbundled," leading to an increase in competitive markets for the sale of electric energy. *See New York v. FERC*, 535 U.S. 1, 5-14 (2002) (describing technological advances and legislative initiatives promoting competitive wholesale electric markets).

To foster the further development of competitive markets, the Commission issued Order No. 888, which directed utilities to offer non-discriminatory, open access transmission service.[1] To implement this directive, the Commission

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[1] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

ordered "functional unbundling," which required each utility to state separate rates for its wholesale generation, transmission and ancillary services, and to take transmission service used to transmit its own wholesale sales and purchases on a non-discriminatory basis under the same terms provided to others. *See New York v. FERC*, 535 U.S. at 11.

As a potential means to accomplish the Commission's open access goals, Order No. 888 encouraged, but did not direct, the formation of independent system operators ("ISOs") to operate regional, multi-system transmission grids. *See* Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,730-32 (announcing certain principles to guide future consideration of ISO proposals).

After gaining experience with initial ISO proposals, the Commission issued Order No. 2000, which encouraged the formation of Regional Transmission Organizations (RTOs) to address regional reliability concerns and foster wholesale competition over broader geographic areas.[2] Order No. 2000 announced certain minimum characteristics and functions of an RTO. It also directed all transmission-owning utilities to make filings proposing to participate in an RTO or explaining their efforts to participate in an RTO. Order No. 2000 further directed

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[2] *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs., Regs. Preambles ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,092 (2000), *appeals dismissed sub nom. Public Utility District No. 1 of Snohomish County v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

the utility members of a Commission-approved ISO (like the Midwest ISO) to make filings showing that the ISO meets the minimum characteristics and functions of an RTO.

II. Development of the Midwest ISO

On January 15, 1998, ten Midwestern transmission-owning utilities first applied for approval of the Midwest ISO, submitting to the Commission plans to transfer operational control of their transmission facilities to the Midwest ISO and an ISO-wide open access transmission tariff. The Commission conditionally approved the proposal, finding that it generally satisfied the ISO principles announced in Order No. 888. *See Midwest Independent Transmission System Operator, Inc.*, 84 FERC ¶ 61,231 (1998) ("ISO Formation Order"). Following approval, all new wholesale and existing unbundled retail transmission services began taking service immediately under the rates, terms and conditions of the open access tariff, while all existing bilateral agreements under which the transmission owners were providing service for wholesale loads ("grandfathered agreements") would be placed under the tariff after a six-year transition period. *Id*. at 62,167, 62,169-70. Certain rate issues were set for evidentiary hearing, including a proposed "cost adder" to recover the ISO's operating costs. *Id*. at 62,167.

On January 16, 2001, the Midwest ISO submitted a filing (pursuant to Order No. 2000) asserting that its current structure satisfied the RTO requirements. On

December 20, 2001, the Commission conditionally granted the Midwest ISO RTO status, and directed that it take further steps to become a fully-functional RTO. *Midwest Independent Transmission System Operator, Inc.*, 97 FERC ¶ 61,326 (2001) ("RTO Formation Order").

Meanwhile, with regard to the rate matters set for hearing in the ISO Formation Order, the Commission affirmed an administrative law judge's finding that "Schedule 10," the cost adder to collect the costs of developing and running the Midwest ISO, should be allocated to all market participants that benefit from the Midwest ISO's operations. The Commission concluded that the beneficiaries responsible for a share of the ISO's administrative costs should include parties to grandfathered agreements. *See Midwest Independent Transmission System Operator, Inc.*, 97 FERC ¶ 61,033 at 61,169 (2001) ("Opinion No. 453"). Because the RTO must be the only provider of transmission service over the facilities under its control, *id*. at 61,169-70, the Commission directed all transmission-owning members of the Midwest ISO to serve their grandfathered agreement customers under the rates, terms and conditions of the Midwest ISO tariff. *See Midwest Independent Transmission System Operator, Inc.*, 98 FERC ¶ 61,141 at 61,413 (2002) ("Opinion No. 453-A"); *see also Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,192 (2003), *order on reh'g*, 104 FERC ¶

61,012 (2003). (The Commission's determinations in this series of orders were upheld by this Court in *Midwest ISO Transmission Owners*.)

In response to the RTO Formation Order, in late 2002 and 2003, Midwest ISO made several filings seeking approval as a fully functional "Day 2" RTO, including approval of its operation of a bid-based energy spot market. The Commission recognized early on that a "threshold issue" presented by Midwest ISO's proposal was the treatment of approximately 300 grandfathered agreements that would remain in place, and established proceedings before administrative law judges to gather more information about those agreements. *See Midwest Independent Transmission System Operator, Inc.*, 107 FERC ¶ 61,191 (2004).

Following the conclusion of those proceedings, the Commission issued a detailed order addressing the treatment of grandfathered agreements in Midwest ISO's new energy markets. As relevant here, the Commission concluded that charges under Schedule 17, through which the Midwest ISO recovers the costs incurred to run its energy markets,[3] should be assessed to all transactions under grandfathered agreements, since the benefits provided by the Midwest ISO flow to both grandfathered and non-grandfathered agreements. *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,236 at P 297-98 (2004)

[3] When Schedule 17 was developed, certain costs included in Schedule 10 but associated with energy market service were "unbundled" from Schedule 10 into Schedule 17. *See Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,235 at P 29-32, 43 (2004).

(citing *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,235 (2004) (companion order approving components of Schedule 17 and describing benefits from regional energy markets enjoyed by parties to bilateral contracts)). The Commission rejected at that time, however, calls to directly charge Schedule 17 costs to customers under the grandfathered agreements, again finding the record evidence regarding the grandfathered agreements insufficient to rule. *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,236 at P 302; *see also Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,042 (2005) (order on rehearing). (The Commission's determinations in this series of orders are under review in this Court in the pending *Wisconsin Public Power Inc., et al.* appeals in Nos. 04-1414, *et al.*)

III. Challenged Orders

In the specific orders under review here, the Commission addressed a proposal by the transmission-owning members of the Midwest ISO to add Schedule 23 to the Midwest ISO tariff. *See* Initial Filing of Midwest ISO Transmission Owners (Jan. 13, 2005), JA 00067. Schedule 23 provides a mechanism for the recovery from customers to grandfathered transmission contracts of: Schedule 10 charges, which recover the costs of running the Midwest ISO; and Schedule 17 charges, which recover the costs of developing and running Midwest ISO's energy markets. The transmission owners submitted proposed

Schedule 23 in response to the Commission's ruling in its previous orders on the development of the Midwest ISO that it did not have enough information to permit Schedule 10 and Schedule 17 charges to be passed-through to grandfathered customers.

In its March 24, 2005 order, *Transmission Owners of the Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,339 (2005) ("Initial Order"), JA00008, FERC conditionally accepted Schedule 23.[4] The Commission reasoned that the Schedule 10 and Schedule 17 charges to be collected from customers to grandfathered agreements through Schedule 23 recover the costs associated with the benefits provided by the Midwest ISO to all users of the Midwest ISO grid, including customers to grandfathered agreements. Initial Order at PP 31-35, JA00021-00023. These benefits, previously identified by the Commission in Order No. 2000 and Opinion Nos. 453 and 453-A (among other orders), include regional transmission pricing, regional transmission system planning, and improved grid reliability and efficiency. *Id*. (citing earlier orders).

In response to arguments that the benefits identified by the Commission are not realized by customers to grandfathered agreements, because they do not use the Midwest ISO's energy markets or because their grandfathered contracts already

[4] The Initial Order required Midwest ISO to make certain modifications to Schedule 23 to identify credits received by transmission owners that must be offset against Schedule 23 charges. Initial Order at P 55, JA00030.

provide such benefits, the Commission concluded that the Midwest ISO provides fundamentally new services and benefits that are different than those provided under the grandfathered agreements. *See* Initial Order at P 38, JA00024 (noting that ISO services cannot "be duplicated or provided by any party operating in a smaller footprint than the Midwest ISO"). Accordingly, the Commission held that the costs to be recovered under Schedule 23 are "separate and distinct from the costs that the Midwest ISO [transmission owners] recover under" the grandfathered agreements. *Id.* Further, responding to parties' assertions that the Commission had already denied recovery of Schedule 10 and 17 charges from customers to grandfathered contracts in its previous orders, the Commission noted that the earlier proposals to collect those charges were unsupported and did not explain whether the grandfathered contracts already address responsibility for those charges. *Id.* at P 39, JA0024-00025.

FERC denied requests for rehearing of the Initial Order on November 2, 2005. *Transmission Owners of the Midwest Independent Transmission System Operator, Inc.*, 113 FERC ¶ 61,122 (2005) ("Rehearing Order"), JA00034. The Commission reiterated its conclusion that the benefits provided by the Midwest ISO "could not have been provided by the Midwest ISO [transmission owners] to the [grandfathered agreement] customers prior to the advent of the Midwest ISO," and thus the costs of providing those benefits (to be collected under Schedule 23)

"are separate and distinct from the costs that the Midwest ISO [transmission owners] recover under current [grandfathered agreement] provisions." *Id*. at P 30, JA00047 (quoting Initial Order at P 38, JA00024). The Commission also affirmed its holding that accepting Schedule 23 did not contradict its prior orders rejecting proposals to directly assign Schedule 10 and 17 charges to grandfathered customers. Rehearing Order at PP 32, 44, JA00048, 00054.

The Commission also rejected assertions that it should have conducted a case-by-case review of each grandfathered agreement subject to Schedule 23. It concluded that such review was unnecessary because the benefits provided by the Midwest ISO are new services that were not and could not have been provided by the individual transmission owners under the grandfathered agreements. *Id.* at P 39, JA00051-00052. Moreover, Schedule 23 assures that transmission owners will not pass through Schedule 10 and 17 costs already recovered under individual grandfathered agreements. *Id.*

SUMMARY OF ARGUMENT

The orders challenged here are just two in a series of FERC orders addressing the complex issues raised by the formation of the Midwest ISO and its operation and administration of the regional transmission grid and spot energy markets. The issue raised here is a narrow one: the appropriate method to recover Midwest ISO costs allocated to transactions made under grandfathered transmission contracts that pre-date the ISO's formation.

This Court has already concluded, in *Midwest ISO Transmission Owners*, that Midwest ISO costs are appropriately allocated to all loads using the grid, including grandfathered loads, because of the benefits the Midwest ISO brings to those loads. Accordingly, the only remaining issue with regard to grandfathered loads was whether the Midwest ISO costs allocated to those loads could be collected from the customers to the grandfathered agreements, or whether those agreements already recovered such costs. In the orders under review here, the Commission reasonably concluded that the allocated costs of operating the Midwest ISO and its energy markets (collected under Schedule 10 and 17) are associated with new services not previously provided under the grandfathered agreements. Accordingly, the Commission appropriately held that those costs were not already collected under the rates charged in the grandfathered agreements,

and that they could be collected from the customers to those agreements through a new proposed rate schedule, Schedule 23.

The Commission's conclusion in the challenged orders was consistent with its prior pronouncements regarding the collection of Midwest ISO costs from grandfathered customers and was not barred by *res judicata* or collateral estoppel. Moreover, contrary to the suggestions of Petitioner and Intevenors, a high "public interest" standard of review is not implicated by the challenged orders, and those orders do not overstep the Commission's jurisdiction under the FPA.

ARGUMENT

I. Standard of Review

The Commission's orders are reviewed under the arbitrary and capricious standard of the Administrative Procedure Act. *See, e.g., Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). Under this standard, the court "will affirm the Commission's orders so long as FERC 'examined the relevant data and articulated a . . . rational connection between the facts found and the choice made.'" *Midwest ISO Transmission Owners*, 373 F.3d at 1368 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 26, 43 (1983)). Further, "in light of the technical nature of rate design," review of the Commission's ratemaking determinations is "highly deferential."

Entergy Servs., Inc. v. FERC, 319 F.3d 536, 541 (D.C. Cir. 2003) (citing *Sithe/Independence Power Partners*, 165 F.3d at 948).

II. The Challenged Orders Are Only Two in a Long Series of Orders Addressing the Administration and Operation of the Midwest ISO and Its Energy Markets.

The orders on appeal here do not stand alone, and should be considered in context. Over the past several years, the Commission has issued numerous orders addressing difficult issues raised by the formation of the Midwest ISO and its administration and operation, and the resulting transformation of the way electricity is sold and distributed in the Midwest ISO region. Prominent among those issues has been the allocation of the costs of the Midwest ISO. This Court, in *Midwest ISO Transmission Owners*, addressed several of the Commission's orders in this series, and affirmed the Commission's determinations with regard to the allocation of Midwest ISO costs to grandfathered transmission customers. Eleven more orders concerning the administration and operation of Midwest ISO energy markets are part of a comprehensive appeal before this Court, *Wisconsin Public Power Inc., et al. v. FERC*, Nos. 04-1414, *et al*. The two orders challenged by Petitioner, East Kentucky Power Cooperative, Inc. ("East Kentucky"), in this case are just part of this broader set of orders, and the issue raised here is little different from the issues that were decided by the Court in *Midwest ISO*

Transmission Owners, or that will be decided by this Court in *Wisconsin Public Power, Inc., et al.*

Most relevant to the issue raised in this appeal are Opinion No. 453 and the orders that followed it. *See supra* pp. 7-8 (discussing orders). Importantly, in that proceeding the Commission directed that all load, including load served under grandfathered agreements, be placed and served under the Midwest ISO's Tariff. Opinion No. 453 at 61,170; Opinion 453-A at 61,413. As a result, transmission owners were required to take service under the Midwest ISO Tariff to meet their obligations under the grandfathered agreements. *Id.* Further, addressing cost allocation issues raised as part of the initial proposal to form the Midwest ISO, the Commission affirmed the determination of an administrative law judge that charges under Schedule 10 (the "cost adder" that recovers the costs of operating the ISO) should be assessed to all load served over the ISO grid, including load served under grandfathered agreements. Opinion No. 453 at 61,169. The Commission reasoned that all users of the Midwest ISO grid will benefit from the ISO's regional, multi-state perspective, its operational and planning responsibilities, and the resulting increase in grid reliability, and thus all load (including grandfathered load) should be included in the divisor used to calculate Schedule 10 charges. *Id.*; *see also* Opinion No. 453-A at 61,413.

On review of the Opinion No. 453 series, in *Midwest ISO Transmission Owners*, this Court affirmed the Commission's cost allocation determinations, holding that "FERC reasonably allocated the Cost Adder to all loads using the [Midwest ISO] transmission system," including grandfathered loads. 373 F.3d at 1370. Noting that "'upgrades designed to "preserve the grid's reliability" . . . "are presumed to benefit the entire system,"'" citing *Entergy Servs.*, 319 F.3d at 543 (quoting *Western Massachusetts Elec. Co. v. FERC*, 165 F.3d 922, 923, 927 (D.C. Cir. 1999)), this Court stated that grandfathered loads would receive several benefits from the presence of the Midwest ISO. *Midwest ISO Transmission Owners*, 373 F.3d at 1369-71. The Court identified those benefits as: enhanced security and reliability, "'an overall reduction in the cost of transmitting energy within the region,' and 'large scale regional coordination and planning of transmission.'" *Id.* at 1371 (quoting from FERC orders). While customers receiving service under grandfathered agreements were "not in some sense using the ISO," they still "benefit from having an ISO," and, consistent with established cost causation principles, should share in the cost of having the ISO. *Id.*

Later orders addressing the Midwest ISO's status as an RTO and its proposal to establish "Day 2" energy markets, on appeal in *Wisconsin Public Power Inc., et al.*, Nos. 04-1414, *et al.*, also addressed issues regarding the allocation of costs to customers taking service under grandfathered agreements. In those proceedings,

the allocation of Schedule 17 charges (through which the Midwest ISO collects the costs of administering its energy markets) was at issue. Like it did with regard to Schedule 10 in the Opinion No. 453 proceedings, the Commission held that all entities using the Midwest ISO grid (including customers to bilateral contracts and customers under grandfathered agreements) benefit from the energy markets, and thus Schedule 17 charges should be assessed on all transactions under grandfathered agreements. *See Midwest Independent Transmission System Operator*, 108 FERC ¶ 61,236 at P 298; *see also Midwest Independent Transmission System Operator*, 108 FERC ¶ 61,235 at P 44 (holding that parties to bilateral transactions outside of the energy markets benefit from increased reliability brought by the energy markets).

The issue raised in the instant case is little different from the Schedule 10 cost allocation issue decided by this Court in *Midwest ISO Transmission Owners*, and is little different from the Schedule 17 allocation issue presented in *Wisconsin Public Power, Inc., et al.* As discussed in more detail below, the Commission's conclusion that Schedule 23 is a reasonable mechanism to charge customers to grandfathered agreements directly for Schedule 10 and 17 costs allocated to grandfathered transactions should be affirmed for the same reasons that this Court affirmed the allocation of Midwest ISO costs to grandfathered agreements in *Midwest ISO Transmission Owners*. The Commission orders on review here are

consistent with this Court's holding in that case and the Commission's own precedent, are reasonable in all other respects, and should be upheld.

III. The Commission's Acceptance of Schedule 23 Was Reasonable

A. Schedule 23 Is a Reasonable Mechanism for Collecting Midwest ISO Costs Allocated to Grandfathered Transactions

The Commission reasonably concluded in the challenged orders that Schedule 23 is a reasonable mechanism for collecting from grandfathered customers the Schedule 10 and 17 charges already assessed to transactions under their grandfathered agreements. As noted above, this Court already has concluded that Midwest ISO costs may, consistent with cost causation principles, reasonably be allocated to all users of the Midwest ISO grid, including bundled retail and grandfathered load, since the benefits provided by the existence of the ISO flow to all who transact on the grid. *Midwest ISO Transmission Owners*, 373 F.3d at 1368-71. If the costs of operating the Midwest ISO can be allocated to all users of the grid, then those costs can surely be collected from all users of the grid according to their allocation. There is no difference between the basic issue of whether Midwest ISO costs can be allocated to all grid users, which *Midwest ISO Transmission Owners* answered in the affirmative, and the ability to actually collect those costs, and East Kentucky and supporting Intervenors offer no useful distinction.

Given that the underlying cost allocation issue had already been decided by this Court, the remaining issue to be resolved in the context of grandfathered agreements was how to collect the costs allocated to grandfathered transactions, given the pre-existing contractual relationships. Specifically, the Commission had to decide whether: (1) the grandfathered agreements already provided for the benefits and services attributable to the Midwest ISO, in which case the costs of the Midwest ISO benefits and services would already be recovered through the rates under those agreements; or (2) the benefits and services provided by the Midwest ISO and its energy markets were new and not previously provided, and thus not recovered through the rates in the existing contracts. *See* Initial Order at P 39, JA00024-00025 ; *see also* Rehearing Order at PP 32, 44, JA00048, 00054 (noting that transmission owners had not supported previous proposals to pass through Midwest ISO costs "on the basis of providing new services" and had not identified "whether or not the contracts already address responsibility for such costs").

Earlier proceedings failed to provide the Commission with enough information to make that decision. The Midwest ISO transmission owners' filing in the instant proceeding brought this issue squarely before the Commission. Their filing asserted that the Schedule 10 and 17 charges associated with the costs of operating the Midwest ISO and its energy markets were not recovered under the

grandfathered agreements because the benefits brought by the Midwest ISO represent new services not previously provided under those pre-ISO contracts. *See* Initial Filing of Midwest ISO Transmission Owners, Exhibit No. MISO TOs-1 (Testimony of Alan C. Heintz), JA00094-00106.

The transmission owners' analysis in their initial filing was not new. The Commission earlier employed such an analysis to approve an individual transmission owner's proposal, in another region with an ISO, to recover the ISO costs incurred in providing service to customers under pre-existing contracts through a separate tariff provision. Initial Order at PP 28-30, JA00020-00021, citing *California Independent System Operator Corp.*, Opinion No. 463, 103 FERC ¶ 61,114 (2003), *order on reh'g*, 106 FERC ¶ 61,032 (2004). In approving this separate tariff provision, the Commission affirmed the holding of an administrative law judge that California ISO's regional planning and operation of the grid was significantly different than the previous utility-specific planning and operation, could not be duplicated or provided by an individual entity operating in a smaller area than the California ISO's footprint, and thus could not have been provided by the transmission owner under the pre-existing contract. *See* 103 FERC ¶ 61,114 at PP 41-46, 106 FERC ¶ 61,032 at PP 25-28.

In the challenged orders, the Commission followed the analysis of its earlier California orders to determine whether the grandfathered agreements already

provide for the Midwest ISO benefits identified by the Commission and this Court in *Midwest ISO Transmission Owners*, and thus whether the rates under those agreements already recover the costs associated with such benefits. The Commission first reiterated the benefits brought by the Midwest ISO, both with regard to its operation of the transmission grid (as confirmed by *Midwest ISO Transmission Owners*) and its operation of energy markets. *See* Initial Order at PP 31-35, JA00021-00023; Rehearing Order at PP 34-37, JA00049-00050. These benefits include independent and regional grid planning (instead of a utility-by-utility approach), enhanced reliability, increased efficiency in the siting of facilities, more effective management of grid congestion to accommodate greater power flows, access to spot power markets, and price transparency to facilitate bilateral contract formation. *Id.*

On the basis of these findings, and consistent with its precedent, the Commission concluded here:

> [T]he services associated with . . . [S]chedules 10 and 17, as a whole, represent a monumental transformation with respect to the way that electricity is sold and distributed in the Midwest ISO region – a change that will bring substantial benefits to all those transacting over the Midwest ISO grid, including [grandfathered agreement] customers. These services cannot be duplicated or provided by any party operating in a smaller footprint than the Midwest ISO. These services, therefore, could not have been provided by the Midwest ISO [transmission owners] to the . . . [grandfathered agreement] customers prior to the advent of the Midwest ISO, and the costs that the Midwest ISO [transmission owners] propose to pass through to [grandfathered agreement] customers under [S]chedule 23 thus are separate and

> distinct from the costs that the Midwest ISO [transmission owners] recover under current [grandfathered agreement] provisions.

Initial Order at P 38, JA00024.

This analysis, and the Commission's resulting approval of Schedule 23, was entirely reasonable and wholly consistent with the principle of *Midwest ISO Transmission Owners* that all users of the grid benefit from the operation of the ISO, and thus should share in its costs. The "new services" analysis used by the Commission was a reasonable approach to considering the difficult issue of how to collect the Midwest ISO costs allocated to grandfathered transactions, given pre-existing contractual relationships. The Commission's conclusion that the benefits brought by the Midwest ISO were not provided previously by individual transmission owners under the grandfathered agreements, and therefore that the costs to be collected under Schedule 23 are "separate and distinct" from the costs collected under the grandfathered agreements, finds adequate support in the record, particularly the evidence offered by transmission owners in support of their filing in the instant proceeding. *See* Initial Filing of Midwest ISO Transmission Owners (Jan. 13, 2005), Exhibit No. MISO TOs-1 (Testimony of Alan C. Heintz) at 9-10, JA00102-00103 (describing benefits and services provided by Midwest ISO that were not available when grandfathered agreements were entered into).

Given the complexity of accounting for and honoring the grandfathered contracts in the midst of the "monumental transformation with respect to the way

that electricity is sold and distributed in the Midwest ISO region," Initial Order at P 38, JA00024, the Commission's reasoning, supported by both its earlier findings in its Opinion No. 453 orders concerning Midwest ISO benefits and the evidence in the record establishing that those benefits represent new services not previously provided, was a reasonable exercise of its ratemaking discretion. *See Western Massachusetts Elec. Co.*, 165 F.3d at 928 ("[W]e are obliged to defer to the Commission's technical ratemaking expertise so long as it has supplied sufficient reasoning backed up by substantial evidence.") (citations omitted); *see also, e.g., Entergy Servs., Inc. v. FERC*, 391 F.3d 1240, 1249 (D.C. Cir. 2004) (Commission may appropriately justify action through adoption of a prior ruling).

East Kentucky argues only that no "service" is provided under Schedule 10 or Schedule 17, and that those schedules only recover the Midwest ISO's "administrative costs." Pet. Br. at 23-24. East Kentucky's "no service" argument ignores, however, the unequivocal conclusion of this Court in *Midwest ISO Transmission Owners* that all users of the Midwest ISO transmission grid benefit from *having* an ISO and, consistent with established principles of cost causation, should share in the costs of the ISO. The Midwest ISO provides "system enhancements [that] are presumed to benefit the entire system," *Midwest ISO Transmission Owners*, 373 F.3d at 1369, and, under Court-approved Commission policy, the cost of such enhancements are assigned "to all customers on an

integrated transmission grid." *Western Massachusetts Elec. Co.*, 165 F.3d at 927. East Kentucky's "administrative costs" contention also fails to discredit the Commission's analysis, since the Schedule 10 and 17 charges do in fact recover the "administrative costs" of the Midwest ISO; that is, the administrative costs of "*having* an ISO," from which "grandfathered loads draw . . . benefits." *Midwest ISO Transmission Owners*, 373 F.3d at 1371 (emphasis in original).

B. The Challenged Orders Are Consistent with the Commission's Prior Orders Concerning the Formation of the Midwest ISO and Are Not Barred by Preclusion Doctrines.

East Kentucky argues that, by approving the recovery of Schedule 10 and 17 charges through Schedule 23, the Commission departed from its prior policies requiring that RTOs honor grandfathered contracts. *See* Pet. Br. at 28-37. Intervenors similarly argue that the Commission violated principles of *res judicata* and collateral estoppel by ignoring its prior orders denying the recovery of Midwest ISO costs from customers under grandfathered agreements. Interv. Br. at 17-21.

The Commission's orders here were consistent with its prior rulings on the pass through of Midwest ISO costs to customers under grandfathered agreements, and did not violate any relevant preclusion doctrines. *See* Initial Order at P 39, JA00024-00025; Rehearing Order at PP 32, 44, JA00048, 00054. With regard to the recovery of Schedule 10 charges for ISO operation, the Commission earlier

held in Opinion No. 453 and subsequent orders that its policy is to "review . . . the interaction between existing contracts and new RTO service . . . on an RTO-by-RTO basis," Opinion No. 453-A at 61,414. The Commission earlier could not make a definitive cost recovery decision because the transmission owners in the Midwest ISO had not provided sufficient evidence that they would be unable to recover Schedule 10 charges as a result of the Commission's rulings or sufficient information regarding the grandfathered agreements themselves, including whether the rates under them already collected Schedule 10 charges. *See Midwest Independent Transmission System Operator,* 102 FERC ¶ 61,192 at P 30; *Midwest Independent Transmission System Operator,* 104 FERC ¶ 61,012 at P 25.

With regard to the recovery of Schedule 17 charges for ISO energy market administration, the Commission subsequently found, again, that transmission owners had failed to make a sufficient showing. Specifically, it noted that the transmission owners had not made a "concrete proposal" and had not provided any information regarding whether the grandfathered agreements already provided for the recovery of Schedule 17 charges. *See Midwest Independent Transmission System Operator*, 108 FERC ¶ 61,236 at P 302. The Commission noted, in fact, that transmission owners could later seek recovery of those costs as new services. *Id.* at P 301.

In its prior orders, then, the Commission did not definitively rule on whether Schedule 10 and 17 charges could be recovered from grandfathered customers, only finding that transmission owners had not provided the Commission with sufficient information to determine that their proposals were just and reasonable under the FPA. *See* Initial Order at P 39, JA00024-00025; Rehearing Order at PP 32, 44, JA00048, 00054 (discussing lack of resolution in earlier orders). In response, the transmission owners elected to file here a new tariff provision to recover from customers to grandfathered agreements those Schedule 10 and 17 charges not already recovered under the agreements, providing evidence that those charges were associated with new services not previously provided under the agreements. *See* Initial Filing of Midwest ISO Transmission Owners (Jan. 13, 2005), Exhibit No. MISO TOs-1 (Testimony of Alan C. Heintz), JA00094-00106. It is this new tariff provision that the Commission considered and accepted in the challenged orders.

In these circumstances, doctrines of claim or issue preclusion simply do not apply. Proceedings involving the setting of rates "are especially unlikely to present the proper occasion for invocation of" collateral estoppel, since "the central issue in a rate proceeding is frequently whether the utility has presented evidence sufficient to show that the proposed rate is reasonable." *Second Taxing District of Norwalk v. FERC*, 683 F.2d 477, 484 (D.C. Cir. 1982). Sufficiency of the

evidence was the "central issue" in the earlier cases that East Kentucky and Intervenors now claim bars the Commission's acceptance of Schedule 23. As this Court has stated, "[a] determination that the utility has not met its burden with respect to one rate does not preclude the utility from making a more successful showing when it files a new rate, as it has the statutory right to do." *Id.* (citing FPA § 205(d), 16 U.S.C. § 824d(d)). As opposed to their earlier requests to pass through Schedule 10 and 17 charges to grandfathered customers, here the transmission owners made a new proposal to collect those costs and provided evidence persuading the Commission that those charges recover the costs of new services not previously provided under the grandfathered agreements, making those costs separate and distinct from the costs collected under the grandfathered agreements. *See* Initial Order at PP 36-38, JA00023-00024.

Further, rate orders are "not *res judicata*" because "where a party presents 'new evidence [that] warrants the change,' the regulatory agency has the power and duty 'to institute new proceedings.'" *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1290 (D.C. Cir. 2000) (quoting *Tagg Bros. & Moorehead v. United States*, 280 U.S. 420, 445 (1930)). As a result, while issue preclusion can apply, its application is "quite weak" in the ratemaking context. *Tesoro*, 234 F.3d at 1290. Here, transmission owners exercised their right to file a new rate and, in doing so, made "a more successful showing" that collecting Schedule 10 and 17 charges

from grandfathered customers is just and reasonable. *Second Taxing District*, 683 F.2d at 484. In particular, they showed that those charges collect the costs of new services not previously provided under the grandfathered agreements, making such costs "separate and distinct" from the costs collected under the grandfathered agreements. *See* Initial Order at PP 36-39, JA00023-00025 (concluding that costs are "separate and distinct" and that transmission owners filing here addressed cost recovery issues under the grandfathered agreements that were not addressed in previous pass through requests). Accordingly, the Commission is not barred from accepting that new rate.

East Kentucky's issue preclusion arguments with regard to its particular grandfathered agreement, labeled "GFA 220," *see* Pet. Br. at 30-37, similarly fail. The Commission fully addressed in the challenged orders the relationship between the separate proceedings regarding East Kentucky's agreement and its acceptance of Schedule 23. Initial Order at P 50, JA00028-00029; Rehearing Order at PP 58-59, JA00060-00061. In the separate proceedings, which are still before the Commission on rehearing, one of the issues before the Commission is whether the fixed-rate under that contract should be revised to pass through to East Kentucky Schedule 10 charges and any further Midwest ISO cost adders incurred by the transmission owner. *See Louisville Gas & Elec. Co. and Kentucky Util. Co. v. East Kentucky Power Cooperative, Inc.*, 109 FERC ¶ 61,330 (2004), *reh'g denied*, 111

FERC ¶ 61,323 (2005). The issue of whether the fixed rate under a particular contract for a particular service should be altered is fundamentally different from whether a new rate for new benefits or services received by a customer is just and reasonable, which is the issue the Commission addressed here. *See* Rehearing Order at P 58, JA00060. "While courts have not hesitated to apply collateral estoppel to those determinations of administrative bodies that have attained finality, . . . the doctrine only applies to issues in substance the same as those resolved in an earlier proceeding." *Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 295-96 n.7 (D.C. Cir. 2003) (citations and internal quotation marks omitted).

Moreover, in the orders cited by East Kentucky, the Commission held that the transmission owner had not shown that the services associated with the Midwest ISO cost adders were "new or different services" not already included in the transmission services provided under the contract. *Louisville Gas & Elec. Co.*, 111 FERC ¶ 61,323 at P 41. In the challenged orders here, as discussed above, the Commission concluded that the transmission owners (including the owner providing service under East Kentucky's grandfathered agreement) made "a more successful showing" with regard to Schedule 23. *Second Taxing District*, 683 F.2d at 484; *see also* Initial Order at P 39, JA00024.

Intervenors misstate the Commission's earlier orders when they contend that the acceptance of Schedule 23 contravenes earlier Commission determinations that

Midwest ISO costs could not be imposed on grandfathered customers without individualized consideration and amendment of the underlying agreements. *See* Interv. Br. at 17-21. As discussed above, the relevant Commission determination with regard to earlier proposals to pass through Schedule 10 and 17 charges was only that transmission owners had not sufficiently proved that those proposals were just and reasonable. *See* Initial Order at P 39, JA0024-00025; Rehearing Order at PP 32, 44, JA00048, 00054 (noting lack of resolution in earlier orders). The Commission did not require individual amendment of the grandfathered agreements. Transmission owners filed a new proposal and accompanying tariff provision (Schedule 23) in this case, as they have a statutory right to do under FPA § 205, 16 U.S.C. § 824d, arguing that the benefits associated with the Schedule 10 and 17 charges represent new services not provided under the grandfathered agreements. The Commission agreed with the transmission owners and accepted their proposal. As a result, individualized amendment of the grandfathered agreements would not have made sense, since the Schedule 10 and 17 charges collected under Schedule 23 are not for services under those agreements. *See* Rehearing Order at P 39, JA00051-00052 (concluding that case-by case review is unnecessary since such charges are for new services not previously provided under the grandfathered agreements, and since Schedule 23 excludes any grandfathered agreements that already collect such charges).

C. The Rigorous *Mobile-Sierra* "Public Interest" Standard Is Not Implicated Here.

East Kentucky asserts that Schedule 23 represents an "end run" around the *Mobile-Sierra* public interest standard. Pet. Br. at 24-28. Under the *Mobile-Sierra* doctrine, parties may voluntarily give up "some of their rate filing freedom" under Section 205 of the FPA and negotiate a fixed-rate contract with a provision that relinquishes their right to file for a unilateral change in the rate. *Maine Pub. Util. Comm'n v. FERC*, 454 F3d 278, 283 (D.C. Cir. 2006); *see United Gas Pipe Line Co. v. Mobile Gas Serv. Corp*., 350 U.S. 332 (1956), and *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956). In that case, the utility-seller "cannot unilaterally (*i.e.*, without the customer's consent) file a new rate under section 205 to supersede the agreed-upon rate" in the contract, *Boston Edison Co. v. FERC*, 233 F.3d 60, 65 (1st Cir. 2000), and the Commission can only modify the rate under the contract if required by the "public interest," *id.*, a standard generally viewed to be "much more restrictive than the FPA's 'just and reasonable' standard." *Potomac Elec. Power Co. v. FERC*, 210 F.3d 403, 407 (D.C. Cir. 2000).

East Kentucky's argument fails because, as the Commission concluded on rehearing, Schedule 23 "does not modify the rates, terms or conditions of services provided under the [grandfathered agreements]," Rehearing Order at P 30, JA00047-00048, and the utility transmission owners who filed Schedule 23 did not

"supercede the agreed-upon rate" under the grandfathered contracts. *Boston Edison Co.*, 233 F.3d at 65.

Instead, as discussed above, Schedule 23 fixes a new rate to recover the costs of the new benefits and services received from the Midwest ISO and its energy markets by customers to grandfathered agreements. The benefits of the Midwest ISO that accrue to all parties using the ISO grid, including grandfathered customers, were not and could not have been provided by the individual transmission owners who furnished service under grandfathered contracts executed prior to the development of the ISO. *See* Initial Order at PP 36-38, JA00023-00024; Rehearing Order at P 33, JA00048-00049. As a result, the Schedule 10 and 17 charges collected under Schedule 23 are not associated with the service that grandfathered customers have received and continue to receive under the grandfathered agreements, but instead are the "separate and distinct" costs of providing the new benefits they receive from the Midwest ISO above and beyond the service they receive under those contracts. Initial Order at P 38, JA00024.

Therefore, as the Commission stated on rehearing, whether the original grandfathered agreements contain *Mobile-Sierra* "public interest" protection is immaterial, since the charges collected under Schedule 23 are not for the existing services provided under those contracts and do not modify or supercede the rates in those contracts. *See* Rehearing Order at P 30, JA00047-00048 ("[B]ecause

[S]chedule 23 addresses new services, . . . there is no need for the transmission owners to demonstrate that modification to those [grandfathered agreements] subject to the *Mobile-Sierra* standard of review meets the public interest standard.").

D. Intervenors' Jurisdictional Arguments Should be Rejected.

Intervenors spend the majority of their brief arguing that the Commission lacks jurisdiction to approve Schedule 23 because it assesses Midwest ISO costs on municipal and cooperative entities not subject to FERC jurisdiction. Interv. Br. at 4-17. East Kentucky does not raise the issue of the Commission's jurisdiction and, consequently, Intervenors' arguments to this effect should be rejected. "[A]bsent extraordinary circumstances, intervenors 'may join issue only on a matter that has been brought before the court' by a petitioner." *California Dep't of Water Res. v. FERC*, 306 F.3d 1121, 1126 (D.C. Cir. 2002) (quoting *Alabama Mun. Distrib. Group v. FERC*, 300 F.3d 877, 879 (D.C. Cir. 2002)); *see also, e.g., Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 37 n.4 (D.C. Cir. 1992). While an exception to this rule is recognized if the intervenors preserved the additional issue they seek to raise in their requests for rehearing before the Commission and otherwise satisfy the statutory requirements to seek judicial review, *California Dep't of Water Res.*, 306 F.3d at 1126, that exception does not apply here. Neither of the Intervenors filed a petition for review "within

sixty days after the order of the Commission upon the application for rehearing," as required by the FPA, 16 U.S.C. § 825*l*(b), and thus have failed to satisfy the statutory requirements to seek judicial review. *See California Dep't of Water Res.*, 306 F.3d at 1126-27.[5]

In any event, Intervenors' jurisdictional arguments are wholly without merit. Section 201(b) of the FPA, 16 U.S.C. § 824(b), grants FERC "jurisdiction over all rates, terms, and conditions of electric transmission service provided by public utilities in interstate commerce, as well as over the sale of electric energy at wholesale." *Maine Pub. Util. Comm'n v. FERC*, 454 F.3d at 282 (citations and internal quotation marks omitted). Section 201(f) of the FPA, 16 U.S.C. § 824(f) (as amended by the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1291(c), 119 Stat. 594, 985 (2005)), exempts certain governmental and cooperatively-owned entities from FERC regulation. As the Commission stated in the challenged orders, under the FPA's jurisdictional grant, it regulates the rates, terms and conditions of transmission services offered by public utilities, and the identity of the customers taking those transmission services is irrelevant. Initial Order at P 41, JA00025; Rehearing Order at P 48, JA00055-00056.

Midwest ISO is a public utility whose interstate electric transmission service is subject to the Commission's FPA jurisdiction. As a result, the Commission has

[5] Intervenors also did not file their interventions with this Court within 60 days of the Rehearing Order.

jurisdiction to review and approve its proposed service rate under Schedule 23. The Commission can consider and approve this rate even if it applies to services taken by customers whose own services would not be subject to regulation under the FPA. As the Commission noted on rehearing, Intervenors' argument to the contrary would render an absurd result:

> Indeed, if the identity of the *customer*, and its jurisdictional status, were determinative, any contract with a non-public utility customer would be non-jurisdictional in the first place and thus rates, terms and conditions that we have regulated for years would be effectively unregulated. But the [FPA] . . ., in fact, focuses on the identity of the *provider* of the service – the power seller or transmission provider – and not on the identity of the customer.

Rehearing Order at P 48, n.77, JA00055 (emphasis in original).

This view is in accord with long-standing judicial precedent construing FPA § 201(f). For example, the Ninth Circuit has held:

> It is clear that the intended exclusion or exemption [of FPA § 201(f)] is from the regulatory burdens of the statute. For the purposes of the Act these public bodies are simply not deemed to be public utilities. But it would be inconsistent with the policy of the legislation, as well as with certain of its provisions already mentioned, to hold that, as wholesale purchasers of power, they are excluded from the benefits of the regulation of the utilities from which they buy. The entire thrust of Part II [of the FPA] is toward the seller at wholesale, not the buyer.

California Elec. Power Co. v. FPC, 199 F.2d 206, 209 (9th Cir. 1952); *see also United States v. Pub. Util. Comm'n of California*, 345 U.S. 295, 314-15 (1953) (noting that the Federal Power Commission's "long assertion that it has authority over rates of sales to municipalities has probably risen to the dignity of an agency

policy," and was entitled to deference). Accordingly, the identity of the customer of Midwest ISO's interstate electric transmission service is of no consequence in determining FERC jurisdiction over the Midwest ISO's rates for that service.

CONCLUSION

For the reasons stated, the Commission's orders should be upheld in all respects.

Respectfully submitted,

John S. Moot
General Counsel

Robert H. Solomon
Solicitor

Jeffery S. Dennis
Attorney

Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426
Phone: 202-502-6027
Fax: 202-273-0901
Jeffery.Dennis@ferc.gov
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