

**ORAL ARGUMENT HAS NOT BEEN SCHEDULED**

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**In the United States Court of Appeals  
for the District of Columbia Circuit**

Nos. 09-1306 and 09-1308 (consolidated)

—————  
DYNEGY MIDWEST GENERATION, INC., *ET AL.*,  
*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,  
*Respondent.*

—————  
ON PETITIONS FOR REVIEW OF ORDERS OF THE  
FEDERAL ENERGY REGULATORY COMMISSION

—————  
**BRIEF OF RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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October 7, 2010

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

A. Parties and Amici

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

B. Rulings Under Review

1. *Midwest ISO Transmission Owners*, 122 FERC ¶ 61,305 (2008) (Tariff Order), JA 52; and
2. *Midwest ISO Transmission Owners*, 129 FERC ¶ 61,041 (2009) (Rehearing Order), JA 95.

C. Related Cases

This case has not been before this Court or any other court. This case involves application of a Commission rule regarding reactive power compensation adopted in Commission Order No. 2003, which was affirmed by this Court in *Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

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October 7, 2010

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## GLOSSARY

FERC or Commission	Federal Energy Regulatory Commission
Filing Rights Settlement	Settlement Agreement Between Transmission Owners and the Midwest ISO on Filing Rights, filed on November 30, 2004 in FERC Docket No. RT01-87-010
FPA	Federal Power Act
Generators	Petitioners Dynegy Midwest Generation, Inc., FirstEnergy Solutions Corp. and Exelon Corp., and Intervenor RRI Energy, Inc.
Midwest ISO	Midwest Independent System Operator
Order No. 888	<i>Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities</i> , Order No. 888, FERC Stats. & Regs. ¶ 31,036, 61 Fed. Reg. 21,540 (1996), <i>clarified</i> , 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1996), <i>on reh'g</i> , Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, 62 Fed. Reg. 12,274, <i>clarified</i> , 79 FERC ¶ 61,182 (1997), <i>on reh'g</i> , Order No. 888-B, 81 FERC ¶ 61,248, 62 Fed. Reg. 64,688 (1997), <i>on reh'g</i> , Order No. 888-C, 82 FERC ¶ 61,046 (1998), <i>aff'd sub nom. Transmission Access Policy Study Group v. FERC</i> , 225 F.3d 667 (D.C. Cir. 2000), <i>aff'd</i> , <i>New York v. FERC</i> , 535 U.S. 1 (2002)
Order No. 2000	<i>Regional Transmission Organizations</i> , Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), <i>on reh'g</i> , Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), <i>dismissed sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC</i> , 272 F.3d 607 (D.C. Cir. 2001)

Order No. 2003	<i>Standardization of Generator Interconnection Agreements and Procedures</i> , Order No. 2003, 104 FERC ¶ 61,103 (2003), <i>on reh'g</i> , Order No. 2003-A, 106 FERC ¶ 61,220 (2004), <i>on reh'g</i> , Order No. 2003-B, 109 FERC ¶ 61,287 (2004), <i>on reh'g</i> , Order No. 2003-C, 111 FERC ¶ 61,401 (2005), <i>aff'd</i> , <i>National Ass'n of Regulatory Util. Comm'rs v. FERC</i> , 475 F.3d 1277 (D.C. Cir. 2007)
Reactive Power	Reactive Supply and Voltage Control from Generator or Other Sources Service
Rehearing Order	<i>Midwest ISO Transmission Owners</i> , 129 FERC ¶ 61,041 (2009)
Tariff Order	<i>Midwest ISO Transmission Owners</i> , 122 FERC ¶ 61,305 (2008)

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

---

**BRIEF OF RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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**STATEMENT OF THE ISSUE**

Whether the Federal Energy Regulatory Commission (FERC or Commission) reasonably affirmed an addition to the Midwest Independent System Operator (Midwest ISO) tariff, that implemented an established Commission policy regarding generator compensation for reactive power supply.

**STATUTES AND REGULATIONS**

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

## INTRODUCTION

It is established Commission policy – affirmed by this Court – that electric generators should not be compensated for reactive power when operating within the established power factor range (the deadband). Providing reactive power within the deadband is essential to allow the generator to interconnect with the transmission system without degrading reliable grid operation. Therefore, providing reactive power within the deadband is an obligation of the generator, rather than a service to the transmission provider that requires compensation. However, under the Commission’s comparability policy, if a transmission provider chooses to compensate affiliated generation for reactive power within the deadband, then the transmission provider must also compensate unaffiliated generators. Thus, the Commission’s reactive power compensation policy entitles transmission owners to decide whether or not to compensate generators (affiliated and unaffiliated) for reactive power within the deadband.

This case concerns compensation for reactive power within the deadband in the Midwest ISO. Prior to the proceeding at issue here, Schedule 2 of the Midwest ISO’s tariff, governing compensation for reactive power, required that Midwest ISO transmission owners compensate all generators for their capability to produce reactive power, including reactive power within the deadband. The Schedule 2 methodology complied with the Commission’s comparability policy because all



generators, affiliated and unaffiliated, were compensated for reactive power in the same manner. Schedule 2 did not, however, permit Midwest ISO transmission owners the option of not compensating any generators within the deadband. To provide this option, a group of Midwest ISO transmission owners proposed an addition to the Midwest ISO tariff, Schedule 2-A, that would permit Midwest ISO transmission owners, on a zonal basis, to choose not to compensate any generators, affiliated or unaffiliated, for reactive power within the deadband.

In the orders challenged here, *Midwest ISO Transmission Owners*, 122 FERC ¶ 61,305 (2008) (Tariff Order), *reh'g denied*, 129 FERC ¶ 61,041 (2009) (Rehearing Order), the Commission approved Schedule 2-A, finding it consistent with the established Commission policy that compensation inside the deadband is not required, unless a transmission owner chooses to compensate its affiliated generators inside the deadband. Schedule 2-A complied with the Commission's comparability policy because all generators in a Schedule 2-A zone, affiliated and unaffiliated, would not receive compensation inside the deadband. Further, permitting Midwest ISO transmission owners to choose the reactive power compensation methodology on a zonal basis was consistent with the zonal pricing for transmission services, including reactive power, already in place in the Midwest ISO.

## STATEMENT OF FACTS

### I. REACTIVE POWER

#### A. The Nature Of Reactive Power

“Reactive” power and “real” power are the two components of the electrical power used in an alternating current system. Real power, which is measured in watts, accomplishes useful work, such as running motors and lighting lamps. Reactive power, measured in volt-amperes reactive, creates the magnetic fields needed to operate transformers, transmission lines and electric motors. It creates a stable voltage profile (*i.e.*, pressure) so that real power can flow through the power system. *See Alabama Power Co. v. FERC*, 220 F.3d 595, 596-97 (D.C. Cir. 2000) (discussing real and reactive power); *See also* FERC Staff Report, Principles for Efficient and Reliable Reactive Power Supply and Consumption, Docket No. AD05-1-000, at 17-19 (2005) (“Reactive Power Principles”), available at <http://www.ferc.gov/EventCalendar/Files/20050310144430-02-04-05-reactive-power.pdf>.

Controlling the amount of reactive power is critical to reliable system operation. Too much reactive power can lead to an over-voltage situation, which can cause breakers to trip and take transmission lines out of service. If too little reactive power is supplied, voltage levels will decrease, which could lead to transmission lines overloading or to cascading failures. *See, e.g., Southern Co.*

*Servs. Inc.*, 80 FERC ¶ 61,318, at 62,080-81 (1997) (discussing nature and role of reactive power); Reactive Power Principles at 17-20 (discussing consequences of inadequate voltage control).

A “power factor” is the measure of real power in relation to reactive power that is being produced at any given time. A high power factor (*e.g.*, 0.99) means that nearly all the output is real power. The power factor decreases when a generator increases production of reactive power. *See* Reactive Power Principles at 7, 12, 41, 119, 120.

In its Order No. 2003 rulemaking (establishing standardized terms for interconnection agreements with large generators),<sup>1</sup> the Commission addressed reactive power issues. In particular, the Commission required interconnecting generating facilities to be designed so that their power factor would be within a range of 0.95 leading to 0.95 lagging, unless the transmission provider had established different requirements applicable to all interconnection customers in the control area on a comparable basis. Order No. 2003 P 542. The “leading” power factor reflects the real/reactive ratio when the generator is consuming reactive power, and the “lagging” power factor reflects the real/reactive power

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<sup>1</sup> *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61,103 (2003), *on reh’g*, Order No. 2003-A, 106 FERC ¶ 61,220 (2004), *on reh’g*, Order No. 2003-B, 109 FERC ¶ 61,287 (2004), *on reh’g*, Order No. 2003-C, 111 FERC ¶ 61,401 (2005), *aff’d*, *National Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

ratio when the generator is supplying reactive power. Reactive Power Principles at 8.<sup>2</sup> The range between the leading and lagging power factor is called the “deadband.”

**B. The Commission Applies Non-Discriminatory Open Access Policies To Compensation For Reactive Power.**

In Order No. 888,<sup>3</sup> the Commission established the foundation for the development of competitive bulk power markets in the United States: non-discriminatory open access transmission services by public utilities. The Commission required that all transmission owning public utilities provide open access transmission service under comparable terms and conditions; that is, to provide transmission service to other generators as good as the service the public utilities provide to their own generation. Utilities were therefore required to “provide access to their transmission lines to anyone purchasing or selling

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<sup>2</sup> Reactive power is both supplied and consumed by generators. For the sake of simplicity, references in this brief to the “supply of reactive power” or “reactive power services” are intended to refer to both concepts.

<sup>3</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, 61 Fed. Reg. 21,540 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1996), *on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, 62 Fed. Reg. 12,274, *clarified*, 79 FERC ¶ 61,182 (1997), *on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, 62 Fed. Reg. 64,688 (1997), *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, New York v. FERC*, 535 U.S. 1 (2002).

electricity in the interstate market on the same terms and conditions as they use their own lines.” *Transmission Access*, 225 F.3d at 681; *see also* Order No. 2003 P 6 (explaining that Order No. 888 “required public utilities to provide other entities comparable access” to their transmission facilities).

In Order No. 2003, the Commission applied the Order No. 888 nondiscrimination principles to the interconnection service offered by transmission providers, to ensure that generators independent of transmission providers and generators affiliated with transmission providers are treated comparably. Order No. 2003-A P 3. Order No. 2003 required that transmission providers have on file standard procedures and a standard agreement (Large Generator Interconnection Agreement) for interconnecting large generators to their transmission systems. Order No. 2003-B P 5.

Article 9.6.1 of the Large Generator Interconnection Agreement requires interconnecting generators to be designed so that their power factor would be within a range of 0.95 leading to 0.95 lagging (the deadband), unless the transmission provider had established different requirements. Order No. 2003 P 542. Under Article 9.6.3, a generator providing reactive power within the deadband should not be compensated, as it is only meeting its obligations. Order No. 2003 P 546. Transmission providers are required to pay generators for reactive power only when the generator operates outside the deadband. *Id.*

Order No. 2003-A clarified that transmission owners are required to compensate generators providing reactive power in the deadband if the transmission provider compensates its own or affiliated generators for such service. Order No. 2003-A P 416. This was necessary to ensure that “an Interconnection Customer [would] be treated comparably with the Transmission Provider and its Affiliates.” Order No. 2003-B P 119. *See also* Order No. 2003-C P 42.

This Court affirmed the Order No. 2003 rulemaking in *Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007). In that appeal, a group of utility petitioners raised challenges to the Commission’s reactive power policy. *See* Final Joint Opening Brief of Utility Petitioners filed on July 31, 2006 in *Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, Docket Nos. 04-1148, *et al.*, at 2, 31-32 (issue 8, challenging the Commission rule requiring payment for reactive power within the deadband if the transmission owner pays its own or affiliated generators); Final Brief of Respondent Federal Energy Regulatory Commission, filed July 31, 2006 in Docket Nos. 04-1148, *et al.*, at 79-80 (answering arguments on reactive power). This Court summarily rejected those arguments, among others, at 475 F.3d at 1286 (rejecting “Petitioners’ remaining objections,” finding that “[t]he issues do not merit discussion in a published opinion”).

## **II. THE MIDWEST ISO PROVISION OF REACTIVE POWER SERVICE**

### **A. The Filing Rights Settlement**

In *Midwest ISO*, 110 FERC ¶ 61,380 (2005), the Commission approved the Settlement Agreement Between Transmission Owners and the Midwest ISO on Filing Rights (Filing Rights Settlement), JA 483-88, which resolved issues concerning the allocation of filing rights under § 205 of the Federal Power Act (FPA), 16 U.S.C. § 824d. As relevant here, the Filing Rights Settlement provided that, with regard to rate filings for ancillary services, which includes reactive power, the transmission owners and the Midwest ISO have mutual filing authority. *Midwest ISO*, 110 FERC ¶ 61,380 P 9. *See also id.* P 7 (“filing rights for certain rates, such as for ancillary services and the pricing of certain new transmission investment, should be shared between the Midwest ISO and the [transmission owners].”)

### **B. The Schedule 2 Reactive Power Compensation Scheme**

Under the license-plate rate design in the Midwest ISO, the Midwest ISO footprint is divided into a number of transmission pricing zones, typically based on the boundaries of individual transmission owners or groups of transmission owners. Tariff Order P 1 n.4, JA 52. Customers taking transmission service for delivery to load within the RTO pay a zonal rate based on the embedded cost of the transmission facilities in the transmission pricing zone where the load is located.

*Id.* In exchange for paying this zonal rate, the customers receive reciprocal access to the entire Midwest ISO grid without paying any additional rates (*i.e.*, no pancaked rates). *Id.*; Rehearing Order P 81, JA 124.

Under Schedule 2 of the Midwest ISO tariff, reactive power rates are also calculated and paid on a zonal basis. Tariff Order P 3, JA 53; Rehearing Order P 1 n.3, JA 95. The zonal reactive power rate is based upon the annual costs of the generators qualified to provide such service in the zone. Tariff Order P 3, JA 53. All qualified generators may receive reactive power compensation under Schedule 2 by filing a cost-based revenue requirement with the Commission based on their capability to provide reactive power, whether or not they actually provide any reactive power. *Id.* While this policy results in compensation for reactive power within the deadband, it satisfies the Commission's comparability policy because all generators, affiliated and unaffiliated, receive compensation on a comparable basis. Tariff Order P 60, JA 73.

### **C. The Schedule 2-A Option**

On October 2, 2007, pursuant to the authority afforded them under the Filing Rights Settlement, certain Midwest ISO Transmission Owners<sup>4</sup> filed a proposed

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<sup>4</sup> The Midwest ISO Transmission Owners consist of: Ameren Services Company, as agency for Union Electric Company d/b/a AmerenUE, Central Illinois Public Service Company d/b/a Ameren CIPS, Central Illinois Light Co. d/b/a Ameren CILCO, and Illinois Power Company d/b/a Ameren IP; American Transmission Company LLC; City of Columbia Water and Light Department



addition to the Midwest ISO's tariff concerning the compensation provided to generators for providing reactive power. *See* October 2, 2007 Midwest ISO Transmission Owners Submission of Tariff Revisions, Record Item 1, JA 141-83. The Transmission Owners proposed a new Schedule 2-A, which transmission owners within each Midwest ISO zone may elect to use in lieu of the existing Schedule 2. *Id.* at 2, JA 142.

Under the existing Schedule 2, any generator can receive a capacity charge associated with reactive power supply once it has its revenue requirements approved by the Commission, which results in compensation for reactive power within the deadband. *Id.* at 3, JA 143. Under the proposed Schedule 2-A, the transmission owners in a zone can elect to compensate generators for reactive power only if the reactive power is provided outside of the deadband. *Id.* at 2, JA 142. This proposal was based upon the Commission's established policy that generators need not be compensated for reactive power within the deadband unless

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(Columbia, MO); City Water, Light & Power (Springfield, IL); Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indianapolis Power & Light Company; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company, a Minnesota Corporation and Northern States Power Company, a Wisconsin Corporation, subsidiaries of Xcel Energy, Inc.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company (d/b/a Vectren Energy Delivery of Indiana); and Southern Minnesota Municipal Power Agency.

there is a comparability issue (*i.e.*, if generators affiliated with the transmission provider are receiving compensation within the deadband, then independent generators should receive compensation as well). *Id.* at 3, JA 143 (citing Order No. 2003 P 546; *Bonneville Power Admin. v. Puget Sound Energy, Inc.*, 120 FERC ¶ 61,211 P 19 (2007), *on reh'g*, 125 FERC ¶ 61,273 (2008); *E.ON U.S. LLC*, 119 FERC ¶ 61,340 P 12 (2007); *Southwest Power Pool, Inc.*, 119 FERC ¶ 61,199 P 29, *on reh'g*, 121 FERC ¶ 61,196 (2007); *Entergy Services, Inc.*, 113 FERC ¶ 61,040 P 22, *reh'g denied*, 114 FERC ¶ 61,303 (2006)).

The transmission owners stated that the filing is significant because, under Schedule 2, generators currently receive compensation whether or not they ever supply reactive power and whether or not the generator is located in an area where there is a need for additional reactive power. *Id.* at 3, JA 143. The number of independent generators within the Midwest ISO footprint continues to grow. *Id.* at 4, JA 144. Midwest ISO customers are paying millions of dollars to generators for reactive supply within the deadband today, and it is expected that this cost will increase. *Id.* Under the proposal, by adopting Schedule 2-A, transmission owners in a zone can eliminate reactive power supply compensation within the deadband. *Id.* at 5, JA 145. Transmission owners that do not elect Schedule 2-A will continue to compensate generators in their zones based on the currently effective Schedule 2. *Id.* The filing transmission owners believed it appropriate that transmission

owners within a given zone be permitted to elect to follow the approach in Order 2003, and other relevant orders, and compensate generators in that zone only for reactive power supply outside of the deadband. *Id.* at 4, JA 144.

### **III. THE CHALLENGED ORDERS**

In the challenged orders, the Commission accepted the proposed Schedule 2-A, as modified. Tariff Order P 1, JA 52; Rehearing Order P 1, JA 95. As established in Order Nos. 2003 and 2003-A, the provision of reactive power within the deadband is an obligation of the generator rather than a compensable service. Rehearing Order PP 48, 95, 103, JA 112, 131, 134; Order No. 2003 P 546. Accordingly, generators have no inherent right to compensation for providing reactive power inside the deadband because in doing so they are only meeting their obligations. Rehearing Order PP 83, 88, 95, JA 125, 128, 131. A generator has a right to compensation for reactive power within the deadband only if the transmission owner compensates its own or affiliated generators for this service. Rehearing Order P 95, JA 131 (citing Order No. 2003-A P 416; *KGen Hinds, LLC*, 120 FERC ¶ 61,284 (2007)). The Commission's reactive power compensation policy therefore entitles transmission owners to choose whether or not to compensate generators (affiliated and unaffiliated) for reactive power inside the deadband, as long as such compensation is made on a comparable basis.

Rehearing Order P 48, JA 112 (citing *Bonneville Power Admin.*, 125 FERC ¶ 61,273 P 25 (2008)).

The Commission rejected generator arguments that the Midwest ISO must maintain a single reactive power compensation policy that applies to all zones. Tariff Order P 57, JA 72; Rehearing Order P 79, JA 124. The Commission’s reactive power compensation policy entitles the “Transmission Provider” to decide whether or not to compensate generators (affiliated and unaffiliated) for reactive power inside the deadband. Rehearing Order P 48, JA 112. While Order No. 2003 defined “Transmission Provider” to include both the RTO and the transmission owners, Tariff Order P 59, JA 73; Rehearing Order PP 61, 74, 76, 78, JA 117, 122, 123, the purpose of the Order No. 2003 comparability policy was best achieved through applying the comparability policy to the transmission owners, rather than the Midwest ISO. Tariff Order P 59, JA 73; Rehearing Order PP 62, 78, 80, JA 118, 123, 124. The Midwest ISO is by design an independent entity with no affiliated generation, so it is unnecessary to require the Midwest ISO to treat affiliated and unaffiliated generation on a comparable basis. Tariff Order P 59, JA 73; Rehearing Order PP 62, 78, 80, JA 118, 123, 124. The comparability policy’s purpose thus can be achieved if the transmission owners in each zone compensate all the generators in their zone – affiliated and unaffiliated – on a comparable basis. Tariff Order P 59, JA 73; Rehearing Order PP 62, 78, 80, JA 118, 123, 124.

Here, Schedule 2-A, like Schedule 2, ensures that transmission owners will treat affiliated and unaffiliated generators on a comparable basis within each zone and that transmission owners will not be able to gain an unfair competitive advantage over unaffiliated generators. Tariff Order P 60, JA 73; Rehearing Order PP 62, 69, JA 118, 120. The Midwest ISO thus may maintain two reactive power compensation policies that both require compensation on a comparable basis. Rehearing Order PP 69, 79, JA 120, 124.

The ability of transmission owners to choose either Schedule 2 or Schedule 2-A is consistent with the existing zonal license plate rate structure for transmission service within the Midwest ISO. Rehearing Order P 82, JA 125. The Commission allows RTOs, including the Midwest ISO, to charge transmission rates that vary by zone, subject to the requirement that customers pay only a single zonal rate (*i.e.*, no pancaked rates) to use the entire RTO system. *Id.* P 81, JA 125. This zonal rate methodology is used in the Midwest ISO for reactive power compensation. Tariff Order P 3, JA 53; Rehearing Order P 1 n.3, JA 95. Under the Schedule 2-A zonal reactive power compensation proposal, customers also pay only a single reactive power rate to serve load in a particular zone, regardless of whether their load is located in a zone covered by Schedule 2 or Schedule 2-A. *Id.*

The Commission rejected arguments that Schedule 2-A was discriminatory between Midwest ISO zones because it does not guarantee full cost recovery for

generators in zones using Schedule 2-A. Rehearing Order PP 95-99, JA 131-33.

Generators do not have a right to compensation for providing reactive power inside the deadband because in doing so they are only meeting their obligations.

Rehearing Order PP 83, 95, JA 125, 131. Further, the incremental cost to the generator of reactive power within the deadband is minimal, and the purpose for which generating assets are built (including reactive power capability to maintain voltage levels for generation entering the grid) is to make sales of real power. *Id.* P 96, JA 131. Generators have the opportunity to recover their reactive power costs through their power sales. *Id.* PP 97, 99, JA 132, 133.

The Commission also rejected claims of discrimination within Schedule 2-A zones based on the fact that adoption of Schedule 2-A in a zone does not abrogate any existing contracts. Thus, in a zone where Schedule 2-A is adopted, already-interconnected generators will continue collecting compensation under their existing, capability-based rate schedules, while new generators will only collect compensation for providing reactive power outside of the deadband. Rehearing Order P 89, JA 129. Schedule 2-A was an FPA § 205 filing; as such, it did not, and could not, abrogate, eliminate or revise any existing rate schedule. *Id.* (citing Tariff Order P 38, JA 66). Consequently, transmission owners that switch to Schedule 2-A remain obligated to compensate generators in their zones pursuant to the generators' filed rate schedules, unless and until those schedules are

successfully challenged under FPA § 206, 16 U.S.C. § 824e. *Id.* If an unaffiliated generator believes that existing contracts result in undue discrimination, the generator should file a complaint under FPA § 206. *Id.*

## SUMMARY OF ARGUMENT

It is settled Commission policy, established in the Commission's Order No. 2003 rulemaking and affirmed by this Court on review of that rulemaking, that generators should not be compensated for reactive power provided within the deadband. In providing such power, generators are only fulfilling their obligations. If a transmission provider decides to compensate its own or affiliated generation within the deadband, however, comparability requires that the transmission provider also compensate unaffiliated generators. Thus, Commission policy permits transmission providers to choose whether to compensate all generators, or none, for reactive power provided within the deadband.

Schedule 2-A, approved in the orders challenged here, did nothing more than implement this policy choice for transmission owners in the Midwest ISO. Schedule 2-A permits transmission owners, on a zonal basis, to choose whether or not to compensate generators for reactive power within the deadband.

Generators<sup>5</sup> contend that Schedule 2-A should have been rejected, and Schedule 2 compensation maintained for the entire Midwest ISO, to avoid undue discrimination among generators in different zones. However, under Order No. 2003, compensation for reactive power within the deadband is not required, except

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<sup>5</sup> Petitioners Dynegy Midwest Generation, Inc., FirstEnergy Solutions Corp. and Exelon Corp., and Intervenor RRI Energy, Inc.



to assure comparable treatment of affiliated and unaffiliated generators. The Midwest ISO has no affiliated generation, so there is no need to assure that the Midwest ISO is treating affiliated and unaffiliated generation comparably in the region as a whole. Comparability is achieved if the Midwest ISO transmission owners, on a zonal basis, are required to provide comparable compensation to affiliated and unaffiliated generation.

Thus, Order No. 2003 permits transmission owners to choose whether or not to compensate generators within the deadband, so long as they compensate affiliated and unaffiliated generators comparably, which necessarily contemplates that generators in different zones may receive different compensation from different transmission owners. Zonal differentiation in reactive power compensation is, moreover, consistent with the existing zonal rate design in the Midwest ISO for transmission rates, including rates for reactive power.

Generators' arguments regarding alleged within-zone discrimination fare no better. The fact that certain generators will continue to be compensated under pre-existing contracts is not discriminatory, but rather is a function of the fact that the Schedule 2-A filing was made (and approved) under FPA § 205. FPA § 205 allows the Commission to determine the justness and reasonableness of the proposed rate, but provides no basis for the Commission to find other existing rates, such as the existing interconnection agreements, unjust and unreasonable.

Nor are independent generators discriminatorily disadvantaged in recovering their reactive power costs in a Schedule 2-A zone as compared to generators affiliated with transmission providers. Independent generators, like transmission providers, have opportunities to recover their costs elsewhere, such as in their market-based rates for power sales.

The Commission also reasonably concluded that the transmission owners were authorized under the Filing Rights Settlement to make the FPA § 205 filing at issue. Although the relevant section of the Settlement, section 3.9, is ambiguous, when viewed in light of its purpose and in the context of the Settlement as a whole, the Commission reasonably interpreted section 3.9 to authorize the transmission owners to make the Schedule 2-A § 205 filing.

## ARGUMENT

### I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g., Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). The relevant inquiry is whether the agency has “examine[d] the relevant data and articulate[d] a rational connection between the facts found and the choice made.” *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

“The statutory requirement that rates be ‘just and reasonable’ is obviously incapable of precise judicial definition, and [the Court] afford[s] great deference to the Commission in its rate decisions.” *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 128 S. Ct. 2733, 2738 (2008). “Because [i]ssues of rate design are fairly technical, and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission, [the court’s] review of whether a particular rate design is just and reasonable is highly deferential.” *Northern States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994) (internal quotation marks and citations omitted). *See also Electricity Consumers Res. Council v. FERC*, 407 F.3d 1232, 1236 (D.C. Cir. 2005) (same). The Commission’s factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 8251(b).

“In evaluating FERC’s interpretation of its own order[s], [the Court] afford[s] the Commission substantial deference, upholding the agency’s decision ‘unless its interpretation is plainly erroneous or inconsistent’ with the order[s].” *Consumers Energy Co. v. FERC*, 428 F.3d 1065, 1067-68 (D.C. Cir. 2005). See also *Entergy Services, Inc. v. FERC*, 375 F.3d 1204, 1209 (D.C. Cir. 2004) (the Court “defer[s] to FERC’s interpretation of its orders so long as the interpretation is reasonable.”). The Court gives substantial deference to the Commission’s interpretation of FERC-jurisdictional agreements as well. *Old Dominion Elec. Coop., Inc. v. FERC*, 518 F.3d 43, 48-49 (D.C. Cir. 2008).

**II. THE COMMISSION REASONABLY APPROVED SCHEDULE 2-A AS IT IMPLEMENTS THE ORDER NO. 2003 REACTIVE POWER COMPENSATION POLICY, CONSISTENT WITH THE MIDWEST ISO’S EXISTING ZONAL RATE STRUCTURE.**

**A. The Midwest ISO Transmission Owners, Rather Than The Midwest ISO, Properly Are Considered The “Transmission Provider” For Purposes Of The Order No. 2003 Reactive Power Compensation Policy.**

Order No. 2003, affirmed by this Court in *Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), established the Commission’s policy on compensation for reactive power within the deadband. Tariff Order P 67, JA 76; Rehearing Order P 98, JA 133. Order No. 2003 held that a generator “should not be compensated for reactive power when operating its Generating Facility within the established power factor range, since it is only meeting its

obligation.” Rehearing Order P 48 n.59, JA 112 (quoting Order No. 2003 P 546).  
*See also* Tariff Order P 72, JA 79; Rehearing Order PP 83, 95, 103, JA 125, 131,  
134.

Providing reactive power within the deadband is essential to allow the generator to connect without degrading the reliable operation of the grid. It is a matter of prudent utility practice that allows the generator’s product to be delivered safely to the transmission system. *See* Tariff Order P 85, JA 82 (“Providing reactive power within the deadband is an obligation of a generator and is as much an obligation of a generator as, for example, operating in accordance with Good Utility Practice.”); *Detroit Edison Co.*, 95 FERC ¶ 61,415 at 62,538 (2001) (“A generator is required to supply reactive power [within the deadband] in order to operate the facility in a safe and reliable manner and in accordance with good utility practice.”); *Arizona Pub. Serv. Co.*, 95 FERC ¶ 61,128 at 61,409 (2001) (a generator supplying reactive power within the deadband “is meeting its obligation as a generator to maintain the appropriate power factor in order to maintain voltage levels for energy entering the grid during normal operations”).

While compensation within the deadband is not *required*, under Order No. 2003-A a Transmission Provider may *choose* to provide such compensation, so long as the Transmission Provider does so in a non-discriminatory fashion, *i.e.*, the Transmission Provider provides unaffiliated generation with compensation

comparable to that provided to its own affiliated generation. Rehearing Order P 48, JA 112 (citing Order No. 2003-A P 416).

This case presented for the first time the question of how the Order No. 2003 comparability requirement applies to a proposal for zone-based compensation in an RTO spanning multiple utility systems and multiple transmission owners across a broad region. Rehearing Order P 73, JA 121. The central question posed was “which entity, in the context of an RTO, is the Transmission Provider *for purposes of the comparability requirement.*” *Id.* In general parlance and under Order No. 2000<sup>6</sup> (establishing the requirements for RTOs), the Midwest ISO is considered to be the transmission provider because the Midwest ISO provides the transmission service over facilities under its control, and administers the open access transmission tariff under which the service is provided. Tariff Order P 58 & n.47; JA 73; Rehearing Order P 75, JA 122. *See* Pet. Br. 36-40.

However, “Transmission Provider” as used in Order No. 2003 was defined to include both the Midwest ISO and the transmission owners. Tariff Order P 59, JA 73; Rehearing Order PP 61, 74, 76, 78, JA 117, 122, 123. “[T]he definition of Transmission Provider in [Order No. 2003] includes the Transmission Owner as

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<sup>6</sup> *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *on reh’g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *dismissed sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

well.” Order No. 2003 P 75. *See also* Section 1 of the Large Generator Interconnection Agreement adopted in Order No. 2003 (defining “Transmission Provider” to “include the Transmission Owner when the Transmission Owner is separate from the Transmission Provider”) (Large Generator Interconnection Agreement at 14, which is attached as Appendix 6 to the Large Generator Interconnection Procedures, which are included as Appendix C to Order No. 2003).

The Commission looked to the purposes underlying the comparability policy to find that the policy more appropriately was applied here to the transmission owners than to the Midwest ISO. Rehearing Order P 78, JA 123. The Midwest ISO is by design an independent entity with no affiliated generation. Tariff Order P 59, JA 73; Rehearing Order PP 62, 78, JA 118, 123. The concern underlying the comparability requirement is that affiliated and unaffiliated generators receive reactive power compensation on a comparable basis. Rehearing Order P 78, JA 123. Because the Midwest ISO has no affiliated generation, it is unnecessary to require the Midwest ISO to adhere to the comparability principle on a region-wide basis. Tariff Order P 59, JA 73; Rehearing Order PP 62, 78, 80, JA 118, 123, 124.

**B. Because Schedule 2-A Properly Implements The Order No. 2003 Compensation Policy, The Commission Reasonably Rejected Generators' Arguments That Resulting Zonal Variations In Compensation Are Discriminatory.**

**1. Schedule 2-A Properly Implements The Order No. 2003 Compensation Policy, Which Governs The Availability Of Compensation Within The Deadband.**

Having determined that the transmission owners are the “Transmission Providers” to whom the Order No. 2003 reactive power compensation policy applies, the Commission reasonably approved Schedule 2-A as properly implementing that policy. Tariff Order PP 55, 60, JA 71, 73; Rehearing Order PP 48, 60, 69, 80, 87, JA 112, 117, 120, 124, 127. The Commission’s policy “entitles transmission owners to make the decision whether or not to compensate generators (affiliated and unaffiliated) for reactive power inside the deadband.” Rehearing Order P 48, JA 112. “Schedule 2-A permits different reactive power compensation policies for different zones within the Midwest ISO. However, all generators in a zone – whether they are affiliated or unaffiliated – will receive compensation on the same basis; either all will receive compensation within the deadband or none will receive compensation within the deadband.” Tariff Order P 60, JA 73. “Thus, Schedule 2-A, like Schedule 2, ensures that transmission owners will treat affiliated and unaffiliated generators on a comparable basis, and that transmission owners will not be able to gain an unfair advantage over unaffiliated generators.”

*Id.*



It does not appear that Generators challenge the Commission’s interpretation of the defined term “Transmission Provider” in Order No. 2003, and the resulting conclusion that Order No. 2003 comparability can be judged by reference to transmission owners, rather than the Midwest ISO. (To the extent such an argument is deemed to have been raised, however, the Commission’s decision was reasonable as demonstrated).

Rather, Generators appear to argue that permitting zonal variation in Midwest ISO reactive power compensation policies raises *other* concerns of undue discrimination. *See, e.g.*, Pet. Br. 25-26 (Commission justified its decision based on the comparability policy, but failed to consider other claims of undue discrimination); Pet. Br. 37 (the Commission’s reliance on comparability does not address Generators’ “basic objections;” “merely requiring comparability” overlooks other forms of undue discrimination); Pet. Br. 50 (“The Commission’s narrow focus on discrimination on the basis of affiliation, while ignoring the broader problems of undue discrimination resulting from Schedule 2-A, offers no answer to the critical issues in this case. . . .”). Because the zone-based compensation results in generators in different zones being paid different rates for reactive power service, (Pet. Br. 31-32, 38-41), and ISO customers in different zones being charged varying rates for reactive power (Pet. Br. 33-34, 40), Generators contend the Commission erred in failing to find undue discrimination.

The Commission did not “overlook” these claims of discrimination, *see* Pet. Br. 37-38, but rather found them precluded by Order No. 2003. “Order Nos. 2003 and 2003-A establish a reactive power compensation policy that, in the first instance, treats the provision of reactive power inside the deadband as an obligation of good utility practice rather than as a compensable service and *permits compensation inside the deadband only as a function of comparability.*” Rehearing Order P 103, JA 134 (emphasis added) (citing *Southwest Power Pool*, 119 FERC ¶ 61,199 P 29; Order No. 2003 PP 546 and 537). *See also* Rehearing Order P 83, JA 125 (“the Commission’s reactive power compensation policy is that a generator has a right to compensation for producing reactive power within the deadband only if the transmission owner so compensates its own or affiliated generators for this service”). Comparability therefore governs the availability of compensation within the deadband under Order No. 2003. *See* Tariff Order P 66, JA 76 (rejecting discrimination arguments on the ground that “[w]hat is relevant is whether the proposal treats [independent power producers] and affiliated generators in a comparable manner. Here, Schedule 2-A meets this requirement.”).

The Commission specifically rejected claims that Schedule 2-A improperly permits transmission owners to choose which schedule will apply in their zones and which generators will collect reactive power compensation on a capability basis and which will not. *See* Pet. Br. 32-33 (complaining that under Schedule 2-A

compensation turns on a “unilateral decision” made by a transmission owner in its own self-interest). The Commission found that this choice does not violate Commission policy; rather, “the Commission’s reactive power compensation policy entitles transmission owners to make the decision whether or not to compensate generators (affiliated or unaffiliated) for reactive power inside the deadband.” Rehearing Order P 48, JA 112 (citing *Bonneville Power*, 125 FERC ¶ 61,273 P 25). *See also* Rehearing Order P 87, JA 127 (rejecting argument that Schedule 2-A fails to treat all generators in the Midwest ISO on a comparable basis, because the comparability requirement is satisfied if all generators within a particular zone are treated comparably). Although reactive power policies may differ in different zones, Schedule 2-A nonetheless complies with Order No. 2003 because all generators in the same zone, affiliated and unaffiliated, will receive compensation on the same basis. Tariff Order P 60, JA 73; Rehearing Order P 62, JA 118.

Thus, Order No. 2003 “specifically addressed the circumstances and manner in which a transmission owner must pay for reactive power inside the deadband.” Tariff Order P 67, JA 76; Rehearing Order P 98, JA 133. Further, this Court in *Nat’l Ass’n of Regulatory Util. Comm’rs*, 475 F.3d at 1286, rejected challenges to the Commission’s policy requiring comparability if compensation is provided to affiliated generators for reactive power within the deadband. *See* Final Joint

Opening Brief of Utility Petitioners filed on July 31, 2006 in *Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, Docket Nos. 04-1148, *et al.*, at 2, 31-32 (issue 8, challenging the Commission rule requiring payment for reactive power within the deadband if the transmission owner pays affiliated generators); 475 F.3d at 1286 (rejecting "Petitioners' remaining objections," finding that "[t]he issues do not merit discussion in a published opinion").

Accordingly, challenges to the Order No. 2003 rule on reactive power compensation within the deadband in this proceeding constitute an impermissible collateral attack on Order No. 2003 as affirmed by this Court. *See* Tariff Order PP 67, 72, JA 76, 79; Rehearing Order PP 48, 98, 103, JA 112, 133, 134. In *Pacific Gas & Elec. Co. v. FERC*, 533 F.3d 820 (D.C. Cir. 2008), this Court rejected a collateral attack on a rule established in Order No. 2003 concerning the conduct of interconnection studies. The Court found that petitioners were unable to challenge the interconnection studies requirement because they failed to raise the issue in a petition for review of Order No. 2003. *Id.* at 825. "[A] challenge made outside of the statutory period is a collateral attack over which [the Court] has no jurisdiction." *Id.* (citing *Sacramento Mun. Util. Dist. v. FERC*, 428 F.3d 294, 299 (2005) (rejecting collateral attack on previous approval of California ISO tariff)). *See also Georgia Indus. Group v. FERC*, 137 F.3d 1358, 1363-64 (D.C. Cir. 1998) (Court lacked jurisdiction over claim that pre-granted abandonment requirement

was inherently discriminatory for treating like customers differently because the claim was a collateral attack on Order No. 636 which established the requirement); *City of Nephi v. FERC*, 147 F.3d 929, 934-35 (D.C. Cir. 1998) (Court lacks jurisdiction to consider arguments collaterally attacking Order No. 636).

**2. Under Order No. 2003, Generators Interconnected To Different Transmission Providers In Different Zones Are Not Similarly Situated For Purposes Of Deadband Compensation.**

According to Generators, there are no “legitimate differences in facts” to support differing compensation for reactive power within the deadband among Midwest ISO zones. *See* Pet. Br. 30, 34 (citing *St. Michaels Utils. Comm’n v. FPC*, 377 F.2d 912, 915 (4th Cir. 1997) for the proposition that differences in rates are justified when predicated upon differences in facts). *See also* Pet. Br. 51-52 (arguing that the Commission failed to adduce evidence of factual differences among generators to justify the differential in rates).

The “factual difference” underlying differing reactive power compensation in Midwest ISO zones is that Midwest ISO generators are interconnected to different “Transmission Providers,” who are entitled under Order No. 2003 to make differing decisions about compensation within the deadband. *See* Rehearing Order P 48, JA 112. “[D]ifferential treatment does not necessarily amount to *undue* preference where the difference in treatment can be explained by some factor deemed acceptable by the regulators (and the courts).” *Town of Norwood v.*

*FERC*, 202 F.3d 392, 402 (1st Cir. 2000). Here, FERC and this Court have accepted the Order No. 2003 rule that permits Transmission Providers to choose whether to compensate within the deadband. Rehearing Order P 48, JA 112; *Nat'l Ass'n of Regulatory Util. Comm'rs*, 475 F.3d at 1286 (rejecting "Petitioners' remaining objections," including challenges to the reactive power compensation policy within the deadband, finding that "[t]he issues do not merit discussion in a published opinion"). Thus, the Commission reasonably rejected claims, Rehearing Order P 50, JA 113, that there needed to be shown some difference "in the cost of service, the type or size of the generator, [or] the amount of reactive supply service the generator is capable of producing," *see* Pet. Br. 32, to justify the differing compensation.

The Commission also reasonably rejected claims, *see* Pet. Br. 30-33, that generators in different Midwest ISO zones, interconnected to different Transmission Providers, are "similarly situated" for purposes of receiving reactive power compensation under Order No. 2003. Tariff Order PP 49, 55, JA 70, 71; Rehearing Order PP 59, 60, JA 117. For purposes of the Order No. 2003 reactive power compensation policy, "similarly situated" generators are all generators – affiliated or unaffiliated – interconnected to the same Transmission Provider, here, the Midwest ISO transmission owners in the relevant zone. *See* Tariff Order PP 59, 60, JA 73; Rehearing Order PP 62, 78, JA 118, 123. *See also, e.g.*, Tariff

Order P 60, JA 73 (finding that transmission owners with facilities in multiple zones must choose the same compensation policy applicable to all zones in which they have facilities, to assure that the transmission owner treats all affiliated and unaffiliated generators alike).

*Calpine Oneta Power, L.P.*, 116 FERC ¶ 61,282 P 36 (2006), *on reh'g*, 119 FERC ¶ 61,177 P 44 (2007), cited at Pet. Br. 30, 35, does not support Generators' argument that all Midwest ISO generators providing reactive power are "similarly situated." In those orders, an independent generator, Calpine Oneta, submitted a rate schedule to recover reactive power compensation in the same manner as the affiliated generators of American Electric Power Service Corporation, a transmission owner in the Southwest Power Pool RTO which administered the control area where the Calpine Oneta generator was located. The Commission held that "generators affiliated *with transmission owners* and unaffiliated generators are similarly situated for reactive power compensation purposes to the extent that they have the capability of providing reactive power service within their respective dead bands." *Calpine Oneta*, 119 FERC ¶ 61,177 P 44 (emphasis added). The Commission therefore found -- fully consistent with its orders here -- that an unaffiliated generator, Calpine Oneta, was similarly situated with the affiliated generators of the transmission owner to which Calpine Oneta was interconnected, American Electric Power. *Id.* See also *Calpine Oneta*, 116 FERC

¶ 61,282 P 36 (same). Therefore, the *Calpine Oneta* orders fully support the result reached here.

**3. The Zonal Compensation Policy Of Schedule 2-A Is Fully Consistent With The Midwest ISO Zonal Rate Structure For Transmission Service.**

Generators assert that rate schedules in the Midwest ISO must apply “grid-wide” to avoid discrimination. *See* Pet. Br. 49-50. However, the ability for the Midwest ISO transmission owners to choose the reactive power compensation under either Schedule 2 or Schedule 2-A is fully consistent with the existing zone-based, license plate rate structure for transmission service within the Midwest ISO, which is beyond challenge in these proceedings. Rehearing Order P 82, JA 125.

The Commission allows RTOs, including the Midwest ISO, to charge transmission rates that vary by zone, subject to the requirement that customers pay only a single zonal rate (*i.e.*, no pancaked rates) to use the entire RTO system. Rehearing Order P 81, JA 124. Under the Midwest ISO’s license-plate rates, customers serving load within the Midwest ISO pay for the embedded cost of the transmission facilities in the local transmission pricing zone and receive reciprocal access to the entire Midwest ISO grid. Tariff Order P 1 n.4, JA 52. Zonal rates permit transmission customers to be charged based on the facilities they have traditionally used, and minimize cost-shifting among transmission customers connected to the systems of different transmission owners. *See, e.g., Midwest ISO,*



84 FERC ¶ 61,231 at 62,167-68 (1998); *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,063 P 10 (2007).

Rates for reactive power service under Schedule 2 are calculated on the same zonal basis, based on the annual costs of the qualified generators in the zone. Tariff Order P 3, JA 53; Rehearing Order P 1 n.3, JA 95. The Schedule 2-A zonal reactive power compensation proposal operates in an analogous fashion, where customers pay only a single reactive power rate to serve load in a particular zone, regardless of whether their load is located in a zone covered by Schedule 2 or Schedule 2-A. Rehearing Order P 81, JA 124. Although the Schedule 2-A option may result in customers in one zone paying a reactive power rate that includes compensation inside the deadband while customers in another zone do not, *see* Pet. Br. 33-34, all customers within the same zone are treated comparably, with revenue associated with rates paid for reactive power in a particular zone going only to generators within the same zone. Tariff Order P 69, JA 78. The introduction of the Schedule 2-A option does not force customers in some zones to subsidize customers in other zones, and it does not result in subsidies to different categories of customers. *Id.*

Indeed, the Commission has allowed compensation methodologies (for reimbursement of generator interconnection upgrade costs) to differ among Midwest ISO transmission owners. Rehearing Order P 87 n.88, JA 127 (citing *Am.*

*Transmission Co. LLC*, 120 FERC ¶ 61,221 PP 2-3, 38 (2007), *reh'g denied*, 123 FERC ¶ 61,065 (2008) (permitting a transmission owner to adopt a methodology for compensating generators for network upgrades that differs from the Midwest ISO tariff); *Int'l Transmission Co.*, 120 FERC ¶ 61,220 PP 2-3, 35 (2007), *reh'g denied*, 123 FERC ¶ 61,065 (2008) (same); *ITC v. Midwest, LLC*, 124 FERC ¶ 61,150 PP 2-3, 14 (2008) (same)).

**4. The Commission's Determination Is Fully Consistent With Commission Precedent.**

The Commission reasonably found that Schedule 2-A is consistent with Commission precedent as it properly implements the Commission's reactive power compensation policy. Tariff Order P 60, JA 73. The cases cited by Generators accepting RTO-wide compensation policies are not to the contrary. *See* Pet. Br. 47-48 (citing *Southwest Power Pool*, 119 FERC ¶ 61,199 P 30 (accepting an RTO-wide tariff provision compensating for reactive power only outside of the deadband); *ISO New England, Inc.*, 118 FERC ¶ 61,163 P 28 (2007) (accepting an RTO-wide tariff provision compensating all generators within the deadband)).

As the Commission explained, Schedule 2-A raised for the first time the question of whether an RTO with different zones must maintain a single reactive power compensation methodology applicable to all zones, or whether it may allow each zone to choose between two different compensation methodologies, provided that both policies compensate affiliated and unaffiliated generators on a

comparable basis. Rehearing Order P 71, JA 121. *Southwest Power Pool* and *ISO New England*, in contrast, simply did not present that issue – the proposed tariff provisions in those cases established reactive power compensation for all generators on an RTO-wide basis; either providing compensation for all within the deadband on a comparable basis (*ISO New England*), or denying compensation for all within the deadband on a comparable basis (*Southwest Power Pool*). *Id.* See also Rehearing Order P 80, JA 124 (“In the typical case involving an RTO’s reactive power compensation provisions, however, we are not faced with the choice of determining whether zone-based compensation satisfies the comparability requirement. Instead we are presented with RTO-wide compensation provisions.”) Thus, this previous precedent simply is inapposite here as it fails to address a proposal for zone-based reactive power compensation within an RTO. Rehearing Order P 71, JA 121.

Similarly, *Midwest ISO*, 109 FERC ¶ 61,005 P 40 (2004) (stating that “only a Schedule 2 that includes all generators . . . is just and reasonable and not unduly discriminatory or preferential”), cited Pet. Br. 46, must be understood in light of the dispute then before the Commission. Rehearing Order P 38, JA 109. There the Commission confronted a Schedule 2 that was applicable RTO-wide and authorized reactive power compensation only for generators affiliated with transmission owners. *Id.* P 39, JA 109; *Midwest ISO*, 109 FERC ¶ 61,005 P 8.

The Commission required the Midwest ISO to revise Schedule 2 to compensate all generators – affiliated and unaffiliated – on a comparable basis. Rehearing Order P 40, JA 109 (citing *Midwest ISO*, 109 FERC ¶ 61,005 P 40).

Thus, when the Commission stated that Schedule 2 must compensate all generators, it was in the specific context of rejecting a Schedule 2 that unduly discriminated *on the basis of affiliation*. Rehearing Order P 41, JA 110. See *Midwest ISO*, 109 FERC ¶ 61,005 P 39 (finding Schedule 2 unduly discriminatory “[b]ecause Schedule 2 has no mechanism to compensate non-transmission owners or [independent power producers]”). “In essence, because the Midwest ISO was compensating existing generators and was doing so on a capability basis, comparability required that the Midwest ISO compensate all generators (including [independent power producers]) on that same basis.” *Midwest ISO*, 116 FERC ¶ 61,283 P 14 (2006).

The Commission’s purpose was to erase the distinction between affiliated and unaffiliated generators; it was not to forbid in the future a zone-based approach that compensates affiliated and unaffiliated generators in the same zone comparably but allows for different zones to employ different schedules. Rehearing Order P 41, JA 110. This earlier order was not a universal mandate that every generator must, for all time, collect reactive power compensation pursuant to Schedule 2, and it was not a blanket prohibition on generators ever collecting

compensation pursuant to a different schedule; it was a specific rejection of discrimination on the basis of affiliation. *Id.* In contrast, here, Schedule 2-A does not create or perpetuate undue discrimination on the basis of affiliation; instead, it applies equally to both affiliated and unaffiliated generators. *Id.* P 43, JA 110.

The Commission therefore reasonably explained why its current holding was not inconsistent with the Commission’s prior precedent. *See* Pet. Br. 45-50. The Court “defer[s] to FERC’s interpretation of its orders so long as the interpretation is reasonable.” *Entergy Services*, 375 F.3d at 1209. *See also Wisconsin Pub. Power, Inc. v. FERC*, 493 F.3d 239, 266 (D.C. Cir. 2007) (“We review FERC’s interpretation of its own orders for reasonableness.”); *Nat’l Ass’n of Regulatory Util. Comm’rs*, 475 F.3d at 1284 (the Court defers to the Commission’s reasonable application of its own precedent).

### **III. THE COMMISSION REASONABLY REJECTED GENERATORS’ ARGUMENTS ALLEGING WITHIN-ZONE DISCRIMINATION.**

In addition to their claims regarding alleged discriminatory impact among zones, discussed above, Generators also assert that Schedule 2-A results in discrimination among generators within the same zone. Generators base this argument on: (1) the fact that certain generators within a zone adopting Schedule 2-A may have preexisting contracts for compensation within the deadband which will not be abrogated by the adoption of Schedule 2-A, Pet. Br. 52-58; and (2) the allegedly superior ability of generators affiliated with transmission owners to

recover their costs of providing reactive power elsewhere, in contrast to the independent generators in the same zone, Pet. Br. 42-43. As demonstrated below, neither argument has merit.

**A. The Schedule 2-A FPA § 205 Filing Provided No Basis To Abrogate Existing Contracts, Which Can Be Challenged Under FPA § 206.**

Generators assert that the Commission's comparability policy is not achieved within each zone because the adoption of the Schedule 2-A alternative does not abrogate existing rate contracts, which continue in effect until the rates are successfully challenged under FPA § 206. Pet. Br. 52-58. As a consequence, some generators within a zone may be compensated under Schedule 2-A, while other generators in the same zone, operating under pre-existing contracts, may still be compensated under Schedule 2 cost-based rates. Pet. Br. 54. In Generators' view, it is not sufficient that such pre-existing contract rates may be challenged by complaint under FPA § 206. Pet. Br. 54-56.

This two-step process -- making an FPA § 205 filing eliminating compensation within the deadband, and then challenging existing contracts providing compensation in the deadband under FPA § 206 -- simply reflects the structure of the Federal Power Act. Tariff Order P 31, JA 64; Rehearing Order PP 26, 30, JA 105, 106. As an FPA § 205 filing, the transmission owner proponents of Schedule 2-A had to show Schedule 2-A to be just and reasonable, but they

were not required to demonstrate that Schedule 2, or any rates filed under Schedule 2, were unjust, unreasonable or unduly discriminatory. Tariff Order P 37, JA 66 (citing *Transcontinental Gas Pipe Line Corp. v. FERC*, 518 F.3d 916, 918 (D.C. Cir. 2008) (distinguishing §§ 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c-717d, which as relevant here parallel FPA §§ 205 and 206, noting that under § 4 the filing utility need merely show that its proposal is just and reasonable, while under § 5 the complaining party must show both that the existing rate/term is unjust and unreasonable, and that the new rate/term is just and reasonable)). *See also Wisconsin Pub. Power*, 493 F.3d at 254 (“FPA section 205 allows utilities to file changes to their rates at any time and requires FERC to approve them as long as the new rates are ‘just and reasonable.’”); *Winnfield v. FERC*, 744 F.2d 871, 874-75 (D.C. Cir. 1984) (“As is evident, § 205, unlike § 206, allows the Commission to approve rate increases without a showing that current rates are unjust and unreasonable; it need only find the proposed rates to be just and reasonable.”). Thus, “Schedule 2-A d[id] not eliminate any generator’s compensation inside the deadband provided under a separate rate schedule on file with the Commission; it merely provide[d] that transmission owners in each zone have the option of switching to Schedule 2-A’s compensation regime.” Tariff Order P 38, JA 66.

An FPA § 205 rate filing provides no basis upon which to abrogate, eliminate or revise any existing rate contracts. Tariff Order P 38, JA 66; Rehearing Order PP 30, 89, JA 106, 129. *See, e.g., Metropolitan Edison Co. v. FERC*, 595 F.2d 851, 855 (D.C. Cir. 1979) (a utility cannot abrogate a contract rate simply by unilaterally filing a new rate with the Commission under FPA § 205); Tariff Order P 42 n.39, JA 67 (citing *Tucson Elec. Power Co.*, 60 FERC ¶ 61,236 at 61,791 (1992) (acceptance of a utility’s agreement with one customer does not erase preexisting contractual obligations to other customers or preempt other customers’ rights under their preexisting agreements)). Rather, the existing contract rate can only be changed if the Commission finds under FPA § 206 that the contract rate is “unjust, unreasonable, unduly discriminatory or preferential.” *Metropolitan Edison*, 595 F.2d at 855. *See, e.g., ChevronTexaco Exploration & Prod. Co. v. FERC*, 387 F.3d 892, 896 (D.C. Cir. 2004) (the filing of a new, proposed tariff provision does not “‘give[] the Commission the authority to reject, post hoc, a previously accepted [tariff] provision or to specify what should replace it’”) (quoting *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 187 (D.C. Cir. 1986)); *ANR Pipeline Co. v. FERC*, 771 F.2d 507, 513 (D.C. Cir. 1985) (Upon receiving a rate filing, the Commission’s authority “is limited to review of increases proposed by the [filing] company. When the Commission seeks to impose its own rate



determinations – rather than to accept or reject a change proposed by the company – the Commission must act under [other statutory authority].”).

Accordingly, approving the Schedule 2-A filing under FPA § 205, while leaving issues regarding the justness and reasonableness of existing contracts for proceedings under FPA § 206, simply follows the structure of the Federal Power Act. Acceptance of the Schedule 2-A § 205 filing did not, and could not under the Federal Power Act, eliminate a generator’s compensation inside the deadband provided under a separate rate schedule or contract on file with the Commission. Tariff Order P 38, JA 66. Transmission owners that switch to Schedule 2-A remain obligated to compensate generators in their zones pursuant to the generators’ filed rate schedules, unless and until those schedules are successfully challenged under FPA § 206, which provides the statutory basis for the Commission to alter existing rates. *Id.*; Rehearing Order PP 30, 89, 114, JA 106, 129, 137.

If generators within a zone are receiving compensation within the deadband under pre-existing contracts, while newly-interconnected generators in the same zone receive no compensation within the deadband under Schedule 2-A, the newly-interconnected generators may institute an FPA § 206 complaint proceeding to challenge the pre-existing contracts. Rehearing Order P 89, JA 129. Further, as Generators themselves observe, “transmission owners that have adopted Schedule

2-A . . . can be expected to file complaints under section 206 challenging existing rate schedules of any generators receiving cost-based compensation for reactive supply service.” Pet. Br. 54-55. While Generators assert that there is no basis to believe such complaints would be granted, *see* Pet. Br. 57-58, Generators at the same time acknowledge that such complaints have been granted in other cases. Pet. Br. 55 (citing *Entergy Servs., Inc.*, 113 FERC ¶ 61,040 (2005), *reh’g denied*, 114 FERC ¶ 61,303 (2006)).

The Commission’s default reactive power compensation policy is that “the Interconnection Customer should not be compensated for reactive power when operating its Generating Facility within the established power factor range, since it is only meeting its obligation.” Order No. 2003 P 546. *See* Rehearing Order P 48, JA 112; *Entergy Servs.*, 114 FERC ¶ 61,303 P 14. A transmission owner is only required to compensate a generator for reactive power inside the deadband if it so compensates its affiliated generators. Rehearing Order P 48, JA 112 (citing Order No. 2003-A P 416). *See also Entergy Servs.*, 114 FERC ¶ 61,303 P 14. Thus, acting under FPA § 206, the Commission has found that, when a transmission owner ceases to compensate its affiliated generation for reactive power within the deadband, a rate schedule that provides such compensation for an unaffiliated generator becomes unduly discriminatory as to the affiliated generators and unduly preferential to the unaffiliated generator. *See E.ON U.S. LLC*, 119 FERC ¶ 61,340

P 20 (2007) (acting under FPA § 206, vacating unaffiliated generator rate schedule providing for compensation within the deadband as unduly discriminatory, coincident with the date that the transmission provider ceases to compensate its own affiliated generation within the deadband). *See also, e.g., Bonneville Power*, 120 FERC ¶ 61,211 P 20 (acting on an FPA § 206 complaint) (“Given that [Bonneville] will discontinue paying its merchant affiliate for within the deadband reactive power service on October 1, 2007, the [independent power producers’] rates for the same service will become unjust and unreasonable on that date, and therefore must be reduced to zero.”), *on reh’g*, 125 FERC ¶ 61,273 P 10 (same).

**B. There Is No Undue Discrimination When Transmission Owners And Independent Generators Both Have The Opportunity To Recover Their Costs Elsewhere.**

Generators contend that Schedule 2-A is discriminatory because it would deprive independent generators in Schedule 2-A zones of the opportunity to recover their costs of providing reactive power service. Pet. Br. 42. Generators complain that transmission owners can recover their reactive power supply costs from captive retail customers, whereas independent generators “must bid to participate in the region-wide Midwest ISO capacity market, and their bids are less likely to be accepted if they are increased to recover for providing reactive supply service.” Pet. Br. 42-43.

First, generators do not have an inherent right to compensation for providing reactive power inside the deadband because in doing so they are only meeting their obligations. Rehearing Order PP 83, 95, JA 125, 131. A generator has a right to compensation for producing reactive power within the deadband only if the transmission owner so compensates its own or affiliated generators for this service. Rehearing Order PP 83, 95, JA 125, 131 (citing Order No. 2003-A P 416; *KGen Hinds LLC*, 120 FERC ¶ 61,284 (2007)). See also *Bonneville Power*, 125 FERC ¶ 61,273 P 14 n.24 (absent comparability concerns, “neither affiliated nor non-affiliated generators have an inherent right to any compensation for reactive power within the deadband”). In a zone covered by Schedule 2-A, neither affiliated nor unaffiliated generators have a right to receive compensation for reactive power within the deadband. Rehearing Order P 83, JA 125.

Further, the Commission rejected claims that Schedule 2-A was unduly discriminatory because transmission owners have an opportunity to recover their reactive power costs through retail rates whereas independent generators do not. Tariff Order PP 65-66, JA 75-76; Rehearing Order P 99, JA 133. Comparability requires only that transmission owners and independent generators have similar opportunities to make up the revenue that they previously might have earned through a separate charge for reactive power inside the deadband. Tariff Order P 65, JA 75; Rehearing Order PP 97, 99, JA 132, 133. Schedule 2-A transmission

owners may be able to recover their lost revenue in their power sales rates, but independent generators likewise have the opportunity to find other ways to recover their costs, such as negotiating agreements that recover these costs through their market-based power sales. Tariff Order P 65, JA 75; Rehearing Order PP 97, 99, JA 132, 133 (citing *Southwest Power Pool*, 121 FERC ¶ 61,196 P 18 (2007) (“the transmission owners may seek to recover their costs in their power sales rates, and [independent power producers] have the same opportunity; they may negotiate agreements recovering these costs through their market-based power sales rates”)).

Comparability does not require that the Commission guarantee that independent generators and transmission owners will be equally successful in pursuing such opportunities. Tariff Order P 65, JA 75; Rehearing Order PP 97, 99, JA 132, 133. Generators do not contest that they have opportunities to recover their lost revenue in their market-based power sale rates; they simply doubt their ability to recover their lost revenue. Rehearing Order P 97, JA 132 (citing *Bonneville Power*, 125 FERC ¶ 61,273 P 15). *See, e.g.*, Pet. Br. 42 (generator bids are “less likely to be accepted” if increased to recover reactive power costs); *id.* 43 (competition in the Midwest ISO market “mitigates strongly against the possibility” that a generator might raise its rates to recover reactive power costs).

The Commission further noted that the incremental cost to the generator of producing reactive power within the deadband is minimal.<sup>7</sup> Rehearing Order P 96, JA 131 (citing *Bonneville Power*, 120 FERC ¶ 61,211 P 21). The purpose for which generating assets are built (including reactive power capability to maintain voltage levels for generation entering the grid) is to make sales of real power. *Id.* Thus, in *Bonneville Power*, the Commission rejected the argument (*see* Pet. Br. 42-43) that the competitive nature of power sales makes it infeasible for independent power producers to recover reactive power costs in such sales, since the incremental cost to be recovered is minimal. *Bonneville Power*, 120 FERC ¶ 61,211 P 21.

On the same ground, the Commission rejected Generators' arguments that "[d]enying fully cost-based compensation for reactive supply service in certain zones of the Midwest ISO may reduce or eliminate incentives for entry of new unaffiliated generators into those zones." Pet. Br. 44. The Commission was not

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<sup>7</sup> All synchronous generators are built with reactive power capability. *See Calpine Oneta Power, L.P.*, 113 FERC ¶ 63,015 P 115 (2005) (ALJ decision), *on exceptions*, 116 FERC ¶ 61,282 (2006), *on reh'g*, 119 FERC ¶ 61,177 (2007). The only expenditure made during construction of a synchronous generator for the purpose of producing reactive power is a minor expenditure, to include an Automatic Voltage Regulator, which controls reactive power rather than producing it. *Id.* P 116. Thus, most of the fixed costs of reactive power capability must be expended in any event in constructing real power capability. *Id.* P 123. Further, reactive power can only be produced when the generator already is in operation producing real power. *Id.* P 119.

persuaded that “Schedule 2-A will either reduce or eliminate incentives for new entry into the market,” given the minimal incremental costs associated with reactive power production. Rehearing Order P 96, JA 131. For their part, Generators provided no evidence to support their claims that certain generators may cease operation if they cannot collect reactive power compensation on a capability basis. *Id.*

**IV. THE COMMISSION REASONABLY DETERMINED THAT THE FILING RIGHTS SETTLEMENT AUTHORIZED THE TRANSMISSION OWNERS’ SCHEDULE 2-A FILING.**

Generators contend that the Midwest ISO transmission owners lacked authority to make the FPA § 205 filing proposing Schedule 2-A under the Filing Rights Settlement. Pet. Br. 59-62. Section 3.9 of the Settlement, JA 487, provides as follows:

Both Transmission Owners that own or control generation or other resources capable of providing ancillary services (offered to customers pursuant to the [Midwest ISO Tariff]) and the Midwest ISO shall have the right to submit filings under FPA section 205 to govern the rates, terms and conditions applicable to the provision of ancillary services. A Transmission Owner shall not be required to follow the governance and coordination provisions of Sections 4 and 5 of this [Filing Rights Settlement] to exercise the filing right provided for in this Section 3.9; provided, however, that any ancillary service proposal that has regional impacts shall be subject to the governance and coordination provisions of Sections 4 and 5 of this [Filing Rights Settlement].

In Generators’ view, this provision limits the filing rights of transmission owners to filings applicable to services provided with the transmission owners’ own assets,

and precludes them making filings changing the Midwest ISO Tariff applicable to services provided by other entities. Pet. Br. 60.

While the Commission found section 3.9 ambiguous, *see* Tariff Order P 22, JA 61; Rehearing Order P 6, JA 98, the Commission concluded that, read in its entirety, and in the context of all of section 3 of the Filing Rights Settlement, section 3.9 reasonably is interpreted to allocate to transmission owners the right to make FPA § 205 filings that modify the Tariff. Rehearing Order P 4, JA 97. The phrase “that own or control generation or other resources capable of providing ancillary services (offered to customers pursuant to the [Tariff])” defines the class of transmission owners eligible to submit filings pursuant to section 3.9 (*i.e.*, those that own or control such resources); it does not define the filing rights of those transmission owners. Tariff Order P 27, JA 62; Rehearing Order PP 14, 16, JA 100, 101.

Further, section 3.9 allocates the same FPA § 205 filing right to transmission owners and to the Midwest ISO. Tariff Order P 24, JA 61; Rehearing Order PP 6, 18, JA 98, 102. Section 3.9 states that “[*b*]oth transmission owners . . . and the Midwest ISO shall have the right to submit filings under FPA section 205 to govern the rates, terms and conditions applicable to the *provision of ancillary services.*” Rehearing Order P 6, JA 98 (quoting Tariff Order P 24, JA 61).

Transmission owners’ filing rights cannot therefore be limited to services provided



with their own assets. Tariff Order P 24, JA 61; Rehearing Order P 7, 99. As the Midwest ISO itself controls or owns no generation capable of providing ancillary services, it could not under Generators' interpretation make a § 205 filing related to those services, and thus it would have no filing rights at all under section 3.9. Tariff Order P 24, JA 61; Rehearing Order PP 7, 18, JA 99, 102.

Generators assert that section 3.9 cannot reasonably be construed to permit transmission owners to make the Schedule 2-A filing because it “allows them to assert precisely the sort of system-wide control over the regional transmission system that is supposed to be vested in the Midwest ISO.” Pet. Br. 61. This interpretation is inconsistent with the language in section 3.9 that subjects all ancillary service proposals that have “regional impacts” to the governance and coordination provisions of section 4 and 5 of the Filing Rights Settlement. Tariff Order P 25, JA 62; Rehearing Order PP 8, 20, JA 99, 102. There is no reason why section 3.9 would contemplate transmission owners submitting § 205 filings that have “regional impacts” if section 3.9 merely authorized transmission owners to make § 205 filings that pertain to their individual ancillary service rates. Tariff Order P 25, JA 62; Rehearing Order PP 8, 20, JA 99, 102.

Additionally, the Commission's interpretation of section 3.9 is supported by a definite and discernable pattern in the Filing Rights Settlement. Rehearing Order P 21, JA 103. There are several instances in which the Filing Rights Settlement

allocates to transmission owners “the full and exclusive right” to submit an FPA § 205 filing. *Id.* (citing sections 3.1, JA 484; 3.3(a), JA 484; 3.4, JA 485, 3.5, JA 485, 3.7, JA 486, and 3.8, JA 486). There are also several instances in which the Settlement allocates filing rights to “both the Transmission Owners and the Midwest ISO.” *Id.* (citing sections 3.5(iii)(b), JA 486, and 3.6, JA 486). The Commission found that the use of the “both shall have” language in section 3.9, rather than the “full and exclusive right” language, confirms the Commission’s finding that section 3.9 allocated the same filing right both to transmission owners and to the Midwest ISO, and supports the Commission’s reading of the provision. *Id.*

As this Court has repeatedly recognized, deference is owed to the Commission’s reasonable interpretation of a FERC-jurisdictional contract. *See Old Dominion Elec. Coop.*, 518 F.3d at 49 (Court affords “substantial deference” to FERC interpretation of ambiguous contract); *Entergy Servs., Inc. v. FERC*, 568 F.3d 978, 982 (D.C. Cir. 2009) (same); *Cajun Elec. Power Coop., Inc. v. FERC*, 924 F.2d 1132, 1135 (D.C. Cir. 1991) (same); *Wisconsin Pub. Power*, 493 F.3d at 271 (same). “Any agreement that must be filed and approved by an agency loses its status as a strictly private contract and takes on a public interest gloss. That means that when the agency reconciles ambiguity in such a contract it is expected to do so by drawing upon its view of the public interest. And, therefore, the

agency to which Congress entrusted the protection and discharge of the public interest is entitled to just as much benefit of the doubt in interpreting such an agreement as it would in interpreting its own orders.” *Cajun Elec.*, 924 F.2d at 1135 (citations omitted). Here, the Court should defer to the Commission’s reasonable interpretation of the ambiguous section 3.9 of the Filing Rights Settlement.

## CONCLUSION

For the foregoing reasons, FERC respectfully requests that the petitions for review be denied and FERC's orders upheld in all respects.

Respectfully submitted,

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October 7, 2010

*Dynegy Midwest Generation, Inc. v. FERC,*  
Nos. 09-1306, *et al.*

### **CERTIFICATE OF COMPLIANCE**

In accordance with Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief contains 11,900 words, not including the tables of contents and authorities, the glossary, the certificate of counsel and this certificate.

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October 7, 2010

# **STATUTORY ADDENDUM**

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**Section 205 of the Federal Power Act, 16 U.S.C. § 824d, provides as follows:**

§ 824d Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

**(a) Just and reasonable rates**

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

**(b) Preference or advantage unlawful**

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission,

(1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or

(2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

**(c) Schedules**

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.



**(d) Notice required for rate changes**

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

**(e) Suspension of new rates; hearings; five-month period**

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public

utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

**(f) Review of automatic adjustment clauses and public utility practices; action by Commission; “automatic adjustment clause” defined**

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

**(3)** The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

**(A)** modify the terms and provisions of any automatic adjustment clause, or

**(B)** cease any practice in connection with the clause, if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

**(4)** As used in this subsection, the term “automatic adjustment clause” means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

**Section 206 of the Federal Power Act, 16 U.S.C. § 824e, provides as follows:**

§ 824e Power of Commission to fix rates and charges; determination of cost of production or transmission

**(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues**

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

**(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest**

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later

than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: Provided, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

**(c) Refund considerations; shifting costs; reduction in revenues; “electric utility companies” and “registered holding company” defined**

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that

**(1)** requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and

**(2)** is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: Provided, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.<sup>[1]</sup>

#### **(d) Investigation of costs**

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

#### **(e) Short-term sales**

**(1)** In this subsection:

**(A)** The term "short-term sale" means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

**(B)** The term "applicable Commission rule" means a Commission rule applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

**(2)** If an entity described in section 824(f) of this title voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the

sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

**(3)** This section shall not apply to—

**(A)** any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

**(B)** an electric cooperative.

**(4)**

**(A)** The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

**(B)** The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

**(C)** In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.

**Section 313(b) of the Federal Power Act, 16 U.S.C. § 825I(b), provides as follows:**

**(b) Judicial review**

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.





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