ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

Nos. 05-1238, *et al.*

ENTERGY SERVICES, INC., *et al.*,
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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AUGUST 30, 2006
FINAL BRIEF: OCTOBER 19, 2006

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CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

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

B. Rulings Under Review

The following seven orders of the Federal Energy Regulatory Commission are under review here:

1. *Nevada Power Co.*, 111 FERC ¶ 61,161 (Nevada Power Remand Order), JA 743, *on reh'g*, 113 FERC ¶ 61,007 (2005) (Nevada Power Rehearing Order), JA 856.

2. *Southern Company Services, Inc.*, 105 FERC ¶ 61,221 (2003) (Southern Order), JA 1407, *on reh'g*, 108 FERC ¶ 61,229 (2004) (Southern First Rehearing Order), JA 1562, *reh'g denied*, 111 FERC ¶ 61,423 (2005) (Southern Second Rehearing Order), JA 1742.

3. *Entergy Services, Inc.*, 104 FERC ¶ 61,084 (2003) (Entergy Order), JA 1132, *reh'g denied*, 111 FERC ¶ 61,181 (2005) (Entergy Rehearing Order), JA 1285.

C. Related Cases

One of the two principal issues being briefed in this appeal is whether the "at or beyond" test applied by the Commission in these orders is a reasonable exercise

of agency discretion, and, more specifically, whether the cost allocation for network facilities, which the policy implements, is consistent with precedent and the Commission's statutory authority. This issue is already before the Court in *National Association of Regulatory Utility Commissioners, et al. v. FERC,* Nos. 04-1148, *et al.* (oral argument scheduled for October 13, 2006), on review of the Commission's Order No. 2003 rulemaking on generator interconnection policy. One of the petitioners there, Southern Company Services, Inc., is raising identical arguments on this issue in this appeal.

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Samuel Soopper
Attorney

October 19, 2006

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GLOSSARY

Consumers Energy	*Consumers Energy Co.*, 95 FERC ¶ 61,233 (2001)
Entergy	Entergy Services Inc.
FPA	Federal Power Act
Entergy	*Entergy Services, Inc. v. FERC*, 391 F.3d 1240 (D.C. Cir. 2004)
Entergy Order	*Entergy Services, Inc.*, 104 FERC ¶ 61,084 (2003)
Entergy Rehearing Order	*Entergy Services, Inc.*, 111 FERC ¶ 61,181 (2005)
Nevada Power	Nevada Power Company
Nevada Power Remand Order	*Nevada Power Co.*, 111 FERC ¶ 61,161 (2005)
Nevada Power Rehearing Order	*Nevada Power Co.*, 113 FERC ¶ 61,007 (2005)
Southern	Southern Company Services, Inc.
Southern Order	*Southern Company Services, Inc.*, 105 FERC ¶ 61,211 (2003)
Southern First Rehearing Order	*Southern Company Services, Inc.*, 108 FERC ¶ 61,229 (2004)
Southern Second Rehearing Order	*Southern Company Services, Inc.*, 111 FERC ¶ 61,423 (2005)

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

1. Whether the Federal Energy Regulatory Commission (Commission or FERC) reasonably explained, in accordance with the Court's remand in *Entergy Services, Inc. v. FERC*, 391 F.3d 1240 (D.C. Cir. 2004) (*Entergy*), that its policy of classifying facilities "at or beyond" the point of interconnection of a generator and that transmission system has been consistently applied.

2. Whether the Commission's policy of allocating to a transmission system, including those operated by petitioners, the costs of facilities "at or beyond" the point of interconnection of a generator and a transmission system, is a reasonable

exercise of the Commission's regulatory discretion.

STATUTORY AND REGULATORY PROVISIONS

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

STATEMENT OF THE CASE

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

These appeals arise from the submission by petitioners Nevada Power Company (Nevada Power), Entergy Services, Inc. (Entergy) and Southern Company Services, Inc. (Southern), all of which are public utilities providing electric transmission service, of proposed agreements governing the interconnection of their transmission systems with particular generators of electricity.

One set of orders at issue in these appeals represents the Commission's response on remand from this Court in *Entergy*: "Order on Remand," *Nevada Power Co.*, 111 FERC ¶ 61,161 (Nevada Power Remand Order), JA 743, *on reh'g*, 113 FERC ¶ 61,007 (2005) (Nevada Power Rehearing Order), JA 856. In these orders, the Commission explained that the application of the "at or beyond" classification policy to Nevada Power's transmission system upgrades necessitated by the interconnection of its system with certain generating facilities was consistent with *Consumers Energy Co.*, 95 FERC ¶ 61,233 (*Consumers Energy*),

reh'g denied, 96 FERC ¶ 61,132 (2001), which initially codified the policy, and subsequent orders. The Commission further explained that the policy was reasonable and based on longstanding precedent that any upgrades to an integrated transmission system benefit the entire system, so that the upgrade costs should be allocated to the entire system, and not to the interconnecting generator.

In the other two sets of orders at issue here, the Commission likewise applied its "at or beyond" classification policy to allocate the costs of certain transmission upgrades required to interconnect transmission systems and generators. *Southern Company Services, Inc.*, 105 FERC ¶ 61,221 (2003) (Southern Order) (JA 1407), *on reh'g*, 108 FERC ¶ 61,229 (2004) (Southern First Rehearing Order) (JA 1562), *reh'g denied*, 111 FERC ¶ 61,423 (2005) (JA 1742), (Southern Second Rehearing Order); *Entergy Services, Inc.*, 104 FERC ¶ 61,084 (2003) (Entergy Order) (JA 1132), *reh'g denied*, 111 FERC ¶ 61,181 (2005) (Entergy Rehearing Order) (JA 1285).

II. STATEMENT OF THE FACTS

A. Statutory and Regulatory Background

The genesis of the Commission's generator interconnection policy is its Order No. 888 rulemaking, which established the foundation for development of the competitive bulk power market in the United States: non-discriminatory open

access transmission services by public utilities.[1]

While Order No. 888 did not specifically address generator interconnection issues, the Commission recognized in *Tennessee Power Co.*, 90 FERC ¶ 61,238 (2000), that interconnection was a critical component of open access transmission service. As such, the Commission determined, interconnection was subject to the requirement that public utilities offer comparable, non-discriminatory service under their open access transmission tariffs. *See id.* at 61,761.

Subsequent to *Tennessee Power*, the Commission addressed issues raised by generator interconnection requests and agreements on a case-by-case basis, such as in *Consumers Energy*. However, the Commission soon recognized that such treatment was time-consuming and unwieldy, allowing utilities to unduly delay or resist altogether interconnection with a generator that might operate as a competitor for wholesale power sales. Therefore, operating under the authority granted by sections 205 and 206 of the Federal Power Act (FPA), 16 U.S.C. §§

[1] *See* 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).

824d, 824e, the agency began a rulemaking procedure culminating in a Commission rule standardizing procedures for generator interconnections with transmission systems. *See 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), *appeal pending, National Association of Regulatory Utility Commissioners, et al. v. FERC*, D.C. Cir. Nos. 04-1148, *et al.* (argument scheduled for October 13, 2006).

With one exception, the orders on review were issued after the promulgation of Order No. 2003 (the first Entergy Order slightly predates it), so that they often refer to Order No. 2003's discussion of the "at or beyond" policy, as well as interconnection agreement nomenclature codified therein. *See* 18 C.F.R. § 35.28(f) (codification of the Order No. 2003 interconnection rulemaking).

As relevant here, Order No. 2003 designated the owner or operator of the Generating Facility as the Interconnection Customer, while the owner or operator of the transmission system, presented with the interconnection request, is called the Transmission Provider. *See* Order No. 2003, Appendix C, Large Generator Interconnection Procedures, Section 1, Definitions.

There are two categories of facilities necessary for the interconnection

between the Interconnection Customer's Generating Facility and the Transmission Provider's Transmission System. First, there are Interconnection Facilities, which are those that solely serve the Interconnection Customer's Generating Facility. Order No. 2003 P 21. Thus, the costs of constructing and operating Interconnection Facilities are assigned solely to the Interconnection Customer (the generating facility).

On the other hand, upgrades to the transmission system necessitated by the interconnection are designated Network Upgrades (sometimes referred to as Network Facilities). *Id.* The costs of Network Upgrades are generally rolled into the rates of the Transmission Provider, and thus paid for by all of the system's transmission customers. The regulation contemplates that the Interconnection Customer will, by and large, initially fund the Network Upgrades, receiving payment back from the Transmission Provider in the form of credits for transmission service. Order No. 2003 P 22.

The basis for socialization of Network Upgrade costs is the Commission's long-established policy that improvements to an integrated transmission system benefit all users of that system. *Id.* & n.22, citing *Entergy Gulf States, Inc.*, 98 FERC ¶ 61,014 at 61,023, *reh'g denied*, 99 FERC ¶ 61,095 (2002) and *Public Service Co. of Colorado*, 59 FERC ¶ 61,311 (1992), *reh'g denied*, 62 FERC ¶ 61,013 at 61,061 (1993). The Court has repeatedly endorsed this "consistent

policy" of the Commission "to assign the costs of system-wide benefits to all customers on an integrated transmission grid," on the ground that "[w]hen a system is integrated, any system enhancements are presumed to benefit the entire system." *Western Massachusetts Electric Co. v. FERC*, 165 F.3d 922, 927 (D.C. Cir. 1999) (citations omitted).

In Order No. 2003, the Commission employed a locational test, already established in prior interconnection cases, to determine which facilities should be classified as Interconnection Facilities, and which as Network Upgrades: facilities "at or beyond" the point of interconnection of the Interconnection Customer's Generating Facility and the Transmission Provider's system are classified as Network Upgrades. *See* Order No. 2003 P 66 & n.52 (citations omitted). It is the Commission's contention on appeal that this policy was initially announced, albeit in less precise terms, in *Consumers Energy* on May 17, 2001. Petitioners, on the other hand, maintain that the "at or beyond" rule was not adopted by the Commission until 2002. *See* Pet. Br. 36.

B. Orders On Review

1. The Nevada Power Remand

a. The Original Orders

In the original Nevada Power orders, *Nevada Power Co.*, 100 FERC ¶ 61,077 (JA 130), *reh'g denied*, 101 FERC ¶ 61,036 (2002) (JA 341), the

Commission reviewed an unexecuted Interconnection Agreement between Transmission Provider Nevada Power and GenWest, LLC (GenWest), an independent generator, pursuant to which GenWest's proposed Generating Facility would be interconnected with the Nevada Power transmission system. As relevant here, Nevada Power proposed to directly assign to GenWest the costs of: (1) "a radial 500 kV line (Generator Tie-Line) from GenWest's plant site to an interconnection with Nevada Power's transmission system at Nevada Power's 500 kV Switchyard," and (2) a one-line terminal at the switchyard, along with certain related equipment. *Nevada Power*, 100 FERC ¶ 61,077 P 9, JA 132.

The Commission agreed with Nevada Power that the cost of the Generator Tie-Line from GenWest's plant site to the Nevada Power system should be the responsibility of GenWest. However, the agency held that "[t]he one line terminal at issue here is a modification of an existing Nevada Power switchyard," which was "a network facility" and thus part of the Nevada Power's integrated transmission system. *Id.* P 13, JA 133. That the switchyard was being "reconfigured or upgraded," the Commission explained, "[did] not somehow transform it into a non-network facility." *Id.*

On rehearing, the Commission affirmed its conclusion. *Nevada Power Co.*, 101 FERC ¶ 61,036 PP 8-9, JA 343-344. While Nevada Power argued that the modification of its pre-existing switchyard (including a substation bay position,

circuit breakers and relays) should be directly assigned to the generator, the Commission determined that "[c]onsistent with our earlier findings, facilities of these types are at or beyond the point of interconnection and are therefore network facilities." *Id.* P 9, JA 344.

b. The Court's *Entergy* Decision

The Court reviewed the *Nevada Power* orders in *Entergy*. At the outset, the Court rejected Nevada Power's argument contesting "the Commission's finding that facilities located 'at or beyond' the point of interconnection to the network benefit the entire network . . . ." 391 F.3d at 1247. Nevada Power's contention, based on the affidavit of its expert Mr. Whalen, was that the additions to the Harry Allen Switchyard did not provide a benefit, in terms of reliability or stability, to its transmission network. The Court, however, did not accept Nevada Power's "cramped view of what constitutes a benefit" to the grid. *Id.* (quoting *Entergy Services, Inc. v. FERC*, 319 F.3d 536, 543 (D.C. Cir. 2004) (internal quotation marks omitted) (referred to by the Court as *Entergy I*)). Rather, the Court in *Entergy* endorsed *Entergy I*'s reliance on the Commission's decision in *Consumers Energy*, which it quoted with approval:

> The Commission's policy regarding credits for network upgrades associated with the interconnection of a generating facility has been, and continues to be, that all *network upgrade* costs (the cost of *all facilities from the point where the generator connects to the grid*), including those necessary to remedy short-circuit and stability problems, should be credited back to the customer that funded the

upgrades once delivery service begins.

391 F.3d at 1248 (quoting *Consumers Energy*, 95 FERC at 61,804) (emphasis the Court's). "In short," the Court concluded, "the Commission's definition of 'network upgrade,' accepted by *Entergy I*, includes any change to facilities located on the grid." *Id.* Thus, the Court viewed the pricing policy of *Consumers Energy* (assigning the costs of network upgrades to the transmission system) as generally upheld in *Entergy I* for "*all* facilities from the point of interconnection." *Id.*, (quoting *Consumers Energy*, 95 FERC at 61,804) (emphasis the Court's).

However, the Court was less certain about the consistency of the Commission's use of the "at or beyond" test to identify which facilities were Network Upgrades. While the Commission had employed the "at or beyond" test in *Nevada Power*, the Court observed that in *Consumers Energy*, the Commission had assigned the costs "from the point" of interconnection to the Transmission Provider. *Id.* (quoting *Consumers Energy*, 95 FERC at 61,804) (emphasis the Court's). Furthermore, the Court indicated, the Commission in *Consumers Energy* had approved $3 million to be allocated as costs directly assigned to the Interconnection Customer, while the remaining $10.2 million were classified as Network Upgrade costs. *Id.* at 1249.

This created a conundrum for the Court: "If the Commission had intended 'from' to mean 'at or beyond' rather than simply 'beyond,' then it is not at all clear

what accounts for the $3 million in direct assignment, as the interconnection presumably is 'at' the determinative point." 391 F.3d at 1249. Nor did the Commission in any of its cases applying the "at or beyond" test take account of this distinction. Additionally, the Commission had failed to explain why *Consumers Energy* had not considered "the physical interconnection of the generating facility with . . . the grid" to be a "network upgrade." 391 F.3d at 1250 (quoting *Consumers Energy*, 95 FERC at 61,802).

Because of the failure to harmonize this precedent, the Court held that further explanation by the Commission was necessary:

> That explanation may take the form of a clarification of [*Consumers Energy*] that in some way establishes that we have misread the Commission's apparent direct assignment of costs occurring precisely at the point of interconnection or an explanation of why it has departed from that policy. It must do one or the other if we are to sustain the result reached in the order on review.

391 F.3d at 1251.

c. The Orders on Remand

In the first order on remand, the Commission reiterated its view that Interconnection Facilities – the costs of which are allocable strictly to the Interconnection Customer (owner or operator of the generating facility) – do not include facilities at the point of interconnection:

> The point of interconnection is typically an electrical substation or a tap point into an existing transmission line. Rarely is the point of interconnection located at the generating facility itself; in virtually all

> cases, interconnection facilities (*e.g.*, a radial line, poles, supports, switches, meters) must be constructed to provide an electrical connection between the generating facility and the transmission system at the point of interconnection. Thus, when we refer to "interconnection facilities," we are not referring to facilities "at" the point of interconnection. Rather, "interconnection facilities" refer to all facilities and equipment from the generating facility up to (but not including) the point of interconnection.

Nevada Power Remand Order, P 13, JA 748.

The Commission went on to explain that the use of the term "'from' the point of interconnection" in *Consumers Energy* was meant to express the same locational test for determining whether a facility is part of the network as "the more precise 'at or beyond' the point of interconnection" test. *Id.* P 16, JA 749. Therefore, the agency concluded, "*Consumers Energy* . . . is consistent with the policy applied to Nevada Power in this case." *Id.* P 14, JA 749.

In its request for rehearing, however, Nevada Power pointed out that the generator in *Consumers Energy* had been directly assigned the costs of facilities similar to those which had been designated Network Upgrades in the Nevada Power Remand Order (and the prior *Nevada Power* orders). *See* Nevada Power Request for Rehearing at 4-7, JA 754-755.

In the Nevada Power Rehearing Order, the Commission acknowledged that "Nevada Power correctly notes that certain facilities in *Consumers Energy* that were 'at' the point of interconnection were in fact directly assigned to the interconnection customer in that case." Nevada Power Rehearing Order, P 13, JA

860. However, the Commission went on to explain, "*Consumers Energy* did not hold that it was just and reasonable for the transmission owner to directly assign facilities 'at' the point of interconnection to the generator[.]" *Id.* Rather, "the direct assignment of the three circuit breakers," similar in nature to the facilities in *Nevada Power*, the costs of which were assigned to the Transmission Provider, "was not contested or discussed" in *Consumers Energy*, "and was thus inadvertently allowed." *Id.*

In sum, the Commission stated:

> While there may have been some confusion stemming from the prior use of the phrase "from the point of interconnection," the Commission has clearly explained that our policy is "at or beyond the point of interconnection" – this is not a change or departure from policy, but instead a more precise way of stating it. Therefore, any inconsistency with the facts underlying *Consumers Energy* is the result of our oversight in not observing that the transmission owner in that case was directly assigning facilities at the point of interconnection, and did not signal any change or departure in our long-standing policy.

Id. P 14, JA 861 (footnote omitted).

The Commission also clarified on rehearing that while Nevada Power's "Harry Allen 500 kV substation was a newly constructed substation," the Nevada Power Remand Order had incorrectly referred to it as "existing," confusing it with an older nearby 230 kV substation with the same name. *Id.* PP 16-17, JA 861-862. However, the Nevada Power Rehearing Order stated, the error made no substantive difference, as the new Harry Allen substation was clearly a network facility,

having been "designed to interconnect new generating plants located in the region and has three integrated transmission lines and four radial generator lines that terminate there." *Id.* P 17 (footnote omitted), JA 862.

The Commission went on to reject various contentions raised by Nevada Power concerning the "at or beyond test," holding that the cost allocation policy was reasonable because transmission upgrades "at or beyond the point where a customer connects to the grid benefit all users of that grid." *Id.* P 19, JA 863.

The Commission also rejected Nevada Power's contention that section 722 of the Energy Policy Act of 1992 (Energy Policy Act), adding section 212 of the FPA, 16 U.S.C. § 824k, governed its interconnection agreement. In any event, the agency determined, its orders were consistent with the Energy Policy Act, which did not affect traditional FPA cost causation principles applied here. *Id.* PP 23-24, JA 865.

Finally, the Commission held that the "at or beyond" test could be waived for good cause, if a party could prove that transmission facilities were in the "exceptional category" of not being integrated into the grid, and thus eligible for direct assignment of costs. Nevada Power Rehearing Order P 26, JA 866.

2. The Southern Orders

In the second set of contested orders, Southern (as an agent for Georgia Power Company), on September 24, 2003, filed an unexecuted Interconnection

Agreement between Georgia Power Company (Georgia Power) and Live Oaks Company, LLC (Live Oaks), pursuant to which Georgia Power would install facilities needed to connect an electric generating facility, to be owned and operated by Live Oaks, with Georgia Power's transmission system.

The Interconnection Agreement identified two types of facilities. The first was "Interconnection Facilities," which included various equipment "required to be installed for the delivery of electric energy onto the Georgia Power Electric System on behalf of Generator," Southern Order P 2, n.1, JA 1407 (quoting Interconnection Agreement Appendix B). The second was "Interconnection Facility Upgrades," which meant "all equipment to be located on the Georgia Power Electric System at or beyond the point where the [generating] Facility connects to the Georgia Power transmission system," including equipment for connection , switching, transmission, protective relaying and system safety. *Id.*, (quoting Appendix C).

The Commission found that "the Interconnection Facility Upgrades . . . at or beyond the point where the customer connects to the grid . . . constitute network upgrades that are integrated with Georgia Power's transmission system." Southern Order P 10, JA 1410. Therefore, the agency assigned the costs of these facilities to Georgia Power, the Transmission Provider. *Id.* The Commission also rejected Live Oaks' contention that the remaining Interconnection Facilities were

Network Upgrades. *Id.* P 11. Rather, applying its interconnection pricing policy, the Commission determined that the costs of those facilities should be directly assigned to Live Oaks. *Id.*

In two subsequent orders, the Commission denied requests for rehearing by Southern challenging the application of the "at or beyond" test to Georgia Power Company's so-called Interconnection Facility Upgrades. In these orders, the Commission reviewed and disposed of essentially the same arguments raised by Nevada Power in the companion orders. Southern First Rehearing Order, PP 15-25, JA 1566-1570; Southern Second Rehearing Order, PP 15-25, JA 1747-1750.

3. The Entergy Orders

In the last set of contested orders, Entergy filed (on behalf of Entergy Gulf States, Inc.) an unexecuted Interconnection and Operating Agreement with ExxonMobil Oil Corporation (ExxonMobil). This Agreement was a revision of a prior interconnection agreement between a predecessor of ExxonMobil and Entergy, governing the interconnection of a 165 MW generating facility with Entergy's transmission system. This original agreement had been accepted by the Commission in a letter order on December 7, 2001. *Entergy Services, Inc.*, Docket No. ER02-144-000, Letter Order (unpublished)(provided in the Addendum to this brief).

On May 16, 2003, Entergy filed a Revised Interconnection Agreement, also

unexecuted, which, *inter alia*, provided for ExxonMobil's generator to interconnect an additional 324 MW of generation to Entergy's transmission system. The Revised Interconnection Agreement reflected additional facilities required for the expansion of ExxonMobil's interconnection, including circuit breakers and breaker control panels. Entergy Order P 5 & n.5, JA 1133.

In both the Original and Revised Interconnection Agreements, Entergy had assigned the cost of all the new facilities to ExxonMobil, which now complained that this violated the Commission's prohibition of direct assignment of transmission network upgrade costs.

The Commission denied ExxonMobil's request that Entergy be directed to reclassify the facilities at issue in the Original Transmission Agreement. In the Commission's view, "ExxonMobil's request is, in effect, a complaint and should be separately filed as a complaint," rather than being included in its protest concerning the Revised Interconnection Agreement. *Id.* P 13, JA 1135.[2]

However, the Commission granted ExxonMobil's protest concerning the Revised Interconnection Agreement, holding that the facilities classified by

[2] ExxonMobil subsequently filed a complaint with the Commission concerning the facilities at issue in the Original Transmission Agreement. *Exxon Mobil Corp. v. Energy Services, Inc.*, Docket No. EL03-230 (filed September 16, 2003).

Entergy as direct assignment facilities "are actually network facilities eligible for transmission credits and interest since they are located at or beyond the point of interconnection to the Entergy transmission network." *Id.* P 16, JA 1136.

The Commission subsequently denied Entergy's request for rehearing contesting the classification of the Revised Interconnection Agreement facilities, addressing and rejecting the same arguments as in the companion Nevada Power and Southern orders. Entergy Rehearing Order, P 6-17, JA 1287-1292.

SUMMARY OF ARGUMENT

I.

The Commission fully complied with the *Entergy* remand, explaining that it intended its use of the terminology "from the point of interconnection" in *Consumers Energy* to mean the same thing as "at or beyond" the point of interconnection. The Commission also explained that it had made a factual mistake in *Consumers Energy*, inadvertently permitting the costs of certain network facilities to be directly assigned to the interconnecting generator, rather than to the Transmission Provider.

Petitioners maintain that *Entergy* did not give the Commission the option of finding that facilities in *Consumers Power* were erroneously classified. However, the Court did not require the Commission to base its policy on cost allocation in generator interconnection cases on a mistaken finding of fact.

Nor has the Commission ever had a policy that the cost of facilities at the point of interconnection should be assigned to the generator, as Petitioners allege. Petitioners cite no case with such a holding. Rather, their contention is based on cases decided prior to the Commission's establishing a generator interconnection policy, or on cases in which generator interconnection agreements were accepted by Commission staff orders on delegated authority, which have no precedential value.

II.

The Commission's allocation of the costs of transmission upgrades "at or beyond" the point of interconnection of a generator and a transmission system, to all customers of the transmission system, is reasonable. As the Court recognized in *Entergy*, the Commission's cost allocation policy reflects the longstanding, judicially-affirmed principle that transmission upgrades benefit the entire integrated transmission grid, so that the costs of such upgrades should be spread among all users of the grid. Petitioners' argument that network upgrades actually decrease network reliability is inconsistent with, and seeks to overturn, this standard rule of ratemaking.

The Commission's allocation of interconnection costs does not violate the Energy Policy Act of 1992. As the Commission determined, that Act does not apply to the generator interconnection policy at issue here. In any event, the Commission reasonably concluded that its generator interconnection cost allocation policy would be consistent with the Act if it were to apply.

The Commission also reasonably demonstrated that its generator interconnection cost allocation policies neither encourage inefficient generator siting, nor discriminate against non-independent Transmission Providers.

ARGUMENT

I. STANDARD OF REVIEW

The Commission's orders are reviewed under the arbitrary and capricious standard, under which a "court must consider whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment. . . . The court is not empowered to substitute its judgment for that of the agency." *ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071, 1083 (D.C. Cir. 2002) (citations and internal quotation marks omitted).

Moreover, "in light of the technical nature of rate design, involving policy judgments at the core of the regulatory function," review of the Commission's ratemaking determinations is "highly deferential." *Entergy I*, 319 F.3d at 541 (citing *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 958 (D.C. Cir. 1999)). Finally, the Commission's findings of fact, if supported by substantial evidence, are conclusive. FPA section 313(b), 16 U.S.C. § 825*l*(b).

II. THE COMMISSION FULLY COMPLIED WITH THE *ENTERGY* REMAND.

The Commission fully addressed the problems identified by the Court in *Consumers Energy*. First, the Commission observed that its use of the terminology "(from) the point of interconnection," while imprecise, was intended to mean the same thing as "'at or beyond' the point of interconnection." Nevada Power Rehearing Order P 12, JA 860. Second, the agency acknowledged that it had made

a mistake of fact in *Consumers Energy* in allocating costs, inadvertently allowing the costs of network facilities to be directly assigned to the interconnecting generator, rather than the Transmission Provider. *Id.* PP 13-14, JA 860-861.

We submit that the Commission, having demonstrated that since *Consumers Energy* it has consistently applied its policy of allocating to the Transmission Provider the cost of facilities "at or beyond" the point of interconnection with the generator – the sticking point for the *Entergy* Court – acted well within its discretion to apply the "at or beyond" test to the facilities at issue in the three sets of contested orders. We further submit that Commission's ratemaking policy underlying the "at or beyond" test, that facilities at or beyond the point of interconnection are presumptively classified as Network Facilities, integrated into the transmission system for the benefit of all transmission customers, has already been affirmed by the Court in *Entergy*, which specifically determined that "the same substantial evidence appears to support" either a "from" test or an "at or beyond" test for cost assignment purposes.

A. Petitioners Have Mislabeled The Facilities In Question.

At the outset, Petitioners muddy the waters by giving their own definition of Interconnection Facilities (which they refer to as "Connection Facilities"), as those "required to physically connect or tie the Generator to the transmission system," and "are not needed to maintain service to other customers." Pet. Br. 7. In

Petitioners' view, such facilities include substations (switching stations) and circuit breakers "constructed within the Substation in order to 'plug' the radial line into the Substation." *Id.*

The Court should reject this attempt by Petitioners to rewrite the Commission's policies as established by Order No. 2003 and the relevant case law. As described above, facilities necessary for interconnection between a generator and a Transmission Provider are either Interconnection Facilities, the costs of which are directly assigned to the Interconnection Customer, or Network Upgrades, with costs assigned to the Transmission Provider. *See* Order No. 2003 PP 675-678; Order No. 2003-A PP 601-602. The classification of facilities necessary for interconnection into these two categories is a factual question, with any facilities that are part of the integrated transmission grid designated as Network Upgrades. The determination cannot be made by means of hypotheticals, removed from the context of specific facilities and their configuration.

Presumably Petitioners intend to describe facilities similar to those at issue in the Nevada Power, Southern, and Entergy orders, in an attempt to classify those facilities according to their own definitions. This attempt must fail, however, in light of specific findings of the Commission in all three cases that the contested facilities were Network Upgrades, the costs of which should be assigned to the Transmission Providers and their customers. *See* Southern Order P 1 & n.1, P 10,

JA 1407, 1410 (facilities classified as upgrades explicitly part of Georgia Power's integrated transmission system); Entergy Order PP 4 & n.3, 5 & n.5, 16, JA 1133; Nevada Power hearing Order P 17, JA 862 (upgrades "contain transmission level protection devices, circuit breakers and other such facilities" that are of benefit to the entire transmission grid).

B. The Commission Demonstrated That *Consumers Energy* Has Been Consistently Applied.

Turning to the issue actually remanded by the Court, Petitioners argue that the Commission failed to abide by the *Entergy* mandate because it "clung to its position previously rejected by this Court that no change in policy had occurred." Pet. Br. 22. However, the Court did not reject the possibility that the policy of assigning costs "at" the interconnection point to the transmission provider had begun at least with *Consumers Energy*. Rather, the Court required the Commission to either make a "clarification of [*Consumers Energy*] that in some way establishes that" the Court had "misread" the Commission's permitting direct assignment of costs "at" the point of interconnection, or alternatively, explain "why it has departed from that policy." 391 F.2d at 1251.

On remand, the Commission provided the clarification requested by the Court. There has been no departure here from the Commission's interconnection cost allocation policy. Rather, as the Commission fully explained, the use of

"from" in *Consumers Energy* was intended to mean exactly the same thing as the more precise term "at or beyond." Nevada Power Rehearing Order P 6, JA 858. The Commission did concede that in *Consumers Energy* the costs of certain transmission facilities "at" the point of interconnection had indeed been directly assigned to the interconnecting generator, but clarified that this signified nothing more than a mistake in the factual application of the policy, rather than a change in the legal policy itself. *Id.* PP 13-14, JA 860-861.

Petitioners' response is that the Court in *Entergy* "did not leave open the possibility for the untenable argument that *Consumers* [*Energy*] allowed the direct assignment of facilities 'at' the point of interconnection while creating a rule prohibiting the direct assignment of facilities 'at or beyond' the interconnection point." Pet. Br. 26. But this approach twists the facts of *Consumers Energy* to meet the legal theory advanced by Petitioners. Put another way, Petitioners are asking the Court to require the Commission's legal policy, on where to draw the cost allocation line in interconnection cases, to be established by a factual error. We submit, however, that the Commission's correction of the factual error to conform to its legal policy was a reasonable response to the *Entergy* mandate.

Petitioners maintain that the Commission cannot rely on a mistake of fact made by the agency merely "because the Generator did not raise the issue." Pet. Br. 28. After all, Petitioners grandly ask, does not FERC "have a duty" to determine if a rate is just and reasonable, "whether the parties have agreed

upon the rate or not"? *Id.*, citing *Pennsylvania Electric Co. v. FERC*, 11 F.3d 207, 210 (D.C. Cir. 1993); *South Carolina Electric & Gas Co.*, 106 FERC ¶ 61,265 P 22 (2004); *Southern Company Services, Inc.*, 108 FERC ¶ 61,220 P 22 (2004).

But while the Commission indeed has such a duty, neither the Commission nor any court has ever held that the Commission must individually examine every aspect of every filed contract or tariff. On the contrary, the Commission depends to a large extent on the voluntary compliance by the parties, and, like a court, relies on the parties to raise matters that it should address. For this reason, the Commission observed, "it is well established that the mere acceptance of an agreement for filing is not a substantive determination that the rate methodology employed is just and reasonable." Nevada Power Rehearing Order P 14 & n.22, JA 861 (citing *Alabama Power Co. v. FERC*, 993 F.2d 1557, 1565 n.4 (D.C. Cir. 1993); *New York State Electric & Gas Corp.*, 87 FERC ¶ 61,049 at 61,208 (1999); 18 C.F.R. § 35.4.

C. The Commission Has Never Had A Policy That The Cost Of Facilities At The Point Of Interconnection Should Be Directly Assigned To The Generator.

Petitioners next argue that the Commission failed on remand to explain its deviation from what they term the "previous policy . . . that facilities . . . located 'at' the interconnection point serving to physically interconnect Generators to the transmission system were Direct Assignment Facilities." Pet. Br. 32-33. In this

regard, Petitioners maintain that there is a "long line of FERC cases . . . leading up to and including *Consumers*" in which the Commission "allowed the direct assignment of the costs of facilities that physically connect a particular customer to the transmission system." *Id.* 33. For example, Petitioners contend, in *Public Service Electric & Gas Co.*, 62 FERC ¶ 61,014 (1993), the cost of certain facilities "identical in all material respects" to the facilities at issue in *Nevada Power*, were allocated to the generator, rather than to the transmission provider. *Id.*

Petitioners' "previous policy" argument is without merit. In *Entergy*, the Court recognized that the "at or beyond" test for allocating costs between generators and transmission providers was clearly announced by the Commission no later than July 2001. 391 F.3d at 1250, citing *Removing Obstacles to Increased Electric Generation and Natural Gas Supply in the Western United States*, 96 FERC ¶ 61,155 (2001) (*Removing Obstacles*). The question this raised for the Court was whether the "at or beyond" test "was born not in *Removing Obstacles* but in *Consumers Energy*." *Id.* at 1251. As explained above, the Commission has now clarified that the "from" test in *Consumers Energy* was intended to be one and the same as the "at or beyond" test.

Thus, Petitioners' reliance on cases prior to *Consumers Energy* is misplaced. To be sure, the Commission itself cited cases of an earlier

vintage for the proposition that the rolled-in method of allocating costs to all transmission customers is appropriate for upgrades on an integrated transmission system. *See, e.g., Western Massachusetts Electric Co.*, 165 F.3d at 927; *Otter Tail Power Co.*, 12 FERC ¶ 61,169 at 61,420 (1980).

However, the idea of a locational test as an administratively feasible and reasonable way of classifying facilities with respect to generator interconnection was a new policy applied for the first time in *Consumers Energy*. It was only after *Tennessee Power* issued in 2000, *see* page 4 *supra*, holding that interconnection was a component of open access transmission service, that the Commission recognized "[g]enerator interconnection cases [as] a special sub-category of transmission pricing cases." *See* Opinion No. 474, *Northeast Texas Electric Cooperative, Inc.*, 108 FERC ¶ 61,084 P 49 n.68 (2004), *reh'g denied*, 111 FERC ¶ 61,189 (2005). Prior to that time, Commission cases concerning classification of facilities as transmission or non-transmission typically involved allocating costs among transmission customers. With respect to generator interconnection cases, however, the Commission has explained:

> There is a special need to ensure that transmission-owning utilities do not use their control over transmission to unduly discriminate against the generators with which these utilities must compete by delaying interconnection of these generators. Because of this need, the Commission, in its case law and in Order No. 2003, decided to adopt a simple test for whether a facility is a network facility: if it is "at or

> beyond" the point where the generator interconnects to the grid, it is a network facility.

Id. (citing Order No. 2003 P 21 and *Ohio Power Co.*, 104 FERC ¶ 61,243 P 8 & n.2 (2003)).

Petitioners base another argument on these older cost allocation cases. Relying on cases such as *Public Service Electric & Gas Co.*, 62 FERC ¶ 61,014 (1993), they maintain the Commission had routinely identified facilities "identical in all material respects to the . . . facilities at issue" in the contested orders as not being part of the integrated transmission grid. Pet. Br. 33.

In Petitioners' view, these cases reveal that the Commission *sub silentio* changed its policy with respect to the types of facilities it considered to be integrated with the transmission grid, stealthily moving the marker to expand the concept of the integrated grid to facilities that had never previously been so classified. Because the Commission has not conceded this policy change, Petitioners allege, the Court must reverse the Commission's orders. Pet. Br. 40-41.

The Court should reject Petitioners' argument. Putting aside that these earlier cases rarely involved generator interconnection situations, we submit that a "policy" neither can be derived, nor was intended to be by the Commission, based on the shorthand descriptions of various electric

facilities in these orders. Indeed, absent detailed review of the evidentiary records in these individual proceedings, it is not possible to discern the precise nature of the facilities or their particular configurations.

In sum, Petitioners cannot show that the Commission has changed any policy without notice in the orders on appeal. Indeed, even if a change from an earlier policy with respect to classification of facilities could be identified, any new policy had long since been established by the time at least Entergy and Southern had filed their new interconnection agreements in these cases in 2003.

Petitioners do also cite a number of post-Order 888 generator interconnection cases, "before the adoption of the At or Beyond Rule," in which they state that "the Commission routinely accepted [Interconnection Agreements] directly assigning the costs" of facilities similar to those at issue here. Pet. Br. 37.

However, Petitioners are unable to cite to any decision prior to May 17, 2001 (the date of the issuance of *Consumers Energy*) in which the Commission specifically *approved* the direct assignment of the costs of any network facilities, *i.e.* facilities necessary for a generator interconnection but benefiting the interconnected transmission grid as a whole (like the facilities in dispute here). Rather, in the cases cited by Petitioners were accepted by the Commission under delegated authority, which specifically provides that they have no precedential

value. *See, e.g., Duke Energy Hinds, LLC v. Entergy Services, Inc.*, 102 FERC ¶ 61,068 (2003), *reh'g pending* (Commission granted complaint where the agency accepted by delegated authority agreements pursuant to which the costs of network facilities were assigned to Interconnection Customers).

Furthermore, in cases where the Commission will reexamine facility classifications, it will be operating prospectively under FPA section 206, 16 U.S.C. § 824e. If, for example, ExxonMobil eventually prevails on its complaint against Entergy to reclassify the Original Transmission Facilities, *see* Entergy Order P 13, JA 1136, the effect will be solely prospective. Thus, it is difficult to ascertain how the earlier alleged misclassification prejudices Entergy, or any similarly situated Transmission Provider, even if there had been a policy change with respect to facility classification.

III. THE AT OR BEYOND TEST IS A REASONABLE EXERCISE OF THE COMMISSION'S REGULATORY DISCRETION.

A. The Allocation Of The Costs of Network Facilities At Or Beyond The Point of Interconnection To The Transmission Provider Is Fully Supported By Judicial Precedent.

In *Entergy*, the Court sustained the Commission's conclusion that the disputed facilities were network upgrades, rather than interconnection facilities, as Nevada Power had asserted. 391 F.3d at 1248. "In short," the Court stated, "the Commission's definition of 'network upgrade,' accepted by *Entergy I*, includes any changes to facilities located on the grid." *Id.* Furthermore, the Court held that,

based on *Entergy I*, "the same substantial evidence appears to support either test," *i.e.*, the "at or beyond" test or the "from" test. *Id.* at 1251.

The Court did not reach other arguments against the Commission's ruling on the facilities that were raised only by petitioners whose appeals were dismissed as moot. *Id.* at 1247. One of these arguments was "that the Commission ignored evidence that the facilities in question actually *decrease* network stability." *Id.* at 1247 (emphasis the Court's).

In the orders on appeal here, the Commission considered and rejected this argument. Before the agency, for example, Southern once again claimed that its evidence demonstrated "that the facilities at issue do not provide system-wide benefits," so that their cost should not be spread to all transmission customers. Southern First Rehearing Order P 20, JA 1568. In denying Southern's claim that allocation of these costs on a system-wide basis violated cost causation principles, the Commission relied on its holding in Order No. 2003-A:

> [I]n assessing the benefits of the network upgrades needed to interconnect new generating capacity, we look beyond the direct usage-related benefits and recognize the reliability benefits of a stronger transmission infrastructure and more competitive power markets that result from a policy that removes unnecessary obstacles to the interconnection of new generating facilities.

Id. P 20 & n.18, JA 1568 (citing Order No. 2003-A PP 583-584).

Rejecting the same argument raised by Entergy, the Commission observed that the reasoning underlying the Court's decision in *Entergy I*, that network upgrades benefit the entire integrated transmission grid (and, accordingly, that their costs should be allocated to all the customers of that grid), also logically reflects the "view that all transmission customers benefit from an expanded, and thus more reliable, transmission system." Entergy Rehearing Order P 15 & n.21, JA 1291 (citing Order No. 2003-A P 602 and *Entergy*, 319 F.3d at 543-44).

On appeal, Petitioners argue that the Commission's view, that Network Upgrades will benefit all users of the transmission system, is contradicted by specific evidence in the record, namely the affidavit of an electrical engineer named James M. Howell. Pet. Br. 45-46. Petitioners maintain that there is no indication that the Commission considered Mr. Howell's affidavit, "and there is no evidence anywhere in those orders where FERC considered the decrease in reliability associated with" the contested facilities "in determining that such facilities provide an overall 'system benefit.'" *Id.* 46.

The Court should reject this argument. Mr. Howell contended that "the construction of a new substation within a previously uninterrupted line will actually decrease the reliability of that line, and thus the transmission system as a whole." Pet. Br. 46 (quoting Howell Aff. P 11).

But Mr. Howell's personal view that, as a general matter, the reliability of an individual uninterrupted line may be degraded by new construction, contradicts the theory, already upheld by this Court, that network upgrades provide "enhanced reliability and security" on the transmission system, benefiting "all transmission customers." *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1369-70 (D.C. Cir. 2004) (costs of developing a regional transmission system with enhanced reliability benefits for the entire system should be allocated to all users of the system); *Entergy I*, 319 F.3d at 543-544 (rolling in prices of Network Upgrades to all users of a transmission system also minimizes incentive for utilities to "gold plate" their systems at customers' expense); *Western Massachusetts Electric Co.*, 165 F.3d at 927. *See* Entergy Rehearing Order P 15, JA 1291 (citing Order No. 2003-A P 602 and *Entergy I*, 319 F.3d at 543-544).

B. The Commission's Allocation Of Interconnection Costs Is Consistent With Its Statutory Authority.

In the orders contested on appeal, the Commission rejected claims by the parties that the Commission's interconnection policy violated section 722 of the Energy Policy Act of 1992, which amended section 212 of the FPA, 16 U.S.C. § 824k(a). *See* Southern First Rehearing Order P 22, JA 1569; Entergy Rehearing Order P 15, JA 1290-1291; Nevada Power Rehearing Order P 22, JA 864. Second, the Commission held that even if section 212 were applicable, FERC's inter-connection policy would not violate that section "because it promotes economic

efficiency, is just and reasonable, and is needed to prevent transmission providers that have an incentive to discourage competitors from unduly discriminating against those competitors." Southern First Rehearing Order P 22, JA 1569.

On appeal, Petitioners claim that the contested orders violate certain cost requirements contained in the Energy Policy Act amendments to the FPA. Pet. Br. 48. The provision on which they rely states that it applies solely to "Rates, charges, terms, and conditions for transmission services provided pursuant to an order *under 824j*" of the FPA. 16 U.S.C. § 824k(a) (emphasis added). That section (Section 211), in turn, provides that any electric utility, federal power marketer or other persons "generating electric energy for sale for resale, may apply to the Commission for an order under this subsection requiring a transmitting utility to provide transmission services . . . to the applicant." 16 U.S.C. § 824j(a).

Thus, as the Commission held, section 212 of the FPA "applies only to orders by which the Commission *compels* interconnection by a utility" under FPA section 211. Southern First Rehearing Order P 22, JA 1569 (emphasis in original). *See also* Entergy Rehearing Order P 15, JA 1290-1291; Nevada Power Rehearing Order P 22, JA 864; Order No. 2003-A P 596-600. In contrast, the agency here is reviewing voluntary filings made under section 205 of the Act.

Petitioners argue that the Commission itself "has acknowledged" that the

requirements of section 211 "generally apply to its transmission pricing policies" under section 205. Pet. Br. 50, citing *Inquiry Concerning the Commission's Pricing Policy for Transmission Services Provided by Public Utilities Under the FPA; Policy Statement*, 1991-96 FERC Stats. & Regs., Regs. Preambles ¶ 31,005 at 31,142-144 (1994) (Transmission Pricing Policy Statement).

However, contrary to Petitioners' argument on this point, the Commission has explained that its "Transmission Pricing Policy Statement does not state that Section 212 applies to service under Sections 205 or 206 or that the two provisions are identical." Order No. 2003-A P 596. Rather, the Commission indicated, it was explaining in the Transmission Pricing Policy Statement that under *any* of its statutory authority, "we do not believe that third-party transmission customers should subsidize existing customers." *Id.* (quoting Transmission Pricing Policy Statement at 31,143-44). This reasonable interpretation by the Commission of language in its own policy statement should be sustained by the Court. *See Natural Gas Clearinghouse v. FERC*, 108 F.3d 397, 399 (D.C. Cir. 1997).

Petitioners also rely on language in the legislative history of the Energy Policy Act concerning the cost allocation principles to be applied here. Pet. Br. 50. But as the Commission observed, it "found in Order No. 2003-A that the legislative history of the Energy Policy Act of 1992 did not support a conclusion that section 212 was intended to require a particular type of transmission pricing."

Southern First Rehearing Order P 22 & n.21, JA 1569 (citing No. 2003-A, PP 599-600); *see also* Entergy Rehearing Order P 15, JA 1290-1291; Nevada Power Rehearing Order P 22, JA 864.

Finally, the Commission also held that "even if section 212 applied here, the Commission's policy would not violate [that section] because it promotes economic efficiency, is just and reasonable, and is needed to prevent transmission providers from unduly discriminating against those competitors." Southern First Rehearing Order P 22, JA 1569; *see also* Entergy Rehearing Order P 15, JA 1290-1291; Nevada Power Rehearing Order P 22, JA 864; Order No. 2003-A P 598 (FPA section 212 merely requires the Commission to ensure, to the extent practicable, that the costs properly allocable to the provision of interconnection service are recovered from interconnection customers). Thus, section 212 would authorize the Commission to allocate the costs of Network Upgrades required to interconnect a Generating Facility to a Transmission System to all of that system's transmission customers, as the upgrades benefit all transmission customers. *See* Order No. 2003-A P 599; *see also Entergy I*, 319 F.3d at 544-45 (noting that "the Commission has long rejected the argument that transmission credits for network upgrades result in 'cross-subsidization' by native load customers as based on the faulty premise that native load customers receive no benefit from the upgrades").

C. Petitioners' Remaining Cost Causation Arguments Are Without Merit.

Petitioners make several additional cost causation arguments, none of which has merit.

1. First, Petitioners argue that the "at or beyond" rule is arbitrary because it causes inefficiencies in generator siting. Pet. Br. 52. Thus, they assert that because Generators do not ultimately pay for Network Upgrades, "there [is] no incentive for them to locate at electrically favorable locations." *Id.* 53. In this regard, they emphasize the Commission's acknowledgment that payment of credits by the Transmission Provider for transmission facilities necessary for interconnection "mutes somewhat the [Generator's] incentive to make an efficient siting decision." Pet. Br. 54 (quoting Order No. 2003 P 695 (footnote omitted)).

Petitioners' speculation, however, cannot be sustained. As the Commission explained, its policy appropriately balances the "importance of sending locational pricing signals to interconnecting generators" with the need to promote competition and infrastructure development, and to protect the interests of both interconnection and native load customers. Entergy Rehearing Order P 17, JA 1291. More specifically, the Commission pointed out in Order No. 2003-A, the agency dealt with siting concerns by limiting credits provided by the Transmission Provider "only for the transmission service taken on the system that includes the generating facility at issue in the relevant interconnection agreement as the source

of the power transmitted." *Id.* & n.24 (citing Order No. 2003-A P 614-615); *see also* Entergy Rehearing Order P 17, JA 1291; Nevada Power Rehearing Order P 23, JA 865. In addition, the Commission stated that the crediting provisions of Order No. 2003-A and Order No. 2003-B would encourage efficient siting decisions, as Interconnection Customers will initially be funding the Network Upgrades (subject to repayment by the Transmission Provider up to twenty years from the commercial operation date of the interconnecting generator). Entergy Rehearing Order P 17, JA 1292. These elements of the Commission's interconnection pricing policy, the Commission concluded, "ensure that the generator receive price signals to encourage it to site its project in a way that makes sense for the grid as a whole." *Id.*

2. Petitioners also contend that the "at or beyond" rule "unduly discriminates against customers who are not part of [a Regional Transmission Organization] or [Independent System Operator]." *Id.* 56.

As the Nevada Power Rehearing Order stated, in Order No. 2003, the Commission held that its general policy for the pricing of Network Upgrades would not necessarily apply to independent Transmission Providers. Nevada Power Rehearing Order P 24 & n.40, JA 865 (citing No. 2003 P 701); *see also* Southern First Rehearing Order P 24, JA 1570. This is because, the Commission explained, "[w]here a transmission provider is an independent entity, the

Commission reasonably is much less concerned that all generation owners will not be treated comparably, because the independent transmission provider has no incentive to treat customers differently." Nevada Power Rehearing Order P 24 & n.40, JA 865 (citing Order No. 2003 P 701 and Order No. 2003-A PP 691-693).

In contesting this conclusion, Petitioners rely on *Town of Norwood v. FERC*, 202 F.3d 392, 402 (1st Cir. 2000), and *City of Frankfort v. FERC*, 678 F.2d 699, 707 (7th Cir. 1982). Pet. Br. 57. However, these cases actually refute their argument. As the court observed in *Town of Norwood*, with respect to the statutory discrimination standard, "differential 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*, 202 F.3d at 402 (emphasis the court's) (citing *Cities of Newark v. FERC*, 763 F.2d 533, 546 (3rd Cir. 1985), and *City of Frankfort*, 678 F.2d at 706 ("differences in facts" be they "cost of service or otherwise" may justify a "rate disparity")). *See generally Cities of Bethany v. FERC*, 727 F.2d 1131, 1139 (D.C. Cir. 1984).

Here, the factual differences relied on by the Commission are obvious and rational. A non-independent Transmission Provider that is in competition with interconnecting Generator Facilities has motive and opportunity to unfairly shift costs of Network Upgrades to its competitors, while an independent Transmission Provider operates only out of concern that costs to all customers are allocated

equitably. *See* Order No. 2003 P 696. While Petitioners reject this reasoning by the agency as mere conjecture and theory (Pet. Br. 57), it is, in fact, a cornerstone of Order No. 2003. One of the "important functions" served by standard interconnection procedures, the Commission has recognized, is to "limit opportunities for Transmission Providers to favor their own generation." Order No. 2003 P 12.

3. Finally, Petitioners take issue with the Commission's view that a Transmission Providers' option to charge a new transmission customer an incremental rate in situations in which a rolled-in rate would increase costs to existing customers, will not prevent cost subsidization by native load customers. Pet. Br. 59. In this regard, they rely once again on the affidavit of Mr. Howell, who believes that an incremental rate could not be developed in this situation for an Interconnection Customer because the Transmission Provider "generally is unable to calculate an incremental rate at the time of the interconnection request." *Id.* (quoting Howell Affidavit P 4).

Mr. Howell's concerns are entirely speculative. As the Commission explained, Order No. 2003 did not intend to prescribe generic rules for the calculation of incremental rates. Southern Second Rehearing Order P 23 & n.24, JA 1749 (citing Order No. 2003-B P 33). Rather, the transmission provider may, in an individual case, propose an alternative pricing mechanism to avoid

subsidization by native load customers. *Id.* & n.25 (citing Order No. 2003-B P 57).

Thus, as Order No. 2003-B stated:

> If a Transmission Provider (or an existing Transmission Customer) believes that, for an actual interconnection, it faces circumstances where native load and other customers are not held harmless, it should make that demonstration in an actual transmission rate filing.

Order No. 2003-B P 561.

CONCLUSION

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

Respectfully submitted,

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October 19, 2006

Entergy Services, Inc., et al. v. FERC **Docket No. ER03-851**
D.C. Cir. No. 05-1238*, et al.*

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 9,153 words, not including the tables of contents and authorities, the certificates of counsel and the addendum.

_____
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October 19, 2006

ADDENDUM

ADDENDUM

PAGE

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

December 7, 2001

To: Entergy Services, Inc.

Docket No. ER02-144-000

Re: Interconnection and Operating Agreement and Generator Imbalance Agreement with Mobil Oil Corporation

Pursuant to authority delegated to the Director, Division of Tariffs and Rates - Central, under 18 C.F.R. 375.307, the Interconnection and Operating Agreement and the Generator Imbalance Agreement with Mobil Oil Corporation filed in the referenced docket are accepted for filing as proposed subject to the outcome of Docket No. ER00-1743-000 and Docket Nos. ER01-2021-000 and ER01-2106-000. Acceptance facilitates the interconnection of additional generation to serve the wholesale market.

Under 18 C.F.R. 385.210, interventions are timely if made within the time prescribed by the Secretary. Under 18 C.F.R. 385.214, the filing of a timely motion to intervene makes the movant a party to the proceeding, if no answer in opposition is filed within fifteen days. The filing of a timely notice of intervention makes a State Commission a party to the proceeding.

This action does not constitute approval of any service, rate, charge, classification, or any rule, regulation, contract, or practice affecting such rate or service provided for in the filed documents; nor shall such action be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate; and such action is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against any of the applicant(s).

This order constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days of the date of issuance of this order, pursuant to 18 C.F.R. 385.713.

Sincerely,

Michael C. McLaughlin, Director
Division of Tariffs and Rates – Central

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

(a) 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) 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) 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) 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) 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)(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:

(a) Whenever the Commission, after a hearing had 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 affected 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) 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 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period. 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 60 days after the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the expiration of such 60-day period. 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 refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, 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 the public utility to make 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) 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.

(d) 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.

Section 211 of the Federal Power Act, 16 U.S.C. § 824j, provides as follows:

(a) Any electric utility, Federal power marketing agency, or any other person generating electric energy for sale for resale, may apply to the Commission for an order under this subsection requiring a transmitting utility to provide transmission services (including any enlargement of transmission capacity necessary to provide such services) to the applicant. Upon receipt of such application, after public notice and notice to each affected State regulatory authority, each affected electric utility, and each affected Federal power marketing agency, and after affording an opportunity for an evidentiary hearing, the Commission may issue such order if it finds that such order meets the requirements of section 824k of this title, and would otherwise be in the public interest. No order may be issued under this subsection unless the applicant has made a request for transmission services to the transmitting utility that would be the subject of such order at least 60 days prior to its filing of an application for such order.

(b) No order may be issued under this section or section 824i of this title if, after giving consideration to consistently applied regional or national reliability standards, guidelines, or criteria, the Commission finds that such order would unreasonably impair the continued reliability of electric systems affected by the order.

(c)(1) Repealed. Pub. L. 102–486, title VII, § 721(4)(A), Oct. 24, 1992, 106 Stat. 2915.

(2) No order may be issued under subsection (a) or (b) of this section which requires the transmitting utility subject to the order to transmit, during any period, an amount of electric energy which replaces any amount of electric energy—

(A) required to be provided to such applicant pursuant to a contract during such period, or

(B) currently provided to the applicant by the utility subject to the order pursuant to a rate schedule on file during such period with the Commission: Provided, That nothing in this subparagraph shall prevent an application for an order hereunder to be filed prior to termination of [1] modification of an existing rate schedule: Provided, That such order shall not become effective until termination of such rate schedule or the modification becomes effective.

(d) Termination or modification of order; notice, hearing and findings of

Commission; contents of order; inclusion in order of terms and conditions agreed upon by parties

(1) Any transmitting utility ordered under subsection (a) or (b) of this section to provide transmission services may apply to the Commission for an order permitting such transmitting utility to cease providing all, or any portion of, such services. After public notice, notice to each affected State regulatory authority, each affected Federal power marketing agency, each affected transmitting utility, and each affected electric utility, and after an opportunity for an evidentiary hearing, the Commission shall issue an order terminating or modifying the order issued under subsection (a) or (b) of this section, if the electric utility providing such transmission services has demonstrated, and the Commission has found, that—

(A) due to changed circumstances, the requirements applicable, under this section and section 824k of this title, to the issuance of an order under subsection (a) or (b) of this section are no longer met, or [2]

(B) any transmission capacity of the utility providing transmission services under such order which was, at the time such order was issued, in excess of the capacity necessary to serve its own customers is no longer in excess of the capacity necessary for such purposes, or

(C) the ordered transmission services require enlargement of transmission capacity and the transmitting utility subject to the order has failed, after making a good faith effort, to obtain the necessary approvals or property rights under applicable Federal, State, and local laws.

No order shall be issued under this subsection pursuant to a finding under subparagraph

(A) unless the Commission finds that such order is in the public interest.

(2) Any order issued under this subsection terminating or modifying an order issued under subsection (a) or (b) of this section shall—

(A) provide for any appropriate compensation, and

(B) provide the affected electric utilities adequate opportunity and time to—
(i) make suitable alternative arrangements for any transmission services terminated or modified, and

(ii) insure that the interests of ratepayers of such utilities are adequately protected.

(3) No order may be issued under this subsection terminating or modifying any order issued under subsection (a) or (b) of this section if the order under subsection (a) or (b) of this section includes terms and conditions agreed upon by the parties which—

(A) fix a period during which transmission services are to be provided under the order under subsection (a) or (b) of this section, or

(B) otherwise provide procedures or methods for terminating or modifying such order (including, if appropriate, the return of the transmission capacity when necessary to take into account an increase, after the issuance of such order, in the needs of the transmitting utility subject to such order for transmission capacity).

(e) As used in this section, the term “facilities” means only facilities used for the generation or transmission of electric energy.

Section 212 of the Federal Power Act, 16 U.S.C. § 824k, provides as follows:

(a) An order under section 824j of this title shall require the transmitting utility subject to the order to provide wholesale transmission services at rates, charges, terms, and conditions which permit the recovery by such utility of all the costs incurred in connection with the transmission services and necessary associated services, including, but not limited to, an appropriate share, if any, of legitimate, verifiable and economic costs, including taking into account any benefits to the transmission system of providing the transmission service, and the costs of any enlargement of transmission facilities. Such rates, charges, terms, and conditions shall promote the economically efficient transmission and generation of electricity and shall be just and reasonable, and not unduly discriminatory or preferential. Rates, charges, terms, and conditions for transmission services provided pursuant to an order under section 824j of this title shall ensure that, to the extent practicable, costs incurred in providing the wholesale transmission services, and properly allocable to the provision of such services, are recovered from the applicant for such order and not from a transmitting utility's existing wholesale, retail, and transmission customers.

(b) Repealed. Pub. L. 102–486, title VII, § 722(1), Oct. 24, 1992, 106 Stat. 2916

(c) Issuance of proposed order; agreement by parties to terms and conditions of order; approval by Commission; inclusion in final order; failure to agree

(1) Before issuing an order under section 824i of this title or subsection (a) or (b) of section 824j of this title, the Commission shall issue a proposed order and set a reasonable time for parties to the proposed interconnection or transmission order to agree to terms and conditions under which such order is to be carried out, including the apportionment of costs between them and the compensation or reimbursement reasonably due to any of them. Such proposed order shall not be reviewable or enforceable in any court. The time set for such parties to agree to such terms and conditions may be shortened if the Commission determines that delay would jeopardize the attainment of the purposes of any proposed order. Any terms and conditions agreed to by the parties shall be subject to the approval of the Commission.

(2)(A) If the parties agree as provided in paragraph (1) within the time set

by the Commission and the Commission approves such agreement, the terms and conditions shall be included in the final order. In the case of an order under section 824i of this title, if the parties fail to agree within the time set by the Commission or if the Commission does not approve any such agreement, the Commission shall prescribe such terms and conditions and include such terms and conditions in the final order.

(B) In the case of any order applied for under section 824j of this title, if the parties fail to agree within the time set by the Commission, the Commission shall prescribe such terms and conditions in the final order.

(d) If the Commission does not issue any order applied for under section 824i or 824j of this title, the Commission shall, by order, deny such application and state the reasons for such denial.

(e)(1) No provision of section 824i, 824j, 824m of this title, or this section shall be treated as requiring any person to utilize the authority of any such section in lieu of any other authority of law. Except as provided in section 824i, 824j, 824m of this title, or this section, such sections shall not be construed as limiting or impairing any authority of the Commission under any other provision of law.

(2) Sections 824i, 824j, 824l, 824m of this title, and this section, shall not be construed to modify, impair, or supersede the antitrust laws. For purposes of this section, the term "antitrust laws" has the meaning given in subsection (a) of the first sentence of section 12 of title 15, except that such term includes section 45 of title 15 to the extent that such section relates to unfair methods of competition.

(f)(1) No order under section 824i or 824j of this title requiring the Tennessee Valley Authority (hereinafter in this subsection referred to as the "TVA") to take any action shall take effect for 60 days following the date of issuance of the order. Within 60 days following the issuance by the Commission of any order under section 824i or of section 824j of this title requiring the TVA to enter into any contract for the sale or delivery of power, the Commission may on its own motion initiate, or upon petition of any aggrieved person shall initiate, an evidentiary hearing to determine whether or not such sale or delivery would result in violation of the third sentence of section 15d(a) of the Tennessee Valley Authority Act of 1933 (16 U.S.C. 831n–4), hereinafter in this subsection referred to as the TVA Act [16 U.S.C. 831 et seq.].

(2) Upon initiation of any evidentiary hearing under paragraph (1), the Commission shall give notice thereof to any applicant who applied for and

obtained the order from the Commission, to any electric utility or other entity subject to such order, and to the public, and shall promptly make the determination referred to in paragraph (1). Upon initiation of such hearing, the Commission shall stay the effectiveness of the order under section 824i or 824j of this title until whichever of the following dates is applicable—

(A) the date on which there is a final determination (including any judicial review thereof under paragraph (3)) that no such violation would result from such order, or

(B) the date on which a specific authorization of the Congress (within the meaning of the third sentence of section 15d(a) of the TVA Act [16 U.S.C. 831n–4 (a)]) takes effect.

(3) Any determination under paragraph (1) shall be reviewable only in the appropriate court of the United States upon petition filed by any aggrieved person or municipality within 60 days after such determination, and such court shall have jurisdiction to grant appropriate relief. Any applicant who applied for and obtained the order under section 824i or 824j of this title, and any electric utility or other entity subject to such order shall have the right to intervene in any such proceeding in such court. Except for review by such court (and any appeal or other review by an appellate court of the United States), no court shall have jurisdiction to consider any action brought by any person to enjoin the carrying out of any order of the Commission under section 824i or section 824j of this title requiring the TVA to take any action on the grounds that such action requires a specific authorization of the Congress pursuant to the third sentence of section 15d(a) of the TVA Act [16 U.S.C. 831n–4 (a)].

(g) No order may be issued under this chapter which is inconsistent with any State law which governs the retail marketing areas of electric utilities.
(h) Prohibition on mandatory retail wheeling and sham wholesale transactions
No order issued under this chapter shall be conditioned upon or require the transmission of electric energy:

(1) directly to an ultimate consumer, or

(2) to, or for the benefit of, an entity if such electric energy would be sold by such entity directly to an ultimate consumer, unless:
(A) such entity is a Federal power marketing agency; the Tennessee Valley Authority; a State or any political subdivision of a State (or an agency, authority, or instrumentality of a State or a political subdivision); a corporation or association

that has ever received a loan for the purposes of providing electric service from the Administrator of the Rural Electrification Administration under the Rural Electrification Act of 1936 [7 U.S.C. 901 et seq.]; a person having an obligation arising under State or local law (exclusive of an obligation arising solely from a contract entered into by such person) to provide electric service to the public; or any corporation or association which is wholly owned, directly or indirectly, by any one or more of the foregoing; and

(B) such entity was providing electric service to such ultimate consumer on October 24, 1992, or would utilize transmission or distribution facilities that it owns or controls to deliver all such electric energy to such electric consumer. Nothing in this subsection shall affect any authority of any State or local government under State law concerning the transmission of electric energy directly to an ultimate consumer.

(i)(1) The Commission shall have authority pursuant to section 824i of this title, section 824j of this title, this section, and section 824l of this title to

(A) order the Administrator of the Bonneville Power Administration to provide transmission service and

(B) establish the terms and conditions of such service. In applying such sections to the Federal Columbia River Transmission System, the Commission shall assure that—

(i) the provisions of otherwise applicable Federal laws shall continue in full force and effect and shall continue to be applicable to the system; and

(ii) the rates for the transmission of electric power on the system shall be governed only by such otherwise applicable provisions of law and not by any provision of section 824i of this title, section 824j of this title, this section, or section 824l of this title, except that no rate for the transmission of power on the system shall be unjust, unreasonable, or unduly discriminatory or preferential, as determined by the Commission.

(2) Notwithstanding any other provision of this chapter with respect to the procedures for the determination of terms and conditions for transmission service—

(A) when the Administrator of the Bonneville Power Administration either

(i) in response to a written request for specific transmission service terms and conditions does not offer the requested terms and conditions, or

(ii) proposes to establish terms and conditions of general applicability for transmission service on the Federal Columbia River Transmission System, then the Administrator may provide opportunity for a hearing and, in so doing, shall—

(I) give notice in the Federal Register and state in such notice the written explanation of the reasons why the specific terms and conditions for transmission services are not being offered or are being proposed;

(II) adhere to the procedural requirements of paragraphs (1) through (3) of section 839e (i) of this title, except that the hearing officer shall, unless the hearing officer becomes unavailable to the agency, make a recommended decision to the Administrator that states the hearing officer's findings and conclusions, and the reasons or basis thereof, on all material issues of fact, law, or discretion presented on the record; and

(III) make a determination, setting forth the reasons for reaching any findings and conclusions which may differ from those of the hearing officer, based on the hearing record, consideration of the hearing officer's recommended decision, section 824j of this title and this section, as amended by the Energy Policy Act of 1992, and the provisions of law as preserved in this section; and
(B) if application is made to the Commission under section 824j of this title for transmission service under terms and conditions different than those offered by the Administrator, or following the denial of a request for transmission service by the Administrator, and such application is filed within 60 days of the Administrator's final determination and in accordance with Commission procedures, the Commission shall—

(i) in the event the Administrator has conducted a hearing as herein provided for

(I) accord parties to the Administrator's hearing the opportunity to offer for the Commission record materials excluded by the Administrator from the hearing record,

(II) accord such parties the opportunity to submit for the Commission

record comments on appropriate terms and conditions,

(III) afford those parties the opportunity for a hearing if and to the extent that the Commission finds the Administrator's hearing record to be inadequate to support a decision by the Commission, and

(IV) establish terms and conditions for or deny transmission service based on the Administrator's hearing record, the Commission record, section 824j of this title and this section, as amended by the Energy Policy Act of 1992, and the provisions of law as preserved in this section, or

(ii) in the event the Administrator has not conducted a hearing as herein provided for, determine whether to issue an order for transmission service in accordance with section 824j of this title and this section, including providing the opportunity for a hearing.

(3) Notwithstanding those provisions of section 825l (b) of this title which designate the court in which review may be obtained, any party to a proceeding concerning transmission service sought to be furnished by the Administrator of the Bonneville Power Administration seeking review of an order issued by the Commission in such proceeding shall obtain a review of such order in the United States Court of Appeals for the Pacific Northwest, as that region is defined by section 839a (14) of this title.

(4) To the extent the Administrator of the Bonneville Power Administration cannot be required under section 824j of this title, as a result of the Administrator's other statutory mandates, either to

(A) provide transmission service to an applicant which the Commission would otherwise order, or

(B) provide such service under rates, terms, and conditions which the Commission would otherwise require, the applicant shall not be required to provide similar transmission services to the Administrator or to provide such services under similar rates, terms, and conditions.

(5) The Commission shall not issue any order under section 824i of this title, section 824j of this title, this section, or section 824l of this title requiring the Administrator of the Bonneville Power Administration to provide transmission service if such an order would impair the Administrator's ability to provide such transmission service to the Administrator's power and transmission customers in

the Pacific Northwest, as that region is defined in section 839a (14) of this title, as is needed to assure adequate and reliable service to loads in that region.

(j) With respect to an electric utility which is prohibited by Federal law from being a source of power supply, either directly or through a distributor of its electric energy, outside an area set forth in such law, no order issued under section 824j of this title may require such electric utility (or a distributor of such electric utility) to provide transmission services to another entity if the electric energy to be transmitted will be consumed within the area set forth in such Federal law, unless the order is in furtherance of a sale of electric energy to that electric utility: *Provided, however*, That the foregoing provision shall not apply to any area served at retail by an electric transmission system which was such a distributor on October 24, 1992, and which before October 1, 1991, gave its notice of termination under its power supply contract with such electric utility.

(k)(1) Any order under section 824j of this title requiring provision of transmission services in whole or in part within ERCOT shall provide that any ERCOT utility which is not a public utility and the transmission facilities of which are actually used for such transmission service is entitled to receive compensation based, insofar as practicable and consistent with subsection (a) of this section, on the transmission ratemaking methodology used by the Public Utility Commission of Texas.

(2) For purposes of this subsection—

(A) the term “ERCOT” means the Electric Reliability Council of Texas; and

(B) the term “ERCOT utility” means a transmitting utility which is a member of ERCOT.