

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

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

Nos. 06-1326 and 06-1331

**OLD DOMINION ELECTRIC COOPERATIVE, 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**

**JOHN S. MOOT
GENERAL COUNSEL**

**ROBERT H. SOLOMON
SOLICITOR**

**MICHAEL E. KAUFMANN
ATTORNEY**

**FOR RESPONDENT
FEDERAL ENERGY REGULATORY
COMMISSION
WASHINGTON, D.C. 20426**

MAY 30, 2007

FINAL BRIEF: JULY 19, 2007

CIRCUIT RULE 28(A)(1) CERTIFICATE

A. Parties and Amici

To counsel's knowledge, all parties are presented in Petitioners' brief.

B. Rulings Under Review

1. *CED Rock Springs, LLC, et al.*, Order Rejecting Rate Filing, Docket Nos. ER06-491-000 and ER06-497-000, 114 FERC ¶ 61,285 (March 17, 2006) ("Initial Order"), R. 18, JA 001; and
2. *CED Rock Springs, LLC, et al.*, Order Denying Rehearing, Docket Nos. ER06-491-001 and ER06-497-001, 116 FERC ¶ 61,163 (August 22, 2006) ("Rehearing Order"), R. 22, JA 012.

C. Related Cases

This case has not previously been before this Court. Counsel is not aware of any related case pending in this Court or any other court.

Michael E. Kaufmann
Attorney

July 19, 2007

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE ISSUE.....	1
STATUTORY AND REGULATORY PROVISIONS	2
STATEMENT OF THE CASE.....	2
I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW.....	2
II. STATEMENT OF FACTS.....	3
A. Statutory And Regulatory Background.....	3
B. The Interconnection Facilities.....	6
C. The PJM Tariff And Agreements.....	8
D. The Rate Filings.....	9
E. The Commission’s Orders.....	9
SUMMARY OF ARGUMENT.....	11
ARGUMENT.....	13
I. STANDARD OF REVIEW.....	13
II. SECTION 37 OF THE PJM TARIFF DICTATES THE COST RESPONSIBILITY FOR GENERATOR INTERCONNECTIONS.....	15
A. Section 37 Applies Regardless Of Line Ownership.....	16
i. The Generators’ Decision To Become Transmission Owners Does Not Free Them Of Their Tariff Obligations.....	18

TABLE OF CONTENTS

	PAGE
ii. Signatories To The Transmission Owners Agreement Are Also Governed By Section 37 Of The Tariff.....	18
B. Section 37 Applies Regardless Of The Type Of Electrical Connection.....	19
i. The Interconnection Facilities Are “Network Upgrades” Under The Tariff.....	20
ii. Interconnection Agreement Designations Are Not Controlling.....	21
C. Neither Section 2.2 Of The Transmission Owners Agreement Nor Section 9.1 Of The PJM Tariff Override Section 37 Of The PJM Tariff.....	22
i. Section 2.2. Of The Transmission Owners Agreement.....	23
ii. Section 9.1 Of The PJM Tariff.....	27
1. Generators Could Not Reasonably Rely On These Tariff Sections.....	27
2. Nothing In FPA § 205 Requires The Bypass Of Section 37 Of The PJM Tariff.....	28
D. The Zero Recovery Provision In Section 2.2.1 Of The Transmission Owners Agreement Does Override Section 37 Of The PJM Tariff.....	29
i. Generator’s Extrinsic Evidence Has No Bearing.....	31
ii. Generators Previously Waived Their “Right” To Revenues.....	32

TABLE OF CONTENTS

	PAGE
iii. PJM’s Statements To Generators Do Not Bind Other Transmission Customers Or The Commission.....	34
III. THE INTERCONNECTION FACILITIES ARE “BUT FOR” FACILITIES UNDER SECTION 37 OF THE PJM TARIFF.....	35
IV. THE COMMISSION’S ORDERS WERE NOT UNDULY DISCRIMINATORY.....	38
CONCLUSION.....	40

TABLE OF AUTHORITIES

	PAGE
<u>COURT CASES:</u>	
<i>Alabama Electric Cooperative, Inc. v. FERC</i> , 684 F.2d 20 (D.C. Cir. 1982).....	28
* <i>Ameren Servs. Co. v. FERC</i> , 330 F.3d 494 (D.C. Cir. 2003).....	14, 31, 34
<i>Arkansas Louisiana Gas Co. v. Hall</i> , 453 U.S. 571 (1981).....	13
<i>Atlantic City Elec. Co. v. FERC</i> , 295 F.3d 1 (D.C. Cir. 2002).....	28, 29
<i>Bulova Watch Co. v. United States</i> , 365 U.S. 753 (1961).....	25
<i>Cajun Elec. Power Coop. v. FERC</i> , 924 F.2d 1132 (D.C. Cir. 1991).....	14
<i>Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984).....	14
* <i>Entergy Servs., Inc. v. FERC</i> , 319 F.3d 536 (D.C. Cir. 2003).....	6, 37
<i>Florida Municipal Power Agency v. FERC</i> , 315 F.3d 362 (D.C. Cir. 2003).....	13, 31
<i>FPL Energy Marcus Hook, L.P. v. FERC</i> , 430 F.3d 441 (D.C. Cir. 2005).....	15

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

	PAGE
<u>COURT CASES (continued):</u>	
<i>FPL Energy Maine Hydro LLC v. FERC</i> , 287 F.3d 1151 (D.C. Cir. 2002).....	13
<i>KN Energy, Inc. v. FERC</i> , 968 F.2d 1295 (D.C. Cir. 1992).....	28
<i>Koch Gateway Pipeline Co. v. FERC</i> , 136 F.3d 810 (D.C. Cir. 1998).....	13
<i>Long Island Lighting Co. v. FERC</i> , 20 F.3d 494 (D.C. Cir. 1994).....	13
<i>Midwest ISO Transmission Owners v. FERC</i> , 373 F.3d 1361 (D.C. Cir. 2004).....	4
<i>NAACP v. FPC</i> , 425 U.S. 662 (1976).....	29
* <i>Nat’l Ass’n of Reg. Comm’rs v. FERC</i> , 475 F.3d 1277 (D.C. Cir. 2007).....	5, 6, 31, 37, 38, 40
<i>Natural Gas Clearinghouse v. FERC</i> , 965 F.2d 1066 (D.C. Cir. 1992).....	13
<i>New York v. FERC</i> , 535 U.S. 1 (2002).....	3, 4, 5
<i>Papago Tribal Util. Auth. v. FERC</i> , 628 F.2d 235 (D.C. Cir. 1980).....	38
<i>Town of Norwood v. FERC</i> , 906 F.2d 772 (D.C. Cir. 1990).....	19

TABLE OF AUTHORITIES

	PAGE
<u>COURT CASES (continued):</u>	
<i>Transmission Access Policy Study Group v. FERC</i> , 225 F.3d 667 (D.C. Cir. 2000).....	5
<i>United States v. Paddack</i> , 825 F.2d 504 (D.C. Cir. 1987).....	25
<i>Western Mass. Elec. Co. v. FERC</i> , 165 F.3d 922 (D.C. Cir. 1999).....	37
<u>ADMINISTRATIVE CASES:</u>	
<i>CED Rock Springs, Inc. and Rock Springs Generation</i> , 101 FERC ¶ 61,325 (2002).....	33
<i>CED Rock Springs, LLC, et al.</i> , 114 FERC ¶ 61,285 (March 17, 2006).....	3, 6-10, 15-17, 19, 20, 22-26, 30, 33, 36, 37, 39
<i>CED Rock Springs, LLC, et al.</i> , 116 FERC ¶ 61,163 (August 22, 2006).....	3, 6-8, 10, 15-19, 20, 22, 24-37, 39
<i>Enron Energy Servs., Inc.</i> , 84 FERC ¶ 61,222 (1998).....	39
<i>Pennsylvania-New Jersey-Maryland Interconnection</i> , 81 FERC ¶ 61,252 (1997), <i>reh'g denied</i> , 92 FERC ¶ 61,282 (2000).....	8
<i>PJM Interconnection, LLC.</i> , 100 FERC ¶ 61,345 (2002).....	8

TABLE OF AUTHORITIES

	PAGE
<u>ADMINISTRATIVE CASES (continued):</u>	
<i>PJM Interconnection, LLC,</i> 105 FERC ¶ 61,294 (2003).....	28
<i>Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996), clarified, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), order on reh’g, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,048, order on reh’g, Order No. 888-B, 81 FERC ¶ 61,248, order on reh’g, Order No. 888-C, 82 FERC ¶ 61,046 (1998).....</i>	4-5
<i>Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003, 68 Fed. Reg. 49,845 (2003), FERC Stats. & Regs. ¶ 31,146 (2003), order on reh’g, Order No. 2003-A, 69 Fed. Reg. 15,923 (2004), FERC Stats. & Regs., ¶ 31,160 (2004), order on reh’g, Order No. 2003-B, 70 Fed. Reg. 265 (2005), FERC Stats. & Regs. ¶ 31,171 (2004), order on reh’g, Order No. 2003-C, 70 Fed. Reg. 37,661 (2005), FERC Stats. & Regs. ¶ 31,190 (2005).....</i>	5, 17, 37
<i>Tampa Elec. Co.,</i> 99 FERC ¶ 61,192 (2002).....	36
<u>STATUTES:</u>	
Federal Power Act	
Section 201, 16 U.S.C. § 824.....	3
Section 201, 16 U.S.C. § 824(a)-(b).....	3
Section 205(a), (b), (e), 16 U.S.C. § 824d(a),(b),(e).....	4, 12, 22, 24, 26-29, 38

TABLE OF AUTHORITIES

<u>STATUTES (continued):</u>	PAGE
Section 206, 16 U.S.C. § 824e.....	39
Section 313(b), 16 U.S.C. § 825l(b).....	13, 19

GLOSSARY

Brief or Br.	Opening Brief of Petitioners (filed March 30, 2007)
Commission or FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act, 16 U.S.C. §§ 791a, <i>et seq.</i>
Generation Interconnection Customer	An entity that submits an Interconnection Request to interconnect a new generation facility or to increase the capacity of an existing generation facility interconnected with the Transmission System (<i>see</i> PJM Tariff § 1.13)
Generators	Petitioners CED Rock Springs, LLC (“Rock Springs”) and Old Dominion Electric Cooperative (“Old Dominion”)
Initial Order	<i>CED Rock Springs, LLC, et al.</i> , Order Rejecting Rate Filing, Docket Nos. ER06-491-000 and ER06-497-000, 114 FERC ¶ 61,285 (March 17, 2006), R. 18, JA 018
Interconnection Agreement or IA	Interconnection Agreement among PECO Energy Company, Old Dominion Electric Cooperative, Inc. and CED Rock Springs, LLC submitted May 8, 2002
Interconnection Facilities	The Petitioner-owned substation and two 900-foot segments of transmission line that extend from the substation that interconnect Petitioners’ generator to the PECO transmission system

GLOSSARY

Interconnection Service Agreement or ISA	Interconnection Service Agreement among PJM Interconnection, L.L.C., Old Dominion Electric Cooperative, Inc., Rock Springs Generation, L.L.C and CED Rock Springs, Inc. dated as of May 18, 2001
JA	Joint Appendix citation
Network Upgrades	Modifications or additions to transmission-related facilities that are integrated with and support the Transmission Provider's overall Transmission System for the general benefit of all users of such Transmission System (<i>see</i> PJM Tariff § 1.26)
Old Dominion	Petitioner Old Dominion Electric Cooperative
P	Paragraph number within a FERC order
PECO	PECO Energy Company
PJM	PJM Interconnection, L.L.C.
PJM Transmission System	The electric facilities of several electric utilities that have turned over operation of their facilities to PJM consistent with the Commission's policies favoring unbundled, non-discriminatory transmission and generation services
R.	Record Item
Rate Filings	Proposed Revisions to PJM Tariff, <i>CED Rock Springs, LLC</i> , Docket No. ER06-491-000 (Jan. 17, 2006), R. 1, JA 078 and <i>Old Dominion Electric Cooperative</i> , Docket No. ER06-497-000 (Jan. 17, 2006), R. 2, JA 027

GLOSSARY

Rehearing Order	<i>CED Rock Springs, LLC, et al.</i> , Order Denying Rehearing, Docket Nos. ER06-491-001 and ER06-497-001, 116 FERC ¶ 61,163 (August 22, 2006), R. 22, JA 012
Rock Springs	Petitioner CED Rock Springs, LLC
Tariff	PJM Interconnection L.L.C. Open Access Transmission Tariff
Transmission Owners Agreement or TOA	PJM's Transmission Owners Agreement among the transmission owners on the PJM Transmission System whereby the owners have agreed to participate in certain collective undertakings

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

Nos. 06-1326 and 06-1331

**OLD DOMINION ELECTRIC COOPERATIVE, INC., *et al.*,
PETITIONERS,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

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

**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission (“Commission” or “FERC”) reasonably rejected attempts by Petitioners CED Rock Springs, LLC (“Rock Springs”) and Old Dominion Electric Cooperative (“Old Dominion”) (collectively “Generators”) to recover from other entities the costs of interconnecting generation facilities to the electric transmission grid, in contravention of the relevant tariff and Commission cost allocation policy.

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

In this case, the Commission was called upon to decide who must bear the costs of facilities required to interconnect an electric generator to the electric transmission grid. In the typical case, the transmission owner constructs these interconnection facilities and the generator reimburses the transmission owner for the cost of necessary construction. In this atypical case, however, the Generators themselves constructed and own the facilities that connect their generation facilities to the transmission system, here operated by PJM Interconnection, L.L.C. (“PJM”).

Having constructed these facilities, Generators then proposed revisions to the PJM Open Access Transmission Tariff (“Tariff”) to recover the cost of constructing those facilities from other PJM transmission customers. *See Proposed Revisions to PJM Tariff, CED Rock Springs, LLC*, Docket No. ER06-491-000 (Jan. 17, 2006), R. 1, JA 078, and *Old Dominion Electric Cooperative*, Docket No. ER06-497-000 (Jan. 17, 2006), R. 2, JA 027 (collectively “Rate Filings”).

The Commission rejected the Rate Filings because, under the terms of the PJM Tariff and consistent with Commission policy, these interconnection upgrades were considered “but for” facilities whose costs should be directly assigned to the Generators. Under section 37 of the PJM Tariff, where interconnection facilities do not provide benefits to the transmission grid and would not have been necessary “but for” the generation project, the generator is solely responsible for the cost of those upgrades. Accordingly, the Commission decided that the Generators are not entitled to recover the costs of these facilities through transmission charges from other PJM transmission customers. *See CED Rock Springs, LLC, et al.*, Order Rejecting Rate Filing, Docket Nos. ER06-491-000 and ER06-497-000, 114 FERC ¶ 61,285 (March 17, 2006) (“Initial Order”), R. 18, JA 001; *CED Rock Springs, LLC, et al.*, Order Denying Rehearing, Docket Nos. ER06-491-001 and ER06-497-001, 116 FERC ¶ 61,163 (August 22, 2006) (“Rehearing Order”), R. 22, JA 012.

II. STATEMENT OF FACTS

A. Statutory And Regulatory Background

Section 201 of the Federal Power Act (“FPA”), 16 U.S.C. § 824, affords the Commission jurisdiction over the rates, terms and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. *See* 16 U.S.C. § 824(a)-(b). This grant of jurisdiction is comprehensive and exclusive. *See New York v. FERC*, 535 U.S. 1 (2002) (discussing statutory framework and

division between federal and state regulatory authority under the FPA). All rates for or in connection with jurisdictional sales and transmission services are subject to FERC review to assure they are just and reasonable, and not unduly discriminatory or preferential. FPA § 205(a), (b), (e), 16 U.S.C. § 824d(a), (b), (e).

Historically, electric utilities were vertically integrated monopolies that owned electric generating facilities, transmission lines and distribution systems, and sold all of these services as a “bundled” package to their customers. *See Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1363 (D.C. Cir. 2004) (describing the historic structure of the electric utility industry). In recent years, however, the generation, transmission and distribution functions have become increasingly “unbundled,” leading to an increase in competitive markets for the sale of electric energy. *See New York v. FERC*, 535 U.S. at 5-14 (describing technological advances and legislative initiatives promoting competitive wholesale electric markets).

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

¹ *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. Preambles ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 and 76

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

Recognizing the critical role played by generator interconnections in assuring non-discriminatory open access to the interstate transmission grid, in Order No. 2003,² the Commission applied the principles established in Order No. 888 – affirmed by this Court and the Supreme Court – to the standardization of procedures for generator interconnections. Interconnection is a critical component of open access transmission service and thus is subject to the requirement that utilities offer comparable, non-discriminatory service under the terms of their open

FERC ¶ 61,347 (1997), *order on reh’g*, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,048, *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248, *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).

² *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,845 (2003), FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh’g*, Order No. 2003-A, 69 Fed. Reg. 15,923 (2004), FERC Stats. & Regs., ¶ 31,160 (2004), *order on reh’g*, Order No. 2003-B, 70 Fed. Reg. 265 (2005), FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh’g*, Order No. 2003-C, 70 Fed. Reg. 37,661 (2005), FERC Stats. & Regs. ¶ 31,190 (2005), *aff’d sub nom., Nat’l Ass’n of Reg. Comm’rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

access transmission tariffs. *See Nat'l Ass'n of Reg. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007); *see also Entergy Servs, Inc. v. FERC*, 319 F.3d 536 (D.C. Cir. 2003). Interconnection plays a crucial role in bringing new resources into the market as relatively unencumbered entry is necessary for competitive markets. *Id.*

B. The Interconnection Facilities

The underlying facts are largely undisputed. Generators own generating facilities at a site in Rising Sun, Maryland. Radial lines extend from the generation facilities to a substation. (These radial lines are not electrically integrated with the grid and are not relevant to the issues on appeal). The substation is connected to PECO Energy Company's ("PECO's") transmission system via 1,800 feet of transmission line; each of two, 900-foot segments of line extend from the substation to one end of a spliced transmission line on PECO's system. *See* diagram, Rock Springs Rate Filing, CED Ex. No. CED-4, R. 1, JA 106, (Addendum Attachment B). To reach PECO's system, electricity from the generation facilities flows over the radial facilities, through the substation and over the 1,800 feet of line, all of which are owned by the Generators. The 1,800 feet of line were necessary to accommodate the interconnection and resulted in the replacement of a portion of a transmission line operated by PECO. *See* Initial Order at P 1, JA 001; Rehearing Order at P 2, JA 012; Br. at 4, 7-9.

Under the PJM Tariff, Generators could have relied upon PECO to construct

and own these connection facilities (the radial facilities, substation and 1,800 feet of line). However, because Generators did not want to wait for PECO to construct the facilities, the parties agreed that Generators would construct and retain ownership of the facilities. Initial Order at P 4, JA 002; Rehearing Order at PP 4, 13, JA 013, 017; Old Dominion Rate Filing at 8, R. 2, JA 034.

The substation and the two 900-foot lines at issue (the “interconnection facilities”) operate as part of PECO’s transmission system, such that electricity from sources other than Generators’ generation facilities might flow over the interconnection facilities. Strictly speaking, the interconnection facilities qualify as “transmission facilities” because of this potential for bi-directional flow from multiple sources. *See* Initial Order at P 1 & n.1, JA 001; Rehearing Order at P 3, JA 013; Br. at 4, 6-9. Nevertheless, these facilities merely replaced an existing PECO transmission line solely to interconnect the Generators’ generation facilities; there was no record evidence that these interconnection facilities provided any additional system benefits (such as accelerating, deferring or eliminating transmission projects necessary for PJM to reliably operate its system). *See* Initial Order at P 14 & n.12, JA 006; Rehearing Order at P 32, JA 023-024. Generators sought to recover the costs of the interconnection facilities (but not the radial facilities) from the region’s transmission service customers. *See* Rate Filings, R. 1 & 2, JA 078 & 027; Rehearing Order at P 3, JA 013.

C. The PJM Tariff And Agreements

PJM operates Generators' interconnection facilities, along with PECO's transmission system, as part of a regional, interconnected transmission grid ("PJM Transmission System"). The PJM Transmission System is composed of the facilities of several electric utilities that have turned over operation of their facilities to PJM consistent with the Commission's policies favoring unbundled, non-discriminatory transmission and generation services. Initial Order at P 3, JA 002; *see also* Section II.A., STATUTORY AND REGULATORY BACKGROUND, *supra*. PJM operates the system as an independent system operator under tariffs and agreements that have been approved by the Commission.³ The PJM Tariff establishes the rates, terms and conditions of service for transmission services over the PJM Transmission System, including the terms by which generators connect their facilities to the system. *Id.*

In addition to being governed by the PJM Tariff, by virtue of retaining ownership of the interconnection facilities, Generators also became "Transmission Owners" under, and signatories to, the PJM Transmission Owners Agreement ("Transmission Owners Agreement" or "TOA") effective April 29, 2003. Initial Order at P 4, JA 002; Rehearing Order at P 4, JA 013; Br. at 9-12. The

³ *See Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC ¶ 61,252 (1997), *reh'g denied*, 92 FERC ¶ 61,282 (2000); *PJM Interconnection, L.L.C.*, 100 FERC ¶ 61,345 (2002).

Transmission Owners Agreement is an agreement among the transmission owners on the PJM Transmission System whereby the owners have agreed to participate in certain collective undertakings. *Id.*

D. The Rate Filings

In their January 17, 2006 Rate Filings, Generators each proposed to recover, from other customers on the PJM Transmission System, a portion of the costs that Generators incurred in connecting their generation facilities to the PJM system. Rock Springs proposed a revenue requirement that would equal Rock Springs' share of the costs associated with the interconnection facilities and that would be allocated, through transmission service charges, to all customers in PJM's PECO Zone. *See* Rock Springs Rate Filing, Docket No. ER06-491-000, R. 1, JA 078. Old Dominion made a parallel proposal in Docket No. ER06-497-000, respecting customers in the PJM Delmarva Zone. *See* R. 2, JA 027.

E. The Commission's Orders

The Commission rejected the Generators' Rate Filings, finding that, under section 37 of the PJM Tariff, Generators are not entitled to recover the costs of the interconnection facilities through transmission charge from PJM transmission customers. Initial Order at PP 1, 11-29 and Ordering Paragraph, JA 001, 015-023 and 026. The Commission also rejected Generators' claim that section 37 of the PJM Tariff was overridden by section 2.2 of the Transmission Owners Agreement

that reserved to individual owners the right to make unilateral rate filings. Initial Order at PP 11, 17-25, JA 004, 007-009.

Both Generators requested rehearing. *See* Rock Springs Rehearing Request, R. 19, JA 299; Old Dominion Rehearing Request, R. 20, JA 349. The Commission denied these requests, finding: (1) Under section 37 of the PJM Tariff, these interconnection facilities were “but for” upgrades to the transmission system and as such, their costs were directly assignable to the Generators, regardless of their ownership interest (Rehearing Order at PP 11-29, JA 015-023); (2) Generators are not otherwise entitled to any recovery, because they provided no evidence that the interconnection facilities provided any benefit to the PJM grid (*id.* at PP 30-33, JA 023-024); (3) Commission precedent cited by Generators to demonstrate unlawful discrimination was inapposite (*id.* at PP 34-35, JA 024-025); and (4) FPA section 205 does not override or negate the Commission’s application of section 37 of the PJM Tariff (*id.* at PP 36-39 and Ordering Paragraph, JA 025-026). These petitions for review followed.

SUMMARY OF ARGUMENT

The Commission, acting within its discretion, and based on its rational reading of the PJM Tariff and its own interconnection policies, reasonably concluded that Generators are not entitled to recover the costs of their interconnection facilities through transmission charges from other PJM transmission customers. Under the PJM Tariff, the allocation of costs for transmission upgrades associated with generation interconnection projects is determined exclusively by the provisions of section 37. That section of the Tariff provides that the generator is responsible for upgrades that would not have been necessary “but for” the generation project and that do not provide benefits to the transmission grid.

Absent a showing that the facilities were not built “but for” a generator’s interconnection request (no such showing was made in this case), the Tariff’s prescribed allocation of interconnection costs to generators is unaffected by the form of ownership or potential uses of the facilities. Therefore, the fact that Generators in this case happen to own their interconnection facilities does not relieve them from the operation of section 37, which allocates to Generators the costs of their “but for” Network Upgrades.

Likewise, section 37 of the Tariff is unaffected by the provisions in the Transmission Owners Agreement or the provision in the Tariff that reserve to

individual owners the right to make unilateral rate filings under FPA § 205.

Generators cannot claim reliance on these provisions as they did not exist at the time they were planning and constructing their facilities. In any case, the right to make a filing under FPA § 205, which Generators exercised, creates no entitlement to recovery and there is no conflict between FPA § 205 and section 37 of the PJM Tariff.

Similarly, Generators' claim that another provision of the PJM Tariff, which reserves the right of transmission owners to collect "zero revenue," overrides section 37 is also misplaced. Having an option to forego collection of otherwise justifiable revenues under the Tariff does not, by implication, create a converse "right" that would allow Generators to collect their "but for" facility costs from other PJM transmission customers, which section 37 prohibits. This is particularly so when one of the Generators explicitly waived any such "right" in its prior filings at the Commission.

Generators' remaining arguments also lack merit. They failed to demonstrate that their facilities were anything other than "but for" facilities. To allow recovery here would turn both the PJM Tariff and the Commission's cost allocation policies (that treat all interconnection requests equally) on their heads. Finally, Generators failed to demonstrate that the Commission's orders were unduly discriminatory.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *E.g., Florida Municipal Power Agency v. FERC*, 315 F.3d 362, 365 (D.C. Cir. 2003). Under that standard, the Commission's decision must be reasoned and based upon substantial evidence in the record. The Commission's factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825l(b). The substantial evidence standard "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." *Florida Municipal*, 315 F.3d at 365 (quoting *FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)).

The Court affords deference to the Commission's reasonable interpretation of its tariffs on file, "even where the issue simply involves the proper construction of language." *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998) (internal citation and quotation marks omitted).⁴ *See also Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1070 (D.C. Cir. 1992); *Long Island Lighting Co. v. FERC*, 20 F.3d 494, 497 (D.C. Cir. 1994).

⁴ *Koch* involved the Natural Gas Act, but courts have applied interpretations of Natural Gas Act provisions to their counterparts in the Federal Power Act because "the relevant provisions of the two statutes are in all material respects substantially identical." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

Similarly, in reviewing the Commission’s interpretation of filed agreements, the Court employs a familiar two-step analysis. *See Ameren Servs. Co. v. FERC*, 330 F.3d 494, 498-499 (D.C. Cir. 2003) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)); *Cajun Elec. Power Coop. v. FERC*, 924 F.2d 1132, 1135-36 (D.C. Cir. 1991) (*Chevron* deference applies to agency interpretation of agency-approved contract). Applying this analysis, the Court first considers *de novo* whether the agreement unambiguously addresses the matter at issue. “If so, the language of the agreement controls for we ‘must give effect to the unambiguously expressed intent of’ the parties.” *Ameren*, 330 F.3d at 498 (citing *Chevron*, 467 U.S. at 843). If the contract is ambiguous, however, the Court then examines the Commission’s interpretation of that agreement “‘under the deferential ‘reasonable’ standard.’” 330 F.3d at 498 (citing *Cajun*, 924 F.2d at 1136).

As explained below, the Commission’s rejection of the Rate Filings, based on the language of the PJM Tariff, the Commission’s generator interconnection and cost allocation policies, and review of the relevant agreements, was reasonable, responsive to the arguments of the various parties, and supported by substantial evidence in the record.

II. SECTION 37 OF THE PJM TARIFF DICTATES THE COST RESPONSIBILITY FOR GENERATOR INTERCONNECTIONS

Under the PJM Tariff, the allocation of costs for transmission upgrades associated with generation interconnection projects is determined exclusively by the provisions of section 37. That section provides that the generator is responsible for upgrades that would not have been necessary but for the generation project and that do not provide benefits to the transmission grid. *See* Initial Order at P 11, JA 004; Rehearing Order at PP 7-9, 11-33, JA 013-014, 015-024.

Only section 37 of the PJM Tariff defines the allocation of costs of Network Upgrades associated with interconnections to the PJM transmission grid. Under section 37, a generator must pay 100 percent of the costs of local and Network Upgrades that would not have been incurred under PJM's Regional Transmission Expansion Plan "but for" the generation interconnection request, net of benefits resulting from the construction of the upgrade. *See FPL Energy Marcus Hook, L.P. v. FERC*, 430 F.3d 441 (D.C. Cir. 2005) (concerning interconnection cost responsibility under PJM Tariff sections 36 and 37); Initial Order at P 12, JA 004-005; Rehearing Order at PP 6, 7, 12, JA 013, 013-014, 015-017.

Specifically, section 37 of PJM's Tariff provides:

37 Cost Responsibility for Necessary Facilities and Upgrades

37.1 Attachment Facilities: A Generation Interconnection Customer shall be obligated to pay for 100 percent of the costs of the Attachment Facilities necessary to accommodate its Generation

Interconnection Request.

37.2 Local and Network Upgrades: A Generation Interconnection Customer shall be obligated to pay for 100 percent of the costs of the minimum amount of Local Upgrades and Network Upgrades necessary to accommodate its Generation Interconnection Request and that would not have been incurred under the Regional Transmission Expansion Plan but for such Generation Interconnection Request, net of benefits resulting from the construction of the upgrades, such costs not to be less than zero. Such costs and benefits shall include costs and benefits such as those associated with accelerating, deferring, or eliminating the construction of planned Local Upgrades and Network Upgrades, the construction of Local Upgrades and Network Upgrades resulting from modifications to the Regional Transmission Expansion Plan to accommodate the Generation Interconnection Request, or the construction of other Local Upgrades and Network Upgrades that are not and do not formally become part of the Regional Transmission Expansion Plan.

PJM Tariff § 37; *see* Initial Order at P 12, JA 004-005; Rehearing Order at P 12, JA 015-017. This provision does not differentiate facilities based on ownership or type of electrical connection. *Id.*

A. Section 37 Applies Regardless Of Line Ownership

Generators argue (Br. 28-32) that because they are Transmission Owners, *i.e.*, because they own the interconnection facilities, which happen to operate as an integrated part of the grid, section 37 of the PJM Tariff should not apply to them. However, section 37 does in fact dictate the proper allocation of interconnection costs, regardless of whether the interconnection customer also happens to be a transmission owner. It applies to every “Generation Interconnection Customer,” which is defined elsewhere in the Tariff, without limitation, as “an entity that

submits an Interconnection Request to interconnect a new generation facility or to increase the capacity of an existing generation facility interconnected with the Transmission System in the PJM Region.” PJM Tariff § 1.13B, JA 498.

Transmission owners building generation facilities are treated no differently than independent generators. *See id.* § 8.3, JA 502 (requiring each transmission owner to keep separate accounts of the costs of Attachment Facilities, Local Upgrades, and Network Upgrades related “to its own Interconnection Requests”); *see also* Order No. 2003-A, 106 FERC ¶ 61,220 at P 52 (2004) (regional cost allocation rules apply to “all interconnections” on the system); Initial Order at P 12 & n.10, JA 004-005 (citing various provisions of the PJM Tariff); Rehearing Order at P 12 & nn.10 & 11, JA 015-017 (same).

Thus, ownership interests notwithstanding, section 37 of the PJM Tariff allocates to all generators the costs of Network Upgrades, subject only to a credit for specified benefits. *See* Initial Order at PP 12-13, JA 004-006; Rehearing Order at PP 11-13, JA 015-017. In this case, Generators never contended that they were eligible for such a credit or produced evidence that their facilities provide benefits to the system. *See* Initial Order at P 14 & n.12, JA 006; Rehearing Order at P 32, JA 023-024.

i. The Generators' Decision To Become Transmission Owners Does Not Free Them Of Their Tariff Obligations

As discussed *supra*, Generators opted to build and own the interconnection facilities at issue because they did not want to wait for PECO to construct them. This decision, however, does not insulate them from their obligations under the Tariff. Had PECO built the facilities instead, section 37 of the PJM Tariff nevertheless would still apply to determine whether Generators would have to bear the costs of the upgrades. The fact that, for business reasons, they chose a different route does not negate the applicability of section 37. Allocation of cost responsibility under section 37.2 does not depend on which party chose to build facilities, but rather on whether the facilities would have been built “but for” the generation interconnection project. *See* Rehearing Order at P 13, JA 017.

ii. Signatories To The Transmission Owners Agreement Are Also Governed By Section 37 Of The Tariff

Generators also argue (Br. 18, 34-35) that because they are signatories to the Transmission Owners Agreement, they incur costs that are not incurred by other generators, such as a \$200,000 replacement of substation “wave traps” needed for reliability. Br. at 34. However, Generators never raised the issue of these specific costs to the Commission on rehearing. While Old Dominion did make a passing reference to bearing “the costs of future improvement to the substation” in a footnote (Old Dominion Rehearing Request at p. 11 & n.5, JA 361), the first

mention of these wave traps and their cost was in Generators' opening brief to this Court. *See, e.g., Town of Norwood v. FERC*, 906 F.2d 772, 774 (D.C. Cir. 1990) (under FPA § 313(b), 16 U.S.C. § 825l(b), arguments to the court must be raised with specificity to the agency).

Regardless, these costs resulted from Generators' own choice to build and own these facilities. PJM's Tariff allocates costs based on whether the facilities would have been built for another purpose or would enable the system to avoid certain costs. No different treatment is provided simply because a party's election to own facilities may result in certain additional costs. *See* Initial Order at P 4, JA 004; Rehearing Order at PP 4, 13, JA 013, 017; *see also* Old Dominion Rate Filing at 8 ("Indeed, [Generators] undertook the construction and ownership of [the interconnection facilities] [] when PECO would not, on a timely basis."), JA 034.

B. Section 37 Applies Regardless Of The Type Of Electrical Connection

Generators argue that their facilities are not "typical" Network Upgrades as they are potentially used by others and, as such, should not be treated within the confines of section 37. Br. at 32-36. However, the allocation of interconnection costs under section 37 applies regardless of the use to which particular interconnection facilities might be put, as evidenced by the express allocation to generators of the costs of Network Upgrades, net of benefits.

i. The Interconnection Facilities Are “Network Upgrades” Under The Tariff

Network upgrades are, by definition, electrically integrated with the transmission grid and therefore might be used by transmission service customers other than the interconnecting generator. The Tariff defines Network Upgrades as “Modifications or additions to transmission-related facilities that are integrated with and support the Transmission Provider’s overall Transmission System for the general benefit of all users of such Transmission System.” PJM Tariff §1.26, JA 499. Generators acknowledge that the interconnection facilities at issue here are modifications and additions to the existing PECO transmission system. *See, e.g.,* Br. 4-5, 7-9. However, Generators never demonstrated to the Commission that these facilities provided any benefits to the system or to other customers. *See* Initial Order at P 14 & n.12, JA 006; Rehearing Order at P 32, JA 023-024.

By allocating to generators the costs of Network Upgrades, subject only to a credit for specified benefits, section 37 contradicts Generators’ position that generators may recover the costs of interconnection facilities through transmission charges merely on the basis that those facilities potentially could be used by others. There is no distinction in the Tariff between Network Upgrades and transmission facilities, as Generators claim. Network upgrades are facilities that are added to the existing transmission system, as are the facilities built here. *See* Initial Order at P 13, JA 006; Rehearing Order at P 16, JA 018.

ii. Interconnection Agreement Designations Are Not Controlling

Generators next argue that the interconnection facilities cannot be “Network Upgrades” because neither the Interconnection Agreement⁵ nor the Interconnection Service Agreement⁶ defines them as such. Br. at 33-34. However, these designations are not relevant to the discussion. The purpose of the designation in the Interconnection Agreement would have been to include the costs of the facilities in the Network Upgrades Charge – a charge that Generators pay to PECO. To have included the costs of the interconnection facilities in that charge would have resulted in Generators paying PECO to build facilities that PECO did not in fact build, but which Generators built and paid for. The Interconnection Agreement determined only the amounts paid to PECO, but does not determine the appropriate characterization of facilities for purposes of the PJM Tariff.⁷ *See*

⁵ Interconnection Agreement among PECO Energy Company, Old Dominion Electric Cooperative, Inc. and CED Rock Springs, LLC submitted May 8, 2002.

⁶ Interconnection Service Agreement among PJM Interconnection, L.L.C., Old Dominion Electric Cooperative, Inc., Rock Springs Generation, L.L.C and CED Rock Springs, Inc. dated as of May 18, 2001.

⁷ In the Initial Order, the Commission treated the interconnection facilities as “Network Upgrades” rather than “Attachment Facilities” to ensure that it had considered and rejected all bases for Generators to avoid cost responsibility for the facilities. Section 37 treats generators more favorably with respect to Network Upgrades as opposed to Attachment Facilities because, in the case of Network Upgrades, a generator’s cost responsibility may be reduced to reflect specified

Rehearing Order at PP 19-20, JA 019. Similarly, the failure of the Interconnection Service Agreement to classify the interconnection facilities as “Network Upgrades” cannot override the operative language of section 37.

C. Neither Section 2.2 Of The Transmission Owners Agreement Nor Section 9.1 Of The PJM Tariff Override Section 37 Of The PJM Tariff

Generators’ central argument is that notwithstanding the plain language of section 37, they are relieved of their cost responsibilities thereunder because, they allege, section 37 is overridden by section 2.2 of the PJM Transmission Owners Agreement and section 9.1(a) of the PJM Tariff. (Br. 22-28). Both sections reserve to owners of transmission facilities in PJM the right to file unilaterally, under section 205 of the FPA, 16 U.S.C. § 824d, for an increase in revenue requirement. However, as the Commission correctly explained in its orders, the right to make a unilateral filing does not confer the right to recover particular costs. It permits the utility only to submit a filing to recover costs. Whether such costs can be recovered, and from whom, depends upon an analysis of the PJM Tariff and the benefits, if any, that such costs provide to other parties. *See* Initial Order at PP 17-27, JA 007-010; Rehearing Order at PP 21-29, JA 019-023.

system benefits. As will be explained in Argument § III *infra*, even when the interconnection facilities are treated as Network Upgrades, Petitioners bear sole cost responsibility under section 37 because no requisite system benefit has been alleged. *See* Rehearing Order at PP 5, 20 & n.21, JA 013, 019.

i. Section 2.2 Of The Transmission Owners Agreement

Through the Transmission Owners Agreement, the transmission owners on the PJM Transmission System agreed to engage in coordinated operation and planning and to distribute PJM's transmission service revenues among themselves based on each owner's proportional share of PJM's total revenue requirement. *See* TOA §§ 4 and 5.3, JA 473-477 and 478; Initial Order at P 17, JA 007. Section 2.2 of the agreement reserves certain rights for the individual owners notwithstanding their collective participation in these undertakings:

Notwithstanding any other provision of this Agreement, or any other agreement or amendment made in connection with the restructuring of PJM, each individual Party shall retain all of the rights set forth in this Section 2.2; provided, however, that such rights shall be exercised in a manner consistent with a Party's obligations under the Federal Power Act and the FERC's rules and regulations thereunder.

TOA § 2.2, JA 471.⁸

The Commission reasonably found, however, that nothing in section 2.2 supports Generators' proposed recovery of interconnection costs. By its terms, section 2.2 is merely a reservation of rights, used to ensure that the parties to the agreement, by executing the agreement, are not waiving particular rights that

⁸ The rights that are specifically reserved to individual owners under section 2.2 include an owner's right to protect its facilities from physical damage, an owner's right to buy and sell transmission facilities and other assets, and an owner's right to take steps to comply with local, state and federal law. TOA § 2.2, JA 471; Initial Order at P 18, JA 007-008.

existed prior to execution. Initial Order at PP 19-22, JA 008-009; Rehearing Order at PP 21-22, JA 019-020. Because the Transmission Owners Agreement imposes on the transmission owners certain obligations to act in concert, section 2.2 focuses on pre-existing rights that are retained by individual transmission owners. *Id.*

To bolster their argument, Generators point to section 2.2.1 of the Transmission Owners Agreement (Br. 11, 23-26) which provides:

Each Party shall have the right at any time unilaterally to file pursuant to Section 205 of the Federal Power Act to change the revenue requirements underlying its rates for providing services under the PJM Tariff. Each Party shall have the unilateral right to adopt a revenue requirement of zero and to forgo any right or claim to compensation for providing transmission services under the PJM Tariff or any other document.

TOA § 2.2.1, JA 471. However, this is another example of how section 2.2 of the Transmission Owners Agreement ensures that each owner may file without the consent of the other owners, *i.e.*, that, by agreeing to certain collective undertakings in the Transmission Owners Agreement, an owner has not waived its statutory right to file unilaterally under FPA § 205. Initial Order at PP 19-22, JA 008-009; Rehearing Order at PP 21-22, JA 019-020.

This reservation of rights does not, as Generators urge, create entitlements to recover particular costs. Rather, section 2.2 contemplates that the merits of a transmission owner's filing would be governed by applicable law; under section 2.2, the rights reserved thereunder "shall be exercised in a manner consistent with a

Party's obligations under the Federal Power Act and the FERC's rules and regulations thereunder." *See* Initial Order at P 20, JA 008.

According to Generators, the "notwithstanding" phrase at the beginning of section 2.2 establishes the supremacy of section 2.2 in overriding the cost allocation provisions in the PJM Tariff. Br. at 25. In effect, Generators' claim is that by inserting a general reservation of rights in the Transmission Owners Agreement, they have rendered the specific core provisions of the PJM Tariff as well as the Commission's underlying policies inoperable. The Commission properly rejected this overbroad interpretation and application. *See* Initial Order at PP 21-22, JA 008-009; Rehearing Order at PP 21-22, JA 019-020; *see also, e.g., United States v. Paddack*, 825 F.2d 504, 514 (D.C. Cir. 1987) (citing *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961) ("the traditional maxim of statutory interpretation [is] that specific rules control over general rules")).

The provisions of the Transmission Owners Agreement notwithstanding, under section 37 of the PJM Tariff, Network Upgrade costs that are incurred only because of the generation project (*i.e.*, because they do not avoid or delay the construction of other facilities) are not recoverable from other customers within PJM. *See* Rehearing Order at P 22, JA 019-020. The Commission reasonably determined that it would be incongruous to permit Generators to recover costs from other PJM customers simply because Generators opted to retain ownership of

the facilities in order to hasten construction when, had those facilities been built and owned by PECO, Generators would have paid for those facilities. *See* Initial Order at PP 17-27, JA 007-010; Rehearing Order at P 22, JA 019-020.

As explained above, Generators emphasize that the critical right retained in section 2.2 includes an individual transmission owner's right to file unilaterally, under section 205 of the FPA. Generators then claim that they are the only transmission owners within PJM whose transmission facilities are being used by PJM, but who have not been permitted to seek cost recovery for PJM's use of their transmission facilities. Br. at 5, 16.

However, as the Commission confirmed, it applied the same standards to Generators as it has to other transmission owners. *See* Rehearing Order at P 23, JA 020. As previously explained the PJM Tariff applies to *all* interconnection requests, including those by transmission owners, and applies the same provisions to those requests. On rehearing, Rock Springs conceded that since 1997 (when PJM became the operator of the regional transmission grid), no PJM East Transmission Owner had constructed generation and sought to include the transmission facilities associated with such new generation in its rate base and that "the future outcome of such a filing by another transmission owner is purely speculative." Rock Springs Rehearing Request at 27, R. 19, JA 328.

To the contrary, as the Commission's orders explained, the outcome would

not be speculative. *See* Rehearing Order at P 23, JA 020. Under PJM's Tariff, the same section 37 cost allocation procedure would apply to *any* generation interconnection request by a transmission owner. *Id.* Indeed, such an outcome is necessary to avoid undue discrimination between transmission owners and independent generators. *Id.*

ii. Section 9.1 Of The PJM Tariff

Generators fare no better under section 9.1 of the PJM Tariff, which provides, in part:

9.1 Rights of the Transmission Owners:

(a) The Transmission Owners shall have the exclusive and unilateral rights to file pursuant to Section 205 of the Federal Power Act and the FERC's rules and regulations thereunder for any changes in or relating to the establishment and recovery of the Transmission Owners' transmission revenue requirements or the transmission rate design under the PJM Tariff, and such filing rights shall also encompass any provisions of the PJM Tariff governing the recovery of transmission-related costs incurred by the Transmission Owners.

PJM Tariff § 9.1(a).

1. Generators Could Not Reasonably Rely On These Tariff Sections

Significantly, Generators fail to acknowledge that at the time the interconnection facilities were being planned and constructed, sections 2.2 of the Transmission Owners Agreement and section 9.1 of the PJM Tariff were not yet in existence. The generating facilities at issue here were placed into service June 1, 2003. These Tariff provisions were not filed until October 3, 2003 in settlement of

the issues addressed in *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002), which held that the Commission exceeded its authority under FPA § 205 when (in allocating responsibilities between PJM and the PJM transmission owners) it had prohibited PJM transmission owners from unilaterally filing for tariff and rate design changes. *See Pennsylvania-New Jersey-Maryland Interconnection*, 105 FERC ¶ 61,294 (2003); Rehearing Order at P 22 & n. 24, JA 019-020. Thus Generators cannot now assert reliance on any of these provisions in claiming an entitlement to cost recovery.

2. Nothing In FPA § 205 Requires The Bypass Of Section 37 Of The PJM Tariff

Under FPA § 205, transmission owners can file to recover prudently incurred costs that are used and useful. But, under the Commission's traditional cost-causation principle, rates reflect to some degree the costs actually caused by the customer who must pay them. *See KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992); *Alabama Electric Cooperative, Inc. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982). Section 37 of the Tariff applies a cost-causation test to determine whether the facilities built by an interconnecting generator provide benefits to other customers. Applying cost-causation principles here, as the interconnection facilities replaced pre-existing PECO facilities and provided no system benefits, the beneficiaries of the upgrades built by the Generators are the Generators, and not the other customers of PJM. Therefore, the costs are properly

and entirely allocated to Generators. *See* Rehearing Order at PP 36-37, JA 025.

Moreover, nothing in the Federal Power Act requires the Commission to allocate connection costs to transmission service customers. Had PECO paid for the interconnection facilities, under the PJM Tariff and the Commission's policies, the Commission would have allocated those costs to the Generators. To change that result based on the fact that Generators own the facilities would be contrary to the interests of the captive customers that the Act is primarily designed to protect. *See, e.g., NAACP v. FPC*, 425 U.S. 662, 669-71 (1976) (noting consumer protection aims of FPA § 205); *Atl. City Elec. v. FERC*, 295 F.3d at 4 (same); *see also* Rehearing Order at P 38, JA 025.

D. The Zero Recovery Provision In Section 2.2.1 Of The Transmission Owners Agreement Does Override Section 37 Of The PJM Tariff

Generators next turn to section 2.2.1 of the Transmission Owners Agreement, which states that each transmission owner “shall have the unilateral right to adopt a revenue requirement of zero and to forgo any right or claim to compensation for providing transmission service under the PJM Tariff or any other document.” According to Generators, this language, by implication, indicates that Generators are entitled to recover a positive revenue requirement related to the interconnection facilities. Br. 39-42. Generators maintain that, at the time they became PJM transmission owners, they elected a zero revenue requirement

because of regulatory concerns with their regulatory status, but that they always reserved the right to seek a revenue requirement for these facilities. Br at 10; Initial Order at P 26, JA 009.

However, as discussed above, while Generators had the right to submit a filing, they are not entitled, by section 37 of the PJM Tariff, to recover their costs for interconnection facilities through a transmission charge assessed to other PJM transmission customers. *See* Initial Order at P 26, JA 009; Rehearing Order at P 24-28, JA 020-022.

By its terms, section 2.2.1 enables a transmission owner unilaterally to forgo the exercise of “any” right to compensation. The word “any” indicates that section 2.2.1 is not intended to confer or recognize rights to compensation; section 2.2.1 merely ensures that each owner may decide *unilaterally* to forgo any compensation to which the owner might be entitled, notwithstanding the joint filings contemplated under the PJM agreements. *See* Initial Order at PP 26-27, JA 009-010; Rehearing Order at P 25, JA 021. Similarly, this provision permitting an owner unilaterally to elect a revenue requirement of zero does not, by itself, confer or recognize rights to compensation; it merely provides the mechanism by which an entity could be a transmission owner and *not* share in revenues generated by PJM. *Id.*

By contrast, Generators insist that this provision recognizes their “right” to recover connection costs despite the specific contrary language in section 37. Generators’ interpretation reads too much into the text of 2.2.1 and assumes that transmission owners have the ability to negate a section of the PJM Tariff at will. The Commission’s finding that section 2.2.1 does not, by its terms, confer a right to recover compensation for which a party is not otherwise eligible under section 37 of the PJM Tariff is reasonable and entitled to deference. *See Fla. Mun. Power Agency v. FERC*, 315 F.3d at 368 (“The question we must answer, however, is not whether record evidence supports [Petitioner’s] version of events, but whether it supports FERC’s.”).

i. Generators’ Extrinsic Evidence Has No Bearing

Generators argue that the Commission improperly discounted the affidavit of Steven Tessem, which they allege demonstrates that the parties always intended to permit Generators to recover these costs. Br. at 39, citing Rock Springs Answer, Att. 1 at P 5, R. 17, JA 293. As the Commission reasonably countered, however, extrinsic evidence cannot overcome the explicit provisions of the PJM Tariff that do not permit such recovery. Rehearing Order at P 26, JA 021-022. *See Ameren Servs. Co. v. FERC*, 330 F.3d at 498 n.7; *see also Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d at 1285 (Commission need not give significant weight to “insignificant” affidavit if Commission’s conclusions are reasonable and

supported by substantial evidence).

In any event, the Tessem affidavit states only that because Rock Springs was concerned about whether receiving revenue would compromise its exempt regulatory status, it arranged to sign an agreement that it would not receive revenue. Rock Springs Answer, Att. 1 at P 5, R. 17, JA 293. But the affidavit never states that the other parties were ever aware of, or agreed to, Generators' right to recover these costs from other transmission customers. Rehearing Order at P 28, JA 028. While Generators' management may have intended to reserve such rights, in contravention of Tariff section 37, it never formalized any such agreement in writing, nor did it ever obtain agreement from other parties that these costs would be recoverable from other transmission customers. *See id.* & n.32, JA 022.

ii. Generators Previously Waived Their “Right” To Revenues

There is no reasonable suggestion that Generators had any expectation, when they built these interconnection facilities, that they would be permitted to collect the costs of the facilities through a transmission service charge. In fact, statements made by Generators in 2002 indicated that their expectation was the exact opposite. In their filing in Commission Docket No. OA02-9-000, Rock Springs stated:

Furthermore, as part of their arrangement with PJM, Applicants will not receive any transmission revenue if the Applicants'

Interconnection Facilities will be used to provide transmission service.

Furthermore, Applicants will adopt a revenue requirement of zero and forgo any right or claim to compensation from transmission services under the PJM Tariff or any other document that utilize the Applicants' Interconnection Facilities.

As such, Applicants will not maintain their own rate schedule as other PJM transmission owners currently do. In fact, under the TOA, the *Applicants have waived any rights to revenue earned by PJM with respect to use of such Facilities.*

See Old Dominion's and Rock Springs' Request for Expedited Order, Docket No. OA02-9-000 (filed August 30, 2002) at 3, 11 and 12 (emphasis added); Initial Order at P 27, JA 009-010; Rehearing Order at P 26, JA 021-022.

These statements were unequivocal and in no way indicated to the other parties or the Commission that the parties had reserved any right to file to recover these costs from other PJM transmission customers. Thus, the Commission took Generators at their word, and in its earlier order stated: "When Applicants' transmission facilities provide transmission service to PJM's customers, Applicants will receive no transmission revenue." *CED Rock Springs, Inc. and Rock Springs Generation*, 101 FERC ¶ 61,325 at P 3 (2002). Neither of the Generators sought rehearing of that order. Had Generators sought to reserve a right to collect revenue for these facilities, they should have explicitly done so in the various agreements they executed. They did not and they must abide by the explicit terms of section 37 of the PJM Tariff. *See Initial Order at P 27, JA 009-010; Rehearing Order at P 26, JA 021-022.*

iii. PJM's Statements To Generators Do Not Bind Other Transmission Customers Or The Commission

Finally, Generators aver that they are entitled to recover their connection costs based on a past statement by PJM that, if they did not sign the Transmission Owners Agreement, Generators would not be eligible to receive revenues under that agreement. Br. at 39-40. Generators reason that since they eventually signed the Transmission Owners Agreement, by inference, the converse must be true and, consequently, they must be entitled to receive revenue. *Id.* But such a negative inference is not sufficient to show that the parties had agreed to permit such recovery in contravention of the PJM Tariff or the parties' own recognition that they would not be able to recover such revenues. *See* Rehearing Order at P 28, JA 022. Neither the understanding nor intentions of Generators is sufficient to show that any agreement was reached with other parties as to the recoverability of these costs or to show that the provisions of the PJM Tariff and contemporaneous commitments should be ignored. *See id., see also Ameren Servs. Co. v. FERC*, 330 F.3d at 499 (the interpretation of the language of an agreement is not undermined by parties later disagreeing on its meaning) (citation omitted).

III. THE INTERCONNECTION FACILITIES ARE “BUT FOR” FACILITIES UNDER SECTION 37 OF THE PJM TARIFF

Generators suggest that they are due recovery because the facilities they built are larger than necessary to accommodate connection of their generation facilities. According to Generators, the size of the connection facilities indicates that the facilities were built not merely to accommodate connection of the generation facilities, but to provide transmission service on the PJM system. Br. at 24-26.

First, issues about whether these facilities would have been necessary “but for” the interconnection of new generation and whether such facilities provide benefits to the system sufficient to warrant spreading of the costs should have been raised at the time the interconnection agreements were signed pursuant to the provisions of section 37 of the PJM Tariff. *See* Rehearing Order at P 31, JA 023. The test under section 37 of the Tariff is whether the facilities would have been necessary “but for” the connection of the generators and whether the facilities provide any benefits by accelerating, deferring, or eliminating other projects. *Id.*

However, Generators never contended that they were eligible for a credit for their interconnection costs under section 37, *i.e.*, that their interconnection facilities constitute Local Upgrades or Network Upgrades that have provided additional benefits to the system. Nor did they allege that the facilities enabled PECO to avoid or delay the construction of other facilities. *See* Rehearing Order at P 5,

JA 013. Even if Generators had alleged and demonstrated benefits under section 37 (which they did not), the appropriate mechanism for cost recovery would not be through a transmission service rate as proposed by Generators; rather, such costs are realized through a transmission credit as provided in section 37 of the PJM Tariff. *See* Initial Order at P 14, JA 006; Rehearing Order at P 31, JA 023.⁹

Second, even though the interconnection facilities were sized to “be part of the PJM integrated grid” (Br. at 24), these facilities were required to replace an existing PECO transmission line solely to interconnect with the Generators. Indeed, had interconnection facilities been sized smaller than the lines being replaced, the facilities would have adversely affected the reliability of the transmission system. *See* Initial Order at P 14 & n.12, JA 006; Rehearing Order at P 32, JA 023-024.

Third, the Commission found no evidence in the record that these facilities were sized to provide additional system benefits by accelerating, deferring or eliminating transmission projects necessary for PJM to reliably operate its system. *Id.* Therefore, under the terms of section 37, the facilities were sized as “necessary to accommodate” connection of Generators’ generation facilities and are “but for”

⁹ Indeed, because Generators never applied for transmission credits under the PJM Tariff, *Tampa Elec. Co.*, 99 FERC ¶ 61,192, 61,797 (2002) (cited by Generators in their Brief at 25) is inapposite.

facilities that Generators alone must pay for.¹⁰ This Court has concluded that the Commission’s generator interconnection policy “avoids both gold plating and less favorable price signals such that the enlarged transmission system, which it views as a public good, can function reliably and continue to expand.” *Entergy Servs, Inc. v. FERC*, 319 F.3d at 544.¹¹

Were Generators to prevail, the PJM Tariff and the Commission’s interconnection policy would be turned on their heads. A generator could simply pay for their interconnection costs initially and then recoup those costs from other transmission service customers. This would defeat the purpose of the PJM Tariff and Order No. 2003, which is to treat generation interconnections built by transmission owners no differently from other generation interconnections. *See*

¹⁰ *Cf. Western Mass. Elec. Co. v. FERC*, 165 F.3d 922, 927 (D.C. Cir. 1999) (“The Commission’s position with regard to assignment of costs is . . . part of a consistent policy to assign the costs of system-wide benefits to all customers on an integrated transmission grid. We have approved the underlying rationale of this policy.”); *accord, Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d at 1285 (same).

¹¹ In the Initial Order, the Commission cited Order No. 2003 in explaining the Commission’s policy of generally allocating connection costs to the generators. *See* Initial Order at P 12 & n.10, JA 004-005. It should be noted, however, that Order No. 2003 was issued after construction of the interconnection facilities at issue in this case. The Commission here relied on section 37 of the PJM Tariff (and not Order No. 2003) in rejecting the Generators’ rate filings. Nevertheless, the Commission referred to Order No. 2003 to explain that, in issuing Order No. 2003, the Commission merely set forth its reasons for adopting, on a nation-wide basis, the policy that was already reflected in section 37 of the PJM Tariff. *See* Rehearing Order at P 12 & n.11, JA 015-017.

Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC, 475 F.3d at 1279 (goal of Commission's interconnection policy is to provide equal access and transparency as between generators and transmission providers). It would also undermine the purpose of encouraging generators to undertake low-cost connections. *See id.* at 1286 (“Recall that the [Commission's interconnection] rule sticks generator owners with the *entire* cost of the link between the generator and the transmission facility; that, presumably, is the cost most affected by siting choices”) (emphasis in original).

IV. THE COMMISSION'S ORDERS WERE NOT UNDULY DISCRIMINATORY

Finally, Generators argue that it is unduly discriminatory to preclude their recovery of costs through transmission service charges. According to Generators, PECO has “apparently recovered costs for substations and transmission lines associated with generation plants such as Limerick, Peach Bottom and Conemaugh generation facilities” that Generators assert are “identical or very similar” to Generators' facilities. Br. at 43. This claim is flawed for several reasons.

First, by raising little more than speculation about, and simply listing these “similar” facilities, Generators did not meet their burden of proof required under FPA § 205. *See* Rock Springs Answer at 26-27 & Att. 2, R. 17, JA 287-288 & 297; *Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 239 (D.C. Cir. 1980) (under FPA § 205, the utility seeking a change in rates has the burden of proof).

Second, as stated in Rock Springs own filing, the data provided were gleaned from the settlement filings in the cases they cite. *See* Rock Springs Rate Filing, CED Ex. No. CED-2 at 9, R. 1, JA 101a. They are therefore of limited precedential value.

Third, assuming, *arguendo*, that a utility is improperly collecting the costs of interconnection facilities in their transmission rates as Generators contend, the proper approach would be to remove those facilities from rates in a proceeding brought under FPA § 206, 16 U.S.C. § 824e, rather to allow Generators to violate the PJM Tariff as well. *See* Rehearing Order at P 29, JA 022-023; *Enron Energy Servs., Inc.*, 84 FERC ¶ 61,222, 62,064 (1998) (“the noncompliance of others also is not a valid basis for granting waiver”). Indeed, in its own rate filing, Rock Springs recognizes this very remedy: “[the Commission] could order that Exelon [PECO’s parent company] remove all of its similar investment from its transmission rate base included under the PJM Tariff.” Rock Springs Answer at 26-27, R. 17, JA 287-288.

Finally, and most important, the PJM Tariff treats all interconnection requests the same, regardless of whether they originated from transmission owners. Initial Order at P 29, JA 011. The cost allocation procedures under section 37 were specifically designed to avoid undue discrimination between transmission owners and independent generators. *See* Rehearing Order at P 23, JA 020; *accord Nat’l*

Ass'n of Reg. Util. Comm'rs v. FERC, 475 F.3d at 1279. Therefore, the Commission reasonably rejected Generators' Rate Filings as inconsistent with the PJM Tariff and the Commission's interconnection policy.

CONCLUSION

For the reasons stated, the petitions should be denied and the challenged FERC Orders should be affirmed in all respects.

Respectfully submitted,

John S. Moot
General Counsel

Robert H. Solomon
Solicitor

Michael E. Kaufmann
Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
TEL: (202) 502-6295
FAX: (202) 273-0901

July 19, 2007

Old Dominion Electric Cooperative, Inc. v. FERC

**Docket Nos. ER06-491
& ER06-497**

D.C. Cir. Nos. 06-1326 & 06-1331

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 9,152 words, not including the tables of contents and authorities, the certificates of counsel, the glossary and the addendum.

Michael E. Kaufmann
Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
TEL: (202) 502-6295
FAX: (202) 273-0901

July 19, 2007