

ORAL ARGUMENT HAS BEEN SCHEDULED FOR MARCH 20, 2009

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

No. 06-1426

**ALCOA INC.,
PETITIONER,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

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

**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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**FOR RESPONDENT FEDERAL
ENERGY REGULATORY
COMMISSION**

DECEMBER 3, 2008

FINAL BRIEF: FEBRUARY 11, 2009

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici:

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

B. Rulings Under Review:

1. *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062 (2006), JA 127; and
2. *North American Electric Reliability Corp.*, 117 FERC ¶ 61,126 (2006), JA 332.

C. Related Cases:

This case has not previously been before this Court or any other court, and counsel is not aware of any other related cases pending before this or any other court.

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December 3, 2008

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GLOSSARY

Alcoa	Petitioner Alcoa Inc.
CA	Courtesy Appendix
Certification Order	<i>North American Electric Reliability Corp.</i> , 116 FERC ¶ 61,062 (2006), JA 127.
Commission	Respondent Federal Energy Regulatory Commission
FERC	Respondent Federal Energy Regulatory Commission
FPA	Federal Power Act
NERC	North American Electric Reliability Corporation
Rehearing Order	<i>North American Electric Reliability Corp.</i> , 117 FERC ¶ 61,126 (2006), JA 332.
Rulemaking Order	<i>Rules Concerning Certification of the Electric Reliability Organization; Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards</i> , Order No. 672, FERC Stats. & Regs. ¶ 31,204 (2006), CA 66.
Rulemaking Rehearing Order	Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006), CA 200.

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

STATEMENT OF THE ISSUE

Whether, assuming jurisdiction, the Federal Energy Regulatory Commission (Commission or FERC), in certifying the North American Electric Reliability Corporation (NERC) as the Electric Reliability Organization for the United States pursuant to newly-added section 215 of the Federal Power Act (FPA), 16 U.S.C. § 824o, reasonably rejected petitioner's proposal concerning the allocation of funding for NERC's reliability program costs.

STATUTORY AND REGULATORY PROVISIONS

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

COUNTERSTATEMENT OF JURISDICTION

Petitioner, Alcoa Inc. (Alcoa) seeks review of orders in which the Commission certified NERC as the single Electric Reliability Organization for the United States under section 215 of the FPA. *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062 (2006), JA 127 (Certification Order), *on reh'g and clarification*, 117 FERC ¶ 61,126 (2006), JA 332 (Rehearing Order).

These orders addressed numerous issues, but Alcoa challenges them solely with respect to their approval of NERC's funding the costs of its reliability program by means of a "net energy for load" method (*i.e.*, based strictly on customer energy use). While Alcoa argues on appeal that the Commission arbitrarily rejected its preferred alternative funding proposal, the agency had previously approved this method as a reasonable funding method for an Electric Reliability Organization in its earlier *Rules Concerning Certification of the Electric Reliability Organization; Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204 (2006), Courtesy Appendix (CA) 66 (Rulemaking Order), *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006), CA 200

(Rulemaking Rehearing Order).

Thus, as the Commission held, Alcoa's appeal here represents an untimely collateral attack on the Commission's earlier and now final decision in the Rulemaking Order that it is fair and reasonable for an Electric Reliability Organization to allocate its funding on a net energy for load basis. Certification Order P 167, JA 150; Rehearing Order P 92, JA 347. Accordingly, Alcoa's appeal of the instant Commission orders should be dismissed by this Court for lack of jurisdiction.

STATEMENT OF THE FACTS

I. Statutory and Regulatory Background

On August 8, 2005, the Energy Policy Act of 2005 was enacted into law. Section 1211 of that Act added section 215 of the FPA (codified as 16 U.S.C. § 824o), which provides for a system of mandatory, enforceable Reliability Standards for the nation's bulk-power transmission system, to be developed by an Electric Reliability Organization, subject to Commission review and approval. The statute directed the Commission to issue a final rule to implement the requirements of newly-added section 215 no later than 180 days after enactment, or by February 5, 2006. With respect to funding, the statute directed the Commission to ensure that the Electric Reliability Organization it certifies will "allocate equitably reasonable dues, fees, and other charges among end users for all

activities under this section.” 16 U.S.C. § 824o(c)(2)(B).

In compliance with the statutory mandate, on September 1, 2005, the Commission issued a Notice of Proposed Rulemaking with respect to this matter. *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, 70 Fed. Reg. 53 (Sept. 7, 2005), FERC Stats. & Regs., Proposed Regulations ¶ 32,587 (Sept. 1, 2005), CA 37.

In the Notice of Proposed Rulemaking, the Commission addressed many issues concerning the certification of the nation’s Electric Reliability Organization, which would be responsible for the development and enforcement of mandatory reliability standards for the nation’s integrated transmission system. One of these issues was the appropriate mechanism for the mandatory funding of the Electric Reliability Organization. Notice of Proposed Rulemaking P 100, CA 55.

In this regard, the Commission noted that the responsibility for the funding of the then-existing NERC, operating as a voluntary organization, was based on “net energy for load.” *Id.* P 102, CA 55. The Commission indicated that this net energy funding method (based on end user energy consumption) appeared to meet the requirements of FPA section 215 requiring the equitable allocation and assessment of Electric Reliability Organization dues, fees and charges. *Id.*

In the Rulemaking Order, among the many issues addressed, the Commission evaluated comments concerning the use of net energy for load to allocate the costs of a national Electric Reliability Organization among electric energy customers. The Commission indicated that “[c]ommenters [had] largely agree[d] that a funding apportionment method based on net energy for load is appropriate.” Rulemaking Order P 213, CA 102. Moreover, the agency observed, “[a]lternative funding apportionment methods suggested by a few commenters appear to garner limited support, can be more complex to implement, or raise the issue of double counting.” *Id.* Thus, the agency found the net energy “funding method to be a fair and reasonable method that minimizes the possibility of ‘double-counting.’” *Id.*

Alcoa participated in the rulemaking proceeding. In its comments, Alcoa raised the funding issue, mentioning (albeit briefly) its concern that a net energy use method would not take into account the company’s particular use of the transmission grid. *See* Comments of Alcoa, Inc, *et al.*, Docket No. RM05-30 (October 7, 2005), 11-13, CA 11-13.

However, Alcoa did not file a request for rehearing of the Rulemaking Order. While several parties did request rehearing of that order, none raised any question concerning the net energy funding method. Thus, the Rulemaking Rehearing Order does not address the issue.

II. The Certification Proceeding

In accordance with the procedure established by the Rulemaking Order, on April 4, 2006, NERC filed its request that the Commission certify it as the nation's Electric Reliability Organization under section 215 of the FPA. R 1, JA 1. NERC was the sole applicant for this status.

NERC's application, consisting of two volumes of material, included a detailed description of its qualifications to serve as the country's Electric Reliability Organization, a demonstration of its compliance with the requirements established by the Commission in the rulemaking proceeding for Electric Reliability Organization certification, its by-laws, and proposed rules of procedure.

With respect to funding for Energy Reliability Organization activities, NERC's application acknowledged the Rulemaking Order as having "concluded that a funding apportionment method based on [net energy for load] is appropriate." NERC Application at 72, JA 81 (citing Rulemaking Order P 213, CA 102). (NERC defined net energy for load as "net generation of an electric system plus energy received from others less energy delivered to others through interchange." *Id.* at 36 n.13, JA 45.) Therefore, NERC stated:

NERC proposes to use the [net energy for load] method for apportioning responsibility for funding all statutory functions. . . . The use of [net energy for load] will ensure that all load served by the North American bulk power systems bears an equitable share of the costs of the reliability functions of the [Electric Reliability Organization]. . . .In order to minimize cross-subsidization, costs

incurred to accomplish the statutory functions for one interconnection, region, or entity will be directly assigned to that interconnection, region, or entity based on [net energy for load].

Id. at 72, JA 81.

In the Certification Order, the Commission accepted NERC's proposal to allocate costs on the basis of net energy for load. Certification Order P 167, JA 150. The Commission rejected Alcoa's objection to this funding method. In the Commission's view, the Rulemaking Order had already approved the net energy load method as "fair and reasonable" for an Electric Reliability Organization. *Id.* Thus, the agency concluded, Alcoa's argument on this issue amounted to "an impermissible collateral attack on [the Rulemaking Order]." *Id.*

Alcoa filed a request for rehearing of the Certification Order, asserting that it was not estopped by the Rulemaking Order from proposing an alternative allocation method for Electric Reliability Organization costs. R 100 at 3-4, JA 227-228. Alcoa went on to argue that an allocation method taking into account a customer's demand on the system would be more reasonable than one based solely on energy use, in accordance with FERC transmission rate precedent. *Id.* at 5-8, JA 229-232.

In the Rehearing Order, the Commission again rejected Alcoa's cost allocation argument as an untimely collateral attack on the Rulemaking Order's conclusion that net energy for load is a fair and reasonable funding method.

Rehearing Order P 92, JA 347. However, the Commission went on to consider the merits of Alcoa's argument that NERC's funding should instead be based on a demand allocation method. Rehearing Order P 94, JA 347. In this regard, the agency concluded that Alcoa had failed to demonstrate how its proposal could be implemented in the context of funding a national Electric Reliability Organization.

Id.

SUMMARY OF ARGUMENT

1. Alcoa's petition should be dismissed as an untimely collateral attack on the Commission's Rulemaking Order. That order held that a net energy for load allocation method (based on actual end user energy consumption) was reasonable for an Electric Reliability Organization. While Alcoa participated in the rulemaking proceeding and commented on the funding mechanism, it did not seek rehearing of the Rulemaking Order before the Commission.

While Alcoa claims that the Rulemaking Order did not approve a net energy for load funding method as reasonable for an Electric Reliability Organization, this is flatly contradicted by specific language in the order itself. Furthermore, the Commission explained in the orders contested here, that while it had left open the possibility for an Electric Reliability Organization applicant to propose an alternative funding method, this did not in any way vitiate its earlier finding that the net energy for load method is reasonable.

If Alcoa was uncertain of the meaning of the Rulemaking Order, its proper remedy was to seek clarification before the agency.

2. Assuming jurisdiction, the Commission reasonably held that Alcoa had failed to demonstrate that its proposed rate design method (reflecting energy demand) was workably appropriate for an Electric Reliability Organization. In the Rehearing Order, the Commission explained that Alcoa's proposal offered no

specifics as to how demand allocation would work for a national Electric Reliability Organization. Under this Court's precedent, the Commission's reasonable explanation on this technical rate design matter deserves deference.

In any event, Alcoa's initial brief does not address in any manner the Commission's finding that Alcoa failed to demonstrate the workability of its alternative funding proposal. Alcoa has thus waived its argument on this issue.

ARGUMENT

I. THE COURT SHOULD DISMISS ALCOA'S PETITION FOR REVIEW FOR LACK OF JURISDICTION.

A. Alcoa's Petition Is An Impermissible Collateral Attack On The Commission's Rulemaking Order.

As discussed above, the Commission concluded in the Rulemaking Order that it was fair and reasonable for an Electric Reliability Organization to allocate its funding on a net energy basis, based on actual energy consumption.

Rulemaking Order P 213, CA 102 (“We find this funding method to be a fair and reasonable method that minimizes the possibility of ‘double counting’”). This conclusion was not challenged on rehearing (much less presented for judicial review) by Alcoa or any other party.

It logically followed, therefore, that the Commission viewed Alcoa's attempt to contest the net energy for load funding method in the subsequent certification proceeding as “an impermissible collateral attack on [the Rulemaking Order].” Certification Order P 167, JA 150.

The Commission elaborated on its position in the Rehearing Order, explaining that, while the Rulemaking Order had not codified any particular funding method in the FERC regulations governing electric reliability issues, the agency there had nonetheless “found funding based on net energy for load to be a fair and reasonable method that minimizes the possibility of double-counting.”

Rehearing Order P 92 & n.55, JA 347 (citing Rulemaking Order P 213, CA 102).

In sum, then, the Commission reasonably rejected Alcoa's attempt in the proceeding below to relitigate the issue of whether net energy for load funding is a reasonable allocation method for an Electric Reliability Organization. In the contested orders, the Commission, therefore, simply applied its previous (and unappealed) decision of the Rulemaking Order, namely that reliability funding allocation on a net energy basis is fair and reasonable and would be acceptable if proposed by an Electric Reliability Organization applicant.

In this circumstance, Alcoa's untimely collateral attack on the Commission's determination concerning Electric Reliability Organization funding made in an earlier, final order is jurisdictionally barred. Section 313 of the FPA, 16 U.S.C. § 825l(b), grants jurisdiction to review Commission orders only if an "aggrieved" party files for judicial review within 60 days of the rehearing order. A petition for review is not timely when filed only in response to later orders that merely apply, without modification, the findings of the earlier "aggrieving" orders. *See, e.g., Pacific Gas and Electric Co. v. FERC*, 533 F.3d 820, 824-25 (D.C. Cir. 2008); *Sacramento Municipal Utility District v. FERC*, 428 F.3d 294, 298-299 (D.C. Cir. 2005); *City of Nephi v. FERC*, 147 F.3d 929, 934-35 (D.C. Cir. 1998).

Having failed to seek review of the Commission's original conclusion upholding a net energy for load allocation method for an Electric Reliability

Organization, Alcoa's belated attempt to raise the issue in a later proceeding should be dismissed.

B. Alcoa's Arguments To The Contrary Are Without Merit.

Alcoa attempts to escape from its failure to contest the funding issue in the rulemaking proceeding primarily on the ground that the Rulemaking Order did not give it "'sufficient notice' of the ruling to which the argument is now addressed." Pet. Br. 18 (quoting *Southern Co. Services, Inc. v. FERC*, 416 F.3d 39, 44 (D.C. Cir. 2005); *Dominion Resources, Inc. v. FERC*, 286 F.3d 586, 590 (D.C. Cir. 2002); *East-Texas Elec. Co-op, Inc. v. FERC*, 218 F.3d 750, 754 (D.C. Cir. 2000)).

In this regard, Alcoa argues that it could challenge the net energy for load funding method in the contested orders because the Rulemaking Order "did not approve *any* particular cost allocation methodology to be applied to [Electric Reliability Organization] costs." Pet. Br. 16 (emphasis Alcoa's). In Alcoa's view, the Commission's earlier conclusion that net energy for load is "*a fair and reasonable method*" for allocating Electric Reliability Organization costs could not "preclude[] a party from arguing that some other allocation method would be more appropriate." *Id.* 18 (quoting Rulemaking Order P 213, CA 102) (emphasis Alcoa's; internal quotation marks omitted).

However, the Commission sufficiently explained that Alcoa's position is based on a misreading of the agency's Rulemaking Order. As the agency

observed, while no particular allocation formula was codified in the reliability regulations, section 39.4(a), 18 C.F.R. § 39.4(a), of those regulations provided “*the [Electric Reliability Organization] applicant* the flexibility to propose a formula or method for the allocation” of reliability costs that must be consistent with section 215 of the FPA. Rehearing Order P 92, JA 347 (emphasis in original). *See also* 18 C.F.R. § 39.3(b)(2)(ii) (providing, in language identical to that in FPA section 215, that the proposed funding mechanism “[a]llocate equitably reasonable dues, fees and charges among end users for all activities”). Therefore, the Commission concluded:

Alcoa’s contention that [the Rulemaking Order] did not preclude a party from arguing that some other allocation method would be more appropriate than net energy for load as a method for allocating [Electric Reliability Organization] costs is incorrect. We allowed the *[Electric Reliability Organization] Applicant*, NERC, to propose an alternative funding methodology, but ruled that if the [Electric Reliability Organization] Applicant proposed to allocate funding based on net energy for load it would be a fair and reasonable method and we would accept it as consistent with the FPA and our regulations.

Rehearing Order P 92, JA 347 (emphasis in original).

It is firmly established that “[a]n agency’s interpretation of its own precedent is entitled to deference by the court.” *Entergy Services, Inc. v. FERC*, 319 F.3d 536, 541 (D.C. Cir. 2003) (citing *Cassell v. FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998)). Here, the Court should defer to the Commission’s reasonable construction of its Rulemaking Order as having approved a net energy for load funding method

as reasonable for an Electric Reliability Organization, while not foreclosing only the applicant from proposing an alternative. This being the case, Alcoa's attempt to attack the Commission's finding comes too late.

At most, Alcoa can claim that the Rulemaking Order may have been somewhat ambiguous with respect to this issue. But "[m]ere ambiguity" in the Commission's order "is not enough to excuse [a petitioner's] previous failure to challenge it." *Dominion Resources, Inc.*, 286 F.3d at 590 (citing *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 286 (1987) ("the remedy . . . for ambiguity is to petition . . . for reconsideration" before the agency, to prevent time limits from being "held hostage to ever present ambiguities"). Rather, this Court's precedent "ask[s] if the Commission's interpretation . . . was so obscure" as not to have provided sufficient notice to the later-appealing party. *Dominion Resources*, 286 F.3d at 590 (citations omitted).

There is nothing obscure about the Commission's flatly stating in the Rulemaking Order that "[w]e find this funding method" – *i.e.*, apportionment based on "net energy for load" – "to be a fair and reasonable method" for the funding of an Electric Reliability Organization. Rulemaking Order P 213, CA 102. The Commission did later clarify in the proceeding below that it had left open the possibility for an Electric Reliability Organization applicant (but not other parties) to propose another funding method. *See* Rehearing Order P 92, JA 347. However,

this Court has explained, a party cannot challenge an order that merely clarifies a prior order, rather than revising it. *Southern Co. Services, Inc.*, 416 F.3d at 44 (citing *Brotherhood of Locomotive Eng'rs*, 482 U.S. at 286).

This Court's decision in *ANR Pipeline Co. v. FERC*, 988 F.2d 1229 (D.C. Cir. 1993), is particularly instructive. There, the petitioner sought review of a Commission order clarifying that a previous order (Order No. 500-I) prevented natural gas pipelines from applying take-or-pay credits in a particular situation. The Court dismissed the petition as an untimely collateral attack on the prior order. While the Court acknowledged that Order No. 500-I was "not . . . a model of clarity by a long shot" on the take-or-pay credits issue, it nonetheless held that:

[B]ecause we believe that an ordinary reader familiar with the industry background would have recognized a very substantial likelihood that the order meant what the Commission ultimately said it meant, we agree with the Commission that we have no jurisdiction over [petitioner's] challenge.

988 F.2d at 1230.

Here, Alcoa maintains that the Commission's decision in the Rulemaking Order that net energy load allocation was "'one fair, reasonable and uncomplicated method' . . . or 'a fair and reasonable method' . . . were not holdings that precluded a party from arguing that some other allocation method would be more appropriate . . . as a method for allocating [Electric Reliability Organization] costs." Pet. Br. 18 (quoting Rulemaking Order P 35, CA 74 & P 213, CA 102) (emphasis Alcoa's).

However, “an ordinary reader familiar with the industry background,” such as Alcoa, which participated in the rulemaking proceeding, is charged with the knowledge that, in the ratemaking context, once the Commission finds that a rate design is reasonable, the agency need not compare it to potential alternatives, even those that may be “more reasonable.” *See OXY USA, Inc. v. FERC*, 64 F.3d 679, 692 (D.C. Cir. 1995); *City of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984); *New England Power Co.*, 52 FERC ¶ 61,090 at 61,336 (1990), *reh’g denied*, 54 FERC ¶ 61,055 (1991), *aff’d sub nom. Town of Norwood v. FERC*, 962 F.2d 20 (D.C. Cir. 1992).

Thus, the language in the Rulemaking Order reasonably put Alcoa on notice that the Commission had approved a net energy for load allocation method as reasonable for the funding of the yet-to-be-certified Electric Reliability Organization. *See also Pacific Gas and Electric*, 533 F.3d at 826-27 (Court rejected company’s attempt to contest, in compliance proceeding, Commission determination that interconnection studies were to be conducted by transmission providers, as an impermissible collateral attack on the earlier rule establishing this policy).

Alcoa also maintains that its challenge to the Commission’s accepting NERC’s funding proposal in the contested orders cannot be a collateral attack on the Rulemaking Order because Alcoa would not have had standing to seek judicial

review of that order. Pet. Br. 20-21. But this is sheer speculation. Because Alcoa did not seek rehearing or reconsideration of the Rulemaking Order before the Commission (for which there is no Article III “standing” requirement), there is no way of knowing whether Alcoa would have been aggrieved by a subsequent order in the Electric Reliability Organization rulemaking proceeding.

In sum, if Alcoa wanted to contest the Commission’s approval of net energy cost allocation by an Electric Reliability Organization, it should have sought further review of the Rulemaking Order. Having failed to do so, Alcoa is collaterally estopped from raising this contention now, on review of these later orders. Accordingly, the Court should dismiss Alcoa’s petition for lack of jurisdiction.

II. THE COMMISSION’S REASONABLE REJECTION OF ALCOA’S RATE DESIGN PROPOSAL SHOULD BE AFFIRMED BY THE COURT.

A. 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). *See also, e.g., Central*

Vermont Pub. Serv. Corp. v. FERC, 214 F.3d 1366, 1369 (D.C. Cir. 2000).

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 decisions is “highly deferential.” *Entergy Services, Inc.*, 319 F.3d at 541 (citing *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999)); *Ass’n of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1431 (D.C. Cir. 1996).

Finally, the findings of the Commission as to the facts, if supported by substantial evidence, are conclusive. FPA section 313(b), 16 U.S.C. § 825l(b).

B. The Commission Reasonably Concluded That Alcoa Had Failed To Demonstrate The Appropriateness Of Its Alternative Rate Design Proposal For An Energy Reliability Organization.

As discussed above, in the Rulemaking Order the Commission determined that the net energy for load allocation method is reasonable for funding an Electric Reliability Organization. The Commission set out the commenters’ key argument in support of the method in these terms:

A benefit of the net energy for load approach is that it counts each kilowatt-hour of electric energy only once, and thus represents the fairest and most efficient method of allocating costs among end-users. Any other method may count energy more than once. A net energy for load approach that charges based on energy consumed avoids such “double counting.”

Rulemaking Order P 207, CA 101 (footnote omitted). Noting that “[c]ommenters largely agree that a funding apportionment method based on net energy for load is appropriate,” the Commission went on to “find this funding method to be a fair and

reasonable method that minimizes the possibility of ‘double counting.’” *Id.* P 213, CA 102.

During the course of the Electric Reliability Organization rulemaking, Alcoa had indicated its concern that a funding mechanism based on net energy use would not take into account its particular use of the transmission grid. *See* Alcoa Comments at 11-13, CA 11-13.

However, Alcoa did not propose an alternative rate design in that proceeding. Nor did it explain any deficiency in the Commission’s concern for double counting. Since it did not petition for rehearing of the Rulemaking Order, it was not until its filing in the instant certification proceeding that Alcoa first broached its argument that the net energy for load method is inconsistent with the Commission’s transmission rate design precedent, which takes into account customer energy demand. *See* Alcoa Protest, R 78 at 26-29 JA 117-120; Alcoa Rehearing Request at 5-8, JA 229-232.

While rejecting Alcoa’s challenge to the net energy load funding method as an impermissible collateral attack on the Rulemaking Order, the Commission nonetheless considered Alcoa’s argument on the merits. *See* Rehearing Order P 94, JA 347. Indeed, the agency specifically rejected Alcoa’s request “that a demand allocation method should be employed for assigning funding responsibility for any of NERC’s fixed costs, infrastructure costs, and overhead program costs.”

Id. As the Commission went on to explain:

While Alcoa contends that a demand allocation method would be consistent with the Commission’s rate making methodologies, it offers no real specifics and fails to demonstrate how the coincident peak demand allocation factors that the Commission uses to allocate demand related costs for ratemaking purposes would be appropriate or could be easily developed on a continent-wide basis for NERC funding purposes.

Id. & n.59, JA 347 (citing 18 C.F.R. § 35.13(h)(27) and *Kentucky Utilities Co.*, Opinion No. 184, 24 FERC ¶ 61,158 (1983)).

As the cited regulations indicate, demand allocation is utilized in the calculation of an individual company’s customer-specific allocated cost of service by means of assessing historical or projected data concerning the peak demand on the transmission provider’s system, as well as customer demands coincident with the transmission provider’s peak demand during particular historical or projected “test periods.” *See* 18 C.F.R. § 35.13(h)(27)(i)(A)-(B). Calculations are then extrapolated from this data to provide an allocation of costs utilized in the calculation of a just and reasonable prospective transmission rate for different customer classes. An attempt to apply these regulations to a national rate for all transmission service would be, at best, problematic. Thus, the Commission reasonably rejected Alcoa’s proposal as lacking a specific explanation of how a demand allocation rate design would be applied to allocating the funding of a national Electric Reliability Organization.

In the context of ratemaking, this Court has recognized the “breadth and complexity of the Commission’s responsibilities,” which “demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties.” *East Kentucky Power Coop., Inc. v. FERC*, 489 F.3d 1299, 1306 (D.C. Cir. 2007) (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968)). This is especially true where, as here, the Commission’s responsibility under the statute and its implementing regulations is to ensure only that the Electric Reliability Organization’s choice of funding allocates costs in an “equitably reasonable” manner. 16 U.S.C. § 824o(c)(2)(B); 18 C.F.R. § 39.3(b)(2)(ii).

In sum, the Commission, entrusted by Congress with major new regulatory responsibilities to ensure the reliability of the nation’s electric power supply, applied its expertise in accepting as reasonable in the earlier rulemaking proceeding the net energy for load allocation method (proposed by NERC and supported by most of the commenters there) for funding the newly-created Electric Reliability Organization. In this later proceeding, it rejected a counter-proposal by one electricity customer, who failed to demonstrate how its preferred method would be workably appropriate in this context. Because the Commission gave a reasonable explanation for its decision concerning this highly technical rate design matter, under the Court’s deferential standard of review, the agency’s action should

be affirmed.

C. In Any Event, Alcoa Has Waived Its Challenge To The Commission's Rejection Of Its Rate Design Proposal.

One coming to Alcoa's brief without having read the Commission's Rehearing Order would have to be forgiven for assuming that the agency had completely failed to address Alcoa's cost allocation argument. *See* Pet. Br. 2 (issue is whether Commission erred in "refusing to consider Alcoa's request" that NERC "allocate costs using FERC's traditional demand and energy allocation methodology"), 14 ("FERC . . . failed to consider Alcoa's arguments with respect to these cost allocation issues"), 24 ("FERC never considered the nature of the [Electric Reliability Organization] costs to be allocated"), 25 ("FERC failed to consider whether, at least initially, [Electric Reliability Organization]-related costs differed from other costs of service").

As demonstrated above, the Commission did in fact consider Alcoa's demand allocation rate design proposal, but rejected it because Alcoa had not offered any specifics about how its proposal, based on utility-specific precedent, would work on a "continent-wide basis". Rehearing Order P 94, JA 347. Alcoa's brief never addresses this decision by the Commission. Nowhere does it attempt to distinguish or even cite the precedent relied on by the Commission (*see, supra*, p. 21) for this determination in the Rehearing Order. Rather, its brief simply hammers away on its mistaken point that the Commission failed to explain why it

was not following its transmission rate design precedent.

This Court has repeatedly held when a “petitioner does not preserve [an] argument in its opening brief,” the argument is waived. *Town of Norwood*, 962 F.2d at 25 (citing *McBride v. Merrell Dow and Pharmaceuticals, Inc.*, 800 F.2d 1208, 1210 (D.C. Cir. 1986)); *City of Waukesha v. EPA*, 320 F.3d 228, 250-51 n.22 (D.C. Cir. 2003) (citing cases). Because Alcoa’s opening brief does not even attempt to confront the Commission’s merits argument – that Alcoa had failed to explain how a demand allocation funding method would work for a national Electric Reliability Organization – Alcoa has waived its right to pursue this issue and should not be allowed to raise it in its reply brief.

Alcoa may have a rejoinder to the Commission’s position. However, “[i]t would . . . be patently inequitable to force [respondent] to defend an appeal by guessing the arguments that the appellant might make in his reply brief.” *McBride*, 800 F.2d at 1211. Additionally, the Court itself is prejudiced by this tactic, as it “entails the risk of an improvident or ill-advised opinion on the legal issues tendered.” *Id.* (citation omitted).

In sum, Alcoa has waived its argument on appeal with respect to the Commission’s rejection of its proposed funding method as inadequately explained. Thus, the Court must affirm the Commission’s reasonable determination that Alcoa had failed to demonstrate the propriety of its proposed rate design for funding the

nation's certified Electric Reliability Organization.

CONCLUSION

For the reasons stated, the appeal should be dismissed for lack of jurisdiction. Alternatively, the petition should be denied and the Commission's orders should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief contains 5,104 words, not including the tables of contents and authorities, the glossary, the certificate of counsel and this certificate.

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