ORAL ARGUMENT IS NOT YET SCHEDULED

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

No. 08-1252

**UNION POWER PARTNERS, L.P.,
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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**May 22, 2009
FINAL BRIEF: July 6, 2009**

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. **Parties and Amici**

All parties before this Court, and those that appeared before the agency, are identified in the Petitioner's brief.

B. **Rulings Under Review**

1. *KGen Hinds LLC*, *et al*., Order Affirming Initial Decision, 120 F.E.R.C. ¶ 61,284 (2007) ("Affirming Order"), JA 295-306; and

2. *Union Power Partners, L.P.,* Order Denying Rehearing, 123 F.E.R.C. ¶ 61,191 ("Rehearing Order"), JA 335-346.

C. **Related Cases**

This case has not previously been before this Court or any other court. Another reactive power compensation case, *American Electric Power Service Corp. v. FERC*, Docket No. 07-1275, *et al*., is currently pending before this Court. In that case, the Commission approved a rate filing by Calpine Oneta Power, L.P. seeking compensation from American Electric Power Service for reactive power services. The Commission found that the proposed charge was just and reasonable, and would remedy the incomparable treatment and undue discrimination Calpine Oneta previously suffered when only AEP-affiliated generators were compensated for reactive power services.

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Robert M. Kennedy
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July 6, 2009

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GLOSSARY

Affirming Order	*KGen Hinds LLC*, *et al*., 120 F.E.R.C. ¶ 61,284 (2007), JA 295-306.
ALJ	Administrative Law Judge
ALJ Decision	*KG Hinds LLC, et al. v. FERC*, 117 F.E.R.C. ¶ 63,004 (2006), JA 247-266.
Commission or FERC	Federal Energy Regulatory Commission
Entergy	Entergy Arkansas Inc.
Hearing Order	*Union Power Partners, L.P. v. FERC*, 112 F.E.R.C. ¶ 61,065 (2005), JA 146-151.
Interconnection Agreement	Amended and Restated Interconnection and Operating Agreement between Entergy Arkansas, Inc. and Union Power Partners, L.P.
Rehearing Order	*Union Power Partners, L.P.,* 123 F.E.R.C. ¶ 61,191 (2008), JA 335-346.
Union Power	Union Power Partners, L.P.

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

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission ("FERC" or "Commission") reasonably concluded, in agreement with the finding of an administrative law judge, that a jurisdictional contract between Petitioner Union Power Partners, L.P. ("Union Power") and Entergy Arkansas Inc. ("Entergy") conditions Union Power's right to compensation for the supply of "reactive" power upon the Commission's approval of such a charge.

STATUTORY AND REGULATORY PROVISIONS

The relevant statutory and regulatory provisions are contained in Addendum A to this brief. For the Court's convenience, Addendum B contains the pertinent provisions of the contract at issue.

COUNTERSTATEMENT OF JURISDICTION

In its opening brief, Union Power asserts, for the first time, that the Commission erred in interpreting the contract provision at issue by ignoring the purported specialized meaning of the phrase "accepts a tariff" and precedent regarding that term. Br. at 5, 23-24.[1] As discussed more fully in Part II of the Argument, Union Power did not raise these objections to the Commission on rehearing below. This Court, therefore, lacks jurisdiction to consider them. *See* 16 U.S.C. § 825*l*(b) (limiting Court's jurisdiction to only those objections "urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do"). Because these newly-raised objections are central to Union Power's appeal to this Court, *see* Br. at 25 ("the Commission's interpretation of 'accepts' in section 4.7.1 is unreasonable and arbitrary and capricious"), their rejection necessarily requires dismissal of the petition for review in its entirety.

STATEMENT OF THE CASE

This case concerns the proper interpretation of a provision in a contract between Union Power and Entergy regarding the terms and conditions under which the generator can connect with and deliver power through the Entergy transmission

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1 "Br." refers to Petitioner's initial brief. "P" refers to the internal paragraph number within a FERC order. "R." refers to the item number in the certified index to the record, and "JA" refers to the joint appendix.

system. The provision at issue states that Union Power shall be entitled to compensation for the supply of "reactive" power if FERC "accepts a tariff … for reactive power services," or FERC "otherwise permits [Union Power] to charge [Entergy] … for reactive power services," or if there is "any other change in law ... that permits [Union Power] to … seek reimbursement for its provision of reactive power services." Interconnection Agreement, § 4.7.1, JA 43.

In May 2005, Union Power filed a rate schedule that sought to charge Entergy a cost-based rate for reactive power service. In its protest, Entergy argued that the parties' agreement did not permit such a charge and that, in any event, the proposed rate was excessive. The Commission determined that Union Power's filing raised issues of material fact regarding whether and to what extent Union Power was entitled to compensation. *Union Power Partners, L.P.*, 112 F.E.R.C. ¶ 61,065, P 14 (2005) ("Hearing Order"), JA 149. In order to permit an analysis of the issue, the Commission accepted the proposed rate schedule for filing and set the matter for hearing before an Administrative Law Judge ("ALJ"). *Id.* at P 15, JA 149.

The ALJ found that, under the terms of the parties' agreement, Union Power is "only entitled to obtain such compensation as may be approved by the Commission and [that] such approval has not been forthcoming from the Commission based on established precedent." *KG Hinds LLC, et al.*, 117 F.E.R.C.

¶ 63,004, P 43 (2006) ("ALJ Decision"), JA 257. The Commission affirmed the ALJ's ruling, finding that the contract did not provide "an independent contractual right to compensation for reactive power." *KG Hinds LLC, et al.*, 120 F.E.R.C. ¶ 61,284, P 22 (2007) ("Affirming Order"), JA 304.

Union Power sought rehearing, which the Commission denied. *Union Power Partners, L.P.*, 123 F.E.R.C. ¶ 61,191 (2008) ("Rehearing Order"), JA 335-346. In doing so, the Commission reiterated its conclusion that, when the provision in question "is read as a whole, it renders Union Power's 'entitlement' contingent on a Commission order finding that compensation is consistent with Commission policy." *Id.* P 15, JA 341.

Having had its prior contentions rejected once by the ALJ and twice by the Commission, Union Power now presents new arguments on appeal which are beyond the Court's jurisdiction to consider and, in any event, fail to establish that the Commission's interpretation of the provision in question was unreasonable.

I. STATUTORY BACKGROUND

The Federal Power Act grants the Commission the authority to regulate the transmission and wholesale sale of electricity in interstate commerce. 16 U.S.C. § 824(b). The Act charges the Commission with the duty to ensure "just and reasonable" rates in the electric industry. *Id.* § 824d(a). In order to permit the Commission to fulfill this obligation, the Federal Power Act requires regulated

utilities to file tariffs with the Commission showing their rates and terms, along with related contracts, for jurisdictional services. *Id*. §§ 824d(c), (d).

The Commission may reject a rate filing if it is "grossly defective in form, or 'so patently a nullity as a matter of substantive law, that administrative efficiency and justice are furthered by obviating any docket at the threshold rather than opening a futile docket.'" *Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 239 (D.C. Cir. 1980) (quoting *Municipal Light Bds. v. FPC*, 450 F.2d 1341, 1346 (D.C. Cir. 1971)). If, however, a rate schedule is accepted for filing, the Commission has the authority to suspend the new rate for up to five months, and to schedule a hearing concerning the lawfulness of the proposed rate or charge. 16 U.S.C. § 824d(e). If FERC fails to reach such a determination within the suspension period, the new rates go into effect, subject to potential refund. *Id*.

II. STATEMENT OF FACTS

Entergy is an affiliate of Entergy Corporation, which is an investor-owned electric utility that owns and operates generation, transmission and distribution facilities in Arkansas, Louisiana, Mississippi and Texas. *See generally, Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 42-43 (2003) (describing Entergy Corporation's multi-state operations). Union Power owns and operates a generating facility in Union County, Arkansas, which is within the Entergy transmission system. Br. at 14.

A. Reactive Power

In 2000, Entergy and Union Power entered into an Interconnection and Operating Agreement (the "Interconnection Agreement"), which set forth the terms and conditions by which Union Power would interconnect its generating facility with the Entergy transmission system. ALJ Decision at P 33, JA 254-55. The parties revised and restated the agreement in 2000 and 2001. *Id*. The Interconnection Agreement requires, as a condition to connection to the Entergy system, that Union Power supply "reactive" power in accordance with prudent utility practice and be able to operate its facility within the contractually-specified power factor range. Interconnection Agreement at §§ 4.7.1, 4.7.2, JA 42-44.

"Reactive" power and "real" power are the two components of the electrical power used in an alternating current system. "Power factor" is the measure of the real power in relation to reactive power that is being produced at any given time. A high power factor (*e.g.*, 0.99) means that nearly all the output is real power. Conversely, the power factor decreases when a generator increases production of reactive power. *See* FERC, Principles for Efficient and Reliable Reactive Power Supply and Consumption, Docket No. AD05-1-000, at 7, 12, 41, 119, 120 (2005) ("Reactive Power Principles").[2] Interconnection agreements generally specify a

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[2] The Reactive Power Principles report is available at http://www.ferc.gov/EventCalendar/Files/20050310144430-02-04-05-reactive-power.pdf.

"leading" power factor – reflecting the real/reactive ratio when the generator is consuming reactive power – and a "lagging" power factor – reflecting the real/reactive power ratio when the generator is supplying reactive power. *Id.* at 8.[3] The "dead band" is the range between the leading and lagging power factor.

Real power accomplishes useful work, such as running motors and lighting lamps. Reactive power creates the magnetic fields needed to operate transformers, transmission lines and electric motors. It creates a stable voltage profile (*i.e.*, pressure) so that real power can flow through the power system. *See Al. Power Co. v. FERC*, 220 F.3d 595, 596-97 (D.C. Cir. 2000) (discussing real and reactive power); Reactive Power Principles at 17-19 (same).

Controlling the amount of reactive power is critical to reliable system operation. Too much reactive power can lead to an over-voltage situation, which can cause breakers to trip and take transmission lines out of service. If too little reactive power is supplied, voltage levels will decrease, which could lead to transmission lines overloading or to cascading failures. *See, e.g., Southern Co. Servs. Inc.*, 80 F.E.R.C. ¶ 61,318, at 62,080-81 (1997) (discussing nature and role of reactive power); Reactive Power Principles at 17-20 (discussing consequences of inadequate voltage control).

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[3] Reactive power is both supplied and consumed by generators. For the sake of simplicity, references in this brief to the "supply of reactive power" or "reactive power services" are intended to refer to both concepts.

B. Commission Precedent Regarding Compensation For The Supply Of Reactive Power

There are "two different reactive power concepts." *Az. Pub. Serv. Co.*, 95 F.E.R.C. ¶ 61,128, at 61,409 (2001). The first – which is not at issue in this case – involves the provision of reactive power outside of the dead band, which may be required on occasion by the transmission provider in order to move power across the grid to serve load (*i.e.*, to meet demand). In Order No. 888 (the agency's transmission open access rulemaking), the Commission held that the supply of such reactive power is a compensable ancillary service provided by generators since it is needed to maintain acceptable voltage levels for the entire grid.[4]

But the supply of reactive power within the dead band is different. Providing reactive power within the power factor specified by the transmission system is essential in order to allow the generator to connect without degrading the reliable operation of the grid. It is a matter of prudent utility practice that allows the generator's product to be delivered safely to the transmission system. *See*

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[4] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, 61 Fed. Reg. 21,540, at 21,541 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1996), *on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, 62 Fed. Reg. 12,274, *clarified*, 79 FERC ¶ 61,182 (1997), *on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, 62 Fed. Reg. 64,688 (1997), *on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd, New York v. FERC*, 535 U.S. 1 (2002).

Detroit Edison Co., 95 F.E.R.C. ¶ 61,415 at 62,538 (2001) ("A generator is required to supply reactive power [within the dead band] in order to operate the facility in a safe and reliable manner and in accordance with good utility practice."); *Az. Pub. Serv. Co*., 95 F.E.R.C. at 61,409 (a generator supplying reactive power within the dead band "is meeting its obligation … to maintain the appropriate power factor in order to maintain voltage levels for energy entering the grid during normal operations").

Because the supply of reactive power within the dead band is a core obligation of a generator seeking to interconnect with the grid – and not a service provided to the transmission owner to assist with the transportation of power across the grid to serve load – the Commission has made clear that, generally, no compensation is owed for such supply. *See, e.g., Consumers Energy Co*., 93 F.E.R.C. ¶ 61,339 at 62,154 (2000) (rejecting request for compensation for reactive power within the dead band); *Mich. Elec. Trans. Co*., 97 F.E.R.C. ¶ 61,187 at 61,852 (2001) ("a generator need not be compensated for providing reactive power within its design limitations"); *Fla. Power & Light Co*., 98 F.E.R.C. ¶ 61,326 at P 74 (2002) (holding that a generator providing reactive power within the dead band is simply "living up to its obligations" and is not owed compensation). This policy was reiterated in the Commission's Order No. 2003 rulemaking, which established standardized terms for interconnection agreements with large

generators.[5] In that rulemaking, the Commission again made clear that a generator "should not be compensated for reactive power when operating [its facility] within the established power factor range, since it is only meeting its obligation." Order No. 2003, 104 FERC ¶ 61,103 at P 546.

There are two exceptions to the general rule of no compensation for reactive power within the dead band. The first is the "comparability" principle. In order to ensure fair and open competition, the Commission requires that, if transmission owners compensate their affiliated generators for the supply of reactive power within the dead band, they must provide equal compensation to unaffiliated generators. *See Mich. Elec. Trans. Co*., 97 F.E.R.C. at 61,853 ("we direct Michigan Electric to compensate Generators for providing reactive power to the same degree that it will compensate its affiliate"); Order No. 2003-A, 106 FERC ¶ 61,220 at P 416 (same). Second, parties are free to agree via contract to compensate generators for the supply of reactive power within the dead band. *See* Affirming Order at P 21 ("We reaffirm that generators may have an independent contractual right to compensation for reactive power within the dead band"), JA 303-304.

[5] *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61,103 (2003), *on reh'g*, Order No. 2003-A, 106 FERC ¶ 61,220 (2004), *on reh'g*, Order No. 2003-B, 109 FERC ¶ 61,287 (2004), *on reh'g*, Order No. 2003-C, 111 FERC ¶ 61,401 (2005), *aff'd*, *Nat'l Ass'n of Regulatory Util. Comm'rs. v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

C. Proceedings Before The Commission

1. Union Power's Proposed Rate Schedule

In May 2005, Union Power filed a rate schedule setting forth its proposed rate for reactive services. Union Power Partners L.P., Rate Schedule (May 17, 2005), JA 82-93. The generator claimed it was entitled to compensation under both the terms of the Interconnection Agreement and the comparability principle, since Entergy allegedly compensated its affiliated generators for the supply of reactive power within the dead band. *Id*. at p. 4-5, JA 85-86. Entergy filed a protest that challenged Union Power's entitlement to, and the amount of, the proposed rate. Entergy Services, Motion To Intervene (June 7, 2005), JA 94-122.

2. The Hearing Order

The Commission's "preliminary analysis indicate[d] that Union Power's proposed rate schedule … may be unjust, unreasonable … or otherwise unlawful." Hearing Order at P 15, JA 149. Because the filing "raise[d] issues of material fact that [could not] be resolved based on the record before" it, the Commission ordered that the matter be heard before an ALJ. *Id*. P 14, JA 149. In order to allow that process to commence, the Commission initially "accepted the proposed rate schedule for filing" and suspended the proposed rate for a nominal period, after which it would become effective subject to refund. *Id*. P 15, JA 149. In doing so, as the Commission explained on rehearing of the Hearing Order, it was not

"making a final determination as to the reasonableness of the proposed rates, but [rather] … indicating that the proposed rates require the development of an evidentiary record." *Union Power Partners, L.P.*, 113 F.E.R.C. ¶ 61,272, P 11 (2005) (R. 101).

3. Union Power's Revised Proposed Rate Schedule

On rehearing, the Commission modified its order accepting Union Power's proposed rate schedule for filing because the sought-after rate included charges that Union Power agreed were excessive. *Id*. PP 8, 12. The Commission directed Union Power to revise and re-file its proposed rate schedule, which the generator did on January 13, 2006. *See* Union Power Partners, L.P., Compliance Filing (Jan. 13, 2006), JA 177-190.

In a February 14, 2006 letter, FERC advised that Union Power's proposed rate schedule had been "accepted for filing." Letter from M. McLaughlin to N. Levy (Feb. 14, 2006) at 1, JA 191. The letter went on to note that, in doing so, the Commission was not "approv[ing] any service, rate, [or] charge," nor was it "recogni[zing] any claimed contractual rate." *Id*. at 2, JA 192. Rather, the action was "without prejudice to any findings or orders which have been or may thereafter be made by the Commission." *Id*.

4. Entergy Eliminates Reactive Power Payments To Affiliated Generators

Prior to the commencement of the hearings before the ALJ, Entergy

petitioned the Commission for a declaration stating that, if it were to no longer compensate its affiliated generators for the provision of reactive power within the dead band, Entergy would not need to compensate non-affiliated generators for such services prospectively. The Commission granted Entergy's petition in an October 14, 2005 order. *Entergy Services, Inc*., 113 FERC ¶ 61,040 (2005), JA 152-169. Noting that, as a general matter, generators "should not be compensated for reactive power when operating within" the dead band, the Commission found that Entergy's proposal was "consistent with … Commission policy on reactive power." *Id*. PP 38, 39, JA 165. The Commission therefore approved Entergy's proposal to eliminate the charge for the provision of reactive power from its own generating units effective November 1, 2005. *Id*. Ordering Para. B, JA 167.[6]

The Commission's order left open the possibility that non-affiliated generators might have a contractual right to compensation for the post-November 1, 2005 period. *Id*. at P. 23 n.17, JA 160. In order to consider that issue, the Commission consolidated Union Power's claim with those raised by four other generators – collectively referred to in the challenged orders as the "Independent Generators" – seeking reactive power compensation under their contracts with Entergy. *See* ALJ Decision at P 41, JA 256.

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[6] The parties ultimately settled the claims for compensation under the comparability principle for the period prior to November 1, 2005. *See, e.g., Union Power Partners*, *L.P*., 115 F.E.R.C. ¶ 61,091 (2006) (R. 140).

5. Section 4.7 Of The Interconnection Agreement

Section 4.7 of the Interconnection Agreement sets forth the parties' rights and obligations with respect to reactive power. Section 4.7.1 – entitled "Obligation to Supply Reactive Power" – specifies that, as a condition to interconnection with the Entergy transmission system, Union Power must "supply reactive power … in accordance with Good Utility Practice,"[7] "in a safe and reliable manner," and "in accordance with the provisions of" the Interconnection Agreement. JA 41-42. Section 4.7.2 – entitled "Reactive Power Standards" – details Union Power's obligation to supply reactive power within a prescribed power factor range (*i.e.*, the dead band). JA 43-44. Section 4.7.3 describes Entergy's right to direct Union Power to increase or decrease its supply of reactive power in the event of an emergency. JA 45. Section 4.7.4 details how payments for the supply of reactive power will be made when such compensation is due. JA 45-46.

In the Interconnection Agreement, the parties agreed that compensation for the supply of reactive power would be due in two instances. The first – which is not at issue here – is when Entergy receives payments from its transmission customers for reactive power supplied by Union Power. Section 4.7.1 establishes a

[7] The Interconnection Agreement defines "Good Utility Practice" as those practices "approved by a significant portion of the electric utility industry" which can be "expected to accomplish the desired result at the lowest reasonable cost consistent with good business practices, reliability, safety and expedition." Interconnection Agreement at § 1.08, JA 34.

pass-through mechanism pursuant to which such payments will be directed to Union Power. Interconnection Agreement, § 4.7.1, JA 43.

The second is when there is certain agency action or a policy change regarding the lack of compensation for the supply of reactive power within the dead band; in such an instance, Union Power has the ability to file a rate schedule with the Commission:

> At such time as FERC or another regulatory agency with jurisdiction over the sale or provision of reactive power at market-based rates accepts a tariff, rate schedule, or market mechanism for reactive power services or otherwise permits [Union Power] to charge [Entergy] and/or other users for reactive power services provided by [Union Power], or in the event of any other change in law or regulation that permits [Union Power] to assess market-based charges or otherwise seek reimbursement for its provision of reactive power services, [Union Power] shall be entitled to compensation for reactive power services at such market-based or tariff rates from its customer using the reactive power services, which may include [Entergy], only in accordance with the terms and conditions of such tariff, rate schedule, market mechanism, or other legal or regulatory scheme.

Id., JA 43. (A copy of section 4.7 is contained in Addendum B to this Brief.)

6. The ALJ's Decision

The ALJ determined that section 4.7.1 did not create "independent contractual authorization [for Union Power] to obtain compensation for [its] generation of reactive power within the specified power factor range (within the band)." ALJ Decision at P 60, JA 266. The ALJ found that, while section 4.7.1 gave Union Power "the contractual right *to seek* compensation for reactive power

provided within the dead band," the generator had no right "*to obtain* compensation" absent Commission approval of the relevant rate schedule. *Id*. at P 52 (emphasis in original), JA 260. The ALJ observed that:

> Section 4.7.1 specifically provides that entitlement to compensation will be "… ***[a]t such time as FERC … permits Customer to charge [Entergy]*** and/or other users for reactive power services provided by Customer … *in accordance with the terms and conditions of such tariff, rate schedule, market mechanism, or other legal or regulatory scheme*."

Id. (alterations and emphasis in original), JA 260-61. In reaching this conclusion, the ALJ specifically noted that "the Independent Generators have acknowledged that merely filing a rate schedule with the Commission does not constitute Commission *approval* of the rate schedule," and that any challenges to the proposed charges "must be fully adjudicated before the Commission." *Id*. P 59 (emphasis in original), JA 264.

Since section 4.7.1 merely provided Union Power with the right "to seek FERC approval," the ALJ concluded that Union Power's ultimate entitlement "to compensation must be determined based on established Commission precedent." *Id*. That precedent "clearly provides that reactive power within the dead band is an industry standard that is required to permit the interconnection customer to deliver its power to the grid in accordance with good utility practice … and is, therefore, not compensable." *Id*., JA 265.

D. The Commission Orders On Review

1. The Affirming Order

On appeal, the Commission found that the ALJ had properly "examined the language of section 4.7.1," and agreed with her conclusion that the Interconnection Agreement did not entitle Union Power "to compensation upon the simple act of filing [its] proposed rate schedules." Affirming Order at PP 18, 19, JA 302-303. Rather, "[s]ection 4.7.1 … states … that [Union Power's] ability to obtain such compensation is contingent on the Commission approving such compensation." *Id*. P 22, JA 304.

The Commission also explained that its decision was consistent with prior cases addressing similar contracts. *Id*. P 24, JA 304-305. Like the language addressed in those prior cases, section 4.7.1 does not go "beyond merely providing that [Union Power] will receive such compensation if the Commission approves a tariff or rate schedule allowing it." *Id*. P 27, JA 306.

2. The Rehearing Order

The Commission denied Union Power's rehearing request, because it "remain[ed] convinced that when section 4.7.1 is read as a whole, it renders Union Power's 'entitlement' contingent on a Commission order finding that compensation is consistent with Commission policy." Rehearing Order at P 15, JA 341.

The Commission noted ambiguity in "the phrase '[a]t such time as [the Commission] accepts a tariff,'" and interpreted it to mean that "Union Power is entitled to compensation only if the Commission finds that compensation is consistent with Commission policy." *Id*. P 20, JA 343. This interpretation was consistent with "the language of section 4.7.1, which renders Union Power's entitlement to compensation contingent on events that rely on future departures from the Commission's current policy." *Id*.

This appeal followed.

SUMMARY OF ARGUMENT

Union Power's appeal should be dismissed for lack of jurisdiction. It is based on the assertion that the Commission erred in failing to (a) afford the word "accepts," as used in section 4.7.1 of the Interconnection Agreement, its supposedly specialized meaning, and (b) address purportedly conflicting precedent regarding that term. Neither objection was presented to the Commission in an application for rehearing or otherwise. And there is no reasonable ground for Union Power's failure to do so. The ALJ Decision, the Affirming Order, and the Rehearing Order all consistently found that the phrase "accepts a tariff," as used in section 4.7.1, along with other words and phrases used in that section, meant the Commission's substantive review and approval of the proposed reactive power charge. Union Power was plainly on notice of the rationale underlying the

decisions from the ALJ and the Commission, yet never raised to the agency the arguments it now presses to this Court. As a result, the Court lacks jurisdiction to consider them. *See* 16 U.S.C. § 825*l*(b) (limiting appellate jurisdiction to objections raised before the Commission in an application for rehearing).

Even if the Court considers the merits of these freshly-minted arguments, Union Power's claim must fail. The Commission reasonably analyzed the entire provision at issue to determine the parties' intent. In doing so, the Commission reasonably concluded that the parties had agreed to condition Union Power's right to compensation on the Commission's substantive approval of a rate schedule for reactive power services.

This conclusion was driven by the fact that section 4.7.1 sets forth three conditions to compensation: (a) the Commission's "accept[ance] of a tariff," or (b) the Commission "otherwise permit[ting]" Union Power to charge Entergy for reactive power services, or (c) "any other change in law or regulation" that permits Union Power to assess such charges. The final predicate's reference to "any *other change*" that would permit a charge for reactive power services indicated that the other two predicates were also intended to constitute departures from the Commission's general policy of treating the supply of reactive power within the dead band as a fundamental obligation of generators seeking to interconnect with the grid, rather than a compensable service. This is a reasonable, if not the only

reasonable, interpretation of the parties' agreement and is entitled to *Chevron*-like respect by this Court.

In contrast to the Commission's approach, Union Power focuses on the term "accepts" to the exclusion of all else. But the generator's reliance upon authorities addressing the concept of accepting a tariff "for filing" is misplaced, because the phrase "accept a tariff for filing" is not used in section 4.7.1. A complete reading of section 4.7.1 reasonably demonstrates that Union Power did not strike a bargain to receive compensation upon the Commission's ministerial act of accepting a tariff for filing. Rather, section 4.7.1 evinces the parties' intent that compensation would be contingent on future "changes" to the Commission's current policy regarding reactive power service within the dead band.

The flaws in Union Power's analytic approach are illustrated by the conclusion to which it leads. Union Power contends that its right to compensation vested when the Commission initially accepted its rate schedule for filing (Br. at 24), even though the very purpose of that acceptance was to establish hearings to determine "whether the [Interconnection Agreement] provides for compensation for reactive power services." Hearing Order at P 14, JA 149. In Union Power's view, in setting the matter for hearing, the Commission resolved the very issue to be decided.

ARGUMENT

I. STANDARD OF REVIEW

The Court's review of FERC orders is governed by the arbitrary and capricious standard of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A). Under that standard, the Commission's decision must be reasoned and responsive. *East Tx. Elec. Coop., Inc. v. FERC*, 218 F.3d 750, 753 (D.C. Cir. 2000). If the Court can "discern a reasoned path" to the decision, the challenged orders will be upheld. *Old Dominion Elec. Coop., Inc. v. FERC*, 518 F.3d 43, 48 (D.C. Cir. 2008).

The Court "generally gives substantial deference to [FERC's] interpretation of filed tariffs, even where the issue simply involves the proper construction of language." *S. Cal. Edison Co. v. FERC*, 415 F.3d 17, 21 (D.C. Cir. 2005) (internal quotations omitted). In such circumstances, the Court employs a variation of the familiar two-step analysis established in *Chevron U.S.A., Inc. v. Natural Res. Def. Counsel, Inc.*, 467 U.S. 837 (1984). The Court first looks to see whether the "language of the tariff is unambiguous – that is, if it reflects the clear intent of the parties to the agreement." *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998). If so, the plain language of the tariff controls. If, however, the Court determines the tariff language is ambiguous, it will "defer to the Commission's construction of the provision at issue so long as that construction is

reasonable." *Id*. at 814-15.

Union Power contends that the pertinent language of the Interconnection Agreement is "plain" and "unambiguous" (Br. at 4, 5), implying that *Chevron* step one applies here. If, however, the meaning of section 4.7.1 is clear, then it is clear in favor of the Commission's interpretation which (unlike Union Power's) considers the entirety of the provision in question. *See* ALJ Decision at P 46 (noting that both parties "agree that the [Interconnection Agreement] language is clear"), JA 257. If, as the Commission found on review of the ALJ Decision, the Interconnection Agreement is ambiguous, then the Commission's reasonable construction is deserving of *Chevron* step two deference and should be sustained. *See* Affirming Order at P 22 (finding that section 4.7.1 is ambiguous), JA 304; Rehearing Order at P 19 (same), JA 342.

II. THIS COURT LACKS JURISDICTION TO CONSIDER UNION POWER'S OBJECTIONS BECAUSE THEY WERE NOT PRESENTED TO THE COMMISSION IN AN APPLICATION FOR REHEARING.

The arguments that form the basis of Union Power's appeal – that the Commission (a) interpreted the term "'accepts a tariff' in a manner that conflicts with [its] plain legal meaning," and (b) failed to address purportedly conflicting precedent (Br. at 5) – were never presented to the Commission. This Court therefore lacks jurisdiction to consider them and should dismiss Union Power's petition in its entirety.

A. This Court May Only Consider Objections Urged With Specificity In An Application For Agency Rehearing.

Section 313(b) of the Federal Power Act tightly circumscribes the Court's power to review FERC orders. The Court lacks jurisdiction to review the Commission on the basis of an error that was not "urged" before the Commission in a rehearing application:

> No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.

16 U.S.C. § 825*l*(b). Section 313(a) of the Act further requires that any such objections be articulated to the Commission with specificity. 16 U.S.C. § 825*l*(a). These jurisdictional prerequisites are "strictly construe[d]." *Norwood v. FERC,* 906 F.2d 772, 774 (D.C. Cir. 1990). *See also Entergy Services, Inc. v. FERC*, 391 F.3d 1240, 1247 (D.C. Cir. 2004) ("We construe § 825*l* narrowly.").

Proper articulation of an objection gives the agency "an opportunity to bring its knowledge and expertise to bear on an issue before it is presented to a generalist court." *Granholm v. FERC*, 180 F.3d 278, 281 (D.C. Cir. 1999). It permits the agency to "exercise the discretion contemplated by *Chevron*" and respond in a manner that is "guided by its familiarity with the statute and policy context." *Pub. Serv. Elec. & Gas Co. v. FERC*, 485 F.3d 1164, 1171 (D.C. Cir. 2007).

B. Union Power Failed To Present The Commission With The Objections It Now Advances Before This Court.

Union Power had ample opportunity to raise all arguments in support of its proffered interpretation of the Interconnection Agreement. But neither before the ALJ, nor before the Commission, did Union Power contend that the use of the word "accept" in section 4.7.1 – in light of its supposedly "plain legal meaning" as recognized in a "myriad" of Commission precedents (Br. at 5) – established its right to compensation for the supply of reactive power within the dead band. To the extent Union Power focused on the language of section 4.7.1 at all, it pointed to the phrase "shall be entitled to compensation." *See* Rehearing Request at 8, 10, 15-16, JA 314, 316, 321-22. *See also* Rehearing Order at PP 10-14 (discussing objections raised on rehearing), JA 339-41; Affirming Order at PP 9-11 (discussing objections raised to the ALJ decision), JA 299-300. And not one of the "myriad" of precedents purportedly ignored by the Commission was cited by Union Power in its Rehearing Request (or in its Brief on Exceptions to the ALJ Decision). *See* Rehearing Request at 8-9, 15-16, JA 314-15, 321-22; Brief on Exceptions at 12-15, JA 284-87.

In fact, in oral argument before the ALJ, Union Power expressly disclaimed the argument it is now pressing before this Court; namely, that its "contractual right to compensation for reactive power services vests when [it] files a tariff that is 'accepted' by the Commission" (Br. at 33):

> **ALJ:** Independent Generators are not maintaining, are they, that the simple act of filing a rate schedule for reactive power compensation for within the band constitutes Commission approval of a rate schedule or tariff within the meaning of 4.7.1, are they?
>
> **Mr. Levy:** No, your Honor.

Oral Argument Transcript (Aug. 29, 2006) at 19:17-23, JA 243.

Union Power points to two sentences in the introductory section of its Rehearing Request that mention the term "accept" and intimates that it raised its current objections with the Commission. *See* Br. at 21 (citing Rehearing Request at 5, JA 311). But the Commission's regulations require parties to identify all objections with clarity and specificity. 18 C.F.R. § 385.713(c). This requirement is designed to effectuate Section 313(b) of the Federal Power Act, which requires objections to "be raised with 'specificity.'" *Allegheny Power v. FERC*, 437 F.3d 1215, 1220 (D.C. Cir. 2006). Under this standard, objections that are not "explicitly presented in proceedings below" – even if "arguably 'implicit' in other objections" – are "not properly preserved." *Entergy Services*, 391 F.3d at 1247.

Union Power's passing reference to the term "accept" fails to meet its obligation to bring its objections to the Commission's attention. "[W]hen a party advances a wholly undeveloped claim – as here – the agency has little occasion to present a reasoned explanation. Under these circumstances, full appellate review would unfairly undermine the agency's ability to rely on *Chevron* deference before an appellate court." *Public Serv. Elec. & Gas*, 485 F.3d at 1171. *See also*

Constellation Energy Commodities Group, Inc. v. FERC, 457 F.3d 14, 22 (D.C. Cir. 2006) (holding that the Court lacks jurisdiction to consider objections raised in "passages [that] state[] a conclusion" and not "an argument. Parties are required to present their arguments to the Commission in such a way that the Commission knows specifically … the grounds on which rehearing is being sought").

C. There Is No Reasonable Ground For Union Power's Failure To Raise Its Objections With The Commission.

Union Power tacitly acknowledges that it failed to raise its current arguments with the Commission when it asserts that the Rehearing Order "set forth a 'new improved rationale'" – *i.e.*, that the phrase "accepts a tariff" as used in section 4.7.1 refers to the Commission's substantive approval of the proposed charge – that freed the generator from its obligation to "file an additional rehearing request." Br. at 2. *See also id*. at 21 (discussing the Rehearing Order's purportedly "new" rationale). There is no basis for this claim.

The same rationale is consistently voiced in each of the relevant orders. Both the ALJ and the Commission found that the term "accepts a tariff" in section 4.7.1 refers to the Commission's substantive approval of the proposed charge:

- ***ALJ Decision***: "[B]oth the contract language of Section 4.7.1 and Section 205 of the Federal Power Act require Commission *approval* of the rate schedule. However, the Independent Generators have acknowledged that merely filing a rate schedule with the Commission does not constitute Commission *approval* of the rate schedule and that challenges to the rate schedule must be fully adjudicated before the Commission …. [Commission] precedent clearly provides that reactive power provided

within the dead band is an industry standard … and is, therefore, not compensable." ALJ Decision at P 59 (emphasis in original), JA 264-65.

- ***Affirming Order***: "[S]ection 4.7.1, like the FPA, does not entitle the Independent Generators to compensation upon the simple act of filing their proposed rate schedules." Section 4.7.1 does not go "beyond merely providing that the Independent Generators will receive such compensation if the Commission approves a tariff or rate schedule allowing it." Affirming Order at PP 19, 27, JA 303, 306.

- ***Rehearing Order***: "[R]eading the condition that the Commission accept a tariff or rate schedule in light of the other predicates to compensation [set forth in section 4.7.1], we conclude that Union Power is entitled to compensation only if the Commission finds that compensation is consistent with Commission policy." Rehearing Order at P 21, JA 344.

Union Power cannot maintain, therefore, that it was not on notice of the rationale the Commission reiterated in the Rehearing Order – *i.e.*, that, within the context of the Interconnection Agreement, the phrase "accepts a tariff" means the Commission's substantive approval of a proposed reactive power charge.

Moreover, this Court lacks jurisdiction not because Union Power failed to seek rehearing of the Rehearing Order, but because Union Power never raised its current objections with the Commission. This Court has held that, even where a rehearing order provides a new rationale supporting the same result, the petitioner "would still be confined in [its] petition to those objections that were actually 'urged before the Commission.'" *Norwood*, 906 F.2d at 775 (quoting 16 U.S.C. § 825*l*(b)). *See also Tenn. Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1110 (D.C. Cir. 1989) ("if Columbia wished to treat the modification as a minor one and rely

on its first petition for rehearing, it was as a consequence constrained to stick with the objections previously raised to the Commission. We have jurisdiction to consider only such objections."). *But see Columbia Gas Trans. Corp. v. FERC*, 477 F.3d 739, 742 (2007) (finding that a party may have "reasonable grounds" for not raising its objections when it was "not on notice of the rationale FERC would adopt in the rehearing order").

Because Union Power failed to present the Commission with the arguments upon which it now relies, the Court lacks jurisdiction to consider them and should dismiss the petition for review.

III. THE COMMISSION'S REASONABLE INTERPRETATION OF SECTION 4.7.1 SHOULD BE UPHELD.

Even if the Court were to consider the merits of Union Power's petition for review, the challenged orders should still be upheld. The Commission reasonably concluded that the language of section 4.7.1 was ambiguous, and resolved that ambiguity by examining the provision in its entirety. That language led the Commission to conclude that Union Power's right to compensation for the supply of reactive power within the dead band was contingent upon Commission approval. As set forth below, that conclusion is well-grounded in the language of the parties' agreement and is entitled to deference. *See, e.g., Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 703 (D.C. Cir. 2007) (noting that issue to be determined on appeal is not whether petitioner's interpretation is "more

reasonable," but simply whether agency's interpretation is reasonable).

A. The Commission Reasonably Concluded That The Interconnection Agreement Granted Union Power A Contingent Right To Compensation.

The Commission's analysis logically began with an examination of the phrase "Customer shall be entitled to compensation for reactive power," which had been the focus of Union Power's textual argument. Rehearing Order at PP 17-19, JA 342. *See also* Affirming Order at P 22, JA 304; ALJ Decision at PP 49-53, JA 259-61. The Commission found that this language did not create an absolute right to compensation. Rather, when section 4.7.1 is read as a whole, it reveals the parties' agreement that any right to compensation would be contingent upon – *i.e.*, would only vest "at such time as" – the occurrence of the conditions precedent listed in that provision. Rehearing Order at P 19, JA 342. The Commission therefore concluded that section 4.7.1 "creates a *contingent*, rather than *independent* 'right to compensation.'" *Id.* (emphasis in original). *See also* Affirming Order at P 22 (same), JA 304; ALJ Decision at P 51 (same), JA 260.

B. The Commission Reasonably Concluded That Union Power's Right To Compensation Was Contingent Upon Commission Approval.

The Commission next examined the first condition precedent to Union Power's right to compensation: FERC's "acceptance" of a tariff or rate schedule for reactive power services. Rehearing Order at PP 20-21, JA 343-44. *See also*

Affirming Order at PP 22, 27, JA 304, 306. The Commission found the phrase "at such time as FERC … accepts a tariff" to be ambiguous. Rehearing Order at P 20, JA 343. *See also* Affirming Order at P 22, JA 304. In the Commission's view, it could either mean that the Commission (a) was "required to accept a tariff," or (b) had "discretion to accept or reject a tariff" for reactive power services. Rehearing Order at P 20, JA 343.

The Commission found that the second meaning was consistent with the language of section 4.7.1 and interpreted the phrase "to mean that Union Power is entitled to compensation only if the Commission finds that compensation is consistent with Commission policy." *Id*. That conclusion was driven by a close examination of the language of section 4.7.1 taking into consideration the Commission's reactive power policy, which treats the supply of reactive power within the dead band as "an obligation of good utility practice rather than as a compensable service." *Id*. *See also supra* pp. 8-10 (discussing Commission's reactive power policies).

The Commission noted that the Interconnection Agreement sets forth three predicates to compensation: (a) "FERC … accepts a tariff … for reactive power services," (b) FERC "otherwise permits" Union Power to charge Entergy for such services, or (c) "*any other change* in law or regulation *that permits*" Union Power to charge Entergy for "using the reactive power services." Interconnection

Agreement, § 4.7.1 (emphasis added), JA 43. The final predicate's reference to "any *other change*" permitting Union Power to charge for reactive power services led the Commission to conclude that the first two predicates also referred to events constituting a "change" in Commission policy. The Commission therefore concluded that "Union Power has not struck a bargain to receive compensation in the absence of a change of policy." Rehearing Order at P 21, JA 343.

Union Power contends that the Commission's reliance upon the "any other change in law" clause is "misplaced, because this clause is set off from 'accepts a tariff' by the disjunctive 'or,'" and thus one may be satisfied even if the other is not. Br. at 40. But this misses the point. The parties' use of the phrase "any *other change*" is important because it signifies that the other conditions set forth in section 4.7.1 – "accepts a tariff" or "otherwise permits [Union Power] to charge [Entergy]" – were *also* intended to constitute departures from the Commission's policy of treating the supply of reactive power within the dead band as a no-charge obligation, rather than a compensable service. *See* Rehearing Order at P 21, JA 343-44.

The Commission's analysis was further informed by its application of the doctrine of *noscitur a sociis*, which "teaches that a word is known by the company it keeps." *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 175 (D.C. Cir. 2006). *See also, e.g., Neal v. Clark,* 95 U.S. 704, 708-09 (1877) ("the coupling of words

together shows that they are to be understood in the same sense"). Here, the Commission looked to the phrase "or otherwise permits [Union Power] to charge [Entergy]" in order to further elucidate the phrase "accepts a tariff." Rehearing Order at P 21, JA 343. The phrase reasonably suggested that "section 4.7.1 renders Union Power's entitlement contingent on Commission permission." *Id.* The Commission thus concluded that "accepts a tariff" as used in section 4.7.1 referred to an affirmative finding by FERC that "compensation is consistent with Commission policy." *Id.*, JA 344. *See also* Affirming Order at P 22 ("Section 4.7.1 … states … that Independent Generators' ability to obtain such compensation is contingent on the Commission approving such compensation."), JA 304.

Union Power attempts to cast doubt upon the Commission's analysis by claiming that the term "permit" has a specialized legal meaning. In support, Union Power points to a single regulation stating that, in "permitting" a rate to "become effective," the Commission is not approving such rate. Br. at 40 (citing 18 C.F.R. § 35.4). But a single citation does not establish that a commonly used word has a particularized legal meaning and that the parties intended that meaning to prevail in their contract.

Moreover, in the Interconnection Agreement, Union Power's right to compensation does not vest when the Commission "permits a rate schedule to become effective;" it is conditioned upon the Commission "permitting" Union

Power "to charge [Entergy] … for reactive power services." Interconnection Agreement, § 4.7.1, JA 43. The Commission may permit a rate to become effective subject to refund and ultimately determine that the rate cannot be charged to customers. *See* 16 U.S.C. § 824d(e); *Papago*, 628 F.2d at 239 (describing rate review process). And that is precisely what occurred here. The Commission permitted the proposed rate to become effective subject to refund, scheduled a hearing to explore Union Power's contractual rights (Hearing Order at PP 1, 15, JA 146, 149), and determined that, in fact, Union Power was not permitted to charge Entergy for the supply of reactive power within the dead band. Affirming Order at P 27, JA 306.

The parties' intent with respect to the phrase "permit [Union Power] to charge" is further illuminated by the final condition found in section 4.7.1 – "any other change in law or regulation." Again, this reasonably suggests that any "permission" from the Commission would stem from a substantive "future policy determination." Rehearing Order at P 21, JA 343.

* * *

The Commission's conclusion that section 4.7.1 conditions Union Power's right to compensation upon FERC's substantive approval of a rate schedule setting a charge for reactive power services is reasonable, well-grounded in the language of the parties' agreement, and worthy of this Court's deference.

IV. UNION POWER'S FAVORED INTERPRETATION OF THE TARIFF FAILS TO DEMONSTRATE THAT THE COMMISSION'S INTERPRETATION IS UNREASONABLE.

In contrast to the Commission's interpretative approach, which considered the complete language and context of section 4.7.1, Union Power focuses on the single word "accepts." This Court has observed in a related context that such an approach is analytically unsound: "Naturally, we try not to interpret statutory language by plucking a single word out of context and placing it under a microscope." *City of Mesa v. FERC*, 993 F.2d 888, 893 (D.C. Cir. 1993).

As explained below, Union Power's myopic focus on the word "accepts" ignores language in section 4.7.1 that illuminates the parties' intent with respect to the circumstances under which Union Power would be compensated for the supply of reactive power within the dead band and leads to an absurd result.

A. Union Power Has Failed To Establish That The Parties Intended Its Right To Compensation To Vest Upon The Mere Acceptance Of A Tariff For Filing.

The crux of Union Power's argument is that the "phrase 'accepts a tariff' is a term of art … that refers to the mere acceptance of a tariff for filing" and not the "substantive review or approval by the Commission." Br. at 23-24. But the generator offers nothing establishing that the phrase "accepts a tariff" has a particularized legal meaning, much less that it is appropriate to incorporate any such meaning into section 4.7.1.

1. Section 4.7.1 does not condition Union Power's right to compensation upon the Commission's mere acceptance of a tariff for filing.

Union Power cites a number of regulations and decisions that discuss the concept of accepting a tariff "for filing." Br. at 29-33, 42-47.[8] This approach, however, is entirely circular. Union Power proclaims that "accepts a tariff" as used in section 4.7.1 means the ministerial acceptance of a tariff for filing because that is the meaning of the phrase "accepts for filing." While the authorities cited by Union Power may establish that the concept of "accepting a tariff for filing" has a particularized legal meaning, that phrase is not used in section 4.7.1.

Rather, section 4.7.1 states that Union Power's right to compensation is triggered when the Commission (a) "accepts a tariff," or (b) "otherwise permits [Union Power] to charge [Entergy] for reactive power services," or (c) "in the event of any other change in law or regulation" that would permit such

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[8] For instance, Union Power cites the following: 18 C.F.R. § 35.3, which discusses the effective date of rate schedules "tendered for filing;" 18 C.F.R. § 35.5, which addresses the Commission's ability to reject material "submitted for filing;" 18 C.F.R. § 154.6, which notes that "acceptance for filing" does not constitute approval; 18 C.F.R. § 375.307, which addresses the authority of the Director of the Office of Energy Market Regulation to "[a]ccept for filing all uncontested tariffs or rate schedules;" *PJM Interconnection LLC*, 126 F.E.R.C. ¶ 61,069, P 1 (2009), in which the Commission accepted a proposed tariff sheet for filing and made its effectiveness subject to refund pending the outcome of further proceedings; and *Am. Elec. Power Serv. Corp.*, 124 F.E.R.C. ¶ 61,306, P 1 (2008), in which the Commission "accept[ed] the revised tariff sheets for filing" and made them subject "to the outcome of hearing and settlement judge procedures."

compensation. JA 43. The Commission looked to the surrounding language in section 4.7.1 for clarity as to the parties' intent with respect to the phrase "accepts a tariff." Rehearing Order at P 20, JA 341; Affirming Order at P 22, JA 304. For even when words with a specialized meaning are used in contracts, the entire context of the agreement must be reviewed to determine whether the parties intended to import that particularized meaning into their agreement. *See, e.g., Krupnik v. Ray*, 61 F.3d 662, 664 (8th Cir. 1995) (noting that, under Arkansas law, "[i]n the absence of some indication that the parties have invoked some specialized meaning for their words, the court is bound to give the language used in the contract its plain, ordinary meaning").[9]

Here, that surrounding language indicated that, in using the term "accepts a tariff," the parties meant something other than the mere ministerial act of accepting a tariff for filing. As this Court has explained, accepting a tariff for filing is a "first cut" that merely ensures the document "contain[s] sufficient information" to allow the Commission to "'reach an informed and equitable decision as to the necessity for an investigation, hearing, and suspension.'" *Papago*, 628 F.2d at 240, 241 (quoting *Municipal Light Bds*., 450 F.2d at 1348).

The act of accepting a tariff for filing "decides nothing concerning the

[9] Article 23.2 of the Interconnection Agreement provides that "[t]he validity, interpretation and performance of this Agreement … shall be governed by the applicable laws of the State of Arkansas…." JA 79.

merits" and is merely "the initiation of an administrative proceeding" regarding the propriety of the proposed charge. *Id*. at 240. In section 4.7.1, however, the parties indicated that "acceptance of a tariff" was the equivalent of actually "permitting" the proposed rate to be charged or "any other change" in the Commission's long-standing policy of treating the supply of reactive power within the dead band as a non-compensable obligation. Rehearing Order at P 21, JA 343-44.

2. The Commission reasonably focused on the language of section 4.7.1, rather than irrelevant precedent.

Union Power nonetheless argues that the challenged orders are arbitrary and capricious because the Commission "failed to come to grips with extensive conflicting precedent" regarding the concept of accepting a tariff for filing. Br. at 44. *See also* Br. at 29-32, 45 (discussing the supposedly conflicting precedents). That these authorities are irrelevant to the question of how section 4.7.1 should be interpreted is unmistakably demonstrated by the fact that none was cited in Union Power's rehearing request (JA 307-334). Nor was any cited in Union Power's brief on exceptions from the ALJ's decision (JA 267-294).

The conspicuous absence of these authorities is explained by the fact that the phrase "accepts a tariff for filing" does not appear in section 4.7.1. Again, the question was what the parties intended by their use of the phrase "accepts a tariff." In resolving this issue, the Commission reasonably looked to the language of the provision, which indicated that the phrase meant a substantive approval of the

proposed charge, and not the ministerial act of accepting a rate schedule for filing. *See* Rehearing Order at PP 20-21, JA 343-44; Affirming Order at P 21-22, JA 303-04.

B. Union Power's Proposed Interpretation Leads To An Absurd Result.

Union Power concludes its analysis with the assertion that, "because the Commission has already 'accepted' Union Power's filing, Union Power is entitled to compensation." Br. at 24. This claim highlights the infirmity of Union Power's proffered interpretation.

The Commission accepted Union Power's rate schedule for filing in order to open a docket to examine "whether the [Interconnection Agreement] provides for compensation for reactive power service." Hearing Order at P 14, JA 149. In doing so, the Commission preliminarily found that the proposed charge "may be unjust, unreasonable … or otherwise unlawful." *Id.* at P 15, JA 149. And when the Commission accepted Union Power's revised rate schedule for filing in February 2006, it similarly noted that its action should not "be deemed as recognition of any claimed contractual right." Ltr. from M. McLaughlin to N. Levy (Feb. 14, 2006) at 2, JA 192.

Yet that is precisely what results from Union Power's proffered interpretation. Under that reading, the Commission's acceptance of the proposed tariff for filing in order to determine *whether* a contractual right exists causes that

contractual right to *vest*. This absurd result demonstrates that Union Power's proposed interpretation must be rejected. *See, e.g., FTC v. Ken Roberts Co*., 276 F.3d 586, 590 (D.C. Cir. 2001) (noting, in the statutory construction context, that interpretations leading to absurd results must be avoided); *Reliance Ins. Co. v. Kinman,* 483 S.W.2d 166, 169 (Ark. 1972) (construing contract that, like the Interconnection Agreement, is governed by Arkansas law (*see supra* p. 36 n.9), and holding that a "contract should not be given a strained, forced, unnatural, or unreasonable construction, or a construction … which would lead to an absurd conclusion").

CONCLUSION

For the reasons stated, the petition for review should be dismissed for lack of jurisdiction. If the Court determines that it has jurisdiction to consider the petition on the merits, the petition should be denied and the Commission's orders affirmed in all respects.

Respectfully submitted,

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D.C. Cir. No. 08-1252

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 9,174 words, not including the (i) cover page, (ii) certificate of counsel, (iii) table of contents and authorities, (iv) glossary, (v) certificate of compliance, and (vi) addendum.

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