ORAL ARGUMENT SCHEDULED FOR MARCH 15, 2004

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

No. 03-1027

ENTERGY SERVICES, 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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JANUARY 12, 2004

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. ***Parties and Amici*:** All participants in the proceedings below and in this Court are listed in Petitioner's Circuit Rule 28(a)(1) certificate.

B. ***Rulings Under Review*:**

1. *Aquila Power Corp. v. Entergy Servs., Inc.*, Docket Nos. EL98-36-000 and ER91-569-009, 90 FERC 61,260 (2000).

2. *Aquila Power Corp. v. Entergy Servs., Inc.*, Docket Nos. EL98-36-001 and ER91-569-010, 92 FERC 61,064 (2000).

3. *Aquila Power Corp. v. Entergy Servs., Inc.*, Docket Nos. EL98-36-001 and ER91-569-010, 101 FERC 61,328 (2002).

C. ***Related Cases*:** Counsel is not aware of any related cases pending before this or any other Court.

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Attorney

January 12, 2004

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GLOSSARY

Commission	Respondent Federal Energy Regulatory Commission
Entergy	Petitioner Entergy Services, Inc.
FPA	Federal Power Act, 16 U.S.C. 791a, *et seq.*
OATT	Open Access Transmission Tariff
Order No. 888	*Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Servs. by Pub. Utils. & Recovery of Stranded Costs by Pub. Utils. & Transmitting Utils.*, Order No. 888, FERC Stats. & Regs. 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC 61,248, *order on reh'g*, Order No. 888-C, 82 FERC 61,046 (1998), *aff'd in substantial part, 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).

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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

Did the Commission reasonably interpret its *pro forma* open-access transmission tariff as requiring an electric utility to designate network resources when reserving network transmission capacity for the purpose of making bundled retail sales, given that the tariff expressly requires such utilities to designate such resources when reserving such capacity to serve "native load customers" and

expressly defines “native load customers” to include the utility’s “retail power customers”?

STATUTES AND REGULATIONS

The statutes and regulations applicable to this case are set forth in an addendum to this brief.

STATEMENT OF JURISDICTION

The Court has jurisdiction to consider the above-stated issue, but lacks jurisdiction to consider certain objections that Petitioner failed to raise on rehearing.

STATEMENT OF THE CASE

I. Statutory and Regulatory Framework

A. The Federal Power Act

The Federal Power Act ("FPA") grants the Commission jurisdiction over the sale for resale and the transmission of electric energy in interstate commerce. *See generally* FPA 201(b), 205 and 206, 16 U.S.C. 824(b), 824d and 824e. FPA 205(c) requires public utilities to file "schedules" showing, *inter alia*, all "rates and charges" for jurisdictional services, and all "practices . . . affecting such rates and charges . . . ." 16 U.S.C. 824d(c).

FPA 205(d), 16 U.S.C. 824d(d), prohibits utilities from altering any jurisdictional service, except after sixty days' notice to the Commission and the public:

> [N]o change shall be made in any such . . . service, or in any rule, regulation or contract relating thereto, except after sixty days notice to the Commission and the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new rate schedules . . . .

The Commission's regulations echo these requirements. *See* 18 C.F.R. § 35.1(a) & (e) (2003).

B. Order No. 888

The Commission issued Order No. 888[1] to remedy pervasive undue discrimination in the transmission of electric power. *See* Order No. 888 at 31,634-37, 31,651-52, 31,668-69. Public utilities that owned, controlled, or operated facilities used for transmitting electric energy in interstate commerce

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[1] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Servs. by Pub. Utils. & Recovery of Stranded Costs by Pub. Utils. & Transmitting Utils.*, Order No. 888, FERC Stats. & Regs. 31,036 (1996) ("Order No. 888"), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. 31,048 (1997) ("Order No. 888-A"), *order on reh'g*, Order No. 888-B, 81 FERC 61,248, *order on reh'g*, Order No. 888-C, 82 FERC 61,046 (1998), *aff'd in relevant part, sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000)("*TAPS*"), *aff'd, sub nom. New York v. FERC*, 535 U.S. 1 (2002) ("*New York*").

("transmission providers") were using their control over such facilities to favor their own sales to the detriment of competing sellers and of consumers. *Id.* at 31,682, 31,919-926; Order No. 888-A at 30,210.

The Commission exercised its authority under FPA 205 and 206 to remedy this situation, imposing three requirements on transmission providers that are relevant here. First, transmission providers had to provide open-access transmission, *i.e.*, to offer transmission services to all eligible parties on a non-discriminatory basis. Order No. 888 at 31,635. *See* 18 C.F.R. § 35.28(c)(1). Second, providers had to unbundle their wholesale services, *i.e.*, offer separate sales, transmission and "ancillary" services. *See New York, supra* n.1, 535 U.S. at 11. Third, providers had to take transmission service to serve their own wholesale sales customers (or wholesale "load") and unbundled retail load on the same terms offered to other transmission customers. *See* 18 C.F.R. § 35.28(c)(2).

C. The *Pro Forma* Open-Access Transmission Tariff

The Commission principally implemented this new regulatory scheme by promulgating a *pro forma* open-access transmission tariff ("OATT") that includes the minimum terms and conditions under which transmission providers may offer service. *See* Order No. 888-A at 30,503-543 (containing the final OATT); 18 C.F.R. § 35.28(c)(1) (requiring all transmission providers to have on file a tariff

equivalent to the OATT "or such other open access tariff as may be approved by the Commission consistent with Order No. 888"). Previously, transmission providers had provided two principal services: "unbundled" transmission, in which they delivered electric power purchased by a transmission customer from a specified origination point to a specified destination at a specified transmission rate; and "bundled" sales, in which they delivered and sold electric power to the customer at a single rate that encompassed both the transmission and the sale. The OATT replaces the first of these services with "point-to-point" service, and partially replaces the second with "network integration service."

Point-to-point transmission service, addressed in Part II of the OATT, is transmission service from a specified point of receipt to a specified point of delivery. *See* Order No. 888-A at 30,510 § 1.35 (JA 204).[2] Point-to-point service can be "firm," *i.e.*, not subject to a prior claim, *see id.* at 30,515-16 § 13.2 (JA 210), or "non-firm," *i.e.*, subject to interruption. *Id.* 30,509 § 1.27 (JA 204). Network integration transmission service, addressed in Part III of the OATT, is a flexible service, which allows the transmission provider to service a network

2The Joint Appendix contains the *pro forma* OATT set out in Order No. 888 rather than the final *pro forma* OATT set out in Order No. 888-A. However, no *pro forma* provision cited herein was revised in that latter order.

customer's load by using multiple receipt and delivery points. All network transmission service is firm. A "Network Customer" is an entity receiving network integration transmission service. *Id.* at 30,509 § 1.20 (JA 203).

Every transmission provider that uses its transmission facilities to serve its wholesale and/or unbundled retail load must take transmission service for such loads under its OATT. 18 C.F.R. § 35.28(c)(2). However, transmission providers need not take transmission service under the OATT to serve their bundled retail load. *See* Order No. 888-A at 30,217 (to the extent that "the transmission of purchased power to the bundled retail customers . . . takes place over [the] transmission provider's facilities," the OATT "does not have to be used for such transmission") (footnote omitted).[3]

D. Comparability between Unbundled and Bundled Services

While the notice of proposed rulemaking that preceded Order No. 888 raised "the possibility that the quality of transmission services for [bundled] retail

[3]This Court affirmed the exemption for bundled retail service as a reasonable policy choice. *TAPS*, 225 F.3d at 694-95. On certiorari, a six-justice majority held that the Commission reasonably declined to exercise such jurisdiction as it may have had over the transmission component of that service, *New York*, 535 U.S. at 25-28, while the dissent argued that the Commission clearly had jurisdiction over this transmission and failed to explain adequately its decision not to exercise that jurisdiction. *Id.* at 28-42. There is no dispute here that the Commission had "jurisdiction to reach the result it did" in the challenged orders. Br. at 11 n.17.

purposes" might "be superior to the quality of transmission services offered for wholesale purposes[,]"[4] the final rule rejected such disparity, requiring that "network service customers receive service comparable to the services provided to the transmission provider's native load[,]" *i.e.*, comparable to services provided to the provider's historical customers. Order No. 888-A at 30,218; *see id.* at 30,508 § 1.19 (JA 203) (defining "Native Load Customers"). *Cf. id.* at 30,306 ("network customers are provided with rights comparable to native load customers because the transmission provider includes their network resources in its long-term planning horizon"). In this regard, the Preamble to Part III of the OATT requires that a transmission provider offer its network transmission service in a manner that allows the "network customer" to serve its "network load" in a manner "comparable to that in which the Transmission Provider utilizes its Transmission System to serve its Native Load Customers." Order No. 888-A at 30,529-30 (JA 223). *See also id.* at 30,536 § 33.2 (JA 229) (providing that during periods of transmission constraints, the transmission provider may not "redispatch" power in

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4*Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Servs. by Pub. Utils. & Recovery of Stranded Costs by Pub. Utils. & Transmitting Utils.*, FERC Stats. & Regs., Proposed Regs. ¶ 32,514 at 33,081-82 1995).

a manner that unduly discriminates between its "use of the Transmission System on behalf of its Native load Customers and any Network Customer's use of the Transmission System to serve its designated Network Load").

E. Issues Involving Reservation of Capacity

Order No. 888 raised the concern that "a transmission customer" might have an incentive to "reserve certain capacity simply to prevent everyone else from using it[.]" Order No. 888 at 31,693. This concern was addressed by, *inter alia*, (1) requiring a network transmission customer to designate, as a prerequisite to obtaining network transmission service, those "network resources" that would generate the power to be transmitted over the reserved capacity, Order No. 888-A at 30,531-32 § 29.2 (v) (JA 225), and (2) allowing the customer to designate only such generation that it owned or had signed a contract to purchase. *Id.* at 30,533 § 30.7 (JA 226). *See also id.* at 30,509 § 1.25 (JA 204) (defining "network resource"). This "designation requirement" helped assure that the "transmission customer" and the "transmission provider" would have "an incentive not to oversubscribe" to capacity requirements, because the costs of these "excessive margin requirements [would] be prohibitive." Order No. 888 at 31,754. In other words, "transmission customers and transmission providers would have no incentive to designate network resources above their needs and, in so doing, tie up

valuable transmission capacity[,]" because "the cost of owning a generating unit or committing to a firm purchase would discourage the designation of network resources in excess of the amount needed to serve load." *Wisconsin Pub. Power, Inc. SYS. v. Wisconsin Pub. Serv. Corp.*, 83 FERC ¶ 61,198 at 61,856, *reh'g denied*, 84 FERC ¶ 61,120 (1998) ("*WPPI*").

The Commission's concerns regarding the tying up "of valuable capacity" led it to examine transmission providers' reservation of capacity to serve bundled retail load. While deciding not to require transmission providers to take transmission service for their bundled retail sales under the OATT, the Commission recognized that the providers' reservation of capacity for such service would have a direct impact on the capacity available to other customers taking firm transmission service under the OATT:

> We reiterate that we are not . . . requiring that bundled retail service be taken under the [OATT]. However, the amount of transmission capacity available to wholesale and unbundled retail customers under the [*pro forma* OATT] is clearly affected by the amount of transmission capacity that the transmission provider reserves for its native load customers . . . .

Order No. 888 at 31,745.

Accordingly, the Commission took steps to assure that transmission providers did not reserve more capacity than was needed to serve bundled retail

load. Transmission providers could reserve only such capacity (1) that was needed to serve existing native load demand or (2) that would be needed to serve reasonably forecasted native load growth. Order No. 888 at 31,745. In addition, transmission providers had to make the latter capacity available to other shippers until it was actually needed to meet native load requirements. *Ibid.*

The provision here at issue, OATT § 28.2, reflects the Commission's intent to assure comparability between transmission service used to serve bundled retail load and that used to serve other loads, and to prevent unnecessary tying up of capacity under the pretext of serving bundled retail load. The provision requires that transmission providers seeking to reserve capacity to serve their "native load customers" designate network resources. The provision states, in pertinent part: "The Transmission Provider, on behalf of its Native Load Customers, shall be required to designate resources and loads in the same manner as any Network Customer under Part III of this Tariff." *Id.* at 30,530 28.2 (JA 223). The requirement applies to service for retail, as well as for wholesale, customers. *Id.* at 30,508 1.19 (JA 203) (defining "Native Load Customers" to include "wholesale *and retail* power customers") (emphasis added).

II. The Proceedings Below

On March 30, 1998, Aquila Power Corporation filed a complaint, amended on June 23, 1998, against Entergy Services, Inc., as agent on behalf of the Entergy operating companies (collectively Entergy). *See* JA 1-30 & 66-144. The complaint charged that Entergy had reserved 2,000 Megawatts (MW) of firm capacity at separate interconnections with four different transmission providers for the purpose of importing power to serve its native load without designating any network resources in connection with these reservations. *Aquila Power Corp. v. Entergy Servs., Inc.*, 90 FERC 61,260 at 61,858-59 (2000) (JA 153-54).[5]

By order dated March 16, 2000, the Commission found that Entergy's action violated OATT § 28.2. 90 FERC ¶ 61,260 (JA 152-58) ("March 16, 2000 Order"). Entergy had "reserved virtually all of the firm interface capacity on four key interfaces, even though it had no off-system network resources." *Id.* at 61,859 (JA 154). By reserving transmission capacity without designating associated network resources, Entergy violated OATT 28.2 s requirement that transmission providers reserving capacity to serve their native load customers designate network resources. *Id.* at 61,859-60 (JA 154-55). Accordingly, the Commission granted the complaint as to this issue and directed Entergy to cease its violations. *Id.* at

[5]Unless otherwise indicated, all citations to the *FERC Reports* are captioned *Aquila Power Corp. v. Entergy Servs., Inc.*

61,861 (JA 156). On April 17, 2000, Entergy requested rehearing, JA 159-78, which was denied by order dated July 26, 2000. 92 FERC 61,064 (2000) (JA 179-82) ("July 26, 2000 Order"). On August 25, 2000, Entergy filed a second request for rehearing, JA 183-93, which was denied by order dated December 20, 2002. 101 FERC 61,328 (2002) (JA 194-97) ("December 20, 2002 Order").

The petition for review followed.

SUMMARY OF ARGUMENT

The Commission's interpretation of OATT § 28.2 follows its explicit language. That provision requires transmission providers to designate network resources for capacity reserved to serve native load customers, and OATT § 1.19 defines native load customers to include all retail sales customers. Thus, the Commission's determination that OATT § 28.2 requires designation of network resources for capacity reserved to serve bundled retail load was consistent with OATT's language and was otherwise reasonable.

Conversely, Entergy's contention that OATT 28.2 applies only to unbundled transactions cannot be reconciled with OATT language that requires a transmission provider to designate network resources when reserving capacity to serve native load customers (§ 28.2), and that defines "Native Load Customers" as encompassing retail customers (§ 1.19). Entergy has identified no language that expressly or implicitly limits the designation requirement to unbundled transactions, and adoption of Entergy's interpretation would be equivalent to modifying the OATT, without the required notice and opportunity to comment, under the guise of interpretation.

Moreover, Entergy's interpretation of § 28.2 would render it superfluous, because even without that provision, the OATT requires a transmission provider to designate network resources when it reserves capacity to serve native load customers that are taking unbundled services. Section 35.28(c)(2) of the Commission's regulations requires transmission providers to take *all* unbundled transmission services, including services for native load, under the OATT. The OATT, in turn, imposes the designation requirement on all parties taking network services. Thus, under Entergy's interpretation, OATT § 28.2 would impose only requirements that already are imposed by other provisions of the OATT.

Entergy's assertion of a conflict between the Commission's interpretation of OATT § 28.2 and Preamble language in Order Nos. 888 and 888-A is irrelevant and erroneous. The assertion is irrelevant, because even if such a conflict existed, the language of § 28.2, upon which the Commission's interpretation is grounded, would necessarily prevail. The assertion is erroneous, because the Commission properly harmonized the pertinent Preamble language with the pertinent language of OATT § 28.2. The Preambles state that transmission providers need not take transmission on behalf of bundled retail sales customers under the OATT, and the Commission does not interpret OATT § 28.2 to impose such a requirement. Requiring a transmission provider to designate the network resources that will

serve its bundled retail load is not equivalent to requiring the provider to take transmission service employed to serve that load under the OATT, as Entergy suggests. Rather, designation of network resources is only one step in obtaining transmission service under the OATT.

Moreover, the Commission's interpretation of OATT § 28.2 furthers, rather than contravenes, the policies articulated in the Preambles. Applying the designation requirement to reservation of capacity for bundled retail load helps to assure that network customers serving their loads under the OATT will receive service comparable to that received by transmission providers serving their bundled retail loads, and that customers seeking transmission service under the OATT will not be deprived of access because a transmission provider has unnecessarily tied up capacity under the pretext of serving its bundled retail load.

Entergy's claim that the Commission's interpretation will jeopardize system reliability is equally without merit. What is at issue is not Entergy's right to reserve sufficient capacity to meet reliability requirements, but its obligation to designate network resources while it is reserving that capacity. In any event, the record clearly shows that Entergy's reservations of capacity in this case were effectuated for economic, rather than reliability, reasons.

ARGUMENT

I. STANDARD OF REVIEW

At issue here is whether the Commission correctly interpreted OATT § 28.2. Because the Commission promulgated that provision in the same manner it would promulgate a regulation – *i.e.*, after notice and comment – the Court properly reviews the Commission's interpretation of the provision under the standards employed for review of an agency's interpretation of a regulation that the agency administers.

This Court defers to such an agency interpretation as long as it is not "'plainly erroneous or inconsistent with the regulation.'" *Drake v. FAA*, 291 F.3d 59, 68 (D.C. Cir. 2002) ("*Drake*") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)); *KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1299 (D.C. Cir. 1992). Similarly, the Court defers to FERC's interpretations of its orders so long as the interpretations are reasonable. *See East Tex. Coop. v. FERC*, 218 F.3d 750, 753-54 (D.C. Cir. 2000) ("*East Texas*"); *Texaco, Inc. v. FERC*, 148 F.3d 1091, 1099 (D.C. Cir. 1998) ("*Texaco*"); *Natural Gas Clearinghouse v. FERC*, 108 F.3d 397, 399 (D.C. Cir. 1997) ("*Clearinghouse*").

II. THE COMMISSION PROPERLY FOUND THAT ENTERGY VIOLATED SECTION 28.2 OF THE *PRO FORMA* OPEN-ACCESS TRANSMISSION TARIFF.

A. The Commission's Interpretation Of The Tariff Follows Its Express Language.

Entergy reserved 2,000 MW of capacity at four interconnnections with other systems, which was virtually all of the firm interface capacity on four key interfaces, even though [Entergy] had no off-system network resources." 90 FERC at 61,859 (JA 154). The Commission found this to be a direct violation of OATT § 28.2, observing that [t]here is no ambiguity in the *pro forma* tariff on this point. Under 28.2, a transmission provider *must* designate resources and loads on behalf of its native load customers *on the same basis* as do its network customers. *Ibid.* (emphasis in original).

The Commission's interpretation follows the express language of the OATT. OATT § 29.2(v) requires a network customer to designate, as a prerequisite to obtaining network transmission service, the "network resources" that will generate the power to be transmitted over the reserved capacity. *See* Order No. 888-A at 30,531-32 § 29.2(v) (JA 225). OATT § 28.2, in the same way, requires a transmission provider to designate network resources used to serve "Native Load Customers." *Id.* at 30,530

§ 28.2 (JA 223). OATT § 1.19, in turn, defines "Native Load Customers" as the "wholesale *and retail* power customers . . . on whose behalf the Transmission Provider . . . has undertaken an obligation to construct and operate the Transmission Provider s system to meet the reliable electric needs of such customers." *Id.* at 30,508 1.19 (JA 203) (emphasis added). Accordingly, the Commission's interpretation of OATT § 28.2, as requiring transmission providers to designate network resources when reserving capacity to serve bundled retail load, was, at a minimum, "not plainly erroneous or inconsistent with" the provision's language. *See Drake*, 291 F.3d at 68.

B. Entergy's Arguments To The Contrary Are Unavailing.

1. Entergy s Proposed Alternative Interpretation of *Pro Forma* Tariff § 28.2 Cannot Be Reconciled With The Provision's Language or Function.

Entergy claims that OATT 28.2 is properly interpreted as applying only *when FERC s functional unbundling requirement applies, i.e.*, when the transmission provider is making a new wholesale sale and therefore must follow the OATT. Br. at 16 (emphasis in original). This interpretation fails for two reasons.

First, the interpretation attempt[s] to dismiss the plain language of 28.2 of the *pro forma* tariff[.] 90 FERC at 61,859 (JA 154). Entergy is attempting to read

language into that provision that would limit its application to unbundled transactions, yet the provision applies the designation requirement, without limitation, to a transmission provider's reservation of capacity "on behalf of its Native Load Customers," Order No. 888-A at 30,530 § 28.2 (JA 223), and OATT § 1.19 defines "Native Load Customers" to include wholesale and retail power customers. *Id.* at 30,508 § 1.19 (JA 203). Neither provision contains language expressly or implicitly limiting its application to customers taking unbundled services. Accordingly, adopting Entergy's proposed interpretation would be equivalent to modifying the OATT under the guise of interpretation, s*ee* *Christensen v. Harris County*, 529 U.S. 576, 588 (2000), *Drake*, 291 F.3d at 68, without the required notice and opportunity to comment. *See* 5 U.S.C. § 553.

Second, the interpretation would render OATT § 28.2 superfluous. The Commission's regulations already require transmission providers to take all unbundled transmission service, including service used to serve native load, under the OATT. *See* 18 C.F.R. § 35.28(c)(2) (transmission providers that "engage in wholesale sales . . . or unbundled retail sales of electric energy, must take transmission service for such sales" under the OATT). The OATT, in turn, requires all entities seeking to reserve network transmission capacity to designate network resources. Order No. 888-A at 30,531-32 § 29.2(v) (JA 225). Thus, even

without OATT § 28.2, transmission providers must designate network resources in order to reserve network transmission capacity to serve native load customers taking unbundled services. Accordingly, Entergy's construction of OATT § 28.2 as imposing no requirement that is not imposed elsewhere should be avoided. *See Jay v. Boyd*, 351 U.S. 345, 360 (1956) (Court must read a body of regulations "so as to give effect, if possible, to all of its provisions"); *Black & Decker Corp. v. Commissioner of Internal Revenue*, 986 F.2d 60, 65 (4th Cir. 1993) ("Chief among" canons governing interpretation of statutes and regulations "is the mandate that constructions that render regulatory provisions superfluous are to be avoided.") (internal quotation omitted).[6]

2. The Commission's Interpretation of the *Pro Forma* Tariff Is Consistent with the Goals Set Out In the Preambles to Order Nos. 888 and 888-A.

Entergy seeks to deflect the focus from the language of the OATT to an alleged conflict between the Commission's interpretation of that language and statements in the Preambles of Order No. 888 and 888-A. According to Entergy, the Commission's interpretation of OATT § 28.2 serves to do "what Order No. 888

6Though the Commission did not rely on this argument in reaching its ruling, the Court has held that it may properly consider additional arguments that support agency interpretations of jurisdictional statutes or documents. *See Ameren Servs. Co. v. FERC*, 330 F.3d 494, 501 n.10 (D.C. Cir. 2003) (contract); *American Bankers Community v. FDIC*, 200 F.3d 822, 835 (D.C. Cir. 2000) (statute).

said it would not do: regulate the transmission component of bundled retail sales." Br. at 12. Entergy urges that the Preambles "clearly limited the scope of the OATT, applying it only to new wholesale or unbundled retail sales." *Id.* at 13 (citing Order No. 888 at 31,745 and Order No. 888-A at 30,217).

The contention that the Commission's interpretation of OATT § 28.2 conflicts with language in the Preambles is irrelevant. As discussed, the Commission's interpretation is grounded on the provision's plain language, whereas Entergy's interpretation cannot be reconciled with that language. Accordingly, regardless of what Entergy may claim about the Preamble language, the Commission's interpretation prevails. *See Wyoming Outdoor Council v. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999) ("*Wyoming Outdoor*") ("language in the preamble of a regulation is not controlling over the language of the regulation itself").[7]

Entergy's contention is also erroneous, because the Commission properly harmonized the pertinent Preamble language with the pertinent language of OATT

7To be sure, preamble language "is evidence of an agency's understanding of its proposed rules." *Wyoming Outdoor*, 165 F.3d at 53. However, this court has only looked at such evidence where the regulations were susceptible to more than one interpretation. *See ibid.*; *Tozzi v. Department of Health & Human Servs.*, 271 F.3d 301, 311 (D.C. Cir. 2001); *Consolidated Coal Co. v. Federal Mine Safety & Health Review Comm'n*, 136 F.3d 819, 822 (D.C. Cir. 1998). Entergy has failed to establish any such susceptibility here.

§ 28.2. The Preamble language cited by Entergy states only that transmission providers need not take transmission service for their bundled retail load under the OATT. *See* Br. at 13 (citing Order No. 888 at 31,745; Order No. 888-A at 30,217). The Commission explained that its interpretation of OATT § 28.2 does "not require a transmission provider to obtain transmission service under the tariff when purchasing power on behalf of bundled retail native load customers," but does "require the transmission provider to designate resources in the same manner as any network customer under the tariff." 92 FERC at 61,192 (JA 181). "Obtaining service under the tariff involves among other things, executing a service agreement and agreeing to be bound by all rates, terms and conditions of the tariff. *Id.* n.12 (JA 181). Designating network resources involves none of these things. Accordingly, "a public utility, such as Entergy, can purchase power on behalf of its bundled retail native load customers and can use its transmission system to deliver that power without obtaining service under the tariff. 92 FERC at 61,192 (JA 181).[8]

[8]Entergy takes issue with the Commission's statement that a transmission provider "'must comply with certain provisions of the [OATT] that specifically relate to the provision of service to native load customers,'" contending that the Commission arbitrarily failed to specify all of the requirements referenced. Br. at 14 (quoting 92 FERC at 61,192 n.12 (JA 181)). However, the only such requirement at issue in this case is expressly imposed by 28.2. Accordingly, Entergy's contention that it

The Commission's interpretation of OATT § 28.2 serves, rather than contravenes, the policy goals articulated in the Preambles. That interpretation serves the goal of comparability between the transmission service employed by a network customer to serve its load and the transmission service employed by a transmission provider to serve its native load, *see* Order No. 888-A at 30,218, by subjecting the network customer and the transmission provider to the same designation requirement. Applying the designation requirement to reservation of capacity for bundled retail load also serves the goal of discouraging transmission providers from tying up capacity unnecessarily on behalf of such customers. *See* Order No. 888 at 31,745 (because "the amount of transmission capacity available to wholesale and unbundled retail customers under the [OATT] is clearly affected by the amount of transmission capacity that the transmission provider reserves for its native load customers [*i.e.*, bundled retail customers,]" transmission providers may only reserve capacity for native load to the extent necessary to meet existing or reasonably forecast future demand, and must release capacity reserved for future demand until it is actually needed); Order No. 888 at 31,754 (the designation requirement provides the transmission provider "an incentive not to oversubscribe"

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lacks guidance as to other potential requirements has little relevance.

its capacity requirements, because the costs of these "excessive margin requirements [would] be prohibitive").

Indeed, the Commission's application of OATT § 28.2 in this case prevents Entergy from further thwarting such goals. "Entergy used its firm transmission reservation to purchase power whenever it was economical for it to do so[,] while denying all firm transmission requests and granting non-firm transmission requests only when it was unable to arrange a sales transaction for itself. 90 FERC at 61,859 (JA 154). In this manner, Entergy "improperly withheld capacity." *Id.* at 61,860 (JA 155). Accordingly, "Entergy s practice, of reserving all of the transmission capacity at four critical interfaces, without designating any resources or loads," was "exactly the type of behavior" that OATT § 28.2's designation requirement was "intended to prevent." 92 FERC at 61,192 (JA 181).[9]

Accordingly, the Commission's interpretation of the Preambles as not conflicting with its interpretation of OATT § 28.2 was reasonable and should be

[9]Entergy asserts that the designation of network resources is burdensome. Br. at 14-15. However, as the purpose of the designation requirements is to discourage parties such as Entergy from tying up capacity unnecessarily, *see* Order No. 888 at 31,754, *WPPI*, 83 FERC at 61,856, any burden is more than offset by the salutary effect of making more capacity available for transmission customers.

upheld. *See East Texas*, 218 F.3d at 753-54; *Texaco*, 148 F.3d at 1099; *Clearinghouse*, 108 F.3d at 399.

Entergy further contends that because the *only* way to reserve network capacity under the OATT is to designate network resources[,] requiring a transmission provider to designate resources in serving its bundled retail load . . . accomplishes the very result eschewed by Order No. 888 requiring a utility to reserve service under its OATT for bundled retail load. Br. at 14-15 (emphasis in original).

The Court lacks jurisdiction to consider this argument. Entergy did not contend in any request for rehearing that requiring designation of network resources as a prerequisite to reserving transmission capacity conflicts with some (unspecified) Order No. 888 statement that transmission providers need not reserve capacity under the OATT. *See* JA 159-78 & 183-93.[10] Entergy s failure to argue to make this argument on rehearing deprives the Court of jurisdiction to consider the argument on judicial review. *See* 16 U.S.C. 825*l*(b) (court lacks jurisdiction

10Entergy's contentions on rehearing regarding the OATT's inapplicability to transmission of purchased power to bundled retail load (JA 160-61, 165) did not preserve Entergy's argument regarding the OATT's alleged inapplicability to reservation of capacity for such load. *See Domtar Me. Corp. v. FERC*, 347 F.3d 304, 313 (D.C. Cir. 2003) (even FERC's concession "that two arguments are closely related (if not equivalent)" does not allow "a litigant to make one argument to the Commission and then another on appeal").

to consider objections not raised in a timely request for rehearing below unless good cause exists for failing to raise the objection); *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 34-35 (D.C. Cir. 1992) (*Platte River*) (requirement that a petitioner raise all objections to a Commission order in a timely rehearing request below is jurisdictional and cannot be waived).

In any event, Entergy s argument fails on the merits. Entergy cites no language in Order No. 888 limiting the OATT's application to a transmission provider's reservation of capacity to serve bundled retail load. On the contrary, Order No. 888 sets limits to how much capacity transmission providers may reserve for bundled retail load. *See* Order No. 888 at 31,745.[11]

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11 Petitioner contends that the Commission's statement that "'[a] transmission provider *taking network service to serve network load under the tariff also* is required to designate its resources and is subject to the same limitations required of any other network customer'" demonstrates that the Commission did not intend for transmission providers to have to designate network resources to reserve network capacity for bundled retail load. Br. at 13 (quoting Order No. 888 at 31,753; emphasis in brief). The Commission, however, explained that the quoted language "addresses the scenario in which the transmission provider obtains network service under the tariff on behalf of a wholesale customer." 92 FERC at 61,192 (JA 181). The language does not exclude application of § 28.2 in other scenarios, such as "when Entergy is purchasing power on behalf of retail native load customers." *Ibid.*

3. Entergy's Contentions Regarding Reliability Are Without Merit.

Entergy's claim that the Commission s ruling will discourage utilities from arranging importations of power from other systems and thereby threaten system reliability, Br. at 16-17, is invalid for two reasons. First, the ruling in no way prevents a utility from reserving transmission import capacity for generation reserve requirement purposes," but "merely requires designation of resources associated with that reservation. 92 FERC at 61,193 (JA 182). *See also* 90 FERC at 61,859-60 (JA 154-55) (the issue in this case is not whether Entergy is allowed "to reserve sufficient capacity to serve native loads reliably," but "whether, in reserving sufficient capacity to meet retail load requirements, Entergy must designate network resources in the same manner as do its OATT customers").[12] Second, the Commission reasoned that whereas Entergy s alleged concern regarding the increased cost of reliability was premised on Entergy's "claim that its reservations of transmission import capacity were made for reliability purposes, the March 16, 2000 Order found that the reservations at issue were made for economic, not reliability reasons. *Ibid.*

12The Commission noted that it had previously ruled that the designation requirement applies to all network resources, "'including those acquired for the purpose of meeting generation reserves,'" *i.e.*, meeting reliability requirements. 90 FERC at 61,860 (JA 155) (quoting *WPPI*, 83 FERC at 61,857-58).

Entergy claims that the March 16, 2000 Order made no such finding and that, in any event, Entergy provided an unrebutted affidavit showing "that reservation of 2,000 MW of import capacity was necessary to meet reliability needs." Br. at 17-18. However, these claims are also without merit.

The March 16, 2000 Order clearly stated that the utility's reservation of capacity was for economic, rather than reliability purposes:

> Based on a generalized claim of reliability, Entergy reserved sufficient capacity on its system to reach all of its network resources and reserved virtually all of the firm interface capacity on four key interfaces, even though it had no off-system network resources. Instead, Entergy used its firm transmission reservation to purchase power whenever it was economical for it to do so. Entergy denied all firm transmission requests and entertained non-firm transmission requests only when it was unable to make an economic deal for itself.

90 FERC at 61,859 (JA 154). Indeed, Entergy's request for rehearing of the March 16, 2000 Order acknowledged that "FERC concludes that Entergy's use of reserved import capacity was for economic, not reliability reasons." JA 169.

The Court is without jurisdiction to consider Entergy's objections to the Commission's finding. While noting the finding on rehearing, Entergy failed to

challenge its substance.[13] That failure deprives the Court of jurisdiction to consider any such objections here. *See* 16 U.S.C. 825*l*(b); *Platte River*, 962 F.2d at 34-35.

Finally, when Entergy later raised an *untimely* objection to the March 16, 2000 Order s findings by citing the affidavit in a request for rehearing of the July 26, 2000 Order, *see* 16 U.S.C. 825*l*(a) (request for rehearing must be filed within 30 days of issuance of the order), the Commission rejected the proffered affidavit, explaining that neither in [the affidavit] nor in its request for rehearing has Entergy provided anything more than the conclusion of that study; not the study, the assumptions, or any other documentation underlying the study. 101 FERC at 62,365 (JA 196). There were good reasons to suspect such unsupported conclusions on this point, because an earlier Entergy loss of load study issued under similar circumstances had proven significantly flawed :

> [I]n an earlier filing, Entergy filed a loss of load study to support a 2900 MW reservation of import capacity that Entergy proposed to set aside for native load use and not make available to customers under its OATT. Upon review of the study and supporting documentation, the Commission found the study to be significantly flawed and required Entergy to recompute its ATC. *See Entergy*

13 Entergy argued only that the Commission should have held a hearing on the issue, *see* JA 169, an argument Entergy does not make here.

> *Operating Cos.*, 87 FERC 61,156, at pp. 61,626-27 (1999).

Id. n.17.

Entergy does not take issue with the Commission's reasoning concerning the affidavit. Accordingly, the Commission's ruling on this point is not only eminently

reasonable but also unchallenged. *See also* 16 U.S.C. 825*l*(b) ("the findings of the Commission as to the facts, if supported by substantial evidence shall be conclusive").[14]

[14]Entergy also asserts that the July 24, 2000 Order's finding that the reserved import capacity was also used to serve wholesale customers was erroneous. Br. at 18-19. However, the December 20, 2002 Order made clear that assuming Entergy had adequately demonstrated that power purchases associated with its firm transmission reservations would, in fact, be made only on behalf of retail native load customers, Entergy s obligation to specifically designate resources and load would have remained unaltered by such a demonstration. 101 FERC at 62,365 (JA 196).

CONCLUSION

For the foregoing reasons, the Commission requests that the Court affirm the challenged orders in their entirety.

Respectfully submitted,

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