ORAL ARGUMENT IS SCHEDULE FOR NOVEMBER 4, 2004

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

No. 03-1284

BOROUGH OF OLYPHANT, PENNSYLVANIA,
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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APRIL 15, 2004
FINAL BRIEF: JUNE 4, 2004

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

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

B. Ruling Under Review

1. *PPL Electric Util. Corp.*, 101 FERC ¶ 61,370 (2002);

2. *PPL Electric Util. Corp.*, 104 FERC ¶ 61,259 (2004).

C. Related Cases

This case has not previously been before this Court or any other court. Counsel is not aware of any other related case involving substantially the same parties and the same or similar issues pending before this or any other court, although substantially the same parties are currently litigating antitrust claims involving these facts *Borough of Olyphant v. PP&L Inc., et al.*, Civil Action No. 03-4023 (E.D. Pa.).

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June 4, 2004

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GLOSSARY

Initial Order	*PPL Electric Util. Corp.*, 101 FERC ¶ 61,370 (2002)
PPL	PPL Electric Utilities Corporation
PUC	Pennsylvania Public Utilities Commission
Rehearing Order	*PPL Electric Util. Corp.*, 104 FERC ¶ 61,259 (2003)
Stranded Cost Order	*Boroughs of Lansdale et al.*, 77 FERC ¶ 61,045 (1996)

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

1. Whether the Federal Energy Regulatory Commission ("Commission" or "FERC") properly issued a declaratory order that clarified the meaning of a settlement agreement that it had previously approved.

2. Whether the clarification reasonably interpreted the settlement agreement.

STATUTORY AND REGULATORY PROVISIONS

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

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition Below

The challenged orders granted PPL Electric Utilities Corporation's ("PPL") request for a declaratory order as to whether a FERC-approved settlement agreement between PPL and Petitioner governed the obligation of certain PPL retail customers to pay retail stranded costs to PPL. *PPL Electric Util. Corp.*, 101 FERC ¶ 61,370 (2002) ("Initial Order"), *on rhr'g*, 104 FERC 61,259 (2003) ("Rehearing Order"). The settlement agreement had resolved an earlier FERC case that had addressed the question, "whether PP&L may recover stranded costs from the Boroughs [including Petitioner] and, if so, in what amount." *Boroughs of Lansdale et al.*, 77 FERC ¶ 61,045 at 61,159 (1996) ("Stranded Cost Order").

Petitioner sought to intervene and to deny PPL's motion because, among other reasons, the parties were litigating antitrust and contract issues related to the same set of facts in *Borough of Olyphant v. PP&L, Inc. et al.*, No. 3:CV-01-2308 (M.D. Pa. filed Dec. 5, 2001).[1] Declining Petitioner's request, the Commission found that its experience and expertise in "delineat[ing] the distinction between wholesale and retail stranded costs," Initial Order ¶ 13, JA 343, and in setting this

[1] The action has since been transferred to the Eastern District of Pennsylvania. *Borough of Olyphant v. PP&L Inc., et al.*, Civil Action No. 03-4023.

particular matter for hearing and then in approving the settlement agreement at issue warranted its ruling on PPL's question. The Initial Order then clarified "that the Settlement Agreement does not address . . . PPL's ability to recover retail stranded costs from its existing retail customers." *Id*. ¶ 14 (emphasis in original; footnote omitted). Petitioner sought rehearing on several grounds, which were denied by the Rehearing Order, ¶¶ 7-12. JA 388-389.

II. Statement of Facts

A. The Original FERC Litigation

Petitioner and other Pennsylvania Boroughs filed an application "under sections 211-213 of the FPA [16 U.S.C. §§ 824j, 824k, 824*l*] requesting that the Commission order PP&L to provide firm transmission services to the Boroughs to enable them to reach other suppliers without PP&L seeking to recover any stranded investment costs from the Boroughs." Stranded Cost Order, 77 FERC at 61,155. The applicants asked that the new transmission service commence on February 1, 1999, when their existing contracts with PPL expired. *Id*. During this same period, PPL filed its Order No. 888[2] *pro forma* open access tariff that offered the transmission service being sought. *Id*. at 61,157.

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[2] *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 (1996)("Order

Accordingly, the Commission dismissed the application for transmission service, and set up a trial-type hearing procedure to determine whether "PP&L may recover stranded costs from the Boroughs and, if so, in what amount." *Id*. at 61,158-59. On March 31, 1998, the parties to the litigation filed a settlement agreement. R.1., App. B, JA 22-55. The Commission approved the agreement as in the public interest by a May 29, 1998 Letter Order. R.1, App. E, JA 96-99. Petitioner and PPL, in accordance with the settlement, entered a Power Supply Agreement, dated December 8, 1998, that set the terms of service between them commencing February 1, 1999. R.1, App. D, JA 79-95.

B. Events Leading To The Challenged Orders

The underlying dispute here involves approximately 75 commercial and industrial end-users located in an industrial park that falls within both PPL's service area and Petitioner's borough limits. Initial Order ¶ 5, JA 32. These end-users have been retail customers of PPL, but "since 1997 . . . Olyphant has been

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No. 888"), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1996), *on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *clarified*, 79 FERC & 61,182 (1997), *on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998); *Open Access Same-Time Information System and Standards of Conduct*, Order No. 889, FERC Stats. & Regs. ¶ 31,035 (1996)("Order No. 889"), *on reh'g*, Order No. 889-A, FERC Stats. & Regs. ¶ 31,049 (1997), *on reh'g*, Order No. 889-B, 81 FERC ¶ 61,253 (1997), *aff'd in part, remanded in part, Transmission Access Policy Study Group, et al. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub. nom, New York v. FERC*, 535 U.S. 1 (2002).

taking steps to acquire these customers and has filed a lawsuit relating to these matters . . . [in which Petitioner] has alleged, among other things, that the Settlement Agreement frees PPL's retail customers from their obligations to pay retail stranded costs if these retail customers terminate their service from PPL and become, instead, customers of Olyphant." *Id*.

After Pennsylvania enacted a retail unbundling statute, PPL applied to the Pennsylvania Public Utility Commission ("PUC") to recover "certain costs that [PPL] claimed had become stranded due to the enactment of" the state unbundling law. Initial Order ¶ 4, JA 34. The PUC issued an order in August 1998 that allowed PPL to recover "up to $2.97 billion in stranded costs from all retail customers located in its certificated service territory." *Id*. The end-users at issue here pay retail stranded costs to PPL consistent with the PUC's ruling. Petitioner's antitrust action against PPL alleges, as pertinent here, that PPL has "breached the [FERC-approved Settlement Agreement and Power Supply Agreement] by informing [Petitioner], as well as customers that [Petitioner] is competing to serve, that if [Petitioner] seeks to resell wholesale power under the federally approved agreements to any customers located within the Borough with whom [PPL] seeks to provide service, [Petitioner and/or the customer] would be required to pay [PPL] an additional stranded cost charge." R. 7, pp. 5-6, JA 267.

C. The Orders Under Review

On October 18, 2002, PPL filed a petition for declaratory order, seeking a ruling that if Petitioner "secures the right to provide electric service to certain of PPL's existing retail customers, the Settlement Agreement would not address (and would not otherwise govern) the obligation of those retail customers to pay retail stranded costs to PPL." Initial Order ¶ 1, JA 341. PPL argued that "while the Settlement Agreement resolved all issues relating to its wholesale stranded cost claims" that had been the subject of the Stranded Cost Order proceeding, "the stranded cost obligations of PPL's retail customers were separately addressed by" the PUC. Initial Order ¶ 4, JA 341. PPL asked for "confirmation that the Settlement Agreement addresses only the wholesale stranded cost obligations of the parties to that agreement, including Olyphant, and do[es] not affect the retail stranded cost obligations of PPL's retail customers (who were not parties to the Settlement Agreement)." *Id*. ¶ 6, JA 342.

Petitioner protested PPL's request on grounds that "PPL should not be permitted to fragment the body of issues now pending in Olyphant's district court [antitrust] action against PPL (in which the meaning of the Settlement Agreement is directly at issue)." *Id*. ¶ 8, JA 342. On the merits, Petitioner argued that "the Settlement Agreement, on its face, precludes PPL from seeking to recover stranded

costs applicable to Olyphant's wholesale purchases (regardless of the loads served by these purchases and their existing status under Pennsylvania law)." *Id.*

The Commission found that, under its precedent related to primary jurisdiction, it could (contrary to Petitioner's claim) appropriately rule on the request while the matter was pending at federal district court. Initial Order ¶ 12, JA 342-343. FERC brought expertise to interpretation of the Settlement Agreement because of its prior approval of it and because the Agreement resulted from "the evidentiary hearing procedures established by the Commission in the Stranded Cost Order and was negotiated and agreed to by the parties following the development of an extensive record in that proceeding." *Id*. ¶ 13, JA 343. Besides this specific involvement in the immediate matter, the Settlement Agreement addressed issues that "are directly related to the stranded cost policies and guidelines set forth by the Commission in Order No. 888," which "delineated the distinction between wholesale and retail stranded costs." *Id*. (footnote omitted).

Turning to PPL's request, the Commission focused on Article 6.2 of the Settlement, R.1, App. B, p. 18, JA 40, which "states, in relevant part, that PPL 'will not seek, and hereby waives the right to seek, any stranded cost recovery or exit fee <u>against any of the parties to this Settlement Agreement</u>.'" *Id*. ¶ 14, JA 343 (emphasis in original). Because the parties "were PPL's <u>wholesale</u> requirements

customers" who were litigating "their rights to wholesale services," the Commission clarified that "the Settlement Agreement does not address-and thus would not limit or preclude-PPL's ability to recover retail stranded costs from its existing retail customers." *Id*. (emphasis in original). The accompanying footnote reinforced that the Stranded Cost Order "set for hearing no issues relating to PPL's recovery of retail stranded costs from its existing customers," and that "PPL's retail customers . . . were not parties to the proceeding." *Id.* n. 12 (emphasis in original). FERC expressly noted it was not asked to, and did not, address "PPL's entitlement to recover retail stranded costs from its existing retail customers," as that was a matter separately decided by the PUC. *Id*. ¶ 15, JA 343.

Petitioner raised "a number of legal and procedural challenges" on rehearing. Rehearing Order ¶ 5, JA 387. Among them were that: the federal district court had "exclusive jurisdiction over the settlement interpretation issues" as part of the antitrust litigation; FPA § 317, 16 U.S.C. § 825p, bars a FERC interpretation of the Agreement in the face of the district court litigation; and, the Commission could not vacate its order approving the Agreement in the absence of a petition for rehearing of that order. *Id*. ¶ 5, JA 387-388. Assuming jurisdiction, Petitioner argued that the Initial Order "improperly construed and unlawfully modified the Settlement Agreement." *Id*. ¶ 6, JA 388.

Petitioner's challenges were rejected in the Rehearing Order. First, FERC was "not required to decide and did not address any antitrust claims" or any other claim not encompassed "within the four corners of the Settlement Agreement." *Id*. ¶ 7, JA 388. In addition, because FERC did not seek enforcement or injunction of its order approving the Agreement, FPA § 317 did not come into play. *Id*. Further, rather than vacating that order or modifying the Agreement, as Petitioner claimed, the Initial Order "only clarifi[ed] that the Settlement Agreement did not apply to non-parties," and thus did not address "PPL's ability to recover retail stranded costs from its existing retail customers." *Id.*

The Commission also denied that it had ruled on whether "PPL can continue to impose retail stranded costs on its existing retail customers, even if these retail customers are subsequently annexed by Olyphant." Rehearing Order ¶ 9, JA 388. The Commission was "not asked to address (and would not address) PPL's rights and obligations" on that point given that it was "the subject of a separate proceeding before the Pennsylvania [PUC]." *Id*. ¶ 9, JA 388-389. On the argument that if Petitioner were to take over service to the end-users at issue, any retail stranded cost for which they would be liable would be transformed into "a wholesale stranded cost that would fall under the Settlement Agreement, not a retail stranded cost," the Commission found that neither the Agreement nor Order

888 was intended to address that question. *Id*. ¶¶ 10-11, JA 389. Rather, such issues were to be addressed by state regulatory authorities, as was done here, without FERC involvement. *Id*. Moreover, the Commission did not see any reason to opine on the issue because it was "not asked to address (and d[id] not address) PPL's obligations under the state-issued order." *Id*. ¶ 12, JA 389.

The petition for review followed.

SUMMARY OF ARGUMENT

Because the Commission was asked to clarify the meaning of a settlement agreement that it had approved, the Court reviews the orders under the *Chevron* analysis. First, the Court looks to whether the language of the agreement unambiguously addresses the question at issue. If the language addresses the issue unambiguously, it controls. If the language is ambiguous, FERC's interpretation is reviewed under a deferential reasonable standard.

FERC is not subject to Article III of the Constitution, and thus it can issue a declaratory order even if the matter does not meet the constitutional "case or controversy" requirement. The APA, 5 U.S.C. § 554(e), allows agencies to issue declaratory orders that will terminate a controversy or remove uncertainty. That section is incorporated into 18 C.F.R. § 385.207(a)(2), the FERC rule invoked in

the declaratory order request. Thus, FERC may act on the request, even if the same sort of request could not be heard by a federal court.

Here, no ruling was made on matters that were being addressed in federal district court litigation between the parties. Specifically, the orders do not address antitrust claims. Rather, the orders address only issues that fit within the confines of the agreement. Likewise, FERC's ruling here did not deprive the district court of its exclusive jurisdiction over antitrust claims, but, rather, allowed the Commission to address a discrete question that is within its jurisdiction and expertise. In such cases, a court may, in its discretion, defer the issue until an agency has spoken on a specific issue. It appears here that no party in the district court action sought to stop the Commission from issuing the declaratory order.

The Commission concluded, based on its review of the settlement agreement language and its own order setting the matter for hearing, that the Stranded Cost Order case involved only stranded costs related to wholesale service, and did not address what retail costs, if any, retail customers are obligated to pay. Moreover, the issue of stranded cost recovery received considerable attention in the Order No. 888 rulemaking. On the question of recovery associated with retail customers, FERC made a policy choice to leave this question for state commissions, at least initially, because this is a matter primarily of local concern.

On the question of stranded cost recovery for retail-turned-wholesale customers, the Commission's test for determining whether it or a state commission should address the question turns on whether the recovery would not have been incurred but for FERC action. Here, Petitioner has indicated that it derives authority to provide service to the customers at issue from a change in Pennsylvania law, not from FERC action. Accordingly, the matter was one for the Pennsylvania PUC to decide, which it has done.

No *Mobile-Sierra* issue is presented here because the orders clarify, rather than modify, the scope of the existing settlement agreement. As this interpretation did not require or result in a change to the agreement's language, the *Mobile-Sierra* doctrine was not implicated. FERC's clarification of the agreement's scope focused on who were "parties" to the underlying case and to the agreement. Under FERC's rules, anyone wishing to become a party to a proceeding must seek to intervene. Because the industrial end-users at issue had never sought to intervene, either individually or jointly, and become a party, they were not parties to the FERC proceeding. Further, they were not signatories to the agreement. Moreover, the hearing was set to address wholesale service issues, not retail issues, and thus the Commission reasonably interpreted the settlement to cover only wholesale, not retail, matters.

ARGUMENT

I. STANDARD OF REVIEW

A court reviews FERC orders under the "arbitrary and capricious" standard of the Administrative Procedure Act at 5 U.S.C. 706(2)(A). *Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). To satisfy that standard, the Commission must "demonstrate that it has made a reasonable decision based on substantial evidence in the record and the path of its reasoning must be clear." *Id.* (citations and internal quotations omitted).

A variation of the *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984), analysis applies to agency interpretation of jurisdictional contracts, *Ameren Services Co. v. FERC*, 330 F.3d 494, 498-99 (D.C.Cir. 2003); *Cajun Elec. Power Coop. v. FERC*, 924 F.2d 1132, 1135-36 (D.C. Cir. 1991), including settlement agreements, even if the "issue simply involves the proper construction of language." *Nat'l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1569-70 (D.C. Cir. 1987). *See also Cajun*, 924 F.2d at 1135 (noting that any "agreement that must be filed and approved by an agency loses its status as a strictly private contract and takes on a public interest gloss.").

Under *Chevron*, this Court first determines *de novo* whether a settlement subject to FERC's jurisdiction unambiguously addresses the matter at issue. If the

language is unambiguous, it controls. If there is ambiguity as to the matter at issue, the court "then examines the Commission's interpretation of that agreement 'under the deferential 'reasonable' standard.'" *Ameren*, 330 F.3d at 498, citing *Cajun*, 924 F.2d at 1136; footnote omitted.

II. FERC PROPERLY ISSUED A DECLARATORY ORDER

Petitioner asserts that FERC's action "is an impermissible advisory opinion" that does not meet the constitutional "case or controversy" requirement. Br. 24. That assertion fails to recognize that FERC and other agencies are not Article III courts, and therefore may properly issue declaratory orders to remove uncertainty. "An administrative agency, which is not subject to Article III of the Constitution of the United States and related prudential limitations, may issue a declaratory order in mere anticipation of a controversy or simply to resolve an uncertainty." *Pfizer Inc. v. Shalala*, 182 F.3d 975, 980 (D.C. Cir. 1999)(citation omitted); *see Kootenai Elec. Coop. v. FERC*, 192 F.3d 144, 147 (D.C. Cir. 1999)(same).

Statutory authority to issue declaratory orders is found in 5 U.S.C. § 554 (e), which allows an agency "in its sound discretion, [to] issue a declaratory order to terminate a controversy or remove uncertainty." FERC has implemented this provision into its regulations, 18 C.F.R. § 385.207(a)(2)(2003), by allowing parties to seek such orders. Indeed, PPL invoked this section of FERC's regulations in

asking for a declaratory order. R. 1, p. 1, JA 1. An agency may act under § 554(e) to terminate a controversy or remove uncertainty about a matter that does not meet the case or controversy requirement or the ripeness doctrine, even though both are necessary to proceed in federal court. *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 626 (1973); *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1161 (D.C. Cir. 1995). Thus, Petitioner is wrong that the Commission had no authority to issue a declaratory ruling here.

Petitioner claims that ongoing disputes about certain facts in the district court litigation meant the Commission was "not in a position to decide that PPL has acted properly in insisting that any of its retail customers that would choose to receive their electric power from Olyphant's distribution system are not covered by the ban on stranded costs in the Settlement Agreement." Br. 23-24. This claim mischaracterizes FERC's ruling. The Commission specifically disclaimed that it was ruling on that question. Rehearing Order ¶ 9, JA 388, ("we made no such ruling"). Rather, FERC recognized that that question "was the subject of a separate proceeding before the Pennsylvania [PUC]," and that it was not asked to address PPL's obligations under the state order *Id*.; *see* Initial Order ¶ 9, JA 342, (end-users ask that the Commission "not also interpret PPL's retail stranded cost obligations under Pennsylvania law"); *id*. ¶ 14 n.12, JA 343, (noting the Stranded

Cost Order did not involve any "issues relating to PPL's recovery of retail stranded costs from its existing retail customers").

In short, the declaratory orders here did not address the issues that Petitioner claims are still disputed in the federal court action.

III. FERC PROPERLY EXERCISED PRIMARY JURISDICTION HERE

Petitioner argues that federal district courts have exclusive jurisdiction over antitrust claims, and therefore "to the extent that the Order may be read to grant PPL immunity from federal antitrust laws, FERC has overstepped its bounds." Br. 21. But, again, the Commission was not asked to and did not address any antitrust claims in its Orders: "we were not required to decide and did not address any antitrust claims asserted by any party or any other issues other than those squarely presented within the four corners of the Settlement Agreement – a matter, which as we held in the [Initial] Order, falls within our primary jurisdiction." Rehearing Order ¶ 7, JA 388. Thus, the Commission did not address any antitrust issue, let alone grant PPL immunity from the antitrust laws.

Petitioner's related claim -- that where "a federal district court is exercising its exclusive jurisdiction over the enforcement of a prior final FERC order, the FERC lacks jurisdiction to unilaterally change or modify that order" (Br. 22) – is equally unavailing. First, the Commission did not change or modify its prior order

approving the Settlement Agreement. "We also reject Olyphant's assertion that the [Initial] Order had the effect of modifying the Settlement Agreement." Rehearing Order ¶ 8, JA 388; *see* Initial Order ¶ 14, JA 343, ("we clarify, here, that the Settlement Agreement does not address" recovery of retail stranded costs from retail customers). This also disposes of the claim that FERC was "powerless to vacate its decision when no petition for rehearing was filed and the [Stranded Cost] Order became final." Br. 23. Whether that claim is true, it does not fit the facts here because the Commission did not vacate the Stranded Cost Order; it merely issued a declaratory order clarifying what matters were set for hearing by that Order, and thus the matters encompassed within the settlement of the hearing issues.

Second, the jurisdiction of federal district courts to enforce FERC orders granted by FPA § 317, 16 U.S.C. § 825p, does not preclude FERC from exercising primary jurisdiction. Petitioner's argument that FERC "lacks jurisdiction" when an FPA § 317 action is pending (Br. 22) misapprehends the primary jurisdiction doctrine. The exercise of primary jurisdiction by an agency "does not deprive the court of jurisdiction; it has discretion either to retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss without prejudice." *Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993); *see, e.g., United States v. Western Pacific*

Railroad Co., 352 U.S. 64, 63-64 (1956)(doctrine "comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body").

Here, nothing indicates that the federal district court litigation was held in abeyance while PPL sought a declaratory order. Nor is there any indication that Petitioner sought to have the district court enjoin FERC from acting on the request. Thus, it appears that Petitioner's antitrust claims have proceeded apace. Moreover, as FERC expressly disclaimed ruling on the antitrust claims or on PPL's right to collect retail stranded costs from retail customers, the exercise of primary jurisdiction did not intrude into areas within the court's or the PUC's jurisdiction.

Reliance on *City of Cleveland v. Cleveland Electric Ill. Co*., 570 F.2d 123. 128 (6th Cir. 1978), for the proposition that "the district court had exclusive jurisdiction under 16 U.S.C. § 825p over a claim relating to the rates approved by the FERC in an order approving a contract" (Br. 22) is misplaced. There, the enforcement claims were pled as counterclaims by the utility to an antitrust action filed by the city. 570 F.2d at 124. The city claimed "that the District Court lacked subject-matter jurisdiction over CEI's counterclaims." *Id*. at 126. While the Sixth Circuit agreed that the district court had ancillary jurisdiction over these as

compulsory counterclaims, *id*., it ruled alternatively that if the counterclaims were considered permissive, the district court still had jurisdiction because, under FPA § 317, "the counterclaims still presented a federal question within the Court's jurisdiction." *Id*. at 128. Thus, the Sixth Circuit did not rule on whether the district court had exclusive jurisdiction, but only that it had subject matter jurisdiction.

Indeed, the Circuit noted that the filing of suit by the Commission in the federal district court for the District of Columbia to enforce the same orders that were the subject of the utility's counterclaims did not preclude the district court in Ohio from "entertain[ing] these counterclaims." *Id*. Finally, that case did not involve application of the primary jurisdiction doctrine, so it cannot control here where the doctrine has come into play.

IV. FERC DID NOT IMPOSE RETAIL STRANDED COSTS ON WHOLESALE POWER

Petitioner charges that because the Settlement and Power Supply Agreements deal with wholesale power, "they are not subject to any retail rate-making power of the states." Br. 18. From this proposition, Petitioner contends that the Commission erred in not ruling on "PPL's obligations under the state-issued order regarding PPL's entitlement to recover retail stranded costs from its existing retail customers." Br. 16. But the Orders found that existing retail customers were not parties to the Settlement or Power Supply Agreements, and thus the existing

retail customers' stranded cost rights were not controlled by those Agreements. This finding rested on review of Article 6.2 of the Settlement Agreement (JA 40), which states, in relevant part, PPL "will not seek, and hereby waives the right to seek, any stranded cost recovery or exit fee against any of the parties to this Settlement Agreement." Initial Order ¶ 14, JA 343 (quoting language).

The Commission reasonably interpreted the language, "any of the parties" to mean "PPL's wholesale requirements customers (who initiated the proceeding in which the Settlement Agreement was approved to pursue their rights to wholesale services)." *Id*. (emphasis in original). Because PPL's existing retail customers, including the end-users at issue, were not parties to the Agreement, it follows that "the Settlement Agreement does not address – and thus would not limit or preclude – PPL's ability to recover retail stranded costs from its existing retail customers." *Id*. (emphasis in original).

To the extent that Petitioner suggests this position is inconsistent with the broad scope ascribed to federal jurisdiction in the judicial review of Order No. 888 (Br 17-18), that suggestion is misplaced:

> In Order No. 888, the Commission decided that it would allow state regulatory authorities to address any stranded costs occasioned by retail wheeling. The Pennsylvania [PUC] did so on August 27, 1998 in a proceeding relating to PPL and PPL's Industrial Park Customers. Accordingly, we stated in the [Initial] Order that we were not asked to

> address (and do not address) PPl's obligations under the final order issued by the Pennsylvania Commission.

Rehearing Order ¶ 11, JA 389; *see* Initial Order ¶ 15, JA 343(same).

Recovery of stranded costs related to retail wheeling received considerable attention in the Order No. 888 rulemaking. *See* Order No. 888 at 31,819-26 *and* Order No. 888-A at 30,410-21 (discussing issues). Responding to claims, like those here, that it had abdicated or delegated its authority over the issue to state regulatory authorities, the Commission indicated, rather, that it had

> made a policy determination that the recovery of stranded costs associated with retail wheeling customers – an issue over which either this Commission or state commission could exercise authority by virtue of their jurisdiction over retail transmission in interstate commerce and over local distribution facilities and services, respectively – is primarily a matter of local or state concern for which the primary forum should be the state commissions. However, if the state regulatory authority does not have authority under state law to be the forum to address when the retail wheeling is required, then we will entertain requests to recover such costs.

Order No. 888-A at 30,417; Order No. 888 at 31,824-25 (same).

This policy determination also negates Petitioner's reliance (Br. 18-20) on the definition of "wholesale stranded costs" in 18 C.F.R. § 35.26(b)(1) (2003) as involving the industrial end-users at issue in the hearing set by the Stranded Cost Order. As the Commission made clear, not all matters that could fit within the definition of wholesale stranded costs would be addressed by FERC: "the stranded

costs associated with retail-turned-wholesale customer for which Order No. 888 provides an opportunity for recovery would not have been incurred *but for* the action of this Commission in requiring a utility to make unbundled transmission services available." Order No. 888-A at 30,404. *See* Order No. 888 at 31,818 (declining to decide jurisdiction over stranded cost issues where "there is no direct nexus between the FERC-jurisdictional transmission access requirement and the exposure to non-recovery of prudently incurred costs").

Petitioner's protest in the instant matter indicated that its proposed service to the industrial end-users at issue was based on authority granted by Pennsylvania, not by FERC.

> On January 1, 1997, the Pennsylvania Legislature enacted the Electricity and Generation Customer Choice and Competition Act (the "Competition Act"), 66 Pa. CSA § 2801 *et seq*., providing that Pennsylvania boroughs having municipal electric systems have the right to serve customers within their respective borough limits, if they did not seek to serve new customers outside their respective limits. *At that time, Olyphant was in a position to seek to compete to serve customers located within its limits, including the Industrial Park.* The Borough enacted a resolution in 1997 quoting the language used in the Act, to enable it to exercise any rights thereunder. . . and used the words of the statute to give notice that it was going to seek to provide electric power to customers within its boundaries.

R. 7, p. 14 ¶ 11, JA 298(emphasis added); *see also id*. p. 15-16 ¶¶ 13 and 14, JA 299-300 (other statements that Petitioner relied on Pennsylvania law, not FERC's policies).

Consequently, there was no direct nexus between FERC's open access requirements and Petitioner's proposed service to the end-users at issue. Rather, Petitioner proposed to serve those users under provisions of Pennsylvania law. It follows that stranded cost recovery from those end-users did not fall into the issues to be resolved in the FERC stranded cost proceeding.[3] Moreover, as the Pennsylvania PUC had exercised its authority to address these issues, FERC saw no need to enter the fray. "Olyphant's strained interpretation of the Settlement Agreement would effectively nullify that state-issued order in a way not contemplated by the Settlement and not contemplated by our policies regarding the recovery of stranded costs under Order No. 888." Rehearing Order ¶ 11, JA 389; *see id*. ¶ 12 (rejecting claim that the Agreement applies "also to any wholesale stranded costs that may result from subsequent municipal annexations" because FERC was "not asked to address (and d[id] not address) PPL's obligations under the state-issued order").

[3] Petitioner refers to the intervention of "a number of industrial intervenors" in support of its position as suggesting that the retail stranded costs of the industrial end-users at issue was presented for hearing. Br. 20. But the industrial intervenors were not those involved in the instant matter nor did they raise retail stranded cost recovery. Rather, the industrial intervenors were entities "that own and operate facilities with the State of Pennsylvania" and whose interests related to "the reasonable expectation standard governing stranded costs." Stranded Cost Order, 77 FERC at 61,156.

V. NO *MOBILE-SIERRA* ISSUE IS PRESENTED

Petitioner charges that the challenged orders "effectively modify the plain language of the final Settlement Agreement and Power Supply Agreement" by allowing PPL "to charge Olyphant for any retail stranded cost that PPL might seek to impose on the Borough or its customers." Br. 13. Related to this charge, Petitioner states that neither Agreement gives "PPL any right to make a unilateral filing with FERC to change the express rates and service terms." Br. 16. Petitioner then asserts that the orders violated the *Mobile-Sierra* doctrine by failing to address "whether PPL's proposed modification of the Settlement Agreement would meet the strict *Mobile-Sierra* burden of proof." *Id.* As Petitioner's premise is invalid, the conclusion it seeks to draw from that premise is equally invalid.

Petitioner's premise that, in effect, PPL sought, and the Commission acquiesced in, a modification of the Settlement and Power Supply Agreements has no record support. PPL asked for a "declaratory order [that] will clarify the scope of the Settlement Agreement," not for an order effectively modifying the Agreement. R. 1, p. 1, JA 1. While Petitioner did raise its current modification claim on rehearing, Petitioner's initial protest did not. Instead, Petitioner argued that PPL asked for a "meaningless advisory opinion" that would "construe the federal orders contrary to their plain language." R. 7 at 27, JA 311; *see also, e.g.,*

id. at 39, JA 323 (Petitioner 'submits that the language of the Agreements expressed the parties' clear intention to prevent the imposition of such standard costs"). A group of industrial customers who take service from PPL asked that "in interpreting the Settlement Agreement, the Commission should not also interpret PPL's retail stranded cost obligations under Pennsylvania law." Initial Order ¶ 9, JA 347. Thus, the Commission reasonably viewed PPL's request as one "to interpret" the Agreement with differing views on how it should be interpreted. *Id*. ¶ 13, JA 348.

As the request did not seek a modification to the Agreements, the *Mobile-Sierra* doctrine was not implicated in addressing the request. The Commission responded to the request for clarification by looking to the plain language of the Agreement and the context within which it was drafted. Initial Order ¶ 14, JA 348. The Agreement's plain language, Article 6.2, R.1, App. B, p. 18, JA 40, indicates that PPL will not seek stranded cost recovery "against any of the parties to this Settlement Agreement." Initial Order 14, JA 348. FERC reasonably interpreted that language to mean that the stranded cost issue related to those who were "parties" in the underlying proceeding. *Id.*

"Party" has a specific meaning under FERC rules, which require that "[a]ny person . . . seeking to become a party must file a motion to intervene." 18 C.F.R. §

385.214(a)(3) and (b)(2003). The industrial end-users at issue did not seek to intervene in the Stranded Cost proceeding, and thus were not parties. *See* Stranded Cost Order, 77 FERC at 61,157 (granting intervention and party status).[4] FERC's interpretation is also consistent with the Agreement as a whole. *See* Agreement, R. 1, App. B, p. 1, JA 23 (expressing that Agreement is entered into between PPL and "the following fifteen of its wholesale requirements power supply customers") *and id.*, repeated p. 19-23, JA 42-55 (signature pages for fifteen customers).

Given this plain language, the Commission clarified that the Agreement "does not address – and thus would not limit or preclude – PPL's ability to recover retail stranded costs from its existing retail customers." Initial Order ¶ 14, JA 343 (emphasis in original). The Agreement likewise does not guarantee PPL's recovery of retail stranded costs from retail customers. In fact, as "no issues relating to recovery of PPL's retail stranded costs from its existing retail customers" were set for the FERC hearing, the Commission was never asked to address those issues, *id*. n. 12, and they were, instead, addressed in a separate PUC proceeding. *Id*. ¶ 15, JA 343.

Thus, no modification of the Agreement was required or undertaken: "[FERC] did not strike any provision from the Settlement Agreement, nor did

[4] As noted earlier, the Industrial Customers noted in the Order were not the same as the industrial end-users at issue here.

[FERC] add any new provision, *i.e.*, [FERC] did not modify the Settlement Agreement." Rehearing Order ¶ 8, JA 388. Nor did the Commission "effectively modify the plain language" of the Agreements by allowing PPL to charge retail stranded costs to retail customers that might switch to Petitioner's service, as Petitioner claims. Br. 13. The Commission was "not asked to address (and d[id] not address)" that question, which was addressed by the Pennsylvania PUC. *Id*. § 12, JA 389. What Petitioner claims effectively modified the Agreements thus was neither asked nor answered in the Orders. Accordingly, the *Mobile-Sierra* doctrine was not implicated.

CONCLUSION

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

Respectfully submitted,

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