ORAL ARGUMENT SCHEDULED FOR NOVEMBER 8, 2004

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

No. 03-1398

ALTERNATE POWER SOURCE, INC.,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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FINAL BRIEF: AUGUST 30, 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. *Alternate Power Source, Inc. v. Western Mass. Elec. Co.*, Docket No. EL03-9, 101 FERC ¶ 61,236 (2002).

2. *Alternate Power Source, Inc. v. Western Mass. Elec. Co.*, Docket No. EL03-9, 104 FERC ¶ 61,255 (2003).

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

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David H. Coffman
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August 30, 2004

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GLOSSARY

APS	Petitioner Alternate Power Source, Inc.
Commission or FERC	Respondent Federal Energy Regulatory Commission
FPA	Federal Power Act, 16 U.S.C. § 791a, *et seq.*
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ISO	Independent System Operator
LNS	Local Network Service
MDTE	Massachusetts Department of Telecommunications & Energy
NEPOOL	New England Power Pool
NGA	Natural Gas Act, 15 U.S.C. 717, *et seq.*
NU	Northeast Utilities
OATT	Open-Access Transmission Tariff
PTF	Pool Transmission Facilities
RNS	Regional Network Service

GLOSSARY

SOS Agreement	Standard Offer and Default Service Wholesale Sales Agreement between APS and WMECO
WMECO	Intervenor Western Massachusetts Electric Company

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STATEMENT OF THE ISSUES

Where Petitioner Alternate Power Source, Inc. ("APS") and Intervenor Western Massachusetts Electric Company ("WMECO") voluntarily executed a bilateral contract under which APS would sell electric power to WMECO, and WMECO would purchase transmission service from the New England Power Pool ("NEPOOL") and from the operating companies of Northeast Utilities ("NU") for delivery of APS power to WMECO's retail sales customers:

1. Did the Federal Energy Regulatory Commission ("Commission" or "FERC") reasonably determine that implementation of contractual provisions allowing WMECO to pass NEPOOL congestion and line-loss charges through to APS was not prohibited by the NEPOOL tariff, the NU tariff or FERC Order No. 888?

2. Does APS' failure to assert on rehearing that FERC should have conducted an evidentiary hearing on the issue of whether WMECO's pass-through of NEPOOL congestion charges to APS was unduly discriminatory deprive the Court of jurisdiction to consider that assertion now?

3. Assuming jurisdiction, did the Commission reasonably conclude, without conducting that evidentiary hearing, that WMECO's pass-through of NEPOOL congestion charges to APS was not unduly discriminatory?

4. Does APS' failure to contend on rehearing that FERC should have asserted primary jurisdiction over the APS-WMECO contract deprive the Court of jurisdiction to consider that contention now?

5. Assuming jurisdiction, did the Commission act reasonably by issuing the challenged orders without asserting primary jurisdiction over that contract?

PERTINENT STATUTES AND REGULATIONS

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

COUNTER-STATEMENT OF JURISDICTION

The Court has jurisdiction to review the challenged orders, but lacks jurisdiction to consider those APS objections that were not raised on rehearing. *See* 16 U.S.C. § 825*l*(b).

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 transmission and wholesale sale of electric energy in interstate commerce, but leaves regulation of retail sales and local distribution of electric power to the states. *See* 16 U.S.C. 824(b)(1). Under the FPA, utilities may charge rates and engage in practices that are just, reasonable and not unduly discriminatory. *Id.* §§ 824d(a)&(b). FERC must replace rates and practices that it finds unjust, unreasonable or unduly discriminatory with just and reasonable rates and practices. *Id.* § 824e(a).

The FPA requires public utilities to file "schedules" showing all "rates and charges" for jurisdictional services, all "practices and regulations affecting such rates and charges," and all "contracts which in any manner affect or relate to such rates, charges . . . and services." 16 U.S.C. § 824d(c). The Act prohibits such utilities from making any change in such rates or services prior to giving the

Commission and the public sixty days' notice. *Id.* § 824d(d). The last cited provision provides the statutory basis for the "filed rate doctrine," which prohibits public utilities from charging rates and engaging in practices not specified in their tariffs. *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 576-79 (1980) ("*Arkla*").[1]

The Public Utilities Regulatory Policy Act authorizes the Commission to exempt public utilities from state laws that would otherwise prohibit the utilities from voluntarily coordinating their services. 16 U.S.C. § 824a-1(a). Agreements among public utilities to coordinate services are sometimes referred to "power pooling" agreements, and are subject to Commission regulation under the FPA. *See generally Central Iowa Power Coop. v. FERC*, 606 F.2d 1156 (D.C. Cir. 1979). Such agreements "promote reliable and economical operation of the interconnected electric network. . . ." *Id.* at 1160 (footnote omitted).

B. Order No. 888

"Historically, electric utilities were vertically integrated, owning generation, transmission, and distribution facilities, and selling these services as a 'bundled' package to wholesale and retail customers in a limited geographical service area."

[1] *Arkla* interpreted the filed-rate provision of the Natural Gas Act ("NGA"), 15 U.S.C. § 717c(d), a provision virtually identical to 16 U.S.C. § 824d(d). Accordingly, the two provisions are properly interpreted consistently with one another. 453 U.S. at 577 n.7.

Public Util. Dist. No. 1 of Snohomish County, Wash. v. FERC, 272 F.3d 607, 610 (D.C. Cir. 2001). In recent years, technological advances and legislative and regulatory initiatives have enabled new participants to enter into wholesale electricity markets, and have encouraged electric utilities to "unbundle" their services. This has led to an increasingly competitive market for the sale of electric energy and power. *See New York v. FERC,* 535 U.S. 1, 5-14 (2002) ("*New York*") (describing developments).

To assure that customers reap the benefits of a competitive market, FERC Order No. 888[2] directed each jurisdictional transmission-owning utility to: (1) offer non-discriminatory, open-access transmission service; (2) unbundle its wholesale generation, transmission, and ancillary services; and (3) take transmission for its own wholesale sales and purchases under a single general tariff applicable uniformly to itself and to others. *New York*, 535 U.S. at 11. Order No. 888 promulgated a *pro forma* open-access transmission tariff ("OATT"), which excluded unduly preferential or discriminatory provisions, *see* Order 888-A at

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[2] *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., Regs. Pmbls. ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 & 76 FERC ¶ 61,347 (1997), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regs. Pmbls. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part, Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York, supra*.

30,503-43, and required all utilities to file OATTs that conformed to the *pro forma* version. *See* Order No. 888 at 31,768-69. Order No. 888 also required power pools to file OATTs, *id.* at 31,727-28, and encouraged independent operation of regional, multi-system transmission grids by independent system operators ("ISOs"). *See id.* at 31,730-32.

Thus, under Order No. 888, as implemented through the *pro forma* OATT, a transmission provider could only sell electric power as a separate service, and had to provide transmission services under uniform terms to all qualified customers. This meant that to sell electric power to customers on its transmission system, a transmission provider had to obtain transmission service on that system under the same terms as other transmission customers.

In states that restructured their laws to allow retail customers to purchase power from competing sellers, FERC asserted its jurisdiction over unbundled transmission, while leaving jurisdiction over retail sales and local distribution to the states. Order No. 888 at 31,689. Utilities providing unbundled transmission were required to provide their transmission services under an OATT filed with the Commission and containing terms equivalent to those in the *pro forma* OATT. *Id.* at 31,689-90.[3]

[3] The Commission did not disturb the states' jurisdiction over traditional, "bundled" service under which retail customers buy electric energy, transmission

C. Restructuring in the Commonwealth of Massachusetts

In 1997, the Commonwealth of Massachusetts embraced retail choice – which permitted consumers to choose their retail supplier of electric energy – by enacting the Massachusetts Restructuring Act. *See* Massachusetts General Laws, Ch. 164. Beginning January 1, 1998, electric utilities operating in Massachusetts had to unbundle their generation, transmission and ancillary services. Each utility had to offer its retail customers a choice between (1) continuing to purchase power from the utility and (2) purchasing power from an alternative power supplier that would deliver the power over the utility's lines.

II. Events Leading to the Proceeding Below

NEPOOL is a regional power pool, operated by an ISO.[4] NEPOOL uses "pool transmission facilities" ("PTF") – high-voltage transmission facilities made available by its transmission-providing pool members – to provide Regional Network Service ("RNS") under its own OATT. *See* JA 90-91.

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service and local distribution service from a single, state-regulated supplier at a single charge. *See* Order No. 888 at 31,689-90.

[4] The NEPOOL facilities are operated by ISO New England, Inc. *See New England Power Pool*, 79 FERC ¶ 61,374 (1997), *order on reh'g*, 85 FERC ¶ 61,242 (1998). For simplicity, NEPOOL and ISO New England are both referred to as "NEPOOL."

NU, a registered public utility holding company, holds five operating companies. JA 86 n.1. Its principal operating companies own two types of network transmission facilities: (1) PTF that NEPOOL operates under its OATT; and (2) lower-voltage "non-PTF" that provide Local Network Service ("LNS") under NU's OATT. One of the NU operating companies is WMECO. JA 86 n.1.

WMECO owns PTF, non-PTF and local distribution facilities. WMECO's PTF are operated by NEPOOL to provide RNS under NEPOOL's OATT. NU's affiliate, Northeast Utilities Service Company, which acts as agent for all of the NU operating companies, provides LNS over WMECO's non-PTF under the NU OATT.[5] WMECO provides local distribution under a tariff on file with the Massachusetts Department of Telecommunications and Energy ("MDTE"). WMECO also purchases electric power from suppliers that it sells to retail customers in Massachusetts. JA 88-91. To move this power on its own facilities, WMECO becomes a transmission customer, purchasing RNS from NEPOOL under the NEPOOL OATT and LNS from NU under the NU OATT.[6]

[5] For simplicity Northeast Utilities Service Company is also referred to as "NU."

[6] WMECO's contract for transmission service under the NU OATT is with NU, acting as agent for all of the NU operating companies, including WMECO. *See* Service Agreement between NU and WMECO, FERC Docket No. ER98-1378-000 (January 9, 1998).

During 2000, APS was a supplier of electricity and a member of NEPOOL.[7] On December 10, 1999, APS and WMECO entered into a Standard Offer and Default Service Wholesale Sales Agreement ("SOS Agreement") for the-year 2000. JA 2. Under the SOS Agreement, APS was responsible for selling electricity to WMECO for resale to WMECO's retail sales customers, and WMECO was responsible for assuring delivery of the power, which meant becoming a transmission customer and obtaining RNS under the NEPOOL OATT, LNS under the NU OATT, and local distribution (from itself) under its MDTE tariff. *See* JA 88-89.

In contrast to "SOS suppliers" like APS, "competitive suppliers" sell directly to retail customers that choose to no longer purchase from WMECO. *See* JA 88 n.3. During 2000, the only year that the APS-WMECO contract was in effect, only one competitive-supply contract was implemented for WMECO's retail customers. *Id.* at 16 n.40. That contract, which was implemented only during the month of January, involved the delivery of 1.43 megawatts of energy, less than .00003% of WMECO's retail load for 2000, for a price of $64. *Ibid.*

[7] APS was subsequently removed from NEPOOL for non-payment of certain charges. *New England Power Pool*, 95 FERC ¶ 61,092 (2001).

Based on its interpretation of the SOS Agreement, WMECO passed through to APS NEPOOL's PTF "transmission congestion charges"[8] and "line loss charges,"[9] which were included as components of NEPOOL's RNS rates. JA 91-92, 93-94. On December 23, 2000 and December 28, 2001, APS filed two separate breach-of-contract actions against WMECO in the Norfolk Division of the Massachusetts Superior Court, claiming that the pass-through of these costs breached the SOS Agreement. JA 148-62, 168-78.

III. The Proceeding Below

On October 8, 2002, APS filed a complaint with FERC. JA 1-29. The complaint alleged that any provisions of the SOS Agreement that permitted WMECO to pass through to APS congestion and line-loss charges that WMECO incurred as a transmission customer of NEPOOL would violate the NEPOOL OATT, the NU OATT, and Order No. 888, and would result in undue preferences

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[8] NEPOOL OATT § 1.17 defines "Congestion" as a "condition of the NEPOOL Transmission System in which transmission limitations prevent unconstrained regional economic dispatch of the power system." Addendum at 10. Transmission congestion costs occur when the utility is unable to move lower-cost power from one part of the grid to another part of the grid as a result of capacity constraints on the system.

[9] Because transmission of electric power invariably results in a loss of some of that power between the utility's receipt and delivery points, traditional rate regulation recognizes that a utility must make up the power loss, and thereby incurs a cost in doing so. *See Northern States Power Co. v. FERC*, 30 F.3d 177, 179-180 (D.C. Cir. 1994).

to competitive suppliers. *Id.* at 4-23. On November 25, 2002, the Commission issued the first challenged order, which dismissed the complaint on grounds that WMECO's pass-through of NEPOOL charges to APS would not result in any of the violations or undue preferences alleged. *Alternate Power Source, Inc. v. Western Mass. Elec. Co.*, 101 FERC ¶ 61,236 (2002) (JA 179-82).[10]

APS filed a request for rehearing four days later, on November 29, 2002, JA 183-99, and an amended request for rehearing on December 20, 2002. JA 200-22. The second challenged order denied rehearing. 104 FERC ¶ 61,255 (2003) (JA 223-26). This petition followed.

[10] Unless otherwise indicated, all citations to the *FERC Reports* are captioned *Alternate Power Source, Inc. v. Western Mass. Elec. Co.*

SUMMARY OF ARGUMENT

The Commission properly dismissed the complaint. APS failed to show that SOS Agreement provisions allowing WMECO to pass through to APS congestion and line-loss charges that WMECO incurred as a transmission customer of NEPOOL violated any FERC tariff or order, or resulted in unduly discriminatory rates.

Many of APS' arguments to this Court are procedurally flawed, because APS failed to raise them on rehearing. Accordingly, the Court lacks jurisdiction to consider them on judicial review. *All* of APS' arguments are substantively flawed, because the FPA, under which the complaint was filed, regulates the providing of jurisdictional services, and WMECO provided no such services under the SOS Agreement. Rather, WMECO purchased electric power under that agreement, and purchased RNS and LNS, as a transmission customer, to assure the delivery of that power.

Though APS now claims that WMECO's pass-through of NEPOOL's RNS congestion and line-loss charges violated specific provisions of the NEPOOL and NU OATTs, APS failed to allege violations of those provisions in its request for rehearing to FERC. APS' failure to allege these so-called violations on rehearing deprives the Court of jurisdiction to consider such allegations on judicial review.

In any event, the pass-through of costs did not violate the NEPOOL and NU OATTs, which govern relationships between transmission providers and their transmission customers. APS cannot point to any OATT provision that governs relationships between transmission customers, such as WMECO, and third parties, such as APS.

APS' claim that WMECO's pass-through of congestion charges violated Order No. 888 also fails, because it rests on Order No. 888 language that does no more than require utilities serving retail customers in states mandating unbundling of services to provide transmission under an OATT substantially similar to the Order No. 888 *pro forma* OATT. APS fails to explain how the pass-through of congestion charges from a transmission customer to a third party contravenes language that does not purport to address relationships between transmission customers and third parties.

APS' claim that the Commission should have conducted an evidentiary hearing into APS' allegations of undue discrimination was not raised on rehearing. Accordingly, the Court lacks jurisdiction to consider that objection on judicial review. Moreover, APS fails to identify any factual issue that would have warranted such a hearing.

In any event, the Commission properly resolved APS' single claim of undue discrimination – that WMECO passed through of NEPOOL congestion charges to APS but not competitive suppliers – on the written record. The Commission found, and APS has not disputed, that WMECO did not incur NEPOOL congestion charges attributable to competitive-supply load because competitive suppliers obtained transmission service from and paid congestion charges to NEPOOL itself. Thus, WMECO had no NEPOOL congestion charges to pass through to competitive suppliers.

APS' claim that the Commission should have exercised primary jurisdiction over the SOS Agreement is yet another objection that APS failed to assert on rehearing, and that the Court, therefore, lacks jurisdiction to consider. In any event, APS does not even try to explain why the Commission was required to assert primary jurisdiction over contractual issues that APS had already chosen to litigate in state court, and a review of FERC's criteria for asserting such jurisdiction reveals that such an assertion would have been unwarranted here.

ARGUMENT

I. STANDARD OF REVIEW

"The role of judicial review is only to ascertain if the agency has met the minimum standards set forth in the statute." *U.S. Postal Serv. v. Gregory*, 534 U.S. 1 (2001). A court reviews Commission orders under the "arbitrary and capricious" standard set out in the Administrative Procedure Act at 5 U.S.C. 706(2)(A). *Sithe/Independence Power Partners 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." *Ibid.* (citations and internal quotations omitted).

II. THE RECORD SHOWS NO VIOLATIONS OF FERC TARIFFS OR ORDERS.

A. Standard for Interpreting Commission Tariffs and Orders

The two-step analysis established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"), applies to the Commission's interpretation of tariffs subject to its jurisdiction. *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814-15 (D.C. Cir. 1998) ("*Koch*"). This is true even if the "issue simply involves the proper construction of language." *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1569 (D.C. Cir. 1987).

Applying *Chevron* to FERC tariffs requires a *de novo* determination as to whether the tariff unambiguously addresses the matter at issue. Unambiguous

language controls. If a court determines that the tariff is ambiguous as to the matter at issue, the court defers to the Commission's reasonable interpretation. *Koch*, 136 F.3d at 814-15. 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); *Texaco, Inc. v. FERC*, 148 F.3d 1091, 1099 (D.C. Cir. 1998); *Natural Gas Clearinghouse v. FERC*, 108 F.3d 397, 399 (D.C. Cir. 1997).

B. WMECO'S Pass-Through of NEPOOL Charges to Petitioner Violated No FERC Tariff or Order

1. The Commission's Conclusions in This Regard Were Reasonable.

The Commission found that WMECO did not "violate the NEPOOL OATT, or any other Commission rule or regulation" by allocating "to a power supplier, such as APS, in a bilateral arrangement – freely entered into by APS – costs and expenses initially assessed to WMECO directly under the NEPOOL OATT." 101 FERC at 62,013 ¶ 7 (JA 181-82). Noting APS' failure to provide "citation or support" for its assumption "that the FPA and the NEPOOL OATT prohibit[ed] WMECO, as a network customer, from assigning" NEPOOL charges "to a third party, such as APS," the Commission reasoned that the NEPOOL OATT does not "govern (or limit)" the ultimate cost allocations "between WMECO and APS" in that it does not address, much less restrict, "a network customer's bilateral

arrangements with third parties." 104 FERC at 61,838 ¶ 10 (JA 226). Rather, "'[s]haring the risk of cost responsibility under bilateral transactions . . . is a private contractual matter[.]'" 101 FERC at 62,013 ¶ 7 n.7 (JA 182) (quoting *ISO New England, Inc.*, 95 FERC ¶ 61,384 at 62,428 (2001), *reh'g denied*, 100 FERC ¶ 61,254 (2002) (collectively, "*ISO New England*")).

This conclusion was consistent with all applicable law. APS failed to identify any tariff provision or rule that prohibits a transmission customer from passing through transmission charges to a third party under a voluntarily executed bilateral contract; indeed, the FPA itself directs the Commission to regulate service providers rather than service customers. *See* 16 U.S.C. §§ 824d(c)&(d) (placing the obligation to file on "every public utility" and prohibiting unauthorized changes "by any public utility"); 16 U.S.C. § 824(e) (defining "public utility" as any person owning or operating facilities providing jurisdictional sales or transmission service). Consistent with this decision, the Commission previously had ruled in *ISO New England* that provisions in the NEPOOL OATT governing allocation of "uplift" costs (which include congestion costs) among NEPOOL's transmission customers do not affect bilateral contracts under which those customers contract with third parties to further share the costs. 95 FERC at 62,428.

2. Petitioner's Arguments Are Unavailing.

a. No Discussion of the Filed-Rate Doctrine Was Warranted.

APS claims that the Commission failed to consider the filed-rate doctrine even though, in APS' view, WMECO's implementation of the SOS Agreement effectively revised the NEPOOL and NU OATTs without prior notice. *See* Br. at 17. This argument fails both procedurally and substantively.

APS' failure to mention the filed-rate doctrine in its request for rehearing, *see* JA 200-22, deprives the Court of jurisdiction to consider APS' contention that the Commission failed to take the doctrine into account. The FPA precludes the Court from considering objections that a petitioner fails to make on rehearing absent good cause for the failure. 16 U.S.C. § 825*l*(b). The courts have strictly adhered to that requirement. *See, e.g., Domtar Me. Corp. v. FERC*, 347 F.3d 304, 313 (D.C. Cir. 2003) ("*Domtar*") (even FERC's concession that two arguments are closely related does not justify a petitioner's raising one on rehearing and the other on judicial review). *See also Panhandle Eastern Pipe Line Co. v. FPC*, 324 U.S. 635, 645 (1945) ("*Panhandle*") (petitioner precluded from raising objection on judicial review that was not raised on rehearing, despite petitioner's having raised the objection earlier in the administrative proceeding); *ASARCO, Inc. v. FERC*, 777 F.2d 764, 773-74 (D.C. Cir. 1985) ("*ASARCO*") (petitioner precluded from

raising objection on judicial review that petitioner failed to raise on rehearing, even though other parties raised the same argument on rehearing).[11]

In any event, there was no need for the Commission to discuss the filed-rate doctrine. APS' claim that WMECO's pass-through of NEPOOL charges violated that doctrine is based solely on the assertion that the pass-through violated filed tariffs, which were the filed rates in this case. *See* Br. at 18-20. As is discussed, *infra*, the Commission properly found that the tariffs at issue did not govern bilateral contracts allocating costs between transmission customers, like WMECO, and third parties, such as APS. Accordingly, the pass-through had no effect on any filed rate.

b. The Commission's Invocation of *ISO New England* Was Appropriate.

APS further argues that the Commission wrongly determined that *ISO New England* was "dispositive of virtually all of the issues raised by APS." Br. at 17. Though *ISO New England* is demonstrably applicable to the issues in this case, APS exaggerates the Commission's reliance on the earlier decision. In fact, the Commission did no more than quote in a footnote *ISO New England's* statement that "'[s]haring the risk of cost responsibility under bilateral transactions . . . is a private contractual matter[.]'" 101 FERC at 62,013 ¶ 7 n.7 (JA 182) (quoting 95

[11] *Panhandle* and *ASARCO* interpreted 15 U.S.C. § 717r(b), a provision of the NGA virtually identical to 16 U.S.C. § 825*l*(b). Accordingly, the two provisions are properly interpreted consistently with one another. *Arkla*, 453 U.S. at 577 n.7.

FERC at 62,428). Additional factors, such as APS' failure to identify language in any tariff or order prohibiting the SOS Agreement's pass-through provisions, or otherwise proscribing pass-through of costs from transmission customers to third parties, mandated the Commission's decision. *See* 104 FERC at 61,838 ¶ 10 (JA 226) ("APS assumes without citation or support . . . that the FPA and the NEPOOL OATT prohibit WMECO, as a network customer, from assigning to a third party, such as APS, costs for which WMECO may be initially responsible under the NEPOOL OATT").

On the merits, APS claims two distinctions between *ISO New England* and the instant case. Neither survives scrutiny.

APS first attempts to distinguish the case on the ground that it did not discuss whether a transmission customer's pass-through of uplift costs to a third party under a bilateral contract "would have the effect of modifying a filed-rate tariff then in effect." Br. at 17. APS' request for rehearing did not attempt to distinguish *ISO New England* based on the absence of any discussion of tariff modification or of the filed rate. *See* JA 202-03. Accordingly, the Court lacks jurisdiction to consider the alleged "distinction" now. *See* 16 U.S.C. § 825*l*(b); *Domtar*, 347 F.3d at 313. *See also Panhandle*, 324 U.S. at 645; *ASARCO*, 777 F.2d at 773-74.

In any event, the distinction is negligible. *ISO New England* ruled that the NEPOOL OATT provisions addressing allocation of uplift charges among NEPOOL's transmission customers would not affect bilateral contracts that such customers executed with third parties to further allocate the costs. 95 FERC at 62,427-28. If the OATT cost-allocation provisions do not affect the contractual pass-through provisions, it follows that the latter provisions cannot violate the former provisions. Thus, *ISO New England* supports the contention that there is no violation of one of the filed rates, the NEPOOL OATT.

APS also attempts to distinguish *ISO New England* on the ground that it addressed "energy uplift costs[,]" Br. at 17 (citing *ISO New England*, 100 FERC at 61,868 ¶ 18), whereas the instant case involves transmission uplift costs. However, this distinction is meaningless, because even APS admits that the relevant portion of *ISO New England* "carefully defined" uplift costs "to include both energy and transmission uplift[.]" *Ibid.* Accordingly, the order applies not only to pass-through of energy uplift costs but also to pass-through of transmission uplift costs, including congestion costs.

c. WMECO's Pass-Through of NEPOOL Congestion Charges Did Not Violate Any FERC Tariff or Order.

Petitioner next claims that "the NEPOOL and NU OATTs and the plain language of Order No. 888 require that [1] WMECO as a Network or Eligible Customer must provide unbundled transmission service to its retail customers and [2] the retail customer must take and pay for transmission service, including congestion charges for which the network customer is responsible." Br. at 18. Thus, in APS' view, the tariffs and Order No. 888 require WMECO to pass these charges through to its retail customers served with APS power, and, conversely, prohibit it from passing the charges on to APS. Thus, the argument goes, WMECO violated the OATTs and Order No. 888 by passing its NEPOOL congestion charges through to APS. This contention is flawed in a number of ways.

First, the tariff provisions that APS alleges were violated by WMECO's pass-through of congestion charges are NEPOOL OATT §§ 1.40, 15.1 and 24 and NU OATT §§ 33.3 and 34.5. APS never alleged on rehearing that the pass-through of congestion charges violated *any* of these tariff provisions. *See* JA 202-08 (discussing congestion charges).[12] APS' omission deprives the Court of jurisdiction to consider those allegations now. *See* 16 U.S.C. § 825*l*(b); *Domtar*,

[12] APS referred to NEPOOL § 24 in a footnote, but did not allege that WMECO's pass-through of congestion charges violated that provision. *See* Item No. 8 at 5 n.10.

347 F.3d at 313. *See also Panhandle*, 324 U.S. at 645; *ASARCO*, 777 F.2d at 773-74.

APS' attempts to demonstrate tariff violations also fail on the merits. Noting that NEPOOL OATT § 15.1 states that NEPOOL shall provide RNS "to each Eligible Customer," APS contends that the NEPOOL definition of "Eligible Customer" (NEPOOL OATT § 1.40, not cited by APS) has a special application in states requiring retail choice (*e.g.*, Massachusetts) in that the definition "limits the use of Network Integrated Transmission Service . . . to those entities (here, WMECO) that provide unbundled service to the ultimate consumer." Br. at 18. APS' point appears to be that NEPOOL OATT §§ 1.40 and 15.1 require end users to take, and pay for, "transmission service under the wholesale OATT" (here the NEPOOL OATT) in states (such as Massachusetts) where transmission providers provide unbundled services to retail users. *Id.* at 19.

APS' contention that the NEPOOL OATT requires retail power customers in states mandating unbundling to take and pay for NEPOOL transmission service is simply wrong. The provisions require transmission providers to offer transmission service to retail customers in states offering retail choice, but do not require retail customers to take it. *See* Addendum at 11-12. Thus, in 2000, the vast majority of WMECO's previous retail customers continued to purchase power from WMECO,

and to leave WMECO with the responsibility of obtaining RNS from NEPOOL. *See* JA 101 n.40.

The next NEPOOL OATT provision that APS cites in its attempt to demonstrate that WMECO, as a network transmission customer, "must provide unbundled transmission service to its retail customers" and that "the retail customer must take and pay for transmission service, including congestion charges for which the network customer is responsible[,]" is § 24. According to APS, that provision requires "that congestion be paid as a transmission charge via [RNS]." Br. at 18.[13] However, the language of that provision supports the Commission's finding that APS' SOS contract with WMECO, rather than the NEPOOL OATT governs "whether and to what extent APS [was] required to pay for the NEPOOL congestion charges associated with APS' service to WMECO." 104 FERC at 61,838 ¶ 9 (JA 225-26). As relevant here, NEPOOL OATT § 24 states: "Congestion Costs . . . shall be paid as a transmission charge" by those "obligated to pay" for RNS. *See* Addendum at 19. The provision governs payments by WMECO (the entity "obligated to pay" for RNS) to NEPOOL (the RNS provider), but does not compel WMECO to pass those charges through to its retail customers,

[13] APS does not explicitly cite NEPOOL OATT § 24, but instead refers to portions of its complaint that cite the provision. Br. at 18 n.20.

or abridge WMECO's right to pass such charges through to third parties pursuant to bilateral contracts.

Thus, the NEPOOL OATT was followed. NEPOOL billed its transmission customer, WMECO, for congestion as a transmission charge, and WMECO paid the charge.

APS also claims that NU OATT §§ 33.3 and 34.5 demonstrate that WMECO, as a network transmission customer, "must provide unbundled transmission service to its retail customers" and that "the retail customer must take and pay for transmission service including congestion charges for which the network customer is responsible." Here, APS cites the provisions' requirement that transmission providers and network customers allocate RNS and LNS congestion costs among themselves in accordance with their respective "load ratio shares," *i.e.*, the percentage of electric energy volume for which they are responsible. *See* Br. at 18 & n.21. APS appears to interpret the load-ratio-share language as prohibiting transmission customers from passing through congestion costs to third parties.

However, the language cited by APS addresses only those cost allocations between the "Transmission Provider" and the "Network Customers." Neither that language nor any other language in the two provisions purport to govern a "Network Customer's" right to pass its share of allocated congestion costs on to a

third party under a bilateral contract. *See* Addendum at 25-26. Thus, NU OATT §§ 33.3 and 34.5 did not affect WMECO's right to pass through congestion charges to APS.

APS further contends that "the plain language of Order No. 888" requires WMECO, as a network customer providing transmission services in a state mandating retail choice, to "provide unbundled transmission service to its retail customers" and to require such retail customers to "take and pay for transmission service including congestion charges for which the network customer is responsible." Br. at 18. In purported support, APS cites Order No. 888 language at 31,689-90 that requires utilities operating in states requiring unbundled retail transmission to provide such services under tariffs conforming to the Order No. 888 *pro forma* OATT. *See* Br. 18 n.22 (citing back to footnote 15, which quotes the Order No. 888 language).

APS makes no attempt to explain how WMECO's pass-through of NEPOOL congestion charges to APS violates the quoted language, and the nexus is not self-evident. Requiring transmission *providers* to make such transmission as they provide available under retail transmission tariffs comparable to wholesale OATTs is not equivalent to requiring retail power *purchasers* to secure transmission under wholesale OATTs as a condition of obtaining alternative power, or to prohibiting a transmission customer from passing through its transmission costs to a supplier.

Accordingly, this argument fails to demonstrate a violation of any "Commission rule or regulation[.]" 101 FERC at 62,013 ¶ 7 (JA 181-82).

d. WMECO's Pass-Through of NEPOOL Line-Loss Charges Did Not Violate the NU OATT.

APS further asserts that WMECO's pass-through of NEPOOL line-loss charges violates § 28.5 of NU's OATT, which provides that '"the NEPOOL system operator'" shall determine NEPOOL line losses in accordance with "'NEPOOL procedures *applicable at the time of delivery* . . . .'" Br. at 19 (quoting NU OATT § 28.5, emphasis in brief). APS claims that WMECO did not calculate NEPOOL line-loss charges passed through to APS under procedures applicable at the time of delivery, and, as a result, overcharged APS. *Id.* at 19-20.

APS never asserted in its request for rehearing that WMECO's pass-through of NEPOOL line-loss charges violated NU OATT § 28.5, that the loss factor should have been calculated using procedures in place at the time of delivery, or that the failure to do so resulted in an overstatement of the loss factor. *See* JA 208-12 (discussing line-loss charges). Accordingly, the Court lacks jurisdiction to consider this contention on judicial review. *See* 16 U.S.C. § 825*l*(b); *Domtar*, 347 F.3d at 313. *See also Panhandle*, 324 U.S. at 645; *ASARCO*, 777 F.2d at 773-74.

In any event, APS' argument lacks merit. On its face, NU OATT § 28.5 addresses how the "NEPOOL System Operator" – rather than WMECO – must

calculate power losses, and provides that the "Network Customer," rather than the "Transmission Provider" shall bear the cost of those losses. *See* Addendum at 23. It does not purport to address how the "Network Customer" is to calculate line-loss charges to be borne by a third party.[14]

Accordingly, NU OATT § 28.5 offers no support to APS.

III. THE COMMISSION PROPERLY DISMISSED PETITIONER'S CLAIM OF UNDUE DISCRIMINATION.

A. Procedures for Determining Undue Discrimination

Complainants at the Commission must "include all documents that support the facts in the complaint in possession of, or otherwise obtainable by, the complainant[.]" 18 C.F.R. § 385.206(b)(8). The Commission need not conduct an evidentiary hearing if it is able to resolve the disputed issues on the written record before it. *See, e.g., Cajun Elec. Power Coop. v. FERC*, 28 F.3d 173, 177 (D.C. Cir. 1994); *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993).

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[14] APS also fails to provide a factual basis for its claim. According to APS, WMECO calculated a "delivery efficiency factor" based on data from 1997 and 1998, but that the data was invalid, because losses were calculated differently by 2000. Br. at 19-20. As a result, argues APS, WMECO charged APS for 9.05% of transmission losses, rather than the 6.27% of such losses that WMECO would have been charged had it used "procedures applicable at the time of delivery." *Id.* at 20. However, APS' claim that WMECO's "delivery efficiency factor" for 2000 would have produced a loss factor of 6.27% is based on Exhibit 13 to APS' complaint. That exhibit, an internal NU memorandum shows only that WMECO used loss factor of 6.27% for May 1999 through May 2000. JA 81. Exhibit 13 does not state WMECO's loss factor for calendar year 2000, which was the term of the SOS Agreement.

Complainants alleging undue discrimination must show that the utility's action "has different effects on similarly situated customers" to make a *prima facie* case of discrimination. *Southwestern Elec. Coop. v. FERC*, 347 F.3d 975, 981 (D.C. Cir. 2003) ("*Southwestern*"). *See also Public Serv. Co. of Ind. v. FERC*, 575 F.2d 1204, 1212 (7th Cir. 1978) (complainant must demonstrate "a substantial disparity in rates between customers of the same class"). The party alleging discrimination also must proffer evidence that supports its allegations. *City of Holyoke v. FERC*, 954 F.2d 740, 744 (D.C. Cir. 1992) ("*Holyoke*") ("[t]he threshold requirement that a complainant to proffer evidence adequate to support its allegations before the Commission screens out meritless hearing requests . . . . the Commission quite properly refused to hold a hearing based on 'bare allegations'"); *General Motors Co. v. FERC*, 656 F.2d 791, 798 n.20 (D.C. Cir. 1981) ("where a party requesting an evidentiary hearing merely offers allegations . . . without an adequate proffer to support them, the Commission may properly disregard them."). Only when the complaining party establishes the required disparity, does the burden shift to the utility to justify the disparity and thereby establish that the discrimination is not undue. *Southwestern*, 347 F.3d at 981; *Metropolitan Edison Co. v. FERC*, 595 F.2d 851, 857 (D.C. Cir. 1979).

B. An Evidentiary Hearing Was Not Required in This Case.

APS asserts that "FERC's refusal to initiate [an FPA § 206(a)] investigation and evidentiary hearing" into the alleged "conflict" between "the terms of the SOS Agreement and the filed tariffs" caused the Commission "cursorily to dismiss APS's allegations of discrimination and undue preference in WMECO's pass-through of congestion charges and billing of line losses." Br. at 21.

APS' request for rehearing did not identify any issue that the Commission should investigate or set for hearing. *See* JA 200-22. Accordingly, the Court lacks jurisdiction to consider this objection on judicial review. *See* 16 U.S.C. § 825*l*(b); *Domtar*, 347 F.3d at 313. *See also Panhandle*, 324 U.S. at 645; *ASARCO*, 777 F.2d at 773-74.

Moreover, APS identifies no underlying factual issues that justify an evidentiary hearing. *See Cajun*, 28 F.3d at 177; *Moreau*, 982 F.2d at 568. Rather, APS' one claim, discussed *infra*, at most, "pose[s] legal and policy issues . . . and as such, do[es] not warrant a hearing." *Pacific Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1119 (D.C. Cir. 2002) (citations omitted).

C. Petitioner Failed To Show or Allege Discrimination.

APS' claim of discrimination is based solely on its assertion that WMECO's passing through of NEPOOL congestion charges to APS, but not the competitive suppliers resulted in (1) an "allocation of congestion charges to APS" that was "discriminatory as compared to competitive suppliers," (2) "a non-uniform application of the NEPOOL OATT" and (3) "non-uniform rates" as between "retail customers" taking SOS power and competitive-supply power. Br. at 22.[15]

Claims (1) and (3) fall of their own weight. As to claim (1), WMECO's allegedly disparate treatment of APS and the competitive supplier could not have resulted in any discrimination subject to the Commission's jurisdiction, because APS has not alleged that WMECO provided APS any jurisdictional services – WMECO simply purchased APS power. Accordingly, even if WMECO had treated APS differently from other suppliers, there was no discrimination, because the disparity was not "with respect to any transmission or sale subject to the jurisdiction of the Commission[.]" 16 U.S.C. § 824d(b). As to claim (3), APS has not explained, either here or to the Commission below (*see* JA 204-05), whether the alleged disparity is between transmission rates or non-jurisdictional sales rates. In its brief, APS asserts that "[t]he same transmission rates are applicable to all

[15] APS made this argument in its request for rehearing, but did not claim, as it appears to claim here, that FERC should have set this issue for hearing. *Compare* JA 204-05 *with* Br. at 20-22.

customers, regardless of their election of 'Generation Services[,]'" *i.e.*, regardless of whether they purchase energy from WMECO or a competitive supplier. Br. at 22 (footnote omitted). In the very next sentence, APS speaks of "WMECO's reduction of congestion charges from the transmission rate for the retail customers receiving standard offer service, and not for those receiving competitive service[.]" *Ibid.* (footnote omitted). Both statements cannot be true: If WMECO applies "[t]he same transmission rates . . . to all customers," then it does not subtract "congestion charges from the transmission rate" for SOS customers, but not competitive-supply customers, because such action would result in disparate transmission rates. Moreover, APS did not provide documentation showing disparity in *any* rates. Given the ambiguity of the allegations and lack of any evidence to support them, APS has failed to make a *prima facie* case of discrimination. *See Southwestern*, 347 F.3d at 981; *Holyoke*, 954 F.2d at 744.[16]

The Commission's finding that the NEPOOL OATT "govern[s] the provision of transmission service by a public utility transmission provider

[16] Any "preference" to the competitive supplier was *de minimis*, and had no impact on WMECO's rates, because during 2000, there was "no competitive supply of any significance." JA 101. NU represented that WMECO's former retail customers were served by one competitive supplier for one month (January). *Id.* n.40. That supplier delivered 1.43 megawatts of power (.00003% of WMECO's retail load) for which it charged $64. *Ibid.* As a result, WMECO incurred NEPOOL congestion charges of "less than $2.00[,]" which it did not pass on to its retail customers. *Id.* nn.40 & 41. APS implicitly acknowledged the accuracy of these assertions in its responsive pleading. R. Item No. 4 at 2-3.

(NEPOOL) to a network customer (WMECO)[,]" but not "a network customer's bilateral arrangements with third parties[,]" 104 FERC at 61,838 ¶ 10 (JA 226), disposes of APS claim (2), that WMECO's allegedly disparate treatment of APS and the competitive supplier caused "a non-uniform application of the NEPOOL OATT." *See* Br. at 22. As APS does not claim to be a NEPOOL network customer, WMECO's charges to APS could not affect the application of the NEPOOL OATT, much less cause that application to be "non-uniform."

IV. THE COMMISSION WAS NOT ASKED, MUCH LESS REQUIRED, TO ASSERT PRIMARY JURISDICTION OVER THE CONTRACT BETWEEN PETITIONER AND WMECO.

Finally, APS contends that the Commission erred by not asserting primary jurisdiction over the interpretation of the SOS Agreement. APS lists the factors to be considered in asserting such assertion – the need for FERC expertise in interpreting such contracts, the need for uniformity in interpreting such contracts, and the importance of the case in FERC's regulatory scheme – and, without explanation, claims they dictated an assertion of jurisdiction over the SOS Agreement. Br. at 23 (citing *Arkansas La. Gas Co. v. Hall*, 7 FERC ¶ 61,175 at 61,322, *reh'g denied*, 8 FERC ¶ 61,031 (1979)).

The Court lacks jurisdiction to consider this argument. In the first challenged order, the Commission observed that APS' "contract claims" were "currently being pursued in two state court proceedings" and that APS had not

asked the Commission to "address these issues." 101 FERC at 62,013 ¶ 7 (JA 181-82). In its amended rehearing request, APS did not dispute this finding or otherwise assert that FERC should assert primary jurisdiction over the SOS Agreement. *See* JA 200-22. APS' omission deprives the Court of jurisdiction to consider the objection on judicial review. *See* 16 U.S.C. § 825*l*(b); *Domtar*, 347 F.3d at 313. *See also Panhandle*, 324 U.S. at 645; *ASARCO*, 777 F.2d at 773-774.

Moreover, APS does not even attempt to explain how the factors it lists warrant FERC's assertion of primary jurisdiction here. *See* Br. at 23. In fact, given that, as has been demonstrated, the SOS Agreement has no bearing on any FERC tariff, and that APS' claims regarding it rest on state rather than federal law, there is no reason for the Commission to assert such jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

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Alternate Power Source, Inc. **Docket No. EL03-9**
v. FERC,
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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 6,446 words, not including the tables of contents and authorities, the certificates of counsel and the addendum.

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