

ORAL ARGUMENT IS SCHEDULED FOR DECEMBER 6, 2004

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

No. 04-1020

**DTE ENERGY COMPANY, *et al.*,
PETITIONERS,**

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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SEPTEMBER 17, 2004

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

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

B. Rulings Under Review

1. *International Transmission Co.*, 99 FERC ¶ 61,211 (2002);
2. *The Detroit Edison Co.*, 102 FERC ¶ 61,282 (2003); and
3. *The Detroit Edison Co.*, 105 FERC ¶ 61,209 (2003).

C. Related Cases

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

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September 17, 2004

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GLOSSARY

Applicants	International Transmission Company and DTE Energy Company
April 11 Order	<i>International Transmission Co.</i> , 103 FERC ¶ 61,041 (2003)
CMS	CMS Marketing, Services and Trading Company
December 20 Order	<i>International Transmission Co.</i> , 97 FERC ¶ 61,328 (2001)
DIG	Dearborn Industrial Generation LLC
DIG Facilities	The 230kV Navarre-DIG line, the 230kV Baxter-DIG line, and the Baxter substation
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
March 13 Order	<i>The Detroit Edison Co.</i> , 102 FERC ¶ 61,282 (2003)
May 22 Order	<i>International Transmission Co.</i> , 99 FERC ¶ 61,211 (2002)
Michigan PSC	Michigan Public Service Commission
Midwest ISO	Midwest Independent Transmission System Operator
OATT	Open Access Transmission Tariff
RAST	Retail Access Service Tariff
Rehearing Order	<i>The Detroit Edison Co.</i> , 105 FERC ¶ 61,209 (2003)
RTO	Regional Transmission Organization
TAPS	<i>Transmission Access Policy Study Group v. FERC</i> , 225 F.3d 667 (D.C. Cir. 2000)

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**BRIEF OF RESPONDENT
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STATEMENT OF THE ISSUE

Whether, in applying the Order No. 888 seven-factor test approved by this Court, the Commission reasonably found Detroit Edison's high voltage facilities, that form a loop through which power flows to and from interstate transmission facilities, to be FERC-jurisdictional transmission facilities, rather than state-jurisdictional local distribution facilities.

STATUTORY AND REGULATORY PROVISIONS

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

COUNTERSTATEMENT OF JURISDICTION

The challenged orders addressed two separate FERC proceedings, *Detroit Edison Co.*, Docket No. ER03-19, and *International Transmission Co.*, Docket No. ER01-3000. Because DTE Energy failed to seek rehearing of the aggrieving order in ER03-19, and failed to petition for review of the aggrieving order in ER01-3000, this Court is without jurisdiction to hear DTE Energy's petition for review.

Detroit Edison and DTE Energy's single joint petition for review challenged three orders. The first of those orders, *International Transmission Co.*, 99 FERC ¶ 61,211 (2002) ("May 22 Order"), was issued in Docket No. ER01-3000, which concerned a compliance filing listing jurisdictional transmission facilities to be transferred to the Midwest Independent Transmission System Operator ("Midwest ISO"). Objectors to that compliance filing contended that the filing omitted certain jurisdictional facilities. The May 22 Order was not an aggrieving order as it reached no final determination regarding whether the omitted facilities were FERC-jurisdictional transmission facilities or state-jurisdictional local distribution facilities. Neither Detroit Edison nor DTE Energy sought rehearing of the May 22 Order.

The second order, *The Detroit Edison Co.*, 102 FERC ¶ 61,282 (2003) ("March 13 Order"), addressed a different docket, No. ER03-19, which concerned Detroit Edison's submission for approval of an agency agreement between it and the Midwest ISO. *Id.* ¶ 1. In the March 13 Order, the Commission found the omitted facilities to be FERC-jurisdictional, and required revisions to the proposed Agency Agreement as a result. Only Detroit Edison, not DTE Energy, sought rehearing of the March 13 Order. *See R.*

79, JA 96. As DTE Energy failed to seek rehearing of the March 13 Order, the Court lacks jurisdiction to entertain DTE Energy's petition for review of that order.

DTE Energy did seek rehearing of the Commission's subsequent order applying its jurisdictional finding in the March 13 Order to DTE Energy's compliance filing in ER01-3000. *International Transmission Company*, 103 FERC ¶ 61,041 at ¶ 11 (2003) ("April 11 Order"), JA 82. *See* R. 81, JA 156. However, while the April 11 Order was the aggrieving order for DTE Energy, DTE Energy did not petition for appellate review of the April 11 Order.

The third challenged order, *The Detroit Edison Co.*, 105 FERC ¶ 61,209 (2003) ("Rehearing Order"), addressed DTE Energy and Detroit Edison's request for rehearing of the April 11 Order in the compliance filing docket, Docket No. ER01-3000, and Detroit Edison's request for rehearing of the March 13 Order in the Agency Agreement docket, ER03-19. Although both DTE Energy and Detroit Edison petitioned for review of the Rehearing Order, that does not aid DTE Energy. DTE Energy never sought rehearing of the March 13 Order in ER03-19, to which it was not a party, and never petitioned for review of the April 11 Order in ER01-3000 which was its aggrieving order. As the March 13 and April 11 Orders, not the Rehearing Order, are the aggrieving orders, *see City of Oconto Falls, Wisconsin v. FERC*, 204 F.3d 1154, 1160 (D.C. Cir. 2000), DTE Energy's failure to seek rehearing of the March 13 Order, or to petition for review of the April 11 Order, is fatal to its petition for review. *See California Department of Water Resources v. FERC*, 306 F.3d 1121, 1125-26 (D.C. Cir. 2002) (explaining jurisdictional requirement of appealing from the aggrieving order).

STATEMENT OF THE CASE

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

International Transmission Company and DTE Energy Company (collectively “Applicants”) sought Commission authorization to transfer operational control of International Transmission’s jurisdictional transmission facilities to the Midwest ISO. CMS Marketing, Services and Trading Company (“CMS”) protested the inadequate identification of the facilities to be transferred, arguing that certain FERC-jurisdictional transmission facilities were omitted. Applicants and Detroit Edison Company contended that the facilities omitted were local distribution facilities exempt from FERC jurisdiction under FPA § 201(b), 16 U.S.C. § 824(b). In the orders under review -- the May 22 Order, the March 13 Order and the Rehearing Order -- the Commission concluded that the facilities at issue were FERC-jurisdictional transmission facilities.

II. Statement of Facts

A. The Order No. 888¹ Seven-Factor Test For Differentiating Local Distribution Facilities From Jurisdictional Transmission Facilities.

Under FPA § 201, FERC regulates wholesale power sales and interstate transmissions, and state agencies retain jurisdiction over bundled retail transactions,

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

including the intrastate sale and distribution of electricity through local distribution facilities. *TAPS*, 225 F.3d at 691. Initially, this regulatory division was easily applied as most transactions involved either a wholesale or retail sale, and correspondingly either jurisdictional transmission or local distribution facilities. *Id.* As the electric industry evolved, however, this changed.

Utilities decided to cover demand spikes by sharing power, rather than by building more generation capacity. The transmission grid developed from these arrangements. Eventually, nonutility generators started producing electricity, and power marketers began to buy and resell electricity to other power marketers, utilities, or even directly to consumers. These industry participants do not own transmission lines, so they rely upon the utilities that own such facilities to provide transmission services. In addition to their traditional bundled sales activity, vertically integrated utilities started “unbundling” their own services and developing their own power marketing units to buy and sell electricity at wholesale. Some states even mandate unbundling of retail services.

Id. As a result, “facilities once used solely for local distribution of bundled retail sales now engage regularly in unbundled wholesale transmissions and retail delivery as well.”

Id. “Thus, while the electricity world was once neatly divided into spheres of retail versus wholesale sales, and local distribution versus transmission facilities, such is no longer the case.” *Id.*

In Order No. 888, “FERC reinterpreted FPA § 201 to accommodate the new industry practices and conditions.” *Id.* The Commission adopted a seven-factor jurisdictional test to identify whether a facility is a local distribution facility subject to state jurisdiction or a facility engaged in interstate transmission subject to FERC jurisdiction. *Id.* at 695. The test evaluates on a case-by-case basis whether the activities of the facilities in question should be classified as transmission or local distribution. *See*

Order No. 888 at 31,980 (“Whether facilities are used in local distribution is a question of fact to be decided by the Commission as an original matter.”)

- (1) Local distribution facilities are normally in close proximity to retail customers.
- (2) Local distribution facilities are primarily radial in character.
- (3) Power flows into local distribution systems; it rarely, if ever, flows out.
- (4) When power enters a local distribution system, it is not reconsigned or transported on to some other market.
- (5) Power entering a local distribution system is consumed in a comparatively restricted geographical area.
- (6) Meters are based at the transmission/local distribution interface to measure flows into the local distribution system.
- (7) Local distribution systems will be of reduced voltage.

Id. n. 6 (citing Order No. 888 at 31,981).

TAPS affirmed the seven-factor test. *Id.* at 696. “Order 888 implicitly recognizes the current reality that many primarily retail utilities engage in both local distribution and interstate transmissions, and seeks through the seven factors to discern each facility’s primary function. We cannot agree with the state petitioners that this approach is unreasonable or otherwise impermissible.” *Id.* The Supreme Court in *New York v. FERC*, 535 U.S. 1, 23 (2002), likewise recognized FERC’s seven-factor test as the means of differentiating between local distribution and FERC-jurisdictional transmission facilities.

B. Events Leading Up To The Commission Orders

Detroit Edison and International Transmission were subsidiaries of DTE Energy. *DTE Energy Company*, 91 FERC ¶ 61,317 at 62,090 (2000). Detroit Edison was a public utility engaged in the generation, transmission and distribution of energy in Michigan. *Id.* DTE Energy created International Transmission to acquire ownership of Detroit Edison's transmission assets, as a first step in DTE's efforts to divest its transmission business to an entity qualified to join a Regional Transmission Organization ("RTO"). *Id.* On May 4, 2000, DTE Energy, Detroit Edison, and International Transmission sought authorization to transfer Detroit Edison's transmission facilities to International Transmission. *Id.* The Commission authorized the transfer of all Detroit Edison integrated transmission facilities with voltage ratings of 120 kV and above, and all related jurisdictional tariffs, contracts, books and records. *Id.* at 62,090-91.

Following the January 1, 2001 transfer, International Transmission's transmission facilities, interconnected with those of Michigan Electric Transmission Company, together comprised substantially all of the Michigan transmission grid. *International Transmission Company*, 97 FERC ¶ 61,328 at 62,534 (2001) ("December 20 Order"), JA 17. Furthering the effort to organize a Midwest RTO, Applicants applied for authorization to transfer functional control over International Transmission's jurisdictional transmission facilities to the Midwest ISO. *Id.* at 62,536, JA 22. The Commission approved the proposed transaction and ordered International to provide an updated final list of the jurisdictional facilities being transferred. *Id.* at 62,538, JA 26.

On January 22, 2002, International Transmission submitted an updated list of jurisdictional facilities. R. 48, JA 224. On February 12, 2002, CMS protested, arguing that the facilities list should include those Detroit Edison facilities that interconnect Dearborn Industrial Generation, LLC (“DIG”) with International Transmission -- specifically, the 230 kV Navarre-DIG line, the 230 kV Baxter-DIG line, and the Baxter substation (collectively “DIG Facilities”) -- as those facilities are the ones by which DIG sells electric energy to wholesale purchasers, including CMS, and therefore are FERC-jurisdictional transmission facilities.

DIG’s power plant began start-up operations in March of 2001, in the Rouge Industrial Complex in Dearborn, Michigan. *See* R. 70 at 2, JA 381. From that plant, DIG sells energy to wholesale customers, including a CMS subsidiary that resells the energy at retail to customers in the Rouge Industrial Complex. *Id.* DIG’s plant is interconnected with the International Transmission system by means of Detroit Edison’s 230 kV Navarre-DIG line and 230 kV Baxter-DIG line, which, together with the DIG generator switchyard, form a 230 kV loop connecting on both ends to International Transmission. *Id.* at 2, 5, JA 381, 384. The Navarre-DIG line was newly-built, installed in conjunction with construction of DIG’s power plant. R. 75 at 3, JA 516. Although the Baxter-DIG line has been in place since approximately 1980, *id.*, it was reconfigured in conjunction with the construction of DIG’s plant, R. 65 at 4, JA 338.

C. The Commission Orders

The May 22 Order found that the Navarre-DIG and Baxter-DIG lines appeared to perform a jurisdictional transmission function since they connect DIG to the transmission

grid. 99 FERC at 61,889, JA 69. FERC therefore required Applicants to explain why control of these facilities should not be transferred to the Midwest ISO, and to provide additional information showing the location of the lines and details of the interconnection between the DIG facilities and the International Transmission system. *Id.*, JA 70.

The Commission also found that the Baxter substation should be included in the updated list of transmission facilities, as it already had been included in the FERC Docket No. EC00-86 list of transmission facilities Detroit Edison was transferring to International Transmission, a list that was incorporated in the December 20 Order. *Id.* at 61,889-90 (citing December 20 Order, 97 FERC at 62,536 n. 21), JA 70. Accordingly, the Applicants were directed to supplement their compliance filing to include the Baxter substation. *Id.* at 61,890, JA 70.

On July 16, 2002, Detroit Edison's intervention and response, R. 61, JA 257, conceded that the DIG Facilities "serve as generator interconnection facilities that are used to effectuate FERC-jurisdictional wholesale sales from the DIG Plant," because the "DIG Plant is interconnected with the Detroit Edison distribution system in a manner that requires use of [the DIG Facilities] to deliver the DIG Plant's output to the [International Transmission] system in order to make wholesale sales." *Id.* at 3, JA 259. Nevertheless, Detroit Edison contended that the DIG Facilities "constitute part of Detroit Edison's distribution system and were developed and historically have been used by Detroit Edison to provide retail distribution service to the electric loads located in and near the Rouge Complex pursuant to retail tariffs and contracts." *Id.* at 11, JA 267. Thus, Detroit Edison argued that the DIG Facilities were "dual-use" facilities subject to both state and

FERC jurisdiction. *Id.* Detroit Edison expressed concern that transfer of the DIG Facilities to the Midwest ISO might lead to unrecoverable stranded costs, as customers served by the DIG Facilities may be able to avoid retail access distribution service from Detroit Edison under its Michigan PSC-jurisdictional Retail Access Service Tariff (“RAST”). *Id.* at 13-14, JA 269-70. Detroit Edison offered in the alternative to transfer operational control over the DIG Facilities only to the extent necessary to effectuate wholesale sales. *Id.* at 15, JA 271.

Applicants’ July 16, 2002 filing in compliance with the May 22 Order acknowledged that certain transmission-related facilities at the Baxter substation were transferred to International Transmission and therefore were already under the control of the Midwest ISO. R. 62 at 3-4, JA 300-01. However, Applicants asserted that Detroit Edison retained control of other facilities in the Baxter substation that are used to provide service to end-use retail loads in the Rouge Complex. *Id.* at 4, JA 301. Applicants further contended that the Baxter-DIG and Navarre-DIG lines were constructed to provide retail distribution service to the Rouge Complex, although they now also connect the DIG generator to the International Transmission grid. *Id.* at 6-7, JA 302-03.

CMS protested the compliance filing, arguing that the Navarre-DIG line serves as the primary point of interconnection between DIG and International Transmission from DIG’s inception. R. 65 at 3-4, JA 337-38. Further, while the Baxter-DIG line may historically have been constructed as a retail distribution line for the Rouge Complex, upon construction of DIG’s power plant the line was reconfigured to serve as a secondary point of interconnection with International Transmission. *Id.* at 4, JA 338. The present

configuration therefore rendered the history of the lines irrelevant because, while some small amount of distribution service may now take place over the lines, they are primarily used for FERC-jurisdictional transmission service. *Id.*

CMS appended to its protest an analysis of power flows on the Navarre-DIG and Baxter-DIG lines. *Id.* at 4 and Exhibit A, JA 338, 345-49. The analysis showed that DIG generated electricity 98% of the time, and 99% of the generated power involves wholesale transactions that are resold both into the Rouge Complex and to external wholesale purchasers. R. 65, Exhibit A at 2, ¶ 5, JA 346. During 97% of the hours analyzed, power flowed from DIG through the Navarre-DIG line into International Transmission's transmission system. *Id.* at 3, ¶ 7(i), JA 347. During 67% of the hours analyzed, power flowed from the Baxter substation into the Rouge Complex, where -- because the Rouge Complex load is met entirely from DIG generation 83% of the time -- power unneeded at the Complex flows out the other side on the Navarre-DIG Line to the International Transmission system, creating loop flow. *Id.* ¶ 7(ii), JA 347.

Detroit Edison did not dispute the accuracy of the CMS power flow analysis, but contended it "serves little purpose" as "Detroit Edison has acknowledged that the [DIG Facilities] are dual-use facilities." R. 66 at 6, JA 359. Indeed, Detroit Edison had obtained FERC approval of a Distribution Interconnection Agreement between itself and DIG that recognized FERC jurisdiction over these facilities. *Id.* at 7, JA 360. "Detroit Edison's position is not that the [DIG Facilities] are exclusively used for retail distribution service. Instead, it is Detroit Edison's position that since the [DIG Facilities] are used to provide distribution service as well as generator interconnection service, the

Commission should not require Detroit Edison to transfer control over the [DIG Facilities] to the Midwest ISO.” *Id.* Alternatively, Detroit Edison asked that, if control is transferred, it should only be “to the limited extent necessary to facilitate wholesale power sales transactions from DIG.” *Id.*

On October 4, 2002, in Docket No. ER03-19, Detroit Edison submitted an Agency Agreement between itself and the Midwest ISO, that sought to transfer limited functional control over the DIG Facilities to the Midwest ISO to permit the ISO to assure that the DIG generator is provided with non-discriminatory service when using the facilities for wholesale sales. R. 68, JA 365. On November 27, 2002, Commission staff issued a deficiency letter to Detroit Edison requesting additional information concerning ownership and rate treatments regarding the facilities in question. R. 72, JA 509.

On January 24, 2003, Detroit Edison responded, explaining that its Agency Agreement limits the Midwest ISO to providing wholesale service over the DIG Facilities, while requiring that retail load customers obtain retail delivery service over the DIG Facilities under Detroit Edison’s RAST. R. 75 at 3, JA 516. Detroit Edison claimed that giving complete functional control over the facilities to the Midwest ISO would make it unable to recover its costs under the RAST, which includes the costs of the Baxter-DIG line. *Id.* As the costs for the newly-built Navarre-DIG line were directly assigned to DIG, they are not included in Detroit Edison’s rate base. *Id.* at 3-4, JA 516-17.

Using the Order No. 888 seven-factor test, on March 13, 2003, the Commission found that the DIG Facilities perform a transmission, not a state-jurisdictional local

distribution, function. March 13 Order ¶ 16, JA 75-76. The facilities are high voltage facilities that, together with the DIG ring bus, form a 230 kV loop through which power flows into and out of International Transmission's interstate transmission facilities. *Id.* (citing Exhibit B, Schematic Diagram of the DIG Generator Interconnection in International Transmission Company's Compliance Filing, Docket No. ER01-3000-006).

The Commission has exclusive jurisdiction over unbundled retail transmission in interstate commerce, including jurisdiction over facilities used for the transmission component of a transaction involving unbundled retail wheeling in interstate commerce. *Id.* ¶ 17 and n. 7, JA 76 (citing Order No. 888 at 31,784). As Michigan has implemented retail access for all customers of Michigan's investor-owned utilities, retail customers are entitled to receive unbundled retail access pursuant to a FERC-approved tariff. *Id.* Finally, DIG, which is interconnected by the DIG Facilities to International Transmission, is selling all its output at wholesale. *Id.* Accordingly, pursuant to FPA § 201(b), the DIG Facilities are subject to Commission jurisdiction. *Id.*

Based upon these factors, the Commission found that the facilities perform a jurisdictional transmission function and that operational control of them should be transferred to the Midwest ISO. *Id.* ¶ 18, JA 76. Transfer should not, however, preclude Detroit Edison from collecting its RAST if allowed by the state. *Id.* ¶ 19, JA 77. “[W]hile we believe that in most cases there will be identifiable local distribution facilities subject to state jurisdiction, we also believe that even where there are no identifiable local distribution facilities, states nevertheless have jurisdiction in all

circumstances over service of delivering energy to end users.” *Id.* (quoting Order No. 888 at 31,783, also citing *Detroit Edison Co.*, 99 FERC ¶ 61,309 (2001)).

On April 11, 2003, in Docket No. ER01-3000, the Commission conditionally accepted the July 16, 2002 compliance filing, but, consistent with its jurisdictional determination in the March 13 Order, required Applicants to revise the compliance filing to reflect the transfer of operational control of the DIG Facilities to the Midwest ISO. April 11 Order ¶ 11, JA 82.

On April 14, 2003, Detroit Edison sought rehearing of the March 13 Order in Docket No. ER03-19, and moved to reopen the record to include a recent Michigan Public Service Commission (“Michigan PSC”) order. R. 79, JA 96. Detroit Edison conceded that the DIG Facilities “are high voltage facilities, that together with DIG’s ring bus facilities (as well as with facilities owned by Ford and Rouge at their plant sites at the Rouge Complex) they form a 230-kV loop configuration under present operating conditions, and that power can flow into and out of the facilities when operated in a loop configuration.” *Id.* at 9, JA 104 (footnote omitted). Detroit Edison contended, nevertheless, that the DIG Facilities also continue to serve a retail distribution function, *id.*, which should be subject to state jurisdiction, *id.* at 11, JA 106. Additionally, Detroit Edison argued that the Commission lacked the statutory authority to compel Detroit Edison to join the Midwest ISO as a transmission-owning member, or to compel Detroit Edison to transfer additional control over the DIG Facilities to the Midwest ISO. *Id.* at 15, JA 110.

On May 12, 2003, DTE Energy and Detroit Edison sought rehearing of the April 11 Order in Docket No. ER01-3000, requiring revision of DTE and International Transmission's compliance filing to reflect transfer of the DIG Facilities to the Midwest ISO. R. 81, JA 156. Again, Detroit Edison and DTE Energy conceded that the DIG Facilities "are high-voltage facilities, that together with DIG's ring bus facilities (as well as with facilities owned by Ford and Rouge at their plant sites at the Rouge Complex) they form a 230-kV loop configuration under present operating conditions, and that power can flow into and out of the facilities when operated in a loop configuration." *Id.* at 11-12, JA 166-67. Nevertheless, the rehearing request reiterated the argument that the DIG Facilities were dual use and dual jurisdiction facilities. *Id.* at 2, JA 157. Further, DTE Energy argued that, because neither DTE Energy nor International Transmission own the DIG Facilities, the April 11 Order should be vacated insofar as it requires them to effect a transfer of control over the Facilities to the Midwest ISO. *Id.*

On November 17, 2003, the Commission addressed Detroit Edison's request for rehearing of the March 13 Order in Docket No. ER03-19 and request to reopen the record, and DTE Energy and Detroit Edison's request for rehearing of the April 11 Order in Docket No. ER01-3000. Rehearing Order ¶¶ 1, 12, JA 84, 87. The Commission denied rehearing on the issue of whether the facilities in question were transmission facilities, finding that neither Detroit Edison nor DTE Energy had raised any new arguments or introduced any new evidence that rebutted the prior finding that the facilities perform a transmission function. *Id.* ¶¶ 17, 18, JA 89. Although local distribution lines may exist within the Rouge Industrial Complex, the record

demonstrated that the DIG Facilities were not local distribution facilities. *Id.* ¶ 18, JA 89. The DIG Facilities are high voltage facilities, not low voltage facilities associated with local distribution. *Id.* Power flows into and out of the facilities, making them looped transmission facilities, *i.e.* not radial in character like those of local distribution facilities. *Id.* The DIG facilities are interconnected to the grid and have a network configuration, and therefore have the capacity to transmit energy to other markets outside the geographical area. *Id.* These characteristics demonstrate that the facilities are jurisdictional transmission facilities, consistent with the Order No. 888 seven-factor test. *Id.*

Further, in its May 2000 application to transfer assets to International Transmission, Detroit Edison specifically stated that it had applied the Commission's seven-factor test to its facilities and identified the Baxter substation as a FERC-jurisdictional transmission facility. *Id.* ¶ 19, JA 90. Detroit Edison also cited to a Michigan PSC order issued on January 14, 1998, adopting Detroit Edison's proposed classification of its facilities. *Id.* (citing DTE Energy, Detroit Edison and International Transmission's May 4, 2000 Filing in Docket No. EC00-86-000 at Attachment 3 (In Re: The Detroit Edison Company, Case No. U-11337 (MPSC 1998))). Thus, the Baxter substation was properly classified as a transmission facility. *Id.*

The 230 kV Navarre-DIG line, which was constructed later, was not included in the classification adopted by the 1998 Michigan PSC Order. *Id.* ¶ 20, JA 90. However, similar to the facilities found to be transmission and transferred to International Transmission in Docket No. EC00-86, the Navarre-DIG line connects to the International

Transmission system and thus to the transmission grid, and is a looped 230 kV transmission line. *Id.* These characteristics are consistent with the Order No. 888 seven-factor test. *Id.* Accordingly, the Commission found that the Navarre-DIG line is a jurisdictional facility. *Id.*

The Commission rejected the argument that the facilities are “dual use” facilities not subject to the Commission’s exclusive jurisdiction. *Id.* ¶ 21, JA 91. For the reasons discussed, the Commission found that the facilities are transmission facilities, not local distribution facilities, and pursuant to FPA § 201 are subject to the Commission’s jurisdiction and review. *Id.* The Commission clarified, however, that this does not prevent Detroit Edison from recovering any retail access charges that the state of Michigan is authorized to impose under state law. *Id.*

The Commission also clarified that the March 13 Order did not require Detroit Edison to join the Midwest ISO, but, rather, to transfer control of those facilities determined to be transmission facilities. *Id.* ¶ 23, JA 91. On rehearing, however, the Commission decided not to require Detroit Edison to transfer control over the DIG Facilities to the Midwest ISO beyond what Detroit Edison proposed in the Agency Agreement, with certain modifications related to reliability concerns. *Id.* ¶ 24, JA 92.

The Commission also rejected the request to reopen the record to include the Michigan PSC’s decision, for failure to demonstrate an extraordinary change in circumstances that outweighs the need for finality in the administrative process and goes to the very heart of the case. *Id.* ¶ 28, JA 93 (citing *East Texas Elec. Coop., Inc. v.*

Central and Southwest Servs., Inc., 94 FERC ¶ 61,218, *reh'g denied*, 95 FERC ¶ 61,066 (2001)). Detroit Edison made no such showing. *Id.*

In any event, the Commission defers to a state commission's classification where the state regulators "specifically evaluate the seven factor indicators and any other relevant facts and [] make recommendations consistent with [those] essential elements.'" *Id.* ¶ 30, JA 93-94 (quoting Order No. 888 at 31,784 and n. 548). For example, *Nevada Power Co.*, 88 FERC ¶ 61,234 at 61,768 and n. 4 (1999), deferred to the state commission's approval of Nevada Power's reclassification based on its application of the seven-factor test, as filed with the Nevada Commission. *Id.* Detroit Edison did not demonstrate that it had followed these procedures for reclassification. *Id.* Here, the proffered Michigan PSC order did not discuss application of the seven-factor test or reclassification of the DIG Facilities. *Id.* Further, it appeared that the facilities discussed in the Michigan PSC's order were not the DIG Facilities. *Id.* n. 27, JA 94.

SUMMARY OF ARGUMENT

The DIG Facilities -- the Baxter-DIG line, the Navarre-DIG line and the Baxter substation -- interconnect DIG generation, which is sold at wholesale, with the International Transmission system, and therefore the DIG Facilities provide FERC-jurisdictional transmission in interstate commerce. Petitioners asserted that the DIG Facilities also provide state-jurisdictional local distribution service. Applying the Order No. 888 seven-factor test, approved by this Court, the Commission reasonably concluded that the DIG Facilities did not function as local distribution facilities.

The seven-factor test looks to the circumstances of facility operation to determine whether the facility operates as local distribution or FERC-jurisdictional transmission. Here, the DIG Facilities are high voltage facilities, not the low voltage facilities associated with local distribution. The facilities are looped so that power flows into and out of them, rather than being radial in character like local distribution facilities, in which power flows into, not out of, the facilities. The DIG Facilities are interconnected to the grid and have a network configuration, and therefore they have the capacity to transmit energy to other markets outside the geographical area. These characteristics demonstrate that the DIG Facilities are FERC-jurisdictional transmission facilities. This conclusion is bolstered by Detroit Edison's May 2000 FERC filing that characterized the Baxter substation as a FERC-jurisdictional transmission facility.

Petitioners contend that the record shows that the DIG Facilities are local distribution facilities or at least "dual function" facilities subject to both federal and state jurisdiction. Petitioners point to the historical usage of the Baxter-DIG line and

substation, and the alleged intent behind the installation of the Navarre-DIG line. However, the historical purpose or alleged intended use of facilities does not speak to whether the facilities as currently operated perform a local distribution function. Rather, application of the seven-factor test, approved by this Court, answers that issue and here application of the seven-factor test demonstrated that the DIG Facilities did not function as local distribution facilities.

Petitioners did not dispute -- indeed, they repeatedly conceded below -- that the DIG Facilities are high voltage facilities, interconnected to the grid, that operate in a looped fashion. Petitioners now assert, however, that the looped operation should be disregarded, and the DIG Facilities regarded as radial lines, because certain facilities completing the loop between the Navarre-DIG line and the Baxter-DIG line are not owned by Detroit Edison. The Court lacks jurisdiction to hear this argument because petitioners never raised it below. Further, the looped operation, not the ownership of the facilities, determines whether the DIG Facilities function as transmission facilities, as the Commission's approved seven-factor test recognizes.

Petitioners challenge the Commission's reliance on Detroit Edison's characterization of the Baxter substation as a transmission facility in its May 2000 filing, contending that the Commission overlooked a purported later reanalysis that found some parts of the substation to be local distribution. The Commission did not overlook, but rather rejected, this claim. Both the Commission and the Michigan PSC approved Detroit Edison's May 2000 classifications, and Detroit Edison never approached the Commission or the Michigan PSC with any reanalysis of that classification.

Petitioners assert that the Michigan PSC Order in Case No. U-12980 provides “conclusive evidence” that the DIG Facilities are local distribution, and that the Commission erred in failing to admit and defer to the Michigan PSC’s determination. The Commission only reopens a record where a movant has demonstrated extraordinary circumstances outweighing the need for finality in the administrative process, a showing Detroit Edison failed to make here. The Commission defers to a state commission’s classification of facilities where the state regulators apply the seven-factor test. Here, the Michigan PSC Order does not apply the seven-factor test or reclassify any of the DIG Facilities.

In fact, FERC was skeptical that the Michigan PSC order addressed the classification of the DIG Facilities. The evidence before the Michigan PSC indicated that the facilities forming the last step of delivery to Rouge Complex end users were not the DIG Facilities, but were privately-owned lines not belonging to Detroit Edison. The Michigan PSC Order concluded that the Rouge Complex end users could be required to pay retail open access charges regardless of whether Detroit Edison owned local distribution facilities interconnecting with DIG or the Rouge Complex.

Petitioners argue that finding the DIG Facilities jurisdictional heightens Detroit Edison’s risk of being bypassed by local distribution customers seeking service directly under FERC-jurisdictional tariffs, thereby avoiding stranded cost charges assessed by the state. The Commission’s jurisdictional finding does not prevent Detroit Edison from recovering any retail access charges that Michigan is authorized to impose under state law. Order No. 888 found that, even where there are no identifiable local distribution

facilities, States nevertheless have jurisdiction over the service of delivering energy to end users. As a result, customers have no incentive to structure purchases to avoid using identifiable local distribution facilities as a means of bypassing state jurisdiction and assessment for stranded cost charges. The Michigan PSC relied upon this FERC determination in finding that Rouge Complex end users were subject to Detroit Edison's retail access service tariff regardless of whether Detroit Edison-owned local facilities actually provide distribution service to Rouge Complex end users.

Thus, the orders here do not undermine state regulation of local distribution service provided pursuant to state retail tariffs. While FERC found the DIG Facilities to be jurisdictional transmission facilities, FERC made no effort to regulate Detroit Edison's retail service, which is still subject to state jurisdiction. Here, FERC has exercised no jurisdiction over matters outside its statutory purview.

ARGUMENT

I. STANDARD OF REVIEW

The “deferential standard” of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), applies to “an agency’s interpretation of its own statutory jurisdiction.” *TAPS*, 225 F.3d at 694. On other issues, the Commission’s orders are reviewed under the arbitrary and capricious standard. *Central Vermont Pub. Serv. Corp. v. FERC*, 214 F.3d 1366, 1369 (D.C. Cir. 2000). That standard requires the Commission to demonstrate that it made a reasoned decision based on substantial record evidence. *Oconto Falls*, 204 F.3d at 1159. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. FPA § 313(b), 16 U.S.C. § 825l(b).

II. THE COMMISSION PROPERLY FOUND THAT THE DIG FACILITIES ARE FERC-JURISDICTIONAL TRANSMISSION FACILITIES.

A. The Commission’s Determination Is Supported By The Record.

The DIG Facilities interconnect the DIG power plant with the International Transmission system, March 13 Order ¶ 2, JA 73, and DIG sells all of its output at wholesale, *id.* ¶ 17. Because the Facilities are used to provide transmission service in interstate commerce to deliver power to wholesale purchasers, the Facilities are subject to FERC jurisdiction. *Id.* ¶ 17, JA 76. *See also* Rehearing Order ¶ 17, JA 89 (reaffirming determinations in March 13 Order regarding jurisdictional status of the DIG Facilities); *Detroit Edison Co.*, 96 FERC ¶ 61,309 at 62,194 (2001) (finding that the Commission has jurisdiction over “a 230 kV line and other interconnection facilities” that connect

DIG's facility with International Transmission because any facilities "used by public utilities to provide transmission service in interstate commerce in order to deliver power and energy to wholesale customers" are subject to Commission jurisdiction and review.) FERC has exclusive authority over the regulation of facilities that sell and transmit electricity at wholesale to customers who will resell electricity to end users. *TAPS*, 225 F. 3d at 695.

Likewise, the Commission has exclusive jurisdiction over unbundled retail transmission in interstate commerce. March 13 Order ¶ 17, JA 76. Michigan has implemented retail access for all customers of Michigan's investor-owned utilities, and therefore those customers are entitled to receive unbundled retail access pursuant to a FERC-approved tariff. *Id.* While FERC has jurisdiction over unbundled retail transmission on facilities engaged in interstate transmission, it lacks jurisdiction under FPA § 201 over transmission by "facilities used in local distribution." *TAPS*, 225 F.3d at 695. Because petitioners assert that the DIG Facilities are used to provide local distribution as well as wholesale transmission service, Pet. Br. 21, it is necessary to determine whether the facilities are local distribution facilities.

To differentiate between local distribution and interstate transmission facilities, the Commission adopted a "carefully formulated" seven-factor test, affirmed by this Court in *TAPS*. *Detroit Edison Co. v. FERC*, 334 F.3d 48, 54 (D.C. Cir. 2003) (citing Order No. 888 at 31,770-71, 31,981, *aff'd TAPS*, 225 F.3d at 696). *See also New York*, 535 U.S. at 23 (recognizing the Order No. 888 seven-factor test as the means of identifying local distribution facilities). FERC's seven-factor test evaluates on a case-by-case basis

whether the activities of the facilities in question correspond with seven indicators of local distribution:

- (1) Local distribution facilities are normally in close proximity to retail customers.
- (2) Local distribution facilities are primarily radial in character.
- (3) Power flows into local distribution systems; it rarely, if even, flows out.
- (4) When power enters a local distribution system, it is not reconsigned or transported on to some other market.
- (5) Power entering a local distribution system is consumed in a comparatively restricted geographical area.
- (6) Meters are based at the transmission/local distribution interface to measure flows into the local distribution system.
- (7) Local distribution systems will be of reduced voltage.

Rehearing Order ¶¶ 17-18 (citing Order No. 888 at 31,981). *See TAPS*, 225 F.3d at 696 (agreeing test is proper exercise of FERC discretion to interpret statute).

Applying the seven-factor test here, the Commission properly determined that the DIG Facilities did not in fact function as state-jurisdictional local distribution facilities but rather operated as FERC-jurisdictional transmission facilities. Rehearing Order ¶¶ 17, 18, JA 89. The DIG Facilities are high voltage, 230 kV facilities, not the low voltage facilities associated with local distribution. *Id.* ¶ 18, JA 89. The facilities are looped so that power flows into and out of them, rather than being radial local distribution facilities, where power flows in, but not out. *Id.* The DIG Facilities' interconnection with the grid and network configuration give them the capacity to transmit energy to other markets

outside the Rouge Complex. *Id.* These characteristics demonstrated that the DIG Facilities are FERC-jurisdictional transmission facilities. *Id.*

Detroit Edison itself reached the same conclusion regarding the Baxter substation. *Id.* ¶ 19, JA 90. In its May 2000 application to transfer jurisdictional transmission facilities in Docket No. EC00-86, Detroit Edison stated that it had applied the Commission’s seven-factor test to its facilities, and included the Baxter substation as a transmission facility. *Id.* Both FERC and the Michigan PSC adopted Detroit Edison’s May 2000 classification.

Because the Commission’s factual determination concerning the DIG Facilities is supported by substantial evidence in a matter subject to FERC’s discretion, *TAPS*, 225 F.3d at 646, that determination should be afforded deference. In the analogous context of applying the “primary function” test to differentiate between jurisdictional transportation and nonjurisdictional gathering under the Natural Gas Act, this Court has recognized that the evaluation and balancing of factors in determining the proper classification of facilities implicates the Commission’s “considerable expertise” about the industry. *ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071, 1084 (D.C. Cir. 2002). Accordingly, the Court defers to the Commission’s reasonable determinations regarding a facility’s jurisdictional status. *Williams Gas Processing v. FERC*, 331 F.3d 1011, 1013 (D.C. Cir. 2003).

B. Petitioners' Arguments Do Not Undermine the Commission's Conclusion.

1. Petitioners Fail To Show Any Factual Or Legal Error.

Petitioners challenge the Commission's jurisdictional determination, contending that the record shows that historically the DIG Facilities served local distribution functions or "[a]t the least" dual functions subject to both federal and state jurisdiction. Pet. Br. 21. As record support, petitioners point to their allegations below regarding the historical usage of the Baxter-DIG line and substation, and the alleged intent behind the installation of the Navarre-DIG line. *See* Pet Br. 22 (arguing that the 230 kV Baxter-DIG line and the 230 kV Baxter substation "have been in place for many years and historically have served to interconnect retail customers at and near the Rouge Complex with the Detroit Edison distribution system," and that the recently-constructed Navarre-DIG line was intended to "provide backup local distribution service to Rouge Complex end-use customers").

This showing provides no support for finding the DIG Facilities to be local distribution facilities. Rehearing Order ¶ 17, JA 89. The historical purpose or alleged intended use of facilities does not speak to the issue at hand, which is whether the DIG Facilities currently are operating as local distribution facilities. *Id.* ¶ 18, JA 89. *Cf. Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 and 1078 n. 9 (9th Cir. 2003). Although local distribution lines may exist within the Rouge Complex, the record amply demonstrated that, under the seven-factor test, the DIG Facilities were not local distribution lines. *Id.* The DIG Facilities are high-voltage, looped lines, unlike the low-

voltage, radial lines indicative of local distribution facilities. *Id.* Additionally, the network configuration of these facilities, interconnected to the grid, further demonstrate that the DIG Facilities function as FERC-jurisdictional transmission facilities. *Id.*

Petitioners do not (nor can they) dispute the factual bases for those findings.² Petitioners repeatedly expressly conceded these facts below. *See, e.g.*, Detroit Edison Rehearing of March 13 Order, R. 79 at 9, JA 104 (conceding that the DIG Facilities “are high voltage facilities, that together with DIG’s ring bus facilities (as well as with facilities owned by Ford and Rouge at their plant sites at the Rouge Complex) they form a 230-kV loop configuration under present operating conditions, and that power can flow into and out of the facilities when operated in a loop configuration.”); DTE and Detroit Edison Rehearing of April 11 Order, R. 81 at 11-12, JA 166-67 (same statement).

Petitioners now claim that the existence of the loop flow should be disregarded, and the lines treated as though they are radial lines, because certain facilities owned by Ford Motor and Rouge Steel that are “beyond Detroit Edison’s control” complete the

² For example, the CMS power flow analysis showed that 99 % of the time that DIG generated electricity, it produced supply for both the Rouge Complex and external wholesale transactions. R. 65, Exhibit A at 2, ¶ 5, JA 346. During 97% of the hours analyzed, power flowed from DIG through the Navarre line into International Transmission’s transmission system. *Id.* at 3, ¶ 7(i), JA 347. During 67% of the hours analyzed, power flowed from the Baxter substation into the Rouge Complex. *Id.* ¶ 7(ii), JA 347. Because the Rouge Complex load is met entirely from DIG generation 83% of the time, unneeded power flowing into the Rouge Complex at the Baxter substation flows out the other side on the Navarre Line to the International Transmission system, creating loop flow. *Id.* In answer to this evidence, Detroit Edison “acknowledged that the [DIG Facilities] are dual-use facilities.” R. 66 at 6, JA 359.

loop. Pet Br. 26. The Court lacks jurisdiction to hear this argument because petitioners never raised this argument below. FPA § 313(b) ("[n]o objection to the Order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so").³ Although petitioners cite to Detroit Edison's Request for Rehearing of the March 13 Order, *see* Pet. Br. at 26 n. 78 (citing R. 79 at 19, JA 114), nowhere on that page (or elsewhere) does Detroit Edison argue that the Commission should have found the DIG Facility lines radial because the facilities completing the loop between the two 230 kV DIG Facility lines were owned by others. Rather, Detroit Edison argued that, if the Commission found the DIG Facilities to be jurisdictional, the Commission should also find the Ford and Rouge facilities completing the loop jurisdictional as well, to avoid discriminatory impact on Detroit Edison. R. 79 at 19-20, JA 114-15.

In any event, whether or not all of the facilities permitting looped flow are owned by Detroit Edison is irrelevant to the issue here -- whether Detroit Edison's DIG Facilities function as local distribution facilities under the Commission's approved seven-factor test. *Detroit Edison*, 334 F.3d at 54; *TAPS*, 225 F.3d at 696. Under the seven-factor test,

³ *See, e.g., City of Orrville, Ohio v. FERC*, 147 F.3d 979, 990 (D.C. Cir. 1998) (court lacks jurisdiction to hear arguments not made on rehearing); *Platte River Whooping Crane Critical Habitat Trust v. FERC*, 876 F.2d 109, 113 (D.C. Cir. 1989) (parties seeking review must themselves raise on rehearing all objections urged on appeal).

the DIG Facilities fail to demonstrate the requisite indicia of local distribution facilities, including the fact that they do not operate as radial lines.

Petitioners also challenge reliance on Detroit Edison's characterization of the Baxter substation as a transmission facility in its May 2000 application, asserting that the Commission "plainly overlooked" the "explanation" given in their July 16, 2002 compliance filing. Pet Br. 25. The July 16, 2002 compliance filing stated that -- after the Commission's approval of the May 2000 application but prior to the final closing on the transfer -- Detroit Edison reanalyzed each asset and determined that certain Baxter substation facilities were local distribution facilities, and excluded them from the transfer. R. 62 at 4, n. 6, JA 301.

The Commission did not "overlook" this explanation, it rejected the explanation. Rehearing Order n. 13, JA 90. Detroit Edison's May 2000 application classified the Baxter substation in its entirety as a transmission facility, a classification adopted by the Michigan PSC in an order issued on January 14, 1998. *Id.* (citing DTE Energy, Detroit Edison and International Transmission's May 4, 2000 Filing in Docket No. EC00-86-000 at Attachment 3 (In Re: The Detroit Edison Company, Case No. U-11337 (MPSC 1998)). While Detroit Edison claims to have reclassified certain of the Baxter substation facilities after the Michigan PSC and FERC approvals, Detroit Edison never presented to FERC either the results of its revised seven-factor test or evidence of any reclassification proposal to the Michigan PSC. *Id.* Accordingly, the Commission properly rejected the purported reclassification. In any event, a year 2000 reclassification does not undermine

the factual conclusion that, under the seven-factor test, the DIG Facilities now operate as jurisdictional transmission facilities, not local distribution facilities.

Petitioners assert that the Michigan PSC Order in Case No. U-12980 provides “conclusive evidence” that the DIG Facilities are local distribution, Pet. Br. at 23, and that the Commission erred in failing to reopen the record to admit this Order and to defer to the Michigan PSC’s determination, Pet. Br. at 24-25. To reopen a record, a movant must demonstrate an extraordinary change in circumstances that outweighs the need for finality in the administrative process and goes to the very heart of the case. Rehearing Order ¶ 29 (citing *East Texas Elec. Coop.*, 94 FERC ¶ 61,218), JA 93. As Detroit Edison failed to make such a showing here, *id.*, the Commission properly rejected the request to reopen the record, *id.* ¶ 28, JA 93.

The Commission will defer to a state commission’s classification of facilities where state regulators “specifically evaluate the seven factor indicators and any other relevant facts and . . . make recommendations consistent with the essential elements of the Rule.” *Id.* ¶ 30 (quoting Order No. 888 at 31,784 and n. 548), JA 93-94. For example, in *Nevada Power Co.*, 88 FERC at 61,768 and n. 4, the Commission deferred to the state commission’s approval of a utility’s reclassification after finding it based upon the seven-factor test. *Id.* Detroit Edison did not demonstrate that it applied the seven-factor test for reclassification, and the Michigan PSC Order that Detroit Edison cites does not apply the seven-factor test or reclassify any of the DIG Facilities. *Id.*

To the contrary, the Commission properly was skeptical of the claim that the Michigan PSC Order addressed the classification of the DIG Facilities. *Id.* n. 27, JA 94.

The evidence before the Michigan PSC indicated that the “last step of the arrangement -- the delivery of the power by CMS [who purchases at wholesale] to the Rouge Complex -- uses only private lines and facilities that do not belong to Detroit Edison.” Michigan PSC Opinion, R. 81, Attachment B at 16, JA 204. Thus, the Michigan PSC made no finding that the DIG Facilities were local distribution facilities. Rather, the Michigan PSC concluded that, even if facilities not owned by Detroit Edison provide the last link between CMS wholesale transactions on Detroit Edison’s facilities and delivery to Rouge Complex end users, the Rouge Complex end users nevertheless could be required to pay retail open access charges to Detroit Edison. *Id.* at 18, JA 206. “FERC has ruled that the obligation to pay retail open access charges is not dependent upon whether Detroit Edison owns the local facilities that interconnect with DIG’s facilities or the Rouge Complex.” *Id.*

The Michigan PSC Order’s indication that local distribution to the Rouge Complex occurs over private lines, not facilities owned by Detroit Edison, further undermines petitioners’ contention that the high-voltage, looped DIG Facilities are local distribution facilities, and supports the Commission’s conclusion that “[a]lthough local distribution lines may exist within the Rouge Industrial Complex . . . the record demonstrates that the [DIG] Facilities are not local distribution facilities.” Rehearing Order ¶ 18, JA 89. Even if the DIG Facilities were the last step in connecting to the Rouge Complex end users, that still would not be determinative of the Facilities’ jurisdictional status. This Court has rejected the contention that delivery to an end-user necessarily equates to local distribution. *Public Utils. Comm’n v. FERC*, 900 F.2d 269,

276 (D.C. Cir. 1990) (“While as a matter of ordinary English ‘local distribution’ might be understood to encompass any delivery to an end user, that is hardly the only or even the more plausible reading.”) Rather, application of the Commission’s approved seven-factor test determines the jurisdictional status of facilities. *Detroit Edison*, 334 F.3d at 54; *TAPS*, 225 F.3d at 696. Here, the DIG Facilities did not show sufficient characteristics of local distribution service to be exempt from FERC regulation.

Because the DIG Facilities failed to meet the seven-factor test for local distribution, the Commission properly rejected the argument that the DIG Facilities are “dual function.” Pet. Br. 21, 26. Rehearing Order ¶ 21, JA 91. *Detroit Edison*, 334 F.3d 48, does not aid petitioners. *See* Pet. Br. at 20. While *Detroit Edison* rejected the contention that FPA § 201 excludes from FERC jurisdiction only facilities used exclusively in local distribution, the Court expressly recognized that the seven-factor test determines whether a facility is performing a local distribution function. 334 F.3d at 54. Indeed, the Court chastised the Commission for failing to apply the seven-factor test. *Id.* Here, the Commission properly employed the seven-factor test to determine that these facilities were primarily jurisdictional transmission facilities. *See TAPS*, 225 F.3d at 696 (purpose of seven-factor test is “to discern each facility’s primary function”).

2. Petitioners Fail to Show that the Commission Decision Will Expose Them to Unrecoverable Stranded Costs.

Petitioners claim that finding the DIG Facilities jurisdictional “puts Detroit Edison at the heightened risk of being bypassed by a local distribution service customer seeking to serve retail loads directly through a FERC-jurisdictional OATT,” thereby avoiding stranded cost charges assessed by the state utility commission. *See* Pet. Br. 28. The Commission’s jurisdictional finding, however, “does not prevent Detroit Edison from recovering any retail access charges that the state of Michigan is authorized to impose under state law.” Rehearing Order ¶ 21, JA 91. As the Commission explained in Order No. 888, at 31,783:

Although we are unable to draw the bright line for local distribution facilities that many commenters would like, we believe it is important to make two clarifications regarding local distribution in the context of retail wheeling. First, even when our technical test for local distribution facilities identifies no local distribution facilities for a specific transaction, we believe that states have authority over the service of delivering electric energy to end users. Second, through their jurisdiction over retail delivery services, states have authority not only to assess stranded costs but also to assess charges for stranded benefits, such as low-income assistance and demand-side management. Because their authority is over services, not just the facilities, states can assign stranded costs and benefits based on usage (kWh), demand (kW), or any combination or method they find appropriate. They do not have to assign them to specific facilities.

Thus, while we believe in most cases there will be identifiable local distribution facilities subject to state jurisdiction, we also believe that even where there are no identifiable local distribution facilities, states nevertheless have jurisdiction in all circumstances over the service of delivering energy to end users. Under this interpretation of state/federal jurisdiction, customers have no incentive to structure a purchase so as to avoid using identifiable local distribution facilities in order to bypass state jurisdiction and thus avoid being assessed charges for stranded costs and benefits.

See Detroit Edison, 334 F.3d at 51 (FERC addressed concern that unbundled retail purchasers could avoid state stranded cost charges by taking service under FERC tariffs, by affirming that states have jurisdiction over local distribution service even where there are no identifiable local distribution facilities). The Michigan PSC in fact relied upon FERC's determination on this issue in finding that Rouge Complex end users were subject to Detroit Edison's retail access service tariff, notwithstanding the fact that Detroit Edison may not own the local facilities that actually provided service to the Rouge Complex end users. Michigan PSC Order, R. 81, Attachment B, at 18, JA 143.

Thus, petitioners' fears, Pet. Br. 28, that Detroit Edison will be bypassed and therefore unable to recover stranded costs are unfounded. Likewise, FERC's orders here do not undermine state regulation of local distribution service provided pursuant to state retail tariffs. Pet Br. 29. While FERC found the DIG Facilities to be jurisdictional transmission facilities, FERC made no effort to regulate Detroit Edison's retail service, which is still subject to state jurisdiction. Rehearing Order ¶ 21, JA 91; Order No. 888 at 31,783. *Northern States Power v. FERC*, 176 F.3d 1090, 1093 (8th Cir. 1999), cited Pet. Br. 29, accordingly is inapposite, because, there, the Court rejected a FERC requirement that directly affected regulation of service to bundled retail load. Here, bundled retail is not present, and FERC has not exercised jurisdiction over matters outside its statutory purview.

CONCLUSION

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

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D.C. Cir. No. 04-1020

CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rule 28(d)(1), I hereby certify that this brief contains 9051 words, not including the tables of contents and authorities, the certificate of counsel, this certificate and the addendum.

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