ORAL ARGUMENT SCHEDULED NOT YET SCHEDULED

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

Nos. 03-1403 & 04-1252 (Consolidated)

CONSUMERS ENERGY COMPANY,
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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MARCH 21, 2005
FINAL BRIEF: MAY 10, 2005

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

All participants in the proceedings below and in this Court are listed in Petitioner's Circuit Rule 28(a)(1) certificate, except that Respondent Federal Energy Regulatory Commission is represented by undersigned counsel.

B. Rulings Under Review:

1. *Midwest Independent Transmission System*, 108 FERC ¶ 61,010 (2004);

2. *Midwest Independent Transmission System Operator, Inc.*, 107 FERC ¶ 61,131 (2004);

3. *Midwest Independent Transmission System Operator, Inc.*, 104 FERC ¶ 61,298 (2003);

4. *Midwest Independent Transmission System Operator, Inc.*, 103 FERC ¶ 61,219 (2003).

C. Related Cases:

Counsel is not aware of any related cases pending before this or any other Court.

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March 21, 2005
Final Brief: May 10, 2005

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GLOSSARY

Alliance RTO	Alliance Regional Transmission Organization
Alliance VI Order	*Alliance Cos.*, 97 FERC ¶ 61,327 (2001)
Alliance VII Order	*Alliance Cos.*, 99 FERC ¶ 61,105 (2002)
CECo	Consumers Energy Company
CECo Initial Order	*Midwest Indep. Transmission Sys. Operator, Inc.*, 103 FERC ¶ 61,219 (2003)
CECo Orders	CECo Initial Order and CECo Rehearing Order
CECo Rehearing Order	*Midwest Indep. Transmission Sys. Operator, Inc.*, 104 FERC ¶ 61,298 (2003)
Commission or FERC	Respondent Federal Energy Regulatory Commission
DTE	DTE Energy
FPA	Federal Power Act
Holdings	Michigan Transco Holdings, LP
ITC	International Transmission Company
METC	Michigan Electric Transmission Company

GLOSSARY

Michigan Transco	Michigan Electric Transmission Company, LLC
Michigan Transco Initial Order	*Midwest Indep. Transmission Sys. Operator, Inc.*, 107 FERC ¶ 61,131 (2004)
Michigan Transco Orders	Michigan Transco Initial Order and Michigan Transco Rehearing Order
Michigan Transco Rehearing Order	*Midwest Indep. Transmission Sys. Operator*, 108 FERC ¶ 61,010 (2004)
MISO	Midwest Independent Transmission System Operator
MISO Tariff	Midwest ISO Open Access Transmission Tariff
OATT	Open access transmission tariff
Purchase Agreement	Membership Interests Purchase Agreement between Holdings and CECo
RTO	Regional transmission organization

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission ("Commission" or "FERC") engaged in reasoned decision-making by denying separate requests for authorization by the Midwest Independent Transmission System Operator ("MISO") to pay Consumers Energy Company ("CECo") or Michigan Electric Transmission Company, LLC ("Michigan Transco") for costs CECo incurred in seeking to establish the Alliance Regional Transmission Organization ("Alliance RTO").

COUNTERSTATEMENT OF JURISDICTION

This Court lacks jurisdiction to review Case No. 04-1252 because CECo lacks standing to bring that appeal.

PERTINENT STATUTES AND REGULATIONS

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

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

This set of cases involves CECo's attempt, under the guise of equity, to avoid the consequences of its failure to satisfy Commission conditions for recovery of CECo's share of costs incurred to establish the Alliance RTO.

On December 20, 2001, after rejecting the proposed Alliance RTO as lacking sufficient scope to be consistent with Order No. 2000,[1] the Commission

[1] *See Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs., Regs. Pmbls. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs., Regs. Pmbls. ¶ 31,092 (2000), *aff'd sub nom.*, *Public Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

directed the various Alliance Companies[2] to explore the possibility of joining MISO or another regional transmission organization ("RTO"), and left open the possibility that the Alliance Companies could submit proposals for recovery of all prudently incurred costs related to the Alliance RTO. *Alliance Cos.*, 97 FERC ¶ 61,327 at 62,530-31 (2001) ("*Alliance* VI Order"). On April 25, 2002, the Commission clarified the recovery requirements, stating that it intended "to allow recovery of all costs prudently incurred by any Alliance GridCo participant to establish an RTO once it is a member of an RTO."[3] *Alliance Cos.*, 99 FERC ¶ 61,105 at 61,442 (2002) ("*Alliance* VII Order").

The orders on review denied MISO the authority to pay CECo and/or Michigan Transco for costs allegedly associated with the start-up of the Alliance RTO. *Midwest Indep. Transmission Sys. Operator, Inc.*, 103 FERC ¶ 61,219

[2] The Alliance Companies were originally: American Electric Power Service Corporation on behalf of the public utility operating company subsidiaries of the AEP system (Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company, and Wheeling Power Company), CECo, Detroit Edison Company, FirstEnergy Corp. on behalf of the transmission-owning FirstEnergy Operating Companies (The Cleveland Electric Illuminating Company, Ohio Edison Company, Pennsylvania Power Company, and The Toledo Edison Company), and Virginia Electric and Power Company. *See Alliance Cos.*, 89 FERC ¶ 61,298 at 61,914 n.1 (1999).

[3] The Alliance GridCo participants include many of the Alliance Companies. *See Alliance* VII Order, 99 FERC at 61,431 n.8.

("CECo Initial Order") (denying payment to CECo), R 11, JA 11,[4] *order denying reh'g*, 104 FERC ¶ 61,298 (2003) ("CECo Rehearing Order"), R 14, JA 17; *Midwest Indep. Transmission Sys. Operator, Inc.*, 107 FERC ¶ 61,131 ("Michigan Transco Initial Order") (denying payment to Michigan Transco), R 14 (Docket No. ER04-158), JA 22, *notice of denial of reh'g by operation of law*, 108 FERC ¶ 61,010 (2004) ("Michigan Transco Rehearing Order"), R 16 (Docket No. ER04-158), JA 27. Among other things, the Commission concluded that neither CECo nor Michigan Transco satisfied the test in the *Alliance* VII Order to justify payment of these costs from MISO and MISO's customers. Furthermore, noting the substantial amount that CECo received in selling its transmission facilities in excess of their book value, the Commission rejected CECo's contention that it had not been adequately compensated for any Alliance RTO start-up costs. It also denied MISO's attempt to pay the start-up costs to Michigan Transco as a collateral attack on FERC's action denying authorization of payment to CECo.

II. STATEMENT OF FACTS

A. Statutory And Regulatory Background

Order No. 2000 sought to advance the formation of RTOs. By combining various utilities' segmented transmission facilities into a regional transmission grid

[4] "R" refers to a record item. Unless otherwise noted, the "R" reference is to the record in Docket No. ER03-574. "JA" refers to the Joint Appendix page number. "P" refers to the internal paragraph number within a FERC order.

under control of one entity, the RTO, FERC expected to eliminate certain transmission inefficiencies and problems that prevented the formation of competitive wholesale electric energy markets. *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1364 (D.C. Cir. 2004).

MISO is an RTO. *Midwest Indep. Transmission Sys. Operator, Inc.*, 97 FERC ¶ 61,326 (2001). As such, it "link[s] up the transmission lines of the member transmission-owning utilities . . . into a single interconnected grid stretching across the northern border of the U.S. from Michigan to eastern Montana, and reaching as far south as Kansas City, Missouri and Louisville, Kentucky." *Midwest ISO*, 373 F.3d at 1365. Individual transmission owners physically operate and maintain their transmission facilities, subject to the instructions and functional control of MISO. *Id.* MISO also administers an open access transmission tariff, under which all customers "pay a single rate to use the entire MISO transmission system, based on the volume of power the customer carrie[s] on the system." *Id.*

B. Events Leading To The Challenged Rulings

Since the issuance of Order No. 2000, electric industry participants, State commissions, and FERC have struggled with how best to achieve a seamless wholesale power market in the Midwest. *Alliance* VI Order, 97 FERC at 62,525. To create such a market, the Commission considered whether, besides MISO,

another competing proposal supported by the Alliance Companies should be approved as an RTO in the Midwest. *Id.* The Commission approved MISO as an RTO, but ultimately rejected the Alliance RTO as having insufficient scope to be a stand-alone RTO. *Id.*

Although the Commission rejected the Alliance RTO, it was confident that the Alliance Companies could be integrated with MISO and directed those companies to explore how their business plan could be accommodated within MISO. *Id.* at 62,531. The Commission further advised that it was "mindful of the significant time and expense incurred by Alliance Companies to date" and would "consider proposals for recovery of all prudently incurred costs." *Id.* at 62,531. Thereafter, the Commission stated its intent "to allow recovery of all costs prudently incurred by any Alliance GridCo participant to establish an RTO once it is a member of an RTO." *Alliance* VII Order, 99 FERC at 61,442.

CECo, one of the original Alliance Companies, *see supra* n. 2, provides electric service to residential, commercial, and industrial customers in the state of Michigan. CECo Initial Order at P 2, JA 11. While originally a vertically integrated public utility, on January 10, 2001, the Commission authorized CECo to transfer: (1) ownership and control of its transmission facilities and (2) the bulk of its open access transmission tariff, to a wholly-owned subsidiary, Michigan Electric Transmission Company ("METC"). *Consumers Energy Co.*, 94 FERC ¶

61,018 at 61,030 (2001). The price for the asset transfer was the transmission assets's actual depreciated value, *i.e.*, net book value, as of the closing date, which was estimated to be $247.4 million. *Id.* at 61,033.

Several months after the transfer, CECo, METC, Trans-Elect, Inc.,[5] and Michigan Transco Holdings, LP ("Holdings") filed a joint application under section 203 of the Federal Power Act ("FPA"), 16 U.S.C. § 824b, requesting approval for CECo (1) to convert METC into a limited liability company, Michigan Transco, and (2) to transfer CECo's interests in Michigan Transco to an unaffiliated entity, Holdings.[6] *Trans-Elect, Inc.*, 98 FERC ¶ 61,142 at 61,415 (2002). The Membership Interests Purchase Agreement ("Purchase Agreement") between Holdings and CECo set the purchase price at CECo's equity in Michigan Transco at the time of closing, plus $44,000,000, subject to certain adjustments, *see id.* at 61,416, which translated to an estimated price of $295,000,000 if the deal closed in the mid-first quarter of 2002. *Id.* at 61,416-17.

Besides the sale and transfer of the Michigan Transco interests, the applicants proposed "an acquisition premium associated with the amount necessary

[5] Trans-Elect, Inc. is a for-profit electric transmission company, not affiliated with CECo.

[6] Throughout the challenged orders, what was actually a transfer of interests in Michigan Transco to an unaffiliated third party, Holdings, is often referred to as a sale or transfer of transmission facilities to Michigan Transco. For purposes of consistency and simplicity, this brief shall also refer to the final transfer or sale of CECo's interests in its former transmission facilities to an unaffiliated third party as a sale or transfer to Michigan Transco.

to compensate [CECo] for the tax consequences of the divestiture." 98 FERC at 61,423. The premium, which reflected the amount paid to CECo for possible income tax liability related to the sale, would be amortized over a 20-year period in Michigan Transco's transmission rates for recovery from customers. *Id.* at 61,422-23. The Commission ratified this rate premium, which was allegedly consistent with FERC's decision in *International Transmission Co.*, 92 FERC ¶ 61,276 (2000). *See Trans-Elect*, 98 FERC at 61,424.

Despite approval of their rate premium, CECo and the other applicants requested rehearing on the issue of taxes. *Trans-Elect, Inc.*, 98 FERC ¶ 61,368 (2002). The CECo applicants asserted that while they believed their proposal to be consistent with Commission policy and precedent promoting RTO development, the initial order appeared to foreclose the relief that they actually sought. *Id.* at 62,590. Under the initial order, the Commission in accordance with *International Transmission* had granted a tax adjustment but reduced it "by the deferred income taxes and investment tax credits associated with the property that had been normalized for rate purposes."[7] On rehearing, the CECo applicants noted that they had requested authority "to recover an amount capped at the balance of accumulated deferred income taxes on the books of METC at the time of closing,

[7] Under tax normalization, ratepayers pay a level tax amount in rates each year even though the utility uses accelerated depreciation for tax purposes. The utility maintains the rate amount collected above its actual tax payments in an accumulated deferred tax account.

which [wa]s expected to be approximately $ 35 million," *id.*, but no reduction of that adjustment by the deferred income taxes and investment tax credits associated with the property that had been normalized for rate purposes.

The Commission granted rehearing on the grounds that the proposed transaction: was uncontested; would further its open access and RTO initiatives; accelerate the transition to competitive regional bulk power markets; result in significant benefits to Michigan Transco's transmission customers; and avoid litigation delay. *Id.* The $35 million premium was approved not to make any party whole for the income tax effect of the sale, but as a premium above the sale price to provide an incentive for the transition to a competitive wholesale power market that would bring significant benefits to electricity users. *See Trans-Elect, Inc.*, 98 FERC at 62,596-97 (Brownell, Comm'r concurring).

C. The Rulings On Review

1. CECo Orders

On February 27, 2003, MISO filed a request for authorization to reimburse CECo approximately $8.3 million, under Schedule 10 of the Midwest ISO Open Access Transmission Tariff ("MISO Tariff"), for costs CECo allegedly incurred in seeking to establish the Alliance RTO.[8] R 1, JA 28. The Commission granted various timely motions to intervene, including one by CECo supporting the filing

[8] Although MISO submitted the request on behalf of CECo, MISO took no position on whether the Commission should grant the request. R 1 at 1, JA 28.

and one by MISO Transmission Owners protesting the filing. CECo Initial Order at P 9, JA 13-14.

The Commission denied MISO's request for authorization, *id.* at P 20, JA 15, explaining that the *Alliance* VII Order, which formed the basis for CECo's argument for recovery of start-up costs, permitted filing for recovery of costs incurred by an Alliance Company to establish the RTO "once a company is a member of an RTO." *Id.* at P 17, JA 15 (emphasis in original). Here, "by the time the [*Alliance* VII] Order had been issued, [CECo] had already transferred its transmission facilities to its affiliate METC and received authorization for the further transfer from METC to Michigan Transco." *Id.* Thus, CECo was not a member of an RTO, but "a firm transmission customer of Michigan Transco, a transmission-owning member of the Midwest ISO." *Id.* at P 3, JA 12. Moreover, through these transfers, CECo "had already been adequately compensated" for the requested cost recovery. *Id.*; *see id.* at P 2, JA 11 (noting Commission "authorized the sale, with financial incentives"). Finally, the *Alliance* VII Order "indicate[d] that a proposal to recover costs associated with Alliance RTO development activities should be part of a participant's proposal when it places transmission facilities in an RTO." CECo Initial Order at P 19, JA 15. As CECo had already sold its transmission facilities, CECo did not join an RTO as a transmission owner. *Id.*, JA 15. Thus, it did not satisfy the test of the *Alliance* VII Order.

CECo and MISO jointly requested rehearing, asking whether "all prudently incurred CECo Alliance RTO start-up costs [could] be recovered by the current corporate owner [*i.e.*, Michigan Transco] of CECo's former transmission system, once that entity is a member of an RTO." R 12 at 1-2, JA 125-26. Alternatively, CECo sought rehearing, alleging that the initial decision was arbitrary and capricious. *Id.* at 2, JA 126.

Rehearing was denied because under the *Alliance* VII Order, a proposal to recover costs associated with Alliance RTO development activities should be part of a participant's filing to place transmission facilities in an RTO. CECo Rehearing Order at P 10, JA 19. As all the Alliance Companies had been transmission-owning companies, the Commission intended to permit recovery of all prudently incurred costs "by transmission[-]owning companies who join an RTO and not 'customer members' of an RTO." *Id.* at P 10 n.5, JA 19. Not only did CECo not join an RTO as a transmission owner, *see id.* at P 10, JA 19, but also as part of its transfer of assets, CECo specifically disavowed that it was a transmission-owning company so as to avoid having to flow a credit for its profit on the transfer back to customers through a jurisdictional transmission rate. *Id.* at P 10 n.5, JA 19-20.

The Commission also dismissed CECo's contention that it had no opportunity to seek clarification on the issue. The Commission had first made its

intention known about cost recovery in December 2001, which was well before the May 2002 closing on CECo's transmission assets. CECo Rehearing Order at P 11, JA 20. Indeed, the closing did not occur until after the *Alliance* VII Order issued. *Id.*

Besides noting CECo's failure to seek clarification of *Alliance* VII prior to closing, the Commission rejected CECo's assertion that it had not been adequately compensated for its Alliance RTO costs as part of the transfer. CECo's transfer of the facilities to Michigan Transco yielded CECo "approximately $50 million in excess of depreciated (i.e., net book) value," without CECo having to credit any of that excess back to its ratepayers. *Id.* at P 11 n.8, JA 20.

2. Michigan Transco Orders

After the Commission denied MISO authorization to pay CECo for costs associated with Alliance RTO development, MISO next submitted, on behalf of Michigan Transco, a request for authorization to reimburse Michigan Transco for those same costs.[9] R 1 (Docket No. ER04-158), JA 172. MISO's request asserted that Michigan Transco, as the direct successor in interest to CECo, was entitled to recover the costs incurred by CECo in its attempt to form the Alliance RTO. *Id.* at 11-12, JA 182-83. MISO sought to justify the costs on grounds that the transfer of

[9] As with the prior request on behalf of CECo, MISO took no position on whether the Commission should grant the request to pay Michigan Transco. R 1 at 1-2 (Docket No. ER04-158), JA 172-73.

METC transmission assets was required by the various authorities, provided essential connectivity, expanded the MISO footprint, and decreased the Schedule 10 charges on a per MWh basis for all load within MISO. *Id.* at 12, JA 183.

The Commission denied MISO's recycled request for authorization to pay these costs as an impermissible collateral attack on the prior orders denying authorization to MISO to reimburse these same costs to CECo. Michigan Transco Initial Order at P 11, JA 25. Because Michigan Transco would purportedly remit any reimbursed sums to CECo, the fundamental issue was not whether Michigan Transco could recover costs that CECo incurred, but whether CECo, through Michigan Transco, should separately recover the costs. *Id.* Indeed, MISO presented "the same issue and ma[de] the same arguments . . . as those raised and addressed" in the prior CECo Orders denying authorization to pay costs to CECo. *Id.*

In addition to being a barred collateral attack, MISO's request did not show that Michigan Transco (or CECo) was eligible to recover the costs that CECo incurred. *Id.* at P 12, JA 25. The test for recovering Alliance RTO costs involved three requirements: "(1) the utility must have been a member of the Alliance RTO; (2) the utility must be a transmission-owning member of an RTO; and (3) the costs must be prudently incurred." *Id.* Michigan Transco failed to satisfy that test because it was not a member of the Alliance RTO. *Id.* As for CECo, it was a

member of the Alliance RTO, but it did not satisfy the second prong because it "did not join an RTO as a transmission owner." *Id.*

Michigan Transco and CECo then filed a joint request for rehearing of the Michigan Transco Initial Order. *See* R 15 (Docket No. ER04-158), JA 260. Besides arguing that MISO's application on behalf of Michigan Transco was not a collateral attack, the joint request repeated essentially the same arguments previously raised and included as an attachment the joint motion for clarification and request for rehearing filed in Docket No. ER03-574. The joint request was denied by a notice of denial by operation of law. *See* 18 C.F.R. § 385.713(f).

Thereafter, CECo, but not Michigan Transco, filed petitions for review of the CECo Initial Order, the CECo Rehearing Order, the Michigan Transco Initial Order, and the Michigan Transco Rehearing Order. *See* Docketing Statements for Case Nos. 03-1403 & 04-1252.

SUMMARY OF ARGUMENT

The Commission engaged in reasoned decision-making when it denied MISO authorization to pay either CECo or Michigan Transco for costs incurred by CECo related to Alliance RTO development. The denial appropriately applied prior Commission orders, and protected MISO customers from paying those costs, which were not properly recoverable from them.

This Court should first dismiss Case No. 04-1252, in which CECo appeals the Michigan Transco Initial Order and the Michigan Transco Rehearing Order. Those two orders addressed MISO's request for authorization to pay Michigan Transco, not the separate MISO filings seeking authorization to pay CECo. Neither of the No. 04-1252 orders injured CECo, and vacating them will not redress any purported injury of CECo. As a result, CECo cannot satisfy the constitutional requirements for standing, and there is no jurisdiction to hear CECo's petition for review filed in Case No. 04-1252.

With respect to Case No. 03-1403, CECo's arguments are unavailing to establish arbitrary and capricious behavior on the Commission's part. Despite receiving notice of the Commission's requirements for Alliance RTO cost recovery proposals, CECo failed to meet those requirements when it sought to recover such costs. In particular, CECo did not seek recovery prior to transfer of its transmission assets. CECo also failed to seek clarification of those requirements

prior to the asset transfer, despite having sufficient time and opportunity, and then sought cost recovery even though it could not satisfy the test. In sum, any failure on the part of CECo to obtain compensation for its Alliance RTO development costs was of its own doing.

CECo's pleas to equity should fall on deaf ears. CECo had opportunities to seek clarification of the Commission's requirements for seeking compensation, but failed to do so. By transferring its transmission assets, CECo could no longer satisfy the requirement that it be a transmission-owning RTO member for cost recovery. Furthermore, CECo received adequate compensation for any Alliance RTO developments costs in the transfer of its transmission facilities, from which it pocketed $50 million above book value. Equity offers no solace in these circumstances, especially when allowing the requested relief would unjustly and inequitably force MISO customers to pay higher rates for costs not properly recoverable from them.

Finally, if the Court does not dismiss Case No. 04-1252, it should affirm the reasonable determination that MISO's application to seek authorization to pay Michigan Transco the same costs constituted a collateral attack on the Commission's prior decision denying MISO authorization to pay CECo for Alliance RTO development costs. MISO's application raised the same issue presented in the prior proceeding denying payment to CECo. In any case,

Michigan Transco was not eligible for payment from MISO as Michigan Transco was never a member of the Alliance RTO and, therefore, did not satisfy the test for recovery of Alliance RTO development costs.

ARGUMENT

I. CECO LACKS STANDING TO APPEAL CASE NO. 04-1252

"The Federal Power Act provides that 'any party to a proceeding . . . *aggrieved* by an order issued by the Commission in such proceeding may obtain a review of such order.'" *Wabash Valley Power Ass'n, Inc. v. FERC*, 268 F.3d 1105, 1112 (D.C. Cir. 2001) (emphasis added). "Parties are 'aggrieved' under the Federal Power Act if they satisfy both the constitutional and prudential requirements for standing." *Id.*; *see also Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 539 (D.C. Cir. 1999) ("A party petitioning for review of agency action must have standing . . . ."). Here, CECo does not satisfy the constitutional requirement for standing to prosecute Case No. 04-1252.

The irreducible constitutional minimum of standing contains three elements that "[t]he party invoking federal jurisdiction bears the burden of establishing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). First, the party must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Id.* Second, there must be a causal connection between the injury

and the conduct complained of, *i.e.*, the injury must be traceable to the challenged action of the defendant and not be the result of the independent action of some third party not before the court. *Id.* Third, the injury must likely be redressed by a favorable decision.[10] *Id.* at 561.

In Case No. 04-1252, CECo petitions for review of the Michigan Transco Initial Order and the Michigan Transco Rehearing Order in Docket No. ER04-158, which do not directly pertain to CECo. Instead, those orders denied authorization to MISO to pay Michigan Transco for costs allegedly associated with Alliance RTO development. Thus, any purported injury from those orders was to Michigan Transco, not to CECo, because the orders specifically rejected payment to Michigan Transco, not to CECo.

Additionally, vacating those two orders would not necessarily redress any "injury" that CECo contends that it has suffered. If the orders were vacated and MISO authorized to pay Michigan Transco, only Michigan Transco, not CECo, would receive any redress.

CECo may argue that Michigan Transco would have passed through any payments from MISO to CECo; therefore, vacating the orders would ultimately redress CECo. That, however, requires action by a third party (Michigan Transco),

[10] "To establish prudential standing, [CECo] generally must show that 'the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute.'" *Grand Council of the Crees v. FERC*, 198 F.3d 950, 954 (D.C. Cir. 2000).

not before this Court, and thus, any injury of non-payment to CECo would not be directly traceable to the challenged orders. In Docket No. ER04-158, MISO did not seek to directly pay CECo, as that had been previously disallowed, but sought to pay Michigan Transco. While the record suggests Michigan Transco would pass through any funds to CECo, that result is not assured, leaving CECo with a possible breach of contract claim. Thus, any claimed injury to, and redressability for, CECo is not directly traceable to the Commission's orders in Docket No. ER04-158, but was contingent on Michigan Transco's subsequent acts.

To the extent CECo asserts that jurisdiction is proper because Case No. 04-1252 was consolidated with Case No. 03-1403 or because Michigan Transco ostensibly supports Case No. 04-1252, those arguments are unavailing. "Neither consolidation with a jurisdictionally proper case nor an agreement by the parties can cure a case's jurisdictional infirmities." *Brown v. Francis*, 75 F.3d 860, 866 (3d Cir. 1996). Accordingly, because CECo is not aggrieved by the Michigan Transco Initial Order and the Michigan Transco Rehearing Order, Case No. 04-1252 is not properly before this Court and should be dismissed.

II. THE COMMISSION REASONABLY DETERMINED THAT NEITHER CECO NOR MICHIGAN TRANSCO JUSTIFIED RECOVERY OF COSTS ASSOCIATED WITH ALLIANCE RTO DEVELOPMENT

A. Standard Of Review

FERC orders are reviewed under the arbitrary and capricious standard of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A); *see also Sithe Indep. Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). This standard requires the Commission to "examine the relevant data and articulate a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Midwest ISO*, 373 F.3d at 1368. The Commission's factual findings, if supported by substantial evidence, are conclusive. *See* 16 U.S.C. § 825*l*(b).

B. The Commission Reasonably Applied Its Test For Recovery Of Alliance RTO Development Costs

In the *Alliance* VII Order, the Commission clarified its intent "to allow recovery of all costs prudently incurred by any Alliance GridCo participant to establish an RTO once it is a member of an RTO." 99 FERC at 61,442. This put CECo on notice that cost recovery could not be sought unless and until the applicant "was a member of an RTO." In denying authorization to MISO to pay CECo for Alliance RTO development costs, the Commission merely applied the test that it had expressly stated in the *Alliance* VII Order. Thus, CECo's contention that "the Commission has not articulated a reasonable basis for treating

CECo differently" from other Alliance Companies, all of whom were members of an RTO, *see* Brief at 23, fails to recognize this requirement. CECo could not satisfy it, while the other Alliance Companies did.

CECo's reference to the cases involving Illinois Power Company and the GridAmerica Companies, *see id.*, two entities that the Commission authorized MISO to reimburse for Alliance RTO costs, highlights the distinction. Unlike CECo, both Illinois Power Company and the GridAmerica Companies joined MISO as transmission owners, and, therefore, satisfied the *Alliance* VII Order condition. *See Illinois Power Co.*, 108 FERC ¶ 61,258 (2004); *Ameren Servs. Co.*, 103 FERC ¶ 61,178 (2003). Illinois Power Company expressly transferred control of its transmission facilities to MISO and became integrated with it. *See Illinois Power Co.*, 108 FERC at P 4. Furthermore, the Commission previously "approved a settlement which specifically provides that if Illinois Power is integrated into the Midwest ISO . . . , Illinois Power may seek recovery of its Alliance RTO costs . . . ." *Id.* at P 6. Authorization to pay Illinois Power Company was "consistent with [FERC's] actions in similar cases." *Id.* The GridAmerica Companies entered MISO as transmission owners through the integration of GridAmerica into MISO. *Ameren Servs. Co.*, 103 FERC at P 1 & n.1. In short, both Illinois Power Company and the GridAmerica Companies satisfied the *Alliance* VII condition by becoming transmission owner members of MISO. In contrast, CECo's transfer of its

jurisdictional transmission facilities meant it could not become a transmission owner member of MISO; instead, CECo is a customer of Michigan Transco. *See* CECo Initial Order at P 3 & 17, JA 12 & 15. Accordingly, CECo did not meet the prerequisite for authorization to recover Alliance RTO development costs.

Because it failed to meet the prerequisite, CECo's assertion that its accounting and cost breakdown of Alliance RTO start-up costs is superior to those of the Illinois Power Company and the GridAmerica Companies, *see* Brief at 23-24, is of no moment in whether it should be allowed to recover those costs. CECo could not recover because it was not a member of an RTO. Whether CECo detailed its purported costs in developing the Alliance RTO better than did the Illinois Power Company and the GridAmerica Companies is irrelevant. Since CECo never satisfied the prong of the *Alliance* VII Order test requiring CECo to be a member of an RTO, the Commission did not have to address CECo's cost breakdown or whether those costs were prudently incurred.

C. CECo Had Sufficient Time And Opportunity To Seek Clarification On Cost Recovery

The Commission "initially expressed its intent to consider proposals for recovery of Alliance RTO-related prudently incurred costs in December 2001." CECo Rehearing Order, 104 FERC at P 11, JA 20. That was several months before CECo closed on the deal transferring its transmission facilities to Michigan Transco. CECo "thus had adequate opportunities and time to recover prudently-

incurred Alliance RTO-related costs," *see id.*, JA 20; yet, during the interim between December 2001 and the date of the closing, CECo did not seek clarification of what would occur if it transferred its assets. Nor did it seek to join MISO or to submit proposals seeking recovery of Alliance RTO development costs. Hence, CECo's inability to recover such costs is due to its own conduct. "Any compensation that [CECo] believes that it missed out on simply amounts to a missed opportunity . . . ." *Id.*, JA 20-21.

Contrary to CECo's argument that the *Alliance* VII Order could not be read to preclude recovery by CECo, *see* Brief at 25, that order clearly notified Alliance RTO participants that cost recovery was reserved for participants that became members of an RTO. The *Alliance* VII Order expressly outlined the Commission's intent "to allow recovery of all costs prudently incurred by any Alliance GridCo participant to establish an RTO once it is a member of an RTO." *Alliance* VII Order, 99 FERC at 61,442 (emphasis added). Reading that language, CECo knew or should have known that transferring its transmission assets, which would preclude it from becoming a member of an RTO, would create a question, at the very least, of whether it could recover the costs. This meant CECo could not sit on its hands. "If [CECo] require[d] more detailed information to determine whether, or to what extent, it m[ight] be affected by a proposed action, it [wa]s [CECo]'s

responsibility to seek out that information." *California v. FERC*, 329 F.3d 700, 708 (9th Cir. 2003). CECo failed to do that.

The April 25, 2002 *Alliance* VII Order was issued several days prior to the date set for transfer of CECo's transmission facilities to Michigan Transco. With several days between the issuance of the *Alliance* VII Order and the closing date, CECo had sufficient time and opportunity (not to mention motivation) to request clarification and additional information regarding the effect of asset transfer on CECo's prospects for cost recovery. *Cf. id.* at 710 (finding adequate a period of four days to respond to a Commission notice).

CECo does not deny it had time and opportunity, but contends that it would have been futile to expect a FERC answer to a clarification motion before the closing date for the asset transfer. *See* Brief at 24-25. This argument lacks merit. For one thing, CECo's contention ignores its failure to seek relief in the months after the *Alliance* VI Order issued. In addition, CECo's futility argument rests on the notion that the scheduled closing date was sacrosanct, but there is no indication that the closing date could not have been extended for some period while clarification was sought, or that CECo could not have requested an expedited FERC ruling to meet the scheduled closing date. While certainly an answer from the Commission within five days is not the norm, *see id.* at 25, CECo offers no explanation why it did not seek a fast response. The Commission can respond, if

requested, on a prompt basis. *See* CECo Rehearing Order, 104 FERC at P 11, JA 20 (noting that CECo "had adequate opportunities and time to recover prudently-incurred Alliance RTO-related costs"); *cf.* 18 C.F.R. § 385.206(h) (noting fast track complaint procedures). As CECo failed to take any action and never requested an expedited FERC response, it cannot now seek to justify that inaction by a futility argument, as there is no basis for judging whether a request that was never made would have been denied out of hand (*i.e.*, would be futile).

Similarly, CECo's reliance on the circumstances of DTE Energy ("DTE") as suggesting a non-transmission owner member of MISO could recover Alliance RTO costs, *see* Brief at 25-26, is misplaced. CECo asserts that DTE sought confirmation that it and its subsidiary International Transmission Company ("ITC") could seek recovery of prudently incurred BridgeCo/Alliance RTO start-up costs, even though DTE planned on selling its transmission system to a third party. *See id.* at 26. Based on its reading of DTE's request, CECo claims a FERC December 19, 2002 order finding DTE's concern about cost recovery to be unwarranted shows that joining an RTO as a transmission owner was not a prerequisite to cost recovery. *See id.*

CECo misreads DTE's and ITC's request. Their concern related to GridAmerica Companies' filing seeking recovery of Alliance RTO costs as foreclosing DTE and ITC from seeking reimbursement of their share of those

costs. *See* Motion for Leave to Intervene, Protest and Comments of DTE Energy Company, Docket Nos. ER02-2233-001 and EC03-14-000 (filed November 2, 2002).[11] Thus, the Commission only addressed whether the GridAmerica Companies' filing precluded DTE and ITC from seeking recovery. *See Ameren Servs. Co.*, 101 FERC ¶ 61,320 at P 145 (2002) ("DTE Energy's concerns regarding the BridgeCo/Alliance Start-Up Cost provisions are unnecessary because other companies are already permitted to file to seek recovery of the start-up costs.") (emphasis added). The order, however, does not state that DTE and ITC would be allowed to recover their share of Alliance RTO development costs.[12] *See id.*

In any case, unlike CECo, which sold its transmission facilities before those transmission facilities became a part of MISO, DTE's transmission facilities under ITC's control were integrated into MISO prior to their sale and prior to DTE and ITC expressing concern about recovering Alliance RTO development costs. *DTE Energy Co.*, 97 FERC ¶ 61,330 at 62,568 (2001) ("approve International Transmission Company's . . . request to transfer operational control of its transmission facilities to Midwest ISO"). Thus, unlike CECo, which never became

[11] Available at http://elibrary.ferc.gov/idmws/search/fercadvsearch.asp (Accession Number 20021122-0287).

[12] Indeed, there is no indication in CECo's Brief or the record that DTE Energy and International Transmission Company have submitted a cost request and received authorization to recover those costs from MISO.

a member of an RTO, DTE and ITC transferred their jurisdictional transmission facilities to MISO when they became members. CECo's reference to DTE, ITC, and FERC's December 19 Order is inapposite to the present circumstances.

Similarly unavailing to CECo's attempt to excuse its failure to seek clarification is the condition in the Purchase Agreement requiring Michigan Transco to reimburse CECo if Michigan Transco recovered Alliance RTO start-up costs. *See* Brief at 27. CECo asserts that that condition left as the only open question under the *Alliance* VII Order which entity, CECo or Michigan Transco, would be eligible to recover Alliance RTO start-up costs following the sale of the transmission facilities. *See id.* CECo maintains that that reimbursement condition mooted any need for clarification. *See id.* But this argument assumes that the *Alliance* VII Order found all conditions for recovery were resolved except for whether Michigan Transco or CECo could recover Alliance RTO development costs. That is incorrect. A plain reading of the Order reveals that to recover costs, two conditions (besides the costs having been prudently incurred) must be met: (1) an entity had to be an Alliance GridCo participant; and (2) it now has to be a member of an RTO. *See also* Michigan Transco Initial Order, 107 FERC at P 12, JA 25. Michigan Transco did not satisfy the first condition, and CECo does not satisfy the second. *See id.* Thus, the inclusion of a reimbursement provision in the Purchase Agreement does not justify recovery or excuse CECo's failure to seek

clarification of whether it or Michigan Transco could seek recovery under the Order.

D. CECo Was Adequately Compensated For The Alliance RTO Costs In The Sale Of Its Transmission Facilities

In addition to CECo's legal failure to comply with the strictures of the Commission's orders, particularly the *Alliance* VII Order, CECo was adequately compensated for the Alliance RTO costs in its transfer of transmission facilities. CECo attempts to twist FERC's finding on this point into a claim that FERC thought the Alliance RTO start-up costs were specifically included in the transmission facilities sale. *See* Brief 27-30. Referring to various provisions in the Purchase Agreement and certain affidavits, CECo asserts that this FERC purported thinking is unsupported by substantial evidence, and therefore, the orders should be vacated. *See id.* Such an assertion is wholly without merit and irrelevant to the matter at hand.

Neither the CECo Initial Order nor the CECo Rehearing Order states that the Alliance RTO start-up costs were specifically included in the sale of CECo's transmission facilities. Quite the opposite, the CECo Rehearing Order found CECo's claims of inadequate compensation because Michigan Transco did not agree to include Alliance RTO start-up costs as part of the purchase price "[we]re to no avail." CECo Rehearing Order, 104 FERC at P 11, JA 20. Despite those claims, the Commission did not concede that "the amounts paid to [CECo] in [sale]

transactions did not adequately compensate [CECo] for its Alliance RTO-related costs." *Id.* at P 11 n.8, JA 20. Support for finding CECo was adequately compensated was found in the fact that CECo did not have to credit any excess over book value to its customers from the transfer, which meant that CECo got to keep "approximately $50 million in excess of depreciated (i.e., net book) value," *id.*, as a premium to the sale. *Trans-Elect, Inc.*, 98 FERC at 62,596-97 (Brownell, Comm'r concurring). Retention of that excess more than offset the Alliance RTO development costs.

Furthermore, as MISO customers will effectively pay that premium in the form of the higher than book value assigned to Michigan Transco's transmission facilities integrated into MISO, no equitable justification exists to force MISO customers to pay CECo additional sums related to Alliance RTO costs. Contrary to CECo's specious equitable arguments, *see* Brief 32-33, vacating the orders would not serve any equitable purpose in these circumstances.

E. MISO's Request For Authorization To Pay Michigan Transco In Docket No. ER04-158 Constituted An Impermissible Collateral Attack

As previously discussed, CECo does not have standing to appeal the Michigan Transco Orders. Even if CECo has standing, its petition seeking to vacate the Michigan Transco Orders would be barred as a collateral attack on the CECo Orders denying MISO authorization to pay CECo. The joint request for

rehearing filed by CECo and MISO of the CECo Initial Order asked FERC to "clarify its order by indicating that it intended to allow all prudently incurred CECo Alliance RTO start-up costs to be recovered by the current corporate owner of CECo's former transmission system, once that entity is a member of an RTO. That transmission owner is . . . Michigan Transco . . . ." *See* R 12 at 1-2, JA 125-26. The Commission denied rehearing in the CECo Rehearing Order. When MISO subsequently applied for authorization "to reimburse [Michigan Transco] for CECo's Alliance RTO development costs," R 1 at 14 (Docket No. ER04-158), JA 185, that application raised the same issue already implicitly addressed by the Commission when it denied rehearing in the CECo Rehearing Order. Hence, CECo's attempt to spin the subsequent MISO application as something other than a collateral attack, *see* Brief at 30-32, is baseless.

On the merits of MISO's application for authorization to pay Michigan Transco, the Commission found "Michigan Transco is not eligible to recover the costs that [CECo] incurred" because "Michigan Transco was not a member of the Alliance RTO," and thus did not satisfy one of the requirements under the *Alliance* VII Order test. Michigan Transco Initial Order, 107 FERC at P 12, JA 25. As a result, even if MISO's subsequent application were not a collateral attack, the Commission reasonably denied the substance of MISO's request. Therefore,

CECo's contention that the Commission did not engage in reasoned decision-making, *see* Brief at 30-32, in the Michigan Transco Orders is unsupported.

CONCLUSION

For the reasons stated, the petitions for review should be denied, and the challenged orders upheld in all respects.

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