ORAL ARGUMENT SCHEDULED FOR NOVEMBER 15, 2005

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

No. 04-1307

OLD DOMINION ELECTRIC COOPERATIVE, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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WASHINGTON, D.C. 20426

AUGUST 19, 2005

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Respondent Federal Energy Regulatory Commission hereby certifies as follows:

A. Parties and Amici

All parties and intervenors appearing before the Commission and this Court are listed in Petitioner's brief. There are no *amici*.

B. Rulings Under Review

The following orders of the Federal Energy Regulatory Commission are under review here:

1. *Pennsylvania-New Jersey-Maryland Interconnection, et al.*, 105 FERC ¶ 61,294 (2003) (Approval Order), R. 13, J.A. 1; and

2. *Pennsylvania-New Jersey-Maryland Interconnection, et al.*, 108 FERC ¶ 61,032 (2004) (Rehearing Order), R. 24, J.A. 17.

C. Related Cases

The instant case arises out of the same proceeding that generated two earlier cases before this Court: *Atlantic City Electric Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002) (*Atlantic City I*); and *Atlantic City Electric Co. v. FERC*, 329 F.3d 856 (D.C. Cir. 2003) (*Atlantic City II*). In addition, a related case in this Court, captioned *Baltimore Gas and Electric Co., et al. v. FERC*, D.C. Cir. No. 03-1197, is being held in abeyance pending the outcome of the instant case.

Robert H. Solomon
Deputy Solicitor

August 19, 2005

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Approval Order	*Pennsylvania-New Jersey-Maryland Interconnection, et al.*, 105 FERC ¶ 61,294 (2003), R. 13, J.A. 1
Atlantic City I	*Atlantic City Electric Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002)
Atlantic City II	*Atlantic City Electric Co. v. FERC*, 329 F.3d 856 (D.C. Cir. 2003)
Commission or FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
ISO	Independent System Operator
J.A.	joint appendix page
Mobile-Sierra	legal doctrine, named after leading cases in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956), and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), governing limitations on filing rights
Old Dominion	Petitioner Old Dominion Electric Cooperative, Inc.
PJM	Pennsylvania-New Jersey-Maryland Interconnection, the operator of the electric transmission grid in the Mid-Atlantic Region
PJM Tariff	PJM Open Access Transmission Tariff
PJM transmission owners	owners of the transmission facilities that make up the PJM grid
R.	record page

Rehearing Order	*Pennsylvania-New Jersey-Maryland Interconnection, et al.*, 108 FERC ¶ 61,032 (2004), R. 24, J.A. 17
RTO	Regional Transmission Organization
TO Agreement	Transmission Owners Agreement

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BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

1. Does Petitioner Old Dominion Electric Cooperative, Inc. ("Old Dominion") have standing to challenge one provision of a comprehensive settlement, approved by the Federal Energy Regulatory Commission ("Commission" or "FERC"), that resolves almost a decade of litigation over an issue that has twice been before this Court, concerning the allocation of filing rights that Old Dominion does not possess and the Commission has no authority to upset?

2. Assuming jurisdiction, did the Commission, in approving the settlement over Old Dominion's objections, respect the statutory rights of both parties and non-parties to that settlement and act in a manner that comports with judicial and agency precedent?

STATUTES AND REGULATIONS

Pertinent sections of the Federal Power Act ("FPA"), 16 U.S.C. §§ 824, *et seq.*, and the Commission's regulations governing the submittal and approval of settlements, *see* 18 C.F.R. § 385.602, are set out in the Addendum to this brief.

COUNTER-STATEMENT OF JURISDICTION

Contrary to Old Dominion's argument (Pet. Br. 1-3), this Court lacks jurisdiction to consider the instant appeal. Old Dominion has neither constitutional nor prudential standing to challenge the provision of a FERC-approved settlement governing the filing rights of public utilities. Old Dominion is not a public utility and possesses no filing rights under FPA section 205, 16 U.S.C. § 824d. The Commission, whether acting on its own initiative or on a complaint filed by Old Dominion, has no statutory authority to take away any filing rights of public utilities or to reallocate the voluntary sharing of such rights. *See Atlantic City Electric Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002) (*Atlantic City I*), and *Atlantic City Electric Co. v. FERC*, 329 F.3d 856 (D.C. Cir. 2003) (*Atlantic City II*). Old Dominion, which does not contest the current allocation of filing rights at issue,

see Pet. Br. 12-13, maintains full rights to file a complaint under FPA section 206, 16 U.S.C. § 824e, challenging the justness and reasonableness of the rates, terms and conditions of service it receives.

STATEMENT OF THE CASE

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

The instant case, involving the restructuring of the Pennsylvania-New Jersey-Maryland Interconnection ("PJM"), has been litigated for almost ten years and has already twice been presented to this Court. This Court emphatically has stated twice that the Commission cannot, whether on its own initiative or acting on complaint, upset or reallocate the right of public utilities under FPA section 205, 16 U.S.C. § 824d, to file for changes in the rates, terms and conditions of jurisdictional service they provide. *See Atlantic City I*, 295 F.3d at 9-11; *Atlantic City II*, 329 F.3d at 858-59.

In an effort to resolve all issues remaining on remand in this proceeding, PJM, which operates the electric transmission grid in the Mid-Atlantic Region, and the owners of the transmission facilities that make up that grid entered into a comprehensive settlement. In relevant respect, the settlement provides for a voluntary division of filing rights, with PJM afforded the exclusive right to make some filings (concerning the terms and conditions of the PJM open access transmission tariff) and the PJM transmission owners afforded the exclusive right

to make other filings (concerning rates). The settlement also limits the Commission's ability to change the settlement's division of filing rights "to the maximum extent permissible by law" and subject to a "public interest" standard of review.

Old Dominion initially objected to the proposed allocation of filing rights. The Commission rejected that objection in approving the settlement, subject to certain modifications and clarifications to protect customer interests. *See Pennsylvania-New Jersey-Maryland Interconnection, et al.*, "Order Approving Settlement With Modification," 105 FERC ¶ 61,294 (Dec. 18, 2003) ("Approval Order"), R. 13, J.A. 1. On rehearing, Old Dominion changed tactics and argued for the first time, alone among the numerous participants to this proceeding, that the settlement improperly limits the ability to file complaints challenging the existing allocation of filing rights. The Commission rejected that objection as well. *See Pennsylvania-New Jersey-Maryland Interconnection, et al.*, "Order Denying Rehearing," 108 FERC ¶ 61,032 (July 9, 2004) ("Rehearing Order"), R. 24, J.A. 17.

II. STATEMENT OF FACTS

The basic facts of this case, as well as the statutory and regulatory framework for the sole remaining issue, are familiar to this Court. They are briefly recounted below, with citations to their discussion in *Atlantic City I* and *II*.

A. Statutory Framework

The only remaining issue concerns the respective filing rights of public utilities and public utility customers under FPA sections 205 and 206, 16 U.S.C. §§ 824d, 824e. As explained in *Atlantic City I*, the two sections "are simply parts of a single statutory scheme under which all rates are *established initially* by the [public utilities], by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful." 295 F.3d at 10 (emphasis and brackets in original) (quoting *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 341 (1956)).

1. **FPA Section 205**. Under this section, 16 U.S.C. § 824d, a public utility has "the right to file rates and terms for services rendered with its assets." *Atlantic City I*, 295 F.3d at 9; *see also id*. at 10 ("the power to initiate rate changes rests with the utility"). [1] Upon receipt of such a filing, the Commission is "obliged to assure that the rates and charges demanded or received by any public utility in connection with the interstate transmission or sale of electric energy are just and reasonable, and that no public utility's rates will unduly discriminate against any consumers." *Id*. at 4 (citing 16 U.S.C. §§ 824d(a)-(b)). The Commission can

[1] FPA § 201(b), 16 U.S.C. § 824(b), affords the Commission jurisdiction "over all rates, terms and conditions of electric transmission service provided by public utilities in interstate commerce, as well as over the sale of electric energy at wholesale." *Atlantic City I*, 295 F.3d at 4. FPA § 201(e), 16 U.S.C. § 824(e), in turn, defines a "public utility" subject to FERC jurisdiction as "any person who owns or operates" jurisdictional facilities.

"suspend [utility-proposed changes] for a period of five months, but it can reject them only if it finds that the changes proposed by the public utility are not 'just and reasonable.'" *Id*. at 9 (quoting 16 U.S.C. § 824d(e) and citing cases).

Thus, the Commission's role under FPA section 205 is "essentially passive and reactive." *Id*. at 10 (quoting *City of Winnfield v. FERC*, 744 F.2d 871, 876 (D.C. Cir. 1984) (Scalia, J.)). The Commission has no authority to eliminate "the very thing that the statute was designed to protect – the ability of the utility owner to 'set the rates it will charge prospective customers, and change them at will,' subject to review by the Commission." *Id*. at 10 (quoting *City of Cleveland v. FPC*, 525 F.2d 845, 855 (D.C. Cir. 1976)).

2. **FPA Section 206**. Under this section, 16 U.S.C. § 824e, the Commission, acting either on its own initiative or after receiving a complaint, can investigate the existing rates and terms of utility service. *Atlantic City I*, 295 F.3d at 4, 10. In order for the Commission to change an existing rate or utility practice, it "must first prove that the existing rates or practices are 'unjust, unreasonable, unduly discriminatory or preferential.'" *Id*. at 10 (quoting 16 U.S.C. § 824e(a)). The Commission must then show "that its proposed changes are just and reasonable." *Id*. (citing cases).

This section does not, however, "give[] FERC the power to deny a utility the right to file changes in the first instance" under FPA section 205. *Id*.; *see also id*.

at 11 (the Commission lacks authority under any FPA provision to require utilities "to cede their right under section 205 of the Act to file changes in rate design with the Commission"); *Atlantic City II*, 329 F.3d at 859 ("FERC has exceeded its jurisdiction" when it "attempts to deprive the utilities of their [filing] rights" under the FPA).

3. ***Mobile-Sierra* Doctrine**. Under this doctrine, named after two leading Supreme Court cases on the subject, *see United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956), and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), "utilities may choose to voluntarily give up, by contract, some of their rate-filing freedom under section 205." *Atlantic City I*, 295 F.3d at 10. Specifically, "parties may negotiate a fixed-rate contract with a provision relinquishing their right to file for a unilateral change in rates." *Id*. at 11. In that case, the Commission may abrogate or modify fixed rates or fixed rate-setting methods "only if required by the public interest." *Id*. at 14 (citing *Texaco Inc. v. FERC*, 148 F.3d 1091, 1095 (D.C. Cir. 1998)). The "public interest" standard of review, while evading precise definition, is "much more restrictive than the just and reasonable standard of" FPA section 205. *Id*. (citing *Potomac Electric Power Co. v. FERC*, 210 F.3d 403, 407 (D.C. Cir. 2000)).

The underlying purpose of the *Mobile-Sierra* doctrine is "to preserve the benefits of the parties' bargain as reflected in the contract, assuming that there was

no reason to question what transpired at the contract formation stage." *Id*. (citing *Town of Norwood v. FERC*, 587 F.2d 1306, 1312 (D.C. Cir. 1978)).

B. PJM Restructuring Efforts and *Atlantic City I* and *II*

This case dates back 10 years, to the dawn of the Commission's efforts to promote open access transmission and the development of independent system operators ("ISOs") to manage regional, multi-utility transmission grids. *See New York v. FERC*, 535 U.S. 1, 7-14 (2002) (describing industry and regulatory initiatives); *Public Utility District No. 1 of Snohomish County v. FERC*, 272 F.3d 607, 609-12 (D.C. Cir. 2001) (describing promotion of regional transmission organizations ("RTOs")).

PJM was the first entity to restructure itself into an ISO in accordance with Commission policies for ISO formation, but only after the Commission rejected PJM's initial efforts and modified subsequent efforts. *See Atlantic City I*, 295 F.3d at 4-7 (describing history). In relevant respect, the Commission declined to accept various PJM agreements that limited PJM, a public utility by virtue of its operation of transmission facilities, to only a veto over FPA § 205 rate filings made exclusively by the PJM transmission owners related to PJM's rates, charges, terms and conditions. The Commission determined that all PJM public utilities, *i.e*., all transmission owners and PJM as the transmission operator, have filing rights, and adopted a filing allocation that afforded the transmission owners the right to seek a

change in their transmission revenue requirements, but not changes in PJM's rate design (which could be made only by PJM). *See id*. at 6-7.

On review, the Court in *Atlantic City I* determined that the Commission lacks authority, under any section of the FPA, to deprive the PJM transmission owners of, or otherwise to reallocate, their statutory filing rights. *See id*. at 9-11; *see supra* pages 6-7 (quoting decision). (The Court also overturned Commission decisions: (1) to require the PJM transmission owners to seek the Commission's authorization under FPA section 203, 16 U.S.C. § 824b, prior to withdrawing from PJM, *see id*. at 11-13; and (2) to modify a preexisting power sales agreement between a PJM utility and Old Dominion containing a *Mobile-Sierra* clause allowing only for "public interest" modification, to reflect transmission pricing under the new ISO regime, *see id*. at 13-15.)

On remand, the Commission directed the PJM transmission owners to explain further why their proposed allocation of FPA § 205 filing rights, between the transmission operator (PJM) and the transmission owners, would not upset the independence of the ISO or result in unduly discriminatory rates and practices. *See Pennsylvania-New Jersey-Maryland Interconnection, et al.*, 101 FERC ¶ 61,318 at PP 3, 18-37 (Dec. 19, 2002). [2]

[2] On remand from *Atlantic City I*, the Commission also: (1) determined that it could not satisfy the *Mobile-Sierra* "public interest" standard necessary to upset the preexisting Old Dominion contract, *see id*. at PP 9-17; and (2) continued to

In response, the PJM transmission owners renewed their request for their originally-proposed (1997) allocation of filing rights, and also sought rehearing of the remand order. The Commission granted rehearing to the extent it found that the PJM transmission owners "may have a role in formulating rate design proposals" and that their filing rights "should not be limited simply to filing their revenue requirements." *See Pennsylvania-New Jersey-Maryland Interconnection, et al.*, 103 FERC ¶ 61,170 at P 20 (May 14, 2003). Accordingly, the Commission now accepted the originally-proposed allocation of filing rights that it earlier had rejected. *Id*. at P 32

Less than a week later, on May 20, 2003, the Court granted the PJM transmission owners' petition to direct the Commission to enforce the mandate of *Atlantic City I*. The Court reaffirmed that the Commission "has no jurisdiction to enter limitations requiring utilities to surrender their rights under § 205 of the FPA to make filings to initiate rate changes." *Atlantic City II*, 329 F.3d at 859.

C. Proposed PJM Settlement and FERC Approval

On October 3, 2003, PJM and the PJM transmission owners jointly filed a comprehensive Settlement Agreement, intended to resolve all remaining issues – including those addressed in *Atlantic City I* and *II* and the Commission's orders on

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conclude that the withdrawal of a transmission owner from PJM requires the Commission's prior authorization under FPA § 203, *see id*. at PP 38-55.

remand. *See* R. 1, J.A. 22. [3] In relevant respect, the settling parties agreed to a voluntary sharing of filing rights among themselves, noting that *Atlantic City I* explicitly recognized that "utilities may choose to voluntarily give up, by contract, some of their rate-filing freedom under section 205." 295 F.3d at 10; *see* R. 1, Joint Explanatory Statement at 3, J.A. 74.

Under the Settlement Agreement, PJM is afforded exclusive rights to make FPA § 205 filings dealing with the terms and conditions of the PJM Open Access Transmission Tariff ("PJM Tariff"). *See* R. 1, Settlement Agreement §§ 3.2, 4.2, and 4.3, adding § 5.2.1 of the Transmission Owners Agreement ("TO Agreement") and § 9.2 of the PJM Tariff, J.A. 29, 34, 39, 54, 67. The PJM transmission owners are afforded exclusive rights to make FPA § 205 filings relating to their transmission revenue requirements, transmission cost recovery, and transmission rate design. *See* R. 1, Settlement Agreement §§ 3.1, 4.2, and 4.3, adding § 5.1.2 of the TO Agreement and § 9.1 of the PJM Tariff, J.A. 29, 31, 36, 52, 64. [4] The settling parties indicated that such a division of filing rights, between rate filings (transmission owners) and terms/conditions filings (PJM) "will both protect the

[3] All PJM transmission owners were either signatories to the settlement or authorized the settling parties to state that they do not oppose the settlement. R. 1, Explanatory Statement at 3, J.A. 74.

[4] Both PJM and the PJM transmission owners must, under the settlement, consult with each other and with other stakeholders prior to exercising their respective filing rights. *See* R. 1, Settlement Agreement §§ 3.1, 3.2, 4.2, and 4.3, adding §§ 5.1.2 and 5.2.1 of the TO Agreement and §§ 9.1 and 9.2 of the PJM Tariff, J.A. 29, 32, 34, 37, 39, 52, 54, 64, 67.

legitimate interest of transmission owners and permit PJM to perform its required functions independently in a manner that PJM has determined to be acceptable." R. 1, Joint Explanatory Statement at 4, J.A. 75.

The Settlement Agreement also limited the ability of the settling parties and the Commission to modify the allocation of filing rights in the future, as follows:

> 4.5 Changes Are Governed by *Mobile Sierra*
>
> It is the intent of the Parties that the provisions of this Settlement Agreement, and the conforming changes to the PJM Tariff and the Transmission Owners Agreement required by this Settlement Agreement, shall be subject to change solely by written amendment executed by PJM and the Transmission Owners. . . . It is the intent of this Section 4.6 [*sic* – should read 4.5] that the Commission's right to change any provision of this Settlement Agreement shall be limited to the maximum extent permissible by law and that any such change shall be in accordance with the *Mobile-Sierra* public interest standard applicable to fixed rate agreements.

R. 1, Settlement Agreement § 4.5, revising § 9.4 of the PJM Tariff, J.A. 42, 57. [5]

A "coalition" of cooperative and municipal customers of PJM transmission service, including Old Dominion, filed a protest to the proposed settlement. *See* R. 4, J.A. 102. They opposed the proposed allocation of filing rights, arguing that PJM with its regional perspective, rather than the transmission owners with their individual perspectives, should have exclusive authority to make rate design changes. *See* R. 4 at 6-11, J.A. 107-112. They also argued that disputes

[5] The language in § 4.5 of the Settlement Agreement and in § 9.4 of the PJM Tariff, limiting future changes to the allocation of filing rights, differs slightly but not in any material respects.

concerning which filings can be made by PJM (terms and conditions) and which can be made by the transmission owners (rates) should be subject to Commission review, not by a "neutral party" as proposed in the settlement. *Id*. at 14, J.A. 115. They offered no objection – nor did any other party object – to Settlement Agreement § 4.5, specifying the burden to be met before filing rights can be reallocated.

On December 18, 2003, the Commission approved the Settlement Agreement, subject to certain modifications. *See* Approval Order, 105 FERC ¶ 61,294 (2003), R. 13, J.A. 1. On the issue of filing rights, the Commission determined "on balance" that the "voluntary, compromise agreement" of the transmission operator (PJM) and the transmission owners is consistent with both the dictates of *Atlantic City I* and Commission policy requiring that "the interests of market participants are safeguarded." *Id*. at PP 30-32, J.A. 12-13.

In response to Old Dominion's concerns, [6] the Commission clarified that the settlement does not limit "its authority to find a given rate to be unjust and unreasonable and to establish a just and reasonable rate." *Id*. at P 32, J.A. 13. The Commission also clarified that if the transmission owners "use their filing rights in a way that compromises RTO independence or functions or causes undue

[6] The Commission denied all motions for late intervention, *see id*. at P 26, J.A. 11, leaving Old Dominion (which previously had intervened in this proceeding) as the only party opposing the proposed settlement.

discrimination between or among RTO members or customers, the Commission will consider whether the Settlement Agreement is contrary to the public interest." *Id*. at P 33, J.A. 13-14.

The Commission also committed to exercise "careful oversight in connection with these matters and, if appropriate, institute a Section 206 proceeding to do so." *Id*. The Commission did, however, agree with Old Dominion to the extent it modified the dispute resolution clause of the settlement, to provide for recourse to the Commission in the event of a dispute whether a particular matter is rate-related (within the transmission owners' filing rights) or terms- and conditions-related (within PJM's filing rights). *Id*. at P 34, J.A. 14. [7]

The settling parties accepted the Commission's modifications, and revised and refiled a modified Settlement Agreement. *See* R. 14, J.A. 170. As for Old Dominion, it filed for clarification and "conditional" rehearing of the Approval Order. *See* R. 15, J.A. 209. Altering tactics, Old Dominion dropped its objection to the initial allocation of filing rights among PJM and the PJM transmission owners. Instead, it now objected to the *Mobile-Sierra* burden in Settlement

[7] While the Commission, consistent with *Atlantic City I* and *II*, approved other provisions of the settlement allowing for withdrawal from PJM without prior Commission authorization under FPA § 203, it directed another customer-protection modification to require Commission authorization under FPA § 205 prior to withdrawal. *Id*. at PP 35-36, J.A. 14-15. As for Old Dominion's concerns regarding the applicability of the settlement provisions to new members seeking to join PJM, the Commission found those concerns premature. *Id*. at P 37, J.A. 15.

Agreement § 4.5 which must be overcome to justify changes to that allocation.

On July 9, 2004, the Commission denied rehearing. *See* Rehearing Order, 108 FERC ¶ 61,032 (2004), R. 24, J.A. 17. In relevant part, the Commission clarified that the *Mobile-Sierra* provision, limiting future efforts to upset the settlement allocation of filing rights, applies as well to "proceedings initiated by or on behalf of non-parties" to the settlement. *Id*. at P 7, J.A. 20. The Commission corrected Old Dominion's erroneous claim that Commission precedent does not bind non-parties to *Mobile-Sierra* provisions: "[T]here is no Commission or court precedent that supports a finding that a non-signatory may unilaterally seek changes to a *Mobile-Sierra* 'public interest' contract under the 'just and reasonable' standard of review." *Id*. (citing *Public Utilities Commission of the State of California, et al.*, 105 FERC ¶ 61,182 at P 50 (2003) (*PUC of California*)).

SUMMARY OF ARGUMENT

Old Dominion has neither constitutional nor prudential standing to challenge the Commission's approval of a settlement governing the FPA § 205 filing rights of PJM public utilities. Old Dominion is not a public utility and possesses no such filing rights. As this Court decided in *Atlantic City I* and *II*, the Commission, whether acting on its own initiative or on a complaint, has no statutory authority to eliminate or reallocate the FPA § 205 filing rights of public utilities. Accordingly, Old Dominion realizes no present injury from a settlement provision that establishes only the standard governing the Commission's review of any future complaint seeking a reallocation of FPA § 205 filing rights. Old Dominion has lost none of its authority under FPA § 206 to file a complaint challenging the justness and reasonableness of the rates, terms and conditions of service it receives.

As for the merits, the Commission reviewed all sections of the proposed settlement and reasonably determined, on balance, that it should be approved. Approval ended almost a decade of litigation over a filing rights issue that twice before has been presented to this Court. The Commission directed modifications and provided clarifications that served to protect the rights and interests of non-parties to the settlement. With customer interests protected, the settlement represented a voluntary sharing of utility filing rights that is entirely consistent with *Atlantic City I* and *II*, as well as with other judicial and agency authority

concerning customer filing rights. The Commission remains fully able to take action under FPA § 206, and Old Dominion remains fully able to file a complaint, as necessary to assure that PJM utilities continue to charge just and reasonable rates and do not engage in unduly discriminatory or preferential practices.

ARGUMENT

I. OLD DOMINION LACKS STANDING TO CHALLENGE FERC APPROVAL OF A SETTLEMENT THAT DOES NOT LIMIT ITS EXERCISE OF ITS STATUTORY RIGHTS

Under FPA § 313(b), 16 U.S.C. § 825*l*(b), only a party "aggrieved" by Commission action may obtain judicial review. *See, e.g., Public Utility District No. 1*, 272 F.2d at 613. To be "aggrieved," a petitioner must meet both constitutional (Article III) and prudential standing requirements. *See, e.g., DTE Energy Co. v. FERC*, 394 F.3d 954, 960 (D.C. Cir. 2005); *Louisiana Energy and Power Authority v. FERC*, 141 F.3d 364, 366 (D.C. Cir. 1998).

A. Old Dominion Lacks Constitutional Standing

Constitutional standing analysis focuses on three familiar requirements: (1) there must be 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;" (2) "the injury has to be fairly traceable to the challenged action of the defendant;" and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and quotations marks omitted).

Old Dominion cannot establish any injury in fact. The settlement does not purport to limit Old Dominion's FPA § 206 complaint rights. Rather, the provision in question (§ 4.5 of the Settlement Agreement), by its very terms, applies only to

the settling parties and the Commission. The former must execute a written agreement prior to seeking a change to the settlement terms; the latter can do so only "to the maximum extent permissible by law" and only "in accordance with the *Mobile-Sierra* public interest standard." *See supra* page 12 (quoting settlement language); *see also Lujan*, 504 U.S. at 562 ("when the [petitioner] is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish") (citations omitted).

Old Dominion and other non-parties to the settlement have not lost any of their filing rights. To the contrary, the settlement and the parties' conforming agreements are explicit that there is no limitation on the "right of any Party or other person" to oppose a Section 205 filing or to make a Section 206 filing. *See* R. 1, Settlement Agreement §§ 4.2 and 4.3, adding §§ 5.1.2(c) and 5.2.1(c) of the TO Agreement and § 9.2(c) of the PJM Tariff, J.A. 32, 34, 39, 55, 65, 67. Old Dominion retains full ability to file a complaint under Section 206, governed by the "just and reasonable" standard of review, concerning any of the rates, terms or conditions of service it receives (or other non-parties receive). As the Commission explained, its "Section 206 authority under the Settlement Agreement is limited only as to the extent of the Settlement Agreement, which addresses only the allocation of these [filing] rights. In other words, the Commission retains its

authority to find a given rate to be unjust and unreasonable and to establish a just and reasonable rate." Approval Order at P 32, J.A. 13.

Even as to FPA § 205 filing rights it does not possess, Old Dominion has not demonstrated any immediate or concrete harm from approval of the settlement. While Old Dominion initially objected, in its protest, to the proposed allocation of filing rights among public utilities (PJM has exclusive filing rights concerning terms and conditions; PJM transmission owners have exclusive filing rights as to rates), it abandoned that objection in its rehearing. On brief, Old Dominion now clarifies that it raises no issue concerning "the specific allocation of filing rights established in the settlement [that] may appropriately govern until FERC changes it in a proper case." Pet. Br. 13.

Thus, Old Dominion's only current concern is its ability to seek a change to that allocation in the future. *Id*. But any harm arising from the burden placed on those persons who may seek future changes to the settlement allocation of filing rights is entirely speculative, and could only arise from a change of circumstances that would make the settlement allocation no longer reasonable. In other words, the extent of that possible harm, if any, cannot be determined from the settlement terms but only from any future effort to change them. *See, e.g.*, *Lujan*, 504 U.S. at 564 ("some day intentions" do not establish standing); *Williams Gas Processing Co. v. FERC*, 17 F.3d 1320, 1322 (10th Cir. 1994) (petitioner's "fear that Williams

will charge unreasonable rates is only speculation for now"); *see also* Pet. Br. 7 (challenging effect of settlement on non-participants "who nonetheless *might be affected* by its terms") (emphasis added).

Even if any actual injury occurs, it would not be directly traceable to the Commission's approval of the current allocation of filing rights to which Old Dominion does not object, but to future action upon the initiation of a FPA § 206 proceeding. It is not clear what burden of proof would then apply. Old Dominion acknowledges that application of the *Mobile-Sierra* "public interest" standard is "less than self-evident," and may require a "more flexible formulation of the test," Pet. Br. 16 & n.24, when applied to the allocation of filing rights. The precise meaning of that standard awaits future application.

Given that *Atlantic City I* and *II* teach that the Commission lacks authority, statutory, contractual or otherwise, to eliminate or reallocate Section 205 filing rights belonging to public utilities, *see* 295 F.3d at 9-11 and 329 F.3d at 858-59, it is difficult to see how its burden in any future Section 206 reallocation proceeding is raised by the terms of the parties' settlement. It is immaterial if the settlement, as a general matter, raises the Commission's burden to "practically insurmountable," or some other level, *see* Pet. Br. 15-17, if its burden under *Atlantic City*, whether acting on its own initiative or on complaint, to take away filing rights of public utilities is, in fact, insurmountable.

B. Old Dominion Lacks Prudential Standing

Prudential standing analysis focuses on whether petitioner's grievance is "within the zone of interests protected or regulated by the statutory provision" it invokes. *Bennett v. Spear*, 520 U.S. 154, 162 (1997). A petitioner's claim fails if its interests "are so marginally related to or inconsistent with the implicit purposes in the statute 'that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Mudd v. White*, 309 F.3d 819, 824 (D.C. Cir. 2002) (quoting *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987)). *See also Grand Council of Crees (of Quebec) v. FERC*, 198 F.3d 950, 954-58 (D.C. Cir. 2000) (applying prudential standing principles to review under the FPA "aggrievement" standard).

In the instant circumstances, Old Dominion does not fall within the zone of interests protected by FPA § 205. Old Dominion is not a public utility and therefore has no FPA § 205 filing rights. *See* Approval Order at P 31, J.A. 13 (citing FPA § 201(e), 16 U.S.C. § 824(e)). It can only petition the Commission under FPA § 206 to seek a change to the allocation of FPA § 205 filing rights belonging to PJM and the transmission owners. But such a right means little if, as mandated under *Atlantic City*, the Commission has no authority to reallocate those rights.

Old Dominion responds that it is acting to vindicate its own filing rights

under FPA § 206. *See* Pet. Br. 14-18. But its assertion of its filing rights, in these particular circumstances, acts only to undermine the exclusive filing rights and settled expectations of public utilities (PJM and the transmission owners) under FPA § 205. If the Commission lacks authority to upset those filing rights when acting on its own initiative, it has no more authority when acting on the complaint of Old Dominion or some other party. *See, e.g.*, *Liquid Carbonics Indus. Corp. v. FERC*, 29 F.3d 697, 704 (D.C. Cir. 1994) (denying prudential standing to claims that would be "more likely to frustrate than to further statutory objectives").

Moreover, both the settlement terms and the Commission's orders act to preserve all of Old Dominion's FPA § 206 authority to file a complaint concerning the rates, terms and conditions of service it receives for a "just and reasonable" review. *See supra* pages 19-20 (quoting provisions from the Settlement Agreement and the Approval Order). Thus, the settlement and the Commission's orders do, in fact, respect the "fundamental policies that animate the FPA," including Section 206 complaint rights and "just and reasonable" review, that Old Dominion claims the Commission failed to respect, Pet. Br. 12. Old Dominion has no other claim worthy of protection under the statute.

II. ASSUMING JURISDICTION, THE COMMISSION'S APPROVAL OF THE SETTLEMENT WAS REASONABLE AND CONSISTENT WITH ALL STATUTORY OBJECTIVES AND COMMISSION PRECEDENT

A. Standard of Review

Judicial review of Commission decisions falls under the arbitrary and capricious standard of 5 U.S.C. ə 706(2)(A). The relevant inquiry for the reviewing court under that standard is whether the agency has "examine[d] the relevant data and articulate[d] a . . . rational connection between the facts found and the choice made." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

The Commission's findings as to facts, if supported by substantial evidence, are conclusive. FPA § 313(b), 16 U.S.C. § 825*l*(b); *see, e.g., Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999) ("highly deferential" review to determine whether agency decision is based on substantial evidence in the record). Similarly, the Commission's decision to approve the provisions of a contested settlement must be sustained if supported by substantial evidence. *See, e.g., Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 37 (D.C. Cir. 1999); *Oxy USA, Inc. v. FERC*, 64 F.3d 679, 690 (D.C. Cir. 1995); *see also* 18 C.F.R. § 385.602(h)(1)(i) (permitting the Commission to resolve contested settlement issues "if the record contains substantial evidence upon which to base a reasoned

decision").

B. The Commission's Approval of the Settlement Was, Under the Circumstances and on Balance, Reasonable

Old Dominion focuses solely on one provision in the settlement. In its opinion, the Commission's modification of other provisions to protect customers is "not here relevant." Pet. Br. 6; *see also id*. at 28 (FERC-ordered revisions "not here germane"). Moreover, Old Dominion asserts that the "subject matter of the settlement" is irrelevant to review of its objection to the "high hurdle" allegedly raised by the *Mobile-Sierra* public interest provision of the settlement. *Id*. at 13.

The Commission's analysis was not so limited. It reviewed the settlement as a whole before finding "[o]n balance," and only "[u]nder these circumstances," Approval Order at P 30, J.A. 12-13, that it should be approved. It recognized the long, tortured history of this case, *see id*. at PP 2-9, J.A. 3-6 (recounting history), and understood that approval of the settlement would end continuing litigation by the transmission owners related to their filing rights. *See* R. 1 at 5, § 2.7 of the Settlement Agreement (purpose of settlement is to "resolve with finality" remaining issues) and Joint Explanatory Statement at 4 (purpose is to "bring a close to litigation that has now been ongoing for almost eight years"), J.A. 28, 75. The Commission also determined that the "voluntary, compromise agreement" of the settling parties to allocate their filing rights was entirely "of the sort found permissible by the court" in *Atlantic City I* , 295 F.3d at 10. Approval Order at P

32, J.A. 13; *see also id*. at P 30, J.A. 13 ("interests of market participants are safeguarded" by the voluntary allocation of filing rights "among the public utilities within PJM, whose rights would otherwise overlap").

If the Commission had reallocated FPA § 205 filing rights, as Old Dominion originally advocated, or had eliminated or modified the *Mobile-Sierra* provision limiting the Commission's future ability to seek a reallocation, as Old Dominion advocated on rehearing, the transmission owners very likely would have abandoned the settlement and continued their litigation over their filing rights. [8] As the transmission owners explained in their opposition to Old Dominion's request for rehearing and clarification, the settlement allocation of rights and limitation on future reallocation of those rights are at "the core of the settlement reached in this case." R. 19 at 3, J.A. 225. As they see it, Old Dominion sought to "derail the settlement" and to upset "the very matter that the settling parties wish to put to rest." *Id*. at 3-4, J.A. 225-226. The transmission owners would have found "unacceptable" any effort to "reopen the very issue that has already been presented twice" to this Court. [9] *Id*. at 4, J.A. 226.

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[8] Indeed, this Court is holding in abeyance the transmission owners' appeal of the two orders issued on remand from *Atlantic City I*, captioned *Baltimore Gas and Electric Co., et al. v. FERC*, D.C. Cir. No. 03-1197. The transmission owners have explained in status reports that their appeal will be activated in the event approval of the Settlement Agreement is overturned in this instant appeal.

[9] Sections 6.1 and 6.2 of the Settlement Agreement, R. 1 at 20, J.A. 43, provide that it "shall be deemed withdrawn and shall be null and void and of no

The Commission did not, however, simply rubber stamp the settlement. It agreed with Old Dominion, *see* R. 4 at 14, J.A. 115, that any dispute over who has what Section 205 filing rights cannot be resolved with finality by a "neutral party" without any recourse (appeal rights) to the Commission, as originally proposed in Sections 4.2 and 4.3 of the Settlement Agreement, *see* R. 1 at 12, 18, J.A. 35, 41. Rather, the Commission agreed with Old Dominion that the settlement must be modified so that "[i]nterested parties . . . have recourse, i.e., appeal rights, to the Commission on such a fundamental issue as whether a particular matter is rate-related or terms and conditions-related and thus who (the PJM TOs or PJM) is entitled under the Settlement Agreement to make a Section 205 filing regarding such matter." Approval Order at P 34, J.A. 14. [10]

The Commission also offered two clarifications on Old Dominion's behalf. First, the Commission explained that the challenged *Mobile-Sierra* provision is "limited only as to the extent of the Settlement Agreement," as it applies only to

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force and effect" if it "is not approved in its entirety without modification or condition." The settling parties were willing to live with the modifications the Commission ordered, and filed a revised Settlement Agreement in compliance with the Approval Order. *See* R. 14, J.A. 170. Given their insistence on maintaining the "core" provisions of the Settlement Agreement dealing with the allocation of filing rights and limitations on future efforts to reallocate those rights, R. 19 at 3, J.A. 225, it cannot be assumed that the settling parties would have similarly acquiesced in modification of those provisions, as requested by Old Dominion.

[10] The Commission also modified the Settlement Agreement to require transmission owners withdrawing from PJM to obtain the Commission's prior authorization under FPA § 205. *See* Approval Order at PP 35-36, J.A. 14-15.

future efforts to reallocate filing rights among PJM public utilities. *Id*. at P 32, J.A. 13. Parties are otherwise completely free to file complaints under the "just and reasonable" FPA § 206 standard: "In other words, the Commission retains its authority to find a given rate to be unjust and unreasonable and to establish a just and reasonable rate." *Id*.; *see also supra* page 19 (settlement provisions confirming non-party complaint rights).

In so clarifying the limited scope of the approved settlement, the Commission satisfied "the core policy of protecting consumers," that Old Dominion claims was ignored, "by ensuring that the rates, terms and conditions of wholesale electricity and transmission services are not unjust, unreasonable or unduly discriminatory." Pet. Br. 12. In other words, in approving the settlement as so clarified, the Commission did not upset Old Dominion's ability to challenge, under the "just and reasonable" standard, the price for or quality of service it receives from PJM utilities; thus, Old Dominion is mistaken in claiming (Pet. Br. 3, 9, 13) that the Commission has "change[d] the legal standard" found in FPA § 206.

Second, the Commission committed "to exercise careful oversight" to protect Old Dominion's rights should the PJM utilities act to abuse their allocation of filing rights. Approval Order at P 33, J.A. 13-14. Specifically, in the event transmission owners "use their filing rights in a way that compromises RTO

independence or functions or causes undue discrimination between or among RTO members or customers, the Commission will consider whether the Settlement Agreement is contrary to the public interest" and will, "if appropriate, institute a Section 206 proceeding. . . ." *Id.* Both Old Dominion and this Court know that these are not mere words. The Commission acted affirmatively (though ultimately unsuccessfully) in the orders underlying *Atlantic City I* to lower the overall price of serving Old Dominion under a contract with one of the PJM transmission owners that included a *Mobile-Sierra* clause. *See Atlantic City I*, 295 F.3d at 13-15 (addressing Commission efforts to modify Old Dominion contract, predating PJM ISO formation, to remedy rates deemed to be unreasonable and unduly discriminatory); *see also supra* page 9. If necessary, the Commission will again act to protect Old Dominion or other PJM customers to ensure that the rates, terms and conditions of service they receive, as required under FPA § 206, are just and reasonable and not unduly discriminatory or preferential.

As the settling parties explained, the Settlement Agreement was "served on hundreds of parties including all PJM members, all state regulatory commissions within the PJM region, and all parties to these consolidated cases." R. 6 at 2, J.A. 122; *see also* R. 19 at 3, J.A. 225 (same). [11] Old Dominion was the only party to challenge the *Mobile-Sierra* limitation on future efforts to reallocate Section 205

[11] Old Dominion lists, in its Circuit Rule 28(a)(1) Certificate, 165 parties which appeared in the agency proceedings below.

filing rights. The Commission ultimately approved the settlement with modifications and clarifications to protect the statutory interests of all market participants, including Old Dominion, *see* Approval Order at P 32, J.A. 13, while at the same time respecting the allocation of filing rights at the core of the settlement, finding approval to be consistent with the mandate of this Court and FERC policies requiring PJM to manage the grid in an independent manner, *see* R. 1, Explanatory Statement at 4, J.A. 75. This balance of competing interests and objectives is entitled to deference and must be upheld. *See Artic Slope Regional Corp. v. FERC*, 832 F.2d 158, 164 (D.C. Cir. 1987) (FERC regulations governing settlements are "quite broadly worded" and afford the agency considerable "breadth of discretion") (citing 18 C.F.R. § 385.602(h)(1)(ii)(B)).

C. The Commission's Approval of a Particular Settlement Provision, Limiting Future Efforts To Alter the Voluntary Allocation of Filing Rights, Was Entirely Consistent With Statutory Requirements and FERC Precedent

The Commission disagreed with Old Dominion's rehearing claim that precedent bars the Commission from enforcing the *Mobile-Sierra* clause as to both parties and non-parties to the settlement. Citing a recent decision, the Commission explained that "there is no Commission or court precedent that supports a finding that a non-signatory may unilaterally seek changes to a *Mobile-Sierra* 'public interest' contract under the 'just and reasonable' standard of review." Rehearing Order at P 7, J.A. 20 (*citing Public Utilities Commission of the State of California,*

et al., 105 FERC ¶ 61,182 at P 50 (2003) (*PUC of California*)). This statement accurately reflects the consistency of the orders, and the inconsistency of Old Dominion's position, with applicable policy and precedent.

1. Commission Followed Judicial Precedent and Respected Statutory Filing Rights

Contrary to Old Dominion's argument (Pet. Br. 20-22), the settlement does not apply to "bystanders." As explained *supra* at pages 12, 18, the *Mobile-Sierra* provision of the Settlement Agreement, by its very terms, applies only to the signing parties and the Commission. The Commission is not a mere "bystander," as it approved the settlement (with modifications and clarifications). Therefore, even under Old Dominion's "voluntary waiver" of rights theory, *see* Pet. Br. 19-20, the Commission, through its action approving the settlement, has legitimately limited whatever right (if any under *Atlantic City*) it has to seek a reallocation of Section 205 filing rights, on its own initiative or on complaint, in the future.

As for Old Dominion, it is no passive "bystander" either. In this case, Old Dominion and other non-parties to the settlement were afforded full opportunity to present their objections. Those objections were not only considered by the Commission, but also, in some cases, adopted as modifications to (or clarifications of) the settlement, *see supra* pages 27-29, thereby enabling the Commission to conclude, on balance, that "the interests of market participants are protected." Approval Order at P 32, J.A. 13.

But even if Old Dominion had not participated in the FERC approval process, and thus could be considered to be a mere "bystander" to the settlement, its rights are still protected. The *Mobile-Sierra* public interest standard exists precisely to protect the interests of customers, particularly those who were not participants in the contracting process. The Supreme Court explained in *Sierra* that the public interest standard allows the Commission to act as necessary when the rates, terms and conditions of service are "unduly discriminatory" or otherwise threaten to impose on consumers an "excessive burden." 350 U.S. at 355. As Old Dominion notes (Pet. Br. 20 n.29), this Court has recognized that the Commission's ability under the *Mobile-Sierra* doctrine to address "undue discrimination" under FPA § 206 includes the ability to address rates, terms and conditions of utility service that are "unduly discriminatory or preferential to the detriment of purchasers who are not parties to the contract." *Papago Tribal Utility Authority v. FERC*, 723 F.2d 950, 953 n.4 (D.C. Cir. 1983); *see also Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 961 (1st Cir. 1993) (*Mobile-Sierra* doctrine "allows for intervention by FERC where it is shown that the interests of third parties are threatened").

Consistent with this line of authority, the Commission, while it consented to the settlement and the *Mobile-Sierra* provision, made clear that it retains full authority, on its own initiative or on complaint, to act as necessary to assure that

rates are just and reasonable and filing rights are not exercised in an unduly discriminatory manner to the detriment of any customers. Approval Order at PP 32-33, J.A. 13-14. Thus, Old Dominion is mistaken in claiming (Pet. Br. 23-24) that the Commission orders violate *Atlantic City* by eliminating its FPA § 206 filing rights. To the contrary, Old Dominion retains full authority to complain to the Commission that the rates, terms and conditions of service it receives are unjust, unreasonable, or unduly discriminatory or preferential. As explained *supra* at pages 20-21, all Old Dominion has lost is, perhaps, some ability to argue in favor of a reallocation of Section 205 filing rights that it does not possess and that the Commission cannot order. *See Atlantic City I*, 295 F.3d at 9-11; *Atlantic City II*, 329 F.3d at 858-59.

2. Commission Followed Agency Precedent and Policy

Old Dominion ignores altogether the principal Commission policy that the settling parties pursued in crafting their settlement and that the Commission followed in approving the settlement. Specifically, in the orders on remand from *Atlantic City I*, the Commission recognized that PJM and the PJM transmission owners are all public utilities with their own FPA filing rights and responsibilities and sought a balance: "A patchwork of duplicative filings and different rate designs, perhaps working at cross purposes, could lead to precisely the type of unduly discriminatory or preferential practices that the ISO (or, later, RTO) is

intended to eliminate." *Pennsylvania-New Jersey-Maryland Interconnection*, 101 FERC at P 29; *see also Pennsylvania-New Jersey-Maryland Interconnection*, 103 FERC at P 19 (original proposal of transmission owners to deprive PJM of its filing rights would undermine PJM's ability to operate the grid in an independent manner and without undue discrimination or preference). The Commission urged the PJM utilities to strike their own balance to eliminate these concerns, and the PJM utilities responded as asked.

Thus, their voluntary settlement allocation of filing rights, with a provision limiting future reallocations, respected, not undermined, Commission policy. *See* Approval Order at P 30, J.A. 13 (agreeing "that voluntary filing rights arrangements among the public utilities within PJM, whose rights would otherwise overlap, is consistent with Commission policy"); *see also* R. 1, Explanatory Statement at 3-4, J.A. 74-75 (balance struck by settling parties respects *Atlantic City* by "preserv[ing] the transmission owners' ability to establish tariff rates for transmission service using their facilities while also preserving PJM's ability to perform its RTO functions independently").

Nor does approval of the *Mobile-Sierra* provision (Settlement Agreement § 4.5) depart from Commission precedent, as Old Dominion claims. *See* Pet. Br. 25-28 (citing FERC cases "go[ing] back at least as far as" 1994 and continuing "as late as September 2002"). The cases cited by Old Dominion stand for the

proposition that the Commission will not bind itself, "absent its consent," to a *Mobile-Sierra* provision in a contract limiting its ability to protect non-parties to the contract. *E.g.*, *Southern Company Services, Inc*., 67 FERC ¶ 61,080 at 61,228 (1994). Here, however, the Commission consented to such a provision as part of its approval of the overall settlement, thereby undercutting the applicability of the cases cited by Old Dominion. Moreover, those cases involved efforts to restrict the Commission's ability, whether on its own initiative or on complaint, "to investigate rates, terms and conditions under a 'just and reasonable' standard." *E.g.*, *Carolina Power & Light Co*., 67 FERC ¶ 61,074 at 61,205 (1994). Here, unlike those earlier cases, there was no need to remove the *Mobile-Sierra* provision as it does not limit the ability of the Commission to undertake such an investigation under the "just and reasonable" standard, but only applies to efforts to reallocate filing rights. *See supra* pages 19-20.

In any event, those 1994-2002 orders do not entirely reflect Commission policy in effect at the time of the PJM orders here. As Old Dominion recognizes (Pet. Br. 29-30 & Add. B), the Commission now is routinely approving agreements with provisions that may affect third-party challenge rights. While that shift has engendered dissent from one Commissioner, *see id.*, that Commissioner did not dissent here, where Old Dominion may challenge any rates, terms and conditions

of service it receives under the FPA § 206 just and reasonable standard. [12]

Thus, there was no need for the Commission to explain further its alleged "radical change in course," Pet. Br. 34, as there was no such change. *See* Rehearing Order at P 7, J.A. 20 (accurately citing *PUC of California* order for the proposition that "there is no Commission or court precedent" in support of Old Dominion's position).

[12] Specifically, breaking from a line of dissents in settlement approval orders, *see* Pet. Br. Add. B, Commissioner Kelly here voted for the Approval Order. She did not participate at the rehearing stage, for undisclosed reasons.

CONCLUSION

For the foregoing reasons stated, the petitions for review should be dismissed for lack of jurisdiction. If the Court proceeds to the merits, the challenged orders should be upheld as reasonable in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rule 28(d)(1), I hereby certify that this brief contains 7734 words, not including the tables of contents and authorities, the certificate of counsel, this certificate and the addendum.

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