ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 04-1341

FPL ENERGY MARCUS HOOK, L.P.,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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JUNE 2, 2005

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

All parties appearing before the Commission and this Court are identified in Petitioner's Rule 28(a)(1) certificate.

B. Rulings Under Review

The ruling under review appears in the following orders issued by the Federal Energy Regulatory Commission:

1. *FPL Energy Marcus Hook, L.P. v. PJM Interconnection,. L.L.C.*, 107 FERC ¶ 61,069 (2004);

2. *FPL Energy Marcus Hook, L.P. v. PJM Interconnection,. L.L.C.*, 108 FERC ¶ 61,171 (2004).

C. Related Cases

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

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Dennis Lane
Solicitor

June 2, 2005

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FPA	Federal Power Act, 16 U.S.C. § 824 *et seq*.
Initial Order	*FPL Energy Marcus Hook, L.P. v. PJM Interconnection,. L.L.C.*, 107 FERC ¶ 61,069 (2004)
JA	Joint Appendix
P	Internal paragraph number within FERC Order
PG&ENE	Pacific Gas & Electric National Energy Group
PJM	PJM Interconnection, L.L.P.
Rehearing Order	*FPL Energy Marcus Hook, L.P. v. PJM Interconnection,. L.L.C.*, 108 FERC ¶ 61,171 (2004)
Request	Generation Interconnection Request
RTEP	Regional Transmission Expansion Plan

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BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission ("Commission" or "FERC") properly interpreted the PJM Tariff to require that Petitioner bear the costs of upgrades constructed under an Interconnection Services Agreement with PJM Interconnection, L.L.P. (“PJM”) even though subsequent events made those upgrades no longer necessary to accommodate Petitioner’s requested interconnection.

PERTINENT STATUTORY AND REGULATORY PROVISIONS

Pertinent sections of the Federal Power Act, 16 U.S.C. ə 824 *et seq*., and FERC regulations are set out in an addendum to this Brief.

STATEMENT OF THE CASE

I. Nature Of The Case, Course Of Proceedings, And Disposition Below

This case involves Petitioner's efforts to reallocate costs it paid for requested and already constructed network upgrades to interconnect its Marcus Hook generating plant with the PJM grid after intervening events made those upgrades no longer needed to accommodate Petitioner's request. Under PJM's tariff, Interconnection Requests are placed in a queue and then analyzed in a PJM feasibility study. In cases, as here, where, multiple Interconnection Requests are clustered for study purposes, the total costs are proportionately allocated among the several Requests. Here, Petitioner's challenge relates to one aspect – the Mickelton-Monroe circuit upgrade – of a larger cluster involving Petitioner's Request (queued at A21) with two higher queued Requests (A13 and A19).

After reviewing the three Requests, PJM's feasibility study showed that network upgrades would be necessary to accommodate Petitioner's Request if the other two projects were brought on line. As it turned out, after nearly a quarter of a billion dollars had been spent on constructing the generation plant related to the A13 Request, its owners decided to terminate construction of the plant. At the time

of termination, PJM had completed approximately 90% of the network upgrade construction related to the three clustered projects. Termination of project A13 meant, however, upgrades were no longer necessary to accommodate Petitioner's Request. Nonetheless, under PJM's Tariff, if one project in a cluster is withdrawn, the costs incurred are reallocated to the remaining participants.

Petitioner challenged that tariff requirement by filing a complaint with FERC alleging that, as the upgrade was no longer necessary to accommodate its Request, Petitioner should not be liable for any incurred costs. The first challenged order, *FPL Energy Marcus Hook, L.P. v. PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,069 (April 20, 2004), JA 138 ("Initial Order"), denied the relief requested.

The Commission stated that the issue raised "is which entity bears the risk that a project that is higher in the queue may be cancelled, so there is no longer need for the construction performed by a lower project in the queue." *Id*. at P 11, JA 139. In this case, the upgrade had been nearly constructed when the higher queued project A13 was terminated, and PJM "correctly used the least cost method under the circumstances, which was to complete" the upgrade. *Id*. at P 14, JA 140. That approach was not challenged by Petitioner, who argued, instead, that the demise of A13 obviated the need for an upgrade to accommodate Petitioner's Request and, therefore, those upgrade costs should be paid by PJM. *Id*. at P 15.

The Commission denied the complaint as "inconsistent with PJM's tariff, which is based on the 'but for' principle[, which] requires that an interconnecting generator must pay for all the costs that would not be incurred except for its project." *Id*. This also means that a generator "bear[s] all the risks associated with its project." *Id*. The Initial Order denied Petitioner's claims that PJM erred in scheduling simultaneous construction of the A13 and A19 projects with Petitioner's A21 project, that requiring Petitioner to pay the costs was inconsistent with other FERC rulings, and that the upgrade had system-wide benefits. *See generally id*. at PP 16-18, JA 141-42.

Petitioner sought rehearing, which was denied in *FPL Energy Marcus Hook, L.P. v. PJM Interconnection, L.L.C.*, 108 FERC ¶ 61,171 (August 9, 2004), JA 171 ("Rehearing Order"). The petition for review followed.

II. STATEMENT OF FACTS

A. Statutory and Regulatory Background

FERC has been delegated authority to evaluate the reasonableness of public utility tariffs governing the wholesale sale and transmission of electric energy by Sections 205 and 206 of the Federal Power Act ("FPA"), 16 U.S.C. §§ 824d and 824e. This case involves the interconnection procedures under PJM's Tariff, *see, e.g.*, Initial Order, 107 FERC at P 12, JA140 (quoting § 36.8.4(c), JA 282, of

PJM's tariff), for situations where one in a group of Interconnection Requests included in the same Interconnection Feasibility Study is withdrawn.

Section 36.8.4(c) had previously been found reasonable as one aspect of "a new Part IV to the PJM Tariff and a new Schedule 6A to the PJM Operating Agreement, which, together, establish application procedures and cost responsibility rules for the interconnection of additional generation capacity (addition of new generation as well as increases in capacity of existing generating plants) to the PJM transmission system." *PJM Interconnection L.L.C.*, 87 FERC ¶ 61,299 at p. 62,196 (1999). PJM's proposed cost responsibility rules required an interconnecting generator to pay the full cost of facilities it requested for physical connection "plus the minimum necessary local and network upgrades that would not have been incurred under PJM's [Regional Transmission Expansion Plan ("RTEP")] 'but for' such interconnection request." *Id*. at p. 62,202.

PJM's proposal 'lack[ed] certain details at th[at] time." *Id*. at p. 62,204. As a result, the Commission "limit[ed its] review to PJM's pricing principles," and did not "dictate, in the abstract, specific requirements for implementing the general pricing principles established by PJM." *Id*. Accordingly, exactly how various pricing principles would be applied in particular factual circumstances would await another day. "Once PJM begins to evaluate the 80 projects that are in the queue, it

will be in a position to identify the critical implementation issues that face it and to evaluate how to address those issues." *Id*.

PJM subsequently "submitted for filing its revised standardized terms and conditions for the interconnection of new and expanded electric generation facilities with the PJM transmission system and for the construction of transmission upgrades and other transmission-related facilities." *Old Dominion Elec. Cooperative v. PJM Interconnection, L.L.C.*, 99 FERC ¶ 61,189 at p. 61,771 (May 17, 2002). PJM's proposal was the subject of many interventions and comments, albeit none by Petitioner, and was consolidated with Old Dominion's complaint regarding the payments and credits related to network upgrades. *Id*.

FERC's preliminary analysis of PJM's proposal indicated that the filing had not been shown to be just and reasonable; accordingly, the filing was suspended for the full five-month statutory period after which it became effective subject to refund. *Id*. at p. 61,773. In addition, the proposed procedures were subject to the then-ongoing rulemaking that eventually led to Order No. 2003.[1] *See id*. (making filing subject to Order No. 2003 rulemaking where "the Commission [was then]

[1] *Standardization of Generator Interconnection Agreements and Procedures,* Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g,* Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 (2004, *order on reh'g*, Order No. 2003-B, 109 FERC ¶ 61,287 (2004), *reh'g pending*; *petitions for review pending, Nat'l Rural Elec. Cooperative Assn. v. FERC,* Nos. 05-1038 and 05-1050 (D.C. Cir.).

currently reviewing the policies on interconnection procedures including its interconnection pricing policies").

B. Events Leading to the Challenged Orders

Under PJM's tariff, Generation Interconnection Requests are queued on a first-come, first-served basis. For large generation facilities, such as Petitioner's Marcus Hook plant with a 750 MW rated capacity,[2] that involve long lead times for construction, Requests are queued while proposed generation facilities are still in the planning stages. For example, the Marcus Hook plant had a queue date of August 17, 1998, even though operations were not expected to commence until late 2004. Initial Order, 107 FERC at P 3, JA 138. To remain on the queue, an interconnecting generator must meet certain "milestones" within specified time periods or risk having its interconnection request "deemed terminated and withdrawn." *Id*. at P 12, JA 140 (quoting PJM Tariff § 36.8.4(c), JA 282; *see PJM Interconnection*, 87 FERC at p. 62,200 (identifying "fuel delivery agreements and obtaining site permits" as milestones)..

After a Request is made, PJM undertakes a Generation Interconnection Facilities Study to determine what upgrades are necessary to accommodate the Request. Initial Order at P 12, JA 140; *see* Rehearing Order at PP 16-17, JA 278 (setting out tariff procedures). Such Studies often show that building multiple

[2] Roughly speaking, each megawatt (MW) of capacity serves the annual use of approximately 1,000 homes.

upgrades would be efficient; that was the case here, where Petitioner's project (A21) was clustered with projects A13 and A19, as all three would be built in the same area. Rehearing Order at P 2, JA 275-76. PJM's Study for the three projects determined that sufficient capacity existed in the area to serve A13 "at the time of that project's application," but the addition of A19 and A21 resulted in "insufficient capacity to support the two subsequent projects." *Id.* Consequently, PJM proposed to assign the cost of "constructing a second 230 kV Mickleton-Monroe transmission line" to the A19 and A21 projects. *Id.* That conclusion was formalized in an Interconnection Services Agreement between PJM and Petitioner.

That process complied with PJM's tariff, and construction of the upgrades began. Problems arose when the generation plant associated with project A13, which was being built by an affiliate of PG&E National Energy Group ("PG&ENE"), was "terminated on December 5, 2002, after PG&ENE filed for bankruptcy under Chapter 11. At that time approximately $240 million had been expended on" the generation plant. Initial Order at p. 61,226 n. 1, JA 138. The demise of project A13 meant the upgrades were no longer needed to accommodate the A19 and A21 Requests, even though by December 2002, the upgrades had been largely completed. *Id.* at P 14, JA 140. Nonetheless, PJM determined, and FERC agreed, that completion was the least costly alternative at that point. *Id*.

Had the termination occurred prior to construction, then the need for upgrades could have been reevaluated, and the proposed costs of construction, if any, could, under § 36.8.4(c) of PJM's Tariff, have been reallocated among either remaining parties and to any newly added parties. *See* Initial Order at P 13, JA 140 ("The language of the tariff provides that where a project is terminated, the remaining responsibility for as yet to be constructed upgrades will be redetermined."). As construction had been completed, no claim was made that such a reallocation was possible. Instead, Petitioner's complaint alleged that "since the construction of the additional 230 kV line capacity turned out to be unnecessary . . . those costs [should] be allocated to PJM, the grid operator, or to Conectiv's rate base as system-wide capacity." *Id*. at P 15, JA 140; *see also id*. at P 3, JA 138 (allegations in complaint).

Petitioner's complaint seeking reallocation to PJM of Petitioner's share of the Mickelton-Monroe upgrade costs alleged that "PJM's tariff required PJM to reallocate the costs of any withdrawn project," Rehearing Order at P 4, JA 276. It was "undisputed that once project A13 was withdrawn[,] there was sufficient network capacity in the area" to obviate the need for the Mickelton-Monroe line. *Id*. Under those circumstances, the complaint alleged, "PJM has the obligation to re-evaluate the necessity for the circuit upgrade, reassign the cost responsibility, and execute an amended I[nterconnection] S[ervices] A[greement]." Initial Order

at P5, JA 138. The complaint argued that Petitioner's proposeal "is consistent with a Commission policy that interconnecting generators not pay any unnecessary costs of connecting the transmission grid." *Id.* Alternatively, the complaint asserted "that the additional transmission line provides system-wide benefits and should be included in the transmission owner's [rate] base." *Id.* at P 6, JA 139.

PJM's answer argued the tariff did not allow reallocation here, and doing so could invite cost reallocation whenever "additional capacity was no longer required." *Id.* at P 7. PJM argued that it had constantly monitored progress on project A13, and that scheduling the work for projects A13, A19, and A21 in parallel was cost effective. *Id*. PJM denied system-wide benefits resulted from the construction "because the additional line was never included in PJM's current five year plan for the upgrading of facilities serving the PJM grid." *Id*. at P 8, JA 139. PJM argued that "under the terms of the 'but for' provisions of the PJM Tariff," Petitioner assumed the risk that project A13 might not be built *Id*.

Petitioner's reply asserted that the tariff language did not support PJM's position, that PJM may have erred by clustering construction of the three projects, and that the original double-towered construction on the Mickelton-Monroe line was prudent only if "long run expansion was contemplated." *Id*. at P 9, JA 139.

C. The Challenged Orders

The Commission framed the issue presented as "which entity bears the risk that a project that is higher in the queue may be cancelled," *i.e.*, whether reallocation is required here after the work was completed. *Id*. at P 11, JA 139. The Commission found that under Section 36.8.4(c) of PJM's Tariff "where a project is terminated, the remaining responsibility for as yet to be constructed upgrades will be redetermined." Initial Order at PP 12-13, JA 140. But, here, where the construction had been completed, reallocation was infeasible. *Id*. at 14. Petitioner did not challenge that finding, but argued, instead, that the costs should be allocated to PJM because termination of project A13 meant the Mickelton-Monroe upgrade was no longer necessary to accommodate Petitioner's request. *Id*.

Petitioner's claims were found to be "inconsistent with PJM's tariff, which is based on the 'but for' principle," and thus requires an interconnecting generator to "pay for all the costs that would not be incurred except for its project." *Id*. Further, the interconnecting generator bears all the risk associated with the project, including "the potential loss of value of the plant due to unfavorable market conditions, or as here, a change in the structure of the queue." *Id.* Petitioner next claimed that PJM "was negligent in its administration of the interconnection program" by scheduling simultaneous construction of the three projects, and therefore should bear the cost of the upgrade. *Id*. at P 15, JA 140. The Commission

found that claim "unpersuasive" because the "project record and analysis" showed PJM "could reasonably have concluded that simultaneous construction was efficient, and that it had no way of anticipating that Project A13 would be withdrawn, particularly given the level of investment in that project." *Id*. Further, Petitioner had "agreed to the simultaneous approach" when it signed the interconnection service agreement. *Id*.

Additionally, the Commission found its ruling here was not inconsistent with *Virginia Elec. and Power Co.*, 104 FERC ¶ 61,249 (2003), as that case involved a different fact pattern. Initial Order at P 17, JA 141. The Commission also disagreed that the upgrade provided system-wide benefits, as it was "not included in PJM's applicable five year investment plans," which were prepared on the basis of what facilities would offer system-wide benefits. *Id*. at P 18, JA 141. Omission from the plans means the tariff's "but for" provision controls. *Id*.

Petitioner sought rehearing on the bases that the Commission: "misconstrued PJM's tariff by concluding that the requirement to reallocate costs applies only to projects for which work has yet to be done"; "ignored record evidence" that the second 230 kV line would provide system-wide benefits; adopted too narrow a view of system-side benefits; improperly relied on Order No. 2003; improperly ruled Petitioner assumed the risk of the A13 termination; and, "improperly adopted

a ‘gross negligence’ standard for evaluating PJM’s implementation of the cluster method.” Rehearing Order at PP 7-8, JA 276.

Petitioner’s rehearing request included evidentiary materials that were “not submitted as part of [Petitioner’s] initial complaint or in its . . . reply to PJM’s answer, and should have been available to [Petitioner] at that time.” Rehearing Order at P 11, JA 277. On rehearing, parties “are not permitted to include additional evidence in support of their position, particularly when such evidence is available at the time of the initial filing.” *Id*. at P 12, citing 18 C.F.R. § 385.713(c)(3). New evidentiary materials are not permitted on rehearing because “answers to rehearing requests are not permitted, and other parties, therefore, will not have an opportunity to respond to newly submitted information.” *Id*. Accordingly, the Commission excluded the new evidentiary materials from the record. *Id.*

Turning to the merits of Petitioner’s rehearing request, the Order discusses the background of the “but for” interconnection procedures in PJM’s Tariff. Rehearing Order at P 13, JA 277. Both the original and revised proposals were made subject to the Order No. 2003 rulemaking, *id*., but, after reviewing PJM’s Order No. 2003 compliance filing, “the Commission expressly concluded that PJM’s ‘but for’ method for determining the assignment of interconnection costs was appropriate.” *Id*. at P 14(footnote omitted).

After reviewing PJM's procedures, *id*. at PP 16-19, JA 278-79, the Commission found that "if additional projects were added to the queue that would use some of the capacity involved in the additional 230 kV line. . . the project costs would be reallocated among the projects lower down in the queue." *Id*. at P 20, JA 279. But, here, no projects were lower down the queue, which left two groups to whom the risk of A13 cancellation could be allocated: "the Interconnection Customers involved in projects A19 and A21, or PJM and its transmission Interconnection Customers." *Id*. at P 21 (footnote omitted). The Commission found that Petitioner and A19 should bear the risk because "the structure of PJM's interconnection procedures [] provide[s] that an Interconnection Customer must assume responsibility for all costs attributable to it proposed interconnection based on its place in the queue." *Id.; see id.* ("All the relevant interconnection provisions discussed, and Section 36.8.4(c) in particular, provide that the reallocation of costs after a withdrawal will be among the *remaining* Interconnection Customers, *i.e.*, [Petitioner] and project A19.") (emphasis in original).

Nothing here supported an exception to that procedure. Petitioner "is no more relieved of its obligation under the PJM Tariff under the facts involved here than if project A-13 had been completed, began operations, and then ceased operations." *Id*. at P 22. As for risk related to clustering, Petitioner was or should have been aware "that the clustering method was being used to evaluate its

proposed project," and, therefore, "should further have known that the construction of the additional 230 kV line was based on its relative queue status, that its cost exposure was unknown, and that there was at least some risk that the higher queue project might be cancelled." *Id*. at P 23, JA 280. The tariff language was clear that "costs are reallocated among the *remaining participating* Interconnection Customers," *id*. (emphasis in original), and thus Petitioner's due diligence "to determine whether to execute the Interconnection Services Agreement" should have assessed the risk of the instant facts occurring. *Id.*

The Commission also rejected Petitioner's claims that PJM misadministered the Tariff. Although Petitioner argued PJM misjudged the possibility that A13 would cancel, the Commission noted Petitioner "does not contest the point that the cancellation was completely unexpected, nor does it assert that PJM failed to exercise due diligence in its role as the system administrator." *Id*. at P 26, JA 280.

PJM's use of the cluster method here was not inconsistent with FERC's earlier admonition in another case that "transmission owners should take steps to reduce the risk that projects lower down in the queue might be required to build capacity that would be unnecessary as long as the project higher up in the queue is delayed." *Id*. at P 27. PJM's cluster method "is intended to provide efficiencies and to reduce such risks," and thus satisfies the earlier admonition. *Id.*

The Commission found it unnecessary to reach the merits of the competing factual submissions of Petitioner and PJM on the question of system-wide benefits. "[T]he additional 230 kV line was not part of the relevant RTEP during the time frame[] at issue here. Thus, under the PJM tariff, [Petitioner] has the responsibility for the construction costs of the line. Given the tariff, it is irrelevant whether that additional line may or may not have been anticipated in the past, or that its alleged need may or may not be evidence of the fact that double towers were available to support the line." *Id*. at P 29, JA 280-81.

The Rehearing Order summarized the basic finding: "Nothing in the record here suggests that PJM misapplied its tariff in its negotiations with [Petitioner], or acted in a discriminatory manner in implementing the relevant Interconnection Services Agreements. While Commission policy is intended to minimize the construction of unnecessary Local and Network Upgrades, . . . the Commission cannot protect Interconnection Customers against all risks." *Id.* at P 30, JA 281.

The petition for review followed.

SUMMARY OF ARGUMENT

FERC orders are reviewed under the arbitrary and capricious standard, which requires examination of relevant data and a rational connection between the facts and the decision. This Court gives substantial deference to FERC's

interpretation of jurisdictional tariffs. FERC's factual findings are conclusive if supported by substantial evidence.

The Commission properly rejected materials Petitioner first introduced on rehearing on fairness and due process grounds, given that FERC's rules require such materials be filed with the complaint and prohibit answers to rehearing requests. The Commission determined also that the materials addressed a matter irrelevant to the issue at hand. While Petitioner claims that rejection is inconsistent with prior FERC rulings, those rulings also rejected, and did not rely on, evidence introduced initially on rehearing.

Petitioner claims that to reach a conclusion the Commission added language to the Tariff. That is inaccurate. The Commission reasonably characterized the Tariff process as requiring a redetermination of necessity and reallocation of cost only in situations prior to upgrades being constructed. That conclusion was based on a thorough review of the Tariff. It follows that where, as here, construction was complete, a similar redetermination and reallocation was not feasible.

Petitioner did not challenge that finding, but asserted PJM should bear the costs because the upgrade was no longer necessary. The Tariff defines necessary costs as those required to accommodate a generator's Request as reflected in the Interconnection Services Agreement. The Commission reasonably found, relying on the Tariff's "but for" principle, that Petitioner had by signing the Agreement

here, assumed the risk for paying the upgrade costs even if later the upgrade was no longer necessary to accommodate its Request.

The Commission did not rely on Order No. 2003-A as support for its conclusion, but referred to an analogous example in that Order to illustrate its point here: that a generator bears the risk of a higher queued project's termination. Likewise, the Orders did not find that Petitioner is somehow at fault, but rest on a reasonable application of the Tariff here. No hearing was required, as no credible grounds were presented to challenge PJM's due diligence.

Petitioner claimed the instant upgrade had system-wide benefits based on its view that the Mickelton-Monroe line's double-towered configuration would be imprudent unless future use of the second line were anticipated. But such evidence, while perhaps important at the time of the line's original construction, was not pertinent to the instant matter. Here, system-wide benefit could only be shown by inclusion in the relevant RTEP. Because the instant upgrade was not identified in the relevant RTEP, it was constructed solely to accommodate Petitioner's Request

This Court lacks jurisdiction to consider Petitioner's new argument on brief -- that it should be charged only for the cost differential of building the upgrade sooner – because Petitioner did not raise it on rehearing. In any event, the Tariff specifically includes within the costs that a generator must pay those associated with accelerating, deferring, or eliminating the construction of planned local and

network upgrades. Thus, even if this upgrade accelerated a possible future network upgrade (which it did not), the Tariff still requires Petitioner pay those costs.

ARGUMENT

I. STANDARD OF REVIEW

FERC orders are reviewed under the arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. § 706 (2)(A). *E.g.*, *Public Utils. Comm'n v. FERC*, 254 F.3d 250, 253-54 (D.C. Cir. 2001). That standard requires FERC 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 Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Midwest ISO Trans. Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004). The Commission's factual findings, if supported by substantial record evidence, are conclusive, 16 U.S.C. § 825*l*(b). This Court gives substantial deference to FERC's interpretation of tariff provisions. *Koch Gateway Pipe. Co. v. FERC*, 136 F. 3d 810, 814 (D.C. Cir. 1998).

II. FERC PROPERLY EXCLUDED EVIDENCE INTRODUCED FOR THE FIRST TIME ON REHEARING

Petitioner charges that exclusion of materials it introduced for the first time on rehearing was "an abuse of discretion, inconsistent with precedent, and inconsistent with the Commission's own rules." Br. 15. Those charges have no basis. New factual materials (or arguments) introduced on rehearing are routinely disallowed for fairness and due process reasons, much as courts will strike new

materials raised in a reply brief. Separately, the newly introduced matters here addressed a question irrelevant to the issue at hand. *See generally* Rehearing Order at P 29, JA 280-81. As either ground adequately supported the decision to strike the newly proffered materials, Petitioner's charge should be rejected. In addition, as Petitioner did not seek rehearing on this point, this Court lacks jurisdiction to consider it. 16 U.S.C. § 825*l*(b).

Petitioner asserts the newly added materials responded to PJM's claim "that absence of the Mickelton-Monroe upgrade in *any* 5-year plan showed the absence of a system benefit." Br. 15 (emphasis added). This misstates PJM's claim, which was "there are no system-wide benefits because the additional line was never included in PJM's *current* five year plan." Initial Order at P 8, JA 139 (emphasis added).[3] Thus, it was Petitioner, not PJM, that initially raised the claim. In Petitioner's view, it was irrelevant whether a project was included in any PJM Regional Transmission Expansion Plan ("RTEP"), so long as the project might have some possible past, present, or future system-wide use. *See* Initial Order at P 6, JA 139 (noting Petitioner's view that "the double tower structure" of the line meant it "was contemplated" to have some system-wide benefit): *see also*

[3] Petitioner states the Commission, among others, "referred to the RTEP plans [sic] as involving 5-year study periods" when, in fact, they encompass six years. Br. 15 n. 12. The Commission understood a RTEP to encompass six years. *See, e.g.*, Rehearing Order at P 11 & n. 3, JA 277 (referring to "two versions of PJM's proposed *six year*" RTEPs) (emphasis added).

Petitioner's Rehearing Request at 8, JA 157 (asserting that "[u]tilities do not build such lines unless they anticipate the prospect of future use"). Petitioner's claim of contemplated possible future system-wide use of the line was rebuffed. *See* Initial Order at P 18 & n. 8, JA 141 (finding that unless the instant project was part of the current RTEP, "the 'but for' provisions of PJM's tariff are controlling"); *see* Rehearing Order at P 28, JA 280 (same).

Petitioner responded to that finding by including in its rehearing requests photographs of various transmission lines with and without a double tower structure, Petitioner's Rehearing Request at 8-10, JA 157-59, as well as two PJM RTEPs. *Id.* at 10-11, JA 159-60. Both sets of materials were available and should have been submitted as part of Petitioner's original argument on this point. Rehearing Order at P 11, JA 277. Failure to include them at that time contravenes FERC's complaint procedures, which require inclusion of "all documents that support the facts in the complaint in possession of, or otherwise attainable by, the complainant, including, but not limited to, contracts and affidavits." *Id*. at P 12, citing 18 C.F.R. § 385.206(8)(2004), JA 277.

In addition, disallowing new factual materials on rehearing is appropriate because "answers to rehearing requests are not permitted and other parties, therefore, will not have an opportunity to respond to newly submitted information." *Id*. Thus, the introduction on rehearing of previously overlooked

factual materials to bolster a previously-made argument (Br. 16) raises due process and fairness concerns, as PJM had no opportunity to respond to such claims.[4] Exclusion of the newly added materials and dismissal of arguments relying solely on them, as was done here, Rehearing Order at P 12, JA 277, was fully justified.

Petitioner does not question the prohibition of newly introduced materials in various circumstances. *See* Br. at 16 (recognizing that new materials are prohibited where they involve "new arguments, new evidence that creates a 'moving target,' and belated attempts to cure a deficient filing")(footnotes omitted). Petitioner asserts, however, that none of those circumstances applies here, and that new evidence is not barred where it "merely support[s] a previously stated, and previously ignored, contention;" in such case, Petitioner contends the Commission "appears to consider" the new materials, subject to possible answer by a party that may be prejudiced. *Id.*

On the latter point, Petitioner relies on *PSI Energy, Inc.*, 52 FERC ¶ 61,260 at 61,965 (1990), as support. Br. 16 n. 17. But, there, the Commission denied

[4] This also answers Petitioner's claim of error for not considering newly added materials related to a proposed retirement of a large generating plant. Br. 18. While it is true those materials did not become available until after the Initial Order issued, *id*., that does not diminish the fact that their introduction on rehearing would not allow other parties to respond to those claims. Further, as review of Petitioner's rehearing request on this point (Rehearing at 12-13, JA 277) shows, the plant retirement was merely proposed for approval by the New Jersey Board of Public Utilities, and was not scheduled to occur until the end of 2007. *Id*.

NIPSCO's (the party who submitted the new evidence on rehearing) request on grounds that NIPSCO gave no "adequate reasons for submitting for the first time on rehearing testimony that incorporates case studies and analyses" that should have been submitted earlier under established procedures. 52 FERC at p. 61,969. NIPSCO's "litigation stratagem" was rejected as "not only [] manifestly unfair to the other parties . . ., but [as] also severely impact[ing] on the Commission's ability to ensure the orderly processing of cases before it." *Id*. at pp. 61,969-70. That the Commission "nevertheless" addressed the merits, *id*., does not negate the force of the denial based on procedural grounds.

Petitioner's reliance on *Questar Pipeline Co.*, 59 FERC ¶ 61,307 (1992), for the proposition that the Commission "appears to consider" newly introduced evidence (Br. 16 & n. 16) is not well founded. *Questar* involved rehearing of a Director's Letter Order rejecting a proposed certificate application as deficient. 59 FERC at p. 62,137. The Commission's decision to undertake further, expeditious review of the application relied, not on newly introduced materials from Questar, but on data request answers by another applicant. *See id*. at p. 62,138 (finding rehearing is "particularly [warranted] in view of the information contained in

CIG's responses to data requests served upon CIG after issuance of [the Director's Letter Order]."[5]

In sum, from a procedural standpoint, the Commission was fully justified in excluding Petitioner's newly added materials from consideration.

III. THE ORDERS FOLLOW THE TARIFF LANGUAGE

Petitioner contends that "the Commission imputed a limitation on the plain language [of PJM's Tariff] and then applied the limitation retroactively to FPLE Marcus Hook." Br. 18. Petitioner agrees that Sections 37.2 and 36.8.4(c) are the relevant portions of the Tariff, but asserts "the Initial Order inserted the words 'as yet to be constructed' into the tariff where they did not actual exist." Br. 18-19. In Petitioner's view, "the Rehearing Order is no more revealing" because it "says nothing about *what* costs are reallocated." *Id*. at 19 (emphasis in original). In Petitioner's view, the Tariff allows reallocation after cancellation of costs "for *necessary* facilities and upgrades." *Id*. (emphasis in original). Petitioner is wrong.

Prior to review of the Tariff language, the Commission summarized the basis on which it originally approved the "but for" principle on which the

[5] While the Commission did refer to what appears to be new material from Questar regarding its efforts to gain market support, *id*. at 62,139, that material was irrelevant in context: "Because it now appears that Questar's proposal can be implemented on a stand-alone basis . . . the Commission's policy does not require the rejection of Questar's application." *Id*.

procedures rest. *See* Rehearing Order at P 13, JA 277-78 (noting it earlier "concluded that the proposal was economically efficient"). The Commission then undertook a complete review of the generator interconnection tariff procedures to inform its analysis of the Tariff language. *Id.* at PP 16-19, JA 278-79. That review showed that the process revolves around a customer's Generation Interconnection Request and the resulting Systems Impact Study Agreement. *E.g., id*. at P 13, JA 277 (noting the process begins with a Request that forms the basis for a Study, which leads to a "System Impact Study Agreement [that] must state the Interconnection Customer's cost responsibility").

In cases, as here, where multiple Interconnection Requests are being considered in the same Study, the Study costs are allocated "proportionate to [each customer's] projected cost responsibility for the upgrades." *Id*. at P 17, JA 278. In the event that a Request is withdrawn, but was included in a Study, the costs of the Study are "redetermined and reallocated among the *remaining participating Interconnection Customers*." *Id*. (emphasis in original); *see also id*. at P 18, JA 278 (noting same reallocation approach followed if withdrawal occurs after the System Impact Study Agreement has been tenedered).

When a Study is completed, PJM must prepare "an Interconnection Services Agreement . . . by which the Interconnection Customer agrees to reimburse PJM for the costs of constructing facilities and upgrades necessary to accommodate the

Interconnection Request." *Id.* at P 19, JA 279. Should a Request be withdrawn at that time, Section 36.8.4(c) of PJM's Tariff provides that PJM "shall reevaluate the need for the facilities and upgrades indicated by the Generation Interconnection Facilities Study, shall redetermine the cost responsibility of *each remaining Interconnection Customer* for the necessary facilities and upgrades . . . , and shall enter into an amended Interconnection Customer Service Agreement *with each remaining Interconnection Customer* setting forth its revised cost obligation." *Id.* at 20 (emphases in original; footnote omitted). Review of the process showed a consistent pattern: "if there is termination and withdrawal at any point in the generator interconnection process, the costs involved are allocated among the remaining participating interconnection customers." *Id.*

Based on its review, the Commission concluded the reallocation procedures in PJM's Tariff, particularly Section 36.8.4(c), apply to "as yet to be constructed upgrades." Initial Order at P 13, JA 140. Contrary to Petitioner's contention (Br. 19), the quoted language from the Initial Order did not rewrite the tariff language by "insert[ing] the words 'as yet to be constructed' into the tariff where they did not actually exist." Rather, the Commission merely characterized how the Tariff's interconnection procedures work.

The Tariff provisions do not require a redetermination and reallocation of costs where construction has been largely completed:

> But in this case, construction had reached the point that a similar reallocation among prospective construction work involving subsequent projects could not take place. The Commission, therefore, concludes that under its tariff, PJM could not reallocate construction responsibility among the remaining project participants. As PJM argues, it makes no sense to require recalculation for the expense of construction that has already occurred unless such a recalculation is consistent with a prospective construction program.

Initial Order at P 14, JA 140.

Petitioner next contends that FERC's tariff evaluation is meaningless because it "says nothing about *what* costs are reallocated." Br. 19 (emphasis in original). In Petitioner's view, the costs here cannot be reallocated because the upgrade was no longer "necessary." *Id*. Petitioner is wrong; Section 37.2 identifies "necessary" in a very specific way.

> A Generating Interconnection Customer shall be obligated to pay for 100 percent of the costs of the minimum amount of Local Upgrades and Network Upgrades *necessary to accommodate its Generation Interconnection Request and that would not have been incurred under the Regional Transmission Expansion Plan but for such Generation Interconnection Request . . . .*

See Br. 9 and JA 282 (setting out provision); *see also* Initial Order at P 18 n. 8, JA 141 (same) (emphasis added).

As the Commission reasonably interpreted that language, the determination of what costs are "necessary" are directly related to and determined at the time the Generator Interconnection Request is made, not at some later point in time based on changed circumstances. "[Petitioner] claims that since the construction of the

additional 230 kV line capacity turned out to be unnecessary, . . . those costs [should] be allocated to PJM. . . . This is inconsistent with PJM's tariff, which is based on the 'but for' principle. This principle requires that an interconnecting generator must pay for all the costs that would not have been incurred except for its project." Initial Order at P 15, JA 140; *see also* Rehearing Order at P 13, JA 277 (noting FERC understood PJM's Tariff to require an interconnecting generator to pay full cost for "upgrades that would not have been incurred under the RTEP 'but for' the interconnection request")(footnotes omitted).

Contrary to Petitioner's assertion (Br. 19), the Commission did answer what costs are relocated by reasonably defining such costs to be those related to a generator's Request under the "but for" tariff principle. Here, that means the costs of the Mickelton-Monroe line are properly allocated to Petitioner. Petitioner agrees that if the A13 project had been completed and then ceased operation, Petitioner would have been obligated to pay its share of the upgrade costs, but says, in that situation, unlike (in Petitioner's view) the instant case, "the upgrade was necessary in order for the later project to be connected to the grid." *Id*. But the two situations do not differ as to the need for the upgrade.

The decision as to what are necessary costs becomes final when PJM and the generator sign an Interconnection Services Agreement by which the generator "agrees to reimburse PJM for the costs of constructing facilities and upgrades

necessary to accommodate the Interconnection Request." Rehearing Order at P 19, JA 278-79.[6] At the time of Petitioner's Request, of PJM's Study, and of the Agreement's execution, the Mickelton-Monroe upgrade was necessary to accommodate Petitioner's Request, and, therefore, Petitioner assumed payment responsibility for its costs. The withdrawal of A13 after the upgrade was constructed did not change that. *E.g.*, Rehearing Order at P 24, JA 280 ("Given the clear tariff language that costs are reallocated among the *remaining participating* Interconnection Customers, part of [Petitioner's] business due diligence was to assess that very risk and to determine whether to execute the Interconnection Service Agreement.")(emphasis in original).

Petitioner charges that the Rehearing Order invoked a portion of Order No. 2003-A as support for the finding that Petitioner had assumed the risk, even though the Interconnection Services Agreement here was signed many months before issuance of that Order. Br. 20. While the Commission referred to an "analogous situation" discussed in Order No. 2003-A as illustrative of its point – that the generator bears the risk, Rehearing Order at P 22, JA 279 -- that point was amply

[6] A variation occurs where multiple Requests are covered by the same Facilities Study and one Request is withdrawn prior to the start of construction. Under Section 36.8.4(c), JA 282, a redetermination is made of what upgrades are still necessary to accommodate the remaining Requests as is a new cost reallocation among the remaining generators. Rehearing Order at PP 18-19, JA 278-79 (quoting Section 36.8.4(c)). Ultimately, that process requires PJM and each remaining generator to "enter into an amended Interconnection Customer Service Agreement," *id.*, that identifies what upgrades remain necessary.

supported on independent grounds. *See, e.g.,* Rehearing Order at P 21, JA 279 ("the [Initial] order assigned this risk to the Interconnection Customer based on an interpretation of PJM's tariff. That determination was correct. All the relevant interconnection provisions discussed, and Section 36.8.4(c) in particular, provide that the reallocation of costs after a withdrawal will be among the *remaining* Interconnection Customers.") (emphasis in original).

Contrary to Petitioner's implication (Br. 21-22), the decision here was not based on a finding that Petitioner was somehow at fault, but follows the Tariff's assignment of the risk to Petitioner. Likewise, Petitioner's assertion that it "had no say" in the decision to cluster projects or in scheduling the upgrade, Br. 22, is not determinative. "The cluster procedure is authorized under PJM's tariff, its use normally promotes efficiency, and [Petitioner] was the one to decide whether to execute the proffered agreement." Rehearing Order at P 24, JA 280.

Nor was there any reason to hold a hearing to test PJM's due diligence. Br. 22. The Commission found "there [are] no credible grounds to believe that PJM did not exercise due diligence in monitoring the progress of project A13 to determine whether the additional facilities would be required. . . . . [S]ome $240 million had been expended on project A13 when it was cancelled. [Petitioner] does not contest the point that the cancellation was completely unexpected, nor does it

assert that PJM failed to exercise due diligence in its role as system administrator." Rehearing Order at P 26, JA 280.

Petitioner claims that a "highly disputed issue" was whether the instant upgrade "provided a system benefit,' Br. 22, and that it "presented a compelling case of system benefit," Br. 23. Petitioner's allegedly compelling case was based on the evidence that was improperly introduced on rehearing, and thus "was excluded from the record and arguments based solely on it [] dismissed." Rehearing Order at P 12, JA 277. *See, infra* at pp. 19-24. ,

In any event, Petitioner's argument concerning system-wide benefits was not relevant to the tariff procedures here. Petitioner assumes that the original construction of the Mickelton-Monroe line with double towers meant "the use of the second set of positions was envisioned at some point in the useful life of the towers." Br. 23; *see also* Br. at 26 (asserting error in use of 6-year RTEP plan, as not reasonably able "to evaluate the need for an upgrade 'eventually'")(footnote omitted). Using that assumption, Petitioner alleged that "the true impact of the recent Mickelton-Monroe upgrade has been to accelerate what was already contemplated for the future." Br. 23 (citation omitted).

As the Commission made clear, however, the question under the Tariff is not whether an upgrade could eventually provide system-wide benefits, as Petitioner

posits, but whether it provides system-wide benefits at the time a Generator's Request is made, as evidenced by inclusion in the applicable RTEP.

> It is undisputed that the additional 230 kV line was not part of the relevant RTEP during the time frames at issue here. Thus, under the PJM tariff, [Petitioner] has the responsibility for the construction costs of the line. Given the tariff, it is irrelevant whether that additional 230 kV line may or may not have been anticipated in the past, or that its alleged need may or may not be evidence[d] by the fact that double towers were available to support the line. Contrary to [Petitioner's] arguments, whatever utility decisions may have been made in the past, as well as the prudence of those decisions, are relevant only in the past. Since the line was not part of the pertinent RTEP, [Petitioner's] engineering arguments have no relevance here.

Rehearing Order at P 29, JA 280-81.

That discussion fully responds to Petitioner's engineering evidence that it "would not be prudent" to build double-towered lines "unless [the utility] anticipate[s] the prospect of future use." Br. 24. The evidence was not "disregarded" (Br. 24), but was found irrelevant to the issue at hand, notwithstanding that it might have been pertinent when the line was constructed, if anyone had challenged whether building a double-towered line was prudent. In addition, if Petitioner thought its requested upgrade had system-wide benefit, and thus should have been included in the relevant RTEP, "PJM's tariff provides procedures to review that broader issue and to assure the RTEP is fairly applied." Rehearing Order at P 29, JA 280-81 (footnote omitted).[7]

[7] The Commission's discussion on this point did not question Petitioner's

Petitioner claims that the system benefit issue here is whether the costs charged to the Generator "'should reflect only the cost differential associated with building the upgrade sooner.'" Br. at 26, citing *Northeast Utilities Service Co.*, 58 FERC ¶ 61,070 at p. 61,206 (1992). As Petitioner did not raise *Northeast Utilities* in its rehearing request, did not argue that it should be charged a similar cost differential, and did not present any evidence as to what it thought that differential should be, this Court lacks jurisdiction to consider those points on review. 16 U.S.C. § 825*l*(b).

In any event those newly raised claims, along with the general argument that the upgrade "accelerate[s] what was already contemplated for the future," Br. 23; *see id*. at 26 (asserting issue here is whether upgrade will provide system-wide benefit eventually), even if proven, would not relieve Petitioner from having to pay the upgrade costs. Section 37.2 of the Tariff, JA 282, includes within the costs that a Generator must pay for upgrades the costs "associated with *accelerating*,

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view of what constitutes system-wide benefit. Thus, there is no force to the contention: "the Commission deviated without explanation from prior precedent that takes a broad view of potential benefit." Br. 25. The question here was not where the line should be drawn between upgrade facilities that have system-wide benefits and those that do not, as was the issue in the *Entergy* cases cited by Petitioner, Br. 25, in which system-wide benefits were defined broadly. Rather, the issue here is whether the upgrade was needed to accommodate Petitioner's Request (no system-wide benefit) or was part of the applicable RTEP (system-wide benefit). *See* Rehearing Order at P 28, JA 280 (determinative question is whether upgrade is included in "the RTEP in effect at the time" of the Request).

deferring, or eliminating the construction of planned Local Upgrades and Network Upgrades," as well as any modifications to the RTEP "to accommodate the Generation Interconnection Request." *Id*. (emphasis added). That language obviates the type of sharing that was contemplated in *Northeast Utilities*. Had Petitioner wished to substitute the *Northeast Utilities* rate sharing for the above cost allocation language in PJM's Tariff, the time to do so was when the Tariff was approved, not now.

CONCLUSION

For the reasons stated, the challenged FERC orders should be affirmed in all respects.

Respectfully submitted,

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FPL Energy Marcus Hook, L.P., **FERC Docket No. EL04-57**
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CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rule 28(d)(1), I hereby certify that this brief contains 7,854 words, not including the tables of contents and of authorities, the certificate of counsel, this certificate, and the addendum.

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