ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

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

No. 06-1090

EAST TEXAS 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

JOHN S. MOOT
GENERAL COUNSEL

ROBERT H. SOLOMON
SOLICITOR

CAROL J. BANTA
ATTORNEY

FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

JANUARY 22, 2007
FINAL BRIEF: MARCH 19, 2007

CIRCUIT RULE 28(A)(1) CERTIFICATE

A. Parties and Amici

To counsel's knowledge, all parties are presented in Petitioner's brief.

B. Rulings Under Review

1. Order Denying Motion to Reopen Record, *East Texas Electric Cooperative, Inc. v. Central and South West Services, Inc., et al.*, Docket No. EL98-66, 94 FERC ¶ 61,218 (2001), R. 101, JA 613;

2. Order Denying Rehearing, *East Texas Electric Cooperative, Inc. v. Central and South West Services, Inc., et al.*, Docket No. EL98-66, 95 FERC ¶ 61,066 (2001), R. 104, JA 624;

3. Opinion and Order Affirming Initial Decision, Opinion No. 475, *East Texas Electric Cooperative, Inc. v. Central and South West Services, Inc., et al.*, Docket No. EL98-66, 108 FERC ¶ 61,079 (2004), R. 109, JA 626; and

4. Order Denying Rehearing, Opinion No. 475-A, *East Texas Electric Cooperative, Inc. v. Central and South West Services, Inc., et al.*, Docket No. EL98-66, 114 FERC ¶ 61,027 (2006), R. 113, JA 665.

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.

Carol J. Banta
Attorney

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

COURT CASES (continued): **PAGE**

TABLE OF AUTHORITIES

COURT CASES (continued): **PAGE**

ADMINISTRATIVE CASES:

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES (continued): **PAGE**

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES (continued): **PAGE**

TABLE OF AUTHORITIES

STATUTES: **PAGE**

REGULATIONS:

GLOSSARY

AEP	Intervenor American Electric Power Service Corporation, or Central and South West Services, Inc. or Southwestern Electric Power Company, its predecessors in the underlying FERC proceeding
AEP Tariff	AEP's open access transmission tariff
ALJ	Administrative law judge
ALJ Decision	Initial Decision, *East Texas Electric Cooperative, Inc. v. Central and South West Services, Inc., et al.*, Docket No. EL98-66, 89 FERC ¶ 63,005 (1999), R. 91, JA 547
Br.	Petitioner's Brief
Commission or FERC	Federal Energy Regulatory Commission
East Texas	Petitioner East Texas Electric Cooperative, Inc.
FERC Orders	Collectively, Record Order, Record Rehearing Order, Merits Order, and Merits Rehearing Order
FPA	Federal Power Act
kV	kilovolt
Merits Order	Opinion and Order Affirming Initial Decision, Opinion No. 475, *East Texas Electric Cooperative, Inc. v. Central and South West Services, Inc., et al.*, Docket No. EL98-66, 108 FERC ¶ 61,079 (2004), R. 109, JA 626

GLOSSARY

Merits Rehearing Order	Order Denying Rehearing, Opinion No. 475-A, *East Texas Electric Cooperative, Inc. v. Central and South West Services, Inc., et al.*, Docket No. EL98-66, 114 FERC ¶ 61,027 (2006), R. 113, JA 665
Order No. 888	*Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs., Regs. Preambles [Jan. 1991-June 1996] ¶ 31,036 (1996)
Order No. 888-A	*Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles [July 1996-Dec. 2000] ¶ 31,048 (1997)
Record Order	Order Denying Motion to Reopen Record, *East Texas Electric Cooperative, Inc. v. Central and South West Services, Inc., et al.*, Docket No. EL98-66, 94 FERC ¶ 61,218 (2001), R. 101, JA 613
Record Rehearing Order	Order Denying Rehearing, *East Texas Electric Cooperative, Inc. v. Central and South West Services, Inc., et al.*, Docket No. EL98-66, 95 FERC ¶ 61,066 (2001), R. 104, JA 624
TAPS	*Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000)

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

STATEMENT OF THE ISSUES

1. Whether the Federal Energy Regulatory Commission ("Commission" or "FERC"), in affirming the findings of an administrative law judge after hearing, reasonably determined that East Texas Electric Cooperative, Inc. ("East Texas") was not entitled to receive transmission credits for facilities that were not demonstrated to be integrated into the transmission provider's plans or operations to serve other transmission customers, or for facilities that East Texas did not own.

2. Whether the Commission's denial of a motion to reopen the record,

after the conclusion of the proceeding before the administrative law judge, constituted an abuse of the Commission's discretion.

STATUTORY AND REGULATORY PROVISIONS

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

INTRODUCTION

This case concerns the Commission's standards for determining whether a network transmission customer is entitled to receive credits against transmission rates for the benefits its own facilities provide to the network. Following fundamental principles of cost allocation, the Commission has consistently required a customer to demonstrate that its facilities are integrated into and provide benefits to the transmission network as a whole — and thus that it is reasonable to allocate the costs of the customer's own facilities to all other network customers.

Here, East Texas filed a complaint against American Electric Power Service Corporation ("AEP") seeking credits reflecting the costs of certain transmission facilities that East Texas constructed and uses to serve its own customers. East Texas contended that its facilities were integrated into AEP's network and enhanced the network's capability and reliability, providing backup functions. Following extensive discovery and litigation, an administrative law judge ("ALJ") found that East Texas's facilities were not integrated into the planning or

operations of AEP's transmission network, and thus that East Texas was not entitled to credits. *See East Texas Electric Cooperative, Inc. v. Central and South West Services, Inc., et al.*, 89 FERC ¶ 63,005 (1999) ("ALJ Decision"), R. 91, JA 547.[1] The ALJ also concluded that some of the facilities at issue were not eligible for credits in any event because East Texas did not own them.

Over a year after that decision, while the parties' briefs on exceptions to the ALJ's ruling were pending before the Commission, East Texas moved to reopen the record to admit new evidence. The Commission denied the motion. *See East Texas Electric Cooperative, Inc. v. Central and South West Services, Inc., et al.*, 94 FERC ¶ 61,218 (2001), R. 101, JA 613, *reh'g denied*, 95 FERC ¶ 61,066 (2001), R. 104, JA 624. The Commission later affirmed the ALJ's decision in all respects and adopted her findings, and subsequently denied rehearing. *See East Texas Electric Cooperative, Inc. v. Central and South West Services, Inc., et al.*, 108 FERC ¶ 61,079 (2004), R. 109, JA 626, *reh'g denied*, 114 FERC ¶ 61,027 (2006), R. 113, JA 665.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

Section 201 of the Federal Power Act ("FPA"), 16 U.S.C. § 824, affords the

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[1] "R." refers to a record item. "JA" refers to the Joint Appendix page number. "P" refers to the internal paragraph number within a FERC order.

Commission jurisdiction over the rates, terms and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. *See* 16 U.S.C. § 824(a)-(b). This grant of jurisdiction is comprehensive and exclusive. *See New York v. FERC*, 535 U.S. 1 (2002) (discussing statutory framework, and division between federal and state regulatory authority under the FPA). All rates for or in connection with jurisdictional sales and transmission services are subject to FERC review to assure they are just and reasonable, and not unduly discriminatory or preferential. FPA § 205(a), (b), (e), 16 U.S.C. § 824d(a), (b), (e).

In 1996, the Commission issued Order No. 888,[2] which required all jurisdictional utilities to offer network services on a nondiscriminatory basis under an open access tariff. The Commission addressed, *inter alia*, whether network transmission customers would be entitled to credits from the transmission provider utility based on any transmission-related benefits that the provider might receive from the customer's transmission facilities. Order No. 888 at 31,741-43. The Commission emphasized that mere interconnection between a customer's facilities

[2] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs., Regs. Preambles [Jan. 1991-June 1996] ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles [July 1996-Dec. 2000] ¶ 31,048, *order on reh'g*, 81 FERC ¶ 61,248, *order on reh'g*, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part, Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) ("*TAPS*"), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

and the transmission provider's facilities would not be sufficient to warrant a cost credit. *Id.* at 31,742-43; *TAPS*, 225 F.3d at 725. Rather, Order No. 888 "required the customer to demonstrate that its 'transmission facilities are integrated with the transmission system of the transmission provider' and 'provide additional benefits to the transmission grid in terms of capability and reliability, and [are] relied upon for coordinated operation of the grid.'" 225 F.3d at 726 (quoting Order No. 888 at 31,742) (alteration in original). *See generally* Argument Section I.B, *infra* (discussing Order No. 888 and relevant case law).

II. The ALJ Decision And Commission Orders

A. Proceedings Before Administrative Law Judge And ALJ Decision

East Texas is a "super" generation and transmission cooperative whose three member/owners are generation and transmission cooperatives. ALJ Decision at 65,006, JA 547; *see also East Texas Electric Cooperative, Inc. v. FERC*, 331 F.3d 131, 133 (D.C. Cir. 2003). On July 27, 1998, East Texas filed a complaint under FPA § 206, 16 U.S.C. § 824e, claiming that AEP[3] violated its open access transmission tariff ("AEP Tariff") by denying East Texas credits for its transmission facilities that are interconnected to AEP's system. R. 1, JA 27.

[3] At the time of the complaint, East Texas was a transmission customer of Central and South West Services, Inc. and an affiliated operating company, Southwestern Electric Power Company. AEP, an intervenor in this appeal, acquired both companies in 2000. To avoid confusion, the Commission will refer to the transmission provider as AEP.

Section 30.9 of the AEP Tariff, which tracks Section 30.9 of the *pro forma* tariff set forth in Order No. 888 (as amended by Order No. 888-A), provides for credits as follows:

> **Network Customer Owned Transmission Facilities**: The Network Customer that owns existing transmission facilities that are integrated with the Transmission Provider's Transmission System may be eligible to receive consideration either through a billing credit or some other mechanism. In order to receive such consideration the Network Customer must demonstrate that its transmission facilities are integrated into the plans or operations of the Transmission Provider to serve its power and transmission customers. For facilities constructed by the Network Customer subsequent to the Service Commencement Date Under Part III of the Tariff, the Network Customer shall receive credit where such facilities are jointly planned and installed in coordination with the Transmission Provider. Calculation of the credit shall be addressed in either the Network Customer's Service Agreement or any other agreement between the Parties.

89 FERC at 65,007 (citation omitted), JA 548; *see also* Order No. 888-A at 30,534.

East Texas sought credit for two groups of facilities on what it designated the North Loop and the South Loop. The North Loop is about 63 miles long; several segments are owned by Wood County Electric Cooperative, Inc. ("Wood County"),[4] which remotely monitors and controls the various switches on the North Loop. *See* 89 FERC at 65,011, JA 552. The South Loop is about 85 miles

[4] Wood County Electric Cooperative, Inc. ("Wood County") is a distribution cooperative that is a member/owner of two of the three member/owners of East Texas. East Texas purchases and transmits power for the benefit of Wood County and the two cooperatives to which Wood County belongs. 89 FERC at 65,006 n.4, JA 547.

long; the main part extends from AEP's Crockett substation to AEP's Jacksonville switching station. *Id.* at 65,011-12, JA 552-53. East Texas sought credit for the following facilities:

> North Loop Facilities:
>
> Five East Texas-owned 138 kV transmission line segments that are part of the North Loop;
>
> Three 138 kV transmission line segments, owned by Wood County, the high voltage portion of six substations owned by Wood County that function as points of delivery from East Texas to another member/owner for the benefit of Wood County loads, and a switching station owned by Wood County;
>
> South Loop Facilities:
>
> The high voltage portion of substations connected to the South Loop that function as points of delivery from East Texas to another member/owner for the benefit of other entities' loads;
>
> Two East Texas-owned 138 kV radial transmission line segments attached to the South Loop that enable East Texas to deliver power to another entity's loads; and
>
> The remaining East Texas-owned 138 kV transmission line segments that are part of the South Loop.

See 89 FERC at 65,006-07, JA 547-48.

The Commission set the matter for hearing before an ALJ "on the question of whether and to what extent East Texas'[s] transmission facilities are integrated with the [AEP] grid for which a credit is appropriate . . . ." *East Texas Electric Cooperative, Inc. v. Central and South West Services, Inc., et al.*, 84 FERC ¶ 61,233 at 62,194 (1998), R. 8, JA 60, 61.

Following extensive discovery, submission of written testimony and exhibits by the parties and FERC Staff, a hearing held from May 24 to May 27, 1999, and post-hearing briefing, on October 29, 1999, the ALJ issued her Initial Decision, *East Texas Electric Cooperative, Inc. v. Central and South West Services, Inc., et al.*, 89 FERC ¶ 63,005 (1999) ("ALJ Decision"), R. 91, JA 547. The ALJ found that East Texas was not eligible for credits for facilities it did not own — that is, the North Loop facilities owned by Wood County. *Id.* at 65,007-08, JA 548-49.[5] The ALJ also rejected AEP's contention that a power supply agreement between AEP and East Texas barred the latter from claiming customer credits. *Id.* at 65,008, JA 549. The ALJ further found that the remaining East Texas-owned facilities did not qualify for credits. *Id.* at 65,017, JA 558. Based on a detailed factual analysis of testimony and load flow studies, discussed more fully in Argument Section II.B, *infra*, the ALJ found that East Texas failed to demonstrate that its facilities were integrated into AEP's plans or operations to serve AEP's transmission customers. *Id.* at 65,010-17, JA 551-58.

In November and December 1999, East Texas, AEP, and FERC Staff filed before the Commission briefs on and/or opposing exceptions to the ALJ Decision. *See* R. 93-97.

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[5] That determination, which was affirmed by the Commission, is not before this Court on review.

B. Orders Denying East Texas Motion To Reopen Record

On November 15, 2000, while the briefs on and opposing exceptions remained pending before the Commission, East Texas filed a motion to reopen the record. R. 98, JA 559. East Texas sought to submit two affidavits regarding the actual use of the South Loop facilities that had gone into service after the close of the hearing before the ALJ. *Id.*

On February 26, 2001, the Commission issued an Order Denying Motion to Reopen Record, *East Texas Electric Cooperative, Inc. v. Central and South West Services, Inc., et al.*, 94 FERC ¶ 61,218 (2001) ("Record Order"), R. 101, JA 613. The Commission found that East Texas had not met its burden to show "extraordinary circumstances" that would warrant reopening the record; the availability of operating data, after East Texas had elected to file a complaint almost a year before the facilities were completed and after all parties had litigated the matter using hypothetical data, was "not sufficient grounds for reopening the record." 94 FERC at 61,801, JA 615. *See generally* Argument Section IV, *infra*.

East Texas filed a request for rehearing, R. 103, JA 616, which the Commission denied on April 13, 2001. Order Denying Rehearing, *East Texas Electric Cooperative, Inc. v. Central and South West Services, Inc., et al.*, 95 FERC ¶ 61,066 (2001) ("Record Rehearing Order"), R. 104, JA 624.

C. Opinion And Order Affirming ALJ Decision

On July 28, 2004, the Commission issued its Opinion and Order Affirming Initial Decision, Opinion No. 475, *East Texas Electric Cooperative, Inc. v. Central and South West Services, Inc., et al.*, 108 FERC ¶ 61,079 (2004) ("Merits Order"), R. 109, JA 626. The Commission affirmed the ALJ Decision in all respects. *See id.* at PP 1, 16, and ordering para., JA 626, 629, 631. The Commission affirmed the ALJ's conclusions that the power supply agreement did not bar East Texas from claiming credits (*id.* at P 20, JA 629) and that East Texas could not claim credits for Wood County's facilities (*id.* at P 23, JA 630), and not only affirmed but also adopted the ALJ's analysis of the integration issue (*id.* at P 33, JA 631).

East Texas and AEP filed requests for rehearing. R. 110 (East Texas), JA 632; R. 111 (AEP).

D. Order Denying Rehearing

On January 17, 2006, the Commission issued an Order Denying Rehearing, Opinion No. 475-A, *East Texas Electric Cooperative, Inc. v. Central and South West Services, Inc., et al.*, 114 FERC ¶ 61,027 (2006) ("Merits Rehearing Order"), R. 113, JA 665. The Commission again held that its approach was consistent with its precedents regarding customer credits and reaffirmed the appropriateness of the ALJ's reliance on load flow study data in applying that test. *Id.* at PP 28, 31, 41-42, JA 669-70, 671-72. The Commission further held that the record, including the

load flow studies submitted by AEP and FERC Staff, supported a finding of lack of integration. *Id.* at PP 31, 34-36, JA 670-71. Citing the ALJ's findings, the Commission rejected East Texas's arguments that the ALJ and Commission had ignored the integration of the facilities into AEP's planning; the Commission also noted that the ALJ had found ample evidence of lack of integration into AEP's operations and that the facilities did not provide additional benefits to the grid. *Id.* at PP 34-37, JA 670-71. The Commission also reaffirmed its rulings regarding the effect of the power supply agreement and denial of credits for Wood County-owned facilities. *Id.* at PP 15-16, 44, JA 667, 672.

This petition followed.

SUMMARY OF ARGUMENT

The Commission properly affirmed the ALJ's reasonable determination that East Texas was not entitled to receive transmission credits.

First, the Commission properly affirmed the ALJ's application of the Commission's established standard for customer credits, which requires the customer to demonstrate that its facilities are integrated — not merely interconnected — with the transmission network and provide additional benefits to other transmission customers. That standard does not violate principles of comparability because it rests on the fundamental tenet of cost allocation that it is reasonable to shift the costs of one customer's facilities to other network customers only if the facilities actually provide benefits to those other customers. The Commission also upheld the ALJ's reliance on technical evidence that included base load flow studies, which the Commission had previously found to be an appropriate tool for determining whether a customer's facilities are integrated with and actually serve the operation of the transmission network.

Second, the Commission reasonably affirmed the ALJ's conclusion that East Texas's transmission facilities were not integrated into the planning or operations of AEP's network, based on detailed factual findings that were amply supported by the testimonial, documentary, and technical evidence in the record.

Third, the Commission rationally interpreted Section 30.9 of the AEP Tariff

to provide credits only for facilities that the network customer owns. Therefore, the Commission affirmed the ALJ's finding that East Texas was not entitled to credits for facilities owned by someone else (Wood County). Moreover, the Commission reasonably found East Texas's policy arguments in favor of allowing such credits unpersuasive, particularly because East Texas did not pay to build or use the Wood County facilities.

Finally, the Commission did not abuse its broad discretion in denying East Texas's motion to reopen the record to admit new technical evidence after the ALJ had issued her decision. The Commission reasonably found that East Texas, which chose to file its complaint before the facilities in question went into operation and, thus, before actual operating data were available, had not shown that changed facts amounted to extraordinary circumstances sufficient to warrant upsetting the finality of the record.

ARGUMENT

I. THE COMMISSION APPLIED AN APPROPRIATE STANDARD IN DETERMINING WHETHER CREDITS WERE WARRANTED

The ALJ, affirmed by the Commission, applied the Commission's standard for customer credits as follows: "[I]n order to qualify for credits the customer must demonstrate that its facilities meet three specific criteria": that they "'must not only be integrated with the transmission provider's system, but must also provide additional benefits to the transmission grid in terms of capability and reliability, and be relied upon for the coordinated operation of the grid.'" ALJ Decision at 65,009 (quoting Order No. 888-A at 30,271), JA 550; *accord* Merits Order at PP 27, 30, JA 630, 631.

East Texas argues that the challenged FERC Orders arbitrarily chose whichever rules would result in denying customer credits, without regard to the principles set forth in Order No. 888 and prior FERC decisions. *See* Br. at 16. In particular, East Texas contends that the FERC Orders improperly applied "different and harder standards" to a customer than to a transmission provider, contrary to the principles of comparability adopted in Order No. 888. *See* Br. at 16-17. As the Commission explained, however, its standard for customer credits, as applied here by the ALJ, is well-established, reasonable, and consistent with FERC's own precedents as well as this Court's decisions on transmission rate issues. To answer East Texas's claims, this Section will explain the standard for

customer credits set forth in Order No. 888, which requires integration with the transmission network, and this Court's approval of that requirement (Part B.1, *infra*); the Commission's justification for requiring a customer, in demonstrating integration, to show its facilities provide "additional benefits" to the network (Part B.2, *infra*); and the Commission's consideration of base load flow studies as evidence of integration (or lack thereof) into network operations (Part C, *infra*).

A. Standard Of Review

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g.*, *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). A court must satisfy itself that the agency "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. 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 decisions regarding rate issues are entitled to broad deference, because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *see also Missouri Pub. Serv. Comm'n v. FERC*, 215 F.3d 1, 3 (D.C. Cir. 2000). The

Commission's policy assessments are also owed "great deference." *TAPS*, 225 F.3d at 702. Additionally, under the *Chevron* standard, this Court gives substantial deference to the Commission's interpretation of filed tariffs and of its own regulations. *See Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998); *Amerada Hess Pipeline Corp. v. FERC*, 117 F.3d 596, 600 (D.C. Cir. 1997).

B. The Commission's Test For Allowing Credits For Customer-Owned Facilities Is Well-Established And Reasonable

1. The Commission Has Consistently Required A Showing Of Integration With The Network In Order To Allocate Costs To All Network Customers

East Texas challenges the Commission's interpretation of Order No. 888 and Section 30.9 of the *pro forma* tariff, arguing that the Commission rejected "the comparability required by Order No. 888" and applied "standards that were different from and harder than those set out in Section 30.9." Br. at 16, 17. To respond to that claim, we will first review the development and underlying principles of the Commission's policy on customer credits, as explained in Order Nos. 888 and 888-A and repeatedly upheld by this Court.

The Commission's analysis in all cases regarding network transmission rates flows from a single, fundamental premise: that the rates a transmission provider may charge its network transmission customers should reflect the costs of facilities that actually benefit the integrated network that serves all of those customers. In

the case of credits for customer-owned transmission facilities, such credits given to an individual customer against the rates it pays for network transmission service are effectively spread across the provider's entire customer base (through higher network transmission rates). *See TAPS*, 225 F.3d at 726 ("credits . . . shift the costs of the customer's facilities to the transmission provider's customers"). Therefore, a customer's entitlement to such credits depends on a showing that it is just and reasonable for all other customers to pay for that customer's facilities.

Following from that premise, the Commission initially developed its test for allowing customer credits in *Florida Municipal Power Agency v. Florida Power & Light Company*, 74 FERC ¶ 61,006 (1996) ("*Florida Municipal*").[6] In that order, issued shortly before Order No. 888, the Commission directed Florida Power & Light to provide network transmission service to the Florida Municipal Power Agency ("FMPA"), and denied the latter's request for credits. The customer had argued that, because it was to pay a rate reflecting the cost of all of the transmission provider's facilities, it was entitled to a credit reflecting the costs of all of its own transmission facilities. 74 FERC at 61,008-09. The Commission disagreed, holding that entitlement to credits must rest on "whether any of the FMPA facilities are integrated with the transmission system of Florida Power." *Id.*

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[6] *Florida Municipal*, with related orders, ultimately was upheld by this Court in *Florida Municipal Power Agency v. FERC*, 315 F.3d 362 (D.C. Cir. 2003).

at 61,010. The Commission further explained that mere interconnection does not result in an integrated transmission system:

> The transmission facilities of most FMPA members are interconnected with the Florida Power transmission system at single points that are used only to transfer power between the Florida Power transmission system and each FMPA member's transmission system. While the FMPA facilities may serve a transmission function on the FMPA side of the interconnection point between FMPA and the Florida Power system, they are not used by Florida Power to provide transmission service to FMPA or any other party. Nor are they used to transmit Florida Power's power to its non-FMPA customers. *The integration of facilities into the plans or operations of a transmitting utility is the proper test for cost recognition in such cases.*

Id. (emphasis added). *See* Merits Order at P 26 n.11, JA 630.

Several months later, the Commission issued Order No. 888, a final rule that required transmission providers to offer non-discriminatory network service under open-access transmission tariffs. Among the myriad issues the Commission addressed in the preamble and the *pro forma* tariff provisions was a customer's entitlement to consideration, in the form of credits, for its own transmission facilities. *See* Order No. 888 at 31,741-43.

The Commission chose not to adopt a one-size-fits-all solution, as it could not resolve the extent to which, or under what circumstances, cost credits would be appropriate under an open-access transmission tariff. Thus, the Commission concluded "that such credits are more appropriately addressed on a case-by-case basis, where individual claims for credits may be evaluated against a specific set of

facts." Order No. 888 at 31,742; *accord* Order No. 888-A at 30,271 ("The Commission reaffirms its finding . . . that the question of credits for customer-owned facilities is best resolved on a fact-specific, case-by-case basis.").

Therefore, the Commission set forth the fundamental principles that would guide that case-by-case analysis. Following its earlier rationale in *Florida Municipal*, the Commission made clear that a customer's ownership of transmission facilities, and even the interconnection of those facilities with those of the transmission provider, would not be sufficient. *See* Order No. 888 at 31,742-43; *see also* Merits Order at P 27, JA 630. The Commission specifically rejected the view of some commenters "that a customer's subscription to transmission service somehow transforms the provider's and customer's systems into an expanded integrated whole to the mutual benefit of both . . . ." Order No. 888 at 31,742-43 (citing *Florida Municipal*). To the contrary, the ability of the transmission provider to use the facilities to serve itself or other customers is the *sine qua non* of integration:

> The fact that a transmission customer's facilities may be interconnected with a transmission provider's system does not prove that the two systems comprise an integrated whole such that the transmission provider is able to provide transmission service to itself or other transmission customers over those facilities — a key requirement of integration.

Id. at 31,743; *accord* Order No. 888-A at 30,271.

This Court has repeatedly indicated approval of the Commission's standard

for customer credits. First, affirming Order No. 888 in *TAPS*, this Court endorsed both the case-by-case approach and the integration requirement:

> The Commission's rejection of [a] blanket approach is well-supported. Credit may be given, but not automatically. The question can only be determined on a case-by-case basis because it depends on whether the customer's facilities are truly integrated with the transmission system, rather than merely interconnected.

225 F.3d at 726.[7]

More recently, in the *Florida Municipal* appeal (affirming the FERC order that laid the groundwork for Order No. 888), the Court recognized the Commission's ruling in Order No. 888 that customer credits would require a showing not only of integration but also of additional benefits, and that credits would be determined on a case-by-case basis. *Florida Mun. Power Agency v. FERC*, 315 F.3d 362, 364 (D.C. Cir. 2003). The Court then affirmed the Commission's denial of credits, where the Commission had found that the customer's facilities were interconnected with transmission provider's network but were not used by the provider to serve its customers. *Id.* at 367-68. *See* Merits

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[7] The Court also has consistently upheld the Commission's policy judgment linking cost allocation to integration. *See, e.g., Western Mass. Elec. Co. v. FERC*, 165 F.3d 922, 927 (D.C. Cir. 1999) ("The Commission's position with regard to assignment of costs is . . . part of a consistent policy to assign the costs of system-wide benefits to all customers on an integrated transmission grid. We have approved the underlying rationale of this policy."); *accord*, *National Ass'n of Regulatory Util. Comm'rs v. FERC*, No. 04-1148, 2007 U.S. App. LEXIS 626, at *21 (D.C. Cir. Jan. 12, 2007).

Order at P 29 & n.14 (citing this Court's opinion in *Florida Municipal*), JA 630.

Similarly, in *East Texas Electric Cooperative, Inc. v. FERC*, 331 F.3d 131 (D.C. Cir. 2003), this Court again accepted the principle that integration with the transmission network is an appropriate standard to determine contribution to the network for purposes of allocating revenues and costs. *See also* Merits Order at P 29 & n.14 (citing this Court's opinion in *Florida Municipal*), JA 630. Notably, that case, as here, involved a tariff provision that tracked Section 30.9 of FERC's *pro forma* tariff. *See* 331 F.3d at 134. There, East Texas challenged the Southwest Power Pool's ("SPP") procedure to allocate revenue among its member utilities (including East Texas), contending that it was unduly discriminatory to require only small transmission owners to show integration. *See id.* The Commission had found not only that it was appropriate to require a showing of integration, but also that East Texas's facilities failed that test. *See id.* at 135.

The Court upheld the Commission's approach requiring integration — that is, contributing benefits to all network users —in order to receive revenue, and noted that the Commission used the same standard for customer credits:

> FERC could reasonably conclude that for SPP to be able to coordinate and control a large transmission system, being a "host zone" of SPP entails providing services that benefit SPP as a whole in that function. As a result, FERC could find that SPP's Regional Tariff includes a standard for transmission owning members to qualify as a "host zone" that required East Texas to show *that its transmission facilities would contribute to the overall functioning of the SPP system*, i.e., *the integration standard. This conclusion is consistent with the*

> *integration standard in the Regional Tariff for customer credits, itself based on the standard in Order No. 888 for customer credits.* Accordingly, FERC did not act arbitrarily in interpreting the Regional Tariff to require application of the integration test to East Texas.

331 F.3d at 137 (emphasis added). The Court remanded the matter to FERC only because it held the Commission had failed to make a finding that the East Texas's facilities were not, in fact, integrated with the power pool's transmission network. *Id.*

Accordingly, East Texas's claim that the Commission in this case "demonstrate[d] a marked disregard for its own rules, its precedent and legal requirements" (Br. at 16) does not withstand scrutiny: "[C]ontrary to [East Texas's] claims, the Commission has followed a consistent policy when considering the merits of customer credit claims." Merits Order at P 30, JA 631.

2. The Commission's Treatment Of Customer-Owned Facilities Is Reasonable

Approving the customer-credits standard articulated by the ALJ, the Commission stated that it "has consistently required that a customer claiming credits must demonstrate that its facilities provide additional benefits to the transmission grid in terms of capability and reliability and that the transmission provider relies upon the customers' facilities for the coordinated operation of the grid." Merits Order at P 30 (citing Order No. 888-A at 30,271), JA 631.

East Texas contends that this standard is unprecedented and unsupported.

See Br. at 18, 27-28, 38-39. But the Commission has reasonably concluded (and fully explained) that integration of a customer's facilities requires a different showing than integration of the transmission provider's own facilities:

> The reason for this distinction is that customer-owned facilities are generally constructed to serve that individual customer's needs; before their costs may be assigned to all users (which is what a credit effectively does), it must be demonstrated that those facilities are relied upon by the transmission provider to provide service to its transmission customers. By contrast, the transmission provider-owned system is planned, constructed and owned, from the very beginning, by the transmission provider to meet its obligation to its customers.

Merits Rehearing Order at P 42 (citing *Northeast Texas Electric Cooperative, Inc.*, 111 FERC ¶ 61,189 at P 17 (2005) ("*Northeast Texas*")), JA 671-72. Put differently, because the impetus for constructing facilities differs, so should the threshold for including facilities in transmission rates. Thus, consistent with the cost allocation principles set forth in Orders No. 888 and 888-A, the Commission applies a "stricter standard" for a customer to have the costs of its facilities paid for by other network users. *Northeast Texas*, 111 FERC ¶ 61,189 at P 15; *see also id.* at P 16 ("higher standard").

Northeast Texas was the mirror image of the present case: there, the facilities at issue had been constructed on AEP's transmission grid at the request of a customer, and were owned by AEP; the customer and AEP contested whether the costs should be rolled into AEP's rates or directly assigned to the customer. The

Commission determined that the AEP-owned facilities were network upgrades that benefited all users of the integrated network, and therefore the construction costs must be rolled into AEP's transmission rates. *Northeast Texas Electric Cooperative, Inc.*, 108 FERC ¶ 61,084 at P 47 (2004) (affirming ALJ's decision), *reh'g denied*, 111 FERC ¶ 61,189 (2005).

In reaching that conclusion, the Commission declined to apply the "stricter standard" applicable to credits for customer-owned facilities, 111 FERC ¶ 61,189 at P 15, and explained the distinction between the tests:

> Customer-owned facilities credit[] cases . . . address whether the customer's transmission system and the transmission provider's transmission system should be considered *separate systems or a single integrated transmission system*. If they are a single integrated system, the customer receives credits against its transmission rates from the transmission provider for the cost of the customer's transmission facilities. The costs of these credits are rolled into the transmission provider's rates and are allocated to all grid users. To determine whether particular customer-owned facilities qualify for transmission credits, *the Commission uses a higher standard* than it uses to determine whether transmission provider-owned facilities serve a network transmission function, even where the transmission provider-owned facilities were built at a customer's request.

Id. at P 16 (emphases added). *See also id.* at P 15 ("The main distinction [between

the tests] is ownership.").[8]

In the orders challenged here, the Commission maintained its consistent approach, drawing heavily on its rationale in *Northeast Texas*, and concluded, "[t]here is nothing wrong with adopting different tests for these different circumstances." Merits Rehearing Order at P 42, JA 672. Indeed, while the tests are different, they are grounded in the same principle: that it is just and reasonable to spread across a transmission provider's customer base the costs of facilities that actually are part of the integrated network that serves all customers.

For that reason, applying a stricter standard to customer-owned facilities does not, as Petitioners contend (Br. at 27, 38-39), violate "the principles of comparability" adopted in Order No. 888. In that Order, just as in *Florida Municipal*, the Commission — in the context of emphasizing that a customer must show that its facilities can be used to serve other transmission network customers — noted that transmission providers' facilities would be subject to the same standard; that is, that a transmission provider could not charge the costs of its own facilities to all its customers if it could not provide transmission service over

[8] Nevertheless, the Commission had earlier noted that, though it applied the more lenient standard for provider-owned facilities, the facilities at issue there could even have met the stricter test for integration of customer-owned facilities: "[T]he facilities at issue in this proceeding complete a circuit on the transmission provider's system. They perform a transmission switching function that maintains reliable service over [AEP's] transmission circuit and *provide system-wide benefits.*" 108 FERC ¶ 61,084 at P 53 (emphasis added).

those facilities. Order No. 888 at 31,743 n.452.[9] Contrary to Petitioner's argument, however, requiring a transmission provider to show that its facilities do, in fact, serve its transmission network — which is already presumed to benefit its network customers — is not inconsistent with requiring a customer to make a heightened showing that its facilities provide additional benefits to *someone else's* (that is, the transmission provider's) customers.

Nor does the Commission's test for customer-owned facilities differ, as East Texas argues (Br. at 24), from the standard set forth in Section 30.9 of the AEP Tariff, which tracks the same provision of the *pro forma* open access transmission tariff set forth in Order No. 888. Section 30.9 provides that a network customer may be eligible to receive consideration for its existing transmission facilities that are integrated with the transmission provider's system, if it demonstrates that the facilities "are integrated into the planning or operations" of the transmission provider to serve its transmission customers. Order No. 888-A at 30,271, 30,534.

As explained *supra,* the Commission has consistently — even before Order

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[9] *See also* Order No. 888-A at 30,271 n.277 ("[T]his fundamental cost allocation concept applies to the transmission provider as well. Just as the customer cannot secure credit for facilities not used by the transmission provider to provide service, the transmission provider cannot charge the customer for facilities not used to provide transmission service.") (citing *Florida Municipal,* 74 FERC at 61,010 n.48); *Florida Power & Light Company,* 105 FERC ¶ 61,287 at P 15 (2003) (cautioning transmission provider that it could not include in transmission rates its own facilities that failed to meet integration test that FERC previously applied to deny credits for customer's facilities).

No. 888 — required a showing of additional benefits, and Order Nos. 888 and 888-A made clear that the tariff would be so interpreted.[10] *Cf. Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999) (noting that "the preamble to a regulation is evidence of an agency's contemporaneous understanding of its proposed rules"). The Commission's interpretations of its own regulations and of FERC-approved tariffs are entitled to "considerable deference." *See, e.g., Amerada Hess*, 117 F.3d at 600; *Koch Gateway*, 136 F.3d at 814. Moreover, there is no conflict between those orders and the *pro forma* tariff; thus, cases cited by East Texas where a regulatory preamble contradicted a regulation (Br. at 24) are inapposite.

C. Base Load Flow Studies Are An Appropriate Tool For Determining Whether Customer-Owned Facilities Are Integrated With The Operation Of The Transmission Network

East Texas also challenges the Commission's reliance in this case on base

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[10] The Commission is currently considering amending Section 30.9 of the *pro* forma tariff to "sever the link between credits and planning" and eliminate the required showing of additional benefits, though only for newly constructed facilities. *See* Notice of Proposed Rulemaking, *Preventing Undue Discrimination and Preference in Transmission Service*, 115 FERC ¶ 61,211 at PP 254-57 (2006). In that rulemaking, the Commission has not proposed to abandon its current test for existing facilities. Moreover, because that rulemaking postdates the orders on review, is still under consideration, and would be applied only to new facilities, it has no impact on the present case. It is relevant only in that the Commission's approach there further demonstrates that Section 30.9, as it stands now for both existing and newly-constructed facilities, does indeed require a customer to show additional benefits to the system.

load flow studies to determine whether East Texas's facilities were integrated into AEP's transmission system. Br. at 17-18, 29-32. The ALJ based her determination that the facilities were not integrated into the operations of AEP's network in part on the results of base load flow studies and related testimony submitted by AEP and FERC Staff. *See* ALJ Decision at 65,014-16, JA 555-56. A load flow study shows the relationship between the customer's system and the transmission network by examining the network's operations under normal and contingency conditions, then examining how, if at all, those results would change if the customer's system were not connected to the network. *Entergy Services, Inc.*, 85 FERC ¶ 61,163, at 61,649 (1998), *cited in* ALJ Decision at 65,014-15 & n.96, JA 555-56.[11] Therefore, this approach identifies the "additional benefit" provided to the network, serving the Commission's focus on distinguishing between "mere interconnection" and actual network integration that allows the transmission provider to serve itself or other customers.

For that reason, the Commission previously approved the use of base load flow analysis in determining entitlement to customer credits. *See Entergy*, 85 FERC ¶ 61,163 (1998), *reh'g denied*, 91 FERC ¶ 61,153 (2000). In that case, the

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[11] Load flow studies are not unique to integration analysis. They are commonly used by transmission providers in considering possible changes to system configuration, total system load, or generation dispatch. *See* ALJ Decision at 65,014 n.96, JA 555.

transmission provider, Entergy:

> performed a base case load flow study of its system under normal situations and contingency conditions. Then, Entergy examined how those same base and contingency case conditions would change if Entergy were not connected to the customer systems in question. The results showed that *Entergy's other wholesale and retail customers would not be negatively affected if the customer-owned transmission facilities were not present*. In other words, the evidence on which the Presiding Judge relied shows that the customer-owned facilities . . . *do not provide any support to the Entergy system* . . . .

85 FERC at 61,649 (emphases added). Similarly, the ALJ here considered load flow studies as evidence regarding the facilities' integration (or lack thereof). ALJ Decision at 65,014-16, JA 555-57; *see generally* Section II.B.2, *infra*. The Commission affirmed the ALJ and adopted her decision on this issue. Merits Order at P 33, JA 631. The Commission noted that, since the issuance of the ALJ Decision, the Commission had addressed the *Entergy* decision on rehearing and reaffirmed the use of load flow studies such as those submitted in this case. *Id.* (citing 91 FERC ¶ 61,153).

Contrary to East Texas's argument (Br. at 30, 32), the Commission did *not* rule that such studies are the only acceptable evidence regarding integration of

customer facilities.[12] Indeed, the ALJ extensively discussed and relied upon other evidence as well (*see* Section II.B.2, *infra*); she was, however, particularly persuaded by the results of load flow studies performed by AEP and FERC Staff. The Commission likewise did not endorse base load flow studies as the only acceptable evidence of integration, but reasonably concluded, consistent with FERC precedent, that such studies are an appropriate "tool to test for integration . . . ." Merits Rehearing Order at P 28, JA 669.

The Commission noted that *Consumers Energy Company*, 86 FERC ¶ 63,004 (1999), *aff'd in part and rev'd in part*, 98 FERC ¶ 61,633 (2002), was not inconsistent with that holding. In that case, an ALJ found integration of customer-owned facilities based on different technical evidence submitted in that record. 86 FERC at 65,016-17, *cited in* Br. at 30. But the standard applied in *Consumers Energy* — whether the facilities were integrated into and provided additional

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[12] East Texas points to statements by the ALJ and the Commission that there is one test for showing integration of existing customer facilities into the transmission provider's network. *See* Br. at 29. But the ALJ and the Commission were referring to the Commission's established test for customer credits, requiring a showing of integration and additional benefits to the system (*see supra* Section I.B) — *not* necessarily to the kind of study that would be accepted as technical evidence *for purposes of that test*. *See* ALJ Decision at 65,009 n.25 ("The idea of two separate tests — one for integration into the planning and the other for integration into the operations of the transmission provider — appears contrary to the Commission's decision in *Entergy Services*, 85 FERC at 61,649, which approves only one integration test for existing facilities."), JA 550; *see also* Merits Order at P 34 (focusing on the integration standard, not on the particular form of proof), JA 631.

benefits to the grid — was the same. *See* Merits Rehearing Order at P 31 & n.34, JA 669-70.

East Texas objects to the Commission's reliance on base load flow studies, contending that the Commission never provided a reasonable basis for using them. Br. at 33. But in fact, the Commission answered that argument directly, explaining that "the test relied on by the judge, contrary to the arguments of [East Texas], makes sense":

> As noted above, the Commission requires that a customer claiming credits must demonstrate that its facilities provide additional benefits to the transmission grid in terms of capability and reliability and that the transmission provider relies upon the customers' facilities for the coordinated operation of the grid. In other words, *does the transmission provider use the transmission customer's facilities* to provide needed transmission service to other customers (or are they part of the transmission provider's plans to provide such needed service)[?] *That is the proper test* to assure that when the transmission provider pays these credits and seeks to recover the costs from other users of the transmission grid, the other users have received benefits in exchange for their payments. We therefore see no merit to [East Texas's] arguments.

Merits Order at P 34 (emphases added), JA 631.

East Texas argues that no transmission facilities can satisfy this test because removing the load as well as the facilities will always benefit the transmission system. Br. at 35. But what the load flow study is designed to identify is what, if anything, those facilities are contributing *in addition to* servicing the customer's own load — that is, the facilities' contribution to the transmission provider's

operation of the network and/or to the service of other customers' loads. Thus, the test removes the transmission facilities and their associated load together and thereby isolates the effect on the transmission provider's operations of losing the *additional benefits*, if any, provided by the customer's transmission facilities.

East Texas argues the Commission should instead have used an alternative test that analyzed whether removing East Texas's facilities alone would result in increased flows, worsened voltages, and/or increased losses. Br. at 34. The ALJ rejected this test because East Texas based it on AEP's response to a data response request, which the ALJ concluded was "wholly taken out of context." ALJ Decision at 65,010, JA 551. "Additionally, [East Texas] provides no legal or factual basis" for adopting such an alternative. *Id.* "Any minimal improvement in voltages or flows may be literally defined as a benefit but not every benefit qualifies for credits. . . . Conversely stated, minimal benefits not necessary or relied upon for coordinated operation of the grid do not qualify for customer credits." *Id.* For those reasons, the ALJ concluded that East Texas's proposed alternative test was "without merit." *Id.* That conclusion is consistent with the Commission's explanation of what load flow studies are designed to detect.

On rehearing, the Commission again affirmed the use of load flow studies, rejecting East Texas's argument that such studies had supplanted the integration test under the tariff:

> Section 30.9 [of the AEP Tariff] provides that network transmission customers with integrated transmission facilities may be eligible to receive credits — but only if they can demonstrate that their transmission facilities are, in fact, integrated. Use of such load flow studies does not repeal section 30.9, but *is merely a tool to test for integration* in order to demonstrate eligibility for credits under section 30.9.

Merits Rehearing Order at P 28 (emphasis added), JA 669.

II. CONSIDERING THE FACTS UNDER THE APPLICABLE STANDARD, THE COMMISSION REASONABLY DETERMINED THAT EAST TEXAS WAS NOT ENTITLED TO TRANSMISSION CREDITS

A. Standard Of Review

As set forth in Section I.A., *supra*, the Court reviews FERC orders under the arbitrary and capricious standard. The Commission's factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825*l*(b). The substantial evidence standard "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." *Florida Municipal*, 315 F.3d at 365 (quoting *FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (internal quotation marks and citation omitted); *accord Consolidated Oil & Gas, Inc. v. FERC*, 806 F.2d 275, 279 (D.C. Cir. 1986).

If the evidence is susceptible of more than one rational interpretation, the

Court must uphold the agency's findings. *See Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966); *accord Florida Municipal*, 315 F.3d at 368 ("The question we must answer . . . is not whether record evidence supports FMPA's version of events, but whether it supports FERC's."). *See also Sierra Pac. Power Co. v. FERC*, 793 F.2d 1086, 1088 (9th Cir. 1986) (noting, in case concerning integration of transmission facilities, that Commission's "conclusions on conflicting engineering and economic issues" must be upheld "so long as its judgment is reasonable and based on the evidence") (citing *City of Cleveland v. FPC*, 525 F.2d 845, 849 n.36 (D.C. Cir. 1976)).

B. The ALJ's Findings, Affirmed By The Commission, Were Well-Supported By Evidence In The Record

Having affirmed the ALJ's understanding of the relevant integration test and the appropriate use of load flow studies in applying that test, the Commission further affirmed the ALJ's factual findings. Merits Rehearing Order at PP 34-36 (citing and discussing ALJ's specific findings), JA 670-71; *see also* Merits Order at PP 10-11, JA 628. Though East Texas disputes the findings (Br. at 37-38), they are adequately supported by the record. As the Commission noted, the ALJ Decision set forth detailed factual findings, extensively supported by numerous citations to testimony and documentary evidence in the record. *See* ALJ Decision at 65,010-17, JA 551-58; Merits Order at P 11 (citing "detailed factual analysis of the [East Texas] facilities" by the ALJ), JA 628; Merits Rehearing Order at P 34

(citing "detailed findings"), JA 670; *id.* at P 36 ("ample evidence"), JA 671.

In addition, because East Texas bore the burden of proving its entitlement to credits,[13] the ALJ specifically addressed evidence to which East Texas pointed and explained why that evidence was unconvincing or otherwise did not indicate the requisite integration. *See*, *e.g.*, ALJ Decision at 65,012-014, 65,015-16, JA 553-55, 556-57.

In these circumstances, the "data-rich evidentiary record," supported by "highly technical evidence that this court is least equipped to second-guess," provides ample support for the Commission's findings. *B&J Oil & Gas v. FERC*, 353 F.3d 71, 77 (D.C. Cir. 2004).

1. Lack Of Integration Into Planning

Section 30.9 of the AEP Tariff provides that a customer seeking credits must show that its facilities "are integrated into the *plans or operations* of the Transmission Provider to serve its power and transmission customers." (Emphasis added). Though East Texas argued before the Commission that the ALJ had failed to consider whether the facilities were integrated into AEP's planning, the Commission responded that the ALJ "made detailed findings on th[at] factual

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[13] Section 30.9 of the AEP Tariff provides that, in order to receive credits, "the Network Customer must demonstrate" that its transmission facilities are integrated into the transmission provider's plans or operations. ALJ Decision at 65,007, JA 548; Order No. 888-A at 30,534. *See also TAPS*, 225 F.3d at 725-26.

issue . . . ." Merits Rehearing Order at P 34, JA 670. We briefly summarize those findings.

Integration in General. The ALJ found there was no evidence of planning for East Texas's facilities to benefit AEP's transmission system; rather, the planning had been only for interconnection with that system. East Texas's own witness's testimony indicated that planning had been for the purpose of transferring load from another provider's transmission grid to AEP's less expensive transmission system. ALJ Decision at 65,012 (citing testimony and exhibits), JA 553. Moreover, AEP's involvement in meetings and consultation was generally "passive" and consistent with technical planning for interconnection. *Id.* The ALJ also found the fact that AEP had modeled East Texas facilities in its own studies did not show that those facilities were integrated; AEP responded that it included all interconnecting facilities in such studies and that it also modeled East Texas's facilities and loads for purposes of ensuring delivery in accordance with the parties' power supply agreement. *Id.* at 65,012-13, JA 553-54. Thus, AEP's inclusion of those facilities in its own models was "not really probative of the issue of integration into the plans of [AEP] in the context of credits." *Id.*

North Loop Facilities. Focusing on the evidence regarding specific groups of facilities, the ALJ determined that the North Loop facilities were not integrated with AEP's network planning. The ALJ agreed with the testimony of FERC

Staff's witness that the route, ampacity, and type of equipment all pointed to East Texas's intent to reliably serve its own customers, rather than AEP's network customers. For example, AEP was not involved in selecting the route; also, the loop was designed to (and does) consist solely of radial lines, which, as Staff's witness testified, generally do not qualify for customer credits. ALJ Decision at 65,013, JA 554. Moreover, undisputed evidence showed that the North Loop was "designed to operate in a normally open switch configuration and Wood County alone made this decision[,]" with AEP playing no role. *Id.* (citing exhibits). Indeed, the open configuration did not serve AEP's interests. *Id.* (citing FERC Staff witness's testimony).

East Texas offered testimony that a switch on the North Loop could potentially close and transfer loads, so that the loop conceivably could be used to provide backup to AEP's system. Based on the witness's own testimony, however, the ALJ concluded that "[u]nder the current design for the North Loop it cannot normally operate closed.[] Indeed, the North Loop has never normally operated closed.[]" ALJ Decision at 65,013, JA 554 (footnotes omitted). And AEP and East Texas had never even discussed, let alone planned for, the possibility of closing the North Loop to provide backup for AEP's system — a fact that the Commission highlighted on review. *Id.*, *cited in* Merits Rehearing Order at P 35, JA 670.

South Loop Facilities. The ALJ likewise found no integration planning with respect to the South Loop. Two radial taps, on which power flowed only one way, extended from the Loop and served only East Texas customers. ALJ Decision at 65,013, JA 554; *accord* Merits Rehearing Order at P 35 n.41, JA 670. As for the South Loop itself, though AEP had conditional rights under the power supply agreement to extend its lines to some of the South Loop lines in order to serve AEP's customers, AEP had no other (non-East Texas) loads in the area and no plans to exercise those rights. ALJ Decision at 65,014, JA 555. "The Commission requires that actual reliance by the transmission provider on the customer's facilities must be shown — not possible future use of the facilities." *Id.* (citing *Florida Municipal*, 74 FERC at 61,010); *see also* Merits Rehearing Order at P 35, JA 670.

Based on the ALJ's detailed findings, the Commission concluded that it found "unconvincing [East Texas's] contentions that the Commission did not consider whether [East Texas's] facilities were integrated into [AEP's] plans, and unconvincing its arguments that the judge's conclusions were in error." *Id.*

2. Lack Of Integration Into Operations

The ALJ, affirmed by the Commission, also determined that East Texas's facilities were not integrated into AEP's operation of the transmission network. We briefly summarize those findings.

Integration in General. The ALJ began by stating that "[t]he question of whether [East Texas's] facilities are integrated into the operations of [AEP] turns on whether [East Texas] has shown that [AEP] uses [East Texas's] facilities to transmit power for itself or any other [AEP] customer." ALJ Decision at 65,014, JA 555. East Texas mistakenly accuses the Commission of "exclusive reliance" on load flow analyses. Br. at 19. The ALJ, however, found "ample evidence that [AEP] uses the North and South Loops only to supply power to [East Texas], and that [East Texas] in turn supplies that power to [East Texas's] customers." *Id.* In particular, the ALJ considered the power supply agreement between the parties and found that AEP delivered power to East Texas at specified delivery points on each loop, with East Texas being solely responsible for providing service on its own transmission facilities; "[AEP] plays no further role." *Id.* (citing exhibits).

The ALJ then turned to load flow studies to supplement the other evidence: "Significant support to the [AEP] system from [East Texas] facilities, or the lack thereof, can be shown by evidence of load flow studies." *Id.* (citing *Entergy*). AEP's witness and FERC Staff's witness had performed such studies, removing both East Texas's load and facilities in accordance with *Entergy*. Moreover, FERC Staff "also performed a second set of load flow studies which removed [East Texas's] facilities but included its load, which is an easier test to meet for operational integration." ALJ Decision at 65,015, JA 556; *accord* Merits

Rehearing Order at P 30, JA 669. In short, *all* of these studies — under the stricter *Entergy* criteria as well as the easier Staff tests — "showed that [East Texas's] facilities failed to make any necessary contribution to the [AEP] system." ALJ Decision at 65,015, JA 556; *see also* Merits Rehearing Order at PP 29, 36, JA 669, 671.[14] Having made that critical finding, the ALJ then addressed East Texas's arguments regarding operations of the North and South Loops.

North Loop Facilities. East Texas contended that its studies showed the North Loop could operate closed "without creating unacceptable line overloads or voltages," and that, even open, it could conceivably contribute to AEP's system as a backup during certain contingencies. *See* ALJ Decision at 65,015, JA 556. But the ALJ rejected that argument because she found East Texas's load flow studies were "based on an unrealistic system model which renders them invalid." *Id.* Specifically, as she had already found, the North Loop is never normally operated closed. Moreover, East Texas's assertion that the open point on the loop could be moved to shift its load to another delivery point was insufficient to show a back-up function justifying a credit. And, because Wood County controls the switches on the North Loop, AEP could not in any event operate the North Loop under the

[14] Indeed, while load flow studies showed that reliability parameters were within normal ranges when the South Loop facilities and load were removed, one study showed an actual reduction of loading on AEP's system when the North Loop facilities and load were removed. *Id.* at P 29, JA 669.

hypothetical contingencies that East Texas posited. *Id.*

South Loop Facilities. The ALJ also rejected East Texas's studies purporting to show the South Loop contributed to AEP's network. East Texas's witness admitted that, when he performed a load flow test that did remove both East Texas's facilities and load from the South Loop, the AEP system would not experience problems — a finding consistent with the studies submitted by AEP. *See* ALJ Decision at 65,015, JA 556. Of the "many" studies submitted by East Texas that simulated removal of its facilities but not its load, only three resulted in reliability problems for the AEP system, and the ALJ found that those three were "based on unrealistic premises." *Id.* at 65,016, JA 557; Merits Rehearing Order at P 30, JA 669. One study assumed the South Loop would be opened at a point that FERC Staff's witness testified would not be reasonable, and the other two simulated removal of not only the South Loop but also another entity's transmission facilities — "suggest[ing] that [AEP] may depend upon [that entity's] facilities rather than the [East Texas] facilities." ALJ Decision at 65,016, JA 557. The ALJ also noted there was no evidence "that the South Loop could or would actually be operated in an open configuration" and that an agreement among East Texas, AEP, and another entity in fact required closed operation. *Id.*

Therefore, based on the ALJ's extensive discussion of the "ample evidence" that AEP used the North and South Loops only to supply power to East Texas for

the benefit of East Texas's customers, together with numerous load flow studies showing that East Texas's facilities failed to contribute to AEP's transmission system, the Commission concluded that the ALJ Decision "properly found and the Commission properly affirmed that the facilities in question were not integrated into [AEP's] operations. Merits Rehearing Order at P 36, JA 671.

3. Substations

The ALJ separately discussed and rejected East Texas's claim for credits for substations attached to the North and South Loops. First, she determined that both sides ("high" and "low") of the substations on the North Loop are owned entirely by Wood County; therefore, East Texas cannot claim credits for those facilities. ALJ Decision at 65,016 (cross-referencing ruling regarding facilities not owned by East Texas, *see id.* at 65,007, JA 548), JA 557; *see infra* Section III. On the South Loop, East Texas owns the "high" side of each substation and sought credits for that portion of those facilities. The ALJ concluded, however, that the substations not only are not integrated into AEP's transmission system, but in fact are *not even directly connected* to AEP's system; they are located at delivery points in East Texas's system that connect to other entities' distribution systems. ALJ Decision at 65,017, JA 558. For that reason, the Commission likewise rejected East Texas's arguments: "[East Texas] misses the heart of the matter; its substations are not integrated with and, indeed, are not even directly connected with [AEP's] system."

Merits Rehearing Order at P 23, JA 668.

III. THE COMMISSION REASONABLY DETERMINED THAT THE TARIFF DOES NOT PROVIDE CUSTOMER CREDITS FOR FACILITIES THAT THE CUSTOMER DOES NOT OWN

A. Standard Of Review

As set forth in Section I.A., *supra*, the Court reviews FERC orders under the arbitrary and capricious standard, with substantial deference to the Commission's interpretation of filed tariffs.

B. The Commission Reasonably Interpreted Section 30.9 of the AEP Tariff As Providing No Credits For Facilities That East Texas Did Not Own

East Texas also challenges the ALJ's ruling, affirmed by the Commission, that denied East Texas credits for facilities that are owned by Wood County. *See* Br. at 44-47. Rather than address the text of the AEP Tariff, East Texas disputes the Commission's holding on policy grounds.

The Commission, however, grounded its ruling in a reasonable interpretation of the tariff language. Section 30.9 of the AEP Tariff provides that credits may be appropriate for "[t]he Network Customer *that owns existing transmission facilities* that are integrated with the Transmission Provider's Transmission System . . . ." ALJ Decision at 65,007 (emphasis added), JA 548. In order to receive such credits, "the Network Customer must demonstrate that *its transmission facilities* are integrated into the plans or operations of the Transmission Provider to serve its power and transmission customers." *Id.* (emphasis added). *See also* Order No.

888-A at 30,271 ("a customer may receive a credit for its *own* facilities") (emphasis added), *quoted in* ALJ Decision at 65,007, JA 548; *accord* Merits Order at P 23, JA 668.

Based on that language, the ALJ, affirmed by the Commission, ruled that Section 30.9 itself "limits credits to facilities owned by network customers." ALJ Decision at 65,007, JA 548. Put differently, "[n]o provision is made for a customer to seek credits for facilities owned by others." Merits Order at P 23, JA 668. In these circumstances, that ruling was reasonable even had it gone no further.

Nevertheless, the ALJ and the Commission did (contrary to East Texas's claim, Br. at 46) consider East Texas's arguments for credits, but simply found them unpersuasive — particularly because East Texas did not even pay the costs of constructing or maintaining the Wood County facilities. "[N]ot only does [East Texas] not own the Wood County facilities, it does not pay for them in any way." *Id.*; *see also* ALJ Decision at 65,007 ("East Texas "offers no convincing reasons why it should receive credits for facilities it did not build and does not pay to use.") (citing admission of East Texas's own witness), JA 548; *accord* Merits Rehearing Order at P 44, JA 672.

In these circumstances, the Commission rationally declined to override relevant tariff language in favor of East Texas's preferred policy approach.

IV. THE COMMISSION DID NOT ABUSE ITS DISCRETION IN DENYING EAST TEXAS'S MOTION TO REOPEN THE RECORD

A. Standard Of Review

This Court "'normally reverse[s] an agency's decision not to reopen the record only for an abuse of discretion.'" *Cooley v. FERC*, 843 F.2d 1464, 1473 (D.C. Cir. 1988) (quoting *Eastern Carolinas Broadcasting Co. v. FCC*, 762 F.2d 95, 103 (D.C. Cir. 1985)); *accord City of Anaheim v. FERC*, 941 F.2d 1234, 1247 (D.C. Cir. 1991). In *Anaheim*, the Court held the Commission had "acted within [its] broad discretion" under 18 C.F.R. § 385.716 "because it addressed criteria relevant to reopening the record . . . ." *Id.* The Court will "only order the Commission to reopen the record where it 'clearly appear[s] that the new evidence would compel or persuade to a contrary result.'" *Cooley*, 843 F.2d at 1473 (quoting *Friends of the River v. FERC*, 720 F.2d 93, 98 n.6 (D.C. Cir. 1983)). *See also Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 296 (1974) (court can require agency to reopen record only "in the most extraordinary circumstances"), *cited in* Record Order at 61,800 n.5, JA 614.

East Texas incorrectly contends that the appropriate standard of review is dictated by FPA § 313(b), 16 U.S.C. § 825*l*(b). *See* Br. at 43-44. That provision allows a court, upon an applicant's showing that additional evidence is material and that there were reasonable grounds for the applicant's failure to adduce such evidence in the underlying FERC proceeding, to order the Commission to conduct

a hearing to take such additional evidence. The statute, however, says nothing about the applicable standard for the Court to review the Commission's exercise of its discretion to determine whether to reopen a closed record.[15]

B. The Commission Did Not Abuse Its Broad Discretion By Declining To Reopen The Record To Admit New Data Over A Year After Completion Of The ALJ Proceeding

On November 15, 2000 — nearly 18 months after the hearing and over a year after the ALJ Decision — East Texas moved to reopen the record to admit two affidavits. R. 98, JA 559. East Texas contended that actual data refuted the ALJ's finding, based on load flow studies that analyzed hypothetical usage, that East Texas's facilities on the North and South Loop were not integrated into AEP's transmission system. *Id.* at 5, JA 563; *see also* ALJ Decision at 65,017, JA 558.

The Commission has broad discretion to decide whether to reopen a completed record. Under 18 C.F.R. § 385.716, the Commission "may" reopen a record after the conclusion of an ALJ proceeding "for good cause" if the Commission "has reason to believe that reopening . . . is warranted by any changes in conditions of fact or law or by the public interest." In practice, the Commission sets a high bar for a party seeking to reopen a completed record:

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[15] Moreover, to the extent East Texas argues that the Commission itself was bound by FPA § 313(b) "to apply a 'material and reasonable' standard" to Petitioner's motion (Br. at 44), East Texas failed to raise this argument on rehearing and thus is barred from raising it on appeal. FPA § 313(b), 16 U.S.C. § 825*l*(b).

> To persuade the Commission to exercise its discretion to reopen the record, the requesting party must demonstrate the existence of "extraordinary circumstances." The party must demonstrate a change in circumstance that is more than just material — it must be a change that goes to the very heart of the case. This policy against reopening the record except in extraordinary circumstances is based on the need for finality in the administrative process.

Record Order at 61,800 n.6 (citing FERC decisions), JA 614.

Applying that standard in this case, the Commission reasonably found that East Texas had not met its burden of showing extraordinary circumstances to "tip the balance" in favor of upsetting the finality of a record that had been closed, and subject to an ALJ Decision, for over a year. Record Rehearing Order at 61,177, JA 625; Record Order at 61,801, JA 615. It was not enough for East Texas to show merely that facts had changed since completion of the ALJ proceeding. *See id.* ("'[W]e recognize of course that changes have occurred since the close of the record. But such changes always occur. Yet litigation must come to an end at some point. Hence the general rule is that the record once closed will not be reopened.'") (quoting *Transwestern Pipeline Co.*, 32 FERC ¶ 61,009 at 61,037 (1985)).

Indeed, East Texas had elected to file its complaint almost one year before the facilities were to be completed, knowing that the parties would therefore have to litigate the credits issue based on hypothetical data. *See* Record Order at 61,801, JA 615. For that reason, the fact that the facilities went into service after the close

of litigation before the ALJ — as all parties plainly had understood would eventually occur — was not extraordinary and thus "not sufficient grounds for reopening the record." *Id.*

The Commission's determination was consistent with its regulations and precedents. On its face, 18 C.F.R. § 385.716 does not require the Commission to reopen a record for any change of fact or law. Record Rehearing Order at 61,177 n.8, JA 625. "Rather, the regulations leave it to the Commission's discretion to decide whether the change in fact or law identified by the party seeking to reopen the record 'warrants' reopening the record." *Id.* (quoting 18 C.F.R. § 385.716). *See generally Amerada Hess*, 117 F.3d at 600 (Commission's interpretation of its own regulations is entitled to "considerable deference"); *Northern Border Pipeline Co. v. FERC*, 129 F.3d 1315, 1318 (D.C. Cir. 1997).

Nor is *Tennessee Gas Pipeline Company*, 80 FERC ¶ 61,070 (1997), to the contrary, as East Texas contends (Br. at 41-42). In *Tennessee*, the Commission, on its own initiative, remanded a cost allocation issue to an ALJ to conduct further proceedings, having found that the issue had not been "fully explored" and that the record was "inadequate to reach a final determination" on the issue. 80 FERC at 61,229-30; *see also* Record Order at 61,801 & n.10, JA 615. The Commission rejected an argument that its discretion was limited by the "extraordinary circumstances" standard such that it was *barred* from ordering further proceedings.

Tennessee, 80 FERC at 61,229.[16] Here, conversely, the Commission rejected an argument (*see* Br. at 44, 47) that its discretion was limited such that it should be *compelled* to reopen the proceeding. Thus, the FERC Orders are consistent with *Tennessee* in holding that the Commission's "broad discretion" is just that: East Texas's argument that the Commission *must* reopen the record is the flip side of the argument in *Tennessee* that it *must not* do so — and it fails for the same reason.

[16] *Tennessee* did not concern 18 C.F.R. § 385.716. Instead, the Commission relied on its "broad discretion," under Section 5 of the Natural Gas Act, 15 U.S.C. § 717d, to initiate an investigation on its own motion and, under established case law, to determine whether to conduct an evidentiary hearing. 80 FERC at 61,229. *See also* Record Order at 61,801 & n.10, JA 615.

CONCLUSION

For the reasons stated, the petition for review should be denied and the challenged FERC Orders should be affirmed in all respects.

Respectfully submitted,

John S. Moot
General Counsel

Robert H. Solomon
Solicitor

Carol J. Banta
Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
TEL: (202) 502-6433
FAX: (202) 273-0901

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