ORAL ARGUMENT SCHEDULED FOR MAY 11, 2009

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

Nos. 07-1278 and 07-1517 (Consolidated)

TC RAVENSWOOD, LLC,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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FINAL BRIEF: MARCH 13, 2009

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are listed in the brief of Petitioner.

B. Rulings Under Review

1. *KeySpan-Ravenswood, LLC v. New York Indep. Sys. Operator, Inc.*, 119 FERC ¶ 61,089 (2007) ("Complaint Order"), JA 203;

2. *KeySpan-Ravenswood, LLC v. New York Indep. Sys. Operator, Inc.*, 119 FERC ¶ 61,319 (2007) ("Complaint Rehearing Order"), JA 235;

3. *New York Indep. Sys. Operator, Inc.*, 119 FERC ¶ 61,130 (2007) ("Tariff Order"), JA 40; and

4. *New York Indep. Sys. Operator, Inc.*, 121 FERC ¶ 61,039 (2007) ("Tariff Rehearing Order"), JA 68.

C. Related Cases

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

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Kathrine L. Henry
Attorney

Final Brief: March 13, 2009

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GLOSSARY

Br.	Brief of Petitioner
Complaint Order	*KeySpan-Ravenswood, LLC v. New York Indep. Sys. Operator, Inc.*, 119 FERC ¶ 61,089 (2007), JA 203
Complaint Rehearing Order	*KeySpan-Ravenswood, LLC v. New York Indep. Sys. Operator, Inc.*, 119 FERC ¶ 61,319 (2007), JA 235
FERC or Commission	Federal Energy Regulatory Commission
FPA	Federal Power Act
ISO	Independent System Operator
JA	Joint Appendix
Minimum Oil Burn Rule	A local reliability rule which requires dual-fuel generators to switch fuel when loads are forecast to reach certain levels
R.	Consolidated Record in Case Nos. 07-1278 and 07-1517
Ravenswood	TC Ravenswood, LLC, the legal successor to KeySpan-Ravenswood, LLC
Tariff Order	*New York Indep. Sys. Operator, Inc.*, 119 FERC ¶ 61,130 (2007), JA 40
Tariff Rehearing Order	*New York Indep. Sys. Operator, Inc.*, 121 FERC ¶ 61,039 (2007), JA 68

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STATEMENT OF ISSUES

1. Whether the Commission reasonably accepted a tariff amendment submitted by the New York Independent System Operator ("New York ISO"), which allowed compensation to dual-fuel generators for variable fuel costs incurred to provide reliability service, without immediately requiring New York ISO to provide further compensation for fixed oil storage and deliverability infrastructure costs, before completion of the ISO stakeholder process.

2. Whether the Commission, in denying TC Ravenswood LLC's complaint, correctly found that it could direct prospective relief only under the Federal Power Act.

STATUTORY AND REGULATORY PROVISIONS

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

STATEMENT OF THE CASE

The New York ISO recognized, and worked to solve, a problem – that certain generators in New York were not recovering adequate revenues to compensate for services provided to ensure the reliability of electricity service in New York. Part of the solution to that problem was relatively easy -- the New York ISO, with the agreement of market participants and stakeholders, including petitioner TC Ravenswood, LLC ("Ravenswood"), developed a method of compensating dual-fuel generators, like Ravenswood, for certain reliability-based variable costs. The remaining part of the solution, however, related to compensation for fixed costs, proved more difficult and elusive.

Ravenswood, upset that the New York ISO was not acting quickly enough, filed with the Commission a complaint, alleging that the New York ISO was violating its tariff and placing dual-fuel generators at an economic disadvantage in comparison to gas-only generators by denying dual-fuel generators full compensation, including lost profit margins. Shortly after the complaint was filed,

the New York ISO made a tariff filing that addressed the concerns in Ravenswood's complaint concerning compensation for lost profit margins associated with certain variable costs. Ravenswood then filed a protest seeking additional, immediate compensation for certain fixed costs.

In the first set of orders on review, the Commission agreed with the New York ISO's interpretation of its tariff and denied Ravenswood's complaint. *See KeySpan-Ravenswood, LLC v. New York Indep. Sys. Operator, Inc.*, 119 FERC ¶ 61,089 ("Complaint Order"), JA 203, *reh'g denied*, 119 FERC ¶ 61,319 (2007) ("Complaint Rehearing Order"), JA 235. However, the Commission agreed with Ravenswood that more complete tariff provisions were needed to appropriately compensate dual-fuel generators for increased fuel oil costs, and noted that the New York ISO had recently filed proposed tariff revisions to allow additional compensation.

In the second set of orders on review, the Commission accepted, to be effective on an expedited basis, the proposed tariff amendment submitted by the New York ISO to allow compensation for dual-fuel generators for the variable increased operating costs associated with burning alternative fuels when required to comply with the Minimum Oil Burn Rule. *See New York Indep. Sys. Operator, Inc.*, 119 FERC ¶ 61,130 ("Tariff Order"), JA 40, *reh'g denied*, 121 FERC ¶ 61,039 (2007) ("Tariff Rehearing Order"), JA 68. Ravenswood protested the

filing on the basis that the New York ISO must also provide, immediately, compensation for fixed oil storage and delivery infrastructure costs. The Commission denied Ravenswood's protest on the grounds that it was beyond the scope of the proceeding and that questions and concerns related to further compensation were best considered, at least initially, in the ongoing stakeholder process.

I. STATEMENT OF FACTS

A. Statutory and Regulatory Background

Under Section 201(b) of the Federal Power Act ("FPA"), 16 U.S.C. § 824(b), the Commission has exclusive jurisdiction to regulate the transmission and sale at wholesale of electric energy in interstate commerce. Section 205(c) of the FPA, 16 U.S.C. § 824d(c), requires public utilities to file tariffs with the Commission showing their rates and terms of service, along with related contracts, subject to FERC jurisdiction. When those tariffs are filed, sections 205(a)-(b) of the FPA, 16 U.S.C. §§ 824d(a)-(b), direct the Commission to assure that the rates and services described in the tariffs are just and reasonable and not unduly discriminatory. The Commission may also institute investigations of existing rates and services on complaint or on its own motion. *See* FPA § 206(a), 16 U.S.C. § 824e(a). *See generally New York v. FERC*, 535 U.S. 1, 5-14 (2002) (describing responsibilities under the ratemaking sections of the FPA).

B. Formation and Development of the New York ISO

The development and structure of the New York ISO are now familiar to this Court. *See Consol. Ed. Co. of N.Y., Inc. v. FERC*, 510 F.3d 333 (D.C. Cir. 2007) (price spikes in operating reserves markets); *Consol. Ed. Co. of N.Y., Inc. v. FERC*, 347 F.3d 964 (D.C. Cir. 2003) (same); *Electricity Consumers Resource Council v. FERC*, 407 F.3d 1232 (D.C. Cir. 2005) (approval of rate design for installed capacity market); *Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964 (D.C. Cir. 2005) (mitigation of prices charged by New York generators and marketers); *PSEG Energy Resources & Trade, LLC v. FERC*, 360 F.3d 200 (D.C. Cir. 2004) (same); *KeySpan-Ravenswood, LLC v. FERC*, 348 F.3d 1053 (D.C. Cir. 2003) (price cap for New York City capacity market).

In relevant respect, the New York ISO structure included the establishment of the New York State Reliability Council, which is responsible for developing reliability standards. *See Central Hudson Gas and Elec. Corp.*, 83 FERC ¶ 61,352 at p. 62,402 (1998), *order on reh'g* 87 FERC ¶ 61,135 (1999). As for the New York ISO governance, decisionmaking is shared by a non-stakeholder Board of Directors and a stakeholder Management Committee. Modifications of the New York ISO tariffs require the approval of the Board of Directors and the Management Committee. If they fail to agree, either may file a complaint under FPA section 206. *See Regional Transmission Organizations*, Order No. 2000,

FERC Stats. & Regs., Regs. Preambles ¶ 31,089 at n. 329 (1999) (describing New York ISO governance structure).[1]

C. Events Leading Up to the Challenged Orders

Ravenswood leases and/or owns and operates electric generation facilities in New York City. Complaint Order P 2, JA 203. It sells energy, capacity and ancillary services in the wholesale electricity market pursuant to market-based rate authority. Three of its generating units are dual-fuel generating units, which are capable of burning fuel oil or natural gas. As the operator of dual-fuel generating units, Ravenswood can be required to burn oil at a minimum level when generation exceeds 9,000 megawatts for the New York system under the reliability rules of the New York State Reliability Council. *Id.* This rule is known as the Minimum Oil Burn Rule. *See* Ravenswood Complaint, R. 18 at Exhibit A, JA 109.

During the summer of 2006, the New York ISO and the Local Transmission Owner, Consolidated Edison Company of New York, Inc., instructed one or more of the Ravenswood units to burn fuel oil, which was more expensive than natural gas. Ravenswood complied with the instructions. Complaint Order P 3, JA 203. Ravenswood sought compensation from the New York ISO for all incremental

[1] *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs., Regs. Preambles ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,092 (2000), *appeal dismissed sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

costs, including opportunity costs, for each hour in the summer of 2006 in which it was required to burn more expensive fuel oil rather than natural gas under the Minimum Oil Burn Rule. *Id.* However, Ravenswood and the New York ISO disagreed on the amount of compensation allowed under the tariff. *Id.* P 8, JA 204.

D. The Challenged Orders

1. Ravenswood's Complaint

On February 13, 2007, Ravenswood filed a complaint against the New York ISO under sections 206 and 306 of the FPA, 16 U.S.C. §§ 824e, 825e. R. 18, JA 72. Although the New York ISO provided some compensation to generators pursuant to its tariff, Ravenswood claimed that the tariff provision applied by the New York ISO, section 4.1.7, only provided sufficient compensation to ensure that a generator breaks even for the service it performs on the day in question. *Id.*, JA 81 n.13. *See also* Complaint Rehearing Order, R. 31, P 2 n. 2, JA 235 (text of section 4.1.7). Ravenswood asserted that the calculation reduced or eliminated the profits it would have earned but for its compliance with the instructions to burn fuel oil. Ravenswood further argued that it should have been compensated under a different section of the tariff, section 5.4, which would have afforded it its full Day Ahead margins, equal to the amount of its incremental operating costs from burning fuel oil. *Id.*, JA 81. *See also* Complaint Rehearing Order, R. 31, P 3 n. 3, JA 236 (text of section 5.4).

On April 25, 2007, the Commission issued the Complaint Order denying Ravenswood's claim. R. 28, JA 203. The Commission held that Ravenswood did not carry its burden under FPA section 206 of proving that tariff section 5.4 was applicable to provide compensation for incremental operating costs from burning oil pursuant to the Minimum Oil Burn Rule. *Id*. P 26, JA 207. In addition, the Commission found that the New York ISO reasonably interpreted tariff section 4.1.7 as permitting compensation for Ravenswood and had complied with its tariff. *Id.* P 27, JA 207.

The Commission further found that Ravenswood's complaint indicated that more complete tariff provisions were needed to ensure that generators were fairly compensated when they respond to reliability rules. *Id.* P 28, JA 207-208. However, the agency acknowledged that the New York ISO had worked with its stakeholders since the fall of 2006 to review compensation rules that apply when the Minimum Oil Burn Rule is activated and to consider improvements. *Id.* P 29, JA 208. The Complaint Order further indicated that on March 7, 2007, the ISO's Business Issues Committee had approved tariff revisions that would establish payment rules prospectively for generators in Ravenswood's situation. *Id.* Finally, the order noted that the New York ISO filed to revise its tariff on April 13, 2007, and that the Commission would address the filing in the new docket. *Id.*

Ravenswood timely filed a request for rehearing, which the Commission denied in its June 25, 2007 Complaint Rehearing Order. R. 31, JA 235. The Commission affirmed its interpretation of section 5.4 of the New York ISO tariff and its finding that Ravenswood was not entitled to compensation under that provision.

Furthermore, the Commission found that -- even assuming relief under the complaint was appropriate -- by the time the Complaint Order was issued, the New York ISO had already filed tariff revisions that provided Ravenswood with prospective relief, and those provisions were accepted by the Commission to be effective May 13, 2007. The Commission held that it could not have provided Ravenswood with additional relief for any earlier period (in particular, the summer of 2006) which preceded the earliest possible refund effective date under FPA section 206, *i.e.*, the filing of the complaint on February 15, 2007. *Id.* P 9 and n. 10, JA 237.

2. The New York ISO's Tariff Filing

On April 13, 2007, the New York ISO filed revisions to section 4.1.7 of its tariff under FPA section 205 that would improve its existing compensation rules for dual-fuel generators for the increased costs they incur when complying with the Minimum Oil Burn Rule. R. 1, JA 1. The New York ISO acknowledged that its proposal would not compensate units for the storage and delivery infrastructure

required to burn an alternative fuel at any given time. However, the filing further stated that the New York ISO and its stakeholders were still pursuing a design mechanism to capture those additional costs. *Id.*

Ravenswood protested the filing. R. 6, JA 22. Ravenswood agreed that the Commission should approve the proposed tariff revisions. However, it asked the Commission to direct New York ISO to make an immediate compliance filing providing an express mechanism for Minimum Oil Burn Rule generators to recover all of their incremental costs, including storage and deliverability costs. *Id.*, JA 30. In addition, Ravenswood stated that the Commission should require New York ISO to include an appropriate proposal for a recovery mechanism for the fixed costs associated with maintaining and investing in equipment required to enable a generator to switch to an alternative fuel "at any given time." *Id.*, JA 29.

On May 11, 2007, the Commission issued the Tariff Order accepting the proposed tariff revisions effective May 13, 2007. R. 13, JA 40. The Commission held that the new provisions would ensure that dual-fuel generators are appropriately compensated for additional fuel costs when required to burn oil in response to the Minimum Oil Burn Rule. *Id.* P 16, JA 42. The Commission also granted the New York ISO's request for an accelerated effective date to enable the ISO to provide compensation for units incurring incremental fuel costs during the peak 2007 summer months. *Id.*

The Commission denied Ravenswood's protest as beyond the scope of the proceeding. *Id.* P 17, JA 42. The Commission stated that the New York ISO stakeholder process was, at least initially, the appropriate mechanism to address the additional compensation issues raised by Ravenswood. *Id.*

Ravenswood filed a timely request for rehearing, which the Commission denied on October 18, 2007 in the Tariff Rehearing Order. R. 17, JA 68. Ravenswood asserted that the proposed tariff revisions were unjust, unreasonable and unduly discriminatory, because they did not include compensation for the incremental costs of storage, delivery infrastructure, and related items necessary to provide reliability service under the Minimum Oil Burn Rule. *Id.* P 10, JA 69.

The Commission held that it would have to proceed under FPA section 206 in order to require the New York ISO to provide the additional compensation requested by Ravenswood, which would require the Commission to bear the burden of showing both that the failure of the New York ISO's tariff to provide such compensation is unjust and unreasonable and that the replacement tariff provision favored by Ravenswood is just and reasonable. *Id.* P 13, JA 69.

The Commission further stated that there may be a number of different ways to address the issue of compensation for fixed oil storage and delivery infrastructure costs. *Id.* The Commission found that, since the New York ISO committed to present the issue to its stakeholders in the next several months, it was

appropriate to give them the opportunity to consider this issue before the Commission took further action. If Ravenswood was not satisfied with the results of the stakeholder process, or if the New York ISO did not act in a timely manner, the Commission stated that Ravenswood could file a complaint. *Id.*

In addition, the Commission rejected Ravenswood's argument that its proposal to provide compensation for storage and delivery infrastructure costs was an "integral" part of the New York ISO's proposed rate, and, as such, must be considered in the FPA section 205 proceeding. The Commission held that the cases cited by Ravenswood did not support Ravenswood's position. *Id.* PP 15-16, JA 70. Moreover, the Commission concluded that there was no interaction between the proposed tariff revisions and the lack of compensation for storage and delivery costs that created an unjust and unreasonable result. *Id.* P 17, JA 70.

Finally, the Commission held that, since it found that the proposed tariff revisions were just and reasonable, there was no reason to condition acceptance of the proposal on providing further compensation for dual-fuel generators or to require New York ISO to make a compliance filing providing for such additional compensation. *Id.* P 20, JA 70-71. The Commission reiterated that a collegial stakeholder process was appropriate, since there were a number of outstanding questions and concerns regarding compensation for fixed costs. *Id.* P 21-22, JA 71. The Commission also reiterated that if Ravenswood were dissatisfied with

either the timing or the results of the stakeholder process, it could file a complaint. *Id.* P 23, JA 71.

SUMMARY OF ARGUMENT

Ravenswood is displeased with the pace of reform in New York wholesale electricity markets. It claims that the Commission, on review of Ravenswood's complaint and the New York ISO's tariff filing, as a matter of law, is compelled: (1) to direct the New York ISO to address all dual-fuel generator compensation issues now, at one time, at a pace dictated by one market participant; and (2) to consider now, as opposed to later after the New York ISO stakeholders have themselves considered the matter, an unchanged element of the New York ISO rate at the same time the Commission is considering a different, changed element of the rate.

But the Commission is under no such compulsion. It does not have to insist that the New York ISO resolve all problems at one time, much less on the timetable preferred by Ravenswood. Rather, here, the Commission reasonably could accept the New York ISO's tariff amendment under FPA section 205 as providing just and reasonable and not unduly discriminatory compensation for increased variable fuel costs, including lost profit margins, incurred by dual-fuel generators that are required to comply with the Minimum Oil Burn Rule. The challenged orders were consistent with Commission policy regarding

compensation to generators for reliability-related costs. Moreover, consistent with Commission and judicial precedent, the Commission reasonably rejected Ravenswood's request that the Commission require the New York ISO to provide further compensation immediately for fixed oil storage and delivery infrastructure costs as beyond the scope of the tariff proceeding. With respect to ratemaking matters of regional applicability, it was entirely appropriate for the Commission to agree with the New York ISO that the stakeholder process was the appropriate mechanism to address the fixed cost compensation issue in the first instance.

With respect to Ravenswood's complaint, the Commission correctly found that, under FPA section 206, it could have provided Ravenswood with prospective relief only. Ravenswood's claim that the Commission was authorized to direct retroactive relief lacks merit.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedures Act's arbitrary and capricious standard. *E.g., Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). Under that standard, the Commission's decisions must be reasoned and based upon substantial evidence in the record. Thus, the Commission's factual findings are conclusive if supported by substantial evidence. FPA section 313(b), 16 U.S.C. § 825*l*(b).

The Court is "particularly deferential to the Commission's expertise in ratemaking cases, which involve complex industry analyses and difficult policy choices." *North Baja Pipeline, LLC v. FERC*, 483 F.3d 819, 821 (D.C. Cir. 2007) (quoting *Exxon Mobil Corp. v. FERC*, 430 F.3d 1166, 1172 (D.C. Cir. 2005)). *See also, e.g.*, *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968) ("the breadth and complexity of the Commission's responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties"), quoted in *East Kentucky Power Coop., Inc. v. FERC*, 489 F.3d 1299, 1306 (D.C. Cir. 2007).

Furthermore, the Court "owe[s] FERC great deference in reviewing its selection of a remedy, for the breadth of agency discretion is, if anything, at its zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions." *Louisiana Public Serv. Comm'n v. FERC*, 522 F.3d 378, 393 (D.C. Cir. 2008) (quoting *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967)). *See also, e.g., Ariz. Corp. Comm'n v. FERC*, 397 F.3d 952, 956 (D.C. Cir. 2005) (similarly noting that FERC "wields maximum discretion" when choosing a remedy).

II. THE COMMISSION REASONABLY ACCEPTED THE NEW YORK ISO'S TARIFF AMENDMENT WITHOUT IMMEDIATELY REQUIRING FURTHER COMPENSATION, BEFORE THE STAKEHOLDER PROCESS WAS COMPLETED.

In arguing that the Commission, in approving the New York ISO's tariff filing, unreasonably delayed in considering Ravenswood's claim for additional compensation, Ravenswood makes two related arguments. First, it argues that the New York ISO in the first instance, and the Commission on review, may not afford Ravenswood only partial compensation and may not allow New York market participants to further consider additional compensation issues. Second, Ravenwood argues that the Commission is compelled, as a matter of law under FPA section 205, 16 U.S.C. § 824d, to go beyond the New York's ISO rate filing and consider now Ravenwood's plea for compensation on top of that now offered by the New York ISO.

As explained below, Ravenswood's arguments are not persuasive.

A. The Commission's Acceptance of the New York ISO's Tariff Amendment Was Consistent with Commission Policy Regarding Compensation for Reliability-Related Costs.

Commission policy requires that generators be fairly compensated in providing reliability services. *See, e.g., Maine Public Utilities Comm'n v. FERC*, 520 F.3d 464, 469-70 (D.C. Cir. 2008) (upholding FERC's approval of settlement transition payments to generators). The challenged orders fully recognized and appropriately addressed this policy.

In the Complaint Order, the Commission devoted a section to the issue of whether the New York ISO's tariff provided appropriate compensation, including lost profit margins, for dual-fuel generators when they are required for local reliability reasons to burn fuel oil that is more expensive than natural gas. Complaint Order PP 28-29, JA 207-208. The Commission agreed that more complete tariff provisions were needed. *Id.* P 28, JA 208. The Commission noted, however, that the New York ISO had recognized the need to ensure that generators are fairly compensated when they respond to reliability rules, and had been working with its stakeholders since the fall of 2006 to review the compensation rules for dual-fuel generators and to consider improvements. *Id.* P 29, JA 208. In addition, the Commission observed that the New York ISO had filed new tariff provisions in a separate proceeding to address these compensation rules. *Id.*

The Commission also addressed its policy concerning generator compensation in the tariff proceeding. In the Tariff Order, the Commission stated that the New York ISO was committed to bringing the issue of compensation for generator storage and delivery infrastructure back to its stakeholders for further review. Tariff Order P 17, JA 42. The Commission further noted that the New York ISO had agreed to propose a recovery mechanism for fixed costs if and when its stakeholders could agree on its necessity and design. *Id.* In denying Ravenswood's request that the New York ISO should be required to make an

immediate compliance filing to address compensation for fixed costs, the Commission explained that the New York ISO's stakeholder process provided the appropriate mechanism to address remaining issues. *Id.*

In the Tariff Rehearing Order, the Commission stated that there may be multiple ways to address the issue of compensation for fixed oil storage and delivery infrastructure costs. Tariff Rehearing Order P 13, JA 69-70. In view of the New York ISO's commitment to present this issue to its stakeholders, the Commission held that, in these circumstances, it was appropriate to give the New York ISO and its stakeholders an opportunity to consider this issue before the Commission takes further action. *Id.* The Commission further stated that if Ravenswood was not satisfied with the results or pace of the stakeholder process, it could then file a complaint. *Id.*

Thus, the challenged orders appropriately considered and addressed the Commission's policy concerning compensation to generators for reliability-related costs. Contrary to Ravenswood's claim, Br. at 27-28, nothing in the orders indicates that the Commission "departed" from that policy. In addition, contrary to Ravenswood's suggestion, *id.*, nothing in the Commission's policy mandates that compensation for different categories of costs be addressed in a single proceeding. Ravenswood's position is contrary to the well-established principle that "an agency need not solve every problem before it in the same proceeding." *Mobil Oil*

Exploration & Producing Southeast, Inc. v. United Distribution Cos., 498 U.S. 211, 231 (1991). Rather, as the Court held in *Mobil*, "an agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures . . . and priorities." 498 U.S. at 230 (citations omitted). *See also FPC v. Sunray DX Oil Co.*, 391 U.S. 9, 49 (1968) (finding that the Commission "did not abuse its discretion" in concluding that a particular issue "can be better dealt with" in another proceeding); *City of Las Vegas v. Lujan*, 891 F.2d 927, 935 (D.C. Cir. 1989) ("[s]ince agencies have great discretion to treat a problem partially, we would not strike down the [agency's decision] if it were a first step toward a complete solution, even if we thought [the agency] 'should' have covered both" issues in the same order) (footnote omitted).

In accordance with this precedent, it was well within the Commission's discretion to take expedited action to accept the New York ISO's tariff amendment so that the compensation mechanism could be in place for the peak 2007 summer months, Tariff Order P 1, 16, JA 40, 42, and to defer action with respect to any further compensation that was not the subject of the New York ISO filing until after the New York ISO stakeholder process was completed.

The New York ISO stakeholder process is specifically designed, and was approved by the Commission, to address issues such as tariff amendments to provide for generator compensation. Indeed, as the Commission observed in the

Complaint Order, the tariff amendments that were eventually accepted were themselves the result of the stakeholder process. Complaint Order P 29, JA 208. Ravenswood's request that the Commission immediately require the New York ISO to make a compliance filing addressing further compensation, if granted, would have circumvented the established ISO stakeholder process. *See, e.g., New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,290, P 26 (2008) (Commission held that making changes requested by companies to proposed procedures without giving other stakeholders an opportunity for comment would inappropriately circumvent the New York ISO's stakeholder process).

In addition, the Commission stated that, in this instance, the stakeholder process concerning infrastructure costs is appropriate "as there are outstanding questions and concerns regarding such compensation." Tariff Rehearing Order P 21, JA 71. One such concern was the lack of clarity concerning the additional costs sought by Ravenswood. In this regard, the Commission stated, it was "unclear whether the costs Ravenswood seeks are short term or long term, fixed or variable, incremental or ongoing, or avoidable or unavoidable." *Id.*

The Commission further explained that there are concerns with respect to the fixed costs of oil storage and delivery infrastructure that are not present with respect to incremental variable costs of burning oil. *Id.* P 22, JA 71. Specifically, the Commission observed that Ravenswood and other dual-fuel generators may use

the capability to burn oil for reasons other than complying with the Minimum Oil Burn Rule, such as earning greater profit margins when natural gas is unavailable or when the price of oil is less than the price of natural gas. *Id.* The Commission stated that it was unclear how these concerns should be resolved. *Id.*

The Commission determined that questions and concerns such as these are "best considered initially" in the New York ISO stakeholder process, which may be able to formulate ways of answering these questions and addressing these concerns. *Id.* P 23, JA 71. The Commission explained that when the stakeholder process is completed, the New York ISO may propose tariff revisions based on a resolution of these concerns. If Ravenswood remains dissatisfied with the length of time the stakeholder process takes or with the results of the stakeholder process, it could bring a complaint under FPA section 206. *Id.* (To date, the New York ISO has not made a new filing reflecting stakeholder consensus on additional compensation, nor has Ravenswood filed a complaint as to timing or substance.)

In sum, the Commission reasonably and appropriately considered and addressed its policy regarding compensation to generators for reliability-related costs in the challenged orders. The Commission complied with its policy by accepting, on an expedited basis, the New York ISO tariff amendment to compensate dual-fuel generators for variable fuel costs, including lost margins, when instructed to comply with the Minimum Oil Burn Rule and by deferring

action on further compensation for fixed costs until the stakeholder process had an opportunity to address such compensation. *See Public Service Comm'n of Wisconsin v. FERC*, 545 F.3d 1058, 1063 (D.C. Cir. 2008) (sustaining the Commission's ability, in regional ratemaking matters, to rely upon the ISO stakeholder process, as long as that process is fair and open; that the majority stakeholder process "may have affected [certain projects] disproportionately in the short run" does not make reliance on that process unreasonable or unduly discriminatory).

B. The Commission Reasonably Accepted the New York ISO's Proposed Tariff Amendment Under FPA Section 205.

The Commission accepted the New York ISO's proposed tariff amendment under FPA section 205, stating that it would "ensure that dual-fuel generators are appropriately compensated for additional fuel costs," including lost profit margins, when required to burn oil in response to the Minimum Oil Burn Rule. Tariff Order P 16, JA 42. The Commission also granted the New York ISO's request for an accelerated effective date to enable the ISO to provide compensation for units incurring incremental fuel costs during the peak 2007 summer months. *Id.*

In its rehearing request, Ravenswood argued that the Commission should have looked beyond the New York ISO's precise filing. Specifically, Ravenswood argued that the Commission should have determined under FPA section 205 whether the alleged "integral rate," consisting of the proposed tariff amendment's

allowance of recovery of incremental commodity costs of fuel oil and the "denial" of the recovery of oil storage and delivery infrastructure costs, was just and reasonable and nondiscriminatory. Tariff Rehearing Order P 11, JA 69. The Commission rejected Ravenswood's "integral rate" theory, finding that the agency would have to proceed under FPA section 206 in order to require the New York ISO to provide the additional compensation requested by Ravenswood. *Id.* P 13, JA 69-70. In addition, the Commission determined that Ravenswood's reliance on certain cases to support its integral rate theory was misplaced. *Id.* PP 15-18, JA 70. Ravenswood reiterates its "integral rate" argument in this appeal.

Ravenswood first argues that the Commission erred in concluding that it would have to proceed under FPA section 206 in order to require the New York ISO to provide additional compensation for fixed oil storage and delivery infrastructure costs. Br. at 31. Ravenswood attempts to limit the applicability of *Western Resources, Inc. v. FERC*, 9 F.3d 1568 (D.C. Cir. 1993), on which the Commission relies, to its facts. *See* Tariff Rehearing Order P 14, JA 70. However, regardless of the factual specifics, the Commission correctly cited *Western*, 9 F.3d at 1578-79, for the principle that the Commission must proceed under FPA section 206 when it seeks to alter aspects of a utility's rate structure which the utility did not propose to change under FPA section 205, which Ravenswood urged. Ravenswood asserts, Br. at 33-34, that the Commission was

compelled to find under FPA section 205 that the New York ISO's tariff filing to provide generators compensation for certain variable costs was unjust and unreasonable, because the filing did not, at the same time, provide further compensation for reliability-related fixed costs. However, the result would be precisely what the Court in *Western* disallowed – an attempt to "blur the line" between FPA sections 205 and 206 and to "compromise [FPA section 206's] limits on [the Commission's] power to revise rates." *Western*, 9 F.3d at 1578.

Ravenswood relies principally on *Cities of Batavia v. FERC*, 672 F.2d 64 (D.C. Cir. 1982), to support its theory that the lack of compensation for fixed oil storage and delivery infrastructure costs, as an integral part of the New York ISO's proposed compensation for variable costs, must have been considered in the FPA section 205 tariff proceeding. Br. at 34-38.

Batavia concerned whether the Commission could exercise its refund authority under FPA section 205 when a public utility filed for a rate increase that included an existing fuel adjustment clause. The Court held that the Commission was not precluded from reviewing a revised rate completely "to assure that all its parts -- old and new -- operate in tandem to insure a 'just and reasonable' result and from ordering refunds if the previously approved fuel clause operates with the new provisions to produce an over-recovery." *Batavia*, 672 F.2d at 77. The Court further explained: "To hold that the Commission had section 205 jurisdiction to

look at how the fuel clause operated is not, of course, the same as ordering it to exercise that jurisdiction and grant[ ] a refund. . . . [A] decision by FERC not to suspend (or refund) is an exercise of discretion." *Id.* (citations omitted).

Thus, *Batavia* does not support Ravenswood's argument that the Commission is compelled to consider, in response to New York ISO's tariff filing under FPA section 205, the lack of compensation for fixed costs as an integral part of the proposed amendment to provide compensation for certain variable costs. First, even assuming that the lack of compensation for oil storage and infrastructure costs could be fairly characterized as an "existing or previously approved rate component," which is questionable at best, *Batavia* plainly held that the Commission has discretion, but is not compelled, to consider a previously approved component of an integral rate in a rate filing pursuant to FPA section 205. *See also Laclede Gas Co. v. FERC*, 670 F.2d 38, 42 (5th Cir. 1982) (whether the Commission decides to exercise its discretionary refund authority is determined by the agency's consideration of the equities).

Second, as the Commission found in its Tariff Rehearing Order, unlike *Batavia*, this case does not involve a situation where the interaction between New York ISO's proposal to provide additional compensation for the variable costs of burning an alternative fuel and the existing lack of compensation for oil storage and delivery infrastructure costs creates an unjust and unreasonable result. Tariff

Rehearing Order P 17, JA 70. *See also East Tennessee Natural Gas Co. v. FERC*, 863 F.2d 932, 943 (D.C. Cir. 1988) (in clarifying the "narrow effect" of *Batavia*, the Court held that "[a]n interaction between proposed changes and existing rates does not open the door to any and all retroactive changes in existing rates. Only where the interaction will *create* results that are unjust and unreasonable under *existing* Commission policy as it applies to the pipeline at the time it files its proposed rate changes does the pipeline forego that reliance interest and invite retroactive changes to existing rates.") (emphasis in original); *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 187 (D.C. Cir. 1986) (reversing a Commission order which relied on *Batavia* to justify changing existing tariff provisions without meeting burden of proof requirements).

Here, Ravenswood did not demonstrate that the lack of compensation for certain fixed costs in the New York ISO tariff interacts with the proposed tariff amendment to compensate for certain variable costs to create results that are unjust and unreasonable. Ravenswood characterizes the various compensation provisions of the New York ISO tariff as a "compensation structure," Br. at 30, and the proposed tariff amendment as "half a rate," *id.*, in an unsuccessful effort to support its integral rate argument. However, Ravenswood's claim is simply that the failure of the tariff, at this time, to provide compensation for certain reliability-

related fixed costs is in itself unjust and unreasonable, regardless of the treatment of the variable costs. Tariff Rehearing Order P 17, JA 70.

The Commission reasonably found that the only rate provisions before it were those in the New York ISO's proposal to pay generators subject to the Minimum Oil Burn Rule, for the first time, and, in time for the peak 2007 summer demand months, compensation for the variable operating costs of burning oil. *Id.* P 18, JA 70. The New York ISO, in the first instance, and the Commission, on review, acted precisely to benefit generators such as Ravenswood and to provide additional compensation – though not as much compensation as Ravenswood would have preferred at this time. *See* Tariff Order P 17, JA 42 ("Ravenswood supports NYISO's proposed revisions but wants NYISO to go further than it has and revise its tariff to provide additional compensation"). Therefore, the Commission reasonably found that Ravenswood's proposal for additional compensation was "beyond the scope of this proceeding," that the topic of potential compensation was more appropriately the focus of future stakeholder discussions, and that the proposed tariff amendment as filed was just and reasonable and not unduly discriminatory. *Id.*

III. THE COMMISSION CORRECTLY FOUND THAT RELIEF UNDER FPA SECTION 206 COULD HAVE BEEN PROSPECTIVE ONLY.

In this appeal, Ravenswood largely abandons the arguments raised in its complaint and in its request for rehearing of the Complaint Order. Instead, Ravenswood challenges the finding in the Complaint Rehearing Order that, under FPA section 206, the Commission could have directed prospective relief only. Br. at 39-43.

Ravenswood incorrectly claims that the Commission had authority to order retroactive relief to require compensation to dual-fuel generators for lost profit margins back to the summer of 2006, six months before Ravenswood filed its complaint. Ravenswood's claim is based on its contention that the New York ISO was on notice in May 2006 that it needed to fully compensate dual-fuel generators operating under the Minimum Oil Burn Rule for their incremental fuel costs. Br. at 41.

Where the Commission institutes an FPA section 206 investigation on complaint, section 206(b), 16 U.S.C. § 824e(b), requires the Commission to establish a refund effective date that is no earlier than the date of the filing of such complaint. *See, e.g., Ameren Services Co.*, 121 FERC ¶ 61,205, PP 106-107 (2007) (refund effective date established at the earliest date allowed, the date of the filing of the complaint; filing of a complaint pursuant to FPA section 206 puts

parties on notice that rates could change, which satisfies concerns with retroactive ratemaking).

The precedent cited by Ravenswood does not support its claim that the Commission may order retroactive relief in a complaint proceeding under FPA section 206. Ravenswood primarily relies, Br. at 42, on an oil pipeline case, *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30 (D.C. Cir. 1999), brought under the Interstate Commerce Act, 49 U.S.C. § 13. In *Exxon*, this Court held that FERC abused its discretion in approving a contested settlement to be effective prospectively only. The settlement was one of several submitted in an ongoing proceeding regarding a rate issue that had been remanded by this Court in an earlier appeal. The Court held that the rule against retroactive ratemaking did not apply, since the parties were on notice for several years before issuance of the challenged settlement approval order that the rate was contested. *Exxon*, 182 F.3d at 49. *Exxon* did not involve the statutory requirements of FPA section 206, which plainly establish the outside limit of any refunds (15 months commencing, at the earliest, from a complaint filing) the Commission may approve in response to a complaint.

In addition, the factual circumstances in the cases cited in Ravenswood's brief with respect to notice, Br. at 42, are distinguishable from the facts in this appeal. Those decisions involved situations where the source of the notice was provided in the context of a formal administrative proceeding that provides an

opportunity for all interested parties to participate and be informed. For example, in *Exxon*, the source of the notice that the rates at issue were contested was formal opposition in the context of an ongoing administrative proceeding. Similarly, in *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794 (D.C. Cir. 2007), cited by Ravenswood, a proceeding under FPA section 205, the Court held that market participants had adequate notice that rates could be revised based on a tariff provision that was the subject of Commission proceedings and approval. *NSTAR*, 481 F.3d at 801. *See also Consol. Ed. Co. of N.Y. v. FERC*, 347 F.3d 964, 970 (D.C. Cir. 2003) ("[e]quity and predictability are not undermined when *the Commission* warns all parties involved that a change in rates is only tentative and might be disallowed," citing *Exxon*, 182 F.3d at 49) (emphasis supplied).

In this case, however, the administrative proceeding started with Ravenswood's complaint on February 15, 2007. It was the filing of the complaint that put parties on notice that the New York ISO's tariff provisions for compensation to generators could change. As the Commission stated in the Complaint Rehearing Order P 9, n. 10, JA 237, had the Commission accepted the complaint and instituted an investigation under FPA section 206, the earliest refund effective date would have been the date of the filing of the complaint. *See Ameren Services*, 121 FERC ¶ 61,205 at P 106 (filing of a complaint pursuant to

FPA section 206 puts parties on notice that rates could change, which satisfies concerns with retroactive ratemaking).

Ravenswood erroneously contends that, since "the parties" were on notice in the summer of 2006 that the compensation to generators was contested, the Commission was authorized to direct relief under FPA section 206 retroactively to that period. Br. at 42-43. The only source of notice mentioned by Ravenswood, Br. at 41, is a May 22, 2006 letter it sent to New York ISO and Consolidated Edison. R. 18, JA 126. According to the complaint, that letter, which was submitted to the Commission as a confidential attachment, gave notice to New York ISO and Consolidated Edison that Ravenswood would incur additional costs if it were required to burn uneconomic fuel oil under the Minimum Oil Burn Rule and that it was entitled to be kept financially whole. *Id.*, JA 126.

The May 2006 letter was not, however, adequate notice that rates could change. The letter does not specify that Ravenswood contested the New York ISO's existing rates and, thus, the rates could be changed. In addition, the letter did not provide any notice at all to other New York market participants who might be affected by a retroactive change in rates. Thus, Ravenswood's claim that the Commission could have directed retroactive relief is entirely unsupported.

CONCLUSION

For the foregoing reasons, the petitions for review should be denied, and the challenged orders should be upheld in every respect.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 7,092 words, not including the tables of contents and authorities, the certificates of counsel and the addendum.

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