ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

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

No. 06-1174

XCEL ENERGY SERVICES INC.,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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MARCH 22, 2007
FINAL BRIEF: APRIL 26, 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. Letter Order, *Xcel Energy Services Inc.*, Docket Nos. ER06-207, *et al.* (Dec. 23, 2005), R. 6, JA 181; and

2. Order Denying Rehearing, *Xcel Energy Services Inc.*, 114 FERC ¶ 61,295 (Mar. 21, 2006), R. 9, JA 193.

C. Related Cases

This case has not previously been before this Court or any other court. *Xcel Energy Services Inc.*, No. 07-1014, currently being held in abeyance, similarly concerns Respondent's denial of waiver of the prior notice and filing requirements with respect to an interconnection agreement, and thus involves some of the same issues raised in this case.

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Carol J. Banta
Attorney

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GLOSSARY

2001 Agreements	Collectively, the Arapahoe Agreement, BIV Generation Agreement, Fountain Valley Agreement, and Valmont Agreement
Arapahoe Agreement	Generation interconnection agreement between PSC Colorado and Black Hills Colorado, LLC, regarding electric generating facility located near Arapahoe Electric Generating Station
BIV Generation Agreement	Generation interconnection agreement between PSC Colorado and BIV Generation Company, L.L.C.
Br.	Petitioner's brief
Central Hudson	*Central Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992)
Commission or FERC	Federal Energy Regulatory Commission
Deferral Requests (First, Second, and Third)	Letters from William M. Dudley to FERC Secretary, *Xcel Energy Servs. Inc.*, Docket No. ER01-2905 (Sept. 27 and Nov. 19, 2001, and Jan. 15, 2002) (copies attached in Addendum)
FERC Orders	Collectively, the Letter Order and Rehearing Order
Filing Letters	Letters submitted by Xcel to FERC with each of the 2001 Agreements (JA 5, 51, 93, 135)
Fountain Valley Agreement	Generation interconnection agreement between PSC Colorado and Fountain Valley Power, L.L.C.
FPA	Federal Power Act

GLOSSARY

Letter Order	*Xcel Energy Services, Inc.*, FERC Docket Nos. ER06-207, *et al.* (Dec. 23, 2005), R. 6, JA 181
Plains End Agreement	Generation interconnection agreement between PSC Colorado and Plains End, LLC
Plains End Settlement	Settlement agreement between Xcel and Plains End, LLC, resolving dispute over charges under the Plains End Agreement, approved by the Commission in *Xcel Energy Services, Inc.*, 107 FERC ¶ 61,198 (2004)
Prior Notice Order	*Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 (1993)
PSC Colorado	Public Service Company of Colorado, which is Xcel's public utility affiliate and the transmission service provider party to the 2001 Agreements and the Plains End Agreement
Rehearing Order	*Xcel Energy Services Inc.*, 114 FERC ¶ 61,295 (2006), R. 9, JA 193
Valmont Agreement	Generation interconnection agreement between PSC Colorado and Black Hills Colorado, LLC, regarding electric generating facility located near Valmont Electric Generating Station
Xcel	Petitioner Xcel Energy Services Inc. (also used interchangeably with PSC Colorado in this brief)

IN THE UNITED STATES COURT OF APPEALS
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No. 06-1174

XCEL ENERGY SERVICES INC.,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether, assuming jurisdiction, the Federal Energy Regulatory Commission ("Commission" or "FERC") reasonably exercised its broad discretion under the Federal Power Act ("FPA") in denying the request of Petitioner Xcel Energy Services Inc. ("Xcel") for waiver of the prior notice and filing requirements, FPA § 205(d), 16 U.S.C. § 824d(d), and 18 C.F.R. § 35.11, for interconnection agreements filed over four years after the requested effective dates.

COUNTERSTATEMENT OF JURISDICTION

The Court lacks jurisdiction to review the FERC orders being challenged here. In addition to satisfying the requirements of FPA § 313(b), 16 U.S.C. § 825*l*(b), for judicial review of FERC rulings, Xcel must satisfy the requirements of Article III of the United States Constitution. As set forth more fully in Part I.A of the Argument, *infra*, Xcel lacks standing because its claimed injury is entirely self-inflicted and thus not fairly traceable to the challenged FERC Orders, and because it has suffered no injury in fact. In addition, Xcel has failed to meet the statutory prerequisites under FPA § 313(b) because, as set forth more fully in Part I.B of the Argument, *infra*, Xcel did not raise on rehearing the alleged "penalty" imposed by the challenged FERC Orders, nor ask the Commission to grant an alternative equitable remedy should it deny waiver.

STATUTORY AND REGULATORY PROVISIONS

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

INTRODUCTION

This case concerns Xcel's untimely filing of four interconnection service agreements under FPA § 205, and the Commission's denial of waiver of the prior notice and filing requirements.

Xcel filed the agreements several years after commencement of service and asked the Commission to set effective dates over four years prior to the filing.

Xcel contended that waiver was warranted because the customer counterparties had agreed to those effective dates, the filings had been delayed pending the outcome of a separate FERC proceeding, and Xcel had never charged the customers under the agreements.

The Commission, however, denied waiver and accepted the agreements with an effective date 60 days after filing. *Xcel Energy Services Inc.*, Docket Nos. ER06-207, *et al.* (Dec. 23, 2005) (unpublished letter order), R. 6, JA 181, *reh'g denied*, 114 FERC ¶ 61,295 (2006), R. 9, JA 193.[1] The Commission found Xcel had not shown extraordinary circumstances justifying waiver because it had filed so long after service commenced, it had chosen to delay filing, and it had similarly violated the prior notice requirement in a previous case.

On appeal Xcel contends that the Commission unreasonably denied waiver, and in so doing imposed a "penalty" by in effect prohibiting Xcel from collecting charges retroactively for past service provided under the unfiled agreements.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

Section 201 of the Federal Power Act, 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). To enable such FERC review, the FPA requires every public utility to file with the Commission "schedules showing all [jurisdictional] rates and charges . . . together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." FPA § 205(c), 16 U.S.C. § 824d(c); *see* 18 C.F.R. § 35.1 (2006) (filing obligations).

Any change in any jurisdictional rate, charge, or contract requires 60 days' advance notice to the Commission and the public, "[u]nless the Commission otherwise orders." FPA § 205(d), 16 U.S.C. § 824d(d). Under some circumstances, the Commission may waive the notice requirement. *See id.* ("The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for . . . ."); 18 C.F.R. § 35.11 (2006) ("Upon application and for good cause shown, the Commission may, by

order, provide that a rate schedule, or part thereof, shall be effective as of a date prior to the date of filing or prior to the date the rate schedule would become effective in accordance with these rules."); *see also Central Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106 at 61,337-39 ("*Central Hudson*"), *reh'g denied*, 61 FERC ¶ 61,089 (1992); *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,984 ("*Prior Notice Order*"), *reh'g granted in part & denied in part*, 65 FERC ¶ 61,081 (1993); *see generally NSTAR Elec. & Gas Corp. v. FERC*, No. 05-1362, 2007 U.S. App. LEXIS 5521 at *9-10 (D.C. Cir. Mar. 9, 2007) (explaining statutory and regulatory basis for waiver).

The Commission has long required payment of refunds as a remedy for violating the filing and notice requirements of FPA § 205. As discussed more fully in Section III.A of the Argument, *infra*, the Commission, in a series of cases in the early 1990s, repeatedly confronted the problem of late tariff filings, and required refunds for sales made prior to filing, absent waiver, in an "attempt[] to convey to the electric utility industry the seriousness with which [FERC] viewed failures to comply with the prior notice and filing requirement contained in the FPA." *Prior Notice Order*, 64 FERC at 61,979; *see generally id.* at 61,973-74 (discussing development of policy in series of cases).

II. The Commission Proceedings And Orders

A. The Related Plains End Proceeding

Though this appeal concerns four interconnection agreements, entered into by the parties in 2001 but not filed with the Commission until November 2005, Xcel's argument before this Court rests in large part on a separate FERC proceeding that centered on a fifth interconnection agreement. On August 22, 2001, Xcel filed with the Commission an interconnection agreement, dated August 20, 2001, between Public Service Company of Colorado ("PSC Colorado")[2] and Plains End, LLC ("Plains End Agreement"). Xcel requested that the agreement be accepted for filing effective August 20, the date it was executed; accordingly, Xcel requested waiver of the 60-day prior notice period. Plains End, LLC filed a protest on September 13, 2001, objecting, *inter alia*, to the amount and calculation of the monthly facilities charge provided in the agreement.

On September 27, 2001, Xcel asked the Commission to defer action on the Plains End Agreement for 60 days after the filing, until November 20, to give the

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[2] PSC Colorado is Xcel's public utility affiliate; Xcel made all filings relevant to this case, before the Commission and this Court, on behalf of PSC Colorado. *See, e.g.,* Br. 1; R. 1, JA 5; R. 2, JA 51; R. 3, JA 93; R. 4, JA 135; R. 7, JA 184. For simplicity, this brief refers to PSC Colorado only in describing its interconnection agreements with various parties and quoting the FERC Orders, and otherwise refers to Xcel.

parties "the opportunity to discuss a negotiated resolution" of the disputed issues. Letter from William M. Dudley to FERC Secretary, *Xcel Energy Servs. Inc.*, Docket No. ER01-2905 (Sept. 27, 2001) ("First Deferral Request") (copy attached in Addendum). Xcel expressly waived any right under FPA § 205 to claim that FERC's lack of action within that time would serve to make the Plains End Agreement effective by operation of law. *Id.* at 2. Xcel subsequently filed two more requests to defer action, on November 19, 2001 (seeking another 60-day deferral, until January 19) and on January 15, 2002 (asking the Commission to "defer action indefinitely"), citing negotiation efforts and waiving arguments concerning FERC's inaction,[3] before finally withdrawing its deferral request on April 16, 2002.[4]

On September 13, 2002, the Commission conditionally accepted the Plains End Agreement for filing, granted waiver of the prior notice requirement, but allowed an effective date of August 23, 2001, one day after the filing. *Xcel Energy*

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[3] Letter from William M. Dudley to FERC Secretary, *Xcel Energy Servs. Inc.*, Docket No. ER01-2905 (Nov. 19, 2001) ("Second Deferral Request") (copy attached in Addendum); Letter from William M. Dudley to FERC Secretary, *Xcel Energy Servs. Inc.*, Docket No. ER01-2905 (Jan. 15, 2002) ("Third Deferral Request") (copy attached in Addendum).

[4] Letter from William M. Dudley to FERC Secretary, *Xcel Energy Servs. Inc.*, Docket No. ER01-2905 (Apr. 16, 2002) (copy attached in Addendum).

Services, Inc., 100 FERC ¶ 61,267 at P 11 (2002). The Commission referred the matter to a settlement judge. *Id.* at P 34. Xcel and Plains End ultimately reached a settlement agreement ("Plains End Settlement") that resolved all issues concerning the Plains End Agreement, including the dispute over the facilities charge. On May 27, 2004, the Commission approved the uncontested Plains End Settlement in *Xcel Energy Services, Inc.*, 107 FERC ¶ 61,198 (2004).

B. The 2001 Interconnection Agreements At Issue In This Appeal

Four interconnection agreements between PSC Colorado and various customers are at issue in this appeal. All four agreements were filed with the Commission on November 14, 2005, nearly 18 months after the Commission approved the Plains End Settlement. All of the agreements were entered into and had designated effective dates in 2001; three of the four agreements predated the Plains End Agreement by six months or more.

1. Valmont Agreement (FERC Docket No. ER06-208)

On January 26, 2001, PSC Colorado and Black Hills Colorado, LLC entered into a generator interconnection agreement ("Valmont Agreement"), under which PSC Colorado would provide interconnection service under its open access transmission tariff to Black Hills Colorado's electric generation facility located at PSC Colorado's Valmont Electric Generating Station. Under the Valmont Agreement, PSC Colorado would provide service for a period of 35 years

beginning June 26, 2001, the day the interconnection facilities were energized. R. 3 at 1-2, JA 93-94. The Valmont Agreement provided for a monthly facilities charge of $0. R. 3, Ex. E, JA 134.

2. Arapahoe Agreement (FERC Docket No. ER06-209)

Also on January 26, 2001, PSC Colorado and Black Hills Colorado, LLC entered into a similar generator interconnection agreement ("Arapahoe Agreement"), under which PSC Colorado would provide interconnection service to Black Hills Colorado's electric generation facility located at PSC Colorado's Arapahoe Electric Generating Station. Under the Arapahoe Agreement, PSC Colorado would provide service for a period of 35 years beginning March 31, 2002, the day the interconnection facilities were energized. R. 4 at 1-2, JA 135-36. The Arapahoe Agreement provided that Black Hills Colorado would pay PSC Colorado a monthly facilities charge in the amount of $727, commencing "on the later of (1) the date [the interconnection facilities were] first energized, (2) the date on which construction of [PSC Colorado]'s Interconnection Facility is completed to [PSC Colorado]'s reasonable satisfaction, or (3) such other date as this Interconnection Agreement is permitted to become effective by the Commission." R. 4, Art. 4, § 8.1, & Ex. E, JA 157, 161, 174.

3. Fountain Valley Agreement (FERC Docket No. ER06-207)

On February 13, 2001, PSC Colorado and Fountain Valley Power, L.L.C.

entered into a generator interconnection agreement ("Fountain Valley Agreement"), under which PSC Colorado would provide interconnection service to Fountain Valley Power's electric generation facility located adjacent to PSC Colorado's Midway Substation. Under the Fountain Valley Agreement, PSC Colorado would provide service for a period of 35 years beginning May 23, 2001, the day the interconnection facilities were energized. R. 1 at 1-2, JA 5-6. The Fountain Valley Agreement provided for a monthly facilities charge of $6,659, commencing on May 23, 2001. R. 4, § 8.1 & Ex. E, JA 31, 50.

4. BIV Generation Agreement (FERC Docket No. ER06-210)

On October 26, 2001, PSC Colorado and BIV Generation Company, L.L.C. entered into a generator interconnection agreement ("BIV Generation Agreement"), under which PSC Colorado would provide interconnection service to BIV Generation Company's electric generation facility located at the Brush Generating Station. Under the BIV Generation Agreement, PSC Colorado would provide service for a period of 35 years beginning April 9, 2002, the day the interconnection facilities were energized. R. 2 at 1-2, JA 51-52. The BIV Generation Agreement provided for a monthly facilities charge of $1,552 beginning on May 1, 2002. R. 2, § 8.1 & Ex. E, JA 78, 92.

C. The Challenged Commission Orders

On November 14, 2005, Xcel filed the Valmont Agreement, the Arapahoe

Agreement, the Fountain Valley Agreement, and the BIV Generation Agreement (collectively, the "2001 Agreements") with the Commission. Xcel requested that each agreement be made effective as of its execution date in 2001, as follows: Valmont and Arapahoe Agreements, January 26 (R. 3, JA 95; R. 4, JA 137); Fountain Valley Agreement, February 13 (R. 1, JA 7)[5]; and BIV Generation Agreement, October 26 (R. 2, JA 53). In each submission letter ("Filing Letter"), Xcel "request[ed] waiver of any Commission regulations necessary for the Agreement to be effective as of the date requested." Filing Letters at 3, JA 7, 53, 95, 137.

Also in each filing, Xcel explained that the accompanying interconnection agreement included rates, terms, and conditions "reflect[ing] the rate treatment and certain associated terms and conditions" adopted in the Plains End Settlement. Xcel noted that each interconnection agreement "ha[d] not previously been filed at the Commission." Filing Letters at 2, JA 6, 52, 94, 136; *accord* Request for

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[5] There has been some confusion regarding this date. In its brief, Xcel first correctly notes the effective date requested for the Fountain Valley Agreement, Br. 11, but later mistakenly asserts that the requested effective date was May 23, 2001, Br. 29 n.4. The Commission made the same error in the challenged FERC Orders. May 23 was the date on which the interconnection facilities were energized and on which the Fountain Valley Agreement provided the facilities charge would begin to be imposed. Nevertheless, Xcel's requested effective date for the agreement was, in fact, February 13.

Rehearing of Xcel Energy Services Inc. at 2, R. 7 ("Rehearing Request"), JA 184, 185. Xcel further explained that it was "aware of the possible penalties of filing agreements out of time . . . ." Filing Letters at 2, JA 6, 52, 94, 136. Xcel also stated that it had not collected any charges under any of the 2001 Agreements. *Id.* For that reason, Xcel stated that "refunds would not be applicable, or necessary," for the late filing of the 2001 Agreements. *Id.*

1. Letter Order

On December 23, 2005, in an unpublished letter order, the Commission (acting pursuant to authority delegated to its Staff) accepted the 2001 Agreements for filing, but denied Xcel's request for waiver of the prior notice and filing requirements and made the Agreements effective January 13, 2006. *Xcel Energy Services, Inc.*, FERC Docket Nos. ER06-207, *et al.* (Dec. 23, 2005) ("Letter Order"), R. 6, JA 181. Noting that waiver may be granted as long as individual service agreements under a generally-applicable tariff are filed within 30 days after service commences, the Commission determined that the 2001 Agreements "do not meet the criteria for waiver . . . ." *Id.* at 2, JA 182. Though Commission policy would require Xcel to refund the time value of revenues actually collected without FERC authorization, the Commission found that, "because Xcel indicates here that [PSC Colorado] has not yet charged Customers under these Agreements, no refunds are due." *Id.*

2. Rehearing Order

Xcel requested rehearing of the Letter Order, arguing that "the Commission should reconsider and grant waiver based on the specific factual circumstances of these filings." Rehearing Request at 2, JA 185. Xcel contended that: (1) the settlement efforts in the Plains End proceeding and "parallel negotiations" with the customers under the 2001 Agreements "created extraordinary circumstances," *id.* at 4, JA 187; and (2) there was "good cause" for waiver because the rates had never been charged and the customers had consented to retroactive effective dates, *id.* at 5-6, JA 188-89.

On March 21, 2006, the Commission issued its Order Denying Rehearing, *Xcel Energy Services Inc.*, 114 FERC ¶ 61,295 (2006) ("Rehearing Order," and together with the Letter Order, the "FERC Orders"), R. 9, JA 193. The Commission found that none of the standards for waiver set forth in the *Prior Notice Order* and *Central Hudson* applied in this case. *Id.* at P 8, JA 195-96. The 2001 Agreements were not filed within 30 days of commencement of service and thus did not qualify for waiver under the *Prior Notice Order*. *Id.* Nor were the 2001 Agreements filed pursuant to a previously-accepted settlement, so waiver under *Central Hudson* did not apply. *Id.* "Rather, [Xcel] simply chose to await the outcome of its negotiations with Plains End before filing." *Id.* Indeed, Xcel filed "many years after service commenced." *Id.*

The Commission also concluded that Xcel was "unable to demonstrate the presence of extraordinary circumstances" required for waiver to be granted where a filing for new service was made on or after the date service had commenced. *Id.* at P 9, JA 196-97. Furthermore, "[l]ack of harm to the Customers from [Xcel]'s non-compliance is not an indicator of 'good cause' and does not warrant waiver." *Id.* at P 11, JA 197. The Commission rejected Xcel's argument that good cause existed where the parties had agreed on an effective date and waiver was in the public interest, because Xcel relied on cases that pre-dated *Central Hudson*: "This analysis is irrelevant because subsequently *Central Hudson* established the Commission's current policy for when waiver will be granted." *Id.* at P 12, JA 197-98. Finally, the Commission noted that "this is not the first time [Xcel] has filed belatedly" without explaining why it could not have filed timely. *Id.* at P 13 (discussing *Xcel Energy Services Inc.*, 111 FERC ¶ 61,206 (2005)), JA 198.

This petition followed.

SUMMARY OF ARGUMENT

The Commission reasonably denied Xcel's request for waiver of the FPA's prior notice and filing requirements.

First, as to jurisdiction, Xcel lacks Article III standing because its claimed injury is not fairly traceable to the challenged FERC Orders. Xcel argues that the Commission's denial of waiver leaves Xcel unable to charge its customers retroactively for interconnection service that it provided for over four years under the 2001 Agreements. That injury, however, was entirely self-inflicted, as Xcel chose to provide service under unfiled agreements without collecting any facilities charges. Xcel also cannot show any injury in fact as to the Valmont Agreement because that agreement provides for a facilities charge of $0, nor as to any of the remaining 2001 Agreements because, by its own account, Xcel was obligated by related contracts to reimburse those customers for all such charges.

Second, Xcel's argument that the FERC Orders imposed a "penalty" and its request for alternative equitable relief from this Court are wholly new on appeal and are thus jurisdictionally barred under FPA § 313(b).

On the merits, the Commission appropriately exercised its broad discretion in denying Xcel's request to make the 2001 Agreements effective over four years before they were filed. Applying its longstanding policy regarding waivers of the advance notice and filing requirements, the Commission reasonably found that

Xcel had not shown extraordinary circumstances justifying waiver in this case. Xcel failed to file the 2001 Agreements until several years after jurisdictional service commenced. Xcel chose to await the outcome of the Plains End proceeding, despite the Commission's prior warnings that utilities may not choose for themselves whether and when to comply with FPA § 205. The Commission noted that Xcel had also filed belatedly in an earlier case, where the Commission had similarly denied waiver.

Finally, because the only question presented to the Commission was whether to grant waiver, and because Xcel never asked the Commission in the alternative to allow retroactive recovery of all or a portion of the facilities charges Xcel had chosen not to collect for service it provided under unfiled agreements, the FERC Orders did not improperly penalize Xcel by denying a waiver it failed to justify.

ARGUMENT

I. THE COURT HAS NO SUBJECT MATTER JURISDICTION OVER XCEL'S PETITION

A. Xcel Lacks Standing

To obtain judicial review of a FERC order, a party must meet the requirements of Article III standing. *See, e.g., Public Util. Dist. No. 1 of Snohomish County v. FERC*, 272 F.3d 607, 613 (D.C. Cir. 2002) (party is not "aggrieved" within the meaning of FPA § 313(b), 16 U.S.C. § 825*l*(b), unless it can establish constitutional and prudential standing). The "irreducible constitutional minimum" for standing requires the petitioner to have suffered (1) an "injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical," (2) that has a "causal connection" with the challenged agency action, and (3) that likely "will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal citations and quotation marks omitted); *see also, e.g., Bennett v. Spear*, 520 U.S. 154, 162 (1997). Xcel's appeal fails both the "injury in fact" and the "causal connection" requirements as to all four of the 2001

Agreements.[6]

1. Xcel Cannot Show A "Causal Connection" Between Its Claimed Injury And The Challenged Agency Action

Xcel cannot demonstrate the requisite "causal connection" between the FERC Orders and its alleged injury. An injury, for purposes of Article III standing, must be "fairly . . . trace[able] to the challenged action . . . ." *Lujan*, 504 U.S. at 560 (alterations in original). Standing cannot be based on an injury that is "entirely self-inflicted." *Brotherhood of Locomotive Eng'rs & Trainmen v. Surface Transp. Bd.*, 457 F.3d 24, 28 (D.C. Cir. 2006).

In *Brotherhood*, the petitioner union challenged an agency's determination that a railroad's acquisition of track was exempted from the authorization process required by one statutory provision, rather than excepted from the agency's authority under another statutory provision. *See* 457 F.3d at 26-27. Because the union's collective bargaining agreement with the railroad applied to excepted transactions but not to exempted ones, the agency's decision meant the union was not entitled to bargain. *Id.* at 26. This Court, however, rejected the union's claim of standing on that basis: "This injury was not in any meaningful way 'caused' by

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[6] On July 10, 2006, the Commission filed a motion to dismiss the petition for lack of standing. By Order of this Court issued on October 24, 2006, that motion was carried over for briefing on the merits.

the Board . . . . [H]ad the Union not traded away its right to bargain over the effects of exempted transactions, it would have no interest" in the agency's determination. *Id.* at 28. Thus, the Court held that "[t]he harm suffered, 'insofar as it is incurred voluntarily,' is simply not 'fairly . . . trace[able]' to the challenged action of the agency." *Id.* at 29 (alterations in original) (citation omitted).[7]

Likewise, Xcel's professed injury here — its inability to collect monthly facilities charges retroactively for service provided for several years under the unfiled 2001 Agreements — is wholly of its own making. Xcel contends that, "[i]n effect, the Challenged Orders would require [PSC] Colorado to provide multiple years of free Interconnection service to three of the four counterparties to the [2001] Agreements." Xcel, however, *chose* to provide interconnection service under those unauthorized agreements for several years without filing them and without collecting any facilities charges. *See* Br. 35.

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[7] *See also Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (rejecting plaintiff states' standing to challenge defendant states' tax on income of nonresident employees; diminution of taxes paid to plaintiff states was "self-inflicted" by their decisions to credit resident taxpayers for income taxes paid to other states); *Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 438 (D.C. Cir. 1989) (trade organization lacked standing to challenge agency decision allowing its members' competitors to use less expensive methods of disposing hazardous waste; even if members were "forced" by competitive pressures to use methods exposing them to environmental cleanup liability, injury would be self-inflicted and not caused by agency action).

Xcel's "injury" was not only voluntary but also avoidable. Xcel could have preserved its ability to charge for the service it was providing by timely filing the 2001 Agreements and asking for immediate Commission action. Alternatively, Xcel could have — as it did with the Plains End Agreement, which it filed promptly, followed by three consecutive requests for deferral of Commission action[8] — timely filed the 2001 Agreements and asked the Commission to defer any action on the filings, even "indefinitely." Third Deferral Request at 1. Had Xcel instead collected the disputed facilities charges under the unfiled agreements, it would have been liable for refunds of the time value of those amounts under the Commission's *Prior Notice Order* (*see infra* page 28). Xcel *knew* that it assumed the risk of late filing — when it eventually did file the 2001 Agreements, it candidly admitted that "[PSC] Colorado is aware of the possible penalties of filing agreements out of time" (Filing Letters at 2, JA 6, 52, 94, 136) — and, as it demonstrated in the Plains End proceeding, it plainly knew how to avoid the consequences.

Instead, here, Xcel opted to provide interconnection service without FERC

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[8] That procedure successfully preserved Xcel's rights; when the Commission eventually accepted the Plains End Agreement for filing, subject to refund, it set the effective date on August 23, 2001, one day after the initial filing. *Xcel Energy Servs., Inc.*, 100 FERC ¶ 61,267 at PP 1, 11 (2002).

authorization and without payment. Having done so voluntarily, Xcel cannot "be heard to complain about damage inflicted by its own hand." *Pennsylvania*, 426 U.S. at 664. Its asserted injury was "entirely self-inflicted" and cannot support its claim of standing.

2. Xcel Suffered No "Injury In Fact" In Connection With Any Of The 2001 Agreements

Xcel all but concedes that it has suffered no injury and seeks no relief with regard to the Valmont Agreement, which provides for a monthly facilities charge of $0. *See* Br. 13 n.1; *see also* R. 3, Ex. E, JA 134. Because no monthly facilities charge would have been due under the Valmont Agreement under any circumstances, and Xcel seeks no recovery as to that agreement, Xcel has no standing and this appeal should be dismissed with regard to the underlying FERC proceeding concerning that agreement, FERC Docket No. ER06-208.

Moreover, Xcel can show no injury in fact with regard to any of the 2001 Agreements. By Xcel's own account, related power purchase agreements between PSC Colorado and each of the interconnection customers (which sell power to Xcel under those agreements) require PSC Colorado to "reimburse [each interconnection customer/power seller] for all Interconnection-related facilities charges that [the customer] incurs during the ten-year term of the [power purchase agreement]." Br. 11-12 (describing power purchase agreement with Fountain Valley Power), 14-15 (same regarding Arapahoe Agreement), 16 (same regarding

BIV Generation Agreement); *see also* Br. 13 (same regarding Valmont Agreement).

Therefore, *all* of the facilities charges that Xcel now complains it cannot collect from its customers under the 2001 Agreements for the period prior to January 13, 2006 (the effective date granted in the Letter Order) would in any event have been repaid to those customers — resulting in a net "injury" of $0. For that reason, Xcel lacks standing as to all four underlying FERC proceedings.

B. Xcel's "Penalty" Arguments Are Barred Because It Failed To Raise Them On Rehearing Before The Commission

In addition to its lack of standing, Xcel is jurisdictionally barred from introducing on appeal objections that it failed to raise on rehearing before the Commission. "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so." FPA § 313(b), 16 U.S.C. § 825*l*(b)); *see also, e.g., California Department of Water Resources v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002) (strictly construing jurisdictional requirement); *Town of Norwood v. FERC*, 906 F.2d 772, 774 (D.C. Cir. 1990) (same). In addition to being an express statutory prerequisite for jurisdiction, rehearing serves the important purpose of "enabl[ing] the Commission to correct its own errors, which might obviate judicial review, or to explain in its expert judgment why the party's objection is not well taken, which facilitates

judicial review." *Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005).[9]

Xcel devotes a substantial portion of its brief to an issue that it never raised before the Commission, on rehearing or otherwise: namely, that the FERC Orders imposed a "penalty" by denying waiver and thus precluding Xcel from recovering the uncollected facilities charges retroactively. *See* Br. 19-20, 32-36. Relatedly, Xcel requests alternative equitable relief from this Court that it likewise never sought from the Commission:

> [T]he Court should direct FERC to permit PS[C] Colorado to recover the rates set forth in the [2001] Agreements from the effective dates agreed upon in those agreements, with at most a time value of money reduction with respect to any charges collected prior to the January 13, 2006 effective date established in the Challenged Orders.

Br. 37.

Before the Commission, Xcel requested only that the Commission waive the prior notice requirements and set the effective dates of the 2001 Agreements as of the execution dates in 2001. *See* Filing Letters at 3, JA 7, 53, 95, 137. In seeking rehearing, Xcel asked the Commission only to "reconsider its decision to deny

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[9] *See also*, *e.g.*, *Ameren Servs. Co. v. FERC*, 330 F.3d 494, 499 n.8 (D.C. Cir. 2003) ("The very purpose of rehearing is to give the Commission the opportunity to review its decision before facing judicial scrutiny."); *Canadian Ass'n of Petroleum Producers v. FERC*, 308 F.3d 11, 15 (D.C. Cir. 2002) ("Simply put, the court cannot review what the Commission has not viewed in the first instance.").

waiver of the notice requirements." Rehearing Request at 2, JA 185. Xcel made no mention of a "penalty" — "unprecedented" (Br. 34) or otherwise — and at no time suggested, as here, that the denial of waiver "thereby establish[ed] a rate of $0 for past Interconnection service . . . ." Br. 36. Nor did Xcel ever ask the Commission, should it deny waiver, to allow an equitable retroactive recovery of past charges, less a "time value" reduction. *Cf.* Br. 8, 37.

Instead, Xcel simply pointed to its noncollection of charges as a factor mitigating its violation of prior notice requirements and justifying waiver: "Although PS[C] Colorado is aware of the possible penalties of filing agreements out of time, [it] has not yet charged the Customer under this agreement to date. Therefore, refunds would not be applicable, or necessary, for this Agreement." Filing Letters at 2, JA 6, 52, 94, 136. On that basis, the Commission found that refunds were not warranted: "because Xcel indicates here that [PSC Colorado] has not yet charged Customers under these Agreements, no refunds are due." Letter Order at 2, JA 182. Xcel highlighted this point again on rehearing. Rehearing Request at 3, JA 186. In addition, Xcel went on to argue that its noncollection supported granting waiver because the failure to file had caused no harm. *See id.* at 5 ("Because the rates have never been charged under these agreements, there is no harm in allowing a retroactive effective date."), JA 188; *see also id.* at 6 ("*There is no rate impact* as these rates have never been charged under these

Agreements.") (emphasis added), JA 189.

Thus, all of Section II of Xcel's Argument on brief — its "penalty" argument — is newly-minted on appeal, as is the correlative request for equitable recovery of at least some uncollected charges in the brief's Conclusion. Because Xcel never gave the Commission an opportunity to consider either its argument that denial of waiver under the circumstances "result[ed] in an excessively harsh penalty" (Br. 32) or its plea for alternative relief, Xcel is accordingly foreclosed from raising those issues before this Court.

II. 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." *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 702 (D.C. Cir. 2000). Additionally, this Court gives substantial deference to the Commission's interpretation of its own regulations and precedents. *See NSTAR*, 2007 U.S. App. LEXIS 5521 at *11 (deferring to Commission's interpretation of *Central Hudson* rule and rejecting challenge to grant of waiver); *Amerada Hess Pipeline Corp. v. FERC*, 117 F.3d 596, 600 (D.C. Cir. 1997).

In particular, this Court's "review of the Commission's waiver rulings is 'quite limited,' as 'Congress, through [FPA] § 205, has clearly delegated waiver discretion to the Commission and not to the courts.'" *NSTAR*, 2007 U.S. App. LEXIS 5521 at *10 (quoting *City of Girard v. FERC*, 790 F.2d 919, 925 (D. C. Cir. 1986)). Indeed, none of the court cases cited by Xcel overturned the Commission's determination either to grant or to deny a waiver.

III. THE COMMISSION REASONABLY DETERMINED THAT WAIVER OF THE PRIOR NOTICE REQUIREMENTS WAS NOT WARRANTED

A. The Commission's Policy On Late Filings And Waivers Reflects The Importance Of The FPA's Prior Notice Requirements

1. The Commission's Prior Notice Policy

FPA § 205 requires that all jurisdictional rates be timely filed with the Commission. 16 U.S.C. § 824d; *see also* 18 C.F.R. § 35.1 (2006) (implementing

notice and filing requirements); *see supra* page 4. The Commission has emphasized that this is "not to be taken lightly as a mere procedural requirement." *Florida Power Corp.*, 60 FERC ¶ 61,003 at 61,023 (1992); *see also El Paso Elec. Co*., 105 FERC ¶ 61,131 at P 36 (2003) ("We do not consider failure to file jurisdictional agreements to be a *de minimus* violation of Section 205."). Rather, it is integral to the Commission's own duties under § 205: "[T]he prior notice and filing requirement is intended to facilitate the Commission's responsibilities under section 205 of the FPA to ensure that all rates and charges for jurisdictional service are just and reasonable and not unduly discriminatory." *PacifiCorp Elec. Operations*, 60 FERC ¶ 61,292 at 62,036 (1992).

Therefore, a utility's failure to comply is of particular concern because it precludes the Commission from determining whether the unauthorized rates are just and reasonable. *See Central Maine Power Co.*, 57 FERC ¶ 61,083 at 61,302 (1991). For that reason, the Commission "[cannot] ignore its statutory duty to determine whether rates are just and reasonable by permitting utilities to submit filings whenever convenient"; rather, it "must have the opportunity to examine proposed rates, terms, and conditions of jurisdictional service before that service commences . . . ." *El Paso*, 105 FERC ¶ 61,131 at P 14 (discussing *Central Maine*), *cited in* Rehearing Order at P 9 & n.18, JA 197.

To fulfill its statutory obligations regarding late tariff filings, the

Commission has, for over 15 years, imposed a refund remedy on the grounds that such a remedy deters late filings, furthers the Commission's statutory goals, and benefits customers. The Commission developed its refund policy in 1991 in *Central Maine*, arising from the Commission's concern about the increasing number of rate filings that were being made after the commencement of jurisdictional service. 56 FERC ¶ 61,200 at 61,817 & n.6, *on reh'g*, 57 FERC ¶ 61,083 at 61,303 (1991); *Central Hudson*, 61 FERC at 61,355; *see also Prior Notice Order*, 64 FERC at 61,981 (noting that remedial policy was issued "because of repeated violations of that important [filing] obligation by the electric utility industry").

In response to that trend, the Commission announced a policy statement of industry-wide application regarding implementation of the FPA's 60-day prior notice and filing requirement. In its *Prior Notice Order*, the Commission specified that, for cost-based rates, the Commission would require a utility to refund "the time value of the revenues collected . . . for the entire period that the rate was collected without Commission authorization." 64 FERC at 61,979.[10]

The Commission emphasized that complying with FPA § 205 is the utility's

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[10] The *Prior Notice Order* also set forth a refund remedy for unauthorized late filing of market-based rates, which is not relevant here.

responsibility and that the Commission would not tolerate self-help; where there is any doubt, the onus is on the utility to file with the Commission. "To the extent a utility remains uncertain, even after consulting this order . . . , as to its obligation to file rates and charges for a particular transaction or type of transaction, it should assume the initiative to seek a specific ruling." *Prior Notice Order*, 64 FERC at 61,977-78. Rejecting calls for further amnesty periods beyond those it had already allowed in the course of implementing its enforcement policy, the Commission declared that "[i]f still unsure, utilities should take the precaution to file all questionable agreements as soon as possible . . . ." *Id.* at 61,978. *See also Central Maine*, 57 FERC at 61,303 (rejecting proposed approach that "would permit utilities, in effect, to ignore a statute to which they must adhere, based upon their own subjective views of the need for timeliness of Commission review[]").

2. Standards For Waiver Of The 60-Day Prior Notice Period

In *Central Maine*, the Commission rebuffed a claim that it had departed without warning from a "past practice of 'generously' granting waivers" of prior notice requirements. 57 FERC at 61,303. In *Central Hudson*, the Commission subsequently took the opportunity to "provide further guidance to the electric utility industry concerning the circumstances under which we will find good cause for waiver of notice." 60 FERC at 61,337. Specifically, the Commission announced that:

> [W]aiver of notice will generally be appropriate when the filing has no rate impact[11] or reduces the rate, or when a rate increase and its effective date are prescribed by an agreement on file with the Commission or by a settlement agreement accepted by the Commission.

Id. Even where waiver was likely to be granted, however, the Commission again cautioned utilities not to drag their feet: "Even in these circumstances, however, the Commission stresses the need for public utilities to make the filings as soon as possible." *Id.*

Pertinent to this case, the Commission established different standards for filings made in advance of the commencement of service and those made afterward:

> When considering requests for waiver related to the provision of new service, we must balance the requirement that utilities promptly file their rates as embodied in the Federal Power Act and the need of utilities to transact business on short notice. Accordingly, we will grant waiver of notice if *good cause* is shown and the agreement is filed *prior to* the commencement of service. . . .
>
> Absent *extraordinary circumstances*, we will not grant waiver

[11] The Commission later explained that "no rate impact" means filings that do not change rates, "such as notices of cancellation when the contract expires by its own terms and the customer does not desire an extension, changes in delivery points, and changes in non-rate terms . . . ." *Id.* at 61,338. This stands in contrast to Xcel's representation that the 2001 Agreements imposing facilities charges would have "no rate impact" because Xcel had not in fact collected those charges (Rehearing Request at 6, JA 189) — all the more so now that Xcel claims it should be allowed to recover those amounts retroactively.

> of notice when an agreement for new service is filed *on or after* the day service has commenced.

Central Hudson, 60 FERC at 61,339 (emphases added). The Commission did not limit that standard, as Xcel implies (Br. 24), to the particular circumstances — the utility's claim that the "press of other business" delayed its filing — raised in that case. *See* 60 FERC at 61,339.

The Commission revisited this guidance in the *Prior Notice Order*, in which it clarified that, as to service agreements filed under existing, FERC-approved "umbrella" tariffs (tariffs of general applicability), waiver would be granted for agreements filed within 30 days after commencement of service. 64 FERC at 61,984. Except for that one category of filings, however, the Commission held firm: "We will not relax the 'extraordinary circumstances' standard of waiver for any other type of agreement for new service. . . . [W]e will retain, without modification, all of the other *Central Hudson* standards for waiver." *Id.*

B. The Commission Reasonably Determined That Xcel Did Not Meet The Standard For Waiver In This Case

1. The Commission Appropriately Held That Xcel Must Show "Extraordinary Circumstances" Justifying Waiver

The Commission determined that none of the conditions for allowing waiver set forth in the *Prior Notice Order* and *Central Hudson* applied in this case: the latter because the 2001 Agreements were not pursuant to a previously-accepted settlement, and the former because the 2001 Agreements, which were service

agreements for interconnection under PSC Colorado's existing umbrella tariff, were not filed within 30 days of commencement of service. Rehearing Order at P 8, JA 195-96; *accord*, Letter Order at 2, JA 182. Indeed, "the agreements were filed long after the date that service commenced. . . . [H]ere Xcel filed many years after service commenced." Rehearing Order at P 8, JA 196. Having ruled out the grounds for waiver available for "good cause," the Commission turned to the policy, established in *Central Hudson*, that where a filing for new service is made after the date that service commenced, the Commission will not grant waiver "absent extraordinary circumstances." Rehearing Order at P 9, JA 196.

Xcel contends that the Commission has a "long-standing general policy" of finding good cause for waiver where the parties to an agreement have agreed on the effective date and waiver is in the public interest. Br. 24-25 (citing, *inter alia*, *City of Girard*, 790 F.2d at 925); *see* Br. 24-32 (also relying on, *inter alia*, *City of Piqua v. FERC*, 610 F.2d 950, 954-55 (D.C. Cir. 1979), and *Northeast Utils. Serv. Co.*, 52 FERC ¶ 61,097 at 61,487 (1990), *aff'd*, *City of Holyoke Gas & Elec. Dep't v. FERC*, 954 F.2d 740 (D.C. Cir. 1992)). But Xcel's reliance on cases that predate *Central Hudson* and the *Prior Notice Order* is misplaced. As the Commission explained, "[t]his analysis is irrelevant because subsequently *Central Hudson* established the Commission's *current* policy for when waiver will be granted." Rehearing Order at P 12 & n.23 (emphasis added) (distinguishing *City of*

Holyoke and *City of Girard*), JA 197-98; *cf. City of Girard*, 790 F.2d at 925 (affirming FERC's *then*-current policy as "a reasonable exercise of the Commission's delegated discretion"). In other words, any "departure" from the prior policy, and from the cited precedents (dating from 1979 to 1990), took place over a decade ago in the series of decisions, from *Central Maine* to *Central Hudson* to *Prior Notice Order*, that cracked down on widespread § 205 violations and tightened the standards for waiver.

To the extent Xcel raises a broader challenge to the Commission's "interpretation of its statutory authority to grant . . . waiver" (Br. 25), which Xcel contends should "place special emphasis" on "retention . . . of private contractual arrangements" (Br. 25-27), its argument is wholly new on appeal and thus barred by FPA § 313(b), 16 U.S.C. § 825*l*(b).

2. On The Facts Of This Case, The Commission's Determination That Xcel Had Not Shown Extraordinary Circumstances Justifying Waiver Was Reasonable

Xcel contends that the Commission failed to consider circumstances that supported waiver. Br. 21. The Commission, however, considered all arguments that Xcel presented below and found them either irrelevant or unpersuasive. *See* Rehearing Order at P 8 ("[Xcel]'s arguments . . . are not persuasive"), JA 195; *id.*. at P 10 (distinguishing *Mirant Americas Energy Mktg., L.P.*, 112 FERC ¶ 61,056 (2005), where extraordinary circumstances were found justifying waiver), JA 197;

id. at P 11 ("Lack of harm to the Customers from [Xcel]'s noncompliance is not an indicator of 'good cause' and does not warrant waiver."), JA 197; *id.* at P 12 (rejecting Xcel's analysis that relied, as here, on obsolete pre-1992 policy).

The Commission provided several reasons, each well-supported by the record, for its conclusion that waiver was not warranted in the circumstances of this case. The Commission's reasoning more than satisfies the "quite limited" review of the Commission's discretionary determination.

First, the Commission was particularly disturbed by the length of time after commencement of service when Xcel finally filed the 2001 Agreements. *See* Rehearing Order at P 8 ("long after," "many years after," "years after"), JA 196; *id.* at P 9 ("years later"), JA 196. *Cf. Central Maine*, 57 FERC at 61,299, 61,302 (noting utility's "degree of disregard for prior Commission review and oversight," where it filed 14 agreements between one and four years after service commenced). None of the cases that Xcel now cites involved such a late filing. *See, e.g., ISO New England Inc.*, 117 FERC ¶ 61,198 (2006) (granting effective date one day *after* filing); *Entergy Mississippi, Inc.*, 102 FERC ¶ 61,105 (2003) (same); *Southwest Power Pool, Inc.*, 115 FERC ¶ 61,051 (2006) (granting effective date three days before filing); *Nevada Power Co.*, 97 FERC ¶ 61,324 (2001) (granting effective date 31 days before filing, for service agreements under umbrella tariff); *Northeast Utils.*, 52 FERC ¶ 61,097 (granting effective date 19

months before filing, under pre-*Central Hudson* policy); *see also City of Piqua*, 610 F.2d at 951-52 (affirming FERC order that granted effective date less than three months before filing date, under pre-*Central Hudson* policy).[12]

Second, the Commission found no justification for waiver in Xcel's self-help: "[Xcel] simply chose to await the outcome of its negotiations with Plains End before filing." Rehearing Order at P 8, JA 196. But Xcel "has a statutory obligation under sections 205(c) and (d) of the [FPA] to provide the Commission and the public with at least 60 days' prior notice . . . ." *Id.* at P 9 (citing *El Paso*, 105 FERC ¶ 61,131 at P 14), JA 196-97. Thus, "an informal, unfiled agreement, not accepted by the Commission, between [Xcel] and its Customers to await the outcome of the Plains End settlement negotiations before filing the agreements at issue here does not constitute the 'extraordinary circumstances' required to waive

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[12] These waiver cases — none of which was presented below to the Commission — are distinguishable not only by the shorter time periods but also by other facts. For example, both *ISO New England* and *Southwest Power Pool* involved agreements that did not change rates, and so were subject to the most lenient waiver standard under *Central Hudson*. *See* 117 FERC ¶ 61,198 at P 9; 115 FERC ¶ 61,051 at P 13 & n.26 (citing *Central Hudson*, 60 FERC at 61,338). The agreement in *ISO New England* was filed only three weeks after execution, and the early effective date was requested by the customer so that it could participate in ISO auctions as soon as possible. 117 FERC ¶ 61,198 at P 9. In *Southwest Power Pool*, the agreement was filed "promptly" after execution, rather than awaiting the outcome of other proceedings or further negotiations. 115 FERC ¶ 61,051 at PP 1, 10.

the 60-day prior notice requirement." *Id.*

The Commission's stance is consistent with its earlier warnings that utilities are not entitled to choose for themselves whether and when to comply with statutory notice and filing requirements. *See supra* page 29 (quoting *Prior Notice Order*, 64 FERC at 61,977-78, and *Central Maine*, 57 FERC at 61,303). Xcel's principal defense of its delay in filing is that it was trying to save the Commission the trouble of resolving disputes between the parties. *See* Br. 30 (Xcel's delay pending the outcome of the Plains End proceeding and ensuing negotiations "eliminated the need for FERC to engage its limited resources in the resolution of potential disputes"); *see generally* Br. 27-30. But the Commission long ago made clear that this is not the utility's call to make.

Third, the Commission noted that this was "not the first time [Xcel] has filed belatedly." Rehearing Order at P 13, JA 198. *Contrast City of Holyoke*, 954 F.2d at 744 (upholding Commission's grant of waiver, noting that "[n]othing in the record supports [the petitioner]'s allegation that [the filing utility] has a history of delaying the filing of rate agreements"). As the Commission explained, it had denied Xcel's request for waiver in a 2005 decision concerning amendments to 11 transmission service agreements. Rehearing Order at P 13 (discussing 111 FERC ¶ 61,206), JA 198.

Notably, the filing in that earlier case was made *prior to* the requested

effective date (by over three weeks).[13] For that reason, the Commission applied a less stringent standard for waiver than "extraordinary circumstances"; there, it required "a strong showing of good cause" because the filing was made before service commenced but imposed a rate change without a contractually agreed effective date. 111 FERC ¶ 61,206 at P 20 (citing *Central Hudson*, 60 FERC at 61,339). Nevertheless, the Commission denied waiver, based in part — as here — on Xcel's self-help. *Id.* Xcel had argued that waiver was warranted because it had awaited Commission action on a request for rehearing in another proceeding "in order to avoid filing for rate changes unnecessary if the Commission granted rehearing" and decided in Xcel's favor on a cost issue. *Id.* The Commission rejected that excuse, stating that "Xcel does not explain why it could not have timely filed an application to take effect April 1, 2005 in the event that rehearing was denied." *Id.*

Having previously found Xcel's choice to delay filing unacceptable even under a more lenient "good cause" test, the Commission acted consistently in denying waiver for Xcel's tardy filing of the 2001 Agreements: "Similarly, in the

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[13] Xcel filed the agreements on March 11, 2005, requesting a limited waiver that would allow them to become effective April 1. 111 FERC ¶ 61,206 at PP 1, 8. (The timely filing date — *i.e.*, 60 days before the requested effective date — would have been January 31.) Instead, the Commission accepted the agreements for filing effective 60 days after filing, on May 10. *Id.* at PP 19-20.

present case, [Xcel] does not explain why it could not have filed timely." Rehearing Order at P 13, JA 198.[14]

Moreover, the circumstances of this case further bear out the Commission's determination that waiver was not warranted. Xcel's arguments for waiver rest entirely on its claim that the resolution of the dispute over the Plains End Agreement was the event on which all the 2001 Agreements hinged, so that the extended process of litigating, negotiating, and ultimately resolving the dispute with Plains End accounts for the delay in filing the 2001 Agreements. *See* Br. 9-10, 12-16, 29-30. (Xcel does not explain why, if its delay in filing was "wholly attributable" to the Plains End proceeding (*e.g.,* Br. 12), an additional 18-month stretch passed after FERC's approval of the Plains End Settlement before Xcel finally submitted the 2001 Agreements.) But that argument obscures two key facts: (1) that three of the four 2001 Agreements actually *predated* the Plains End Agreement by substantial periods, and (2) that Xcel's conduct in the Plains End proceeding in fact demonstrates that it could have timely filed the 2001

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[14] Nor was this case the last to address Xcel's untimeliness. In a third set of orders, now pending on review before this Court, the Commission denied waiver of the prior notice requirement for an interconnection agreement filed in June 2006 — three months after the Rehearing Order in this case — for which Xcel requested a January 2001 effective date. *Xcel Energy Servs. Inc.*, 117 FERC ¶ 61,225 (2006) (citing earlier *Xcel* orders), *appeal pending*, No. 07-1014.

Agreements while awaiting the outcome of the Plains End proceeding and continuing negotiations with its other customers.

Specifically, the Plains End Agreement was executed by the parties and filed with the Commission in August 2001 — already seven months after the execution and requested effective dates of the Valmont and Arapahoe Agreements, and six months after that of the Fountain Valley Agreement. Service under at least the Fountain Valley and Valmont Agreements had already commenced (on May 23 and June 26, 2001, respectively (*see* Filing Letters at 1, JA 5, 93)) — well beyond the 30-day period allowed for filing service agreements under an umbrella tariff. Put differently, at least two of the unfiled 2001 Agreements were *already* considerably late *even before the Plains End proceeding began*.

In addition, as noted *supra* at pages 6-7 and 20, Xcel demonstrated that it well knew how to comply with the Commission's notice and filing requirements, even where a rate issue remained in dispute — leaving its self-help with respect to the 2001 Agreements all the more unexplained. Xcel filed the Plains End Agreement at the Commission a mere two days after its execution and requested effective date. When Plains End filed its protest concerning the facilities charge, Xcel responded by filing three consecutive requests for the Commission to defer action, specifically citing efforts to "discuss a negotiated resolution" as the reason. First, Second, and Third Deferral Requests at 1. As requested, the Commission did

not act on the filing of the Plains End Agreement until after Xcel withdrew its deferral request.

Thus, Xcel demonstrated in the Plains End proceeding that it understood its FPA § 205 filing obligation and was able to preserve its rights to collect facilities charges while deferring Commission action to permit negotiations with its interconnection customers. The contrast with its course of action here further bolsters the Commission's observation in the Rehearing Order that Xcel has not "explain[ed] why it could not have filed timely" the 2001 Agreements as well. Rehearing Order at P 13, JA 198.

C. The Commission Did Not Improperly Penalize Xcel By Denying A Waiver That Xcel Failed To Justify

The sole question presented to the Commission was whether to grant waiver — not whether to allow Xcel, if waiver were denied, to recover retroactively all or some of the facilities charges Xcel had failed to collect for service provided under unfiled agreements. Nevertheless, Xcel concludes with the arguments that the Commission's denial of waiver "results in an excessively harsh penalty," prohibiting PSC Colorado from recovering any compensation for service provided prior to the effective date of January 13, 2006 and thus "establish[ing] a rate of $0" for past service. Br. 32-36.

As explained more fully in the jurisdictional argument, *see supra* Section I.B, Xcel never sought the relief that it now contends the Commission

unreasonably denied. Neither in its Filing Letters nor in its Rehearing Request did Xcel ever mention that denying waiver would effect a penalty. Nor did Xcel indicate that it was asking for retroactive recovery of facilities charges, or that the *Prior Notice Order* would (in its view, *see* Br. 33-34) support such after-the-fact recovery.

To the contrary, Xcel repeatedly emphasized its noncollection of charges as a factor mitigating its FPA § 205 violation and proving the absence of harm. Rehearing Request at 3, 5, JA 186, 188; Filing Letters at 2, JA 6, 52, 94, 136. Xcel's novel request for retroactive recovery of all or a portion of four-plus years of charges cannot be squared with Xcel's own statement that its late filings had "*no rate impact*" for the very reason that it had *not* charged the customers. Rehearing Request at 6, JA 189. In any event, as explained *supra* in Section I.A.2, PSC Colorado and its customers actually *agreed* to a rate of $0 in the Valmont Agreement and, effectively, in all of the 2001 Agreements (due to PSC Colorado's 100% reimbursement obligation under each of the power purchase agreements).

CONCLUSION

For the reasons stated, the petition should be dismissed for lack of jurisdiction. Alternatively, the petition should be denied on the merits and the challenged FERC Orders should be affirmed in all respects.

Respectfully submitted,

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March 22, 2007
Final Brief: April 26, 2007