ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 06-1353

NORTHERN VIRGINIA ELECTRIC COOPERATIVE, 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

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SEPTEMBER 11, 2007

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CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

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

B. Rulings Under Review

1. *Northern Virginia Electric Cooperative v. Old Dominion Electric Cooperative*, 114 FERC ¶ 61,240 (2006) ("Complaint Order"); and

2. *Northern Virginia Electric Cooperative v. Old Dominion Electric Cooperative*, 116 FERC ¶ 61,173 (2006) ("Rehearing Order").

C. Related Cases

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

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Lona T. Perry
Senior Attorney

September 11, 2007

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Complaint Order	*Northern Virginia Elec. Coop. v. Old Dominion Elec. Coop.*, 114 FERC ¶ 61,240 (2006)
FERC or Commission	Federal Energy Regulatory Commission
Mobile-Sierra	*United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956)
Northern Virginia	Northern Virginia Electric Cooperative
Old Dominion	Old Dominion Electric Cooperative
Order No. 888	*Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, 61 Fed. Reg. 21,540 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1996), *on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, 62 Fed. Reg. 12,274, clarified, 79 FERC ¶ 61,182 (1997), *on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, 62 Fed. Reg. 64,688 (1997), *on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998)
Potomac Electric	*Potomac Electric Power Co. v. FERC*, 210 F.3d 403 (D.C. Cir. 2000)
Rehearing Order	*Northern Virginia Elec. Coop. v. Old Dominion Elec. Coop.*, 116 FERC ¶ 61,173 (2006)
TAPS	*Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 709 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002)

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission ("Commission" or "FERC") reasonably denied the complaint of Northern Virginia Electric Cooperative ("Northern Virginia") seeking to reform its long-term electricity requirements contract with Old Dominion Electric Cooperative ("Old Dominion") because Northern Virginia failed to show that the contract was contrary to the public interest or even unjust and unreasonable.

STATUTES AND REGULATIONS

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

INTRODUCTION

In the challenged orders, the Commission denied Northern Virginia's complaint seeking reformation of its long-term electricity requirements contract with Old Dominion because Northern Virginia failed to show that the contract was contrary to the public interest, as required by the *Mobile-Sierra* doctrine.[1] *Northern Virginia Elec. Coop. v. Old Dominion Elec. Coop.*, 114 FERC ¶ 61,240 (2006) ("Complaint Order"), JA 7, *reh'g denied*, 116 FERC ¶ 61,173 (2006) ("Rehearing Order"), JA 14. Under *Mobile-Sierra*, a contract that sets fixed prices and denies either party the right to change prices unilaterally may be modified by FERC only if required in the public interest. *See, e.g., Texaco, Inc. v. FERC*, 148 F.3d 1091, 1095 (D.C. Cir. 1998); *Metropolitan Edison Co. v. FERC*, 595 F.2d 851, 855 (D.C. Cir. 1979).

[1] *See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) ("*Mobile*"); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) ("*Sierra*") (collectively "*Mobile-Sierra*").

Northern Virginia argued that, under Order No. 888,[2] which addressed the market power of transmission providers, the Commission was required to apply the "just and reasonable" standard, rather than the more restrictive *Mobile-Sierra* "public interest" standard, to Northern Virginia's reformation claims. Northern Virginia also contended that the Commission erred in failing to consider documents purportedly supporting the complaint that Northern Virginia filed in response to Old Dominion pleadings. The Commission denied rehearing, finding that the public interest standard was properly applied and, in any event, Northern Virginia had failed to demonstrate even that its contract was unjust and unreasonable. The Commission's regulations permit a decision to be made on the merits of a complaint based upon the complaint and the answer, and Northern Virginia failed to comply with the Commission requirement that complainants include all supporting documentation with their complaint.

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[2] *Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, 61 Fed. Reg. 21,540 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1996), *on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, 62 Fed. Reg. 12,274, clarified, 79 FERC ¶ 61,182 (1997), *on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, 62 Fed. Reg. 64,688 (1997), *on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) ("*TAPS*"), *aff'd*, *New York v. FERC*, 535 U.S. 1 (2002).

STATEMENT OF FACTS

I. EVENTS LEADING TO THE COMMISSION ORDERS

A. Order No. 888

In Order No. 888, the Commission found that monopoly control over transmission facilities created a persistent barrier to the development of competitive wholesale markets. *TAPS*, 225 F.3d at 682. As a remedy, Order No. 888 required that transmission owners or operators provide non-discriminatory open-access transmission to allow access to competitive energy supplies. Order No. 888-A at 30,192. The Commission was concerned, however, that wholesale requirements contracts entered into during the era of monopoly control of transmission might reflect the exercise of market power, and unduly limit the (usually captive) buyer's ability to take advantage of competitive supplies. *Id*. at 30,192-93.

Under these circumstances, the Commission found that it was not in the public interest to require all customers to be held to requirements contracts that were executed under the prior regulatory regime, no matter what the circumstances of those contracts. *Id*. at 30,193. Accordingly, the Commission found that reforming requirements contracts pre-dating July 11, 1994, on a case-by-case basis, might be appropriate. *Id*. at 30,194. Further, the Commission found that customers under such requirements contracts should be allowed to obtain contract reformation

upon a showing that their contracts no longer are just and reasonable, even if their contracts contain a *Mobile-Sierra* clause prohibiting unilateral modification. *Id*.

The Commission, however, rejected generically abrogating existing requirements contracts. Order No. 888 at 31,663-64. Although the changes in the industry had been and would continue to be dramatic, the Commission did not believe that they compelled generic abrogation. *Id*. at 31,664. Further, the Commission did not believe that unfavorable requirements contracts would derail the attainment of competitive wholesale markets. *Id*. at 31,664 n. 173.

B. Northern Virginia's Contract with Old Dominion

The Rural Electrification Act, 7 U.S.C. § 901 *et seq*. empowered the Rural Electrification Administration (now the Rural Utilities Service), to provide rural areas with low cost electricity and telephone service by lending funds to rural electric and telephone systems at below-market interest rates. *In re Cajun Elec. Power Coop*., 109 F.3d 248, 252 (D.C. Cir. 1997). In response, cooperative electrical systems were formed to seek government subsidized loans and deliver electricity to rural consumers. *Id*. In addition, groups of rural electric cooperatives formed central generation and transmission cooperatives, which also borrowed under the Rural Electrification Act, for the purpose of generating and purchasing

electric energy for sale at wholesale to their respective rural electrical cooperative members who would then sell that electricity at retail to the ultimate consumer. *Id*.

Old Dominion is one such not-for-profit electric generation and transmission cooperative, created in 1948 by its member cooperatives to procure bulk generation resources and transmission service. Old Dominion Motion for Summary Dismissal, R. 4 at 3, JA 135. It has been continuously owned and controlled by the member cooperatives since its inception. *Id*. Thus, while Old Dominion's member cooperatives purchase power from Old Dominion under requirements contracts, Northern Virginia Complaint, R. 1 at 6, JA 29, the member cooperatives are also Old Dominion's owners. R. 1 Ex. NVC-10 at 3, JA 110.

Pursuant to section 4 of the requirements contracts with all of Old Dominion's member cooperatives, Old Dominion's board, which consists of two representatives from each member cooperative, has the responsibility to establish rates sufficient to cover Old Dominion's revenue requirement. Old Dominion Answer to Complaint, R. 12 at 12, JA 225. The Board accomplished this task through filing with FERC a formula-based rate that collects Old Dominion's actual costs. *Id*. at 13, JA 226. Old Dominion's rates for wholesale power sales are based on this formula, which has been accepted by the Commission. *Id*.

Operation of the rate formula produces a "postage stamp" rate representing the system average cost of all generation resources necessary to supply power to the member cooperatives. *Id*. at 14, JA 227. No generation asset or power supply contract is allocated to any particular load; the same rate is paid by each member cooperative regardless of their location or the origin of the power serving their individual needs. *Id*. The postage stamp rate, therefore, equalizes among the member cooperatives all of the generation and other power supply costs incurred by Old Dominion to serve its members, on a load-ratio share basis. *Id*.

In 1983, Old Dominion's twelve member cooperatives signed 45-year requirements contracts with Old Dominion, in connection with Old Dominion's financing of the purchase of an ownership interest in a nuclear power station. R. 4 at 3 & n.3, JA 135. Other cooperatives who had been members of Old Dominion elected not to participate in the purchase and withdrew from Old Dominion. *Id*. This was the first occasion on which Old Dominion became an owner of generation to serve the resource needs of its member cooperatives. *Id*.

Like eleven other member cooperatives, Northern Virginia entered into a 45-year requirements contract with Old Dominion, expiring in 2028. *Id*. Northern Virginia is one of the largest distribution cooperatives in the United States, and is

the largest of Old Dominion's 12 member cooperatives, accounting for nearly 30 percent of Old Dominion's load and member revenues. R. 1 at 7, JA 30.

In 1992, Northern Virginia's contract with Old Dominion, along with the contracts of the other 11 member cooperatives, was amended when Old Dominion retired its Rural Utilities Service debt, and thus became a Commission-regulated public utility.[3] R. 1 at 7-8, JA 30-31. The 12 amended wholesale power contracts were filed with and accepted by the Commission in 1992. R. 1 at 6, JA 29. *See Old Dominion Elec. Coop., Inc*., Docket No. ER92-432-001, Letter Order (July 22, 1992) (accepting Northern Virginia contract with Old Dominion).

Old Dominion purchased ownership interests in generation facilities, built generation facilities, and entered into third-party power purchase agreements with

[3] Loans made under the Rural Electrification Act, 7 U.S.C. § 901 *et seq*., require the borrower's rates and rate structure to be approved by the Rural Electrification Administration, both at inception and through the term of the loan. *See Arkansas Electric Coop. Ass'n v. Arkansas Pub. Serv. Co*., 461 U.S. 375, 385 (1983). In 1967, FERC's predecessor, the Federal Power Commission, determined that it did not have jurisdiction under the Federal Power Act ("FPA") over wholesale rates charged by rural power cooperatives while they were still under the supervision of the Rural Electrification Administration. *Id*. at 383. The Energy Policy Act of 2005 § 1291(c), 119 Stat. 985, amended FPA § 201(f), 16 U.S.C. § 824(j), and codified exemption from FPA jurisdiction for all electric cooperatives with Rural Utilities Service financing and small electric cooperatives selling less than 4 million MWh per year.

wholesale suppliers to meet its obligations under the wholesale power contracts with its member cooperatives. R. 4 at 3, JA 135. In addition, because Old Dominion has always been a transmission-dependent utility that owns no transmission facilities, it purchased transmission service on behalf of the member cooperatives from a number of transmission service providers.[4] *Id*.

In the Wholesale Power Contract between Old Dominion and Northern Virginia, as amended in 1992, R. 1 Ex. NVC-2, JA 65, Northern Virginia expressly acknowledged that Old Dominion had and would continue to obtain financing, invest in plant and facilities, and make commitments relating to long-term power supply arrangements, "all on the basis of the cash flow produced by this contract and similar contracts between [Old Dominion] and its other members." *Id*. at 1, Recital (C), JA 65. Northern Virginia acknowledged that Old Dominion was incurring debt to construct, improve or acquire facilities to benefit Northern Virginia and other members, *id*. at 2, Recital (F), JA 66, and acknowledged that it had determined that its interest and the interest of its own members would be best served by entering into the contract with Old Dominion "in lieu of undertaking the

[4] Prior to 2004, Old Dominion owned no transmission facilities of its own (except a portion of the switchyards associated with its generation facilities). In 2004, Old Dominion acquired an ownership interest in a 900-foot high-voltage transmission line in Maryland. *Id*. Except for that segment of line, Old Dominion remains a fully transmission dependent utility. R. 4 at 3-4 n. 5, JA 135-36.

risks of developing other sources of electricity itself or purchasing electricity from other sources." *Id*. at 2, Recital (G), JA 66.

With the exception of a small amount of energy purchased from the Southeastern Power Administration, Northern Virginia agreed to purchase from Old Dominion "all electric power and energy which [Northern Virginia] shall require for the operation of [Northern Virginia's] system to the extent that [Old Dominion] shall have the power, energy and facilities available." *Id*. at 2, Section 1, JA 66. Rates under the contract are determined by a formula intended to provide rates "sufficient, but only sufficient, with the revenues of [Old Dominion] from all other sources, to meet [Old Dominion's] costs and expenses." *Id*. at 4, Section 4(a)(1), JA 68. The formula rate is subject to an annual true-up. *Id*. at 5, Section 4(a)(iii), JA 69.

By its terms, Northern Virginia's contract with Old Dominion can be amended only by a written instrument executed by both Old Dominion and Northern Virginia. *Id*. at 10, Section 14, JA 74. Beginning in 1997, Northern Virginia sought Old Dominion's agreement to contract modifications that would permit Northern Virginia to obtain some power from wholesale sources other than Old Dominion. R. 1 at 9, JA 32. Unable to obtain Old Dominion's consent to such

modifications, Northern Virginia filed a complaint with the Commission seeking reformation of the contract.

C. The Complaint Proceeding

In its complaint filed on January 5, 2006, Northern Virginia sought reformation of its requirements contract with Old Dominion. R. 1 at 3, JA 26. Although Northern Virginia's contract was substantially similar to that of the other member cooperatives, none of the other eleven member cooperatives challenged their contracts. R. 4 at 3 & n. 4, JA 135.

Northern Virginia contended that the Order No. 888 restructuring of the electric industry introduced sweeping changes in terms of access to competitive power supplies, and that, because Northern Virginia's contract with Old Dominion "prevents [Northern Virginia] from accessing competitive markets through the year 2028," it is "precisely the type of contract that requires reformation under Order No. 888." R. 1 at 3, JA 26. Northern Virginia further contended that Order No. 888 permits it to obtain reformation of its requirements contract under the more lenient just and reasonable standard, notwithstanding the fact that its contract with Old Dominion included a *Mobile-Sierra* clause. *Id*. at 18, JA 41.

On January 30, 2006, Old Dominion moved for summary dismissal, arguing that the complaint, on its face, failed to state a *prima facie* case that the contract was

contrary to the public interest or unjust and unreasonable. R. 4, JA 133. On February 6, 2006, Old Dominion filed an answer to the complaint, contending that, if summary dismissal is not granted, the complaint should be denied on the substantive bases presented therein. R. 12 at 4, JA 217. Old Dominion argued that the cooperative relationship involves the long-term commitment by the member cooperatives to band together for their mutual benefit. *Id*. at 17, JA 230. By its own choice and for the benefit of its members, Northern Virginia entered into its long-term requirements contract with Old Dominion in 1983, as part of a transaction in which Old Dominion made its first purchase of generation assets, and reaffirmed that commitment in 1992 when Old Dominion became FERC-jurisdictional. *Id*. at 22, JA 235. The contract expressly precludes unilateral changes. *Id*. at 26, JA 239.

Old Dominion challenged Northern Virginia's assumption that the just and reasonable standard should apply, arguing that the Order No. 888 finding with regard to wholesale requirements contracts was inapplicable to Northern Virginia's contract with Old Dominion, because the Order No. 888 finding was based upon the possibility of the exercise of unequal bargaining power between a monopolist transmission owner and its customers. *Id*. at 32-33, JA 245-46. In contrast, as a transmission-dependent utility, Old Dominion was never in the position of a

monopolistic transmission owner vis-à-vis Northern Virginia. *Id*. To the contrary, Old Dominion's member cooperatives, including Northern Virginia, voluntarily entered into their contracts with Old Dominion to leverage their combined financial resources, and Northern Virginia verified in 1983 and again in 1992 that the contract was in its and its members' best interests. *Id*. at 33, JA 246.

Thus, Old Dominion concluded that the complaint should be denied as Northern Virginia failed even to argue that its complaint satisfied the public interest test. *Id*. at 36-37, JA 249-50. Old Dominion also asserted that, in any event, Northern Virginia failed to satisfy the "life-of-the-contract" standard for showing its contract to be unjust and unreasonable. *Id*. at 37, JA 250.

On February 15, 2006, Northern Virginia filed a Response to Old Dominion's motion for summary dismissal, arguing that it had complied with the Commission's complaint requirements and stated a *prima facie* case for reformation in its complaint. R. 19 at 1-2, JA 399-400. Northern Virginia also asserted that it should be allowed an opportunity to present additional evidence rather than having its complaint dismissed with prejudice. *Id*. at 2, JA 400. On February 21, 2006, Northern Virginia filed a Response to Old Dominion's Answer to the Complaint, arguing again that the information provided in its complaint was a sufficient *prima facie* case to warrant a hearing, and providing five affidavits which Northern

Virginia contended "further support [Northern Virginia's] complaint and rebut the essence of Old Dominion's contentions." R. 20 at 2, JA 428.

II. THE CHALLENGED ORDERS

In the Complaint Order, the Commission denied Northern Virginia's complaint. Complaint Order P 1, JA 7. The contract by its terms precluded unilateral modification, thereby invoking the *Mobile-Sierra* doctrine. *Id*. PP 17-18, JA 11-12. Because Old Dominion had not consented to the proposed modifications, Northern Virginia was required to, but failed to, demonstrate that modification of its contract was required in the public interest. *Id*. P 18, JA 12. The Commission further rejected the argument that Northern Virginia was entitled to have its requirements contract reformed as unjust and unreasonable under Order No. 888, as the Commission in that Order had expressly declined to generically modify requirements contracts. *Id*. P 19, JA 12.

Northern Virginia argued on rehearing that the Commission erred in summarily dismissing Northern Virginia's complaint without considering its February 15, 2006 Response to Old Dominion's motion for summary dismissal, and its February 21, 2006 response to Old Dominion's answer. R. 26 at 3-4, JA 565-66. Northern Virginia contended that the evidence presented in those pleadings raised a material issue of fact as to whether its contract with Old Dominion was unjust and

unreasonable, which Northern Virginia continued to maintain was the proper standard of review. *Id*. at 4-5, JA 566-67.

The Commission denied rehearing. Rehearing Order P 1, JA 14. The Commission held that Order No. 888's finding that certain requirements contracts could be modified under a just and reasonable standard was inapplicable here, because it was based on the determination that monopoly transmission providers were in a position to exercise market power over their captive customers. *Id*. P 10, JA 17. Here, Old Dominion effectively had no transmission facilities, and was in no position to dictate contractual conditions to its member cooperatives, who own and control it. *Id*. In its Request for Rehearing, Northern Virginia made no effort to show that its current circumstances met the public interest test. *Id*. P 11, JA 18.

The Commission also held that none of Northern Virginia's allegations gave rise to the need for a hearing. *Id*. P 12, JA 18. Although Northern Virginia complained about the high cost of Old Dominion's generation, the Commission will not relieve customers from contracts simply because they have come to regard them as an unfavorable bargain. *Id*. P 12 & n. 10, JA 18. Indeed, Northern Virginia failed to show even that its contract rates were unjust and unreasonable. *Id*. P 12, JA 18. Such a determination is made based on the benefits and burdens over the

life of the contract, and Northern Virginia failed to introduce evidence to support such a finding. *Id*.

The Commission also rejected Northern Virginia's procedural claims. *Id*. PP 13-15, JA 19-20. The Commission did not grant Old Dominion's motion for summary dismissal, but rather ruled on the merits of the complaint. *Id*. P 13, JA 19. The Commission's regulations specifically provide that the Commission may decide a complaint on the merits based upon the pleadings, which are the complaint and the answer. *Id*. (citing 18 C.F.R. § 385.206(g)(2)). The Commission's regulations require complainants to include with their complaint all supporting documents and affidavits, *id*. P 15, JA 19, and Northern Virginia failed to give any justification for not including with its complaint the evidence it unsuccessfully tried to introduce later.

The Commission further did not err in failing to consider Northern Virginia's February 15 and February 21 submissions. *Id*. PP 14-15, JA 19-20. The Commission's regulations generally prohibit answers to answers, and therefore, to the extent that Northern Virginia filed a response to Old Dominion's answer, it was properly not considered. *Id*. (citing 18 C.F.R. § 385.213(a)(2)). To the extent that Northern Virginia's subsequent pleadings were a response to Old Dominion's motion for summary dismissal, any failure of the Commission to consider such

pleadings was without effect as the Commission did not grant the motion. *Id*. P 13, JA 19.

SUMMARY OF ARGUMENT

Northern Virginia filed a complaint seeking reformation of its long-term requirements contract with Old Dominion, the transmission and generation cooperative Northern Virginia and other member cooperatives founded to pool their purchasing power in the energy and transmission markets. Because the contract contains a *Mobile-Sierra* clause, prohibiting unilateral modification, Northern Virginia was required to, but failed to, demonstrate that contract reformation was required in the public interest.

Northern Virginia contends that the just and reasonable standard should apply, based on the determination in FERC Order No. 888 that pre-existing requirements contracts entered into between transmission providers and their largely captive customers could be reformed under the just and reasonable standard. That finding is inapposite here, however, because Old Dominion owns no transmission facilities and could not therefore have exercised market power. Indeed, Old Dominion is owned and controlled by its members.

On brief, Northern Virginia asserts for the first time that the Commission failed to meet prerequisites for applying the *Mobile-Sierra* standard, and misinterpreted the public interest standard in a high rate case, based on a recent Ninth Circuit decision. As Northern Virginia made no arguments before the

Commission regarding failure to meet prerequisites or misinterpretation of the public interest standard, the Court lacks jurisdiction to hear them now. In any event, the Ninth Circuit decision is inapposite here, as it concerned the application of *Mobile-Sierra* to market-based rate contracts that had never been filed with the Commission, in the unprecedented situation of a massive market failure in California. The case expressly did not address application of *Mobile-Sierra* to cost-based contracts, such as Northern Virginia's, that were previously filed with and accepted by the Commission in ordinary course.

Indeed, Northern Virginia's allegations failed even to satisfy the more lenient just and reasonable standard. Contract reformation under the just and reasonable standard requires evidence of the benefits and burdens over the life of the contract. Northern Virginia provided no evidence of the benefits of the contract over the prior years it was in effect, and provided no evidence of burden other than speculation that Northern Virginia's contract would be non-competitive in the future.

Last, the Commission reasonably rejected Northern Virginia's claims based on the Commission's failure to consider evidence purportedly contained in Northern Virginia's February 15 and February 21 responses to Old Dominion pleadings. The Commission's regulations require that all documentation supporting the complaint, including affidavits and other evidence, be included with the

complaint, and Northern Virginia provided no justification for failing to meet this requirement. Further, the Commission's regulations permit the Commission to decide a complaint on the merits based on the complaint and answer, and, therefore, the Commission did not err in failing to consider Northern Virginia's later submissions in denying the complaint.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC's orders to assure they are not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Transcontinental Gas Pipe Line Corp. v. FERC*, 54 F.3d 893, 898 (D.C. Cir. 1995). Judicial scrutiny is limited to assuring that the Commission's decision-making is reasoned, principled, and based upon the record. *Pennsylvania Office of Consumer Advocate v. FERC*, 131 F.3d 182, 185 (D.C. Cir. 1997).

"'[A]n agency's interpretation of the intended effect of its own orders is controlling unless clearly erroneous.'" *Southwest Gas Corp. v. FERC*, 145 F.3d 365, 370 (D.C. Cir. 1998) (quoting *Transcontinental Gas Pipe Line Corp. v. FERC*, 922 F.2d 865, 871 (D.C. Cir. 1991)). The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. FPA § 313(b), 16 U.S.C. § 825*l*(b). The substantial evidence standard "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." *Florida Municipal Power Agency v. FERC*, 315 F.3d 362, 365 (D.C. Cir. 2003) (quoting *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)).

II. THE COMMISSION REASONABLY DENIED NORTHERN VIRGINIA'S COMPLAINT.

A. The Commission Reasonably Applied the *Mobile-Sierra* Public Interest Standard to Northern Virginia's Complaint.

Northern Virginia concedes that its contract with Old Dominion contains a *Mobile-Sierra* clause precluding the parties from unilaterally modifying the contract. Br. 19-21, 30. *See* Complaint Order P 18, JA 12; Rehearing Order P 8, JA 16. Because Old Dominion did not consent to Northern Virginia's proposed changes, therefore, the contract could be modified only under the "paramount power of the Commission to modify [the contract] when necessary in the public interest." *Mobile*, 350 U.S. at 344; Complaint Order P 18, JA 12; Rehearing Order PP 4-5, JA 15. Accordingly, the Commission did not deny Northern Virginia's complaint based on Old Dominion's lack of consent. *See* Br. at 19-20. Rather, Old Dominion's lack of consent meant the contract could be reformed only under the *Mobile-Sierra* public interest standard, which Northern Virginia failed to meet. Rehearing Order PP 12-13, JA 18-19.

Northern Virginia contends that the just and reasonable standard applies to its reformation claims, based on the intent expressed in Order No. 888 to permit customers with wholesale requirements contracts predating July 11, 1994 to seek modification of their contracts under a just and reasonable standard. Br. at 22-27.

However, Northern Virginia's contract, although a requirements contract, is not of the type that the Commission in Order No. 888 intended to address. Rehearing Order P 10, JA 17. Order No. 888 remedied the exercise of monopoly control over transmission facilities by requiring transmission owners or operators to provide non-discriminatory open-access transmission. Order No. 888-A at 30,192; *TAPS*, 225 F.3d at 682. Because wholesale requirements contracts entered into between such transmission providers and their (usually captive) customers during the era of monopoly control might reflect the exercise of market power, the Commission further found that reforming such requirements contracts pre-dating July 11, 1994, on a case-by-case basis, might be appropriate. *Id*. at 30,192-94.

Thus, the finding in Order No. 888 permitting reformation of requirements contracts under the just and reasonable standard "rested on a finding that utilities, prior to Order No 888, were in a position to impose such [requirements] contracts on their customers because of their monopoly control of transmission facilities." *See* Rehearing Order P 10, JA 17 (citing Order No. 888 at 31,664; Order No. 888-A at 30,192-93; *TAPS*, 225 F.3d at 709). In *TAPS*, this Court affirmed the Commission's determination to review such requirements contracts under the just and reasonable standard, notwithstanding *Mobile-Sierra* clauses, expressly because the requirements contracts at issue "'necessarily reflect the [utilities'] monopoly

power.'" *TAPS*, 225 F.3d at 712 (quoting *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1017 (D.C. Cir. 1987)).

Here, however, Old Dominion effectively has no transmission facilities, and in fact provided transmission service for Northern Virginia over Virginia Electric Power Company transmission facilities. Rehearing Order P 10, JA 17. Further, Old Dominion, a non-profit entity owned and operated by its member cooperatives, was in no position to dictate to its member cooperatives (including Northern Virginia) the conditions under which it would supply electricity. *Id*. Therefore, Northern Virginia's requirements contract with Old Dominion is not the product of an exercise of transmission market power, which is the foundation for the Order No. 888 finding. *Id*.

Northern Virginia claims that Order No. 888 promised that pre-existing requirements contracts "would be reviewed under the 'just and reasonable' standard, '**no matter what the circumstances of those contracts**.'" Br. at 25 (quoting Order No. 888 at 30,193) (emphasis added in petitioner's brief). However, Order No. 888 **actually** states that "[w]e cannot conclude that it is in the public interest **to require all customers to be held to requirements contracts** that were executed under the prior industry regime, **no matter what the circumstances of those contracts**." Order No. 888 at 30, 193 (emphasis added). Thus, rather than

supporting Northern Virginia's contention, this statement evidences that the Commission did not wish to hold customers to pre-Order No. 888 requirements contracts in **all** circumstances, such as where there was the possibility of unequal bargaining power. *Id*.

Further, although the Commission recognized that the monopoly transmission providers "'may not have exercised monopoly power in all situations,'" Br. at 25, 26 (quoting Order No. 888 at 30,193), there was nevertheless the potential for such an exercise, given the monopoly power over transmission facilities. Order No. 888 at 30,193. Here there was no such possibility as Old Dominion did not own transmission facilities, and was indeed owned and controlled by Northern Virginia and its other member cooperatives. Rehearing Order P 10, JA 17.

Similarly, although a goal of the Commission's finding in Order No. 888 was "to accelerate the opportunity of parties to participate in competitive markets," *see* Br. at 24 (quoting Order No. 888-A at 30,192), that goal alone is not a sufficient basis for reformation, as the Commission expressly rejected generically reforming all requirements contracts to permit such access. Rehearing Order P 6, JA 16; Complaint Order P 19, JA 12; Order No. 888 at 31,663. Although the Commission recognized that the changes in the industry had been and would continue to be

dramatic, *see* Br. at 26, the Commission did not believe these changes required generic abrogation of contracts. Order No. 888 at 31,664. Further, the Commission did not believe that unfavorable requirements contracts would derail the attainment of competitive wholesale markets. *Id*. at 31,664 n. 173. *See, e.g., Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 14 (D.C. Cir. 2002) (overturning Commission orders generically modifying pre-existing contracts because, under Order No. 888, pre-existing contracts were to be left unchanged "unless the parties voluntarily agreed to an amendment or the customer proved, on a case-by-case basis, that the facts presented by an individual contract justified a change").

Accordingly, the Commission reasonably found that the *Mobile-Sierra* standard was properly applied to Northern Virginia's contract. While Northern Virginia relies on the fact that there is no express exception in Order No. 888 or 888-A for this situation, the fact remains that the rationale for the rule -- to remedy the potential exercise of market power by monopoly transmission providers -- was express and does not apply here. "'[A]n agency's interpretation of the intended effect of its own orders is controlling unless clearly erroneous.'" *Southwest Gas Corp.*, 145 F.3d at 370 (quoting *Transcontinental Gas*, 922 F.2d at 871).

Thus, while Northern Virginia's contract was a requirements contract, Northern Virginia's relationship with its requirements supplier, Old Dominion, was

not the type of relationship contemplated by the Commission in Order No. 888, which meant to address the potential for transmission providers to exercise monopoly control over access to transmission facilities. *TAPS*, 225 F.3d at 709-10 (citing Order No. 888-A at 30,193). For those reasons, the concerns at issue in Order No. 888 could not apply and therefore neither does the generic public interest finding permitting modification of such requirements contracts under the just and reasonable standard notwithstanding the presence of *Mobile-Sierra* clauses.

B. Northern Virginia Failed to Meet the Public Interest Standard.

The Commission reasonably denied Northern Virginia's complaint as Northern Virginia failed to meet the public interest test set forth in *Sierra*, of demonstrating that the contract "might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." *Sierra*, 350 U.S. at 355; Complaint Order P 18, JA 12; Rehearing Order PP 5, 11, JA 15, 18. Indeed, Northern Virginia did not even assert that its current circumstances would meet this standard. Rehearing Order P 11, JA 18.

Rather, Northern Virginia alleged that its power supply costs were too high, causing competitive disadvantage, and, according to an unsupported assertion by Northern Virginia's Chief Executive Officer, three non-Old Dominion distribution

cooperatives in Northern Virginia had lower power costs. Northern Virginia Request for Rehearing, R. 26 at 25-26, JA 587-88; Br. 28-29; 45-46.

These alleged facts fail to support a claim for contract reformation under the stringent *Mobile-Sierra* public interest standard. "The fact that [Northern Virginia], by contract, must now pay Old Dominion more than it would like to pay does not by itself entitle [Northern Virginia] to be relieved from its contract, or even to a trial-type evidentiary hearing." Rehearing Order P 12, JA 18 (citing, *e.g.*, *Potomac Electric Power Co. v. FERC*, 210 F.3d 403, 409 (D.C. Cir. 2000) ("*Potomac Electric*")).

The fact that contracts become uneconomic with the passage of time does not render them contrary to the public interest under the FPA. *Sierra*, 350 U.S. at 354-55; *Potomac Electric*, 210 F.3d at 409; *Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 953 (D.C. Cir. 1983) (J. Scalia). In *Sierra*, the Supreme Court reversed Commission orders modifying a contract found unjust and unreasonable. 350 U.S. at 354. The Supreme Court found that the FPA does not preclude parties from agreeing to -- and being held to -- contract rates that may be unjust and unreasonable to one of the parties. *Id*. at 355.

Although Northern Virginia asserts that its customers' rates are "negatively impacted" by the contract, Br. at 28 (citing Complaint, R. 1 at 16, JA 39), Northern

Virginia makes no effort to support or quantify that impact. The fact that a rate reduction would benefit ratepayers is not a sufficient basis for contract modification. *Public Service Co. of New Mexico*, 43 FERC ¶ 61,469 at 62,152, *reh'g denied*, 45 FERC ¶ 61,034 (1988). This Court in *Potomac Electric* affirmed dismissal of a complaint seeking contract modification under *Mobile-Sierra* where the buyer's contract rate was twice that paid by other customers. The utility customer's failure to provide any evidence of excessive burden on ratepayers, "other than the disparity in rates and a bald claim that PEPCO ratepayers would derive benefit from a rate modification, render[ed] its request wholly inadequate." *Potomac Electric*, 210 F.3d at 409. *See also Atlantic City*, 295 F.3d at 15 (a customer's desire "to avail itself of a lower rate than it was entitled to under the terms of its original agreement" is not a ground for contract reformation under *Mobile-Sierra*; FERC must "not take contract modification lightly"). Similarly, here, Northern Virginia failed to show any burden on ratepayers or other circumstances that would support contract modification under *Mobile-Sierra*.

C. The Court Lacks Jurisdiction to Hear Northern Virginia's New Arguments on Appeal Based on the Ninth Circuit Decision in *Snohomish*, Which Is, In Any Event, Inapposite.

Before the Commission, Northern Virginia argued that the Commission improperly failed to apply the just and reasonable standard, or to regard the evidence Northern Virginia proffered as at least creating material issues of fact. Now, for the first time on brief, Northern Virginia makes a number of arguments that the Commission misapplied the *Mobile-Sierra* public interest standard, based upon the Ninth Circuit's recent decision in *Snohomish Public Utility Dist. v. FERC*, 471 F.3d 1053 (9th Cir. 2006). Br. at 29-37.

1. The Court Lacks Jurisdiction to Hear New Arguments Based on *Snohomish*.

On brief, Northern Virginia asserts for the first time that the Commission failed to meet certain prerequisites for applying the *Mobile-Sierra* standard, and misinterpreted the content of the public interest standard in a high rate case, based on *Snohomish*. *See* Br. 29-37. As Northern Virginia made no arguments before the Commission regarding failure to meet prerequisites or misinterpretation of the public interest standard, the Court lacks jurisdiction to hear them now. FPA § 313(b) ("[n]o 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.").

See also City of Orrville, Ohio v. FERC, 147 F.3d 979, 990 (D.C. Cir. 1998) (court lacks jurisdiction to hear arguments not made on rehearing); *Platte River Whooping Crane Critical Habitat Trust v. FERC*, 876 F.2d 109, 113 (D.C. Cir. 1989) (same). Parties seeking review of FERC orders must petition for rehearing of those orders and must themselves raise in that petition **all** of the objections urged on appeal. *Platte River*, 876 F.2d at 113. Neither FERC nor this Court has authority to waive these statutory requirements. *Id*.

Although FPA § 313(b) provides an exception where the petitioner has a reasonable ground for its failure to raise objections on rehearing, this exception is reserved for an "'extraordinary situation.'" *Save Our Sebasticook v. FERC*, 431 F.3d 379, 382 (D.C. Cir. 2005) (quoting *Wisconsin Power & Light Co. v. FERC*, 363 F.3d 453, 460 (D.C. Cir. 2004)). That *Snohomish* did not issue until after the Rehearing Order, *see* Br. at 29 n. 111, is not such an extraordinary situation compelling this Court to consider the post-record judgment of another court of appeals that the agency itself could not consider. *See Brooklyn Union Gas Co. v. FERC*, 409 F.3d 404, 406 (D.C. Cir. 2005) (explaining that court "will not reach out to examine a decision made after the one actually under review") (quoting *MacLeod v. ICC*, 54 F.3d 888, 892 (D.C. Cir. 1995)). Northern Virginia never argued to the Commission that it failed to meet necessary prerequisites to applying *Mobile-*

Sierra, nor that it misapplied the public interest standard, the issues in *Snohomish*. Rather, Northern Virginia focused on the Commission's failure to apply the just and reasonable standard in the first instance.

2. *Snohomish* Does Not, In Any Event, Aid Northern Virginia.

a. *Mobile-Sierra* Applies to Northern Virginia's Contract.

Snohomish does not, in any event, aid Northern Virginia. In the first instance, the Ninth Circuit expressly was addressing an entirely different factual scenario – the application of *Mobile-Sierra* to market-based rate contracts in the context of an extraordinary and unprecedented market failure in California. *See Snohomish*, 471 F.3d at 1060. In this case, the contract is a traditional one for service at cost-based rates and there is no allegation of any severe market dysfunction. Therefore, *Snohomish* has no application here.

While Northern Virginia acknowledges that its contract with Old Dominion, like other cost-based contracts, was filed with the Commission and allowed to go into effect, it nevertheless contends, in an attempt to come within the factual scenario of *Snohomish*, that the Commission did not undertake a "meaningful review" of the contract. Br. at 30. Specifically, Northern Virginia points to language in the FERC order accepting the contract that provides that "[t]his acceptance for filing does not constitute approval of any service, rate, charge,

classification, or any rule, regulation, contract or practice affecting such rate or service provided for in the filed documents . . . ." *Id*. at 30 (quoting July 22, 1992 FERC Order accepting Northern Virginia contract).

This language reflects nothing more than the fact that the vast majority of rates are accepted for filing without being subject to a litigated challenge and a resulting determination that the rates are just and reasonable. A regulated energy seller is required to file with the Commission "all rates and the classifications, practices, and regulations affecting such 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). Where, as here, rates and related contracts are accepted for filing and are unchallenged, language such as that in the July 22, 1992 Old Dominion FERC Order is routinely included in the order accepting the rates for filing to reiterate the general proposition that a FERC order "permit[ting] a rate schedule or any part thereof . . . to become effective shall not constitute approval by the Commission of such rate schedule or part thereof . . . ." 18 C.F.R. § 35.4.

Mobile-Sierra public interest review consistently has been applied to such contracts "accepted for filing" but not expressly approved by the Commission. *See, e.g., Boston Edison Co. v. FERC*, 233 F.3d 60, 65 (1st Cir. 2000) (*Mobile-Sierra*

applies where the utility and its customer have contracted for a particular rate, and the agency has accepted the contract for filing and allowed the rate to become effective); *Boston Edison Co. v. FERC,* 856 F.2d 361, 368-69 & n. 6 (1st Cir. 1988) (*Mobile-Sierra* applicable to filed and accepted rates). Indeed, the orders accepting the contracts at issue in *Mobile* and *Sierra* contained substantively identical language. *See Pacific Gas & Elec. Co*., 7 FPC 832 (1948) (accepting contract challenged in *Sierra* for filing and stating that "[n]othing contained in this order shall be construed as constituting approval by the Commission of any service, rate, charge, classification, or any rule, regulation, contract or practice"); *United Gas Pipe Line Co*., 5 FPC 770 (1946) (accepting the contract challenged in *Mobile* for filing and stating that "[n]othing contained . . . shall [] be construed as constituting approval by this Commission of any service, rate, charge, classification, or any rule, regulation, contract or practice"). Thus, as *Mobile* and *Sierra* both concerned contracts filed with and accepted by the Commission, subject to the same qualifying language relied on by Northern Virginia, this argument provides no basis on which to avoid application of the *Mobile-Sierra* doctrine here.

Northern Virginia asserts that the public interest standard does not apply to the Commission's initial review of a contract, Br. at 30 (citing *Northeast Utils. Serv. Co*., 66 FERC ¶ 61,332 at 62,087, *reh'g denied*, 68 FERC ¶ 61,041 (1994),

aff'd Northeast Utils. Serv. Co. v. FERC, 55 F.3d 686 (1st Cir. 1995)). Here, however, the contract previously has been filed with and accepted by the Commission. *See* Br. at 30. As this Court observed in *Potomac Electric*, "FERC was clear in *Northeast Utilities* that it was 'not being asked to allow a party a unilateral rate change from a fixed-rate contract whose terms [it] previously accepted' and that it was instead 'reviewing the . . . contract for the first time, without having had any previous opportunity to determine whether its terms are lawful.'" 210 F.3d at 409 (quoting *Northeast Utils.*, 66 FERC ¶ 61,332 at 62,087). *Northeast Utilities* was therefore inapplicable in *Potomac Electric*, and likewise here, where a contract was not being filed for the first time. *Id*.

b. Northern Virginia's Other Arguments Based On *Snohomish* Are Similarly Without Merit.

Northern Virginia's other arguments based on *Snohomish* are likewise jurisdictionally barred as they were not raised on rehearing, are inapposite as *Snohomish* concerned a completely distinguishable factual scenario, and, in any event, are without merit.

Northern Virginia asserts that, under *Snohomish*, the Commission was required to consider the circumstances regarding the formation of its contract with Old Dominion. Br. at 32. However, Northern Virginia alleges no impropriety in the negotiation of the contract, in fact conceding that "Old Dominion may not have

exercised monopoly control through transmission ownership." *Id*. Indeed, Old Dominion is a non-profit entity wholly owned and controlled by its members. *See* R. 12 at 7, JA 220. Accordingly, Old Dominion was in no position to dictate to its member cooperatives (including Northern Virginia) the conditions under which it would supply electricity. Rehearing Order P 10, JA 17.

Notably, Northern Virginia did not protest Old Dominion's 1992 filing of its amended contract with Northern Virginia. To the contrary, Northern Virginia expressly acknowledged in its contract with Old Dominion that the contract rates were just and reasonable for now and in the future and the contract would provide it benefits unavailable elsewhere. R. 1 Ex. NVC-2 at 10, Section 13, JA 74.

These contractual stipulations undermine any claims regarding improprieties in contract formation. In *Potomac Electric*, while the buyer alleged that the contract was the result of unequal bargaining power, this Court found that the buyer could not escape the fact that it fully supported the fixed-rate contract before FERC when it was executed, and it alleged no bad faith negotiations on the part of the parties to the agreement. 210 F.3d at 410. "[A]bsent any claim, much less evidence, of unfairness or bad faith in the original negotiations, it is reasonable for FERC to require parties 'to live with their bargains as time passes and various projections about the future are proved correct or incorrect.'" *Id*. (quoting *Town of*

Norwood v. FERC, 587 F.2d 1306, 1312-13 (D.C. Cir. 1978)). Consequently, here, where Northern Virginia does not even allege the exercise of unequal bargaining power, there is even less basis to relieve Northern Virginia from the contract it strongly supported at inception.

Based also on *Snohomish*, Northern Virginia asserts that a customer complaining of high rates may satisfy the public interest test by showing only that the rates are outside the zone of reasonableness. Br. 33-34. Again, this argument is jurisdictionally barred, *see supra* pages 29-30, as Northern Virginia failed to argue on rehearing that a different standard should apply to buyer high rate challenges under *Mobile-Sierra*. Moreover, this final portion of *Snohomish* upon which Northern Virginia relies is dictum (as the court of appeals already had remanded for failure to consider whether the public interest standard was properly applied in the first instance) and, in any event, is inapposite as it addresses the "zone of reasonableness" as applied to market-based rate contracts, not cost-based rate contracts.

Even if *Snohomish* could be interpreted in the broad fashion espoused by Northern Virginia, this Court has not diluted the public interest test in the case of buyer claims (or agency concerns) that rates are too high. *See, e.g., East Kentucky Power Cooperative v. FERC*, No. 06-1003 slip op. at 18 (D.C. Cir. June 15, 2007)

(recognizing that *Mobile-Sierra* public interest standard is "much more restrictive" than the just and reasonable standard, though "not implicated in this case"); *Atlantic City*, 295 F.3d at 14 (the *Mobile-Sierra* public interest test is much more restrictive than the just and reasonable standard); *Papago*, 723 F.2d at 954 (the burden under the public interest standard is "practically insurmountable"); *Kansas Cities v. FERC*, 723 F.2d 82, 87-88 (D.C. Cir. 1983) (the burden under the public interest standard is "almost insurmountable"). *See also, e.g.*, *Boston Edison*, 233 F.3d at 68 (recognizing that rates that are unjust and unreasonable rates nevertheless may not be so high as to be contrary to the public interest under *Mobile-Sierra*).

In *Potomac Electric*, 210 F.3d at 409, this Court affirmed the Commission's dismissal of a buyer's complaint alleging that its rate was contrary to the public interest because it was twice the rate paid by other customers under the seller's open access transmission tariff, and that a rate modification would benefit ratepayers. The Court found these allegations "wholly inadequate" to satisfy the public interest standard as expressed in *Sierra*, which requires proof of undue discrimination or an excessive burden on ratepayers. *Id*. Rate disparities attributable to the operation of the *Mobile-Sierra* doctrine are not on that basis alone unduly discriminatory, and the fact that a contract has become uneconomic to one party does not necessarily render the contract contrary to the public interest. *Id*.

Thus, "[e]xcept as the exigencies of the public interest demand[]," FERC is "no more at liberty to alter the . . . contract to the prejudice of the [sellers] than to do so in their favor." *Pub. Serv. Comm'n of New York v. FPC*, 543 F.2d 757, 798 (D.C. Cir. 1974). *See also, e.g., Boston Edison*, 856 F.2d at 372 ("In our view, the policies enunciated by Congress are in no way demeaned by requiring primary energy distributors and their wholesale customers alike to exercise reasonable self-interested vigilance and to act promptly to protect their respective positions.")

D. Northern Virginia In Any Event Failed to Demonstrate that Its Contract With Old Dominion Was Unjust and Unreasonable.

Under Order No. 888, a customer seeking to reform the terms of an existing requirements contract even under the just and reasonable standard still has a "heavy burden in demonstrating that the contract ought to be modified." Order No. 888 at 31,665. Here, Northern Virginia "has not shown that the rates it is charged rise to a level that, even under the just and reasonable standard of review, entitles it to relief from which it now views as an unfavorable bargain." Rehearing Order P 12, JA 18; *see id*. (Commission would reach same result "even if we were to apply a just and reasonable standard of review").

As Northern Virginia recognized, R. 1 at 20-21, JA 43-44, the Commission assesses the justness and reasonableness of a contract on a "life-of-the-contract" rather than a "snapshot-in-time" basis. Rehearing Order P 12, JA 18 (citing

Pontook Operating Ltd. Partnership v. Pub. Serv. Comm'n. of N.H., 94 FERC ¶ 61,144 at 61,552 (2001); *French Broad Elec. Membership Corp. v. Carolina Power & Light Co.*, 92 FERC ¶ 61,283 (2000)). Under this standard, a complainant must provide evidence of the benefits and burdens over the full term of the contract. *Id*.

Here, Northern Virginia made no attempt to quantify, or even list, the benefits it has received for the past years under the contract, as required under the "life-of-the-contract" standard. Rehearing Order P 12, JA 18 (citing *French Broad*, 92 FERC at 61,967; *Pontook*, 94 FERC at 61,552). In *French Broad*, the Commission denied a complaint seeking reformation where the complainant showed only evidence that its current rate may not be cost-justified, but failed to account for the substantial benefits the complainant had previously received under the contract. *French Broad*, 92 FERC at 61,967. Similarly, in *Pontook*, the complainant failed to state a *prima facie* case for reformation where the complainant alleged only that its current contract rate exceeds the seller's tariff rate.

The contract itself evidences that Northern Virginia received considerable benefits. Like other electric generation and transmission cooperatives, Old Dominion was created by its member cooperatives to pool their resources for greater purchasing power in procuring bulk generation resources, transmission service, and other services. R. 4 at 3, JA 135. In the Wholesale Power Contract

between Old Dominion and Northern Virginia, as amended in 1992, R. 1 Ex. NVC-2, JA 65, Northern Virginia expressly acknowledged that Old Dominion was incurring debt to construct, improve or acquire facilities to benefit Northern Virginia and other members, *id*. at 2, Recital (F), JA 66, and acknowledged that it had determined that its interest and the interest of its own members would be best served by entering into the contract with Old Dominion "in lieu of undertaking the risks of developing other sources of electricity itself or purchasing electricity from other sources." *Id*. at 2, Recital (G). Furthermore, Northern Virginia expressly agreed that the rates were just and reasonable currently and under reasonably anticipated future conditions, specifically taking into account "specific benefits achieved by the parties through this contract, and not otherwise available to the parties." *Id*. at 10, Section 13, JA 74.

Northern Virginia's failure to take the benefits of the contract into account is fatal to its case under the life of the contract standard. Rehearing Order P 12, JA 18. *See French Broad*, 92 FERC at 61,967. Northern Virginia's claims regarding the burdens of its contract fare no better. For example, Northern Virginia claims that its current rates are higher than those of certain other generation and transmission cooperatives. Br. at 28. However, Northern Virginia is not challenging Old Dominion's existing rates. Br. at 39 (Northern Virginia is "not

challenging Old Dominion's existing rates."); Rehearing Order P 12, JA 18. Accordingly, this allegation, even if true, is irrelevant to the relief sought in the complaint, which concerns only relief from responsibility for future projects.

Northern Virginia also complains that, under the Old Dominion governance structure, it is "captive" to projects that provide it no benefit. Br. at 31, 38. In its contract with Old Dominion, Northern Virginia accepted this risk, acknowledging that, while the Old Dominion projects are "intended to directly or indirectly benefit the Member and its members as well as other members of the Seller," the "Member recognizes that such benefits cannot be assured." R. 1 Ex. NVC-2 at 2, JA 66. In any event, this too is irrelevant to the complaint because Northern Virginia did not request any determination from the Commission as to the appropriateness of the Old Dominion governance structure or other internal arrangements. Rehearing Order P 12, JA 18. The governance structure is set forth in the Old Dominion by-laws (the governance provisions of which have not changed since the contract was executed, R. 4 at 8, JA 140), which were not even addressed in Northern Virginia's complaint.

Indeed, as Old Dominion explained, this same governance structure is employed by almost all generation and transmission cooperatives in the United States. R. 12 at 4, JA 217. Further, Northern Virginia had the option, as did all Old

Dominion's member cooperatives, to withdraw from Old Dominion rather than execute this requirements contract. Several cooperatives that had been members of Old Dominion withdrew from Old Dominion rather than execute the agreements. *Id*. at 21-22, JA 234-35.

Northern Virginia asserts that, under the contract, it will be denied access to competitive supplies in the future. *See* Br. at 38. However, if allowing access to competitive supplies was a sufficient ground to reform a contract, the Commission would have generically reformed all requirements contracts, which it declined to do in Order No. 888. Rehearing Order P 6, JA 16; Complaint Order P 19, JA 12; Order No. 888 at 31,663.

In any event, this speculative, unquantified assertion of future competitive disadvantage is insufficient "evidence" to support contract reformation. Rehearing Order P 12, JA 18. Even if Northern Virginia could show that the contract would become uneconomic in the future, that is not an adequate basis for contract reform, even under the just and reasonable standard. *Soyland Power Cooperative, Inc. v. Central Illinois Public Service Co*., 51 FERC ¶ 61,004 at 61,014 (1990). "[T]he question of whether a contract is financially burdensome to the purchaser is distinct from whether the contract is just and reasonable." *Gulf States Utils. Co. v. Southern Co. Servs., Inc*., Opinion No. 300, 43 FERC ¶ 61,003 at 61,017, *reh'g denied*,

Opinion No. 300-A, 43 FERC ¶ 61,394 (1988), *aff'd sub nom. Gulf States Utils. Co. v. FERC*, 886 F.2d 442 (D.C. Cir. 1989). In determining whether a contract is unjust and unreasonable, mere economic hardships or unforeseen changed circumstances are not appropriate considerations to relieve a party of which it feels is an unfavorable contractual bargain. *Soyland*, 51 FERC at 61,014. *See also San Diego Gas & Electric Co. v. FERC*, 904 F.2d 727, 730 (D.C. Cir. 1990) (affirming Commission orders denying claims that contract rates had become unjust and unreasonable due to changes in the market). These allegations thus are insufficient to sustain Northern Virginia's claim for reformation, even under the just and reasonable standard.

E. Northern Virginia's Procedural Claims Are Without Merit.

Northern Virginia contends that the Commission erred in summarily dismissing its complaint. Br. at 44-48. The Commission did not, however, summarily dismiss the complaint but rather denied the complaint on the merits, following review of the complaint and answer. Rehearing Order P 13, JA 19. The Commission's regulations provide that the Commission may decide a complaint on its merits based upon the pleadings. *Id*. (citing 18 C.F.R. § 385.206(g)(2)). The pleadings consist of the complaint and answer, as the Commission's regulations

generally prohibit answers to answers. *Id*. P 14, JA 19 (citing 18 C.F.R. § 385.213(a)(2)).

Applying 18 C.F.R. § 385.206(g)(2), the court in *Coalition for the Fair and Equitable Regulation of Docks v. FERC*, 297 F.3d 771, 780 (8th Cir. 2002), upheld FERC's refusal to assign a complaint to an administrative law judge for an evidentiary hearing. The Commission found that, while trial-type procedural measures may be used to develop a record, they are not intended to be used as a cure for an inadequate complaint. *Id*. (quoting *Union Elec. Co*., 93 FERC ¶ 61,158 (2000)). The court affirmed, finding that Congress provided that FERC should prescribe its own hearing procedures, *id*. (citing FPA § 308, 16 U.S.C. § 825g), and that the formulation of administrative procedures is within FERC's discretion. *Id*. (citing *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc*., 435 U.S. 519, 524 (1978)). This Court has repeatedly determined that an evidentiary, trial-type hearing is not necessary where, as here, the Commission can make a decision on the basis of the written record. *See, e.g*., *Sacramento Municipal Util. Dist. v. FERC,* 474 F.3d 797, 804 (D.C. Cir. 2007) ("[E]ven where there are . . . disputed issues, FERC need not conduct . . . a hearing if they may be adequately resolved on the written record.") (quoting *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993)). *See also* Rehearing Order P 12 & n. 12, JA 18-19 (noting that

"[c]omplainants seeking a hearing have the burden to show that a hearing is warranted," and that, here, Northern Virginia "has not made a showing sufficient to warrant a trial-type evidentiary hearing").

Northern Virginia complains that the Commission ruled on its complaint without considering its February 15 and February 21, 2006 submissions. Br. at 39-44. However, under the Commission's regulations, complainants are required to file "'all documents that support the facts in the complaint in possession of, or otherwise obtainable by, the complainant. . . .'" *Southwestern Electric Coop., Inc. v. FERC*, 347 F.3d 975, 981 (D.C. Cir. 2003) (quoting 18 C.F.R. § 385.206(b)(8)); Rehearing Order P 15, JA 19-20. Northern Virginia therefore was required to file with its complaint all documents supporting that complaint, including the affidavits it belatedly tried to file in answer to Old Dominion's pleadings. *Id*. (citing 18 C.F.R. § 385.206 (b)(8)). No justification was offered by Northern Virginia for its failure to include its affidavits with its complaint. *Id*. Accordingly, Northern Virginia's claims regarding the Commission's failure to consider later-filed "evidence" are without merit.

The Commission thus did not err in failing to consider Northern Virginia's February 15 and February 21 submissions. Rehearing Order PP 14-15, JA 19-20. The Commission's regulations generally prohibit answers to answers, and therefore,

to the extent that Northern Virginia filed a response to Old Dominion's answer, it properly was not considered. *Id.* (citing 18 C.F.R. § 385.213(a)(2)). To the extent that Northern Virginia responded to Old Dominion's motion for summary dismissal, any failure of the Commission to consider such pleadings was without effect as the Commission did not grant the motion, but rather decided the case on the merits. *Id*. P 13, JA 19.

CONCLUSION

For the reasons stated, the Commission's orders should be affirmed in all respects.

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 9855 words, not including the tables of contents and authorities, the glossary, the certificates of counsel and the addendum.

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