

**ORAL ARGUMENT SCHEDULED FOR APRIL 14, 2005**

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

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**No. 04-1146**

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**WISCONSIN PUBLIC SERVICE CORPORATION,  
PETITIONER,**

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,  
RESPONDENT.**

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

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**BRIEF FOR RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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**JANUARY 19, 2005  
FINAL BRIEF: MARCH 10, 2005**

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## GLOSSARY

ATC	American Transmission Company LLC
Commission or FERC	Respondent Federal Energy Regulatory Commission
FPA	Federal Power Act
Initial Order	<i>Wisconsin Public Serv. Corp. v. Midwest Indep. Transmission Sys. Operator, Inc.</i> , 102 FERC ¶ 61,255 (2003)
MISO or Midwest ISO	Midwest Independent Transmission System Operator, Inc.
MISO Business Practices or Business Practices	MISO Tariff Business Practices
MISO Tariff or Tariff	MISO Open Access Transmission Tariff
NSP	Northern States Power
NSPM	Northern States Power Marketing
NSPM-NSP Agreement	Firm Point-to-Point Transmission Service Agreement between NSPM and NSP

## GLOSSARY

NSPM partial path	Transmission service path on which the PSA energy was delivered to an interconnection point between NSP and WPSC pursuant to the NSPM-NSP Agreement
OATT	Open access transmission tariff
PSA	Five-year power supply agreement between NSPM and WPSC for 150 MW winter / 200 MW summer of capacity and energy
Rehearing Order	<i>Wisconsin Public Serv. Corp. v. Midwest Indep. Transmission Sys. Operator, Inc.</i> , 106 FERC ¶ 61,203 (2004)
Rehearing Request	WPSC's Request for Rehearing
RTO	Regional transmission organization
WPSC	Petitioner Wisconsin Public Service Corporation
WPSC-ATC Agreement	Network Integration Service Agreement between WPSC and ATC



## **GLOSSARY**

WPSC partial path	Transmission service path on which the PSA energy was transmitted within WPSC's control area pursuant to the WPSC-ATC Agreement
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**ON PETITION FOR REVIEW OF ORDERS OF THE  
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**BRIEF FOR RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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**STATEMENT OF THE ISSUES**

1. Whether the Federal Energy Regulatory Commission (“Commission” or “FERC”) reasonably approved the decisions of the Midwest Independent Transmission System Operator, Inc. (“MISO” or “Midwest ISO”) (a) to uphold the contractual rights of Northern States Power Marketing (“NSPM”) to transmission on one of the two separate and distinct partial path reservations between NSPM and Petitioner Wisconsin Public Service Corporation (“WPSC”) and (b) to deny WPSC’s attempt to exercise NSPM’s rollover rights over that path.

2. Whether the Commission properly exercised its discretion in deciding not to conduct an evidentiary hearing on issues raised by WPSC.

3. Whether the Commission properly rejected the Petitioner's Answer.

### **COUNTERSTATEMENT OF JURISDICTION**

WPSC failed to raise certain objections before the Commission in its Request for Rehearing. Hence, those objections, which are discussed *infra*, are not properly before this Court as jurisdiction is lacking under Section 313(b) of the Federal Power Act ("FPA"), 16 U.S.C. § 825l(b).

### **PERTINENT STATUTES AND REGULATIONS**

The pertinent statutes, regulations, and tariff provisions are contained in the Addendum to this Brief.

### **STATEMENT OF THE CASE**

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

This case involves the denial of rollover rights to a party lacking contractual rights to transmission capacity, including rollover rights, over a partial path. Thus, at its core, this case concerns the enforcement of NSPM's contract rights against Petitioner, who had no such rights.

NSPM and WPSC were parties to a five-year power supply agreement ("PSA") that ended in May 2003 and under which WPSC purchased 150 MW Winter/200 MW Summer of capacity and energy. R. 12 (*Wisconsin Public Serv.*

*Corp. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,255 (2003) (“Initial Order”)) at P 2, JA 306.<sup>1</sup> Two separate partial path transmission service agreements provided the transmission for this energy transaction. *Id.* Northern States Power (“NSP”) delivered the PSA energy to an interconnection point between NSP and WPSC (hereinafter “NSPM partial path”) pursuant to a long-term point-to-point transmission agreement between NSPM and NSP (“NSPM-NSP Agreement”). *Id.* From there, the energy was transmitted within WPSC’s control area (hereinafter “WPSC partial path”) under a Network Integration Service Agreement between WPSC and American Transmission Company LLC (“ATC”) (“WPSC-ATC Agreement”). *Id.* After formation of MISO, these two separate transmission agreements were assigned to MISO,<sup>2</sup> and service was then provided under the MISO Open Access Transmission Tariff (“MISO Tariff” or “Tariff”). *Id.* at P 3, JA 306.

WPSC filed a complaint against MISO, alleging that MISO violated the terms of its Tariff and the MISO Tariff Business Practices (“MISO Business Practices” or “Business Practices”) by refusing to treat the two paths as a single path, to allow WPSC to roll over both agreements as one network transmission

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<sup>1</sup> “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.

<sup>2</sup> The WPSC-ATC Agreement was filed in Docket No. ER02-1091-000, and designated as MISO Service Agreement No. 150. The NSPM-NSP Agreement was filed in Docket No. ER02-951-000, and designated as MISO Service Agreement No. 250.

service reservation, and to reassign the receipt point for the NSPM partial path to an alternative point. R. 1 (“Complaint”) at 1, JA 1. In opposition, MISO asserted that it could not roll over the transmission service in its entirety to WPSC because NSPM, who held the rights to one of the two partial paths, did not consent to the merger of the two paths. R. 6 (“MISO Answer”) at 2, JA 134.

The Commission orders found that MISO appropriately followed its Business Practices by not merging the two separate and distinct partial path reservations service and appropriately denied WPSC rollover rights in the NSPM partial path. *See* Initial Order at P 17, JA 310; R. 16 (*Wisconsin Public Serv. Corp. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 106 FERC ¶ 61,203 (2004) (“Rehearing Order”)) at PP 16 & 18, JA 345 & 346-47. As the Business Practices merely provide an option to merge partial path transactions, MISO was not required to merge the instant paths. Rehearing Order at P 18, JA 346. Furthermore, the Commission concluded that both NSPM and WPSC have, and are entitled to maintain, separate contractual rights, which include the exercise of their individual rollover rights, with respect to each partial path arrangement. *Id.* at P 16, JA 345. Moreover, the Commission noted that Section 2.2 of the MISO Tariff and Section 9.3.1 of the MISO Business Practices precluded MISO from granting WPSC rollover rights to the NSPM partial path to the detriment of NSPM, the party holding such rights. *Id.*

This petition for review followed.

## II. Statement Of Facts

### A. Statutory and Regulatory Background

Section 201 of the FPA, 16 U.S.C. § 824, grants FERC jurisdiction over transmission and wholesale sales of electric energy in interstate commerce. All rates for such transmission and sales must be just and reasonable and not unduly discriminatory. *See* FPA § 205(a) & (b), 16 U.S.C. § 824d(a) & (b).

In 1996, the Commission began proposing a set of rules<sup>3</sup> designed to create a more competitive environment in the electric utility industry. To assure that customers reap the benefits of a competitive energy market, Order No. 888 directed each jurisdictional transmission-owning utility to: (1) offer non-discriminatory, open-access transmission service; (2) unbundle its wholesale generation, transmission, and ancillary services; and (3) take transmission for its own wholesale sales and purchases under the same terms applicable to others. *New York v. FERC*, 535 U.S. 1, 11 (2002). To aid this process, FERC promulgated

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<sup>3</sup> *See, e.g., Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. By Pub. Utils. & Recovery of Stranded Costs by Pub. Utils. & Transmitting Utils.*, Order No. 888, FERC Stats. & Regs., Regs. Pmbls. ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 & 76 FERC ¶ 61,347 (1997), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regs. Pmbls. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part, Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom., New York v. FERC*, 535 U.S. 1 (2002); *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs., Regs. Pmbls. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs., Regs. Pmbls. ¶ 31,092 (2000), *aff'd sub nom., Public Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

a *pro forma* open access transmission tariff (“OATT”), *see* Order 888-A at 30,503-43, required all utilities as well as power pools to file OATTs that conformed to the *pro forma* version, *see* Order No. 888 at 31,768-69 and 31,727-28, and encouraged independent operation of regional, multi-system transmission grids by independent system operators, *see id.* at 31,730-32.

Notwithstanding the positive ramifications of Order No. 888 and its related orders, two categories of barriers remained to a competitive wholesale electric energy market: (1) engineering and economic inefficiencies in the transmission grid, and (2) lingering opportunities for transmission owners to discriminate to favor their own activities. *Public Util. Dist. No. 1 v. FERC*, 272 F.3d 607, 611 (D.C. Cir. 2001). Consequently, Order No. 2000 advanced the formation of regional transmission organizations, or RTOs, in response to those two concerns. *Id.* RTO formation, by combining various utilities’ segmented portions of a regional transmission grid and placing control of that grid in one entity, was expected to overcome these inefficiencies and problems. *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1364 (D.C. Cir. 2004). MISO is an RTO with an OATT generally conforming to the Order No. 888-A *pro forma* tariff. *Midwest Indep. Transmission Sys. Operator, Inc.*, 97 FERC ¶ 61,326 (2001).

## **B. Events Leading to the Challenged Rulings**

Under the terms of the instant PSA, NSPM's sale of energy and capacity to WPSC expired in May 2003. Initial Order at P 2, JA 306. Because NSPM could not provide the required level of capacity to service WPSC's native load customers after May 2003, WPSC began looking for another energy supplier in 2002. *Id.* at P 4, JA 306-07. WPSC also initiated discussions with MISO about rolling over the two underlying partial path transmission agreements, i.e., the NSPM-NSP Agreement and the WPSC-ATC Agreement, and reassigning the point of receipt to another new supplier that could deliver the capacity and energy over the same combined transmission path. *Id.* at P 4, JA 307.

WPSC had rights over the WPSC partial path, but not over the NSPM partial path, the rights to which were held by NSPM. Initial Order at P 20, JA 311. NSPM, not WPSC, had contractually arranged, was liable, and paid for transmission service from NSP on the NSPM partial path, although WPSC ultimately reimbursed NSPM. R. 5 ("Motion to Intervene & Protest of Xcel Energy Services, Inc.") at 6, JA 98. MISO maintained that it could not merge the two partial paths because they involved two separate and distinct reservations made by two different customers, and because NSPM withheld consent. MISO Answer at 12, JA 144. Hence, MISO concluded that WPSC had the right to renew and roll over its transmission service on the WPSC partial path, but could not



exercise rollover rights over the NSPM partial path, which was contractually owned by NSPM. *Id.* at 18-19, JA 150-51.

### **C. The Rulings on Review**

On January 13, 2003, WPSC filed the Complaint against MISO. R. 1, JA 1. The Complaint alleged that MISO violated its Tariff and Business Practices by disallowing WPSC from rolling over its network transmission service reservation as a single path, and from reassigning the receipt point for the NSPM partial path to an alternative point. *Id.* at 1 & 12, JA 1 & 12. WPSC charged that MISO should have merged the NSPM partial path with the WPSC partial path and rolled over the two partial path transmission agreements as one seamless network transmission reservation. *Id.* at 13-14, JA 13-14. WPSC noted that MISO had treated the two partial path agreements as one seamless reservation for scheduling and operational purposes. *Id.* at 13, JA 13. WPSC asserted that it was improperly required to pay MISO twice for transmission service because, in addition to paying for MISO network transmission service, it paid for point-to-point transmission on the NSPM partial path. *Id.* at 12, JA 12.

MISO's Answer, filed on January 27, 2003, *see* R. 6, JA 133, raised three principal points. It sought dismissal of the Complaint because WPSC failed to use the Internal Dispute Resolution Procedures in Section 12.1 of the MISO Tariff to resolve this matter, which the Commission had envisioned would be the case.

MISO Answer at 6, JA 138. Substantively, MISO argued that the Commission should uphold MISO's decision because the two partial path transmission agreements established separate rollover rights. *Id.* at 10, JA 142. On this point, MISO defended its decision not to merge as the two partial paths were two separate and distinct reservations made by two separate customers, one of whom refused to permit the requested merger. *Id.* at 12, JA 144. It further noted that WPSC could roll over its rights to the WPSC partial path, but not NSPM's rights to the NSPM partial path. *Id.* at 18, JA 150. Lastly, MISO contended that it had properly accounted for WPSC's payments for transmission service because WPSC had been receiving firm point-to-point transmission service from NSPM and network service from MISO. *Id.* at 22-23, JA 154-55. Thus, WPSC received two different services for which it was required to pay two separate rates. *Id.* at 23, JA 155.

The Initial Order, 102 FERC ¶ 61,255, first rejected WPSC's Answer to MISO's Answer, citing Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2). Initial Order at P 16, JA 309. Rather than send the question back for alternative dispute resolution, the Commission addressed the substance of WPSC's Complaint. *Id.* at P 25, JA 312. The Commission found that MISO had appropriately followed its Business Practices by not merging the two separate and distinct partial path reservations of NSPM and

WPSC. *Id.* at P 17, JA 310. The Commission observed that the MISO Business Practices only provide an *option* to merge partial path reservations when specific criteria are met, particularly that MISO only merges partial path reservations having the same owner, at the owner's request. *Id.* Here, there were two owners. NSPM did not request a merger, and did not agree to relinquish its rights. Thus, MISO was correct to apply transmission rights to the rightful owner of each partial path transmission customer, which in the case of the NSPM partial path was NSPM. *Id.* at P 19, JA 310. Additionally, the Commission concluded that the facts that MISO treated the NSPM partial path and the WPSC partial path as combined for scheduling purposes and that WPSC reimbursed NSPM for the NSPM partial path transmission service did not confer on WPSC contractual rights to the entire transmission capacity to permit a merger. *Id.*

Similarly, the Commission held that MISO had acted appropriately in denying rollover rights to WPSC. Initial Order at P 20, JA 311. "Both NSPM and WPSC [we]re entitled to maintain their existing contractual rights and exercise their individual rollover rights with respect to each such partial path agreement." *Id.* Section 2.2 of the MISO Tariff, which parallels *pro forma* Section 2.2 (Order No. 888-A), grants rollover rights to all existing firm service customers with a contract term of one year or more. *Id.* at P 21, JA 311. The Commission also noted that Section 9.3.1 of the MISO Business Practices, which states that MISO

“will not sell new transmission service that would cause a customer’s rollover right to be denied prior to the customer’s rollover rights notification deadline,” precludes MISO from granting WPSC rollover rights to the NSPM partial path to the detriment of NSPM, the party holding such rights. *Id.*

The Commission further concluded that WPSC paid the appropriate rates for two separate services under two separate agreements: the point-to-point service (as a customer of NSPM on the NSPM partial path) and the network service (as a MISO direct customer on the WPSC partial path). Initial Order at P 22, JA 311. The Commission also found that MISO would not be unjustly enriched because the revenues associated with point-to-point transactions are allocated to the transmission owner systems that support such service pursuant to the MISO point-to-point revenue distribution method. *Id.* at P 23, JA 312. The Commission believed (erroneously, as it turned out) that WPSC would ultimately receive a portion of those revenues. *Id.* Likewise, WPSC’s network service revenues would flow back to transmission owners, and the Commission again believed (also erroneously) that WPSC would share in those revenues. *Id.*

WPSC’s Request for Rehearing (“Rehearing Request”) raised substantially the same arguments that WPSC raised in its Complaint. *See* Rehearing Order at P 14, JA 345. Again, the Commission rejected the substance of WPSC’s points of error. *Id.*

Noting that both NSPM and WPSC are entitled to maintain their separate contractual rights and to exercise their individual rollover rights with respect to each partial path arrangement, the Commission dismissed WPSC's contention that, as a network integration transmission service customer of MISO paying the network service rate, WPSC had rights to use the NSPM partial path to integrate WPSC's resources with its load. Rehearing Order at PP 15 & 16, JA 345 (referring to Section 2.2 of the MISO Tariff and Section 9.3.1 of the Business Practices as precluding WPSC's entitlement to rollover rights over the NSPM partial path). Furthermore, the Commission found unavailing WPSC's repeated contention that, because MISO "tags" the two partial path transactions as one transaction for operational purposes, the two partial paths constituted a single, merged contractual arrangement. *Id.* at P 19, JA 347.

Although the Commission agreed with WPSC that the Initial Order erred in describing the Business Practices as limiting merged partial path transactions to those with the same owner and as stating that a merger could be done only at the owner's request, this did not change the outcome here because the Business Practices provide only an option to merge partial path transactions. *Id.* at P 18, JA 346. As the two partial paths were not identical, but separate and distinct, and involved different customers, both with valid transmission rights in their respective transmission service arrangements, MISO acted correctly under the Business

Practices when it assigned the NSPM partial path transmission service rights to NSPM, which was the customer under the partial path contract and which had not agreed to relinquish those rights. *Id.* at P 18, JA 346-47.

The Commission reiterated that WPSC had paid the appropriate rates for two separate services under the two separate agreements, and it reaffirmed that MISO would not be unjustly enriched, despite noting that WPSC would not directly share in the point-to-point or network service revenues since it was not a transmission owner. Rehearing Order at P 21, JA 347. The Commission found that the critical issue regarding the lack of unjust enrichment was that MISO would not retain any of those revenues, which were disbursed to the affected transmission owners. *Id.* at P 22, JA 348.

Lastly, the Commission again relied on its Rule 213(a)(2) for rejecting WPSC's Answer to MISO's Answer. Rehearing Order at P 23, JA 348. It also disagreed with WPSC's contention that the Commission should have set an evidentiary hearing, finding that the Complaint raised no issues of material fact that could not be resolved on the existing record. *Id.* at P 24, JA 348.

## SUMMARY OF ARGUMENT

In accordance with the broad deference afforded the Commission's interpretations of filed tariff provisions, this Court should affirm the dismissal of WPSC's Complaint. NSPM's contractual rights over the NSPM partial path and the rights afforded NSPM as a result of that ownership gave it certain rights and authority over the NSPM partial path pursuant to the MISO Tariff and the MISO Business Practices. Enforcement of those contractual rights favors the Commission's reasonable decisions to uphold MISO's determination not to merge the NSPM and WPSC partial paths, and to deny WPSC rollover rights to the NSPM partial path.

The plain language of Section 2.2 of the Tariff and Section 9.3.1 of the Business Practices also establishes that MISO properly did not merge the two partial paths, as requested by WPSC. Moreover, application of the test to determine whether merger would be appropriate under Section 10.3 of the Business Practices revealed that MISO acted properly and within its discretion when it opted to deny merger. WPSC's operational concerns regarding scheduling and delivery of power did not trump NSPM's contractual rights to the NSPM partial path. Similarly, no policies required the Commission to reverse MISO's decision. Indeed, Commission policy in favor of enforcing contracts indicates that affirmance was proper. Furthermore, because WPSC received two separate

services, its separate payments for network transmission service and partial path point-to-point transmission service were proper, and did not unjustly enrich MISO as MISO did not retain those payments.

Finally, WPSC's challenges to the Commission's discretion in declining to hold an evidentiary hearing and in rejecting WPSC's Answer to MISO's Answer are unavailing. No disputed issues of material fact required an evidentiary hearing, and resolution of this, essentially contractual, case was possible based on the written record. None of WPSC's alleged factual issues disputed the controlling fact: NSPM had contractual rights to the NSPM partial path. Likewise, the Commission properly rejected WPSC's Answer in accordance with FERC's regulations, as nothing in WPSC's Answer would have aided the Commission's decisionmaking or provided information that would have altered the Commission's conclusion.

## **ARGUMENT**

### **I. Standard Of Review**

FERC orders are reviewed under the arbitrary and capricious standard of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A); *see also Sithe Indep. Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). This standard requires the Commission to "examine the relevant data and articulate a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs.*



*Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Midwest ISO*, 373 F.3d at 1368. The Commission's factual findings, if supported by substantial evidence, are conclusive. 16 U.S.C. § 825l(b).

Furthermore, under the deferential standard announced in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court gives substantial deference to FERC's interpretation of filed tariffs even where the issue simply involves the proper construction of language. *See Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998). If the tariff language is unambiguous, then this Court must give effect to the unambiguously expressed intent of the parties. *See Ameren Servs. Co. v. FERC*, 330 F.3d 494, 498 (D.C. Cir. 2003). "If the tariff language is ambiguous, [this Court] defer[s] to the Commission's construction of the provision at issue so long as that construction is reasonable." *See Koch Gateway*, 136 F.3d at 814-15.

## **II. The Commission Acted Reasonably When It Agreed With MISO's Decision To Enforce NSPM's Contractual Rights, Thereby Precluding Merger Of The Two Partial Path Reservations And Preventing WPSC From Rolling Over Service On The NSPM Partial Path.**

### **A. NSPM, Not WPSC, Has Contractual Rights to the NSPM Partial Path, Which Provide Certain Protections to NSPM.**

NSPM, not WPSC, purchased and procured transmission service from NSP on the NSPM partial path. Complaint at 5, JA 5 ("[T]he power purchased from NSPM was delivered to the WPS[C] system via a long-term point-to-point

transmission agreement between NSPM (the supplier) and Northern States Power as transmission provider . . .”). NSPM was the signatory to, and customer under, that transmission service agreement with NSP, R. 5 (attached Service Agreement For Firm Point-To-Point Transmission Service), JA 108-09, which was ultimately assigned to MISO. WPSC cannot challenge the fact that NSPM had contractual rights to the transmission service on the NSPM partial path.<sup>4</sup> Initial Order at P 2 & 19, JA 306 & 310 (“NSPM has the contractual rights to the point-to-point transmission service across NSP’s transmission system.”).

Under Section 2.2 of the MISO Tariff, which adheres to *pro forma* § 2.2, all existing firm service customers (wholesale requirements and transmission-only with a contract term of one-year or more) have rollover rights to continue transmission service from MISO. MISO Tariff § 2.2; *see also* Initial Order at P 21, JA 311. As the firm service customer over the NSPM partial path, NSPM still had rollover rights to continue transmission service from MISO when the NSPM-NSP Agreement (assigned to MISO) expired, rolled over, or was renewed. Similarly,

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<sup>4</sup> To the extent WPSC now contends that NSPM has no contractual rights to the NSPM partial path because the PSA expired and that, therefore, the Commission need not have worried about abrogation, *see* Brief 24, WPSC failed to raise that contention on rehearing. Consequently, it is an objection not properly before this Court. *See* 16 U.S.C. § 825l(b) (“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 . . .”). In any case, the expiration of the PSA did not eviscerate NSPM’s contractual rights to transmission service on the NSPM partial path because the NSPM-NSP Agreement was separate and distinct from the PSA and because, as the original (and only) rights holder, NSPM had the right to roll over transmission service on the NSPM partial path. *See* MISO Tariff § 2.2.

under Section 9.3.1 of the Business Practices, MISO is obligated not to sell new transmission service that would cause a customer's rollover right to be denied prior to the customer's rollover rights notification deadline. R. 1 (attached Business Practices), JA 60; *see also* Initial Order at P 21, JA 311. Thus, MISO could not grant WPSC's request for transmission service over the NSPM partial path when WPSC sought such service before NSPM's rollover rights notification deadline, at which time NSPM had the right to determine whether it would roll over its transmission service.

Under the deferential *Chevron* standard, this Court gives substantial deference to the Commission's interpretation of filed tariffs even where the issue simply involves the proper construction of language. *See Koch Gateway*, 136 F.3d at 814. With respect to the MISO Tariff and Business Practices, the unambiguously expressed intent of the parties was to preserve existing firm transmission service customers' rights, including rollover rights. To the extent there were any ambiguities in the provisions of the Tariff and the Business Practices, the Commission reasonably interpreted them to conclude that MISO could not grant WPSC rollover rights to the NSPM partial path because those provisions indicated that the existing firm transmission customer should have those rights. The enforcement of NSPM's contractual rights, thereby preserving NSPM's valuable transmission rollover rights, is perfectly consistent with the

dictates of ordinary contract law, the MISO Tariff, and the MISO Business Practices, and it does not amount to arbitrary or capricious behavior. In contrast, WPSC's reading would permit it to usurp rights that it did not own and, thus, would contravene the Tariff, the Business Practices, and ordinary contract law.

**B. NSPM's Contractual Rights, the Tariff, the MISO Business Practices, and the Commission's Policies Militate Against Merger of the Partial Path Reservations and Against Granting Rollover Rights to WPSC.**

Because NSPM declined to relinquish its contractual rights over the NSPM partial path, the Commission agreed with MISO's finding that merger of the NSPM partial path with the WPSC partial path to form a single network transmission service would be improper. The Tariff specifically grants NSPM, not WPSC, rollover transmission service rights over the NSPM partial path. MISO Tariff § 2.2. Merging the two partial paths, as requested by WPSC, would have negatively affected NSPM's rollover rights because then WPSC, not NSPM, would have had rollover rights over the previously designated NSPM partial path. This action would have violated the Tariff because the existing firm transmission service customer, NSPM, would no longer have rollover rights. The Commission reasonably chose not to permit such a result.

Nothing in the MISO Business Practices mandates a different conclusion. As the Tariff does, the Business Practices provide that "[e]xisting long-term firm service customers have the right under certain conditions to continue to take

transmission service when the contract expires, rolls over, or is renewed. This transmission reservation priority for existing long term firm service customers is an ongoing right that may be exercised at the end of all firm contracts for a term of 12 months or longer.” R. 1 (attached Business Practices), JA 60. Hence, the Business Practices also preclude WPSC’s requested merger, which would improperly infringe NSPM’s transmission service rights over the NSPM partial path, because NSPM as the firm service customer has the right to roll over that service.

Furthermore, contrary to WPSC’s assertion, *see* Brief 22-24, the Business Practices do not require merger of the partial paths on the part of MISO. “The Midwest ISO’s Business Practices still provide only an *option* to merge partial path transactions, they do not require it.” Rehearing Order at P 18, JA 346 (emphasis added). Section 10.3 of the Business Practices states, in pertinent part: “In some cases, a transmission customer may indicate that a reservation made on one MISO TO [transmission owner] and a reservation made on a separate MISO TO were really one reservation and should be treated as such under the MISO tariff. . . . The MISO will determine whether these reservations meet the criteria to be combined, and if these criteria are met, will manually combine these reservations and place them on the MISO node . . . .” That does not mandate that MISO must merge two partial path reservations, but merely sets out the merger criteria that MISO may consider in deciding whether to merge partial paths. In other words, MISO has

discretion to determine whether the reservations should be merged pursuant to the criteria noted in Section 10.3.

“The criteria used for determining whether the reservations can be combined are as follows: The type of service sold is identical. The time period of the service originally sold is identical. The reservations identified by the customers form a continuous path.” R. 1 (attached Business Practices Section 10.3), JA 68. Applying those criteria, the Commission expressly concluded that “the Midwest ISO had before it two separate and different transactions involving two different customers, both with valid transmission rights in their respective transmission service arrangements. The partial paths in this proceeding were not identical; the partial paths at issue here involved separate arrangements for different transmission services with different parties.” Rehearing Order at P 18, JA 346. As the requested merger did not satisfy the test criteria, MISO’s decision to deny WPSC a merger of the two partial paths followed the language of Section 10.3. Accordingly, the Commission’s decision supporting MISO’s application of the discretionary merger test under Section 10.3 was a reasonable interpretation of the governing language. *Koch Gateway*, 136 F.3d at 814-15.

In an attempt to obfuscate the discretionary nature of Section 10.3, WPSC contends, *see* Brief 23-24, that the Commission utilized language not found in the Business Practices and provided a new rationale not provided under the Business

Practices, thereby warranting reversal. This is simply not the case, and results from WPSC's misreading of the Rehearing Order. The Rehearing Order acknowledges that the Initial Order mistakenly stated that the Business Practices only permitted MISO to merge partial path transactions involving the same owner and at the owner's request. Rehearing Order at P 18, JA 346. The Rehearing Order then corrected that misstatement: "we agree that the Midwest ISO Business Practices do not *require* that merged partial path transactions must have the same owner and that it can be done only at the owner's request." *Id.* Thus, contrary to WPSC's contention, *see* Brief 23-24, the Commission did not state that merger can only be "at the owner's request." The Commission actually said the opposite of what WPSC now wrongly claims was stated.

The Commission reasonably indicated that the correction "does not change our conclusion," as the correction did not change the discretionary nature of merger, *see* Rehearing Order at P 18, JA 346, or the language or application of the test under Section 10.3, *see id.* at P 18 n. 15, JA 346 n.15. The fact that NSPM had contractual rights to the NSPM partial path and did not consent to relinquishing those rights reinforced MISO's discretionary decision not to merge the two partial path reservations.

Likewise, the operational issues related to MISO's treatment of the two partial path reservations do not affect the reasonableness of the Commission's

determination. WPSC cites no legal authority permitting the unauthorized transfer of another's contractual rights based on operational or other aspects of the service. *See generally* Brief 25-26. MISO's treatment of the two partial path transactions as one for scheduling purposes and WPSC's reimbursement of NSPM for the NSPM partial path transmission service "d[id] not confer contractual rights to the transmission capacity, *i.e.*, c[ould] not transfer NSPM's contractual rights from NSPM to WPSC . . . ." Rehearing Order at P 19, JA 347. The contractual rights remained unchanged, notwithstanding how the paths were used in operating and scheduling the MISO system or the extent to which WPSC benefited from the NSPM partial path. In short, the Commission reasonably concluded that NSPM's contractual rights trump how MISO operated or scheduled the two partial paths in determining who holds contractual and rollover rights to the NSPM partial path.

As for WPSC's argument that partial path network service cannot exist because network service customers are prohibited from purchasing point-to-point transmission service to designate a network resource, *see* Brief 19-20, this Court should reject that argument for procedural and substantive reasons. The argument is procedurally improper because WPSC did not adequately raise on rehearing the issue of purchasing point-to-point transmission by network service customers. The Rehearing Request makes a faint reference to Order 888-A at 30,259, to support its assertion that network service customers are precluded from purchasing point-to-



point transmission service. That page of Order 888-A, however, discusses the interplay between behind-the-meter generation and *pro forma* tariff section 1.22. It has nothing to do with WPSC's current claims that "Partial Path Network Service Cannot Exist" and that "it is prohibited under Order No. 888 from obtaining point-to-point transmission service to link its partial path right to reach a source." Brief 19-20. By referencing a citation that had no relation to the asserted current contention, the Rehearing Request insufficiently advised the Commission as to the point, and it failed to comply with this Court's precedent that arguments be adequately raised for the Commission to address on rehearing. *See Domtar Maine Corp. v. FERC*, 347 F.3d 304, 310 (D.C. Cir. 2003) (finding section 23(a) argument not properly raised because reference to section 23(b) did not adequately apprise FERC of the section 23(a) argument and because, despite some nexus between that argument and previously raised arguments, petitioner failed to fairly raise the section 23(a) issue).

WPSC's argument substantively fails because, even though WPSC received appropriate network service, contractual and congestion-related reasons limited it to partial network transmission. Although WPSC had "not lost elements of its network service," Rehearing Order at P 17, JA 345, it received the service only to the extent warranted under the circumstances. "For operational and reliability purposes the Midwest ISO allowed WPSC to schedule transmission service with a

point receipt indicating a designated network resource within the NSP Control Area to a point of delivery of WPSC's, based upon WPSC's and NSP's representation that the point of receipt was backed by a firm point-to-point transmission service request and as such qualified as a network resource." *Id.* at P 17, JA 345-46. The operational concerns, however, did not transfer the transmission rights to the NSPM partial path, which covered the NSP Control Area, to WPSC. Consequently, when the point-to-point transmission service on the NSPM partial path was not rolled over for the benefit of WPSC, the transmission service "expired," *id.*, as did implicitly the network resource designation in the NSP Control Area.

"Thus, WPSC's request to roll over the entire reservation was treated by the Midwest ISO as a request to renew just one of the two partial path agreements [the WPSC Agreement] and the Midwest ISO reassigned the receipt point of that partial path service." Rehearing Order at P 17, JA 346. MISO did its best to protect all parties with interests in the two partial paths and to provide appropriate service to WPSC. Because the pre-MISO, NSPM partial path transmission service, reserved by NSPM, would not have rolled over on behalf of WPSC, WPSC's attempt to receive transmission service on the NSPM partial path, after the PSA expired, no longer had priority. As the interface for that partial path was constrained, *see id.* ("the constrained interface of the Midwest ISO between Minnesota and

Wisconsin”), MISO rightfully placed WPSC’s post-expiration transmission request on the constrained NSPM partial path “at the back of the queue for the purpose of determination of available transmission capacity.” *Id.* Besides the fact that no point-to-point transmission service reservation now backed up and, therefore, qualified WPSC’s alleged network resource, congestion barred MISO from including the NSPM partial path as part of WPSC’s network transmission service. Permitting WPSC “to have source to sink rights over the constrained interface . . . would in effect, double existing transmission rights which could degrade transmission reliability over the interface.” *Id.* In light of such circumstances, the Commission correctly found that MISO provided the appropriate level of transmission service to WPSC.

WPSC’s claim that the Commission’s orders are contrary to espoused policies, *see* Brief 20-22, is also unavailing. First, the affirmance of the MISO’s decision to uphold contractual rights reflects a Commission policy to enforce contractual rights. *See generally* Initial Order at PP 19-20, JA 311-12 (finding contractual rights to trump operational concerns and noting that parties are entitled to maintain existing contractual rights); Rehearing Order at P 16, JA 345 (observing that parties are entitled to maintain existing contractual rights). Second, in contrast to WPSC’s contention that the conclusion here resulted in transmission inefficiencies in contradiction of FERC policy, *see* Brief 20-21, the Commission

reasonably determined that MISO’s decision assured transmission reliability, *see, e.g.*, Rehearing Order at P 17, JA 345-46 (noting that granting source to sink rights, as requested by WPSC, over the constrained interface would ostensibly double existing transmission rights, thereby degrading reliability). Hence, the Commission reasonably considered policy matters when it issued its orders affirming MISO’s decision.<sup>5</sup>

**C. WPSC Properly Paid Two Rates, and No Unjust Enrichment Occurred.**

In the Rehearing Order, the Commission clearly and reasonably concluded that WPSC “had paid the appropriate rates for the two separate services under the two separate agreements.” Rehearing Order at P 21, JA 347. Nevertheless, WPSC contends that, as a network transmission customer, it should have had to pay only

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<sup>5</sup> WPSC also argues in its Brief that the orders fail to take into account the elimination of rate-pancaking, which WPSC suggests is a goal of MISO and FERC. *See* Brief 21. Rate-pancaking, however, was never raised as an issue on rehearing and is, therefore, not properly before this Court. Even if it were, the Commission properly concluded that WPSC paid two rates for two distinct and separate services, *see* Rehearing Order at P 21, JA 347; consequently, the alleged goal of MISO and FERC to eliminate rate-pancaking would not have necessarily affected the outcome because the services were separate.

one rate, and that MISO was unjustly enriched.<sup>6</sup> *See* Brief 26. These points are without merit.

“Contrary to WPSC’s assertion that it is only paying for network service, WPSC was receiving and so [had to pay] for two distinct services, the point-to-point service, as a customer of NSPM and the network service, as a direct customer of the Midwest ISO.” Rehearing Order at P 21, JA 347. Paying for network service on MISO did not authorize WPSC to receive point-to-point transmission service on the NSPM partial path, which was distinct from MISO’s network service. Hence, WPSC had to pay for transmission service on the NSPM partial path separately.

Moreover, MISO did not unjustly benefit from receiving both payments as Petitioner contends, *see* Brief 26. Although WPSC correctly notes that the Commission acknowledged an error in its Initial Order regarding whether point-to-point and network transmission revenues directly flowed back to WPSC, *see id.* (“In its Rehearing Order, FERC acknowledged that WPSC no longer owned

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<sup>6</sup> WPSC’s current contention, *see* Brief 26, that NSPM was also unjustly enriched was not properly raised on rehearing. *See Domtar*, 347 F.3d at 312-13 (rejecting argument not adequately addressed in rehearing request). Other than a stray reference in sub-heading E. that NSPM was unjustly enriched and an irrelevant point that NSPM may be seeking Financial Transmission Rights, the Rehearing Request does not expand on that argument. R. 13 at 18-19, JA 330-31. Rather, the Rehearing Request states that MISO, not NSPM, “would and clearly has the opportunity to collect a second transmission charge over that point-to-point transmission path clearly leading to an overcollection.” *Id.* As noted, *see supra* Section II.C, there was no unjust enrichment by MISO. In any case, there was no unjust enrichment of NSPM, and WPSC points to no actual evidence, *see* Brief 26, establishing that NSPM received more than it was due.

transmission assets . . . .”), that acknowledgment did not affect the conclusion that MISO was not unjustly enriched. Rather, “[t]he critical issue . . . is that the Midwest ISO will not retain these revenues either and so will not be unjustly enriched.” Rehearing Order at P 22, JA 348. As the revenues are disbursed, according to MISO’s procedures, to those transmission owners whose facilities are used to provide the service, *see id.*, MISO does not retain such revenues, and it cannot be said to be unjustly enriched.

### **III. The Commission Did Not Abuse Its Discretion With Regard To Procedural Matters.**

#### **A. No Disputed Issue of Material Fact Warranted an Evidentiary Hearing.**

The Commission need not conduct an evidentiary hearing if it is able to resolve any disputed issues on the written record before it. *See, e.g., Cajun Elec. Power Coop. v. FERC*, 28 F.3d 173, 177 (D.C. Cir. 1994); *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993). Likewise, the Commission has broad discretion to tailor administrative procedures to the needs of a particular case. *See Atlanta Gas Light Co. v. FERC*, 140 F.3d 1392, 1399 (11th Cir. 1998). Hence, even if material factual disputes are presented on the record, the Commission need not conduct a trial type hearing if the issues can be resolved on the written record. *Id.*

The Commission did not abuse its discretion in declining to pursue WPSC’s discovery inquiries through an evidentiary hearing because the fundamental issues

here could be resolved on the existing written record. Rehearing Order at P 24, JA 348 (“[T]he complaint did not raise issues of material fact, but rather issues that could be resolved on this record.”). Contrary to WPSC’s allegations, *see* Brief 27-29, no material questions of fact affected the conclusion to enforce NSPM’s contractual rights or the discretionary nature of the Commission’s decision. As previously noted, *see supra* Section II.B., WPSC makes much ado about nothing when it discusses the Rehearing Order’s acknowledgment, *see* Rehearing Order at P 18, JA 346, that merger under the Business Practices does not need to involve partial path transactions with the same owner or require an owner’s consent. But WPSC does not question the validity of that acknowledgment nor does it explain how the acknowledgment would change the Commission’s application of the merger test. The Business Practices Section 10.3 criteria asks whether the type of service and the time period of the service originally sold are identical and whether the reservations identified by the customers form a continuous path. The Commission followed those criteria to conclude “[t]he partial paths in this proceeding were not identical; the partial paths at issue here involved separate arrangements for different transmission services with different parties.” Rehearing Order at P 18, JA 346.

Furthermore, the acknowledgment did not raise a material question of fact regarding NSPM’s contractual rights, *see generally* Brief 27-29, which was

another basis for finding in favor of NSPM and against merger of the partial paths. Similarly, no factual issues regarding operational matters or consent affected NSPM's contractual rights, *see id.* at 28-29, and, therefore, could not preclude resolution of this case on the pleadings. In short, WPSC identifies no underlying factual issues that justify an evidentiary hearing. *See Cajun*, 28 F.3d at 177; *Moreau*, 982 F.2d at 568. Rather, WPSC's claims, *see generally* Brief 27-29, at most, "pose legal and policy issues . . . and as such, do not warrant a hearing." *Pacific Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1119 (D.C. Cir. 2002) (citations omitted).

**B. The Commission Properly Rejected WPSC's Answer.**

Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2), states, in pertinent part, that "[a]n answer may not be made to . . . an answer . . . unless otherwise ordered by the decisional authority." Thus, as it had not ordered WPSC's proffered Answer to MISO's Answer, the Commission acted consistent with its discretion under the regulations to strike the Answer.

In support of its contention that the Commission should have permitted its Answer in contravention of FERC Rules, *see* Brief 30, WPSC asserts that the Commission has occasionally waived the Rule when an answer aids decisionmaking or corrects factual misstatements, or when acceptance of the



answer results in a further developed record. But the prior waivers do not correlate to a finding that it must waive Rule 213, as WPSC wrongfully suggests, *see id.* Indeed, such waivers reinforce and underlie the FERC's discretion with respect to Rule 213 as to whether to permit an answer to an answer.

Besides the rejection being a matter within the Commission's discretion, none of the alleged circumstances raised by WPSC, *see* Brief 30, are evident in this case. WPSC's Answer would not have aided the Commission's decisionmaking because nothing in that Answer demonstrated that, instead of NSPM, WPSC had contractual rights over the NSPM partial path. Moreover, to the extent WPSC contends that its Answer corrected factual misstatements in MISO's Answer, *see id.* at 30 ("In WPSC's Answer, WPSC detailed factual mis-statements . . . ."), and assuming that to be true, those corrections were not germane to the Commission's analysis. The key issue here was NSPM's contractual rights over the NSPM partial path. Further development of the factual record would not have altered those rights. Thus, as WPSC's Answer did not aid the Commission's decisionmaking or correct facts necessary to the analysis, the Commission's exercise of its broad discretion to reject WPSC's Answer, consistent with Rule 213(a)(2) and prior waiver cases, was sound and reasonable.

## CONCLUSION

For the reasons stated, the petition for review should be denied, and the challenged orders upheld in all respects.

Respectfully submitted,

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January 19, 2005  
Final Brief: March 10, 2005