

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

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

Nos. 05-1325, *et al.*

**PUBLIC SERVICE ELECTRIC AND GAS COMPANY, *et al.*,
PETITIONERS,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

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

**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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COMMISSION
WASHINGTON, D.C. 20426**

September 5, 2006

CIRCUIT RULE 28(A)(1) CERTIFICATE

A. Parties and Amici

All parties, intervenors and *amici* appearing before the Commission and this Court are listed in Petitioners' Joint Opening Brief.

B. Rulings Under Review

The following two orders of the Federal Energy Regulatory Commission are under review here:

1. *Neptune Regional Transmission System, LLC v. PJM Interconnection, L.L.C.*, Order on Complaint, Docket No. EL05-48-000, 110 FERC ¶ 61,098 (February 10, 2005) ("Complaint Order"), R. 22, JA 517;
2. *Neptune Regional Transmission System, LLC v. PJM Interconnection, L.L.C.*, Order on Rehearing, Docket No. EL05-48-001, 111 FERC ¶ 61,455 (June 23, 2005) ("Rehearing Order"), R. 32, JA 605.

C. Related Cases

Case Numbers 05-1330 and 05-1335 have been consolidated before this court. Counsel is not aware of any other related cases pending before this or any other court.

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September 5, 2006

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GLOSSARY

2001 Neptune Order	<i>Neptune Regional Transmission System, LLC</i> , 96 FERC ¶ 61,147 (2001)
Commission or FERC	Federal Energy Regulatory Commission
Complaint Order	Order on Complaint, <i>Neptune Regional Transmission System, LLC v. PJM Interconnection, L.L.C.</i> , Docket No. EL05-48-000, 110 FERC ¶ 61,098 (February 10, 2005), R. 22, JA 517
Facilities Study	The third study in the three-step interconnection evaluation process
Feasibility Study	The first study in the three-step interconnection evaluation process
FirstEnergy Companies	Jersey Central Power & Light Company, Metropolitan Edison Company and Pennsylvania Electric Company
FPA	Federal Power Act
Incremental reliability upgrade costs	The costs above the \$4.4 million in interconnection costs that were estimated in the second re-study of the Neptune Project
Intervenors	Intervenors and <i>Amici</i> Gerdau Ameristeel Corporation, New Jersey Division of Ratepayer Advocate and the New Jersey Board of Public Utilities

GLOSSARY (Cont.)

Int. Br.	Joint Opening Brief of Intervenors and <i>Amici</i> in Support, Gerdau Ameristeel Corporation, New Jersey Division of Ratepayer Advocate and the New Jersey Board of Public Utilities, <i>Public Service Electric and Gas Company v. FERC</i> , Case No. 05-1325, <i>et al.</i> (filed June 2, 2006)
JA	Joint Appendix
LGIP	Standard Large Generator Interconnection Procedures (established in Order No. 2003)
Order No. 2003	<i>Standardization of Generator Interconnection Agreements and Procedures</i> , Order No. 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146 (2003), <i>order on reh’g</i> , Order No. 2003-A, 69 Fed. Reg. 15,923 (Mar. 26, 2004), FERC Stats. & Regs., ¶ 31,160 (2004), <i>order on reh’g</i> , Order No. 2003-B, 70 Fed. Reg. 265 (Jan. 4, 2005), FERC Stats. & Regs. ¶ 31,171 (2004), <i>order on reh’g</i> , Order No. 2003-C, 70 Fed. Reg. 37,661 (June 16, 2005), FERC Stats. & Regs. ¶ 31,190 (2005), <i>appeal pending sub nom. National Assoc. of Reg. Comm’rs v. FERC</i> , D.C. Cir. Nos. 04-1148, <i>et al.</i> (consolidated) (filed May 5, 2004)
Pennsylvania Commission	Pennsylvania Public Utility Commission
Petitioners	Public Service Electric and Gas Company; Jersey Central Power & Light Company and Metropolitan Edison Company (collectively “the FirstEnergy Companies”) and the Pennsylvania Public Utility Commission (or “Pennsylvania Commission”)

GLOSSARY (Cont.)

Pet. Br.	Joint Opening Brief of Petitioners, Public Service Electric and Gas Company, Jersey Central Power & Light Company, Metropolitan Edison Company, Pennsylvania Electric Company and the Pennsylvania Public Utility Commission, <i>Public Service Electric and Gas Company v. FERC</i> , Case No. 05-1325, <i>et al.</i> (filed May 18, 2006)
PJM	PJM Interconnection, L.L.C.
R.	Record
Rehearing Order	Order on Rehearing, <i>Neptune Regional Transmission System, LLC v. PJM Interconnection, L.L.C.</i> , Docket No. EL05-48-001, 111 FERC ¶ 61,455 (June 23, 2005), R. 32, JA 605
RTO	Regional Transmission Organization
System Impact Study	The second study in the three-step interconnection evaluation process

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**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUES

1. Whether this Court should review the challenged orders where Petitioners, which have not suffered any definitive injury, lack standing and the issues complained of are not ripe for review.
2. Assuming jurisdiction, where an interconnection project had secured its place in the interconnection queue, and PJM Interconnection L.L.C.’s (“PJM’s”) tariff was unclear regarding the criteria permitting re-study of interconnection projects, whether the Federal Energy Regulatory Commission

(“Commission” or “FERC”) reasonably interpreted the PJM tariff as not authorizing unlimited re-studies related to unanticipated and speculative subsequent events.

3. Assuming jurisdiction, whether the Commission reasonably determined that subsequent reliability upgrade costs imposed pursuant to PJM’s Regional Transmission Expansion Plan are properly allocable in later proceedings via Schedule 12 of the PJM tariff.

STATUTORY AND REGULATORY PROVISIONS

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

COUNTERSTATEMENT OF JURISDICTION

Petitioners and Intervenors invoke this Court’s jurisdiction under Federal Power Act (“FPA”) section 313(b), 16 U.S.C. § 8251(b). *See* Joint Opening Brief of Petitioners (“Pet. Br.”) at 2-5; Joint Opening Brief of Intervenors (“Int. Br.”) at 2. The two challenged orders involve the resolution of a complaint brought by Neptune Regional Transmission System, LLC (“Neptune”), a merchant transmission project, to limit re-studies of its interconnection request under the interconnection provisions of PJM’s tariff. However, as demonstrated in Point I of the Argument below, Petitioners and Intervenors do not have standing to bring their claims before this Court, in that they have not suffered, and are not in

imminent peril of suffering, any justiciable injury caused by the Commission's tariff interpretation that set reasonable limits on the interconnection re-study process. Alternatively, this Court should decline review of the challenged orders because they are not ripe for consideration.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

This Court is familiar with the complications that can arise when a merchant generator endeavors to navigate its way through the complexities of the PJM Regional Transmission Organization ("RTO") interconnection queue process. *See FPL Energy Marcus Hook, L.P. v. FERC*, 430 F.3d 441, 444 (D.C. Cir. 2005) (noting, "[b]ut, alas, the best-laid plans of mice and RTOs often go awry...."). In this case, a merchant transmission project (as opposed to merchant generation) was the entity that encountered obstacles along the path to PJM interconnection.

These consolidated appeals were brought by certain transmission owners, state agencies and an industrial end-user, all located within PJM, that object to the Commission's resolution of a complaint filed by Neptune, a merchant transmission project that sought, but was denied, timely interconnection with PJM. The Commission determined that the interconnection provisions of PJM's tariff, which were ambiguous regarding the criteria that would allow for re-studies, did not permit PJM unlimited opportunities to re-study the interconnection of the Neptune

Project because of subsequent unexpected announcements of generation retirements in the PJM system. The Commission's orders found that a project's queue position provides the appropriate baseline for the allocation of interconnection costs and that subsequent reliability upgrade costs should be allocated via the PJM regional transmission expansion plan tariff provisions.

Neptune is a merchant transmission project that is designed to deliver 660 MW of energy and capacity from the PJM system to Long Island. Neptune began its quest to interconnect with PJM in December 2000 and established its place in the PJM interconnection queue as of March 2001. PJM completed its Feasibility Study of the Neptune Project (the first step of a three-step interconnection study process) in July 2001. In October 2003, PJM completed a System Impact Study of the Neptune Project (the second step) and estimated Neptune's interconnection costs to be \$3.7 million in network upgrades. The System Impact Study had to be revised in January 2004 because of the withdrawal of a higher-queued interconnection project. This increased Neptune's estimated interconnection costs to \$4.4 million.

In March 2004, while Neptune was waiting for PJM to complete its interconnection study procedures, PJM informed Neptune that its System Interconnection Study had to be re-studied yet again because PJM had learned of a number of announced retirements of operating generating units in the PJM system.

PJM then completed third and fourth System Impact Studies of the Neptune Project in June 2004. By the fourth System Impact Study, the estimated network upgrade costs for the project had increased to nearly \$26.3 million due to the anticipated effects the generator retirements would cause to the PJM system. Neptune objected to the third and fourth re-studies.

By September 2004, Public Service Electric and Gas Company (“PSE&G”) announced another round of generator retirements in PJM. In light of this development, PJM informed Neptune that a fifth re-study of the Neptune interconnection request would be necessary and that PJM would not complete a Facilities Study for the project (the third and final interconnection study step), nor would it enter into an Interconnection Agreement with Neptune, until PJM had completed the fifth System Impact re-study. When negotiations between Neptune and PJM failed to resolve the matter, Neptune filed a complaint against PJM with the Commission, requesting expedited consideration in order for Neptune to acquire an Interconnection Agreement with PJM so that Neptune could close its construction financing and complete its project on schedule. Neptune and PJM concurred that the case did not involve disputes of issues of material fact, but rather involved a policy question, concerning tariff interpretation, that required expeditious resolution.

Responding to the parties’ arguments and weighing the evidence before it,

the Commission made the following key findings: (1) Neptune's position in the interconnection queue established the base for distinguishing the project's interconnection costs from other upgrade costs to be allocated later through PJM's tariff mechanisms; (2) PJM's tariff was ambiguous regarding the conditions allowing re-study; (3) PJM's re-studies of the System Impact Study were not performed in accordance with PJM's tariff; (4) cost allocations due to the announcements of generator retirements should have no bearing on the Facility Study; (5) PJM should have provided to Neptune a Facility Study (the last stage in the study process) immediately upon the completion of its second System Impact Study in January 2004; and (6) subsequent reliability upgrade costs above the \$4.4 million in interconnection costs associated with the January 2004 System Impact Study should be allocated according to PJM tariff provisions in future proceedings.

The two Commission orders are entitled *Neptune Regional Transmission System, LLC v. PJM Interconnection, L.L.C.*, and are reported at:

- 110 FERC ¶ 61,098 (Feb. 10, 2005) (“Complaint Order”), R. 22, JA 517; and
- 111 FERC ¶ 61,455 (June 23, 2005) (“Rehearing Order”), R. 32, JA 605.

II. STATEMENT OF THE FACTS

A. The Commission's Interconnection Policy

In its Order No. 888 rulemaking, the Commission established the foundation for the development of competitive bulk power markets in the United States: non-

discriminatory open access transmission services by public utilities.¹ Recognizing the critical role played by generator interconnections in assuring non-discriminatory open access to the interstate transmission grid, in Order No. 2003,² the Commission applied the principles established in Order No. 888 – affirmed by this Court and the Supreme Court – to the standardization of procedures for generator interconnections.

Order No. 888 did not directly address generator interconnection issues. In *Tennessee Power Co.*, 90 FERC ¶ 61,238 (2000), the Commission recognized that interconnection was a critical component of open access transmission service and

¹ *Promoting Wholesale Competition Through Open Access Non-discriminatory 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).

² *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,845 (2003), FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, 69 Fed. Reg. 15,923 (2004), FERC Stats. & Regs., ¶ 31,160 (2004), *order on reh'g*, Order No. 2003-B, 70 Fed. Reg. 265 (2005), FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, 70 Fed. Reg. 37,661 (2005), FERC Stats. & Regs. ¶ 31,190 (2005), *appeal pending sub nom. National Assoc. of Reg. Comm'rs v. FERC*, D.C. Cir. Nos. 04-1148, *et al.* (consolidated) (filed May 5, 2004).

thus was subject to the requirement that utilities offer comparable, non-discriminatory service under the terms of their open access transmission tariffs. Order No. 2003 at P 9. Interconnection plays a crucial role in bringing new resources into the market as relatively unencumbered entry is necessary for competitive markets. *Id.* at P 11.

Prior to Order No. 2003, the Commission had addressed interconnection issues on a case-by-case basis, which resulted in complex, time-consuming disputes about interconnection feasibility, cost and cost responsibility. *Id.*; *see e.g., Entergy Services, Inc. v. FERC*, 319 F.3d 536 (D.C. Cir. 2003). This undermined the ability of new entrants to compete in the market and provided an unfair advantage to utilities that owned both generation and transmission facilities. *Id.* The Commission accordingly concluded that there was a pressing need for a single set of procedures for jurisdictional Transmission Providers and a single, uniformly applicable interconnection agreement for Large Generators.³ *Id.* A standard set of

³ In a separate rulemaking, the Commission established procedures and an interconnection agreement applicable to Small Generators (any energy resource having a capacity of no more than 20 megawatts, or the owner of such a resource) that seek to interconnect to jurisdictional Transmission Providers. *See Standardization of Small Generator Interconnection Agreements and Procedures*, Order No. 2006, 111 FERC ¶ 61,220 (2005), *on reh'g*, Order No. 2006-A, 113 FERC ¶ 61,195 (2005), *reh'g pending*. That rulemaking is currently under review before this Court in the case captioned *Consolidated Edison Co., et al. v. FERC*,

procedures as part of the open access transmission tariff for all jurisdictional transmission providers would minimize opportunities for undue discrimination and expedite the entry of new market participants, while protecting reliability and ensuring that rates are just and reasonable. *Id.*

The Commission also recognized the harm caused to energy markets in general, and to interconnection customers in particular, by potential delays in the interconnection process:

Currently, the interconnection process is fraught with delays and lack of standardization that discourage merchant generators from entering into the energy marketplace, in turn stifling the growth of competitive energy markets.

Order No. 2003-A, 106 FERC ¶ 61,220 at P 2 (2004).

The Final Rule in Order No. 2003 included Standard Large Generator Interconnection Procedures (“LGIP”) – standardized procedures for interconnection. Order No. 2003 at P 34. The LGIP “specif[ies] the details of the uniform process a prospective Interconnection Customer and its Transmission Provider shall use to initiate, evaluate, and implement an Interconnection Request pursuant to the Final Rule.” *Id.* at P 30. Under Order No. 2003, re-studies of a System Impact Study are permitted if: (1) a higher queued project withdraws from

the interconnection queue; (2) a higher queued project is modified; or (3) the point of interconnection is re-designated. LGIP Section 7.6 (“Re-Study”).

In this case, the Commission found that, since the PJM tariff was silent in some respects and ambiguous in others on the issue of interconnection re-study, the principles of Order No. 2003 would provide guidance with respect to the interconnection of merchant transmission projects. *See* Complaint Order at PP 21, 22, 25, 26, 27, JA 523, 525-26; Rehearing Order at PP 20, 21, JA 612.

B. Merchant Transmission

The Commission supports innovation in its policies for the development of merchant transmission projects. *See generally* *Sea Breeze Pacific Juan de Fuca Cable, LP*, 112 FERC ¶ 61,295 (2005); *Northeast Utilities Service Co.*, 98 FERC ¶ 61,310 (2002); *TransEnergie Ltd. and Hydro One Delivery Services, Inc.*, 98 FERC ¶ 61,147 (2002); *TransEnergie Ltd.*, 98 FERC ¶ 61,144 (2002); *Northeast Utilities Service Co.*, 97 FERC ¶ 61,026 (2001); *Neptune Regional Transmission System, LLC*, 96 FERC ¶ 61,147 (2001), *order on reh’g*, 96 FERC ¶ 61,326 (2001); *TransEnergie Ltd.*, 91 FERC ¶ 61,230 (2000). Merchant transmission projects add additional capacity to the electric grid and enhance competition and market integration by expanding transmission and trading opportunities between regions. *Id.* The Commission reviews proposed merchant transmission projects on a case-by-case basis to ensure that the projects meet the Commission’s goals of

supporting new infrastructure, encouraging competition, and ensuring just and reasonable rates. *Id.*

In the orders under review, the Commission confirmed that merchant transmission developers, and the Neptune project specifically, remain responsible for the costs and the risks of their projects based on the system configuration at the time of their queue position. Complaint Order at PP 22-25, JA 523-26; Rehearing Order at P 22, JA 613. However, the Commission elaborated that these costs must be determined within the framework of the PJM tariff, properly and reasonably construed. Projects cannot be held responsible for costs that occur after their queue positions are established, because this could lead the interconnection provider, as was the case here, to fail to determine a final level of interconnection costs within a reasonable period of time. *Id.*

C. The Neptune Project

The Neptune project is a merchant transmission project which will provide for the delivery of 660 MW of capacity from New Jersey to Long Island via a high-voltage, direct-current, underwater transmission cable. Complaint at 2, 10-11, R. 1, JA 8, 16-17. On July 27, 2001, the Commission approved negotiated rates for the Neptune project, subject to certain conditions. *Neptune Regional Transmission System, LLC*, 96 FERC ¶ 61,147 (2001) (“2001 Neptune Order”). In the 2001 Neptune Order, the Commission directed Neptune to work with the

Northeastern regional transmission organization to ensure that the RTO's tariff is designed to accommodate Neptune's financing needs.⁴ 96 FERC at 61,634. The 2001 Neptune Order also noted that Neptune had agreed to assume the entire risk of the Neptune project. *See id.*

On June 23, 2004, Neptune secured, through a request for proposal open-season process, a twenty-year contract with the Long Island Power Authority ("LIPA") for the entire capacity of the cable, with service to begin in June 2007. Complaint at 2, 12-13, R. 1, JA 8, 18-19. Neptune then obtained all of the regulatory and financial commitments it required to complete the project, except for construction funding, which was needed to manufacture the equipment, construct the converter stations, and lay the cable. *See id.* at 2-3, 11, 14, JA 8-9, 17, 20. However, Neptune could not obtain its construction financing without having obtained an executed Interconnection Agreement with PJM by the end of March 2005. *See id.* at 2-3, 14, JA 8-9, 20. Neptune complained that, because of a series of re-studies of the impact of the Neptune project on PJM's system due to unanticipated announced generator retirements, Neptune was unable to secure an executed Interconnection Agreement with PJM. *See id.* at 4-5, 17-23, JA 10-11,

⁴ At the time of the 2001 Neptune Order, the term "Northeastern regional transmission organization" was used to refer to what is now ISO New England, the New York ISO and PJM.

23-29.

D. PJM Interconnection Process

In 1999, the Commission approved a new Part IV of the PJM tariff, establishing procedures for interconnecting additional capacity to the PJM system. *PJM Interconnection L.L.C.*, 87 FERC ¶ 61,299 (1999), *reh'g denied*, 89 FERC ¶ 61,186 (1999). (A thorough overview of the PJM interconnection queue process can be found in this Court's decision, *FPL Energy Marcus Hook*, 430 F.3d at 443-44.) In December 2000, as amended in March 2001, Neptune submitted its Interconnection Request to PJM in accordance with the interconnection procedures specified in PJM's tariff. Complaint at 3, 15, App. Ex. B thereto, R. 1, JA 9, 21, 68. The Interconnection Request established Neptune's interconnection queue position (as of March 8, 2001), the first step in a series of events that must occur before an Interconnection Agreement can be executed. *Id.* Under PJM's tariff, the queue position determines an interconnection customer's cost responsibility for the construction of facilities or upgrades to accommodate its interconnection request. *See* PJM tariff section 36.10; *see also* Complaint Order at P 22, JA 523; PJM Answer at 8, R. 16, JA 450.

Next, three levels of study must be completed: a Feasibility Study, a System Impact Study and a Facility Study. Complaint App. Ex. BB, Sec. 41.4.1, R. 1, JA 361-63. These studies, which are progressively more expensive and are paid

for by the interconnecting party, estimate and refine the system upgrade costs to be allocated to an interconnection customer. *Id.* After the Facility Study has been completed, an Interconnection Agreement can be executed. PJM Answer at 8, R. 16, JA 450. In the executed Interconnection Agreement, facilities required for the interconnection upgrade are identified and the costs for those facilities are “locked in,” *i.e.*, the estimated costs for identified facilities can be “trued up” based on the final construction costs, but additional upgrade facilities cannot be allocated to the interconnection customer. Complaint App. Ex. BB, Sec. 41.3.2, R. 1, JA 361.

E. Multiple Re-Studies of the Neptune Project

The Feasibility Study for the Neptune project was completed in July 2001. Complaint at 3, 16, App. Ex. C, R. 1, JA 9, 22, 76. There have been numerous Neptune System Impact Studies. The first System Impact Study was completed in October 2003 and estimated that Neptune would be responsible for \$3.7 million in system upgrade costs. *Id.* at 3, 16, App. Ex. F, JA 9, 22, 97. A second System Impact Study was required when a higher-queued project withdrew its proposal. *Id.* at 3-4, 16-17, App. Ex. G, JA 9-10, 22-23, 108. Neptune did not object to this re-study. *Id.* The second study, which was completed in January 2004, estimated Neptune’s system upgrade costs to be \$4.4 million. *Id.*

At the time Neptune first made its interconnection request, PJM’s tariff was entirely silent regarding the re-study of System Impact Studies. Complaint at 32,

36-37, R. 1, JA 38, 42-43; PJM Answer at 11-12, R. 16, JA 453-54. On January 20, 2004, in response to the Commission's directives in Order No. 2003 (*see supra*), PJM added the following provision to its tariff:

Re-study: If re-study of the system impact study is required, the Transmission Provider shall notify the Transmission Interconnection Customer in writing explaining the reason for the re-study and providing a scheduled completed date. Any cost of re-study shall be borne by the Transmission Interconnection Customer being restudied.

PJM Tariff Section 41.4.3 (System Impact Study), Complaint App. Ex. BB, R. 1, JA 360. The Commission accepted PJM's Compliance Filing that included this provision in *PJM Interconnection, L.L.C.*, 108 FERC ¶ 61,025 (2004).

In this case, PJM interpreted this provision as giving it discretion to conduct re-studies whenever PJM deemed them necessary. PJM Answer at 12, R. 16, JA 454. However, the Commission found that while this provision provides notice to the interconnection customer when PJM will conduct re-studies, it says nothing about the circumstances which might trigger the re-study itself. Complaint Order at P 25, JA 525.

After January 2004, PJM decided to re-study the Neptune Project once again due to a number of unanticipated announced retirements of generators operating in New Jersey, within the PJM system. Complaint at 4, 17-18, App. Exs. J, K, R. 1, JA 10, 23-24, 128, 147. PJM completed its third and fourth studies in June 2004. *Id.* The estimated costs of system upgrades resulting from these two new studies

rose to \$25.5 million and \$26.3 million, respectively. *Id.* Neptune objected to the June 2004 re-studies and invoked PJM's Internal Dispute Resolution process under section 12.1 of the PJM tariff. *Id.* at 18-19, App. Ex. L, JA 24-25, 165. In August 2004, Neptune, in an effort to move the interconnection process along, and without prejudice to its objections to the re-study of its project in light of generator retirements, executed a Facilities Study Agreement (the Facilities Study is the third and final study in the interconnection queue process) with PJM based on the scope of upgrades in the June 2004 Re-Study. *Id.* at 19, App. Ex. M, JA 25, 174.

In September 2004, PSE&G announced that it was considering the retirement of seven more generating units in New Jersey; in turn, PJM informed Neptune that would have to re-start the System Impact Study process for a fifth time. *Id.* at 4, 19-20, JA 10, 25-26. Because of the series of re-studies, PJM informed Neptune that it would not complete the Facilities Study until May 2005, beyond Neptune's deadline to close its construction financing. *Id.* at 19-20, 23, JA 25-26, 29. Without a completed Facilities Study, PJM would not execute an Interconnection Agreement with Neptune. *Id.* PJM and Neptune disagreed as to what were appropriate reasons to re-study Neptune's system impact on PJM; and, after five months of unsuccessful settlement discussions, Neptune filed the instant complaint. *Id.* at 9, 48, JA 15, 54.

F. The Neptune Complaint

On December 21, 2004, Neptune filed a complaint under section 206 of the Federal Power Act, 16 U.S.C. § 824e, against PJM. Neptune claimed that PJM's re-studies directly conflict with Order No. 2003, which states that re-studies can be conducted for three reasons: (1) a higher-queued project drops out of the queue, (2) a modification of a higher-queued project is required, or (3) the point of interconnection is re-designated. Complaint at 5-8, 26-43, App. Ex. U, R. 1, JA 11-14, 32-49, 268. Neptune claimed that since generator retirements are not one of the discrete re-study triggers included in Order No. 2003, the re-studies performed as a result of announced generator retirements were not permissible. *Id.* Neptune further noted that there is no guarantee that there will not be additional generator retirements that would give PJM another occasion to re-study Neptune's system impacts. *Id.* at 4, 25, JA 10, 31. Neptune claimed that an unanticipated series of re-studies for generator retirements is the type of regulatory uncertainty that, if left unresolved, will prevent Neptune or any other independent transmission project from moving forward in PJM. *Id.* at 5, 8, 26, 43-45, JA 11, 14, 32, 49-51.

Neptune requested that the Commission determine that it is unjust and unreasonable for PJM to interpret its tariff provision on re-study as giving PJM unfettered discretion to re-study interconnection requests as it sees fit, or, if necessary, that PJM's tariff provisions are unjust and unreasonable because they

can be interpreted as providing such unfettered discretion. *Id.* at 7-8, 46, JA 13-14, 52. Finally, Neptune requested expedited resolution of the complaint in order to secure the construction financing in time to build the facilities needed and to meet its commitment to be operational by June 2007. *Id.* at 2, 9, 46-48, JA 8, 15, 52-54.

G. Parties to the Commission Proceedings

PJM filed an answer to the complaint. R. 16, JA 443. Comments supporting Neptune's complaint were filed by the New York State Public Service Commission. Protests were filed by PSE&G and the FirstEnergy Companies. LIPA, the Pennsylvania Public Utility Commission ("Pennsylvania Commission"), PPL Electric Utilities Corporation, the New Jersey Board of Public Utilities, the New York Independent System Operator, Inc., TransEnergie U.S. LTD., the New Jersey Division of the Ratepayer Advocate, the Maryland Public Service Commission and FPL Energy, LLC were granted intervenor status. Complaint Order at P 9, JA 520.

H. The Complaint Order

On February 10, 2005, the Commission granted Neptune's complaint, finding that the PJM's re-studies were not performed in accordance with PJM's tariff. *See generally* Complaint Order, JA 517. The Commission found that PJM had not identified the \$26.3 million in network upgrades until its fourth System Impact Study on the Neptune project (*id.* at P 5, JA 518-19), and the Commission

noted that the third, fourth and fifth System Impact Studies were only performed because of unanticipated generator retirements (*id.* at PP 28-29, JA 526-527) that were announced several years after Neptune was assigned its place in the interconnection queue. *Id.* at P 5, JA 518-19. The Commission explained that queue position provides a method for cost allocation by assigning an interconnecting generator or transmission project a position in the queue based upon the date the transmission provider determined that the customer's application is valid. *Id.* at P 22, citing Order No. 2003, JA 523-24. The Commission also explained that, if an interconnecting generator or transmission project were to be held financially responsible for the costs of events occurring *after* its System Impact Study is completed, it would be impossible for such entities to make reasoned business decisions. *Id.* at PP 22-23, JA 523-24

In addition, the Commission addressed the costs above those identified in the earlier, second System Impact Study, *i.e.*, how costs above those properly allocable to Neptune (the difference between \$4.4 million and \$26.3 million) were to be allocated. In the Complaint Order, the Commission stated that when Neptune or one of its customers seeks transmission service from PJM in the future, the transmission service may trigger upgrade costs, and those costs should be allocated according to PJM's tariff at that time. *Id.* at P 31, JA 528. However, the Commission deferred deciding how those costs would be recovered because the

Commission believed that until the request for transmission service was made, those costs would remain unknown. *Id.*

I. The Rehearing Order

Requests for rehearing or clarification of the Complaint Order were filed by PSE&G and the FirstEnergy Companies. The Pennsylvania Commission requested rehearing. A letter in support of the Pennsylvania Commission's request for rehearing was filed by the New Jersey Board of Public Utilities. Rehearing Order at P 6, JA 607. Notably, PJM filed a request for clarification, *but did not seek rehearing* of the Complaint Order. *Id.*; *see also* R. 25, JA 573.

PJM asked for clarification of Paragraph 31 of the Complaint Order, which stated that the costs of providing transmission service for the Neptune Project will be “unknown” until there is a request for transmission service. Rehearing Order at P 7, JA 607-08. PJM requested the Commission to confirm that a subsequent transmission service request to deliver power to Neptune is likely to require few, if any, additional upgrades to the PJM transmission system because Neptune had already been studied for firm Transmission Withdrawal Rights. *Id.* PJM also requested clarification to confirm its intent to allocate transmission upgrade costs above the \$4.4 million figure identified in the second System Impact Study to the affected PJM transmission owners, in accordance with the PJM tariff. *Id.*

The Commission granted clarification on this point and stated that these

incremental costs, which are solely reliability upgrade costs, are to be allocated to transmission owners and then assigned to transmission customers (*i.e.*, load) through PJM's Transmission Enhancement Charge specified in Schedule 12 of the PJM Tariff. *Id.* at P 25, JA 614. The Commission denied rehearing in all other respects. *See id.* at P 1, Ordering P (B), JA 605, 617.

J. Petitions for Review

On August 16, 2005, PSE&G filed a petition for review of the Complaint and Rehearing Orders. That appeal was designated Case No. 05-1325. On August 19, 2005, the FirstEnergy Companies filed a petition for review of the orders, and that petition was assigned Case No. 05-1330. On August 22, 2005, the Pennsylvania Commission filed a petition for review of the orders, and that petition was assigned Case No. 05-1335. Thereafter, this Court consolidated the three cases for briefing and argument.

SUMMARY OF ARGUMENT

Petitioners and Intervenors do not have standing to bring their claims before this Court. They have failed to demonstrate that they have suffered, or are in imminent peril of suffering, any injury caused by the Commission's tariff interpretation that set reasonable limits on the interconnection re-study process. While the Commission found that additional reliability upgrade costs may be allocated to transmission owners and then assigned to transmission customers (*i.e.*, load) through Schedule 12 of the PJM Tariff, the final level of those costs and their allocation remain undetermined. In fact, the Commission has set these very issues for settlement judge and hearing procedures in two recently consolidated cases. Alternatively, for similar reasons, this Court should decline review of the challenged orders because the cost allocation issues raised are not yet ripe for consideration.

Assuming jurisdiction, the Court should affirm the Commission's orders, which represent a reasonable exercise of the agency's broad discretion in interpreting filed tariffs. Where PJM's tariff was silent, or at best vague, regarding the circumstances that would allow re-studies of interconnection projects, the Commission properly found, in light of the tariff's queue provisions and the principles of its Order No. 2003 interconnection rulemaking, that PJM did not have unfettered discretion to re-study Neptune's interconnection request in light of

subsequently announced generator retirements. There must be reasonable limits to the study process. In the words of then-Commissioner (now Chairman) Kelliher, “[t]he re-study provision is not designed to permit a transmission provider to re-study the project to death....”

It was therefore reasonable for the Commission to find that the queue position provides a method for cost allocation of interconnection projects. Similarly, the Commission acted within its broad discretion in deferring to later proceedings the determination and precise allocation of subsequent reliability upgrade costs through Schedule 12 of the PJM Tariff.

The remaining arguments of the Petitioners and Intervenors are without merit. Reliability and operational issues were beyond the scope of this proceeding. Finally, the state commissions had adequate notice and opportunity to present their view on the issues raised in the complaint.

ARGUMENT

I. THE PETITIONS FOR REVIEW SHOULD BE DISMISSED FOR LACK OF JURISDICTION, WHERE PETITIONERS LACK STANDING AND THE ISSUES COMPLAINED OF ARE NOT RIPE FOR JUDICIAL REVIEW

A. The Petitioners Lack Standing

Under FPA section 313(b), 16 U.S.C. § 825l(b), only a party that is “aggrieved” by a Commission order may obtain judicial review. *See, e.g., Public Utility District No. 1 of Snohomish County v. FERC*, 272 F.3d 607, 613 (D.C. Cir. 2001). An “aggrieved” petitioner must meet the constitutional standing requirements. *See, e.g., Louisiana Energy and Power Authority v. FERC*, 141 F.3d 364, 366 (D.C. Cir. 1998). These requirements are that: (1) a petitioner must have suffered an “injury in fact” – an “invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical;” (2) there must be a “causal connection between the injury and the conduct complained of;” and (3) “it must be likely, as opposed to be merely speculative, that the injury will be redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (citations and internal quotation marks omitted); *see also, e.g., Alabama Municipal Distributors Group v. FERC*, 312 F.3d 470, 472 (D.C. Cir. 2002). Accordingly, “[t]he burden on a party challenging an administrative decision in the court of appeals is ‘to show a substantial probability that it has been injured, that the defendant caused its injury,

and that the court could redress that injury.’” *Village of Bensenville v. FAA*, 376 F.3d 1114, 1118 (D.C. Cir. 2004) (quoting both *Rainbow/PUSH Coalition v. FCC*, 330 F.3d 539, 542 (D.C. Cir. 2003) and *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002)).

In this case, Petitioners and Intervenors have failed to meet their burden to demonstrate an injury in fact inflicted by the contested orders that could be redressed by this Court, because, at this point in time, the threat of injury is not imminent, but rather is conjectural and hypothetical.

Petitioners state that “[t]his case involves a question of the allocation of the costs and burdens of interconnecting a merchant transmission project” Pet. Br. at 7; Int. Br. at 3. This is not an accurate description of this case. This case simply involves the Commission, acting on a complaint, setting reasonable limits to what was becoming an unlimited interconnection study process. The Commission interpreted the PJM tariff as not giving PJM unfettered discretion to re-study the Neptune Project in light of subsequent announcements of unanticipated generator retirements on the PJM system. As to the “allocation of the costs and burdens” of necessary reliability upgrades, the Commission left the resolution of that dispute for another day. Rehearing Order at PP 24-27, JA 614 15.

With respect to the costs above the \$4.4 million in interconnection costs that

were estimated in the second re-study (*id.* at P 24) (the “incremental reliability upgrade costs”), Petitioners’ and Intervenors’ specific allegations of a legally-cognizable injury do not come close to meeting the applicable standard. Indeed, Petitioners admit in their briefs the speculative nature of the harm alleged.

Petitioners can only say “those costs will *most likely* be allocated to PSE&G and the FirstEnergy Companies,” Pet. Br. at 3 (emphasis added), or “[a]lthough the final allocation of such costs *remains unknown, it is certainly possible* that some or all of these costs can be allocated to PJM customers,” *id.* at 43-44 (emphasis added). Similarly, Intervenors state that “New Jersey customers are directly *exposed* to more than \$20 million in interconnection costs and system upgrade costs” Int. Br. at 2 (emphasis added). However, Petitioners and Intervenors cannot say more because the actual level and allocation of those incremental reliability upgrade costs are currently unknown and the Petitioners’ and Intervenors’ risk of injury remains conjectural at best.

In the Rehearing Order, the Commission stated:

The February [Complaint] Order does not address subsequent upgrade costs (not included in the project’s projection) that may be imposed pursuant to PJM’s regional transmission expansion plan. These costs, which are solely reliability upgrade costs, are allocated to Transmission Owners and then assigned to transmission customers (*i.e.*, load) through PJM’s Transmission Enhancement Charge specified in Schedule 12 of the PJM tariff. The Transmission Enhancement Charge is assessed when the transmission owner builds the upgrades and then files to recover its costs of construction.

Rehearing Order at P 25, JA 614 (footnotes omitted). Thus, Petitioners and Intervenors will only suffer an injury that can be redressed when and if a final determination of the level and allocation of those costs takes place. Only then will those costs be assigned to transmission customers through PJM Transmission Enhancement Charge specified in Schedule 12 of PJM's tariff. In turn, the Transmission Enhancement Charge is not assessed until the transmission owner builds the upgrades and then files to recover its cost of construction.

The assessment of the magnitude and allocation of the incremental reliability upgrade costs remains in its preliminary stages. The final result depends on the outcome of two recent cases currently pending before the Commission. On May 26, 2006, the Commission issued its Order on Cost Allocation Report and Establishing Hearing and Settlement Judge Procedures in *PJM Interconnection, L.L.C.*, Docket No. ER06-456, 115 FERC ¶ 61,261 (2006). This case sets for hearing and settlement judge procedures the allocation of cost responsibility for certain transmission upgrades approved by the PJM Board of Managers as part of PJM's Regional Transmission Expansion Plan. Specifically, PJM's filing includes the costs of certain planned upgrades associated with the Neptune Project. *Id.* at P 8.

Moreover, on June 19, 2006, the Commission issued its Order on Proposed Tariff Modifications, Establishing Hearing and Settlement Judge Procedures and

Consolidating Proceedings in *PJM Transmission Owners*, Docket No. ER06-888, 115 FERC ¶ 61,345 (2006). This docket, *inter alia*, evaluates proposed modifications that seek to clarify Schedule 12 of the PJM tariff regarding the allocation of transmission expansion costs to merchant transmission owners, including Neptune. *Id.* at P 3. This order consolidates Dockets ER06-456 and ER06-880 and sets these matters for settlement judge procedures and possibly hearing. Per a June 20, 2006 notice issued in these dockets, a Technical Conference on these issues was convened on June 27, 2006 at the Commission and a further Settlement Judge conference was scheduled to begin on July 19, 2006 with a possible carryover to the next day.

In short, ongoing FERC proceedings in Docket Nos. ER06-456 and ER06-880 provide an adequate forum to address the issues of the scope and allocation of the incremental reliability upgrade costs.

B. The Issues Presented are not Ripe for Judicial Review

Even if Petitioners can somehow satisfy the Court's requirements for standing, the issues presented are not ripe for judicial review. Of course, as this Court has recognized, the issues of ripeness and standing "overlap significantly," and involve many of the same considerations. *Alabama Municipal Distributors Group v. FERC*, 312 F.3d 470, 472 (D.C. Cir. 2002); *see also New York State Electric & Gas Corp. v. FERC*, 177 F.3d 1037, 1040 n.4 (D.C. Cir. 1999) (citation

omitted). The ripeness doctrine’s “basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). In addition, the doctrine aims to avoid a “piecemeal, duplicative, tactical and unnecessary appeal[] which [is] costly to the parties and consume limited judicial resources.” *Toca Producers v. FERC*, 411 F.3d 262, 266 (2005) (“*Toca Producers*”), quoting *Mount Wilson FM Broadcasters v. FCC*, 884 F.2d 1462, 1465 (D.C. Cir. 1989) (“*Mount Wilson*”). In implementing the doctrine, a court must evaluate both “the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” *Toca Producers*, 411 F.3d at 265; *Abbott Laboratories*, 387 U.S. at 149.

This Court “has framed the test to be: ‘[I]f the interests of the court and the agency in postponing review outweigh the interests of those seeking relief, settled principles of ripeness call for adjudication to be postponed.’” *Mount Wilson*, 884 F.2d at 1466 (quoting *State Farm Mut. Ins. Co. v. Dole*, 802 F.2d 474, 480 (D.C. Cir. 1986) (“*Dole*”). To find the converse, that hardship to the parties justifies immediate review, the Court must determine that the contested action’s impact on the parties is “sufficiently direct and immediate as to render the issue appropriate

for judicial review at this stage.” *Alascom, Inc. v. FCC*, 727 F.2d 1212, 1217 (D.C. Cir. 1984) (quoting *Abbott Laboratories*, 387 U.S. at 152). In evaluating whether hardship has been established, a court must also consider whether judicial review will be available at a later stage. *Toca Producers*, 411 F.3d at 266; *Friends of Keeseville v. FERC*, 859 F.2d 230, 236-37 (1988).

Application of the balancing test articulated in *Toca Producers*, *Mount Wilson* and *Dole* to the issues under review dictates dismissal of the petitions. The substantial benefits of deferring this adjudication derive from “the possibility that if the issue is not adjudicated at this time, it may not require adjudication at all.” *Toca Producers*, 411 F.3d at 266; *Friends of Keeseville*, 859 F.2d at 235.

Petitioners and Intervenors in this case (with the exception of the Pennsylvania Commission and New Jersey Division of Ratepayer Advocate), as well as PJM and LIPA, are active participants in the ongoing Commission proceedings to establish the amount and allocation of the incremental reliability upgrade costs. If the parties can reach a settlement in those proceedings, there may be no need for review of any of these cases. If they cannot, there will be Commission hearings and orders that will determine the cost allocation issue. Until that time, Petitioners’ and Intervenors’ issues are not ripe for judicial review.

Moreover, deferral of judicial review will not deprive Petitioners of the eventual opportunity to seek judicial review of any adverse rulings concerning the

incremental reliability upgrades. *See Toca Producers*, 411 F.3d at 266; *Friends of Keeseville*, 859 F.2d at 236-37. Thus, Petitioners have not, and cannot, show hardship from deferral, or that the orders otherwise impact Petitioners' interests in the kind of "direct and immediate" way that would justify their request for piecemeal review.

II. STANDARD OF REVIEW

The Court reviews FERC orders under the arbitrary and capricious standard. *Florida Municipal Power Agency v. FERC*, 315 F.3d 362, 365 (D.C. Cir. 2003). Under that standard, the Commission's decision must be reasoned and based upon substantial evidence in the record. The Commission's factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825l(b). The substantial evidence standard "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." *Florida Municipal*, 315 F.3d at 365 (quoting *FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)). The Court affords deference to the Commission's reasonable interpretation of its tariffs on file, "even where the issue simply involves the proper construction of language." *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998) (internal citation and quotation marks

omitted).⁵ See also *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1070 (D.C. Cir. 1992); *Long Island Lighting Co. v. FERC*, 20 F.3d 494, 497 (D.C. Cir. 1994).

As explained below, the Commission’s interpretation of the PJM tariff as not authorizing unlimited re-studies related to unanticipated and speculative subsequent events, based on queue principles of the tariff and the principles enunciated in Order No. 2003, is reasonable, responsive to the arguments of the various parties, and supported by substantial evidence in the record.

III. WHERE THE PJM TARIFF WAS SILENT REGARDING INTERCONNECTION RE-STUDIES, THE COMMISSION REASONABLY INTERPRETED THE TARIFF AS NOT PERMITTING UNLIMITED RE-STUDIES RELATED TO UNANTICIPATED AND SPECULATIVE GENERATOR RETIREMENTS

A. Where the Tariff Was Silent or Ambiguous, the Commission Reasonably Relied on Queue and Order No. 2003 Principles to Prevent Potentially Unlimited Interconnection Re-Studies

In its Answer below, PJM admitted that its tariff did not expressly address the effects of generation retirements on its interconnection process. R. 16 at 2,

⁵ *Koch* involved the Natural Gas Act, but courts have applied interpretations of Natural Gas Act provisions to their counterparts in the Federal Power Act because “the relevant provisions of the two statutes are in all material respects substantially identical.” *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

JA 444; Complaint Order at P 11, JA 521. Petitioners admit as much now. Pet. Br. at 23, 39; Int. Br. at 5. The Commission thus correctly found that the PJM tariff is unclear on the impacts of generation retirements upon PJM's interconnection process, especially with respect to the queue position and the criteria for engaging in re-studies. Complaint Order at P 21, JA 523, citing PJM Answer at 2, R. 16, JA 444. Further, the Commission found that there were conflicting provisions in PJM's tariff relating to PJM's interconnection policy regarding merchant transmission projects. Complaint Order at P 21, JA 523. Because the tariff was unclear and vague, the Commission rightly exercised its authority and discretion to interpret it in a reasonable manner. *Id.*

I. Queue Position

For example, section 36.10 of the PJM tariff provides that the queue position determines a generation customer's cost responsibility for the construction of facilities or upgrades to accommodate its interconnection request. Complaint Order at P 21, JA 523. However, in its Answer, PJM argued that although the queue position protects each project, the protection offered is not absolute. *Id.* (citing PJM's Answer at 8, R. 16, JA 450). To clarify the ambiguity, the Commission found that the queue position provides a baseline for distinguishing the project's interconnection costs from other upgrade costs to be allocated later through PJM's tariff mechanisms. Complaint Order at P 21, JA 523; Rehearing

Order at P 19, JA 611. The Commission found that the queue prioritizes the interconnection customer's project by assigning the customer a position in the queue based upon the date the interconnection provider determines that the customer's application is valid. *Id.* (citing Order No. 2003 at P 35). The Commission then found that the queue position serves as an important baseline for the process that leads to an Interconnection Agreement. *Id.*

The Commission then further explained the utility of the queue system to cut off limitless re-studies of interconnection requests:

This queue date serves important functions for the interconnection customer and the interconnection provider. It does not, as PSE&G contends, simply "freeze" the costs of interconnection. Rather, it establishes a baseline from which the studies are conducted. As we explained in the [Complaint] Order, by looking to the date of each customer's position in the queue, the interconnection customer may assess its business risks. Each customer knows that cost allocations will be determined by the interconnection provider's studies based upon circumstances existing as of the queue date. Projects may drop out of the queue and customers may move up the queue, but the queue system ensures that an interconnection customer does not pay for costs occurring after it joins the queue, other than for events defined by the tariff, where the potential costs are reasonably known, such as higher queued projects dropping out. Most importantly, as we explained in the [Complaint] Order, without the queue system, there exists the possibility for unlimited changes, creating the potential for havoc for interconnection providers and customers alike.

Rehearing Order at P 19, JA 611; *see also* Complaint Order at P. 23, JA 524. In short, the queue system provides a "snapshot" of a critical point in a dynamic process that allows all parties to make rational decisions.

2. PJM's "Re-Study" Provision

The Commission found further ambiguity in section 41.4.3 of the PJM tariff:

Re-study: If re-study of the system impact study is required, the Transmission Provider shall notify the Transmission Interconnection Customer in writing explaining the reason for the re-study and providing a scheduled completed date. Any cost of re-study shall be borne by the Transmission Interconnection Customer being restudied.

See Complaint App. Ex. BB, Sec. 41.4.3, R. 1, JA 364. The Commission found that this was only a notice provision, *i.e.*, PJM must provide notice to the interconnection customer should PJM conduct a re-study. Complaint Order at P 25, JA 525-26. While it is true that Order No. 2003 permitted "independent entity variation" for RTO interconnection procedures (*see* Pet. Br. at 10; Int. Br. at 8-9), the Commission nevertheless found that this provision said nothing about the actual circumstances which could permissibly trigger a re-study. Complaint Order at P 25, JA 525-26; Rehearing Order at P 20, 21, JA 612. Since this language did not address when or whether a re-study is "required," the Commission stepped in to reasonably construe the tariff's ambiguity on the issue. *Id.* Moreover, neither PJM's tariff nor its manuals defined the appropriate "baseline" conditions as they would apply to re-study in light of subsequently announced generator retirements. Complaint Order at P 28, JA 526.

In this light, the Commission reasonably interpreted the tariff as not giving PJM sole, unreviewable discretion, but rather, construed the tariff as having some

reasonable boundary to the re-study process. *See* Complaint Order at P 25; Rehearing Order at PP 20, 21. In other words, independent entity variation is not a *carte blanche* for the RTO to restudy a project *ad infinitum*.

3. *Order No. 2003 and Queue Position Principles*

Because the PJM tariff provisions were unclear as to the conditions for re-studies, the Commission reasonably interpreted the PJM tariff in light of the re-study provisions of Order No. 2003, its rulemaking on interconnection, *see supra* pages 7-10, in combination with the fundamental principles of the queue system. In light of these considerations, the Commission reasonably could conclude that re-studies are permitted based only on changes that are reasonably foreseeable and calculable at the time a project joins the queue (such as the risk of changes in higher-queued projects). *Id.*

Before the Commission, PJM had offered contradictory pleadings as to when the interconnection principles of Order No. 2003 apply to merchant transmission projects. Complaint Order at P 26, JA 526. For instance, when PJM filed for approval of its tariff changes to establish provisions to accommodate merchant transmission projects, *see supra* pages 7-10, PJM conceded that Order No. 2003 principles applied:

The tariff changes proposed today apply to merchant transmission interconnections the same study procedures and, with only minor exceptions reflecting physical differences between generation and transmission facilities, the same standard terms and conditions of

interconnection and related construction agreements that apply under the PJM Tariff to interconnection of new and expanded generation resources.

Id. (quoting PJM transmittal letter dated January 10, 2003, Docket No. ER03-405-000 at 3, JA 620). That PJM filing was accepted by the Commission on March 13, 2003. *PJM Interconnection, L.L.C.*, 102 FERC ¶ 61,277 (2003). However, before the Commission in this proceeding, PJM claimed that Neptune “vastly overstates” the limited, if any, “applicability to this controversy of Order No. 2003’s *pro forma* tariff provisions regarding generation interconnection.” PJM Answer at 7, R. 16, JA 449.

The Commission, appropriately exercising its discretion and expertise, found that since PJM itself stated that it intended to apply the same procedures, terms and conditions for merchant transmission interconnection (such as to Neptune) that it applies to interconnection of generation facilities, the principles of Order No. 2003 may provide useful guidance in this case. Complaint Order at P 27,⁶ JA 526;

⁶ The relevant passage in P 27 of the Complaint Order states “The Commission finds that since PJM itself stated that it intended to apply the same procedures, terms and conditions for merchant generation interconnection that it applies to interconnection of generation facilities, the principles of Order No. 2003 may provide useful guidance here.” However, viewed in context of the Complaint Order, the Rehearing Order and the remainder of the case, the Commission apparently meant to say “merchant transmission interconnection” and not “merchant generation interconnection” in this sentence.

Rehearing Order at P 20, JA 612.

The Commission then applied the principles of the queue and the guidance of Order No. 2003 and found that the three-tiered study process established under Order No. 2003 includes several legitimate bases for re-studies of interconnection projects when: (1) a higher-queued project drops out of the queue; (2) a modification of a higher-queued project is required; or (3) the point of interconnection is re-designated. Rehearing Order at P 20, quoting Order No. 2003 at LGIP § 7.6, JA 639; Complaint Order at P 24, JA 525.⁷ Thus, the Commission reasonably found that when Neptune joined the PJM queue in March 2001, it became responsible for (1) any costs associated with its project as determined by its queue position, and (2) the costs of any reconfiguration arising from higher-queued projects withdrawing from consideration. Complaint Order at P 24, JA 525. Accordingly, when a higher-queued project dropped out of the queue, PJM properly conducted a re-study of the Neptune project and projected that system upgrade costs associated with the interconnection of the Neptune project increased from \$3.7 million to \$4.4 million. *Id.*; accord *FPL Energy Marcus*

⁷ Notably, on March 28, 2005, in response to a separate February 10, 2005 Commission Order, *PJM Interconnection, L.L.C.*, 110 FERC ¶ 61,099 (2005), PJM filed to revise its re-study provisions and adopted the three reasons for re-studies provided in Order No. 2003. The revisions were accepted in *PJM Interconnection, L.L.C.*, 112 FERC ¶ 61,276 (2005).

Hook, 430 F.3d at 448 (interconnection project responsible for costs when higher-queued project withdrew). Indeed, not even Neptune objected to this initial re-study. Complaint at 3-4, 16-17, App. Ex. G, R. 1, JA 9-10, 22-23, 108.

4. *Subsequent Generator Retirements*

In contrast to the dropping-out of the higher queued project, the announcements of the proposed generator retirements in October and November 2003, and in September and October 2004, took place several years after Neptune was assigned to its place in the queue. Complaint Order at P 24, JA 525. These generator retirements were not announced when the initial re-study was undertaken, could not reasonably have been considered as part of Neptune's business risk, and the Commission concluded that they should not have been a basis for subsequent re-study. *Id.* Accordingly, the Commission ruled that PJM failed to apply the principles of the queue system when it re-studied the Neptune project based upon the announcement of retiring generators. *Id.*; Rehearing Order at P 20, JA 612. In a similar vein, then-Commissioner (now Chairman) Kelliher stated in his Concurring Opinion to the Complaint Order as follows:

The re-study provision is not designed to permit a transmission provider to re-study the project to death by refusing to provide a project sponsor with the completed facilities study and interconnection agreement that the project needs to proceed on a reasonable construction schedule. PJM's continuous re-studies in this case are based on potential events that are difficult to anticipate and whose impact cannot be projected with reasonable certainty. Making continuous revisions for future events that may never occur, and

whose finality cannot be readily determined under the PJM tariff, in my view, constitutes an unreasonable practice.

Concurring Opinion to Complaint Order, R. 22, JA 530. In its Rehearing Order, the Commission was united in holding that Neptune's four-year pursuit of an Interconnection Agreement with PJM was long enough, that certainty must be part of the process, and that PJM's delays based on speculative future events⁸ were unjust and unreasonable:

We uphold our previous finding that, in this case, PJM's continuous delay in finalizing an Interconnection Agreement is unjust and unreasonable. Allowing repeated re-studies for possible speculative events occurring after a project joins the queue unfairly delays the ability of projects to receive financing and commence construction. Project sponsors are entitled to a timely upfront determination of costs, based on reasonably foreseeable events. For example, the interconnection customer will know the costs associated with any higher queued project and can therefore factor into its analysis the possibility that it may have to pay some of those costs in the event the higher queued project drops out. There is no certainty in a process that can be continued indefinitely based on potential retirements or other reconfigurations of the transmission owner's system. We therefore deny rehearing and uphold our conclusion in the [Complaint] Order that the process PJM sought to apply in this case is unjust and unreasonable, and it is just and reasonable for PJM to provide to Neptune an Interconnection Agreement based on Neptune's queue position as of January 2004.

Rehearing Order at P 23, JA 613-14.

⁸ See *PJM Interconnection, L.L.C.*, 113 FERC ¶ 61,205, Docket No. ER05-1010-003, *Order on Rehearing* at n.9 (stating that some of the planned retirements by PSEG Power LLC will no longer take place).

Based on all the foregoing, the Commission concluded that PJM's re-studies were not performed in accordance with PJM's tariff, and that cost allocations due to the announcements of generator retirements should have had no bearing on the Facility Study (the third and final step in the three-part interconnection study process). Complaint Order at P 29, JA 527; Rehearing Order at P 20, JA 612.⁹ The Commission then determined that PJM should have provided Neptune a Facility Study immediately upon the completion of its second System Impact Study on January 21, 2004. Complaint Order at P 29, JA 527.

B. Petitioners' and Intervenors' Order No. 2003 Arguments Are Jurisdictionally Barred

1. Applicability of Order No. 2003 Principles

Petitioners and Intervenors improperly attempt to resurrect PJM's unsuccessful argument below and claim here that the interconnection principles of Order No. 2003 are not properly applicable to merchant transmission. Pet. Br. at 42; Int. Br. at 7-8. However, while this argument was made below by PJM, *see* PJM Answer at 19-20, R. 16, JA 461-62, PJM did not file for rehearing of the

⁹ The passage in P 20 of the Rehearing Order states "the possible costs due to the announcement of generator retirements after Neptune's queue date should have no bearing on the Feasibility Study." However, viewed in context of the Complaint Order and the rest of the case, the Commission apparently meant to say "Facility Study" in this sentence.

Complaint Order. Moreover, Petitioners and Intervenors failed to raise this argument to the Commission on rehearing.¹⁰ Accordingly, the Court lacks jurisdiction to hear these claims. FPA § 313(b), 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 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).

It is well settled that this Court strictly construes the jurisdictional rehearing requirement of FPA § 313(b), which requires that a petitioner seek rehearing before the Commission and that the petitioner raise in that rehearing request “the very objection urged on appeal.” *Town of Norwood v. FERC*, 906 F.2d 772, 774 (D.C. Cir. 1990) (quoting *Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1110 (D.C. Cir. 1989)). The argument must be raised with sufficient specificity so as to put the Commission on notice of the ground on which rehearing was being sought. *Intermountain Municipal Gas Agency v. FERC*, 326 F.3d 1281, 1285

¹⁰ Petitioners’ and Intervenors’ rehearing requests are found in the record at R. 23, JA 531; R. 24, JA 549; and R. 26, JA 581.

(D.C. Cir. 2003) (interpreting identical language of § 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b)).

Neither PJM's Answer (R. 16, JA 443) nor PJM's request for clarification (R. 25, JA 573) aids Petitioners and Intervenors. In order to be preserved for review, issues on rehearing must be raised by the petitioner itself, not some other party. *ASARCO, Inc. v. FERC*, 777 F.2d 764, 773 (D.C. Cir. 1985). Although PJM is an intervenor in this matter, "absent extraordinary circumstances, intervenors 'may join issue only on a matter that has been brought before the court by' a petitioner." *California Department of Water Resources v. FERC*, 306 F.3d 1121, 1126 (D.C. Cir. 2002) (quoting *Alabama Municipal Distributors Group v. FERC*, 300 F.3d 877, 879 (D.C. Cir. 2002)). This is particularly true where, as here, PJM did not seek either rehearing or review of either Commission order.

2. *PJM Manual 14B*

Petitioners and Intervenors criticize the Commission for failing to consider relevant evidence before it that it could have used to interpret the ambiguity of the PJM tariff. *See* Pet. Br. at 18, 23, 40-41; Int. Br. at 5-6. Specifically, they point to PJM Manual 14B "Generation and Transmission Interconnection Planning," which Petitioners and Intervenors claim put Neptune on notice that generation retirements had the potential to impact study results for any interconnection customer that did not have an executed Interconnection Service Agreement in place, citing PSE&G's

Motion to Intervene at 11, R. 14, JA 437.

While PSE&G raised this issue in its intervention below, no party raised the issue of PJM Manual 14B on rehearing. Consequently, for the reasons outlined *supra*, this argument has not been preserved for review. Even assuming *arguendo* that the argument was preserved, in the words of Petitioners, the PJM Manual was only “extrinsic evidence” that the Commission could examine “to interpret an ambiguous tariff,” citing *Consolidated Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1544-46 (D.C. Cir. 1985). Pet. Br. at 23. As such, the Commission was authorized to consider to the PJM Manual along with the other extrinsic evidence it evaluated in interpreting PJM’s ambiguous tariff, giving it as much weight as the Commission deemed appropriate. In this case the Commission, within the reasonable exercise of its discretion, gave weight to the principles of Order No. 2003 but did not give weight to PJM Manual 14B.

C. The Orders Did Not Violate “But For” or Cost-Causation Principles

The crux of the Petitioners’ and Intervenors’ arguments is that the orders on review violated the “but for” principle of the PJM tariff and the cost-causation principle. *See* Pet. Br. at 19-20, 24-28, 32-34, 35-38; Int. Br. at 2-3. Essentially, Petitioners and Intervenors point to three precepts they claim the orders violated: First, PJM tariff Section 42.2, approved by the Commission in 1999, adopted the “but for” approach for the allocation of interconnection costs. *PJM*

Interconnection L.L.C., 87 FERC at 62,202-04 (1999). Specifically, the tariff states that an interconnection customer must pay “the full cost of the facilities necessary to physically connect its generation capacity to the nearest PJM substation, plus the minimum necessary local and network upgrades that would not have been incurred under PJM’s Regional Transmission Expansion Plan ‘but for’ such interconnection request.” *Id.* Second, the 2001 Neptune Order required Neptune to assume the entire market risk of the project. 96 FERC at 61,634. Finally, this Court requires that Commission ratemaking must reasonably conform to the “cost-causation” principle. This principle requires costs of transmission systems to be allocated to those customers that cause the costs to be incurred. *See, e.g., KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992) (“requir[ing] that all approved rates reflect to some degree the costs actually caused by the customer who must pay them”). Since the Commission found that the incremental reliability upgrade costs were not attributable to Neptune’s interconnection request, however, all of these arguments fail.

Petitioners claim that “[t]he record is undisputed that the “but for” costs of interconnecting Neptune are at least \$26.3 million.” Pet. Br. at 19; *see also id.* at 25-26, 33. This is not the case. There is substantial evidence in the record that the costs above the \$4.4 interconnection costs identified in the January 2004 System Impact Study were not “but for” Neptune’s interconnection request, but rather

were “but for” the subsequent announced generator retirements:

In fact, the additional system upgrades identified in PJM’s re-studies for generator retirements would not be necessary “but for” the decisions of operating generating facility owners in late 2003 and 2004 to “retire” (or mothball) their generating facilities, often for economic reasons. The January 2004 Study identified the system upgrades “necessary to accommodate [Neptune’s] Transmission Interconnection Request,” as PJM’s “but for” provision requires. *See* PJM Tariff § 42.2. None of the *additional* system upgrade costs at issue in this Complaint would be required “but for” the generator retirements.

* * *

In its Answer, PJM acknowledges that the system upgrade[] costs at issue are the “result of the announced generation retirements.” PJM Answer at 19-20 [R. 16, JA 443]; *see also id.* at 3 (“changes arising from generation retirement”). There appears to be no argument that “but for” the decision of third parties to “retire” (or “mothball”) these operating generating facilities (often for economic reasons), these additional costs would not exist.

Reply of Neptune to Answer of PJM at 6-7, R. 19, JA 506-07 (emphasis in original).

Based on this evidence and the principles of the queue system and Order No. 2003, the Commission reasonably determined that PJM had not identified the \$26.3 million in network upgrades until its fourth System Impact Study on the Neptune project. Complaint Order at P 5, JA 518-19. The Commission then noted that the third, fourth and fifth System Impact Studies were only performed because of unanticipated generator retirements (*id.* at PP 28-29, JA 526-27) which were announced several years after Neptune was assigned its place in the

interconnection queue. *Id.* at P 5, JA 518-19. Therefore, the incremental reliability upgrade cost (costs above the \$4.4 million figure identified in the second System Impact Study) were not “but for” costs attributable to Neptune’s interconnection request; accordingly, neither the “but for” nor cost-causation principles were violated. The Commission explicitly addressed these issues on rehearing:

FirstEnergy argues that under both the PJM tariff and Commission precedent, Neptune must be held responsible for all of the “but for” costs of its project. Further, FirstEnergy and the Pennsylvania Commission contend that the Commission requires merchant transmission developers to assume full market and financial risk for their projects. *Merchant transmission developers, and the Neptune project specifically, are held responsible for the costs and the risks of their projects based on the system configuration at the time of their queue position. However, these costs must be determined within the framework of PJM’s tariff, properly and reasonably construed, as discussed above.*

Rehearing Order at P 22, JA 613 (emphasis added, footnotes omitted).

Both the Commission and the Petitioners agree that there must be some logical point in time during the interconnection process after which an interconnection customer is no longer responsible for later events (except for the three circumstances elaborated in Order No. 2003 discussed *supra*) and after which later costs would be allocated through the PJM tariff. Petitioners would draw that line the moment an Interconnection Service Agreement is executed, following all studies. Pet. Br. at 9, 19. By contrast, the Commission drew that line at the point

when the interconnection customer has established its place in the interconnection queue:

Projects cannot be held responsible for costs that occur after their queue positions are established, because that could lead the interconnection provider, as was the case here, to fail to [] determine a final level of interconnection costs within a reasonable period of time. As discussed further in the next section, upgrade costs occurring after the interconnection process can be allocated based on Schedule 12 of PJM's tariff. Only in this way is the interconnection cost allocation process just and reasonable.

Rehearing Order at P 22, JA 613. To emphasize the point, the Commission noted the following illustration:

For instance, if PJM had already signed an Interconnection Agreement with Neptune or the Neptune project had already been built, and PJM's system configuration changed, any resulting upgrade costs could not have been directly assigned to Neptune, but would have been allocated pursuant to Schedule 12 of the tariff. The same result should be applied to upgrade costs incurred based on events occurring after the project's queue position is determined in order to ensure that projects are not unduly delayed while system configuration issues are confronted.

Id. at n.16. Since a line must be drawn somewhere along the interconnection continuum, for the reasons stated *supra*, the Commission acted within its discretion to draw that line at the point Neptune established its place in the interconnection queue. As this Court recently noted in similar circumstances, when the Commission must draw lines, "some practical accommodation is necessary." *Niagara Mohawk Power Corp., v. FERC*, No. 04-1227, slip op. at 11 (D.C. Cir. June 23, 2006).

IV. THE COMMISSION REASONABLY DETERMINED THAT SUBSEQUENT RELIABILITY UPGRADE COSTS ARE PROPERLY ALLOCABLE IN LATER PROCEEDINGS VIA SCHEDULE 12 OF THE PJM TARIFF.

A. The Orders are not based on “Shifting Grounds”

As discussed, the Commission addressed the costs in excess of those identified in the earlier, second System Impact Study, *i.e.*, how costs above those properly allocable to Neptune were to be allocated. In the Complaint Order, the Commission stated that when Neptune or one of its customers seeks transmission service from PJM in the future, the transmission service may trigger upgrade costs, and those costs should be allocated according to PJM’s tariff at that time.

Complaint Order at P 31, JA 528. However, the Commission deferred deciding how those costs would be recovered because the Commission believed that until the request for transmission service was made, those costs would remain unknown.

Id.

PJM sought clarification of Paragraph 31 of the Complaint Order. R. 25, JA 573; *see also* Rehearing Order at P 7, JA 607-08. PJM explained to the Commission that a subsequent transmission service request to deliver power to Neptune is likely to require few, if any, additional upgrades to the PJM transmission system because Neptune had already been studied for firm Transmission Withdrawal Rights. *Id.* PJM also requested clarification to confirm its intent to allocate transmission upgrade costs above the \$4.4 million to the

affected PJM transmission owners, in accordance with the PJM tariff. *Id.*

The Commission granted clarification on this point and stated that these costs, which are solely reliability upgrade costs, are to be allocated to transmission owners and then assigned to transmission customers (*i.e.*, load) through PJM's Transmission Enhancement Charge specified in Schedule 12 of the PJM Tariff. Rehearing Order at P 25, JA 614.

Petitioners now criticize the Commission for granting clarification on this point, claiming that the Commission “vacillated in articulating a rationale for its result.” Pet. Br. at 20, 43-44, citing *Tennessee Gas Transmission Co. v. FERC*, 789 F.2d 61, 62-63 (D.C. Cir. 1986). However, this argument ignores the fact that the purpose of rehearing (or clarification in this case) is to provide the Commission with another opportunity to address the issues raised. *Ameren Services Co. v. FERC*, 330 F.3d 494, 499 n.8 (D.C. Cir. 2003) (“The very purpose of rehearing is to give the Commission the opportunity to review its decision before facing judicial scrutiny.”). *See also Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005) (rehearing “enables the Commission to correct its own errors, which might obviate judicial review, or to explain in its expert judgment why the party’s objection is not well taken, which facilitates judicial review.”).

B. Petitioners did not Raise to the Commission their Objection to the Cost Allocation Methodology Identified in the Rehearing Order

It appears that Petitioners are dissatisfied that the Commission granted

clarification of Paragraph 31 of the Complaint Order. Pet. Br. at 27-28. Paragraph 31 of the Complaint Order classified the incremental costs as transmission-related, such that they would have been allocated to new transmission customers.

Petitioners describe Complaint Order Paragraph 31 as “respecting the spirit, if not the letter, of Section 42.2.” *Id.* at 27. On rehearing, the Commission granted clarification on this point, at PJM’s request, describing these costs as reliability upgrade costs that are to be allocated through the process specified in Schedule 12 of the PJM Tariff. Rehearing Order at P 25, JA 614.

Now, for the first time, Petitioners take issue with this method of allocating the upgrade costs. Pet. Br. at 27-28. However, if displeased with the Commission’s “new” allocation methodology, discussed in its Rehearing Order, it became incumbent upon Petitioners to raise their objections to the Commission by filing a request for rehearing of the Commission’s clarification. FPA § 313(b), 16 U.S.C. § 825l(b); *see Canadian Ass’n of Petroleum Producers v. FERC*, 254 F.3d 289, 296-97 (D.C. Cir. 2001) (citing *Town of Norwood v. FERC*, 906 F.2d at 775 (party must file another rehearing petition whenever a new source of complaint is introduced)). Petitioners did not seek rehearing of Paragraph 25 of the Rehearing Order, or the allocation method contained therein, prior to filing their petitions for review with this Court. Thus, Petitioners are jurisdictionally barred from seeking review of the Commission’s incremental upgrade cost allocation methodology.

V. PETITIONERS' AND INTERVENORS' REMAINING ARGUMENTS ARE WITHOUT MERIT

A. Reliability and Operational Issues were not before the Commission in this Case

In the proceeding below, the FirstEnergy Companies raised certain concerns regarding Neptune's potential effects on the reliability of and operations on the PJM system. Pet. Br. at 21, 45-46; Int. Br. at 10-12. In the Complaint Order, the Commission dismissed these issues:

These are the exact types of issues which the three levels of studies are intended to address. For example, the System Impact Study includes load flow, short-circuit and stability analyses. Since the FirstEnergy Companies' concerns should have already been fully addressed in detail by PJM, the Commission dismisses these issues.

Complaint Order at P 32, JA 528. On rehearing the Commission reiterated:

As noted in the [Complaint] Order, reliability and operational concerns are the exact types of issues that PJM should study in the Feasibility Study, the System Impact Study and the Facility Study. *Questions concerning the validity of PJM's study process are beyond the scope of this proceeding, which deals only with the question of interconnection restudies based on events occurring after the applicant's queue position has been established.* Questions concerning the scope of PJM's review should have been raised during the course of the studies, not afterwards.

Rehearing Order at P 29, JA 616 (emphasis added). In fact, Intervenors admit as much:

Moreover, FERC disembowels PJM's planning authority by directing PJM to ignore known generation retirements on the PJM-coordinated system when PJM determines whether Neptune can be added to the system reliably and at what cost. Such a conclusion directly contradicts the authority given to PJM by tariff provision that were

previously approved by FERC.

Int. Br. at 6-7.

While the Commission does not agree that it directed PJM to “ignore” generator retirements (it merely set allocation of those associated costs in a manner Petitioners and Intervenors disliked), Intervenors here admit that reliability concerns of the kind raised by the FirstEnergy Companies are squarely within the purview of PJM under its tariff. The Commission therefore acted within the scope of its authority and discretion when it limited the scope of the proceeding in this fashion. *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, 498 U.S. 211, 231 (1991) (“an agency need not solve every problem before it in the same proceeding”); *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 366 (D.C. Cir. 2003) (“[a]dministrative agencies enjoy ‘broad discretion’ to manage their own dockets”) (citation omitted).

B. FPA Section 202 is not Applicable to this Case

Petitioners and Intervenors aver that by ordering PJM to grant Neptune interconnection rights, the Commission *de facto* increased the PJM RTO’s geographic scope to effectively include central Long Island. Pet. Br. at 21, 46-53; Int. Br. at 3-4. Because of this, Petitioners and Intervenors argue that the Commission had a duty under FPA § 202(a), 16 U.S.C. § 824a, breached here, to consult with State commissions and seek their views regarding this “major

expansion” of the PJM system. *Id.* This argument is entirely specious.

1. *FPA Section 202 is Inapposite*

FPA Section 202 simply does not apply to the circumstances of this case. Under section 202(a) of the FPA, “the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy.” The purpose of this division into regional districts is for “assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources.” Section 202(a) also states that it is “the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts.” *See generally Central Iowa Power Cooperative v. FERC*, 606 F.2d 1156, 1167-68 (D.C. Cir. 1979) and *Municipalities of Groton v. FERC*, 587 F.2d 1296 (D.C. Cir. 1978).

Section 202(a) also requires that before the Commission exercises its authority to establish regional districts and to fix or modify their boundaries, “[t]he Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.”

As Petitioners properly noted, the Commission knows how to comply with FPA Section 202, as it did in 1998, when circumstances so dictate. Pet. Br. at 48 (citing *Notice of Intent to Consult Under Section 202(a)*, 85 FERC ¶ 61,304 (1998)). In that case, the Commission had set out to promote the formation of *nationwide RTOs*:

As part of a broader inquiry concerning the Commission’s policies on independent system operators (ISOs) and other regional transmission organizations (RTOs) in the electric utility industry, the Commission is considering whether and how to use its authority under section 202(a) of the Federal Power Act (FPA).

Id. at 1. FPA Section 202 simply does not apply, and has never been held to apply, to an interconnection request of a lone transmission project.

2. *The PJM Tariff Contemplates Merchant D.C. Interconnections with Other Control Areas*

The Interconnection of Neptune between PJM and LIPA does not “effectively expand” PJM and does not present novel issues requiring special FPA Section 202-type State commission consultation. Section 47.2 of the PJM Tariff on merchant transmission interconnection specifically contemplates “a Transmission Interconnection Customer that constructs Merchant D.C. Transmission Facilities that interconnect with the [PJM] Transmission System and with another control area outside the PJM Region. . . .” Moreover, Section 1.18F of the PJM tariff also contemplates a new transmission project connecting PJM with another control area.

The PJM merchant transmission provisions, including PJM tariff Section 47.2, were approved by the Commission on March 12, 2003. *PJM Interconnection, L.L.C.*, 102 FERC ¶ 61,277 (2003). *Cf. Ameren Services Co. v. FERC*, 330 F.3d 494, 500 n.10 (D.C. Cir. 2003) (court on review can consider all tariff provisions that are consistent with the agency’s overall reading of the document). Therefore, since that time, no party can rightly claim that the interconnection of a merchant D.C. transmission project to a point in another control area, pursuant to these tariff provisions, creates a new “regional district” that would trigger the provision of FPA Section 202.

3. *The Neptune Load*

Petitioners portray the Neptune Project’s load as a “major expansion of the PJM system.” Pet. Br. at 21. Intervenors state that the Neptune Project will create a “giant sucking sound” out of PJM with the potential for dire consequences. Int. Br. at 3. It is important, however, to keep the actual scope of the Neptune Project in perspective. The Neptune project will provide for the delivery of 660 MW of capacity from PJM to Long Island. Complaint at 2, 10-11, R. 1, JA 8, 16-17. On the other hand, as of the date of this submission, PJM currently controls and coordinates 164,634 MW of generating capacity. *See PJM at a Glance*, <http://www.pjm.com/about/glance.html>. In other words, the Neptune Project load represents only about four-tenths of one percent of PJM’s generation capacity.

4. *The State Commissions Received Ample Notice and Opportunity to be Heard*

Finally, it is beyond reason for the state agencies to claim that they did not receive sufficient notice and opportunity to be heard, when they admit here that they received notice (Pet. Br. at 49; *see also* Notice, R. 3, JA 403) and they were in fact active participants in this case.¹¹ As the Commission found:

The Pennsylvania Commission argues that the [Complaint] Order did not afford state commissions a reasonable opportunity to be heard. The Commission notes that the Pennsylvania Commission, as well as the New York State Department of Public Service, the New Jersey Board of Public Utilities, the New Jersey Division of Ratepayer Advocate, and the Maryland Public Service Commission, are all parties to this proceeding. As such, they had a reasonable opportunity to express their views on the issues in the complaint.

Rehearing Order at P 32, JA 617.

Significantly, Petitioners fail to identify what additional process they were entitled to receive, or what submissions or proffers they were unable to make in the proceedings below.

While the Commission processed this complaint on an expedited basis, contrary to the allegations of Petitioners and Intervenors (*see* Pet. Br. at 17, 21, 30, 47, 49-50; Int. Br. at 7), the Commission did not engage in a “rush to judgment.”

¹¹ It is not altogether clear how the state agencies seeking review here have standing to complain on behalf of other state agencies that are not before the Court. *See* Pet. Br. at 50.

In the pleadings below, both Neptune and PJM agreed that this case did not involve disputed issues of material fact, but rather involved only a policy question that needed to be resolved expeditiously. Complaint Order at P 20, JA 523. The Court “review[s] FERC’s decision not to hold a hearing only for ‘abuse of discretion.’” *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993). The Court defers to the Commission’s determination that a controversy raises no disputed issues of material fact. *Alabama Power Co. v. FERC*, 993 F.2d 1557, 1565 (D.C. Cir. 1993). “And ‘even where there are such disputed issues, FERC need not conduct . . . a hearing if they may be adequately resolved on the written record.’” *Id.* (quoting *Moreau*, 982 F.2d at 568). Such was the case here – the state agencies were not denied a hearing.

CONCLUSION

For the reasons stated, the petitions for review should be dismissed or, in the alternative, denied in all respects.

Respectfully submitted,

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