ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 07-1306, *et al.*

EXXON MOBIL CORPORATION, *et al.*
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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AUGUST 18, 2008

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CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

All parties, intervenors and amici appearing below and in this Court are listed in Petitioners' briefs.

B. Rulings Under Review:

1. *ExxonMobil Corporation v. Entergy Services, Inc.*, 118 FERC ¶ 61,032 (2007), R.36, JA 1 ("Exxon Order").

2. *ExxonMobil Corporation v. Entergy Services, Inc*, 119 FERC ¶ 61,261 (2007), R.72, JA 8 ("Exxon Rehearing Order").

3. *Union Power Partners, L.P. v. Entergy Services Inc.*, 118 FERC ¶ 61,134 (2007), R.44, JA 544 ("Union Order").

4. *Union Power Partners, L.P. v. Entergy Services Inc.*, 119 FERC ¶ 61,328 (2007), R.75, JA 550 ("Union Rehearing Order").

5. *Tenaska Alabama II Partners, L.P. et al. v. Alabama Power Co. et al.*, 118 FERC ¶ 61,037 (2007), R.37, JA 915 ("Tenaska Order").

6. *Tenaska Alabama II Partners, L.P. et al. v. Alabama Power Co. et al.*, 119 FERC ¶ 61,315 (2007), R.73, JA 927 ("Tenaska Rehearing Order").

7. *Mirant Las Vegas, LLC v. Nevada Power Co.*, 118 FERC ¶ 61,034 (2007), R.38, JA 1527 ("Mirant Order").

8. *Mirant Las Vegas, LLC v. Nevada Power Co.*, 120 FERC ¶ 61,002 (2007), R.76, JA 1535 ("Mirant Rehearing Order").

C. Related Cases:

In *Exxon Mobil Corp. v. FERC*, D.C. Cir. No. 08-1158 (filed April 21, 2008), Petitioner Exxon Mobil Corporation filed a Petition for Review of two

Federal Energy Regulatory Commission orders addressing filings made in compliance with the determinations in *ExxonMobil Corporation v. Entergy Services, Inc.*, 118 FERC ¶ 61,032, R.36, JA 1 ("Exxon Order"), *order on reh'g*, 119 FERC ¶ 61,261 (2007), R.72, JA 8 ("Exxon Rehearing Order"), two of the orders challenged in the instant consolidated appeal. On May 13, 2008, the Court issued an order holding that later-filed appeal in abeyance pending the disposition of the instant proceedings. *See infra* pp. 56-61 (discussing related proceedings).

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Senior Attorney

August 18, 2008

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GLOSSARY

Commission or FERC	Federal Energy Regulatory Commission
Duke Hinds II	*Duke Energy Hinds, LLC et al. v. Entergy Services, Inc., et al.*, 102 FERC ¶ 61,068 (2003), JA 2088
Duke Hinds III	*Duke Energy Hinds, LLC et al. v. Entergy Services, Inc., et al.*, 117 FERC ¶ 61,210 (2006), JA 2103
Exxon Order	*ExxonMobil Corporation v. Entergy Services, Inc.*, 118 FERC ¶ 61,032 (2007), R.36, JA 1
Exxon Rehearing Order	*ExxonMobil Corporation v. Entergy Services, Inc*, 119 FERC ¶ 61,261 (2007), R.72, JA 8
FPA	Federal Power Act
Interconnection Facilities	Equipment and facilities constructed to interconnect an electricity generator that are located between the generating facility and the network transmission system; the cost of these facilities are borne by the generator alone
JA	Joint Appendix
Mirant Order	*Mirant Las Vegas, LLC v. Nevada Power Co.*, 118 FERC ¶ 61,034 (2007), R.38, JA 1527
Mirant Rehearing Order	*Mirant Las Vegas, LLC v. Nevada Power Co.*, 120 FERC ¶ 61,002 (2007), R.76, JA 1535
Network Upgrades	Equipment and facilities constructed to interconnect an electricity generator that are located at or beyond the point of interconnection to the network transmission system; the costs of these

	facilities are shared by all users of the transmission grid
P	Paragraph number in a FERC order
R.	Record Citation
Tenaska Order	*Tenaska Alabama II Partners, L.P. et al. v. Alabama Power Co. et al.*, 118 FERC ¶ 61,037 (2007), R.37, JA 915
Tenaska Rehearing Order	*Tenaska Alabama II Partners, L.P. et al. v. Alabama Power Co. et al.*, 119 FERC ¶ 61,315 (2007), R.73, JA 927
Union Order	*Union Power Partners, L.P. v. Entergy Services Inc.*, 118 FERC ¶ 61,134 (2007), R.44, JA 544
Union Rehearing Order	*Union Power Partners, L.P. v. Entergy Services Inc.*, 119 FERC ¶ 61,328 (2007), R.75, JA 550

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RESPONDENT.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission ("FERC" or "Commission"), in granting complaints filed by a group of electric generators that sought to reclassify certain facilities constructed to connect them to the grid, and consequently to reassign cost responsibility for those facilities, reasonably applied its existing interconnection and transmission pricing policies within the limitations of Section 206 of the Federal Power Act ("FPA"), 16 U.S.C. § 824e, the filed rate doctrine and the rule against retroactive ratemaking.

COUNTERSTATEMENT OF JURISDICTION

As explained more fully *infra* (*see* pp. 38, 56-61), certain arguments raised by Petitioners were not presented to the Commission, and thus should be rejected pursuant to 16 U.S.C. § 825*l*(b).

STATUTES AND REGULATIONS

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

STATEMENT OF THE CASE

This consolidated appeal is another in a series of cases addressing the Commission's interconnection and transmission pricing policies. Under these policies (described *infra*), an electricity generator that wishes to interconnect its generating facility to the transmission system typically provides upfront funding for the cost of constructing all facilities and equipment needed to accommodate its interconnection to the grid. For all facilities and equipment between the generating facility and the point of interconnection with the integrated transmission grid, the generator remains solely responsible for the costs it paid upfront. For all facilities and equipment located at or beyond the point of interconnection, however, the generator may not be made solely responsible, and the costs must be shared by all users of the grid. For these upfront costs, the generator is entitled to receive credits

against the cost of the transmission service it later receives from the transmission provider.

In the usual case, these policies are applied when a generator and a transmission provider first enter into an interconnection agreement to govern the terms of that generator's interconnection to the transmission system. That agreement will spell out what costs the generator is solely responsible for, and its entitlement to transmission service credits, before the generator becomes operational and begins taking transmission service.

In this unusual case, interconnection agreements already completed and on file with FERC required Petitioners Exxon Mobil Corporation *et al.* ("Generators") to bear sole cost responsibility for certain equipment and facilities constructed to connect them to the grid. Generators filed complaints with the Commission, under FPA § 206, 16 U.S.C. § 824e, asserting that the equipment and facilities in question were actually at or beyond the point of interconnection, and therefore the costs of such facilities should not be solely assigned to them. Generators asked the Commission to reclassify the equipment and facilities in question and provide them with transmission service credits, as provided by Commission policy.

In the challenged orders, the Commission agreed with Generators that the equipment and facilities in question were incorrectly classified, and ordered that they be reclassified. FERC also ordered that Generators be provided with

transmission service credits, consistent with the agency's policies. The Commission further held, however, that the refund limitations of FPA § 206(b), 16 U.S.C. § 824e(b), as well as the filed rate doctrine and rule against retroactive ratemaking, allowed the agency to order transmission credits only prospectively (with the exception of a 15-month period permitted by statute), thus preventing it from ordering the full amount of transmission credits that Generators might have received had the costs of the facilities been correctly classified from the outset. *See ExxonMobil Corporation v. Entergy Services, Inc.*, 118 FERC ¶ 61,032, R.36, JA 1 ("Exxon Order"), *order on reh'g*, 119 FERC ¶ 61,261 (2007), R.72, JA 8 ("Exxon Rehearing Order"); *Union Power Partners, L.P. v. Entergy Services Inc.*, 118 FERC ¶ 61,134, R.44, JA 544 ("Union Order"), *order on reh'g*, 119 FERC ¶ 61,328 (2007), R.75, JA 550 ("Union Rehearing Order"); *Tenaska Alabama II Partners, L.P. et al. v. Alabama Power Co. et al.*, 118 FERC ¶ 61,037, R.37, JA 915 ("Tenaska Order"), *order on reh'g*, 119 FERC ¶ 61,315 (2007), R.73, JA 927 ("Tenaska Rehearing Order"); *Mirant Las Vegas, LLC v. Nevada Power Co.*, 118 FERC ¶ 61,034, R.38, JA 1527 ("Mirant Order"), *order on reh'g*, 120 FERC ¶ 61,002 (2007), R.76, JA 1535 ("Mirant Rehearing Order").

Generators argue in this appeal that the Commission improperly applied FPA § 206(b) and the filed rate doctrine to limit the amount of transmission credits they are entitled to receive. Petitioners Southern Company Services, Inc., Alabama

Power Company, and Georgia Power Company ("Utilities") (the transmission provider in the Tenaska orders), in turn, argue that the Commission's directive that Utilities provide transmission credits to Generators, while less than the amount of transmission credits sought by Generators, nevertheless violates the filed rate doctrine and the rule against retroactive ratemaking.

STATEMENT OF FACTS

I. Statutory and Regulatory Background

A. Federal Power Act

Under Section 201(b) of the Federal Power Act ("FPA"), 16 U.S.C. § 824(b), the Commission has exclusive jurisdiction to regulate the transmission and sale at wholesale of electric energy in interstate commerce. *See, e.g., New York v. FERC*, 535 U.S. 1 (2002) (discussing statutory framework and Commission jurisdiction under the FPA).

Section 205(c) of the FPA, 16 U.S.C. § 824d(c), requires public utilities to file tariff schedules with the Commission showing their rates and terms of service, along with related contracts, for service subject to FERC jurisdiction. When those tariff schedules are filed, Sections 205(a)-(b) of the FPA, 16 U.S.C. §§ 824d(a)-(b), obligate the Commission to assure that the rates and services described in the tariff are just and reasonable and not unduly discriminatory.

The Commission may also institute investigations concerning the lawfulness of existing rates and services on complaint or on its own motion, pursuant to Section 206 of the FPA, 16 U.S.C. § 824e. If the Commission finds that any rate, charge or classification on file for the transmission or wholesale sale of electric energy subject to its jurisdiction is unjust, unreasonable or unduly discriminatory, it may determine and fix the just and reasonable rate, charge or classification to be prospectively in effect. FPA § 206(a), 16 U.S.C. § 824e(a).

When FERC takes such prospective action, FPA § 206(b), 16 U.S.C. § 824e(b), limits the agency's authority to order retroactive refunds. FPA § 206(b), as it existed at the time of the proceedings at issue here, required FERC to set a refund effective date that is no earlier than 60 days after the filing of a complaint, and no later than five months after the expiration of that 60-day period.[1] The statute provides that the Commission may order refunds of past charges only during the period beginning with the refund effective date and ending 15 months from the refund effective date. *Id.*

[1] In 2005, Congress amended FPA § 206(b) to allow the Commission to set the refund effective date, and to commence the limited 15-month refund period, as early as the date of the filing of the complaint, rather than 60 days later. *See* Energy Policy Act of 2005, P.L. 109-58, 119 Stat. 980, 985 (Aug. 8, 2005).

B. Non-Discriminatory, Open Access Transmission and Interconnection Service Requirements

Historically, electric utilities were vertically integrated monopolies that owned electric generating facilities, transmission lines and distribution systems, and sold all of these services as a "bundled" package to their customers. *See Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1363 (D.C. Cir. 2004) (describing historic structure of the electric utility industry). In recent years, the generation, transmission and distribution functions have become increasingly "unbundled" as competitive markets have developed for the sale of electric energy at wholesale. *New York v. FERC*, 535 U.S. at 5-14 (describing technological advances and legislative and administrative initiatives promoting competitive wholesale electric markets).

To foster the further development of competitive wholesale electricity markets, the Commission issued Order No. 888, a rulemaking that directed utilities to offer non-discriminatory, open access transmission service.[2] To implement this directive, the Commission ordered "functional unbundling," which required each

[2] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles ¶ 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 sub nom. 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).

utility to state separate rates for its wholesale generation, transmission and ancillary services, and to take transmission service used to transmit its own wholesale sales and purchases on a non-discriminatory basis under the same terms provided to others. *See New York*, 535 U.S. at 11.

Order No. 888 did not directly address issues regarding the interconnection of electric generating facilities. The Commission recognized, however, that interconnection of generators to the grid was a critical component of the open access transmission service it envisioned in Order No. 888, and thus was subject to that order's basic requirement that public utilities offer comparable, non-discriminatory service under the terms of their FERC-filed open access tariffs. *See Tennessee Power Co.*, 90 F.E.R.C. ¶ 61,238 (2000); *see also Entergy Services, Inc. v. FERC*, 319 F.3d 536, 539 (D.C. Cir. 2003) (hereinafter "*Entergy I*"). Later, in Order No. 2003,[3] the Commission applied the principles established in Order No. 888 – affirmed by this Court and the Supreme Court – and issued rules standardizing the procedures for generator interconnections. *See Nat'l Ass'n of Reg. Utility Comm'rs*

[3] *Standardization of Generator Interconnection Agreements and Procedures*, Order No 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs., Regs. Preambles 2001-2005 ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, 69 Fed. Reg. 15,932 (Mar. 26, 2004), FERC Stats. & Regs., Regs. Preambles 2001-2005 ¶ 31,160 (2004), *order on reh'g and directing compliance*, Order No. 2003-B, 70 Fed. Reg. 265 (December 20, 2004), FERC Stats. & Regs., Regs. Preambles 2001-2005 ¶ 31,171 (2005), *order on reh'g*, Order No. 2003-C, 70 Fed. Reg. 37,662 (June 30, 2005), FERC Stats. & Regs., Regs. Preambles 2001-2005 ¶ 31,190 (2005); *aff'd, Nat'l Ass'n of Reg. Utility Comm'rs v. FERC*, 475 F. 3d 1277 (D.C. Cir. 2007).

v. FERC, 475 F.3d 1277 (D.C. Cir. 2007) (affirming Order No. 2003), *cert. denied*, 76 U.S.L.W. 3454 (U.S. 2008).

C. The Commission's Interconnection and Transmission Service Pricing Policies

The Commission's long-standing policy regarding the prices charged for electric transmission service allows a transmission service provider to charge a transmission rate that reflects the higher of either: (1) the average embedded cost of the entire transmission system, with any costs incurred to expand the network to serve that customer rolled-in to the average embedded cost; or (2) the incremental cost for the transmission network upgrades needed to serve the customer. This pricing formula is known as "or" pricing. *See* Tenaska Rehearing Order at P 21, JA 934; *see also Duke Energy Hinds, LLC et al. v. Entergy Services, Inc., et al.*, 102 FERC ¶ 61,068 at P 22 (2003), JA 2095 ("*Duke Hinds II*"), *order on reh'g, Duke Energy Hinds, LLC et al. v. Entergy Services, Inc., et al.*, 117 FERC ¶ 61,210 at P 22 (2006), JA 2108 ("*Duke Hinds III*").[4]

Consequently, the Commission's pricing policy bars a utility from charging a customer a transmission rate based on the full embedded cost of the transmission system where that customer has already paid the full incremental cost of any

[4] The *Duke Hinds II* and *Duke Hinds III* orders, as well as excerpts from Order No. 2003 and its subsequent rehearing orders, while not part of the formal record in this proceeding, are included in the Joint Appendix for the convenience of the Court.

upgrades or expansions of the integrated transmission grid. Known as "and" pricing, FERC prohibits such rates because they result in the customer being charged twice for the same use of the transmission grid. *See Duke Hinds II* at P 28 & n. 25, JA 2098; *Duke Hinds III* at P 22, JA 2108-09; Exxon Rehearing Order at P 19, JA 14-15; Tenaska Rehearing Order at P 21, JA 934; *Entergy I*, 319 F.3d at 542.

To enforce its prohibition of "and" pricing, for many years the Commission has required that when an electricity generator initially pays the cost of transmission system upgrades necessary to accommodate its interconnection to the grid, and those upgrades benefit all users of the integrated transmission grid, the transmission provider must provide the generator with credits against the cost of transmission service up to the total cost of the upgrades. *See* Tenaska Rehearing Order at P 22, JA 934-35 (citing *Consumers Energy Co.*, 95 FERC ¶ 61,233 at 61,804 ("*Consumers I*"), *reh'g denied*, 96 FERC ¶ 61,132 (2001) ("*Consumers II*"). In Order No. 2003, the Commission codified its crediting policy for new interconnection agreements filed pursuant to its terms. *See* Order No. 2003 at P 675 *et seq*., JA 2065.

Over the past several years the Commission has developed the "at or beyond" rule to help it determine cost responsibility for facilities and equipment constructed to accommodate the interconnection of a generating facility. *See Nat'l Ass'n*, 475 F.3d at 1284-86 (affirming the "at or beyond" rule); *see also Entergy I*, *supra*; *Entergy Services, Inc. v. FERC*, 391 F.3d 1240 (D.C. Cir. 2004) (hereinafter

"*Entergy II*"). Under this rule, the interconnection customer (the generator) is solely responsible for paying the costs of facilities and equipment constructed between the generator and the point of interconnection with the network transmission system – these facilities and equipment are labeled "Interconnection Facilities." *See Nat'l Ass'n*, 475 F.3d at 1284. The transmission providing utility, however, is responsible for the costs of all facilities and equipment constructed at or beyond the point of interconnection with the transmission system and on the integrated transmission grid – these facilities and equipment are labeled "Network Upgrades." *Id.* The transmission provider includes the costs of Network Upgrades in the transmission rates it charges to all users of the transmission system, based on the long-held and judicially-affirmed principle that additions and upgrades to the integrated transmission grid benefit all users of that grid. *Id*. at 1284-85; *see also Entergy II*, 391 F.3d at 1243.

Under these policies, a generator wishing to interconnect to the transmission system typically funds the construction of all facilities needed to accommodate its interconnection, including both the Interconnection Facilities and Network Upgrades. The generator is then entitled to credits against the cost of transmission service in an amount equaling the total cost of any Network Upgrades it funded, benefitting all system customers, to ensure that the generator is not subjected to prohibited "and" pricing. *See, e.g.*, Order No. 2003 at P 676, JA 2066 (explaining

Commission's interconnection pricing policy and process of upfront funding followed by transmission credits).

II. The Instant Complaint Proceedings

In the usual case, the classification of facilities and equipment needed to accommodate the interconnection of a generator is determined at the time the parties enter into an interconnection agreement. Thus, the resulting division of cost responsibility between the generator and the transmission provider, and the generator's entitlement to transmission credits, is known well in advance of the time it begins taking transmission service. The FERC proceedings underlying the orders challenged here, however, all involve later reclassification of interconnection facilities and equipment, after the generators had paid the cost of the interconnection facilities and equipment and had begun taking transmission service.

Specifically, in the proceedings below, Generators were each parties to various interconnection agreements, already filed with the Commission under FPA § 205, 16 U.S.C. § 824d, that assigned them sole cost responsibility for certain facilities and equipment needed to connect them to the grid (and as a result, provided them with no transmission credits). The Generators each filed complaints, pursuant to FPA § 206, 16 U.S.C. § 824e, seeking to reclassify the subject facilities as Network Upgrades, which would entitle them to transmission service credits under the Commission's transmission pricing policy. They each argued that the facilities

and equipment at issue were improperly classified in the filed interconnection agreements as Interconnection Facilities, and should be reclassified as Network Upgrades to reflect the fact that they are at or beyond the point where their generators connect to the transmission grid. Generators argued that failing to reclassify the facilities and equipment at issue, and failing to prospectively order transmission service credits, would subject them to the "and" pricing that is prohibited by Commission policy. *See* Complaint of Exxon Mobil Corporation, R.2, JA 141; Complaint of Union Power Partners, L.P., R.5, JA 859; Complaints of Tenaska Entities, R.18, R.19, R.20, JA 944, 1014, 1071; Complaint of Mirant Las Vegas, L.L.C., R.1, JA 1634.

A. The *Duke Hinds* Proceeding

Generators' complaints were filed after the Commission's ruling in the similar, earlier-filed *Duke Hinds* complaint proceeding. *See Duke Hinds II*, *supra* p. 9. In that proceeding, the Commission granted a complaint, filed by generators similarly situated to Generators in this case, which sought to reclassify certain facilities located at or beyond the point of interconnection, from Interconnection Facilities to Network Upgrades. FERC agreed with the complainants that the facilities, as integrated transmission network facilities, should be reclassified as Network Upgrades, regardless of their original classification as Interconnection Facilities. *Duke Hinds II* at P 28, JA 2098. FERC also held that the improper

classification of the subject facilities as Interconnection Facilities and resulting assignment of the costs of the facilities solely to the generator (without any entitlement to transmission service credits), combined with the transmission provider charging the generator a transmission service rate based on the full embedded cost of the transmission system, was unjust and unreasonable and violated the prohibition against "and" pricing. *Id.* at P 22, JA 2095-96. Accordingly, the Commission directed that the interconnection agreements at issue be revised to reclassify the subject facilities as Network Upgrades and to provide the generators with transmission service credits. *Id.* at P 28, JA 2098.

After the filing of the complaints at issue here, but before the issuance of the challenged orders, the Commission issued *Duke Hinds III*, which addressed requests for rehearing of *Duke Hinds II*. In that order, *inter alia*, FERC clarified the appropriate calculation of the transmission credits ordered in its prior ruling, to ensure that the relief provided generators was consistent with the refund limitation in FPA § 206(b), 16 U.S.C. § 824e(b), as well as the filed rate doctrine and the rule against retroactive ratemaking (discussed *infra*). Specifically, the Commission explained that the generators would be entitled to credits only for transmission service taken after the refund effective date established pursuant to FPA § 206(b), 16 U.S.C. § 824e(b), but would not be entitled to any credits against rates already paid

for transmission service prior to the refund effective date. *Duke Hinds III* at PP 32-34, JA 2112-13.

B. Challenged Orders

Following its rulings in the *Duke Hinds* proceeding, in the challenged orders the Commission granted Generators' complaints and directed that the interconnection agreements in question be revised to reclassify the facilities at issue as Network Upgrades, and to provide Generators with transmission credits. Applying the determinations in *Duke Hinds III*, and the requirements of FPA § 206(b), the Commission directed that Generators receive transmission credits for two distinct time periods: (1) the period beginning with the refund effective date, and ending with the date 15 months after the refund effective date (the "refund effective period"), and (2) prospectively from the date of the Commission's reclassification order. *See* Exxon Order at P 17, JA 6; Tenaska Order at P 25, JA 923. For two other distinct time periods, FERC determined that no credits could be recovered for transmission service already received: (1) the period before the refund effective date, and (2) the period between the end of the refund effective period (*i.e.* the date 15 months after the refund effective date) and the date of the Commission's reclassification order. *Id*.

Both Generators and Utilities filed requests for rehearing, which the Commission denied in all relevant respects, again incorporating its reasoning from

the *Duke Hinds* cases. FERC rejected Generators' assertions that the Commission erred in not granting them transmission credits equal to the full amounts they paid upfront for the reclassified equipment and facilities. In particular, FERC rejected Generators' contentions that the limitations of FPA § 206(b) do not apply to their right to transmission credits, and that the Commission acted contrary to its own precedent. Exxon Rehearing Order at PP 15-22, JA 13-16; Tenaska Rehearing Order at PP 25-32, JA 936-39. The Commission also rejected Utilities' argument that granting the complaints and providing Generators with some transmission credits was essentially a requirement that they provide retroactive refunds, in violation of the filed rate doctrine and rule against retroactive ratemaking. Tenaska Rehearing Order at PP 19-20, JA 933-34.

These consolidated petitions for review followed.

SUMMARY OF ARGUMENT

In the FERC orders challenged in this consolidated appeal, the Commission did nothing more than apply its existing interconnection and transmission pricing policies to an unusual set of facts. Unlike the usual case, where cost responsibility for any equipment and facilities constructed to interconnect a new generator is determined upfront, when the parties enter into an interconnection agreement and file it with FERC, in this case Generators filed complaints under FPA § 206, 16 U.S.C. § 824e, seeking to alter the cost responsibility already established in existing filed interconnection agreements. Despite this atypical factual scenario, FERC consistently applied its usual policies – repeatedly affirmed by this Court – in granting Generators' complaints.

The Commission's orders correctly recognize, however, that in the context of the after-the-fact complaints filed here, FPA § 206(b), 16 U.S.C. § 824e(b), limits the amount of retroactive relief the agency may provide Generators. Contrary to Generators' various contentions, this statutory provision (and the filed rate doctrine it embodies) prevents FERC from ordering that Generators receive transmission credits for all service taken during all past periods, because to do so would require their transmission providers (including Utilities) to return charges they lawfully collected under the prior filed rate.

Furthermore, by granting a prospective remedy, the Commission's orders do not implicate the filed rate doctrine or the rule against retroactive ratemaking, as Utilities suggest. FERC did not retroactively adjust the filed rate that was paid to Utilities prior to the challenged orders, and likewise did not substitute a new just and reasonable rate for the previous filed rate. Rather, the Commission ordered that Generators be provided with transmission service credits to ensure that the *future* transmission rates charged by Utilities for *current and future* transmission service are just and reasonable.

Moreover, the Commission's orders do not conflict with any of its policies or any relevant agency precedents. As noted above, the Commission applied its usual interconnection and transmission pricing policies, within the limits of FPA § 206(b), the filed rate doctrine and the rule against retroactive ratemaking, to the unusual circumstances presented by Generators' after-the-fact complaints. Moreover, the Commission reasonably explained that its orders here were not inconsistent with its previous analogy comparing the process of upfront funding by the generator of construction costs for equipment and facilities needed to accommodate its interconnection, followed by transmission service credits, to a loan transaction. While that analogy holds in the normal case, in this unusual case the limits of the statute (and the legal principles it embodies) and the agency's authority prevent FERC from literally treating Generators' previous upfront

payments as loans and requiring that they receive transmission credits equal to the entire amount of the upfront payments.

Additionally, given that several proceedings (generic and utility-specific) impacting the entirety of the Commission's interconnection policies were ongoing (both before the agency and before this Court) during the time Generators' complaints were pending, the Commission did not unreasonably delay acting on the complaints. Further, contrary to Generators' suggestion, the FPA does not mandate that the agency *act* on complaints within a specified time period. While the statute does mandate that FERC meet certain procedural timelines, Generators fail to show how any failure by the Commission to do so here changed the end result of these proceedings.

Finally, the factual circumstances specific to one generator, Exxon Mobil, do not warrant granting its petition for review. To the extent Exxon Mobil presented in its pleadings underlying the challenged orders the concerns it presses here, regarding the "sequential" application of transmission credits between two sets of Network Upgrades built to accommodate its interconnection, the Commission reasonably addressed those concerns in the challenged orders. Much of the argument Exxon Mobil advances with regard to this issue, however, was not presented in the instant proceeding, but rather in later proceedings before the Commission. Accordingly, the Court should decline to hear those arguments here.

ARGUMENT

I. Standard of Review

The Commission's orders are reviewed under the arbitrary and capricious standard of the Administrative Procedure Act. *See, e.g., Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). Under this standard, the court "will affirm the Commission's orders so long as FERC 'examined the relevant data and articulated a . . . rational connection between the facts found and the choice made.'" *Midwest ISO Transmission Owners*, 373 F.3d at 1368 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). "Further, in light of the technical nature of rate design, involving policy judgments at the core of the regulatory function, the court's review of challenges to rate design . . . is highly deferential." *Entergy I*, 319 F.3d at 541. Additionally, "[a]n agency's interpretation of its own precedent is entitled to deference by the court." *Id.* (citing *Cassell v. FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998)).

II. The Commission Reasonably Applied its Existing Interconnection and Transmission Pricing Policies in Ruling on Generators' Complaints

In the challenged orders, and the earlier *Duke Hinds* proceeding those orders rely on, the Commission did nothing more than apply its existing interconnection and transmission pricing policies to Generators' complaints. As discussed above (*see supra* pp. 9-12), these policies:

- (1) Allow a transmission provider to charge a generator a transmission service rate that reflects the higher of either (a) the full embedded cost of the entire transmission system, which includes the cost of any expansions to the transmission system constructed to serve the generator, or (b) the incremental cost of any transmission system upgrades needed to serve the generator (called "or" pricing) (*see Duke Hinds II* at P 22, JA 2095, *aff'd*, *Duke Hinds III* at P 22, JA 2108; Tenaska Rehearing Order at P 21, JA 934);
- (2) Prohibit a transmission provider from charging a generator a transmission rate based on the full embedded cost of the transmission system when the generator has already paid the cost of any upgrades or expansions to the integrated transmission grid (called "and" pricing) (*see Duke Hinds II* at P 22, JA2095, *aff'd*, *Duke Hinds III* at P 22, JA 2108; Tenaska Rehearing Order at P 21, JA 934);
- (3) Provide that all facilities and equipment constructed to interconnect a new generator that are located at or beyond the point of interconnection with the transmission system (called "Network Upgrades") represent expansions and upgrades of the integrated grid that benefit all users (the "at or beyond" rule), and prohibit a transmission provider from requiring the generator to alone bear the costs of such facilities and equipment (s*ee*,

e.g., *Nat'l Ass'n*, 475 F.3d at 1284-85; *see also* Tenaska Rehearing Order at P 24, JA 935-36 (citing *Consumers I*, *Consumers II*, and *Duke Hinds III*, as well as *Entergy I*); *Duke Hinds III* at PP 23-24, JA 2109-10; *Duke Hinds II* at P 28, JA 2098).

As noted above, in the usual case these policies are applied upfront, when the parties first enter into an interconnection agreement spelling out their responsibilities – a process governed by the initial filing requirements of FPA § 205, 16 U.S.C. § 824d – and before any facilities are constructed. The generator wishing to interconnect to the transmission system (like Generators here) initially funds the cost of all facilities that must be constructed to accommodate its interconnection to the grid. If the facilities are deemed Network Upgrades (defined, as discussed above, as any facilities or equipment located at or beyond the point of interconnection with the transmission system), the generator is entitled to credits against the price of the transmission service it takes once it begins operation, up to the full amount it paid upfront. If the facilities are deemed Interconnection Facilities (defined as facilities or equipment between the generating facility and the point of interconnection with the network transmission system), the interconnection customer bears complete cost responsibility for the facilities and receives no transmission credits. *See* Order No. 2003 at P 676, JA

2066 (describing Commission's interconnection and transmission pricing policies, as well as the process of upfront funding followed by transmission credits).

In these proceedings, however, FERC was faced with a much different circumstance – complaints, filed under FPA § 206, 16 U.S.C. § 824e, concerning the classification of facilities and equipment in existing interconnection agreements already filed with the Commission under FPA § 205. In each of the after-the-fact complaint cases, Generators argued that the facilities constructed to interconnect their plants to the transmission system were erroneously classified in the filed interconnection agreements as Interconnection Facilities, making the Generators solely responsible for their costs. Explaining that the subject facilities in each case were actually at or beyond the point of interconnection, Generators asked the Commission to prospectively reclassify the facilities as Network Upgrades and provide them with transmission service credits to reimburse the upfront costs they paid to construct such facilities, consistent with its existing policies.

Ruling on these complaints (as well as the similar, earlier-filed *Duke Hinds* complaint), the Commission applied the same interconnection and transmission pricing policies it applies to the usual case to the unusual context presented by Generators' after-the-fact FPA § 206 complaints seeking reclassification of facilities and equipment. As the Commission explained in the *Duke Hinds* series of orders (which it followed in the orders challenged here), regardless of their

initial erroneous classification, the subject facilities and equipment are integrated transmission facilities located at or beyond the point of interconnection, and thus properly viewed as Network Upgrades. *Duke Hinds II* at P 28, JA 2098. As a result, the Commission held that charging Generators a full transmission rate reflecting the full cost of the entire transmission system, including the costs of the Network Upgrades funded by the Generators, results in duplicative "and" pricing, which is prohibited by Commission policy. *Id*. at PP 22, 28 & n.25, JA 2095, 2098, *aff'd in Duke Hinds III* at PP 22-24, JA 2108-10; *see also* Tenaska Rehearing Order at PP 21-22, JA 934-35. Accordingly, pursuant to FPA § 206, the Commission granted the complaints in *Duke Hinds* and the challenged orders, holding that the full transmission rates charged to Generators by the transmission providers (including Utilities) were unjust and unreasonable. *See id*.

To fix the just and reasonable transmission rate to be observed prospectively, as required by FPA § 206, the Commission applied its long-standing policy of requiring the transmission provider to provide transmission service credits to an interconnection customer that has already paid the costs of constructing Network Upgrades. *See Duke Hinds III* at P 23, JA 2109; Tenaska Rehearing Order at P 22, JA 934. As FERC explained, the purpose of requiring credits against transmission service is to enforce its prohibition of "and" pricing and ensure that the transmission rate paid by the generator is just and reasonable.

See id. (both citing *Consumers I*, 95 FERC at 61,804). Providing credits to a generator that has already funded Network Upgrades, up to the total cost of those upgrades, enforces this policy by ensuring that the generator is not forced to pay twice for the same use of the transmission system – first by paying the incremental cost of transmission system upgrades and expansions, and second by paying an "embedded" transmission service rate based on the entire cost of the transmission system (including the facilities it already paid to construct). *Id*.; *see also* Order No. 2003 at P 694, JA 2068.

The policies applied here have been upheld by this Court. *See Duke Hinds III* at P 24 & n.20, JA 2109; Order No. 2003 at P 694 & n.112, JA 2068; Order No. 2003-A at P 584, JA 2077. In *Entergy I*, for instance, this Court upheld Commission orders that required a transmission provider to provide generators with transmission service credits for the costs they paid for the construction of integrated transmission grid upgrades necessary for their interconnection. 319 F.3d at 539-40, 543-44 (finding reasonable the Commission's "less-cramped view of what constitutes a 'benefit'" received by users of the integrated transmission system). In *Entergy II*, the Court similarly upheld FERC's application of its crediting policy to upgrades and expansions made to the integrated transmission grid (though it remanded to the Commission the discrete question of how it defines the precise point where the integrated grid begins). 391 F.3d at 1247-48

(recognizing, as in *Entergy I*, that expansions of the transmission system provide a benefit to all users of the grid sufficient to support the Commission's crediting policy). Later, in *National Association of Regulatory Utility Commissioners*, the Court upheld the entirety of the agency's Order No. 2003 rulemaking, which codified both the "at or beyond" rule for classifying facilities and the Commission's transmission service crediting policy. 475 F.3d at 1284-86 (affirming the "at or beyond" rule, and noting the Court's prior endorsement of "'assign[ing] the costs of system-wide benefits to all customers on an integrated transmission grid'" (citation omitted)) and 1286 (rejecting remaining challenges to Order No. 2003, including the crediting policy, without discussion); *see also Entergy Services, Inc. v. FERC*, 224 Fed. Appx. 2 (D.C. Cir. 2007) (again rejecting challenges to the "at or beyond" rule).

III. The Commission's Orders Satisfy Statutory and Legal Requirements

While granting Generators' complaints, FERC recognized that in the unique circumstances of this case, statutory and legal barriers prevented it from ordering that Generators be provided with the full amount of transmission credits that they might have been entitled to had the facilities and equipment at issue been appropriately classified, years earlier, in the originally-filed interconnection agreements. In particular, the Commission ruled that FPA § 206(b), 16 U.S.C. § 824e, the filed rate doctrine and the rule against retroactive ratemaking all placed

limits on the amount of credits the Commission could order. *See* Exxon Order at PP 15-17, JA 5-6; Exxon Rehearing Order at PP 18, 20-22, JA 14, 15-16; Tenaska Order at PP 23-25, JA 922-23; Tenaska Rehearing Order at PP 28, 30-32, JA 937-39; *see also Duke Hinds III* at PP 32-34, 40, JA 2112-13, 2115.

Generators and Utilities each claim that the Commission misapplied or violated these statutory and legal requirements. Generators contend that FERC erred in concluding that the refund limitations of FPA § 206(b) and the filed rate doctrine applied to their request for full transmission credits (up to the total amounts they paid upfront for the facilities and equipment in question). Generators' Br. at 20-29. Utilities, in turn, contend that the Commission's orders granting Generators even some transmission credits (but less than they requested) violate the filed rate doctrine and the rule against retroactive ratemaking. Utilities Br. at 19-38. All of these arguments should be rejected. The Commission's orders carefully apply the requirements of FPA § 206(b), the filed rate doctrine and the rule against retroactive ratemaking to ensure that the transmission service rates charged to Generators are just and reasonable during all time periods.

A. FERC Correctly Held that FPA § 206(b) and the Filed Rate Doctrine Limit the Retroactive Relief Available to Generators

1. Generators Err in Arguing that FPA § 206(b) Does Not Limit FERC's Authority to Order Transmission Credits

Generators broadly contend that while FERC properly exercised its authority under FPA § 206(a) in granting their complaints and reclassifying the subject equipment and facilities, it erred in concluding that FPA § 206(b) applied to their request for full transmission credits. Generators Br. at 20-24; *see also id.* at 36-37 (asserting that the Commission's approach violates the statute). As the Commission explained, however, when it institutes an investigation on complaint under FPA § 206, subsection (b) of the statute (as it existed at the time the complaints were filed) requires that the agency establish a refund effective date no earlier than 60 days after the filing of the complaint, and no later than five months after 60 days after the filing of the complaint. *See* Exxon Order at P 15, JA 5; Tenaska Order at P 23, JA 922; *see also* 16 U.S.C. § 824e(b) (2000).[5] Further, this subsection limits the Commission's power to order retroactive refunds. Specifically, FERC may order refunds only of amounts that were paid during the

[5] As noted above, Congress amended FPA § 206(b) after these complaints were filed to allow the Commission to set the refund effective date, and to commence the limited 15-month refund period, as early as the date of the filing of the complaint, rather than 60 days later. *See* Energy Policy Act of 2005, P.L. 109-58, 119 Stat. 980, 985 (Aug. 8, 2005). Generators do not suggest, below to the agency or on review to this Court, that this legislative change is relevant in any respect to their arguments.

limited period beginning on the refund effective date and ending 15 months after the refund effective date (the "refund effective period"). *See* Exxon Order at P 16, JA 5; Tenaska Order at P 24, JA 922; *see also* 16 U.S.C. § 824e(b) (2000).

Applying this statutory limitation, the Commission determined that it could only direct that Generators receive credits for transmission service taken and paid for during the 15-month refund effective period and prospectively from the date of its order in each complaint case. *See* Exxon Order at P 16, JA 5; Tenaska Order at P 24, JA 922. As a result, FERC explained that calculating the transmission credits available to Generators required the consideration of four distinct time periods:

- (1) The period from commercial operation of the generating plant to the refund effective date – Generators could not receive credits for any transmission service they received and paid for during this time;
- (2) The 15-month refund effective period - Generators could receive credits for any transmission they received and paid for during this time;
- (3) The period from the end of the refund effective period to the date of the Commission's order – Generators could not receive credits for any transmission service they received and paid for during this time; and

- (4) The period from the date of the Commission's order forward – Generators could prospectively receive credits for transmission service they received and paid for during this time.

See Exxon Order at P 17, JA 6; Tenaska Order at P 25, JA 923; *see also Duke Hinds III* at PP 33-34, JA 2112-13 (providing example calculation of credits).

Generators assert, however, that the refund limitations of FPA § 206(b) do not apply because they are not seeking "'refunds of any amounts paid' for *past* services." Generators Br. at 23-24 (quoting 16 U.S.C. § 824e(b)). But the services in question are, in fact, prior transmission services, provided by the relevant transmission providers (including Utilities) and paid for by Generators before the filing of Generators' later FPA § 206 complaints, and during time periods outside of the refund effective period.

The fundamental premise of Generators' complaints, and the Commission's key holding in granting those complaints, was that the full embedded transmission rates being charged to Generators were unjust and unreasonable and violated the Commission's policy forbidding "and" pricing, since the Generators had already paid the incremental cost of Network Upgrades (*i.e.*, integrated transmission system facilities that benefit all users of the system) needed to connect them to the grid. *See, e.g.*, Complaint of Union Power at 5-9, JA 863-67; Complaint of Exxon at 5-6, JA 145-46; Complaint of Tenaska Alabama II Partners at 8, JA 951;

Complaint of Mirant at 7-8, JA 1640-41; *see also Duke Hinds II* at PP 22-23, JA 2095-96, *aff'd in Duke Hinds III* at PP 22-23, 32, JA 2108-09, 2112; Tenaska Rehearing Order at PP 21-22, JA 934-35. Further, to remedy these unjust and unreasonable transmission rates, the Commission applied its usual transmission service credits policy, as Generators requested in their complaints. The purpose of that policy, as explained above, is to enforce the Commission's prohibition of "and" pricing and ensure that transmission rates are just and reasonable going forward. *See supra* p. 10.

In other words, the complaints, and the Commission's orders granting them, focus entirely on the justness and reasonableness of the transmission rates charged to Generators. *See Duke Hinds III* at P 32, JA 2112, and Tenaska Rehearing Order at P 19, JA 933 (noting the focus of the Commission on ensuring that the transmission provider could not continue to charge an unjust and unreasonable transmission rate); *see also* Exxon Rehearing Order at PP 21-22, JA 15-16 and Tenaska Rehearing Order at PP 31-32, JA 938-39 (relying on *Duke Hinds III* at P 32, JA 2112). As a result, by seeking to receive transmission credits up to the full amounts they paid for the reclassified Network Upgrades, Generators were in fact seeking retroactive refunds of the full embedded transmission service charges they paid for transmission service they received prior to FERC's order reclassifying the

subject facilities and equipment as Network Upgrades, contrary to their contentions.

Further, during the time period prior to FERC's orders, the rate on file with the Commission made Generators solely responsible for the costs of the subject facilities and equipment and did not provide them with any transmission credits. The only way FERC could revise that filed effective rate to entitle them to transmission credits was to act pursuant to FPA § 206, with its attendant limitations. Exxon Rehearing Order at P 20, JA 15; Tenaska Rehearing Order at P 30, JA 938; *see also, e.g., Atlantic City Electric Co. v. FERC*, 295 F.3d 1, 9-10 (D.C. Cir. 2002) (explaining FERC's ratesetting authority under FPA §§ 205 and 206); *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1578-79 (D.C. Cir. 1993) (reminding FERC of its obligation not to "blur" the line between the provisions of the statute – there, the analogous Natural Gas Act – delineating the agency's ratesetting authority). Accordingly, the Commission correctly determined that the refund limitations of FPA § 206(b) must be applied, and reasonably found that these limitations prevented it from ordering that Generators receive transmission credits for service they received prior to the statutory refund effective date, and between the end of the refund effective period and the date of its reclassification orders. Exxon Rehearing Order at P 21, JA 15-16; Tenaska Rehearing Order at P 31, JA 938.

2. Generators Rely on an Overly Narrow View of the Term "Rate" in the FPA

Generators contend, however, that their requests for transmission credits to be applied prospectively "have nothing to do with any past transmission service [they] may or may not have purchased." Generators Br. at 24-25. Rather than a jurisdictional rate subject to FPA § 206(b), they argue that the upfront payments they made to build the subsequently reclassified facilities and equipment were loans that they have a right to recoup. *Id.* This argument relies on an overly narrow view of what constitutes a "rate" subject to the Commission's jurisdiction. The FPA requires FERC to ensure the justness and reasonableness of not just the precise rate demanded for jurisdictional service, but also any "rule, regulation, practice, or contract affecting such rate." FPA § 206(a), 16 U.S.C. 824e(a); *see City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985) (noting "infinitude" of practices affecting rates and services and leaving to the Commission, "within broad bounds of discretion, to give concrete application to this amorphous directive").

"[W]hile not a rate for service in the traditional sense that the customer receives a service for its payment," the upfront payments are "a term or condition for interconnection service" that serves to encourage generators to make efficient decisions about where they will interconnect. Exxon Rehearing Order at P 17, JA 14; Tenaska Rehearing Order at P 27, JA 937; *see also Nat'l Ass'n*, 475 F.3d at

1286 (citing Order No. 2003-A at P 613, JA 2079) (rejecting challenges to FERC's explanation that upfront funding would promote efficient siting). When the upfront payments are combined with the right to transmission service credits in the case of Network Upgrades, the resulting process encourages efficient interconnection while also ensuring that the generator is not subjected to duplicative "and" pricing once it begins taking transmission service. Exxon Rehearing Order at PP 17, 19, JA 14-15; Tenaska Rehearing Order at PP 27, 29, JA 937. As a result, the process of upfront payments followed by transmission credits appropriately can be characterized, at a minimum, as a "rule," "regulation," or "practice" affecting jurisdictional rates and charges, making it reasonable to subject that process to the requirements of the FPA, including the refund limitations of FPA § 206(b). In fact, the agency has no statutory authority to do otherwise and treat the process strictly as a "loan" transaction. *See* Exxon Rehearing Order at P 21, JA 15-16; Tenaska Rehearing Order at P 29, JA 937.

3. Generators Err in Arguing that the Filed Rate Doctrine Does Not Apply

Generators' assertion that the agency erred in applying the filed rate doctrine here (*see* Generators Br. at 27-29) fails for many of the same reasons. That doctrine "'forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority.'" *Consolidated Edison Co. of New York v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003) (quoting

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 (1981)). The corollary to the filed rate doctrine, the rule against retroactive ratemaking, prohibits the Commission from retroactively altering a filed rate it later deems to have been too high or too low. *See Towns of Concord v. FERC*, 955 F.2d 67, 71 & n.2 (D.C. Cir. 1992). The FPA codifies these rules: FPA § 205 requires utilities to file their rates, charges and terms of service with the Commission, while FPA § 206 allows the Commission to fix new rates, with limited exceptions (discussed above), on only a prospective basis. *See id.* at 72 ("Together, these provisions prohibit 'a regulated seller of [power] from collecting a rate other than the one filed with the Commission and prevent[] the Commission itself from imposing a rate increase for [power] already sold'") (quoting *Arkansas Louisiana*, 453 U.S. at 578).

As noted above, the original interconnection agreements that were filed with and accepted by the Commission under FPA § 205 classified the subject facilities and equipment as Interconnection Facilities, making Generators solely responsible for their costs. Exxon Rehearing Order at P 20, JA 15; Tenaska Rehearing Order at P 30, JA 937-38. Under this filed rate, Generators were not entitled to any transmission credits, and their transmission providers were not prohibited from charging them a full embedded transmission rate. *Id.* Generators' complaints asserted, and the Commission agreed, that charging a full embedded transmission rate was unjust and unreasonable given that the facilities and equipment at issue

should now be viewed as Network Upgrades. *See Duke Hinds II* at PP 22-23, JA 2095-96, *aff'd in Duke Hinds III* at PP 22-23, 32, JA 2108-09, 2112 (relied on in challenged orders); *see also supra* pp. 30-31. In accordance with this holding, the Commission granted the maximum amount of relief (retroactive for the 15-month refund effective period, and prospective from the date of the orders) available under the statute. *See* Exxon Rehearing Order at P 22, JA 16; Tenaska Rehearing Order at P 32, JA 939 (noting that orders provide "the maximum protection that the Commission can afford [Generators] under the FPA").

But to order here that Generators receive transmission credits equal to the full amount of upfront funding they provided for the now reclassified Network Upgrades would have required their transmission providers to return the full embedded transmission service rates they lawfully collected under the prior filed rate. Exxon Rehearing Order at P 18, JA 14; Tenaska Rehearing Order at P 32, JA 938-39. The Commission correctly concluded that full transmission credit recovery, reflecting all past periods and not limited to the statutory 15-month refund effective period, would violate the filed rate doctrine (as well as the corollary rule against retroactive ratemaking). *Id.*

4. Generators' Remaining Arguments Lack Merit

Generators also argue that where "a utility mischarges a customer, the Commission can order a complete refund of the unlawfully collected charges

without violating the filed-rate doctrine." Generators Br. at 28. However, Generators were never mischarged here; prior to the challenged orders, they were charged a full embedded transmission rate consistent with the filed rate (*i.e.*, the original interconnection agreements) as it existed at that time. That rate was not deemed unlawful until FERC issued the challenged orders reclassifying the already-constructed facilities.

Nor did Generators contend in their complaints that the Commission wrongfully or unlawfully approved the original interconnection agreements (with the subject facilities classified as Interconnection Facilities) at the time they were filed, which in certain circumstances might permit the agency to act where it otherwise lacks authority and thus order refunds. *See United Gas Improvement Co. v. Callery*, 382 U.S. 223, 229 (1965) (while "the Commission 'has no power to make reparation orders,'" it may order full refunds "where its order, which never became final, has been overturned by a reviewing court") (relied on in Generators Br. at 28). Instead, they asserted (and FERC agreed) that the subject facilities and equipment previously classified as Interconnection Facilities in the interconnection agreements are now properly viewed as Network Upgrades (relying on *Duke Hinds II*), making it unjust and unreasonable to *continue* charging them a full embedded cost transmission service rate. *See Duke Hinds III* at P 32, JA 2112 (FERC orders grant "prospective rate relief only, thus ensuring that . . . subsequent rates for

transmission service . . . are just and reasonable"); Tenaska Rehearing Order at P 19, JA 933 (same); *see also* Exxon Rehearing Order at PP 21-22, JA 15-16 (relying on *Duke Hinds III*).

Generators also add an argument before this Court, broadly asserting that their complaints could not have been seeking refunds for past excessive transmission rates because their right to transmission credits was not recognized until the equipment and facilities at issue were reclassified in the challenged orders. Generators Br. at 25-27. Generators did not, however, present this argument to the Commission. As a result, the Court should not consider the argument here. FPA § 313(b), 16 U.S.C. 825*l*(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"); *see also, e.g.*, *Constellation Energy Commodities Group v. FERC*, 457 F.3d 14, 21 (D.C. Cir. 2006); *Allegheny Power v. FERC*, 437 F.3d 1215, 1220 (D.C. Cir. 2006) ("Under [FPA] § 313(b) an objection cannot be preserved indirectly, but must be raised with specificity").

In any event, as discussed in more detail below (*see* Section III.C, *infra* pp. 47-49), the Commission's choice to calculate the transmission credits beginning with the time Generators entered operation and began taking transmission service represents a reasonable exercise of the agency's discretion to fashion remedies,

given its concern that to do otherwise would exceed the limits imposed by FPA § 206(b) (and the filed rate doctrine and rule against retroactive embodied in the statute).

B. FERC Correctly Held That Utilities Must Provide Transmission Credits for Current and Future Service

1. Utilities Err in Asserting that FERC's Orders Implicate the Filed Rate Doctrine and Rule Against Retroactive Ratemaking

Utilities and the Alabama Commission, on the other hand, argue that the Commission's rulings violate both the filed rate doctrine and the rule against retroactive ratemaking by requiring Utilities to refund rates that Generators had already paid for interconnection service. Utilities Br. at 23-38; Alabama Commission at 8-12.

As noted above, the filed rate doctrine "'forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority.'" *Consolidated Edison Co.*, 347 F.3d at 969 (quoting *Arkansas Louisiana*, 453 U.S. at 577). "The related rule against retroactive ratemaking 'prohibits the Commission from adjusting current rates to make up for a utility's over or under-collection in prior periods.'" *Id.* (quoting *Towns of Concord*, 955 F.2d at 71 & n.2). These related principles are enshrined in the filing and rate change requirements of the FPA – a utility may not impose a rate, charge or term of service other than that on file with FERC (FPA § 205), and the

agency may order that a filed rate be replaced with a new rate only on a prospective basis (FPA § 206). *See Towns of Concord*, 955 F.2d at 71 & n.2; *see also NSTAR Electric & Gas Corp. v. FERC*, 481 F.3d 794, 800 (D.C. Cir. 2007).

In the challenged orders, and the *Duke Hinds* orders they follow, the Commission did not retroactively alter the filed rate that was paid to Utilities for transmission service, nor did it retroactively substitute a new just and reasonable rate for the previous filed rate. *See, e.g., Southern California Edison Co. v. FERC*, 805 F.2d 1068, 1070 n. 2 (D.C. Cir. 1986) (under the filed rate doctrine and rule against retroactive ratemaking, FERC may not retroactively substitute "an unreasonably high or low rate with a just and reasonable rate"). Rather, the agency granted Generators only a prospective remedy, consistent with the limitations of FPA § 206(b), that would ensure that the subsequent rates charged to them are just and reasonable. *See Duke Hinds III* at PP 32-33, JA 2112-13, *relied on in* Tenaska Rehearing Order at P 19, JA 933.

Specifically, as explained elsewhere in this brief, the Commission granted the complaints filed in the *Duke Hinds* proceeding and the instant proceedings on the basis of its holding that it was not just and reasonable for Generators, having already paid the incremental cost of Network Upgrades, to later also be charged a full embedded cost transmission rate. *Duke Hinds II* at PP 22-23, JA 2095-96, *aff'd in Duke Hinds III* at PP 22-23, JA 2108-09; Tenaska Rehearing Order at PP

21-22, JA 934-35; *see also supra* pp. 30-31. This is the "and" form of pricing (*i.e.*, charging a customer twice for the same use of the transmission system) that Commission policy has long found unjust and unreasonable. *See id.* To fix a just and reasonable transmission rate to be observed prospectively, the Commission ruled that Generators must be provided with transmission service credits pursuant to its usual transmission credit policy, which serves to ensure that Generators will not be charged twice for the same use of the transmission system. *See Duke Hinds III* at PP 22-24, JA 2108-10, *relied on in* Tenaska Rehearing Order at PP 21-22, JA 934-35.

To make this remedy truly prospective as required by FPA § 206(b), the filed rate doctrine and the rule against retroactive ratemaking, the Commission went further and concluded that it could only direct that Generators receive credits against transmission service taken during the refund effective period and prospectively from the date of its orders. *See Duke Hinds III* at PP 33-34, JA 2112-13, *relied on in* Tenaska Rehearing Order at PP 18-19, JA 933; *see also supra* pp. 29-30 (describing calculation of transmission credits). For any transmission service taken by Generators prior to the refund effective period, or between the end of that period and the date of the Commission's orders, these legal requirements prevented FERC from ordering that Generators receive additional

credits. *See Duke Hinds III* at PP 33-34, JA 2112-13; Tenaska Rehearing Order at P 31, JA 938.

As a result, with the exception of the limited 15-month refund effective period permitted by FPA § 206(b), the Commission's rulings are focused entirely on fixing the just and reasonable *prospective* transmission rates that Utilities may charge. Consequently, the rule against retroactive ratemaking is never implicated. Tenaska Rehearing Order at P 19, JA 933.

2. Utilities Err in Contending that FERC's Orders Impermissibly Require Reimbursement of Charges for Past Services

Utilities assert that FERC's orders nonetheless violate the rule against retroactive ratemaking because they direct the reimbursement of amounts paid for a past jurisdictional service – interconnection to the transmission system – through credits for the separate jurisdictional service of transmission. *See, e.g.*, Utilities Br. at 24-25, 27, 29-30, 32, 33, 35. The Commission's orders, however, explicitly recognize that the agency cannot direct Utilities to return any funds they collected upfront for the costs of the reclassified Network Upgrades, because to do so would violate the filed rate doctrine and rule against retroactive ratemaking. *See Duke Hinds III* at P 32, JA 2112, *relied on in* Tenaska Rehearing Order at P 18-19, JA 933. These principles do not, however, allow Utilities to continue charging a transmission rate that is unjust and unreasonable and contrary to Commission

policy. *See id.* As a result, the Commission did not run afoul of the filed rate doctrine or the rule against retroactive ratemaking when it held that Utilities, having already collected from Generators an incremental cost rate for use of the transmission system (in the form of the upfront payments for the reclassified Network Upgrades), could not continue to charge a full embedded cost transmission rate that Commission policy deems unjust and unreasonable. *See id*.

To be sure, FERC has used the terms "reimburse" or "refund" when describing the process of upfront funding of Network Upgrades followed by the provision of transmission credits. *See, e.g.*, Order No. 2003 at P 676, JA 2066; Exxon Rehearing Order at P 9, JA 11 (citing Order No. 2003-B at P 10, JA 2083). But FERC has never used such language where, as here and in the earlier *Duke Hinds* orders, the agency is confronting the atypical circumstance of upfront funding of Interconnection Facilities *later* found to be Network Upgrades, thereby *later* triggering the agency's transmission credit policy and implicating the restrictions of FPA § 206(b). Moreover, the agency's use of these terms does not transform the long-held credit policy (which has been affirmed by this Court) into a scheme that requires retroactive refunds of interconnection rates in violation of the rule against retroactive ratemaking, as Utilities seem to suggest. Rather, as FERC repeated often in the challenged orders (and the underlying *Duke Hinds* orders), the purpose of the transmission service credits is to ensure that the

transmission rates paid by an entity that has funded Network Upgrades remain just and reasonable, and to guarantee that such an entity will not be forced to pay twice for the same use of the transmission system. *See Duke Hinds II* at P 28 & n.25, JA 2098, *aff'd in Duke Hinds III* at PP 22-23, JA 2108-09; Tenaska Rehearing Order at PP 21-22, JA 934-35.

The cases relied on by Utilities (*see* Generators Br. at 25-32) and Alabama Commission (*see* Alabama Commission Br. at 9-10) all address situations where FERC ran afoul of the filed rate doctrine and rule against retroactive ratemaking by assessing new or revised rates for services already purchased under a filed rate, without any connection to current services. *See Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135, 1140 (D.C. Cir. 1987) (rule against retroactive ratemaking violated where FERC orders required purchasers to pay a surcharge, "over and above the rates on file at the time of sale, for gas they had already purchased"); *Public Utilities Comm'n of California v. FERC*, 894 F.2d 1372, 1380 (D.C. Cir. 1990) (to the extent FERC orders requiring that retained funds collected by a utility be returned to customers rested on theory that previous rates for gas "were in retrospect too high," agency violated rule against retroactive ratemaking by forcing utility to return portion of rates already approved); *Pacific Gas & Electric v. FERC*, 373 F.3d 1315, 1320 (D.C. Cir. 2004) (FERC orders allocating an additional charge to cover remaining costs of a defunct utility on the basis of

past purchases, without reflection of current services, "directly violates the filed-rate doctrine or the rule against retroactive ratemaking"). In contrast, as explained above, in these proceedings the Commission ordered the provision of transmission credits *prospectively* to ensure that the rates charged to Generators for *current and future* transmission service are just and reasonable. *Duke Hinds III* at P 32, JA 2112, *relied on in* Tenaska Rehearing Order at P 19, JA 933. As a result, the filed rate doctrine and rule against retroactive ratemaking are not applicable. *See, e.g., Public Utilities Comm'n of California v. FERC*, 988 F.2d 154, 160 (D.C. Cir. 1993) (filed rate doctrine does not apply where approved rate is assessed prospectively to services that have yet to be provided).

Moreover, Utilities' repeated reliance on the fact that interconnection and transmission service are obtained separately is irrelevant. *See, e.g.*, Utilities Br. at 16-18 (and repeated throughout). As the Commission explained in *Duke Hinds II* at P 22, JA 2095 (citing *Consumers I*, 95 FERC at 61,804), the Commission's policy prohibiting "and" pricing applies even where "the interconnection component of transmission service is obtained separately and in advance of the delivery component of transmission service." *See also Entergy I*, 319 F.3d at 539 (noting Commission's decision, in promoting non-discriminatory access to the grid, that interconnection is itself a component of transmission service). Utilities' argument "misses the point" – FERC prohibits "and" pricing because it charges the

customer twice for the same use of the transmission system. *See Duke Hinds II* at P 28 & n. 25, JA 2098. As a result, the Commission's order directing transmission credits on a prospective basis to enforce this policy does not result in a retroactive refund of interconnection rates. Rather, as explained above, it simply recognizes that the Generators have already paid once to use the transmission system, and a second charge for the same use is unjust and unreasonable. *See Duke Hinds III* at P 32, JA 2112; Tenaska Rehearing Order at P 19, JA 933 (regardless of the fact that facilities and equipment had already been paid for and installed, the rule against retroactive ratemaking does not permit Utilities to continue charging an unjust and unreasonable transmission rate).

Utilities also repeatedly assert that while there are exceptions to the filed rate doctrine and rule against retroactive ratemaking that would allow the Commission to retroactively adjust a filed rate, none apply here. Utilities Br. at 22-23, 25, 27, 30. But as explained above, the Commission did not rely on any exception to these principles. Rather, it directed that the just and reasonable transmission rate it fixed in its orders be applied only prospectively; as a result, the filed rate doctrine and rule against retroactive ratemaking are never implicated. *See, e.g.*, Tenaska Rehearing Order at P 19, JA 933.

Taken to their logical conclusion, Utilities' filed rate doctrine and rule against retroactive ratemaking claims amount to a collateral attack on the

Commission's long-standing transmission credits policy. That policy requires, in all cases, exactly what the Commission required here – that Utilities provide transmission credits to Generators that paid the incremental cost of Network Upgrades, to ensure that their transmission rates remain just and reasonable. *See, e.g.*, Order No. 2003 at P 694 (explaining crediting policy). As noted above, this Court has consistently affirmed this policy in several earlier cases. *See supra* pp. 25-26 (citing *Nat'l Ass'n* and various *Entergy* opinions).

C. The Commission Reasonably Exercised its Remedial Discretion in Applying the Transmission Credit Policy Within the Limits of its Statutory and Legal Obligations

In addition to complying with the relevant statutory and legal requirements, FERC's decisions here were a reasonable exercise of its remedial discretion. No party argues before this Court that the subject facilities and equipment at issue in each of the underlying complaints are not properly classified as Network Upgrades. Nor does any party challenge the Commission's view that "and" pricing is unjust and unreasonable. The dispute now concerns the Commission's application of FPA § 206(b) and the requirements of the filed rate doctrine and rule against retroactive ratemaking (discussed above), as well as its choice of remedy to ensure just and reasonable rates prospectively.

As this Court has noted, the Commission has broad discretion when "fashioning policies, remedies and sanctions." *Connecticut Valley Elec. Co. v.*

FERC, 208 F.3d 1037, 1044 (D.C. Cir. 2000). The agency has such discretion "'even in the face of an undoubted statutory violation, unless the statute itself mandates a particular remedy.'" *Consolidated Edison Co. of New York v. FERC*, 510 F.3d 333, 339 (D.C. Cir. 2007) (citing *Connecticut Valley*, 208 F.3d at 1044). This Court's review of FERC actions relating to "'the fashioning of remedies'" is "particularly deferential." *Consolidated Edison*, 510 F.3d at 339 (citing *Towns of Concord*, 955 F.2d at 76).

Generators, in particular, assail the Commission's application of its transmission credits policy to the facts of these proceedings as "inherently arbitrary" (*see* Generators Br. at 38-39), focusing in part on FERC's conclusion that to comply with FPA § 206(b) and the filed rate doctrine, it must take into account any transmission credits Generators would have received prior to the statutory refund effective date. *See also* Generators Br. at 25-27.[6]

The Court should accord appropriate deference to the agency's choice in applying its long-standing transmission credit policy upon its finding, after consideration of Generators' complaints, that newly-constructed facilities once classified as Interconnection Facilities (for which credits are not available) are now treated as Network Upgrades (for which credits are available). While it may be true that no one can know precisely what decisions Generators would have made

[6] As noted above, Generators did not present this particular argument to the agency, and thus the Court should refuse to entertain it. *See supra* p. 38.

regarding their usage of the transmission facilities had the facilities and equipment at issue been properly classified from the outset (*see* Generators Br. at 38-39), the agency's choice to calculate transmission credits from the date of commercial operation was a reasonable exercise of its remedial discretion. That exercise of discretion is especially worthy of deference here, given that it was based on FERC's very legitimate concern that to do otherwise would violate FPA § 206(b), the filed rate doctrine and the rule against retroactive ratemaking.

IV. FERC's Orders Do Not Conflict With its Policies or Precedent

Generators broadly contend that the Commission's orders conflict with its interconnection pricing policies, and unreasonably depart from the agency's precedent. Generators Br. at 29-35; *see also id*. at 37-38 (arguing that FERC orders "radically depart" from regulations enacted in Order No. 2003).

Generators' assertions that FERC's orders conflict with its interconnection and transmission pricing policies (*see* Generators Br. at 32-35) fail primarily because they ignore the special circumstances presented by the instant complaint proceedings. As explained in Part II of the Argument section of this brief, *supra*, the Commission in these proceedings applied its usual interconnection and transmission pricing policies, within the constraints imposed by FPA § 206, the filed rate doctrine and the rule against retroactive ratemaking, in the unusual circumstances presented by an after-the-fact reclassification of facilities and

reassignment of cost responsibility. While the limits of these statutory and legal requirements (discussed *supra* pp. 28-32) prevented the Commission from ordering that Generators receive all the transmission service credits they might have received had the subject facilities and equipment been properly classified from the outset, the agency's orders do not "undermine" or abandon any of its long-held interconnection and transmission pricing policies. To the contrary, the Commission's orders carefully adhere to its existing judicially-confirmed interconnection and transmission pricing policies, while also complying with the requirements of the FPA. *See Duke Hinds III* at PP 22-24, JA 2108-09, *relied on in* Tenaska Rehearing Order at PP 21-22, JA 934-35 (explaining that Commission was applying its existing policies).

Furthermore, contrary to Generators' contentions (*see* Generators Br. at 29-32), the Commission reasonably explained why its rulings here do not conflict with the loan analogy it used in Order No. 2003 to describe the process of upfront payments made by generators for the cost of Network Upgrades, followed by their receipt of transmission service credits from the transmission provider. *See* Exxon Rehearing Order at PP 15-19, JA 13-15; Tenaska Rehearing Order at PP 25-29, JA 936-37. Specifically, FERC explained that it described this process as one with "the essential attributes of a loan" to make it easier to explain how the upfront payments, followed by transmission service credits equal to the full amount of

those payments plus interest, would operate. Exxon Rehearing Order at P 16, JA 14; Tenaska Rehearing Order at P 26, JA 936. This process could not be a loan in the literal sense of the word, however, since interconnecting generators do not always receive a full repayment, even in the usual case where Network Upgrades are properly identified in the first instance. *See* Exxon Rehearing Order at P 16, JA 14 and Tenaska Rehearing Order at P 26, JA 936 (noting that repayment is not required where a generator does not go into commercial operation).

As discussed above, the process of upfront funding followed by the provision of transmission service credits, while not a "rate" in the usual sense of the term, is a "term or condition applicable to interconnection service," making it subject to FERC's FPA jurisdiction. Exxon Rehearing Order at P 17, JA 14; Tenaska Rehearing Order at P 27, JA 937; *see also supra* pp. 32-34. For this reason, in the unusual circumstances of this case (where the limits of FPA § 206(b), the filed rate doctrine and the rule against retroactive ratemaking apply to the after-the-fact reclassification of facilities), FERC could not literally treat the upfront payments at issue as loans and order the transmission providers to return the entire amounts. As discussed above (*see supra* p. 36), to do so would require the transmission providers to return amounts that were lawfully collected pursuant to the rate on file, violating the filed rate doctrine. Exxon Rehearing Order at P 18, JA 14; Tenaska Rehearing Order at P 28, JA 937.

Generators assert that regardless of the agency's explanation, "[t]he point is that the [upfront] payment has the essential attributes of a loan." Generators Br. at 31 (citing Order No. 2003-C at P 9 n.9, JA 2087; Order No. 2003-B at P 36, JA 2084). But FERC did not abandon its view that in the normal case, where Network Upgrades are correctly designated at the outset, the process of upfront payments followed by transmission credits operates like a conventional loan transaction, providing a full repayment of the upfront funding. *See* Exxon Rehearing Order at P 16 & n. 28, JA 14; Tenaska Rehearing Order at P 26 & n. 38, JA 936. Rather, the Commission merely recognized that in this unusual case, where facilities were reclassified as Network Upgrades after transmission service had commenced, the fact that this process is at bottom a term or condition of interconnection service subject to the limitations imposed by FPA § 206(b) (and the related filed rate doctrine and rule against retroactive ratemaking) prevented it from literally treating Generators upfront payments as "loans," subject to full repayment. Exxon Rehearing Order at PP 17-18, JA 14; Tenaska Rehearing Order at PP 27-28, JA 937.

Finally, Alabama Commission, in support of Utilities, asserts that the Commission inappropriately applied the 20-year crediting period established in Order No. 2003, when it had previously stated there that it would not require retroactive changes to interconnection agreements already on file. Alabama

Commission Br. at 11. To be sure, the Commission stated in Order No. 2003 that it would not require that previously-filed interconnection agreements be reformed to comply with the standardized interconnection procedures adopted there. Order No. 2003 at P 911, JA 2072. However, FERC also explained that "[f]or previously accepted individual interconnection agreements, the Commission's interconnection case law and policies govern." *Id.* As explained above, the Commission here did nothing more than apply its existing interconnection case law and policy, which itself was carried over into Order No. 2003. *See supra* pp. 20-26.

V. Under the Circumstances, the Commission Acted Within a Reasonable Period of Time

Generators assert that even if the Commission correctly applied FPA § 206(b), its orders are arbitrary and capricious because they were "long-delayed." Generators Br. at 39-41. As Generators admit (*see id.* at 39-40), however, during the time these complaints were before the Commission, the agency's interconnection policies were undergoing wholesale review both internally and before this Court. For example, in its generic interconnection rulemaking, FERC was considering numerous challenges to its determinations in Order No. 2003, which resulted in three additional orders on rehearing and clarification, followed by the *Nat'l Ass'n* appeal. Furthermore, the individual parties in the *Duke Hinds II* case, which Generators relied on in their complaints, had filed several requests for rehearing. The resolution of those rehearing requests, particularly regarding the

calculation of transmission credits under the limitations of FPA § 206(b), necessarily impacted the Commission's decision on the instant complaints. *See Duke Hinds III* at PP 33-34, JA 2112-13 (clarifying the prospective application of the crediting policy to complaints filed under FPA § 206, which was later applied in the challenged orders). Once these matters were concluded, FERC promptly began issuing orders on the complaints filed in these proceedings. Under these circumstances, the agency did not unreasonably delay issuing the challenged orders.

Moreover, Generators themselves did not raise any objections to the interconnection agreements, including the provisions treating the now reclassified facilities as Interconnection Facilities (for which credits are not appropriate), when they were originally filed with the Commission. *See* Exxon Rehearing Order at P 20, JA 15; Tenaska Rehearing Order at P 30, JA 937-38. And although Generators claim that the Commission's transmission crediting policy became clear as of the *Consumers Energy I* and *II* cases (issued on May 17 and July 26, 2001, respectively) (*see* Generators Br. at 39), they did not file their complaints until 2003 and 2004 – several years after their interconnection agreements had been filed with and accepted by FERC.

Generators also assert that the Commission failed to comply with its obligations under FPA § 206(b) when it "failed to act upon the complaint within

180 days." Generators Br. at 40-41. That statutory provision does not, however, obligate the Commission to *act* on a complaint within 180 days. Rather, the statue requires only that FERC act "as speedily as possible," and in the event it does not act "by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding," that it state why it has not acted and "its best estimate as to when it reasonably expects" to act. FPA § 206(b), 16 U.S.C. § 824e(b).

Admittedly, the agency did not, in the instant complaint proceedings, make any definitive statements as to why it did not act prior to the refund effective date or within 180 days, or when it intended to act. But the reasons for the Commission's delay in acting on Generators' complaints easily can be inferred from the agency's contemporaneous actions in the related (and controlling) *Duke Hinds* proceeding and in its generic Order No. 2003 rulemaking proceeding (in which all Generators and Utilities participated). *See supra* pp. 53-54. Moreover, as Generators themselves note (*see* Generators Br. at 38-39), no one can surmise whether Generators would have taken a different amount of transmission service during the periods where FERC did not order transmission credits (*see supra* pp. 29-30) had these proceedings progressed differently. As a result, it is entirely unclear how many additional transmission credits Generators might have recovered had the Commission expressly stated when it would act, and Generators fail to

identify any harm or prejudice that would have been alleviated had the agency done so. *See, e.g., Air Canada v. Dep't of Transportation*, 148 F.3d 1142, 1156-57 (D.C. Cir. 1998) ("As incorporated into the [Administrative Procedure Act, 5 U.S.C. § 706], the harmless error rule requires the party asserting error to demonstrate prejudice from the error").

Moreover, given the Commission's conclusion that FPA § 206(b) (as well as the filed rate doctrine and rule against retroactive ratemaking) prevented it from providing the Generators with all the transmission credits they were seeking, even if the Commission stated why it failed to act and when it would act as contemplated in the statute, Generators still would have been prevented from collecting transmission credits for those periods where the statute (and related legal principles) prevents retroactive refunds. Accordingly, any procedural error in this regard was "at most 'harmless error.'" *See, e.g.*, *Hadson Gas Systems, Inc. v. FERC*, 75 F.3d 680, 683 (D.C. Cir. 1996) (citing *Sheppard v. Sullivan*, 906 F.2d 756, 761-62 (D.C. Cir. 1990) (finding harmless error where an agency modified a regulation without necessary notice and comment).

VI. Exxon Mobil's Generator-Specific Arguments, Resting on its Individual Circumstances, Are Without Merit

Generators contend that even if the Commission correctly applied FPA § 206(b) to their complaints, Exxon Mobil's particular factual circumstances dictate that it is entitled to obtain the full amount of transmission credits equal to its

upfront payments. Generators Br. at 41-51. They explain that in Exxon Mobil's case, two separate sets of Network Upgrades were constructed to accommodate its generating facility. *Id.* at 42-44. Generators argue that the Commission erred in not exercising the broad FPA § 205 authority it allegedly retained in prior orders, *see id.* at 44-45, and in not directing the transmission provider to separately (or "sequentially") apply transmission credits for the two sets of Network Upgrades, *see id.* at 46-51.

To the extent Exxon Mobil presented any arguments in this regard to the Commission in its pleadings underlying the orders on review here, the agency provided a reasonable response that fully addressed Exxon Mobil's concerns regarding the sequential application of transmission credits. To the extent Exxon Mobil has recast and added to its arguments in its brief before this Court, its arguments should not be considered.

In its request for rehearing and clarification, Exxon Mobil asked the Commission to clarify, or in the alternative grant rehearing, to confirm that it would be entitled to a 100 percent return of its upfront payments to the transmission provider, and that the transmission provider could not offset the transmission credits required by the Exxon Order with transmission credits already being provided for the other set of Network Upgrades. *See* Exxon Request for Rehearing and Clarification at 3, 5, 15-19, JA 372, 374, 384-88. First, it asserted

that Article 11.4.1 of the Large Generator Interconnection Agreement in Order No. 2003 (relied on by the agency in directing how credits should be calculated) makes no reference to the four distinct periods identified by FERC, and provide that a generator is entitled to full reimbursement of its upfront funding of Network Upgrades. *Id*. at 16-18, JA 385-87. Second, Exxon Mobil asked the Commission to resolve ambiguity in the time period in which transmission credits should commence for the facilities and equipment in question (labeled "Phase I" in Generators' brief). *Id*. at 18-19, JA 387-88.

Considering these arguments in the Exxon Rehearing Order, the Commission noted Exxon Mobil's particular concern that the transmission provider not be permitted to offset the transmission credits required in the Exxon Order with transmission credits it was already providing for a separate set of Network Upgrades constructed for the same generating facility. Exxon Rehearing Order at P 23, JA 16-17 (citing Exxon Request for Rehearing at 3, JA 372). While FERC rejected Exxon Mobil's arguments regarding Article 11.4.1 of the Large Generator Interconnection Agreement (reiterating its conclusion that FPA § 206 and the rule against retroactive ratemaking limited the amount of transmission credits it could order), the agency addressed Exxon Mobil's concern regarding the possibility that one set of transmission credits would be used to offset those it ordered here. *Id.* at PP 24-26, JA 17. Specifically, the Commission noted that it

addressed the issue of credits associated with different sets of facilities in different orders, and thus concluded that the transmission provider "must separately reimburse ExxonMobil for each group of [N]etwork [U]pgrades." *Id.* at P 26, JA 17.

Generators do not acknowledge this response or explain why it did not adequately address the concerns expressed by Exxon Mobil on rehearing and clarification regarding the "offset" of transmission credits between the two sets of Network Upgrades. Before this Court, they recast those concerns into their arguments on brief that FERC should have required "sequential" application of transmission credits for the two separate sets of Network Upgrade facilities. FERC's response reasonably addressed the "offset" concerns of Exxon Mobil as they were presented in its request for rehearing, and to that extent, should be upheld. *See State of North Carolina v. FERC*, 112 F.3d 1175, 1192-93 (D.C. Cir. 1997) (quoting *City of Vernon v. FERC*, 845 F.2d 1042, 1047 (D.C. Cir. 1988)) (FERC "'cannot be asked to make silk purse responses to sow's ear arguments'").

Generators also present several additional arguments regarding Exxon Mobil's particular circumstances that do not appear in its request for rehearing. For example, Exxon Mobil never presented to FERC in this proceeding its contention that the agency retained authority under FPA § 205 to provide it with the full amount of transmission credits (*see* Generators Br. at 44-45), nor did it

present its assertion that FERC should exercise its authority under FPA § 309, 16 U.S.C. § 825h (*see* Generators Br. at 48). As a result, the Court should not consider those arguments here, and should uphold the reasonable response provided by the agency to Exxon Mobil's primary concerns regarding the offsetting of transmission credits. FPA § 313(b), 16 U.S.C. 825*l*(b); *see also, e.g.*, *Constellation Energy*, 457 F.3d at 21; *Allegheny Power*, 437 F.3d at 1220 ("Under [FPA] § 313(b) an objection cannot be preserved indirectly, but must be raised with specificity").

In any event, the issues regarding Exxon Mobil's particular factual circumstances that Generators attempt to press here were more thoroughly considered by the Commission in subsequent proceedings addressing filings made in compliance with the agency's directives in the Exxon Order and Exxon Rehearing Order. *See Exxon Mobil Corp. v. Entergy Services, Inc.*, 120 FERC ¶ 61,051 (2007), *reh'g denied*, 122 FERC ¶ 61,168 (2008). In fact, in that proceeding Exxon Mobil presents many of the arguments that were not earlier preserved in its pleadings before the agency underlying the orders challenged in the instant appeal. *See Exxon Mobil Corp.*, 122 FERC ¶ 61,168 at P 27 (presenting certain arguments not earlier preserved) and PP 29-41 (Commission response).

On April 21, 2008, Exxon Mobil filed a petition for review of these later compliance orders in this Court in *Exxon Mobil Corp. v. FERC*, D.C. Cir. No. 08-

1158. Since Exxon Mobil presented in that case the arguments it seeks to press here, giving the Commission the opportunity to respond and more fully develop its rationale, the Court can address those arguments there, and should decline to reach them in this appeal.

CONCLUSION

For the reasons stated, the petitions for review should be denied and the Commission's orders should be upheld in all respects.

Respectfully submitted,

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August 18, 2008

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D.C. Cir. Nos. 07-1306 *et al.*

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 14,000 words, not including the tables of contents and authorities, the certificates of counsel, or the addendum.

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ADDENDUM

PAGE

The Administrative Procedure Act, 5 U.S.C. § 706 provides as follows:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Section 201(b) of the Federal Power Act, 16 U.S.C. § 824(b), provides as follows:

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at whole-sale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

Sections 205(a)-(c) of the Federal Power Act, 16 U.S.C. §§ 824(a)-(c) provides as follows:

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

Section 206 of the Federal Power Act, 16 U.S.C. ə 824 provides as follows:

(a) Unjust or preferential rates, etc., statement of reasons for changes, hearings, specification of issues

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affected such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date, preferential proceedings, statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date 60 days after the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the expiration of such 60-day period. Upon

institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the refund effective date or by the conclusion of the 180day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order the public utility to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: Provided, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise' be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that

(1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and

(2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company:

Provided, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended (15 U.S.C. 79 et seq.).

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

Section 309 of the Federal Power Act, 16 U.S.C. § 825h provides as follows:

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

Section 313 of the Federal Power Act, 16 U.S.C. § 825*l*, provides as follows:

(a) Application for rehearing; time periods; modification of order

Any person, State municipality, of State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have the made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Com-mission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission

shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. 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 reason-able ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission’s order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission’s order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission’s order.