ORAL ARGUMENT NOT YET SCHEDULED

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

No. 09-1220

RICHARD BLUMENTHAL, ATTORNEY GENERAL
FOR THE STATE OF CONNECTICUT, AND
CONNECTICUT OFFICE OF CONSUMER COUNSEL,
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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APRIL 1, 2010

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties

All parties appearing before the Commission and this Court are listed in Petitioners' Rule 28(a)(1) certificate.

B. Rulings Under Review:

The rulings under review appear in the following orders issued by the Federal Energy Regulatory Commission:

1. *ISO New England, Inc.*, 125 FERC ¶ 61,392 (2008) ("Initial Order"), JA 438;

2. *ISO New England, Inc.*, 127 FERC ¶ 61,254 (2009) ("Rehearing Order"), JA 462.

C. Related Cases:

This case has not previously been before this Court or any other court.

/s/ Beth G. Pacella
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Senior Attorney

April 1, 2010

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GLOSSARY

Commission	Federal Energy Regulatory Commission
Connecticut	Petitioners, Richard Blumenthal, Attorney General for the State of Connecticut, and the Connecticut Office of Consumer Counsel
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
Initial Order	*ISO New England, Inc.*, 125 FERC ¶ 61,392 (2008), JA 438
ISO	ISO New England Inc.
ISO New England	ISO New England Inc.
Mercer	Mercer Consulting
Proxy group challenge	Connecticut's challenge to Mercer's comparison of ISO New England's proposed executive pay to that of companies with higher revenues
Rehearing Order	127 FERC ¶ 61,254 (2009), JA 462

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

The issue presented for review is whether the Federal Energy Regulatory Commission ("FERC" or "Commission") reasonably approved the proposal of ISO New England Inc. ("ISO New England" or "ISO"), the operator of the regional transmission network in New England, to recover its estimated 2009 executive compensation costs.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutory and regulatory provisions are contained in the Addendum to this Brief.

INTRODUCTION

The challenged orders address ISO New England's 2008 filing to recover its estimated revenue requirement for the calendar year 2009. *ISO New England, Inc.*, 125 FERC ¶ 61,392 (2008) ("Initial Order"), JA 438, *order on reh'g*, 127 FERC ¶ 61,254 (2009) ("Rehearing Order"), JA 462. While Petitioners, Richard Blumenthal, Attorney General for the State of Connecticut, and the Connecticut Office of Consumer Counsel (collectively, "Connecticut"), challenged several aspects of the estimated revenue requirement before the Commission, on appeal Connecticut challenges only the executive compensation portion of the proposed revenue requirement. The Commission found ISO New England's estimated executive compensation adequately supported and just and reasonable. *See*, *e.g.*, Initial Order at P 35, JA 448; Rehearing Order at PP 20-22, JA 469-70.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

Section 201(b) of the Federal Power Act ("FPA"), 16 U.S.C. § 824(b), grants FERC exclusive jurisdiction over the transmission and wholesale sale of electricity in interstate commerce. *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239,

246 (D.C. Cir. 2007). In accordance with FPA § 205(a), 16 U.S.C. § 824d(a), all rates for or in connection with such transmission and sales must be just and reasonable. *Id.* "To enforce [this] requirement[], Section 205 requires that utilities file tariffs reflecting their rates and service terms with the Commission, which must in turn ensure that those rates and terms are just and reasonable . . . ." *Id.* (citing FPA § 205(c), 16 U.S.C. § 824d(c)).

The Commission's regulations provide for the filing of wholesale electric power rates by public utilities (including ISO New England) based on historical or estimated costs. 18 C.F.R. § 35.13(d)(1) and (2); *see also Am. Pub. Power Ass'n v. FPC*, 522 F.2d 142, 143 (D.C. Cir. 1975) (affirming orders promulgating rule, *Filing of Elec. Serv. Tariff Changes*, Order No. 487, 50 FPC 125, *order on reh'g*, 50 FPC 736 (1973)); *Trunkline Gas Co.*, 90 FERC ¶ 61,017 at 61,047-48 (2000) (citing 18 C.F.R. § 35.13(d), and explaining that "the rates for electric utilities can be based on actual data for the prior twelve months or prior calendar year, known as 'Period I' or they can be based on estimated (or projected) data for a future twelve months or year known as 'Period II.'" (footnote omitted)).

As this Court has noted, "it is ordinarily impossible for a [utility] to know at the time of filing what its actual costs will be during the effective period of the filed rates, and so the use of a 'test period' for calculating the cost of service is appropriate." *BP West Coast Products, LLC v. FERC*, 374 F.3d 1263, 1307 (D.C.

Cir. 2004) (citing *Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 56 (D.C. Cir. 1999)); *see also Trunkline*, 90 FERC at 61,048 ("The electric utility regulations do not explicitly require that Period II estimates (or projections) be known and measurable (indeed, because they can be estimates, they cannot be known and measurable when they are made), or that they will in fact occur during the test period."). Moreover, the Court has found that, "[w]hile use of a test period is not perfect, it is a reasonable proxy for actual costs." *BP*, 374 F.3d at 1307 (citing *Am. Pub. Power*, 522 F.2d 142).

II. ISO New England

A. ISO New England's Formation

In 1971, New England transmission and generation owners, suppliers, publicly-owned entities, and end-users formed the New England Power Pool. *Braintree Elec. Light Dep't v. FERC*, 550 F.3d 6, 9 (D.C. Cir. 2008). New England Power Pool operated the unified regional network, which coordinated bulk power transmission and generation facilities. *See ISO New England Inc.*, 106 FERC ¶ 61,280 at P 5, *order on reh'g*, 109 FERC ¶ 61,147 (2004), *aff'd sub nom. Me. Pub. Utils. Comm'n v. FERC*, 454 F.3d 278 (D.C. Cir. 2006). In 1997, in response to FERC Order No. 888,[1] New England Power Pool obtained FERC

[1] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by*

approval for the creation of ISO New England, Inc., a "non-profit entity to administer New England energy markets and operate the region's bulk power transmission system." *Braintree*, 550 F.3d at 9 (quoting *NSTAR Electric & Gas Corp. v. FERC*, 481 F.3d 794, 796 (D.C. Cir. 2007)); *see New England Power Pool*, 83 FERC ¶ 61,045 (1998); *New England Power Pool*, 85 FERC ¶ 61,379 (1998), *order on reh'g*, 95 FERC ¶ 61,074 (2001).

Subsequently, in 2003, ISO New England and the New England Transmission Owners jointly requested approval to establish ISO New England as a Regional Transmission Organization pursuant to Order No. 2000.[2] The Commission approved the proposal in 2004, finding, among other things, that, as a "not-for-profit entity governed by an independent, non-stakeholder board," ISO New England satisfied Order No. 2000's independence requirement. *Braintree*,

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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).

[2] *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs., Regs. Preambles ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,092 (2000), *petitions for review dismissed*, *Public Util. Dist. No. 1 of Snohomish County v. FERC*, 272 F.3d 607 (D.C. Cir. 2001) ("*Snohomish*").

550 F.3d at 9; *ISO New England*, 106 FERC at P 51. *See also Snohomish*, 272 F.3d at 610-12 (discussing Order Nos. 888 and 2000 rulemakings).

B. ISO New England's Annual Revenue Requirement Procedure

"[T]he ISO revises its specific rates each year from a proposed annual Revenue Requirement that has been reviewed through a multi-stage stakeholder process, subjected to a vote of participants, and ultimately approved by its independent Board of Directors." R.1, Transmittal Letter at 6, JA 6. In accordance with Section 12 of its Participants Agreement,[3] ISO New England submits a proposed budget to its Budget & Finance Subcommittee no later than 120 days before the start of each calendar year. *Id.* at 5, JA 5. After considering the Subcommittee's comments, the ISO submits the budget to New England Power Pool's Participants Committee no later than 75 days before the start of the calendar year. *Id.* All Participants Committee votes are reported to the ISO's independent Board of Directors, which approves the final budget. *Id.* at 5-6, JA 5-6. No later than 60 days before the start of each calendar year, the ISO must file rates reflecting the budget approved by the Board of Directors. *Id.* at 6, JA 6.

[3] The Participants Agreement is available at: http://www.iso-ne.com/regulatory/part_agree/participants_agreement.pdf.

III. ISO New England's Proposal To Recover Its Estimated 2009 Administrative Costs

A. ISO New England's October 31, 2008 Filing

On October 31, 2008, ISO New England filed its estimated 2009 Revenue Requirement. ISO New England explained that it presented its Revenue Requirement to the Budget & Finance Subcommittee on August 21, 2008, and, after receiving favorable comments, submitted it to the Participants Committee, which unanimously (with abstentions) supported the proposal on October 10, 2008. R.1, Transmittal Letter at 6, JA 6; R.1, Exh. 3 at RCL-8 (Participants Committee Resolution), JA 151. Also, on September 4, 2008, ISO New England presented the proposed 2009 revenue requirement to staff and commissioners representing the New England Conference of Public Utilities Commissioners for review and comment; no changes were recommended. *Id.*; R.1, Exh. 3 at RCL-4 (chronology of budget approval process), JA 131. On October 16, 2008, the ISO's independent Board of Directors unanimously approved the proposed budget. R.1, Transmittal Letter at 6, JA 6; R.7, Answer to Protest at 3, JA 219.

Among other things, ISO New England's proposed 2009 Revenue Requirement included a total of $68,371,316 for salaries, payroll taxes and employee benefits, and Board fees and expenses. R.1, Exh. 3, RCL-5 Sched. 2 at p.1, JA 133; R.1, Exh. 3, RCL-5 Sched. 3, JA 136; R.1, Exh. 3, RCL-5 Sched. 4,

JA 137. This represented a $5.6 million net increase from 2008 requirements, primarily due to: a 3.5% merit and 1.0% promotional increase in salaries ($2.5 million); a net increase of 25 additional staff members ($2.6 million) necessitated in large part by new ISO New England initiatives; and $1.5 million of increased costs for employee benefits (including health, pension and post-retirement benefits).[4] R.1, Exh.3 (Ludlow Affidavit) at 14, JA 59.

ISO New England's filing explained that the Internal Revenue Service requires ISO New England executive and Board of Directors compensation to "fall within a range of competitive practices for total compensation paid by similarly-situated organizations, both taxable and tax-exempt, for functionally comparable positions." R.1, Exh.3 (Ludlow Affidavit) at 16-17, JA 61-62. To meet this requirement, the ISO "engaged a nationally recognized, independent consulting firm, which evaluate[d] the compensation offered by similarly situated entities . . . includ[ing] other independent system operators, [Regional Transmission Organizations], and select for-profit 'peer' utility organizations (selected for organizational size, complexity, and scope of responsibilities)." *Id.* The consulting firm's analysis "also incorporate[d] a broader comparison across all

[4] These expenses "were partially offset by a shift of O&M salaries to capital and other miscellaneous reductions which combined to total $1 million." R.1, Exh.3 (Ludlow Affidavit) at 14, JA 59.

industries for positions not unique to utilities (again, selected for organizational size, complexity, and scope of responsibilities)." *Id.* at 17, JA 62. After conducting its analysis, the consulting firm concluded "that the ISO's executive and Board compensation is within a reasonable range of competitive practice for functionally comparable positions among similarly-situated entities." *Id.*

B. Connecticut's Protest

On November 21, 2008, Connecticut intervened and protested, asserting that ISO New England's "filing does not provide sufficient documentation or evidence to support its proposed costs for the Commission to determine whether those costs are just and reasonable." R.6, Protest at 4, JA 209. Connecticut asked the Commission "to conduct a hearing to investigate fully the ISO's proposed tariff sheets, specifically with respect to [the] ISO's requested executive compensation and salary structure, employee staffing levels, depreciation rates and schedules and external affairs activities." *Id.* at 1, JA 206.

As relevant here, Connecticut complained that ISO New England's filing did not "disclose precisely what it proposes to pay its executives, whether base pay or in bonuses," or "how its executive compensation will be calculated and what criteria would trigger an executive bonus." *Id.* at 5-6, JA 210-11. Connecticut asserted, therefore, that the Commission should reject the executive compensation proposal as unreasonable and set this matter for hearing. *Id.*

C. ISO New England's Answer To Connecticut's Protest

On December 8, 2008, ISO New England filed a motion for leave to answer and a detailed answer addressing all matters raised in Connecticut's protest. R.7, Answer to Protest, JA 217-437.

For example, the answer described the components that make up executive compensation as well as the extensive process ISO New England undertakes to determine the level of each component. R.7, Answer to Protest at 5-10, JA 221-23; *id.* at Exh. 7 (Janice Dickstein Affidavit) pp. 3-13, JA 246-56; *id.* at Exh. 8 (Mercer Report), JA 259-304; *id.* at Exh. 9 (Annual Report on Executive Compensation), JA 305-15. Furthermore, the answer explained that the ISO New England Board of Directors had estimated its 2009 executive compensation at 2008 levels. R.7, Answer to Protest at 9, JA 225; *see also id.* at Exh. 7 (Janice Dickstein Affidavit) p. 12, JA 255. The answer then provided the details of each ISO New England executive's 2008 compensation. *Id.* at Exh. 8 (Mercer Report), Final Report pp. 14-22, JA 284-92; *id.* at Exh. 11 (Oct. 10, 2008 Presentation to New England Power Pool's Participants Committee) p. 24, JA 364.

IV. The Commission Orders On Review

A. The Initial Order

On December 31, 2008, the Commission issued its Initial Order on ISO New England's filing. R. 8, JA 438. After noting that "Rule 213(a)(2) of the

Commission's Rules of Practice and Procedure[, 18 C.F.R. § 385.213(a)(2) (2008),] prohibits an answer to a protest unless otherwise ordered by the decisional authority," the Commission accepted ISO New England's answer because it "provided information that assisted [the Commission] in [its] decision-making process." Initial Order at P 33, JA 448.

The Commission found ISO New England's proposed executive compensation package adequately supported and just and reasonable. Initial Order at P 35, JA 448-49. As the Commission explained, the record established that the proposed executive compensation was evaluated by Mercer Consulting ("Mercer"), a nationally recognized independent consulting firm, which concluded that ISO New England's "executive compensation is within a reasonable range of competitive practices for functionally comparable positions among similarly-situated entities." *Id.*, JA 449. The record also showed that ISO New England's independent Board of Directors had reviewed and approved the proposed executive compensation. *Id.*

The Commission found that, while ISO New England had not provided the details of its executive compensation proposal in its original filing, its answer provided the necessary details. *Id.* "On the basis of this information, [the Commission] conclude[d] that [ISO New England] justified its proposed executive compensation package" and found the proposal "to be just and reasonable." *Id.*

Accordingly, the Commission determined it was unnecessary to set the matter for an evidentiary hearing. *Id.*

B. Connecticut's Request For Rehearing

In its rehearing request, Connecticut asserted that it "should be entitled to a hearing process and an opportunity to challenge both the methodology and conclusions in the Mercer report." R. 9, Rehearing Request at 5, JA 456; *see also id.* at 1, JA 452 (requesting that the Commission "hold a full hearing in this matter and to rehear that portion of the [Initial] Order with respect to ISO's requested executive compensation and salary structure, employee staffing levels, depreciation rates and schedules, and external affairs activities.").

Specifically, Connecticut argued that the Commission "should not accept on face value, and without any hearing, [ISO New England]'s one-sided evidence, being its consultant's word that the executive compensation proposals are reasonable." *Id.* at 5, JA 456. Connecticut added that, "[o]bviously, if [ISO New England]'s consultant never had to face any challenge to their conclusions or methodology, the consultant's only incentive would be to approve of every executive compensation proposal, no matter how lavish or inappropriate. Otherwise the consultant would be assured it would not be hired again next year." *Id.*

Connecticut also argued that the Mercer report erred by comparing ISO New England's executive compensation to executive compensation provided by companies with much higher revenues than ISO New England's. *Id.* at 5-6, JA 456-57. In Connecticut's view, "executive compensation packages are generally higher with much bigger firms," and "[a]s a relatively small 'non-profit' public utility with demonstrably fewer risks[,] [ISO New England] simply should not be compared to larger, more heavily capitalized, more risky, for-profit business interests." *Id.* at 6, JA 457.

In addition, pointing to the economic downturn since the Mercer report issued in March 2008, Connecticut questioned whether what "experts believed in March 2008 constituted appropriate executive salary and bonus compensation would be outdated and irrelevant today." *Id.* at 6-7, JA 457-58.

C. The Rehearing Order

In the Rehearing Order, the Commission found that Connecticut "ha[d] not supported [its] claim that Mercer Consulting gave a biased report to ensure being re-hired." Rehearing Order at P 22, JA 470. In fact, the Commission explained, "Mercer Consulting's motivations are no different from any other independent paid consultant's, including any that [Connecticut itself] would hire." *Id.*

The Commission also found no merit to Connecticut's contention that Mercer's reasonableness analysis included some companies whose revenues were

too high. Rehearing Order at P 21, JA 469. Rather, based on the information provided in ISO New England's answer, the Commission determined that Mercer's comparison analysis involved entities that were similarly situated to ISO New England. *Id.*

In addition, the Commission found it appropriate that ISO New England's "compensation package [was] based on the facts as they existed when it proposed its budget and submitted it for stakeholder approval." Rehearing Order at P 22, JA 470. The Commission noted, however, that "when [ISO New England] files seeking approval for executive compensation again, it may use any new benchmarks that have arisen due to the economic situation at that time." *Id.*

Again finding that ISO New England "ha[d] adequately supported its executive compensation package," the Commission reaffirmed its determination "not [to] set this matter for hearing." Rehearing Order at P 20, JA 469. ISO New England "provided the information in its Answer necessary to allow the Commission to determine its proposed compensation package was just and reasonable." *Id.*

SUMMARY OF ARGUMENT

The Commission reasonably determined there was no need for an evidentiary hearing here. Connecticut did not provide support for its allegation that the credibility of the Mercer report on executive compensation was questionable. In addition, the Commission was able to resolve, on the written record, Connecticut's claim that Mercer's analysis included companies whose revenues were too high.

Connecticut did not raise on rehearing to the Commission the argument that a hearing was necessary because the record included only ISO New England's estimated, not actual, 2009 executive compensation. As a result, Connecticut is jurisdictionally barred from raising that argument on appeal. In any event, ISO New England's proposed executive compensation, like the rest of its revenue requirement, appropriately was based on estimated costs.

Connecticut had ample opportunity to challenge ISO New England's executive compensation proposal. Connecticut could have moved for leave to submit an answer to ISO New England's answer, but failed to pursue that opportunity. Connecticut also had a full opportunity to challenge, and did in fact challenge, ISO New England's executive compensation proposal (including ISO New England's answer) in its request for rehearing.

Furthermore, the Commission adequately responded to Connecticut's allegations. The Commission explained that, based on the information in ISO New England's answer, it determined that ISO New England's proposed executive compensation was adequately supported and just and reasonable. Moreover, based on that information, the Commission found that Mercer's analysis was based on entities that were similarly situated to ISO New England.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *Braintree*, 550 F.3d at 10 (affirming the Commission's approval of ISO New England's proposed recovery of 2005-2006 external affairs (characterized as "lobbying") expenses). Under that standard, the Commission must make "a reasoned decision based upon substantial evidence," and "the path of its reasoning [must be] clear." *Id.* The Commission's factual findings are conclusive if supported by substantial evidence in the record. FPA § 313(b), 16 U.S.C. § 825*l*(b).

The Court "recogniz[es] that 'matters of rate design . . . are technical and involve policy judgments at the core of FERC's regulatory responsibilities. Hence, the court's review of whether a particular rate design is just and reasonable is highly deferential.'" *Wis. Pub. Power*, 493 F.3d at 256 (quoting *Me. Pub. Utils.*

Comm'n, 454 F.3d at 287); *see also Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009) ("the statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions") (quoting *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1*, 128 S. Ct. 2733, 2738 (2008)).

II. THE COMMISSION APPROPRIATELY FOUND ISO NEW ENGLAND'S 2009 EXECUTIVE COMPENSATION REVENUE REQUIREMENT JUST AND REASONABLE

A. The Commission Reasonably Determined There Was No Need For An Evidentiary Hearing Here

Connecticut contends the Commission was required to conduct an evidentiary, trial-type hearing so that it could challenge: (1) Mercer's independence in reviewing the proposed executive compensation levels in light of its incentive to be hired again by ISO New England; (2) Mercer's comparison of ISO New England's proposed executive pay to that of companies with much higher revenues ("proxy group challenge"); and (3) the fact that ISO New England disclosed only estimated, not the actual, executive compensation it would pay in 2009. Br. 17-22. Connecticut's contention is mistaken.

1. Connecticut Failed To Support Its Claim That Mercer's Credibility Was Questionable

"Mercer is a compensation, benefits and human resources consulting firm" that "regularly perform[s] compensation valuation studies" like the one at issue

here. R.7, Answer to Protest Exh. 8 (Mercer Report) at Transmittal Letter p. 8, JA 267. ISO New England explained that, "to ensure independence from management, [ISO New England's] compensation advisor[, *i.e.*, Mercer,] is retained by and reports directly to a Committee of the Board [of Directors]," and "the ISO does not use Mercer for any other consulting within the ISO." R.7, Answer to Protest Exh. 7 (Janice Dickstein Affidavit) at 8, JA 251. *See also* R.7, Answer to Protest Exh. 8 (Mercer Report) at Transmittal Letter p. 1, JA 260 ("Mercer has been engaged by [ISO New England] on behalf of the Compensation and Human Resources Committee of the Board of Directors"); R.7, Answer to Protest Exh. 9 (Annual Report on Executive Compensation) at 1, JA 306 (the Compensation and Human Resources Committee "consists of three or more non-employee members of the Board of Directors. Each member of the Committee must meet all independence standards").

Connecticut argued that an evidentiary, trial-type hearing was necessary because Mercer allegedly had an "incentive . . . to approve of every executive compensation proposal, no matter how lavish or inappropriate." R.9, Rehearing Request at 5, JA 456. "Otherwise," Connecticut asserted, "the consultant would be assured it would not be hired again next year." *Id.*

As this Court has found, however, "mere allegations of disputed facts are insufficient to mandate a hearing; petitioners must make an adequate proffer of

evidence to support them." *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124, 129 (D.C. Cir. 1982), *cited in* Rehearing Order n.25, JA 470; *see also Woolen Mill Assocs. v. FERC*, 917 F.2d 589, 592 (D.C. Cir. 1990), *cited in* Rehearing Order n.25, JA 470 (same); *General Motors Corp. v. FERC*, 656 F.2d 791, 798 n.20 (D.C. Cir. 1981) ("where a party requesting an evidentiary hearing merely offers allegations or speculations without an adequate proffer to support them, the Commission may properly disregard them.").

The Commission reasonably determined that Connecticut "ha[d] not supported [the] claim that Mercer Consulting gave a biased report to ensure being re-hired." Rehearing Order at P 22, JA 470; *see also id.* at P 23 and n.25, JA 470 ("The proponent of a trial-type hearing also must make a proffer of evidence as to those disputed facts that it alleges requires a hearing.") (citing *Cerro*, 677 F.2d at 129; *Woolen Mill*, 917 F.2d at 592). As the Commission found, "Mercer Consulting is a nationally recognized independent consulting firm," Rehearing Order at P 21, JA 469, whose "motivations are no different from any other independent paid consultant's, including any that [Connecticut itself] would hire," *id.* at P 22, JA 470. "Having been given the necessary information" in ISO New England's answer, the Commission was "satisfied with [ISO New England]'s reliance on Mercer Consulting and the consultants' report." *Id.* PP 21-22, JA 469-70.

2. The Commission Appropriately Determined That It Could Resolve Connecticut's Proxy Group Challenge On The Written Record

Connecticut also argued that an evidentiary hearing was necessary to address its claim that Mercer's analysis included companies whose revenues were too high. R.9, Rehearing Request at 5-6, JA 456-57. Because the Commission was able to resolve Connecticut's proxy group challenge on the written record, Initial Order at P 35, JA 448; Rehearing Order at PP 20-21 JA 469, however, it appropriately found no need for an evidentiary hearing on that issue. *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993) ("FERC need not conduct an evidentiary hearing when there are no disputed issues of material fact," and "even where there are such disputed issues, FERC need not conduct such a hearing if they may be adequately resolved on the written record."); *see also*, *e.g.*, *Braintree*, 550 F.3d at 13 (citing *Cent. Me. Power Co. v. FERC*, 252 F.3d 34, 46-47 (1st Cir. 2001)) (same); *Ark. Elec. Energy Consumers v. FERC*, 290 F.3d 362, 369-70 (D.C. Cir. 2002) (same).

ISO New England's answer extensively detailed Mercer's comparability methodology. R.7, Answer to Protest, JA 217-437. As relevant here, the answer explained that Mercer met with key ISO New England officials to obtain information regarding ISO New England's organization and responsibilities. R. 7, Answer to Protest Exh. 8 (Mercer Report) at Transmittal Letter p. 3, JA 262; *id.* Exh. 7 (Janice Dickstein Affidavit) at 9-10, JA 252-53. Based on this information,

Mercer determined that "ISO New England competes for executive talent in a broad labor market in the energy/utility industry, and for some of the study positions (e.g., the Vice President, General Counsel, Chief Financial Officer and the Vice President, Human Resources), in the broader/general industry as well." R. 7, Answer to Protest Exh. 8 (Mercer Report) at Transmittal Letter p. 4, JA 263; *see also id.* at Final Report p. 8, JA 278 (same).

Mercer also determined that its analysis should include utilities and general industry companies with revenues higher than ISO New England's. R. 7, Answer to Protest Exh. 7 (Janice Dickstein Affidavit) at 11, JA 254. As the record showed, "[w]hile the ISO's budget is in the $150 million range, its settlements are in the range of approximately $12 billion." *Id.* "Neither marker [was] appropriate," however, because "[c]ompanies with revenues in the $150 million range generally have operations that are much less sophisticated than those of the ISO, and companies in the $12 billion range generally are too large for accurate comparison to the ISO." *Id.* Based on the sophistication and complexity of ISO New England's operations, Mercer determined that ISO New England was comparable to utilities with median revenues of $3 billion and general industry organizations with revenues of less than $1 billion for corporate level jobs and revenues of less than $5 billion for subsidiary/group level jobs. *Id.* at 10-11, JA 253-54; R. 7, Answer to Protest Exh. 8 (Mercer Report) at Transmittal Letter pp. 4-5, JA 263-64;

id. at Final Report pp. 24-26, JA 294-96.

Thus, ISO New England's answer explained why Mercer's analysis included utilities and general industry companies with revenues higher than ISO New England's, providing the information necessary for the Commission to resolve Connecticut's proxy group challenge on the written record. Initial Order at P 35, JA 449; Rehearing Order at PP 20-21 JA 469. While Connecticut contends an evidentiary hearing was necessary simply because it raised a disputed issue of material fact concerning the Mercer Report, Br. 21, that contention ignores that an evidentiary hearing is unnecessary where, as here, the Commission was able to resolve the disputed issue on the written record. *Braintree*, 550 F.3d at 13; *Ark. Elec.*, 290 F.3d at 369-70; *Moreau*, 982 F.2d at 568.

3. ISO New England's Proposal Appropriately Included Its Estimated 2009 Executive Compensation

In its petition for rehearing to the Commission, Connecticut stated that ISO New England's original (October 31, 2008) filing did not disclose the compensation it proposed to pay its executives, and that "[i]t was only after [Connecticut] protested [ISO New England]'s failure to disclose these amounts that [ISO New England] belatedly released that information in [the] December 8 Answer." R. 9, Rehearing Request at 4-5, JA 455-56.

By contrast, Connecticut asserts on appeal, for the first time, that an evidentiary hearing was necessary because ISO New England disclosed estimated, rather than actual, 2009 executive compensation levels. Br. at 19, 22; *see also* Br. at 24-25 (complaining that the Mercer Report concerned ISO New England's 2008 executive compensation, not the executive compensation ISO New England would pay in 2009). In Connecticut's view, disclosure of the estimated executive compensation ISO New England intended to pay in 2009 was "not sufficient to permit FERC to discharge its obligation to ensure that rates are just and reasonable." Br. 22.

Connecticut did not raise this assertion to the Commission on rehearing, R. 9, JA 452-60, and, therefore, is jurisdictionally barred from raising it on appeal. 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 unless there is a reasonable ground for failure to do so."); *see also*, *e.g.*, *Pub. Serv. Comm'n of Wis. v. FERC*, 545 F.3d 1058, 1065 n.12 (D.C. Cir. 2008) (same).

As this Court has explained, "[e]nforcement of this provision, which [the Court] ha[s] considered to pose a jurisdictional bar, enables the Commission to correct its own errors, which might obviate judicial review, or to explain why in its expert judgment the party's objection is not well taken, which facilitates judicial

review." *Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005) (citations omitted); *see also Cal. Dep't of Water Res. v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002); *Town of Norwood v. FERC*, 906 F.2d 772, 774-75 (D.C. Cir. 1990). Moreover, the "reasonable ground for failure" to raise an objection exception "is reserved for extraordinary situations," *Sebasticook*, 431 F.3d at 381-82 (citing *Wis. Power & Light Co. v. FERC*, 363 F.3d 453, 460 (D.C. Cir. 2004)), not present here.

In any event, ISO New England's 2009 revenue requirement (including executive compensation) appropriately was based on historical or estimated costs. As this Court has explained, "[s]tandard FERC ratemaking, in its most simple form, involves projecting a 'revenue requirement' . . . ." *Interstate Natural Gas Ass'n v. FERC*, 285 F.3d 18, 56 (D.C. Cir. 2002); *see also* 18 C.F.R. § 35.13(d)(1) and (2) (providing that rate filings are to be based either on actual data for the prior year or on estimated or projected data for the future year); *Trunkline*, 90 FERC at 61,047-48 (same). As a FERC-regulated utility generally will not know at the time of a rate filing what its actual costs will be during the effective period of the rates, this Court has found it appropriate, and a reasonable proxy for actual costs, for revenue requirements to be based on historical or estimated costs. *BP*, 374 F.3d at 1307; *Williston Basin*, 165 F.3d at 56.

Connecticut attempts to analogize the use of estimated executive compensation here to the situation in *General Motors*, 656 F.2d 791. Br. 21-22. In that case, a pipeline filed for a certificate of public convenience and necessity to construct additional facilities to increase the amount of natural gas it delivers on peak demand days. *General Motors*, 656 F.2d at 793. General Motors intervened and requested a formal evidentiary hearing on the issue of whether the pipeline's "supply situation over both the short and long terms [was] adequate to permit the proposed increase in peak day service." *Id.* at 794. The Court found that, because the record provided only information about the pipeline's short-term supply situation, the record justified FERC's denial of an evidentiary hearing as to short-term, but not long-term, supply. *Id.* at 797 (footnote omitted).

Connecticut contends that, "[s]imilarly, in the present case, the FERC refused to hold any hearing despite that [ISO New England] had never disclosed the actual executive compensation levels it proposed to pay." Br. 22. As already explained, however, the record here provided ISO New England's estimated 2009 executive compensation (R.7, Answer to Protest at Exh. 8 (Mercer Report) at Final Report pp. 14-22, JA 284-92; *id.* at Exh. 11 (Oct. 10, 2008 Presentation to New England Power Pool's Participants Committee) p. 24, JA 364), and that is all the Commission needed to determine whether the proposed revenue requirement was just and reasonable. *BP*, 374 F.3d at 1307; *Williston Basin*, 165 F.3d at 56;

Trunkline, 90 FERC at 61,047-48; *see also* Rehearing Order at P 20, JA 444 (ISO New England "provided the information in its answer necessary to allow the Commission to determine its proposed compensation package was just and reasonable.").

B. Connecticut Had Ample Opportunity To Challenge ISO New England's Executive Compensation Proposal

Connecticut argues that "FERC's failure to hold any type of hearing or evidentiary process in this matter denied [its] due process rights under the FPA." Br. 17. "Due process," however, "requires only a 'meaningful opportunity' to challenge new evidence . . . ." *BNSF Ry. Co. v. Surface Transp. Bd.*, 453 F.3d 473, 486 (D.C. Cir. 2006) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976)). The paper hearing below provided Connecticut a meaningful opportunity to challenge ISO New England's proposed executive compensation, thereby satisfying due process.

1. Connecticut Could Have, But Did Not, Pursue Its Opportunity To File An Answer To ISO New England's Answer

ISO New England's answer to Connecticut's protest, which detailed and provided evidentiary support for its executive compensation proposal, was filed on December 8, 2008, more than three weeks before the Initial Order issued on December 31, 2008. Just as ISO New England successfully moved for leave to

answer and answered Connecticut's protest, Connecticut could have moved for leave to answer and answered ISO New England's answer.

Initially, Connecticut asserts that, "[u]nder Rule 213 of the Commission's Rules of Practice and Procedure, [it was] not permitted to file a substantive response to the answer." Br. 19. As that rule provides only that "[a]n answer may not be made to a protest, an answer, or a request for rehearing **unless otherwise ordered by the decisional authority**," 18 C.F.R. § 385.213(a)(2) (emphasis added); *see also* Initial Order at P 33, JA 448 (same), however, Connecticut then "admit[s] [it] could have sought leave to file an answer to the answer . . . ." Br. 19 n.8.

The Commission often permits answers to protests and answers to those answers where it finds they provide information that assists the Commission in its decision-making process. Indeed, the Commission repeatedly has done so in ISO New England proceedings. *E.g.*, *ISO New England, Inc.*, 109 FERC ¶ 61,383 at P 13 (2004) (permitting answer to protest), *aff'd*, *Braintree*, 550 F.3d 6; *ISO New England Inc.*, 125 FERC ¶ 61,102 at PP 16-17 (2008) (permitting answer to protest and answer to answer); *ISO New England Inc.*, 124 FERC ¶ 61,298 at PP 24, 25, 46 (2008) (same); *ISO New England Inc.*, 123 FERC ¶ 61,290 at PP 10, 12 (2008) (same); *New England Power Pool*, 105 FERC ¶ 61,300 at PP 16, 20 (2003) (same).

As Connecticut concedes, therefore, it could have tried to raise its challenges in an answer to ISO New England's answer, Br. 19 n.8, but failed to pursue that opportunity. *See Nat'l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1566 (D.C. Cir. 1987) (petitioner could have tried to raise its new concern in the period before the Commission issued its order or on rehearing; those avenues afforded ample opportunity to raise the concern) (citing *Midwestern Gas Transmission Co. v. FERC*, 734 F.2d 828, 832 (D.C. Cir. 1984)); *see also Market Street Ry. Co. v. R.R. Comm'n of Ca.*, 324 U.S. 548, 558-59 (1945) (there was "no adequate excuse for the failure to offer [evidence] in the proceeding" where "[n]o offer was rejected, no request for time to obtain such evidence was denied.").

2. Connecticut Challenged ISO New England's Answer In Its Request For Rehearing

Connecticut also had a full opportunity to challenge, and did in fact challenge, ISO New England's answer in its request for rehearing. R. 9, Rehearing Request, JA 452. As this Court has found, rehearing provides ample opportunity for parties to raise any concerns they have. *BNSF Ry.*, 453 F.3d at 486 (an application for rehearing provides a meaningful opportunity to challenge new evidence); *Global Naps, Inc. v. FCC*, 247 F.3d 252, 257 (D.C. Cir. 2001) (petitioner had adequate opportunity to raise matters on reconsideration); *Nat'l Fuel*, 811 F.2d at 1566 (rehearing affords ample opportunity to raise concerns).

While this Court found the opportunity to raise challenges on rehearing insufficient in the specific circumstances underlying *Public Service Commission of Kentucky v. FERC*, 397 F.3d 1004, 1012 (D.C. Cir. 2005) (cited in Connecticut's Br. at 11, 12, 25), the circumstances here are wholly different. In *Kentucky*, the Commission ordered a trial-type evidentiary hearing, at which it specifically prohibited consideration of an incentive-based premium. *Id.* As a result, the hearing record contained no evidence on the need for, or appropriate size of, such a premium. *Id.* After the hearing, however, the Commission *sua sponte* announced its decision to provide an incentive-based premium. *Id.* In those circumstances, the Court found, "FERC failed to place petitioners on notice that it would consider an incentive-based premium, and ultimately applied [one] without considering *any* record evidence." *Id.* at 1013.

Here, by contrast, Connecticut had notice from the inception of this proceeding that executive compensation was at issue. Moreover, the paper hearing record contained evidence supporting the proposed executive compensation, and Connecticut had the opportunity to challenge that evidence. In these circumstances (just as in *BNSF Ry.*, 453 F.3d at 486; *Global Naps*, 247 F.3d at 257; and *Nat'l Fuel*, 811 F.2d at 1566), rehearing provided Connecticut a meaningful and ample opportunity to challenge ISO New England's executive compensation proposal and answer.

3. The Commission's Statement That Connecticut "Submitted [Its] Arguments In Detail In [Its] Protest" Did Not Apply To The Executive Compensation Proposal

Connecticut asserts that the Commission erred in stating that Connecticut "submitted [its] arguments in detail in [its] protest to the October 31 Filing" because the October 31 Filing "did not include [ISO New England]'s proposed executive compensation packages or any information in support thereof." Br. 22-23. In fact, however, the Commission made the statement in question in the portion of the Rehearing Order "[r]egarding whether [ISO New England]'s total staffing and compensation to its employees, its depreciation and amortization schedules and external affairs costs are just and reasonable," not in the portion addressing executive compensation. Rehearing Order at P 23, JA 470.

C. The Commission Adequately Responded To Connecticut's Allegations

Connecticut contends that the Commission's response to its proxy argument was "inadequate to meet FERC's obligation of reasoned decision-making." Br. 24. This contention has no merit, as the path of the Commission's reasoning is readily discerned. *Old Dominion Elec. Coop., Inc. v. FERC*, 518 F.3d 43, 48 (D.C. Cir. 2008) ("we uphold orders in which we can 'discern a reasoned path' to the decision."); *see also Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 497 (2004) ("Even when an agency explains its decision with 'less than ideal

clarity,' a reviewing court will not upset the decision on that account 'if the agency's path may reasonably be discerned.'") (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974)); *Transcontinental Gas Pipe Line Corp. v. FERC*, 518 F.3d 916, 922 (D.C. Cir. 2008) ("we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.").

After setting out Connecticut's claim that Mercer improperly included in its analysis companies with much higher revenues than ISO New England's, the Commission looked to the record. Rehearing Order at PP 17, 20, JA 468, 469. Based on the record, the Commission reasonably found that ISO New England "provided the information in its Answer necessary to allow the Commission to determine its proposed compensation package was just and reasonable." *Id.* at P 20, JA 469.

The answer explained that, while ISO New England's revenues are around $150 million and its settlements are around $12 billion, $150 million revenue companies generally have much less sophisticated operations than the ISO, and $12 billion revenue companies generally are too large for accurate comparison to the ISO. R. 7, Answer to Protest Exh. 7 (Janice Dickstein Affidavit) at 11, JA 254. Based on the sophistication and complexity of ISO New England's operations, Mercer determined that ISO New England was comparable to utilities with median

revenues of $3 billion and general industry organizations with revenues of less than $1 billion for corporate level jobs and revenues of less than $5 billion for subsidiary/group level jobs. *Id.* at 10-11, JA 253-54; R. 7, Answer to Protest Exh. 8 (Mercer Report) at Transmittal Letter pp. 4-5, JA 263-64; *id.* at Final Report pp. 24-26, JA 294-96.

Having been given the necessary information in the record, the Commission reasonably concluded that Mercer's analysis was based on entities that were similarly situated to the ISO. Rehearing Order P 21, JA 469.

The path of the Commission's determination that Mercer's analysis appropriately included companies with revenues higher than ISO New England's is readily discerned and, therefore, should be upheld. *See*, *e.g.*, *Colo. Interstate Gas Co. v. FPC*, 324 U.S. 581, 595 (1945) (upholding findings that were "quite summary and incorporate by reference the Commission's staff's exhibits on allocation of cost" because "the path which it followed can be discerned."); *Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232, 1237 (D.C. Cir. 2005) ("While the Commission does not explore this difference in detail, the court can 'discern a reasoned path' to the Commission's conclusion because the intervening capacity suppliers lay out that path in detail in their brief.") (internal citation omitted).

D. The Commission Did Not Delegate Its Reviewing Responsibility To ISO New England

There also is no merit to Connecticut's claim (Br. 25) that FERC delegated its reviewing responsibility to ISO New England because it stated that it was "satisfied with [ISO New England]'s reliance on Mercer Consulting and the [Mercer] report." Rehearing Order at P 21, JA 469. The orders establish that the Commission reviewed the record and made its own determination that ISO New England's proposal was just and reasonable.

For example, the Commission stated: "We find that [ISO New England] has adequately supported its executive compensation package," Initial Order at P 35, JA 448; "[ISO New England] did provide details on the executive base pay and bonuses in its Answer," and "[o]n the basis of this information, we conclude that [ISO New England] has justified its proposed executive compensation package and thus we find [ISO New England]'s proposed executive compensation package to be just and reasonable," *id.*, JA 449; "[ISO New England] provided the information in its Answer necessary to allow the Commission to determine its proposed compensation package was just and reasonable," Rehearing Order at P 20, JA 469; "Using this information [in the Mercer Report], as well as the recommendations of [ISO New England]'s Compensation and Human Resources Committee, [ISO New England]'s independent Board of Directors approved the executive compensation package, and we have not been persuaded that it is not just and reasonable," *id.* at P

21, JA 469.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 7,287 words, not including the tables of contents and authorities, the certificates of counsel, or the addendum.

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April 1, 2010

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

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 wholesale 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.
>
> (2) The provisions of sections 824i, 824j, and 824k of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order of the Commission under the provisions of section 824i or 824j of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

Section 205 of the Federal Power Act, 16 U.S.C. § 824d 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.

(d) Notice required for rate changes - Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period - Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without

answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; “automatic adjustment clause” defined - (1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—
(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and –
(B) whether any such clause reflects any costs other than costs which are—
(i) subject to periodic fluctuations and
(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred. Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.
(2) Not less frequently than every 2 years, in rate proceedings or in generic or other

separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

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

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 Commission 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 reasonable 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.

18 C.F.R. §§ 35.13(d)(1) and (2) provide as follows:

(d) Cost of service information—

(1) Filing of Period I data. Any utility that is required under paragraph (a)(1) of this section to submit cost of service information, or that is subject to the exceptions in paragraphs (a)(2)(i) and (a)(2)(ii) of this section but elects to file such information, shall submit Statements AA through BM under paragraph (h) of this section using:

(i) Unadjusted Period I data; or

(ii) Period I data adjusted to reflectchanges that affect revenues and costs prior to the proposed effective date of the rate change and that are known and measurable with reasonable accuracy at the time the rate schedule change is filed, if such utility:

(A) Is not required to and does not file Period II data;

(B) Adjusts all Period I data to reflect such changes; and

(C) Fully supports the adjustments in the appropriate cost of service statements.

(2) Filing of Period II data. (i) Except as provided in clause (ii) of this subparagraph, any utility that is required under paragraph (a)(1) of this section to submit cost of service information shall submit Statements AA through BM described in paragraph (h) using estimated costs and revenues for Period II;

(ii) A utility may elect not to file Period II data if:

(A) The utility files a rate increase that is less than one million dollars for Period I; or

(B) All wholesale customers that belong to the affected rate class have consented to the rate increase.

18 C.F.R. § 385.213(a) provides as follows:

(a) Required or permitted. (1) Any respondent to a complaint or order to show cause must make an answer, unless the Commission orders otherwise.

(2) An answer may not be made to a protest, an answer, a motion for oral argument, or a request for rehearing, unless otherwise ordered by the decisional authority. A presiding officer may prohibit an answer to a motion for interlocutory appeal. If an answer is not otherwise permitted under this paragraph, no responsive pleading may be made.

Richard Blumenthal, et al. v. FERC **Docket No. ER09-197**
D.C. Cir. No. 09-1220

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 1st day of April, 2010, served the foregoing upon the Counsel listed in the Service Preference Report via email through the Court's CM/ECF system, as indicated below:

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