ORAL ARGUMENT IS SCHEDULED FOR JANUARY 13, 2011

In the United States Court of Appeals for the District of Columbia Circuit

No. 09-1309

NEW YORK REGIONAL INTERCONNECT, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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November 9, 2010

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

The parties before this Court and the Commission are identified in the brief of Petitioner New York Regional Interconnect, Inc.

B. Rulings Under Review:

1. *New York Indep. Sys. Operator, Inc.*, 125 FERC ¶ 61,068 (2008) ("First Order"), R.42, JA 450;

2. *New York Indep. Sys. Operator, Inc.*, 126 FERC ¶ 61,320 (2009) ("Second Order"), R.62, JA 742; and

3. *New York Indep. Sys. Operator, Inc.*, 129 FERC ¶ 61,045 (2009) ("Third Order"), R.81, JA 864.

C. Related Cases:

New York Regional Interconnect, Inc. petitioned this Court for review of the first two orders now on appeal here while its request for rehearing of the second order remained pending with the Commission. The Court dismissed that petition as incurably premature. *New York Regional Interconnect, Inc. v. FERC*, No. 09-1150 (D.C. Cir. Sept. 16, 2009) (dismissed). Counsel is not aware of any related cases pending before this or in any other court.

/s/ Holly E. Cafer
Holly E. Cafer
Attorney

November 9, 2010

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GLOSSARY

Antitrust Institute	American Antitrust Institute (*amicus curiae*)
Br.	Brief
Central Hudson	Intervenor Central Hudson Gas & Electric Company
Commission or FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
First Order	*New York Indep. Sys. Operator, Inc.*, 125 FERC ¶ 61,068 (2008), R.42, JA 450
Intervention Order	*New York Indep. Sys. Operator, Inc.*, 127 FERC ¶ 61,136 (2009), R.67, JA 829
ISO	Independent System Operator
JA	Joint Appendix
New York ISO	New York Independent System Operator
NYRI	Petitioner New York Regional Interconnect, Inc.
Order No. 679	*Promoting Transmission Investment through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057, *on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006)
Order No. 689	*Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, Order No. 689, 71 Fed. Reg. 69440 (Dec. 1, 2006), FERC Stats. & Regs. ¶ 31,234 (2006), *on reh'g*, Order No. 689-A, 119 FERC ¶ 61,154 (2007), *rev'd in part, Piedmont Environmental Council v. FERC*, 558 F.3d 304 (4th Cir. 2009)
Order No. 888	*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, 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)
Order No. 890	*Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009)
Order No. 890-A	*Preventing Undue Discrimination and Preference in Transmission Service*, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007)
P	Paragraph number in a Commission order
R.	Record
RTO	Regional Transmission Organization
Second Order	*New York Indep. Sys. Operator, Inc.*, 126 FERC ¶ 61,320 (2009), R.62, JA 742
Third Order	*New York Indep. Sys. Operator, Inc.*, 129 FERC ¶ 61,045 (2009), R.81, JA 864
Transmission Owners	Transmission-owning members of the New York ISO
Transmission Planning Proposed Rulemaking	*Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Notice of Proposed Rulemaking, 131 FERC ¶ 61,253 (2010)

White Paper	New York ISO, *Transmission Expansion in New York State* (Nov. 2008), JA 635
Wind Association	American Wind Energy Association (*amicus curiae*)

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

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission reasonably approved the New York Independent System Operator's revised transmission planning process, including a cost-benefit methodology and a provision allowing project beneficiaries to vote for the proposed projects they must pay for.

STATEMENT REGARDING JURISDICTION

This Court has jurisdiction pursuant to section 313(b) of the Federal Power Act ("FPA"), 16 U.S.C. § 825*l*(b).

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

INTRODUCTION

In the orders on review, the Federal Energy Regulatory Commission ("Commission" or "FERC") conditionally accepted, with modifications, proposals by the New York Independent System Operator, Inc. ("New York ISO") to revise its transmission planning process in compliance with an earlier Commission rulemaking, Order No. 890.[1] *New York Indep. Sys. Operator, Inc.*, 125 FERC ¶ 61,068 (2008) ("First Order"), R.42, JA 450, *order on reh'g*, 126 FERC ¶ 61,320 (2009) ("Second Order"), R.62, JA 742, *order on reh'g and motion*, 129 FERC ¶ 61,045 (2009) ("Third Order"), R.81, JA 864. In Order No. 890, the Commission revised the standard open access transmission tariff to expand the obligations of transmission providers, like the New York ISO, to ensure that transmission service is provided on a non-discriminatory basis. Order No. 890 at P 3. As relevant here,

[1] *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009).

Order No. 890 directed transmission providers to revise their transmission planning processes, as necessary, to ensure that they are open, transparent and coordinated. *Id*. Order No. 890 did not mandate particular methodologies, but required providers to address nine principles. *Id*. at PP 439, 444. Two of those principles are at issue in this case: economic planning and cost allocation. *Id*. at PP 529, 552.

In compliance with Order No. 890, the New York ISO proposed a new economic planning process intended to identify cost efficient solutions (transmission, generation or demand response) to congestion problems. First Order at PP 5-6, JA 452. The New York ISO also proposed a new cost allocation methodology for projects resulting from the economic planning process, using a cost-benefit analysis and voting process to select projects eligible for cost recovery from New York ISO customers under its tariff. *Id*. at P 102, JA 487.

Petitioner New York Regional Interconnect, Inc. ("NYRI"), before the Commission and now before this Court, argued that the New York ISO's process is too exclusive. First, NYRI claims that the cost-benefit analysis understates the benefits of economic projects. Second, NYRI asserts that the voting process, which requires a supermajority of project beneficiaries to approve a project for cost recovery, improperly gives those beneficiaries the ability to exclude competitors

from the market. As a result, NYRI claims that the process does not adequately promote the Commission's policy goal of facilitating transmission development.

The Commission rejected these claims, finding that the cost allocation methodology serves the legitimate purpose of selecting least-cost solutions to congestion problems and is consistent with Order No. 890. *See, e.g.*, Second Order at PP 20-21, 35-39, JA 748-49, 752-56. However, the Commission committed to monitor the implementation of the process, in particular the voting provision. To this end, the Commission acted to both detect and deter unlawful behavior by requiring the New York ISO to submit periodic reports detailing the voting results, and by highlighting its authority to initiate, where appropriate, investigations and enforcement proceedings. *See, e.g.*, Third Order at PP 24-25, JA 872-73.

STATEMENT OF THE FACTS

I. Statutory And Regulatory Background

Section 201(b) of the FPA confers on the Commission jurisdiction over the "transmission of electric energy in interstate commerce," the "sale of electric energy at wholesale in interstate commerce," and "all facilities for such transmission or sale." 16 U.S.C. § 824(b)(1). The Commission acts to ensure that rates for transmission and wholesale sales are "just and reasonable" and not unduly discriminatory or preferential. FPA §§ 205, 206, 16 U.S.C. §§ 824d, 824e.

In furtherance of its statutory obligations, the Commission, in its Order No. 888 rulemaking[2] and later measures, took steps to promote wholesale electricity competition by, among other things, directing utilities to offer non-discriminatory, open access transmission service and to functionally unbundle their generation and transmission services. Order No. 888 at 31,690, 31,654; *see Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 128 S. Ct. 2733, 2740-41 (2008) (describing developments); *see also New York v. FERC*, 535 U.S. at 5-14 (same). Order No. 888, and later Order No. 2000,[3] also encouraged the formation of independent system operators ("ISOs") and regional transmission organizations ("RTOs").

New York utilities responded to these reforms by creating the New York ISO, with the following transmission-owning members: Central Hudson Gas &

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[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, 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).

[3] *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 (2002), *appeals dismissed sub nom. Public Util. Dist. No. 1 of Snohomish County v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

Electric Corporation, Niagara Mohawk Power Corporation, New York State Electric & Gas Corporation, Consolidated Edison Company of New York, Inc., New York Power Authority, Long Island Power Authority, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation (collectively, "Transmission Owners"). This Court has addressed many issues arising from the development and operation of the New York ISO. *See, e.g., Electricity Consumers Resource Council v. FERC*, 407 F.3d 1232 (D.C. Cir. 2005) (rate design for installed capacity market); *Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964 (D.C. Cir. 2005) (mitigation of prices charged by New York generators and marketers). As the operator of the New York transmission network, the New York ISO is responsible for providing open access transmission service and maintaining system reliability.

The electric industry continued to undergo economic and regulatory changes in the years following the issuance of Order No. 888. In 2005, Congress enacted the Energy Policy Act, adding a number of new authorities and priorities for the Commission and emphasizing certain of its existing obligations. *See* Pub. L. No. 109-58, 119 Stat. 594 (2005). Among other things, the Energy Policy Act recognized the importance of adequate transmission infrastructure development and its role in facilitating the development of competitive wholesale markets. Congress required the Commission to establish incentive ratemaking for

transmission infrastructure to help promote reliability and reduce congestion. *See* FPA § 219, 16 U.S.C. § 824s; *see also Promoting Transmission Investment through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057, *on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006). Congress also gave the Commission certain limited transmission siting authority. *See* FPA § 216, 16 U.S.C. § 824p; *see also Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, Order No. 689, 71 Fed. Reg. 69440 (Dec. 1, 2006), FERC Stats. & Regs. ¶ 31,234 (2006), *on reh'g*, Order No. 689-A, 119 FERC ¶ 61,154 (2007), *rev'd in part, Piedmont Envtl. Council v. FERC*, 558 F.3d 304 (4th Cir. 2009). In addition, Congress emphasized compliance, adopting and increasing the civil and criminal penalties for violations of Commission-administered statutes and regulations. *See* 16 U.S.C. §§ 825o, 825o-1.

In 2007, in its Order No. 890 rulemaking, the Commission identified market and regulatory flaws that, in the ten years since issuance of Order No. 888, continue to undermine its fundamental objective of remedying undue discrimination. Order No. 890 at P 1; *see also id*. at P 26. To remedy these flaws, Order No. 890 directed a number of significant reforms. As relevant here, Order No. 890 "increase[d] the ability of customers to access new generating resources and promote efficient utilization of transmission by requiring an open, transparent, and coordinated transmission planning process." *Id* at P 3. Order No. 890

recognized that existing planning processes addressed only reliability needs, *i.e.*, those projects necessary to prevent violation of reliability rules. *Id*. at P 542. With Order No. 890, the Commission required transmission providers to establish an economic planning process for stakeholders to request "studies that evaluate potential upgrades or other investments that could reduce congestion or integrate new resources and loads on an aggregated or regional basis," *i.e.*, economic projects. *Id*. at P 544. The Commission also required transmission providers to address cost allocation for new reliability and economic projects, *id*. at P 557, but did not mandate construction of identified economic projects. *Id*. at P 594.

Order No. 890 emphasized the importance of regional flexibility and declined to specify a particular allocation method. *Id*. at PP 558-59. Instead, the Commission indicated that it would weigh several factors in the event of a dispute over cost allocation, including whether costs are fairly assigned to "those who cause them to be incurred and those who otherwise benefit from them," whether a "proposal provides adequate incentives to construct new transmission," and whether a proposal is "generally supported by state authorities and participants." *Id*. at P 559.

II. The Commission's Proceedings

A. The New York ISO's Order No. 890 Compliance Filing

On December 7, 2007, as supplemented on June 18, 2008 and June 27, 2008, the New York ISO submitted revisions to Attachment Y of its tariff proposing enhancements to its existing transmission planning process in compliance with Order No. 890. Compliance Filing at 1, R.1, JA 1; *id*. at 8-10 (discussing stakeholder process conducted to develop proposal), JA 8-10. The New York ISO explained that its existing transmission planning process was approved by the Commission in 2004. *Id*. at 3 (citing *New York Indep. Sys. Operator, Inc.*, 109 FERC ¶ 61, 372 (2004)), JA 3.

The New York ISO's revised process, known as the Comprehensive System Planning Process, includes three components: (1) local transmission planning; (2) reliability planning; and (3) economic planning. Compliance Filing at 11, JA 11; *see also id*., Attachment IV (flow chart), JA 95-97. The New York ISO articulated certain principles applicable to all aspects of the process. First, the process "encourages the deployment of market-based solutions from market participants," *i.e.*, projects that are constructed and funded outside the New York ISO's transmission planning process. *Id*. at 3, JA 3; First Order at P 5 n.9, JA 452. Second, the process "evaluates all potential solutions – transmission, generation, or

demand response – on a comparable basis." Compliance Filing at 3, JA 3; *id*. at 13, JA 13.

The first step, local planning, is conducted by the Transmission Owners to prepare information for inclusion in the second step, the New York ISO's assessment of reliability needs in its Comprehensive Reliability Planning Process. *Id*. at 4, JA 4. The New York ISO then requests solutions from the market and from the designated responsible Transmission Owners, which it analyzes in a Comprehensive Reliability Plan. *Id*. If the market does not move forward with a solution, then the New York ISO can mandate that the responsible Transmission Owner itself implement a backstop solution. *Id*. at 12, JA 12.

Using the Comprehensive Reliability Plan, the New York ISO then conducts the economic planning process, consisting of a series of congestion studies, designed with market participant input, evaluating proposed solutions. *Id*. at 11, JA 11. The New York ISO emphasized that the economic planning process "is consistent with [its] market-based philosophy . . . . The proposal is designed to encourage stakeholders' voluntary participation and . . . the development of market-based solutions to reduce congestion, as the [New York ISO] will not mandate the construction or funding of" economic projects. *Id*. at 12, JA 12.

While the New York ISO does not mandate the construction of economic projects, as it will for reliability projects, the economic planning process does

include a cost allocation methodology. Under that methodology, certain economic projects can be selected for implementation, and the project costs can be recovered from the beneficiaries, *i.e.*, New York ISO customers. *Id*. at 12, 15, JA 12, 15. At issue in this case are two of the thresholds for cost allocation eligibility: (1) the benefits of the proposed project must outweigh the costs; and (2) 80 percent or more of the project's identified beneficiaries, weighted in accordance with their share of the total project benefits, must vote in favor of the project. *Id*. at 14-15, JA 14-15. The cost-benefit analysis uses a production cost savings metric, measured over ten years following a project's proposed in-service date. *Id*. at 14, JA 14. The New York ISO will also assess other project effects, including load costs, environmental impacts, and renewable integration, for beneficiaries to consider at the voting stage. *Id*. at 14-15, JA 14-15.

B. Protests And Comments On The New York ISO's Proposal

NYRI filed a motion to intervene and protest following the New York ISO's June 2008 supplemental filings. NYRI Protest, R.26, JA 366. NYRI explained that it was, at that time, proposing to build an approximately 190-mile transmission line within the New York ISO control area.[4] *Id*. at 2-3, JA 367-68. NYRI

[4] The Commission conditionally approved NYRI's project for certain incentive rates in a separate proceeding. At that time, NYRI's siting application was pending before the New York Public Service Commission. *See New York Reg'l Interconnect, Inc.*, 124 FERC ¶ 61,259 (2008). In April 2009, following the Second Order, NYRI withdrew the siting application, citing the significant risks

addressed a "single aspect" of the New York ISO's compliance filing, arguing that the beneficiary voting provision is unreasonable, unduly discriminatory, contrary to Order No. 890, and anticompetitive. *Id*. at 9-24, JA 374-89.

The four upstate transmission-owning members of the New York ISO, Central Hudson, Niagara Mohawk, New York State Electric & Gas, and Rochester Gas and Electric (together, Upstate Transmission Owners), protested the beneficiary voting provision for the same reasons as NYRI. Upstate Transmission Owner Protest at 5-9, R.11, JA 113-17. The Upstate Transmission Owners, of whom only Central Hudson is an intervenor before this Court, also argued that the use of a production cost savings metric at the cost-benefit analysis stage is inadequate because it does not capture changes in load payments and reductions in installed capacity costs. *Id*. at 10, JA 118.

The four downstate transmission-owning members of the New York ISO, Consolidated Edison, New York Power Authority, Long Island Power Authority and Orange and Rockland Utilities (together, Downstate Transmission Owners), filed comments in support of the beneficiary voting mechanism. Downstate Transmission Owner Protest at 4-5 (citing Makholm Affidavit ¶ 39, JA 159), R.12,

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associated with cost recovery. *See* Press Release, New York Pub. Serv. Comm'n, Commission Officially Dismisses NYRI (Apr. 21, 2009), http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/0/AF865D6E5239CC858525759F0053BA39/$File/pr09033.pdf.

JA 124-25. The Downstate Transmission Owners objected to other aspects of the New York ISO's proposal, arguing in particular that the production cost metric understates project costs. *Id*. at 10, JA 130.

C. The Commission's Orders On Appeal

1. First Order

On October 16, 2008, the Commission conditionally accepted the New York ISO's revised transmission planning process, with modifications. First Order at P 1, JA 450. The Commission addressed challenges to both the reliability and economic planning process. While the Commission accepted the revised tariff provisions, it also "encourage[d] further refinements and improvements . . . as [the New York ISO] and its customers and other stakeholders gain more experience through actual implementation of this process." *Id*. at P 17, JA 455. Moreover, the Commission committed to monitor the implementation, through regional technical conferences, to determine if changes are necessary. *Id*.

In response to the Upstate Transmission Owners' concerns regarding the production cost metric, the Commission found that the metric "measures a project's total benefits on the entire system, i.e. the change in the difference between the value of the electricity to consumers and the real resource costs incurred by suppliers to produce the electricity." *Id*. at P 110, JA 490. Changes in

load payments, the Commission explained, "will not accurately measure the net economic effect of the project on the market as a whole." *Id*. at P 111, JA 491.

The Commission also approved the proposed beneficiary vote as a "valuable element in the process of selecting those economic transmission projects whose costs should be allocated through the [New York ISO] tariff." *Id*. at P 130, JA 497. Because a project's beneficiaries – those who will pay for the project – have a particularly strong incentive to ensure that the estimated benefits are accurate, the voting mechanism provides a "useful check to ensure that a project has net benefits." *Id*.

While the Commission accepted the New York ISO's proposal to monitor the voting mechanism for potential abuse, it imposed an additional condition requiring the New York ISO to file a report, following each planning cycle, detailing "the results of each vote on economic projects, the identified beneficiaries, the results of the cost/benefit analysis, and if vetoed, whether the developer has provided any formal indication to [the New York ISO] as to the future development of the project." *Id*.

2. Second Order

NYRI and other parties sought rehearing of the First Order, challenging both the beneficiary voting provision and the cost-benefit analysis. NYRI First Rehearing Request, R.43, JA 501. Other parties also sought rehearing on issues

concerning both the economic planning process and other aspects of the tariff revisions. By order of March 31, 2009, the Commission granted rehearing, in part, and denied rehearing, in part. Second Order at P 1, JA 742.

The Commission denied NYRI's request for rehearing on the adequacy of the cost-benefit analysis, emphasizing that the production cost metric is the relevant test where, as here, the objective is to promote economic efficiency. *Id*. at P 21, JA 749. Moreover, the production cost metric takes into account changes in the generation mix, as well as the energy price effect on customers. *Id*. at PP 25, 26, JA 750-51. Other regional transmission providers may use additional metrics, but the New York ISO need not because Order No. 890 permits regional variation, and because additional metrics are in fact considered during the beneficiary voting stage. *Id*. at PP 23, 27, JA 750, 751.

The Commission also denied rehearing of NYRI's objections to the beneficiary voting mechanism, reaffirming the First Order, *id*. at P 35, JA 754, and adding that Order No. 890 contemplated that "beneficiaries who must pay for projects should have the right to determine if other solutions are superior to economic projects." *Id*. at P 36, JA 754 (citing Order No. 890-A at P 252).

Addressing NYRI's concerns that the voting mechanism is unduly discriminatory and anticompetitive, the Commission explained that any project – even one that fails to receive supermajority support – has alternative means of

receiving funding and recovering costs. *Id*. at P 37, JA 755. The Commission rejected, as speculative, NYRI's argument that any veto of a project by a market participant or group of participants with 21 percent of the benefit would necessarily violate antitrust laws. *Id*. at P 39, JA 755. The voting mechanism does not "foreclose potential competition" because other funding opportunities exist for these types of projects. *Id*. Moreover, the New York ISO's process always gives preference to market solutions, whether transmission, generation or demand response. *Id*. Thus, the process "ensure[s] that no market participant is precluded from making proposals" to lower congestion, and all proposals – transmission or not – are treated equally. *Id*.

In any event, however, the Commission directed the New York ISO to include in the required reports on beneficiary votes the stated reasons for each vote, to allow for better monitoring. *Id*. at P 38, JA 755.

3. Intervention Order

Following the Second Order, the American Antitrust Institute ("AAI") (*amicus* before this Court), the American Public Power Association and the National Rural Electric Cooperative Association sought late intervention and requested rehearing of the Second Order. The Commission dismissed the rehearing request, and denied the motion for late intervention by order of May 15, 2009. *New York Indep. Sys. Operator, Inc*., 127 FERC ¶ 61,136 (2009)

("Intervention Order"), R.67, JA 829. (The Intervention Order is not one of the orders on appeal.)

The movants explained that they took no position on the merits of the antitrust issues raised by NYRI, but that the Commission was nonetheless obligated to consider antitrust allegations. Intervention Order at P 4, JA 830. In denying rehearing, the Commission reasoned that, while it does not enforce antitrust laws, it "agree[s] with [m]ovants that we do have a responsibility 'to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations.'" *Id*. at P 6, JA 831 (quoting *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 758-59 (1973)). The Commission explained that the Second Order engaged in such consideration, finding NYRI's anticompetition concerns speculative and also that the New York ISO process does not foreclose competition. *Id*.

4. Third Order

NYRI subsequently filed a request for rehearing of the Second Order, accompanied by a motion to reopen the record. Consolidated Edison and Long Island Power Authority filed answers to NYRI's rehearing request and motion, and NYRI filed an answer to the answers. In the Third Order, the Commission denied the rehearing request and dismissed the motion as moot. Third Order at P 1, JA 864.

NYRI sought to lodge in the record a New York ISO White Paper, *Transmission Expansion in New York State* (JA 635), issued after the First Order. *Id*. at P 6, JA 865. The Commission explained that it had no obligation to consider such a late-filed submission. *Id*. at P 14, JA 868. But, in any event, the Commission found that NYRI did not accurately characterize the contents of the White Paper. *Id*. at P 15, JA 869. The White Paper expresses concern about the rate of transmission investment in New York, but ultimately "concludes that '[i]t is too early to tell whether the [new planning] process will succeed in encouraging a significant increase in transmission investment.'" *Id*. (quoting White Paper at 6-1, JA 679). The Paper also concludes that the economic planning process, together with state initiatives, "may provide the vehicle to facilitate significant economic transmission investment in New York." *Id*. (quoting White Paper at 6-1, JA 679). Further, the Commission reiterated its determination that the New York ISO's beneficiary vote does not foreclose competition, and that the process ensures that all market participants can propose solutions of any type to resolve identified congestion problems. *Id*.

As it did in the Intervention Order, the Commission also rejected NYRI's claim that the Commission failed to address NYRI's concerns regarding anticompetitive behavior. *Id*. at P 19, JA 870. The Commission adopted the discussion in the Intervention Order, finding that it had adequately addressed

anticompetition and antitrust policy implications. *Id*. The Commission added that NYRI's view of competition, ostensibly limited to projects within New York that will enhance opportunities for transmission of generation located in upstate New York and Canada, is "too narrow." *Id*. at P 21, JA 871. "NYRI would have [Transmission Owners], who have the ability to access lower cost, diversified power, nonetheless be required to pay for new transmission projects that they conclude do not provide a net benefit for them." *Id*., JA 872.

Finally, the Commission addressed NYRI's contention that the reporting requirement will not prevent anticompetitive activity, but only document it. *Id*. at P 23, JA 872. Contrary to NYRI's claims, the Commission held that the reporting requirement is a "reasonable vehicle to detect abuses" and that improper voting behavior may be deterred by the reporting requirement. *Id*. at P 24, JA 872. NYRI had not demonstrated that abuse was likely, but the Commission characterized as "improper" certain voting scenarios offered by NYRI. *Id*. Further, the Commission emphasized that it can exercise its investigatory and enforcement powers in the event of improper behavior. *Id*. But the Commission declined to deem anticompetitive or otherwise unlawful hypothetical reasons why a beneficiary might cast a vote, explaining that such a determination is necessarily fact specific and must be made based on a record. *Id*. at P 25, JA 873.

Commissioner Moeller dissented from the Third Order on the issue of the voting provision. Third Order, Comm'r Moeller Dissenting Statement, JA 874. Commissioner Moeller reasoned that the New York ISO White Paper shows that new transmission developers face great challenges in gaining beneficiary support for economic transmission projects. *Id*. at p. 1-2, JA 874-75. Nevertheless, he "recognize[d] the difficulty of finding a cost allocation methodology that will satisfy both [Transmission Owners] and [independent transmission] developers, as well as upstate and downstate interests." *Id*. at p. 3, JA 876.

SUMMARY OF ARGUMENT

The Commission's orders demonstrate agreement with NYRI on the goals of encouraging investment in transmission infrastructure in order to address congestion problems, and promoting an open, non-discriminatory process for selecting solutions. But while NYRI's goal is to secure a transmission planning process that mandates cost recovery for large transmission projects – such as its own – within New York that allow downstate access to upstate and Canadian resources, the Commission, consistent with its statutory obligations and Order No. 890, takes a broader, more flexible view.

Order No. 890 requires transmission providers, like the New York ISO, to adopt an open, transparent, and coordinated transmission planning process which, with regard to cost allocation, takes into account the need to promote transmission development. The New York ISO's cost allocation methodology for economic projects, which may be transmission, generation or demand response, gives preference to market-based solutions and seeks specifically to promote least-cost solutions to congestion. These principles are consistent with Order No. 890, and NYRI does not claim otherwise.

The Commission reasonably determined that both the New York ISO's cost-benefit analysis and the beneficiary voting provision are appropriately tailored to these goals. The production cost metric used in the cost-benefit analysis measures

the total economic benefit on a system-wide basis, which the Commission found most relevant to the objective of promoting economic efficiency. As for other metrics advanced by NYRI (*e.g.*, capacity costs, ancillary services costs, emissions costs, and environmental benefits), the New York ISO's process ensures they are considered at the voting stage.

NYRI's claim that the Commission may not allow *any* beneficiary vote reveals NYRI's narrow objective. The Commission reasonably found that the beneficiaries who will fund a project are in the best position to ensure that an economic project is superior to other solutions, whether or not transmission. NYRI disputes that a process can be selective without being unduly discriminatory and anticompetitive, but the Commission demonstrated that the process – even with an 80 percent supermajority requirement – serves its objective without foreclosing competition. Nevertheless, in response to NYRI's concerns, and because it identified potential improper voting behaviors, the Commission reasonably acted to deter and detect unlawful behavior by imposing a robust reporting requirement and explaining that it would invoke its broad investigatory and enforcement powers as necessary.

ARGUMENT

I. Standard Of Review

Commission orders are reviewed under the arbitrary and capricious standard of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A). Under that standard, "FERC must have 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal citation omitted)) (affirming FERC's denial of complaint challenging the lawfulness of Connecticut's electricity market). In rate cases such as this, the Court recognizes that "[t]he statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition," and therefore "afford[s] great deference to the Commission in its rate decisions." *Id.* (quoting *Morgan Stanley Capital Group*, 128 S. Ct. at 2738).

"Because [i]ssues of rate design are fairly technical, and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission, [the court's] review of whether a particular rate design is just and reasonable is highly deferential." *Northern States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994) (internal citations omitted); *see also Electricity Consumers Res. Council*, 407 F.3d at 1236 (same). The question is not "whether

the line drawn by the Commission is precisely right," but whether the Commission's decision is "within a zone of reasonableness." *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 260 (D.C. Cir. 2007) (quoting *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1084 (D.C. Cir. 2002)).

The Commission's factual findings, if supported by substantial evidence, are conclusive. *See* 16 U.S.C. § 825*l*(b). The substantial evidence standard "requires more than a scintilla," but "can be satisfied by something less than a preponderance of the evidence." *Florida Mun. Power Ag. v. FERC*, 315 F.3d 362, 365-66 (D.C. Cir. 2003) (citations omitted). Merely pointing to some contradictory evidence is insufficient, as "the question [the Court] must answer . . . is not whether record evidence supports [the petitioner's] version of events, but whether it supports FERC's." *Cogeneration Ass'n of Cal. v. FERC*, 525 F.3d 1279, 1283 (D.C. Cir. 2008) (citations omitted). And with regard to the Commission's selection of a remedy, "[p]erhaps because of the multiplicity of potentially relevant factors and the broad range of choices, [this Court] approach[es] agencies' decisions on remedies with exceptional deference." *Braintree Elec. Light Dep't v. FERC*, 550 F.3d 6, 15 (D.C. Cir. 2008) (affirming Commission's requirement that a utility release reports of activities in order to enhance transparency).

II. The Commission Reasonably Determined That The New York ISO Tariff Satisfies Order No. 890 And Is Otherwise Consistent With Commission Policy And Precedent.

A. The Commission Reasonably Concluded That The New York ISO's Process Is Consistent With Order No. 890.

NYRI claims that the New York ISO's economic planning process fails to satisfy the Commission's Order No. 890 rulemaking, asserting that the process does not adequately promote transmission development, and lacks adequate stakeholder support. Br. 2, 29, 36-37. But, as the Commission reasonably found, the process, with modifications imposed in the orders on review, complies with the planning principles and other requirements of Order No. 890. First Order at P 16, JA 455.

The primary purpose of Order No. 890's reforms to the transmission planning process is to "increase the ability of customers to access new generating resources and promote efficient utilization of transmission by requiring an open, transparent, and coordinated transmission planning process." Order No. 890 at P 3. The Commission rejected suggestions that it specify a particular cost allocation method, instead permitting "transmission providers and stakeholders to determine their own specific criteria which best fit their own experience and regional needs." *Id*. at P 558; *see also id*. at P 559. Further emphasizing flexibility, the Commission noted that "allocation of costs . . . involves judgment on a myriad of facts. It has no claim to an exact science." *Id*. at P 559 (quoting *Colorado Interstate Gas Co. v.*

FPC, 324 U.S. 581, 589 (1945)). Thus, the Commission indicated that it would "exercise [its] judgment by weighing several factors" including "whether a cost allocation proposal provides adequate incentives to construct new transmission." *Id*.

In the orders on review, the Commission reasonably concluded that the New York ISO's cost allocation methodology satisfies the objectives of Order No. 890. The Commission emphasized the fundamental premise of the New York ISO's process: to identify the "least-cost economic solution to a transmission congestion problem," whether transmission, generation or demand response. Second Order at P 20, JA 748; *see also id*. at P 21 ("objective is to promote economic efficiency"), JA 749. This objective is consistent with Order No. 890, which required consideration of both transmission and non-transmission solutions, and did not mandate implementation of economic projects. *See* Order No. 890 at P 3 (transmission planning "is the means by which customers consider and access new sources of energy and have an opportunity to explore the feasibility of non-transmission alternatives"); *id*. at P 479 (demand response); Order No. 890-A at P 251 (no obligation to build).

Moreover, the Commission confirmed that the New York ISO process "always give[s] preference to market solutions." Second Order at P 39, JA 756; Third Order at P 19 (same), JA 871. Indeed, in its 2004 order approving the New

York ISO's original transmission planning process, the Commission cited the New York ISO's process as "a substantial improvement over planning processes that traditionally have depended largely or even solely on transmission owner developed, regulated solutions" *New York Indep. Sys. Operator, Inc*., 109 FERC ¶ 61,372 at P 33 (2004). In the orders on review here, the Commission once again endorsed this approach. Second Order at P 39, JA 755.

NYRI's assertion that the New York ISO process inadequately promotes transmission development disregards Order No. 890's directive that the Commission weigh transmission development as one of several factors. While NYRI objects to a process that fails to advance the development of its own project, it does not object more generally to the twin premises of the New York ISO's process, favoring market-solutions while promoting least-cost economic solutions of any type. In the orders on review, the Commission found these objectives, and the New York ISO's methodologies,[5] consistent with Order No. 890. Moreover, the New York ISO's cost allocation methodology is a new process, and the Commission will be monitoring the implementation of the process through oversight and review of the mandated New York ISO reports. *E.g.*, First Order at PP 16, 130, JA 455, 497. Even if the success of the process in promoting

[5] This Brief addresses NYRI's specific concerns with the cost-benefit analysis and the beneficiary voting proposal below in Parts III and IV.

transmission and relieving congestion is uncertain, it is not unjust and unreasonable in violation of the FPA, for "the record does not show that [the] policy *will not* work." *Public Serv. Comm'n of New York v. FPC*, 463 F.2d 824, 828 (D.C. Cir. 1972) (affirming incentive policy addressing a gas shortage as "the type of activity that the [Commission] was created to perform, and [to which] we give great weight"); *see also Interstate Natural Gas Ass'n v. FERC*, 617 F.3d 504, 508-09 (D.C. Cir. 2010) (noting that the Court gives Commission "experiments" special deference in order to allow time to generate "real world" data).

NYRI also claims that the New York ISO's process fails to satisfy the standards enunciated in Order No. 890 because it lacks sufficient stakeholder support. Br. 12, 37. Order No. 890 provides that, in "considering a dispute over cost allocation," the Commission will "exercise [its] judgment by weighing several factors," including "whether the proposal is generally supported by state authorities and participants across the region." Order No. 890 at P 559. The New York ISO's Compliance Filing acknowledged that New York ISO stakeholders did not reach a consensus on all elements of the process, and on the beneficiary vote in particular. Compliance Filing at 10, JA 10.

Such an absence of consensus – not unexpected, in light of the contrasting stakeholder perspectives presented (*see* Third Order, Comm'r Moeller Dissenting

Statement at 3, JA 876) – does not doom the New York ISO's proposals. In Order No. 890, the Commission identified stakeholder support as one of several relevant factors; it did not make either general or majority support dispositive. While "half of [the Transmission Owners] opposed" aspects of the two proposals (Br. 37), *half* (four of eight) of the Transmission Owners did not oppose the proposals. The New York Public Service Commission supported the economic planning process, and asked the Commission to allow the New York ISO additional time to develop the cost allocation methodology, but did not object to any specific aspect of the methodology. *See* New York Commission Comments at 5-6, R.13, JA 176-77. Further, NYRI does not allege or demonstrate any impropriety in the stakeholder process leading to the proposal. *See Pub. Serv. Comm'n of Wis. v. FERC*, 545 F.3d 1058, 1063-63 (D.C. Cir. 2008) (rejecting claim that FERC erred in giving weight to stakeholder support where petitioners "did not offer evidence of majority overreaching or assert the process was not open") (citations omitted)). The Commission reasonably considered the opposing comments of the stakeholders, but nonetheless found the proposal consistent with Order No. 890. First Order at P 16, JA 455.

Finally, NYRI argues that the New York ISO's process is necessarily unjust and unreasonable because other regional ISOs and RTOs employ processes that do not include a voting mechanism. Br. 39. But, Order No. 890 adopted flexible,

principles-based reform, as opposed to mandatory procedures, precisely to allow for regional variation. First Order at P 3, JA 451. Moreover, "there can be more than one just and reasonable planning process and RTOs and ISOs are not required to have identical planning processes to comply with Order No. 890 and 890-A." Second Order at P 40 (explaining the Commission's rejection of an intervenor's proposal, in another ISO's Order No. 890 compliance proceeding, to include a voting mechanism), JA 756. And the Commission recognized that because "one planning process for one RTO is just and reasonable does not preclude the possibility that other planning processes may also be just and reasonable, and even better suited, to other RTOs." Second Order at P 27, JA 751; *see also id*. at P 40, JA 756.

B. The Commission Reasonably Found That The New York ISO's Economic Planning Process Complements, But Is Distinct From, Other Transmission-Related Initiatives.

Order No. 890's reforms to the transmission planning process are one of several Commission actions taken in recent years to encourage transmission development. Here, NYRI invokes two of these measures, Order No. 679's authorization for incentive ratemaking and Order No. 689's provisions authorizing the Commission's exercise of limited transmission siting authority under FPA § 216, 16 U.S.C. § 824p. *See supra* p. 7. In NYRI's view, if the Commission grants a project incentive rates under Order No. 679 and/or a construction siting

authorization under Order No. 689, that project necessarily must receive cost recovery under a Commission-approved tariff through an Order No. 890 transmission planning process. Br. 46-48.

The Commission found nothing in the Energy Policy Act, the Commission's implementing regulations, or Order No. 890, to support this contention. "Transmission incentives, evaluation of projects by [the New York ISO], and siting are intended to work in tandem with the economic planning process, but not replace it." Second Order at P 43, JA 757. Transmission providers, like the New York ISO here, had transmission planning processes in place prior to the 2005 passage of the Energy Policy Act; later legislative initiatives were "not intended to supplant an RTO's or ISO's planning process or the cost allocation provisions of the RTO's or ISO's tariff." *Id.* at P 41, JA 756; *see* Order No. 890 at P 79 (Order No. 890 reforms are consistent with the principles Congress emphasized in the Energy Policy Act, but Energy Policy Act initiatives are addressed elsewhere).

Order No. 679's "incentive rate policy provides for the grant of incentive transmission rates to transmission projects that satisfy the criteria of FPA section 219," First Order at P 131, JA 497 (citing FPA § 219, 16 U.S.C. § 824s); it does not address whether a project should ultimately qualify for rate recovery. Similarly, Order No. 689's transmission siting process addresses whether a project should, in certain circumstances, be permitted for construction, but "[c]ost

recovery and the effect on customer rates are not part of the proceeding to issue a construction permit." Order No. 689 at P 193; *see* First Order at P 131, JA 497. Thus, the Commission reasonably concluded that neither of these processes has "any bearing on how the costs of economic transmission upgrades should be allocated, or whether those costs can or should be imposed on beneficiaries over their objections." *Id*., JA 498.

III. The Commission's Acceptance Of The New York ISO's Cost Allocation Methodology Is Based On Reasoned Decision-Making And Supported By Substantial Evidence.

NYRI claims that two steps of the New York ISO's cost allocation methodology are unjust and unreasonable, result in undue discrimination and are not supported by reasoned decision-making. In NYRI's view, the first step, the cost-benefit analysis, understates the benefits of proposed projects (such as its own). Br. 41-46. As to the second step, the beneficiary vote (which includes consideration of certain benefits NYRI seeks to include in the first stage), NYRI claims that it necessarily gives the beneficiaries an undue advantage over project proponents. Br. 46-48. NYRI concludes that the Court must prohibit the Commission from authorizing *any* vote by any project beneficiaries. Br. 65.

A. The Commission Reasonably Approved The Cost-Benefit Analysis As Appropriate To Promote Economic Efficiency And Identify System-Wide Benefits.

1. The Production Cost Savings Metric Captures The Total, System-Wide, Economic Benefit.

The first step of the New York ISO's cost allocation methodology, as approved by the Commission, requires that a proposed project's benefits must exceed its costs. First Order at P 102, JA 487. The New York ISO selected a cost-benefit test, the production cost metric, that "measures a project's total benefits on the entire system, i.e. the change in the difference between the value of the electricity to consumers and the real resource costs incurred by suppliers to produce the electricity." First Order at P 110, JA 490; *see also id*. at P 111 n.99 (illustrative example), JA 491. The total economic benefit is the sum of the total producer benefit, *i.e.*, the increase in net generator revenue, and the total consumer benefit, *i.e.*, the decrease in net load payment. Second Order at P 20 & nn.14-15, JA 748-49.

Many of NYRI's concerns with the cost-benefit test reflect a fundamental misunderstanding of the objective of the economic planning process. As the Commission explained, the objective of the economic planning process is to "promote economic efficiency," Second Order at P 21, JA 749. "The production cost savings metric, identifying the total economic benefits, is fundamental to deciding whether a project is *economic* – i.e., whether it will result in the least-cost

economic solution to a transmission congestion problem." *Id*. at P 20, JA 748. NYRI claims that the cost-benefit test is incomplete, and indeed unduly discriminatory and anticompetitive, because it does not include, *inter alia*, changes in installed capacity costs, ancillary services costs, emissions costs, losses, local taxation, and transmission congestion contract payments, as well as employment effects, other environmental benefits, and "multiplier" effects. Br. 2, 42-44; *see* American Wind Energy Association Br. 9-12 (environmental benefits); American Antitrust Institute Br. 8-16 (competitive and consumer benefits). But the Commission explained that these potential benefits are not relevant to determining whether a particular project is the least-cost economic solution to a transmission congestion problem. Second Order at PP 20-21, JA 748-49.

Moreover, the New York ISO tariff provides that, at the second step of the analysis, the voting beneficiaries may "consider metrics in addition to production cost savings." First Order at P 113, JA 492; *id*. at P 113 n.101 (discussing tariff requirements to consider "load costs, changes to generator payments, [installed capacity] costs, Ancillary Services costs, emissions costs, losses and [transmission congestion contract] payments," as well as "fuel and load forecast uncertainty, emissions data and the cost of allowances, pending environmental or other regulations, and alternate resource and energy efficiency scenarios"), JA 492. The Commission emphasized that the two steps of the New York ISO process serve

different purposes: "The first step looks at system-wide benefit and the second step . . . allows for an individual [utility's] estimation of its individual benefit." Second Order at P 21, JA 749. While the production cost metric alone satisfies the goal of identifying the system-wide, least-cost economic solution to a transmission congestion problem, the Commission recognized the value in permitting the voting beneficiaries, who would fund a project, to consider the additional metrics. *Id*. at P 20 ("the process also requires later consideration of other metrics, as requested by NYRI, to better inform entities who must pay for such projects of the individual benefits they may expect to receive from the projects"), JA 749. The different purposes of the two steps of the process are a reasoned basis for permitting the use of additional benefit metrics in the second step, but not in the first.

NYRI claims that the "principal defect in sole reliance on production cost savings" is the failure to take into account changes in the generation mix. Br. 42; *see* Wind Association Br. 11. But the Commission explicitly required the New York ISO to "model each year what generation mix is available and include that in the calculation of production costs." Second Order at P 25, JA 750. Similarly, the Commission explained that "[e]conomic projects allow . . . expensive generation located near load to be displaced with cheaper generation farther away from load" and "that benefit is captured in the reduction of production costs . . . ." *Id*. at P 21, JA 749. NYRI nevertheless asserts that the production cost metric does not take

into account new generation developed as the result of an authorized economic project (Br. 44-45), but it points to nothing in the New York ISO's process or the Commission's orders to support this assertion.

NYRI also argues that the cost-benefit analysis ignores the consumer impact of a project. Br. 43. But the Commission explained that the production cost savings metric "indeed captures the energy price effect on customers system-wide," Second Order at P 26, JA 751, by measuring the "change in the difference in the value of the electricity to consumers" and the costs of producing that electricity. First Order at P 110, JA 490. The Commission rejected NYRI's specific demand to include changes in load payments in the cost-benefit test, reasoning that reliance on changes in energy payments made by load "will not accurately measure the net economic effect of the project on the market as a whole, because it does not consider the effects of the project on generator revenues." *Id.* at P 111, JA 491. Further, while other RTOs may incorporate load payment changes into their cost-benefit analysis, the New York ISO need not because these types of metrics are taken into account by individual beneficiaries at the voting stage. Second Order at P 23, JA 750.

Finally, the Commission reasonably concluded that the New York ISO's use of a ten-year assessment period, beginning with the in-service date of a project, "achieves a reasonable balance." First Order at P 123, JA 495. NYRI asserts that

a ten year period is too short (Br. 42-43), while other parties before the Commission objected to delaying the start of the time period until the in-service date. *See id*. at P 123, JA 495. The Commission found ten years "sufficient to observe the benefits of a transmission proposal," but not so long that "uncertainties such as fuel costs, locational demand, and other drivers of energy prices . . . distort the model." *Id*. Inclusion of a project's first ten years of costs likewise reflects a balance, as other parties sought to include the entire costs of the thirty-year amortization period in the cost-benefit analysis, but the Commission found "it appropriate that an analysis matches a project's costs and benefits over the same time period." *Id*. at P 125, JA 496.

NYRI faults the Commission for failing explicitly to reference an affidavit included in NYRI's filings. Br. 41-42. Dr. Hieronymous' affidavit addressed the issues discussed above. The Commission need not reference each piece of evidence before it, so long as its orders are reasonably responsive to the arguments and evidence presented. *See Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 530 (D.C. Cir. 2010) (Commission "reasonably responded to the issues raised by" the witness); *see also Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277, 1285 (D.C. Cir. 2007) (finding that Commission need not address testimony directly where it has addressed the issues presented). The discussion above

demonstrates that the Commission's three orders fully satisfy its obligation to confront the arguments presented.[6]

In approving the use of the production cost savings metric in the first stage of the process, and additional benefits in the second stage, the Commission sought to balance competing demands. On the one hand, NYRI and others sought to include an extensive list of potential project benefits in the first threshold. On the other hand, potential project beneficiaries sought to raise the threshold by, for instance, including a requirement that the benefits of a project must exceed the costs by a certain ratio. (The Commission rejected this proposal, even though two other regions have adopted such a standard. First Order at PP 114-16, JA 493.) That NYRI might have weighed these competing interests differently does not render the Commission's judgment arbitrary and capricious. *See Pub. Serv. Comm'n*, 545 F.3d at 1067; *see also Blumenthal*, 552 F.3d at 885 ("the Commission must be given the latitude to balance the competing considerations and decide on the best resolution").

[6] To the extent Dr. Hieronymous's affidavit discusses NYRI's previously-proposed transmission project, the Commission explained that "[t]he NYRI Project itself is not before us here. . . . Thus, we make no findings on the merits of the NYRI Project . . . ." Second Order at P 20 n.12, JA 748.

2. NYRI's Reliance On Commission Orders Issued After The Orders On Review Is Inappropriate And Unpersuasive.

NYRI's reliance on the Commission's recent decisions in *Southwest Power Pool, Inc*., 131 FERC ¶ 61,252 (2010) and the Commission's recently issued Notice of Proposed Rulemaking concerning additional transmission planning reforms is not only improper, but also unpersuasive. Br. 45 (citing *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Notice of Proposed Rulemaking, 131 FERC ¶ 61,253 (2010) ("Transmission Planning Proposed Rulemaking")); *see also* Central Hudson Br. 11, 19, and Wind Association Br. 18-23. The Court "will not reach out to examine a decision made after the one actually under review. . . . An agency's decision is not arbitrary and capricious merely because it is not followed in a later adjudication." *Brooklyn Union Gas Co. v. FERC*, 409 F.3d 404, 406 (D.C. Cir. 2005) (quoting *MacLeod v. ICC*, 54 F.3d 888, 892 (D.C. Cir. 1995)).

In any event, the Commission's orders on review are not inconsistent with *Southwest Power Pool* and the proposed rulemaking. The Commission here did not wholly discount the value of benefit metrics other than the production cost savings metric, but merely found them irrelevant to identifying whether a project is the least-cost economic solution, *i.e.*, whether it promotes economic efficiency, from a system-wide perspective. Second Order at PP 20, 21, JA 748-49. Further, to the extent the Commission approved a different cost-benefit analysis here than it

did in *Southwest Power Pool* (which did not address an Order No. 890 compliance filing), the Commission has explained that regional variations are permitted. Second Order at P 27, JA 751.

Likewise, the New York ISO's process addresses the issues raised by the Transmission Planning Proposed Rulemaking with regard to the consideration of public policy driven infrastructure improvements. Transmission Planning Proposed Rulemaking at P 63 (proposing to require consideration of public policy). The New York ISO tariff incorporates "pending environmental or other regulations, and alternate resources and energy efficiency scenarios" into the second step of the process. First Order at P 113 n.101, JA 492. That the Proposed Rulemaking may propose to require more does not render the New York ISO's process unjust and unreasonable, but merely illustrates the Commission's continuing efforts to fulfill its statutory responsibility to eliminate undue discrimination.

B. The Commission Reasonably Approved The Beneficiary Voting Provision As An Appropriate Threshold For Cost Recovery.

The Commission reasonably determined that the beneficiary voting mechanism appropriately permits those New York ISO customers who will pay for a project to determine if it is the superior solution to an identified congestion problem. Second Order at P 36, JA 754; First Order at P 130, JA 497. NYRI contends that *any* voting mechanism (Br. 65) is necessarily unjust, unreasonable,

and unduly discriminatory because such a process could exclude projects that NYRI believes meritorious. Br. 35, 46-52.

As discussed with regard to the cost-benefit analysis, the purpose of the economic planning process is to identify the least-cost, economically efficient solution to an identified congestion problem. Second Order at P 20, JA 748; *supra* pp. 33-34. Significantly, the Commission reasoned that an economic project may not be the least-cost, most efficient solution. *Id*. at P 36 ("voting mechanisms" allow beneficiaries the "right to determine if other solutions are superior to economic projects"), JA 755; *see also* Order No. 890 at P 594; Order No. 890-A at P 251 ("cost allocation methodology will not impose an obligation to build"). A transmission project also may not be the preferred solution under the New York ISO process, which considers transmission on equal footing with generation and demand response alternatives. *See* First Order at P 5, JA 452; Second Order at P 39, JA 756; Third Order at P 19, JA 871. Accordingly, the process is intended to be selective. First Order at P 130, JA 497.

The Commission determined that the voting provision "provides a useful check to ensure that a project has net benefits." *Id.* Indeed, the Commission rejected a proposal to require that the benefits of a project exceed the costs by a certain ratio, because the voting provision "will serve to check-and-balance the costs and benefits" of proposed projects. *Id*. at P 116, JA 493. The Commission

reasonably approved the assignment of voting rights to the project beneficiaries, as they have a "particularly strong incentive to ensure that [the New York ISO's] estimate of benefits is accurate" because they "will bear the costs of the project if it goes forward." *Id.*; Second Order at P 22, JA 750; *see also* Makholm Aff. ¶¶ 38-42, JA 159-61.

In addition, while the first step of the process measures system-wide costs and benefits, the voting mechanism reasonably permits project beneficiaries – who must assume the cost of any economic project they approve – to consider projects from their individual perspectives. The Commission reasoned that the voting provision "strike[s] an appropriate balance between [the New York ISO's] estimation of benefits from a system perspective and an individual member's estimation of benefits from its individual perspective." Second Order at P 28, JA 751; *see id*. at P 21 (same), JA 749. An individual New York ISO utility is in the best position to assess the individual benefits a project may produce for it; therefore, the Commission reasonably assigned these utilities voting rights in selecting the least-cost economic solution to a congestion problem.

NYRI argues that the voting mechanism is unduly discriminatory and affords the Transmission Owners an undue preference. Br. 35. But, the Commission recognized, and NYRI does not dispute, that "no market participant is precluded from making a proposal." Second Order at P 39, JA 756. The New York

ISO's planning process, and the voting provision in particular, does not distinguish between incumbent transmission-owning utilities and independent transmission developers. The Commission reasonably explained the reasons for assigning project beneficiaries voting rights. Project beneficiaries, regardless of whether they are also Transmission Owners, are therefore not similarly situated with non-beneficiaries, including non-incumbent transmission developers. *See Sacramento Mun. Util. Dist. v. FERC*, 474 F.3d 797, 802-04 (D.C. Cir. 2007) (parties not similarly situated when abilities to offer transmission capacity exchange varied significantly). As such, there can be no undue discrimination.

NYRI does not demonstrate that individual beneficiaries are unable or unwilling to select the least-cost economic solution to a congestion problem. NYRI simply cannot accept the conclusion – that is the premise of the economic planning process – that a large transmission project, such as the one it sponsored, *may not be* the least-cost economic solution to congestion. *See* New York ISO White Paper at 6-2 ("stakeholders that view transmission as a market product that competes with other solutions to provide system needs will consider the [New York ISO] planning process as a successful initiative that properly encourages and respects market outcomes"), JA 680.

Allowing project beneficiaries to vote on whether a proposed economic project should receive cost recovery is consistent with Order No. 890. In that

rulemaking, the Commission rejected a proposal to "require tariff changes resulting from this rulemaking only with the support of the ISO and RTO members who may bear the costs" because it would have allowed market participants to veto Order No. 890's requirements. Order No. 890 at P 159; *see* Second Order at P 36 ("[s]uch a proposal would have been overly broad"), JA 755. On rehearing of Order No. 890, however, the Commission addressed whether project beneficiaries should be permitted to vote on cost recovery for economic projects. The Commission rejected the specific proposal presented, but supported the idea that "beneficiaries who must pay for a project should have the right to determine if other solutions are superior to economic projects." Second Order at P 36, JA 755 (citing Order No. 890-A at P 252 (stakeholder processes, including voting mechanisms, may be used to determine whether to pursue projects)); *see also* Order No. 890 at P 175 (ISO may delegate delineated responsibilities to members); *contra* Central Hudson Br. 14-15. Accordingly, NYRI's request that the Court now prohibit the Commission from permitting any beneficiary vote is both untimely and inappropriate. *See Pacific Gas & Elec. Co. v. FERC*, 533 F.3d 820, 826-27 (D.C. Cir. 2008) (rejecting, as a collateral attack, company's attempt to contest, in compliance proceeding, a Commission determination first announced in an earlier rulemaking).

Finally, NYRI once again invokes the Transmission Planning Proposed Rulemaking, *see supra* p. 39, to argue that the Commission has done an "about face" and now agrees that the planning process must treat incumbent and non-incumbent transmission owners equally. Br. 49-50. As above, NYRI may not invoke Commission decisions issued after the orders on review to challenge those orders. *See supra* p. 39. In any event, there is no inconsistency. Order No. 890 "did not specifically address the potential for undue preference to incumbent utilities over non[-]incumbent transmission developers." Transmission Planning Proposed Rulemaking at P 71. Nor did Order No. 890 address a utility's ability to exercise a right of first refusal. As such, these issues are not within the scope of this proceeding. Nonetheless, NYRI's argument serves to highlight that reforms to transmission planning processes are ongoing and the Commission continues to satisfy its statutory obligation to ensure that the processes are not unduly discriminatory.

C. The Commission Adequately Considered The New York ISO White Paper.

NYRI argues that the Commission inadequately considered a New York ISO White Paper, issued in the month following the First Order, which NYRI asserts "directly contradicts" the New York ISO's filings in this proceeding and otherwise shows that its "proposals are unlikely to promote economic transmission development in New York and are anticompetitive." Br. 3. The Commission

ultimately did address the White Paper in the Third Order, where it also explained that the document was not addressed in the Second Order because it was submitted with a pleading rejected on procedural grounds. Third Order at P 14, JA 868.

In the Third Order, the Commission reviewed and considered the White Paper and found that NYRI did not accurately portray its contents. Of most importance, NYRI overlooked these conclusions:

- "It is too early to tell whether the [new] process will succeed in encouraging a significant increase in transmission investment, as its full scale implementation will not begin until summer 2009."
- "Implementation of the [new] process with its beneficiaries pay principle, in conjunction with the various New York State energy and environmental policy initiatives . . . may provide the vehicle to facilitate significant economic transmission investment in New York."

White Paper at 6-1, JA 679, *cited in* Third Order at P 15, JA 869. The White Paper, sponsored by the New York ISO, expresses overall optimism that the new economic planning process, also sponsored by the New York ISO, will facilitate investment in economic projects.

As the Commission found, the selected statements NYRI relies upon "do not accurately characterizes its contents." Third Order at P 15, JA 869. NYRI cites a range of pages for the proposition that the New York ISO "concluded . . . its cost allocation process is unlikely to promote transmission investment and construction" (Br. 20 (citing White Paper at 4-7 to 5-6, JA 665-72)). But those pages do not contradict the conclusion referenced above: the process "may

provide the vehicle to facilitate significant economic transmission investment." White Paper at 6-1, JA 679. NYRI asserts that the Paper concludes that the voting provision "will likely prevent rather than promote transmission development in New York," (Br. 20 (citing White Paper at 4-7 to 4-8, JA 665-66)), but the voting provision is not discussed on the pages NYRI references. The White Paper does discuss the voting provision, but it expresses no opinion on the provision's expected efficacy. *See* White Paper at 2-5, JA 643.

Indeed, many of the statements in the White Paper upon which NYRI relies refer to the reliability process, not the economic planning process NYRI challenges here. For instance, while offering the above optimistic assessment of the economic planning process, the White Paper concludes that the "[Comprehensive Reliability Planning Process] is unlikely to facilitate a large-scale transmission buildout." White Paper at 6-1, JA 679. Also, while the White Paper cites New York as having fallen behind neighboring regions in transmission development (White Paper at 2-2, 4-7, JA 640, 665), this difference is attributed to the strength of the other regions' reliability planning processes, not their economic planning processes. *Id*. at 2-2, 6-1, JA 640, 665; *see also id*. at 3-5, 3-9 (other regions' economic planning processes had yet to identify a single project), JA 651, 655.

IV. The Commission Adequately Addressed NYRI's Concern For Anticompetitive Effects And Imposed A Reasonable Remedy.

NYRI argues both that the Commission failed to adequately consider the anticompetitive effects of the cost-benefit analysis and the beneficiary voting provision, and that the Commission never considered the anticompetitive effects at all. Br. 2, 53, 56. To the contrary, the Commission both recognized and satisfied its responsibility to "consider[], where appropriate, anticompetitive effects and the bearing of antitrust policy on matters within its jurisdiction." Third Order at P 19 (citing Intervention Order at P 6, JA 831), JA 871; *see also Gulf States Utilities Co.*, 411 U.S. at 758-59, and *Alabama Power Co. v. FPC*, 511 F.2d 383, 393 (D.C. Cir. 1974). The Commission found NYRI's assertions about the likelihood of anticompetitive behavior to be speculative. But, in any event, the Commission identified types of behavior that would be improper, and imposed a reasonable remedy to detect and deter anticompetitive or otherwise unlawful behavior. *See, e.g.*, Third Order at PP 21, 24, 25, JA 871-73.

The Commission addressed, and found unsupported and speculative, NYRI's claims that beneficiaries could vote against projects for a variety of potentially anticompetitive reasons, or reasons inconsistent with antitrust policy. *See, e.g.*, Third Order at P 21 ("NYRI offers no support for these contentions."), JA 871. Specifically, the Commission found that "NYRI has not demonstrated that [New York Transmission Owners] are likely to abuse" the voting process. *Id*. at P

24, JA 872. It points to no concrete facts supporting a conclusion that, under the New York ISO's carefully designed planning process, and with the protection of the enhanced reporting requirement and the Commission's ability to initiate investigations and enforcement proceedings, project beneficiaries will engage in unlawful, anticompetitive voting behavior.

NYRI argues that its anticompetitive concerns are not speculative because transmission-owning beneficiaries have incentives to vote against cost recovery for a project proposed by another transmission developer. Br. 58; *see also* Br. 37-39. NYRI points to the Commission's statements in Order No. 890, also acknowledged in Commissioner Moeller's dissent (at 2, JA 875), recognizing the potential for discriminatory behavior under the then-current standard open access transmission tariff. Br. 38 (citing Order No. 890 at P 422). But the New York ISO's process, as detailed in Part II above, is consistent with Order No. 890 which remedies the identified undue discrimination. *See* Order No. 890 at P 3.

Nonetheless, that Commission agreed with NYRI that certain types of voting behavior would be improper. Third Order at P 24, JA 872. Specifically, the Commission offered guidance as to potential types of unlawful behavior, characterizing as "improper" a vote cast "to drive [a] competitor out of business and increase the voting entity's market share" and a vote to deny cost recovery to a

competitor and then grant cost recovery to an identical project sponsored by the voting beneficiary or an affiliate. *Id*. at P 24, JA 872.

NYRI also lists a number of other hypothetical reasons why a project beneficiary could vote against a proposed project, including preserving transmission congestion contract values and maintaining high congestion costs. Br. 38-39. But NYRI's speculation about why a particular beneficiary might vote against a particular project is just that. Third Order at P 25, JA 873. The Commission reasonably concluded that it needs a factual record to reach a judgment: "What constitutes abuse of the voting process is a fact specific determination to be made by the Commission on a case by case basis after consideration of the information [the New York ISO] submits in its reports." *Id*. Consistent with *Public Systems v. FERC*, 606 F.2d 973, 983 (D.C. Cir. 1979), the Commission found "good cause" for delaying further findings on abuse of the process. *Cf*. Antitrust Institute Br. 23. This is well within the Commission's "broad discretion to determine when and how to hear and decide the matters that come before it." *Tennessee Valley Mun. Gas Ass'n v. FERC*, 140 F.3d 1085, 1088 (D.C. Cir. 1998) (citing, *e.g*., *Mobil Oil Exploration v. United Distribution Cos*., 498 U.S. 211, 230 (1991)).

NYRI's reliance on *Northern Natural Gas Co. v. FPC*, 399 F.2d 953 (D.C. Cir. 1968), for the proposition that the Commission can approve actions that

"violate antitrust policies where other economic, social and political considerations are found to be of overriding importance" (Br. 53 (quoting *Northern Natural Gas*, 399 F.2d at 961)) is misplaced, as the Commission determined that the New York ISO's process does not violate antitrust policy. The Commission's reference to its limited authority in this arena, *i.e.*, that it "is not charged with 'enforcing' the antitrust statutes," (Third Order at P 19, JA 870 (citing, *e.g.*, *Northern Natural Gas*, 399 F.2d at 960-61)), in fact echoes this Court's description of the Commission's authority, and does not demonstrate that the Commission did not address NYRI's claims. *See* Second Order at P 39, JA 755; Third Order at P 19, JA 870.

A. The Planning Process Does Not Foreclose Competition.

The Commission examined opportunities to develop transmission projects in New York and reasonably concluded that the beneficiary voting provision "does not foreclose competition." Third Order at P 19, JA 871; *see also* Second Order at P 39 (same), JA 755. NYRI recognizes that opportunities exist to build economic projects outside the New York ISO's new process, even if they are not preferable to NYRI. Br. 31 (citing bilateral contract opportunities with utilities and generators); *see* Br. 62. Similarly, the Commission found that "market participants remain free to individually or jointly develop projects that have not received super-

majority support at their own cost." First Order at P 130, JA 497; *see* Second Order at P 24, JA 750; *id*. at P 37, JA 755.

In support of these findings, the Commission pointed to examples of utilities "using merchant transmission developers as evidence of transmission projects that can be funded outside of [the New York ISO's] cost allocation processes." Third Order at P 19, JA 871. Consolidated Edison's subsidiary was awarded transmission scheduling rights in an open season auction for the Linden merchant line. Second Order at P 39, JA 756; *see also* White Paper at 3-5, JA 651 (describing the Linden project as providing additional transfer capability between New Jersey and New York). Long Island Power Authority entered into long-term firm transmission contracts to support both the Cross Sound Cable and Neptune projects. *Id*.; *see* Long Island Power Authority Answer to Protest at 2, R.58, JA 710; NYRI Answer at 12, R.61, JA 739; *see also* White Paper at 4-7 (describing benefits of Linden, Cross Sound and Neptune projects), JA 665.

Consolidated Edison's and Long Island Power Authority's commitments to support these projects demonstrate that market opportunities exist to develop projects intended to reduce congestion. The Commission noted that these projects "would reduce congestion below what it would have been without the addition of these projects." Third Order at P 21, JA 871. And NYRI acknowledged that the Neptune project provides access to diversified lower-cost generation, the same

benefit NYRI claims economic projects will likely offer. *Id*. (citing NYRI Second Rehearing Request at 26-27, R.64, JA 799-800). The fact that these projects were developed prior to approval of the New York ISO's process is not a flaw, as NYRI alleges (Br. 48, 62-63). The Commission utilizes them not to demonstrate the effectiveness of the process, but to demonstrate, as NYRI puts it, that the status quo continues, Br. 35; the Order No. 890 reforms do not alter existing funding opportunities. Order No. 890 at P 558. Market-oriented, merchant opportunities continue to be available.

Alternatively, NYRI claims that even if there are opportunities to fund a project outside the New York ISO's process, the process is anticompetitive on its face. Br. 60, 63. But NYRI's objections demonstrate only that, as the Commission explained, NYRI's "view of competition is too narrow." Third Order at P 21, JA 871. Any "project that provides access to energy, whether from neighboring RTOs, from upstate New York, or from Canada, contributes to competition in the marketplace." *Id*. NYRI wants to tailor the process to transmission projects (such as its own) located wholly within the New York control area, which deliver power from upstate and Canadian sources. *Id*. Similarly, NYRI believes that independent transmission companies (such as itself) should receive preference in the process. Br. 65. The Commission's statutory responsibilities and the goals of Order No. 890, in particular, however, require it to take a broader view.

The process can be, and is, selective without being anticompetitive. In *Central Iowa Power Coop. v. FERC*, 606 F.2d 1156 (D.C. Cir. 1979), this Court affirmed the Commission's approval of a pooling agreement that limited participation in the pool to utilities who own or use generation where the "[s]election of the . . . members in accordance with the valid interests of the pool reasonably furthers the pool's objectives." *Id*. at 1164-65. The *Central Iowa* Court distinguished *Associated Press v. United States*, 326 U.S. 1 (1945), upon which NYRI relies here (Br. 58, 63), noting that the restraints at issue there "were designed to destroy competition and effectively did so." *Central Iowa*, 606 F.2d at 1165. Here, the New York ISO process sets reasonable limitations, the cost-benefit analysis and beneficiary vote, designed to achieve the stated goals of the process.

To the Commission's finding that market opportunities exist to construct these types of transmission projects, NYRI responds that constructing a transmission project through these means is challenging.[7] Br. 61-62. Outside of the New York ISO's process, NYRI asserts that an independent transmission company's "only realistic opportunity to recover its investment is by negotiating a

[7] The issue of whether non-incumbent transmission developers should be entitled to recover transmission costs under provisions of the New York ISO tariff other than the economic planning process (*see* Br. 36, 40, 51, 61) was not addressed in Order No. 890 and is therefore not within the scope of this proceeding.

bilateral contract with an anchor customer," which is likely to be a beneficiary with voting rights under the New York ISO process. Br. 62. But because NYRI fails to recognize the fundamental purpose of the economic planning process, it cannot explain why a voting utility legitimately would decline to support – either through the New York ISO process or by contract – a project that is the least-cost economic solution to an identified congestion problem.

B. The Commission Imposed A Reasonable Remedy To Deter And Detect Unlawful Voting Behavior.

The Commission recognized that improper reasons for vetoing a project may exist. Third Order at P 24, JA 872 (citing examples of potential improper behavior). In order to remedy potential abuse, the Commission required the New York ISO to file, after each economic planning cycle, a report detailing "the results of each vote on economic projects, the identified beneficiaries, the results of the cost/benefit analysis, and, if vetoed, whether the developer has provided any formal indication to [the New York ISO] as to the future development of the project." First Order at P 130, JA 497. On rehearing, in response to NYRI's arguments, the Commission additionally required the New York ISO to include in the report "the reasons stated by the parties that vetoed the project for their decision." Second Order at P 38, JA 755. The Commission found that this information will enhance its ability to monitor the voting provision. *Id*.; *see also* First Order at P 17 (staff will monitor the planning process), JA 455.

Contrary to NYRI's assertions, the Commission explained that the reporting requirement will both deter and detect anticompetitive, unlawful voting behavior. Third Order at P 24, JA 872. The Commission explained that, armed with the information in the reports, it can "police" improper voting behavior because such behavior "fall[s] under the Commission investigatory and enforcement powers." *Id*. (citing FPA §§ 307, 314, 16 U.S.C. §§ 825f, 825m (2006)). Under FPA § 307, the Commission can institute investigations to determine whether a violation of the FPA or any rule thereunder has occurred. 16 U.S.C. 825f(a). Under FPA § 314, the Commission can institute enforcement actions to enjoin unlawful behavior and compel compliance. 16 U.S.C. § 825m(a). Moreover, the Commission has broad authority to assess penalties upon a finding of a violation of the FPA or any Commission order issued pursuant to the FPA. *See* FPA § 316, 16 U.S.C. 825o (authorizing penalties of up to $1 million in fines and imprisonment for willful violations of the FPA); FPA § 316A, 16 U.S.C. § 825o-1 (authorizing penalties up to $1 million per day for certain violations of the FPA).

NYRI (Br. 58) and the Antitrust Institute (Br. 22) fail to give appropriate weight to the Commission's determination that the reporting requirement will deter improper behavior, and the Commission's reliance on its broad investigative and enforcement authority. NYRI scoffs that the Commission "appears to believe that it can rely on a [Transmission Owner] that vetoes a project" to report the actual

reason for its vote, Br. 49, but does not demonstrate that the New York ISO's monitoring, and the Commission's monitoring, investigative, and enforcement efforts will be ineffective at preventing (and detecting) anticompetitive or unlawful behavior. Notably, the Court in *Central Iowa* also relied upon the Commission's commitment to "monitor access" to the pool in rejecting anticompetitive concerns. 606 F.2d at 1165. Here, the Commission's "predictive judgment about the effects of a proposed remedy for [here, alleged] undue discrepancies among operating companies" warrants "great deference." *Sacramento Mun. Util. Dist.*, 616 F.3d at 541.

Moreover, because the Commission imposed the reporting requirement to address the potential for unlawful voting behavior, *Maryland People's Counsel v. FERC*, 761 F.2d 780, 786 (D.C. Cir. 1985), is inapposite. The Commission did not simply dismiss NYRI's antitrust and anticompetitive concerns as "premature." Br. 59. The reporting requirement imposed here is at least as effective as the "first line of defense" the Court found necessary in *Maryland People's Counsel*, because it both detects and deters unlawful behavior. 761 F.2d at 788; *see also Electricity Consumers Resource Council*, 407 F.3d at 1239 ("deference [to] the Commission is based on the understanding that the Commission will monitor its experiment and review it accordingly"). In imposing the reporting requirement, and relying upon its broad investigative and enforcement authority, the Commission has made clear

that a beneficiary may not cast a vote for just "any" reason. Br. 18; Third Order, Comm'r Moeller Dissenting Statement at 1, JA 874.

CONCLUSION

For the foregoing reasons, the petition for review should be denied and the orders on review should be affirmed in their entirety.

Respectfully submitted,

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November 9, 2010

New York Regional Interconnect, Inc., **Docket No. OA08-52**
v. FERC
D.C. Cir. No. 09-1309

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I hereby certify that the Brief of Respondent Federal Energy Regulatory Commission contains 12,819 words, not including the tables of contents and authorities, the certificates of counsel and the addendum.

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November 9, 2010

ADDENDUM

STATUTES

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Section 201(b) of the Federal Power Act, 16 U.S.C. § 824(b)(1) 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 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.

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

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

Whenever the Commission, after a hearing held 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 affecting 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 of the filing of such complaint nor later than 5 months after the filing of such complaint. 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 of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. 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 conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, 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 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.[1]

(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.

(e) Short-term sales

(1) In this subsection:

(A) The term “short-term sale” means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

(B) The term “applicable Commission rule” means a Commission rule applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

(2) If an entity described in section 824 (f) of this title voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to—

(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

(B) an electric cooperative.

(4) (A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

(B) The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

(C) In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.

Section 216 of the Federal Power Act, 16 U.S.C. § 824p provides as follows:

(a) Designation of national interest electric transmission corridors
(1) Not later than 1 year after August 8, 2005, and every 3 years thereafter, the Secretary of Energy (referred to in this section as the "Secretary"), in consultation with affected States, shall conduct a study of electric transmission congestion.
(2) After considering alternatives and recommendations from interested parties (including an opportunity for comment from affected States), the Secretary shall issue a report, based on the study, which may designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national interest electric transmission corridor.
(3) The Secretary shall conduct the study and issue the report in consultation with any appropriate regional entity referred to in section 824o of this title.
(4) In determining whether to designate a national interest electric transmission corridor under paragraph (2), the Secretary may consider whether—

(A) the economic vitality and development of the corridor, or the end markets served by the corridor, may be constrained by lack of adequate or reasonably priced electricity;
(B)
(i) economic growth in the corridor, or the end markets served by the corridor, may be jeopardized by reliance on limited sources of energy; and
(ii) a diversification of supply is warranted;
(C) the energy independence of the United States would be served by the designation;
(D) the designation would be in the interest of national energy policy; and
(E) the designation would enhance national defense and homeland security.

(b) Construction permit
Except as provided in subsection (i) of this section, the Commission may, after notice and an opportunity for hearing, issue one or more permits for the construction or modification of electric transmission facilities in a national interest electric transmission corridor designated by the Secretary under subsection (a) of this section if the Commission finds that—
(1)
(A) a State in which the transmission facilities are to be constructed or modified does not have authority to—
(i) approve the siting of the facilities; or
(ii) consider the interstate benefits expected to be achieved by the proposed construction or modification of transmission facilities in the State;

(B) the applicant for a permit is a transmitting utility under this chapter but does not qualify to apply for a permit or siting approval for the proposed project in a State because the applicant does not serve end-use customers in the State; or
(C) a State commission or other entity that has authority to approve the siting of the facilities has—
(i) withheld approval for more than 1 year after the filing of an application seeking approval pursuant to applicable law or 1 year after the designation of the relevant national interest electric transmission corridor, whichever is later; or
(ii) conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible;
(2) the facilities to be authorized by the permit will be used for the transmission of electric energy in interstate commerce;
(3) the proposed construction or modification is consistent with the public interest;
(4) the proposed construction or modification will significantly reduce transmission congestion in interstate commerce and protects or benefits consumers;
(5) the proposed construction or modification is consistent with sound national energy policy and will enhance energy independence; and
(6) the proposed modification will maximize, to the extent reasonable and economical, the transmission capabilities of existing towers or structures.

(c) Permit applications
(1) Permit applications under subsection (b) of this section shall be made in writing to the Commission.
(2) The Commission shall issue rules specifying—
(A) the form of the application;
(B) the information to be contained in the application; and
(C) the manner of service of notice of the permit application on interested persons.

(d) Comments
In any proceeding before the Commission under subsection (b) of this section, the Commission shall afford each State in which a transmission facility covered by the permit is or will be located, each affected Federal agency and Indian tribe, private property owners, and other interested persons, a reasonable opportunity to present their views and recommendations with respect to the need for and impact of a facility covered by the permit.

(e) Rights-of-way
(1) In the case of a permit under subsection (b) of this section for electric transmission facilities to be located on property other than property owned by the

United States or a State, if the permit holder cannot acquire by contract, or is unable to agree with the owner of the property to the compensation to be paid for, the necessary right-of-way to construct or modify the transmission facilities, the permit holder may acquire the right-of-way by the exercise of the right of eminent domain in the district court of the United States for the district in which the property concerned is located, or in the appropriate court of the State in which the property is located.
(2) Any right-of-way acquired under paragraph (1) shall be used exclusively for the construction or modification of electric transmission facilities within a reasonable period of time after the acquisition.
(3) The practice and procedure in any action or proceeding under this subsection in the district court of the United States shall conform as nearly as practicable to the practice and procedure in a similar action or proceeding in the courts of the State in which the property is located.
(4) Nothing in this subsection shall be construed to authorize the use of eminent domain to acquire a right-of-way for any purpose other than the construction, modification, operation, or maintenance of electric transmission facilities and related facilities. The right-of-way cannot be used for any other purpose, and the right-of-way shall terminate upon the termination of the use for which the right-of-way was acquired.

(f) Compensation
(1) Any right-of-way acquired pursuant to subsection (e) of this section shall be considered a taking of private property for which just compensation is due.
(2) Just compensation shall be an amount equal to the fair market value (including applicable severance damages) of the property taken on the date of the exercise of eminent domain authority.
(g) State law
Nothing in this section precludes any person from constructing or modifying any transmission facility in accordance with State law.

(h) Coordination of Federal authorizations for transmission facilities
(1) In this subsection:
(A) The term “Federal authorization” means any authorization required under Federal law in order to site a transmission facility.
(B) The term “Federal authorization” includes such permits, special use authorizations, certifications, opinions, or other approvals as may be required under Federal law in order to site a transmission facility.

(2) The Department of Energy shall act as the lead agency for purposes of coordinating all applicable Federal authorizations and related environmental reviews of the facility.
(3) To the maximum extent practicable under applicable Federal law, the Secretary shall coordinate the Federal authorization and review process under this subsection with any Indian tribes, multistate entities, and State agencies that are responsible for conducting any separate permitting and environmental reviews of the facility, to ensure timely and efficient review and permit decisions.
(4)
(A) As head of the lead agency, the Secretary, in consultation with agencies responsible for Federal authorizations and, as appropriate, with Indian tribes, multistate entities, and State agencies that are willing to coordinate their own separate permitting and environmental reviews with the Federal authorization and environmental reviews, shall establish prompt and binding intermediate milestones and ultimate deadlines for the review of, and Federal authorization decisions relating to, the proposed facility.
(B) The Secretary shall ensure that, once an application has been submitted with such data as the Secretary considers necessary, all permit decisions and related environmental reviews under all applicable Federal laws shall be completed—
(i) within 1 year; or
(ii) if a requirement of another provision of Federal law does not permit compliance with clause (i), as soon thereafter as is practicable.
(C) The Secretary shall provide an expeditious pre-application mechanism for prospective applicants to confer with the agencies involved to have each such agency determine and communicate to the prospective applicant not later than 60 days after the prospective applicant submits a request for such information concerning—
(i) the likelihood of approval for a potential facility; and
(ii) key issues of concern to the agencies and public.
(5)
(A) As lead agency head, the Secretary, in consultation with the affected agencies, shall prepare a single environmental review document, which shall be used as the basis for all decisions on the proposed project under Federal law.
(B) The Secretary and the heads of other agencies shall streamline the review and permitting of transmission within corridors designated under section 503 of the Federal Land Policy and Management Act [1] (43 U.S.C. 1763) by fully taking into account prior analyses and decisions relating to the corridors.
(C) The document shall include consideration by the relevant agencies of any applicable criteria or other matters as required under applicable law.
(6)

(A) If any agency has denied a Federal authorization required for a transmission facility, or has failed to act by the deadline established by the Secretary pursuant to this section for deciding whether to issue the authorization, the applicant or any State in which the facility would be located may file an appeal with the President, who shall, in consultation with the affected agency, review the denial or failure to take action on the pending application.
(B) Based on the overall record and in consultation with the affected agency, the President may—
(i) issue the necessary authorization with any appropriate conditions; or
(ii) deny the application.
(C) The President shall issue a decision not later than 90 days after the date of the filing of the appeal.
(D) In making a decision under this paragraph, the President shall comply with applicable requirements of Federal law, including any requirements of—
(i) the National Forest Management Act of 1976 (16 U.S.C. 472a et seq.);
(ii) the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.);
(iii) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.);
(iv) the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.); and
(v) the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.).
(7)
(A) Not later than 18 months after August 8, 2005, the Secretary shall issue any regulations necessary to implement this subsection.
(B)
(i) Not later than 1 year after August 8, 2005, the Secretary and the heads of all Federal agencies with authority to issue Federal authorizations shall enter into a memorandum of understanding to ensure the timely and coordinated review and permitting of electricity transmission facilities.
(ii) Interested Indian tribes, multistate entities, and State agencies may enter the memorandum of understanding.
(C) The head of each Federal agency with authority to issue a Federal authorization shall designate a senior official responsible for, and dedicate sufficient other staff and resources to ensure, full implementation of the regulations and memorandum required under this paragraph.
(8)
(A) Each Federal land use authorization for an electricity transmission facility shall be issued—
(i) for a duration, as determined by the Secretary, commensurate with the anticipated use of the facility; and
(ii) with appropriate authority to manage the right-of-way for reliability and environmental protection.

(B) On the expiration of the authorization (including an authorization issued before August 8, 2005), the authorization shall be reviewed for renewal taking fully into account reliance on such electricity infrastructure, recognizing the importance of the authorization for public health, safety, and economic welfare and as a legitimate use of Federal land.
(9) In exercising the responsibilities under this section, the Secretary shall consult regularly with—
(A) the Federal Energy Regulatory Commission;
(B) electric reliability organizations (including related regional entities) approved by the Commission; and
(C) Transmission Organizations approved by the Commission.

(i) Interstate compacts
(1) The consent of Congress is given for three or more contiguous States to enter into an interstate compact, subject to approval by Congress, establishing regional transmission siting agencies to—
(A) facilitate siting of future electric energy transmission facilities within those States; and
(B) carry out the electric energy transmission siting responsibilities of those States.
(2) The Secretary may provide technical assistance to regional transmission siting agencies established under this subsection.
(3) The regional transmission siting agencies shall have the authority to review, certify, and permit siting of transmission facilities, including facilities in national interest electric transmission corridors (other than facilities on property owned by the United States).
(4) The Commission shall have no authority to issue a permit for the construction or modification of an electric transmission facility within a State that is a party to a compact, unless the members of the compact are in disagreement and the Secretary makes, after notice and an opportunity for a hearing, the finding described in subsection (b)(1)(C) of this section.

(j) Relationship to other laws
(1) Except as specifically provided, nothing in this section affects any requirement of an environmental law of the United States, including the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).
(2) Subsection (h)(6) of this section shall not apply to any unit of the National Park System, the National Wildlife Refuge System, the National Wild and Scenic Rivers System, the National Trails System, the National Wilderness Preservation System, or a National Monument.

(k) ERCOT
This section shall not apply within the area referred to in section 824k (k)(2)(A) of this title.

Section 219 of the Federal Power Act, 16 U.S.C. § 824s provides as follows:

(a) Rulemaking requirement
Not later than 1 year after August 8, 2005, the Commission shall establish, by rule, incentive-based (including performance-based) rate treatments for the transmission of electric energy in interstate commerce by public utilities for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.

(b) Contents The rule shall—
(1) promote reliable and economically efficient transmission and generation of electricity by promoting capital investment in the enlargement, improvement, maintenance, and operation of all facilities for the transmission of electric energy in interstate commerce, regardless of the ownership of the facilities;
(2) provide a return on equity that attracts new investment in transmission facilities (including related transmission technologies);
(3) encourage deployment of transmission technologies and other measures to increase the capacity and efficiency of existing transmission facilities and improve the operation of the facilities; and
(4) allow recovery of—
(A) all prudently incurred costs necessary to comply with mandatory reliability standards issued pursuant to section 824o of this title; and
(B) all prudently incurred costs related to transmission infrastructure development pursuant to section 824p of this title.

(c) Incentives
In the rule issued under this section, the Commission shall, to the extent within its jurisdiction, provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization. The Commission shall ensure that any costs recoverable pursuant to this subsection may be recovered by such utility through the transmission rates charged by such utility or through the transmission rates charged by the Transmission Organization that provides transmission service to such utility.

(d) Just and reasonable rates
All rates approved under the rules adopted pursuant to this section, including any revisions to the rules, are subject to the requirements of sections 824d and 824e of this title that all rates, charges, terms, and conditions be just and reasonable and not unduly discriminatory or preferential.

Section 307(a) of the Federal Power Act, 16 U.S.C. § 825f(a) provides as follows:

(a) Scope
The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person, electric utility, transmitting utility, or other entity has violated or is about to violate any provision of this chapter or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this chapter or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates, or in obtaining information about the sale of electric energy at wholesale in interstate commerce and the transmission of electric energy in interstate commerce. The Commission may permit any person, electric utility, transmitting utility, or other entity to file with it a statement in writing under oath or otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish or make available to State commissions information concerning any such subject.

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

(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 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.

Section 314(a) of the Federal Power Act, 16 U.S.C. § 825m(a) provides as follows:

(a) Enjoining and restraining violations
Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

Section 316 of the Federal Power Act, 16 U.S.C. § 825o provides as follows:

(a) Statutory violations
Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than $1,000,000 or by imprisonment for not more than 5 years, or both.

(b) Rules violations
Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this chapter, or any rule or regulation imposed by the Secretary of the Army under authority of subchapter I of this chapter shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $25,000 for each and every day during which such offense occurs.

Section 316A of the Federal Power Act, 16 U.S.C. § 825o-1 provides as follows:

(a) Violations
It shall be unlawful for any person to violate any provision of subchapter II of this chapter or any rule or order issued under any such provision.

(b) Civil penalties
Any person who violates any provision of subchapter II of this chapter or any provision of any rule or order thereunder shall be subject to a civil penalty of not more than $1,000,000 for each day that such violation continues. Such penalty shall be assessed by the Commission, after notice and opportunity for public hearing, in accordance with the same provisions as are applicable under section 823b(d) of this title in the case of civil penalties assessed under section 823b of this title. In determining the amount of a proposed penalty, the Commission shall take into consideration the seriousness of the violation and the efforts of such person to remedy the violation in a timely manner.

New York Regional Interconnect, Inc., **Docket No. OA08-52**
v. FERC
D.C. Cir. No. 09-1309

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 9th day of November 2010, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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