ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 12-1340

WEST DEPTFORD ENERGY, LLC,
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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Washington, D.C. 20426

April 18, 2013

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in Petitioner's brief.

B. Rulings Under Review

1. *PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,195 (2011), JA 1 ("First Order"); and

2. *PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,084 (2012), JA 18 ("Rehearing Order").

C. Related Cases

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

There are no related cases pending judicial review.

/s/ Beth G. Pacella
Beth G. Pacella
Senior Attorney

April 18, 2013

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GLOSSARY

2008 tariff modification proceeding	FERC Docket No. EL08-36
Commission	Federal Energy Regulatory Commission
FERC	Federal Energy Regulatory Commission
First Order	*PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,195 (2011)
PJM	PJM Interconnection, L.L.C.
Rehearing Order	*PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,184 (2012)
System Operator	PJM Interconnection, L.L.C.
West Deptford	Petitioner, West Deptford Energy, LLC

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BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

In this case, the Federal Energy Regulatory Commission ("FERC" or "Commission") was presented with a dispute over whether the original or modified version of a FERC-approved tariff would apply to an interconnection service request by West Deptford Energy, LLC ("West Deptford"), which generates electricity for resale. The question presented on appeal is:

Whether the Commission reasonably determined that West Deptford had adequate notice and, therefore, that the original version of the cost allocation provision of the tariff would continue to apply to West Deptford's interconnection request.

STATUTORY AND REGULATORY PROVISIONS

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

STATEMENT OF FACTS

I. Interconnection With PJM's Transmission System

PJM Interconnection, L.L.C. ("PJM" or "System Operator") is the independent regional transmission organization that operates the interstate transmission facilities in the District of Columbia and all or part of 13 eastern states. *Pub. Serv. Elec. and Gas Co. v. FERC*, 485 F.3d 1164, 1165 (D.C. Cir. 2007); *FPL Energy Marcus Hook, L.P. v. FERC*, 430 F.3d 441, 442-43 (D.C. Cir. 2005). PJM was named for the states of **P**ennsylvania, New **J**ersey, and **M**aryland, where it first started operations.

A request to interconnect with the PJM transmission system is placed into a "first-come, first-served queue." *FPL Energy Marcus Hook*, 430 F.3d at 443. PJM then conducts three types of studies. *Id.*; *Pub. Serv. Elec. and Gas*, 485 F.3d at 1166. First, PJM conducts a feasibility study, which "preliminarily determines

what system upgrades are necessary to accommodate the new interconnection," and "estimate[s] the requesting party's cost responsibility for the upgrades." *FPL Energy Marcus Hook*, 430 F.3d at 443. Next, PJM conducts a system impact study, which "refines and more comprehensively estimates cost responsibility for necessary system upgrades." *Id.* Finally, PJM conducts a facilities study, which "allocates good faith estimates of cost responsibility" for the system upgrades. *Id.* PJM then provides the requesting party with an Interconnection Service Agreement, which "specifies the party's actual cost responsibility." *Id.*

II. The Filed Rate Doctrine And Notice

The filed rate doctrine "generally prohibits a regulated entity from charging rates 'other than those properly filed with the appropriate federal authority.'" *Consolidated Edison Co. of N.Y. v. FERC*, 958 F.2d 429, 432 (D.C. Cir. 1992) (quoting *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981)); *see also Town of Concord v. FERC*, 955 F.2d 67, 71 (D.C. Cir. 1992) (same). "As a central purpose of the doctrine is to enable purchasers to 'know in advance the consequences of the purchasing decisions they make,' it requires that customers receive adequate notice of a rate in advance of the service to which it relates . . . ." *W. Res., Inc. v. FERC*, 72 F.3d 147, 149-50 (D.C. Cir. 1995) (quoting *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 577 (D.C. Cir. 1990), and citing *Town of Concord*, 955 F.2d at 75, and *Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135, 1140 (D.C.

Cir. 1987), *on reh'g*, 844 F.2d 879 (1988)); *see also Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 709 (D.C. Cir. 2000) (same), *aff'd, N.Y. v. FERC*, 535 U.S. 1 (2002).

III. Events Leading To The Challenged Orders

A. Network Upgrade 28

PJM's Mickleton-Monroe transmission line was built with double towers capable of holding two transmission lines but, initially, only one transmission line was constructed. *PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,184 P 3 (2012), JA 18 ("Rehearing Order"). Three projects requested interconnection with the Mickleton-Monroe line, and were in the interconnection queue in the following order: the Mantua Creek Project (queue position A13); the Liberty Electric Project (queue position A19); and the Marcus Hook Project (queue position A21). *Id.* PJM determined that the Mantua Creek Project could be interconnected without upgrading the Mickleton-Monroe transmission line, but that the later-queued Liberty Electric and Marcus Hook Projects would overload that line. *Id.* Accordingly, the latter two projects were allocated the costs (10 percent to Liberty Electric; 90 percent to Marcus Hook) for constructing a second Mickleton-Monroe 230 kilovolt transmission line, known as Network Upgrade 28 or Network Upgrade n0028. *Id.* PP 2-3, JA 18-19.

After Network Upgrade 28 was substantially constructed, Mantua Creek terminated its project. Rehearing Order P 3, JA 19. As a result, Network Upgrade 28 was no longer needed to interconnect the Liberty Electric and Marcus Hook Projects. *Id.* at P 3 and n.2, JA 19. Nonetheless, those projects remained financially responsible for Network Upgrade 28, as its costs were already incurred. *Id.* Network Upgrade 28 was placed into service in June 2003. *PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,195 P 25 (2011), JA 8 ("First Order"); Rehearing Order P 2, JA 18.

B. West Deptford's Interconnection Request

On July 31, 2006, West Deptford submitted a request to interconnect with PJM, and entered PJM's interconnection queue at position Q90. First Order P 25, JA 8; Rehearing Order P 4, JA 19. In November 2006, PJM issued an Interconnection Feasibility Study Report regarding the West Deptford Project. R.6 (PJM Answer) Att. C, JA 572-87. The Report found that the West Deptford Project would overload the original, single Mickleton-Monroe transmission line and, based on PJM Tariff section 37.7 [1] (which, shortly thereafter, was

[1] Tariff section 37.7 provided, in pertinent part:

> In the event that Transmission Provider determines that accommodating an Interconnection Customer's Interconnection Request would require, in whole or part, any Local Upgrade or Network Upgrade that was previously determined to be necessary to accommodate, and that was constructed in connection with, an

redesignated, without any other change, as tariff section 219, R.6 (PJM Answer) at 5 n.10, JA 561; First Order n.28, JA 11), determined that West Deptford "**will be responsible, in whole or part, for the $10,500,461 cost to construct Network Upgrade 28**." *Id.* Att. C at 7-8, JA 579-80 (emphasis in original).

The September 2010 System Impact Study Report reiterated that Network Upgrade 28 was necessary to accommodate West Deptford's interconnection request. R.6 (PJM Answer) Att. D at 5, JA 595. It also quoted the original version of tariff section 219, and, based on that cost allocation provision, stated that West Deptford "will be responsible for 100% of the **$10,500,461** cost to construct Network Upgrade n0028." *Id.* at 4-5, JA 594-95 (emphasis in original). West Deptford's cost responsibility was again confirmed in PJM's April 2011 Facilities

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> Interconnection Request that was part of a previous Interconnection Queue, such Interconnection Customer may be responsible, subject to terms of Section 46.4 [later redesignated as Section 231.4, *see* R.4 (West Deptford's Protest) at 12 n.34, JA 437] and 48.5 below and in accordance with criteria prescribed by Transmission Provider in the PJM Manuals, for additional costs up to an amount equal to a proportional share of the costs of such previously constructed facility or upgrade. Cost responsibility under this Section 37.7 may be assigned with respect to any facility or upgrade: . . . (c) the completed cost of which was $10,000,000 or more, provided that the facility or upgrade was placed in service no more than five years prior to the affected Interconnection Customer's Interconnection Queue Closing Date.

First Order P 24, JA 8.

Study Report for the West Deptford Project, which stated that Network Upgrade 28's total cost was $10,761,078. R.6 (PJM Answer) Att. E at 4, 10, JA 612, 618.

On April 21, 2011, PJM provided West Deptford a draft Interconnection Service Agreement which, among other things, allocated 100 percent of Network Upgrade 28's costs to West Deptford. R.1 (Unexecuted Interconnection Service Agreement) at Specifications § 4.2 & Schedule F, JA 60, 143. West Deptford objected to this cost allocation, and requested that PJM file the draft as an unexecuted agreement for Commission review. R.4 (West Deptford's Protest) at 9, JA 434.

C. West Deptford's Protest

West Deptford protested the unexecuted Interconnection Service Agreement. R.4 (West Deptford's Protest), JA 426. The protest first argued that, under the filed rate doctrine and Commission precedent, West Deptford should not be allocated Network Upgrade 28's costs because it would not be allocated those costs under the PJM tariff as modified in 2008. *Id*. at 15-25, JA 440-50.

West Deptford further asserted that it should not be held responsible for Network Upgrade 28's costs because Liberty Electric and Marcus Hook had not

relinquished the auction revenue rights[2] they received for funding that upgrade as required under PJM tariff § 231.4, JA 767. *Id.* at 25-26, JA 450-51. In addition, West Deptford argued, even if Liberty Electric and Marcus Hook had relinquished their auction revenue rights, West Deptford's Network Upgrade 28 cost allocation should be offset by the revenues Liberty Electric and Marcus Hook already received as a result of the auction revenue rights assigned to them for that upgrade. *Id.* at 26-27, JA 451-52.

D. Answers To The Protest

PJM and Marcus Hook answered West Deptford's protest. R.6, JA 557; R.5, JA 520. The answers pointed out that the November 2006 Interconnection Feasibility Study Report "made clear that West Deptford may have responsibility for all or a portion of Network Upgrade 28" and, in fact, "clearly incorporated the specific tariff language in Section 37.7(c) that would apply to the project." R.6 (PJM Answer) at 7, Att. C at 7-8, JA 563, 579-80; *see also* R.5 (Marcus Hook Answer) at 13-14, JA 532-33 (same).

Furthermore, the Answers noted, when PJM substantively modified tariff section 219 in a 2008 proceeding ("2008 tariff modification proceeding"),

[2] Auction revenue rights entitle the holder to revenues from the sale of financial transmission rights, which entitle the holder to receive transmission congestion credits that can offset congestion transmission charges. *PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,280 P 3 (2009).

PJM stated, in response to a request for clarification whether the proposed modifications would be applied to projects currently in the PJM interconnection queue or only to projects that enter the queue on or after the proposed August 1, 2008 effective date, that modified section 219 was "'intended to be effective as of August 1, 2008, **and will be initially applied to the U2-Queue**,'" a later queue than West Deptford's Q queue. R.6 (PJM Answer) at 6-7, JA 562-63 (quoting R.5 Att. C (PJM's July 7, 2008 Answer to Request for Clarification in Docket No. EL08-36-000) at 4, JA 555) (emphasis added in R.6); *see also* R.5 (Marcus Hook Answer) at 15-16, JA 534-35 (same).

The Answers added that both the September 2010 Impact Study Report and the April 2011 Facilities Study Report stated that, based on the original version of tariff section 219, West Deptford would be responsible for the entire cost to build Network Upgrade 28. R.6 (PJM Answer) at 7, JA 563; R.5 (Marcus Hook Answer) at 14, JA 533.

As to West Deptford's auction revenue rights claim, the Answers explained that "a precondition to reallocation of [auction revenue rights] is that the interconnection customer (West Deptford) execute an [Interconnection Service Agreement] – which has not yet occurred." R.6 (PJM Answer) at 10-11, JA 566-67; *see also* R.5 (Marcus Hook Answer) at 24, JA 543 (same).

E. West Deptford's Answer To The Answers

West Deptford answered PJM's and Marcus Hook's Answers. R.7, JA 621. West Deptford again argued that, under Commission precedent, cost allocation is governed by the tariff in effect when the interconnection service agreement is executed or filed unexecuted. *Id.* at 5-6 & n.24, JA 625-26 (citing cases involving the Midwest Independent Transmission System). Furthermore, West Deptford argued, the "preliminary, non-binding cost determination in an interconnection study report is not a filed rate for interconnection service,[3] and cannot supersede the language in the Tariff." *Id.* at 4, JA 624.

West Deptford's answer also asserted that PJM's clarification was ambiguous. *Id.* at 6, JA 626. At the same time, West Deptford's answer asserted that "neither the proposed Tariff language, nor PJM's other statements in its pleadings gave any indication that PJM would grandfather West Deptford's Interconnection Request under the previous, superseded version of Section 219" and, therefore, its parent company, which was a party in the 2008 tariff modification proceeding, did not protest PJM's proposal to modify section 219 or seek rehearing of the Commission's order accepting PJM's proposal. *Id.* at 17, JA 637.

[3] Citing *Dominion Resources Servs., Inc. v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,025 P 36 (2008).

Finally, while continuing to argue that tariff section 231.4 bars reimbursement under tariff section 219 because Marcus Hook and Liberty Electric did not surrender their auction revenue rights, West Deptford acknowledged that the first step under section 231.4 is execution of an interconnection service agreement. *Id.* at 13, JA 633 (citing PJM Tariff section 231.4(1)(b)). "Even if [Liberty Electric and Marcus Hook's] contention were correct that Section 231.4 cannot apply because the West Deptford [Interconnection Service Agreement] has not been executed," West Deptford asserted, "the reimbursement claim would still be barred" because "Section 231.4(3) affirms that the surrender of [auction revenue rights] by the Preceding Customer(s) is a condition precedent for the Current Customer's obligation to reimburse the Preceding Customer(s) under Section 219." *Id.* at 13-14, JA 633-34.

IV. The Challenged Orders

The Commission determined that West Deptford had been on notice since the beginning of the interconnection process that its responsibility for Network Upgrade 28's costs would be decided based on the original version of tariff section 219. Rehearing Order PP 37, 41, JA 32, 33. First, PJM explicitly stated so in the 2006 feasibility study report, in the 2010 system impact study report, and again in the 2011 facility study report. *Id.* PP 28, 45, JA 28, 34. PJM's July 7, 2007 clarification in the 2008 tariff modification proceeding also provided adequate

notice, as PJM stated that the modified section 219 would be initially applied to the U2 queue, a later queue than West Deptford's Q queue. *Id.* PP 31, 42, JA 29, 34; First Order P 37, JA 14.

Since the "essence of the filed rate doctrine is that customers be on notice of the rates that will apply to their transaction," the Commission found that the original version of tariff section 219 applies to West Deptford's interconnection request. Rehearing Order P 27, JA 28 (citing *Consolidated Edison Co. of N.Y. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003)). *See also id.* P 34, JA 30 ("providing the necessary predictability is the whole purpose of the well established 'filed rate doctrine'") (quoting *Elec. Dist. No. 1 v. FERC*, 774 F.2d 490, 493 (D.C. Cir. 1985), and *Columbia Gas*, 831 F.2d at 1141).

In addition, the Commission found that West Deptford's arguments regarding Liberty Electric's and Marcus Hook's auction revenue rights were "not yet ripe." First Order P 43, JA 16; *see also* Rehearing Order P 59, JA 40 (same). As the Commission explained, another tariff provision (section 231.4), which governs the reallocation of auction revenue rights, applies only after the new interconnection customer executes an Interconnection Service Agreement. First Order P 43, JA 16; Rehearing Order P 59, JA 40. "In the event West Deptford does execute an [Interconnection Service Agreement], its claim to receive [auction

revenue rights] will be perfected and PJM will be required to assign those [auction revenue rights] as provided in its tariff." *Id.*

SUMMARY OF ARGUMENT

The Commission reasonably determined that West Deptford had adequate notice throughout the interconnection process. West Deptford has known all along that, if it chose to proceed with its 2006 request to interconnect with the PJM transmission system, its responsibility for the costs of the upgrade necessary to accommodate its interconnection would be decided based on the original version of the PJM tariff.

West Deptford's opening brief does not present any argument challenging the Commission's finding that PJM's 2006, 2010, and 2011 study reports provided adequate notice. Accordingly, West Deptford has waived any challenge to that finding, and there is no need for the Court to review the Commission's alternative basis for its adequate notice finding, i.e., the statements in the 2008 tariff modification proceeding.

In any event, West Deptford's claim that the statements in the 2008 tariff modification proceeding did not provide adequate notice that the original version of tariff section 219 would continue to apply to its interconnection service request lacks merit. Not only did PJM clarify that its proposed modification to tariff section 219 would not apply to projects (like West Deptford) that already had

entered the interconnection queue, but the Commission order accepting the proposed modifications noted that clarification. In addition, as West Deptford acknowledges, its parent company was a party in that tariff modification proceeding.

West Deptford's claim that the decision here is inconsistent with Commission precedent fails as well. Commission precedent does not establish that modified interconnection procedures will apply to already-queued projects. Rather, it establishes that whether newly-proposed interconnection procedures will apply to already-queued projects depends on the particular circumstances in each case.

The Commission also reasonably determined that West Deptford's auction revenue rights claims were premature. As West Deptford acknowledged in the proceeding below, it will not have any obligation to reimburse Liberty Electric and Marcus Hook for Network Upgrade 28 costs unless and until: (1) West Deptford executes the Interconnection Service Agreement; (2) Liberty Electric and Marcus Hook elect to be reimbursed for those costs; and (3) Liberty Electric and Marcus Hook surrender the auction revenue rights they received for incurring those costs. As none of those things had occurred when West Deptford raised its auction revenue rights claims, the Commission appropriately determined there was no need to rule on those claims at this time.

ARGUMENT

I. Standard Of Review

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard, and upholds FERC's factual findings if supported by substantial evidence. *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 528 (D.C. Cir. 2010). FERC's orders will be affirmed "so long as FERC examine[d] the relevant data and articulate[d] a . . . rational connection between the facts found and the choice made." *Id.* (quoting *Alcoa Inc. v. FERC*, 564 F.3d 1342, 1347 (D.C. Cir. 2009) (alterations and omission by Court)).

The Court gives substantial deference to FERC's interpretation of its own orders, *e.g.*, *Ind. Util. Regulatory Comm'n v. FERC*, 668 F.3d 735, 740 (D.C. Cir. 2011), as well as to FERC's interpretation of tariffs, *e.g.*, *Old Dominion Elec. Coop. v. FERC*, 518 F.3d 43, 48 (D.C. Cir. 2008).

II. FERC Reasonably Determined That The Original Version Of The PJM Tariff Applies In The Circumstances Here

A. The Filed Rate Doctrine's Notice Analysis Applies Here

West Deptford agrees with the Commission that "the filed rate doctrine 'is not violated where a utility propose[s] a tariff change to be effective prospectively for those customers that seek service after that date.'" Br. 40 (quoting Rehearing Order P 27, JA 28) (alteration by West Deptford). West Deptford contends, however, that that is not what occurred here because it has not yet sought service

and will not do so until it signs a final interconnection service agreement. Br. 35, 40. The Commission reasonably found otherwise.

As the Commission explained, a customer seeks service, for previously-approved construction cost allocation purposes, when it enters the interconnection queue, not when it signs its final interconnection agreement. Rehearing Order PP 30, 41, JA 29, 33; First Order P 35, JA 13. This not only acknowledges the contractual arrangements and studies that precede the final interconnection agreement, Rehearing Order P 29, JA 29, but also ensures that an interconnection customer knows, from the outset, its potential cost responsibility for previously-approved construction, *id.* PP 30, 42, JA 29, 33; First Order P 35, JA 13. Determining cost responsibility based on the tariff in effect when the final interconnection agreement is signed, rather than on the tariff in effect when the customer entered the interconnection queue, could provide little or no notice to the customer of its potential cost allocation. Rehearing Order P 30, JA 29. Moreover, West Deptford's position would effectively discard the studies and cost allocations for dozens of queued projects that relied on the allocations in PJM's studies and, thus, would require PJM to redo the studies and cost allocation determinations for those projects. *Id.* P 29, JA 29.

Contrary to West Deptford's next claim, Br. 40, the Commission's interpretation does not permit the System Operator to unduly discriminate. Undue

discrimination occurs where similarly situated entities are treated differently. *See Transmission Agency of Northern California v. FERC*, 628 F.3d 538, 549 (D.C. Cir. 2010) ("The court will not find a Commission determination to be unduly discriminatory if the entity claiming discrimination is not similarly situated to others."); *Sacramento Mun. Utility Dist. v. FERC*, 474 F.3d 797, 802 (D.C. Cir. 2007) (to make an undue discrimination claim, a petitioner must show that it is similarly situated). West Deptford is not similarly situated to U2 queue and later-queued customers, whose queues, unlike West Deptford's queue, had not yet closed, and whose projects, unlike West Deptford's, had not yet been the subject of any interconnection studies, when PJM proposed the new interconnection procedures.

West Deptford also argues that the concept of notice under the filed rate doctrine applies only in specific factual circumstances (i.e., correcting legal error, charging a new rate for past services, notice from the tariff itself) that do not exist here. Br. 36-38, 48-50. But notice under the filed rate doctrine is not so limited.

Rather, as this Court has explained, "a central purpose of the [filed rate] doctrine is to enable purchasers to 'know in advance the consequences of the purchasing decisions they make,'" and, therefore, "it requires that customers receive adequate notice of a rate in advance of the service to which it relates . . . ." *W. Res.*, 72 F.3d at 149-50 (quoting *Transwestern*, 897 F.2d at 577); *see also*

Rehearing Order P 27, JA 28 ("The essence of the filed rate doctrine is that customers be on notice of the rates that will apply to their transaction.") (citing *Consolidated Edison*, 347 F.3d at 969); Rehearing Order P 34, JA 30 ("providing the necessary predictability is the whole purpose of the well established 'filed rate doctrine'") (quoting *Elec. Dist.*, 774 F.2d at 493, and *Columbia Gas*, 831 F.2d at 1141); Rehearing Order P 32, JA 30 (the "'filed rate doctrine simply does not extend to cases in which buyers are on adequate notice'") (quoting *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992)).

As discussed more fully in the next section of this brief, West Deptford knew from the time it requested interconnection with PJM and throughout the entire interconnection process that, if it chose to proceed with its 2006 request to interconnect with PJM, its responsibility for the costs for Network Upgrade 28 would be decided based on the original version of tariff section 219.

B. West Deptford Had Adequate Notice That The Original Version Of The PJM Tariff Would Apply To Its Interconnection Service Request

1. The Commission's Adequate Notice Findings

a. Notice From The 2008 Tariff Modification Proceeding

The Commission found that PJM put all parties on notice that the original version of tariff section 219 would continue to apply to already-queued interconnection requests when PJM substantively modified that provision. First

Order PP 34, 37, JA 13, 14; Rehearing Order PP 26, 28, 31, 42, JA 27, 28, 29, 33. As the Commission pointed out, PJM requested that its tariff filing become effective August 1, 2008, and clarified in that same proceeding that modified section 219 "will be initially applied to the U2-Queue," a later queue than West Deptford's Q-Queue. Rehearing Order P 31, JA 29 (quoting R.5 (Marcus Hook Answer) Att. C (PJM's Answer to Request for Clarification in Docket No. EL08-36-000) at 4, JA 555); *id.* PP 26, 28, 42, JA 27, 28, 33; First Order P 37, JA 14.

b. Notice From The West Deptford Studies

The Commission also found that the interconnection study reports put West Deptford on adequate notice throughout the interconnection process that its cost responsibility for Network Upgrade 28 would be determined under the original version of tariff section 219. Rehearing Order PP 28, 37, 41, 45, JA 28, 32, 33, 34. First, PJM's 2006 Feasibility Study Report quoted then-section 37.7c of the tariff, and stated that West Deptford "**will be responsible, in whole or part, for the $10,500,461 cost to construct Network Upgrade N28**." R.6 (PJM Answer) Att. C at 7-8, JA 579-80; *see also* Rehearing Order PP 28, 45, JA 28, 34 (same). PJM's next report on West Deptford's interconnection request, the 2010 System Impact Study Report, again quoted and relied on the original version of tariff section 219 in determining that West Deptford "will be responsible for 100% of the

$10,500,461 cost to construct Network Upgrade n0028." R.6 (PJM Answer) Att. D at 4-5, JA 594-95; *see also* Rehearing Order PP 28, 45, JA 28, 34. And, PJM's final report, the 2011 Facility Study Report, reiterated that West Deptford "will be responsible for 100% of the cost of network upgrade n0028. R.4 (West Deptford's Protest) Att.6 at 4, JA 511.

2. West Deptford Waived Any Challenge To The Commission's Findings Regarding Notice Provided By PJM's Study Reports

Federal Rule of Appellate Procedure 28(a)(9)(A) requires that the argument section of a petitioner's brief "contain . . . [petitioner]'s contentions and the reasons for them, with citations to the authorities and parts of the record on which the [petitioner] relies . . . ." *See also* D.C. Circuit Handbook of Practice and Internal Procedures at IX.A.8(j) (the argument section of a brief "contains the contentions of the parties on the issues presented, with citations to authorities, statutes, and portions of the record on which the parties rely").

Merely setting out the Commission's findings in the statement of facts section of an opening brief is not sufficient to properly raise an argument. *PDK Labs Inc. v. U.S. DEA*, 438 F.3d 1184, 1196 (D.C. Cir. 2006) (citing *City of Nephi, Utah v. FERC*, 147 F.3d 929, 933 n.9 (D.C. Cir. 1998)); *AMSC Subsidiary Corp. v. FCC*, 216 F.3d 1154, 1161 n.** (D.C. Cir. 2000) (citing *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000)). And, arguments not raised in an

opening brief are waived. *E.g.*, *Xcel Energy Servs., Inc. v. FERC*, 510 F.3d 314, 318 (D.C. Cir. 2007); *Power Co. of Am. v. FERC*, 245 F.3d 839, 845 (D.C. Cir. 2001).

While the background section of West Deptford's opening brief notes that the Commission found adequate notice based on the study reports as well as on statements in the 2008 tariff modification proceeding, Br. at 5, 25-26 (citing Rehearing Order PP 28-29, JA 28-29), the argument section of that brief does not address or challenge the study report aspect of the notice findings. *See* Br. 31-55, particularly Br. 40-43 (argument section headed: "The 'Notice' Provided Was Not Legally Adequate"). Accordingly, West Deptford has waived any challenge to the Commission's adequate notice findings based on PJM's statements in the study reports. *E.g.*, *Xcel*, 510 F.3d at 318; *PDK Labs*, 438 F.3d at 1196; *Consolidated Edison*, 347 F.3d at 970.

Since the Commission's determination that there was adequate notice from the study reports is unchallenged, there is no need for the Court to review the other basis for the Commission's adequate notice finding, i.e., the statements in the 2008 tariff modification proceeding. *See Verizon Tel. Cos. v. FCC*, 292 F.3d 903, 911-12 (D.C. Cir. 2002) (where petitioner's opening brief raised arguments regarding only one of two bases for agency's finding, the Court affirmed on the unchallenged basis without reaching the challenged ground).

3. West Deptford's Challenge To The Commission's Finding Regarding PJM's Statement In The 2008 Tariff Revision Proceeding Lacks Merit

Even if the Court were to review West Deptford's challenge to the Commission's finding that there was adequate notice from statements in the 2008 tariff modification proceeding, Br. 40-43, that challenge has no merit.

West Deptford argues that PJM's statement that revised tariff section 219 "will be initially applied to the U2-Queue" (R.5 Att. C (PJM's Answer to Request for Clarification in Docket No. EL08-36-000) at 4, JA 555) cannot provide adequate notice because it was made in a pleading filed in response to a request for clarification regarding a different section of the Tariff. Br. 41. In fact, however, PJM's pleading responded to a filing asking PJM to clarify "whether the modifications it proposed regarding," among other things, "cost allocation between queues . . . will, if accepted by the Commission, apply only to projects that enter the interconnection queue on or after the proposed effective date of August 1, 2008 or whether they will also apply to projects that have entered the queue before that date." Request for Clarification of American Municipal Power – Ohio, Inc., Docket No. EL08-36-000 (June 20, 2008), quoted in Rehearing Order P 12, JA 22. As the Commission found, PJM's response clarified that revised tariff section 219 would not apply to projects, like West Deptford's, that were in queues earlier than U2. Rehearing Order PP 12, 26, 31, JA 22, 27, 29.

Furthermore, the Order accepting PJM's tariff revisions pointed out that "PJM clarified that the modification regarding cost allocation . . . will be applied to the U2-Queue effective August 1, 2008." *PJM Interconnection, L.L.C.*, Docket No. EL08-36-001, August 19, 2008 Letter Order, JA 742. And, as West Deptford acknowledges, its parent company, LS Power Associates, L.P., was a party in the 2008 tariff modification proceeding. Br. iii-iv, 41; *see also* R.6 (PJM Answer) at 7-8 & n.19, JA 563-64; R.5 (Marcus Hook Answer) at 20, JA 539.[4]

The Commission's determination that, in these circumstances, the statements in the 2008 tariff modification proceeding provided West Deptford adequate notice that the original version of tariff section 219 would continue to apply to its interconnection service request was reasonable and should be upheld (either independently or in conjunction with the unchallenged notice provided by the statements in the study reports).

[4] Thus, contrary to West Deptford's assertions (Br. 40, 43), prospective application of modified tariff section 219 was not unilaterally accomplished by PJM but, rather, was approved by the Commission, and could have been challenged through a protest, 18 C.F.R. § 385.211, and a petition for rehearing, 18 C.F.R. § 385.713; *see also* 16 U.S.C. § 825*l*(a) ("Any person . . . aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person . . . is a party may apply for a rehearing").

C. The Commission's Determination Is Consistent With Its Precedent

West Deptford contends that applying the original version of the PJM tariff here is inconsistent with Commission precedent. Br. 44-50. West Deptford's contention is mistaken.

As the Commission explained, whether newly-proposed interconnection procedures will apply to already-queued projects depends on the particular circumstances in each case. Rehearing Order PP 38-40, 42, JA 32-34. "Under section 205 of the Federal Power Act, [16 U.S.C. § 824d,] a utility can propose any just and reasonable terms and conditions, regardless of whether other terms and conditions may be just and reasonable as well." Rehearing Order n.48, JA 33. In each case the Commission must evaluate the utility's proposal, including whether the interconnection procedure changes will apply to already-queued projects. Rehearing Order P 38, JA 32; *see also id.* (Commission precedent does not "establish a single policy to address all of the myriad issues that may arise from a change to cost allocation in the interconnection process.").

For example, the Commission pointed out, while it has accepted the Midwest Independent Transmission System Operator's proposal to apply newly-proposed interconnection procedures to pending projects so that the unanticipated consequences of prior procedures could be more fully and quickly rectified, Rehearing Order P 40, JA 32 (citing *Midwest Independent Transmission System*

Operator Inc., 129 FERC ¶ 61,060 (2009)), it also has accepted that system operator's proposal, in other circumstances, to continue to apply the original interconnection procedures to already-queued projects, *id.*, JA 33 (citing *Midwest Independent Transmission System Operator Inc.*, 124 FERC ¶ 61,183 P 90 (2008), *order on reh'g*, 127 FERC ¶ 61,294 (2009)). Thus, contrary to West Deptford's claim (Br. 44-45), the Commission's determination here is not inconsistent with precedent involving the Midwest Independent System Operator's transmission system.

Furthermore, the Commission added, its precedent establishes that independent system operators, like PJM, have broad flexibility to tailor their proposals to fit their specific circumstances. Rehearing Order P 39, JA 32 (discussing *Critical Path Transmission LLC. v. Cal. Indep. Sys. Operator Corp.*, 135 FERC ¶ 61,031 P 44 (2011), which held that California's system operator was not required to handle pending projects in the same way another system operator did, but could submit a proposal it found more appropriate to its own circumstances); *id.* P 42, JA 33 (discussing Order No. 2003,[5] a rulemaking that

[5] *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

gave independent system operators, like PJM, greater flexibility than non-independent transmission providers to diverge from the generally standardized interconnection agreements to fit their needs); *id.* (discussing *Interconnection Queuing Practices*, 122 FERC ¶ 61,252 PP 11-13, 19 (2008), which held that system operators have the option whether to apply queue reforms to early-stage or later-stage queue requests and can propose variations to accommodate their particular needs).

Ignoring the purpose for which these cases were cited, West Deptford argues that they are irrelevant because none involves a situation where "the Commission appl[ied] a superseded tariff that was no longer in effect based only on statements made by the utility in an 'answer' not reflected in the filed tariff." Br. 48-49. West Deptford's inadequate notice claims were already addressed *supra* pp. 18-23.

West Deptford also claims that the decision here is inconsistent with the Commission's order in *PJM Interconnection, L.L.C.*, 108 FERC ¶ 61,025 (2004). Br. 45. The Commission reasonably found otherwise. Rehearing Order PP 43-44, JA 34. The 2004 proceeding involved a PJM proposal to attach to the Interconnection Service Agreement the standard terms and conditions of Subpart E of the tariff in effect when the agreement is executed. *Id.* P 44, JA 34. The Commission determined that PJM could do so if it chose to, as long as it also

attached all of the other standard terms and conditions in the tariff at that time. *Id.* P 43, JA 34.

The Commission also reasonably determined that its decision here is not inconsistent with *FPL Energy Marcus Hook, L.P. v. PJM Interconnection L.L.C.*, 118 FERC ¶ 61,169 (2007), *order on reh'g*, 123 FERC ¶ 61,289 (2008), as West Deptford asserts (Br. 46-47). In that case, unlike here, the Commission was presented with the question whether to resolve a complaint by applying tariff provisions in effect when the Interconnection Service Agreement was signed or by applying tariff provisions in effect when the Commission considered the complaint. Rehearing Order P 36, JA 31. No party there argued that provisions from an earlier tariff were relevant and should apply. *Id.*

D. West Deptford's Auction Revenue Rights Claims Were Not Ripe

West Deptford raises one more issue. It claims that, "[i]f Liberty Electric and Marcus Hook are ultimately compensated *in full* by West Deptford in the amount of $10 million for the network upgrade, but allowed to retain the proceeds from the auction revenue rights they exercised in past years, they will have received a substantial, anti-competitive windfall at West Deptford's expense." Br. 50; *see also* Br. 50-54 (same). As the Commission reasonably determined, West Deptford's auction revenue rights claims were not yet ripe for resolution. Rehearing Order PP 58-59, JA 40; First Order P 43, JA 16.

West Deptford's own description, in the proceeding below, of PJM tariff section 231.4 – the provision governing the reallocation of auction revenue rights – demonstrates this point. "Section 231.4 sets forth the following three-step process for the Preceding Customer(s) (*i.e.*, Marcus Hook or Liberty Electric) to obtain reimbursement under Section 219: (1) the Current Customer (*i.e.*, West Deptford) is to execute its [Interconnection Service Agreement];[6] (2) PJM is to give the Preceding Customer(s) the opportunity to obtain reimbursement under Section 219, in exchange for surrendering its share of Incremental [auction revenue rights];[7] and (3) if and only if, the Preceding Customer elects to surrender its Incremental [auction revenue rights], then the Current Customer is to reimburse the Preceding Customer for the previously constructed upgrades; otherwise the Current Customer

[6] Citing PJM tariff section 231.4(1)(b), JA 767 ("This section shall apply in the event that . . . such New Service Customer (hereinafter in this section, the 'Current Customer') executes, as applicable, an Interconnection Service Agreement").

[7] Citing PJM tariff section 231.4(1)(d), JA 767 (PJM shall "afford each such Preceding customer, subject to the terms of this Section 231.4, an opportunity to obtain, in exchange for a proportional share (as determined in accordance with Section 231.3) of the Incremental auction revenue rights associated with such facility or upgrade that the Preceding Customer holds, reimbursement for a share of the cost of the facility or upgrade that the Preceding Customer paid or incurred that is proportional to the cost responsibility of the Current Customer for such facility or upgrade.").

'shall have no cost responsibility' for these upgrades.[8] R.7 (West Deptford's Answer to the Answers) at 13-14, JA 633-34. Moreover, West Deptford added, tariff "Section 231.4(3)[9] affirms that the surrender of Incremental [auction revenue rights] by the Preceding Customer(s) is a condition precedent for the Current Customer's obligation to reimburse the Preceding Customer(s) under Section 219." *Id.* at 14, JA 634.

None of the preconditions necessary to trigger a reimbursement obligation had occurred when West Deptford raised its auction revenue rights claims to the Commission. The Commission appropriately determined, therefore, that these claims were premature and need not be ruled on at that time. Rehearing Order P

[8] Citing PJM tariff section 231.4(2), JA 767 ("A Preceding Customer shall have no obligation to exchange Incremental auction revenue rights for cost reimbursement pursuant to this section. In the event, however, that a Preceding Customer chooses not to relinquish Incremental auction revenue rights associated with a previously-constructed facility or upgrade, the Current Customer shall have no cost responsibility with respect to the portion of such facility or upgrade for which that Preceding Customer bore cost responsibility.").

[9] Providing, in relevant part, that, "[i]n the event that a Preceding Customer elects to exchange Incremental auction revenue rights for cost reimbursement pursuant to this section, (a) the Preceding Customer shall relinquish the Incremental auction revenue rights that it elects to exchange in writing, in a form and at a time reasonably satisfactory to the Office of the Interconnection; [and] (b) the Current Customer shall pay Transmission Provider, upon presentation of Transmission Provider's invoice therefor, an amount equal to the portion of such customer's cost responsibility for the relevant, previously-constructed facility or upgrade that is proportional to the Incremental auction revenue rights that the Preceding Customer agreed to exchange; . . . ." JA 767-68.

59, JA 40; *see also, e.g.*, *Devia v. NRC*, 492 F.3d 421, 425 (D.C. Cir. 2007) ("claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all") (quoting *Texas v. U.S.*, 523 U.S. 296, 300 (1998)) (internal quotation omitted); *TC Ravenswood, LLC v. FERC*, 705 F.3d 474, 478 (D.C. Cir. 2013) ("An agency abuses its broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and policies, when its manner of proceeding significantly prejudices a party or unreasonably delays a resolution") (internal citation and quotation omitted). West Deptford has not demonstrated any legitimate reason for this Court to resolve now an issue the Commission reasonably determined is best addressed, if at all, later.

CONCLUSION

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

Respectfully submitted,

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April 18, 2013

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief contains 6,759 words, not including the tables of contents and authorities, the glossary, the certificate of counsel and this certificate.

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April 18, 2013

ADDENDUM

STATUTES AND REGULATIONS

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STATUTES: **PAGE**

§ 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(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

Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

§ 825*l*. Review of orders

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

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

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the 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.

(c) Stay of Commission's order

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

(June 10, 1920, ch. 285, pt. III, §313, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 860; amended June 25, 1948, ch. 646, §32(a), 62 Stat. 991; May 24, 1949, ch. 139, §127, 63 Stat. 107; Pub. L. 85–791, §16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title XII, §1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58 inserted ''electric utility,'' after ''Any person,'' and ''to which such person,'' and substituted ''brought by any entity unless such entity'' for ''brought by any person unless such person''.

1958—Subsec. (a). Pub. L. 85–791, §16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85–791, §16(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and in third sentence, substituted ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals''.

§ 825m. Enforcement provisions

(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

(c) Except as provided in §381.302(b), each petition for issuance of a declaratory order must be accompanied by the fee prescribed in §381.302(a).

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 395, 49 FR 35357, Sept. 7, 1984]

§ 385.208 [Reserved]

§ 385.209 Notices of tariff or rate examination and orders to show cause (Rule 209).

(a) *Issuance.* (1) If the Commission seeks to determine the validity of any rate, rate schedule, tariff, tariff schedule, fare, charge, or term or condition of service, or any classification, contract, practice, or any related regulation established by and for the applicant which is demanded, observed, charged, or collected, the Commission will initiate a proceeding by issuing a notice of tariff or rate examination.

(2) The Commission may initiate a proceeding against a person by issuing an order to show cause.

(b) *Contents.* A notice of examination or an order to show cause will contain a statement of the matters about which the Commission is inquiring, and a statement of the authority under which the Commission is acting. The statement is tentative and sets forth issues to be considered by the Commission.

(c) *Answers.* A person who is ordered to show cause must answer in accordance with Rule 213.

§ 385.210 Method of notice; dates established in notice (Rule 210).

(a) *Method.* When the Secretary gives notice of tariff or rate filings, applications, petitions, notices of tariff or rate examinations, and orders to show cause, the Secretary will give such notice in accordance with Rule 2009.

(b) *Dates for filing interventions and protests.* A notice given under this section will establish the dates for filing interventions and protests. Only those filings made within the time prescribed in the notice will be considered timely.

§ 385.211 Protests other than under Rule 208 (Rule 211).

(a) *General rule.* (1) Any person may file a protest to object to any application, complaint, petition, order to show cause, notice of tariff or rate examination, or tariff or rate filing.

(2) The filing of a protest does not make the protestant a party to the proceeding. The protestant must intervene under Rule 214 to become a party.

(3) Subject to paragraph (a)(4) of this section, the Commission will consider protests in determining further appropriate action. Protests will be placed in the public file associated with the proceeding.

(4) If a proceeding is set for hearing under subpart E of this part, the protest is not part of the record upon which the decision is made.

(b) *Service.* (1) Any protest directed against a person in a proceeding must be served by the protestant on the person against whom the protest is directed.

(2) The Secretary may waive any procedural requirement of this subpart applicable to protests. If the requirement of service under this paragraph is waived, the Secretary will place the protest in the public file and may send a copy thereof to any person against whom the protest is directed.

§ 385.212 Motions (Rule 212).

(a) *General rule.* A motion may be filed:

(1) At any time, unless otherwise provided;

(2) By a participant or a person who has filed a timely motion to intervene which has not been denied;

(3) In any proceeding except an informal rulemaking proceeding.

(b) *Written and oral motions.* Any motion must be filed in writing, except that the presiding officer may permit an oral motion to be made on the record during a hearing or conference.

(c) *Contents.* A motion must contain a clear and concise statement of:

(1) The facts and law which support the motion; and

(2) The specific relief or ruling requested.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 225–A, 47 FR 35956, Aug. 18, 1982; Order 376, 49 FR 21705, May 23, 1984]

§ 385.213 Answers (Rule 213).

(a) *Required or permitted.* (1) Any respondent to a complaint or order to

(b) *Nature of briefs on exceptions and of briefs opposing exceptions.* (1) Any brief on exceptions and any brief opposing exceptions must include:

(i) If the brief exceeds 10 pages in length, a separate summary of the brief not longer than five pages; and

(ii) A presentation of the participant's position and arguments in support of that position, including references to the pages of the record or exhibits containing evidence and arguments in support of that position.

(2) Any brief on exceptions must include, in addition to matters required by paragraph (b)(1) of this section:

(i) A short statement of the case;

(ii) A list of numbered exceptions, including a specification of each error of fact or law asserted; and

(iii) A concise discussion of the policy considerations that may warrant full Commission review and opinion.

(3) A brief opposing exceptions must include, in addition to matters required by paragraph (b)(1) of this section:

(i) A list of exceptions opposed, by number; and

(ii) A rebuttal of policy considerations claimed to warrant Commission review.

(c) *Oral argument.* (1) Any participant filing a brief on exceptions or brief opposing exceptions may request, by written motion, oral argument before the Commission or an individual Commissioner.

(2) A motion under paragraph (c)(1) of this section must be filed within the time limit for filing briefs opposing exceptions.

(3) No answer may be made to a motion under paragraph (c)(1) and, to that extent, Rule 213(a)(3) is inapplicable to a motion for oral argument.

(4) A motion under paragraph (c)(1) of this section may be granted at the discretion of the Commission. If the motion is granted, any oral argument will be limited, unless otherwise specified, to matters properly raised by the briefs.

(d) *Failure to take exceptions results in waiver*—(1) *Complete waiver.* If a participant does not file a brief on exceptions within the time permitted under this section, any objection to the initial decision by the participant is waived.

(2) *Partial waiver.* If a participant does not object to a part of an initial decision in a brief on exceptions, any objections by the participant to that part of the initial decision are waived.

(3) *Effect of waiver.* Unless otherwise ordered by the Commission for good cause shown, a participant who has waived objections under paragraph (d)(1) or (d)(2) of this section to all or part of an initial decision may not raise such objections before the Commission in oral argument or on rehearing.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.712 Commission review of initial decisions in the absence of exceptions (Rule 712).

(a) *General rule.* If no briefs on exceptions to an initial decision are filed within the time established by rule or order under Rule 711, the Commission may, within 10 days after the expiration of such time, issue an order staying the effectiveness of the decision pending Commission review.

(b) *Briefs and argument.* When the Commission reviews a decision under this section, the Commission may require that participants file briefs or present oral arguments on any issue.

(c) *Effect of review.* After completing review under this section, the Commission will issue a decision which is final for purposes of rehearing under Rule 713.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.713 Request for rehearing (Rule 713).

(a) *Applicability.* (1) This section applies to any request for rehearing of a final Commission decision or other final order, if rehearing is provided for by statute, rule, or order.

(2) For the purposes of rehearing under this section, a final decision in any proceeding set for hearing under subpart E of this part includes any Commission decision:

(i) On exceptions taken by participants to an initial decision;

(ii) When the Commission presides at the reception of the evidence;

(iii) If the initial decision procedure has been waived by consent of the participants in accordance with Rule 710;

(iv) On review of an initial decision without exceptions under Rule 712; and

(v) On any other action designated as a final decision by the Commission for purposes of rehearing.

(3) For the purposes of rehearing under this section, any initial decision under Rule 709 is a final Commission decision after the time provided for Commission review under Rule 712, if there are no exceptions filed to the decision and no review of the decision is initiated under Rule 712.

(b) *Time for filing; who may file.* A request for rehearing by a party must be filed not later than 30 days after issuance of any final decision or other final order in a proceeding.

(c) *Content of request.* Any request for rehearing must:

(1) State concisely the alleged error in the final decision or final order;

(2) Conform to the requirements in Rule 203(a), which are applicable to pleadings, and, in addition, include a separate section entitled ''Statement of Issues,'' listing each issue in a separately enumerated paragraph that includes representative Commission and court precedent on which the party is relying; any issue not so listed will be deemed waived; and

(3) Set forth the matters relied upon by the party requesting rehearing, if rehearing is sought based on matters not available for consideration by the Commission at the time of the final decision or final order.

(d) *Answers.* (1) The Commission will not permit answers to requests for rehearing.

(2) The Commission may afford parties an opportunity to file briefs or present oral argument on one or more issues presented by a request for rehearing.

(e) *Request is not a stay.* Unless otherwise ordered by the Commission, the filing of a request for rehearing does not stay the Commission decision or order.

(f) *Commission action on rehearing.* Unless the Commission acts upon a request for rehearing within 30 days after the request is filed, the request is denied.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995; 60 FR 16567, Mar. 31, 1995; Order 663, 70 FR 55725, Sept. 23, 2005; 71 FR 14642, Mar. 23, 2006]

§ 385.714 Certified questions (Rule 714).

(a) *General rule.* During any proceeding, a presiding officer may certify or, if the Commission so directs, will certify, to the Commission for consideration and disposition any question arising in the proceeding, including any question of law, policy, or procedure.

(b) *Notice.* A presiding officer will notify the participants of the certification of any question to the Commission and of the date of any certification. Any such notification may be given orally during the hearing session or by order.

(c) *Presiding officer's memorandum; views of the participants.* (1) A presiding officer should solicit, to the extent practicable, the oral or written views of the participants on any question certified under this section.

(2) The presiding officer must prepare a memorandum which sets forth the relevant issues, discusses all the views of participants, and recommends a disposition of the issues.

(3) The presiding officer must append to any question certified under this section the written views submitted by the participants, the transcript pages containing oral views, and the memorandum of the presiding officer.

(d) *Return of certified question to presiding officer.* If the Commission does not act on any certified question within 30 days after receipt of the certification under paragraph (a) of this section, the question is deemed returned to the presiding officer for decision in accordance with the other provisions of this subpart.

(e) *Certification not suspension.* Unless otherwise directed by the Commission or the presiding officer, certification under this section does not suspend the proceeding.

West Deptford Energy, LLC v. FERC **Docket No. ER11-4073**
D.C. Cir. No. 12-1340

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 18th day of April 2013, 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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