ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 11-1451

CONSTELLATION ENERGY COMMODITIES GROUP, INC., AND CONSTELLATION NEWENERGY, INC.,
Petitioners,

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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December 3, 2014

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in Petitioners' brief.

B. Rulings Under Review

1. *Midwest Independent Transmission System Operator, Inc.*, 131 FERC ¶ 61,173 (2010), JA 647 ("Challenged Order"); and

2. *Midwest Independent Transmission System Operator, Inc.*, 136 FERC ¶ 61,244 (2011), JA 918 ("Challenged 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; all related cases were settled and voluntarily dismissed. *See* Docket Nos. 03-1223, *et al.*

/s/ Beth G. Pacella
Beth G. Pacella
Deputy Solicitor

December 3, 2014

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GLOSSARY

Administrative Judge	Administrative Law Judge
Administrative Judge Decision	*Midwest Indep. Transm. System Oper.*, 116 FERC ¶ 63,030 (2006)
American Electric Power	American Electric Power Service Corporation
Challenged Order	*Midwest Indep. Transmission System Operator, Inc.*, 131 FERC ¶ 61,173 (2010)
Challenged Rehearing Order	*Midwest Indep. Transmission System Operator, Inc.*, 136 FERC ¶ 61,244 (2011)
CMS Energy	CMS Energy Resource Management Company
Commission	Federal Energy Regulatory Commission
Constellation	Petitioner Constellation Energy Commodities Group
FERC	Federal Energy Regulatory Commission
Michigan Cities	Bay City and the five members of the "Michigan Public Power Rate Payers Association": the Cities of Chelsea, Eaton Rapids, Hart, Portland, and St. Louis
Michigan South Central	Michigan South Central Power Agency
Midwest Operator	Midwest Independent Transmission Operator, Inc.
November 17, 2003 Order	*Midwest Indep. Transm. System Oper.*, 105 FERC ¶ 61,212 (2003)

Old Dominion	Old Dominion Electric Company
PJM	PJM Interconnection, L.L.C.
Shift-to-shipper claims	Claims by load-serving entities to shift their seams elimination surcharges pursuant to paragraph 45 of the November 17, 2003 Order

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

No. 11-1451

CONSTELLATION ENERGY COMMODITIES GROUP, INC., AND CONSTELLATION NEWENERGY, INC.,
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FEDERAL ENERGY REGULATORY COMMISSION,
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ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Originally, this case involved numerous petitions raising numerous issues related to several entities' decisions to join regional transmission organizations. *See* D.C. Circuit Docket Nos. 03-1223, *et al.* Now, after numerous Federal Energy Regulatory Commission ("FERC" or "Commission") orders and settlement of virtually all claims, this case involves only one petition for review challenging two compliance orders, *Midwest Indep. Transmission System Operator, Inc.*, 131

FERC ¶ 61,173 (2010) ("Challenged Order"), JA 647, *on reh'g*, 136 FERC ¶ 61,244 (2011) ("Challenged Rehearing Order"), JA 918. The question presented on appeal is:

Whether the Commission reasonably determined that proposals to shift a certain type of surcharge liability, incurred during a 16-month locked-in period from December 1, 2004 through March 31, 2006, to Petitioner Constellation Energy Commodities Group, Inc. complied with the liability shifting mechanism the Commission previously established in a 2003 Order.

STATUTORY AND REGULATORY PROVISIONS

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

COUNTER-STATEMENT OF JURISDICTION

Two Constellation companies petition for review. One, Constellation Energy Commodities Group, has established its standing here; the other, Constellation NewEnergy, Inc., has not. All of the claims raised in petitioners' brief address Commission determinations on shift-to-shipper claims involving Constellation Energy Commodities Group. None of the claims involves Constellation NewEnergy, which, unlike Constellation Energy Commodities Group, is a load-serving entity, not a supplier against whom shift-to-shipper claims

were filed. Br. at 18-19 & n.53. *See also* D.C. Cir. Rule 28(a)(7) (standing, if not self-evident, must be established in petitioner's opening brief).

All further references in this brief to "Constellation" refer to petitioner Constellation Energy Commodities Group.

STATEMENT OF FACTS

I. DEVELOPMENT OF REGIONAL TRANSMISSION ORGANIZATIONS

A. FERC Order No. 888

"Historically, electric utilities were vertically integrated, owning generation, transmission, and distribution facilities and selling these services as a 'bundled' package to wholesale and retail customers in a limited geographical service area." *Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash. v. FERC*, 272 F.3d 607, 610 (D.C. Cir. 2001). In Order No. 888,[1] the Commission found that it was in the economic interest of these vertically-integrated utilities to deny transmission service to others altogether or offer it on terms less favorable than those offered to themselves. Order No. 888 at 31,682.

[1] *See Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Servs. by Pub. Utils.; Recovery of Stranded Costs by Pub. Utils. & Transmitting Utils.*, Order No. 888, FERC Stats. & Regs. Preambles ¶ 31,036 (1996), *clarified*, 76 FERC ¶¶ 61,009 and 61,347 (1997), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. Preambles ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd Transm. Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

To remedy these anti-competitive practices, Order No. 888 directed public utilities to adopt open access transmission tariffs that contained minimum terms for non-discriminatory service. *See Transmission Access*, 225 F.3d at 682. In addition, Order No. 888 "encouraged . . . the development of multi-utility regional transmission organizations." *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1364 (D.C. Cir. 2004). "The concern was that the segmentation of the transmission grid among different utilities, even if each had functionally unbundled transmission, contributed to inefficiencies that impeded free competition in the market for electric power. Combining the different segments and placing control of the grid in one entity -- [a Regional Transmission Organization, or RTO] -- was expected to overcome these inefficiencies and promote competition." *Id.* (citing Order No. 888 at 31,730-32).

B. FERC Order No. 2000

The electric industry changed significantly in response to Order No. 888, and the resulting increased inter-regional electricity transfers "'put new stresses on regional transmission systems -- stresses that call for regional solutions.'" *Snohomish Cnty.*, 272 F.3d at 610-11 (quoting Notice of Proposed Rulemaking, *Regional Transmission Organizations*, 64 Fed. Reg. 31,390, 31,393 (1999)). To address engineering and economic inefficiencies in the transmission grid as well as lingering opportunities for transmission owners to discriminate in their own favor,

the Commission issued Order No. 2000.[2] *Snohomish Cnty.*, 272 F.3d at 611 (citing Order No. 2000 at 31,017); *Midwest ISO*, 373 F.3d at 1364.

Because Regional Transmission Organizations are "mechanisms for providing large and stable transmission systems that would reduce regional pricing disparities and create an efficient market for new power generators," *Me. Pub. Utils. Comm'n v. FERC*, 454 F.3d 278 (D.C. Cir. 2006) (citing Order No. 2000 at 30,933 and Order No. 2000-A at 31,355), Order No. 2000 encouraged Regional Transmission Organization participation by requiring all public utilities that own, operate, or control interstate transmission facilities to make a filing either proposing to participate in a Regional Transmission Organization or explaining why they were not doing so. *See Snohomish Cnty.*, 272 F.3d at 611; *Midwest ISO*, 373 F.3d at 1365. Order No. 2000 also set out the minimum characteristics of a Regional Transmission Organization, including that it "must be of sufficient scope and configuration to permit the Regional Transmission Organization to maintain reliability, effectively perform its required functions, and support efficient and non-discriminatory power markets." 18 C.F.R. § 35.34(j)(2); *see also Snohomish Cnty.*, 272 F.3d at 611-12.

[2] *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000) (regulations codified at 18 C.F.R. § 35.34), *pets. dismissed sub nom. Snohomish Cnty.*, 272 F.3d 607.

C. Order No. 2000 Compliance Filings

Among the many filings made in compliance with Order No. 2000, two separate Regional Transmission Organizations were proposed for the Midwest: the Midwest Independent Transmission Operator, Inc. ("Midwest Operator") and the Alliance. *See Alliance Cos.*, 97 FERC ¶ 61,327 at 62,525 (2001); *Midwest Independent Transmission Operator, Inc.*, 97 FERC ¶ 61,326 at 62,500 (2001). The Commission found that the Alliance proposal lacked sufficient geographic scope to exist as a stand-alone Regional Transmission Organization, but approved the Midwest Operator's proposal because, among other things, its scope and configuration were sufficient to satisfy Order No. 2000. *Alliance Cos.*, 97 FERC ¶ 61,327 at 62,525; *Midwest Operator*, 97 FERC ¶ 61,326 at 62,500. The Commission directed the companies that had intended to join the Alliance to make filings regarding their plans to join a different Regional Transmission Organization. *Alliance Cos.*, 97 FERC ¶ 61,327 at 62,531.

Although geographically located in the Midwest Operator's region, several Alliance Companies proposed to join a different Regional Transmission Organization, PJM Interconnection, L.L.C. ("PJM").[3] *Alliance Cos.*, 100 FERC

[3] PJM operates in various mid-Atlantic states; its name derives from the states (Pennsylvania, New Jersey, and Maryland) in which it first operated. *See Ind. Util. Regul. Comm'n v. FERC*, 668 F.3d 735, 737 (D.C. Cir. 2012) (describing PJM operations).

¶ 61,137 at P 1 (2002), JA 1021, *order on reh'g*, 103 FERC ¶ 61,274 (2003); *see also* Challenged Order at P 2, JA 648. The Commission found these choices would create a highly irregular seam between the Midwest Operator and PJM that, without mitigation, would subject a large number of transactions to charges by both Regional Transmission Organizations (i.e., "rate pancaking") for transmissions that cross the Midwest Operator - PJM seam, impeding the goals of Order No. 2000. *See id.* at PP 2-3, JA 648; *see also Alliance Cos.*, 103 FERC ¶ 61,274 at PP 21-32, JA 1097-1102. Accordingly, as a condition of accepting these companies' choices to join PJM, the Commission instituted a trial-type hearing to address the rates for service between the Midwest Operator and PJM. *Alliance*, 100 FERC ¶ 61,137 at PP 49-50, JA 1034.

D. The Orders Directing Elimination Of Through And Out Rates And Development Of The Transitional Seams Elimination Surcharge

After the hearing, the Commission determined that the rates for service through or out of either the Midwest Operator or PJM to serve load (i.e., end-use customers) in the other produced rate pancaking and were, therefore, unjust and unreasonable. *Midwest Indep. Transm. System Oper.*, 104 FERC ¶ 61,105 at PP 1, 33-35, 39, JA 1121, 1134-36, 1137, *order on reh'g*, 105 FERC ¶ 61,212 at PP 8-16 (2003) ("November 17, 2003 Order"), JA 420-24, *order on reh'g*, 131 FERC ¶ 61,174 at P 83 (2010), JA 869.

To address revenue losses and potential cost shifts from eliminating the through and out rates, the Commission directed that a transitional seams elimination surcharge be developed based on the most recent historical data available at that time -- 2002 and 2003 data. November 17, 2003 Order, 103 FERC ¶ 61,212 at PP 9, 42-53, 64-67, JA 420-21, 436-41, 445-46; *Midwest Oper.*, 131 FERC ¶ 61,174 at PP 82, 84-107, JA 869, 870-81. The surcharge was to be recovered from customers in proportion to the benefits they receive from the elimination of through and out charges. November 17, 2003 Order at PP 9, 44, JA 420, 437.

Thus, the seams elimination surcharge responsibility for each zone would be based on the amount of energy in megawatt-hours that "sank" in the zone during the test period that crossed the Midwest Operator-PJM seam, multiplied by the average through and out revenues per megawatt-hour of the transmission providers involved in the transactions across the Midwest Operator-PJM seam. Challenged Order P 6, JA 651. The load in the importing Regional Transmission Organization would pay approximately the same amount in the aggregate through the seams elimination surcharge as had previously been paid under through and out rates to serve such load; the surcharges, however, would be assessed on all deliveries within the importing Regional Transmission Organization, not only on those associated with through and out transactions. Challenged Order P 5, JA 650.

The Commission recognized "that generators may benefit to some extent from the elimination of [through and out rates], and that those savings may not all be passed on to load serving entities (LSEs)." [4] November 17, 2003 Order at P 45, JA 437. To address the disproportionate impact on load-serving entities that would have to pay both through and out rates and the seams elimination surcharge, the Commission determined that it would allow load-serving entities to shift their seams elimination surcharge obligations to the supplier charging them through and out rate rates. Specifically, "as part of the compliance filing process, [the Commission would] allow [load-serving entities] under existing contracts for delivered power that continue into the transition period to demonstrate that the supplier is the shipper for such transactions and to propose that the supplier be required to pay the [seams elimination surcharge] for that portion of the [load-serving entity's] load served by the contract." *Id.* at P 45 and n.94, JA 438.

Subsequently, the Commission approved a settlement that set December 1, 2004 as the date for elimination of through and out rates, and ordered compliance filings to incorporate the seams elimination surcharge as the transitional replacement rate effective for a locked-in period from December 1, 2004 through March 31, 2006. *Midwest Indep. Transm. System Oper.*, 106 FERC ¶ 61,262 at P 1

[4] A "load-serving entity" acquires energy to sell to end-use customers or "load."

(2004); *Midwest Indep. Transm. System Oper.*, 109 FERC ¶ 61,168 at PP 55, 61 (2004); *Midwest Oper.*, 131 FERC ¶ 61,174 at P 130, JA 892.

E. The Administrative Judge's Decision On The Seams Elimination Surcharge Compliance Filings

A number of parties filed claims to shift their seams elimination surcharges ("shift-to-shipper claims") pursuant to paragraph 45 of the November 17, 2003 Order, JA 437. *See Midwest Indep. Transm. System Oper.*, 116 FERC ¶ 63,030 at P 347 (2006) ("Administrative Judge Decision"), JA 564. Most of the shift-to-shipper claims were settled. *See id.* at PP 6, 347, JA 465, 564. The remaining claims were addressed at a trial-type hearing before an Administrative Law Judge ("Administrative Judge").

1. Michigan South Central Power Agency's Shift-to-Shipper Claim

The Administrative Judge examined the contract between Constellation and Michigan South Central Power Agency ("Michigan South Central"). Because that contract was an existing bundled contract for delivered power that continued into the transition period, Michigan South Central satisfied the requirements set out in paragraph 45 of the November 17, 2003 Order to shift its seams elimination surcharge liability under its contract with Constellation. Administrative Judge Decision at PP 423-426, 428-31, JA 581, 582.

In addition, the Administrative Judge determined that Michigan South Central's claim against Constellation should be reduced by 21.8 percent because in 2005 Michigan South Central sold 57,354 megawatt-hours of power (equivalent to 21.8 percent of the quantity Michigan South Central purchased from Constellation that year) to third parties. *Id.* at P 435, JA 583. Michigan South Central explained that the power sold to third parties came from its own generating units, but the Administrative Judge concluded that Michigan South Central had not submitted evidence supporting that explanation. *Id.*

Constellation contended that seams elimination surcharges should not apply to any energy it purchased for delivery to Michigan South Central in Midwest Operator "Day 2 markets." *See* Administrative Judge Decision at PP 436-37, JA 584. The Day 2 markets, which the Midwest Operator implemented on April 1, 2005, allow the purchase of power within the Midwest Operator region with no need to cross over the PJM seam. *See id.* at PP 436-37, JA 584. The Administrative Judge agreed with Constellation that seams elimination surcharges do not apply to energy purchased in the Day 2 markets "because the transmission of power never crossed the border into PJM, and thus, the shipper never incurred a [through and out rate]." *Id.* at P 437, JA 584. The Administrative Judge found, however, that Constellation had not demonstrated that it had purchased power in the Day 2 markets and, therefore, that seams elimination surcharges applied. *Id.*

2. Michigan Cities' Shift-to-Shipper Claims

The Administrative Judge found that each of the Michigan Cities (Bay City and the five members of the "Michigan Public Power Rate Payers Association": the Cities of Chelsea, Eaton Rapids, Hart, Portland, and St. Louis) had an existing bundled contract for delivered power with Constellation that continued into the transition period. Thus, each of the Michigan Cities satisfied the requirements set out in paragraph 45 of the November 17, 2003 Order to shift its seams elimination surcharge liability to Constellation. Administrative Judge Decision at PP 440-48, JA 585-87.

The Administrative Judge rejected Constellation's claim that Bay City's contract was not with Constellation, but with CMS Energy Resource Management Company ("CMS Energy"). Administrative Judge Decision at PP 390, 451-55, JA 574, 587-88. The record established that: CMS Energy had sold its power supply agreement with Bay City to Constellation effective February 12, 2003; Bay City had adopted and delivered a resolution consenting to that assignment on November 21, 2003; Constellation, not CMS Energy, billed and received payments from Bay City for the power deliveries in question; and no evidence suggested that CMS Energy supplied power to Bay City during the transition period. *Id.* at PP 451-52, JA 587.

3. Constellation's Ripple Claim

"[A]lthough not specifically articulated by the Commission's orders," the Administrative Judge permitted the parties "to defend against a shift-to-shipper claim by asserting 'ripple claims.'" *Id.* at P 427, JA 581. In the Administrative Judge's view, "the initial shift in [seams elimination surcharge] liability by [a load-serving entity] does not foreclose the possibility of a subsequent 'ripple' shift to an upstream supplier shown to be the actual beneficiary of the Commission's elimination of [through and out rates]." *Id.* at PP 427, 433, JA 581, 583; *see also id.* at P 460, JA 589. Thus, the Administrative Judge determined that a shipper to whom a load-serving entity's seams elimination surcharge obligation was shifted could file a ripple claim to shift its obligation further upstream. *Id.* at PP 427, 433, JA 581, 583.

Constellation argued at the hearing that Michigan South Central and the Michigan Cities should shift a portion of their seams elimination surcharge obligations to American Electric Power Service Corporation ("American Electric Power") rather than to Constellation. *See* Administrative Judge Decision at PP 383-86, 388-89, 392-95, 398-400, 403, JA 572-76. Constellation contracted with American Electric Power to provide two 50 megawatt-hour blocks of power, which Constellation then used to serve its contracts with Michigan South Central and the Michigan Cities. *See id.* at PP 398, 456-57, JA 575, 588-89. Constellation

contended that American Electric Power transmitted that power across the PJM seam into the Midwest Operator's region and, therefore, that American Electric Power, rather than Constellation, was the shipper that benefited from elimination of through and out rates regarding that power. *See id.* American Electric Power countered that the November 17, 2003 Order did not provide for ripple claims, and that Constellation's failure to seek rehearing of that order to contest its meaning precluded Constellation from making that claim in the compliance proceeding. *See id.* at P 417, JA 579.

The Administrative Judge found that American Electric Power, rather than Constellation, benefited from the elimination of through and out rates and, therefore, that "a general sense of fairness requires that the [seams elimination surcharge] ultimately rest with [American Electric Power] via a 'ripple' claim brought by [Constellation]. *Id.* at P 460, JA 589. "While true that the Commission's orders do not explicitly reference the concept of ripple claims, such claims have been deemed fair throughout the course of the hearing." *Id.*

The Administrative Judge acknowledged that the Commission's orders allowed only load-serving entities to file shift-to-shipper claims and that Constellation was not a load-serving entity. *Id.* at P 462, JA 590. Nonetheless, the Administrative Judge found that Constellation could shift its seams elimination surcharge liability to American Electric Power because it was not making a shift-

to-shipper claim against American Electric Power, but rather, defending itself against Michigan South Central and the Michigan Cities' claims. *Id.* at PP 462, 465-66, JA 590-91.

II. THE CHALLENGED ORDERS

The orders on review addressed challenges to the Administrative Judge's shift-to-shipper claim determinations, as well as to other seams elimination surcharge issues that are not before the Court.

A. Shift-to-Shipper Claims Against Constellation

The Commission determined that Michigan South Central's shift-to-shipper claim should not be reduced by 21.8 percent to address Michigan South Central's 2005 sales of power to third parties. Challenged Order at P 378, JA 792. The record showed that Michigan South Central's load exceeded its purchases from Constellation during 2005, and that Michigan South Central increased the output of its own plants in 2005 compared to 2002 by more than the 57,354 megawatt-hours of power Michigan South Central sold to third parties that year. *Id.* Thus, the Commission concluded that the Michigan South Central's third-party sales did not indicate that it did not need the energy it purchased from Constellation to serve its load. *Id.*

The Commission also found no merit in Constellation's assertion that the shift-to-shipper claims should be reduced because Constellation made some of its

2005 energy purchases in the Midwest Operator's Day 2 market rather than from PJM sources. Challenged Order at P 379, JA 792; Challenged Rehearing Order at P 171, JA 994. The contracts at issue were long-term, fixed price, fixed quantity contracts between the load-serving entities and Constellation that presumed a regional through and out rate would be assessed. Challenged Order at n.466, P 379, JA 791, 792; Challenged Rehearing Order at P 171, JA 994. Thus, the load-serving entities' purchases from Constellation under those contracts were at locked-in prices that were unaffected by any energy market changes. Challenged Order at P 379, JA 792; Challenged Rehearing Order at P 171, JA 994.

Furthermore, the Commission determined that Constellation's attempt to insert a benefits showing into the shift-to-shipper mechanism was an improper collateral attack on the November 17, 2003 Order, which established that mechanism. Challenged Rehearing Order at P 171, JA 994. In any event, the Commission determined, even if the shift-to-shipper mechanism included a benefits test, it was satisfied here. *Id.* As the Administrative Judge found, regardless of where Constellation obtained the power used to serve these load-serving entities, the contract price Constellation charged them included the through and out rates that were in place when the contracts were formed. *Id.*; Administrative Judge Decision at P 432, JA 583.

The Commission also affirmed the Administrative Judge's finding that Bay City had a contractual relationship with Constellation. Challenged Rehearing Order at P 183, JA 999; *see also* Administrative Judge Decision at PP 390, 451-55, JA 574, 587-88. Accordingly, the Commission determined that Bay City appropriately shifted its seams elimination surcharge liability to Constellation. Challenged Rehearing Order at P 183, JA 999.

B. Constellation's Ripple Claims Against American Electric Power

Under the shift-to-shipper mechanism, a load-serving entity may shift its seams elimination surcharge liability to the entity with which it has an existing contract for delivered power. Challenged Order at PP 375, 393, JA 570, 574. Accordingly, the Commission determined that Constellation, which is not a load-serving entity, could not invoke the shift-to-shipper mechanism either in the first instance or as a defense to further shift its seams elimination surcharge liability to American Electric Power. *Id.* at P 393, JA 574; *see also id.* at P 375, JA 570 (the shift-to-shipper mechanism expressly requires that a load-serving entity have an existing contract for delivered power with the supplier targeted for a shift-to-shipper claim).

Furthermore, the Commission found that the Administrative Judge's attempt to support the notion of ripple claims using a benefits test had no basis. Challenged Order at P 393, JA 574. In fact, as the Administrative Judge Decision

correctly recognized, a load-serving entity need not satisfy a benefits test (i.e., show that the supplier to whom it seeks to shift its seams elimination surcharge liability benefited from elimination of through and out rates) to support a shift-to-shipper claim. *Id.* at PP 376, 385, 393, JA 570, 573, 574.

Constellation argued on rehearing that it is similarly situated to load-serving entities because its contract with American Electric Power prevented it from being able to choose a new supplier that may be more economical due to the elimination of rate pancaking. *See* Challenged Rehearing Order at P 174, JA 995. Neither Constellation nor any other party, however, sought rehearing of the November 17, 2003 Order (or the other orders adopting the seams elimination surcharge mechanism) to expand the shift-to-shipper mechanism set out in paragraph 45 to include ripple claims. *Id.* at P 175, JA 996. Thus, the Commission determined that this argument was an untimely request for rehearing of, and improper collateral attack on, those orders. *Id.*

SUMMARY OF ARGUMENT

The Commission reasonably determined that Michigan South Central's and the Michigan Cities' proposals to shift their seams elimination surcharge liability -- incurred during a 16-month locked-in period from December 1, 2004 through March 31, 2006 -- to Constellation complied with the shift-to-shipper mechanism the Commission established in paragraph 45 of the November 17, 2003 Order.

Constellation's arguments to reduce or avoid these shift-to-shipper claims fail.

First, Constellation's attempt to insert a benefits test into the shift-to-shipper mechanism in this compliance proceeding is too late. The November 17, 2003 Order set out the specific requirements necessary to establish a shift-to-shipper claim; those requirements do not include a benefits showing. Constellation should have raised its argument that cost causation requires that the shift-to-shipper mechanism also include a benefits showing in a petition for rehearing of the November 17, 2003 Order. Accordingly, the Commission appropriately rejected Constellation's belated attempt to insert a benefits test into the shift-to-shipper mechanism as an improper collateral attack on the November 17, 2003 Order.

In any event, as the Commission found, a benefits test was satisfied here. Regardless of where Constellation obtained the power with which it served Michigan South Central and Michigan Cities after through and out rates were eliminated, Constellation continued to collect through and out rates under their fixed-price bundled contracts for that service.

Constellation also raised too late its contention that it was unduly discriminatory or preferential not to allow ripple claims under the shift-to-shipper mechanism. The November 17, 2003 Order's shift-to-shipper mechanism provided only for the shifting of seams elimination surcharge liability by a load-serving entity to the entity with which the load-serving entity has a contractual

relationship. The Commission reasonably determined, therefore, that Constellation's attempt in this compliance proceeding to expand the shift-to-shipper mechanism to provide for the further shifting of seams elimination surcharge liability to a non-load-serving entity's upstream shipper was an improper collateral attack on the November 17, 2003 Order.

The Commission reasonably found no merit in Constellation's argument that Michigan South Central's shift-to-shipper claim should be reduced because of its third-party sales in 2005. The record established that Michigan South Central's load exceeded its purchases from Constellation in 2005 and that Michigan South Central increased the output of its own plants in 2005 compared to that in 2002 by more than the amount of power it sold to third parties in 2005. Thus, the Commission rejected the notion that Michigan South Central did not need all the power it purchased from Constellation in 2005 to serve its load.

Moreover, Michigan South Central's circumstances were not like those involving Old Dominion Electric Company ("Old Dominion"). Old Dominion replaced power previously supplied under an expired contract with power from its own plant. Unlike Dominion, Michigan South Central's power contract continued into the transition period, and there was no substantial difference in the amount of power Michigan South Central purchased under that contract in 2005 and the 2002-2003 test period.

The Commission also reasonably determined that Michigan South Central and Michigan Cities' shift-to-shipper claims should not be reduced because of Constellation's Day 2 market purchases, i.e., purchases of power within the Midwest Operator region with no need to cross over the PJM seam. Regardless of where Constellation obtained the power it provided to those load-serving entities after the Day 2 markets opened, Constellation still collected through and out rates under their long-term, fixed price, fixed quantity contracts.

Finally, the Commission appropriately affirmed the Administrative Judge's determination that Constellation, not CMS Energy, had a contractual relationship with Bay City. The record established that: CMS Energy had sold its contract with Bay City to Constellation; Bay City had adopted and delivered a resolution consenting to that assignment; Constellation had billed and retained payment from Bay City for its power deliveries under the contract; and CMS Energy had made no deliveries under the contract.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard, and upholds the Commission's factual findings if supported by substantial evidence. *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 528 (D.C. Cir. 2010). The Commission'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 Commission's decisions regarding rate issues are entitled to particular deference because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *see also Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008) ("The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions."). In addition, the Court gives substantial deference to FERC's interpretation of its own orders. *E.g.*, *Ind. Util. Regulatory Comm'n*, 668 F.3d at 740.

II. THE COMMISSION'S DETERMINATIONS REGARDING THE SHIFT-TO-SHIPPER COMPLIANCE FILINGS WERE REASONABLE

Paragraph 45 of the Commission's November 17, 2003 Order, JA 437, permitted load-serving entities to submit filings to shift their seams elimination surcharge obligations to the supplier charging them through and out rates. Specifically, the Commission provided that, "as part of the compliance filing process, we will allow LSEs [i.e., load-serving entities] under existing contracts for delivered power that continue into the transition period to demonstrate that the

supplier is the shipper for such transactions and to propose that the supplier be required to pay the [seams elimination surcharge] for that portion of the LSE's load served by the contract." "Therefore, we will allow such load-serving entities with existing transmission arrangements that continue into the transition period to demonstrate to the Commission the extent of disproportionate impact of paying both the [through and out rate] and the [seams elimination surcharge] and propose an adjustment to its [seams elimination surcharge] obligation proportional to the [through and out rate] charges it will continue to incur under the existing transmission arrangements." November 17, 2003 Order at P 45 & n.94, JA 438.

In compliance, Michigan South Central and the Michigan Cities filed shift-to-shipper claims against Constellation. Constellation does not dispute that the shift-to-shipper claims by these load-serving entities involved existing bundled contracts for delivered power that continued into the seams elimination surcharge transition period. Nonetheless, Constellation raises various assertions to reduce or avoid these shift-to-shipper claims. Br. at 20-51. The Commission appropriately considered and rejected Constellation's assertions on the merits or as impermissible collateral attacks on the November 17, 2003 Order.

A. The Shift-To-Shipper Mechanism Does Not Include A Benefits Test But, Even If It Did, It Was Satisfied Here

1. Constellation's Attempt To Insert A Benefits Test Into The Shift-To-Shipper Mechanism Is An Impermissible Collateral Attack On The November 17, 2003 Order

Constellation contends that cost causation principles require that, to invoke the shift-to-shipper mechanism, a load-serving entity must show that the supplier to whom it proposes to shift a seams elimination surcharge benefitted from the elimination of through and out rates. Br. at 20-28. As the Commission found, however, Constellation should have raised this claim in a request for rehearing of the order establishing that mechanism -- the November 17, 2003 Order -- not years later in the compliance proceeding implementing it. Challenged Rehearing Order at P 171, JA 994; *see Pacific Gas and Elec. Co. v. FERC*, 533 F.3d 820, 825 (D.C. Cir. 2008) (petitioner cannot wait until later compliance proceeding to raise concerns about non-conditional FERC orders) (citing *Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 398 (D.C. Cir. 2008)).

Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), grants the Court jurisdiction to review FERC orders only if a petition for review of those orders is filed within 60 days of issuance of the order on rehearing. *Pacific Gas and Elec. Co.*, 533 F.3d at 824-25; *Sacramento Mun. Util. Dist. v. FERC*, 428 F.3d 294, 298-99 (D.C. Cir. 2005). The 60-day clock starts running when "'the agency has decided a question in a manner that reasonably puts aggrieved parties on notice

of the rule's content.'" *Dynegy Midwest Gener., Inc. v. FERC*, 633 F.3d 1122, 1126 (D.C. Cir. 2011) (quoting *Southern Co. Servs., Inc. v. FERC*, 416 F.3d 39, 44-45 (D.C. Cir. 2005)); *see also* Br. at 37 (same). Moreover, "[a]s the Supreme Court has recognized, if the challenged order 'revised' the prior order, then it can be reviewed; if it is a mere 'clarification,' then it cannot." *Southern*, 416 F.3d at 44 (citing *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 286 (1987)).

The November 17, 2003 Order set out specific, limited requirements for a shift-to-shipper claim. It must: (1) be filed by a load-serving entity during the compliance process; (2) involve an existing contract for delivered power that continues into the transition period; (3) demonstrate that the supplier is the shipper for such transactions; and (4) propose that the supplier be required to pay the seams elimination surcharge for that portion of the load-serving entity's load served by the contract. November 17, 2003 Order at P 45, JA 438. As the Commission and Administrative Judge found, those requirements did not include a benefits test. Challenged Rehearing Order at P 171, JA 994; Challenged Order at P 376, JA 791; Administrative Judge Decision at P 447, JA 586 ("The Commission's November 17, 2003 Order did not reference a benefits test as part of the requirements for a successful shift-to-shipper claim;" Constellation's "reliance on this 'phantom' element is essentially an attempt to shift the burdens of proof").

Contrary to Constellation's claim, Br. at 38, therefore, a reasonable entity in Constellation's position (i.e., a supplier with existing contracts with load-serving entities for delivered power that continued into the transition period) would have perceived a substantial risk that the load-serving entities it supplied would be able to shift their seams elimination surcharges without having to establish an additional, unlisted benefits requirement. Despite this, and the fact that numerous parties sought rehearing of the November 17, 2003 Order (*see Midwest ISO*, 131 FERC ¶ 61,174 at Appendix, JA 914), Constellation did not seek rehearing or clarification of the November 17, 2003 Order, or of the other orders adopting the seams elimination surcharge mechanism, to add that requirement. *See* Challenged Rehearing Order at P 175, JA 996.

Accordingly, the Commission appropriately rejected Constellation's belated attempt in this compliance proceeding to insert a benefits test into the shift-to-shipper mechanism as an impermissible collateral attack on the November 17, 2003 Order. Challenged Rehearing Order at P 171, JA 994. *See also City of Cleveland, Ohio v. FERC*, 773 F.2d 1368, 1374 (D.C. Cir. 1985) (the issue presented by a compliance filing is whether it accords with the directions of the underlying Commission order).

2. A Benefits Test Was Satisfied Here

In any event, the Commission and Administrative Judge reasonably found that a benefits test was satisfied here. Challenged Rehearing Order at P 171, JA 994; Administrative Judge Decision at P 448, JA 587. Even after the Commission eliminated through and out rates in the Midwest Operator and PJM regions, the fixed-price bundled contracts under which Constellation served Michigan South Central and the Michigan Cities continued to include through and out rate charges. Challenged Rehearing Order at P 171, JA 994; Administrative Judge Decision at P 448, JA 587; *see also* Br. at 22 (same).

Thus, regardless of where Constellation obtained the power it provided to Michigan South Central and the Michigan Cities after through and out rates were eliminated (*see* Br. at 25), Constellation continued to collect through and out rates for that service. Challenged Rehearing Order at P 171, JA 994; Administrative Judge Decision at P 448, JA 587. Accordingly, Constellation benefitted from the elimination of through and out rates for shift-to-shipper claim purposes. Challenged Rehearing Order at P 171, JA 994; Administrative Judge Decision at P 448, JA 587.

B. The Shift-To-Shipper Mechanism Does Not Provide For "Ripple" Claims

Next, Constellation argues that it should have been allowed, under the shift-to-shipper mechanism, to further shift a portion of the seams elimination

surcharges shifted to it to American Electric Power. Br. at 28-35. The Commission reasonably found otherwise. Challenged Order at PP 375, 393, JA 791, 796.

The Commission's shift-to-shipper mechanism "restricted shift-to-shipper claims to load-serving entities," Br. at 29, and Constellation is not a load-serving entity. Challenged Order at P 393, JA 796. Thus, as Constellation acknowledges, Br. at 29, it could not directly assert a shift-to-shipper claim against American Electric Power. *Id.* at PP 375, 393, JA 791, 796; Challenged Rehearing Order at P 175, JA 996; Administrative Judge Decision at P 459, JA 589.

Nor did the shift-to-shipper mechanism provide for "ripple claims," i.e., the further shifting of a shipper's seams elimination surcharge liability to its own upstream shipper in defense of a load-serving entity's shift-to-shipper claim. Challenged Order at PP 375, 393, JA 791, 796; Challenged Rehearing Order at P 175, JA 996. As the Commission explained, the shift-to-shipper mechanism allowed seams elimination surcharge liability to be shifted only by load-serving entities and only to entities with a contractual relationship with the load-serving entity. Challenged Order at PP 375, 393, JA 791, 796; Challenged Rehearing Order at P 175, JA 996. Thus, whether Constellation had its own supplier upon whom it relied to meet its obligation to serve the load-serving entity and whether that supplier transmitted the power Constellation used to serve the load-serving

entity across the Midwest Operator/PJM seam, Br. at 29-30, are irrelevant under the shift-to-shipper mechanism. Challenged Order at P 375, JA 791.

Constellation argues that it was unduly discriminatory or preferential not to allow ripple claims. Br. at 32-35. But, as the Commission found, Constellation should have raised that argument on rehearing of the November 17, 2003 Order establishing the shift-to-shipper mechanism, not years later in the compliance proceeding. Challenged Rehearing Order at P 175, JA 996.

A reasonable entity in Constellation's position -- i.e., a non-load-serving entity supplier with contracts with load-serving entities for delivered power that continued into the transition period -- would have perceived a substantial risk that the shift-to-shipper mechanism did not provide for the further shifting of seams elimination surcharge liability to an upstream shipper. Nonetheless, as the Commission (and American Electric Power) pointed out, Constellation failed to seek rehearing of the November 17, 2003 Order to expand the shift-to-shipper mechanism to include ripple claims. Challenged Order P 387, JA 795; Challenged Rehearing Order at P 175, JA 996. Accordingly, the Commission reasonably determined that Constellation's undue discrimination or preferential treatment claim, raised during the compliance proceeding to expand the shift-to-shipper mechanism to include ripple claims, constituted an untimely request for rehearing

of, and improper collateral attack on, the November 17, 2003 Order establishing that mechanism. *Id.*

Constellation points to the Administrative Judge's statement that allowing ripple claims would be "consistent with the Commission's underlying intent when drafting Paragraph 45: that the beneficiary of elimination of [through and out rates] is the appropriate party to pay the transitional [seams elimination surcharge]." Br. 38-39 & n.113 (quoting Administrative Judge Decision at P 460, JA 589). As the Administrative Judge acknowledged, however, the Commission's shift-to-shipper mechanism neither explicitly referenced the concept of ripple claims nor included a benefits test. Administrative Judge Decision at PP 447, 460, JA 586, 589; *see also id.* at P 447, JA 586 (finding that Constellation's attempt to rely on a "benefits test" was an attempt to rely on a "'phantom' element" of the Commission's shift-to-shipper mechanism); Challenged Order at PP 376, 393, JA 791, 796 (the shift-to-shipper mechanism does not include a benefits test); Challenged Rehearing Order at P 171, JA 994 (same). Thus, the Commission reasonably rejected the Administrative Judge's reliance on a nonexistent benefits test to support ripple claims under the shift-to-shipper mechanism. Challenged Order at P 393, JA 796 (noting that the Administrative Judge Decision correctly recognized that a load-serving entity is not required to satisfy a benefits test in

bringing a shift-to-shipper claim, yet improperly and inconsistently relied upon a benefits test in allowing ripple claims).

C. The Commission Reasonably Determined That Michigan South Central's Shift-To-Shipper Claim Should Not Be Reduced Because Of Third-Party Sales

Constellation contends that Michigan South Central's shift-to-shipper claim should be reduced by 21.8 percent because Michigan South Central sold 57,354 megawatt-hours of power (equivalent to 28.1 percent of the quantity of power Michigan South Central purchased from Constellation) to third parties in 2005. Br. at 43-47. The Commission reasonably found otherwise.

As the Commission explained, seams elimination surcharge obligations are calculated based on test period data and reduced from that level only if the load served during the transition period was lower than that in the test period. Challenged Order at PP 34-35, 324-26, JA 661, 772-73. That circumstance did not apply here. Rather, the record established that Michigan South Central's load exceeded its purchases from Constellation during the transition period, and that Michigan South Central increased the output of its own plants in 2005 compared to that in 2002 by more than the 57,354 megawatt-hours of power it sold to third parties. Challenged Order at PP 378-79, JA 792. The Commission concluded, therefore, that Michigan South Central's third party sales did not indicate that it did not need the energy it purchased from Constellation to serve its load, and its shift-

to-shipper claim should not be reduced because of those sales. *Id.* at P 378, JA 792. This fact-based, record-based determination is entitled to judicial respect. *See Florida Mun. Power Agency v. FERC*, 602 F.3d 454, 461 (D.C. Cir. 2010) (relevant inquiry under substantial evidence standard is whether record supports the agency's conclusions, not whether it supports petitioner's desired outcome).

Constellation further argues that, since the Commission reduced the seams elimination surcharge obligation of Old Dominion, it should have reduced Michigan South Central's shift-to-shipper claim. Br. 46-47. The Commission found, however, that Michigan South Central and Old Dominion were not similarly situated. Challenged Rehearing Order at P 172, JA 995.

The Commission reduced Old Dominion's seams elimination surcharge obligation to exclude power related to a 490-megawatt contract that expired on May 31, 2003, before the transition replacement rate went into effect on December 1, 2004. *Id.*; *see also* Challenged Order at P 323, JA 771. Old Dominion replaced the power it had been receiving under that expired contract with power from a new 500-megawatt combustion turbine plant it built within the Midwest Operator's region. Challenged Rehearing Order at P 172, JA 995. By contrast, Michigan South Central's long-term, fixed price, fixed quantity contract with Constellation continued into the transition period, and the record revealed no substantial difference in the amount of power Michigan South Central purchased under that

contract from Constellation since the 2002-2003 test period. Challenged Rehearing Order at P 172, JA 995.

D. The Commission Reasonably Determined That Shift-To-Shipper Claims Should Not Be Reduced Because Of Day 2 Market Purchases

Constellation argues that the shift-to-shipper claims should not include any power Constellation purchased from the Midwest Operator's Day 2 markets once those markets opened in April 2005. Br. 39-43; *see also supra* p. 11 (explaining Day 2 market). Since Constellation's contracts with the load-serving entities were long-term, fixed price, fixed quantity contracts, however, the Commission found that, for shift-to-shipper purposes, they were unaffected by any market changes. Challenged Order at P 379 & n.466, JA 791-92. Regardless of where Constellation obtained the power it provided to Michigan South Central and the Michigan Cities after the Day 2 markets opened, Constellation continued to collect through and out rates under those contracts and, therefore, remained subject to seams elimination surcharge liability for that service. Challenged Rehearing Order at P 171, JA 994; Challenged Order at P 379 & n.466, JA 791-92.

E. The Commission Appropriately Affirmed the Administrative Judge's Determination That Constellation Had A Contractual Relationship With Bay City

Finally, Constellation contends that the Commission erred in affirming the Administrative Judge's determination that Bay City could shift its seams

elimination surcharge liability to Constellation. Br. at 47-51. Constellation argues that Bay City did not execute and deliver a consent of assignment of its contract with CMS Energy and, therefore, that CMS Energy remained the contractual party. Br. at 50 & n.150. Based on the record evidence, however, the Administrative Judge found, and the Commission affirmed, that Constellation had a contractual relationship with Bay City for shift-to-shipper purposes. Administrative Judge Decision at PP 451-54, JA 587-88; Challenged Rehearing Order at P 183, JA 999; Challenged Order at P 402, JA 799.

CMS Energy sold its "wholesale electricity to load-serving entity" business, including its power supply agreement with Bay City, to Constellation effective February 12, 2003. Administrative Judge Decision at P 451, JA 587 (citing R. 3206, Exh. CMS-4 at 4:9-13, JA 1561; R. 3443, Exh. MTDU-50 at 15, 25, JA 1582, 1589). Bay City adopted a resolution consenting to the assignment of its contract with CMS Energy to Constellation on November 17, 2003, and provided a certified copy of that resolution to CMS Energy in a letter dated December 3, 2003. *Id.* at P 452, JA 587-88 (citing R. 3209, Exh. CMS-7, JA 1568-69; R. 3443, Exh. MTDU-50 at 25, JA 1589; R. 3451, Exh. MTDU-58, JA 1619-38).

In addition, Constellation, not CMS Energy, billed Bay City for Constellation's power deliveries under the contract during the transition period; Constellation did not remit any of those payments to CMS Energy. *Id.* (citing

R. 2117, Tr. at 1812:15-18, 1813:2-9, JA 1512-13; R. 2127, Tr. at 1896:17-1897:1, 1898:17-20, JA 1527, 1529; R. 3206, Exh. CMS-4 at 9:23-10:1, JA 1564-65). Furthermore, no evidence indicated that CMS Energy supplied any power to Bay City during the transition period. *Id.*

In these circumstances, the Commission reasonably agreed with the Administrative Judge that an executed and delivered consent of assignment was a mere formality, and that Constellation was the contractual counterparty responsible for Bay City's seams elimination surcharge. Administrative Judge Decision at PP 451-54, JA 587-88; Challenged Rehearing Order at P 183, JA 999; Challenged Order at P 402, JA 799. This finding, resting on substantial record evidence, should not be disturbed.

CONCLUSION

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

Respectfully submitted,

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December 3, 2014

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief contains 7,528 words, not including the tables of contents and authorities, the glossary, the certificate of counsel and this certificate.

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December 3, 2014

ADDENDUM

STATUTES AND REGULATIONS

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STATUTES: **PAGE**

Federal Power Act

Section 313(b), 16 U.S.C. § 825*l*(b) A-1

REGULATIONS:

18 C.F.R. § 35.34(j)(2) A-5

vertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

(June 10, 1920, ch. 285, pt. III, § 312, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859.)

CODIFICATION

''Sections 1535 and 1536 of title 31'' substituted in text for ''sections 601 and 602 of the Act of June 30, 1932 (47 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

(2) Activity of the Fund during the period, including amounts received from the utility, a summary amount for purchases of fund investments and a summary amount for sales of fund investments, gains and losses from investment activity, disbursements from the Fund for decommissioning activity and payment of Fund expenses, including taxes; and

(3) Fund assets and liabilities at the end of the period. The report should not include the liability for decommissioning.

(4) Public utilities owning nuclear plants must maintain records of individual purchase and sales transactions until after decommissioning has been completed and any excess jurisdictional amounts have been returned to ratepayers in a manner that the Commission determines. The public utility need not include these records in the financial report that it furnishes to the Commission by March 31 of each year.

(e) The utility must also mail a copy of the financial report provided to the Commission pursuant to paragraph (d) of this section to anyone who requests it.

(f) If an independent public accountant has expressed an opinion on the report or on any portion of the report, then that opinion must accompany the report.

[Order 580–A, 62 FR 33348, June 19, 1997, as amended at 69 FR 18803, Apr. 9, 2004; Order 658, 70 FR 34343, June 14, 2005; Order 737, 75 FR 43404, July 26, 2010]

Subpart F—Procedures and Requirements Regarding Regional Transmission Organizations

§ 35.34 Regional Transmission Organizations.

(a) *Purpose.* This section establishes required characteristics and functions for Regional Transmission Organizations for the purpose of promoting efficiency and reliability in the operation and planning of the electric transmission grid and ensuring non-discrimination in the provision of electric transmission services. This section further directs each public utility that owns, operates, or controls facilities used for the transmission of electric energy in interstate commerce to make certain filings with respect to forming and participating in a Regional Transmission Organization.

(b) *Definitions.* (1) *Regional Transmission Organization* means an entity that satisfies the minimum characteristics set forth in paragraph (j) of this section, performs the functions set forth in paragraph (k) of this section, and accommodates the open architecture condition set forth in paragraph (l) of this section.

(2) *Market participant* means:

(i) Any entity that, either directly or through an affiliate, sells or brokers electric energy, or provides ancillary services to the Regional Transmission Organization, unless the Commission finds that the entity does not have economic or commercial interests that would be significantly affected by the Regional Transmission Organization's actions or decisions; and

(ii) Any other entity that the Commission finds has economic or commercial interests that would be significantly affected by the Regional Transmission Organization's actions or decisions.

(3) *Affiliate* means the definition given in section 2(a)(11) of the Public Utility Holding Company Act (15 U.S.C. 79b(a)(11)).

(4) *Class of market participants* means two or more market participants with common economic or commercial interests.

(c) *General rule.* Except for those public utilities subject to the requirements of paragraph (h) of this section, every public utility that owns, operates or controls facilities used for the transmission of electric energy in interstate commerce as of March 6, 2000 must file with the Commission, no later than October 15, 2000, one of the following:

(1) A proposal to participate in a Regional Transmission Organization consisting of one of the types of submittals set forth in paragraph (d) of this section; or

(2) An alternative filing consistent with paragraph (g) of this section.

(d) *Proposal to participate in a Regional Transmission Organization.* For purposes

of this section, a proposal to participate in a Regional Transmission Organization means:

(1) Such filings, made individually or jointly with other entities, pursuant to sections 203, 205 and 206 of the Federal Power Act (16 U.S.C. 824b, 824d, and 824e), as are necessary to create a new Regional Transmission Organization;

(2) Such filings, made individually or jointly with other entities, pursuant to sections 203, 205 and 206 of the Federal Power Act (16 U.S.C. 824b, 824d, and 824e), as are necessary to join a Regional Transmission Organization approved by the Commission on or before the date of the filing; or

(3) A petition for declaratory order, filed individually or jointly with other entities, asking whether a proposed transmission entity would qualify as a Regional Transmission Organization and containing at least the following:

(i) A detailed description of the proposed transmission entity, including a description of the organizational and operational structure and the intended participants;

(ii) A discussion of how the transmission entity would satisfy each of the characteristics and functions of a Regional Transmission Organization specified in paragraphs (j), (k) and (l) of this section;

(iii) A detailed description of the Federal Power Act section 205 rates that will be filed for the Regional Transmission Organization; and

(iv) A commitment to make filings pursuant to sections 203, 205 and 206 of the Federal Power Act (16 U.S.C. 824b, 824d, and 824e), as necessary, promptly after the Commission issues an order in response to the petition.

(4) Any proposal filed under this paragraph (d) must include an explanation of efforts made to include public power entities and electric power cooperatives in the proposed Regional Transmission Organization.

(e) [Reserved]

(f) *Transfer of operational control.* Any public utility's proposal to participate in a Regional Transmission Organization filed pursuant to paragraph (c)(1) of this section must propose that operational control of that public utility's transmission facilities will be transferred to the Regional Transmission Organization on a schedule that will allow the Regional Transmission Organization to commence operating the facilities no later than December 15, 2001.

NOTE TO PARAGRAPH (f): The requirement in paragraph (f) of this section may be satisfied by proposing to transfer to the Regional Transmission Organization ownership of the facilities in addition to operational control.

(g) *Alternative filing.* Any filing made pursuant to paragraph (c)(2) of this section must contain:

(1) A description of any efforts made by that public utility to participate in a Regional Transmission Organization;

(2) A detailed explanation of the economic, operational, commercial, regulatory, or other reasons the public utility has not made a filing to participate in a Regional Transmission Organization, including identification of any existing obstacles to participation in a Regional Transmission Organization; and

(3) The specific plans, if any, the public utility has for further work toward participation in a Regional Transmission Organization, a proposed timetable for such activity, an explanation of efforts made to include public power entities in the proposed Regional Transmission Organization, and any factors (including any law, rule or regulation) that may affect the public utility's ability or decision to participate in a Regional Transmission Organization.

(h) *Public utilities participating in approved transmission entities.* Every public utility that owns, operates or controls facilities used for the transmission of electric energy in interstate commerce as of March 6, 2000, and that has filed with the Commission on or before March 6, 2000 to transfer operational control of its facilities to a transmission entity that has been approved or conditionally approved by the Commission on or before March 6, 2000 as being in conformance with the eleven ISO principles set forth in Order No. 888, FERC Statutes and Regulations, Regulations Preamble January 1991–June 1996 ¶31,036 (Final Rule on Open Access and Stranded Costs; see 61 FR 21540, May 10, 1996), must, individually or jointly with other entities, file with the Commission, no later than January 15, 2001:

(1) A statement that it is participating in a transmission entity that has been so approved;

(2) A detailed explanation of the extent to which the transmission entity in which it participates has the characteristics and performs the functions of a Regional Transmission Organization specified in paragraphs (j) and (k) of this section and accommodates the open architecture conditions in paragraph (l) of this section; and

(3) To the extent the transmission entity in which the public utility participates does not meet all the requirements of a Regional Transmission Organization specified in paragraphs (j), (k), and (l) of this section,

(i) A proposal to participate in a Regional Transmission Organization that meets such requirements in accordance with paragraph (d) of this section,

(ii) A proposal to modify the existing transmission entity so that it conforms to the requirements of a Regional Transmission Organization, or

(iii) A filing containing the information specified in paragraph (g) of this section addressing any efforts, obstacles, and plans with respect to conformance with those requirements.

(i) *Entities that become public utilities with transmission facilities.* An entity that is not a public utility that owns, operates or controls facilities used for the transmission of electric energy in interstate commerce as of March 6, 2000, but later becomes such a public utility, must file a proposal to participate in a Regional Transmission Organization in accordance with paragraph (d) of this section, or an alternative filing in accordance with paragraph (g) of this section, by October 15, 2000 or 60 days prior to the date on which the public utility engages in any transmission of electric energy in interstate commerce, whichever comes later. If a proposal to participate in accordance with paragraph (d) of this section is filed, it must propose that operational control of the applicant's transmission system will be transferred to the Regional Transmission Organization within six months of filing the proposal.

(j) *Required characteristics for a Regional Transmission Organization.* A Regional Transmission Organization must satisfy the following characteristics when it commences operation:

(1) *Independence.* The Regional Transmission Organization must be independent of any market participant. The Regional Transmission Organization must include, as part of its demonstration of independence, a demonstration that it meets the following:

(i) The Regional Transmission Organization, its employees, and any nonstakeholder directors must not have financial interests in any market participant.

(ii) The Regional Transmission Organization must have a decision making process that is independent of control by any market participant or class of participants.

(iii) The Regional Transmission Organization must have exclusive and independent authority under section 205 of the Federal Power Act (16 U.S.C. 824d), to propose rates, terms and conditions of transmission service provided over the facilities it operates.

NOTE TO PARAGRAPH (j)(1)(iii): Transmission owners retain authority under section 205 of the Federal Power Act (16 U.S.C. 824d) to seek recovery from the Regional Transmission Organization of the revenue requirements associated with the transmission facilities that they own.

(iv)(A) The Regional Transmission Organization must provide:

(*1*) With respect to any Regional Transmission Organization in which market participants have an ownership interest, a compliance audit of the independence of the Regional Transmission Organization's decision making process under paragraph (j)(1)(ii) of this section, to be performed two years after approval of the Regional Transmission Organization, and every three years thereafter, unless otherwise provided by the Commission.

(*2*) With respect to any Regional Transmission Organization in which market participants have a role in the Regional Transmission Organization's decision making process but do not have an ownership interest, a compliance audit of the independence of the Regional Transmission Organization's decision making process under paragraph (j)(1)(ii) of this section, to be performed two years after its approval as a Regional Transmission Organization.

(B) The compliance audits under paragraph (j)(1)(iv)(A) of this section must be performed by auditors who are not affiliated with the Regional Transmission Organization or transmission facility owners that are members of the Regional Transmission Organization.

(2) *Scope and regional configuration.* The Regional Transmission Organization must serve an appropriate region. The region must be of sufficient scope and configuration to permit the Regional Transmission Organization to maintain reliability, effectively perform its required functions, and support efficient and non-discriminatory power markets.

(3) *Operational authority.* The Regional Transmission Organization must have operational authority for all transmission facilities under its control. The Regional Transmission Organization must include, as part of its demonstration of operational authority, a demonstration that it meets the following:

(i) If any operational functions are delegated to, or shared with, entities other than the Regional Transmission Organization, the Regional Transmission Organization must ensure that this sharing of operational authority will not adversely affect reliability or provide any market participant with an unfair competitive advantage. Within two years after initial operation as a Regional Transmission Organization, the Regional Transmission Organization must prepare a public report that assesses whether any division of operational authority hinders the Regional Transmission Organization in providing reliable, non-discriminatory and efficiently priced transmission service.

(ii) The Regional Transmission Organization must be the security coordinator for the facilities that it controls.

(4) *Short-term reliability.* The Regional Transmission Organization must have exclusive authority for maintaining the short-term reliability of the grid that it operates. The Regional Transmission Organization must include, as part of its demonstration with respect to reliability, a demonstration that it meets the following:

(i) The Regional Transmission Organization must have exclusive authority for receiving, confirming and implementing all interchange schedules.

(ii) The Regional Transmission Organization must have the right to order redispatch of any generator connected to transmission facilities it operates if necessary for the reliable operation of these facilities.

(iii) When the Regional Transmission Organization operates transmission facilities owned by other entities, the Regional Transmission Organization must have authority to approve or disapprove all requests for scheduled outages of transmission facilities to ensure that the outages can be accommodated within established reliability standards.

(iv) If the Regional Transmission Organization operates under reliability standards established by another entity (*e.g.*, a regional reliability council), the Regional Transmission Organization must report to the Commission if these standards hinder it from providing reliable, non-discriminatory and efficiently priced transmission service.

(k) *Required functions of a Regional Transmission Organization.* The Regional Transmission Organization must perform the following functions. Unless otherwise noted, the Regional Transmission Organization must satisfy these obligations when it commences operations.

(1) *Tariff administration and design.* The Regional Transmission Organization must administer its own transmission tariff and employ a transmission pricing system that will promote efficient use and expansion of transmission and generation facilities. As part of its demonstration with respect to tariff administration and design, the Regional Transmission Organization must satisfy the standards listed in paragraphs (k)(1)(i) and (ii) of this section, or demonstrate that an alternative proposal is consistent with or superior to satisfying such standards.

(i) The Regional Transmission Organization must be the only provider of transmission service over the facilities under its control, and must be the sole administrator of its own Commission-approved open access transmission tariff. The Regional Transmission Organization must have the sole authority to receive, evaluate, and approve or deny

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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 3rd day of December 2014, 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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