In the United States Court of Appeals for the Seventh Circuit

No. 10-1635

INDIANA UTILITY REGULATORY COMMISSION,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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COUNTERSTATEMENT OF JURISDICTION

The jurisdictional statement in the Brief of Petitioner is not complete and correct. *See* Cir. R. 28(b).

The Court lacks jurisdiction to review the FERC orders being challenged here. In addition to satisfying the requirements of section 313(b) of the Federal Power Act ("FPA"), 16 U.S.C. § 825*l*(b), for judicial review of FERC rulings, Petitioner Indiana Utility Regulatory Commission ("Indiana") must satisfy the requirements of Article III of the United States Constitution.

As set forth more fully in Part I.A of the Argument, *infra*, Indiana lacks standing because it has suffered no injury in fact, as the Commission already has granted the very relief that Indiana purports to seek: the challenged FERC orders expressly conditioned the rate incentives on separate approval of the project in regional planning processes. For the same reason, Indiana also fails to meet the "aggrievement" requirement of FPA § 313(b), 16 U.S.C. § 825*l*(b). *See* Argument, Part I.B, *infra*.

Moreover, as set forth more fully in the Part I.C of the Argument, *infra*, the Court lacks jurisdiction to consider Indiana's principal arguments on appeal because Indiana failed to preserve those issues for judicial review, as required under section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), by failing to raise them on rehearing to the agency. *See, e.g., Cal. Dep't of Water Res. v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002).

STATEMENT OF THE ISSUE

Assuming jurisdiction, whether the Federal Energy Regulatory Commission ("Commission" or "FERC") reasonably accepted certain transmission rate incentives proposed by Pioneer Transmission, LLC ("Pioneer"), conditioned on the separate approval of Pioneer's project in regional transmission planning processes.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

This appeal arises from Pioneer's proposal to construct an extra-high voltage transmission project that would connect two regional transmission systems and facilitate the interconnection of new wind generation resources in the Midwest. The instant case began with Pioneer's filing of proposed rates for the project, which included several varieties of rate incentives that the Commission had previously established under a statutory directive to promote investment in new transmission infrastructure.

In the orders challenged here, the Commission largely approved the proposed incentives, but conditioned their taking effect on subsequent events — most notably, for several of the incentives, approval of the project in regional transmission planning processes. *Pioneer Transmission, LLC*, 126 FERC ¶ 61,281 (2009) ("Incentives Order"), R. 48, App. 60, *on clarification and reh'g*, 130 FERC ¶ 61,044 (2010) ("Rehearing Order"), R. 81, App. 1.[1] Of the more than 35 parties that participated in the underlying proceeding, only Indiana has sought judicial review of the FERC orders.

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[1] "R." refers to a record item. "App." refers to the Appendix filed by Indiana. "P" refers to the internal paragraph number within a FERC order. "Br." refers to Indiana's initial Brief.

II. STATEMENT OF FACTS

A. Statutory and Regulatory Background

Section 201 of the Federal Power Act ("FPA"), 16 U.S.C. § 824, gives the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. *See* 16 U.S.C. §§ 824(a)-(b). This grant of jurisdiction is comprehensive and exclusive. *See generally New York v. FERC*, 535 U.S. 1 (2002). All rates for or in connection with jurisdictional sales and transmission services are subject to FERC review to assure they are just and reasonable, and not unduly discriminatory or preferential. FPA §§ 205(a), (b), (e), 16 U.S.C. §§ 824d(a), (b), (e). (The pertinent statutory provisions are contained in the Addendum to this Brief.)

In furtherance of its statutory responsibilities, the Commission has promoted efforts to foster wholesale electricity competition over broader geographic areas in recent decades through, among other things, the creation of regional transmission organizations ("RTOs"). *See Morgan Stanley Capital Group v. Pub. Util. Dist. No. 1*, 128 S. Ct. 2733, 2740-41 (2008). These independent regional entities operate the transmission grid on behalf of transmission-owning member utilities and are required to maintain system reliability. *See NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 130 S. Ct. 693, 697 & n.1 (2010) (explaining responsibilities of an RTO); *see also Ill.*

Commerce Comm'n v. FERC, 576 F.3d 470, 473 (7th Cir. 2009) (describing RTOs).

In the Energy Policy Act of 2005, Congress added a new section 219 to the Federal Power Act, directing the Commission to establish incentive-based rate treatments for electric transmission for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1241, 119 Stat. 594, 315, 1283 (2005) (codified at 16 U.S.C. § 824s). Section 219 specified that the Commission's implementing rule must provide "a return on equity that attracts new investment in transmission facilities" and incentives for joining a regional transmission organization. FPA § 219(b)(2), (c), 16 U.S.C. § 824s(b)(2), (c).

To that end, the Commission issued a rulemaking that provided for incentives for transmission infrastructure investment. *Promoting Transmission Investment Through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057, *on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006). The Commission explained that it approached its statutory mandate with a "recognition of the unique and substantial challenges faced by large new transmission projects." Order No. 679 at P 24. In particular, the Commission noted that the "significant risks and challenges" associated with siting and constructing such projects were "underscored by the fact that, in

many instances, new transmission projects will not be financed and constructed in the traditional manner." *Id.* at P 25. For that reason, the Commission found that both Congress's directive and the national interest in integrating the next generation of resources required a policy designed to "encourage investors to take the risks associated with constructing large new transmission projects that can integrate new generation and otherwise reduce congestion and increase reliability." *Id.* With that in mind, the Commission further explained that its incentives for construction of new transmission "do not constitute an 'incentive' in the sense of a 'bonus' for good behavior"; rather, each incentive would be "applied in a manner that is rationally tailored to the risks and challenges faced in constructing new transmission." *Id.* at P 26.

Accordingly, Order No. 679 did not grant such incentives outright, but rather identified specific incentives that the Commission would allow when justified in the context of individual filings by public utilities under the FPA. Order No. 679 at P 1. Each applicant must demonstrate that there is a nexus between the incentive sought and the investment being made. *Id.* at P 26. In addition, a proposed incentive rate of return must be found to be within the zone of reasonableness. *Id.* at P 2. *See Conn. Dep't of Pub. Util. Control v. FERC*, 593 F.3d 30, 33 (D.C. Cir. 2010) (explaining that Order No. 679 contemplates consideration of transmission incentives on a case-by-case

basis; affirming the Commission's grant of a particular transmission incentive — a higher return on equity — under preexisting authority).

B. The Commission Proceedings and Orders

1. Incentives Order

In October 2008, Pioneer filed tariff sheets proposing a formula rate for transmission services for a planned project that will consist of a 765 kilovolt (kV) line connecting two regional transmission systems: one operated by PJM Interconnection, L.L.C ("PJM"), serving 13 eastern states and the District of Columbia, and another operated by the Midwest Independent Transmission System Operator, Inc. ("Midwest ISO"), serving 15 states and one Canadian province. *See Ill. Commerce Comm'n*, 576 F.3d at 473 (describing PJM's region); *Pub. Serv. Elec. & Gas Co. v. FERC*, 485 F.3d 1164, 1165 (D.C. Cir. 2007) (same); *Pub. Serv. Comm'n of Wis. v. FERC*, 545 F.3d 1058, 1059 (D.C. Cir. 2008) (describing Midwest ISO's region). The Pioneer project also will facilitate the interconnection of more than 4,000 megawatts (MW) of new wind generation. Incentives Order at P 1, App. 60.

In its proposed tariff, Pioneer included four of the transmission rate incentives available under Order No. 679: (1) a return on equity of 13.5 percent; (2) recovery of 100 percent of costs for construction work in progress; (3) recovery of prudently-incurred costs if the project were abandoned for reasons outside of Pioneer's control; and (4) permission to establish a

regulatory asset for costs incurred prior to the effective date of the formula rate. *See* Incentives Order at P 1, App. 60. The proposed return on equity was calculated using a base of 11.0 percent and several adders established in Order No. 679: (a) 50 basis points for membership in a regional transmission organization; (b) 150 basis points for investment in new transmission; and (c) 50 basis points for use of advanced transmission technology. *See* Incentives Order at P 6, App. 62.

More than 35 parties intervened in the FERC proceeding (including two groups of transmission owners: 25 in Midwest ISO and 18 in PJM), many filing comments or protests. Incentives Order at PP 22-27 & nn.14-16, App. 66-67. In December 2008, Commission Staff issued a deficiency letter requesting studies on how the project would ensure reliability or reduce the cost of delivered power by reducing transmission congestion, in accordance with the requirement of FPA § 219. R. 37, App. 126; *see also* Incentives Order at P 26, App. 67. In response, Pioneer submitted a study report in January 2009. R. 41, App. 116. *See also* Incentives Order at P 26, App. 67. Indiana and a group of PJM transmission owners each filed comments on that report. *See id.* at P 27, App. 67-68; R. 45, App. 111 (Indiana's Comments).

On March 27, 2009, the Commission issued the Incentives Order. App.60. First, the Commission reiterated its policy of "review[ing] each

request for transmission incentives on its own merits and on a case-by-case basis." *Id.* at P 37, App. 70 (citing *Pac. Gas & Elec. Co.*, 123 FERC ¶ 61,067 (2008), and *Cent. Me. Power Co.*, 125 FERC ¶ 61,079 (2008)). The Commission explained that an applicant seeking transmission incentives must "demonstrate that the project meets [FPA § 219] requirements of ensuring reliability and/or reducing the cost of delivered power by reducing congestion." Incentives Order at P 37, App. 70-71. The Commission concluded that Pioneer had made the requisite showing, as its study provides a reasonable basis to conclude that the project will reduce congestion, ensure reliability, and accelerate the integration of renewable energy resources. *Id.* at PP 38-39, App. 71.

The Commission directly addressed the concerns of some parties (including Indiana) that its consideration of the incentives was premature because the project had not yet been approved in the RTOs' regional planning processes. *Id.* at P 40, App. 71-72. The Commission found that granting incentives "will not undermine the [Midwest ISO] or PJM stakeholder processes," and that nothing in the Commission's order would change the manner of the RTOs' evaluations or prejudge the separate determinations of the RTOs' regional planning. *Id.* (citing *Tallgrass Transmission, LLC*, 125 FERC ¶ 61,248 at P 43 (2008)).

Turning to the specific incentives at issue, the Commission explained that an applicant must show a nexus between each proposed incentive and the investment being made; the test "is fact-specific and requires the Commission to review each application on a case-by-case basis." Incentives Order at P 42, App. 72; *see also supra* p. 6 (describing nexus requirement in Order No. 679).

With regard to the return on equity, the Commission granted in part and denied in part Pioneer's proposal. The Commission approved a 150 basis point adder for investment in new transmission facilities and a 50 basis point adder for RTO participation. *See* Incentives Order at PP 56-57, App. 76-77. The Commission ruled that neither adder would go into effect until certain conditions were met. The new transmission incentive was contingent on (1) approval of the project by the regional transmission planning processes of both PJM and Midwest ISO and (2) the establishment of a FERC-approved cost-allocation methodology. The RTO participation adder was contingent upon (1) Pioneer's becoming a member of PJM and Midwest ISO and (2) its project being placed under the RTOs' operational control. *See id.*

The Commission, however, reduced the proposed base return on equity, from 11 percent to 10.54 percent, based on its own analysis of the appropriate proxy group. *See id.* at PP 91, 94, App. 88, 89-90. The Commission also denied the 50 basis point adder for advanced transmission technology,

because the proposed extra-high voltage technologies were well-established and did not warrant a separate adder, and Pioneer had not sufficiently explained its smart grid plans to qualify for the incentive. *See id.* at PP 58-59, App. 77-78.

The Commission granted Pioneer's requests for: inclusion of prudently-incurred "construction work in progress" costs in the rate base (*id.* at PP 64-68, App. 79-81); the right to file to recover prudently incurred costs if the project were to be abandoned for reasons outside of Pioneer's control (*id.* at P 75, App. 83); and permission to establish a regulatory asset to include, and amortize, certain other project expenses (*id.* at PP 83-85, App. 85-86). Like the return on equity incentives, the construction work in progress cost incentive "will not go into effect unless and until the project is approved by the regional transmission planning processes of PJM and [Midwest ISO] and there is a Commission-approved cost-allocation methodology in place." *Id.* at P 65, App. 79. The abandonment and regulatory asset incentives were made effective as of December 15, 2008, but could be recovered only through a subsequent rate filing under FPA § 205, 16 U.S.C. § 824d, subject to challenge by other parties and to Commission approval of such costs as just and reasonable. Incentives Order at PP 76, 86, App. 83, 86.

Finally, the Commission determined that Pioneer's proposed formula rates raised issues of material fact and set those rates for hearing and

settlement procedures. *Id.* at PP 109-110, App. 94. The Commission went on to conclude, however, that "approval of the formula rate should be tied to the final outcome of a cross-border cost-allocation methodology established between PJM and [Midwest ISO]." *Id.* at P 124, App. 100. Accordingly, the proposed formula rates "may not become effective until: (1) the Pioneer project has been approved by the regional transmission planning processes of PJM and [Midwest ISO]; and (2) an appropriate Commission-approved cost allocation mechanism for the recovery of the cross-border PJM/[Midwest ISO] costs is in effect." *Id.*

2. Rehearing Order

Numerous parties sought rehearing and/or clarification of the Incentives Order; relevant here, Indiana timely filed a Request for Clarification and Rehearing ("Rehearing Request"). R. 52, App. 49. Indiana preserved two issues for review: (1) that, by granting incentives before regional planning was completed, the Commission acted prematurely and might undermine planning processes; and (2) that the 150 basis point adder for new transmission investment was not supported by substantial evidence. Rehearing Request at 9, App. 57.

On January 21, 2010, the Commission issued its Rehearing Order. App. 1. The Commission "recognized but disagreed with" the concerns of Indiana and others that considering the project was premature. *Id.* at PP 17-

18, App. 7-9. The Commission reaffirmed that evaluation of a project through regional planning processes is not a prerequisite for granting incentives. *Id.* at P 17, App. 8. The Commission further clarified that its ruling on Pioneer's proposed incentives "does not prejudge the determinations of the Order No. 890[2] regional transmission planning processes." *Id.*

The Commission responded specifically to Indiana, clarifying that the Commission had approved only the rate incentives: "it did not 'approve' the project itself." *Id.* at P 19, App. 9. The Commission further assured Indiana that approval of incentives "does not prejudge any other project, does not indicate a preference of one particular project over another, nor does it impact the tariff criteria by which PJM and/or [Midwest ISO] will evaluate the project(s)." *Id.* at P 21, App. 11; *see also id.* at P 29, App. 15. The Commission also responded to various objections regarding the particular incentives, including Indiana's contention below that the return on equity adder was unsupported. *See id.* at P 58, App. 31-32 (explaining that

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2 *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008) *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009). That rulemaking, which followed from the Commission's earlier efforts to require open access to transmission as well as from Congress's emphasis on transmission infrastructure development in the Energy Policy Act of 2005, required transmission providers (including RTOs) to implement coordinated transmission planning processes. *See* Order No. 890 at PP 435-42.

magnitude and cost of Pioneer project, task of securing approval in two RTOs' planning processes, and "unique risks" as "one of the first large-scale projects designed to strengthen the interconnection between two RTOs" warranted adder for new investment).

Indiana timely filed a petition for review in this Court.

3. Other FERC Proceedings

As noted above, in the Incentives Order, the Commission set Pioneer's proposed formula rates for hearing and settlement procedures. Those procedures resulted, within a few months, in an uncontested settlement that resolved all issues set for hearing. *See* Letter Order, *Pioneer Transmission, LLC*, 129 FERC ¶ 61,065 at P 1 (2009). The settlement was filed with the Commission on August 13, 2009, and approved on October 26, 2009. *See id.* at PP 1, 4.

Meanwhile, the Commission, RTOs, and other parties continue to work to refine FERC policies concerning transmission planning. On June 17, 2010, the Commission, building on its experience with Order No. 890 and following several technical conferences and numerous comments, proposed rules designed to establish a closer link between regional transmission planning and cost allocation. *See* Notice of Proposed Rulemaking, *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 131 FERC ¶ 61,253 at P 5 (2010).

SUMMARY OF ARGUMENT

Consistent with its case-by-case approach to rate incentives for new transmission investments, the Commission fully considered the purposes and merits of each of Pioneer's proposed rate incentives and determined that, with some downward adjustments to the return on equity, they were just and reasonable. To address concerns raised by Indiana and other parties, however, the Commission made the effectiveness of the challenged incentives contingent on the separate approval of the Pioneer project in the regional planning processes of both PJM and Midwest ISO.

Because the Commission already conditioned Pioneer's rate incentives on separate approval in regional transmission planning processes, Indiana's appeal seeking precisely the same condition is not appropriately before the Court. Indiana cannot demonstrate any injury caused by the agency orders, as required for constitutional standing, nor any aggrievement, as required by the Federal Power Act. Furthermore, Indiana's principal arguments on appeal — challenging, for the first time, the sufficiency of Pioneer's study and the Commission's consistency with precedents — are jurisdictionally barred by the Federal Power Act because Indiana failed to raise them on rehearing before the Commission.

Nevertheless, the Commission's orders approving Pioneer's transmission rate incentives fully addressed parties' concerns about the

Commission's policy of granting such incentives prior to, and separate from, project approval in regional transmission planning processes. The Commission clarified that its decision on incentives would not prejudge or otherwise undermine the regional planning processes, and emphasized the conditional effectiveness of Pioneer's incentives, subject to the RTOs' approval. In addition, the Commission thoroughly considered the merits of the proposed incentives and reasonably determined, based both on its own expertise and on evidence in the record, that they were tailored to the particular risks and challenges that Pioneer's proposed transmission project would encounter.

ARGUMENT

I. THE COURT HAS NO SUBJECT MATTER JURISDICTION OVER INDIANA'S PETITION FOR REVIEW

A. Indiana Lacks Standing

First, the petition should be dismissed for lack of standing because Indiana cannot demonstrate any injury from the FERC orders that it challenges. Indiana seeks relief that it in fact obtained in the agency proceeding: the Commission *already* made the rate incentives contingent on regional transmission planning processes.

The "irreducible constitutional minimum" for Article III standing requires the petitioner to have suffered: (1) an "injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized and

(b) actual or imminent, not conjectural or hypothetical," (2) that has a "causal connection" with the challenged agency action, and (3) that likely "will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal citations and quotation marks omitted); *see also, e.g., Bennett v. Spear*, 520 U.S. 154, 162 (1997). Indiana's appeal fails each of those requirements.

Indiana's Brief is specific regarding the relief it requests: "FERC can simply correct this error by requiring the necessary and prudent regional transmission planning processes to be completed prior to the incentives going into effect." Br. 11; *see also* Br. 19 (requesting Court to remand order "with the instructions that, if granted at all, the rate incentives should be conditioned on approval of the Pioneer Project by the relevant RTO Order No. 890 transmission planning processes"); Br. 17 (citing, "[i]n contrast," other FERC cases in which Commission has granted incentives contingent on approval in planning process). But the Commission itself imposed exactly that condition in the Incentives Order, ruling that the return on equity (with adders) and construction cost incentives will not become effective unless and until the Pioneer project is approved in such planning processes *and* a cost-allocation methodology is in place. Incentives Order at PP 56 (150 point adder), 57 (50 point adder), 65 (construction costs), 124 (proposed formula rates), App. 76-77, 79, 100. *See supra* pp. 10-12.

On rehearing, the Commission repeated, and emphasized, the contingency. Responding to Indiana's Rehearing Request, the Commission pointed out that the Incentives Order had "explained that certain incentives were effective upon either the project being placed under operational control of PJM and Midwest ISO[3] or upon the approval of the project by the regional transmission planning processes of PJM and Midwest ISO." Rehearing Order at P 19, App. 9. The Commission then went on to quote from the Incentives Order, highlighting that the 150 point adder for new transmission and the construction costs incentive are both expressly conditioned on approval by both RTOs' planning processes, as well as on the Commission's approval of a cost-allocation methodology. *Id.*; *accord id.* at PP 3, 20, App. 2, 10.[4]

Therefore, Indiana's appeal is redundant; it asks this Court to direct the Commission to do what it has already done. As such, the appeal does not present a live, justiciable controversy. *See, e.g.*, *Ailor v. City of Maynardville*,

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[3] This condition applies to the 50 basis point adder for RTO participation, as noted above. *See supra* p. 10.

[4] As to the remaining incentives — recovery of prudently-incurred costs in the case of abandonment and permission to establish a regulatory asset — the Commission made clear that its approval did not determine any rate and did not guarantee Pioneer any recovery; Pioneer would have to seek recovery in a rate filing under FPA § 205, 16 U.S.C. § 824d, subject to Commission review and approval. *See* Rehearing Order at PP 27 (abandonment costs), 28-29 (regulatory asset), App. 14-15.

368 F.3d 587, 596 (6th Cir. 2004) (finding lack of standing where requested relief had already been procured).

B. Indiana Is Not "Aggrieved" By The FERC Orders

For the same reason, Indiana also fails to meet the requirement under Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), that a petitioner must be "aggrieved" by a FERC order to seek judicial review. This statutory requirement is jurisdictional. *See Util. Users League v. FPC*, 394 F.2d 16, 19 (7th Cir. 1968) ("We are without jurisdiction to entertain this petition unless petitioners are parties 'aggrieved by an order issued by the Commission.'") (quoting FPA § 313(b)). As such, it is a question for the Court. *See id.* at 19 (Court was not bound by agency's having granted party leave to intervene in underlying proceeding: "Petitioners' standing is a jurisdictional question to be determined by this Court.").

This Court has held that a party is aggrieved under FPA § 313(b) "if it satisfies both the constitutional and prudential requirements for standing." *Wis. v. FERC*, 192 F.3d 642, 646 (7th Cir. 1999) (holding that party that lacked Article III standing did not qualify as aggrieved); *accord Util. Users League*, 394 F.2d at 21 (same); *PNGTS Shippers' Group v. FERC*, 592 F.3d 132, 136 (D.C. Cir. 2010) (applying same standard under identical provision in Natural Gas Act § 19(b), 15 U.S.C. § 717r(b)). Thus, just as the Commission's express conditions for Pioneer's rate incentives — making the

return on equity (including adders) and construction costs contingent on the outcome of regional transmission planning processes — leave Indiana without constitutional standing, those conditions likewise leave it without the aggrievement required by the statute. Indiana is not "aggrieved" by orders that already provide the very relief that it seeks on appeal.

C. Indiana's New Arguments On Appeal Are Jurisdictionally Barred By Statute

In addition to its lack of standing, Indiana is jurisdictionally barred from introducing on appeal objections that it failed to raise on rehearing before the Commission. "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 to do so." FPA § 313(b), 16 U.S.C. § 825*l*(b)); *see also, e.g., Cal. Dep't of Water Res.*, 306 F.3d at 1125 (strictly construing jurisdictional requirement). Besides being an express statutory prerequisite for jurisdiction, rehearing serves the important purpose of "enabl[ing] the Commission to correct its own errors, which might obviate judicial review, or to explain in its expert judgment why the party's objection is not well taken, which facilitates judicial review." *Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005).

Indiana, however, devotes substantial portions of its Brief to issues that it never raised before the Commission, on rehearing or otherwise. In particular, Indiana introduces new objections in at least three respects: (1) by challenging the Commission's reliance on Pioneer's study report (Br. 14-18), which neither Indiana nor any other party[5] questioned before the Commission; (2) by accusing the Commission of improperly departing from precedents (Br. 15-18) that neither Indiana nor any other party asked the Commission to consider; and (3) by criticizing, for the first time, the Commission's decision to set certain issues for hearing (Br. 18-19).

At a minimum, Indiana's change in strategy puts the Commission at a disadvantage on appeal. Indiana's failure to raise its principal appellate arguments before the Commission deprived the agency of the opportunity to provide the further explanation that Indiana now finds lacking. *See Ameren Servs. Co. v. FERC*, 330 F.3d 494, 499 n.8 (D.C. Cir. 2003) ("The very purpose of rehearing is to give the Commission the opportunity to review its decision before facing judicial scrutiny."); *Canadian Ass'n of Petroleum Producers v.*

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[5] Even if another party had raised such a challenge, Indiana would be jurisdictionally barred from adopting that argument on appeal without having preserved the issue in its own Rehearing Request. *See ASARCO, Inc. v. FERC*, 777 F.2d 764, 773-75 (D.C. Cir. 1985) (Scalia, J.) (construing substantially identical language in Natural Gas Act § 19(b), 15 U.S.C. § 717r(b)). We note the absence of *any* challenge only to explain the Commission's "failure" to address issues that were never raised at all.

FERC, 308 F.3d 11, 15 (D.C. Cir. 2002) ("Simply put, the court cannot review what the Commission has not viewed in the first instance.").

II. THE COMMISSION REASONABLY APPROVED THE INCENTIVES, WITH CONDITIONS

A. Standard Of Review

Under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), the Court reviews agency orders to determine whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See, e.g.*, *Clancy v. Geithner*, 559 F.3d 595, 599 (7th Cir. 2009). "Under this standard, the court's review is narrow; a court may not set aside an agency decision that articulates grounds indicating a rational connection between the facts and the agency's action." *Schneider Nat'l, Inc. v. ICC*, 948 F.2d 338, 343 (7th Cir. 1991) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *accord N. Ind. Pub. Serv. Co. v. FERC*, 782 F.2d 730, 739 (7th Cir. 1986) ("[O]ur review of the Commission's orders 'is essentially narrow and circumscribed.'") (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 766 (1968)).

The Commission's factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825*l*(b); *City of Frankfort v. FERC*, 678 F.2d 699, 702-03 (7th Cir. 1982) (citing cases). *Cf. Jancik v. HUD*, 44 F.3d 553, 555 (7th Cir. 1995) ("Substantial evidence is such relevant

evidence as a reasonable mind might accept as adequate to support a conclusion.") (internal quotation marks and citation omitted); *accord N. Ind. Pub. Serv.*, 782 F.2d at 743 ("It does not matter that this court might have reached a different result were it reviewing the record *de novo*."). *See also Conn. Dep't of Pub. Util. Control*, 593 F.3d at 34-35 (finding substantial evidence supporting transmission rate incentive; causal link between incentive adder and customer benefit requires only a likelihood, not certainty, of utility response to financial motivation).

Under the Federal Power Act, "Congress has entrusted the regulation of the . . . industry to the informed judgment of the Commission, and therefore a presumption of validity attaches to each exercise of the Commission's expertise." *Village of Bethany v. FERC*, 276 F.3d 934, 940 (7th Cir. 2002) (quoting *N. Ind. Pub. Serv.*, 782 F.2d at 739)) (internal quotation marks omitted). Deference to FERC's decisions regarding rate issues is particularly appropriate, because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin*, 390 U.S. at 790. "The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and [the Court] afford[s] great deference to the Commission in its rate decisions." *Morgan Stanley*, 128 S. Ct. at 2738.

B. The Commission Appropriately Considered The Proposed Rate Incentives In Advance Of The Regional Transmission Planning Process

1. The Commission Followed Its Transmission Incentive Policy And Precedents

Though Indiana, on appeal, has recast its objection as a substantive challenge to the study report that Pioneer submitted to support its request for rate incentives, Indiana's argument remains, at its core, a disagreement with the Commission's determination that it will, on a case-by-case basis, accept incentives for projects that have not yet been approved in regional transmission planning processes. *See*, *e.g.*, Br. 2, 4-5, 14 (arguing that Commission should not have granted incentives prior to planning process).

Indiana and other parties raised this objection forcefully and repeatedly before the agency. *See* Rehearing Order at PP 13-15, 21-22, App. 5-7, 10-11; Rehearing Request at 1-10, App. 49-58. In particular, Indiana contended on rehearing that the Commission had potentially undermined regional planning processes, and sought clarification that FERC's granting of rate incentives did not constitute project approval or create a presumption in favor of such approval. *See* Rehearing Request at 6-7, 9, App. 54-55, 57. For that reason, the Commission responded extensively to those concerns, expanding upon its previous determinations, in other

incentive cases and in the rulemaking implementing FPA § 219, 16 U.S.C. § 824s, on case-by-case consideration of transmission rate incentives.

The Commission first determined that regional planning approval was not a prerequisite for considering incentives in Order No. 679. Beginning, as it must, with the statute, the Commission found that FPA § 219 "does not require higher standards of review for projects that do not result from independent planning processes" (Order No. 679 at P 49) and does not require "participation in regional planning processes as a precondition for obtaining incentives" (*id.* at P 58). Accordingly, the Commission did not impose such a requirement in its rules. *Id.*[6]

On rehearing in that rulemaking, state regulators and other parties argued "that any public utility seeking incentive rates for its new transmission project should be required to demonstrate that the project was formulated through an open, regional planning process." Order No. 679-A at P 110. But the Commission disagreed:

> We will not . . . limit incentive rate treatments to projects that result from regional planning processes. While the Commission agrees that there are substantial benefits to be derived from

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[6] Finding such planning processes beneficial, the Commission did adopt a rebuttable presumption in favor of projects that have been approved in those processes — *i.e.*, in those circumstances, the Commission presumes that the project satisfies the statutory criteria of ensuring reliability and/or reducing congestion. Order No. 679 at P 58. That presumption, of course, did not apply to Pioneer's proposal. *See* Incentives Order at P 37, App. 70.

> regional planning, there may be transmission projects that arise outside of the context of a regional plan that help to ensure reliability or reduce the costs of delivered power and which deserve incentive rate treatment.

Id. at P 111.

As substantial transmission projects began to develop in the wake of FPA § 219 and Order No. 679, the Commission further explained the separate criteria and independent determinations for approval of incentives versus approval of a project. In *Tallgrass Transmission, LLC*, 125 FERC ¶ 61,248 (2008), the Commission approved incentives for projects that had not been approved by the relevant RTO. *See id.* at P 40. The Commission explained that it did not determine "whether the projects are the best solution," but that its policy is "to review each request for incentives on its own merits and on a case-by-case basis." *Id.* at P 42. It also disagreed with protestors that the approval of incentives "will undermine the [RTO] stakeholder process. . . . Nothing here changes [the RTO's] process or the manner in which [the RTO] evaluates projects." *Id.* at P 43.

In the instant case, the Commission answered Indiana and other parties that raised similar concerns:

> We recognize but disagree with protestors' concerns that the project is premature because it has not been approved by the regional transmission expansion plans of PJM and [Midwest ISO]. We find that granting incentives as discussed in this order will not undermine the [Midwest ISO] or PJM stakeholder processes. Nothing here changes the manner in which [Midwest

> ISO] or PJM evaluates projects, nor do our findings regarding Pioneer's satisfaction of the requirements under section 219 prejudge the determinations of the regional transmission expansion plans of PJM or [Midwest ISO].

Incentives Order at P 40 (citing *Tallgrass* at P 43). Two weeks later, the Commission repeated that assurance in yet another transmission incentives case. *See Green Power Express LP*, 127 FERC ¶ 61,031 at P 42 (2009) (evaluation through an RTO planning process "is not a prerequisite to the Commission granting incentives"; Commission's decision on incentives "does not prejudge the findings of a particular transmission planning process" and "will not change how Midwest ISO evaluates the Project") (citing *Tallgrass* at P 43 and Incentives Order at P 40, App. 71-72).

On rehearing in Pioneer's case, the Commission further clarified the limits of its determination on incentives. The Commission again drew the distinction between its approval of rate incentives and any approval of the project itself, and emphasized again that it had conditioned the effectiveness of Pioneer's incentives on regional approvals of the project. Rehearing Order at P 19, App. 9; *see also supra* pp. 10-12, 17-18 (discussing condition of effectiveness of the return on equity (including adders) and construction cost incentives, and of the formula rates, on separate approval of Pioneer's project in both PJM's and Midwest ISO's regional planning processes). *Cf.* Rehearing Order at P 17, App. 7-8 (Incentives Order did not prejudge

planning determinations); *id.* at P 20, App. 10 (same); *id.* at P 18, App. 8-9 (Commission had followed Order No. 679 and had not departed from precedent). The Commission also clarified that, despite approval of the incentives, Pioneer "is not guaranteed recovery of its costs," which would require a separate filing and FERC approval under FPA § 205. *See* Rehearing Order at P 19, App. 9; *id.* at P 20, App. 10 ("In this proceeding, we are not making any determinations as to how or from whom Pioneer may recover its costs.").

Lest there be any room left for doubt, the Commission again stated that its approval of certain rate incentives for the Pioneer project:

> does not prejudge any other project, does not indicate a preference of one particular project over another, nor does it impact the tariff criteria by which PJM and/or Midwest ISO will evaluate the project(s).[] We also recognize that if the Pioneer project is ultimately approved by the PJM and Midwest ISO regional transmission planning processes, there may be changes to the project.

Id. at P 21, App. 11; *accord id.* at P 22, App. 12 (same); *see also id.* at P 29, App. 15 (clarifying that approval of regulatory asset incentive "does not prejudge the determinations of the regional transmission expansion plans of PJM or Midwest ISO, and does not create a greater likelihood of approval of the project either by the relevant RTOs or the Commission.").

2. Indiana Disagrees With FERC Policy And Disregards The Conditions On Pioneer's Incentives

Thus, the instant appeal arises, not from the Commission's failure to explain its decisionmaking, but from Indiana's disagreement with the Commission's policy from its inception in Order No. 679. *See* Br. 14 ("planning should be the first step in the evaluation of potential transmission projects"); *see also* Br. 19 ("FERC's decision not to require the RTO planning prior to its granting of the incentive was economically inefficient"). The Commission, however, is responsible for determining national policy regarding both transmission rate incentives and regional planning, and Indiana's dissatisfaction with the Commission's policy choice is no basis for reversal. *See Sacramento Mun. Util. Dist. v. FERC*, No. 07-1208, 2010 U.S. App. LEXIS 15179, at *19, *30, *34, *59 (D.C. Cir. July 23, 2010) (exercise of judgment involving regulatory policy at the core of FERC's mission is entitled to substantial deference); *Alcoa Inc. v. FERC*, 564 F.3d 1342, 1347 (D.C. Cir. 2009) ("issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission").

More important to this appeal, Indiana mistakenly faults the Commission for something it has not done. The Commission has explicitly (and repeatedly, and emphatically) conditioned the effectiveness of the return

on equity, construction costs, and formula rates on the separate approval of the Pioneer project in both PJM's and Midwest ISO's regional planning processes. Nevertheless, Indiana bases its appeal on the Commission's supposed failure to impose such a condition, and asks the Court to require that specific relief.

Indeed, Indiana approvingly cites four cases in which the Commission "conditioned eligibility for incentives on whether a project would later pass an RTO transmission planning process." Br. 17 (citing *Cent. Me. Power Co.*, 125 FERC ¶ 61,079 (2008); *Green Energy Express LLC*, 129 FERC ¶ 61,165 (2009); *W. Grid Dev., LLC*, 130 FERC ¶ 61,056 (2010); and *Primary Power, LLC*, 131 FERC ¶ 61,015 (2010)). Indiana notes that the Commission granted rate incentives in those cases, "but required as a condition of receiving the incentives that the projects must first be approved in an RTO planning process." Br. 17. Indiana then purports to contrast the Pioneer project with those cases, never acknowledging that the Commission in fact imposed that *very same condition* in this case.

C. The Commission Thoroughly Considered The Justifications For Granting The Incentives

As discussed in the previous section, Indiana's objections before the Commission to Pioneer's proposed incentives always concerned timing: Indiana insisted that granting such incentives before the project was

approved in the RTOs' regional planning processes would be premature — notwithstanding the Commission's policy determination to the contrary, its repeated clarifications that FERC approval of incentives does not prejudge the RTOs' planning decisions, and its express conditioning of certain incentives on the outcome of those planning processes.

1. The Commission Reasonably Relied On Pioneer's Study

On appeal, however, Indiana now challenges the merits of the Commission's decision by contesting the study that Pioneer submitted to support its proposal. Indiana argues that the Commission relied "solely" on that study, which Indiana contends was too limited and not independent and could not constitute substantial evidence to support the Commission's approval of the incentives. Br. 15, 18. Indiana also contends that the Commission departed without explanation from other cases in which it had relied on different types of studies when approving rate incentives in advance of regional planning. *See* Br. 15-18.

The Commission did indeed consider Pioneer's study, finding that the project met the FPA § 219 "criteria of ensuring reliability and/or reducing the cost of delivered power by reducing transmission congestion." Incentives Order at P 38, App. 71. The study included "the results of a powerflow and contingency analysis that shows the potential system benefits of the project, including reliability and congestion benefits, and facilitating the

interconnection of wind energy in Indiana." *Id.* The study used Midwest ISO's own projections for summer peak conditions (when demand for electricity is highest) in a future period (2018[7]) in the region where the proposed project will be located (Indiana).

The Commission found, without employing any presumption, that the study "provides a reasonable basis to conclude" that the project: (1) will reduce congestion in the future — in an area that the Department of Energy has identified as a conditional congestion area — "by facilitating integration and delivery of low-cost wind energy"; and (2) will ensure reliability "by enhancing the voltage profile and reducing thermal loadings on many lower voltage facilities . . . ." Incentives Order at P 38, App. 71. The Commission also found that the project will facilitate the interconnection of approximately 4,000 MW of wind energy, both accelerating the integration of reliable renewable energy resources and mitigating expected overloads of other transmission facilities. *Id.* at P 39, App. 71.

Indiana has not — before the agency or before this Court — disputed those findings. *See supra* pp. 20-22 (Indiana's failure to challenge agency

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[7] When it submitted the study, Pioneer explained that it used the modeling created by Midwest ISO in its 2008 transmission planning process. R. 41 at 5, App. 120. Pioneer stated that it expected its transmission project to be in service in 2015, "and a 2018 base case is consistent with industry practice to take a forward look at the Project in the years after it enters service." *Id.* As noted previously, neither Indiana nor any other party objected to Pioneer's methodology.

reliance on Pioneer's study in its petition for agency rehearing, or indeed at any time in the agency proceeding, acts as a jurisdictional bar to review of challenge on appeal).[8] Indeed, in response to Pioneer's study report, Indiana noted that it was "pleased with the analysis performed by Pioneer showing reliability and economic benefits for Indiana . . . ." Indiana's Comments at 2, App. 112.

Nor is the Commission's consideration of Pioneer's study inconsistent with its consideration of other studies in other incentives cases. The Commission said nothing, in any of the earlier cases that Indiana cites (*see* Br. 15-17), to suggest that only a certain kind of study can constitute substantial evidence to support transmission incentives. *See PacifiCorp*, 125 FERC ¶ 61,076 at P 40 (2008) (denying incentives for one segment of project because there were *no* supporting studies in the record — not based on quality or sufficiency of a study); *Tallgrass Transmission, LLC*, 125 FERC ¶ 61,248 at PP7-8 (2008) (relying not only on RTO's earlier study, but also on project-specific study that applicants themselves had commissioned); *ITC*

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[8] Even in its response to the study, Indiana focused, not on the merits of the study, but rather on the timing of the Commission's decision. *See* Indiana's Comments at 2-3, App. 112-13 ("approval for incentive rates would be premature until such time as the PJM and the Midwest ISO complete their coordinated and broader regional analysis"); *see also* Rehearing Request at 4, App. 52 (characterizing its comments on Pioneer's study as having objected to approval of incentives before regional planning was completed).

Great Plains, LLC, 126 FERC ¶ 61,223 at PP 35-38 (2009) (same); *Green Power Express LP*, 127 FERC ¶ 61,031 at P 19 (2009) (describing applicant's study, without mentioning, let alone deeming relevant, the source or conduct of the study).

2. The Commission Appropriately Considered The Particular Circumstances Of Pioneer's Proposal

But the Commission's analysis did not end with the study. The Commission went on to consider, based on the facts and circumstances of Pioneer's proposed project and on its own expertise with regard to transmission projects, the risks associated with Pioneer's proposal:

> The magnitude of the Pioneer project, cost of the project, and the fact that Pioneer faces the difficult task of securing the project's approval in two RTOs' transmission planning processes impose significant risks on Pioneer, and will have a negative impact on its ability to raise capital for the project. Pioneer also faces unique risks because it is one of the first large-scale projects designed to strengthen the interconnection between two RTOs.

Rehearing Order at P 58, App. 32. The Commission also put forth extensive affirmative findings as to each proposed incentive. *See, e.g.*, *id.* at P 53, App. 29 ("the Commission authorized [a return on equity] incentive that reflected, in its judgment, the level of remaining risk, explaining that given the size, scope, and cost of the project, Pioneer faces risks and challenges that warrant" the adders for new transmission investment and for RTO participation) (internal footnote omitted); *see also id.* ("The Commission

concluded, based on its expertise and close scrutiny of Pioneer's request, that while [construction costs] and abandonment did reduce the Project's overall risk, they did not completely mitigate the need for [a return on equity] incentive.") (footnote omitted); *id.* at PP 56-57, App. 30-31 (explaining purposes of each incentive and specific findings in this case that each is "instrumental in supporting Pioneer's financial integrity and ability to attract capital").

The Commission, however, was no rubber stamp. When unsatisfied with Pioneer's proposed proxy group, the Commission set the base return on equity at a lower level than Pioneer requested. *See* Rehearing Order at P 49, App. 26-27; Incentives Order at PP 91, 94, App. 88, 89-90. It also denied the requested 50 basis point adder for advanced transmission technology, finding Pioneer's explanation inadequate. *See* Incentives Order at PP 58-59, App. 77-78.

The Commission considered "the facts of the record in its entirety" in approving this particular combination of incentives for the project (Rehearing Order at P 50, App. 27), including:

> • *Size and scope of the project. See* Rehearing Order at P 50, App. 27 ("the large scale of the project, which spans two RTOs"); Incentives Order at P 97, App. 91 (noting "the challenges of securing the project's approval in two RTOs' transmission planning processes"); *id.* at P 48, App. 74 ("the 240 mile 765 kV transmission line will cost approximately $1 billion, one of the highest-cost transmission projects in

the region"); *id.* ("the project will connect two RTOs using 765 kV facilities").

• *Regulatory and other hurdles. See* Rehearing Order at P 58, App. 32 ("[B]ecause Indiana does not have a formal siting process, Pioneer will have to obtain rights-of-way for the 240 mile line by negotiating with individual landowners, and if such negotiations are unsuccessful, Pioneer will have to initiate eminent domain proceedings in the circuit court for each county . . . ."); *accord* Incentives Order at P 49, App. 75; *id.* at P 97, App. 91 (noting "the challenges of . . . obtaining rights-of-way through several counties without the benefit of a state siting process").

• *Benefits of the project. See* Rehearing Order at P 50, App. 27 ("the project will facilitate the interconnection and transport of at least 4,000 MW of the proposed 6,000 MW[] of new wind generation in Indiana that is currently in the Midwest ISO and PJM interconnection queues, without requiring substantial upgrades to the underlying low-voltage networks"); *accord* Incentives Order at P 48, App. 74; *id.* ("we agree with Pioneer that adding the Pioneer project to the transmission network may allow more economic interconnections for currently proposed generation projects, and may incent additional wind projects to locate in the area").

The Commission has repeatedly explained that it considers every proposal for transmission rate incentives on a case-by-case basis, as the particular facts and circumstances of each project warrant. *See* Incentives Order at P 37, App. 70; *Pac. Gas & Elec. Co.*, 123 FERC ¶ 61,067 at P 39; *Cent. Me. Power Co.*, 125 FERC ¶ 61,079 at P 86. Here, having thoroughly evaluated Pioneer's specific proposal and the unique risks and challenges the project would face, the Commission appropriately found that the proposed rate incentives, as adjusted by the Commission and subject to certain

conditions (including project approval in regional planning processes), were reasonable. This finding, both well-explained and fully based on substantial evidence, is deserving of judicial respect. *See Conn. Dep't of Pub. Util. Control*, 593 F.3d at 33-34 (affirming Commission's approval of rate incentives where agency made uncontested findings of proposed transmission projects' value in reducing congestion and promoting reliability).

CONCLUSION

For the reasons stated, Indiana's petition should be dismissed for lack of jurisdiction. Alternatively, the petition should be denied, and the challenged FERC Orders should be affirmed in all respects.

Respectfully submitted,

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August 24, 2010

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(5), (6), and (7)(C)(i) and 7th Cir. R. 32, I certify that the Brief of Respondent Federal Energy Regulatory Commission has been prepared in a proportionally spaced typeface using Microsoft Word, in 13-point Century font (12-point in footnotes), and contains 8,337 words, not including the tables of contents and authorities, the addendum, and the certificates of counsel.

/s/ Carol J. Banta
Carol J. Banta
Attorney for Federal Energy
Regulatory Commission

August 24, 2010

ADDENDUM
STATUTES

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good

cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine -

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are -

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility
to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

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

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

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

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

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

(a) Rulemaking requirement

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

(b) Contents

The rule shall—

(1) promote reliable and economically efficient transmission and generation of electricity by promoting capital investment in the enlargement, improvement, maintenance, and operation of all facilities for the transmission of electric energy in interstate commerce, regardless of the ownership of the facilities;

(2) provide a return on equity that attracts new investment in transmission facilities (including related transmission technologies);

(3) encourage deployment of transmission technologies and other measures to increase the capacity and efficiency of existing transmission facilities and improve the operation of the facilities; and

(4) allow recovery of—

(A) all prudently incurred costs necessary to comply with mandatory reliability standards issued pursuant to section 824o of this title; and

(B) all prudently incurred costs related to transmission infrastructure development pursuant to section 824p of this title.

(c) Incentives

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

(d) Just and reasonable rates

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

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

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

Indiana Utility Regulatory Commission v. FERC **Docket No. ER09-75**
7th Cir. No. 10-1635

CERTIFICATE OF SERVICE

I hereby certify that I have, this 24th day of August, 2010, served the foregoing by causing copies of it to be mailed to the counsel listed below.

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