ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 16-1342

ESI ENERGY, LLC,
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

DAVID L. MORENOFF
GENERAL COUNSEL

ROBERT H. SOLOMON
SOLICITOR

NICHOLAS M. GLADD
ATTORNEY

FOR RESPONDENT
FEDERAL ENERGY REGULATORY
COMMISSION
WASHINGTON, D.C. 20426

APRIL 21, 2017

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Respondent submits:

A. Parties and Amici

To counsel's knowledge, all parties before this Court and the Federal Energy Regulatory Commission are listed in Petitioner's opening brief.

B. Rulings Under Review

This case arises after remand in *West Deptford Energy, LLC v. FERC*, 766 F.3d 10 (D.C. Cir. 2014). *West Deptford* addressed the Commission's orders in *PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,195 (2011) ("2011 Order"), JA 146, *reh'g denied*, 139 FERC ¶ 61,184 (2012) ("2012 Order"), JA 164.

The rulings now under review in this new appeal are:

Order on Remand, *PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,237 (2015) (Remand Order), R. 8, JA 001; and

Order on Rehearing, Compliance, and Clarification, *PJM Interconnection, L.L.C.*, 156 FERC ¶ 61,090 (2016) (Rehearing Order), R. 17, JA 012.

C. Related Cases

Counsel is not aware of any related cases pending in this Court or any other court. This case is on remand from this Court's decision in *West Deptford Energy, LLC v. FERC*, 766 F.3d 10 (D.C. Cir. 2014). In an earlier case, *FPL Energy Marcus Hook, L.P. v. FERC*, 430 F.3d 441 (D.C. Cir. 2005), this Court addressed

unrelated issues concerning the same transmission system network upgrade whose cost allocation is at issue here.

/s/ Nicholas M. Gladd
Nicholas M. Gladd
Attorney

April 21, 2017

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GLOSSARY

2011 Order	*PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,195 (2011), JA 146
2012 Order	*PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,184 (2012), JA 164
Br.	Opening brief of Petitioner ESI Energy, LLC
Commission or FERC	Federal Energy Regulatory Commission
JA	Joint Appendix
new tariff	The version of the System Operator's tariff containing section 219, JA 362, which was filed with the Commission on Aug. 1, 2008
Marcus Hook	Petitioner ESI Energy, LLC, successor in interest to FPL Energy Marcus Hook, L.P.
old tariff	The version of the System Operator's tariff containing section 37.7, JA 360, which was in effect prior to Aug. 1, 2008
P	Denotes a paragraph in a Commission order
PJM or System Operator	Intervenor PJM Interconnection, L.L.C., operator of the regional transmission grid in 13 states and the District of Columbia
R.	Indicates an item in the certified index to the record
Rehearing Order	*PJM Interconnection, L.L.C.*, 156 FERC ¶ 61,090 (2016), R. 17, JA 012
Remand Order	*PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,237 (2015), R. 8, JA 001

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BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

Two different electric generating companies agreed to interconnect with the high-voltage transmission system operated by PJM Interconnection, L.L.C. ("PJM" or "System Operator"). Petitioner ESI Energy, LLC ("Marcus Hook")[1] agreed first; intervenor West Deptford Energy, LLC ("West Deptford") agreed later. This

[1] On December 19, 2016, the Court granted ESI Energy, LLC's motion to substitute itself for FPL Energy Marcus Hook, L.P. as Petitioner in this proceeding. To maintain consistency with the earlier proceedings and Petitioner's opening brief, this brief will use "Marcus Hook" instead of ESI Energy, LLC.

case concerns which generator – Marcus Hook or West Deptford – is ultimately responsible for the cost of a necessary transmission system upgrade.

The answer to this question turns on which vintage of the PJM tariff applies: the old tariff (in effect when West Deptford commenced negotiations with PJM); or the new tariff (in effect when the West Deptford-PJM agreement was filed with the Federal Energy Regulatory Commission ("Commission")). If the old tariff applies, West Deptford must pay for the cost of the transmission system upgrade. If the new tariff applies, Marcus Hook must pay for the cost of that upgrade.

The Commission initially decided that the old tariff should govern West Deptford's interconnection agreement; not surprisingly, West Deptford petitioned for review. In *West Deptford Energy, LLC v. FERC*, 766 F.3d 10 (D.C. Cir 2014), this Court remanded that decision back to the Commission and, in doing so, made numerous findings to guide the agency in fulfilling the Court's mandate. Every one of the Court's conclusions indicated that it would be more appropriate to apply the new tariff—i.e., the one in effect when the agreement was filed with the Commission. On remand, the Commission agreed. *PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,237 (2015) (Remand Order), R. 8, JA 001, *on reh'g*, *PJM Interconnection, L.L.C.*, 156 FERC ¶ 61,090 (2016) (Rehearing Order), R. 17, JA 012.

This time, Marcus Hook (which is now responsible for the cost of the

transmission upgrade) seeks review. The remand orders on review raise the following two issues:

(1) whether the Commission reasonably determined that the new tariff should govern West Deptford's interconnection agreement; and

(2) whether the Commission reasonably interpreted the new tariff as providing that West Deptford is not responsible for the cost of the system upgrade at issue.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the attached Addendum.

STATEMENT OF FACTS

I. PJM's Transmission Interconnection Process

PJM is the independent regional transmission organization that operates transmission facilities in 13 eastern states and the District of Columbia. *West Deptford*, 766 F.3d at 13; *Pub. Serv. Elec. and Gas Co. v. FERC*, 485 F.3d 1164, 1165 (D.C. Cir. 2007); *FPL Energy Marcus Hook, L.P. v. FERC*, 430 F.3d 441, 442-43 (D.C. Cir. 2005). (PJM is not an acronym coined for this brief; it is named after the smaller Pennsylvania-New Jersey-Maryland region in which it first operated.)

A request to interconnect with the PJM transmission system is placed into a "first-come, first-served queue." *West Deptford*, 766 F.3d at 13 (quoting *Marcus*

Hook, 430 F.3d at 443) (internal quotations omitted). PJM then conducts three types of studies. *Marcus Hook*, 430 F.3d at 443; *Pub. Serv. Elec. and Gas*, 485 F.3d at 1166. First, PJM conducts a feasibility study, which "preliminarily determines what system upgrades are necessary to accommodate the new interconnection," and "estimate[s] the requesting party's cost responsibility for the upgrades." *Marcus Hook*, 430 F.3d at 443. Next, PJM conducts a system impact study, which "refines and more comprehensively estimates cost responsibility for necessary system upgrades." *Id.* Finally, PJM conducts a facilities study, which "allocates good faith estimates of cost responsibility" for the system upgrades. *Id.*

Each of those studies is conducted pursuant to separate agreements between the interconnection customer and PJM. *See Standardization of Generator Interconnection Agreements and Procedures*, 104 FERC ¶ 61,103 (2003), at App. C §§ 6.1 (describing Interconnection Feasibility Study Agreements), 7.1 (describing Interconnection System Impact Study Agreements), 8.1 (describing Interconnection Facilities Study Agreements). Those agreements set the parameters of the studies and establish the interconnection customer's responsibility for the cost of conducting the studies. *See id.* After all of the studies are completed, PJM then provides the requesting party with an Interconnection Service Agreement, which "specifies the customer's actual cost responsibility." *Marcus Hook*, 430 F.3d at 443.

II. The Filed Rate Doctrine

The filed rate doctrine "generally prohibits a regulated entity from charging rates 'other than those properly filed with the appropriate federal authority.'" *Consol. Edison Co. of N.Y. v. FERC*, 958 F.2d 429, 432 (D.C. Cir. 1992) (quoting *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981)); *see also Town of Concord v. FERC*, 955 F.2d 67, 71 (D.C. Cir. 1992) (same); *West Deptford*, 766 F.3d at 12 (citing *Ark. La. Gas*, 453 U.S. at 577, and *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 800 (D.C. Cir. 2007)). The doctrine "ensures evenhandedness, fairness, stability, and predictability in the prices charged for electrical energy." *West Deptford*, 766 F.3d at 12.

A "notice exception" to the doctrine exists when a buyer has "'adequate notice that resolution of some specific issue may cause later adjustment to the rate being collected at the time of service.'" *Id.* at 22 (quoting *Nat. Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992)). But that exception generally has been confined to certain specific situations involving formulas for calculating rates or judicial invalidation of Commission decisions. *See id.* at 22-24.

III. Events Leading to the *West Deptford* Decision

In 1998, Marcus Hook sought to interconnect with PJM's transmission system. *Id.* at 14. In reviewing that interconnection request, PJM determined that a transmission circuit would need to be upgraded ("Upgrade," also referred to as

"Network Upgrade 28" and the "Mickleton-Monroe upgrade" elsewhere in these proceedings) to accommodate Marcus Hook's interconnection.[2] *West Deptford*, 766 F.3d at 14. In 2002, after PJM completed the necessary transmission studies, Marcus Hook entered into an interconnection agreement with PJM in which Marcus Hook agreed to pay 90 percent (over $10 million) of the Upgrade's total cost. *Id.*; *Marcus Hook*, 430 F.3d at 444. The Upgrade ultimately was completed and placed into service in June 2003. 766 F.3d at 14.

In 2006, West Deptford requested to interconnect with the PJM transmission system. *Id.* at 15. In analyzing West Deptford's request, PJM determined that the request would also necessitate the Upgrade. *See id.* At that time, PJM's old tariff was in effect. *Id.* Under the relevant provision (section 37.7) of that tariff, JA 360, costs associated with a transmission upgrade could be assigned to subsequent interconnection customers whose projects would use or require the upgrade, as long as the projects entered PJM's interconnection queue within 5

[2] Originally, Marcus Hook's was one of three interconnection requests submitted in 1998 for which PJM determined the Upgrade would be necessary. *See West Deptford*, 766 F.3d at 14. One of those requests subsequently was withdrawn, which led PJM to conclude that the Upgrade was no longer necessary. *Id.* But by then the Upgrade was almost complete, so PJM determined that the least costly option was to finish the Upgrade. *Id.* Notwithstanding that history, for purposes of this appeal it is uncontested that Marcus Hook's interconnection request initially necessitated the Upgrade. *See* Br. 41 n.35 (noting that Marcus Hook did not seek rehearing of this finding); *accord* 766 F.3d at 14-15 and *Marcus Hook*, 430 F.3d at 447-49.

years of the date the upgrade was placed in service. *West Deptford*, 766 F.3d at 15. As a result, PJM asserted that it could assign costs associated with the Upgrade to West Deptford, because West Deptford entered the interconnection queue within five years of the Upgrade's in-service date. *Id.* at 16; *see also infra* p. 9 (showing graphical representations of old tariff versus new tariff). But throughout its time in the interconnection queue, West Deptford disputed that it should be responsible for costs associated with the Upgrade. *West Deptford*, 766 F.3d at 16, 24.

In 2008, while PJM was still studying West Deptford's interconnection request, the Commission approved a change to PJM's tariff which replaced the old tariff with the new tariff, which "significantly changed Section 37.7's assignment of financial responsibility for prior upgrades." *Id.* at 15 (citing *Dominion Res. Servs., Inc.*, 123 FERC ¶ 61,025 (2008)). Under the relevant provision (section 219) of the new tariff, JA 362, costs associated with a transmission upgrade that costs $5 million or more can be assigned to subsequent interconnection customers whose projects would require the upgrade "only for a period of five years 'from the execution date of the Interconnection Service Agreement for the project that initially necessitated the requirement for the [upgrade].'" *West Deptford*, 766 F.3d at 15 (quoting section 219 of the new tariff).

The following graphics illustrate how the cost responsibility provisions in the old tariff and new tariff, as interpreted by the Commission, apply to the

timeline of this case (note that the timelines are identical, but the determinative events under each version of the tariff differ and are in bold outline):

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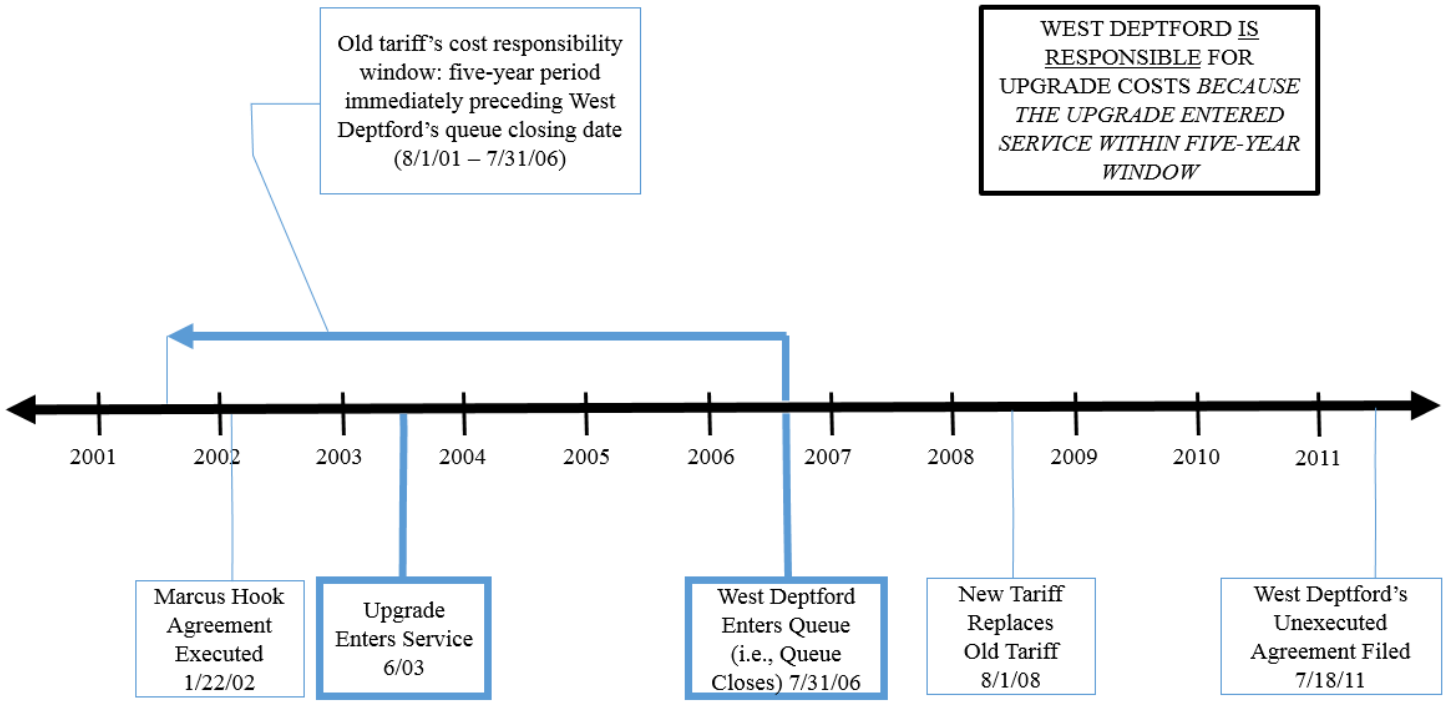
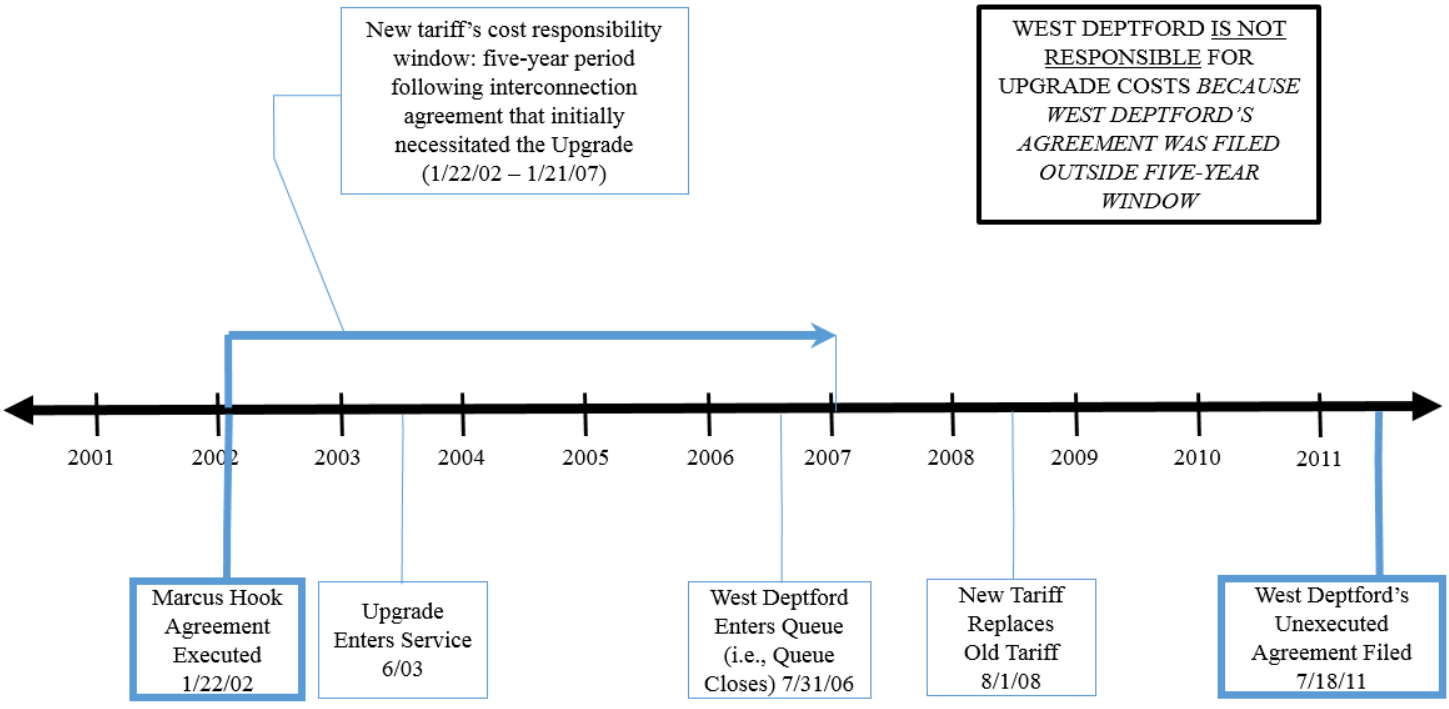
Old Tariff (Section 37.7)



New Tariff (Section 219)



In 2011, PJM concluded its third study of West Deptford's interconnection request and filed the resulting interconnection agreement with the Commission. *West Deptford*, 766 F.3d at 16. Because PJM and West Deptford did not agree on all aspects of the interconnection agreement, including the issue of which vintage of PJM's tariff should govern, PJM filed the agreement unexecuted and left it to the Commission to resolve that dispute. *Id.*

The Commission initially ruled on the dispute in the 2011 Order. *PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,195 at PP 31-38 (2011) ("2011 Order"), JA 156-59. The Commission acknowledged that "West Deptford could not be liable for the Upgrade under the [new] tariff" but nonetheless concluded that the old tariff should govern because West Deptford had notice that the tariff in effect when it entered the queue would be the one that established its financial responsibility. *West Deptford*, 766 F.3d at 16 (citing 2011 Order P 35, JA 158).

The Commission denied rehearing in the 2012 Order. *PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,184 at PP 26-46 (2012) ("2012 Order"), JA 173-81. The Commission continued to find that West Deptford had adequate notice based on four considerations: (1) the new tariff's proposed effective date; (2) the 2008 transmittal letter that PJM attached to the new tariff ("2008 transmittal letter"); (3) an answer that PJM filed in 2008 in response to a protest of the new tariff ("PJM's 2008 answer"); and (4) the studies that PJM undertook based on West Deptford's

interconnection request. *Id.* PP 26-37. The Commission also reasoned that it was appropriate to apply a case-by-case approach to this issue, and that the Commission's determination was consistent with its precedent. *Id.* PP 37-46.

West Deptford petitioned this Court to review the 2011 and 2012 Orders.

IV. The *West Deptford* Decision

In 2014, the Court issued *West Deptford*, vacating in part and remanding the 2011 and 2012 Orders. The Court found that the Commission had not explained how applying the old tariff satisfied the Federal Power Act's filed rate doctrine requirements. *West Deptford*, 766 F.3d at 18. The Court began its analysis by explaining that the text of the new tariff does not identify its own effective date. *Id.* "Right out of the box, then, the Commission's application of the [old] tariff, rather than the new one, ran into statutory headwinds that the Commission needed to address." *Id.* The Court then found that the Commission relied on PJM's 2008 transmittal letter without adequately explaining how that letter satisfied the statutory requirements. *Id.* at 18-19. The Court did not stop there. Instead, it parsed the language of the 2008 transmittal letter, finding that "at best" it is silent about which tariff vintage should apply, and "at worst . . . the letter implies that, beginning August 1st [2008], all charges for transmission and sales contracts, including interconnection service, would hew to the new tariff's terms." *Id.*; *see also id.* at 19 (finding that PJM's explanatory language concerning the August 1,

2008 effective date "simply adds confusion about what must be in place by August 1st").

The Court also found that the Commission's determination appeared to contradict Commission precedent without a reasoned explanation for its deviation. *West Deptford*, 766 F.3d at 19-20. The Court found unpersuasive the Commission's argument that it can employ a case-by-case approach in deciding what event triggers an effective date during the interconnection process. *Id.* at 20. The Court then walked through, step-by-step, the type of explanation the Commission would need to provide to support its case-by-case approach. *Id.* (Commission would have to explain how a case-by-case approach would satisfy the Federal Power Act's requirements); *id.* at 20-21 (Commission would have to explain how a case-by-case approach is consistent with the Federal Power Act's purposes, given Commission's previous findings that those purposes are "best served by imposing increased uniformity in tariff terms in lieu of conducting case-by-case adjudications"); *id.* at 21 ("Commission would have to provide a reasoned analysis, resting on articulated objective, nondiscriminatory, and evenhanded criteria, that would justify treating West Deptford differently than the generators in all those other cases in which the Commission enforced the tariff in effect at the time an agreement was filed or executed.").

The Court then dissected the cases the Commission relied upon, and found that they do not support the case-by-case approach. *West Deptford*, 766 F.3d at 21 ("*MISO II* makes things worse not better for the Commission's position); *id.* at 21-22 (analyzing *Marcus Hook* and finding that "the last time the Commission addressed for this very same tariff the question of which event the effective date turned on—the queue entry date or the interconnection agreement date—the Commission gave the exact opposite answer").

Finally, the Court rejected the Commission's assertion that this case fits within the "so-called notice exception to the filed rate doctrine." *Id.* at 22. The Court explained that, although the Court's "decisions on the necessary notice have not been altogether clear," *id.* (quoting *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 577 (D.C. Cir. 1990)), "[f]or the most part . . . the notice exception has been confined to two scenarios." *Id.* at 22-23 (describing the two scenarios as (1) the use of a formula, rather than specific numbers, to determine a rate; and (2) a retroactive rate change caused by judicial invalidation of a Commission decision). The Court concluded that "[t]his case presented neither of those well-established situations." *Id.* at 23. The Court then analyzed each piece of evidence that the Commission relied upon in invoking the notice exception, rejecting the Commission's rationale for why that evidence provided adequate notice. *Id.* at 23-24.

The Court therefore vacated, in relevant part, and remanded the orders to the Commission for further explanation "consistent with the decision of this court." *West Deptford*, 766 F.3d at 25.

V. The Challenged Orders

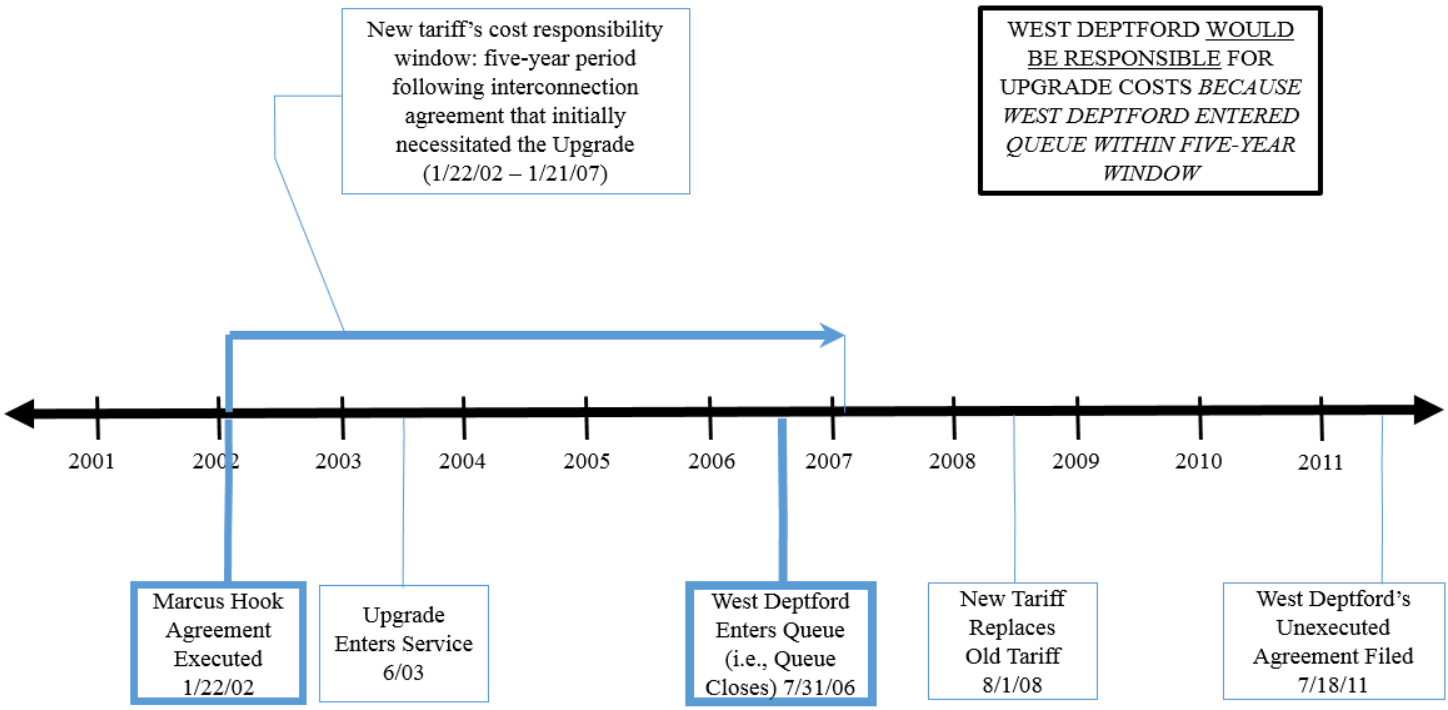
On remand, and after reviewing additional pleadings from West Deptford and Marcus Hook, *see* R. 3, 4, 6, 7, 10, 11, 13, 14, 16, the Commission reversed its earlier determination that the old tariff should govern West Deptford's interconnection agreement. Remand Order PP 14-18, JA 006-08; Rehearing Order PP 9-17, JA 013-18.

The Commission noted that, although the Court in *West Deptford* "did not dictate a precise outcome on remand," it "expressed significant skepticism with the Commission's determination that [the old tariff] should apply and identified numerous shortcomings in the Commission's analysis." Rehearing Order P 10, JA 014-15. The Commission therefore reconsidered its prior rulings in light of the Court's reasoning. Remand Order P 14, JA 006; Rehearing Order P 10, JA 014-15. The Commission deferred to the Court at every opportunity and concluded that West Deptford did not have adequate notice that PJM intended to phase in the new tariff, rather than apply it immediately upon its effective date. Remand Order P 14, JA 006; Rehearing Order P 11, JA 015.

In reaching that decision, the Commission considered the parties' additional pleadings and reconsidered the record evidence and precedent that the Court analyzed in *West Deptford*. Remand Order PP 15-22, JA 006-10; Rehearing Order PP 9-23, JA 013-21. The Commission's rationale mirrored the Court's conclusions in *West Deptford* and provided additional explanation where necessary. *See* Remand Order PP 15-22, JA 006-10; Rehearing Order PP 9-23, JA 013-21. Ultimately, the Commission found that none of the evidence gave West Deptford sufficient notice that the old tariff would govern its interconnection agreement. Remand Order P 14, JA 006; Rehearing Order P 11, JA 015. The Commission therefore concluded that the new tariff should govern West Deptford's cost responsibility. Remand Order PP 14, 18, JA 006, 008.

Next, the Commission proceeded to address an alternative interpretation of the new tariff which Marcus Hook presented for the first time on remand. Remand Order PP 19-22, JA 008-10; Rehearing Order PP 18-23, JA 018-21. Marcus Hook argued that the new tariff should be interpreted such that an interconnection customer is liable for the cost of network upgrades that entered service during the five years preceding the customer's queue entry date, rather than the date the customer executed or filed its interconnection agreement. *See* Rehearing Order P 21, JA 019. The following graphic illustrates how Marcus Hook's interpretation applies to the timeline of this case:

Marcus Hook's Alternative Interpretation of the New Tariff (Section 219)



The Commission rejected Marcus Hook's interpretation, *id.* P 22, JA 019-20, favoring instead the interpretation that the Commission and PJM have used throughout this dispute. *Id.*; Remand Order P 19 n.27, JA 008. The Commission acknowledged that the new tariff is "ambiguous in that it does not explicitly identify the event that closes the five-year window," Rehearing Order P 22, JA 020, and concluded that the "most reasonable interpretation" is that the five-year window closes on the date a customer's interconnection agreement is executed or filed. *Id.*; *see also* Remand Order P 22, JA 009-10. The Commission explained that its interpretation is consistent with the Court's reasoning in *West*

Deptford as well as the new tariff provision's purposes—i.e., to assign cost responsibility, clarify interconnection procedures, and shorten the window of cost responsibility. Rehearing Order PP 22-23, JA 019-21.

SUMMARY OF ARGUMENT

The Commission's orders on review faithfully and thoughtfully implement this Court's mandate in *West Deptford*. What were once statutory and regulatory "headwinds," 766 F.3d at 18, are now tailwinds. The Commission deferred to every one of the Court's findings and concluded that West Deptford's interconnection agreement should be governed by the tariff that was in effect when that agreement was filed—i.e., the new tariff, not the old tariff, should apply. That conclusion is supported by substantial evidence and is consistent with the Federal Power Act and Court and Commission precedent. Marcus Hook's arguments to the contrary, most of which the Court already rejected in *West Deptford*, have no merit.

After determining that the new tariff should govern here, the Commission acknowledged a point of ambiguity in the new tariff and concluded that the most reasonable interpretation is the one that the Commission and PJM have used throughout this long-running dispute. In doing so, the Commission acted reasonably in rejecting Marcus Hook's attempt (for the first time on remand) to push for an alternative interpretation of the new tariff that would make West

Deptford responsible for the Upgrade costs under that vintage of the tariff. As a result, Marcus Hook will remain on the hook for the cost of a transmission system upgrade that Marcus Hook caused.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g.*, *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). The "scope of review under [that] standard is narrow." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (citation omitted). The relevant inquiry is whether the agency has "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *see also Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (finding reasoned decisionmaking where Commission "weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that choice").

The Commission's decisions regarding rate issues are entitled to respect, because of "the breadth and complexity of the Commission's responsibilities."

Permian Basin Area Rate Cases, 390 U.S. 747, 790 (1968); *see also Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1286 (D.C. Cir. 2011) ("[B]ecause 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, our review of whether a particular rate design is just and reasonable is highly deferential.") (internal quotation marks and citation omitted). *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."); *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 951 (D.C. Cir. 2007) ("In reviewing FERC's orders, we are 'particularly deferential to the Commission's expertise' with respect to ratemaking issues.") (citation omitted).

The Commission's factual findings are conclusive if supported by substantial evidence. Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b). The substantial evidence standard "'requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.'" *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 395 (D.C. Cir. 2008) (citation omitted); *accord S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014). If the evidence is susceptible of more than one rational interpretation, the Court must uphold the agency's findings. *See Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966);

accord Fla. Gas Transmission Co. v. FERC, 604 F.3d 636, 645 (D.C. Cir. 2010) ("[W]e do not ask whether record evidence could support the petitioner's view of the issue, but whether it supports the Commission's ultimate decision.").

Finally, in proceedings on remand, the Commission's determinations are reviewed to ensure that they are responsive to the Court's mandate. *See, e.g.*, *Process Gas Consumers Grp. v. FERC*, 292 F.3d 831, 840 (D.C. Cir. 2002). While it is for the Court, of course, to construe its own mandate, *see FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 141 (1940), "the court's opinion may be consulted to ascertain the intent of the mandate." *City of Cleveland v. FPC*, 561 F.2d 344, 347 n.25 (D.C. Cir. 1977) (citing cases).

II. THE COMMISSION REASONABLY CONCLUDED THAT THE NEW TARIFF SHOULD GOVERN

When the Commission reacquires jurisdiction through remand, it has "the discretion to reconsider the whole of its original decision," in light of the Court's mandate. *Se. Mich. Gas Co. v. FERC*, 133 F.3d 34, 38 (D.C. Cir. 1998) (citing *Radio Television S.A. de C.V. v. FCC*, 130 F.3d 1078, 1082–83 (D.C. Cir. 1997)). The Commission appropriately exercised that discretion here, reconsidering its previous decision in light of the Court's detailed analysis of the relevant authorities and record evidence. In doing so, the Commission deferred to the Court's well-reasoned findings and concluded that West Deptford's interconnection agreement should be governed by the tariff that was in effect when the agreement was filed.

A. The Commission's Determination Satisfies the Federal Power Act and the Court's Mandate

The spirit of the Court's mandate in *West Deptford* is obvious: the Commission must either provide a much better explanation for applying the old tariff, or apply the new tariff. *See* 766 F.3d at 25 (remanding for "additional explanation consistent with the decision of this court," "[b]ecause the Commission failed to provide an adequate explanation . . . for its decision to apply the [old] tariff to an interconnection agreement filed after the new tariff's effective date"). The Commission has fully satisfied that mandate.

In remanding this proceeding, the Court provided a roadmap of the Federal Power Act's filed rate doctrine requirements, the relevant Commission and Court precedent, and the record evidence in this case. *See id.* at 18-24. At every turn, the Court rejected the Commission's rationale for applying the old tariff to West Deptford's interconnection agreement. *Id.* Although the Court left open the theoretical possibility that the Commission could come up with a satisfactory explanation for applying the old tariff, the Court expressed significant skepticism that the Commission could do so on the facts of this case. *See, e.g.*, *id.* at 23-24. Rather than fight the "statutory headwinds" or deviate from the "unbroken chain of precedent" disfavoring the old tariff, *id.* at 18-20, the Commission found that it would be more appropriate to apply the new tariff—the tariff that has been on file and open for public inspection at the Commission since 2008. Remand Order

P 14, JA 006. That conclusion satisfies the Federal Power Act, 16 U.S.C. §§ 824d(a)-(d), and is supported by the relevant evidence in this proceeding.

As to PJM's 2008 transmittal letter, the Court in *West Deptford* found that the letter "simply adds confusion" to the effective date issue and implies that West Deptford's interconnection charges would "hew to the new tariff's terms." 766 F.3d at 19. On remand, the Commission agreed. *See* Remand Order PP 15-16 (finding, "[b]ased on the court's decision," that the 2008 transmittal letter is "not sufficiently clear" that the old tariff would govern West Deptford), JA 006-08.

As to the 2008 Commission order that accepted the new tariff, the Court found that the Commission's order had not "endorsed th[e] prefatory language" in the 2008 transmittal letter that allegedly clarified PJM's intent to phase-in the new tariff's effectiveness. *West Deptford*, 766 F.3d at 19. On remand, the Commission agreed. *See* Remand Order P 15 (adopting the Court's finding and rejecting Marcus Hook's argument that the Court "misread" the Commission order accepting the new tariff), JA 006-07.

As to the relevant precedent, the Court analyzed a long line of Commission cases and found that, "until now, there appeared to be an unbroken Commission practice of holding that interconnection agreements filed after the designated effective date of an amended tariff are governed by the amended tariff, unless the amended tariff has a grandfathering provision." *West Deptford*, 766 F.3d at 19-20

(discussing relevant Commission precedent); *id.* at 22 ("[T]he last time the Commission addressed for this very same tariff the question of which event the effective date turned on—the queue entry date or the interconnection agreement date—the Commission gave the exact opposite answer.") (discussing *FPL Energy Marcus Hook, L.P. v. PJM Interconnection, L.L.C.*, 118 FERC ¶ 61,169 (2008)). On remand, the Commission agreed. *See* Remand Order P 15 (rejecting Marcus Hook's challenge to "the court's explanation of the legal precedent in other Commission interconnection queue cases"), JA 006-07.

As to the Commission's attempt to employ a "case-by-case approach" to deciding the relevant trigger for an effective date in this context, the Court rejected that attempt and enumerated several statutory and precedential roadblocks that the agency would need to overcome in order to use such an approach here. *West Deptford*, 766 F.3d at 20-21 (identifying several of the Federal Power Act's "requirements," "purposes," and "proscri[ptions]" with which a case-by-case approach appears to conflict); *id.* at 21-22 (explaining that none of the precedent that the Commission relied upon to support its case-by-case approach actually supports such an approach). On remand, the Commission once again deferred to the Court's legal findings and abandoned its attempt to use a case-by-case approach. *See* Remand Order PP 14-24 (making no mention of case-by-case approach, and adopting Court's interpretation of precedent undermining such an

approach), JA 006-10; Rehearing Order PP 9-17 (same), JA 013-18.

The Court concluded by rejecting the Commission's argument that this case fits within the notice exception to the filed-rate doctrine. *West Deptford*, 766 F.3d at 22-24. In so doing, the Court explained at length why none of the relevant evidence—i.e., the 2008 transmittal letter, PJM's 2008 answer, the Commission order accepting the new tariff, and the interconnection studies—provided West Deptford adequate notice that the old tariff would apply. And yet again, on remand, the Commission agreed. *See* Remand Order PP 14-16, JA 006-08; Rehearing Order PP 11-17, JA 015-18. In doing so, the Commission acknowledged, as did the Court, that the notice exception to the filed-rate doctrine might apply beyond the two classic situations that the Court identified, and might even apply in this type of situation. *Compare West Deptford*, 766 F.3d at 22, 23-24 (acknowledging that the notice exception is not strictly limited to the two most common scenarios) *with* Remand Order P 14 n.17 (same) (citing *Consol. Edison Co. of N.Y. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003), and *Tex. E. Transmission Corp. v. FERC*, 102 F.3d 174, 186 (5th Cir. 1996)), JA 006. But the Commission ultimately agreed with the Court that, on the facts of this case, West Deptford did not have adequate notice that the old tariff would apply. *See* Remand Order P 14, JA 006; Rehearing Order PP 10-11, JA 014-15.

In sum, the Commission, on remand from this Court, provided a well-

reasoned explanation for its determination that the new tariff should now apply. *See, e.g.*, *Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (respecting FERC's decision on an issue indicating "technical understanding and policy judgment," where the agency "addressed that issue seriously and carefully, providing reasons in support of its position and responding to the principal alternative advanced").

B. Marcus Hook's Attempts to Undermine the Commission's Interpretation of the Court's Mandate Lack Merit

Marcus Hook prefers that the Commission, rather than apply the new tariff, either roll the old tariff back up the hill or tell this Court that it erred in *West Deptford*. *See, e.g.*, Rehearing Request at 27 ("In short, the Commission should have explained why the court's discussion [of Commission policy and precedent] . . . is incorrect."), JA 104; Br. 33 (FERC must offer "a detailed justification for its sudden reversal"). The Commission appropriately declined those invitations. *See Atl. City Elec. Co. v. FERC*, 329 F.3d 856, 859 (D.C. Cir. 2003) ("If FERC thinks we are wrong, then like any other litigant, it may petition for *certiorari* to the Supreme Court of the United States.").

At bottom, Marcus Hook's position is that the Commission did not comply with the Court's mandate because the Commission relied on the Court's legal and factual conclusions to reverse course, rather than starting anew on remand. Br. 24 ("[T]he Commission repeatedly deferred to what it perceived to be the Court's view of the evidence, and its legal implications, rather than conducting its own re-

evaluation . . . ."). But the Commission did not need to explain why its previous findings were wrong. The Court did that in *West Deptford*. On remand, the Commission agreed with the Court, acknowledged its change in course, and provided a well-reasoned explanation for how its determination on remand is consistent with the Federal Power Act and relevant precedent. There is nothing more for the Commission to do. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (when changing course, agency need not demonstrate that the reasons for the new course are better than the reasons for the old one); *see also Mich. Consol. Gas Co. v. FERC*, 883 F.2d 117, 122 (D.C. Cir. 1989) ("Agency explanation need not be elaborate if it is consistent with precedent.") (internal quotations and citation omitted).

Marcus Hook argues that the Commission ignored some of the Court's concerns about the legal significance of transmittal letters and whether the Commission "endorsed" the 2008 transmittal letter in this case. Br. 29-30. But the Commission's determination that the new tariff governs does address those concerns for purposes of this case: the 2008 transmittal letter was too confusing to provide West Deptford adequate notice here, regardless of whether the Commission "endorsed" it by accepting it "as proposed." Remand Order PP 14-16, JA 006-08; Rehearing Order PP 11, 13, JA 015, 016. And, in any event, the Commission has addressed those concerns in other proceedings, and the

Commission's conclusion on remand is fully consistent with that precedent. *See, e.g.*, *ISO New England Inc.*, 144 FERC ¶ 61,169 at P 21 (2013) ("As an initial matter, we note that the language contained in the actual tariff, not an applicant's transmittal letter, is the filed rate."); *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,268, at n.8 (2009) (when tariff and transmittal letter conflict, tariff controls).

Marcus Hook also contends that the Commission failed to consider certain arguments based on the mistaken belief that the Court already rejected them in *West Deptford*. Br. 36-40. Those arguments are not properly before the Court. And, in any event, the Commission was not mistaken.

Marcus Hook first contends that the Commission failed to address the argument that notice could be imputed to West Deptford because its affiliate, LS Power Associates, L.P., was a party to the *Dominion* proceeding (the 2008 proceeding where the new tariff replaced the old tariff). Br. 36-37. This argument is easily dismissed for three reasons. First, it was not raised on rehearing to the agency, *see* Rehearing Request at 1-37, and is therefore not properly before the Court. 16 U.S.C. § 825*l*(b) ("No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is a reasonable ground for failure to do so."); *Ind. Util. Regulatory Comm'n v. FERC*, 668 F.3d 735, 739

(D.C. Cir. 2012) (holding judicial review is limited to grounds "'set forth specifically'" in rehearing request) (quoting 16 U.S.C. § 825*l*(a)). Second, the Commission previously made this same argument and the Court was not persuaded by it. *Compare* Brief of Respondent FERC, at 23, West Deptford Energy, LLC, No. 12-1340 (D.C. Cir. Apr. 18, 2013) (arguing that West Deptford had adequate notice because its affiliate was a party to the *Dominion* proceeding) *with West Deptford*, 766 F.3d at 23 (rejecting Commission's argument that the *Dominion* proceeding gave West Deptford adequate notice). Third, Marcus Hook's argument on brief (Br. 36-37) conflates two different affiliates—LS Power Associates, L.P. (i.e., the party to the *Dominion* proceeding) and LS Power Development (i.e., the West Deptford affiliate mentioned in the Facilities Study Agreement)—without attempting to explain the relationship between them.

Marcus Hook next asserts that, although the Court considered PJM's interconnection studies in *West Deptford*, it did not consider the Facilities Study Agreement that West Deptford signed. Br. 37-39. That argument—which was, at best, tucked away in a footnote, Rehearing Request at 22 n.98, JA 099, on rehearing—also is not properly before the Court. *See Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1310 (D.C. Cir. 2015) (declining to consider "arguments 'tucked away in a footnote' in a request for rehearing") (citation omitted). But even if the Court finds it to be sufficiently preserved, the

argument has no merit.

The same Facilities Study Agreement—which was signed between the second and third interconnection studies, while West Deptford was still in the interconnection queue—did not sway the Court in *West Deptford*. Remand Order P 17 (citing *West Deptford*, 766 F.3d at 24), JA 008; Rehearing Order P 15, JA 017. Rightly so, as that agreement merely established the study parameters and West Deptford's commitment to pay for the *study*, nothing more. *See* West Deptford Aug. 8, 2011 Protest, Docket No. ER11-4073-000, at Att. 5, "West Deptford Facilities Study Agreement" (designated as item R. 4 in the certified index to the record in West Deptford Energy, LLC, No. 12-1340 (D.C. Cir. Sept. 14, 2012)), JA 260. The Commission correctly found that, as it relates to West Deptford's responsibility for network upgrade costs (as opposed to *study* costs), the Facilities Study Agreement represents the same type of "one-way assertion[] . . . [that] generators have no apparent way to challenge." Remand Order P 17 (quoting *West Deptford*, 766 F.3d at 24) (internal quotations omitted), JA 008; Rehearing Order P 17, JA 017-18.

Notwithstanding Marcus Hook's assertions to the contrary, the Commission gave the Facilities Study Agreement the attention it deserved. *See Mich. Consol. Gas*, 883 F.2d at 122 ("Agency explanation need not be elaborate if it is consistent with precedent.") (internal quotations and citation omitted). Tellingly, Marcus

Hook has identified no precedent in which the Commission applied an out-of-date tariff on the basis that it was in effect when a facilities study agreement was signed. Nor can it. The Commission's determination is entirely consistent with precedent, including *West Deptford* itself. *See West Deptford*, 766 F.3d at 24 (citing *Dominion*, 123 FERC ¶ 61,025 at P 52). Indeed, each of the three specific reasons that the Court gave in *West Deptford* for why the interconnection studies did not provide adequate notice are equally applicable to the Facilities Study Agreement. *See id.* at 24 (noting that West Deptford repeatedly objected throughout the time that it was in the interconnection queue to the imposition of Upgrade costs); *id.* (noting that there is no way to challenge an alleged cost responsibility at the "stage in the interconnection process" during which the studies are being conducted); *compare id.* (finding that prior Commission precedent treats studies as "just a 'non-binding estimate of costs'") (quoting *Dominion*, 123 FERC ¶ 61,025 at P 52) *with Dominion*, 123 FERC ¶ 61,025 at P 52 ("[T]he system impact study agreement does not set a rate for interconnection service.").

III. THE COMMISSION'S INTERPRETATION OF THE NEW TARIFF IS REASONABLE

From the outset of this proceeding, the Commission has consistently applied the same interpretation of the new tariff. *See* Remand Order P 19 n.27 (citing 2011 Order P 34, JA 158), JA 008; *accord West Deptford*, 766 F.3d at 15 ("[T]he Commission and PJM agree that, if the [new] tariff controls, then that tariff's five-

year time limit insulates West Deptford from having to pay for the Upgrade.") *and id.* at 16 ("Acknowledging that West Deptford could not be liable for the Upgrade under the [new] tariff, the Commission nonetheless concluded that the cost-allocation provisions of the [old] tariff should govern . . . ."). On remand, the Commission acknowledged that the new tariff is "ambiguous in that it does not explicitly identify the event that closes the five-year window" of cost responsibility, Rehearing Order P 22, JA 019-20, and therefore provided an expanded discussion of the rationale underlying its tariff interpretation. *Id.* PP 18-23, JA 018-21.

As an initial matter, to understand the "clos[ing] [of] the five year window," it is helpful to recognize that there are two possible starting points for the cost responsibility analysis set forth in the new tariff. Each involves a different five-year window. But each produces the same cost responsibility result. You can start by focusing on a particular upgrade (like the Upgrade at issue here) and ascertain the five-year time period for which its costs can be allocated to a subsequent interconnection customer (like West Deptford). *See supra* p. 9 (diagramming the five-year cost responsibility window for the Upgrade at issue here). Or, you can start by focusing on the interconnection customer and ascertain the five-year time period during which it may be responsible for upgrades that predated its interconnection agreement.

Because this case involves looking at both the Upgrade and West Deptford, the Commission has explained its tariff interpretation in terms of both approaches at different points in this proceeding. *Compare, e.g.*, 2011 Order P 34 (referring to window relative to network upgrade), JA 158, *with* Rehearing Order PP 21-22 (referring to window relative to interconnection customer), JA 019-20. The Commission's explanation on remand takes the latter approach, focusing on the five-year window for an interconnection customer rather than a particular upgrade. *See* Rehearing Order PP 21-22, JA 019-20. Regardless of which approach is used, the Commission's tariff interpretation concerning the event that determines cost responsibility is the same.

The Commission found the "most reasonable interpretation" of the new tariff to be that the filing or execution of a customer's interconnection agreement is the event that closes the time period during which that customer may be responsible for the cost of earlier upgrades. Rehearing Order P 22, JA 019-20; *see also* Remand Order P 22, JA 009-10. Both PJM and the Commission have applied that interpretation throughout this proceeding. *See* Remand Order P 19 n.27 (noting the 2011 Order's statement that, under the new tariff, West Deptford would not be liable for costs associated with the Upgrade), JA 008; *accord West Deptford*, 766 F.3d at 15, 16.

The Commission explained that it makes more sense to close an interconnection customer's cost responsibility window on the date that its cost responsibility is determined—not, as Marcus Hook contends, years before the interconnection negotiations conclude and cost responsibility is determined. Rehearing Order P 22, JA 019-20; Remand Order P 22, JA 009-10. In other words, faced with a choice between (1) cutting off cost responsibility on the date that responsibility is legally determined, or (2) cutting off cost responsibility at some uncorrelated date many years before the date that responsibility is legally determined, the Commission chose the former. That conclusion is reasonable on its face. And it is all the more so in light of the Commission's explanation that it is consistent with the tariff provision's purpose of assigning cost responsibility, PJM's overall intent for the new tariff to clarify interconnection procedures and shorten the window of cost responsibility, and this Court's rationale in *West Deptford*. *See* Rehearing Order PP 21-23, JA 019-21; Remand Order P 22, JA 009-10; *see also Old Dominion Elec. Coop., Inc. v. FERC*, 518 F.3d 43, 48 (D.C. Cir. 2008) (Court gives "substantial deference" and "*Chevron*-like" standard of review to Commission's interpretation of filed tariffs) (citing *Consolidated Edison*, 347 F.3d at 972, and *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

On appeal, Marcus Hook admits that it initially caused the Upgrade. *See* Br. 41 n.35. Nevertheless, Marcus Hook makes several policy arguments for why its alternative interpretation of the new tariff is superior to the Commission's interpretation. Br. 45-48, 51-53. But the Commission rejected those policy arguments on remand and explained why it did not find them persuasive. *See* Rehearing Order P 23 (explaining why Marcus Hook's concerns do not raise a significant problem), JA 020-21; *accord id.* P 22 (noting policy advantages of the Commission's own interpretation), JA 019-20. Such policy judgments are within the Commission's discretion and are worthy of judicial respect. *See Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 702 (D.C. Cir. 2000) (Commission's policy assessments are afforded "great deference"), *aff'd*, *N.Y. v. FERC*, 535 U.S. 1 (2002); *see also South Carolina*, 762 F.3d at 55 ("[T]he Commission must have considerable latitude in developing a methodology responsive to its regulatory challenge.") (internal quotation marks and citations omitted).

Marcus Hook contends that the Commission has been inconsistent in its own interpretation of the new tariff. Specifically, Marcus Hook quotes one passage from the 2012 Order that allegedly indicates that the Commission previously supported Marcus Hook's alternative interpretation. Br. 48 (quoting 2012 Order P 30, JA 175). But that passage does not help Marcus Hook. The passage at

issue indeed stated that "the relevant date for determining cost responsibility is when the new interconnection project enters the queue." 2012 Order P 30, JA 175. Nevertheless, that passage (and the entire determination section in which it appears) concerns cost responsibility based on which version of the tariff applies. The passage has no bearing on which event must take place during the five-year window under the new tariff, when that tariff is found to apply.

In summary, Marcus Hook would have the Court believe that no one really considered the issue of how to interpret the new tariff until the remand stage of this proceeding. That simply is not true. The Commission's interpretation of the new tariff has been an important element of this long-running dispute because it established the stakes for West Deptford and Marcus Hook: West Deptford would have to reimburse Marcus Hook for the Upgrade under the old tariff, but not under the new tariff. Indeed, West Deptford's insistence throughout the proceeding that the new tariff should apply only makes sense in light of the interpretation adopted by PJM and the Commission. And as noted above, the Court in *West Deptford*, 766 F.3d at 15, 16, acknowledged that this is the Commission's interpretation of the new tariff. The Commission's interpretation remains reasonable and should not now be upset on this Court's second review. *See Old Dominion Elec. Coop.*, 518 F.3d at 48 ("This Court also 'generally gives substantial deference to [FERC's] interpretation of filed tariffs, even where the issue simply involves the

proper construction of language.'") (quoting *S. Cal. Edison Co. v. FERC*, 415 F.3d 17, 21 (D.C. Cir. 2005)).

CONCLUSION

For the reasons stated, the petition should be denied, and the challenged FERC orders should be affirmed.

Respectfully submitted,

David L. Morenoff
General Counsel

Robert H. Solomon
Solicitor

/s/ Nicholas M. Gladd
Nicholas M. Gladd
Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
Tel.: (202) 502-8836
Fax: (202) 273-0901
E-mail: Nicholas.Gladd@ferc.gov

April 21, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(a), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,806 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

/s/ Nicholas M. Gladd
Nicholas M. Gladd
Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
Tel.: (202) 502-8836
Fax: (202) 273-0901
E-mail: Nicholas.Gladd@ferc.gov

April 21, 2017

ADDENDUM

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TRANSFER OF FUNCTIONS

Executive and administrative functions of Securities and Exchange Commission, with certain exceptions, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 10 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out in the Appendix to Title 5, Government Organization and Employees.

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under

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

§ 825*l*. Review of orders

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

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

(b) Judicial review

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

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this

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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 21st day of April 2017, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system, as indicated below:

Larry F. Eisenstat — Email
Crowell & Moring LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2595

Pauline Foley — Email
PJM Interconnection, LLC
2750 Monroe Boulevard
Audubon, PA 19403

Neil Lawrence Levy
Stephanie Szu-Ping Lim
Ashley Charles Parrish
Justin Alan Torres
King & Spalding LLP
1700 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006-4706

Email

/s/ Nicholas M. Gladd
Nicholas M. Gladd
Attorney

Federal Energy Regulatory
Commission
888 First Street, NE
Washington, D.C. 20426
Telephone: (202) 502-8836
Fax: (202) 273-0901
Email: Nicholas.gladd@ferc.gov