1995 WL 17204576 (C.A.D.C.) (Appellate Brief)
United States Court of Appeals,
District of Columbia Circuit.

CAJUN ELECTRIC POWER COOPERATIVE, INC., Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Respondent.

No. 94-1556.
August 3, 1995.

On Petition for Review of Orders of the Federal Energy Regulatory Commission

Brief for Respondent Federal Energy Regulatory Commission

Susan Tomasky, General Counsel, Jerome M. Feit, Solicitor, Joseph S. Davies, Deputy Solicitor, Edward S. Geldermann, Attorney, for Respondent, Federal Energy Regulatory Commission, Washington, D.C. 20426.

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Glossary

Cajun	Cajun Electric Power Company
CSTS	Service Schedule CSTS, part of the Power Interconnection Agreement originally executed by and between Gulf States and Cajun in 1977, which defined Gulf States' obligations to transmit power on behalf of Cajun. CSTS was amended in 1980, *inter alia*, to add Section 3.3d, the provision in dispute here.
CTOC	Service Schedule CTOC, part of a Power Interconnection Agreement executed by and between Gulf States and Cajun in 1980, and which defined Cajun's ownership rights in an extra high voltage (above 200 kv) transmission system operated by Gulf States.
Delivery Point	Location where electric energy and power leaves transmitting utility's transmission system, and enters the recipient utility's transmission system or the retail lines of an end-user.
Gulf States	Gulf States Utilities Company

Integrated System	local distribution transmission system of each Cajun cooperative serving loads primarily in their traditional service areas.
Load	the aggregate electric power demanded from an electric utility at any given time.
Normal Load Growth	term used by the parties in Service Schedule CSTS defined as the average rate of growth in percent for the most recent five-year period for the applicable delivery point.
PIA	Power Interconnection Agreement
REA	U.S. Rural Electrification Administration
River Bend	Nuclear generating plant owned in part by Gulf States and Cajun

***1** *STATEMENT OF THE ISSUE*

Whether the Federal Energy Regulatory Commission ("Commission") reasonably interpreted an amended electric power transmission contract between the Cajun Electric Power Cooperative, Inc. ("Cajun") and Gulf States Utilities Company ("Gulf States" or "GSU") as not requiring Gulf States to provide transmission service to delivery points beyond a Cajun member's integrated distribution system.

PERTINENT STATUTES AND REGULATIONS

The statutory and regulatory provisions pertinent to this case are contained in an appendix to this brief.

***2** *STATEMENT OF THE CASE*

A. *Nature of the Case, Course Of Proceedings, and Disposition Below.*

In this case, Cajun filed a complaint against Gulf States asserting that Gulf States wrongfully refused to provide electric transmission service to certain delivery points for the transmission of power on behalf of Cajun. Gulf States responded that its transmission contract with Cajun only required Gulf States to provide transmission service to delivery points that are located on an integrated part of the system of one of Cajun's member cooperatives.

In earlier orders in this proceeding, the Commission ruled that the plain language of the contract supported Gulf States' position. On review, this Court ruled that the contract language was ambiguous, and remanded the case for "a hearing in which Cajun should have the opportunity to show whatever evidence it may adduce that is probative of the intent of the parties." *Cajun Electric Power Cooperative, Inc.*, 924 F.2d 1132 (D.C. Cir. 1991).

On remand, following a lengthy evidentiary hearing, an Administrative Law Judge ("ALJ") issued an initial decision in which he dismissed the complaint, ruling that the transmission contract only required Gulf States to provide transmission service to delivery points located on Cajun members' integrated distribution systems.

In the orders under review, the Commission affirmed this ruling. *Cajun Electric Power Cooperative. Inc. v. Gulf States* ***3** In Part And Vacating In Part Initial Decision," 66 FERC ¶ 61,325 (Mar. 21, 1994) (J.A. 1764-1791); *Cajun Electric Power*

Cooperative, Inc. v. Gulf States Utilities Company, Opinion No. 388-A, "Opinion and Order Denying Rehearing," 68 FERC ¶ 61,205 (Aug. 3, 1994) (J.A. 1792-1797).

B. *Statement Of The Facts*

1. *The 1972 Power Interconnection Agreement Between Cajun And Gulf States. Its Replacement By A New Agreement In 1977, And The 1980 Amendment To That Agreement.*

a. Gulf States is a large investor-owned utility company which owns a transmission network running through Louisiana and other neighboring states. Cajun is an electric power cooperative consisting of twelve cooperative members in Louisiana.

In 1972, Cajun entered into a Power Interconnection Agreement ("1972 PIA") with Gulf States, J.A. 868-905, which permitted Cajun to transmit power from a coal-fired electricity generating plant known as Big Cajun No. 1 to its member cooperatives with distribution systems located on Gulf States' transmission system. The 1972 PIA required Gulf States to transmit only the existing loads and "normal load growth" of Cajun's member cooperatives, and it restricted the delivery points for Cajun's power to the specific locations on Cajun's system enumerated in "Exhibit A" of the 1972 PIA. *See* J.A. 884885. Gulf States was not bound by the 1972 PIA to serve Cajun members' "above-normal load growth" transmission needs or to serve those members at delivery points other than identified in ***4** Exhibit A, absent a separate mutual agreement of the parties. *Id.*

b. From 1974 until 1977, the parties engaged in negotiations to amend the 1972 PIA to require Gulf States to transmit power from the future Big Cajun No. 2 coal-fired generating plant. These negotiations culminated in a new PIA in 1977 ("1977 PIA"), which included "Service Schedule CSTS." [1]

Section 2.1 of Schedule CSTS required Gulf States to deliver Cajun power to its member cooperatives at delivery points as defined in Section 5.1. [2]

Section 5.1 of Schedule CSTS, entitled "Delivery Points," established a general limitation on GSU's obligation to transmit electricity under Schedule CSTS to "delivery points on an integrated part of the system" of any of Cajun's members:

[I]t is agreed that for the purposes of this Service Schedule, all delivery points initially included in Exhibit "A" of Rate Schedule CSTS and added by mutual agreement ***5** of the parties *shall be limited to delivery points on an integrated part of the system* of a rural electric cooperative duly organized and existing under the laws of the State of Louisiana which is an active member of CEPCO [Cajun] and relies fully upon CEPCO [Cajun] for the supply of its power and energy, and which are served from the system of Gulf States.

(Emphasis added.)

c. In August 1979, Gulf States and Cajun executed a joint ownership agreement in which Cajun agreed to purchase 30 percent of Gulf States' River Bend nuclear generating facility ("River Bend"). To fund its portion of River Bend, Cajun requested a loan guarantee from the Rural Electrification Administration ("REA"); The REA would not grant the requested funding until Cajun obtained additional transmission rights from Gulf States. Accordingly, in 1980 Cajun and Gulf States amended their existing interconnection agreement in two principal ways.

First, Cajun and Gulf States agreed to a new Service Schedule CTOC, which provided for Cajun and Gulf States to develop jointly and coordinate a high voltage Integrated Transmission System ("Integrated System") for facilities of 200 kilovolts or more. Second, the parties amended Section 3.3 of Schedule CSTS, which dealt with Gulf States' obligations in respect to Cajun's

above-normal load growth. See note 2, p. 4 *supra; see also* Exh. R-43; J.A. 496-512). The new Section 3.3d granted Cajun the right to build facilities for its above-normal load growth, if Gulf States were unable or unwilling to perform the construction:

***6** If the parties fail to reach mutual agreement for [Gulf States] to furnish additional points of delivery or increases in capacity for whatever reasons, then [Cajun] shall have the option of providing the necessary distribution and transmission facilities to interconnect with [Gulf States'] existing transmission system at mutually agreeable points, subject to appropriate approvals and certifications by any regulatory authorities having jurisdiction. [Gulf States] shall have the right to contest such interconnection in any regulatory proceedings and otherwise.

J.A. 503.

This case turns on whether the addition of Section 3.3d to Schedule CSTS altered Gulf States' obligations under Section 5.1 so as to require Gulf States to supply transmission service for Cajun at delivery points not located on Cajun members' integrated distribution systems.

2. *Cajuns Complaint With FERC. The Commission's Orders, And This Courts Opinion Remanding The Case For Further Proceeding*

a. In the spring of 1989, Cajun and one of its member cooperatives, Jefferson Davis Electric Cooperative, Inc. (“Jefferson Davis”), became interested in selling power to two industrial plants, the Westlake Petrochemical Corporation (“Westlake”) and NL Chemicals, Inc. (“NL Chemicals”) located near Gulf States' system. Gulf States also wished to sell power to these same companies. Both Westlake and NL were situated in the midst of Gulf States' system at a point where Gulf States had transmission and distribution lines running alongside both customers' tracts. The nearest Cajun member's distribution facilities were located eighteen miles south and eight miles east ***7** of the industrials' sites. Accordingly, it was undisputed that Westlake and NL were not located on an integrated part of a distribution system of any Cajun member cooperative within the meaning of Section 5.1 of the CSTS.

When Cajun requested Gulf States to provide transmission service to Westlake and NL pursuant to Schedule CSTS, Gulf States refused on the ground that they were not located on Cajun's integrated distribution system. On August 7, 1989, Cajun filed a complaint against Gulf States with FERC, asserting that Section 3.3d of the CSTS obligated Gulf States to either provide new delivery points or agree to reasonable locations for new delivery points to be constructed by Cajun. Gulf States argued in opposition that its refusal to provide the new service was justified because Section 5.1 of the CSTS restricted its transmission service obligation to delivery points located on the integrated distribution system of a member of the Cajun cooperative.

b. The Commission subsequently dismissed Cajun's complaint without holding a hearing, agreeing with GSU that, under the plain meaning of the CSTS, GSU had no contractual obligation to deliver Cajun power to Westlake and NL since they were not located on a Cajun member's integrated system. After this Court ruled that the contract language was ambiguous, and reversed and remanded the case (924 F.2d at 1137), the Commission assigned the case to an ALJ for an evidentiary hearing.

***8** 3. *The ALJ's Decision On Remand And The Commission's Orders Affirming Its Decision.*

a. Following a lengthy evidentiary hearing, the ALJ issued an initial decision, dismissing Cajun's complaint. 59 FERC ¶ 63,204 (1992); J.A. 1718-1763. In his decision, the ALJ found that Cajun had failed to satisfy its burden of proving by a preponderance of the evidence that, when the parties added Section 3.3d to CSTS in 1980, they intended to afford Cajun the right to require Gulf States to provide transmission service to delivery points not located on Cajun's integrated system. Instead, the ALJ found that Section 3.3d should be construed in conjunction with Section 5.1 and that, on that basis, Gulf States' obligation to furnish or allow Cajun to construct new delivery points under Section 3.3d was subject to the restriction of Section 5.1 that new delivery points must be located on Cajun's integrated system. 59 FERC at 65,214; J.A. 1757.

The ALJ placed substantial reliance on the uncontradicted evidence submitted by Norman Lee, Gulf States' president, Whose testimony the ALJ characterized as "consistent" and "credible." 59 FERC at 65,204, J.A. 1748. Mr. Lee had testified that the purpose of adding Section 3.3d to CSTS in 1980 was only to ensure that Cajun could obtain delivery points for above-normal growth at locations on its members' integrated systems by affording Cajun the option of building delivery facilities itself in the ***9** event Gulf States refused or was unable to go so.[3] The ALJ specifically credited Mr. Lee's testimony that "[w]ith regard to the interaction between Sections 3.3d and 5.1 of Service Schedule CSTS ... there was no intent to exclude delivery points for above-normal load growth, the specific subject of Section 3.3d, from the requirements of Section 5.1." 59 FERC at 65,203-04, J.A. 1747-48.

The ALJ also rejected Cajun's assertions that the evidence showed that the REA had pressured GSU into granting Cajun unlimited access to delivery points located off its distribution system when the CSTS was amended in 1980. Although the ALJ acknowledged that the REA was a "dominant force in the negotiations leading to the 1980 amendments to CSTS," he nonetheless found, based on the testimony of three REA witnesses, that:

At no time did any REA employee ever tell any employee or representative of Gulf States that REA intended, by requesting the 1980 amendment to Service Schedule CSTS adding Section 3.3d, that Cajun be empowered to tap into the Gulf States' transmission system at will.

59 FERC at 65,198; J.A. 1742.

b. On March 21, 1994, the Commission issued an opinion substantially affirming the ALJ's findings of fact and concluding ***10** that the ALJ reasonably interpreted Sections 3.3d and 5.1 of the CSTS. Opinion No. 388, 66 FERC ¶ 61,325, J.A. 1764-1791.[4]

The Commission attributed special weight to the credibility findings of the ALJ and agreed with him that Cajun failed to prove its case as to the meaning of Section 3.3d of CSTS. 66 FERC at 62,048. The Commission also agreed with the ALJ that the documentary evidence for the period between the execution of the 1978 Service Schedule CSTS and the 1980 amendments did not support a finding that Gulf States was aware that Cajun or the REA was demanding unrestricted access to delivery points anywhere on GSU's system. As the Commission pointed out, nearly all of the documents generated during this period dealt with addition of Schedule CTOC to the PIA, which contained few references to Schedule CSTS or delivery points. 66 FERC at 62,049, J.A. 1778.

The Commission also found that the ALJ's construction of the language of Sections 3.3d and 5.1 of the CSTS -- as retaining the requirement that all delivery points be located on a Cajun member's integrated system -- was reasonable. In the Commission's view, Section 5.1 was not modified in any respect when Section 3.3d was added in 1980 and the term "mutually agreeable" was inserted in Section 3.3d simply to confirm that ***11** the requirement of Section 5.1 still required mutual agreement on new delivery sites. The Commission also agreed with the ALJ that the purpose of Section 3.3d was to grant Cajun a right it did not have before, *i.e.*, to allow Cajun -- if Gulf States were unwilling or unable to do so -- to construct delivery facilities on its members' integrated systems to interconnect with Gulf States in order to accommodate above-normal load growth. *See* 66 FERC at 62,056, J.A. 1785.

b. On August 3, 1994, the Commission denied rehearing, again concluding that during their 1978-1980 negotiations, the parties never addressed any issues affecting the location of delivery points, but instead "only used euphemisms instead of candid and honest language because, to do otherwise, might have resulted in their failure to agree." 68 FERC ¶ 61,205 at 61,994 (1994), J.A. 1795. The Commission also acknowledged that "there is no explanation in Service Schedule CSTS as to what the parties meant when they agreed to include the requirement that they mutually agree to the site of the interconnection." 68 FERC at 61,995, J.A. 1796. The Commission therefore adhered to its conclusion that Section 3.3d granted Cajun a right to require Gulf

States to provide new capacity to accommodate above-normal load growth at delivery points located on Cajun's integrated system, but did not grant Cajun a unilateral right to require Gulf States to provide service at delivery points located beyond Cajun's members' integrated systems, contrary to the language of Section 5.1. *Id.*

This appeal followed.

***12** *SUMMARY OF ARGUMENT*

I.

A.

The Commission properly found that Cajun failed to satisfy its burden of proving, by the preponderance of the evidence, that the Gulf States-Cajun PIA, as amended in 1980, requires Gulf States to provide transmission service to delivery points beyond Cajun's members' integrated systems. The record clearly does not establish that the parties agreed that Section 3.3d of the CSTS granted Cajun a right to locate delivery points anywhere on Gulf States' transmission system, subject only to engineering limitations, as Cajun claims. Undisputed testimony shows that the parties did not agree that Section 3.3d altered Section 5.1's requirement that delivery points have to be located on a member's integrated system. Likewise, the documentary evidence adduced below confirms that during its negotiations with Gulf States between 1975 and 1980, Cajun made no identifiable effort to seek delivery points located off a member's integrated system.

B.

The Commission's interpretation of the parties' agreement should be accorded *Chevron* deference and upheld because it is reasonable. Prior to 1980, Gulf States was only required to construct delivery point capacity to serve Cajun's members' normal load growth on their integrated systems. This obligation did not extend to above-normal load growth at those same locations. As the Commission explained, Section 3.3d was added ***13** to afford Cajun the assurance that it would be able to serve above-normal load growth on its member cooperatives' integrated systems. This interpretation properly construes Section 3.3d in light of other provisions of the contract, and gives it a meaning suggested by the contract as a whole.

C.

The Commission also reasonably responded to concerns raised by this Court in its opinion remanding this case. Thus, the Commission found plausible Gulf States' argument that its reservation of the right in Section 3.3d to challenge Cajun's interconnection in a regulatory proceeding amounted simply to an express non-waiver of Gulf States' right to challenge Cajun before the Louisiana Public Service Commission for the right to serve retail customers. The Commission also reasonably found that its interpretation of Section 3.3d -- as authorizing Cajun to construct delivery facilities on its members' integrated systems, if Gulf States refused or was unable to do so -- was not meaningless for Cajun, since there may be periods of insufficient cash flow, such as Gulf States experienced in 1980, during which Gulf States may not want to lay out substantial sums to construct facilities that benefit only Cajun. Finally, the Commission reasonably concluded that Section 3.3d served a useful purpose because, although Gulf States was obligated before 1980 to construct delivery facilities at locations specified on CSTS Exhibit A to meet Cajun member's normal load growth, it was not ***14** similarly obligated before 1980 to construct facilities at those locations to accommodate members' above-normal load growth.

II.

Cajun's claims to the contrary are without merit.

A.

The Commission and its ALJ did not overlook evidence which Cajun claims supports its interpretation of Section 3.3d; they simply declined to draw inferences favorable to Cajun from it. For example, the Commission reasonably declined to infer from the testimony of Mr. Lee, President of Gulf States, that Gulf States had granted Cajun unrestricted delivery points rights. Instead, as the Commission explained, Mr. Lee's testimony could just as reasonably be viewed as supporting Gulf States' interpretation of Section 3.3d. Moreover, there was no reasonable basis on which to find that a August 1977 letter from Donald Olsen, a Director of the REA -- suggesting that additional delivery point rights be "specific" and be subject only to "engineering-defined limitations" -- should inform the Commission's interpretation of Section 3.3d. That letter was transmitted long before the REA approved the 1977 PIA in June 1978 without the suggested specific language. Moreover, as the ALJ observed, the parties also did not agree to place such a "specific" provision in their 1980 agreement, and the REA nevertheless approved it. Nor was there any evidence that in 1980 the REA was concerned with locating delivery points off a Cajun member's integrated system, as Cajun claims. The evidence indicates that the concessions that the REA ***15** was seeking from Gulf States during the 1976-80 period involved an entirely different matter.

B.

The Commission likewise did not misconstrue Mr. Lee's testimony in declining to find a parole agreement between Gulf States and Cajun to construct delivery points for Cajun anywhere so long as Gulf States did not already have retail power lines in the area. Mr. Lee's testimony was in response to a hypothetical that bore no similarity to this case.

C.

Finally, petitioner's claim that the Commission's orders are not entitled to *Chevron* deference because the Commission did not draw upon its view of the public interest in resolving this controversy is in error. Even if the Commission's interpretation of Section 3.3d did not rest upon public interest factors, the Commission's orders would nonetheless be entitled to *Chevron* deference. In any event, petitioner's claim is without foundation since the Commission actually considered public interest factors in resolving this case.

16** ***ARGUMENT

I. *THE ALJ AND THE COMMISSION PROPERLY FOUND THAT CAJUN HAD FAILED TO SUSTAIN ITS BURDEN OF PROVING EITHER THE PARTIES' INTENT IN ENTERING THE 1980 PIA OR THAT THE PIA SHOULD BE INTERPRETED IN THE MANNER CAJUN CLAIMS.*

As the ALJ (59 FERC at 65,200; J.A. 1744) and the Commission (66 FERC at 62,048; J.A. 1777; 68 FERC at 61,993; J.A. 1793) emphasized, Cajun had the burden of proving, by a preponderance of the evidence, that the parties intended the PIA, as amended in 1980, to require Gulf States to provide transmission service to delivery points off of Cajun's members' integrated systems, or that the language of the PIA required that result. As we proceed to explain, the ALJ and the Commission properly found that Cajun failed to satisfy its burden as to either of these issues, and, since their findings are supported by substantial evidence, they should be upheld.

A. *The ALJ And The Commission Properly Found That Cajun Had Failed To Sustain Its Burden Of Proof.*

1. *The ALJ and The Commission Correctly Concluded that The Evidence Failed To Show That The Parties Intended To Grant Cajun The Right To Establish Delivery Points Outside Its Members, Integrated Distribution Systems.*

As the ALJ found (*See* 59 FERC at pp. 65,207, 65,213, J.A. 1751, 1758), the record clearly did not establish that the parties agreed that Section 3.3d of the CSTS granted Cajun a right to establish delivery points anywhere on Gulf States' transmission system, subject only to engineering limitations, as Cajun claims.

a. In finding that Cajun had failed to sustain its burden of proof, the ALJ relied principally on the testimony of Norman ***17** Lee, president of Gulf States, who was intirately involved in negotiating both the 1977 PIA (including Service Schedule CSTS) as well as Section 3.3d, one of the 1980 amendments to the PIA. Mr. Lee testified that, throughout the history of the negotiations, the parties never discussed a requirement that Gulf States provide transmission of Cajun power to areas where Cajun members did not have existing facilities to serve retail customers. 59 FERC ¶ 63,024 at 65,203, J.A. 1747; *citing* Exhibit G-l at 4, 19 and 23-24; J.A. 835, 850, 854-55. Mr. Lee also explained that the REA's primary interest in enhanced transmission rights for Cajun did not grow out of concern that Cajun lacked unfettered access to delivery points throughout Gulf States' system; rather, Mr. Lee maintained that REA's principal objective throughout 1978-80 was to ensure that Cajun would obtain an ownership interest in the high-voltage transmission facilities, which ultimately occurred in 1980 when the parties executed Service Schedule CTOC. Tr. 1039-40, 1148-49; J.A. 117980, 1290-91; *see also* 59 FERC at 65,204, J.A. 1748.

With respect to delivery points, Mr. Lee testified that, even after Section 3.3d was adopted in 1980, Gulf States' delivery obligation with respect to Cajun power was still subject to the "mutual agreement" proviso of Section 5.1, and thus was limited to points enumerated on Exhibit A, unless the parties mutually agreed to locate them elsewhere on a member's integrated system. Tr. 1093-95; J.A. 1233-1235. Section 3.3d, Mr. Lee explained, was not intended to alter Section 5.1's requirement ***18** that delivery points had to be located on a member's integrated system. *See* 59 FERC at 65,203-04; J.A. 1747-48. Instead, Mr. Lee stated that Section 3.3d was added to the CSTS to grant Cajun the option of constructing transmission facilities to deliver power to a member's service area, should Gulf States refuse or be unable to build them. 59 FERC at 65,203; J.A. 1747.

Mr. Lee's testimony was corroborated by the deposition testimony of Alfred E. Naylor ("Naylor"), a retired GSU executive assistant to Mr. Lee, who likewise had participated in the contract negotiations. Mr. Naylor stated that, to his knowledge, Cajun never requested the right to establish delivery points anywhere on Gulf States' system. *See Exhs.* G-103 at pages 70-71; J.A. 417-18, and G-104 at pages 60-61, 78, 140, 146, 197-99 and 205-6; J.A. 435-36, 445, 448, 451, 463-65, 468-69; 59 FERC at 65,206, J.A. 1750. instead, he stated, Cajun was only concerned with transmission service to its members' systems. *Id.* Mr. Naylor also testified that the parties' adoption of Service Schedule CTOC was not intended to enhance Cajun's access to GSU's transmission system. Exh. G-104 at 154, 156, J.A. 454, 456. According to Mr. Naylor, this was clear from the "mutual agreement" phrase in Section 3.3d which preserved for Gulf States an absolute veto over proposed delivery points not listed on Exhibit A. Exh. G-103 at 99-100, 106, J.A. 421-22, 425; Exh. G-104 at 184-85, J.A. 459-60; 59 FERC at 65,206, J.A. 1750.

b. The ALJ also reasonably concluded (*see* 59 FERC at 65,209; J.A. 1753) that the documentary evidence in the record ***19** did not establish that Gulf States agreed in Section 3.3d of the CSTS to make delivery points available beyond Cajun's members' integrated systems.

(1.) The ALJ cited at least four draft proposals and/or counterproposals exchanged by the parties between December 1975 and April 11, 1978, in which Guli States consistently rejected Cajun's efforts to enlarge its rights to delivery point capacity as they existed under the 1972 PIA. *See* Findings No. 26, 45, 49, 59, and 60; 59 FERC at pp. 65,181, 65,186, 65,189, and 65,192; J.A. 1725, 1730, 1733, and 1736. During this series of exchanges, Cajun made no effort to seek delivery points located off a member's integrated system. Just to the contrary, in a January 21, 1977 letter to an REA official, Cajun specifically proposed locating all such new delivery point capacity in "geographical areas then physically occupied by facilities of the member rural electric cooperatives." Exhibits R-4, J.A. 560; R-32 at 3, J.A. 473; *see* 59 FERC at 65,186, Finding No. 45, J.A. 1730. Indeed, rather than relax the existing limitations on available delivery points that were adopted in 1972, Gulf States in fact reinforced those limitations in the 1977 PIA by adding, in Sections 3.2b and 5.1 of CSTS, the "integrated" restriction which did not exist in the Article X of the 1972 PIA. *See* Exh. C-32 at 7, 12, J.A. 253, 258.

(2.) Furthermore, the ALJ reasonably declined to attach significant probative weight to an April 11, 1978 letter (Exh. R-36; J.A. 490) from Jack Gambrell, Cajun's Manager of Operations ***20** ("Gambrell", to GSU's Mr. Naylor asking Guss States to inc uje proposed language in the new PIA that would authorize Cajun, at its election, to construct and interconnect "such facilities as may reasonably be required for" its transmission service under Schedule CSTS. The ALJ reasoned that:

> even were we to conclude that Gambrell's April 11, 1977 [*sic*] letter to Naylor clearly stated REA's intent regarding the expansion of Cajun's access to Gulf States' transmission system ... Cajun and Gulf States did enter into an agreement after this point in time (the 1978 PIA) which everyone agrees did not contain such a provision and the REA did approve this agreement. A reasonable person could conclude from these facts that both Cajun and REA were backing off from their previous demands.

59 FERC at 65,208; J.A. 1752.

(3.) The ALJ also observed that "with regard to the summer 1980 negotiations, at the end of which Cajun and Gulf States agreed to include Section 3.3d as a part of Service Schedule CSTS, the parties have provided a dearth of information for the record." 59 FERC at 65,208 n.59; J.A. 1752 n.59. More specifically, the ALJ found that the record is unclear about whether Cajun or Gulf States made the offer to include Section 3.3d in the 1980 version of Service Schedule CSTS. Accordingly, he reasonably determined that the normal rule that "contract language will be construed against the party furnishing it" does not apply here. *Id.*

c. In these circumstances, the Commission properly concluded that the ALJ had correctly found "that Gulf States did not agree to provide the service that Cajun now seeks," and that ***21** "art best, Gulf States and Cajun had different intentions and did not resolve the difference." 66 FERC at 62,055, J.A. 1784.

As the Commission observed (66 FERC at 62,049, J.A. 1778), almost all the documentary evidence generated during the 1978-1980 period dealt with the addition of Schedule CTOC to the PIA, with only few references to Schedule CSTS or delivery points. Thus, as the Commission pointed out, Cajun's March 1980 letter to Gulf States (Exh. R-39; J.A. 493) addressed only ownership in the high voltage transmission system, not delivery point access. Moreover, the minutes of Cajun's board meetings at the time Service Schedule CSTS was signed in July 1980 (Exhs. G-92, G-93, and G-94; S.A. 387, 389, 397) do not mention that any delivery point rights that were obtained by Cajun. And, as the Commission further explained (66 FERC at 62,049, J.A. 1778), when REA approved Cajun's River Bend loan commitment in September 1980, it failed to acknowledge any significant change in delivery points under Service Schedule CSTS, even though it was executed at approximately the same time. Finally, the Commission observed that, in a January 1981 memorandum approving the release of the funds involved in Cajun's River Bend loan (Exh. R-47, J.A. 625-34), the REA focused at length on the significance of Schedule CTOC, while stating that only "slight modifications" had been made to Schedule CSTS. The "slight modification" referred to in this memorandum, as the Commission found (66 FERC at 62,040, J.A. 1769), "was Cajun's right to construct facilities to interconnect to Cajun's transmission system." Exh. R-47 at 8-10; J.A. 632-34.

22 2. *Since The Commission's Findings Are Supported By Substantial Evidence, They Should Be Upheld.

Section 313(b) of the Federal Power Act, 16 U.S.C. § 8251(b), provides: "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." *Id.* The term "substantial evidence," as commonly used in judicial review statutes, "does not mean a large or considerable amount of evidence, but rather 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Pierce v. Underwood,* 487 U.S. 552, 564-65 (1988), quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938). The test under Section 313(b) is not "whether the court of appeals would have arrived at the same result as the agency." *NLRB v. Enterprise Asso. of Steam. etc.,* 429 U.S. 507, 531-32 (1977)("*Steam*"). Instead, the substantial evidence standard "forbids a court to 'make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences.' " *FTC v. Indiana Federation of Dentists,* 476 U.S. 447, 455 (1986), *quoting FTC v. Algoma Lumber Co.,* 291 U.S. 67, 73 (1934). [5]

***23** Moreover, deference is ever more appoprtate where, as here, a significant number of findings have been made on credibility determinations based on an ALJ's observations of the demeanor of witnesses while testifying at an evidentiary hearing. As this Court has explained, "credibility determinations are particularly inappropriate for judicial review." *Property Resources,* 863

F.2d at 966; *see also NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962); *Paredes-Urrestarazu v. INS*, 36 F.3d 801, 818 (9th Cir. 1994); *NLRB v. Lakepark Industries. Inc.*, 919 F.2d 42, 44 (6th Cir. 1990).

Since, as we have shown, the Commission's findings that Cajun failed to satisfy its burden of proving its case are supported by substantial evidence in the record, they therefore are "conclusive," *see* 16 U.S.C. § 8251(b), and should be affirmed. [6]

24 B. *Since The Commission Reasonably Interpreted The Agreement At Issue Here, Its Interpretation Is Entitled To Substantial Deference And Should Be Upheld.

1. After determining that Cajun had failed to sustain its burden of proof, the ALJ and the Commission concluded that the PIA was ambiguous, and they principally resorted to the language of the agreement and canons of construction to interpret it. *See* 59 FERC at 65,210-11; J.A. 1754-55; 66 FERC at 62,056, J.A. 1785. In its prior opinion in this case, this Court, citing *Chevron, USA v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), expressly stated (924 F.2d at 1137):

> [i]f after these proceedings it can still can be said that the parties never meant squarely to address the issue raised by this dispute, then the Commission is entitled to place its own construction on the resultant ambiguity -- so long as it is reasonable.

Accord Williams Natural Gas Co. v. FERC, 3 F.3d 1544, 1549-51 (D.C. Cir. 1993). As we now explain, the Commission's interpretation of the parties' agreement should be accorded *Chevron* deference and upheld because it is reasonable.

a. The Commission's interpreted CSTS Section 3.3d as authorizing Cajun to construct new delivery facilities, if Gulf States fails to do so -- but only if those facilities are located on a Cajun member's "integrated system." 66 FERC at 62,055-56, J.A. 1784-85. As the Commission found, this interpretation of ***25** the contract, which all parties agree is governed by Louisiana law, [7] "satisfies the requirement of Louisiana law that each provision of a contract be interpreted in light of other provisions of the same contract and each provision be given a meaning suggested by the contract as a whole," 66 FERC at 62,056, *citing Woods v. Dravo Basic Materials Co.*, 887 F.2d 618, 621 (5th Cir. 1989); *see also Williston on Contracts* (3rd Ed. 1961) at 710-711.

Accordingly, as the Commission explained, Section 3.3d must be interpreted in light of Sections 2.1 and 5.1:
In describing Gulf States' obligations under Service Schedule CSTS, section 2.1 limits Gulf States' commitment to delivering power to delivery points defined in section 5.1. Section 5.1, in turn, specifies that 'for purposes of this Service Schedule, all delivery points ... shall be limited to delivery points on an integrated part of a system of a rural electric cooperative.'

66 FERC at 62,055; J.A. 1784. Reading Section 3.3d to harmonize with 2.1 and 5.1, it was clear to the Commission that "Gulf States' obligations under Service Schedule CSTS do not require it to allow Cajun to establish delivery points which are not located on the integrated system of a Cajun member." *Id.;* J.A. 1784.

As the Commission stated, *id.* at 62,055-56; J.A. 1784-85, under Sections 2.1 and 5.1, which were adopted in 1977, Gulf States was obligated to supply the integrated systems of member ***26** cooperatives with Cajun power at points listed in Exhibit A. However, by virtue of Section 3.2b, also adopted in 1977, Gulf States was not bound to build new facilities at those locations to serve the members' above-normal load growth. Thus, as the Commission concluded (66 FERC at 62,056; J.A. 1785), because, before 1980, Gulf States had no obligation to furnish facilities for such growth, [8] Section 3.3d was added to afford Cajun the assurance that it could serve the above-normal load growth on its members' integrated systems by furnishing such facilities itself. With the parties' adoption of section 3.3d, the Commission explained, Cajun could provide the needed facilities itself, and thus was "assured that all of the growth on its members' integrated systems -- normal and above-normal -- can be served by it." *Id.*

b. The Commission therefore properly rejected Cajun's argument (repeated at Pet. Br. 45) that because the parties referred to "integrated system" in Section 3.2b of CSTS as a restriction on potential delivery locations, their failure to mention such a restriction in Section 3.3d implied that Section 3.3d was a stand-alone provision free from the "integrated system" restrictions of Section 5.1. As the ALJ recognized (59 FERC at 65,214; J.A. 1757), such an interpretation would lead to the "absurd" result of granting Cajun greater rights for service ***27** that is discretionary under Section 3.3 than it enjoys for service that is mandatory under Section 3.2. Moreover, as the Commission observed (66 FERC at 62,055, J.A. 1784), "Section 3.2b was created before section 3.3d, and we agree with the judge's finding that the parties may have felt it redundant to repeat the language specified in section 3.2b in section 3.3d."

C. *The Commission Responded Reasonably To Concerns Raised By This Court In Its Opinion Remanding This Case.*

The Commission's interpretation also responds to concerns expressed by this Court in its earlier opinion remanding this case, that the Commission's construction of Section 3.3d -- as not requiring Gulf States to serve delivery points beyond Cajun's members' integrated systems -- raised questions about the reasons for including other provisions in the parties' agreement.

1. Thus, the Commission acknowledged this Court's concern in *Cajun,* 924 F.2d at 1136, that Gulf States's reservation of the right in Section 3.3d to challenge new Cajun interconnections in any regulatory proceeding would appear to be unnecessary if Section 3.3d did not authorize Cajun to establish delivery points without Gulf States' consent or, in other words, that Gulf States would not appear to need a right to contest interconnections which required its consent. The Commission properly found that Gulf States provided a plausible explanation for this Court's concern.

Section 3.3d states that service provided under the Section is "subject to appropriate approvals and certifications by any regulatory authorities having jurisdiction"; the reservation in ***28** 3.3d simply assured Gulf States that it was not waiving its rights regarding any "approvals and certifications" that are required. As Gulf States explained below (R.7241; J.A. 1515):

> The last sentence of 3.3d is a nonwaiver provision. Gulf States reserved the right to challenge proposed service before an appropriate regulatory body, even if Gulf States agreed there was a location on Cajun's integrated system where a new delivery point might be established. A reservation of available legal rights does not constitute a waiver of other specific rights sct forth in the CSTS. (Footnote omitted.)

The Commission accepted this explanation, stating that it was plausible for Gulf States to "agree to establish a delivery point on an integrated system of a Cajun member but reserve the right to challenge Cajun before the [LPSC] for the right to serve retail customers." 66 FERC at 62,056; J.A. 1785.

2. The Commission also responded to this Court's observation that interpreting Section 3.3d to leave Cajun with only a right to build facilities for delivery points on its integrated system if Gulf States refused to do so appeared to be meaningless since "the costs of construction could always be charged back to Cajun by GSU." *See* 924 F.2d at 1136. As the Commission explained, however, such a provision is not meaningless since there may be periods of insufficient cash flow, such as Gulf States experienced in 1980, during which Gulf States "may not want to lay out substantial sums to construct facilities that would only benefit Cajun." 66 FERC at 62,056; J.A. 1785. Thus, the provision gives Cajun the option of constructing the facilities if Gulf declined to do so. Indeed, as the Commission ***29** observed, none of the parties contested this explanation of Section 3.3d proffered by Gulf States, and the Commission found it plausible. 66 FERC at 62,056; J.A. 1785.

3. The Commission likewise responded to this Court's concern (*Cajun,* 924 F.2d at 1136-37 n.6) that if the Commission's interpretation of the 1977 version of Section 3.3, as requiring Gulf States agreement before the construction of any delivery facilities, were correct then (prior to 1980) Gulf States could have refused to construct delivery facilities for Cajun even at the points listed on Exhibit A of Schedule CSTS -- a result this Court described as "rather peculiar, to say the least." As the Commission explained (66 FERC at 62,056 and n.125, J.A. 1785 and n.125), prior to 1980 Gulf States actually *was obligated*

under Section 2.1 to construct facilities to make deliveries to points listed on Exhibit A, so long as it was for normal load growth. However, prior to 1980, Gulf States could have refused to construct or allow construction of delivery facilities for above-normal load growth at those locations. The adoption of Section 3.3d therefore granted Cajun a right it did not have before. As the Commission explained, with the addition of Section 3.3d, "Cajun can provide the needed facilities for above-normal growth on the integrated systems of its members and is thus assured that all of the growth in its members' system -- normal and above normal -- can be served." 66 FERC at 62,056; J.A. 1785.

30 II. *PETITIONER'S REMAINING CLAIMS LIKEWISE ARE WITHOUT MERIT.

In its opening brief, Cajun raises a number of other challenges to the Commission's conclusion that Section 3.3d of CSTS did not confer a right upon Cajun to delivery points located beyond a member's integrated system. As we now explain, none of these arguments has merit.

A. *The Commission And The ALJ Did Not Ignore Critical Evidence*

Cajun initially argues (Pet. Br. 35) that the Commission and its ALJ ignored critical evidence suggesting that in 1980 Gulf States sacrificed the "integrated system" restriction on the location of delivery points in order to obtain REA financing of Cajun's ownership interest in the River Bend nuclear generating plant. In support, Cajun cites (Pet. Br. 22, 35) testimony by Gulf States' president Norman Lee stating that Gulf States gave Cajun and the REA everything they asked for, and that "meter points" were "part of the things [Gulf States] had to give up to get the River Bend funded." *See also* Pet. Br. 14, *quoting* Exh. C-126 at 484; J.A. 830; *see also* Tr. 1178; J.A. 1320. Cajun repeatedly points (Pet. Br. 11, 16-17, 19, 34), to a 1977 letter from Donald Olsen, a Director of the REA (Exh. C-40 t 2; J.A. 288-89), suggesting to the parties that the contract language about additional delivery points needed to be specific and subject only to "engineering-defined" limitations. Contrary to Cajun's claims, the Commission did not overlook this evidence; it simply declined to draw inferences favorable to Cajun from it.

***31** 1. The Commission reasonably decline to inter from Mr. Lee's testimony about "meter point" concessions that Gulf States had granted Cajun unrestricted delivery points rights. As the Commission found, the "meter point" concessions referred to by Mr. Lee could "just as reasonably be viewed as permitting Cajun to construct delivery points at locations on the integrated portions of its members' systems when Gulf States would not or could not build such facilities." 66 FERC at 62,050; J.A.

Moreover, the ALJ reasonably inferred that Mr. Lee's testimony about giving Cajun and REA "everything they asked for" was not tantamount to an admission that Gulf States granted Cajun delivery points beyond its members' integrated systems. Instead, the ALJ found (59 FERC at 65,208, J.A. 1752) that based on a March 19, 1980 letter, Exh. R-39, J.A. 493, which Cajun sent to Gulf States, "during this period, Cajun only was seeking access to Gulf States' high voltage transmission lines," and that:

> substantial evidence in the record supports a conclusion that the Gulf States' officials involved in the 1980 negotiations did believe that they had given Cajun everything which REA wanted it to have in the way of enhanced transmission rights by virtue of agreeing to the joint ownership arrangement represented by Service Schedule CTOC.

59 FERC at 65,208, J.A. 1752.

2. Likewise, despite petitioner's claims to the contrary (Pet. Br. 11, 16-17, 19, 34), the ALJ properly discounted the significance of the 1977 Olsen letter (Exh. C-40; J.A. 288-89). According to Cajun, since the letter indicated that delivery points should be linked "only by engineering-defined parameters," ***32** this constituted evidence that REA was demanding delivery points anywhere on Gulf States' transmission system.

As the ALJ found, however, (59 FERC at 65,206 n.55, J.A. 1750 n.55) it was not clear that, by emphasizing engineering-defined parameters as the "only" restriction on delivery points, REA was demanding delivery locations off of a Cajun member's integrated system.[9] REA's primary concern around the time of these discussions was Cajun's need for sufficient transmission capacity to receive the output of the new Big Cajun No. 2 coal-fired generating plant in order to meet each member's above-normal load growth. Thus, an internal REA memorandum (Exh. C-79, J.A. 377-78), dated November 21, 1977, two months *after* the August 1977 Olsen letter, stated:

There are still outstanding problems with the Cajun and Gulf States transmission agreement for Big Cajun No. 2. In August I met with Mr. Lee and others of [Gulf States] and Cajun in Baton Rouge. The two major items are: 1) contract language assurance that Gulf States transmission service for Cajun does not come second after Gulf States own loads and 2) planning and commitment by Gulf States of transmission system adequacy for projected needs of Cajun as well as Gulf States, with a recognition that *should Gulf States not have transmission facilities committed for construction necessary to meet projected loads. Cajun would have the right to construct such facilities and receive compensating credit.*

***33** (Emphasis added.) *See also* R-1 at pages 10-11, J.A. 552-53; and R-24, J.A. 589-90; Tr. 899-905, J.A. 1039-45).

In any event, there was no reasonable basis on which to find that the August 1977 letter required any new delivery-point rights for Cajun. It was transmitted long before the REA approved the 1977 PIA in June 1978 without the suggested specific language. Moreover, as the ALJ found (59 FERC at 65,206 n.55, J.A. 1750 n.55), "the parties did not agree to place such a 'specific' provision in their 1980 agreement, and REA nevertheless did approve it."

3. Nor was there any evidence that in 1980 the REA was concerned with locating delivery points off of a Cajun member's integrated system, as Cajun claims (Pet. Br. 31).

The evidence indicates that the concessions that the REA was seeking during the 1978-80 period involved Cajun's acquisition of ownership rights in Gulf States' backbone transmission system, which resulted in the parties' execution of Schedule CTOC. Indeed, in a 1989 deposition, Mr. Lee testified that in July 1980, REA wanted Cajun to have an ownership interest in Gulf States' transmission system, and that this is the reason why Gulf States agreed to Service Schedule CTOC. Exhibit C-122 at pages 36-39; J.A. 690-93.

Moreover, as previously explained (*see* p. 21, *supra*), in a 1981 memorandum approving the release of the River Bend loan funds (Exh. R-47, J.A. 625-34), the REA dwelt at length on Cajun's acquisition of the transmission ownership rights ***34** reflected in Schedule CTOC. At that time it stated that only "slight modifications" had been made to Schedule CSTS. The "slight modification," as the Commission found (66 FERC at 62,049, J.A. 1778), was Cajun's right to construct facilities to interconnect to Cajun' transmission system. *See* Ex. R-47 at 8-10; J.A. 632-34.[10]

Likewise, the testimony of the REA's own witnesses tends to belie the notion that as a condition of its River Bend financing, the REA was pressuring Gulf States to grant Cajun access to delivery points beyond a member cooperative's integrated system. As the ALJ pointed out, REA officials Morris, Olsen, and Eddy each testified that they could not recall ever making an explicit demand for this type of concession. *See* 59 FERC at 65,202, J.A. 1746; *see also* Tr. 833-34; 927-28; 987; J.A. 967-77, 1067-68, 1127. Accordingly, the Commission reasonably concluded that REA's concern was with Cajun's right to build additional *capacity* to serve above-normal load growth, not with locating delivery points outside a member's service area.

35 B.** ***The Commission Did Not Misconstrue Statements Of Gulf States' President.

Cajun nonetheless asserts (Pet. Br. 22) that the Commission failed to accord sufficient weight to a concession Cajun alleges Gulf States' president Lee made during cross examination to the effect that, despite Section 5.1's limitation on delivery point locations, there was a parole agreement between Gulf States and Cajun that Gulf States would serve Cajun members' transmission needs

beyond their integrated systems so long as GSU did not already have retail lines in the area. The ALJ, however, (59 FERC at 65,204, J.A. 1748) properly rejected the notion there was an inconsistency in Mr. Lee's testimony.

In the first place, in his cross-examination, Mr. Lee (*see* Pet. Br. 25-28) was addressing a hypothetical delivery point serving a hypothetical customer, which, as the ALJ found (59 FERC at 65,204, J.A. 1748), bears no similarity to the facts of this case. Moreover, as the ALJ further observed (*id.*), Mr. Lee testified that he considered service to this hypothetical isolated point to be an extension of the Cajun member's integrated system. *See* Tr. 1302-04, J.A. 1446-48; 59 FERC at 65,204, J.A. 1748. The ALJ also credited Mr. Lee's additional testimony that if this hypothetical customer represented "above-normal load growth," and "isolated from their normal load, not on their system," then Gulf States "did not have an obligation ... to serve it," but it could agree to do so anyway. *Id.*, *citing* Tr. 1302-04, J.A. 1446-48. Thus, the ALJ reasonably rejected Cajun's claim that Mr. Lee had made a ***36** concession that undermined his previous testimony that, in Gulf States' view, Section 3.3d was always subject to the "integrated system" restriction of Section 5.1.

C. ***The Commission's Construction of The Parties' Agreement Does Not Render Section 3.3d Meaningless.***

Cajun (Pet. Br. 46) maintains that the Commission's interpretation of Section 3.3d, as having been adopted to ensure that Cajun can obtain sufficient delivery-point capacity to meet its above-normal load growth, renders Section 3.3d meaningless. According to Petitioner (*id.*), under Section 3.3 of the 1977 PIA (applicable to above-normal load growth), Gulf States was already obligated to furnish such additional capacity (at Cajun's expense) because that section provided that GSU's mutual agreement to furnish delivery-point capacity could not be "unreasonably withheld." This claim is entirely without merit.

Under the express terms of Section 3.3 of the 1977 PIA (Exh. C-32), Gulf States' obligations to furnish delivery-point capacity for above-normal load growth was subject to Gulf States' "mutual agreement" and thus discretionary. Moreover, Cajun had no right to request, and Gulf States had no duty to furnish, facilities that were not coordinated in time with GSU's "planning and construction" program. *See* Exh. C-32 at 8-9; J.A. 254-55. The Commission's interpretation of Section 3.3d is therefore meaningful because it liberates Cajun from the risk of *reasonable* GSU refusals to construct new capacity (*i.e.*, for example, for reasons such as the possible cash flow problem cited by the Commission at 66 FERC at 62,056, J.A. 1785). As the Commission ***37** found (J.A. 1785), Section 3.3d granted Cajun an unconditional right "*for whatever reasons*" to build new delivery point capacity at mutually agreeable locations on its members' integrated systems.

D. ***Petitioner's Claim That The Commission Is Not Entitled To Chevron Deference Is Without Substance.***

Finally, petitioner claims (Pet. Br. 51-53) that this Court should not apply *Chevron* deference, but should interpret CSTS Section 3.3d *de novo*, because the Commission "did not draw upon its view of the public interest" in determining that Cajun had no contractual right to establish delivery points for Westlake and NL. This claim is likewise in error. Even if the Commission's interpretation of Section 3.3d did not rest upon public interest factors, the Commission's orders would nonetheless be entitled to *Chevron* deference. This Court has expressly "rejected the idea that deference was appropriate only when it was clear that the interpretation rested on expertise." *Tarpon Transmission Co. v. FERC*, 860 F.2d 439, 442 (D.C. Cir. 1988); *see also National Fuel Supply Corp. v. FERC*, 811 F.2d 1563, 1570 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 869 (1987).

In any event, the Commission drew upon the public interest by considering state and federal antitrust policies. With respect to state law, the Commission reasoned:

> [O]ur decision not to give Cajun whatever it may desire is simply not anticompetitive. We are not aware of any state law or policy -- and Cajun identifies none -- that requires that in order to promote competition Cajun is entitled to delivery points wherever it wishes. Indeed, the Louisiana Commission did ***38** not argue that a finding in favor of Gulf tates would violate state law, but, rather, supported Gulf States' position.

68 FERC at 61,996; J.A. 1797.

In regard to federal antitrust policy, the ALJ found that Cajun failed to proffer any evidence that established that the Gulf States transmission system was an "essential facility" for service to NL and Westlake by Cajun. 59 FERC at 65,216 n.93, J.A. 760 n.93. He further found (*id.*) that even if the record had established that the Gulf States' system was an "essential facility," the record did not support a finding that Gulf States had no "legitimate business reason" for refusing to provide the disputed delivery points. The Commission (66 FERC at 62,058; J.A. 1787) affirmed the ALJ's antitrust findings, specifically finding that the ALJ's "interpretation of Service Schedule CSTS does not implement a territorial allocation and that ... [n]either Gulf States or Cajun are prevented from extending their operations into any unserved areas, subject to challenge under Louisiana law."

Accordingly, Cajun's claim lacks substance.

*39 *CONCLUSION*

For the foregoing reasons, the orders of the Commission should be affirmed.

Appendix not available.

Footnotes

* Cases chiefly relied upon are marked with an asterisk.

1 The 1977 PIA (Exh. C-32; J.A. 247-262) and the amended 1930 version of the Service Schedule CSTS (Exh. R-43; J.A. 496-512) are reproduced in "Addendum B" to this brief. The 1972 PIA appears at pages 868-905 of the Joint Appendix.

2 Section 3 established how and by whom delivery point facilities would be constructed to accommodate load growth on Cajun members' integrated systems. Specifically, Section 3.1 provided that Gulf States was not required to serve Cajun during periods of insufficient capacity. Section 3.2 specified that Gulf States would "provide and maintain transmission capacity" -- *i.e.*, construct new capacity, if necessary -- only for Cajun member's existing load, including "normal load growth," defined as the average rate of growth in percent for the most recent five-year period for the applicable delivery point. In Section 3.3, the parties agreed that Gulf States would not be similarly obligated for Cajun's above-normal load growth.

3 As noted, *see supra*, note 2, p. 4, prior to this amendment, Gulf States only was obligated to provide delivery-point capacity for Cajun members' normal load growth.

4 The Commission vacated the ALJ's finding that until Jefferson Davis obtains approval from the Louisiana Public Service Commission ("LPSC") to serve Westlake and NL, there is no justiciable controversy. 66 FERC at 62,061-62; 1790-91. The Commission also vacated the ALJ's determination that once the LPSC authorizes a cooperative to serve a new customer, the customer automatically becomes part of the member's integrated system. Id. The Commission's vacatur of these findings is not challenged in this appeal.

5 Indeed, even as to factual matters *not* requiring agency expertise, a reviewing court may not displace an agency's "choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *see also Property Resources Corp. v. NLRB*, 863 F.2d 964, 966 (D.C.Cir. 1988)("*Property Resources*"). Rather, so long as substantial evidence exists in the record supporting the agency's decision, it is reversible error for a court of appeals to reweigh evidence and to substitute its view of the facts for those of the agency. *Steam*, 429 U.S. at 532; *see also Ralston Purina Co. v. Louisville & N. R. Co.*, 426 U.S. 476, 477-78 (1976).

6 The ALJ made most of the factual findings regarding the parties' intent in adopting CSTS Section 3.3d, and these findings were simply affirmed by the Commission. *See* 66 FERC at 62,048, J.A. 1777. At Pet. Br. 20, Cajun argues that the Commission orders are infirm because "the Commission did not specify overall which findings it accepted or rejected." *See also* Pet. Br. 30. In fact the Commission clearly delineated which findings of the ALJ it vacated. *See* note 4, p. 10, *supra.* Moreover, it is wellsettiad that an agency is entitled to rely on and adopt findings of an ALJ in reaching its decision and that, under the Administrative Procedure Act, it does not have to make an independent evaluation of each and every finding of the ALJ. *See Cities of Bethany, Bushnell. etc. v. FERC*, 727 F.2d 1131, 1144 (D.C.Cir. 1984), *cert. denied*, 469 U.S. 917 (1984); *Kenworth Trucks of Philadelphia. Inc. v. NLRB*, 580 F.2d 55, 62-63 (3d Cir. 1978), *citing*, *Vermont Yankee Nuclear Power Corp v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

7 The ALJ found (59 FERC at 65,210; J.A. 1754) and the Commission agreed (*see* 66 FERC at 62,056); J.A. 1785, that the 1980 PIA, of which Service Schedule CSTS is a part, is governed by the laws of the State of Louisiana.

8 Contrary to Petitioner's claim at Pet. Br. 36, prior to the adoption of Section 3.3d, Cajun did not have an unqualified right to require Gulf States to build new capacity absent Gulf States' consent, even if Cajun paid "up front." *See* Exh. C-32 at 8-9, J.A. 254-55.

9 The ALJ observed that, "for example, [Olsen] states that Cajun should have the alternative of providing transmission facilities should Gulf States be unwilling or unable to do so. Arguably, the actual terms of the 1980 PIA, including Service Schedule CSTS, could be read to satisfy this demand even without giving Cajun and Jefferson Davis the right to the disputed delivery points." *Id.*

10 There would have been no reasonable basis for the Commission or its ALJ to infer that REA was referring to a relaxation of the "integrated system" restriction of CSTS Section 5.1 as a "slight modification." Cajun was well aware from the "Cortana Mall" incident in the early 1970s that GSU was adamant in its refusal to allow Cajun to tap Gulf States' at points not geographically located on a member's system. *See* ALJ Finding No. 10, 59 FERC at 65,177; J.A. 1721. Indeed, the evidence suggests that Cajun was so certain that Gulf States would never grant it delivery points off its members' integrated systems that they did not even pursue this possibility in the negotiations leading up to the 1977 PIA. *See* ALJ Finding No. 20, 59 FERC at 65,179, 65,213 n.82; J.A. 1723, 1758 n.82; *see also* 59 FERC at 65,203; J.A. 1747; Exh. G-1 at 16, 29-30; J.A. 847, 860-61; Tr. 1183-84, 1196, J.A. 1325-26, 1338.

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