**IN THE UNITED STATES COURT OF APPEAL**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**NO. 91-1118**

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**MAINE PUBLIC SERVICE COMPANY,**
**PETITIONER**

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,**
**RESPONDENT**

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

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# BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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## STATEMENT OF THE ISSUES

1. Whether the Federal Energy Regulatory Commission (Commission) reasonably found that a proposed rate of a regulated utility would not produce excessive revenues where the rolled-in method of pricing employed was consistent with longstanding Commission ratemaking policy and precedent, and where the Commission's review of the rate formula took into account the non-firm character of the customer's transmission service and all other relevant matters.

2. Whether the Commission reasonably concluded that the proposed rate to a particular customer was not unduly discriminatory where it reflected the fact that this customer, unlike similarly situated customers, had not become a member of the New England Power Pool (NEPOOL).

3. Whether in the circumstances of this case the Commission correctly determined that the filing of the proposed rate was not prohibited under the Mobile-Sierra doctrine.

4. Whether the Commission acted within its lawful authority in declining to hold an evidentiary hearing to inquire into factual issues that were not, in the Commission's view, material to the outcome.

## STATEMENT OF THE CASE

In this case, Maine Public Service Company (MPSC), a privately owned electric utility, challenges orders of the Commission accepting for filing an unexecuted transmission service agreement governing the rate for Central Maine Power Company's (CMP) transmission service to MPSC. These orders are: (1) Central Maine Power Co., Order Noting Interventions, Rejecting Rates, Accepting For Filing And Suspending Rates, Denying Waiver And Directing The Filing Of Briefs, Docket No. ER90-539-000 issued December 28, 1990 (53 FERC ¶ 61,465); (2) Central Maine Power Co., Order Denying Requests For Rehearing And Request For A Stay, Docket No. ER90-539-001, issued February 28, 1991 (54 FERC ¶ 61,206). MPSC's claims are that the rulings of the Commission erroneously establish excessive and discriminatory rates.

## STATEMENT OF THE FACTS

### A. Background: The Underlying Transmission Agreement

1. In 1973, CMP proposed to construct a 600 megawatt electric generating unit at its plant site in Yarmouth, Maine,

and invited joint ownership participation therein by other utilities in the New England area. In an ensuing "Offer of Participation," CMP informed potential participants that no offeree would be entitled to an ownership interest in the Unit until it had become a member of the New England Power Pool ("NEPOOL") (R. 690, J.A. 235). 1/ On November 1, 1974, CMP and nine electric utilities, including MPSC, entered into an agreement (ownership agreement) for the joint ownership, construction, and operation (but not transmission) of William Wyman Unit No. 4 ("Wyman 4") (R. 613-85, J.A. 158-230).

Contemporaneously with the execution of this agreement, the same utilities executed a separate "Wyman 4 Transmission Agreement" intended to govern, inter alia, the rates for transmission from Yarmouth of their Wyman 4 power entitlements (R. 523-542, J.A. 69-88). Section 3(c) of the Wyman 4 Transmission Agreement provided that charges to owners for "PTF" deliveries 2/ shall be in accordance with the NEPOOL agreement,

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1/ The NEPOOL agreement was entered into in 1971 and approved by the Commission (then the Federal Power Commission) in 1976. It provides for joint planning, central dispatch and coordinated operation of its participants' generation and transmission facilities. See generally, New England Power Pool Agreement (NEPOOL), 56 FPC 1562 (1976), reh'g denied, 56 FPC 2862 (1976), pet. for review denied, Municipalities of Groton v. FPC, 587 F.2d 1296 (D.C. Cir. 1978).

2/ The Wyman 4 Transmission Agreement was filed with the FPC as "FPC Rate Schedule 60." Section 1.2 of that agreement defines "PTF" as "pool transmission facilities as defined in the NEPOOL Agreement" (R. 523, J.A. 69). In turn, Section 13 of the NEPOOL Agreement defines "PTF" as transmission lines and related facilities rated at 69 kilovolt (kv) or above that contribute to the pool-wide interconnected

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while Section 3(d) provided that, if no NEPOOL agreement is in effect, charges for transmission over CMP's facilities shall be "in accordance with the provisions of CMP's applicable rate from time-to-time" (R. 525, J.A. 71).

2. Construction of the Wyman 4 unit was completed in 1978. By then, all joint owners except MPSC had become members of NEPOOL and, pursuant to Section 3(c) of the Transmission Agreement, charges for deliveries of their Wyman 4 entitlements were determined by the NEPOOL agreement. MPSC, on the other hand, informed CMP in April 1978 that it wished to delay becoming a NEPOOL member until October 31, 1980 (R. 694, J.A. 239). It then requested and obtained from all other Wyman 4 joint owners a temporary waiver of the requirement of NEPOOL membership. Id. 3/ By doing so, MPSC became the sole joint owner of Wyman 4 whose transmission rates would not be determined by the NEPOOL agreement -- at least until October 1980. 4/

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2/(...continued)
system, that provide parallel capability to the interconnected system, or provide a principal transmission link between a member and an interconnected system. See Public Service Co. of New Hampshire, 49 FERC ¶ 61,030 at p. 61,114 n.2 (1984).

3/ The NEPOOL membership requirement (expressly set out in the Offer of Participation) apparently survived the execution of the Wyman 4 ownership agreement, even though that agreement superseded the Offer and did not contain the NEPOOL requirement (R. 694, J.A. 239).

4/ See Sections 3(c) and 3(d) of the Wyman 4 Transmission Agreement (R. 525, J.A. 71).

3. Shortly before Wyman 4 became operational, an Assistant to CMP's President transmitted a letter to MPSC dated September 27, 1978, which stated in its entirety:

> Central Maine Power Company will wheel on its 345 KV facilities your entitlement in W. F. Wyman #4 at CMP's FERC Rate Schedule No. 54.
>
> This rate schedule provides for wheeling services at the rate of 3¢ per KW per mile per year. The mileage from the Buxton switchyard to the Maine Yankee 345 KV switchyard which will be involved is 56.22 miles. Based on that the annual rate per KW for your entitlement will be $1.6866.
>
> Enclosed for your information is a copy of Rate Schedule No. 54. If you have any questions, please let me know (R. 550, J.A. 96). 5/

Wyman 4 became commercially operational on December 1, 1978; at that time it appeared as though transmission of MPSC's Wyman 4 entitlement at a non-NEPOOL rate would last only until October 31, 1980. However, on October 29, 1980, the day before that deadline, MPSC officers met with a CMP official to explain that

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5/ CMP had previously tendered Rate Schedule 54 to the Commission (then the Federal Power Commission) for filing in June 1976 and it was accepted for filing on October 22, 1976 (R. 543). In a cover letter that accompanied this filing, CMP explained that it would "use this rate schedule for transmission of power over the subject 345 kv lines for transmission services not covered by . . . the [NEPOOL] Agreement" (R. 544-45, J.A. 90-91) (emphasis added). While identifying seventeen utilities that would receive service under Rate Schedule No. 54, the cover letter also specifically stated: "Other utilities may choose to use this rate but are presently unknown to [CMP.]" (R. 545). In addition, that rate schedule itself explicitly stated that CMP reserved the right to amend the foregoing rate in the event that circumstances should arise that make such amendment necessary or desirable (R. 548, J.A. 94).

the economic disadvantages to MPSC of joining NEPOOL still outweighed the benefits, and therefore, MPSC would still refrain from becoming a NEPOOL member for the time being 6/ (R. 695, J.A. 240). As a result, MPSC continued to receive transmission service of its Wyman 4 power at the same rate specified in FERC Rate Schedule No. 54; this arrangement continued until a new rate schedule was filed in the proceeding below.

**B. CMP's Filing Of The Rate Schedule At Issue Here And MPSC's Response Thereto**

1. On August 6, 1990, CMP filed with the Commission an unexecuted transmission service agreement proposing to increase the rate for transmission of MPSC's Wyman 4 entitlement to $15.02 per kw/mi/yr (FERC Docket No. ER90-530-000). 7/ CMP explained that because there appeared to be no prospect that MPSC would ever join NEPOOL and thereby become entitled to NEPOOL transmission rates, it was proposing a rolled-in form of transmission rate 8/ that it characterized as "compensatory."

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6/ According to CMP, MPSC indicated in 1980 that it wished to defer becoming a NEPOOL member until 1982. In 1982, MPSC again indicated that it would again defer a decision on joining NEPOOL (R. 492, J.A. 39).

7/ In a cover letter accompanying this filing, CMP explained that MPSC previously had been receiving this service at the "rate set forth in Rate Schedule No. 54" (R. 491). CMP added that Rate Schedule No. 54 was intended to serve only as an "interim" rate and, by its own terms, the schedule was "subject to being superseded by the NEPOOL agreement."

8/ As this Court has recognized, under a rolled-in method of pricing,

> a utility determines its transmission costs per unit of electricity by dividing the total

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CMP also explained that this rate was the same as had been offered to other transmission customers receiving comparable service under rate schedules already on file with the Commission (R. 565, J.A. 108). 9/ Finally, CMP represented that it would "cancel Rate Schedule No. 54" when the current rate filing became effective (R. 492, J.A. 39).

2. On August 24, 1990, MPSC filed pleadings urging that CMP's rate filing be rejected. (R. 563, J.A. 106). Asserting that the September 27, 1978 letter from CMP to it and filed with the Commission constituted a fixed-rate contract, MPSC argued that the Commission should reject the rate filing as in violation of the Mobile-Sierra doctrine (R. 571, J.A. 114). 10/ MPSC

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8/(...continued)
annual costs of constructing and maintaining its entire transmission network by the load, or the amount of power on the network, at certain peak periods.

Fort Pierce Utilities Authority v. FERC, 730 F.2d 778, 782 (D.C. Cir. 1984). This definition describes the rolled-in method for pricing "firm" transmission service, i.e., highest priority service that is not interruptible. As explained at pp. 13 and 30, infra, the rolled-in rate for non-firm, transmission service (lower priority, interruptible), as is involved here, is computed somewhat differently, i.e., by using system capability, not peak loads as the divisor in the equation.

9/ As the Commission later found, the proposed rate change would increase CMP's revenues by $276,198 annually (R. 147, J.A. 5).

10/ United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956); FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956) (Sierra). These cases stand for the proposition that, where utilities have contractually committed themselves to a fixed rate, unilateral rate filings purporting to change the rate are a nullity unless the (continued...)

also argued that, apart from violating the Mobile-Sierra doctrine, the proposed rate increase should be found to be excessive and unduly discriminatory in violation of Section 205(e) of the Federal Power Act (FPA), 16 U.S.C. § 824d(e).

In support, MPSC argued that CMP's 1989 cost study, submitted in support of the proposed rate, overstated costs properly assignable to transmission (R. 717, J.A. 262). In addition, MPSC claimed that CMP's pricing method which rolled-in the costs of all of the high and low voltage transmission facilities on its network was objectionable because: (1) service to MPSC was "path-specific", i.e., it utilized only a 56-mile path of 345 kv transmission facilities north from CMP's Buxton switchyard and relied only on high voltage lines; and (2) MPSC receives its Wyman 4 entitlement by "displacement" from Canadian

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10/(...continued)
contract reserves the right to make rate changes, or unless an increase in the rate is required in order to serve the public interest. In this context, the "public interest" showing essentially requires the utility filing a new rate to prove that the old, fixed rate is "so low as to adversely affect the public interest -- as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory." Sierra, 350 U.S. at 355.

power sources (R. 582-83, J.A. 125). 11/ On these bases, MPSC claimed it should be charged an incremental rate. Id. 12/

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11/ In order to receive its Wyman 4 power entitlement, MPSC, a northern Maine utility bordering Canada, has to arrange for wheeling services not only from CMP but also from two other intervening transmission systems north of CMP. However, because of a prevalent southbound flow over the Maine utilities' transmission systems (from the Canadian border to Maine's southern border), and because of MPSC's proximity to Canadian power sources, MPSC, as a matter of electric power physics, may actually draw the equivalent of its Wyman 4 entitlement from the passing flows out of Canada. In effect, MPSC's receipt of this Canadian power may "displace" its need for the power actually emanating from Wyman 4. Power transmitted from Wyman initially flows around CMP's system, and then may ultimately flow to states south of Maine and become a substitute for the power MPSC drew from the Canadian power flow upstream.

Although the intervening systems must stand ready to wheel MPSC's power northward, as required in MPSC's transmission contracts with them, this displacement may have the net effect of eliminating the use the two intervening transmission systems north of CMP's system for wheeling of MPSC's Wyman 4 entitlement. However, because Wyman 4 is located within CMP's transmission system, even a displacement cannot eliminate MPSC's need to physically utilize that system. As explained at p. 28, infra, because an integrated transmission system functions like a reservoir, the specific path flows within the CMP system of MPSC's Wyman 4 entitlement cannot be isolated and identified.

12/ As the Commission observed in its order on rehearing, MPSC

> uses the phrase 'incremental form of transmission rate' to refer to a rate based on the cost of only certain [CMP] transmission facilities, as opposed to a rolled-in rate based on the cost of all of [CMP's] transmission facilities. [MPSC] argues that this incremental form of transmission rate should include the cost of only those path-specific facilities used to

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In support of its undue discrimination claim, MPSC pointed out that all of the joint owners were paying the NEPOOL rate of $3.05 per kw mi/yr. while MPSC would be charged $15.02 under the proposed rate. MPSC asserted further that it would actually cost CMP less to serve MPSC than to transmit the other owners' Wyman 4 entitlements because of the alleged "path-specific" and "displacement" nature (discussed above) of MPSC's service (R. 716, J.A. 261).

### C. The Commission's Orders Accepting The Rate Schedule Filing And Denying Rehearing

1. On December 28, 1990, the Commission issued an order denying MPSC's motion to reject the rate filing and accepting the $15.02 rate for filing (R. 156, J.A. 14). The Commission rejected MPSC's claim that the rate filing was prohibited under the Mobile-Sierra doctrine because the 1978 letter constituted a fixed price agreement. Rather, the Commission found that the letter in question merely informed MPSC that: (1) the service for the time being would be provided under Rate Schedule No. 54; and (2) that the rate in effect under that schedule was $.03 per kw/mi/yr. or $1.68 for the 56 miles of transmission lines north of the Buxton switchyard. Id. In the Commission's view, this rate filing did not amount to a contract, much less a fixed price contract. 53 FERC ¶ 61,465 at p. 62,646 (1990).

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12/(...continued)
provide its service or specified by its contract.

54 FERC at p. 61,610.

Next, the Commission considered MPSC's arguments that the proposed rate was excessive based on overstated cost figures and the rolled-in method of pricing. 13/ Initially, the Commission accepted all of MPSC's proposed cost adjustments, except its objection to the rolled-in pricing method (R. 157, J.A. 15). However, even having recalculated the cost data with the adjustments proposed by MPSC, the Commission concluded that under its preliminary review of the $15.02 rate level, that rate still would not produce excessive revenues. Id. Finding no infirmity in CMP's inclusion of all of its transmission-related costs in the $15.02 rate, the Commission approved CMP's roll-in of transmission investment as consistent with the Commission's longstanding policy and practice (R. 157, J.A. 15).

The Commission also rejected MPSC's undue discrimination claim growing out of the disparity between the rate proposed for MPSC and the lower rate charged all other Wyman 4 owners. The Commission found that the difference in rates was justified on the ground that all other Wyman 4 joint owners had joined NEPOOL, while MPSC elected not to do so:

> Participation in NEPOOL carries with it many obligations and benefits and [MPSC] determined that it is in its best interest not to join. Having made that decision [MPSC] can lay no claim to NEPOOL benefits.

(R. 156-57, J.A. 14-15). Furthermore, because the Commission found that MPSC had raised no material issues of fact with

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13/ These alleged cost overstatements are specifically detailed in the Commission's order. See R. 154, J.A. 12. See also n.21, infra.

respect to CMP's rolled-in pricing, it denied MPSC's request for an evidentiary hearing on this issue.

2.a. On January 28, 1991, MPSC filed a petition for rehearing of the Commission's December 28 order (R. 764, J.A. 265). In this petition, MPSC repeated its claims that the 1978 CMP letter to it constituted a fixed-rate contract, and that the "path-specific" and "displacement" nature of its transmission service should preclude CMP from using the rolled-in pricing method (R. 780, 784, J.A. 281, 285). 14/ In addition, MPSC contended that the Commission overlooked the "subordinate and inferior" nature of CMP's non-firm service to MPSC vis-a-vis CMP's service to its native load customers which, MPSC claimed, warranted a lower rate for MPSC (R. 776, J.A. 277). MPSC reiterated its argument that the disparity between the rate charged for transmission of its Wyman 4 entitlement and that charged for the other Wyman 4 owners made MPSC's rate unduly discriminatory (R. 769, J.A. 270). Finally, as further evidence of undue discrimination, MPSC pointed to joint, discounted transmission rates that CMP had offered to other parties under other agreements, but not here (R. 772, J.A. 273).

b. By order dated February 28, 1991, the Commission denied MPSC's rehearing request (R. 397, J.A. 19). At the outset, the Commission agreed with MPSC that the service to it under the rate filing was non-firm, and also agreed with MPSC's contention that

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14/ MPSC also repeated its claim that its service only uses CMP's high voltage lines (R. 785, J.A. 286).

non-firm transmission service warrants a lower rate than firm transmission service (R. 410, J.A. 32). The Commission then calculated CMP's rate using an established rate formula that effectively excluded the cost of transmission reserves (assignable only to firm customers) from the rates of non-firm customers. 15/ After applying the revised formula, it still found that the proposed rate fell within the just and reasonable range and would not produce excessive revenues.

The Commission also rejected MPSC's renewed undue discrimination claim. In the Commission's view, the rate disparity was an eventuality that resulted from the bargain freely struck by MPSC. Because the Wyman 4 Transmission Agreement, to which MPSC was a knowing party, specifically contemplated different rates for members of NEPOOL as opposed to nonmembers, CMP was authorized to establish a different rate for nonmembers such as MPSC (R. 406-07, J.A. 28-29).

As the Commission pointed out, there are certain obligations that all of the other Wyman 4 owners have incurred as a result of joining NEPOOL that nonmembers like MPSC may avoid. These included: (1) costs involved in keeping in reserve a specified amount of generating capacity (or incurring deficiency charges); (2) the obligation to schedule maintenance of generating facilities in coordination with other NEPOOL; and (3) the

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15/ The Commission relied on the non-firm transmission rate formula established in New England Power Co. (NEPCO), Opinion No. 335, 49 FERC ¶ 61,129 at pp. 61,554-55 (1989), reh'g denied, Opinion No. 335-A, 50 FERC ¶ 61,151 (1990).

obligation to transmit power from NEPOOL-planned units. Having been spared these costs, the Commission reasoned, MPSC was not entitled to the benefits of NEPOOL, i.e., the lower transmission rate applicable to the other Wyman 4 owners (R. 407, J.A. ).

As to the other discrimination claim -- based on CMP's failure to offer MPSC rate discounts similar to those offered other customers -- the Commission pointed out that New England utilities are routinely eliminating these discounts from rates for non-NEPOOL services. It found that the fact that certain preexisting agreements containing the discounts may still remain in effect does not rise to the level of undue discrimination because they are not available to MPSC (R. 408, J.A. 30). 16/

Next, the Commission rejected MPSC's claim that the Commission has in other cases required an incremental form of pricing whenever a transaction specifies the path over which the power must flow. The Commission stated that MPSC misunderstood its precedent, noting that the only electric cases in which it has found incremental pricing to be appropriate involved transmission facilities that were not integrated. Id. Because MPSC had neither alleged nor submitted any evidence to suggest that CMP's transmission facilities are not integrated, the

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16/ The Commission also cited other cases in which it had rejected identical discrimination claims. Northeast Utilities Service Co., 52 FERC ¶ 61,097 at p1 61,486 (1990), appeal pending sub nom. City of Holyoke Gas & Electric Dept. v. FERC, No. 90-1565 (D.C. Cir.); Public Service Co. of New Hampshire (PSNH), 50 FERC ¶ 61,107 at p. 61,351 (1990), remanded on other grounds in Bangor Hydro-Electric Co. v. FERC, 925 F.2d 465 (D.C. Cir. 1991) (R. 408, J.A. ).

Commission concluded that a rolled-in pricing approach was appropriate, and that no evidentiary hearing was warranted on this issue (R. 409, J.A. 31). 17/

On MPSC's related point -- that rolled-in pricing was not appropriate because MPSC allegedly transmitted its Wyman 4 entitlement by displacement -- the Commission found no logical connection between the alleged displacement nature of MPSC's service and an incremental rate (R. 410-11, J.A. 32-33). 18/ Because MPSC uses CMP's facilities to transmit its entitlement, and because those facilities are integrated, the Commission concluded that rolled-in pricing was appropriate whether or not a "displacement" may have been involved in the transaction. (R. 411, J.A. 33.) 19/

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17/ Applying identical reasoning, the Commission rejected MPSC's objection to the roll-in of CMP's "subtransmission" facilities because MPSC made no allegation and presented no facts tending to show that CMP's higher and lower voltage transmission facilities are not integrated. For this reason, the Commission denied MPSC's request for an evidentiary hearing to show that its service did not benefit from CMP's lower voltage facilities (R. 411, J.A. 33).

18/ Although MPSC below had sometimes used the term "backhaul" interchangeably with the term "displacement," the Commission did not adopt MPSC's characterization of electric transmission by displacement as a "backhaul."

19/ The Commission found MPSC's assertion that its Wyman 4 power entitlement followed a path-specific course to be contradicted by its assertion that it receives its power by displacement:

> The displacement argument assumes that [MPSC] receives its Wyman power by diverting power southbound from Canada to [CMP]s] transmission system. The path specific argument rests on the contrary premise that

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Finally, the Commission remained unpersuaded that the 1978 letter was a fixed-rate contract. On this point, the Commission observed that the letter was not executed by MPSC, did not reflect CMP's acceptance of any offer, and contained none of the terms involved in such service, including duration and reliability (R. 412, J.A. 34). The Commission stated that it would not infer an intent on the part of CMP to waive its right to have rates reviewed under a just and reasonableness standard from "doubtful or equivocal acts or language," since the Mobile-Sierra "public interest" showing required of utilities seeking to be excused from fixed-rate contracts is "almost insurmountable" (R. 413, J.A. 35).

This appeal followed.

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> [MPSC] receives its Wyman power by direct transmission north on [CMP's] transmission lines connected to Wyman 4.

(R. 411, J.A. 33).

## SUMMARY OF ARGUMENT

A. Based on cost and peak load data submitted by CMP, the Commission reasonably concluded that the $15.02 per kw/mi/yr. rate proposed by CMP would not produce excessive revenues. In reaching that conclusion, the Commission's review of CMP's rate structure took into account most of the cost adjustments proposed by MPSC as well as the non-firm character of the service to MPSC. The Commission's approval of CMP's ratemaking methodology was reasonable because it was consistent with longstanding Commission policy and practice to roll-in the cost of a utility's transmission network. The Commission reasonably found that CMP had justified its change to a rolled-in rate structure because its former rate was intended only to be temporary, i.e., until MPSC joined NEPOOL, and because MPSC ultimately decided not to become a NEPOOL member.

B. The Commission's rejection of MPSC's undue discrimination claims was also reasonable. The difference in rates between MPSC and the other Wyman 4 joint owners was justified because MPSC, as a result of its own reasoned choice, was the sole joint owner not to join NEPOOL, and because the Wyman 4 Transmission Agreement, which MPSC freely joined, specifically prescribed a rate differential between NEPOOL and non-NEPOOL transmission services. The Commission likewise properly rejected MPSC's separate discrimination claim based on CMP's failure to include a multi-system rate discount. Because all New England utilities are eliminating these discounts from

transmission agreements, the fact that certain discounts still exist in older CMP agreements with other customers does not rise to the level of undue discrimination.

C. The Commission reasonably concluded that the instant rate filing was not prohibited under the Mobile Sierra doctrine. This conclusion was based on the Commission's sound reasoning that the September 1978 letter bore no resemblance to a contract, and that MPSC's right to transmission service was instead governed by the Wyman 4 Transmission Agreement, which it signed in 1974. Given the events leading up to the 1978 letter, the record suggests that, by sending the letter, CMP was merely establishing a temporary rate to be superseded as soon as MPSC joined NEPOOL. In any event, if the Court finds ambiguity in the 1978 letter, the Commission's reasonable interpretation of its meaning is entitled to deference.

D. The Commission reasonably declined to hold an evidentiary hearing. MPSC has never alleged nor attempted to show that CMP's transmission facilities are not integrated, the only recognized exception to the Commission's longstanding ratemaking policy "roll-in". MPSC's sole ground for requesting a hearing are to show the alleged "path specific" and "displacement" nature of its transmission service, which are not material to the justness and reasonableness of CMP's rolled-in rate formula.

## ARGUMENT

### I. THE COMMISSION CORRECTLY RULED THAT CMP'S RATE HERE IN ISSUE IS NEITHER UNJUST NOR UNREASONABLE NOR UNDULY DISCRIMINATORY, AND THAT NO TRIAL-TYPE HEARING WAS NEEDED TO RESOLVE THESE QUESTIONS

As this Court has recognized "[r]atemaking is . . . much less a science than an art[,]" and "[c]ost itself is an inexact standard" that may serve as the basis in different circumstances as the basis for different rates. Alabama Electric Cooperative, Inc. v. FERC, 684 F.2d 20, 27 (D.C. Cir. 1982) (footnote omitted); see also Permian Basin Area Rate Cases, 390 U.S. 747, 797 (1968). Because of the nature of the process, "great deference is given to FERC's expertise and judgment on the reasonableness of a particular rate proposal -- and courts will not be so presumptuous as to hold unlawful a rate approved by the Commission if, even if not in the court's judgment the 'ideal' design, it is nevertheless within a 'zone of reasonableness.'" Alabama Electric Cooperative, Inc., 684 F.2d at 27 (footnote omitted); see generally, Permian Basin, 390 U.S. at 747. Furthermore, this Court has recognized that a utility's costs are the customary -- though not unalterably required -- method by which the Commission determines the reasonableness of rates. E.g., Kentucky Utilities Co. v. FERC, 760 F.2d 1321, 1329 (D.C. Cir. 1985); Alabama Electric Cooperative, Inc., 684 F.2d at 27.

Further, courts owe deference to the Commission's reasonable interpretations as to the meaning of agreements. As this Court has recognized, "particularly with regard to issues of contractual interpretation pertaining to the application of the

[Mobile] Sierra doctrine," it is "proper to defer to the Commission's expertise if its decision is amply supported both factually and legally." Kansas Cities v. FERC, 723 F.2d 82, 87 (D.C. Cir. 1983) (citations omitted); see also Holyoke Water Power Co. v. FERC, 799 F.2d 755, 758-59 n.6 (D.C. Cir. 1986). And, as this Court acknowledged more recently, Congress' explicit delegation of authority to this Commission to ensure reasonable rates through adjudication

> compels a court to give deference to the agency's conclusions even on pure questions of law within that domain and implicitly modifies the traditional rule of withholding deference on questions of contract interpretation.

Vermont Dept. of Public Service v. FERC, 817 F.2d 127, 135 (D.C. Cir. 1987) (citations and inside quotation marks omitted). Finally, this Court has also observed that courts owe deference to the Commission's reasonable interpretations of ambiguous language in agreements filed with the Commission. See Cajun Electric Power Cooperative, Inc. v. FERC, 924 F.2d 1132, 1135 (D.C. Cir. 1991).

In light of these principles, this Court should find that the Commission reasonably concluded on the basis of the record before it that the proposed rate for transmission of MPSC's Wyman 4 entitlement was just and reasonable and not unduly discriminatory.

### A. The Commission Reasonably Concluded That The Proposed Rate Was Just And Reasonable And Would Not Produce Excessive Revenues

Every application to change electric transmission rates is reviewed by the Rate Filings Branch ("RFB") of the Commission's Office of Electric Power Regulation prior to acceptance by the Commission. In this case, the RFB reviewed CMP's application to determine whether the proposed $15.02 rate was justified on the basis of CMP's transmission costs as well as CMP's explanation of how the rate was derived. In that application, CMP explained that, based on a fully rolled-in method of pricing, MPSC could have been charged as much as $24.31 per kw/mi/yr., i.e., more than $9.00 above the proposed rate (R. 842, J.A. 339). Instead, it unilaterally decided to charge the lower $15.02 rate. 20/

When MPSC filed a protest asserting, inter alia, that CMP had overstated its transmission costs in its application, the RFB found in its internal review that some of these contentions had merit. Accordingly, the Commission in the first order below stated that it had accepted "essentially all of Maine Public's proposed adjustments," 21/ except its objection related to

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20/ According to CMP, the $15.02 rate is the same rate that CMP currently has in effect under three other rate schedules already on file with the Commission, extending comparable service to other customers (R. 596, J.A. 141).

21/ As the Commission observed in that same order, these adjustments included: (1) significant deviations in various cost components, including total overhead and maintenance expense, for 1986, 1988, and 1989; (2) costs improperly included as the costs of "Transmission By Others"; (3) costs of customer service, information and accounting relating to CMP's native, on-system load; and (4) CMP's improper

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rolled-in pricing (R. 157, J.A. 15). Having recalculated CMP's costs with these adjustments, the Commission concluded that the $15.02 rate would not produce excessive revenues. Similarly, as already noted, because the Commission agreed with MPSC's argument on rehearing that MPSC was entitled to a non-firm transmission rate, it modified the divisor of CMP's rate formula (increasing it to 120% of system load) to reflect CMP's system capability (R. 410, J.A. 32). On this point, too, it concluded that, even with this additional adjustment, the $15.02 rate would still not produce excessive revenues. Thus, MPSC had sufficient notice from the orders under review which adjustments were accepted, and which were not accepted, in measuring CMP's rate for excessiveness.

Nonetheless, MPSC argues that the Commission's findings that the proposed rate is not excessive cannot be sustained because: (1) they are based on "non-public" cost studies and are unsupported by substantial evidence; (2) they were improperly based on a rolled-in method of pricing; and (3) they failed to take into account the non-firm character of its service. None of these arguments has any merit.

### 1. Non-Public Cost Studies Were Not Relied Upon By The Commission

Initially, MPSC asserts that the Commission's findings that the $15.02 rate is not excessive are deficient because the

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21/(...continued)
functionalization of administrative and general expenses to plant ratios instead of labor ratios (R. 154, J.A. 12).

Commission's orders fail to refer to "any record or other public evidence" to support its calculations, but instead relied on "internal, non-public cost studies" that cannot constitute substantial evidence. (MPSC Br. at 21-22.) As a threshold matter, these arguments should be rejected on jurisdictional grounds because MPSC failed to raise them in its rehearing request, or in a supplemental request for rehearing. See Section 313(b) of the FPA, 16 U.S.C. § 825l(b); Town of Norwood, Mass. v. FERC, 906 F.2d 772, 775 (D.C. Cir. 1990).

But, even if the Court were to consider these arguments on the merits, they are baseless. To begin with, it is noteworthy that MPSC has never asserted that, as a factual matter, the Commission has erred in determining that a $15.02 rate would not be excessive, or that under its own calculations the Commission should have reached a different result.

In any event, MPSC's claim (Br. 20-26) that the Commission relied on nonpublic data is refuted by the record. As discussed above, the cost data that were adjusted by the Commission in the first order were submitted by CMP and are part of the official record. See (R. 836-47, 879-97, J.A. 333-344, 376-394). 22/ Likewise, the information that comprised the divisor of CMP's rate formula, adjusted on rehearing to reflect the non-firm character of MPSC's service, was also submitted by CMP and is

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22/ In the first order, the Commission gave MPSC sufficient notice of the specific adjustments that were accepted, of those that were not. See note 21 supra.

part of the public record (R. 879, J.A. 376). 23/ Thus, from the data in the record as well as the Commission's explanations of what adjustments were made, MPSC had the means to determine whether the Commission's ultimate conclusion that the $15.02 rate was not excessive was correct or at least subject to challenge. Since MPSC has failed to mount any specific challenge to the correctness of the Commission's calculation -- by proffering its own alternative calculations or otherwise -- its evidentiary challenge should be rejected.

**2. The Commission Correctly Followed The Rolled-In Method Of Pricing In This Case Because Of The Integrated Nature Of The Entire System.**

a. MPSC's various challenges to the rolled-in method of pricing followed by the Commission have no merit. As the Commission explained on rehearing in PSNH, supra, 49 FERC at p. 61,116 (footnotes omitted) (emphasis added):

> The use of rolled-in investment for transmission pricing does not depend on whether power will, in fact, flow over all facilities. Rather, it reflects the fact that all parts of an integrated system work in tandem and that all facilities contribute to each and every service without regard to specific load flows associated with each particular transaction. 24/

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23/ System peak load data was submitted by CMP (R. 879, J.A. 376). The Commission multiplied that by 120% to arrive at system capability (R. 410, J.A. 32).

24/ In Sierra Pacific Power Co. v. FERC, 793 F.2d 1086, 1088 (9th Cir. 1986), the Ninth Circuit described "integration" in the following manner:

> Lower voltage transmission facilities are "integrated" when, in addition to being

(continued...)

To be sure, the Commission has carved out exceptions to its roll-in policy, primarily where it has been shown that the seller's transmission facilities are not integrated and thus could not possibly benefit the seller's system as a whole. 25/ However, in this case MPSC has not even alleged, much less attempted to show, that CMP's transmission facilities are not integrated.

Indeed, in its brief, MPSC carefully avoids making any claim that CMP's facilities are not integrated. 26/ Instead, it

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24/(...continued)

> connected with higher voltage facilities, the lower voltage facilities are themselves interconnected and designed to operate in parallel. This is also referred to as "looping," that is, the lower voltage transmission facilities form parallel paths for electric energy with the higher voltage transmission facilities. The existence of two or more parallel transmission paths from sources of power to receiving points establishes integration. This is true even where one of the parallel paths is normally operated "opened," that is, with the connection broken by a switch . . . . When a higher voltage line goes out of service, power is automatically rerouted throughout the parallel 46 kilowatt because of this "looping" or integration in accordance with the law of physics.

25/ See, e.g., Minnesota Power & Light Co., 16 FERC ¶ 63,012 at pp. 65,070-71 (1981), aff'd, Opinion No. 155, 21 FERC ¶ 61,233 (1982), aff'd sub nom. Cities of Aitkin v. FERC, 704 F.2d 1254, 1257 (D.C. Cir. 1982); Idaho Power Co., Opinion No. 13, 3 FERC ¶ 61,108, at pp. 61,295-96, reh'g denied, Opinion No. 13-A, 5 FERC ¶ 61,009 (1978).

26/ MPSC simply claims that there is no affirmative evidence in the record that the facilities are integrated (MPSC Br. 29-30). Initially, this argument is not properly before the Court because it was not raised in MPSC's rehearing request. See Town of Norwood v. FERC, 906 F.2d 772, 775 (D.C. Cir. 1990). Moreover, MPSC's rehearing request actually concedes (continued...)

complains that it is entitled to a hearing on whether MPSC, from a normal operational standpoint, receives any "benefit" from CMP's lower voltage facilities (see MPSC Br. 26-28). But this is simply another way of arguing that the Commission cannot impose rolled-in pricing absent proof that MPSC's Wyman 4 power physically flows over all of CMP's higher and lower voltage facilities. As already demonstrated, however, so long as transmission facilities are integrated, the Commission considers it irrelevant, for roll-in purposes, "whether power will, in fact, flow over all facilities." PSNH, supra, 49 FERC at 61,116. Because MPSC has not alleged or attempted to show that it could not possibly benefit from CMP's subtransmission facilities as a result of non-integration, it has not established that the Commission has committed reversible error in declining to investigate whether CMP's subtransmission facilities are normally used for MPSC's service.

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26/(...continued)
that CMP's transmission facilities are integrated. See R. 770, J.A. (asserting that MPSC should not be charged rolled-in form of rate "as if Maine Public were dependent upon CMP's integrated power supply transmission and production system to the same extent as CMP's firm native load") (emphasis added); see also R. 780, J.A. 281 (asserting that the Commission should not "simply assume that CMP's whole integrated system is fully used in delivering [MPSC]'s Wyman entitlement.") (emphasis added). Finally, MPSC has been on notice from the outset of this proceeding that rolled-in pricing was proposed and that the Commission's longstanding policy is to allow roll-in unless transmission facilities are not integrated. Yet, MPSC has never claimed or attempted to establish that CMP's facilities are not integrated.

b. By the same token, the Commission properly rejected MPSC's proposal that it replace rolled-in pricing in favor of a rate formula that would have reflected only the cost of a 56-mile path of high voltage facilities. The Commission's rejection of MPSC's "path-specific" pricing in favor of rolled-in pricing was well-founded because it was nothing more than an application of the Commission's longstanding general policy, going back almost twenty years, of gauging the justness and reasonableness of rates on the basis of rolled-in transmission costs. Detroit Edison Co., 54 FPC 3012 (1975); Utah Power & Light Co., 14 FERC ¶ 61,162 (1981); Otter Tail Power Co., 12 FERC ¶ 61,169 (1980); Utah Power & Light Co., 27 FERC ¶ 61,258 (1984), aff'd sub nom., Sierra Pacific Power Co. v. FERC, 793 F.2d 1086 (9th Cir. 1986); PSNH, supra 46 FERC at p. 62,332, remanded on other grounds sub nom., Bangor Hydro-Electric Co. v. FERC, 925 F.2d 465 (D.C. Cir. 1991); Northeast Utilities Service Co., 52 FERC ¶ 61,095 (1990); reh'g denied, 52 FERC ¶ 61,336 at 62,316 (1991), appeal pending sub nom. City of Holyoke Gas & Electric v. FERC, No. 90-1565 (D.C. Cir.). 27/

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27/ In its brief to this Court (Br. 25, 28) MPSC cites this Court's decisions in Algonquin Gas Transmission Co. v. FERC, No. 89-1634 (D.C. Cir. Nov. 1, 1991) (Algonquin), and ANR Pipeline Co. v. FERC, 771 F.2d 507 (D.C. Cir. 1985) (ANR), in support of an argument that the Commission failed to support its finding with substantial evidence that roll-in was reasonable. MPSC's reliance on both Algonquin and ANR is misplaced, however, because in those cases no party in interest had proposed a change from incremental to rolled-in pricing, and the Commission (as the sole proponent for the change) had the burden to create a factual record that would support a change from incremental pricing to rolled-in

(continued...)

Indeed, MPSC's arguments that it should receive a lower rate because CMP allegedly incurs lower costs from the specific path flows over which MPSC's Wyman 4 power allegedly travels are undercut by this Court's reasoning in Fort Pierce Utilities Authority v. FERC, 730 F.2d 778, 782 (D.C. Cir. 1984). There, this Court acknowledged that:

> a unit of electricity does not actually travel like a railroad shipment from the point at which it enters the system to the point to which it is delivered. A transmission network functions more like a reservoir: a given amount of power enters the system at one point and a like amount is delivered at another point. The costs associated with this pair of operations do not vary with the distance between its point of entry and the point of delivery, but are based on the costs for the entire transmission network.

c. On a related point, MPSC argues (MPSC Br. 34-35) that the Commission failed to address why the alleged "backhaul" nature of its transmission service does not warrant a lower rate.

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27/(...continued)
pricing. In the Court's view, the Commission failed to meet that burden.

Here, on the other hand, the change to rolled-in pricing was proposed by CMP, after it became clear that MPSC would never join NEPOOL as originally anticipated. Thus, under Section 205 of the FPA, CMP had the burden of demonstrating that the pricing method was just and reasonable. It met this burden by proposing a rolled-in method that was consistent with longstanding Commission policy and by showing that the change in rate structure was justified by MPSC's decision not to join NEPOOL.

MPSC did not make this argument on rehearing and therefore it may not be considered by this Court. 28/

In any event, as noted, MPSC used the terms "displacement" and "backhaul" interchangeably in the proceeding below. And the Commission did address MPSC's displacement argument -- albeit without mentioning the term "backhaul" -- in its order on rehearing when it concluded that there was no logical connection "between the supposed 'displacement' nature of the service to [MPSC] and the use of an incremental rate." 54 FERC at p. 61,612-13. 29/ The Commission unequivocally declared that displacement is not one of the circumstances that could justify a departure from rolled-in pricing. Id. 30/

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28/ Town of Norwood v. FERC, 906 F.2d at 775. MPSC made one passing reference to the term "backhaul" buried in footnote 18 of its rehearing request (R. 785, J.A. 286). This single mention of the term "backhaul" did not put the Commission on notice of any need to devote a full discussion in its order on rehearing. Furthermore, on rehearing, MPSC did not request an evidentiary hearing to explore "backhaul"-related issues.

29/ "Backhaul" is a concept that MPSC has apparently borrowed from ratemaking cases under the Natural Gas Act. Contrary to MPSC's brief (at p. 6), the Commission has never referred to transmission of electric power by displacement as a "backhaul." Moreover, it has never considered a ratemaking policy approach to electric transmission that would employ backhaul-type concepts. Compare Interstate Natural Gas Pipeline Rate Design, 47 FERC ¶ 61,295 at pp. 62,058-59 (natural gas shippers may be entitled to lower "backhaul" rate where displacement nature of gas deliveries does not use pipeline capacity between the receipt and delivery point). See also ANR Pipeline Co. v. FERC, 771 F.2d 507, 512 (D.C. Cir. 1985).

30/ This holding did not represent any departure from Commission policy or precedent, as the Commission has never recognized displacement transactions as an exception to rolled-in pricing.

### 3. The Non-Firm Character Of The Service Was Taken Into Account In Determining The Rolled-In Rate

There is no support for MPSC's contention (MPSC Br. 31-33) that under the rate approved by the Commission it will be required to pay a "firm rate reflecting the full allocation of fixed costs" for service that is not firm. As already explained, supra pp. 12-13, the Commission on rehearing applied a rate formula that assured that MPSC, as a non-firm transmission customer, would not be charged for the reserve transmission capacity that CMP has to maintain to meet the requirements of its firm customers. 54 FERC at p. 61,612. 31/ MPSC has not in its brief challenged the reasonableness of the NEPCO non-firm ratemaking formula as applied in this case, let alone shown, that the Commission has erred in its method of calculating the rate for MPSC's non-firm service.

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31/ As noted, the Commission in the rehearing order below found that

> by dividing the seller's transmission costs by the seller's system capability (the amount of power the system is capable of supplying) instead of system load (the amount of power actually supplied), as is used for firm service[,] [t]his approach essentially excludes the cost of transmission reserves from the rates of the non-firm customers.

54 FERC at p. 61,612. As noted, the Commission then estimated CMP's system capability to be 120 percent of its system load, as it did in the NEPCO case, supra. MPSC has never challenged the reasonableness of this estimate.

**B. The Rate Approved By The Commission Was Not Unduly Discriminatory Where The Commission Took Into Account MPSC's Refusal To Join NEPOOL And Where CMP's Failure To Include A Rate Discount Was Consistent With Current Industry Practice.**

MPSC further argues that the Court must find the rate to be unduly discriminatory because it is several times higher than the current rate applicable to all the other Wyman 4 owners. See Br. 35. As noted earlier, however, the Commission found no undue discrimination because the Wyman 4 Transmission Agreement (to which MPSC is a party) specifically prescribes a rate differential between NEPOOL and non-NEPOOL transmission services. The correctness of this conclusion is rendered immediately apparent by virtue of Sections 3(c) and 3(d) of Wyman 4 Transmission Agreement (Rate Schedule 60), see page 3-4, supra. Those provisions clearly call for different rates depending upon whether NEPOOL service is involved.

Moreover, the Commission reasonably found the rate differential to be justified on the basis of MSPC's choice not to join NEPOOL and incur the costs required of NEPOOL members. In addition, the Commission likewise properly rejected MPSC's separate discrimination claim (MPSC Br. 12, 36) based on CMP's failure to include rate discounts that would have been based on MPSC's need to use more than one utility's system to wheel its Wyman 4 entitlement, pointing out that all New England utilities are routinely eliminating such discounts from transmission rates applicable to non-NEPOOL services.

**1. In Determining The Rate To Be Charged MPSC, The Commission Properly Took Into Account The Wyman 4 Transmission Agreement And MPSC's Decision Not To Join NEPOOL**

With respect to its NEPOOL-related rate discrimination claim, MPSC's opening brief does not even address, much less challenge, the Commission's initial holding that CMP's rate differential between MPSC and the other Wyman 4 owners was specifically authorized by Sections 3(c) and 3(d) of the Wyman 4 Transmission Agreement (Rate Schedule No. 60). See MPSC Br. 35-36. Because MPSC failed in its opening brief to raise any challenge to the Commission's rejection of its discrimination claim on contractual grounds, it has waived the point, and this Court should affirm the Commission ruling on this ground alone. Columbia Gas Transmission Corp. v. FERC, 848 F.2d 250, 256 (D.C. Cir. 1988); see also Corson & Gruman Co. v. NLRB, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990).

With respect to the Commission's related but independent holding that since MPSC had never become a NEPOOL member, and had not incurred the costs of such membership, it was not entitled to the rate benefits flowing from such membership, MPSC argues that the Commission's ruling is contrary to this Court's decision in Bangor Hydro-Electric Co. v. FERC, 925 F.2d 465 (D.C. Cir. 1991) ("Bangor Hydro"). According to MPSC, the Bangor Hydro decision compels this Court to remand this case to require the Commission to deal more clearly with its discrimination and anticompetitiveness claims. As shown below, MPSC's reliance on Bangor Hydro is not well taken.

First, unlike in Bangor Hydro, MPSC had participated in the ownership of a generating unit that was originally intended to serve only NEPOOL members. Had MPSC followed through on its initial commitment to join NEPOOL, no disparity in rates would ever have arisen. Thus, the disparity in rates at issue here are a direct consequence of MPSC's own voluntary choice not to join NEPOOL because, in its sole judgment, the economic costs of joining NEPOOL outweighed the economic benefits. The Commission was clearly reasonable in not permitting MPSC to translate this economic tradeoff into a claim of discriminatory and anti-competitive injury. 32/

A second major distinction between Bangor Hydro and this case is the Wyman 4 Transmission Agreement itself, which specifically authorizes the rate disparity and which MPSC knowingly signed. Thus, the Commission reasonably concluded that in paying a different rate from the NEPOOL rate, MPSC was receiving just what it bargained for. Finally, Bangor Hydro is distinguishable from the case here because the issue there was whether NEPOOL's service was firm or non-firm, and MPSC has not alleged or attempted to establish in the proceeding below that CMP's NEPOOL-related service is firm transmission service.

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32/ Indeed, had the Commission permitted MPSC to enjoy the NEPOOL rate without incurring NEPOOL's costs, this could have raised discrimination and anticompetitive concerns about MPSC's favorable treatment vis-a-vis all the other Wyman 4 owners.

**2. No Discrimination Resulted From The Fact That "Discounts" Were Not Given To MPSC.**

There is no substance to MPSC's argument (MPSC brief at 36) that the Commission "totally ignored" its claims of discrimination based on CMP's non-inclusion of a so-called "multi-system discount" in its rate, while some preexisting CMP agreements with other transmission customers still contain such discounts. 33/ As noted, the Commission specifically addressed this claim and found no discrimination because all New England utilities are phasing out these discounts. This ruling was correct.

As this Court has acknowledged in construing the anti-discrimination provisions of Section 205(b) of the FPA, "[a] fixed rate contract between the parties may justify a rate disparity, rendering it lawful under [that] section . . . ." Cities of Bethany v. FERC, 727 F.2d 1131, 1139, citing Boroughs of Chambersburg v. FERC, 580 F.2d 573, 577 (D.C. Cir. 1978) (per curiam). See also United Municipal Distributors Group v. FERC,

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33/ MPSC further complains (Br. 14) that the Commission did not specifically respond to its assertion that CMP extends transmission service to another jointly owned generating plant, the Maine Yankee nuclear generating plant, at a lower rate than is extended to MPSC for its Wyman 4 service. However, it appears that the Commission resolved this issue under its broader ruling that discounts in preexisting contracts that are no longer offered by CMP do not rise to the level of undue discrimination. In any event, MPSC is ill-positioned to complain about rate discrimination in CMP's service to the Maine Yankee joint owners because MPSC is itself a joint owner of Maine Yankee and thus is entitled to the benefits of CMP's discounted rate (R. 845, J.A. ).

732 F.2d 202, 212 (D.C. Cir. 1984); Town of Norwood v. FERC, 587 F.2d 1306, 1310 (D.C. Cir. 1978).

Here, the Commission found, as it has in other New England transmission rate cases, that the rate differentials pointed to by MPSC were the product of different contracts entered into at different times and under different circumstances. MPSC has not alleged that CMP is presently offering these multi-system rate discounts to any other utilities, nor has it taken issue with the Commission's finding that these discounts are being routinely eliminated throughout for non-NEPOOL services in the New England area. Therefore, MPSC has not shown that the Commission erred by declining to find discrimination or to set this issue for an evidentiary hearing.

### C. The Commission Correctly Determined That The Filing Of The Proposed Rate Was Not Precluded By The Mobile-Sierra Doctrine

1. The Commission acted in a wholly reasonable fashion in rejecting MPSC's contention, renewed in this Court (MPSC Br. 37-43), that the one-page letter dated September 22, 1978 from CMP to MPSC constituted a fixed-rate contract. Given the events that led up to CMP's sending of the 1978 letter, see pp. 2-6, supra, the Commission reasonably found that MPSC had been receiving transmission service under Rate Schedule No. 54. And, as the Commission correctly noted, "Rate Schedule No. 54 expressly reserved to CMP the right to revise the rate." 54 FERC at 61,614 n.42.

Aside from the historical context of the 1978 letter, the Commission also reasonably found that the letter bore no resemblance to a fixed-rate contract. It was typewritten on CMP's letterhead, not executed by MPSC, contained no indication that CMP had accepted an offer from MPSC, and "addressed virtually none of the terms involved in such service, including duration and reliability." 54 FERC at p. 61,613.

Had the Commission, on such de minimis evidence, accepted MPSC's contentions, CMP would have been permanently prohibited from changing the rate absent a showing that the rate would "adversely affect the public interest." See note 10, supra. Noting that the Mobile-Sierra "public interest" standard is "almost unsurmountable," the Commission ruled that it was not appropriate to infer a waiver of CMP's right to change rates from such "doubtful or equivocal acts or language." 54 FERC at 61, 613. There is no basis to depart from this sound ruling in the particular circumstances of this case.

2. Although MPSC concedes that "the letter was not an executed contract" (MPSC Br. 38, n.31), it nonetheless claims that the Commission ignored the fundamental purpose of the 1978 letter which, according to MPSC, was to meet the necessity for CMP and MPSC to establish a fixed rate for the transmission of its Wyman 4 entitlement. (Br. 41). The fact of the matter is, however, that -- as the record establishes -- MPSC entered into its commitment to participate as a joint owner of Wyman 4 in November 1974, almost four years before the September 1978 letter

was drafted. It is difficult to believe that MPSC, if it deemed the matter to be essential to ensuring the long-term economic viability of its Wyman 4 investment, would not have negotiated and reached a fixed-rate transmission service agreement in November 1974, not 1978.

As the Commission correctly viewed the matter, MPSC did in fact come to an agreement with CMP for the transmission of its Wyman 4 entitlement long before the 1978 letter was written. But this happened in November 1974 when MPSC and CMP both signed the Wyman 4 Transmission Agreement, FPC Rate Schedule 60. That agreement did not provide for a fixed rate, but, as already discussed, provided for a NEPOOL rate for NEPOOL membership services (Section 3(c)), and, for non-NEPOOL services, a charge that would be "in accordance with the provisions of CMP's applicable rate from time-to-time" (Section 3(d)). As also noted, the CMP's "applicable rate" that was already in effect in September 1978, when the letter was sent, was FPC Rate Schedule No. 54 (specifying a rate of $.03 per kw/mi/yr). That rate schedule belied any notion of permanency as it also expressly provided that the rate therein was "interim," and subject to being superseded by the NEPOOL agreement (R. 547-48, J.A. 93-94).

Indeed, MPSC's argument that the purpose of the 1978 letter was to meet CMP's and MPSC's need to agree on a permanently fixed rate tests the limits of credulity. The record establishes that between November 1974 and April 1978, it was the understanding of the Wyman 4 joint owners that they would all join NEPOOL and

thereby become entitled to the NEPOOL transmission rate under Section 3(c) of the Wyman 4 Transmission Agreement. An exception, initially perceived as temporary, was made for MPSC when in April 1978 it sought and obtained a two-year waiver from all other Wyman 4 owners of the requirement to join NEPOOL.

The September 1978 letter was thus written at a time when it was reasonable for all to conclude that MPSC simply needed a temporary rate that would become superseded by the NEPOOL rate at the end of October 1980. It is our submission that this scenario more accurately reflects the intent of the parties than does the assertion that the parties intended that the imprecise and casual phrasing of the 1978 letter set the precise limits of the price properly chargeable to MPSC. At all events, if there is any ambiguity in that document, the Commission's interpretation should be given deference. See Cajun Electric Power Cooperative, supra, 924 F.2d at 1135.

### D. The Commission Reasonably Determined Not To Hold An Evidentiary Hearing Where MPSC Had Requested One To Inquire Only Into Alleged Factual Disputes That The Commission Has Found To Be Immaterial

As noted above, the Commission declined to order an evidentiary hearing in this case to determine whether the rolled-in rate was unjust and unreasonable. The Commission so decided because lack of integration had been the only recognized exception to the Commission's longstanding policy of rolled-in pricing in electric transmission cases, and because MPSC had never alleged or attempted to show that CMP's transmission facilities are not integrated. This ruling was correct.

1. Under this Court's established precedent, it is proper for the Commission not to require an evidentiary hearing on issues for which there are no material facts in dispute. For example, in Kansas Power & Light Co. v. FERC, 851 F.2d 1479, 1484 (D.C. Cir. 1988), this Court recently stated:

> "[T]he standard of review which applies to an agency's decision to forego an evidentiary hearing is in the absence of a disputed factual issue is quite narrow." Cerro Wire & Cable v. FERC, 677 F.2d 124, 129 (D.C. Cir. 1982). Moreover, "[m]ere allegations of disputed facts are insufficient to mandate a hearing," and this Circuit has in the past accorded considerable deference to determinations by the Commission that the petitioner failed to "make an adequate proffer of evidence to support [its allegations of disputed facts]." Id. (citing General Motors Corp. v. FERC, 656 F.2d 791, 798 n.20 (D.C. Cir. 1981).

See also Cerro Wire & Cable v. FERC, 677 F.2d 124, 129 (D.C. Cir. 1982); General Motors Corp. v. FERC, 656 F.2d 791, 798 n.20 (D.C. Cir. 1981). As noted, MPSC's failure to allege non-integration was the basis for the Commission's refusal to hold a hearing. Rather than seeking to show non-integration, MPSC insists on a hearing merely to show the alleged path-specific nature of its service and its alleged non-use of lower voltage transmission facilities during normal operational conditions (R. 28, 45). 34/ Because the Commission has never recognized

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34/ It is noteworthy that MPSC has not argued that it could never benefit from the lower voltage facilities, for example, during outages of higher voltage facilities. Rather, it asserts that, pursuant to the 1978 letter, service was limited to the 345 kv facilities, and, alternatively, from an "operational standpoint," MPSC

(continued...)

"path-specific" or "voltage-specific" usage of transmission facilities as an exception to its roll-in policy, it was reasonable for it to dispose of these claims below without a hearing.

2. The Commission also reasonably declined to order a hearing on the "firm vs. non-firm" character of MPSC's service because, as already detailed, supra p. 12-13, 30, the Commission agreed with MPSC that its service was non-firm, and applied an established non-firm rate formula in determining the just and reasonable nature of the proposed rate. Similarly, the Commission did not err in refusing to grant a hearing on rate discrimination and anticompetitiveness because MPSC never explained the need for such a hearing. 35/

3. Likewise, the Commission did not abuse its discretion by declining to hold an evidentiary hearing on whether it should adopt a special policy in electric transmission rate cases recognizing, as MPSC would have it, lower rates for "backhaul" transactions. As previously noted, see note 29, supra, the Commission has never referred to electric transmission by displacement as a "backhaul". As also noted, MPSC barely mentioned this concept in its petition for rehearing, and did not specifically request an evidentiary hearing to explore

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34/(...continued)
receives no "benefit" from the below 345 kv facilities. (MPSC Br. 28).

35/ Indeed, in its opening brief to this Court, MPSC still has not articulated why a hearing is necessary on the issues. See MPSC Br. 47-48.

"backhaul"-related issues. 36/ Thus, the Commission cannot be faulted for failing to set the issue of "backhaul" for an evidentiary hearing. 37/

4. Finally, the Commission properly declined to order an evidentiary hearing on MPSC's Mobile-Sierra claim. MPSC has not relied on anything other than the 1978 letter to support its claim that a fixed-rate contract exists. It has made no proffer suggesting that CMP and MPSC had reached an oral understanding that CMP would be forever bound by the rate specified in the 1978 letter. Moreover, MPSC has not filed any affidavits from witnesses who would be prepared to testify about negotiations, representations, admissions, or other events that would lend support to its claim of a permanently fixed rate agreement. Absent such a showing, the Commission reasonably concluded that

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36/ In any event, a "backhaul" concept would find no support in the record. As that term has been applied to a natural gas pipeline, both ends of a backhaul transaction occur wholly within the same pipeline's system. That is, whatever capacity savings result from the backhaul accrue entirely to a single pipeline. See generally Interstate Natural Gas Pipeline Rate Design, supra, 47 FERC at pp. 62,058-59; see also ANR Pipeline Co. v. FERC, 771 F.2d 501, 509 (D.C. Cir. 1985). Here, MPSC receives its Wyman 4 entitlement off CMP's system, and, as explained in note 11, supra, no transmission capacity savings accrue to CMP.

37/ In any event, merely by raising the issue, MPSC cannot require the Commission in this proceeding to fashion a policy vis-a-vis backhauls of electric power transmission. See Mobil Oil Exploration and Producing Southeast, Inc. v. United Distribution Cos., 111 S.Ct. 615, 627 (1991) ("An agency has broad discretion in determining how best to handle related yet discrete issues in terms of procedures and priorities"), citing Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978); Heckler v. Chaney, 470 U.S. 821, 831-32 (1985); see also, United States v. Gaubert, 111 S.Ct. 1267, 1276 (1991).

no material issues of fact existed within MPSC's Mobile-Sierra claim that would have required an evidentiary hearing.

In sum, the Commission in this case approved a rate which is neither excessive nor unduly discriminatory.

## CONCLUSION

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

Respectfully submitted,

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