

156 FERC ¶ 61,202
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Midwest Independent Transmission
System Operator, Inc.

Docket Nos. ER11-1844-001
ER11-1844-002

OPINION NO. 550

ORDER ON INITIAL DECISION AND
DISMISSING REHEARING AS MOOT

(Issued September 22, 2016)

1. This case is before the Commission on exceptions to an Initial Decision¹ issued on December 18, 2012. The Initial Decision addressed issues relating to a filing by Midwest Independent Transmission System Operator, Inc. (MISO)² and International Transmission Company (ITC) (collectively, Joint Applicants) that proposed revisions to MISO's Open Access Transmission, Energy, and Operating Reserve Markets Tariff (Tariff) to establish a methodology to recover costs of ITC's Phase Angle Regulating Transformers (PAR) located at Bunce Creek on the Michigan-Ontario, Canada border.³ In this order, we affirm in part, and reverse in part, certain determinations of the Presiding Administrative Law Judge (Presiding Judge), and we dismiss the remaining determinations of the Presiding Judge as moot. Consistent with these conclusions, we find that Joint Applicants have not demonstrated that their proposal to allocate costs of the ITC PARs to entities outside of MISO, including to entities in the New York

¹ *Midwest Indep. Transmission Sys. Operator, Inc.*, 141 FERC ¶ 63,021 (2012) (Initial Decision).

² Effective April 26, 2013, MISO changed its name from "Midwest Independent Transmission System Operator, Inc." to "Midcontinent Independent System Operator, Inc."

³ See *Midwest Indep. Transmission Sys. Operator, Inc.*, 133 FERC ¶ 61,275 (2010) (Hearing Order).

Independent System Operator, Inc. (NYISO) or PJM Interconnection, L.L.C. (PJM) regions, is just and reasonable. We also dismiss requests for rehearing of the Hearing Order as moot.

I. Background

A. Lake Erie Loop Flow

1. ITC PARs

2. Loop flow issues have been common and volatile in the Lake Erie region. In the 1990s, unscheduled flows increased between Ontario and Michigan, as well as Ontario and New York, culminating in numerous transmission line relief and curtailment events in 1998. In response, Detroit Edison Company (Detroit Edison) and Ontario Hydro (a predecessor company to Hydro One Networks) developed plans to modify existing interconnection facilities between Ontario and Michigan to improve electric reliability and address Lake Erie loop flow problems. On December 8, 1998, Detroit Edison submitted a request to the U.S. Department of Energy to amend its Presidential Permit. One requested modification was the installation of an 850 mega volt ampere (MVA) PAR at the Bunce Creek station switchyard on the Michigan-Ontario interface (Original PAR).⁴

3. On June 29, 2000, the Commission authorized a series of DTE Energy Company intra-corporate transactions which, among other things, resulted in the transfer of ownership, operation, and control of certain Detroit Edison transmission facilities to ITC.⁵ As a result of this corporate restructuring, Detroit Edison and ITC jointly applied to the U.S. Department of Energy to rescind Detroit Edison's Presidential Permit and issue a new Presidential Permit to ITC. The new permit, issued on April 19, 2001, transferred Detroit Edison's international transmission facilities to ITC, including the Original PAR.⁶

⁴ Initial Decision, 141 FERC ¶ 63,021 at P 88 (citing Ex. ITC Tab F at 6).

⁵ See *DTE Energy Company, The Detroit Edison Company, and International Transmission Company*, 91 FERC ¶ 61,317 (2000).

⁶ Initial Decision, 141 FERC ¶ 63,021 at P 89 (citing Dep't of Energy, Presidential Permit, Int'l Transmission Co., Order No. PP-230-2 (Apr. 19, 2001) (Presidential Permit)).

4. In March 2003, the Original PAR failed while in service, and the tower supporting the Canadian side of the Bunce Creek transmission line collapsed due to inclement weather. ITC ordered replacement facilities for the Original PAR after service on the Bunce Creek line was restored.⁷ Because of the failure of the Original PAR, ITC chose a different design for the new PARs, opting for two 700 MVA units connected in series (ITC PARs) instead of a singular 850 MVA unit (i.e., the Original PAR).⁸

2. NYISO Proceedings

5. Beginning in January 2008, a small number of market participants submitted transactions to NYISO to export power to PJM, scheduled as circuitous flows around Lake Erie. The scheduled pathway exited NYISO, crossed through both the Independent Electricity System Operator of Ontario (IESO) and MISO, and ultimately sank in PJM. This scheduled pathway benefitted from lower market prices at the NYISO/IESO border, compared to the more congested NYISO/PJM border. However, approximately 80 percent of the power flows associated with this scheduled pathway flowed directly across the NYISO/PJM border.⁹

6. In July 2008, NYISO proposed requiring the use of more direct routing by prohibiting the scheduling of external transactions over eight circuitous pathways. NYISO stated that its proposal was a temporary solution until adequate controls were in place to ensure that actual and scheduled flows more closely aligned. In August 2008, the Commission accepted NYISO's temporary solution.¹⁰ The Commission noted that it had initiated a non-public investigation into the Lake Erie loop flow problem and encouraged affected parties to consider all appropriate long-term solutions, including market solutions and the installation of operational controls such as PARs, to ensure that actual and scheduled flows more closely aligned.

7. In July 2009, the Commission reaffirmed these directives, requiring NYISO and interested entities to develop long-term comprehensive solutions to the Lake Erie loop flow problem.¹¹ The Commission also directed public disclosure of the Enforcement

⁷ Replacement of the tower and transmission line was completed in 2006. *Id.* P 91.

⁸ *Id.* (citing Ex. ITC Tab F at 9).

⁹ *N.Y. Indep. Sys. Operator, Inc.*, 132 FERC ¶ 61,031, at P 2 (2010) (July 2010 Order).

¹⁰ *N.Y. Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,174 (2008).

¹¹ *N.Y. Indep. Sys. Operator, Inc.*, 128 FERC ¶ 61,049, at P 6 (2009).

Staff Report resulting from the non-public investigation into the Lake Erie loop flow problem. Further, the Commission required NYISO to submit a report addressing its proposed solutions to the Lake Erie loop flow problem, including, among other things, a proposed solution addressing interface pricing and congestion management. In September 2009, the Commission clarified that NYISO should report on the status of all solutions to the Lake Erie loop flow problem, including the installation of PARs.¹²

8. In January 2010, NYISO filed its status report, which recommended the implementation of four market initiatives. The report also stated that the ITC PARs installed on the Ontario-Michigan border would be available for service in early 2010. The report noted, however, that ITC would not execute the operating agreements required to make the ITC PARs operational until an agreement addressing the allocation of costs associated with the ITC PARs was in place. NYISO opposed paying for a portion of the ITC PARs because they were not developed pursuant to a Commission-approved regional planning process. NYISO also noted that a regional study would be initiated during 2010 to identify PARs and other devices capable of influencing Lake Erie loop flow. In the July 2010 Order, the Commission found that the initiatives described by NYISO represented a workable framework for minimizing the occurrence of Lake Erie loop flow. The Commission noted, though, that some issues were not fully addressed in NYISO's report, such as the equitable allocation of the ITC PARs costs. The Commission requested further information on several matters, including implementation of the ITC PARs.¹³

B. Procedural History

1. Joint Applicants' Filing and Hearing Order

9. On October 20, 2010, pursuant to section 205 of the Federal Power Act (FPA),¹⁴ Joint Applicants proposed revisions to the MISO Tariff to establish a methodology to allocate and recover the costs of the ITC PARs among MISO, NYISO, and PJM.¹⁵ Joint Applicants asserted that an initial transfer distribution factor (DFAX) analysis, based on 2015 projections, supported allocating 49.6 percent of the ITC PARs revenue requirement to MISO, 19.5 percent to PJM, and 30.9 percent to NYISO, based on each

¹² *N.Y. Indep. Sys. Operator, Inc.*, 128 FERC ¶ 61,239 (2009).

¹³ July 2010 Order, 132 FERC ¶ 61,031 at PP 40-42.

¹⁴ 16 U.S.C. § 824d (2012).

¹⁵ Specifically, Joint Applicants proposed the addition of Attachments SS and SS-1, as well as a new Schedule 36, to MISO's Tariff.

region's alleged contribution to the loop flows over the Michigan-Ontario interface that would occur if the ITC PARs were not operational. Joint Applicants further stated that each Regional Transmission Organization (RTO) would determine how its individual share of the ITC PARs revenue requirement would be recovered from load within its region.¹⁶

10. Numerous parties submitted motions to intervene and notices of intervention, including: Exelon Corporation (Exelon); NYISO; Ontario Power Generation, Inc.; PJM; Maryland Public Service Commission; Old Dominion Electric Cooperative; Dayton Power and Light Company; New England Power Pool Participants Committee; Rockland Electric Company; American Municipal Power, Inc. (AMP); Connecticut Department of Public Utility Control (Connecticut DPUC); Consumers Energy Company; New York Transmission Owners (NYTO)¹⁷ and New York Municipal Power Agency; Baltimore Gas and Electric Company; Duquesne Light Company; Pepco Holdings, Inc.; Consolidated Edison Solutions, Inc. and Consolidated Edison Energy, Inc. (Consolidated Edison); American Electric Power Service Corporation; Illinois Commerce Commission; New York State Public Service Commission (New York Commission); PSEG Companies;¹⁸ Indiana Utility Regulatory Commission; FirstEnergy Service Company; Connecticut Municipal Electric Energy Cooperative; Michigan Public Service Commission; Allegheny Power; MISO Transmission Owners (MISOTO);¹⁹ New York

¹⁶ Hearing Order, 133 FERC ¶ 61,275 at PP 10-11.

¹⁷ NYTOs include: Central Hudson Gas & Electric Corporation; Consolidated Edison Company of New York, Inc.; Long Island Power Authority; New York Power Authority; New York State Electric & Gas Corporation; Niagara Mohawk Power Corporation d/b/a/ National Grid; Orange and Rockland Utilities, Inc.; and Rochester Gas and Electric Corporation.

¹⁸ PSEG Companies include Public Service Electric and Gas Company; PSEG Power LLC; and PSEG Energy Resources & Trade LLC.

¹⁹ MISOTOs include: Ameren Services Company, as agent for Union Electric Company d/b/a Ameren Missouri, Ameren Illinois Company d/b/a Ameren Illinois, and Ameren Transmission Company of Illinois; American Transmission Company LLC; City Water, Light & Power (Springfield, IL); Dairyland Power Cooperative; Duke Energy Corporation for Duke Energy Indiana, Inc.; Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indiana Municipal Power Agency; Indianapolis Power & Light Company; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation, subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern

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Association of Public Power; Massachusetts Department of Public Utilities (Massachusetts DPU); Detroit Edison; DC Energy Midwest, LLC; New England Conference of Public Utility Commissioners (NECPUC); ISO New England, Inc. (ISO-NE); IESO; Wisconsin Electric Power Company; PJM Transmission Owners (PJMTO);²⁰ and Dominion Resources Services.²¹

11. Numerous parties submitted protests and comments, including: NYTOs and New York Municipal Power Agency; NYISO; New York Commission; PSEG Companies, who also submitted a request for summary dismissal and motion to consolidate; PJM; Massachusetts DPU; PJMTOs; NECPUC, who also submitted a motion for summary rejection; AMP.; New England States Committee on Electricity (New England States Committee); Consolidated Edison; New England Power Pool Participants Committee (New England Participants); Connecticut Municipal Electric Energy Cooperative; Michigan Public Service Commission; MISOTOs; Detroit Edison; and ISO-NE. Joint Applicants, MISOTOs, and NYTOs submitted answers.

Illinois Power Cooperative; Southern Indiana Gas & Electric Company (d/b/a Vectren Energy Delivery of Indiana); Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.

²⁰ PJMTOs include: American Electric Power Service Corporation, on behalf of its affiliates Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company and Wheeling Power Company, AEP Appalachian Transmission Company Inc., AEP Indiana Michigan Transmission Company Inc., AEP Kentucky Transmission Company Inc., AEP Ohio Transmission Company Inc., and AEP West Virginia Transmission Company; Exelon; Jersey Central Power & Light Company, Metropolitan Edison Company, Pennsylvania Electric Company, Monongahela Power Company, The Potomac Edison Company, West Penn Power Company, and American Transmission Systems, Inc.; Pepco Holdings, Inc., on behalf of its affiliates Potomac Electric Power Company, Delmarva Power & Light Company, and Atlantic City Electric Company; Old Dominion Electric Cooperative; PPL Electric Utilities Corporation, PPL EnergyPlus, LLC, PPL Brunner Island, LLC, PPL Holtwood, LLC, PPL Martins Creek, LLC, PPL Montour, LLC, PPL Susquehanna, LLC, PPL University Park, LLC, Lower Mount Bethel Energy, LLC, PPL New Jersey Solar, LLC, PPL New Jersey Biogas, LLC, and PPL Renewable Energy, LLC; Public Service Electric and Gas Company; and Virginia Electric and Power Company, doing business as Dominion Virginia Power.

²¹ On March 24, 2011, Monitoring Analytics, LLC filed an out-of-time motion to intervene, which the Presiding Judge granted on April 21, 2011.

12. In the December 30, 2010 Hearing Order, the Commission found that Joint Applicants' filing raised issues of material fact that could not be resolved based on the record before the Commission. Accordingly, the Commission accepted the proposed Tariff revisions for filing, suspended them for a nominal period, made them effective January 1, 2011, subject to refund, and set them for hearing and settlement judge procedures.²²

2. Requests for Rehearing and Motions to Stay

13. Requests for rehearing of the Hearing Order were filed by NYISO, NYTOs, New York Commission, PJM, PJMTOs, AMP, Joint Rehearing Parties²³ and MISOTOs. Several parties argue that because there is no customer or contractual relationship between NYISO or PJM and Joint Applicants, the Commission has no authority under section 205 of the FPA to accept the filing.²⁴ Some parties maintain that the Commission erred by accepting Joint Applicants' proposal despite conflict with the interregional cost allocation proposal in the Order No. 1000 Notice of Proposed Rulemaking,²⁵ which proposed that cost allocation among neighboring RTOs is a consensual matter.²⁶ NYTOs argue that the Commission should not have accepted Joint Applicants' filing because doing so would prejudice the Order No. 1000 final rule and they ask the Commission to either reject Joint Applicants' filing without prejudice to refile after the

²² Hearing Order, 133 FERC ¶ 61,275 at PP 1, 44.

²³ Joint Rehearing Parties include: ISO-NE; the New England Participants; NECPUC; Exelon; the New England States Committee; the Massachusetts DPU; and the Connecticut DPUC.

²⁴ Joint Rehearing Parties Request for Rehearing at 6-7; PJM Request for Rehearing at 4-5 (citing *Commonwealth Edison Co.*, 129 FERC ¶ 61,298, at P 17 (2009) (*Commonwealth Edison*), *on reh'g*, 132 FERC ¶ 61,268 (2010)); NYISO Request for Rehearing at 5-10 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 131 FERC ¶ 61,173 (2010); *Commonwealth Edison*, 129 FERC ¶ 61,298); NYTOs Request for Rehearing at 5-6 (citing *In re Permian Basin Area Rate Case*, 390 U.S. 747, 822 (1968) *Permian Basin*); *Commonwealth Edison*, 129 FERC ¶ 61,298); PJMTOs Request for Rehearing at 9.

²⁵ See *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,660 (2010) (Order No. 1000 NOPR).

²⁶ NYTOs Request for Rehearing at 6-7; New York Commission Request for Rehearing at 6-9; AMP Request for Rehearing at 3-6.

issuance of the final rule on Order No. 1000 or to hold this proceeding in abeyance pending the issuance of the final rule. Several parties also argue that the cost allocation proposal violates Commission precedent in which the Commission has rejected unilateral filings proposing to compel charges on a neighboring utility without consensus.²⁷

14. In addition, PJM argues that, because the ITC PARs replace failed equipment that was planned, developed and placed into service to meet local system needs, the ITC PARs should not be allocated to PJM and NYISO and the Commission should have dismissed Joint Applicants' proposal. Similarly, NYTOs state that under Commission precedent, Joint Applicants may not request payment after-the-fact from non-customers without agreement. PJM and PJMTOs argue that the only agreement between MISO and PJM under which MISO may allocate costs to PJM is their Joint Operating Agreement (JOA); however, they argue the JOA does not permit unilateral section 205 amendments or allocations. PJM also contests Joint Applicants' exclusion of IESO from the cost allocation proposal arguing that it is inconsistent with the principle of cost causation. PJM argues that any cost allocation that spreads 100 percent of the costs among only three of the four regions contributing to loop flow and excludes one of the primary beneficiaries is unjust and unreasonable on its face, and the Commission should dismiss the proposal.²⁸

15. Additionally, both NYISO and NYTOs requested that the Commission stay the hearing and settlement judge procedures until the Commission acted on requests for rehearing. New England Power Pool Participants Committee, New England States Committee on Electricity, ISO-NE, and New England Conference of Public Utility

²⁷ PJM Request for Rehearing at 9 (citing *So. Cal. Edison Co.*, 70 FERC ¶ 61,087, at 61,250 (1995) (*SoCal Edison*)); PJMTOs Request for Rehearing at 7 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 133 FERC ¶ 61,221, at P 439 (2010), *clarifying order on rehearing*, 137 FERC ¶ 61,074 (2011); *Ill. Commerce Comm'n v. FERC*, 721 F.3d 764 (7th Cir. 2013) (*Illinois Commerce Commission II*), *cert. denied sub nom. Schuette v. FERC*, 134 S.Ct. 1277 (2014) and *cert. denied sub nom. Hoosier Rural Energy Co-op., Inc. v. FERC*, 134 S.Ct. 1278 (2014); *SoCal Edison*, 70 FERC at 61,250); MISOTOs Request for Rehearing at 9 (citing *SoCal Edison*, 70 FERC ¶ 61,087; *Ft. Pierce Utils. Auth. v. FERC*, 730 F.2d 778, 784 (D.C. Cir. 1984); Order No. 1000 NOPR, FERC Stats. & Regs. ¶ 32,660 at P 164).

²⁸ PJM Request for Rehearing at 11 (citing *Illinois Commerce Commission v. FERC*, 576 F.3d 470 (7th Cir. (2009) (*Illinois Commerce Commission I*)).

Commissioners; PJMTOs; and PJM supported requests to stay, while Joint Applicants submitted a motion in opposition. The Commission denied requests for stay.²⁹

3. Hearing and Settlement Judge Procedures and Initial Decision

16. Settlement conferences began on May 6, 2011. However, on December 13, 2011, NYISO filed a motion to dismiss or for summary disposition of Joint Applicants' filing or, in the alternative, request for expedited action on rehearing requests, arguing that Joint Applicants' filing is inconsistent with the policy enunciated by the Commission in Order No. 1000,³⁰ which the Commission issued subsequent to the Hearing Order. NYTOs, New York Commission, PJM, and the New York State Division of Consumer Protection submitted answers supporting NYISO's motion to dismiss. On December 28, 2011, Joint Applicants submitted an answer opposing NYISO's motion. NYTOs submitted an answer to Joint Applicants' answer, and NYISO submitted an answer in support of NYTOs' answer. Settlement discussions were terminated on December 20, 2011.

17. The hearing commenced on August 13, 2012, continued until a recess was taken on August 20, 2012, recommenced on September 10, 2012, and continued until September 13, 2012. On October 16, 2012, Joint Applicants, PJM, PJMTOs, NYISO, NYTOs, MISOTOs, and Commission Trial Staff (Trial Staff) filed Initial Briefs; on October 31, 2012, those parties filed Reply Briefs. The Presiding Judge issued the Initial Decision on December 18, 2012.³¹ The Presiding Judge ordered that, subject to the Commission's review on exceptions, within 30 days of the issuance of the final order in

²⁹ *Midwest Indep. Transmission Sys. Operator, Inc.*, 134 FERC ¶ 61,185 (2011). In that order, the Commission also denied Organization of PJM States, Inc. and New York State Consumer Protection Board's late-filed motions to intervene but stated that they may direct any requests to intervene in the hearing and settlement judge procedures to the appropriate presiding officer or settlement judge. *Id.* P 10 n.13.

³⁰ See *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g and clarification*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. Aug. 14, 2014).

³¹ See Initial Decision, 141 FERC ¶ 63,021. The parties in the proceeding developed a Joint Statement of Issues containing 11 issues that the Presiding Judge ruled on in the Initial Decision, which are listed in the Appendix of this order.

this proceeding, all parties shall take appropriate action to implement all the rulings in the Initial Decision.³²

4. Brief on Exceptions and Briefs Opposing Exceptions

18. On January 17, 2013, Joint Applicants filed a Brief on Exceptions which listed 26 exceptions to the Initial Decision. On February 6, 2013, PJM, MISOTOs, Trial Staff, PJMTOs, NYTOs,³³ and NYISO filed Briefs Opposing Exceptions.³⁴

II. Discussion

A. Procedural Matters

1. Motions to Lodge

19. On December 11, 2012, Joint Applicants submitted a motion to lodge a Commission order from a proceeding in Docket No. ER12-1761-001 concerning a filing by PJM to revise its Open Access Transmission Tariff to “establish terms and conditions for recovering from end users costs allocated to PJM under the . . . MISO Tariff[] for the portion of the revenue requirement” for the ITC PARs.³⁵ Joint Applicants argued that the order was directly relevant to the obligations of NYISO and PJM to pursue deficiencies, if any, in their customers’ payments of PARs-related charges.³⁶ The Presiding Judge denied this motion to lodge in the Initial Decision.³⁷ Joint Applicants did not except to the Presiding Judge’s denial of the motion.

20. On May 23, 2013, Joint Applicants submitted a motion to lodge slide 12 of a 2012 State of the Markets Report issued by the Commission’s Office of Enforcement on

³² *Id.* P 925.

³³ NYTOs filed errata to their Brief Opposing Exceptions on February 7, 2013.

³⁴ Relevant arguments will be discussed below.

³⁵ See *PJM Interconnection, L.L.C.*, 141 FERC ¶ 61,200 (2012). This Commission letter order accepted a compliance filing involving, *inter alia*, modifications to Rate Schedule 10 (Michigan-Ontario Interface) in PJM’s Open Access Transmission Tariff.

³⁶ Joint Applicants December 11, 2012 Motion to Lodge at 1.

³⁷ Initial Decision, 141 FERC ¶ 63,021 at P 923.

May 16, 2013. Joint Applicants claim that language on slide 12 confirms that the nature of Lake Erie loop flow is such that physically controlling flows at the Michigan-Ontario interface also serves to control flows at other interfaces around Lake Erie.³⁸ Specifically, Joint Applicants note that slide 12 states as follows:

For years, loop flow around Lake Erie has caused difficult-to-manage congestion and reliability costs in the four surrounding regions, New York ISO, Ontario's, Independent Electricity System Operator, MISO and PJM. Full PAR control on the interface was the culmination of more than 20 years of various projects.

Since the complete system of PARs on the Michigan-Ontario interface have gone into service, loop flows have decreased compared to earlier periods. Early reports indicate that congestion costs in Michigan are lower with fewer binding constraints and the interchange capacity across the Michigan-Ontario interface has been boosted.

NYTOs, PJMTOs, NYISO, and Trial Staff submitted answers opposing Joint Applicants' motion to lodge. PJMTOs argue that it is inappropriate to lodge new items for the Commission's consideration since the hearing before the Presiding Judge has been completed and the record is closed. Further, PJMTOs argue that Joint Applicants fail to identify any changes in conditions of fact or other criteria that would warrant reopening the record under Rule 716 of the Commission's regulations.³⁹ Finally, PJMTOs argue that Joint Applicants have conceded that the report "does not specifically address congestion costs and constraints in locations around Lake Erie other than Michigan."⁴⁰ PJM filed an answer supporting Joint Applicants' motion to lodge and state that, to the extent that the excerpt in the report, singled out by Joint Applicants, is pertinent to the Commission's consideration in the ITC PARs cost allocation proceeding, it would be relevant only because it is consistent with the Presiding Judge's findings in the Initial Decision.⁴¹

21. On April 7, 2014, Joint Applicants submitted a motion to lodge two PARs performance evaluation reports. Joint Applicants state that these reports confirm that the PARs installed on the Ontario-Michigan interface are effectively and consistently

³⁸ Joint Applicants May 23, 2013 Motion to Lodge at 2.

³⁹ 18 C.F.R. § 385.716 (2016).

⁴⁰ PJMTOs June 5, 2013 Response to Motion to Lodge at 2 (citing Joint Applicants May 23, 2013 Motion to Lodge).

⁴¹ PJM June 7, 2013 Answer to Motion to Lodge at 4.

controlling and reducing Lake Erie loop flow and are thus necessarily benefitting all the RTOs around Lake Erie, including both NYISO and PJM. On April 22, 2014, NYISO, PSEG Companies, Trial Staff, NYTOs, and PJM submitted answers opposing the motion to lodge. NYTOs argue that Joint Applicants have failed to show “a change in core circumstances that go to the very heart of the case,” and have, therefore, failed to demonstrate “extraordinary circumstances” that clearly outweigh the “administrative chaos” and disruption to the proceedings that would result if the Commission were to grant the motion.⁴² NYISO and Trial Staff argue that Joint Applicants fail to demonstrate extraordinary circumstances to support reopening the evidentiary record in this docket.

22. We reject Joint Applicants’ May 23, 2013 and April 7, 2014 motions to lodge because, as explained below, the documents that Joint Applicants request to be added to the record do not help Joint Applicants in supporting their cost allocation proposal.⁴³

2. Motions to Strike

23. On February 25, 2013, Joint Applicants filed a motion to strike a portion of PJM’s Brief Opposing Exceptions.⁴⁴ Joint Applicants claim that PJM has impermissibly sought to challenge the Presiding Judge’s ruling that the MISO/PJM JOA was not the exclusive vehicle for cost allocation between MISO and PJM. Joint Applicants further argue that PJM should have raised its challenge in a Brief on Exceptions and that failure to do so has effectively waived all objections to aspects of the Initial Decision. According to Joint Applicants, PJM’s challenges are effectively raising new arguments in PJM’s Brief Opposing Exceptions.⁴⁵ On March 12, 2013, PJM filed an answer opposing Joint Applicants’ motion to strike. PJM asserts that Commission policy disfavors such motions, further contending that its arguments relating to the JOA—which PJM states is a central issue in the proceeding—are a reiteration of its previous position and responsive to arguments raised by Joint Applicants in their Brief on Exceptions. PJM also argues that it had no reason to file a Brief on Exceptions because it was not aggrieved by the

⁴² NYTOs June 6, 2013 Answer to Motion to Lodge at 1.

⁴³ *See infra* PP 133-134.

⁴⁴ Specifically, Joint Applicants request to strike pages 18-21 from PJM’s Brief Opposing Exceptions that involve arguments concerning the MISO/PJM Joint Operating Agreement.

⁴⁵ Joint Applicants February 25, 2013 Motion to Strike at 3.

Initial Decision, further noting that nothing precludes the Commission from addressing any and all aspects of the Initial Decision.⁴⁶

24. We find that Joint Applicants' motion to strike is moot in view of other determinations in this opinion, and we will dismiss it. As discussed below, we find that we do not need to decide the merits of whether the JOA is the exclusive vehicle for cost allocation, because we find that Joint Applicants have not justified their proposal to allocate costs of the ITC PARs at issue in this proceeding outside of MISO.⁴⁷

B. Substantive Matters

25. Before addressing the substantive matters presented in the Initial Decision and the briefs on and opposing exceptions, we note as a threshold matter that, although the parties argue whether Joint Applicants' proposal is consistent with Commission policies adopted in Order No. 1000, the policies adopted by the Commission in Order No. 1000 do not apply to Joint Applicants' filing because that filing pre-dated the issuance and the effective date of Order No. 1000.

26. As discussed below, we reverse the Presiding Judge's determinations, in part, and find that FPA section 205 and Commission cost allocation policies predating Order No. 1000 did not bar Joint Applicants from making their filing. Nonetheless, we affirm the Presiding Judge's determinations, in part, and find that Joint Applicants have not demonstrated the proposed cost allocation to be just and reasonable. We dismiss the remaining determinations of the Presiding Judge as moot.

1. Customer or Contractual Relationship

a. Presiding Judge's Findings

27. The Presiding Judge found that FPA section 205 only permits assessment of costs to entities with which that utility has a customer or contractual relationship.⁴⁸ The Presiding Judge explained that FPA section 205(c) provides:

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission . . . schedules

⁴⁶ PJM March 12, 2013 Answer Opposing Motion to Strike at 5-7.

⁴⁷ See *infra* P 135.

⁴⁸ *Id.* at P 367 (citing NYISO Initial Br. at 17; NYTOs Initial Br. at 16; PJMTOs Initial Br. at 7; Trial Staff Initial Br. at 6-7).

showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classes, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications and services.⁴⁹

28. The Presiding Judge explained that FPA section 205 permits a utility to assess costs under two circumstances: (1) where the entity assessed is taking jurisdictional service from the utility (“charges for any transmission or sale subject to the jurisdiction of the Commission”); or (2) where the entity assessed is a party to an agreement authorizing the utility to assess the costs (“together with all contracts which in any manner affect or relate to such rates, charges, classifications and services”). The Presiding Judge continued that, therefore, FPA section 205 authorizes a utility to assess rates or charges only to its customers or to parties to a contractual agreement for jurisdictional services. The Presiding Judge stated that filed and accepted tariffs govern the rates, terms, and conditions of service between a public utility and parties with which the utility has such a customer or contractual relationship.⁵⁰

29. The Presiding Judge noted that FPA section 205 also mandates that “all rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission . . . shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.”⁵¹

30. The Presiding Judge explained that in addition to the clear language of the statute, Commission precedent supports the proposition that FPA section 205 filings can only lawfully govern the rates, terms, and conditions of service between a public utility and its customers, not third parties.⁵² The Presiding Judge agreed with the proposition that *Permian Basin* conveys the principle that, absent a matter that would impair its financial ability to continue to provide public service, the Commission does not have the authority to abrogate existing contract arrangements.⁵³

⁴⁹ 16 U.S.C. § 824d(c) (2012).

⁵⁰ Initial Decision, 141 FERC ¶ 63,021 at P 369.

⁵¹ 16 U.S.C. § 824d(a) (2012).

⁵² Initial Decision, 141 FERC ¶ 63,021 at P 371.

⁵³ *Id.* P 372 (citing *Permian Basin*, 390 U.S. at 822 (“[T]he regulatory system created by the [FPA] is premised on contractual agreements voluntarily devised by the
(continued ...)

31. The Presiding Judge also explained that in *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County*, the Supreme Court explained that the Court previously held in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.* that the requirement that all new rates be filed with the Commission “is merely a precondition to changing a rate, not an authorization to change rates in violation of a lawful contract (i.e., a contract that sets a just and reasonable rate).”⁵⁴ The Presiding Judge explained that the Court then went a step further, describing the standard the Commission uses to evaluate whether a contract rate is just and reasonable, stating:

[W]hile it may be that the Commission may not normally impose upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain. . . . In such circumstances the sole concern of the Commission would seem to be whether the 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.⁵⁵

32. Continuing, the Presiding Judge stated that the Court went on to clarify the *Mobile-Sierra* standard, explaining that it is not “different from the statutory just-and-reasonable standard,” but rather “the term ‘public interest standard’ refers to the differing application of that just-and-reasonable standard to contract rates.”⁵⁶

regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity.”)).

⁵⁴ *Id.* P 376 (quoting *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County*, 554 U.S. 527, 532-533 (2008) (*Morgan Stanley*) (citing *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 339-344 (1956) (*Mobile*))).

⁵⁵ *Id.* (quoting *Morgan Stanley*, 554 U.S. at 533 (citing *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 354-355 (1956) (*Sierra*))).

⁵⁶*Id.*

33. The Presiding Judge also explained that, although Trial Staff and NYISO relied on *Midwest Independent Transmission System Operator, Inc.* and the decision on rehearing, neither case is dispositive of the facts of this case.⁵⁷ Further, the Presiding Judge noted that NYISO, at the time, was seeking appellate judicial review of portions of Order No. 1000-A. Accordingly, the Presiding Judge declined to rely upon these cases.⁵⁸

34. The Presiding Judge found that Joint Applicants have not met their burden of proving that they have authority to make a unilateral filing to impose costs on those outside of their region who are neither customers nor participants in an agreement to share costs.⁵⁹ The Presiding Judge also found that Joint Applicants have failed to prove that NYISO or PJM are taking jurisdictional service from Joint Applicants or that Joint Applicants are assessing costs to NYISO or PJM pursuant to an agreement authorizing such.

35. First, the Presiding Judge found that Joint Applicants do not provide transmission service or make wholesale sales of electric power to PJM or NYISO, so there is no customer relationship that justifies the filing. The Presiding Judge explained that FPA section 205 provides a mechanism whereby utilities establish rates and charges for transmission service and wholesale sales of electricity, subject to the Commission's approval. The Presiding Judge continued that, in contrast, FPA section 205 does not authorize a utility to charge entities that do not take jurisdictional service from the utility or that are not party to a contract with that utility, which provides for such assessment of costs.⁶⁰

36. The Presiding Judge explained that while it can be argued that controlling loop flows in a manner that benefits all is equivalent to providing a transmission service, Joint Applicants have not demonstrated that the ITC PARs will be operated in such a manner.⁶¹ The Presiding Judge stated that proposed Schedule 36 "provides for recovery of a portion of the revenue requirement associated with [the ITC PARs] at the Bunce Creek Station on the Michigan-Ontario interface."⁶² However, the Presiding Judge explained that the

⁵⁷ *Midwest Indep. Transmission Sys. Operator, Inc.*, 131 FERC ¶ 61,173 (2010), *order on reh'g*, 136 FERC ¶ 61,244 (2011).

⁵⁸ Initial Decision, 141 FERC ¶ 63,021 at P 377.

⁵⁹ *Id.* P 378 (citing 16 U.S.C. § 824d (2012)).

⁶⁰ *Id.* P 380.

⁶¹ *Id.* P 381.

⁶² *Id.* (citing Ex. ITC Tab A, Proposed Schedule 36 § I).

proposed tariff sheets do not encompass a charge for transmission service, but instead charge PJM and NYISO for the cost of facilities installed for the express purpose of denying PJM and NYISO use of the MISO transmission system. Moreover, MISO chose to operate the ITC PARs on a “flow to schedule” basis, which prevents unscheduled flows of energy from PJM and NYISO across the Michigan-Ontario interface.⁶³

37. The Presiding Judge agreed that Joint Applicants seek to charge for the installation of physical devices that prevent the flow of unscheduled energy across the Michigan-Ontario interface.⁶⁴ The Presiding Judge also agreed that, although Joint Applicants describe the ITC PARs as being necessary to address Lake Erie loop flow, they do not seek compensation for the loop flows on the MISO or ITC transmission systems.⁶⁵ The Presiding Judge explained that Joint Applicants constructed the electrical equivalent of a barrier that prevents NYISO and PJM from accessing MISO’s system, and Joint Applicants seek to charge NYISO and PJM and their customers for the cost of that barrier.⁶⁶

38. Second, the Presiding Judge found that there are no contractual relationships between Joint Applicants and NYISO or between Joint Applicants and PJM that support the proposed cost allocation.⁶⁷

39. The Presiding Judge explained that the only agreement providing for allocation of costs among MISO and PJM is the JOA.⁶⁸ The Presiding Judge continued that the JOA precludes allocation of costs associated with the ITC PARs to PJM both because its procedures were not followed and because of the application of the *Mobile-Sierra* doctrine.⁶⁹ The Presiding Judge explained that under the *Mobile-Sierra* doctrine, the

⁶³ *Id.* P 381.

⁶⁴ *Id.* P 382 (citing PJMTOs Initial Br. at 6-7).

⁶⁵ *Id.* (citing PJMTOs Initial Br. at 9).

⁶⁶ *Id.* (see Ex. PJM-1 at 4:17–18 (explaining that loop flows “are an accepted part of operating an interconnected transmission grid”); PJMTOs Initial Br. at 7; PJM Reply Br. at 26).

⁶⁷ *Id.* P 384 (citing Hearing Tr. 91:14–92:25; Ex. PTO-1 at 23:12–14; Ex. NYT-1 at 5–6).

⁶⁸ *Id.* P 385 (citing Ex. PTO-1 at 23:12-15).

⁶⁹ *Id.*

Commission is bound to enforce the rates, terms, and conditions of all Commission-accepted agreements and may modify such an agreement “only if it ‘adversely affects the public interest.’”⁷⁰ The Presiding Judge continued that PJM argues that the Commission repeatedly has recognized its “obligation under the FPA to enforce the provisions of parties’ agreements” and, therefore, the Commission “will hold parties to the language they drafted and agreed to.” The Presiding Judge also explained that PJM argues that the Commission may amend such agreements “only in circumstances of unequivocal public necessity” and “has no discretion to accept a FPA section 205(e) rate filing that contravenes a private contract.”⁷¹ The Presiding Judge concluded that the installation of the ITC PARs was a local decision made without any interregional involvement and without following the procedures outlined in the JOA.⁷²

40. The Presiding Judge also explained that NYTOs argue that, despite the absence of any customer or contractual relationship, Joint Applicants seek to have the Commission force NYISO and PJM and their customers to pay for facilities that pre-exist the JOA.⁷³ The Presiding Judge continued that NYTOs argue that these are the very same costs that MISO refused to allocate to its customers outside of the ITC zone, but now seek approval to impose on non-customers outside of the ITC region. Moreover, the Presiding Judge explained that NYTOs assert that Joint Applicants’ filing runs afoul of Opinion No. 494⁷⁴ because, with respect to pre-existing facilities, the fact that such facilities might provide some benefit outside a particular transmission zone does not justify reallocating the costs across regions.⁷⁵ The Presiding Judge explained that in Opinion No. 494, discussed *infra*, the Commission determined that broad cost allocation is not warranted where “existing

⁷⁰ *Id.* (citing PJM Initial Br. at 9 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,090, at P 47 n.41 (2008) (quoting *Sierra*, 350 U.S. at 355))).

⁷¹ *Id.* (citing PJM Initial Br. at 10).

⁷² *Id.*

⁷³ *Id.* P 386 (citing NYTOs Initial Br. at 2).

⁷⁴ *PJM Interconnection, L.L.C.*, Opinion No. 494, 119 FERC ¶ 61,063 (2007), *order on reh’g*, Opinion No. 494-A, 122 FERC ¶ 61,082, *order denying reh’g*, 124 FERC ¶ 61,033 (2008), *Illinois Commerce Commission v. FERC*, 576 F.3d 470 (7th Cir. 2009), *order on remand, PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,230 (2012), *order on reh’g*, 142 FERC ¶ 61,216 (2013).

⁷⁵ Initial Decision, 141 FERC ¶ 63,021 at P 386 (citing NYTOs Initial Br. at 15).

facilities represent sunk costs that were built primarily by individual utilities to serve their own internal needs and were financed by those utilities.”⁷⁶

41. The Presiding Judge explained that Joint Applicants could have availed themselves of the benefits of the JOA, but they did not, and that Joint Applicants also could have filed for a transmission service rate to account for the purported extra costs of the unscheduled loop flows, but they did not.⁷⁷ The Presiding Judge concluded that Joint Applicants have not demonstrated that the ITC PARs are backbone facilities that benefit the entire multi-regional footprint.⁷⁸ Moreover, the Presiding Judge agreed with NYISO that Joint Applicants are not proposing to charge NYISO for its unscheduled use of MISO’s transmission system.⁷⁹ Thus, the Presiding Judge concluded that not only is there no customer or contractual relationship that justifies the proposed cost allocation, but Joint Applicants also seek to allocate pre-existing sunk costs.

b. Joint Applicants’ Brief on Exceptions

42. Joint Applicants state that the Presiding Judge erred in finding that contracts are a prerequisite to transmission charges under the FPA. Joint Applicants explain the Presiding Judge’s finding that FPA section 205 only permits the assessments of costs to entities with which the utility has a customer or contractual relationship is directly contrary to the Commission’s holding in Order No. 1000 that “[n]either section 205 nor section 206 of the FPA state or imply that an agreement is a precondition for any transmission charges.”⁸⁰ Joint Applicants continue that Order No. 1000 states:

⁷⁶ *Id.* (citing NYTOs Initial Br. at 15 (quoting Opinion No. 494, 119 FERC ¶ 61,063 at P 50)).

⁷⁷ *Id.* P 387.

⁷⁸ *Id.* (citing Opinion No. 494, 119 FERC ¶ 61,063 at P 80).

⁷⁹ *Id.* (citing NYISO Initial Br. at 25).

⁸⁰ Joint Applicants Brief on Exceptions at 13 (quoting Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 533).

On the contrary, the Commission's jurisdiction is clearly broad enough to allow it to ensure that all beneficiaries of service provided by specific transmission facilities bear the costs of those benefits regardless of their contractual relationship with the owner of those transmission facilities.^[81]

43. Joint Applicants note that because neither ITC nor MISO has a customer or contractual relationship with either NYISO or PJM regarding the ITC PARs, the Presiding Judge's finding that the existence of such a relationship is necessary as a prerequisite to the imposition of charges under the FPA negatively influenced Joint Applicants' filing and the Presiding Judge's findings on several other issues, and accordingly, the Initial Decision should be vacated.⁸²

c. Briefs Opposing Exceptions

44. PJMTOs, PJM, NYTOs, NYISO, MISOTOs, and Trial Staff (the Opposing Parties) state that they oppose Joint Applicants' argument that the Presiding Judge erred in finding that contracts are a prerequisite to transmission charges under the FPA.⁸³ NYISO also states that this legal finding has no relation to the factual findings, and as such, the Commission should reject Joint Applicants' argument that the legal finding prejudiced the entire Initial Decision.⁸⁴

45. PJMTOs, NYTOs, and Trial Staff explain that Joint Applicants mischaracterize the Presiding Judge's finding that only contracts are a prerequisite to transmission charges. PJMTOs, NYTOs, and Trial Staff explain that the Presiding Judge applied a two-pronged analysis and held that FPA section 205 permits a utility to assess costs under two circumstances: (1) where the entity assessed is taking jurisdictional service from the utility or (2) where the entity assessed is a party to an agreement authorizing the utility to assess the costs. PJMTOs, NYTOs, and Trial Staff state that under the first prong, the proposed allocation is not authorized by FPA section 205 because it does not involve any transmission service or sale subject to the jurisdiction of the Commission. PJMTOs,

⁸¹ *Id.* (quoting Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 531).

⁸² *Id.*

⁸³ PJMTOs Brief Opposing Exceptions at 5-6; PJM Brief Opposing Exceptions at 37; NYTOs Brief Opposing Exceptions at 15-17; NYISO Brief Opposing Exceptions at 9-11; MISOTOs Brief Opposing Exceptions at 9; Trial Staff Brief Opposing Exceptions at 14-16.

⁸⁴ NYISO Brief Opposing Exceptions at 9-10.

NYTOs, and Trial Staff continue that under the second prong, there is no contractual relationship among the parties that would support the proposed cost allocation. These parties conclude that the Presiding Judge correctly found that Joint Applicants did not meet the requirements under the two pronged analysis.⁸⁵

46. NYTOs state that the fundamental issue addressed by the Presiding Judge was not whether Joint Applicants can charge other regions for the costs of the ITC PARs only if they have a customer or contractual relationship, but rather whether Joint Applicants have carried their burden to show that the tariff they filed establishes any service commitment that gives the Commission jurisdiction. NYTOs state that if there is no transmission service involved, a utility may not collect charges under FPA section 205. NYTOs explain that Joint Applicants' tariff lacks the requisite service commitment because Joint Applicants have not taken exception to the Presiding Judge's finding that the whole purpose of the ITC PARs is to deny transmission service to NYISO and PJM by ensuring that no flows of energy from the NYISO region move on ITC's transmission facilities.⁸⁶ Additionally, NYTOs explain that Joint Applicants' Department of Energy-approved operating guide does not show a commitment to operate the ITC PARs to provide transmission service for NYISO or PJM, and NYISO and PJM and their customers are not parties to that agreement.⁸⁷

47. PJMTOs, MISOTOs, and Trial Staff state that the Commission should reject Joint Applicants' arguments as to Issue 1 because the Presiding Judge did not undermine Order No. 1000.⁸⁸ MISOTOs explain that, while Order No. 1000 stated that FPA section 205 provides the Commission with jurisdictional authority to approve the allocation of costs to parties who benefit from a service even when there is no specific contract allowing for such allocation, Order Nos. 1000 and 1000-A held that the cost of facilities constructed in one region cannot be allocated to other regions absent their consent.⁸⁹ Trial Staff

⁸⁵ PJMTOs Brief Opposing Exceptions at 6-8 (citing Initial Decision, 141 FERC ¶ 63,021 at P 369); NYTOs Brief Opposing Exceptions at 15-16; Trial Staff Brief Opposing Exceptions at 15-16.

⁸⁶ NYTOs Brief Opposing Exceptions at 15-17 (citing Initial Decision, 141 FERC ¶ 63,021 at PP 381-382).

⁸⁷ *Id.* at 17.

⁸⁸ PJMTOs Brief Opposing Exceptions at 2-3; MISOTOs Brief Opposing Exceptions at 9-10; Trial Staff Brief on Exceptions at 16.

⁸⁹ MISOTOs Brief Opposing Exceptions at 9-11 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 657).

explains that Order No. 1000's holding that an agreement is not a precondition for transmission charges is not triggered because neither NYISO nor PJM take transmission service from MISO or ITC. Trial Staff continues that Joint Applicants repeatedly stated that Order No. 1000 does not apply in this case.⁹⁰

48. NYISO states that the Commission held in Order No. 1000 that “[n]either section 205 nor section 206 of the FPA state or imply that an agreement is a precondition for any transmission charges.”⁹¹ NYISO continues that in Order No. 1000-A, the Commission rejected on rehearing arguments that “the costs of new transmission facilities can only be allocated within a preexisting contractual relationship,” reasoning that “[r]ather than contractual relationships, the benefits received by users of the regional transmission grid provide for a basis for how costs should be allocated.”⁹² NYISO explains that the customer or contractual relationship issue is currently unresolved, as it is pending in judicial review,⁹³ and the Presiding Judge's finding related to this issue was made with full awareness of the current posture of Order No. 1000 and 1000-A.⁹⁴

d. Commission Determination

49. We reverse the Initial Decision as it pertains to the Presiding Judge's finding that FPA section 205 only permits assessment of costs to entities with which the utility has a customer or contractual relationship. Consistent with the subsequent conclusion of the D.C. Circuit in its decision affirming Order No. 1000, we find that a customer or contractual relationship is not a prerequisite to the allocation of transmission charges.

50. In Order No. 1000, the Commission rejected the argument that the FPA limits the allocation of transmission costs to beneficiaries that have a customer or contractual relationship with the entity that is collecting costs. The Commission stated that “[n]either

⁹⁰ Trial Staff Brief on Exceptions at 16.

⁹¹ NYISO Brief Opposing Exceptions at 10 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 533).

⁹² *Id.* (citing Order No. 1000-A, 139 FERC ¶ 61,132 at P 564).

⁹³ The oral argument in the Order No. 1000 appeal occurred on March 20, 2014. As cited above, the United States Court of Appeals for the District of Columbia (D.C. Circuit) issued its opinion after the issuance of the Initial Decision and the submission of briefs on and opposing exceptions. *See S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41.

⁹⁴ NYISO Brief Opposing Exceptions at 11 (citing Initial Decision, 141 FERC ¶ 63,021 at PP 330, 336, 377).

section 205 nor section 206 of the FPA state or imply that an agreement is a precondition for any transmission charges.”⁹⁵ Additionally, the Commission found that nothing in the language of FPA section 205 or section 206 “precludes flows of funds to public utility transmission providers through mechanisms other than agreements between the service provider and the beneficiaries of those transmission facilities.”⁹⁶ The Commission stated that, on the contrary, “the Commission’s jurisdiction is clearly broad enough to allow it to ensure that all beneficiaries of services provided by specific transmission facilities bear the costs of those benefits regardless of their contractual relationship with the owners of those transmission facilities.”⁹⁷

51. In affirming Order No. 1000, the D.C. Circuit likewise rejected the argument that FPA section 206 unambiguously forecloses the Commission from mandating the allocation of costs beyond pre-existing commercial relationships. The D.C. Circuit held that “[n]o such limitation exists in the statutory text. . . . Section 206 nowhere limits cost allocation to entities with preexisting commercial relationships. To the contrary, it empowers the Commission to fix ‘any rate’ ‘demanded, observed, charged, or collected by any public utility for any transmission . . . subject to the jurisdiction of the Commission,’ and ‘any . . . practice’ ‘affecting such rate.’”⁹⁸ The D.C. Circuit added that “[t]he use of ‘any’ to describe ‘rate,’ ‘public utility,’ and ‘transmission’ bestows authority on the Commission that is not cabined to pre-existing commercial relationships of any given utility.”⁹⁹

52. We agree with NYISO that the Initial Decision should not be vacated based on the Presiding Judge’s finding on this issue. Contrary to Joint Applicants’ statement that this finding negatively influenced the Presiding Judge’s view of the entire record and thus the outcome of the Initial Decision, we find that Joint Applicants’ proposed cost allocation is unjust and unreasonable for other reasons, discussed *infra*.

⁹⁵ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 533.

⁹⁶ *Id.*; see also Order No. 1000-A, 139 FERC ¶ 61,132 at P 570.

⁹⁷ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at PP 530-531.

⁹⁸ *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d at 84 (citing section 206(a) of the FPA (emphasis supplied by the Court)).

⁹⁹ *Id.*

2. **Pre-Order No. 1000 Commission Precedent on Allocating Loop Flow Costs to Neighboring Utilities Absent a Consensual Arrangement**

a. **Presiding Judge's Findings**

53. The Presiding Judge found that, although the policies adopted by the Commission in Order No. 1000 – including interregional cost allocation principle four,¹⁰⁰ – do not apply to the ITC PARs or to Joint Applicants' filing since the installation of the ITC PARs and the rate filing both pre-dated the issuance and the effective date of Order No. 1000, the Commission's pre-Order No. 1000 policy with respect to interregional cost allocation was "the same as that found in cost allocation principle four of Order No. 1000."¹⁰¹ The Presiding Judge further found that:

The Joint Applicants have violated this policy in that the proposed cost allocation for the interregional transmission facility (the ITC PARs) is not limited to the transmission planning region in which the PARs are located and the Joint Applicants have not engaged in any consensual negotiation to resolve the alleged loop flow problem.^[102]

54. In so doing, the Presiding Judge found that under pre-Order No. 1000 policy, the Commission has rejected unilateral filings by a utility to impose loop flow costs on neighboring utilities and instead has required consensual resolution, which the Presiding

¹⁰⁰ Interregional Cost Allocation Principle 4: "Costs allocated for an interregional transmission facility must be assigned only to transmission planning regions in which the transmission facility is located. Costs cannot be assigned involuntarily under this rule to a transmission planning region in which that transmission facility is not located." Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 657.

¹⁰¹ Initial Decision, 141 FERC ¶ 63,021 at P 411 (citing *Permian Basin*, 390 U.S. 747, *Sierra*, 350 U.S. 348, *Illinois Commerce Commission I*, 576 F.3d 470, and *Am. Elec. Power Serv. Corp.*, 49 FERC ¶ 61,377 (1989)).

¹⁰² *Id.* P 412.

Judge found to be absent in this case.¹⁰³ Citing *Indiana Michigan Power*,¹⁰⁴ the Presiding Judge quoted the Commission:

While the Commission has left open an option for utilities to seek compensation for unscheduled power flows if the problem cannot be resolved through mutual agreement, this was not intended as an alternative to a good faith attempt at working out the problem. Rather, it was intended as a last resort to address situations that could not be resolved consensually. Utilities that choose to interconnect bear the responsibility to exercise all appropriate measures to resolve loop flow and other operational problems on a mutually acceptable basis, including dispute resolution mechanisms clearly delineated in their contracts, before filing a transmission service rate with the Commission. Even if utilities' contracts do not contain specific provisions requiring attempts at mutual resolution, as here, we expect utilities to make such attempts before filing a loop flow transmission rate. If, in the event *good faith* negotiation proves unsuccessful in resolving a loop flow problem, and a Commission filing is made, the Commission will consider all potential remedies (including options that the parties neglect to present to the Commission), and will select the remedy that in its view best reflects the public interest.[¹⁰⁵]

55. The Presiding Judge found that Joint Applicants failed to overcome the requirement of voluntary cost sharing between different regions, especially where the sunk cost (the ITC PARs) is not located in the region being asked to pay. The Presiding Judge found that in the instant case, and contrary to the Commission's holding in *Indiana Michigan Power*, Joint Applicants made a unilateral filing without a showing that they engaged in a "good faith effort" to work out their problems with NYISO and PJM prior to their filing.¹⁰⁶

¹⁰³ *Id.* P 391 ("the Commission has rejected unilateral filings by a utility to impose loop flow costs on neighboring utilities and has required 'good faith' negotiation.").

¹⁰⁴ *Indiana Michigan Power Co. and Ohio Power Co.*, 64 FERC ¶ 61,184 (1993) (*Indiana Michigan Power*).

¹⁰⁵ Initial Decision, 141 FERC ¶ 63,021 at P 395 (quoting *Indiana Michigan Power*, 64 FERC at 62,554) (emphasis in original).

¹⁰⁶ *Id.* P 404 (citing *Indiana Michigan Power*, 64 FERC ¶ 61,184).

b. Joint Applicants' Brief on Exceptions

56. Joint Applicants assert that, prior to Order No. 1000, the Commission never had a policy that prohibited involuntary interregional cost allocation in appropriate cases. That policy prohibition, they argue, was established for the first time in Order No. 1000, and it is inextricably linked to the new transmission planning reforms adopted in that order.¹⁰⁷ They argue that, prior to Order No. 1000, there were no binding policy distinctions between regional and interregional cost allocation, and involuntary interregional cost allocations in appropriate circumstances were not barred.

57. In addition, Joint Applicants contend that they did attempt in good faith prior to the filing to negotiate a consensual cost sharing arrangement with NYISO and PJM with respect to the ITC PARs, but that attempt was rebuffed.¹⁰⁸ They also contend that the Commission's decision setting the filing for hearing shows that they attempted in good faith to negotiate a cost-sharing agreement.¹⁰⁹ Joint Applicants contend that the Presiding Judge's erroneous view of binding Commission policy negatively influenced the rest of the Initial Decision.

c. Briefs Opposing Exceptions

i. Involuntary Cost Allocation

58. The Opposing Parties argue that the Presiding Judge correctly relied on Commission precedent.¹¹⁰ Trial Staff argues that the Presiding Judge did not rely on Commission policy *per se* but rather on Commission cases in which it rejected unilateral

¹⁰⁷ Joint Applicants Brief on Exceptions at 14 (citing Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 539).

¹⁰⁸ *Id.* at 15 (citing Hearing Order, 133 FERC ¶ 61,275 at P 8; Ex. S-4, NYISO's Broader Regional Markets Report filed on January 12, 2010 in Docket No. ER08-1281, transmittal letter at 14-15 and Attachment E). According to Joint Applicants, the exhibit recounts ITC's efforts a full year prior to the submission of the instant rate filing to commence discussions of interregional allocation of the costs of the ITC PARs and the rebuff of that proposal.

¹⁰⁹ *Id.*

¹¹⁰ Trial Staff Brief Opposing Exceptions at 17-18; NYISO Brief Opposing Exceptions at 12-14; NYTOs Brief Opposing Exceptions at 19-21; PJM Brief Opposing Exceptions at 22-25; PJMTOs Brief Opposing Exceptions at 9-11; MISOTOs Brief Opposing Exceptions at 12-15.

filings by a utility to impose costs related to loop flow on neighboring utilities in the absence of good faith negotiations to resolve loop flows. NYTOs assert that the Initial Decision was not “premised” on a single policy finding; rather, it is supported by an expansive record that, NYTOs contend, time and again illuminates Joint Applicants’ evidentiary failings.

59. NYISO argues that Joint Applicants gloss over the actual content of paragraph 411 of the Initial Decision. NYISO argues that, in that paragraph, as well as in paragraphs 391-400, the Presiding Judge reviewed the cases cited in the parties’ briefs and appropriately found – citing *American Elec. Service Power Corp.* and *Indiana Michigan Power* – that the Commission’s pre-Order No. 1000 policy was, like Order No. 1000 cost allocation principle four, premised on consensual arrangements between neighboring utilities. In support, NYISO cites a 1995 order involving the Western Systems Coordinating Council (WSCC), in which the Commission accepted for filing a plan addressing loop flow that was developed by the signatories to the WSCC Agreement to address a longstanding problem.¹¹¹ NYISO states that the plan called for the use of controllable devices owned by five of the member utilities and included a cost allocation and compensation methodology. The plan was approved by 57 of the 64 WSCC members. In noting favorably the collaborative development and approval of the plan, the Commission contrasted attempts to impose charges on neighbors through section 205 filings, stating: “The Commission has consistently rejected unilateral filings by single utilities proposing to impose charges, terms and conditions on a neighboring utility that, according to the filing utility, is responsible for loop flows.”¹¹²

60. NYTOs argue that the Commission, against that backdrop of rejection of such unilateral filings, reaffirmed this approach in Order No. 890 while recognizing the potential for “free rider problems.”¹¹³ NYTOs state that Order No. 1000 again reaffirmed

¹¹¹ See *S. Cal. Edison Co.*, 70 FERC ¶ 61,087 (footnote omitted) (*S. Cal. Edison*), subsequent order approving loop flow plan, 73 FERC ¶ 61,219 (1995).

¹¹² NYISO Brief Opposing Exceptions at 12-13 (citing *S. Cal. Edison*, 70 FERC at 61,250).

¹¹³ NYTOs Brief Opposing Exceptions at 19 (citing *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, at P 561, order on reh’g, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), order on reh’g, Order No. 890-B, 123 FERC ¶ 61,299 (2008), order on reh’g, Order No. 890-C, 126 FERC ¶ 61,228 (2009), order on clarification, Order No. 890-D, 129 FERC ¶ 61,126 (2009) (“[W]e recognize that there are free rider problems associated with new transmission investment” . . . but “continue to believe that regional solutions that garner the support of stakeholders, including affected state authorities, are preferable.”)).

this policy and rejected MISO's argument that the Commission should change its policy as it applies to interregional cost allocations. NYTOs also noted that, regarding Joint Applicants' free rider concerns, the Initial Decision found that Joint Applicants had failed to establish that PJM and NYISO are free riders.

61. NYISO contends that Joint Applicants do not cite a single case from the pre-Order No. 1000 period where the Commission approved non-consensual charges imposed by one utility on another to address loop flow issues. NYTOs assert that the record is undisputed that Joint Applicants have not proposed to use the ITC PARs to provide transmission service to NYISO or PJM. As a result, NYTOs state that MISO witness Mr. Chatterjee confirmed that the cost allocation cases cited in his testimony are not analogous to the situation here as the Presiding Judge found¹¹⁴ and that MISO correctly admitted that its attempt to force other regions to pay for the costs of facilities that are not in their regions is a case of first impression.

62. Regarding Joint Applicants' claim that "the Commission never had a policy that prohibited interregional cost allocation" and "involuntary interregional cost allocations in appropriate circumstances were not barred," PJMTOs and MISOTOs argue that Joint Applicants neither cite any Commission decisions to support their claim nor attempt to distinguish or refute any of the several cases cited by the Initial Decision.¹¹⁵

ii. Lack of Good Faith Effort to Negotiate

63. The Opposing Parties argue that the Presiding Judge's finding of a lack of a "good faith effort" by Joint Applicants to work out the problem with NYISO and PJM was supported by record evidence. For example, NYISO states that ITC admitted in discovery that it did not ask NYISO to contribute to the cost of the ITC PARs until after it had already begun its efforts to construct the ITC PARs.¹¹⁶ NYISO further argues that Joint Applicants do not assert that Detroit Edison (ITC's predecessor) sought any agreement to share costs with NYISO or PJM prior to the construction of the Original PAR, of which the ITC PARs were simply replacements. NYISO states that the December 23, 2009 letter from ITC (included as Attachment E to the January 12, 2010 NYISO report on Broader Regional Markets) that asks for contributions from NYISO and others explicitly states in the first paragraph that ITC has already "installed new PARs."

¹¹⁴ NYTOs Brief Opposing Exceptions at 20 (citing Chatterjee Cross Examination, Tr. 220:24-223:3).

¹¹⁵ PJMTOs Brief Opposing Exceptions at 10-11; MISOTOs Brief Opposing Exceptions at 13.

¹¹⁶ NYISO Brief Opposing Exceptions at 13-14 (citing Ex. NYT-11 at 1).

Further, ITC's request for NYISO to contribute was made after the completion of MISO's planning process, after the construction of the ITC PARs was essentially complete, and over two years after ITC assumed a contractual obligation to construct the ITC PARs. NYISO contends that ITC moved forward with the construction of the ITC PARs without any assurance that the ITC PARs were candidates for multi-regional cost-sharing, according to NYISO. Thus, NYISO argues, planning and building new transmission facilities without the involvement or consent of the neighboring regions, then demanding payment from those regions after the facilities were constructed and the costs sunk, does not constitute a "good faith effort" to consensually resolve an interregional cost sharing issue. Regarding the matter being set for hearing, NYISO notes that the portion of the Hearing Order cited by Joint Applicants is part of the Background section of the order, in which the Commission recounted statements made by various parties but made no rulings.

64. PJM asserts that Joint Applicants provide no support whatsoever for their contention that they ever approached or engaged in negotiations with PJM about cost allocation for the ITC PARs. PJM states that Joint Applicants cite to a report by NYISO but do not mention PJM.¹¹⁷ PJM adds that its un rebutted testimony shows that neither MISO nor ITC ever approached PJM to discuss an allocation of the costs to PJM prior to Joint Applicants filing their cost allocation proposal.¹¹⁸ Trial Staff notes that, at hearing, Joint Applicants presented no witnesses to testify to the timing of any negotiation sessions with PJM and/or NYISO.¹¹⁹

65. PJM argues that the Commission's policy of requiring good faith negotiation before bringing a unilateral rate filing before the Commission is based on the fundamental premise that "[i]nadvertent or unauthorized power flows are an *unavoidable consequence* of interconnected utility operations"¹²⁰ and "that fact alone traditionally has *not entitled the interconnected neighboring transmission system to the Commission's ordering compensation.*"¹²¹ Rather, PJM states that the Commission has found that

¹¹⁷ PJM Brief Opposing Exceptions at 22-23 (citing Hearing Order, 133 FERC ¶ 61,275 at P 8).

¹¹⁸ *Id.*

¹¹⁹ Trial Staff Brief Opposing Exceptions at 18.

¹²⁰ PJM Brief Opposing Exceptions at 24 (quoting *Am. Elec. Power Serv. Corp.*, 49 FERC, at 62,381 (emphasis added)).

¹²¹ *Id.* (quoting *Am. Elec. Power Serv. Corp.*, 93 FERC ¶ 61,151, at 61,474 (2000) (emphasis added)).

“[u]tilities that choose to interconnect bear the responsibility to exercise all appropriate measures to resolve loop flow and other operational problems on a *mutually acceptable basis*.”¹²² According to PJM, the Commission has “directed the utilities themselves, in the first instance to work to resolve such issues.”¹²³ Moreover, PJM asserts that only “as a last resort to address situations that could not be resolved consensually”¹²⁴ will the Commission consider unilateral cost allocations if the proponent can demonstrate that the loop flow places “a burden on its system.”¹²⁵ PJM states that it and MISO did resolve consensually how to resolve loop flows and cross-border allocations when they entered into the JOA.

d. Commission Determination

66. We reverse the Initial Decision with respect to the Presiding Judge’s conclusion that certain pre-Order No. 1000 Commission precedent with respect to allocation of loop flow costs to neighboring utilities absent a consensual resolution precludes Joint Applicants’ proposal.

67. In *American Elec. Power Service Corp.*, the Commission expressed a preference for voluntary resolutions of certain operational issues, such as loop flow. The Commission explained that:

Inadvertent or unauthorized power flows are an unavoidable consequence of interconnected utility operations. Interconnected utilities must, and do, work closely to ensure that the operation of one system does not jeopardize the reliability of a neighboring system, nor diminish the neighbor's ability to utilize its system in the most economical manner. . . . The Commission, however, does not and, indeed, could not oversee the operation of utility systems. . . . It is, in the first instance, for the interconnected parties as the owners and operators of utility systems to establish mutually acceptable

¹²² *Id.* (quoting *Indiana Michigan Power*, 64 FERC at 62,554 (emphasis added)).

¹²³ *Id.* (quoting *Am. Elec. Power Serv. Corp.*, 93 FERC at 61,474).

¹²⁴ *Id.* (quoting *Pa. Elec. Co.*, 65 FERC ¶ 61,304, at 62,402 (1993)).

¹²⁵ *Id.* (quoting *Am. Elec. Power Serv. Corp.*, 49 FERC at 62,381).

operating practices. In addition, if Allegheny can demonstrate that this transaction is a burden on its system, Allegheny can file a transmission service rate for Commission consideration which would account for any unauthorized loop flows.^[126]

68. However, the Commission has explained that “[t]he Commission’s authority is not limited in principle by cases where the Commission expresses a preference not to exercise that authority.”¹²⁷ Thus, while the Commission has made clear its preference that interconnected utilities strive to resolve loop flow-related issues among themselves rather than resort to unilaterally filing proposed solutions with the Commission, a public utility is legally permitted to make a unilateral filing to address loop flow.¹²⁸

69. We also disagree with the Presiding Judge’s application to this case of *Indiana Michigan Power*. In that case, the Commission determined that, in light of the terms of existing interconnection agreements between the parties, the filing was at best premature and inconsistent with the parties’ contractual commitment to resolve technical and operating problems of that kind according to mutually acceptable practice.¹²⁹ The Commission further found:

The interconnection agreements provide for synchronous operations along with different types of energy transactions such as coordination, sale and purchase, interchange and energy transfer, as defined in specific service schedules among the parties. All of the agreements contain provisions clearly stating that mutual agreement is necessary to change the terms and conditions of the various service schedules, and to provide for new or supplemental service.^[130]

70. Thus, the Commission’s determination in *Indiana Michigan Power* turned on the applicants’ failure to follow procedures set forth in the relevant contracts requiring that the contracting parties resolve technical and operational difficulties by mutual agreement.

¹²⁶ *Am. Elec. Power Serv. Corp.*, 49 FERC at 62,381.

¹²⁷ Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 539.

¹²⁸ While we agree with the Presiding Judge that Cost Allocation Principle 4 of Order No. 1000 is consistent with principles set forth in Commission orders prior to Order No. 1000, we interpret those cases differently, as discussed above.

¹²⁹ *Indiana Michigan Power*, 64 FERC at 62,552.

¹³⁰ *Indiana Michigan Power*, 64 FERC at 62,552..

That determination is consistent with the Commission's preference for interconnected utilities to resolve such issues between themselves, as stated in *American Elec. Power Service Corp.*, and did not preclude Joint Applicants from proposing to allocate the ITC PARs costs.

3. Pre-Order No. 1000 Commission Precedent on Relationship between Joint Transmission Planning and Cost Allocation

a. Presiding Judge's Findings

71. The Presiding Judge agreed with PJM that Joint Applicants' proposal was inconsistent with the Commission's policy dictating that cost allocation must follow transmission planning.¹³¹ PJM asserted that the intent of this policy was to ensure that the parties who are to pay for facilities are involved in the determination of whether such facilities "are necessary to meet [their] reliability and economic needs."¹³² The Presiding Judge agreed with PJM that, while the Commission permits regional cost allocation for new transmission facilities to "influence[] the incentive to invest," with regard to facilities constructed prior to the advent of regional transmission planning processes, the Commission has held that "[t]hese transmission facilities were developed by the individual companies to benefit their own systems and their own customers."¹³³ The Presiding Judge also found that the proposed cost allocation was created long after the decision to construct the Original PAR was made. Further, the Presiding Judge found that neither NYISO nor PJM participated in the planning decision processes for either the Original PAR or the ITC PARs, nor did NYISO or PJM have any notice that they might be allocated costs for the ITC PARs. The Presiding Judge found, therefore, that Joint Applicants' request for an allocation of costs to NYISO and PJM as beneficiaries was barred.¹³⁴

¹³¹ Initial Decision, 141 FERC ¶ 63,021 at PP 621-622 (citing PJM Initial Br. at 29-30).

¹³² *Id.* P 621 (citing PJM Initial Br. at 29 (citing Opinion No. 494, 119 FERC ¶ 61,063 at P 44)).

¹³³ *Id.* P 634 (citing PJM Initial Br. at 32 (citing Opinion No. 494, 119 FERC ¶ 61,063 at PP 42, 53)).

¹³⁴ *Id.* P 623 (citing PJM Initial Br. at 31).

72. The Presiding Judge also agreed with NYISO that Joint Applicants were seeking to impose a “super-regional postage stamp rate” on entities outside the MISO footprint.¹³⁵ Both the Presiding Judge and NYISO noted that in Opinion Nos. 494 and 494-A, the Commission made a clear distinction between “zonal” license-plate rates and “postage stamp” rates, with the distinction centering around pre-existing facilities and associated sunk costs and the construction of new or planned facilities.¹³⁶ The Presiding Judge pointed to the Commission’s determination in Opinion No. 494 that using a license-plate rate design¹³⁷ was essentially the same as allocating existing system costs to the parties for whom the investment was originally made.¹³⁸

73. In addition to reviewing Opinion No. 494, the Presiding Judge agreed with NYISO and PJM that *AEP* applied in this case. The Presiding Judge explained that, in *AEP*, the Commission provided three reasons for rejecting AEP’s assertion that its existing high-voltage facilities provided regional benefits and that, therefore, the costs for the facilities should be allocated on a regional basis within both MISO and PJM: (1) AEP’s facilities were not “planned to address regional needs of either the [MISO] or PJM wholesale market, and therefore they [were] not comparable to new facilities that were planned pursuant to each RTO’s regional planning process;” (2) AEP’s facilities “were created principally to serve the customers of the transmission owners on whose system they are located and were not the product of centralized regional planning;” and (3) “AEP undertook financial responsibility for the existing projects they planned before it was known whether any cost sharing policy would be adopted.”¹³⁹ The Presiding Judge noted that Mr. Chatterjee attempted to distinguish the current filing from *AEP* but found that

¹³⁵ *Id.* P 635 (citing NYISO Initial Br. at 47).

¹³⁶ *Id.* (citing NYISO Initial Br. at 47–48 (citing Opinion No. 494, 119 FERC ¶ 61,063 at P 1 n.2, P 18; *Midwest Indep. Transmission Sys. Operator, Inc.*, 114 FERC ¶ 61,106, *order on reh’g*, 117 FERC ¶ 61,241 (2006); and *American Electric Power Service Corp. v. MISO*, 122 FERC ¶ 61,083, at P 18 n.30 (*AEP I*), *order on reh’g*, 125 FERC ¶ 61,341 (2008) (*AEP II*)).

¹³⁷ Under a license-plate (or zonal) rate design, a customer pays the embedded cost of transmission facilities that are located in the same zone as the customer. A customer does not pay for other transmission facilities outside of the zone, even if the customer engages in transactions that rely on those zones. Opinion No. 494-A, 122 FERC ¶ 61,082 at P 1 n.2.

¹³⁸ Initial Decision, 141 FERC ¶ 63,021 at P 636 (citing Opinion No. 494-A, 122 FERC ¶ 61,082 at P 26 n.28).

¹³⁹ *Id.* P 652 (citing *AEP II*, 125 FERC ¶ 61,341 at P 42; PJM Initial Br. at 33).

Mr. Chatterjee's testimony was unsupported and contrary to Commission precedent. Thus, the Presiding Judge found that the ITC PARs were pre-existing facilities planned to meet the needs within MISO.¹⁴⁰

b. Joint Applicants' Brief on Exceptions

74. Joint Applicants argue that the Presiding Judge erroneously interpreted the Commission's policy regarding interregional cost allocation in Opinion No. 494 and *AEP* as barring the proposed cost allocation.¹⁴¹ Joint Applicants argue that both Opinion No. 494 and *AEP* are limited to their specific facts and are readily distinguishable from this proceeding. First, Joint Applicants argue that, unlike the instant case, Opinion No. 494 and *AEP* involved requests under section 206 of the FPA to modify existing rates, thus requiring a different burden of proof. Further, Joint Applicants argue that the ITC PARs are relatively small, discrete facilities, located at a single substation, that were neither in service nor approved by the U.S. Department of Energy when the cost allocation proposal was filed, whereas all facilities involved in Opinion No. 494 and *AEP* had been in service for many years.

75. Joint Applicants also argue that Opinion No. 494 and *AEP* involved large numbers of facilities that would have resulted in large, abrupt cost shifts if there had been a reallocation of costs. In this case, Joint Applicants argue that the proposed cost allocation would involve such small cost shifts that they would be virtually lost in the rounding in NYISO's and PJM's rates. Further, Joint Applicants assert that those costs would be more than offset by the benefits received from the physical loop flow control. Joint Applicants also argue that the facilities involved in Opinion No. 494 and *AEP* provided only ancillary benefits to the surrounding regions. In this case, Joint Applicants argue that the facilities are fundamentally different because they are designed to provide direct benefits to address Lake Erie loop flow, an interregional issue.¹⁴²

c. Briefs Opposing Exceptions

76. The Opposing Parties agree with the Presiding Judge's finding that the Commission's decisions in Opinion No. 494 and *AEP* barred Joint Applicants' cost allocation proposal. The Opposing Parties disagree with Joint Applicants' argument that Opinion No. 494 and *AEP* are distinguishable from the instant case because of the

¹⁴⁰ *Id.* P 653 (quoting Ex. MSO Tab D at 25:3-13, 26:4-15).

¹⁴¹ Joint Applicants Brief on Exceptions at 15 (citing Initial Decision, 141 FERC ¶ 63,021 at PP 643, 652)).

¹⁴² Joint Applicants Brief on Exceptions at 17.

different burdens of proof under sections 205 and 206 of the FPA. NYISO argues that the guidance that the Commission provided on cost allocation issues in those cases is just as relevant to determining whether Joint Applicants' proposed cost allocation is just and reasonable in this proceeding.¹⁴³ Similarly, PJMTOs assert that Joint Applicants incorrectly focus on burdens of proof in these cases, instead of how these cases illustrate the general principles that costs of pre-existing facilities must be allocated to those for whom the facility was constructed, and new transmission investments must go through a regional planning process before costs are allocated.¹⁴⁴ NYTOs argue that Joint Applicants overlook the fact that the Commission ruled that joint planning is a precondition to cost allocation for new facilities apart from the rate design change issue.¹⁴⁵ Trial Staff asserts that it is well-established that a party filing a rate adjustment with the Commission under section 205 of the FPA bears the burden of proving the adjustment is lawful,¹⁴⁶ and MISOTOs assert that Joint Applicants failed to satisfy this burden.¹⁴⁷

77. Several parties also dispute Joint Applicants' claim that the instant case is distinguishable from Opinion No. 494 and *AEP* because the ITC PARs facilities are small and the Joint Applicants' cost allocation proposal would not involve large cost shifts. MISOTOs, PJMTOs, and Trial Staff argue that the relatively small cost impact of a proposed cost allocation does not justify a proposal that is otherwise contrary to Commission policy.¹⁴⁸

¹⁴³ NYISO Brief opposing Exceptions at 16.

¹⁴⁴ PJMTOs Brief opposing Exceptions at 13.

¹⁴⁵ NYTOs Brief opposing Exceptions at 22.

¹⁴⁶ Trial Staff Brief opposing Exceptions at 19 (citing *Al. Power Co. v. FERC*, 993 F.2d 1557, 1571 (D.C. Cir. 1993)).

¹⁴⁷ MISOTOs Brief opposing Exceptions at 14 (citing 16 U.S.C. § 824a(e) (2012); *Allegheny Power v. FERC*, 437 F.3d 1215, 1219 (D.C. Cir. 2006); 18 C.F.R. § 35.13(e)(3) (2016)).

¹⁴⁸ *Id.* Brief opposing at 14-15 (citing Joint Applicants Brief on Exceptions at 16-17; *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 113 FERC ¶ 61,282, at P 73 (2005)); PJMTOs Brief opposing Exceptions at 15-16; Trial Staff Brief opposing Exceptions at 19-20.

78. Several parties agree with the Presiding Judge that the ITC PARs should be classified as pre-existing facilities.¹⁴⁹ NYISO asserts that, even though the Commission's license-plate rate design decisions are not limited to transmission facilities that have already been placed into service,¹⁵⁰ the key issue is not whether the underlying transmission facility is already in service before a postage stamp cost allocation method takes effect, but rather whether the developer of a transmission facility moved forward in its effort to develop and construct that facility without any assurance that the project would be a candidate for regional or interregional cost-sharing.¹⁵¹ In this case, NYISO argues that there was no postage stamp rate in place for allocating costs across the MISO, PJM, and NYISO region in 1998 when Detroit Edison assumed the obligation to construct the Original PAR, or in 2007 when ITC assumed the obligation to construct the ITC PARs. NYISO and Trial Staff also point out that ITC did not ask NYISO to contribute to the cost of the ITC PARs until October or November of 2009, after it had already begun its efforts to construct them, further supporting their contention that the ITC PARs are appropriately classified as pre-existing facilities not eligible for cost allocation outside of the local zone.¹⁵² Opposing Parties provide further arguments that the ITC PARs were existing facilities ineligible for a regional cost allocation.¹⁵³

d. Commission Determination

79. We disagree with the Presiding Judge's interpretation of Opinion No. 494 and *AEP* and find that this precedent does not preclude the regional allocation of costs for existing facilities or facilities not developed as part of a joint transmission planning process.

¹⁴⁹ See, e.g., PJM Brief opposing Exceptions at 28-29 (the Presiding Judge correctly found that the ITC PARs are not new devices, but merely replacements for a pre-existing facility and, in turn, Joint Applicants' proposal violates the Commission's policies with regard to cost allocation for existing facilities as evidenced in Opinion No. 494 and *AEP*); PJMTOs Brief opposing Exceptions at 14-15 (noting that MISO classified the ITC PARs as a "like-for-like replacement" of the original PAR and determined that they are not eligible for cost sharing in MISO under the MISO Tariff).

¹⁵⁰ NYISO Brief opposing Exceptions at 16-17 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,241 at P 96).

¹⁵¹ NYISO Brief opposing Exceptions at 16-17 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,241 at PP 86, 96).

¹⁵² Trial Staff Brief opposing Exceptions at 21.

¹⁵³ See *infra* P 96.

80. The Presiding Judge takes the position that Commission precedent, as articulated in Opinion No. 494 and *AEP*, makes clear that zonal or license-plate cost allocations are the only just and reasonable rate designs for existing facilities or facilities not planned through a transmission planning process of appropriate regional scope. For instance, the Presiding Judge asserts that, “Opinion No. 494 clearly states that the Commission does not permit the involuntary allocation of pre-existing costs that were not incurred through joint planning.”¹⁵⁴

81. We disagree with the Presiding Judge’s interpretation of Commission precedent pre-dating Order No. 1000 for two reasons. First, we note the importance of context when considering Opinion No. 494 and *AEP*. Those decisions followed Order No. 2000, in which the Commission expressed reservations regarding the continued use of zonal or license-plate rates on a long-term basis, even for existing facilities.¹⁵⁵ The Commission permitted RTOs to use zonal or license-plate cost allocations for a limited, transitional period, followed by a reevaluation of the appropriateness of such cost allocations for existing and new facilities in their regions.¹⁵⁶ In Opinion No. 494 and *AEP*, the Commission found that zonal or license-plate rates continued to be just and reasonable for existing facilities in PJM and across the MISO-PJM seam, beyond the initial transition period envisioned in Order No. 2000. This precedent did not make claims that zonal or license-plate cost allocations were the only just and reasonable rate designs for existing facilities or for facilities not planned through a regional planning process.

82. Second, Opinion No. 494 and *AEP* present a more nuanced view than is reflected in the Initial Decision. The Commission stated in Opinion No. 494 that, based on the record in that proceeding, it could not find that sunk costs must be shared equally among all customers in order to produce just and reasonable rates.¹⁵⁷ The Commission found that the record demonstrated that a license plate rate design for existing facilities was consistent with the principles of cost causation, further adding that, in PJM, new investments go through the PJM planning process, which in contrast to the investments in

¹⁵⁴ Initial Decision, 141 FERC ¶ 63,021 at P 643 (citing Opinion No. 494, 119 FERC ¶ 61,063 at PP 42, 44).

¹⁵⁵ *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh’g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff’d sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

¹⁵⁶ Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at PP 523-525.

¹⁵⁷ Opinion No. 494, 119 FERC ¶ 61,063 at P 42.

existing facilities, helps to ensure such projects are necessary to meet reliability and economic needs of the region.¹⁵⁸ Of significance, the Commission stated that:

With respect to the allocation of existing or sunk costs, *on the record developed here*, we conclude that, *while other cost allocation methodologies may also be just and reasonable*, we cannot find that the continued use of the existing zonal or license plate rate design is unjust and unreasonable . . . There is no identifiable threshold at which a particular rate design becomes unjust and unreasonable.[¹⁵⁹]

83. Thus, in Opinion No. 494, the Commission emphasized that it based its determinations on the record developed in the proceeding and that multiple just and reasonable rate designs were possible for existing facilities. The Commission also found that a regional transmission planning process can help ensure that facilities meet regional needs, thereby providing a basis for regional cost allocation. However, the Commission in Opinion No. 494 did not find that a regional planning process is a prerequisite for regional cost allocation. The Commission made similar statements in *AEP*, finding that the Commission should balance a variety of factors when determining whether a proposed rate design is just and reasonable and further noted that its decision applied in the context described in that proceeding.¹⁶⁰

84. Accordingly, we find that, contrary to assertions made by the Presiding Judge and several Opposing Parties, Opinion No. 494 and *AEP* did not mandate that joint planning precede a regional allocation of costs for existing facilities. This precedent did not bar Joint Applicants' filing of the proposed cost allocation for the ITC PARs, and it permits consideration of a broader cost recovery of the ITC PARs beyond the local zone.¹⁶¹

¹⁵⁸ *Id.* PP 42, 44.

¹⁵⁹ *Id.* P 41 (citing *Consolidated Edison Co. of New York, Inc. v. FERC*, 165 F.3d 992 at 1003 (D.C. Cir. 1999)) (emphasis added).

¹⁶⁰ *AEP I*, 122 FERC ¶ 61,083 at PP 82-83, 95.

¹⁶¹ Because of our finding here concerning the interpretation of *AEP* and Opinion No. 494 (i.e., that existing facilities are not required to be allocated on a license plate basis), we find the issue of whether the ITC PARs is a new facility or a replacement facility to be moot.

4. Justness and Reasonableness of Proposed Cost Allocation

85. As discussed above, a customer or contractual relationship is not a prerequisite to the allocation of costs of transmission facilities. Recognizing the Commission's ability to allocate costs in the absence of a pre-existing contractual relationship, a question remains of when the Commission should do so, consistent with its responsibility to ensure that rates are just and reasonable.

86. In order to address this question in this case, we find that the pre-Order No. 1000 Commission precedent discussed above is instructive. First, *American Elec. Power Service Corp.* and *Indiana Michigan Power* reflect the Commission's preference for consensual resolution of loop flow cost issues. In this case, Joint Applicants have not reached any agreement with NYISO or PJM over allocation of the cost of the ITC PARs. Second, Opinion No. 494 and *AEP* reflect the Commission's belief that projects that are a result of joint transmission planning are more likely to have benefits that could warrant regional cost allocation. In this case, as discussed in more detail below, Joint Applicants have not supported their proposed cost allocation with such joint planning efforts.

87. Despite the absence of these factors that could have supported Joint Applicants' proposed cost allocation, we also examine whether there is sufficient evidence in this record to conclude that Joint Applicants' proposed cost allocation is just and reasonable. For the reasons discussed below, we find that Joint Applicants' proposed cost allocation has not been shown to be just and reasonable.

a. Lack of Regional Planning Process

i. Presiding Judge's Findings

88. The Presiding Judge found that there was no credible, persuasive evidence in the record demonstrating that the ITC PARs were subject to a regional planning process or were planned to address regional, rather than local, needs. The Presiding Judge disagreed with Mr. Chatterjee's testimony that the Original PAR and the ITC PARs were part of a regional planning process that would justify, pursuant to Opinion No. 494 and other Commission policy, the proposed cost allocation.¹⁶² Further, the Presiding Judge noted that ITC admitted that it did not ask NYISO to contribute to the cost of the ITC PARs until after it had already begun its efforts to construct them.¹⁶³ Additionally, the Presiding Judge found that merely because the Commission and many parties may have said that the issue of Lake Erie loop flow is worthy of interregional attention did not

¹⁶² Initial Decision, 141 FERC ¶ 63,021 at P 646.

¹⁶³ *Id.*

mean that NYISO, PJM, or their stakeholders directly and financially would benefit from the Joint Applicants' operation of the PARs, nor did it serve as evidence to support the conclusion that the facilities were the product of an interregional planning effort involving NYISO and PJM, as Mr. Chatterjee contended.¹⁶⁴ The Presiding Judge also found unsupported Mr. Chatterjee's argument that the Commission itself had identified Lake Erie loop flow as an issue to be resolved to ensure just and reasonable rates and address free rider problems. Rather, the Presiding Judge found that the Joint Applicants' own evidence demonstrated that ITC built the ITC PARs strictly for ITC's local needs and that neither PJM nor NYISO were "free riders" engaged in activities that caused Joint Applicants to incur the ITC PARs costs.¹⁶⁵

89. The Presiding Judge agreed with PJM that the Commission's policy regarding previously allocated facilities costs is reflected in its approval of the JOA's cross-border cost allocation provisions of the JOA. The Presiding Judge found that the Commission expressly exempted pre-planned facilities in accordance with the "settled expectations" of the parties.¹⁶⁶

90. The Presiding Judge also noted PJM's point that, in evaluating competing cost allocation proposals submitted by MISO and PJM for cross-border projects under the JOA, the Commission selected MISO's proposal because "its approach most closely matches the actual modeled flow in the planning model" and that the decisions "on which cross-border facilities needed to be built are based on that model, and the cost allocation reasonably should parallel the planning model used to determine if the facilities should be built."¹⁶⁷ The Presiding Judge further noted PJM's point that MISO witness Mr. Chatterjee admitted that the cost allocation model that MISO used in that proceeding did not match the planning model used to determine whether the ITC PARs should be installed.¹⁶⁸ The Presiding Judge also found credible the portion of Mr. Chatterjee's

¹⁶⁴ *Id.* P 647.

¹⁶⁵ *Id.* PP 648-649.

¹⁶⁶ *Id.* P 660.

¹⁶⁶ *Id.* P 640 (citing PJM Initial Br. at 34 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 113 FERC ¶ 61,194, at P 35 (2005) and Opinion No. 494, 119 FERC ¶ 61,063 at PP 50-57)).

¹⁶⁷ *Id.* P 621 (citing PJM Initial Br. at 30 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,084, at PP 1, 24 (2008))).

¹⁶⁸ *Id.* P 622 (citing PJM Initial Br. at 30 (citing Hearing Tr. 634:12-14)).

testimony highlighting that Joint Applicants' method for allocating the costs of the ITC PARs to PJM and NYISO did not follow MISO's planning method for including the ITC PARs in the 2006 MISO Transmission Expansion Plan (MTEP06).¹⁶⁹

91. The Presiding Judge agreed with PJMTOs that, while Joint Applicants proposed to allocate 23.8 percent of the costs of the ITC PARs to PJM, they had not demonstrated that PJM or NYISO would receive any benefits from installation and operation of the ITC PARs.¹⁷⁰ The Presiding Judge found credible Trial Staff's argument that any potential benefit from the ITC PARs would accrue primarily to ITC because both the Original and ITC PARs were intended to relieve thermal overload on the ITC system. Further, the Presiding Judge found credible and persuasive PJMTOs' assertion that Joint Applicants' use of the ITC PARs may actually harm PJM "by increasing west-to-east congestion on PJM's system and requiring the operation of more expensive eastern generation closer to the eastern loads."¹⁷¹

92. Additionally, the Presiding Judge found that Joint Applicants did not support their contentions regarding the Presidential Permit. The Presiding Judge found that Joint Applicants' argument that both the Original PAR and the ITC PARs were specifically approved by the Department of Energy for interregional purposes was plainly unsupported. The Presiding Judge found misleading Joint Applicants' assertion that "the Presidential Permit for the Original PAR acknowledged that its purpose was 'to provide enhanced control over the inadvertent power flow between Michigan and Ontario and, *by extension, around Lake Erie.*'"¹⁷² The Presiding Judge emphasized that the words "by extension, around Lake Erie" were found in Detroit Edison's filing and were not in the Presidential Permit from the Department of Energy. The Presiding Judge also found that the premise that the Original PAR was permitted to address thermal concerns at the Michigan-Ontario flowgate was not the equivalent of it controlling loop flow around Lake Erie.¹⁷³ The Presiding Judge disagreed with Joint Applicants that, because NYISO's witness Mr. Yeomans agreed that loop flow is "very similar" at each of the various interfaces around Lake Erie, "controlling loop flow at the Michigan-Ontario

¹⁶⁹ *Id.* (citing Hearing Tr. 364: 12-14).

¹⁷⁰ *Id.* P 627 & nn.2033-34 (citing PJMTOs Initial Br. at 35); *see also Id.* PP 628-630).

¹⁷¹ *Id.* P 630 (citing PJMTOs Initial Br. at 35 (citing Ex. PJM-1 at 38:6-17)).

¹⁷² *Id.* P 661 (quoting Joint Applicants Reply Br. at 16 (citing Ex. MSO-4 at 2) (emphasis in original)).

¹⁷³ *Id.* P 663.

interface necessarily also controls it elsewhere around the lake.”¹⁷⁴ The Presiding Judge found that Joint Applicants offered no support for this logical leap.

93. Relying on principles articulated in Order No. 890 to resolve cost allocation disputes, which the Commission discussed and expanded upon in Opinion No. 494, the Presiding Judge concluded that: (1) the proposed cost allocation did not “fairly assign [] costs among participants, including those who cause them to be incurred and those who otherwise benefit from them; (2) did not “provide [] adequate incentives to construct new transmission;” and (3) was not “generally supported by state authorities and participants across the region.”¹⁷⁵

ii. Joint Applicants’ Brief on Exceptions

94. In addition to their other arguments distinguishing the instant proceeding from Opinion No. 494 and *AEP*,¹⁷⁶ Joint Applicants contend that, while the facilities in Opinion No. 494 and *AEP* had never been the subject of interregional review, the Original PAR and ITC PARs were discussed among the utilities around Lake Erie and were specifically addressed and endorsed in several interregional studies over many years.¹⁷⁷ Joint Applicants assert that, although a formalized interregional planning process did not exist at the time, the ITC PARs were subjected to what sufficed as “interregional planning” at the time.¹⁷⁸

95. Joint Applicants also disagree with the Presiding Judge’s finding that the Original PAR was constructed to benefit Detroit Edison and its customers and built strictly for local concerns. Instead, Joint Applicants assert that the fundamental purpose of the Original PAR was “to improve the reliability of the bulk power system by controlling circulating loop flows *around Lake Erie* that would otherwise interfere with the ability to carry out scheduled transactions.”¹⁷⁹ Joint Applicants point to the Department of Energy

¹⁷⁴ *Id.* P 662 (quoting Joint Applicants Reply Br. at 16 (citing Ex. NYI-1 at 12 n.3, 37 n.9)).

¹⁷⁵ *Id.* P 651 (citing Opinion No. 494, 119 FERC ¶ 61,063 at P 38 (quoting Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 559)).

¹⁷⁶ *See supra* PP 74-75.

¹⁷⁷ Joint Applicants Brief on Exceptions at 17-18.

¹⁷⁸ *Id.* at 18.

¹⁷⁹ *Id.* at 41 (citing Ex. ITC Tab 4 at 4-5 (emphasis added)).

Presidential Permit issued in 2001 authorizing the Original PAR as acknowledging that Detroit Edison had claimed in its application that approval of the Original PAR would “provide enhanced control over the inadvertent power flow between Michigan and Ontario and, *by extension, around Lake Erie.*”¹⁸⁰ Joint Applicants argue that, contrary to the Presiding Judge’s findings, the words “by extension, around Lake Erie” are present in both Detroit Edison’s filing and the Department of Energy permit itself. Joint Applicants argue that, more importantly, the point at issue is that Detroit Edison intended the Original PAR to serve not only local needs but also loop flow around Lake Erie. Further, Joint Applicants argue that, since loop flow is “very similar” at each of the various interfaces around Lake Erie, controlling loop flow at the Michigan/Ontario interface necessarily and unavoidably has the effect of controlling it elsewhere around the lake. Joint Applicants argue that this fact is supported by NYISO and PJM’s support for the installation and activation of the ITC PARs at that location for that purpose. According to Joint Applicants, NYISO and PJM would have no other interest in the ITC PARs.¹⁸¹

iii. Briefs Opposing Exceptions

96. In addition to arguments discussed above, NYISO and PJM assert that MISO treated the ITC PARs as existing facilities for purposes of the MTEP06 planning process, and as a result, the ITC PARs were like-for-like replacements of the Original PAR and ineligible for cost sharing under the MISO Tariff at Attachment FF.¹⁸² NYISO notes that the ITC PARs were approved for construction in the MTEP06 and that the cost of the ITC PARs did not qualify for region-wide cost sharing as a baseline reliability project; rather, the cost was allocated to ITC’s customers under a license-plate rate. PJM argues that Joint Applicants cannot circumvent local cost allocations by replacing the Original PAR with the ITC PARs. Also, PJMTOs assert that there is a several-year disconnect between the planning for the ITC PARs and the *post hoc* allocation of their costs to

¹⁸⁰ *Id.* (quoting Ex. MSO-4 at 2 (emphasis added)).

¹⁸¹ *Id.* at 42.

¹⁸² NYISO Brief opposing Exceptions at 17-18; PJM Brief opposing Exceptions at 32-33 (citing Ex. PJM-11, Ex. PJM-6); PJMTOs Brief opposing Exceptions at 14-15 (citing Ex. PJM-6 through PJM-11; Tr. 297:1-15, 304:11-19, 304:1-3, 559:19-560:2); NYTOs Brief opposing Exceptions at 46 (citing Initial Decision, 141 FERC ¶ 63,021 at PP 451-453).

NYISO and PJM, and even MISO witness Mr. Chatterjee's testimony and a MISO email to ITC corroborate that MISO's policy does not permit the ITC PARs costs to be allocated outside of the ITC zone.¹⁸³

97. Contrary to Joint Applicants' argument that the Original PAR and ITC PARs were installed to meet interregional purposes, several parties argue that the record demonstrates that the ITC PARs were designed and installed to meet local purposes and benefit Joint Applicants' own customers. For example, NYISO argues that the 2001 Presidential Permit for the Original PAR recited the contents of Detroit Edison's application stating that "Detroit [Edison] claimed that the combined effect of these two proposals would be to provide enhanced control over the inadvertent power flow between Michigan and Ontario, and by extension, around Lake Erie."¹⁸⁴ NYISO states that nowhere in the "Discussion," "Finding and Decision," or "Order" sections of the Presidential Permit is there a finding that the Original PAR was being installed to meet an interregional need, nor does Detroit Edison's claim actually state that the "enhanced control" is being sought for anything other than Detroit Edison's own purposes.¹⁸⁵

98. PJM also agrees with the Presiding Judge that the ITC PARs were constructed to benefit local ITC customers and were not planned regionally, barring any cost allocation to PJM.¹⁸⁶ According to PJM, the record belies Joint Applicants' claim that the ITC PARs were designed and intended to address interregional needs as well as local needs because (1) the Original PAR was planned in the late 1990s by Detroit Edison and Hydro One (the predecessor company to Ontario Hydro) to resolve local needs and was not the product of a Commission-approved transmission planning process; and (2) the ITC PARs have the identical purpose as the Original PAR and were approved by MISO as "like-for-like" replacements in the MISO planning process.¹⁸⁷

99. PJM, PJMTOs, and NYTOs argue that the purpose of the Original PAR was to address local needs. PJM states that ITC witness Mr. Capra's testimony supports the notion that the fundamental purpose of the Original PAR was a local need to facilitate the

¹⁸³ PJMTOs Brief opposing Exceptions at 14-15 (citing Ex. PJM-6 through PJM--11; Tr. 297:1-15, 304:11-19, 304:1-3, 559:19-560:2).

¹⁸⁴ NYISO Brief opposing Exceptions at 71 (quoting Ex. MSO-4 at 2).

¹⁸⁵ *Id.*

¹⁸⁶ PJM Brief opposing Exceptions at 25 (citing Initial Decision, 141 FERC ¶ 63,021 at PP 655, 659).

¹⁸⁷ *Id.* at 26 & nn.103-04.

ability to carry out scheduled transactions that would be scheduled within Michigan. Further, PJM argues that ITC's agreement to pay for the facilities without contribution from others is further demonstration that ITC was furthering local needs. According to PJM, if ITC believed that the facility served regional needs, then ITC would have sought contributions from others before, not after, the facilities were planned and fully constructed.¹⁸⁸ Further, NYTOs agree with the Presiding Judge that the record shows that ITC and Hydro One built the ITC PARs to encourage economic transactions between Michigan and Ontario and to meet local reliability needs in Michigan.¹⁸⁹ Specifically, NYTOs and PJMTOs argue that the main impetus to build the Original PAR came from a Michigan Public Service Commission directive to expand available transmission capability within the state by at least 2,000 MW in compliance with a state statute enacting retail choice in Michigan.¹⁹⁰ According to PJMTOs, when ITC planned to replace the Original PAR with the ITC PARs, the original planning purpose – to expand transmission capability to meet state law requirements – did not change.¹⁹¹ Trial Staff argues that, as in Opinion No. 494, the fact that the ITC PARs are used today in ways that differ from when the facilities were first constructed does not provide a basis for finding that a license-plate rate design is no longer just and reasonable.¹⁹²

100. PJM also dismisses Joint Applicants' argument that the ITC PARs were installed to address interregional needs because controlling loop flow at the Michigan/Ontario interface "necessarily and unavoidably has the effect of controlling it elsewhere around the Lake."¹⁹³ Rather, PJM argues that Joint Applicants' statement is unremarkable since operation on one system will always affect flows on neighboring systems. According to

¹⁸⁸ See PJM Brief opposing Exceptions at 27, 30-31.

¹⁸⁹ NYTOs Brief opposing Exceptions at 45 (citing Initial Decision, 141 FERC ¶ 63,021 at PP 448-450, 727).

¹⁹⁰ PJMTOs Brief opposing Exceptions at 32-33; see NYTOs Brief opposing Exceptions at 45 (citing Ex. ITC Tab F at 4:21-5:3).

¹⁹¹ PJMTOs Brief opposing Exceptions at 33.

¹⁹² Trial Staff Brief opposing Exceptions at 20-21 (citing Opinion No. 494, 119 FERC ¶ 61,063 at P 51).

¹⁹³ PJM Brief opposing Exceptions at 27-28 (quoting Joint Applicants Brief on Exceptions at 42).

PJM, the fact that the impact of the ITC PARs may extend beyond ITC's zone does not mean that the facilities were planned and designed to meet external needs.¹⁹⁴

101. Several parties argue that Opinion No. 494 and *AEP* are applicable in this case and demonstrate the lack of evidence in the record showing that Joint Applicants' facilities were planned to address the regional needs of either NYISO or PJM. First, NYISO challenges Joint Applicants' statement that the transmission facilities in *AEP* had never been the subject of any interregional review. NYISO states that, in response to *AEP*'s argument that it "in fact did coordinate the development of its [high-voltage] system with other utilities in the region," the Commission explained "AEP has not shown that the level and type of coordination it says occurred in the development of its existing high-voltage facilities is comparable to the RTO regional planning processes currently in place."¹⁹⁵ Agreeing with the Presiding Judge, PJMTOs assert that merely because many of the participants in this case, as well as the Commission, may have said that the issue of controlling Lake Erie loop flow is worthy of interregional attention does not mean that NYISO, PJM, or their stakeholders directly and financially benefit from Joint Applicants' operation of the ITC PARs, nor does it serve as evidence to support the conclusion that the facilities were the product of interregional planning efforts involving NYISO and PJM.¹⁹⁶ Also, Trial Staff argues that Joint Applicants did not approach PJM at all for interregional planning purposes and only approached NYISO about cost sharing in 2009, after the ITC PARs had been planned and the decision to replace the failed Original PAR had been unilaterally reached by ITC.¹⁹⁷ Finally, NYTOs agree with the Presiding Judge that the ITC PARs were not built as a result of coordinated interregional transmission planning and that ITC did not negotiate a cost sharing arrangement pursuant to such a plan.¹⁹⁸

102. Finally, MISOTOs argue that Joint Applicants failed to address the fact that the Presiding Judge did not rely on Opinion No. 494 and *AEP* alone in determining that the proposed cost allocation was improper. MISOTOs state that the Presiding Judge relied on a multitude of factors, including his determination that the decisions previously relied upon by Joint Applicants did not support their proposal and justified its rejection; that the

¹⁹⁴ PJM Brief opposing Exceptions at 28.

¹⁹⁵ NYISO Brief opposing Exceptions at 19 (citing *AEP I*, 122 FERC ¶ 61,083 at P 98).

¹⁹⁶ PJMTOs Brief opposing Exceptions at 16.

¹⁹⁷ Trial Staff Brief opposing Exceptions at 21.

¹⁹⁸ NYTOs Brief opposing Exceptions at 23.

allocation of costs is inconsistent with MTEP06, and MISO's determination that the costs were appropriately allocated to the ITC zone alone; and that neither NYISO nor PJM participated in the planning or MTEP process for the Original PARs or ITC PARs.¹⁹⁹

iv. Commission Determination

a. Lack of Regional Planning Process

103. With respect to whether the ITC PARs are the result of joint transmission planning so as to warrant regional cost allocation, as the Commission held in *AEP* and Opinion No. 494, cost allocations must be shown to be just, reasonable, and not unduly discriminatory or preferential, as well as consistent with the principles of cost causation. Opinion No. 494 and *AEP* provide guidance on how joint planning efforts can help make this demonstration.

104. Engaging in a joint planning process helps ensure that costs are being allocated to those who benefit or incur costs and that the projects are necessary to meet reliability and economic needs within a region or across regions.²⁰⁰ We disagree with Joint Applicants that the development of the ITC PARs resulted from a meaningful joint planning effort. As the Presiding Judge correctly recognized, merely acknowledging that an issue is worthy of interregional attention does not mean that the ITC PARs were a product of planning efforts involving NYISO or PJM. Further, Joint Applicants do not show that the level and type of coordination Joint Applicants claim occurred between NYISO, PJM, and Joint Applicants in the development of the ITC PARs were comparable to regional planning processes. Although Joint Applicants argue that the ITC PARs were included in the MTEP06 planning process, MISO concedes that NYISO was not invited to participate in the MTEP06 and did not do so.²⁰¹ Similarly, PJM argues that it was not given the opportunity to participate in the MTEP06.²⁰² Thus, neither NYISO nor PJM participated in the planning decision processes for either the Original PAR or the ITC PARs.²⁰³ This

¹⁹⁹ MISOTOs Brief opposing Exceptions at 15 (citing Initial Decision, 141 FERC ¶ 63,021 at PP 378, 394-400, 451-453, 572-574, 622-623).

²⁰⁰ Opinion No. 494, 119 FERC ¶ 61,063 at P 44; *AEP I*, 122 FERC ¶ 61,083 at P 96.

²⁰¹ NYTOs Initial Br. at 14 (citing Ex. NYT-9, Ex. NYT-10 at 1, Ex. NYI-45 at 1, and Ex. NYI-10 at 1).

²⁰² PJM Initial Br. at 31.

²⁰³ Initial Decision, 141 FERC ¶ 63,021 at P 623.

lack of a meaningful, inclusive planning process is important to consider when evaluating whether the cost allocation proposal for the ITC PARs properly assigns costs to NYISO and PJM. While Opinion No. 494 and *AEP* did not mandate that a joint planning effort precede a regional cost allocation, we find that the lack of a joint planning effort is an important factor for the Commission to consider in this proceeding.

b. Lack of Benefits to NYISO and PJM by Operation of ITC PARs

i. Presiding Judge's Findings

105. The Presiding Judge found that Joint Applicants failed to show that NYISO or PJM will be benefited by the operation of the ITC PARs.²⁰⁴ First, the Presiding Judge found that Joint Applicants failed to produce any credible benefits analysis to support the proposed cost allocation.²⁰⁵ The Presiding Judge found that the study performed on NYISO's behalf by Dr. David Patton estimating that, between October 2008 and November 2009 "loop flow had caused a total of approximately \$430 million in pricing inefficiencies in the four control areas around Lake Erie," is inaccurately portrayed by Joint Applicants, because the purpose of the study was not to estimate the impact of unscheduled power flows on congestion costs, but to determine the potential benefits that improved scheduling and coordinated congestion management could provide.²⁰⁶

106. The Presiding Judge found that the three studies cited by Joint Applicants in which PJM had some participation took place in 2007, 2008, and 2009, after the installation of the ITC PARs had been approved and included in the MTEP06 and after ITC had already committed to pay for the ITC PARs on its own. The Presiding Judge found that Joint Applicants did not demonstrate that those three studies are relevant for cost allocation purposes.²⁰⁷

107. The Presiding Judge found that although Joint Applicants contend that Lake Erie loop flow changes direction frequently, none of the studies cited provide any guidance on expected loop flow direction in the future; moreover, each predates NYISO's tariff

²⁰⁴ *Id.* PP 732-749.

²⁰⁵ *Id.* P 732.

²⁰⁶ *Id.* P 733.

²⁰⁷ *Id.* P 735.

revisions prohibiting the scheduling of circuitous transactions from NYISO across the Michigan-Ontario interface, which stemmed much of the counterclockwise loop flows.²⁰⁸

108. Second, in addition to not producing a credible benefits analysis, the Presiding Judge found that Joint Applicants have failed to prove that benefits accrue to NYISO or PJM from the ITC PARs to justify the proposed cost allocation.²⁰⁹ In this regard, the Presiding Judge found that Joint Applicants have failed to show that the ITC PARs provide reliability benefits to New York or PJM. The Presiding Judge explained that NYISO is correct in pointing out that when challenged on the benefits analysis, Joint Applicants switched theories and claimed the ITC PARs were instead a reliability project for which cost causation, not beneficiary pays, principles apply. The Presiding Judge also found that Joint Applicants' assertion that the ITC PARs provide reliability benefits is flawed because (1) when MISO included the ITC PARs in MTEP06, MISO rejected the notion that the ITC PARs were a reliability project; (2) Joint Applicants conceded they have not performed any studies of reliability impacts of the ITC PARs; (3) Joint Applicants have not produced any evidence that NYISO or PJM contributed to the decision to construct the ITC PARs; and (4) the overwhelming weight of the evidence shows the costs were incurred to avoid curtailment of scheduled economic energy imports to Michigan from Ontario.²¹⁰

109. The Presiding Judge found that the following scenarios, pointed out by NYTOs, in which the New York transmission system could be harmed bear note. First, if the Michigan-Ontario PARs are operated to reduce counterclockwise loop flows, constraints on the New York transmission system could develop. Second, if the Michigan-Ontario PARs are not successfully operated to conform actual power flows to scheduled power flows, but are still declared to be "regulating" for purposes of the North American Electric Reliability Corporation Interchange Distribution Calculator, New York may not be able to use Transmission Loading Relief to obtain relief from the unscheduled Lake Erie loop flows. Third, New York may also be harmed if MISO and IESO do not accurately anticipate power flows and move the Michigan-Ontario PARs in a direction that exacerbates unscheduled flows, or if the Michigan-Ontario PARs are operated in a manner that regularly causes unscheduled power flows over the New York transmission system. The Presiding Judge found that that these concerns, coupled with Joint Applicants' failure to put forth credible, persuasive evidence concerning future flows,

²⁰⁸ *Id.* P 737.

²⁰⁹ *Id.* P 740.

²¹⁰ *Id.* P 742.

caused him to accept NYTOs' scenarios of unintended future harms as credible threats to NYISO's system.²¹¹

110. The Presiding Judge also found that PJM derives no benefit from the ITC PARs, but is harmed by the flow-to-schedule operation of them. The Presiding Judge found that PJM would have incurred an annual harm of \$11.4 million in 2010 and \$16 million in 2011 had the ITC PARs been so operating.²¹² The Presiding Judge found that the ITC PARs would reduce costly redispatch that would be required under market-to-market coordination between PJM and NYISO. Additionally, the Presiding Judge found that contrary to ITC witness Shavel's testimony that PJM would benefit from the operation of the ITC PARs, there would likely be no costs to PJM at all from NYISO, and that under the recently accepted market-to-market coordination process between PJM and NYISO, each RTO is granted a "firm flow entitlement" on monitored flowgates, meaning PJM would be able to place loop flows on NYISO's system similar to those it has placed in the past, without having to redispatch.²¹³ Therefore, the Presiding Judge found that Joint Applicants have failed to produce evidence to prove NYISO and PJM will benefit from operation of the ITC PARs.²¹⁴

ii. Joint Applicants' Briefs on Exceptions

111. Joint Applicants assert that one of the most important factual issues is the extent to which NYISO and PJM benefit from the physical control of loop flows provided by the ITC PARs and that the Presiding Judge improperly found that NYISO and PJM will not derive sufficient benefits from ITC's PARs to justify the proposed cost allocation to them.²¹⁵ Joint Applicants argue that the Presiding Judge failed to properly consider the numerous prior reports and regulatory filings in which, prior to the filing of this cost allocation proposal, both NYISO and PJM recounted the numerous problems caused on their systems by Lake Erie loop flow and endorsed the installation and activation of the ITC PARs to help control loop flow. Joint Applicants contend that Joint Applicants' 2007 and 2008 loop flow studies, NYISO's filings at the Department of Energy in the

²¹¹ *Id.* P 744.

²¹² *Id.* P 745. "Flow to schedule operation" refers to MISO's assertion that the PARs were being operated to hold actual flow to scheduled flow. See Ex. MSO-3 (Rebuttal Testimony of Mr. Mallinger) at 8:11-12.

²¹³ *Id.* PP 746-747.

²¹⁴ *Id.* P 749.

²¹⁵ Joint Applicants Brief on Exceptions at 5, 26.

PARs Presidential Permit proceeding, and NYISO's filings at the Commission in Docket No. ER08-1281 emphasized the need for and importance of the ITC PARs for helping to control loop flow.²¹⁶ Joint Applicants argue that these prior statements by NYISO and PJM add up to an admission that NYISO and PJM will benefit substantially from the physical control of loop flow that the ITC PARs would provide.²¹⁷ Joint Applicants also contend that the Presiding Judge improperly disregarded the testimony of ITC's witness Shavel and MISO's witness Mallinger confirming that loop flow-related problems would necessarily be eliminated or ameliorated by physical loop flow control.²¹⁸

112. Joint Applicants argue that the record contains evidence of the costs that uncontrolled loop flow can impose on NYISO and PJM. Joint Applicants contend that, among other things, on August 16, 2010, NYISO filed a study with the Commission in Docket No. ER08-1281, which was prepared by NYISO's independent market advisor Dr. David Patton, estimating that loop flow had caused a total of \$430 million in pricing inefficiencies in the four control areas around Lake Erie between November 2008 and October 2009, including approximately \$140 million in NYISO and \$70 million in PJM. Joint Applicants assert that NYISO's witness Pike initially confirmed that the \$430 million figure represented "the cost of congestion" caused by loop flow during that period, but later argued that to determine congestion costs, the forward and reverse loop flows should be netted, which would substantially decrease the congestion costs. Joint Applicants also argue that even if the netting argument is accepted, which it should not be, the remaining costs to NYISO and PJM of \$18 million and \$4 million, respectively, still exceed the ITC PARs costs proposed for allocation. Additionally, Joint Applicants contend that although the Presiding Judge stated that the purpose of the Patton study was to estimate the benefits of improved scheduling and coordination and not to estimate congestion costs, the Presiding Judge ignored that the Patton study states that the first step in estimating the value of coordinated scheduling is to estimate pricing inefficiencies caused by loop flow.²¹⁹

²¹⁶ *Id.* at 33.

²¹⁷ *Id.* at 34.

²¹⁸ *Id.* at 34-35.

²¹⁹ *Id.* at 36 (citing Initial Decision, 141 FERC ¶ 63,021 at P 733).

iii. Briefs Opposing Exceptions

113. PJMTOs, PJM, NYTOs, NYISO, and Trial Staff argue that the Presiding Judge correctly found that Joint Applicants failed to show that NYISO or PJM will be benefited by the operation of the ITC PARs.²²⁰

114. PJMTOs assert that the Presiding Judge correctly found that the Joint Applicants failed to make a sufficient showing that the ITC PARs will benefit NYISO and PJM such that the costs associated with the PARs should be allocated to NYISO and PJM. PJMTOs argue that rather than make such a showing, Joint Applicants instead claim that “it is self-evident that the physical elimination or reduction of loop flow that the PARs will provide will similarly eliminate or reduce” the problems caused by loop flows. PJMTOs contend that Joint Applicants point to historical problems caused by loop flows, but fail to present any evidence of the benefits to PJM that would result from the termination of loop flows. PJMTOs continue that although Joint Applicants propose to allocate 23.8 percent of the costs of the ITC PARs to PJM, Joint Applicants have not demonstrated that PJM or the PJMTOs receive any benefits at all from installation and operation of the ITC PARs. Additionally, PJMTOs argue that Joint Applicants have neither evaluated the economic impacts of the planned operation of the ITC PARs, nor assessed or determined the physical or economic impacts of the ITC PARs on PJM’s transmission system.²²¹ PJMTOs also contend that the possibility that MISO may benefit from the elimination of loop flows on its system does not constitute a benefit to PJM and PJMTOs.²²²

115. PJM argues that Joint Applicants presented no evidence quantifying any benefit to PJM and that neither MISO nor ITC ever evaluated the economic impacts produced by the planned operation of the ITC PARs. PJM contends that as to the impacts on PJM, the record contains only PJM witness Bresler’s study of the impact of the ITC PARs, and that study shows that PJM will be harmed, not benefited, by the flow-to-schedule operation of the ITC PARs,²²³ which would cost its market participants millions of dollars

²²⁰ See, e.g., PJMTOs Brief Opposing Exceptions at 26-28; PJM Brief Opposing Exceptions at 49-60; NYTOs Brief Opposing Exceptions at 33-35; NYISO Brief Opposing Exceptions at 51-59; Trial Staff Brief on Exceptions at 41-44.

²²¹ PJMTOs Brief Opposing Exceptions at 26-27.

²²² *Id.* at 28.

²²³ PJM Brief Opposing Exceptions at 50.

annually.²²⁴ Against this, PJM argues that Joint Applicants provided only generalized statements that the surrounding areas would benefit.

116. PJM asserts that the various studies upon which Joint Applicants rely do not provide a basis for cost allocation to PJM. PJM argues that Joint Applicants failed to perform any studies of their own demonstrating an identified need for the ITC PARs, the harmful flows that give rise to that need, the system conditions under which that need arises, or that the ITC PARs would provide any benefit to others.²²⁵ PJM continues that the studies upon which Joint Applicants primarily rely were produced by NYISO or its consultants and that PJM was never approached about sharing costs for the ITC PARs until Joint Applicants submitted the instant cost allocation proposal. PJM argues that Joint Applicant's reliance on NYISO's filing with the Commission cannot support a cost allocation to PJM because the filing and associated Patton study is the product of NYISO. PJM contends that the three regional studies cited by Joint Applicants in which PJM had some participation took place in 2007, 2008, and 2010, which occurred after the installation of the ITC PARs had been approved and included in the MTEP06 and after ITC already undertook to pay for the ITC PARs on its own.²²⁶ PJM argues that any PJM statements in these reports were in the context only of indicating lack of opposition to Joint Applicant's installation of already planned and approved projects and have no bearing on cost allocation.

117. NYTOs argue that Joint Applicants failed to show that the ITC PARs enhance service reliability and have not provided a credible measurement of the benefits associated with that service.²²⁷ NYTOs contend the record shows that the only reliability benefit the ITC PARs provide is the reduction of thermal overloads on the ITC system, further asserting that the Presiding Judge correctly found that "Joint Applicants have failed to show that the ITC PARs provide reliability benefits to New York or PJM."²²⁸ NYTOs argue that Joint Applicants fail to cite record evidence to contradict the Presiding Judge's findings and failed to show that NYISO or PJM "caused" ITC to install the ITC PARs as they now contend. NYTOs also argue that with no credible reliability theory to support Joint Applicants' inter-regional cost allocation plan, the only alternative cost

²²⁴ *Id.* at 51-53.

²²⁵ *Id.* at 53-56.

²²⁶ *Id.* at 55.

²²⁷ NYTOs Brief Opposing Exceptions at 33.

²²⁸ *Id.* at 33-34 (citing Initial Decision, 141 FERC ¶ 63,021 at P 742).

allocation theory is based on the beneficiary pays approach, which Joint Applicants contend is not their theory either.²²⁹

118. NYISO asserts that Joint Applicants have not performed, and did not submit, any studies that quantify the expected benefits to NYISO and its customers from the operation of the ITC PARs, and the data that NYISO submitted in Exhibit NYI-66 proves that the ITC PARs have not controlled Lake Erie loop flow in the manner Joint Applicants claimed the ITC PARs would.²³⁰ NYISO argues that MISO witness Chatterjee admitted that MISO did not perform a study of the “benefits” of the ITC PARs to NYISO or PJM and that ITC admitted that it did not create any documents relating to the economic or reliability benefits of the ITC PARs. Additionally, NYISO contends that MISO and ITC stated that they did not perform assessments of studies to identify specific reliability criteria that are potentially violated by Lake Erie loop flow.²³¹

119. NYISO argues that its statement indicating support for the construction and operation of the ITC PARs were all made before the ITC PARs entered service and were premised on untested MISO and ITC claims regarding loop flow control capabilities of the ITC PARs.²³² NYISO contends that because all of these documents were produced before the ITC PARs entered service, it was not possible for NYISO to know how effective the collective operation of the ITC PARs would be, or what impact the operation of those facilities would have on the New York Control Area.²³³

120. NYISO argues that Joint Applicants offered testimony from MISO witness Mallinger and ITC witness Shavel that identified areas in which generalized benefits, such as reductions in transmission congestion and system losses, might occur if the ITC PARs operate perfectly at all times, to the limits of their purported control capability. NYISO contends that the Mallinger and Shavel testimonies did not address or attempt to discount their claimed benefits to reflect any trade-offs that occur between and among the Independent System Operators (ISOs) and RTOs that surround Lake Erie. NYISO notes that, for example, a reduction in counterclockwise Lake Erie loop flow that might benefit MISO could, simultaneously, harm NYISO, assuming both transmission systems are

²²⁹ *Id.* at 34-35.

²³⁰ NYISO Brief Opposing Exceptions at 52.

²³¹ *Id.* at 53.

²³² *Id.*

²³³ *Id.* at 54.

experiencing congestion on transmission facilities that are impacted by Lake Erie loop flow at the same time.²³⁴

121. NYISO argues that Joint Applicants did not submit any evidence supporting their claim that the ITC PARs will control 600 MW of Lake Erie loop flow nearly 100 percent of the time. Additionally, NYISO asserts that Exhibit NYI-66 demonstrates that the ITC PARs did not effectively conform actual power flows to scheduled power flows during the first 104 days of operation (from April 5 to July 18, 2012), and that the ITC PARs were frequently a cause of additional Lake Erie loop flow during that time period.²³⁵ NYISO also argues that Joint Applicants assert that the Patton study, which was performed for NYISO, estimated that between October 2008 and November 2009, “loop flow had caused a total of \$430 million in pricing inefficiencies in the four control areas around Lake Erie.” However, as NYISO witness Pike explained, the “\$430 million is not a cost incurred by the ISOs and RTOs around Lake Erie” but rather it “is an estimate of the total gross value of the over-priced and under-priced loop flow for the specific period . . . without regard to whether the loop flow was increasing or decreasing congestion costs or whether that loop flow was circulating around Lake Erie, or not.”²³⁶ Additionally, NYISO argues that the Patton study suggests that there may be times when NYISO, PJM, MISO, and IESO can better coordinate interregional transaction scheduling and dispatch to increase economic efficiency by taking advantage of beneficial loop flows, and that operating the ITC PARs on a strict flow-to-schedule basis could actually prevent these potential benefits of interregional coordination from being realized.²³⁷ NYISO contends that because the direction and magnitude of loop flow can vary significantly from hour-to-hour, day-to-day, year-to-year, a one year snapshot like the Patton study does not present a valid basis for reaching any conclusions about the expected long-term impact of loop flow on congestion costs.²³⁸

122. Trial Staff argues that Joint Applicants have presented no evidence that NYISO or PJM will enjoy “substantial benefits” from the presence of the ITC PARs.²³⁹ With regard to Joint Applicants’ contention that the Presiding Judge ignored the numerous reports and

²³⁴ *Id.*

²³⁵ *Id.* at 55-56.

²³⁶ *Id.* at 56.

²³⁷ *Id.* at 57.

²³⁸ *Id.* at 58-59.

²³⁹ Trial Staff Brief Opposing Exceptions at 41.

regulatory filings in which NYISO and PJM recounted the problems caused by Lake Erie loop flow on their systems and endorsed the prompt installation of the ITC PARs to help control loop flow, Trial Staff asserts that Joint Applicants mischaracterize this issue. Trial Staff argues that the Presiding Judge did consider three studies produced by Joint Applicants as evidence that PJM and NYISO will receive benefits from the operation of the PARs. However, Trial Staff states that the Presiding Judge found the studies irrelevant to the issue of cost allocation because they were undertaken in 2007, 2008, and 2009, after the decision to install and pay for the PARs had been made by ITC and after the installation had been approved in MTEP06.²⁴⁰

123. Trial Staff notes Joint Applicants' contention that the Patton study concluded that Lake Erie loop flow caused a total of \$430 million in pricing inefficiencies in the control areas around Lake Erie, and that this conclusion translates into an acknowledgement by PJM and NYISO that they will benefit from the elimination of those flows by a similar magnitude. However, Trial Staff argues that the Presiding Judge considered the study and found that the purpose of the study "was not to estimate the impact of unscheduled power flows on congestion costs, but to determine the potential benefits that improved scheduling and coordinated congestion management could provide."²⁴¹

124. Trial Staff points out that Joint Applicants do not address the Presiding Judge's findings that the cited reports are irrelevant or mischaracterized. Instead, Trial Staff states that Joint Applicants continue to present them as evidence of benefits that accrue to PJM and NYISO by virtue of the operation of the ITC PARs. Additionally, Trial Staff notes that Joint Applicants do not address the Presiding Judge's observation that on rebuttal, MISO witness Chatterjee claimed, "because the Joint Applicants view the PARs as a reliability project, their cost allocation is not based on a beneficiary pays theory." Trial Staff states that the Presiding Judge found that this testimony is inconsistent with the MTEP06, in which "MISO rejected the notion that the ITC PARs were a reliability project."²⁴²

²⁴⁰ *Id.* at 42-43.

²⁴¹ *Id.* at 43-44 (citing Initial Decision, 141 FERC ¶ 63,021 at P 733).

²⁴² *Id.* at 44 (citing Initial Decision, 141 FERC ¶ 63,021 at P 742).

iv. **Commission Determination**

a. **Lack of Benefits to NYISO and PJM by Operation of ITC PARs**

125. With respect to whether, notwithstanding the lack of joint planning, there is sufficient evidence in this record to conclude that Joint Applicants' proposed cost allocation is just and reasonable, based on the factual record in the Initial Decision, we affirm aspects of the Presiding Judge's finding that Joint Applicants failed to show that NYISO or PJM will benefit from the operation of the ITC PARs. Moreover, to the extent that Joint Applicants may have demonstrated some benefit to NYISO or PJM from the operation of the ITC PARs, we find that any such benefit does not outweigh the considerations discussed above that counsel against Joint Applicants' proposal. Therefore, we find that the proposed cost allocation has not been shown to be just and reasonable.²⁴³

126. First, we find that the Presiding Judge properly found that Joint Applicants failed to produce any credible benefits analysis to support the proposed cost allocation and failed to prove that benefits accrue to NYISO or PJM from the ITC PARs to justify the proposed cost allocation.²⁴⁴ We agree that Joint Applicants failed to show that the ITC PARs provide reliability benefits to NYISO or PJM and that – as NYISO witness Pike, NYTOs, and PJM witness Bresler provide – NYISO and PJM may actually be harmed by the planned operation of the ITC PARs.²⁴⁵ For example, a reduction in counterclockwise loop flow that may benefit MISO might, at the same time, harm NYISO if both transmission systems are experiencing congestion on transmission facilities that are affected by loop flow. Additionally, we find unconvincing the testimony of ITC witness Shavel and MISO witness Mallinger stating that PJM and NYISO will benefit from the ITC PARs because general benefits, such as reductions in transmission congestion and system losses, might occur if the ITC PARs operate perfectly at all times. We note that these testimonies do not address any trade-offs that might occur between and among the ISOs and RTOs that surround Lake Erie.²⁴⁶

²⁴³ See Initial Decision, 141 FERC ¶ 63,021 at P 723.

²⁴⁴ See *id.* PP 732, 740

²⁴⁵ See *id.* PP 742-744.

²⁴⁶ See *id.* PP 756-747.

127. Second, we find that the Presiding Judge properly considered the numerous reports and regulatory filings in which NYISO and PJM acknowledged that they would benefit from the ITC PARs. The Presiding Judge found that the 2007, 2008, and 2009 studies cited by Joint Applicants, in which PJM participated, were conducted after the installation of the ITC PARs had been approved and included in the MTEP06 after ITC had already committed to pay for the ITC PARs on its own. We find that NYISO's and PJM's statements in these reports and regulatory filings were premised on untested MISO and ITC claims regarding loop flow control capabilities and made without full knowledge of the operational instructions for the ITC PARs. Accordingly, Joint Applicants' reliance on these statements as a credible benefits analysis for its proposed cost allocation is insufficient.

128. Third, we find that the Presiding Judge properly accorded weight to the Patton study, which estimated that between October 2008 and November 2009, loop flow had caused approximately \$430 million in pricing inefficiencies and that this cost was not incurred by the ISOs and RTOs around Lake Erie. We agree that the purpose of the study was not to estimate the impact of unscheduled power flows on congestion costs but rather to determine the potential benefits that improved scheduling and coordinated congestion management could provide.²⁴⁷ Additionally, as NYISO explains, the study suggests that there may be times when NYISO, PJM, MISO, and IESO can better coordinate interregional transaction scheduling and dispatch to increase economic efficiency by taking advantage of beneficial loop flows, and operating the ITC PARs on a strict flow-to-schedule basis could actually prevent this potential interregional coordination from being realized. Moreover, the estimated cost of congestion calculated in the study was an intermediate step in the process of determining potential production cost savings that could be achieved by implementing an identified set of market improvements.²⁴⁸

129. Moreover, with respect to the Joint Applicants' May 23, 2013 motion to lodge slide 12 of a 2012 State of the Markets Report issued by the Commission's Office of Enforcement,²⁴⁹ Slide 12 merely demonstrates that ITC has benefitted by "congestion costs in Michigan [that] are lower with fewer binding constraints and the interchange capacity across the Michigan-Ontario interface has been boosted." However, Slide 12 does not analyze the degree to which NYISO and PJM benefit, if at all, from the ITC

²⁴⁷ See *id.* P 732.

²⁴⁸ See NYISO Brief Opposing Exceptions at 57.

²⁴⁹ See *supra* P 22.

PARs. Thus, slide 12 is not dispositive on the issue of benefits to NYISO and PJM, and we deny the motion to lodge.²⁵⁰

130. Similarly, with respect to the Joint Applicants' April 7, 2014 motion to lodge a performance study and related report, which we deny above, the documents do not help Joint Applicants support the proposed cost allocation. The performance study and related report show that the ITC PARs, "in conjunction with controls already operational elsewhere on the system," have helped to limit the flows over the Michigan-Ontario. But, the study was performed to address a Joint and Common Market initiative to evaluate the ability of the ITC PARs to have actual flow equal scheduled flow. In fact, the study and related report note that the study should be considered "a limited scope study that addressed a specific [Joint and Common Market] Initiative." Similar to the studies submitted by the Joint Applicants during the proceeding, as discussed above, this study and related report do not produce any credible benefits analysis to support the proposed cost allocation and failed to demonstrate that NYISO, PJM accrue benefits from the ITC PARs. While it shows Lake Erie flow is decreased, during the hearing it was shown that a reduction in counterclockwise loop flow that may benefit MISO might, at the same time, harm NYISO if both transmission systems are experiencing congestion on transmission facilities that are affected by loop flow.²⁵¹ Thus, the performance study and related report are not dispositive on the issue of benefits to NYISO and PJM, and we deny the motion to lodge.

131. Therefore, for the reasons discussed above, Joint Applicants' proposed cost allocation has not been shown to be just and reasonable. Accordingly, we reject it.

132. Pursuant to our determination in this order, within 30 days of the date of this order, Joint Applicants are required to submit a compliance filing making any necessary changes to the Tariff. In addition, Joint Applicants shall refund all amounts collected pursuant to their October 20, 2010 filing in excess of rates in effect prior to January 1, 2011, with interest at the rate prescribed by section 35.19a of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 35.19a (2016), and then file with the Commission a refund report, within thirty (30) and sixty (60) days, respectively, of the date of the issuance of this order, unless there is a timely request for rehearing in these dockets. In

²⁵⁰ See, e.g., *California Indep. Sys. Operator Corp.*, 137 FERC ¶ 61,062, at P 13 (2011) (denying motion to lodge where the proffered document did not assist in the Commission's decision-making); *Maritimes & Northeast Pipeline, L.L.C.*, 93 FERC ¶ 61,117, at 61,339 (2000) (the Commission granted the motion to lodge but held that it was not persuaded that the information contained therein was dispositive on the issue).

²⁵¹ See Initial Decision, 141 FERC ¶ 63,021 at PP 742-744.

that event, the refunds and refund report must be submitted within thirty (30) and sixty (60) days, respectively, of the Commission's final disposition of any such rehearing request.

5. Remaining Issues

133. In their Brief on Exceptions, Joint Applicants argue that the Presiding Judge erroneously found that Joint Applicants failed to comply with the Commission's regulations by not providing cost of service data.²⁵² In view of our determination that the proposed cost allocation has not been shown to be just and reasonable, we find that this issue is moot and we need not address it.

134. Joint Applicants also argue that the Presiding Judge erroneously found that the proposed allocation of ITC PARs costs to PJM is precluded by the JOA. In view of our determination that the proposed cost allocation has not been shown to be just and reasonable, we find that this issue is moot and we need not address it.

135. Joint Applicants also argue that the Presiding Judge erroneously found that Joint Applicants failed to show that the benefits of the ITC PARs were roughly commensurate with the proposed costs to be allocated.²⁵³ Concerning the ITC PARs cost allocation proposal, Joint Applicants argue that the Presiding Judge's findings of fact were erroneously found.²⁵⁴ In view of our determination that the proposed cost allocation has not been shown to be just and reasonable, we find that the issues of fact regarding the contributions to loop flow, the DFAX study, whether the filing creates a service obligation of MISO and ITC to NYISO or PJM or their customers, whether the ITC PARs will control Lake Erie loop flow, and the impact of MISO's January 2012 testimony on PJM's cost responsibility to MISO (see Issues 6–10 in the Appendix) are moot and we need not address them.

136. Finally, Joint Applicants argue that the Presiding Judge erroneously found that Joint Applicants failed to satisfy the elements of the judicial estoppel doctrine raised against NYISO's challenge of the efficacy of the ITC PARs. In its Initial Brief, NYISO argued that the PARs, including the ITC PARs, will experience outages. According to NYISO, Joint Applicants' failure to address the possibility of such outages in the proposed tariff revisions was one of many reasons that their proposed charge to the

²⁵² See *id.* PP 667-668. This issue is subsumed within Issue 4.

²⁵³ See Appendix, Issue 5.

²⁵⁴ See Appendix, Issues 6-10.

NYISO's customers was unjust and unreasonable.²⁵⁵ To support its argument, NYISO reviewed the outage history of the PARs between Ontario and Michigan and stated that "the history of [these] PARs indicates that they are prone to failure."²⁵⁶

137. In their Initial Brief, Joint Applicants argue that NYISO is estopped from challenging the efficacy of the PARs because NYISO's position is inconsistent and irreconcilable with the position it took regarding the PARs both before the Commission in Docket No. ER08-1281-000²⁵⁷ and before the Department of Energy in the ITC Presidential Permit proceeding.²⁵⁸ Joint Applicants contend that NYISO violated the doctrine of judicial estoppel by deliberately changing positions "according to the exigencies of the moment."²⁵⁹ According to Joint Applicants, NYISO touted the capability of the PARs and their benefits in the exigent circumstances proceeding and filed two sets of comments in support of the PARs in the Presidential Permit proceeding at the Department of Energy, never suggesting the PARs would not work as proposed.²⁶⁰

138. The Presiding Judge found that Joint Applicants failed to allege, or convincingly prove, both that they relied on NYISO's prior testimony in the exigent circumstances or Presidential Permit proceedings and changed their position in this proceeding as a result of that reliance. Further, the Presiding Judge found that in none of the statements cited by Joint Applicants from those proceedings did NYISO take a position on the justness and reasonableness of recovering the costs of the ITC PARs through rates charged to NYISO and PJM customers or on the effectiveness of the ITC PARs.²⁶¹

²⁵⁵ NYISO Initial Br. at 150-153.

²⁵⁶ *Id.* at 150.

²⁵⁷ The Commission required NYISO to submit status reports addressing its progress in developing long-term, comprehensive solutions to the occurrence of the Lake Erie region loop flows. *See N.Y. Indep. Sys. Operator, Inc.*, 128 FERC ¶ 61,049.

²⁵⁸ Joint Applicants Initial Br. at 22-28, 33.

²⁵⁹ *Id.* at 39 (citing *Mo. Interstate Gas, LLC*, 122 FERC ¶ 61,136, at P 29 (2008), *vacated sub nom. Mo. Pub. Serv. Comm'n v. FERC*, 601 F.3d 581 (D.C. Cir. 2010) and *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (quoting *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993))).

²⁶⁰ *Id.* at 39-40 (citing Ex. ITC-3 at 10-11 and the attached July 21, 2008, exigent circumstances filing at 4 n.11, 7 n.30, 26-27, Ex. ITC-26 at 7-8, Ex. ITC-23 at 17, Ex. ITC-14 at 4, and Ex. MSO-7).

²⁶¹ Initial Decision, 141 FERC ¶ 63,021 at PP 892-893.

139. In their Brief on Exceptions, Joint Applicants argue that the Presiding Judge erroneously found that the doctrine of judicial estoppel does not apply to the facts of this case. Joint Applicants argue that the Presiding Judge failed to address NYISO's attack of the PARs operating plan and instead focused on NYISO's claim that the PARs are prone to failure. Joint Applicants contend that there could not be more inconsistency than that between NYISO's "specific, unconditional support for the operating plan before [the Department of Energy] and its attack on the plan as discriminatory in this case."²⁶² Further, Joint Applicants argue that the Initial Decision failed to recognize that the essence of the judicial estoppel doctrine is whether a party has taken a position on an issue in one case and thereby gained a benefit, and then sought to take a contrary position on the same issue in a subsequent case to "fit the exigencies of the moment" and gain another separate advantage.²⁶³

140. The Commission has said "the doctrine of judicial estoppel applies only where, as a result of prior testimony, parties have relied upon that testimony and changed positions by reason of that testimony."²⁶⁴ At no point in Joint Applicants' Brief on Exceptions do they argue that they relied upon NYISO's prior testimony made in the exigent circumstances and the Department of Energy Presidential Permit proceedings. Further, Joint Applicants never argue that they changed positions by reason of NYISO's testimony. Thus, Joint Applicants have failed to make the required allegations under the doctrine of judicial estoppel. Accordingly, we affirm the Initial Decision on this issue.

141. In view of our determinations on the Initial Decision herein, we will dismiss the requests for rehearing as moot.

The Commission orders:

(A) The Initial Decision is hereby affirmed in part, and reversed in part, and the remaining determinations of the Presiding Judge are dismissed as moot, as discussed in the body of this order.

(B) Joint Applicants are hereby directed to submit a compliance filing to revise the MISO Tariff within 30 days of the date of this order, as discussed in the body of this order.

²⁶² Joint Applicants Brief at 24-25.

²⁶³ *Id.* at 25 (referencing *New Hampshire v. Maine*, 532 U.S. 742 (2001)).

²⁶⁴ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 115 FERC ¶ 61,230, at P 33 n.59 (2006).

(C) Joint Applicants are hereby ordered to make refunds of all amounts collected pursuant to their October 20, 2010 filing in excess of rates in effect prior to January 1, 2011, with interest at the rate prescribed by section 35.19a of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 35.19a (2016), and then to file with the Commission a refund report, within thirty (30) and sixty (60) days, respectively, of the date of the issuance of this order, unless there is a timely request for rehearing in these dockets. In that event, the refunds and refund report must be submitted within thirty (30) and sixty (60) days, respectively, of the Commission's final disposition of any such rehearing request.

(D) Joint Applicants' motions to lodge are hereby denied, as discussed in the body of this order.

(E) Joint Applicants' motion to strike is hereby dismissed as moot, as discussed in the body of this order.

(F) The requests for rehearing of the Hearing Order are hereby dismissed as moot, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

APPENDIXIssues Addressed by the Initial Decision

ISSUE 1: Whether the FPA and applicable Commission policies thereunder permit MISO and ITC to make, and the Commission to approve, the October 20, 2010 filing (as amended on January 31, 2012)?

ISSUE 2: Whether the JOA between MISO and PJM precludes allocation of costs associated with the ITC PARs to PJM?

ISSUE 3: Whether there are any other customer or contractual relationships or interregional plans, or lack thereof, that are relevant to the proposed cost allocation?

ISSUE 4: Whether the allocation of the costs of the ITC PARs to NYISO and PJM, and the level of such allocations, is just, reasonable, and not unduly discriminatory or preferential under the FPA and the applicable Commission policies, orders, and precedent thereunder (including but not limited to the policies, if applicable, contained in Order No. 1000)?

ISSUE 5: Whether any allocation of costs of the ITC PARs to NYISO and PJM and their customers (or others) is appropriate based on cost causation/incurrence and/or beneficiary pays principles or on other considerations and, if so, is the proposed cost allocation roughly commensurate with: (a) the extent to which NYISO and PJM and their customers (or MISO, IESO, or others) caused ITC to incur the costs of the installation and operation of the ITC PARs (and, to the extent relevant, the reasons for which Detroit Edison/ITC incurred costs for installation of the Original PAR); and/or (b) the extent to which NYISO and PJM and their customers (or MISO, IESO, or others) will benefit from (or be harmed by) the installation and operation of the ITC PARs?

ISSUE 6: What is the extent of the contributions to loop flows of MISO, IESO, NYISO, PJM, and others, and do they represent a basis for MISO/ITC to allocate the costs of the ITC PARs to PJM and NYISO?

ISSUE 7: Whether Joint Applicants' DFAX study provides an adequate basis for the proposed cost allocation?

ISSUE 8: Whether the filing creates a service obligation of MISO and ITC to NYISO or PJM or their customers and, if so, what is the nature of the obligation?

ISSUE 9: Whether and to what extent will the PARs control Lake Erie loop flow, including whether, if any of the ITC PARs (or the Hydro One PARs) are unavailable, bypassed, or not being operated in a manner that is consistent with the Presidential Permit

issued to ITC by the Department of Energy, NYISO, PJM, or their customers nonetheless should be required to pay the charges at issue in this proceeding?

ISSUE 10: Whether, if the costs of the ITC PARs are allocated to PJM, the cost responsibility assigned to PJM by MISO's January 2012 testimony, which increases PJM's allocation above the amount allocated by the MISO/ITC filing, may be imposed on PJM?

ISSUE 11: Whether, if the costs of the ITC PARs are allocated to PJM or NYISO, PJM or NYISO is responsible (respectively) for paying MISO in the case of a PJM or NYISO customer's failure to pay PARs-related charges?²⁶⁵

²⁶⁵ The Presiding Judge determined that this issue was moot in view of his finding that it was unjust and unreasonable to allocate the costs of the ITC PARs to NYISO and PJM. Accordingly, the Presiding Judge also denied Joint Applicants' December 11, 2012 motion to lodge. Initial Decision, 141 FERC ¶ 63,021 at P 923. Joint Applicants did not except to the Initial Decision on this issue.