UNITED STATES OF AMERICA 117 FERC ¶61,212
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Cabazon Wind Partners, LLC Docket Nos. EL04-137-000
EL04-137-001

v.

Southern California Edison Company

OPINION NO. 490

OPINION AND ORDER ON INITIAL DECISION AND REHEARING

(Issued November 20, 2006)

1. This proceeding is before the Commission on exceptions to an *Initial Decision*[1] that addressed whether Southern California Edison Company (SCE) properly classified certain upgrades needed to interconnect Cabazon Wind Partners, LLC's (Cabazon) wind generator to SCE's system. SCE wants to treat the upgrades as non-integrated facilities and thus directly assign the costs of them to Cabazon, rather than classifying them as upgrades to the integrated transmission network (network upgrades),[2] the costs of which

[1] *Cabazon Wind Partners, LLC v. Southern California Edison Co.*, 113 FERC ¶ 63,009 (2005) (*Initial Decision*).

[2] The Interconnection Agreement uses the term "Reliability Upgrades" rather than "Network Upgrades," as it predates *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146 (2003) (Order No. 2003), *order on reh'g*, Order No. 2003-A, 69 Fed. Reg. 15,932 (Mar. 26, 2004), FERC Stats. & Regs. ¶ 31,160 (2004) (Order No. 2003-A), *order on reh'g*, Order No. 2003-B, 70 Fed. Reg. 265 (Jan. 4, 2005), FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, 70 Fed. Reg. 37,661 (Jun. 30, 2005), FERC Stats. & Regs. ¶ 31,190 (2005) (Order No. 2003-C), *appeal docketed sub nom. National Association of Regulatory Utility Commissioners, et al. v. FERC*, Nos. 04-1148, *et al*. (D.C. Cir. argued Oct. 13, 2006). Reliability Upgrades are integrated transmission network upgrades that benefit the entire transmission system, and their costs are assigned to all transmission customers (*i.e.*, rolled in with other transmission costs). Distribution Upgrades are upgrades to non-integrated facilities, and their costs are directly assigned to the generator.

20061120-3007 Issued by FERC OSEC 11/20/2006 in Docket#: EL04-137-001

are not directly assignable to the interconnection customer. As discussed below, we affirm the *Initial Decision*'s finding that the facilities in dispute are not network facilities. We also clarify that the California Independent System Operator (CAISO) need not have operational control over facilities in order for them to be network facilities.

2. Additionally, in this order the Commission grants in part and denies in part rehearing of its order setting this case for hearing.[3] As discussed below, the Commission will grant rehearing and set for hearing whether the cost of the upgrades was excessive. We will deny all other aspects of the rehearing request.

I. Background

3. Cabazon owns a 41 MW wind generator near Palm Springs, California, and is approximately 10 miles west of Garnet and 4 miles east of Banning. In August 2002, under an amended Interconnection Facilities Agreement (Agreement),[4] the generator was interconnected to SCE through a substation at Banwind and a line tap to SCE's pre-existing Garnet-Windfarm Banning-Maraschino 115 kV Line (Garnet-Maraschino Line). The Garnet-Maraschino Line has four taps at Renwind, Transwind, Banwind, and Banning extending westward from Garnet respectively. The taps from Renwind, Transwind, and Banwind each extend to a wind power project. The segment of the Garnet-Maraschino Line from the tap at Banwind to the Banning and Maraschino substations terminates at circuit breakers that are normally open. Energy generated by Cabazon is transmitted to the transmission grid operated by the CAISO.

4. The Agreement identifies the upgrades at issue as "distribution system facilities"[5] and directly assigns the $4,509,000 cost of them to Cabazon.[6] To accommodate

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[3] *Cabazon Wind Partners, LLC v. Southern California Edison Co.*, 109 FERC ¶ 61,203 (2004) (*Hearing Order*).

[4] The Commission accepted the original Interconnection Facilities Agreement. *See Southern California Edison Co.*, Docket No. ER02-1764-000 (July 5, 2002) (unpublished letter order). The Commission also accepted the amended Agreement. *See Southern California Edison Co.*, Docket No. ER03-228-000 (January 24, 2003) (unpublished letter order).

[5] We note that the term "distribution" is often confused with "local distribution." As we explained in Order No. 2003,

> "Local distribution" is a legal term; under [Federal Power Act] section 201(b)(1)[, 16 U.S.C. § 824(b)(1) (2000)], the Commission lacks jurisdiction over local distribution facilities. "Distribution" is an unfortunately vague term, but it is usually used to refer to lower-voltage lines that are not networked and that carry power in one direction. Some

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20061120-3007 Issued by FERC OSEC 11/20/2006 in Docket#: EL04-137-001

Cabazon's interconnection, the Garnet-Maraschino Line was upgraded by replacing approximately 10.5 miles of the line with higher rated conductors between the tap at Transwind and the Garnet substation. The cost of the upgrades was approximately $5,928,000, which SCE directly assigned to Cabazon.[7]

5. Cabazon paid SCE for the upgrades, but on September 27, 2004, filed a complaint against SCE claiming that it is entitled to transmission credits or reimbursement for the cost plus tax gross-up related to the upgrades. Cabazon claimed that SCE incorrectly classified the upgraded facilities as non-integrated facilities rather than recognizing them as transmission network upgrades. Specifically, Cabazon alleged that SCE: (1) incorrectly classified the upgrades associated with Cabazon's interconnection as non-integrated facilities (2) failed to give Cabazon transmission credits or other reimbursement for money Cabazon paid up front for the upgrades; and (3) incorrectly required Cabazon to pay a tax gross-up associated with the project.

6. In the *Hearing Order*, the Commission found that Cabazon had raised issues of material fact that could not be resolved based on the record before the Commission.[8] The Commission stated that it could not determine from the pleadings whether the facilities in dispute function as part of SCE's integrated transmission network or as non-integrated facilities. We recognized that the initial classification of the facilities had been made in a 1996 Commission order in which the Commission had also stated that the classification

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> lower-voltage facilities are "local distribution" facilities not under our jurisdiction, but some are used for jurisdictional service such as carrying power to a wholesale power customer for resale and are included in a public utility's OATT (although in some instances, there is a separate OATT rate for using them, sometimes called a Wholesale Distribution Rate).

Order No. 2003 at P 803-04 (footnotes and citations omitted). Therefore, in this order we will refer to the facilities that SCE calls distribution as "non-integrated facilities."

[6] The Agreement also requires Cabazon to pay an additional $1,370,000 for a "tax gross-up" on these upgrades to indemnify SCE from any federal income tax liability that SCE might incur due to Cabazon's payment for the upgrades.

[7] Cabazon noted that the total cost of the disputed upgrades, $5,928,000, includes the following: cost of the facilities ($4,509,000); two tax gross-up payments ($736,000 and $634,000) and a one-time cost of $49,000. *Initial Decision*, 113 FERC ¶ 63,009 at P 153.

[8] *Hearing Order*, 109 FERC ¶ 61,203 at P 22.

20061120-3007 Issued by FERC OSEC 11/20/2006 in Docket#: EL04-137-001

could change if the use of the facilities changed.[9] The *Hearing Order* stated that Cabazon must show that there has been a change in the use of the facilities so that they now function as part of SCE's integrated transmission system.[10] The *Hearing Order* further stated that, if the presiding judge found that the upgrades at issue were network upgrades, then he or she must determine how much, and what way, Cabazon would receive reimbursement. The Commission, therefore, set Cabazon's complaint for hearing and settlement judge procedures.[11]

7. Cabazon seeks rehearing or clarification of the *Hearing Order*. It challenges the Commission's determination that Cabazon must show that there has been a change in the use of the facilities so that they function as part of SCE's integrated transmission system. Cabazon argues that requiring it to show a change assumes that the original designation of the facilities as "distribution" was based on the same criteria the Commission now applies to determine whether the facilities should be directly assigned to an interconnecting generator. According to Cabazon, that assumption is not necessarily correct.

8. Cabazon asserts that the basis for the original designation was Order No. 888's seven-factor test, while the issue in this case is whether the upgrades are integrated with SCE's transmission grid.[12] While there is some overlap between the seven-factor test

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[9] *Id.*, citing *Pacific Gas and Electric Co., San Diego Gas & Electric Co., and Southern California Edison Co.*, 77 FERC ¶ 61,077 (1996). In that order, for purposes of jurisdiction, among other purposes, the "transmission" and "distribution" facilities were identified to permit SCE to convey operational control of any facilities categorized as "transmission" to the CAISO. *See* 77 FERC ¶ 61,077 (1996).

[10] The Commission noted that if the disputed facilities were classified as network upgrades, then the parties would need to re-determine the costs to be directly assigned. *Hearing Order*, 109 FERC ¶ 61,203 at n. 17. The Commission noted further that, under SCE's Wholesale Distribution Access Tariff (WDAT), which covers delivery of generation output to the CAISO-controlled grid, the rate is based only on the cost of those distribution system facilities that are fully directly assigned to the customer. *Id.*; *see also* Southern California Edison Co., FERC Electric Tariff, First Revised Volume No. 5, Original Sheet No. 31, 33.

[11] *Hearing Order*, 109 FERC ¶ 61,203 at P 22, 23.

[12] To determine what facilities would be under the Commission's jurisdiction and what facilities would remain under the states' jurisdiction for purposes of retail stranded cost adders or other retail regulatory purposes, in Order No. 888, the Commission developed a seven-factor test to determine what facilities are transmission facilities and what facilities are local distribution facilities. *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities;*

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20061120-3007 Issued by FERC OSEC 11/20/2006 in Docket#: EL04-137-001

used for the initial designation and the integration test, the tests are not identical and do not serve the same purposes. Cabazon argues that the question is not whether there has been a change in function since 1996, but whether at present the upgrades are "integrated" with the transmission grid.

9. Cabazon also requests the Commission to clarify that the hearing is to include the issue of whether SCE imprudently incurred the cost for the disputed upgrades. It argues that, should the Commission assign the disputed costs directly to Cabazon rather than rolling them into SCE's general transmission rates, Cabazon must have an opportunity to contest the level of these costs. Whether SCE considered less costly alternatives is a factual question that can be resolved only through a hearing.

10. SCE filed a response to Cabazon's request for rehearing arguing that the Commission should not grant Cabazon's request for rehearing or clarification.

11. The presiding judge issued his *Initial Decision* addressing the following issues: (1) whether the facilities in dispute function as part of SCE's integrated transmission network or merely as distribution facilities; and (2) if the facilities in dispute are part of SCE's integrated transmission network, then how much and in what manner will Cabazon receive reimbursement of the money it paid for the upgrades. The presiding judge determined that the disputed facilities are not network facilities and therefore, did not decide on the second issue.[13]

12. Trial Staff filed a brief on exceptions to the *Initial Decision* on November 21, 2005 and SCE filed a brief opposing exceptions on December 9, 2005. Cabazon did not file a brief on exceptions.

II. Discussion

A. Nature of Facilities at Issue

13. In the *Whitewater* proceeding, the Commission explained that in addition to the usual two categories of facilities, interconnection facilities and network upgrades, there is

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Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274, FERC Stats. & Regs. ¶ 31,048 (1997); *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

[13] *Initial Decision*, 113 FERC ¶ 63,009 at P 4.

20061120-3007 Issued by FERC OSEC 11/20/2006 in Docket#: EL04-137-001

a third category.[14] In this case, the disputed facilities may belong to a third category, upgrades to non-integrated facilities that can be directly assigned to the generator.[15] In California, the integrated transmission network is controlled by the CAISO, while the non-integrated facilities under SCE's control are referred to as "distribution facilities," even when used for wholesale transactions.[16] We must decide whether the Garnet-Maraschino Line is a network facility whose costs should be rolled into the rates or a non-integrated facility whose costs should be directly assigned.

14. In the *Initial Decision*, the presiding judge determined that the facilities are not integrated because they do not meet the Commission's five-factor test for network integration under *Mansfield*.[17] He also stated that the disputed facilities are not integrated unless they have been turned over to the CAISO-controlled grid. Further, the presiding judge concluded that Cabazon failed to demonstrate a change in the function of the Garnet-Maraschino Line. Therefore, the presiding judge concluded that the cost of the upgrade was correctly assigned to Cabazon.

15. No party excepted to the presiding judge's findings that the disputed facilities do not satisfy the *Mansfield* five-factor test. We find that the presiding judge's rulings on these issues were well reasoned and fully supported by the record. Accordingly, we summarily affirm that the Garnet-Maraschino Line is not a network facility and that the upgrades therefore are not network upgrades. Thus, no reimbursement is due to Cabazon.

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[14] The usual two categories are as follows: (1) an interconnection facility is a facility on the generator's side of the point of interconnection to the transmission grid, and its cost can be directly assigned to the generator without credits; (2) network upgrades are upgrades to the transmission grid and include all facilities at or on the transmission provider's side of the point of interconnection. *Southern California Edison Co.*, 117 FERC ¶ 61,103, at P 12 (2006) (*Whitewater*).

[15] In Order No. 2003, we explained that "Distribution Upgrades" are upgrades to the utility's jurisdictional "distribution system." Order No. 2003 at P 803-04. Facilities in this system are generally lower voltage, are not networked, and carry power in one direction. Upgrades to such facilities can be directly assigned to the generator because they generally do not benefit other transmission customers. *Id.* P 697.

[16] SCE provides transmission service under its WDAT. SCE states that this tariff governs wholesale service across its non-integrated facilities for eligible wholesale customers; it does not provide service for retail sales or purchases.

[17] *See Initial Decision*, 113 FERC ¶ 63,009 P 172-P 189; *see also Mansfield Municipal Electric Dept. v. New England Power Co.*, 97 FERC ¶ 61,134 (2001), *reh'g den.*, 98 FERC ¶ 61,119 (2002) (*Mansfield*).

20061120-3007 Issued by FERC OSEC 11/20/2006 in Docket#: EL04-137-001

16. The presiding judge found that because the Garnet-Maraschino Line is a non-integrated facility and not an integrated part of the CAISO's transmission system, he did not need to decide the issue of reimbursement. We agree.

B. CAISO Control

17. The presiding judge concluded that under Commission precedent, the disputed facilities are not integrated unless Operational Control[18] of them has been turned over to CAISO.[19] Because the CAISO does not have Operational Control over the Garnet-Maraschino line and upgrades, the presiding judge stated that "the disputed facilities cannot be said to be integrated to the CAISO controlled grid."[20] He gave this as a second reason for finding that the line was properly classified as a non-integrated facility in the Agreement.

18. Trial Staff filed a brief on exceptions to the presiding judge's findings on this issue. It states that he wrongly concluded that a facility cannot be an integrated, network facility unless the CAISO has Operational Control over it.[21] Trial Staff states that a requirement that the CAISO exercise Operational Control over the facilities before reimbursement is required is an unnecessary obstacle that could delay reimbursement indefinitely.[22] Whether a facility is a transmission network facility is an engineering

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[18] Operational Control is defined as:

> The rights of the ISO under the Transmission Control Agreement and the ISO Tariff to direct Participating [Transmission Owners (TOs)] how to operate their transmission lines and facilities and other electric plant affecting the reliability of those lines and facilities for the purpose of affording comparable non-discriminatory transmission access and meeting Applicable Reliability Criteria.

California Independent System Operator Corporation, FERC Electric Tariff, First Revised Volume No. 1, Appendix A: Master Definitions Supplement.

[19] *Initial Decision*, 113 FERC ¶ 63,009 at P 190, citing *Southern California Edison Co.*, 111 FERC ¶ 61,122 at ¶ 5 (2005).

[20] *Id.*

[21] Trial Staff's Brief on Exceptions at 4.

[22] *Id*. at 5.

20061120-3007 Issued by FERC OSEC 11/20/2006 in Docket#: EL04-137-001

matter that is determined by the function of the facilities; it does not depend on if and when the CAISO decides to take operational control of them.[23]

19. In its brief opposing exceptions, SCE argues that the Trial Staff has misconstrued the presiding judge's findings, which simply reiterated the Commission's precedent. SCE asserts that the presiding judge did not rule that CAISO's Operational Control was a prerequisite to the right to reimbursement for upgrades. Rather, he ruled that it was a prerequisite to a finding of integration. SCE contends that under Commission precedent, the CAISO must assume Operational Control over a facility before it can be found to be integrated.[24]

20. The issue of reimbursement is moot since, as discussed above, we affirm the presiding judge's ruling that the Garnet-Maraschino Line and the upgrade are non-integrated facilities. However, we state for purposes of clarity that we disagree with the presiding judge's finding and SCE's contention that the CAISO must assume Operational Control over a facility before it can be found to be integrated. If a disputed facility already in operation is not yet under CAISO Operational Control and is found to be integrated, then the CAISO grid is already benefiting from use of that facility; therefore, CAISO Operational Control is not a prerequisite for a finding of integration. In addition, as explained in *Whitewater*, it is unnecessary for the CAISO to assume Operational Control of the disputed facilities before reimbursement is issued.[25] The disputed facility in this proceeding is different from the non-jurisdictional facilities involved in the cases cited by SCE because there the facilities in question were physically separate from the CAISO grid and thus, were not available for use by the CAISO before CAISO got Operational Control over them.[26]

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[23] *Id*. at 6.

[24] SCE's Brief Opposing Exceptions at 8-11, citing *Southern California Edison Co.*, 92 FERC ¶ 61,070 at 61,255 (2000) (Opinion No. 445) (finding that transmission-owning transmission customer taking service from CAISO is not entitled to credits against transmission rate it pays CAISO because CAISO could not use customer's transmission facilities to provide service, since CAISO did not have operational control over customer-owned facilities), *reh'g denied*, 108 FERC ¶ 61,085 (2004); and *City of Vernon, California*, 109 FERC ¶ 63,057 at P 50 (2004), *aff'd*, 111 FERC ¶ 61,092 (Opinion No. 479), *order on reh'g*, 112 FERC ¶ 61,207 (2005) (Opinion No. 479-A).

[25] *See Whitewater*, 117 FERC ¶ 61,103 at P 30.

[26] *Id.*

20061120-3007 Issued by FERC OSEC 11/20/2006 in Docket#: EL04-137-001

C. Cabazon's rehearing request

21. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a request for rehearing unless otherwise ordered by the decisional authority. We are not persuaded to accept SCE's December 14 response and will, therefore, reject it.

22. In its rehearing request, Cabazon argues that, should the Commission assign the disputed costs directly to Cabazon, Cabazon should have an opportunity to contest the level of these costs. It states that whether less costly alternatives were adequately considered by SCE is a factual question that can be resolved only through a hearing. We agree and find that Cabazon raises issues of material fact that cannot be resolved based on the record before us and that are more appropriately addressed in a trial-type evidentiary hearing as ordered below. The cost of the upgrades may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. Therefore, upon further consideration, we will grant Cabazon's request for rehearing with respect to its assertion that there should be a hearing on the cost of the disputed upgrades that may be excessive. The issues to be addressed include whether or not SCE evaluated reasonable and feasible alternatives to the disputed upgrades and selected the most prudent option, but the judge may examine any aspect of the question. We will set the issue for hearing and settlement judge procedures to determine whether or not the cost of the upgrades to the disputed facilities is just and reasonable. If the presiding judge finds that the cost is unjust and unreasonable, then the judge must determine the amount of any cost adjustments and the manner in which to account for any such adjustment.

23. While we are setting this matter for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures commence. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.[27] If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.[28] The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief

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[27] 18 C.F.R. § 385.603 (2006).

[28] If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (<www.ferc.gov> -- click on Office of Administrative Law Judges).

20061120-3007 Issued by FERC OSEC 11/20/2006 in Docket#: EL04-137-001

Judge shall provide the parties additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

24. Given our discussion above, we deny Cabazon's request for rehearing on all other issues. Because we are affirming the presiding judge's finding in the *Initial Decision* that the Garnet-Maraschino Line and the upgrades are not integrated facilities, all other issues are now moot.

The Commission orders:

(A) Cabazon's request for rehearing is hereby granted in part and denied in part as discussed in the body of this order.

(B) Pursuant to the authority contained in, and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning the treatment of the disputed upgrades and the costs associated with the upgrades, as discussed in the body of this order. However, the hearing shall be held in abeyance pending settlement procedures, as provided in Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2006), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such a settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge in writing or by telephone with five (5) days of the date of this order.

(D) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the matters of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussion, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

20061120-3007 Issued by FERC OSEC 11/20/2006 in Docket#: EL04-137-001

(E) If the settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge shall within 15 days of the date of the presiding judge's designation convene a conference in the proceeding in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.