UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Cross-Sound Cable Company, LLC	**)**	**Docket No. ER21-2334-000**

PROTEST OF THE
NEW ENGLAND STATES COMMITTEE ON ELECTRICITY

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission" or "FERC")[1] and Combined Notice of Filings #1 issued by the Commission on July 2, 2021, the New England States Committee on Electricity ("NESCOE")[2] files this protest of the filing made by Cross-Sound Cable, LLC ("Cross-Sound Cable") on July 1, 2021 ("Application").[3]

I. INTRODUCTION

Cost recovery for prudent investments made to improve cybersecurity reliability at the direction of ISO New England Inc. ("ISO-NE") are the type of costs that NESCOE expects the Commission to approve as wholly consistent with its policies. NESCOE supported, and worked closely with ISO-NE and stakeholders to develop, a cost recovery mechanism through the ISO-NE tariff in connection with such investments.[4] However, in this case, the relief Cross-Sound Cable seeks is incompatible with the ISO-NE rate schedule under which it is seeking cost

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1 18 C.F.R. § 385.211.

2 On July 7, 2021, NESCOE filed a doc-less motion to intervene in this proceeding. NESCOE is the Regional State Committee for New England, representing the collection positions of the six states in regional electricity matters.

3 Cross-Sound Cable Company, LLC, Application for Regulatory Asset Incentive to Recover Interconnection Reliability Operating Limits Critical Infrastructure Protection Costs Pursuant to ISO-NE Schedule 17, Docket No. ER21-2334-000 (filed July 1, 2021).

4 *See* Comments of the New England States Committee on Electricity, Docket No. ER20-739-000 (filed Jan. 27, 2020) ("NESCOE Initial Comments"), at 2-3.

recovery. Indeed, the arguments Cross-Sound Cable makes in its Application mirror those that the Commission already heard and rejected in ruling on the ISO-NE rate schedule. The Commission's rulings are now pending before the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"). Subject to the outcome of that case, the Commission's prior rulings on the arguments that Cross-Sound Cable revives in support of its Application still stand and provide no basis to grant the request.

II. BACKGROUND

On January 6, 2020, ISO-NE filed pursuant to Federal Power Act ("FPA") section 205[5] proposed revisions to its Open Access Transmission Tariff ("OATT")[6] to incorporate a mechanism to facilitate the recovery of certain specified Critical Infrastructure Protection ("CIP") costs by facilities that ISO-NE designates as critical to the derivation of Interconnection Reliability Operating Limits ("IROL") ("IROL-CIP Costs").[7] ISO-NE's proposed cost recovery mechanism was reflected in a new OATT Schedule 17, Recovery of Critical Infrastructure Protection Costs by Facilities Critical to the Derivation of the Interconnection Reliability Operating Limits ("Schedule 17"). ISO-NE sought an effective date of March 6, 2020 for proposed Schedule 17.

From the outset of the proceeding, there was disagreement over whether owners of IROL-critical facilities ("IROL-Critical Facility Owners"), including Cross-Sound Cable, should be entitled to recover past incremental costs related to the IROL-CIP medium impact

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5 16 U.S.C. § 824d.

6 The OATT is Section II of the ISO-NE's Transmission, Markets and Services Tariff (the "ISO-NE Tariff"). Capitalized terms not defined in this filing are intended to have the meaning given to such terms in the ISO-NE Tariff.

7 ISO New England Inc., Cost Recovery Mechanism for Facilities Designated Critical to the Derivation of Interconnection Reliability Operating Limits, Docket No. ER20-739-000 (filed Jan. 6, 2020).

designation. NESCOE requested that the Commission clarify that only going-forward costs are eligible for recovery under Schedule 17.[8] Cross-Sound Cable, jointly with other IROL-Critical Facility Owners, argued that NESCOE's request should be rejected for a multitude of reasons.[9]

In February 2021, Commission staff issued a deficiency letter—the sole topic of which was probing whether ISO-NE intended to allow for the recovery of costs prior to the requested effected date and if so, how this would be consistent with the filed rate doctrine and the rule against retroactive ratemaking.[10] Following ISO-NE's response to the deficiency letter and other pleadings, the Commission issued an order accepting ISO-NE's Schedule 17.[11] The Commission disagreed with arguments made by Cross-Sound Cable and other IROL-Critical Facility Owners "that the proposed revisions would violate the filed rate doctrine or rule against retroactive ratemaking."[12] The Commission explained that "[u]nder FPA section 205, rate changes may be prospective only, and, under the rule against retroactive ratemaking, the Commission is prohibited 'from imposing a rate increase for [power] already sold' or 'adjusting current rates to make up for a utility's over-or undercollection in prior periods.'"[13]

Cross-Sound Cable, along with other IROL-Critical Facility Owners, sought rehearing of the Commission's Schedule 17 Initial Order.[14] The IROL-Critical Facility Owners argued,

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8 NESCOE Initial Comments at 9-10.

9 Answer of IROL-Critical Facility Owners, Docket No. ER20-739-000 (filed Feb. 11, 2020). IROL-Critical Facility Owners that joined the Answer are Cross-Sound Cable; Cogentrix Energy Power Management, LLC; First Light Power, Inc.; NextEra Energy Resources, LLC; NRG Energy, Inc.; and Vistra Energy Corp.

10 *ISO New England Inc.*, Deficiency Letter, Docket No. ER20-739-000 (Feb. 26, 2020), at 2.

11 *ISO New England Inc.*, Order Accepting Proposed Rate Schedule, 171 FERC ¶ 61,160 (2020) ("Schedule 17 Initial Order").

12 *Id*. at P 27.

13 *Id*. (quoting *Towns of Concord, Norwood, and Wellesley v. FERC*, 955 F.2d 67, 75, 71 n.2 (D.C. Cir. 1992)).

14 Request for Rehearing of IROL-Critical Facility Owners, Docket No. ER20-739-002 (filed June 25, 2020). The IROL-Critical Facility Owners that joined the rehearing request were Cross-Sound Cable; Vistra Energy Corp.;

among other things, that the Commission's Schedule 17 Initial Order "produces unlawful rates by impermissibly limiting the cost recovery rights Congress granted IROL-Critical Facility Owners through FPA section 219 and producing a confiscatory rate by depriving IROL-Critical Facility Owners of the opportunity to recover capital deployed in the public interest."[15] Arguments raised in the IROL-Critical Facility Owners Rehearing Request included that: the Commission misapplied the filed rate doctrine and the rule against retroactive ratemaking;[16] the Commission failed to explain how its interpretation of Schedule 17 to require forward-looking cost recovery is just and reasonable;[17] the Commission's order failed to recognize IROL-Critical Facility Owners' statutory right to recovery prudently-incurred compliance costs;[18] and the filed rate doctrine and rule against retroactive ratemaking do not apply in this case (or if they do, the notice exception is satisfied).[19]

The Commission addressed—and rejected—each of these arguments, finding that the filed rate doctrine and rule against retroactive ratemaking preclude recovery of IROL-Critical Facility Owners' previously incurred costs.[20] The Commission also explained how it reasonably interpreted Schedule 17 to encompass only forward-looking cost recovery.[21] Certain of the

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Calpine Corporation; Cogentrix Energy Power Management, LLC; First Light Power, Inc.; NextEra Energy Resources, LLC; and NRG Energy, Inc. ("IROL-Critical Facility Owners Rehearing Request").

15 *Id*. at 7.

16 *See id*. at 12-14.

17 *Id*. at 18-19.

18 *Id*. at 20-23.

19 *Id*. at 24-27.

20 *ISO New England Inc.*, Order Addressing Arguments Raised on Rehearing, 172 FERC ¶ 61,251, at PP 12-24 (2020) ("Schedule 17 Rehearing Order") (the Schedule 17 Initial Order and Schedule 17 Rehearing Order are collectively referred to herein as the "Schedule 17 Orders").

21 Schedule 17 Rehearing Order at PP 25-26.

IROL-Critical Facility Owners (although not Cross-Sound Cable) sought review of these orders, and the case is currently pending before the D.C. Circuit.[22]

On May 28, 2021, Cross-Sound Cable submitted a filing pursuant to FPA section 205 requesting that the Commission "accept a proposed rate schedule to establish a date by which Cross-Sound Cable can commence the recovery period" for certain IROL-CIP Costs under Schedule 17 of the ISO-NE Tariff.[23] Cross-Sound Cable requested a June 1, 2021 effective date for its proposed rate schedule.[24] Cross-Sound Cable explained that with this filing, it was "not seeking to recover any costs already incurred, but simply [sought] to provide notice that it intends to seek recovery of such costs incurred on or after the effective date of this Filing."[25] The request was accepted for filing by letter order on July 8, 2021.[26]

III. PROTEST

A. Schedule 17 Does Not Provide for the Rate Incentive Treatment That Cross-Sound Cable Seeks, and Cross-Sound Cable Should Not Be Allowed to Circumvent the Parameters for Cost Recovery in Schedule 17.

Cross-Sound Cable argues that it is entitled to regulatory asset incentive treatment under both FPA section 219[27] and FPA section 205,[28] and in the alternative, it argues that the Commission should exercise its authority under FPA section 309[29] to grant the requested

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22 *Cogentrix Energy Power Management, LLC and Vistra Corp. v. FERC*, Case No. 20-1389 (D.C. Cir. filed Sept. 25, 2020).

23 Cross-Sound Cable Company, LLC, Interconnection Reliability Operating Limits Critical Infrastructure Protection, ISO-NE Schedule 17 Cost Recovery, Docket No. ER21-2031-000 (filed May 28, 2021), at 1.

24 *Id*.

25 *Id*. at 5.

26 *Cross-Sound Cable Company, LLC*, Docket No. ER21-2031-000 (July 8, 2021) (letter order).

27 16 U.S.C. § 824s. *See* Cross-Sound Cable Application at 10-13.

28 16 U.S.C. § 824d. *See* Cross-Sound Cable Application at 13-16.

29 16 U.S.C. § 825h.

regulatory asset incentive treatment.[30] NESCOE addresses these arguments in turn, below. At the outset, however, it is important to recognize that the rate treatment Cross-Sound Cable seeks is not provided for under Schedule 17. And the Commission left little doubt in its Schedule 17 Orders that it intended for recovery of the costs at issue to be prospective only. In essence, Cross-Sound Cable seeks a second bite at the apple in asking the Commission to side-step its Schedule 17 Orders. The Commission should deny this request.

NESCOE does not dispute Cross-Sound Cable's characterization of investments to further "reliability in the face of expanded cybersecurity threats"[31] as a public policy goal that the Commission would support. Indeed, NESCOE strongly supports efforts to ensure cybersecurity reliability. The salient issue, however, is not the merits of policies around cybersecurity investment: it is about respecting the Commission's prior rulings and the confines of the FPA. While NESCOE is sympathetic to the absence of a cost-recovery mechanism preceding Schedule 17, what Cross-Sound Cable seeks here is outside the scope of the ISO-NE rate schedule that Cross-Sound Cable has elected to use. Indeed, as ISO-NE explained to the Commission in response to proposals to modify Schedule 17 in certain respects:

> Certain Facility Owners and Cross-Sound Cable are free to pursue their preferred approach even if the Commission (as it should) accepts the January 6 Filing in toto. . . . Nothing in Schedule 17 restricts or limits the rights of an IROL-Critical Facility Owner to make a filing with the Commission pursuant to Section 205 of the FPA, at any time, to recover reliability-related compliance costs through means *other than* Schedule 17. And, should an IROL-Critical Facility Owner choose to pursue that path, that proceeding (not the instant matter as that proposal is not before the

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[30] *See* Cross-Sound Cable Application at 16-17.

[31] *Id.* at 15 (citations omitted).

> Commission) can assess the cost recovery means for the proposed costs.[32]

In light of the existence of the Schedule 17 Tariff mechanism and Cross-Sound Cable's use of this rate schedule, whether Cross-Sound Cable meets the standard for regulatory asset incentive treatment under FPA section 219 is not relevant.[33] The fatal flaw in Cross-Sound Cable's request is that it seeks a mode of recovery outside the confines of Schedule 17. If granted, this would circumvent the Commission's Schedule 17 Orders by permitting retroactive cost recovery through the Schedule 17 billing mechanism. The Commission expressly addressed the question of whether IROL-CIP related costs incurred prior to the effective date of a section 205 filing by the IROL-Critical Facility Owner would be recoverable. The answer was unambiguously "no."[34] Cross-Sound Cable joined others in seeking rehearing of this ruling, and, again, the Commission made clear that such cost recovery would be inconsistent with the filed rate doctrine and the rule against retroactive ratemaking.[35]

In some respects, Cross-Sound Cable's Application can be seen as a collateral attack on the Commission's Schedule 17 Orders. "A collateral attack is an 'attack on a judgment in a proceeding other than a direct appeal' and is generally prohibited."[36] Although Cross-Sound

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32 Answer of ISO New England Inc., Docket No. ER20-739-000 (filed Feb. 11, 2020), at 7-8 (emphasis in original).

33 NESCOE further notes that Cross-Sound Cable's statement that the regulatory asset may have a *de minimis* effect on transmission rates in New England is not the salient inquiry under FPA section 219. *See* Cross-Sound Cable Application at 12 (citing Order No. 679 at P 43). By contrast, the Commission does use an "effect on rates" analysis in transactions under section 203 of the FPA, 16 U.S.C. § 824b. *See, e.g., Startans IO, L.L.C.*, 130 FERC ¶ 61,209, at P 30 (2010) ("When the Commission evaluates a transaction under section 203, it must consider, among other things, the effect of the transaction on rates….However, a finding under the 'effect on rates' prong of the Commission's FPA section 203 analysis is distinct from a finding that an acquisition warrants an adjustment under FPA section 205.").

34 Schedule 17 Initial Order at P 27.

35 Schedule 17 Rehearing Order at PP 11-24.

36 *Louisville Gas & Elec. Co.*, 144 FERC ¶ 61,054, at P 12 (2013) ("*Louisville*").

Cable's request here may not be as blatant or direct of an attempt to challenge the Commission's orders as was the case in *Louisville*, Cross-Sound Cable's Application nonetheless asks for relief that was expressly denied in the Schedule 17 Orders. Even a more subtle attempt to side-step prior orders should still be viewed through the lens of the analysis in *Louisville*:

> Southern Companies attempt to challenge the Commission's findings in Order No. 1000 as applied to Southern Companies, notwithstanding that Southern Companies raised, and the Commission rejected, the same arguments in the Order No. 1000 proceedings; indeed, much of the material submitted in support of Southern Companies' protest is a copy of material submitted as exhibits to Southern Companies' request for rehearing in the Order No. 1000 proceedings. Southern Companies' attempt to revive those arguments in this compliance proceeding is an improper collateral attack upon the Commission's findings in Order No. 1000 and therefore must be rejected.[37]

While the Commission has held that "the preclusive effect of collateral estoppel ends when a party presents new evidence or a change in circumstances warrants reopening the issue,"[38] there is no change in circumstances here. The factors and circumstances on which Cross-Sound Cable relies in its Application were present during the pendency of the Docket No. ER20-739 proceeding in which the Commission issued the Schedule 17 Orders.

Cross-Sound Cable falters in relying on Commission precedent related to Order No. 1000[39] to validate cost recovery here. Cross-Sound Cable states: "Notably, the Commission has justified allowing these non-incumbent transmission developers to recover previously incurred

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37 *Id*.

38 *Am. Elec. Power Serv. Corp. v. Midwest Indep. Transmission Sys. Operator, Inc*., 122 FERC ¶ 61,083, at P 70 (2008).

39 *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011), *order on reh'g*, 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. 2014).

pre-commercial and formation costs because they 'do not have a mechanism to recover these costs as they are incurred.'"[40] However, unlike the situation where a non-incumbent transmission provider was bidding into the Order No. 1000 competitive process of the Midcontinent Independent System Operator, Inc., here, Cross-Sound Cable *does* have a mechanism to recover costs—Schedule 17. And, as discussed above, the Commission definitively found that Schedule 17 does not permit recovery of costs prior to the effective date of the relevant FPA section 205 filing (in Cross-Sound Cable's case, June 1, 2021).

Cross-Sound Cable also overstates the bounds of the Commission's authority under FPA section 309. Cross-Sound Cable's statement that the D.C. Circuit "has found that Section 309 allows the Commission to 'advance remedies not expressly provided by the FPA[,]'"[41] is incomplete. The rest of the sentence states: "*as long as they are consistent with the Act.*"[42] It is well established that the Commission's FPA section 309 authority is constrained by its authority under other sections of the FPA. Thus, the D.C. Circuit explained, "[w]hile Section 206's limitations and the filed-rate doctrine thus restrict the remedies that FERC may order, FERC's remedial authority is *otherwise expansive*."[43]

Here, the Commission has already found that permitting recovery of costs incurred prior to the effective date would be inconsistent with the filed rate doctrine and rule against retroactive ratemaking.[44] Cross-Sound Cable's conclusion that "[t]he Commission therefore has the broad

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[40] Cross-Sound Cable Application at 14 (quoting *GridLiance Heartland LLC*, 166 FERC ¶ 61,067, at P 57 (2019)).

[41] Cross-Sound Cable Application at 16 (quoting *Verso Corp. v. FERC*, 898 F.3d 1, 10 (D.C. Cir. 2018)).

[42] *Verso*, 898 F.3d at 10 (citations omitted) (emphasis supplied).

[43] *Id.* (citations omitted) (emphasis supplied).

[44] *See* Section III.B, *infra*.

authority to remediate situations in which a public utility has been unable to recover amounts legitimately owed to them from prior periods"[45] ignores that the Commission's broad authority is limited by its express findings to the contrary.

B. Cross-Sound Cable's Arguments That Its Request for Incentive Rate Treatment Is Consistent with the Filed Rate Doctrine and Rule Against Retroactive Ratemaking Ignore the Commission's Schedule 17 Orders.

Cross-Sound Cable recirculates arguments that it, along with other IROL-Critical Facility Owners, made in a rehearing request in Docket No. ER20-739—arguments that were expressly rejected by the Commission in the Schedule 17 Rehearing Order. Cross-Sound Cable frames the issue by pointing to Commission precedent providing that "'[f]or there to be retroactive ratemaking or a violation of the filed rate doctrine, . . . there must first be a rate on file.'" [46] Cross-Sound Cable explains that "[d]uring the period in which Cross-Sound Cable incurred the IROL-CIP Costs for which it seeks recovery in this proceeding, there was no operative rate on file that accounted for the Cross-Sound Cable's compliance with the medium impact requirements and the resulting enhanced reliability to the ISO-NE system."[47] Applying this precedent, Cross-Sound Cable concludes that "recovery of previously incurred IROL-CIP Costs neither (1) charges a rate different than the rate on file, nor (2) retroactively modifies a filed rate."[48] Cross-Sound Cable asserts that the recovery of "IROL-CIP Costs it incurred during the

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45 Cross-Sound Cable Application at 17.

46 *Id.* at 18 (quoting *Niagara Mohawk Power Corp. v. Huntley Power LLC, et al.*, 111 FERC ¶ 61,120, at P 46 (2005)).

47 Cross-Sound Cable Application at 18.

48 *Id*.

period of January 2016 through May 2021 solely to meet the ISO-NE-elevated impact category does not therefore implicate the filed rate doctrine or the rule against retroactive ratemaking."[49]

The Commission rejected this same argument in its Schedule 17 Rehearing Order. It held:

> Whether a rate is an initial rate or a changed rate is relevant to determining whether a rate is subject to suspension by the Commission pursuant to FPA section 205(e). By contrast, whether a rate is an initial rate or a changed rate is irrelevant here because the above-noted notice requirement of FPA section 205(d) applies to both initial rates and changed rates. Even if the distinction between an initial rate and a changed rate were relevant here, we find that Schedule 17 is, in fact, a changed rate.[50]

Cross-Sound Cable next argues that "even if the requested recovery of previously incurred IROL-CIP Costs did implicate the filed rate doctrine or rule against retroactive ratemaking (it does not), the notice exception to those rules applies in this proceeding."[51] The Commission rejected this same argument in the Schedule 17 Rehearing Order, finding "similarly unavailing IROL-Critical Facility Owners' argument that the notice exception to the filed rate doctrine would allow them to recover previously-incurred IROL-CIP costs."[52] The Commission held that the legally required notice would be provided with each IROL-Critical Facility Owner's section 205 filing.[53]

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49 *Id*.

50 Schedule 17 Rehearing Order at P 19 (citations omitted).

51 Cross-Sound Cable Application at 21.

52 Schedule 17 Rehearing Order at P 16. *See also id*. at P 17 (rejecting argument that FPA section 219 provided notice).

53 *Id*. at 18 ("That notice will be provided through the effective date of any Commission-accepted individual FPA section 205 filing.").

Cross-Sound Cable's argument that there is a guarantee of cost recovery pursuant to FPA section 219 and Section 35.35(f) of the Commission's regulations[54] was likewise rejected by the Commission: "We find that [section 219] is appropriately read as directing the Commission through its regulations to allow recovery of 'all' such costs when consistent with FPA section 205, pursuant to which individual public utilities propose rates to the Commission and thereby provide notice to potentially affected ratepayers. . . . Accordingly, we find that the strictures of FPA section 205, including the prohibition against retroactive rate recovery, apply here."[55] Similarly, Cross-Sound Cable's argument that Order No. 672[56] provides a "guarantee" of cost recovery[57] was rejected by the Commission: "Order No. 672 contains no discussion of the filed rate doctrine or the rule against retroactive ratemaking and does not suggest that these principles are inapplicable to section 219."[58]

C. If the Commission Does Grant Cross-Sound Cable's Application, It Should Make Clear That Its Ruling Does Not Create Precedent for Other IROL-Critical Facility Owners.

Cross-Sound Cable notes in its Application that it is uniquely situated, in that it is not an incumbent transmission owner, and it is not a merchant generator.[59] If the Commission does grant the Application, NESCOE urges it to make abundantly clear that such an order cannot serve as precedent for generator IROL-Critical Facility Owners that may seek to follow in Cross-

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54 Cross-Sound Cable Application at 21.

55 Schedule 17 Rehearing Order at P 15.

56 *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, 114 FERC ¶ 61,104, *order on reh'g*, Order No. 672-A, 114 FERC ¶ 61,328 (2006)).

57 Cross-Sound Application at 21 (citing Order No. 672 at P 259).

58 Schedule 17 Rehearing Order at P 15.

59 Cross-Sound Cable Application at 19.

Sound Cable's footsteps in finding a way to circumvent the Commission's explicit rulings in the Schedule 17 Orders.

IV. CONCLUSION

For the reasons discussed above, NESCOE respectfully asks that the Commission deny Cross-Sound Cable's request for regulatory asset incentive treatment under Schedule 17.

Respectfully Submitted,

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Date: July 22, 2021

CERTIFICATE OF SERVICE

In accordance with Rule 2010 of the Commission's Rules of Practice and Procedure, I hereby certify that I have this day served by electronic mail a copy of the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 22nd day of July, 2021.

/s/ Phyllis G. Kimmel

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