

175 FERC ¶ 61,025
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
Neil Chatterjee, James P. Danly,
Allison Clements, and Mark C. Christie.

Shell Energy North America (US), L.P.

Docket No. EL20-49-001

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued April 15, 2021)

1. On November 19, 2020,¹ the Commission issued an order granting in part, and denying in part, a petition for declaratory order submitted by Shell Energy North America (US), L.P. (Shell),² relating to disputes between Shell and GreenHat Energy, LLC (GreenHat). On December 18, 2020, GreenHat requested clarification or, in the alternative, rehearing of the November 2020 Order.³
2. Pursuant to *Allegheny Defense Project v. FERC*,⁴ the rehearing request filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 313(a) of the Federal Power Act (FPA),⁵ we are modifying the discussion in the

¹ *Shell Energy N. Am. (US), L.P.*, 173 FERC ¶ 61,153 (2020) (November 2020 Order).

² *Shell Energy N. Am. (US), L.P.*, Petition for Declaratory Order, Docket No. EL20-49-000 (May 29, 2020) (Petition); *see also* 18 C.F.R. § 385.207 (2020).

³ While the pleading is labeled “GreenHat’s Request for Clarification or Rehearing” (GreenHat Rehearing Request), based on the similar content and relief sought in the clarification and rehearing sections, we regard it as presenting only a request for rehearing.

⁴ 964 F.3d 1 (D.C. Cir. 2020) (en banc).

⁵ 16 U.S.C. § 825l(a) (“Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.”).

November 2020 Order and continue to reach the same result in this proceeding, as discussed below.⁶

I. Background

A. PJM Tariff and History of Dispute Between Shell and GreenHat

3. As relevant to the GreenHat Rehearing Request, a Financial Transmission Right (FTR) is a right to receive transmission congestion credits in accordance with the PJM Interconnection, L.L.C. (PJM) Open Access Transmission Tariff (PJM Tariff).⁷ FTRs can be traded in two ways: through a PJM-administered auction or a bilateral agreement.⁸ For FTRs sold through an auction, PJMSettlement is a contracting party and also settles the transaction. Bids or offers for FTRs in auctions must be submitted using software in the PJM FTR Center, which requires entry of various types of information and includes a mandatory price field. The price field is used for auction sellers to specify the lowest price at which they will sell (called a “reservation price”) and that auction bidders use to specify the highest price at which they will buy. PJM determines who prevails in the auction by selecting the set of simultaneously feasible FTRs with the highest net total auction value as determined by the bids of buyers and taking into account the reservation prices of the sellers.⁹

4. At issue in this proceeding are bilateral FTR transactions, which are governed by PJM Tariff, Attachment K-Appendix, section 5.2.2(d).¹⁰ FTRs may be transferred or sold

⁶ *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the November 2020 Order. See *Smith Lake Improvement & Stakeholders Ass’n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

⁷ PJM Interconnection, L.L.C., Intra-PJM Tariffs, PJM Tariff, Attach. K-App., § 5.2.2(d) (12.0.0); Operating Agreement (OA), Sched. 1, § 5.2.2(d) (12.0.0) (containing identical provisions). Tariff references throughout the order are to PJM Interconnection, L.L.C., Intra-PJM Tariffs. For purposes of this order, unless otherwise noted, capitalized terms not defined herein have the meanings set forth in the PJM Tariff and Operating Agreement. All references to the PJM Tariff provisions also refer to the identical provisions in the OA, Schedule 1.

⁸ The PJM Tariff provisions cited herein generally were in effect during the time at issue from August 2016 to June 2017. The PJM Tariff provisions cited herein also are substantively similar to those in effect today.

⁹ PJM Tariff, Attach. K-App. § 7.3, Auction Procedures (3.0.0), § 7.3.6.

¹⁰ *Id.* § 5.2.2(d) (providing that, in “addition to . . . auctions,” an FTR “may be sold or otherwise transferred to a third party by bilateral agreement, subject to

to a third party through bilateral agreements; however, the FTR transfers must “be reported” to PJM in the FTR Center as the posting enables PJM to credit or invoice the correct party at settlement¹¹ and to verify the buyer’s credit.¹²

5. In a bilateral FTR trade, the rights and obligations of the FTR seller pass to the buyer, subject to the provisions of the PJM Tariff.¹³ The Tariff’s reporting requirement enables PJM to determine whether to consent to the trades being effective, based on PJM’s assessment of the buyer’s “ability to perform the [relevant] obligations, including meeting applicable creditworthiness requirements.”¹⁴ The seller posts the bilateral transaction in PJM’s FTR Center and the buyer must confirm the transaction. The PJM Tariff provides that PJMSettlement has no role in settling the transaction or determining the price for the FTRs traded: “All payments and related charges associated with such a bilateral contract shall be arranged between the parties to such bilateral contract and shall not be billed or settled by PJMSettlement or the Office of the Interconnection.”¹⁵

6. Parties use the FTR Center interface to submit their notices of bilateral trades. Because the PJM FTR Center software interface has a mandatory price field, parties must enter a value in that field even though it is undisputed that PJM “has not used the price-field information input into FTR Center by the parties to FTR bilateral transactions for purposes of FTR settlements to date.”¹⁶

compliance with . . . procedures . . . for verification of the rights of the purchaser or transferee”).

¹¹ *Id.* § 5.2.2(d)(i).

¹² *Id.* § 5.2.2(d)(iii).

¹³ *Id.* § 5.2.2(d)(ii).

¹⁴ *Id.* § 5.2.2(d)(iii) (The reporting requirement facilitates PJM’s assessment of the buyers’ “ability to perform the [relevant] obligations, including meeting applicable creditworthiness requirements.”).

¹⁵ *Id.* § 5.2.2(d)(v).

¹⁶ PJM Comments, Docket No. EL20-49-000, at 8 n.25 (July 14, 2020).

7. In 2016 and 2017, GreenHat and Shell executed three written bilateral FTR agreements (Agreements).¹⁷ GreenHat transferred FTRs to Shell, and Shell then offered them for sale in a PJM auction. It is undisputed that Shell paid the Final Purchase Price specified in the Agreements.¹⁸ During this time, GreenHat and Shell posted, accepted, and/or confirmed transfers of thousands of FTRs on the FTR Center, and entered non-zero numerical values in the price field.

8. In 2018, GreenHat contacted Shell to seek payment of additional amounts based on the entries in 2016 and 2017 in the FTR Center and began to invoice Shell for additional payments, based on the numerical data entered in the price field in the FTR Center in 2016 and 2017. Shell later calculated that the invoiced amounts totaled to \$62 million, an amount that GreenHat had pledged to PJM to address PJM's concerns about potential losses on GreenHat's FTR portfolio.¹⁹

9. In the fall of 2018, GreenHat filed a claim against Shell in Texas state court, alleging that Shell owes it an additional \$68 million, separate from their three Agreements, based on entries in the price field for trades of approximately 3,870 FTRs. In that lawsuit, GreenHat asserted that entry of numerical values into the FTR Center automatically creates new payment obligations.²⁰ Shell agreed that parties

¹⁷ The description of the relevant entities and the history of the dispute that led to the instant Petition are derived from generally undisputed facts presented in the Petition, Protest, and Shell and GreenHat Answers.

¹⁸ For the first two Agreements, Shell made one-time lump sum payments to GreenHat of the Final Purchase Price on October 18, 2016 and February 10, 2017. Petition at 10-11. Shell paid the one-time lump sum Final Purchase Price for the third Agreement on June 16, 2017. *Id.* at 11. Shell stated that no other payments were contemplated in the Agreements or otherwise. *Id.* at 19, 22, 26-27; *see also* GreenHat's Protest and Request for Expedition, Docket No. EL20-49-000, at 30 (filed Jul. 14, 2020; corrected Jul. 15, 2020) (GreenHat Protest) ("the letter agreements' fees had already been paid, which was obvious from their terms"); *id.* at 56 (discussing "fee paid by Shell under the . . . agreements").

¹⁹ *See* Petition at 10-12.

²⁰ Petition, Exhibit AM, GreenHat Energy, L.L.C.'s First Amended Petition, No. 2018-69829-A, at ¶ 29 (Harris Cnty. Tex. Dist. Ct., 190th Judicial District) (filed Jan. 8, 2019) ("By conducting trades over the PJM bilateral trading system, GreenHat agreed to sell, and Shell Energy agreed to buy, each FTR at the price specified in the price box.").

can, if they so choose, enter into contracts that rely on numerical values in the price field.²¹

10. In its Petition in this proceeding, Shell requested that the Commission interpret provisions regarding bilateral transfers of FTRs under the PJM Tariff. Shell stated that an interpretation of the PJM Tariff will clarify whether the entry of price, volume, and other data regarding FTR bilateral transfers into PJM's FTR Center automatically establishes stand-alone bilateral contracts at the stated price. Shell also asked the Commission to assert primary jurisdiction to resolve on the merits the Texas state court lawsuit.

B. November 2020 Order

11. The Commission in the November 2020 Order asserted jurisdiction to provide an interpretation of the PJM Tariff, thereby granting Shell's first request, in part.²² The Commission found that, under the PJM Tariff, entry of data into the FTR Center for bilateral trades does not automatically establish stand-alone bilateral contracts at the stated price, absent a separate agreement by the parties to do so.²³ Specifically, the Commission found that: (1) the parties' bilateral agreements control the terms and conditions of their transactions; however, the parties to bilateral FTR agreements also are subject to compliance with the PJM Tariff; (2) in the context of bilateral FTR transfers, the FTR Center is only a reporting mechanism for the transfers; and (3) entering data into the FTR Center to report the transfer of FTRs does not, by itself, create a separate, stand-alone contract between the parties to the bilateral agreement, or modify the parties' bilateral agreement.²⁴ The Commission determined that this interpretation applies to all market participants, not merely to GreenHat and Shell.²⁵

12. In its second request, Shell asked the Commission to "assert primary jurisdiction over and resolve GreenHat's claim [in the Texas lawsuit] on the merits," enabling Shell

²¹ Shell Energy North America (US), L.P., Motion for Leave to Answer and Answer of Shell Energy North America (US), L.P., Docket No. EL20-49-000, at 2-3 (July 29, 2020) (Shell Answer).

²² November 2020 Order, 173 FERC ¶ 61,153 at P 2.

²³ *Id.* PP 2, 63-75.

²⁴ *Id.* P 63 (citing PJM Tariff, Attach. K-App., § 5.2.2(d) as applying to these requests; Petition at 2-3, 32); *see also id.* PP 63-75.

²⁵ *Id.* P 63.

to seek dismissal of that case.²⁶ The Commission declined to assert primary jurisdiction to resolve the dispute under Texas law as to whether Shell and GreenHat entered into separate contracts that Shell would make payments based on entries in the FTR Center.²⁷ Applying the three *Arkla*²⁸ factors, the Commission declined to assert primary jurisdiction over the dispute pending in Texas state court, finding:²⁹ (1) the Commission does not have special expertise when it comes to deciding what claims GreenHat is actually making in the Texas lawsuit, and whether Shell has, in fact, entered into separate agreements to pay a purchase price based on entries in the FTR Center;³⁰ (2) the contract formation dispute between GreenHat and Shell is based on their specific circumstances and resolution of the contract formation dispute likely will have little effect beyond the parties involved;³¹ and (3) while the Commission has the authority under the FPA and its regulations to determine whether market participants have engaged in conduct inconsistent with the FPA and take appropriate action,³² its authority under the FPA is not

²⁶ *Id.* PP 2, 76.

²⁷ *Id.* PP 2, 76-81.

²⁸ *Ark. La. Gas Co. v. Hall*, 7 FERC ¶ 61,175, at 61,322 (*Arkla*), *reh'g denied*, 8 FERC ¶ 61,031 (1979).

²⁹ November 2020 Order, 173 FERC ¶ 61,153 at P 78.

³⁰ *Id.* P 79 (citing *New England Ratepayers Ass'n*, 172 FERC ¶ 61,042, at PP 35-36 (2020) (“exercis[ing] our discretion to decline to address the issues set forth in the Petition” and finding the Petition did “not warrant a generic statement” and did “not identify a specific controversy or harm”)).

³¹ *Id.* P 80 (citing *S. Md. Elec. Coop., Inc. v. J.P. Morgan Ventures Energy Corp.*, 155 FERC ¶ 61,164, at P 24 (2016) (finding that “[r]esolution of the contractual dispute therefore likely will have little impact beyond the parties involved and this particular issue involving PJM’s Capacity Performance construct would also not be applicable to entities operating in other [Regional Transmission Organizations]”); *BG Energy Merchants, LLC v. Crosstex LIG, LLC*, 136 FERC ¶ 61,098, at P 37 (2011); *PPL Elec. Util. Corp.*, 92 FERC ¶ 61,057, at 61,147 (2000)).

³² The Commission acknowledged its earlier public statement that its Office of Enforcement is investigating whether GreenHat violated the Commission’s Anti-Manipulation Rule or other regulations or statutes. *See PJM Interconnection, L.L.C.*, 166 FERC ¶ 61,072, at P 36 (2019).

ordinarily impaired by the pendency of private state court litigation on contract formation, and that is no less the case here.³³

13. The Commission also denied GreenHat's motion to bar certain staff from participating in an advisory role in this proceeding.³⁴

II. Discussion

A. Procedural Matters

14. On January 4, 2021, Shell filed a conditional motion for leave to answer and answer to GreenHat's request for clarification and rehearing. Rule 713(d) of the Commission's Rules of Practice and Procedure³⁵ prohibits answers to requests for rehearing. Accordingly, because we consider GreenHat's filing a request for rehearing rather than a request for clarification of the November 2020 Order, we deny Shell's motion and reject its answer to GreenHat's rehearing request.

B. Substantive Matters

1. Impact on Other Proceedings

a. November 2020 Order

15. In the November 2020 Order, the Commission provided an interpretation of the PJM Tariff and declined to assert primary jurisdiction to resolve the merits of the Texas state litigation between Shell and GreenHat.³⁶ The November 2020 Order also acknowledged an ongoing investigation by the Commission's Office of Enforcement into whether GreenHat violated the Commission's Anti-Manipulation Rule or other regulations or statutes, and recognized the Commission's authority under the FPA and implementing regulations to determine whether market participants have engaged in conduct inconsistent with the FPA and to take appropriate action.³⁷

³³ November 2020 Order, 173 FERC ¶ 61,153 at P 81.

³⁴ *Id.* PP 59-61.

³⁵ 18 C.F.R. § 385.713(d) (2020).

³⁶ November 2020 Order, 173 FERC ¶ 61,153 at P 2.

³⁷ *Id.* P 81 & n.112.

b. GreenHat's Rehearing Request

16. GreenHat requests that the Commission clarify that it is not prejudging the merits of either the Texas state litigation or any subsequent Commission enforcement proceeding (either before the Commission or a federal district court acting de novo), “including on the central question whether parties can bilaterally contract on FTR Center without any other express contractual agreement beyond what occurred on FTR Center.”³⁸ GreenHat urges the Commission to clarify that it did not intend to prejudge any aspect of the Texas litigation or the Office of Enforcement Staff’s (Enforcement Staff) investigation of GreenHat, or to limit the law and facts that may be relied upon in the Texas litigation to address whether Shell and GreenHat have a contract established based on prices entered in the FTR Center.³⁹ GreenHat states that state contract law determines whether the prices parties post, accept, and confirm in the FTR bind parties contractually. GreenHat requests that the Commission clarify that it did not intend to displace or modify state contract law in its statement that parties “need to agree to such pricing explicitly.”⁴⁰ GreenHat maintains that requiring explicit agreement to establish contract prices is inconsistent with principles of contract law permitting express or implied contractual terms. Accordingly, GreenHat urges the Commission to clarify that the November 2020 Order “does not override, contradict, or otherwise opine on state contract law and does not purport to require that agreements related to bilateral FTR transactions be express rather than implied.”⁴¹

17. GreenHat states that the Commission’s description of the FTR Center as merely a reporting mechanism that would require a separate agreement to establish payment obligations could be interpreted as prohibiting the FTR Center from serving as anything beyond a reporting mechanism. GreenHat argues that the Commission’s description of the FTR Center is potentially inconsistent with the Commission’s later statement in the November 2020 Order that parties may establish a contract with a price based on numbers entered into the FTR Center and inconsistent with Texas state law that respects freedom of contract.⁴² GreenHat requests that the Commission clarify that it has neither opined on state contract law nor restricted parties who enter prices into the FTR Center from being bound contractually pursuant to state contract law.

³⁸ GreenHat Rehearing Request at 5.

³⁹ *Id.* at 6-7, 10.

⁴⁰ *Id.* at 7 (citing November 2020 Order, 173 FERC ¶ 61,153 at P 74).

⁴¹ *Id.* at 8.

⁴² *Id.* at 8-9 (referencing November 2020 Order, 173 FERC ¶ 61,153 at PP 63, 74).

18. GreenHat argues that statements in the November 2020 Order suggesting that prices entered in the FTR Center's price field are binding only upon a separate agreement, specifically the last sentence of paragraph 74⁴³ and the second finding in paragraph 63,⁴⁴ conflict with Texas state contract law and exceed the Commission's constitutional and statutory authority.⁴⁵ GreenHat states that this conflict with state law unconstitutionally establishes federal common law for contract formation, which the Commission itself has recognized is impermissible.⁴⁶

19. GreenHat contends that, if the Commission was intending to preempt state law, then the Commission has failed to provide advance notice of its change in position. GreenHat states that the Commission has acted inconsistently with prior Commission orders and PJM documents that permit parties to use the FTR Center to establish bilateral FTR agreements and provide objective evidence that parties understood the FTR Center as "a bilateral trading system through which parties may agree on price."⁴⁷ GreenHat argues that the Commission did not address GreenHat's evidence intended to show that GreenHat and Shell "understood and intended the Price Field to be binding, including their use of non-zero prices in the Price Field."⁴⁸ GreenHat states that whether a party has entered into a binding agreement is a matter of state law and that "posting, accepting,

⁴³ See November 2020 Order, 173 FERC ¶ 61,153 at P 74 ("For example, parties could choose to enter into a written bilateral agreement that a buyer will pay a seller for FTRs based on prices set in a recent auction, on current day-ahead price spreads, on numbers entered into the price field in the FTR Center, or, for that matter, on any other basis they may choose. *But they would need to agree to such pricing explicitly.*" (emphasis added)).

⁴⁴ *Id.* P 63 ("[I]n the context of bilateral FTR transfers, the FTR Center is only a reporting mechanism for the transfers . . .").

⁴⁵ GreenHat Rehearing Request at 5.

⁴⁶ *Id.* at 10-12 (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (quoting *Balt. & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting)); *Farmers Edge Inc. v. Farmobile, LLC*, 970 F.3d 1027, 1031 (8th Cir. 2020); *Hancock v. Am. Tel. & Tel. Co.*, 701 F.3d 1248, 1255 (10th Cir. 2012); *Liu v. T & H Mach., Inc.*, 191 F.3d 790, 795 (9th Cir. 1999); *Pennzoil Co. v. FERC*, 645 F.2d 360, 386 (5th Cir. 1981); *Pac. Gas & Elec. Co.*, 170 FERC ¶ 61,194, at P 35 (2020); *Pub. Util. Dist. No. 1 of Snohomish Cty.*, 115 FERC ¶ 61,375, at P 70 (2006)).

⁴⁷ *Id.* at 12-14 (citing *PJM Interconnection, L.L.C.*, 87 FERC ¶ 61,054, at 61,221 (1999); *Atl. City Elec. Co.*, 86 FERC ¶ 61,147, at 61,528 (1999)); see also *id.* at 19.

⁴⁸ *Id.* at 14.

and confirming prices with the understanding that they would be binding should alone be sufficient to establish that contractual relationship.”⁴⁹ GreenHat maintains that the Commission did not address GreenHat’s expert’s explanation of the reasonableness of entering into bilateral FTR contracts through the FTR Center or GreenHat’s argument claiming “that PJM performed its own analysis in connection with the Pledge Agreement and determined that the values entered in FTR Center entitled GreenHat to payments from Shell.”⁵⁰ GreenHat contends that the Commission did not distinguish between PJM’s FTR Center and other regional transmission organizations’ (RTOs’) bilateral FTR interfaces and other PJM bulletin boards. GreenHat states that the Commission’s description of the FTR Center as a mere reporting mechanism disregards the seller guarantee and indemnification provisions in the PJM Tariff that are triggered by entry of data into the FTR Center.⁵¹

20. GreenHat states that the Commission has failed to describe or explain which “technical limitations” exist to limit the function of the price field in the FTR Center.⁵² GreenHat maintains that it is illogical that PJM is unable to remove the price field or prevent parties from attaching contractual significance to it given that PJM’s own documents and training materials define the price field as required for buying or selling FTRs. GreenHat asserts that despite the absence of the term “price” in cited PJM Tariff provisions, a Texas court should be able to interpret language in PJM training documents and manuals in deciding whether parties objectively agreed to a contract using the price field.⁵³ GreenHat states that the PJM Tariff uses similar language to these PJM documents and manuals in other areas that elevates this language to PJM’s filed rate under FPA sections 205 and 206. GreenHat suggests that the Commission’s failure to recognize that language violates the filed rate doctrine. GreenHat claims that Commission precedent permits market participants to rely on RTO documents, even if these documents conflict with the RTO’s filed rate.⁵⁴

⁴⁹ *Id.*

⁵⁰ *Id.* at 15.

⁵¹ GreenHat Rehearing Request at 15.

⁵² *Id.* at 15-16 (citing November 2020 Order, 173 FERC ¶ 61,153 at P 69).

⁵³ *Id.* at 16-17.

⁵⁴ *Id.* at 17-18; *see also id.* at 2.

21. GreenHat argues that footnote 105 of the November 2020 Order,⁵⁵ without support, asserts jurisdiction over agreements related to bilateral FTR transactions, which is outside the scope of Shell's petition in this proceeding.⁵⁶ GreenHat represents that agreements related to bilateral FTR transactions are not Commission-jurisdictional because parties to these agreements do not need market-based rate authority. GreenHat states that the Commission asserting jurisdiction over bilateral FTR transactions raises questions regarding whether these agreements need to be filed with the Commission, whether bilateral FTR agreements should be included in the Commission's market-based rate regime, and how to determine whether bilateral FTR agreements are unjust, unreasonable, or unduly discriminatory.⁵⁷

c. Commission Determination

22. We disagree with the arguments raised on rehearing by GreenHat, as discussed below, that the Commission has pre-judged or interfered with the Texas state litigation between GreenHat and Shell or the publicly announced investigation of GreenHat. The Commission appropriately interpreted the PJM Tariff, a matter squarely within the Commission's jurisdiction. We find that the other documents GreenHat cites do not demonstrate that the Commission erred in interpreting the PJM Tariff.

i. Concurrent Jurisdiction with State Court

23. The Commission has long recognized that state courts have concurrent jurisdiction to consider contract interpretation issues.⁵⁸ *Arkla* describes the factors that the

⁵⁵ November 2020 Order, 173 FERC ¶ 61,153 at P 74 (“For example, parties could choose to enter into a written bilateral agreement that a buyer will pay a seller for FTRs based on prices set in a recent auction, on current day-ahead price spreads, on numbers entered into the price field in the FTR Center, or, for that matter, on any other basis they may choose. But they would need to agree to such pricing explicitly.”) & n.105 (“Any such agreement would, of course, also be subject to the requirements of the FPA that the rates, terms, and conditions be just and reasonable and not unduly discriminatory or preferential. 16 U.S.C. §§ 824d, 824e.”).

⁵⁶ GreenHat Rehearing Request at 5.

⁵⁷ *Id.* at 20-22.

⁵⁸ See *Ne. Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n*, 707 F.3d 883, 896 (7th Cir. 2013) (“[T]he Federal Power Act does not completely preempt state law causes of action in FERC's actual practices. FERC itself recognizes a role for state contract law in adjudicating contract disputes involving federal tariffs

Commission must weigh in determining whether, in particular cases, it “should assert jurisdiction over contractual issues otherwise litigable in state court.”⁵⁹

24. GreenHat argues that the Commission has infringed on Texas state law in determining whether a contract exists between Shell and GreenHat. We disagree. After weighing the *Arkla* factors, the Commission in the November 2020 Order expressly declined Shell’s request to assert primary jurisdiction over whether Shell and GreenHat, in fact, had entered into separate agreements to pay a purchase price based on entries in the FTR Center. GreenHat does not object on rehearing to the Commission’s *Arkla* analysis.⁶⁰ State courts may entertain contract disputes arising from Commission jurisdictional agreements.⁶¹ The Commission expressly declined to assert primary jurisdiction over the specific state court litigation between Shell and GreenHat, and determined neither whether GreenHat and Shell entered into a cognizable agreement under state law at the prices included in the FTR Center nor the form of agreement necessary to find a binding contract.

25. Although the Commission declined to assert primary jurisdiction over whether GreenHat and Shell entered into any separate agreements under state law, the Commission was well within its jurisdiction to interpret the PJM Tariff with respect to FTRs. The Commission has exclusive jurisdiction over provisions in RTO tariffs, including PJM’s Tariff provisions governing FTRs,⁶² and the Texas state court, state

FERC finds state court contract interpretation helpful in resolving such disputes when they eventually come before FERC.”).

⁵⁹ *Arkla*, 7 FERC ¶ 61,175 at 61,322; *see id.* (“Those factors are: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and, (3) whether the case is important in relation to the regulatory responsibilities of the Commission.”).

⁶⁰ *See* November 2020 Order, 173 FERC ¶ 61,153 at PP 76-81.

⁶¹ *Pan Am. Petroleum Corp. v. Superior Ct. of Del.*, 366 U.S. 656, 663 (1961) (“The rights as asserted by Cities Service are traditional common-law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas.”); *Portland Gen. Elec. Co.*, 72 FERC ¶ 61,009, at 61,021 (1995) (“[O]ur jurisdiction to settle disputes over the meaning of rate schedules does not as a matter of law preclude state courts from entertaining contract litigation of the type raised by Edison’s complaint in Oregon state court.”).

⁶² *See Cal. Indep. Sys. Operator, Inc.*, 94 FERC ¶ 61,343, at 62,271 (2001) (“[O]ur requirement that non-public utilities that opt to participate in the FTR market comply

agencies, or any other court, therefore, are bound by the Commission's interpretation of Commission-jurisdictional tariffs when interpreting state contract claims.⁶³

26. GreenHat specifically contests footnote 105 of the November 2020 Order, which states that any bilateral FTR agreement would have to comply with the PJM Tariff and be just, reasonable, and not unduly discriminatory. Because the Commission has jurisdiction over FTR transactions, however, that footnote is correct.⁶⁴ All bilateral FTR transactions take place under the purview of an RTO's tariff and therefore must comply with that tariff and otherwise be just, reasonable, and not unduly discriminatory. As a prerequisite to participation in the FTR bilateral market, parties to such transactions, such as GreenHat and Shell, sign participation agreements that require them to abide by PJM's market rules. While the Commission chose not to exercise primary jurisdiction with respect to the GreenHat-Shell dispute, that does not mean the Commission lacks jurisdiction over bilateral FTR agreements. As discussed below, the Commission reasonably determined that the "FTR Center is only a reporting mechanism for bilateral

with the pertinent ISO tariff terms falls clearly within our jurisdiction over the transmission of energy under section 201 of the Federal Power Act.").

⁶³ See *AEP Texas N. Co. v. Texas Indus. Energy Consumers*, 473 F.3d 581, 585–86 (5th Cir. 2006) ("FERC, not the state, is the appropriate arbiter of any disputes involving a tariff's interpretation.") (citing *Miss. Power & Light Co. v. Moore*, 487 U.S. 354, 378 (1988) (Scalia, J., concurring); *id.* ("If each state could enforce its own findings as to the meaning of a filed tariff . . . the conflicting interpretations would undermine FERC's ability to ensure that a filed rate is uniform across different states, and intrude upon its exclusive jurisdiction over interstate power transactions.")).

⁶⁴ "[T]he FTR market transactions at issue in this matter are in connection with the purchase or sale of electric energy or transmission of electric energy subject to the jurisdiction of the Commission." *PJM Interconnection, L.L.C.*, 127 FERC ¶ 61,007 (2009). See *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Services by Public Utilities*, Order No. 697, 119 FERC ¶ 61,295 at P 921 ("[S]ellers engaging in [resales of FTRs and virtual trading] sign a participation agreement with RTOs/ISOs which require them to abide by those market rules. Hence, the approval of the market rules in conjunction with approval of the generic participation agreement by the Commission constitutes authorization for public utilities to engage in the resale of FTRs and virtual transactions, and no separate authorization is required under the FPA."), *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, 123 FERC ¶ 61,055, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, 125 FERC ¶ 61,326 (2008), *order on reh'g*, Order No. 697-C, 127 FERC ¶ 61,284 (2009), *order on reh'g*, Order No. 697-D, 130 FERC ¶ 61,206 (2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011).

FTR transfers” and that “entering data into the FTR Center to report the transfer of FTRs does not, by itself, create a separate, stand-alone contract between the parties to the bilateral agreement, or modify the parties’ bilateral agreement.”⁶⁵

ii. **The PJM Tariff and Other Documents**

27. We disagree with GreenHat that the Commission improperly interpreted the PJM Tariff in the November 2020 Order or that the interpretation is inconsistent with prior Commission orders. As the Commission discussed in the November 2020 Order, nothing in the PJM Tariff suggests that, absent a separate agreement, entering non-zero numbers into the price field in the FTR Center binds the parties to a bilateral trade to make payments between themselves based on those numbers.⁶⁶ Indeed, the PJM Tariff provides that the parties, not the PJM system, determine the terms of a bilateral contract: “All payments and related charges associated with such a bilateral contract shall be arranged between the parties to such bilateral contract and shall not be billed or settled by PJMSettlement or the Office of the Interconnection.”⁶⁷

28. In addition, we note that the other Tariff provisions support the Commission’s interpretation. First, the ability of market participants to engage in bilateral trades at all derives from the Tariff: “Market Participants may enter into bilateral agreements to transfer to a third party a Financial Transmission Right, for its entire tenure or for a specified period.”⁶⁸ Second, the Tariff assumes that parties will independently agree to bilateral trades, which they must then report to PJM: “*Such bilateral transactions shall be reported to [PJM] in accordance with this Schedule and pursuant to the LLC’s rules related to its FTR reporting tools.*”⁶⁹ Third, the Tariff is clear that “[a]ll payments and related charges associated with such a bilateral contract shall be arranged *between the*

⁶⁵ November 2020 Order, 173 FERC ¶ 61,173 at P 63.

⁶⁶ *See id.* PP 67-73.

⁶⁷ PJM Tariff, Attach. K-App., § 5.2.2(d)(v).

⁶⁸ *Id.* § 5.2.2(d)(i).

⁶⁹ *Id.* (emphasis added).

*parties to such bilateral contract,”*⁷⁰ with no suggestion that payment obligations will be created automatically through use of the mandatory reporting mechanism.⁷¹

29. Further, in the 1999 Commission orders cited by GreenHat that directed PJM to establish a “liquid and robust secondary FTR market,”⁷² the Commission did not require explicitly or suggest implicitly that entering numbers into a reporting mechanism like the FTR Center alone would automatically create a contract between a buyer and seller. Rather, the way in which the PJM Tariff provisions “encourage[d] a liquid and robust secondary market” was by authorizing bilateral transactions subject to the requirement that the parties report bilateral trades to PJM so it can account for the proper payment and collection of payments.⁷³ We therefore disagree with GreenHat’s contention that the PJM Tariff and the Commission’s orders from 1999 demonstrate that entering information into the FTR Center price field alone generates bilateral agreements between market participants.

30. In its protest, GreenHat requested that “the Commission . . . reject Shell’s position that it is *impossible* to form a contract on FTR Center,”⁷⁴ and GreenHat on rehearing requests that the Commission clarify that it has not precluded “parties from being contractually bound to the prices entered in FTR Center as determined by application of state contract law.”⁷⁵ The Commission agreed, as both GreenHat and Shell acknowledged, that parties could agree to use entries on the FTR Center in a contract.⁷⁶

⁷⁰ *Id.* § 5.2.2(d)(v) (emphasis added); *see also id.* (“The LLC, PJMSettlement, and the Members will not assume financial responsibility for the failure of a party to perform obligations owed to the other party under such a bilateral contract reported to the Office of the Interconnection under this Schedule.”).

⁷¹ *See also* November 2020 Order, 173 FERC ¶ 61, 173 at PP 66-75 (discussing PJM Tariff).

⁷² *PJM Interconnection, L.L.C.*, 87 FERC ¶ 61,054 at 61,221; *Atl. City Elec. Co.*, 86 FERC ¶ 61,147 at 61,528.

⁷³ *See* PJM Tariff, Attach. K-App. § 5.2.2(d)(i) (mandatory reporting), (ii) (ownership rights pass to buyer), (iii) (creditworthiness), (iv) (guarantee and indemnification).

⁷⁴ GreenHat Protest at 9.

⁷⁵ GreenHat Rehearing Request at 10.

⁷⁶ November 2020 Order, 173 FERC ¶ 61,173 at P 74 (“parties could choose to enter into a written bilateral agreement that a buyer will pay a seller for FTRs based on

Consistent with GreenHat's own statement, however, the Commission found that, for the reasons discussed above, the Tariff does not create such a contract automatically upon entry of price information in the mandatory price field.⁷⁷ Other parties to this proceeding expressed their understanding that entry of information into the price field of the FTR Center alone does not automatically create a bilateral FTR agreement.⁷⁸ As noted in the November 2020 Order, the Commission's ruling here addresses the concern that automatic contract formation through the entry of price information in the price data field could create unexpected contractual obligations for tens of thousands of past FTR trades reported in the FTR Center.⁷⁹

31. Separate from the PJM Tariff, GreenHat refers to non-tariff PJM documents and other RTO documents for the proposition that these documents suggest that entering non-zero price information into the FTR Center alone may automatically create a separate contract in addition to an existing bilateral agreement. GreenHat relies mostly on such PJM documents containing the words "bilateral," "trading," and "system," together with instructions for entering price information into the FTR Center.⁸⁰

prices set in a recent auction, on current day-ahead price spreads, on numbers entered into the price field in the FTR Center").

⁷⁷ *See id.* ("In its Protest, GreenHat states it does not seek a ruling that entry of data into the PJM FTR Center automatically creates new contractual obligations. Instead, it asks only for a ruling that the PJM Tariff does not prohibit parties, if they wish, from agreeing that price and payments will be based on data entered into the FTR Center. Neither Shell nor any commenter disputes that, in principle, parties could enter into a contract with price and payment terms based on entries in the FTR Center, or on any other basis chosen by the parties. We agree.") (footnotes omitted).

⁷⁸ *See id.* P 72.

⁷⁹ *Id.* P 64 n.87.

⁸⁰ *See* GreenHat Rehearing Request at 15, App., at 1-8.

32. Although we acknowledge that parties may rely on non-tariff documents,⁸¹ the PJM documents explaining the use of the FTR Center cannot contradict the PJM Tariff.⁸² As discussed above, the PJM Tariff provides that parties' obligations under bilateral FTR contracts are determined based on the parties' agreement, not based solely on entries into PJM software.⁸³ The Commission's Tariff interpretation therefore did not violate the filed rate doctrine.

⁸¹ *Midwest Indep. Transmission Sys. Operator, Inc.*, 118 FERC ¶ 61,212, at P 89 (2007) (“[M]arket participants may, as a general matter, view an RTO as a credible source of information regarding the RTO’s own tariff.”); *PPL EnergyPlus, LLC v. N.Y. Indep. Sys. Operator Inc.*, 115 FERC ¶ 61,383, at P 29 (2006) (“It is unfair to market participants to assume that interpretations made by [the RTO] in its own publications . . . cannot be regarded as coming from a credible source.”).

⁸² *See W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 18, 23 (D.C. Cir. 2014) (“language in a non-binding pleading” does not provide sufficient notice to parties to overrule the provisions of the tariff). *See also PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,145, at P 58 (2020) (“if a manual provision conflicts with a filed tariff provision, the tariff provision governs”); *Diamond State Generation Partners, LLC*, 167 FERC ¶ 61,262, at P 10 (2019) (“in the event of a conflict between a filed tariff and an unfiled business manual, the tariff governs”); *Cal. Indep. Sys. Operator Corp.*, 154 FERC ¶ 61,122, at P 16 (2016) (“Commission precedent has long held that when a conflict exists between a filed tariff and an unfiled business practice manual, the tariff governs”); *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,113, at P 47 (2006) (“the filed and accepted tariff is the governing document and not the Business Practice Manuals - the former has precedence over the latter and not the other way around”). GreenHat has acknowledged this point. *See GreenHat Protest* at 5 (“If an RTO tariff and an RTO business manual disagree, the tariff wins in the end.”).

⁸³ Further, we note that PJM has confirmed this function of the FTR Center in other proceedings. In 2010, PJM submitted a compliance filing to the Commission in which it stated that “market participants *inform* PJM [through the FTR Center] of bilateral transactions for the purchase and sale of [FTRs] between two market participants.” PJM, Revised Tariff Sheets of the PJM Open Access Transmission Tariff and the Amended and Restated Operating Agreement, Docket No. ER10-1003-000, at 3 (filed Apr. 1, 2010) (emphasis added). PJM also stated that use of the FTR Center in connection with a bilateral trade “serve[s] as a *reporting mechanism only*.” *Id.* at 4 (emphasis added). PJM’s Tariff filing was accepted by a delegated letter order. *PJM Interconnection, L.L.C.*, Docket No. ER10-1003-000, at 1 (May 5, 2010) (delegated order) (“The tariff changes clarify that the use of PJM’s eTools serve as a reporting mechanism only . . .”).

33. Moreover, when read in context with the PJM Tariff, the documents GreenHat cites do not contradict the PJM Tariff because they do not give notice to market participants that reporting information to the FTR Center, by itself, would create a separate contract in addition to an existing bilateral agreement. Neither language in PJM manuals or guidance documents, such as use of the phrase “bilateral trading system,”⁸⁴ nor the PJM Tariff FTR auction requirements that expressly require entry of price information, govern bilateral FTR transactions; nor do they impose affirmative payment obligations from the mere entry of numbers into the FTR Center with respect to bilateral FTR transactions. The fact that other RTOs may have different tariff provisions governing bilateral FTR transactions, or that other non-FTR PJM market mechanisms under the PJM Tariff use different language than the language governing bilateral agreements in the FTR Center, has no bearing on this proceeding.⁸⁵

34. We are also unpersuaded by GreenHat’s argument that the Tariff provision imposing guarantee and indemnification obligations on bilateral FTR sellers supports its position that price field entries in the FTR Center by themselves create new payment obligations. While creditworthiness and indemnification terms are necessary for every bilateral FTR agreement under the PJM Tariff,⁸⁶ these terms are irrelevant to whether entering non-zero price information into the price field, by itself, automatically creates

⁸⁴ See, e.g., GreenHat Rehearing Request, App. 1 at 1 (“PJM’s FTR Manual, FTR Center Users Guide, and External Interface Specification each say that FTR Center provides a ‘bilateral trading system’ or ‘bilateral trading market.’”).

⁸⁵ See *id.* at 15; GreenHat Protest at 32-34 (FTR Center is different from other non-FTR Center PJM market mechanisms and other RTO bilateral FTR transactions in that FTR Center requires that parties enter information into the price field).

⁸⁶ See PJM Comments at 8 (“[W]hen parties enter their bilateral transfer information into FTR Center, that action also has consequences for their relationships with third parties (such as a seller’s indemnity obligations under the Tariff, and a buyer’s responsibility to meet FTR obligations, including PJM credit requirements.)”; PJM Tariff, Attach. K-App. § 5.2.2(d)(iii) (“Consent of the Office of the Interconnection shall be required for a seller to transfer to a buyer any Financial Transmission Right Obligation. Such consent shall be based upon the Office of the Interconnection’s assessment of the *buyer’s ability to perform the obligations, including meeting applicable creditworthiness requirements*, transferred in the bilateral contract.” (emphasis added)), (iv) (“A seller under such a bilateral contract *shall guarantee and indemnify* the Office of the Interconnection, PJMSettlement, and the Members for the buyer’s obligation to pay any charges associated with the transferred Financial Transmission Right and for which payment is not made to PJMSettlement by the buyer under such a bilateral transaction.” (emphasis added)).

a bilateral FTR agreement imposing payment obligations. Moreover, the Commission recognized that PJM's mandatory reporting requirements are precisely what enables PJM to assess an FTR buyer's ability to perform obligations such as creditworthiness requirements.⁸⁷ Further, there is no need for the Commission to assess GreenHat's claim that PJM "determined that the values entered in FTR Center entitled GreenHat to payments from Shell" in a Pledge Agreement; that claim, about a private agreement between PJM and GreenHat, is irrelevant to whether entering non-zero price information into the price field in the FTR Center automatically creates new contractual obligations. In any event, the Commission's interpretation of the text, structure, and purpose of the relevant PJM Tariff provisions also is not controlled by language in a private communication between PJM and GreenHat, just as it is not controlled by other non-tariff documents.⁸⁸

35. We similarly reject GreenHat's contention that the Commission erred in citing "technical limitations" as a reason why PJM could not process an FTR transaction outside of the FTR Center auction unless parties enter numerical price information.⁸⁹ Although PJM explains that "it has not used the price-field information input into FTR Center by the parties to FTR bilateral transactions for purposes of FTR settlements to date,"⁹⁰ the FTR Center requires that parties input a numerical value into the price field, but does not distinguish between auctions and bilateral agreements.⁹¹ Contrary to GreenHat's suggestion, the Commission in the November 2020 Order did not prohibit parties from attaching contractual significance to the price field information if they had agreed to do so beyond mere entry of data in the price field.

36. Further, nothing in the November 2020 Order pre-judged the outcome of any litigation separate from the instant proceeding, nor did the Commission tie the announced

⁸⁷ November 2020 Order, 173 FERC ¶ 61,153 at P 68.

⁸⁸ *See supra* PP 32-33.

⁸⁹ *See* GreenHat Rehearing Request at 15-16.

⁹⁰ PJM Comments at 8 n.25.

⁹¹ *See* PJM Tariff, Attach. K-App., § 5.2.2(d)(iii)-(v); Petition at 42-43 ("All participants of bilateral transactions are required to report their bilateral transfers in FTR Center to allow PJM to identify the FTR Holder or auction seller with whom PJM will settle during the Planning Period. Because of technical limitations in FTR Center, reporting entities must input a numerical value into the Price field during the reporting process (e.g., the party entering data for the transfer will not be permitted to continue without entering some number—zero or otherwise—into the Price field)." (footnote omitted)).

investigation of GreenHat to the outcome of Shell's Petition. The Commission's interpretation of the PJM Tariff in this declaratory order proceeding does not interfere with or prejudice the outcome of GreenHat's litigation in Texas state court. GreenHat states that it intends to rely on more than just the entry of numbers in the FTR Center price field to demonstrate the parties' intent.⁹² Because the Commission has declined to assert primary jurisdiction over the Texas state court litigation, it need not address this evidence herein. But, nothing in the November 2020 Order precludes GreenHat from presenting the evidence it plans to present as to the merits of its claims in state court litigation.

2. Commission's Denial of GreenHat's Motion to Bar

a. November 2020 Order

37. In the November 2020 Order, the Commission denied GreenHat's motion to bar certain Commission staff from participating in an advisory role in this proceeding. GreenHat's motion was based on an ongoing investigation by the Commission's Office of Enforcement into GreenHat's default on its FTR obligations in PJM⁹³ and a meeting some Commission staff attended with PJM independent consultants who were evaluating PJM's handling of the GreenHat default. In denying the motion to bar, the Commission took into account the conclusion of the Department of Energy's Inspector General that there was no merit to GreenHat's allegations concerning the conduct of Enforcement staff.⁹⁴

b. GreenHat's Rehearing Request

38. GreenHat argues that the Commission denied GreenHat due process in rejecting, without explanation, GreenHat's motion to bar Enforcement Staff and certain other Commission staff from participating in this proceeding and in failing to disclose nonpublic findings by the Department of Energy's Inspector General upon which the Commission relied in denying the motion.⁹⁵ GreenHat states that the fairness of this proceeding and the reasonableness of the Commission's denial of GreenHat's motion to bar are in doubt as long as the Commission has failed to disclose the scope of the Inspector General's investigation, the standards used to evaluate Enforcement Staff's conduct, and the Inspector General's findings. GreenHat states that even if the Inspector

⁹² See GreenHat Protest at 37-38, 42-46.

⁹³ See *PJM Interconnection, L.L.C.*, 166 FERC ¶ 61,072 at P 36.

⁹⁴ November 2020 Order, 173 FERC ¶ 61,173 at PP 59-61.

⁹⁵ GreenHat Rehearing Request at 6.

General did not find impropriety with Enforcement Staff's conduct, Enforcement Staff "might have advised the Commission to include or alter language in its orders for the purpose of benefiting Enforcement's subsequent litigation position—just as Enforcement is reported to have done with the PJM report," and therefore the Commission should have excluded Enforcement Staff from participating in this proceeding.⁹⁶

39. In addition to urging the Commission to disclose the Inspector General's report, GreenHat insists that the Commission explain whether it approves of Enforcement Staff's conduct rather than hiding behind the Inspector General's report. Given the alleged denial of due process to GreenHat, GreenHat argues that the Commission has disregarded executive⁹⁷ and statutory⁹⁸ requirements that the Commission guarantee even the perception of fairness through separation of functions between enforcement and adjudicatory staff.⁹⁹

c. Commission Determination

40. As described in the November 2020 Order, the Commission's Designated Agency Ethics Official referred GreenHat's concerns regarding the conduct of Enforcement Staff in the ongoing investigation to the Department of Energy's Inspector General. In response to that referral, the Department of Energy's Inspector General investigated the matter and concluded that there was no merit to GreenHat's allegations. The Department of Energy's Inspector General labeled its report "Official Use Only" and has not authorized the Commission to disclose it.¹⁰⁰ Accordingly, the Commission lacks

⁹⁶ *Id.* at 22-24.

⁹⁷ *Regulatory Relief to Support Economic Recovery*, Exec. Order 13,294, 85 Fed. Reg. 31,353, at 31,355 (May 19, 2020).

⁹⁸ 5 U.S.C. § 554(d).

⁹⁹ GreenHat Rehearing Request 24-26.

¹⁰⁰ The following label appears on the cover of the Department of Energy's Inspector General Report: "This report, including any attachments and information contained therein, is the property of the Office of Inspector General (OIG) and is for OFFICIAL USE ONLY. The original and any copies of the report must be appropriately controlled and maintained. Disclosure to unauthorized persons without prior OIG written approval is strictly prohibited and may subject the disclosing party to liability. Unauthorized persons may include, but are not limited to, individuals referenced in the report, contractors, and individuals outside the Department of Energy. Public disclosure is determined by the Freedom of Information Act (Title 5, U.S.C., Section 552) and the Privacy Act (Title 5, U.S.C., Section 552a)."

authority to disclose the contents of the Inspector General's report beyond the finding that there was no merit to GreenHat's allegations. Moreover, as discussed below, it is consistent with the Administrative Procedure Act (APA) and the Commission's separation of functions regulations and policy for Commission staff across offices to advise the Commission.

41. In any event, regardless of GreenHat's allegations with respect to the Inspector General's investigation and report, Enforcement Staff's participation in this proceeding is proper under the Commission's regulations and the APA. The Commission's separation of functions policy addresses situations where Commission staff may perform multiple functions without violating the APA.¹⁰¹ Neither the APA, nor Rule 2202 nor Rule 2201 of the Commission's regulations, bar participation by any Commission staff in an advisory role in this declaratory order proceeding.¹⁰²

42. Rule 2202 addresses the requirements for the separation of investigative and adjudicative functions from advisory functions performed by Commission staff and governs contacts between Commission decisional and non-decisional employees.¹⁰³

43. Rule 2202 states:

¹⁰¹ 5 U.S.C. § 557; *Separation of Functions*, 101 FERC ¶ 61,340, at P 1 (2002) (“[T]his statement of administrative policy addresses those situations where a Commission staff member may perform multiple functions without running afoul of the Administrative Procedure Act (APA), 5 U.S.C. 554(d)(2) and 557(d). Simply put, it examines “who may talk to whom when.””).

¹⁰² 18 C.F.R. §§ 385.2201-385.2202 (2020).

¹⁰³ 18 C.F.R. § 385.2202. “A ‘decisional employee’ is defined as a Commissioner or member of his or her personal staff, an administrative law judge, or any other employee or contractor of the Commission, who is or may reasonably be expected to be involved in the decisional process of a proceeding. *See* 18 C.F.R. 385.2201(c)(3). A ‘non-decisional employee’ is a member of the Commission’s trial staff in a proceeding, a settlement judge, a neutral (other than an arbitrator) in an alternative dispute resolution proceeding, or an employee designated as non-decisional in a case. *Id.* Both definitions presuppose an on-going on-the-record proceeding in which persons have filed a complaint or have intervened and protested a filing or proposal, and the issues are being litigated or have been litigated before an ALJ or are being adjudicated in on-the-record ‘paper’ hearings that will be decided by the Commission.” *Statement of Admin. Policy on Separations of Functions*, 101 FERC ¶ 61,340 at P 7 (emphasis added). As relevant here, “[s]uch proceedings do not include . . . investigations under 18 C.F.R. Part 1b.” *Id.* P 12 n.7.

In any proceeding in which a Commission adjudication is made after hearing, or in any proceeding arising from an investigation under part 1b of this chapter beginning from the time the Commission initiates a proceeding governed by part 385 of this chapter, no officer, employee, or agent assigned to work upon the proceeding or to assist in the trial thereof, in that or any factually related proceeding, shall participate or advise as to the findings, conclusion or decision, except as a witness or counsel in public proceedings.¹⁰⁴

44. The applicability of Rule 2202 “assumes a trial-type evidentiary hearing.”¹⁰⁵ The Commission has long held that a declaratory order proceeding is not an adjudication subject to separation of functions.¹⁰⁶ Non-trial-type proceedings, such as this one, do not require a separation of functions, although the Commission may exercise discretion to put such protocols in place.¹⁰⁷ The Commission did not need to impose such protocols in this case because the instant proceeding concerns a dispute among the parties to this proceeding rather than between Enforcement Staff and any of the parties to this proceeding. As discussed above, nothing in this proceeding prejudices any litigation separate from the instant proceeding.¹⁰⁸

45. Rule 2201, which implements section 557(d) of the APA, pertains to the prohibition of off-the-record communications in contested on the record proceedings and states, in relevant part, that investigations under FPA Part 1b are excluded from applicability.¹⁰⁹ The Commission has stated that Rule 2202 explicitly implements

¹⁰⁴ 18 C.F.R. § 385.2202.

¹⁰⁵ See *Separations of Functions*, 101 FERC ¶ 61,340 at P 26.

¹⁰⁶ *Id.* P 4 n.5 (citing *Tenneco Inc.*, 14 FERC ¶ 61,097, at 61,182 (1981) (*Tenneco*)); *Energy Transfer Partners, L.P.*, 121 FERC ¶ 61,282, at P 79 n.147 (2007); see also *Ex Parte Contacts & Separation of Functions*, Order No. 718, 125 FERC ¶ 61,063, at P 23 (2008) (clarifying roles while an investigation is pending until an enforcement proceeding is initiated).

¹⁰⁷ See, e.g., *N. Am. Elec. Reliability Corp.*, 139 FERC ¶ 61,179, at PP 14-16 (2012).

¹⁰⁸ See *supra* P 36.

¹⁰⁹ 18 C.F.R. § 385.2201; see also *Elec. Power Supply Ass’n v. FERC*, 391 F.3d 1255, 1257 (D.C. Cir. 2004).

section 554(d) of the APA¹¹⁰ “by separating its staff into advisory and trial staff once a filing, complaint, or investigation has been set for a trial-type evidentiary hearing before an [administrative law judge].”¹¹¹

46. Participation by Enforcement staff and other Commission staff in an investigation therefore does not trigger either Rule 2202 or Rule 2201 with respect to declaratory order proceedings.¹¹² As the Commission has explained, an “investigator may speak to decision makers and their advisors throughout her investigation (up to the point where she may be assigned to be a litigator), providing them with details of the investigation, seeking their input on how to proceed, and discussing settlement with them. Proceeding in this way does not compromise the Commission’s decision making process, because the ‘mere exposure to evidence presented in non-adversary investigative procedures is insufficient in itself to impugn the fairness of the [Commissioners] at a later adversary hearing.’”¹¹³ This approach satisfies due process requirements because the Commission issued its declaratory order in this proceeding ahead of the commencement of any adversarial on-the-record enforcement proceeding.¹¹⁴

¹¹⁰ 5 U.S.C. § 554(d).

¹¹¹ *Separations of Functions*, 101 FERC ¶ 61,340 at P 12; see also *BP America Inc.*, 173 FERC ¶ 61,239, at P 327 (2020) (“Although both [Rule 2202 and section 554(d) of the Administrative Procedure Act] address the issue with slight variation, both require the same fundamental condition: that an individual involved with the investigative or prosecutorial portion of the case cannot also participate in the agency review or decision on the matter.”).

¹¹² *Separations of Functions*, 101 FERC ¶ 61,340 at P 26 (finding that an “investigation triggers neither Rule 2201, which assumes a proceeding with parties, nor Rule 2202, which assumes a trial-type evidentiary hearing”).

¹¹³ *Id.* (quoting *Withrow v. Larkin*, 421 U.S. 35, 55 (1975)).

¹¹⁴ GreenHat also alleges the Commission has violated Executive Order 13,924. See GreenHat Rehearing Request at 25. We observe that Executive Order 13,924 has been revoked and any suggestion that the November 2020 Order violates that Executive Order is moot. See *Revocation of Certain Presidential Actions*, Exec. Order 14,018, 86 Fed. Reg. 11,855 (Feb. 24, 2021).

The Commission orders:

In response to GreenHat's request for rehearing, the November 2020 Order is hereby modified and the result is sustained, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.