

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AKIACHAK NATIVE COMMUNITY	)	
et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:06-cv-00969 (RC)
	)	
DEPARTMENT OF THE INTERIOR	)	
et al.,	)	
	)	
Defendants.	)	
	)	

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO FEDERAL DEFENDANTS'  
MOTION FOR RECONSIDERATION**

Federal Defendants seek reconsideration of this Court's March 31 Memorandum Opinion<sup>1</sup> and Order<sup>2</sup> granting Plaintiffs' motions for summary judgment<sup>3</sup> and in turn denying Federal Defendants' and Intervenor-State of Alaska's (State) motions for summary judgment.<sup>4</sup> After seven years of extensive briefing addressing the question of whether the Alaska exception in 25 C.F.R. § 151.1 diminishes the privileges available to Alaska Native tribes (except for Metlakatlangs) relative to the "privileges . . . available to all other federally recognized tribes by

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<sup>1</sup> *Akiachak Native Cmty. et. al. v. Dept. of Interior*, No. 1:06-cv-00969 (RC) (D.D.C. March 31, 2013), ECF No. 109.

<sup>2</sup> *Akiachak Native Cmty. et. al.*, No. 1:06-cv-00969 (D.D.C. March 31, 2013), ECF No. 110.

<sup>3</sup> Pls.' Mot. Summ. J., *Akiachak Native Cmty. et. al.*, No. 1:06-cv-00969 (D.D.C. April 21, 2008), ECF No. 46; Pls.' Cross-Mot. Summ. J. as to Alaska Native Claims Settlement Act, *Akiachak Native Cmty. et. al.*, No. 1:06-cv-00969 (D.D.C. Nov. 14, 2008), ECF No. 83.

<sup>4</sup> Defs.' Mot. Summ. J., *Akiachak Native Cmty. et. al.*, No. 1:06-cv-00969 (D.D.C. June 13, 2008), ECF No. 55; State of Alaska's Opp'n Pls.' Mot. Summ. J. & Cross-Mot. Summ. J., *Akiachak Native Cmty. et. al.*, No. 1:06-cv-00969 (D.D.C. Sep. 30, 2008), ECF No. 77.

virtue of their status as Indian tribes,”<sup>5</sup> Federal Defendants now ask this Court to withdraw its ruling on 25 U.S.C. §§ 476(f) and (g), and limit its Memorandum Opinion to holding that the Secretary of the Interior’s (Secretary) rationale in support of the Alaska exception was based on a flawed legal premise.<sup>6</sup> Federal Defendant’s motion for reconsideration should be denied as they have failed to carry their burden of showing that reconsideration is warranted.

**I. Reconsideration Should be Denied as Federal Defendants Have Failed to Carry Their Burden of Demonstrating Where There was a Patent Misunderstanding of the Parties, Where the Court’s Decision Exceeded the Issues Presented, Where the Court Failed to Consider Controlling Law, or Where a Significant Change in the Law Occurred After the Decision Was Rendered.**

Plaintiffs previously briefed the legal standard governing reconsideration of orders that do not constitute final judgments in responding to the State’s motion for reconsideration.<sup>7</sup> Plaintiffs incorporate herein that discussion and emphasize that Federal Defendants have failed to point to *any* controlling law that would support reconsideration in the instant case.<sup>8</sup> Established precedent in the D.C. Circuit holds that “motions for reconsideration” cannot be used as “an opportunity to reargue facts and theories upon which a court has already ruled, nor as a vehicle for presenting theories or arguments that could have been advanced earlier.”<sup>9</sup> Thus, for example, in *Estate ex rel. Gaither v. District of Columbia*, the court found that repackaged

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<sup>5</sup> 25 U.S.C. § 476(g) (2012).

<sup>6</sup> Defs.’ Mot. Recons. 14, *Akiachak Native Cmty. et. al.*, No. 1:06-cv-00969 (D.D.C. July 3, 2013), ECF No. 120.

<sup>7</sup> See Plfs.’ Mem. Opp’n Intervenor-Def’s.’ Mot. Recons., or in the Alt., Certification for Interlocutory Review 2-7, *Akiachak Native Cmty. et. al.*, No. 1:06-cv-00969 (D.D.C. May 1, 2013), ECF No. 113.

<sup>8</sup> Federal Defendants cite *John Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82, 88 (1922) and *Zimzores v. Veterans Admin.*, 778 F.2d 264, 266 (5th Cir. 1985) as supporting authority for this Court to reconsider its Memorandum Opinion, yet neither are directly relevant to its pending motion. The former’s holding on rules of procedure has been overcome by the subsequent development of the Federal Rules of Civil Procedure, while the latter is from a non-controlling sister Court of Appeals.

<sup>9</sup> *Estate ex rel. Gaither v. Dist. of Columbia*, 771 F. Supp. 2d 5, 10 (D.D.C. 2011) (quoting *Secs. & Exch. Comm’n. v. Bilzerian*, 729 F. Supp. 2d 9, 14 (D.D.C. 2010)).

versions of arguments previously made in a prior motion for summary judgment were merely an attempt “to relitigate the matter anew in the guise of a motion for reconsideration.”<sup>10</sup> In rejecting the movant’s attempted second bite at the apple, the court cautioned that “where litigants have once battled for the court’s decision, they should neither be required, nor without good reason permitted, to battle for it again.”<sup>11</sup>

Reconsideration of an interlocutory order is only appropriate “as justice requires.”<sup>12</sup> Under this “interests of justice” standard, reconsideration may be justified where there was a patent misunderstanding of the parties, where a decision was made that exceeded the issues presented, where a court failed to consider controlling law, or where a significant change in the law occurred after the decision was rendered.<sup>13</sup> The party seeking reconsideration bears the burden of proving that reconsideration is warranted, and that some harm or injustice would result if reconsideration were to be denied.<sup>14</sup> Here, Federal Defendants have made no attempt to address any of these factors. They identify nothing in the Memorandum Opinion where the Court erred in finding the Alaska exception in 25 C.F.R. § 151.1 diminishes the privileges available to Alaska Native tribes (except for Metlakatlangs) relative to the privileges available to all other federally recognized tribes. This is perhaps because (as this Court previously noted),

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<sup>10</sup> *Id.* at 13 (internal quotation marks omitted).

<sup>11</sup> *Id.* (quoting *Lewis v. Dist. of Columbia*, 736 F. Supp. 2d 98, 102 (D.D.C. 2010)).

<sup>12</sup> *Cobell v. Norton*, 224 F.R.D. 266, 272 (D.D.C. 2004) (citing *APCC Servs., Inc. v. AT&T Corp.*, 281 F. Supp. 2d 41, 44 (D.D.C. 2003)).

<sup>13</sup> *Singh v. George Washington Univ.*, 383 F. Supp. 2d 99, 101 (D.D.C. 2005) (quoting *Cobell*, 224 F.R.D. at 272). Even in those limited cases where reconsideration under Rule 54(b) has been granted, courts have been careful to do so upon an error that “figured prominently” into the court’s reasoning. *See, e.g., Lederman v. United States*, 539 F. Supp. 2d 1, 2 (D.D.C. 2008) (reconsideration granted of a ruling on plaintiff’s § 1983 civil rights claim because a factual error caused the court to “side-step” an outcome determinative legal issue).

<sup>14</sup> *In Def. of Animals v. Nat’l Institutes of Health*, 543 F. Supp. 2d 70, 76 (D.D.C. 2008) (citing *Cobell v. Norton*, 355 F. Supp. 2d 531, 539-40 (D.D.C. 2005)).

“the Secretary does not deny that [her] regulation diminishes the privileges available to tribes of Alaska Natives (except for the Metlakatlangs) relative to the privileges . . . available to all other federally recognized tribes by virtue of their status as Indian tribes.”<sup>15</sup> Rather than address the requirements for reconsideration, Federal Defendants argue instead that the Court did not adequately consider the “statutory text along with the complex and unique history of 25 U.S.C. §§ 476(f) and (g).”<sup>16</sup> But this is just another way of seeking a second bite at the apple as the issues involving § 476(g)’s statutory text and its legislative history were fully briefed by the parties and addressed by the Court.

Indeed, in Federal Defendants’ 2008 cross-motion for summary judgment (the first written counter-argument on the scope of 25 U.S.C. § 476(g)) they argued that the legislative history of § 476(g) “clearly addresses . . . Congress’ intention to correct how Interior was, in their view, misinterpreting Section 16 of the Indian Reorganization Act (IRA) concerning the prerogative of the Secretary to revoke tribal elections and, thus favoring one group of Indians over another residing on the same reservation.”<sup>17</sup> The 2008 brief detailed portions of the floor speeches offered by Senators McCain and Inouye (the amendment’s co-sponsors)—the same floor speeches cited by the Federal Defendants’ present reconsideration motion. The floor

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<sup>15</sup> Mem. Op. 25, *Akiachak Native Cmty. et. al.*, No. 1:06-cv-00969 (D.D.C. March 31, 2013), ECF No. 109 (quoting 25 U.S.C. § 476(g)).

<sup>16</sup> Defs.’ Mot. Recons. 5, *Akiachak Native Cmty. et. al.*, No. 1:06-cv-00969 (D.D.C. July 3, 2013), ECF No. 120. To support this narrow view of the statute’s scope, Federal Defendants allegedly provide “additional information not previously considered by the Court” that serves to shed new light on the statute’s true meaning. *Id.* However, the “additional information not previously considered” is anything but. A close look at the additional material shows that it is the *same* congressional record as previously cited in the parties’ 2008 summary judgments briefs and the Court’s 2013 Memorandum Opinion, but just a different page. Additionally, the exhibits attached to Federal Defendants’ motion for reconsideration are just hard copies of documents—like the 1936 Solicitor’s opinion justifying “historic” vs. “created” tribes—that have already been cited by the parties and discussed extensively in previously filings. In sum, the legislative history arguments are merely a rehash of arguments previously made.

<sup>17</sup> Defs.’ Mem. Supp. Defs.’ Cross-Mot. Summ. J. & Resp. Opp’n. Pls.’ Mot. Summ. J. 18, *Akiachak Native Cmty. et. al.*, No. 1:06-cv-00969 (D.D.C. June 13, 2008), ECF No. 55-2.

speeches generally reflect the Senators' concern that distinctions between "historic" and "created" tribes were unwarranted under Section 16 of the IRA and a desire that the Secretary treat all federally-recognized tribes equally.<sup>18</sup> Federal Defendants specifically cited these floor speeches as evidence that Congress intended the legislation's scope to be limited to circumstances involving tribal distinctions under Section 16 of the IRA, with no applicability to or impact on Section 5, the land-into-trust authority.<sup>19</sup> In countering that argument, Plaintiffs responded in their sur-reply that:

The Secretary argues that the IRA Amendments were motivated by a concern involving historical versus non-historical tribes. But whatever Congress' motivations—and we do not agree this issue was the sole impetus for the Amendments—it is the words of the Amendments that control. Here, the Secretary does not deny that the plain words of the Amendments adding 25 U.S.C. §§ 476(f) and (g) forbid the action he has taken here.<sup>20</sup>

In its Memorandum Opinion, this Court directly addressed the parties' arguments concerning the legislative history and meaning of § 476(g) and reiterated Plaintiff's "straightforward" argument in this case: "the Alaska exception is a regulation that diminishes the *privileges* of non-Metlakatlan Alaska Natives relative to all other Indian tribes . . . ."<sup>21</sup> With respect to the Secretary's argument that the statute was only enacted to remedy the "historic" vs. "created" tribes issue under IRA Section 16, this Court responded:

That is true enough, but 25 U.S.C. § 476(g) plainly applies to "any regulation" that violated its prohibition. Congress commonly enacts statutes that address more than the precise concern that gave

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<sup>18</sup> *Id.* at 19.

<sup>19</sup> *Id.* at 20.

<sup>20</sup> Pls.' Sur-Reply Resp. Defs.' Reply Supp. Defs.' Cross-Mot. Summ. J. 11-12, *Akiachak Native Cmty. et. al.*, No. 1:06-cv-00969 (D.D.C. Aug. 11, 2008), ECF No. 72.

<sup>21</sup> Mem. Op. 23-24, *Akiachak Native Cmty. et. al.*, No. 1:06-cv-00969 (D.D.C. March 31, 2013), ECF No. 109 (emphasis added).

rise to them, and courts should “not resort to legislative history to cloud a statutory text that is clear.” Nothing in the text of 25 U.S.C. § 476(g) suggests that it is limited in the way that the Secretary suggests and the court will not read such a limitation into the statute.<sup>22</sup>

As this passage demonstrates, Federal Defendants’ motion for reconsideration is nothing more than an attempt to reargue facts and theories the Court has already rejected. As such, the motion should be denied.

**A. Federal Defendants Have Failed to Prove That the Interests of Justice Support Reconsideration of the Court’s Order Under Rule 54(b).**

This Court’s Memorandum Opinion clearly repudiated a limiting construction of 25 U.S.C. § 476(g), yet Federal Defendants now seek to evade judicial relief by asking the Court to limit its decision to a holding that the Secretary’s rationale in support of the Alaska exception was based on a flawed legal premise.<sup>23</sup> But this limited approach would substantially harm Plaintiffs’ entitlement to relief and create manifest injustice to Alaska Native tribes. The record in this case shows a stunning level of bureaucratic recalcitrance when it comes to making privileges available to Alaska Native tribes relative to the “privileges . . . available to all other federally recognized tribes by virtue of their status as Indian tribes.”<sup>24</sup> For example, although the Federal Defendants agreed throughout this litigation that the Secretary has “discretionary power to take lands into trust in the State of Alaska,”<sup>25</sup> they have steadfastly refused to revise or amend 25 C.F.R. § 151.1 accordingly. And notwithstanding the fact that the Secretary has further

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<sup>22</sup> *Id.* at 24 (citing *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994)).

<sup>23</sup> Defs.’ Mot. Recons. 14, *Akiachak Native Cmty. et. al.*, No. 1:06-cv-00969 (D.D.C. July 3, 2013), ECF No. 120.

<sup>24</sup> 25 U.S.C. § 476(g).

<sup>25</sup> Defs.’ Reply Supp. Defs.’ Cross-Mot. Summ. J. 1, *Akiachak Native Cmty. et. al.*, No. 1:06-cv-00969 (D.D.C. July 25, 2008), ECF No. 67.

agreed that “[s]ubsequent laws—the Alaska Native Claims Settlement Act and the Federal Land Policy and Management Act—have not removed the Secretary’s discretionary authority to take lands into trust status in the State of Alaska,”<sup>26</sup> it has required litigation to force the Secretary to grant Alaska Native tribes the “privilege” of participating in the land into trust process consistent with 25 U.S.C. § 476(g). Without a holding that the Secretary is denying Alaska Native tribes the privilege of participating in the land into trust process consistent with § 476(g), the Secretary may continue to use her discretion to treat Alaska Native tribes differently in the land into trust regulatory process. This is evident from the briefing on remedies which has shown the Secretary’s lack of interest in a remand for a curative rulemaking that would aid in the development of procedures that accommodate petitions for lands in Alaska.<sup>27</sup>

The reconsideration motion is but one more ill-conceived attempt to avoid treating Alaska Native tribes as equals to all other federally recognized tribes.

## **II. On the Merits, There is No Authority to Support the Newly-Introduced Theory That the Phrase “Privileges and Immunities” is Too Ambiguous to Interpret.**

Contrary to this Court’s holding on the statute’s plain language, Federal Defendants now attempt yet another revision of previously made arguments by insisting that the phrase “privileges and immunities” used in 25 U.S.C. § 476(f) and (g) is ambiguous.<sup>28</sup> Rather than rely on well-accepted precedent for construing statutory language, Federal Defendants brainstorm various ways the term “privileges and immunities” *might* be ambiguous.<sup>29</sup> The question,

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<sup>26</sup> *Id.* at 1-2 (internal citations omitted).

<sup>27</sup> See Defs.’ Remedy Br. 7 n.4, *Akiachak Native Cmty. et. al.*, No. 1:06-cv-00969 (D.D.C. June 24, 2013), ECF No. 118 (“If the Court sets aside the Alaska exception, Interior believes the remainder of the Part 151 regulations could apply in Alaska.”).

<sup>28</sup> Defs.’ Mot. Recons. 7, *Akiachak Native Cmty. et. al.*, No. 1:06-cv-00969 (D.D.C. July 3, 2013), ECF No. 120.

<sup>29</sup> *Id.* at 7-8.

however, is not what “privileges and immunities” means in the abstract, but rather what *privilege* the Secretary is denying Alaska Native tribes relative to all other Indian tribes in the context of the land into trust process. As this Court has already explained, the “privilege” in *this* context, is the privilege to participate in the land into trust process relative to all other federally recognized tribes.<sup>30</sup> The Federal Defendants’ statutory interpretation arguments fail for three reasons.

First, the Federal Defendants employ an erroneous approach to statutory interpretation by claiming the first step in interpreting a statute is to determine whether its terms are ambiguous.<sup>31</sup> In actuality, “[t]he first step in statutory interpretation considers the statute’s plain language.”<sup>32</sup> In other words, we look for clarity before we look for ambiguity. The Court in *Robinson v. Shell*

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<sup>30</sup> Mem. Op. 24-25, *Akiachak Native Cmty. et. al.*, No. 1:06-cv-00969 (D.D.C. March 31, 2013), ECF No. 109 (emphasis added). Plaintiffs specifically note that in the publication of its 1993 list of federally recognized tribes, the Bureau of Indian Affairs underscored the equal status Alaska Native tribes enjoyed relative to all other federally recognized tribes:

The purpose of the current publication is to publish an Alaska list of entities conforming to the intent of 25 CFR 83.6(b) and to eliminate any doubt as to the Department’s intention by expressly and unequivocally acknowledging that the Department has determined that the village and regional tribes listed below are distinctly Native communities and *have the same status as tribes in the contiguous 48 states*. . . . This list is published to clarify that the villages and regional tribes listed below are not simply eligible for services, or recognized as tribes for certain narrow purposes. Rather, *they have the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes* with a government-to-government relationship with the United States; *are entitled to the same protection, immunities, privileges as other acknowledged tribes*; have the right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities available to other tribes; and are subject to the same limitations imposed by law on other tribes.

Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,365, 54,365-66 (Oct. 21, 1993) (emphasis added).

<sup>31</sup> Defs.’ Mot. Recons. 6, *Akiachak Native Cmty. et. al.*, No. 1:06-cv-00969 (D.D.C. July 3, 2013), ECF No. 120.

<sup>32</sup> *United States v. Mohammed*, 693 F.3d 192, 199 (D.C. Cir. 2012) (citing *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1237 (D.C. Cir. 2008)). See also *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (“Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.”).



*Oil Company* held that “the plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”<sup>33</sup> The Federal Defendants urge the Court to consider whether “privileges and immunities” may have ambiguous meanings when applied to issues not in dispute in this case such as federal agencies charged with implementing treaty rights.<sup>34</sup> This argument, however, ignores the rule that courts interpret the meaning of statutes “with regard to the particular dispute in the case.”<sup>35</sup>

Second, a party challenging the dominant “plain meaning” rule of statutory interpretation bears the burden of showing “either that some other section of the act expands or restricts its meaning, that the provision itself is repugnant to the general purposes of the act, or that the act considered [in conjunction] with other similar acts or with its legislative history imports a different meaning.”<sup>36</sup> The Federal Defendants do not meet this burden. The Federal Defendants cite no authority for the proposition that “privileges and immunities” is an ambiguous phrase beyond this Court’s capability to interpret by its terms. Indeed, the Federal Defendants cannot cite a single case where this phrase has ever been found to be vague or ambiguous—even though the phrase is employed in nine different statutes under Title 25 of the U.S. Code.<sup>37</sup> In fact, there is little ambiguity in the specific context of this case, as this Court’s Memorandum Opinion specifically identifies that the privilege at issue is the privilege enjoyed by all federally

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<sup>33</sup> *Robinson*, 519 U.S. at 340 (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992)).

<sup>34</sup> Defs.’ Mot. Recons. 13, *Akiachak Native Cmty. et. al.*, No. 1:06-cv-00969 (D.D.C. July 3, 2013), ECF No. 120.

<sup>35</sup> *Robinson*, 519 U.S. at 340.

<sup>36</sup> 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:1 (7th ed. 2012).

<sup>37</sup> See 25 U.S.C. §§ 182; 348; 349; 379; 465; 476(f)-(g); 757(b); 1212(4); & 1311 (2012).

recognized Indian tribes and individuals to request the Secretary to place their lands into trust status.<sup>38</sup>

Finally, the Court should reject Federal Defendant's novel theory that the Court should avoid ruling on a statutory interpretation question when the interpretation of a statute is "complex."<sup>39</sup> Again, Federal Defendants cite no authority for this proposition. In this litigation, the Plaintiffs' primary contention was that the Alaska exception violated the prohibitions listed in 25 U.S.C. § 476(g). Plaintiffs' argument that the Secretary's failure to rescind the exception was arbitrary and capricious was secondary to the argument that the Alaska exception was contrary to law.<sup>40</sup> The Federal Defendant's request for the Court to rescind and rewrite its Memorandum Opinion based on the Secretary's fear of "unintended consequences" is misplaced. "Administrative agencies often have to apply regulatory schemes to unforeseen circumstances."<sup>41</sup> A holding limited to finding the Alaska exception arbitrary and capricious would miss the fundamental error with the exception's existence—it unlawfully discriminates among federally recognized Indian tribes.

### III. Conclusion

For the reasons stated above, Plaintiffs respectfully request this Court to deny Federal Defendants' Motion for Reconsideration.

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<sup>38</sup> Mem. Op. 23-24, *Akiachak Native Cmty. et. al.*, No. 1:06-cv-00969 (D.D.C. March 31, 2013), ECF No. 109. Federal Defendants also note, for no clear purpose, that Ms. Kavairlook is not an Indian tribe capable of enjoying privileges and immunities. Defs.' Mot. Recons. 7 n.2, *Akiachak Native Cmty. et. al.*, No. 1:06-cv-00969 (D.D.C. July 3, 2013), ECF No. 120. This ignores, however, that Ms. Kavairlook is also presently unable to petition the Secretary to consider taking her land into trust because she is an enrolled member of the Native Village a Barrow as opposed to a federally recognized Indian tribe outside Alaska.

<sup>39</sup> Defs.' Mot. Recons. 5, *Akiachak Native Cmty. et. al.*, No. 1:06-cv-00969 (D.D.C. July 3, 2013), ECF No. 120.

<sup>40</sup> Consolidated Compl. 14, *Akiachak Native Cmty. et. al.*, No. 1:06-cv-00969 (D.D.C. Nov. 9, 2007), ECF No. 15.

<sup>41</sup> *Atlanta Gas & Light Co. v. Fed. Power Comm'n*, 495 F.2d 1070, 1072 (D.C. Cir. 1974).

Respectfully submitted this 9<sup>th</sup> day of August, 2013.

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