

No. 14-60822

**In the United States Court of Appeals
for the Fifth Circuit**

EL PASO ELECTRIC COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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STATEMENT REGARDING ORAL ARGUMENT

In accordance with Fifth Circuit Rule 28.2.4 and Federal Rule of Appellate Procedure 34(a)(1), the Federal Energy Regulatory Commission respectfully submits that oral argument would assist the Court's resolution of this case.

This case concerns ten public utilities' (the WestConnect jurisdictional utilities) efforts to comply with Federal Energy Regulatory Commission reforms to planning and cost allocation processes for upgrades to the interstate electric transmission grid. Those reforms support a range of implementation strategies. Transmission planning and cost allocation is, by nature, highly technical and varies from utility to utility and from region to region. Several cases concerning the proper interpretation and application of the Commission's new rules are pending in the United States Courts of Appeals for the District of Columbia (four appeals: Nos. 14-1085 *et al.*, No. 14-1248, No. 14-1281, and No. 15-1139), and the Seventh (three appeals: No. 14-2153, No. 14-2533, and No. 15-1316) Circuits.

Oral argument will enable counsel to answer any questions the Court may have regarding not only the particular issues presented in the orders on review, but also the broader context of the Commission's recent transmission planning reforms, and the implementation of those reforms.

TABLE OF CONTENTS

	<u>PAGE</u>
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	3
I. STATUTORY AND REGULATORY BACKGROUND	3
A. Federal Power Act	3
B. Commission Open Access And Regional Planning Rulemakings	5
C. The D.C. Circuit Fully Affirms Order No. 1000.....	8
II. THE PROCEEDING UNDER REVIEW.....	10
A. The WestConnect Region.....	10
B. The WestConnect Order No. 1000 Compliance Filings	13
1. The Planning Management Committee	13
2. The WestConnect Jurisdictional Utilities’ Proposed Transmission Planning and Cost Allocation Processes	14
C. The Commission Orders.....	16
SUMMARY OF ARGUMENT	21
ARGUMENT.....	23
I. STANDARD OF REVIEW.....	23
II. THE COMMISSION REASONABLY CONCLUDED THAT THE WESTCONNECT JURISDICTIONAL UTILITIES’ PROPOSED CATEGORICAL EXCLUSION WOULD UNDERMINE ORDER NO. 1000’S GOALS	25

TABLE OF CONTENTS

	<u>PAGE</u>
A. The Commission Sought to Promote Order No. 1000’s Goal Of Efficient And Cost-Effective Facilities In Light Of WestConnect’s Unique Circumstances	25
B. The Commission’s Orders Are Not Inconsistent With Order No. 1000’s Cost Allocation Requirements.....	28
1. Non-Jurisdictional Utilities Are Not Governed By Order No. 1000	28
2. The Commission Reasonably Balanced Order No. 1000’s Goals	30
3. The Commission’s Reciprocity Principle Applies To Encourage Non-Jurisdictional Utility Participation.....	32
III. THE COMMISSION REASONABLY ASSIGNED TRANSMISSION PLANNING AND COST ALLOCATION RESPONSIBILITIES TO THE WESTCONNECT COMMITTEE.....	34
A. The Commission Did Not Improperly Subdelegate Its Authority Over Cost Allocation.....	35
B. The Commission Did Not Expand The Requirements Of Order No. 1000 Or Violate Other Law In Requiring A Binding Cost Allocation And A Binding Selection Of A Transmission Developer For Each Project.....	39
1. Order No. 1000 Requires A Binding Cost Allocation.....	39
2. Order No. 1000 Also Requires A Binding Selection Of A Developer For Each Project In The Regional Transmission Plan	43

TABLE OF CONTENTS

	<u>PAGE</u>
C. The <i>Mobile-Sierra</i> Doctrine Does Not Apply To WestConnect’s Transmission Planning Process	47
CONCLUSION.....	50

TABLE OF AUTHORITIES

<u>COURT CASES:</u>	<u>PAGE</u>
<i>Blumenthal v. FERC</i> , 552 F.3d 875 (D.C. Cir. 2009).....	27
<i>Brazos Elec. Power Coop., Inc. v. FERC</i> , 205 F.3d 235 (5th Cir. 2000)	23, 24
<i>Burlington Truck Lines, Inc. v. United States</i> , 371 U.S. 156 (1962).....	24
<i>Carnegie Nat. Gas Co. v. FERC</i> , 968 F.2d 1291 (D.C. Cir. 1992).....	31
<i>Entergy La., Inc. v. La. Pub. Serv. Comm’n</i> , 539 U.S. 39 (2003).....	36-37
<i>FCC v. Fox Television Stations, Inc.</i> , 556 U.S. 502 (2009).....	24
<i>FPC v. Sierra Pac. Power Co.</i> , 350 U.S. 348 (1956).....	47
<i>Ill. Commerce Comm’n v. FERC</i> , 576 F.3d 470 (7th Cir. 2009)	30, 42
<i>Ill. Commerce Comm’n v. FERC</i> , 721 F.3d 764 (7th Cir. 2013)	37, 41
<i>Interstate Nat. Gas Ass’n of Am. v. FERC</i> , 285 F.3d 18 (D.C. Cir. 2002).....	9, 30, 31
<i>La. Pub. Serv. Comm’n v. FERC</i> , 761 F.3d 540 (5th Cir. 2014)	35-36, 37, 38, 45
<i>La. Pub. Serv. Comm’n v. FERC</i> , 771 F.3d 903 (5th Cir. 2014)	24

TABLE OF AUTHORITIES

<u>COURT CASES:</u>	<u>PAGE</u>
<i>Laclede Gas Co. v. FERC</i> , 997 F.2d 936 (D.C. Cir. 1993).....	37
<i>Midwest ISO Transmission Owners v. FERC</i> , 373 F.3d 1361 (D.C. Cir. 2004).....	9, 30
<i>Morgan Stanley v. Pub. Util. Dist. No. 1 of Snohomish Cnty.</i> , 554 U.S. 527 (2008).....	5, 24, 47
<i>Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.</i> , 463 U.S. 29 (1983).....	23-24
<i>New England Power Generators Ass’n v. FERC</i> , 707 F.3d 364 (D.C. Cir. 2013).....	48-49
<i>New York v. FERC</i> , 535 U.S. 21 (2002).....	4, 5
<i>Permian Basin Area Rate Cases</i> , 390 U.S. 747 (1968).....	27
<i>Potomac Elec. Power Co. v. FERC</i> , 210 F.3d 403 (D.C. Cir. 2000).....	24
<i>Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash. v. FERC</i> , 272 F.3d 607 (D.C. Cir. 2001).....	5
<i>Pub. Utils. Comm’n of Cal. v. FERC</i> , 254 F.3d 250 (D.C. Cir. 2001).....	24
<i>S.C. Pub. Serv. Auth. v. FERC</i> , 762 F.3d 41 (D.C. Cir. 2014).....	passim

TABLE OF AUTHORITIES

<u>COURT CASES:</u>	<u>PAGE</u>
<i>Shell Oil Co. v. FPC</i> , 520 F.2d 1061 (5th Cir. 1975)	27
<i>Sithe/Independence Power Partners v. FERC</i> , 285 F.3d 1 (D.C. Cir. 2002).....	30
<i>Tex. Clinical Labs, Inc. v. Sebelius</i> , 612 F.3d 771 (5th Cir. 2010)	24
<i>Tex. Office of Pub. Util. Counsel v. FCC</i> , 265 F.3d 313 (5th Cir. 2001)	37
<i>Texas v. United States</i> , 866 F.2d 1546 (5th Cir. 1989)	26
<i>United Distrib. Cos. v. FERC</i> , 88 F.3d 1105 (D.C. Cir. 1996).....	34
<i>United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.</i> , 350 U.S. 332 (1956).....	47
<i>U.S. Telecom Ass’n v. FCC</i> , 359 F.3d 554 (D.C. Cir. 2004).....	38

TABLE OF AUTHORITIES

<u>ADMINISTRATIVE CASES:</u>	<u>PAGE</u>
<i>Preventing Undue Discrimination and Preference in Transmission Serv.,</i>	
Order No. 890, FERC Stats. & Regs. ¶ 31,241, <i>on reh'g</i> ,	
Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), <i>on reh'g</i> ,	
Order No. 890-B, 123 FERC ¶ 61,299 (2008), <i>on reh'g</i> ,	
Order No. 890-C, 126 FERC ¶ 61,228, <i>on clarification</i> ,	
Order No. 890-D, 129 FERC ¶ 61,126 (2009)	6
 <i>Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. by Pub. Utils. and Recovery of Stranded Costs by Pub. Utils. and Transmitting Utils.,</i>	
Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), <i>clarified</i> ,	
76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), <i>on reh'g</i> ,	
Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, <i>on reh'g</i> ,	
Order No. 888-B, 81 FERC ¶ 61,248 (1997), <i>on reh'g</i> ,	
Order No. 888-C, 82 FERC ¶ 61,046 (1998), <i>aff'd in relevant part sub nom. Transmission Access Policy Study Grp. v. FERC</i> ,	
225 F.3d 667 (D.C. Cir. 2000)	5
 <i>Pub. Serv. Co. of Colo.,</i>	
142 FERC ¶ 61,206 (2013), <i>on reh'g</i> ,	
148 FERC ¶ 61,213 (2014), <i>reh'g denied</i> ,	
151 FERC ¶ 61,128 (2015).....	passim
 <i>Transmission Planning and Cost Allocation by Transmission Owning and Operating Pub. Utils.,</i>	
Order No. 1000, 136 FERC ¶ 61,051 (2011), <i>on reh'g and clarification</i> ,	
Order No. 1000-A, 139 FERC ¶ 61,132, <i>on reh'g and clarification</i> ,	
Order No. 1000-B, 141 FERC ¶ 61,044 (2012)	passim
 <i>WestConnect,</i>	
143 FERC ¶ 61,291 (2013).....	10

TABLE OF AUTHORITIES

<u>STATUTES:</u>	<u>PAGE</u>
Administrative Procedure Act	
5 U.S.C. § 706(2)(A)	23
Federal Power Act	
Section 201(b), 16 U.S.C. § 824(b).....	3, 4
Section 201(e), 16 U.S.C. § 824(e).....	4
Section 205(a), (b), (e), 16 U.S.C. § 824d(a), (b), (e)	4
Section 206, 16 U.S.C. § 824e.....	4, 38
Section 211A, 16 U.S.C. § 824j-1(b)	4
Section 313(b), 16 U.S.C. § 825l(b).....	24

GLOSSARY

Commission or FERC	Federal Energy Regulatory Commission
El Paso	El Paso Electric Company
First Order	<i>Pub. Serv. Co. of Colo.</i> , 142 FERC ¶ 61,206 (2013), ROA 75, JA 279, on review in this appeal
Intervenors	Xcel Energy Services Inc., Public Service Company of Colorado, Arizona Public Service Company, Black Hills Power Inc., Black Hills Colorado Electric Utility Company, LP, Cheyenne Light, Fuel, and Power Company, NV Energy, Inc., Tucson Electric Power Company, UNS Electric, Inc., and Public Service Company of New Mexico
Order No. 1000	<i>Transmission Planning and Cost Allocation by Transmission Owning and Operating Pub. Utils.</i> , Order No. 1000, 136 FERC ¶ 61,051 (2011), <i>on reh'g and clarification</i> , Order No. 1000-A, 139 FERC ¶ 61,132, <i>on reh'g</i> , Order No. 1000-B, 141 FERC ¶ 61,044 (2012)
P	The internal paragraph number within a FERC order
ROA	Record of Appeal
Second Order	<i>Pub. Serv. Co. of Colo.</i> , 148 FERC ¶ 61,213 (2014), ROA 147, JA 1003, on review in this appeal
<i>South Carolina</i>	<i>S.C. Pub. Serv. Auth. v. FERC</i> , 762 F.3d 41 (D.C. Cir. 2014)

GLOSSARY

Third Order	<i>Pub. Serv. Co. of Colo.</i> , 151 FERC ¶ 61,128 (2015), ROA 182, JA 1537, on review in this appeal
WestConnect	An association of Commission-jurisdictional and non-jurisdictional utilities, with service territories in nine western States, that has historically engaged in joint transmission planning activities
WestConnect Committee	WestConnect Planning Management Committee, a group of transmission provider representatives and other stakeholders that develops a regional transmission plan and implements the cost allocation in the WestConnect jurisdictional utilities' tariffs
WestConnect jurisdictional utilities	El Paso and the Intervenors

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**BRIEF OF RESPONDENT
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STATEMENT OF THE ISSUES

Petitioner El Paso Electric Company (El Paso), along with other public utilities intervening in support of El Paso (Intervenors),¹ are members of WestConnect, a voluntary association of utilities – both jurisdictional and non-jurisdictional to the Federal Energy Regulatory Commission (FERC or

¹ Intervenors consist of Xcel Energy Services Inc., Public Service Company of Colorado, Arizona Public Service Company, Black Hills Power Inc., Black Hills Colorado Electric Utility Company, LP, Cheyenne Light, Fuel, and Power Company, NV Energy, Inc., Tucson Electric Power Company, UNS Electric, Inc., and Public Service Company of New Mexico.

Commission) – that assesses transmission needs and plans transmission improvements for a region that spans all or part of nine western States. El Paso and the supporting Intervenors (collectively, WestConnect jurisdictional utilities) object to the Commission’s consideration of their filings to comply with the regional transmission planning requirements established in the Commission’s recent Order No. 1000 rulemaking, which was recently affirmed by the D.C. Circuit.² Order No. 1000’s transmission planning reforms require, among other things, that all FERC-jurisdictional utilities participate in a regional transmission planning process that produces a regional transmission plan. El Paso and the Intervenors filed proposals to comply with Order No. 1000 and to establish a new transmission planning process for WestConnect.

El Paso challenges three Commission orders that modified, but ultimately accepted, the WestConnect jurisdictional utilities’ proposals to implement and participate in a regional electric transmission plan. *Pub. Serv. Co. of Colo.*, 142 FERC ¶ 61,206 (2013) (First Order), ROA 75, JA 279, *on reh’g*, 148 FERC ¶ 61,213 (2014) (Second Order), ROA 147, JA 1003, *reh’g denied*, 151 FERC ¶

² *Transmission Planning and Cost Allocation by Transmission Owning and Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 61,051 (2011), *on reh’g and clarification*, Order No. 1000-A, 139 FERC ¶ 61,132, *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) (*South Carolina*).

61,128 (2015) (Third Order), ROA 182, JA 1537. The issues presented on appeal are:

1. Whether the Commission properly rejected the WestConnect jurisdictional utilities' proposal to categorically exclude transmission projects from regional cost allocation if the projects benefit, in some manner, an unenrolled non-jurisdictional utility, because the proposal would undermine Order No. 1000's goal to increase consideration of efficient and cost-effective transmission projects.

2. Whether the Commission reasonably required WestConnect's Planning Management Committee (WestConnect Committee) to identify the beneficiaries of new transmission projects and a developer to implement the cost allocation for each transmission project included in the WestConnect regional transmission plan, consistent with Order No. 1000's requirements.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

A. Federal Power Act

Section 201(b) of the Federal Power Act, 16 U.S.C. § 824(b), grants the Commission jurisdiction over the “transmission of electric energy in interstate commerce,” the “sale of electric energy at wholesale in interstate commerce,” and “all facilities for such transmission or sale.” 16 U.S.C. § 824(b)(1). The owners and operators of jurisdictional facilities are defined as “public utilities” (public

utilities or jurisdictional utilities). *Id.* § 824(e). *See generally New York v. FERC*, 535 U.S. 1, 5-7 (2002) (describing structure and operation of the Federal Power Act).

All rates for or in connection with jurisdictional sales and transmission service are subject to Commission review under Section 205 of the Federal Power Act to assure that they are just and reasonable, and not unduly discriminatory or preferential. 16 U.S.C. §§ 824d(a), (b), (e). Section 206 of the Federal Power Act authorizes the Commission, on its own initiative or based on a third-party complaint, to investigate whether existing rates for jurisdictional utilities are just and reasonable, and if they are not, to establish a new rate. 16 U.S.C. § 824e. As relevant here, the Commission has previously invoked Section 206 to require jurisdictional utilities to incorporate tariff revisions related to electric transmission planning. *See South Carolina*, 762 F.3d at 55-60.

Section 211A of the Federal Power Act also provides that the Commission “may” require non-public utilities (non-public utilities or non-jurisdictional utilities) to provide transmission services at a comparable and not unduly discriminatory or preferential basis. 16 U.S.C. § 824j-1(b). The pertinent statutes and regulations are reproduced in the Addendum to this brief.

B. Commission Open Access And Regional Planning Rulemakings

“Historically, electric utilities were vertically integrated, owning generation, transmission, and distribution facilities and selling these services as a ‘bundled’ package to wholesale and retail customers in a limited geographical service area.” *Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash. v. FERC*, 272 F.3d 607, 610 (D.C. Cir. 2001). The Commission found that it was in the economic interest of these vertically-integrated utilities to deny transmission service to others, or to offer it on terms less favorable than those they offered to themselves. Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,682.³ *See South Carolina*, 762 F.3d at 50. To remedy these anti-competitive practices, in recent decades the Commission has sought to foster wholesale electricity competition over broader geographic areas. *See Morgan Stanley v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 536-37 (2008).

The D.C. Circuit’s recent opinion affirming the Order No. 1000 rulemaking provides a concise overview of the history of the Commission’s electric industry

³ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. by Pub. Utils. and Recovery of Stranded Costs by Pub. Utils. and Transmitting Utils.*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *on reh’g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part sub nom. Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).

reforms. *See South Carolina*, 762 F.3d at 49-54. The *South Carolina* court traced the industry changes and the legislative and regulatory developments leading to the Commission's recent efforts to reform regional transmission planning and cost allocation. *Id.* at 51-54.

In 1996, the Commission issued Order No. 888, a landmark rulemaking, ultimately upheld by the United States Supreme Court, directing jurisdictional utilities to adopt open access non-discriminatory transmission tariffs. *Id.* at 50. In 2007, the Commission issued Order No. 890,⁴ which set out certain measures to require transmission providers to establish open, transparent, and coordinated transmission planning processes. *Id.* at 51.

After assessing the effectiveness of those measures, the Commission determined that additional reforms were necessary to ensure – as the Federal Power Act requires – that rates for jurisdictional utilities would be just and reasonable and not unduly discriminatory or preferential. *Id.* at 52. Accordingly, in 2011, the Commission issued its Order No. 1000 rulemaking.

Order No. 1000 adopted a number of requirements for transmission planning. It mandates that jurisdictional utilities enroll in a transmission planning

⁴ *Preventing Undue Discrimination and Preference in Transmission Serv.*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228, *on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

region – the size and scope of which is defined by the integrated nature of the grid. Order No. 1000 P 160; *accord* First Order P 25 (same), JA 293. Jurisdictional utilities must have an enrollment process that defines how entities, including non-jurisdictional utilities, become part of a transmission planning region. Order No. 1000-A PP 275-76.

Through this regional process, jurisdictional utilities must participate in regional planning that evaluates more efficient or cost-effective solutions to transmission needs than those proposed in local transmission planning processes. Order No. 1000 PP 2, 146, 203-205; *South Carolina*, 762 F.3d at 52-53. It also requires that those planning processes include methods to allocate the costs of new transmission facilities to the benefitting jurisdictional utilities. Order No. 1000 P 558; *see South Carolina*, 762 F.3d at 53. Enrollment subjects a utility to regional and interregional cost allocation methods for that region, and makes a utility a potential beneficiary of transmission planning for that area. Order No. 1000-A PP 275-76.

Order No. 1000 does not apply to non-jurisdictional utilities – neither requiring them to join a planning region nor making them subject to cost allocation. Order No. 1000 PP 818-19. Non-jurisdictional utilities are permitted, but not required, to enroll in transmission planning regions. *Id.* If they do not enroll, they may participate in regional transmission planning processes as

stakeholders. *Id.* But there is an exception. Under the “reciprocity condition,” if a non-jurisdictional utility takes transmission service from a jurisdictional utility, it must participate in regional planning and cost allocation processes. *Id.*; Order No. 1000-A P 773 (“[T]hose [utilities, including non-jurisdictional utilities] that ‘take advantage of open access, including improved transmission planning and cost allocation, should be expected to follow the same requirements as public utility transmission providers.’”) (quoting Order No. 1000 P 818); *South Carolina*, 762 F.3d at 92.⁵

C. The D.C. Circuit Fully Affirms Order No. 1000

The *South Carolina* court upheld the Commission’s Order No. 1000 rulemaking in all respects. The Court of Appeals found that Order No. 1000’s “focus” was “improving the process through which needed infrastructure is identified and planned.” *South Carolina*, 762 F.3d at 77. According to the court, the Commission concluded that the “threat to just and reasonable rates arose” from deficient “cost allocation practices that could thwart the identification of more efficient and cost-effective transmission solutions.” *Id.* at 66. Order No. 1000 was necessary to ensure that transmission planning is “adequate to support more

⁵ In order to maintain a voluntary “safe harbor” Commission tariff that allows them to make sales to jurisdictional public utilities, non-jurisdictional utilities are required to ensure that the provisions of their tariffs are consistent with or superior to the provisions of the *pro forma* Open Access Transmission Tariff as it was revised in Order No. 1000. Order No. 1000 P 799 & n.574, P 815.

efficient and cost-effective decisions moving forward.” *Id.* (quoting Order No. 1000 P 44). “[T]here is ample reason to think that injecting competition into the planning process will help to ensure that rates remain just and reasonable.” *South Carolina*, 762 F.3d at 77.

The *South Carolina* court rejected arguments that Order No. 1000’s cost-allocation requirements were not sufficiently precise because the rulemaking did not provide for cost allocation between regions – even if a jurisdictional utility benefitted from a new facility in a neighboring region. *Id.* at 81-90. It held that, although some benefitting utilities may escape cost responsibility, “nothing requires the Commission to ensure full or perfect cost causation.” *Id.* at 88 (“[W]e have never required a ratemaking agency to allocate costs with exacting precision.”) (quoting *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368-69 (D.C. Cir. 2004)).

The court found that the Commission may “undertake [cost-allocation] reform one step at a time,” and a court can overturn such gradualism “only if it truly yields unreasonable discrimination or some other kind of arbitrariness.” *Id.* (quoting *Interstate Nat. Gas Ass’n of Am. v. FERC*, 285 F.3d 18, 35 (D.C. Cir. 2002)). The Commission may balance differing goals and “emphasize other, competing policies” over cost causation. *Id.* (quoting *Interstate Nat. Gas*, 285 F.3d at 35).

The *South Carolina* court also rejected a challenge to the Commission’s decision to not mandate – but instead incentivize – non-jurisdictional utility participation through the reciprocity condition. The court explained that “[n]on-public utilities are not subject to Section 206 of the FPA, and so are not directly governed by Order No. 1000 and its planning and cost allocation requirements.” *Id.* at 93. Non-jurisdictional utilities are instead subject to Section 211A of the Federal Power Act, which “plainly permits, but does not mandate, the Commission to require a non-public utility to provide transmission service.” *Id.* at 96.

So the Commission “was under no statutory obligation to regulate non-public utilities, and it provided a reasoned basis” for its reciprocity approach. *Id.* at 96. By “conditioning non-public utilities’ access to the open systems of public utilities on the former’s adherence to the planning and cost allocation requirements,” Order No. 1000 “encourages non-public utilities to participate in planning and cost allocation.” *Id.*

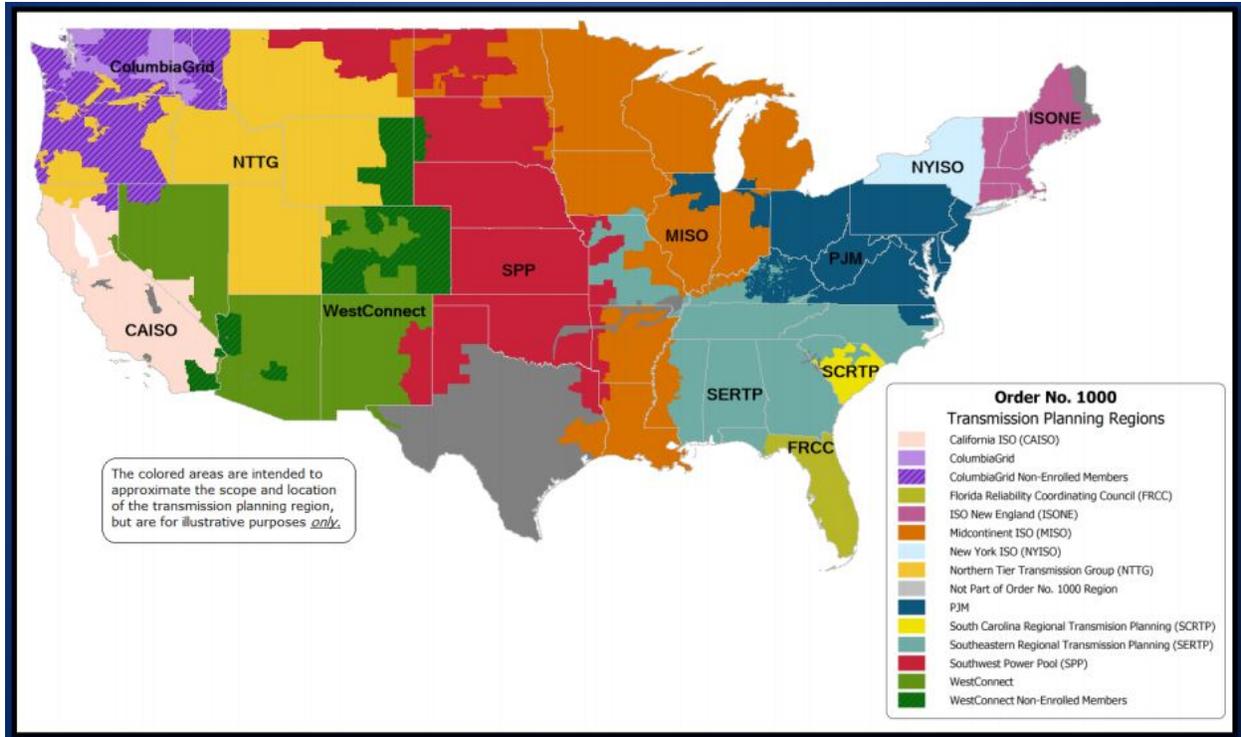
II. THE PROCEEDING UNDER REVIEW

A. The WestConnect Region

WestConnect is not itself a jurisdictional utility, but rather a voluntary association of the WestConnect jurisdictional utilities and neighboring non-jurisdictional utilities that is governed by a memorandum of understanding among its members. *WestConnect*, 143 FERC ¶ 61,291, P 2 (2013). Its members own and

operate more than 33,000 miles of high-voltage transmission lines that cover all or parts of Colorado, New Mexico, Nevada, and Arizona, and parts of Nebraska, South Dakota, California, Wyoming, and Texas. First Order P 6, JA 286.

In the region covered by WestConnect – as in much of the western United States – jurisdictional and non-jurisdictional transmission providers are “closely intertwined.” Request for Rehearing of the Jurisdictional WestConnect Utilities at 23, ROA 82, JA 519. A WestConnect planning region that encompassed only jurisdictional transmission providers “would look like Swiss cheese,” *id.*, as “in many cases those entities are completely separated from one another by non-jurisdictional transmission owners.” *Id.* at 21 (internal citation omitted), JA 517. The following map shows the relationship between jurisdictional and non-jurisdictional transmission providers in WestConnect:



FERC, *Order No. 1000 Transmission Planning Regions*,

<http://www.ferc.gov/industries/electric/indus-act/trans-plan/trans-plan-map.pdf> .

Under these “unique circumstances,” the eleven WestConnect jurisdictional utilities have historically engaged in significant joint transmission planning and development with ten neighbors, which are non-jurisdictional utilities. Second Order P 55, JA 1032-33. The group produces an annual Transmission Plan Report, and has filed a regional electric transmission tariff that provides access to multiple members’ transmission systems at rates lower than customers would pay by contracting with the individual member utilities. Transmittal Letter at 3-4, ROA 5, JA 22-23.

B. The WestConnect Order No. 1000 Compliance Filings

In Order No. 1000 – although the Commission recognized that some existing transmission planning processes might be similar to the requirements of the Order No. 1000 rulemaking – it nonetheless required jurisdictional utilities to file tariffs and explain how the relevant provisions meet Order No. 1000’s requirements. Order No. 1000 PP 792, 795. The Commission allowed utilities that are not members of a Regional Transmission Organization or Independent System Operator – which the WestConnect jurisdictional utilities are not – to coordinate their compliance efforts with one another and with such organizations as needed. *Id.* PP 797-98.

The WestConnect jurisdictional utilities submitted coordinated, “largely uniform” compliance filings that proposed revisions to WestConnect’s existing transmission planning process, and made other changes to the utilities’ individual tariffs. First Order PP 5-7, JA 285-87. The compliance filings and the challenged orders addressed many matters, only a few of which are at issue on review. They are described below.

1. The Planning Management Committee

The WestConnect jurisdictional utilities proposed a new membership and governance structure for WestConnect – superseding or replacing their pre-Order No. 1000 transmission planning agreement with a Planning Participation

Agreement, the signatories to which would become voting members of a new Planning Management Committee (WestConnect Committee). First Order P 124, JA 331. The five-sector WestConnect Committee would have sole authority over WestConnect’s transmission planning process – functions that include selecting transmission projects in the regional transmission plan for purposes of cost allocation. *Id.* PP 8, 135, JA 287, 336; Second Order P 142, JA 1074. A jurisdictional utility that executes the Planning Participation Agreement and joins the WestConnect Committee satisfies Order No. 1000’s requirement to enroll in a transmission planning region. Second Order P 24, 52, JA 1017, 1030.

The WestConnect jurisdictional utilities also proposed to allow non-jurisdictional utilities to join the WestConnect Committee as coordinating transmission owners, without enrolling in the WestConnect region. Second Order P 27-29, JA 1018-21. Under the proposal, non-jurisdictional utilities using this form of membership could submit transmission projects for study in the regional transmission planning process, but would not receive regional cost allocation for such projects. *Id.* P 29, JA 1020-21.

2. The WestConnect Jurisdictional Utilities’ Proposed Transmission Planning and Cost Allocation Processes

In that initial compliance filing, the WestConnect jurisdictional utilities also proposed a “bottom-up” transmission planning process to produce a regional transmission plan every other year. First Order P 107, JA 325; Second Order

P 117, JA 1061-62. Utilities would “roll[] up” their individual, local transmission plans, and assess whether the transmission projects they proposed were simultaneously feasible. First Order P 104, JA 323-24; Second Order P 123, JA 1065. The WestConnect Committee would then study the reliability, economic, and public policy needs that prompted the utilities’ project proposals, Second Order PP 127-29, JA 1067-68, identifying transmission and non-transmission upgrades that could meet regional transmission needs more efficiently or cost-effectively than those proposed by individual utilities *Id.* P 126, JA 1066-67.

The WestConnect jurisdictional utilities proposed that a project that qualifies as a reliability upgrade, an economic upgrade, or a public policy upgrade, and that satisfies certain cost-benefit analyses, be eligible for regional cost allocation. First Order P 283, JA 396. They recommended allocating project costs and associated transmission rights to the beneficiaries of such projects – if those beneficiaries agree to share in cost allocation. *Id.* PP 281-82, JA 395-96. But the regional transmission planning process would not require any entity to build transmission facilities, whether or not those facilities were included in the regional transmission planning program. *Id.* P 281, JA 395-96. It would merely establish the regional transmission plan, and the corresponding cost allocation.

C. The Commission Orders

The Commission accepted the WestConnect jurisdictional utilities' Order No. 1000 compliance filings, subject to specific modifications described in the orders on review. As relevant here, the Commission approved the proposed governance structure for WestConnect, including the option for utilities to join the WestConnect Committee without enrolling in the region, noting that the Committee will have "sole authority" over the regional transmission planning process. Second Order P 142, JA 1074; First Order PP 136-41, JA 336-38 (requiring minor clarifications not at issue here).

But the Commission required the WestConnect jurisdictional utilities to modify their transmission planning proposal in order to make cost allocation for regionally beneficial transmission projects binding on the identified beneficiaries. First Order PP 306-09, JA 405-06. It held that a non-binding cost allocation is "directly inconsistent" with Order No. 1000's goals of minimizing free ridership and increasing the likelihood that projects in regional transmission plans will move forward to construction. *Id.* at P 308, JA 405-06. The Commission found that allowing an entity to opt out of a Commission-approved cost allocation for a specific transmission project would not minimize the free rider problem. *Id.* It explained, however, that including a project in a binding cost allocation does not carry with it an obligation to build the project. *Id.* P 309, JA 406.

The Commission also found that the transmission planning proposal must identify a developer for each transmission project that would receive regional cost allocation under the regional transmission plan. First Order PP 268-69, JA 390-91; Second Order P 292, JA 1141-42. The Commission noted that a transmission developer must be able to rely on the cost allocation in order to determine whether to move forward with its project. Second Order P 292, JA 1141-42.

In response to the Commission's requirement that cost allocation be binding, the WestConnect jurisdictional utilities made a second compliance filing, requesting the right for WestConnect jurisdictional utilities to conduct regional planning for non-jurisdictional utilities. *See* Second Order PP 55-56, JA 1032-34; Third Order PP 28, 31 JA 1551, 1553. The WestConnect jurisdictional utilities also proposed that regional cost allocation be *per se* inapplicable to any transmission project that would provide quantifiable benefits to an unenrolled non-jurisdictional utility in the WestConnect region. *See* Second Order P 56, JA 1033-34.

The Commission permitted the WestConnect jurisdictional utilities to plan for non-jurisdictional utilities, finding that it would "expand opportunities for identifying and proposing more efficient or cost-effective regional transmission projects." Second Order P 55, JA 1032-33. Given the unique circumstances in the WestConnect region, the Commission held that the planning proposal "is

appropriate to foster continued, proactive cooperation between and among” the region’s jurisdictional and non-jurisdictional utilities. *Id.* The Commission also observed that Order No. 1000 applies the reciprocity condition to non-jurisdictional utilities in the WestConnect region. *Id.* at n.101, JA 1033.

But the Commission rejected the WestConnect jurisdictional utilities’ proposal to categorically exclude projects benefitting, in some way, non-jurisdictional utilities from cost allocation because it would “undermine the Commission’s broader goal to identify more efficient or cost-effective solutions to regional transmission needs.” Third Order P 28, JA 1551; *accord* Second Order P 56, JA 1033-34.

Given the “significant level of interconnection between the public utility and non-public utility transmission providers’ systems,” the Commission concluded that “excluding from consideration for regional cost allocation any transmission facility that either benefits or interconnects with an unenrolled non-public utility transmission provider would likely disqualify a significant number of transmission projects that provide meaningful regional benefits.” Third Order P 32, JA 1553-54. It would “unduly restrict consideration of transmission facilities that nonetheless may have regional benefits and are determined to be more efficient or cost-effective transmission solutions to regional transmission needs.” Second Order P 56, JA 1033-34.

The Commission acknowledged that, without such a *per se* exclusion, there is potential for free ridership if an unenrolled non-jurisdictional utility benefits from a selected regional transmission plan yet does not accept cost allocation. *See* Third Order P 29, JA 1551-52; *id.* P 31, JA 1553. Yet the Commission concluded that such a risk was “not at odds with preventing free-ridership to the extent required by Order No. 1000,” Third Order P 28, JA 1551, because Order No. 1000 does not govern non-jurisdictional utilities. *Id.* at P 33, JA 1554. Whether the WestConnect jurisdictional utilities “allocate transmission costs to beneficiaries in a manner that is consistent with cost causation principles does not turn on what costs are allocated to an unenrolled non-public utility transmission provider.” *Id.*; *accord id.* at P 29, JA 1551-52 (The “potential [for free-ridership] exists because the transmission project has benefits for entities that are not required to enroll, and have not enrolled, in the region.”).

Further, the Commission found that “Order No. 1000 did not seek to eliminate all instances of free ridership.” *Id.* P 30, JA 1552-53. For instance, Order No. 1000 does not mandate inter-regional cost allocation because, “to account [for] the relationship between the Commission’s cost allocation reforms and the other reforms contained in Order No. 1000,” many “factors must be balanced to ‘ensure that the [aforementioned] reforms achieve the goal of

improved planning and cost allocation for transmission in interstate commerce.”

Id. (quoting Order No. 1000-A P 707).

The Commission asserted that it “sought a similar balance in the unique circumstances presented” by WestConnect. Third Order P 31, JA 1553. “To the extent a transmission project otherwise satisfies the regional evaluation metrics, the project should not be categorically excluded from potential selection in the regional transmission plan for purposes of cost allocation simply because the facility interconnects with or provides benefits to a transmission owner that is not enrolled in the WestConnect region.” Second Order P 56, JA 1033-34.

The Commission instead required that a non-jurisdictional utility benefitting from a proposed WestConnect project have the opportunity to accept its share of the costs of that transmission facility. *Id.* at P 57, JA 1034; *accord* Third Order P 34, JA 1554-55. Given the “long and productive history of collaborative transmission development,” the Commission encouraged the WestConnect members to cooperate with unenrolled non-jurisdictional utilities. Third Order P 32 (citations omitted), JA 1553-54.

In response, the WestConnect jurisdictional utilities proposed to make a transmission project ineligible for cost causation if a non-jurisdictional utility declines cost allocation and the cost shift to the remaining beneficiaries would exceed ten percent of the jurisdictional utilities’ prior cost allocation. Third Order

P 57, JA 1567. The Commission found the proposal might similarly result in “the transmission planning process rejecting regional cost allocation for a proposed transmission solution that continues to be a more efficient or cost-effective solution for the remaining beneficiaries.” *Id.*

SUMMARY OF ARGUMENT

FERC’s Order No. 1000 rulemaking introduced numerous reforms to ensure, consistent with the Federal Power Act’s requirements, just and reasonable rates from jurisdictional utilities – principally through improving transmission planning processes and reforming cost allocation processes. In considering the WestConnect jurisdictional utilities’ Order No. 1000 compliance filings, the Commission found that the WestConnect region poses “unique circumstances” for implementing Order No. 1000 due to the significant interconnection between FERC-jurisdictional and non-jurisdictional utilities. Because non-jurisdictional utilities are not required to enroll in the WestConnect region, there is tension between the planning of regionally beneficial new facilities and an inability to allocate costs to unenrolled non-jurisdictional utilities that benefit from such facilities.

To address the latter issue, the WestConnect jurisdictional utilities proposed to exclude from consideration for cost allocation projects that benefit non-jurisdictional utilities. But the Commission rejected this provision, reasonably

determining that the proposal would undermine Order No. 1000's "broader goal" to identify more efficient or cost-effective solutions to regional transmission needs, preventing otherwise beneficial projects from consideration.

The Commission's order is consistent with the D.C Circuit's affirmance of Order No. 1000 in *South Carolina*, where the court observed that Order No. 1000 mandates that cost allocation not impede more efficient and cost-effective projects. Although the Commission acknowledges that its decision here could potentially lead to free ridership by non-jurisdictional utilities, Order No. 1000 does not apply to, or require cost allocation from, unenrolled non-jurisdictional utilities.

Even if non-jurisdictional utilities were subject to Order No. 1000, the Commission may balance cost allocation with other factors and emphasize competing priorities. The Commission reached such a balance here, in light of the WestConnect region's unique circumstances, to ensure that Order No. 1000's goal of identifying more efficient or cost-effective solutions was satisfied. El Paso and the Intervenors ignore that the Commission reached a similar balance in Order No. 1000 in not mandating inter-regional cost allocation. And the WestConnect jurisdictional utilities ignore that non-jurisdictional utilities remain subject to Order No. 1000's reciprocity condition, which incentivizes non- jurisdictional utility participation in regional planning and cost allocation without excluding beneficial transmission projects from consideration.

The Commission also reasonably determined that when a transmission project is selected for regional cost allocation through the regional transmission planning process, the WestConnect Committee must make a binding cost allocation for such a project, and identify a developer who may rely on that cost allocation. These requirements are not improper subdelegations of Federal Power Act authority, but rather implementations of jurisdictional tariff procedures the Commission has approved, and over which the Commission retains oversight. They do not form a contract, or even concrete obligations to pay or to be paid. Nothing in Order No. 1000 requires construction of a project identified for regional cost allocation. Those determinations are left to the decision-makers in each region, including the States – upon whose authority the Commission repeatedly declined to intrude in the challenged orders.

ARGUMENT

I. STANDARD OF REVIEW

Courts review Commission orders under the Administrative Procedure Act’s “arbitrary and capricious” standard. *See, e.g., Brazos Elec. Power Coop., Inc. v. FERC*, 205 F.3d 235, 240 (5th Cir. 2000) (citing 5 U.S.C. § 706(2)(A)). A court must satisfy itself that the agency “articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*,

463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *South Carolina*, 762 F.3d at 54. The court “must examine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Brazos*, 205 F.3d at 240 (internal quotation marks and citation omitted). The standard of review is “highly deferential to the administrative agency whose final decision is being reviewed.” *Tex. Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 775 (5th Cir. 2010) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009)). The Commission’s factual findings are conclusive if supported by substantial evidence. Federal Power Act § 313(b), 16 U.S.C. § 825l(b); *see also, e.g., Potomac Elec. Power Co. v. FERC*, 210 F.3d 403, 407 (D.C. Cir. 2000) (citations omitted) (same).

The “statutory requirement that rates be ‘just and reasonable’ is obviously incapable of precise judicial definition.” *Morgan Stanley*, 554 U.S. at 532. Consequently, the Court affords a high level of deference to the Commission’s rate decisions, “because issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission.” *La. Pub. Serv. Comm’n v. FERC*, 771 F.3d 903, 910 (5th Cir. 2014) (quoting *Pub. Utils. Comm’n of Cal. v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001)); *accord South Carolina*, 762 F.3d at 54-55.

II. THE COMMISSION REASONABLY CONCLUDED THAT THE WESTCONNECT JURISDICTIONAL UTILITIES' PROPOSED CATEGORICAL EXCLUSION WOULD UNDERMINE ORDER NO. 1000'S GOALS

In its Order No. 1000 rulemaking, the Commission sought both to increase regional planning and to improve cost allocation for jurisdictional utilities. Given the significant interconnection between jurisdictional and non-jurisdictional utilities in the WestConnect region, the Commission reasonably determined that a blunt *per se* exclusion from cost allocation of facilities benefitting non-jurisdictional utilities would undermine Order No. 1000's goal of ensuring efficient and cost-effective transmission planning. The Commission's decision was consistent with Order No. 1000 because that rulemaking does not apply to non-jurisdictional utilities and permits the Commission to balance competing priorities – which the Commission reasonably did here.

A. The Commission Sought To Promote Order No. 1000's Goal Of Efficient And Cost-Effective Facilities In Light Of WestConnect's Unique Circumstances

Contrary to El Paso and the Intervenors' claims, Order No. 1000 was not focused solely upon "eliminat[ing]" free ridership. Int. Br. at 28; *see also* El Paso Br. at 18 (addressing Order No. 1000's cost allocation reforms). Instead, in Order No. 1000, the Commission undertook numerous reforms to ensure just and reasonable rates in furtherance of its Federal Power Act responsibilities. In particular, Order No. 1000 sought for "more transmission projects to be considered

in the transmission planning process on an equitable basis and increase the likelihood that transmission facilities in the transmission plan will move forward to construction.” Order No. 1000 P 42.

In affirming the Commission’s rulemaking in its entirety, the D.C. Circuit in *South Carolina* likewise found that the “focus” of Order No. 1000 was “improving the process through which needed infrastructure is identified and planned.” *Id.* at 77. The court further observed that, in Order No. 1000, the Commission concluded:

- That promoting ““more efficient and cost-effective development of new transmission facilities”” is ““necessary to ensure just and reasonable rates,”” *South Carolina*, 762 F.3d at 64 (quoting Order No. 1000 P 52); and that
- “The threat to just and reasonable rates arose, in the Commission’s judgment, from existing planning and cost allocation practices that could thwart the identification of more efficient and cost-effective transmission solutions.” *Id.* at 66

In light of these holdings, the Commission reasonably rejected the WestConnect jurisdictional utilities’ proposal to exclude from cost allocation projects that benefit unenrolled non-jurisdictional utilities. Third Order P 32, JA 1553-54; *see Texas v. United States*, 866 F.2d 1546, 1556 (5th Cir. 1989) (courts only review for whether an agency’s interpretation of precedent is “reasonable” or “tenable”). Courts defer to the Commission’s judgment when it addresses “intensely practical difficulties,” because “FERC must be given the

latitude to balance the competing considerations and decide on the best resolution.” *Blumenthal v. FERC*, 552 F.3d 875, 885 (D.C. Cir. 2009) (internal quotations omitted). “The court’s responsibility is not to supplant the Commission’s balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors.” *Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968); *see also Shell Oil Co. v. FPC*, 520 F.2d 1061, 1071 (5th Cir. 1975) (same).

As El Paso and the Intervenors recognize, *e.g.*, Int. Br. at 9 (“jurisdictional utilities are often electrically separated from other jurisdictional utilities by the transmission systems of non-jurisdictional utilities”), the WestConnect region possesses a “significant level of interconnection between public and non-public utilities.” Third Order P 32, JA 1553-54. Given that interconnection, the Commission reasonably concluded that a *per se* exclusion of transmission projects benefitting unenrolled non-jurisdictional utilities would “likely disqualify a significant number of transmission projects that provide meaningful regional benefits” *Id.* It would “undermine the Commission’s broader goal to identify more efficient or cost-effective solutions to regional transmission need.” *Id.* P 28, JA 1551. And it would “unduly restrict consideration of transmission facilities that nonetheless may have regional benefits and are determined to be more efficient or

cost-effective transmission solutions to regional transmission needs.” Second Order P 56, JA 1033-34.

The Commission’s approach was not only consistent with Order No. 1000. *See South Carolina*, 762 F.3d at 66. It was also apparent throughout the Commission’s orders. *See* Second Order P 55 (upholding the WestConnect jurisdictional utilities’ proposal to plan for non-jurisdictional utilities, because doing so would “expand opportunities for identifying and proposing more efficient or cost-effective regional transmission projects”), JA 1032-33. It animated the Commission’s rejection of the WestConnect jurisdictional utilities’ subsequent proposal that transmission projects be ineligible for cost causation if a non-jurisdictional utility declines cost allocation and the cost shift to the remaining beneficiaries would exceed ten percent. *See* Third Order P 57 (finding the proposal might similarly result in “the transmission planning process rejecting regional cost allocation for a proposed transmission solution that continues to be a more efficient or cost-effective solution for the remaining beneficiaries”), JA 1567.

B. The Commission’s Orders Are Not Inconsistent With Order No. 1000’s Cost Allocation Requirements

1. Non-Jurisdictional Utilities Are Not Governed By Order No. 1000

El Paso and supporting Intervenors contend that the Commission’s orders are inconsistent with Order No. 1000’s cost allocation requirements. *See* El Paso

Br. at 28. Unlike jurisdictional utilities, “[n]on-jurisdictional utilities are not subject to Section 206 of the FPA, and so are not directly governed by Order No. 1000 and its planning and cost allocation requirements.” *South Carolina*, 762 F.3d at 93. Non-jurisdictional utilities are instead governed by Section 211A of the Act, which “permits, but does not mandate,” Commission regulation of non-jurisdictional utility transmission service. *Id.* at 95-96. The Commission declined such regulation with Order No. 1000. *Id.*; *see also supra* pp. 3-4 (discussing relevant provisions of the Federal Power Act).

So although the Commission acknowledged that rejecting the WestConnect jurisdictional utilities’ proposal could result in free ridership by non-jurisdictional utilities, such free ridership is only a consequence of non-jurisdictional utilities not being subject to Order No. 1000. *See* Third Order P 30, JA 1552-53. Whether Order No. 1000’s cost allocation requirements are satisfied “does not turn on what costs are allocated to an unenrolled non-public utility transmission provider.” *Id.* P 33, JA 1554.

As a result – despite the interconnection between jurisdictional and non-jurisdictional utilities – there is no actual conflict between increasing transmission planning in the WestConnect region and implementing Order No. 1000’s cost-allocation requirements. The WestConnect jurisdictional utilities’ proposed categorical exclusion would hinder the former without having any bearing upon the

latter. The Commission’s finding is not only consistent with the *South Carolina* court’s holding – it is predicated upon it.

2. The Commission Reasonably Balanced Order No. 1000’s Goals

Even assuming that Order No. 1000’s cost-allocation requirements did apply to non-jurisdictional utilities, the Commission’s WestConnect orders satisfy Order No. 1000’s framework. The D.C. Circuit in *South Carolina* reiterated longstanding court precedent that costs need not be allocated with “‘exacting precision.’” *South Carolina*, 762 F.3d at 88 (quoting *Midwest ISO Transmission Owners*, 373 F.3d at 1368-69). Instead – as the Intervenors concede – cost causation need only be “at least roughly commensurate with the benefits received.” Int. Br. at 45 (quoting *Ill. Commerce Comm’n v. FERC*, 576 F.3d 470, 477 (7th Cir. 2009)). The requirement is not precisely defined but only requires the Commission to have an “articulable and plausible reason” to support its cost allocation findings. *Ill. Commerce Comm’n*, 576 F.3d at 477.

In addressing cost causation, the Commission may:

- Consider feasibility concerns, *Sithe/Independence Power Partners v. FERC*, 285 F.3d 1, 5 (D.C. Cir. 2002);
- “Undertake reform one step at a time,” *Interstate Nat. Gas*, 285 F.3d at 35;
- “Balance competing goals,” *South Carolina*, 762 F.3d at 88; and

- “Emphasize other, competing policies and approve measures that do not best match cost responsibility and causation.” *Carnegie Nat. Gas Co. v. FERC*, 968 F.2d 1291, 1294 (D.C. Cir. 1992).

A court will overturn such gradualism “only if it truly yields unreasonable discrimination or some other kind of arbitrariness.” *Id.* (quoting *Interstate Nat. Gas*, 285 F.3d at 35); *see also Carnegie Nat. Gas*, 968 F.2d at 1294 (upholding the Commission’s rejection of natural gas company’s proposal to pass costs through to customers because – even though the natural gas company’s proposal would better match cost causation – the Commission’s decision better protected those customers). On these bases, the *South Carolina* court affirmed the Commission’s decision in Order No. 1000 to not apply cost-allocation across regions – even if it “lead[s] to some beneficiaries escaping cost responsibility.” 762 F.3d at 88 (citing Order No. 1000 P 660). In making this determination, the Commission held that “to account [for] the relationship between the Commission’s cost allocation reforms and the other reforms contained in Order No. 1000,” numerous “factors must be balanced to ‘ensure that the [aforementioned] reforms achieve the goal of improved planning and cost allocation for transmission in interstate commerce.’” Third Order P 30 (quoting Order No. 1000-A P 707) (insertions in original), JA 1552-53.

So too here, the Commission found that a categorical exclusion of cost allocation for projects benefitting non-jurisdictional utilities would undermine the

Commission’s goal of increasing the consideration of cost-effective and efficient projects – even if it could result in free-riding by non-jurisdictional utilities. *See* Third Order P 31, JA 1553; *see also* Second Order P 56 (project should not be excluded from potential selection for cost allocation because the facility interconnects with or provides benefits to an unenrolled non-jurisdictional utility), JA 1033-34. Contrary to Intervenors’ assertion, the Commission’s analysis is not “*post hoc*” rationalization. *See* Int. Br. at 41. It is the Commission abiding by Order No. 1000’s directive that cost allocation need not be perfect but must be balanced to “further expand open, transparent planning.” Third Order P 31, JA 1553. Such a holding is consistent with the *South Carolina* court’s finding that Order No. 1000 seeks to prevent cost allocation from thwarting the identification of efficient and cost-effective transmission solutions. 762 F.3d at 66.

3. The Commission’s Reciprocity Principle Applies To Encourage Non-Jurisdictional Utility Participation

And the Commission has other methods – namely the reciprocity condition – to incentivize non-jurisdictional utility participation. *See South Carolina*, 762 F.3d at 92-97. As noted, *see supra* pp. 7-8, the reciprocity condition was implemented in the agency’s Order No. 888 rulemaking proceeding, and requires that, “when non-public utilities use the open public lines, they are subject to the same conditions as public utilities.” *Id.* at 93 (citing Order No. 888 at 31,760). The Order No. 1000 rulemaking expanded the reciprocity condition to require non-

jurisdictional utility participation in regional planning and cost allocation if those utilities obtain transmission service from a jurisdictional utility. *See id.* at 93 (citing Order No. 1000-A P 773).

In so holding, the *South Carolina* court rejected the argument that this voluntary approach provided non-jurisdictional utilities a “free ride.” *Id.* at 96. Instead, the “Commission was under no statutory obligation to regulate non-public utilities, and it provided a reasoned basis for choosing a conditional approach.” *Id.* The Commission affirmed that the reciprocity condition applies in WestConnect. *See* Second Order P 55 & n.101, JA 1032-33.

Not only do El Paso and the Intervenors ignore that the reciprocity condition incentivizes non-jurisdictional utility participation in WestConnect, they assert that the Commission’s reasoning here is somehow in conflict. *See* Int. Br. at 52. Yet – contrary to Intervenors’ claim – the *South Carolina* court did not base its holding on Commission assertions that non-jurisdictional utilities would enroll. Rather, the Court affirmed the Commission’s approach in Order No. 1000 – namely not mandating but instead encouraging non-jurisdictional utility participation through the reciprocity condition. *See South Carolina*, 752 F.3d at 93, 96.

Neither El Paso nor Intervenors explain why the reciprocity condition does not apply here. But the condition incentivizes non-jurisdictional utility participation in regional planning and cost allocation – without the need for the

WestConnect jurisdictional utilities' proposed categorical exclusion that would limit regional planning. *See* Second Order P 55 n.101 (noting that a non-jurisdictional utility may not be able to maintain its safe harbor tariff if it does not enroll in a transmission planning region and comply with Order No. 1000's requirements).

Intervenors instead assert that non-jurisdictional utilities have yet to enroll. *See* Int. Br. at 23. But they provide no evidence that a non-jurisdictional utility in the WestConnect region has rejected cost allocation for a beneficial transmission project. Putting aside that Order No. 1000's cost allocation requirements do not govern non-jurisdictional utilities – and that the Commission is under no obligation to target such utilities – El Paso and Intervenors' concerns are premature. *See United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1161 (D.C. Cir. 1996) (holding challenges to Commission incentive program were premature because petitioners did not cite supporting evidence of the incentive program being inadequate).

III. THE COMMISSION REASONABLY ASSIGNED TRANSMISSION PLANNING AND COST ALLOCATION RESPONSIBILITIES TO THE WESTCONNECT COMMITTEE

In its Order No. 1000 rulemaking, the Commission required jurisdictional utilities to participate in a regional transmission planning process that produces a regional transmission plan. *See South Carolina*, 762 F.3d at 52-53; Order No. 1000 PP 2, 146, 203-05. And in the challenged orders, the Commission reasonably

found – after requiring the WestConnect jurisdictional utilities to incorporate specific amendments to their proposals – that the WestConnect jurisdictional utilities’ proposals described a just and reasonable process by which the WestConnect Committee would identify regionally beneficial transmission system projects and allocate the related costs. *See* First Order at PP 270-327, JA 391-415; Second Order at PP 303-66, JA 1147-81. El Paso objects to those amendments. El Paso raises three specific challenges, each of which is grounded in the idea that the WestConnect Committee now has too much authority over the transmission planning and cost allocation process.

A. The Commission Did Not Improperly Subdelegate Its Authority Over Cost Allocation

El Paso contends that allowing the WestConnect Committee to manage the regional transmission planning process and allocate the costs of new transmission facilities is an improper subdelegation of the Commission’s statutory authority. El Paso Br. at 45-46. But the Commission approved specific tariff-based processes for the WestConnect Committee to implement, and the Commission will maintain oversight over those processes – something that does not amount to unlawful subdelegation.

This Court recently held that the Commission did not impermissibly subdelegate its authority when it approved a formula rate that a utility will implement. *See La. Pub. Serv. Comm’n*, 761 F.3d 540, 551-52 (5th Cir. 2014)

(*Louisiana*). *Louisiana* concerned the so-called “bandwidth remedy” – a formula rate that roughly equalizes costs among the Entergy Corporation operating companies. The bandwidth formula includes state regulatory agencies’ depreciation rates, prompting the argument on appeal that the Commission unlawfully subdelegated its rate-setting authority to a state agency. *Id.* at 550-51. This Court determined that, because the Commission had reviewed the reasonableness of incorporating the state-set depreciation rates in the bandwidth formula when it accepted that formula, and retained authority to review those rates going forward, it had not improperly subdelegated its authority. *Id.* at 552-53.

The Court should not reach a different result here. The tariff provisions at issue create a process for identifying transmission network upgrades, and the beneficiaries of those upgrades that will be responsible for funding them if built. Consistent with Order No. 1000, the tariff does not specify what the result of that process should be. *See South Carolina*, 762 F.3d at 57-58 (Order No. 1000 reforms do not dictate substantive outcomes); Second Order P 112 (regional transmission planning process must result in a regional transmission plan that allows for identification of transmission facilities that more efficiently or cost-effectively meet the region’s transmission needs), JA 1060. The Commission often approves such tariff-based methods for calculating rates or making cost allocations, instead of particular rates or cost allocations. *See, e.g., Entergy La., Inc. v. La.*

Pub. Serv. Comm'n, 539 U.S. 39, 42-43 (2003) (formula rate that equalizes costs among utility operating companies); *Louisiana*, 761 F.3d at 543-44 (same); *Ill. Commerce Comm'n v. FERC*, 721 F.3d 764 (7th Cir. 2013) (electric transmission tariff that allocates cost of regionally beneficial system upgrades).

As this Court recently held in rejecting a similar allegation that the Commission failed to regulate, the Commission “exercised its role when it initially reviewed” the tariff provisions at issue. *Louisiana*, 761 F.3d at 552. It is when an agency “abdicates its role as a rational decision-maker” and does not exercise its own judgment, but defers to private parties, that it may have unlawfully delegated its authority. *Id.* at 551-52; *accord Tex. Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 328 (5th Cir. 2001) (citing *Laclede Gas Co. v. FERC*, 997 F.2d 936, 947 (D.C. Cir. 1993)). The challenged orders here – which total 428 pages and took two and a half years to complete – amply reflect the Commission’s own determinations. The Commission exercised its independent judgment over the justness and reasonableness of the WestConnect jurisdictional utilities’ proposals, and required numerous changes and refinements before approving them. *See, e.g.*, First Order PP 114-19 (requiring clearer explanation of regional transmission planning process); 136-39 (requiring additional description of relationship between the newly-established Committee and the existing Steering Committee); 306-09

(requiring jurisdictional utilities to make clear that cost allocation is binding),
JA 327-29, 336-38, 405-06.

Ongoing rate review also cuts against the suggestion that there has been unlawful delegation. *See Louisiana*, 761 F.3d at 552 (“continuing review in [Federal Power Act] Section 206 proceedings distinguishes it from the unease expressed [elsewhere], of agencies’ ‘vague or inadequate assertions of final reviewing authority’”) (quoting *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 568 (D.C. Cir. 2004)). The Commission retains oversight over the transmission planning process and the resulting cost allocations by way of Federal Power Act Section 206, 16 U.S.C. § 824e, which provides parties with the right to challenge the results of the WestConnect Committee’s determinations. *See Second Order P 341*, JA 1166-67 (Order No. 1000 does not deprive parties of complaint rights). And costs allocated through this process may not later be recovered from beneficiaries without first obtaining either Commission approval, or executing a bilateral agreement between developer and beneficiaries. *See Second Order at PP 377, 389*, JA 1187, 1193.

Finally, El Paso contends that the Commission has “signaled” that it does not intend to examine the Committee’s determinations in future agency proceedings, and therefore “has ceded to the [Committee] its exclusive authority” over cost allocation. *El Paso Br.* at 46. This concern is unfounded not only

because the Commission retains authority to review any cost allocation as needed, but because the WestConnect jurisdictional utilities did not propose to require such a review – as they could have done. Order No. 1000 provides flexibility for regions to propose to submit their transmission plans and cost allocation for Commission review. *See* Order No. 1000-B P 19 (in developing compliance filings, stakeholders could advocate that transmission providers require the filing of specific applications of the cost allocation). El Paso and the other WestConnect jurisdictional utilities therefore could have decided – but apparently did not decide – to submit the transmission plan or applications of the cost allocation to the Commission for review under applicable provisions of the Federal Power Act. El Paso cannot blame the agency for failing to impose greater advance protection.

B. The Commission Did Not Expand The Requirements Of Order No. 1000 Or Violate Other Law In Requiring A Binding Cost Allocation And A Binding Selection Of A Transmission Developer For Each Project

1. Order No. 1000 Requires A Binding Cost Allocation

El Paso’s initial compliance filing proposed to exempt utilities from having to implement or effectuate the cost allocation resulting from the transmission planning process, and did not obligate any entity to pay or commit to pay the costs of any project or proposed project in accordance with the cost allocation. First Order PP 281-82, JA 395-96. The Commission agreed with several protestors that this proposal made cost allocation methods voluntary, and held that Order No.

1000 requires that the cost allocation determinations for projects selected in the regional transmission planning process be binding on identified beneficiaries. *Id.* PP 288-89, JA 398-99 (citing Public Interest Organizations Comments at 15, ROA 56; LS Power Protest at 6, ROA 41, JA 245; Western Indep. Transmission Group Comments at 5-7, ROA 38, JA 205-07), 306-08, JA 405-06. *See also* Second Order PP 320-25, 334-44, 359 (denying rehearing and repeating compliance requirement), JA 1154-56, 1161-69, 1178-79.

El Paso now contends that Order No. 1000 does not require a binding cost allocation, and therefore the Commission's finding modifies Order No. 1000 without engaging in a new rulemaking process under the Administrative Procedure Act. This argument seems to incorrectly read into the word "binding" the notion that the transmission planning process necessarily creates an obligation to pay (on the part of beneficiaries of transmission projects identified in the planning process) and a right to be paid (on the part of the developers of those projects). El Paso Br. at 39.

A binding *ex ante* cost allocation, as described in Order No. 1000 and the challenged orders, reflects the planning region's findings as to which entities benefit from using a transmission project. "Rather than contractual relationships, the benefits received by users of the regional transmission grid provide a basis for how costs should be allocated." Order No. 1000-A P 565. This "beneficiary-based

cost allocation method is a logical extension of the cost causation principle.” *South Carolina*, 762 F.3d at 85. The obligation to pay costs allocated in the regional transmission planning process arises after construction, because it “is imposed by a Commission-approved tariff concerning the charges made by a public utility transmission provider for the use of the public utility transmission provider’s facility.” Order No. 1000-A P 568. *See also* Second Order P 335 (same), JA 1161-63; *Ill. Commerce Comm’n*, 721 F.3d at 770-72 (upholding Commission approval of a regional tariff that allocates cost of regional transmission upgrades in proportion to energy withdrawn from the grid). Cost allocation ensures that transmission developers can make informed decisions as to what projects to build. Second Order PP 292, 342, JA 1141-42, 1167-68. A non-binding cost allocation determination does not provide certainty about who is responsible for paying the costs of a transmission project, and this is a disincentive for non-incumbent transmission providers to propose more efficient or cost-effective solutions. First Order P 308, JA 405-06; Second Order P 336, JA 1163-64.

That the cost allocation must be binding at the time the transmission plan is completed is evident because the Commission in Order No. 1000 specifically foreclosed waiting to see who will willingly pay for upgrades before allocating costs. *See South Carolina*, 762 F.3d at 53 (participant funding is not an acceptable form of cost allocation for a regional project). It further prohibited allowing

beneficiaries to opt out of cost allocations. *See* Order No. 1000 P 640 (permitting beneficiaries to opt out of cost allocation would not minimize the free rider problem); Order No. 1000-A P 565 (allowing customers to disclaim costs undermines principle that “all approved rates must reflect to some degree the costs actually caused by the customer who must pay them”) (quoting *Ill. Commerce Comm’n*, 576 F.3d at 476); First Order P 308, JA 405-06 (option to disclaim responsibility for the costs of a project does not comport with cost causation); Second Order P 335, 337-38, JA 1161-63, 1164-65 (same). In requiring a binding cost allocation, the challenged orders comported with Order No. 1000; they did not expand its requirements.

Neither Order No. 1000 nor the challenged orders require construction of any particular project. *South Carolina*, 762 F.3d at 57-58; First Order P 309, JA 406; Second Order P 343; JA 1168-69. El Paso knows this. El Paso Br. at 35 (it is “abundantly clear that in attempting to facilitate the planning process, [the Commission] did not intend to force the construction of new projects”); *see also id.* at 34-38 (distinguishing planning from development). Rather, “any obligation to pay will arise only if and when the project developer later seeks approval of its rates and associated terms and conditions of transmission service under the developer’s new” tariff. *Id.* at 39-40; *see also* Second Order P 335 & n.549 (quoting Order No. 1000 P 568) (obligation to pay costs allocated under a regional

transmission planning process is imposed by a Commission-approved tariff concerning the charges for use of a jurisdictional utility transmission provider's facility), JA 1161-63. If a transmission facility is never built, then the responsibility to pay does not arise. El Paso's argument that the challenged orders impose obligations to pay and to be paid therefore is not persuasive.

2. Order No. 1000 Also Requires A Binding Selection Of A Developer For Each Project In The Regional Transmission Plan

The WestConnect jurisdictional utilities' compliance filings did not set out criteria for evaluating whether a particular entity is qualified to propose a transmission project for selection in the regional transmission plan, or language that would enable the Committee to identify a developer for each project that will receive regional cost allocation under the regional transmission plan. First Order PP 217-18, 268, JA 370-71, 390. The Commission required the WestConnect jurisdictional utilities to add such qualifying criteria to their tariffs. First Order PP 268-69, JA 390-91; Second Order P 292, JA 1141-42. It also required those utilities to include a process for identifying a transmission developer to use that cost allocation with respect to each project selected in the regional transmission plan. *Id.*

El Paso contends that these requirements are inconsistent with Order No. 1000 and impermissibly expand its scope without the benefit of a notice-and-

comment rulemaking. El Paso Br. at 49-53. El Paso also argues that allowing the Committee to select a developer for each project afforded regional cost allocation impermissibly intrudes on state jurisdiction over transmission siting and construction. *Id.* at 53-57. Both assertions are incorrect.

Order No. 1000 requires that jurisdictional utilities and non-incumbent transmission providers receive an equal opportunity to propose and develop regionally beneficial transmission projects. Second Order P 292, JA 1141-42 (citing Order No. 1000 P 332). The regional transmission planning process must evaluate alternative projects, and competing transmission developers. Order No. 1000 P 255-59. This consideration of alternatives is intended to ensure that the transmission plan contains more efficient or cost-effective solutions. Order No. 1000 P 255. Greater transmission developer participation in the transmission planning process may lower the cost of new transmission facilities, and therefore enable more efficient or cost-effective deliveries. *Id.* P 291. “There is ample reason to think that injecting competition into the planning process will help to ensure that rates remain just and reasonable.” *South Carolina*, 762 F.3d at 77.

Identifying a transmission developer in the planning process who may rely on the cost allocation serves a similar purpose to the binding cost allocation discussed *supra*, pages 41-44: The transmission developer must be able to rely on the relevant cost allocation method or methods in order to determine whether to

move forward with its project. Second Order P 292, JA 1141-42. Non-incumbent developers must be as eligible as incumbents to utilize regional cost allocation, *id.*, whereas their previous lack of participation was “a real deficiency in the transmission infrastructure development market.” *South Carolina*, 762 F.3d at 77. Because Order No. 1000 explains the importance of selecting a transmission developer for projects selected for regional cost allocation, it is entirely consistent for the Commission to require WestConnect to do the same. Second Order at P 292 (finding that the WestConnect jurisdictional utilities’ challenge to the requirement that they identify a developer in the transmission process was, in fact, an impermissible collateral attack on Order No. 1000), JA 1141-42; *see also Louisiana*, 761 F.3d at 558 (finding collateral attack where it would require the Court to “unravel” orders not before it to grant relief).

El Paso is also incorrect in arguing that the transmission planning process requirements, including the requirement to identify a developer for each project selected, interferes with the rights of the States to supervise transmission construction. “The determination of which transmission developer may use the regional cost allocation method for a selected transmission planning process does not necessarily confer rights to construct the project.” First Order P 269, JA 390-91. In response to arguments like El Paso’s, the *South Carolina* court stated that, assuming the Federal Power Act reserves siting and construction authority to the

States, Order No. 1000 “expressly and repeatedly” disclaims federal authority over these matters, and does not require construction of facilities or allow construction without State approval. *South Carolina*, 762 F.3d at 62. “The substance of a regional transmission plan and any subsequent formation of agreements to construct or operate regional transmission facilities remain within the discretion of the decision-makers in each planning region.” *Id.* at 58.

El Paso does not identify specific conflicts between the transmission planning process and state law, but merely asserts that identifying a transmission developer for each transmission project in the transmission plan interferes with States’ rights to select the developer. El Paso Br. at 56. No State joins El Paso’s objections. Moreover, state regulators may participate in the transmission planning process, including the selection of a developer to match each project. The transmission planning procedures that the Commission approved for WestConnect allow any interested stakeholder to join the Committee and to participate in the transmission planning process as a voting member. First Order P 125, 134, 137, JA 331, 335-36, 337. In fact, one of the WestConnect Committee’s five sectors is for state regulators, and approval of a transmission plan requires the support of three sectors. *Id.* P 125, JA 331.

C. The *Mobile-Sierra* Doctrine Does Not Apply To WestConnect’s Transmission Planning Process

The *Mobile-Sierra* doctrine addresses the Commission’s authority to modify certain rates set by contract, as opposed to those set by tariff. *South Carolina*, 762 F.3d at 86. See *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353-55 (1956); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344-45 (1956). Because “contract stability ultimately benefits customers,” the Commission may abrogate a valid individualized contract between a willing seller and a willing buyer, negotiated at arm’s length and in good faith, only in “those extraordinary circumstances where the public will be severely harmed.” *Morgan Stanley*, 554 U.S. at 550-51.

El Paso does not allege improper contract abrogation in the challenged orders; rather, it makes the novel argument that the binding cost allocation resulting from the transmission planning process unlawfully *creates* a contract between unwilling parties. El Paso Br. at 48. El Paso provides no legal authority to support its invocation of the *Mobile-Sierra* doctrine, and the Court should not credit its unsubstantiated theory.

This situation involves rates set by tariff, to which the *Mobile-Sierra* presumption does not apply. The use of a transmission facility is voluntary. Such use entails elective acceptance of the charges, terms and conditions set forth in the

tariff that the Commission approves for the owner of that transmission facility, including with respect to cost allocation. Order No. 1000-A P 568.

El Paso's novel argument cannot change that fact. Order No. 1000 did not modify any existing contract provisions governing use of existing transmission facilities. Order No. 1000-A P 572. And as explained above, the challenged orders do not require that parties enter into contracts to implement a binding cost allocation, that they construct the facilities identified in a regional transmission plan, or that they recover the costs of new facilities by contract instead of by tariff. Second Order PP 342-44, JA 1167-69. Because there is no obligation to build facilities, or to recover costs for their construction by contract if they are built, the Commission cannot be said to have required any party to the WestConnect planning process to enter into a contract, much less to have abrogated a contract. The Commission understandably rejected the WestConnect jurisdictional utilities' efforts to "render the *Mobile-Sierra* doctrine applicable through their choice of an implementation mechanism," Second Order P 344, JA 1169, and the Court should as well.

The Commission, in its discretion, can determine that the outcome of a tariff-based process, such as an auction, should be subject to an application of the statutory "just and reasonable" standard that is similar to the *Mobile-Sierra* presumption that attaches to contract rates. *See New England Power Generators*

Ass'n v. FERC, 707 F.3d 364, 371 (D.C. Cir. 2013). But that is not what happened here. The Commission made no such finding that *Mobile-Sierra*-like protection is warranted in this instance. Moreover, the outcome of the tariff-based transmission planning process is a transmission plan that may or may not lead to the construction of facilities and the recovery of associated costs in jurisdictional rates. *See South Carolina*, 672 F.3d at 48, 57-58; Second Order P 342, JA 1167-68 (cost allocation is distinct from cost recovery).

CONCLUSION

For the foregoing reasons, the petition for review should be denied, and the Commission orders on review should be affirmed.

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FINAL BRIEF: March 14, 2016

El Paso Electric Company v. FERC
5th Cir. No. 14-60822

CERTIFICATE OF SERVICE

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March 14, 2016

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C) and Fifth Circuit Rule 32.3, I certify that the Brief of Respondent Federal Energy Regulatory Commission is prepared in 14-point, proportionally-spaced typeface, and that it contains 10,369 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

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March 14, 2016

ADDENDUM

STATUTES

TABLE OF CONTENTS

PAGE

STATUTES:

Administrative Procedure Act

5 U.S.C. § 706(2)(A) A-1

Federal Power Act

Section 201, 16 U.S.C. § 824 A-2

Section 205, 16 U.S.C. § 824d A-4

Section 206, 16 U.S.C. § 824e..... A-6

Section 211A, 16 U.S.C. § 824j-1 A-8

Section 313(b), 16 U.S.C. § 8251(b)..... A-10

Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94-574, §1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1009(b).	June 11, 1946, ch. 324, §10(b), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94-574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, §10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, §10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85-791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: "This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title]."

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

- Sec. 801. Congressional review.
- 802. Congressional disapproval procedure.
- 803. Special rule on statutory, regulatory, and judicial deadlines.

with the purposes of this subchapter, or other applicable law, the Commission may refer the dispute to the Commission's Dispute Resolution Service. The Dispute Resolution Service shall consult with the Secretary and the Commission and issue a non-binding advisory within 90 days. The Secretary may accept the Dispute Resolution Service advisory unless the Secretary finds that the recommendation will not adequately protect the reservation. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.

(b) Alternative prescriptions

(1) Whenever the Secretary of the Interior or the Secretary of Commerce prescribes a fishway under section 811 of this title, the license applicant or any other party to the license proceeding may propose an alternative to such prescription to construct, maintain, or operate a fishway.

(2) Notwithstanding section 811 of this title, the Secretary of the Interior or the Secretary of Commerce, as appropriate, shall accept and prescribe, and the Commission shall require, the proposed alternative referred to in paragraph (1), if the Secretary of the appropriate department determines, based on substantial evidence provided by the license applicant, any other party to the proceeding, or otherwise available to the Secretary, that such alternative—

(A) will be no less protective than the fishway initially prescribed by the Secretary; and

(B) will either, as compared to the fishway initially prescribed by the Secretary—

(i) cost significantly less to implement; or

(ii) result in improved operation of the project works for electricity production.

(3) In making a determination under paragraph (2), the Secretary shall consider evidence provided for the record by any party to a licensing proceeding, or otherwise available to the Secretary, including any evidence provided by the Commission, on the implementation costs or operational impacts for electricity production of a proposed alternative.

(4) The Secretary concerned shall submit into the public record of the Commission proceeding with any prescription under section 811 of this title or alternative prescription it accepts under this section, a written statement explaining the basis for such prescription, and reason for not accepting any alternative prescription under this section. The written statement must demonstrate that the Secretary gave equal consideration to the effects of the prescription adopted and alternatives not accepted on energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality); based on such information as may be available to the Secretary, including information voluntarily provided in a timely manner by the applicant and others. The Secretary shall also submit, together with the aforementioned written statement, all studies, data, and other factual information available to the Secretary and relevant to the Secretary's decision.

(5) If the Commission finds that the Secretary's final prescription would be inconsistent

with the purposes of this subchapter, or other applicable law, the Commission may refer the dispute to the Commission's Dispute Resolution Service. The Dispute Resolution Service shall consult with the Secretary and the Commission and issue a non-binding advisory within 90 days. The Secretary may accept the Dispute Resolution Service advisory unless the Secretary finds that the recommendation will not adequately protect the fish resources. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.

(June 10, 1920, ch. 285, pt. I, § 33, as added Pub. L. 109-58, title II, § 241(c), Aug. 8, 2005, 119 Stat. 675.)

SUBCHAPTER II—REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

§ 824. Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with re-

spect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824e(e), 824e(f),¹ 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of—

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State

¹ So in original. Section 824e of this title does not contain a subsec. (f).

commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall—

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms "affiliate", "associate company", "electric utility company", "holding company", "subsidiary company", and "exempt wholesale generator" shall have the same meaning as when used in the Public Utility Holding Company Act of 2005 [42 U.S.C. 16451 et seq.].

(June 10, 1920, ch. 285, pt. II, §201, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 847; amended Pub. L. 95-617, title II, §204(b), Nov. 9, 1978, 92 Stat. 3140; Pub. L. 102-486, title VII, §714, Oct. 24, 1992, 106 Stat. 2911; Pub. L. 109-58, title XII, §§1277(b)(1), 1291(c), 1295(a), Aug. 8, 2005, 119 Stat. 978, 985.)

REFERENCES IN TEXT

The Rural Electrification Act of 1936, referred to in subsec. (f), is act May 20, 1936, ch. 432, 49 Stat. 1363, as amended, which is classified generally to chapter 31 (§901 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 901 of Title 7 and Tables.

The Public Utility Holding Company Act of 2005, referred to in subsec. (g)(5), is subtitle F of title XII of Pub. L. 109-58, Aug. 8, 2005, 119 Stat. 972, which is classified principally to part D (§16451 et seq.) of subchapter XII of chapter 149 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 15801 of Title 42 and Tables.

AMENDMENTS

2005—Subsec. (b)(2). Pub. L. 109-58, §1295(a)(1), substituted "Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title" for "The provisions of sections 824i, 824j, and 824k of this title" and "Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title" for "Compliance with any order of the Commission under the provisions of section 824i or 824j of this title".

Subsec. (e). Pub. L. 109-58, §1295(a)(2), substituted "section 824e(e), 824e(f), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title" for "section 824i, 824j, or 824k of this title".

Subsec. (f). Pub. L. 109-58, §1291(c), which directed amendment of subsec. (f) by substituting "political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year," for "political subdivision of a state," was executed by making the substitution for "political subdivision of a State," to reflect the probable intent of Congress.

for such purpose in such order, or otherwise in contravention of such order.

(d) Authorization of capitalization not to exceed amount paid

The Commission shall not authorize the capitalization of the right to be a corporation or of any franchise, permit, or contract for consolidation, merger, or lease in excess of the amount (exclusive of any tax or annual charge) actually paid as the consideration for such right, franchise, permit, or contract.

(e) Notes or drafts maturing less than one year after issuance

Subsection (a) of this section shall not apply to the issue or renewal of, or assumption of liability on, a note or draft maturing not more than one year after the date of such issue, renewal, or assumption of liability, and aggregating (together with all other then outstanding notes and drafts of a maturity of one year or less on which such public utility is primarily or secondarily liable) not more than 5 per centum of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this subsection shall be the fair market value as of the date of issue. Within ten days after any such issue, renewal, or assumption of liability, the public utility shall file with the Commission a certificate of notification, in such form as may be prescribed by the Commission, setting forth such matters as the Commission shall by regulation require.

(f) Public utility securities regulated by State not affected

The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

(g) Guarantee or obligation on part of United States

Nothing in this section shall be construed to imply any guarantee or obligation on the part of the United States in respect of any securities to which the provisions of this section relate.

(h) Filing duplicate reports with the Securities and Exchange Commission

Any public utility whose security issues are approved by the Commission under this section may file with the Securities and Exchange Commission duplicate copies of reports filed with the Federal Power Commission in lieu of the reports, information, and documents required under sections 77g, 78l, and 78m of title 15.

(June 10, 1920, ch. 285, pt. II, §204, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 850.)

TRANSFER OF FUNCTIONS

Executive and administrative functions of Securities and Exchange Commission, with certain exceptions, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 10 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out in the Appendix to Title 5, Government Organization and Employees.

§ 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and de-

livering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

(June 10, 1920, ch. 285, pt. II, §205, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 851; amended Pub. L. 95-617, title II, §§207(a), 208, Nov. 9, 1978, 92 Stat. 3142.)

AMENDMENTS

1978—Subsec. (d). Pub. L. 95-617, §207(a), substituted "sixty" for "thirty" in two places.

Subsec. (f). Pub. L. 95-617, §208, added subsec. (f).

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

Section 207(b) of Pub. L. 95-617 directed chairman of Federal Energy Regulatory Commission, in consultation with Secretary, to conduct a study of legal requirements and administrative procedures involved in consideration and resolution of proposed wholesale electric rate increases under Federal Power Act, section 791a et seq. of this title, for purposes of providing for expeditious handling of hearings consistent with due process, preventing imposition of successive rate increases before they have been determined by Commission to be just and reasonable and otherwise lawful, and improving procedures designed to prohibit anti-competitive or unreasonable differences in wholesale and retail rates, or both, and that chairman report to Congress within nine months from Nov. 9, 1978, on results of study, on administrative actions taken as a result of this study, and on any recommendations for changes in existing law that will aid purposes of this section.

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate,

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term “automatic adjustment clause” means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

(June 10, 1920, ch. 285, pt. II, §205, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 851; amended Pub. L. 95-617, title II, §§207(a), 208, Nov. 9, 1978, 92 Stat. 3142.)

AMENDMENTS

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§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate,

charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; “electric utility companies” and “registered holding company” defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies

of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.¹

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(e) Short-term sales

(1) In this subsection:

(A) The term "short-term sale" means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

(B) The term "applicable Commission rule" means a Commission rule applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

(2) If an entity described in section 824(f) of this title voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to—

(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

(B) an electric cooperative.

(4)(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by

the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

(B) The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

(C) In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.

(June 10, 1920, ch. 285, pt. II, § 206, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 852; amended Pub. L. 100-473, § 2, Oct. 6, 1988, 102 Stat. 2299; Pub. L. 109-58, title XII, §§ 1285, 1286, 1295(b), Aug. 8, 2005, 119 Stat. 980, 981, 985.)

REFERENCES IN TEXT

The Public Utility Holding Company Act of 1935, referred to in subsec. (c), is title I of act Aug. 26, 1935, ch. 687, 49 Stat. 803, as amended, which was classified generally to chapter 2C (§79 et seq.) of Title 15, Commerce and Trade, prior to repeal by Pub. L. 109-58, title XII, § 1263, Aug. 8, 2005, 119 Stat. 974. For complete classification of this Act to the Code, see Tables.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109-58, § 1295(b)(1), substituted "hearing held" for "hearing had" in first sentence.

Subsec. (b). Pub. L. 109-58, § 1295(b)(2), struck out "the public utility to make" before "refunds of any amounts paid" in seventh sentence.

Pub. L. 109-58, § 1285, in second sentence, substituted "the date of the filing of such complaint nor later than 5 months after the filing of such complaint" for "the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period", in third sentence, substituted "the date of the publication" for "the date 60 days after the publication" and "5 months after the publication date" for "5 months after the expiration of such 60-day period", and in fifth sentence, substituted "If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision" for "If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision".

Subsec. (e). Pub. L. 109-58, § 1286, added subsec. (e).

1988—Subsec. (a). Pub. L. 100-473, § 2(1), inserted provisions for a statement of reasons for listed changes, hearings, and specification of issues.

Subsecs. (b) to (d). Pub. L. 100-473, § 2(2), added subsecs. (b) and (c) and redesignated former subsec. (b) as (d).

EFFECTIVE DATE OF 1988 AMENDMENT

Section 4 of Pub. L. 100-473 provided that: "The amendments made by this Act [amending this section] are not applicable to complaints filed or motions initiated before the date of enactment of this Act [Oct. 6, 1988] pursuant to section 206 of the Federal Power Act [this section]: *Provided, however*, That such complaints may be withdrawn and refiled without prejudice."

¹ See References in Text note below.

AMENDMENTS

2005—Subsec. (c). Pub. L. 109-58, §1295(c)(1), struck out par. (2) designation before introductory provisions, redesignated former subpars. (A) and (B) as pars. (1) and (2), respectively, and in par. (2) substituted “termination or modification” for “termination of modification”.

Subsec. (d)(1). Pub. L. 109-58, §1295(c)(2), substituted “if the transmitting utility providing” for “if the electric utility providing” in introductory provisions.

1992—Subsec. (a). Pub. L. 102-486, §721(1), amended first sentence generally. Prior to amendment, first sentence read as follows: “Any electric utility, geothermal power producer (including a producer which is not an electric utility), or Federal power marketing agency may apply to the Commission for an order under this subsection requiring any other electric utility to provide transmission services to the applicant (including any enlargement of transmission capacity necessary to provide such services).”

Pub. L. 102-486, §721(2), in second sentence, substituted “the Commission may issue such order if it finds that such order meets the requirements of section 824k of this title, and would otherwise be in the public interest. No order may be issued under this subsection unless the applicant has made a request for transmission services to the transmitting utility that would be the subject of such order at least 60 days prior to its filing of an application for such order.” for “the Commission may issue such order if it finds that such order—

“(1) is in the public interest,

“(2) would—

“(A) conserve a significant amount of energy,

“(B) significantly promote the efficient use of facilities and resources, or

“(C) improve the reliability of any electric utility system to which the order applies, and

“(3) meets the requirements of section 824k of this title.”

Subsec. (b). Pub. L. 102-486, §721(3), amended subsec. (b) generally, substituting provisions relating to reliability of electric service for provisions which related to transmission service by sellers of electric energy for resale and notice, hearing, and determinations by Commission.

Subsec. (c). Pub. L. 102-486, §721(4), struck out pars. (1), (3), and (4), and substituted “which requires the transmitting” for “which requires the electric” in introductory provisions of par. (2). Prior to amendment, pars. (1), (3), and (4) read as follows:

“(1) No order may be issued under subsection (a) of this section unless the Commission determines that such order would reasonably preserve existing competitive relationships.

“(3) No order may be issued under the authority of subsection (a) or (b) of this section which is inconsistent with any State law which governs the retail marketing areas of electric utilities.

“(4) No order may be issued under subsection (a) or (b) of this section which provides for the transmission of electric energy directly to an ultimate consumer.”

Subsec. (d). Pub. L. 102-486, §721(5), in first sentence substituted “transmitting” for “electric” before “utility” in two places, in second sentence inserted “each affected transmitting utility,” before “and each affected electric utility”, in par. (1) substituted “, or” for period at end of subpar. (B) and added subpar. (C), and in par. (3)(B) substituted “transmitting” for “electric” before “utility”.

1986—Subsec. (c)(2)(B). Pub. L. 99-495 inserted provisions that nothing in this subparagraph shall prevent an application for an order hereunder to be filed prior to termination or modification of an existing rate schedule, provided that such order shall not become effective until termination of such rate schedule or the modification becomes effective.

1980—Subsec. (a). Pub. L. 96-294 added applicability to geothermal power producers.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99-495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99-495, set out as a note under section 797 of this title.

STATE AUTHORITIES; CONSTRUCTION

Nothing in amendment by Pub. L. 102-486 to be construed as affecting or intending to affect, or in any way to interfere with, authority of any State or local government relating to environmental protection or siting of facilities, see section 731 of Pub. L. 102-486, set out as a note under section 796 of this title.

§ 824j-1. Open access by unregulated transmitting utilities

(a) Definition of unregulated transmitting utility

In this section, the term “unregulated transmitting utility” means an entity that—

(1) owns or operates facilities used for the transmission of electric energy in interstate commerce; and

(2) is an entity described in section 824(f) of this title.

(b) Transmission operation services

Subject to section 824k(h) of this title, the Commission may, by rule or order, require an unregulated transmitting utility to provide transmission services—

(1) at rates that are comparable to those that the unregulated transmitting utility charges itself; and

(2) on terms and conditions (not relating to rates) that are comparable to those under which the unregulated transmitting utility provides transmission services to itself and that are not unduly discriminatory or preferential.

(c) Exemption

The Commission shall exempt from any rule or order under this section any unregulated transmitting utility that—

(1) sells not more than 4,000,000 megawatt hours of electricity per year;

(2) does not own or operate any transmission facilities that are necessary for operating an interconnected transmission system (or any portion of the system); or

(3) meets other criteria the Commission determines to be in the public interest.

(d) Local distribution facilities

The requirements of subsection (b) of this section shall not apply to facilities used in local distribution.

(e) Exemption termination

If the Commission, after an evidentiary hearing held on a complaint and after giving consideration to reliability standards established under section 824o of this title, finds on the basis of a preponderance of the evidence that any exemption granted pursuant to subsection (c) of this section unreasonably impairs the continued reliability of an interconnected transmission system, the Commission shall revoke the exemption granted to the transmitting utility.

(f) Application to unregulated transmitting utilities

The rate changing procedures applicable to public utilities under subsections (c) and (d) of

section 824d of this title are applicable to unregulated transmitting utilities for purposes of this section.

(g) Remand

In exercising authority under subsection (b)(1) of this section, the Commission may remand transmission rates to an unregulated transmitting utility for review and revision if necessary to meet the requirements of subsection (b) of this section.

(h) Other requests

The provision of transmission services under subsection (b) of this section does not preclude a request for transmission services under section 824j of this title.

(i) Limitation

The Commission may not require a State or municipality to take action under this section that would violate a private activity bond rule for purposes of section 141 of title 26.

(j) Transfer of control of transmitting facilities

Nothing in this section authorizes the Commission to require an unregulated transmitting utility to transfer control or operational control of its transmitting facilities to a Transmission Organization that is designated to provide non-discriminatory transmission access.

(June 10, 1920, ch. 285, pt. II, §211A, as added Pub. L. 109-58, title XII, §1231, Aug. 8, 2005, 119 Stat. 955.)

§ 824k. Orders requiring interconnection or wheeling

(a) Rates, charges, terms, and conditions for wholesale transmission services

An order under section 824j of this title shall require the transmitting utility subject to the order to provide wholesale transmission services at rates, charges, terms, and conditions which permit the recovery by such utility of all the costs incurred in connection with the transmission services and necessary associated services, including, but not limited to, an appropriate share, if any, of legitimate, verifiable and economic costs, including taking into account any benefits to the transmission system of providing the transmission service, and the costs of any enlargement of transmission facilities. Such rates, charges, terms, and conditions shall promote the economically efficient transmission and generation of electricity and shall be just and reasonable, and not unduly discriminatory or preferential. Rates, charges, terms, and conditions for transmission services provided pursuant to an order under section 824j of this title shall ensure that, to the extent practicable, costs incurred in providing the wholesale transmission services, and properly allocable to the provision of such services, are recovered from the applicant for such order and not from a transmitting utility's existing wholesale, retail, and transmission customers.

(b) Repealed. Pub. L. 102-486, title VII, §722(1), Oct. 24, 1992, 106 Stat. 2916

(c) Issuance of proposed order; agreement by parties to terms and conditions of order; approval by Commission; inclusion in final order; failure to agree

(1) Before issuing an order under section 824i of this title or subsection (a) or (b) of section 824j of this title, the Commission shall issue a proposed order and set a reasonable time for parties to the proposed interconnection or transmission order to agree to terms and conditions under which such order is to be carried out, including the apportionment of costs between them and the compensation or reimbursement reasonably due to any of them. Such proposed order shall not be reviewable or enforceable in any court. The time set for such parties to agree to such terms and conditions may be shortened if the Commission determines that delay would jeopardize the attainment of the purposes of any proposed order. Any terms and conditions agreed to by the parties shall be subject to the approval of the Commission.

(2)(A) If the parties agree as provided in paragraph (1) within the time set by the Commission and the Commission approves such agreement, the terms and conditions shall be included in the final order. In the case of an order under section 824i of this title, if the parties fail to agree within the time set by the Commission or if the Commission does not approve any such agreement, the Commission shall prescribe such terms and conditions and include such terms and conditions in the final order.

(B) In the case of any order applied for under section 824j of this title, if the parties fail to agree within the time set by the Commission, the Commission shall prescribe such terms and conditions in the final order.

(d) Statement of reasons for denial

If the Commission does not issue any order applied for under section 824i or 824j of this title, the Commission shall, by order, deny such application and state the reasons for such denial.

(e) Savings provisions

(1) No provision of section 824i, 824j, 824m of this title, or this section shall be treated as requiring any person to utilize the authority of any such section in lieu of any other authority of law. Except as provided in section 824i, 824j, 824m of this title, or this section, such sections shall not be construed as limiting or impairing any authority of the Commission under any other provision of law.

(2) Sections 824i, 824j, 824l, 824m of this title, and this section, shall not be construed to modify, impair, or supersede the antitrust laws. For purposes of this section, the term "antitrust laws" has the meaning given in subsection (a) of the first sentence of section 12 of title 15, except that such term includes section 45 of title 15 to the extent that such section relates to unfair methods of competition.

(f) Effective date of order; hearing; notice; review

(1) No order under section 824i or 824j of this title requiring the Tennessee Valley Authority

Stat. 417 [31 U.S.C. 686, 686b)]” on authority of Pub. L. 97-258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

§ 825l. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, 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.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceed-

ings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, §313, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 860; amended June 25, 1948, ch. 646, §32(a), 62 Stat. 991; May 24, 1949, ch. 139, §127, 63 Stat. 107; Pub. L. 85-791, §16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109-58, title XII, §1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), “section 1254 of title 28” substituted for “sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)” on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109-58 inserted “electric utility,” after “Any person,” and “to which such person,” and substituted “brought by any entity unless such entity” for “brought by any person unless such person”.

1958—Subsec. (a). Pub. L. 85-791, §16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85-791, §16(b), in second sentence, substituted “transmitted by the clerk of the court to” for “served upon”, substituted “file with the court” for “certify and file with the court a transcript of”, and inserted “as provided in section 2112 of title 28”, and in third sentence, substituted “jurisdiction, which upon the filing of the record with it shall be exclusive” for “exclusive jurisdiction”.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted “court of appeals” for “circuit court of appeals”.

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this