# In the United States Court of Appeals for the Sixth Circuit

**No. 16-3791**

MISO TRANSMISSION OWNERS,
*Petitioners*,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
*Respondent*.

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

**BRIEF FOR RESPONDENT**
**FEDERAL ENERGY REGULATORY COMMISSION**


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## GLOSSARY

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| ALJ Decision | Initial Decision, *Midwest Indep. Transmission Sys. Operator*, *Inc.*, 144 FERC ¶ 63,007 (2013), R. 309, JA 1199 |
| American Transmission | Intervenor American Transmission Systems, Inc. (sometimes referenced as its parent, FirstEnergy Service Company) |
| Commission or FERC | Respondent Federal Energy Regulatory Commission |
| Duke | Intervenors Duke Energy Ohio, Inc. and Duke Energy Kentucky, Inc. |
| Exiting Members | Duke and American Transmission |
| FPA | Federal Power Act |
| MISO | Midcontinent Independent System Operator, Inc. (formerly, the Midwest Independent Transmission System Operator, Inc.), the independent operator of the regional transmission system in fifteen states and one Canadian province |
| [MISO] Tariff | MISO's Open Access Transmission, Energy and Operating Reserve Markets Tariff |
| Multi-Value Project Orders | *Midwest Indep. Transmission Sys. Operator*, *Inc.*, 133 FERC ¶ 61,221 (2010), *on reh'g*, 137 FERC ¶ 61,074 (2011), *aff'd*, *Ill. Commerce Comm'n v. FERC*, 721 F.3d 764 (7th Cir. 2013) |
| Opinion No. 539 | Opinion No. 539, Order on Initial Decision and Rehearing, *Midwest Indep. Transmission Sys. Operator*, *Inc.*, 153 FERC ¶ 61,101 (2015), R. 322, JA 1 |

## GLOSSARY

| | |
|---|---|
| Plan | Midwest ISO Transmission Expansion Plan |
| Regional Expansion Orders | *Midwest Indep. Transmission Sys. Operator, Inc.*, 114 FERC ¶ 61,106, *on reh'g*, 117 FERC ¶ 61,241 (2006), *aff'd*, *Pub. Serv. Comm'n of Wis. v. FERC*, 545 F.3d 1058 (D.C. Cir. 2008); *Midwest Indep. Transmission Sys. Operator, Inc.*, 118 FERC ¶ 61,209, *on reh'g*, 120 FERC ¶ 61,080 (2007) |
| Rehearing Order | Order Denying Rehearing, *Midwest Indep. Transmission Sys. Operator, Inc.*, 155 FERC ¶ 61,174 (2016), R. 326, JA 95 |
| Schedule 39 Order | *Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,140 (2012), R. 21, JA 224 |

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**BRIEF FOR RESPONDENT
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## STATEMENT REGARDING ORAL ARGUMENT

In accordance with Sixth Circuit Rule 28(b)(1)(B) and Federal Rule of Appellate Procedure 34(a)(1), Respondent Federal Energy Regulatory Commission submits that oral argument would assist the Court's resolution of this case. The issues in this appeal concern methods of allocating costs of transmission facilities in a regional transmission organization. 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 transmission cost allocation and various related regulatory and judicial proceedings.

## COUNTER-STATEMENT OF JURISDICTION

Petitioners MISO Transmission Owners ("Transmission Owners") seek review of orders issued by the Federal Energy Regulatory Commission ("Commission" or "FERC"). Those orders concern cost allocation provisions in the FERC-jurisdictional tariff of the Midcontinent Independent System Operator, Inc. ("MISO") (formerly, the Midwest Independent Transmission System Operator, Inc.). *See* Opinion No. 539, Order on Initial Decision and Rehearing, *Midwest Indep. Transmission Sys. Operator, Inc.*, FERC Docket Nos. ER12-715, *et al.*, 153 FERC ¶ 61,101 (Oct. 29, 2015), R. 322, JA 1 ("Opinion No. 539"); Order Denying Rehearing, *Midwest Indep. Transmission Sys. Operator, Inc.*, 155 FERC ¶ 61,174 (May 19, 2016), R. 326, JA 95 ("Rehearing Order").[1]

The Commission agrees that Transmission Owners (*see* Br. 2-3) timely filed a request for agency rehearing of Opinion No. 539 and that they timely filed a petition for review of final orders of the Commission. Transmission Owners, however, have not explained why venue is appropriate in this Court.

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[1] "R." refers to a record item. "P" refers to the internal paragraph number within a FERC order. "JA" refers to a page in the Joint Appendix.

The judicial review provision of the Federal Power Act ("FPA") provides for venue in the circuit "wherein the . . . public utility to which the [challenged] order relates is located or has its principal place of business," or in the D.C. Circuit. FPA § 313(b), 16 U.S.C. § 825*l*(b). In this case, the relevant public utility is MISO, which is the independent operator of the regional transmission system at issue here, and which is headquartered in Carmel, Indiana. MISO was the filing party that submitted the proposed Schedule 39 and other revisions to its Open Access Transmission, Energy and Operating Reserve Markets Tariff ("MISO Tariff" or "Tariff"). R. 1, JA 134. The FERC proceeding centered on certain provisions of the MISO Tariff, and the Commission based its ruling on its consideration of that Tariff. *See, e.g.*, Opinion No. 539 PP 69-78, JA 38-44; Rehearing Order PP 39-44, JA 114-17. Even if the FERC proceeding were construed to "relate[]" to more than one public utility, such as transmission owners in the MISO region, MISO's Tariff was the focus of the dispute and thus MISO is the entity to which the FERC orders most "relate[]." *See Fed. Power Comm'n v. Texaco, Inc.*, 377 U.S. 33, 38-39 (1964) (in the context of statutory venue language [there, identical language of the FERC-administered Natural Gas Act], and in contrast to "principal place of business," the word "located" "means more than having physical presence or existence in a place" and logically means single place of incorporation).

The MISO Transmission Owners have previously sought judicial review of FERC orders concerning the MISO Tariff in the D.C. Circuit or (more recently) the Seventh Circuit, where MISO has its headquarters. *See, e.g.*, *Midwest ISO Transmission Owners v. FERC*, 96 F. App'x 721 (D.C. Cir. 2004) (affirming orders concerning treatment of administrative costs in the MISO Tariff); *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361 (D.C. Cir. 2004) (affirming orders concerning treatment of administrative costs in the MISO Tariff); *MISO Transmission Owners v. FERC*, 819 F.3d 329 (7th Cir. 2016) (affirming orders concerning regional transmission planning and revisions to the MISO Tariff and the Transmission Owners Agreement), *reh'g denied* (June 16, 2016), *cert. denied sub nom. Ameren Servs. Co., et al. v. FERC*, No. 16-531 (Mar. 6, 2017). In other recent cases, the MISO Transmission Owners have, in the D.C. Circuit, sought review of FERC orders under the names of individual transmission owners. *See, e.g., Ameren Servs. Co., et al. v. FERC*, D.C. Cir. Nos. 16-1150 (briefing completed) and 16-1075, *et al*. (briefing underway).

Other parties have likewise appealed FERC orders concerning the MISO Tariff to those two courts. *See, e.g., E. Ky. Power Coop., Inc. v. FERC*, 489 F.3d 1299, 1305 (D.C. Cir. 2007) (recovery of MISO's administrative costs); *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239 (D.C. Cir. 2007) (MISO energy markets); *Pub. Serv. Comm'n of Wis. v. FERC*, 545 F.3d 1058 (D.C. Cir. 2008) (appeal from

Regional Expansion Orders, discussed *infra* at pp. 8-12); *Integrys Energy Grp., Inc. v. FERC*, 314 F. App'x 324 (D.C. Cir. 2009) (refund methodology under MISO Tariff); *Ill. Commerce Comm'n v. FERC*, 721 F.3d 764 (7th Cir. 2013) (appeal from Multi-Value Project Orders, discussed *infra* at pp. 12-15); *Pioneer Trail Wind Farm, LLC v. FERC*, 798 F.3d 603 (7th Cir. 2015) (MISO's pricing for network upgrades related to new interconnections).

Indeed, since MISO's formation, *no* appeal of *any* MISO-related FERC orders has been brought to or adjudicated by this Court. Accordingly, Transmission Owners must explain why the instant dispute over provisions of the MISO Tariff is properly before this Court under the judicial review provision of the Federal Power Act. *See Ga.-Pac. Corp. v. Fed. Power Comm'n*, 512 F.2d 782 (5th Cir. 1975) (transfer or dismissal permissible in light of lack of venue for appeal of FPC (FERC's predecessor) order).

## STATEMENT OF THE ISSUE

This case concerns a single issue arising from extensive litigation surrounding the withdrawal of two transmission owners from the MISO regional system. Much of that litigation has centered on what, if any, financial obligations those exiting members continue to have with respect to regional cost-sharing for large transmission projects that were approved through MISO's regional planning process prior to their withdrawal. In the orders challenged on review, the

Commission ruled on numerous issues related to: the MISO Tariff; a newly proposed rate schedule for various charges to former MISO members; the regional Transmission Owners Agreement; and an exit fee agreement between MISO and one of the former members.

Notwithstanding the complexity of the underlying proceedings, only one issue, concerning interpretation of the MISO Tariff, is now presented for review:

Whether the Commission reasonably determined that the exiting members had not incurred, and thus do not remain responsible for, financial obligations prior to withdrawal under the MISO Tariff's cost allocation methodology for certain regional transmission projects.

## STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the attached Addendum.

## STATEMENT OF THE CASE

## I. STATUTORY AND REGULATORY BACKGROUND

### A. The Federal Power Act

Section 201 of the Federal Power Act ("FPA"), 16 U.S.C. § 824, gives the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and wholesale sale of electric energy in interstate commerce. This grant of jurisdiction is comprehensive and exclusive. *See generally New York v. FERC*, 535 U.S. 1 (2002) (discussing statutory framework and FERC jurisdiction). All rates for or in connection with jurisdictional sales and transmission services are subject to FERC review to assure they are just and reasonable, and not unduly discriminatory or preferential. FPA § 205(a), (b), (e), 16 U.S.C. § 824d(a), (b), (e).

### B. Regional Entities and Transmission Planning Reforms

The Commission's efforts to foster wholesale electricity competition over broader geographic areas in recent decades have led to the creation of independent system operators and regional transmission organizations. *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 536-37 (2008). These independent regional entities operate the transmission grid on behalf of transmission-owning member utilities and are required to maintain system reliability. *See NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 169 & n.1 (2010) (explaining responsibilities of regional system operators). In this case, MISO is a regional transmission organization comprising utilities in fifteen states and one Canadian province. *See Pub. Serv. Comm'n of Wis. v. FERC*, 545 F.3d 1058, 1059 (D.C. Cir. 2008) (describing MISO region); *see also Illinois*, 721 F.3d at 770 (MISO map) and 777 (maps of changing MISO borders in upper Midwest).

In its recent opinion affirming the Commission's Order No. 1000 transmission planning rulemaking, the D.C. Circuit provided an overview of the pertinent history of the Commission's electric industry reforms. *See S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 49-54 (D.C. Cir. 2014). In particular, the 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. *See id.* at 51-54. In addition, the Seventh Circuit discussed those developments as they relate to MISO in particular in *Illinois*, 721 F.3d at 769-72, and in *MISO Transmission Owners*, 819 F.3d at 332.

### C. Development of Regional Transmission Projects in MISO

Because the challenged orders interpreted MISO Tariff provisions concerning several categories of regional transmission projects, with the context of a decade of FERC proceedings on the development of regional transmission planning in the MISO region, this Brief provides the following overview.

#### 1. The Regional Expansion Orders

In a series of proceedings beginning in 2005, the Commission approved revisions to MISO's Tariff that implemented regional transmission planning and developed several categories of network upgrades that would be planned on a regional basis and eligible for cost-sharing across all or part of the MISO region. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 114 FERC ¶ 61,106, *on reh'g*, 117 FERC ¶ 61,241 (2006), *aff'd, Pub. Serv. Comm'n of Wis. v. FERC,* 545

F.3d 1058 (D.C. Cir. 2008); *Midwest Indep. Transmission Sys. Operator, Inc.*, 118 FERC ¶ 61,209, *on reh'g*, 120 FERC ¶ 61,080 (2007).[2]

The Regional Expansion Orders approved the criteria and methodologies for several categories of cost-shared network upgrades, adding Attachment FF, among other provisions, to the MISO Tariff.

**The Midwest ISO Transmission Expansion Plan ("MTEP" or "Plan").** MISO's Tariff requires it to undertake a regional transmission planning process at least biennially. *See* Attachment FF, Section I.A.1, JA 773. Attachment FF describes the process that MISO uses to develop the Plan, subject to review and approval by the Transmission Provider Board; details the criteria for several categories of regionally-planned projects; and provides for the designation of cost responsibility for projects in the Plan. *See* JA 771-844.

**Baseline Reliability Projects ("BRPs").** In the 2006 Regional Expansion Orders, the Commission approved MISO's tariff provisions for Baseline Reliability Projects (i.e., projects of 100 kilovolts and above needed to maintain system reliability, in accordance with regulatory and industry requirements and

[2] The 2006 orders are commonly known as the RECB I Orders, and the 2007 orders as the RECB II Orders. (RECB stands for Regional Expansion Criteria and Benefits.) To minimize use of acronyms, this Brief refers instead to the 2006 and 2007 Regional Expansion Orders. For the convenience of the Court, this Brief also notes the common acronyms for various Tariff terms, as they may be used in relevant FERC orders and in briefs of other parties.

criteria, to serve existing transmission customers). *See* 114 FERC ¶ 61,106 at PP 26-29; Attachment FF, Section II.A.1, JA 813-14; Attachment FF, Section III.A.2.c, JA 828-30. Those provisions required that, to receive any cost-sharing, a project must either cost at least $5 million or constitute at least five percent of the transmission owner's net plant. Section III.A.2.c, JA 828.

For Baseline Reliability Projects from 100 kilovolts up to 344 kilovolts, the project cost was allocated sub-regionally to transmission customers in the pricing zones impacted by the particular project. Section III.A.2.c.1, JA 828-29. That impact, and the resulting allocation, was determined using a Line Outage Distribution Factor analysis, which evaluates the impact a new transmission facility will have on power flows in different zones. *See id.*, JA 829. For Baseline Reliability Projects of 345 kilovolts and higher, 20 percent of the project cost would be allocated system-wide to all transmission customers, with the remaining 80 percent allocated sub-regionally, using the flow-impact analysis. *See* Section III.A.2.c.ii, JA 829-30.[3]

[3] In October 2012 — after the period relevant to the instant dispute — MISO and the Transmission Owners proposed revisions to the MISO Tariff to modify the cost allocation method for Baseline Reliability Projects to remove sub-regional and regional cost sharing, and to provide for 100 percent of the costs of each project to be allocated to the pricing zone(s) in which it is located. *See Midwest Indep. Transmission Sys. Operator, Inc., et al.*, 142 FERC ¶ 61,215 (2013), *on reh'g*, 147 FERC ¶ 61,127 (2014). The Seventh Circuit affirmed those orders in *MISO Transmission Owners v. FERC*, 819 F.3d 329 (7th Cir. 2016).

**Market Efficiency Projects ("MEPs").** In the 2007 Regional Expansion Orders, the Commission approved Tariff provisions for Regionally Beneficial Projects, later renamed Market Efficiency Projects. These projects are economic upgrades that satisfy certain cost/benefit tests, cost more than $5 million, and involve 345 kilovolt or higher facilities. *See* 118 FERC ¶ 61,209 at PP 5-8; Attachment FF, Section II.B, JA 815-21; Attachment FF, Section III.A.2.f, JA 837-39.

For these upgrades, 20 percent of the project cost is "allocated on a system-wide basis to all Transmission Customers." Section III.A.2.f.i, JA 837; *see also* 118 FERC ¶ 61,209 at P 7. The remaining 80 percent is allocated among defined sub-regions based on an analysis of the relative annual cost-saving benefits. Section III.A.2.f.ii, JA 837-38; *see also* 118 FERC ¶ 61,209 at P 7.

**Financial Obligations After Withdrawal.** In the 2007 Regional Expansion Orders, the Commission required MISO to include in Attachment FF a provision clarifying that a party that withdrew from the MISO system would remain responsible for costs of network upgrades that had been previously allocated to it. *See* 118 FERC ¶ 61,209 at P 193; 120 FERC ¶ 61,080 at P 83. As a result, Attachment FF provided that a withdrawing party "shall remain responsible for all financial obligations incurred pursuant to this Attachment FF" prior to its exit. Section III.A.2.j, JA 840.[4]

### 2. The Multi-Value Projects (MVP) Orders

In 2010, MISO proposed adding a new category of transmission projects with a regional orientation. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 133 FERC ¶ 61,221 at P 1 (2010), *on reh'g*, 137 FERC ¶ 61,074 (2011), *aff'd*, *Ill. Commerce Comm'n v. FERC*, 721 F.3d 764 (7th Cir. 2013); Attachment FF, Section II.C, JA 821-26. Multi-Value Projects must include facilities rated at 100 kilovolts or higher, must cost at least $20 million, and must meet one of three criteria: (1) the project must be developed through the Plan process for the purpose of supporting public policy mandates, and must enable the transmission system to deliver energy more reliably and/or more economically; (2) the project must provide multiple types of economic value across multiple pricing zones with a specified cost-benefit ratio; or (3) the project must address at least one reliability need and at least one economic issue, with quantifiable benefits that exceed quantifiable costs. 133 FERC ¶ 61,221 at PP 29, 207, 217; Attachment FF, Sections II.C.2.A, 3, 5, 7, JA 822-26; *see also Illinois*, 721 F.3d at 774 ("[E]very

[4] Similarly, the MISO Transmission Owners Agreement, Article V, Section II.B, provided: "All financial obligations incurred and payments applicable to time periods prior to the effective date of such [transmission owner's] withdrawal shall be honored by [MISO] and the withdrawing [o]wner." JA 637.

multi-value project is to be large, is to consist of high-voltage transmission (enabling power to be transmitted efficiently across pricing zones), and is to help utilities satisfy renewable energy requirements, improve reliability. . . , facilitate power flow to currently underserved areas in the MISO region, or attain several of these goals at once.”). Multi-Value Projects would be evaluated and approved on a portfolio basis, “whose benefits are spread broadly across the footprint.” Attachment FF, Section II.C.1, JA 821-22.

Moreover, as discussed *infra* in Part II.A.1 of the Argument, MISO designed this new category of regional projects with a different approach to cost allocation: Not only would 100 percent of costs be shared across the MISO region, but they would be allocated based on actual usage:

> We agree with [MISO and the Transmission Owners] that a significant portion of MVP benefits will likely accrue during off-peak demand periods and, therefore, a usage-based cost allocation methodology is consistent with cost causation principles. . . . A proposed usage charge would more appropriately reflect MVP benefits by allowing costs to be allocated during all hours of the year. Moreover, *rather than making an upfront allocation of costs based on an analysis of benefits and usage at a specific point in time* . . . , *the proposed MVP rate design allocates costs based on usage over time*.[] This also allows an allocation of costs to load in a manner that reflects changes in MVP beneficiaries over time.

133 FERC ¶ 61,221 at P 383 (emphasis added; footnote omitted); *see also* 137 FERC ¶ 61,074 at P 257 (“Put another way, we find that a load’s relative use of the

regional transmission system during all hours of the year is indicative of the degree to which it benefits from MVP facilities.”).

To implement that allocation, the Commission also approved Attachment MM to the MISO Tariff, which defines the “Multi-Value Project Charge (‘MVP Charge’).” JA 929-39. As discussed in Part II.A.1 of the Argument, *infra*, Attachment MM set forth a formula that apportioned the annual revenue requirement for all Multi-Value Projects by a monthly calculation based on system usage. *Id.*

In the Multi-Value Projects proceeding, MISO also proposed Tariff revisions regarding the financial obligations under Attachment FF of transmission owners that withdraw from MISO. *See* 133 FERC ¶ 61,221 at P 453. Several parties — including intervenors here, Duke Energy Ohio, Inc. and Duke Energy Kentucky, Inc. (together, “Duke”) and American Transmission Systems, Inc. (here, “American Transmission,” commonly known as “ATSI” or referenced as its parent, FirstEnergy Service Company) — objected to the proposal. *See id.* at PP 454-62. The Commission approved the Tariff revisions (*id.* at PP 470-71), but declined to prejudge the costs for which any particular MISO member would be responsible, finding such matters “beyond the scope” of the Tariff proposal before it. *Id.* at P 472; 137 FERC ¶ 61,074 at P 321.

Various parties sought judicial review of the Multi-Value Projects Orders in the Seventh Circuit, which largely affirmed the Commission's orders approving the proposal, including the regional cost allocation provisions. *See Illinois*, 721 F.3d at 773-77. The court rejected a challenge by Duke and FirstEnergy, noting that the Commission "has ruled that allocation to departing utilities is proper in principle" but finding the matter "premature" because of the Commission's scope ruling. *Id.* at 780 (FERC's conclusion "amounts to a truism . . . saying that if they're liable they're liable").

## II. THE COMMISSION PROCEEDINGS AND ORDERS NOW ON REVIEW

### A. Background: Withdrawals from MISO and the Schedule 39 Order

On July 31, 2009, American Transmission notified MISO of its intent to withdraw from MISO effective May 31, 2011. The Commission authorized American Transmission's exit and its integration into another regional transmission organization, PJM Interconnection, L.L.C. American Transmission and MISO negotiated an exit fee agreement that the Commission conditionally accepted in June 2011. *See* Opinion No. 539 PP 6, 16, JA 7, 10 (citing FERC orders).

On May 20, 2010, Duke notified MISO of its intent to withdraw from MISO effective December 31, 2011. The Commission likewise authorized its exit and conditionally accepted an exit fee agreement between Duke and MISO. *See id.* PP 7, 17, JA 7, 10 (citing FERC orders).

In December 2011, MISO and the Transmission Owners submitted a new Schedule 39, concerning Multi-Value Project financial obligations and cost recovery relating to withdrawing transmission owners, and proposed revisions to Attachment MM to the MISO Tariff. The revisions allowed MISO to charge a withdrawing member, on an ongoing monthly basis, for a share of costs of all Multi-Value Projects that the MISO Board had approved prior to the effective date of the member's exit. *See* Opinion No. 539 PP 22-23, JA 13-14. The proposed change would allow MISO to charge Duke and American Transmission (together, the "Exiting Members") for costs related to Multi-Value Projects in a Plan that the MISO Board had approved before their respective withdrawal dates in 2011. *See id.* P 24, JA 14.

In February 2012, the Commission conditionally accepted the proposed schedule and revisions to Attachment MM on a prospective basis, effective January 1, 2012. *Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,140 at PP 1-3 (2012), R. 21, JA 224 ("Schedule 39 Order"). But the Commission ruled that MISO could not automatically apply the new provisions to the Exiting Members "unless those provisions are consistent with the MVP-related withdrawal obligations in the Tariff at the time that [the Exiting Members] withdrew from MISO." *Id.* P 74, JA 256. The Commission set that question of consistency and several other issues for hearing before an administrative law judge. *Id.*

**B. ALJ Decision**

Following a hearing, the administrative law judge issued an initial decision in July 2013. *Midwest Indep. Transmission Sys. Operator, Inc.*, 144 FERC ¶ 63,007 (2013), R. 309, JA 1199 ("ALJ Decision"). The ALJ Decision found, among other issues, that the Schedule 39 cost calculation methodology could be applied automatically to the Exiting Members, and that it could be appropriate to apply that methodology even if Schedule 39 were to be found inconsistent with the withdrawal obligations in the pre-withdrawal Tariff. *See id.* PP 74-78, JA 1263-66.

**C. Opinion No. 539**

Duke, American Transmission, and FERC Trial Staff filed briefs on exceptions to the ALJ Decision. On October 29, 2015, the Commission issued the 94-page Opinion No. 539, which addressed the many findings in the ALJ Decision at length and also denied rehearing of the Schedule 39 Order. (The instant appeal concerns only the proceeding on review of the ALJ Decision.) Of relevance here, the Commission reversed the ALJ Decision, finding that imposing the Schedule 39 charges on the Exiting Members would violate the filed rate doctrine because the

Schedule 39 cost calculations were not consistent with the Tariff that was in effect when they left MISO. Opinion No. 539 P 40, JA 22. The Commission further found that imposing the Schedule 39 charges would violate the rule against retroactive ratemaking because the new methodology "fills a gap in the pre-withdrawal Tariff . . . ." *Id.* P 41, JA 22-23.

In particular, the Commission reversed the ALJ Decision's conclusion that Schedule 39 was consistent with the pre-withdrawal Tariff. *See id.* As discussed more fully in the Argument, *infra*, the Commission determined that the pre-withdrawal Tariff did not assign Multi-Value Project cost obligations upon MISO Board approval of such projects in a Plan. *See id.*; *see also* PP 40-78, JA 22-44.

### D. Rehearing Order

MISO and the Transmission Owners timely filed the only request for rehearing of Opinion No. 539. R. 323, JA 1341. On May 19, 2016, the Commission denied rehearing in the Rehearing Order, for reasons discussed in the Argument, *infra*.

This appeal followed.

## SUMMARY OF ARGUMENT

This is the latest in a series of cases arising from the ongoing efforts of the Commission, regional system operators, electric utilities, and other stakeholders to develop and implement regional transmission planning processes, broad regional cost-sharing for large transmission projects, and appropriate allocation of project costs. In the challenged orders, the Commission considered numerous issues surrounding the withdrawal of two transmission owners from a regional organization and their financial obligations under various tariffs and contracts in effect before and after their exit.

On appeal, however, only one question of tariff interpretation remains in dispute: whether the Commission reasonably concluded that, under the MISO Tariff provisions that were in effect before Duke and American Transmission withdrew from MISO, cost responsibility for Multi-Value Projects was not allocated up-front at the time when the MISO Board approved a Regional Transmission Expansion Plan. That determination — that is, the point in time when cost responsibility for Multi-Value Projects was assigned — is key to whether those costs were "financial obligations incurred" prior to the Exiting Members' withdrawal.

The Commission's interpretation of the pre-withdrawal Tariff was reasonable, based not only on the relevant Tariff language but also on the Commission's prior orders and on Tariff provisions concerning other categories of regional projects. First, the Commission analyzed the language of the only provision in Attachment FF addressing the allocation of costs for Multi-Value Projects (Section III.A.2.g.i), and found that the provision did not refer to Board approval or an up-front designation of cost responsibility to pricing zones. Instead, that provision stated that costs would be allocated to transmission customers that withdrew energy, and referenced the methodology in Attachment MM for apportioning Multi-Value Project costs according to system usage. Moreover, the Commission's interpretation was consistent with its own prior orders, affirmed by the Seventh Circuit, that had approved the Multi-Value Projects as a distinct category of regional projects with a unique allocation methodology. The Commission further supported its Tariff interpretation by contrasting the cost allocation provisions for other categories of regional projects, which required up-front, fixed designations that became effective upon Board approval of the Plan.

The Transmission Owners' challenges to the Commission's reasoning miss the mark because they rely on the incorrect premise that the Commission had conflated cost allocation and cost recovery. The Commission explained that it had focused on identifying the point in time when cost responsibility was assigned; that the Tariff also prescribed cost recovery for Multi-Value Projects was beside the point. Therefore, the Commission adequately responded to the Transmission Owners' objections.

## ARGUMENT

## I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard; the "scope of review under [that] standard is narrow." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (citation omitted). The relevant inquiry is whether the agency has "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)); *see also Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (finding reasoned decisionmaking where Commission "weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that choice").

The Commission's decisions regarding rate issues are entitled to broad deference, because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *see also Morgan Stanley*, 554 U.S. at 532 (affording "great deference" to Commission's rate decisions). In addition, "[a]n agency's interpretation of its own precedents receives considerable deference." *Aburto-Rocha v. Mukasey*, 535 F.3d

500, 503 (6th Cir. 2008) (citing *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007)); *see also, e.g.*, *NRG Power Mktg., LLC v. FERC*, 718 F.3d 947, 957 (D.C. Cir. 2013) ("we afford FERC substantial deference in its interpretation of its own orders"); *Pioneer Trail Wind Farm, LLC v. FERC*, 798 F.3d 603, 612 (7th Cir. 2015) (same).

As to contracts and tariffs, this Court (in contrast to the D.C. and Seventh Circuits), does not afford *Chevron*-like deference to the Commission's interpretation. *See Cincinnati Gas & Elec. Co. v. FERC*, 724 F.2d 550, 554 (6th Cir. 1984) ("An agency's interpretation of a contract . . . may be reviewed by a court without special deference."); *Dayton Power & Light Co. v. FERC*, 843 F.2d 947, 953 n.12 (6th Cir. 1988) (noting but "specifically refrain[ing] from adopting" the D.C. Circuit's approach); *cf. Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814-15 (D.C. Cir. 1998) (*Chevron*-like deference); *City of Kaukauna v. FERC*, 214 F.3d 888, 895 (7th Cir. 2000) ("less deference"); *Amoco Prod. Co. v. FERC*, 765 F.2d 686, 690 (7th Cir. 1985) ("some deference to the Commission as an expert body"). *See generally Nat'l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1568 (D.C. Cir. 1987) (adopting the substantial deference standard, while noting the no-deference approach of the Fifth and Sixth Circuits and the less-deference approach of the Fourth and Seventh Circuits).

Nevertheless, this Court does defer to the Commission's contract interpretations that are based on its specialized expertise. *See Cincinnati Gas & Elec.*, 724 F.2d at 554; *cf. Rhinehimer v. U.S. Bancorp Investments, Inc.*, 787 F.3d 797, 809 (6th Cir. 2015) ("Agency interpretations not entitled to *Chevron* deference may nonetheless 'merit some deference' in light of agency expertise and the value of uniformity in interpreting [] the law.") (quoting *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001)); *Thornton v. Graphic Commc'ns Conference of the Int'l Bhd. of Teamsters Supp. Ret. & Disability Fund*, 566 F.3d 597, 615 (6th Cir. 2013) (citing deference "due to the agency's institutional expertise"); *cf. Mid-La. Gas Co. v. FERC*, 780 F.2d 1238, 1243 (5th Cir. 1986) (deference may be appropriate based on "the agency's expert understanding of the industry"); *Pac. Gas & Elec. Co. v. FERC*, 746 F.2d 1383, 1387 (9th Cir. 1984) (where FERC "employed its unique expertise in rate-setting contracts" and capacity allocation arrangements, its interpretation "was so clearly based upon the agency's expertise in electricity transmission regulation" that deference was warranted).

Notably, the Fifth Circuit — which shares this Court's *Cincinnati Gas* approach — recently cited such expertise as grounds for deference in upholding the Commission's interpretation of cost-allocation provisions in another complex agreement governing a regional electrical system. *See La. Pub. Serv. Comm'n v.*

*FERC*, 761 F.3d 540, 554 (5th Cir. 2014) (affording deference "[b]ecause FERC utilized its technical and factual expertise to interpret the ambiguous language").

## II. THE COMMISSION REASONABLY DETERMINED THAT THE PRE-WITHDRAWAL MISO TARIFF DID NOT ASSIGN COST RESPONSIBILITY FOR MULTI-VALUE PROJECTS UPON PLAN APPROVAL

Much of the extensive litigation before the agency centered on whether the imposition of charges under Schedule 39 to recover a share of Multi-Value Project costs from the Exiting Members was consistent with the Exiting Members' obligations under the MISO Tariff at the times when they withdrew. The Commission set the matter for an administrative hearing, then issued a 94-page order addressing a number of disputed issues, most of which are not contested in this appeal.

Ultimately, the Commission determined that the Schedule 39 charges were not consistent with the pre-withdrawal Tariff, and thus the filed rate doctrine and the rule against retroactive ratemaking precluded the assessment of Schedule 39 charges. Because that inconsistency determination turned on whether costs for Multi-Value Projects were "financial obligations incurred" before the Exiting Members withdrew from MISO, the Commission focused on the "point in time" when cost responsibility for Multi-Value Projects was assigned under the Tariff that was in effect when the Exiting Members withdrew. Rehearing Order P 40, JA 115; *see also* Opinion No. 539 P 71, JA 39 ("in order for any MVP-related ‘financial obligations’ . . . to have been ‘incurred’ . . . prior to withdrawal, they must have been allocated to [American Transmission] and Duke while they were MISO members”). The Commission made a “narrow finding” that the pre-withdrawal tariff did not provide for the up-front allocation of Multi-Value Project costs. Rehearing Order P 40, JA 115. That determination was grounded in the language of the Tariff and consistent with precedent, and should be affirmed.

### A. The Commission Reasonably Interpreted The Relevant Tariff Provisions Concerning The Point In Time When Cost Responsibility For Each Type Of Regional Project Was Assigned

#### 1. Multi-Value Projects

The Commission found (as had the administrative law judge, ALJ Decision P 53, JA 1252) that the only Tariff provision that specifically referenced cost allocation for Multi-Value Projects was Attachment FF, Section III.A.2.g, JA 839:

> Multi Value Projects: Costs of Multi Value Projects will be allocated as follows:
>
> One-hundred percent (100%) of the annual revenue requirements of the Multi Value Projects shall be allocated on a system-wide basis to Transmission Customers that withdraw energy, including External Transactions sinking outside the Transmission Provider’s region, and recovered through an MVP Usage Charge pursuant to Attachment MM.

Opinion No. 539 P 71, JA 39-40. The Commission found that the introductory phrase — “will be allocated as follows” — did not “leave room for a determination” that the ensuing paragraph concerned something *other* than the allocation of Multi-Value Project costs. *Id.* P 72, JA 40. For that reason, the

Commission read the paragraph to describe an assignment of costs to transmission customers that used energy and the quantification of that cost assignment through the usage methodology in Attachment MM. *See id.*

Transmission Owners argue (Br. 37-39) that the Commission misconstrued Attachment MM (JA 929-39), which, in their view, merely prescribed the calculations for collecting the charges for Multi-Value Projects. But the Commission concluded that Sections 3 and 4 of Attachment MM, establishing the methodology for determining annual revenue requirements and apportioning those costs to customers based on actual system usage, described the mechanism for cost allocation that was referenced in Section III.A.2.g of Attachment FF. *See* Opinion No. 539 P 73, JA 41. "[T]he formula for the MVP Usage Rate provided for a monthly system-wide rate based on the annual revenue requirement for each MVP, and each monthly calculation of MVP costs resulted in a new allocation of MVP costs resulting from the usage of the system in that month." *Id.* Put differently, Multi-Value Project costs were not assigned up-front; "instead, the annual revenue requirement associated with MVPs was allocated based upon each customer's use of the MISO system during that year." *Id.* P 75, JA 42.

That allocation mechanism was indeed unusual — but the Commission recognized MISO's unconventional approach when it approved the Tariff provisions in the Multi-Value Project Orders. The Commission had understood that MISO's proposal for a new category of regional projects would allocate costs differently: "The usage-based method of allocating MVP costs was specifically intended to change the paradigm of MISO's former practice of making fixed-percentage cost allocations at the time of MISO Board approval for non-MVPs." Rehearing Order P 41, JA 116. Specifically, MISO had proposed a different way to identify which customers would benefit, and to what extent, from regional projects, and to align costs with causation. *See* Multi-Value Projects Order, 133 FERC ¶ 61,221 at P 383 ("rather than making an upfront allocation of costs based on an analysis of benefits and usage at a specific point in time . . . , the proposed MVP rate design allocates costs based on usage over time"). *Cf. Illinois*, 721 F.3d at 775 (finding that the benefits of Multi-Value Projects, including access to wind power resources and increased grid reliability, are broadly shared but "can't be calculated in advance"); *id.* at 774 ("It's impossible to allocate these cost savings with any precision across MISO members.").[5] Therefore, in this case, the

[5] Those difficulties notwithstanding, the Commission did not rule, in the Multi-Value Projects Orders, that MISO's allocation methodology was the only reasonable approach, or the best; MISO's burden under the Federal Power Act was only to show that its proposal was just and reasonable. *See* 133 FERC ¶ 61,221 at P 384. Moreover, the Commission noted in this proceeding that MISO "could have proposed language in its pre-withdrawal Tariff making clear that MVP costs were allocated to specific transmission owners' zones at the time of MISO Board approval," but that MISO had not done so until it filed Schedule 39, after the Existing Members had withdrawn from MISO. Opinion No. 539 P 77, JA 43.

Commission reasonably found that its interpretation of Attachments FF and MM was consistent with its prior orders.

### 2. Other Regional Projects (Baseline Reliability And Market Efficiency)

The Commission also contrasted the Tariff provisions concerning assignment of responsibility for costs of Multi-Value Projects with the cost assignment provisions for other categories of cost-shared projects. *See* Opinion No. 539 P 69, JA 38 ("the pre-withdrawal Tariff established that cost responsibility for MVPs was assigned differently than cost responsibility for non-MVPs"). Key differences from the provisions for Baseline Reliability Projects and Market Efficiency Projects further confirm the Commission's interpretation as to Multi-Value Projects. In particular, the Commission pointed to two distinctions: First, the Multi-Value Project provisions did not contain language "with respect to MISO Board approval or an up-front allocation of costs." Rehearing Order P 42, JA 116-17. Second, the Tariff "did not specify zonal allocation of the costs of [Multi-Value Projects] in Appendix A of [the Plan] as it did for [other projects]." *Id.*; *accord*, Opinion No. 539 P 77, JA 43. By contrast, provisions for the other categories of regional projects contained both.

Specifically, for large Baseline Reliability Projects, MISO allocated 20 percent of the project costs system-wide (up-front), and apportioned the remaining 80 percent among specified pricing zones based on a power flow-based analysis.

*See* Attachment FF, Section III.A.2.c, JA 828 (Baseline Reliability Projects that meet the project cost threshold "shall be subject to the cost sharing of this Attachment FF and will be assigned to the Transmission Customers in pricing zones as follows:"); Section III.A.2.c.ii, JA 829-30 (prescribing the 20%-80% allocation), *cited in* Opinion No. 539 P 76, JA 42.

Similarly, for Market Efficiency Projects, MISO allocated 20 percent of the project costs system-wide (up-front), and allocated the remaining 80 percent among defined sub-regions based on an analysis of the relative annual cost-saving benefits. Section III.A.2.f.i-ii, JA 837-38; *see also* 133 FERC ¶ 61,221 at P 13. Section II of Attachment FF, which prescribes the process for developing the MISO Transmission Expansion Plan, specifies that, for Market Efficiency Projects, "[t]he benefits of the project and the cost allocations as a percentage of project cost shall be determined one time at the time that the project is presented to the [MISO] Board for approval." Section II.B.1.c, JA 818-19, *cited in* Opinion No. 539 P 76, JA 42. The Commission also noted that MISO's Business Practice Manual for Transmission Planning stated that Market Efficiency Project costs were allocated up-front, at the time of MISO Board approval, but did not say the same regarding

Multi-Value Projects. Rehearing Order P 77, JA 43 (citing § 7.4.2 and § 7.5 of the Manual).[6]

For both types of projects, charges would be calculated under Tariff Attachment GG, JA 1112-14, using the revenue requirements of projects that had already been apportioned to each pricing zone. Opinion No. 539 P 76, JA 43. "The project costs for both Baseline Reliability Projects and Market Efficiency Projects were apportioned at the time of the MISO Board's approval, with such apportionment reflected in Appendix A of the [MISO Transmission Expansion Plan]" — *including* the 20 percent of project costs allocated on a system-wide basis to all pricing zones — in contrast to Multi-Value Projects, which have no such up-front apportionment. *Id.*

That difference in timing — the "point in time" when costs were assigned to transmission customers — was central to the Commission's determination. Under the Tariff, the costs of Baseline Reliability Projects and Market Efficiency Projects were fixed and assigned to customers, both system-wide and zonally, at the time when the MISO Board approved the specific, case-by-case allocations in a Plan.

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6 The 2013 version of the Manual that the Commission cited is available online at https://www.misoenergy.org/Library/Repository/Meeting%20Material/Stakeholder/LOLEWG/2013/20130717/20130717%20LOLEWG%20Item%2007d%20BPM-020-r9%20Transmission%20Planning%20Redline.pdf.

The costs of Multi-Value Projects, however, were not assigned to "Transmission Customers that withdraw energy" (Attachment FF, Section III.A.2.g, JA 839) until MISO determined the monthly apportionment weighted by actual usage, in accordance with Attachment MM, Section 4(a), JA 934.

Because of that difference in timing, the Commission's interpretation did not conflict with the Regional Expansion Orders (*see supra* pp. 11-12), as they did not contemplate the allocation methodology that MISO later adopted for Multi-Value Projects. In approving Attachment FF in the Regional Expansion Orders, the Commission held that "cost allocations made under Attachment FF" would be "financial obligations incurred"; otherwise, costs assigned to a departing member would be transferred to the remaining members. 120 FERC ¶ 61,080 at P 83; *see also* 118 FERC ¶ 61,209 at P 193 ("In principle, a transmission owner should not be able to avoid previously allocated costs by withdrawing from [MISO]."). In the orders challenged here, the Commission did not, as Transmission Owners claim (Br. 48), "repudiate[]" those orders; rather, based on its interpretation of the Tariff and the context of the novel allocation methodology adopted in the Multi-Value Project Orders, the Commission found the Regional Expansion Orders inapposite because the Multi-Value Project costs had not, in fact, been "previously allocated" to the Exiting Members when they withdrew from MISO. *See* Rehearing Order

P 40, JA 115. That is, the *point in time* at which Multi-Value Project cost responsibility was assigned to customers based on usage fell after the exit date.

Nor, for the same reason, was the Schedule 39 Order to the contrary. *See* 138 FERC ¶ 61,140 at P 63, JA 251 ("Attachment FF specifies that transmission owners withdrawing from MISO are obligated to honor financial obligations associated with transmission facility additions *incurred under Attachment FF prior to withdrawal*") (emphasis added), *cited in* Br. 49. Thus, the Commission appropriately reconciled its findings in the challenged orders with its reasonable interpretations of its own precedents, which are entitled to deference. *See, e.g., Aburto-Rocha*, 535 F.3d at 503. *See also Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (upholding judgment that "the Commission addressed . . . seriously and carefully, providing reasons in support of its position").

### B. The Transmission Owners' Arguments Are Without Merit

Petitioners argue that Schedule 39 is consistent with the pre-withdrawal Tariff and that the Commission ignored their objection that applying Schedule 39 would not violate the filed rate doctrine or the rule against retroactive ratemaking. Br. 50-55. But their argument presumes that the Multi-Value Project costs were "financial obligations incurred" prior to the Exiting Members' withdrawal. Therefore, the Commission, having found to the contrary, reasonably declined to reconsider its conclusions that flowed from that finding. *See* Rehearing Order P 44, JA 117.

The Transmission Owners' remaining arguments depend on an incorrect premise: that the Commission conflated or confused cost allocation and cost recovery. *See* Br. 34-44. The Commission explained, however, that its analysis focused only on the "point in time" when Multi-Value Project costs were allocated, and that it "made the narrow finding" that the pre-withdrawal Tariff did not provide for upfront allocation. Rehearing Order P 40, JA 115-16. "Thus, the general distinction between cost allocation and cost recovery is irrelevant to the Commission's determination," and the Commission made no findings about "the relationship between cost allocation and cost recovery." *Id.*

In addition, contrary to Transmission Owners' claim (Br. 45), the Commission did explain its reference to language in the introduction to Section III of Attachment FF. Here, again, the Commission's point was that the allocation provision for Multi-Value Projects was distinct from the allocation provisions for other regional projects (Opinion No. 539 P 74, JA 41): "[W]e find that Section III did not establish that financial responsibility for all [regional] projects was determined at the same point in time" — i.e., upon Board approval of the Plan. *Id.* P 75, JA 41. For that reason, the Commission pointed out that the introductory language made any cost responsibility under Section III subject to the rest of

Section III, including the distinct allocation provision for Multi-Value Projects in Section III.A.2.g.i. *See* Opinion No. 539 P 75, JA 42.

For all their efforts to parse the "structure and syntax" of the Tariff, or to contest the Commission's interpretation of Section III.A.2.g — the only provision in Section III that addresses Multi-Value Projects — Transmission Owners fail to acknowledge, let alone try to explain, that provision's opening sentence ("Costs of Multi Value Projects will be allocated as follows:"). Nor can they refute the differences between that provision and the cost assignment provisions for Baseline Reliability Projects and Market Efficiency Projects. Therefore, the Commission's reasoned analysis of Section III, placed in the context of previous orders and informed by the agency's substantive expertise and experience with regional tariff provisions for transmission planning and cost allocation, should be upheld. *See also Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (finding "reasoned decisionmaking" where the Commission had "weighed competing views . . . and intelligibly explained the reasons" for its decision: "It is not our job to render that judgment, on which reasonable minds can differ.").

## CONCLUSION

For the reasons stated, assuming venue is proper in this Court, the petition should be denied and the challenged FERC Orders should be affirmed.

Respectfully submitted,

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March 13, 2017

## CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(B), (f), and (g), I certify that the Brief for Respondent has been prepared in a proportionally spaced typeface (using Microsoft Word 2013, in 14-point Times New Roman) and contains 7,485 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

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March 13, 2017

# ADDENDUM

## STATUTES

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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), the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824*o*–1, 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 respect 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, 824*o*, 824*o*–1, 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, 824*o*, 824*o*–1, 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 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; Pub. L. 114–94, div. F, § 61003(b), Dec. 4, 2015, 129 Stat. 1778.)

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

2015—Subsec. (b)(2). Pub. L. 114–94, § 61003(b)(1), inserted ''824*o*–1,'' after ''824*o*,'' in two places.

Subsec. (e). Pub. L. 114–94, § 61003(b)(2), inserted ''824*o*–1,'' after ''824*o*,''.

2005—Subsec. (b)(2). Pub. L. 109–58, § 1295(a)(1), substituted ''Notwithstanding subsection (f), the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 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, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title'' for ''Compliance with any order of the Commission under the provi-sions 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, 824*o*, 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

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

### § 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 delivering 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

(June 10, 1920, ch. 285, pt. III, § 311, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859.)

### § 825k. Publication and sale of reports

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and is authorized to sell at reasonable prices copies of all maps, atlases, and reports as it may from time to time publish. Such reasonable prices may include the cost of compilation, composition, and reproduction. The Commission is also authorized to make such charges as it deems reasonable for special statistical services and other special or periodic services. The amounts collected under this section shall be deposited in the Treasury to the credit of miscellaneous receipts. All printing for the Federal Power Commission making use of engraving, lithography, and photolithography, together with the plates for the same, shall be contracted for and performed under the direction of the Commission, under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe, and all other printing for the Commission shall be done by the Director of the Government Publishing Office under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe. The entire work may be done at, or ordered through, the Government Publishing Office whenever, in the judgment of the Joint Committee on Printing, the same would be to the interest of the Government: *Provided*, That when the exigencies of the public service so require, the Joint Committee on Printing may authorize the Commission to make immediate contracts for engraving, lithographing, and photolithographing, without advertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

(June 10, 1920, ch. 285, pt. III, § 312, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859; amended Pub. L. 113–235, div. H, title I, § 1301(b), (d), Dec. 16, 2014, 128 Stat. 2537.)

#### CODIFICATION

"Sections 1535 and 1536 of title 31" substituted in text for "sections 601 and 602 of the Act of June 30, 1932 (47 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 sec-tion of which enacted Title 31, Money and Finance.

#### CHANGE OF NAME

"Director of the Government Publishing Office" substituted for "Public Printer" in text on authority of section 1301(d) of Pub. L. 113–235, set out as a note under section 301 of Title 44, Public Printing and Docu-ments.

"Government Publishing Office" substituted for "Government Printing Office" in text on authority of section 1301(b) of Pub. L. 113–235, set out as a note preceding section 301 of Title 44, Public Printing and Documents.

### § 825*l*. 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), 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 proceedings 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) 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 amend-ed (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 Proce-dure.

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 chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

**(b) Writs of mandamus**

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

**(c) Employment of attorneys**

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

**(d) Prohibitions on violators**

In any proceedings under subsection (a), the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 824u of this title (and related rules and regulations) from—

(1) acting as an officer or director of an electric utility; or

(2) engaging in the business of purchasing or selling—

(A) electric energy; or

(B) transmission services subject to the jurisdiction of the Commission.

(June 10, 1920, ch. 285, pt. III, § 314, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 861; amended June 25, 1936, ch. 804, 49 Stat. 1921; June 25, 1948, ch. 646, § 32(b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 109–58, title XII, § 1288, Aug. 8, 2005, 119 Stat. 982.)

CODIFICATION

As originally enacted subsecs. (a) and (b) contained references to the Supreme Court of the District of Columbia. Act June 25, 1936, substituted ''the district court of the United States for the District of Columbia'' for ''the Supreme Court of the District of Columbia'', and act June 25, 1948, as amended by act May 24, 1949, substituted ''United States District Court for the District of Columbia'' for ''district court of the United States for the District of Columbia''. However, the words ''United States District Court for the District of Columbia'' have been deleted entirely as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial

## CERTIFICATE OF SERVICE

I certify that on the 13th of March, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

*/s/ Carol J. Banta*
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