ORAL ARGUMENT HAS NOT BEEN SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

NOS. 16-1075, *ET AL.*

AMEREN SERVICES COMPANY, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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WASHINGTON, D.C. 20426

FINAL BRIEF: APRIL 21, 2017

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties to the underlying agency proceedings and in this Court are identified in the brief of Petitioners Ameren Services Company, *et al*.

B. Rulings Under Review

1. *Midcontinent Indep. System Operator, Inc*., 151 FERC ¶ 61,220 (June 18, 2015), R. 34, JA 22;

2. *Otter Tail Power Co. v. Midcontinent Indep. System Operator, Inc*., 153 FERC ¶ 61,352 (Dec. 29, 2015), R. 69, JA 54;

3. *Otter Tail Power Co. v. Midcontinent Indep. System Operator, Inc*., 156 FERC ¶ 61,099 (Aug. 9, 2016), R. 89, JA 87;

4. *Midcontinent Indep. System Operator, Inc*., 156 FERC ¶ 61,098 (Aug. 9, 2016), R. 90, JA 100; and

5. *Midcontinent Indep. System Operator, Inc*., 157 FERC ¶ 61,013 (Oct. 7, 2016), R. 99, JA 109.

C. Related Cases

This case has not previously been before this Court or any other court. Counsel is not aware of any other cases related to this case currently pending in this Court or in any other court.

/s/ Holly E. Cafer
Holly E. Cafer

April 21, 2017

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GLOSSARY

Ameren	Petitioners Ameren Services Company, International Transmission Company d/b/a ITC*Transmission*, ITC Midwest LLC, and Michigan Electric Transmission Company, LLC
August 2016 Rehearing Order	The third order on review, *Otter Tail Power Co. v. Midcontinent Indep. System Operator, Inc*., 156 FERC ¶ 61,099 (Aug. 9, 2016), R. 89, JA 87
Br.	Opening brief of Petitioner Ameren
Commission or FERC	Federal Energy Regulatory Commission
December 2015 Rehearing Order	The second order on review, *Otter Tail Power Co. v. Midcontinent Indep. System Operator, Inc*., 153 FERC ¶ 61,352 (Dec. 29, 2015), R. 69, JA 54
Facilities Construction Agreement	The standard interconnection agreement governing procedures, including financing, for facilities required to connect new generation to an affected, but not directly-connected, transmission owner's system
FPA or the Act	Federal Power Act
Generator Funding	A financing option for network upgrades whereby the interconnection customer, i.e., the generator, pays the upfront capital costs of construction, referenced in the orders on review as Option 2
Generator Interconnection Agreement	The standard interconnection agreement governing procedures, including financing, for facilities required to directly connect new generation to a transmission owner's system
JA	Joint Appendix
June 2015 Order	The first order on review, *Midcontinent Indep. System Operator, Inc*., 151 FERC ¶ 61,220 (June 18, 2015), R. 34, JA 22

GLOSSARY

P	Denotes a paragraph number in a Commission order
R.	Indicates an item in the certified index to the record
System Operator	Midcontinent Independent System Operator, Inc.
Transmission Owner Funding	A financing option for network upgrades whereby the transmission owner pays the upfront capital costs of construction and charges the interconnection customer to recover both a return of and return on that investment, referenced in the orders on review as the "initial funding option"

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BRIEF FOR RESPONDENT
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STATEMENT OF THE ISSUES

This appeal arises from the ongoing efforts of the Federal Energy Regulatory Commission ("FERC" or "Commission") to ensure non-discriminatory, open access to transmission services. In the orders on review, the Commission found that certain procedures governing the interconnection of new electric generating facilities to the grid allowed existing transmission owners the unilateral discretion to raise costs for the new generators, and required changes to those procedures.

Before this Court, certain transmission owners present the following issues:

1. Whether the Commission reasonably determined that it is unduly discriminatory, in violation of the Federal Power Act, to permit a transmission owner the sole discretion, through the unilateral selection of a financing scheme, to increase costs for a generator seeking interconnection services; and

2. Whether the Commission reasonably determined that it is just and reasonable, consistent with the Federal Power Act, to allow an interconnection customer to choose to pay the upfront capital costs of the transmission upgrades required for its interconnection, with the result that those capital costs are excluded from the transmission owner's rate base.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes are contained in the Addendum.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY FRAMEWORK

A. Federal Power Act

Section 201 of the Federal Power Act, 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. Section 205(c) of the Federal Power Act ("FPA"), 16 U.S.C. § 824d(c), requires public utilities to file tariff schedules with the Commission showing their rates and terms

of service, along with related contracts, for service subject to FERC jurisdiction. When those tariff schedules are filed, sections 205(a)-(b) of the Act, 16 U.S.C. §§ 824d(a)-(b), obligate the Commission to assure that the rates and services described in the tariff are "just and reasonable," and not "unduly discriminatory."

The Commission may also institute investigations concerning the lawfulness of existing rates and services on complaint or on its own motion, pursuant to section 206 of the Federal Power Act, 16 U.S.C. § 824e. If the Commission finds that any rate, charge or classification on file for the transmission or wholesale sale of electric energy subject to its jurisdiction is unjust, unreasonable or unduly discriminatory, it may determine and fix the just and reasonable rate, charge or classification to be prospectively in effect. FPA § 206(a), 16 U.S.C. § 824e(a).

B. Regulatory Background

1. The Development Of Standard Interconnection Procedures

Historically, electric utilities were vertically integrated monopolies that owned electric generating facilities, transmission lines and distribution systems, and sold all of these services as a "bundled" package to their customers. *See New York v. FERC*, 535 U.S. 1, 5 (2002) ("most electricity was sold by vertically integrated utilities that had constructed their own power plants, transmission lines, and local delivery systems"); *see also Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1363 (D.C. Cir. 2004) (describing historic structure of the

electric utility industry).

Since the 1970s, a combination of technological advances and policy reforms has given rise to market competition in the Nation's electricity system. In particular, the Commission encouraged competition by directing, in its Order No. 888 rulemaking, public utilities to offer non-discriminatory, open access transmission service.[1] Further, the Commission encouraged efficient access to transmission over broader geographic areas through the creation of regional transmission organizations. *See Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 536-37 (2008). These independent regional entities operate (but do not own) the transmission grid to provide access for all "at rates established in a single, unbundled, grid-wide tariff." *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 169 n.1 (2010) (explaining responsibilities of an independent system operator) (quotation omitted).

Since Order No. 888, independent power generators—generators that do not own transmission lines or distribution facilities—have an increasing presence. *See*

[1] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Pub. Utils. and Recovery of Stranded Costs by Pub. Utils. and Transmitting Utils.*, Order No. 888, FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order 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*, *New York v. FERC*, 535 U.S. 1 (2002).

Transmission Access, 225 F.3d at 681. But "competition clearly depended on generators' having adequate means of getting their power to market." *Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277, 1279 (D.C. Cir. 2007). Thus, Order No. 888 required transmission providers, "which typically have a natural monopoly, to give generators equal access to transmission facilities." *Id*. Later, in its Order No. 2003 rulemaking,[2] the Commission applied the principles established in Order No. 888 in issuing rules to standardize the procedures for generator interconnections.

Under Order No. 2003, each transmission provider maintains a standard, or *pro forma*, generator interconnection agreement. To determine cost responsibility for facilities and equipment constructed to accommodate the interconnection of a generating facility, the Commission developed the so-called "at or beyond" rule. *See Nat'l Ass'n*, 475 F.3d at 1284-86 (affirming the "at or beyond" rule); *see also Entergy Servs., Inc. v. FERC*, 391 F.3d 1240 (D.C. Cir. 2004). Under this rule, the interconnection customer (the generator) is typically solely responsible for paying the costs of facilities and equipment constructed between the generator and the point of interconnection with the network transmission system—the

[2] *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n*, 475 F.3d 1277.

"interconnection facilities." *See Nat'l Ass'n*, 475 F.3d at 1284. The transmission-providing utility, however, is responsible for the costs of all facilities and equipment constructed at or beyond the point of interconnection with the transmission system and on the integrated transmission grid—the "network upgrades." *Id*. The transmission provider includes the costs of network upgrades in the transmission rates it charges to all users of the transmission system. *Id*. at 1284-85; *see also Entergy*, 391 F.3d at 1243.

2. The Midcontinent Independent System Operator's Interconnection Procedures

The Midcontinent Independent System Operator ("System Operator") is a regional transmission organization, operating 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 operations of the System Operator, formerly known as the Midwest Independent Transmission System Operator). Petitioners Ameren Companies and International Transmission Companies (collectively, Ameren) are transmission-owning member utilities operating within the System Operator's footprint. *See* Br. 4. Under Order No. 2003, independent transmission providers, such as the System Operator here, are allowed flexibility as to the specifics of their interconnection pricing policies subject to Commission approval. *See* Order No. 2003 P 827. The System Operator's standard generator interconnection procedures provide that an interconnection customer is responsible for 100 percent of the costs

of network upgrades rated below 345 kilovolts, but will receive 10 percent reimbursement for projects rated at 345 kilovolts and above. *See Otter Tail Power Co. v. Midcontinent Indep. System Operator, Inc*., 156 FERC ¶ 61,099, P 5 (Aug. 9, 2016), R. 89, JA 87 ("August 2016 Rehearing Order") (citing *Midwest Indep. Transmission Sys. Operator, Inc*., 129 FERC ¶ 61,060, P 8 (2009), *on reh'g*, 154 FERC ¶ 61,063 (2016)); *see also Pioneer Trail Wind Farm, LLC v. FERC*, 798 F.3d 603, 608 (7th Cir. 2015) (Order No. 2003 "allows regional system operators to implement participant funding, under which the costs of network upgrades fall on the interconnecting customer. [The System Operator] did this in 2006."); *id*. at 606 (summarizing the process leading to an interconnection agreement).

Around this time, the System Operator's tariff provided three alternatives for funding the costs of network upgrades. First, under Option 1, the interconnection customer provided the upfront funding, but the transmission owner refunded that full cost upon completion of construction. August 2016 Rehearing Order P 6, JA 89. Then, the transmission owner assessed the interconnection customer a monthly charge to recover certain non-reimbursable costs (e.g., operation and maintenance, and a return on capital investment). *Id*. In 2011, the Commission directed the System Operator to remove Option 1 funding from its tariff, finding that it created opportunities for undue discrimination. *See id*. (citing *E.ON Climate & Renewables North America, LLC v. Midwest Indep. Transmission Sys. Operator*,

Inc., 137 FERC ¶ 61,076, P 43 (2011) ("*E.ON*"), *on reh'g*, 142 FERC ¶ 61,048, P 39 (2013), *on reh'g*, 151 FERC ¶ 61,264 (2015)). No party appealed the removal of Option 1 funding.

The two remaining funding options, in place at the time this case arose, are best described as the Generator Funding option (elsewhere, Option 2) or Transmission Owner Funding option (elsewhere, the "initial funding" option or "Self-Funding Option"). With Generator Funding: (1) the interconnection customer provides the upfront capital costs for network upgrades and (2) the transmission owner refunds any reimbursable portion of the costs (i.e., 10 percent of the capital costs for projects rated 345 kilovolts or above) to the interconnection customer in the form of a credit to reduce the transmission service charges incurred by the customer. August 2016 Rehearing Order PP 5, 7, JA 88, 90. The upfront capital costs, provided by the interconnection customer, are not included in the transmission owner's rate base. *Id*. P 12, JA 93. With Transmission Owner Funding, the transmission owner provides the upfront capital costs, includes those costs in its rate base, and then collects those costs—including a return (profit) on that capital investment—from the interconnection customer through a network upgrade charge. *Id*. P 8, JA 90. Under either funding option, cost responsibility ultimately lies with the interconnection customer. *Id*. P 15, JA 94.

The core differences between Generator Funding and Transmission Owner

Funding are (1) who provides the upfront capital costs and (2) whether, correspondingly, those capital costs are included in the transmission owner's rate base. *See id*. PP 12, 14, JA 93, 94; *see also*, *e.g*., *United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1178-79 (D.C. Cir. 1996) (discussing the relationship between rate base and return on equity).

The choice between these two options for funding network upgrades is the central issue in this case, and is governed by certain interconnection agreements that are part of the System Operator's tariff. There are three agreements governing three different types of interconnections. First, the standard (*pro forma*) Generator Interconnection Agreement (referenced in the record as the GIA) governs the network upgrades constructed for the interconnection customer by the transmission owner with which it "directly interconnects." *Midcontinent Indep. System Operator, Inc*., 151 FERC ¶ 61,220, P 3 (June 18, 2015), R. 34, JA 23 ("June 2015 Order"). Under that Agreement, the transmission owner can "unilaterally elect" Transmission Owner Funding. *Id*. P 6, JA 25. Second, the standard Facilities Construction Agreement (referenced in the record as the FCA) governs network upgrades "on affected systems, or network upgrades constructed for an interconnection customer by a transmission owner other than the transmission owner with which it directly interconnects." *Id*. P 9, JA 27. Third, the standard Multi-Party Facilities Construction Agreement (referenced in the record as the

MPFCA) is used "when multiple interconnection requests" require "construction of common network upgrades" on either a directly-connected transmission system or an affected system. *Id*. P 9, JA 27. Under these last two agreements, before the proceedings on review here, the transmission owner could not unilaterally elect Transmission Owner Funding.

Evidence in the record indicates that Generator Funding is the most commonly used funding option in the System Operator's region. *See Otter Tail Power Co. v. Midcontinent Indep. System Operator, Inc*., 153 FERC ¶ 61,352, P 48 (Dec. 29, 2015), R. 69, JA 78 ("December 2015 Rehearing Order") (citing record comments).

II. THE COMMISSION'S PROCEEDINGS AND ORDERS

A. Events Leading To The Orders On Review

This case began when the System Operator filed for Commission approval an unexecuted Facilities Construction Agreement among Border Winds Energy, LLC, as the interconnection customer; Otter Tail Power Company, as the affected transmission owner; and the System Operator, as the transmission provider. *See* June 2015 Order P 10, JA 27. The Facilities Construction Agreement was unexecuted because the customer disputed Otter Tail's request to modify the standard agreement to allow Otter Tail the unilateral right to elect Transmission Owner Funding, where the standard agreement permits only Generator Funding.

Id. In an order that preceded those on review here, the Commission rejected the proposed modification to the Facilities Construction Agreement. *See id*. P 11, JA 28 (citing *Midcontinent Indep. System Operator, Inc.*, 149 FERC ¶ 61,224 (2014), JA 122, *reh'g denied*, June 2015 Rehearing Order, JA 22). The Commission denied requests by the System Operator and Otter Tail for rehearing of that decision in the June 2015 Order (at PP 21-27, JA 33-37), and no party has petitioned for review of that determination.

In addition to its rehearing request, Otter Tail filed a complaint with the Commission. It alleged that the Facilities Construction Agreement is unduly discriminatory because it does not permit affected transmission owners to unilaterally elect Transmission Owner Funding for network upgrades, a right provided to directly-connected transmission owners under the Generator Interconnection Agreement. *See id*. P 28, JA 37; Complaint, R. 16, JA 137. Otter Tail asked the Commission to revise the Facilities Construction Agreement to provide the same option to elect Transmission Owner Funding as found in the Generator Interconnection Agreement. *See* June 2015 Order P 28, JA 37.

B. The Commission's Orders On Review

In the June 2015 Order, the Commission granted Otter Tail's complaint in part, denied it in part, and instituted a new proceeding. June 2015 Order PP 47-56, JA 46-51. First, the Commission found that the customers of a directly-connected

transmission owner (subject to the terms of the Generator Interconnection Agreement) and the customers of an affected system operator (subject to the terms of the Facilities Construction and Multi-Party Agreements), are similarly situated, and must be treated comparably. *Id*. P 47, JA 46. Thus, the Commission held that "the same funding options should be available to all interconnection customers in" the System Operator. *Id*. The Commission denied, however, the remedy Otter Tail sought in its complaint. *Id*. P 48, JA 47.

Otter Tail asked the Commission to revise the Facilities Construction Agreement to allow the same options then set forth in the Generation Interconnection Agreement, permitting transmission owners to unilaterally elect Transmission Owner Funding. *Id*. But the Commission found that the Generator Interconnection Agreement may be unjust, unreasonable and unduly discriminatory, in violation of the Federal Power Act, because it allows transmission owners to unilaterally elect Transmission Owner Funding, and does not require reimbursement of interconnection customers (through credits), which may increase costs. *Id*. P 49, JA 47-48. Specifically, the Commission pointed out that the unilateral election "may deprive the interconnection customer of other options to finance the cost of the network upgrades that provide more favorable terms and rates," *id*. P 48, JA 47, and also subjects the customer to a security requirement not required by Generator Funding. *Id*. P 49, JA 47. The Commission

noted that these characteristics are similar to another funding option eliminated in earlier orders. *Id*. (citing *E.ON*, 137 FERC ¶ 61,076, P 37 (eliminating Option 1 funding on the basis that it increases costs to some customers for the same service)); *see also supra* p. 7-8 (discussing the elimination of Option 1).

As the result of this finding, the Commission initiated a new proceeding, under section 206 of the Federal Power Act, 16 U.S.C. § 824e, to examine the relevant agreements. The Commission explained that to ensure comparable treatment of interconnection customers, the System Operator could revise the Generator Interconnection Agreement to remove transmission owners' ability to unilaterally elect Transmission Owner Funding. June 2015 Order P 53, JA 50. Nonetheless, the Commission directed the System Operator either to: (1) report whether it will propose the changes discussed; or (2) explain why changes are not necessary to address the potential for transmission owners to, at their sole discretion, increase costs to interconnection customers. *Id*. P 54, JA 50.

In response to the Commission's directive, the System Operator reported that it would propose the tariff changes the Commission discussed in the June 2015 Order, upon the Commission's resolution of any requests for rehearing of that order and further comments. *See* December 2015 Rehearing Order P 36, JA 73. A group of 16 transmission owners, called Certain MISO Transmission Owners, (which included the Petitioners in this appeal, Otter Tail, and numerous others),

sought agency rehearing of the June 2015 Order. *See* December 2015 Rehearing Order P 1 n.4 (listing group members), JA 55; *see also* First Rehearing Request, R. 48, JA 170 (filed July 20, 2015). The Commission denied rehearing in the December 2015 Rehearing Order, and ordered the System Operator to revise the agreement consistent with its directive. *See* December 2015 Rehearing Order PP 29-35, 55-61, 65, JA 68-72, 81-84, 85. A group of six transmission owners (including Petitioners, Otter Tail, and Indianapolis Power & Light Company) filed once again for agency rehearing, raising new claims that the Commission's remedy is confiscatory and results in an unconstitutional taking. *See* Second Rehearing Request, R. 81, JA 252 (filed Jan. 28, 2016). The Commission denied that request for rehearing in the August 2016 Rehearing Order.[3]

This appeal, brought by the remaining group of four transmission owners (essentially two, the Ameren Companies and the International Transmission Companies), followed.

[3] Ameren also petitioned for review of two Commission orders approving the System Operator's compliance filing, and denying rehearing of that approval, but raises no arguments on appeal directed specifically to that action. *See Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC ¶ 61,098 (2016), R. 90, JA 100, *reh'g denied*, 157 FERC ¶ 61,013 (2016), R. 99, JA 109.

SUMMARY OF ARGUMENT

Much progress has been made in recent years to encourage new generation that will compete in the wholesale electricity market and to ensure that those new market entrants have nondiscriminatory access to the transmission grid. This case illustrates both that progress, and that opportunities for undue discrimination still arise. When the Commission identifies such undue discrimination, it is obligated by the Federal Power Act to eliminate it. That is what the Commission did here.

In the Midcontinent System Operator, interconnection customers (new generators) bear the costs of network upgrades. There are two existing choices for securing the upfront capital costs of upgrades: from the customer via Generator Funding, or from the transmission owner via Transmission Owner Funding. Transmission Owner Funding requires increased security costs and allows the transmission owner to include those capital costs in its rate base, while Generator Funding does not.

In the orders on review, the Commission found that it is unduly discriminatory, in violation of the Federal Power Act, to allow the transmission owner to choose between Generator Funding and Transmission Owner Funding. (The options themselves have not changed.) In so doing, the Commission followed not only its Order No. 2003 interconnection rulemaking, but a line of recent interconnection cases. In those cases, as here, the Commission has required

incremental reforms to the System Operator's tariff based on the record before it in those cases, in order to ensure transmission owners cannot unilaterally increase costs to interconnection customers.

Ameren—representing some, but not all, transmission owners—argues that the Commission did not show either an opportunity for undue discrimination, or any such discriminatory behavior. But the Commission relied on fundamental economic and regulatory principles to explain that the cost-bearing customer has the incentive to pursue lower cost options, while the transmission owner does not. The Commission offered examples demonstrating that the customer can reduce its costs through Generator Funding, by avoiding a more onerous security requirement under Transmission Owner Funding, or by obtaining more favorable financing.

To fix the problem, the Commission directed changes to allow the customers to choose between Generator Funding and Transmission Owner Funding. Ameren prefers Transmission Owner Funding, because it permits the owner to earn a return on the capital investment, and claims that allowing the customer to choose results in low, confiscatory rates. The Commission explained, though, that the Federal Power Act allows a utility the opportunity to fairly compensate investors only for the risks they assume. Following this rule, the Commission found that the transmission owner bears the risks associated with network upgrades only when it provides the upfront capital costs. Other risks, including those associated with

construction and reliability, are compensated—to the extent necessary—through other parts of the transmission owner's rates.

On balance, the Commission reasonably found that investor interests should not outweigh customer interests when the transmission owner has not provided the capital for the upgrades. Nonetheless, the Commission explained that if the transmission owners and the System Operator identify particular costs they believe are improperly excluded from recovery under the Generator Funding option, they maintain the right to file a proposal to address those concerns.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews Commission orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g., Sithe/Indep. Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). As the Supreme Court has recently explained, "[t]he 'scope of review under the 'arbitrary and capricious' standard is narrow.'" *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *Id*. Rather, the court must uphold an agency's decision "if the agency has 'examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,]

including a rational connection between the facts found and the choice made.'" *Id*. (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43); *see also S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014) ("*South Carolina*"). "And nowhere is that more true than in a technical area like electricity rate design: '[W]e afford great deference to the Commission in its rate decisions.'" *Elec. Power Supply Ass'n*, 136 S. Ct. at 782 (quoting *Morgan Stanley*, 554 U.S. at 532).

The Commission's factual findings are conclusive if supported by substantial evidence. Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b). "Substantial evidence 'is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *South Carolina*, 762 F.3d at 54 (quoting *Murray Energy Corp. v. FERC*, 629 F.3d 231, 235 (D.C. Cir. 2011)) (internal quotation marks omitted). It "'requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.'" *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 365 (D.C. Cir. 2003) (quoting *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)). "Under [this Court's] precedent, therefore, it [is] perfectly legitimate for the Commission to base its findings . . . on basic economic theory, given that it explained and applied the relevant economic principles in a reasonable manner." *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 531 (D.C. Cir. 2010).

The Court also gives substantial deference to FERC's interpretation of its own precedent. *See Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698, 703-04 (D.C. Cir. 2010); *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007). And, finally, the Court "will set aside FERC's remedial decision only if it constitutes an abuse of discretion." *La. Pub. Serv. Comm'n v. FERC*, 174 F.3d 218, 225 (D.C. Cir. 1999) (affirming Commission orders denying refunds).

II. THE COMMISSION REASONABLY DETERMINED THAT IT IS INAPPROPRIATE TO ALLOW TRANSMISSION OWNERS THE UNILATERAL DISCRETION TO INCREASE CUSTOMERS' COSTS

A. The Commission Supported Its Finding Of Undue Discrimination

The Commission reasonably held that, in the context of the Midcontinent System Operator's particular interconnection funding policies, it is unduly discriminatory to allow transmission owners the unilateral choice to increase costs for interconnection customers. *See* December 2015 Rehearing Order PP 29-33, 56-59, JA 68-71, 81-84; *see also* August 2016 Rehearing Order PP 12-15, 18, JA 93-95, 97. Ameren claims that the record does not contain evidence of either the "possibility" of undue discrimination or "actual" undue discrimination. Br. 51-56. But the Commission relied on both economic theory—that the customer bearing the costs has the incentive to seek lower costs, while the incumbent owner does not—and demonstrative examples in support. This is more than a "scintilla" of evidence and all that is required.

In the orders on review, the Commission found that it is unduly discriminatory to deprive the interconnection customer (the interconnecting generator) of the opportunity to provide its own capital funding for network upgrades, where (1) the customer bears 90 to 100% of the costs of network upgrades regardless of the initial funding mechanism, (2) the customer receives no credits in return for this funding, and (3) the transmission owner has the discretion to increase the customers' costs through the imposition of a more onerous security requirement and by depriving the customer of the opportunity to secure more favorable financing terms. *See* December 2015 Rehearing Order P 29, JA 68; *see also* June 2015 Order PP 48-52, JA 47-49; August 2016 Rehearing Order PP 15, 19-20, JA 94, 97-98.

The Commission "repeatedly held that that the unilateral option to initially fund network upgrades in [the Midcontinent System Operator] was unjust and unreasonable *in the context of* MISO's Interconnection Funding Policy." December 2015 Rehearing Order P 30, JA 69 (emphasis added). The "Policy," as designated in the orders, refers to two differences between the standard interconnection funding procedures under the Commission's Order No. 2003 rulemaking and the region-specific interconnection procedures in the System Operator's tariff. *See id.* P 30, JA 69; *see also id.* P 3, JA 56 (defining "MISO's Interconnection Customer Funding Policy"). Under Order No. 2003, a customer is

generally reimbursed for its capital investment in network upgrades through transmission credits, and the transmission owner recovers the costs of the upgrades in transmission rates charged to all transmission customers. *See id.* P 30, JA 69; *see also Nat'l Ass'n*, 475 F.3d at 1285-86 (affirming Commission holding that network upgrades benefit all). "In contrast," in the System Operator, "an interconnection customer is charged for 100 percent of network upgrade costs" (subject to a possible 10% reimbursement for high voltage projects), and does not receive transmission credits for that upfront payment. December 2015 Rehearing Order P 30, JA 69. These core features of the System Operator's interconnection procedures form the backbone of the Commission's finding of undue discrimination. Ameren does not dispute them.

Instead, Ameren disputes only the Commission's finding that that it is unduly discriminatory to allow a transmission owner, through the unilateral election of Transmission Owner Funding, to increase an interconnection customer's costs. *See* Br. 52-56. The Commission found two ways that the selection of Transmission Owner Funding can increase customer costs—through a more onerous security requirement and by depriving the customer of the opportunity to seek more favorable financing.

First, the Commission found that Transmission Owner Funding requires the customer to post security on the full costs of the network upgrades over the term of

the Facilities Construction Agreement, while Generator Funding requires such security only during construction. *See* December 2015 Rehearing Order P 29, JA 68; *see also* June 2015 Order P 49, JA 47. Thus, the Commission held that "[t]he security requirement on the network upgrade charge imposes an additional cost on the interconnection customer." *See* June 2015 Order P 49, JA 48; *see also* December 2015 Rehearing Order PP 14, 29, 30, 32, JA 62, 68, 69, 70. Considering the security requirement specifically, the Commission held that such an increase may in fact "frustrate the development of new, competitive generation, which would contradict a stated purpose of Order No. 2003 to 'increas[e] the number and variety of new generation that will compete in the wholesale electricity market.'" June 2015 Order P 49, JA 48 (citing Order No. 2003 P 1).

On rehearing before the Commission, Ameren disputed the Commission's evidentiary basis generally, without reference to the security requirement. *See* Second Rehearing Request at 23, JA 274; *see also* First Rehearing Request at 14-15, JA 183-84. But Ameren did not address, either on rehearing or in its opening brief, the Commission's finding that, where the funding choice lies in the transmission owner's discretion, the increased costs created by the security requirement under Transmission Owner Funding are inconsistent with Order No. 2003 and result in undue discrimination.

Second, the Commission found that the transmission owners' unilateral selection of Transmission Owner Funding deprives the cost-bearing customer of the opportunity to seek more favorable, lower-cost financing. In support, the Commission relied on reasonable economic propositions and two demonstrative examples. *See* December 2015 Rehearing Order PP 29-34, 56, JA 68-72, 81; *see also* June 2015 Order PP 48-50, JA 47-49. Where, as in the System Operator, the customer is always responsible for the costs of network upgrades, "it stands to reason that the interconnection customer would have the incentive to find the lowest cost solution to funding" those upgrades. December 2015 Rehearing Order P 56, JA 82; *see also* August 2016 Rehearing Order P 15, JA 94 (same); June 2015 Order P 50, JA 48 (same). For this reason, the Commission explained, "the transmission owner should not have control over the interconnection customer's funding decision." June 2015 Order P 50, JA 48; *see also* December 2015 Rehearing Order P 56, JA 81.

By contrast, the transmission owner has the incentive both to increase costs for its competitor—the new generator seeking interconnection—and to increase its rate base. *See* December 2015 Rehearing Order P 35 n.66, JA 72 (citing *E.ON*, 137 FERC ¶ 61,076, P 38 (citing Order No. 2003 P 696)). Here, the Commission reiterated concerns expressed in both Order No. 2003 and *E.ON* (*see supra* p. 7-8): when the transmission owner "is not independent and has an interest in frustrating

rival generators," giving the owner a subjective role in determining costs produces "the ability and incentive to exploit this subjectivity to its own advantage." December 2015 Rehearing Order P 35 n.66, JA 72 (quoting *E.ON*, 137 FERC ¶ 61,076, P 38 (citing Order No. 2003 P 696)). In *E.ON*, as here, the election of the funding option rested not with the now-independent System Operator, but with the non-independent transmission owner. 137 FERC ¶ 61,076, P 38. And putting that decision in the hands of the non-independent transmission owner "creates unacceptable opportunities for undue discrimination by affording a transmission owner the discretion to increase the costs of interconnection service by assigning [increased costs], to particular interconnecting generators, but not others . . . ." *E.ON*, 137 FERC ¶ 61,076, P 38; *see also, e.g.*, June 2015 Order P 48, JA 47 (explaining that the unilateral election allows the transmission owner to impose different costs on similarly situated customers); *see also* August 2016 Rehearing Order P 17, JA 96.

These incentives are the same that the Commission has repeatedly sought to counteract through orders promoting competition and endeavoring to eliminate undue discrimination. Indeed, both the Supreme Court and this Court have recognized transmission owners' incentives to stymie the development of competing generation. *See New York*, 535 U.S. at 8–9 (affirming Order No. 888 open access rulemaking and explaining that "[t]he utilities' control of transmission

facilities gives them the power either to refuse to deliver energy produced by competitors or to deliver competitors' power on terms and conditions less favorable than those they apply to their own transmissions."); *see also Nat'l Ass'n*, 475 F.3d at 1279 (affirming Order No. 2003 rulemaking and noting that its goal is to "prevent[] transmission facility owners from favoring affiliated generators over independents in interconnection"). Likewise, Ameren generally takes the position that utilities prefer to increase rate base, and therefore return on (profit from) that rate base. *See, e.g.*, *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1177-78 (D.C. Cir. 1987) (en banc) (discussing investors' interests).

The Commission appropriately relied on these reasonable economic propositions to find that allowing a transmission owner the unilateral discretion to increase a customer's costs is unduly discriminatory. In the context of the System Operator's interconnection policies, the selection of Transmission Owner Funding creates rates that are higher for some customers than others, with no corresponding difference in service. *See* June 2015 Order P 48, JA 47. "Agencies do not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall; nor need they do so for predictions that competition will normally lead to lower prices." *South Carolina*, 762 F.3d at 65 (quoting *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1008 (D.C. Cir. 1987)).

The Commission then identified two examples of how a customer can seek to obtain lower-cost financing. First, the Commission explained that an interconnection customer given the opportunity may choose "to use cash to fund its own network upgrades when the interconnection customer's perceived cost of that cash is below the transmission owner's rate charged to the interconnection customer (i.e. the interconnection customer's avoided cost through using cash is above its opportunity cost of cash)." December 2015 Rehearing Order P 58, JA 83; *see also* August 2016 Rehearing Order P 14 n.30, JA 94. Ameren did not challenge this finding on rehearing before the Commission or in its opening brief.

Second, the Commission pointed to evidence concerning the Border Winds Facilities Construction Agreement, the agreement that led to the proceedings here. *See supra* p. 10. There, the interconnection customer, Border Winds Energy, LLC, explained that the transmission owner's (Otter Tail's) unilateral election to use Transmission Owner Funding would increase Border Winds' costs for the upgrades at issue. December 2015 Rehearing Order P 33, JA 70; *see also* August 2016 Rehearing Order P 19, JA 97. Border Winds compared the net present value of its own cost of capital to the net present value of Otter Tail's cost of capital, and estimated that it would save over $1.8 million if it chose Generator Funding. December 2015 Rehearing Order P 33, JA 70 (citing Border Winds Motion at 5, R. 6, JA 116 (filed Aug. 8, 2014)).

The Commission acknowledged that Border Winds' estimate was not calculated consistent with the most recent policy, inferring that the actual cost savings would likely be lower than Border Winds' estimate, but would still result in increased costs. December 2015 Rehearing Order P 33 & n.61, JA 71 (noting that a Commission order, issued after Border Winds submitted its estimate, excludes certain non-capital costs from the rate base to which the rate of return is applied). Ameren now claims that the Commission may not rely on this flawed data point, Br. 53-54, a claim that it did not offer on rehearing before the agency. *See* Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b) ("[n]o 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 to do so"); *Xcel Energy Servs. Inc. v. FERC*, 510 F.3d 314, 318-19 (D.C. Cir. 2007) (failure to raise an objection on rehearing to FERC deprives the court of jurisdiction).

In any event, Ameren's suggestion that the Commission placed undue reliance on this evidence is in error. The Commission explained that the "costs that the interconnection customer incurs are irrelevant to our finding" of undue discrimination, which focuses on the *opportunity* to secure more favorable financing. December 2015 Rehearing Order P 58, JA 83. Moreover, there is no significance threshold for a finding of undue discrimination. *See*, *e.g.*, FPA

§ 205(b), 16 U.S.C. § 824d(b) (prohibiting "any undue preference"); *see also Ala. Elec. Coop., Inc. v. FERC*, 684 F.2d 20, 30 (D.C. Cir. 1982) (remanding orders to consider whether a "discriminatory disparity of 0.45 percent" is unlawful); *cf.* Br. 54.

Finally, Ameren "misconceive(s) the nature of the Commission's evidentiary burden," *South Carolina*, 762 F.3d at 64, offering the same flawed view of *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 833 (D.C. Cir. 2006), that this Court corrected in *South Carolina*. *See* Br. 52. As the Court explained in *South Carolina*, substantial evidence "does not necessarily mean empirical evidence." *South Carolina*, 762 F.3d at 65. Where, as here, the "[p]romulgation of generic rate criteria clearly involves the determination of policy goals or objectives, and the selection of means to achieve them," *id*. (quoting *Associated Gas Distribs.*, 824 F.2d at 1008) and the Commission's finding is "based on reasonable economic propositions, the court will uphold it." *Id*.; *see also Associated Gas Distribs.*, 824 F.2d at 1008 (where FERC reasonably relies on economic theory, the "Courts reviewing an agency's selection of means are not entitled to insist on empirical data for every proposition on which the selection depends")). *See also, e.g.*, *Sacramento Mun. Util. Dist.*, 616 F.3d at 531 (FERC appropriately made findings based on "'generic factual predictions' derived from economic research and theory") (quotation omitted); *Wis. Pub. Power Inc. v.*

FERC, 493 F.3d 239, 260-61 (D.C. Cir. 2007) (FERC's prediction that a rate would "provide an efficient incentive to invest" was a "reasonable predictive judgment that warrants judicial deference"). "[I]n rate-related matters, the court's review of the Commission's determinations is particularly deferential because such matters are either fairly technical or involve policy judgments that lie at the core of the regulatory mission." *South Carolina*, 762 F.3d at 54-55 (internal quotation omitted). Ameren's narrow challenge to the Commission's finding of undue discrimination fails to recognize that the breadth of the Commission's analysis, and its reliance on fundamental economic principles, well satisfy this standard.

B. The Commission's Orders Are Consistent With Precedent

Ameren argues that the Commission acted inconsistently with its precedent, which it asserts provides that Transmission Owner Funding is just and reasonable, consistent with the Federal Power Act, while Generator Funding has not been found to be just and reasonable standing alone. Br. 44-51. To the contrary, the Commission's recent orders demonstrate that the Commission has taken steps to identify and eliminate undue discrimination in the System Operator's procedures, when and where it has the record basis to do so. *See* June 2015 Order PP 49, 51-52, JA 47, 49; *see also* December 2015 Rehearing Order PP 31-32, 34, JA 69-70, 71; August 2016 Rehearing Order P 21, JA 98.

The Commission's orders here build, in particular, on its earlier decisions in *E.ON*, where the Commission rejected another funding option—so-called Option 1—as unduly discriminatory. *See* June 2015 Order P 7, JA 25 (discussing *E.ON*, 137 FERC ¶ 61,076, *on reh'g*, 142 FERC ¶ 61,048); *see also* August 2016 Rehearing Order P 21, JA 98. In *E.ON*, the Commission held that "the election of Option 1 by a transmission owner increases the costs that are directly assigned to the interconnection customer, but there is no difference in the interconnection service provided." June 2015 Order P 49 n.112, JA 48 (quoting *E.ON*, 137 FERC ¶ 61,076, P 37); *see also supra* p. 7 (discussing once-allowed, but later repealed, Option 1 funding).

Here, the Commission found that the transmission owner's unilateral election of Transmission Owner Funding similarly allows the owner to increase costs to the customer with no corresponding increase in service. *See* June 2015 Order P 49, JA 48 (citing *E.ON*, and noting similarity). Contrary to Ameren's claims (Br. 44, 51), however, *E.ON*: (1) made no findings about Transmission Owner Funding—because no issues concerning Transmission Owner Funding were raised to the agency; but (2) recognized that Generator Funding "was a just and reasonable alternative consistent with Order No. 2003." August 2016 Rehearing Order P 21, JA 98 (citing *E.ON*, 137 FERC ¶ 61,076, P 40 ("We find that, in contrast [to Option 1], Option 2 [i.e., Generator Funding] represents a just

and reasonable alternative, as we agree with the [parties] that Option 2 generally follows the approach that was provided by the Commission in Order No. 2003.")). The Commission's interpretation of *E.ON* as finding that Generator Funding is just and reasonable warrants this Court's respect. *See Columbia Gas Transmission Corp. v. FERC*, 477 F.3d 739, 743 (D.C. Cir. 2007). But—even if *E.ON* did not expressly find Generator Funding just and reasonable—the later orders on review here did. *See also* August 2016 Rehearing Order P 14 n.30, JA 94 ("The Commission reiterated that [Generator Funding] is just and reasonable . . . .") (citing December 2015 Rehearing Order PP 29-30, 58, JA 68-69, 83).

Following *E.ON*, the Commission was presented with objections to Transmission Owner Funding in another case arising from a specific interconnection agreement, there involving Hoopeston Wind, LLC. *See* June 2015 Order P 8, JA 26 (discussing *Midcontinent Indep. Sys. Operator, Inc.*, 145 FERC ¶ 61,111 (2013) ("*Hoopeston*"), *reh'g denied*, 149 FERC ¶ 61,099 (2014)). Ameren contends that the Commission here unreasonably departed from *Hoopeston*, Br. 49-51, but the Commission interpreted its *Hoopeston* orders and found that, like *E.ON*, *Hoopeston* supports the Commission's actions here. June 2015 Order P 51, JA 49; December 2015 Rehearing Order PP 31-32, JA 69-70. Indeed, the Commission in *Hoopeston* reached a finding of undue discrimination similar to that in the orders now on review, but directed a different remedy based

on the factual record before it. *See* December 2015 Rehearing Order P 32, JA 69-70. In *Hoopeston*, the Commission held that it is unduly discriminatory to allow a transmission owner the discretion to increase an interconnection customer's costs. *Id*. But, the Commission "reasoned based on the record in that case that removal of costs other than the return of and on the capital costs of the network upgrades address this concern." *Id*., JA 70; *see also* June 2015 Order P 8, JA 26.

By contrast, the record in this case demonstrated a need for reform to the unilateral nature of the Transmission Owner Funding option. The "Commission considered for the first time . . . the justness and reasonableness of the unilateral aspect of [Transmission Owner Funding] where evidence was provided that the proposed recovery of capital costs and security [requirement] increased costs to the interconnection customer with no corresponding increase in service." December 2015 Rehearing Order P 32, JA 70. Thus, the progression from *Hoopeston* to the orders on review demonstrates that the Commission addresses the source of undue discrimination where it has a record basis to do so.

III. THE COMMISSION REASONABLY DETERMINED THAT ALLOWING THE INTERCONNECTING GENERATOR ITS CHOICE OF FINANCING OPTIONS IS APPROPRIATE, AND DOES NOT RESULT IN A CONFISCATORY RATE

Having found undue discrimination in the System Operator's tariff, the Commission directed a remedy. Specifically, the Commission directed the System Operator to allow Transmission Owner Funding only on the mutual agreement of the transmission owner and the interconnection customer (the interconnecting generator). *See* December 2015 Rehearing Order P 65, JA 85; *see also* June 2015 Order P 54, Ordering Para. (D), JA 50, 52. Ameren claims that this remedy exceeds the Commission's statutory authority (Br. 20-22), resulting in rates for transmission-owning utilities that are confiscatory in violation of the U.S. Constitution (Br. 29-31), and arbitrarily fail to compensate utilities with a return on all facilities that are part of their system, whether the utility paid for the construction of those facilities or not (Br. 23-29, 31-37). The Commission, interpreting the scope of its duties under the Federal Power Act, and balancing the oft-opposed interests of utility investors with utility customers, reasonably found that utilities are not entitled to earn a return (profit) on an investment they do not make. *See* August 2016 Rehearing Order PP 12-21, JA 93-98; *see also* December 2015 Rehearing Order PP 57, 59, JA 82, 83. Far from "divorcing risk from return," Br. 33, the Commission's action ensures that return follows risk, by recognizing that risk follows investment.

A. Investors Are Compensated For The Risks Of Their Investments

Under the Federal Power Act, the Commission's role is to ensure that a utility has the "opportunity to offer its investors a return that is commensurate with the risk associated with their investment, as represented by the utility's business and financial risks." August 2016 Rehearing Order P 13, JA 93 (citing *FPC v. Hope Nat. Gas Co*., 320 U.S. 591, 603 (1944)). The Act sets a "capital attraction standard," *id*., providing that "[r]ates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed cannot be condemned as invalid, even though they might produce only a meager return on the so-called 'fair value' rate base." August 2016 Rehearing Order P 16, JA 95 (quoting *Hope*, 320 U.S. at 605). As the Supreme Court has explained, "whether a particular rate is 'unjust' or 'unreasonable' will depend to some extent on what is a fair rate of return given the risks under a particular rate-setting system, and on the amount of capital upon which the investors are entitled to earn that return." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310 (1989) ("In *Hope* we ruled that historical cost was a valid basis on which to calculate utility compensation.").

Turning to the facts here, the Commission explained that when the interconnection customer opts to pay the costs of the network upgrades up-front, i.e., Generator Funding, it "bears the business and financial risks associated with

financing and constructing" the upgrades. August 2016 Rehearing Order P 13, JA 94. "[B]ecause the transmission owner does not bear that risk, its investors are not exposed to that risk, and it is therefore not necessary . . . to offer investors a return based on that risk in exchange for their capital investment." *Id*.; *see also Distrigas of Mass. Corp. v. FERC*, 737 F.2d 1208, 1213-14 (1st Cir. 1984) ("The return the company is usually allowed to recover on its rate base compensates it for its costs in obtaining the requisite capital."). When a customer selects Generator Funding, the utility investors are compensated "for the risks assumed," *Hope*, 320 U.S. at 605, and only those risks. *See* August 2016 Rehearing Order P 16, JA 95; *see also Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968) (holding that a Commission rate order must "reasonably be expected to . . . fairly compensate investors for the risks they have assumed").

To be clear, this case concerns only the capital costs of facility construction. *See* December 2015 Rehearing Order P 57, JA 82. Ameren repeatedly references the risks of operating and maintaining the transmission upgrades. *See* Br. 3, 13, 17, 20, 24, 27, 35. But the Commission's orders here do not impact those costs: "Transmission owners will recover their cost of service (beyond capital costs) through their transmission rates." December 2015 Rehearing Order P 57, JA 83 (citing transmission owner tariffs governing recovery of operation and maintenance costs); *see also* August 2016 Rehearing Order P 17, JA 96.

Nonetheless, Ameren identifies three categories of risk that it asserts are not compensated when the interconnection customer selects Generator Funding: financing, reliability and construction. *See* Br. 31-35. As discussed immediately below, the Commission addressed each of these concerns, most particularly in the August 2016 Rehearing Order, and found each without merit. Ameren's brief before this Court mostly reiterates its request for agency rehearing of the December 2015 Rehearing Order, and fails to rebut the Commission's reasoning. *See* Br. 17-57 (in 40 pages of argument, Ameren cites the August 2016 Rehearing Order only once, for another issue). It has now passed up the opportunity to do so. *See Rollins Envtl. Servs. v. EPA*, 937 F.2d 649, 652 n.2 (D.C. Cir. 1991) ("Issues may not be raised for the first time in a reply brief.").

First, Ameren continues to assert (Br. 31-32) that it requires compensation for the risks of financing network upgrades. But Ameren offers no challenge to the Commission's holding that, where it does not provide the upfront capital, it bears no financing risks. *See* August 2016 Rehearing Order P 16, JA 95.

Second, Ameren invokes reliability. It asserts that ownership and operation of network upgrades increases the risk that it will violate reliability standards, subjecting it to potential civil penalties. Br. 33. But as the Commission held, Ameren still has not explained "how network upgrades should be considered *additive* to the reliability risk" as opposed to "potentially *mitigating* existing

reliability risk." August 2016 Rehearing Order P 17, JA 96. For example, the Commission explained that "the addition of a network upgrade" could "relieve congestion on a previously congested pathway, reducing the risk of a reliability event on that section of the transmission system." *Id*. n.40, JA 97. Ameren offers no response to the Commission's findings.

Third, Ameren asserts that transmission owners continue to bear construction risks. Br. 34-35. Specifically, Ameren argues that the requirement for an interconnection customer to post security equivalent to the full cost of the network upgrades during construction does not adequately insulate the transmission owner from construction risks. *Id*.; *see* December 2015 Rehearing Order P 29 & n. 53, JA 68 (discussing security requirements under both Generator Funding and Transmission Owner Funding). The Commission held that Ameren had failed to specifically explain which construction risks are not covered by the security requirement or insurance. *See* August 2016 Rehearing Order P 17, JA 96; *see also* December 2015 Rehearing Order P 59, JA 83. Before this Court, Ameren offers no further insight or response to the Commission's holding. Br. 35 (referencing, without citation, "other risks associated with construction" which it "noted in proceedings below").

More generally, Ameren claims that it is entitled to a return on property in use—its "entire enterprise"—without regard to the initial investment in that

property.[4] Br. 35 (citing, e.g., *Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679 (1923)). Neither *Hope* nor *Bluefield* speak directly to circumstances where an interconnection customer funds network upgrades, since the competition and regulatory developments that made this possible came about well after those decisions. Nonetheless, neither *Hope* nor *Bluefield* permits the Commission to cast aside capital investment as a factor to be considered in setting rates. *See* August 2016 Rehearing Order P 13, JA 93. In *Hope*, the Supreme Court explained that "it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business." 320 U.S. at 603; *see also Bluefield*, 262 U.S. at 691 (quoting, from *Smyth v. Ames*, 169 U.S. 546, 547 (1898), a non-exclusive list of factors to be considered in determining rates, including the original cost of construction). The Commission's action here requires that transmission owners continue to have this

[4] Ameren also raises a new argument—that the Commission is engaged in extra-statutory "novel" rulemaking of the type barred by *Hope*. *See* Br. 24-25, 27. Ameren's selective quotation of the Court's opinion in *Hope* aside, the Court's concern with novel ratemaking was directed at rates intended to discourage certain uses of natural gas, not at determining which costs should be part of a utility's rate base. *See Hope*, 320 U.S. at 616-17; *see also id*. at 602 ("Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling."). Moreover, any suggestion that Generator Funding is inherently unjust and unreasonable is a collateral attack on earlier Commission orders, including its Order No. 2003 rulemaking and *E.ON*, as well as this Court's 2007 decision in *National Association*, 475 F.3d 1277, affirming Order No. 2003. *See* August 2016 Rehearing Order P 21, JA 98.

opportunity: operating costs are recovered separately, and capital costs are recovered when they are incurred. *See NEPCO Mun. Rate Comm. v. FERC*, 668 F.2d 1327, 1333-35 (D.C. Cir. 1981) (affirming FERC orders allowing recovery of costs of cancelled project in rates, but not allowing those costs to be included in rate base on which utility collects return).

Thus, while the Commission found no evidence to support a finding that transmission owners' risks are not adequately compensated under Generator Funding, the Commission noted that transmission owners and the System Operator may return to the Commission to seek recovery of particular costs. *See* December 2015 Rehearing Order P 57, JA 83 ("To the extent that [the System Operator] believes that the mutual agreement aspect of the initial funding option raises concerns about the impact of certain costs on particular transmission owners and their customers, [it] may file a proposal under section 205 of the FPA to address such concerns."); *see also id.* P 59, JA 84 (same). Neither the System Operator nor Ameren have requested such a change, but "if in light of experience [the rates] turn out to be inadequate . . . the doors of the Commission are open for increased allowances. This is not an order for all time. The Act contains machinery for obtaining rate adjustments." *Hope*, 320 U.S. at 615; *see also Transmission Access*, 225 F.3d at 688-89 (affirming finding of undue discrimination and noting that

utilities claiming an adverse impact "have a mechanism by which they can seek relief for their particular concerns").

B. The Commission Balanced Investor And Customer Interests

Based on its evaluation of the financial and business risks, the Commission balanced the competing investor and customers interests at issue. *See* August 2016 Rehearing Order PP 14-15, JA 94-95 (discussing *Hope*, 320 U.S. at 605). The Commission emphasized that under either Transmission Owner Funding or Generator Funding, the interconnection customer retains ultimate responsibility for capital costs. *See id*. PP 14-17, JA 94-97 (referencing, in each paragraph, the customer's ultimate cost responsibility). In these circumstances, "[i]t does not stand to reason that the investor interests discussed in *Hope* should outweigh customer interests where transmission owners have not provided investment capital for such network upgrades." *Id*. P 14, JA 94; *see also id*. P 15, JA 94.

Ameren responds that the Commission "failed to conduct" any balancing of investor and customer interests. Br. 41. But the Commission precisely explained how and why it weighed the interests at stake. Moreover, the Commission's balance is consistent with the Federal Power Act, which has as its "primary aim . . . the protection of consumers from excessive rates and charges." *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 952 (D.C. Cir. 2016) (citation omitted). The requirements for non-discriminatory access to interconnection services "present

intensely practical difficulties that demand a solution," and require that "FERC must be given the latitude to balance the competing considerations and decide on the best resolution." *NRG Power Mktg., LLC v. FERC*, 718 F.3d 947, 955–56 (D.C. Cir. 2013) (quotations and citation omitted); *see also New Eng. Power Generators Ass'n, Inc. v. FERC*, 757 F.3d 283, 293 (D.C. Cir. 2014) ("FERC evaluated the relative importance of several parameters . . . . Such a juggling act would not benefit from our rearranging.").

Finally, Ameren argues that the Commission should wait, and require an interconnection customer facing undue discrimination to seek relief through the System Operator's dispute resolution procedures, or by filing a complaint with the Commission. Br. 56. But once the Commission finds, as it has here, substantial evidence of undue discrimination, the Federal Power Act "require[s] FERC to provide a remedy for that discrimination." *New York*, 535 U.S. at 27; *see also* December 2015 Rehearing Order P 35, JA 72 (explaining that the availability of other avenues of relief does not undermine the Commission's responsibility to act where it finds undue discrimination). Ameren's preferred approach recalls the days before the Order No. 2003 rulemaking (*see supra* p. 5), when the Commission relied on case-by-case determinations to root out undue discrimination—a process that ultimately proved inadequate to provide the statutory protections to which interconnection customers are entitled under the Federal Power Act. *See*

W. Deptford Energy, LLC v. FERC, 766 F.3d 10, 13 (D.C. Cir. 2014) (describing the case-by-case approach as "delaying entry into the market by new generators and providing an unfair competitive advantage to utilities owning both transmission and generation facilities").

CONCLUSION

For the foregoing reasons, the petitions for review should be denied and the Commission's orders should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,486 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

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April 21, 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).

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§ 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

(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 anticompetitive 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, 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), in a proceeding commenced under this section involving two or more electric utility companies of a reg-

istered holding company, refunds which might otherwise be payable under subsection (b) 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

Pub. L. 100–473, § 4, Oct. 6, 1988, 102 Stat. 2300, 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

[1] See References in Text note below.

(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; amendedJune 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

Ameren Services Co., et al. v. FERC **Docket Nos. EL15-36 and EL15-68**
D.C. Cir. No. 16-1075*, et al.*

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P.25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 21st day of April 2017, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system, as indicated below:

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