ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 16-1150

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

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

David L. Morenoff
General Counsel

Robert H. Solomon
Solicitor

Elizabeth E. Rylander
Nicholas M. Gladd
Attorneys

For Respondent Federal Energy
Regulatory Commission
Washington, D.C. 20426

FINAL BRIEF: February 6, 2017

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Except for the following, all parties and intervenors appearing before the Commission and this Court are identified in the Brief of Petitioners:

Climate & Energy Project
Earthjustice
Environmental Law and Policy Center
Florida Public Service Commission
Maryland Public Service Commission
National Audubon Society
Natural Resources Defense Council
Pace Energy and Climate Center
Sierra Club
Southern Environmental Law Center
Union of Concerned Scientists

B. Rulings Under Review

1. *Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,045 (Jan. 23, 2015) (First Order), R.84, JA 148;

2. *Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,247 (Nov. 25, 2015) (Second Order), R.148, JA 464; and

3. *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,227 (Mar. 22, 2016) (Third Order), R.162, JA 505.

C. Related Cases

This case has not previously been before this Court or any other court. There is one related appeal, *MISO Transmission Owners v. FERC*, D.C. Cir. No. 16-1449 (filed Dec. 27, 2016), concerning a separate filing that Midcontinent Independent System Operator, Inc. made to comply with interregional transmission

planning requirements—this one in conjunction with PJM Interconnection, L.L.C., which operates the interstate electric transmission grid in the mid-Atlantic region. Respondent concurs with Petitioners' statement (Br. vi) concerning the earlier appeal of the First and the Second Orders, and the voluntary dismissal of that appeal.

/s/ Elizabeth E. Rylander
Elizabeth E. Rylander
Nicholas M. Gladd
Attorneys

FINAL BRIEF: February 6, 2017

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Commission or FERC	Respondent Federal Energy Regulatory Commission
First Order	*Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,045 (Jan. 23, 2015), R.84, JA 148
JA	Joint Appendix
Order No. 1000	*Transmission Planning and Cost Allocation by Transmission Owning and Operating Pub. Utils.*, 136 FERC ¶ 61,051 (2011)
Order No. 1000-A	Order on rehearing of Order No. 1000, 139 FERC ¶ 61,132 (2012)
P	A paragraph in a Commission order
R.	Item in the certified index to the record
Second Order	*Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,247 (Nov. 25, 2015), R.148, JA 464
Southeast Utilities	Intervenors Duke Energy Carolinas, LLC; Duke Energy Progress, Inc.; Louisville Gas and Electric Company; Ohio Valley Electric Corporation; and Alabama Power Company

GLOSSARY

System Operator	Intervenor Midcontinent Independent System Operator, Inc., a regional transmission organization that operates the interstate electric grid in 15 states and one Canadian province, and administers auction-based wholesale energy markets
Third Order	*Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,227 (Mar. 22, 2015), R.162, JA 505
Transmission Owners	Petitioners, 31 transmission-owning utility members of System Operator

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

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v.

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

BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

Intervenor Midcontinent Independent System Operator, Inc. (System Operator) is a regional transmission organization that operates the interstate electric grid in 15 states and one Canadian province, and administers auction-based wholesale energy markets. This appeal concerns System Operator's efforts to comply with Respondent Federal Energy Regulatory Commission's (FERC or Commission) Order No. 1000 rulemaking.[1] As relevant here, Order No. 1000

[1] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 61,051 (2011), *on reh'g and*

requires utilities in neighboring regions to engage in joint interregional transmission planning and cost allocation.

In the orders on review, the Commission considered and resolved numerous issues that arose from the compliance filings that System Operator and neighboring southeastern utilities made to implement Order No. 1000's interregional transmission planning requirements. *Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,045 (Jan. 23, 2015) (First Order), R.84, JA 148, *on reh'g*, 153 FERC ¶ 61,247 (Nov. 25, 2015) (Second Order), R.148, JA 464, *reh'g denied*, 154 FERC ¶ 61,227 (Mar. 22, 2016) (Third Order), R.162, JA 505. Petitioners, which are 31 transmission-owning utility members of System Operator (Transmission Owners)—but not System Operator itself or any of the southeastern utilities with which it made its joint compliance effort—now seek review of the Commission's orders. The issues presented on appeal are:

1. Have Transmission Owners—who did not identify any regional transmission project that has been displaced by an interregional project, or explain how they, in particular, are harmed by the orders on review—suffered a concrete, immediate injury that would justify findings of standing and ripeness?

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clarification, Order No. 1000-A, 139 FERC ¶ 61,132 (2012), *on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd, S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

2. Assuming jurisdiction, did the Commission properly find that, under Order No. 1000, a new, interregional transmission project may displace an already-approved regional project in a regional transmission plan, if the interregional project presents a better solution to regional transmission problems?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the Addendum.

COUNTER-STATEMENT REGARDING JURISDICTION

This Court lacks jurisdiction to review the challenged orders. Transmission Owners have not shown that they have suffered a concrete, particularized injury, derived from the Commission's orders; accordingly, they lack standing to pursue this appeal. *See, e.g.*, *N.Y. Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 586 (D.C. Cir. 2011) (party is "aggrieved" under section 313 of the Federal Power Act, 16 U.S.C. § 825*l*(b), if it demonstrates constitutional and prudential requirements for standing). Transmission Owners offer only generalized harm (cost uncertainty) to broad categories of market participants; any costs they incur from selection of an interregional project are uncertain and may be offset by future benefits. In addition, their claim is unripe because it "rests 'upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *N.Y. State Elec. & Gas Corp. v. FERC*, 177 F.3d 1037, 1040 (D.C. Cir. 1999) (citing *Texas v. United States*, 523 U.S. 296, 300-01 (1998)).

Further, this Court does not have jurisdiction to consider Transmission Owners' argument (Br. 26, 37-44) that the Commission was required to justify Transmission Owners' compliance proposal under Federal Power Act section 206, 16 U.S.C. § 824e. Transmission Owners did not raise this issue on rehearing before the Commission, and therefore the agency has not had an opportunity to consider it. *See* 16 U.S.C. § 825*l*(a) (aggrieved party must seek rehearing, specifying the particular grounds on which its application is based), -(b) (party may present for judicial review only those issues preserved in its application for rehearing).

STATEMENT OF FACTS

I. Statutory and Regulatory Background

A. Federal Power Act

Section 201(b) of the Federal Power Act grants the Commission jurisdiction over the "transmission of electric energy in interstate commerce," the "sale of electric energy at wholesale in interstate commerce," and "all facilities for such transmission or sale." 16 U.S.C. § 824(b)(1). *See generally New York v. FERC*, 535 U.S. 1, 5-7 (2002) (describing structure and operation of the Federal Power Act).

All rates for or in connection with jurisdictional sales and transmission service are subject to Commission review under section 205 of the Federal Power

Act to assure that they are just and reasonable, and not unduly discriminatory or preferential. 16 U.S.C. §§ 824d(a), (b), (e). Section 206 of the Federal Power Act authorizes the Commission, on its own initiative or based on a third-party complaint, to investigate whether existing rates for jurisdictional services are just and reasonable and, if they are not, to establish a new rate to be thereafter observed. 16 U.S.C. § 824e. As relevant here, in its Order No. 1000 rulemaking, the Commission invoked section 206 to require jurisdictional utilities to incorporate tariff revisions related to electric transmission planning. *See South Carolina*, 762 F.3d at 55-60.

B. Commission Open Access and Regional Planning Rulemakings

"Historically, electric utilities were vertically integrated, owning generation, transmission, and distribution facilities and selling these services as a 'bundled' package to wholesale and retail customers in a limited geographical service area." *Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash. v. FERC*, 272 F.3d 607, 610 (D.C. Cir. 2001); *see South Carolina*, 762 F.3d at 49. The Commission found that it was in the economic interest of these vertically-integrated utilities to deny transmission service to others, or to offer it on terms less favorable than those they offered to themselves. *South Carolina*, 762 F.3d at 50 (citing Order No. 888,

FERC Stats. & Regs. ¶ 31,036 at 31,682).[2] To remedy these anti-competitive practices, in recent decades the Commission has sought to foster wholesale electricity competition over broader geographic areas. *See Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 536-37 (2008); *South Carolina*, 762 F.3d at 49-54; *see also MISO Transmission Owners v. FERC*, 819 F.3d 329, 332-34 (7th Cir. 2016) (same).

The filings at issue in this appeal were made in order to comply with the Commission's most recent transmission planning rulemaking. Order No. 1000 required public utilities to participate in regional planning processes that evaluate more efficient or cost-effective solutions to transmission needs than those proposed in local transmission planning processes. Order No. 1000 PP 2, 146, 203-05; *South Carolina*, 762 F.3d at 52-53. New transmission projects that are more efficient or cost-effective solutions to a regional need may be selected in a regional transmission plan to receive regional cost allocation—i.e., to have their costs assigned to the benefiting public utilities. Order No. 1000 P 63; *South Carolina*,

[2] *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. ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part*, *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).

762 F.3d at 83-84. In order to eliminate practices that may undermine identification and evaluation of beneficial new regional transmission facilities, the Commission also required transmission providers to eliminate from their tariffs and agreements any provisions that establish a federal right of first refusal for incumbent utilities to build new regional transmission facilities. Order No. 1000 P 253; *South Carolina*, 762 F.3d at 53.

C. Interregional Planning Requirements of Order No. 1000

In Order No. 1000, the Commission held that after its earlier transmission planning initiatives, there remained obstacles to effective planning of interregional transmission projects. Order No. 1000 P 369. To remedy this problem, Order No. 1000 required utilities to develop and implement procedures that provide for neighboring transmission providers to share data, and to identify and jointly evaluate interregional transmission facilities. *Id.* PP 345, 398, 435; Order No. 1000-A P 501; *see South Carolina*, 762 F.3d at 52-53. Interregional transmission projects—i.e., facilities located in more than one transmission planning region—potentially could meet regions' needs more efficiently and cost-effectively than facilities that are located within only one region. Order No. 1000 PP 368, 482 n.374.

The Commission required that the developer of an interregional transmission project must first propose the project in the transmission planning process of each

region where it proposes to locate the project. *Id.* P 436; Order No. 1000-A P 506. Each region must consider the interregional project individually, and—in the same general time frame—jointly evaluate the project with other affected regions. Order No. 1000 P 436; Order No. 1000-A P 506. A project must be selected for purposes of cost allocation in each affected region before it can be eligible for interregional cost allocation. *See* Order No. 1000 P 400; Order No. 1000-A PP 506, 509.

But the Commission left the transmission planning regions discretion to develop coordination procedures and to decide how to address an interregional transmission project. *See* Order No. 1000 PP 397, 447. This flexible approach allows transmission planning regions to "develop procedures that work for them, while still addressing the concern that joint evaluation of a proposed interregional transmission facility" requires neighboring regions to "harmonize differences in the data, models, assumptions, planning horizons, and criteria used to study a proposed transmission project." Order No. 1000-A P 510. On compliance, utilities were required to describe the methods they would use to identify and evaluate interregional transmission facilities, including the types of studies that they would use to determine whether interregional transmission facilities are more efficient and cost-effective than regional facilities. *Id.* P 398.

D. The Court Fully Affirmed Order No. 1000

In *South Carolina*, this Court upheld the Order No. 1000 rulemaking in all respects, including the Commission's finding that Order No. 1000 was necessary to ensure that transmission planning will "'support more efficient and cost-effective decisions moving forward.'" *South Carolina*, 762 F.3d at 66 (quoting Order No. 1000 P 44). The Court agreed with the Commission that Federal Power Act section 206, 16 U.S.C. § 824e, gives the Commission authority to require transmission planning and cost allocation reforms. *South Carolina*, 762 F.3d at 55-59. This is because the "practices of failing to engage in regional planning and *ex ante* cost allocation for development of new regional transmission facilities" implicate a "core reason" underlying Congress's instruction to remedy unjust, unreasonable, and unduly discriminatory practices that affect FERC-jurisdictional rates. *Id.* at 56-57 (citing *Transmission Access Policy Study Grp.*, 225 F.3d at 687, *aff'd*, *New York*, 535 U.S. 1). Order No. 1000's transmission planning mandate is "the next step in a series of related reforms that began no later than Order No. 888." *Id.* at 58.

The Court also upheld the Commission's determination to focus its reforms on transmission planning and cost allocation processes, and not the substantive outcomes of those processes. *Id.* at 57-58. It explained that Commission did not purport to "determine what needs to be build, where it needs to be built, and who

needs to build it," but left the "substance of a regional transmission plan and any subsequent formation of agreements to construct or operate regional transmission facilities . . . within the discretion of the decision-makers in each planning region." *Id.* As for cost allocation, the "Final Rule uses a light touch: it . . . provides for general cost allocation principles and leaves the details to" the transmission planning process. *Id.* at 81. The Court also noted that Order No. 1000 distinguishes cost allocation from cost recovery. *Id.* at 86-87. Its reforms "do not require any rate . . . to be paid; indeed, they do not require any utility to pay any cost or define the mechanism for doing so, leaving to the transmission providers to devise for themselves cost allocation methodologies and recovery mechanisms." *Id.*

II. The Proceeding Under Review

Like the Commission's transmission planning policies, System Operator's regional transmission planning and cost allocation processes have evolved substantially in recent years. In 2004, System Operator stakeholders began to develop criteria for including transmission projects in what was then called the Midwest ISO Transmission Expansion Plan. *See Pub. Serv. Comm'n of Wis. v. FERC*, 545 F.3d 1058, 1060-61 (D.C. Cir. 2008). System Operator completes a Transmission Expansion Plan cycle, including the approval of new transmission

projects, each year. *See Midwest Indep. Transmission Sys. Operator, Inc. and MISO Transmission Owners*, 142 FERC ¶ 61,215 at P 34 (2013).

System Operator implemented its first regional transmission cost allocation in 2005, for transmission projects of a certain minimum voltage that were necessary to maintain system reliability. *Pub. Serv. Comm'n of Wis.*, 545 F.3d at 1060-61. Through subsequent reforms, System Operator also implemented regional transmission cost allocation for what are now called Market Efficiency Projects: system upgrades, also of a certain minimum voltage, that were made for economic reasons and conferred a minimum level of benefits to the grid. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 133 FERC ¶ 61,221 at PP 9 & n.18, 13 (2010), *on reh'g*, 137 FERC ¶ 61,074 (2011), *aff'd in relevant part, Ill. Commerce Comm'n v. FERC*, 721 F.3d 764 (7th Cir. 2013). And finally, in 2010, System Operator created a cost allocation mechanism for Multi-Value Projects: large projects that reduce energy costs, improve system reliability, or advance state or federal public policy. *See Ill. Commerce Comm'n*, 721 F.3d at 774; *Midwest Indep. Transmission Sys. Operator, Inc.*, 133 FERC ¶ 61,221 at P 29.

A. System Operator's Initial Order No. 1000 Compliance Filings

In 2012, System Operator, together with the Transmission Owners, made filings with the Commission in order to comply with Order No. 1000. *See generally Midwest Indep. Transmission Sys. Operator, Inc. and MISO*

Transmission Owners, 142 FERC ¶ 61,215 (2013), *on reh'g*, 147 FERC ¶ 61,127 (2014), *on reh'g*, 150 FERC ¶ 61,037 (2015), *aff'd*, *MISO Transmission Owners v. FERC*, 819 F.3d 329 (7th Cir. 2016). System Operator and the Transmission Owners contended that System Operator's existing regional transmission planning process generally complied with Order No. 1000. *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,215 at PP 11-13. But they claimed that the standard for revising the Transmission Owners Agreement—the document that creates System Operator—did not allow them to eliminate provisions that granted the Transmission Owners a right of first refusal to build new transmission facilities, even those identified by non-incumbent developers. *See id.* PP 1 n.5, 13, 138-44. The Commission disagreed, and accepted for filing an amendment to the Transmission Owners Agreement that eliminated the right of first refusal for regional projects included in the regional transmission plan. *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,215 at PP 194-201.

The Transmission Owners appealed the Commission's decisions to the United States Court of Appeals for the Seventh Circuit. That court, noting that "legal challenges to the order eliminating the rights of first refusal have already failed," explored why entities such as the Transmission Owners would nonetheless want to "prevent the order from applying to them by arguing that FERC must *presume* that their contractual right of first refusal is reasonable." *MISO*

Transmission Owners, 819 F.3d at 332-33 (citing *South Carolina*, 762 F.3d 48-49, 72-82). The Seventh Circuit noted that until Order No. 1000, "every member of MISO had a protected monopoly, created by the right of first refusal, regarding the construction of new facilities in its service area," and could exclude competition by exercising that right. *Id.* at 333. As the Commission had found, the monopoly power created potential for higher rates to electric consumers than those that might exist in the presence of competition to create transmission facilities. *Id.* Transmission Owners "don't want to have to bid down the prices at which they will build new facilities in order to remain competitive." *Id.*

But the Seventh Circuit found that the very fact of the right of first refusal implied that competition in the market was possible—"why otherwise create such a right?" *Id.; see also* Order No. 1000-A P 86 (although transmission is a natural monopoly, the Commission has never found that it is "antithetical to competition in all respects"). And it held that the Transmission Owners had not shown that maintaining the right of first refusal provisions in the Transmission Owners Agreement was in the public interest, i.e., that doing so would benefit consumers of electricity or society as a whole. *MISO Transmission Owners*, 819 F.3d at 333 ("if there are indeed good things to be said about the rights of first refusal . . . they are not said in any of the voluminous filings to this case").

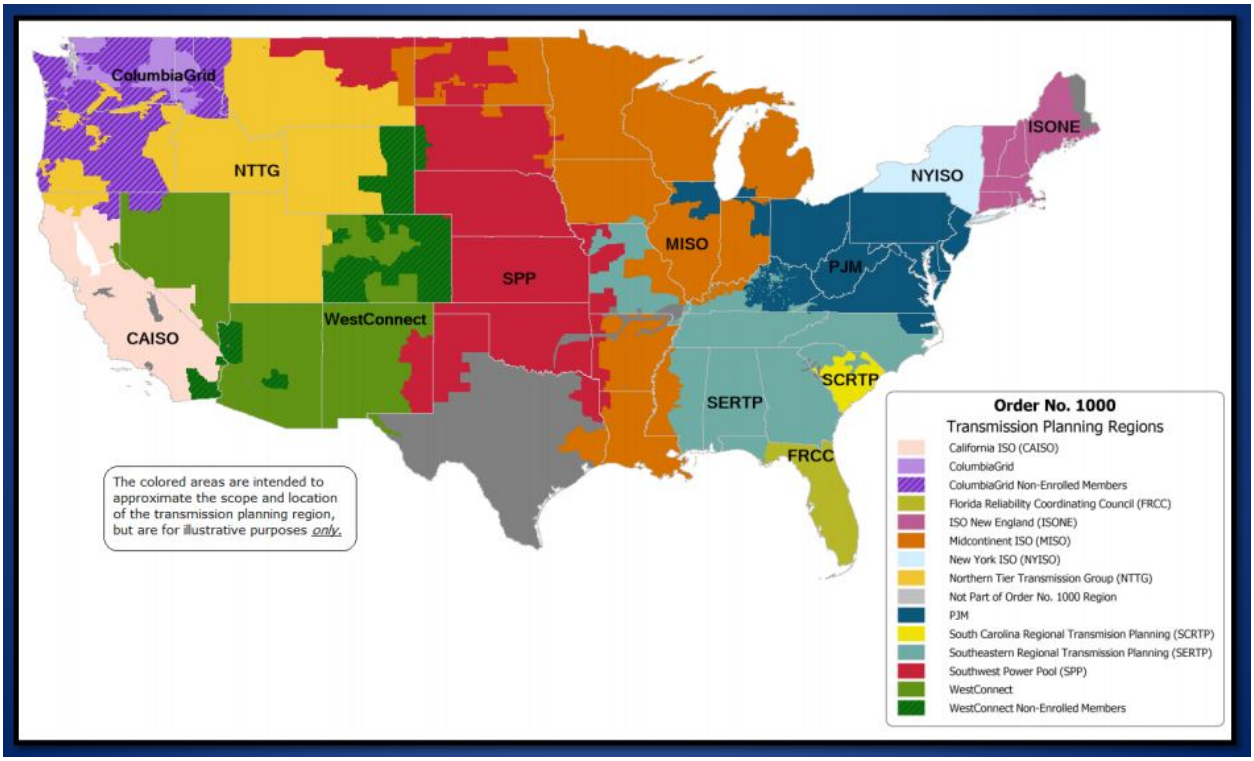
The Seventh Circuit distinguished the Transmission Owners Agreement from the contract at issue in *FPC v. Sierra Pacific Power Co.*, which the Supreme Court found did not warrant regulatory intervention. *Id.* at 334-35 (citing 350 U.S. 348, 355 (1956)). The contract challenged in *Sierra* was disadvantageous to the utility because it produced rates too low to guarantee a fair return, but did not harm the broader public. *Id.* at 335 ("the adverse consequences are contained, they do not ramify"). By contrast, the parties to the Transmission Owners Agreement, "are seeking to protect themselves from competition from third parties," as a "cartel" would, and "[t]hat's different." *Id.* The Seventh Circuit therefore upheld the Commission's decision to abrogate the rights of first refusal. *Id.* at 335. (The Court also affirmed the Commission on other issues presented by other petitioners, concerning cost allocation for certain Baseline Reliability Projects and issues related to non-incumbent utilities' ability to propose new transmission projects. *See id.* at 335-37.)

B. Interregional Transmission Planning Filings and the Commission's Orders on Review

In 2013, in the second phase of Order No. 1000 compliance, System Operator and five southeastern utilities, all intervenors in this proceeding, made coordinated interregional transmission planning proposals.[3] The southeastern

[3] Entergy Services Inc. and Cleco Power LLC, also made compliance filings in coordination with those of System Operator and the Southeast Utilities. First

utilities—Duke Energy Carolinas, LLC; Duke Energy Progress, Inc.; Louisville Gas and Electric Company; Ohio Valley Electric Corporation; and Alabama Power Company (collectively, Southeast Utilities)—sponsor the Southeastern Regional Transmission Planning Process. First Order P 1 & n.5, JA 150. As shown in the following map, the Southeast Regional Transmission Planning (SERTP) region is located along System Operator's (MISO's) southern and southeastern borders:



FERC, *Order No. 1000 Transmission Planning Regions*, http://www.ferc.gov/industries/electric/indus-act/trans-plan.asp (visited Dec. 30,

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Order P 11, JA 156-57. But because Entergy Services and Cleco Power joined System Operator as transmission-owning members shortly thereafter, the Commission rejected their interregional coordination filings as moot. *See id.* P 28, JA 160.

2016). System Operator also made a filing to incorporate "general revisions" to Attachment FF of its transmission tariff, which governs its regional and interregional transmission planning processes.[4] *See* Transmittal Letter at 2, Docket No. ER13-1945-000 (July 10, 2013), JA 2; First Order P 10, JA 156.

The orders on review resolved numerous issues, only a few of which are presented for review. As relevant to this appeal, the Commission approved System Operator's and the Southeast Utilities' proposal to calculate the benefits of potential interregional transmission projects using only avoided cost—the savings realized from using an interregional project instead of regional and/or local projects—as a metric. First Order PP 176-80, JA 228-31. The Commission held that the regional transmission planning process, which comes before the interregional process, accounts for potential benefits associated with regional reliability, economic, and public policy. *Id.* PP 179-80, JA 229-31.

The Commission did not allow System Operator to exclude transmission projects already approved in System Operator's regional transmission plan from potential displacement by an interregional project. First Order P 187, JA 233-35;

[4] Separately, and not at issue here, System Operator also submitted interregional transmission planning compliance filings with the Commission in conjunction with utilities in the mid-Atlantic region (PJM), and the Great Plains (Southwest Power Pool). *See PJM Interconnection, L.L.C.*, 149 FERC ¶ 61,250 (2014), *on reh'g*, 155 FERC ¶ 61,008 (2016), *reh'g denied*, 157 FERC ¶ 61,065 (2016), *appeal docketed sub nom. MISO Transmission Owners v. FERC*, No. 16-1449 (D.C. Cir. Dec. 27, 2016); *Sw. Power Pool, Inc.*, 150 FERC ¶ 61,093 (2015).

Second Order P 36, JA 480-81. Under this proposal, projects evaluated (and costs avoided) in the interregional planning process would be those that System Operator's board had "*not* selected as the more efficient or cost-effective solution" to regional transmission issues. Second Order P 37, JA 481 (emphasis in original). The Commission found that System Operator had not explained how a project that had not been approved as a more efficient or cost-effective solution at the regional level could be so at an interregional level. *Id.* P 38, JA 481. The proposal was therefore inconsistent with Order No. 1000's requirements that utilities allocate the costs of new transmission in a way that is transparent, and roughly commensurate with estimated benefits. *Id.* PP 38-39, JA 481-82.

The Commission disagreed with System Operator and Transmission Owners that there was a conflict between the avoided cost-only method of measuring benefits, and System Operator's existing transmission planning processes, because the avoided-cost method would allow interregional transmission projects to displace already-approved regional projects. *Id.* P 40, JA 482-83. The Commission also disagreed with System Operator and the Transmission Owners' assertion that System Operator's tariff does not contemplate removing projects from its bid solicitation process, or removing a project from a developer that has won a bid. *Id.* P 42, JA 483-84.

SUMMARY OF ARGUMENT

The Court does not have jurisdiction to consider this appeal. Transmission Owners have not shown that they suffered the concrete, particularized injury that is necessary to support a claim of standing. They allege only that the Commission's orders create general uncertainty—not that any particular interregional transmission project has displaced, or even may displace, a regional transmission upgrade from System Operator's regional transmission plan at an unrecoverable cost to any Transmission Owner. Nor is any alleged injury ripe for review at this time, as any potential harm to any Transmission Owner depends on contingent future events that are not certain to occur. Finally, Transmission Owners did not raise on rehearing, and therefore did not preserve for appellate review, their argument that the Commission must justify System Operator's and Southeast Utilities' proposed interregional transmission planning process as just and reasonable.

If the Court proceeds to the merits of this appeal, it should deny the petition for review. Transmission Owners' challenge goes to the merits of Commission policy decisions that were made in Order No. 1000, and later affirmed by this Court. There the Commission required reforms to utilities' transmission planning processes under Federal Power Act section 206, 16 U.S.C. § 824e, in order to ensure that they were just and reasonable. As relevant here, the Commission found

that interregional transmission projects could be more efficient, cost-effective solutions to regional transmission problems than regional transmission projects. Pairs of neighboring regions were required to develop coordinated processes to compare regional with interregional projects, and identify the most advantageous upgrades.

This case concerns only whether System Operator and Southeast Utilities have complied with Order No. 1000. The Commission reasonably held that System Operator's proposal to evaluate the benefits of interregional projects using only one metric (avoided cost) was consistent with Order No. 1000, but that System Operator must modify its proposal to ensure that its analysis captured all of the benefits of regional transmission projects. After comparing the benefits of interregional projects and regional projects, the affected regions may choose to displace an approved regional transmission project with an interregional project that better solves specific transmission problems. Any such displacement would be beneficial at both a regional and interregional level, and would advance the public policy goals of Order No. 1000. Contrary to Transmission Owners' assertions, there is no need for further Commission justification under Federal Power Act section 206.

ARGUMENT

I. The Court Lacks Jurisdiction to Consider This Appeal

A. Transmission Owners Lack Standing to Challenge the Commission Orders

Petitioners bear the burden of establishing the elements of standing in their opening brief. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *Texas v. EPA*, 726 F.3d 180, 198 (D.C. Cir. 2013). The "irreducible constitutional minimum" for standing requires a petitioner to show that it has suffered (1) an "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical;" (2) that has a "causal connection" with the challenged agency action; and (3) that likely "will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations and internal quotations omitted); *Spokeo*, 136 S. Ct. at 1547. In a case like this one, where the petitioners were not the objects of the agency action they challenge—Intervenors System Operator and Southeast Utilities, not Transmission Owners, were the filing parties—"standing is not precluded," but it is more difficult to establish because it generally depends on the independent actions of third parties in response to the agency action. *Lujan*, 504 U.S. at 560-61.

Transmission Owners do not even attempt to adduce facts that would establish standing. Their initial brief asserts—in a single, conclusory sentence—

that they "have standing . . . because the challenged orders affect the rates, terms, and conditions for service on their transmission facilities." Br. 27. Neither that sentence nor any other allegation in their brief demonstrates an injury sufficient to support a claim of standing, or that the harm alleged can be fairly traced to the orders on review.

1. Transmission Owners Cannot Show Aggrievement Or Injury-In-Fact

Section 313(b) of the Federal Power Act provides that any party "aggrieved" by a Commission order may appeal that order to the court of appeals. 16 U.S.C. § 825*l*(b). "The requirement of aggrievement serves to distinguish a person with a direct stake in the outcome of a litigation from a person with a mere interest in the problem," and merely participating in the agency proceedings that gave rise to the appeal is not enough to confer standing. *N.Y. Reg'l Interconnect*, 634 F.3d at 586 (quoting *City of Orrville v. FERC*, 147 F.3d 979, 985 (D.C. Cir. 1998)).

"To show aggrievement, a [petitioner] must allege facts sufficient to prove the existence of a concrete, perceptible harm of a real, non-speculative nature." *N.C. Utils. Comm'n v. FERC*, 653 F.2d 655, 662 (D.C. Cir. 1981) (citation and internal quotations omitted); *see also Spokeo*, 136 S. Ct. at 1548 (same). The Supreme Court has "repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013)

(citation and internal quotations omitted). Transmission Owners foresee negative effects from the orders on review, but their concerns—generalized to market behavior affecting all transmission developers and market participants, not just themselves—do not satisfy the requirements of concreteness and particularity. *See* Br. 26-27, 31-34.

"A 'concrete' injury must be '*de facto*'; that is, it must actually exist." *Spokeo*, 136 S. Ct. at 1548. "A 'conjectural or hypothetical' injury will not do." *Occidental Permian Ltd. v. FERC*, 673 F.3d 1024, 1026 (D.C. Cir. 2012) (citing *Lujan*, 504 U.S. at 560). All the Commission has done here, in this limited Order No. 1000 compliance proceeding, is allow consideration of interregional transmission proposals that might bestow overall benefits, not harm, to the same market participants that Transmission Owners champion. The Commission simply declined to draw the line at displacing regional projects that have been identified, but not approved for development, finding that the policy goals of Order No. 1000 would be better advanced if the interregional process considered regionally-approved projects. *See, e.g.*, Second Order P 37, JA 481. At this time, the Commission has not directed Transmission Owners to do anything more.

Transmission Owners argue that the possibility for an interregional transmission project to displace an approved regional transmission project creates uncertainty for System Operator's stakeholders. Br. 26-27, 33; First Rehearing

Request at 7, R.92, JA 277. Even if this allegation were true (and it is unsubstantiated, as discussed *infra*, Section I.A.2), it does not constitute an injury-in-fact. "[B]road-based market effects stemming from regulatory uncertainty are quintessentially conjectural," and this Court has found them insufficient to support standing. *New England Power Generators Ass'n v. FERC*, 707 F.3d 364, 369 (D.C. Cir. 2013) (citing *Shell Oil Co. v. FERC*, 47 F.3d 1186, 1202 (D.C. Cir. 1995) (no standing based on plausible, but still hypothetical scenario)). *See also Occidental Permian*, 673 F.3d at 1026 (finding no concrete injury associated with concern about chain of events that might eventually result in petitioner paying higher rates for transmission service).

"For an injury to be 'particularized,' it 'must affect the [petitioner] in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548. Transmission Owners' brief does not allege such a particularized impact. *See N.Y. Reg'l Interconnect*, 634 F.3d 581, 586-88 (no injury derived from Commission's approval of transmission planning proposal where petitioner had no active proposals for new projects that would be affected by the orders). Rather, they contend that many market actors will feel the effects of the Commission's orders. *See*, *e.g.*, Br. 5 (harm to "project developers and consumers"), 25 & 28 (System Operator's "stakeholders"), 30 ("the overall transmission planning process, Designated Developers, Selected Developers, and other stakeholders"), 32-33 (System

Operator and "numerous developers"). Alleging nebulous harm to every stakeholder in System Operator's region is not sufficient to support a claim of standing. *See New England Power Generators Ass'n*, 707 F.3d at 369 (such allegations are conjectural and do not support standing); *N.Y. Reg'l Interconnect*, 634 F.3d at 588 (no standing where nothing distinguished petitioner from any other party potentially affected by Commission's orders).

Transmission Owners worry that regional transmission they might someday develop could be displaced by another party's better interregional project. *See* Br. 26-27, 31-34. But the orders on review do not foreclose the opposite scenario, i.e., that Transmission Owners might someday develop interregional transmission projects that will displace inferior regional projects. Transmission cost recovery lies outside the scope of Order No. 1000. *See* Order No. 1000 P 563 ("cost allocation and cost recovery are distinct," and the Final Rule "does not address matters of cost recovery"). And as Transmission Owners admit, System Operator has not yet addressed the question of cost recovery for displaced projects. *See* Br. 33 (in the event of displacement, "not clear" who would pay for resources expended), 40 (no tariff provisions governing recovery of lost development costs), 43 (the "costs will be passed on to someone eventually"). It is therefore premature for Transmission Owners to argue that they can only be harmed, and not benefited,

as a result of the orders on review. *See Occidental Permian*, 673 F.3d at 1027 (fear of possible rate increase in the future does not support a claim of standing).

2. Transmission Owners Have Not Shown That Their Alleged Injury Is Traceable to the Orders On Review

Transmission Owners have also not shown that the alleged injury is "fairly traceable" to the Commission determination at issue here. In the orders on review, the Commission merely held, as a general matter, that it is consistent with Order No. 1000 to calculate the benefits of an interregional project based on avoided cost only. First Order PP 176-80, JA 228-31; Second Order PP 36-37, JA 480-81. The orders on review did not involve the identification, approval, or displacement of any specific transmission projects, which occurs, if at all, through System Operator's annual regional planning process. *See generally* Order No. 1000 P 436. *See also N.Y. Reg'l Interconnect*, 634 F.3d at 586-87 (Commission's approval of new planning process for New York transmission grid did not injure company that had no existing transmission proposals).

Transmission Owners do not identify a specific injury, but merely contend that the orders will decrease interest and participation in transmission planning, and harm transmission system planning and reliability. *See* Br. 26-27, 30-33. These arguments counter, without explanation, the Commission's finding that System Operator's and Southeast Utilities' proposals will further the policy goals

of Order No. 1000. *See* First Order PP 169-88, JA 225-36 (proposals, as amended, comply with Order No. 1000); Second Order PP 36-43, JA 480-84 (same).

Any concrete injury to Transmission Owners' interests would occur at the end of "a hypothetical chain of events, none of which is certain to occur." *N.Y. Reg'l Interconnect*, 634 F.3d at 587. System Operator would have to include in its regional transmission plan a regional project for which a Transmission Owner is (or is later chosen to be) the developer; and, at about the same time, a third-party developer would have to propose an interregional project that both System Operator and the Southeastern Regional Transmission Planning Process independently find is a more efficient or cost-effective solution to a transmission issue within their regions than the regional upgrade for which a Transmission Owner is responsible. *See* Br. 13-16 (describing project selection and developer assignment processes); Second Order PP 41-42, JA 483-84 (dismissing Transmission Owners' concerns about "late presentation" of a competing interregional proposal). "This theory stacks speculation upon hypothetical upon speculation, which does not establish an 'actual or imminent' injury." *N.Y. Reg'l Interconnect*, 634 F.3d at 587 (citing *Lujan*, 504 U.S. at 560). And because two regional entities will have to make independent determinations in this scenario, it is not appropriate to assume that they will draw the same conclusions. *See Clapper*, 133 S. Ct. at 1150 (reaffirming reluctance "to endorse standing theories that

require guesswork as to how independent decisionmakers will exercise their judgment").

As this Court observed in *North Carolina*, 653 F.2d at 663, "[i]t is not this [C]ourt's job to ferret out or even to speculate as to possible impacts of possible outcomes of existing lawsuits upon future litigation; it is the petitioner's responsibility to show the specifics of the aggrievement alleged, and this petitioner has not done so." As in *North Carolina*, the petition should be dismissed because Transmission Owners fail to demonstrate that their petition for review meets minimum constitutional standing requirements.

B. The Petition For Review Is Unripe

Alternatively, the Court should dismiss Transmission Owners' petition for lack of ripeness. *See R.J. Reynolds Tobacco Co. v. FDA*, 810 F.3d 827, 830-31 (D.C. Cir. 2016) (speculative claims are insufficient whether they are cast in terms of ripeness or standing). A claim is unripe "when it rests 'upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *N.Y. State Elec. & Gas Corp.*, 177 F.3d at 1040 (citing *Texas*, 523 U.S. at 300-01).

As applied to judicial review of agency action, ripeness is a "'prudential attempt'" to balance the interests of both parties. *Miss. Valley Gas Co. v. FERC*, 68 F.3d 503, 508 (D.C. Cir. 1995) (quoting *Eagle-Picher Indus. v. EPA*, 759 F.2d 905, 915 (D.C. Cir. 1985)). The Court considers "'both the fitness of the issues for

judicial decision and the hardship to the parties of withholding court consideration.'" *Miss. Valley Gas*, 68 F.3d at 508 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967)). It asks whether the agency or court would benefit from deferring review until the question arises in "some more concrete and final form." *Miss. Valley Gas*, 68 F.3d at 508.

Transmission Owners' petition does not present concrete issues fit for judicial review at this time. As described *supra*, Section I.A, the facts needed to support Transmission Owners' claim of injury cannot exist until Transmission Owners propose, and System Operator and Southeast Utilities' planning organization evaluate, specific transmission upgrades. If, eventually, an interregional transmission project displaces a regional project to which one or more Transmission Owners are assigned as developers, causing harm to one or more Transmission Owners, then those transmission developers may challenge the regions' determinations of project benefits before the Commission. If unsuccessful before the Commission, they may seek review before this Court. This highly contingent, speculative series of events does not favor judicial review at this time. *See, e.g.*, *Miss. Valley Gas*, 68 F.3d at 509 (finding issues not fit for review where "the future impact of the FERC orders is uncertain at present, and will likely be more clear once [pipeline]'s actual rates for the period in question have been

finalized," and where "[t]he possible benefit to both FERC and this court counsels in favor of a delay in review of the FERC orders").

C. Transmission Owners Did Not Argue Below That the Commission Did Not Satisfy Its Burden of Proof

Even if the Court finds that Transmission Owners have standing and have presented a ripe controversy, the Court does not have jurisdiction to review Argument Section III of their opening brief. There Transmission Owners contend that the Commission did not satisfy its obligation under section 206 of the Federal Power Act, 16 U.S.C. § 824e, to find that the evaluation mechanism it directed System Operator to adopt is just and reasonable. *See* Br. 37-44.

Transmission Owners did not raise this argument on rehearing before the Commission, as section 313 of the Federal Power Act requires. *See* 16 U.S.C. § 825*l*(a) (aggrieved party must first seek rehearing before the Commission, specifically setting forth the ground or grounds on which its claim is based). Indeed, the First Rehearing Request does not mention section 206 of the Federal Power Act or the issue of cost recovery at all. *See generally* First Rehearing Request, JA 271. (The Second Rehearing Request, R.155, JA 490, concerned additional issues, not presented for review here, that were addressed in the Third Order.)

Transmission Owners have, therefore, waived this argument, and it is jurisdictionally barred by section 313(b) of the Federal Power Act, 16 U.S.C.

§ 825*l*(b). *See, e.g., Intermountain Mun. Gas Agency v. FERC*, 326 F.3d 1281, 1286 n.7 (D.C. Cir. 2003) (no jurisdiction where petitioner's "rehearing request did not even cite the statute or use the statutory phrase . . . on which it now relies"). And, in any event, as explained *infra* Section II.B, the Commission did satisfy its burden in this proceeding.

II. Transmission Owners' Arguments Are Wrong On Their Merits

A. Standard of Review

If the Court proceeds to the merits of this appeal, it should review the Commission's determinations deferentially. Generally, review under the Administrative Procedure Act's arbitrary and capricious standard, 5 U.S.C. § 706(2)(A), is "narrow." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2015) (citing *Motor Vehicle Mfrs. Ass'n of United States, Inc. 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 a rule 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.* (internal quotations and citation omitted).

"[N]owhere is that more true than in a technical area like electricity rate design." *Id.* In rate- and tariff-design matters, the Court's "review of the

Commission's determinations is particularly deferential because such matters are either fairly technical or involve policy judgments at the core of the regulatory mission." *South Carolina*, 762 F.3d at 54-55 (internal quotations and citation omitted); *see also Morgan Stanley*, 554 U.S. at 532 (courts accord "great deference" to the Commission's decisions because the Federal Power Act's "statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition . . . .") (citations omitted). The Commission's predictive judgments in areas within its expertise are also entitled to "particularly deferential review." *Wis. Pub. Power Inc. v. FERC*, 493 F.3d 239, 260 (D.C. Cir. 2007) (internal quotations and citation omitted).

The Commission's factual findings are conclusive if supported by substantial record 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." *Murray Energy Corp. v. FERC*, 629 F.3d 231, 235 (D.C. Cir. 2011); *see also Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010) ("[W]e do not ask whether record evidence could support petitioner's view of the issue, but whether it supports the Commission's ultimate decision.").

B. The Commission Fully Addressed Transmission Owners' Concerns About Displacing Projects from the Regional Transmission Plan

In response to Order No. 1000's findings on interregional transmission development, System Operator was required to develop a compliance proposal that revised its tariff or other documents "as necessary to demonstrate that it meets the requirements set forth herein with respect to the interregional transmission coordination procedures and an interregional cost allocation method or methods." Order No. 1000 P 792. The point of a compliance filing is not to reargue or to reconsider policy decisions, but to implement them. *See City of Cleveland v. FERC*, 773 F.2d 1368, 1374 (D.C. Cir. 1985). "Since the underlying order consists precisely of a determination that what it prescribes will produce just and reasonable rates, the only issue remaining is whether the compliance filing accords with what it prescribes." *Id.* *See also Entergy Servs., Inc.*, 101 FERC ¶ 61,141 at P 14 (2002) (same); *High Point Gas Transmission, LLC*, 140 FERC ¶ 61,259 at P 26 & n.30 (2012) (same).

Accordingly, the Commission only needed to consider whether System Operator's and Southeast Utilities' proposals fit within the flexible parameters of Order No. 1000. As explained below, the Commission satisfied that obligation by providing a thorough, well-reasoned explanation for its determination that a

modified version of System Operator's compliance proposal was consistent with Order No. 1000.

Transmission Owners assert that the Commission "utterly failed to engage" their arguments concerning the displacement of approved regional transmission projects. Br. 30. *See also id.* at 5 (Commission "failed to respond meaningfully"), 7 ("wholly ignored legitimate objections"), 25 ("completely ignored" System Operator's and Transmission Owners' concerns), 31 ("simply failed to engage"). (Notably, they allege errors in the First Order and the Second Order, but do not challenge the Third Order.) But in fact, the Commission rejected Transmission Owners' arguments, and provided a well-reasoned explanation for doing so. *See* Second Order PP 36-43, JA 480-84.

1. The Avoided Cost Metric Allows For The Possibility That Superior Projects May Displace Inferior Ones

The focus of Order No. 1000 is "improving the process by which needed infrastructure is identified and planned," and injecting competition into this process helps to ensure just and reasonable rates. *South Carolina*, 762 F.3d at 77; *accord MISO Transmission Owners*, 819 F.3d at 333-34 (competition brings about lower transmission development costs, and therefore lower transmission rates). And as the challenged orders explain, the Order No. 1000 reforms were meant to ensure that transmission providers properly evaluate transmission alternatives at the local, regional, and interregional levels. *See* First Order PP 179-80, JA 229-31 (citing

Order No. 1000 PP 11, 81, 148, 393, 399). Local transmission projects may be displaced by more efficient (or less expensive) regional projects; regional transmission projects may be displaced by more efficient (or less expensive) interregional projects. *See* First Order P 179, JA 229-30; Order No. 1000 PP 81, 396. Each region is responsible for assessing and evaluating potential solutions to transmission problems; the Commission only approves the process used to do so. *See South Carolina*, 762 F.3d at 57-58 (Commission is concerned with process, not with particular outcomes).

In this limited compliance proceeding, System Operator and Southeast Utilities proposed to assess the benefits of interregional transmission projects using an avoided cost-only method to compare these projects to other alternatives. *See* First Order P 176, JA 228. The Commission explained that using only avoided cost to measure the benefits of *regional* projects does not comply with Order No. 1000, because it would consider as benefits only the savings realized when a regional transmission project can be used to avoid a local project. *Id.* Avoided cost, alone, would not account for all of the benefits that transmission providers must consider when evaluating regional projects—benefits driven by reliability, economics, and public policy requirements. *Id.* P 179, JA 229-30. By contrast, however, using only avoided cost to assess the benefits of *interregional* projects may comply with Order No. 1000. *See id.* PP 176-87, JA 228-35. Such an

analysis would consider the savings associated with displacing approved regional projects, and in the process of approving regional projects, transmission providers will already have measured the reliability, economic, and public policy benefits of such projects. *See id.* PP 179-81, 187, JA 229-32, 233-35.

But the specific avoided cost-only method that System Operator proposed for measuring the benefits of interregional projects was too constrained to comply with Order No. 1000. *See id.* PP 181, 187, JA 231-32, 233-35. System Operator proposed to exclude from its calculation of benefits—and therefore, exclude from consideration in the interregional planning process—regional projects that have been approved in System Operator's regional transmission plan. *See id.* P 187, JA 233-35. The proposal would mean that the interregional planning process could not evaluate whether it was possible to avoid the costs of regional projects, and therefore could not properly reflect all the benefits that may accrue from an interregional transmission project. *Id.*; *see* Second Order PP 37-38, JA 481. The Commission directed System Operator to revise its cost allocation method in a way that accounts for all types of benefits, i.e., to use an avoided cost-only method that quantifies the benefits of interregional projects based on the avoided costs of approved regional projects. *See* First Order P 187, JA 233-35; Second Order P 43, JA 484. The revisions would bring System Operator's compliance proposal into

line with the requirements of Order No. 1000. *See* Second Order PP 36-39, JA 480-82.

In the course of making these findings, the Commission addressed Transmission Owners' arguments that the avoided cost-only method, as revised by the Commission, is inconsistent with Order No. 1000. *See* Br. 25-26, 30-37. With regard to the potential displacement of already-approved regional transmission projects, the Commission explained that an avoided cost-only method to evaluate interregional projects must consider all of the benefits that may accrue from such projects in order to comply with Order No. 1000. *See* First Order PP 176-87, JA 228-35. The Commission also explained that excluding already-approved projects from displacement would "sever a key aspect of the relationship between the regional transmission planning process and the interregional coordination procedures." Second Order P 37, JA 481. If System Operator "does not complete its evaluation of a regional transmission project by selecting it in the regional transmission plan for purposes of cost allocation, it is unclear how the use of an avoided cost-only method will properly account for benefits of an interregional transmission project." *Id.*

Ultimately, in directing System Operator to use the specific avoided cost-only method adopted in this proceeding, the Commission found that it accounts for all types of benefits that were identified in the regional transmission planning

process, as required by Order No. 1000. *See* First Order P 187, JA 233-35 (setting forth compliance directive for an avoided cost-only method that would comply with Order No. 1000); Second Order P 43, JA 484 (adding specificity to the First Order's compliance directive). This is precisely the type of "disputed question," involving "both technical understanding and policy judgment," entrusted to the Commission's decisionmaking; "[i]t is not [the court's] job to render that judgment, on which reasonable minds can differ." *Elec. Power Supply Ass'n*, 136 S. Ct. at 784.

2. The Commission Reasonably Found No Inconsistency Between System Operator's Regional and Interregional Transmission Planning Processes

The orders on review also address Transmission Owners' assertion that the avoided cost-only method, as revised in the Commission's orders, is inconsistent with System Operator's regional transmission planning process. The Commission addressed those arguments on rehearing and found that "there is no conflict between the avoided cost-only method and [System Operator's] regional transmission planning process." Second Order P 40, JA 482-83. The Commission noted that the avoided cost-only method adopted in this proceeding is the same method that Southeast Utilities proposed to use with all of their other neighboring planning regions, and "none of those regions indicat[ed] a problem with this approach." *Id.*

The Commission further explained that the "alleged conflict" Transmission Owners raise is the direct result of Transmission Owners' and System Operator's proposal to use an avoided cost-only method to determine the benefits of interregional projects. *Id.* The Commission explained that, in Order No. 1000, the Commission gave transmission providers flexibility to develop cost allocation methods that best suit the needs of their planning regions, as long as the methods comply with the cost allocation principles set forth in Order No. 1000. *Id.* In other words, System Operator is not required to use an avoided cost-only method, but may propose other methods it deems appropriate for its planning region. It also has flexibility to revise its regional transmission planning rules to better align its regional and interregional cost allocation methods. *Id.* (citing Order 1000 P 580 ("As in the case of regional cost allocation, we do not require a single nationwide approach to interregional cost allocation but instead allow each pair of neighboring regions the flexibility to develop its own cost allocation method or methods[.]")).

System Operator selected an avoided cost-only method for interregional cost allocation. First Order PP 179-80, JA 229-31; Second Order PP 40-42, JA 482-84. It also chose to make ministerial—not extensive—revisions to its regional transmission plan at the time of its interregional compliance filing. *See* First Order P 10, JA 156 (revisions to regional plan were limited to identifying newly-proposed interregional proceedings and redesignating existing agreements).

Transmission Owners' argument that there are conflicts between the regional and interregional processes therefore is unconvincing.

3. The Commission Addressed the Issue of Harm to Transmission Developers

Before the Commission, Transmission Owners argued that System Operator's tariff does not contemplate removing projects from the bid solicitation process, or removing a project from a developer, because the project is to be replaced by a more efficient or cost-effective interregional project. Second Order P 42, JA 483-84. The Commission disagreed, and noted that System Operator's tariff allows projects to be reevaluated—and, if necessary, cancelled, reassigned to another developer, or subjected to a mitigation plan—based on cost increases or changes in a developer's qualifications. *Id.* (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,215 at PP 356-61, 381, 383). On appeal, Transmission Owners argue that this rationale is "completely inapposite" because the tariff provisions that the Commission referenced apply only "when something goes awry in the development process." Br. 35.

Transmission Owners misunderstand the Commission's rationale. The Commission did not find that the referenced tariff provisions govern the specific type of project displacement at issue in this compliance proceeding. Indeed, the Commission noted that the referenced tariff provisions involve "cost increases or developer qualifications," neither of which is at issue here. Second Order P 42,

JA 483-84. The Commission's reference to those tariff provisions merely shows that System Operator's tariff currently allows for the reevaluation of approved projects in some circumstances. Based on that fact, the Commission found unconvincing the notion that the tariff does not "contemplate" the type of potential project displacement underlying Transmission Owners' concern. *Id.* (finding "no basis for . . . Transmission Owners' assertion that displacing a selected regional transmission project with a more efficient or cost-effective interregional transmission solution . . . would be inconsistent with [System Operator's] regional transmission planning process").

Transmission Owners also contend that the Commission's "directed result—that even an approved project be compared to and potentially displaced by a new interregional project—is irrational." Br. 35. But this is an attack on Commission policy, and the "sole issue on compliance is whether the compliance filing complies with the Commission's directives." *Entergy Servs.*, 101 FERC ¶ 61,141 at P 14; *see also City of Cleveland*, 773 F.2d at 1374. The Commission's task here was only to ensure that the instructions in its previous orders were properly implemented. *See id.* And further, as the Commission has repeatedly stated, and the Court has affirmed, the transmission reforms of Order No. 1000 provide greater certainty that the transmission facilities in each regional transmission plan are more efficient or cost-effective solutions to meeting the region's needs. *See*, *e.g.*, First

Order P 180, JA 230-31; Second Order P 36, JA 480-81; Order No. 1000 PP 148, 393, 396; Order No. 1000-A P 52; *South Carolina*, 762 F.3d at 52-53.

Consistent with that policy, the Commission concluded that it is appropriate to calculate the benefits of interregional projects using the avoided costs of regional projects that have been approved, because doing so will sufficiently consider all of the benefits that accrue from the interregional projects. *See, e.g.*, First Order P 187, JA 233-35. Transmission Owners prefer that, in calculating those benefits, the Commission draw the line earlier in the transmission planning process—specifically, when regional projects are identified, but not yet approved for inclusion in the transmission plan. First Rehearing Request at 8, JA 278. The Commission considered that proposal and found it inadequate for several reasons. *See* First Order P 187, JA 233-35 (proposal "fails to sufficiently consider all of the benefits that may accrue from an interregional transmission project."); Second Order P 37, JA 481 (proposal flawed because it is based on costs that do not reflect the most efficient or cost-effective solution); *id.* P 38, JA 481 (proposal has not been shown to produce cost allocation at least roughly commensurate with benefits); *id.* P 39, JA 481-82 (proposal lacks requisite transparency; System Operator's tariff does not indicate what it means for a regional project to be "identified").

At bottom, Transmission Owners' objection is simply one of timing. They argue that it is appropriate to include for consideration regional projects identified by System Operator but not approved by System Operator; the Commission concluded that it is appropriate to include projects approved by System Operator. *See* Br. 35 (Transmission Owners perceive a different "logical point" for conducting avoided cost comparison than what the Commission required). This is precisely the type of line drawing that is particularly suited for the agency entrusted to make this kind of policy decision and distinction. *See Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010) ("the Commission enjoys broad discretion to invoke its expertise in balancing competing interests and drawing administrative lines.") (citing *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1085 (D.C. Cir. 2002); *Pub. Serv. Comm'n of N.Y. v. FPC*, 543 F.2d 757, 806 (D.C. Cir. 1974)).

Moreover, as Transmission Owners conceded on rehearing, even if the potential for displacement of approved projects causes uncertainty, transmission developers can reflect that risk in any bids they submit during the transmission planning processes. *See* First Rehearing Request at 7, JA 277 ("developers must price into their bids the heightened risk of a project being later displaced by an interregional project."). *See also MISO Transmission Owners*, 819 F.3d at 335 (citing *Sierra*, 350 U.S. 348) (if a utility "makes a contract that turns out to be

disadvantageous to it but does no harm to the broader public, a regulatory commission has no business bailing the company out. It's a big boy; it took a risk; the risk materialized[.]"). And finally, as this Court has previously noted, Order No. 1000 concerned only cost allocation, not cost recovery. *South Carolina*, 762 F.3d at 83 (rule did not specify how new facilities should be paid for). The issue of how a transmission developer will recover sunk costs for a displaced transmission project is beyond the scope of this proceeding—as Transmission Owners seem to recognize. *See* Br. 33, 40, 43 (cost recovery not addressed in System Operator's filing); *see also Mobil Oil Expl. & Prods. Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991) ("An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities.") (citations omitted).

The Commission's rationale for approving the avoided cost-only method at issue in this proceeding was thorough, well-reasoned, and responsive to the arguments that Transmission Owners raised. The Court should defer to the Commission's findings. *See, e.g.*, *South Carolina*, 762 F.3d at 54-55 ("[I]n rate-related matters, the [C]ourt's review of the Commission's determinations is particularly deferential because such matters are either fairly technical or involve policy judgments at the core of the regulatory mission.") (internal quotations and citation omitted); *see also Morgan Stanley*, 554 U.S. at 532 (same).

C. Transmission Owners' Interpretation of Federal Power Act Section 206 Is Incorrect

Transmission Owners appear to argue that, because the Commission issued Order No. 1000 pursuant to its authority under section 206 of the Federal Power Act, 16 U.S.C. § 824e, the Commission—not System Operator or Transmission Owners—had the burden to prove that the tariff revisions proposed in System Operator's compliance filing were just and reasonable. *See* Br. 40-41 (citing *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194 (D.C. Cir. 2005); *Atl. City Electric Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002)). Transmission Owners contend that the Commission failed to carry that burden, and instead "sought to shift to [System Operator and Transmission Owners] the burden of demonstrating the justness and reasonableness of the revised rate." Br. 39-40.

As explained *supra* Section I.C, Transmission Owners waived this argument by not presenting it to the agency. However, if the Court finds that it has jurisdiction to review this argument, the Court should dismiss it on the merits. Transmission Owners' contention misinterprets the Federal Power Act and implicates policy decisions that were made in Order No. 1000.

In Order No. 1000, the Commission found, pursuant to section 206 of the Federal Power Act, 16 U.S.C. § 824e, that interregional transmission coordination reforms were necessary. Order No. 1000 P 369. The Commission "adopted a package of reforms addressing transmission planning and cost allocation that,

taken together, are designed to ensure that Commission-jurisdictional services are provided at just and reasonable rates and on a basis that is just and reasonable and not unduly discriminatory or preferential." First Order P 7, JA 152-54. Included in that package of reforms was the requirement that System Operator must have, together with its neighboring planning regions, a common method or methods of allocating the costs of new interregional transmission projects. *Id.* P 8, JA 154. The Commission's finding that the package of reforms in Order No. 1000 is just and reasonable was subsequently appealed to, and affirmed by, this Court; it is therefore final. *See South Carolina*, 762 F.3d 41. No party challenged the interregional coordination requirements on appeal, and the Court affirmed the Commission's findings on all issues raised. In this limited compliance proceeding, the only issue before the Commission (and therefore the Court) is whether System Operator's compliance filing is consistent with the guidance of Order No. 1000. *See City of Cleveland*, 773 F.2d at 1374; *High Point*, 140 FERC ¶ 61,259 at P 26 & n.30; *Entergy Servs.*, 101 FERC ¶ 61,141 at P 14.

Notwithstanding the fact that Transmission Owners failed to appeal the interregional coordination requirements of Order 1000, they now contend that the Commission has the burden to prove that whatever rate System Operator filed in response to Order No. 1000 is just and reasonable. Br. 37-44. Their argument entirely misunderstands the standard of review applicable to the compliance filing.

Under section 206 of the Federal Power Act, the Commission is empowered to find that an existing rate is unjust and unreasonable and to replace it with a just and reasonable rate. 16 U.S.C. § 824e. With regard to the interregional coordination requirements at issue here, the Commission made both of those findings in Order No. 1000. *See* Order No. 1000 PP 1-10 (invoking Federal Power Act section 206 to find that existing transmission planning processes were not just and reasonable, and announcing specific reforms). The cases cited by Transmission Owners are not to the contrary; both state correctly that when the Commission changes a jurisdictional rate or practice under Federal Power Act section 206, 16 U.S.C. § 824e, it must replace the previous, unjust and unreasonable rate with one that is just and reasonable. *See PPL Wallingford Energy*, 419 F.3d at 1199; *Atl. City Electric*, 295 F.3d at 10.

CONCLUSION

For the foregoing reasons, Transmission Owners' petition for review should be dismissed for lack of standing or ripeness. To the extent that the petition is not dismissed, it should be denied on the merits.

Respectfully submitted,

David L. Morenoff
General Counsel

Robert Solomon
Solicitor

/s/ Elizabeth E. Rylander
Elizabeth E. Rylander
Nicholas M. Gladd
Attorneys

Federal Energy Regulatory Commission
Washington, D.C. 20426
Tel: (202) 502-8466
Fax: (202) 273-0901

FINAL BRIEF: February 6, 2017

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 10,205 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.

/s/ Elizabeth E. Rylander

Elizabeth E. Rylander
Nicholas M. Gladd
Attorneys

Federal Energy Regulatory Commission
Washington, D.C. 20426
Tel.: (202) 502-8466
Fax: (202) 273-0901
elizabeth.rylander@ferc.gov
nicholas.gladd@ferc.gov

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injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

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

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(a).	June 11, 1946, ch. 324, § 10(a), 60 Stat. 243.

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

AMENDMENTS

1976—Pub. L. 94–574 removed the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

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

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

HISTORICAL AND REVISION NOTES

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

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

ABBREVIATION OF RECORD

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

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

Sec.
801. Congressional review.
802. Congressional disapproval procedure.
803. Special rule on statutory, regulatory, and judicial deadlines.
804. Definitions.
805. Judicial review.
806. Applicability; severability.
807. Exemption for monetary policy.
808. Effective date of certain rules.

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

(A) the later of the date occurring 60 days after the date on which—

(i) the Congress receives the report submitted under paragraph (1); or

(ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

(i) on which either House of Congress votes and fails to override the veto of the President; or

(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 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*, 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*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

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

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

(g) Books and records

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

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

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

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

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

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

TRANSFER OF FUNCTIONS

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and 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) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms ''electric utility companies'' and ''registered holding company'' shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.[1]

(d) Investigation of costs

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

(e) Short-term sales

(1) In this subsection:

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

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

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

(3) This section shall not apply to—

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

(B) an electric cooperative.

(4)(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

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

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

[1] See References in Text note below.

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

§ 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) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the 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) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

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

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

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

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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 6th day of February 2017, served the foregoing upon the counsel listed in the Service Preference Report via the Court's CM/ECF system or via U.S. Mail, as indicated below:

Brooksany Barrowes — Email
Baker Botts LLP
1299 Pennsylvania Avenue, NW
The Warner, Suite 1300 West
Washington, DC 20004-2400

James Walter Brew — Email
Stone Mattheis Xenopoulos & Brew, PC
Suite 800, West Tower
1025 Thomas Jefferson Street, NW
Washington, DC 20007

Matthew Ryan Dorsett — Email
MISO
720 City Center Drive
Carmel, IN 46032

James Carl Holsclaw — Email
The Holsclaw Group, LLC
303 E. Main Street
Plainfield, IN 46168

Marcia Elizabeth Hook Baker Botts LLP 1299 Pennsylvania Avenue, NW The Warner, Suite 1300 West Washington, DC 20004-2400	Email
Jennifer Mira Keisling LG&E Energy Corporation 220 West Main Street Louisville, KY 40202-0000	Email
Richard T. Saas Tennessee Valley Authority 400 West Summit Hill Drive Knoxville, TN 37902	US Mail
Christopher Davies Supino The Holsclaw Group, LLC 303 E. Main Street Plainfield, IN 46168	Email
Andrew W. Tunnell Balch & Bingham LLP 1710 Sixth Avenue North Birmingham, AL 35203	Email

Jesse Stuart Unkenholz
Balch & Bingham LLP
1710 Sixth Avenue North
Birmingham, AL 35203

Email

/s/ Nicholas Gladd
Nicholas Gladd
Attorney

Federal Energy Regulatory Commission
888 First Street, NE Washington, D.C. 20426
Telephone: (202) 502-8836
Fax: (202) 273-0901
Email: nicholas.gladd@ferc.gov