ORAL ARGUMENT SCHEDULED FOR FEBRUARY 6, 2019

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

No. 18-1166

MISSOURI RIVER ENERGY SERVICES,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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CORRECTED FINAL BRIEF: JANUARY 9, 2019

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The Parties before this Court are identified in Petitioner's Rule 28(a)(1) certificate.

B. Rulings Under Review

1. *Sw. Power Pool, Inc.*, 160 FERC ¶ 61,115 (2017) ("Initial Order"), R. 203, JA 617–56; and

2. *Sw. Power Pool, Inc.*, 163 FERC ¶ 61,063 (2018) ("Rehearing Order"), R. 209, JA 692–715.

C. Related Cases

This case has not previously been before this Court or any other court. To counsel's knowledge there are no related cases pending elsewhere. However, this Court has considered Federal Energy Regulatory Commission orders in the same agency proceeding in Case No. 15-1447. On November 28, 2017, this Court issued a decision in that matter denying the petition for review. *State Corp. Comm'n of Kan. v. FERC*, 876 F.3d 332 (D.C. Cir. 2017).

/s/ Jared B. Fish
Jared B. Fish

January 9, 2019

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GLOSSARY

1977 Contract	Transmission service contract between Nebraska Public Power District and Basin Electric Power Cooperative as operating agent for the Joint Owners (Apr. 29, 1977), JA 291–355
Attachment W	Attachment to the Southwest Power Pool Tariff listing grandfathered agreements
Br.	Corrected final opening brief of Petitioner Missouri River Energy Services
Carve-Out Settlement	Settlement resolving carve-out treatment for grandfathered agreements in the Southwest Power Pool's Integrated Marketplace, JA 364–86
Carve-out treatment	Exemption from congestion and marginal loss charges applicable to certain grandfathered agreements
Commission or FERC	Federal Energy Regulatory Commission
Grandfathered Agreement	Contracts receiving certain exemptions from the Southwest Power Pool Tariff
Grandfathered Agreement 496	Designation of the grandfathered 1977 Contract in Attachment W of the Southwest Power Pool Tariff
Initial Order	*Sw. Power Pool, Inc.*, 160 FERC ¶ 61,115 (2017), R. 203, JA 617–56.
Integrated System	Transmission system in the Great Plains Region
Integrated System Parties	Entities owning transmission facilities in the Integrated System: Western-Area Power Administration—Upper Great Plains Region, Basin Electric Power Cooperative, and Heartland Consumers Power District
JA	Deferred Joint Appendix

Joint Owners	Six public power authorities and electric cooperatives that own the Missouri Basin Power Project: Basin Electric Power Cooperative, Lincoln Electric System, Heartland Consumers Power District, Wyoming Municipal Power Agency, Tri-State Generation and Transmission Association, Inc., and Western Minnesota Municipal Power Agency
Nebraska Entities	Entities that joined the Southwest Power Pool in 2008: Nebraska Public Power District, Lincoln Electric System, and the Omaha Public Power District
P	Internal paragraph number in a FERC order
Partial Settlement	Joint partial settlement offer of the Southwest Power Pool, R. 174, JA 256–601
Power Project	Missouri Basin Power Project
R.	Record item
Rehearing Order	*Sw. Power Pool, Inc.*, 163 FERC ¶ 61,063 (2018), R. 203, JA 692–715
Southwest Pool, Pool, or SPP	Southwest Power Pool, Inc.
Stipulated Facts	Stipulated facts submitted by parties to the Partial Settlement, JA 277–90

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FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Missouri River Energy Services ("Missouri River") seeks an exemption from electric transmission-related charges assessed other members of a centralized electric power market. Missouri River joined a regional transmission organization—the Southwest Power Pool ("Southwest Pool," "Pool," or "SPP")—in 2015. It did so as part of an electric system integration plan that greatly expanded the Pool's transmission network across several States in the Great Plains Region. *See State Corp. Comm'n of Kan. v. FERC*, 876 F.3d 332, 333 (D.C. Cir. 2017) (upholding the expansion).

Like other regional transmission organizations, the Southwest Pool operates pursuant to a Tariff. That Tariff, which must be approved by Respondent Federal Energy Regulatory Commission ("FERC" or "the Commission"), sets forth terms of membership, including—as is relevant here—charges assessed members to account for electric losses that occur in the normal course of electric transmission. Like other entities who became Pool members after those charges took effect in 2014, Missouri River became responsible for those charges—called congestion and marginal loss charges—when it joined the Pool.

Missouri River and two other entities protested the charges as applied to them. They argued that their status as parties to a 1977 contract addressing payments for infrastructure upgrades exempted them from paying charges incident to transmission service on the Pool's system. The Commission denied their requested "carve-out" from the charges. Only Missouri River appeals that decision.

The question presented is:

Whether the Commission reasonably concluded, in interpreting an ambiguous tariff governing the calculation of wholesale electric rates, that Missouri River is not entitled to a special exemption from congestion and marginal loss charges required by the Pool's Tariff and assessed other members of the Pool.

JURISDICTIONAL STATEMENT

The Commission agrees with Missouri River's statement of jurisdiction.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the attached Addendum.

STATEMENT OF FACTS

I. Background

A. The Missouri Basin Power Project and the 1977 Contract

This dispute has its genesis in an agreement between six entities[2] to finance the construction of new transmission facilities. In the late 1970s, those entities—public power authorities and electric cooperatives (collectively, the "Joint Owners")—decided to construct and own energy infrastructure in the Midwest. *Sw. Power Pool, Inc.*, 160 FERC ¶ 61,115 at P 2 (2017) ("Initial Order"), R. 203, JA 618, *order denying reh'g*, 163 FERC ¶ 61,063 (2018) ("Rehearing Order"), R. 209, JA 692. That initiative—the Missouri Basin Power Project (the "Power Project")—consists of transmission facilities and a power plant in Wyoming.[3]

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[2] The six entities are Basin Electric Power Cooperative ("Basin Electric"), Lincoln Electric System ("Lincoln Electric"), Heartland Consumers Power District ("Heartland"), Wyoming Municipal Power Agency, Tri-State Generation and Transmission Association, Inc., and Western Minnesota Municipal Power Agency ("Western Minnesota"). Sw. Power Pool, Inc., *Resubmission of Joint Offer of Partial Settlement and Request for Shortened Procedures and Waiver of Settlement Comment Period*, Appendix B: Stipulated Facts ¶ 6 (filed Mar. 24, 2016) ("Stipulated Facts"), R. 174, JA 279.

[3] One of the Joint Owners—Western Minnesota Municipal Power Agency ("Western Minnesota")—has sold all of its capacity in the Power Project to

Initial Order P 2, JA 618; Stipulated Facts ¶ 7, JA 279–80; Transmission Service Contract Between Neb. Pub. Power Dist. and Basin Elec. Power Coop. at 1 (Apr. 29, 1977) ("1977 Contract"), JA 294.

The Joint Owners designed the Power Project to transmit power to certain destination points. *See* Initial Order P 2, JA 618; Stipulated Facts ¶ 7, JA 279–80. Specifically, electricity would be delivered to a transmission network called the Integrated System in the Upper Great Plains Region. *State Corp. Comm'n of Kan.*, 876 F.3d at 333; Initial Order P 2, JA 618. The Integrated System included transmission facilities owned by Western Area Power Administration—Upper Great Plains Region, Basin Electric, and Heartland (the "Integrated System Parties"). Initial Order P 2 n.5, JA 618; Rehearing Order P 3, JA 692–93.

To finance the construction of the additional transmission infrastructure necessary to transmit the new power, Basin Electric—on behalf of Missouri River and the other Joint Owners—contracted with the Nebraska Public Power District ("Nebraska Power") in 1977. Initial Order P 2, JA 618; Rehearing Order P 3, JA 693. Under the 1977 Contract, the Joint Owners—including Missouri River—agreed to pay Nebraska Power approximately $54.4 million to construct the

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Petitioner Missouri River. Initial Order P 2 n.4, JA 618; Stipulated Facts ¶ 2, JA 277. The Commission recognizes Missouri River and not Western Minnesota as the real party in interest in the Power Project, and has treated the two entities as one for ratemaking and other regulatory purposes. *See Mo. River Energy Servs.*, 125 FERC ¶ 61,300 at P 16 (2008), *order on clarification*, 127 FERC ¶ 61,024 (2009); Stipulated Facts ¶ 2, JA 277–78. This brief does the same.

necessary transmission infrastructure, and to pay annual operating and maintenance costs. Initial Order P 2, JA 618; Stipulated Facts ¶ 10, JA 281. In return, the Joint Owners received transmission service on Nebraska Power's transmission network. Initial Order P 2, JA 618; Rehearing Order P 3, JA 693; Stipulated Facts ¶ 9, JA 280–81. Until October 1, 2015, when the Integrated System and Missouri River joined the Southwest Pool, transmission service was provided by the Integrated System. Stipulated Facts ¶¶ 11, 30, JA 282, 287–88.

B. The 2008 Expansion of the Southwest Pool to Include Lincoln Electric and the Other Nebraska Entities

The Southwest Pool began operations in the central United States in 2004. *Sw. Power Pool, Inc.*, 125 FERC ¶ 61,239 at P 2 (2008), JA 716.[4] As a regional transmission organization, the Pool oversees wholesale electric sales and interstate transmission of power over facilities owned by member utilities. *See Okla. Gas & Elec. Co. v. FERC*, 827 F.3d 75, 77 (D.C. Cir. 2016). It does so pursuant to a Tariff that sets forth uniform rules governing those transactions. *See Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1364 (D.C. Cir. 2004).

In 2008, Nebraska Power, Lincoln Electric, and the Omaha Public Power District (collectively the "Nebraska Entities") became members of the Southwest Pool (in Pool parlance, they became Pool transmission owners). Initial Order P 3,

[4] *See* Sw. Power Pool, Inc., *About Us*, *available at* https://www.spp.org/about-us/ (last accessed Nov. 19, 2018).

JA 618–19; Rehearing Order P 4, JA 693; *Sw. Power Pool, Inc.*, 125 FERC ¶ 61,239 at P 1, JA 716. By joining the Pool, they also became subject to the Pool's Tariff. *See Sw. Power Pool, Inc.*, 125 FERC ¶ 61,239 at PP 3, 8 n.4, JA 716, 717. But as part of the Nebraska Entities' membership deal, the Pool included the 1977 Contract as a grandfathered agreement at Attachment W of its Tariff, designated as Grandfathered Agreement 496.[5] Initial Order P 3, JA 618–19; Rehearing Order P 4, JA 693. The description of the 1977 Contract in the Tariff includes the transmission reservations of Missouri River and Lincoln Electric. *Id.*; Stipulated Facts ¶ 17, JA 283–84. Because that Contract was added to the Tariff as a grandfathered agreement, the Contract—governing payments for infrastructure upgrades and attendant operating expenses—remained in effect. *See* Initial Order P 81, JA 653–54. That remained true even after Missouri River joined the Pool in 2015 (*see infra*, "Background," Part I.E). *See id.*

C. The 2012 Tariff Modifications Assessing Congestion and Marginal Loss Charges on Southwest Pool Members

In February 2012, the Southwest Pool filed with the Commission a Tariff revision. Initial Order P 4, JA 619; Rehearing Order P 5, JA 693; Stipulated Facts ¶ 19, JA 284. That revision—called the Integrated Marketplace proposal—sought changes to the Pool's electric market design. *Id.* As relevant here, it included

[5] Because the 1977 Contract is listed as Grandfathered Agreement 496 in the Pool's Tariff, this brief uses the two terms interchangeably.

assessment of congestion and marginal loss charges associated with Pool transmission service, including on parties to grandfathered agreements. *Id.* The term "marginal losses" refers to the amount of power loss that occurs as electricity flows across the grid.[6] All members of the Southwest Pool bear the costs of these losses.[7] The term "congestion charges" refers to charges covering losses incurred during times of transmission congestion.[8] As with marginal losses, these costs are spread across Pool members.[9]

Several parties to the 1977 Contract—Nebraska Power, Missouri River, Heartland, and Basin Electric—protested the Pool's proposal. Initial Order P 4, JA 619; Rehearing Order P 5, JA 693. In its answer, the Pool noted that Missouri River's 272 megawatt transmission reservation—while listed in the description of Grandfathered Agreement 496—did not fall within its transmission footprint, and

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[6] Sw. Power Pool, Inc., *Submission of Tariff Revisions to Implement SPP Integrated Marketplace*, Transmittal Letter at 24 & Exhibit SPP-3 at 18–19 (filed Feb. 29, 2012) ("Transmittal Letter to Integrated Marketplace Proposal"), JA 744, 765–66; *see also* Sw. Power Pool, "Marginal Loss Component," *available at* https://www.spp.org/glossary/?term=mlc (last accessed Nov. 19, 2018).

[7] Transmittal Letter to Integrated Marketplace Proposal at 24 & Exhibit SPP-3 at 19, JA 744, 765–66; *see also* Rehearing Order P 26, JA 702 (explaining that carving out congestion and marginal loss charges for certain customers shifts those costs to other customers).

[8] Transmittal Letter to Integrated Marketplace Proposal at 18, JA 738; *Sw. Power Pool, Inc.*, 141 FERC ¶ 61,048 at P 229 (2012), JA 808–09, *order on reh'g and clarification*, 142 FERC ¶ 61,205 (2013).

[9] Transmittal Letter to Integrated Marketplace Proposal at 18, JA 738; *see also* Rehearing Order P 26, JA 702.

so it would not assess the charges on Missouri River. Initial Order P 4, JA 619–20; Rehearing Order P 5, JA 693–94. In response, Missouri River and Heartland conditionally withdrew their protest, based on their understanding that they would not be subject to the Integrated Marketplace's assessment of congestion and marginal loss charges. Initial Order P 4 & n.16, JA 619–20.

In October 2012, the Commission directed the Pool to enter into settlement negotiations with protestors who were parties to grandfathered agreements, and whose integration into the Integrated Marketplace had not been resolved. Initial Order P 4, JA 620; Rehearing Order P 6, JA 694. The Commission also directed the Pool to clarify whether it agreed with the reason Missouri River and Heartland gave for withdrawing their protest. *Id*. In response, the Pool explained that, because Missouri River and Heartland's transmission reservations under Grandfathered Agreement 496 were not, at that time, part of its network, it would not assess congestion and marginal loss charges on them. Initial Order P 4 & n.19, JA 620–21.

D. The 2013 Settlement Addressing Treatment of Grandfathered Agreements

In July 2013, the Southwest Pool reached an agreement with parties to the grandfathered agreements to address carve-out treatment. Initial Order P 5, JA 621; Rehearing Order P 7, JA 694. The resulting settlement—the Carve-Out Settlement ("Settlement")—determined with finality which transmission

reservations under the Pool's Tariff would receive a carve-out from congestion and marginal loss charges. Sw. Power Pool, Inc., *Submission of Offer of Settlement Resolving Treatment of Grandfathered Agreements in SPP's Integrated Marketplace*, Transmittal Letter at 3 (filed July 31, 2013) ("Carve-Out Settlement"), JA 367 (explaining that the Settlement "will resolve all issues concerning the process for determining carve-out eligibility for [grandfathered agreement]s and will specifically identify those [grandfathered agreement]s deemed to meet the eligibility criteria for carve-out"). Article 2.2 of the Settlement states that "Schedule 1 constitutes the exclusive list of eligible 'Carved-Out [grandfathered agreements],' meaning that only those agreements and the megawatts associated with them identified on Schedule 1 are eligible for carve-out treatment in [the Southwest Pool's] Integrated Marketplace." Stipulated Facts ¶ 26, JA 286 (quoting Carve-Out Settlement, Article 2.2, JA 377)) (brackets used in quoted material in this brief generally indicates spelled-out acronyms). As concerns Grandfathered Agreement 496, Schedule 1 explains that only Lincoln Electric's 190 megawatt reservation—and not Missouri River's 272 megawatt reservation—is eligible for carve-out treatment: "'Contract 496 covers two (2) reservations,'" but "'only the 190 megawatt reservation under this [grandfathered agreement] is eligible for carve-out.'" *Id*. ¶ 26, JA 286–87 (quoting Carve-Out Settlement, Schedule 1, JA 385).

Once the Pool and protestors finalized the Carve-Out Settlement, the Pool proposed implementing Tariff changes. Initial Order P 5, JA 621; Rehearing Order P 7, JA 694. The pertinent Tariff revision references carve-out-eligible agreements—which are listed in the Settlement—and sets forth procedures that parties to those agreements must follow to receive carve-out treatment. *See* Initial Order P 42, JA 637 (quoting Sw. Power Pool, Inc., *Open Access Transmission Tariff, Sixth Revised Volume No. 1*, Att. AE § 2.16 ("Sw. Pool Tariff"), JA 415).

In July 2013, the Pool filed the Settlement and implementing Tariff revisions. Initial Order P 5, JA 621; Rehearing Order P 7, JA 694. In September 2013, the Commission conditionally approved the Settlement and conditionally accepted the Tariff revisions. *Id.*; *see also* 16 U.S.C. § 824d (Commission approves Tariff provisions if they result in just and reasonable electric rates). The Commission's decision ended the Integrated Marketplace proceeding and resolved the carve-out issue. *See* Initial Order P 5, JA 621; Rehearing Order P 7, JA 694. Missouri River did not protest the Settlement or the implementing Tariff revisions. Rehearing Order P 36, JA 706; Stipulated Facts ¶ 27, JA 287. The Integrated Marketplace commenced in March 2014. Initial Order P 5, JA 621; Rehearing Order P 7, JA 694.

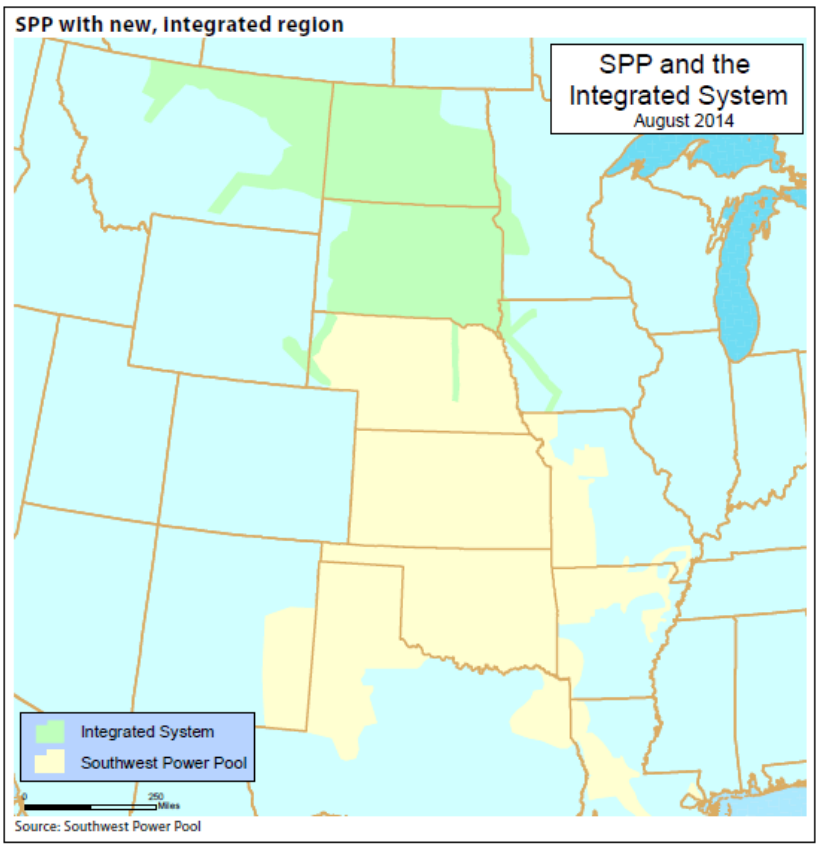
E. The 2014 Decision of the Integrated System Parties to Join the Southwest Pool

In September 2014, the Pool made a filing under section 205 of the Federal Power Act, 16 U.S.C. § 824d, to accommodate a request by the Integrated System Parties to join the Pool. *See Sw. Power Pool, Inc.*, 149 FERC ¶ 61,113 at P 1 (2014), R. 95, JA 138–39, *order on reh'g and clarification*, 153 FERC ¶ 61,051 at P 1 (2015), R. 144, JA 210; Initial Order P 6, JA 621; Rehearing Order P 8, JA 694. As discussed, prior to integration Missouri River and the other Integrated System Parties received transmission service provided by the Integrated System. Stipulated Facts ¶¶ 11, 30, JA 282, 288. After integration, that service was converted to Southwest Pool Network Integration Transmission Service. *Id.* ¶ 31, JA 288. The record does not reflect that any party protested the service change, or that the Integrated System service agreement was grandfathered under the Pool's Tariff.

Nevertheless, Missouri River protested the integration proposal. Initial Order P 6, JA 621; Rehearing Order P 8, JA 694. It argued it should receive carve-out treatment from congestion and marginal loss charges associated with Pool transmission service because it was a party to the grandfathered 1977 Contract. *See id.*

In November 2014, the Commission issued an order conditionally approving the Pool's proposal and setting the grandfathered agreement carve-out issue for

hearing and settlement judge procedures. *Sw. Power Pool, Inc.*, 149 FERC ¶ 61,113 at P 2, JA 139; Initial Order P 6, JA 621–22; Rehearing Order P 8, JA 694. In October 2015, the Integrated System Parties, as well as Missouri River, became Southwest Pool members and began taking Pool transmission service. Initial Order P 6, JA 622; Rehearing Order P 8, JA 694–95. The following map illustrates the Pool's footprint before and after integration:



Ultimately, the parties to the 1977 Contract and the Pool could not agree on carve-out treatment. Initial Order P 7, JA 622; Rehearing Order P 9, JA 695. But they did agree to a partial settlement, which initiated the current proceeding on

judicial review to address their carve-out eligibility. *Id*. In June 2016, the Commission approved an uncontested Joint Offer of Partial Settlement ("Partial Settlement") between the Southwest Pool, Missouri River, Nebraska Power, and the Integrated System Parties. *Id*. The Partial Settlement includes a list of stipulated facts, which are referenced in the orders on review and cited in this brief. Initial Order P 7, JA 622. The September 26, 2017 Initial Order and April 27, 2018 Rehearing Order followed.

II. The Commission Orders on Review

In its Initial Order, the Commission denied the requests of Missouri River, Basin Electric, and Heartland for carve-out treatment from congestion and marginal loss charges.[10] Rehearing Order P 1, JA 692. The Commission began with the text of the Pool's Tariff. Initial Order P 40, JA 636. It found that while the Tariff contemplates grandfathered agreements eligible for carve-out treatment, it does not define eligibility criteria and is therefore ambiguous. *Id*. PP 44–45, JA 638–39. Following its practice of considering extrinsic evidence to clarify ambiguous tariff provisions, the Commission looked to the Carve-Out Settlement and related Tariff proceedings, as well as its own precedent addressing carve-out proposals in other regional transmission organizations. *Id*. PP 46–51, JA 639–41.

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[10] As discussed *supra*, Basin Electric and Heartland are two of the Integrated System Parties that sought entry into the Southwest Pool after the Integrated Marketplace took effect. *See* Rehearing Order PP 3, 8, JA 693–94.

The Commission began by observing that the Settlement sets forth the exclusive list of grandfathered agreements eligible for carve-out treatment. *Id.* P 46, JA 639–40. It noted that Missouri River's reservation under Grandfathered Agreement 496 is expressly excluded. *Id.* The Commission then consulted its past precedent—namely, its orders in the *Dairyland* proceeding, *see Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,221 (2009) *("Dairyland I")*, *order on reh'g and compliance*, 131 FERC ¶ 61,163 (2010) *("Dairyland II")*—where it had similarly granted carve-out treatment to parties who were already members of a regional transmission organization at the time of a tariff change, but denied it to those who joined later. Initial Order PP 47–48, JA 640. The Commission rejected the argument that granting carve-out treatment to Lincoln Electric and not to other parties to the 1977 Contract constituted undue discrimination. *Id.* PP 61–63, JA 645–46. It found that, consistent with *Dairyland*, Missouri River, Basin Electric, and Heartland were not similarly situated to Lincoln Electric. *Id.* That is because Lincoln Electric, as a member of the Southwest Pool when the Integrated Marketplace and attendant congestion and marginal loss charges took effect, had no choice but to accept those FERC-approved charges absent a carve-out. *Id.* P 62, JA 645–46. By contrast, Missouri River, Basin Electric, and Heartland faced no such government compulsion: they voluntarily chose to join the Pool after the charges were in place, and so could weigh the costs and benefits of membership under those conditions. *Id.*

The Commission also rejected the argument that it was equitably estopped from assessing the charges based on the Pool's prior statements in the Integrated Marketplace proceeding. *Id*. PP 73–77, JA 650–52. It found that Missouri River, Basin Electric, and Heartland unreasonably interpreted the Pool's statement declining to assess charges at that time as a promise not to do so in the future. *Id*. P 75, JA 651. It explained that the Pool had expressly stated it would not assess charges on those entities because they did not transmit power over its network. *Id*. But the Pool made no representation that those entities would continue receiving an exemption if they eventually joined the Pool, as they did in 2015. *Id*.

Finally, the Commission rejected the argument that assessing congestion and marginal loss charges modified or abrogated the 1977 Contract. Initial Order P 81, JA 653–54. It explained that the charges did not alter the Contract at all because Missouri River, Basin Electric, and Heartland continued to perform under the terms of the Contract. Initial Order PP 80–81, JA 653–54; Rehearing Order P 55, JA 713. Instead, the charges reflected those entities' new use of Pool transmission service, which is distinct from the payments related to infrastructure upgrades under the 1977 Contract. *Id*.; *see also* Stipulated Facts ¶ 9, JA 281. Moreover, exempting those entities from congestion and marginal loss charges would mean shifting costs associated with their use of Pool service to other Pool members. Initial Order P 28, JA 631–32; Rehearing Order P 26, JA 702. The Commission distinguished this proceeding from a case relied upon by Missouri River, Basin

Electric, and Heartland, where this Court applied a higher standard of review—the *Mobile-Sierra* public interest test—to the modification of private-party contracts there. Rehearing Order PP 56–57, JA 713–14 (citing *Wisc. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 272–73 (D.C. Cir. 2007) (citing *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) and *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956))).

Missouri River appealed; Basin Electric and Heartland did not.

SUMMARY OF ARGUMENT

Missouri River seeks treatment not afforded similarly situated members of the Southwest Pool: the benefits of Pool membership, without having to pay its share of operating expenses. The Commission, however, reasonably concluded otherwise. Relying on the full context of prior proceedings assessing carve-out treatment for Pool members, a reasonable interpretation of an ambiguous Tariff provision, and its own precedent, the Commission acted well within its discretion in declining to exempt Missouri River from the Pool's generally applicable congestion and marginal loss charges associated with Pool transmission service.

First, the Commission reasonably read Tariff Section 2.16 to be ambiguous. That provision references "a party to [grandfathered agreement](s) eligible for [grandfathered agreement] Carve Out," but leaves undefined the criteria for eligibility in the first place. Consistent with its past practice—endorsed by this Court—the Commission considered extrinsic evidence to clarify the ambiguity.

Specifically, the Commission looked to documents in the 2013 Carve-Out Settlement proceeding, which resolved which grandfathered agreements would receive carve-out treatment in the new Integrated Marketplace. The resulting Carve-Out Settlement—uncontested by Missouri River and approved by the Commission—established that, of the transmission reservations in the 1977 Contract (listed in the Tariff as Grandfathered Agreement 496), "only the 190 megawatt [Lincoln Electric] reservation under [Grandfathered Agreement 496] is eligible for carve-out." The Settlement expressly excludes Missouri River's 272 megawatt reservation. Missouri River now seeks to protest that determination by asserting a new construction of the Settlement's terms and the implementing Tariff itself. The Commission, however, reasonably concluded that the text of the Settlement, filed concurrently with the Tariff revision, militates against granting Missouri River a carve-out.

Second, the Commission acted consistent with its own precedent. Several years ago, the Commission considered a similar request for carve-out treatment in the *Dairyland* proceeding, which involved another regional transmission organization. There, the Commission denied such treatment for grandfathered agreements held by *prospective* members at the time of the tariff revision at issue, and retained carve-out treatment for entities that were *existing* members at the time the revision took effect. Applying that principle here, the Commission drew a bright line between Missouri River—a prospective Southwest Pool member at the

time of the Integrated Marketplace, and Lincoln Electric—an existing member at that time. Consistent with *Dairyland*, the Commission reasonably concluded that Missouri River was not eligible for carve-out treatment.

Third, the Commission did not err in declining to apply a rigorous "public interest" standard of review to its decision not to grant Missouri River a special exemption. As an initial matter, Missouri River waives this argument because it fails to support its conclusory assertion that the Commission abrogated or modified the 1977 Contract—the occurrence that Missouri River argues triggers the "public interest" review standard. In any event, as the Commission found and Missouri River concedes, Missouri River continues to make payments under the terms of the 1977 Contract related to certain infrastructure upgrades. Congestion and marginal loss charges assessed under the Pool's Tariff, by contrast, relate to something else: costs associated with Pool transmission service. Requiring Missouri River to pay its share of those costs for a service it uses does not modify—much less abrogate—the terms of the 1977 Contract.

Finally, Missouri River fails to develop a reasoned equitable estoppel argument. It is therefore waived. To the extent Missouri River purports to argue that it relied to its detriment on the Southwest Pool's past statement declining to assess congestion and marginal loss charges on it, the Commission reasonably concluded that any such reliance was unwarranted. Indeed, a fair reading of the

Pool's statement is that Missouri River *would* be assessed those charges should it ultimately join the Pool. That is precisely what happened.

ARGUMENT

I. Standard of Review

The Commission's determinations are reviewed under the Administrative Procedure Act's "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A); *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). Review under this standard is narrow. *Elec. Power Supply Ass' n*, 136 S. Ct at 782. "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.* (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

II. The Commission Correctly Determined That the Tariff Provision Governing Carve-Out Treatment is Ambiguous, and Reasonably Interpreted That Provision to Exclude Missouri River's Reservation From Carve-Out Treatment

Under the Southwest Pool's Tariff, a grandfathered agreement that receives carve-out treatment is exempt from "congestion and marginal loss charges for the amount of energy ([megawatt hours]) actually transacted associated with [grandfathered agreements]." Sw. Pool Tariff, § 1.1 ("Definitions G"), JA 408.

But while the Tariff recognizes that certain grandfathered agreements are carve-out-eligible, it does not set forth criteria for determining eligibility in the first place. The pertinent provision—Section 2.16 of Attachment AE—merely acknowledges "[grandfathered agreement](s) eligible for [grandfathered agreement] Carve Out …." Initial Order P 42, JA 637 (quoting Sw. Pool Tariff, Att. AE § 2.16, JA 415).

Missouri River suggests that the Tariff unambiguously mandates carve-out treatment for its 272 megawatt reservation. Br. 28–34. But it does so by eliding the actual text of the Tariff, while conflating grandfathered agreements with the subset of those agreements that are carve-out-eligible.

A. The Southwest Pool Tariff is Ambiguous

Consistent with FERC's broad discretion in setting wholesale rates, courts "generally give[ ] substantial deference to [FERC's] interpretation of filed tariffs, even where the issue simply involves the proper construction of language." *FPL Energy Marcus Hook, L.P. v. FERC*, 430 F.3d 441, 446–47 (D.C. Cir. 2005) (quoting *S. Cal. Edison Co. v. FERC,* 415 F.3d 17, 21 (D.C. Cir. 2005)) (internal quotation marks omitted). The deference applied is "*Chevron*-like" in nature, meaning the Court should "defer to FERC's construction so long as it is reasonable." *Consol. Edison Co. of New York, Inc. v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003); *ESI Energy, LLC v. FERC*, 892 F.3d 321, 329 (D.C. Cir. 2018)

(same). Deference is inappropriate, however, where the tariff language is unambiguous. *Id.*

Tariff Section 2.16 is ambiguous. It provides that:

> (a) Transmission Owners that are a party to *[grandfathered agreement](s) eligible for [grandfathered agreement] Carve Out* 30 days prior to the start of the initial transmission service verification as described in 7.1.1 of Attachment AE shall:
>
> 1. Elect [grandfathered agreement] Carve Out;
> 2. Elect such [grandfathered agreement](s) be treated comparably to other firm transmission reservations eligible for Auction Revenue Rights and Transmission Congestion Rights in accordance with Attachment AE of this Tariff; or
> 3. Convert such [grandfathered agreement] to Transmission Service or Network Integration Service under this Tariff.
>
> (b) A [grandfathered agreement] added to Attachment W of the Tariff after October 18, 2012 shall be subject to the following treatment:
>
> (1) Auction Revenue Rights and Transmission Congestion Rights eligibility under Attachment AE of this Tariff; or
> (2) Full conversion to Transmission Service or Network Integration Transmission Service under this Tariff.

Initial Order P 42, JA 637 (quoting Sw. Pool Tariff, Att. AE § 2.16, JA 415). Subsection (b) does not apply because Grandfathered Agreement 496 was added to Attachment W in 2008—before the October 18, 2012 trigger date. *Id*. P 43, JA 637–38. Missouri River does not challenge the inapplicability of subsection (b).

Subsection (a), on the other hand, does apply because Missouri River is a transmission owner and also a "party to [a] [grandfathered agreement][]." Stipulated Facts ¶¶ 17, 31, JA 283–84, 288. But Subsection (a) states that only certain grandfathered agreements are "eligible for [grandfathered agreement] Carve Out." It leaves unanswered the question of *whether* a grandfathered agreement is so eligible in the first place. Thus, the Commission concluded that the Tariff is ambiguous and does not determine Missouri River's carve-out eligibility. Initial Order PP 44–45, JA 638–39.

Missouri River disagrees. While it does not explain why it believes "[Grandfathered Agreement] 496 [i]s [u]nambiguously [e]ligible for the [grandfathered agreement] [c]arve-[o]ut" under the Tariff, Br. 29, its assertion appears to be rooted in the fact that "[t]he [Southwest Pool] Tariff specifies that to qualify for Carve-Out Treatment, the [grandfathered agreement] had to have been listed in Attachment W prior to commencement of the [Southwest Power Pool] [Integrated Marketplace]." *Id*. at 30. True enough. But another step in the inquiry is involved, one that Missouri River does not engage: determining *which* grandfathered agreements in the Tariff are carve-out-eligible. Missouri River's argument assumes that if a grandfathered agreement is listed in the Tariff, then it must be eligible for carve-out treatment.

Missouri River offers no basis for this assumption, and the Tariff's text offers a ready rejoinder. It provides distinct, stand-alone definitions for "Grandfathered

Agreements" and "[Grandfathered Agreement] Carve Out." Stipulated Facts ¶ 17 n.13, JA 283; Sw. Pool Tariff, § 1.1 ("Definitions G"), JA 408, 845–46. The former is defined as any one of several listed types of agreement, and the latter is defined as a particular type of treatment—"[r]emoval of the congestion and marginal loss charges …"—that can be applied to grandfathered agreements. *See id.* Moreover, Tariff Section 2.16—quoted above—expressly contemplates that not all grandfathered agreements are "eligible for [grandfathered agreement] Carve Out." If all such agreements were so eligible, then Section 2.16 would not specify that *only* "[grandfathered agreement](s) eligible for [grandfathered agreement] Carve Out" may, in fact, receive carve-out treatment. Where practicable, courts read a tariff in a way that gives effect to all of its provisions. *Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698, 703 (D.C. Cir. 2010) (citing Restatement (Second) of Contracts § 203(a) (2009)). The Commission's acknowledgment that grandfathered agreements receiving carve-out treatment are a subset of the universe of *all* grandfathered agreements adheres to this canon. *See* Rehearing Order PP 21, 24–25, 54, JA 699, 700–01, 712 ("Mere status as a party to [Grandfathered Agreement] 496 does not establish an entitlement to carve-out treatment for any of the parties to that contract.").

Missouri River's argument on appeal falls short for another reason. It is undisputed that Grandfathered Agreement 496 was added to the Tariff at Attachment W before the Integrated Marketplace took effect. If, as Missouri River

suggests, the only relevant consideration for carve-out eligibility is the date the grandfathered agreement was added, *see* Br. 30, then there was no need to wrestle with the question of carve-out treatment in the settlement proceeding. It would have been obvious that all grandfathered agreements added before the Integrated Marketplace were entitled to the exemption. Yet determining the eligibility of those agreements was the entire purpose of the Carve-Out Settlement—a proceeding Missouri River did not challenge. *See Sw. Power Pool, Inc.*, 144 FERC ¶ 61,254 at PP 3, 18 (2013), JA 825, 830; Stipulated Facts ¶¶ 26–29, JA 286–87.

In short, contrary to Missouri River's contention, the Commission correctly determined that the Tariff is ambiguous on the question of its eligibility for carve-out treatment, because it does not establish criteria for determining *whether* a grandfathered agreement is a "[grandfathered agreement] eligible for Carve Out." Initial Order PP 40–44, JA 636–38; Rehearing Order P 22, JA 700.

B. The Commission Reasonably Considered Extrinsic Evidence to Resolve the Ambiguity in Tariff Section 2.16

Confronted with an ambiguity in the Tariff, the Commission turned to extrinsic evidence. Initial Order P 46, JA 639; Rehearing Order PP 14–16, 23–24, JA 696–97, 700–01. In doing so, it adopted an interpretive approach consistent with its past practice. *See, e.g.*, *Cent. N.Y. Oil and Gas Co.,* LLC, 152 FERC ¶ 61,097 at P 30 (2015) ("Given the ambiguity in the [contract] provisions, the Commission must look to extrinsic evidence to resolve the ambiguity."); *Keyspan-*

Ravenswood LLC v. N.Y. Indep. Sys. Operator, Inc., 119 FERC ¶ 61,089 at P 27 n.23 (2007) ("Because the Tariff was reasonably susceptible to different interpretations, the Commission found that extrinsic evidence of interpretation or intent may also be relied upon in interpreting the Tariff."); *Miss. River Transmission Corp.*, 96 FERC ¶ 61,185 at 61,819 (2001) (explaining that "'[i]f a contract is ambiguous … the parties may introduce extrinsic evidence of the parties' intent to prove a meaning to which the contract language is reasonably susceptible'" (quoting *Pac. Gas and Elec. Co.*, 85 FERC ¶ 61,180 at 61,724 (1998))). This Court has approved the Commission's approach. *See, e.g.*, *Old Dominion Elec. Coop., Inc. v. FERC*, 518 F.3d 43, 48–49 (D.C. Cir. 2008) (affording "substantial deference" to FERC's consideration of extrinsic evidence to "resolve the ambiguities" in a tariff); *see also Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814–15 (D.C. Cir. 1998) ("If the tariff language is ambiguous, we defer to the Commission's construction of the provision so long as that construction is reasonable.").

Missouri River takes issue with FERC's consideration of extrinsic evidence, arguing that, once the Commission discerned an ambiguity, it should have automatically construed the Tariff's language against the author, the Southwest Pool. Br. 34–38. This interpretive canon—*contra proferentem*—holds that ambiguities in a written instrument should be resolved against the drafter. *See*

United States v. Ins. Co. of N. Am., 131 F.3d 1037, 1043 n.11 (D.C. Cir. 1997) (quoting Restatement (Second) of Contracts § 206 cmt. a (1979)).

Missouri River's argument is meritless. First, Missouri River erroneously asserts that the Commission "offered no guidance about how it chose the interpretative method it selected." *Cf.* Br. 37. To the contrary, the Commission explained that, because the relevant clause in Tariff Section 2.16 is ambiguous, it would follow its established practice of "turn[ing] to extrinsic evidence." Initial Order P 44, JA 638 (citing *N.Y. Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,032 at P 30 (2010); *N.Y. Indep. Sys. Operator, Inc. v. Astoria Energy LLC*, 118 FERC ¶ 61,216 at P 34 (2007)); Rehearing Order P 23, JA 700 ("[t]o resolve the ambiguity," the Commission considered extrinsic evidence "in accordance with its precedent"). Missouri River's repeated assertion that FERC offered "no explanation" for its interpretive approach is plainly wrong. *Cf.* Br. 37.

Second, Missouri River's paean to *contra proferentem* ignores the Commission's past and repeated use of extrinsic evidence to resolve ambiguities. As the Commission explained in the rehearing order below, "[t]he Commission has rejected the treatment of th[e *contra proferentem*] canon of construction as a strict rule." Rehearing Order P 26, JA 702. Indeed, the Commission routinely enlists the aid of extrinsic evidence, and has expressly rejected calls to reflexively interpret ambiguities against the drafter. *See, e.g.*, *Cent. N.Y.*, 152 FERC ¶ 61,097 at PP 23, 29–30 (rejecting call to interpret an ambiguous contract provision against the

drafter, and instead considering extrinsic evidence); *Miss. River*, 96 FERC ¶ 61,185 at 61,819 (rejecting petitioners' call for a tariff's ambiguous provision to be "resolved against" the drafter, and instead looking to "extrinsic evidence of the parties' intent" (internal quotation marks omitted)).

Accordingly, because Missouri River errs in asserting that the Commission departed from past practice by considering extrinsic evidence, it fails to meet its burden of showing that FERC's use of that interpretive tool here was unreasonable. *See Koch Gateway*, 136 F.3d at 814–15 (court will uphold Commission's interpretations of ambiguous tariff provisions "so long as [its] construction is reasonable"). The Court should uphold the Commission's interpretive approach. *Id*.

C. The Commission Reasonably Concluded That Tariff Section 2.16 Does Not Entitle Missouri River to Carve-Out Treatment

The Commission evaluated two pieces of extrinsic evidence. First, it assessed the Southwest Pool's transmittal letter in the Tariff proceeding that implemented the Carve-Out Settlement. Initial Order P 46, JA 639. There, the Pool articulated its intent to exclude from carve-out treatment those entities not included in the 2013 Carve-Out Settlement, explaining that "'[t]he concurrently-filed settlement specifies those [grandfathered agreements] from Attachment W that may be carved out from the Integrated Marketplace. *Other [grandfathered agreements] are ineligible for carve-out treatment*.'" Initial Order P 46, JA 639

(emphasis in order) (quoting Sw. Power Pool, Inc., *[Grandfathered Agreement] "Carve-Out" Rules*, Transmittal Letter at 9 (filed July 31, 2013), JA 396) (internal quotation marks omitted).

Second, the Commission observed that Article 2.2 of the Settlement states that Schedule 1 of the Settlement "'constitutes the *exclusive list* of eligible Carved-Out grandfathered agreements, meaning [that] *only those agreements* and the megawatts associated with them identified … *are eligible for carve-out treatment* ….'" *Id*. (quoting Carve-Out Settlement, Article 2.2, JA 377) (emphasis added) (internal quotation marks omitted). For its part, Schedule 1 states that "only the 190 megawatt reservation under this [Grandfathered Agreement] [496—i.e., the Lincoln Electric reservation] is eligible for carve-out …." *Id*. (quoting Carve-Out Settlement, Schedule 1, JA 385).

The Commission's determination is reasonable. First, its construction gives effect to the Southwest Pool's intent of limiting carve-out treatment under Grandfathered Agreement 496 to Lincoln Electric's reservation—a decision the Commission approved and that Missouri River did not challenge. *Sw. Power Pool, Inc.*, 144 FERC ¶ 61,254 at P 18, JA 830; Stipulated Facts ¶ 27, JA 287.

Second, the Commission's construction avoids anomalous results. *See, e.g.*, *Validus Reinsurance, Ltd. v. United States*, 786 F.3d 1039, 1045–46 (D.C. Cir. 2015) (explaining that courts "must … avoid statutory interpretations that bring about an anomalous result when other interpretations are available" (internal

quotation marks omitted)). Adopting Missouri River's construction of the Tariff as unambiguously mandating carve-out treatment would create an internal tension within the Commission's own precedent: granting additional carve-out treatment to Missouri River's 272 megawatt reservation bumps up against the Commission's prior order approving an exclusive list of carve-outs *excluding* that reservation. *See Sw. Power Pool, Inc.*, 144 FERC ¶ 61,254 at PP 3, 18, JA 825, 830.

Missouri River attempts to undercut the force and effect of Schedule 1 of the Settlement by misconstruing FERC's determination in several ways. For example, it argues that "FERC found a latent ambiguity in the conflict between Attachment W … and a note to Schedule 1 of the 2013 Carve-Out Settlement," and then asserts that FERC unreasonably resolved that conflict to Missouri River's detriment. Br. 30–31. But nowhere did the Commission perceive a "conflict" between the two documents. *See* Rehearing Order P 21, JA 699–700. In fact, the Commission explained that Schedule 1—considered alongside other extrinsic evidence—addressed the pertinent issue—eligibility for carve-out treatment—that Tariff Attachment W left unanswered. *Id*. PP 21, 24, JA 699–701.

Missouri River also contends that the Commission neglected to consider Article 2.3 of the Carve-Out Settlement, which establishes carve-out eligibility criteria. Br. 31 (citing Carve-Out Settlement, Article 2.3, JA 377). While Missouri River is correct that "'[i]n order to qualify as a 'Carved-Out [grandfathered agreement],'" the grandfathered agreement must meet certain criteria set forth in

Article 2.3, *id*. at 30 (quoting Carve-Out Settlement, Article 2.3, JA 377), its assertion ignores the relevant context. Missouri River does not acknowledge that the immediately preceding section—Settlement Article 2.2—establishes the outer bounds of carve-out eligibility. Article 2.2 explains that "Schedule 1 constitutes the exclusive list of eligible 'Carved-Out [grandfathered agreements]' …." Carve-Out Settlement, Article 2.2, JA 377. The Commission confirmed Article 2.2's dispositive effect in its order approving the 2013 Carve-Out Settlement. *Sw. Power Pool, Inc.*, 144 FERC ¶ 61,254 at PP 3, 18, JA 825, 830 ("the Settlement … identifies the specific [grandfathered agreement]s that qualify" for carve-out treatment). The Commission evaluated Article 2.2 in its analysis in this case, Initial Order P 46, JA 639–40; Rehearing Order P 15, JA 697, and it is that provision—not the subsequent lesser-included Article 2.3—that is determinative.

Finally, Missouri River makes an oblique reference to Tariff Section 2.16's identification of grandfathered agreements, rather than to individual reservations contained therein. Br. 29. To the extent Missouri River suggests the Pool unreasonably designated only a part of Grandfathered Agreement 496 as carve-out-eligible, it fails to state as much, and so any such argument is waived. *See CTS Corp. v. EPA*, 759 F.3d 52, 60 (D.C. Cir. 2014) (deeming waived petitioner's "oblique" and "conclusory" challenge). Even if Missouri River *had* made this argument, it fails on the merits: the Tariff implements the Carve-Out Settlement, which expressly states that only the reservations "associated with [grandfathered

agreements] *identified*" are carve-out-eligible. Initial Order P 46, JA 639 (emphasis added) (quoting Carve-Out Settlement, Article 2.2, JA 377) (internal quotation marks omitted); *id*. P 5, JA 621 (explaining that the Tariff filing "implement[s] the Carve-Out Settlement"). Thus, the Tariff's acknowledgement of "[grandfathered agreement](s) eligible for [grandfathered agreement] Carve Out" refers back to those agreements defined at Article 2.2 and Schedule 1 of the Carve-Out Settlement. And, as discussed, Schedule 1 "identifie[s]" only the Lincoln Electric reservation.

III. The Commission's Rejection of Missouri River's Claim of Undue Discrimination is Supported by Substantial Evidence and is Anchored in Commission Precedent

The Federal Power Act bars the Commission from "mak[ing] or grant[ing] any undue preference or advantage to any person" or "maintain[ing] any unreasonable difference in rates, charges, service, facilities, or in any other respect …." 16 U.S.C. § 824d(b). Missouri River argues it is similarly situated to Lincoln Electric—which received a carve-out—meaning that not granting Missouri River the same accommodation amounts to the type of undue discrimination the Federal Power Act prohibits. Br. 22.

To prevail on its undue discrimination claim, Missouri River must do more than demonstrate a similarity between itself and Lincoln Electric; it must show that any differential treatment "cannot be justified." *State Corp. Comm'n of Kan.*, 876 F.3d at 335. Indeed, discrimination between entities "does not alone make [a

Commission decision] arbitrary and capricious; rather, [a] petitioner[] must show that there is *no reason* for the difference." *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 721 (D.C. Cir. 2000) (emphasis added), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002); *see also Associated Gas Distribs. v. FERC*, 824 F.2d 981, 998 (D.C. Cir. 1987) ("the mere fact of a rate disparity is not enough to constitute unlawful discrimination" (internal quotation marks omitted)). The Commission is vested with broad discretion in deciding whether two entities are similarly situated, *Transmission Access*, 225 F.3d at 721, and its factual findings "are conclusive if supported by substantial evidence," *see S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014).

Missouri River fails to meet its burden. The Commission explained why Missouri River, Basin Electric, and Heartland are not similarly situated to Lincoln Electric: Lincoln Electric joined the Pool before the Integrated Marketplace took effect; those other entities joined after. Thus, absent a carve-out, Lincoln Electric faced government compulsion to pay congestion and marginal loss charges. Missouri River, Basin Electric, and Heartland, by contrast, had a choice whether to join the Pool with full knowledge of the Integrated Marketplace. As discussed below, this distinction between existing and prospective Pool members suffices to "justif[y]" FERC's refusal to exempt Missouri River from complying with the Pool's Tariff. *See State Corp. Comm'n of Kan.*, 876 F.3d at 335. It also comports

with the Commission's policy of decreasing carve-outs over time and is anchored in the Commission's *Dairyland* precedent.

A. The Commission Provided a Reasoned Explanation for Why Missouri River is Not Similarly Situated to Lincoln Electric

Missouri River points to no entity that joined the Southwest Pool after the Integrated Marketplace rules took effect that has received carve-out treatment. Based on the record in this case, Missouri River would be the first among similarly situated entities.[11] Missouri River nevertheless argues that the only reasonable basis for comparison is Lincoln Electric—an entity that entered the Pool four years *before* the Integrated Marketplace took effect.

To recap (*see supra*, "Background," Part I.B), as part of the Nebraska Entities' integration into the Pool in 2008, the 1977 Contract—to which both Lincoln Electric and Missouri River are parties—was added to the Pool's Tariff at Attachment W as Grandfathered Agreement 496. Initial Order P 3, JA 618–19; Stipulated Facts ¶ 17, JA 283–84. Based on this commonality, Missouri River argues that the Pool must accord it equal treatment as Lincoln Electric. Br. 22–23. It asserts that the Commission decided to treat the two entities differently based

[11] Western-Area Power Administration—Upper Great Plains Region, which joined the Pool after the Integrated Marketplace, is an exception. It receives carve-out treatment due to its special status as a federal entity. *See* Initial Order P 55 & n.112, JA 643. Missouri River makes no argument that Western's exemption constitutes undue discrimination.

only on "differences in timing of [Southwest Pool] membership"—Lincoln Electric in 2008 and Missouri River in 2015. *Id*. at 23.

Missouri River's argument fundamentally misconstrues the Commission's orders. The Commission did not deny Missouri River a special carve-out because it joined the Pool some years after Lincoln Electric. *Cf*. *id*. It did so because of what *happened* in those intervening years. In 2012, FERC approved the Integrated Marketplace which, among other things, imposed congestion and marginal loss charges, including on parties to grandfathered agreements. Because Lincoln Electric was a then-existing member, the Commission agreed to grant it an exemption from the new charges. Initial Order P 62, JA 645–46; Rehearing Order P 54, JA 712.

Missouri River, by contrast, faced no such government compulsion. *See* Rehearing Order PP 48, 50, JA 710–11. By the time it joined the Pool in 2015, *id*. P 8, JA 694–95, the Integrated Marketplace proceeding was over, congestion and marginal loss charges were in place, and prospective Pool members could weigh the costs and benefits of joining the Pool under those conditions, *see* Initial Order P 62, JA 646; Rehearing Order P 47, JA 710. As Missouri River acknowledges, quoting the Commission's Rehearing Order: "Lincoln Electric did not receive carve-out treatment simply because it was a party to [Grandfathered Agreement] 496 but rather because it was a party to that contract *and* joined [the Southwest Pool] *before commencement of the Integrated Marketplace*." Rehearing Order

P 54, JA 712 (emphasis in original and added); Br. 25. And "[s]ince the same cannot be said of [Missouri River]"—the Commission continued—"it is not unduly discriminatory to deny them carve-out treatment." Rehearing Order P 54, JA 712. This distinguishing characteristic—government-approved charges on one party and the absence of any government compulsion on the other, *see id*. P 50, JA 711—provides a reasoned "justifi[cation]" for treating Lincoln Electric and Missouri River differently. *See State Corp. Comm'n of Kan.*, 876 F.3d at 335. By failing to address this distinction, Missouri River falls short of meeting its burden to "show that there is no reason for the difference" in treatment between Lincoln Electric and Missouri River. *Transmission Access*, 225 F.3d at 721. The Court should uphold the Commission's decision declining to grant Missouri River a special exemption on this basis alone.

B. The Commission's Decision is Consistent With Its Practice of Reducing Carve-Outs Over Time

The Commission's decision is also consistent with its practice of limiting carve-out treatment to entities that are already members of an organized market, with an eye toward reducing carve-outs over time. *See, e.g.*, *Wisc. Pub. Power*, 493 F.3d at 275 (carve-outs afforded utilities that formed a regional transmission organization a "transition period" to fully comply with a new tariff); *Dairyland I*, 129 FERC ¶ 61,221 at P 41 (carve-outs are to "decrease over time"); *see also* Initial Order P 48, JA 640 (incorporating by reference *Dairyland*'s reasoning).

Carve-outs are an exception to the Commission's policy of non-discriminatory treatment of all members of an organized market. *See Midwest ISO*, 373 F.3d at 1364. Since introducing the concept of regional grid operators more than twenty years ago, FERC has sought to bring generators, transmitters, and distributors of electricity under a common set of rules. *Id*. These rules are administered through regional transmission organizations like the Southwest Pool. *Id*. In doing so, FERC intended to discipline a marketplace previously occupied by a variety of individual contracts.[12] FERC determined that the prior individualized approach resulted in inefficiencies that "impeded free competition." *Id*.

The Commission has departed from uniform grid administration only in limited circumstances. One such circumstance involves revisions to a Tariff. For example, in 2009—in an earlier proceeding that figures prominently in this case—the Midwest Independent Transmission System Operator ("Midwest Operator") filed a tariff revision seeking to limit new and to eliminate old carve-outs for grandfathered agreements. *Dairyland I*, 129 FERC ¶ 61,221 at P 5. The *Dairyland* proceeding involved the Midwest Operator's proposed elimination of carved-out grandfathered agreement status for, among other entities, prospective members of its organized market. *Id*. PP 1, 8.

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[12] *See Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 31,204–05 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001) (codified at 18 C.F.R. § 35.34).

The Commission granted the Midwest Operator's proposal in part and rejected it in part. As relevant here, it preserved a limited carve-out from tariff scheduling requirements and congestion and marginal loss charges to *existing* members of the Midwest Operator. *Id*. PP 5, 39–41; *Dairyland II*, 131 FERC ¶ 61,163 at P 22. But it rejected the request of the Dairyland Power Cooperative—a *prospective* member—for carve-out treatment. *Dairyland I*, 129 FERC ¶ 61,221 at P 41; *Dairyland II*, 131 FERC ¶ 61,163 at P 22.

The Commission explained that the distinction between existing and prospective members turns on the compulsory nature of any tariff changes on existing members. It reasoned that "[o]riginal transmission owners and their [grandfathered agreement] counterparties … did not have control over" operational changes made effective through tariff revisions. *Dairyland II*, 131 FERC ¶ 61,163 at P 22. "[B]y virtue of their [pre-existing] membership in [the Midwest Operator], [existing members] were forced to either endure market changes or face substantial withdrawal costs." *Id*. "By contrast"—the Commission explained—"prospective applicants …, such as Dairyland, are not subject to forced market transitions." *Id*. In other words, because the Commission—through its earlier approval of the Midwest Operator's tariff revisions—had imposed new requirements on existing members, those members' grandfathered agreements were eligible for carve-out treatment. But *non*-members—including prospective members like Dairyland—faced no similar government-imposed bind. *See id*.

The Commission's orders rejecting Missouri River's request pay fidelity to *Dairyland*. The Commission explained here that "the relevant trait for determining whether parties to a [grandfathered agreement] are similarly situated for purposes of carve-out treatment is whether they joined [the Southwest Pool] before commencement of the Integrated Marketplace or after that time." Rehearing Order P 54, JA 712. Missouri River—along with the Integrated System parties that, together, sought carve-out treatment in the administrative proceeding below—fall into the latter category because they opted to join the Pool after the Integrated Marketplace took effect. *Id.*; *see also Sw. Power Pool, Inc.*, 149 FERC ¶ 61,113 at P 1, JA 138–39 (Southwest Pool sought integration "to facilitate *the decision of [the Integrated System Parties]*, to join [the Pool]" (emphasis added)). Thus, Missouri River was not "subject to a forced transition" that included assessment of congestion and marginal loss charges.[13] Initial Order P 62, JA 646. Lincoln Electric, by contrast, *was* "subject to a forced transition." *Id.* The Commission's application of *Dairyland* to this proceeding deserves deference. *See, e.g.*, *Mo. Pub. Serv. Comm'n v. FERC*, 783 F.3d 310, 316 (D.C. Cir. 2015) ("deference is due to the Commission's interpretation of its own precedent").

[13] To the extent Missouri River argues it was forced to join the Pool, *see* Br. 48, any lack of choice resulted from the majority decision of its business partners to the 1977 Contract, not by FERC or the Pool itself. *See Sw. Power Pool, Inc.*, 149 FERC ¶ 61,113 at P 1, JA 138–39.

* * *

Because the Commission's determination—anchored in precedent—articulates a principled basis for declining to grant the same exemption to Missouri River as it gave to Lincoln Electric, the Court should uphold its decision. *See State Corp. Comm'n of Kan.*, 876 F.3d at 335 ("a difference in rate design" is unlawful only if "the differences cannot be justified"); *Associated Gas*, 824 F.2d at 998; *see also Elec. Power Supply Ass'n*, 136 S. Ct. at 782 (a court must uphold FERC's orders if the Commission has "articulate[d] a satisfactory explanation for its action" (internal quotation marks omitted)).

C. Missouri River Misconstrues Both the Text and Context of the Commission's *Dairyland* Orders

Missouri River also misconstrues *Dairyland* on its own merits. As discussed, *Dairyland* stands for the straightforward proposition that entities who were members of a regional transmission organization at the time of a tariff revision are not similarly situated to entities that joined after. *See Dairyland I*, 129 FERC ¶ 61,221 at PP 40–42; *Dairyland II*, 131 FERC ¶ 61,163 at PP 21–22. That is the relevant distinction here. But *Dairyland* also considered a second issue: whether the Midwest Operator could eliminate carve-outs for those members who *already enjoyed* such preferential treatment. *Dairyland I*, 129 FERC ¶ 61,221 at P 42; *see also* Rehearing Order PP 44–45, JA 709. On that issue, the Commission "reject[ed] [the Midwest Operator's] proposal to *eliminate* the availability of carve-

out [grandfathered agreement] status for existing agreements between a prospective new member and another transmission owner." *Dairyland I*, 129 FERC ¶ 61,221 at P 42 (emphasis added).

Missouri River seizes on the quoted language and observes that it, too, is a prospective new member that has contracted for transmission service with another transmission owner (i.e., an existing member)—that transmission owner being Nebraska Power. Br. 44–45. Thus, Missouri River reasons, *Dairyland* supports its requested carve-out. *Id*. at 45.

Missouri River's analysis misses its target because it ignores a critical distinguishing fact: in *Dairyland*, the Commission addressed grandfathered agreements that *already enjoyed* carve-out treatment, whereas here, Missouri River seeks a *new* carve-out. *Dairyland I*, 129 FERC ¶ 61,221 at P 42; *see also Dairyland II*, 131 FERC ¶ 61,163 at P 24 (noting the "disadvantages of abrogating *existing* carved-out [grandfathered agreement]s" (emphasis in original)). As the Commission explained in the Rehearing Order, *Dairyland*'s rejection of a proposed elimination of carve-out treatment for grandfathered agreements between existing members and prospective ones has no bearing on the legal issue here. Rehearing Order PP 44–45, JA 709. Missouri River is not protesting a Commission proposal to strip away an existing entitlement; it is challenging the Commission's decision to not create a new one. And on that question, the Commission's decision here aligns with its determination in *Dairyland* rejecting new carve-out treatment for

prospective members.[14] *Id.*; *Dairyland I*, 129 FERC ¶ 61,221 at P 39–41; *Dairyland II*, 131 FERC ¶ 61,163 at P 22 (emphasis added).

This distinction—between eliminating existing carve-outs and creating new ones—also comports with the Commission's policy of phasing out carve-outs over time. *See Dairyland I*, 129 FERC ¶ 61,221 at P 41; *Dairyland II*, 131 FERC ¶ 61,163 at PP 48–50 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,236 at P 143 (2004)). Indeed, carve-outs co-exist in tension with FERC's policy of non-discriminatory application of a uniform set of rules governing the operations of a regional transmission organization. *See Midwest ISO*, 373 F.3d at 1364. Thus, consistent with this policy, the Commission rejected Dairyland's proposal to *expand* carve-out treatment. *Dairyland I*, 129 FERC ¶ 61,221 at P 41.

Moreover, the Commission's policy of promoting uniformity is distinctly reasonable in the context of congestion and marginal loss charges. Such charges reflect all members' use of a regional transmission organization's system, and account for energy losses that occur across the transmission grid. *See supra* notes 6–9 (explaining congestion and marginal loss charges). Allowing Missouri River to opt out of these charges would shift that cost burden onto others, effectively

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[14] The Commission rejected canceling this particular category of carve-outs for an additional and independent reason: the Midwest Operator's Tariff did not allow it to "delete[]" carved-out grandfathered agreements. *Dairyland I*, 129 FERC ¶ 61,221 at P 42.

allowing Missouri River to enjoy a free ride on the backs of other Pool members. Rehearing Order P 26, JA 702. Reversing the Commission's determination would therefore not only run counter to FERC's longstanding policy of "decreas[ing] [carve-outs] over time," *Dairyland I*, 129 FERC ¶ 61,221 at P 41, it would also *cause* a type of discriminatory treatment that its orders here prevent, *see* Rehearing Order P 26, JA 702.

IV. The Commission Did Not "Change Its Approach" to Modifying Non-Jurisdictional Contracts—Assessing the Disputed Charges on Missouri River Does Not Modify the 1977 Contract

Missouri River argues the Commission failed to follow its own precedent for modifying non-jurisdictional contracts of non-public utilities. Br. 18–21. It reasons that assessing congestion and marginal loss charges on Missouri River somehow modifies the grandfathered 1977 Contract, and that the Commission failed to apply the rigorous "public interest" test for abrogating or modifying private-party contracts. *Id*. (citing the *Mobile-Sierra* doctrine).

Missouri River's argument fails because the Commission did not modify—let alone abrogate—the 1977 Contract. Indeed, nowhere does Missouri River explain how the Commission purportedly "change[d]" the 1977 Contract or identify which parts it altered. *Cf. id*. at 20; *see* Rehearing Order P 57, JA 714. Missouri River even acknowledges that the terms of the 1977 Contract remain intact, noting in a separate section of its brief that "[b]oth [Missouri River] and

Lincoln Electric continue to receive transmission service under [Grandfathered Agreement] 496 ….” Br. 23; *see also* Initial Order P 81, JA 653.

Missouri River cites this Court’s decision in *Wisconsin Public Power* for support, Br. 19–20, but that case deals with a different issue. There, the Court addressed a challenge to FERC’s decision carving out a subset of grandfathered agreements under the Midwest Operator’s tariff. 493 F.3d at 272–73. The Commission found carve-out treatment necessary due to “the direct collision between [grandfathered agreement] scheduling practices and the [Midwest Operator] Tariff’s scheduling requirements.” *Id*. at 272. Thus, applying the revised tariff’s scheduling rules to those agreements would have “impose[d] significant changes” on the agreements themselves. *Id*. (internal quotation marks omitted). The Commission concluded that “*not* carving out th[at] narrow class of [grandfathered agreements] would modify them, thereby triggering application of *Mobile-Sierra*’s public interest standard.” *Id*. at 273 (emphasis in original). The Court upheld the Commission’s decision to carve out the grandfathered agreements. *Id*.

Here, there exists no similar “collision” between the 1977 Contract and the Southwest Pool’s Tariff assessing congestion and marginal loss charges. Missouri River’s compliance with the 1977 Contract runs parallel with—not headlong into—the Tariff’s terms of service. Initial Order P 81, JA 653–54; Rehearing Order P 55, JA 713. Indeed, as Missouri River acknowledges, it “continue[s] to pay the

transmission rate stated in the 1977 Contract." Initial Order P 81, JA 653; *see also* Br. 23.

Moreover, the congestion and marginal loss charges that Missouri River suggests conflict with the 1977 Contract actually pertain to a new service that is not—nor could it have been—addressed by that Contract. Specifically, they reflect Missouri River's use of Southwest Pool transmission service—service that is not provided under the 1977 Contract, and which Missouri River has benefitted from since joining the Pool in 2015. *See* Initial Order PP 6, 81, JA 622, 653–54; Stipulated Facts ¶ 34, JA 289 (Missouri River pays Southwest Pool "Zone 19" charges for Pool transmission service). This fact immediately distinguishes *Wisconsin Public Power*, where applying the revised tariff to grandfathered agreements would have "pervasively disrupt[ed] the [grandfathered agreement] parties' scheduling practices," thereby upsetting the "bargain" struck by the parties to those agreements. *See* 493 F.3d at 273 (internal quotation marks omitted). It also distinguishes this case from those FERC orders Missouri River relies on, Br. 41, to support its contrary conclusion, and which discuss the carve-out scheduling clash this Court addressed in *Wisconsin Public Power*.

This case instead tracks another of this Court's decisions addressing carve-outs for grandfathered agreements in organized markets. In *East Kentucky Power Cooperative, Inc. v. FERC*, the Court considered the Midwest Operator's proposed assessment of administrative charges for provision of wholesale service on its

network. 489 F.3d 1299, 1303 (D.C. Cir. 2007). As here, those charges applied universally, including to parties to grandfathered agreements. *Id*. While those parties continued to perform under the terms of those agreements, they took transmission service from the Midwest Operator. *Id*.

This Court upheld the charges, affirming the Commission's reasoning that "the costs of operating the [regional transmission organization] and its energy markets were not recovered under the grandfathered agreements because the benefits brought by the [regional transmission organization] represent 'new services' not previously provided under those pre-[regional transmission organization] grandfathered contracts." *Id*. at 1307–10. As the Commission similarly explained in the underlying orders in that case, because the regional transmission services "[could not] be duplicated or provided by any party operating in a smaller footprint than the [Midwest Operator]," the costs associated with those services were "separate and distinct from the costs … under current [grandfathered agreement] provisions." *Transmission Owners of the Midwest Indep. Transmission System Oper., Inc.*, 110 FERC ¶ 61,339 at P 38 (2005), *order on reh'g and compliance filing*, 113 FERC ¶ 61,122 at P 30 (2005), *aff'd*, *E. Ky. Power*, 489 F.3d. 1299.

Same here. Congestion and marginal loss charges reflect costs associated with Missouri River's use of Pool transmission service, and are not "recovered under the [1977 Contract]." *E. Ky. Power*, 489 F.3d. at 1307; Initial Order PP 80–

81, JA 653–54; Rehearing Order P 55, JA 713. Indeed, Missouri River continues to pay rates under that Contract related to the Missouri Basin Power Project. Initial Order PP 80–81, JA 653–54; Rehearing Order P 55, JA 713. And while Missouri River is correct that the 1977 Contract addresses losses for discrete service on the Bulk Transmission System—i.e., Nebraska Power's network—that does not somehow exempt Missouri River from use charges for a separate, new service. *See* Initial Order P 81, JA 653–54; 1977 Contract, Exhibit E ¶¶ 1, 3, JA 331, 334. Moreover, even if Missouri River could make the case that the 1977 Contract addressed the same types of payments as congestion and marginal loss charges associated with Pool transmission service (which it cannot), its argument fails for an additional and independent reason. Contrary to its assertion, the 1977 Contract does not assess loss "charges" at all: losses are instead addressed through increased supply provided by Basin Electric on behalf of Missouri River and the other parties to the Contract. 1977 Contract, Exhibit E ¶ 1, JA 331; *cf.* Br. 23.

Finally, while Missouri River complains about paying charges incident to Pool membership, it fails to acknowledge the benefits of new access to Pool service—e.g., "increased efficiency and reliability, … a lower price of energy[,]" and systemwide cost benefits of $334 million over ten years. *State Corp. Comm'n of Kan.*, 876 F.3d at 334–35; *see also* Initial Order PP 80–81, JA 653–54; Rehearing Order P 55, JA 713. These benefits—which cannot be realized through the limited mandate of the 1977 Contract—are compelling evidence that Pool

transmission service is "new service," and that the congestion and marginal loss charges associated with that service are "separate and distinct from the costs collected under the grandfathered agreements." *See E. Ky. Power*, 489 F.3d at 1307–08.

* * *

The Commission reasonably concluded that because the Pool did not alter Missouri River's benefits and obligations under the 1977 Contract, it was not modifying—much less abrogating—that agreement. That finding deserves deference. *See Elec. Power Supply Ass'n*, 136 S. Ct. at 782. And because the 1977 Contract remains intact, the Commission did not err in declining to apply the *Mobile-Sierra* public interest review standard in refusing to grant Missouri River a special exemption from congestion and marginal loss charges. *See Wisc. Pub. Power*, 493 F.3d at 254.

V. Missouri River Did Not Reasonably Rely on the Southwest Pool's Past Statements

Section VI of Missouri River's brief spends several pages recounting the events leading up to the current proceeding. Br. 48–52. The section makes no particular argument, however, except to state—without elaboration—that the Commission "knew that the factual basis for [the Southwest Pool's] assertions" in the Integrated Marketplace proceeding "was no longer correct," *id.* at 49, and that "FERC unreasonably agreed with [the Southwest Pool] that 2013 was too early to

address the carve-out status of the [Missouri River] service under [Grandfathered Agreement] 496," *id*. at 52. These discrete assertions, lacking in analysis and authority, do not constitute reasoned argument and are therefore waived. *See CTS Corp.*, 759 F.3d at 60.

To the extent Missouri River purports to argue the Commission is equitably estopped from assessing congestion and marginal loss charges—as suggested by the brief's section header, Br. 48—any such argument is meritless. To state an actionable claim for equitable estoppel, Missouri River must show on the part of the Southwest Pool: "false representation, a purpose to invite action by the party to whom the representation was made, ignorance of the true facts by that party, … reliance," and "a showing of an injustice." *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988) (internal quotation marks omitted); *see also* Initial Order P 77, JA 652.

Even if waiver did not apply, Missouri River's argument would still fail at the threshold because the Southwest Pool made no false representations. The Pool stated the following in the Integrated Marketplace proceeding: because Missouri River's transmission reservation fell outside its footprint, it would not assess congestion and marginal loss charges on Missouri River. Specifically, in March 2013, the Pool "confirm[ed] that because [the Missouri River and Heartland] reservation is not associated with a [Southwest Pool] Settlement Location or [Southwest Pool] transmission service, and is not tagged by [the Southwest Pool],

it will not be subject to the rules and tariff requirements of [the Southwest Pool's] proposed Integrated Marketplace." Initial Order PP 4 n.19, 74, JA 620–21, 650–51 (quoting Sw. Power Pool, Inc., *Supplemental Representation* at 2 (filed Mar. 1, 2013), JA 819). Contrary to Missouri River's argument, the Pool made no representation that *should* Missouri River's reservation at some future point fall within its system, Missouri River would *still* be exempt from congestion and marginal loss charges. Rehearing Order P 34, JA 705. Indeed, because the Pool tied its determination to Missouri River's non-association with its network, the natural inference is that Missouri River *would* be assessed those charges under that scenario.

In short, the Pool made no "false representation" to Missouri River that it would never be assessed congestion and marginal loss charges regardless of its future membership. *See Auster v. Ghana Airways Ltd.*, 514 F.3d 44, 48 (D.C. Cir. 2008) (equitable estoppel did not apply where "plaintiffs … identified no false representation"). Thus, even were the Court to reach the merits of Missouri River's implied equitable estoppel claim, it should reject it.

CONCLUSION

For the foregoing reasons, the Commission requests that the Court deny the petition and affirm the Commission orders on review.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B) because it contains 11,363 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 LT Std 14-point font using Microsoft Word 2013.

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January 9, 2019

ADDENDUM

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denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or 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

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§ 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

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

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

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

(i) cost significantly less to implement; or

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

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

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

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

(2) Notwithstanding subsection (f), the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824*o*–1, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824*o*–1, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

The term ''public utility'' when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824e(e), 824e(f),[1] 824i, 824j, 824j–1, 824k, 824*o*, 824*o*–1, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

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

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

(g) Books and records

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

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

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

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

wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

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

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

(4) Nothing in this section shall—

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

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

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

(June 10, 1920, ch. 285, pt. II, § 201, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 847; amended Pub. L. 95–617, title II, § 204(b), Nov. 9, 1978, 92 Stat. 3140; Pub. L. 102–486, title VII, § 714, Oct. 24, 1992, 106 Stat. 2911; Pub. L. 109–58, title XII, §§ 1277(b)(1), 1291(c), 1295(a), Aug. 8, 2005, 119 Stat. 978, 985; Pub. L. 114–94, div. F, § 61003(b), Dec. 4, 2015, 129 Stat. 1778.)

REFERENCES IN TEXT

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

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

AMENDMENTS

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

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

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

Subsec. (e). Pub. L. 109–58, § 1295(a)(2), substituted ''section 824e(e), 824e(f), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title'' for ''section 824i, 824j, or 824k of this title''.

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

Subsec. (g)(5). Pub. L. 109–58, § 1277(b)(1), substituted ''2005'' for ''1935''.

1992—Subsec. (g). Pub. L. 102–486 added subsec. (g).

1978—Subsec. (b). Pub. L. 95–617, § 204(b)(1), designated existing provisions as par. (1), inserted ''except as provided in paragraph (2)'' after ''in interstate commerce, but'', and added par. (2).

Subsec. (e). Pub. L. 95–617, § 204(b)(2), inserted ''(other than facilities subject to such jurisdiction solely by reason of section 824i, 824j, or 824k of this title)'' after ''under this subchapter''.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by section 1277(b)(1) of Pub. L. 109–58 effective 6 months after Aug. 8, 2005, with provisions relating to effect of compliance with certain regulations

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

approved and made effective prior to such date, see section 1274 of Pub. L. 109–58, set out as an Effective Date note under section 16451 of Title 42, The Public Health and Welfare.

STATE AUTHORITIES; CONSTRUCTION

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

PRIOR ACTIONS; EFFECT ON OTHER AUTHORITIES

Pub. L. 95–617, title II, §214, Nov. 9, 1978, 92 Stat. 3149, provided that:

''(a) PRIOR ACTIONS.—No provision of this title [enacting sections 823a, 824i to 824k, 824a–1 to 824a–3 and 825q–1 of this title, amending sections 796, 824, 824a, 824d, and 825d of this title and enacting provisions set out as notes under sections 824a, 824d, and 825d of this title] or of any amendment made by this title shall apply to, or affect, any action taken by the Commission [Federal Energy Regulatory Commission] before the date of the enactment of this Act [Nov. 9, 1978].

''(b) OTHER AUTHORITIES.—No provision of this title [enacting sections 823a, 824i to 824k, 824a–1 to 824a–3 and 825q–1 of this title, amending sections 796, 824, 824a, 824d, and 825d of this title and enacting provisions set out as notes under sections 824a, 824d, and 825d of this title] or of any amendment made by this title shall limit, impair or otherwise affect any authority of the Commission or any other agency or instrumentality of the United States under any other provision of law except as specifically provided in this title.''

§ 824a. Interconnection and coordination of facilities; emergencies; transmission to foreign countries

(a) Regional districts; establishment; notice to State commissions

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnection and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

(b) Sale or exchange of energy; establishing physical connections

Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

(c) Temporary connection and exchange of facilities during emergency

(1) During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority, either upon its own motion or upon complaint, with or without notice, hearing, or report, to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest. If the parties affected by such order fail to agree upon the terms of any arrangement between them in carrying out such order, the Commission, after hearing held either before or after such order takes effect, may prescribe by supplemental order such terms as it finds to be just and reasonable, including the compensation or reimbursement which should be paid to or by any such party.

(2) With respect to an order issued under this subsection that may result in a conflict with a requirement of any Federal, State, or local environmental law or regulation, the Commission shall ensure that such order requires generation, delivery, interchange, or transmission of electric energy only during hours necessary to meet the emergency and serve the public interest, and, to the maximum extent practicable, is consistent with any applicable Federal, State, or local environmental law or regulation and minimizes any adverse environmental impacts.

(3) To the extent any omission or action taken by a party, that is necessary to comply with an order issued under this subsection, including any omission or action taken to voluntarily comply with such order, results in noncompliance with, or causes such party to not comply with, any Federal, State, or local environmental law or regulation, such omission or action shall

§ 824c. Issuance of securities; assumption of liabilities

(a) Authorization by Commission

No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. The provisions of this section shall be effective six months after August 26, 1935.

(b) Application approval or modification; supplemental orders

The Commission, after opportunity for hearing, may grant any application under this section in whole or in part, and with such modifications and upon such terms and conditions as it may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of subsection (a) of this section.

(c) Compliance with order of Commission

No public utility shall, without the consent of the Commission, apply any security or any proceeds thereof to any purpose not specified in the Commission's order, or supplemental order, or to any purpose in excess of the amount allowed for such purpose in such order, or otherwise in contravention of such order.

(d) Authorization of capitalization not to exceed amount paid

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

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

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

(f) Public utility securities regulated by State not affected

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

(g) Guarantee or obligation on part of United States

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

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

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

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

TRANSFER OF FUNCTIONS

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

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

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

to time prescribe. The entire work may be done at, or ordered through, the Government Publishing Office whenever, in the judgment of the Joint Committee on Printing, the same would be to the interest of the Government: *Provided*, That when the exigencies of the public service so require, the Joint Committee on Printing may authorize the Commission to make immediate contracts for engraving, lithographing, and photolithographing, without advertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

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

CODIFICATION

''Sections 1535 and 1536 of title 31'' substituted in text for ''sections 601 and 602 of the Act of June 30, 1932 (47 Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

CHANGE OF NAME

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

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

§ 825*l*. Review of orders

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

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

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

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

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

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as 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 chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

(b) Writs of mandamus

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

(c) Employment of attorneys

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

(d) Prohibitions on violators

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

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

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

(A) electric energy; or

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

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

CODIFICATION

As originally enacted subsecs. (a) and (b) contained references to the Supreme Court of the District of Columbia. Act June 25, 1936, substituted ''the district court of the United States for the District of Columbia'' for ''the Supreme Court of the District of Columbia'', and act June 25, 1948, as amended by act May 24, 1949, substituted ''United States District Court for the District of Columbia'' for ''district court of the United States for the District of Columbia''. However, the words ''United States District Court for the District of Columbia'' have been deleted entirely as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which states that ''There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district'', and section 88 of Title 28 which states that ''the District of Columbia constitutes one judicial district''.

AMENDMENTS

2005—Subsec. (d). Pub. L. 109–58 added subsec. (d).

§ 825n. Forfeiture for violations; recovery; applicability

(a) Forfeiture

Any licensee or public utility which willfully fails, within the time prescribed by the Commission, to comply with any order of the Commission, to file any report required under this chapter or any rule or regulation of the Commission thereunder, to submit any information or document required by the Commission in the course of an investigation conducted under this chapter, or to appear by an officer or agent at any hearing or investigation in response to a subpena issued under this chapter, shall forfeit to the United States an amount not exceeding $1,000 to be fixed by the Commission after notice and opportunity for hearing. The imposition or payment of any such forfeiture shall not bar or affect any penalty prescribed in this chapter but such forfeiture shall be in addition to any such penalty.

(b) Recovery

The forfeitures provided for in this chapter shall be payable into the Treasury of the United

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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 9th day of January 2019, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

/s/ Jared B. Fish
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