No. 15-1316

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LSP TRANSMISSION HOLDINGS, LLC, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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GLOSSARY

Commission	Respondent Federal Energy Regulatory Commission
Entergy	The Entergy Operating Companies (Entergy Arkansas, Inc., Entergy Gulf States Louisiana, L.L.C., Entergy Louisiana, L.L.C., Entergy Mississippi, Inc., Entergy New Orleans, Inc., and Entergy Texas, Inc.)
Federal rights of first refusal	Rights of first refusal created by provisions in Commission jurisdictional tariffs or agreements
FERC	Respondent Federal Energy Regulatory Commission
First Rehearing Order	*Midwest Indep. Transmission Sys. Operator, Inc. and MISO Transmission Owners*, 147 FERC ¶ 61,127 (May 15, 2014), JA 2277
Incumbents	utilities that develop transmission projects within their own retail distribution territories or footprints
Initial Order	*Midwest Indep. Transmission Sys. Operator, Inc. and MISO Transmission Owners*, 142 FERC ¶ 61,215 (March 22, 2013), JA 1664
LS Power	Petitioners LSP Transmission Holdings, LLC and LS Power Transmission, LLC
MISO	Midcontinent Independent System Operator, Inc.

Nonincumbents	Developers that do not have their own retail distribution territories or footprints or providers that propose projects outside their own territories or footprints)
Rights of first refusal	provide incumbent utilities the option to build any new transmission in their service areas or footprints, even if the proposal for a project comes from a third party
Second Rehearing Order	*Midwest Indep. Transmission Sys. Operator, Inc. and MISO Transmission Owners*, 150 FERC ¶ 61,037 (January 22, 2015), JA 2731
System Operator	Midcontinent Independent System Operator, Inc.
Transmission facilities selected in a regional transmission plan for purposes of cost allocation	Transmission facilities that have been selected pursuant to a transmission planning region's Commission-approved regional transmission planning process for inclusion in a regional plan for purposes of cost allocation because they are more efficient or cost-effective solutions to regional transmission needs
Transmission Owners	MISO Transmission Owners

COUNTER-STATEMENT OF JURISDICTION

The jurisdictional statement of Petitioners LSP Transmission Holdings, LLC and LS Power Transmission, LLC (together, "LS Power") is not complete and correct. *See* Cir. R. 28(b).

The instant petition for review challenges three orders issued by Respondent Federal Energy Regulatory Commission ("Commission" or "FERC"), *Midwest Indep. Transmission Sys. Operator, Inc. and MISO Transmission Owners*, 142 FERC ¶ 61,215 (March 22, 2013) ("Initial Order"), JA 1664, *on reh'g*, 147 FERC ¶ 61,127 (May 15, 2014) ("First Rehearing Order"), JA 2277, *on reh'g*, 150 FERC ¶ 61,037 (January 22, 2015) ("Second Rehearing Order"), JA 2731.[1] FERC had jurisdiction to issue the orders under Federal Power Act sections 201 and 205, 16 U.S.C. §§ 824 and 824d.

LS Power timely sought rehearing of the Initial Order on April 22, 2013, which the Commission denied in the Rehearing Order. *See* Federal Power Act section 313(a), 16 U.S.C. § 825*l*(a). LS Power also timely sought rehearing of the First Rehearing Order on June 13, 2014, which the Commission denied in the Second Rehearing Order. LS Power timely filed a petition for review of the challenged orders on February 19, 2015. Accordingly, the Court has jurisdiction over this case under Federal Power

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[1] The first two of these orders are also pending review before this Court on different issues in related Case Nos. 14-2153 and 14-2533.

Act section 313(b), 16 U.S.C. § 825*l*(b).

STATEMENT OF ISSUES

This appeal involves a filing submitted by the Midcontinent Independent System Operator, Inc. ("System Operator" or "MISO"), formerly called the Midwest Independent Transmission System Operator, Inc., and the MISO Transmission Owners ("Transmission Owners") to comply with the regional transmission planning and cost allocation requirements established in the Commission's recent Order No. 1000 rulemaking.[2]

The issues presented for review in the instant petition are:

(1) Whether the Commission reasonably determined that MISO's reference in its Tariff to state or local rights of first refusal did not, in contravention of Order No. 1000, create a prohibited federal right of first refusal;

(2) Whether the Commission reasonably approved, as consistent with Order No. 1000, MISO's criteria to choose a developer for a project MISO selected in its regional transmission plan as the more efficient or cost-

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[2] *Transm. & Cost Allocation by Transm. Owning & Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 61,051 (2011) ("Order No. 1000"), *order on reh'g and clarification*, 139 FERC ¶ 61,132 ("Order No. 1000-A"), *order on reh'g and clarification*, 141 FERC ¶ 61,044 (2012) ("Order No. 1000-B"), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014) ("*South Carolina*").

effective solution to meet a regional need; and

(3) Whether the Commission reasonably determined that, since the Entergy Operating Companies historically have provided service as a single transmission provider, they constitute a single transmission provider for Order No. 1000 compliance purposes.

STATEMENT OF THE CASE

I. Statement Of Facts

A. Statutory And Regulatory Background

1. Federal Power Act

Section 201 of the Federal Power Act, 16 U.S.C. § 824, gives the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and wholesale sale of electric energy in interstate commerce. All rates, and all practices directly affecting rates, for or in connection with jurisdictional sales and transmission service are subject to FERC review to assure that they are just and reasonable, and not unduly discriminatory or preferential. *See* Federal Power Act sections 205 and 206, 16 U.S.C. §§ 824d(e), 824e(a); *South Carolina*, 762 F.3d at 55, 84.

The pertinent statutes are reproduced in the Addendum to this brief.

2. The Commission's Open Access and Regional Planning Rulemakings

The Commission's efforts to foster wholesale electricity competition over broader geographic areas in recent decades have led to the creation of independent system operators and regional transmission organizations. *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 536-37 (2008). These independent regional entities operate the transmission grid on behalf of transmission-owning member utilities. *See Ill. Commerce Comm'n v. FERC*, 721 F.3d 764, 769-71 (7th Cir. 2013) (discussing development of regional system operators and operation of MISO); *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 169 & n.1 (2010) (explaining responsibilities of regional system operators). MISO, the system operator involved here, operates the transmission facilities of utilities in fifteen states and one Canadian province. *See Pub. Serv. Comm'n of Wis. v. FERC*, 545 F.3d 1058, 1059 (D.C. Cir. 2008) (describing System Operator's region).

The D.C. Circuit's recent opinion affirming the Commission's Order No. 1000 rulemaking provided a concise overview of the history of the Commission's electric industry reforms. *See South Carolina*, 762 F.3d at 49-54. In particular, the Court traced the industry changes and the legislative

and regulatory developments leading to the Commission's recent rulemaking to reform regional transmission planning and cost allocation. *See id.* at 51-54.

a. Order Nos. 888 And 890

In 1996, the Commission issued Order No. 888, a landmark rulemaking which directed public utilities to adopt open access non-discriminatory transmission tariffs.[3] Then, in 2007, the Commission issued its Order No. 890 rulemaking,[4] which established certain measures to require transmission providers to establish open, transparent, and coordinated transmission planning processes. *See South Carolina*, 762 F.3d at 51.

b. Order No. 1000

After assessing the effectiveness of those measures, the Commission determined that additional reforms were necessary to ensure that rates for FERC-jurisdictional services would be just and reasonable and not unduly

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

[4] *Preventing Undue Discrimination and Preference in Transmission Serv.*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 (2007).

discriminatory or preferential, as required by the Federal Power Act. *See South Carolina*, 762 F.3d at 52. Accordingly, in July 2011, the Commission issued Order No. 1000. That rulemaking required transmission providers to participate in regional planning processes that, among other things, would evaluate more efficient or cost-effective solutions to transmission needs. *See id.* at 52-53 (summarizing Order No. 1000 requirements).

The rulemaking also required regional planning processes to include regional cost allocation methods for new transmission facilities selected in the regional plan for purposes of cost allocation that would satisfy certain principles set forth by the Commission. *See id.* at 53. "Transmission facilities selected in a regional transmission plan for purposes of cost allocation are transmission facilities that have been selected pursuant to a transmission planning region's Commission-approved regional transmission planning process for inclusion in a regional plan for purposes of cost allocation because they are more efficient or cost-effective solutions to regional transmission needs." Order No. 1000 at P 63, JA 53.

Order No. 1000 allowed significant flexibility, directing transmission providers, working with their stakeholders, to implement the Commission's requirements and principles through processes tailored to different regional needs and characteristics. *See*, *e.g.*, Order No. 1000 at PP 14, 61-62, 149, 157, JA 19, 52, 120, 127; *see also* LS Power Br. at 26 (same).

(i) Removal Of Federal Rights Of First Refusal

As part of its regional planning requirements, Order No. 1000 directed transmission providers "to remove provisions from Commission-jurisdictional tariffs and agreements that grant incumbent transmission providers a federal right of first refusal to construct transmission facilities selected in a regional transmission plan for purposes of cost allocation." Order No. 1000 at P 253, JA 176; *see also id.* at PP 225, 313, JA 201, 250 (same); *South Carolina*, 762 F.3d at 48 (same). Rights of first refusal provide "incumbent" utilities (i.e., utilities that develop transmission projects within their own retail distribution territories or footprints) the option to build any new transmission in their service areas or footprints, even if the proposal for a project comes from a third party. *South Carolina*, 762 F.3d at 72 & n.6; Order No. 1000-A P 416, JA 938; *see also South Carolina*, 762 F.3d at n.6 (explaining that a "non-incumbent" is either a developer that does not have its own retail distribution territory or footprint or a provider that proposes a project outside its own territory or footprint).

The Commission found that a "federal right of first refusal has 'the potential to undermine the identification and evaluation of more efficient or cost-effective solutions to regional transmission needs, which in turn can result in rates for Commission-jurisdictional services that are unjust and unreasonable or otherwise result in undue discrimination by public utility

transmission providers.'" Order No. 1000-B at P 37, JA 1246 (quoting Order No. 1000 at P 253, JA 201); *see also* Order No. 1000 at P 320, JA 256 (removing "federal rights of first refusal will address disincentives that may be impeding participation by nonincumbent developers in the regional transmission planning process").

Order No. 1000 limited this directive to "federal rights of first refusal," i.e., "rights of first refusal that are created by provisions in Commission jurisdictional tariffs or agreements." Order No. 1000 at n.231, JA 201; Order No. 1000-A at P 415, JA 938. As the Commission explained, nothing in Order No. 1000 was intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, and Order No. 1000 does not require references to such state or local laws or regulations to be removed from Commission-approved tariffs or agreements. Order No. 1000 at PP 253 & n.231, 287, 289, JA 201, 229, 230; Order No. 1000-A at PP 342, 359 & n.423, 360, 377, 379, 381, JA 876, 892, 894, 909, 910, 911.

Likewise, Order No. 1000 stated that its "reforms are not intended to alter an incumbent transmission provider's use and control of its existing rights-of-way." Order No. 1000 at P 319, JA 255; Order No. 1000-A at P 357, JA 890 (same). Thus, Order No. 1000 does not grant or deny transmission developers the ability to use rights-of-way held by other entities, even if

transmission facilities associated with such existing rights-of-way are selected in the regional transmission plan for purposes of cost allocation. Order No. 1000 at P 319, JA 255. "The retention, modification, or transfer of rights-of-way remain subject to relevant law or regulation granting the rights-of-way." *Id.*

(ii) Qualification And Selection Criteria

In addition, Order No. 1000 required transmission providers to establish qualification criteria to determine whether an entity is eligible to propose a transmission project for selection in the regional transmission plan for purposes of cost allocation.[5] The qualification criteria must not be unduly discriminatory or preferential, must not be unfair or unreasonably stringent, and must provide each entity the opportunity to demonstrate that it has the necessary financial resources and technical expertise to develop, construct, own, operate, and maintain transmission facilities. Order No. 1000 at PP 323-24, JA 258; Order No. 1000-A at PP 432, 439, JA 951, 955; *see also South Carolina*, 762 F.3d at 53; Initial Order at P 259, JA 1777-78.

Order No. 1000 also required transmission providers to identify the information that needs to be included in a transmission project proposal. Order No. 1000 at PP 325-26, JA 260. The information must be sufficient to

[5] Because any stakeholder can propose a project, the qualification criteria apply only to entities that intend to develop the projects they propose. Order No. 1000 at n.304, JA 259; Order No. 1000-A at n.520, JA 956.

allow proposed projects to be compared, and "may require, for example, relevant engineering studies and cost analyses and may request other reports or information from the transmission developer that are needed to facilitate evaluation of the transmission project in the regional transmission planning process." *Id.* at P 326, JA 259-60; *see also South Carolina*, 762 F.3d at 53; Initial Order at P 273, JA 1783-84 (same).

Furthermore, Order No. 1000 required transmission providers to describe a transparent and not unduly discriminatory process for selecting which of the proposed transmission facilities will be included in the regional transmission plan for purposes of cost allocation. The selection process must ensure transparency and an opportunity for stakeholder coordination, and transmission providers should evaluate the relative efficiency and cost-effectiveness of each solution in choosing among proposals. Order No. 1000 at P 328, n.307, JA 262, 265-66; Order No. 1000-A at PP 267, 445, 452, JA 823, 960, 964; *see also South Carolina*, 762 F.3d at 53; Initial Order at PP 305-06, JA 1797.

B. MISO's Compliance Filings And The Commission's Rulings

The compliance filings and challenged orders addressed numerous matters, only a few of which are at issue in this (or any) appeal. As relevant here, the Commission approved, as consistent with Order No. 1000, MISO's proposal to reference state or local rights of first refusal and rights of way in

its Tariff. *See* First Rehearing Order at PP 77-78, 147-50, JA 2315-16, 2349-51; Second Rehearing Order at PP 12-16, 24-33, JA 2736, 2742-49. The Commission also approved, as consistent with Order No. 1000, MISO's proposed criteria to evaluate the merits of competing bids to develop a project that has been selected in the regional transmission plan for purposes of cost allocation. *See* Initial Order at PP 334-44, JA 1809-12; First Rehearing Order at PP 346-51, JA 2453-56; Second Rehearing Order at PP 68-70, 81-86, JA 2765-66, 2771-74.

In addition, the Commission determined that the Entergy Operating Companies (Entergy Arkansas, Inc.; Entergy Gulf States Louisiana, L.L.C.; Entergy Louisiana, L.L.C.; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; and Entergy Texas, Inc.) (collectively, "Entergy") constitute a single transmission provider for Order No. 1000 compliance purposes. Second Rehearing Order at PP 87, 90 & nn.175-76, JA 2775, 2777; Initial Order P 5 & n.12, JA 1669; First Rehearing Order at P 414, JA 2487.

SUMMARY OF ARGUMENT

The Commission reasonably approved MISO's proposed developer selection criteria. The Federal Power Act affords the Commission broad "just and reasonable" discretion and flexibility; it does not compel a particular weighting of cost and non-cost factors. As the Commission explained, the proposed criteria will allow MISO to determine which prospective developer

is more likely to be able to avoid major cost overruns during project implementation and efficiently maintain the project over its lifetime and, therefore, are directly related to determining whether a proposal is more efficient or cost-effective. Moreover, the Commission's Order No. 1000 rulemaking did not require any particular weighting of selection criteria. Instead, Order No. 1000 provided significant flexibility, and required only that, in evaluating proposals, a region consider the relative efficiency and cost-effectiveness of alternatives.

The Commission also properly concluded that MISO's proposal to reference state or local rights of first refusal in its Tariff was consistent with Order No. 1000. Order No. 1000 stated that it was directed only at, and prohibited only, federal rights of first refusal, i.e., rights of first refusal created by provisions in Commission-jurisdictional tariffs or agreements. Order No. 1000 also stated that it did not intend to limit, preempt or otherwise affect state or local laws or regulations that restrict the construction of transmission facilities by nonincumbents, or require transmission providers to remove references to such laws or regulations from their FERC-jurisdictional tariffs or agreements.

Allowing MISO's Tariff to reference state and local rights of first refusal is not inconsistent with Order No. 1000's goals. Order No. 1000 sought to remove barriers to competition in regional transmission processes,

but it did not intend to address every barrier to nonincumbent participation. Instead, the Commission struck an important balance between removing barriers to participation and ensuring that the nonincumbent reforms do not result in the regulation of matters reserved to the states. Moreover, the Commission determined in Order No. 1000 that the reforms therein would result in the selection of more efficient or cost-effective solutions to regional needs.

Finally, the Commission reasonably determined that the Entergy Operating Companies are a single transmission provider for Order No. 1000 compliance purposes. LS Power does not dispute that this simply continues these companies' historic practice of providing service as a single transmission provider.

ARGUMENT

I. Standard of Review

The Court reviews agency orders under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), to determine whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See*, *e.g.*, *Pioneer Trail Wind Farm, LLC v. FERC*, No. 13-2326, 2015 WL 4927002 at *3 (7th Cir. Aug. 19, 2015). "Under this standard, the court's review is narrow; a court may not set aside an agency decision that articulates grounds indicating a rational connection between the facts and the agency's action."

Schneider Nat'l, Inc. v. ICC, 948 F.2d 338, 343 (7th Cir. 1991) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *accord N. Ind. Pub. Serv. Co. v. FERC*, 782 F.2d 730, 739 (7th Cir. 1986) ("[O]ur review of the Commission's orders 'is essentially narrow and circumscribed.'") (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 766 (1968)).

Under the Federal Power Act, "Congress has entrusted the regulation of the . . . industry to the informed judgment of the Commission, and therefore a presumption of validity attaches to each exercise of the Commission's expertise." *Village of Bethany v. FERC*, 276 F.3d 934, 940 (7th Cir. 2002) (quoting *N. Ind. Pub. Serv. Co.*, 782 F.2d at 739) (internal quotation marks omitted). "The petitioners have the burden of showing that the Commission's choices are unreasonable and . . . not within a 'zone of reasonableness.'" *Pioneer*, 2015 WL 4927002 at *3. Moreover, the Commission's factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825*l*(b); *Pioneer*, 2015 WL 4927002 at *3.

II. The Commission Reasonably Approved MISO's Criteria To Choose A Developer For A Selected Project

A. MISO's Proposed Criteria

MISO's compliance filing explained that, after MISO selects a project in the regional plan as the more efficient or cost-effective solution to a regional

need, it will evaluate bids to develop that project based on the following four criteria and weighting: (1) cost and reasonably descriptive facility design (30 percent) [6]; (2) project implementation capabilities (35 percent) [7]; (3) operations, maintenance, repair and replacement capabilities (30 percent)[8]; and (4) transmission provider planning process participation

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[6] This criterion will evaluate, at a minimum: (1) estimated project cost; (2) estimated annual revenue requirements for all new transmission facilities; (3) cost estimate rigor, including financial assumptions and supporting information to clearly demonstrate a thorough analysis in support of the cost estimate; (4) reasonably descriptive facility design quality; and (5) reasonably descriptive facility design rigor, including facility studies and other supporting data that clearly document and support consideration and attention given to the proposed descriptive facility designs. R. 17, First Compliance Filing, Tariff Att. FF, Sec. VIII.G.3, JA 1454-55; R. 152, Second Compliance Filing, Tariff Att. FF, Sec. VIII.E.3, JA 2174-75; *see also* Initial Order at P 309, JA 1799.

[7] This criterion will evaluate, at a minimum, existing or planned capabilities and processes regarding: (1) project management; (2) route and site evaluation; (3) land acquisition; (4) engineering and surveying; (5) material procurement; (6) facility construction; (7) final facility commissioning; and (8) previous applicable experience and demonstrated ability. R. 17, First Compliance Filing, Tariff Att. FF, Sec. VIII.G.4, JA 1455; R. 152, Second Compliance Filing, Tariff Att. FF, Sec. VIII.E.4, JA 2175-76; *see also* Initial Order at P 310, JA 1799.

[8] This criterion will evaluate, at a minimum, existing or planned capabilities and processes regarding, as applicable: (1) forced outage response; (2) switching; (3) emergency repair and testing; (4) spare parts; (5) preventative and/or predictive maintenance and testing; (6) real-time operations monitoring and control; and (7) major facility replacement capabilities, including ongoing financial capabilities to restore facilities after catastrophic outages. R. 17, First Compliance Filing, Tariff Att. FF, Sec. VIII.G.5, JA 1455-56; R. 152, Second Compliance Filing, Tariff Att. FF, Sec. VIII.E.5, JA 2176-77; *see also* Initial Order at P 311, JA 1799.

(5 percent).[9] R. 17, MISO's First Compliance Filing, Transmittal Letter at 51-57, JA 1330-36; *see also* Initial Order at P 262 & n.469, PP 308-12, JA 1778, 1798-1800.

LS Power protested the proposed developer selection criteria and weighting. R. 82 at 25-29, JA 1547-51; R. 163 at 40, JA 2257. In its protests, LS Power argued, among other things, that "the appropriate weighting of cost and project design [(criterion 1)] is 75% of the total evaluation. Project implementation [(criterion 2)] and operations/maintenance [(criterion 3)] should be accorded 12.5% each . . . ." *Id. See also* R. 82, Protest, at 25, JA 1547 ("cost should be the primary, but not the exclusive, selection factor") (capitalization in heading altered); *id.* at 26-27, JA 1548-49 ("the 'Cost and Reasonably Descriptive Facility Design Quality' evaluation criteria can be, and should be heavily weighted (at least 75 percent)").

B. The Commission's Determinations

1. The Initial Order

In the Initial Order, the Commission found it appropriate and consistent with Order No. 1000 for MISO to consider several factors in

[9] This criterion will evaluate relevant planning studies conducted by the bidding transmission developer and transmission project ideas previously submitted as potential solutions to address the same identified transmission need. R. 17, First Compliance Filing, Tariff Att. FF, Sec. VIII.G.6, JA 1456; R. 152, Second Compliance Filing, Tariff Att. FF, Sec. VIII.E.6, JA 2177; *see also* Initial Order at P 312, JA 1800.

evaluating bids to develop a selected transmission project. Initial Order at P 337, JA 1809. In addition, noting that MISO's compliance filing did not, as required by Order No. 1000, include criteria to determine whether a developer is qualified to submit project proposals, the Commission suggested that developer selection criteria 2 (project implementation capabilities) and 3 (operations, maintenance, repair and replacement capabilities) "may be" better used in that evaluation. Initial Order at PP 335, 338, JA 1809, 1810; *see also* First Rehearing Order at P 328, JA 2445. The Commission directed MISO to specify and distinguish the criteria it will use to determine whether a developer is qualified to submit project proposals and those it will use to choose a developer for a selected project. Initial Order at P 340, JA 1810.

The Commission also noted that MISO had not explained its proposed criteria weighting. Initial Order at P 339, JA 1810. The Commission was "concerned that an evaluation process that considers costs as part of a single criterion, and weights that criterion at only 30 percent[,] may not properly measure the relative efficiency and cost-effectiveness of a proposed bid." *Id.* Thus, the Commission directed MISO to "revise its evaluation process to reflect greater weighting of costs in evaluating transmission developer bids in order to better reflect the relative efficiency and cost-effectiveness of any proposed transmission solutions, **or** explain and justify why its proposed weighting of costs in the evaluation process complies with the requirements

of Order No. 1000." *Id.* at P 340, JA 1811 (emphasis added).

2. MISO's Second Compliance Filing

MISO's second compliance filing included separate criteria to determine whether a developer is qualified to submit project proposals. *See* First Rehearing Order at PP 245-57, 331, JA 2399-2409, 2447. LS Power does not challenge those criteria on appeal.

The compliance filing also justified MISO's developer selection criteria and weighting. *See* First Rehearing Order at PP 332-33, 342-44, JA 2447-48, 2451-52. MISO explained that, "[u]nlike other industries, there is far too much uncertainty and risk associated with the development of a new transmission facility to establish a fixed price in advance of regulatory permitting, right-of-way acquisition, and final engineering and design." R. 152, Second Compliance Filing, Transmittal Letter at 25-26, JA 2019-20. In these circumstances, "placing a disproportionate emphasis in the bid evaluation process on the cost estimates submitted in bids will result in an undue emphasis on the most inherently inaccurate aspect of the overall bid, which does nothing to ensure that more efficient and cost-effective solutions are chosen." *Id.* "In fact, the opposite would likely occur, because an over-emphasis on the cost portion of the bid could encourage parties to under-estimate their bid costs or submit projects that are inferior from a design perspective, which could actually result in a less efficient or cost-effective

project being selected, simply because the cost factor carries so much weight." *Id.*

Moreover, MISO explained, a developer's cost estimate is only one of the factors that affects whether a developer's bid will be the more efficient or cost-effective one over a project's lifetime. R. 165, MISO Answer to Protests, at 5, JA 2266. "Other, more certain factors are equally important to the successful completion and reliable operation of new transmission facilities -- such as the capabilities, competencies, and track records of the [bidders], the attributes of the proposed reasonably described facility design, and the rigor of the facility design proposal -- and thus should play at least as much of a role in the overall decision as a non-binding cost estimate." *Id.* at 4-5, JA 2265-66.

These other factors, MISO pointed out, "are directly related to determining whether a [bid] is more efficient or cost-effective, as [they] have a direct bearing on the overall cost of a project, and thus rates paid by customers." *Id.* at 5, JA 2266. "A developer's ability to implement and operate a transmission project in an efficient and reliable manner will translate to lower rates to consumers" by "reducing the likelihood of the need for replacement or reliability issues over the life of the project." *Id.* "MISO's evaluation process places appropriate weight on all aspects of a [bid], rather than myopically focusing on an unreliable bid cost estimate to the detriment

of ensuring that the developer is sufficiently qualified to develop, own, operate, and reliably maintain the facility." *Id.*

3. The First And Second Rehearing Orders

The Commission found that MISO had sufficiently explained and justified its proposed developer selection criteria and weighting. First Rehearing Order at PP 346-49, JA 2453-55; Second Rehearing Order at PP 81-86, JA 2771-74. While only one criterion refers explicitly to project costs, the other criteria are also directly related to determining whether a proposal is more efficient or cost-effective. First Rehearing Order at P 349, JA 2455; Second Rehearing Order at PP 85-86, JA 2773. These other criteria will allow MISO to consider, for example, which prospective developer is more likely to be able to avoid major cost overruns during project implementation and efficiently maintain the project over its lifetime. First Rehearing Order at P 349, JA 2455. Thus, the proposed criteria and weighting will enable MISO to choose the most efficient or cost-effective developer for a selected project. First Rehearing Order at PP 348-49, JA 2454-55; Second Rehearing Order at PP 85-86, JA 2773.

C. LS Power's Challenges To MISO's Developer Selection Criteria Lack Merit

1. MISO's Developer Criteria Are Directly Related To Determining Whether A Bid Is More Efficient Or Cost-Effective

LS Power first attempts to undercut the Commission's finding by asserting that Order No. 1000 requires that "cost and cost-based factors be the majority emphasis" in evaluating developer bids "because the Commission's authority is limited to those factors." Br. at 27-28; *see also* Br. at 26-28, 36-38, 40 (same).

The Federal Power Act, however, does not limit FERC's authority to "costs" and "cost-based" factors. Indeed, "[t]he Supreme Court has repeatedly rejected the argument 'that there is only one just and reasonable rate possible . . . and that this rate must be based entirely on some concept of cost plus a reasonable return.'" *Blumenthal v. FERC*, 552 F.3d 875, 883 (D.C. Cir. 2009) (quoting *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 316 (1978); citing *Permian Basin*, 390 U.S. at 796-98, and *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944)); *see also Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464, 471 (D.C. Cir. 2008), *rev'd in other part sub nom. NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 130 S.Ct. 693 (2009) (FERC "need not rely on generators' costs to determine rates. The Supreme Court has disavowed the notion that rates must depend on historical costs and has held that rates may

be determined by a variety of formulae"); *Am. Pub. Power Ass'n v. FPC*, 522 F.2d 142, 146 (D.C. Cir. 1975) ("Congress carefully eschewed tying 'just and reasonable rates' to any particular method of deriving rates. Certainly there is nothing in the Federal Power Act specifically endorsing historic test year ratemaking or any other technique of ratemaking. Congress clearly intended to allow the Commission broad discretion in regard to the methodology of testing the reasonableness of rates.").

Moreover, as just discussed, the Commission reasonably found that the developer selection criteria are directly related to determining whether a proposal is more efficient or cost-effective, and together will enable MISO to choose the most efficient or cost-effective developer. First Rehearing Order at PP 348-49, JA 2454, 2455; Second Rehearing Order at PP 85-86, JA 2773. Thus, the Commission reasonably rejected LS Power's claim that the developer selection criteria include matters beyond the Commission's jurisdiction.

Another difficulty with LS Power's argument is that, in contending that the majority, but not all, of the developer selection criteria should be cost and cost-based (*see*, *e.g.*, Br. at 27-28; LS Power Protests (R. 82 at 25-29, JA 1547-51; R. 163 at 40, JA 2257), discussed *supra* at p. 16), LS Power concedes that FERC has jurisdiction to approve non-cost-based criteria. *See Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822, 828 (D.C. Cir. 2006) (by

objecting only to monthly, and not hourly, netting period, petitioner conceded it was within FERC's authority to approve a netting period).

Order No. 1000 does not require any particular weighting of developer selection criteria. Second Rehearing Order at P 84, JA 2772. In fact, "the Commission declined to address transmission developer selection in Order No. 1000." Order No. 1000-A at P 455, JA 966. And, in Order No. 1000-A, the Commission rejected LS Power's request that a region be required to select the developer guaranteeing the lowest net present value of its annual revenue requirement. *Id.* at PP 450, 455, JA 963, 966.

Order No. 1000 does not require any minimum criteria (including cost estimates) or particular weighting for project proposal selection either. Order No. 1000-A at PP 453, 455, JA 965, 966, *cited in* Second Rehearing Order at P 86 & n.164, JA 2774; Second Rehearing Order at P 84, JA 2772; *see also* Order No. 1000-A at P 455, JA 967 ("clarify[ing] that when cost estimates are part of the selection criteria, the regional transmission planning process must scrutinize costs in the same manner when the transmission project is sponsored by an incumbent or nonincumbent transmission developer"), *cited in* Initial Order at P 306 & n.558, JA 1798.

Instead Order No. 1000, consistent with the Federal Power Act's broad "just and reasonable" standard, provides flexibility, allowing selection criteria to vary among regions and requiring only that regions consider relative

efficiency and cost-effectiveness in choosing among proposed transmission projects. Second Rehearing Order at P 84, JA 2772; First Rehearing Order at P 348, JA 2454 (citing Order No. 1000 at n.307, JA 265); Order No. 1000-A at P 455, JA 966; *see also* LS Power Br. at 26 ("Order No. 1000 was necessarily broad. The Commission rejected multiple efforts to add specificity to the rulemaking, deferring to compliance filings so that regional differences could be taken into account.") (citing Order No. 1000-A at PP 452-56, JA 964-68); Br. at 28 (same). The Commission determined that the same evaluation, i.e., relative efficiency and cost-effectiveness, should be used in choosing a developer for a project selected in the regional transmission plan for purposes of cost allocation, and that that requirement was satisfied here. First Rehearing Order at P 348, JA 2454; Second Rehearing Order at PP 82, 84, JA 2771-72.

At bottom, determining whether proposed criteria and weighting are appropriate and consistent with Order No. 1000 is an exercise entrusted to the Commission's expert consideration. As this Court recently explained, "'FERC must be given the latitude to balance the competing considerations and decide on the best resolution.'" *Pioneer*, 2015 WL 4927002 at *6 (quoting *NRG Power Mktg., LLC v. FERC*, 718 F.3d 947, 955-56 (D.C. Cir. 2013)). The Commission's reasonable determination here should stand.

2. The Commission Reasonably Found That MISO's Process Selects The More Efficient Or Cost-Effective Project

Order No. 1000 requires that a region's transmission plan include transmission facilities that the region has determined will more efficiently or cost-effectively meet its needs. Order No. 1000 at P 148, JA 119; *see also* Initial Order at P 70, JA 1694. The rulemaking provides regions flexibility in determining how they will select the more efficient or cost-effective projects. Initial Order at P 68, JA 1694.

The Commission determined that MISO selects the more efficient or cost-effective solution to its region's needs through its project selection process. First Rehearing Order at PP 346-47, JA 2453; Second Rehearing Order at P 81, JA 2771. As MISO explained, it evaluates every proposed project that is a potential solution under its project selection criteria to determine which projects are the more efficient or cost-effective solutions to regional needs. *See* Initial Order at PP 71-73 & nn.120-23, JA 1695-98; First Rehearing Order at P 347, JA 2453. This evaluation considers a variety of factors, including a "comparison from amongst alternatives of operating performance, initial investment costs, robustness of solution, longevity of the solution provided, and performance against other economic metrics." Initial Order at P 72 & n.123, P 73, JA 1696-97; *see also* First Rehearing Order at P 347, JA 2453. After a proposed project is selected as the more efficient or

cost-effective solution to a regional need, MISO then solicits bids to develop that project. *Id.* Thus, as the Commission found, in MISO the more efficient or cost-effective project is already selected before MISO solicits bids to develop the selected project.

LS Power claims MISO asserted that cost estimates are so inherently inaccurate that they do nothing to ensure that more efficient and cost-effective solutions are chosen. Br. at 30-31, citing First Rehearing Order at P 332, JA 2447. MISO actually stated that "placing a disproportionate emphasis in the bid evaluation process on cost estimates submitted in bids will result in an undue emphasis on the most inherently inaccurate aspect of the overall bid, which does nothing to ensure that more efficient or cost-effective solutions are chosen." R. 152, Second Compliance Filing, Transmittal Letter at 26, JA 2020; *see also* First Rehearing Order at P 332, JA 2447 (same). MISO's concern was resolved when the Commission approved MISO's proposal to consider a project's estimated cost as only one factor in selecting the more efficient or cost-effective project.

Next, LS Power asserts that, to address the uncertainty of cost estimates, MISO should require that cost estimates be binding. Br. at 31. MISO explained, however, there is far too much uncertainty and risk associated with the development of a new transmission facility to establish a binding price in advance of regulatory permitting, right-of-way acquisition,

and final engineering and design. R. 152, Second Compliance Filing, Transmittal Letter at 25-26, JA 2019-20. Moreover, the Commission's role here was to review MISO's filing for compliance with Order No. 1000 and the statutory "just and reasonable" standard, not to require MISO to change its compliant regional planning processes to LS Power's preferred approach. *Cf. OXY USA, Inc. v. FERC*, 64 F.3d 679, 692 (D.C. Cir. 1995) ("when determining whether proposed rate was 'just and reasonable,' as required by the Federal Power Act, FERC properly did not consider 'whether a proposed rate schedule is more or less reasonable than alternative rate designs'") (quoting *City of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1995)).

There also is no merit to LS Power's claim that selecting the more efficient or cost-effective project before soliciting bids to develop a selected project would leave nonincumbents out of the competitive process. Br. at 32-33. As required by Order No. 1000, MISO will select a project after it considers the relative efficiency and cost-effectiveness of all competing project proposals, whether submitted by incumbents or nonincumbents. Second Rehearing Order at P 82, JA 2771. And, the Commission found, in the developer selection process, MISO must consider the relative efficiency and cost-effectiveness of all bids to develop a selected project, whether submitted by incumbent or nonincumbent developers. *Id.* Accordingly, MISO will consider both nonincumbent and incumbent proposals in selecting the more

efficient or cost-effective project and then in selecting a developer for the selected project.

3. The Commission Reasonably Found That MISO's Process Selects The More Efficient Or Cost-Effective Developer

As previously noted, the Commission determined that MISO's developer selection criteria will enable MISO to identify the more efficient or cost-effective developer for a selected project. First Rehearing Order at PP 348-49, JA 2454-55; Second Rehearing Order at PP 85-86, JA 2773. LS Power asserts that this determination ignores another Commission "finding" that the second (project implementation) and third (operations/maintenance capabilities) criteria would better serve as criteria to determine whether an entity is qualified to propose projects. Br. at 36 (citing Initial Order at P 338, JA 1810); *see also* Br. at 23 (same). The Commission made no such finding.

Instead, after noting that MISO's filing did not comply with Order No. 1000's requirement to provide criteria to assess whether an entity is qualified to submit project proposals, the Commission simply stated that the project implementation and operations/maintenance capabilities criteria "may be better used" in determining whether an entity is qualified to submit project proposals. Initial Order at PP 335, 338, JA 1809, 1810. The Commission further stated, however, that, "[i]n the context of a competitive bidding model like MISO has proposed, there will be overlap between the qualification

criteria and the information a qualified transmission developer must submit with a bid to develop a specific transmission facility." First Rehearing Order at P 285, JA 2426.

An entity's qualification to submit project proposals does not mean, as LS Power asserts (Br. at 37, 38), that it has been determined to have the ability to develop a specific project selected in the regional plan. As MISO pointed out, while an entity may be approved as generally qualified to propose projects for selection in the regional plan, it may not have the specific qualifications necessary to build a particular project selected in that plan. First Rehearing Order at PP 315, 333, JA 2439, 2448. Thus, the Commission found it appropriate for MISO to require project-specific information from an entity bidding to develop a selected project, even though that entity already had been generally qualified to submit project proposals. *Id.* at P 295, JA 2431.

LS Power also argues that the developer selection criteria "reveal no obvious ability or intent to determine" either the "'the ability of the entity actually to implement the project and meet the in-service date'" or "'whether a transmission developer is likely to avoid major cost overruns during project implementation.'" Br. at 37-38 (quoting First Rehearing Order at P 349, JA 2455); *see also* Br. at 37 (noting that the developer selection criteria "do not reference the in-service date at all").

As the Commission pointed out, however, MISO's compliance filing explained that "the development of transmission infrastructure must be focused on," among other things, "the following attributes: (i) the quality and rigor of the proposed facility design attributes compared to the level and rigor of the cost estimates (i.e., how much bang for the buck and how accurate is the assessment); [and] (ii) the ability of the entity actually to implement the project and meet the in-service date (i.e., will the project actually materialize and will that happen on or before the date required) . . . ." Second Compliance Filing, Transmittal Letter at 26, JA 2020, *cited in* First Rehearing Order at P 349, JA 2455.

The Commission found the developer criteria (set out *supra* at pp. 15-16) "broad enough to allow MISO to consider the attributes MISO noted in its compliance filing (including the ability of the transmission developer to implement a transmission project and meet the in-service date) and to evaluate whether a transmission developer is likely to avoid major cost overruns during project implementation . . . ." Second Rehearing Order at P 85, JA 2773. There was no need for MISO to specifically reference every possible component of each factor it will consider in its evaluation. *Id.*

4. The Commission Reasonably Found The Proposed Selection Criteria Are Not Unduly Discriminatory

LS Power contends that two of MISO's developer selection criteria (criterion 2 (project implementation capabilities) and criterion 3 (operations, maintenance and repair capabilities)) were designed so that incumbent developers would meet them and, therefore, that the criteria are unduly discriminatory against nonincumbent developers. Br. at 39. In LS Power's view, MISO could not have proposed that incumbent transmission developers automatically meet these criteria unless they were designed so those developers would meet them. *Id.*

As LS Power acknowledges, Br. at 39, the Commission rejected MISO's proposal to consider an incumbent developer as automatically meeting the project implementation and operations, maintenance and repair criteria for projects that connect to the incumbent's system. First Rehearing Order at PP 294, 325, 350, JA 2430, 2443, 2455.

Moreover, as already discussed, the Commission found these criteria appropriate, as they address important issues: a prospective developer's ability to actually and timely implement a selected transmission project, and its ability to operate and maintain the project's facilities reliably throughout their life. First Rehearing Order at P 349, JA 2455; Second Rehearing Order at PP 85-86, JA 2773. "[T]hat an incumbent transmission provider may have

particular strengths that are considered as part of the criteria used in the evaluation process does not make the evaluation process unduly discriminatory." Second Rehearing Order at P 83, JA 2772 (citing Order No. 1000 at P 260, JA 208; Order No. 1000-A at P 454 & n.535, JA 966). Order No. 1000 recognized that incumbents may have particular strengths, and determined that it was appropriate to consider those strengths during the evaluation process. Order No. 1000 at P 260, JA 208; Order No. 1000-A at P 454 & n.535, JA 966.

III. The Commission Reasonably Determined That MISO's Proposal To Reference State Or Local Rights Of First Refusal And Rights Of Way Was Consistent With Order No. 1000

The challenged orders approved, as consistent with Order No. 1000, MISO's proposal to include the following provision in its Tariff to recognize that state or local laws might define which entities are eligible to develop transmission projects:

> State or Local Rights of First Refusal. The Transmission Provider shall comply with any Applicable Laws and Regulations granting a right of first refusal to a Transmission Owner. The Transmission Owner will be assigned any transmission project within the scope, and in accordance with the terms, of any Applicable Laws and Regulations granting such a right of first refusal. These Applicable Laws and Regulations include, but are not limited to, those granting a right of first refusal to the incumbent Transmission Owner(s) or governing the use of existing developed and undeveloped right[s] of way held by an incumbent utility.

R. 17 (First Compliance Filing) at Att. FF Sec. VIII.A, JA 1428; *see also id.* at Transmittal Letter 50, 55 (discussing provision), JA 1329, 1334.

LS Power raises various arguments in an effort to show that this provision is inconsistent with Order No. 1000. Br. at 41-50. None of these arguments has merit.

A. Order No. 1000 Required Removal Of Federal, Not State Or Local, Rights Of First Refusal

LS Power contends that permitting MISO to include the state or local right of first refusal provision in its Tariff is inconsistent with Order No. 1000. Br. at 42. Order No. 1000 explicitly stated, however, that it was directed only at, and prohibited only, federal rights of first refusal, i.e., rights of first refusal "created by provisions in Commission-jurisdictional tariffs or agreements." Order No. 1000-A at P 415, JA 315, *cited in* First Rehearing Order at n.128, JA 2315; *see also* Order No. 1000 at P 253 & n.231, JA 201 (explaining that rulemaking "purposely refers to 'federal rights of first refusal'"); Order No. 1000-A at P 360, JA 893; Order No. 1000-B at P 39, JA 1247; First Rehearing Order at PP 77, 78, 148-149, 156 JA 2315-16, 2349-50, 2353 (citing Order No. 1000 at P 313, JA 250); Second Rehearing Order at PP 25-33, JA 2289-92.

Moreover, Order No. 1000 "acknowledge[d] that there may be restrictions on the construction of transmission facilities by nonincumbent

transmission providers under rules or regulations enforced by other jurisdictions," and stated that "[n]othing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities. **This Final Rule does not require removal of references to such state or local laws or regulations from Commission-approved tariffs or agreements**." Order No. 1000 at n.231, JA 201 (emphasis added), P 287, JA 229; Order No. 1000-A at P 381, JA 911; *see also* Second Rehearing Order at P 25, JA 2743; First Rehearing Order at PP 149, 156, JA 2350, 2353; *South Carolina*, 762 F.3d at 76.

LS Power "recognizes that state rights of first refusal may prohibit it from constructing a transmission project in a particular state," and that "nothing in Order No. 1000 was intended to abrogate those state laws." Br. at 47. Nonetheless, LS Power claims that allowing MISO's Tariff to reference state and local rights of first refusal is inconsistent with Order No. 1000's goal of identifying and evaluating more efficient or cost-effective alternatives to regional transmission needs, and abdicates the Commission's responsibility to ensure just and reasonable rates. Br. at 44-45, 46-47; *see also* Br. at 46 (arguing that states that do not provide state rights of first refusal subsidize the costs of projects in states that provide those rights).

As already discussed, however, the Commission's focus in Order No. 1000 was on federal, not state or local, rights of first refusal. The Commission found it necessary to remove federal rights of first refusal to construct facilities selected in a regional transmission plan for purposes of cost allocation because they have the potential to undermine the identification and evaluation of more efficient or cost-effective alternatives to meet regional transmission needs, which can result in unjust and unreasonable rates.[10] *See*, *e.g.*, Order No. 1000 at PP 225-26, 253, 257, 289, JA 176-78, 201, 205, 230; First Rehearing Order at PP 148, 154-56, JA 2349, 2353; Second Rehearing Order at PP 27, 29, 30, 32, 33, JA 2745-48.

"[W]hile Order No. 1000 sought to remove barriers to competition in regional transmission planning processes, it did not purport to address every barrier to participation by nonincumbent transmission developers." First Rehearing Order at P 156, JA 2353; *see also* Second Rehearing Order at PP 32-33, JA 2748 (same); First Rehearing Order at P 155, JA 2353 (same) (citing Order No. 1000 P 287, JA 229).

Instead, "the Commission struck an important balance between removing barriers to participation by potential transmission providers in the regional transmission planning process and ensuring the nonincumbent

[10] MISO Transmission Owners' challenges to the Commission's requirement that MISO remove federal rights of first refusal from its FERC-jurisdictional tariff and agreements are before this Court in related Docket No. 14-2153.

transmission developer reforms do not result in the regulation of matters reserved to the states." Second Rehearing Order at P 27, JA 2745; *see also* First Rehearing Order at P 156, JA 2353 (same) (citing Order No. 1000-A at P 377, JA 908); *id.* (Order No. 1000 "repeatedly emphasized" that it did not preempt state or local laws regarding construction); *South Carolina*, 762 F.3d at 76 (Order No. 1000 took "great pains to avoid intrusion on the traditional role of the States . . . . Even if the Commission's mandate opens up opportunities for nonincumbents, such developers must still comply with state law.").

The Commission determined that its Order No. 1000 reforms were "*adequate* to support more efficient and cost-effective investment decisions moving forward." Second Rehearing Order at P 30, JA 2747 (quoting Order No. 1000 at P 44, JA 39) (emphasis added by Commission); *see also* Order No. 1000 at P 46, JA 41 (same), *cited in* Second Rehearing Order at nn.51-52, JA 2745; First Rehearing Order at P 154, JA 2353 (Order No. 1000 found its reforms "would 'address disincentives that may be impeding participation by nonincumbent transmission developers in the regional transmission planning process'") (quoting Order No. 1000 at P 320, JA 256).

Moreover, the Commission explained, the competitive process is only one of the means set out in Order No. 1000 to accomplish the goal of selecting more efficient or cost-effective transmission solutions. First Rehearing Order

at P 157, JA 2354; Second Rehearing Order at PP 32-33, JA 2748. The regional transmission planning process itself, including the requirement that transmission providers consider regional solutions that might resolve a region's transmission needs more efficiently or cost-effectively than the solutions identified in local transmission plans of individual transmission providers, is also an important tool for accomplishing this goal. First Rehearing Order at P 157, JA 2354; Second Rehearing Order at PP 32-33, JA 2748; Initial Order at PP 40, 68, JA 1680, 1693; Order No. 1000 at PP 78, 116, 148, 156, JA 95, 119, 127.

Thus, the Commission reasonably concluded that Order No. 1000's regional transmission planning reforms would result in the selection of more efficient or cost-effective transmission solutions even if a transmission project is subject to a state or local right of first refusal. First Rehearing Order at P 157, JA 2354; Second Rehearing Order at PP 32-33, JA 2748.

LS Power's claim is similar to one rejected by the Supreme Court in *New York v. FERC*, 535 U.S. 1, 26-28 (2002), which affirmed the Commission's Order No. 888 (open access transmission) rulemaking. In that case, a petitioner argued that the Commission should have applied its rulemaking's requirements not only to wholesale, but also to bundled retail, transmission. *New York*, 535 U.S. at 26. In finding the Commission's determination "clearly acceptable," the Court noted that Order No. 888's

focus was on the wholesale power market and that the Commission found limiting its remedy to that market was a sufficient response to the problem it identified. *Id.* at 26-27.

The Court recognized that FERC's wholesale market discrimination findings might suggest that discrimination existed in the retail market as well, but found that, because the rulemaking did not concern discrimination in the retail market, the Federal Power Act did not require FERC to provide retail-market remedies. *Id.* at 27. In addition, the Court stated that, "even if [it] assume[d], for present purposes that [petitioner] is *correct* in its claim that the [Federal Power Act] gives FERC the authority to regulate the transmission component of a bundled retail sale," FERC "had discretion to decline to assert such jurisdiction in this proceeding in part because of the complicated nature of the jurisdictional issues." *Id.* at 28. "FERC's choice not to assert jurisdiction over bundled retail transmissions in a rulemaking focused on the wholesale market represents a statutorily permissible policy choice." *Id.* (internal quotation marks omitted). Similarly here, the Federal Power Act did not require the Commission to provide state and local right of first refusal remedies in its rulemaking focused on federal rights of first refusal. *See also Mobil Oil Explor. & Prod. Se. v. United Distrib. Cos.*, 498 U.S. 211, 230-31 (1991) (Commission need not solve all problems at one time in one proceeding; "agency enjoys broad discretion in determining how best to

handle related, yet discrete issues") (citing *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 543-44 (1978)).

LS Power's contention that the provision here does not merely reference state right of first refusal laws but, instead, creates a federal right of first refusal, Br. at 42, 44-45, fails as well. First Rehearing Order at PP 147, 149, JA 2349, 2350; Second Rehearing Order at PP 25-26, 28-30, JA 2743-44, 2745-47. As the Commission explained, the state and local right of first refusal provision simply recognizes that there might be state or local laws and regulations that grant an incumbent a right of first refusal and provides that, if there are, MISO will comply with them. Second Rehearing Order at PP 25, 28, 29, JA 2743, 2745, 2746; First Rehearing Order at P 147, JA 2349. This provision does not create a federal right of first refusal. Rather, any state or local right of first refusal would be created at the state and local level, and would continue to exist even if reference to it were removed from the Tariff. First Rehearing Order at P 149, JA 2350(citing Order No. 1000-A at P 381, JA 911); Second Rehearing Order at P 29 & n.58, P 30, JA 2746, 2747.

LS Power "seek[s] to expand the reach of Order No. 1000's reforms" in arguing that MISO should be prohibited "from recognizing state or local laws or regulations when deciding whether MISO will hold a competitive solicitation for a transmission facility selected in the regional plan for

purposes of cost allocation." Second Rehearing Order at P 29, JA 2746. This improper collateral attack on the final and judicially affirmed Order No. 1000 rulemaking should be rejected. *See*, *e.g.*, *Constellation Energy Commodities Grp., Inc. v. FERC*, 602 Fed. Appx. 536, 538 (D.C. Cir. 2015) (court lacks jurisdiction to consider untimely collateral attacks on earlier FERC orders) (citing *Pac. Gas & Elec. Co. v. FERC*, 533 F.3d 820, 825 (D.C. Cir. 2008); *Sacramento Mun. Util. Dist. v. FERC*, 428 F.3d 294, 299 (D.C. Cir. 2005)).

LS Power's concern that the proposed provision will "ensnare FERC in the application and interpretation of state law," Br. at 43, is baseless. LS Power ignores that "states will provide input regarding their state or local laws and regulations." Second Rehearing Order at P 31, JA 2747. In fact, the Commission expects that state regulators will play a strong role in regional transmission planning, and that public utility transmission providers will consult closely with state regulators during the transmission planning process. *Id.* (citing Order No. 1000-A at P 338, JA 873); *see also* Initial Order at PP 62, 64, 66, 354, JA 1691, 1692, 1693, 1816 (approving MISO's proposal to create a committee of state representatives to provide input regarding transmission planning matters).

Next, LS Power asserts that there is a conflict in the Commission's determinations in the First Rehearing Order that (1) MISO can recognize state and local rights of first refusal when deciding whether it will hold a

competitive solicitation for a transmission facility selected in the regional transmission plan for purposes of cost allocation (First Rehearing Order at P 149, JA 1731); and (2) MISO cannot require a non-incumbent developer to show, as part of the qualification criteria, that it is authorized to do business in at least one state within the MISO footprint (First Rehearing Order at P 292, JA 2428). Br. at 45.

LS Power failed to raise this purported conflict to the Commission in its request for rehearing of the First Rehearing Order (R. 182, JA 2540) and, therefore, waived its opportunity to raise it on appeal. Federal Power Act section 313(b), 16 U.S.C. § 825*l*(b) ("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."); *see also*, *e.g.*, *Ind. Util. Regul. Comm'n v. FERC*, 668 F.3d 735, 738-40 (D.C. Cir. 2012) (jurisdiction to review FERC orders is limited to arguments specifically raised in petitioner's rehearing request); *Wis.-Mich. S. Cent. Power Co. v. FPC*, 197 F.2d 472, 475 (7th Cir. 1952) (failure to raise an issue on rehearing "should be conclusive" in light of FPA § 313(b)'s rehearing requirement).

In any event, LS Power's assertion lacks merit. First, as just discussed, *supra* at p. 33-36, Order No. 1000 does not prohibit a transmission provider's tariff from recognizing state and local laws and regulations that might

provide rights of first refusal to construct facilities. Order No. 1000, however, does prohibit those tariffs from requiring a non-incumbent to show, as part of the qualification process, that it either has, or can obtain, state approvals necessary to operate in a state, such as state public utility status, state permits, and the right to eminent domain. *See* First Rehearing Order at P 292, JA 2429 (citing Order No. 1000-A at P 441, JA 957); Second Rehearing Order at P 67, JA 2764.

Allowing reference to state and local rights of first refusal does not "allow[] MISO to exclude projects as a threshold matter," as LS Power claims. Br. at 45; *see also id.* at 41 (heading). Rather, the provision simply allows MISO to recognize state and local right of first refusal laws when deciding whether it will hold a competitive solicitation to select a developer for a transmission project that already has been selected in the regional plan for purposes of cost allocation. First Rehearing Order at P 149, JA 2350; Second Rehearing Order at P 28, JA 2745.

B. Order No. 1000 Permits Consideration Of Existing Rights Of Way

LS Power does not dispute (*see* Br. at 48-50) that Order No. 1000 "does not remove, alter, or limit an incumbent transmission provider's use and control of its existing rights-of-way under state law." Initial Order at P 135, JA 1724; First Rehearing Order at P 78, JA 2315; *see also* Second Rehearing

Order at n. 45, JA 2754 (same) (citing Order No. 1000 at P 319, JA 255); Order No. 1000 at P 226, JA 177 (same); Order No. 1000-A at PP 357, 427, JA 890, 947 (same).

LS Power argues, however, that the state providing the right of way, not MISO or the Commission, is the appropriate entity to interpret or apply existing rights of way. Br. at 49-50. But, again, this ignores that the Commission expects MISO to "work closely with the states throughout the transmission planning process" and to be transparent about any state or local laws or regulations it plans to use in its decision-making process. Second Rehearing Order at P 31, JA 2747.

IV. The Commission Reasonably Determined That The Entergy Operating Companies Are A Single Transmission Provider For Order No. 1000 Compliance Purposes

MISO included Entergy in its Order No. 1000 compliance filing because Entergy had announced its intention to join MISO. Initial Order at P 446, JA 1856. LS Power asked the Commission to consider each Entergy Operating Company as "a separate retail distribution territory or footprint" for purposes of defining "local transmission facilities" under Order No. 1000. R. 163, LS Power Protest to Second Compliance Filing, at 43, JA 2260; R. 182, LS Power Second Rehearing Request, at 9-11, JA 2548-50.

LS Power apparently made this request because Order No. 1000's requirements apply only to new transmission facilities selected in a regional

transmission plan for purposes of cost allocation, not to "local transmission facilities." Order No. 1000 at P 63, JA 53. Under Order No. 1000, a "local transmission facility is a transmission facility located solely within a public utility transmission provider's retail distribution service territory or footprint that is not selected in a regional transmission plan for purposes of cost allocation." *Id.*; *see also* Order No. 1000-A at P 429, JA 948 (clarifying that, under Order No. 1000, "a local transmission facility is one that is located within the geographical boundaries of a public utility transmission provider's retail distribution territory, if it has one, otherwise the area is defined by the public utility transmission provider's footprint.").

The Commission reasonably rejected LS Power's request. Second Rehearing Order at P 90 & nn.175-76, JA 2777-78; First Rehearing Order at P 414 & n.781, JA 2487. As the Commission explained (and LS Power does not dispute, *see* Br. at 50-52), before joining MISO, Entergy provided transmission service as a single transmission provider, under a single open access transmission tariff, at a transmission rate that provided access to the entire Entergy transmission system footprint, which was made up of the Entergy Operating Companies' combined retail distribution territories. Second Rehearing Order at n.175, JA 2777. *See also La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 383-84 (D.C. Cir. 2008) (explaining that the Entergy Operating Companies have "been highly integrated for over fifty years, with

transactions within the System governed by a System Agreement," which "acts as an interconnection and pooling agreement for the energy generated in the System and provides for the joint planning, construction and operation of new generating capacity in the System").

Based on this history, the Commission found that Entergy is a single transmission provider for Order No. 1000 compliance purposes and, therefore, that the boundaries of Entergy's combined retail distribution service territories will govern whether transmission facilities are local under Order No. 1000.[11] Second Rehearing Order at P 90, JA 2777 (citing *Duke Energy Carolinas LLC*, 145 FERC ¶ 61,252 (2013) (finding that, because the companies at issue there constitute a single transmission provider for purposes of Order No. 1000 compliance, their retail distribution service territories taken together constitute a single footprint for purposes of defining local transmission facilities under Order No. 1000)).

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[11] The Commission's determination is consistent with LS Power's position in the Order No. 1000 proceeding. There, LS Power asserted that "where there are affiliated public utility transmission providers located in adjacent and electrically connected geographic areas, they may be treated as a single transmission owner only if, as of the date Order No. 1000 became effective, the affiliates have, in the past, conducted joint planning and maintained a single transmission rate applicable to service provided by all such affiliates regardless of the customer's location within the retail distribution area of a single affiliate . . . ." Order No. 1000-A at P 404, JA 930. Entergy meets those criteria. In declining to provide this clarification, Order No. 1000 stated that the Commission would address such matters during the compliance process. *Id.* at P 429, JA 949.

LS Power contends that each Entergy Operating Company's retail distribution territory is a distinct "local" area for MISO planning purposes. Br. at 50-52. This contention ignores Entergy's history and the Commission's finding, based on that history, that the Entergy Operating Companies are a single transmission provider for Order No. 1000 compliance purposes. Second Rehearing Order at P 90, JA 2777. This means, as the Commission found, that Entergy's combined retail distribution territories will determine whether a facility is local for Order No. 1000 purposes. *Id.*

LS Power also argues that the Commission improperly permitted the determination whether a transmission facility is local to be based on Entergy's footprint rather than on its retail distribution territories. Br. at 51. The Commission stated, however, that this determination will be based on Entergy's combined retail distribution service territories. Second Rehearing Order at P 90, JA 2777. This is unchanged by the Commission's further statement that, "because, for purposes of compliance with Order No. 1000, the Entergy Operating Companies together constitute a single transmission provider . . . the single Entergy transmission provider footprint is the combined retail distribution service territories of each of the Entergy Operating Companies." *Id.*

CONCLUSION

For the reasons stated, the petition for review should be denied.

Respectfully submitted,

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December 15, 2015

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief for Respondent contains 10,942 words, including the glossary but excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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December 15, 2015

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dicial 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

§ 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;

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

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 condition 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 reservation. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.

(b) Alternative prescriptions

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

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

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

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

(i) cost significantly less to implement; or

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

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

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

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

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

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

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

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

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

(g) Books and records

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

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

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

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

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

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

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

(4) Nothing in this section shall—

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

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

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

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

REFERENCES IN TEXT

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

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

AMENDMENTS

2005—Subsec. (b)(2). Pub. L. 109–58, § 1295(a)(1), substituted ''Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 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''.

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

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 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

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

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

(f) Public utility securities regulated by State not affected

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

(g) Guarantee or obligation on part of United States

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

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

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

ation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

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

§ 825k. Publication and sale of reports

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and is authorized to sell at reasonable prices copies of all maps, atlases, and reports as it may from time to time publish. Such reasonable prices may include the cost of compilation, composition, and reproduction. The Commission is also authorized to make such charges as it deems reasonable for special statistical services and other special or periodic services. The amounts collected under this section shall be deposited in the Treasury to the credit of miscellaneous receipts. All printing for the Federal Power Commission making use of engraving, lithography, and photolithography, together with the plates for the same, shall be contracted for and performed under the direction of the Commission, under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe, and all other printing for the Commission shall be done by the Public Printer under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe. The entire work may be done at, or ordered through, the Government Printing 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.)

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.

§ 825*l*. Review of orders

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

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

(b) Judicial review

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

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

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

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

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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Beth G. Pacella

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