ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 15-1157

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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FINAL BRIEF: MAY 17, 2016

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties to the underlying agency proceedings and in this Court are identified in the brief of Petitioners LSP Transmission Holdings, LLC and LS Power Transmission, LLC.

B. Rulings Under Review

1. *Southwest Power Pool, Inc.*, 144 FERC ¶ 61,059 (July 18, 2013) ("First Order"), R. 95, JA 1885;
2. *Southwest Power Pool, Inc.*, 149 FERC ¶ 61,048 (Oct. 16, 2014) ("Second Order"), R. 159, JA 2400; and
4. *Southwest Power Pool, Inc.*, 151 FERC ¶ 61,045 (Apr. 16, 2015) ("Third Order"), R. 183, JA 2812.

C. Related Cases

A petition for review of the First Order and the Second Order, concerning different issues and brought by a different petitioner, is pending before this Court. *See Oklahoma Gas & Elec. Co. v. FERC*, Case No. 14-1281 (oral argument scheduled for May 4, 2016).

Also, Petitioners here have petitioned the Seventh Circuit for review of similar issues arising from a proceeding involving a different regional transmission system, the Midcontinent Independent System Operator. *See LSP Transmission Holdings, LLC v. FERC*, 7th Cir. Case No. 15-1316 (oral argument held Feb. 8, 2016).

/s/ Holly E. Cafer
Holly E. Cafer

May 17, 2016

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GLOSSARY

Br.	Opening brief of Petitioners LSP Transmission Holdings, LLC and LS Power Transmission, LLC
Commission or FERC	Federal Energy Regulatory Commission
First Order	*Southwest Power Pool, Inc.*, 144 FERC ¶ 61,059 (July 18, 2013), R. 95, JA 1885
Fourth Order	*Southwest Power Pool, Inc.*, 152 FERC ¶ 61,106 (Aug. 3, 2015), JA 3154
FPA or the Act	Federal Power Act
JA	Joint Appendix
LS Power	Petitioners LSP Transmission Holdings, LLC and LS Power Transmission, LLC
P	Denotes a paragraph number in a Commission order
R.	Indicates an item in the certified index to the record
Second Order	*Southwest Power Pool, Inc.*, 149 FERC ¶ 61,048 (Oct. 16, 2014), R.159, JA 2400
Third Order	*Southwest Power Pool, Inc.*, 151 FERC ¶ 61,045 (Apr. 16, 2015), R. 183, JA 2812

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STATEMENT OF THE ISSUES

This appeal involves a filing submitted by Southwest Power Pool, Inc., a non-profit regional transmission organization that independently operates the high-voltage transmission grid in eight southwestern states, to comply with the regional transmission planning and cost allocation requirements of the Commission's recent Order No. 1000 rulemaking.[1]

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[1] *Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 61,051 (2011), JA 1, *order on reh'g and clarification*, Order No. 1000-A, 139 FERC ¶ 61,132, JA 621, *order on reh'g and*

The issues presented for review in this case are:

1. Whether Petitioners LSP Transmission Holdings, LLC and LS Power Transmission, LLC (together, "LS Power") have established standing to challenge the orders on review when any injury is purely speculative and, as to issue number two below, also is not caused by the challenged orders and cannot be redressed by this Court.
2. Assuming jurisdiction, whether the Commission reasonably determined that Southwest Power Pool's reference in its tariff to state and local laws concerning the construction of transmission facilities did not, in violation of Order No. 1000, create a prohibited federal right of first refusal.
3. Assuming jurisdiction, whether the Commission reasonably approved, as consistent with Order No. 1000 and within its jurisdiction, Southwest Power Pool's criteria to choose a developer for a project selected in its regional transmission plan as the more efficient or cost-effective transmission solution to meet a regional need.

COUNTERSTATEMENT OF JURISDICTION

As described below, *infra* p. 15, LS Power has not established standing to pursue any of its challenges to the Commission's orders on review. This Court has held, in circumstances also involving compliance with a Commission rulemaking

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clarification, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), JA 1216, *aff'd*, *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014) ("*South Carolina*").

that reformed transmission planning processes, that the petitioner must "have an active application for a transmission project" to demonstrate an injury-in-fact for the purpose of constitutional standing. *N.Y. Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 587 (D.C. Cir. 2011). LS Power has not made this showing.

LS Power also has not shown, and cannot show, that any purported injury related to the tariff provisions referencing state and local laws is traceable to the challenged orders. Any injury would result not from the Commission's orders, but from the state and local laws the orders permit to be referenced. *See Klamath Water Users Ass'n v. FERC*, 534 F.3d 735, 740 (D.C. Cir. 2008) (dismissing petition where the alleged harm arose from rate decisions of state commissions, not FERC). Likewise, LSP has not shown, and cannot show, that any purported injury is redressable by the Court.

LS Power has failed to secure this Court's jurisdiction over the Commission's approval of Southwest Power Pool's proposal to reference rights-of-way created by state and local law on an additional basis as well. *See* Br. 67-71; *see also infra* p. 35 (Part III.C (addressing merits of that challenge)). While the Commission issued four orders in the proceeding below, LS Power appeals only the first three. In the third challenged order, the Commission directed Southwest Power Pool to revise the rights-of-way provision. The Fourth Order, which LS Power does not challenge here, approved a different rights-of-way provision than

was before the Commission in the orders challenged here. LS Power's decision not to appeal the fourth order means that it cannot satisfy the requirements of constitutional standing to challenge the tariff's rights-of-way provision. *See N.M. Attorney Gen. v. FERC*, 466 F.3d 120, 121 (D.C. Cir. 2006) (per curiam).

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY FRAMEWORK

A. Federal Power Act

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

B. 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 NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 169 & n.1 (2010) (explaining responsibilities of regional system operators). Southwest Power Pool is a FERC-authorized regional transmission organization that operates the transmission facilities of utilities covering portions of eight states. *See* First Order at P 25, JA 1897.

This Court'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.

1. 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.[2] Then, in 2007, the Commission issued its Order No. 890 rulemaking,[3] 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.

2. 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 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).

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[2] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Pub. Utils. and Recovery of Stranded Costs by Pub. Utils. and Transmitting Utils.*, Order No. 888, FERC Stats. & Regs., 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).

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

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* Br. 39, 42 (same).

This Court, in *South Carolina*, affirmed Order No. 1000, rejecting challenges from 45 petitioners to the rule's various requirements. *See South Carolina*, 762 F.3d at 48, 49. This case concerns only whether Southwest Power Pool's filing complies with Order No. 1000.

(a) 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 201; *see also id.* at PP 225, 313, JA 176, 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 at 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 202); *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 937. 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, 893, 908, 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.*

(b) 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.[4] 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; First Order at P 209, JA 1977-78.

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 allow proposed projects to be compared, and the transmission provider "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

[4] 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.

evaluation of the transmission project in the regional transmission planning process." *Id.* at P 326, JA 261; *see also South Carolina*, 762 F.3d at 53; First Order at P 231, JA 1988 (same).

Furthermore, Order No. 1000 required transmission providers to describe and offer 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; First Order at PP 246-247, JA 1994-95.

II. Southwest Power Pool's Compliance Filing And The Commission's Rulings

On November 13, 2012, Southwest Power Pool submitted proposed revisions to its tariff and membership agreement[5] to comply with Order No. 1000. First Compliance Filing at 1, R. 16, JA 1285; *see also* First Order at P 1, JA 1888.

The compliance filings and challenged orders addressed numerous matters, only a few of which are at issue in this appeal. As relevant here, the Commission

[5] A related appeal concerning revisions to the membership agreement is pending before this Court in Case No. 14-1281. *See* Br. 11.

approved, as consistent with Order No. 1000, Southwest Power Pool's proposal to reference state or local rights of first refusal and rights-of-way in its tariff in determining whether to solicit bids to develop a transmission facility selected in the regional transmission plan for purposes of cost allocation. *See* Second Order at PP 143-46, JA 2471-73; Third Order at PP 28-38, JA 2822-25; *see also Southwest Power Pool, Inc*., 152 FERC ¶ 61,106 at PP 15, 16 (Aug. 3, 2015), JA 3159-60 ("Fourth Order").[6] The Commission also approved, as consistent with Order No. 1000, Southwest Power Pool'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* Second Order at PP 248-253, JA 2522-25; Third Order at PP 49-52, JA 2834-36.

[6] In the Third Order, the Commission directed Southwest Power Pool to revise its proposed rights-of-way tariff language. Southwest Power Pool filed revised language, LS Power protested that language, and the Commission approved it in the Fourth Order. LS Power did not petition for review of the Fourth Order and acknowledges, Br. 4 n.2, that the Fourth Order is not before the Court for review.

SUMMARY OF ARGUMENT

Standing

LS Power has not established standing to pursue any of its challenges to the Commission's orders. First, LS Power has not established that it has suffered any actual or imminent injury from the Commission's orders, and fails to address this Court's precedent requiring it to show more than that the approved transmission planning processes might deny it the opportunity to develop a hypothetical future transmission project.

LS Power also has not established, and cannot establish, that any injury-in-fact – assuming it has one – is caused by the Commission orders challenged here. Any purported injury is caused by state and local laws, not by the Commission's determination that any such laws may be referenced in the tariff.

And, finally, LS Power has failed to secure this Court's jurisdiction over the Commission's approval of the rights-of-way provision because it did not petition for review of the last order in the series – the Fourth Order – which approved that language.

Merits

In any event, LS Power's claims have no merit. The Commission reasonably concluded that Southwest Power Pool's proposal to reference state and local rights of first refusal and rights-of-way in its tariff was consistent with Order

No. 1000. Order No. 1000 expressly provides that it 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 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 Commission-jurisdictional tariffs or agreements.

Allowing Southwest Power Pool's tariff to reference state and local rights of first refusal and rights-of-way is consistent with Order No. 1000. Order No. 1000 sought to remove barriers to competition in regional transmission processes, but that one rulemaking was not intended to address every barrier to nonincumbent participation. Instead, the Commission struck an important balance between removing barriers to participation and ensuring that the 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, and that goal has been satisfied here.

The Commission also properly approved Southwest Power Pool's proposed developer selection criteria. Each of the criteria directly relates to whether a bid is the more efficient or cost-effective, and thus falls well within the Commission's

jurisdiction. The proposed criteria will allow Southwest Power Pool to determine which prospective developer is more likely to be able to avoid major cost overruns during project implementation, efficiently maintain the project over its lifetime, and help to assure the reliability of the transmission grid. Neither the Federal Power Act nor Order No. 1000 compels a particular weighting of cost and non-cost factors. The Commission's approval of Southwest Power Pool's proposed criteria reflects the significant flexibility afforded by Order No. 1000, which required only that, in evaluating proposals, a transmission provider consider the relative efficiency and cost-effectiveness of alternatives.

ARGUMENT

I. LS POWER HAS FAILED TO ESTABLISH STANDING

Section 313 of the Federal Power Act provides that "[a]ny 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 courts of appeals. 16 U.S.C. § 825*l*(b). Parties are "aggrieved" under the Federal Power Act if they satisfy both the constitutional and prudential requirements for standing. *See Exxon Mobil Corp. v. FERC*, 571 F.3d 1208, 1219 (D.C. Cir. 2009).

It is well established "that the irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The three elements of Article III standing require: "(1) that the

plaintiff have suffered an 'injury in fact'. . . ; (2) that there be a causal connection between the injury and the conduct complained of—the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Wabash Valley Power Ass'n, Inc. v. FERC*, 268 F.3d 1105, 1113 (D.C. Cir. 2001) (quoting *Bennett v. Spear*, 520 U.S. 154, 167 (1997)).

The burden of establishing standing falls on the petitioner, and LS Power has yet to establish it here. *See Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002).

A. LS Power Has Not Established An Injury-In-Fact Regarding Any Of Its Claims

LS Power has not established that it has suffered an injury-in-fact from either of the agency rulings it challenges. LS Power contends that Southwest Power Pool's state and local law tariff provisions, "and only those provisions, deprive nonincumbent developers of the opportunity to become the developer of, and to ***access*** the regional cost allocation methodology for, certain projects." Br. 51. LS Power further contends that the Commission "acted beyond its jurisdictional authority in approving a developer selection process that does not quantitatively determine relative efficiency and cost-effectiveness." Br. 31.

An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (quotations and citations omitted). This Court has found, in similar circumstances arising on compliance from Order No. 890, *supra* p. 6, another rulemaking requiring transmission providers to revise their transmission planning processes, that the petitioner must "have an active application for a transmission project" to demonstrate an injury-in-fact and distinguish itself from "any other party who might someday wish to build a high-voltage transmission line." *N.Y. Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 587 (D.C. Cir. 2011).

Although it contains a section titled "Standing," Br. 22-24, LS Power's opening brief does not address why it believes it has standing to raise the challenges here. For example, LS Power does not point to an "active application," as contemplated by *New York Regional Interconnect*. Instead, it apparently relies on the unstated theories that it will be barred from competing for a future project due to a hypothetical state or local right of first refusal or right-of-way prohibiting nonincumbent project development, or that the weighting of the developer selection criteria will necessarily cause some future, hypothetical bid to fail. But these theories "stack[] speculation upon hypothetical upon speculation, which does

not establish an 'actual or imminent' injury." *N.Y. Reg'l Interconnect*, 634 F.3d at 587 (quoting *Lujan*, 504 U.S. at 560).

As in *New York Regional Interconnect*, the orders here "merely change the criteria" for evaluating developer bids for projects selected by the system operator, here Southwest Power Pool, to "receive cost allocation through the FERC-approved tariff." *Id.* And, even if the orders create a "practical obstacle" to LS Power's future development of hypothetical projects, "a practical obstacle is not necessarily coterminous with a cognizable injury in fact that is necessary to support Article III standing."[7] *Id.* at 588; *see also Ala. Mun. Distribs. Grp. v. FERC*, 312 F.3d 470, 474 (D.C. Cir. 2002) (dismissing for lack of standing where injury, if any, would arise from a future case, and noting that "it seems inescapable that neither standing nor ripeness could properly grow out of a harm predicated on a potential collateral estoppel effect").

B. LS Power Cannot Establish Causality And Redressability Regarding The State And Local Law Tariff Provisions

LS Power also has not established that any injury regarding Southwest Power Pool's state and local law tariff provisions is caused by the Commission's

[7] Not only is LS Power uninjured by the Commission's approval of the tariff provisions here, but it seems LS Power actually may benefit from the Commission's determination that Southwest Power Pool may consider state and local laws when determining whether to solicit bids to develop a project. As a result, LS Power and other would-be developers will avoid spending substantial time and resources competing for a project they ultimately, due to state and local laws, will be unable to develop.

orders or can be redressed by an order of this Court on review of the Commission's orders.

Any state or local rights of first refusal or rights-of-way, not the challenged orders' approval of the state or local provisions here, might prevent a nonincumbent developer from developing projects eligible for regional cost allocation. The challenged tariff provisions have *no impact* in the absence of a state or local law prohibiting nonincumbent development. *See infra* p. 24 (citing tariff provisions). At most, the federal tariff alters the stage at which Southwest Power Pool can consider any such state or local law: early or late in the process. And, regardless of the stage at which Southwest Power Pool may consider such a state or local law, the result is the same – if the state or local law prohibits development by a nonincumbent or provides an incumbent a right-of-way, nonincumbents will not be able to develop the project. *See* Second Order at P 145, JA 2472 (state and local law may "independently prohibit" nonincumbent development). LS Power acknowledges this. Br. 62 (recognizing "that state rights of first refusal may prohibit it from constructing a transmission project in a particular state"). Thus, even a wholly favorable decision from this Court would not redress LS Power's alleged injury, which turns on the "independent authority" of state and local jurisdictions. *Klamath Water Users Ass'n*, 534 F.3d at 739

(dismissing petition where the alleged injury arose from rate decisions of state commissions, and could be redressed only by those commissions, not FERC).

C. LS Power's Challenge To The Rights-Of-Way Provision Must Be Dismissed For Lack Of Standing Or As Moot

LS Power does not challenge the rights-of way provision ultimately approved by the Commission, but an earlier-proposed version of that provision (Br. 67-71), which provided that Southwest Power Pool will solicit bids to develop a transmission facility selected in the regional transmission plan for purposes of cost allocation if the transmission facility "do[es] not use rights-of-way where facilities exist." Third Order at P 36, JA 2827. The challenged orders did not approve that provision, and any challenge to it must be dismissed for lack of standing or on mootness grounds.

In the Third Order, partly in response to LS Power's arguments, the Commission required Southwest Power Pool to revise its then-proposed rights-of-way tariff provision. *Id*. In response to this directive, Southwest Power Pool changed the language to provide that it will solicit bids to develop a selected project if the transmission facility "do[es] not alter a Transmission Owner's use and control of its existing right of way under relevant laws or regulations." Fourth Order at P 8, JA 3156. The Commission's July 10, 2015 motion to hold this case in abeyance pending issuance of the Fourth Order pointed out that "the issue of how [Southwest Power Pool] will take into account rights-of-way remains pending

before the Commission." FERC Motion for Abeyance at 3, Case No. 15-1157 (filed July 10, 2015).[8] The Commission accepted the revised provision in the Fourth Order. *See* Fourth Order at PP 15-16, JA3159-60.

LS Power did not seek rehearing of the Fourth Order, and did not petition this Court for review of that Order. In fact, LS Power concedes that the Fourth Order is not on review here. Br. 4 n.2. As a result, LS Power does not challenge, and this Court does not have jurisdiction over, the Commission's approval, in the Fourth Order, of the tariff's rights-of-way provision.

LS Power's challenge to the originally-proposed rights-of-way provision cannot stand either. As this Court has repeatedly held, "a party petitioning for review of an order that is 'conditional, subject to a further compliance filing' can 'show no injury-in-fact'—and hence cannot satisfy the requirements of constitutional standing—because such an order is 'without binding effect.'" *N.M. Attorney Gen.*, 466 F.3d at 121 (quoting *DTE Energy Co. v. FERC*, 394 F.3d 954, 960-61 (D.C. Cir. 2005)). Because "standing is assessed at the time the action commences," the Commission's subsequent acceptance of Southwest Power Pool's compliance filing cannot cure the defects in LS Power's petition. *Id*. at 122.

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[8] The Commission's August 3, 2015 reply in support of the motion noted that the Fourth Order had issued that same day. The Court dismissed FERC's motion for abeyance as moot after the time for LS Power to seek either agency rehearing or judicial review of the Fourth Order had passed. *See* Order Dismissing Motion, Case No. 15-1157 (Oct. 6, 2015).

Alternatively, the Court should dismiss LS Power's challenge to the superseded rights-of-way provision as moot. While LS Power claims that the changed "language does not change LS Power's position here," Br. 68, LS Power cannot divorce its complaints about the Commission's reasoning from the provision before the Commission. *See Entergy Servs., Inc. v. FERC*, 391 F.3d 1240, 1245 (D.C. Cir. 2004) (dismissing challenge to expired contracts as moot where contract expired after petition was filed) ("To open the courthouse doors to [petitioners] for the purposes of their policy challenge disembodied from the original Commission orders would open the door to every other utility company's challenges to Commission policies."). The challenged orders considered proposed language that the third of those orders directed Southwest Power Pool to change. That directive, along with the Commission's approval of Southwest Power Pool's revised tariff proposal in the Fourth Order, rendered any challenge to the originally-proposed provision moot.

II. STANDARD OF REVIEW

Assuming jurisdiction, this Court reviews Commission orders under the Administrative Procedure Act's arbitrary and capricious standard. *See*, *e.g.*, *Sithe/Indep. Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). As the Supreme Court has recently stated, "[t]he 'scope of review under the 'arbitrary and capricious standard is narrow.'" *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct.

760, 782 (2016) ("*FERC v. EPSA*") (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *Id*. Rather, the court must uphold an agency's decision "if the agency has 'examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'" *Id*. (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43); *see also South Carolina*, 762 F.3d at 54. "And nowhere is that more true than in a technical area like electricity rate design: '[W]e afford great deference to the Commission in its rate decisions.'" *FERC v. EPSA*, 136 S. Ct. at 782 (quoting *Morgan Stanley Capital Grp.*, 554 U.S. at 532).

The Court also gives substantial deference to FERC's interpretation of its own precedent. *See Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698, 703-04 (D.C. Cir. 2010); *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007). Moreover, the Commission's factual findings are conclusive if supported by substantial evidence. Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b). "Substantial evidence 'is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *South Carolina*, 762 F.3d at 54 (quoting *Murray Energy Corp. v. FERC*, 629 F.3d 231, 235 (D.C. Cir. 2011)) (internal quotation marks omitted). It "'requires more than a scintilla, but can be satisfied

by something less than a preponderance of the evidence.'" *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 365 (D.C. Cir. 2003) (quoting *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)).

III. THE COMMISSION REASONABLY DETERMINED THAT SOUTHWEST POWER POOL'S PROPOSAL TO REFERENCE STATE AND LOCAL RIGHTS OF FIRST REFUSAL AND RIGHTS-OF-WAY IS CONSISTENT WITH ORDER NO. 1000

LS Power challenges the Commission's determinations regarding Southwest Power Pool's proposal to solicit bids to develop a selected transmission project only when doing so would "not violate relevant law where the transmission facility is to be built" and would "not use rights-of-way where facilities exist." Br. 51-67, 67-71; *see also* First Order at P 136, JA 1949 (listing all criteria); *id*. at PP 167-180, JA 1960-67; Second Order at PP 130-131, 143-146, JA 2463-64, 2471-73; Third Order at PP 28-38, JA 2822-28; First Compliance Filing at 72, JA 1356; *id*. Exh. SPP No. 9 at 40, JA 1503 (proposed tariff); Fourth Order at PP 15-16, JA 3159-60 (approving final rights-of-way language). None of LS Power's challenges has merit.

A. Order No. 1000 Required Removal Of Only Federal Rights Of First Refusal

LS Power challenges the Commission's determination that it is consistent with Order No. 1000 to permit Southwest Power Pool to recognize state and local law in determining whether to solicit developers for a project it had selected as the

more efficient or cost effective solution to a regional need. Br. 51-71. LS Power misunderstands the requirements of Order No. 1000: it requires only the removal of federal rights of first refusal, and Southwest Power Pool's tariff does not create such a right. *See* Second Order at PP 143-45, JA 2471-72; Third Order at PP 28-37, JA 2822-28.

Order No. 1000 expressly stated that it was directed 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 938, *cited in* Second Order at P 71 n.114, JA 2431, Third Order at P 33, JA 2825; *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; Second Order at P 71 n.114, JA 2431 (citing Order No. 1000 at P 313, JA 250). Likewise, Order No. 1000 provided that the "retention, modification, or transfer of rights-of-way remain subject to relevant law or regulation granting the rights-of-way" and, therefore, did not disturb rights-of-way granted by state and local law. Order No. 1000 at P 319, JA 255; *see also* Order No. 1000 at P 226, JA 177 (same); Order No. 1000-A at PP 357, 427, JA 890, 947 (same); *see also* Br. 69 (same).

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 Order at P 131 n.270, JA 2464 (reciting Order No. 1000 at n.231); Second Order at P 143 n.307, JA 2471; Third Order at P 29, JA 2822; *South Carolina*, 762 F.3d at 76.

LS Power claims that Southwest Power Pool's tariff creates a federal right of first refusal. *See* Br. 56-58. As the Commission explained, however, the state and local law provisions simply recognize that there might be state or local laws and regulations that grant an incumbent a right of first refusal and provide that, if there are, Southwest Power Pool will comply with them. Second Order at PP 145-46, JA 2472-73 ("some such laws or regulations may independently prohibit a nonincumbent transmission developer from developing a particular transmission project"); Third Order at P 30, JA 2824. In fact, "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. 62. *See also South Carolina*, 762 F.3d at 76 ("Even if the Commission's mandate opens up opportunities for nonincumbent developers, such developers must still comply with state law."). Any state or local right of first refusal or right-of-way created by state and local law would be created at the state and local level, and would continue to exist even if the challenged provisions were removed from the Tariff. Second Order at P 145, JA 2472 (citing Order No. 1000-A at P 381, JA 911); *see also* Third Order at P 30, JA 2824.

While the First Order stated, without explanation, that the challenged provisions conflicted with Order No. 1000, the Commission found otherwise on rehearing. *See* First Order at PP 170, 178, JA 1961, 1964. Notwithstanding LS Power's efforts to portray this as a shortcoming, Br. 57, the Commission's process here reflects thoughtful deliberation, the type envisioned by the Federal Power Act's rehearing requirement, which "enables the Commission to correct its own errors, which might obviate judicial review, or to explain why in its expert judgment the party's objection is not well taken, which facilitates judicial review." *Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005) (citing *Granholm ex rel. Mich. Dep't of Natural Res. v. FERC*, 180 F.3d 278, 281 (D.C. Cir. 1999)).

Here, after considering the arguments presented on rehearing, the Commission found that Order No. 1000 did not "prohibit [Southwest Power Pool]

from recognizing state and local laws and regulations when deciding whether [it] will hold a competitive solicitation for a transmission facility selected in the regional transmission plan for purposes of cost allocation." Second Order at P 145, JA 2472. As the Commission explained, "Order No. 1000's focus [was] on federal right of first refusal provisions," and "Order No. 1000 does not require removal from Commission-jurisdictional tariffs or agreements of references to state or local laws or regulations with respect to construction of transmission facilities, including but not limited to, authority or permitting of transmission facilities . . . ." Third Order at P 29, JA 2822. "Regardless of whether state or local laws or regulations are expressly referenced in the [Southwest Power Pool tariff], some such laws or regulations may independently prohibit a nonincumbent transmission developer from developing a particular transmission project in a particular state, even if the nonincumbent transmission developer would otherwise be designated to develop the transmission project under [Southwest Power Pool's] regional transmission planning process," a possibility that Order No. 1000-A expressly recognized. Second Order at P 145, JA 2472 (citing Order No. 1000-A at P 381, JA 911).

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

cost allocation." Third Order at P 33, JA 2825. As already discussed, 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. *See, e.g.*, Order No. 1000 at PP 225-26, 253, 257, 289, JA 176-78, 201, 205, 230; Second Order at P 144, JA 2471; Third Order at P 29, JA 2822.

"[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." Second Order at P 188, JA 2493; Third Order at PP 29, 31, JA 2822, 2824. 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 transmission developer reforms do not result in the regulation of matters reserved to the states." Third Order at P 31, JA2824; *see also* Second Order at P 188, JA 2493 ("The Commission repeatedly emphasized that Order No. 1000 would not preempt those authorities vested in the states.") (citing Order No. 1000 at P 107, JA 87); Order No. 1000-A

at P 377, JA 908. Thus, this Court recognized in *South Carolina* that 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." 762 F.3d at 76 (citing and quoting Order No. 1000 at P 227, JA 178).

LS Power's 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 F. App'x 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)).

B. The Commission Reasonably Found That Southwest Power Pool's Process Selects The More Efficient Or Cost-Effective Project

LS Power claims that allowing Southwest Power Pool'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. 57-61. LS Power's claim is mistaken.

The Commission determined in Order No. 1000 that its reforms there were "'*adequate* to support more efficient and cost-effective investment decisions moving forward.'" Third Order at P 34, JA 2827 (quoting Order No. 1000 at P 44,

JA 39) (emphasis added by Commission); *see also* Order No. 1000 at P 46, JA 41 (same); Second Order at P 186, JA 2493 (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).

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. Second Order at P 189, JA 2494. 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. *Id.*; *see also* Order No. 1000 at PP 78, 116, 148, 156, JA 65, 95, 119, 126.

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 state or local laws granting rights of first refusal or rights-of-way. Second Order at P 189, JA 2494. LS Power's demands to eliminate references to state and local law go beyond what is required by Order No. 1000 – the standard applicable in this case.

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 assumed "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)); *see also* Second Order at P 188, JA 2493 ("The Commission's decision to focus on *federal* (not state) right of first refusal provisions in Commission-jurisdictional tariffs was an exercise of remedial discretion designed to ensure that its nonincumbent transmission developer reforms do not result in the regulation of matters reserved to the states.").

LS Power's challenge to the Second Order's discussion of the inefficiencies that would result if Southwest Power Pool were required to hold a competitive solicitation for developers where state or local laws would require the selected project to be developed by the incumbent (Br. 58-59, 65-66) fails as well. *See* Second Order at P 146, JA 2472. As the Commission made clear in the Third Order, the rationale for its determination that Southwest Power Pool did not have to remove the proposed state and local law provisions was not potential inefficiencies or delays, but was that the provision did not create a federal right of

first refusal. Third Order at P 30, JA 2824.

LS Power offers dueling claims concerning the respective roles of the Commission and the States in Southwest Power Pool's regional transmission planning process. First, LS Power claims that Southwest Power Pool's tariff "abdicates" the Commission's responsibility to ensure just and reasonable rates to the States by allowing state and local law to perform a threshold function in the competitive process. Br. 59-61. But then, LS Power claims that Southwest Power Pool's tariff makes Southwest Power Pool and the Commission the "final arbiters" of matters of state and local law. *See, e.g.*, Br. 55. What LS Power's internal conflict on these issues demonstrates is that Southwest Power Pool's tariff strikes a balance between Commission and state authority, much like other cooperative federalism programs in place under the Federal Power Act. *See FERC v. EPSA*, 136 S. Ct. at 780 (affirming FERC's "program of cooperative federalism, in which the States retain the last word").

Southwest Power Pool's tariff adheres to Order No. 1000 by continuing to recognize appropriate roles for both the Commission and the States. Regional planning is conducted in the Commission-approved process; "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" remain in place; and the Commission retains ultimate authority over the rates for

jurisdictional transmission service. Third Order at P 29, JA 2823; *see also South Carolina*, 762 F.3d at 62-64 ("The orders neither require facility construction nor allow a party to build without securing necessary state approvals.") (rejecting claim that Order No. 1000 reforms improperly intrude into matters reserved to the States).

As to LS Power's claim that states are not involved enough in the process, LS Power ignores that "states will provide input regarding their state or local laws and regulations." Third Order at P 35, JA 2827. The Commission has made clear that it expects Southwest Power Pool will consult closely with state regulators during the transmission planning process and will ensure that state regulators will play a strong role in regional transmission planning. *Id.* (citing Order No. 1000-A at P 338, JA 873).

C. Order No. 1000 Did Not Require Removal Of Provisions Recognizing Rights-Of-Way

As with the state rights of first refusal provision, the Commission found that Order No. 1000 did not require removal of the provision permitting Southwest Power Pool to consider, in determining whether to solicit developers for a selected project, whether the selected project would use a state-granted right-of-way. Second Order at PP 130, 143-46, JA 2463, 2471-73; Third Order at PP 36-37, JA 2827-28. The Commission explained that the arguments raised on rehearing of the First Order, which the Commission found persuasive, encompass both the

proposed state rights of first refusal and rights-of-way provisions. Third Order at P 37, JA 2828.

LS Power argues that the "only" arguments raised on rehearing of the First Order were efficiency arguments. Br. 68-69. LS Power is mistaken. Southwest Power Pool's request for rehearing of that order argued, at length, that the First Order's rejection of the tariff provisions conflicted with Order No. 1000 and exceeded the Commission's statutory authority. Southwest Power Pool Request for Rehearing at 69-77, R. 98, JA 2118-26.

LS Power's concern that state laws regarding rights-of-way are complex and Southwest Power Pool cannot make a determination as a threshold matter that a selected transmission project would alter a transmission owner's use and control of its existing rights-of-way, Br. 68-70, is baseless as well. As already discussed, the Commission expects Southwest Power Pool to consult closely with state regulators during the transmission planning process. Third Order at P 35, JA 2827 (citing Order No. 1000-A at P 338, JA 873); *see also* Fourth Order at P 16, JA 3160 ("reiterat[ing] that [the Commission] anticipates [Southwest Power Pool's] procedures and close work with the states will provide transparency regarding any state or local laws or regulations [Southwest Power Pool] uses in its decision-making process"); *id*. at P 15, JA 159.

Further, LS Power again relies, Br. 68-69, on efficiency arguments that,

while persuasive, were not the basis for the Commission's decision not to prohibit Southwest Power Pool from recognizing state and local laws and regulations. *See supra* p. 33; *see also* Third Order at P 30, JA 2842.

IV. THE COMMISSION REASONABLY APPROVED SOUTHWEST POWER POOL'S DEVELOPER SELECTION CRITERIA

A. Southwest Power Pool's Proposed Criteria And The Commission's Orders

Under Southwest Power Pool's proposed regional transmission planning process, it first selects, from among all proposed *projects*, the more efficient or cost-effective solutions to regional needs. Then, in a subsequent competitive bidding process, Southwest Power Pool evaluates potential *developers* for the selected projects. *See* First Order at PP 6-10, JA 1890-92; First Compliance Filing at 3-6, JA 1287-90.

Southwest Power Pool's compliance filing explained that it will evaluate bids to develop a selected project based on the following five categories of criteria and weighting: (1) reliability/quality/general design (up to 200 points or 20%)[9]; (2) construction project management (up to 200 points or 20%)[10];

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[9] This criterion will evaluate the quality of the design, material, technology, and life expectancy of the bid, including the type of construction, losses (design efficiency), estimated life of construction, and reliability/quality metrics. Third Compliance Filing, Tariff Att. Y, § III.2.f(iii)(1), R. 173, JA 2646.

[10] This criterion will evaluate a developer's expertise in implementing construction projects similar in scope to the selected project, including: "(a) Environmental; (b) Rights-of-way acquisition; (c) Procurement; (d) Project scope; (e) Project

(3) operations/maintenance/safety (up to 250 points or 25%)[11]; (4) rate analysis (i.e., cost to customers) (up to 225 points or 22.5%)[12]; and (5) financial viability and creditworthiness (up to 125 points or 12.5%).[13] First Order at P 250, JA 1996; *see also*, *e.g.*, First Compliance Filing at 80, JA 1364; *id.*, Tariff Att. Y, § III.2.f(iii), JA 1519. LS Power protested Southwest Power Pool's proposal,

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development schedule (including obtaining necessary regulatory approvals); (f) Construction; (g) Commissioning; (h) Timeframe to construct; and (i) Experience/track record." Third Compliance Filing, Tariff Att. Y, § III.2.f(iii)(2). JA 2646.

[11] This criterion will evaluate the safety and capability of a developer to operate, maintain, and restore a transmission facility, including consideration of: "(a) Control center operations (staffing, etc.); (b) Storm/outage response plan; (c) Reliability metrics; (d) Restoration experience/performance; (e) Maintenance staffing/training; (f) Maintenance plans; (g) Equipment; (h) Maintenance performance/expertise; (i) [North American Electric Reliability Corporation] compliance-process/history; (j) Internal safety program; (k) Contractor safety program; and (l) Safety performance record (program execution)." Third Compliance Filing, Tariff Att. Y, § III.2.f(iii)(3), JA 2647.

[12] This criterion will evaluate the developer's cost to construct, own, operate, and maintain the selected project over a 40-year period, including "(a) Estimated total cost of project; (b) Financing costs; (c) FERC incentives; (d) Revenue requirements; (e) Lifetime cost of the project to customers; (f) Return on equity; (g) The quantitative cost impact of material on hand, assets on hand, rights-of-way ownership, control, or acquisition; and (h) Cost certainty guarantee." Third Compliance Filing, Tariff Att. Y, § III.2.f(iii)(4), JA 2647.

[13] This criterion will measure the developer's ability to obtain financing for the project, including "(a) Evidence of financing; (b) Material conditions; (c) Financial/business plan; (d) Pro forma financial statements; (e) Expected financial leverage; (f) Debt covenants; (g) Projected liquidity; (h) Dividend policy; and (i) Cash flow analysis." Third Compliance Filing, Tariff Att. Y, § III.2.f(iii)(5), JA 2648.

arguing that "cost should be the primary, but not the exclusive, selection factor." LS Power First Protest at 22, R. 68, JA 1748 (capitalization altered).

In the First Order, the Commission found that Southwest Power Pool had "not provided sufficient justification for the point system" and directed it *either* to "revise its evaluation process to reflect greater weighting of costs in evaluating transmission developer bids in order to reflect 'the relative efficiency and cost-effectiveness of [any proposed transmission] solution,' *or* to further explain and justify why its proposed weighting of costs in the evaluation process complies with the requirements of the Order No. 1000." First Order at P 282, JA 2008 (emphasis added).

In its second compliance filing, Southwest Power Pool opted to further explain and justify its proposed weighting of costs. *See* Second Compliance Filing at 26-28, R. 123, JA 2202-04. Southwest Power Pool explained that the Commission erred in characterizing the design, financial, project management, and operations categories as "non-cost-based," because each category "in some way evaluate[s] the ultimate cost to the customer." *Id*. at 27, JA 2203.

The Commission found Southwest Power Pool's additional support for its developer selection criteria convincing. *See* Second Order at PP 248-53, JA 2522-25; Third Order at PP 49-52, JA 2834-36. And, as the Commission explained, Order No. 1000 does not require Southwest Power Pool to "place the majority

emphasis in the evaluation on costs and cost-based factors." Third Order at P 51, JA 2835. Instead, the Commission determined that the developer selection process should employ the "same evaluation" as the project selection process, which requires the transmission provider to "consider 'the relative efficiency and cost-effectiveness'" of the bid. Second Order at P 252, JA 2524 (quoting Order No. 1000 at P 331 n.307, JA 265). Applying this standard, and as further described below, the Commission found that "each of [Southwest Power Pool's] proposed evaluation criteria are designed to assess and ensure efficiency and cost-effectiveness," consistent with Order No. 1000 requirements. Second Order at P 253, JA 2524.

B. The Commission Acted Within Its Jurisdiction In Approving A Process That Selects The More Efficient Or Cost-Effective Bid

LS Power claims that the Commission "acted beyond its jurisdictional authority in approving a developer selection process that does not quantitatively determine relative efficiency and cost-effectiveness in any manner relative to ratepayers." Br. 31. LS Power misunderstands the requirements of both the Federal Power Act and Order No. 1000. As the Commission held, every evaluation category in the developer selection process is directly related to determining whether a bid is the more efficient or cost-effective option to develop a selected project. *See* Second Order at P 253, JA 2524. As further explained below, this is all that is required.

LS Power is correct, Br. 26, that the Commission's jurisdiction, as pertinent here, extends to "rates" and "any rule, regulation, practice, or contract affecting such rate . . . ." Federal Power Act § 206, 16 U.S.C. § 824e. The Supreme Court recently confirmed this Court's "common-sense construction of the [Act's] language, limiting FERC's 'affecting' jurisdiction to rules or practices that 'directly affect'" the rate. *FERC v. EPSA*, 136 S. Ct. at 774 (quoting *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 403 (D.C. Cir. 2004)).

Both Order No. 1000 and the orders on review here reflect this standard. In Order No. 1000, the Commission explained that the regional transmission planning process "determine[s] which transmission facilities will more efficiently or cost-effectively meet the needs of the region" and that "the development of [those facilities] directly impacts the rates, terms and conditions of jurisdictional services."[14] Third Order at P 52, JA 2836 (quoting Order No. 1000 at P 112, JA 91); *see also* Order No. 1000-A at P 210, JA 785; *South Carolina*, 762 F.3d at 58-59 (finding FERC "reasonably interpreted Section 206 to authorize [Order No. 1000's] planning mandate"); *see also id*. at 72 (recognizing the Commission's

[14] To the extent LS Power challenges this Order No. 1000 determination, it poses an impermissible collateral attack on that rulemaking and this Court's decision in *South Carolina*. *See* Third Order at P 52, JA 2835. But, to the extent that LS Power challenges only whether the Commission is "meeting the requirements of the Order," i.e., Order No. 1000, Br. 41, the Commission agrees that whether the Commission is meeting the requirements of Order No. 1000 is the applicable standard.

finding that reforms were needed to ensure that transmission projects in a regional transmission plan are not developed "at a higher cost than necessary," resulting in rates that are not just and reasonable) (citing Order No. 1000 at P 228-30, JA 179-81). LS Power recognizes these foundational holdings in Order No. 1000 and *South Carolina*. Br. 27-28 (citing, e.g., Order No. 1000 at P 229, JA 179). Accordingly, so long as Southwest Power Pool's developer evaluation criteria allow it to identify "the more efficient or cost-effective" developer bid, the criteria necessarily directly affect rates and fall within the Commission's jurisdiction.

In the orders on review here, the Commission determined that "every evaluation category is directly related to determining whether a bid in the [process] is the more efficient or cost-effective option to developing" a transmission solution selected in the regional transmission plan for purposes of regional cost allocation. Second Order at P 253, JA 2524; *see also id*. ("each of its proposed evaluation criteria are designed to assess and ensure efficiency and cost-effectiveness") (citing Second Compliance Filing at 26-28, JA 2202-04).

LS Power challenges four of the five developer selection criteria approved by the Commission (criteria one through three, and criterion five), claiming that Southwest Power Pool and the Commission have not shown how each criterion is directly tied to Commission-jurisdictional rates, i.e. how each supports selection of the more efficient and cost-effective proposal. Br. 29-36. The Commission

reviewed Southwest Power Pool's justification for its evaluation criteria and cited examples in support of its findings. *See* Second Order at PP 210-15, 252-53, JA 2503-06, 2524-25.

The Commission explained that the project management criterion (criterion two) will allow Southwest Power Pool to "evaluate . . . whether a transmission developer is likely to avoid major cost overruns during project implementation," Second Order at P 253, JA 2525. As Southwest Power Pool explained, "delays in project implementation exacerbate the need for which the project was selected (e.g., addressing a reliability violation or alleviating congestion) and postpone the relief that the facility is expected to provide, which leads to increased costs to customers . . . ." *Id*. at P 213, JA 2505 (citing Second Compliance Filing at 27, JA 2203). As Southwest Power Pool puts it, "a project that is delayed years beyond its need date cannot logically be characterized as 'more efficient or cost-effective,'" Second Compliance Filing at 27, JA 2203, and LS Power fails to explain how cost overruns are not cost-related. *Cf.* Br. 33.

Moreover, as Southwest Power Pool explained, the first criterion, "engineering design[,] is a major factor driving the cost of a project," as design flaws can lead to operational and reliability problems. Second Compliance Filing at 27, JA 2203; *see* Second Order at P 213, JA 2505. And the third criterion, operations and maintenance, allows Southwest Power Pool to evaluate whether a

bidder can "efficiently maintain the project over its lifetime . . . ." Second Order at P 253, JA 2525; *see also id*. at P 213, JA 2505. As Southwest Power Pool explained, the operations criterion is "the most critical element to ensuring that the project is more efficient or cost-effective," since it "evaluates whether the [developer] is able to maintain continued safe and reliable operation of the transmission project over its 40-year (or longer) lifespan." Second Compliance Filing at 27, JA 2203; *see also* Second Order at P 214, JA 2505.

Notably, the first and third criteria are plainly tied to reliability, which the Supreme Court recently confirmed is directly linked to reduced costs and, ultimately, to Commission-jurisdictional rates. *See FERC v. EPSA*, 136 S. Ct. at 782 ("We will not read the FPA, against its clear terms, to halt a practice that so evidently enables the Commission to fulfill its statutory duties of holding down prices and enhancing reliability . . . ."); *see also id*. at 774 ("the easing of pressure on the grid, and the avoidance of service problems, further contributes to lower charges").

LS Power does not appear to question that the fifth, finance, criterion, which evaluates the developer's ability to secure "favorable rates and terms[,] has a direct bearing on the costs customers will pay." Second Order at P 215, JA 2506 ; *see also* Second Compliance Filing at 28, JA 2204. But, in any event, the Commission relied upon "reasonable economic propositions" to link the developer selection

criteria directly to the selection of the more efficient and cost-effective transmission solution; it need not provide "empirical data" or "conduct experiments in order to rely on the prediction that an unsupported stone will fall." *South Carolina*, 762 F.3d at 65.

LS Power claims that all of the developer selection criteria should be cost-based, and indeed demands that Southwest Power Pool "quantitatively measure the rate impact" of each criterion. *See, e.g.*, Br. 31, 33. 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 Area Rate Cases*, 390 U.S. 747, 796-98 (1968), 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) (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"), *rev'd in other part sub nom. NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2010); *Am. Pub. Power Ass'n v. FPC*, 522 F.2d 142, 146 (D.C. Cir. 1975) ("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."). And, as already discussed, all five developer selection criteria directly affect rates. LS Power acknowledges that matters directly affecting rates are within the Commission's jurisdiction. *See*, *e.g.*, Br. 33.

Moreover, LS Power took a different position before the Commission, arguing that most – not all – criteria should be cost-based. *See*, *e.g.*, LS Power Protest to Second Compliance Filing at 9, R. 137, JA 2352 ("LSP Transmission's position is that the appropriate weighting of quantifiable cost related factors is 75% of the total evaluation. Other evaluation criteria should be accorded 25% . . . ."). LS Power thus 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).

Further, Order No. 1000 does not require any particular weighting of developer selection criteria. *See* Third Order at P 51, JA 2835; *see also* Second Order at P 252, JA 2524. In fact, "the Commission declined to address transmission developer selection in Order No. 1000." Order No. 1000-A at P 455, JA 966. Indeed, 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. Third Order at P 51, JA 2835 (citing Order No. 1000-A at PP 450, 455, JA 963, 966).

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 Order at P 250, JA 2523 (citing Order No. 1000 at n.307, JA 265); Third Order at P 51, JA 2835; Order No. 1000-A at P 455, JA 966; *see also* Br. 39 ("Order No. 1000 was necessarily broad. The Commission rejected multiple efforts to add specificity to the rulemaking, including efforts by LS Power, deferring instead to the compliance phase where regional differences could be taken into account.") (citing Order No. 1000-A at PP 452-56, JA 964-68). 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 requirement was satisfied here. Second Order at P 252, JA 2524. That standard does not focus solely on cost estimates. Rather, the Commission held that "equal emphasis on factors other than those referring explicitly to transmission project costs will allow [Southwest Power

Pool] to select the appropriate transmission developer . . . ." *Id*. at P 252, JA 2524; *see also id*. at P 250, JA 2523.

Finally, LS Power claims that the Commission "apparently conclu[ded]," Br. 50, that the developer selection process is "largely unnecessary" to determining just and reasonable rates. Br. 49; *see also id*. at 43-50. The Commission reached no such conclusion. To the contrary, the Commission made clear that its *separate* determination that the project selection process in fact satisfies Order No. 1000 by "identifying the more efficient or cost-effective solution to an identified need prior to [Southwest Power Pool] soliciting bids for the approved transmission project does not undermine the benefits to efficiency or cost-effectiveness provided by [Southwest Power Pool's] competitive bidding process." Third Order at P 50, JA 2835. And, the Commission explained, just like the criteria used to select among competing transmission solutions, the criteria to choose from competing bids to develop a selected project must consider the relative efficiency and cost-effectiveness of any bid. *Id*.; *see also* Second Order at P 252, JA 2524. LS Power fails to show how using the "same evaluation" for these two separate stages of the process undermines the developer selection stage. Third Order at P 50, JA 2834.

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. "The disputed question here involves both

technical understanding and policy judgment. The Commission addressed [the issues] seriously and carefully, providing reasons in support of its position and responding to the principal [arguments] advanced." *FERC v. EPSA*, 136 S. Ct. at 784. "All of that together is enough," and the Commission's reasonable determination here should stand. *Id*.

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed for lack of jurisdiction or, alternatively, should be denied.

Respectfully submitted,

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March 15, 2016
FINAL BRIEF: May 17, 2016

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 11,478 words, not including the (i) cover page, (ii) certificates of counsel, (iii) tables of contents and authorities, (iv) glossary, and (v) addendum.

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May 17, 2016

ADDENDUM
Statutes

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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

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

(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''.

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

TRANSFER OF FUNCTIONS

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under

any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

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

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms ''electric utility companies'' and ''registered holding company'' shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.[1]

(d) Investigation of costs

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

(e) Short-term sales

(1) In this subsection:

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

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

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

(3) This section shall not apply to—

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

(B) an electric cooperative.

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

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

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

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

[1] See References in Text note below.

Subsecs. (b) to (d). Pub. L. 100–473, § 2(2), added subsecs. (b) and (c) and redesignated former subsec. (b) as (d).

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100–473, § 4, Oct. 6, 1988, 102 Stat. 2300, provided that: ''The amendments made by this Act [amending this section] are not applicable to complaints filed or motions initiated before the date of enactment of this Act [Oct. 6, 1988] pursuant to section 206 of the Federal Power Act [this section]: *Provided*, *however*, That such complaints may be withdrawn and refiled without prejudice.''

LIMITATION ON AUTHORITY PROVIDED

Pub. L. 100–473, § 3, Oct. 6, 1988, 102 Stat. 2300, provided that: ''Nothing in subsection (c) of section 206 of the Federal Power Act, as amended (16 U.S.C. 824e(c)) shall be interpreted to confer upon the Federal Energy Regulatory Commission any authority not granted to it elsewhere in such Act [16 U.S.C. 791a et seq.] to issue an order that (1) requires a decrease in system production or transmission costs to be paid by one or more electric utility companies of a registered holding company; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company. For purposes of this section, the terms 'electric utility companies' and 'registered holding company' shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C. 79 et seq.].''

STUDY

Pub. L. 100–473, § 5, Oct. 6, 1988, 102 Stat. 2301, directed that, no earlier than three years and no later than four years after Oct. 6, 1988, Federal Energy Regulatory Commission perform a study of effect of amendments to this section, analyzing (1) impact, if any, of such amendments on cost of capital paid by public utilities, (2) any change in average time taken to resolve proceedings under this section, and (3) such other matters as Commission may deem appropriate in public interest, with study to be sent to Committee on Energy and Natural Resources of Senate and Committee on Energy and Commerce of House of Representatives.

§ 824f. Ordering furnishing of adequate service

Whenever the Commission, upon complaint of a State commission, after notice to each State commission and public utility affected and after opportunity for hearing, shall find that any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate, or sufficient service to be furnished, and shall fix the same by its order, rule, or regulation: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel the public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers.

(June 10, 1920, ch. 285, pt. II, § 207, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 853.)

§ 824g. Ascertainment of cost of property and depreciation

(a) Investigation of property costs

The Commission may investigate and ascertain the actual legitimate cost of the property of every public utility, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation, and the fair value of such property.

(b) Request for inventory and cost statements

Every public utility upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

(June 10, 1920, ch. 285, pt. II, § 208, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 853.)

§ 824h. References to State boards by Commission

(a) Composition of boards; force and effect of proceedings

The Commission may refer any matter arising in the administration of this subchapter to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The board shall be appointed by the Commission from persons nominated by the State commission of each State affected or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

(b) Cooperation with State commissions

The Commission may confer with any State commission regarding the relationship between rate structures, costs, accounts, charges, practices, classifications, and regulations of public utilities subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) Availability of information and reports to State commissions; Commission experts

The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of public utilities. Whenever the Commission can do so without prejudice to the efficient

vertisement 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 sec-tion 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 view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which states that ''There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district'', and section 88 of Title 28 which states that ''the District of Columbia constitutes one judicial district''.

AMENDMENTS

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

§ 825n. Forfeiture for violations; recovery; applicability

(a) Forfeiture

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

(b) Recovery

The forfeitures provided for in this chapter shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States, brought in the district where the person is an inhabitant or has his principal place of business, or if a licensee or public utility, in any district in which such licensee or public utility transacts business. It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures under this chapter. The costs and expenses of such prosecution shall be paid from the appropriations for the expenses of the courts of the United States.

(c) Applicability

This section shall not apply in the case of any provision of section 824j, 824k, 824*l*, or 824m of this title or any rule or order issued under any such provision.

(June 10, 1920, ch. 285, pt. III, § 315, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 861; amend-

LSP Transmission Holdings, LLC, et al. **FERC Docket No. ER13-366**
v. FERC,
D.C. Cir. No. 15-1157

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P.25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 17th day of May 2016, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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