ORAL ARGUMENT NOT YET SCHEDULED

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

No. 19-1190

INTERNATIONAL TRANSMISSION COMPANY, *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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CIRCUIT RULE 28(A)(1) CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

To counsel's knowledge, the parties and intervenors before this Court and before the Federal Energy Regulatory Commission in the underlying agency docket are as stated in the Brief of Petitioners.

B. Rulings Under Review

1. Order on Complaint, *Consumers Energy Co. v. Int'l Transmission Co.*, 165 FERC ¶ 61,021 (2018), R. 32, JA 13; and

2. Order Denying Rehearing, *Consumers Energy Co. v. Int'l Transmission Co.*, 168 FERC ¶ 61,035 (2019), R. 41, JA 46.

C. Related Cases

This case has not previously been before this Court or any other court. A separate case pending before this Court concerns FERC orders that initially approved (for one of the petitioners in this case) the incentive rate treatment that the Commission later reduced in the orders challenged here. *Resale Power Group of Iowa v. FERC*, No. 16-1088 (D.C. Cir. filed Mar. 4, 2016); *see infra* pp. 18-19 (discussing *ITC Midwest* orders). That case has been held in abeyance pending completion of another FERC proceeding concerning the base return on equity for all transmission owners operating within the Midcontinent Independent System Operator region. *Ass'n of Businesses Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, FERC Docket No. EL14-12.

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GLOSSARY

Term	Definition
Adder	Incentive-based rate treatment that adds a specified number of basis points to the return on equity in a utility's FERC-approved rates
Br.	Opening brief of Petitioners Transmission Companies
Commission or FERC	Respondent Federal Energy Regulatory Commission
Complaint Order	Order on Complaint, *Consumers Energy Co. v. Int'l Transmission Co.*, 165 FERC ¶ 61,021 (2018), R. 32, JA 13
FPA	Federal Power Act
Independence adder or Transco adder	Adder that the Commission may approve for a stand-alone transmission company
JA	Joint Appendix
Midcontinent Region	Midcontinent Independent System Operator, Inc., a regional transmission organization
Order No. 679	*Promoting Transmission Investment through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057 (2006)
P	Paragraph in a FERC order
Rehearing Order	Order Denying Rehearing, *Consumers Energy Co. v. Int'l Transmission Co.*, 168 FERC ¶ 61,035 (2019), R. 41, JA 46

GLOSSARY

Transmission Companies	Petitioners International Transmission Company, ITC Midwest LLC, and Michigan Electric Transmission Company, LLC

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BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

This case concerns a decision by the Federal Energy Regulatory Commission (Commission or FERC) to reduce, but not eliminate, certain incentive-based rate treatments granted to three transmission companies. Under Commission regulations, stand-alone transmission companies that the Commission finds are independent from market participants may include an elevated return on equity (called an adder)

in their Commission-approved transmission rates. Previously, the Commission approved such adders of 100 or 50 basis points for each of the petitioners — International Transmission Company, Michigan Electric Transmission Company, LLC, and ITC Midwest LLC (collectively, the Transmission Companies) — based on their independence. (100 basis points equals one percent.)

In the orders challenged here, however, the Commission found that a 2016 merger transaction had reduced the Transmission Companies' level of independence, such that the previously-granted adders were no longer "just and reasonable" as required by the Federal Power Act. The Commission then approved a lower adder of 25 basis points because it found that the merger had reduced, but not eliminated, their independence. *See Consumers Energy Co. v. Int'l Transmission Co.*, 165 FERC ¶ 61,021 (2018), R. 32, JA 13 (Complaint Order), *reh'g denied*, 168 FERC ¶ 61,035 (2019), R. 41, JA 46 (Rehearing Order) (together, the Orders). On appeal, the Transmission Companies challenge the determination that their previously granted adders had become unjust and unreasonable.

The question presented on appeal is:

Whether the Commission appropriately determined, based on substantial evidence, that the Transmission Companies' adders had become unjust and unreasonable, and should be reduced, where the Commission applied its longstanding criteria for assessing independence and found that the Transmission Companies' post-merger business structure had reduced their level of independence.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the attached Addendum.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. The Federal Power Act

Section 201 of the Federal Power Act ("FPA"), 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. This grant of jurisdiction is comprehensive and exclusive. *See generally New York v. FERC*, 535 U.S. 1 (2002) (discussing statutory framework and FERC jurisdiction).

All rates for or in connection with jurisdictional sales and transmission services are subject to FERC review to assure they are just and reasonable, and not unduly discriminatory or preferential. FPA § 205(a), (b), (e), 16 U.S.C. § 824d(a), (b), (e). Section 206 of the Federal Power Act, 16 U.S.C. § 824e, authorizes the Commission, on its own initiative or on a third-party complaint, to investigate whether existing rates are lawful. In such a proceeding, the complainant bears "the burden of proof to show that any rate . . . is unjust, unreasonable, unduly discriminatory, or preferential . . . ." FPA § 206(b), 16 U.S.C. § 824e(b); *see also Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009) (stating complainant's burden of proof). If the Commission finds that the burden has been met, it must determine and set the new just and reasonable rate. FPA § 206(a), 16 U.S.C. § 824e(a).

In 2005, Congress passed the Energy Policy Act to, among other things, increase transmission efficiency and innovation. *See N.C. Util. Comm'n v. FERC*, 741 F.3d 439, 443 (4th Cir. 2014) (citing Pub. L. 109-58, 119 Stat. 594 (2005)). As part of that legislation, Congress added Section 219 to the Federal Power Act. *See* 16 U.S.C. § 824s. Section 219(a) directed the Commission to establish, by rule, incentive-based

rate treatments for transmission infrastructure, "for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion." 16 U.S.C. § 824s(a).

Pursuant to Section 219, the Commission issued such a rule, codified at 18 C.F.R. § 35.35. *See Promoting Transmission Investment through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057, *on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006), *on reh'g*, Order No. 679-B, 119 FERC ¶ 61,062 (2007); *see also S. Cal Edison Co. v. FERC*, 717 F.3d 177, 179 (D.C. Cir. 2013) ("[p]ursuant to the Energy Policy Act of 2005, the Commission has also established incentive-based rate treatments to further encourage the construction of transmission" projects); *Conn. Dep't of Pub. Util. Control v. FERC*, 593 F.3d 30, 33 (D.C. Cir. 2010) (noting that the Commission issued the incentives rule to comply with newly added section 219 of the Federal Power Act). The rule does not automatically grant any incentive-based rate treatment to any utility; each utility must demonstrate that it meets the Commission's criteria for that incentive, that the total package of requested incentives is tailored to demonstrable risks or challenges of a project, and that the

overall return on equity is just and reasonable. 18 C.F.R. § 35.35(c)-(e). *See generally San Diego Gas & Elec. Co. v. FERC*, 913 F.3d 127, 131 (D.C. Cir. 2019) (discussing the incentives rule and Order No. 679).

Several of the enumerated incentives increase a utility's return on equity. *See, e.g.*, 18 C.F.R. § 35.35(d)(1)(i) (allowing "[a] rate of return on equity sufficient to attract new investment in transmission facilities"); *id.* § 35.35(e) (allowing "public utilities that join a Transmission Organization" to receive "a return on equity that is higher than . . . the Commission might otherwise allow"). The incentive at issue in this case allows a "Transco" — defined as "a stand-alone transmission company" (*id.* § 35.35(b)) — to include an elevated return on equity in its transmission rates. *See id.* § 35.35(d)(2)(1) (allowing "[a] return on equity that both encourages Transco formation and is sufficient to attract investment").

B. Regional Transmission Organizations

Since the 1970s, a combination of technological advances and policy reforms has given rise to market competition among power suppliers. The expansion of vast regional grids and the possibility of long-distance transmission has enabled electric utilities to make large

transfers of electricity in response to market conditions, thereby creating opportunities for competition among suppliers. *See New York*, 535 U.S. at 7-8 (explaining evolution of competitive markets).

In the 1990s, the Commission furthered the development of such competition by ordering functional unbundling of wholesale generation and transmission services, requiring utilities to provide open, non-discriminatory access to their transmission facilities to competing suppliers. *See generally id.* at 11-13; *cf. Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 536 (2008) ("the Commission has attempted to break down regulatory and economic barriers that hinder a free market in wholesale electricity").

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 Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999) (cross-referenced at 89 FERC ¶ 61,285), *on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000) (cross-referenced at 90 FERC ¶ 61,201), *aff'd sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001); *Morgan*

Stanley, 554 U.S. at 536-37. These independent regional entities operate the transmission grid on behalf of transmission-owning member utilities and are required to maintain system reliability. *See Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292 (2016); *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 768 (2016); *see also NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 169 & n.1 (2010) (explaining responsibilities of regional system operators).

Midcontinent Independent System Operator, Inc. (formerly Midwest Independent Transmission System Operator, Inc.) is a regional transmission organization comprising utilities in all or part of fifteen states in the Midwest and South and one Canadian province. *See MISO Transmission Owners v. FERC*, 860 F.3d 837, 839 (6th Cir. 2017) (describing system region); *see also Ill. Commerce Comm'n v. FERC*, 756 F.3d 556, 557 (7th Cir. 2014) (showing regional map); *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 249 (D.C. Cir. 2007) (discussing formation of system). (This Brief refers to that regional transmission organization as the Midcontinent Region.) The three Transmission Companies are members of the Midcontinent Region and have transferred operational control of their transmission assets to the system operator; they recover

rates for transmission service using those assets under the system operator's tariff.

II. EARLY INDEPENDENCE INCENTIVES AND THE CREATION OF THE TRANSCO ADDER

The history of the Transmission Companies and the history of the Transco adder are intertwined. The Commission developed its policy on approving an elevated return on equity as an incentive for creation of stand-alone transmission companies soon after regional transmission organizations were established. The Commission first granted such an adder in response to requests by the first stand-alone transmission companies that formed — including International Transmission and Michigan Electric (which were not yet affiliated). The Commission later clarified its standards developed in those cases in a 2005 policy statement to guide future rate filings by independent transmission companies, and then formalized a Transco adder in the 2006 rulemaking and expounded upon the underlying policy grounds and the applicable criteria — citing International Transmission and Michigan Electric as the paradigm. The Commission further explained its policy in granting a Transco adder to ITC Midwest in 2015.

A. 2003: Early FERC Approvals of Incentive Rate Treatments for Independent Transmission Companies

International Transmission was created as a wholly-owned subsidiary of DTE Energy Company for the purpose of acquiring The Detroit Edison Company's transmission assets and transferring operational control of those facilities to the Midcontinent Region. *See DTE Energy Co.*, 91 FERC ¶ 61,317, at 62,090-91 (2000). DTE Energy then sold International Transmission to ITC Holdings, an independent, unaffiliated entity whose ownership would result in International Transmission's independence from any market participants. *See ITC Holdings Corp.*, 102 FERC ¶ 61,182, *reh'g denied*, 104 FERC ¶ 61,033 (2003). International Transmission proposed transmission rates for its facilities that would include a return on equity that was 100 basis points higher than the return approved for all participants in the Midcontinent Region, based on the Commission's indication, in earlier orders, that it would be "willing[] to consider a higher rate of return for greater degrees of independence." 102 FERC ¶ 61,182 at P 63. (In that case, International Transmission requested a return on equity of 13.88 percent, which represented the 12.88-percent return that the

Commission had previously approved for participants in the Midcontinent Region, plus 100 basis points. *See id.*)

The Commission authorized the sale and approved the rate proposal. *See id.* at P 1. In particular, the Commission examined the ownership and governance structure to determine effects on International Transmission's independence from "market participants," as measured by standards the Commission had developed in Order No. 2000 to evaluate the independence of system operators and regional transmission organizations. *See id.* at PP 26-28, 39-47; *see also* Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 31,061-64. The Commission concluded that the company would be sufficiently independent because its parent's general partner would have no financial ties to market participants, and the two limited partners had only limited voting rights. *See* 102 FERC ¶ 61,182 at PP 39, 41-42. The Commission also relied on the fact that one of those limited partners was affiliated only with a market participant located in the Western Interconnection,[1] and

[1] "In the contiguous United States, [the transmission] system is composed of three major grids: the Eastern Interconnection, the Western Interconnection, and the Texas Interconnection." *New York*, 535 U.S. at 32. The Midcontinent Region is in the Eastern

the other limited partner held too small an interest in another market participant to be relevant under Commission regulations. *See* 102 FERC ¶ 61,182 at P 43 & n.33. (But the Commission noted that it would reexamine International Transmission's adder if that partner acquired a larger share of the affiliated market participant. *Id.* at PP 43-44.)

The Commission again examined International Transmission's business structure when ITC Holdings made a public offering of its common stock; the Commission continued to allow the independence adder, conditioned on measures designed to protect International Transmission's independence from stock-owning market participants. *See ITC Holdings Corp.*, 111 FERC ¶ 61,149 at PP 18-26 (2005).

The Commission likewise approved the same 100-basis-point adder for Michigan Electric Transmission Company, which also was an independent transmission company in the Midcontinent Region. *Mich. Elec. Transmission Co.*, 105 FERC ¶ 61,214 (2003). The Commission further explained why independence justified a higher return on equity:

Interconnection. *See*, *e.g.*, *Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,045 at P 35 (2015).

"Independent ownership and operation of transmission is an important policy objective of the Commission because it will bring significant benefits including, among other things, lessened potential for discrimination, improved access to capital markets for transmission investment, improved asset management, and development of innovative services." *Id.* at P 20. *See also Mich. Elec. Transmission Co.*, 113 FERC ¶ 61,343 at PP 15, 17-19 (2005) (approving independence adder again in a subsequent rate proceeding; further discussing policy justification), *on reh'g*, 116 FERC ¶ 61,164 (2006). (ITC Holdings subsequently acquired Michigan Electric Transmission Company. *See ITC Holdings Corp.*, 116 FERC ¶ 61,271 (2006).)

The Commission also approved various incentive rate treatments to a third stand-alone transmission company based on its operational and managerial independence. *See American Transmission Co.*, 105 FERC ¶ 61,388 at PP 24-31 (2003), *order dismissing reh'g as moot, providing clarification and approving uncontested settlement*, 107 FERC ¶ 61,117 (2004).

B. 2005: Policy Statement

Seeking to facilitate the creation of, and to stimulate investment by, independent transmission companies, the Commission further clarified its approach in June 2005. *Policy Statement Regarding Evaluations of Independent Ownership and Operation of Transmission*, 111 FERC ¶ 61,473 (2005). The Commission explained that it would grant incentives to such companies notwithstanding passive ownership by market participants, and set forth factors that it would consider in evaluating the transmission company's level of independence from market participant control or influence. *See id.* at PP 4-9. Drawing from its earlier orders concerning Independent Transmission, Michigan Electric, and American Transmission, the Commission emphasized that it would "consider the applicant's governance structure and any rights that could allow market participant owners to directly or indirectly affect the applicant's operation, planning or investment decisions." *Id.* at P 5. The Commission would "weigh the representation (if any) by market participants" on a company's board of directors and would consider "the composition and responsibilities" of committees and "the extent and nature of corporate actions" or capital investments requiring

prior board approval. *Id.* at P 6. The Commission also would consider the role of market participants in financing the company's investments. *Id.* at P 7.

C. 2006: Incentives Rulemaking

As noted *supra* at pp. 4-5, the Energy Policy Act of 2005 required the Commission to establish incentive-based rate treatments for transmission construction. Accordingly, the Commission issued a Notice of Proposed Rulemaking in November 2005. *Promoting Transmission Investment through Pricing Reform*, 70 Fed. Reg. 71,409 (Nov. 29, 2005), FERC Stats. & Regs., Proposed Regs. ¶ 32,593 (2005). In July 2006, the Commission issued its incentives rule, which enumerated a variety of incentives that the Commission would consider on a case-by-case basis. Several of those incentives would increase a utility's return on equity. *See supra* p. 6.

As relevant here, the rulemaking formalized the Commission's policy of granting incentive adders to stand-alone transmission companies, called Transcos. *See* Order No. 679 at PP 201, 221; 18 C.F.R. § 35.35(d)(2)(i). The Commission further extended such rate treatments to transmission companies with active ownership by market

participants, with the requisite demonstration of independence. *See* Order No. 679 at P 202 (explaining that the rule "does not exclude" transmission companies with active ownership, but noting that "[c]oncerns regarding affiliated Transcos . . . will be considered in the context of specific applications for incentive treatment"); *see also id.* at P 4 ("The Commission will not limit an applicant's ability to seek incentive-based rate treatments based on corporate structure or ownership."); *id.* at P 203 ("we will not establish specific limits" regarding "levels of active and passive ownership"). Each company would have to "show[] how [its] specific characteristics . . . affect its ability and propensity to increase transmission investments and lead to increased transmission investment similar to the Transcos we have already approved." *Id.* at P 202.

To allow "flexibility" (*id.* at P 201), the Commission declined to "establish a specific methodology to factor the level of independence" into its case-by-case determinations or to set "additional incentive levels . . . to correspond to certain levels of independence." *Id.* at P 239; *see also id.* (Commission was "not quantifying a precise formula or method"). But the Commission pointed to International Transmission,

Michigan Electric, and American Transmission as models of the standards by which it would evaluate independence. *See id.* at P 240 (noting that the existing Transcos "are either totally independent of market participants or can meet the independence standards in the [2005] Policy Statement").[2] In future cases, a company with active ownership by a market participant would be eligible for the Transco incentive "to the extent it can show, for example, why active ownership by an affiliate does not affect the integrity of its investment planning, capital formation, and investment processes or how its business structure provides support for transmission investments in a way similar to the structure" of fully independent companies or those with only passive ownership. *Id.*

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[2] The Commission praised the benefits of the Transco business model and justified the incentive adder by citing "the proven and encouraging track record of Transco investment in transmission infrastructure" (*id.* at P 222) based on information submitted by International Transmission and Michigan Electric. *See id.* at PP 222-23 (citing comment filings); *see also id.* at P 215 & n.144 (describing International Transmission's comments on its own transmission investments and the level of such investments by the three independent transmission companies in the Midcontinent Region, compared with those of other utilities). *Cf. id.* at P 196 (International Transmission argued for the benefits of independence); *id.* at P 233 (International Transmission advocated for the Commission to grant the highest incentives to companies that are truly independent).

D. 2015: ITC Midwest LLC

In 2007, another ITC Holdings subsidiary, ITC Midwest LLC, sought approval of a 100-basis-point Transco adder (together with a separate 50-basis-point adder on different grounds). The Commission rejected ITC Midwest's proposed return on equity, not based on analysis of its independence, but because ITC Midwest had failed to demonstrate that the *total* requested return was just and reasonable by reference to comparable companies. *See ITC Holdings Corp.*, 121 FERC ¶ 61,229 at PP 39-44 (2007); *see also id.* at P 87 & n.60 (approving ITC Midwest's status as a Transco, because its ownership structure would protect its independence; citing *ITC Holdings Corp.*, 111 FERC ¶ 61,149 at P 25, *discussed supra* at p. 12).

In 2015, the Commission approved ITC Midwest's request for a Transco adder pursuant to Order No. 679, finding that ITC Midwest was fully independent. *See Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,252 at PP 43-47 (2015), *on reh'g*, 154 FERC ¶ 61,004 (2016). Specifically, the Commission reaffirmed its previous finding that ITC Midwest's ownership structure would protect its independence. 150 FERC ¶ 61,252 at P 43 (citing 121 FERC ¶ 61,229 at P 87). The

Commission reduced ITC Midwest's requested 100-basis-point adder to 50 basis points, however, explaining that it found the larger amount "to be excessive for the Transco Adder at this time," and found 50 basis points "an appropriate size . . . taking into account the interests of consumers and applicants, as well as current market conditions." 150 FERC ¶ 61,252 at P 45; *see also* 154 FERC ¶ 61,004 at P 27 ("[T]he Commission has never . . . stated that 100 basis points is the appropriate size of the Transco Adder in all cases. . . . [G]ranting a 50-basis point Transco Adder based on a case-by-case analysis . . . is consistent with the Commission's precedent.").

III. THE COMMISSION PROCEEDINGS AND ORDERS

A. The Merger Transaction and the Complaint

In 2016, ITC Holdings and other parties sought Commission authorization for a series of transactions that would result in ITC Holdings becoming indirectly owned by two parent companies: Fortis Inc., a Canadian corporation (holding 80.1 percent of an entity that would own ITC Holdings), and GIC (Ventures) Pte. Ltd, a company indirectly owned by the government of Singapore (holding 19.9 percent). *See Fortis Inc.*, 156 FERC ¶ 61,219 at P 1 (2016), *on clarification and reh'g*, 158 FERC ¶ 61,019 (2017). Fortis owns other utility subsidiaries

in Canada and the United States, some of which participate in New York and mid-Atlantic regional transmission systems. *See id.* at PP 3-13. GIC indirectly owns electric utilities that participate in those regional systems as well as in Texas and the Southeast. *See id.* at PP 15-16.

Because Fortis and GIC own those market participants, several parties questioned the Transmission Companies' independence — and their continued entitlement to Transco adders — following the merger. *See id.* at PP 63-66. The Commission, however, determined that "an examination of the current rates and . . . incentives" was outside the scope of the merger authorization; parties seeking to challenge the Transmission Companies' existing rates could do so in a complaint under section 206 of the Federal Power Act, 16 U.S.C. § 824e. 156 FERC ¶ 61,219 at P 83.

In 2018, a group of transmission customers (calling themselves "the Midwest Ratepayers") filed a section 206 complaint against International Transmission, ITC Midwest, and Michigan Electric. R. 1, JA 60. The Midwest Ratepayers asserted that the return on equity adders that the Commission had previously approved based on the

Transmission Companies' independence were rendered unjust and unreasonable by the merger. *Id.* at 1-3, 23, JA 60-62, 82. Specifically, the Midwest Ratepayers argued that the Transmission Companies are now affiliated with participants in nearby regional electricity markets. *See id.* at 1-12, JA 60-71. Therefore, the Midwest Ratepayers asked the Commission to remove the adders entirely. *Id.* at 23, JA 82.

B. The Complaint Order

On October 18, 2018, the Commission issued the Complaint Order, granting the Complaint in part. The Commission determined that the Transmission Companies' independence adders were no longer just and reasonable because the merger had reduced their independence from market participants. Complaint Order PP 1, 68, 73, JA 13, 35, 36-37. Applying the independence criteria it had set forth in Order No. 679, the Commission based that finding on the merger's effects on investment planning, capital formation, and business structure. Complaint Order PP 69-71, JA 35-36. The Commission, however, did not agree with the Midwest Ratepayers that no incentive was warranted, as the Transmission Companies' independence had been reduced but not eliminated. Rather, the Commission considered their

remaining level of independence and set the replacement adders at 25 basis points. The Commission based that determination on its current policy of affording a 50-basis-point adder for fully-independent transmission companies, reduced to 25 basis points for the reduced independence of the Transmission Companies. *Id.* at P 73, JA 36-37.

Two Commissioners wrote separately, both echoing the finding that the adders had become unjust and unreasonable due to the Transmission Companies' reduced independence; one Commissioner agreed that the reduced adders were just and reasonable (*see* Commissioner LaFleur, concurring, R. 34, JA 39-40), while the other would have eliminated the adders entirely (*see* Commissioner Glick, dissenting, R. 33 at PP 1, 4-7, JA 41, 42-45 (Complaint Order Dissent)).

C. The Rehearing Order

The Transmission Companies timely filed a request for agency rehearing. R. 38, JA 287. (The Midwest Ratepayers did not seek rehearing as to the Commission's decision to continue to allow any Transco adder.) The Commission denied rehearing on July 18, 2019. The Commission explained that its rulemaking in Order No. 679

articulated its current policy. *See* Rehearing Order P 10, JA 50. In that rulemaking, the Commission did not quantify a precise formula or method and did not place any geographic limitation on the scope of relevant affiliate relationships. *See id.* at PP 10, 12-13, JA 50-51, 52. The Commission also rejected a geographic limitation on the definition of an affiliated market participant. *See id.* at P 15, JA 52-53. For those reasons, the Commission explained that it appropriately considered the Transmission Companies' relationship to affiliates. *See id.* The Commission also further discussed its finding that the Transmission Companies were no longer fully independent after the merger. *See id.* at PP 19-20, JA 54-55. Finally, the Commission more fully explained its reasons for setting a replacement rate with a 25-basis-point adder, based on its case-specific evaluation of the Transmission Companies' reduced independence. *See id.* at PP 22-23, JA 56.

Commissioner Glick supported the Commission's rationale and joined its determination as to the first step: "that the then-existing [return on equity] adder was unjust and unreasonable." Rehearing Order Dissent at P 2, JA 58. (Because only the Transmission Companies sought rehearing — that is, because the Midwest

Ratepayers did not challenge the award of any adder, even reduced — Commissioner Glick again dissented from the second step of the Commission's decision (the replacement rate) but did not revisit his specific objections. *See id.*)

This appeal followed.

SUMMARY OF ARGUMENT

This case concerns the Commission's responsibility under the Federal Power Act to ensure that incentive-based rate treatments for transmission infrastructure investment, like all rates, are just and reasonable. Having approved return on equity adders for three stand-alone transmission companies based on their independence from market participants, upon complaint the Commission appropriately reexamined their independence after a merger transaction changed their corporate ownership and governance.

The Commission reasonably determined, based upon substantial record evidence, that the merger had diminished the companies' independence. Following the merger, the Transmission Companies are now indirectly owned by Fortis and GIC, which both own other market participants and exercise control over the Transmission Companies.

The Commission found that the Transmission Companies are now dependent on Fortis for financing, Fortis now has the authority to influence the Transmission Companies' investment decisions, and the ITC Holdings board now has representatives from Fortis and GIC, providing corporate oversight.

Collectively these changes in corporate structure and governance reduced, but did not eliminate, the Transmission Companies' independence from market participants. Based upon their diminished independence, the Commission found their previously-granted full Transco adders were no longer just and reasonable. Because the companies' independence was reduced, but not eliminated, the Commission did not eliminate the Transco adders as requested by the complaining Midwest Ratepayers, but reduced the adders to 25 basis points.

The Transmission Companies argue that the Commission failed to make the required finding under Federal Power Act section 206 that their existing full Transco adders were unjust and unreasonable. The Commission did make such a finding; indeed, the challenged orders expressly granted the section 206 complaint to the extent it alleged that

the existing full Transco adders are now unjust and unreasonable following the merger. The Commission is not required to use "magic words" to fulfill its statutory obligation.

The Transmission Companies also focus on the Commission's supposed departure from precedent. They insist that, having declined in its 2006 rulemaking to establish a specific formula or method to assess a Transco's level of independence, the Commission, in two 2018 adjudications, adopted a strict geographic test from which it cannot deviate without explanation. Under the Transmission Companies' interpretation, the Commission considers only the size, location, and contractual status of a transmission company's affiliates to determine whether the company is independent of market participants. Their preferred approach, however, disregards the Commission's stated policy and misunderstands its 2018 cases.

Interpreting its own policy and precedents for itself, the Commission reasonably applied the same criteria that it endorsed in the 2006 rulemaking and subsequently applied to the Transmission Companies and other Transcos — criteria that it had employed from the earliest cases granting independence adders to the Transmission

Companies. Indeed, two of the Transmission Companies, International Transmission and Michigan Electric, were the Commission's models in encouraging formation of other independent transmission companies. Evaluating the post-merger Transmission Companies on the same factors — ownership and corporate governance — that it had used in granting the adders, the Commission reasonably found that the companies' integration into another corporate structure had reduced, but not entirely eliminated, their independence.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's deferential "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A); *Elec. Power Supply Ass'n*, 136 S. Ct. at 782. The "scope of review under [that] standard is narrow." *Elec. Power Supply Ass'n*, 136 S. Ct. at 782 (citation omitted). The relevant inquiry is whether the agency has "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

Judicial review of the Commission's rate decisions is particularly deferential, as "'just and reasonable' is obviously incapable of precise judicial definition . . . ." *NextEra Energy Res., LLC v. FERC*, 898 F.3d 14, 20 (D.C. Cir. 2018) (quoting *Morgan Stanley*, 554 U.S. at 532). Moreover, rate-related matters "are either fairly technical or 'involve policy judgments that lie at the core of the regulatory mission.'" *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 55 (D.C. Cir. 2014) (citation omitted); *accord PJM Power Providers Grp. v. FERC*, 880 F.3d 559, 562 (D.C. Cir. 2018); *cf. Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 702 (D.C. Cir. 2000) (Commission's "policy assessment[s]" are "owe[d] great deference"), *aff'd sub nom. New York*, 535 U.S. 1. This Court also defers to the Commission's reasonable interpretations of its own precedents. *Ala. Mun. Elec. Auth. v. FERC*, 662 F.3d 571, 573 (D.C. Cir. 2011); *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007).

The Commission's factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825*l*(b). The substantial evidence standard "'requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.'"

La. Pub. Serv. Comm'n v. FERC, 522 F.3d 378, 395 (D.C. Cir. 2008) (citation omitted); *accord S.C. Pub. Serv. Auth.*, 762 F.3d at 54. If the evidence is susceptible of more than one rational interpretation, the Court must uphold the agency's findings. *See Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966); *accord Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010) ("[W]e do not ask whether record evidence could support the petitioner's view of the issue, but whether it supports the Commission's ultimate decision.").

II. THE COMMISSION APPROPRIATELY DETERMINED THAT THE TRANSMISSION COMPANIES' EXISTING RATES HAD BECOME UNJUST AND UNREASONABLE.

In evaluating a complaint made under section 206 of the Federal Power Act, 16 U.S.C. § 824e, the Commission first determines whether the complainants have demonstrated that the existing rate is unjust and unreasonable. If so, the Commission sets a just and reasonable replacement rate. *See*, *e.g.*, *FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346, 353-54 (D.C. Cir. 2014) (discussing standard under section 206 of the Federal Power Act). Here, the Commission reasonably concluded that the complaining Midwest Ratepayers had shown that the Transmission Companies' full Transco adders of 100 or 50 basis points

had become unjust and unreasonable due to diminished independence, and set a just and reasonable replacement Transco adder at 25 basis points.

On appeal, the Transmission Companies challenge the Commission's determination that they are no longer entitled to their previously-approved full Transco adders. As demonstrated below, the Commission's determination was reasonable, supported by substantial evidence, and fully consistent with Commission precedent.

A. The Commission Reasonably Determined That The Merger Had Reduced The Transmission Companies' Independence From Market Participants.

The Section 206 complaint that commenced this proceeding alleged that, following the 2016 merger, the Transmission Companies are no longer sufficiently independent from affiliated market participants to justify continuation of their previously-awarded full Transco adders. To determine the Transmission Companies' level of independence, the Commission reasonably considered the same factors it had analyzed in granting (and continuing) adders to all three of the Transmission Companies: the effects of ownership and governance on a

stand-alone transmission company's operational independence in making transmission investments.

The Commission views the independence of Transcos as vital to the benefit they provide to the grid (*see* Order No. 679 at P 240): "By eliminating competition for capital between generation and transmission functions and thereby maintaining a singular focus on transmission investment, the Transco model responds more rapidly and precisely to market signals" for needed transmission investments. *Id.* at P 224. For that reason, the Commission's independence standards evaluate whether active ownership by a market participant affects "the integrity of [a Transco's] investment planning, capital formation, and investment processes . . . ." *Id.* at P 240; *see also* 2005 Policy Statement, 111 FERC ¶ 61,473 at PP 6-7 (explaining the Commission would look at representation by market participants on a company's board of directors, the composition and responsibilities of committees, and the role that market participants could play in financing (or potentially frustrating) investments), *cited in* Order No. 679 at P 240.

The Commission applied this approach from the start to the Transmission Companies. In approving the first independence adder

for International Transmission, the Commission looked at the financial interests and voting rights of the company's owners and at measures designed to ensure that the management and employees had no financial or economic stake in any market participant. *ITC Holdings*, 102 FERC ¶ 61,182 at PP 39-41. The Commission's focus was the company's "operational independence." *Id.* at P 39; *see also id.* at P 41 ("independent operation"); *id.* at P 44 (limited partner would have "no day-to-day control"). Similarly, in reaffirming Michigan Electric's adder, the Commission emphasized the company's "single-focus business model" and the absence of "any internal conflicts with other business functions regarding the use of capital." *Mich. Elec.*, 113 FERC ¶ 61,343 at P 18. In 2007 and again in 2015, the Commission found that "ITC Holdings' ownership structure would prevent market participants from being able to influence or control ITC Holdings and thus undermine ITC Midwest's independence." *Midcontinent*, 150 FERC ¶ 61,252 at P 43 (citing *ITC Holdings*, 121 FERC ¶ 61,229 at P 87); *see also id.* at P 47 ("We find that ITC Holdings' business model and independence safeguards have adequately protected the independence of ITC Holdings, and its subsidiary ITC Midwest."). *Cf.*

S. Cent. MCN LLC, 153 FERC ¶ 61,099 at P 67 (2015), *on reh'g*, 154 FERC ¶ 61,271 at PP 24-25 (2016) (denying Transco adder based on analysis of company's ownership and governance).

Similarly, here, the Commission looked at changes to the Transmission Companies' governance after the merger. Following the merger, the Transmission Companies are indirectly owned by Fortis and GIC, which have affiliates that participate in energy and capacity markets. Complaint Order P 10, JA 17. Therefore, following Order No. 679, the Commission considered the extent to which this new ownership affects the integrity of the Transmission Companies' investment planning, capital formation, and business processes. *See id.* at P 7, JA 16.

With respect to business structure, the Commission found that Fortis and GIC now both have representatives on the ITC Holdings board of directors, providing oversight over ITC Holdings's operations. Complaint Order P 71, JA 36; Rehearing Order P 19, JA 55. Also, executives from all of Fortis's regulated utility subsidiaries meet as a group to discuss business operations. *Id.* On capital formation, the Commission found that the Transmission Companies now must rely on

Fortis for financing, as they can no longer issue their own common stock and Fortis has indicated that cash for subsidiary capital expenditures will come from Fortis debt issuances. Rehearing Order P 19, JA 55; Complaint Order P 70, JA 36. Similarly, on investment planning, the Commission found that Fortis evaluates capital expenditures on a consolidated basis, indicating that Fortis may exercise some level of coordination and control over the Transmission Companies' investment plans. Rehearing Order P 19, JA 54-55; Complaint Order P 69, JA 35.

The Transmission Companies assert that the Commission's finding on investment planning "consist[s] entirely of speculation." Br. 43. But the Commission found the Transmission Companies' claims of independence in investment planning unpersuasive in light of Fortis's decision-making authority over them. Rehearing Order P 19 n.54, JA 55. On brief, the Transmission Companies do not dispute the Commission's findings regarding their dependence on Fortis for financing, nor the presence of Fortis and GIC representatives on the ITC Holdings board.

Thus, the Commission reasonably concluded that the post-merger changes — Fortis and GIC board representation, reliance on Fortis

financing, and Fortis authority to affect investment plans — make the Transmission Companies less independent than they had been before the merger. *See* Rehearing Order PP 19-20, JA 54-55. Accordingly, the Commission granted the Midwest Ratepayers' complaint insofar as it alleged that the previously-granted full Transco incentives were now unjust and unreasonable. Complaint Order P 1, JA 13-14; Rehearing Order P 1, JA 46.

As evidenced by the foregoing, the Transmission Companies are simply wrong that the Commission did not make the requisite Federal Power Act section 206 finding that their existing Transco adders were unjust and unreasonable. Br. 41 (citing *Emera Me. v. FERC*, 854 F.3d 9, 27 (D.C. Cir. 2017)). In *Emera Maine*, the Commission failed to make an express finding that the existing rate was unjust and unreasonable before imposing a new just and reasonable rate. *See* 854 F.3d at 26-27. Here, the Commission's finding that the existing rate was unjust and unreasonable was explicit, whether or not the Commission recited the statutory language. *See Interstate Nat. Gas Ass'n of Am. v. FERC*, 285 F.3d 18, 47 (D.C. Cir. 2002) ("When FERC seeks affirmatively to displace . . . existing rates or tariff provisions . . . . there is no

requirement that FERC use the 'magic words' of [the statute] itself . . . .") (citation omitted). The challenged orders granted a complaint alleging that, following the 2016 merger, the Transmission Companies' full Transco adders had become unjust and unreasonable. Complaint Order P 1, JA 13-14; Rehearing Order P 1, JA 46. This finding is further highlighted by Commissioner Glick's Dissent to the Rehearing Order: "Today's order . . . find[s] *primarily* that the Commission did not err in concluding that the then-existing [return on equity] adder was unjust and unreasonable. I support the Commission's conclusion in that regard . . . ." Rehearing Order Dissent P 2, JA 58 (emphasis added).

B. In Determining That The Existing Adders Were Unjust And Unreasonable, The Commission Did Not Depart From Its Practice Or Precedent.

The Transmission Companies claim that, in finding their existing full Transco adders unjust and unreasonable, the Commission departed without explanation from precedent established in two recent cases: *NextEra Energy Transmission N.Y., Inc.*, 162 FERC ¶ 61,196 (2018), and *GridLiance W. Transco LLC*, 164 FERC ¶ 61,049 (2018). *See* Br. 17-38. Indeed, in the Transmission Companies' telling, those two

orders represent the *only* relevant Commission precedent on determining independence for purposes of the Transco adder. *See*, *e.g.*, Br. 21-28. The Transmission Companies reduce the 2006 rulemaking to "general guidance" (Br. 18, 21) and interpret its determination that it would not establish a precise formula or rigid methodology to assess independence (*see supra* pp. 16-17) as a mere placeholder for a defined test to be developed later — which, in the Transmission Companies' view, the Commission did in the two 2018 cases. *See* Br. 18 (FERC "left the details of the independence analysis to be worked out through later adjudications" and "operationalized this aspect of Order No. 679 in two adjudications," *NextEra* and *GridLiance*).

In *NextEra*, a newly-formed company sought Commission approval for a package of incentive rate treatments, including a Transco adder and several project-specific incentives for its investment in a high-voltage transmission line in the New York regional system. 162 FERC ¶ 61,196 at PP 1-2. The New York Public Service Commission objected to the Transco adder because (among other concerns) it believed the single-project subsidiary of a parent with many utility subsidiaries should not be treated as a new, stand-alone entity. *See id.*

at P 46 & n.74. Based on the record in that case, the Commission determined that *NextEra*'s relationship to its affiliates would not affect the integrity of its investment planning, capital formation, and investment processes. *See id.* at P 51. Some of its generation affiliates were in Florida —"geographically distant" from the New York region; those within the region were small, distant ("three hundred miles away" from the transmission project), and committed under long-term power purchase agreements. *Id.* On those facts, the Commission found that the affiliates would "not affect the integrity of [NextEra's] investment planning, capital formation, and investment processes." *Id.* *See* Rehearing Order P 13, JA 52 (NextEra's "Florida affiliates were sufficiently geographically distant and operationally independent").

Similarly, *GridLiance* involved a newly-formed company seeking several incentives for a single transmission project in the California regional system. 164 FERC ¶ 61,049 at PP 1-2. A group of cities protested its request for a Transco adder, arguing that the adder overlapped with a different incentive and that the total proposed return on equity was unreasonable — but not that GridLiance was not fully independent. *See id.* at PP 34-35. The Commission briefly addressed

the independence standard, finding that GridLiance's generation affiliates outside the California region were "geographically distant" and the only one within the region was small, far from the transmission project, and committed under a long-term contract. *Id.* at P 43. *See* Rehearing Order P 17, JA 54.

From those two orders, the Transmission Companies depict a uniform Commission precedent imposing a clear "[*NextEra*]/*GridLiance* test." Br. 13, 14, 23, 26, 27, 29, 30, 31, 32, 34, 38; *see also id.* at 22, 24, 28 ("[*NextEra*]/*GridLiance* methodology"); *id.* at 22 ("[*NextEra*]/*GridLiance* criteria"); *id.* at 23 ("[*NextEra*]/*GridLiance* framework"). In their view, that test entails sorting affiliated market participants by their presence inside or outside the Transco's system region. Outside affiliates are, per se, irrelevant to independence, and inside affiliates are acceptable if they are small and if their output is committed under long-term power purchase agreements. *See* Br. 8-9, 23; *see also id.* at 24 (claiming that the Commission's methodology is limited to "analyzing the location, size, and contractual arrangements of . . . [a Transco's] affiliated generation holdings"). The Transmission

Companies contend that their new, post-merger affiliates "present an easy case" under that formula. *Id.* at 31.[3]

Thus, by the Transmission Companies' account, the Commission — despite its stated choice not to "establish a specific methodology" (Order No. 679 at P 239) — nevertheless "established its methodology" (Br. 21) a dozen years later, abruptly adopting a strict geographic measure in two proceedings where the applicable standard was not even litigated. They further assert that the Commission's independence evaluation "does not include any specific analysis of the corporate structure or internal governance" of a Transco (Br. 22) — notwithstanding the line of cases from 2003 through 2015 in which the Commission examined the Transmission Companies' own ownership structures to determine whether they were independent, and stated that it would revisit its assessments if warranted (*see supra* pp. 10-19).

[3] The Transmission Companies incorrectly claim that Commissioner Glick ratified their interpretation. *See* Br. 34 (the Complaint Order Dissent "recognized that [*NextEra*] compelled a finding of full independence for the [Transmission] Companies"). But the Dissent only noted concerns that *NextEra* itself had been wrongly decided because the company's relation to a "a vast array of non-transmission" affiliates disadvantaged its capital needs "in a way that is inconsistent with" the Order No. 679 policy justification for the Transco adder. Complaint Order Dissent P 5 n.8, JA 43.

Instead, the Transmission Companies proclaim the Commission's evaluation of their structures in *this* case to be a "novel analysis" and "entirely new." Br. 12, 25.

But neither *NextEra* nor *GridLiance* made any such pronouncements. Neither order purported to establish any rule or policy, or to modify or define any criteria the Commission had articulated in Order No. 679. To the contrary: the Commission in *NextEra* recounted the history of the Transco adder from its origins in *ITC Holdings* through Order No. 679 and repeated the policy set forth in that rulemaking, before turning to the particular facts of NextEra's proposal. *See* 162 FERC ¶ 61,196 at PP 49-50. In each case, the Commission addressed the applicant's independence based on the record before it and the arguments actually raised by the parties.

Moreover, the Commission has long rejected using a strict geographic delineation to assess independence. Even before it established its current policy in the 2006 rulemaking, the Commission repeatedly rejected a geographic definition for affiliate relationships that might affect independence: due to "the high degree of integration within the Eastern and Western Interconnections, the growth of

transactions involving buyers and sellers separated by hundreds of miles[,] and the participation of energy concerns in multiple markets," it would be "virtually impossible to apply a geographically delineated standard." Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 31,062 (rulemaking promoting development of regional transmission organizations), *quoted in* Rehearing Order P 15, JA 52-53. Nor did the Commission apply a geographic standard in approving International Transmission's adder at the outset. *See ITC Holdings*, 102 FERC ¶ 61,182 at PP 43-44 (considering International Transmission's relationship to an affiliate in a different regional system). Consistent with that view, the Commission still placed no geographic limitation on the scope of relevant affiliate relationships when it promulgated the incentives rule in 2006. *See* 18 C.F.R. § 35.35(b)(1)); Order No. 679 at PP 239-40; Rehearing Order P 12, JA 52.

Therefore, the Transmission Companies' cramped reading of the 2006 rulemaking and expansive reading of the *NextEra* and *GridLiance* orders do not represent the Commission's actual policy. The Commission's reasonable interpretation of its own orders is entitled to

deference, as is its policy judgment. *See*, *e.g.*, *Ala. Mun.*, 662 F.3d at 573; *Transmission Access*, 225 F.3d at 702.

Because the Commission never adopted a rigid geographic definition, it did not deviate from such imagined practice. For that reason, cases such as *West Deptford Energy LLC v. FERC*, 766 F.3d 10 (D.C. Cir. 2014), are inapposite. There, the Court remanded what it found to be a "one-off decision" to deviate both from the filed tariff and from consistent precedent on applying filed rates. *Id.* at 21. Indeed, until that case, "there appeared to be an unbroken Commission practice," including a previous case in which the Commission applied the "very same tariff" but reached "the exact opposite answer." *Id.* at 20, 22; *see also id.* at 19-22 (discussing numerous orders spanning 2006 to 2012). *Cf.* Br. 36 (*West Deptford* involved "multiple precedents that had established the 'Commission['s] practice'") (quoting 766 F.3d at 20); *cf. New Eng. Power Generators Ass'n v. FERC*, 881 F.3d 202, 213 (D.C. Cir. 2018) (Commission may have a "change in heart," but must explain "why it changed course").

In *New England Power Generators*, the Court recognized that, "[a]lthough case-by-case adjudication sometimes results in decisions

that seem at odds but can be distinguished on their facts, it is the agency's responsibility to provide a reasoned explanation of why those facts matter." 881 F.3d at 211. That is what the Commission did here: it relied on the policy it had established in a rulemaking — which itself drew its standards from the International Transmission and Michigan Electric precedents — and measured the Transmission Companies' current governance structures against their circumstances when the existing adders were approved. *See* Complaint Order PP 67-71, JA 35-36; Rehearing Order P 19, JA 54-55. (If anything, the Commission's longstanding practice and multiple precedents point to the evaluation of corporate governance that the Transmission Companies claim to be "entirely new." *See supra* pp. 10-19.)

The Transmission Companies also argue that they are more independent under the post-merger corporate structures than the Transcos granted full adders in *NextEra* and *GridLiance*. *See* Br. 27 n.4, 32-34. But before the Commission, they offered no factual support for that assertion: "Regarding the [Transmission] Companies' contention that they are more independent than [NextEra], [they] do not explain *how* they are more independent." Rehearing Order P 20,

JA 55 (emphasis added); *see* Rehearing Request at 7, JA 293 (citing Answer at 25-27, JA 186-88, which did not address NextEra).

The Transmission Companies assert that it is not their burden "to prove their entitlement to their existing Transco incentive." Br. 31. But, as the Commission found, this ignores that the Commission had already determined that record evidence specifically demonstrated that the merger reduced the Companies' independence, rendering the full Transco adder unjust and unreasonable. Rehearing Order P 20, JA 55. In an effort to support their contention, the Transmission Companies cite — for the first time on brief — websites and filings in the NextEra and GridLiance proceedings. *See* Br. 33. Even if those materials supported the Transmission Companies' assertions regarding those entities, and even if those assertions were relevant to the Commission's case-specific assessment of the Transmission Companies, this minimal effort to support their argument comes too late to cure the failure to do so in the underlying agency proceeding.

Rather, as demonstrated above, the Commission in the challenged orders reasonably concluded, based upon substantial evidence and in accordance with its precedents, that the Transmission Companies'

existing full Transco adders had become unjust and unreasonable. The Commission, moreover, reasonably reduced those full Transco adders of 100 or 50 basis points to 25 basis points to reflect the Companies' diminished independence. The Commission's reasonable determinations in the challenged orders should be upheld. *Cf. Elec. Power Supply Ass'n*, 136 S. Ct. at 784 ("It is not our job to render that judgment, on which reasonable minds can differ. Our important but limited role is to ensure that the Commission engaged in reasoned decisionmaking . . . .").

CONCLUSION

For the reasons stated, the petition for review should be denied and the challenged FERC orders should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief for Respondent has been prepared in a proportionally spaced typeface (using Microsoft Word, in 14-point Century Schoolbook) and contains 8,416 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

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conducted over the term of the existing license; and

(B) were not expressly considered by the Commission as contributing to the length of the existing license term in any order establishing or extending the existing license term.

(c) Commission determination

At the request of the licensee, the Commission shall make a determination as to whether any planned, ongoing, or completed investment meets the criteria under subsection (b)(2). Any determination under this subsection shall be issued within 60 days following receipt of the licensee's request. When issuing its determination under this subsection, the Commission shall not assess the incremental number of years that the investment may add to the new license term. All such assessment shall occur only as provided in subsection (a).

(June 10, 1920, ch. 285, pt. I, § 36, as added Pub. L. 115–270, title III, § 3005, Oct. 23, 2018, 132 Stat. 3867.)

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

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

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

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

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

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

(g) Books and records

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

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

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

(C) any electric utility company, or holding company thereof, which is an associate com-

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

pany or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

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

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

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

(4) Nothing in this section shall—

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

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

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

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

REFERENCES IN TEXT

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

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

AMENDMENTS

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

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

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

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

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

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

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

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

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

EFFECTIVE DATE OF 2005 AMENDMENT

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

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§ 824c. Issuance of securities; assumption of liabilities

(a) Authorization by Commission

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

(b) Application approval or modification; supplemental orders

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

(c) Compliance with order of Commission

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

(d) Authorization of capitalization not to exceed amount paid

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

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

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

(f) Public utility securities regulated by State not affected

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

(g) Guarantee or obligation on part of United States

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

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

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

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

TRANSFER OF FUNCTIONS

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

(g) Inaction of Commissioners

(1) In general

With respect to a change described in subsection (d), if the Commission permits the 60-

day period established therein to expire without issuing an order accepting or denying the change because the Commissioners are divided two against two as to the lawfulness of the change, as a result of vacancy, incapacity, or recusal on the Commission, or if the Commission lacks a quorum—

(A) the failure to issue an order accepting or denying the change by the Commission shall be considered to be an order issued by the Commission accepting the change for purposes of section 825*l*(a) of this title; and

(B) each Commissioner shall add to the record of the Commission a written statement explaining the views of the Commissioner with respect to the change.

(2) Appeal

If, pursuant to this subsection, a person seeks a rehearing under section 825*l*(a) of this title, and the Commission fails to act on the merits of the rehearing request by the date that is 30 days after the date of the rehearing request because the Commissioners are divided two against two, as a result of vacancy, incapacity, or recusal on the Commission, or if the Commission lacks a quorum, such person may appeal under section 825*l*(b) of this title.

(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; Pub. L. 115–270, title III, § 3006, Oct. 23, 2018, 132 Stat. 3868.)

AMENDMENTS

2018—Subsec. (g). Pub. L. 115–270 added subsec. (g).

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 re-

funds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

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

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

[1] See References in Text note below.

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100–473, §4, Oct. 6, 1988, 102 Stat. 2300, provided that: ''The amendments made by this Act [amending this section] are not applicable to complaints filed or motions initiated before the date of enactment of this Act [Oct. 6, 1988] pursuant to section 206 of the Federal Power Act [this section]: *Provided, however*, That such 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

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in subsection (b) shall not be considered by such action as engaging in undue discrimination or preference under this chapter.

(June 10, 1920, ch. 285, pt. II, § 217, as added Pub. L. 109–58, title XII, § 1233(a), Aug. 8, 2005, 119 Stat. 957.)

FERC RULEMAKING ON LONG-TERM TRANSMISSION RIGHTS IN ORGANIZED MARKETS

Pub. L. 109–58, title XII, § 1233(b), Aug. 8, 2005, 119 Stat. 960, provided that: ''Within 1 year after the date of enactment of this section [Aug. 8, 2005] and after notice and an opportunity for comment, the [Federal Energy Regulatory] Commission shall by rule or order, implement section 217(b)(4) of the Federal Power Act [16 U.S.C. 824q(b)(4)] in Transmission Organizations, as defined by that Act [16 U.S.C. 791a et seq.] with organized electricity markets.''

§ 824r. Protection of transmission contracts in the Pacific Northwest

(a) Definition of electric utility or person

In this section, the term ''electric utility or person'' means an electric utility or person that—

(1) as of August 8, 2005, holds firm transmission rights pursuant to contract or by reason of ownership of transmission facilities; and

(2) is located—

(A) in the Pacific Northwest, as that region is defined in section 839a of this title; or

(B) in that portion of a State included in the geographic area proposed for a regional transmission organization in Commission Docket Number RT01–35 on the date on which that docket was opened.

(b) Protection of transmission contracts

Nothing in this chapter confers on the Commission the authority to require an electric utility or person to convert to tradable or financial rights—

(1) firm transmission rights described in subsection (a); or

(2) firm transmission rights obtained by exercising contract or tariff rights associated with the firm transmission rights described in subsection (a).

(June 10, 1920, ch. 285, pt. II, § 218, as added Pub. L. 109–58, title XII, § 1235, Aug. 8, 2005, 119 Stat. 960.)

§ 824s. Transmission infrastructure investment

(a) Rulemaking requirement

Not later than 1 year after August 8, 2005, the Commission shall establish, by rule, incentive-based (including performance-based) rate treatments for the transmission of electric energy in interstate commerce by public utilities for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.

(b) Contents

The rule shall—

(1) promote reliable and economically efficient transmission and generation of electricity by promoting capital investment in the enlargement, improvement, maintenance, and operation of all facilities for the transmission of electric energy in interstate commerce, regardless of the ownership of the facilities;

(2) provide a return on equity that attracts new investment in transmission facilities (including related transmission technologies);

(3) encourage deployment of transmission technologies and other measures to increase the capacity and efficiency of existing transmission facilities and improve the operation of the facilities; and

(4) allow recovery of—

(A) all prudently incurred costs necessary to comply with mandatory reliability standards issued pursuant to section 824*o* of this title; and

(B) all prudently incurred costs related to transmission infrastructure development pursuant to section 824p of this title.

(c) Incentives

In the rule issued under this section, the Commission shall, to the extent within its jurisdiction, provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization. The Commission shall ensure that any costs recoverable pursuant to this subsection may be recovered by such utility through the transmission rates charged by such utility or through the transmission rates charged by the Transmission Organization that provides transmission service to such utility.

(d) Just and reasonable rates

All rates approved under the rules adopted pursuant to this section, including any revisions to the rules, are subject to the requirements of sections 824d and 824e of this title that all rates, charges, terms, and conditions be just and reasonable and not unduly discriminatory or preferential.

(June 10, 1920, ch. 285, pt. II, § 219, as added Pub. L. 109–58, title XII, § 1241, Aug. 8, 2005, 119 Stat. 961.)

§ 824t. Electricity market transparency rules

(a) In general

(1) The Commission is directed to facilitate price transparency in markets for the sale and transmission of electric energy in interstate commerce, having due regard for the public interest, the integrity of those markets, fair competition, and the protection of consumers.

(2) The Commission may prescribe such rules as the Commission determines necessary and appropriate to carry out the purposes of this section. The rules shall provide for the dissemination, on a timely basis, of information about the availability and prices of wholesale electric energy and transmission service to the Commission, State commissions, buyers and sellers of wholesale electric energy, users of transmission services, and the public.

(3) The Commission may—

(A) obtain the information described in paragraph (2) from any market participant; and

(B) rely on entities other than the Commission to receive and make public the information, subject to the disclosure rules in subsection (b).

(4) In carrying out this section, the Commission shall consider the degree of price trans-

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Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

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

§ 825k. Publication and sale of reports

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and is authorized to sell at reasonable prices copies of all maps, atlases, and reports as it may from time to time publish. Such reasonable prices may include the cost of compilation, composition, and reproduction. The Commission is also authorized to make such charges as it deems reasonable for special statistical services and other special or periodic services. The amounts collected under this section shall be deposited in the Treasury to the credit of miscellaneous receipts. All printing for the Federal Power Commission making use of engraving, lithography, and photolithography, together with the plates for the same, shall be contracted for and performed under the direction of the Commission, under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe, and all other printing for the Commission shall be done by the Director of the Government Publishing Office under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe. The entire work may be done at, or ordered through, the Government Publishing Office whenever, in the judgment of the Joint Committee on Printing, the same would be to the interest of the Government: *Provided*, That when the exigencies of the public service so require, the Joint Committee on Printing may authorize the Commission to make immediate contracts for engraving, lithographing, and photolithographing, without advertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

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

CODIFICATION

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

CHANGE OF NAME

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

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

§ 825*l*. Review of orders

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

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

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided

in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

(b) Writs of mandamus

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

(c) Employment of attorneys

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

(d) Prohibitions on violators

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

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

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

(A) electric energy; or

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

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(ii) The Regional Transmission Organization's planning and expansion process must accommodate efforts by state regulatory commissions to create multi-state agreements to review and approve new transmission facilities. The Regional Transmission Organization's planning and expansion process must be coordinated with programs of existing Regional Transmission Groups (See § 2.21 of this chapter) where appropriate.

(iii) If the Regional Transmission Organization is unable to satisfy this requirement when it commences operation, it must file with the Commission a plan with specified milestones that will ensure that it meets this requirement no later than three years after initial operation.

(8) *Interregional coordination.* The Regional Transmission Organization must ensure the integration of reliability practices within an interconnection and market interface practices among regions.

(l) *Open architecture.* (1) Any proposal to participate in a Regional Transmission Organization must not contain any provision that would limit the capability of the Regional Transmission Organization to evolve in ways that would improve its efficiency, consistent with the requirements in paragraphs (j) and (k) of this section.

(2) Nothing in this regulation precludes an approved Regional Transmission Organization from seeking to evolve with respect to its organizational design, market design, geographic scope, ownership arrangements, or methods of operational control, or in other appropriate ways if the change is consistent with the requirements of this section. Any future filing seeking approval of such changes must demonstrate that the proposed changes will meet the requirements of paragraphs (j), (k) and (l) of this section.

[Order 2000–A, 65 FR 12110, Mar. 8, 2000, as amended by Order 679, 71 FR 43338, July 31, 2006]

Subpart G—Transmission Infrastructure Investment Provisions

§ 35.35 Transmission infrastructure investment.

(a) *Purpose.* This section establishes rules for incentive-based (including performance-based) rate treatments for transmission of electric energy in interstate commerce by public utilities for the purpose of benefiting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.

(b) *Definitions.* (1) *Transco* means a stand-alone transmission company that has been approved by the Commission and that sells transmission services at wholesale and/or on an unbundled retail basis, regardless of whether it is affiliated with another public utility.

(2) *Transmission Organization* means a Regional Transmission Organization, Independent System Operator, independent transmission provider, or other transmission organization finally approved by the Commission for the operation of transmission facilities.

(c) *General rule.* All rates approved under the rules of this section, including any revisions to the rules, are subject to the filing requirements of sections 205 and 206 of the Federal Power Act and to the substantive requirements of sections 205 and 206 of the Federal Power Act that all rates, charges, terms and conditions be just and reasonable and not unduly discriminatory or preferential.

(d) *Incentive-based rate treatments for transmission infrastructure investment.* The Commission will authorize any incentive-based rate treatment, as discussed in this paragraph (d), for transmission infrastructure investment, provided that the proposed incentive-based rate treatment is just and reasonable and not unduly discriminatory or preferential. A public utility's request for one or more incentive-based rate treatments, to be made in a filing pursuant to section 205 of the Federal Power Act, or in a petition for a declaratory order that precedes a filing pursuant to section 205, must include a detailed explanation of how the proposed

rate treatment complies with the requirements of section 219 of the Federal Power Act and a demonstration that the proposed rate treatment is just, reasonable, and not unduly discriminatory or preferential. The applicant must demonstrate that the facilities for which it seeks incentives either ensure reliability or reduce the cost of delivered power by reducing transmission congestion consistent with the requirements of section 219, that the *total* package of incentives is tailored to address the demonstrable risks or challenges faced by the applicant in undertaking the project, and that resulting rates are just and reasonable. For purposes of this paragraph (d), incentive-based rate treatment means any of the following:

(1) For purposes of this paragraph (d), incentive-based rate treatment means any of the following:

(i) A rate of return on equity sufficient to attract new investment in transmission facilities;

(ii) 100 percent of prudently incurred Construction Work in Progress (CWIP) in rate base;

(iii) Recovery of prudently incurred pre-commercial operations costs;

(iv) Hypothetical capital structure;

(v) Accelerated depreciation used for rate recovery;

(vi) Recovery of 100 percent of prudently incurred costs of transmission facilities that are cancelled or abandoned due to factors beyond the control of the public utility;

(vii) Deferred cost recovery; and

(viii) Any other incentives approved by the Commission, pursuant to the requirements of this paragraph, that are determined to be just and reasonable and not unduly discriminatory or preferential.

(2) In addition to the incentives in §35.35(d)(1), the Commission will authorize the following incentive-based rate treatments for Transcos, provided that the proposed incentive-based rate treatment is just and reasonable and not unduly discriminatory or preferential:

(i) A return on equity that both encourages Transco formation and is sufficient to attract investment; and

(ii) An adjustment to the book value of transmission assets being sold to a Transco to remove the disincentive associated with the impact of accelerated depreciation on federal capital gains tax liabilities.

(e) *Incentives for joining a Transmission Organization.* The Commission will authorize an incentive-based rate treatment, as discussed in this paragraph (e), for public utilities that join a Transmission Organization, if the applicant demonstrates that the proposed incentive-based rate treatment is just and reasonable and not unduly discriminatory or preferential. Applicants for the incentive-based rate treatment must make a filing with the Commission under section 205 of the Federal Power Act. For purposes of this paragraph (e), an incentive-based rate treatment means a return on equity that is higher than the return on equity the Commission might otherwise allow if the public utility did not join a Transmission Organization. The Commission will also permit transmitting utilities or electric utilities that join a Transmission Organization the ability to recover prudently incurred costs associated with joining the Transmission Organization, either through transmission rates charged by transmitting utilities or electric utilities or through transmission rates charged by the Transmission Organization that provides services to such utilities.

(f) *Approval of prudently-incurred costs.* The Commission will approve recovery of prudently-incurred costs necessary to comply with the mandatory reliability standards pursuant to section 215 of the Federal Power Act, provided that the proposed rates are just and reasonable and not unduly discriminatory or preferential.

(g) *Approval of prudently incurred costs related to transmission infrastructure development.* The Commission will approve recovery of prudently-incurred costs related to transmission infrastructure development pursuant to section 216 of the Federal Power Act, provided that the proposed rates are just and reasonable and not unduly discriminatory or preferential.

(h) *FERC–730, Report of transmission investment activity.* Public utilities that have been granted incentive rate treatment for specific transmission projects

must file FERC–730 on an annual basis beginning with the calendar year incentive rate treatment is granted by the Commission. Such filings are due by April 18 of the following calendar year and are due April 18 each year thereafter. The following information must be filed:

(1) In dollar terms, actual transmission investment for the most recent calendar year, and projected, incremental investments for the next five calendar years;

(2) For all current and projected investments over the next five calendar years, a project by project listing that specifies for each project the most up-to-date, expected completion date, percentage completion as of the date of filing, and reasons for delays. Exclude from this listing projects with projected costs less than $20 million; and

(3) For good cause shown, the Commission may extend the time within which any FERC–730 filing is to be filed or waive the requirements applicable to any such filing.

(i) *Rebuttable presumption.* (1) The Commission will apply a rebuttable presumption that an applicant has demonstrated that its project is needed to ensure reliability or reduces the cost of delivered power by reducing congestion for:

(i) A transmission project that results from a fair and open regional planning process that considers and evaluates projects for reliability and/or congestion and is found to be acceptable to the Commission; or

(ii) A project that has received construction approval from an appropriate state commission or state siting authority.

(2) To the extent these approval processes do not require that a project ensures reliability or reduce the cost of delivered power by reducing congestion, the applicant bears the burden of demonstrating that its project satisfies these criteria.

(j) *Commission authorization to site electric transmission facilities in interstate commerce.* If the Commission pursuant to its authority under section 216 of the Federal Power Act and its regulations thereunder has issued one or more permits for the construction or modification of transmission facilities in a national interest electric transmission corridor designated by the Secretary, such facilities shall be deemed to either ensure reliability or reduce the cost of delivered power by reducing congestion for purposes of section 219(a).

[Order 679, 71 FR 43338, July 31, 2006, as amended by Order 679–A, 72 FR 1172, Jan. 10, 2007, Order 691, 72 FR 5174, Feb. 5, 2007]

Subpart H—Wholesale Sales of Electric Energy, Capacity and Ancillary Services at Market-Based Rates

SOURCE: Order 697, 72 FR 40038, July 20, 2007, unless otherwise noted.

§ 35.36 Generally.

(a) For purposes of this subpart:

(1) *Seller* means any person that has authorization to or seeks authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates under section 205 of the Federal Power Act.

(2) *Category 1 Seller* means a Seller that:

(i) Is either a wholesale power marketer that controls or is affiliated with 500 MW or less of generation in aggregate per region or a wholesale power producer that owns, controls or is affiliated with 500 MW or less of generation in aggregate in the same region as its generation assets;

(ii) Does not own, operate or control transmission facilities other than limited equipment necessary to connect individual generating facilities to the transmission grid (or has been granted waiver of the requirements of Order No. 888, FERC Stats. & Regs. ¶ 31,036);

(iii) Is not affiliated with anyone that owns, operates or controls transmission facilities in the same region as the Seller's generation assets;

(iv) Is not affiliated with a franchised public utility in the same region as the Seller's generation assets; and

(v) Does not raise other vertical market power issues.

(3) *Category 2 Sellers* means any Sellers not in Category 1.

(4) *Inputs to electric power production* means intrastate natural gas transportation, intrastate natural gas storage

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 15th day of May 2020, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

/s/ Carol J. Banta
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