ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 10-1141

ALABAMA MUNICIPAL ELECTRIC AUTHORITY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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Washington, D.C. 20426

May 5, 2011

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in the brief of Petitioner.

B. Rulings Under Review

1. *Alabama Mun. Elec. Auth. v. Alabama Power Co.*, 119 FERC ¶ 61,286 (2007) (Complaint Order), JA 210; and

2. *Alabama Mun. Elec. Auth. v. Alabama Power Co.*, 131 FERC ¶ 61,101 (2010) (Rehearing Order), JA 257.

C. Related Cases

This case has not been before this Court or any other court. There are no related cases.

/s/ *Lona T. Perry*
Lona T. Perry
Senior Attorney

May 5, 2011

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GLOSSARY

Alabama Municipal	Petitioner Alabama Municipal Electric Authority
Answer	Alabama Municipal October 5, 2006 Answer to Southern Companies in Docket No. EL06-93, JA 192
Commission or FERC	The Federal Energy Regulatory Commission
Complaint	Alabama Municipal August 1, 2006 Complaint in Docket No. EL06-93, JA 1
Complaint Order	*Alabama Mun. Elec. Auth. v. Alabama Power Co.*, 119 FERC ¶ 61,286 (2007), JA 210
Order No. 888	*Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, 61 Fed. Reg. 21,540 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1996), *on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, 62 Fed. Reg. 12,274, *clarified*, 79 FERC ¶ 61,182 (1997), *on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, 62 Fed. Reg. 64,688 (1997), *on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd, Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd*, *New York v. FERC*, 535 U.S. 1 (2002)
Order No. 890	*Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241 (2007), *on reh'g*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *on reh'g*, Order No. 890-B, 73 Fed. Reg. 39,092 (Jul. 8, 2008), 123 FERC ¶ 61,299 (2008), *on reh'g*, Order No. 890-C, 74 Fed. Reg. 12,540 (Mar. 25, 2009), 126 FERC ¶ 61,228 (2009), *on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009)

Rehearing Order	*Alabama Mun. Elec. Auth. v. Alabama Power Co.*, 131 FERC ¶ 61,101 (2010), JA 257
Southern	Southern Company, a public utility holding company
Transmission Pricing Policy Statement	*Inquiry Concerning the Commission's Pricing Policy for Transmission Services Provided By Public Utilities Under the Federal Power Act*, 59 Fed. Reg. 55,031, FERC Stats. & Regs. ¶ 31,005 (1994), *on reconsideration*, 71 FERC ¶ 61,195 (1995)

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BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission (FERC or Commission), reasonably determined that Southern Company (Southern), a public utility holding company, does not discriminate in its pricing of transmission service where Southern provides unbundled transmission service to its operating companies for their wholesale transactions at the same rate charged to Petitioner Alabama Municipal Electric Authority (Alabama Municipal) for unbundled transmission for its wholesale transactions.

STATUTES AND REGULATIONS

The relevant statutes are contained in the Addendum to this brief.

INTRODUCTION

The Commission's comparability policy addresses the potential for undue discrimination between a transmission provider's use of its own system and access provided to third parties. Here, petitioner Alabama Municipal contends that comparability is required between: (1) the FERC-jurisdictional unbundled transmission rate Alabama Municipal pays to transmit wholesale power over the Southern holding company system; and (2) the state-jurisdictional transmission component of bundled retail rates that Southern's subsidiary, Alabama Power Company, charges to serve its retail customers.

In the challenged orders, *Alabama Mun. Elec. Auth. v. Alabama Power Co.*, 119 FERC ¶ 61,286 (2007) (Complaint Order), JA 210, *on reh'g*, 131 FERC ¶ 61,101 (2010) (Rehearing Order), JA 257, the Commission reasonably determined that Southern's tariff satisfies the comparability standard and is not unduly discriminatory. Southern's operating subsidiaries take unbundled transmission service for their own wholesale transactions under the same tariff rate applicable to other unbundled transmission customers, including Alabama Municipal. Rate comparability and the principles of undue discrimination do not

require comparison of Southern's system-wide tariff for unbundled transmission service with the transmission component of Alabama Power's bundled retail rates.

STATEMENT OF FACTS

I. THE ORDER NO. 888 NON-DISCRIMINATION REQUIREMENT

In Order No. 888,[1] the Commission established the foundation for the development of competitive bulk power markets in the United States: non-discriminatory open access transmission service by public utilities. Order No. 888 found that public utilities controlling facilities used for transmitting electric energy in interstate commerce were exercising their control to favor their own sales, resulting in systemic undue discrimination. *See Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 682-83 (D.C. Cir. 2000), *aff'd, New York v. FERC*, 535 U.S. 1 (2002). To remedy this problem, Order No. 888 required that each transmission-providing utility: (1) unbundle its wholesale generation and transmission services; (2) file an open access transmission tariff containing minimum terms and conditions for non-discriminatory service substantially similar

[1] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, 61 Fed. Reg. 21,540 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1996), *on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, 62 Fed. Reg. 12,274, *clarified*, 79 FERC ¶ 61,182 (1997), *on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, 62 Fed. Reg. 64,688 (1997), *on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd, Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd, New York v. FERC*, 535 U.S. 1 (2002).

to (or superior to) those set out in a Commission-prescribed *pro forma* tariff; and (3) take transmission service for its own wholesale sales and purchases under the same tariff terms and conditions as those it offers to others. *Transmission Access*, 225 F.3d at 682. *See also* Order No. 888 at 31,635-36.

The Commission declined, however to extend the open access requirement to the transmission component of bundled retail sales. *New York*, 535 U.S. at 12 (citing Order No. 888 at 31,699). Although unbundling retail transmission and generation would be "helpful" in achieving comparability, the Commission concluded that such unbundling was not necessary and would raise difficult jurisdictional issues that could more appropriately be considered in other proceedings. *Id*. In *New York*, the Supreme Court affirmed this determination. *Id*. at 26. "Because FERC determined that the remedy it ordered constituted a sufficient response to the problems FERC had identified in the wholesale market, FERC had no [Federal Power Act § 206, 16 U.S.C. § 824e] obligation to regulate bundled retail transmission or to order universal unbundling." *Id*.

Accordingly, a transmission provider does not have to "take service" under its own open access transmission tariff for the transmission of power that is purchased on behalf of bundled retail customers. Order No. 888-A at 30,216-17. However, all transmission in interstate commerce by a public utility in conjunction with a sale for resale of electric energy is FERC-jurisdictional and must be taken

under a FERC-jurisdictional tariff. *Id*. at 30,217 n.130. The same is true for all unbundled transmission in interstate commerce to wholesale customers, as well as to unbundled retail customers. Order No. 888-A at 30,217 n.130. *See also New York*, 535 U.S. at 27.

The Commission determined in Order No. 888 that it was not necessary to abrogate existing bundled wholesale power supply contracts and wholesale transmission contracts. Order No. 888 at 31,662, 31,664 (cited in Complaint Order P 37 n. 20). As a result, the terms and conditions of the Order No. 888 *pro forma* tariff do not apply to service under such existing contracts. *Id*. at 31,665. The Commission concluded, however, that certain existing wholesale coordination agreements, including public utility holding company arrangements, had to be modified to ensure that such agreements are not unduly discriminatory. Order No. 888 at 31,276.

Specifically, public utility holding companies were required under Order No. 888 to file a single, system-wide *pro forma* tariff permitting transmission service across the entire holding company system at a single price. *Id*. at 31,728. *See, e.g., East Texas Elec. Coop., Inc. v. FERC*, 218 F.3d 750, 752 (D.C. Cir. 2000) (Order No. 888 "required all [registered public utilities holding companies] to file a tariff permitting transmission service across the holding company's entire system at a single price.") The Commission further required "that holding company

operating subsidiaries take transmission service under the same tariff rates, terms, and conditions as third-party customers that seek transmission service over the holding company system." Order No. 888-A at 30,244. Accordingly, wholesale transactions of the public utility operating companies are subject to the same system tariff as are the transactions of third parties. *Id*. at 30,242. *See also*, *e.g*., Order No. 888 at 31,726 (requiring that public utility parties to coordination agreements, including holding company arrangements, "trade power under those agreements using transmission service obtained under the same open access transmission tariff available to nonparties"); Order No. 888-B at 62,098 ("comparability is achieved if the same service is provided at the same or comparable rate to both pool and non-pool members").

II. THE PROCEEDING BELOW

A. Alabama Municipal's Complaint

Alabama Power Company, Georgia Power Company, Gulf Power Company and Mississippi Power Company are operating company affiliates and subsidiaries of Southern, a public utility holding company. *Southern Co. Servs., Inc*., 131 FERC ¶ 61,232 P 3 (2010). Each of theses operating company affiliates is a traditional, vertically-integrated public utility, owning and operating generation, transmission and distribution facilities and providing electric service for retail and wholesale customers in its service area. *Id*. Southern has coordinated and

integrated its electric utility system operations and planning to achieve economies of scale, and operates as an integrated system under a single control area. *Id*.

Petitioner Alabama Municipal is an Alabama public corporation that provides wholesale electric service to eleven member cities. Alabama Municipal August 1, 2006 Complaint in Docket No. EL06-93 (Complaint), R. 1 at 5, JA 5; Alabama Municipal October 5, 2006 Answer to Southern Companies in Docket No. EL06-93 (Answer), R. 13 at 2, JA 193. Alabama Municipal serves no retail customers. Answer, R. 13 at 2, JA 193.

On January 1, 2006, Alabama Municipal began purchasing energy from Alabama Power under a long-term unbundled wholesale Power Supply Agreement. Answer, R. 13 at 2, JA 193. Transmission for that power is provided by Southern under Southern's open access transmission tariff. *Id*. at 6, JA 197. The rate under Southern's open access transmission tariff is a postage-stamp rate[2] based on Southern's system-wide average costs. *Id*. at 2, JA 193. Southern's operating affiliates take unbundled transmission service under the Southern open access transmission tariff in the same manner as Alabama Municipal, or any other unbundled transmission service customer. Complaint, R. 1 at 19, JA 19.

[2] Most transmission contracts set a single price for energy flow over a utility's transmission system. Order No. 888 at 31,650 n.94. This single-price policy is called "postage stamp" pricing because the rate does not depend on how far the power moves within a company's transmission system. *Id*.

On August 1, 2006, Alabama Municipal filed a complaint against Southern under Federal Power Act § 206, 16 U.S.C. § 824e. Rehearing Order P 12, JA 262. Under a prior agreement of the parties, Southen agreed to bear the burden of proof to show that its rates were just and reasonable under the statute. *Id*.

In its complaint, Alabama Municipal alleged that Southern's system-wide open access transmission tariff rate contravenes the rule of comparability and is unduly discriminatory. Complaint, R. 1 at 2, JA 2. The unbundled transmission rate charged Alabama Municipal is based on Southern's system-wide average costs. Alabama Power -- the Southern operating subsidiary from whom Alabama Municipal purchases wholesale power -- provides bundled retail service at a rate based on Alabama Power's costs, including Alabama Power's transmission costs, which are lower than Southern's system-wide, system-average costs. *Id*. at 14, JA 14.

Alabama Municipal alleged that comparability requires that Alabama Municipal be charged no more for transmission than the Alabama Power costs charged as part of Alabama Power's bundled retail rate. *Id*. at 2, JA 2. Alabama Municipal's proposed "primary remedy" was that Southern adopt zonal rates under the open access transmission tariff, with a discrete zone for Alabama Power. *Id*.

B. The Challenged Orders

1. The Complaint Order

The Complaint Order denied Alabama Municipal's complaint, finding that Alabama Municipal's arguments exceeded the scope of the Commission's Order No. 888 comparability standard, and that Southern's tariff rate for unbundled transmission service was not unduly discriminatory. Complaint Order PP 36, 38, JA 221, 222.

In Order No. 888, the Commission required functional unbundling, *i.e.*, the separation of the transmission component of wholesale sales from the energy component of wholesale sales. *Id*. P 36, JA 221. However, the Commission did not require unbundling of existing long-term firm wholesale agreements (grandfathered agreements) and did not assert jurisdiction over the transmission component of bundled retail sales. *Id*. P 37, JA 222 (citing Order No. 888 at 31,664; *Transmission Access*, 225 F.3d at 694). *See also New York*, 535 U.S. at 26. Thus, a transmission provider must take transmission service under its own open access transmission tariff only for unbundled wholesale sales and purchases of electric energy and for unbundled retail sales of electric energy. Complaint Order P 37, JA 222.

Comparability, accordingly, only encompasses a comparison of the transmission components of unbundled wholesale and unbundled retail rates. *Id*.

"Because, in Order No. 888, the Commission did not require the unbundling of existing bundled wholesale sales or assert jurisdiction over the transmission component of bundled retail sales, comparability was never extended to require a comparison of grandfathered wholesale sales and bundled retail sales, as [Alabama Municipal] would have it." *Id.* Thus, "comparability, as set forth in Order No. 888 and followed in Order No. 890, requires only that [Alabama Municipal] receive transmission service that is comparable to the transmission service that Southern Companies receives when it makes unbundled wholesale sales or purchases or unbundled retail sales of electric energy." *Id.*

Because comparability is more limited than Alabama Municipal asserts, the Commission rejected Alabama Municipal's argument that Southern's system-wide tariff is unjust and unreasonable. *Id.* P 38, JA 222. Southern's system-wide rates are not unduly discriminatory because Alabama Municipal will pay the same transmission rate as any unbundled transmission customer on the Southern system, including Southern's own operating companies. *Id.*

Further, Alabama Municipal's arguments would require the Commission to lower Southern's wholesale transmission rate to match the transmission component of Alabama Power's bundled retail rate. *Id.* P 39, JA 223. This option would effectively require the Commission to use state-set rates as the Commission-jurisdictional rate, and would turn a long-standing Congressionally-established and

judicially-sanctioned regulatory scheme on its head. *Id*. (citing, *e.g.*, *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1372 (D.C. Cir. 2004) ("states are prevented from taking regulatory authority in derogation of federal regulatory objectives")).

Moreover, in the context of multi-state holding companies such as Southern, the Commission has determined that a system-wide wholesale transmission rate for members of the holding company is necessary to achieve a just and reasonable rate for use of transmission across the holding company. *Id*. (citing Order No. 888 at 31,728). Lowering the wholesale transmission rate for only one of the holding company's transmission provider utilities would mean that the utility either under-recovers its transmission costs or that the utility's costs would be shifted to customers served by other transmission provider utilities of the holding company. *Id*. The Commission found neither result permissible or acceptable. *Id*.

2. The Rehearing Order

The Commission denied Alabama Municipal's request for rehearing of the denial of its complaint. Rehearing Order P 3, JA 258. While acknowledging that, due to a prior agreement of the parties, Southern bore the burden of proof to show that its system-wide rate was just and reasonable, the Commission found Southern met that burden and that Alabama Municipal's complaint properly was denied. *Id*. P 12, JA 262.

In the Rehearing Order, the Commission concluded that it was unnecessary to revisit the analysis of the Commission's jurisdiction over bundled and unbundled rates, addressed in the Complaint Order, to resolve Alabama Municipal's complaint. *Id*. P 8, JA 259. The simplest answer to Alabama Municipal's complaint is that Southern's system-average rate is just and reasonable and not unduly discriminatory because it meets the express requirements of Order No. 888 for public utility holding company rates. *Id*. PP 10, 12 & n.20, JA 261-263.

Order No. 888 required that public utility holding companies file single, system-wide open access transmission tariff rates. *Id*. P 10, JA 261.

> Public utility members of registered and exempt holding companies that are also members of tight or loose pools are subject to the tight and loose pool requirements set forth above. The remaining holding company public utility members . . . are required to file a single system-wide Final Rule *pro forma* tariff permitting transmission service across the entire holding company system at a single price.

Id. (quoting Order No. 888 at 31,728).

Because Southern is a public utility holding company that is not a member of a tight or loose pool, it is required to have a single system-wide transmission rate on file with the Commission. *Id*. Further, Southern's tariff is not unduly discriminatory because "[Alabama Municipal] will pay the same transmission rate as any unbundled transmission customer on the Southern Companies' system, including Southern Companies itself." *Id*. P 12 n.20, JA 263 (quoting Complaint

Order P 38, JA 222). Thus, Southern met its burden to show that its "use of its system-wide, system-average rate was just, reasonable and not unduly discriminatory." *Id*. P 12, JA 263. Alabama Municipal's arguments to the contrary were based either on prior Commission pronouncements concerning comparability with respect to non-rate terms and conditions, or companies in different circumstances than Southern (companies that are not public utility holding company members that are also members of power pools). *Id*. P 10, JA 262.

Because Southern's rate had been found just and reasonable, the Commission did not consider Alabama Municipal's proffered alternative zonal rate methodology. *Id*. PP 10, 14, JA 262, 264. "Southern's [open access transmission tariff] is consistent with Order No. 888's requirement that, as a holding company system that is not a member of a power pool, Southern must offer system-wide service at a single rate," and "Southern has met its burden of demonstrating that its use of a system-wide, system-average transmission rate is just and reasonable." *Id*. P 14, JA 264. "[T]hus, a hearing on another possible rate methodology is not warranted." *Id*.

SUMMARY OF ARGUMENT

In the challenged orders, the Commission reasonably concluded that Alabama Municipal was not the victim of undue discrimination. Southern's operating companies pay the same rate as Alabama Municipal for the same service that Alabama Municipal receives, unbundled transmission service. The principles of undue discrimination and the Commission's comparability policy do not require a comparison of rates for two distinct services: (1) Southern's unbundled transmission rate used for wholesale transactions that Alabama Municipal pays; and (2) the transmission component of Alabama Power's bundled retail rate that it charges to serve its retail customers.

The Commission also reasonably found it improper to consider Alabama Municipal's proffered alternative zonal rate methodology. Southern met its burden to show that its system-wide, system-average unbundled transmission rate was just and reasonable. Indeed, FERC Order No. 888 required that public utility holding companies adopt a single, system-wide rate. Further, even prior to Order No. 888, the Commission had required that Southern adopt a system-wide rate based on Southern's system-wide average costs, in reflection of the fact that the Commission treats public utility holding companies as a single integrated system. Because Southern had shown its system-wide rate to be just and reasonable, the

Commission had no basis under the Federal Power Act to require adoption of any other rate, including Alabama Power's zonal rate proposal.

For its part, Alabama Municipal's arguments go far beyond the confines of comparability and undue discrimination. As Alabama Municipal itself states, the Commission's "golden rule of pricing" requires only that a transmission owner charge itself on the same or comparable basis that it charges others *for the same service*. That condition is fulfilled here where, as Alabama Municipal concedes, it receives unbundled transmission service under the same tariff rate paid by the Southern operating companies.

Accordingly, the Commission reasonably found that Southern had shown that its tariff rate was just and reasonable and not unduly discriminatory, and the Commission properly denied Alabama Municipal's complaint.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g.*, *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). The relevant inquiry is whether the agency has "examine[d] the relevant data and articulate[d] a rational connection between the facts found and the choice made." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

This case involves interpretation of Order No. 888 and other Commission orders. The Court defers to FERC's interpretations of its orders so long as the interpretations are reasonable. *See East Tex. Coop.*, 218 F.3d at 753-54; *Texaco, Inc. v. FERC*, 148 F.3d 1091, 1099 (D.C. Cir. 1998); *Natural Gas Clearinghouse v. FERC*, 108 F.3d 397, 399 (D.C. Cir. 1997).

This case involves review of the Commission's determination that Southern's open access transmission tariff rate is just and reasonable. "The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and [the Court] afford[s] great deference to the Commission in its rate decisions." *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008). "Because [i]ssues of rate design are fairly technical, and, insofar as they are not technical, involve policy judgments

that lie at the core of the regulatory mission, [the court's] review of whether a particular rate design is just and reasonable is highly deferential." *Northern States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994) (internal quotation marks and citations omitted). *See also Electricity Consumers Res. Council v. FERC*, 407 F.3d 1232, 1236 (D.C. Cir. 2005) (same). The Commission's factual findings are conclusive if supported by substantial evidence. Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b).

II. THE COMMISSION REASONABLY CONCLUDED THAT SOUTHERN'S TARIFF RATE IS JUST AND REASONABLE AND NOT UNDULY DISCRIMINATORY.

Alabama Municipal argues that Southern's rate for unbundled transmission across Southern's system violates the Commission's comparability requirement and is unduly discriminatory because the rate is not comparable to the transmission component of the bundled retail rate charged by Southern's subsidiary, Alabama Power, to serve its retail customers. Brief For Petitioner (Pet. Br.) at 33-34. To remedy this alleged discrimination, Alabama Municipal urges that Southern be required to adopt zonal rates, with a discrete pricing zone for Alabama Power. *See* Complaint, R. 1 at 2-3, JA 2-3; Pet. Br. 16-17.

While Southern bore the burden of proof under a prior agreement of the parties, Rehearing Order P 12, JA 262, the Commission reasonably concluded that Southern met its burden under the Federal Power Act to demonstrate that its

system-wide, system-average rate was just and reasonable. Rehearing Order PP 10, 12 & n.20, 14, JA 261, 263, 264; Complaint Order PP 36, 38, 39, JA 221, 222, 223. The rate complied with the Order No. 888 requirement that holding companies adopt a single, system-wide rate. Rehearing Order PP 10, 12, 14, JA 261, 263, 264; Complaint Order P 39, JA 223. Further, the rate was not unduly discriminatory; as Alabama Municipal concedes, Pet. Br. 36, Southern's own operating companies take unbundled transmission service for their wholesale transactions under the same rate paid by unbundled transmission customers, including Alabama Municipal. Complaint Order PP 36, 38, JA 221, 223; Rehearing Order PP 10, 12 & n.20, 14, JA 262, 263, 264.

Order No. 888 "determined that a system-wide wholesale transmission rate for members of the holding company is necessary to achieve a just and reasonable rate for use of transmission across the holding company." Complaint Order P 39, JA 223 (citing Order No. 888 at 31,728) (requiring that public utility holding companies "file a single system-wide Final Rule *pro forma* tariff permitting transmission service across the entire holding company system at a single price"); Rehearing Order P 10, JA 261. *See also East Texas Elec.,* 218 F.3d at 752 (Order No. 888 "required all [registered public utilities holding companies] to file a tariff permitting transmission service across the holding company's entire system at a single price.").

Southern's system-wide, system-average rate satisfies this requirement. Rehearing Order PP 10, 12 & n.20, 14, JA 262, 263, 264; Complaint Order P 39, JA 223. Indeed, since 1991, the Commission has required Southern to employ postage stamp, single-system pricing. Complaint Order P 13, JA 215; Rehearing Order P 8 n.6, JA 260 (citing *Southern Co. Servs., Inc*., 55 FERC ¶ 61,173 at 61,556, *on reh'g*, 57 FERC ¶ 61,093 (1991), *aff'd*, *Alabama Power Co. v. FERC*, 993 F.2d 1557 (D.C. Cir. 1993) (rejecting Southern's attempt to deviate from a single system rate)). The operating companies comprising Southern are organized, both physically and as a matter of corporate ownership, into a single, consolidated system. *Alabama Power Co*., 993 F.2d at 1561. "Affiliated utility systems like the Southern Companies' system, although comprised of separate, individual public utilities each of which is a separate corporation, are typically planned and operated as single systems and not as separate systems representing the separate public utilities." *Southern Co. Servs.*, 55 FERC at 61,556.

As a consequence, "affiliated utility systems typically will develop a single transmission rate reflecting the costs of the affiliated utility system." *Id*. *See, e.g*., *Tex-La Elec. Coop. of Texas, Inc*., 69 FERC ¶ 61,269 at 62,035 (1994) ("Where, as here, affiliated companies operate an integrated transmission system and provide transmission service to third parties, single system rates for such service are appropriate."); *Pennsylvania–New Jersey–Maryland Interconnection*, 92 FERC

¶ 61,282 at 61,951-52 (2000) (the Commission "treats the operating units of a holding company . . . as a single entity," and thus holding company failed to justify departure from the Order No. 888 single system rate requirement), *vacated in part on other grounds, Atlantic City Elec. Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002).

To assure comparability between the holding company and its wholesale customers, Order No. 888 further required that holding company operating companies themselves take service for their own wholesale transactions under the system-wide single rate tariff in the same manner as third-party customers. Rehearing Order P 12 n.20, JA 263; Complaint Order PP 36, 38, JA 222, 223. In requiring holding companies to file a pool-wide tariff, the Commission intended to assure "that holding company operating subsidiaries take transmission service under the same tariff rates, terms, and conditions as third-party customers that seek transmission service over the holding company system." Order No. 888-A at 30,244. Thus, wholesale trades among the public utility operating companies within the holding company system are subject to the same system tariff as are transactions with third parties. *Id*. at 30,242.[3]

[3] *See also*, *e.g*., Order No. 888 at 31,726 (requiring that public utility parties to coordination agreements, including holding company arrangements, "trade power under those agreements using transmission service obtained under the same open access transmission tariff available to non-parties"); Order No. 888-B at 62,098 ("comparability is achieved if the same service is provided at the same or comparable rate to both pool and non-pool members").

Accordingly, comparability "requires simply that Southern Companies must provide transmission service to [Alabama Municipal] at rates and terms comparable to those that Southern Companies provides to itself or other wholesale customers for *unbundled* (wholesale and retail) transmission service." Complaint Order P 36, JA 222. Here, Alabama Municipal *concedes* that Southern's operating companies pay the same open access tariff rate for unbundled transmission service as do other unbundled transmission customers, including Alabama Municipal.[4] Pet Br. 36. The Commission therefore reasonably concluded in the challenged orders that Southern's tariff meets the comparability requirement because Alabama Municipal "will pay the same transmission rate as any unbundled transmission customer on the Southern Companies' system, including Southern Companies itself." Complaint Order P 38, JA 223; Rehearing Order P 12 n.20, JA 263.

Thus, the Commission did not conclude that Southern's tariff satisfies the comparability requirement based solely on the fact that Southern employs a single system-wide rate. *See, e.g.*, Pet. Br. 44 (arguing that the Commission "found that any single, system-wide rate would meet the comparability standard"). Rather, to meet the Order No. 888 requirements for holding company tariffs, Southern has to employ a system-wide single rate *and* assure that its operating companies take

[4] This concession provides substantial evidence to support the Commission's conclusion. *See* Pet. Br. 52-53 (arguing that the Commission lacked substantial evidence).

unbundled transmission service under that tariff in the same manner as other unbundled transmission customers. Here, both requirements are satisfied. Complaint Order PP 38, 39, JA 222, 223; Rehearing Order PP 10, 12 & n.20, 14, JA 261, 263, 264.

Alabama Municipal asserts, Pet. Br. 44-47, that the Order No. 888 single rate requirement did not *mandate* that Southern adopt a postage stamp rate based on average system costs, and that Southern therefore could employ a zonal rate methodology. As the Commission found, the issue is whether Southern's system-wide, system-average rate is just and reasonable, not whether some other rate could have been adopted. Rehearing Order PP 8, 14, JA 260, 264. Because Southern demonstrated that its system-wide, system-average rate is just and reasonable, consideration of another rate, including Alabama Municipal's alternative zonal rate methodology, was not warranted. *Id*. PP 10, 14, JA 262, 264. Under the Federal Power Act, utilities have the authority in the first instance to establish their rates. *Atlantic City,* 295 F.3d at 10. Absent a finding that the utility's rates are unjust and unreasonable or unduly discriminatory, the Commission has no authority to order a change. *Id. See also Maine Pub. Utils. Comm'n v. FERC*, 454 F.3d 278, 283 (D.C. Cir. 2006) (the Commission may change a utility's proposed or existing rates only upon finding those rates unjust and unreasonable or unduly discriminatory). In particular, because Southern's system-wide rate is just and reasonable, it is

neither "permissible nor acceptable" to lower Alabama Power's wholesale transmission rate such that it under-recovers its transmission costs, or to shift additional transmission costs to the customers of the other Southern operating companies. Complaint Order P 39, JA 223.

III. ALABAMA MUNICIPAL MISAPPREHENDS THE COMMISSION'S COMPARABILITY POLICY.

Alabama Municipal asserts that comparability requires a comparison between Southern's unbundled transmission rate and the transmission component of the bundled retail rate charged by Alabama Power. Pet. Br. 33-34. The Commission reasonably determined that Alabama Municipal misapprehends the Commission's comparability policy. *See* Complaint Order P 38, JA 222 (rejecting claim that comparability "requires that [Alabama Municipal] receive the same rate for its unbundled wholesale transmission service as Alabama Power provides for its bundled retail sales"); Rehearing Order P 10, JA 262 (rejecting Alabama Municipal arguments based upon "prior Commission pronouncements concerning comparability with respect to non-rate terms and conditions"). "Recognizing that comparability is more limited than [Alabama Municipal] would wish, its argument that Southern Companies' system-wide, postage-stamp rate methodology is no longer just and reasonable becomes unavailing." Complaint Order P 38, JA 222.

A. Comparability Requires Only Comparison Of Rates For The Same Service, Unbundled Transmission.

The Commission reasonably determined that the proper comparison for evaluating rate comparability is between the rate Alabama Municipal pays as an unbundled transmission customer on Southern's system, and the rate that the Southern operating companies pay for the same unbundled transmission service. Rehearing Order P 12 n.20, JA 263; Complaint Order PP 36, 38, JA 222, 223. In other words, the rates compared should be rates for the same service, unbundled transmission. Here, Alabama Municipal concedes that it takes unbundled transmission service from Southern under the same tariff rate as Southern's operating companies. Pet. Br. 36. Comparable rates for the same service is all that comparability and the principles of undue discrimination require. *See* Rehearing Order P 12 n.20, JA 263; Complaint Order PP 36, 38, JA 222, 223.

This conclusion represents no "complete reversal of FERC's historic understanding of comparability." *See* Pet. Br. 37. To the contrary, as Alabama Municipal itself states, the "golden rule of pricing" set forth in the Transmission Pricing Policy Statement[5] requires that a transmission provider "charge itself on the same or comparable basis as it charges others *for the same service*." *See* Pet.

[5] *Inquiry Concerning the Commission's Pricing Policy for Transmission Services Provided By Public Utilities Under the Federal Power Act* (Transmission Pricing Policy Statement), 59 Fed. Reg. 55,031, FERC Stats. & Regs. ¶ 31,005 (1994), *on reconsideration*, 71 FERC ¶ 61,195 (1995).

Br. 4, 21, 32 (quoting Transmission Pricing Policy Statement at 55,035) (emphasis added). *See also* Amicus Brief of The American Public Power Association (Amicus Br.) at 13 (same). For example, "when a utility uses its own transmission system to make off-system sales, it should 'pay' for transmission service at the same price that third-party customers pay *for the same service*." Pet. Br. 32-33 (quoting Transmission Pricing Policy Statement at 55,035) (emphasis added). *See also* Order No. 888-B at 62,098 ("comparability is achieved if the same service is provided at the same or comparable rate to both pool and non-pool members"); *Southwest Power Pool, Inc*., 112 FERC ¶ 61,319 P 35 n.36 (2005) ("comparability requires the transmission owner and all customers to be charged the same rates for the same service"); *Kansas Cities v. FERC*, 723 F.2d 82, 94 (D.C. Cir. 1983) (Scalia, J.) (the setting of nondiscriminatory rates concerns whether different rates are being charged for the same service); *St. Michaels Utils. Comm'n v. FPC*, 377 F.2d 912, 915 (4th Cir. 1967) (prohibition against rate discrimination is intended to insure equality of treatment on rates for substantially similar services).

Unbundled wholesale transmission is not the same service as a bundled retail sale, and thus does not require comparable treatment. Complaint Order P 38, JA 223 (rejecting claim that comparability is required between unbundled wholesale transmission service and bundled retail sales). Alabama Municipal itself quotes *American Elec. Power Serv. Corp*., 67 FERC ¶ 61,168 at 61,490 (1994), *see* Pet.

Br. 31-32, which states that "[t]he transmission provider may use its system for serving its native load customers, for participating in the bulk power market (making off-system sales and purchases), for serving wholesale requirements customers, or for other purposes. There may be differences in the way the transmission system is priced and operated for those different uses." Thus, "[t]he pricing of services provided in concert by all companies for their mutual benefit may reasonably differ from the pricing of services provided by one company to its native load customers." *Southern Co. Servs.*, 55 FERC at 61,556. This Court affirmed requiring Southern to adopt a system-wide, system-average transmission rate for off-system wholesale power sales, *Alabama Power Co.*, 993 F.2d at 1563, while recognizing that "[n]o one disputes that an individual operating company, owned by a holding company, is entitled to charge its own native load customers a rate based solely upon its own transmission costs." *Id.* at 1561.

Order No. 888 makes clear that comparability is intended to assure that transmission providers take unbundled transmission service for their own wholesale transactions under the same terms and conditions offered to unbundled transmission customers. Order No. 888 "required providers to take transmission service to serve their own wholesale customers (wholesale 'load') and unbundled retail load on the same terms offered other transmission customers." *Entergy Servs., Inc. v. FERC*, 375 F.3d 1204, 1206 (D.C. Cir. 2004). *See also*

Transmission Access, 225 F.3d at 682 (Order No. 888 required that transmission owners "take transmission service for their own new wholesale sales and purchases of electric energy under the same terms and conditions as they offer that service to others."); Order No. 888 at 31,700 (to ensure non-discriminatory open access transmission, "[i]n the case of a public utility buying or selling at wholesale, the public utility must take service under the same tariff under which other wholesale sellers and buyers take service").

Thus, under the Order No. 888 comparability requirement, "*insofar as all wholesale transmission customer usage is concerned*, third-party network customers are treated the same as the transmission owner." Order No. 888-A at 30,217 (emphasis added). Here, that requirement is fully satisfied where Alabama Municipal purchases unbundled transmission service for its wholesale transactions under the same tariff rate paid by Southern's operating companies for their own wholesale transactions. Rehearing Order P 12 n.20, JA 263; Complaint Order PP 36, 38, JA 222, 223.

B. Comparability Does Not Require Consideration Of Rates For Bundled Retail Sales.

In the Complaint Order, the Commission explained how the jurisdictional determinations made in Order No. 888 – as affirmed by this Court and the Supreme Court – limit the scope of the comparability requirement to jurisdictional unbundled transmission, and do not encompass comparisons with nonjurisdictional

bundled retail sales. As Alabama Municipal concedes, "[w]hile FERC's Rehearing Order called this analysis of comparability an 'unnecessary . . . digression,' FERC did not rescind it or disclaim reliance on it as a sufficient reason for denying relief." Pet. Br. 36. *See also id*. at 2 (noting "alternative" bases for the Commission's decision).

Order No. 888 required public utilities to separate the transmission component of wholesale sales from the energy component of such sales, and also exercised jurisdiction over unbundled retail transmission service. Complaint Order P 37, JA 222. The Commission did not, however, assert jurisdiction over the transmission component of bundled retail sales. *Id*. (citing Order No. 888 at 31,664; *Transmission Access*, 225 F.3d at 694). Thus, a transmission provider must take transmission service under its own open access transmission tariff for unbundled wholesale sales and purchases and unbundled retail sales, but it does not have to take transmission service under the open access transmission tariff for power purchased on behalf of its bundled retail customers. *Id*. Such transmission remains subject to state authority as part of the bundled retail sales service. *Id*.

Because Order No. 888 did not require the unbundling of bundled retail sales, comparability was never extended to require a comparison of unbundled transmission service with the transmission component of bundled sales. *Id*. Comparability requires only that Alabama Municipal receive transmission service

that is comparable to the transmission service that Southern Companies receive when they make unbundled wholesale sales or purchases or unbundled retail sales of electric energy. *Id*. It does not require that Alabama Municipal receive the same rate for its unbundled wholesale transmission as the transmission component of Alabama Power's bundled retail sales. *Id*. P 38, JA 223.

Indeed, throughout the Order No. 888 proceeding and subsequent appeals, Enron and like-minded parties argued that, to assure comparability, transmission for bundled retail customers must be taken under the open access transmission tariff to avoid discriminatory differences in rate between the implicit tariff for bundled retail transmission and the explicit tariff for unbundled transmission. *See* Order No. 888 at 31,699 (addressing arguments that comparability could not be achieved without requiring unbundling of bundled retail sales); Order No. 888-A at 30,216 (addressing arguments that the rates charged network customers under the open access transmission tariff must be developed on the same basis as the transmission component of retail rates); Order No. 888-B at 62,088 (addressing arguments that the Commission destroyed comparability by exempting service of retail customers from the unbundling requirement); *Transmission Access*, 225 F.3d at 692 (addressing arguments that excluding bundled retail sales from the open access transmission tariff would permit undue discrimination and give transmission owners a competitive advantage); *New York*, 535 U.S. at 26-28 (addressing

arguments that unbundling of bundled retail rates was necessary to remedy undue discrimination).

The Commission, as affirmed by this Court and the Supreme Court, rejected these arguments. *Transmission Access*, 225 F.3d at 694-95; *New York*, 535 U.S. at 26-28. The Commission concluded that, "[a]lthough the unbundling of retail transmission and generation, as well as wholesale transmission and generation, would be helpful in achieving comparability, we do not believe it is necessary," and "[i]n addition, it raises numerous difficult jurisdictional issues." Order No. 888 at 31,699. *See also* Order No. 888-A at 30,225. The Commission therefore left regulation of bundled retail transmission to the states, concluding that "when transmission is sold at retail as part and parcel of the delivered product called electric energy, the transaction is a sale of electric energy at retail." *Transmission Access*, 225 F.3d at 691 (quoting Order No. 888 at 31,781).

This Court found that FERC's decision "to characterize bundled transmissions as part of retail sales subject to state jurisdiction" represented a "statutorily permissible policy choice." *Transmission Access*, 225 F.3d at 694-95. The Supreme Court reached the same conclusion. *New York*, 535 U.S. at 28. Order No. 888 was addressed toward electric utilities' use of their market power to deny their *wholesale* customers access to competitively-priced electric generation. *New York*, 535 U.S. at 26. "In other words, [Order No. 888] requires the public

utilities to provide the same transmission services *to anyone purchasing or selling wholesale power* – other public utilities, federal power suppliers and marketers, municipalities, cooperatives, independent power producers, qualifying facilities, or power marketers – as they provide to themselves." *Transmission Access*, 225 F.3d at 684 (emphasis added). Because the Commission determined that the remedy it ordered "constituted a sufficient response to the problems FERC had identified in the wholesale market, FERC had no [Federal Power Act] § 206 obligation to regulate bundled retail transmissions or to order universal unbundling." *New York*, 535 U.S. at 27.

Thus, the different treatment of bundled retail rates from unbundled transmission rates results not from the exercise of undue discrimination, but from the Commission's permissible policy choice, as affirmed by this Court and the Supreme Court, to decline to assert jurisdiction over the transmission component of such bundled retail sales. "[D]ifferential treatment does not necessarily amount to *undue* preference where the difference in treatment can be explained by some factor deemed acceptable by the regulators (and the courts)." *Town of Norwood v. FERC*, 202 F.3d 392, 402 (1st Cir. 2000).

Conversely, as the Commission found, Alabama Municipal's argument "would have us lower Southern Companies' wholesale transmission rate to match the transmission component of Alabama Power's retail rate." Complaint Order P

39, JA 223. "[T]his option would effectively require the Commission to use state-set rates as the Commission-jurisdictional rate, and would turn a long-standing Congressionally-established and judicially-sanctioned regulatory scheme on its head." *Id*. (citing, *e.g. Barton Village, Inc*., 100 FERC ¶ 61,244 P 12 (2002) ("Under the Federal Power Act . . . the Commission has excusive jurisdiction over [the utility's] wholesale power sales rates. Thus, we have no legal obligation to review, much less rely upon, the findings by the [state]."), *aff'd, Barton Village Inc. v. FERC*, No. 02-4693 (2d Cir. June 17, 2004) (unpublished)).

C. Alabama Municipal's Citations To Order Nos. 888 And 890 Concern Inapplicable Non-Rate Terms And Conditions.

"[C]omparability, as set forth in Order No. 888 and followed in Order No. 890,[6] requires only that [Alabama Municipal] receive transmission service that is comparable to the transmission service that Southern Companies receives when it makes unbundled wholesale sales or purchases or unbundled retail sales of electric energy." Complaint Order P 37, JA 222. The passages of Order No. 888 and Order No. 890 (which revised the Order No. 888 *pro forma* tariff) that Alabama

[6] *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241 (2007), *on reh'g*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *on reh'g*, Order No. 890-B, 73 Fed. Reg. 39,092 (Jul. 8, 2008), 123 FERC ¶ 61,299 (2008), *on reh'g*, Order No. 890-C, 74 Fed. Reg. 12,540 (March 25, 2009), 126 FERC ¶ 61,228 (2009), *on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

Municipal cites, *see* Pet. Br. 38-42, are inapplicable here as they concern comparability in non-rate terms and conditions of service. Rehearing Order P 10, JA 262.

In Order No. 888, Alabama Municipal points to the preamble to Part III of the *pro forma* tariff, which states in part:

> Network Integration Transmission Service allows the Network Customer to integrate, economically dispatch and regulate its current and planned Network Resources to serve its Native Load in a manner comparable to that in which the Transmission Provider utilizes its Transmission System to service its Native Load customers.

Pet. Br. 38-39 (quoting the *pro forma* open access transmission tariff, Appendix D to Order No. 888 at 31,951). Alabama Municipal then goes on to quote section 28.2 of the *pro forma* tariff, which provides:

> The Transmission Provider shall include the Network Customer's Network Load in its Transmission System planning and shall, consistent with Good Utility Practice, endeavor to construct and place into service sufficient transmission capacity to deliver the Network Customer's Network Resources to serve its Network Load on a basis comparable to the Transmission Provider's delivery of its own generating and purchased resources to its Native Load customers."

Pet. Br. 39 (quoting Section 28.2 of the *pro forma* open access tariff, Appendix D to Order No. 888 at 31,951).

These *pro forma* tariff provisions refer to resource integration, economic dispatch, regulation of network resources and transmission system planning, not rates. *See* Order No. 890 P 603 (The Order No. 888 *pro forma* tariff "was designed

to include primarily non-rate terms and conditions of open access non-discriminatory transmission service.") Accordingly, the Commission reasonably determined that these cited provisions concern "comparability with respect to non-rate terms and conditions" that do not govern rate comparability. Rehearing Order P 10, JA 262. Indeed, this Court in *Entergy Servs.*, 375 F.3d at 1207, rejected arguments that the *pro forma* tariff provisions cited by Alabama Municipal – the preamble to Part III and section 28.2 – imposed any requirement with regard to taking service under the open access transmission tariff. *Id*. at 1210. The cited provisions do not require a regulated entity to "execute a service agreement, to be bound by the tariff rates and conditions of the [open access transmission tariff], or to do anything else involved in obtaining service under the tariff." *Id*.

Order No. 890 continued the focus on the non-rate terms and conditions of open access. Order No. 890 P 603. Alabama Municipal's citations to Order No. 890, *see* Pet. Br. 41-42, likewise "concern[] comparability with respect to non-rate terms and conditions." Rehearing Order P 10, JA 262. *See* Order No. 890 PP 489-95, 770 (Pet. Br. 41 nn.62 & 63) (transmission system planning); PP 903, 917, 924, 927, 980 (Pet. Br. 41 nn. 64 & 65) (evaluation of transmission availability); P 1632 (Pet. Br. 42 n.66) (reliability dispatch provisions). Thus, the Commission reasonably rejected Alabama Municipal's argument that the cited *pro forma* tariff provisions govern rate comparability. Rehearing Order P 10, JA 262.

The American Public Power Association argues that, in the Rehearing Order, the Commission held that comparability applies only to non-rate terms and conditions of service. *See, e.g.*, Amicus Br. at 5, 10, 12-13. The Commission held no such thing, in the Rehearing Order or otherwise. As the Commission found, Order No. 888 specified the rate comparability standard applicable here -- public utility holding companies must file a single system-wide rate and holding company operating companies must take service under that tariff rate for unbundled transmission in the same manner as other unbundled transmission customers. Rehearing Order PP 10, 12 n.20, JA 262, 263; Complaint Order PP 36, 38, 39, JA 221, 222, 223.

Outside the holding company context, Order No. 888 did not extensively discuss rates and rate comparability, *see* Rehearing Order P 10, JA 261, because Order No. 888 did not generally impose rate requirements. Rather, Order No. 888 gave "public utilities flexibility to propose their own rates to be used in conjunction with the minimum non-rate terms and conditions necessary to ensure comparable service." Order No. 888 at 31,768. *See also id*. at 31,739 (Order No. 888 does not require any specific rate design, but, rather, "accord[s] substantial flexibility to public utilities to propose appropriate pricing terms."). Nevertheless, Order No. 888 required that utility rate proposals comply with the Transmission Pricing Policy Statement, which requires rate comparability. *See* Order No. 888 at

31,739 (utilities have flexibility in proposing rates but they must comply with the Transmission Pricing Policy Statement); *id*. at 31,768-70 (same); *id*. at 31,650 (under the Transmission Pricing Policy Statement "comparability of service applies to price as well as to terms and conditions") (citing Transmission Pricing Policy Statement at 55,035). *See also* Pet. Br. 47 (Order No. 888 "requir[ed] that all [open access transmission tariff] rate proposals comply with the comparability requirements of the *Transmission Pricing Policy Statement*.")

Thus, the Commission did not hold that comparability applies only to non-rate terms and conditions. Rather, in the Rehearing Order, the Commission pointed out that Order No. 888 specifies the rate comparability conditions applicable to public utility holding companies, and the specific passages of Order Nos. 888 and 890 cited by Alabama Municipal are not requirements of rate comparability, but rather requirements concerning non-rate terms and conditions of the *pro forma* tariff. Rehearing Order PP 10, 12 & n.20, JA 262, 263. When the proper standard for rate comparability is employed, Southern's tariff fully satisfies the requirement. Complaint Order PP 38, 39, JA 222, 223; Rehearing Order PP 10, 12 & n.20, 14, JA 262, 263, 264.

IV. ALABAMA MUNICIPAL FAILED TO DEMONSTRATE ANTICOMPETITIVE EFFECTS.

Alabama Municipal cites *FPC v. Conway Corp.*, 426 U.S. 271, 272-73 (1976), for the proposition that the Commission may consider the anticompetitive effects of a difference in jurisdictional and non-jurisdictional rates. Pet. Br. 57. The Commission reasonably denied Alabama Municipal's request for a hearing on this allegation, where Southern had met its burden of showing that its system-wide, system-average rate was just and reasonable and not unduly discriminatory. Rehearing Order PP 13, 14, JA 263, 264. Southern's rate for unbundled transmission is not anticompetitive where Alabama Municipal pays the same rate for unbundled transmission for its wholesale transactions as do the Southern operating companies. *Id*. PP 12, n.20, 14, JA 263, 264.

In *Conway*, a wholesale supplier allegedly increased its wholesale rate with the intent of squeezing wholesale customers out of competition with the supplier in the retail market. *Conway*, 426 U.S. at 273-74. Here, in contrast, there is no price squeeze -- Alabama Municipal has no retail customers. *See* Pet. Br. 6; Alabama Municipal's Answer, R. 13 at 2, JA 193. *See, e.g., Cities of Newark v. FERC*, 763 F.2d 533, 548 (3d Cir. 1985) (no price squeeze where "there is no allegation that the company is attempting to gain a competitive advantage in a retail market in which both [the petitioners] and [the company] compete").

As this Court has recognized, price squeeze cases are "the exception" to the rule that "anti-competitive danger must be proved in order to invalidate an otherwise reasonable rate disparity." *Cities of Bethany v. FERC*, 727 F.2d 1131, 1141 (D.C. Cir. 1984). Alabama Municipal has made no such anticompetitive showing where it competes only at wholesale, and where the Southern companies take service at wholesale under the same tariff rate as Alabama Municipal. *See* Rehearing Order PP 13-14, JA 263-264 (rejecting Alabama Municipal's request for a hearing on its proposed zonal rate methodology to remedy alleged anticompetitive effects). Thus, to the extent that Southern operating affiliates compete with Alabama Municipal to serve wholesale customers, the operating affiliate will pay the same unbundled transmission charge as Alabama Municipal. *Cleco Power, LLC*, 103 FERC ¶ 61,272 P 29 (2003) (cited Complaint Order P 15 n.16, JA 216) (rejecting Alabama Municipal's arguments that the difference between Southern's system-wide rates and Alabama Power's bundled retail rates is anticompetitive).

The contrast with this Court's recent decision in *Dynegy Midwest Generation, Inc. v. FERC*, 633 F.3d 1122 (D.C. Cir. 2011), is instructive. *Dynegy* rejected a Midwest ISO tariff provision, approved by the Commission, permitting zonal variations in reactive power compensation to generators. The Court found that the Commission failed to explain how the zonal variation in compensation was

not unduly discriminatory. *Id*. at 1127. Because the generators in the Midwest ISO compete with each other across zonal boundaries, those with lower compensation for the reactive power they supply would suffer competitively. *Id*. Here, in contrast, Alabama Municipal is a wholesale customer who purchases unbundled transmission for such wholesale sales from Southern. No discrimination occurs when Alabama Municipal is able to purchase that unbundled transmission service at the same rate that Southern's operating companies pay when they use unbundled transmission service for their own wholesale transactions. Rehearing Order P 12 n.20, JA 263; Complaint Order PP 36, 38, JA 222, 223.

Alabama Municipal also cites to Commission orders approving Southern's Cost Allocation Tariff, which allocates costs of transmission upgrades among the Southern companies. *See* Pet. Br. 51 (citing *Southern Co. Servs., Inc*., 123 FERC ¶ 61,204 (2008), *on reh'g*, 131 FERC ¶ 61,232 (2010)). Alabama Municipal asserts that approval of this tariff "exacerbates the non-comparable treatment of [open access transmission tariff] loads by the Southern Companies." *Id*. at 52. Of course, the Commission's actions in those orders in approving the Cost Allocation Tariff are not properly before the Court in this proceeding. In any event, in those orders the Commission found no support for Alabama Municipal's claims of harm where the Cost Allocation Tariff does not even affect rates under the open access

transmission tariff. *Southern Co. Servs*., 123 FERC ¶ 61,204 P 26. *See* Pet. Br. 51 ("the Cost Allocation Tariff does not alter [the open access transmission tariff] rates").

Moreover, the Commission's decisions in that proceeding follow the orders issued here. The Commission found there, as here, that Alabama Municipal's comparability claims are based on the "faulty premise" that "comparability requires that [Alabama Municipal] receive the same rate for its unbundled wholesale transmission service as Alabama Power provides for its bundled retail sales." *Southern Co. Servs*., 123 FERC ¶ 61,204 P 26. "As we recently stated in *Alabama Municipal*, the comparability standard is not violated because it does not require that [Alabama Municipal] receive the same rate for its unbundled wholesale transmission service as Alabama Power provides for its bundled retail rates." *Id*. P 30 (citing Complaint Order P 38, JA 223). Rather, "Southern's 'single system-wide [open access transmission] tariff permitting transmission service across the entire holding company system at a single price' is just and reasonable insofar as it satisfies the comparability requirement in Order No. 888." *Southern Co. Servs*., 131 FERC ¶ 61,232 P 17 (quoting Order No. 888 at 31,728).

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the petition for review be denied and that the orders on appeal be upheld in all respects.

Respectfully submitted,

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May 5, 2011

Alabama Municipal Electric Authority v. FERC,
No. 10-1141

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief contains 8815 words, not including the tables of contents and authorities, the glossary, the certificate of counsel and this certificate.

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May 5, 2011

ADDENDUM

STATUTES

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livering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

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

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

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

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

(d) Investigation of costs

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

(e) Short-term sales

(1) In this subsection:

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

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

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

(3) This section shall not apply to—

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

(B) an electric cooperative.

(4)(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by

[1] See References in Text note below.

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

§ 825*l*. Review of orders

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

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

(b) Judicial review

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

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

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

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P.25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 5th day of May 2011, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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