ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 10-1381

OCCIDENTAL PERMIAN LTD., OCCIDENTAL CHEMICAL CORPORATION AND OCCIDENTAL POWER MARKETING, L.P.,
Petitioners,

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

October 20, 2011

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

To counsel's knowledge, the parties, intervenors, and amici before this Court in the underlying agency proceeding are as listed in Petitioners' brief.

The following appeared in the administrative proceedings below before the Federal Energy Regulatory Commission in FERC Docket No. ER10-396:

Amarillo College Hereford Campus
American Public Power Association
American Wind Energy Association
Arkansas Electric Cooperative Corporation
Arkansas Public Service Commission
Big Five Renewable Energy Project, LLC
Blackline Energy
Bonneville Power Administration
Bootleg Energy
California Municipal Utilities Association
Centerpoint Energy Houston Electric, LLC
Caleb Chandler, Curry County Commissioner
City of Hereford, Texas
City of Tucumcari, New Mexico
Class 4 Winds, Inc.
Clovis Industrial Development Corporation
Coalition of Renewable Energy Landowner Associations, Inc.
Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc.
CottonWind Farms, LLC
Anna Crook, New Mexico State Representative
Crosby County Wind Farm, LLC
Deaf Smith County Wind Farm LLC
East Texas Cooperatives
Eastern New Mexico Economic Development Alliance
Eastern New Mexico Energy, LLC
Eastern Plains Council of Governments
Electric Power Supply Association

Electric Reliability Council of Texas, Inc.
Farwell Wind Farm, LLC
Field Community Wind Farm, LLC
Forrest/Ragland Energy Association, LLC
Fort Sumner Community Development Corporation
Frio Ridge Energy Development Association, LLC
Golden Spread Electric Cooperative, Inc.
Greater Sedan Area Energy Resources, LLC
Greater Tucumcari Economic Development Corporation
Clinton D Harden, New Mexico State Senator
Gene Hendrick
Hereford Economic Development Corporation
Hereford Independent School District
Iberdrola Renewables, Inc.
IMA Wind Energy Association
ITC Grid Development, LLC
Lakeview Wind Farms, LLC
Mid-Kansas Electric Company, LLC
National Rural Electric Cooperative Association
Dr. John Neibling
Randy Neugebauer, U.S. Representative (TX-19)
New Mexico Cooperatives
New Mexico Renewable Energy Transmission Authority
NRG Energy, Inc., NRG Power Marketing LLC, & NRG Texas Power LLC
Occidental Permian, Ltd., Occidental Chemical Corporation, & Occidental Power Marketing, L.P.
Oncor Electric Delivery Company
Pattern Transmission LP
Tom M. Phelps
Public Service Company of New Mexico
Public Service Electric and Gas Company, PSEG Power LLC, & PSEG Energy Resources & Trade LLC
Public Utilities Commission of Texas
Lance A. Pyle, Curry County Manager
Bill Richardson, Governor of New Mexico
Scandia Wind Southwest, LLC
Tom Simons, Deaf Smith County Judge
Pat Smith, Deaf Smith County Commissioner
Solar Energy Industries Association
South Texas Electric Cooperative

Southern California Edison Company
Southwest Power Pool, Inc.
Sunflower Electric Power Corporation
Texas Industrial Energy Consumers
Texas-New Mexico Power Company
Tom Timberlake
Tognetti Wind Group
Tri Global Energy, LLC
Tubin International, Inc.
Walcott Independent School District
Wave Wind LLC
Westar Energy, Inc.
Wilson & Company, Inc.
Xcel Energy Services Inc.
Yeso Renewable Energy Association, LLC

B. Rulings Under Review:

1. Order on Application for Authorization to Sell Transmission Services at Negotiated Rates, *Tres Amigas LLC*, 130 FERC ¶ 61,207 (Mar. 18, 2010) ("Negotiated Rates Order"), R.86, JA 339;

2. Order Denying Rehearing, *Tres Amigas LLC*, 132 FERC ¶ 61,233 (Sept. 16, 2010) ("Rehearing Order"), R.95, JA 415.

C. Related Cases:

This case has not previously been before this Court or any other court.

Counsel is not aware of any other related cases pending before this Court or any other court.

/s/ Jennifer S. Amerkhail
Jennifer S. Amerkhail
Attorney

August 15, 2011

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GLOSSARY

Commission or FERC	Federal Energy Regulatory Commission
Eastern Grid	The asynchronous transmission system or interconnection covering the area in North America roughly east of the Rocky Mountains but excluding most of Texas and the Quebec Interconnection
FPA	Federal Power Act
JA	Joint Appendix
Negotiated Rates Order	*Tres Amigas LLC*, 130 FERC ¶ 61,207 (Mar. 18, 2010), R.86, JA 339
Project	Transmission and appurtenant facilities that Tres Amigas proposes to build in New Mexico
Occidental	Petitioners Occidental Permian Ltd., Occidental Chemical Corporation, and Occidental Power Marketing, L.P.
R.	Record citation
Rehearing Order	*Tres Amigas LLC*, 132 FERC ¶ 61,233 (Sept. 16, 2010), R.95, JA 415
Texas Grid	The asynchronous transmission system, covering about 75 percent of the state, operated by the Electric Reliability Council of Texas
Tres Amigas	Tres Amigas LLC or the project that it proposes
Western Grid	The asynchronous transmission system or interconnection covering the area in North America roughly west of the Rocky Mountains and synonymous with the Western Electric Coordinating Council reliability region

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Petitioners,

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

STATEMENT OF THE ISSUE

Tres Amigas LLC ("Tres Amigas") proposes to build a unique transmission facility that may connect the three major electrical grids in the United States if third parties construct additional transmission facilities. Assuming jurisdiction, the issue presented is whether the Federal Energy Regulatory Commission ("Commission" or "FERC") properly determined under Section 205 of the Federal Power Act ("FPA"), 16 U.S.C. § 824d, that negotiated, as opposed to conventional cost-based, rates are just and reasonable for the proposed project.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes are contained in the Addendum to this brief.

COUNTERSTATEMENT OF JURISDICTION

Petitioners Occidental Permian Ltd., Occidental Chemical Corporation and Occidental Power Marketing, L.P. (collectively, "Occidental") do not have standing to appeal the orders at issue because they have not suffered, and are not in imminent peril of suffering, any justiciable injury caused by the Commission's approval of negotiated rates for Tres Amigas. As set forth more fully in Part I of the Argument, *infra*, Occidental's concern – that the Commission's grant of negotiated rate authority might, somehow, negatively affect it if neighboring utilities ever actually receive approvals for and build lines to connect with Tres Amigas – is speculative and does not present the type of direct immediate injury required for standing. *See*, *e.g.*, *New York Regional Interconnect, Inc. v. FERC*, 634 F.3d 581, 586-88 (D.C. Cir. 2011). Thus Occidental's petition should be dismissed for lack of jurisdiction.

INTRODUCTION

This is the first judicial challenge to the Commission's policy of allowing merchant transmission service to be sold at rates determined by competition in the electricity markets.

Evolving from a longstanding policy allowing opportunity costs to set prices for some utility transactions, the Commission's current negotiated rates policy requires merchant transmission developers to show that their rates will be disciplined by customer alternatives in the markets. Further, the Commission grants negotiated rates to merchant projects only when a developer can demonstrate that neither it nor its affiliates have a captive pool of customers from which it can recoup the cost of the project. The Commission then monitors merchant transactions to guard against anticompetitive behavior.

The instant appeal arises from Tres Amigas' request for negotiated rates for a unique proposal that, if built and connected to existing electrical grids, could greatly increase the ability to transfer power between major markets in the continental United States. Addressing Occidental's objections that the Commission should apply a different competitive analysis and expand the scope of the proposal to include neighboring utilities' lines, the Commission found its negotiated rates policy flexible enough to apply to this unique project without such changes. The Commission did, however, direct revisions to Tres Amigas' proposal in order to ensure fair and transparent initial allocation of transmission rights. With those revisions and additional protections from subsequent reporting and monitoring, the Commission concluded that Tres Amigas met its burden to show that negotiated rates for the project are just and reasonable. *Tres Amigas LLC*, 130

FERC ¶ 61,207 (Mar. 18, 2010) ("Negotiated Rates Order"), R.86, JA 339, *reh'g denied*, 132 FERC ¶ 61,233 (Sept. 16, 2010) ("Rehearing Order"), R.95, JA 415.[1]

STATEMENT OF FACTS

I. Statutory And Regulatory Background

A. The Federal Power Act

Section 201(b) of the Federal Power Act, 16 U.S.C. § 824b, grants the Commission exclusive jurisdiction over transmission and wholesale sales of electricity in interstate commerce by public utilities. *See, e.g., New York v. FERC*, 535 U.S. 1 (2002) (discussing statutory framework and Commission jurisdiction under the FPA).

Section 205(c) of the FPA, 16 U.S.C. § 824d(c), requires public utilities to file tariff schedules with the Commission providing their jurisdictional rates, terms and conditions of service, and related contracts for service. When those tariff schedules are filed, Sections 205(a)-(b) of the FPA, 16 U.S.C. §§ 824d(a)-(b), direct the Commission to assure that the rates and services described in the tariff are just and reasonable and not unduly discriminatory.

Section 206 of the FPA, 16 U.S.C. § 824e, authorizes the Commission to investigate whether existing rates are lawful. If the Commission, on its own

[1] "R." refers to a record item. "JA" refers to the Joint Appendix page number. "P" refers to the internal paragraph number within a FERC order or within the affidavits attached to either Occidental's brief or its pleadings below.

initiative or on third-party complaint, finds that an existing rate or charge is "unjust, unreasonable, unduly discriminatory, or preferential," it must determine and set the just and reasonable rate.

B. The Development And Refinement Of Negotiated Rates Policy

1. Opportunity Cost Pricing For Transmission Service

Negotiated transmission rates are an extension of the Commission's policy on incremental (or marginal) pricing for transmission service. About 20 years ago, the Commission first allowed incremental pricing at the higher of (1) the "embedded cost" rate calculated to include the average capital and operating costs of all transmission facilities plus a return on investment or (2) opportunity costs capped at the cost of expanding the transmission system. *See generally Pennsylvania Elec. Co. v. FERC*, 11 F.3d 207, 208-09 (D.C. Cir. 1993) (discussing the development of the incremental pricing policy). The opportunity costs for vertically integrated utilities, that is, utilities that own and operate both transmission and generating facilities, is the cost of changing the operating order of generators and, thereby, foregoing the use of cheaper generators to serve the utility's own customers, in order to free up more transmission service for third parties. *Id*. (providing an example of and defining "opportunity costs").

Eleven years ago, the Commission first considered the request of a merchant transmission developer for negotiated rate authority. *See TransEnergie U.S., Ltd.*,

91 FERC ¶ 61,230, at 61,838 (2000) (addressing proposal to connect grids in New England and New York with an underwater direct current cable). The Commission recognized that opportunity costs are different for merchant transmission developers, who, by definition, are not vertically integrated and who do not have power customers. *See* Negotiated Rates Order at P 1 n.1, JA 339 (defining merchant transmission).

In the merchant transmission setting, "the opportunity costs are either the generation savings of the power customers served by [the merchant's] stand-alone transmission line or the savings provided by customers' other alternatives, e.g., new generation." *TransEnergie*, 91 FERC ¶ 61,230, at 61,838. Therefore, in this setting, the Commission's "higher of" pricing policy allows the rate for transmission service to reflect the differences in power prices at each end of the transmission line or the cost of building new generating facilities that serve the same purpose as the line. *Id*. These opportunity costs are capped at the cost of expanding transmission. *Id*. at 61,838-39.

"[I]n an industry generally thought to have the features of a natural monopoly," *Interstate Natural Gas Ass'n of Am. v. FERC*, 285 F.3d 18, 31 (D.C. Cir. 2002), the cost of expanding transmission remains the important cost-based backstop in both the merchant transmission and vertically integrated utility context. In *TransEnergie*, this expansion cost cap was provided through the obligations of

the transmission providers on each end of the merchant project. 91 FERC ¶ 61,230, at 61,839. Those transmission providers, the regional operators for New York and New England, were required "to expand transmission at cost-based rates to meet new requests for transmission service, including facilities to provide service across Long Island Sound." *Id.*

This expansion cost cap is the rough equivalent of the traditional cost-based "recourse" rate for natural gas pipeline transportation.[2] The Commission's Pipeline Rates Policy Statement permits interstate pipelines to negotiate rates that vary from their otherwise applicable cost-of-service pipeline tariff so long as the customer has the option of using a recourse rate instead of negotiating. 74 FERC ¶ 61,076 at 61,240. The availability of a recourse rate prevents pipelines from exercising market power by assuring that the customer can choose cost-based, traditional service if the pipeline demands excessive prices. *Id.*; *see also Iberdrola Renewables, Inc. v. FERC*, 597 F.3d 1299, 1304-05 (D.C. Cir. 2010) ("FERC's requirement that [pipeline] offer the recourse rate gave [customer] the choice of a FERC-reviewed [cost-of-service] rate" rather than "freely negotiated rates [that] are presumed just and reasonable"). Unlike the recourse rate for pipelines, the recourse rate for merchant transmission projects is usually provided, not by the

[2] *Cf. Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, Regulation of Negotiated Transportation Services*, 74 FERC ¶ 61,076 (1996) ("Pipeline Rates Policy Statement").

merchant, but by neighboring utilities' obligations to expand transmission at cost-based rates. *Cf. TransEnergie*, 91 FERC ¶ 61,230, at 61,839.

By contrast, the Commission's policy on market rates for wholesale energy sales, while subject to some of the same ongoing oversight requirements as those for negotiated rates, focuses on the individual seller not on the overall market. In determining whether to grant market rates for the electric commodity, the Commission examines whether an individual "seller and its affiliates do not have, or adequately have mitigated, market power in the generation and transmission of [electric] energy. . . . " *Blumenthal v. FERC*, 552 F.3d 875, 882 (D.C. Cir. 2009) ("what matters is whether an individual seller is able to exercise anticompetitive market power, not whether the market as a whole is structurally competitive"). Instead of examining market shares for each merchant transmission developer in the relevant market, the negotiated rates policy focuses on customers' alternatives, that is, opportunity costs, determining whether alternatives create competitive conditions for the new transmission in that market. *TransEnergie*, 91 FERC ¶ 61,230, at 61,838.

Furthermore, energy sellers need not be new entrants into the market to have market rates, whereas only new entrants without affiliates in the region are granted negotiated rate authority. *See Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134 at P 56 (2009) ("*Chinook*"). Moreover, merchant transmission developers

are required initially to make all of their capacity available in an open and transparent process which in turn enables the developer to determine the appropriate size of the project. *Id*. at P 41. There is no analogous requirement for energy sellers.

2. Negotiated Rate Authority For Merchant Transmission Service

Relying on its opportunity cost policy that rates should reflect the price differences for generation at the two extremes of the transmission line, and the protection of the backstop expansion cost cap, *TransEnergie*, 91 FERC ¶ 61,230, at 61,839, the Commission developed ten criteria for evaluating negotiated rate applications. *See Chinook*, 126 FERC ¶ 61,134 at P 34 (listing criteria). In practice, the criteria imposed requirements on negotiated rates applicants that they, for example, must assume full market risk of proposed projects. *Id*. The criteria also require that transmission developers commit to coordinate with, turn over operational control to, and otherwise meet the requirements of the relevant regional transmission organization. *Id*. These latter requirements reflected that the first negotiated rates applications were for lines proposed for construction within or between regional transmission organizations. *Id*.

In 2005, a merchant transmission developer filed the first negotiated rates application for a project located in a region without a regional transmission organization. *See Sea Breeze Pac. Juan de Fuca Cable, LP*, 112 FERC ¶ 61,295 at

PP 2-3 (2005) (proposing to connect British Columbia, Canada with Washington through underwater direct current cable). The Commission granted negotiated rate authority and waived the requirements to turn over operational control and submit to market monitoring of a regional transmission organization. *Id*. at P 17. The Sea Breeze project was the first of many merchant projects proposed for construction in the Western Electric Coordinating Council ("Western Grid"), a transmission interconnection without any regional transmission organizations. *See, e.g.*, *Montana Alta. Tie, Inc.*, 116 FERC ¶ 61,071 (2006) (proposal to connect Montana with Alberta, Canada to access new sources of power); *Mountain States Transmission Intertie, LLC*, 127 FERC ¶ 61,270 (2009) (proposal to export wind power from Montana into Idaho); *SunZia Transmission, LLC*, 131 FERC ¶ 61,162 (2010) (connecting wind and solar resources to markets in New Mexico and Arizona).

3. Adoption of Flexible Negotiated Rates Policy

In 2009, with a decade's worth of experience with merchant transmission applications, and a recognition that its ten-criteria test was too inflexible to meet transmission development needs in all regions of the country, the Commission reformed its negotiated rates policy. *Chinook*, 126 FERC ¶ 61,134 at PP 33-53. Under this policy, the Commission uses a four-prong test to assess whether a transmission provider should be granted negotiated rate authority: (1) whether the

proposed rates are just and reasonable; (2) whether there is potential for undue discrimination; (3) whether there is potential for undue preference, including affiliate preference; and (4) whether the proposed facility will satisfy regional reliability and operational efficiency requirements. *Id*. at P 37.

Under the first prong (just and reasonable rates) of the *Chinook* test, the only one at issue in this appeal, the Commission examines the following safeguards: (1) "whether the merchant transmission owner has assumed the full market risk for the cost of constructing a particular transmission project and is not building within the footprint of its own (or an affiliate's) traditionally regulated transmission system," *id*. at P 38; (2) whether the proposal contains a commitment to a "fair, open and transparent" initial allocation of transmission capacity, *id*. at P 41, that removes "any incentive to withhold capacity," *id*. at P 38; (3) whether customer alternatives to the project will provide a "disciplining force on the negotiated rates," *id*. at P 58; and (4) "whether the merchant transmission owner is capable of erecting any barriers to entry among competitors," *id*. at P 38. Before approving negotiated rates, the Commission also requires the creation of viable secondary transmission rights and an open access same-time information system to facilitate a market for exchange of those rights. *Id*. at P 39.

Under the other three prongs of *Chinook*, the Commission imposes further requirements on merchant transmission providers, including provision of service

pursuant to a Commission-approved Open Access Transmission Tariff, *id*. at P 47, non-discriminatory initial allocation of transmission rights with publication of the prices paid for such rights, *id*. at PP 41-42, and restrictions on affiliate transactions without Commission approval, *id*. at PP 49-50.

Because merchant transmission projects "expand[ ] competitive generation alternatives," the Commission's policy balances various considerations. *Id*. at P 46. The Commission's ultimate goal is to "prevent undue discrimination and ensure that rates are just and reasonable" while respecting "the real-life financing and cost-recovery concerns of the merchant transmission entities that undertake to build such projects." *Id*.

II. The Tres Amigas Project

The Tres Amigas transmission project ("Tres Amigas" or "Project") is a proposal to build, in eastern New Mexico, a configuration of superconducting transmission cables and electricity current converters in order to tie together the three electric grids in the continental United States. Application for Authorization to Sell Transmission at Negotiated Rates, at 4-5, R.1, JA 4-5 (filed Dec. 8, 2009) ("Application"). These three grids, the Western Grid, the Eastern Interconnection ("Eastern Grid"), and the Electric Reliability Council of Texas ("Texas Grid"), operate asynchronously so that power flowing between them must be converted first to direct current and then back to alternating current. *Id*. at 4, JA 4. Tres

Amigas, if built and connected to the three grids, will not change the asynchronous nature of the grids; rather, it will increase power flows over new direct current transmission lines, thereby reducing the electricity price differences (that is, the market separation) between the three grids. *Id.* at 4, 9, JA 4, 9.

As presented to the Commission in a conceptual design, the size of the Project is unknown because it is scalable to meet customer demand. *Id*. at 5, 7, JA 5, 7. It is, however, expected to "far exceed" the current transfer capabilities between the three grids. *Id*. at 5, JA 5 (the Project will "remove barriers to the movement of power across the electric system"). Tres Amigas also is expected to cost at least $1 billion. *Id*. at 3, JA 3.

III. The Commission Proceedings And Orders

A. Application For Negotiated Rates

On December 8, 2009, Tres Amigas filed an application, under section 205 of the FPA, 16 U.S.C. § 824d, for negotiated rate authority. Application at 1, JA 1. It argued that its proposal satisfies all four prongs of the *Chinook* test. *Id*. at 33-39, JA 33-39. Tres Amigas observed that traditional cost-based rates are unrealistic for the project because it is not located in a service territory or regional transmission organization with captive customers. *Id*. at p 2, JA 2; *see also TransEnergie*, 91 FERC ¶ 61,230, at 61,838 (defining captive customers as "customers located within a franchise area who have no ability to take service from

any party other than the local franchise holder"). Without the ability to negotiate rates with customers, Tres Amigas argued it could not proceed with the transmission project. Application at 2, JA 2.

B. Challenged FERC Orders

1. Negotiated Rates Order

On March 18, 2010, the Commission issued the Negotiated Rates Order conditionally granting negotiated rate authority to Tres Amigas. 130 FERC ¶ 61,207 at P 2, JA 339. Notwithstanding the unusual properties of the Project, the Commission found its four prong analysis, first adopted in *Chinook*, "sufficiently flexible to account for any . . . differences between [Tres Amigas and other] projects." *Id*. at P 39, JA 354.

The Commission first examined the reasonableness of negotiated rates for the Project. *Id*. at P 44, JA 355. Finding no captive customers onto which Tres Amigas or its affiliates can shift the costs of the Project, the Commission determined that Tres Amigas will assume the full market risk of its project. *Id*. at PP 51-52, JA 358. Further, in responding to Occidental's request, the Commission modified Tres Amigas' initial allocation process in order to ensure reasonable rates. *Id*. at P 60, JA 362. Striking a balance between the need for a "transparent, fair and non-discriminatory open season" and the financing needs of the merchant transmission developer, *id*. at PP 57-58, JA 360-61, the Commission required Tres

Amigas to sell all of its service through either bilateral agreements approved in advance by the Commission or auctions held during the initial allocation process. *Id*. at P 61, JA 362-63 ("Applicant may not withhold any capacity . . . during the open season").

Potential customers of Tres Amigas have many alternatives that compete with the service that Tres Amigas will offer: all of the opportunities to purchase or sell energy in the organized and bilateral energy markets in the three Grids, *id*. at PP 74, 75, JA 369; service at cost-based rates on existing, or any expanded, transmission lines that tie any of the three Grids together; *id*. at PP 72, 74, JA 368, 369; service on new ties between the Grids built by competitors of Tres Amigas, *id*. at PP 71, 72, JA 368; resale of rights by Tres Amigas customers in a secondary market; *id*. at P 72, 75, JA 368, 369; service on an expanded Tres Amigas system at cost-based rates, *id*. at P 72, 76, JA 368, 370; and service on neighboring transmission systems, capped at the cost of expanding those systems, *id*. at P 76, JA 370. Moreover, the differences in the price of power between interconnections, reflecting customers' willingness to pay for service on the Project, will discipline Tres Amigas' rates. *Id*. at PP 77-78, JA 370-71.

For these reasons, the Commission concluded that Tres Amigas will not be able to exercise market power during the initial allocation of service or over the long term. *Id*. at P 80, JA 371. The Commission noted, however, that it will be

watching for potential abuses of market power by Tres Amigas and will respond appropriately if rates no longer reflect competitive conditions. *Id*.

Under the second prong of the *Chinook* test, the Commission determined that Tres Amigas' proposal for allocating transmission rights raised undue discrimination concerns. *Id*. at P 88, JA 374. Responding again to Occidental's protest, the Commission required Tres Amigas to make the terms of any bilateral "anchor customer" agreement available to all other customers during its open season process. *Id*. at PP 88-89, JA 374-75. These requirements, along with the filing of an independently-audited report of the results of the open season auctions, prevent withholding of transmission rights and ensure equal access for all customers. *Id*. at P 88, JA 374.

Finally, the order also found that the proposal met the last two prongs of the *Chinook* test in that Tres Amigas committed to seek Commission authorization for any affiliate transaction, *id*. at P 94, JA 377, and agreed to meet all regional reliability requirements, *id*. at P 102, JA 379.

2. Order Clarifying Open Season Requirements

On June 29, 2010, the Commission issued an order clarifying the conditions that it placed upon Tres Amigas' initial allocation process. Order on Motion for Clarification, *Tres Amigas LLC*, 131 FERC ¶ 61,281 (2010), R.94, JA 408. Because Tres Amigas planned to hold a series of auctions in its open season, the

Commission clarified that the requirement to offer the same price and term as provided in the anchor customer agreement need occur only once during the open season. *Id*. at P 14, JA 413.

3. Rehearing Order

Occidental timely filed a request for rehearing of the Negotiated Rates Order. R.90, JA 382. On September 16, 2010, the Commission addressed Occidental's arguments and denied rehearing. Rehearing Order, 132 FERC ¶ 61,233 at P 1, JA 415. It reaffirmed its findings that Tres Amigas does not have market power and that alternatives in the relevant market, including power price differences between the Grids, will discipline the rates for service on the Project initially and in the long term. *Id*. at PP 44-57, JA 435-41.

The Commission also reaffirmed its finding that neither Tres Amigas nor its affiliates have captive customers, and, therefore, Tres Amigas assumes the full market risk of its proposal. *Id*. at P 19, JA 423. The Commission rejected Occidental's request to expand the scope of the Commission's analysis of the project to include neighboring transmission facilities, finding that such an approach is inconsistent with its prior application of the *Chinook* safeguards. *Id*. at PP 20-21, 24, JA 423, 424.

Finally, the Commission explained that it was not shifting the burden of proof to Occidental by suggesting that, if in the future, Tres Amigas develops

market power, remedies are available under Section 206 of the FPA, 16 U.S.C. § 824e. *Id*. at P 67, JA 446. The Commission concluded that "Tres Amigas had met its burden of proof to show that its rate proposal was just and reasonable, consistent with longstanding policy on . . . negotiated rate authority." *Id*. at P 61, JA 443.

This appeal followed.

SUMMARY OF ARGUMENT

This is a case about a unique transmission project that, if all the stars align, will bring significant benefits to the wholesale energy markets by connecting the nation's three major electrical grids. For that to happen, not only will the merchant developer need to secure customer support and further regulatory approvals for its project, but other entities will need to plan, site, build and receive regulatory approvals for transmission projects that would connect to it. In its brief, Occidental repeatedly recognizes this. But in arguing injury for Article III standing, it ignores these prerequisites and assumes away the uncertainty therein. Because Occidental's alleged injuries are too speculative and do not flow directly from the challenged orders, the Court should dismiss its appeal for lack of jurisdiction.

Assuming jurisdiction, the Commission's assessment of the proposed Tres Amigas Project was reasonable in all respects. Although neither this Court nor any other has reviewed the Commission's policy on negotiated rates for merchant transmission developers, it is closely analogous to the Commission's policies on discounting and negotiated rates on natural gas pipelines, which this Court has upheld. *See, e.g.*, *Interstate Natural Gas*, 285 F.3d at 29-35 (uncapped rates in secondary market). It also has its roots in the Commission's opportunity cost

pricing policy for electric transmission transactions that has been approved by this Court. *See Pennsylvania Elec.*, 11 F.3d at 209-11.

In refining its current negotiated rates policy three years ago, *see Chinook*, 126 FERC ¶ 61,134, the Commission created a more effective and flexible approach that balances the need to promote innovative designs, that create new transmission infrastructure and new market opportunities, with customer protections from unreasonable rates and anticompetitive conditions.

At bottom, Occidental challenges the Commission's application of its *Chinook* policy, arguing that the Commission must apply a different approach for the unique Tres Amigas Project. In the challenged orders, the Commission properly determined that customer alternatives are the appropriate focus of its analysis and sufficient, in conjunction with subsequent oversight, to discipline Tres Amigas' rates. Further, because the relevant scope of the proposal did not include any lines that might be built to connect the Project to existing grids, the Commission, over Occidental's objection, reasonably elected not to include the captive customers of neighboring utilities in its analysis of the merchant characteristics of the Project.

Finding its existing policy flexible enough to apply to the unique and innovative Project, the Commission reasonably concluded, based on substantial evidence, that Tres Amigas is a merchant developer dependent solely upon the

voluntary decisions of its customers for its success. Rates negotiated between Tres Amigas and those customers will reflect competition, not market power; Occidental and other wholesale market participants will benefit from increased market opportunities and Tres Amigas will remain subject to vigorous Commission oversight.

ARGUMENT

I. Petitioners Have Not Established Article III Standing

To obtain judicial review of a FERC order, a party must meet the requirements of Article III standing. *See, e.g., Public Util. Dist. No. 1 of Snohomish County v. FERC*, 272 F.3d 607, 613 (D.C. Cir. 2001) (party is not "aggrieved" within the meaning of FPA § 313(b), 16 U.S.C. § 825*l*(b), unless it can establish constitutional and prudential standing). The "irreducible constitutional minimum" of Article III standing requires a petitioner to show it has suffered (1) an "injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical," (2) that has a "causal connection" with the challenged agency action, and (3) that "likely . . . will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations and quotation marks omitted); *see also, e.g., Bennett v. Spear*, 520 U.S. 154, 162 (1997).

This is not the typical challenge to a Commission grant of negotiated or market-based rate authority. Here, many intervening acts of independent third parties are required before any risk to Occidental's interest could flow from the Tres Amigas Project "because [the Project] cannot by itself provide transmission service to anyone." Br. 9; *see id*. at 18 (Tres Amigas "requires that these transmission lines be built by others if the project is to go forward"). Under Occidental's theory, if neighboring utilities proceed with transmission projects to connect to Tres Amigas, and if those proposals obtain siting and planning approvals from the relevant authorities, and if those proposals receive certain regulatory treatment for cost allocation, and if Tres Amigas completes its project, then Occidental could be harmed as either a captive customer of the neighboring utilities or a customer of Tres Amigas or a competitor in the market affected by Tres Amigas. *Id*. at 11, 17-20; *see also New York Regional Interconnect*, 634 F.3d at 587-88 (holding that petitioner lacked standing based on conjectural injury). "This theory stacks speculation upon hypothetical upon speculation, which does not establish an 'actual or imminent' injury." *New York Regional Interconnect*, 634 F.3d at 587; *see also El Paso Natural Gas Co. v. FERC*, 50 F.3d 23, 24 (D.C. Cir. 1995) (petitioner failed to show "a likelihood of imminent injury under the challenged rulings").

Occidental states that, as captive customers, its subsidiaries will "confront higher rates as a result of the costs of the multi-billion dollar build-out of the transmission facilities that will be needed" to connect the Project's proposed transmission facilities to at least two of the three Grids. Br. 16-17. Occidental's alleged injury thus rests solely on the possibility that some neighboring utility may in the future seek cost-of-service rates for transmission lines that may receive "planning, siting and cost allocation" regulatory approvals, which in turn may result in increased transportation costs for the utility's captive customers. *Id*. at 11 (quoting Application at 16, JA 16, that notes additional risks that the Project will not succeed). These outcomes are far from guaranteed. Indeed, Occidental acknowledges (in an affidavit attached to its brief) that customer support and favorable regulatory treatment, which are both difficult to secure, are necessary prerequisites to the development of any connecting line. Payton Aff. at P 16.

The alleged harm from higher rates is too speculative and conjectural because no connecting transmission lines have been proposed and, more important, no regulatory approvals to pass costs to captive customers have been given for any connecting line. *See New York Regional Interconnect*, 634 F.3d at 586 (no injury because petitioner "does not have any active proposals for new transmission projects"); *New Mexico Attorney Gen. v. FERC*, 466 F.3d 120, 121-22 (D.C. Cir. 2006) (petitioners do not have standing when their alleged injury is conditional

upon further agency action); *see also Illinois Mun. Gas Agency v. FERC*, No. 06-1010, 2007 U.S. App. LEXIS 27890, at **3 (D.C. Cir. Nov. 27, 2007) (finding that alleged injury, i.e., "higher rates" imposed on "captive customers" because of FERC discounting policy, "is purely 'conjectural or hypothetical' at this point because no discounts have been permitted").

Further, any harm from transmission rates on neighboring franchise utility systems is not directly traceable to or redressible by the challenged orders. "To the extent that neighboring transmission providers decide to construct transmission facilities to interconnect with the Project, their customers are protected by independent review of those transmission investments and the rates for service on those facilities must be shown to be just and reasonable." Rehearing Order at P 22, JA 424. As the challenged orders did not approve rates for any other transmission facilities besides the Project, Occidental's rates have not changed as a result of the Commission's grant of negotiated rate authority to Tres Amigas. *See Commuter Rail Div. of the Reg'l Transp. Auth. v. Surface Transp. Bd.*, 608 F.3d 24, 31 (D.C. Cir. 2010) (alleged injuries are "not traceable" to challenged agency decision; injuries, "should they ever occur, would result from the [agency's future] decision"). Moreover, the only available redress for higher rates on the neighboring systems is a challenge to the "'choices made by independent actors not before the courts'" regarding any new transmission proposals to connect with

Tres Amigas. *US Ecology, Inc. v. U.S. Dep't of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000) (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989)) ("Courts have been loath to find standing when redress depends largely on policy decisions yet to be made by government officials.").

Occidental's power marketing and chemical manufacturing subsidiaries, as wholesale sellers of electricity, assert that they may be injured by excessive rates if they take service across the Project's transmission facilities because the Commission failed to restrain Tres Amigas' ability to exercise market power. Br. 19. This alleged injury suffers from the same infirmities as Occidental's other asserted bases for constitutional standing – it is uncertain whether any third parties will receive the planning and regulatory approvals and pursue the construction of transmission lines to connect any two of the three grids to Tres Amigas. Without these connections, Occidental cannot take service over Tres Amigas and cannot be harmed by rates that may never be charged. "The potential for future economic injury, even assuming it is readily quantifiable into a possible rate increase in the future, is not enough to show the requisite injury. . . ." *PNGTS Shippers' Group v. FERC*, 592 F.3d 132, 137 (D.C. Cir. 2010) (quotations omitted).

Injury from any future excessive rate charged by Tres Amigas is also illusory. As Occidental explains, it will not take service over Tres Amigas if it judges that prices are "above a competitive rate." Payton Aff. at P 26. In that

instance, Occidental will experience no change in the status quo and thus no injury. *See Alabama Mun. Distribs. Group v. FERC*, 312 F.3d 470, 472 (D.C. Cir. 2002) ("petitioners' claim is not that they will be worse off under the Commission orders"). It cannot now readily access "low cost energy," Payton Aff. at P 26, presumably because of a physical rather than an economic barrier. This status quo harm did not result from the challenged orders; nor can it be used to show "some reasonably increased risk of [the] injury" resulting from the challenged orders as necessary to meet constitutional standing requirements. *Crete Carrier Corp. v. EPA*, 363 F.3d 490, 493 (D.C. Cir. 2004) (quotation omitted) (higher prices resulting from limits on air pollutants are not fairly traceable to agency's action because higher prices resulted from prior consent decrees imposing same limits); *see also Alabama Mun. Distribs. Group*, 312 F.3d at 472 ("[petitioners] are unable to demonstrate any connection between the allegedly improper FERC action and higher prices"); Negotiated Rates Order at P 78, JA 371 ("Consumers have not . . . show[n] that [Tres Amigas'] market entrance as a supplier of transmission service to [the Texas Grid] would harm ratepayers").

Occidental further alleges that Tres Amigas will cause its subsidiaries harm because of more competition for power and ancillary service sales due to increased electricity flowing into the Texas and Eastern Grids. Br. 19. Again, because the lines connecting to Tres Amigas (and the regulatory approvals for those lines) may

never materialize, *see New York Regional Interconnect*, 634 F.3d at 587, and, as a result, increased competition in the markets of the Texas and Eastern Grids is not imminent, Occidental has not demonstrated competitor standing. *See Sherley v. Sebelius*, 610 F.3d 69, 73 (D.C. Cir. 2010) ("basic requirement" for competitor standing "is that complainant show an actual or imminent increase in competition, which increase [the Court] recognize[s] will almost certainly cause an injury in fact"). Furthermore, because the Commission reserved the issue of sales of ancillary services for another proceeding, Negotiated Rates Order at P 46, JA 357, Occidental's assertion of competition in the ancillary services market, Br. 19-20, is not an injury that results from the challenged orders. *See Wisconsin Pub. Power Inc. v. FERC*, 493 F.3d 239, 268-69 (D.C. Cir. 2007) ("petitioner must show that it has been aggrieved by the final order under review" not "other, related orders").

Insofar as Occidental alleges competitive injury to its power sales business, it has not shown that "FERC's decision 'will almost surely cause' [it] 'to lose business,' or to cut prices in order to preserve business." *DEK Energy Co. v. FERC*, 248 F.3d 1192, 1196 (D.C. Cir. 2001) (quoting *El Paso Natural Gas*, 50 F.3d at 27). Occidental Chemical Company sells some excess power into the Texas and Eastern Grids from its cogeneration manufacturing facilities. Br. 20 & Payton Aff. at PP 22-23. Added to the uncertainty of whether any transmission developer will secure the planning and regulatory approvals to construct lines to

connect to Tres Amigas and then construct those lines, *see New York Regional Interconnect*, 634 F.3d at 587, is the uncertainty of whether cheaper power will flow into the Texas or Eastern Grids. *See* Application, Attach. C at 1-3 (showing that Western Grid prices usually are higher than prices in the other grids), JA 49-51. Occidental has not shown that any such flows, however tenuous at this point, will "make it more likely that [it] will be subject to material competition" in the markets of the Texas and Eastern Grids. *DEK Energy*, 248 F.3d at 1196 ("some vague probability that any gas will actually reach that market and a still lower probability that its arrival will cause [petitioner] to lose business or drop its prices" are insufficient to show injury); *see also Associated Gas Distribs. v. FERC*, 899 F.2d 1250, 1259 (D.C. Cir. 1990) (petitioner must show "that the challenged action authorizes allegedly illegal transactions that have the clear and immediate potential to compete with petitioners' own sales").

Under these circumstances, Occidental has not suffered an injury, concrete or otherwise, that is in any way actual or imminent, or that is caused by the Commission's action challenged here; thus, it cannot meet constitutional standing requirements. *See Lujan*, 504 U.S. at 560.

II. Standard Of Review

The Court's review of FERC orders is governed by the arbitrary and capricious standard of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A). Under that standard, the Commission's decision must be reasoned. *East Texas Elec. Coop., Inc. v. FERC*, 218 F.3d 750, 753 (D.C. Cir. 2000).

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.'" *Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 395 (D.C. Cir. 2008) (quoting *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)).

The Court "recognize[s] that 'matters of rate design . . . are technical and involve policy judgments at the core of FERC's regulatory responsibilities. Hence, the court's review of whether a particular rate design is just and reasonable is highly deferential.'" *Wisconsin Pub. Power*, 493 F.3d at 256 (quoting *Maine Pub. Util. Comm'n v. FERC*, 454 F.3d 278, 287 (D.C. Cir. 2006)); *see also Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008) ("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").

When reviewing "FERC's decision to elect more relaxed . . . regulation than traditional cost-based ceilings," the Court requires a showing that the rates "fall within a 'zone of reasonableness, where [they] are neither less than compensatory nor excessive.'" *Interstate Natural Gas*, 285 F.3d at 31 (quoting *Farmers Union Cent. Exch. v. FERC*, 734 F.2d 1486, 1502 (D.C. Cir. 1984)). To pass muster, the Commission must have "a substantial basis [after considering cost and non-cost factors] for concluding that the uncapped market price for capacity . . . will be roughly in line . . . with the cost-based price." *Id*. at 32. The Commission also "must retain some general oversight over the system, to see if competition in fact drives rates into the zone of reasonableness 'or to check rates if it does not.'" *Id*. at 31 (quoting *Farmers Union*, 734 F.2d at 1509).

III. Negotiated Rates Are Consistent With The Federal Power Act If Customer Alternatives Are Sufficient To Discipline Rates And There Is Meaningful Continuing Oversight

The crux of Occidental's argument is a fundamental challenge to the Commission's negotiated rates policy – that is, negotiated rates are deemed just and reasonable where the merchant transmission developer lacks significant market power because of sufficient customer alternatives, and ongoing oversight ensures rates remain reasonable over the long term. Occidental frequently returns to its theme that the Commission must replace its traditional analysis of customer alternatives and focus instead on the share of the specific transmission market held

by the merchant provider, presuming market power when the market share is above some unspecified threshold. Br. 12-13, 41-42, 49-50. Occidental also repeatedly argues that the Commission may not consider customer alternatives in the aggregate and that no one customer alternative is sufficient to meet the mandate of the Federal Power Act to protect customers from excessive transmission rates. Br. 13, 36-37, 51-52.

Occidental's cramped view of these obligations, however, is at odds not only with the principles underlying the Commission's negotiated rates policy, *see infra* p. 39, but also with decisions consistently upholding the Commission's choice of tests in instituting market-driven regulation as a permissible exercise of the Commission's discretion. *See, e.g.*, *Connecticut Dep't of Pub. Util. Control v. FERC*, 593 F.3d 30, 34-36 (D.C. Cir. 2010) (upholding FERC's nexus test in determining the award of transmission incentives); *Columbia Gas Transmission Corp. v. FERC*, 477 F.3d 739, 743 (D.C. Cir. 2007) (upholding FERC's test for when to apply restrictions on waivers of rights under the Natural Gas Act for discounted rates); *Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364, 369-70 (D.C. Cir. 1998) (upholding FERC's test for mitigated transmission market power when awarding market-based generation rates to vertically integrated utilities). This Court has held that the Commission meets its obligation to show such rates are expected to "fall within a 'zone of reasonableness'" if it finds that

various factors, including the availability of "adequate substitute[s]," work together to check excessive rates and if there is meaningful subsequent oversight. *Interstate Natural Gas*, 285 F.3d at 31-35 (rejecting facial challenge to negotiated rates policy for short-term pipeline capacity resales); *see also American Gas Ass'n v. FERC*, 428 F.3d 255, 258-59 (D.C. Cir. 2005) (upholding FERC's reliance on six factors to limit pipelines' market power over captive customers); *accord Iberdrola Renewables*, 597 F.3d at 1301 (explaining how pipeline customers can substitute cost-based recourse rates for negotiated rates and what redress is available if the negotiated "rate has become unjust over time").

The core purpose of the Federal Power Act is not only "preventing excessive rates," but also "protecting against inadequate service" and "promoting the orderly development of plentiful supplies of electricity." *Consolidated Edison Co. of N.Y. v. FERC*, 510 F.3d 333, 342 (D.C. Cir. 2007) (quotations omitted); *see also Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 538 (D.C. Cir. 2010) (FERC's "Congressionally-defined regulatory mission includes stimulating transmission investment"). In accord with these statutory purposes, the Commission, in establishing negotiated rate authority, "balance[s] its responsibility to prevent undue discrimination and ensure that rates are just and reasonable with the real-life financing and cost-recovery concerns of the merchant transmission" developers that suppress the construction of new transmission infrastructure.

Chinook, 126 FERC ¶ 61,134 at P 46; *see* Negotiated Rates Order at P 72, JA 368 (same); Rehearing Order at P 29, JA 427 (listing policy goals addressed by negotiated rate authority); *see also Blumenthal*, 552 F.3d at 884-85 (noting "'presumption of validity'" afforded to "'each exercise of the Commission's expertise,'" and latitude necessarily given to FERC "to balance the competing considerations and decide on the best resolution") (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 767, 790 (1968)).

The policy on negotiated rates is grounded in a recognition that transmission expands energy markets. *TransEnergie*, 91 FERC ¶ 61,230, at 61,838 (merchant transmission "enhances competition and market integration by expanding capacity and trading opportunities" between regions); *see also Public Serv. Elec. & Gas v. FERC*, 485 F.3d 1164, 1166 (D.C. Cir. 2007) (describing same). Recognizing that conditions imposed may be so "onerous as to stifle [developers'] ability to proceed with the development" of transmission projects, the negotiated rates policy contains flexibility to craft obligations that are consistent with merchant transmission providers' financing and development needs. Negotiated Rates Order at P 2, JA 340; *see also Sacramento Mun. Util. Dist.*, 616 F.3d at 541-42 (FERC "balanc[ed] the competing goals of flexibility and certainty" and properly reflected on those interests "to explain why it struck the balance it did").

In its application, the policy meets the mandates of the Federal Power Act as it ensures, at the outset, that alternatives are available to discipline merchant transmission prices. *See Environmental Action v. FERC*, 996 F.2d 401, 409 (D.C. Cir. 1993) ("[b]uyers presumably buy from others only when doing so is less costly than the alternative"); *see also Columbia Gas*, 477 F.3d at 743 (defining "competitive markets" as ones in which pipeline customers have "alternatives"); *Interstate Natural Gas*, 285 F.3d at 31-33 (alternatives help ensure "rates will approximate costs, at least over the long pull"). To ensure that these alternatives are available to all, the Commission grants negotiated rate authority only where merchant developers have no captive customers. *See* Rehearing Order at P 23, JA 424. Should these alternatives fail to provide the expected discipline, the Commission also retains the authority to police unreasonable rates through broad monitoring and redress under Section 206 of the FPA, 16 U.S.C. § 824e. Negotiated Rates Order at P 80, JA 371 ("conditions will be in place to detect and respond to [any future] exercise of market power"); *see also Environmental Action*, 996 F.2d at 410-11 (finding that the combined protections of monitoring and § 206 complaint rights are sufficient to meet FPA requirements even where a FERC policy "permits price discrimination").

For example, those granted negotiated rate authority must report the results of their initial offerings, including the prices, terms, and identities of buyers. *See*

Negotiated Rates Order at PP 87, JA 374 (details in the independently-audited post-open season report), 89, JA 375 (details of the anchor tenant agreement), 90, JA 376 (requiring the filing of books and records and financial statements "to assist the Commission in carrying out its oversight role"). The Commission also collects information quarterly on merchant transmission sales, analyzes that information, and makes it available to the public. *See* Rehearing Order at P 44 & n.95, JA 435 (details in the electronic quarterly reports). These reporting requirements backed by complaint procedures, as well as other oversight activities of the Commission, plus the analysis of alternatives to transmission service for all customers (with a special focus on those who are already customers of the merchant developer or its affiliate), enables the Commission to meet its statutory duty to ensure that negotiated rates are just and reasonable. *See* Negotiated Rates Order at P 44, JA 355; *see also Interstate Natural Gas*, 285 F.3d at 35 (concluding that FERC's multi-factor analysis of competitive conditions, ongoing oversight commitment, and the "non-cost advantages" of its "'lighthanded' regulation" combine to meet the statutory requirement).

IV. The Commission Reasonably Applied Its Negotiated Rates Policy In This Case To Ensure Rates Would Be Competitive

A. To Ensure Initial Rates Do Not Reflect Market Power, The Commission Reasonably Restricted Tres Amigas' Open Season Process

Restrictions on a merchant developer's open season offerings are the primary tool for ensuring that initial rates reflect competition. Negotiated Rates Order at P 53, JA 358 ("a transparent, fair and non-discriminatory open season . . . ensure[s] that the initial rates for transmission service . . . are just and reasonable by protecting against physical and economic withholding"); *see also Process Gas Consumers Group v. FERC*, 292 F.3d 831, 833, 836-37 (D.C. Cir. 2002) (explaining interaction of recourse rates and open seasons to "simulate the end product of a competitive market" in the natural gas context). Because a customer's willingness to pay for service in an open season auction is bounded by both the differences in energy prices at the ends of the transmission line and other cost-based and market alternatives available to the customer, *Chinook*, 126 FERC ¶ 61,134 at P 38, the Commission's greatest concern with the structure of an open season is the merchant provider's ability to withhold service. *See* Negotiated Rates Order at P 60, JA 362. Withholding service, that is, restricting access or reserving for a later auction the transmission capacity of the project, "unreasonably create[s] an artificial level of scarcity" that can drive up prices. *Id*.; *see* Rehearing Order at P 43, JA 434 (same).

The Commission emphasized that Tres Amigas is a new entrant without captive customers. Negotiated Rates Order at P 51, JA 358; *see Columbia Gas*, 477 F.3d at 743 n.1 (in the "subscription phase . . . a new [entrant's] market power is relatively low"). Nevertheless, based on its market power analysis (and responding, in part, to Occidental's objections in the proceeding below), the Commission required changes to Tres Amigas' open season process to prevent prices that reflect scarcity during the first phase. Negotiated Rates Order at P 60, JA 362. For example, while Tres Amigas initially proposed to retain 20 percent of the capacity of the project for sale after the initial allocation, *id*., the Commission insisted on no restrictions on transmission rights in the open season, to help strike an appropriate balance between "important consumer protections" and the financing needs of the Project. *Id*. at P 61, JA 362; *see Sacramento Mun. Util. Dist*., 616 F.3d at 541-42 (deferring to FERC's balancing of competing interests).

On appeal, Occidental does not dispute the restrictions placed upon Tres Amigas' open season; rather, it argues that these restrictions do nothing to protect customers from excessive rates. Br. 50. At bottom, this is an argument that customers will be forced to take service on Tres Amigas at a non-competitive price because they have no other options. This view is inconsistent both with the Commission's reasonable finding that price differences between the Grids and customers' willingness to pay will create reasonable prices for the Project's

service, Rehearing Order at P 53, JA 439, and with this Court's similar inference. *See Columbia Gas*, 477 F.3d at 743 n.1 ("[w]e infer that . . . [during] the subscription phase . . . the potential shippers will have either the alternative of continuing to use their then-current carriers, or, if they have no current carrier . . . , of choosing to locate their facilities elsewhere if they decline the proposed new service").

Occidental also confuses the protections for initial rates with long term protections afforded by customer alternatives in the relevant market. Contrary to Occidental's claim, Br. 51, the Commission did not rely on open season restrictions to deter the exercise of market power in the long term. *See* Negotiated Rates Order at P 72, JA 368 (noting restrictions on open season as separate from "long-term market disciplining characteristics"); Rehearing Order at P 43, JA 434 (restrictions "designed to . . . ensure that capacity is allocated in a competitive manner"). Rather, the Commission relied on an analysis of customer alternatives in the relevant market to show that rates would be competitive over time. *See infra* pp. 41-46.

B. To Check Whether Rates Will Remain Competitive In The Long Term, The Commission Appropriately Analyzed Opportunity Costs In The Relevant Market

As the foundation of its market power assertions, Occidental argues that the Commission "did not dispute . . . evidence" that "Tres Amigas will have a dominant market share of the transmission capacity connecting each of the three interconnections." Br. 12. But Occidental ignores that the Commission rejected Occidental's market shares evidence when it found that Occidental applied the wrong standard to a market definition that is too narrow.

In the challenged orders, the Commission repeatedly emphasized that its negotiated rates policy requires an analysis of opportunity costs with a focus on: (1) price differences in the markets connected by the project to serve as a cap on prices; (2) identifying other customer alternatives in the relevant market; and (3) protections provided through the obligation of neighboring transmission systems to expand at cost-based rates. *See* Negotiated Rates Order at P 62, JA 363; Rehearing Order at P 30, JA 428. Not only is this analysis consistent with twenty years of Commission precedent in the transmission context, *see supra* p. 5 (explaining early opportunity cost principles), but it is also consistent with the lack of data available from the amorphous early plans of merchant developers. *See*, *e.g.*, Negotiated Rates Order at P 73, JA 368 (market shares analysis requires "sets of assumptions" that are necessarily "speculative"); *id*. at P 82, JA 373 (noting "preliminary stage

of the Project's development" makes evaluating potential barriers to entry difficult).

Thus, the *Chinook* policy, and its predecessors, do not, as Occidental (and its expert) would have it, Br. 12, 40-43, require calculation of the merchant's share of the market relative to the market as a whole. Rehearing Order at PP 29-31, 38, 43, 62, JA 427-28, 432, 434, 443; *see also Wisconsin Pub. Power*, 493 F.3d at 261 ("expert testimony that petitioners rely on, however, did not refute FERC's conclusion" about price mitigation in a particular market). Nor does this Court require market share data from the Commission when it adopts market-based, as opposed to traditional cost-based, rates. *Interstate Natural Gas*, 285 F.3d at 31 (rejecting argument that market rates "cannot be sustained in the absence of data establishing the existence of competition[,] . . . for example, a calculation of Herfindahl-Hirschman indices for the capacity release market"); *cf*. Br. 42 (arguing that Tres Amigas has market power because Occidental calculated high Herfindahl-Hirschman Index concentrations).

Moreover, even if market share evidence were appropriate in the merchant transmission context, Occidental's evidence is inappropriate because it fails to assess shares based on the relevant market. *See* Rehearing Order at P 38, JA 432 (rejecting "Occidental's narrow definition of the relevant market"). The relevant inquiry is not the "share of the transmission capacity connecting the

interconnections," as Occidental repeatedly suggests. Br. 36 & n.102 (citing Br. 8-9, 40-42). Rather, Occidental's "view of the relevant market fails to consider a number of other viable alternatives that customers seeking transmission service on the Tres Amigas facility would have . . . includ[ing] all of the existing opportunities that potential customers currently have in their interconnections." Negotiated Rates Order at P 74, JA 369; *see American Gas*, 428 F.3d at 259 (FERC did not ignore evidence; instead, petitioner's "evidence reveals nothing at all about the [relevant inquiry]").

C. The Commission's Analysis Of Customer Alternatives Was Reasonable

Not accepting the Commission's analysis, Occidental argues that each alternative, standing alone, is insufficient to provide competition to Tres Amigas. Br. 13, 36-37, 51-52. As discussed above, the Commission may reasonably adopt a multi-factor analysis to determine whether a market rate is reasonable. *See supra* pp. 31-32. Occidental's arguments about the Commission's consideration of each alternative are also without merit.

Occidental argues, for example, that existing and new transmission facilities linking the three Grids will not provide meaningful competition to Tres Amigas. Br. 40-47. In the challenged orders, the Commission reasonably relied on some competition from new and existing ties among the Grids to help keep Tres Amigas' prices in line. *See* Negotiated Rates Order at P 74, JA 369 ("customers would also

have opportunities to purchase capacity on existing interties (to the extent such capacity is available)"); Rehearing Order at P 38, JA 432 ("intertie capacity is one of many 'reasonable alternatives' a potential customer may have").

But Occidental ignores the Commission's finding that "all of the opportunities that exist [for customers] in their [Grids], such as opportunities to buy and sell power in organized markets in the Eastern [Grid] and [the Texas Grid] and through bilateral transactions in the [Western Grid]," provide reasonable alternatives that will help discipline Tres Amigas' rates. Rehearing Order at P 38, JA 432; *see* Negotiated Rates Order at P 74, JA 369 (same); *see also Interstate Natural Gas*, 285 F.3d at 33 (interruptible service, though "not . . . as desirable as firm service," is an "adequate substitute" for uncapped short-term resales of pipeline capacity). The Commission properly relied on many factors, including existing and new transmission intertie capacity, in developing its "inference of competition" in the relevant market in which Tres Amigas may participate. *Interstate Natural Gas*, 285 F.3d at 32 (upholding FERC's competitive inference as "well founded" based on several cost and non-cost factors).

In addition to those alternatives, the Commission determined, consistent with its earlier cases on opportunity cost pricing, that "rates for transmission service on the Project should remain disciplined by . . . the difference in the price of generation in the markets connected by the Project." Negotiated Rates Order at

P 72, JA 368; *see id*. at P 77, JA 370 (citing *TransEnergie*, 91 FERC ¶ 61,230, at 61,838). On appeal, Occidental objects that "FERC has never found such price differences alone – without the cap at the costs of expanding the transmission system – to be sufficient." Br. 39. That is true and applies here as well. Indeed, the Commission relied only in part on the existence of price differences as evidence that Tres Amigas' rates will approximate costs. *See* Rehearing Order at PP 54-56, JA 440-41 (elaborating on all available customer alternatives). This reliance on price differences as part of a multi-factor analysis to determine whether market rates are reasonable is an approach approved by this Court. *See Interstate Natural Gas*, 285 F.3d at 31 (approving approach that used differences in prices between the gas field and the destination markets to show that capacity resale prices rarely exceeded those differentials).

Consistent with *TransEnergie* and other opportunity cost pricing precedent, *see supra* pp. 5-9, the Commission found that the availability of many alternatives, including "a number of cost-based alternatives," would discipline long-run prices. Rehearing Order at P 54, JA 440. In most negotiated rate cases, the Commission relies on the obligation of nearby utilities to expand at cost-based rates in order to provide the cost cap under its opportunity cost pricing regime. *See id*. at P 41, JA 433; *see also TransEnergie*, 91 FERC ¶ 61,230, at 61,839 ("cap is provided through the obligation of [two regional operators] to expand transmission . . . to

meet new requests for transmission service . . . across Long Island Sound"). But here, the Commission also was able to rely on Tres Amigas' commitment to expand its project at cost-based rates. Negotiated Rates Order at P 18, JA 346. In addition to these expansion cost caps, the Commission found that the obligation of utilities to expand at cost-based rates within their franchise areas is a viable alternative for customers. *See* Rehearing Order at P 39, JA 433 ("expansions . . . wholly within one of the three existing interconnections").

Occidental's arguments that these cost-based alternatives are meaningless in disciplining Tres Amigas' prices, *see* Br. 42-46, and that Tres Amigas can create barriers to entry through its own expansion, Br. 46, are built upon the incorrect "presum[ption] that the relevant market for transmission service is limited to competition between interconnections." Rehearing Order at P 39, JA 432. Because it believes that only a connection between the three Grids provides any competition to Tres Amigas, Occidental ignores the other alternatives in the relevant market that discipline both Tres Amigas' rates and Tres Amigas' ability to keep others out of the relevant market. *Id*. at PP 39, 54, JA 432, 440. The Commission reasonably concluded that all of these alternatives, including the expansion cost caps, are "sufficient long-term checks . . . to ensure that negotiated rates for transmission service on the Project will be just and reasonable. . . ." *Id*. at P 32, JA 429; *see* Negotiated Rates Order at P 72, JA 368 (same).

Finally, the secondary market further reduces the possibility that Tres Amigas will be able to sustain non-competitive rates in the long term. Negotiated Rates Order at P 75, JA 369; Rehearing Order at PP 46-49, JA 436-38. Customers of Tres Amigas holding long-term capacity rights can resell those rights and, thereby, compete with Tres Amigas. *See* Negotiated Rates Order at P 80, JA 372 (noting requirement that Tres Amigas develop a trading platform "to facilitate . . . trading" in the secondary market). Addressing Occidental's concern about the sufficiency of the secondary market, *see* Br. 47-49, the Commission concluded that "secondary capacity is likely to be available, which will help ensure that rates on Tres Amigas remain just and reasonable." Rehearing Order at P 48, JA 437; *cf. Interstate Natural Gas*, 285 F.3d at 33 (discussing, as one of many factors supporting market rates, FERC's prediction that pipelines' ability to add capacity will serve as a constraint on "high prices in the secondary market").

The Commission based this prediction on its experience with both secondary markets and drivers of merchant transmission development. *See* Rehearing Order at P 48, JA 437 ("long-term contracts are a critical component in [merchant] financing"). It also based the prediction on the record below, which shows that Tres Amigas "will allocate initial capacity on a twenty-year, ten-year, five-year, and one-year basis," *id*. at P 47, JA 437, and Tres Amigas intends "to secure an anchor tenant" for financing purposes, *id*. at P 48, JA 437. The Commission's

reasonable conclusion is deserving of deference. *See Process Gas*, 292 F.3d at 838 ("[e]ven if we were skeptical of the Commission's conclusion, . . . [it] embodies precisely the sort of prediction about the behavior of a regulated entity to which – in the absence of contrary evidence – we ordinarily defer"); *Environmental Action, Inc. v. FERC*, 939 F.2d 1057, 1064 (D.C. Cir. 1991) ("it is within the scope of the agency's expertise to make . . . a prediction about the market it regulates, and a reasonable prediction deserves our deference notwithstanding that there might also be another reasonable view").

The Commission properly analyzed all of the alternatives that are available to customers in the relevant market and reasonably concluded that the alternatives, in the aggregate, are sufficient to ensure reasonable rates over the long term on Tres Amigas' facilities. "That conclusion is entitled to substantial deference, both as an interpretation of the parameters set by FERC's own orders, and as a judgment involving regulatory policy at the core of FERC's mission." *Sacramento Mun. Util. Dist.*, 616 F.3d at 533 (citations omitted).

V. The Commission Properly Determined, Consistent With Its Precedent, That Tres Amigas Assumes The Full Market Risk Of Its Project

In addition to its inquiry into whether competitive market forces will produce reasonable negotiated rates, the Commission also must determine whether the developer is in fact a merchant transmission developer willing to accept market risk. *See* Negotiated Rates Order at P 44, JA 355. If the developer or its affiliate

have captive customers in the same region as the proposed project, alternatives that otherwise discipline project prices may not be available to those customers. *See* Rehearing Order at P 23, JA 424.

A. The Commission Properly Applied Its *Chinook* Analysis

In applying the safeguards under the first prong of its *Chinook* test, the Commission must determine whether Tres Amigas "has assumed the full market risk for the cost of constructing" its proposed project "and is not building within the footprint of its own (or an affiliate's) traditionally regulated transmission system. In such a case, there are no 'captive' customers who would be required to pay the costs of the project." *Chinook*, 126 FERC ¶ 61,134 at P 38; *see* Negotiated Rates Order at P 48, JA 357 (same). The goal of this inquiry is to "protect customers from inappropriately cross-subsidizing the merchant project." Rehearing Order at P 22, JA 424.

The Commission made two findings to support its conclusion that Tres Amigas assumed the full market risk of its project. First, it found that Tres Amigas has no presence in the region and, therefore, no way to shift costs to its (or its affiliates') captive customers. Negotiated Rates Order at P 51, JA 358 (Tres Amigas is a "new entrant" and Project will not be located in the footprint of its own or an affiliate's transmission system); *see* Rehearing Order at P 19, JA 423 (no "customers from which it can be guaranteed to recover the costs of the Project

through cost-based rates"). Lacking an affiliate relationship with neighboring utilities and the influence such relationships provide, Tres Amigas has no control over those utilities' decisions. *See* Rehearing Order at P 22, JA 424. It cannot force them to build connections to its project. Negotiated Rates Order at P 52, JA 358 (utilities will pursue connection only if Tres Amigas "provides sufficient value to justify the new construction"). Nor can it force costs upon their customers. *See* Rehearing Order at P 22, JA 424.

Second, the Commission found that Tres Amigas will recover its costs only from customers who voluntarily take transmission service. Negotiated Rates Order at P 51, JA 358; Rehearing Order at PP 18-19, JA 422-23. While pre-construction agreements mitigate Tres Amigas' risk, they are voluntary. Rehearing Order at P 23, JA 424. They, therefore, do not reduce the risk that Tres Amigas assumes in the first instance. *Id*.

These dual findings show that those customers who lack a voluntary choice of transmission provider will not subsidize the costs of this merchant facility. *Id*. at P 24, JA 424; *cf*. *Mountain States Transmission*, 127 FERC ¶ 61,270 at P 61 (rejecting negotiated rates for a proposal where affiliate's actual and expected investments in the project may harm affiliate's ratepayers); *American Gas Ass'n v. FERC*, 593 F.3d 14, 18 (D.C. Cir. 2010) (describing protections to prevent

"pipeline customers from cross-subsidization of discounted, negotiated, or recourse rates" on that same pipeline).

Contrary to Occidental's claim, Br. 32, the Commission did not suggest that there is some *de minimus* amount of risk that captive customers of a merchant facility can bear. To be sure, the Commission noted that regulatory protections are available for a captive customer should its utility elect to build a connection to Tres Amigas. Rehearing Order at P 22, JA 424. And, indeed, the challenged orders contain many instances of the Commission's balancing and weighing of policy goals and multiple factors. *See*, *e.g.*, Rehearing Order at P 29, JA 427. But here, the Commission did not balance the risks that captive customers will bear against those protections, as Occidental asserts, Br. 33, because the test is whether the developer assumes all of the market risk. *See* Negotiated Rates Order at P 44, JA 355; Rehearing Order at P 18, JA 422. Instead, the Commission found that Tres Amigas has "no captive customers," and, therefore, no captive customers will bear any risk of the Project. Negotiated Rates Order at PP 75, 103, JA 369, 380; *see* Rehearing Order at PP 19, 21, JA 423. The Commission reasonably concluded that Tres Amigas assumes the full market risk of its project because it cannot shift the risk of its project onto any unwilling customers.

B. The Commission Reasonably Rejected Occidental's Request To Change The *Chinook* Analysis

Occidental argues that the Commission, in its consideration of whether Tres Amigas assumes full market risk, must expand the scope of the Project to include all the lines that might connect to it. Br. 9-12, 22-29. Premised on the unique character of Tres Amigas' proposal and its inability to fit neatly into the traditional definition of transmission, Br. 9, 23, Occidental's argument amounts to a call for a new standard for analyzing negotiated rate applications. *See* Rehearing Order at P 20, JA 423 (rejecting Occidental's request to "apply a different standard" by "incorporate[ing] adjacent transmission facilities that may be built"). Although the Commission agreed with Occidental that the Project's design is novel in that it does not propose to connect to the existing transmission grid, Negotiated Rates Order at P 52, JA 358, it disagreed that this unusual characteristic required a change to its *Chinook* analysis. *See* Rehearing Order at PP 20-21, JA 423; *see also B&J Oil & Gas v. FERC*, 353 F.3d 71, 77 (D.C. Cir. 2004) ("although [this Court's] cases certainly *authorize* FERC to shift course in response to evolving circumstances, they do not permit us to *compel* FERC to consider the factors that *we* believe are in the public interest as [petitioner] would have us do").

Occidental's premise, that the Commission cannot grant negotiated rate authority to Tres Amigas because it does not meet the traditional definition of transmission, Br. 23, is inconsistent with the Commission's flexible negotiated

rates policy as well as this Court's decisions upholding the flexible application of existing policy in unique circumstances. *See, e.g.*, *Cogeneration Ass'n of Cal. v. FERC*, 525 F.3d 1279, 1281, 1284-85 (D.C. Cir. 2008) (upholding "unique rates" calculated using an unusual allocation method that reflects, consistent with FERC policy, the usage attributes of the customer class); *Louisiana Pub. Serv. Comm'n*, 522 F.3d at 396 (approving FERC's rejection of system-wide allocation of power contract with "a unique nature" and "unique tax settlement" provisions); *Industrials v. FERC*, 426 F.3d 405, 407-08 (D.C. Cir. 2005) (upholding FERC's evolving policy on price arbitrage when "[n]o Commission decision has passed on a proposal identical to [applicant's]"); *Environmental Action*, 996 F.2d at 410 (upholding new flexible rates over objection that "FERC struck the wrong balance between promoting efficiency and ensuring that efficiency gains are widely distributed").

Acknowledging the need for more transmission infrastructure to meet future needs and deliver new and distant sources of power, the Commission refined its negotiated rates policy to remove some of the restrictions stifling transmission development. *Chinook*, 126 FERC ¶ 61,134 at P 37; Negotiated Rates Order at P 38, JA 353. As a result, the Commission's *Chinook* policy is flexible enough to allow it to consider any type of design that has the potential to increase transmission capabilities, even designs that entirely lack proposed new

transmission cables. Negotiated Rates Order at PP 38-39, JA 353-54; *see*, *e.g.*, *Linden VFT, LLC*, 119 FERC ¶ 61,066, *order on reh'g*, 120 FERC ¶ 61,242 (2007) (proposed project will use variable frequency transformers in an existing transmission line to create additional capacity on that line); *cf.* Negotiated Rates Order at P 6, JA 341 (Tres Amigas proposes to install "several miles of underground, superconducting [direct current] transmission cable").

Furthermore, expanding the scope of the Project, as Occidental suggests, Br. 25, is inappropriate because the negotiated rate authority granted to Tres Amigas is only for the proposed transmission facility, not any lines that might connect to it. Rehearing Order at P 21, JA 424. While the Commission considers proposed facilities and the facilities of affiliates together in evaluating available alternatives, *see Mountain States Transmission*, 127 FERC ¶ 61,270 at P 62, it reasonably elected not to conflate unaffiliated non-merchant transmission with the proposed merchant facilities in its analysis of Tres Amigas. *See* Rehearing Order at P 22, JA 424 (rejecting request to "extend[ ] the inquiry to unaffiliated transmission providers"). For these reasons, the Commission properly applied the *Chinook* test to this unique project consistent with its precedent. *See Automated Power Exch., Inc. v. FERC*, 204 F.3d 1144, 1146, 1153 (D.C. Cir. 2000) (upholding decision that a "new computerized market" is a jurisdictional public utility because FERC "explained why its decision . . . is in harmony with its relevant precedent").

In the proceeding below, Occidental urged that Tres Amigas will not assume the full risk of its project because it will mitigate risk by selling transmission capacity in advance of construction. *See* Rehearing Request at 8, JA 389; Rehearing Order at P 16, JA 422 (same); *see also* Negotiated Rates Order at P 49, JA 357 (summarizing concern that utilities might purchase capacity from Tres Amigas and "roll the costs into their costs-of-service formula rates"). The Commission's answer to this argument was the same as its answer regarding captive customers of neighboring utilities: buying service from Tres Amigas, as well as connecting to the Project, is voluntary. *See* Rehearing Order at P 23, JA 424 ("same logic applies"). The Commission recognized that a "customer's voluntary decision to purchase transmission service in advance of construction" can mitigate a project's risk. *Id*. Such agreements do not cause the project to fail the assumption of risk requirement unless there is some showing that the advance purchase was involuntary. *See id*.

On appeal, Occidental changes course and criticizes the Commission for answering its rehearing request by making a comparison between voluntary customers and voluntary connections. Br. 29-31. But the comparison is appropriate. Tres Amigas cannot coerce any potential purchaser or any potential entity that might build a connection between it and an existing grid. *See* Rehearing Order at PP 22-23, JA 424. Like other merchant projects, Tres Amigas "will

succeed or fail based on whether a market exists for [its] services. . . ." *Chinook*, 126 FERC ¶ 61,134 at P 55; *see* Negotiated Rates Order at P 37, JA 353 (developer will "build the initial project . . . only where a market exists for the project").

Finally, Occidental argues that the Commission failed to address the evidence submitted by its expert on subsidies of Tres Amigas by captive customers and that the Commission's response on these subsidy concerns "is devoid of . . . logic." Br. at 34-35 & n.96 (citing Affidavit of David DeRamus, at PP 38-43, R.81, JA 283-85). Again, this argument is an attempt to change the test on cross subsidies that the Commission has applied to date. The Commission's response was a logical answer to the new standard proposed by Occidental's expert. *See National Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277, 1285 (D.C. Cir. 2007) (FERC need "not address [expert's] Affidavit directly," as long as it has adequately responded to all specific, supported arguments).

Admitting that Tres Amigas proposal did not raise any direct subsidy concerns, *see* Rehearing Order at P 24, JA 424, Occidental's expert argued that "a hybrid approach to rate setting, with negotiated rates for the Tres Amigas facility itself, and cost-based rates for other complementary transmission investments," cause a "special form of cross-subsidization that can occur" even when companies are not affiliated. DeRamus Aff. at PP 40-41, JA 284-85. Given that this hybrid approach is the common circumstance in that merchant projects are usually located

next to a neighboring system with cost-based transmission rates, the Commission reasonably responded that new transmission facilities that "are subject to independent review" of cost-based rates raise no more subsidy concern than existing cost-based facilities in a hybrid pricing system. *See* Rehearing Order at P 24, JA 425; *see also Blumenthal*, 552 F.3d at 884 (rejecting "contention that the hybrid electricity market, in which some generators receive market-based rates and some receive cost-based rates, is inherently unjust and unreasonable").

Occidental also raises a similar subsidy concern about hybrid rates should Tres Amigas also build the connecting facilities and seek cost-based rates for them. Br. 34. In the proceeding below and again on appeal, it failed to identify any involuntary customers of Tres Amigas that would be harmed by such an approach. *See* DeRamus Aff. at P 43, JA 285; *see also* Rehearing Order at P 18, JA 422 (FERC "looks to whether the transmission provider is recovering its costs only from customers who *voluntarily agree* to take transmission service"). Thus, the Commission correctly focused on the salient factor, whether Tres Amigas or its affiliates have captive customers upon whom they can foist the costs of the Project, and reasonably concluded that, because Tres Amigas has no such ability, it assumes the full market risk. *See B&J Oil*, 353 F.3d at 77 ("despite . . . claims to the contrary, FERC did consider [petitioner's argument] – it simply rejected [its] position").

VI. The Commission Properly Placed The Burden Of Proof On Tres Amigas

Occidental claims that the Commission shifted the burden to Occidental to prove that Tres Amigas has market power. Br. 52-53. Occidental misunderstands the Commission's ruling.

Under section 205 of the FPA, 16 U.S.C. § 824d, the burden of proof to show that its proposal is reasonable and not unduly discriminatory is on the merchant transmission developer, here, Tres Amigas. Rehearing Order at P 61, JA 443. Tres Amigas made its affirmative showings, many in the form of future commitments, that its proposal met all four prongs of the *Chinook* test. *See*, *e.g.*, Application at 33-39, JA 33-39 (summarizing evidence and commitments for each prong). Regarding the reasonableness of its rates, Tres Amigas submitted information on the relevant market and alternatives in that market, as well as details regarding its affiliates and Tres Amigas' ability to shift costs to any customers of its affiliates.

Reviewing the preliminary plans, competitive alternatives and Tres Amigas' commitments, the Commission concluded that Tres Amigas' analysis of alternatives in the relevant market provided sufficient evidence that its "rate proposal was just and reasonable, consistent with [the Commission's] longstanding policy on merchant transmission developer requests for negotiated rate authority." Rehearing Order at P 61, JA 443. That plans are preliminary and evidence is of a

general nature, does not mean, as Occidental implies, Br. 39, that the Commission automatically grants negotiated rates to every applicant. Indeed, the Commission recently rejected an innovative proposal to deliver solar and wind power because that proposal contained insufficient information and commitments for the Commission to determine whether negotiated rates would be reasonable under the first prong of *Chinook*. *SunZia Transmission*, 131 FERC ¶ 61,162 at PP 44-45.

The Commission rejected Occidental's request to use a market shares analysis, like that used in the generation market rates context, as inconsistent with *Chinook* safeguards. Rehearing Order at PP 29-31, 62, JA 427-28, 443; *see also* Negotiated Rates Order at P 74, JA 369 (incorrect market selected by Occidental for analysis). The Commission did, however, remind Occidental that, in the event problems do arise from the grant of negotiated rates, under section 206 of the FPA, 16 U.S.C. § 824e, the agency has the right to institute an investigation and order appropriate changes. Negotiated Rates Order at PP 47, 72, JA 357, 368. And, of course, Occidental itself can seek relief under that section if it can allege an actual injury resulting from excessive rates or undue discrimination. *See id*.; *see also Sacramento Mun. Util. Dist.*, 616 F.3d at 542 (explaining the importance of FPA § 206 "if, in the future, [an approved] process results in an unjust outcome").

Furthermore, Occidental's attempt to distinguish *Sacramento Municipal Utility District* from this case, Br. 55-56, is unavailing. There, the petitioner

argued, as Occidental does here, Br. 14, 51-52, both that the proposed rates were not just and reasonable as required by Section 205 of the FPA, 16 U.S.C. § 824d, and that the Commission "erroneously conflate[d] the burden of proof" by obligating the protesting party to prove that the proposal was not just and reasonable. 616 F.3d at 533, 537. This Court rejected petitioner's first argument, finding that the Commission had fully and reasonably addressed all of the arguments presented below. *Id*. at 533-35. Based on that determination, the Court found that the Commission correctly placed the initial burden on the applicant and correctly determined that petitioner "had failed to controvert [the] conclusion" that rates were just and reasonable. *Id*. at 537-38. The Court should make the same findings here.

In sum, the Court should not fault the Commission for failing to probe deeper into an analysis that it found was irrelevant and beyond the scope of Tres Amigas' preliminary proposal. *See, e.g.*, Negotiated Rates Order at P 73, JA 368 (arguments are "speculative" and "impossible to address at this preliminary stage of the Project's development"). Nor should it fault the Commission for explaining an important part of its oversight regime for protecting customers from any future non-competitive results, *see* Rehearing Order at P 68, JA 446, where, as the record here shows, "the likelihood is that competition and consumer welfare will be enhanced rather than undercut by the ability of [the applicant] to sell at market[ ]

rates. . . ." *Louisiana Energy & Power*, 141 F.3d at 371; *see id*. at 370-71 ("[w]hile [the FPA § 206 complaint and investigation] escape hatch might be insufficient if [petitioner] had shown a substantial likelihood that FERC's predictions would prove incorrect, it provides an appropriate safeguard against the uncertainties of FERC's prognostications where there has been no such showing").

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed for lack of standing. If not, and the Court proceeds to the merits, the petition should be denied and the Commission's orders should be upheld in all respects.

Respectfully submitted,

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Occidental Permian Ltd., et al. v. FERC **Docket No. ER10-396**
D.C. Cir. No. 10-1381

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 13,328 words, not including the tables of contents and authorities, the certificates of counsel and the addendum.

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October 20, 2011

ADDENDUM

STATUTES

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

(b) Alternative prescriptions

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

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

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

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

(i) cost significantly less to implement; or

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

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

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

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with re-

spect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

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

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

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

(g) Books and records

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

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

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

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

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

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

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

(4) Nothing in this section shall—

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

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

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

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

REFERENCES IN TEXT

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

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

AMENDMENTS

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

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

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.

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

for such purpose in such order, or otherwise in contravention of such order.

(d) Authorization of capitalization not to exceed amount paid

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

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

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

(f) Public utility securities regulated by State not affected

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

(g) Guarantee or obligation on part of United States

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

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

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

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

TRANSFER OF FUNCTIONS

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

Whenever any such new schedule is filed the Commission shall have authority, either upon 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 de-

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.

the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

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

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

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

Section 4 of Pub. L. 100–473 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

Section 3 of Pub. L. 100–473 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

Section 5 of Pub. L. 100–473 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 on 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.)

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 20th day of October 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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