No. 12-1881

In the United States Court of Appeals for the Fourth Circuit

NORTH CAROLINA UTILITIES COMMISSION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission (FERC or the Commission) reasonably granted the application of Virginia Electric and Power Company, doing business as Dominion Virginia Power (Dominion Virginia), for rate incentives for five transmission projects, when substantial evidence demonstrated that the projects met the requirements of section 219 of the Federal Power Act, 16 U.S.C. § 824s, and the Commission's implementing rulemaking,

that the projects either ensure reliability or reduce congestion on the transmission grid, that a nexus exist between the projects and the incentives requested, and that the resulting rates are just and reasonable.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum to this brief.

STATEMENT OF THE CASE

In Federal Power Act section 219, in recognition of a serious shortfall in electric transmission construction, Congress directed the Commission to issue a rule providing for rate incentives to encourage investment in infrastructure that will increase reliability or reduce congestion on the transmission system. In Order No. 679,[1] the Commission established a rule, 18 C.F.R. § 35.35, authorizing incentives for projects that increase reliability or reduce congestion, if the applicant can demonstrate a nexus between the investment and the incentives requested, and if the resulting rates will be just and reasonable. In the challenged orders, *Va. Elec. & Power Co.*, 124 FERC ¶ 61,207 (2008) (Incentives Order), JA 782, *reh'g denied*, 139 FERC ¶ 61,143 (2012) (Rehearing Order), JA 962, the Commission

[1] *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222, 116 FERC ¶ 61,057 (Order No. 679), *on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236, 117 FERC ¶ 61,345 (2006) (Order No. 679-A), *on reh'g*, 119 FERC ¶ 61,062 (2007).

granted Dominion Virginia's application for incentives for eleven transmission projects, finding that they fulfilled the requirements of section 219 and Order No. 679. On appeal, petitioner North Carolina Utilities Commission (North Carolina) challenges the incentives for five of those projects.

STATEMENT OF FACTS

I. SECTION 219 OF THE FEDERAL POWER ACT AND THE ORDER NO. 679 RULEMAKING ON TRANMISSION INCENTIVES

A. Section 219 Of The Federal Power Act

In enacting the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, Congress expressed concern regarding insufficient investment in transmission infrastructure.

> Investment in electric transmission has not kept pace with electricity demand. Moreover, transmission system reliability is suspect as demonstrated by the blackout that hit the Northeast and Midwest in August of 2003. Legislation is needed to address the issues of transmission capacity, operation and reliability.

H.R. Rep. No. 109-215 at 171 (2005). *See also* S. Rep. No. 109-78 at 8 (2005) (recognizing that "[b]illions of dollars need to be invested in the national transmission grid to ensure reliability and to allow markets to function").

In response to these concerns, in section 1241 of the Energy Policy Act of 2005, Congress added section 219 to the Federal Power Act, 16 U.S.C. § 824s. Section 219(a) directed FERC to establish, by rule, incentive-based rate treatments for transmission infrastructure "for the purpose of benefitting consumers by

ensuring reliability and reducing the cost of delivered power by reducing transmission congestion." 16 U.S.C. § 824s(a). Section 219(b) required that the rule, *inter alia*: (1) "promote reliable and economically efficient transmission and generation of electricity by promoting capital investment," 16 U.S.C. § 824s(b)(1); and (2) "provide a return on equity that attracts new investment in transmission facilities." 16 U.S.C. § 824s(b)(2). Under section 219(d), all incentive rates "are subject to the requirements of [Federal Power Act] sections 205 [16 U.S.C. § 824d] and 206 [16 U.S.C. § 824e] that all rates, charges, terms, and conditions be just and reasonable and not unduly discriminatory or preferential." 16 U.S.C. § 824s(d).

B. The FERC Rulemaking Implementing The Statute

In compliance with Federal Power Act section 219, the Commission in Order No. 679 promulgated a final rule providing "incentives for transmission infrastructure investment that will help insure the reliability of the bulk power transmission system in the United States and reduce the cost of delivered power to customers by reducing transmission congestion." Order No. 679 P 1. *See* 18 C.F.R. § 35.35 (transmission infrastructure investment). The rule did not grant any incentives, but rather identified specific incentives that the Commission would allow when justified in individual public utility filings. *Id*.

To qualify for incentives, the Commission required that the applicant meet a three-prong test. Order No. 679 P 76. First, the applicant must demonstrate that

the facilities for which it seeks incentives either ensure reliability or reduce transmission congestion. Order No. 679 P 76. The Commission adopted a rebuttable presumption that certain review processes satisfy this requirement, such as regional planning processes and state siting approvals. Order No. 679-A P 41.

Second, to demonstrate that increased rates will provide real incentives to construct new infrastructure, each applicant must demonstrate a nexus between the incentive being sought and the investment being made. Order No. 679 PP 6, 48, 76. The most compelling case for incentives is a new project that presents special risks or challenges, not a routine investment. Order No. 679-A P 23.

Third, as required by section 219(d), each applicant must show that the resulting rates will be just and reasonable. Order No. 679 P 76. For example, an acceptable incentive rate of return on equity must be within a range of reasonable returns on equity (as demonstrated by a discounted cash flow analysis)[2] and the rate proposal as a whole must be within the zone of reasonableness before it will be approved. *Id*. PP 2, 92.

[2] The Commission uses a discounted cash flow analysis to determine the range of reasonableness of a utility's return on equity. This analysis assesses representative proxy companies and the impact of other factors, including risk, on the zone of reasonableness for the return on equity, resulting in a range of just and reasonable returns on equity (e.g., 9 percent to 13 percent). Order No. 679 P 92. *See also, e.g., Town of Norwood v. FERC*, 80 F.3d 526, 534 (D.C. Cir. 1996) (explaining analysis).

C. Subsequent Policy Changes

Following issuance of Order No. 679, the Commission has on several occasions further addressed the application of the nexus test. In 2007, the Commission clarified that "when an applicant has adequately demonstrated that the project for which it requests an incentive is not routine, that applicant has, for purposes of the nexus test, shown that the project faces risks and challenges that merit an incentive." *See* Incentives Order P 45, JA 797 (quoting *Balt. Gas & Elec. Co.*, 120 FERC ¶ 61,084 P 54 (2007), *reh'g denied*, 122 FERC ¶ 61,034 (2008)).

In 2010, in *PJM Interconnection, Inc.*, 133 FERC ¶ 61,273 P 45 (2010), and *Okla. Gas & Elec. Co.*, 133 FERC ¶ 61,274 P 39 (2010), the Commission revised the nexus policy with regard to incentives applications that present multiple, unconnected projects as a group. *PJM*, 133 FERC ¶ 61,273 P 43. While in the past the Commission had applied the nexus test to aggregated groups of projects, *see id*. P 44, the Commission determined that "in this and future cases" it would "no longer apply the nexus test on an aggregated basis to individual and unconnected projects simply because an applicant sought incentives for those projects in a single application." Rehearing Order P 11, JA 965 (citing *PJM*, 133 FERC ¶ 61,273 P 45; *Okla. Gas*, 133 FERC ¶ 61,274 P 39).

In November 2012, the Commission issued a Policy Statement again revising the nexus requirement. *Promoting Transmission Investment Through*

Pricing Reform, 141 FERC ¶ 61,129 (2012). In that Policy Statement, which will be applied "on a prospective basis to incentive applications received after the date of its issuance," *id*. P 1, the Commission held that it would no longer rely on the routine/non-routine analysis adopted in *Baltimore Gas* as a proxy for satisfaction of the nexus test. *Id*. P 10. The Commission will instead analyze the need for each individual incentive and the total package of incentives. *Id*. The Commission further provided additional guidance regarding applications for incentive returns on equity based on a project's risks and challenges. *Id*. P 4.

II. THE PROCEEDINGS BELOW

A. Dominion Virginia's Rate Filing

Dominion Virginia is a transmission-owning utility that is a member of PJM Interconnection (PJM) (PJM stands for "Pennsylvania-New Jersey-Maryland," although the full name is no longer used). PJM is a Regional Transmission Organization, which is a voluntary association in which the owners of transmission lines that comprise an integrated regional grid (here, in various mid-Atlantic states) cede operational control over their transmission lines to the Regional Transmission Organization. *See Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, 473 (7th Cir. 2009).

In the proceedings below, in a voluminous filing, Dominion Virginia requested return on equity transmission rate incentives under Order No. 679 for

eleven transmission projects, setting out in detail the manner in which the designated projects met the section 219 and Order No. 679 requirements. *See* July 1, 2008 Dominion Virginia rate filing, JA 13-572. Dominion Virginia requested that an incentive adder of 150 basis points be added to its return on equity for four transmission projects, and an incentive adder of 125 basis points for an additional seven projects.[3] *See id*. JA 13. Petitioner North Carolina protested the request with respect to six projects. *See* Protest of the North Carolina Utilities Commission (Protest) at 4-8, JA 525-29; Request for Rehearing of the North Carolina Utilities Commission (Rehearing Request) at 4-13, JA 950-59. On appeal, North Carolina does not pursue its objections to the Glen Carlyn Project. *See* Brief of Petitioner (Br.) at 28. Of the five projects at issue on appeal, Dominion Virginia requested a 150 basis point adder for one, the Proactive Transformer Replacement Project, Incentives Order P 9, JA 785, and requested a 125 basis point adder for the remaining four. *Id*. PP 11, 12, 15, 17, JA 786-87.

North Carolina protested two projects (Garrisonville and Pleasant View) that involved building underground transmission lines, rather than less expensive overhead lines. Protest at 4-5, JA 525-26; Rehearing Request at 9, JA 955. North

[3] Dominion Virginia's return on equity of 11.4 percent (a base return on equity of 10.9 percent plus a 50 basis point return on equity adder for continued Regional Transmission Organization membership) was determined in a prior proceeding. *See Va. Elec. & Power Co.*, 123 FERC ¶ 61,098 P 58 (2008).

Carolina protested two projects (Lexington Tie and Idylwood) because those projects were already under construction, and thus further incentives to construct were unnecessary. Protest at 8, JA 529; Rehearing Request at 10-11, JA 956-57. North Carolina further contended that the Proactive Transformer Replacement Project contemplated replacement of far more transformers than was recommended in PJM's Regional Transmission Expansion Plan,[4] and had not been shown to be cost-effective. Protest at 7-8, JA 528-29; Rehearing Request at 4-8, JA 950-54.

B. The Challenged Orders

In the challenged orders, the Commission granted Dominion Virginia's requested transmission rate incentives. Incentives Order P 1, JA 782; Rehearing Order P 1, JA 962. Consistent with section 219 and Order No. 679, the Commission found substantial evidence that the projects would ensure reliability and/or reduce the cost of delivered power by reducing congestion. Incentives Order PP 32, 36, JA 792, 796; Rehearing Order P 12, JA 965 (denying rehearing). The Commission found that Dominion Virginia was undertaking considerable risks and challenges to develop and construct its projects, and that Dominion Virginia had demonstrated a nexus between those risks and challenges and the incentives

[4] PJM's Regional Transmission Expansion Plan forecasts the expansion of the PJM transmission system needed to meet the demand for firm transmission service. *See FPL Energy Marcus Hook, L.P. v. FERC*, 430 F.3d 441, 443 (D.C. Cir. 2005).

that it had requested, both as a package and for each individual project. Incentives Order P 48, JA 797; Rehearing Order P 12, JA 965. The Commission further found that Dominion Virginia's rates with the incentives would remain just and reasonable. Incentives Order PP 114, 119-120, JA 816, 818 (with the requested return on equity adders, Dominion Virginia's resulting return on equity (12.65 percent for 125 basis point projects and 12.9 percent for 150 basis point projects) would remain within the zone of reasonableness of 9.46 percent to 14.4 percent).

Following the 2008 Incentives Order, the Commission in 2010 decided that, prospectively, it would no longer apply the nexus test on an aggregated basis to individual and unconnected projects. *See* Rehearing Order P 11, JA 965. The Commission nonetheless in the Rehearing Order affirmed its decision here which was based, in part, on the requested incentives as a package, recognizing the potential inequity of rescinding previously-granted incentives long after Dominion Virginia relied on those incentives in proceeding with the projects in question. *Id*. P 12, JA 965-66. Further, the Commission found that granting rehearing at this time would contribute to unnecessary confusion and uncertainty, which was likely to cause greater harm than allowing these incentives to remain in place. *Id*.

To understand the Commission's findings with regard to the specific projects at issue on appeal, it is helpful to understand the nature of the facilities involved in those projects, and their role in providing reliable, low-cost power.

PJM's region stretches east and south from the Chicago area, primarily to western Michigan and eastern Indiana, Ohio, Pennsylvania, New Jersey, Delaware, Maryland, the District of Columbia, and Virginia. *Ill. Commerce Comm'n*, 576 F.3d at 473. Generally, PJM's Extra High Voltage transmission system, which includes Dominion Virginia's 500 kilovolt (kV) system, delivers lower-cost power from sources in the western side of the PJM footprint to serve load centers on the eastern side. Dominion Exh. 8 at 35, JA 231. Delivery of power from this system includes transformation (by 500/230 kV transformers) from 500 kV lines to 230 kV facilities for delivery to customers. *Id*. Most major metropolitan areas are generation-deficient and thus they depend on the Extra High Voltage transmission system to transport electricity into the area to meet energy needs reliably. *Id*. at 2, JA 198. Further, congestion on the system can require the use of higher-cost generation on the restricted side of the constraint to meet customer demand, resulting in congestion costs. *Id*. at 35, JA 231.

Specifically with regard to the projects challenged by North Carolina on appeal, the Commission found as follows:

1. The Garrisonville and Pleasant View Projects

The Garrisonville Project involved constructing a double-circuit five-mile 230 kV transmission line and substation near Garrisonville, Virginia. Incentives Order P 11, JA 785. The Commission found that the Project would ensure

reliability in Stafford County, Virginia, which had been experiencing sustained load growth, and would exceed the capability of existing distribution facilities in the service area in the next five years. *Id*. P 39, JA 794. Further, the Garrisonville Project would also enhance regional reliability and involve substantial construction risks, and therefore was not routine. *Id*. P 77, JA 806 (citing Dominion Exh. 7 at 28-30, JA 167-69 and Dominion Exh. 8 at 39-45, JA 235-41).

The Pleasant View Project involved constructing a 12-mile 230 kV transmission line and substation near the towns of Hamilton and Purcellville, Virginia. Incentives Order P 12, JA 786. The Commission found that the Pleasant View Project would ensure reliability. Incentive Order P 40, JA 794. Without the proposed additional transmission capacity the Purcellville load area would, under normal load conditions, nearly exceed the capacity of the distribution circuits in 2010, and, under a single contingency scenario, would exceed that capacity in 2008. *Id*. (citing Dominion Exh. 7 at 33, JA 172 and Dominion Exh. 8 at 46, JA 242). The project was not routine, as it would increase regional reliability and involve substantial technological challenges and construction risk. *Id.* P 85, JA 808 (citing Dominion Exh. 8 at 48, JA 244).

North Carolina objected to incentives for both projects based on their use of expensive underground construction when a lower-cost overhead alternative was available. Rehearing Request at 9, JA 955. However, the projects were needed to

reliably serve local load growth, Incentives Order PP 39 & n.20, 40 JA 794, and to enhance regional reliability. *Id*. PP 77, 85, JA 806, 808. As both projects met the statutory and regulatory standards for incentive rates, *id*. PP 39-40, 77, 85, JA 794, 806, 808, no demonstration regarding alternatives was required.

2. The Lexington Tie and Idylwood Projects

The Lexington Tie Project involved installation of a modified 230 kV bus tie arrangement at the Lexington substation in Rockbridge County, Virginia. Incentives Order P 15, JA 787. The Idylwood Project would replace an existing conductor on a 230 kV transmission line with a high temperature/high capacity conductor. *Id*. P 17, JA 787. The Lexington Tie and Idylwood Projects were PJM Regional Transmission Expansion Plan baseline projects that were entitled to a rebuttable presumption that they enhance reliability or reduce congestion.[5] Incentives Order PP 26, 32, JA 790, 792.

Moreover, there was substantial evidence that the projects would ensure reliability or reduce the cost of delivered power. *Id*. The Lexington Tie Project would lessen the possibility of a voltage collapse that would result from the loss of

[5] Pursuant to the PJM Operating Agreement, PJM is required to adopt a single regional plan that will maintain the reliability of the PJM grid in a manner that supports competition in the PJM region. *Balt. Gas*, 120 FERC ¶ 61,084 P 58. "Baseline" projects in the PJM Regional Transmission Expansion Plan benefit customers in one or more transmission owner zones for the purpose of maintaining reliability or reducing congestion on the PJM grid. *Id*.

two transmission elements at the Lexington substation. *Id*. P 33, JA 792. This was critical because the Lexington substation is connected to the 500 kV Lexington-Cloverdale line, which is a major regional interface of the Eastern Interconnection. *Id*. Likewise, the Idylwood Project would correct a double contingency loss of two 230 kV underground lines in the Alexandria-Arlington areas. *Id*. P 34, JA 793.

The Lexington Tie Project was not routine because it is needed to support reliability on the Eastern Interconnection by reducing the risks of voltage collapse. Incentives Order P 100, JA 812. Further, the project would involve substantial construction risks because the work would be completed at an in-service substation, with portions of the substation taken out-of-service as needed. *Id*. (citing Dominion Exh. 8 at 64, JA 260). The risk of a double contingency loss condition with voltage drop during the construction period was significant and demonstrated the level of construction risk involved in the project. *Id*.

Likewise, the Idlywood Project was not routine because it was a PJM Regional Transmission Expansion Project baseline project, it would have a substantial reliability impact on the densely-populated Arlington area, and it would involve substantial construction risks because the work would be completed in an urban area where significant opposition to the project was expected. *Id*. P 110, JA 815.

North Carolina objected to incentives for both projects because construction of the projects was already underway when incentives were granted. Rehearing Request at 10, JA 956. The Commission rejected these arguments because the projects, although underway, were not yet completed, and still faced substantial risks in construction. *Id*. PP 101, 110, JA 813, 815. The Commission permits incentives for projects that are not yet complete where the utility is still facing challenges in the construction of the project. Rehearing Order P 14, JA 966 (citing *Ne. Utils. Serv. Co*., 126 FERC ¶ 61,052 P 26 (2006)).

3. The Proactive Transformer Replacement Project

The Proactive Transformer Replacement Project involved the proactive replacement of Dominion Virginia's 32 highest risk 500/230 kV transformers before they fail, rather than following the standard industry practice of replacing transformers after failure. Incentives Order P 9, JA 785. The Commission found that, by reducing transformer outages, the project would significantly reduce congestion and congestion costs. *Id*. P 37, JA 793 (citing Dominion Exh. 8 at 36, JA 232, listing estimated congestion costs associated with the outage of the target transformers, ranging from $1.7 million to $29 million). The project further would enhance reliability as the loss of a transformer could potentially cause Dominion Virginia to curtail service to customers in the Shenandoah Valley, South Hampton Roads, Lexington or Carson areas of Virginia. *Id*. The Commission also found

that the project was not routine, due to its significant cost ($110 million) and scope, and the fact that it deviated from the standard industry practice of replacing transformers only when they fail. *Id*. P 72, JA 804.

North Carolina opposed the incentive, on the ground that PJM's Regional Transmission Expansion Plan did not include replacement of the transformers, and the number of spare transformers exceeded that recommended by PJM. Rehearing Request at 6-7, JA 952-53. However, the fact that the project went beyond standard utility practice in proactively replacing transformers provided the reliability and congestion cost benefits of the project that justified an incentives award. Incentives Order P 37, JA 793. Further, because Dominion Virginia demonstrated that the project was not routine, "its inclusion or exclusion from PJM's [Regional Transmission Expansion Plan] [was] not dispositive." *Id*. P 72, JA 804. In Order No. 679, the Commission did not make approval in a regional planning process a prerequisite for incentives. Rehearing Order P 15, JA 967 (citing Order No. 679 PP 57-58).

SUMMARY OF ARGUMENT

In recognition of a serious shortfall in electric transmission construction, Federal Power Act section 219 directed the Commission to issue a rule providing for rate incentives to encourage investment in transmission infrastructure that will increase reliability or reduce congestion on the transmission system. Order No.

679 established a rule authorizing incentives for projects that increase reliability or reduce congestion, if the applicant can demonstrate a nexus between the investment and the incentives requested (i.e., the incentive is tailored to the risks and challenges of the project), and if the resulting rates will be just and reasonable. In the challenged orders, the Commission found that Dominion Virginia's application for incentives for eleven projects satisfied these requirements.

On appeal, North Carolina challenges the award of incentives to five of Dominion Virginia's projects. As to all five projects, North Carolina asserts that the Commission was required to apply a change in its nexus policy that occurred in 2010, after issuance of the Incentives Order in 2008 and the filing of requests for rehearing of that order. The Court lacks jurisdiction to hear this argument as the argument was never raised to the Commission below. Moreover, the argument lacks merit. The Commission is not required to apply policy changes retroactively, and the Commission reasonably exercised its discretion here not to apply the 2010 policy change retroactively. First, the Commission expressly intended the changed policy only to apply prospectively. Further, applying the new policy to Dominion Virginia's 2008 application, where the record was fully developed and the Incentives Order issued under the old policy, would result in an unwarranted administrative burden on the parties and the Commission and would be inequitable to Dominion Virginia.

North Carolina asserts that three projects -- the Garrisonville, Pleasant View and Proactive Transformer Replacement Projects -- are not "economically efficient." In North Carolina's view, by referring to "economically efficient" transmission, Federal Power Act section 219 requires the Commission to consider whether these projects are the least cost alternative to achieve the desired benefits. However, the statute imposes no independent obligation on the Commission to provide incentives only for least cost alternatives. In Order No. 679, the Commission found that Congress intended incentives to be available for transmission projects that met the statutory and regulatory requirements of enhancing reliability or reducing congestion. A project that satisfies those requirements can be found to be economically efficient without a comparison to every conceivable alternative. As the projects here met that standard, the statute required no further consideration of alternatives.

Further, while North Carolina contends that Garrisonville and Pleasant View are local projects ineligible for incentives, North Carolina failed to preserve this argument by raising it on rehearing. In any event, local projects that enhance reliability are eligible for incentives, and the Commission reasonably determined that both Garrisonville and Pleasant View would enhance regional reliability as well. Likewise, while North Carolina complains that the Proactive Transformer Replacement Project exceeded the number of transformer replacements

recommended by PJM, the fact that the project went beyond standard utility practice in proactively replacing transformers provided a basis for finding that the project was not routine and was eligible for incentives.

North Carolina asserts that incentives were unnecessary for two projects -- the Lexington Tie and Idylwood Projects -- because Dominion Virginia was already constructing the projects when the incentives were awarded. The Commission reasonably rejected this argument, finding that incentives were still warranted where, as here, the projects continued to face considerable risks in construction.

ARGUMENT

I. STANDARD OF REVIEW

Judicial review of FERC orders is governed by Federal Power Act section 313(b), 16 U.S.C. § 825*l*(b), which provides that "the findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." *Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 508, 512 (4th Cir. 1992). The scope of the Court's review of FERC action is narrow. *Appomattox River Water Auth. v. FERC*, 736 F.2d 1000, 1002 (4th Cir. 1984); *Nantahala Power & Light Co. v. FERC*, 727 F.2d 1342, 1345 (4th Cir. 1984); *Consol. Gas Supply Corp. v. FERC*, 653 F.2d 129, 133 (4th Cir. 1981). "This Court may set aside the FERC's order only if we find it to be arbitrary, capricious, an abuse of discretion or otherwise not

in accordance with law, or unsupported by substantial evidence." *Appomattox River*, 736 F.2d at 1002 (citations omitted).

"Substantial evidence" is more than a mere scintilla, but less than a preponderance. *T-Mobile Ne. LLC v. City Council of Newport News*, 674 F.3d 380, 385-86 (4th Cir. 2012), *cert. denied*, *City Council of Newport News v. T-Mobile Ne. LLC*, 133 S. Ct. 264 (2012); *AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F.3d 423, 430 (4th Cir.1998). It has been described as "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *T-Mobile*, 674 F.3d at 385-86 (quoting *AT&T Wireless*, 155 F.3d at 430). "If the findings of the [agency] have substantial support in the record as a whole, our inquiry ends and its order must be enforced even though we might have reached a different result had we heard the evidence in the first place." *NLRB v. Frigid Storage, Inc*., 934 F.2d 506, 509 (4th Cir. 1991) (quoting *NLRB v. Nueva Eng'g, Inc*., 761 F.2d 961, 965 (4th Cir.1985) (citations omitted)). "It is not the function of this court to reweigh the evidence and draw inferences therefrom." *Nantahala Power*, 727 F.2d at 1345. The relevant inquiry is whether the Commission has "examine[d] the relevant data and articulate[d] a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

This case concerns whether transmission rate incentives approved by the Commission are just and reasonable. As "[t]he statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition," the Court "afford[s] great deference to the Commission in its rate decisions." *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008). In particular, "FERC's determinations on [return-on-equity] adders involve matters of rate design, which are technical and involve policy judgments at the core of FERC's regulatory responsibilities." *Me. Pub. Utils. Comm'n v. FERC*, 454 F.3d 278, 287 (D.C. Cir. 2006). Further, "'[s]tatutory reasonableness is an abstract quality represented by an area rather than a pinpoint.'" *Consol. Gas*, 653 F.2d at 134 (quoting *Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951)). The Court "may not reject an allowed rate which falls within a 'zone of reasonableness,'" and "'if the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry . . . is at an end.'" *Id*. at 133.

In the challenged orders, the Commission applied its Order No. 679 rulemaking, implementing Congress' directive in section 219 of the Federal Power Act, 16 U.S.C. § 824s, that the Commission establish by rule incentive-based rate treatments to encourage new transmission infrastructure. Order No. 679 P 5. Where Congress has expressly delegated authority to the agency to "'elucidate a specific provision of the statute by regulation,'" the Court is "obliged" to accord

the regulations "'controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.'" *Elm Grove Coal Co. v. Director, Office of Workers' Comp. Programs*, 480 F.3d 278, 293 (4th Cir. 2007) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 844 (1984)).

Because the Commission is charged with establishing incentive rate treatments for transmission investment, the Court "substantially defer[s]" to the Commission's construction of any ambiguous language in the Act, as long as the Commission's construction "'is based on a permissible construction of the statute.'" *Mackenzie Med. Supply, Inc. v. Leavitt*, 506 F.3d 341, 346 (4th Cir. 2007) (quoting *Chevron*, 467 U.S. at 843). Thus, if "'Congress has not directly addressed the precise question at issue,'" the Court may not substitute its own construction of the statute. *Elm Grove*, 480 F.3d at 292 (quoting *Chevron*, 467 U.S. at 843). "'Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'" *Id*. (quoting *Chevron*, 467 U.S. at 843).

II. THE COMMISSION REASONABLY APPROVED THE CHALLENGED INCENTIVE RATES.

Under Order No. 679, the Commission requires applicants for incentives to meet a three-prong analysis. Order No. 679 P 76; 18 C.F.R. § 35.35. First, in accordance with Federal Power Act section 219(a), 16 U.S.C. § 824s, the applicant must demonstrate that the facilities for which it seeks incentives either ensure

reliability or reduce the cost of delivered power by reducing transmission congestion. Order No. 679 P 76; 18 C.F.R. § 35.35(d). The Commission adopted a rebuttable presumption that this requirement is satisfied if the project results from a fair and open regional planning process, or if the project has received construction approval from an appropriate state commission, agency or siting authority. Order No. 679 P 58; Order No. 679-A P 41; 18 C.F.R. § 35.35(i).

Second, to demonstrate that increased rates will provide real incentives to construct new infrastructure, each applicant is required to demonstrate a nexus between the incentive being sought and the investment being made. Order No. 679 PP 6, 48, 76; 18 C.F.R. § 35.35(d). The incentives must be tailored to address the applicant's risks or challenges in constructing the project. Order No. 679-A PP 6, 27; 18 C.F.R. § 35.35(d). The most compelling case for incentives is a new project that presents special risks or challenges, not a routine investment. Order No. 679-A PP 6, 27. "[W]hen an applicant has adequately demonstrated that the project for which it requests an incentive is not routine, that applicant has, for purposes of the nexus test, shown that the project faces risks and challenges that merit an incentive." Incentives Order P 45, JA 797 (quoting *Balt. Gas*, 120 FERC ¶ 61,084 P 54). The relevant factors to be considered include: (1) the scope of the project (e.g., dollar investment, increase in transfer capability, size, effect on region); (2) the effect of the project (e.g., improving reliability or reducing congestion costs);

and (3) the challenges or risks faced by the project (e.g., siting, long lead times, regulatory and political risks). *Id*. (citing *Balt. Gas*, 120 FERC ¶ 61,084 P 52).

Third, under Federal Power Act section 219(d), 16 U.S.C. § 824s(d), each applicant is required to show that the resulting rates are just and reasonable. Order No. 679 P 76; 18 C.F.R. § 35.35(c), (d).

The challenged orders granted Dominion Virginia's application for incentive-based rate treatment for eleven transmission projects. On appeal, petitioner North Carolina challenges the awards for five projects. As to all five projects, North Carolina asserts that the Commission was required to apply a change in its nexus policy that occurred in 2010, after issuance of the Incentives Order in 2008 and the filing of requests for rehearing of that order. As to three projects, North Carolina asserts that section 219 requires the Commission to consider whether approved projects are the least cost alternative to achieve the desired benefits. North Carolina further raises additional issues as to individual projects.

As explained below, however, none of these objections warrants upsetting the Commission's grant of incentives in the orders on review.

A. The Commission Reasonably Declined To Apply The 2010 Policy Change To Dominion Virginia's Incentive Rate Application.

In the 2008 Incentives Order, the Commission found that Dominion Virginia had demonstrated a nexus between its projects and the incentives requested, "both

as a package and for each individual project." Incentives Order P 48, JA 797. *See also* Rehearing Order P 12, JA 965. In 2010, however, the Commission decided it would no longer apply the nexus test on an aggregated basis to unconnected projects. Rehearing Order P 11, JA 965 (citing *PJM*, 133 FERC ¶ 61,273 P 45; *Okla. Gas*, 133 FERC ¶ 61,274 P 39). The Commission specified, however, that it would only apply this revised policy prospectively. *Id*.

On rehearing here, the Commission declined to apply its 2010 nexus policy retroactively to Dominion Virginia's application for incentive rates. Rehearing Order P 12, JA 965-66. North Carolina argues on brief that, when the Commission changes its policy during a pending case, it is "appropriate" to apply the new policy retroactively, and the Commission here failed adequately to explain its decision not to apply the new policy. Br. 14-15. As demonstrated below, this Court lacks jurisdiction to hear this argument as it was never raised to the Commission. Even if there were jurisdiction, the argument lacks merit as the Commission reasonably explained in the Rehearing Order why it declined to apply the 2010 nexus policy to Dominion Virginia's application.

1. North Carolina's Arguments Are Jurisdictionally Barred.

The Court lacks jurisdiction to consider North Carolina's argument regarding the 2010 policy change, as this argument was never raised to the Commission in North Carolina's 2008 Rehearing Request, or at any other time.

As this Court has recognized, its review of FERC orders "is limited by 16 U.S.C. § 825*l*, which provides, '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 to do so.'" *Mt. Lookout-Mt. Nebo Prop. Prot. Ass'n v. FERC*, 143 F.3d 165, 173 (4th Cir. 1998) (citing *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 779 n.23 (1984)). The Court "will not consider a contention not presented to, or considered by, the Commission." *Aquenergy Sys., Inc. v. FERC*, 857 F.2d 227, 230 (4th Cir. 1988). *See also Consol. Gas Supply Corp. v. FERC*, 611 F.2d 951, 958-59 (4th Cir. 1979) (refusing to consider "the two grounds most strenuously urged" by petitioner where they were never raised to the Commission on rehearing).

Here, the Commission for the first time in the Rehearing Order declined to apply the new 2010 nexus policy to Dominion Virginia's application. To preserve that issue for review, North Carolina should have sought further rehearing on the issue of applying the 2010 policy. *See, e.g., Consol. Edison Co. v. FERC*, 315 F.3d 316, 322 (D.C. Cir. 2003) (where new policy was adopted after original order, petitioner sought rehearing of rehearing order declining to apply new policy before appealing failure to apply new policy).

North Carolina may argue that it was not required to seek further rehearing of the Rehearing Order, because the ultimate outcome (granting Dominion Virginia's requested incentives) did not change. *See, e.g., S. Natural Gas Co. v. FERC*, 877 F.2d 1066, 1073 (D.C. Cir. 1989) (no request for rehearing of rehearing order required where rehearing order does not change result, only the rationale). To be sure, the Commission, in its discretion, acting on rehearing of rehearing, may decide not to address further the merits of an unchanged decision. *See, e.g., Open Access Same-Time Info. Sys. & Standards of Conduct*, 87 FERC ¶ 61,382 at 62,417 (1999) (Commission's usual practice is to deny, without reaching the merits, a request for rehearing of an order denying rehearing that does not establish new policy). However, the Commission has considered requests for rehearing of rehearing where, as here, the Commission declines on rehearing to apply a newly-adopted policy. *See, e.g., Transcon. Gas Pipe Line Corp.*, 95 FERC ¶ 61,388 (2001) (addressing on second rehearing arguments that new policy should have been applied on rehearing), *aff'd, Consol. Edison*, 315 F.3d 316.

Even if North Carolina were not required to seek further rehearing, North Carolina nevertheless is confined by statute "to those objections that were actually 'urged before the Commission.'" *Town of Norwood v. FERC*, 906 F.2d 772, 775 (D.C. Cir. 1990) (quoting statute). As the issue of applying the new 2010 policy was never urged before the Commission in any request for rehearing, the Court is

"still precluded from considering it now." *Id*. Even absent a rehearing requirement in the governing statute, a party is required to first raise an issue before the agency before seeking judicial review. *See ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 962 (D.C. Cir. 2007) (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36–37 (1952)) (in case under act imposing no rehearing requirement, Court nonetheless did not consider arguments petitioners failed to raise before FERC below).

2. The Commission Explained Why It Declined To Apply The 2010 Policy To Dominion Virginia's Application.

In any event, the Commission reasonably explained why it declined to apply its 2010 policy change retroactively. Where "there is an intervening change of agency policy, the central question is 'whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act,' and that question is committed, in the first instance, to the agency's sound discretion." *Nat'l Posters, Inc. v. NLRB*, 720 F.2d 1358, 1363-64 (4th Cir. 1983) (quoting *NLRB v. Food Store Emp. Union*, 417 U.S. 1, 10 n.10 (1974)). Thus, when an agency issues a new policy regarding how it will handle future cases, "there is no legal principle that mandates retroactive application of the new policy statement to pending cases. Retroactive application to pending cases may be permissible, but it is not required." *Consol. Edison*, 315 F.3d at 319 (cited Br. 17 n.3).

While North Carolina cites *Panhandle E. Pipe Line Co. v. FERC*, 890 F.2d 435 (D.C. Cir. 1989), for the proposition that "the law clearly states that the Commission should apply modifications of policy to pending cases," Br. 17, that case says nothing of the sort. In *Panhandle*, agency policy changed while the case was on appeal. As the Commission had not opined on how the new policy would affect its decision, the Court found that it was "required to remand so that the Commission may indicate how, if at all, its decision would be affected by its intervening policy change." *Id*. at 439. *See also Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 62 (D.C. Cir. 1999) (same) (cited Br. 13). As the Court explained in *Consolidated Edison*, "*Williston Basin* does not stand for the proposition that an agency *must* apply a newly adopted policy statement to all pending cases." 315 F.3d at 324. "The agency need only give a reasoned explanation for its failure to apply a new policy statement in a pending case tried under an old policy statement." *Id*. (citing *Williston Basin*, 165 F.3d at 62).

Consequently, "[a]n agency may decide to apply a pre-existing policy to resolve a pending case, so long as that policy is not otherwise arbitrary and the agency provides a reasoned explanation for its decision." *Id*. at 319. Here, the Commission fully explained in the Rehearing Order why it was exercising its discretion not to apply the 2010 policy to Dominion Virginia's 2008 application. Rehearing Order PP 11-12, JA 965-66.

First, the Commission specified when changing its policy in 2010 that the new policy would have only prospective effect. Rehearing Order P 11, JA 965 (citing *PJM*, 133 FERC ¶ 61,273 P 45) (applying new policy "[i]n this and future cases"); *Okla. Gas*, 133 FERC ¶ 61,274 P 39 (same)).[6] "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204, 208 (1988). *See also Leland v. Fed. Ins. Adm'r*, 934 F.2d 524, 528 (4th Cir. 1991) (quoting *Bowen*).

This Court and the D.C. Circuit have declined to require retroactive application of rules that the promulgating agency specified were to be given only prospective effect. *See, e.g., Varandani v. Bowen*, 824 F.2d 307, 313 (4th Cir. 1987) (declining to apply new regulations retroactively where the agency specified an effective date); *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 965 (D.C. Cir. 2000) (a new policy statement issued while appeal was pending "has no bearing on these proceedings" because FERC specified that the policy did not apply retroactively); *Consol. Edison*, 315 F.3d at 324 (declining to apply FERC

[6] The Commission has similarly stated that its November 2012 revision to the nexus policy will apply "only on a prospective basis to incentive applications received after the date of its issuance." *Promoting Transmission Investment*, 141 FERC ¶ 61,129 P 2.

policy statement retroactively where the new policy was issued "with a statement that FERC intended to change its enforcement regime in *future* rate cases").

Of course, the agency cannot continue to apply an older policy that it has found unlawful. In *Kern River Gas Transmission Co*., 126 FERC ¶ 61,034 (2009) (cited Br. 13, 15, 17), the Commission found that it must apply a new policy on proxy groups retroactively because its prior policy was unreasonable. *Id*. P 38. The Commission contrasted that situation with *Consolidated Edison*, *id*., where the Court concluded that "there is nothing in the record of this case indicating that application of the [older policy] was unreasonable or otherwise unlawful." 315 F.3d at 324. Similarly, nothing in the record or the Commission's findings here indicates that the nexus policy as applied to this case in 2008 was unreasonable. As this Court observed in *Varandani*, "[o]bviously, the Secretary's adoption of new rules does not in itself mean that the old ones were invalid." 824 F.2d at 313.

To the contrary, here, the Commission expressly found that Dominion Virginia's rates, including the requested incentive return on equity adders, resulted in rates within the zone of reasonableness. Incentives Order P 120, JA 818 (finding Dominion Virginia's return on equity with the incentive adders would be 12.65 percent (for projects with 125 basis point adders) and 12.9 percent (for projects with 150 basis point adders), well within the zone of reasonableness of 9.46 percent to 14.4 percent). *See*, *e.g.*, *Me. Pub. Utils. Comm'n*, 454 F.3d at 288-

289 (affirming FERC finding that rates with incentive adder were just and reasonable based upon range of reasonable return on equity analysis).

Second, the Commission found that granting rehearing to apply the new policy at this time would "contribute to unnecessary confusion and uncertainty," which "is likely to cause greater harm than allowing these incentives previously granted to [Dominion Virginia] to remain in place." Rehearing Order P 12 & n.14, JA 966 (citing *Bangor Hydro-Elec. Co.*, 122 FERC ¶ 61,265 P 70 (2008), *aff'd, Conn. Dep't of Pub. Util. Control v. FERC*, 593 F.3d 30, 37 (D.C. Cir. 2010)). *Connecticut Dep't* upheld the Commission's decision not to apply a new policy on rehearing that post-dated the Commission's initial decision. 593 F.3d at 37. The Court found that "the Commission's decision makes clear that it was in fact principally concerned with the administrative burden that would result for both it and the transmission owners from reconsidering the decision under the new standard." 593 F.3d at 185. Because incentives cannot be precisely calculated in any event, *Connecticut Dep't* found it reasonable for the Commission "to conclude that any gain from evidence that might have been obtained on remand would not improve the decision-making process enough to justify the burden of doing so." *Id*. *Consolidated Edison* likewise recognized the Commission's legitimate interest in declining to apply a new policy that was not established until after rehearing

requests were filed, as there was no record upon which the Commission could apply the new policy. *Consol. Edison*, 315 F.3d at 325.

Third, the Commission found that applying the new policy on rehearing would be inequitable to Dominion Virginia, after Dominion Virginia relied on the incentives in proceeding with the projects. Rehearing Order P 12 & n.13, JA 966. *See Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993) (cited Br. 15) (retroactivity may be unfair in cases involving "substitution of new law for old law that was reasonably clear"). North Carolina disputes that there was clear precedent on which Dominion Virginia could rely, citing the 2010 cases changing the nexus policy, *PJM*, 133 FERC ¶ 61,273 P 44 (finding that the nexus test "may be unclear"), and *Okla. Gas*, 133 FERC ¶ 61,274 P 38 (same).[7] Br. 15-16.

However, in the 2008 Incentives Order, the Commission held that Dominion Virginia met the nexus requirement, "both as a package and for each individual project." Incentives Order P 48, JA 797. This Court and the D.C. Circuit have

[7] In suggesting that the nexus test "may be unclear," both *PJM* and *Oklahoma Gas* pointed to *Westar Energy, Inc.*, 122 FERC ¶ 61,268 (2008), as applying the nexus test to individual projects. *PJM*, 133 FERC ¶ 61,273 P 44 n.28; *Okla. Gas*, 133 FERC ¶ 61,274 P 38 n.58. In that case, however, Westar only proposed incentives for three projects, and the Commission found two ineligible, one that was already complete and in-service, *Westar*, 122 FERC ¶ 61,268 P 53, and one that the Commission had required to be constructed to mitigate Westar's market power. *Id*. PP 51-52. *See* Incentives Order P 41, 78, 101, 106, JA 795, 798, 813, 814. As only one project was eligible for incentives in *Westar*, the issue of aggregating projects to satisfy the nexus test was not presented.

found that parties reasonably rely on agencies to apply precedent consistently in the context of a particular proceeding or undertaking. *ARA Serv., Inc. v. NLRB*, 71 F.3d 129, 135-36 & n. 4 (4th Cir. 1995), held that it would be "manifestly unjust" to allow retroactive application of a new agency standard where, *inter alia*, "the Board expressly based its prior rulings in this case on the former rule," and "the parties presumably relied on that former rule and the Board's heretofore consistent application of it." Similarly, *Se. Mich. Gas Co. v. FERC*, 133 F.3d 34 (D.C. Cir. 1998), upheld FERC's determination not to apply a new standard to recovery of expansion capacity costs, on the ground that parties reasonably expected that the Commission would apply the rate policy existing when construction was undertaken. *Id*. at 38 (recognizing that "in some circumstances, parties are entitled to rely on the consistent application of administrative rules"). "So long as courts are permitted to consider parties' reliance on old rules in determining whether the retroactive application of a new rule is arbitrary and capricious, it follows that agencies may consider the benefits of doctrinal stability when deciding whether to apply new rules retroactively." *Id.*

The regulatory uncertainty of shifting standards at a late stage of the proceedings, moreover, has implications beyond this proceeding, potentially deterring development of future projects. *See* Rehearing Order P 12 & n.13, JA 966 (citing *Ne. Utils. Serv. Co.*, 124 FERC ¶ 61,044 P 62 (2008)). As recently

recognized in *N. Natural Gas Co. v. FERC*, No. 11-1240, slip op. at 6, 2012 WL 5907365, at *3 (D.C. Cir. Nov. 27, 2012), "an incentive tends to be less effective if the party extending it gains a reputation for sharp practice."

Last, North Carolina asserts that failing to apply the new policy precludes "retroactive relief" and therefore "meaningful judicial review" fails. *See* Br. 17. However, North Carolina relies upon cases concerning whether courts are empowered under particular state statutes to order retroactive relief from rate orders, not whether agency policies must be retroactively applied. Here, the Court possesses the authority to remand orders to the Commission for the purpose of correcting legal errors, which is the "retroactive relief" these courts require for "meaningful judicial review." *See Sw. Bell Tel. Co. v. Pub. Utils. Comm'n*, 615 S.W.2d 947, 955 (Tex. Ct. App. 1986) (adequate legal remedy exists where the "remedy of remand" is effective and "the agency must correct whatever errors it committed"); *State ex rel. Utils. Comm'n v. Conservation Council*, 320 S.E.2d 679, 686 (1984) (court is authorized to order retroactive refunds when the Commission makes an error of law in ratemaking); *Pennwalt Corp. v. Mich. Pub. Serv. Comm'n*, 311 N.W.2d 423, 425 (Mich. Ct. App. 1981) (court has authority upon finding rates unjust and unreasonable to order refunds). As demonstrated above, however, it is not legal error for the Commission to fail to apply new policy to a pending case where, as here, the Commission provides an adequate explanation.

B. North Carolina's Arguments Based On "Economically Efficient Transmission" Misinterpret The Statute.

North Carolina argues that the Commission erred in granting incentives to the Garrisonville, Pleasant View, and the Proactive Transformer Replacement Projects "due to the fact that these projects were not economically efficient." Br. 18. In North Carolina's view, the reference in section 219(b) of the Federal Power Act, 16 U.S.C. § 824s(b), to "economically efficient transmission" requires that the Commission limit incentives to the "most economically efficient" project, i.e., the least-cost alternative. *See* Br. 20-21 (Commission erred in granting incentives to Garrisonville and Pleasant View underground facilities when less expensive overhead facilities could have been built); Br. 24 (Proactive Transformer Replacement Project not shown to be "economically efficient" where "a less costly approach might well be available").

The statute, however, imposes no requirement that the Commission identify least cost alternatives before granting incentives for particular projects. In section 219, Congress directed the Commission to use its ratemaking authority "to address a national problem – the decline in transmission investment that is threatening reliability and imposing billions of dollars in congestion costs on consumers." Order No. 679-A P 37. To reverse this historical trend, section 219 directed the Commission to establish by rule incentive-based rate treatments "for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered

power by reducing transmission congestion." Order No. 679 P 5 (quoting Federal Power Act section 219(a), 16 U.S.C. § 824s(a)); Order No. 679-A P 3. Section 219(b) provides that "the rule," i.e., Order No. 679, shall "'promote reliable and economically efficient transmission and generation of electricity by promoting capital investment. . . .'" Order No. 679 P 14 (quoting Federal Power Act section 219(b)(1), 16 U.S.C. § 824s(b)(1)) (emphasis added by Commission). Congress's enactment of section 219 reflected its determination that incentives generally can spur transmission investment which will, in turn, provide the benefits to consumers of a robust transmission system. Order No. 679 P 65. In Order No. 679, the Commission found that "[c]onsistent with the overall goals of Congress in [the Energy Policy Act of 2005], and in particular its focus on reliability improvements and relief of transmission congestion, we interpret section 219 to promote capital investment in a wide range of infrastructure investments that can have either reliability or congestion benefits." Order No. 679 P 42.

Section 219 complements other provisions of the Energy Policy Act of 2005 which likewise emphasize enhancing reliability and reducing congestion. Order No. 679 P 41. New section 215 of the Federal Power Act, 16 U.S.C. § 824*o*, provided that the Commission would, for the first time in its history, approve and enforce mandatory reliability standards for the nation's power grid. Order No. 679 P 41. *See Alcoa, Inc. v. FERC*, 564 F.3d 1342, 1344 (D.C. Cir. 2009). New

section 216, 16 U.S.C. § 824p, directed the Secretary of Energy to identify areas of the nation in which transmission congestion adversely affects consumers and gave the Commission certain permitting authority to ensure timely construction of transmission facilities in those areas. Order No. 679 P 41. *See Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 310 (4th Cir. 2009).

Accordingly, in Order No. 679, the Commission required that an applicant "demonstrate that the facilities for which its seeks incentives either ensure reliability or reduce the cost of delivered power by reducing transmission congestion consistent with the requirements of section 219, that there is a nexus between the incentive sought and the investment being made, and that the resulting rates are just and reasonable." *Id.* P 76. In evaluating incentive applications pursuant to Order No. 679, the Commission has distinguished these requirements from a possible requirement similar to that favored by North Carolina, stating:

> [T]here is no requirement in section 219 or Order No. 679 that an applicant must demonstrate that its project is the best of all possible projects, or that it has explored every conceivable alternative before deciding to proceed with a particular project. While these considerations might be relevant in a Certificate of Public Convenience and Necessity proceeding, regional planning process, or stakeholder process, they are not relevant to determining whether a project either ensures reliability or reduces congestion or to evaluating whether a nexus exists between the incentive and the applicant's investment.

Cent. Me. Power Co., 125 FERC ¶ 61,182 P 45 (2008). *See also, e.g., Tallgrass Transmission, LLC*, 125 FERC ¶ 61,248 P 42 (2008) (in addressing arguments

regarding whether the projects were the "best solution," the Commission found that "it is the Commission's policy to review each request for incentives on its own merits and on a case-by-case basis" and therefore the Commission reviews "only whether these specific projects meet the requirements for incentives under Commission policy"); *ITC Great Plains, LLC*, 126 FERC ¶ 61,223 (2009) (same).[8] "FERC is not required to choose the best solution, only a reasonable one." *Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 703 (D.C. Cir. 2007). *See also ExxonMobil*, 487 F.3d at 955 (FERC need not adopt the best possible policy as long as agency acts within the scope of its discretion and reasonably explains its actions). Accordingly, here, the Incentives Order properly dealt only with the issue of whether the projects met the requirements of section 219 and Order No. 679. *See PJM Interconnection, L.L.C.*, 127 FERC ¶ 61,092 P 21 (2009) (finding that the Incentives Order dealt only with the issue of "whether a project satisfies the test to qualify for construction incentives").

[8] *But see Promoting Transmission Investment*, 141 FERC ¶ 61,129 PP 25-26. In this November 2012 Policy Statement, the Commission stated its expectation that future applicants for an incentive return on equity based on a project's risks and challenges would demonstrate that alternatives to the project have been, or will be, considered in either a relevant transmission planning process or another appropriate forum, as such a showing should help identify the demonstrable consumer benefits of the project.

C. North Carolina's Objections To Incentive Awards For The Five Individual Projects Are Without Merit.

In addition to the foregoing arguments, North Carolina also raises objections specific to the five individual projects, which, as discussed below, are without merit. In considering the merits of these claims, it is important to bear in mind the nature of the facilities involved in these projects, and their role in providing reliable, low-cost power to customers. Generally, PJM's Extra High Voltage transmission system, which includes Dominion Virginia's 500 kV system, delivers lower-cost power from sources in the western side of the PJM footprint to serve load centers on the eastern side. Dominion Exh. 8 at 35, JA 231. Delivery of power from this system includes transformation (by 500/230 kV transformers) from 500 kV lines to 230 kV facilities for further delivery to customers. *Id*. Most major metropolitan areas are generation-deficient and thus they depend on the Extra High Voltage transmission system to transport electricity into the area to meet energy needs reliably. *Id*. at 2, JA 198. Further, congestion on the system can require the use of higher-cost generation on the restricted side of the constraint to meet customer demand, resulting in congestion costs. *Id*. at 35, JA 231.

1. The Lexington Tie And Idylwood Projects: Projects Already Under Construction

The Commission found that the Lexington Tie (installing a modified 230 kV bus tie arrangement) and Idylwood (conductor replacement) Projects were PJM

Regional Transmission Expansion Plan baseline projects that were entitled to a rebuttable presumption that they ensure reliability or reduce congestion. Incentives Order PP 26, 32, JA 790, 792. Substantial evidence supported this presumption. *Id*. The Lexington Tie Project would lessen the possibility of a voltage collapse affecting the Lexington-Cloverdale 500 kV line, which is a major regional interface of the Eastern Interconnection, acting as a gateway for western PJM power to reach eastern PJM loads. *Id*. P 33, JA 792-93; Dominion Exh. 7 at 44, JA 183. The Idylwood Project would lessen the risk of a cascading outage in the Arlington region of northern Virginia, which could potentially affect over 130,000 customers. *Id*. P 34, JA 793; Dominion Exh. 7 at 49, JA 188. This significant impact on regional reliability also supported finding a nexus between the incentives and investments, because the projects were not routine. Incentives Order PP 100-01, 110, JA 812-13, 815.

North Carolina contends that incentives for these Projects were unwarranted because Dominion Virginia was already "moving forward" with these projects before incentives were awarded. Br. 25. In North Carolina's view, "[i]ncentives are intended to promote the construction of transmission facilities that otherwise would not be built." *Id*. at 26. Order No. 679, however, expressly rejected the argument that an applicant must show that it would not build the facilities but for the incentive. Order No. 679 P 48. The "but for" test erects an evidentiary hurdle

that could only be satisfied in rare cases. Order No. 679-A P 25. In enacting the Energy Policy Act of 2005, Congress understood that there are many impediments to new transmission projects, including siting concerns, financing challenges and rate recovery issues. *Id*. PP 25-26. It is therefore unreasonable to require that an applicant show that facilities would not be constructed but for the removal of a single impediment, i.e., enhanced cash flow through an enhanced return on equity. *Id*. P 25.

The Commission, therefore, distinguishes between projects that are ineligible for incentives because they are already complete, Rehearing Order P 14, JA 966 (citing *Commonwealth Edison Co*., 122 FERC ¶ 61,037 PP 30-37 (2008)), and projects that remain eligible for incentives even if they are nearly compete. *Id*. (citing *Ne. Utils.*, 126 FERC ¶ 61,052 P 26). *See also* Incentives Order PP 101, 110, JA 813, 815.

An applicant cannot show risks and challenges to satisfy the nexus requirement when the project is completed, as those risks and challenges no longer exist. *Commonwealth Edison*, 122 FERC ¶ 61,037 P 36. In contrast, the requisite nexus can be demonstrated for projects that are not yet complete. *Ne. Utils*., 126 FERC ¶ 61,052 P 26 (citing Order No. 679 P 35) (noting that incentives "may help in securing financing for the project or may bring the project to completion sooner than originally anticipated"). For example, in *Connecticut Dep't*, 593 F.3d at 34,

the Court affirmed Commission orders granting return on equity incentive adders to projects that would be completed without the incentives, for the purpose of "*accelerating* completion of the projects." In *Northeast Utils.*, the Commission found that the utility requested an advanced technology incentive in a timely fashion, even though the utility had decided to use the technology nearly three years prior, because "it was still facing challenges relating to the installation of the advanced technology, i.e., during the construction phase of the Project's development." 126 FERC ¶ 61,052 P 26.

Like *Northeast Utils.*, Dominion Virginia was still facing challenges in the construction phases of these projects at the time it applied for incentives. Rehearing Order P 14, JA 966. The Lexington Tie Project would involve substantial risks during construction because the work would be completed at an in-service substation. Incentives Order P 100, JA 812 (citing Dominion Exh. 8 at 64, JA 260). In order to perform the work necessary to complete the project, various parts of the substation must be taken out of service. *Id*. (citing Dominion Exh. 8 at 64, JA 260). Under ordinary circumstances, the surrounding transmission system could absorb the voltage drop if one item (line or transformer) went out of service, but if a second item went off-line (an N-2 contingency), substantial reliability problems would arise. Dominion Exh. 8 at 64, JA 260. With equipment out of service for construction, any fault would cause the station to be in

an N-2 contingency state. *Id*. Consequently, the system would experience a severe voltage dip which might result in outages for a significant number of customers. *Id*. The Commission found that the risk of a double contingency loss condition with voltage drop during the construction period was significant and demonstrated the level of construction risk involved in the project. Incentives Order P 100, JA 812 (citing Dominion Virginia Application for Incentives at 28, JA 40). Although some construction at the site had commenced by the time the Incentives Order issued in August 2008, most of the construction, including removing equipment from service, was scheduled to occur after the Incentives Order issued. *See* Dominion Exh. 8 at 66, JA 262 (setting out the construction schedule for the Lexington Tie Project).

Likewise, the Idylwood Project was being built in a very dense urban environment, located along the most heavily-used portion of the Washington & Old Dominion Trail, and it was likely to be the target of significant opposition. *Id*. PP 106, 110, JA 814-15; Dominion Exh. 7 at 49, JA 188. Dominion's first two applications for road crossing permits had been denied, and its third application was still pending at the time that incentives were granted. Incentives Order P 106, JA 814. Construction of the project was not scheduled to commence until permits were obtained. *See* Dominion Exh. 8 at 71, JA 267. Thus, the Commission

concluded that the project would involve substantial risks. Incentives Order P 110, JA 815.

Indeed, siting and regulatory concerns, such as local opposition to projects and the need for siting approval, are among the many potential impediments to transmission investment that Congress sought to mitigate in enacting the Energy Policy Act of 2005. Order No. 679-A PP 25-26; Order No. 679 PP 24, 41. Thus, for purposes of meeting the nexus test, the risks and challenges faced by transmission projects include siting issues, as well as regulatory and political risks. Incentives Order P 45 (citing *Balt. Gas*, 120 FERC ¶ 61,084 P 52).

North Carolina asserts that remand is required because the Commission stated that North Carolina objected to incentives for completed projects, rather than projects under construction. *See* Br. 25-27. As the Commission responded to that argument, made by other parties to the proceeding, as discussed above, any inaccuracy with regard to the description of North Carolina's arguments is at most harmless error and provides no basis for remand.

2. The Garrisonville and Pleasant View Projects: "Local" Projects With Higher-Cost Underground Facilities

Both Garrisonville and Pleasant View involved construction of a 230 kV transmission line and substation. Incentives Order PP 11, 12, JA 785-86. North Carolina objects to incentives for Garrisonville and Pleasant View on the grounds that they were local reliability projects which failed to meet the nexus test, and the

projects were constructed with costly underground facilities instead of less costly overhead facilities. Br. 19-21.

North Carolina's argument regarding the alleged presence of less-costly alternatives was addressed *supra* at Section II.B. Moreover, the Commission has found that costs associated with underground construction are not ineligible for incentives. *Ne. Utils.*, 124 FERC ¶ 61,044 P 85. Underground construction of facilities can, as here, *inter alia*, make project siting possible and practical by facilitating acceptance of the project in highly concentrated urban areas. *Id.* As North Carolina notes, the Garrisonville Project faced considerable local opposition to overhead lines. Br. 19. Likewise, Pleasant View faced considerable opposition which required repeatedly changing routing options, particularly with respect to utilizing portions of the Washington & Old Dominion Trail. Incentives Order PP 79-80, JA 806-07; Dominion Exh. 8 at 49, JA 245.

Further, North Carolina does not lack a forum for its concerns regarding cost responsibility for the Garrisonville and Pleasant View Projects. North Carolina intervened in a proceeding challenging Dominion Virginia's 2010 rate filing including the costs of the Garrisonville and Pleasant View Projects.[9] *See Old*

[9] Dominion has a formula rate for transmission service within the Dominion Virginia Power zone of PJM that is included in the PJM tariff. *See Va. Elec. & Power Co.*, 123 FERC ¶ 61,098 (2008). Dominion makes annual filings of the costs to be included in the formula rate. *Id*. P 30.

Dominion Elec. Coop. v. Va. Elec.& Power Co., 133 FERC ¶ 61,009 PP 1, 6, 9, 11, 13 (2010). The parties have settled the issue of the rate treatment for Garrisonville and Pleasant View, except that they reserved for briefing the appropriate rate treatment for the incremental costs of underground construction. *Old Dominion Elec. Coop. v. Va. Elec. & Power Co*., 139 FERC ¶ 61,137 PP 8-9 (2012).

North Carolina's arguments regarding the local nature of the projects fare no better. First, North Carolina is jurisdictionally barred from raising this argument as it failed to raise this argument on rehearing. *See Mt. Lookout-Mt. Nebo Prop. Prot. Ass'n*, 143 F.3d at 173. *See also supra* pp. 25-28 (discussing statutory rehearing requirement). In fact, North Carolina expressly asserted on rehearing that its arguments were *not* based on the local nature of the facilities, but rather on the presence of a less-expensive alternative (overhead lines). *See* Rehearing Request at 9, JA 955.

In any event, contrary to North Carolina's assertions, Br. 19, 21, projects built to address reliability issues arising from local load growth may be eligible for incentives. "As long as the project ensures reliability or reduces the cost of delivered power by reducing congestion, regardless of where it is located on the nationwide transmission grid, the project is eligible for incentive ratemaking." Order No. 679 P 49. The Commission has approved incentives for projects needed to reliably serve load growth in a fast-growing region. Incentives Order P 39 &

n.20, JA 794 (citing *S. Cal. Edison Co.*, 121 FERC ¶ 61,168 P 39 & n.71 (2007) (approving incentives for project to address local load growth), *reh'g denied*, 123 FERC ¶ 61,293 P 46 (2008)).

Here, the Commission, as well as the Virginia State Corporation Commission, determined that both the Garrisonville and Pleasant View Projects were needed to ensure reliability due to local load growth. Incentives Order P 39, JA 794 (citing Dominion Exh. 7 at 33, JA 172; Dominion Exh. 8 at 40, JA 236; Final Order – Garrisonville 230 kV Transmission Line, Dominion Exh. 16 at 7, JA 375); Incentives Order P 40, JA 794 (citing Dominion Exh. 7 at 33, JA 172; Dominion Exh. 8 at 46, JA 242). *See also* Final Order – Pleasant View-Hamilton 230 kV Transmission Line and Hamilton Substation, Dominion Exh. 17 at 7-9, JA 387-89.

Furthermore, the Commission found that the projects also would enhance regional reliability. Incentives Order PP 77, 85, JA 806, 808. This finding was not "conclusory" as to Garrisonville, Br. 19, but rather was supported by substantial evidence. *See* Incentives Order P 77, JA 806 (citing Dominion Exh. 7 at 28-30, JA 167-69 and Dominion Exh. 8 at 39-45, JA 235-41). The Garrisonville Project would permit Dominion to maintain service to approximately 32,000 customers in the event of an outage on one circuit of the 230 kV system between Possum Point and Fredericksburg. Dominion Exh. 8 at 40-41, JA 236-37. Further, the

Garrisonville Project would allow for future expansion of the transmission network in the region, permitting the addition of either two 500 kV lines or one 500 kV line and another double circuit 230 kV tower line in the existing right of way. *Id*. at 41, JA 237. Likewise, the Pleasant View Project would provide future reliability benefits to the broader Northern Virginia region through networking with an existing radial line, which will resolve line overloading issues and provide an additional parallel path to support future growth in Northern Virginia. Incentives Order P 85, JA 808 (citing Dominion Exh. 8 at 48, JA 244).

3. The Proactive Transformer Replacement Project

The Proactive Transformer Replacement Project involved the proactive replacement of aging 500/230 kV transformers in nine transformer banks in seven substations before they fail, rather than following the standard industry practice of replacing transformers only when they fail. Incentives Order P 9, JA 785. Each of these transformers is a key component of Dominion's Extra High Voltage system, which forms the backbone of the regional transmission grid. Dominion Exh. 8 at 26, JA 222. Replacing identified high risk transformers proactively would significantly reduce congestion costs, and would also enhance reliability, as loss of a transformer could potentially cause significant service interruptions. Incentives Order P 37, JA 793. Dominion Virginia further demonstrated that the project is not routine because of its significant cost ($110 million) and scope, and the fact

that it deviated from the standard industry practice of replacing transformers only when they fail, thereby improving reliability and reducing congestion. *Id*. P 72, JA 804 (citing Dominion Exh. 7 at 26, JA 165).

North Carolina asserts that "the record did not suggest that the proposed investment represented an economically efficient solution to a potential problem." Br. 21. *See also id*. at 24. As discussed above, however, section 219's reference to economic efficiency does not impose a statutory requirement that the Commission identify least cost alternatives. *See supra*, Section II.B.

Moreover, the record contained substantial evidence that the Project was addressing a significant risk to the transmission system. *See* Incentives Order PP 37, 72, JA 793, 804 (citing Dominion Exh. 7 at 26, JA 165 and Dominion Exh. 8 at 36, JA 232). Older transformers experience higher failure rates. Dominion Exh. 7 at 23, JA 162. The targeted transformers averaged over 30 years in age, and were nearing the end of their design life. Dominion Exh. 8 at 27-28, JA 223-24. *See also id*. at 29-30, JA 225-26 (listing vintages of targeted transformers). Analysis indicated that the majority of the targeted transformers were in marginal condition, and the existing spares were themselves aging. *Id*. at 29-30, JA 225-26. The probability of multiple transformer failures within one bank further increases for older transformers, because transformers in a single bank have similar design and operating history. *Id*. at 28, JA 224. Since there is only one dedicated spare

transformer per bank, the risk of having the bank out of service increases with age. *Id*. Lead times for replacing transformers of this voltage class (500/230kV) can take 18-24 months and each replacement unit costs several million dollars. *Id*.

The unplanned loss of a single 500/230 kV transformer can dramatically impact regional reliability. Dominion Exh. 8 at 27, JA 223. Here, loss of a transformer could potentially cause Dominion Virginia to curtail service to customers in the Shenandoah Valley, South Hampton Roads, Lexington, or Carson areas. Incentives Order P 37, JA 793. If the 500/230 kV transformers at the Loudoun and Ox Substations failed, the Northern Virginia area could potentially lose 25-50 percent of its bulk power transformation capability. Dominion Exh. 8 at 34, JA 230. Loss of the transformers at the Dooms and Valley Substations would deprive the Shenandoah Valley area of Virginia of 66 percent of its 500/230 kV transformation capability. *Id*. at 35, JA 231. The loss of the Yadkin Substation transformers would deprive the South Hampton Roads load area of 33 percent of its transformation capability. *Id*. In the event of an outage, the Lexington area would receive no electrical service until transformers were replaced. *Id*. The loss of transformers at the Carson Substation would curtail service to a major industrial customer. *Id*.

Further, PJM's analyses demonstrated that outages and/or equipment degradation of 500/230 kV transformers would result in significant annual losses.

Incentives Order P 37, JA 793. *See also* Dominion Exh. 8 at 27, JA 223 (failures and/or equipment degradation of 500/230 kV transmission transformers in PJM over the last few years have resulted in hundreds of millions of dollars in congestion costs, as well as adversely impacting system reliability). There was no record data regarding historic outages or equipment degradation associated specifically with the targeted transformers, Br. 22, because those transformers were still operating at the time. However, Dominion Virginia, in collaboration with PJM, developed an innovative approach (the Probabilistic Risk Assessment analysis) to evaluate the risk and likelihood of loss associated with transformers on the system. Incentives Order P 37, JA 793. The Probabilistic Risk Analysis couples the consequences of a loss of a transformer with the likelihood of its loss. *Id*. The product of these inputs and risk is expressed in terms of annual risk exposure dollars. *See* Dominion Exh. 8 at 27, JA 223 (explaining analysis).

The Probabilistic Risk Analysis indicated that the annual congestion costs resulting from outages of the targeted transformers would range from $1.7 million to $29 million. *See* Incentives Order P 37 & n.17, JA 793 (citing Dominion Exh. 8 at 36, JA 232 (listing congestion costs associated with outages of the targeted transformers, based upon the Probabilistic Risk Analysis, Dominion Exh. 13 at 3-4, 6, JA 341-42, 344); Dominion Exh. 7 at 26, JA 165 (citing Dominion Exh. 13 at 3, JA 341)). Thus, the Commission reasonably rejected the argument that incentives

should be denied because the project was not necessary, or that the number of transformers replaced under the project should be limited, finding that Dominion Virginia had demonstrated that the project meets the nexus test and section 219 criteria. Incentives Order P 72, JA 804.

North Carolina points to the fact that this project was not approved as part of PJM's Regional Transmission Expansion Plan, and that PJM did not recommend the purchase of any additional spare transformers. Br. 23-24. The Commission granted incentives for this project precisely because the project went well beyond what is required under standard industry practice in avoiding major service disruptions and congestion, i.e., the project was not routine. *See* Incentives Order PP 37, 72, JA 793, 804. Because Dominion Virginia demonstrated that the project is not routine, "its inclusion or exclusion from PJM's [Regional Transmission Expansion Plan] is not dispositive." Incentives Order P 72, JA 804. In Order No. 679, the Commission did not make approval in a regional planning process a prerequisite for incentives. Rehearing Order P 15, JA 967 (citing Order No. 679 PP 57-58).

North Carolina complains that the Commission described the project as "replace[ment] of nine 500/230 kV transformers" rather than nine transformer banks, implying that the Commission was unaware of the parameters of the project. Br. 22. However, the Commission simply was echoing Dominion

Virginia's own description of the project in its application materials. *See* JA 28, 78, 162, 163, 165. Certainly, the Commission as well as Dominion Virginia was well aware of the actual scope of the project. *See, e.g.*, Incentives Order PP 9-10, 37-38, 68, 72, JA 785, 793, 803-04 (describing the significant expense ($110 million) and scope of the project). Further, Dominion Exh. 8 (cited Incentives Order P 37 n.17, JA 793), includes a list of all 32 individual transformers being replaced. *See* Dominion Exh. 8 at 29-30, JA 225-26.

* * * *

Last, North Carolina complains that the Commission failed to address any of the arguments North Carolina made in its Rehearing Request, except for arguments regarding a project no longer at issue. Br. 27-28. However, the Commission denied rehearing "based on the record on which the Commission relied in the [Incentives] Order when it applied the nexus test consistent with the then-existing precedent." Rehearing Order P 12, JA 965. "In the [Incentives] Order, the Commission found that the record was sufficient to justify granting the requested incentives. As discussed above, we accept that previous finding; therefore, an evidentiary hearing is unnecessary." Rehearing Order P 16, JA 967. Thus, in the Rehearing Order the Commission expressly relied upon and incorporated its prior findings in the Incentives Order. As demonstrated above, the Commission's findings in the Incentives Order regarding the challenged projects amply

demonstrate substantial evidence to support the award of incentives to Dominion Virginia.

CONCLUSION

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

REQUEST FOR ORAL ARGUMENT

Because this case presents significant issues of Commission policy and rate regulation, the Commission respectfully requests that oral argument be held in this case.

Respectfully submitted,

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December 10, 2012

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Case No. 12-1881 *North Carolina Utilities Commission v. FERC*

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P 32(a)(7)(B) because this brief contains 13,035 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in Microsoft Office Word 2003 14-point and Normal.

/s/ Lona T. Perry
Lona T. Perry
Attorney for Federal Energy
Regulatory Commission

December 10, 2012

ADDENDUM

STATUTES
AND
REGULATIONS

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STATUTES:

REGULATIONS:

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,

(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.

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

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

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

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

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

(d) Investigation of costs

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

(e) Short-term sales

(1) In this subsection:

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

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

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

(3) This section shall not apply to—

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

(B) an electric cooperative.

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

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

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

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

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.''

[1] See References in Text note below.

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

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

§ 824h. References to State boards by Commission

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

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

(b) Cooperation with State commissions

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

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

The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of public utilities. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may upon request from a State make available to such State as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement to the Commission by such State of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

(June 10, 1920, ch. 285, pt. II, § 209, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 853.)

The Energy Policy Act of 1992, referred to in subsec. (i)(2)(A)(III), (B)(i), is Pub. L. 102–486, Oct. 24, 1992, 106 Stat. 2776. For complete classification of this Act to the Code, see Short Title note set out under section 13201 of Title 42, The Public Health and Welfare and Tables.

AMENDMENTS

1992—Subsec. (a). Pub. L. 102–486, § 722(1), added subsec. (a) and struck out former subsec. (a) which related to determinations by Commission.

Subsec. (b). Pub. L. 102–486, § 722(1), struck out subsec. (b) which required applicants for orders to be ready, willing, and able to reimburse parties subject to such orders.

Subsec. (e). Pub. L. 102–486, § 722(2), amended subsec. (e) generally. Prior to amendment, subsec. (e) related to utilization of interconnection or wheeling authority in lieu of other authority and limitation of Commission authority.

Subsecs. (g) to (k). Pub. L. 102–486, § 722(3), added subsecs. (g) to (k).

STATE AUTHORITIES; CONSTRUCTION

Nothing in amendment by Pub. L. 102–486 to be construed as affecting or intending to affect, or in any way to interfere with, authority of any State or local government relating to environmental protection or siting of facilities, see section 731 of Pub. L. 102–486, set out as a note under section 796 of this title.

§ 824*l*. Information requirements

(a) Requests for wholesale transmission services

Whenever any electric utility, Federal power marketing agency, or any other person generating electric energy for sale for resale makes a good faith request to a transmitting utility to provide wholesale transmission services and requests specific rates and charges, and other terms and conditions, unless the transmitting utility agrees to provide such services at rates, charges, terms and conditions acceptable to such person, the transmitting utility shall, within 60 days of its receipt of the request, or other mutually agreed upon period, provide such person with a detailed written explanation, with specific reference to the facts and circumstances of the request, stating (1) the transmitting utility's basis for the proposed rates, charges, terms, and conditions for such services, and (2) its analysis of any physical or other constraints affecting the provision of such services.

(b) Transmission capacity and constraints

Not later than 1 year after October 24, 1992, the Commission shall promulgate a rule requiring that information be submitted annually to the Commission by transmitting utilities which is adequate to inform potential transmission customers, State regulatory authorities, and the public of potentially available transmission capacity and known constraints.

(June 10, 1920, ch. 285, pt. II, § 213, as added Pub. L. 102–486, title VII, § 723, Oct. 24, 1992, 106 Stat. 2919.)

STATE AUTHORITIES; CONSTRUCTION

Nothing in this section to be construed as affecting or intending to affect, or in any way to interfere with, authority of any State or local government relating to environmental protection or siting of facilities, see section 731 of Pub. L. 102–486, set out as a note under section 796 of this title.

§ 824m. Sales by exempt wholesale generators

No rate or charge received by an exempt wholesale generator for the sale of electric energy shall be lawful under section 824d of this title if, after notice and opportunity for hearing, the Commission finds that such rate or charge results from the receipt of any undue preference or advantage from an electric utility which is an associate company or an affiliate of the exempt wholesale generator. For purposes of this section, the terms ''associate company'' and ''affiliate'' shall have the same meaning as provided in section 16451 of title 42.[1]

(June 10, 1920, ch. 285, pt. II, § 214, as added Pub. L. 102–486, title VII, § 724, Oct. 24, 1992, 106 Stat. 2920; amended Pub. L. 109–58, title XII, § 1277(b)(2), Aug. 8, 2005, 119 Stat. 978.)

REFERENCES IN TEXT

Section 16451 of title 42, referred to in text, was in the original ''section 2(a) of the Public Utility Holding Company Act of 2005'' and was translated as reading ''section 1262'' of that Act, meaning section 1262 of subtitle F of title XII of Pub. L. 109–58, to reflect the probable intent of Congress, because subtitle F of title XII of Pub. L. 109–58 does not contain a section 2 and section 1262 of subtitle F of title XII of Pub. L. 109–58 defines terms.

AMENDMENTS

2005—Pub. L. 109–58 substituted ''section 16451 of title 42'' for ''section 79b(a) of title 15''.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by Pub. L. 109–58 effective 6 months after Aug. 8, 2005, with provisions relating to effect of compliance with certain regulations approved and made effective prior to such date, see section 1274 of Pub. L. 109–58, set out as an Effective Date note under section 16451 of Title 42, The Public Health and Welfare.

STATE AUTHORITIES; CONSTRUCTION

Nothing in this section to be construed as affecting or intending to affect, or in any way to interfere with, authority of any State or local government relating to environmental protection or siting of facilities, see section 731 of Pub. L. 102–486, set out as a note under section 796 of this title.

§ 824n. Repealed. Pub. L. 109–58, title XII, § 1232(e)(3), Aug. 8, 2005, 119 Stat. 957

Section, Pub. L. 106–377, § 1(a)(2) [title III, § 311], Oct. 27, 2000, 114 Stat. 1441, 1441A–80, related to authority regarding formation and operation of regional transmission organizations.

§ 824*o*. Electric reliability

(a) Definitions

For purposes of this section:

(1) The term ''bulk-power system'' means—

(A) facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof); and

(B) electric energy from generation facilities needed to maintain transmission system reliability.

The term does not include facilities used in the local distribution of electric energy.

[1] See References in Text note below.

(2) The terms ''Electric Reliability Organization'' and ''ERO'' mean the organization certified by the Commission under subsection (c) of this section the purpose of which is to establish and enforce reliability standards for the bulk-power system, subject to Commission review.

(3) The term ''reliability standard'' means a requirement, approved by the Commission under this section, to provide for reliable operation of the bulk-power system. The term includes requirements for the operation of existing bulk-power system facilities, including cybersecurity protection, and the design of planned additions or modifications to such facilities to the extent necessary to provide for reliable operation of the bulk-power system, but the term does not include any requirement to enlarge such facilities or to construct new transmission capacity or generation capacity.

(4) The term ''reliable operation'' means operating the elements of the bulk-power system within equipment and electric system thermal, voltage, and stability limits so that instability, uncontrolled separation, or cascading failures of such system will not occur as a result of a sudden disturbance, including a cybersecurity incident, or unanticipated failure of system elements.

(5) The term ''Interconnection'' means a geographic area in which the operation of bulk-power system components is synchronized such that the failure of one or more of such components may adversely affect the ability of the operators of other components within the system to maintain reliable operation of the facilities within their control.

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

(7) The term ''regional entity'' means an entity having enforcement authority pursuant to subsection (e)(4) of this section.

(8) The term ''cybersecurity incident'' means a malicious act or suspicious event that disrupts, or was an attempt to disrupt, the operation of those programmable electronic devices and communication networks including hardware, software and data that are essential to the reliable operation of the bulk power system.

(b) Jurisdiction and applicability

(1) The Commission shall have jurisdiction, within the United States, over the ERO certified by the Commission under subsection (c) of this section, any regional entities, and all users, owners and operators of the bulk-power system, including but not limited to the entities described in section 824(f) of this title, for purposes of approving reliability standards established under this section and enforcing compliance with this section. All users, owners and operators of the bulk-power system shall comply with reliability standards that take effect under this section.

(2) The Commission shall issue a final rule to implement the requirements of this section not later than 180 days after August 8, 2005.

(c) Certification

Following the issuance of a Commission rule under subsection (b)(2) of this section, any person may submit an application to the Commission for certification as the Electric Reliability Organization. The Commission may certify one such ERO if the Commission determines that such ERO—

(1) has the ability to develop and enforce, subject to subsection (e)(2) of this section, reliability standards that provide for an adequate level of reliability of the bulk-power system; and

(2) has established rules that—

(A) assure its independence of the users and owners and operators of the bulk-power system, while assuring fair stakeholder representation in the selection of its directors and balanced decisionmaking in any ERO committee or subordinate organizational structure;

(B) allocate equitably reasonable dues, fees, and other charges among end users for all activities under this section;

(C) provide fair and impartial procedures for enforcement of reliability standards through the imposition of penalties in accordance with subsection (e) of this section (including limitations on activities, functions, or operations, or other appropriate sanctions);

(D) provide for reasonable notice and opportunity for public comment, due process, openness, and balance of interests in developing reliability standards and otherwise exercising its duties; and

(E) provide for taking, after certification, appropriate steps to gain recognition in Canada and Mexico.

(d) Reliability standards

(1) The Electric Reliability Organization shall file each reliability standard or modification to a reliability standard that it proposes to be made effective under this section with the Commission.

(2) The Commission may approve, by rule or order, a proposed reliability standard or modification to a reliability standard if it determines that the standard is just, reasonable, not unduly discriminatory or preferential, and in the public interest. The Commission shall give due weight to the technical expertise of the Electric Reliability Organization with respect to the content of a proposed standard or modification to a reliability standard and to the technical expertise of a regional entity organized on an Interconnection-wide basis with respect to a reliability standard to be applicable within that Interconnection, but shall not defer with respect to the effect of a standard on competition. A proposed standard or modification shall take effect upon approval by the Commission.

(3) The Electric Reliability Organization shall rebuttably presume that a proposal from a regional entity organized on an Interconnection-wide basis for a reliability standard or modification to a reliability standard to be applicable on an Interconnection-wide basis is just, reasonable, and not unduly discriminatory or preferential, and in the public interest.

(4) The Commission shall remand to the Electric Reliability Organization for further consideration a proposed reliability standard or a modification to a reliability standard that the Commission disapproves in whole or in part.

(5) The Commission, upon its own motion or upon complaint, may order the Electric Reliability Organization to submit to the Commission a proposed reliability standard or a modification to a reliability standard that addresses a specific matter if the Commission considers such a new or modified reliability standard appropriate to carry out this section.

(6) The final rule adopted under subsection (b)(2) of this section shall include fair processes for the identification and timely resolution of any conflict between a reliability standard and any function, rule, order, tariff, rate schedule, or agreement accepted, approved, or ordered by the Commission applicable to a transmission organization. Such transmission organization shall continue to comply with such function, rule, order, tariff, rate schedule or agreement accepted, approved, or ordered by the Commission until—

(A) the Commission finds a conflict exists between a reliability standard and any such provision;

(B) the Commission orders a change to such provision pursuant to section 824e of this title; and

(C) the ordered change becomes effective under this subchapter.

If the Commission determines that a reliability standard needs to be changed as a result of such a conflict, it shall order the ERO to develop and file with the Commission a modified reliability standard under paragraph (4) or (5) of this subsection.

(e) Enforcement

(1) The ERO may impose, subject to paragraph (2), a penalty on a user or owner or operator of the bulk-power system for a violation of a reliability standard approved by the Commission under subsection (d) of this section if the ERO, after notice and an opportunity for a hearing—

(A) finds that the user or owner or operator has violated a reliability standard approved by the Commission under subsection (d) of this section; and

(B) files notice and the record of the proceeding with the Commission.

(2) A penalty imposed under paragraph (1) may take effect not earlier than the 31st day after the ERO files with the Commission notice of the penalty and the record of proceedings. Such penalty shall be subject to review by the Commission, on its own motion or upon application by the user, owner or operator that is the subject of the penalty filed within 30 days after the date such notice is filed with the Commission. Application to the Commission for review, or the initiation of review by the Commission on its own motion, shall not operate as a stay of such penalty unless the Commission otherwise orders upon its own motion or upon application by the user, owner or operator that is the subject of such penalty. In any proceeding to review a penalty imposed under paragraph (1), the Commission, after notice and opportunity for hearing (which hearing may consist solely of the record before the ERO and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the penalty), shall by order affirm, set aside, reinstate, or modify the penalty, and, if appropriate, remand to the ERO for further proceedings. The Commission shall implement expedited procedures for such hearings.

(3) On its own motion or upon complaint, the Commission may order compliance with a reliability standard and may impose a penalty against a user or owner or operator of the bulk-power system if the Commission finds, after notice and opportunity for a hearing, that the user or owner or operator of the bulk-power system has engaged or is about to engage in any acts or practices that constitute or will constitute a violation of a reliability standard.

(4) The Commission shall issue regulations authorizing the ERO to enter into an agreement to delegate authority to a regional entity for the purpose of proposing reliability standards to the ERO and enforcing reliability standards under paragraph (1) if—

(A) the regional entity is governed by—

(i) an independent board;

(ii) a balanced stakeholder board; or

(iii) a combination independent and balanced stakeholder board.

(B) the regional entity otherwise satisfies the provisions of subsection (c)(1) and (2) of this section; and

(C) the agreement promotes effective and efficient administration of bulk-power system reliability.

The Commission may modify such delegation. The ERO and the Commission shall rebuttably presume that a proposal for delegation to a regional entity organized on an Interconnection-wide basis promotes effective and efficient administration of bulk-power system reliability and should be approved. Such regulation may provide that the Commission may assign the ERO's authority to enforce reliability standards under paragraph (1) directly to a regional entity consistent with the requirements of this paragraph.

(5) The Commission may take such action as is necessary or appropriate against the ERO or a regional entity to ensure compliance with a reliability standard or any Commission order affecting the ERO or a regional entity.

(6) Any penalty imposed under this section shall bear a reasonable relation to the seriousness of the violation and shall take into consideration the efforts of such user, owner, or operator to remedy the violation in a timely manner.

(f) Changes in Electric Reliability Organization rules

The Electric Reliability Organization shall file with the Commission for approval any proposed rule or proposed rule change, accompanied by an explanation of its basis and purpose. The Commission, upon its own motion or complaint, may propose a change to the rules of the ERO. A proposed rule or proposed rule change shall take effect upon a finding by the Commission, after notice and opportunity for comment, that

the change is just, reasonable, not unduly discriminatory or preferential, is in the public interest, and satisfies the requirements of subsection (c) of this section.

(g) Reliability reports

The ERO shall conduct periodic assessments of the reliability and adequacy of the bulk-power system in North America.

(h) Coordination with Canada and Mexico

The President is urged to negotiate international agreements with the governments of Canada and Mexico to provide for effective compliance with reliability standards and the effectiveness of the ERO in the United States and Canada or Mexico.

(i) Savings provisions

(1) The ERO shall have authority to develop and enforce compliance with reliability standards for only the bulk-power system.

(2) This section does not authorize the ERO or the Commission to order the construction of additional generation or transmission capacity or to set and enforce compliance with standards for adequacy or safety of electric facilities or services.

(3) Nothing in this section shall be construed to preempt any authority of any State to take action to ensure the safety, adequacy, and reliability of electric service within that State, as long as such action is not inconsistent with any reliability standard, except that the State of New York may establish rules that result in greater reliability within that State, as long as such action does not result in lesser reliability outside the State than that provided by the reliability standards.

(4) Within 90 days of the application of the Electric Reliability Organization or other affected party, and after notice and opportunity for comment, the Commission shall issue a final order determining whether a State action is inconsistent with a reliability standard, taking into consideration any recommendation of the ERO.

(5) The Commission, after consultation with the ERO and the State taking action, may stay the effectiveness of any State action, pending the Commission's issuance of a final order.

(j) Regional advisory bodies

The Commission shall establish a regional advisory body on the petition of at least two-thirds of the States within a region that have more than one-half of their electric load served within the region. A regional advisory body shall be composed of one member from each participating State in the region, appointed by the Governor of each State, and may include representatives of agencies, States, and provinces outside the United States. A regional advisory body may provide advice to the Electric Reliability Organization, a regional entity, or the Commission regarding the governance of an existing or proposed regional entity within the same region, whether a standard proposed to apply within the region is just, reasonable, not unduly discriminatory or preferential, and in the public interest, whether fees proposed to be assessed within the region are just, reasonable, not unduly discriminatory or preferential, and in the public interest and any other responsibilities requested by the Commission. The Commission may give deference to the advice of any such regional advisory body if that body is organized on an Interconnection-wide basis.

(k) Alaska and Hawaii

The provisions of this section do not apply to Alaska or Hawaii.

(June 10, 1920, ch. 285, pt. II, §215, as added Pub. L. 109–58, title XII, §1211(a), Aug. 8, 2005, 119 Stat. 941.)

STATUS OF ERO

Pub. L. 109–58, title XII, §1211(b), Aug. 8, 2005, 119 Stat. 946, provided that: ''The Electric Reliability Organization certified by the Federal Energy Regulatory Commission under section 215(c) of the Federal Power Act [16 U.S.C. 824*o*(c)] and any regional entity delegated enforcement authority pursuant to section 215(e)(4) of that Act [16 U.S.C. 824*o*(e)(4)] are not departments, agencies, or instrumentalities of the United States Government.''

ACCESS APPROVALS BY FEDERAL AGENCIES

Pub. L. 109–58, title XII, §1211(c), Aug. 8, 2005, 119 Stat. 946, provided that: ''Federal agencies responsible for approving access to electric transmission or distribution facilities located on lands within the United States shall, in accordance with applicable law, expedite any Federal agency approvals that are necessary to allow the owners or operators of such facilities to comply with any reliability standard, approved by the [Federal Energy Regulatory] Commission under section 215 of the Federal Power Act [16 U.S.C. 824*o*], that pertains to vegetation management, electric service restoration, or resolution of situations that imminently endanger the reliability or safety of the facilities.''

§ 824p. Siting of interstate electric transmission facilities

(a) Designation of national interest electric transmission corridors

(1) Not later than 1 year after August 8, 2005, and every 3 years thereafter, the Secretary of Energy (referred to in this section as the ''Secretary''), in consultation with affected States, shall conduct a study of electric transmission congestion.

(2) After considering alternatives and recommendations from interested parties (including an opportunity for comment from affected States), the Secretary shall issue a report, based on the study, which may designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national interest electric transmission corridor.

(3) The Secretary shall conduct the study and issue the report in consultation with any appropriate regional entity referred to in section 824*o* of this title.

(4) In determining whether to designate a national interest electric transmission corridor under paragraph (2), the Secretary may consider whether—

(A) the economic vitality and development of the corridor, or the end markets served by the corridor, may be constrained by lack of adequate or reasonably priced electricity;

(B)(i) economic growth in the corridor, or the end markets served by the corridor, may

the change is just, reasonable, not unduly discriminatory or preferential, is in the public interest, and satisfies the requirements of subsection (c) of this section.

(g) Reliability reports

The ERO shall conduct periodic assessments of the reliability and adequacy of the bulk-power system in North America.

(h) Coordination with Canada and Mexico

The President is urged to negotiate international agreements with the governments of Canada and Mexico to provide for effective compliance with reliability standards and the effectiveness of the ERO in the United States and Canada or Mexico.

(i) Savings provisions

(1) The ERO shall have authority to develop and enforce compliance with reliability standards for only the bulk-power system.

(2) This section does not authorize the ERO or the Commission to order the construction of additional generation or transmission capacity or to set and enforce compliance with standards for adequacy or safety of electric facilities or services.

(3) Nothing in this section shall be construed to preempt any authority of any State to take action to ensure the safety, adequacy, and reliability of electric service within that State, as long as such action is not inconsistent with any reliability standard, except that the State of New York may establish rules that result in greater reliability within that State, as long as such action does not result in lesser reliability outside the State than that provided by the reliability standards.

(4) Within 90 days of the application of the Electric Reliability Organization or other affected party, and after notice and opportunity for comment, the Commission shall issue a final order determining whether a State action is inconsistent with a reliability standard, taking into consideration any recommendation of the ERO.

(5) The Commission, after consultation with the ERO and the State taking action, may stay the effectiveness of any State action, pending the Commission's issuance of a final order.

(j) Regional advisory bodies

The Commission shall establish a regional advisory body on the petition of at least two-thirds of the States within a region that have more than one-half of their electric load served within the region. A regional advisory body shall be composed of one member from each participating State in the region, appointed by the Governor of each State, and may include representatives of agencies, States, and provinces outside the United States. A regional advisory body may provide advice to the Electric Reliability Organization, a regional entity, or the Commission regarding the governance of an existing or proposed regional entity within the same region, whether a standard proposed to apply within the region is just, reasonable, not unduly discriminatory or preferential, and in the public interest, whether fees proposed to be assessed within the region are just, reasonable, not unduly discriminatory or preferential, and in the public interest and any other responsibilities requested by the Commission. The Commission may give deference to the advice of any such regional advisory body if that body is organized on an Interconnection-wide basis.

(k) Alaska and Hawaii

The provisions of this section do not apply to Alaska or Hawaii.

(June 10, 1920, ch. 285, pt. II, § 215, as added Pub. L. 109–58, title XII, § 1211(a), Aug. 8, 2005, 119 Stat. 941.)

STATUS OF ERO

Pub. L. 109–58, title XII, § 1211(b), Aug. 8, 2005, 119 Stat. 946, provided that: ''The Electric Reliability Organization certified by the Federal Energy Regulatory Commission under section 215(c) of the Federal Power Act [16 U.S.C. 824*o*(c)] and any regional entity delegated enforcement authority pursuant to section 215(e)(4) of that Act [16 U.S.C. 824*o*(e)(4)] are not departments, agencies, or instrumentalities of the United States Government.''

ACCESS APPROVALS BY FEDERAL AGENCIES

Pub. L. 109–58, title XII, § 1211(c), Aug. 8, 2005, 119 Stat. 946, provided that: ''Federal agencies responsible for approving access to electric transmission or distribution facilities located on lands within the United States shall, in accordance with applicable law, expedite any Federal agency approvals that are necessary to allow the owners or operators of such facilities to comply with any reliability standard, approved by the [Federal Energy Regulatory] Commission under section 215 of the Federal Power Act [16 U.S.C. 824*o*], that pertains to vegetation management, electric service restoration, or resolution of situations that imminently endanger the reliability or safety of the facilities.''

§ 824p. Siting of interstate electric transmission facilities

(a) Designation of national interest electric transmission corridors

(1) Not later than 1 year after August 8, 2005, and every 3 years thereafter, the Secretary of Energy (referred to in this section as the ''Secretary''), in consultation with affected States, shall conduct a study of electric transmission congestion.

(2) After considering alternatives and recommendations from interested parties (including an opportunity for comment from affected States), the Secretary shall issue a report, based on the study, which may designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national interest electric transmission corridor.

(3) The Secretary shall conduct the study and issue the report in consultation with any appropriate regional entity referred to in section 824*o* of this title.

(4) In determining whether to designate a national interest electric transmission corridor under paragraph (2), the Secretary may consider whether—

(A) the economic vitality and development of the corridor, or the end markets served by the corridor, may be constrained by lack of adequate or reasonably priced electricity;

(B)(i) economic growth in the corridor, or the end markets served by the corridor, may

be jeopardized by reliance on limited sources of energy; and

(ii) a diversification of supply is warranted;

(C) the energy independence of the United States would be served by the designation;

(D) the designation would be in the interest of national energy policy; and

(E) the designation would enhance national defense and homeland security.

(b) Construction permit

Except as provided in subsection (i) of this section, the Commission may, after notice and an opportunity for hearing, issue one or more permits for the construction or modification of electric transmission facilities in a national interest electric transmission corridor designated by the Secretary under subsection (a) of this section if the Commission finds that—

(1)(A) a State in which the transmission facilities are to be constructed or modified does not have authority to—

(i) approve the siting of the facilities; or

(ii) consider the interstate benefits expected to be achieved by the proposed construction or modification of transmission facilities in the State;

(B) the applicant for a permit is a transmitting utility under this chapter but does not qualify to apply for a permit or siting approval for the proposed project in a State because the applicant does not serve end-use customers in the State; or

(C) a State commission or other entity that has authority to approve the siting of the facilities has—

(i) withheld approval for more than 1 year after the filing of an application seeking approval pursuant to applicable law or 1 year after the designation of the relevant national interest electric transmission corridor, whichever is later; or

(ii) conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible;

(2) the facilities to be authorized by the permit will be used for the transmission of electric energy in interstate commerce;

(3) the proposed construction or modification is consistent with the public interest;

(4) the proposed construction or modification will significantly reduce transmission congestion in interstate commerce and protects or benefits consumers;

(5) the proposed construction or modification is consistent with sound national energy policy and will enhance energy independence; and

(6) the proposed modification will maximize, to the extent reasonable and economical, the transmission capabilities of existing towers or structures.

(c) Permit applications

(1) Permit applications under subsection (b) of this section shall be made in writing to the Commission.

(2) The Commission shall issue rules specifying—

(A) the form of the application;

(B) the information to be contained in the application; and

(C) the manner of service of notice of the permit application on interested persons.

(d) Comments

In any proceeding before the Commission under subsection (b) of this section, the Commission shall afford each State in which a transmission facility covered by the permit is or will be located, each affected Federal agency and Indian tribe, private property owners, and other interested persons, a reasonable opportunity to present their views and recommendations with respect to the need for and impact of a facility covered by the permit.

(e) Rights-of-way

(1) In the case of a permit under subsection (b) of this section for electric transmission facilities to be located on property other than property owned by the United States or a State, if the permit holder cannot acquire by contract, or is unable to agree with the owner of the property to the compensation to be paid for, the necessary right-of-way to construct or modify the transmission facilities, the permit holder may acquire the right-of-way by the exercise of the right of eminent domain in the district court of the United States for the district in which the property concerned is located, or in the appropriate court of the State in which the property is located.

(2) Any right-of-way acquired under paragraph (1) shall be used exclusively for the construction or modification of electric transmission facilities within a reasonable period of time after the acquisition.

(3) The practice and procedure in any action or proceeding under this subsection in the district court of the United States shall conform as nearly as practicable to the practice and procedure in a similar action or proceeding in the courts of the State in which the property is located.

(4) Nothing in this subsection shall be construed to authorize the use of eminent domain to acquire a right-of-way for any purpose other than the construction, modification, operation, or maintenance of electric transmission facilities and related facilities. The right-of-way cannot be used for any other purpose, and the right-of-way shall terminate upon the termination of the use for which the right-of-way was acquired.

(f) Compensation

(1) Any right-of-way acquired pursuant to subsection (e) of this section shall be considered a taking of private property for which just compensation is due.

(2) Just compensation shall be an amount equal to the fair market value (including applicable severance damages) of the property taken on the date of the exercise of eminent domain authority.

(g) State law

Nothing in this section precludes any person from constructing or modifying any transmission facility in accordance with State law.

(h) Coordination of Federal authorizations for transmission facilities

(1) In this subsection:

(A) The term ''Federal authorization'' means any authorization required under Federal law in order to site a transmission facility.

(B) The term ''Federal authorization'' includes such permits, special use authorizations, certifications, opinions, or other approvals as may be required under Federal law in order to site a transmission facility.

(2) The Department of Energy shall act as the lead agency for purposes of coordinating all applicable Federal authorizations and related environmental reviews of the facility.

(3) To the maximum extent practicable under applicable Federal law, the Secretary shall coordinate the Federal authorization and review process under this subsection with any Indian tribes, multistate entities, and State agencies that are responsible for conducting any separate permitting and environmental reviews of the facility, to ensure timely and efficient review and permit decisions.

(4)(A) As head of the lead agency, the Secretary, in consultation with agencies responsible for Federal authorizations and, as appropriate, with Indian tribes, multistate entities, and State agencies that are willing to coordinate their own separate permitting and environmental reviews with the Federal authorization and environmental reviews, shall establish prompt and binding intermediate milestones and ultimate deadlines for the review of, and Federal authorization decisions relating to, the proposed facility.

(B) The Secretary shall ensure that, once an application has been submitted with such data as the Secretary considers necessary, all permit decisions and related environmental reviews under all applicable Federal laws shall be completed—

(i) within 1 year; or

(ii) if a requirement of another provision of Federal law does not permit compliance with clause (i), as soon thereafter as is practicable.

(C) The Secretary shall provide an expeditious pre-application mechanism for prospective applicants to confer with the agencies involved to have each such agency determine and communicate to the prospective applicant not later than 60 days after the prospective applicant submits a request for such information concerning—

(i) the likelihood of approval for a potential facility; and

(ii) key issues of concern to the agencies and public.

(5)(A) As lead agency head, the Secretary, in consultation with the affected agencies, shall prepare a single environmental review document, which shall be used as the basis for all decisions on the proposed project under Federal law.

(B) The Secretary and the heads of other agencies shall streamline the review and permitting of transmission within corridors designated under section 503 of the Federal Land Policy and Management Act[1] (43 U.S.C. 1763) by fully taking into account prior analyses and decisions relating to the corridors.

(C) The document shall include consideration by the relevant agencies of any applicable criteria or other matters as required under applicable law.

(6)(A) If any agency has denied a Federal authorization required for a transmission facility, or has failed to act by the deadline established by the Secretary pursuant to this section for deciding whether to issue the authorization, the applicant or any State in which the facility would be located may file an appeal with the President, who shall, in consultation with the affected agency, review the denial or failure to take action on the pending application.

(B) Based on the overall record and in consultation with the affected agency, the President may—

(i) issue the necessary authorization with any appropriate conditions; or

(ii) deny the application.

(C) The President shall issue a decision not later than 90 days after the date of the filing of the appeal.

(D) In making a decision under this paragraph, the President shall comply with applicable requirements of Federal law, including any requirements of—

(i) the National Forest Management Act of 1976 (16 U.S.C. 472a et seq.);

(ii) the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.);

(iii) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.);

(iv) the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.); and

(v) the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.).

(7)(A) Not later than 18 months after August 8, 2005, the Secretary shall issue any regulations necessary to implement this subsection.

(B)(i) Not later than 1 year after August 8, 2005, the Secretary and the heads of all Federal agencies with authority to issue Federal authorizations shall enter into a memorandum of understanding to ensure the timely and coordinated review and permitting of electricity transmission facilities.

(ii) Interested Indian tribes, multistate entities, and State agencies may enter the memorandum of understanding.

(C) The head of each Federal agency with authority to issue a Federal authorization shall designate a senior official responsible for, and dedicate sufficient other staff and resources to ensure, full implementation of the regulations and memorandum required under this paragraph.

(8)(A) Each Federal land use authorization for an electricity transmission facility shall be issued—

(i) for a duration, as determined by the Secretary, commensurate with the anticipated use of the facility; and

(ii) with appropriate authority to manage the right-of-way for reliability and environmental protection.

(B) On the expiration of the authorization (including an authorization issued before August 8,

[1] So in original. Probably should be followed by ''of 1976''.

2005), the authorization shall be reviewed for renewal taking fully into account reliance on such electricity infrastructure, recognizing the importance of the authorization for public health, safety, and economic welfare and as a legitimate use of Federal land.

(9) In exercising the responsibilities under this section, the Secretary shall consult regularly with—

(A) the Federal Energy Regulatory Commission;

(B) electric reliability organizations (including related regional entities) approved by the Commission; and

(C) Transmission Organizations approved by the Commission.

(i) Interstate compacts

(1) The consent of Congress is given for three or more contiguous States to enter into an interstate compact, subject to approval by Congress, establishing regional transmission siting agencies to—

(A) facilitate siting of future electric energy transmission facilities within those States; and

(B) carry out the electric energy transmission siting responsibilities of those States.

(2) The Secretary may provide technical assistance to regional transmission siting agencies established under this subsection.

(3) The regional transmission siting agencies shall have the authority to review, certify, and permit siting of transmission facilities, including facilities in national interest electric transmission corridors (other than facilities on property owned by the United States).

(4) The Commission shall have no authority to issue a permit for the construction or modification of an electric transmission facility within a State that is a party to a compact, unless the members of the compact are in disagreement and the Secretary makes, after notice and an opportunity for a hearing, the finding described in subsection (b)(1)(C) of this section.

(j) Relationship to other laws

(1) Except as specifically provided, nothing in this section affects any requirement of an environmental law of the United States, including the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(2) Subsection (h)(6) of this section shall not apply to any unit of the National Park System, the National Wildlife Refuge System, the National Wild and Scenic Rivers System, the National Trails System, the National Wilderness Preservation System, or a National Monument.

(k) ERCOT

This section shall not apply within the area referred to in section 824k(k)(2)(A) of this title.

(June 10, 1920, ch. 285, pt. II, § 216, as added Pub. L. 109–58, title XII, § 1221(a), Aug. 8, 2005, 119 Stat. 946.)

REFERENCES IN TEXT

The National Forest Management Act of 1976, referred to in subsec. (h)(6)(D)(i), is Pub. L. 94–588, Oct. 22, 1976, 90 Stat. 2949, as amended, which enacted sections 472a, 521b, 1600, and 1611 to 1614 of this title, amended sections 500, 515, 516, 518, 576b, and 1601 to 1610 of this title, repealed sections 476, 513, and 514 of this title, and enacted provisions set out as notes under sections 476, 513, 528, 594–2, and 1600 of this title. For complete classification of this Act to the Code, see Short Title of 1976 Amendment note set out under section 1600 of this title and Tables.

The Endangered Species Act of 1973, referred to in subsec. (h)(6)(D)(ii), is Pub. L. 93–205, Dec. 28, 1973, 87 Stat. 884, as amended, which is classified principally to chapter 35 (§ 1531 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1531 of this title and Tables.

The Federal Water Pollution Control Act, referred to in subsec. (h)(6)(D)(iii), is act June 30, 1948, ch. 758, as amended generally by Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 816, which is classified generally to chapter 26 (§ 1251 et seq.) of Title 33, Navigation and Navigable Waters. For complete classification of this Act to the Code, see Short Title note set out under section 1251 of Title 33 and Tables.

The National Environmental Policy Act of 1969, referred to in subsecs. (h)(6)(D)(iv) and (j), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) 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 4321 of Title 42 and Tables.

The Federal Land Policy and Management Act of 1976, referred to in subsec. (h)(6)(D)(v), is Pub. L. 94–579, Oct. 21, 1976, 90 Stat. 2743, as amended, which is classified principally to chapter 35 (§ 1701 et seq.) of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 1701 of Title 43 and Tables.

§ 824q. Native load service obligation

(a) Definitions

In this section:

(1) The term ''distribution utility'' means an electric utility that has a service obligation to end-users or to a State utility or electric cooperative that, directly or indirectly, through one or more additional State utilities or electric cooperatives, provides electric service to end-users.

(2) The term ''load-serving entity'' means a distribution utility or an electric utility that has a service obligation.

(3) The term ''service obligation'' means a requirement applicable to, or the exercise of authority granted to, an electric utility under Federal, State, or local law or under long-term contracts to provide electric service to end-users or to a distribution utility.

(4) The term ''State utility'' means a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or a corporation that is wholly owned, directly or indirectly, by any one or more of the foregoing, competent to carry on the business of developing, transmitting, utilizing, or distributing power.

(b) Meeting service obligations

(1) Paragraph (2) applies to any load-serving entity that, as of August 8, 2005—

(A) owns generation facilities, markets the output of Federal generation facilities, or holds rights under one or more wholesale contracts to purchase electric energy, for the purpose of meeting a service obligation; and

(B) by reason of ownership of transmission facilities, or one or more contracts or service agreements for firm transmission service,

FERC RULEMAKING ON LONG-TERM TRANSMISSION RIGHTS IN ORGANIZED MARKETS

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

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

(a) Definition of electric utility or person

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

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

(2) is located—

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

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

(b) Protection of transmission contracts

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

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

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

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

§ 824s. Transmission infrastructure investment

(a) Rulemaking requirement

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

(b) Contents

The rule shall—

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

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

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

(4) allow recovery of—

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

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

(c) Incentives

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

(d) Just and reasonable rates

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

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

§ 824t. Electricity market transparency rules

(a) In general

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

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

(3) The Commission may—

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

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

(4) In carrying out this section, the Commission shall consider the degree of price transparency provided by existing price publishers and providers of trade processing services, and shall rely on such publishers and services to the maximum extent possible. The Commission may establish an electronic information system if it determines that existing price publications are

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

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

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

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

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

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

Subpart G—Transmission Infrastructure Investment Provisions

§ 35.35 Transmission infrastructure investment.

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

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

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

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

(d) *Incentive-based rate treatments for transmission infrastructure investment.* The Commission will authorize any incentive-based rate treatment, as discussed in this paragraph (d), for transmission infrastructure investment, provided that the proposed incentive-based rate treatment is just and reasonable and not unduly discriminatory or preferential. A public utility's request for one or more incentive-based rate treatments, to be made in a filing pursuant to section 205 of the Federal Power Act, or in a petition for a declaratory order that precedes a filing pursuant to section 205, must include a detailed explanation of how the proposed rate treatment complies with the requirements of section 219 of the Federal Power Act and a demonstration that the proposed rate treatment is just, reasonable, and not unduly discriminatory or preferential. The applicant must demonstrate that the facilities for which it seeks incentives either ensure reliability or reduce the cost of delivered power by reducing transmission congestion consistent with the

requirements of section 219, that the *total* package of incentives is tailored to address the demonstrable risks or challenges faced by the applicant in undertaking the project, and that resulting rates are just and reasonable. For purposes of this paragraph (d), incentive-based rate treatment means any of the following:

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

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

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

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

(iv) Hypothetical capital structure;

(v) Accelerated depreciation used for rate recovery;

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

(vii) Deferred cost recovery; and

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

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

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

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

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

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

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

(h) *FERC–730, Report of transmission investment activity.* Public utilities that have been granted incentive rate treatment for specific transmission projects must file FERC–730 on an annual basis beginning with the calendar year incentive rate treatment is granted by the Commission. Such filings are due by April 18 of the following calendar year and are due April 18 each year thereafter. The following information must be filed:

(1) In dollar terms, actual transmission investment for the most recent

calendar year, and projected, incremental investments for the next five calendar years;

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

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

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

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

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

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

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

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

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

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

§ 35.36 Generally.

(a) For purposes of this subpart:

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

(2) *Category 1 Sellers* means wholesale power marketers and wholesale power producers that own or control 500 MW or less of generation in aggregate per region; that do not own, operate or control transmission facilities other than limited equipment necessary to connect individual generating facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888, FERC Stats. & Regs. ¶ 31,036); that are not affiliated with anyone that owns, operates or controls transmission facilities in the same region as the seller's generation assets; that are not affiliated with a franchised public utility in the same region as the seller's generation assets; and that do not raise other vertical market power issues.

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

(4) *Inputs to electric power production* means intrastate natural gas transportation, intrastate natural gas storage or distribution facilities; sites for generation capacity development; physical coal supply sources and ownership of or control over who may access transportation of coal supplies.

(5) *Franchised public utility* means a public utility with a franchised service obligation under State law.

(6) *Captive customers* means any wholesale or retail electric energy customers served by a franchised public utility under cost-based regulation.

(7) *Market-regulated power sales affiliate* means any power seller affiliate other than a franchised public utility, including a power marketer, exempt wholesale generator, qualifying facility

CERTIFICATE OF SERVICE

I certify that on December 10, 2012, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Lona T. Perry
Signature

December 10, 2012
Date