ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

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

No. 12-1158

SOUTHWEST POWER POOL, INC.,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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DECEMBER 17, 2012
FINAL BRIEF: FEBRUARY 5, 2013

CIRCUIT RULE 28(A)(1) CERTIFICATE

A. Parties and Amici

To counsel's knowledge, the parties and intervenors before this Court (in addition to Petitioner Southwest Power Pool, Inc. and Respondent Federal Energy Regulatory Commission) and before the Federal Energy Regulatory Commission in the underlying docket are as stated in the Brief of Petitioner.

B. Rulings Under Review

1. Order on Petition for Declaratory Order, *Midwest Independent Transmission Operator, Inc.*, Docket No. EL11-34, 136 FERC ¶ 61,010 (July 1, 2011) ("Declaratory Order"), R. 73, JA 275; and

2. Order on Rehearing, *Midwest Independent Transmission Operator, Inc.*, Docket No. EL11-34, 138 FERC ¶ 61,055 (Jan. 26, 2012) ("Rehearing Order"), R. 84, JA 373.

C. Related Cases

This case has not previously been before this Court or any other court. Counsel is not aware of any other related cases pending before this or any other court.

/s/ *Carol J. Banta*
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GLOSSARY

Agreement	Joint Operating Agreement between Southwest Pool and Midwest Operator
Commission or FERC	Respondent Federal Energy Regulatory Commission
Declaratory Order	Order on Petition for Declaratory Order, *Midwest Independent Transmission Operator, Inc.*, 136 FERC ¶ 61,010 (July 1, 2011), R. 73, JA 275
Entergy Arkansas	Entergy Arkansas, Inc.
FERC Orders	Declaratory Order and Rehearing Order
FPA	Federal Power Act
Midwest Operator	Intervenor (in support of Respondent) Midwest Independent Transmission System Operator, Inc., a regional transmission organization serving fifteen states and one Canadian province
Rehearing Order	Order on Rehearing, *Midwest Independent Transmission Operator, Inc.*, 138 FERC ¶ 61,055 (Jan. 26, 2012), R. 84, JA 373
Southwest Intervenors	Intervenors (in support of Petitioner) American Electric Power Service Corporation; Arkansas Electric Cooperative Corporation; The Empire District Electric Company; Kansas City Power & Light Company; KCP&L Greater Missouri Operations Company; Mid-Kansas Electric Company, LLC; Sunflower Electric Power Corporation; and Nebraska Public Power District
Southwest Pool	Petitioner Southwest Power Pool, Inc., a regional transmission organization serving members in nine states

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

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SOUTHWEST POWER POOL, INC.,
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V.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Assuming jurisdiction, whether the Federal Energy Regulatory Commission ("Commission" or "FERC") reasonably interpreted a capacity-sharing provision in a joint operating agreement between two neighboring regional transmission system operators, to allow each operator access to the other's transmission capacity for the purpose of providing network service.

COUNTERSTATEMENT OF JURISDICTION

The Court lacks jurisdiction to review the FERC orders being challenged here. In addition to satisfying the requirements of Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), for judicial review of FERC rulings, Petitioner Southwest Power Pool, Inc. ("Southwest Pool") and its supporting intervenors must satisfy the requirements of Article III of the United States Constitution. As set forth more fully in Part I.A of the Argument, *infra*, Southwest Pool and the intervenors lack standing because their claimed injuries are speculative and hypothetical. For the same reasons, as set forth more fully in Part I.B of the Argument, their arguments are not ripe for review. In addition, the intervenors' arguments that go beyond the scope of the narrow contract interpretation issue are jurisdictionally barred under Section 313(b) of the Federal Power Act, as set forth more fully in Part I.C of the Argument.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes are contained in the attached Addendum.

INTRODUCTION

This case involves a contract interpretation dispute between two regional transmission organizations, regarding each party's access to transmission capacity on the other's system.

Petitioner Southwest Pool is a regional transmission organization with members in nine states. *See Sw. Power Pool, Inc.*, 106 FERC ¶ 61,110, at PP 1, 5

(2004). Intervenor Midwest Independent Transmission System Operator, Inc. ("Midwest Operator") is a regional transmission organization comprising utilities in fifteen states and one Canadian province. *See Pub. Serv. Comm'n of Wis. v. FERC*, 545 F.3d 1058, 1059 (D.C. Cir. 2008) (describing Midwest Operator's region). Southwest Pool and Midwest Operator coordinate operations of their neighboring transmission systems under a Joint Operating Agreement (the "Agreement").

The instant dispute between these regional operators arose in connection with state regulatory proceedings concerning the withdrawal of Entergy Arkansas, Inc., a transmission-owning utility serving retail load in Arkansas, from the multi-state Entergy system. In discussions about possible successor arrangements for Entergy Arkansas, the two regional operators disagreed as to the interpretation of a transmission capacity-sharing provision under the Agreement.

Midwest Operator sought a declaratory order from the Commission resolving the interpretation of that provision. In the challenged orders, the Commission determined that the Agreement would allow available transmission capacity to be shared between the regional systems, to provide network transmission service to Entergy Arkansas, in the event that Entergy Arkansas became a member of Midwest Operator. *Midwest Indep. Transmission Sys.*

Operator, Inc., 136 FERC ¶ 61,010 ("Declaratory Order"), R. 73, JA 275, *reh'g denied*, 138 FERC ¶ 61,055 (2012) ("Rehearing Order"), R. 84, JA 373.[1]

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

Section 201 of the Federal Power Act ("FPA" or "Act") gives the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. 16 U.S.C. §§ 824(a)-(b). This grant of jurisdiction is comprehensive and exclusive. *See generally New York v. FERC*, 535 U.S. 1 (2002) (discussing statutory framework and FERC jurisdiction). All rates for or in connection with jurisdictional sales and transmission services are subject to FERC review to assure they are just and reasonable, and not unduly discriminatory or preferential. FPA § 205(a), (b), (e), 16 U.S.C. § 824d(a), (b), (e).

The Commission's efforts to foster wholesale electricity competition over broader geographic areas in recent decades have led to the creation of independent system operators and regional transmission organizations. *See Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 536-37 (2008). These

[1] "R." refers to a record item. "JA" refers to the Joint Appendix page number. "P" refers to the internal paragraph number within a FERC order. "Pool Br." refers to the Opening Brief of Petitioner Southwest Power Pool, Inc.; "Int. Br." refers to the Joint Brief of Intervenors Supporting Petitioner.

independent regional entities operate the transmission grid on behalf of transmission-owning member utilities. *See NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 130 S. Ct. 693, 697 & n.1 (2010) (explaining responsibilities of regional system operators). Both Southwest Pool and Midwest Operator are FERC-approved regional transmission organizations. *See Sw. Power Pool, Inc.*, 109 FERC ¶ 61,009 (2004), *on reh'g*, 110 FERC ¶ 61,137 (2005); *Midwest Indep. Transmission Sys. Operator, Inc.*, 97 FERC ¶ 61,326 (2001), *on reh'g*, 103 FERC ¶ 61,169 (2003).

II. THE COMMISSION PROCEEDINGS AND ORDERS

A. Background

The Agreement. Midwest Operator and Southwest Pool entered into the Agreement in connection with the latter's application to become a FERC-approved regional transmission organization. *See Sw. Power Pool, Inc.*, 106 FERC ¶ 61,110, at P 63 (requiring Southwest Pool to have a joint operating agreement with the neighboring Midwest Operator), *cited in* Declaratory Order at P 8 n.17, JA 279. The instant dispute centers on a single provision of the Agreement, Section 5.2, which states as follows:

> **Sharing Contract Path Capacity.** If the Parties have contract paths to the same entity, the combined contract path capacity will be made available for use by both Parties. This will not create new contract paths for either Party that did not previously exist. [Southwest Pool] will not be able to deal directly with companies with which it does not physically or contractually interconnect and the [Midwest Operator]

> will not be able to deal directly with companies with which it does not physically or contractually interconnect.

Declaratory Order at P 11, JA 280.

Entergy Arkansas. As noted above, this dispute between two regional operators arose in connection with the planned departure of Entergy Arkansas from the Entergy system. Since the 1950s, the Entergy affiliates (and their predecessors) have operated an integrated electric system spanning several southern states. *See Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 42 (2003). In 2005, however, Entergy Arkansas gave notice that it would terminate its participation in the Entergy system agreement, effective December 18, 2013. *See Council of City of New Orleans v. FERC*, 692 F.3d 172, 173 (D.C. Cir. 2012) (affirming Commission orders that allowed the withdrawal). The Commission made clear that it would review Entergy Arkansas's post-withdrawal operating arrangements, such as transmission operations and wholesale electricity transactions, in a later proceeding. *See id.* at 177.

In 2010, the Arkansas Public Service Commission initiated a proceeding to manage the process of choosing Entergy Arkansas's successor arrangement after withdrawal from the Entergy system. During discussions among state regulators, Entergy Arkansas, Southwest Pool, and Midwest Operator, the two regional transmission organizations disagreed as to the interpretation of Section 5.2 of the Joint Operating Agreement — specifically, whether Midwest Operator would be

able to use the transmission capacity of Southwest Pool's interconnections (with Midwest Operator's system and with the Entergy system) if Entergy Arkansas joined Midwest Operator.[2]

Interconnections. The Entergy transmission system interconnects with Midwest Operator's transmission system in New Madrid, Missouri, where Entergy Arkansas and Ameren Corporation ("Ameren"), a transmission-owning member of Midwest Operator, share transformer capacity allowing approximately 1,000 megawatts of tie capability. *See* Declaratory Order at P 3, JA 276. The Entergy system also has 41 direct connections with Southwest Pool's transmission system, capable of transferring up to 14,100 megawatts. *See id.* at P 4, JA 277. The transmission systems of Southwest Pool and Midwest Operator meet via Southwest Pool's interconnections with transmission facilities of Ameren and another Midwest Operator member, providing a combined transfer capability between the two regional systems of approximately 6,900 megawatts. *See id.*

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[2] Though other Entergy operating companies may also decide to join Midwest Operator, the Commission made clear that its ruling "only addresses the application of Section 5.2 to a scenario where Entergy Arkansas becomes a transmission-owning member of [Midwest Operator]." Declaratory Order at P 1 n.1, JA 275; *see also id.* at P 60 n.109 (Midwest Operator's petition "lacks the necessary factual foundation" for the Commission to determine whether Section 5.2 would apply to other Entergy companies, if they were to join Midwest Operator, and the petition did not seek such a determination), JA 303.

B. Declaratory Order

In April 2011, Midwest Operator filed a petition before the Commission, seeking a declaratory order confirming that the transmission capacity-sharing provision of the Agreement would apply to Entergy Arkansas if it became a transmission-owning member of Midwest Operator.

On July 1, 2011, the Commission issued its Declaratory Order, which granted Midwest Operator's petition. As set forth more fully in the Argument, *infra*, the Commission interpreted Section 5.2 of the Agreement, based on its language and context and consistent with the course of performance, as providing for capacity-sharing on physical or contractual interconnections with transmission-owning members of Southwest Pool or Midwest Operator. Declaratory Order at PP 60-63, JA 303-05. The Commission also noted that the regional operators had an obligation under the Agreement to negotiate in good faith over revisions proposed by either party. *Id.* at P 64, JA 305. The Commission further determined that its decision on the narrow question of contract interpretation was not premature, as it would remove uncertainty and allow the parties to move forward with discussions about Entergy Arkansas's successor arrangements and any necessary revisions to the Joint Operating Agreement. *Id.* at P 65, JA 305-06.

Finally, the Commission declined to address arguments raised by various commenters that went beyond the scope of the contract interpretation, including

concerns about "potential impacts" of Entergy Arkansas's joining Midwest Operator. *Id.* at P 67, JA 307. The Commission anticipated that such concerns "would be raised and addressed in the filings required to implement any decision by Entergy Arkansas to join [Midwest Operator] as a transmission-owning member." *Id.*

C. Rehearing Order

Southwest Pool filed a timely request for rehearing. R. 77, JA 324. Several other parties, including the Southwest Intervenors,[3] also filed timely requests for rehearing and/or for clarification. *See* R. 74, 76, 80.

On January 26, 2012, the Commission denied those requests in its Rehearing Order. The Commission affirmed its interpretation of Section 5.2 of the Agreement based on its language and context. Rehearing Order at PP 18-19, JA 381. The Commission further explained that principles of contract interpretation favor course of performance over usage of trade and course of dealing, and concluded that course of dealing evidence, even if considered, would support the Commission's interpretation. *Id.* at PP 20-24, JA 381-83. The

[3] The Southwest Intervenors are the following parties who intervened in this appeal and filed a joint brief ("Int. Br.") in support of Southwest Pool: American Electric Power Service Corporation; Arkansas Electric Cooperative Corporation; The Empire District Electric Company; Kansas City Power & Light Company; KCP&L Greater Missouri Operations Company; Mid-Kansas Electric Company, LLC; Sunflower Electric Power Corporation; and Nebraska Public Power District.

Commission again declined to rule on matters outside the narrow question of contract interpretation. *See id.* at PP 30, 33, JA 386-87, 388. The Commission repeatedly emphasized that the door remained open to potential changes to the Agreement, noting the parties' obligation to negotiate in good faith as to any revisions that either party might propose. *See id.* at PP 10, 30, 33, JA 377, 386-87, 388.

This appeal followed.

SUMMARY OF ARGUMENT

The Commission reasonably interpreted the capacity-sharing provision. Based on a careful review of the contractual language, its context, and extrinsic evidence, the Commission determined that the Agreement would allow Midwest Operator to use shared capacity to provide network service to Entergy Arkansas if it were a member of Midwest Operator's system. In so doing, the Commission properly rejected Southwest Pool's narrow interpretation of Section 5.2 as applying only to point-to-point transmission service for interchange transactions.

First, however, the Court lacks jurisdiction over this appeal. Southwest Pool and Southwest Intervenors cannot establish Article III standing because their asserted injuries are speculative; the Commission issued a narrow, contingent declaratory ruling that will apply only if Entergy Arkansas becomes a member of Midwest Operator. To join that regional transmission organization, Entergy

Arkansas would have to file for Commission approval, initiating a proceeding in which the Commission could address parties' concerns about implementation of that decision and other impacts. For the same reasons, the issues raised in this appeal also are not ripe for judicial review. Moreover, Southwest Intervenors' arguments are beyond the scope of Southwest Pool's petition for review on the narrow issue of contract interpretation, and thus are barred under the Federal Power Act.

Assuming jurisdiction, the Commission reasonably interpreted the contract, beginning with the language in Section 5.2 of the Agreement and the context in which that provision operates. The Commission determined that the term "entity" includes regional system members and that "contract path" is not limited to point-to-point transmission agreements, but — taken with the section's reference to physical or contractual connections — is broad enough to include network transmission service to system members. The Commission further found that its interpretation was appropriate in the context of an agreement between regional system operators, who primarily provide network service to their members' loads.

The Commission also appropriately considered the course of performance, which is deemed the most important extrinsic evidence under general principles of contract interpretation. In particular, the Commission found that Midwest Operator previously used available capacity on Southwest Pool's system to serve

the network load of a Midwest Operator member. Having discerned a reasonable interpretation of the contract based on the most preferred sources (language, context, and course of performance), the Commission reasonably chose not to rely upon the least preferred, usage of trade, or upon course of dealing. In any event, the Commission noted that the evidence on course of dealing would support its interpretation of Section 5.2 of the Agreement, as that section was taken directly from another joint operating agreement that was designed to address network service to regional system members.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO CONSIDER THE CHALLENGES RAISED BY SOUTHWEST POOL AND THE SOUTHWEST INTERVENORS

A. Southwest Pool And The Southwest Intervenors Lack Standing To Challenge The Declaratory Order

To obtain judicial review of a FERC order, a party must meet the requirements of Article III standing. *See, e.g.*, *Nat'l Comm. for the New River, Inc. v. FERC*, 433 F.3d 830, 832 (D.C. Cir. 2005); *N.Y. Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 586 (D.C. Cir. 2011) (party is not "aggrieved" within the meaning of FPA § 313(b), 16 U.S.C. § 825*l*(b), unless it can establish constitutional and prudential standing).[4] The "irreducible constitutional minimum"

[4] This standing requirement applies not only to the Petitioner Southwest Pool but also to the Southwest Intervenors. *See Ala. Mun. Distribs. Group v. FERC*,

for standing requires the party to have suffered (1) an "injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," (2) that has a "causal connection" with the challenged agency action, and (3) that likely "will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal citations and quotation marks omitted); *see also Bennett v. Spear*, 520 U.S. 154, 162 (1997).

Southwest Pool and its supporting Southwest Intervenors cannot show an "actual or imminent" injury as a basis for standing. In granting Midwest Operator's petition for a declaratory order, the Commission decided a narrow issue of contract interpretation for the purpose of a specific future contingency: Section 5.2 of the Agreement "*would* allow for the sharing of available transmission capacity between [Midwest Operator] and Entergy Arkansas and [Southwest Pool] and Entergy Arkansas *in the event that* Entergy Arkansas becomes a transmission-owning member of [Midwest Operator]." Declaratory Order at P 60 (emphases added), JA 303. *See also id.* at P 65 (referring to "Entergy Arkansas' potential decision to join [Midwest Operator] as a transmission-owning member"), JA 306.

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300 F.3d 877, 879 n.2 (D.C. Cir. 2002) (citing *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 538-39 (D.C. Cir. 1999)).

Before Entergy Arkansas could become a member of Midwest Operator, it would be required to seek Commission approval of that successor arrangement (in addition to various other approvals, including from Arkansas regulators). The Commission made this clear in its order approving Entergy Arkansas's withdrawal from the Entergy system, *see New Orleans*, 692 F.3d 177 (citing FERC order), and again in the Declaratory Order (at P 67, JA 307): "To the extent commenters are concerned with any potential impacts of Entergy Arkansas joining Midwest Operator, we anticipate that these issues would be raised and addressed in the filings required to implement any decision by Entergy Arkansas to join [Midwest Operator] as a transmission-owning member." *See also* Rehearing Order at P 30 ("The Petition did not seek guidance as to how [the capacity-sharing] provision would be implemented . . . ."), JA 387. No such filings have yet been made before the Commission.

In basing their challenges to the Commission's narrow and explicitly contingent determination on circumstances that may result *if* Entergy Arkansas decides to join Midwest Operator, *if* it successfully obtains all state and federal approvals to do so, *if* the parties to the Agreement do not negotiate pertinent revisions, *if* Midwest Operator uses shared capacity under Section 5.2 to integrate Entergy Arkansas into its network, and *if* various costs and consequences to other system members or customers follow from such use, Southwest Pool and

Southwest Intervenors "stack[] speculation upon hypothetical upon speculation, which does not establish an 'actual or imminent' injury." *N.Y. Reg'l Interconnect*, 634 F.3d at 587 (dismissing petition for review of FERC orders that adopted a new planning process for future transmission projects, where petitioner challenged the new criteria but had no active project proposal); *accord Occidental Permian Ltd. v. FERC*, 673 F.3d 1024, 1026-27 (D.C. Cir. 2012) (dismissing challenge based on speculation about future cost-shifting); *Wis. Pub. Power Inc. v. FERC*, 493 F.3d 239, 267-68 (D.C. Cir. 2007) (rejecting customers' standing to challenge orders that approved charges to transmission providers, because customers would not suffer any injury unless and until providers subsequently sought to pass through those charges to customers).

Nor can the parties claim standing based on any preclusive effect of the Commission's declaratory contract interpretation in a possible future proceeding. As this Court has previously explained, "it seems inescapable that neither standing nor ripeness could properly grow out of a harm predicated on a potential collateral estoppel effect. . . . To create standing out of the preclusive effect that *would* flow from granting standing is to create it ex nihilo." *Ala. Mun. Distribs. Group v. FERC*, 312 F.3d 470, 474 (D.C. Cir. 2002) (emphasis in original).

Accordingly, unless and until Entergy Arkansas files for Commission approval to join Midwest Operator as a transmission-owning member — initiating

a proceeding in which interested parties may raise concerns about implementation of the capacity-sharing provision, compensation for such sharing, and any other pertinent disputes, the resolution of which the Commission may determine (and this Court may review) based upon a full record — any potential injury is too speculative to provide standing.[5]

B. Challenges To The Commission's Declaratory Ruling Are Not Yet Ripe For Review

The arguments raised by Southwest Pool and Southwest Intervenors are likewise unripe for review. This Court finds an issue unripe for review when "the injury has not yet materialized" and there is no showing that a "delay of adjudication would inflict hardship." *Ala. Mun. Distribs. Group*, 312 F.3d at 473. In a case such as this, standing and ripeness "overlap significantly," as "[t]he contingencies that stand between the orders here and any injury to petitioners tend

[5] Commission counsel understands that, since the Commission issued the Orders challenged here, Entergy Arkansas has announced its decision to join Midwest Operator and moved forward in seeking the necessary state regulatory approvals. Nevertheless, Southwest Pool's and Southwest Intervenors' purported injury from the challenged Orders remains speculative. In *Wisconsin Public Power*, the transmission providers had in fact sought approval to pass through the disputed charges in a subsequent FERC proceeding (which had come to a conclusion before the Court decided *Wisconsin Public Power*) — nevertheless, the Court held that the petitioners did not have standing for purposes of the existing appeal: "The fact that the Commission approved a pass-through of [the charges] . . . in orders not currently before us does not alter our standing analysis." 493 F.3d at 269.

both to show the injury's lack of imminence and to render their claim unripe." *Id.* at 472.

Here, the Commission repeatedly emphasized the contingent nature of its determination:

> Regardless of whether there may be further disagreements among . . . [various] parties surrounding Entergy Arkansas' potential decision to join [Midwest Operator] as a transmission-owning member and whether the parties negotiate revisions to the [Agreement] in order to accommodate such a decision, we need not resolve all disputes that may exist between the parties, either presently or in the future, in order to act on the Petition, which is only focused on interpretation of one section of the [Agreement].

Declaratory Order at P 65, JA 306. Rather, if Entergy Arkansas sought to join Midwest Operator, all such issues could be addressed in the requisite approval proceeding: "To the extent commenters are concerned with any potential impacts of Entergy Arkansas joining [Midwest Operator], we anticipate that these issues would be raised and addressed in the filings required to implement any decision by Entergy Arkansas to join [Midwest Operator] as a transmission-owning member." *Id.* at P 67, JA 307.[6] *Cf. Flint Hills Res. Alaska, LLC v. FERC*, 627 F.3d 881, 889

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[6] The Commission also noted that parties would have later opportunities to object to actual operation under the transmission path-sharing provision:

> If and when Entergy Arkansas joins [Midwest Operator], and if and when [Midwest Operator] utilizes the provisions in the [Agreement], whatever they might be at such time, then parties may file a complaint . . . under section 206 of the Federal Power Act [16 U.S.C.

(D.C. Cir. 2010) ("a case may not be ripe for review when it would be inappropriate for a court to spend scarce resources on claims that, 'though predominantly legal in character, depend[] on future events that may never come to pass, or that may not occur in the form forecasted.'") (citation omitted); *Toca Producers v. FERC*, 411 F.3d 262, 266-67 (D.C. Cir. 2005) (finding appeal unripe where issue might be resolved in separate rate case).

The Commission's argument that this case is unripe for judicial review does not contradict its finding below that a declaratory ruling on the contract interpretation dispute was "not premature." Declaratory Order at P 65, JA 305. The Commission explained that an interlocutory determination of the meaning of Section 5.2 of the Agreement would "remove[] uncertainty" on a question "central to the resolution of any other issues that may need to be renegotiated" if Entergy Arkansas chose to join Midwest Operator, but the Commission recognized that further proceedings regarding such a move would be necessary and that additional disputes and implementation issues could arise. *See id.* at PP 65 & n.114, 67, JA 305-06, 307. This Court has declined judicial review in similar circumstances. *See, e.g.*, *Alaska v. FERC*, 980 F.2d 761, 765 (D.C. Cir. 1992) (finding no

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> § 824e] if they believe the terms of the [Agreement] are unjust, unreasonable, unduly discriminatory or preferential.

Rehearing Order at P 30 n.53, JA 386-87.

jurisdiction to review an interlocutory agency order on a question of contract interpretation, notwithstanding the prospect that resolution of that issue would narrow the dispute and assist in the negotiation process).

C. The Southwest Intervenors' Arguments Are Jurisdictionally Barred Under The Federal Power Act

While the Southwest Intervenors' arguments share the jurisdictional infirmities of Southwest Pool's challenge under the doctrines of standing and ripeness — indeed, with their focus on possible functional and cost impacts of hypothetical capacity-sharing (*see* Int. Br. 2-5), the Intervenors' concerns are even more conjectural — those arguments also are beyond the statutory limits on judicial review under the Federal Power Act.

Midwest Operator's petition for a declaratory order "sought only a determination as to whether the contract path sharing provision of section 5.2 would apply to Entergy Arkansas if it becomes a transmission-owning member of [Midwest Operator]." Rehearing Order at P 30, JA 386-87; *see also id.* ("The Petition did not seek guidance as to how such provision would be implemented nor whether compensation is necessary."). The Commission confined its order to that narrow issue, finding that it "need not resolve all disputes that may exist between the parties, either presently or in the future, in order to act on the Petition, which is only focused on interpretation of one section of the [Agreement]." Declaratory Order at P 65, JA 306. Accordingly, the Commission declined to rule on the

arguments raised by Southwest Intervenors and others that went beyond the scope of the contract interpretation. *See id.* at P 67, JA 307; Rehearing Order at PP 6 n.10, 33, JA 375, 388.

On appeal, Petitioner Southwest Pool likewise focuses narrowly on the only issue that the Commission decided below. The Southwest Intervenors admit (Int. Br. 6 n.17) that they seek to raise issues and arguments that Southwest Pool has not addressed on appeal — thus contravening the "well-established principle that, absent extraordinary circumstances, intervenors 'may join issue only on a matter that has been brought before the court by another party.'" *Ala. Mun. Distribs.*, 300 F.3d at 879 (quoting *Ill. Bell Tel. Co. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990)); *accord Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 37 n.4 (D.C. Cir. 1992); *see also Rio Grande Pipeline*, 178 F.3d at 539 (intervenors must petition for review directly if they desire to raise any additional issues).

The Southwest Intervenors invoke the Court's general discretion to consider additional issues that were "fully litigated in the agency proceedings." *Synovus Fin. Corp. v. Bd. of Governors of the Fed. Reserve Sys.*, 952 F.2d 426, 433 (D.C. Cir. 1991), *cited in* Int. Br. 6 n.17. Setting aside that the Commission expressly declined to address the possible effects of capacity-sharing if Entergy Arkansas joined Midwest Operator until a (potential) later proceeding — as was the agency's

prerogative[7] — the Southwest Intervenors have not satisfied the "strict jurisdictional prerequisites for review of FERC orders" under the Federal Power Act because they did not file their own petitions for review of the challenged FERC Orders. *Process Gas Consumers Grp. v. FERC*, 912 F.2d 511, 514 (D.C. Cir. 1990) (holding, under substantially identical review provision of the Natural Gas Act, that intervenors failed to meet all statutory prerequisites for judicial review).[8]

II. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g., Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1286 (D.C. Cir. 2011); *Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). A court must satisfy itself that the

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[7] *See, e.g., Mobil Oil Exploration & Producing Se., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991) (question of "how best to handle related, yet discrete, issues in terms of procedures" is a matter committed to agency discretion); *Tenn. Valley Mun. Gas Ass'n v. FERC*, 140 F.3d 1085, 1088 (D.C. Cir. 1998) ("An agency has broad discretion to determine when and how to hear and decide the matters that come before it.") (citing cases).

[8] Even if the Court could construe Intervenors' motions to intervene in this case as petitions for review, those motions — filed nearly three months after the Rehearing Order issued — were untimely under the statute's sixty-day period for seeking review. *See* 16 U.S.C. § 825*l*(b); *Process Gas*, 912 F.2d at 514-15 ("Treating a notice of intervention filed beyond [the statutory] sixty-day filing period . . . as a timely petition for review would squarely conflict with [the statute's] strict jurisdictional time limits.").

agency "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

Southwest Pool challenges the Commission's interpretation of Section 5.2 of the Agreement. Under the *Chevron* standard, this Court gives substantial deference to the Commission's interpretation of filed tariffs, "even where the issue simply involves the proper construction of language." *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998) (citation omitted); *see also Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698, 701 (D.C. Cir. 2010). The Court likewise affords such deference to the Commission's interpretation of contracts within its jurisdiction. *See Appalachian Power Co. v. FERC*, 101 F.3d 1432, 1435 (D.C. Cir. 1996); *Cajun Elec. Power Coop. v. FERC*, 924 F.2d 1132, 1135 (D.C. Cir. 1991). Southwest Pool concedes that the relevant contract language is ambiguous. *See* Pool Br. 13, 18-19; *see also* Int. Br. 3.[9] Accordingly, the

[9] Though the Commission did not state outright that it found Section 5.2 ambiguous, its reliance on context and extrinsic evidence shows that it analyzed that provision as such. *See* Declaratory Order at PP 61-63 (noting that "entity" and "contract path" are not defined in the Agreement, using context to interpret those terms, and finding that course of performance confirms that interpretation), JA 304-05; Rehearing Order at PP 7-9, 18-20, JA 375-77, 381-82; *see also id.* at

Commission's interpretation of that language is entitled to the Court's respect so long as it is a reasonable interpretation. *See, e.g.*, *Colo. Interstate Gas*, 599 F.3d at 701. As explained herein, it is.

III. THE COMMISSION'S INTERPRETATION OF THE TRANSMISSION CAPACITY-SHARING PROVISION IS REASONABLE AND SUPPORTED BY SUBSTANTIAL EVIDENCE

The disputed contract interpretation in this case turns on a single sentence: "If the Parties have contract paths to the same entity, the combined contract path capacity will be made available for use by both Parties." Agreement, Section 5.2, *quoted in* Declaratory Order at P 11, JA 280; *see supra* p. 5. The Commission appropriately considered that language (*see* Parts A.1 and A.2, *infra*), its particular context in the contract and more generally in the setting of regional transmission system operations (Part A.2), and the course of performance by the parties under that provision (Part A.3). The Commission did not ignore the arguments raised and evidence proffered by Southwest Pool and other parties concerning usage of trade and course of dealing, but determined that those factors carry less weight under general principles of contract interpretation and would not alter the

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P 21 (contrasting a case "where the tariff language did not help resolve an ambiguity" with the instant case, where context and course of performance evidence "were available to aid in the Commission's interpretation"), JA 382.

Commission's analysis based on preferred interpretive sources. *See* Parts B and C, *infra*.

A. The Commission Appropriately Looked First At The Language And Context Of The Provision

1. The Commission Reasonably Concluded That "Entity" Includes Transmission-Owning Members Of The Regional Operators

The Commission began its analysis of the contract language by considering the term "entity," which is not defined in the Agreement. *See* Declaratory Order at P 61, JA 304.[10] Looking to other provisions in the Agreement, the Commission noted that certain defined terms use "entity" to refer to companies that are members of one of the regional operators; for example, the Agreement defines "Operating Entity" as "an entity that operates and controls a portion of the bulk transmission system with the goal of ensuring reliable energy interchange between generators, loads, and other operating entities." Agreement, § 2.2.39, *quoted in* Declaratory Order at P 61, JA 304. Because that defined subset of entities (an "Operating Entity") could apply to any transmission-owning member of Midwest

[10] Southwest Pool has not directly disputed the Commission's interpretation of "entity," but it contends, based on its own view of the term "contract path" (*see* Part A.2, *infra*), that Section 5.2 must be interpreted to apply only to "third party entities" — non-members of either regional transmission organization. *See*, *e.g.*, Pool Br. 22. As explained herein, the Commission found Southwest Pool's interpretation to be "unsupported" by the text of the Agreement. Rehearing Order at P 7, JA 375-76.

Operator or Southwest Pool, "the undefined term 'entity' must then also apply to any transmission-owning member" of one of the regional organizations. Declaratory Order at P 61, JA 304. Accordingly, the Commission found that "'entity' is sufficiently broad to encompass Entergy Arkansas, regardless of whether it is a member of [Midwest Operator], [Southwest Pool], or neither." *Id.*

2. The Commission Reasonably Concluded That "Contract Path" Includes Transmission Capacity On Physical Or Contractual Interconnections

At the heart of Southwest Pool's appeal is its argument that a regional Operator cannot have a "contract path to" one of its own members; therefore, if Entergy Arkansas became a member of Midwest Operator, Midwest Operator would no longer have a contract path with Entergy Arkansas, and thus capacity-sharing under Section 5.2 would not be mandated. *See, e.g.*, Pool Br. 16, 25, 29. The Commission, however, found no such limitation in the Agreement. Because "contract path" also is not defined in the Agreement, the Commission looked first to its context in Section 5.2. In particular, after providing for sharing transmission capacity, Section 5.2 goes on to stipulate that the sharing requirement "will not create new contract paths for either Party that did not previously exist" and that neither regional operator will be able to "deal directly with companies with which it does not physically or contractually interconnect." Agreement, § 5.2, *quoted in* Declaratory Order at P 62, JA 304. The Commission noted that, if Entergy

Arkansas joined Midwest Operator as a transmission-owning member, both regional operators "would still be physically or contractually interconnected with Entergy Arkansas." Declaratory Order at P 62, JA 304.

Southwest Pool contends that a "contract path" is necessarily limited to point-to-point transmission service pursuant to an interchange transaction. *See* Pool Br. 15, 33. The Commission, however, disagreed, finding that the first sentence of Section 5.2 does not require that either party have a transmission service agreement in place in order for the sharing provision to apply — only that there be a "contract path." *See* Rehearing Order at P 19, JA 381. The Commission explained that Section 5.2 refers only to "contract paths" and "contract path capacity," but never to the term "contract" standing alone — a distinction it found "notable, when read in context" with the rest of Section 5.2, which "specifically contemplate[s]" either of the regional operators dealing with companies with which it *either* physically *or* contractually connects. *Id.* Put differently, "[i]f Section 5.2 were only to apply to companies with which both [Southwest Pool] and [Midwest Operator] have point-to-point contract paths, there would be no need to refer to 'physical' interconnection" in that same section. *Id.* Therefore, the Commission determined "that 'contract path,' in this context, is sufficiently broad to encompass a physical or contractual interconnection capacity." *Id.* at P 18, JA 381. That conclusion is entitled to respect. *See Entergy Servs., Inc. v. FERC*,

568 F.3d 978, 982 (D.C. Cir. 2009) (Court "give[s] *Chevron*-like deference to [Commission's] reasonable interpretation of ambiguous contract language.").

Moreover, the Commission explained that the use of this section of the Joint Operating Agreement, governing coordination between two regional transmission systems, to aid in transmission service to a member of one of those regional systems "is not surprising given that the bulk of transmission service over [regional transmission organizations] is network service to [their] members." Rehearing Order at P 20, JA 382.[11] Here, the Commission appropriately took into account the regulatory setting and function of a "seams" arrangement between neighboring regional systems; "[i]n interpreting a contract or tariff, 'the court looks to the language of the contract and its commercial (or in this case, regulatory) context.'" *Consol. Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1547 (D.C. Cir. 1985) (quoting *Pennzoil Co. v. FERC*, 645 F.2d 360, 388 (5th Cir. 1981)); *see also Colo. Interstate Gas Co.*, 599 F.3d at 703 (Commission must interpret tariffs "in light of

[11] The Commission also observed that a similar capacity-sharing provision in a another joint operating agreement between two regional systems — Midwest Operator and PJM Interconnection, L.L.C. (the independent system operator for a regional transmission system in the mid-Atlantic region) — has consistently been used to serve Midwest Operator's network load and in other circumstances where the common entity was a transmission-owning member of one of the regional systems. *See* Declaratory Order at P 63 n.112, JA 305; *see also* p. 33, *infra* (discussing circumstances of capacity sharing under the Midwest Operator-PJM Interconnection agreement).

their 'commercial . . . context'") (quoting *Consol. Gas*). Thus, with the Agreement's context in mind, the Commission found it "reasonable to infer that a contract provision between two [regional transmission organizations] would serve to benefit the members" of those regional systems in serving their network loads. Rehearing Order at P 20, JA 382.

B. The Commission Reasonably Relied On The Parties' Course Of Performance

Having analyzed the language and context of Section 5.2, the Commission went on to find that the course of performance supported its interpretation. Specifically, Midwest Operator had previously invoked Section 5.2 to use available Southwest Pool capacity to serve a system member's network load. That load was served by Ameren (an operating member of Midwest Operator) and located radially off the Entergy transmission system; in 2009, Midwest Operator used Southwest Pool's available transmission capacity to provide transmission service through Southwest Pool's and Entergy Arkansas's systems. *See* Declaratory Order at P 63, JA 304-05; Rehearing Order at PP 9, 20, JA 376-77, 381-82.

Southwest Pool argues that this performance in fact supports its own narrow interpretation of Section 5.2, because Midwest Operator reached the Ameren load through Entergy Arkansas, a third party with which both Southwest Pool and

Midwest Operator had contract paths. *See* Pool Br. 24.[12] But Southwest Pool misses the point: the Commission found that performance meaningful *not* because it involved Entergy Arkansas — then a third party to both regional operators, and potentially a future operating member of Midwest Operator — but because it involved network transmission service to a system member's load, not a point-to-point transmission service transaction with a third party buyer or seller. *See* Rehearing Order at P 20, JA 381-82; *cf.* Pool Br. 27.

Southwest Pool also disputes the significance of Midwest Operator's previous use of Section 5.2, arguing that course of performance "requires repeated occasions and a pattern of conduct . . . ." Pool Br. 27. Southwest Pool relies, however, on law regarding course of performance in validating oral modifications to contracts, such as waiver of written terms — not, as here, in *confirming* an interpretation of a written contract provision. *See* Restatement (Second) of Contracts § 150 (1981) ("Reliance on Oral Modification"); *id.* cmt. e ("A waiver [by oral modification] . . . may be found in a course of performance."), *cited in* Pool Br. 27; *Exxon Corp. v. Crosby-Miss. Res., Ltd.*, 40 F.3d 1474, 1492 (5th Cir.

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[12] Though Southwest Pool emphasizes that both it and Midwest Operator had contract paths with Entergy Arkansas, and claims that Southwest Pool had no connection to that particular Ameren load (Pool Br. 21 & n.14, 23), the Commission noted that Southwest Pool does have multiple interconnections with Ameren. *See* Rehearing Order at P 20 n.35, JA 381.

1995) (noting party's "course of conduct in consistently accepting underpayments," together with an "oral agreement to modify" a contract, demonstrated that party's waiver of a contractual requirement), *cited in* Pool Br. 27.

C. The Commission Reasonably Decided Not To Rely On Evidence Regarding Usage Of Trade And Course Of Dealing

1. The Commission Reasonably Determined That Usage Of Trade Carries Less Weight Than Context And Course Of Performance

Southwest Pool further argues that the Commission should have considered its proffered trade usage evidence, based on various definitions used in materials concerning electric reliability standards and business practices, to interpret the meaning of "contract path." Pool Br. 27-30. "Although usage of trade is one form of evidence that the Commission *may* consider when interpreting a contract," the Commission declined to do so in this case because it found the context and course of performance sufficient to determine the meaning of the Agreement's capacity-sharing provision. Rehearing Order at P 21 (emphasis added), JA 382-83.

Southwest Pool argues that the Commission's decision was arbitrary and capricious, citing this Court's endorsement of trade usage evidence in *Colorado Interstate Gas*, 599 F.3d at 703. The Commission, however, distinguished that case, in which the Commission had lacked the interpretive sources present here: "Unlike *Colorado Interstate Gas*, . . . where the tariff language did not help resolve

an ambiguity, here, the context of the contract provision and course of performance of the parties were available to aid in the Commission's interpretation." Rehearing Order at P 21, JA 382; *see Colo. Interstate Gas*, 599 F.3d at 702 (noting that tariff language did not address the circumstances in question).

Indeed, "the law generally favors examination of express terms of a contract and course of performance, over usage of trade." Rehearing Order at P 21 (emphasis added), JA 382. For instance, the Restatement (Second) of Contracts provides, among its "Standards of Preference in Interpretation," that trade usage is the least preferred: "express terms are given greater weight than course of performance, course of dealing, and usage of trade, course of performance is given greater weight than course of dealing or usage of trade, and course of dealing is given greater weight than usage of trade . . . ." Restatement (Second) of Contracts § 203(b) (1981), *cited in* Rehearing Order at P 21 n.37, JA 382; *accord*, Del. Code Ann. tit. 6, § 1-303(e) (West 2012),[13] *cited in* Rehearing Order at P 21 n.39, JA 383; *see also Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 769 F. Supp. 671, 708 (D. Del. 1991) (course of performance is the "most important extrinsic evidence of the parties' intent") (citing Restatement (Second) of Contracts § 203 (1981), and 2 E.A. Farnsworth, Farnsworth on Contracts § 7.13 at

[13] Delaware law governs interpretation of the Agreement. *See* Rehearing Order at P 21 (citing Agreement, Sec. 18.9, concerning choice of law), JA 382.

292-93 (1985)), *aff'd*, 988 F.2d 414 (3d Cir. 1993). Having determined the meaning of Section 5.2 using the most preferred bases for interpretation, the Commission reasonably declined to rely on the least. *See* Rehearing Order at P 21, JA 382-83.

2. The Commission Reasonably Determined That Less Preferred Evidence On The Course Of Dealing Was Unnecessary, But Would Support Its Interpretation In Any Event

Southwest Pool also argues that the Commission improperly declined to consider Southwest Pool's proffered affidavit regarding its own representatives' understanding of the capacity-sharing provision at the time the Agreement was negotiated. *See* Pool Br. 30-31. For the same reasons explained in the previous section, however, the Commission appropriately concluded that course of dealing evidence — which testimony regarding one party's belief at the time of negotiation "arguably" would be (Rehearing Order at P 23, JA 383) — is inferior to context and course of performance for purposes of contract interpretation. *See id.* at P 22, JA 383. Moreover, the Commission found Southwest Pool's evidence unpersuasive in light of the origins of the capacity-sharing provision.

When the Commission approved Southwest Pool's application to become a regional transmission organization, it required Southwest Pool to develop and file a joint operating agreement with Midwest Operator. *See Sw. Power Pool, Inc.*, 106 FERC ¶ 61,110, at PP 62-63 (2004), *cited in* Declaratory Order at P 8 n.17,

JA 279, *and* Rehearing Order at P 4 n.7, JA 374. A month after that order, the Commission accepted such an agreement between Midwest Operator and another regional operator. *See Midwest Indep. Transmission Sys. Operator, Inc. and PJM Interconnection L.L.C.*, 106 FERC ¶ 61,251 (2004). The Commission had directed Midwest Operator and PJM Interconnection to develop such an agreement to address the "seam" between them that had resulted from the Commission's directive to several utilities lying between the two regional systems to join one or the other. *Id.* at PP 2-6. Of particular concern was the potential stranding of Midwest Operator members in Michigan and Wisconsin who had limited interconnections to the Midwest Operator system because large neighboring utilities had chosen to join PJM Interconnection. *See id.*; Affidavit of Thomas J. Mallinger at paras. 6-7 (attached to Petition for Declaratory Order), JA 81-82.

To address that concern, Midwest Operator and PJM Interconnection included a capacity-sharing provision in their joint operating agreement. *See* Mallinger Aff. at para. 7, JA 81-82; Declaratory Order at P 15 n.26 (excerpt from Midwest Operator-PJM Interconnection agreement), JA 282. Notwithstanding Southwest Pool's contention that it "was not privy to" to that agreement (Pool Br. 32), Southwest Pool told the Commission that its own joint operating agreement with Midwest Operator would be based on that earlier agreement. *Sw. Power Pool, Inc.*, 109 FERC ¶ 61,008, at PP 4, 30 (2004). The Commission

eventually directed Southwest Pool to file, and subsequently approved, an Agreement that was substantially similar to the Midwest Operator-PJM Interconnection agreement — including an identical capacity-sharing provision. *Sw. Power Pool, Inc.*, 110 FERC ¶ 61,031, at PP 2, 20, 32 (2005); Mallinger Aff. at paras. 8-9, JA 82; *see also* Rehearing Order at P 23 (finding that evidence indicated that both regional operators knew that the language in Section 5.2 was identical to a provision in the agreement between Midwest Operator and PJM Interconnection), JA 383.

Accordingly, the Commission explained that, even if it were to consider less-favored course of dealing evidence, such evidence in this case "would, on balance, support" the interpretation that the Commission determined from the contractual context and the course of performance by the parties: that the capacity-sharing provision is sufficiently broad to allow Midwest Operator to use available capacity on Southwest Pool's system to provide network transmission service to Entergy Arkansas, if Entergy Arkansas becomes a Midwest Operator member. Rehearing Order at P 23, JA 383.

In sum, the Commission considered the language and context of the Agreement, applied well-established principles of contract interpretation, and addressed all relevant extrinsic evidence in reaching its conclusion. Accordingly, the Commission's reasonable interpretation is worthy of this Court's respect.

CONCLUSION

For the reasons stated, the petition should be dismissed for lack of jurisdiction. Alternatively, the petition should be denied on the merits and the challenged FERC Orders should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent contains 7,828 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

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February 5, 2013

ADDENDUM

Statutes

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

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

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

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

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

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

(g) Books and records

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

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

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

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

wherever located, if such examination is required for the effective discharge of the State

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

§ 825*l*. Review of orders

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

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

(b) Judicial review

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

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

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

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d) and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 5th day of February 2013, served the foregoing upon the following counsel listed in the Service Preference Report via email through the Court's CM/ECF system:

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