ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

Nos. 12-1232, *et al.*

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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December 13, 2013

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in the Joint Initial Brief Of Petitioners/Intervenors Concerning Statement of the Case, Statement Of Facts, And Standards Of Review.

B. Rulings Under Review

1. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (July 21, 2011) ("Order No. 1000"), JA 144;

2. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000-A, 139 FERC ¶ 61,132 (May 17, 2012) ("Order No. 1000-A"), JA 328; and

3. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. No. 1000-B, 141 FERC ¶ 61,044 (Oct. 18, 2012) ("Order No. 1000-B"), JA 489.

C. Related Cases

This case has not been before this Court or any other court, and counsel is not aware of any other related cases pending before this or any other court.

/s/ Beth G. Pacella
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December 13, 2013

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* Cases chiefly relied upon are marked with an asterisk.

ADMINISTRATIVE CASES AND ORDERS:

STATUTES:

GLOSSARY

Commission or FERC	Federal Energy Regulatory Commission
Cost Alloc. Br.	Joint Initial Brief Of Petitioners/Intervenors Concerning Cost Allocation
Edison	Petitioner Edison Electric Institute
FPA	Federal Power Act
International	Petitioner International Transmission Company
ITC Br.	Corrected Brief Of Petitioners International Transmission Company d/b/a ITC*Tranmission*, Michigan Electric Transmission Company, LLC, ITC Midwest LLC, And ITC Great Plains, LLC.
Native load customers	the wholesale and retail power customers of the transmission provider on whose behalf the transmission provider has undertaken an obligation to construct and operate the transmission provider's system to meet the reliable electric needs of such customers
NERC	North American Electric Reliability Corporation
Order No. 888	*Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. Preambles ¶ 31,036 (1996)
Order No. 888-A	*Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888-A, FERC Stats. & Regs. Preambles ¶ 31,048 (1997)

Order No. 890	*Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 (2007)
Order No. 1000	*Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051, (2011)
Order No. 1000-A	*Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000-A, 139 FERC ¶ 61,132 (2012)
Order No. 1000-B	*Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012)
Pub. Policy Br.	Joint Brief Of Petitioners And Supporting Intervenors Concerning Transmission Planning and Public Policy
Reciprocity Br.	Joint Initial Brief Of Petitions/Intervenors Concerning Reciprocity Condition
ROFR Br.	Joint Brief Of Petitioners And Supporting Intervenors Concerning Rights of First Refusal
States Br.	Joint Brief of State Petitioner And Intervenors
Threshold Br.	Joint Initial Brief of Petitioners/Intervenors In Support Of Petitioners Concerning Threshold Issues
211A Br.	Initial Brief Of Petitioner Concerning FPA § 211A

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 12-1232, *et al.*

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY, *ET AL.*,
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

In its Order No. 1000 rulemaking, the Federal Energy Regulatory Commission ("FERC" or "Commission") required FERC-jurisdictional electric transmission providers to engage in nondiscriminatory regional planning processes designed to identify and evaluate more cost-effective and efficient solutions to regional transmission needs, to ensure appropriate consideration of public policy requirements and to develop methods to allocate the cost of any such facilities fairly among beneficiaries. Various interest groups have challenged the

Commission's action, and their petitions for review present the questions of whether:

1. the Commission reasonably determined that it has authority under the Federal Power Act to require public utility transmission providers to participate in a regional transmission planning process (raised in Threshold Brief);

2. in rectifying deficiencies in a prior FERC rulemaking, the Commission appropriately acted based on a theoretical threat (raised in Threshold Brief);

3. FERC acted reasonably and within the scope of its statutory authority when it eliminated incumbent transmission providers' federal rights of first refusal, in order to permit nonincumbent developers to participate on a nondiscriminatory basis in the competitive process of regional transmission project selection (raised in Right of First Refusal Brief);

4. in enacting reforms that leave traditional state authority over permitting, siting and construction of transmission facilities undisturbed, the Commission appropriately respected state authority (raised in States Brief);

5. the Commission reasonably required regional planning processes to provide for the consideration of transmission needs driven by public policy requirements established by federal, state and local laws (raised in Public Policy Brief);

6. in requiring the development of methods to allocate the costs of new regional transmission facilities among those who benefit from them and declining to require involuntary interregional cost allocation, the Commission acted reasonably and within the scope of its statutory authority (Raised in Cost Allocation and International Transmission Company Briefs); and

7. the Commission reasonably observed that the prospect of being denied service pursuant to the *pro forma* tariff's reciprocity condition would encourage non-public utility transmission providers to enroll in the transmission planning regions established by Order No. 1000, and thus reasonably declined to exercise its discretionary authority under section 211A of the Federal Power Act to mandate enrollment of these non-jurisdictional entities (Raised in Reciprocity and 211A Briefs).

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutory and regulatory provisions are contained in the Addendum.

INTRODUCTION

This case concerns the Commission's reforms to its electric transmission planning and cost allocation requirements for FERC-jurisdictional public utility transmission providers. The final rule adopted in Order No. 1000 continues the evolutionary reform process the Commission began with the functional unbundling

of the electric industry in the mid-1990s. The rule responds to an expected marked increase in investments in transmission projects – and recognized shortcomings in transmission infrastructure – and is designed to ensure that transmission planning and cost allocation requirements support more efficient and cost-effective investment decisions. *See Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 61,051, (2011) ("Order No. 1000"), *order on reh'g and clarification*, 139 FERC ¶ 61,132 ("Order No. 1000-A"), *order on reh'g and clarification*, 141 FERC ¶ 61,044 (2012) ("Order No. 1000-B").

Order No. 1000 had four primary components: (1) the establishment of regional transmission planning requirements, (2) the establishment of interregional transmission coordination processes, (3) the elimination of the federal right of first refusal in favor of existing transmission owners to build new regional projects, and (4) the development of a "beneficiaries pay" cost allocation methodology in each region.

Some parties contended that the proposed changes went too far, while others argued that they did not go far enough. In the end, the Commission balanced these competing interests and resolved these complex matters in a manner it determined would ensure that the rates and conditions of FERC-jurisdictional service are just and reasonable in light of the changing conditions in the electric industry.

COUNTERSTATEMENT OF JURISDICTION

Certain of Petitioners' arguments are not ripe for review at this time because they concern matters that are being, or will be, addressed in compliance proceedings before the Commission. The Court has often "postponed review for want of ripeness where (1) delay would permit better review of the issues while (2) causing no significant hardship to the parties." *Interstate Natural Gas Ass'n of Am. v. FERC*, 285 F.3d 18, 60 (D.C. Cir. 2002) (internal quotations omitted).

Here, compliance proceedings are addressing (or will address) Petitioners' concerns regarding: (a) the specific contours of plans to reevaluate nonincumbent developer transmission projects that are delayed or abandoned (ROFR Br. 37-38); (b) the cost allocation methodology or methodologies to be applied to projects in a multi-transmission provider zone (ROFR Br. 30-31); (c) whether any individual contracts contain a federal right of first refusal that is protected by the *Mobile-Sierra* doctrine (ROFR Br. 33-34); and (d) the appropriate procedures to consider regional transmission needs driven by state, federal and local laws or regulation (Pub. Policy Br. 9-15). *See infra* Argument Part III.E, F, G and Part V.C.2. Allowing the compliance proceedings to run their course will permit the development of a concrete factual setting in which to address Petitioners' concerns (to the extent they still exist). Proceeding in this manner would impose no hardship on Petitioners. To the extent they are aggrieved by the Commission's

future determinations, they may pursue appellate review, as appropriate, of the compliance orders. *Cf. N.M. Att'y Gen. v. FERC*, 466 F.3d 120, 121, 122 (D.C. Cir. 2006) (orders subject to a further compliance filing are "without binding effect," and "not until the Commission accepts the compliance" may a litigant "demonstrate actual injury") (internal quotations omitted); *DTE Energy Co. v. FERC*, 394 F.3d 954, 960-61 (D.C. Cir. 2005) (same).

STATEMENT OF FACTS

I. Statutory Framework

The Federal Power Act delineates federal and state regulation over electricity markets and services. Section 201(b) of the Act grants the Commission jurisdiction over the "transmission of electric energy in interstate commerce," the "sale of electric energy at wholesale in interstate commerce," and "all facilities for such transmission or sale." 16 U.S.C. § 824(b)(1). States retain jurisdiction over "any other sale of electric energy" and "facilities used for generation" or "local distribution" of electricity. *Id*.

With respect to transactions within its jurisdiction, the Commission is empowered under sections 205 and 206 of the Federal Power Act to correct utility rates and practices that are unjust and unreasonable or unduly discriminatory or preferential. 16 U.S.C. §§ 824d(b), 824e(a). *See, e.g.*, *New York v. FERC*, 535 U.S. 1, 7 (2002).

II. Background

A. Order No. 888[1]: The Commission Determines That Some Form Of Transmission Planning Is Necessary To Remedy Anti-Competitive Practices.

"Historically, electric utilities were vertically integrated, owning generation, transmission, and distribution facilities and selling these services as a 'bundled' package to wholesale and retail customers in a limited geographical service area." *Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash. v. FERC*, 272 F.3d 607, 610 (D.C. Cir. 2001). The Commission found that it was in the economic interest of these vertically-integrated utilities to deny transmission service to others altogether, or offer it on terms less favorable than those offered to themselves. Order No. 888 at 31,682.

In order to remedy these anti-competitive practices, in 1996, the Commission issued Order No. 888, which directed public utilities to adopt open access non-discriminatory transmission tariffs that contained minimum terms for

[1] *See Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Servs. by Pub. Utils.; Recovery of Stranded Costs by Pub. Utils. & Transmitting Utils.*, Order No. 888, FERC Stats. & Regs. Preambles ¶ 31,036 (1996), *clarified*, 76 FERC ¶¶ 61,009 and 61,347 (1997), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. Preambles ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd Transm. Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

non-discriminatory service.[2] Because certain owners and operators of interstate transmission facilities were not subject to the Commission's jurisdiction, the *pro forma* Open Access Transmission Tariff adopted in Order No. 888 included a reciprocity provision that conditioned the use of public utility's open access services on an agreement to offer non-discriminatory transmission services in return.

With respect to transmission planning, Order No. 888 required, among other things, that public utilities account for the needs of their network customers on the same basis as they provide for their own needs, and construct new facilities to meet the service requests of long-term point-to-point customers.[3] *See* Sections 13.5, 15.4, 27, 28.2 of the *pro forma* Open Access Transmission Tariff (Appendix D to Order No. 888). The Commission also encouraged joint planning between transmission providers and their customers and between transmission providers in a given region, but did not mandate such coordination. Order No. 888-A at 30,311.

[2] Each public utility was required to file the *pro forma* Open Access Transmission Tariff included in Order No. 888 without any deviation. Public utilities were subsequently allowed to file revisions that were consistent with, or superior to, the *pro forma* tariff's terms and conditions. Order No. 888 at 31,770.

[3] "Firm point-to-point service . . . is transmission service reserved and/or scheduled between specified points of receipt and delivery." *Transm. Access*, 225 F.3d at 733.

B. The Energy Policy Act Of 2005: Congress Emphasizes The Need For Adequate Transmission Infrastructure Planning And Development.

In August 2005, Congress enacted the Energy Policy Act of 2005, Pub. L. No. 109-58, which emphasized the importance of adequate transmission infrastructure planning and its role in fostering the growth of competitive wholesale markets. The Act included a number of directives aimed at reversing the decline in transmission infrastructure investment. Congress instructed the Commission to "exercise its authority . . . in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities." FPA § 217(b)(4), 16 U.S.C. § 824q(b)(4). Congress also gave the Commission certain "backstop" transmission siting authority, and authorized the creation of interstate compacts establishing transmission siting agencies. FPA § 216, 16 U.S.C. § 824p. The Act further authorized the Commission to require non-jurisdictional transmitting utilities (except for certain small entities) to provide access to their transmission facilities on a comparable basis. FPA § 211A, 16 U.S.C. § 824j-1.

C. Order 890: The Commission Determines That Further Transmission Planning Requirements Are Necessary.

In 2007, the Commission issued Order No. 890 to remedy certain flaws that had become apparent with the reforms adopted in Order No. 888. *Preventing Undue Discrimination and Preference in Transmission Serv.*, Order No. 890,

FERC Stats. & Regs. ¶ 31,241 P 422 (2007) ("Order No. 890"). The Commission found that the non-mandatory joint and regional planning exhortations in Order No. 888 were insufficient to eliminate opportunities for undue discrimination in transmission service – particularly in an era of increasing transmission congestion and insufficient investment in new transmission: "While transmission providers may have an incentive to expand the grid to meet their state-imposed obligations, they can have a disincentive to remedy transmission congestion when it would reduce the value of their generation or encourage greater competition." *Id*. at P 422.

The *pro forma* tariff adopted in Order No. 888 failed to counteract these incentives in the planning area because it did not contain "clear criteria regarding the transmission provider's planning obligation." *Id*. at P 424. For instance, there was no "requirement that the overall transmission planning process be open to customers, competitors, and state commissions," nor any obligation to make "key assumptions and data that underlie transmission plans . . . available to customers." *Id*. This "lack of coordination, openness, and transparency" opened the door to undue discrimination in transmission planning. *Id*. at P 425. As the Commission explained, "[w]ithout adequate coordination and open participation, market participants have no means to determine whether the plan developed by the transmission provider in isolation is unduly discriminatory." *Id*.

To address the potential for undue discrimination in transmission planning activities, the Commission required each public utility transmission provider to develop and include in its tariff a planning process that satisfies the following nine principles:

- *Coordination*: "eliminate the potential for undue discrimination in planning by opening appropriate lines of communication between transmission providers, their transmission-providing neighbors, affected state authorities, customers, and other stakeholders" (*id*. at P 452);

- *Openness*: "transmission planning meetings [must] be open to all affected parties including, but not limited to, all transmission and interconnection customers, state commissions and other stakeholders" (*id*. at P 460);

- *Transparency*: "transmission providers . . . [must] disclose to all customers and other stakeholders the basic criteria, assumptions, and data that underlie their transmission system plans" (*id*. at P 471);

- *Information Exchange*: "network transmission customers . . . [must] submit information on their projected loads and resources on a comparable basis (e.g., planning horizon and format) as used by transmission providers in planning for their native load" (*id*. at P 480);

- *Comparability*: "the transmission provider" must "develop a transmission system plan that (1) meets the specific service requests of its transmission customers and (2) otherwise treats similarly-situated customers (*e.g.*, network and retail native load) comparably in transmission system planning" (*id*. at P 494);

- *Dispute Resolution*: "transmission providers [must] develop a dispute resolution process to manage disputes that arise from the Final Rule's planning process" (*id*. at P 501);

- *Regional Participation*: "each transmission provider [must] . . . coordinate with interconnected systems to (1) share system plans to ensure that they are simultaneously feasible and otherwise use consistent assumptions and data and (2) identify system enhancements that could relieve congestion or integrate new resources" (*id.* at P 504);

- *Economic Planning Studies*: "the transmission planning process under the pro forma [Open Access Transmission Tariff] must consider both reliability and economic considerations," such as whether "transmission upgrades or other investments can reduce the overall costs of serving native load" (*id*. at P 542); and

- *Cost Allocation*: "transmission providers and stakeholders" should develop a cost allocation principle, for regional projects involving several transmission owners or economic projects, that is based on "their own specific criteria which best fit their own experience and regional needs" (*id*. P 558).

The transmission planning reforms adopted in Order 890 applied to all public utility transmission providers. While the Commission expected that all non-public utility transmission providers would participate in the planning processes, the Commission did not invoke its authority under section 211A of the Federal Power Act, 16 U.S.C. § 824j-1, which allows the Commission to require an unregulated transmission utility to provide transmission service on a comparable and not unduly discriminatory basis.

D. The Commission's Ongoing Assessment Of Order No. 890

In December 2007, most public utility transmission providers and several non-public utility transmission owners submitted their proposed transmission planning processes to the Commission. *See* Order No. 1000 P 20, JA 153. In a

series of orders issued throughout 2008, the Commission generally accepted the filings, but noted that it would continue to examine the adequacy of these new processes. *See* Notice of Request for Comments, *Transmission Planning Processes Under Order No. 890*, FERC Dkt. No. AD09-8-000 (Oct. 8, 2009) ("October 2009 Notice").

To that end, in September 2009, the Commission convened three regional conferences to assess the effectiveness of the new transmission planning processes. During these conferences, participants noted a lack of coordination between neighboring transmission systems, which could needlessly increase costs or result in discrimination among users. Discussions also revealed a lack of consistency across existing planning processes as to the integration of state renewable resource requirements as well as shortcomings in cost allocation methodologies for new inter-regional transmission facilities and upgrades to such existing facilities. October 2009 Notice at 5. These issues (and others) constituted "barriers to the expansion of transmission facilities necessary to accomplish the goals of ensuring the reliable operation of the grid, reducing congestion, and meeting renewable resource requirements." *Id*. In an effort to determine how best to eliminate these barriers, the Commission presented the industry with numerous questions regarding potential enhancements to regional transmission planning processes and to the allocation of new transmission facilities. In response, the Commission

received 107 initial comments and 45 reply comments. *See* Notice of Proposed Rulemaking, *Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, 131 FERC ¶ 61,253 P 16 (2010), JA 102.

E. Congress Emphasizes The Need For Additional Transmission Planning.

While the Commission was evaluating the adequacy of Order No. 890's reforms, Congress, as part of the American Recovery and Reinvestment Act of 2009, provided the Department of Energy with $80 million to support long-term, coordinated interconnection transmission planning across the country. Under the program, state and local governments, utilities, and other stakeholders were to collaborate on the development and implementation of the next generation of high-voltage transmission networks. Of particular focus was the development of long-term interconnection plans in each of three networks that serve the continental United States (the Western, Eastern and Texas interconnection). Order No. 1000 PP 26-27, JA 153-54.

Such plans were necessary given the "major long-term challenge" faced by the electricity industry "in ensuring an adequate, affordable and environmentally sensitive energy supply." *Id*. at P 28, JA 154. The Department of Energy determined that, "under any future electric industry scenario," a "[s]ignificant expansion of the transmission grid will be required." Department of Energy, *20% Wind Energy by 2030*, at 93 (July 2008). Such expansion is critical to ensuring "a

reliable electric supply and provid[ing] greater access to economically priced power," as well as "bringing [renewable energy] resources, which are often remotely located, to consumer load centers." Electricity Advisory Committee, *Keeping the Lights On in a New World*, at 45 (Jan. 2009); *see also Ill. Commerce Comm'n v. FERC*, 721 F.3d 764, 771 (7th Cir. 2013) (same).

The North American Electric Reliability Corporation ("NERC") similarly concluded that significant transmission expansion will be needed to comply with state renewable energy standards, which typically require that a certain percentage of energy sales or installed capacity come from renewable resources. Notice of Proposed Rulemaking, 131 FERC ¶ 61,253 at P 31, JA 104. "[A]n analysis of the past 14 years shows that the siting and construction of transmission lines will need to significantly accelerate to maintain reliability over the coming years." NERC, *2009 Long-Term Reliability Assessment: 2009-2018*, October 2009, at 29.

F. The Commission Recognizes The Need For Reform.

The Commission found that compliance with Order No. 890 resulted in substantial improvement in transmission planning processes, particularly at the regional level. Notice of Proposed Rulemaking, 131 FERC ¶ 61,253, P 32, JA 105. Nonetheless, "significant changes in the nation's electric power industry" since the issuance of Order No. 890 – such as the "trend of increased investment in the country's transmission infrastructure" (*id.* at P 33 n.41, JA 105) – required the

Commission to "consider additional reforms" in order to "ensure that Commission-jurisdictional services are provided at rates, terms and conditions that are just and reasonable and not unduly discriminatory or preferential." *Id*. at P 33, JA 105.

The Commission found five general deficiencies with transmission planning processes and cost allocation methodologies developed in response to Order No. 890. First, the Commission determined that Order No. 890's regional participation principle – as opposed to a mandatory regional transmission plan – was insufficient. *Id*. at P 35, JA 105. Without a comprehensive regional transmission planning process, "each transmission provider will not have information needed to . . . determine which project or group of projects could satisfy local and regional needs more efficiently and cost-effectively." *Id*. at P 49, JA 108.

Second, existing transmission planning processes failed to account for – and, in some cases, did not even permit consideration of – public policy requirements established by state or federal law, such as renewable energy standards or energy conservation efforts. *Id*. at P 37, JA 105. As a result, "some areas are struggling with how to adequately address transmission expansion necessary to . . . integrate renewable generation resources into the transmission system." *Id*. at P 59, JA 109.

Third, Order No. 890 failed to address the potential for undue preferences in favor of incumbent utilities through practices applied within transmission planning processes. *Id*. at P 71, JA 112. In recent years, non-incumbent developers have

shown increasing interest in developing transmission projects. *Id*. at P 38, JA 106. In some areas, however, such developers would lose the opportunity to construct their proposed projects if incumbent transmission owners exercise a right of first refusal to construct any transmission facility in its service territory. *Id*. at P 72, JA 112.

Fourth, the planning processes developed in response to Order No. 890 generally failed to consider whether interregional transmission solutions would more efficiently or cost effectively meet the needs identified in individual regional transmission plans. *Id*. at P 103, JA 118. The lack of coordination between transmission planning regions became more glaring in light of the significant growth of interest in interregional facilities since the issuance of Order No. 890. *Id*. at P 39, JA 106.

Fifth, the general cost allocation principles discussed in Order No. 890 failed to result in any rate structures allocating costs for projects that are outside of a regional power market or in more than one transmission planning region. *Id*. at P 41, JA 106. The need for such rate structures has "become more acute as the need for transmission infrastructure has grown," since uncertainty regarding cost recovery may hinder development. *Id*. at P 40, JA 106.

III. The Challenged Orders

To address the foregoing deficiencies, on July 21, 2011, the Commission issued Order No. 1000, which employed a principles-based approach allowing regional flexibility in meeting the Order's transmission planning and cost allocation requirements. The final rule adopted three requirements for transmission planning:

- each public utility transmission provider must participate in a regional transmission planning process that satisfies the principles of Order No. 890 and produces a regional transmission plan (Order No. 1000 P 146, JA 179);

- local and regional transmission planning processes must consider transmission needs driven by public policy requirements established by state, federal or local laws or regulations (*id*. at P 203, JA 191; Order No. 1000-A P 319, JA 393); and

- public utility transmission providers in neighboring planning regions must coordinate to determine if there are more efficient or cost-effective solutions to their mutual transmission needs (Order No. 1000 P 368, JA 228).

The rule likewise established three requirements for transmission cost allocation:

- each public utility transmission provider must participate in a regional transmission planning process that has a regional cost allocation method for new transmission facilities selected in the regional transmission plan for purposes of cost allocation. The method or methods must satisfy six regional cost allocation principles which are designed, in large measure, to assign the costs to the facility's beneficiaries in a manner that is at least roughly commensurate with estimated benefits (*id*. at PP 558, 585, JA 261, 265);

- neighboring transmission planning regions must have a common interregional cost allocation method for new interregional transmission facilities. The method must satisfy six interregional cost allocation principles, which are similar to the regional principles (*id*. at PP 578, 585, JA 264, 265); and

- participant-funding of new transmission facilities (i.e., the allocation of new transmission facility costs only to entities that volunteer to bear those costs, *id.* at P 715, JA 288) is not permitted as a regional or interregional cost allocation method (*id*. at P 723, JA 289).

The Commission also "direct[ed] public utility transmission providers to remove from their [Open Access Transmission Tariffs] or other Commission-jurisdictional tariffs and agreements any provisions that grant a federal right of first refusal to transmission facilities that are selected in a regional transmission plan for purposes of cost allocation." *Id.* at P 7, JA 150. Such tariff provisions "allow practices that have the potential to undermine the identification and evaluation of a more efficient or cost-effective solution to regional transmission needs, which in turn can result in rates for Commission-jurisdictional services that are unjust and unreasonable or otherwise result in undue discrimination by public utility transmission providers." *Id.*

Order No. 1000 "focused on the transmission planning *process*, and not on any substantive outcomes that may result from this process." *Id*. at P 12, JA 151 (emphasis in original). Nothing in the Order requires that any facility identified in, or selected through, a regional plan "be built, nor does it give any entity permission

to build a facility," or "relieve[] any developer from having to obtain all approvals required to build such facility." *Id.* at P 66, JA 162.

Moreover, Order No. 1000's requirements do not directly apply to non-public utility transmission providers. Accordingly, "non-jurisdictional entities, unlike public utilities, may choose whether to join a regional transmission planning process and, to the extent they choose to do so, they may advocate for those processes to accommodate their unique limitations and requirements." *Id.* at P 117, JA 173. But, to maintain a safe harbor tariff (which assures service from public utility transmission providers), a non-public utility transmission provider must ensure that the provisions of that tariff substantially conform with, or are superior to, the *pro forma* Open Access Transmission Tariff as it has been revised by Order No. 1000. *Id.* at P 815, JA 304.

On rehearing, the Commission rejected various challenges to Order No. 1000 and affirmed the final rule in all material respects. *See* Order No. 1000-A P 3, JA 331; Order No. 1000-B P 4, JA 490.

SUMMARY OF ARGUMENT

In this case, various petitioners challenge the Commission's efforts to remedy flaws in its existing transmission planning and cost allocation requirements. The need for reform was driven by the ever-growing demands placed on the electric grid. The expansion of regional power markets has led to an

increased need for new transmission facilities. And the widespread adoption of state energy resource policies has led to the rapid growth of renewable energy resources, whose viability is dependent upon the development of new transmission facilities.

In responding to this acute need for reform, the Commission has to consider the needs of divergent interest groups, such as transmission owners, transmission customers, independent transmission owners and developers, and state regulatory commissions. It is the Commission's obligation to strike "an appropriate balancing of the[se] investor and consumer interests." *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 532 (2008) (internal quotation omitted). Here, the Commission fulfilled its statutory responsibility by striking the balance in a manner designed to encourage open and transparent planning and cost allocation for new transmission facilities, so that the transmission grid can better support wholesale power markets and thereby ensure that FERC-jurisdictional services are provided at rates that are just and reasonable.

The Commission's Authority to Act: Transmission planning and cost allocation processes are practices directly affecting transmission rates. The Commission is obligated under section 206 of the Federal Power Act, 16 U.S.C. § 824e, to ensure that such practices are just and reasonable and not unduly discriminatory. Here, the Commission reasonably found that existing planning and

cost allocation processes were unjust and unreasonable because, among other things, they did not ensure the identification of more efficient or cost-effective solutions to regional transmission needs, resulting in jurisdictional rates that are higher than they would otherwise be. In addition, the processes were unduly discriminatory to the extent they granted federal rights of first refusal to traditional utilities with respect to the construction of new transmission facilities.

Consistent with the requirements of FPA section 206, Order No. 1000 fixed the just and reasonable planning and cost allocation practices to be thereafter observed. In doing so, the Commission did not violate section 202(a) of the Act, 16 U.S.C. § 824a(a) – which empowers the Commission to establish regions for "voluntary interconnection and coordination of facilities" – as that provision neither explicitly mentions planning nor implicitly limits the Commission's authority with respect to transmission planning.

The Commission exercised its authority proactively to address the theoretical threat posed by existing planning and cost allocation processes, which could thwart identification of more efficient and cost-effective transmission solutions. In doing so, the Commission used its knowledge and expertise to assess current circumstances and judge how to best avoid the adverse effects on jurisdictional rates likely to arise in the absence of reform. In light of the vital importance of transmission development to the nation, the Commission reasonably

took immediate steps rather than waiting for the consequences of the deficient existing processes to be realized.

Elimination of the Right of First Refusal: The Commission reasonably required the elimination of provisions in FERC-jurisdictional documents granting incumbent transmission providers a federal right of first refusal to construct certain facilities. The practical effect of such provisions is to discourage new entrants from proposing new transmission projects. This limits the universe of transmission developers which, in turn, may prevent the identification and evaluation of more efficient or cost-effective potential solutions to regional transmission needs. The Commission's right of first refusal reforms are rooted in the well-established principle that competition will normally lead to lower prices and, thus, lower jurisdictional rates.

The Commission's reforms vested transmission planning regions with sufficient flexibility to develop processes ensuring that the elimination of federal rights of first refusal does not threaten the reliability of the grid. In addition, the Commission made clear that it would address on a case-by-case basis in compliance proceedings whether any federal rights of first refusal are contained in contracts protected by the *Mobile-Sierra* doctrine. That decision was appropriate to offer parties in individual transmission planning regions an additional opportunity to present information about their region's specific circumstances.

Respect for State Authority: Order No. 1000 does not intrude on state authority. The reforms adopted therein focus only on the processes used to identify and evaluate potential solutions to transmission system needs. Order No. 1000 does not dictate what transmission facilities will be built, nor does it affect any preferences given to incumbent utilities by state or local law. Projects selected in regional transmission plans will not be constructed unless all necessary state approvals are secured. While Order No. 1000's planning and cost allocation processes may influence those state approvals, that is a permissible byproduct of the Commission's legitimate exercise of its authority to regulate interstate transmission.

Considerations of Public Policy Requirements: The Commission reasonably required that jurisdictional transmission providers develop procedures to identify transmission needs driven by federal, state or local law, and evaluate potential solutions to meet those needs. The public policy requirements expressed in such laws could directly affect the need for FERC-jurisdictional transmission facilities, which are squarely within the Commission's jurisdiction.

The Commission did not mandate consideration of the public policy requirements themselves. It simply required transmission providers to consider, in their planning transmission, needs driven by federal, state and local laws, rather than considering only transmission needs driven by reliability and economic

concerns. Because any statute's effect on a region's transmission needs is highly variable, the Commission reasonably declined to identify any particular public policy requirements that transmission providers must consider. Instead, the Commission required that all stakeholders be given the opportunity to provide meaningful input as to the transmission needs they believe are driven by public policy requirements. Such procedures are consistent with section 217(b)(4) of the Federal Power Act, 16 U.S.C. § 824q(b)(4), which requires the Commission to facilitate the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities. The Commission's reforms support the development of needed transmission facilities, which benefits load-serving entities.

Allocation Of Costs To Beneficiaries: Order No. 1000 requires public utilities to develop methods for allocating the costs of new transmission facilities selected through regional plans among those who will benefit from the facilities. Beneficiaries may include those who use the grid within the relevant region but do not have a contractual relationship with the transmission provider building the new facility. This is consistent with the engineering and scientific principles underlying the grid, as well as the Commission's jurisdiction over "any transmission" in interstate commerce and "all facilities" used for such transmission. An entity taking service over the grid necessarily benefits from all facilities comprising that

portion of the grid, not only the facilities over which it has contracted for service. It is thus reasonable to allocate the costs of new facilities to these entities.

The Commission reasonably limited the scope of cost allocation to the region or regions where the transmission facilities are located (unless other regions voluntarily agree to assume a portion of the costs). To be sure, this could permit some beneficiaries to escape cost responsibility. But the Commission believed it important to limit the scope of cost allocation to those who had an opportunity to participate in the transmission planning process (i.e., those within a particular region). This ensures fairness, which ultimately promotes successful planning. In addition, permitting involuntary interregional cost allocation would result in an inefficient form of interconnection-wide planning and cost allocation. The Commission reasonably found that such a sweeping remedy was unnecessary at this time, and could intrude on the Department of Energy's initiative to develop interconnection-based transmission plans.

Reciprocity: Participation by non-public utility transmission providers in the planning and cost allocation processes established by Order No. 1000 is entirely voluntary. The Commission reasonably found, however, that if non-public utilities choose not to enroll in planning regions and do not assume the same cost allocation obligations as public utilities, they may be found to have violated the "reciprocity" condition of the *pro forma* Open Access Transmission Tariff, which permits public

utilities to deny service to those who refuse to offer comparable service in return. This does not constitute a change to the reciprocity condition itself. It merely recognizes that transmission planning and cost allocation are integral and essential components of transmission service, and thus part of the comparable service owed to public utilities by those using their systems.

Based on its experience with Order No. 890 – a prior rulemaking which resulted in substantial collaboration between public and non-public utility transmission providers – the Commission reasonably declined to exercise its discretionary authority under section 211A of the Federal Power Act, 16 U.S.C. § 824j-1, to mandate that non-public utilities enroll in transmission planning regions. Should a lack of participation by non-public utilities threaten the success of Order No. 1000's reforms, the Commission made clear that it would consider exercising its section 211A authority on a case-by-case basis.

ARGUMENT

I. Standard Of Review

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard and upholds FERC's factual findings if supported by substantial evidence. *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 528 (D.C. Cir. 2010). The Commission's orders will be affirmed "so long as FERC examine[d] the relevant data and articulate[d] a . . . rational connection between

the facts found and the choice made." *Id.* (quoting *Alcoa, Inc. v. FERC*, 564 F.3d 1342, 1347 (D.C. Cir. 2009) (alterations and omission by Court)).

The Commission's factual findings are conclusive if supported by substantial evidence. 16 U.S.C. § 825*l*(b). This standard "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002). Once satisfied, "it is not for [the Court] to reweigh the conflicting evidence or otherwise to substitute [its] judgment for that of the Commission." *Ind. Mun. Power Agency v. FERC*, 56 F.3d 247, 254 (D.C. Cir. 1995).

"In matters of ratemaking, [the Court's] review is highly deferential, as '[i]ssues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission.'" *Alcoa*, 564 F.3d at 1347 (quoting *Town of Norwood v. FERC*, 962 F.2d 20, 22 (D.C. Cir. 1992)). This "great deference" derives from the Federal Power Act itself, because "[t]he statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition . . . ." *Morgan Stanley*, 554 U.S. at 532. Furthermore, "the breadth and complexity of the Commission's responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties." *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968).

This case also raises issues regarding the Commission's interpretation of the scope of its jurisdiction under the Federal Power Act. An agency's construction of the statute it administers is reviewed under well-settled principles. If Congress has directly spoken to the precise question at issue, the Court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 843 (1984). If the statute is silent or ambiguous, the Court "must defer to a 'reasonable interpretation made by the [agency].'" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 481 (2001) (quoting *Chevron*, 467 U.S. at 844). "Such deference . . . extends to the agency's interpretation of statutory ambiguity that concerns the scope of the agency's jurisdiction." *Helicopter Ass'n Int'l, Inc. v. FAA*, 722 F.3d 430, 433 (D.C. Cir. 2013) (citing *City of Arlington, Tex. v. FCC*, 133 S.Ct. 1863 (2013)).

II. The Commission Reasonably Required Public Utility Transmission Providers To Participate In A Regional Transmission Planning Process.

Order No. 888 encouraged utilities to engage in joint, regional planning with other utilities and customers, but did not require transmission providers to: coordinate with their customers in transmission planning; publish information underlying their transmission plans; or require joint planning between transmission providers in a given region. *See* Order No. 890 PP 1, 3, 420; Order No. 1000 PP 16-17, JA 152. In Order No. 890, the Commission determined that the planning requirements under the *pro forma* Open Access Tariff adopted in Order

No. 888 were insufficient to eliminate opportunities for undue discrimination in transmission service. *See* Order No. 890 PP 1, 3, 420; Order No. 1000 PP 16-17, JA 152. In an effort to remedy this, Order No. 890 required, among other things, that each public utility transmission provider have coordinated, open and transparent local and regional transmission planning processes that complied with certain principles set out in that Rule. *See* Order No. 890 PP 3, 435, 437; Order No. 1000 P 18, JA 152 (setting out Order No. 890 planning principles).

In Order No. 1000, the Commission recognized that Order No. 890's transmission planning requirements had improved transmission planning processes by making them more open, transparent and inclusive, and that certain regions had made significant strides in regional transmission planning by enhancing existing or creating new regional transmission planning processes. Order No. 1000 PP 21, 370, JA 153, 229. The Commission found, however, that Order No. 890 had certain remaining deficiencies that, in light of the substantial investment in new transmission facilities that is expected, needed to be addressed now to ensure that rates for Commission-jurisdictional transmission services are just and reasonable and not unduly discriminatory. Order No. 1000 PP 1-3, 28-31, 44-46, 78, 80, 99, 147-48, JA 148-49, 151-55, 157-58, 165, 169, 179-80.

For example, while Order No. 890 required public utility transmission providers to coordinate at the regional level to share system plans and identify

system enhancements that could relieve congestion or integrate new resources, it did not require the identification of potential solutions that could better meet regional needs. Order No. 1000 P 147, JA 79 (citing Order No. 890 P 523). Under Order No. 890, therefore, regional transmission planning processes could be used merely as a forum to confirm the simultaneous feasibility of transmission facilities contained in local transmission plans. *Id.* at PP 80, 147, JA 165, 179.

Order No. 1000 remedied Order No. 890's deficiencies in a number of ways, several of which are challenged on appeal. This section of the brief addresses challenges to the requirement that public utilities participate in a regional planning process that produces a regional transmission plan. As the following discussion shows, the Commission had both the authority and a reasonable basis to establish this requirement.

A. The Commission Reasonably Determined That It Has The Authority Under FPA Section 206 To Require Public Utilities To Participate In a Regional Transmission Planning Process.

1. FERC Has Authority Under FPA Section 206 To Require Regional Planning.

The Commission reasonably concluded that it has authority under FPA section 206 to require regional transmission planning. Order No. 1000 P 116, JA 173. First, as required under that provision, the Commission found that the planning processes established in prior FERC rulemakings (Order Nos. 888 and 890) are unjust and unreasonable or unduly discriminatory or preferential because,

among other things, they do not ensure that public utility transmission providers, in consultation with stakeholders, identify and evaluate transmission alternatives at the regional level that may resolve the region's needs more efficiently or cost-effectively than solutions identified in the local transmission plans of individual public utility transmission providers. *Id.* at PP 78, 116, JA 164, 173. Moreover, as required by FPA section 206, the Commission determined the just and reasonable rule or practice to be thereafter in effect, i.e., that transmission planning processes must result in a regional transmission plan that satisfies Order No. 890's transmission planning principles and that provides an opportunity to consider transmission needs driven by public policy requirements. *Id.* at PP 78, 116, JA 164, 173.

Threshold Petitioners argue that the Commission did not have authority to act under FPA section 206 because *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002), purportedly determined that FERC is "limited under section 206 to investigate the reasonableness of the terms of *existing* utility-customer relationships." Threshold Br. 8. In fact, however, *Atlantic City*, 295 F.3d at 10, states that FPA section 206 permits the Commission "to initiate changes to *existing* utility rates and practices," which is what the Commission addressed here. When proceeding by rule, the Commission can conclude that "*any* tariff violating the rule would have such adverse effects . . . as to render it unjust and unreasonable" within

the meaning of section 206 of the FPA. Order No. 1000-A P 56 (quoting *Assoc. Gas Distrib. v. FERC*, 824 F.2d 981, 1008 (D.C. Cir. 1987)); *see also Interstate Natural Gas Ass'n*, 285 F.3d at 37 (same); Order No. 1000-A PP 56, 587, JA 342, 446 (the Commission is not required to make individual findings concerning the rates of individual public utility transmission providers when proceeding under FPA section 206 by means of a generic rule) (citing *Assoc. Gas*, 824 F.2d at 1008).

Threshold Petitioners also cite *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994), for the proposition that it is "highly unlikely" Congress would give the Commission authority to mandate transmission planning "'through such a subtle device as permission [to review rates and practices under sections 205 and 206].'" Threshold Br. 8-9 (alteration by Threshold Petitioners). The circumstances in *MCI* and the instant case, however, are quite different.

MCI involved 47 U.S.C. § 203, subsection (a) of which required common carriers to file tariffs, and subsection (b) of which authorized the Federal Communications Commission to modify any requirement of section 203. *MCI*, 512 U.S. at 220. The Court rejected the FCC's attempt to make tariff filings optional for certain carriers, finding that "[r]ate filings are, in fact, the essential characteristic of a rate-regulated industry," and, therefore, it was "highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion -- and even more

unlikely that it would achieve that through such a subtle device as permission to 'modify' rate filing requirements." *MCI*, 512 U.S. at 231.

FPA section 206(a), 16 U.S.C. § 824e(a), the statutory provision at issue here, provides that, whenever the Commission finds that a practice affecting rates is unjust and unreasonable, it shall determine the just and reasonable practice to be thereafter observed. Thus, in contrast to the situation in *MCI*, it is unsurprising that FPA section 206 provides the Commission authority to require public utilities to participate in a regional transmission planning process. The Commission's authority "arises directly from its authority under section 206 to ensure that practices that affect transmission rates, such as transmission planning, are just and reasonable and not unduly discriminatory or preferential." Order No. 1000-A P 588, JA 447. *See also id.* at P 151, JA 362 (explaining that planning is a practice that affects rates, and the Commission has a duty under FPA section 206 to ensure that such practices are just and reasonable and not unduly discriminatory or preferential); Order No. 1000 P 284, JA 210 ("The Commission's remedial authority under FPA section 206 of the FPA is broad and allows us to act, as we do here, to revise terms in jurisdictional tariffs and agreements that may cause the rates, terms or conditions of transmission service to become unjust and unreasonable and unduly discriminatory or preferential.") (citing *Assoc. Gas*, 824 F.2d at 1008); Order No. 1000-A P 359, JA 401 ("the Commission acted under its

legal authority in section 206 to require the elimination of provisions in federally-regulated tariffs establishing practices in the regional transmission planning process that affect rates.").

2. FPA Section 202(a) Does Not Prohibit The Commission From Acting Under FPA Section 206 To Mandate Regional Transmission Planning.

Threshold Petitioners contend that FPA section 202(a), 16 U.S.C. § 824a(a), prohibits the Commission from mandating regional transmission planning under FPA section 206. Br. 8-19. The Commission, interpreting this statutory provision that it administers, reasonably found otherwise.

a. FPA Section 202(a) Does Not Mention Planning.

First, the Commission considered Threshold Petitioners' contention that the plain language of FPA section 202(a) prohibits mandated transmission planning. Br. 11-14. That provision states, in pertinent part:

> For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy . . . .

As the Commission found, FPA section 202(a) does not mention planning. Order No. 1000-A PP 123, 131, 136, JA 357, 358, 359. Thus, the Commission

concluded, the provision's plain language does not address transmission planning. *Id.* at P 136, JA 359.

b. The Commission Reasonably Interpreted FPA Section 202(a).

The Commission also reasonably found no merit to Threshold Petitioners' claim (Br. 11-19) that FPA section 202(a) nonetheless prohibits Order No. 1000's transmission planning requirements. Order No. 1000 PP 100-105, JA 169-70 ; Order No. 1000-A PP 121-58, JA 356-63.

FPA section 202(a) provides that the Commission can divide the country into regional districts for the "voluntary interconnection and coordination of facilities" for, among other things, transmission. The Commission, following the direct flow of the statutory language and reading that language in context, determined that FPA section 202(a) requires that the coordinated operation of facilities be voluntary. Order No. 1000-A PP 123-24, 126, 129, 131, 143, JA 356-57, 357, 357, 358, 361; Order No. 1000 PP 100-01, JA 169-70. The Commission based its interpretation on: (1) the sequencing set out in FPA section 202(a) – first the voluntary interconnection, and then the voluntary coordination, of facilities; (2) the fact that FPA section 202(a) "does not use the term 'coordination' in isolation but rather in the phrase 'coordination of facilities;'" and (3) the fact that FPA section 202(a) "does not include any terms such as plan or planning or any

synonyms for such terms." Order No. 1000-A PP 123-24, 129, 131, 143, JA 356-57, 357; 358, 361; Order No. 1000 PP 100-01, JA 169-70.

The Commission explained that Order No. 1000 does not address the operation of facilities. Instead, Order No. 1000 addresses the planning process for new transmission facilities, which occurs before the operational activities addressed in FPA section 202(a). Accordingly, the Commission concluded, FPA section 202(a) is not implicated here. Order No. 1000 PP 101, 105, JA 169, 170; Order No. 1000-A PP 123, 125, 129, 135, 141, 143, JA 356, 357, 357, 359, 360, 361.

Threshold Petitioners point out that there might already be coordinated operation when new transmission facilities are planned. Threshold Br. 13. Order No. 1000's requirements would apply, however, only to the pre-construction planning process for any new facilities, not to the operation of any of the facilities, existing or planned. Order No. 1000 PP 101, 105, JA 169, 170; Order No. 1000-A PP 123, 125, 129, 135, 141, 143, JA 356, 357, 357, 359, 360, 361.

In addition, Threshold Petitioners emphasize that "*no* facility gets built without first being planned – including the interconnection facilities FERC admits it may encourage but not require." Threshold Br. 14. Threshold Petitioners further contend that the Commission's interpretation of FPA section 202(a) conflicts with precedent that discusses planning or coordination. Threshold Br. 14-15 (citing

Reliability and Adequacy of Elec. Serv.-Reporting of Data, Order No. 383-4, 56 FPC 3457 at 3548 (1976), and *Pub. Serv. Co. of Ind.*, 59 FPC 1351, 1355 (1977)); *id.* at 16-17 (citing *Power Pooling in the U.S.* at 2 (1981), and *New Reporting Req. under the FPA*, Notice of Proposed Rulemaking, 58 FR 17544-01 at 17546 (1993)).

As the Commission explained, however, there are many types of planning and coordination. Order No. 1000-A PP 129, 145, 154, JA 357, 361, 363. "For instance, there is a significant difference between planning a trip and taking it. Likewise, the act of planning the transmission grid and the act of coordinating facilities in their operations are two quite different things." *Id.* at P 129, JA 357. "The broad range of activities that involve planning cannot be deemed to be intrinsically related to each other simply by virtue of having a characteristic in common that virtually all business, commercial, and industrial activities share." *Id.* at P 145, JA 361. The same is true for the term "coordination." *Id.* at P 132, JA 358. Its meaning in one context does not suggest that it has the same meaning in other contexts. *Id.*; *see also id.* (explaining that use of the term "coordination" in this rulemaking simply means "joint cooperation," not "coordination" as used in FPA section 202(a)).

Threshold Petitioners also argue that the Commission's interpretation of FPA section 202(a) is foreclosed by *Central Iowa Power Co-op. v. FERC*, 606

F.2d 1156 (D.C. Cir. 1979). Threshold Br. 9-10. In Threshold Petitioners' view, that case "left no doubt" that "coordination" encompasses joint transmission planning. Threshold Br. 9.

Central Iowa's focus, however, was not on transmission planning, but on joint system operations through power pooling. For example, *Central Iowa*, 606 F.2d at 1160, 1161, described the agreement at issue there as a power pooling agreement "designed to promote reliable and economical operation of the interconnected electrical network in the mid-continent area, primarily through reserve sharing to back up large generating units." The Court agreed with the Commission that it could not compel greater integration of the utilities, i.e., tighter power pooling, than the utilities' agreement proposed. *Id.* at 1167-68; *see also* Order No. 1000-A PP 140-41, JA 360 (same). As the Court explained, "[g]iven the expressly voluntary nature of coordination under section 202(a), the Commission could not have mandated adoption of the Agreement, and failure of the [agreement] participants to establish a fully integrated electric system[4] could not justify rejection of the Agreement filed." *Central Iowa*, 606 F.2d at 1168.

The Commission order underlying *Central Iowa*, *Mid-Continent Area Power Pool Agreement*, 58 FPC 2622 (1977), likewise shows that the Commission's focus in that case was on joint system operations. In *Mid-Continent*, the Commission

[4] Footnote setting out the different degrees of power pooling as discussed in the Federal Power Commission's 1970 National Power Survey.

rejected requests that it broaden the scope of the pooling agreement to provide for wheeling (i.e., the transmission or displacement of electric power from one utility to another over the facilities of an intermediate utility, *Otter Tail Power Co. v. United States*, 410 U.S. 366, 368, 374 (1973)). *Mid-Continent Area Power Pool*, 58 FPC at 2636-37. The Commission found that '[t]he mere fact that a particular pool does not offer the same range of services as another pool does not permit the Commission to direct expansion of the narrower pool's scope." *Id.* at 2637. "Unless the limited scope of the [power pooling agreement] is for some reason unjust, unreasonable or unduly discriminatory," the Commission is "not authorized under Part II of the Federal Power Act to direct the pool to offer more services." *Id.* Thus, despite Threshold Petitioners' claim to the contrary (Br. 16), the Commission's focus in *Mid-Continent Area Power Pool*, just like the Court's focus on review of that order, was on joint system operations, not on transmission planning.

Threshold Petitioners note that *Central Iowa* referenced a statement in the 1970 National Power Survey that "Coordination is joint planning and operation of bulk power facilities by two or more electric systems for improved reliability and increased efficiency which would not be attainable if each system acted independently." Threshold Br. 9-10 (quoting *Central Iowa*, 606 F.2d at 1168 n.36). That statement does not help Threshold Petitioners either.

First, Threshold Petitioners omit the limiting language from the beginning of the quoted sentence, which says: "As used in this chapter . . . ." *Central Iowa*, 606 F.2d at 1168 n.36 (quoting 1970 National Power Survey Part I Chapter 17 at 1). Furthermore, as the Commission pointed out, "nothing anyone cites to in the 1970 National Power Survey suggests that its definition of the term 'coordination' is intended as an interpretation of the term 'coordination' for purposes of section 202(a)." Order No. 1000-A P 146, JA 361. While Threshold Petitioners assert that the 1970 National Power Survey, "on its face, was intended to describe FERC's section 202(a) efforts," Br. 17, they cite nothing to support that assertion. In any event, the Commission found that, even if the 1970 National Power Survey's definition of "coordination" – "joint planning *and* operation of bulk power facilities" – applies to "coordination" as used in FPA section 202(a), then joint planning alone, which is all that is required under Order No. 1000, is not coordination under FPA section 202(a).[5] Order No. 1000-A P 146 (emphasis added by Commission), JA 361.

Thus, the Commission reasonably determined that neither the 1970 National Power Survey's definition of "coordination," nor *Central Iowa*'s reference to that

[5] This also resolves Threshold Petitioners' claim (Br. 15) that the Commission's interpretation here is inconsistent with the statement in *Public Serv. Co. of Ind.*, 59 FPC at 1355, that "[t]he importance of encouraging coordinated planning and operation of bulk power supply systems has been a cornerstone of Commission policy for many years."

definition, demonstrates that "coordination of facilities" in FPA section 202(a) includes "coordination of planning." *Id.*

The Commission's interpretation of FPA section 202(a) is consistent with Congress' intent in enacting that provision: to promote the economic use of resources through voluntary power pooling, i.e., the coordinated operation of facilities. Order No. 1000-A PP 126, 134, JA 357, 358 (citing *Central Iowa*, 606 F.2d at 1160-62); *see also Richmond Power & Light of Richmond, Ind. v. FERC*, 574 F.2d 610, 618 (D.C. Cir. 1978) (a power pool is "made up of interlocked utilities contracting to shunt electricity back and forth as needed"). As the Supreme Court has explained, "[t]he essential thrust of [FPA] § 202 . . . is to encourage voluntary interconnections of power." *Otter Tail*, 410 U.S. at 373 (citing S. Rep. No. 621, 74th Cong., 1st Sess., 19-20, 48-49; H.R. Rep. No. 1318, 74th Cong., 1st Sess., 8).

Threshold Petitioners argue that the Commission's interpretation is inconsistent with the underlying basis of the FPA which, citing *Otter Tail*, 410 U.S. at 374, they say is the regulation of "voluntary commercial relationships." Br. 13. Once again, however, *Otter Tail* supports the Commission's interpretation.

In *Otter Tail*, the Supreme Court noted that the FPA, as originally proposed, would have required every public utility to transmit energy for any person upon

reasonable request (i.e., to be a "common carrier"), and would have empowered the Commission to order the wheeling of power (i.e., the transmission or displacement of electric power from one utility to another over the facilities of an intermediate utility). *Otter Tail*, 410 U.S. at 368, 374. These provisions were eliminated from the FPA because "Congress rejected a pervasive regulatory scheme for controlling the interstate *distribution* of power in favor of voluntary commercial relationships." *Id.* at 374 (emphasis added). As distribution is part of the operation of, not the planning for, a facility, the discussion in *Otter Tail* cited by Threshold Petitioners supports the reasonableness of the Commission's interpretation here.

Threshold Petitioners also contend that Congress' decision not to include in the FPA a common carrier provision or a requirement that public utilities receive a certificate of public convenience and necessity before constructing or abandoning facilities shows Congress intended transmission planning to be voluntary. Threshold Br. 18-19 (quoting Hearing on H.R. 5423 Before the House Interstate & Foreign Commerce Commission. 74th Cong. 560 (1935)).

As just discussed, however, *Otter Tail*, 410 U.S. at 374, found that the common carrier provision was omitted from the FPA because Congress chose not to enact a "pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships." The proposed certificate of

public convenience and necessity provision likewise involved post-transmission planning matters. Accordingly, the Commission reasonably determined that the Federal Power Commission's statement that the common carrier and certificating provisions were absolutely necessary to effectively carry out regional planning and coordination related to operational, power pooling matters, not to planning for new transmission facilities. Order No. 1000-A P 139, JA 359. Congress' decision not to include these operationally-related provisions says nothing about whether the Commission has authority to require public utilities to engage in planning for new transmission facilities.

Next, Threshold Petitioners argue that there is no logical reason why Congress would have charged the Commission with promoting only coordinated operation but not coordinated planning of transmission facilities. Threshold Br. 14, 18. As already discussed, however, the activities involved in planning new transmission facilities are separate and distinct from, and occur before, the operational activities that are addressed in FPA section 202(a). Order No. 1000 PP 101, 105, JA 169, 170; Order No. 1000-A PP 123, 125, 129, 135, 141, 143, JA 356, 357, 357, 359, 360, 361.

Threshold Petitioners also assert that mandating coordinated transmission planning "necessarily drive[s] coordinated interconnection and operation since interconnection and operations follow planning." Threshold Br. 18. As Threshold

Petitioners acknowledge, however, "not all planned facilities get built, so mandating planning does not thereby mandate construction or coordinated operation." *Id.* at 14.

B. The Commission Satisfied Its FPA Section 206 Burden Based On A Theoretical Threat.

1. Precedent Establishes That The Commission May Act Based Solely On A Theoretical Threat.

This Court's precedent establishes that the Commission appropriately may act based solely on a theoretical threat. *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 844 (D.C. Cir. 2006); *see also BNSF Ry. Co. v. Surface Transp. Bd.*, 526 F.3d 770, 778 (D.C. Cir. 2008) (explaining that *National Fuel* permitted "FERC to either compile [a] record of [affiliate] abuse or 'try to support [its rule] by setting out its best case for relying *solely* on a theoretical threat of abuse.'") (quoting *Nat'l Fuel*, 468 F.3d at 844; emphasis and third alteration by Court); Order No. 1000-A PP 56-57, 74, JA 342, 346 (explaining that the Commission can act based on the existence of a threat that, in absence of Commission action, would likely materialize and cause rates to be unjust and unreasonable, or unduly discriminatory or preferential).

Threshold Petitioners do not dispute this. Threshold Br. 27. Instead, they claim the Commission failed to justify relying on a theoretical threat in the circumstances here. *Id.* at 26-39. As explained below, this claim is mistaken.

2. The Commission Reasonably Relied On A Theoretical Threat In The Circumstances Here.

The Commission recognized that the transmission planning requirements it established in Order No. 890 had improved transmission planning processes and that certain regions had made significant strides in regional transmission planning by enhancing existing or creating new regional transmission planning processes. Order No. 1000 P 21, JA 153. The Commission found, however, that there were certain deficiencies in Order No. 890's transmission planning and cost allocation requirements that, in light of the substantial investment in new transmission facilities that is expected,[6] needed to be addressed now to ensure that future rates for Commission-jurisdictional transmission services are just and reasonable and not unduly discriminatory. Order No. 1000 PP 1-3, 21, 28-31, 43-46, 78, 80, 99, 147-48, 370, JA 148-49, 153, 154-55, 157-58, 164, 165, 169, 179-80, 227; Order No. 1000-A PP 5, 50-51, 54, JA 332, 341, 342.

First, Order No. 890's requirements were insufficient because they did not require public utility transmission providers to plan together and assess the potential benefits of transmission solutions that might meet a region's needs more

[6] *See, e.g.*, Order No. 1000 P 44 & n.36, JA 157 (citing Brattle Group report commissioned by Edison Electric Institute indicating that approximately $298 billion of new transmission facilities will be required between 2010 and 2030); Order No. 1000-A PP 5, 50, JA 332, 341 (discussing expected substantial increase in transmission investment, and explaining that it is driven in part by changes in the generation mix). No party contested the need for additional transmission facilities. Order No. 1000 P 49, JA 158.

efficiently or cost-effectively than solutions an individual transmission provider would identify in its local transmission planning process. Order No. 1000 PP 3, 81, 147, JA 149, 165, 179. For example, the Commission pointed out, transmission facilities that span multiple service territories might obviate the need for transmission facilities identified in multiple local transmission plans while simultaneously reducing congestion across the region. *Id.*

Second, Order No. 890 did not require public utility transmission providers to consider transmission needs driven by public policy requirements and, as a result, did not ensure that transmission providers accurately identify and plan transmission to meet their customers' needs. Order No. 1000 PP 3, 82, 204, JA 149, 165, 191; Order No. 1000-A P 317-20, 336, JA 392-93, 396; *see also id.* at P 336, JA 396 (noting that federal and state laws and regulations potentially impacting transmission needs have significantly increased in recent years). In addition, the Commission explained, since prudent transmission providers consider transmission needs driven by public policy requirements when planning transmission to serve their native load customers,[7] they must consider those

[7] Native load customers are the "wholesale and retail power customers of the Transmission Provider on whose behalf the Transmission Provider, by statute, franchise, regulatory requirement, or contract, has undertaken an obligation to construct and operate the Transmission Provider's system to meet the reliable electric needs of such customers." Order No. 890, *pro forma* Open Access Transmission Tariff § 1.20; *see also* 18 C.F.R. § 35.28(c) (providing that every

transmission needs for the rest of their FERC-jurisdictional customers as well. Order No. 1000 PP 71, 79, 83, 204, JA 163, 165, 166, 191; Order No. 1000-A PP 329, 336, JA 395, 396.

Third, Order No. 890 did not require the removal from Commission-jurisdictional agreements and tariffs of federal rights of first refusal to construct transmission facilities. Order No. 1000 P 3, JA 149. The Commission explained that federal rights of first refusal create barriers to entry that discourage nonincumbent transmission developers from seeking to invest in transmission and, therefore, undermine the identification and evaluation of more efficient or cost effective solutions to regional needs which can result in unjust and unreasonable or unduly discriminatory or preferential rates for Commission-jurisdictional services. Order No. 1000 PP 253, 256-257, JA 203, 204; Order No. 1000-A PP 77-78, 80, JA 347, 347. Removing federal rights of first refusal was expected to bring competition into the transmission development process and, thereby, lower transmission rates. Order No. 1000-A P 11 & n.18, JA 333 (citing *Cleco Power LLC*, 101 FERC ¶ 61,008 P 117 (2002), *order terminating proceedings*, 112 FERC ¶ 61,069 (2005); *Carolina Power & Light Co.*, 94 FERC ¶ 61,273 at 62,010, *order on reh'g*, 95 FERC ¶ 61,282 at 61,995 (2001) (finding that a right of first refusal would unduly limit the planning authority and allow for discrimination by self-

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public utility transmission provider must have a tariff complying with Order No. 888, as amended by Order Nos. 890 and 1000).

interested transmission owners, potentially reduce reliability and preclude lower cost or superior transmission facilities or upgrades by third parties from being planned and constructed)).

Fourth, Order No. 890 did not ensure that cost allocation methods account for the benefits associated with new transmission facilities, which could cause rates to be unjust and unreasonable or unduly discriminatory or preferential and make it less likely that transmission facilities will be built. Order No. 1000 PP 3, 495-99, 501, JA 149, 250-51, 251; Order No. 1000-A P 52, JA 341. The Commission explained that, while Order No. 890 cost allocation requirements may have sufficed in the past, the electric industry has changed at an accelerated pace in recent years, and transmission facilities' benefits have become more broadly diffuse. Order No. 1000 P 497, JA 250. Specifically, regional power markets have expanded and state resource policies (such as renewable portfolio standards) have increasingly been implemented, contributing to the rapid growth of renewable energy resources, which are frequently remote from load centers. *Id.*; *see also Ill. Commerce Comm'n*, 721 F.3d at 771 (same). This has increased the need for transmission facilities that cross several utilities, regional transmission organizations, or independent system operator regions. Order No. 1000 P 497, JA 250.

In addition, the Commission pointed out, cost allocation is often a contentious subject, and many regions' cost allocation methods do not reflect an analysis of those who benefit from transmission facilities. Order No. 1000 P 498, JA 251. The Commission determined that, unless the beneficiaries of, and cost allocation for, proposed transmission facilities are identified during the transmission planning process, needed transmission facilities might not be built, and ratepayers will be harmed. *Id.* at P 499, JA 251.

In short, based on its expertise and knowledge of the electric energy industry, the Commission determined that its existing transmission planning and cost allocation requirements were unjust and unreasonable, unduly discriminatory or preferential because regional transmission planning: did not have to consider all transmission needs; allowed barriers to proposing and evaluating alternative transmission solutions, inhibiting more efficient or cost-effective transmission solutions; and did not require a clear understanding in advance of who will be allocated the costs of facilities, making it less likely that transmission facilities will actually be built. Order No. 1000-A PP 52, 60, JA 341, 343; Order No. 1000 P 496, JA 250.

Accordingly, contrary to Threshold Petitioners' claim, Br. 20-25, 27, 31, the Commission satisfied its FPA section 206 burden here. The Commission found that its existing procedures failed to encourage the consideration of more efficient

or cost effective transmission planning alternatives and, therefore, did not merely fail to produce an "optimal outcome" (Threshold Br. 23), but were unjust and unreasonable. Order No. 1000 PP 1-3, 21, 28-31, 43-46, 78, 80, 99, 116, 147-48, 370, JA 148-49, 153, 154-55, 157-58, 164, 165, 169, 173, 179-80, 229; Order No. 1000-A PP 5, 50-51, 54, JA 332, 341, 342. *See also id.* at P 74, JA 346 ("The Commission's task is to assess current circumstances and to form a judgment on the steps necessary to avoid adverse effects on rates that it concludes are likely to arise if the present situation persists.").

Moreover, contrary to Threshold Petitioners' claim (Br. 21, 24-25), the Commission satisfied its FPA section 206 obligation to put in effect a just and reasonable replacement rule or practice to be thereafter in effect. To rectify Order No. 890's inadequacies, the Commission amended that rule to require, among other things, that: (1) public utility transmission providers participate in a regional transmission planning process that considers and evaluates, on a non-discriminatory basis, possible alternatives and produces a regional transmission plan; (2) transmission planning processes provide an opportunity to identify and evaluate transmission needs driven by local, state and federal laws or regulations; (3) federal rights of first refusal to build transmission facilities be removed from Commission-approved tariffs and agreements; and (4) public utility transmission providers in a region use the same method or methods for allocating the costs of

new facilities selected in the regional transmission plan for purposes of cost allocation. *E.g.*, Order No. 1000 PP 1-2, 4, 284, 497, JA 148-49, 149, 210, 250; Order No. 1000-A PP 151, 359, 523, 588, JA 362, 401, 434, 446. The Commission determined these reforms will ensure that more transmission projects are considered in the transmission planning process, will increase the likelihood that transmission facilities in the transmission plan are actually constructed, and will ensure that Commission-jurisdictional services are provided at just and reasonable rates and on a basis that is just and reasonable and not unduly discriminatory or preferential. Order No. 1000 PP 42, 159, 501, JA 157, 182, 251; Order No. 1000-A P 3, JA 331.

The Commission's use of the terms "might," "may," or "could" does not undercut its findings, as Threshold Petitioners contend, Br. 24, 26. Order No. 1000-A PP 69-73, JA 345-46. "When making a generic factual prediction, one is not predicting what will occur with certainty in every instance but rather what is reasonable to conclude will occur with sufficient frequency and to a sufficient degree to conclude that the reforms are needed." *Id.* at P 173, JA 366; *see also id.* at P 69, JA 345 (the Commission appropriately may make generic factual predictions based on economic theory) (citing *Sacramento*, 616 F.3d at 531; *Assoc. Gas*, 824 F.2d at 1008). The Commission's expectation that its reforms will improve transmission planning was not based on speculation but, rather, on the

Commission's expertise and knowledge of the electric industry. Order No. 1000-A P 60, JA 343.

3. The Commission Appropriately Addressed The Matters Set Out In *National Fuel*.

Threshold Petitioners contend that, in order to rely on a theoretical threat, *National Fuel*, 468 F.3d at 844-45, requires the Commission "to: (1) explain why evidence of abuse is undetectable; (2) justify the cost of the rules; and (3) explain why case-specific resolution is not feasible." Threshold Br. 27-28; *see also id*. at 33-39 (same). As the Commission explained, however, the matters identified by the Court to be addressed on remand in *National Fuel* were specific to the facts of that case and did not apply in all cases. Order No. 1000-A P 58, JA 342; *see also BNSF Ry.*, 526 F.3d at 778 (affirming agency's reliance on theoretical threat because it reasonably explained the undetectable nature of the problem). In any event, the Commission appropriately addressed each of these matters.

a. The Commission Reasonably Determined It Needed To Act Now.

Transmission planning is a complex, long-range process, and developing transmission facilities can involve long lead times and problems related to design, siting, permitting, and financing. Order No. 1000 P 50, JA 159; Order No. 1000-A PP 6, 54, JA 332, 342. In addition, the record here included comments from a number of parties showing that current transmission planning and cost allocation

processes have impeded, or led to less efficient and cost-effective, transmission facility development. Order No. 1000 PP 32-38, 49-50, 58, JA 155-56, 158-59, 160; Order No. 1000-A P 6, JA 332. The Commission reasonably determined, despite Petitioners' claims otherwise (Threshold Br. 28; Pub. Policy Br. 16), that, since a substantial increase in transmission investment is expected and transmission planning has long-range ramifications, it was appropriate and prudent to act now rather than to wait for evidence of systemic transmission planning problems. Order No. 1000 PP 44 & n.36, 50, JA 157, 159. Order No. 1000-A PP 5-6, 50, JA 332, 341. *See also*, *e.g.*, *id.* at P 80, JA 347-48 (explaining that, while the record contained evidence that nonincumbent transmission developers have experienced discriminatory treatment, it is unsurprising that there is limited evidence of nonincumbent transmission developers being excluded since rights of first refusal, by their nature, discourage nonincumbent transmission developers from proposing to build new facilities).

b. The Commission Reasonably Determined Order No. 1000's Benefits Exceed Its Costs.

The Commission also reasonably balanced Order No. 1000's costs and benefits. Order No. 1000-A PP 75, 91, JA 346, 350. "Order No. 1000 is intended to encourage the development of more efficient and cost-effective transmission solutions to regional transmission needs, which will promote considerable economic benefits in the form of lower congestion, greater reliability, and greater

access to generation resources." Order No. 1000-A P 586, JA 446. In light of the expected substantial investment in new transmission facilities, the Commission determined that Order No. 1000's benefits (i.e., identifying more efficient or cost effective transmission solutions and ensuring that transmission services are provided at rates that are just and reasonable and not unduly discriminatory or preferential), outweighed its burdens (i.e., adopting and implementing additional transmission planning and cost allocation procedures). *Id.* at PP 75, 91, JA 346, 350.

As the Commission explained, many transmission providers already engage in processes and procedures of the type required by the Rule. Order No. 1000-A P 91, JA 350; Order No. 1000 P 56, JA 160. Moreover, the Commission found, the burden of complying with Order No. 1000's requirements was minimal compared to the billions of dollars in needed transmission investment that is frustrated by current transmission planning and cost allocation requirements. Order No. 1000-A P 91, JA 350 (citing Brattle Group study stating that more than $180 billion in transmission projects will not be built due to overlaps and deficiencies in transmission planning and cost allocation processes; citing Edison Electric Institute study estimating that $298 billion in new transmission investment is needed between 2010 and 2030); Order No. 1000 P 38, JA 156 (same).

Threshold Petitioners argue that the Commission did not adequately consider the costs and benefits of removing rights of first refusal. Br. 31-39. To the contrary, in addition to the cost-benefit findings just discussed, the Commission determined that removing rights of first refusal would benefit consumers by allowing for competition in the transmission development process. Order No. 1000-A PP 76-77, JA 346-47; *see also id.* at P 76, JA 346 (noting that Federal Trade Commission comments supported eliminating rights of first refusal in order to remove barriers to entry and, thereby, benefit consumers); *id.* at P 80, JA 347 (finding that federal rights of first refusal discourage investment by nonincumbent transmission developers); *id.* at P 77, JA 347 (removing these barriers to entry from the transmission development process was expected to bring the same benefits that competition generally brings to most industries). The Commission reasonably expected that expanding the universe of potential transmission developers would lead to the identification and evaluation of more efficient or cost effective alternatives to meet regional needs. *Id.* at PP 78, 83, 85, 87, JA 347, 348, 348, 349. For example, the Commission noted, alternatives proposed by nonincumbent transmission providers might satisfy several regional needs rather than just the one specific reliability need on which an incumbent transmission provider would focus. *Id.* at P 85, JA 348.

The Commission did not misapply competition theory, as Threshold Petitioners claim (Br. 31-33). Rather, the Commission reasonably determined, based on its expertise, that bringing competition into the transmission development process should result in more efficient or cost effective transmission solutions. Order No. 1000-A PP 60, 78, 83, 85, 87, JA 343, 347, 348, 348, 349.

Nor did the Commission fail to consider vertical integration efficiencies in its analysis. Threshold Br. 33-37. The Commission acknowledged that vertical integration may provide efficiencies and benefits to consumers and determined that, where that is so, "vertically-integrated public utilities will be well-positioned to compete in a transmission development process that is open to nonincumbent transmission developers." Order No. 1000-A P 90, JA 349; *see also id.* at P 88, JA 349 (noting that, for a number of reasons, incumbent transmission providers may be well-equipped to prevail in a competitive process). There was no need to retain this barrier to entry and competition since the potential loss of efficiencies, like other factors that affect stakeholders' choice among alternatives, should be considered in the transmission planning process. Order No. 1000-A PP 89-90, JA 350-51.

Threshold Petitioners' brief neither mentions nor challenges this vertical integration efficiency finding and, therefore, waives any challenge to it. *E.g.*, *Xcel Energy Servs., Inc. v. FERC*, 510 F.3d 314, 318 (D.C. Cir. 2007); *Power Co. of*

Am. v. FERC, 245 F.3d 839, 845 (D.C. Cir. 2001). Instead, Threshold Petitioners erroneously argue that "FERC's sole response" to petitioners' vertical integration efficiencies concern was that it "'confuses the concept of vertical integration with that of monopoly,' citing the successful introduction of competitive generation into electric operations." Threshold Br. 36 (quoting Order No. 1000-A P 90, JA 349). But the cited statements simply make the point that, since generation markets have become competitive, vertically integrated utilities are no longer necessarily natural monopolies "in all aspects of electric service." Order No. 1000-A P 90, JA 349. Threshold Petitioners acknowledge that electric generation is no longer a natural monopoly. Threshold Br. 36.

Threshold Petitioners also assert that the Commission ignored their claim that removing rights of first refusal raises reliability concerns by allowing nonincumbents to construct and own transmission facilities required to satisfy reliability and service obligations. Threshold Br. 37. But, as is discussed more fully *infra* p. 78, the Commission considered that claim and determined that there was no basis for the concern that nonincumbent developers would be more likely to abandon transmission projects, as all potential project developers should establish during the selection process that they will be in a position to fulfill their commitments. Order No. 1000-A P 95, JA 351. Moreover, Order No. 1000's requirement that public utility transmission providers have procedures in place to

identify when delays in the development of a transmission facility selected in a regional transmission plan for purposes of cost allocation require evaluation of alternative solutions further ensures that incumbent transmission providers will be able to satisfy their reliability needs and service obligations when they are relying on a nonincumbent transmission developer's project. *Id.* at P 428, JA 416. In any event, the Commission explained, nothing in Order No. 1000 prevents an incumbent transmission provider from choosing to meet a reliability need or service obligation by building new transmission facilities located solely within its retail distribution service territory or footprint and that are not submitted for regional cost allocation. Order No. 1000 P 262, JA 205; Order No. 1000-A PP 85, 428, JA 348, 416.

The Commission also disagreed with the claim (Threshold Br. 38) that removing rights of first refusal would cause incumbent transmission providers to favor local planning over participation in the regional planning process. Order No. 1000-A P 179, JA 367. While nothing in Order No. 1000 prohibits an incumbent from proposing a local transmission solution to satisfy a reliability need or service obligation, the Commission was not persuaded that allowing incumbent providers to choose among these options will lead to less robust regional planning. *Id.* "There are a variety of factors that incumbent transmission providers must consider when deciding whether to propose a local transmission facility instead of relying

on a transmission facility selected in the regional transmission plan for purposes of cost allocation." *Id.* Furthermore, the Commission expected that incumbents ultimately will benefit from these reforms because they support identification of more efficient or cost-effective transmission solutions, thereby improving incumbents' ability to meet the reasonable needs of load-serving entities to satisfy their service obligations. *Id.* at PP 178-79, JA 367.

c. The Commission Appropriately Amended Its Order No. 890 Rulemaking Requirements Via Rulemaking.

In addition, the Commission reasonably explained why it chose to amend the transmission planning and cost allocation requirements promulgated in its prior rulemaking via rulemaking rather than through individual adjudications. Order No. 1000 PP 52, 60, JA 159, 160; Order No. 1000-A PP 51, 79, JA 341, 347. While individual adjudications, by their nature, focus on the discrete questions presented in a specific case, the transmission planning and cost allocation rulemaking amendments addressed here are general matters that cannot adequately or efficiently be addressed through the adjudication of individual complaints. Order No. 1000 PP 52, 60, JA 159, 160; Order No. 1000-A PP 51-52, 79, JA 341, 347. Moreover, requiring nonincumbent transmission developers to overcome these barriers to entry solely through individual complaint proceedings would require them to file a complaint every time they wanted to engage in the development process. Order No. 1000-A P 79, JA 347. The expense, delay and

uncertainty this would create would provide further disincentive for nonincumbents to participate in the development process. *Id.*

Threshold Petitioners contend that a nationwide rulemaking was inappropriate because certain regions of the country purportedly have effective planning processes in place. Threshold Br. 28-31, 39-40; *see also* Pub. Policy Br. 16 (same). The Commission reasonably found otherwise. Order No. 1000 PP 60-61, JA 160-61; Order No. 1000-A PP 64-66, JA 344.

The Commission recognized that some regions may already satisfy some of Order No. 1000's requirements. Order No. 1000-A P 66, JA 344; Order No. 1000 PP 60-61, JA 160-61. Thus, the Commission permitted transmission providers to explain in their compliance filings how they already satisfy any of Order No. 1000's transmission planning and cost allocation requirements. Order No. 1000-A P 66, JA 344; *see also Interstate Natural Gas Ass'n*, 285 F.3d at 37 (affirming the Commission's decision to defer to individual compliance filings whether a particular tariff was just and reasonable under the standard set out in the rulemaking).

The Commission determined, however, that a nationwide rulemaking was necessary. No region satisfied all of Order No. 1000's requirements. Order No. 1000-A P 66, JA 344. In addition, the Commission pointed out, even if a particular region might not currently face transmission planning problems, it might face such

problems in the future without Order No. 1000's requirements. *Id.* at P 65, JA 344. Furthermore, basic principles, such as the proposition that transmission developers will be more likely to invest if there is a mechanism already in place by which their costs will be allocated, apply in every region. *Id.*

Accordingly, the Commission appropriately amended its Order No. 890 rulemaking requirements through a rulemaking rather than through individual adjudications. Order No. 1000 P 60, JA 343 (citing, *e.g.*, *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)). *See also, e.g.*, *U.S. Telecomm. Ass'n v. FCC*, 400 F.3d 29, 39 n.19 (D.C. Cir. 2004) (an agency must act by rulemaking to substantively amend a rulemaking); *Sprint Corp. v. FCC*, 315 F.3d 369, 373-74 (D.C. Cir. 2003) (same).

C. The Commission Acted Consistently With FPA Section 217(b)(4).

Federal Power Act section 217(b)(4)[8] "requires the Commission to exercise its authority to facilitate the planning and expansion of transmission facilities to assist load-serving entities in meeting their reasonable transmission needs and to

[8] FPA section 217(b)(4), 16 U.S.C. § 824q(b)(4), states that:

> The Commission shall exercise the authority of the Commission under this chapter in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service obligations of the load-serving entities, and enables load-serving entities to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term power supply arrangements made, or planned, to meet such needs.

secure long-term firm transmission rights." Order No. 1000-A P 177, JA 366. The statute defines a load-serving entity as "a distribution utility or electric utility that has a service obligation," i.e., "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." FPA section 217(a)(2)-(3), 16 U.S.C. § 824q(a)(2)-(3).

Threshold Petitioners argue that Order No. 1000's transmission planning requirements, particularly the removal of federal rights of first refusal, harm rather than facilitate transmission planning and expansion. Threshold Br. 40-41. As the Commission found, however, allowing for competition in the transmission development process should lower new transmission facilities' costs and enable increased access to resources and more efficient or cost-effective deliveries by load-serving entities. Order No. 1000 P 291, JA 212; Order No. 1000-A P 178, JA 367; *see also id.* at P 94, JA 351 (native loads of individual transmission providers will benefit from improvements to the transmission grid that extend beyond their own facilities).

Accordingly, the Commission reasonably determined that Order No. 1000 will enhance the transmission planning process and support the development of needed transmission facilities and, therefore, consistent with FPA section 217(b)(4), will aid load-serving entities in meeting their reasonable transmission

needs. Order No. 1000 PP 108, 291, JA 171, 212; Order No. 1000-A PP 168-78, JA 365-67.

III. The Commission's Decision On The Right Of First Refusal Was Reasonable.

A. The Commission Reasonably Concluded There Was A Need For This Reform.

Order No. 1000 required that public utilities remove from Commission-jurisdictional tariffs and agreements provisions granting incumbent transmission providers a federal right of first refusal to construct certain transmission facilities.[9] Order No. 1000 P 225, JA 196. The Commission removed federal rights of first refusal "to eliminate practices that have the potential to undermine the identification and evaluation of more efficient or cost-effective alternatives to regional transmission needs, which in turn can result in rates for Commission-jurisdictional services that are unjust and unreasonable, or otherwise result in

[9] An incumbent transmission provider is one developing a project within its own retail distribution service territory or footprint (i.e., the location of its transmission facilities). Order No. 1000-A P 416, JA 413; Order No. 1000 P 225, JA 196. A "federal" right of first refusal is an incumbent's right, created by provisions in FERC-jurisdictional tariffs or agreements, to construct and own new projects in its service territory or footprint that are selected in a regional transmission plan for purposes of cost allocation. Order No. 1000-A P 340 n.373, JA 396; Order No. 1000 P 253 n.231, JA 203. A "transmission facility selected in a regional transmission plan for purposes of cost allocation" is one that is selected, pursuant to a Commission-approved regional transmission planning process, as a more efficient or cost-effective solution to regional transmission needs. Order No. 1000 P 5, JA 150.

undue discrimination by public utility transmission providers." *Id.* at P 226, JA 196; *see also id*. at P 7, JA 150.

As the Commission recognized in Order Nos. 888 and 890, it is not in the economic self-interest of public utility transmission providers to expand the grid to permit access to competing sources of supply. Order No. 1000 P 254, JA 203 (citing Order No. 888 at 31,682; Order No. 890 P 524). Order No. 890 addressed transmission providers' incentive to avoid upgrading transmission capacity that would benefit competitors, *id.*, but it did not address undue preference to incumbent providers over nonincumbent developers in the transmission planning process, *id.* at P 228, JA 197. In Order No. 1000, the Commission found additional requirements necessary "to ensure that these processes [established under Order No. 890] are not adversely affected by federal rights of first refusal." *Id.* at P 315, JA 217. Thus, the Commission found the pre-existing Order No. 890 planning requirements inadequate, *see* ROFR Br. 11-12; 25-26; 28-29 (arguing that FERC never found Order No. 890 processes inadequate), including the failure to address rights of first refusal. Order No. 1000 P 3, JA 149 (listing Order No. 890 inadequacies, including the lack of nonincumbent reforms).

Order No. 1000 determined that, "[j]ust as it is not in the economic self-interest of public utility transmission providers to expand transmission capacity to allow access to competing suppliers, it is not in the economic self-interest of

incumbent transmission providers to permit new entrants to develop transmission facilities, even if proposals submitted by new entrants would result in a more efficient or cost-effective solution to the region's needs." Order No. 1000 P 256, JA 204. *See also* Order No. 1000-B P 38, JA 497. Even absent incumbents' economic incentives to preclude entry, expanding the universe of transmission developers offering potential solutions can lead to the identification and evaluation of potential solutions to regional needs that are more efficient or cost-effective. Order No. 1000-A P 83, JA 348.

Federal rights of first refusal exacerbate these problems by creating barriers to entry in the field of transmission development. Order No. 1000 P 257, JA 204; Order No. 1000-A P 80, JA 347. Even if a nonincumbent transmission developer's project is selected in the regional transmission planning process, the nonincumbent may lose the opportunity to construct the project -- and lose its investment in developing the project -- to an incumbent transmission owner with a federal right of first refusal. Order No. 1000 PP 228-29, JA 197. As developing transmission projects requires significant investment, an incumbent's ability to use a right of first refusal to act in its own economic self-interest may discourage new entrants from proposing new transmission projects in the regional transmission planning process. Order No. 1000 PP 229, 231, 256-57, JA 197, 197, 204; Order No. 1000-A P 80, JA 349.

The Commission's findings were supported by the Federal Trade Commission. Order No. 1000-A P 76, JA 346 (citing R. 45, Comments of the Federal Trade Commission on the Proposed Rule at 2, 7, JA 509, 514); *id*. at P 77, JA 347; Order No. 1000-B P 38, JA 497. As the Federal Trade Commission explained, market competition often takes the form of new entry. Federal Trade Commission Comments at 7, JA 514. Antitrust agencies "have long criticized mechanisms by which incumbents may impede new entry that can improve market performance." *Id*. at 8, JA 515. Incumbents "may have incentives to maintain a less than robust transmission system to discourage new generation entry and competition from distant generators." *Id*. at 10, JA 517. "The existing right of first refusal increases risk for potential entrants, without any countervailing incentives, and encourages free riding by incumbent transmission owners on the investments of potential entrants in developing transmission project proposals." *Id*. at 8, JA 515.

Furthermore, the record confirmed that nonincumbent transmission developers in fact experience discriminatory treatment. Order No. 1000-A P 80, JA 347 (citing R. 124, LS Power Comments on Proposed Rule at 3, JA 878). *See also, e.g.*, R. 278, LS Power Reply Comments on Proposed Rule at 42-46, JA 1426-30 (discussing record evidence of discriminatory nature of the right of first refusal); R. 77, Primary Power, LLC Comments on Proposed Rule at 16-18,

JA 687-89 (same). As the Commission explained, however, the evidence of discriminatory impact was, unsurprisingly, somewhat limited because the existence of a right of first refusal discourages nonincumbent developers from proposing projects in the first place. Order No. 1000-A P 80, JA 347.

While nonincumbent developers can pursue projects on a merchant basis, ROFR Br. 27, that does not demonstrate a lack of barriers to entry. Merchant projects are ineligible for cost-of-service rates; the developer of a merchant transmission project assumes all financial risks for developing and constructing the project. Order No. 1000 P 163, JA 183. Accordingly, merchant projects are not included in a regional plan for purposes of cost allocation. *Id.* at PP 163, 165, JA 183, 184. Thus, the ability to pursue a project on a merchant basis is not comparable to incumbents' opportunity to build projects on a cost-of-service basis. *See, e.g.*, *Primary Power, LLC*, 131 FERC ¶ 61,015 P 48 (2010), *on reh'g*, 140 FERC ¶ 61,052 (2012) (nonincumbent developer declined to pursue its proposed project as a merchant project because it could be financed only on a cost-of-service basis). *See, e.g.*, Order No. 1000 PP 332, 335, JA 221, 222 (finding that each nonincumbent developer must have the same opportunity as an incumbent developer to allocate the cost of transmission facilities selected in the regional transmission plan through a regional cost allocation method).

B. The Commission Reasonably Expected That The Nonincumbent Reforms Would Produce Competitive Benefits.

Federal rights of first refusal effectively restrict the universe of transmission developers offering potential solutions for consideration in the regional transmission planning process. Order No. 1000 P 284, JA 210. In enacting the right of first refusal reforms, the Commission had a "reasonable expectation" that expanding the universe of transmission developers offering potential solutions could lead to the identification and evaluation of potential solutions that are more efficient or cost-effective. Order No. 1000-B P 38, JA 497; Order No. 1000-A P 77, JA 347 (quoting *Wis. Gas Co. v. FERC*, 770 F.2d 1144, 1158 (D.C. Cir. 1985)); *id*. at P 83, JA 348. In other words, the Commission found that "'[t]he presence of multiple transmission developers would lower costs to customers.'" Order No. 1000 P 268, JA 207 (quoting *Cleco Power*, 101 FERC ¶ 61,008 P 117. Thus, the Commission relied upon the well-established general principle that "'competition will normally lead to lower prices.'" Order No. 1000-A P 70, JA 345 (quoting *Assoc. Gas*, 824 F.2d at 1008-09 ("Agencies do not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall; nor need they do so for predictions that competition will normally lead to lower prices.")).

ROFR Petitioners argue that this expectation of competitive benefits is unfounded here, where only one entity at a time can provide service over a

transmission line, and therefore customers cannot select among alternative providers. ROFR Br. 24-26. The Commission saw no contradiction between the fact that transmission is a natural monopoly and the Commission's support for competition in the development of transmission infrastructure; the Commission has never found that natural monopolies are antithetical to competition in all respects. Order No. 1000-A P 86, JA 348. In fact, transmission is a natural monopoly in part because of the barriers to entry into the transmission market and the economies of scale for transmission facilities. *Id.* Nonetheless, determining who will own a particular line can be done on a competitive basis. *Id.* The Commission reasonably expected that such competition would provide benefits similar to those it produces elsewhere in terms of improved facilities, enhanced technology, or better transmission solutions generally. *Id.*

Thus, while ROFR Petitioners argue that the real issue is who will be the monopoly owner of a transmission line, ROFR Br. 24, they overlook that competitive forces can be harnessed in a number of ways. Order No. 1000-A P 87, JA 349. Here, by removing federal rights of first refusal the Commission makes it possible for nonincumbent developers to compete, and propose more efficient or cost-effective transmission solutions, in the regional transmission planning process. *Id*.

C. The Commission Has Jurisdiction To Adopt The Nonincumbent Reforms Under Federal Power Act Section 206.

The Commission reasonably determined that it had authority under Federal Power Act section 206 to eliminate federal rights of first refusal from FERC-jurisdictional tariffs and agreements. Order No. 1000 P 284, JA 210. The Commission's remedial authority under section 206 is broad and permits the Commission to revise terms in jurisdictional tariffs and agreements that may cause the rates, terms or conditions of transmission service to be unjust and unreasonable or unduly discriminatory. Order No. 1000 P 284, JA 210 (citing *Assoc. Gas*, 824 F.2d at 1008). *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395 (D.C. Cir. 2004) (discussed ROFR Br. 8-10), held that section 206 reaches "practices" that "directly affect the rate or are closely related to the rate," but "'not all those remote things beyond the rate structure that might in some sense indirectly or ultimately do so.'" Order No. 1000 P 285, JA 211 (quoting *Cal. ISO*, 372 F.3d at 403); Order No. 1000-A P 358, JA 401. *California ISO* found that a public utility's corporate governance was not a "practice" under section 206 because it was too remote from the public utility's rates. Order No. 1000 P 288, JA 211 (citing *Cal. ISO*, 372 F.3d at 398, 403).

The effect of federal rights of first refusal on rates for jurisdictional service and on undue discrimination extends well beyond the effects of the internal corporate governance matters at issue in *California ISO*. Order No. 1000 P 289,

JA 211. First, the right of first refusal adversely impacts jurisdictional rates. *See* ROFR Br. 16 (arguing that FERC's primary purpose is to protect customers from excessive rates). Federal rights of first refusal create barriers to entry for nonincumbent developers, which can limit the potential solutions offered to address regional transmission needs and, as a result, increase transmission development costs recovered from jurisdictional customers through rates. Order No. 1000 PP 257, 289, JA 204, 211; Order No. 1000-A PP 76, 358, JA 346, 401; Order No. 1000-B PP 37, 38, JA 497, 497. The selection of transmission facilities in a regional transmission plan for purposes of cost allocation is, therefore, directly related to costs that will be allocated to jurisdictional ratepayers. Order No. 1000 PP 285, 289, JA 210, 211; Order No. 1000-A P 358, JA 401; Order No. 1000-B P 37, JA 497.

The nonincumbent reforms also address opportunities for undue discrimination against nonincumbent transmission developers within existing regional transmission planning processes. Order No. 1000 P 229, JA 197. The Commission found it unduly discriminatory or preferential to deny a nonincumbent developer that sponsors a project in a regional transmission plan the same rights provided to an incumbent developer. *Id.* at P 270, JA 207. In particular, a nonincumbent developer must have the same opportunity as an incumbent developer to allocate the cost of transmission facilities selected in the regional

transmission plan through a regional cost allocation method. *Id.* at PP 332, 335, JA 221, 222.

Further, "[i]t is not in the economic self-interest of incumbent transmission providers to permit new entrants to develop transmission facilities, even if proposals submitted by new entrants would result in a more efficient or cost-effective solution to the region's needs." Order No. 1000 P 256, JA 204. *See also* Order No. 1000-B P 38, JA 497. Thus, the Commission was concerned that incumbent transmission providers would use rights of first refusal to act in their own economic self-interest to discourage new entrants from proposing transmission projects in the regional transmission planning process. Order No. 1000 P 256, JA 204.

The Commission's authority to address anticompetitive discrimination that adversely affects rates is well established. *Transm. Access*, 225 F.3d at 685-87, affirmed the Commission's FPA section 206 jurisdiction to require transmission-owning utilities to allow access to competing generators on comparable terms. The effect on rates is comparable to that here; "[b]y requiring utilities to transmit competitors' electricity, open access transmission is expected to increase competition from alternative power suppliers, giving consumers the benefit of a competitive market." *Id*. at 681. *Assoc. Gas*, 824 F.2d 981, likewise affirmed the Commission's jurisdiction under the comparable language of section 5 of the

Natural Gas Act, 15 U.S.C. § 717d, to require pipelines to transport natural gas for competing suppliers, because "discrimination in transportation has denied gas users, and the economy generally, the benefits of a competitive wellhead market." *Id*. at 1000.

The Commission rejected arguments, *see* ROFR Br. 16-17, that FPA section 206 prohibits only discrimination against customers, not potential or actual competitors, finding no such limitation in the statute or case law. Order No. 1000-A P 362, JA 402. This Court has affirmed findings of discrimination among competitors. *See, e.g*., *Cent. Iowa*, 606 F.2d at 1172 (power pool agreement creating two classes of participants unduly discriminatory as to small generating systems); *Muns. of Groton v. FERC*, 587 F.2d 1296, 1301 (D.C. Cir. 1978) (deficiency charges in power pool agreement unduly discriminatory as to small participant utilities); *Miss. Indus. v. FERC*, 808 F.2d 1525, 1542-43 (D.C. Cir. 1987), *vacated in part on other grounds*, 822 F.2d 1104 (D.C. Cir. 1987) (operating agreement among affiliated utilities unduly discriminatory); *Dynegy Midwest Generation, Inc. v. FERC*, 633 F.3d 1122, 1127 (D.C. Cir. 2011) (variations in compensation to competing generators unduly discriminatory).

Indeed, *Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc*., 550 U.S. 45 (2007), interpreted the phrase "practice . . . that is unjust and

unreasonable" in section 201(b) of the Communications Act of 1934,[10] *id*. at 47, to include practices that harm competing suppliers as well as customers. *Id*. at 62-63. The Court found that the statute did not limit the term "practices" to practices that harm customers, and the Interstate Commerce Act, on which the relevant statutory provisions were modeled, reached harm to other carriers, as well as shippers. *Id*. at 62-63 (quoting *Chi. & Nw. Transp. Co. v. Atchison, Topeka, & Santa Fe Ry. Co.*, 609 F.2d 1221, 1226 (7th Cir. 1979) ("Although it is true . . . that a primary purpose of the Interstate Commerce Act is to ensure equal treatment of all shippers, the Act, as we have discussed above, also provides for the regulation of inter-carrier relations as a part of its general rate policy.")). Likewise, here -- where the statute also was modeled on the Interstate Commerce Act, *Cal. ISO*, 372 F.3d at 402-03 -- ROFR Petitioners point to no language in the Federal Power Act limiting section 206 only to "practices" that harm customers.

Further, while *Mich. Wis. Pipeline Co*., 34 FPC 621, 626 (1965) (cited ROFR Br. 9), held that "practice" *includes* a "consistent and predictable course of conduct of the supplier that affects [the supplier's] financial relationship with the consumer," the Commission in no way purported to define the full extent of what

[10] Section 201(b), 47 U.S.C. § 201(b), provides in pertinent part that: "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful. . . ."

could be considered a "practice" under the statute. *See* Order No. 1000-A P 362, JA 402 (cases concerning discrimination among customers do not address whether 206 may be used to eliminate discrimination between competitors).

In any event, even if the Commission were authorized to act only for the benefit of customers, the Commission did not base its decision here solely on competition concerns. Order No. 1000-A P 363, JA 402. Rather, the Commission acted to remedy the potential for unjust and unreasonable rates for Commission-jurisdictional services and to promote competition among potential transmission developers. *Id*.

ROFR Petitioners argue that FERC's rate authority does not empower it to regulate how utilities provide service. ROFR Br. 14. This argument -- and the argument that the Federal Power Act does not provide jurisdiction over "construction decisions" in the manner of section 7 of the Natural Gas Act, ROFR Br. 12; States Br. 19 – misconstrues the Commission's actions in Order No. 1000. Order No. 1000-A P 359, JA 402. By requiring the evaluation of proposed transmission solutions in the regional planning process, the Commission is not dictating that any particular proposals be accepted, or that selected facilities be constructed. *Id.* (citing Order No. 1000 P 287, JA 211); Order No. 1000 P 331, JA 221. The Commission simply required the establishment of processes to evaluate potential solutions to regional transmission needs. *Id.* Whether public

utility transmission providers within a region select a transmission facility in the regional transmission plan for purposes of cost allocation will turn on their combined view of whether the transmission facility is an efficient or cost-effective solution to their needs. *Id.*

Indeed, while ROFR Petitioners rely on *United States v. Pa. R.R.*, 242 U.S. 208, 228-29 (1916) (ROFR Br. 13) (finding refusal to furnish tank cars to a shipper was not a "practice" under the Interstate Commerce Act), the *Pa. R.R.* Court found that "practice" *could* encompass practices that "favored the large shipper, and oppressed the small one." *Id*. at 229. Thus, while the Interstate Commerce Commission lacked the power generally to order a carrier to enlarge its facilities, the Commission did possess regulatory power over the facilities to assure "that there should be no unjust discrimination." *Id*. at 230. The Commission, therefore, appropriately acted here under its authority in FPA section 206 to require the elimination of provisions in federally-regulated tariffs establishing practices in the regional transmission planning process that affect rates and produce discrimination. Order No. 1000-A PP 358-59, JA 401.

D. The Nonincumbent Reforms Do Not Discriminate Against Incumbents.

The Commission reasonably rejected arguments, ROFR Br. 19-21, that eliminating the federal right of first refusal discriminates against incumbents, who must comply with reliability standards and have an obligation to serve customers.

Order No. 1000 P 265, JA 206; Order No. 1000-A PP 364-65, JA 402-03. The Commission merely removed barriers to participation by all potential transmission providers in the regional transmission planning process subject to the Commission's jurisdiction. Order No. 1000 P 265, JA 206; Order No. 1000-A P 365, JA 403. Under Order No. 1000, no transmission developer should, as a result of a Commission-approved open access tariff or agreement, receive different treatment in a regional transmission planning process. Order No. 1000 P 294, JA 212. Both incumbent and nonincumbent transmission developers should share similar benefits and obligations, including the opportunity, consistent with state or local law, to construct and own a transmission facility selected in the regional plan. *Id.*

The Commission disagreed that incumbents' service obligations, ROFR Br. 19-20, 35, justified a right of first refusal in their favor. Order No. 1000-A P 365, JA 403; Order No. 1000 P 262, JA 205. ROFR Petitioners assume that nonincumbent developers necessarily create additional reliability risks that will jeopardize incumbents' ability to fulfill their service obligations, ROFR Br. 35, 36-38, and cause increased costs, *id.* at 29-30. The Commission saw no reason to expect that the performance of qualified incumbent and nonincumbent developers will differ. Order No. 1000-A P 95, JA 351.

As the Commission explained, proper selection criteria for project developers should assure that all project developers will be in a position to fulfill their commitments. Order No. 1000-A P 95, JA 351. Thus, the Commission required that public utility transmission providers in each planning region establish, in consultation with stakeholders, qualification criteria for determining an entity's eligibility to propose a project for selection in the regional transmission plan for purposes of cost allocation. *Id.* at P 439, JA 418. Under these qualification criteria, each potential developer must demonstrate that it has the necessary financial resources and technical expertise to develop, construct, own, operate, and maintain transmission facilities. *Id.*; Order No. 1000 P 323, JA 219.

Moreover, all owners and operators of bulk-power system transmission facilities, including nonincumbent transmission developers, that successfully develop a project, are required to be registered with NERC as Functional Entities[11] and must comply with all applicable reliability standards. Order No. 1000-A PP 365, 444, JA 403, 419; Order No. 1000 P 266, JA 206 (citing 18 C.F.R. § 39.2(a)); *id.* at P 342, JA 223. Because transmission providers historically have connected to other transmission systems and jointly owned transmission facilities

[11] The term Functional Entity refers to any user, owner or operator of the bulk power system that is responsible for complying with a NERC reliability standard as that term is defined in Federal Power Act section 215(a)(3), 16 U.S.C. § 824o(a)(3). Order No. 1000-A P 365 n.434, JA 403.

for reliability and other reasons, they have developed experience, protocols and business models for coordinated operations with multiple transmission providers, operators, and users. *Id.* at P 266, JA 206.

Additionally, Order No. 1000 requires reevaluation procedures to identify when delays in nonincumbent construction require consideration of alternative solutions to ensure that incumbent transmission providers can meet their reliability needs or service obligations. Order No. 1000-A PP 428, 477, JA 416, 425; Order No. 1000 PP 263, 329, JA 205, 220; *see infra* p. 83 (discussing reevaluation procedures). Order No. 1000 also permits incumbents to build new transmission facilities located solely within their retail distribution service territory that are not included in a regional transmission plan for purposes of cost allocation. Order No. 1000-A PP 85, 425, 428, JA 348, 415, 416; Order No. 1000 PP 262, 329, JA 205, 220. The Commission determined that, if these processes are followed, incumbent transmission providers should be able to meet reliability related requirements. Order No. 1000-A P 477, JA 425.

The Commission found that the advantages of incumbent transmission providers, ROFR Br. 30, such as their familiarity, experience and existing permits and rights of way, did not justify maintaining rights of first refusal. Order No. 1000 P 260, JA 205; Order No. 1000-A P 88, JA 349. The regional transmission planning process will consider the particular strengths of incumbent and

nonincumbent developers during its evaluation, and incumbents and nonincumbents can highlight their strengths during that process. Order No. 1000-A P 454, JA 421; Order No. 1000 P 260, JA 205. The Commission found no reason to believe that incumbents will be superior to nonincumbents in all situations. Order No. 1000-A P 88, JA 349.

The Commission disagreed, *see* ROFR Br. 30, that its nonincumbent reforms would fundamentally alter regional transmission planning processes. Order No. 1000 P 258, JA 204. While the selection of any transmission facility in the regional plan for purposes of cost allocation may be contentious, transmission providers have been required since Order No. 890 to compare proposed solutions to regional needs. Order No. 1000 PP 258, 330, JA 204, 221. Therefore, existing regional planning processes have mechanisms in place to weigh various alternatives against one another. *Id.* at P 258, JA 204. Indeed, this is the fundamental nature of "bottom-up, top-down" transmission planning, in which local needs and solutions are combined within a region and analyzed to determine whether regional solutions would be more efficient or cost-effective than the local solutions identified by individual public utility transmission providers. *Id*.

ROFR Petitioners also argue that Order No. 1000 discriminates against members of Regional Transmission Operators (sometimes referred to as Independent System Operators), *vis a vis* other public utilities. ROFR Br. 21. In

ROFR Petitioners' view, because Regional Operators engage in regional planning and cost allocation to a greater degree than individual public utilities, members of Regional Operators will have less ability than other public utilities to construct upgrades to their own facilities, or to construct projects within their own service territories. *Id*.

The requirement to eliminate a federal right of first refusal does not apply to any upgrade. Order No. 1000-A P 427, JA 416. *See also* Order No. 1000 P 319, JA 218 (the "reforms do not affect the right of an incumbent transmission provider to build, own and recover costs for upgrades to its own transmission facilities . . . regardless of whether or not an upgrade has been selected in the regional transmission plan for purposes of cost allocation"). Similarly, as to facilities built within a public utility's service territory, Order No. 1000 does not require elimination of a federal right of first refusal for a new transmission facility if the regional cost allocation method allocates all of the facility's costs to the public utility in whose service territory or footprint the facility is located. Order No. 1000-A P 423, JA 415. Accordingly, the Commission "clarif[ied] that the term 'selected in a regional transmission plan for purposes of cost allocation' excludes a new transmission facility if the costs of that facility are borne entirely by the public utility transmission provider in whose retail distribution service territory or footprint that new transmission facility is to be located." *Id*.

Thus, under Order No. 1000, all public utilities, whether or not they are members of a Regional Operator, retain the right to build upgrades to their own facilities and projects located in their service territory where the costs are allocated solely to the public utility. Order No. 1000-A PP 425, 427, JA 415, 416. ROFR Petitioners fail to demonstrate how this equivalent treatment results in discrimination against public utility members of Regional Operators.

E. The Commission Reasonably Found ROFR Petitioners' Reliability Concerns Unfounded.

ROFR Petitioners assert that the Commission's reevaluation requirement "fails to resolve the underlying threat to reliable system operations." ROFR Br. 37. *See also id*. at 39. In the event of nonincumbent delays or abandonment, ROFR Petitioners argue that incumbents will be reduced to short-term operational measures to "keep the lights on" without the long-term solution provided by the nonincumbent project. *Id.* at 37-38.

The reevaluation process is designed, however, to determine whether delays in construction have the potential to adversely affect reliability, and to permit timely consideration of alternative solutions. Order No. 1000-A P 477, JA 425; Order No. 1000 P 263, JA 205. When a transmission facility is selected in the regional transmission plan for purposes of cost allocation, the developer "must submit a development schedule that indicates the required steps, such as the granting of state approvals, necessary to develop and construct the transmission

facility." Order No. 1000-A P 442, JA 419. As part of the monitoring process, public utilities in a transmission planning region are required to establish dates for those critical steps, and, if those dates are not met, they may remove the transmission project from the plan and reevaluate the plan to seek an alternative solution. *Id*. The Commission found that these processes should permit utilities to meet their reliability obligations. *Id.* at P 477, JA 425.

Transmission planners and developers already routinely communicate regarding the construction status of transmission projects. Order No. 1000-A P 479, JA 425. Current reliability standards require a Functional Entity, such as an incumbent provider, to study the performance of its system and to decide when it must develop corrective plans to ensure reliability. *Id.* Specifically, reliability standards require evaluation of the reliability impact of new facilities, and coordination and results sharing by the entities involved, as well as development of corrective plans if reliability requirements are not met when projects are delayed or abandoned. *Id.* at P 479 n.556, JA 425 (citing NERC Reliability Standards in the Facility Connection and Transmission Planning series). Order No. 1000 does not change any obligations an incumbent as a Functional Entity has under the reliability standards to monitor a nonincumbent's progress in developing its facility. *Id.* at P 479, JA 425.

Furthermore, Order No. 1000 left it to public utility transmission providers to adopt plans for the reevaluation process in their open access transmission tariffs, Order No. 1000-A P 479, JA 425, and the Commission is evaluating those plans as part of the Order No. 1000 compliance proceedings.[12] For example, in the compliance proceedings, the Commission has conditionally accepted tariff provisions allowing assignment to incumbents, without competition, of projects needed in three years or less to solve reliability criteria violations. *See PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214 PP 247-55 (2013); *ISO New England Inc.*, 143 FERC ¶ 61,150 PP 235-41 (2013); *Sw. Power Pool, Inc*., 144 FERC ¶ 61,095 PP 193-99 (2013). Any arguments regarding the sufficiency of these individual reevaluation proposals properly are heard on review of the compliance proceedings. *See* Counterstatement of Jurisdiction, *supra* p. 5 (discussing prematurity of issues being addressed on compliance).

[12] *See Cal. Indep. Sys. Operator Corp.*, 143 FERC ¶ 61,057 PP 249-69 (2013); *Avista Corp*., 143 FERC ¶ 61,255 PP 219-21 (2013); *Tampa Elec. Co.*, 143 FERC ¶ 61,254 PP 203-11 (2013); *ISO New England*, 143 FERC ¶ 61,150 PP 317-23; *NorthWestern Corp*., 143 FERC ¶ 61,056 PP 126-31 (2013); *Midwest Indep. Transm. Sys. Operator, Inc.*, 142 FERC ¶ 61,215 PP 356-58 (2013); *PacifiCorp*, 143 FERC ¶ 61,151 PP 184-95 (2013); *N.Y. Indep. Sys. Operator, Inc.*, 143 FERC ¶ 61,059 PP 248-50 (2013); *PJM Interconnection*, 142 FERC ¶ 61,214 PP 316-18); *Louisville Gas & Elec. Co*., 144 FERC ¶ 61,054 PP 207-21 (2013); *S.C. Elec. & Gas Co*., 143 FERC ¶ 61,058 PP 197-200 (2013); *Sw. Power Pool*, 144 FERC ¶ 61,059 PP 299-310; *Pub. Serv. Co. of Colo.*, 142 FERC ¶ 61,206 PP 245-62 (2013).

In response to concerns that reevaluation does not address the need for short-term operational adjustments, ROFR Br. 39-40, the Commission noted that the current reliability standards require Functional Entities to prepare their system to operate regardless of whether a planned project is delayed or abandoned. Order No. 1000-A P 478, JA 425. "[T]he present operationally-focused NERC reliability standards require Functional Entities to operate so that the portion of the system that is in service at that time will be capable of delivering the output of generation to firm demand and transfers within the applicable performance criteria." *Id*. The Commission accordingly found no need to set requirements in addition to those already established in the applicable NERC standards. *Id*.

As the reevaluation requirement did not create new reliability standards or modify existing ones, FPA section 215(d), 16 U.S.C. § 824o(d) (establishing the review process for NERC reliability standards), *see* ROFR Br. 43-44, does not apply. Order No. 1000-A P 483, JA 426. *See also id*. at PP 478-79, JA 425. The reevaluation requirement rather establishes a tariff process to assure that utilities meet existing standards. *Id.* at PP 477, 483, JA 425, 425. Likewise, the requirement that utilities submit a mitigation plan to NERC in the event of a reliability violation, Order No. 1000 P 344, JA 223; Order No. 1000-A P 480, JA 426, *see* ROFR Br. 43, is not new. *See, e.g., Cal. Indep. Sys. Operator*, 143 FERC ¶ 61057 P 269 (in Order No. 1000 compliance filing, rejecting tariff

provision imposing mitigation plan requirement as duplicative of already-existing NERC reliability standards).

The Commission will not penalize a utility for a reliability standard violation caused by a nonincumbent's decision to abandon a facility if the utility timely identifies the violation and complies with all NERC reliability standards to address it. Order No. 1000-A P 481, JA 426. ROFR Petitioners complain that the Commission has not prevented NERC from imposing penalties in these circumstances and "[n]othing in the existing rules permits NERC to waive a penalty." ROFR Br. 45. However, the statute does not require NERC to impose penalties (*see* FPA section 215(e)(1), 16 U.S.C. § 824o(e)(1) (NERC as the statutory Electric Reliability Organization "may impose" penalties)), and the Commission, in any event, has review authority over all NERC penalties. *See* Order No. 1000-A P 483, JA 426 (FERC has enforcement discretion under FPA section 215 to set forth a particular circumstance where it will not impose a penalty); section 215(e)(2), 16 U.S.C. § 824o(e)(2) (providing for Commission review of penalties imposed by NERC).

ROFR Petitioners also complain that mitigation plans will "run afoul" of FPA section 215(i)(2), 16 U.S.C. § 824o(i)(2), which states that section 215 does not authorize the Commission or NERC to order the construction of additional transmission capacity. ROFR Br. 46. However, nothing in Order No. 1000

requires an incumbent transmission provider to construct a project abandoned by a nonincumbent. Order No. 1000-A P 490, JA 427; Order No. 1000 P 344, JA 223. In a mitigation plan, the incumbent's proposed solutions may or may not include constructing transmission facilities. *See id.* at P 329, JA 220. While a utility may choose construction as a solution, that does not mean the Commission has required such construction. *See, e.g., Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 482 (D.C. Cir. 2009) (installed capacity requirement does not violate FPA section 201, 16 U.S.C. § 824, prohibition on requiring construction of generation facilities where utilities have other means of meeting the requirement short of building new capacity).

ROFR Petitioners contend that the Commission ignored incumbents' potential liability under state reliability requirements. ROFR Br. 41-43. Order No. 1000 did not preempt state laws governing transmission facilities. *See* Order No. 1000 P 253 n.231, JA 203; Order No. 1000-A P 381, JA 406. Nevertheless, the Commission did not ignore these reliability needs but rather established processes and reforms that will permit incumbent transmission providers to meet all reliability-related requirements, including those required by state laws. Order No. 1000-A PP 428, 477, JA 416, 425; Order No. 1000 P 262, JA 205.

F. The Commission Reasonably Set The Scope of the Right of First Refusal Reforms.

Order No. 1000 does not require elimination of a federal right of first refusal for a new transmission facility if all of its costs are allocated to the transmission provider in the service territory where the facility is located, i.e., if it is a "local facility." Order No. 1000-A P 423, JA 415. In the case of a Regional Operator, local transmission facilities are defined by reference to the retail distribution service territories of its underlying transmission-owning members. *Id.* at P 429, JA 416. The Commission explained that, *in general*, any allocation of a facility's costs outside a single transmission provider's retail distribution service territory, including an allocation to a "zone" consisting of more than one transmission provider, constitutes an application of the regional cost allocation method and, therefore, that new transmission facility is not a local facility. *Id.* at PP 424, 430, JA 415, 416; Order No. 1000-B P 52, JA 500. For example, the Commission did not intend to permit transmission-owning members of a Regional Operator to retain a federal right of first refusal by dividing the region into East and West multi-utility zones and allocating costs just within one zone consisting of more than one transmission provider. Order No. 1000-A P 424, JA 415.

ROFR Petitioners assert that this ruling reaches projects they consider to be "local," when Order No. 1000 states it is directed at regional projects. ROFR Br. 30-31 (citing Order No. 1000 at PP 7, 63, 226, 313, 318, JA 150, 161, 196, 217,

218). There is no inconsistency; as the ROFR Petitioners' Order No. 1000 citations make clear, the determinative factor is whether the project has been selected in the regional transmission plan for purposes of cost allocation. Order No. 1000-A simply found that facilities whose costs are not allocated solely in the local service territory are, generally, considered to be allocated regionally for purposes of Order No. 1000. However, recognizing that there is a continuum of situations in multi-transmission provider zones, *see* ROFR Br. 31, the Commission "did not adopt a generic rule as to whether a cost allocation solely to a multi-transmission provider zone is an application of the regional cost allocation method for which a federal right of first refusal must be eliminated." Order No. 1000-B P 54, JA 501. Instead, the Commission permitted transmission providers to address on compliance, on a case-by-case basis, whether a cost allocation to a multi-transmission provider zone is regional. *Id.*; Order No. 1000-A P 424, JA 415.

G. The Commission Reasonably Declined To Address *Mobile-Sierra* Arguments In This Rulemaking.

"Under the Supreme Court's *Mobile-Sierra* doctrine, where parties have negotiated a contract that sets firm prices or dictates a specific method of computing charges and includes a clause denying either party the right to change such prices or charges unilaterally, 'FERC may abrogate or modify the contract only if the public interest so requires.'" *Transm. Access*, 225 F.3d at 709 (quoting

Texaco, Inc. v. FERC, 148 F.3d 1091, 1095 (D.C. Cir. 1998)). *See FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353-55 (1956); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344-45 (1956); *see also NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 167 (2010) ("Under this Court's *Mobile-Sierra* doctrine, FERC must presume that a rate set by 'a freely negotiated wholesale-energy contract' meets the statutory 'just and reasonable' requirement."). Because the doctrine generally rests on the provisions of the particular contract at issue, FERC usually makes *Mobile-Sierra* determinations on a case-by-case basis. *Transm. Access*, 225 F.3d at 709. *See also Atl. City*, 295 F.3d at 14 (requiring the Commission to make a *Mobile-Sierra* finding particularized to the challenged contract).

The Commission reasonably determined that it would address whether individual contracts contain a federal right of first refusal protected by a *Mobile-Sierra* provision when it reviews the transmission providers' compliance filings, rather than in this generic rulemaking proceeding. Order No. 1000-A P 388, JA 408; Order No. 1000 P 292, JA 212. That decision was appropriate to offer parties in individual transmission planning regions an additional opportunity to present information about their region's specific circumstances. "An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures," particularly "where a different proceeding would

generate more appropriate information and where the agency was addressing the question." *Mobil Oil Exploration & Producing Se. Inc. v. United Distrib. Co.*, 498 U.S. 211, 230 (1991). The Commission's determination to address individualized *Mobile-Sierra* claims in individual compliance proceedings should be affirmed.

ROFR Petitioners contend that *Mobile-Sierra* "is a threshold question" that is "ripe for adjudication when it is raised." ROFR Br. 33 (citing *Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 244-45 (D.C. Cir. 1980)). However, as this Court found in *ASARCO, Inc. v. FERC*, 777 F.2d 764, 771-72 (D.C. Cir. 1985), Commission orders deferring the merits of the *Mobile-Sierra* issue to future proceedings are not final orders ripe for the Court's review. *ASARCO* distinguished *Papago*, where the Commission addressed the merits of the *Mobile-Sierra* issue in the challenged orders. *ASARCO*, 777 F.2d at 771-72.

Moreover, the Commission did not, and could not, shift the burden to defend such provisions to contracting parties. ROFR Br. 33. Rather, the Commission simply determined when it will address the issue. Order No. 1000-A P 388, JA 408. If a transmission provider presents a *Mobile-Sierra* argument in its compliance filing, the Commission will decide, based on a more complete record, including the views of other interested parties, whether the agreement at issue includes a *Mobile-Sierra* provision. Order No. 1000-A P 389, JA 408; Order No. 1000 P 292, JA 212; Order No. 1000-B P 40, JA 498. If it does, the Commission

will determine whether the applicable standard of review to modify the contract is satisfied. Order No. 1000-A P 389, JA 408; Order No. 1000 P 292, JA 212; Order No. 1000-B P 40, JA 498. If the applicable standard is not satisfied, the Commission will not review the proposed revised tariffs and agreements for compliance with Order No. 1000. Order No. 1000-A P 389, JA 408; Order No. 1000-B P 40, JA 498_. However, if the agreement does not include a *Mobile-Sierra* provision or if the Commission meets the *Mobile-Sierra* standard of review, the Commission will review the revised tariffs and agreements for compliance with Order No. 1000. Order No. 1000-A P 389, JA 408.

As a result, the Commission is not "stripping parties of their contractual rights" prior to making a *Mobile-Sierra* determination, ROFR Br. 33, but is ensuring that the Order No. 1000 compliance process proceeds expeditiously and effectively. Order No. 1000-A P 389, JA 408; Order No. 1000-B P 40, JA 498. As ROFR Petitioners acknowledge, ROFR Br. 34, the Commission is addressing these issues in the Order No. 1000 compliance filing proceedings. Should the ROFR Petitioners believe they are aggrieved by final Commission determinations in those proceedings, they of course may pursue appellate review of those orders.

IV. Order No. 1000's Reforms Do Not Intrude On State Authority.

The Commission's Order No. 1000 reforms do not intrude on traditional state powers. *See* Threshold Br. 41-42; State Br. 22-24; ROFR Br. 14-15. Order

No. 1000 establishes processes to identify and evaluate potential solutions to transmission system needs; the Order No. 1000 reforms in no way involve an exercise of authority over substantive matters traditionally reserved to the states, including transmission construction, ownership or siting. Order No. 1000-A PP 186, 342, 377, 379, 382, JA 368, 397, 406, 406, 406; Order No. 1000 PP 107, 227, 253 n.231, 287, JA 171, 196, 203, 211.

As a threshold matter, no presumption against preemption applies in this case. *See* ROFR Br. 14-15 (arguing that a presumption against preemption applies; citing *Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 449 (2005)). *See also* States Br. 19; Threshold Br. 41. Such a presumption applies only where the issue is "whether a given state authority conflicts with, and thus has been displaced by, the existence of Federal Government authority." *New York*, 535 U.S. at 17-18. *Bates*, for example, concerned whether the federal Insecticide, Fungicide and Rodenticide Act preempted state law claims for damages caused by pesticides. *See Bates*, 544 U.S. at 434. Conversely, where the issue is whether the federal agency "is acting within the scope of its congressionally delegated authority," no presumption applies. *New York*, 535 U.S. at 18.

In any event, there is no issue of preemption here; Order No. 1000 leaves state law undisturbed. The Order No. 1000 reforms focus solely on Commission-jurisdictional tariffs and agreements. Order No. 1000-A P 377, JA 406; Order No.

1000 P 287, JA 211. The reforms, moreover, focus only on the process used to identify and evaluate potential solutions to transmission system needs. Order No. 1000-A P 186, JA 368; Order No. 1000 P 107, JA 171. The Order No. 1000 reforms do not dictate substantive outcomes, such as what transmission facilities will be built and where, or which entity ultimately may construct any facility. Order No. 1000-A PP 186, 188, 378, 382, JA 368, 368, 406, 406; Order No. 1000 PP 107, 113, JA 171, 172. *See, e.g.*, *Primary Power, LLC v. PJM Interconnection, L.L.C.*, 140 FERC ¶ 61,054 P 75 (2012) (cited in States Br. 23) (nonincumbent transmission developer was allowed to participate in regional planning process but Regional Operator was not obligated to select nonincumbent project). Therefore, the Commission's reforms do not affect any limitations on nonincumbent construction arising under state or local law, Order No. 1000-A P 381, JA 406; Order No. 1000 P 287, JA 211, and thus do not interfere with state authority over "who will develop the transmission facilities in its jurisdiction." ROFR Br. 15.

Nor does Order No. 1000 eliminate states' "traditional regulatory prerogatives." States Br. 23 (citing *S.C. Elec. & Gas*, 143 FERC ¶ 61,058 PP 191-93). The cited paragraphs of *South Carolina Electric* discuss the role of state regulators in the regional transmission planning process, not the ability of state regulators to exercise their traditional powers over construction and siting, which remain undisturbed. Thus, nothing in Order No. 1000 gives any entity permission

to build a facility, or relieves a developer from obtaining any necessary state regulatory approvals. Order No. 1000-A P 191, JA 369; Order No. 1000 P 66, JA 162. To the contrary, projects selected in the regional transmission plan will not be constructed unless the developer secures necessary approvals from the relevant state regulators. Order No. 1000-A P 190, JA 369.

In an analogous situation, *Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), found that the Commission had jurisdiction to address the discriminatory conduct of transmission owners who used their eminent domain powers to benefit affiliates but not independent generators. 475 F.3d at 1282-83. While licensing the use of eminent domain is a state power, the Court found that the Commission had not infringed on that power. *Id*. at 1283. "FERC has done nothing more than impose a non-discrimination provision on public utilities. The orders explicitly leave state law untouched, specifying that any exercise of eminent domain by a public utility pursuant to the orders' non-discrimination mandate be 'consistent with state law.'" *Id*. (quoting *Standardization of Generation Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61,103 (2003), *order on reh'g*, Order No. 2003-A, 106 FERC ¶ 61,220 at 31,144 (2004), *aff'd*, *Nat'l Ass'n of Regulatory Util. Comm'rs*, 475 F.3d 1277). Thus, "the orders here leave state law completely undisturbed and bind only utilities – not state officials." *Id*. Similarly, here, Order No. 1000 leaves

state law concerning the permitting and siting of transmission facilities undisturbed, and only imposes non-discrimination obligations on public utilities in the planning process.

Petitioners assert that the practical effect of Order No. 1000 forecloses state decision-making. Threshold Br. 41 (controlling planning and wholesale cost allocation effectively decides which projects will be built); State Br. 23 (same); ROFR Br. 15 (there are "significant barriers and risks on states that disagree with nonincumbent projects"). The Commission recognized that the selection of a new transmission facility in the regional transmission plan for purposes of cost allocation may affect which entity ultimately constructs and owns transmission facilities. Order No. 1000-A P 382, JA 406. Nevertheless, the Commission disagreed that it was effectively making decisions about which transmission facilities would be sited and constructed, that it was preempting state decisions in that regard, or that it was doing anything indirectly that it could not do directly. *Id.* at PP 191, 382, JA 369, 406.

Where the Commission is acting within its statutory authority in enacting regulations, the fact that those regulations affect non-jurisdictional parties or matters -- including state decision-making on non-jurisdictional matters -- does not alter the Commission's jurisdiction. *See, e.g.*, *Conn. Dep't*, 569 F.3d at 482 (FERC had jurisdiction over installed capacity requirement because of rate effect,

notwithstanding argument that the capacity requirement influences state decision-making regarding where, by whom and how much non-jurisdictional generating capacity is built); *Ill. Commerce Comm'n*, 721 F.3d at 773 (FERC had jurisdiction to approve cost allocation for transmission projects in a regional organization notwithstanding allegation that FERC's action "coerces each state to approve all [transmission] within its territory"); *Miss. Indus.*, 808 F.2d at 1547 (FERC had jurisdiction over cost allocation among affiliated operating companies, notwithstanding argument that allocation would have "such an extensive impact on the rate base in the state jurisdictions that it, in effect, removes regulation of retail rates and capacity construction from the hands of the state commissions."); *Nat'l Ass'n of Regulatory Util. Comm'rs*, 475 F.3d at 1280-81 (Commission properly exercised jurisdiction over interconnections to facilities jointly owned by public utilities and non-jurisdictional entities; FERC has authority to regulate public utility transactions notwithstanding effect on the state ownership rights).

The Commission's regulation of a jurisdictional entity "'may, of course, impinge as a practical matter on the behavior of non-jurisdictional ones.'" *Transm. Agency of N. Cal. v. FERC*, 628 F.3d 538, 546 (D.C. Cir. 2010) (quoting *Nat'l Ass'n of Regulatory Util. Comm'rs*, 475 F.3d at 1280). But "this is not a basis for concluding that the Commission has exceeded its jurisdiction under the [Federal Power Act]." *Id.*

Because the Commission is not permitting or siting facilities, Order No. 1000's reforms are unrelated to the Commission's authority under FPA section 216, 16 U.S.C. § 824p, *see* State Br. 18-19; ROFR Br. 6 n.2 and 16, addressing the designation and siting of transmission facilities within National Interest Electric Transmission Corridors. Order No. 1000 P 291, JA 212; Order No. 1000-A P 378 & n.461, JA 406.

Nor does Federal Power Act section 201, 16 U.S.C. § 824, aid the State Petitioners. States Br. 16-17 (arguing that section 201 "specif[ies] as a matter of policy that regulation under the FPA was 'to extend only to those matters which are not subject to regulation by the States'"). The Supreme Court has held that the reserved state powers language in § 201(a) is a mere "'policy declaration'" that "'cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose.'" *New York*, 535 U.S. at 22 (quoting *FPC v. S. Cal. Edison Co*., 376 U.S. 205, 215 (1964)). *See, e.g.*, *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 390 (D.C. Cir. 2008) (In *Mississippi Industries*, the "generating facility exception of Section 201(b)(1) did not eliminate the Commission's jurisdiction because it does not apply where jurisdiction is specifically provided for in certain specified sections of the Act, including Sections 201 and 206.") (citing *Miss. Indus*., 808 F.2d at 1543).

V. The Commission Appropriately Determined That Transmission Planning Must Consider Needs Driven By Public Policy Requirements.

A. The Bases For The Commission's Determination

The Commission found that, to ensure that FERC-jurisdictional rates and practices are just and reasonable and not unduly discriminatory, it needed to amend Order No. 890 to require public utility transmission providers to consider transmission needs driven by state, federal and local laws or regulations ("public policy requirements") in planning transmission. Order No. 1000 PP 6, 82-83, 109, 203-05, JA 150, 165-66, 171, 191-92; Order No. 1000-A PP 205, 206, 208, 215, 317-20, 336, JA 372, 372, 372, 374, 392-93, 396.

As the Commission explained, "transmission planning cannot be fully effective if it does not consider all transmission needs." Order No. 1000-A P 98, JA 351; *see also id.* at P 209 n.269, JA 372 (public utility transmission providers must plan for the needs of their transmission customers). Moreover, the Commission noted, the number of laws and regulations that affect the need for, and configuration of, prospective transmission facilities, and that, therefore, have a direct impact on transmission needs, has increased significantly in recent years. Order No. 1000 P 109, JA 171; Order No. 1000-A PP 205, 206, 336, JA 372, 372, 396. In these circumstances, the Commission concluded that transmission planning processes that do not consider transmission needs driven by public policy requirements may not accurately identify customers' needs, will result in deficient

transmission plans, and, therefore, are unjust and unreasonable. Order No. 1000 PP 109, 203-04, JA 171, 191-92; Order No. 1000-A P 215, JA 374; *see also id.* at P 206, JA 372 (the Commission expected that transmission planning processes that include an opportunity for transmission providers, in consultation with stakeholders, to consider transmission needs driven by public policy requirements will identify more efficient or cost effective solutions to meet those needs).

Furthermore, transmission providers consider transmission needs driven by public policy requirements when planning transmission to serve their native load customers. To ensure they are not acting in an unduly discriminatory manner, the Commission found that transmission providers must also consider those transmission needs in planning to serve the rest of their FERC-jurisdictional customers as well. Order No. 1000 PP, 79-80, 83, 203-04, JA 165, 166, 191-92; Order No. 1000-A PP 329, 336, JA 395, 396.

Accordingly, the Commission reasonably required public utility transmission providers, in consultation with stakeholders and subject to Commission review on compliance, to establish procedures: (1) to identify transmission needs driven by public policy requirements for which potential solutions will be evaluated; and (2) to evaluate potential solutions to meet those identified needs. Order No. 1000 PP 205-11, JA 192-93; Order No. 1000-A PP 321, 334, JA 393, 395. The Commission explained that transmission providers

must show in their compliance filings that their transmission planning processes provide all stakeholders a meaningful opportunity to identify transmission needs they believe are driven by public policy requirements and also provide an open and transparent process to determine whether to move forward to evaluate potential solutions for those identified needs. Order No. 1000 PP 207-09, 211, JA 192-93; Order No. 1000-A PP 208, 321, 335, JA 372, 393, 396.

Some of the Public Policy Petitioners[13] argue that the Commission stepped outside its traditional role in directing public utility transmission providers to consider transmission needs driven by public policy requirements. Pub. Policy Br. 17. First, these petitioners argue that the public policy directive is comparable to the Federal Power Commission's attempt to regulate against racial discrimination in *NAACP v. FPC*, 425 U.S. 662 (1976). *Id.* As already discussed, however, public policy requirements, unlike the employment practices at issue in *NAACP*, can affect the need for, and configuration of, prospective transmission facilities, and, therefore, can have a direct impact on transmission needs. Order No. 1000 PP 110-11, JA 171-72; Order No. 1000-A PP 206-07, JA 372, 393, 396. The Commission appropriately mandated that public utility transmission providers consider transmission needs driven by those requirements when planning

[13] *See* Pub. Policy Br. 3 n.1 (explaining that only some of the Public Policy Petitioners join in this argument).

transmission. Order No. 1000 P 111, JA 171; Order No. 1000-A PP 98, 206-07, JA 351, 372.

In addition, these Public Policy Petitioners argue that the public policy directive promotes environmental policies, and that doing so conflicts with Commission orders finding that the Commission has no authority to require environmental impact studies. Pub. Policy Br. 17. As the Commission explained, however, the public policy directive does not promote any particular environmental or other public policy. Order No. 1000-A P 209, JA 373. Rather, that directive simply ensures that transmission needs driven by public policy requirements, like transmission needs driven by reliability and economic concerns, are considered in the transmission planning process. *Id.*

B. The Commission Acted Consistently With FPA Section 217(b)(4).

Public Policy Petitioners contend that the public policy directive contravenes FPA section 217(b)(4), 16 U.S.C. § 824q(b)(4).[14] Pub. Policy Br. 4-9. The Commission reasonably found otherwise.

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[14] FPA section 217(b)(4) provides that:

> The Commission shall exercise the authority of the Commission under this chapter in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service obligations of the load-serving entities, and enables load-serving entities to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term power supply arrangements made, or planned, to meet such needs.

First, there is no merit to Public Policy Petitioners' claim that the Commission did not explain how the public policy directive meets FERC's obligation under FPA section 217(b)(4). Pub. Policy Br. 7-8. The Commission explained that the public policy directive ensures that all transmission needs are accurately identified and considered in transmission planning and, therefore, consistent with FPA section 217(b)(4), facilitates the planning and expansion of transmission facilities to assist load-serving entities in meeting their reasonable transmission needs. Order No. 1000-A PP 168-70, 172-75, 215, JA 365-66; 366, 374; Order No. 1000 P 204, JA 191; *see also id.* at P 108, JA 181 (Order No. 1000's requirements are consistent with section 217(b)(4) because they support the development of needed transmission facilities, benefiting load-serving entities).

In addition, FPA section 217(b)(4) does not establish a systematic transmission planning preference in favor of load-serving entities, as Public Policy Petitioners argue, Br. 6, 8-9. The Commission reasonably found that, while FPA section 217(b)(4) establishes a preference for load-serving entities in the allocation of long-term firm transmission rights (a matter not addressed in Order No. 1000), it does not establish a preference for load-serving entities in transmission planning (the matter addressed in Order No. 1000). Order No. 1000-A PP 170-72, JA 365-66; Order No. 1000-B PP 8-11, JA 491-92. Rather, on matters other than long-term firm transmission rights, section 217(b)(4) requires only that the Commission

use its authority in a way that facilitates planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities. Order No. 1000 P 108, JA 171. As already discussed, the Commission did that here.

Public Policy Petitioners also claim that another FERC rulemaking, *Long-Term Firm Transmission Rights in Organized Elec. Mkts.*, Order No. 681, FERC Stats. & Regs. ¶ 31,226 at PP 319-20, *order on reh'g*, 117 FERC ¶ 61,201 (2006), interpreted FPA section 217(b)(4) as establishing a transmission planning preference for load-serving entities. Pub. Policy Br. 8-9. As the Commission explained, however, its statements in Order No. 681 regarding the preference for load-serving entities were made in the context of long-term firm transmission rights (the subject of that rulemaking), not transmission planning. Order No. 1000-A PP 171-72, JA 366; Order No. 1000-B P 111, JA 491.

Specifically, Order No. 681 determined that FPA section 217(b)(4) establishes a firm transmission rights preference for all load-serving entities, not only for those load-serving entities with long-term power supply arrangements as the Commission originally had proposed. Order No. 681 PP 318-25; Order No. 681-A PP 51-52. Thus, having determined that the proposed preference for load serving entities with long-term power supply arrangements should be replaced by "a general preference for load serving entities vis-à-vis non-load serving entities" (Order No. 681 PP 318, 319), Order No. 681's guideline (5) provides that "[l]oad-

serving entities must have priority over non-load-serving entities in the allocation of long-term firm transmission rights that are supported by existing transmission capacity." Order No. 681 P 325, quoted in Order No. 1000-A P 171, JA 366, and in Order No. 1000-B P 10, JA 491. *See also* Pub. Policy Br. 8 (acknowledging that the Commission determined in Order No. 681 that FPA section 217(b)(4) "'provides a general 'due' preference for load serving entities to obtain long-term firm transmission rights.'") (quoting Order No. 681, FERC Stats. & Regs. ¶ 31,226 at P 320).

The Commission reasonably declined to designate FPA section 217(b)(4) as a public policy requirement for purposes of Order No. 1000. Pub. Policy Br. 5-9; *see also id.* at 11-12 (complaining that the Commission declined to designate or exclude any particular law or regulation from the definition of public policy requirements). Because a statute's or regulation's effect on transmission needs is highly variable (depending on factors such as geography, existing resources, and transmission constraints), the Commission determined that it would allow each region to determine which public policy requirements drive transmission needs in that region. Order No. 1000 P 208, JA 192; *see also* Order No. 1000-B P 31, JA 496 (the Commission provides for regional flexibility so transmission providers, in consultation with stakeholders, can design proposals addressing this requirement that they believe best meet the needs of their respective transmission

planning regions); Order No. 1000-A P 266, Ja 383 ("Order No. 1000 sets forth an approach that balances the need to ensure that specified regional transmission planning requirements are satisfied with our belief that the various regions of the country differ significantly in resources, industry organization, market design, and other ways so that a one-size-fits-all approach to regional transmission planning would not be appropriate."). Accordingly, the Commission neither mandated nor prohibited consideration of any particular statute or regulation, including FPA section 217(b)(4), as a public policy requirement driving transmission needs. Order No. 1000 PP 176, 207, 208, 210, 214, 215, JA 186, 192, 192, 193, 194, 194; Order No. 1000-A P 319, JA 393.

This decision does not allow load-serving entities' needs to be ignored, as Public Policy Petitioners contend (Br. 6, 7). Rather, the Commission explicitly mandated that all stakeholders, including load-serving entities, be given meaningful opportunities to provide input as to the transmission needs they believe are being driven by public policy requirements and to offer solutions to meet those needs. Order No. 1000 PP 206-09, JA 192-93; Order No. 1000-A P 335, JA 396

The Commission's interpretations of FPA section 217(b)(4) and Order No. 681 are reasonable, due deference, and should be affirmed. *E.g.*, *Ind. Util. Regulatory Comm'n v. FERC*, 668 F.3d 735, 740 (D.C. Cir. 2011) (Court gives substantial deference to FERC's interpretation of its own orders); *Transm. Access*,

225 F.3d at 694 (Court "must defer to the Commission's construction of ambiguous provisions of the FPA.")

C. The Public Policy Directive Is Sufficiently Clear.

Some of the Public Policy Petitioners contend that the public policy directive "fails to provide transmission owners clear notice of what they are required to do." Pub. Policy Br. 9; *see also id.* at 10-15 (same); *id.* at 3 n.1 (explaining that only some of the Public Policy Petitioners join in this argument). This contention is mistaken.

1. The Public Policy Directive

To ensure just and reasonable and not unduly discriminatory or preferential rates, the Commission determined that public utility transmission providers must consider needs driven by state, federal and local laws or regulations, i.e., public policy requirements, in planning transmission. Order No. 1000 PP 6, 82-83, 109, 203-05, JA 150, 165-66, 171, 191-92; Order No. 1000-A PP 205, 206, 208, 215, 317-20, 336, JA 372, 372, 372, 374, 392-93, 396. Thus, the Commission directed transmission providers to consult with their stakeholders and establish procedures by which they will: (1) identify transmission needs driven by state, federal and local laws or regulations for which potential solutions will be evaluated; and (2) evaluate potential solutions to meet those needs. Order No. 1000 PP 205-11, JA 192-93; Order No. 1000-A PP 321, 331, 334, JA 393, 395, 395.

The Commission explained that the proposed procedures must allow all stakeholders to suggest any transmission needs they believe are driven by state, federal and local laws or regulations, must establish an open and transparent process to determine which of those identified needs will be evaluated for potential solutions, and must provide stakeholders an opportunity to provide input regarding potential solutions for identified transmission needs. Order No. 1000 PP 207-09, 211, JA 192-93, 193; Order No. 1000-A P 335, JA 396. Furthermore, the process must: provide interested stakeholders with access to studies, models and data used to make decisions, Order No. 1000-A P 208, JA 372; satisfy Order Nos. 890 and 1000's transmission planning principles, *id.* at P 321, JA 393; and provide a record that the Commission and stakeholders can review to ensure the identification and evaluation decisions are open and fair and not unduly discriminatory or preferential, *id.* at PP 321, 325, JA 393, 394; Order No. 1000 P 209, JA 192. Accordingly, the Commission provided clear notice of what transmission providers are required to do.

2. Permitting Regional Flexibility Does Not Render The Directive Void For Vagueness.

The Commission's decision to provide for regional flexibility so that transmission providers, in consultation with stakeholders, can design proposals that best meet the needs of their respective transmission planning regions, Order No. 1000-B P 31, JA 496, does not make the public policy directive void for

vagueness. *See Am. Export-Isbrandtsen Lines, Inc. v. Fed. Maritime Comm'n*, 389 F.2d 962, 967 (D.C. Cir. 1968); Order No. 1000-A P 334, JA 395.

In *American Export*, the petitioners argued that agency orders directing them to modify certain provisions of their tariffs were void for vagueness and ambiguity because they left a number of questions unanswered.[15] 389 F.2d at 965, 967. This Court found "no legitimate basis for complaint about the order's indefiniteness." *Id.* at 967. "Rather," the Court found, "petitioners should welcome the leeway and flexibility the Commission ha[d] given them" in complying with its order. *Id.* As the Court pointed out, "[t]he Commission ha[d] simply given petitioners, who are most familiar with the conditions on the piers, broad initial authority to construct a rule and an enforcement procedure which is fair to all the parties concerned. It hardly behooves them to complain that they have been left too many options in undertaking this task." *Id.* Moreover, the Court pointed out, "[a]ny indefiniteness complaint petitioners or [others] may have against the order is certainly premature pending a good faith effort on their part to comply with it." *Id.*

Likewise, the Commission here has simply given transmission providers and their stakeholders, who are most familiar with their own regions' transmission needs, initial authority to develop procedures to consider regional transmission

[15] Those questions included: "What will be the measure of damages and what sort of tribunal would fix them? What is an unusual delay? Who shall have the burden of proof of causation? And what does 'under control of the terminal' mean?" *Id.*

needs driven by state, federal and local laws or regulations. Accordingly, Public Policy Petitioners have no legitimate basis for complaint.

Public Policy Petitioners liken the circumstances here to those in *Timpinaro v. SEC*, 2 F.3d 453 (D.C. Cir. 1993). Pub. Policy Br. 10. That case, however, like the other cases to which Public Policy Petitioners cite in support of their vagueness argument, Br. 9-10, involved a claim that the provision in question failed to provide adequate notice to enable petitioners to ascertain what conduct was prohibited. *Timpinaro*, 2 F.3d at 460; *see also FCC v. Fox Telev. Stations, Inc.*, 132 S.Ct. 2307, 2317-18 (2012); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Hayes v. N.Y. Att'y Grievance Comm. of Eighth Judicial Dist.*, 672 F.3d 158, 168-70 (2d Cir. 2012); *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 619, 628 (D.C. Cir. 2000); *Chatin v. Coombe*, 186 F.3d 82, 86-89 (2d Cir. 1999); *Gen. Elec. Co. v. U.S. EPA*, 53 F.3d 1324, 1328-30 (D.C. Cir. 1995). The circumstances here, by contrast, involve a claim that the Commission provided Public Policy Petitioners with too much flexibility to determine how to comply with a directive.

Public Policy Petitioners further contend that the Commission's decision to provide flexibility here conflicts with its decision in *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,265 P 30 (2007), *order on reh'g*, 123 FERC ¶ 61,051 (2008). Pub. Policy Br. 16-17. The Commission acknowledged that it required a formulaic

approach to determining which projects will be in a regional transmission plan in that one case. Order No. 1000 P 223, JA 195; Order No. 1000-A P 283, JA 386. The Commission explained, however, that most of the comments submitted here on whether there should be a flexible or formulaic approach to identifying and evaluating transmission needs supported a flexible approach, and that a flexible approach might capture certain transmission projects a bright-line approach would exclude. Order No. 1000 P 223, JA 195; Order No. 1000-A PP 283-84, JA 386-387. The Commission determined, therefore, that it would allow transmission providers, in consultation with stakeholders, to determine whether to have a flexible or bright-line approach. Order No. 1000 PP 223-24, JA 195-96; Order No. 1000-A PP 283-84, JA 386-97. Public Policy Petitioners neither acknowledge nor challenge the Commission's findings on this issue.

3. The Rejection In Part Of Some Compliance Filings Does Not Show That The Public Policy Directive Is Too Vague.

Public Policy Petitioners argue that the Commission's rejection of portions of some of the filings made to comply with Order No. 1000 provides evidence that the public policy directive is too vague. Br. 14-15. As Public Policy Petitioners must surely be aware, however, initial compliance filings are often rejected in part because they fail to meet all of the requirements set out in a Commission order.

Moreover, it is unsurprising that the Commission partially rejected the compliance filings cited by Public Policy Petitioners (Br. 15). For example,

although Order No. 1000 specifically required that proposed procedures "establish a just and reasonable and not unduly discriminatory process through which public utility transmission providers will identify, out of [the] larger set of [identified] needs, those needs for which transmission solutions will be evaluated" (Order No. 1000 P 209, JA 192; *see also* Order No. 1000-A P 335, JA 396 (same)), the compliance filing at issue in *PJM Interconnection*, 142 FERC ¶ 61,214 P 115, did not propose such a process. Accordingly, the Commission directed the Regional Operator (PJM) to submit another compliance filing describing the process by which it will determine "which public policy requirements identified by stakeholders may result in transmission needs for which transmission solutions will be evaluated." *Id.*

The rest of the compliance orders cited by Public Policy Petitioners (Br. 15) rejected portions of the filings in those cases for the same or similarly unsurprising reasons. *See S.C. Elec. & Gas*, 143 FERC ¶ 61,058 P 116 (rejecting compliance filing in part because it did not explain the process by which it will identify, out of the larger set of transmission needs proposed by stakeholders, those transmission needs for which transmission solutions will be evaluated, as required by Order No. 1000 P 209, JA 192); *Pub. Serv. Co. of Colo.*, 142 FERC ¶ 61,206 PP 172, 200 (2013) (same, citing Order No. 1000-A P 335, JA 396); *NorthWestern*, 143 FERC ¶ 61,056 PP 83-88 (same; also rejecting compliance filing in part because it did

not: make clear when and how stakeholders can propose transmission needs driven by public policy requirements for potential evaluation; propose to post an explanation why identified transmission needs were not selected for further evaluation as required by Order No. 1000 P 209, JA 192, and Order No. 1000-A P 325, JA 394; establish procedures to evaluate potential transmission solutions as required by Order No. 1000 PP 211, 220, JA 193, 195); *Me. Pub. Serv. Co.*, 142 FERC ¶ 61,129 P 41 (2013) (rejecting compliance filing in part because it did not propose a process to select identified transmission needs for further evaluation (as required by Order No. 1000-A P 335, JA 396) or propose to post an explanation why identified transmission needs were not selected for further evaluation (as required by Order No. 1000 P 209, JA 192, and Order No. 1000-A P 325, JA 394)).

4. Complaints Regarding The Public Policy Directive's Scope Misapprehend Order No. 1000.

Public Policy Petitioners raise several arguments contending that the public policy directive's scope and burden are excessive. Br. 12-14, 18. These arguments misunderstand the public policy directive.

First, Public Policy Petitioners complain that Order No. 1000 "leaves transmission providers inundated with myriad public policies that they *must* consider." Pub. Policy Br. 12. As the Commission explained, however, public utility transmission providers must plan for the needs of their transmission

customers, and the public policy directive provides a tool for them to do so. Order No. 1000-A P 205 & n.269, JA 372 (citing, *e.g.*, Order No. 890 PP 418-19); *id.* at P 215, JA 194. In any event, Order No. 1000 requires only that transmission providers consider transmission needs driven by public policy requirements; it does not require that every transmission need identified by stakeholders be selected for further evaluation. Order No. 1000-A at PP 320-21, JA 393; Order No. 1000 P 210, JA 193.

Likewise, Order No. 1000's determination that transmission providers may consider transmission needs driven by additional public policy objectives that are not specifically required by laws or regulations does not constitute a new rule undermining wholesale energy markets, as Public Policy Petitioners contend (Br. 18). This determination simply recognizes that transmission providers consider many different factors in planning transmission and have always had the ability to plan for any transmission system needs they foresee. Order No. 1000 P 216, JA 194; Order No. 1000-A P 333, JA 395. Thus, while Order No. 1000 establishes the requirement that transmission providers consider transmission needs driven by enacted laws and regulations, it does not expand what transmission providers have always been entitled to do, i.e., consider and plan for foreseeable transmission needs. Order No. 1000 P 216, JA 194; Order No. 1000-A P 333, JA 395.

Public Policy Petitioners' contentions that: (1) the Commission should have "limit[ed] its order to Public Policy Requirements that are consistent with the FPA" (Pub. Policy Br. 12) or that "provide transmission related benefits" (*id.* at 12 n.4); and (2) "public policy must come in the form of assumptions, criteria and metrics that transmission planners can translate into an implementable transmission plan" (*id.* at 12-13 (internal quotation omitted); *see also id.* at 11 (same)), also misunderstand the public policy directive.

Order No. 1000 does not require consideration of the public policy requirements themselves. Order No. 1000-A P 319, JA 393; *see also id.* at P 318, JA 393. Rather, Order No. 1000 simply requires transmission providers to consider all transmission needs, including those driven by public policy requirements, not just those transmission needs driven by reliability and economic concerns. *Id.* at P 205, JA 372.

Just as transmission providers are not required to consider the public policy requirements themselves, they also are not required to reconcile and prioritize different or conflicting state policies (Pub. Pol. Br. 13-14). Order No. 1000-A P 327, JA 394. Instead, a transmission provider's role is to help utilities comply with state policies by considering in the transmission process, but not necessarily including in the regional transmission plan, transmission facilities needed to meet their obligations, and also to determine if diverse objectives can be met more

efficiently or cost-effectively through regional transmission planning than through individual utility planning. *Id.*

In addition, while Public Policy Petitioners contend that transmission providers should not be able to select and promote some public policies over others (Br. 13), the procedures to determine which identified transmission needs will be evaluated for potential solutions must be developed in consultation with stakeholders and subject to Commission review on compliance to ensure that the proposed process is just and reasonable and not unduly discriminatory. Order No. 1000 PP 205-11, JA 192-93; Order No. 1000-A PP 321, 334, JA 393, 395. Any concern that an inappropriate process will be adopted on compliance is premature. *See American Export*, 389 F.2d at 967.

VI. The Commission's Cost Allocation Determinations Were Reasonable.

In Order No. 890, the Commission determined that there is a close relationship between transmission planning and cost allocation. Order No. 1000 P 496, JA 250 (citing Order No. 890 P 557). Accordingly, the Commission required transmission planning processes to identify cost allocation method(s) that would apply to new transmission facilities that do not fit under previously existing rate structures. Order No. 1000 P 496, JA 250; *see also* Order No. 890 PP 557-58, 561.

In Order No. 1000, the Commission found that, in light of the changes in the electric industry in recent years (discussed *supra* p. 49) as well as other Order No.

1000 reforms, its Order No. 890 cost allocation requirements were no longer adequate to ensure that the rates, terms and conditions of FERC-jurisdictional service are just and reasonable and not unduly discriminatory or preferential. Order No. 1000 P 497, JA 250; *see also id.* at PP 484-87, JA 248-49.

As the Commission explained, Order No. 890 failed to ensure that cost allocation methods appropriately account for the benefits associated with new transmission facilities. Order No. 1000 PP 495, 498, JA 250, 251. Existing requirements allow some users to "free ride" on the transmission facility investments of others. *Id.* at P 486, JA 248; Order No. 1000-A P 592, JA 447. Moreover, without a clear understanding in advance of how facilities' costs will be allocated, it is less likely that those facilities will be built, undermining the purpose of the transmission planning process, i.e., the development of efficient and cost-effective transmission solutions. *Id.* at PP 52, 592, JA 341; 497; Order No. 1000 PP 485, 499, JA 248, 251. These elements impede efficient transmission planning and development, causing jurisdictional rates to be higher than they should be. Order No. 1000-A P 592, JA 447.

Accordingly, Order No. 1000 required that public utilities include in their tariffs a method, or set of methods, for allocating the costs of new transmission facilities selected in the regional plan for purposes of cost allocation (i.e., selected in the region's transmission plan as a more efficient or cost-effective solution to

regional transmission needs) that adhere to the following six principles. Order No. 1000 PP 5, 9, 558, JA 150, 150, 261. The methods (1) must meet the cost causation principle by allocating costs roughly commensurate with benefits; (2) cannot allocate costs to an entity that receives no benefits unless the entity voluntarily assumes the costs; (3) cannot contain a benefit to cost threshold ratio that is so high (i.e., more than 1.25) that it excludes facilities with significant benefits; (4) must assign costs solely within the transmission planning region unless those outside the region voluntarily assume costs; (5) must set forth a transparent means of determining benefits and identifying beneficiaries; and (6) may be different for different types of transmission facilities, but must be applied consistently. *Id*. at P 586, JA 266; *see id*. PP 622-93, JA 273-284 (discussing each principle). Otherwise, regions have flexibility to develop their cost allocation methods. *Id*. at PP 604-605, JA 270.

A. The Commission Reasonably Determined That It Has Statutory Authority Under FPA Section 206 To Require The Cost Allocation Reforms.

1. Cost Allocation Is A Practice Affecting Rates Under FPA Section 206.

The Commission reasonably determined that FPA section 206(a), 16 U.S.C. § 824e(a), provides it authority to promulgate the cost allocation requirements here. Order No. 1000-A PP 577, 588, 592, JA 444, 446, 447; Order No. 1000 P 1, JA 148.

FPA section 206(a) provides that:

> 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.

As the Commission explained, cost allocation is a practice affecting FERC-jurisdictional rates. Order No. 1000-A PP 577, 588, 592, JA 444, 446, 447. *See, e.g.*, *La. Pub. Serv. Comm'n*, 522 F.3d at 390 (the Commission has jurisdiction under FPA section 206 to modify cost allocation because the cost allocation affects wholesale rates); *Miss. Indus*., 808 F.2d at 1546 (same); *Pub. Serv. Comm'n of Wis. v. FERC*, 545 F.3d 1058, 1067 (D.C. Cir. 2008) (affirming Commission orders finding cost allocation just and reasonable). If transmission planners do not know in advance who will pay for regional facilities and free riding is not prevented, transmission planning will be inefficient, the development of more efficient or cost effective transmission facilities will be impeded, and jurisdictional rates will be higher than they otherwise would be. Order No. 1000 PP 496, 499, JA 250, 251; Order No. 1000-A PP 52, 588, 592, JA 341, 446, 447. Thus, the Commission reasonably determined that it had authority under FPA section 206 to determine that any tariff that does not include a cost allocation method or methods

consistent with Order No. 1000's requirements is unjust and unreasonable under FPA section 206. Order No. 1000-A at P 56, JA 342.

2. The Commission's FPA Section 206 Authority Is Not Limited To Customer Relationships.

Cost Allocation Petitioners assert that the plain language of FPA sections 205 and 206 applies only to transmission service to customers and, therefore, precludes allocating costs to those who do not have a contractual relationship with the transmission provider. Cost Alloc. Br. 10-11. To support this contention, Cost Allocation Petitioners point out that FPA sections 205 and 206 "refer to rates 'made,' 'demanded,' 'received,' 'observed,' 'charged,' or 'collected' for the 'transmission . . . of electric energy subject to the jurisdiction of the Commission.'" Br. 10.

As the Commission found, however, "[n]either section 205 nor section 206 of the FPA state or imply that an agreement is a precondition for any transmission charges." Order No. 1000 P 533, JA 257. Nothing in the language cited by Cost Allocation Petitioners "precludes flows of funds to public utility transmission providers through mechanisms other than agreements between the service provider and the beneficiaries of those transmission facilities." *Id.*; *see also* Order No. 1000-A P 570, JA 443 (same).

To the contrary, FPA section 206 applies to practices affecting rates for "any transmission" that is "subject to the jurisdiction of the Commission." FPA

§ 206(a), 16 U.S.C. § 824e(a). Thus, the Commission's section 206 authority applies to matters within the scope of the Commission's jurisdiction, which is set forth in FPA section 201, 16 U.S.C. § 824. Order No. 1000-A P 577, JA 444. Under FPA section 201(b)(1), the Commission has jurisdiction over "the transmission of electric energy in interstate commerce," and "all facilities" used for such transmission. Order No. 1000 P 532, JA 257. This jurisdiction is not limited to the use of transmission facilities within a certain class of transactions. *Id*.; *see also New York*, 535 U.S. at 17-20 (same).

The Commission further reasonably determined that this jurisdiction "permits [its 206] authority to be applied in a way that follows 'the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental, test,' and Order No. 1000's application of the principle of cost causation is a reasonable exercise of that authority." Order No. 1000-A P 577, JA 444 (quoting *Conn. Light & Power Co. v. FPC*, 324 U.S. 515, 529 (1945)). As this Court has explained, "all of the individual facilities used to transmit electricity are treated as if they were part of a single machine." *N. States Power Co. v. FERC*, 30 F.3d 177, 179 (D.C. Cir. 1994), quoted in Order No. 1000-A P 560, JA 441. This is because "a transmission system performs as a whole; the availability of multiple paths for electricity to flow from one point to another contributes to the reliability of the system as a whole." *N. States Power*, 30 F.3d at 179. "This principle has a strong

basis in the physics of electrical transmission for there is no way to determine what path electricity actually takes between two points or indeed whether the electricity at a point of delivery was ever at the point of origin." *Id.*; *see also id.* ("the Commission treats each customer not as using a single transmission path but rather as using the entire transmission system."); Order No. 1000-A P 559, JA 440 (explaining that "[e]lectric energy does not travel on a preset path but rather along all available pathways in accordance with the laws of physics. Continuous fluctuations in the demand for power and in generation operations affect power flows throughout the transmission grid. This means that electric energy received by an individual customer at any one time could be delivered over any number of transmission facilities that constitute the transmission grid. Changes in demand for or supply of electricity at any point in the system will change flows on all the transmission lines to varying degrees, often in ways that are not easily controlled.").

Thus, an entity receiving service over the transmission grid does not only use, or benefit from, the transmission facilities over which it has contracted for service. Order No. 1000-A P 561, JA 441; *see also id.* at P 570, JA 443 (any entity that uses the transmission grid will necessarily use many different transmission providers' facilities); *id*. at P 556 n.659, JA 440 (transmission providers "may effectively rely on transmission facilities of another transmission provider in order

to provide transmission service"). Rather, "in the case of transmission, there is only one service -- service over the entire grid." *Id.* at P 560, JA 441. There is no merit, therefore, to Cost Allocation Petitioners' claim (Br. 14, 19 n.6) that the Commission is allowing costs to be allocated to entities that take no service from a particular facility.

Cost Allocation Petitioners argue, without citing any authority, that the Commission should not have considered FPA section 201 in interpreting FPA section 206. Cost Alloc. Br. 14-16. This Court's precedent establishes, however, that, in interpreting one provision of a statute, an agency appropriately may consider other provisions of that statute. *See, e.g.*, *Consumer Elec. Ass'n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003) (citing *Am. Scholastic TV Programm. Found. v. FCC*, 46 F.3d 1173, 1178-79 (D.C. Cir. 1995)).

The Commission appropriately acted under its FPA section 206 authority, therefore, when it determined that cost allocation methods in transmission providers' FERC-jurisdictional tariffs must satisfy the cost causation principle, i.e., must allocate costs roughly commensurate with benefits. Order No. 1000-A PP 528, 558, 568, 578, 592, JA 435, 440, 443, 444, 447. As the Commission found, it could not satisfy its FPA section 206 duty to ensure that transmission rates are just and reasonable and not unduly discriminatory or preferential if it allowed those contracting for service on a regional transmission facility to be

allocated costs caused by others who benefit from, but do not contract for service on, that facility. *Id.* at PP 558, 577, 578, JA 440, 444, 444.[16]

The Commission's reasonable interpretation of its statutory authority, not Cost Allocation Petitioners' contrary interpretation, is due deference, and should be affirmed. *Transm. Access*, 225 F.3d at 694; *see City of Arlington*, 133 S.Ct. at 1868-75; *Me. Pub. Util. Comm'n v. FERC*, 454 F.3d 278, 285 (D.C. Cir. 2006).

3. The Commission Appropriately Determined That Any Tariff Without A Cost Allocation Method Consistent With The Rulemaking's Requirements Is Unjust And Unreasonable.

Cost Allocation Petitioners argue that the Commission has authority under the FPA to review and correct unlawful rates, but does not have authority to establish rates or the right to recover them in the first instance. Cost Alloc. Br. 12, 26-29, 16-17 (citing *Otter Tail*, 410 U.S. at 374; *Morgan Stanley*, 554 U.S. at 562 n.2; *Sierra*, 350 U.S. at 353; *Mobile*, 350 U.S. at 341, 347).

This argument ignores that, when proceeding by rule, the Commission can conclude that "*any* tariff violating the rule would have such adverse effects . . . as to render it unjust and unreasonable" within the meaning of section 206 of the FPA. Order No. 1000-A P 56, JA 342 (quoting *Assoc. Gas*, 824 F.2d at 1008); *see*

[16] Accordingly, there is no merit to Cost Allocation Petitioners' assertion that the cost allocation requirement's purpose is to establish a "socialized funding mechanism." Cost Alloc. Br. 28. The cost allocation requirement's purpose is to ensure that a facility's costs are allocated to those who benefit from those facilities. *E.g.*, Order No. 1000-A P 592, JA 447.

also Interstate Natural Gas Ass'n, 285 F.3d at 37 (same); *Entergy Servs., Inc. v. FERC*, 319 F.3d 536, 545 (D.C. Cir. 2003) (FERC "may require a public utility to revise its tariff to reflect a Commission policy determination that the existing tariff is unjust and unreasonable"). Order No. 1000 appropriately determined that any tariff that does not include a cost allocation method or methods consistent with Order No. 1000's requirements is unjust and unreasonable under FPA section 206. Order No. 1000-A P 56, JA 342. Because Cost Allocation Petitioners' brief does not address this explanation, they waive any challenge to it.

Moreover, the cost allocation requirement does not address matters of cost recovery, as Cost Allocation Petitioners contend (Br. 13, 26-28). Order No. 1000 P 563, JA 441; Order No. 1000-A P 615, JA 451 ("the question of specific cost recovery mechanisms is beyond the scope of this proceeding"); *id.* at P 616, JA 451 (noting that the Commission has broad discretion in determining which issues to address in a particular proceeding) (citing *Mobil Oil*, 498 U.S. at 230); *Tenn. Valley Mun. Gas Ass'n v. FERC*, 140 F.3d 1085, 1088 (D.C. Cir. 1998)).

Cost allocation and cost recovery are distinct issues. Order No. 1000 PP 537 n.427, 563, JA 257, 262; Order No. 1000-A PP 615-16, JA 451. Cost allocation involves the identification of beneficiaries and the costs they cause, but does not involve the establishment of mechanisms to recover those costs. Order No. 1000-A P 616, JA 451. Cost recovery, on the other hand, addresses how a cost allocation

will be implemented. Order No. 1000 P 537 n.427, JA 258. Accordingly, Cost Allocation Petitioners are mistaken when they argue that Order No. 1000 requires each transmission provider to "include provisions in its tariff *to recover the costs* of regional transmission facilities." Cost Alloc. Br. 27-28 (emphasis added).

Likewise, Cost Allocation Petitioners' contention that, "[i]f FERC cannot mandate the use of joint rates (i.e., a rate based on the combined costs of two or more transmission facilities, *see Fort Pierce Utils. Auth. v. FERC*, 730 F.2d 778, 783 (D.C. Cir. 1984)), it cannot mandate that an entity *pay* the rates charged by a utility with which it has no contractual or tariff-based customer/provider relationship," *id.* at 27 (emphasis added), is inapposite here. Order No. 1000-A P 581, JA 445. Order No. 1000 does not require any one to pay any rate. Instead, the Commission appropriately exercised its "broad discretion to determine when and how to hear and decide matters that come before it," *Tenn. Valley*, 140 F.3d at 1088, by addressing cost allocation matters in this rulemaking and leaving the separate matter of cost recovery to later proceedings. Order No. 1000 P 563, JA 262; Order No. 1000-A PP 615-16, JA 451.

Consistent with the flexibility the Commission provided throughout the rulemaking, the Commission noted that, "[w]hile [it would] not address cost recovery in this proceeding, . . . cost recovery may be considered as part of a region's stakeholder process in developing a cost allocation method or methods to

comply with Order No. 1000. Therefore, to the extent that cost recovery provisions are considered in connection with a cost allocation method or methods for a regional or interregional transmission facility, public utility transmission providers may include cost recovery provisions in their compliance filings." Order No. 1000-A P 616, JA 451. As a result, some Order No. 1000 compliance filings include cost recovery provisions (*e.g.*, *Tampa Elec.*, 143 FERC ¶ 61,254 PP 265-68), and some do not (*e.g.*, *Avista*, 143 FERC ¶ 61,255 P 269).

4. The Cost Allocation Requirement Is Consistent With Precedent.

Cost Allocation Petitioners argue that *Morgan Stanley*, 554 U.S. 527, stands for the proposition that contracts for transmission service are the only basis on which costs can be allocated. Cost Alloc. Br. 16-18 (also citing *Mobile*, 350 U.S. 332; *Sierra*, 350 U.S. 348). The Commission disagreed that *Morgan Stanley* "means that contracts, which will not fully reflect how transmission facilities are impacted by power flows, are the only device that defines what rates are unjust and unreasonable and not unduly discriminatory or preferential." Order No. 1000-A P 567, JA 442. To the contrary, *Morgan Stanley* recognizes that service under the Federal Power Act is provided under the terms set out in contracts *or* in Commission-approved tariffs. 554 U.S. at 531-32 (citing *Mobile*, 350 U.S. 332; *Sierra*, 350 U.S. 348).

The cost allocation method or methods required under Order No. 1000 will be included in transmission providers' FERC-jurisdictional tariffs. Order No. 1000-A P 568, JA 443. And, while Cost Allocation Petitioners contend otherwise (Br. 21), the Commission reasonably determined that an entity's voluntary choice to take service on the transmission grid includes its voluntary acceptance of the terms and conditions set forth in tariffs governing the facilities they use, including those facilities used because of the immutable laws of physics. Order No. 1000-A P 568, JA 442; *see also supra* p. 122 (describing grid-wide flow of electricity); Order No. 1000-A P 580, JA 445 ("entities that receive benefits from these facilities in the course of their use of the transmission grid cannot be characterized as 'unwilling customers.'"). *See, e.g.*, *Metro E. Ctr. for Conditioning & Health v. Qwest Commc'n Int'l, Inc*., 294 F.3d 924, 926 (7th Cir. 2002) ("The tariff is an offer that the customer accepts by using the product"); *Atl. & Gulf Stevedores, Inc. v. Alter Co*., 617 F.2d 397, 401 n.16 (5th Cir. 1980) ("A party who makes use of the facilities or service offered and rendered by another under the terms of a validly promulgated tariff impliedly consents to be bound by the tariff's terms").

The cost allocation requirements here do not "require an existing transmission customer to accept a new transmission service it has not requested." Cost Alloc. Br. 21-22 (citing *Exxon Mobil Corp. v. FERC*, 430 F.3d 1166, 1176-77 (D.C. Cir. 2005)). They apply only to new, not already-existing, transmission

facilities. *E.g.*, Order No. 1000 P 9, JA 150. Furthermore, as already discussed, an entity receiving service over the transmission grid does not use only, or benefit only from, the facilities over which it has contracted for service. Order No. 1000-A PP 560, 561, 570, JA 441, 441, 443; Order No. 1000 P 541, JA 258. Accordingly, the cost allocation requirements do not require an entity that uses the transmission grid to accept a new transmission service but, rather, appropriately require that the transmission customer be allocated all the costs incurred in providing that service. *Id.*; Order No. 1000-A P 580, JA 445.

Cost Allocation Petitioners profess concern that transmission developers could unilaterally allocate costs for transmission facilities no one wants. Cost Alloc. Br. 22. To be eligible for regional cost allocation under Order No. 1000, however, a proposed transmission facility must first be selected in a regional transmission plan for purposes of cost allocation. Order No. 1000 P 539, JA 258; Order No. 1000-A P 579, JA 445. This can occur only after the transmission providers in a region, in consultation with stakeholders (i.e., any entity interested in the regional transmission planning process, Order No. 1000 n.143, JA 181), have evaluated a proposed facility and its benefits, including the identification of the entities who will benefit from, and therefore, be allocated the costs of, those facilities. Order No. 1000 PP 5, 9, 539, 558, JA 150, 150, 258, 261; Order No. 1000-A P 579, JA 445. *See also id.* P 580, JA 445 (entities cannot be allocated

costs for benefits that are trivial in relation to those costs; all cost allocation methods will be subject to Commission review and approval and issues regarding the appropriateness of a particular method can be raised at that time). Order No. 1000 therefore does not permit the allocation of costs to those receiving no benefit, or to a region receiving no benefit, Order No. 1000 P 544, JA 256, nor does Order No. 1000 permit cost allocations to those without a sufficient opportunity to participate in the stakeholder consideration of the project. Order No. 1000 P 582, JA 265; Order No. 1000-A P 709, JA 467. *See, e.g., Pub. Serv. Comm'n of Wis.*, 545 F.3d at 1062-63 (affirming Commission orders giving weight to the position of the majority of participants within a regional market on an issue of cost allocation, where the regional stakeholder process was open and allowed for extensive participation).

Similarly, Cost Allocation Petitioners' concern that costs could unilaterally be allocated outside a transmission planning region (Br. 28) is baseless. The Commission specifically foreclosed that possibility, finding it would impose too heavy a burden on stakeholders to actively monitor transmission planning processes in other regions. Order No. 1000-A P 557, JA 440; *see infra* p. 134.

Cost Allocation Petitioners claim that the Commission improperly relied on *Illinois Commerce Comm'n v. FERC*, 576 F.3d 470 (7th Cir. 2009), as supporting its determination that costs can be allocated to those who benefit from the use of

transmission facilities. Cost Alloc. Br. 20-21. In Cost Allocation Petitioners' view, because *Illinois Commerce Commission* used the word "customer" in discussing cost allocation, that case "only pertains to the allocation of costs by a transmission provider to its customers." *Id.*

This argument "inappropriately revise[s] the *Illinois Commerce Commission* court's explanation that the cost causation principle requires 'that all approved rates [must] reflect to some degree the costs actually caused by the customer who must pay them' by adding a further requirement that the customer also agree to be responsible for such costs. The court did not, however, reach such a conclusion." Order No. 1000-A P 565, JA 442 (quoting *Ill. Commerce Comm'n*, 576 F.3d at 476 (internal citation omitted)). Indeed, that decision notes that compliance with the cost causation principle is evaluated "'by comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party.'" *Id.* (quoting *Ill. Commerce Comm'n*, 576 F.3d at 476 (internal citation omitted)). Furthermore, the court stated, "[t]o the extent that a utility benefits from the costs of new facilities, it may be said to have 'caused' a part of those costs to be incurred, as without the expectation of its contributions the facilities might not have been built, or might have been delayed." *Id.* (quoting *Ill. Commerce Comm'n*, 576 F.3d at 476). *See also Ill. Commerce Comm'n*, 721 F.3d at 770 ("The Federal Power Act requires that [rates] be 'just and reasonable,' 16 U.S.C. § 824d(a), and therefore at least

roughly proportionate to the anticipated benefits to a utility of being able to use the grid."). Cost Allocation Petitioners' brief does not address this explanation and, therefore, waives any challenge to it.

Cost Allocation Petitioners cite *Am. Elec. Power Co.*, 49 FERC ¶ 61,377 (1989), and *S. Cal. Edison Co.*, 70 FERC ¶ 61,087 (1995), in support of their argument that the Commission "has consistently rejected unilateral attempts to impose costs on non-customers" for unintended power flows. Cost Alloc. Br. 22. These cases represent no such policy; rather, they simply reflect that the Commission prefers operational issues on existing transmission facilities to be resolved in the first instance on a consensual, regional basis, but will allow unilateral filings to recover costs where parties are unable to resolve the issue. Order No. 1000 P 506, JA 252 (citing Notice of Proposed Rulemaking at P 143 & nn.154-55, JA 124; *Am. Elec. Power Co.*, 49 FERC ¶ 61,377 at 62,381; *S. Cal. Edison Co.*, 70 FERC ¶ 61,087 at 61,241-42); *id.* at P 539, JA 258; Order No. 1000-A P 583-84, JA 445-46.

The Commission orders in *Midwest Indep. Transm. Sys. Operator, Inc.*, 131 FERC ¶ 61,173 (2010), *order on reh'g*, 136 FERC ¶ 61,244 (2011), likewise do not reflect a rule requiring a contractual relationship between utilities and those charged for jurisdictional services. Cost Alloc. Br. 23-24. In the *Midwest* orders, the Commission simply determined which entity was responsible for seams

elimination charges based on the specific tariff and contract provisions in that case. Order No. 1000-A P 582, JA 445. The transmission provider's tariff stated that its customers would be responsible for seams elimination charges, and the customer's (BP Energy) contract with its affiliate (Green Mountain) stated that BP Energy was responsible to pay for network transmission service, which the Commission determined included seams elimination charges. *Id.* (citing *Midwest*, 131 FERC ¶ 61,173 at PP 422-23, *on reh'g*, 136 FERC ¶ 61,244 at P 205). The Commission's reasonable interpretation of its own order is due deference, and should be affirmed. *Entergy*, 319 F.3d at 541.

B. The Commission Reasonably Rejected Involuntary Interregional Cost Allocations.

While Cost Allocation Petitioners argue that the Commission exceeded its authority in ordering cost allocation reforms, International Transmission Company ("International") argues that the Commission did not go far enough. As explained below, International's challenge to the Commission's decision not to mandate involuntary interregional cost allocation has no merit.

1. The Commission Reasonably Determined That Involuntary Interregional Cost Allocation Would Undermine Stakeholder Participation In Cost Allocation Determinations.

Regional Cost Allocation Principle 4 and Interregional Cost Allocation Principle 4 provide that costs must be allocated to the region or regions where

transmission facilities are located unless other regions agree to assume a portion of the costs. *See* Order No. 1000 P 657, JA 279 (setting out Regional and Interregional Cost Allocation Principle 4). International complains that Principle 4 is "patently inconsistent with the cost causation principle" because it prohibits allocating costs to regions that benefit from facilities. ITC Br. 10-12.

The Commission acknowledged that its approach "may lead to some beneficiaries of transmission facilities escaping cost responsibility because they are not located in the same transmission planning region as the transmission facility." Order No. 1000 P 660, JA 279; Order No. 1000-A P 708, JA 467. *See* ITC Br. 17-18 (arguing that Principle 4 permits free-riding).[17] Thus, while regions remain free to negotiate voluntary cost-sharing agreements (Order No. 1000 P 658, JA 279; Order No. 1000-A PP 504, 711, JA 430, 468), the Commission recognized that regions may not choose to contribute (*see* ITC Br. 18). The Commission, however, reasonably "balance[d] the possibility that some beneficiaries could escape cost responsibility against the larger goal of linking cost allocation with the transmission planning process for the purpose of improving that process." Order

[17] In the event that International's reply brief attempts to rely on the recently-issued case *Illinois Commerce Commission*, 721 F.3d 764, that case is distinguishable. *Illinois Commerce Commission*, 721 F.3d at 780, vacated in one part Commission orders that permitted cost allocations to some, but not all, recipients of exports from the Midwest Regional System Operator. Order No. 1000, in contrast, treats all those who benefit from a project built outside their region the same; it prohibits involuntary allocation of project costs to any beneficiary outside of the region in which the project is located. *See* Order No. 1000 P 657, JA 279.

No. 1000-A P 710, JA 468. *See also id.* at P 503, JA 430 (same); *id.* at P 708, JA 467, (discussing importance of link between transmission planning and cost allocation); Order No. 1000 PP 582, 660, JA 265, 279.

As this Court has recognized, the policy of matching cost causation and cost responsibility "may be well-established, but it is far from absolute. . . . [T]he Commission may rationally emphasize other, competing policies and approve measures that do not best match cost responsibility and causation." *Carnegie Natural Gas Co. v. FERC*, 968 F.2d 1291, 1293-94 (D.C. Cir. 1992) (citations omitted). *See also id*. at 1293 ("There is, however, no requirement in the Act itself that rates precisely match cost causation and responsibility. Section 4(a) only requires that rates be 'just and reasonable.' 15 U.S.C. § 717c(a)."); *Ill. Commerce Comm'n*, 576 F.3d at 476 (the cost causation principle requires that all approved rates "reflect to some degree" the costs actually caused); *Ill. Commerce Comm'n*, 721 F.3d at 770 (to be just and reasonable, rates must be "at least roughly proportionate to the anticipated benefits to a utility of being able to use the grid.").

The Commission explained that it is important for entities that may be allocated costs to have the opportunity to participate in the transmission planning and cost allocation process. Order No. 1000-A PP 509, 709-10, JA 431, 467-68. This ensures fairness, which ultimately promotes successful transmission planning. *Id.* at P 709, JA 467.

Under Order No. 1000, stakeholders will consider interregional projects primarily through regional transmission planning processes. Order No. 1000-A PP 509, 519, JA 431, 433; Order No. 1000 P 465, JA 245; Order No. 1000-B P 61, JA 502. Interregional projects have to be proposed in the transmission planning process for each region in which a facility would be located. Order No. 1000 P 436, JA 240. To be eligible for interregional cost allocation, the proposed facility must be selected in each regional plan; no region is required to involuntarily accept an allocation of costs. Order No. 1000 PP 400, 443, JA 234, 241; Order No. 1000-A P 509, JA 431. Thus, stakeholders will have an opportunity to provide meaningful input with respect to proposed interregional facilities before costs can be allocated to them, *id.*; Order No. 1000-B P 61, JA 502, and each region will be able to decide the relative costs and benefits of the project to that region. Order No. 1000 P 443, JA 241; Order No. 1000-A P 512, JA 432.

The Commission found that this process would be undermined if regions could unilaterally allocate costs to potential beneficiaries in other regions; those potential beneficiaries might not have an adequate opportunity to review the need for, and to participate in, beneficiary determinations regarding a proposed facility that would be located outside their region. Order No. 1000 P 582, JA 265; Order No. 1000-A P 709, JA 467. Allowing one region to allocate costs unilaterally to other regions would impose too heavy a burden on stakeholders to actively monitor

transmission planning processes in all other regions that potentially could identify them as beneficiaries and subject them to cost allocation. Order No. 1000 P 660, JA 279; Order No. 1000-A PP 708-09, JA 467-68.

2. Involuntary Interregional Cost Allocations Would Result In Interconnection-wide Planning And Cost Allocation, Which The Commission Reasonably Declined To Require.

The Commission also found that permitting involuntary interregional cost allocations would result in a highly inefficient form of interconnection-wide planning and cost allocation, which the Commission determined it would not require. Order No. 1000 P 660, JA 279; Order No. 1000-A PP 503, 708, JA 430, 467. While Order No. 1000 required regions to engage in bilateral cooperation with neighboring regions (*see* ITC Br. 14; Order No. 1000 P 396, JA 233; Order No. 1000-A P 502, JA 429), the Commission expressly declined to impose multilateral or interconnection-wide planning requirements. Order No. 1000 P 417, JA 237; Order No. 1000-A PP 502, 511, JA 429, 431. In the contiguous United States, the electric grid is composed of three interconnected grids, the Eastern Interconnection, the Western Interconnection and the Texas Interconnection. *New York*, 535 U.S. at 31 n.4. Because transmission facilities "often have effects on multiple neighboring systems," considering a facility's effect on every region in the interconnection could "trigger a chain of multilateral

evaluation processes," which the Commission determined was not necessary at this time. Order No. 1000 P 416, JA 236; Order No. 1000-A P 502, JA 429.

Furthermore, under the American Recovery and Reinvestment Act, the Department of Energy has undertaken an 80 million dollar initiative to develop interconnection-based transmission plans for the Eastern, Western, and Texas Interconnections. Order No. 1000 P 26, JA 153. The Commission found that imposing multilateral or interconnection-wide coordination requirements at this time could frustrate that initiative. Order No. 1000 P 417, JA 237; Order No. 1000-A P 502, JA 429.

Thus, while recognizing that a region may reject an interregional project for insufficient benefits to the region, even if it would be a more efficient or cost-effective project for a broader area, *see* ITC Br. 19-20, the Commission determined that it would not require interconnection-wide planning at this time. Order No. 1000-A P 512, JA 432. The Commission further rejected "practical suggestions" for limiting the scope of involuntary interregional cost allocations, such as limiting such allocations to extra-high voltage facilities or to adjacent regions (ITC Br. 14-15). Order No. 1000-A P 711, JA 468. While the Commission acknowledged that limiting involuntary interregional cost allocation to these circumstances might mitigate the burden on some shareholders to monitor multiple planning processes,

the Commission remained concerned that allowing this would effectively require interconnection-wide transmission planning. *Id.*

Thus, the Commission reasonably exercised its discretion to improve regional transmission planning and bilateral interregional transmission coordination in a manner that does not have the effect of requiring interconnection-wide planning. Order No. 1000-A P 502, JA 429. As this Court has found, "the Commission is free to undertake reform one step at a time." *Interstate Natural Gas Ass'n*, 285 F.3d at 35. *See also TC Ravenswood, LLC v. FERC*, 705 F.3d 474, 479 (D.C. Cir. 2013) (upholding FERC's "iterative process" for addressing "the complexities posed by regional integration"). This court should defer to the Commission's reasonable policy decisions not to mandate multilateral or interconnection-wide transmission planning, and to maximize meaningful stakeholder input in the selection of transmission facilities for cost allocation. *See New York*, 535 U.S. at 28 (deferring to FERC's decision not to regulate bundled retail sales as a "permissible policy choice"); *Tenn. Gas Pipeline Co. v. FERC*, 400 F.3d 23, 27 (D.C. Cir. 2005) ("court properly defers to policy determinations invoking the Commission's expertise in evaluating complex market conditions").

3. The Commission Reasonably Found That The Interregional Coordination Process Does Not Resolve Its Policy Concerns.

International asserts that the Order No. 1000 interregional coordination process provides a framework for involuntary interregional cost allocations. ITC

Br. 14. In International's view, the interregional coordination process provides for stakeholder consideration of interregional projects that is equivalent to, and therefore redundant of, the regional planning processes. ITC Br. 18-19. The interregional coordination process, however, is not an adequate basis for imposing involuntary interregional cost allocations, nor does it provide for stakeholder review that is redundant of the regional planning process.

Order No. 1000 requires planning regions to coordinate with neighboring regions on a bilateral basis to share regional plans and to jointly evaluate potential interregional facilities that might be more efficient in resolving regional needs. Order No. 1000 PP 396, 416, JA 233, 236; Order No. 1000-A P 502, JA 429. This coordination is designed to complement local and regional planning processes, not to substitute for them. Order No. 1000 PP 401, 465, JA 234, 245. Order No. 1000 did not require the interregional transmission coordination procedure to satisfy the planning principles for local planning (under Order No. 890) and regional planning (under Order No. 1000). Order No. 1000 P 465, JA 245. *See also* Order No. 1000-A P 511, JA 431 (the Order No. 1000 interregional transmission coordination reforms do not require the creation of a distinct interregional transmission planning process or the formation of interregional transmission planning entities). Rather, as discussed, stakeholder participation in considering interregional transmission facilities occurs primarily during the regional planning process. Order No. 1000

P 465, JA 245; Order No. 1000-A P 519, JA 433. "Adequate stakeholder review," therefore, can *not* "be provided through the already-required interregional coordination process," as International posits. ITC Br. 19. Accordingly, interregional coordination does not suffice for involuntary interregional cost allocations, nor does it render the regional planning processes redundant.

International argues that cost causation should not turn on "arbitrary" regional boundaries; because the transmission regions are formed through voluntary agreements, "[e]ach region may, but won't necessarily, reflect the integrated nature of the regional transmission grid and the resources that bear upon the reliability of that grid." ITC Br. 16-17. This argument ignores that, in Order No. 890, the Commission determined that "the scope of a transmission planning region should be governed by the integrated nature of the regional power grid and the particular reliability and resource issues affecting individual regions." Order No. 1000-A P 712, JA 468; Order No. 1000 P 160, JA 183 (citing Order No. 890 P 527). Prior to Order No. 1000, every public utility transmission provider included itself in a region approved by the Commission as complying with this regional planning principle. Order No. 1000 P 160, JA 183; *See also id.* at P 21 & n.16, JA 153 (listing planning regions); Order No. 1000-A P 712, JA 468 (regions have already voluntarily formed pursuant to Order No. 890). If regional boundaries change as a result of Order No. 1000, the Commission will review

those changes to ensure they continue to meet all scoping requirements, including the requirement that the scope is governed by the integrated nature of the regional power grid. Order No. 1000-A P 712, JA 468. Accordingly, International's concerns regarding the planning regions are unfounded.

VII. The Commission Reasonably Relied Upon The Reciprocity Condition To Encourage Non-Public Utility Transmission Providers To Enroll In The Regional Planning Processes Required By Order No. 1000.

Order No. 1000 does not obligate non-public utility transmission providers to enroll in transmission planning regions and become subject to regional and interregional cost allocation methodologies. *See* Order No. 1000-A P 275, JA 384. Their participation – while expected – is entirely voluntary. *See* Order No. 1000 PP 818-19, JA 305. The Commission noted, however, that the reciprocity condition of the *pro forma* Open Access Transmission Tariff would likely encourage their participation.

The reciprocity condition, which was established in Order No. 888, rests on the principle that any public utility offering "nondiscriminatory open access transmission for the benefit of customers should be able to obtain the same nondiscriminatory access in return." Order No. 888 at 31,760. The condition is set forth in section 6 of the *pro forma* Open Access Transmission Tariff, which provides that public utilities need not offer non-public utilities access unless they reciprocate by offering open access on their own systems. *See* Order No. 890 at

P 163. Non-public utilities may satisfy the reciprocity requirement by: (1) providing service under a tariff that has been approved pursuant to the Commission's "safe harbor" regulations as substantially conforming to the *pro forma* Open Access Transmission Tariff, 18 C.F.R. § 35.28(e)(2); (2) entering into bilateral agreements with public utilities that satisfy their reciprocity obligation; or (3) seeking a waiver of the reciprocity condition from the public utility transmission provider. *See* Order No. 1000 P 799 n.574, JA 301.

Some petitioners ("Reciprocity Petitioners") argue that the Commission improperly expanded the reciprocity condition by including planning and cost allocation obligations. On the other hand, petitioner Edison Electric Institute ("Edison") asserts that the Commission did not go far enough; the Commission should have exercised its discretionary authority under section 211A of the Federal Power Act, 16 U.S.C. § 824j-1(b), to mandate that non-public utilities enroll in transmission planning regions, rather than relying upon their voluntary participation. As demonstrated below, the Commission reasonably struck a middle course.

A. Order No. 1000 Did Not Modify The Reciprocity Condition.

The Reciprocity Petitioners contend that the Commission "expand[ed] Order 888's reciprocity condition while arbitrarily denying it had done so." Reciprocity Br. at 5 (capitalization in heading altered); *see also id.* at 5-9 (same). But the

Commission did not propose, or make, "any changes to the reciprocity provision of the pro forma [Open Access Transmission Tariff] or any other document." Order No. 1000 P 816, JA 304.

Nor did it change the principle of reciprocity. The reciprocity condition still does not obligate non-public utility transmission providers to do anything. *See, e.g.*, Order No. 1000-A P 775, JA 480 ("the reciprocity provision of Order No. 1000 does not require non-public utility transmission providers to comply with the Order No. 1000 transmission planning and cost allocation reforms"). It continues simply to require public utilities to provide open access services to non-public utilities that offer transmission service on the same (or superior) terms in return. *See, e.g.*, Order No. 890 at P 163; Order No. 1000-A P 71, JA 345.

Accordingly, Order No. 1000 does not "impose rate remediation on non-jurisdictional non-public utilities," Reciprocity Br. 8, nor does it transform the reciprocity condition into an "affirmative obligation" under FPA section 211A, 16 U.S.C. § 824j-1, Reciprocity Br. 9. Rather, non-public utility transmission providers remain free to decide whether they will seek FERC-jurisdictional transmission service and, thus, become subject to the reciprocity provision. Order No. 1000 P 819, JA 305; Order No. 1000-A P 775, JA 480; *see also id.* at P 778, JA 481 ("the Commission did not act under FPA section 211A in Order No. 1000").

B. The Commission Reasonably Determined That Transmission Service Includes Transmission Planning And Cost Allocation.

While the Commission did not modify the *pro forma* tariff's reciprocity condition itself, it determined that the comparable transmission service owed to public utilities under that condition includes "both transmission planning and cost allocation." Order No. 1000-A P 776, JA 480. The Commission found that "[t]hose that take advantage of open access, including improved transmission planning and cost allocation, should be expected to follow the same requirements as public utility transmission providers." Order No. 1000 P 818, JA 305. Moreover, the Commission explained that transmission planning and cost allocation are essential components of transmission service, *see* Reciprocity Br. at 8, because they facilitate the development of a robust transmission system capable of providing improved open access transmission service, including greater reliability and availability, and will help ensure that transmission rates are just and reasonable and not unduly discriminatory or preferential. Order No. 1000 P 818, JA 305; *see also* Order No. 1000-A PP 776, 777, JA 480, 481.

Accordingly, in order to maintain a reciprocity tariff under the safe harbor provision – *i.e.*, to continue to insulate itself from denial of service by a public utility – "a non-public transmission provider must ensure that the provisions of that tariff substantially conform to the pro forma" Open Access Transmission Tariff as "revised by Order No. 1000." Order No. 1000-A P 772, JA 479; *see also* Order

No. 1000 P 816, JA 304 ("it remains up to each non-public utility transmission provider whether it wants to maintain its safe harbor status by meeting the transmission planning and cost allocation requirements of this Final Rule."). Noting that a public utility transmission provider may agree to waive or modify the reciprocity requirement for a non-public utility seeking service from it, the Commission declined to rule on a generic basis that bilateral service agreements must include transmission planning and cost allocation provisions. Order No. 1000-A P 773, JA 479. But because non-public utilities "should be expected to follow the same requirements of public utility providers" – including transmission planning and cost allocation – the Commission stated that they may be denied service where they have "not met the Commission's reciprocity requirements." *Id*.

There is no merit to the claim that Order No. 1000 "fundamentally modif[ied] the existing scope of the reciprocity condition" by extending reciprocity to transmission planning and cost allocation. Reciprocity Br. at 6. The reciprocity condition, as adopted in Order No. 888 and as carried forward in Order No. 1000, recognizes that, if non-public utilities choose to benefit from reforms imposed upon FERC-jurisdictional entities, they must offer comparable service in return.

When it established the reciprocity condition in order No. 888, the Commission recognized that non-public utilities taking service from public utilities

benefit from the reforms imposed upon those jurisdictional entities. Equity thus dictates that they offer comparable service in return. *See* Order 888-A at 3285.

Similarly, following Order No. 1000, non-public utilities that choose to take advantage of open access "will benefit greatly from the improved transmission planning and cost allocation processes required for public utility transmission providers because a well-planned grid is more reliable and provides more available, less congested paths for the transmission of electric power in interstate commerce." Order No. 1000 P 818, JA 305; *see also* Order No. 1000-A P 776, JA 480 (same); *see also id.* at P 777, JA 481 ("The transmission planning and cost allocation reforms adopted in Order No. 1000 are intended to facilitate the development of a robust transmission system capable of providing improved open access transmission service and to help ensure that transmission rates are just and reasonable and not unduly discriminatory or preferential."). Such planning and cost allocation processes "are integral and essential components of the provisions of transmission service," Order No. 1000-A P 777, JA 481, and thus constitute part of "comparable reciprocal service," *id.* at P 776, JA 480.

The obligation to provide that comparable reciprocal transmission service flows to the parties furnishing the benefit -- whether it be the public utilities directly providing open access service, or a broader group engaging in planning and cost allocation for the wider benefit of the grid. *See* Order No. 1000 P 818,

JA 305 ("Those that take advantage of open access, including improved transmission planning and cost allocation, should be expected to follow the same requirements as public utility transmission providers."). The long-standing reciprocity provision of the *pro forma* Open Access Transmission Tariff does not limit a non-public utility transmission provider's comparable transmission service obligations to only the public utility from which it directly takes service, as Reciprocity Petitioners assert (Br. 6).[18] Moreover, in Order No. 890, the Commission explained that comparable service for reciprocity purposes includes participation in transmission planning processes. *See* Order No. 890 at P 214 ("A nonpublic utility transmission provider with reciprocity obligations that declines to adopt a planning process that complies with Order No. 890 therefore may not be considered to be providing reciprocal transmission service and may be at risk of

[18] Section 6 of the *pro forma* Open Access Transmission Tariff (Order No. 890, Appendix C at Orig. Sheet No. 31) provides in relevant part:

> A Transmission Customer that is a member of, or takes transmission service from, a power pool, Regional Transmission Group, Regional Transmission Organization (RTO), Independent System Operator (ISO) or other transmission organization approved by the Commission for the operation of transmission facilities also agrees to provide comparable transmission service to the members of such power pool and Regional Transmission Group, RTO, ISO or other transmission organization on similar terms and conditions over facilities used for the transmission of electric energy owned, controlled or operated by the Transmission Customer and over facilities used for the transmission of electric energy owned, controlled or operated by the Transmission Customer's corporate affiliates.

being denied open access transmission services by a public utility transmission provider.").

C. The Commission Reasonably Declined To Adopt A Generic Rule Under Section 211A Of The Federal Power Act.

Section 211A(b), 16 U.S.C. § 824j-1(b)[19], provides that the Commission "may, by rule or order," require non-public utility transmission providers to provide transmission services on a comparable and not unduly discriminatory or preferential basis. Order No. 1000 P 815, JA 304. "Congress' use of the word 'may' evinces Congress' intent that any exercise of section 211A authority by the Commission is discretionary." *Town of Edinburgh, Indiana*, 132 FERC ¶ 61,102 P 20 (2010). *See Bennett v. Panama Canal Co*., 475 F.2d 1280, 1282 (D.C. Cir. 1973) ("may" is a permissive, not a mandatory, term).

In Order No. 1000, the Commission declined to invoke its authority under section 211A to impose generic requirements regarding non-public utility participation in regional transmission planning. Order No. 1000 P 817, JA 304; Order No. 1000-A P 778, JA 481. Based upon the successful experience with non-

[19] Section 211A provides in relevant part: "Subject to section 824k(h) of this title, the Commission may, by rule or order, require an unregulated transmitting utility to provide transmission services - (1) at rates that are comparable to those that the unregulated transmitting utility charges itself; and (2) on terms and conditions (not relating to rates) that are comparable to those under which the unregulated transmitting utility provides transmission services to itself and that are not unduly discriminatory or preferential." 16 U.S.C. § 824j-1(b).

public utility participation in transmission planning following Order No. 890, the Commission expected that non-public utilities will participate voluntarily in the Order No. 1000 regional transmission planning. Order No. 1000 PP 815, 822, JA 304, 305. If the Commission finds on the appropriate record that non-public utility transmission providers are not participating in the transmission planning and cost allocation process required under Order No. 1000, it may exercise its authority under FPA section 211A at that time on a case-by-case basis. *Id.* at P 815, JA 304.

There is no merit to Edison's contention that this decision was arbitrary. First, Edison claims there is "no support in the record" for the Commission's determination that the reciprocity provision of the *pro forma* Open Access Transmission Tariff will encourage non-public utilities to enroll in regional planning processes. 211A Br. at 6. But again, the Commission's decision not to invoke section 211A on a generic basis was informed by its experience with Order No. 890, which indicated that non-jurisdictional entities would collaborate with public utilities. *See* Notice of Proposed Rulemaking, 131 FERC ¶ 61,253, P 43, JA 107; Order No. 1000 P 815, JA 304. The Court has "long recognized, it is within the scope of the agency's expertise to make . . . a prediction about the market it regulates, and a reasonable prediction deserves [the Court's] deference notwithstanding that there might also be another reasonable view." *Constellation*

Energy Commodities Grp., Inc. v. FERC, 457 F.3d 14, 24 (D.C. Cir. 2006) (internal quotation omitted).

Edison claims that the Commission may not rely on its experience with Order No. 890 because those reforms did not involve cost allocation, and because some non-public utilities have expressed reluctance to enroll in the regional planning processes established by Order No. 1000. 211A Br. at 6, 7. But again, if it appears that a lack of participation by non-public utilities is threatening the success of Order No. 1000's reforms, the Commission may proceed under section 211A of the Federal Power Act. *See* Order No. 1000 P 815, JA 304. Edison's speculation about what non-public utilities may or may not do in the future fails to establish that Commission abused its discretion in declining to exercise its discretionary authority under section 211A on a generic basis at this stage of the proceeding. *See, e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293 (1974) (agency enjoys broad discretion in deciding whether to act by a generic rulemaking or by case-by-case adjudication); *Chenery*, 332 U.S. at 203 ("And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."); *Transm. Access*, 225 F.3d at 724 ("Given FERC's discretion to proceed through adjudication rather than by generic rule . . . the [petitioners'] challenge is without merit.").

In a variation on its theme, Edison contends that the Commission's refusal to invoke its authority under section 211A of the Federal Power Act unduly discriminates against public utility transmission providers "who will pay the full costs for projects that partly benefit non-public utility transmission providers." 211A Br. at 10. This claim, however, is premised on sheer speculation – i.e., that non-public utility transmission providers will not participate in the planning and cost allocation processes required by Order No. 1000. And if Edison's speculation should ever come to pass, the Commission would consider the invocation of its authority under section 211A on a case-by-case basis. *See* Order No. 1000 P 815, JA 304. Waiting for an "appropriate record" (*id*.) before acting with respect to non-public utilities does not amount to undue discrimination against public utility transmission providers. *See, e.g.*, *Tenn. Gas Pipeline Co. v. FERC*, 972 F.2d 376, 381 (D.C. Cir. 1992) ("The agency is entitled to make reasonable decisions about when and in what type of proceeding it will deal with an actual problem.").

Finally, Edison claims that the Commission "ignored" their arguments on rehearing regarding FPA section 211A. 211A Br. at 10-11. The Commission did not ignore these arguments on rehearing, but rather reaffirmed its determination not to act generically under section 211A in this proceeding. Order No. 1000-A P 778, JA 481. The Commission was not required to repeat its responses to issues already addressed in Order No. 1000. Following the Notice of Proposed

Rulemaking, in which the Commission announced its intention not to invoke its section 211A authority at this time, Notice of Proposed Rulemaking, 131 FERC ¶ 61,253 at P 43, JA 107, numerous parties raised arguments that Edison ultimately echoed in its request for rehearing of Order No. 1000. *See* Order No. 1000 P 812, JA 303 (discussing comments calling for the use of section 211A to "ensure maximum participation" and avoid "an inequitable burden on jurisdictional utilities"). The Commission addressed those arguments in detail in Order No. 1000. *Id*. at PP 815, 817, 821, JA 304, 304, 305. Edison's rehearing request did not raise any issues that had not been previously addressed by the Commission in Order No. 1000. The Commission's decision not to reiterate its responses on rehearing does not constitute arbitrary decisionmaking; all that is required is that "the agency's path may reasonably be discerned." *Transmission Agency of N. Cal.*, 628 F.3d at 552.

CONCLUSION

For the foregoing reasons, the Court should dismiss for lack of ripeness those claims discussed in the Counterstatement of Jurisdiction. The balance of the petitions for review should be denied on the merits.

Respectfully submitted,

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December 13, 2013

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief contains 35,810 words, not including the tables of contents and authorities, the glossary, the certificate of counsel and this certificate.

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December 13, 2013

ADDENDUM

STATUTES
AND
REGULATIONS

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ther, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

(June 19, 1934, ch. 652, title II, § 201, 48 Stat. 1070; May 31, 1938, ch. 296, 52 Stat. 588.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (b), was in the original ''this Act'', meaning act June 19, 1934, ch. 652, 48 Stat. 1064, known as the Communications Act of 1934, which is classified principally to this chapter. For complete classification of this Act to the Code, see section 609 of this title and Tables.

AMENDMENTS

1938—Subsec. (b). Act May 31, 1938, inserted proviso relating to reports of positions of ships at sea.

TELEPHONE RATES FOR MEMBERS OF ARMED FORCES DEPLOYED ABROAD

Pub. L. 109–459, § 2, Dec. 22, 2006, 120 Stat. 3399, provided that:

''(a) IN GENERAL.—The Federal Communications Commission shall take such action as may be necessary to reduce the cost of calling home for Armed Forces personnel who are stationed outside the United States under official military orders or deployed outside the United States in support of military operations, training exercises, or other purposes as approved by the Secretary of Defense, including the reduction of such costs through the waiver of government fees, assessments, or other charges for such calls. The Commission may not regulate rates in order to carry out this section.

''(b) FACTORS TO CONSIDER.—In taking the action described in subsection (a), the Commission, in coordination with the Department of Defense and the Department of State, shall—

''(1) evaluate and analyze the costs to Armed Forces personnel of such telephone calls to and from American military bases abroad;

''(2) evaluate methods of reducing the rates imposed on such calls, including deployment of new technology such as voice over Internet protocol or other Internet protocol technology;

''(3) encourage telecommunications carriers (as defined in section 3(44) of the Communications Act of 1934 (47 U.S.C. 153(44) [now 153(51)])) to adopt flexible billing procedures and policies for Armed Forces personnel and their dependents for telephone calls to and from such Armed Forces personnel; and

''(4) seek agreements with foreign governments to reduce international surcharges on such telephone calls.

''(c) DEFINITIONS.—In this section:

''(1) ARMED FORCES.—The term 'Armed Forces' has the meaning given that term by section 2101(2) of title 5, United States Code.

''(2) MILITARY BASE.—The term 'military base' includes official duty stations to include vessels, whether such vessels are in port or underway outside of the United States.''

Pub. L. 102–538, title II, § 213, Oct. 27, 1992, 106 Stat. 3545, which required the Federal Communications Commission to make efforts to reduce telephone rates for Armed Forces personnel in certain countries, was repealed by Pub. L. 109–459, § 3, Dec. 22, 2006, 120 Stat. 3400.

§ 202. Discriminations and preferences

(a) Charges, services, etc.

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services included

Charges or services, whenever referred to in this chapter, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Penalty

Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $6,000 for each such offense and $300 for each and every day of the continuance of such offense.

(June 19, 1934, ch. 652, title II, § 202, 48 Stat. 1070; Pub. L. 86–751, Sept. 13, 1960, 74 Stat. 888; Pub. L. 101–239, title III, § 3002(a), Dec. 19, 1989, 103 Stat. 2131.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (b), was in the original ''this Act'', meaning act June 19, 1934, ch. 652, 48 Stat. 1064, known as the Communications Act of 1934, which is classified principally to this chapter. For complete classification of this Act to the Code, see section 609 of this title and Tables.

AMENDMENTS

1989—Subsec. (c). Pub. L. 101–239 substituted ''$6,000'' for ''$500'' and ''$300'' for ''$25''.

1960—Subsec. (b). Pub. L. 86–751 substituted ''common carrier lines of communication, whether derived from wire or radio facilities,'' for ''wires''.

§ 203. Schedules of charges

(a) Filing; public display

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information,

and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) Changes in schedule; discretion of Commission to modify requirements

(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) Overcharges and rebates

No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) Rejection or refusal

The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) Penalty for violations

In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $6,000 for each such offense, and $300 for each and every day of the continuance of such offense.

(June 19, 1934, ch. 652, title II, §203, 48 Stat. 1070; Pub. L. 94–376, §1, Aug. 4, 1976, 90 Stat. 1080; Pub. L. 101–239, title III, §3002(b), Dec. 19, 1989, 103 Stat. 2131; Pub. L. 101–396, §7, Sept. 28, 1990, 104 Stat. 850.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a) and (c), was in the original ''this Act'', meaning act June 19, 1934, ch. 652, 48 Stat. 1064, known as the Communications Act of 1934, which is classified principally to this chapter. For complete classification of this Act to the Code, see section 609 of this title and Tables.

AMENDMENTS

1990—Subsec. (b). Pub. L. 101–396 substituted ''one hundred and twenty days'' for ''ninety days'' in pars. (1) and (2).

1989—Subsec. (e). Pub. L. 101–239 substituted ''$6,000'' for ''$500'' and ''$300'' for ''$25''.

1976—Subsec. (b). Pub. L. 94–376 designated existing provisions as par. (1), substituted ''after ninety days notice'' for ''after thirty days' notice'', and struck out provision that the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions, and added par. (2).

§ 204. Hearings on new charges; suspension pending hearing; refunds; duration of hearing; appeal of order concluding hearing

(a)(1) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or a revised charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or revised charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or revised charges as by its decision shall be found not justified. At any hearing involving a new or revised charge, or a proposed new or revised charge, the burden of proof to show that the new or revised charge, or proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(2)(A) Except as provided in subparagraph (B), the Commission shall, with respect to any hearing under this section, issue an order concluding such hearing within 5 months after the date that

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

(b) Alternative prescriptions

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

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

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

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

(i) cost significantly less to implement; or

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

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

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

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

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

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

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

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

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

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

(g) Books and records

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

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

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

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

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

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

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

(4) Nothing in this section shall—

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

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

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

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

REFERENCES IN TEXT

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

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

AMENDMENTS

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

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

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

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

commission's regulatory responsibilities affecting the provision of electric service.

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

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

(4) Nothing in this section shall—

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

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

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

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

REFERENCES IN TEXT

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

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

AMENDMENTS

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

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

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

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

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

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

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

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by section 1277(b)(1) of Pub. L. 109–58 effective 6 months after Aug. 8, 2005, with provisions relating to effect of compliance with certain regulations approved and made effective prior to such date, see section 1274 of Pub. L. 109–58, set out as an Effective Date note under section 16451 of Title 42, The Public Health and Welfare.

STATE AUTHORITIES; CONSTRUCTION

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

PRIOR ACTIONS; EFFECT ON OTHER AUTHORITIES

Section 214 of Pub. L. 95–617 provided that:

''(a) PRIOR ACTIONS.—No provision of this title [enacting sections 823a, 824i to 824k, 824a–1 to 824a–3 and 825q–1 of this title, amending sections 796, 824, 824a, 824d, and 825d of this title and enacting provisions set out as notes under sections 824a, 824d, and 825d of this title] or of any amendment made by this title shall apply to, or affect, any action taken by the Commission [Federal Energy Regulatory Commission] before the date of the enactment of this Act [Nov. 9, 1978].

''(b) OTHER AUTHORITIES.—No provision of this title [enacting sections 823a, 824i to 824k, 824a–1 to 824a–3 and 825q–1 of this title, amending sections 796, 824, 824a, 824d, and 825d of this title and enacting provisions set out as notes under sections 824a, 824d, and 825d of this title] or of any amendment made by this title shall limit, impair or otherwise affect any authority of the Commission or any other agency or instrumentality of the United States under any other provision of law except as specifically provided in this title.''

§ 824a. Interconnection and coordination of facilities; emergencies; transmission to foreign countries

(a) Regional districts; establishment; notice to State commissions

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnection and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and

between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

(b) Sale or exchange of energy; establishing physical connections

Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

(c) Temporary connection and exchange of facilities during emergency

During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority, either upon its own motion or upon complaint, with or without notice, hearing, or report, to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest. If the parties affected by such order fail to agree upon the terms of any arrangement between them in carrying out such order, the Commission, after hearing held either before or after such order takes effect, may prescribe by supplemental order such terms as it finds to be just and reasonable, including the compensation or reimbursement which should be paid to or by any such party.

(d) Temporary connection during emergency by persons without jurisdiction of Commission

During the continuance of any emergency requiring immediate action, any person engaged in the transmission or sale of electric energy and not otherwise subject to the jurisdiction of the Commission may make such temporary connections with any public utility subject to the jurisdiction of the Commission or may construct such temporary facilities for the transmission of electric energy in interstate commerce as may be necessary or appropriate to meet such emergency, and shall not become subject to the jurisdiction of the Commission by reason of such temporary connection or temporary construction: *Provided*, That such temporary connection shall be discontinued or such temporary construction removed or otherwise disposed of upon the termination of such emergency: *Provided further*, That upon approval of the Commission permanent connections for emergency use only may be made hereunder.

(e) Transmission of electric energy to foreign country

After six months from August 26, 1935, no person shall transmit any electric energy from the United States to a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application unless, after opportunity for hearing, it finds that the proposed transmission would impair the sufficiency of electric supply within the United States or would impede or tend to impede the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may by its order grant such application in whole or in part, with such modifications and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate.

(f) Transmission or sale at wholesale of electric energy; regulation

The ownership or operation of facilities for the transmission or sale at wholesale of electric energy which is (a) generated within a State and transmitted from the State across an international boundary and not thereafter transmitted into any other State, or (b) generated in a foreign country and transmitted across an international boundary into a State and not thereafter transmitted into any other State, shall not make a person a public utility subject to regulation as such under other provisions of this subchapter. The State within which any such facilities are located may regulate any such transaction insofar as such State regulation does not conflict with the exercise of the Commission's powers under or relating to subsection (e) of this section.

(g) Continuance of service

In order to insure continuity of service to customers of public utilities, the Commission shall require, by rule, each public utility to—

(1) report promptly to the Commission and any appropriate State regulatory authorities any anticipated shortage of electric energy or capacity which would affect such utility's capability of serving its wholesale customers,

(2) submit to the Commission, and to any appropriate State regulatory authority, and periodically revise, contingency plans respecting—

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-

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

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

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

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–495 effective with respect to each license, permit, or exemption issued under this chapter after Oct. 16, 1986, see section 18 of Pub. L. 99–495, set out as a note under section 797 of this title.

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.

§ 824j–1. Open access by unregulated transmitting utilities

(a) Definition of unregulated transmitting utility

In this section, the term ''unregulated transmitting utility'' means an entity that—

(1) owns or operates facilities used for the transmission of electric energy in interstate commerce; and

(2) is an entity described in section 824(f) of this title.

(b) Transmission operation services

Subject to section 824k(h) of this title, the Commission may, by rule or order, require an unregulated transmitting utility to provide transmission services—

(1) at rates that are comparable to those that the unregulated transmitting utility charges itself; and

(2) on terms and conditions (not relating to rates) that are comparable to those under which the unregulated transmitting utility provides transmission services to itself and that are not unduly discriminatory or preferential.

(c) Exemption

The Commission shall exempt from any rule or order under this section any unregulated transmitting utility that—

(1) sells not more than 4,000,000 megawatt hours of electricity per year;

(2) does not own or operate any transmission facilities that are necessary for operating an interconnected transmission system (or any portion of the system); or

(3) meets other criteria the Commission determines to be in the public interest.

(d) Local distribution facilities

The requirements of subsection (b) of this section shall not apply to facilities used in local distribution.

(e) Exemption termination

If the Commission, after an evidentiary hearing held on a complaint and after giving consideration to reliability standards established under section 824*o* of this title, finds on the basis of a preponderance of the evidence that any exemption granted pursuant to subsection (c) of this section unreasonably impairs the continued reliability of an interconnected transmission system, the Commission shall revoke the exemption granted to the transmitting utility.

(f) Application to unregulated transmitting utilities

The rate changing procedures applicable to public utilities under subsections (c) and (d) of section 824d of this title are applicable to unregulated transmitting utilities for purposes of this section.

(g) Remand

In exercising authority under subsection (b)(1) of this section, the Commission may remand transmission rates to an unregulated transmitting utility for review and revision if necessary to meet the requirements of subsection (b) of this section.

(h) Other requests

The provision of transmission services under subsection (b) of this section does not preclude a request for transmission services under section 824j of this title.

(i) Limitation

The Commission may not require a State or municipality to take action under this section that would violate a private activity bond rule for purposes of section 141 of title 26.

(j) Transfer of control of transmitting facilities

Nothing in this section authorizes the Commission to require an unregulated transmitting utility to transfer control or operational control of its transmitting facilities to a Transmission Organization that is designated to provide nondiscriminatory transmission access.

(June 10, 1920, ch. 285, pt. II, § 211A, as added Pub. L. 109–58, title XII, § 1231, Aug. 8, 2005, 119 Stat. 955.)

§ 824k. Orders requiring interconnection or wheeling

(a) Rates, charges, terms, and conditions for wholesale transmission services

An order under section 824j of this title shall require the transmitting utility subject to the order to provide wholesale transmission services at rates, charges, terms, and conditions which permit the recovery by such utility of all the costs incurred in connection with the transmission services and necessary associated services, including, but not limited to, an appropriate share, if any, of legitimate, verifiable and economic costs, including taking into account any benefits to the transmission system of providing the transmission service, and the costs of any enlargement of transmission facilities. Such rates, charges, terms, and conditions shall promote the economically efficient transmission and generation of electricity and shall be just and reasonable, and not unduly discriminatory or preferential. Rates, charges, terms, and conditions for transmission services provided pursuant to an order under section 824j of this title shall ensure that, to the extent practicable, costs incurred in providing the wholesale transmission services, and properly allocable to the provision of such services, are recovered from the applicant for such order and not from a transmitting utility's existing wholesale, retail, and transmission customers.

ing 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.

§ 824o. 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.

(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.

[1] See References in Text note below.

(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 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, 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 Na-

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

tional 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, holds firm transmission rights for delivery of the output of the generation facilities or the purchased energy to meet the service obligation.

(2) Any load-serving entity described in paragraph (1) is entitled to use the firm transmission rights, or, equivalent tradable or financial transmission rights, in order to deliver the output or purchased energy, or the output of other generating facilities or purchased energy to the extent deliverable using the rights, to the extent required to meet the service obligation of the load-serving entity.

(3)(A) To the extent that all or a portion of the service obligation covered by the firm transmission rights or equivalent tradable or financial transmission rights is transferred to another load-serving entity, the successor load-serving entity shall be entitled to use the firm transmission rights or equivalent tradable or financial transmission rights associated with the transferred service obligation.

(B) Subsequent transfers to another load-serving entity, or back to the original load-serving entity, shall be entitled to the same rights.

(4) The Commission shall exercise the authority of the Commission under this chapter in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service obligations of the load-serving entities, and enables load-serving entities to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term power supply arrangements made, or planned, to meet such needs.

(c) Allocation of transmission rights

Nothing in subsections (b)(1), (b)(2), and (b)(3) of this section shall affect any existing or future methodology employed by a Transmission Organization for allocating or auctioning transmission rights if such Transmission Organization was authorized by the Commission to allocate or auction financial transmission rights on its system as of January 1, 2005, and the Commission determines that any future allocation or auction is just, reasonable and not unduly discriminatory or preferential, provided, however, that if such a Transmission Organization never allocated financial transmission rights on its system that pertained to a period before January 1, 2005, with respect to any application by such Transmission Organization that would change its methodology the Commission shall

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 the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision 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 natural-gas company, 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) Storage services

(1) In exercising its authority under this chapter or the Natural Gas Policy Act of 1978 (15 U.S.C. 3301 et seq.), the Commission may authorize a natural gas company (or any person that will be a natural gas company on completion of any proposed construction) to provide storage and storage-related services at market-based rates for new storage capacity related to a specific facility placed in service after August 8, 2005, notwithstanding the fact that the company is unable to demonstrate that the company lacks market power, if the Commission determines that—

(A) market-based rates are in the public interest and necessary to encourage the construction of the storage capacity in the area needing storage services; and

(B) customers are adequately protected.

(2) The Commission shall ensure that reasonable terms and conditions are in place to protect consumers.

(3) If the Commission authorizes a natural gas company to charge market-based rates under this subsection, the Commission shall review periodically whether the market-based rate is just, reasonable, and not unduly discriminatory or preferential.

(June 21, 1938, ch. 556, § 4, 52 Stat. 822; Pub. L. 87–454, May 21, 1962, 76 Stat. 72; Pub. L. 109–58, title III, § 312, Aug. 8, 2005, 119 Stat. 688.)

REFERENCES IN TEXT

The Natural Gas Policy Act of 1978, referred to in subsec. (f)(1), is Pub. L. 95–621, Nov. 9, 1978, 92 Stat. 3350, as amended, which is classified generally to chapter 60 (§ 3301 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 3301 of this title and Tables.

AMENDMENTS

2005—Subsec. (f). Pub. L. 109–58 added subsec. (f).

1962—Subsec. (e). Pub. L. 87–454 inserted ''or gas distributing company'' after ''State commission'', and struck out proviso which denied authority to the Commission to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only.

ADVANCE RECOVERY OF EXPENSES INCURRED BY NATURAL GAS COMPANIES FOR NATURAL GAS RESEARCH, DEVELOPMENT, AND DEMONSTRATION PROJECTS

Pub. L. 102–104, title III, Aug. 17, 1991, 105 Stat. 531, authorized Federal Energy Regulatory Commission, pursuant to this section, to allow recovery, in advance, of expenses by natural-gas companies for research, development and demonstration activities by Gas Research Institute for projects on use of natural gas in motor vehicles and on use of natural gas to control emissions from combustion of other fuels, subject to Commission finding that benefits, including environmental benefits, to both existing and future ratepayers resulting from such activities exceed all direct costs to both existing and future ratepayers, prior to repeal by Pub. L. 102–486, title IV, § 408(c), Oct. 24, 1992, 106 Stat. 2882.

§ 717c–1. Prohibition on market manipulation

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of this title) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

(June 21, 1938, ch. 556, § 4A, as added Pub. L. 109–58, title III, § 315, Aug. 8, 2005, 119 Stat. 691.)

§ 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, 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: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance

with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation

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 transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

(June 21, 1938, ch. 556, § 5, 52 Stat. 823.)

§ 717e. Ascertainment of cost of property

(a) Cost of property

The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, 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) Inventory of property; statements of costs

Every natural-gas company 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 21, 1938, ch. 556, § 6, 52 Stat. 824.)

§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

Application for certificates shall be made in writing to the Commission, be verified under

disputed issues whether the customer will market or broker a portion or all of the capacity and energy associated with stranded costs allowed by the Commission.

(iii) If a customer undertakes the brokering option, and the customer's brokering efforts fail to produce a buyer within 60 days of the date of the brokering agreement entered into between the customer and the utility, the customer shall relinquish all rights to broker the released capacity and associated energy and will pay stranded costs as determined by the formula in paragraph (c)(2)(iii) of this section.

(d) *Recovery of retail stranded costs*—1) *General requirement.* A public utility may seek to recover retail stranded costs through rates for retail transmission services only if the state regulatory authority does not have authority under state law to address stranded costs at the time the retail wheeling is required.

(2) *Evidentiary demonstration necessary for retail stranded cost recovery.* A public utility seeking to recover retail stranded costs in accordance with paragraph (d)(1) of this section must demonstrate that:

(i) It incurred costs to provide service to a retail customer that obtains retail wheeling based on a reasonable expectation that the utility would continue to serve the customer; and

(ii) The stranded costs are not more than the customer would have contributed to the utility had the customer remained a retail customer of the utility.

[Order 888–A, 62 FR 12460, Mar. 14, 1997]

§ 35.27 Authority of State commissions.

Nothing in this part—

(a) Shall be construed as preempting or affecting any jurisdiction a State commission or other State authority may have under applicable State and Federal law, or

(b) Limits the authority of a State commission in accordance with State and Federal law to establish

(1) Competitive procedures for the acquisition of electric energy, including demand-side management, purchased at wholesale, or

(2) Non-discriminatory fees for the distribution of such electric energy to retail consumers for purposes established in accordance with State law.

[Order 697, 72 FR 40038, July 20, 2007]

§ 35.28 Non-discriminatory open access transmission tariff.

(a) *Applicability.* This section applies to any public utility that owns, controls or operates facilities used for the transmission of electric energy in interstate commerce and to any non-public utility that seeks voluntary compliance with jurisdictional transmission tariff reciprocity conditions.

(b) *Definitions*—(1) *Requirements service agreement* means a contract or rate schedule under which a public utility provides any portion of a customer's bundled wholesale power requirements.

(2) *Economy energy coordination agreement* means a contract, or service schedule thereunder, that provides for trading of electric energy on an ''if, as and when available'' basis, but does not require either the seller or the buyer to engage in a particular transaction.

(3) *Non-economy energy coordination agreement* means any non-requirements service agreement, except an economy energy coordination agreement as defined in paragraph (b)(2) of this section.

(4) *Demand response* means a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy.

(5) *Demand response resource* means a resource capable of providing demand response.

(6) *An operating reserve shortage* means a period when the amount of available supply falls short of demand plus the operating reserve requirement.

(7) *Market Monitoring Unit* means the person or entity responsible for carrying out the market monitoring functions that the Commission has ordered Commission-approved independent system operators and regional transmission organizations to perform.

(8) *Market Violation* means a tariff violation, violation of a Commission-approved order, rule or regulation, market manipulation, or inappropriate dispatch that creates substantial concerns regarding unnecessary market inefficiencies.

(c) *Non-discriminatory open access transmission tariffs.*

(1) Every public utility that owns, controls, or operates facilities used for the transmission of electric energy in interstate commerce must have on file with the Commission an open access transmission tariff of general applicability for transmission services, including ancillary services, over such facilities. Such tariff must be the *pro forma* tariff promulgated by the Commission, as amended from time to time, or such other tariff as may be approved by the Commission consistent with the principles set forth in Commission rulemaking proceedings promulgating and amending the *pro forma* tariff.

(i) Subject to the exceptions in paragraphs (c)(1)(ii), (c)(1)(iii), (c)(1)(iv), and (c)(1)(v) of this section, the open access transmission tariff, which tariff must be the *pro forma* tariff required by Commission rulemaking proceedings promulgating and amending the *pro forma* tariff, and accompanying rates must be filed no later than 60 days prior to the date on which a public utility would engage in a sale of electric energy at wholesale in interstate commerce or in the transmission of electric energy in interstate commerce.

(ii) If a public utility owns, controls, or operates facilities used for the transmission of electric energy in interstate commerce, it must file the revisions to its open access transmission tariff required by Commission rulemaking proceedings promulgating and amending the *pro forma* tariff, pursuant to section 206 of the FPA and accompanying rates pursuant to section 205 of the FPA in accordance with the procedures set forth in Commission rulemaking proceedings promulgating and amending the *pro forma* tariff.

(iii) If a public utility owns, controls, or operates transmission facilities used for the transmission of electric energy in interstate commerce, such facilities are jointly owned with a non-public utility, and the joint ownership contract prohibits transmission service over the facilities to third parties, the public utility with respect to access over the public utility's share of the jointly owned facilities must file the revisions to its open access transmission tariff required by Commission rulemaking proceedings promulgating and amending the *pro forma* tariff pursuant to section 206 of the FPA and accompanying rates pursuant to section 205 of the FPA in accordance with the procedures set forth in Commission rulemaking proceedings promulgating and amending the *pro forma* tariff.

(iv) Any public utility whose transmission facilities are under the independent control of a Commission-approved ISO or RTO may satisfy its obligation under paragraph (c)(1) of this section, with respect to such facilities, through the open access transmission tariff filed by the ISO or RTO.

(v) If a public utility obtains a waiver of the tariff requirement pursuant to paragraph (d) of this section, it does not need to file the open access transmission tariff required by this section.

(vi) Any public utility that seeks a deviation from the *pro forma* tariff promulgated by the Commission, as amended from time to time, must demonstrate that the deviation is consistent with the principles set forth in Commission rulemaking proceedings promulgating and amending the *pro forma* tariff.

(vii) Each public utility's open access transmission tariff must include the standards incorporated by reference in part 38 of this chapter.

(2) Subject to the exceptions in paragraphs (c)(2)(i) and (c)(3)(iii) of this section, every public utility that owns, controls, or operates facilities used for the transmission of electric energy in interstate commerce, and that uses those facilities to engage in wholesale sales and/or purchases of electric energy, or unbundled retail sales of electric energy, must take transmission service for such sales and/or purchases under the open access transmission tariff filed pursuant to this section.

(i) For sales of electric energy pursuant to a requirements service agreement executed on or before July 9, 1996, this requirement will not apply unless separately ordered by the Commission. For sales of electric energy pursuant to a bilateral economy energy coordination agreement executed on or before July 9, 1996, this requirement is effective on December 31, 1996. For sales of electric energy pursuant to a bilateral

non-economy energy coordination agreement executed on or before July 9, 1996, this requirement will not apply unless separately ordered by the Commission.

(ii) [Reserved]

(3) Every public utility that owns, controls, or operates facilities used for the transmission of electric energy in interstate commerce, and that is a member of a power pool, public utility holding company, or other multi-lateral trading arrangement or agreement that contains transmission rates, terms or conditions, must have on file a joint pool-wide or system-wide open access transmission tariff, which tariff must be the *pro forma* tariff promulgated by the Commission, as amended from time to time, or such other open access transmission tariff as may be approved by the Commission consistent with the principles set forth in Commission rulemaking proceedings promulgating and amending the *pro forma* tariff.

(i) For any power pool, public utility holding company or other multi-lateral arrangement or agreement that contains transmission rates, terms or conditions and that is executed after October 11, 2011, this requirement is effective on the date that transactions begin under the arrangement or agreement.

(ii) For any power pool, public utility holding company or other multi-lateral arrangement or agreement that contains transmission rates, terms or conditions and that is executed on or before May 14, 2007, a public utility member of such power pool, public utility holding company or other multi-lateral arrangement or agreement that owns, controls, or operates facilities used for the transmission of electric energy in interstate commerce must file the revisions to its joint pool-wide or system-wide open access transmission tariff required by Commission rulemaking proceedings promulgating and amending the *pro forma* tariff pursuant to section 206 of the FPA and accompanying rates pursuant to section 205 of the FPA in accordance with the procedures set forth in Commission rulemaking proceedings promulgating and amending the *pro forma* tariff.

(iii) A public utility member of a power pool, public utility holding company or other multi-lateral arrangement or agreement that contains transmission rates, terms or conditions and that is executed on or before July 9, 1996 must take transmission service under a joint pool-wide or system-wide open access transmission tariff filed pursuant to this section for wholesale trades among the pool or system members.

(4) Consistent with paragraph (c)(1) of this section, every Commission-approved ISO or RTO must have on file with the Commission an open access transmission tariff of general applicability for transmission services, including ancillary services, over such facilities. Such tariff must be the *pro forma* tariff promulgated by the Commission, as amended from time to time, or such other tariff as may be approved by the Commission consistent with the principles set forth in Commission rulemaking proceedings promulgating and amending the *pro forma* tariff.

(i) Subject to paragraph (c)(4)(ii) of this section, a Commission-approved ISO or RTO must file the revisions to its open access transmission tariff required by Commission rulemaking proceedings promulgating and amending the *pro forma* tariff pursuant to section 206 of the FPA and accompanying rates pursuant to section 205 of the FPA in accordance with the procedures set forth in Commission rulemaking proceedings promulgating and amending the *pro forma* tariff.

(ii) If a Commission-approved ISO or RTO can demonstrate that its existing open access transmission tariff is consistent with or superior to the *pro forma* tariff promulgated by the Commission, as amended from time to time, the Commission-approved ISO or RTO may instead set forth such demonstration in its filing pursuant to section 206 in accordance with the procedures set forth in Commission rulemaking proceedings promulgating and amending the *pro forma* tariff.

(d) *Waivers.* A public utility subject to the requirements of this section and Order No. 889, FERC Stats. & Regs. ¶31,037 (Final Rule on Open Access Same-Time Information System and

Standards of Conduct) may file a request for waiver of all or part of the requirements of this section, or Part 37 (Open Access Same-Time Information System and Standards of Conduct for Public Utilities), for good cause shown. Except as provided in paragraph (f) of this section, an application for waiver must be filed no later than 60 days prior to the time the public utility would have to comply with the requirement.

(e) *Non-public utility procedures for tariff reciprocity compliance.* (1) A non-public utility may submit an open access transmission tariff and a request for declaratory order that its voluntary transmission tariff meets the requirements of Commission rulemaking proceedings promulgating and amending the *pro forma* tariff.

(i) Any submittal and request for declaratory order submitted by a non-public utility will be provided an NJ (non-jurisdictional) docket designation.

(ii) If the submittal is found to be an acceptable open access transmission tariff, an applicant in a Federal Power Act (FPA) section 211 or 211A proceeding against the non-public utility shall have the burden of proof to show why service under the open access transmission tariff is not sufficient and why a section 211 or 211A order should be granted.

(2) A non-public utility may file a request for waiver of all or part of the reciprocity conditions contained in a public utility open access transmission tariff, for good cause shown. An application for waiver may be filed at any time.

(f) *Standard generator interconnection procedures and agreements.* (1) Every public utility that is required to have on file a non-discriminatory open access transmission tariff under this section must amend such tariff by adding the standard interconnection procedures and agreement and the standard small generator interconnection procedures and agreement required by Commission rulemaking proceedings promulgating and amending such interconnection procedures and agreements, or such other interconnection procedures and agreements as may be required by Commission rulemaking proceedings promulgating and amending the standard interconnection procedures and agreement and the standard small generator interconnection procedures and agreement.

(i) Any public utility that seeks a deviation from the standard interconnection procedures and agreement or the standard small generator interconnection procedures and agreement required by Commission rulemaking proceedings promulgating and amending such interconnection procedures and agreements, must demonstrate that the deviation is consistent with the principles set forth in Commission rulemaking proceedings promulgating and amending such interconnection procedures and agreements.

(ii)–(iv) [Reserved]

(2) The non-public utility procedures for tariff reciprocity compliance described in paragraph (e) of this section are applicable to the standard interconnection procedures and agreements.

(3) A public utility subject to the requirements of this paragraph (f) may file a request for waiver of all or part of the requirements of this paragraph (f), for good cause shown.

(g) *Tariffs and operations of Commission-approved independent system operators and regional transmission organizations.*

(1) *Demand response and pricing.*

(i) *Ancillary services provided by demand response resources.*

(A) Every Commission-approved independent system operator or regional transmission organization that operates organized markets based on competitive bidding for energy imbalance, spinning re serves ,supplemental reserves, reactive power and voltage control, or regulation and frequency response ancillary services (or its functional equivalent in the Commission-approved independent system operator's or regional transmission organization's tariff) must accept bids from demand response resources in these markets for that product on a basis comparable to any other resources, if the demand response resource meets the necessary technical requirements under the tariff, and submits a bid under the Commission-approved independent system operator's or regional transmission organization's bidding

Commission pursuant to section 215(j) of the Federal Power Act that is organized to advise the Electric Reliability Organization, a Regional Entity, or the Commission regarding certain matters in accordance with § 39.13.

Regional Entity means an entity having enforcement authority pursuant to § 39.8.

Regional Entity Rule means, for purposes of this part, the bylaws, a rule of procedure or other organizational rule or protocol of a Regional Entity.

Reliability Standard means a requirement approved by the Commission under section 215 of the Federal Power Act, 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.

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.

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.

§ 39.2 Jurisdiction and applicability.

(a) Within the United States (other than Alaska and Hawaii), the Electric Reliability Organization, any Regional Entities, and all users, owners and operators of the Bulk-Power System, including but not limited to entities described in section 201(f) of the Federal Power Act, shall be subject to the jurisdiction of the Commission for the purposes of approving Reliability Standards established under section 215 of the Federal Power Act and enforcing compliance with section 215 of the Federal Power Act.

(b) All entities subject to the Commission's reliability jurisdiction under paragraph (a) of this section shall comply with applicable Reliability Standards, the Commission's regulations, and applicable Electric Reliability Organization and Regional Entity Rules made effective under this part.

(c) Each user, owner and operator of the Bulk-Power System within the United States (other than Alaska and Hawaii) shall register with the Electric Reliability Organization and the Regional Entity for each region within which it uses, owns or operates Bulk-Power System facilities, in such manner as prescribed in the Rules of the Electric Reliability Organization and each applicable Regional Entity.

(d) Each user, owner or operator of the Bulk-Power System within the United States (other than Alaska and Hawaii) shall provide the Commission, the Electric Reliability Organization and the applicable Regional Entity such information as is necessary to implement section 215 of the Federal Power Act as determined by the Commission and set out in the Rules of the Electric Reliability Organization and each applicable Regional Entity. The Electric Reliability Organization and each Regional Entity shall provide the Commission such information as is necessary to implement section 215 of the Federal Power Act.

§ 39.3 Electric Reliability Organization certification.

(a) Any person may submit an application to the Commission for certification as the Electric Reliability Organization no later than April 4, 2006. Such application shall comply with the requirements for filings in proceedings before the Commission in part 385 of this chapter.

(b) After notice and an opportunity for public comment, the Commission may certify one such applicant as an Electric Reliability Organization, if the Commission determines such applicant:

(1) Has the ability to develop and enforce, subject to § 39.7, Reliability Standards that provide for an adequate

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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 13th day of December 2013, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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