ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 12-1382

PUBLIC SERVICE ELECTRIC AND GAS COMPANY, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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April 10, 2013

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

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

B. Rulings Under Review

1. *Primary Power, LLC*, 131 FERC ¶ 61,015 (2010) (Primary Power Declaratory Order), JA 212;

2. *Primary Power, LLC*, 140 FERC ¶ 61,052 (2012) (Primary Power Rehearing Order), JA 331;

3. *Central Transmission, LLC v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,243 (2010) (Central Transmission Complaint Order), JA 436; and

3. *Central Transmission, LLC v. PJM Interconnection, L.L.C.*, 140 FERC ¶ 61,053 (2012) (Central Transmission Rehearing Order), JA 455.

C. Related Cases

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

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

April 10, 2013

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GLOSSARY

Commission or FERC	The Federal Energy Regulatory Commission
Central Transmission	Central Transmission, LLC
Central Transmission Complaint Order	*Central Transmission, LLC v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,243 (2010), JA 436
Central Transmission Rehearing Order	*Central Transmission, LLC v. PJM Interconnection, L.L.C.*, 140 FERC ¶ 61,053 (2012), JA 455
Incumbent Owners	Petitioners the Public Service Gas and Electric Companies, the PPL PJM Companies and Exelon Corporation
PJM	PJM Interconnection, L.L.C., a Regional Transmission Organization operating in 13 eastern states and the District of Columbia
Primary Power	Primary Power, LLC
Primary Power Declaratory Order	*Primary Power, LLC*, 131 FERC ¶ 61,015 (2010), JA 212
Primary Power Rehearing Order	*Primary Power, LLC*, 140 FERC ¶ 61,052 (2012), JA 331
Public Service	The Public Service Gas and Electric Companies

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STATEMENT OF THE ISSUES

In this case, the Federal Energy Regulatory Commission (FERC or Commission) determined that the tariff governing the operation of the PJM Interconnection, L.L.C. (PJM) regional transmission network does not bar the owners of electric transmission facilities, including transmission owners who may wish to enter the PJM region in the future, from receiving cost-based rates under certain circumstances. The questions presented are:

1. Whether petitioners, who are incumbent transmission owners in the PJM region, can demonstrate standing where the challenged orders addressed only threshold issues of tariff eligibility, and did not grant any non-incumbent transmission developers authority to construct transmission facilities in the incumbent owners' zones.

2. Whether, assuming jurisdiction, the Commission reasonably determined that the PJM tariff does not preclude PJM from designating non-incumbent transmission providers to construct cost-of-service economic projects approved in PJM's Regional Transmission Expansion Plan.

COUNTERSTATEMENT OF JURISDICTION

As this Court has recognized, to obtain judicial review, section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), requires that a party be aggrieved by the Commission's orders. *Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash. v. FERC*, 272 F.3d 607, 613 (D.C. Cir. 2001). A party is aggrieved within the meaning of section 313(b) if it can establish both the constitutional and prudential requirements for standing, including an injury in fact that is actual or imminent. *Id*.

As demonstrated in Argument Section II *infra*, petitioners cannot establish the requisite injury here. The challenged orders addressed only the threshold issue of whether non-incumbent developers are eligible under the PJM tariff to be

designated to build cost-of-service economic projects included in the PJM Regional Transmission Expansion Plan. The challenged orders did not authorize the designation of any non-incumbent developers to build projects in petitioners' service areas, nor did the orders authorize any cost-based rates. This same lack of injury renders the orders unripe for review. *See Ala. Mun. Distribs. Grp. v. FERC*, 312 F.3d 470, 473 (D.C. Cir. 2002).

STATUTES AND REGULATIONS

The relevant statutes and regulations are contained in the Addendum to this brief. Excerpts of relevant tariff provisions are attached as Exhibit A to this brief.

INTRODUCTION

In the Primary Power orders, *Primary Power, LLC*, 131 FERC ¶ 61,015 (2010) (Primary Power Declaratory Order), JA 212, *on reh'g*, 140 FERC ¶ 61,052 (2012) (Primary Power Rehearing Order), JA 331, the Commission addressed on a petition for Declaratory Order whether PJM's tariff permits it to designate entities that are not currently owners of transmission facilities in PJM (non-incumbent developers) to build cost-of-service economic projects included in PJM's Regional Transmission Expansion Plan. Petitioners, the Public Service Gas and Electric Companies ("Public Service"), the PPL PJM Companies and Exelon Corporation, who are owners of existing transmission facilities in PJM (collectively Incumbent Owners), took the position that the PJM tariff provides incumbent transmission

owners with a right of first refusal regarding the construction of economic projects in their service area.

In the Primary Power orders, the Commission concluded that PJM's tariff does not preclude PJM from designating non-incumbent developers to construct such projects, and to seek cost-based rate recovery for them. In the Central Transmission orders, *Central Transmission, LLC v. PJM Interconnection, L.L.C.*, 131 FERC ¶ 61,243 (2010) (Central Transmission Complaint Order), JA 436, *on reh'g*, 140 FERC ¶ 61,053 (2012) (Central Transmission Rehearing Order), JA 455, based upon its Primary Power decision, the Commission dismissed a complaint alleging that the PJM tariff is unjust and unreasonable to the extent that it does not permit PJM to designate non-incumbent developers to construct economic projects. The challenged orders do not require PJM to designate any non-incumbent developers to construct any projects, nor do they make any determination regarding cost recovery for any project.

STATEMENT OF FACTS

I. COMMISSION RULEMAKINGS ADDRESSING DISCRIMINATION IN TRANSMISSION PLANNING

Section 201 of the Federal Power Act, 16 U.S.C. § 824, gives the Commission jurisdiction over the rates, terms and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. Under sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d, 824e,

the Commission has an obligation to ensure that all rates by a public utility "for or in connection with" the transmission or sale of electric energy subject to the Commission's jurisdiction are just and reasonable and not unduly discriminatory or preferential.

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

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

(3) take transmission service for itself under the same tariff terms and conditions that it offers to others. *Transmission Access*, 225 F.3d at 682.

In Order No. 2000,[2] the Commission encouraged the development of Regional Transmission Organizations, which are voluntary associations that assume control of, but not ownership of, the transmission lines in an integrated regional grid. Regional Transmission Organizations were designed to "eliminate certain transmission inefficiencies and opportunities for discrimination that hindered the formation of competitive wholesale electric energy markets." *Me. Pub. Utils. Comm'n v. FERC*, 454 F.3d 278, 280-81 (D.C. Cir. 2006). To be approved as a Regional Transmission Organization, the Commission required, *inter alia*, that the organization be responsible for planning necessary transmission expansions and upgrades that will enable it to provide efficient, reliable and non-discriminatory transmission service. *See* 18 C.F.R. § 35.34(k)(7).

In Order No. 890,[3] the Commission amended the Order No. 888 *pro forma* tariff to require coordinated, open and transparent transmission planning, under the

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[2] *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *petitions for review dismissed*, *Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

[3] *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12266 (Mar. 15, 2007), *on reh'g*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), *on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009).

Commission's broad authority to remedy undue discrimination by ensuring that transmission providers plan for the needs of their customers on a comparable basis to planning for their own needs. *N.Y. Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 584 (D.C. Cir. 2011); Order No. 890 P 435. The Commission found that it could not rely on the self-interest of transmission providers to expand the grid in a nondiscriminatory manner, because they lack the incentive to remedy transmission congestion when doing so would reduce the value of their own generation or otherwise stimulate new entry or greater competition in their area. Order No. 890 P 422.

Most recently, building upon Order No. 890, the Commission in Order No. 1000[4] enhanced the obligations placed on electric utility transmission providers to, *inter alia*, further address discrimination in transmission planning. *See* Order No. 1000 P 4. Among other things, the Commission directed electric utility transmission providers subject to Commission jurisdiction to eliminate provisions in Commission-jurisdictional tariffs and agreements that establish a federal right of first refusal for an incumbent transmission provider with respect to cost-of-service

[4] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Pub. Utils.*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *on reh'g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *appeal pending, S.C. Pub. Serv. Auth. v. FERC*, Nos. 12-1232, *et al*. (D.C. Cir. filed May 25, 2012 and later).

transmission projects that are selected in a regional transmission plan. *Id*. PP 7, 313.

II. THE PJM TARIFF

PJM (PJM stands for "Pennsylvania-New Jersey-Maryland," the states in which PJM first started operating; the full name is no longer used) is a Regional Transmission Organization. *See Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, 473 (7th Cir. 2009). PJM coordinates the movement of wholesale electricity in all or part of thirteen eastern states and the District of Columbia. *Pub. Serv. Elec. & Gas Co. v. FERC*, 485 F.3d 1164, 1165 (D.C. Cir. 2007).

All owners of generation and transmission facilities in the PJM region are parties to the PJM Open Access Transmission Tariff. *Old Dominion Elec. Co-op, Inc. v. FERC*, 518 F.3d 43, 46 (D.C. Cir. 2008). The tariff establishes the rates, terms, and conditions of service for transmission service over the PJM system. *Id*. Transmission owners in PJM also are parties to a Transmission Owners Agreement. *Id*. at 47. PJM's responsibilities with respect to planning and expansion are set forth in Schedule 6 of its Operating Agreement, which describes PJM's Regional Transmission Expansion Plan Protocol. *See PJM Interconnection, L.L.C.*, 96 FERC ¶ 61,061 at 61,239 (2001).

PJM's Regional Transmission Expansion Plan forecasts the expansion of the PJM transmission system needed to meet the demand for firm transmission service.

See FPL Energy Marcus Hook, L.P. v. FERC, 430 F.3d 441, 443 (D.C. Cir. 2005). Pursuant to the PJM Operating Agreement, PJM must adopt a single regional plan that will maintain the reliability of the PJM grid in a manner that supports competition in the PJM region. *Balt. Gas & Elec. Co.*, 120 FERC ¶ 61,084 P 58 (2007). Projects that are identified in the PJM Regional Transmission Expansion Plan as "baseline" projects benefit customers in one or more transmission owner zones by maintaining reliability or reducing congestion on the PJM grid. *Id*. Reliability projects are upgrades or enhancements that PJM identifies in the Regional Transmission Expansion Plan to address reliability concerns. Economic projects are upgrades or enhancements included in the Regional Transmission Expansion Plan to relieve transmission congestion and thus reduce costs. Primary Power Rehearing Order P 5 n.14, JA 332. A merchant transmission project is one in which the costs of construction will be recovered through negotiated rather than cost-based rates. *Id*. P 1 n.5, JA 331.

III. THE PROCEEDINGS BELOW

A. The Primary Power and Central Transmission Proceedings

On November 10, 2009, Primary Power, LLC (Primary Power) filed a petition for a declaratory order requesting approval of certain transmission rate incentives for its proposed Grid Plus Transmission System. Primary Power Declaratory Order P 1, JA 212. In the petition, Primary Power sought assurance

that, if PJM includes the Grid Plus project in the Regional Transmission Expansion Plan as an economic project, PJM must designate Primary Power to build it, and Primary Power will be eligible for cost-based rate recovery. *Id*. P 23, JA 215; Primary Power Rehearing Order PP 35-36, JA 337. Primary Power declined to pursue Grid Plus as a merchant transmission project because Primary Power could not finance Grid Plus except on a cost-of-service basis. Primary Power Declaratory Order P 48, JA 218.

As Primary Power sought approval of its Grid Plus project as an economic project, not a reliability project, the Commission in the Primary Power orders addressed only issues relating to economic projects under the Regional Transmission Expansion Plan. Primary Power Rehearing Order P 36, JA 337. The Commission granted in part and denied in part Primary Power's petition, finding that the PJM tariff permits, but does not require, PJM to designate Primary Power as the entity to build Grid Plus if it is included in the Regional Transmission Expansion Plan as an economic project. Primary Power Declaratory Order P 62, JA 220. The Commission further found that the PJM tariff does not prevent Primary Power from seeking cost-based rate recovery if its project is included in the Regional Transmission Expansion Plan and satisfies the same requirements set forth for other transmission owner cost-based projects. *Id*.

On March 25, 2010, Central Transmission LLC (Central Transmission) filed a complaint against PJM under Federal Power Act section 206, 16 U.S.C. § 824e, alleging that the PJM tariff is unjust and unreasonable and unduly discriminatory insofar as it prevents PJM from designating Central Transmission, a non-incumbent developer, to construct and own a proposed economic project, and to receive cost-based rate recovery for the project. *See* Central Transmission Complaint Order P 1, JA 436. Consistent with its decision in Primary Power, the Commission found that Central Transmission is eligible to be designated to build the facilities and eligible to seek cost-of-service rate treatment. *Id*. P 46, JA 442. Accordingly the Commission dismissed the complaint. *Id*.

B. The Interpretation of the Regional Transmission Expansion Plan Protocol

The challenged orders found that, while ambiguous, the language of the PJM Regional Transmission Expansion Plan Protocol (Schedule 6 of the PJM Operating Agreement) does not prohibit PJM from designating an entity other than an incumbent transmission owner to build and own an economic project approved in the Regional Transmission Expansion Plan. Primary Power Rehearing Order P 35, JA 337; Central Transmission Rehearing Order PP 16-17, JA 457-58.

Section 1.5.7 of the Regional Transmission Expansion Plan Protocol, JA 474, entitled "Development of Economic Transmission Enhancements and Expansions," establishes who can be designated to build economic projects.

Central Transmission Rehearing Order PP 18, JA 458. Section 1.5.7(c)(iii), JA 475, provides that "any market participant" may submit a proposal to construct economic facilities and, if the proposal is accepted, the PJM Board shall designate "the entity or entities" that will be responsible for constructing and owning the project. Primary Power Rehearing Order P 42, JA 338 (quoting section 1.5.7(c)(iii)). The Commission interpreted this reference to "entity or entities," which is not defined, to include non-incumbent developers. *Id*. PP 47, 49, JA 339, 340.

The Commission's interpretation was informed by PJM's obligation to apply its tariff in a non-discriminatory fashion, Primary Power Rehearing Order PP 5, 80, 89-90, JA 332, 345, 346-47; Primary Power Declaratory Order PP 62, 65, JA 220-21, as well as by the purpose of the tariff provision and the Commission orders approving PJM as a Regional Transmission Organization which led to the provision's adoption. Primary Power Rehearing Order PP 35-42, JA 337-39. In those orders, the Commission identified the need to provide for economic upgrades to support competition, and emphasized the importance of third party participation in constructing such projects. *See id*. PP 38-39, JA 338 (citing *PJM Interconnection, L.L.C.*, 96 FERC ¶ 61,061 at 61,236 (2001); *PJM Interconnection, L.L.C.*, 101 FERC ¶ 61,345 P 20 (2002)). Thus, the Commission required, and section 1.5.7 accordingly provides, that entities other than incumbent

owners can propose and construct economic projects. Primary Power Rehearing Order P 56, JA 341.

The Commission rejected Incumbent Owners' reliance on Section 1.5.6 of the Regional Transmission Expansion Plan Protocol, JA 470, entitled "Development of the Recommended Regional Transmission Expansion Plan," finding that this provision does not override or otherwise conflict with section 1.5.7. Primary Power Rehearing Order P 50, JA 340. Section 1.5.6(f), JA 471, provides in part that: "To the extent that one or more Transmission Owners are designated to construct, own, and/or finance a recommended transmission enhancement or expansion, the recommended plan shall designate the Transmission Owner that owns transmission facilities located in the Zone where the particular enhancement or expansion is to be located." The Commission found that this sentence does not refer to or control the designation of economic projects under section 1.5.7, nor does it refer to or control the designation of economic projects assigned to entities other than incumbent owners. Primary Power Rehearing Order P 52, JA 340. To the contrary, section 1.5.6(d), JA 471, specifies that economic enhancements shall be developed in accordance with the procedures described in section 1.5.7. Primary Power Rehearing Order P 52, JA 340. Even if section 1.5.6(f) did control, it expressly permits PJM to designate "Transmission Owners or other entities" to construct projects. *Id*. P 53, JA 341.

The Commission likewise rejected Incumbent Owners' reliance on section 1.5.6(g), JA 472. Primary Power Rehearing Order PP 55-57, JA 341. Incumbent Owners point to the clause of 1.5.6(g) stating that: "notwithstanding the foregoing, with respect to any facilities that the [Regional Transmission Expansion Plan] designates to be owned by an entity other than a Transmission Owner, the plan shall designate that entity as responsible for the cost of such facilities." First, this provision by its terms does not preclude a non-incumbent developer being designated to construct an economic project under section 1.5.7. Primary Power Rehearing Order P 56, JA 341. Further, the Commission found that this provision does not preclude a non-incumbent developer from receiving cost-of-service recovery for such a project. *Id*. P 57, JA 341. Unlike other clauses that refer to current "Transmission Owners," this clause refers to projects "to be owned" by an entity other than a Transmission Owner. *Id*. This refers, therefore, to the future status of the entity when the project is completed, and Primary Power would be a Transmission Owner when its project is completed. *Id*.

Given the Commission's requirements for PJM to open its economic planning process to non-incumbents and the imprecision in the terms used, the Commission could not find that any of the provisions cited by Incumbent Owners take precedence over the provision in section 1.5.7 that permits any market participant to propose an economic project and to be so designated. *Id*. Therefore,

the Commission did not find that section 1.5.6(g) applies to an entity that intends to become a transmission owner, or that it precludes cost-based compensation for such entity's project. *Id*.

C. The Commission Rejected Incumbent Owners' Arguments Based On A Pre-Existing Right of First Refusal And The PJM Transmission Owners Agreement.

The challenged orders rejected the argument that Incumbent Owners possessed a right of first refusal "pre-dating" PJM, or one preserved or created in the PJM tariff, finding no "tacit agreement or [] contractual bargain providing a right of first refusal for economic projects." Primary Power Rehearing Order P 59, JA 342. *See also id*. P 70, JA 343 (finding that nothing in the Federal Power Act nor in the PJM tariff or governing agreements "provided transmission owners with the absolute right to bar a third party from constructing facilities within a transmission owner's historic state defined zone").

The Commission also rejected Incumbent Owners' reliance on sections 4.2.1, JA 510, 5.2, JA 519, and 7.4, JA 548 of the Transmission Owners Agreement, which establish Incumbent Owners' obligations to build reliability projects (4.2), their right to construct and control their own assets (5.2), and prohibit the construction of new rate zones (7.4). *See* Primary Power Rehearing Order PP 60-62, JA 342. The Commission found that none of these provisions establishes or supports a right of first refusal on the part of the Incumbent Owners

as they do not preclude assignment of economic projects to non-incumbent developers, nor do they preclude non-incumbent developers from cost-of-service rate recovery. *Id*.

Because the Commission had not altered the Incumbent Owners' position under any of the relevant agreements, the Commission further rejected the argument that it was depriving Incumbent Owners of any of their filing (or other) rights under the Federal Power Act. Primary Power Rehearing Order PP 68-69, JA 343.

SUMMARY OF ARGUMENT

In the challenged orders, the Commission did nothing more than interpret the FERC-jurisdictional PJM tariff to determine whether non-incumbent developers are eligible to be designated to build cost-of-service economic projects. The Commission addressed only this threshold issue of tariff eligibility, and did not authorize the designation of any non-incumbent developer or the construction of any project. Therefore, Incumbent Owners lack standing as the orders have caused them no injury, and their appeal is, for the same reason, unripe. Similarly, FERC was well within its statutory authority in issuing the orders, as the orders were confined to interpretation of pre-existing provisions of a FERC-jurisdictional tariff, consistent with the anti-discrimination dictates of section 205 of the Federal Power Act.

The orders, moreover, reasonably interpreted the PJM tariff (excerpts of relevant tariff provisions are set forth in Exhibit A to this brief). Section 1.5.7(c)(iii) of the PJM Regional Transmission Expansion Plan Protocol, which governs the development of economic enhancements and expansions, authorizes "any market participant" to propose to construct an economic project, with PJM to designate "the entity or entities" responsible for constructing it. Finding the Protocol ambiguous, the Commission reasonably interpreted the language in light of prior Commission orders requiring that PJM permit third party participation in constructing economic projects, and the Federal Power Act's anti-discrimination requirement, and determined that PJM is permitted to designate non-incumbent developers. Incumbent Owners nowhere in their brief challenge the Commission's findings regarding its prior directives to PJM, nor the anti-discrimination mandates of the statute.

For their part, Incumbent Owners assert that sections 1.5.6(f) and 1.5.6(g) of the Protocol preclude non-incumbent cost-of-service economic projects. Given the ambiguity of the Protocol, the Commission found that the provisions of section 1.5.6 do not control the designation of economic projects, which are governed by section 1.5.7. In any event, section 1.5.6(f) likewise permits PJM to designate "Transmission Owners or other entities" to construct projects, which the Commission found includes non-incumbent developers.

The Commission further rejected Incumbent Owners' assertion that they possessed a right of first refusal, pre-dating PJM's formation, that was preserved in the PJM Transmission Owners Agreement. The Commission found no pre-existing right of first refusal (and indeed Incumbent Owners have cited no authority or support for this pre-existing right, either on brief or in their requests for rehearing). Nor did the Commission find that any provision in the Transmission Owners Agreement precludes PJM from designating non-incumbent developers to construct cost-of-service economic projects.

ARGUMENT

I. STANDARD OF REVIEW

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

Incumbent Owners challenge the Commission's jurisdiction. In determining whether the Commission acted beyond its jurisdiction, this Court grants the Commission deference under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

See, e.g., *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663, 673 (D.C. Cir. 2007).[5]

This case involves the interpretation of a FERC-jurisdictional tariff. The Court reviews the Commission's interpretation of tariffs in much the same way that the Court applies deference under *Chevron* to agency interpretations of the statute it administers. *Pub. Serv.*, 485 F.3d at 1168. If the tariff language is unambiguous, the Court follows it; if not, the Court defers to a reasonable interpretation. *Id*. The Court gives substantial deference to FERC's interpretation of filed tariffs even if the issue simply involves the proper construction of language. *S. Cal. Edison v. FERC*, 415 F.3d 17, 21 (D.C. Cir. 2005).

The challenged orders assured that PJM implemented its tariff in a just and reasonable and not unduly discriminatory manner. "The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and [the Court] afford[s] great deference to the Commission in its rate decisions." *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008). "Because [i]ssues of rate design are fairly technical, and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission, [the court's] review of whether a particular rate design is just and

[5] This issue is currently pending before the Supreme Court in *City of Arlington, Texas v. FCC*, No. 11-1545 (argument held Jan. 16, 2013).

reasonable is highly deferential." *N. States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994) (internal quotation marks and citations omitted). *See also Electricity Consumers Res. Council v. FERC*, 407 F.3d 1232, 1236 (D.C. Cir. 2005) (same). The Commission's factual findings are conclusive if supported by substantial evidence. Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b).

II. INCUMBENT OWNERS HAVE NOT MET THEIR BURDEN TO ESTABLISH STANDING AS THEY ARE NOT AGGRIEVED BY THE CHALLENGED ORDERS, AND THEIR APPEAL IS UNRIPE.

Incumbent Owners have failed to meet their burden to prove that they have standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). To obtain judicial review, section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), requires that a party be aggrieved by the Commission's orders. *Pub. Util. Dist. No. 1*, 272 F.3d at 613. A party is aggrieved within the meaning of the statute if it can establish both the constitutional and prudential requirements for standing. *Id*. To establish constitutional standing, petitioners must show three elements: (1) injury in fact; (2) causation; and (3) redressability. *Transmission Agency*, 495 F.3d at 669-70.

Incumbent Owners here cannot show the requisite injury in fact from any intrusion upon their franchised service territory, *see* Petitioner Brief (Br.) at 28, because such intrusion has not occurred, nor is it imminent. *See Lujan*, 504 U.S. at 560 (injury in fact must be (a) concrete and particularized, and (b) actual or

imminent, and not conjectural or hypothetical). *See also, e.g.*, *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143 (2013) (threatened injury must be "'certainly impending'") (quoting *Whitmore v. Ark.*, 495 U.S. 149, 158 (1990)). The Primary Power orders addressed a petition for a declaratory order on a threshold issue of whether non-incumbent developers are *eligible* under the PJM tariff to be designated to construct a cost-of-service economic project. *See* Primary Power Declaratory Order P 1, JA 212. While the Commission found that non-incumbent developers are eligible, the Commission designated no non-incumbent developer construction (*see id*. P 71, JA 221 ("we are not designating Primary Power to build the project")), and granted no cost-based rates (*see id*. P 69, JA 221 (rejecting as premature request for cost-based rate treatment)). Likewise, based upon the Primary Power finding of eligibility, the Central Transmission orders simply dismissed a complaint alleging that the PJM tariff was unjust and unreasonable to the extent that it precluded such eligibility. Central Transmission Complaint Order PP 1-2, 46, JA 436, 442.

Incumbent Owners could only suffer injury from non-incumbent developer construction of cost-of-service economic projects in their zones *if* PJM selected the project for the Regional Transmission Expansion Plan, *if* PJM designated the non-incumbent developer to construct the project, and *if* the Commission granted the non-incumbent developer cost-based rates. This potential injury "stacks

speculation upon hypothetical upon speculation, which does not establish an 'actual or imminent' injury." *N.Y. Reg'l Interconnect*, 634 F.3d at 587 (no standing where alleged injury rested upon a hypothetical future application to build a transmission project). *See also Clapper*, 133 S. Ct. at 1148 ("a highly attenuated chain of possibilities does not satisfy the requirement that threatened injury must be certainly impending"). Hypothetical future scenarios, even if not inconceivable, are not imminent and do not satisfy the requirements of standing. *Shell Oil Co. v. FERC,* 47 F.3d 1186, 1202 (D.C. Cir. 1995). *See also, e.g.*, *Occidental Permian Ltd. v. FERC*, 673 F.3d 1024, 1028 (D.C. Cir. 2012) (no injury from FERC authorization of energy project where any resulting increase in cost to consumers was dependent upon a series of eventualities); *Transmission Agency*, 495 F.3d at 670 (allegation that FERC order may affect future decisions whether to participate in a regional transmission market too speculative to provide standing); *DEK Energy v. FERC,* 248 F.3d 1192, 1196 (D.C. Cir. 2001) (alleged injury from speculative increase in competition insufficient for standing). Further, as the Supreme Court held in *Clapper*, 133 S. Ct. at 1150, "[i]n the past, we have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment."

In contrast, in Incumbent Owners' cited cases, Br. 28, the appellant's franchise was in fact being impaired or was about to be impaired by a competing

company. *See Frost v. Corp. Comm'n of Okla*., 278 U.S. 515, 520 (1929) (cotton gin owner had standing to enjoin state commission from issuing a permit to a competing cotton gin); *Morris Cnty. Transfer Station, Inc. v. Frank's Sanitation Serv., Inc*., 617 A.2d 291, 293-94 (N.J. App. Div. 1992) (granting preliminary injunction against competing waste disposal company infringing upon appellant's waste disposal franchise).

PJM has not in fact selected these projects for inclusion in the Regional Transmission Expansion Plan, and so has not designated these non-incumbent developers to construct. *See Primary Power, LLC v. PJM Interconnection, L.L.C.*, 140 FERC ¶ 61,054 PP 75-77 (2012), *reh'g pending* (denying Primary Power's complaint that portions of Grid Plus were approved but assigned to incumbent owners, finding that the projects assigned to incumbent owners were not the same as Grid Plus, and PJM adequately justified choosing the alternative projects). Similarly, Central Transmission's LaSalle Project has not to date been included in the Regional Transmission Expansion Plan. Even if PJM ultimately did include one of these projects in the plan and designate the non-incumbent developer to construct it, that would not cure the jurisdictional defect in Incumbent Owners' petition here. *See N.M. Attorney Gen. v. FERC*, 466 F.3d 120, 122 (D.C. Cir. 2006) (standing is assessed at the time the action commences).

This same lack of injury also renders these orders unripe for review. This Court finds that an issue is not yet ripe for review when "the injury has not yet materialized" and there is no showing that a "delay of adjudication would inflict hardship." *Ala. Mun. Distribs. Grp.*, 312 F.3d at 473. In a case such as this, standing and ripeness "overlap significantly," as "[t]he contingencies that stand between the orders here and any injury to petitioners tend both to show the injury's lack of imminence and to render their claim unripe." *Id*. at 472.

In the absence of actual injury, Incumbent Owners cannot base standing on the precedential effect of the Commission's declaratory interpretation. "[M]ere precedential effect within an agency is not, alone, enough to create Article III standing, no matter how foreseeable the future litigation." *Sea-land Serv., Inc. v. DOT*, 137 F.3d 640, 648 (D.C. Cir. 1998). "A petitioner's 'interest in the Commission's legal reasoning and its potential precedential effect does not by itself confer standing where, as here, it is 'uncoupled' from any injury in fact caused by the substance of [FERC's] adjudicatory action.'" *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 268 (D.C. Cir. 2007) (quoting *Telecomms. Research & Action Ctr. v. FCC*, 917 F.2d 585, 588 (D.C. Cir. 2007)). *See also New England Power Generators Ass'n, Inc. v. FERC*, 707 F.3d 364, 369 (D.C. Cir. 2013) ("neither a FERC decision's legal reasoning nor the precedential effect of such reasoning confers standing unless the substance of the decision itself gives rise to

an injury in fact"); *Exxon Mobil Corp. v. FERC*, 571 F.3d 1208, 1219 (D.C. Cir. 2009) ("a mere interest in FERC's legal reasoning and the possibility of a 'collateral estoppel effect' are insufficient to confer a cognizable injury in fact"); *Ala. Mun. Distribs. Grp.*, 312 F.3d at 474 ("neither standing nor ripeness could properly grow out of a harm predicated on a potential collateral estoppel effect.").

III. THE COMMISSION DID NOT EXCEED ITS JURISDICTION IN THE CHALLENGED ORDERS.

Incumbent Owners argue that the challenged orders exceeded the Commission's jurisdiction under the Federal Power Act by unlawfully intruding on incumbent transmission owners' "exclusive right to build economic transmission expansion or enhancement projects" within their service territory. Br. 32. However, whether incumbent transmission owners have an "exclusive right to build" is the very question under review on the merits. The Commission found that incumbent transmission owners do not possess an exclusive right to build cost-of-service economic projects in their zones, either as a right "pre-existing" the formation of PJM or as one embodied in the PJM tariff. Primary Power Rehearing Order PP 58-59, JA 342. *See* Section IV *infra*. Because neither the Federal Power Act nor the PJM tariff provides incumbent transmission owners with the right to bar a third party from constructing facilities in their service zones, the Commission found that its actions "ha[d] not altered the transmission owners' position under the relevant agreements." Primary Power Rehearing Order P 70, JA 344.

> [O]ur finding stems directly from our reading of the relevant language in the [Regional Transmission Expansion Plan] procedures. . . . As such, we are not revising the operative procedures. Because there is no revision, unilateral or otherwise, there is no denial of [Public Service's] rights under the Federal Power Act as a transmission owner. Likewise, as our finding arises from our reading of the operative contracts and agreements, there is no abrogation of any contractual bargain.

Central Transmission Rehearing Order P 20, JA 459. As the challenged orders deprived Incumbent Owners of no rights under either the Federal Power Act or contract, this case is distinguishable from *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002) (finding Commission orders intruded upon statutory filing rights which had not been surrendered by contract). Primary Power Rehearing Order PP 68-69, JA 343.

Further, as the Commission found the relevant tariff provisions ambiguous, the Commission interpreted PJM's tariff in light of the Commission's directives to PJM when approving PJM as a Regional Transmission Organization, *see* Primary Power Rehearing Order PP 35-42, JA 337-39, and consistent with PJM's duty to implement the planning processes in its tariff in a non-discriminatory fashion. *Id*. P 90, JA 346. *See also id*. PP 5, 80, 89, JA 332, 345, 346; Primary Power Declaratory Order PP 62, 65, 220. Based upon the foregoing, the Commission found that its prior orders required, and PJM's tariff accordingly provides, that entities other than incumbent owners can propose and construct economic projects. Primary Power Rehearing Order P 56, JA 341.

Such actions are well within FERC's statutory jurisdiction. While Incumbent Owners assert that FERC possesses rate jurisdiction here only over Primary Power's facilities after they are built, *see* Br. 34 & n.4, the Commission here exercised its rate jurisdiction over PJM's tariff, which includes its governing documents. *See* Primary Power Rehearing Order PP 5, 80, 89-90, JA 332, 345, 346-47; Primary Power Declaratory Order PP 62, 65, 220. This Court has recognized that FERC created Regional Transmission Organizations, and that FERC has broad authority over proposals to create such organizations, and over their tariffs and operating agreements. *Me. Pub. Utils. Comm'n v. FERC*, 454 F.3d 278, 280 (D.C. Cir. 2006); *Braintree Elec. Light Dept. v. FERC*, 550 F.3d 6, 9 (D.C. Cir. 2008). As "of its Owner's own volition" PJM is a Commission-approved Regional Transmission Organization, it must comply with the applicable requirements, *see Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1369 (D.C. Cir. 2004), including the requirement that it maintain non-discriminatory planning processes. *See* 18 C.F.R. § 35.34(k)(7); *see also* p. 6 *supra* (Order No. 2000 requirements).

Further, "the duty to implement the [tariff] and Operating Agreement in a non-discriminatory fashion arises under section 205 of the [Federal Power Act]." Primary Power Rehearing Order P 90, JA 346. Federal Power Act section 205 "broadly precludes public utilities, in any transmission or sale subject to FERC

jurisdiction, from 'mak[ing] or grant [ing] any undue preference or advantage to any person or subject[ing] any person to any undue prejudice or disadvantage.'" *Transmission Access*, 225 F.3d at 685 (quoting section 205 of the Federal Power Act, 16 U.S.C. § 824d(b)). Here, the Commission has jurisdiction to interpret PJM's jurisdictional tariff and governing documents consistent with its statutory duty to avoid undue discrimination. Primary Power Rehearing Order P 90, JA 346.

Thus, unlike the corporate governance issues in *Cal. Indep. Sys. Operator v. FERC*, 372 F.3d 395 (D.C. Cir. 2004) (Br. 34-35), which were not "closely related to the rate," *id*. at 403, here the Commission orders addressed non-discriminatory implementation of a FERC-jurisdictional tariff. *See id*. at 402 (distinguishing *Cent. Iowa Power Co-op. v. FERC*, 606 F.2d 1156 (D.C. Cir. 1979), finding FERC jurisdiction over undue discrimination in a regional power pool agreement because it was "a rate that [Federal Power Act] section 205(a) required the utilities to file with FERC").

Incumbent Owners also assert -- for the first time on brief -- that the Commission's orders determine who will build transmission facilities in violation of **state** jurisdiction over the siting and construction of transmission facilities. Br. 33-34, 38-39 (citing *Piedmont Envtl. Council v. FERC*, 558 F.3d 304 (4th Cir. 2009) (interpreting FERC's siting authority under Federal Power Act section 216, 16 U.S.C. § 824p)). As Incumbent Owners failed to raise this argument on

rehearing, the Court lacks jurisdiction to consider it.[6] "Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b), makes articulation of an 'objection' on petition for rehearing a predicate to judicial review: 'No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing.'" *Pub. Serv.*, 485 F.3d at 1170 (quoting statute). "In review of decisions of the Commission and its predecessor, we, of course, insist that a party claiming statutory error have identified the substance of the claim." *Id*. at 1170-71.

While the challenged orders do not address this state jurisdiction argument, the Commission found in its Order No. 1000 ruling, *see supra* pp. 7-8, that its non-discriminatory planning requirements, including the removal of any federal rights of first refusal of incumbent transmission owners, do not involve an exercise of siting, permitting or construction authority, but rather "are associated with the processes used to identify and evaluate transmission system needs and potential

[6] While Public Service purported to incorporate by reference in its Central Transmission Request for Rehearing at 8, JA 451, its request for rehearing in Primary Power, and the protest of PJM Transmission Owners in Central Transmission, those pleadings also do not raise the issue of states' authority to site and permit construction. Even if they did, the Commission rejected the purported incorporation by reference, as "[t]he Commission's standard practice is not to allow parties to incorporate by reference arguments made in prior pleadings." Central Transmission Rehearing Order P 22 n.28, JA 459. This Court has found that references to arguments made in other pleadings do not satisfy the rehearing requirement. *See Ind. Util. Regulatory Comm'n v. FERC*, 668 F.3d 735, 739 (D.C. Cir. 2012).

solutions to those needs." Order No. 1000 P 107. Requiring that certain processes be instituted "in no way involves an exercise of authority over those specific substantive matters traditionally reserved to the states." *Id*. *See also* Order No. 1000-A P 377. The Commission's transmission planning requirements are not intended to dictate substantive outcomes, such as what transmission facilities will be built and where, which are decisions ordinarily made at the state level. Order No. 1000-A P 188. Nothing in the Commission's planning reforms "creates any new authority for the Commission nor public utility transmission providers acting through a regional transmission planning process to site or authorize the construction of transmission projects." *Id*. P 382.

While, on brief, Incumbent Owners cite *N. States Power Co. v. FERC*, 176 F.3d 1090 (8th Cir. 1999), in support of their argument regarding the Commission's purported intrusion on state authority, Br. 37-38, on rehearing the case was cited only with regard to the alleged intrusion on incumbent transmission owner rights. *See* PJM Transmission Owners Primary Power Request for Rehearing at 36, JA 270. In any event, as there is no intrusion on either transmission owner rights or state authority here, the case is inapposite.

IV. THE COMMISSION REASONABLY CONCLUDED THAT INCUMBENT OWNERS POSSESS NO RIGHT OF FIRST REFUSAL.

A. The Commission Reasonably Interpreted The PJM Regional Transmission Expansion Plan Protocol To Permit PJM To Designate Non-Incumbent Developers To Construct Economic Projects.

As Incumbent Owners state, Schedule 6 of the PJM Operating Agreement "establishes the [Regional Transmission Expansion Plan] Protocol for planning new transmission facilities, designating who will build them, and allocating their costs." Br. 55. In the challenged orders, the Commission reasonably concluded that the Regional Transmission Expansion Plan Protocol, while ambiguous, does not establish a right of first refusal on behalf of incumbent transmission owners and does not preclude a non-incumbent selected in the Regional Transmission Expansion Plan process from receiving cost-of-service rate recovery. Primary Power Rehearing Order P 35, JA 337. Excerpts of relevant tariff provisions are set forth in Exhibit A to this brief.

1. Section 1.5.7 of the Protocol, Which Governs Economic Expansions, Permits PJM to Designate Non-Incumbent Developers.

Section 1.5.7 of the Regional Transmission Expansion Plan Protocol, JA 474, entitled "Development of Economic Transmission Enhancements and Expansions," controls the designation of economic projects. Primary Power Rehearing Order PP 16, 52, JA 334, 340. Section 1.5.7(c)(iii) provides as follows:

> The [PJM] Office of the Interconnection shall evaluate whether including any additional economic-based enhancements or expansions in the Regional Transmission Expansion Plan or modifications of existing Regional Transmission Expansion Plan reliability-based enhancements or expansions would relieve an economic constraint. In addition, **any market participant at any time may submit to the Office of the Interconnection a proposal to construct an additional economic-based enhancement or expansion to relieve an economic constraint**. . . . Upon consideration of the advice of the Transmission Expansion Advisory Committee, the PJM Board shall consider any new economic-based enhancements and expansions for inclusion in the Regional Transmission Plan and for those enhancements and expansions it approves, the PJM Board shall designate (a) **the entity or entities that will be responsible for constructing and owning or financing the additional economic-based enhancements and expansions**, (b) the estimated costs of such enhancements and expansions, and (c) the market participants that will bear responsibility for the costs of the additional economic-based enhancements and expansions pursuant to section 1.5.6(g) of this Schedule 6.

Section 1.5.7(c)(iii), JA 475 (emphasis added by Commission).

Thus, this provision authorizes "any market participant" to propose to construct an economic project, with PJM to designate "the entity or entities" responsible for constructing it. Primary Power Rehearing Order P 16, JA 334; Primary Power Declaratory Order P 63, JA 220. Nothing in this tariff section reserves cost-based projects for incumbent transmission owners. Primary Power Rehearing Order P 47, JA 339. The word "entities" is not defined, and the Incumbent Owners provided no basis on which to determine exactly which parties are covered by that designation. *Id*. P 49, JA 340.

Finding the language ambiguous, the Commission properly interpreted the language in the light of the Commission's underlying orders approving PJM as a Regional Transmission Organization. Primary Power Rehearing Order P 35, JA 337. "'[T]o decide the question of the scope of [a] tariff without consideration of the factors and purposes underlying the terminology employed would make the process of adjudication little more than an exercise in semantics.'" *Consol. Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1545 (D.C. Cir. 1985) (quoting *United States v. W. Pac. R.R.*, 352 U.S. 59, 67 (1956)).

A Regional Transmission Organization is responsible for planning transmission expansions that will enable it to provide efficient, reliable and non-discriminatory transmission service. *See* 18 C.F.R. § 35.34(k)(7). In fulfillment of this requirement, in the orders granting PJM Regional Transmission Organization status, the Commission required that PJM expand the Regional Transmission Expansion Plan Protocol for designating construction and ownership of new Plan facilities beyond incumbent owners and merchant projects, to permit meaningful participation by non-merchant third party developers. *See* Primary Power Rehearing Order PP 38-39, JA 338 (quoting portions of *PJM Interconnection, L.L.C.*, 96 FERC ¶ 61,061 at 61,236, 61,241 (2001), and *PJM Interconnection, L.L.C.*, 101 FERC ¶ 61,345 P 20 (2002)). Based on these directives, PJM filed section 1.5.7 of the Operating Agreement, to provide for the construction of

economic projects under cost-of-service rates. *Id*. P 40 & n.63, JA 338. Section 1.5.7, therefore, was intended to permit participation in the Regional Transmission Expansion Plan by independent transmission developers that did not wish to follow the merchant transmission business model. Central Transmission Rehearing Order P 17 & n.20, JA 458 (citing *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,218 P 6 (2006) (approving revisions to section 1.5.7 and noting potential for transmission developers to seek incentive, *i.e.*, cost-based, rate treatment for economic upgrades)). Consistent with this history, the Commission reasonably interpreted the phrase "entity or entities" to include non-incumbent developers. Primary Power Rehearing Order P 42, JA 338.

Significantly, Incumbent Owners nowhere in their brief dispute the Commission's finding regarding its prior directives to PJM, nor the finding that PJM's tariff must be implemented in a non-discriminatory fashion. *See* Primary Power Rehearing Order PP 5, 80, 89-90, JA 332, 345, 346-47; Primary Power Declaratory Order PP 62, 65, JA 220. Given the ambiguity in the provisions of the PJM tariff and, in particular, the governing provision here, section 1.5.7 of the Regional Transmission Expansion Plan Protocol, these findings amply support the Commission's orders.

On brief, Incumbent Owners now contend that the "entity or entities" that the PJM Board may designate under section 1.5.7(c)(iii) includes only incumbent

transmission owners. Br. 66-67. However, Incumbent Owners never raised this argument to the Commission; neither the PJM Transmission Owners' request for rehearing in Primary Power, nor Public Service's requests for rehearing in Primary Power or Central Transmission, even mentions the interpretation of the term "entity or entities" in Section 1.5.7(c)(iii). Both the PJM Transmission Owners and Public Service argued on rehearing in Primary Power that the phrase "or other entities" in section 1.5.6 of the Protocol refers to merchant transmission. *See* Public Service Primary Power Request for Rehearing at 9-12, JA 308-11; PJM Transmission Owners' Primary Power Request for Rehearing at 24-25, JA 258-59. The Commission found that this interpretation of "entities" could not apply to Section 1.5.7(c)(iii), as merchant transmission providers are not subject to the section 1.5.7(d) cost-benefit test, but instead are processed as market solutions under section 1.5.7(j) as alternatives to economic projects. Primary Power Rehearing Order PP 48, 54 & n.78, JA 340, 341.

In any event, Incumbent Owners' arguments regarding the meaning of "entity or entities" in section 1.5.7(c)(iii) at best do nothing more than demonstrate the ambiguity of the Regional Transmission Expansion Plan Protocol. *See* Primary Power Rehearing Order P 35, JA 337. Notably, while Incumbent Owners argue that "entity or entities" must be construed to apply only to Transmission Owners, Br. 66-67, provisions of the Protocol expressly refer to "entities" that are separate

from "Transmission Owners." Section 1.5.6(f), JA 471, for example, expressly refers to "Transmission Owners or other entities" designated to construct plan expansions. *See* Primary Power Declaratory Order P 64, JA 220. *See also* section 1.7(a), JA 483 (referring to "an entity other than a Transmission Owner" that is designated to construct plan expansions). Thus, the Commission reasonably found the section 1.5.7(c)(iii) reference to the "entity or entities" ambiguous and interpreted it consistently with the Commission's prior orders and the anti-discrimination mandate of the Federal Power Act.

2. Section 1.5.6 Is Consistent With The Commission's Interpretation of Section 1.5.7.

Incumbent Owners assert that a sentence in section 1.5.6(f) of the Regional Transmission Expansion Plan Protocol, JA 471, establishes a right of first refusal. Br. 57-62. That sentence states: "To the extent that one or more Transmission Owners are designated to construct, own or finance a recommended transmission enhancement or expansion, the recommended plan shall designate the Transmission Owner that owns the transmission facilities located in the Zone where the particular enhancement or expansion is to be located."

The Commission found that this sentence in section 1.5.6 does not control the designations of economic projects under section 1.5.7, a separate provision. Primary Power Rehearing Order P 52, JA 340. The sentence does not refer to proposals for economic projects which are designated in accordance with the

economic project provisions, section 1.5.7. *Id.*; Central Transmission Rehearing Order P 18, JA 458. Indeed, section 1.5.6(d), JA 471, specifies that "the recommended plan shall identify" economically-justified projects, which "shall be developed in accordance with the procedures, criteria and analyses described in Section 1.5.7 below." Primary Power Rehearing Order PP 50, 52, JA 340. Thus, Incumbent Owners err in arguing that section 1.5.6(d) requires only that "PJM *identify* economic expansions," and does not reference other provisions of section 1.5.7, including the designation procedures. *See* Br. 60.

Further, even if section 1.5.6(f) controls the designation of entities to build economic projects despite the specific provisions of section 1.5.7, section 1.5.6(f) expressly permits PJM to designate "Transmission Owners or other entities" to construct projects. Primary Power Rehearing Order P 53, JA 341. *See also id.* PP 17, 50, JA 334, 340; Primary Power Declaratory Order P 64, JA 220. The "or other entities" language permits PJM to designate non-incumbent developers to construct plan projects. Primary Power Declaratory Order P 64, JA 220. In contrast, the sentence on which Incumbent Owners rely by its terms applies only "to the extent that one or more Transmission Owners are designated." Primary Power Rehearing Order P 18, JA 335; Primary Power Declaratory Order P 65, JA 220. The "to the extent" clause thus does not provide for reassignment of projects when PJM designates "other entities" to construct. Primary Power Rehearing

Order P 18, JA 335; Primary Power Declaratory Order P 65, JA 220. Accordingly, the Commission found that section 1.5.6 does not conflict with, and in fact is consistent with, the Commission's interpretation of 1.5.7. Primary Power Rehearing Order P 50, JA 340.

Incumbent Owners complain that the Commission's interpretation is irrational, Br. 59-60, because, once a non-incumbent developer constructs a project, it will become a Transmission Owner subject to the 1.5.6(f) "to the extent" clause. As the Commission pointed out, however, owners of merchant transmission facilities currently become PJM transmission owners when their facilities go into service in the same manner. Primary Power Rehearing Order P 47 n.74, JA 340.

3. Section 1.5.6(g) Does Not Bar Cost-Based Rates For Non-Incumbent Economic Projects.

Section 1.5.7(c)(iii) of the Protocol, JA 475, provides that PJM will designate "the market participants that will bear responsibility" for the costs of economic expansions "pursuant to section 1.5.6(g) of Schedule 6." Section 1.5.6(g), JA 472, provides in part that, "with respect to any facilities that the [Regional Transmission Expansion Plan] designates to be owned by an entity other than a Transmission Owner, the plan shall designate that entity as responsible for the cost of such facilities." Primary Power Rehearing Order P 55, JA 341.

Incumbent Owners assert that this provision is a "flat bar on cost-based rates for any entity that is not a zonal Transmission Owner." Br. 68.

The Commission rejected this argument. "[G]iven the convoluted construction of these provisions of the PJM Operating Agreement, we cannot find that this one sentence imposes a limitation on the designation of non-incumbents to construct transmission facilities under the economic project development provisions of section 1.5.7 which permits such designations." Primary Power Rehearing Order P 56, JA 341. First, the Commission observed that section 1.5.7(c)(iii) governs cost allocations for economic projects, and it authorizes PJM to designate "the market participants" that will bear cost responsibility pursuant to 1.5.6(g). Central Transmission Rehearing Order P 18, JA 458. Further, section 1.5.6(g) does not refer to current "Transmission Owners," but rather to the designation of a project "to be owned by an entity other than a Transmission Owner." Primary Power Rehearing Order P 57, JA 341. This refers to the future status of the entity when the project is completed; Primary Power would be a PJM Transmission Owner if its project is completed. *Id*. This finding does not, moreover, conflict with the Commission's finding that Primary Power would be an "entity" and not a "Transmission Owner" under section 1.5.6(f). Br. 69, 71. A non-incumbent developer building transmission facilities will become a

transmission owner only when its facilities go into service. *See* Primary Power Rehearing Order P 47 n.74, JA 340.

Fundamentally, the Commission found that reading section 1.5.6 as limiting non-incumbents to merchant transmission projects ignores the fact that the Commission required, and section 1.5.7 accordingly provides, that entities other than incumbent transmission owners can propose and construct economic projects. *Id.* P 56, JA 341. Given the Commission's requirements for PJM to open its economic planning process to non-incumbents and the imprecision in the tariff terms used, the Commission could not find that the provisions relied upon by Incumbent Owners take precedence over the provision in section 1.5.7 that permits any participant to propose to construct an economic project, and to be so designated. Primary Power Rehearing Order P 57, JA 341.

B. The Commission Reasonably Rejected Incumbent Owners' Arguments Based Upon Purported Pre-existing Rights And The Transmission Owners Agreement.

For their part, Incumbent Owners argue that they possess an exclusive right to build planned cost-of-service transmission in their zones that "pre-dates" the formation of PJM, and that the PJM Transmission Owners Agreement reflects the "understanding" that incumbent transmission owners did not surrender this right. Br. 41-42. *See* Primary Power Rehearing Order P 58, JA 342. None of Incumbent Owners' arguments in support of this proposition, *see* Br. 40-55, has any merit.

First, the Commission rejected the argument that Incumbent Owners possessed a right of first refusal "pre-dating" PJM, or one preserved or created in the PJM tariff, finding no "tacit agreement or [] contractual bargain providing a right of first refusal for economic projects." Primary Power Rehearing Order P 59, JA 342. *See also id*. P 70, JA 343 (finding that nothing in the Federal Power Act nor in the PJM tariff or governing agreements "provided transmission owners with the absolute right to bar a third party from constructing facilities within a transmission owner's historic state defined zone"). Notably, Incumbent Owners on brief cite no authority or support for this alleged pre-existing right of first refusal other than citations to their own rehearing requests. *See* Br. 41 (citing PJM Transmission Owners Primary Power Request for Rehearing at 32-33, JA 266-67; Public Service Primary Power Request for Rehearing at 8, JA 307). The rehearing requests cite no authority to support this proposition.

Absent a pre-existing right of first refusal, Primary Power Rehearing Order PP 58, 70, JA 342, 343, the provisions of Article 5 of the Transmission Owners Agreement cannot have preserved that right. *See* Br. 41, 50, 52 (citing Transmission Owners Agreement section 5.6, JA 523 (preserving "rights not specifically transferred by the Parties to PJM"), and section 5.4, JA 521 (preserving "rights pursuant to the Federal Power Act and the FERC's rules and regulations thereunder")). Section 5.2, JA 519, Br. 50-52, preserves a transmission

owner's "right to build, finance, own, acquire, sell, dispose, retire, merge or otherwise transfer or convey all or any part of its assets, including any Transmission Facilities." This provision preserves only a transmission owner's right to construct and control its own assets; the provision does not guarantee a transmission owner the right to construct all assets in a defined zone or geographic area. Primary Power Rehearing Order P 61, JA 342. Incumbent Owners concede that "[s]tanding alone, that is true." Br. 51.

Incumbent Owners assert that the Transmission Owners Agreement contemplates only incumbent transmission owners and merchant transmission, and cannot be read to accommodate non-incumbent developers constructing cost-of-service economic projects. Br. 45-50. While the Transmission Owners Agreement is, not surprisingly, limited to "those entities that own . . . Transmission Facilities," Transmission Owners Agreement section 1.28, JA 493, Br. 47, the Commission found that, like merchant transmission, non-incumbent developers will become PJM Transmission Owners upon completion of their facilities. Primary Power Rehearing Order P 47 n.74, JA 340. While non-incumbent developers are not yet "Parties" to the Transmission Owners Agreement, Br. 47, nothing in that Agreement precludes PJM from designating non-incumbent developers to build economic projects and to become parties to that agreement.

Article 4.2 of the Transmission Owners Agreement, JA 509-12, entitled "Obligation to Build," does not preclude PJM from designating non-incumbent developers to build economic projects. Br. 45-50. As the Commission found, the obligation to build set out in section 4.2.1, JA 510, Br. 45-48, by its terms, does not convey a right of first refusal or any other reservation of rights to construct cost-of-service economic projects. Primary Power Rehearing Order P 60, JA 342. The obligation to construct if designated does not limit PJM's ability to decide who to designate to construct economic projects consistent with section 1.5.7(c)(iii). *Id*. The obligation to build does not apply to economic construction under section 1.5.7(c)(iii). *Id*. Incumbent Owners assert that 4.2.1 does not distinguish between reliability and economic projects, Br. 47, but the 4.2.1 obligation to build expressly is subject to "other conditions or exceptions set forth in the Regional Transmission Expansion Planning Protocol," which permits transmission owners to decline to construct section 1.5.7 economic projects. *See* Primary Power Rehearing Order P 59, JA 342 (citing Section 1.5.7(c)(iii) of the Protocol, JA 475). *See also* section 1.7(d) of the Protocol, JA 483.

Incumbent Owners also contend that section 7.4 of the Transmission Owners Agreement, JA 548, which prohibits the creation of new transmission rate zones, "further crystallizes the exclusive rights of incumbent Transmission Owners." Br. 54. The Commission rejected the contention that this provision prevents Primary

Power from constructing a cost-of-service project. Primary Power Rehearing Order P 62, JA 342. The inclusion of a cost-based economic project does not require the construction of a new rate zone, *id*., a fact that Incumbent Owners concede is true. Br. 55.

Last, Incumbent Owners make several arguments premised upon certain transmission owner filing rights set forth in Article 7 of the Transmission Owners Agreement. Br. 53-55 (citing section 7.1.1. JA 533 (transmission owner's right to file transmission revenue requirement for its own transmission facilities); section 7.1.3, JA 535 (transmission owner's right to file rates for transmission and ancillary services within its zone); section 7.3.4, JA 544 (transmission owners' collective filing rights with respect to changes to certain tariff provisions); and section 7.3.5, JA 545 (transmission owner's individual filing rights with respect to certain tariff provisions)). None of these sections is cited, let alone discussed, in Incumbent Owners' rehearing requests, and thus the Court lacks jurisdiction to consider them. As this Court has recognized, the failure to even cite a tariff provision on which petitioner now relies does not result in a cognizable argument. *Constellation Energy Commodities Grp., Inc. v. FERC*, 457 F.3d 14, 21 (D.C. Cir. 2006). *See also Intermountain Mun. Gas Agency v. FERC*, 326 F.3d 1281, 1286 n.7 (D.C. Cir. 2003) (statutory objection not adequately raised where rehearing request did not even cite the statute).

In any event, the Commission concluded that its action in the challenged orders in no way deprived transmission owners of their Federal Power Act section 205 filing rights, in contravention of *Atlantic City*, 295 F.3d 1. Primary Power Rehearing Order P 69, JA 343. Each transmission owner remains able to make its own filing to recover costs for its own facilities. *Id*. Incumbent Owners complain that the Commission orders change the *status quo* as only incumbent transmission owners in the past have filed for cost-based rates. Br. 54-55. However, as the Commission found, neither the Federal Power Act nor the PJM tariff provides transmission owners with a right of first refusal to preclude designation of other entities to build cost-of-service economic projects. Primary Power Rehearing Order P 70, JA 343.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the petition for review be dismissed for lack of standing or ripeness. Should the Court proceed to the merits, the Commission requests that the petition be denied and that the orders on appeal be upheld in all respects.

Respectfully submitted,

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April 10, 2013

Pub. Serv. Elec. and Gas Co. v. FERC,
No. 12-1382

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief contains 10,778 words, including the charts attached hereto as Exhibit A, and not including the tables of contents and authorities, the glossary, the certificate of counsel and this certificate.

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April 10, 2013

EXHIBIT A

THE REGIONAL TRANSMISSION EXPANSION PLAN PROTOCOL

Section 1.5.6: Development of the Recommended Regional Transmission Expansion Plan

1.5.6(d)	The Plan "shall identify" economic projects. "Such economic expansions and enhancements shall be developed in accordance with the procedures, criteria and analyses described in Section 1.5.7 below."	JA 471
1.5.6(f)	The Plan shall "designate one or more Transmission Owners or other entities to construct" each project included in the Plan. "To the extent that one or more Transmission Owners are designated to construct" a project, the Plan "shall designate the Transmission Owner that owns the transmission facilities located in the Zone" where the project is to be located.	JA 471
1.5.6(g)	"[W]ith respect to any facilities that the Regional Transmission Expansion Plan designates to be owned by an entity other than a Transmission Owner, the plan shall designate that entity as responsible for the costs of such facilities."	JA 472

Section 1.5.7: Development of Economic Transmission Enhancements and Expansions

1.5.7(c)(iii)	"Any market participant" may propose an economic project. The PJM Board shall designate: "the entity or entities" responsible for constructing approved economic projects, and "the market participants that will bear responsibility" for the costs of economic expansions "pursuant to section 1.5.6(g)."	JA 475
1.5.7(d)	Cost/benefit analysis for selecting economic projects	JA 475
1.5.7(j)	Procedures for merchant solutions to economic constraints	JA 479

Section 1.7: Obligation to Build

1.7(a)	Subject to specified conditions, "Transmission Owners designated as the appropriate entities to construct" projects in the Plan shall "fulfill such obligations." "However, nothing herein shall require any Transmission Owner to construct" projects "for which the plan designates an entity other than a Transmission Owner as the appropriate entity to construct" such project.	JA 483
1.7(d)	"In the event that a Transmission Owner declines to construct an economic transmission enhancement or expansion developed under Sections 1.5.6(d) and 1.5.7 of this Schedule 6 that such Transmission Owner is designated by the Regional Transmission Expansion Plan to construct," PJM "shall promptly file with the FERC a report on the results of the pertinent economic planning process in order to permit the FERC to determine what action, if any, it should take."	JA 483

THE TRANSMISSION OWNERS AGREEMENT

Article 1: Definitions

1.28	"Transmission Owners shall mean those entities that own or lease (with rights equivalent to ownership) Transmission Facilities."	JA 493

Article 4: Section 4.2 Obligation to Build

4.2.1	Subject to conditions, including "other conditions or exceptions set forth in the Regional Transmission Expansion Planning Protocol," "Parties designated as the appropriate entities to construct" Plan projects "shall construct and own or finance such facilities or enter into appropriate contracts to fulfill such obligations."	JA 510
4.2.2	Within 90 days of receiving notification of designation to construct, the Party shall acknowledge the designation and "the reasons why the Party disagrees with such designation or any aspect thereof," and propose a preliminary schedule.	JA 511

Article 5: Parties' Retained Rights

5.2	"Each Party shall have the right to build, finance, own, acquire, sell, dispose, retire, merge or otherwise transfer or convey all or any part of its assets, including any Transmission Facilities."	JA 519
5.4	"Except as otherwise provided in this Agreement, each Party retains its rights pursuant to the Federal Power Act and FERC's rules and regulations thereunder."	JA 521
5.6	"Rights not specifically transferred by the Parties to PJM pursuant to this Agreement or any other agreement are expressly reserved by the Parties."	JA 523

Article 7: Section 7.4 Transmission Rate Zone Size

7.4	"For purposes of developing rates for service under the PJM Tariff, transmission rate Zones smaller than those shown in Attachment J to the PJM Tariff, or subzones of those Zones, shall not be permitted within the current boundaries of the PJM Region."	JA 548

ADDENDUM

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STATUTES:

REGULATION:

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).

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

(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

ation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

(June 10, 1920, ch. 285, pt. III, § 311, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859.)

§ 825k. Publication and sale of reports

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and is authorized to sell at reasonable prices copies of all maps, atlases, and reports as it may from time to time publish. Such reasonable prices may include the cost of compilation, composition, and reproduction. The Commission is also authorized to make such charges as it deems reasonable for special statistical services and other special or periodic services. The amounts collected under this section shall be deposited in the Treasury to the credit of miscellaneous receipts. All printing for the Federal Power Commission making use of engraving, lithography, and photolithography, together with the plates for the same, shall be contracted for and performed under the direction of the Commission, under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe, and all other printing for the Commission shall be done by the Public Printer under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe. The entire work may be done at, or ordered through, the Government Printing Office whenever, in the judgment of the Joint Committee on Printing, the same would be to the interest of the Government: *Provided*, That when the exigencies of the public service so require, the Joint Committee on Printing may authorize the Commission to make immediate contracts for engraving, lithographing, and photolithographing, without advertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

(June 10, 1920, ch. 285, pt. III, § 312, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859.)

CODIFICATION

"Sections 1535 and 1536 of title 31" substituted in text for "sections 601 and 602 of the Act of June 30, 1932 (47 Stat. 417 [31 U.S.C. 686, 686b])" on authority of Pub. L. 97–258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

§ 825*l*. Review of orders

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

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

(b) Judicial review

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

hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

(b) Writs of mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Prohibitions on violators

In any proceedings under subsection (a) of this section, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 824u of this title (and related rules and regulations) from—

(1) acting as an officer or director of an electric utility; or

(2) engaging in the business of purchasing or selling—

(A) electric energy; or

(B) transmission services subject to the jurisdiction of the Commission.

(June 10, 1920, ch. 285, pt. III, § 314, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 861; amended June 25, 1936, ch. 804, 49 Stat. 1921; June 25, 1948, ch. 646, § 32(b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 109–58, title XII, § 1288, Aug. 8, 2005, 119 Stat. 982.)

CODIFICATION

As originally enacted subsecs. (a) and (b) contained references to the Supreme Court of the District of Columbia. Act June 25, 1936, substituted ''the district court of the United States for the District of Columbia'' for ''the Supreme Court of the District of Columbia'', and act June 25, 1948, as amended by act May 24, 1949, substituted ''United States District Court for the District of Columbia'' for ''district court of the United States for the District of Columbia''. However, the words ''United States District Court for the District of Columbia'' have been deleted entirely as superfluous in

(c) To the extent that the Trustee does not currently require the assets of the Fund for the purposes described in paragraphs (b)(1) and (b)(2) of this section, the Investment Manager, when investing Fund assets, must exercise the same standard of care that a reasonable person would exercise in the same circumstances. In this context, a ''reasonable person'' means a prudent investor as described in Restatement of the Law (Third), Trusts § 227, including general comments and reporter's notes, pages 8–101. St. Paul, MN: American Law Institute Publishers, 1992. ISBN 0–314–84246–2. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the American Law Institute, 4025 Chestnut Street, Philadelphia, PA 19104, and are also available in local law libraries. Copies may be inspected at the Federal Energy Regulatory Commission, 888 First Street, NE. Washington, DC or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html*.

(d) The utility must submit to the Commission by March 31 of each year, one original and three conformed copies of the financial report furnished to the utility by the Fund's Trustee that shows for the previous calendar year:

(1) Fund assets and liabilities at the beginning of the period;

(2) Activity of the Fund during the period, including amounts received from the utility, a summary amount for purchases of fund investments and a summary amount for sales of fund investments, gains and losses from investment activity, disbursements from the Fund for decommissioning activity and payment of Fund expenses, including taxes; and

(3) Fund assets and liabilities at the end of the period. The report should not include the liability for decommissioning.

(4) Public utilities owning nuclear plants must maintain records of individual purchase and sales transactions until after decommissioning has been completed and any excess jurisdictional amounts have been returned to ratepayers in a manner that the Commission determines. The public utility need not include these records in the financial report that it furnishes to the Commission by March 31 of each year.

(e) The utility must also mail a copy of the financial report provided to the Commission pursuant to paragraph (d) of this section to anyone who requests it.

(f) If an independent public accountant has expressed an opinion on the report or on any portion of the report, then that opinion must accompany the report.

[Order 580–A, 62 FR 33348, June 19, 1997, as amended at 69 FR 18803, Apr. 9, 2004; Order 658, 70 FR 34343, June 14, 2005; Order 737, 75 FR 43404, July 26, 2010]

Subpart F—Procedures and Requirements Regarding Regional Transmission Organizations

§ 35.34 Regional Transmission Organizations.

(a) *Purpose.* This section establishes required characteristics and functions for Regional Transmission Organizations for the purpose of promoting efficiency and reliability in the operation and planning of the electric transmission grid and ensuring non-discrimination in the provision of electric transmission services. This section further directs each public utility that owns, operates, or controls facilities used for the transmission of electric energy in interstate commerce to make certain filings with respect to forming and participating in a Regional Transmission Organization.

(b) *Definitions.* (1) *Regional Transmission Organization* means an entity that satisfies the minimum characteristics set forth in paragraph (j) of this section, performs the functions set forth in paragraph (k) of this section, and accommodates the open architecture condition set forth in paragraph (l) of this section.

(2) *Market participant* means:

(i) Any entity that, either directly or through an affiliate, sells or brokers electric energy, or provides ancillary services to the Regional Transmission Organization, unless the Commission

must have authority to approve or disapprove all requests for scheduled outages of transmission facilities to ensure that the outages can be accommodated within established reliability standards.

(iv) If the Regional Transmission Organization operates under reliability standards established by another entity (*e.g.*, a regional reliability council), the Regional Transmission Organization must report to the Commission if these standards hinder it from providing reliable, non-discriminatory and efficiently priced transmission service.

(k) *Required functions of a Regional Transmission Organization.* The Regional Transmission Organization must perform the following functions. Unless otherwise noted, the Regional Transmission Organization must satisfy these obligations when it commences operations.

(1) *Tariff administration and design.* The Regional Transmission Organization must administer its own transmission tariff and employ a transmission pricing system that will promote efficient use and expansion of transmission and generation facilities. As part of its demonstration with respect to tariff administration and design, the Regional Transmission Organization must satisfy the standards listed in paragraphs (k)(1)(i) and (ii) of this section, or demonstrate that an alternative proposal is consistent with or superior to satisfying such standards.

(i) The Regional Transmission Organization must be the only provider of transmission service over the facilities under its control, and must be the sole administrator of its own Commission-approved open access transmission tariff. The Regional Transmission Organization must have the sole authority to receive, evaluate, and approve or deny all requests for transmission service. The Regional Transmission Organization must have the authority to review and approve requests for new interconnections.

(ii) Customers under the Regional Transmission Organization tariff must not be charged multiple access fees for the recovery of capital costs for transmission service over facilities that the Regional Transmission Organization controls.

(2) *Congestion management.* The Regional Transmission Organization must ensure the development and operation of market mechanisms to manage transmission congestion. As part of its demonstration with respect to congestion management, the Regional Transmission Organization must satisfy the standards listed in paragraph (k)(2)(i) of this section, or demonstrate that an alternative proposal is consistent with or superior to satisfying such standards.

(i) The market mechanisms must accommodate broad participation by all market participants, and must provide all transmission customers with efficient price signals that show the consequences of their transmission usage decisions. The Regional Transmission Organization must either operate such markets itself or ensure that the task is performed by another entity that is not affiliated with any market participant.

(ii) The Regional Transmission Organization must satisfy the market mechanism requirement no later than one year after it commences initial operation. However, it must have in place at the time of initial operation an effective protocol for managing congestion.

(3) *Parallel path flow.* The Regional Transmission Organization must develop and implement procedures to address parallel path flow issues within its region and with other regions. The Regional Transmission Organization must satisfy this requirement with respect to coordination with other regions no later than three years after it commences initial operation.

(4) *Ancillary services.* The Regional Transmission Organization must serve as a provider of last resort of all ancillary services required by Order No. 888, FERC Statutes and Regulations, Regulations Preamble January 1991–June 1996 ¶ 31,036 (Final Rule on Open Access and Stranded Costs; see 61 FR 21540, May 10, 1996), and subsequent orders. As part of its demonstration with respect to ancillary services, the Regional Transmission Organization must

satisfy the standards listed in paragraphs (k)(4)(i) through (iii) of this section, or demonstrate that an alternative proposal is consistent with or superior to satisfying such standards.

(i) All market participants must have the option of self-supplying or acquiring ancillary services from third parties subject to any restrictions imposed by the Commission in Order No. 888, FERC Statutes and Regulations, Regulations Preamble January 1991–June 1996 ¶ 31,036 (Final Rule on Open Access and Stranded Costs), and subsequent orders.

(ii) The Regional Transmission Organization must have the authority to decide the minimum required amounts of each ancillary service and, if necessary, the locations at which these services must be provided. All ancillary service providers must be subject to direct or indirect operational control by the Regional Transmission Organization. The Regional Transmission Organization must promote the development of competitive markets for ancillary services whenever feasible.

(iii) The Regional Transmission Organization must ensure that its transmission customers have access to a real-time balancing market. The Regional Transmission Organization must either develop and operate this market itself or ensure that this task is performed by another entity that is not affiliated with any market participant.

(5) *OASIS and Total Transmission Capability (TTC) and Available Transmission Capability (ATC).* The Regional Transmission Organization must be the single OASIS site administrator for all transmission facilities under its control and independently calculate TTC and ATC.

(6) *Market monitoring.* To ensure that the Regional Transmission Organization provides reliable, efficient and not unduly discriminatory transmission service, the Regional Transmission Organization must provide for objective monitoring of markets it operates or administers to identify market design flaws, market power abuses and opportunities for efficiency improvements, and propose appropriate actions. As part of its demonstration with respect to market monitoring, the Regional Transmission Organization must satisfy the standards listed in paragraphs (k)(6)(i) through (k)(6)(iii) of this section, or demonstrate that an alternative proposal is consistent with or superior to satisfying such standards.

(i) Market monitoring must include monitoring the behavior of market participants in the region, including transmission owners other than the Regional Transmission Organization, if any, to determine if their actions hinder the Regional Transmission Organization in providing reliable, efficient and not unduly discriminatory transmission service.

(ii) With respect to markets the Regional Transmission Organization operates or administers, there must be a periodic assessment of how behavior in markets operated by others (*e.g.*, bilateral power sales markets and power markets operated by unaffiliated power exchanges) affects Regional Transmission Organization operations and how Regional Transmission Organization operations affect the efficiency of power markets operated by others.

(iii) Reports on opportunities for efficiency improvement, market power abuses and market design flaws must be filed with the Commission and affected regulatory authorities.

(7) *Planning and expansion.* The Regional Transmission Organization must be responsible for planning, and for directing or arranging, necessary transmission expansions, additions, and upgrades that will enable it to provide efficient, reliable and non-discriminatory transmission service and coordinate such efforts with the appropriate state authorities. As part of its demonstration with respect to planning and expansion, the Regional Transmission Organization must satisfy the standards listed in paragraphs (k)(7)(i) and (ii) of this section, or demonstrate that an alternative proposal is consistent with or superior to satisfying such standards.

(i) The Regional Transmission Organization planning and expansion process must encourage market-driven operating and investment actions for preventing and relieving congestion.

(ii) The Regional Transmission Organization's planning and expansion process must accommodate efforts by state regulatory commissions to create

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

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

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

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

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

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

Subpart G—Transmission Infrastructure Investment Provisions

§ 35.35 Transmission infrastructure investment.

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

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

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

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

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

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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 10th day of April 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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