13-2316

In The United States Court Of Appeals
For The Second Circuit

PEOPLE OF THE STATE OF NEW YORK AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
PETITIONERS,

V.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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Association	Intervenor (for Petitioners) National Association of Regulatory Utility Commissioners (commonly called NARUC)
Commission or FERC	Respondent Federal Energy Regulatory Commission
FPA	Federal Power Act
Modernization Act	Electricity Modernization Act of 2005, enacted in the Energy Policy Act of 2005, Pub. L. No. 109-58, Title XII, 119 Stat. 594, 941 (2005) (codified at 16 U.S.C. § 824, *et seq.*)
New York	Collectively, Petitioners People of the State of New York and the Public Service Commission of the State of New York
Order No. 743	*Revision to Electric Reliability Organization Definition of Bulk Electric System*, Order No. 743, 133 FERC ¶ 61,150 (2010), *order on reh'g*, Order No. 743-A, 134 FERC ¶ 61,210 (2011)
Order No. 773	*Revisions to Electric Reliability Organization Definition of Bulk Electric System and Rules of Procedure*, Order No. 773, 141 FERC ¶ 61,236 (Dec. 20, 2012), R. 83, JA 139, on review in this case
Order No. 773-A	*Revisions to Electric Reliability Organization Definition of Bulk Electric System and Rules of Procedure*, Order No. 773-A, 143 FERC ¶ 61,053 (Apr. 18, 2013), R. 103, JA 3, on review in this case

GLOSSARY

Order No. 888	*Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996) [subsequent history detailed at pp. 6-7 & note 3, *infra*]
Reliability Organization	Intervenor (for Respondent) North American Electric Reliability Corporation (commonly called NERC), which the Commission has certified as the Electric Reliability Organization as defined in Federal Power Act section 215(a)(2)

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PEOPLE OF THE STATE OF NEW YORK AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
***PETITIONERS*,**

v.

FEDERAL ENERGY REGULATORY COMMISSION,
***RESPONDENT*.**

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

In 2005, in the aftermath of a widespread blackout, Congress for the first time authorized the Federal Energy Regulatory Commission ("Commission" or "FERC") to oversee and enforce requirements to provide for reliable operation of the electrical grid. The orders on review represent a critical piece of the Commission's implementation of that mandate: a rulemaking that approved the criteria and process for identifying the facilities to be subject to those reliability

standards — the "bulk-power system" defined in the 2005 legislation. The questions presented on appeal are:

(1) Whether the Commission, in approving a multi-step process to identify facilities constituting the "bulk-power system," included an appropriate procedure to implement the statute's exclusion of "facilities used in local distribution," consistent with court and Commission precedents regarding local distribution determinations under the Federal Power Act; and

(2) Whether the Commission appropriately provided for state regulators to participate in the Commission's local distribution determinations.

STATUTES AND REGULATIONS

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

STATEMENT OF THE CASE

I. INTRODUCTION

This appeal seeks review of two orders in a series of rulemakings to implement new provisions of the Federal Power Act, reflecting a Congressional mandate to develop and enforce reliability standards for the operation of the electric grid. The instant orders concern a key piece of that implementation, as they finalize the process for defining the "bulk-power system" — that is, identifying all facilities that are included and thereby subject to the mandatory reliability standards and the enforcement mechanisms authorized by the statute.

Revisions to Electric Reliability Organization Definition of Bulk Electric System and Rules of Procedure, Order No. 773, 141 FERC ¶ 61,236 (Dec. 20, 2012), R. 83, JA 139, *on reh'g*, Order No. 773-A, 143 FERC ¶ 61,053 (Apr. 18, 2013), R. 103, JA 3.[1]

In this appeal, Petitioners People of the State of New York and the Public Service Commission of the State of New York (collectively, "New York") — representing a state that directly experienced the broad regional blackouts of 1965 (which gave rise to the development in 1968 of voluntary reliability standards) and 2003 (which spurred the 2005 legislation providing for mandatory reliability standards) — challenge the Commission's process for defining the elements comprising the bulk-power system.

More than 60 parties submitted comments in the rulemaking, and 12 sought agency rehearing. Only New York sought judicial review, supported by Intervenor National Association of Regulatory Utility Commissioners (the "Association"), and the only issues on appeal concern the Commission's process for excluding local distribution facilities from network reliability standards.

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[1] "R." refers to a record item. "P" refers to the internal paragraph number within a FERC order. "JA" refers to a page in the Joint Appendix. "NY Br." refers to Petitioners' opening brief; "Ass'n Br." refers to the opening brief of the Intervenor in support of Petitioners.

II. STATEMENT OF FACTS

A. Statutory and Regulatory Background

1. Federal Power Act and Electricity Modernization Act

Section 201 of the Federal Power Act ("FPA") gives the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. 16 U.S.C. §§ 824(a)-(b). This grant of jurisdiction is comprehensive and exclusive. *See generally New York v. FERC*, 535 U.S. 1 (2002) (discussing statutory framework and FERC jurisdiction). The Commission, however, "shall not have jurisdiction, except as specifically provided . . . , over facilities used in local distribution . . . ." FPA § 201(b)(1), 16 U.S.C. § 824(b)(1).

The Electricity Modernization Act of 2005 ("Modernization Act"), enacted as Title XII of the Energy Policy Act of 2005, included amendments to the Federal Power Act that ranged from transmission siting and operation to market transparency and consumer protection. *See* Energy Policy Act of 2005, Pub. L. No. 109-58, Title XII, 119 Stat. 594, 941 (2005) (codified at 16 U.S.C. § 824, *et seq.*). *See generally S.C. Pub. Serv. Auth. v. FERC*, Nos. 12-1232, *et al.*, 2014 WL 3973116, at *3 (D.C. Cir. Aug. 15, 2014) ("*South Carolina*") (summarizing new provisions). Subtitle A, "Reliability Standards," added a new section 215 to the Federal Power Act. Pub. L. No. 109-58, § 1211, 119 Stat. at 941 (codified at 16 U.S.C. § 824*o*). Section 215 authorizes the Commission to certify and oversee an

Electric Reliability Organization, which will develop and enforce reliability standards for the "bulk-power system." FPA § 215(c)-(g), 16 U.S.C. § 824*o*(c)-(g); *see South Carolina*, 2014 WL 3973116, at *31 (discussing Commission's authority under new section 215). Section 215(a)(1) defines "bulk-power system" as the "facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof)" and "electric energy from generation resources needed to maintain transmission system reliability." 16 U.S.C. § 824*o*(a)(1).[2] The term, however, "does not include facilities used in the local distribution of energy." *Id.*

Sections 215(d) and (f) require the certified Electric Reliability Organization to file all proposed reliability standards or rules, or any modifications thereto, with the Commission, which may approve such standards if it finds them to be "just, reasonable, not unduly discriminatory or preferential, and in the public interest." 16 U.S.C. §§ 824*o*(d)(1)-(2), (f). The Commission also may change a rule on its own initiative or on a third-party complaint. *Id.* § 824*o*(f).

[2] This brief uses the terms "bulk-power system" and "bulk electric system" interchangeably. (Though the former is the statutory definition introduced by Modernization Act and the latter is a term of art familiar to the Commission and the industry, any distinction between them is not relevant for purposes of this brief.)

2. The "Seven-Factor Test" to Determine Local Distribution

Since the 1970s, the expansion of vast transmission networks and the possibility of long distance transmission have enabled electric utilities to make large transfers of electricity across regions. *See New York*, 535 U.S. at 7-8 (explaining evolution of competitive markets and regional grids); *South Carolina*, 2014 WL 3973116, at *16 (noting that Commission's jurisdiction under Federal Power Act section 201 "has expanded over time because transmissions on the interconnected grids that have now developed 'constitute transmissions in interstate commerce'") (citation omitted).

In 1996, the Commission issued a landmark rulemaking, known as Order No. 888,[3] that ordered functional unbundling of wholesale generation and transmission services, requiring utilities to provide open, non-discriminatory access to their transmission facilities to competing suppliers. *See New York*, 535 U.S. at 11-13 (summarizing Order No. 888). That rulemaking was upheld, in all material respects, by the D.C. Circuit and the Supreme Court. *See Transmission*

[3] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998).

Access Policy Study Grp. v. FERC, 225 F.3d 667 (D.C. Cir. 2000) ("*Transmission Access*"), *aff'd sub nom. New York*, 535 U.S. 1.

Of particular relevance here, Order No. 888 addressed the Commission's method for identifying local distribution facilities to give effect to the jurisdictional exclusion in section 201 of the Federal Power Act. *See supra* p. 4 (explaining statutory framework). Noting that the Supreme Court had long held that "whether facilities are used in local distribution is a question of fact to be decided by the Commission as an original matter,"[4] and that no clear case law defined the line between transmission and local distribution, the Commission outlined the approach that it would use to make such determinations. Order No. 888 at p. 31,980. The Commission adopted a "combination functional-technical test that will take into account technical characteristics of the facilities," including seven "indicators":

> • Local distribution facilities are normally in close proximity to retail customers.
> • Local distribution facilities are primarily radial in character.
> • Power flows into local distribution systems[;] it rarely, if ever, flows out.
> • When power enters a local distribution system, it is not reconsigned or transported on to some other market.
> • Power entering a local distribution system is consumed in a comparatively restricted geographical area.
> • Meters are based at the transmission/local distribution interface to measure flows into the local distribution system.
> • Local distribution systems will be of reduced voltage.

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[4] *See* Part II.C of the Argument, *infra* (discussing case law).

Id. at p. 31,981.[5] The Commission also indicated that, in some cases, it would consider state regulators' recommendations as to where to draw the jurisdictional line. *See id.* at p. 31,784.

On rehearing, the Commission considered objections to its test (including those raised by New York and the Association) and reaffirmed its approach to its "fact-specific determination": "The seven-factor test is intended to provide sufficient flexibility to take into account unique local characteristics and historical usage of facilities used to serve retail customers." Order No. 888-A at p. 30,342.

The D.C. Circuit upheld Order No. 888 in "nearly all respects" (*Transmission Access*, 225 F.3d at 681), including the seven-factor test: "The [Federal Power Act] does not define 'facilities used in local distribution,' but instead leaves that task to FERC. As *Chevron* counsels us, FERC's interpretation of undefined and ambiguous statutory terms is entitled to deference." 225 F.3d at 696 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). The court went on to note that the Commission's approach "recognizes the current reality that many primarily retail utilities engage in both local distribution and interstate transmissions, and seeks through the seven factors

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[5] As to the voltage indicator, the Commission noted that, although various utilities' distinctions between transmission and distribution showed "no uniform breakpoint," utilities generally accounted for facilities over 30 kilovolts as transmission, and "distribution facilities are usually less than 40 kV." *Id.* n.100.

to discern each facility's primary function." *Id.*; *see also id.* ("We cannot agree with the state petitioners [including New York] that this approach is unreasonable or otherwise impermissible."). *See also Detroit Edison Co. v. FERC*, 334 F.3d 48, 50-51 (D.C. Cir. 2003) (summarizing the Commission's jurisdictional determinations, including the seven-factor test, in Order No. 888).

The Supreme Court likewise upheld the rulemaking, agreeing that the Commission "has not attempted to regulate local distribution facilities" but "has merely set forth a seven-factor test for identifying these facilities, without purporting to regulate them." *New York*, 535 U.S. at 23.

B. Blackouts and Reliability Standards

1. Large-Scale Blackouts and the Development (and Failures) of Voluntary Reliability Standards

Decades-long efforts to improve the reliable operation of the transmission network have, at several turns, been advanced in the aftermath of large-scale disruptions of the electricity supply. After the Northeast blackout of 1965, which affected New York and much of the Northeast, the electric industry established a voluntary reliability organization called the North American Electric Reliability Corporation. That organization developed guidelines for operating and planning the grid, but industry compliance was voluntary. *See* Notice of Proposed Rulemaking, *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement*

of Electric Reliability Standards, 112 FERC ¶ 61,239 at P 3 (2005) ("2005 Proposed Rulemaking").

Violations of those voluntary standards resulted in three large-scale disruptions in the decade before the Modernization Act was enacted. During July and August 1996, the West Coast region experienced two cascading blackouts; in August 2003, approximately 50 million people in the Northeast, Midwest, and Canada lost power. *See* 112 FERC ¶ 61,239 at PP 4-5. After each event, task force investigations concluded that the outages had been caused by violations of voluntary policies and called for legislation to make reliability standards mandatory and enforceable. *See id.* & nn. 2-5 (citing reports); *id.* at P 4 ("A common cause of the past three major regional blackouts was violation" of the voluntary standards.).

2. The Modernization Act of 2005 and the Development of Mandatory Reliability Standards

Before 2005, the Commission exercised its authority under the Federal Power Act as an economic regulator of wholesale power sales and interstate transmission, and tried to improve network reliability by promoting regional cooperation and planning and by adopting pricing policies and incentives. *See* 2005 Proposed Rulemaking, 112 FERC ¶ 61,239 at P 2. The addition of Federal Power Act section 215 by the Modernization Act gave the Commission new

authority to oversee the institution of mandatory reliability standards and to ensure their enforcement. *See id.*

In accordance with the legislation's direction to implement the requirements of FPA section 215 (*see* 16 U.S.C. § 824*o*(b)(2)), the Commission issued the 2005 Proposed Rulemaking, which suggested criteria for certifying an Electric Reliability Organization and procedures governing enforcement of reliability standards. The Commission subsequently issued a final rule establishing the selection and certification process[6] and then certified the North American Electric Reliability Corporation as the Electric Reliability Organization.[7]

The Commission then approved, "at least for an initial period," the Reliability Organization's existing definition of the bulk electric system, which included facilities that are generally operated at voltages of 100 kilovolts or higher, but expressed its continuing "concern[] about the need to address the potential for gaps in coverage of facilities" for purposes of enforcing reliability standards. *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC

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[6] *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

[7] *N. Am. Elec. Reliability Corp.*, 116 FERC ¶ 61,062, *order on reh'g and compliance*, 117 FERC ¶ 61,126 (2006), *aff'd sub nom. Alcoa Inc. v. FERC*, 564 F.3d 1342 (D.C. Cir. 2009).

Stats. & Regs. ¶ 31,242 at PP 75, 77, *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

To address that concern, the Commission issued a rule in 2010 requiring the Reliability Organization to revise its definition of the "bulk electric system." *Revision to Electric Reliability Organization Definition of Bulk Electric System*, Order No. 743, 133 FERC ¶ 61,150 (2010), *order on reh'g*, Order No. 743-A, 134 FERC ¶ 61,210 (2011). The Commission set forth its various technical concerns, and determined that the best way to prevent gaps was to eliminate regional discretion, institute a "bright-line threshold" of 100 kilovolts for most facilities, and establish a process and criteria to exclude facilities from the definition. *See* Order No. 743 at P 1. The Commission directed the Reliability Organization, using its established process for developing reliability standards, to revise the definition,[8] either adopting the Commission's proposed approach or developing an alternative proposal that would be at least as effective in addressing the Commission's concerns. *Id.*

[8] The Commision had previously held that definitions are standards, for purposes of Commission approval under FPA section 215(d). *See* Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 1893.

C. The FERC Proceedings and Orders

The Reliability Organization submitted two petitions in early 2012: (1) its proposed revision to its definition of "bulk electric system," using a "core" definition of facilities operating at 100 kilovolts or higher, with additional criteria to include certain facilities that fall below that threshold and to exclude certain facilities above that voltage; and (2) proposed revisions to its procedural rules to create an exception process to exclude an element from, or include it in, the bulk electric system. *See Revision to Electric Reliability Organization Definition of Bulk Electric System and Rules of Procedure*, Notice of Proposed Rulemaking, 139 FERC ¶ 61,247 at P 12 (2012). The Commission addressed the two petitions together, proposing to approve both the definition and the rules, and inviting comments from interested parties. *See id.* at PP 4-5. More than 60 comments were submitted. *See* Order No. 773 at P 30, JA 160; *id.* Appendix A (listing parties), JA 341-42.

1. Order No. 773

In December 2012, the Commission issued its final rule, accepting both of the Reliability Organization's proposals (with some modifications). Order No. 773 at PP 1-4, JA 143-45. The rule addressed numerous aspects of the system definition and process, most of which are not challenged on appeal but are relevant to the Commission's rulings on the disputed issues.

No Regional Variation. The Reliability Organization's previous system definition had allowed for broad regional discretion, among eight regional coordinating entities, to define the bulk electric system. *See* Order No. 743 at PP 8-10. The Commission noted that the Reliability Organization already applied a general 100-kilovolt threshold, as did all regional entities except the one that oversees the Northeast (including New York). Order No. 773 at P 42, JA 168. The Commission reiterated its previously-stated concerns about the methodology and results of the Northeast's approach (*id.* at PP 41-42, JA 166-68; *see also* Order No. 743 at PP 76-85), and concluded that a uniform definition would provide consistency and clarity (Order No. 773 at PP 38-39, JA 164-66).

Core Definition: Bright-Line Threshold. The Commission approved the use of a "100 kV bright line threshold" as the first step in identifying facilities. Order No. 773 at P 39, JA 165. Explaining that most facilities operated at 100 kilovolts or more are part of parallel networks with high voltage facilities and are necessary for reliable operation of the grid (*see id.* at P 40, JA 166), the Commission found the 100-kilovolt threshold was "a reasonable 'first step or proxy'" for identifying facilities to be included in the bulk electric system (*id.* at P 67, JA 183). *See infra* Part II.A.1 of the Argument.

Core Definition: Inclusions and Exclusions. The Commission also approved, as part of the definition, a list of pre-defined inclusions and exclusions.

The Reliability Organization proposed inclusions of five specific facility configurations (*see id.* at P 13, JA 151-52) and exclusions of four configurations that "generally address radial systems, behind-the-meter generation and local networks that distribute power to load" (*id.* at P 18, JA 153-55). The Commission approved those inclusions and exclusions. *See id.* at P 52, JA 174. *See infra* Part II.A.1 of the Argument.

Exception Process. The Commission also approved the Reliability Organization's proposal for an "'exceptions process' to add elements to, and remove elements from, the bulk electric system, on a case-by-case basis." *Id.* at PP 238, 269, JA 279, 294-96. Under that process, the owner of a facility would submit an exception request to its regional entity, which would make a recommendation to the Reliability Organization. *Id.* at P 27, JA 158-59. The Reliability Organization would evaluate the recommendation and technical materials, then make a final determination, which the owner could challenge to the Reliability Organization's Compliance Committee, whose decision could then be appealed to the Commission. *Id.*

Local Distribution Determinations. Separate from that technical exception process, the Commission concluded that jurisdictional issues — i.e., claims that particular facilities are used in local distribution, and thus are jurisdictionally excluded from regulation of the bulk electric system — are questions of fact for the

Commission itself to determine. *Id.* at PP 66, 72, 252, 258, JA 183, 188, 286, 289. In those circumstances, an entity must file a petition with the Commission seeking a determination that the facility is used in local distribution. *Id.* at P 70, JA 186-87. "Such petitions should include information that will assist the Commission in making such determination, and notice of the petition must be provided to [the Reliability Organization] and relevant Regional Entities." *Id.* "The determinations would be public proceedings subject to notice and comment requirements which will allow [the Reliability Organization] and interested parties (including state regulators) to provide input on a petition." *Id.* n.73, JA 187. The Commission would "apply the Seven Factor Test set forth in Order No. 888 to make such [jurisdictional] determinations." *Id.* at P 69, JA 185. *See infra* Parts II.A.2 and II.B of the Argument.

24-Month Implementation Period. The Commission approved the Reliability Organization's proposal that compliance obligations for all elements newly identified as subject to the bulk electric system definition should begin after a 24-month implementation period after the definition's effective date. *Id.* at PP 302, 304, JA 315, 316. The Commission agreed that such an implementation period would give sufficient time to accommodate planning, including exception requests. *Id.* at P 304, JA 316.

2. Order No. 773-A

Twelve parties, including New York and the Association, filed timely requests for rehearing and/or clarification. *See* Order No. 773-A at P 10 (listing parties), JA 11-12.

In April 2013, the Commission issued Order No. 773-A, denying rehearing in part and granting it in part. As relevant here, the Commission reaffirmed its acceptance of the core definition and its decision to handle any case-by-case jurisdictional determinations directly. Order No. 773-A at PP 18-26, JA 15-23. The Commission explained that "the determination of whether an element or facility is 'used in local distribution[]' is a multi-step process that may require a jurisdictional analysis that is more appropriately performed by the Commission." *Id.* at P 22, JA 18. The Commission disagreed with New York's contention that the core definition would sweep in non-jurisdictional elements, because application of the 100-kilovolt threshold is only "the first step in the process of determining whether an element is part of the bulk electric system" (*id.*, JA 19) — a process that, for newly-included elements, would not result in imposition of mandatory reliability standards until the end of the 24-month implementation period. *See id.* at P 26, JA 22.

The Commission again clarified that the Commission, not the Reliability Organization, would determine whether a facility is used in local distribution: the

Reliability Organization exception process and the local distribution determination "are separate, not concurrent [processes] and will be used for different determinations." *Id.* at P 89, JA 68; *see also id.* at P 90 (Commission's local distribution inquiry, using the seven-factor test, "is a distinct process not made in connection with review of [Reliability Organization] exception process decisions"), JA 69; *id.* at P 93 ("[T]he Final Rule contemplates two separate and distinct processes and does not direct entities to seek an exception from [the Reliability Organization] before seeking a local distribution determination from the Commission."), JA 71.

The Commission also clarified that state regulators would have the opportunity to participate in local distribution determinations: "state regulators are not excluded from involvement in a Commission proceeding involving a local distribution determination and will have the opportunity to participate" in that process, including by submitting evidence that state regulators themselves had determined the particular facilities to be local distribution. *Id.* at P 104, JA 79.

3. Subsequent Orders: Extension of Effective Date

In May 2013, the Reliability Organization asked the Commission to extend the effective date of the "bulk electric system" definition for one year, to July 1, 2014, to resolve uncertainties resulting from Commission-directed modifications to the definition. The Commission granted the motion. *Revisions to Electric*

Reliability Organization Definition of Bulk Electric System and Rules of Procedure, 143 FERC ¶ 61,231 (2013), *reh'g denied*, 146 FERC ¶ 61,070 (2014). Accordingly, the two-year implementation period commenced on that date; for any facilities that were not previously included in the system definition and that are not excluded by an exception or a local distribution determination, compliance with mandatory reliability standards will be required on July 1, 2016.

SUMMARY OF ARGUMENT

Under new statutory authority enacted in the aftermath of another wide-ranging blackout, the Commission is responsible for implementing reliability requirements for the electrical grid. In the rulemaking challenged in this appeal, the Commission adopted a multi-step definition to act as a sorting mechanism to identify the network transmission facilities that comprise the bulk electric system, while giving effect to the statute's jurisdictional exclusion of facilities that are used in local distribution. That definition reflects the Commission's reasonable exercise of its expertise and policy judgment, as well as its discretion to interpret the Federal Power Act and to develop procedures to carry out its duties.

Specifically, the Commission adopted a core definition that employs an initial, bright-line threshold to identify transmission elements operating at 100 kilovolts or above, then applies a number of standardized exclusions and inclusions based on typical system configurations. After self-applying that two-step core

definition, facility owners may seek case-by-case determinations through the Reliability Organization's procedures (for exclusion or inclusion based on technical characteristics) and/or directly from the Commission (for jurisdictional exclusion as local distribution facilities), before compliance obligations go into effect for included facilities after a 24-month implementation period.

The Commission reasonably concluded that this multi-step process would appropriately implement both the definition of the bulk electric system and the exclusion of local distribution facilities. In addition, the provision for entities to seek case-specific local distribution determinations from the Commission is consistent with decades of case law holding that such determinations are factual matters for the Commission to decide, as well as with the court-approved seven-factor test that the Commission had previously adopted to make those determinations.

Finally, as to state regulators' ability to seek local distribution determinations, New York and the Association challenge a ruling that the Commission did not make, on a matter it did not address, on a question it was not asked. The Commission did, however, rule that state regulators will have the opportunity to participate in Commission proceedings for local distribution determinations. New York's speculative concerns about the adequacy of that

process fail to undermine the Commission's reasoned exercise of its statutory and procedural discretion.

ARGUMENT

I. STANDARD OF REVIEW

Courts review FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g.*, *Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009); *cf. LaFleur v. Whitman*, 300 F.3d 256, 267 (2d Cir. 2002). On review, a court determines whether the agency "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *accord*, *LaFleur*, 300 at 267. The "court must evaluate whether the decision was based on a 'consideration of the relevant factors and whether there has been a clear error of judgment.'" *Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549, 1553 (2d Cir. 1992) (quoting *Allegheny Elec. Coop., Inc. v. FERC*, 922 F.2d 73, 80 (2d Cir. 1990)).

The Commission's factual findings are conclusive if supported by substantial evidence. Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b); *Allegheny*, 922 F.2d at 80. Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Allegheny*,

922 F.2d at 80 (internal citations and quotation marks omitted); *see also id.* ("The Federal Power Act's substantial evidence test 'is no more than a recitation of the application of the "arbitrary and capricious" standard to factual findings.'") (quoting *Md. People's Counsel v. FERC*, 761 F.2d 768, 774 (D.C. Cir. 1985)); *South Carolina*, 2014 WL 3973116, at *7 ("When applied to rulemaking proceedings, the substantial evidence test 'is identical to the familiar arbitrary and capricious standard'") (internal citation omitted).

The Commission's interpretation of the Federal Power Act is entitled to *Chevron* deference. *Transmission Access*, 225 F.3d at 687; *South Carolina*, 2014 WL 3973116, at *7. Such deference applies even where the agency is construing the limits of its own statutory jurisdiction. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868-73 (2013). As to "local distribution" determinations in particular, the D.C. Circuit, in an opinion affirmed by the Supreme Court, held that *Chevron* deference to the Commission is appropriate because the Federal Power Act "does not define 'facilities used in local distribution' . . . ." *Transmission Access*, 225 F.3d at 696.

The Commission's policy assessments are similarly owed "great deference." *Transmission Access*, 225 F.3d at 702; *see Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 240 (D.C. Cir. 2013) (courts "defer to FERC's policy priorities"). "[T]he breadth and complexity of the Commission's responsibilities demand that it

be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968). *See also South Carolina*, 2014 WL 3973116, at *7 ("the Commission must have considerable latitude in developing a methodology responsive to its regulatory challenge") (internal quotation marks and citations omitted); *cf. U.S. SEC v. Citigroup Global Mkts., Inc.*, 752 F.3d 285, 296 (2d Cir. 2014) (courts must "respect legitimate policy choices" made by agencies).

Such deference is grounded not only in Congress's intent but also in the agency's substantive expertise. *See Permian Basin*, 390 U.S. at 767 ("Congress has entrusted the regulation of the . . . industry to the informed judgment of the Commission, and not to the preferences of reviewing courts. A presumption of validity therefore attaches to each exercise of the Commission's expertise . . . .")[9]; *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991) ("applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives"); *South Carolina*, 2014 WL 3973116, at *20 (affording substantial deference "[b]ased on

[9] Though *Permian Basin* arose under the Natural Gas Act, 15 U.S.C. § 717 *et seq.*, the relevant provisions of the Federal Power Act are "'are in all material respects substantially identical'" and courts cite decisions regarding both statutes "interchangeably." *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981) (quoting *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956)).

[FERC's] expertise and experience"); *cf. New Eng. Power Generators Ass'n, Inc. v. FERC*, 757 F.3d 283, 293 (D.C. Cir. 2014) (court "properly defers to policy determinations invoking the Commission's expertise in evaluating complex market conditions") (internal quotation marks and citation omitted).

II. THE COMMISSION REASONABLY APPROVED A MULTI-STEP SORTING PROCESS TO IMPLEMENT THE STATUTORY DEFINITION OF THE "BULK-POWER SYSTEM"

The Commission, charged by Federal Power Act section 215 with implementing and enforcing reliability standards for the "bulk-power system," 16 U.S.C. § 824*o*, approved a reasonable and pragmatic process for sorting and identifying the transmission facilities that fall within that statutorily-defined system. The challenged orders reflect an appropriate exercise of the Commission's authority to interpret and apply the Federal Power Act, its discretion to determine its own methods and procedures for carrying out its duties, its technical expertise, and its considered policy judgment, supported by substantial record evidence.

New York and the Association contend that the Commission has impermissibly regulated local distribution facilities (or, at least, has regulated all network facilities without regard to whether any might be used in local distribution). *See* NY Br. 1-3, 15-16; Ass'n Br. 2, 4-12. But they misunderstand

both the statutory scheme and the Commission's implementation in the rulemaking.

A. The Commission's Rule Uses A Two-Part Definition As A Sorting Mechanism To Identify System Elements, Then Provides Case-Specific Processes For Jurisdictional And Non-Jurisdictional Exclusions

Federal Power Act section 215 establishes a new regulatory regime, under which the Reliability Organization, with the Commission's oversight, imposes and enforces reliability standards on an ongoing basis. The statutory provision begins by defining the universe of facilities that are subject to that regulatory regime, but does not plainly detail the characteristics of such facilities or specify the process for applying that definition. *See* FPA § 215(a)(1)(A)-(B) ("bulk-power system" includes both elements "necessary" for operating network and generation "needed" for system reliability), 16 U.S.C. § 824*o*(a)(1)(A)-(B); *supra* p. 5. Nor does the statute define excluded "facilities used in local distribution" — the same language that appears in section 201 of the Federal Power Act, which the D.C. Circuit found ambiguous: "The statute does not define 'facilities used in local distribution,' but instead leaves that task to FERC." *Transmission Access*, 225 F.3d at 696.

What the Commission designed was a multi-step sorting process that balanced the policy need — indeed, the statutory mandate — to include all facilities "necessary" for reliable operation of the grid with the obligation to make individual factual determinations to identify and exclude local distribution

facilities. In the following Parts 1 and 2, we explain the purpose, premise, and operation of the steps.

1. Core Definition: The Bright-Line Threshold and the Defined Inclusions and Exclusions

The Commission approved a 100-kilovolt "bright-line threshold" as a "first step or proxy" — an initial sorting mechanism — but made clear that the system definition does not end at that threshold. *See, e.g.*, Order No. 773-A at P 22 ("application of the 100 kV threshold is the first step in the process of determining whether an element is part of the bulk electric system"), JA 19.[10] Rather, the threshold is only a first cut that is then narrowed by subsequent steps.

The definition also includes a list of pre-defined exclusions (to remove facilities over 100 kilovolts that have certain characteristics) and inclusions (to draw in facilities under 100 kilovolts that have certain characteristics). *See supra*

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[10] That threshold itself is a reasonable policy choice. The Commission explained, based on its industry and technical expertise, that the threshold reflected the fact that higher voltage facilities generally operate in interconnected transmission networks. *See, e.g.*, Order No. 773 at P 41, JA 167-68. The Commission also noted that "failure of 100-200 kV facilities has caused cascading outages that would have been minimized or prevented" if the facilities had been operated in compliance with existing reliability standards. Order No. 773-A at P 25, JA 21.

Conversely, the Commission anticipated that "this threshold will remove from the bulk electric system the vast majority of facilities that are used in local distribution, which tend to be operated at less than 100 kilovolts." Order No. 773 at P 67, JA 183-84; *see also* Order No. 888 at p. 31,981 n.100 (noting that "distribution facilities are usually less than 40 kV."), *quoted supra* at note 5.

pp. 14-15. That list addresses typical facilities and configurations, "providing additional granularity that improves consistency and provides a practical means to determine the status of common system configurations." Order No. 773 at P 39, JA 165-66. New York largely ignores this second step, focusing the bulk of its argument on the 100-kilovolt threshold — which it misconstrues as a "proxy to determine jurisdiction" (NY Br. 20) — and the process for seeking local distribution determinations. *See* NY Br. 14-21. (New York does not even acknowledge the second step of the core definition until a passing reference at the end of its brief. *See* NY Br. 21 n.3 (dismissing significance of exclusions in removing local distribution facilities from the bulk electric system).)

Several of the exclusions address configurations that are characteristic of local distribution. In particular, exclusion E3, which excludes local networks operating at less than 300 kilovolts that serve customer load rather than transfer bulk power, defines such local networks as having limited generation, as flowing power only into the system (not delivering outside energy through), and as not being part of a flowgate or transfer path (*See* Order No. 773 at P 18, JA 154) — characteristics that reflect indicators in the seven-factor test in Order No. 888. *See supra* p. 7. Therefore, both the Reliability Organization and the Commission expected that exclusion E3 would filter out higher-voltage facilities that are used in local distribution. *See* Order No. 773 at P 67, JA 183-84. "In other words, most

local distribution facilities will be excluded by the 100 kV threshold or exclusion E3 without needing to seek a Commission jurisdictional determination." *Id.*, JA 184.

The two-step core definition — application of the threshold and then of the various exclusions and inclusions — does not require any further process or determination by the Reliability Organization or by the Commission. *See* Order No. 773-A at P 69 ("An entity's application of the definition as a whole, inclusive of the inclusions and exclusions, is the first step in determining whether the element is part of the bulk electric system . . . ."), JA 56; *id.* at P 42 ("Exclusion E3 is one part of the bright-line definition of bulk electric system, and all asset owners must apply the definition as a whole in order to determine whether their elements are part of the bulk electric system."), JA 34; *id.* at P 125 ("an entity may apply the E3 exclusion without having to submit an application to [the Reliability Organization] for a case-specific ruling"), JA 90.

2. Two Separate And Distinct Processes for Case-by-Case Exclusions

For further individualized consideration of particular facts, the Commission provided two separate processes. Any entity that still believes its facilities to be incorrectly categorized as necessary for reliability can seek an exception through the Reliability Organization's procedures, while any entity that believes its facilities should be categorized as local distribution can seek a factual

determination directly from the Commission in the first instance. *See infra* Part II.C.

On this point, the Association fundamentally misunderstands the Commission's ruling, arguing at length that a facility owner cannot seek a local distribution determination from the Commission until after it has exhausted the exception process through the Reliability Organization. Ass'n Br. 4-7, 10-11. That is simply wrong. The Commission made clear that those two processes are "separate and distinct" and that the rule "does not direct entities to seek an exception from [the Reliability Organization] before seeking a local distribution determination from the Commission." Order No. 773-A at P 93, JA 71; *id.* at P 90 (local distribution determination "is a distinct process not made in connection with" the exception process), JA 69.[11]

Finally, the Commission further ensured an orderly sorting process by approving a 24-month implementation period, during which facility owners can

[11] The Association's mistake appears to stem from its erroneous conflation of the pre-defined list of inclusions and exclusions (to be considered by the facility owner as part of the core definition) with the process for seeking case-by-case exceptions from the Reliability Organization. *See* Ass'n Br. 5, 7 & n.5 (citing Order No. 773 at PP 72, 252, JA 188, 286, and Order No. 773-A at P 93, JA 70-71). A facility owner can seek a local distribution determination directly after applying the definition (threshold plus exclusions) itself, whether or not it also initiates the separate exception process. *See* Order No. 773-A at PP 42, 69, 125, JA 35, 56, 90, *discussed supra*; *see also* 143 FERC ¶ 61,231 at P 15 (order granting extension of effective date, discussed *supra* at pp. 18-19).

either seek exception as unnecessary for reliability (from the Reliability Organization) and/or exclusion as local distribution (from the Commission), or prepare to comply with the reliability standards. *See*, *e.g.*, Order No. 773-A at P 94 (implementation period "should provide ample time" to seek local distribution determinations "before any compliance obligations are imposed"), JA 71-72. Indeed, to avoid confusion in applying the two-step core definition, the Commission later agreed to extend the effective date of the definitional rule to July 2014, allowing affected entities another two years (until July 2016) to seek exception or exclusion before becoming subject to the standards. *See supra* pp. 18-19.

B. The Multi-Step Definition Is A Reasonable Exercise Of The Commission's Discretion To Implement The Statute

The Commission determined that the multi-step process, with individualized local distribution determinations, would be an accurate and efficient method to implement the statutory definition. The Commission expected that few, if any, facilities would require individual local distribution findings, because the core definition and pre-defined exclusions are designed to sort out local distribution facilities. *See* Order No. 773-A at P 90, JA 69; Order No. 773 at P 67, JA 183-84. (To the Commission's knowledge, some entities have sought exceptions from the Reliability Organization, but none has yet asked the Commission for a local distribution determination.)

Accordingly, the Commission explained that all of the steps in the process, taken together, would ensure a clear, consistent method for implementing the statutory mandate, including its jurisdictional limitation. *See*, *e.g.*, Order No. 773-A at PP 21-22, 90, JA 17-19, 69; Order No. 773 at P 72, JA 188.

The Commission has broad discretion to design such a process: "Absent constitutional constraints or extremely compelling circumstances . . . administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978)) (internal quotation marks and citations omitted); *accord*, *Zhang v. U.S. Dep't of Justice*, 362 F.3d 155, 157 (2d Cir. 2004). *See also Mobil Oil Exploration & Producing Se., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991) ("An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities"); *Tenn. Valley Mun. Gas Ass'n v. FERC*, 140 F.3d 1085, 1088 (D.C. Cir. 1998) ("An agency has broad discretion to determine when and how to hear and decide the matters that come before it.") (citing cases).

Courts are appropriately reluctant to interfere with that discretion, even in the ordinary course of appellate review. *See FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976) ("At least in the absence of substantial

justification for doing otherwise, a reviewing court may not . . . proceed by dictating to the agency the methods, procedures, and time dimension of the needed inquiry . . . ."), *cited in Vt. Yankee*, 435 U.S. at 544-45; *Mobil*, 498 U.S. at 230 (appeals court had "clearly overshot the mark" if it required the Commission to resolve a particular issue at a particular time in a particular proceeding) (internal citations omitted).

Accordingly, the Commission's orders reflect an appropriate exercise of its *Chevron* discretion to implement the "bulk-power system" definition and to determine how to identify local distribution facilities, and its *Vermont Yankee* discretion to institute procedures to apply that definition and exclusion.

C. The Commission Appropriately Established A Process To Make Case-By-Case, Fact-Specific Determinations Whether Specific Facilities Are "Used In Local Distribution"

Moreover, this multi-step process is entirely consistent with adherence to the local distribution limitation on the Commission's jurisdiction under the Federal Power Act. As noted *supra* at p. 8, the term "local distribution," which neither new section 215 nor old section 201 defines, is ambiguous and therefore within the Commission's discretion to interpret under *Chevron*. *Transmission Access*, 225 F.3d at 696; *cf. Conn. Light & Power Co. v. FPC*, 324 U.S. 515, 531 (1945) ("The expression 'facilities used in local distribution' is one of relative generality.").

Moreover, in the context of FPA section 215, which defines the parameters of the "bulk-power system," the Commission has broad discretion in developing its process for implementing the general definition while also giving effect to the narrow exclusion. The Supreme Court has emphasized that *Chevron* deference applies even where a petitioner contends that an agency is pushing the limits of its authority. "Our cases hold that *Chevron* applies equally to statutes designed to *curtail* the scope of agency discretion. . . . And we have applied *Chevron* where concerns about agency self-aggrandizement are at their apogee . . . ." *Arlington*, 133 S. Ct. at 1872.

The Supreme Court first considered the local distribution limitation in *Connecticut Light & Power*, holding that the Commission had overstepped its Federal Power Act jurisdiction by failing to consider the local distribution question at all. In that case, the Commission had issued an order requiring a transmission owner to show cause why it should not be subject to the Commission's accounting rules. The Commission subsequently issued an order finding that the entity was under its jurisdiction because its facilities were for interstate transmission. "It ha[d] not, however, made an explicit finding that these facilities are not used in local distribution," and the Court doubted whether, on the facts of that case, the Commission could have made such a finding. 324 U.S. at 532. The Court held that the Commission was required to make "explicit findings" (*id.*), "giving due

weight to the policy declaration in doubtful cases" (*id.* at 533), that the facilities were not used in local distribution.

Later cases confirmed that the jurisdictional determination is not a simple legalistic analysis, but a factual question left to the Commission, subject to review under the substantial evidence standard. "Whether facilities are used in local distribution — although a limitation on [Commission] jurisdiction and a legal standard that must be given effect . . . — involves a question of fact to be decided by the [Commission] as an original matter." *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 210 n.6 (1964). That "conclusion may properly rest upon the specialized experience of the [Commission] in determining such questions." *Id. Accord*, *Pub. Serv. Co. of Ind., Inc. v. FPC*, 375 F.2d 100, 104 (7th Cir. 1967) (local distribution determination "involves factual questions and these are original matters for the Commission. We have found ample evidence in the record to support the Commission finding on this point.") (citing *S. Cal. Edison*); *Ark. Power & Light Co. v. FPC*, 368 F.2d 376, 382-83 (8th Cir. 1966) (upholding Commission's assertion of jurisdiction based on expert judgment and factual findings); *cf. FPC v. La. Power & Light Co.*, 406 U.S. 621, 647 (1972) (in case under the analogous Natural Gas Act, Court must "defer to the [Commission] for the initial determination of its jurisdiction[,]" which could be reviewed "in due course" under that statute's judicial review provision).

The Commission has not, as New York contends (NY Br. 3, 13, 15-16), bluntly asserted jurisdiction over all facilities operating at above 100 kilovolts. To the contrary, the Commission has unequivocally disavowed any intention to regulate local distribution facilities, providing a separate, expeditious process to consider the particular facts of individual facilities and make explicit findings to exclude them from the system definition before the reliability standards take effect. *See* Order No. 773 at PP 43, 69-72, JA 168-69, 185-88; Order No. 773-A at PP 21-22, JA 17-19.

In contrast to *Connecticut Light & Power*, the Commission has not attempted to regulate facilities without considering whether they are local distribution. *See* 324 U.S. at 532-33. Nor has it purported to modify the statutory limitation on its jurisdiction. Rather, in implementing the broad system definition required by the statute, the Commission has repeatedly clarified that it will — separate from the exception process for other, non-jurisdiction determinations — consider the particular facts and make an explicit finding as to any facility that seeks such an evaluation. Order No. 773 at PP 70-72, JA 186-88; Order No. 773-A at PP 93, 103, JA 70-71, 78. *Cf. Am. Forest & Paper Ass'n v. FERC*, 550 F.3d 1179, 1183 (D.C. Cir. 2008) (in implementing another provision of the Energy Policy Act of 2005, Commission's choice "to adopt certain rebuttable presumptions via rulemaking" that could be addressed in individual adjudications

was within the agency's discretion); *South Carolina*, 2014 WL 3973116, at *32 (upholding Commission's rulemaking that broadly mandated removal from transmission tariffs of rights of first refusal, leaving parties' assertions of contractual rights to be considered on a case-by-case basis) (citing *Mobil Oil* and *Transmission Access*).

Nor has the Commission "abandoned" (NY Br. 16) the seven-factor test for local distribution. The Commission emphasized that it would apply that test in making case-by-case factual determinations. Order No. 773 at PP 69, 71, JA 185, 187; Order No. 773-A at PP 69, 82, 90, 97, 101-04, JA 56-57, 64-65, 69, 73-74, 77-79. *Compare Detroit Edison*, 334 F.3d at 54 (holding that Commission disregarded its own precedent, "totally ignor[ing] Order 888's carefully formulated seven-factor test"), *cited in* NY Br. 5, 15.

Furthermore, contrary to New York's argument (NY Br. 2, 18), the Commission has not impermissibly shifted the burden of determining its jurisdiction. The definitional process, using a voltage threshold and defined exclusions, operates to identify necessary elements of the bulk electric system and to filter out characteristics of local distribution facilities, but that definition is not the last word: the Commission will make explicit findings as to any claimed local distribution exclusions. Nothing in the case law — in which objecting parties have been left to participate in fact-intensive evidentiary proceedings before the

Commission, followed by ordinary judicial review — precludes the Commission from ordering its proceedings to carry out its statutory responsibilities in this manner. *Cf. Vt. Yankee*, 435 U.S. at 543; *Mobil Oil*, 498 U.S. at 230.

III. THE COMMISSION DID NOT IMPERMISSIBLY LIMIT THE PROCESS FOR LOCAL DISTRIBUTION DETERMINATIONS TO FACILITY OWNERS

The Association and (to a lesser extent) New York challenge the Commission's process for considering local distribution determinations based on their mistaken claim that the Commission "denied State utility commissions any opportunities to seek [local distribution] determinations" as to specific facilities in their states. Ass'n Br. 3; NY Br. 4. But the Commission made no such ruling. In fact, the Commission did not address who may, or may not, file for a local distribution determination — because no one asked.

In the rulemaking, the Commission focused on the role of facility owners, who (being most familiar with their configurations and potentially responsible for complying with reliability requirements) would apply the system definition in the first instance. On rehearing, New York, the Association, and other parties raised two distinct questions: (1) whether state regulators could participate directly in the Reliability Organization's exception process (*see* Order No. 773-A at P 100, JA 76-77); and (2) whether the Commission, in making local distribution determinations, would (in addition to applying the seven-factor test) defer to state regulators'

jurisdictional recommendations, as Order No. 888 had said it would in some cases (*see id.* at P 98, JA 74-75; *supra* p. 8).[12]

In response, the Commission affirmed that only facility owners could seek exceptions from the Reliability Organization, but that third parties could provide comments. Order No. 773-A at P 105, JA 79-80. "With regard to state involvement in Commission local distribution determinations," the Commission only "stated that the Commission would apply the factors in the seven factor test" established in Order No. 888, without adopting all of Order No. 888 (such as deference to state regulators' recommendations); nevertheless, "state regulators are not excluded from involvement in a Commission proceeding involving a local distribution determination and will have the opportunity to participate" in that

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[12] *See* New York's Request for Rehearing and Clarification at 4 (requesting clarification whether Commission intended to defer to state regulators' determinations, as suggested in Order No. 888), R. 95, JA 117, 121; *id.* at 16 (arguing that Reliability Organization's exceptions process should provide for states to receive notice, submit comments, and contribute to development of the record), JA 133. Association's Request for Rehearing at 6-7 (raising similar argument as to deference to state regulators' determinations in local distribution inquiry), R. 91, JA 105, 110-11.

Neither New York nor the Association, however, objected that the Commission "improperly denied State utility commissions any opportunities to seek [local distribution] determinations," as they now argue on appeal. NY Br. 2; Ass'n Br. 3. "[N]o objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so." FPA § 313(b), 16 U.S.C. § 825*l*(b).

process, including by submitting evidence that state regulators themselves had "determined that the facilities in question are local distribution facilities." *Id.* at P 104, JA 79.[13]

Moreover, New York's argument that the local distribution determinations will be "inadequate" and "ineffective" (NY Br. 12, 14) is entirely speculative. *Cf. N.Y. Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 587 (D.C. Cir. 2011) (finding no injury in mere "speculation"). New York hypothesizes that some facility owners might "lack incentive" to seek factual determinations (an argument that New York did not present before the Commission). *See* NY Br. 17. That conjecture understates the compliance obligations under reliability standards — not merely the costs of one-time upgrades that New York suggests facility owners might pass through to customers, but ongoing operational and reporting requirements — and underestimates the interests of utilities in avoiding those

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[13] The challenged order did not purport to limit (or even to address) any entity's ability to pursue ordinary statutory remedies, such as complaints, that may be available under the Federal Power Act. *Cf., e.g., Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002) (holding that Commission could not require utility members of voluntary regional organization to give up authority to file unilateral rate changes under FPA section 205 — "the very statutory rights given to them by Congress"); *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 at P 94 (2011) (rejecting tariff constraint on statutory right to file complaints; "states and generating resources retain their statutory right to file complaints under [FPA] section 206 unencumbered by the parameters proposed by [a regional system operator]"), *on reh'g*, 138 FERC ¶ 61,194 (2012), *aff'd sub nom. N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 80 (3d Cir. 2014).

compliance burdens (as demonstrated by the numerous objections raised in the various rulemaking proceedings under FPA section 215). *See generally, e.g.*, *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242 (approving 83 of 107 proposed reliability standards).

Ultimately, New York asserts a "likelihood" that, at the end of the 24-month implementation period, at least some local distribution facilities will be subject to the compliance requirements. NY Br. 17. As the Commission's rulemaking became effective on July 1, 2014, that period has only recently begun — neither the Commission nor New York yet knows whether any entity will, or will not, seek a local distribution determination from the Commission. But the Commission concluded, after careful consideration of the Reliability Organization's proposal, that the multi-step definition, beginning with a voltage threshold and then applying defined configuration exclusions, would leave few, if any, facilities to be considered in case-by-case determinations. *See* Order No. 773 at P 67, JA 183-84; Order No. 773-A at P 90, JA 69. The Commission further concluded that the 24-month period "should provide ample time" to handle any such determinations before reliability standards would apply. *See* Order No. 773-A at P 94, JA 71-72.

Those expectations are grounded in the agency's regulatory experience and technical expertise and lie within its broad policy and procedural discretion "to formulate methods of regulation appropriate for the solution of its intensely

practical difficulties." *Permian Basin*, 390 U.S. at 790. They should not be upset on the basis of mere conjecture.

CONCLUSION

For the reasons stated, the petition should be denied and the challenged FERC Orders should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Final Brief of Respondent Federal Energy Regulatory Commission is proportionally spaced, has a typeface of 14 points, and contains 9,174 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addenda. (The word count is 9,440 with the glossary included.)

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September 24, 2014

ADDENDUM

STATUTES

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Federal Power Act

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

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

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

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

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

(g) Books and records

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

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

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

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

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

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

ing that information be submitted annually to the Commission by transmitting utilities which is adequate to inform potential transmission customers, State regulatory authorities, and the public of potentially available transmission capacity and known constraints.

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

STATE AUTHORITIES; CONSTRUCTION

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

§ 824m. Sales by exempt wholesale generators

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

EFFECTIVE DATE OF 2005 AMENDMENT

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

STATE AUTHORITIES; CONSTRUCTION

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

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

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

§ 824o. Electric reliability

(a) Definitions

For purposes of this section:

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

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

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

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

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

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

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

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

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

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

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

[1] See References in Text note below.

(b) Jurisdiction and applicability

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

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

(c) Certification

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

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

(2) has established rules that—

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

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

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

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

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

(d) Reliability standards

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

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

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

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

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

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

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

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

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

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

(e) Enforcement

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

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

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

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

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

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

(A) the regional entity is governed by—

(i) an independent board;

(ii) a balanced stakeholder board; or

(iii) a combination independent and balanced stakeholder board.

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

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

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

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

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

(f) Changes in Electric Reliability Organization rules

The Electric Reliability Organization shall file with the Commission for approval any proposed rule or proposed rule change, accompanied by an explanation of its basis and purpose. The Commission, upon its own motion or complaint, may propose a change to the rules of the ERO. A proposed rule or proposed rule change shall take effect upon a finding by the Commission, after notice and opportunity for comment, that the change is just, reasonable, not unduly discriminatory or preferential, is in the public interest, and satisfies the requirements of subsection (c) of this section.

(g) Reliability reports

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

(h) Coordination with Canada and Mexico

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

(i) Savings provisions

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

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

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

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

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

(j) Regional advisory bodies

The Commission shall establish a regional advisory body on the petition of at least two-thirds of the States within a region that have

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

(k) Alaska and Hawaii

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

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

STATUS OF ERO

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

ACCESS APPROVALS BY FEDERAL AGENCIES

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

§ 824p. Siting of interstate electric transmission facilities

(a) Designation of national interest electric transmission corridors

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

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

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

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

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

(B)(i) economic growth in the corridor, or the end markets served by the corridor, may be jeopardized by reliance on limited sources of energy; and

(ii) a diversification of supply is warranted;

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

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

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

(b) Construction permit

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

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

(i) approve the siting of the facilities; or

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

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

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

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

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

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

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

(4) the proposed construction or modification will significantly reduce transmission

vertisement 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

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. 25(d) and Local Rule Rule 25.1, I hereby certify that I have, this 24th day of September 2014, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system:

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