Nos. 13-1674, 13-1676, 13-2052, and 13-2262 (consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ILLINOIS COMMERCE COMMISSION, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petitions for Review of Orders of the
Federal Energy Regulatory Commission

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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STATEMENT OF JURISDICTION

The jurisdictional statement in the joint brief of petitioners is not complete and correct. *See* Cir. R. 28(b).

This is a consolidated appeal of Federal Energy Regulatory Commission ("Commission" or "FERC") orders on remand from this Court's decision in *Illinois Commerce Comm'n v. FERC*, 576 F.3d 470 (7th Cir. 2009) ("*Illinois Commission I*") (reviewing *PJM Interconnection, L.L.C.*, Opinion No. 494, 119 FERC ¶ 61,063 (2007) ("Rate Design Opinion"), R.283, JA 35, *order on reh'g*, Opinion No. 494-A, 122 FERC ¶ 61,082 (2008) ("Rate Rehearing Opinion"), R.345, JA 103). There the Court rejected challenges to the Commission's cost allocation decision for existing facilities in the PJM Interconnection power pool ("PJM"), but held that the Commission lacked substantial evidence in the record to support a regional allocation of the costs of new transmission facilities that have a capacity of 500 kilovolts ("kV") or greater. This Court remanded the case for the Commission to quantify benefits where it could and otherwise show that the "benefits [of new 500 kV facilities to western utilities] are at least roughly commensurate with those utilities' share of total electricity sales in PJM's region . . . ." *Id.* at 477.

On remand, following further submissions by the parties, the Commission affirmed the regional allocation of high-voltage transmission costs, demonstrating substantial, quantifiable or otherwise tangible regional

benefits to all utility members of PJM from those facilities. *PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,230 (Mar. 30, 2012) ("Remand Order"), R.651, JA 535. On March 22, 2013, the Commission issued a final order denying rehearing of its Remand Order. *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,216 (2013) ("Remand Rehearing Order"), R.673, JA 993.

Three petitions for review were timely filed with this Court within 60 days of issuance of the Remand Rehearing Order. *Illinois Commerce Comm'n v. FERC*, No. 13-1674 (filed Mar. 29, 2013); *American Transmission Sys., Inc. v. FERC*, No. 13-1676 (filed Mar. 29, 2013); *Public Utils. Comm'n of Ohio v. FERC*, No. 13-2052 (filed May 16, 2013). Additionally, on April 11, 2013, Dayton Power and Light Company ("Dayton") filed a petition in the District of Columbia Circuit. *See* D.C. Cir. No. 13-1133. It was later transferred to this Court. *See* 7th Cir. No. 13-2262.

This Court has jurisdiction to decide these petitions for review pursuant to section 313 of the Federal Power Act ("FPA"), 16 U.S.C. § 825*l*(b).

STATEMENT OF ISSUE

Whether the Commission satisfied the Court's remand requiring that it quantify the benefits of new high-voltage transmission lines in PJM as compared to lower voltage lines, or otherwise explain why the benefits of the high-voltage lines are at least roughly commensurate with the western utilities' share of the costs of those lines.

STATEMENT OF THE CASE

On remand from this Court, the Commission compared two settled cost allocation methods to determine which was just and reasonable for allocating the costs of new transmission projects with capacity of 500 kV or above ("high-voltage"). After evaluating available quantitative and qualitative evidence of the benefits of high-voltage facilities on the PJM grid and the specific benefits of 18 proposed new facilities (the "Projects"), the Commission determined that regional allocation was a reasonable method for allocating these costs. The Commission also found fault with the application of the other method, a flow-based model ("Distribution Factor Analysis"), that was developed specifically for allocating the costs of facilities with capacities of 345 kV and below. This method not only overlooked present and future beneficiaries of the high-voltage projects, but also failed to identify all of the utilities that caused the need for the projects.

By the time of the second challenged order in March 2013, the Commission had approved a replacement method for allocating the costs of new transmission projects in PJM, thereby setting an end date of January 31, 2013 for the allocation at issue here. Also by that time, PJM had canceled three of the most expensive Projects, reducing their total costs by half, to about $2.7 billion.

A group of three original petitioners, the state utility commissions for Illinois and Ohio plus Dayton, joined by the new petitioner subsidiaries of FirstEnergy Corporation ("FirstEnergy") and an intervenor industrial group (collectively, "Illinois"), revives its call for adoption of the Distribution Factor Analysis in assigning the costs of the Projects.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

Section 201 of the Federal Power Act, 16 U.S.C. § 824, gives the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. 16 U.S.C. §§ 824(a)-(b); *see generally New York v. FERC*, 535 U.S. 1 (2002). "Rates may be examined by the Commission, upon complaint or on its own initiative, when a new or altered tariff or contract is filed or after a rate goes into effect." *NRG Power Mktg., LLC v. Maine Pub. Utils. Comm'n*, 130 S. Ct. 693, 698 (2010) (citing FPA sections 206(a), 16 U.S.C. § 824e(a), and 205(e), 16 U.S.C. § 824d(e)). If the Commission finds, pursuant to Federal Power Act section 206, that an existing rate is "unjust, unreasonable, unduly discriminatory, or preferential," it must determine and set the just and reasonable rate. 16 U.S.C. §§ 824e(a); *see generally Maryland Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1285 n.1 (D.C. Cir. 2011) (discussing FPA § 206 burden in context of PJM rates).

In furtherance of its statutory responsibilities, the Commission has encouraged competition and reliability improvements in the wholesale market for electric power through provision of non-discriminatory, efficient access to transmission over broader geographic areas and the creation of regional transmission organizations ("RTOs").[1] *See also Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 536-37 (2008) (describing same); *Illinois Commerce Comm'n v. FERC*, 721 F.3d 764, 770 (7th Cir. 2013) ("*Illinois Commission II*") (quoting *Morgan Stanley* for same). "These are voluntary associations of utilities that own electrical transmission lines interconnected to form a regional grid and that agree to delegate operational control of the grid to the association." *Illinois Commission II*, 721 F.3d at 769; *see also Illinois Commission I*, 576 F.3d at 473 (describing PJM's grid ownership and operation).

These independent operators, which now control more than half of the nation's electrical grid, are responsible for planning and directing expansions of their grids. *Illinois Commission II*, 721 F.3d at 769-70. They also provide access for all "at rates established in a single, unbundled, grid-wide tariff."

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[1] *See Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs., Regs. Preambles ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,092 (2000), *appeal dismissed sub nom. Public Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

NRG Power Mktg, 130 S. Ct. at 697 n.1 (quotation omitted); *see Illinois Commission II*, 721 F.3d at 778 (FERC "required . . . that each RTO charge a single fee for use of its entire grid").

In 2011, the Commission instituted specific transmission planning and cost allocation reforms to ensure wholesale power services continue to be provided at just and reasonable rates.[2] As relevant here, the rule requires transmission providers to engage in regional planning processes designed to identify more cost-effective and efficient solutions to regional transmission needs and to develop methods to allocate the cost of any such facilities fairly among beneficiaries. Order No. 1000 PP 4-7. Transmission providers, like PJM, that already provide regional planning must ensure that their regional cost allocation methods satisfy six allocation principles which are designed, in large measure, to assign the costs to the facility's beneficiaries in a manner that is at least roughly commensurate with estimated benefits. *Id.* PP 558, 585.

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[2] *Transmission Planning & Cost Allocation by Transmission Owning & Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *appeal pending sub nom. South Carolina Pub. Serv. Auth. v. FERC*, Nos. 12-1232, *et al.*, (D.C. Cir., briefs filed Dec. 13, 2013).

II. PJM Structure

PJM is "the oldest . . . power pool in the nation," *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 5-6 (D.C. Cir. 2002), and the first RTO approved by FERC, *FPL Energy Marcus Hook, L.P. v. FERC*, 430 F.3d 441, 442 (D.C. Cir. 2005). PJM is governed by an independent board that provides oversight on behalf of PJM's more than 700 members. PJM, *2011 ISO/RTO Metrics Report*, 262 (Aug. 31, 2011) ("Metrics Report"). Members elect the board through the Members Committee which is made up of five sectors: Generation Owners; Other Suppliers; Transmission Owners; Electric Distributors; and End-Use Customers. PJM Operating Agreement, § 8.1.1 (describing sector-weighted voting). Members also have a voice through the many stakeholder committees and task forces. *See generally* PJM Stakeholder Process Groups Diagram.

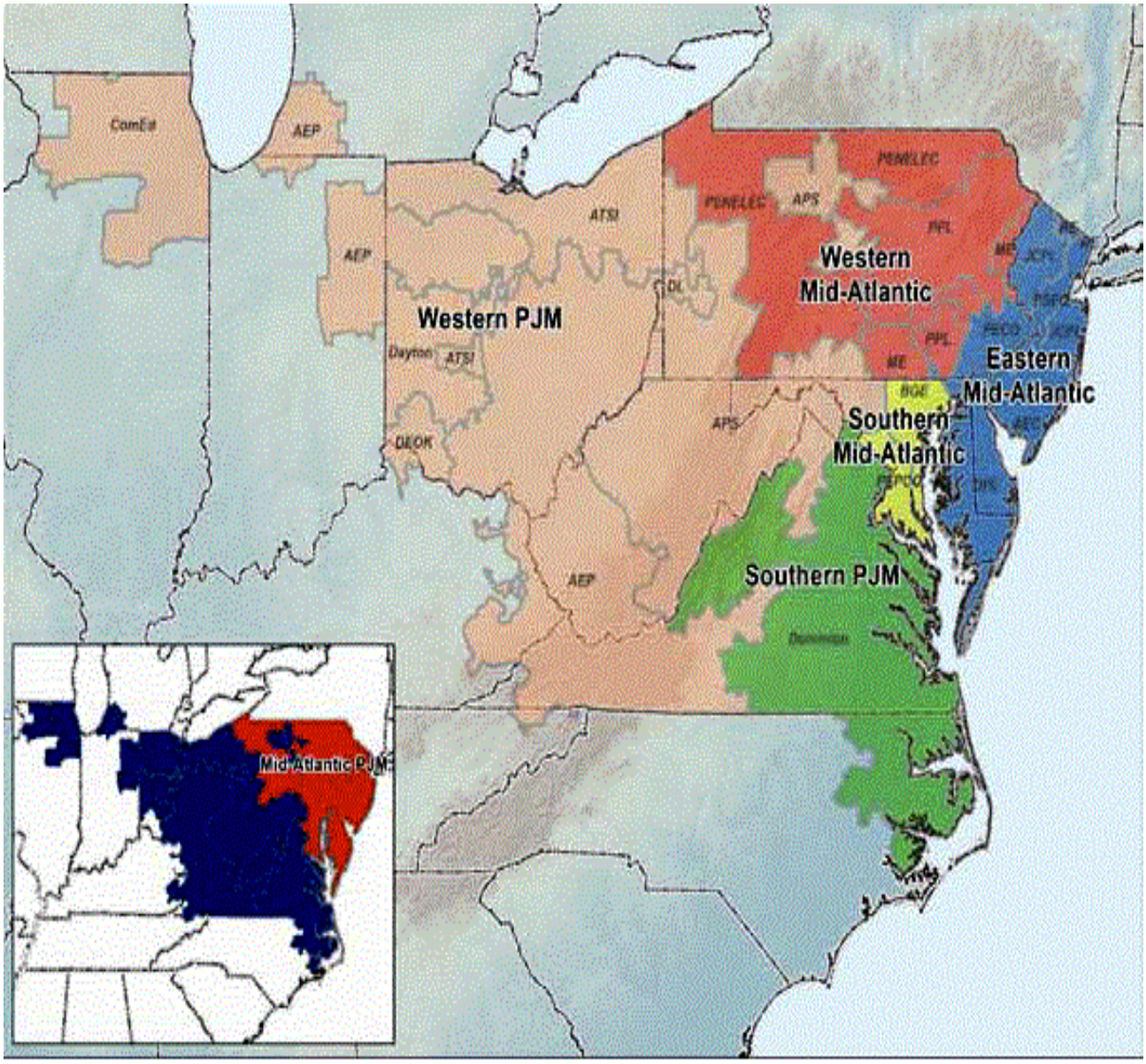
A. PJM Membership

FERC authorized PJM as an Independent Operator in 1997 with eight utility systems in all or part of six mid-Atlantic states. It now includes all or part of 13 states and the District of Columbia, as shown in Figure 1 below, and 20 utility transmission zones. *See also Illinois Commission I*, 576 F.3d at 473.

The addition of what was then the four-state system of Allegheny Power Company ("APS"), but are now subsidiaries of petitioner FirstEnergy,

greatly expanded the geographic scope of PJM in 2002. *See* Remand Rehearing Order at 49 (showing FirstEnergy's territories), JA 1041.

Fig. 1: Map of PJM Member Utilities & Planning Subregions



Source: PJM, June 2013

Also "[i]n the early 2000s, Commonwealth Edison and American Electric Power . . . requested FERC's permission to join PJM despite being

inside [a neighboring Operator's] region (around Chicago and in southwestern Michigan, respectively)." *Illinois Commission II*, 721 F.3d at 778. Petitioner Dayton joined these two utilities in their requests. In 2004, FERC approved their requests (with reservations and some conditions), *see id.* at 778-79, in part because Commonwealth Edison argued successfully that PJM was the best market for its power sales and its strongest and most reliable transmission connections were with PJM. Remand Order PP 93-94 & nn.172-73, JA 581-82. PJM grew again in 2005 with the addition of Dominion Power, located in Virginia and North Carolina, and Duquesne Light in far western Pennsylvania. *See* Remand Rehearing Order at 48 (Map of PJM pricing zones as of March 2013), JA 1040.

Since June 2011, the PJM territory has grown to include: petitioner FirstEnergy's subsidiary American Transmission Systems, Inc. in Ohio and Pennsylvania; Duke Energy Ohio and Kentucky; and East Kentucky Power Cooperative (not shown in Figure 1 above). PJM, *News Release: East Kentucky Power Cooperative Successfully Integrated into PJM* (June 1, 2013). PJM is now home to more than 61 million consumers of electricity and more than 62 thousand miles of transmission lines. *Id.*

As with all RTOs, PJM membership is voluntary. Utilities that join and then exit must pay a departure fee designed to hold a departing member

responsible for costs incurred on its behalf. *See Illinois Commission II*, 721 F.3d at 776.

B. Regional Transmission Expansion Planning

PJM became an RTO in 2001, *Illinois Commission I*, 476 F.3d at 474, taking responsibility for maintaining long-term reliable and economic service across its grid through an annual regional transmission planning process, Rate Design Opinion P 6, JA 42. *See generally* Remand Order PP 19-21 (describing PJM planning methods), JA 543-44. The high-voltage projects approved first in the 2006 Regional Transmission Expansion Plan ("Regional Plan") and subsequent plans are the subject of this litigation. *See* Metrics Report at 276 (describing major 500 kV and 765 kV projects).

PJM develops the Regional Plan in collaboration with a stakeholder advisory committee. *Id.* at 274. Participation in this advisory committee is open to any interested entity including PJM members, transmission customers, and state electric regulatory agencies. PJM Operating Agreement, Schedule 6, § 1.3(b). The board is responsible for final approval of the Regional Plan after reviewing recommendations from the advisory committee and PJM planning staff. *Id.* § 7.7; Metrics Report at 275.

This Court understood this case to "pivot on an asymmetry between the eastern and western portions of PJM's region." 576 F.3d at 475. The "classic" PJM utilities, which the Court calls the eastern utilities (as does this brief),

id., use 500 kV lines to move power across states to their customers. The western utilities, including Commonwealth Edison (Illinois), Dayton (Ohio), Duquesne Light (Pennsylvania bordering Ohio), the six-state system of American Electric Power, and now FirstEnergy's American Transmission System, Inc. (Ohio and Pennsylvania) and Duke Energy Ohio and Kentucky, use 765 kV lines located in Virginia, West Virginia, Ohio, Indiana, Illinois, Kentucky and Michigan to move power from distant sources to their customers. *See* Remand Order P 81 (map of high-voltage lines), JA 575. APS, now owned by FirstEnergy, has a large territory in the middle. *See supra* p. 8, Fig. 1 (PJM Planning Subregions). Because it was not part of classic PJM, the grid operator designates it for planning purposes as a western utility (as does this brief). *See id.* (APS in western PJM planning subregion); Remand Order P 63 n.98 (listing utilities in subregions), JA 564.

Large cities in western PJM are ringed mainly by 345 kV lines, *Illinois Commission I*, 576 F.3d at 475, whereas large cities in eastern PJM use mostly 230 kV lines. *See* Remand Rehearing Order P 46 & n.71, JA 1013-14. This provides symmetry in application of the rate design in the West and East because new high-voltage lines (765 kV and 500 kV, respectively) are regionally allocated whereas new lower voltage lines (345 kV and 230 kV, respectively) are allocated based on Distribution Factor Analysis. *Id.* P 46, JA 1014.

III. The Rate Design Challenge

A. Existing Cost Allocation Method

Before this proceeding began in 2005, PJM's tariff contained Commission-approved language providing that, for new transmission upgrades, "cost allocation assignments will be based on PJM's 'assessment of the contributions to the need for, and benefits expected to be derived from, the pertinent enhancement or expansion by affected Market Participants.'" *PJM Interconnection, LLC*, 109 FERC ¶ 61,067 P 64 (2004) (citing PJM Operating Agreement, Schedule 6, §1.5.6(g)); *see also* Rate Design Opinion P 12 & n.12 (describing this language as "beneficiary pays" approach and citing tariff provision), JA 44; Remand Order P 5 (quoting same provision), JA 537. Parties repeatedly protested PJM's filings asserting that the vague language was insufficient to inform them of what method would be used to designate beneficiaries of new transmission facilities. *See*, *e.g.*, *PJM Interconnection,* 109 FERC ¶ 61,067 PP 64, 67; *PJM Interconnection, L.L.C.,* 115 FERC ¶ 61,261 P 35 (2006). The Commission took no action on these protests until after it established this proceeding.

B. Rate Design Opinions

On May 31, 2005, pursuant to Federal Power Act section 206(a), 16 U.S.C. § 824e(a), the Commission established a broad investigation of PJM's transmission rate design, including the method for allocating the costs

of new regionally-planned transmission facilities. *Allegheny Power Sys. Operating Cos.*, 111 FERC ¶ 61,308 (2005), R.1, JA 1. As relevant here, the Commission set for evidentiary hearing the issue of whether the cost allocation for new transmission facilities in PJM's tariff was reasonable. *Id.* P 1, JA 1.

On April 19, 2007, reversing the administrative judge's initial decision, the Commission found that rates for existing facilities were reasonable, Rate Design Opinion P 3, JA 40, but that the method for allocating new transmission costs was unjust and unreasonable, *id.* PP 4, 72, JA 40, 70. It determined that the method for identifying the beneficiaries of the facilities was not set forth in the PJM Tariff and was otherwise insufficient to provide customers with certainty regarding allocation of these costs. *Id.* PP 4, 65, 72 JA 40, 67, 70.

For new facilities of 500 kV or above, the Commission accepted a proposal, submitted by PJM after the evidentiary hearing, to allocate these costs broadly across the region. *Id.* P 4, JA 41. In adopting this regional allocation, the Commission relied on historic agreements on cost sharing at this voltage level, *id.* P 79, JA 73, and a presumption that the high-voltage projects will benefit the entire integrated grid, *id.* P 80, JA 74.

For new facilities at capacities below 500 kV, the Commission directed another evidentiary hearing so that parties could develop the details of a

discrete allocation method using a power flow model for inclusion in the tariff. *Id.* PP 72, 82, JA 70, 74. The parties later reached settlement on the details, criteria, and assumptions of a method that was accepted by the Commission and made part of the PJM tariff. *PJM Interconnection, L.L.C.*, 124 FERC ¶ 61,112 PP 5-7 (2008); *see also* Remand Rehearing Order P 6 n.7, JA 996. This allocation method, described in more detail *infra* pp. 17-18, is now referred to as the Distribution Factor Analysis or DFAX.[3]

Parties seeking rehearing argued that the yet-to-be developed Distribution Factor Analysis should be applied to all new transmission facilities. Rate Rehearing Opinion P 59, JA 124; *see*, *e.g.*, Illinois Commission Rehearing Request, 14 (requesting application of the "same cost allocation processes that the Commission ordered to be developed to identify beneficiaries" of lower voltage project to all projects), R.288, JA 95. On rehearing, the Commission affirmed the regional cost allocation for new 500 kV and above projects, relying on the same rationales expressed in the Rate Design Opinion. Rate Rehearing Opinion PP 63-65, JA 125-26.

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[3] Because the high-voltage projects at issue in this proceeding were approved to resolve reliability violations, this brief does not discuss the methods for allocating the costs of projects, if any, that are approved for congestion relief. *Cf.* Br. 7; *see generally PJM Interconnection, LLC*, 105 FERC ¶ 61,123 PP 54-55 (2003) (explaining allocations for "economic upgrades").

C. The *Illinois Commerce Commission I* Decision

On appeal, the Illinois and Ohio Commissions, Dayton, and Exelon Corporation ("Exelon") renewed their argument that the costs of all new transmission facilities should be allocated by the same Distribution Factor Analysis that the Commission directed be developed for 345 kV facilities. *Illinois Commission I*, 576 F.3d at 475.

The Court reviewed the Commission's rationales for regional allocation of the costs of 500 kV and above facilities and found them lacking in evidentiary support. *Id.* at 477. The Commission did not provide "even the roughest of ballpark estimates" of the reliability benefit of high-voltage transmission lines, *id.* at 476, or "compare the reliability of a 500 kV line to that of a 345 kV line," *id.* at 477. The Court added that "nowhere do the Commission's opinions suggest that degraded reliability is a danger in Midwestern PJM." *Id.*

Further, the Court dismissed the agency's reliance on historic cost sharing agreements finding them inapplicable to decisions about cost sharing in the larger, modern PJM grid. *Id.* at 475. Regarding the disincentives to build new transmission resulting from litigation, the Court faulted the Commission for not explaining approximately how much more litigation there is likely to be from the allocation of more costly facilities. *Id.* at 475-76. Nor did the Commission give "any indication that the difficulty [of measuring

benefits of high-voltage lines] exceeds that of measuring the benefits to particular utilities of a smaller-capacity transmission line." *Id.* at 475.

Reminding the Commission that it need not calculate benefits with precision, the Court concluded that if the Commission "cannot quantify the benefits to the midwestern utilities from new 500 kV lines in the East, even though it does so for 345 kV lines," it can approve a regional cost allocation based on "an articulable and plausible reason to believe that the benefits are at least roughly commensurate with those utilities' share of total electricity sales in PJM's region." *Id.* at 477. The Court allows the Commission to "presume that new transmission lines benefit the entire network by reducing the likelihood or severity of outages" but also requires a comparison of costs and benefits. *Id.*

The Court "remanded for further proceedings . . . intimat[ing] no view" on which of the two allocation methods the Commission should select. *Id.* at 478.

D. Proceeding On Remand

On October 29, 2009, Exelon requested that the Commission establish a paper hearing on remand to allow parties to supplement the existing record with new evidence. Exelon Motion, 4 (2009), R.558, JA 139. On January 21, 2010, the Commission granted Exelon's motion. It instructed PJM to submit data on approved high-voltage projects and to compare the distribution of

their costs under the two existing Commission-approved allocation methods: the Distribution Factor Analysis and the regional allocation. *PJM Interconnection, L.L.C.*, 130 FERC ¶ 61,052 PP 9-10 (2010), R.573, JA 145-46. It also requested that all parties address the benefits of high-voltage projects and the advantages and disadvantages of the two allocation methods. *Id.* P 11, JA 147-49. The Commission later granted Exelon's additional request for PJM to supplement the record with data on 345 kV projects. *PJM Interconnection, L.L.C.*, 130 FERC ¶ 61,233 P 9 (2010) (directing data on cost allocations of projects by utility under Distribution Factor Analysis and regional allocation), JA 153.

1. Two Allocation Methods

The regional allocation assigns the costs of high-voltage projects to utilities on a *pro rata* basis – that is, based on each utility's peak usage of the grid as a share of the total PJM usage. Remand Order P 58, JA 562.

The Distribution Factor Analysis, adopted for lower-voltage projects in the 2007 settlement, is more complicated. In its planning process, PJM first identifies a potential future reliability violation and the constrained transmission facility causing that future violation. PJM Response to Information Requests, 4 (Apr. 13, 2010), R.597, JA 159. Then PJM uses a power flow model to determine which utilities will flow electricity over the constrained transmission facility in the peak period of the year in which the

reliability violation is predicted to occur. *Id.* at 3, JA 158. The inputs into the model, generally the same as those used for transmission planning, are based on assumptions about future energy demand and supply (generator) growth and availability at the time the project is approved in the regional expansion plan. *Id.* at 5, JA 160.

The resulting distribution factors reveal the effect of each member utility on the transmission constraint relative to all other member utilities' impacts on that constraint. *Id.* at 4, JA 159. "[Distribution Factor Analysis] does not attach a dollar value to the benefit associated with resolution of the violations." *Id.* at 6, JA 161. Rather, the analysis establishes a relative contribution to the need for the new project during the peak period of the year and assigns the project's costs accordingly. *Id.*

2. Paper Hearing Responses

As directed by the Commission, PJM submitted a discussion of Distribution Factor Analysis limitations, studies of different projects, and a discussion of the various cost allocation methods used by other regions. *See generally id.* at 1, JA 156. After modifying the assumptions of the Distribution Factor Analysis for higher-voltage projects, PJM analyzed 18 projects with voltages at or above 500 kV approved in the 2006 or later Regional Plans. *Id.* at 6-8, JA 161-63. The total cost for these 18 projects was $6.6 billion but is now $2.7 billion due to cancelation of three of the most

expensive projects as noted in Table 1 below. Remand Rehearing Order P 10, JA 997. The annual cost of the 15 projects is now $516 million, reduced from $1.3 billion. *Id.* P 67 & n.93, JA 1022.

Table 1: High-Voltage Reliability Projects

	Project Description	Utility Location (Project Owner)*	Cost ($M)	Status
1	Susquehanna - Roseland	PPL, PSEG	1,161	in construction
2	502 Junction – Loudoun (TrAIL)	APS, Dominion	1,117	built
3	Amos - Welson Springs – Kemptown (PATH or Mountaineer)	APS, AEP	1,860	canceled
4	Carson - Suffolk	Dominion	173	built
5	Suffolk Substation	Dominion	5	built
6	Possum Point - Calvert Cliffs - Indian River (MAPP)	Pepco, DPL, AEC	1,128	canceled
7	Branchburg - Roseland- Hudson	PSEG	946	canceled
8	Kammer Transformer	APS	42	built
9	Orchard 500/230 kV substation	AEC	26	built, but not regionally allocated
10	Black Oak Static VAR Compensator	APS	50	built
11	Center Point 500/230 kV Substation	PECO	28	built
12	Jacks Mt. 500 KV Substation & 400 MVAR	PENELEC	25	study
13	Jacks Mt. 100 MVAR Fast Switched Capacitor	PENELEC	12	study
14	Jacks Mt. 500 KV MVAR Fast Switched Capacitor	PENELEC	32	study
15	Elroy 600 MVAR Fast Switched Capacitor	PECO	11	built
16	Branchburg 400 MVAR Capacitor	PSEG	9	built
17	Loop 5021 Circuit into New Freedom Substation	PSEG	17	built
18	Hanging Rock 765 kV Circuit Breakers	AEP	5	built

Source: PJM

***** Utility zone abbreviations from PJM Response at 8-9, JA 163-64; *see also supra* p. 8, Fig. 1.

Parties filed comments disagreeing as to the suitability of the allocation methods for assigning costs of high-voltage projects and the effect of the different allocations. *See*, *e.g.*, Illinois Commission Comments, 9 (May 28, 2010) (arguing Commonwealth Edison would pay $68 for every $1 of project costs that it caused), R.602, JA 261; Exelon Comments, Naumann Aff. PP 31, 44, 61 (May 28, 2010) (asserting that even the Distribution Factor Analysis is wrong and that Commonwealth Edison would not benefit from any of the Projects), R.609, JA 368, 379, 392; Fair Pricing Group Comments, Ex. FPG-100, 13-38 & Table 2 (May 28, 2010) (supporting regional allocation as having small effect on western ratepayers; average residential customer in western PJM will pay $.13 to $.16/month more for the Projects under regional cost allocation), R.616, JA 493-516.

E. Locked-In Period For This Rate Design

The cost allocation method at issue here applies starting with projects approved in PJM's 2006 Regional Plan and includes any projects approved before February 1, 2013. Remand Rehearing Order P 9, JA 997.

To comply with Order No. 1000 requirements, PJM adopted a new transmission cost allocation method that replaced this one on that date. *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,074 P 1 (2013). Going forward, the costs of transmission lines with capacity at or above 500 kV (and 345 kV double circuit lines) are allocated under a hybrid method. *PJM*

Interconnection, L.L.C., 142 FERC ¶ 61,214 P 345 (2013). Half of the costs are assigned to everyone in the region in recognition of system-wide benefits. *Id.* PP 347, 363. Half are assigned to particular beneficiaries identified through a modified power flow method. *Id.* P 348.

This modified power flow method differs from the Distribution Factor Analysis at issue here in several respects. Unlike the Analysis which focuses on the contribution each member utility makes to the reliability violation at the peak hour of the year under outage conditions, this modified power flow method estimates the relative use of the project under normal operating conditions. *See id.* PP 348, 427-29. The new method thus allocates a portion of the costs to those who directly benefit from the new project as opposed to only those who cause the violation. *Id.* Further, in contrast to the Distribution Factor Analysis which sets allocation percentages once in the year the project is approved, the new power flow analysis will be "updated annually to account for changes in use due to modifications of the grid." *Id.* P 348.

IV. Orders On Remand

A. The Remand Order

In its order on remand, the Commission reaffirmed its prior finding that the existing rate was unjust and unreasonable because neither the PJM Tariff nor the PJM manual that supplemented it contained a sufficiently

detailed method for allocating the costs of new transmission that would provide parties with certainty and transparency about the filed rate. Remand Order P 35, JA 549.

Next, as directed by the Court, the Commission compared the regional cost allocation method with the Distribution Factor Analysis. *E.g.*, *id.* PP 36, 110-111, JA 549, 591-92. It found that the Analysis, designed for application to lower voltage facilities, was not a reasonable method for allocating the costs of 500 kV and above projects. *Id.* P 37, JA 550. The Analysis is static insofar as it models a single point in time before a project is built and is not updated to account for changes that occur over time. *Id.* PP 39, 41, 43, JA 551, 552, 553. Further, the Analysis is not well-suited to identifying the cost causers of larger projects because it analyzes a single reliability violation in a five-year period, whereas larger projects solve many reliability violations during the fifteen-year planning horizon. *Id.* P 41, JA 552. This results in deficiencies in aligning costs and benefits that are particularly acute with respect to high-voltage lines that serve large portions of the PJM grid. *Id.* PP 38-46, JA 550-55.

By contrast with the Distribution Factor Analysis, the Commission found that the regional allocation method was more fair in assigning costs to present and future beneficiaries of the new high-voltage projects, *id.* P 111, JA 592, because "system-wide benefits of the higher voltage facilities are

significant and will inure to all members of PJM." *Id.* P 55, JA 560. As compared with lower voltage facilities, 500 kV and above projects provide benefits by: (1) efficiently moving large amounts of power long distances to many zones of the region, *id.* PP 103-104, JA 586-87; (2) addressing many and different kinds of reliability violations over wide areas, *id.* PP 77, 82, JA 572, 575; *see also id.* PP 68-73 (explaining reliability tests for stability, thermal, voltage and deliverability), JA 568-70; (3) readily accommodating changing power flows and needs of the region, *id.* PP 86, 88-91, JA 577, 578-80; and (4) protecting all parts of the region from significant service disruptions, *id.* PP 92-93, 100, JA 580-81, 584.

The Commission explained the incremental value of the Projects as compared with their 345 kV counterparts. If all of the projects had been built in 2008 and 2011, they would have reduced congestion costs throughout the region by about $1.25 to $2 billion per year, lowering the concomitant risk of line overloads. *Id.* P 99, JA 583. They are less likely to experience emergency outages and require less time to restore service after such outages than 345 kV lines, providing as much as $53 million per year in benefits. *Id.* P 100 & nn.184-86 (citing outage statistics and loss of load studies, R.655, JA 608, 610, 652, 719-21, 722), JA 584. The projects will also provide between $505 and $784 million annually in savings from fewer transmission line losses. *Id.*

P 106 & nn.205-207 (citing PJM Response, Cost Allocation Methods Survey at 6-7, JA 200-01), JA 589.

Because parties did not quantify all of the economic values of a reliable system, the Commission used estimates of cost savings, developed in another Commission proceeding, to provide a rough quantification of the other benefits that would flow from the Projects. *Id.* P 63, JA 565. This report estimated annual savings of: (1) $390 million for "planning for future reliability needs on a region-wide rather than a utility-by-utility or state-by-state basis;" (2) $78 to $98 million by avoiding power sales curtailments through centralized alternative dispatch of available resources; (3) $640 million to $1.2 billion from reduced reserve requirements; and (4) $420 to $550 million as a result of access to cheaper power sources to meet demand ("production cost savings"), grid services, and short-term reserve requirements. *Id.* P 78, JA 572; *see also* Metrics Report at 317-318 (summary of benefits and economic value for the PJM region). While the Commission noted that several of these estimates reflected the value of the integrated grid as a whole, it found that the annual savings of $1.5 to $2.2 billion compared favorably to the $1.3 billion (now $516 million) in costs per year for the 18 (now 15) high-voltage projects. *See* Remand Order P 79, JA 573.

Providing a more detailed cost-benefit analysis for Commonwealth Edison, the western-most utility in PJM, the Commission found that the

annual payment by the utility under a Distribution Factor Analysis ($2.9 million) was far less than the direct and indirect benefits that it would enjoy from the new high-voltage projects, which the Commission estimated at $320 to $468 million annually. *Id.* P 109 & n.213, JA 591.

The Commission predicted that the Projects would provide the following annual benefits to Commonwealth Edison, either directly or in their role in maintaining the integrated grid, to offset its annual costs of what was $198 million, *id.* P 79 n.142, JA 574, and is now $76 million, Remand Rehearing Order P 84 n.121, JA 1029, under a regional allocation:

- $7.8 million in fewer and shorter service interruptions, Remand Order P 100 & n.188, JA 585;
- $87 to $136 million in fewer transmission losses, *id.* P 107, JA 590;
- $50 to $65 million in production cost savings, *id.* P 104 (extrapolated from Metrics Report), JA 588; *but see id.* P 108 (citing 2004 PJM market simulation, R.619, JA 521, to show $50 million in direct annual production costs savings), JA 590;
- $12 to 15 million in lower short-term operating reserves and other ancillary services requirements, *id.* P 104 (extrapolated from Metrics Report), JA 588; *but see id.* P 102 (explaining 590 megawatt reduction in reserve requirement gained from joining PJM), JA 586;
- $11 to $14 million in fewer voluntary and involuntary curtailments due to efficient management of congestion on the system, *id.* P 100 & n.189 (extrapolated from Metrics Report), JA 585; and
- $94 to $176 million in long-term planning reserve requirements, *id.* P 104 (extrapolated from Metrics Report), JA 588.

Finally, the Commission recognized that while not all Projects are located proximate to all PJM utilities, they were selected by the PJM planning process as the most effective way to resolve looming reliability violations. *Id.* P 97, JA 583. Left unaddressed, the violations would jeopardize the reliability of the entire integrated system. *Id.* The Commission concluded that the regional allocation met the requirements of the cost causation principle in that the reliability and economic benefits of these projects will be sufficiently shared by all utilities in the PJM region, including those in western PJM. *Id.* P 61, JA 564.

B. The Remand Rehearing Order

Four parties sought rehearing of the Remand Order, arguing for global application of the Distribution Factor Analysis or, in the alternative, further administrative process and modification of the Analysis to fix its flaws. *See* Remand Rehearing Order PP 25, 65 JA 1003, 1021. Exelon did not seek rehearing or otherwise contest the Commission's findings as to the benefits Commonwealth Edison would receive from the Projects. *See id.* P 19, JA 1001.

On rehearing, the Commission affirmed its findings and rejected the contention that the Distribution Factor Analysis was a better measure of cost causation than the Commission's analysis of region-wide benefits. *Id.* PP 1, 3, JA 994, 995. Given that the PJM transmission owners had settled on a new

approach to transmission allocation going forward, *id.* P 2, JA 994, the Commission found that the proceeding was limited to a defined set of projects, with about half of the project costs now immaterial because of cancellations, *id.* PP 4, 10, JA 995, 997.

Two Commissioners dissented despite their agreement that the Analysis was unreasonable as applied to higher voltage projects. *Id.*, LaFleur Dissent at 1-3, JA 1042-44; Clark Dissent at 8, JA 1052. They voiced their support for further administrative process to develop a third (hybrid) allocation alternative. *Id.* The majority, noting that the alternative proposals were "mere outlines of a methodology lacking in implementation details and . . . supporting evidence," *id.* P 3, JA 995, found an "[in]sufficient basis to warrant expending additional time and resources of the parties and the Commission on still further administrative procedures," *id.* P 4, JA 995. *See id.* P 86 & n.126 (same), JA 1030-31.

SUMMARY OF ARGUMENT

On remand, the Commission conducted a thorough inquiry into whether particular cost allocation mechanisms assign the Project costs to utilities in a manner that is "roughly commensurate" with the benefits they receive. Executing the Court's mandate, it compared two well-developed cost allocation methods: the regional allocation method and the Distribution Factor Analysis, a flow-based model developed for voltages of 345 kV and below. The Commission declined to examine alternative allocations that were presented to Commission as mere outlines without evidentiary support for even a rough matching of costs and benefits.

The Commission may allocate transmission project costs broadly where, as here, there is evidence of a broad class of beneficiaries. The Commission carefully weighed and evaluated all of the evidence submitted by parties on the two allocation methods. While it found this evidence sufficient to approve the regional allocation, it supplemented the evidence with other available data. In taking notice of this material, the Commission followed its rules and invited parties to rebut the evidence, thereby providing full and fair process.

Conducting an exhaustive review both at the regional level and for the western-most utility on PJM's system, the Commission "showed its math" as this Court directed, and thereby met its evidentiary burden. Unlike its prior

orders remanded by the Court, the Commission here offered a comprehensive explanation of the tangible, but unquantifiable, benefits that accrue to the region because of the reliability improvements to the PJM grid. The challenged orders reflect careful consideration of the benefits that will flow to the customers who will bear the financial burden of the new high-voltage projects.

ARGUMENT

I. Standard Of Review

Under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), the Court reviews agency orders to determine whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See*, *e.g.*, *Michael v. FDIC*, 687 F.3d 337, 348 (7th Cir. 2012). "Under this standard, the court's review is narrow; a court may not set aside an agency decision that articulates grounds indicating a rational connection between the facts and the agency's action." *Schneider Nat'l, Inc. v. ICC*, 948 F.2d 338, 343 (7th Cir. 1991) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

The Commission's factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825*l*(b); *see Northern Ind. Pub. Serv. Co. v. FERC*, 782 F.2d 730, 739-40 (7th Cir. 1986) (the Court considers whether actions are "supported by substantial evidence," and

"whether the Commission has given reasoned consideration to . . . balancing the needs of the industry with the relevant public interests") (quotation omitted). "Substantial evidence is such relevant evidence a reasonable person would deem adequate to support the ultimate conclusion." *Michael*, 687 F.3d at 348. In making its determination, the Court is not permitted to "decide the facts anew, reweigh the evidence, or to substitute [its] own judgment" for that of the agency. *Jancik v. HUD*, 44 F.3d 553, 556 (7th Cir. 1995) (quotation omitted).

Under the Federal Power Act, "Congress has entrusted the regulation of the . . . industry to the informed judgment of the Commission, and therefore a presumption of validity attaches to each exercise of the Commission's expertise." *Village of Bethany v. FERC*, 276 F.3d 934, 940 (7th Cir. 2002) (quotation omitted). Deference to FERC's decisions regarding rate issues is particularly appropriate, because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968). "The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and [the Court] afford[s] great deference to the Commission in its rate decisions." *Morgan Stanley*, 554 U.S. at 532.

II. After Comparing Two Available Allocation Methods, The Commission Properly Found That Regional Allocation Of The Costs Of High-Voltage Projects Is Reasonable

Issues of transmission cost allocation are some of the most contentious and difficult issues that face the utility industry and the Commission. Remand Rehearing Order P 2, JA 994. The costs of transmission projects are usually precise, concrete, and quantifiable. *Id.* The benefits of incremental additions to an existing grid, however, are generally difficult to quantify with precision, involving a greater need for prediction about the future use and operation of that grid. *Id.*; *see Illinois Commission II*, 721 F.3d at 774 (noting "limitations on calculability that the uncertainty of the future imposes"). The distribution of benefits across a large non-contiguous grid like PJM's region further complicates the comparison of costs and benefits. *See* Remand Rehearing Order P 67, JA 1022; *Illinois Commission II*, 721 F.3d at 775 (discussing the difficulties of calculating benefits on a subregional basis in a large RTO). And as demonstrated here, those parties potentially responsible for these costs not only assign different values to quantifiable and unquantifiable benefits but also hold disparate views on how, if at all, the benefits spread across the region.

Facing these challenges in selecting a reasonable cost allocation for the Projects, and with instructions from this Court to do a better job of quantifying benefits and otherwise identifying tangible, unquantifiable

benefits, *Illinois Commission I*, 576 F.3d at 477, the Commission compared the two well-developed allocation methods and selected the one best supported by the record. Remand Rehearing Order P 3, JA 995.

The Commission found that the Distribution Factor Analysis does not account for important tangible benefits and burdens and fails to identify the broader set of beneficiaries of the Projects. Remand Order P 37, JA 550; *see also infra* section II.C (further explaining deficiencies of Analysis as applied to high-voltage facilities). A regional allocation for the Projects, however, tracks changes in the grid over time and accounts for the ability of high-voltage transmission facilities to efficiently move larger amounts of power over longer distances, address many reliability violations, and limit service disruptions. Remand Order PP 97, 117, JA 582, 596. The regional allocation is also consistent with the presumption of reliability benefits on an integrated grid as applied by this and other courts. *See*, *e.g.*, *Illinois Commission I*, 576 F.3d at 477 ("[FERC] can presume that new transmission lines benefit the entire network by reducing the likelihood or severity of outages"); *Entergy Servs., Inc. v. FERC*, 319 F.3d 536, 543 (D.C. Cir. 2003) ("upgrades designed to 'preserve the grid's reliability' constitute 'system enhancements [that] are presumed to benefit the entire system'") (citing *Western Massachusetts Elec. Co. v. FERC*, 165 F.3d 922, 927 (D.C. Cir. 1999)).

Illinois, like parties in the proceeding below, argues for a third approach to cost allocation, such as a hybrid of the two settled methods. Br. 52-54; *see also* Remand Order P 30, JA 547; Remand Rehearing Order P 65, JA 1021. It asserts that the Commission was "obliged to consider" other approaches, even though it agrees that the structure and implementation of such approaches were undeveloped in the record of this proceeding. Br. 53. This argument is without merit.

Because the remand of the Rate Design Orders was based on an evidentiary failing, *Illinois Commission I*, 576 F.3d at 474-75, the Commission reasonably decided to review only those two methods that were developed in the record. *See* Remand Rehearing Order PP 3, 86, JA 995, 1030. Proponents did not submit evidence showing how the hybrid methods roughly match costs to benefits even though the Commission alerted them to this deficiency in the Remand Order. *Id.* Nor did parties reach settlement on a hybrid approach to apply to the Projects, although that avenue was available to them. *Id.* P 86 n.126, JA 1031. "Merely because petitioners can conceive of a [rate] allocation method that they believe would be superior to the one FERC approved does not mean that FERC erred in concluding the latter was just and reasonable." *Wisconsin Pub. Power, Inc. v. FERC*, 493 F.3d 239, 266 (D.C. Cir. 2007).

Moreover, having determined that the regional allocation met the cost causation principle, the Commission reasonably concluded that yet another evidentiary proceeding to develop yet another allocation method would be an inefficient use of resources. Remand Order P 49 n.70, JA 556; Remand Rehearing Order PP 4, 86, JA 995, 1030. Finality is a valid consideration in evaluating allocation of transmission costs. *See Illinois Commission II*, 721 F.3d at 776 (providing more evidentiary procedures "would be creating gratuitous delay . . . at this late date" given "the highly technical character of the data and analysis required to match costs and benefits of transmission projects [and] the technical knowledge and experience of FERC's members and staff"); *accord Illinois Commission I*, 576 F.3d at 482 (Cudahy, J., dissenting) ("Pro rata assignment of costs eliminates . . . delays standing in the path of action.").

In any event, the Commission did not ignore the hybrid approach. Rather, it acknowledged that PJM members may consider it as one option to comply with Order No. 1000. Remand Order PP 2-3, JA 536. And, in fact, because the PJM transmission owners agreed to a hybrid approach and the Commission preliminarily approved it, the parties (including dissenting Commissioners) that supported a hybrid approach in this proceeding likely have what they want going forward. *See supra* pp. 20-21 (explaining the hybrid approach to apply starting in February 2013).

A. Cost Causation Requires That Benefits Match Costs To Some Degree, But Not With Precision For Each Individual Customer

The courts of appeals consistently construe the Commission's statutory mandate of just and reasonable rates to include the cost causation principle. This principle mandates that "'[a]ll approved rates [must] reflect to some degree the costs actually caused by the customer who must pay them.'" *Illinois Commission I*, 576 F.3d at 476 (quoting *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992)); *accord California Dep't of Water Res. v. FERC*, 489 F.3d 1029, 1037-41 (9th Cir. 2007) (upholding broad allocation of transmission costs to all users of transmission system as just and reasonable). The courts and the Commission have extended this to include an examination of both burdens and benefits, *K N Energy*, 968 F.2d at 1301, finding rates reasonable where the costs imposed are "at least roughly proportionate to the anticipated benefits to a utility of being able to use the grid." *Illinois Commission II*, 721 F.3d at 770 (citing *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004)).

Illinois argues that the Commission applied the wrong cost causation standard in failing to match costs with burdens imposed or benefits received for each party or utility in PJM. Br. 22, 32-34, 54. This interpretation of the cost causation principle necessitates more precision than the Court requires and more than is reasonably possible. *See Illinois Commission I*, 576 F.3d at

477 (citing *Midwest ISO Transmission Owners,* 373 F.3d at 1369 ("exacting precision" not required in allocating costs)); *Illinois Commission II*, 721 F.3d at 774 (explaining that "[i]t's impossible to allocate these cost savings with any precision across [RTO] members" and there are "limitations on calculability that the uncertainty of the future imposes"). On remand, this Court directed the Commission to conduct the same cost causation analysis that it had conducted in *Midwest ISO Transmission Owners* and *Western Massachusetts*. *Illinois Commission I*, 576 F.3d at 477.

To begin that analysis, the Commission explained that the directive of this and other courts to "'compare[ ] the costs assessed against a party to the burdens imposed or benefits drawn by that party'" does not require an analysis for each utility or party. Remand Order P 51 (quoting *Illinois Commission I*, 576 F.3d at 477, and *Midwest ISO Transmission Owners*, 373 F.3d at 1368), JA 557; *see also* Remand Rehearing Order PP 42-43 (agreeing that exacting precision is not required but that the agency must meet the cost causation principle "as closely as possible"), JA 1012. Objecting utilities in *Midwest ISO Transmission Owners* estimated a level of benefits that they received and alleged that level was far below the costs to be allocated to them. *See Illinois Commission I*, 576 F.3d at 477-78 (describing same). But in that earlier proceeding, the Commission did not perform any individualized analysis in determining that costs should be allocated based

on each utility's peak usage of the Midwest operator's grid. Remand Order P 51 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, Opinion No. 453, 97 FERC ¶ 61,033, 61,169 (2001)), JA 558; Remand Rehearing Order P 42 ("there was no party-by-party analysis of costs and benefits submitted by the rate proponent in [*Midwest ISO Transmission Owners*]"), JA 1012. And the court upheld the regional cost allocation without such analysis. *Midwest ISO Transmission Owners*, 373 F.3d at 1371 (affirming on FERC finding of system-wide benefits including "overall reduction in costs of transmitting energy" and "large scale regional coordination").

Illinois ignores this explanation and repeats its argument made below that *Midwest ISO Transmission Owners* does not apply here because that allocation concerned administrative costs. Br. 33-34. It alleges, without support, that new high-voltage transmission projects do not benefit everyone like the administrative costs of maintaining an RTO. *Id.* This Court, however, recently affirmed a regional cost allocation for about $5 billion in new transmission lines where neither the Commission nor the proponent of the rates performed a cost-benefit analysis for each utility. *Illinois Commission II*, 721 F.3d at 774. There the Commission approved the allocation, as it did here, Remand Order P 126, JA 600, on a finding that some of the benefits of the new lines were spread across all of the RTO regions. *See* 721 F.3d at 774.

Moreover, the Court also upheld eligibility criteria that allowed for new lines to be regionally allocated without any cost-benefit analysis. *Id.* at 773-74. It did so with the understanding that "[n]one of these eligibility criteria ensures that every utility in [RTO]'s vast region will benefit from every [qualifying] project." *Id.* at 774 (recognizing that 16 projects "are just the beginning"). Likewise, no showing that every utility in PJM must benefit from every high-voltage project is required here.

Furthermore, contrary to Illinois's assertion, Br. 34, the underlying proceeding in *Western Massachusetts* did not determine benefits for each transmission customer or identify every beneficiary of the new line. *See* Remand Order P 52, JA 559. There, the Commission allocated to all network customers the costs of a transmission project, analogous to the grid expansion at issue here, that allowed a generator to transmit its electricity across one utility's grid for sale to a neighboring utility in the power pool. Remand Rehearing Order P 40 & n.58 (citing *Western Massachusetts*, 165 F.3d at 923), JA 1011. Even though the project was necessary only because of the generator's request, the Commission based this broad allocation on (1) a presumption that new transmission lines benefit the entire network; and (2) a study of flows on the system that predicted that other grid customers would use the upgrades once they were built. *Id.* P 40 & nn.59-60 (citing

Western Massachusetts, 165 F.3d at 925, 927), JA 1011; *see also* Remand Order P 52 (citing *Western Massachusetts*, 165 F.3d at 927), JA 559.

As the Commission explained in the orders challenged here, that study did not show that each customer on the grid would, or even could, make use of the facilities once they were built; rather, it showed that "customers other than [the generator] will make use of and benefit from the grid upgrades," in those few times when the power flowing from the generator is "lower than expected." Remand Rehearing Order P 40 (citing *Western Massachusetts*, 165 F.3d at 927), JA 1011. Thus, to the extent this "evidence in the record [the loadflow study] identif[ied] the beneficiary of the upgrades" Br. 34, it identified all of the transmission customers as a group and did not detail any distribution of benefits across that group. Remand Rehearing Order P 40 (citing underlying agency proceeding for evidence that Commission staff identified more than one possible beneficiary, but not each and every beneficiary), JA 1011.

Illinois also suggests that, except in extraordinary circumstances, the Commission may not approve cost sharing and must allocate costs only to those that cause them to be incurred. Br. 23 (citing cases). This assertion lacks merit. In a case without extraordinary circumstances, this Court in *Illinois Commission II* affirmed that the cost of new transmission lines built primarily to transport wind power on the grid need not be allocated to those

generators that cause the lines to be built, but can be allocated to all utilities that benefit from cheaper power generated by the projects. 721 F.3d at 778. Indeed, utilities that are not required to purchase wind power, and so did not cause the wind generators to be built, still must pay their *pro rata* share of the costs of all the projects. *Id.* at 774 (finding such utilities will gain from reliability and the "provision of benefits across pricing zones").

Finally, Illinois draws an artificial distinction between burdens and benefits in application of the cost causation principle. *See* Br. 25. According to Illinois, proper cost causation allows for the allocation of costs to those that caused the need for the facility *or* those that benefit from the facility; if causation is available, a benefits analysis is unwarranted. Br. 25-26, 29. In response, the Commission explained that it must account for both the immediate cause of cost incurrence as well as the ultimate beneficiaries. Remand Rehearing Order P 27 (citing *K N Energy*, 968 F.2d at 1302), JA 1004; *see id.* P 28 (FERC "balance[s] both short-run causes and benefits with long-run benefits"), JA 1005. This position is supported by *Illinois Commission I*: "To the extent a utility benefits from the costs of new facilities, it may be said to have 'caused' a part of those costs to be incurred, as without the expectation of its contributions the facilities might not have been built, or might have been delayed." 576 F.3d at 476. Further, on remand, the Court explicitly directed the Commission to examine, explain,

and, where possible, estimate the "benefits" of high-voltage lines. *Id.* at 475-477. The Commission has done so in the challenged orders. *See* Remand Order PP 56-77 (explaining reliability benefits), JA 561-72, 81-96 (same), JA 574-82, 97-109 (quantifying benefits), JA 582-90; Remand Rehearing Order PP 67-85, JA 1022-30.

This Court remanded because of an evidentiary defect in the Rate Design Opinion, *Illinois Commission I*, 576 F.3d at 478, not because the Commission applied the wrong cost causation principle, as Illinois argues, Br. 31-32. As shown next, on remand the Commission remedied that lack of "data," offered "specifics concerning difficulties in assessing benefits," noted "particulars . . . concerning the contribution that very high-voltage facilities are likely to make to the reliability of PJM's network," and even provided a "rough[ ] estimate of likely benefits" to Commonwealth Edison, the western-most utility on PJM's system. *Illinois Commission I*, 576 F.3d at 474-75. The Commission's post-remand orders provided the explanation and record-based detail that the Court found were altogether missing from its pre-remand orders.

B. The Commission Fully Explained That The High-Voltage Projects Benefit A Broad Class Of Beneficiaries

The record below demonstrates that high-voltage transmission projects will provide substantial and widespread benefits in the PJM region. Remand

Order PP 117, 126, JA 596, 600. The Projects will move large amounts of power to utilities in the region, address reliability violations over wide areas, readily accommodate changing power flows and needs of the region, and protect all parts of the region from significant power disruptions. *Id.* P 97, JA 582. Where possible, the Commission quantified the expected benefits in terms of reduced reserve requirements, reduced transmission losses, reduced incidence of transmission facility outages, production cost savings, and congestion relief. *See* Remand Rehearing Order P 74, JA 1025.

1. The Commission Provided Particulars About The Reliability Benefits Of These Projects

Because reliability benefits are difficult to calculate, the Commission relied in part on the presumption that new lines benefit the entire network. *See Illinois Commission I*, 576 F.3d at 477 ("there will be some benefit to the midwestern utilities just because the network is a network"). That presumption did not predominate, however, as the Commission also explained in detail the kinds of reliability benefits utilities would receive from the high-voltage projects. Remand Rehearing Order P 45, JA 1013.

While a few of these high-voltage projects were approved to address reliability violations in western PJM, Remand Order P 87, JA 577, the Commission generally agreed with Illinois, Br. 39-40, that the majority were intended to address reliability violations in eastern PJM. Remand Rehearing

Order P 69, JA 1022. The Commission explained that in an integrated system that is centrally-planned by the regional operator, new lines improve overall reliability, allowing the resulting benefits to extend to a greater number of parties. *Id.* These benefits are available throughout the life of the project, which may be 40 years or more for higher voltage lines. *Id.* P 67, JA 1022; *see Illinois Commission II*, 721 F.3d at 775 (the benefit of "increasing the reliability of the grid . . . can't be calculated in advance"). Furthermore, the Commission detailed the difficulties of assessing certain reliability benefits, explaining that not all reliability problems can be quantified through the Distribution Factor Analysis. *See* Remand Order P 46 & n.65 (explaining that "system stability" is unquantifiable), JA 555.

Illinois argues that the 500 kV lines are no different than the 345 kV lines that support the grid in western PJM. Br. 44-45. But the record shows how different they are in the reliability and deliverability benefits each class provides. *See*, *e.g.*, Remand Order P 106 (500 kV lines reduce line losses by about 75% relative to 345 kV lines), JA 589; Remand Rehearing Order P 81 (500 kV lines have about 37% fewer sustained outages than 345 kV lines), JA 1028.

To be sure, 345 kV lines provide some of the benefits that accrue from general RTO membership. Br. 44. But the Commission properly determined that, given their limits on reliability and deliverability as compared with

higher voltage lines, they are more local in character. Remand Order PP 60, 86, JA 563, 577. Here, the Commission has drawn a reasonable demarcation between regional and local lines at 500 kV and the court should uphold that determination. *See Wisconsin Pub. Power*, 493 F.3d at 266 (the burden "is on the petitioners to show that the Commission's choices are unreasonable and its chosen line of demarcation is not within a zone of reasonableness as distinct from the question of whether the line drawn by the Commission is precisely right").

Illinois further complains that the Commission has not proven that benefits, such as increased reliability, are "evenly distributed among PJM's membership." Br. 45. This Court recognizes that reliability is a difficult benefit to calculate, much less to determine how it is distributed across a large grid. *Illinois Commission II*, 721 F.3d at 775 ("[o]ther benefits . . ., such as increasing the reliability of the grid, also can't be calculated in advance, especially on a subregional basis"). Yet, the Commission made great efforts to explain the value that reliability, in its many forms, brings to the entire PJM grid and every customer on that grid. *See* Remand Order PP 56-77, JA 561-72. The Commission is not required to show an exactly-even distribution of these benefits. *See Illinois Commission II*, 721 F.3d at 775 ("increasing the reliability of the grid . . . will benefit utilities and consumers in all of [RTO]'s subregions").

Illinois argues that the Commission must establish that utilities in Illinois and Ohio "benefit from the construction of power lines in New Jersey, Maryland, Virginia, West Virginia, Pennsylvania and Delaware." Br. 34. The Commission has established such benefits.

It explained that the geographic location of a line in an integrated system has little influence on who receives benefits from the line. Remand Rehearing Order P 69, JA 1023; *see also* Remand Order P 86 (e.g., service disruptions range far beyond the geographic location of a reliability event), JA 577. The geographic "reach" of a single 500 kV line – one that is not in an integrated grid – is 200 miles, four times that of a 345 kV line. Remand Order P 103, JA 586. Moreover, the Distribution Factor Analysis already establishes that western utilities contribute to the need for two major lines at issue by flowing power over the currently constrained facilities in those areas. *Id.* P 24, JA 545; *see also* Remand Rehearing Order P 69 n.96 (showing that two western utilities also contribute to the need for 345 kV lines located in northern New Jersey), JA 1023. Finally, Commonwealth Edison and other western utilities still require imports from the rest of PJM to ensure reliability. Remand Order P 74, JA 571.

This Court in *Illinois Commission I* was concerned about where future high-voltage projects would be located, stating that "[s]o far as appears, few if any such facilities will be built in the . . . Midwest, within the foreseeable

future." 576 F.3d 475; *see* Br. 46 (asserting no new high-voltage lines planned in Commonwealth Edison in next 15 years). In response, the Commission showed that two of the most costly lines will be located and address reliability violations in western PJM, as PJM defines that planning subregion. Remand Order P 87 (e.g., Trans-Allegheny Interstate Line ("TrAIL") located primarily in West Virginia, including in American Electric Power's zone), JA 577; *see supra* p. 8 (map of planning subregions). The Commission further noted the development of, and approval of rate incentives for, a new 420-mile 765 kV project for construction in Illinois, Indiana, and Ohio. Remand Order P 43 n.59 (citing *RITELine Illinois, LLC*, 137 FERC ¶ 61,039 PP 2-3 (2011) (project operations expected five to six years after obtaining PJM planning approval)), JA 553.

Illinois now complains that West Virginia is not properly part of western PJM. Br. 49. But this disregards both PJM's planning subregions and American Electric Power's six-state pricing zone that stretches from Michigan through Ohio and West Virginia into central Virginia. *See* Remand Rehearing Order, Attach. A, at 48 (map of pricing zones), JA 1040. The Commission, therefore, properly responded to the Court's request on remand to explain which transmission projects were expected to be built in the Midwest, basing its answer on PJM's planning definitions and reasonable

assumptions about which utilities are western utilities. *See supra* pp. 10-11 (discussing definition of western utilities).

In sum, because all customers using the transmission network receive these benefits, the Commission reasonably chose to allocate costs based on a method that recognizes the benefits of PJM's integrated high-voltage regional transmission system. *See Northern Ind.*, 782 F.2d at 743 (FERC properly "reach[ed] a result that is consistent with the evidence on which it relie[d]").

2. The Commission Quantified Benefits To The Extent Possible

To remedy its lack of evidentiary support in the Rate Design Opinion, *Illinois Commission I*, 576 F.3d at 474, the Commission collected and evaluated data on the quantifiable benefits of the Projects and the general benefits of an integrated high-voltage transmission grid. *See* Remand Order PP 78-79, 99, 100, 106, JA 572-73, 583, 584, 588. As to incremental benefits delivered by these Projects, the Commission quantified annual savings of $1.25 to $2 billion in reduced congestion, $505 to $784 million from lower transmission losses, and $53 million in fewer emergency transmission outages. Remand Order PP 99, 101, 106, JA 583, 585, 589. To calculate the $53 million in savings from fewer transmission outages, the Commission consulted five sources and literally "showed its math" by compiling data in a spreadsheet and providing that spreadsheet to the parties. *Id.* P 100 n.187

(spreadsheet, R.655, JA 722), JA 585. The Commission supplemented this data on incremental benefits with PJM's general estimates of the value of maintaining its reliable, integrated high-voltage system. *Id.* P 109, JA 590. This Metrics Report showed potential annual savings of $2.2 billion. *Id.*

Illinois's main evidentiary complaint is that the Commission extrapolated from data that showed merely the value of PJM membership and is "unrelated to the specific projects at issue." Br. 43. While the Commission recognized the imprecision inherent in valuing the benefits of new 500 kV and above facilities, the Commission concluded that the data was sufficient to support a regional allocation of the Project costs. Remand Rehearing Order P 74, JA 1025; Remand Order P 109, JA 590; *see Illinois Commission II*, 721 F.3d at 775 ("if [a] crude [attempt to match the costs and the benefits of high-voltage transmission] is all that is possible, it will have to suffice"). It explained that if reliability and deliverability on the grid are not maintained, then no utility will see the grid benefits. Remand Order P 79, JA 573; Remand Rehearing Order P 49, JA 1015.

Moreover, the $390 million savings from planning on a regional basis as opposed to planning for separate utility systems is a region-wide benefit that could not be realized without these high-voltage, regional projects. Remand Order P 97 (citing Metrics Report), JA 583. Benefits, such as those

for reserve sharing, valued at $80 to $105 million per year, are only available to utilities because of PJM's interconnected high-voltage system and the high-voltage upgrades to that system that maintain deliverability across the system. *Id.* P 101, JA 585; Remand Rehearing Order P 77, JA 1026. Without these projects, which have two to six times greater ability to deliver power than 345 kV lines, Remand Order P 103, JA 586, all utilities in PJM would have fewer opportunities for sharing reserves. *Id.* P 101, JA 585. Because the high-voltage projects provide these regional benefits, the Commission reasonably found that their costs should be shared by everyone in the region. Remand Rehearing Order P 49, JA 1015.

Illinois further argues that because the regional allocation lacks the specificity of the Distribution Factor Analysis in assigning costs, western utilities will receive no or trivial benefits from the Projects and, therefore, should not be allocated any of their costs. Br. 18-20; *see id.* 43-45 (arguing general RTO benefits are not dependent on the Projects). Even without relying on evidence quantifying the benefits that come from "planning and operating a reliable transmission system," Remand Order P 78, JA 572, the Commission demonstrated that other benefits, resulting directly from the Projects, would offset the Project's costs. *See id.* PP 99 (less congestion), JA 583, 100 (fewer emergency outages), JA 584, 106 (lower transmission losses), JA 588; *see also supra* p. 23 (listing benefit amounts). This is more

than enough when the Commission has also demonstrated significant, but not directly quantifiable, benefits from increased reliability from these network improvements. *See Illinois Commission I*, 576 F.3d at 477 (FERC may approve an allocation based on a plausible reasoning that benefits are commensurate with costs; it may also presume benefits to the entire network from reliability improvements).

Using Commonwealth Edison as an example, the Commission predicted that the utility would benefit every year from reduced transmission losses and reduced outages by about $95 to $143 million, but would only pay $76 million per year for the Projects. Remand Rehearing Order P 84, JA 1029; *see also* Remand Order PP 100, 107 (explaining outage and loss calculations), JA 584, 589. The majority of these significant measurable benefits are from transmission losses, Remand Order P 107, JA 589, a benefit that Illinois does not dispute in its brief. The Commission reasonably found that savings from losses correlate well with an allocator based on peak usage because "consumers with higher peak usage enjoy greater benefit from reduced losses," under PJM's market-based loss charges. Remand Rehearing Order P 83 (citing PJM Response, App. A at 47-48, JA 242), JA 1029; *see also Illinois Commission II*, 721 F.3d at 774 (recognizing reduced transmission losses as one of the benefits of high-voltage transmission).

Illinois also does not contest the outage data showing that 500 kV lines have fewer emergency outages and outages of shorter duration than 345 kV lines. *See* Remand Order P 100, JA 584; Remand Rehearing Order P 81, JA 1028. Rather, it argues that data on emergency events show that reliability is improving in western PJM. Br. 52. The Commission answered this claim by pointing to the economic downturn, Remand Rehearing Order P 80, JA 1027, and noting that Projects had been canceled due, in part, to a more reliable system resulting from reduced demand. *See id.* P 10, JA 997.

Illinois contends, as it did below, that a 2007 PJM study shows that it will never receive a benefit from these projects in terms of lower energy prices. Br. 20, 37-42. The Commission responded that PJM's prediction that prices would go up in some areas and down in others as a result of the high-voltage projects, was evidence of price convergence across the PJM grid. Remand Rehearing Order P 72, JA 1024. "[C]onverging prices signal that the grid is reliable and robust enough to support energy flows in any direction and that the benefits will accrue to the market as a whole." Remand Order P 96, JA 582. The Commission found that such market convergence and related reduction in grid congestion is a benefit to all users of the grid over time, as flows and the resource mix constantly change. Remand Rehearing Order P 72, JA 1024.

That conditions will change on PJM's grid is not "rank speculation" as Illinois contends. Br. 46. Rather, the record shows that, for each of three years, PJM has seen significant changes to the conditions on its system. Remand Order PP 43 n.57, 86, JA 553, 577; PJM Response at 28-30 (describing generator deactivation and reactivation requests, generator connection requests, new transmission reservations, and merchant transmission proposals made in its planning model between 2006 and 2009), JA 183-85. Additionally, while current peak power flows are predominately West to East, flows are not constant across the day, month, season or year. Remand Order P 88, JA 578. Annual data detailing how power was shared between Commonwealth Edison and the six-state system of American Electric Power before PJM integration shows that flows were westward 25 to 35 percent of the time. *Id.* PP 38 n.48, 88, JA 550, 578.

As further demonstration of how flows can change on the system, the Commission evaluated PJM's simulation which showed that one of the Projects could be used to flow off-shore wind power into western PJM. *Id.* P 88 & n.156 (citing PJM 2010 Regional Plan, 84, R.660, JA 819), JA 578; *see also Western Massachusetts*, 165 F.3d at 927 (affirming allocation based on load flow study showing that line could be used for other purpose than transporting power from the connecting generator). The Commission's determination that flows on PJM's system change constantly and will

continue to change, Remand Rehearing Order P 82, JA 1028, is a "reasonable predictive judgment [that] warrants judicial deference." *Wisconsin Pub. Power*, 493 F.3d at 260; *see Wisconsin Elec. Power Co. v. Costle*, 715 F.2d 323, 329 (7th Cir. 1983) (affording "great deference" to agency decision to rely on predictive modeling) (citing cases).

Based on quantification of economic benefits and an understanding of the widespread benefits of reliability, the Commission reasonably concluded that a regional allocation best matches costs with beneficiaries. *See* Remand Order P 126 ("On balance," and "based upon the record in this proceeding," a regional allocation "is the more credible basis upon which to set just and reasonable rates."), JA 600; *see also Northern Ind.*, 782 F.2d at 740 (finding substantial evidence supports FERC's approval of cost allocation).

C. Allocating The Costs Of High-Voltage Lines Based Solely On Distribution Factors Violates Cost Causation

Illinois argues that the Commission must apply the Distribution Factor Analysis, developed and approved for lower voltage facilities, in allocating high-voltage project costs as it is, in Illinois's judgment, the only method that identifies direct beneficiaries and cost causers of each Project. Br. 18, 26-28. Finding to the contrary, the Commission reasonably determined that the Analysis not only misses many direct beneficiaries of the Projects but also

fails to identify all of those that cause the need for the Projects. Remand Rehearing Order P 37, JA 550.

In conducting the Distribution Factor Analysis for any voltage, PJM selects the single most severe reliability violation for each project, models it on a 5-year period, instead of the 15-year planning horizon, and never revisits the allocation for changes that may have occurred on its system prior to construction. *See* Remand Order PP 41, 44, JA 552, 554. Furthermore, the Analysis predicts with great specificity which utilities use the constrained facilities at peak thereby causing the need for the new line; it does not predict who will use (or otherwise benefit from) the new line once it is built. *See id.* P 38 (characterizing Analysis as a "snapshot in time" model), JA 551.

Thus, the Analysis misses cost causers because it ignores any changes that occur between the time the project is approved in the Regional Plan and when it is built, *id.* P 44, JA 554, which for larger lines can be more than five years. *See* PJM Response at 18, JA 173. As discussed *supra* p. 52, these changes occur every year and are significant. Although PJM updates its planning model with this information, it does not and cannot update the cost allocations made pursuant to Distribution Factor Analysis in the same way. Remand Order P 45, JA 554. A PJM study showed that, over a three-year period as the system changed, utilities' contribution to the need for a yet-to-be-built line changed, some significantly. PJM Response at 20-21 (e.g., Jersey

City pays $56 million less for the Susquehanna-Roseland line under 2009 conditions versus 2007 conditions), JA 175-76; *see also supra* p. 19, Table 1 (Project No. 1). Further, the Analysis fails to identify everyone that contributes to secondary reliability violations. Remand Order P 121, JA 598. For example, the Susquehanna-Roseland line will resolve 143 secondary violations on 20 overloaded facilities – many more than the original 20 violations used for the Distribution Factor Analysis. *Id.*

On appeal, Illinois argues that the Commission ignored that changes in costs allocated are minimal when PJM accounts for additional reliability violations. Br. 27-28. While the Commission recognized that the changes are indeed small for Commonwealth Edison and Dayton, it reasonably determined that the study shows flaws in the Distribution Factor Analysis that could exclude direct causers of costs from any obligation to pay for a line. Remand Rehearing Order P 29, JA 1005; *see also* PJM Response at 19 (western utilities had minimal increases in cost responsibility; most eastern utilities had decreases, some by 10 percentage points), JA 174.

And the analysis fails to identify direct beneficiaries because it does not predict who will flow power over or otherwise use the new line once it is built. Remand Order P 44, JA 554. In fact, the Distribution Factor Analysis allocation remains fixed over the life of the project based on conditions present when the project was accepted into the Regional Plan. *Id.* P 58,

JA 562. If new members join they receive no new obligations for these lines even if they use them. *Id.* PP 27, 38, JA 546, 550.

An examination of the TrAIL project illustrates this disconnect. *See id.* P 56 n.90 (describing project), JA 561; *see also supra* p. 19, Table 1 (Project No. 2). The project was planned in the 2006 Regional Plan to address, in part, FirstEnergy's reservation of 1000 megawatts of transmission capacity to flow power from its Ohio subsidiary, then a member of another RTO, to subsidiaries in central Pennsylvania. PJM Response at 28-29, JA 183-84; *see also* 2006 Regional Plan at 65, R.656, JA 738; *see* Remand Rehearing Order P 48 (describing changes to ownership and control of the grid), JA 1014. Although FirstEnergy contributed to the eastern power flows, its Ohio subsidiary was not part of PJM until a month after TrAIL was completed in 2011, *see supra* p. 9, and that subsidiary would pay nothing toward the project if costs were assigned under the Distribution Factor Analysis. PJM Response at 10 (showing charges only for FirstEnergy's subsidiaries Metropolitan Edison (1%) and APS (21%)), JA 165; *see also American Transmission Sys., Inc.*, 140 FERC ¶ 61,226, PP 4, 26-30 (2012) (rejecting FirstEnergy's request for waiver of Project costs as part of its entry into PJM), *appeal pending sub nom.*, *FirstEnergy Serv. Co. v. FERC*, D.C. Cir. No. 12-1461 (argued Dec. 11, 2013); *Illinois Commission II*, 721 F.3d at 776 (describing how utilities, unhappy with cost allocation decisions, can "vote

with their feet" and leave an RTO for a neighboring one). The Commission reasonably determined that the regional allocation, adjusted every year to reflect utility demand in PJM, would better reflect situations like these. Remand Order P 59, JA 562.

For these reasons, the Commission properly concluded that the Analysis misaligns the costs and benefits of 500 kV and above facilities to such an extent that it is not a reasonable allocation method. *Id.* P 47, JA 555. Illinois asserts that this finding is insufficient to meet the Commission's burden under section 206 of the Federal Power Act, 16 U.S.C. § 824e, because the Commission applies exacting precision in evaluating the Distribution Factor Analysis. Br. 18-19, 29-31. Illinois misapplies the section 206 analysis.

The Distribution Factor Analysis was designed for lower voltage facilities, those of 345 kV and below, and was never the existing cost allocation method for facilities of 500 kV or above. Remand Rehearing Order P 50 ("PJM did not allocate the costs of any 500 kV and above facility using the static [Distribution Factor Analysis] methodology"), JA 1015. It was developed, pursuant to settlement, after the Commission found, under Federal Power Act section 206, that PJM's tariff was unreasonable as it contained insufficient detail to provide the transparency and certainty required to allocate facilities of any voltage. Remand Order P 5, JA 537; *see also* Dayton Rehearing Request, 10 (May 18, 2007) (agreeing with FERC

directive to establish "clear standards *incorporated into the tariff* that can be consistently applied for determining the beneficiaries of projects") (emphasis added), R.290, JA 101.

Contrary to Illinois's assertion, the Commission is not required to make an affirmative finding, under Federal Power Act section 206, that the Distribution Factor Analysis is unjust and unreasonable. Rather, in order to replace the existing rate with a reasonable rate, the Commission is first required to find that the existing method for allocating new facilities, used by PJM prior to development of the Analysis, is unjust and unreasonable. The Commission made this finding in the Rate Design Opinion, and affirmed it in the challenged order. Remand Order P 35 & n.43 (affirming Rate Design Opinion P 65, JA 67), JA 549. Illinois's brief neither mentions nor challenges this section 206 finding on the existing method and, therefore, waives any challenge to it. *See*, *e.g.*, *Black v. Educ. Credit Mgmt. Corp.*, 459 F.3d 796, 803 (7th Cir. 2006); *Hart v. Transit Mgmt. of Racine, Inc.*, 426 F.3d 863, 867 (7th Cir. 2005).

III. The Commission Properly Followed Its Rules In Taking Official Notice Of Evidence And Provided Adequate Opportunity To Rebut That Evidence

Pursuant to Rule 508 of its Rules of Practice and Procedure, 18 C.F.R. § 385.508, the Commission took official notice of more than 20 publicly-available reports by PJM and others, and, for convenience of the parties,

placed copies of those documents (that were not already there) into its electronic record system. Remand Order P 33, JA 548; *see id.* P 63 n.101 (noting how to locate Metrics Report in FERC's electronic system), JA 565; Remand Rehearing Order P 91 & n.134, JA 1032. Responding to Illinois's objection on rehearing of improper official notice, the Commission explained that its actions were consistent with its rules as it may take notice of "any matter about which the Commission, by reason of its functions, is expert." Remand Rehearing Order P 92 (quoting 18 C.F.R. § 385.508(d)(1)), JA 1033.

Ignoring altogether the Commission's application of Rule 508, Illinois renews its argument that two of the public reports are not properly part of the record and may not be considered as evidence by the Commission or this Court. Br. 50-52. Illinois again asserts that the Metrics Report does not qualify for official notice because it is "subject to dispute," Br. 51, and that a report on emergency events is not appropriate for official notice because the data therein can be characterized in different ways, Br. 52. Illinois concludes that it made a "'good showing' that it could contest the significance of [the two reports]," thereby requiring the Commission to grant rehearing to allow the parties to further develop the record. *Id.* (citing *Southern Cal. Edison Co. v. FERC*, 717 F.3d 177, 188 (D.C. Cir. 2013)). These arguments are without merit.

As it explained on rehearing, the Commission is an expert about any of its own proceedings, including the separate proceeding to develop the Metrics Report. Remand Rehearing Order P 92, JA 1033. It has expertise about the reliability and operations of PJM, especially the complex energy market that PJM operates and the Commission regulates. *Id.* To be sure, the Commission must provide parties with a reasonable opportunity to contradict these documents. *Union Elec. Co. v. FERC*, 890 F.3d 1193, 1202 (D.C. Cir. 1989); *see also* Remand Rehearing Order P 89 (finding proper reliance on official notice and adequate opportunity to rebut), JA 1032. It did so here: "inviting parties to contest the data" in their requests for rehearing of the Remand Order and allowing for full process to all parties participating in the development of the Metrics Report. Remand Rehearing Order P 93, JA 1034; *see Blumenthal v. FERC*, 613 F.3d 1142, 1146 (D.C. Cir. 2010) (opportunity to respond in petition for rehearing before FERC is sufficient due process). Illinois availed itself of these opportunities in this proceeding and the separate Metrics Report proceeding. *Id.* P 93 n.141, JA 1034. No more is required. *Illinois Commission II*, 721 F.3d at 775 (affirming FERC's reliance, in allocating transmission costs, on "materials to which the petitioners had access").

Moreover, unlike the rebuttal and new "proffered expert analysis" presented by petitioner (and ignored by FERC) in *Southern California*

Edison, 717 F.3d at 187, the Commission did not dismiss or ignore Illinois's arguments here about the officially noticed data. *Compare id.* at 188 (FERC "declined to consider the affidavit, noting . . . the record is closed") *with* Remand Rehearing Order PP 74-75 (addressing Metrics Report), JA 1025, 80 (addressing report on emergency events), JA 1027, 93 ("we address these arguments [on rebuttal of the officially noticed evidence] in this order"), JA 1034, 94 (addressing Metrics Report), JA 1034. At best, a remedy based on *Southern California Edison* would provide parties with an opportunity only to supplement the record in order to have the Commission squarely confront the new evidence; it would not require, as Illinois here requests, that the court ignore the evidence that the Commission officially noticed. 717 F.3d at 188. As the Commission noted, Illinois submitted no new evidence. Remand Rehearing Order P 95, JA 1035. And like the petitioners in *Illinois Commission II*, on appeal it "has failed to indicate what evidence . . . it might present" if allowed to supplement the record. 721 F.3d at 776.

CONCLUSION

For the foregoing reasons, the petitions for review should be denied and the Commission's orders should be upheld in all respects.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I hereby certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word, in 13-point Century Schoolbook font, and complies with the type-volume limitation of Federal Rule of Appellate Procedure Rule 32(a)(7)(B) in that the brief contains 13,986 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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February 28, 2014

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denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, §1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(a).	June 11, 1946, ch. 324, §10(a), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 removed the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, §1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(b).	June 11, 1946, ch. 324, §10(b), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, §10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, §10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

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

(b) Alternative prescriptions

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

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

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

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

(i) cost significantly less to implement; or

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

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

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

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

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

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

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

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

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

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

(g) Books and records

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

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

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

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

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

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

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

(4) Nothing in this section shall—

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

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

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

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

REFERENCES IN TEXT

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

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

AMENDMENTS

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

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

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

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

§ 825*l*. Review of orders

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

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

(b) Judicial review

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

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

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

within the time provided by the presiding officer, in no case later than 10 days before the session of the hearing at which such exhibit is offered, unless a shorter period is permitted under paragraph (c) of this section.

(c) *Late-filed testimony.* (1) If all participants in attendance at the hearing agree, the 10-day requirement for filing any written testimony under paragraph (b) of this section is waived.

(2) The presiding officer may permit the introduction of any prepared written testimony without compliance with paragraph (b) of this section, if the presiding officer determines that the introduction of the testimony:

(i) Is necessary for a full disclosure of the facts or is warranted by any other showing of good cause; and

(ii) Would not be unduly prejudicial to any participant.

(3) If any written testimony is served and filed within the 10 day period provided in paragraph (b) of this section, the presiding officer will provide the participants in attendance with a reasonable opportunity to inspect the testimony.

(d) *Form; authentication.* Prepared written testimony must have line numbers inserted in the left-hand margin of each page and must be authenticated by an affidavit of the witness.

§ 385.508 Exhibits (Rule 508).

(a) *General rules.* (1) Except as provided in paragraphs (b) through (e) of this section, any material offered in evidence, other than oral testimony, must be offered in the form of an exhibit.

(2) Any participant who seeks to have an exhibit admitted into evidence must provide one copy of the exhibit to the presiding officer and two copies to the reporter, not later than the time that the exhibit is marked for identification.

(3) The presiding officer will cause each exhibit offered by a participant to be marked for identification.

(b) *Designation and treatment of matter sought to be admitted.* (1) If a document offered as an exhibit contains material not offered as evidence, the participant offering the exhibit must:

(i) Plainly designate the matter offered as evidence; and

(ii) Segregate and exclude the material not offered in evidence, to the extent practicable.

(2) If, in a document offered as an exhibit, material not offered in evidence is so extensive as to unnecessarily encumber the record, the material offered in evidence will be marked for identification. The remainder of the document will be considered not to have been offered in evidence.

(3) Copies of any document offered as an exhibit under paragraph (b)(2) of this section must be delivered to the other participants appearing at the hearing by the participant offering the exhibit in evidence. The participants will be offered an opportunity to inspect the entire document and to offer as an exhibit in evidence, in like manner, any other portions of the document.

(c) *Public document items by reference.* If all or part of a public document is offered in evidence and the participant offering the document shows that all or the pertinent part of the document, is reasonably available to the public, the document need not be produced or marked for identification but may be offered in evidence as a public document by identifying all or the relevant part of the document to be offered.

(d) *Official notice of facts.* (1) A presiding officer may take official notice of any matter that may be judicially noticed by the courts of the United States, or of any matter about which the Commission, by reason of its functions, is expert.

(2) The presiding officer must afford any participant, making a timely request, an opportunity to show the contrary of an officially noticed fact.

(3) Any participant requesting official notice of facts after the conclusion of the hearing must set forth reasons to justify the failure to request official notice prior to the close of the hearing.

(e) *Stipulations.* (1) Participants in a proceeding may stipulate to any relevant matters of fact or the authenticity of any relevant documents.

(2) A stipulation may be received in evidence at the hearing and, if received in evidence, the stipulation is binding on the stipulating participants with respect to any matter stipulated.

(3) A stipulation may be written or made orally at the hearing.

§ 385.509 Admissibility of evidence (Rule 509).

(a) *General standard.* The presiding officer should exclude from evidence any irrelevant, immaterial, or unduly repetitious material. The presiding officer may also exclude from evidence any other material which the presiding officer determines is not of the kind which would affect reasonable and fair-minded persons in the conduct of their daily affairs.

(b) *Ruling on evidence.* (1) The presiding officer will rule on the admissibility of any evidence offered.

(2) If any participant objects to the admission or exclusion of evidence, the participant must state briefly the grounds for the objection.

(3) The presiding officer will not permit formal exceptions to any ruling on evidence. This prohibition against formal exceptions does not preclude a participant from raising, as an issue, the validity of any ruling on evidence later in the proceeding, consistent with Rule 711.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 225–A, 47 FR 35956, Aug. 18, 1982]

§ 385.510 Miscellaneous provisions (Rule 510).

(a) *Transcript.* (1) Any statement made at a hearing session will be transcribed in a verbatim report, with nothing omitted except as directed by the presiding officer on the record. A statement at a hearing may not occur off-the-record, except as otherwise directed by the presiding officer.

(2) After the closing of a record, changes in the transcript are not permitted, except as provided in paragraph (b) of this section.

(b) *Transcript corrections.* (1) Any correction in the transcript of a hearing may be made only if the correction conforms the transcript to the evidence presented at the hearing and to the truth.

(2) A transcript correction may be incorporated in the record, in accordance with a ruling of the presiding officer, if:

(i) Agreed to by all participants and approved by the presiding officer; or

(ii) The presiding officer requests submittal of transcript corrections and rules on the corrections submitted.

(3) Transcript corrections may be made at any time during the hearing or after the close of evidence, as the presiding officer determines appropriate, but only if the correction is made not less than 10 days before the time for filing final briefs.

(c) *Close of evidentiary record.* The presiding officer will designate the time at which the evidentiary record is closed. Evidence may not be added to the evidentiary record after the record is closed, unless the record is reopened under Rule 716.

(d) *Copies of exhibits and motions to participants.* Except as otherwise provided in this subpart, copies of exhibits and motions will be provided at the hearing to any participants who have not been provided copies.

(e) *Fees of subpoenaed witnesses.* (1) Any witnesses subpoenaed by the Commission must be paid the same fees and mileage provided for similar services in the district courts of the United States.

(2) Any fees and mileage paid to a subpoenaed witness under paragraph (e)(1) of this section will be paid by the Commission, unless the witness is subpoenaed at the instance of a party.

(3) If the witness is subpoenaed at the instance of a party, any fees and mileage paid to the witness under paragraph (e)(1) of this section must be paid by the party. The Commission, before issuing any subpoena at the instance of the party, may require the party to deposit an amount adequate to cover the witness probable fees and mileage under paragraph (e)(1) of this section. The deposit will be refunded when the party pays the witness in full.

(f) *Offers of proof.* (1) Any offer of proof made in connection with a ruling of the presiding officer rejecting or excluding proffered oral testimony must consist of a statement of the substance of the evidence which the participant claims would be adduced by the testimony.

Illinois Commerce Comm'n, et al. v. FERC, Docket No. EL05-121
7th Cir. Nos. 13-1674, *et al.*

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2014, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Respectfully submitted,

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