Nos. 13-2326 and 14-3023 (consolidated)

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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PIONEER TRAIL WIND FARM, LLC, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

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# BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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# GLOSSARY

| | |
|---|---|
| Ameren | Intervenor Ameren Illinois Company |
| Br. | Brief of Petitioners Pioneer Trail Wind Farm, LLC and Settlers Trail Wind Farm, LLC |
| Commission or FERC | Respondent Federal Energy Regulatory Commission |
| E.ON Rehearing Order | *E.ON Climate & Renewables N. Am., LLC v. Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,048 (2012) |
| First Order | *Midwest Indep. Transmission Sys. Operator, Inc.*, 135 FERC ¶ 61,222 (June 10, 2011), R.28, JA 771 |
| *Illinois 2009* | *Illinois Commerce Comm'n v. FERC*, 576 F.3d 470 (7th Cir. 2009) |
| *Illinois 2013* | *Illinois Commerce Comm'n v. FERC*, 721 F.3d 764 (7th Cir. 2013) |
| JA | Joint Appendix |
| Option 1 | One of two methods found in System Operator's tariff at the time of the original agreements for reimbursing a transmission owner for the cost of network upgrades, whereby the transmission owner repays 100 percent of the cost of network upgrades to the interconnection customer, and then requires the interconnection customer to pay a monthly charge to recover the costs of the upgrades over a negotiated period of time. |

# GLOSSARY

| | |
|---|---|
| Option 2 | The other method for reimbursing a transmission owner for the cost of network upgrades, whereby the transmission owner keeps the amount the interconnection customer paid to fund the non-reimbursable portion of the network upgrades, and assesses no further charges to the interconnection customer. |
| P | Paragraph number in a FERC order |
| R. | Record citation |
| Second Order | *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,050 (Apr. 18, 2013), R.50, JA 840 |
| System Operator | Intervenor Midcontinent Independent System Operator, Inc. |
| System Operator Answer | Motion for Leave to Answer and Answer to Protest of the Midwest Independent Transmission System Operator, Inc., Docket Nos. ER11-3326-000, *et al.* (May 16, 2011), R.22, JA 648 |
| Third Order | *Midwest Indep. Transmission Sys. Operator, Inc.*, 148 FERC ¶ 61,047 (July 17, 2014) R.63, JA 885 |
| Wind Farms | Petitioners Pioneer Trail Wind Farm, LLC and Settlers Trail Wind Farm, LLC |
| Wind Farms Protest | Motions to Intervene and Consolidate and Protest of Settlers Trail Wind Farm, LLC and Pioneer Trail Wind Farm, LLC, Docket Nos. ER11-3326-000, et al., R.16, JA 516 |

## STATEMENT OF JURISDICTION

The jurisdictional statement of Petitioners Pioneer Trail Wind Farm, LLC and Settlers Trail Wind Farm, LLC (collectively, Wind Farms) is complete and correct. *See* Cir. R. 28(b).

## STATEMENT OF ISSUES

Respondent Federal Energy Regulatory Commission (Commission or FERC) found that it was appropriate for Intervenor Midcontinent Independent System Operator, Inc. (System Operator) to revise generator interconnection agreements among itself, Wind Farms, and Intervenor Ameren Illinois Company (Ameren). The revised agreements compensated for an error that would have prevented the parties from connecting Wind Farms' electric generation facilities to Ameren's transmission grid, which System Operator runs, without violating applicable reliability standards and, therefore, the terms of their agreements.

The issues presented for review are:

1. Whether FERC reasonably found that System Operator could correct an error in the transmission system impact study that analyzed how Wind Farms would connect their electric generation projects to Ameren's transmission system, and could identify in revised generator interconnection agreements additional transmission network upgrades necessary to complete this work;

2. Whether FERC reasonably found that Wind Farms, but for whose interconnection the additional network upgrades would not have been built, should pay for the upgrades; and

3. Whether FERC reasonably decided that Ameren could obtain reimbursement for earlier-identified network upgrades associated with Ameren's interconnections using a formula selected in the original agreements (Option 1), when FERC directed Ameren to use a different reimbursement mechanism for the additional network upgrades identified in the revised agreements.

## STATEMENT OF THE CASE

This case is about allocating the risk – which is to say, the cost – of an error. In 2010, Wind Farms, System Operator,[1] and Ameren agreed to terms and conditions under which Wind Farms would connect two 150-megawatt wind farms to Ameren's electric transmission grid. The original agreements identified transmission network upgrades that Ameren would have to build on its grid in order to reliably connect Wind Farms' generation facilities. System Operator's tariff and the agreements required Wind Farms to reimburse Ameren for building the upgrades, and Ameren elected to receive this reimbursement under a formula called Option 1.

[1] System Operator changed its name from Midwest Independent Transmission System Operator, Inc. to Midcontinent Transmission System Operator, Inc. in 2013.

It later emerged that there had been an error underlying the transmission system impact study that System Operator used to identify the network upgrades needed for the interconnection. The results of the study were incorrect and, as a result, the original agreements called for Ameren to build network upgrades that were insufficient to reliably interconnect Wind Farms' facilities. System Operator corrected the study and sought to revise the agreements to accurately reflect what network upgrades were needed for the interconnection.

The Commission evaluated the revised interconnection agreements to determine whether they are "just and reasonable," as section 205 of the Federal Power Act, 16 U.S.C. § 824d, requires. In the course of the three orders challenged here, the Commission concluded that it was just and reasonable to revise the agreements. *Midwest Indep. Transmission Sys. Operator, Inc.*, 135 FERC ¶ 61,222 (June 10, 2011) (First Order), R.26, JA 771, *order on reh'g*, 143 FERC ¶ 61,050 (Apr. 18, 2013) (Second Order), R.50, JA 840, *order on reh'g*, 148 FERC ¶ 61,047 (July 17, 2014) (Third Order) R.63, JA 885. The Commission determined that the language of the agreements, which reflect the filed rate, require that Wind Farms pay for additional network upgrades that all parties agreed were necessary for the interconnection. It also found that its precedent concerning reimbursement mechanisms for network upgrades supported Ameren's ongoing use of Option

1 for the network upgrades identified in the initial agreements, but not for the newly-identified network upgrades.

Wind Farms challenged FERC's approval of the revised cost allocation, and of its application of the Option 1 reimbursement policy, in the revised agreements. The Commission denied rehearing of their arguments.

## I. Statement of Facts

### A. Statutory and Regulatory Background

Section 201 of the Federal Power Act, 16 U.S.C. § 824, gives FERC jurisdiction over the rates, terms, and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. "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*, 558 U.S. 165, 171 (2010) (citing Federal Power Act sections 205 and 206, 16 U.S.C. §§ 824d(e), 824e(a)). All rates for or in connection with jurisdictional sales and transmission service are subject to FERC review to assure that they are just and reasonable, and not unduly discriminatory or preferential. *See* 16 U.S.C. §§ 824d(a), (b), (e). *See also, e.g., Illinois Commerce Comm'n v. FERC*, 721 F.3d 764, 770 (7th Cir. 2013) (*Illinois 2013*) ("The Federal Power Act requires that the fee be 'just and reasonable,' 16 U.S.C. § 824d(a), and therefore at

least roughly proportionate to the anticipated benefits to a utility of being able to use the grid.").

Commission determinations under section 205 and/or section 206 of the Federal Power Act account for continued reliability of electric service. *See Consol. Edison Co. of New York v. FERC*, 510 F.3d 333, 342 (D.C. Cir. 2007) (Federal Power Act "has multiple purposes in addition to preventing 'excessive rates' including protecting against 'inadequate service' and promoting the 'orderly development of plentiful supplies of electricity'" (quoting *Cities of Anaheim v. FERC*, 723 F.2d 656, 663 (9th Cir. 1984), and *Pub. Utils. Comm'n of Cal. v. FERC*, 367 F.3d 925, 929 (D.C. Cir. 2004))). Additionally, "[a]ll users, owners, and operators of the bulk-power system shall comply with reliability standards that take effect under" section 215 of the Federal Power Act. 16 U.S.C. § 824o(b)(1); *see also* 18 C.F.R. § 40.2 (same).

The pertinent statutes and regulations are reproduced in the Addendum to this brief.

### B. FERC's Generator Interconnection Policy

In recent years, the Commission has advanced its statutory responsibilities by encouraging competition and reliability improvements in the wholesale market for electric power through provision of non-discriminatory, efficient access to transmission over broad geographic areas.

*See Morgan Stanley Capital Group v. Pub. Util Dist. No. 1*, 554 U.S. 527, 536-37 (2008). The Commission also has encouraged formation of regional transmission organizations, which are voluntary associations of utilities whose electric transmission lines interconnect to form a regional grid. *Illinois 2013*, 721 F.3d at 769. Member utilities agree to delegate operational control of their transmission facilities to the regional transmission organization. *Id.* System Operator, operating in fifteen states, is such an organization, and Ameren, a transmission-owning utility operating in Illinois, is one of its members.

In addition to operating the grid, regional transmission organizations are responsible for overseeing its expansion. *Id.* at 770. This happens through two interrelated processes: the construction of new transmission facilities and the interconnection of new generation. Either process may stimulate the other. *See generally id.* at 772 (describing need for new transmission lines to move windpower from remote generation facilities to population centers). The term "interconnection" does not refer simply to facilities, but also to relationships between parties as to electricity flowing over facilities. *Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007).

FERC has standardized the terms of those relationships, and it requires all public utilities that own, control, or operate facilities used for transmitting

electric energy in interstate commerce to use standard procedures and a standard agreement for interconnecting large generators to their transmission systems. *See id.* at 1279-80; *see also Standardization of Generator Interconnection and Procedures*, Order No. 2003, 104 FERC ¶ 61,103, at PP 11-12 (2003), *order on reh'g*, Order No. 2003-A, 106 FERC ¶ 61,220 (2004), *order on reh'g*, Order No. 2003-B, 109 FERC ¶ 61,287 (2004), *order on reh'g*, Order No. 2003-C, 111 FERC ¶ 61,401 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs*, 475 F.3d 1277. Consistent with this requirement, System Operator has incorporated a version of the Commission's *pro forma* Large Generator Interconnection Procedures and Large Generator Interconnection Agreement at Attachment X to its transmission tariff. *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,027, at P 6, *order on reh'g*, 109 FERC ¶ 61,085 (2004).

System Operator's review of an interconnection request and its subsequent system impact study identifies two sets of equipment that are necessary for the interconnection: generator interconnection facilities and network upgrades. Interconnection facilities, which are not in dispute here, are on the generator's side of the point where it connects to the transmission system. *Nat'l Ass'n of Regulatory Util. Comm'rs*, 475 F.3d at 1284. Network upgrades are facilities and equipment constructed at or beyond the point of interconnection for the purpose of accommodating the new generating

facility. *See id.* Although an interconnection customer may cause the addition of these facilities via its request to connect to the grid, network upgrades are transmission system expansions that also benefit all users of the integrated grid in some way. *Id.* at 1285. As the independent entity, System Operator must use its study processes to identify network upgrades that ensure: (1) that an interconnection customer can reliably connect to the transmission system; and (2) that the network upgrades chosen promote efficiency. *Midwest Indep. Transmission Sys. Operator, Inc.*, 131 FERC ¶ 61,165, at P 21, *reh'g denied*, 133 FERC ¶ 61,011 (2010).

### C. FERC's Interconnection Pricing Policy

The Commission's interconnection pricing policy began with the principle that an interconnection customer (i.e., an electric generator seeking access to the grid) should not pay twice for using the transmission system. Typically a transmission owner interconnecting its own generation rolls the cost of the associated network upgrades into its embedded transmission rates. FERC Order No. 2003 at P 694. To ensure that transmission owners treat interconnection customers comparably to their own generation, FERC allows them to charge the interconnection customer the higher of the embedded costs of the transmission system with expansion costs rolled in, or the incremental expansion costs, but not both. Order No. 2003 at P 694 & n.111. In order to avoid this double-charging, in the past the Commission has found

that it is appropriate for the interconnection customer to fund the cost of interconnection facilities and network upgrades that would not be needed but for the interconnection. *Id.* PP 694-95. Non-independent transmission owners (like Ameren) must then reimburse the generator for the upgrades' cost by issuing transmission service credits. *Id.*

In Order No. 2003 FERC allowed independent entities (such as regional system operators, which lack the incentive to discriminate among interconnection customers) flexibility to propose participant funding – the direct assignment of the costs of network upgrades to the interconnecting generator. *Id.* PP 699, 701. Among other things, the Commission found that providing transmission service credits to interconnection customers for the cost of network upgrades that would not be needed but for the interconnection request muffles the interconnection customer's incentive to make an efficient siting decision, and could be viewed as providing an improper subsidy. *Id.* P 695.

System Operator implemented participant funding in 2006. *Midwest Indep. Transmission Sys. Operator, Inc.*, 114 FERC ¶ 61,106, at PP 61-63 (2006). Since that time, some or all of the cost of network upgrades for generator interconnection has been directly assigned to the generator. *See generally Midwest Indep. Transmission Sys. Operator, Inc.*, 133 FERC ¶ 61,221, at PP 265-67, 332-37 (2010) (describing cost allocation for network

upgrades), *order on reh'g*, 137 FERC ¶ 61,074 (2011), *aff'd*, *Illinois 2013*, 721 F.3d 764; *see also Midwest Indep. Transmission Sys. Operator, Inc. and Midwest ISO Transmission Owners*, 129 FERC ¶ 61,060 (2009) (describing most current cost allocation methodology). System Operator uses the "but for" test to limit the interconnection customer's cost responsibility to the cost of the upgrades that System Operator finds would not be necessary in the absence of the interconnection. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 131 FERC ¶ 61,165, at P 20, *reh'g denied*, 133 FERC ¶ 61,011 (2010).

When System Operator, Ameren, and Wind Farms signed the original agreements, System Operator's tariff allowed a transmission owner (such as Ameren) to select between two options for recovering the costs of network upgrades subject to participant funding. *See E.ON Climate & Renewables N. Am., LLC v. Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,048, at P 4 (2012) (E.ON Rehearing Order). Under Option 1, the transmission owner repaid 100 percent of the cost of network upgrades to the interconnection customer, and then required the interconnection customer to pay the transmission owner a monthly charge to recover the costs of the upgrades over a negotiated period of time. *Id.* Under Option 2, the transmission owner would keep the amount the interconnection customer

paid to fund the non-reimbursable portion of the network upgrades, and assess no further charges to the interconnection customer. *Id.*

### D. Wind Farms' Interconnection Agreements

The original agreements at issue here are not part of the record of this case because they conformed to System Operator's *pro forma* Large Generator Interconnection Agreement.[2] New conforming agreements do not have to be filed with the Commission, but are reported on a quarterly basis. System Operator reported these agreements. *See* First Order at P 4, JA 772. Accordingly this brief will refer to the Large Generator Interconnection Agreement in System Operator's tariff when discussing the original agreements. *See generally* Large Generator Interconnection Agreement, *available at* https://www.misoenergy.org/Library/Tariff/Pages/Tariff.aspx, JA 904-19.

The Large Generator Interconnection Agreement requires System Operator to conduct studies of the interconnection request and of its system. *Id.* at Articles 4.1.1.2, 4.1.2.2, and 4.2, JA 909-10, 910-12, 914. The system impact study, which is further described in Sections 7 and 8 of the Generator

[2] The only record items that reflect the text of the original agreements are the copies of the revised agreements that System Operator filed with the Commission. Amended and Restated Generator Interconnection Agreement, Docket No. ER11-3326-000 (Apr. 8, 2011) R.1, JA 1; Amended and Restated Generator Interconnection Agreement, Docket No. ER11-3327-000 (Apr. 8, 2011) R.3, JA 275.

Interconnection Procedures, evaluates the impact of the proposed interconnection request on the reliability and safety of the transmission system. It identifies the network upgrades necessary to integrate a generator to the transmission system, and those upgrades are identified in the interconnection agreement.

Ameren agreed to build network upgrades necessary to integrate Wind Farms' generating facilities to the transmission network. *See id.* at Article 4.1.1.1 (Transmission Owner shall construct facilities identified in Appendix A of the agreement), Article 4.1.2.1, Article 5.6, JA 908-09, 910, 917. Wind Farms agreed to pay for the network upgrades to the extent that Ameren did not fund them. *Id.* at Article 11.3, JA 918. Ameren chose to be reimbursed for the cost of these upgrades under Option 1. *See* Third Order at P 13, JA 890.

Several months after the parties signed the agreements, System Operator informed Wind Farms of an error in the model underlying the system impact study. First Order at P 5, JA 772-73. The generating capacity of two other projects was misrepresented in the study as 100 megawatts, rather than 130 megawatts. *Id.* As a result of the error, the interconnection upgrades identified in the generator interconnection agreements would not be enough to mitigate the overloads on the transmission system that Wind Farms' interconnected generating facilities would cause. *Id.* This would, in turn,

cause System Operator and Ameren to violate an applicable reliability standard, Reliability Standard TPL-001-0.[3]

Ameren proposed three options to resolve the problem: (1) increase the network upgrades required for the interconnection, at additional cost to Wind Farms; (2) maintain the contracted-for network upgrades and costs, but decrease the output of Wind Farms' generation facilities; or (3) a combination of the two. *See* Motions to Intervene and Consolidate and Protest of Settlers Trail Wind Farm, LLC and Pioneer Trail Wind Farm, LLC at Exh. 15, Docket Nos. ER11-3326-000, *et al.* (Wind Farms Protest), R.16, JA 608-09. Wind Farms rejected these options. *See id.* at Exh. 16, JA 611.

Ameren, on behalf of System Operator, conducted a restudy to correctly identify the upgrades that should be included in each agreement. Motion for Leave to Answer and Answer to Protest of the Midwest Independent Transmission System Operator, Inc. at 4-5, Docket Nos. ER11-3326-000, *et al.* (May 16, 2011) (System Operator Answer), R.22, JA 651-52. Once the study model was modified to account for the additional 30 megawatts of generation capacity, System Operator found that additional system upgrades would be necessary to interconnect Wind Farms' projects. First Order at P 5,

[3] TPL-001-0 requires System Operator to ensure that its portion of the interconnected transmission system is operated in such a way that the loss of a single piece of equipment will not cause operating limits to be exceeded on other elements of the bulk power system, jeopardizing overall reliability.

JA 772-73. Ameren and System Operator again presented options to Wind Farms for resolving the contract issues, but the parties were unable to agree. *Id.* at PP 5-6, JA 772-73. There is no dispute, however, that the upgrades are necessary for the interconnections, and that if the original study had been performed without errors, the additional upgrade costs would have been Wind Farms' responsibility. *See* First Order at P 23, JA 779; Second Order at P 54, JA 858.

Wind Farms did not object to the changes to the extent that the Revised Agreements would reflect the correct network upgrades to allow them to connect their facilities to the transmission system; in fact, they requested that these changes be made to their agreements. First Order at P 23, JA 779; Second Order at P 50, JA 857 (quoting Wind Farms Protest at n.133, JA 563). They did object to paying for the additional network upgrades that the new study identified. First Order at P 6, JA 773; Second Order at P 6, JA 842-43. They also objected to Ameren's request to be reimbursed for the network upgrades under Option 1, *see supra* p. 10, which had been discredited in a complaint proceeding filed on March 22, 2011, after the original agreements were signed. *See E.ON Climate & Renewables N. Am., LLC v. Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,076, at P 4 (2011) (hereinafter, *E.ON Order*), *reh'g denied*, E.ON Rehearing Order.

At Wind Farms' request, System Operator filed the Revised Agreements with the Commission on an unexecuted basis. First Order at P 6, JA 773; Second Order at P 6, JA 842-43.

## II. The FERC Orders

In the orders on review, FERC found that the revised generator interconnection agreements were just and reasonable and not unduly discriminatory, in accordance with Federal Power Act section 205, 16 U.S.C. § 824d. *See* First Order at P 3, JA 772; Second Order at P 57, JA 859-60. The Commission stated that its orders would only address the specific facts of the case, not set broad policy that would create uncertainty for other interconnection customers, because it expected situations like this one to be rare. *See* First Order at P 24, JA 779; Second Order at P 32-35, JA 849-51.

First, the Commission found that it was just and reasonable to amend the agreements, because if the parties performed as the contracts required, a reliability standards violation would result. Specifically, designating both generating facilities, each with 150 MW rights, as of the original effective dates of September 2011 (for Pioneer Trail) and March 2012 (for Settlers Trail), would violate reliability standard TPL-001-0. First Order at P 25, JA 779-80; *see supra* p.13 n.2 (explaining standard). Although there was no language in the agreements that explained how to address an inadvertent error, FERC found that System Operator and Ameren must not ignore a

known reliability concern but, consistent with Good Utility Practice, must address it. First Order at P 30, JA 781. FERC also found that System Operator could amend the agreements unilaterally under section 205 of the Federal Power Act, 16 U.S.C. § 824d, and that the terms of the agreements contemplated this possibility. First Order at PP 26-27, 31, JA 780-81, 782. Amendment of an interconnection agreement to accommodate additional upgrades is a "not infrequent" occurrence. Third Order at P 37, JA 898.

Second, FERC found that it was reasonable, and consistent with precedent, to assign the costs of the additional network upgrades to Wind Farms. First Order at PP 28, 31-32, JA 781, 782-83. The record supported, and no party disputed, the need for the additional upgrades. First Order at P 23, JA 779; Second Order at P 57, JA 859-60. Indeed, had no mistakes been committed, the original agreements would have included the same network upgrades as those included in the revised agreements. First Order at P 32 & n.35, JA 782-83; *see also* Second Order at PP 40, 57, JA 853, 859-60 (same). And because "the error resulted in real costs for network upgrades that must be constructed before the generators can be interconnected consistent with reliability requirements, the most appropriate parties to pay these costs under these circumstances are the generators that will benefit from the upgrades." First Order at P 32, JA 782-83; *see also* Second Order at P 57-58, JA 859-60 (same).

Finally, FERC found that Ameren may continue to use the Option 1 reimbursement scheme for the originally-identified upgrades because, as explained in the E.ON Rehearing Order, the original agreements were not affected by the Commission's later rejection of Option 1. Second Order at PP 66-70 (citing E.ON Rehearing Order, 142 FERC ¶ 61,048 at P 34), JA 862-64. The Commission required Ameren to use a different reimbursement mechanism for the additional network upgrades, however, because the need for those upgrades was discovered after Option 1 was removed from Operator's tariff. *Id.* PP 69-70, JA 864. FERC examined the cases that Wind Farms cite in their brief to argue that the use of Option 1 is not permitted in the revised agreements, and it found that those cases were consistent with allowing Option 1 to remain in effect with regard to the originally-identified network upgrades. Third Order at PP 39-41, JA 899-900. The Commission found that the specific regulatory remedy adopted with respect to agreements that include Option 1 – i.e., the Commission's holding that Option 1 may be preserved in agreements effective prior to March 22, 2011 – governs in this case. *Id.* P 38, JA 899.

## SUMMARY OF THE ARGUMENT

Wind Farms do not dispute that the additional network upgrades identified in the amended agreements are necessary to connect their facilities to Ameren's transmission grid. The record shows that the initial agreements

should have included these upgrades, and Wind Farms requested that the amended agreements include them. But Wind Farms object to paying for those upgrades. "Essentially, [they] seek to be held harmless from the results of a corrected study and to retain their original costs and construction schedules without regard for the actual conditions on the transmission system." System Operator Answer at 6, JA 653. They contend that allowing System Operator to restudy its system in the wake of an error means that System Operator may restudy its system under a host of different conditions, and thereby defeat interconnection customers' settled expectations of their cost obligations.

But here the Commission reasonably construed the filed rate – i.e., the silence in System Operator's tariff as to whether and how to restudy the system in the event of an error – along with court and Commission precedent, to conclude that a restudy was justified and that the costs of the additional network upgrades identified through the restudy should be assigned to Wind Farms. FERC reasonably found in its orders that, in light of the unusual circumstances of this case, and the limited guidance that was available in the tariff, System Operator was justified in conducting a restudy. The Commission noted that it expected situations like this one to be rare, and that it did not intend to set broad precedent by resolving the dispute at issue

here. The Commission also found that the result Wind Farms seek is contrary to the filed rate – i.e., the tariff and the agreements.

System Operator's tariff requires that an interconnection customer integrating its generation facilities to the grid System Operator controls pay the cost of network upgrades. Court precedent requires that Wind Farms must pay the filed rate, not a lower rate negotiated outside the structure of the tariff. And Commission policy, which is reflected in the tariff, specifies that Wind Farms must pay for network upgrades – like these – that would not have been built but for their interconnection. The Commission therefore correctly did not consider who was at fault for the error, but assessed the costs of the additional network upgrades to Wind Farms to, on balance, best match costs with benefits.

Finally, with regard to the reimbursement policy that applied to these network upgrades, FERC followed its policy allowing transmission owners who had secured Option 1 reimbursement prior to March 22, 2011 – the effective date of the complaint challenging Option 1 – to continue to use Option 1 to the extent that they had previously agreed to it. FERC reasonably decided to allow Ameren to recover the costs of the originally-identified network upgrades under Option 1, as it contracted to do at the time of the original upgrades.

# 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 the law. *See, e.g., Michael v. FDIC*, 687 F.3d 337, 348 (7th Cir. 2012). This review is narrow, and the Court may not set aside an agency decision that indicates a rational connection between the facts and its action. *See 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)).

FERC's factual findings are conclusive if they are supported by substantial evidence. 16 U.S.C. § 825*l*(b); *see also Northern Ind. Pub. Serv. Co. v. FERC*, 782 F.2d 730, 739-40 (7th Cir. 1986) (same). "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 again, to reweigh the evidence, or to substitute its judgment for that of the agency. *Jancik v. HUD*, 44 F.3d 553, 556 (7th Cir. 1995).

In light of FERC's recognized expertise in administering the Federal Power Act, *see City of Kaukauna v. FERC*, 214 F.3d 888, 899 (7th Cir. 2000), courts are also respectful of the agency's rate decisions and of its

interpretation of tariffs and jurisdictional agreements. "The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and [the Court] afford[s] great deference to the Commission in its rate decisions." *Morgan Stanley Capital Group v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008). As for filed tariffs, the Court provides substantial deference to the Commission's interpretation unless the tariff language is unambiguous. *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 17 (D.C. Cir. 2014). If the agreement is ambiguous or silent, the Court examines the Commission's interpretation using the "reasonable" standard. *See Old Dominion Elec. Co-op., Inc. v. FERC*, 518 F.3d 43, 48 (D.C. Cir. 2008); *Cajun Elec. Power Coop., Inc. v. FERC*, 924 F.2d 1132, 1135 (D.C. Cir. 1991).

## II. The Commission Reasonably Concluded That It Was Appropriate To Amend the Agreements.

When "entities before FERC present intensely practical difficulties that demand a solution, FERC must be given the latitude to balance the competing considerations and decide on the best resolution." *NRG Power Mktg., LLC v. FERC*, 718 F.3d 947, at 955-56 (D.C. Cir. 2013) (internal quotations omitted); *see also Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968) ("[T]he breadth and complexity of the Commission's responsibilities demand that it be given every reasonable opportunity to

formulate methods of regulation appropriate for the solution of its intensely practical difficulties."). Ameren, System Operator, and Wind Farms faced such difficulties here because, in light of the study error, they could not perform their obligations under the interconnection agreements without violating those agreements.

The Commission was required to interpret the agreements in order to resolve this impracticability, because no provision of the Large Generator Interconnection Agreement explained how the parties should correct a modeling error that ultimately caused erroneous network upgrades to be included in a generator interconnection agreement. *See* Second Order at P 49, JA 856-57. The Commission is expected to draw on its view of the public interest in interpreting agreements. *See Cajun Elec. Power Coop.*, 924 F.2d at 1135. Here, the Commission reasonably construed the original agreements to conclude that System Operator should revise them. In doing so, the Commission struck an appropriate balance between regulatory certainty and electric reliability. *See* Second Order at PP 34, 57 (Commission allowed System Operator to correct error based on "totality of circumstances of this case"), JA 850, 859-60; Third Order at P 37 (Commission's choice of remedy balances various factors), JA 898.

### A. The filed rate doctrine requires revision of the agreements.

The filed rate doctrine, originating in cases interpreting the Interstate Commerce Act, has been extended to apply to other regulated utilities. *See Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981). The rule is simply that utilities must charge the rate that is on file with the jurisdictional agency. *Id.*; *see also Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915). A jurisdictional contract is a filed rate. 16 U.S.C. § 824d(d); *Ark. La. Gas Co.*, 453 U.S. at 583 (parties may set rates by contract). Deviation from the tariff is not permitted on any pretext, such as ignorance or intentional misstatement of the rate. *See Louisville & Nashville*, 237 U.S. at 97; *Norwest Transp. v. Horn's Poultry, Inc.,* 23 F.3d 1151, 1153 (7th Cir. 1994). Deviation is permitted, however, if there is notice that it might occur; for example, if buyers are on adequate notice that resolution of some specific issue may cause the rate collected at the time of service to change. *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992).

Wind Farms contend that the filed rate doctrine precludes FERC's approval of the revised agreements because those agreements do not contemplate error, because the interconnection customer is on notice of the cost of all network upgrades at the end of the study process, and because System Operator and Ameren are not empowered to correct the error found here. Br. 16-24. They seem to contend that Ameren may only restudy its

system under the circumstances specifically enumerated in Article 11.3.1 (listing specific circumstances where network upgrades, system protection facilities, and distribution upgrades can be modified, such as changes in higher-queued interconnection requests or changes in equipment design standards), which does not apply in the case. Br. 19-20; *see also* First Order at P 30, JA 781 (Wind Farms and Operator agree that Article 11.3.1 does not apply). Wind Farms also read the definition of "Network Upgrade" as a limiting principle, arguing that only the upgrades identified in the initial study process – and no upgrades identified later – can be included in the generator interconnection agreement. Br. 23.

But the Tariff is not as limiting as Wind Farms claim it to be. Second Order at P 49, JA 856-57. Wind Farms cannot reconcile any of their arguments with the undisputed fact that the upgrades identified in the original agreements do not permit reliable integration of their generators with the transmission grid, and therefore frustrate the purpose of the agreements. Second Order at P 40, 50, JA 853, 857 (original agreements should have included all of the upgrades specified in the revised agreements); *see also, e.g., United States v. Sw. Elec. Coop., Inc.*, 869 F.2d 310 (7th Cir. 1989) (rejecting frustration of purpose arguments where – unlike here – mistake was based on future events). The Commission's reading of the tariff shows its understanding that some resolution was necessary.

Several tariff provisions leave room for System Operator to restudy its system under exigent circumstances, and the Commission noted these provisions in its orders. First, the Commission found that correction of the error is required in order to implement the filed rate in System Operator's tariff. Second Order at P 50, JA 857. As the Commission observed, "Network Upgrades" are defined as facilities required to connect a generator to the transmission grid, and everyone agreed that additional upgrades were required in order to satisfy the definition in this case. *Id.* (Despite this, Wind Farms now argue that the fact that the upgrades are needed is irrelevant for filed rate purposes. Br. 23.) Article 5.1.1 of the Large Generator Interconnection Agreement, JA 915-16, allows Ameren to change the construction timeline if it cannot complete construction of the network upgrades in a timely way. First Order at P 26, JA 780-81. Under Article 30.11 of that agreement, JA 919, System Operator may make unilateral amendments to the agreements "with respect to any rates, terms and conditions, classifications of service, rule or regulation under Section 205 of the Federal Power Act." Large Generator Interconnection Agreement at Article 30.11, JA 919; *see* Second Order at P 51, JA 857.

Finally, no language in the Generator Interconnection Procedures or the Large Generator Interconnection Agreement limits restudy to the situations enumerated in the tariff. *See* First Order at P 30 & n.32, JA 781 (restudy in

the circumstances present here is consistent with Good Utility Practice); Second Order at P 32, JA 849-50 (no Commission policy or precedent prohibits correction of interconnection study errors under these facts). Indeed the tariff requires that each party perform their duties under the agreement in accordance with Applicable Laws and Regulations, Applicable Reliability Standards and Good Utility Practice, as such terms are defined therein. *See* Large Generator Interconnection Agreement at Article 4.3 (Performance Standards), Article 1 (definitions), JA 914, 906, 907; *see also* First Order at P 30 (citing System Operator Answer at 23, JA 679), JA 781.

The Commission's reading of the filed rate is consistent with applicable precedent, which requires utilities to correct errors that result in incorrect applications of the filed rate. *See Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 106 FERC ¶ 61,228, at P 89 (2004) (utility must recompute bills not calculated in accordance with filed rate); *Philadelphia Elec. Co.*, 57 FERC ¶ 61,147, at 61,566 (1991) (same). *See also Ark. La. Gas Co.*, 453 U.S. at 582 (in case of conflict between the filed rate and the contract rate, the filed rate controls). The Commission has enforced this requirement even when the tariff does not provide specific guidance as to when and how the correction must be made. *See Exelon Corp. v. PPL Elec. Utils. Corp.*, 111 FERC ¶ 61,065, at PP 25-26 (2005) (finding, absent any specific tariff provision establishing a time frame to dispute billing errors, that there is no such time

frame). It also has required corrections in cases like this, where an incorrect billing is the result of a third party's error that went undetected for a period of time. *See id.* at P 24 (requiring correction of an error to ensure that each customer pays for the service taken); *Sw. Pub. Serv. Co.*, 68 FERC ¶ 61,184, at 61,943 (1994) (correcting billing several years after fuel supply service was provided because utility was unaware of underlying error in fuel charges).

The restudy and recalculation that the Commission endorsed in its orders allowed System Operator and Ameren to correctly apply the filed rate, i.e., to correctly identify the network upgrades required to integrate Wind Farms' projects to the transmission grid. Wind Farms do not challenge the fact that the restudy corrected the list of network upgrades in the original agreements. (Before the Commission, they even requested that the additional network upgrades be included in the Revised Agreements. First Order at P 23, JA 779.) They do not ask the Court to reverse the challenged orders to the extent that the orders provide for further network upgrades, to Wind Farms' benefit, but only to the extent that they assign Wind Farms additional costs. *See* Br. 47. This leaves Wind Farms in the curious position of arguing that although the filed rate does not permit System Operator and Ameren to conduct a restudy or to revise the agreements, the results of that restudy should be included in revised agreements anyway.

### B. Wind Farms' arguments about regulatory certainty are misplaced.

Wind Farms complain that the challenged orders increase uncertainty for interconnection customers, because they allow System Operator to re-do its study processes at any time. Br. 21. They argue that the Commission's holdings are inconsistent with the notice requirement of the filed rate doctrine. Br. 21-22. FERC did not accept this contention. It noted that it expected situations like this one to be rare, and that its holding was limited to the specific facts of this case. *See* First Order at P 24, JA 779 (rejecting suggestion that correction of error would "chill" development because the Commission expects the situation to be rare); Second Order at PP 33, 35, JA 850, 851 (finding that the likelihood of these circumstances reoccurring is no greater than other risks that interconnection customers must factor into their planning). FERC further found that all entities that are responsible for preparing inputs into a system impact study are responsible for doing so carefully, and in accordance with industry standards, and that they may be held accountable for failure to do so. Second Order at P 34, JA 850.

Indeed, System Operator and Ameren are bound throughout the study process and the term of the agreements to the reliability standards incorporated into the Commission's regulations, just as they are to the definition of "Network Upgrades" that Wind Farms point out in their brief. Br. 23-24. They are, in other words, just as obligated to perform their restudy

correctly as they are to perform their initial study correctly. It is speculative for Wind Farms to suggest that, because an error occurred in one instance that made it impossible for System Operator and Ameren to satisfy the terms of the Large Generator Interconnection Agreement, System Operator and other transmission owners will do less than adhere to the terms of the agreements in the future. Indeed, it is not even clear from the record that either System Operator or Ameren was at fault for the error in the first place. *See* Second Order at n.36, JA 850 (finding no clear evidence in the record of how the error occurred, who caused it, or who could have detected it before the original agreements were signed). The Court should disregard these unsupported allegations.

## III. The Commission Reasonably Found That Wind Farms Are Responsible for the Costs of the Additional Network Upgrades.

### A. Court precedent, Commission policy, and the filed rate all require that Wind Farms pay for the network upgrades.

The real issue in this case, as Wind Farms argue throughout their brief, is that they do not want to pay for the additional network upgrades identified in the revised agreements. Br. 37-38. Before the Commission, Wind Farms proposed to shift these costs from themselves to Ameren, in the name of fulfilling their expectations of what their rates would be at the time they signed the original agreements. But court precedent, Commission policy, and the language of the original agreements all prevent this result. Consequently,

the Commission reasonably found that Wind Farms must bear the risk (meaning, the cost) of an error that necessitates additional upgrades to the transmission grid.

All approved rates must reflect, to some degree, the costs caused by the customer who must pay them. *Illinois Commerce Comm'n v. FERC*, 576 F.3d 470, 476 (7th Cir. 2009) (*Illinois 2009*) (quoting *KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992)). The Commission honors this principle in the context of generator interconnection, requiring that the parties that cause and benefit from network upgrades must pay for them. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,060 at P 3. And since System Operator implemented participant funding in its footprint, the Commission has found that the benefitting party is the generator. *See id.* at PP 3-4, 48-49 (describing and accepting a cost allocation that assigns 90 to 100 percent of the cost of network upgrades to the interconnecting generator). This Court has upheld System Operator's network upgrade cost allocation as part of a broader allocation of costs for all network upgrades, including high-voltage transmission projects connecting to distant wind resources. *See Illinois 2013*, 721 F.3d at 777-78, *aff'g Midwest Indep. Transmission Sys. Operator, Inc.*, 133 FERC ¶ 61,221, at PP 265-67, 332-37 (2010) (accepting cost allocation for network upgrades), *order on reh'g*, 137 FERC ¶ 61,074 (2011). The Large Generator Interconnection Agreement accordingly assigns

the cost of network upgrades to the interconnection customer. *See* Large Generator Interconnection Agreement at Article 11.3, JA 918.

FERC's determination that Wind Farms should bear the costs of the additional network upgrades was consistent with precedent. To the extent that a utility benefits from new facilities, "it may be said to have caused" the costs of those facilities. *Illinois 2009*, 576 F.3d at 476. The record demonstrates that Wind Farms are the primary beneficiaries of the upgrades, because the upgrades were built on Wind Farms' behalf to allow their interconnection. *See* First Order at P 5, JA 772-73 (upgrades were required to mitigate transmission system overloads that interconnections would cause); Second Order at P 33, JA 850 (interconnection customers caused the need for the network upgrades). The costs assessed against a party must be proportionate to the benefits that party receives. *Illinois 2009*, 576 F.3d at 476-77. Wind Farms do not contest the level of the network upgrade costs at issue here, but rather the implication that they bear any cost responsibility at all following the system study error.

For the Commission to assign costs elsewhere, as Wind Farms suggest that it should, would turn these cost-allocation principles upside down. This Court has prohibited the Commission from approving a pricing scheme that compels a utility to pay for facilities from which its members derive no benefits, or benefits that are trivial in relation to the costs sought to be

shifted to them. *Illinois 2009*, 576 F.3d at 476; *see also Illinois Commerce Comm'n v. FERC*, 756 F.3d 556 (7th Cir. 2014) (same). The record does not suggest that System Operator or Ameren will benefit from the upgrades to any significant extent, because the upgrades were not needed but for the interconnection with Wind Farms. *See, e.g.*, Second Order at P 43, JA 854-55 (upgrades were undisputedly for the interconnection). Indeed, Wind Farms' argument that they should pay for the upgrades is based not on a cost-benefit analysis, but on the filed rate doctrine and the notion of fault.

That the additional network upgrades may provide *some* system-wide benefits merely because they are part of the network, *Illinois 2009*, 576 F.3d at 477, cannot upset established cost causation principles. System Operator, as the independent entity, determines what upgrades to build. It uses the "but for" test to determine the extent to which an upgrade is needed for interconnection, and assesses only that amount to the interconnection customer. *Midwest Indep. Transmission Sys. Operator, Inc.*, 131 FERC ¶ 61,165, at PP 20-22; s*ee also W. Mass Elec. Co. v. FERC*, 165 F.3d 922, 927 (D.C. Cir. 1999) (all customers should pay for interconnection-related network upgrades that enhance an integrated transmission system). Any amount that is not needed for reliable interconnection should not be reflected in the interconnection agreements in the first place, but allocated by other means to the customers who benefit from overall grid improvements.

### B. Wind Farms' allegations concerning fault are not relevant, and are inconsistent with the filed rate doctrine.

Wind Farms attack the Commission's comment that no parties are more equitably assessed the costs of this error than Wind Farms are. Br. 35 (quoting First Order at P 35, JA 783). They contend that System Operator or Ameren should be responsible for the costs instead. Br. 37-39. Wind Farms' arguments disregard the Commission's findings that it is just and reasonable under the Federal Power Act for System Operator to modify the agreements to ensure reliable system operation. Further, their suggestion that another party should pay for the network upgrades, developed to accommodate Wind Farms' interconnection, is inconsistent with the filed rate doctrine.

The FERC orders found that it is just and reasonable under the Federal Power Act for Wind Farms to pay for the additional network upgrades they cause. *See* First Order at P 28, JA 781 (under the circumstances, Wind Farms' cost responsibility is reasonable and consistent with the Large Generator Interconnection Agreement and FERC precedent); Second Order at P 51, 57-58, JA 857, 859-60. The Commission recognized Wind Farms' argument that they did not cause the study error, and considered their arguments that the responsible party or parties should pay. But the Commission deemed this line of inquiry irrelevant, because enforcement of the filed rate doctrine does not rest, and never has rested, on the fault of a

party. First Order at n.33, JA 782; Second Order at P 57, JA 859-60. The Commission therefore did not improperly disregard evidence concerning the origins of the error. Rather, the Commission found that its responsibility was to determine whether the amended agreements, offered by System Operator, are just and reasonable, and not simply to make a decision based on who is to blame for the error. *Id.*

The Commission was correct. Parties may not undermine the filed rate doctrine by intentionally misquoting a rate, or by negotiating agreements between themselves that deviate from it. *See Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116, 127-28 (1981) (filed rate doctrine follows from the requirement that only filed rates may be collected); *Louisville & Nashville*, 237 U.S. at 98-99 (primacy of filed rate necessary to prevent carriers from intentionally "misquoting" rates to shippers as a means of offering discounts). The customer may not benefit from the incorrect application of the filed rate, even if the fault lies with another party. *See Louisville & Nashville*, 237 U.S. at 96-97 (requiring passenger to pay the full fare for a rail trip, even though he was not at fault for ticket agent's quotation of incorrect rate).

Wind Farms' suggestion that Ameren or System Operator assume the costs of the network upgrades that the filed rate requires Wind Farms to pay amounts to a request for a very substantial discount, or a subsidy from another party. This would require misapplying the filed rate – the Large

Generator Interconnection Agreement – which itself does not support this proposed outcome. Moreover, the Commission lacks authority to order reparations; it can only "undo what was wrongfully done by virtue of its order." *United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229-30 (1965).

## IV. The Commission Reasonably Applied Its Policy Concerning Use of Option 1 Reimbursement.

Wind Farms' objection to cost responsibility for network upgrade costs caused by their interconnections (addressed *supra* Section III) is distinct from their objection to how they will be reimbursed by Ameren for the network upgrade costs. *See generally* E.ON Rehearing Order at PP 3-6 (describing reimbursement policy for network upgrades). Here, while disputing that the agreements need to be revised at all, Wind Farms seek to benefit from the change in reimbursement policy since they signed their original agreements.

This issue arises because Wind Farms' dispute coincided with a complaint proceeding (the *E.ON* proceeding, *see supra* p. 10, 14), originating on March 22, 2011, over the reimbursement mechanism for network upgrades. When the Commission issued the First Order on June 10, 2011, it had not made any decisions in the complaint proceeding over Option 1 reimbursement. Therefore, the First Order accepted Ameren's proposal to use Option 1,

subject to the outcome of the complaint proceeding. First Order at P 37, JA 784.

Several months later, on October 20, 2011, the Commission found in the complaint proceeding that Option 1 (i.e., transmission owner repays the interconnection customer for network upgrade costs the customer funded – and then assesses interconnection customer with a monthly charge to recover the costs of the upgrades over a negotiated period of time) was no longer a just and reasonable mechanism for reimbursement. E.ON Order, 137 FERC ¶ 61,076 at P 1. The Commission required System Operator to remove Option 1 from its tariff effective March 22, 2011 – the date the complaint had been filed pursuant to section 206 of the Federal Power Act. 16 U.S.C. § 824e(b) ("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."). The Commission also held that its decision did not automatically modify any existing agreement, and that it would not apply to agreements effective prior to the date the complaint was filed (i.e. March 22, 2011). E.ON Rehearing Order at P 34.

Since the parties were on notice that the use of Option 1 was subject to change, the Commission could have required the application of Option 2 to all of the network upgrades in the Revised Agreements. *See Natural Gas Clearinghouse*, 965 F.2d at 1075 (no violation of filed rate doctrine as long as

users of a service receive notice that another rate, under challenge elsewhere, might replace the Commission-stated rate). Although it may have been within the Commission's power to apply its new reimbursement policy to all network upgrades included in the Revised Agreements, it was nevertheless also within the Commission's broad discretion, and consistent with Commission precedent, for the Commission to hold Wind Farms to their original bargain on the network upgrades identified in the original agreements but apply the new reimbursement policy to incremental network upgrades. *See* Second Order at P 69, JA 864 (citing E.ON Rehearing Order at P 34 (citing *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) (the breadth of Commission discretion is at its zenith when fashioning remedies)); *see also Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 816 (D.C. Cir. 1998) ("In general, [courts] defer to FERC's decisions in remedial matters, respecting that the difficult problem of balancing competing equities and interests has been given by Congress to the FERC with full knowledge that this judgment requires a great deal of discretion." (internal quotation marks omitted)).

Wind Farms contend that the Commission had no discretion – that it was compelled to apply the reimbursement policy (Option 2) most favorable to Wind Farms. To support their argument, Wind Farms (Br. 43-45) cite Commission cases that make general statements concerning the application

of a revised tariff provision. But here, the Commission has made a specific decision to grandfather the use of Option 1. *See* E.ON Rehearing Order at P 34. Wind Farms' argument therefore does not tell the entire story.

Wind Farms' focus on *West Deptford* (Br. 44-45 (citing 766 F.3d 10)) is similarly unhelpful to them because the Commission's treatment of the reimbursement issue comports with the framework in *West Deptford*. As a general matter, FERC does not retroactively apply newly-approved cost allocations, or allow a utility to use a rate that has been superseded. *See W. Deptford*, 766 F.3d at 19-20 (surveying prior cases); *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,277 (2008) (rejecting proposed use of the tariff that was effective during contract negotiation, rather than the tariff that was effective at the time agreements were signed); *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,128 (2006) (rejecting proposal to apply a new reimbursement rate to a class of previously-executed interconnection agreements). This general policy notwithstanding, when making an exception to the effective date of a tariff change, the Commission must: 1) provide a reason for making the exception, 2) explain how the variation fits with the Federal Power Act's purposes, and 3) provide a non-discriminatory reason for treating a case differently from others in which it enforced the tariff in effect at the time the agreement was filed. *W. Deptford*, 766 F.3d at 20-21.

Here, the Commission reasoned that grandfathering existing agreements that include Option 1 balances the interests of the parties, the need for regulatory certainty, and ease of administration. *See* Second Order at P 69 (citing E.ON Rehearing Order at P 34), JA 864; Third Order at P 37 (citing E.ON Rehearing Order at P 34), JA 898. This reasoning is sufficient to explain why the Commission allowed earlier-identified network upgrades to be treated for reimbursement under Option 1 – even if that option was no longer in the tariff at the time the Revised Agreements became effective.

Next, the Commission explained how the variation in question fits with the Federal Power Act's purposes. *See W. Deptford*, 766 F.3d at 20. The Commission applied its holding in *E.ON* to agreements formed after the refund effective date identified in that order, as the Federal Power Act requires. *See* E.ON Order, 137 FERC ¶ 61,076 at P 43 (citing Federal Power Act section 206, 16 U.S.C. § 824e); E.ON Rehearing Order at P 34 (E.ON Order did not consider ongoing validity of specific agreements). *See also United Gas Improvement Co.*, 382 U.S. at 229 (FERC cannot order reparations, but can fix rates prospectively). Additionally, Commission policy is always to strive to preserve the expectations of contracting parties. *See Morgan Stanley*, 554 U.S. at 551 (Federal Power Act contemplates and respects rate stability and contract certainty).

Finally, the Commission explained why its decision was consistent with other similar cases. *See W. Deptford*, 766 F.3d at 21. Since its ruling in *E.ON*, FERC has allowed transmission owners and interconnection customers who agreed to the use of Option 1 reimbursement prior to March 22, 2011 to continue to use it. *See Rail Splitter Wind Farm, LLC v. Ameren Servs. Co.*, 142 FERC ¶ 61,047 (2013) (declining to modify under Federal Power Act section 206, 16 U.S.C. § 824e, an agreement that provided for Option 1 reimbursement), *reh'g denied*, 146 FERC ¶ 61,017 (2014); *Midcontinent Indep. Sys. Operator, Inc.*, 145 FERC ¶ 61,111 (2013) (hereinafter, *Hoopeston*), *reh'g denied*, 149 FERC ¶ 61,099 (2014). "Rail Splitter's reliance on . . . *E.ON* alone was insufficient to counter the considerations underlying the Commission's historical hesitation to abrogate interconnection agreements following revision of the applicable tariff." *Rail Splitter*, 146 FERC ¶ 61,017 at P 25. Contracts are "not to be lightly revised," because "a degree of stability and predictability is crucial to the functioning of businesses and markets and to attracting investment in the utility business." *Rail Splitter*, 142 FERC ¶ 61,047 at P 31 (quoting *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,128, at P 26).

And in *Hoopeston*, as here, the Commission applied different reimbursement mechanisms for upgrades identified in a pre-*E.ON* interconnection agreement, and a post-*E.ON* revision to that agreement.

Third Order at P 37 (citing *Hoopeston*), JA 898. The Commission found that because the original upgrades did not change between the first and the second agreements in that case, and because there had been an agreement effective prior to March 22, 2011 with regard to those upgrades – circumstances also found in this case – under *E.ON* there was a sufficient basis to allow Ameren to continue its use of Option 1 with regard to those upgrades. *Hoopeston*, 145 FERC ¶ 61,111 at P 40; 149 FERC ¶ 61,099 at P 14-16. The Commission has emphasized stability and predictability in making decisions about the application of Option 1. *See Rail Splitter*, 142 FERC ¶ 61,047 at P 31. It also has emphasized the distinction between previously executed interconnection agreements, to which the parties have agreed to be bound – like those at issue in *Rail Splitter* and here – and interconnection agreements that may be entered into in the future. *Id.* at P 20. If the Commission and the Court adjusted the reimbursement mechanism with the "not infrequent" act of amending an interconnection agreement, the change would void the remedial balance that the Commission struck in the E.ON Rehearing Order. Third Order at P 37, JA 898.

The Commission's decision in *E.ON* not to strike Option 1 from agreements dated prior to March 22, 2001 balances the interests of the parties, the need for regulatory certainty, and the ease of administration. Third Order at P 37, JA 898 (citing E.ON Rehearing Order at P 34). The

Commission has treated existing uses of Option 1 consistently, and it has explained its reasons for allowing pre-existing uses of Option 1 to continue under the framework described in *West Deptford*. The Commission's equitable reimbursement findings are grounded in maintaining settled expectations and predictability – just as its decision concerning system re-studies was grounded in maintaining reliable interconnection of Wind Farms' facilities with the grid. They should be respected.

## CONCLUSION

For the foregoing reasons, the Court should deny the petitions for review and affirm the challenged orders.

Respectfully submitted,

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April 8, 2015

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 it has been prepared in a proportionally spaced typeface using 13-point Century Schoolbook font. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure Rule 32(a)(7)(B) because it contains 9,893 words, including the glossary but excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

/s/ *Elizabeth E. Rylander*
Elizabeth E. Rylander
Attorney

April 8, 2015

# ADDENDUM
# STATUTES AND REGULATIONS

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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.)

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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* |
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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;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(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(e). | June 11, 1946, ch. 324, §10(e), 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.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

## CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING



### § 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

(A) the later of the date occurring 60 days after the date on which—

(i) the Congress receives the report submitted under paragraph (1); or

(ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

(i) on which either House of Congress votes and fails to override the veto of the President; or

(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

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

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

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

### § 824. Declaration of policy; application of subchapter

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

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

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

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

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

#### (c) Electric energy in interstate commerce

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

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

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

#### (e) "Public utility" defined

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

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

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

#### (g) Books and records

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

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

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

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

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

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

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

**(a) Just and reasonable rates**

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

**(b) Preference or advantage unlawful**

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

**(c) Schedules**

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

**(d) Notice required for rate changes**

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

(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

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

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

STATE AUTHORITIES; CONSTRUCTION

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

### § 824m. Sales by exempt wholesale generators

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

EFFECTIVE DATE OF 2005 AMENDMENT

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

STATE AUTHORITIES; CONSTRUCTION

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

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

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

### § 824o. Electric reliability

#### (a) Definitions

For purposes of this section:

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

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

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

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

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

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

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

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

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

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

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

[1] See References in Text note below.

**(b) Jurisdiction and applicability**

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

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

**(c) Certification**

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

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

(2) has established rules that—

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

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

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

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

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

**(d) Reliability standards**

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

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

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

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

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

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

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

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

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

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

**(e) Enforcement**

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

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

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

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

States (other than Alaska or Hawaii), including, but not limited to, entities described in section 201(f) of the Federal Power Act.

(b) Each Reliability Standard made effective by §40.2 must identify the subset of users, owners and operators of the Bulk-Power System to which a particular Reliability Standard applies.

### §40.2 Mandatory Reliability Standards.

(a) Each applicable user, owner or operator of the Bulk-Power System must comply with Commission-approved Reliability Standards developed by the Electric Reliability Organization.

(b) A proposed modification to a Reliability Standard proposed to become effective pursuant to §39.5 of this Chapter will not be effective until approved by the Commission.

### §40.3 Availability of Reliability Standards.

The Electric Reliability Organization must post on its Web site the currently effective Reliability Standards as approved and enforceable by the Commission. The effective date of the Reliability Standards must be included in the posting.

# PART 41—ACCOUNTS, RECORDS, MEMORANDA AND DISPOSITION OF CONTESTED AUDIT FINDINGS AND PROPOSED REMEDIES

DISPOSITION OF CONTESTED AUDIT FINDINGS AND PROPOSED REMEDIES

Sec.



CERTIFICATION OF COMPLIANCE WITH ACCOUNTING REGULATIONS



AUTHORITY: 16 U.S.C. 791a–825r, 2601–2645; 42 U.S.C. 7101–7352.

SOURCE: Order 141, 12 FR 8500, Dec. 19, 1947, unless otherwise noted.

CROSS REFERENCE: For rules of practice and procedure, see part 385 of this chapter.

DISPOSITION OF CONTESTED AUDIT FINDINGS AND PROPOSED REMEDIES

### §41.1 Notice to audited person.

(a) *Applicability.* This part applies to all audits conducted by the Commission or its staff under authority of the Federal Power Act except for Electric Reliability Organization audits conducted pursuant to the authority of part 39 of the Commission's regulations.

(b) *Notice.* An audit conducted by the Commission's staff under authority of the Federal Power Act may result in a notice of deficiency or audit report or similar document containing a finding or findings that the audited person has not complied with a requirement of the Commission with respect to, but not limited to, the following: A filed tariff or tariffs, contracts, data, records, accounts, books, communications or papers relevant to the audit of the audited person; matters under the Standards of Conduct or the Code of Conduct; and the activities or operations of the audited person. The notice of deficiency, audit report or similar document may also contain one or more proposed remedies that address findings of noncompliance. Where such findings, with or without proposed remedies, appear in a notice of deficiency, audit report or similar document, such document shall be provided to the audited person, and the finding or findings, and any proposed remedies, shall be noted and explained. The audited person shall timely indicate in a written response any and all findings or proposed remedies, or both, in any combination, with which the audited person disagrees. The audited person shall have 15 days from the date it is sent the notice of deficiency, audit report or similar document to provide a written response to the audit staff indicating any and all findings or proposed remedies, or both, in any combination, with which the audited person disagrees, and such further time as the audit staff may provide in writing to

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## CERTIFICATE OF SERVICE

**Certificate of Service When All Case Participants Are CM/ECF Participants**

I hereby certify that on April 8, 2015, I electronically filed the foregoing 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.

s/ Elizabeth E. Rylander

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## CERTIFICATE OF SERVICE

**Certificate of Service When Not All Case Participants Are CM/ECF Participants**

I hereby certify that on _____, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

| counsel / party: | address: |
|---|---|
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
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s/_____